BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of an Investigation for the Purpose of Clarifying and Determining Certain Aspects Surrounding the Provisioning of Metropolitan Calling Area Service after the Passage and Implementation of the Telecommunications Act of 1996.	))))	Case No. TO-99-483

REPLY BRIEF OF CASS COUNTY TELEPHONE COMPANY ET AL.

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I. INTRODUCTION

The Metropolitan Calling Area ("MCA") Plan was developed after many years of effort by Missouri's telephone customers, the Commission, and the industry. Today, MCA service continues to serve the public interest. As recognized by Public Counsel, "[w]ithout question, the customers in the three major metropolitan areas of this state want MCA service and find it a valuable feature." (Public Counsel's Initial Brief, p. 1) No party to this case has outwardly proposed eliminating the MCA plan, yet a number of parties have made proposals that would ultimately lead to the termination of the MCA plan.

Cass County Telephone Company et al. ("Cass County")[1] believes that the MCA plan should be preserved; however, if CLECs are allowed to depart from the rates, terms, and conditions ordered by the Commission in Case No. TO-92-306, the MCA plan's long term viability will be seriously threatened. CLEC participation in the MCA plan is clearly in the public interest so long as CLECs participate in the MCA plan under the same rates, terms, and conditions that were originally ordered by the Commission. Cass County believes that this is the best, and perhaps only way to preserve the MCA plan.

Cass County stands by the specific positions taken in its initial brief. The fact that this reply brief may not address all of the arguments raised in the initial briefs of other parties does not indicate agreement with those arguments, only that Cass County believes its initial brief adequately addressed those arguments.

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[1] Cass County Telephone Company et al. includes the following incumbent local exchange companies: ALLTEL Missouri, Inc., Cass County Telephone Company, Citizens Telephone Company of Higginsville, Missouri, Inc., Grand River Mutual Telephone Corporation, Lathrop Telephone Company, Green Hills Telephone Company, and Orchard Farm Telephone Company.

II. ARGUMENT

A. The Commission Should Retain the MCA Plan's Existing Calling Scope

CLECs are free to offer their own expanded calling offerings in addition to the existing MCA calling plan. However, the Commission should retain the MCA plan's existing calling scope, and the Commission should clarify that CLECs are responsible for: (1) tracking, recording, and reporting traffic that goes beyond the MCA plan's existing calling scope, and (2) paying the appropriate access rates to the affected LECs for termination of such traffic.

For the most part, the CLECs seem to agree that this is the way expanded calling plans beyond the present MCA boundaries should be provisioned. For example, "Gabriel certainly acknowledges that it must pay terminating access charges to ILECs in adjoining areas for any toll-free calling outside the scope of the MCA plan." (Gabriel's Initial Brief, p. 13) Similarly, Sprint explains that if CLEC calling scopes differ from the present MCA calling scope, then "other LECs should not be required to treat their outbound calls as local calls for any area larger than the Commission defined MCA area." (Sprint's Initial Brief, p. 2) Finally, Public Counsel recognizes that "no CLEC or ILEC is required to accept calls under this expanded calling feature as a non toll call if it was a toll call under the MCA." (Public Counsel's Initial Brief, p. 4)

To avoid any confusion, the Commission should make two things clear about any expanded calling plan with a different calling scope than the Commission's MCA plan. First, any calling to areas outside the scope of the present MCA plan is subject to the appropriate terminating access charges.[2] Second, any plans with calling scopes that differ from the present

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[2] This would be true if either a CLEC or an ILEC chose to expand the local calling scope for its customers beyond the current bounds of the MCA plan. SWBT's Local Plus service is an example of such a service.

