program were in the "from RAO" field. Instead of accurately reflecting the actual RAO, Fidelity falsified the information to identify the originating exchange as a Fidelity exchange on each call. In addition, Fidelity falsified the LATA indicator so that the calls which were interLATA in nature (IXC transported) would appear as intraLATA calls. Fidelity also set the Intercompany Settlements Indicator (ICS) to incorrectly signify that the purchased messages qualified for CATS settlements. Finally, Fidelity replaced the transporting IXC's Carrier Identification Code (CIC) with the 000 code reserved in CMDS for LEC transported traffic. Id. Without each of these falsifications the messages would automatically have been edited out by the system. Testimony of W. Micou. The record is clear that Fidelity consciously and knowingly developed a scheme that is based on the submission of false information to obtain access to a system that it had no right to access for its purpose.

Fidelity's Notice Concerning Use of CATS
Southwestern's Reaction

In its Brief Fidelity continues to claim that "at no time prior to February 21, 1992, did Southwestern Bell or Bellcore inform Fidelity that the submission of its messages directly into CMDS and CATS was prohibited." Brief at p. 10. This claim is particularly surprising because the IXC messages were processed only because Fidelity falsified the message characteristics to gain entrance to a system which would have otherwise rejected the messages. Further, the CMDS Users Guide which Southwestern Bell sent to Fidelity on three separate occasions in early to mid-1991

specifically states that IXC messages do not get settled through CATS. See p. 10, supra; Defendant's Exhs. 21, 22 & 23, at p. 1-1.

The evidence shows that Southwestern Bell first discovered that Fidelity was submitting recoded IXC messages to CATS in mid-March 1992 when the February BOC CATS report was issued. Testimony of R. Taylor. Although Southwestern Bell believed that Fidelity's use of CATS was improper, it did not want to hold money which did not belong to it, and so reserving all rights, it agreed to remit 90% to Fidelity. Id. That agreement was in place through July 1992 at which time Southwestern Bell began to remit the 10% which had been retained in an attempt to avoid additional litigation. Id. Even while agreeing to remit moneys to Fidelity in April 1992, Southwestern Bell asked Fidelity to voluntarily stop misusing the CATS system. Id. When discussions and correspondence did not resolve the dispute, Southwestern Bell developed a screen which would reject any non-LEC messages submitted by Fidelity, but which would still allow for the proper submission and settlement of Fidelity LEC messages. Id. The screen was implemented after due notice to Fidelity. Although Fidelity's brief claims that the "screening process was jointly developed," with the other RBOCs and Bellcore, the testimony of Mr. Taylor was clear that although Southwestern Bell sought Bellcore's