MCA calling scopes should not be called "Metropolitan Calling Area" or "MCA" plans. At the hearing, the CLECs appeared to agree with this condition. For example, Gabriel states that "the CLECs all confirmed that they could live with a requirement that they only use the name 'MCA' to refer to the original calling scope." (Gabriel's Initial Brief, p. 13)

B. The Commission Should Retain the MCA Plan's Existing Bill and Keep Compensation Mechanism

In order to preserve the MCA plan, it is absolutely critical that the Commission maintain the MCA Plan's existing bill and keep intercompany compensation mechanism. In Case No. TO-92-306, the Commission ordered that intercompany compensation for MCA service would occur on a bill an keep basis, and this mechanism has worked for years. The Commission has not ordered and should not order any different method of intercompany compensation for MCA traffic.

Public Counsel, GTE, the MITG, SWBT, and Cass County all agree that bill and keep is the appropriate method of intercompany compensation for the MCA plan.[3] Anything other than bill and keep is likely to lead to the end of MCA service. As explained by the MITG, bill and keep "is the only intercompany compensation mechanism that will allow retention of MCA service, with CLEC participation, on a competitively neutral basis." (MITG's Initial Brief, p. 11)

Although Sprint proposes that bill and keep compensation should be the default mechanism, Sprint argues that "carriers should have the option of entering a reciprocal compensation agreement for the exchange of MCA traffic that calls for a compensation

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[3] Public Counsel's Initial Brief, p. 7; GTE's Initial Brief, p. 5; MITG's Initial Brief, p. 11; SWBT's Initial Brief, p. 49

arrangement other than bill-and-keep should they so choose." (Sprint's Initial Brief, pp. 2-3) However, Sprint readily concedes that this proposal "increases the pressure on the rate because the cost of provisioning the service increases." (*Id.* at p. 2) As a result, the viability of the MCA plan is threatened by Sprint's proposal, and the Commission should reject it. Likewise, the Commission should reject the proposals by those CLECs that seek to avoid the MCA plan's ordered bill and keep intercompany compensation mechanism. If CLECs choose to participate in the Commission mandated MCA plan, then they should play by the same rules that have been ordered for the ILECs.

Ordering that MCA intercompany compensation continue on a bill and keep basis is appropriate in order to preserve the service. Section 253(b) of the Act authorizes state commissions to impose competitively neutral requirements if they are "necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers." Thus, the Commission may maintain the MCA plan's competitively neutral bill and keep intercompany compensation mechanism in order to ensure the continued provision of MCA service.[4] State law also allows the Commission to order that intercompany compensation for MCA traffic continue on a bill and keep basis. *See* Section 392.470 RSMo 1994. The Commission's authority to order that MCA service continue to be provisioned under a bill and keep intercompany compensation arrangement is discussed more fully in Section II.H, *infra*.

Finally, Southwestern Bell agrees that "the appropriate intercompany compensation

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[4] At the very least, the Commission should not order any change in the bill and keep intercompany compensation arrangement until it can develop a more complete record with calling and financial data.

mechanism is bill and keep for all locally dialed calls within the MCA," and SWBT's Initial Brief defines "Bill and Keep" as "meaning that neither carrier reimburses the other for traffic within the MCA." (p. 49) This is consistent with the way MCA traffic is presently handled; however, SWBT's witness at the hearing proposed that a SWBT be allowed to impose a transiting charge on MCA traffic. This is different from the bill and keep currently in place between ILECs in the MCA. Under SWBT's proposal, CLECs and ILECs would be forced to pay SWBT a transiting charge for MCA traffic. SWBT's proposal to impose a transiting charge on MCA traffic will put upward pressure on prices for MCA services, and it should be rejected.

C. The Commission Should Retain the MCA Plan's Existing Prices

The Commission-mandated MCA service should be provided under the same rates that were ordered in Case No. TO-92-306. GTE explains: "To conform to the same terms and conditions of the MCA Plan, thereby sustaining its viability, all carriers must adhere to the rates for MCA service as set out in Case No. TO-92-306." (GTE Initial Brief, p. 6)

CLECs are free to develop and price their own expanded calling plans above and beyond the MCA plan, but the Commission should maintain the MCA plan's existing rates that were established in Case No. TO-92-306. These rates should apply to both CLECs and ILECs. Allowing CLECs to have pricing flexibility would provide CLECs with a regulatory-imposed competitive advantage, and it would endanger the viability of the MCA plan. (*See* SWBT's Initial Brief, p. 44) Moreover, pricing flexibility could also lead to predatory pricing since large CLECs could choose to offer MCA service for free. (*Id.* at 42, citing Tr. 515-17)

A number of parties argue in favor of pricing flexibility.[5] Sprint argues that the competitive marketplace should determine the appropriate rates for MCA service – both ILECs and CLECs. (Initial Brief, p. 4) Gabriel claims that uniform rates "will only serve as an unnecessary annoyance," and Gabriel argues that "the pressures of the market will effectively constrain CLECs pricing of MCA services." (Initial Brief, pp. 16-17) Public Counsel suggests that CLECs be allowed to offer MCA service to customers in the current optional tiers "at an additive to be designated by the CLEC." (Initial Brief, p. 3) In fact, Public Counsel even goes as far as to suggest that CLECs be allowed to charge nothing for the service in the optional zones. (*Id.*)

The evidence in this case indicates that some CLECs wish to offer MCA service for free. (Kohly Direct, Ex. 11, p. 3), yet the Commission did not develop cost based rates when MCA service was implemented because the retail rates would not support the access fees. (Ex. 43, p. 3) Thus, the CLECs' proposals for pricing flexibility would be discriminatory to the ILECs with whom they compete if the ILECs are forced to adhere to the rates set in Case No. TO-92-306.

During the hearing, Cass County's witness Ken Matzdorff testified that pricing flexibility would begin to unravel the MCA plan, and he explained the necessity for maintaining the MCA rates established in Case No. TO-92-306:

> We've never distinguished cost from pricing here, and it's all kind of bundled together, and we did that for public service issues, I mean for socialization and public interest. And without that there's going to be disadvantages inherent to that because one group of companies owned the network.
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> . . .

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[5] *See e.g.* Staff's Initial Brief, p. 11; Birch's Initial Brief, pp. 4-5; AT&T pp. 12-13

> [I]f you take that away, you start nibbling at the core of the business plan, which was provide something that provides enough public interest and community interest so we don't have red-line communities in Kansas City and St. Louis and Springfield and . . . [s]o I think if you want to keep MCA you have to do that.

(Tr. 1199-1200) Because uniform rates are necessary to preserve MCA service and avoid a discriminatory and anti-competitive situation, the Commission should order that the rates for MCA service set forth in Case No. TO-92-306 apply equally to both CLECs and ILECs.

The Commission should also note that the MCA additive in the outer tiers is merely one element of a multi-element local bill, so pricing flexibility for MCA is unnecessary because CLECs can price their other services lower than the ILECs. For example, a CLEC could charge its customers less, or nothing at all, for basic local and other local calling features, making the CLEC's overall total bill for local service less expensive than the ILEC's (and more attractive to prospective customers).

D. MCA Plan Restrictions

Cass County does not object to MCA service being used to access the internet, and Cass County recognizes that prohibitions against resale of MCA service are inappropriate. However, the other existing tariff restrictions (e.g. payphone restrictions) are lawful and reasonable, and there is no evidence for the Commission to conclude otherwise.

Birch's Initial Brief (p. 6) argues that there is no evidence to demonstrate that restrictions are necessary. Likewise, Gabriel's Initial Brief (p. 14) claims that any proponent of MCA restrictions "should bear a heavy burden to show that the restriction is not contrary to federal and state law requirements, does not inhibit competition and is necessary to promote the public interest." These arguments reverse the statutory burden of proof. Under Missouri law, existing tariff restrictions are lawful until proven otherwise. *See* Sections 386.270 and 386.430 RSMo 1994. There has been no such showing in this case, so the existing tariff restrictions (other than restrictions on resale) must remain.

E. MCA NXX Codes

Although Cass County recognizes the importance of number conservation, the public interest of preserving MCA service outweighs the use of additional NXX codes. Even Public Counsel recognizes that the MCA plan's current use of NXXs "should not be used as an excuse to exclude CLECs from participating in MCA." (Meisenheimer Direct, Ex. 6, p. 10) Therefore, the MCA plan should continue to use segregated NXX codes.

This case was initiated because of confusion about who was participating in the MCA plan, and the evidence in this case suggests that there is continued confusion about MCA NXXs. (Stowell Direct, Ex. 8, pp. 11-12) The Local Exchange Routing Guide ("LERG") has not been effective thus far. As explained by the MITG, the "[u]se of the LERG tables alone is insufficient to assure uniform and orderly administration." (Initial Brief, p. 10) Gabriel argues that a "verified form" would be sufficient to notify other participating LECs. (Initial Brief, pp.19-21) The use of some type of "verified form" is simply inferior to central administration of MCA NXX's by the Commission's Staff. The best way to resolve the present confusion about MCA NXX codes and prevent future misunderstandings is the central administration of MCA NXX's by the Commission's Staff.

F. Revenue Neutrality

The Commission's Staff recognizes that revenue neutrality, on a company-specific basis, is appropriate for rate-of-return ILECs if the current MCA plan is modified. (Staff's Initial Brief, p. 13) However, Public Counsel claims, "There is no legal basis to provide revenue neutrality to the ILECs in the current MCA plan . . . Revenue neutrality does not apply." (Public Counsel's Initial Brief, p. 8) Public Counsel's position overlooks abundant authority for the doctrine of revenue neutrality.

The Missouri Supreme Court has ruled that a public utility company's lawfully collected revenues are protected by the due process provisions of the state and federal constitutions. See *Lightfoot v. City of Springfield*, 361 Mo. 659, 236 S.W.2d 348, 354[10] (Mo. 1951) The Cole County Circuit Court recently reaffirmed the doctrine of revenue neutrality and cited three prior decisions where it had "***ruled that the Commission may not direct a change in Relators' revenue and expense structure without a proper proceeding challenging them, and without findings of unlawfulness or unreasonableness . . . [I]n such a situation, the Commission must provide the utility, at the utility's election, with revenue neutrality (i.e. keep them whole)***." Case Nos. CV19V019901082 and CV19V019901098, *Findings of Fact, Conclusions of Law, Decision and Order*, issued Jan. 27, 2000, p. 12 (emphasis added).

Under this legal precedent, the Commission must provide for revenue neutrality whenever a Commission Order adversely affects a public utility's existing revenue and expense structure. Therefore, any modifications to the MCA Plan must occur on a revenue neutral basis, and factors to be considered as a part of any revenue neutral calculation include: (a) changes in toll, access, and/or MCA revenues due to changes in calling scopes (i.e. local vs. toll) as well as changes in subscribership, and (b) non-recurring costs associated with implementing changes to the MCA service (e.g. training costs, customer notice costs, billing system change costs, translation costs)

G. MCA Traffic Should be Separately Tracked, Recorded, and Reported

The evidence in this case indicates that CLECs are not doing a very good job of tracking, recording, and reporting their traffic. For example, during the hearing AT&T's witness admitted:

> We have spent considerable time and effort to create a billing system or exchange system that I believe would allow us to charge 92-99 records with Southwestern Bell. It is my understanding that we are not currently doing that – exchanging records based again upon these data request responses. I do not know why. I know that significant investment has been made to exchange these records. ***I do not understand – I do not know why we are not exchanging records.***

(Tr. 454-55) (emphasis added) The testimony of Nextlink's witness also indicates that records are not currently being passed:

> Q. You said you're going to exchange the 92-99s with Southwestern Bell. Are you currently doing that?
>
> A. My understanding is that we have received records from Southwestern Bell. We have had, I guess, some discrepancies with our records, but we are working to fix that, and ***it's my understanding that we will soon be exchanging records.***

(Tr. 865) (emphasis added) Gabriel's witness admitted uncertainty about whether records are being passed:

> Q. Would you – I guess are any records being passed today, that you're aware of, to Orchard Farm such that originating – terminating access can be billed by Orchard Farm on that call to the non-MCA subscriber?

A. I'm not sure. My understanding is that it's a different record. I think it's referred to in the industry as a Report 11 or an 011. My understanding is the traffic that's – that's the billing that's used for access, and what I don't know is whether in terms of our process of developing the record reporting, whether the 92-99 and the 011 processes are interlinked . . . ***I don't know if those records are being sent at this point.***

(Tr. 799) (emphasis added)

If CLECs are allowed to participate in the Commission-mandated MCA plan, then the Commission should make it clear that CLECs must create the necessary records that will allow Missouri's small ILECs to distinguish between MCA and non-MCA traffic sent by the CLEC to the small ILEC. Most of the CLECs concede that they will be responsible for paying terminating access charges on non-MCA traffic, yet the small ILECs will have no way to bill for this traffic if the CLECs do not track the traffic and create the appropriate records. Therefore, CLECs should be ordered to: (1) separately track and record MCA and non-MCA traffic, and (2) send reports to the small ILECs for all non-MCA traffic. Alternatively, the Commission may choose to order that MCA traffic is separately trunked. Either of these alternatives will help to assure that Missouri's small ILECs are compensated for traffic that CLECs send to the small ILECs' non-MCA customers.

H. The Commission's Authority over Interconnection Agreements

Although the Commission clearly has authority over existing and future interconnection agreements, the Commission need not reach the question of whether it needs to order modifications to interconnection agreements in this case. In order to preserve MCA service, the Commission has the authority to: (1) allow CLECs to participate in the MCA plan on a voluntary basis; and (2) order that the MCA plan continue to be provisioned under the same terms and conditions ordered in Case No. TO-92-306. The Commission should specifically order that the MCA plan will continue under a bill and keep intercompany compensation arrangement, just as it has since the MCA plan was implemented. Accordingly, those CLECs that choose to participate in the Commission's MCA plan will be required to follow the same bill and keep intercompany compensation method that the Commission requires for the ILECs. Likewise, CLECs that opt to provide MCA service must follow the same prices and geographic calling scope that were established in Case No. TO-92-306.

If the Commission does decide that it is necessary to alter existing interconnection agreements, then the Commission has clear authority to do so. Not surprisingly, many of the CLECs fail to recognize the Commission's authority over existing interconnection agreements. For example, Intermedia's Initial Brief (p. 5) claims that there is "no positive statutory authority which would authorize such action by state commissions." Intermedia and the other CLECs fail to recognize clear and ample statutory authority for the Commission to act in this case.

Section 253(b) of the Act authorizes the Commission to impose, on a competitively neutral basis, requirements necessary to preserve and advance the public welfare, ensure continued quality of telecommunications services, and safeguard the rights of consumers. The MITG recognizes that "MCA service provides value to consumers that competition will not replace." (Initial Brief at p. 6) Therefore, permitting CLECs to offer MCA service on the same basis as ILECs will help ensure the continued quality of telecommunications services while allowing local competition.

Section 251(d)(3)(A) of the Act allows the Missouri Commission to enforce of any regulation, order, or policy that establishes access and interconnection obligations of local exchange carriers.

Section 252(e)(3) of the Act allows the Missouri Commission to establish or enforce other requirements of state law in its review of interconnection agreements.

State law also provides the Commission with broad authority. Section 392.470 RSMo 1994 provides the Commission with the authority to impose conditions that it deems reasonable and necessary upon any company providing telecommunications service if such conditions are in the public interest. Section 392.361 RSMo 1994 provides the Commission with the authority to require competitive telecommunications companies to comply with any conditions reasonably made necessary to protect the public interest.

AT&T's Initial Brief (pp. 21-22) argues that the Commission has no authority to settle contract disputes, but AT&T's argument about the Commission's ability to construe or enforce contracts is irrelevant. Likewise, McLeod's arguments about contract law and private agreements are not on point. Two regulated utility companies cannot contract around an order from the Commission, and the terms of a private agreement cannot override the terms of a pre-existing, Commission-mandated calling plan. Under Section 392.240 RSMo 1994, the Commission has authority over the rates and charges that are charged or collected by telecommunications companies operating in Missouri. Moreover, a Commission order will supercede the terms of a contract agreement between two telephone companies as to the service rates they charge each other. *Oak Grove Home Telephone Co. v. Round Prairie Telephone Co.*, 209 S.W. 552, 553[4] (Mo. Ct. App. 1919). The CLECs' arguments to the contrary should be dispatched.

AT&T also argues that bill and keep compensation cannot be used in the future because "no showing has been made pursuant to § 51.711(b)." AT&T's argument confuses the elements of the FCC's rule and the burden on the parties. The FCC explains:

> ***States may, however, apply a general presumption that traffic between carriers is balanced and is likely to remain so. In that case, a party asserting imbalanced traffic arrangements must prove to the state commission that such imbalance exists.*** Under such a presumption, ***bill-and-keep arrangements would be justified unless a carrier seeking to rebut this presumption satisfies its burden of proof.*** We also find that states that have adopted bill-and-keep arrangements prior to the date this order becomes effective, either in arbitration or rulemaking proceedings, may retain such arrangements, unless a party proves to the state commission that traffic is not roughly balanced.

First Report and Order, CC Docket Nos. 96-98, 95-185, para. 1113. (emphasis added) Thus, this Commission may presume that traffic is balanced and is likely to remain so. None of the CLECs in this case have presented evidence to the contrary even though intercompany compensation has been an issue in this case from the outset. In fact, it is unlikely that the CLECs could produce any evidence that a traffic imbalance exists given the fact that the CLECs do not appear to be tracking, recording, or reporting MCA traffic. (*See* Section II.G *supra*) Therefore, the Commission may order that MCA traffic continue on a bill and keep basis because the CLECs have done nothing to rebut the presumption that MCA traffic is balanced. In short, no showing has been made in this case that would prohibit the Commission from ordering that MCA traffic continue to be exchanged on a bill and keep basis.

McLeodUSA claims that it would "violate *the intent* of the Telecom Act were the Commission to require that all future agreements adopt bill and keep as the method of inter-company compensation." (Initial Brief, p. 3) (emphasis added) The Commission should reject McLeodUSA's argument. First of all, McLeod's analysis is flawed because both the Act and the

FCC's rules allow for bill and keep intercompany compensation. In fact, McLeod's own brief concedes that: (1) "the requirements contained in Section 252(d)(2) do not preclude the use of bill and keep arrangements . . ." (*Id.* at 18); (2) "it is clear that the bill and keep arrangements may be imposed in the context of the arbitration process for termination of traffic . . ." (*Id.*)(quoting the FCC's *First Report and Order* in CC Docket Nos. 96-98, 95-185, para. 1111); and (3) "the FCC has opened the door for the use of bill and keep . . ." (*Id.*)

McLeod's argument about the *intent* of the Telecommunications Act also ignores the fact that Act was intended to bring consumers more choices at better prices. McLeod's proposal, however, is likely to lead to the demise of the MCA plan. The result will be fewer choices and higher prices for consumers. Therefore, the Commission should preserve the MCA plan and order that MCA service continue to be provisioned on a bill and keep basis.

III. CONCLUSION

The MCA plan is in the public interest, and Cass County's proposal is best suited to preserving this valuable service. CLECs should be allowed to participate in the MCA plan under the same rates, terms, and conditions that were ordered by the Commission in Case No. TO-92-306. To assure the continued success of the MCA plan, the Commission should also order that: (1) MCA traffic is to be separately tracked, recorded, and reported, or alternatively, MCA traffic is to be separately trunked; (2) Intercompany compensation for MCA traffic between all LECs (both CLECs and ILECs) will continue on a bill and keep basis; and (3) MCA traffic will not be subject to any type of transiting charges imposed by SWBT or any other LEC.

Respectfully submitted,

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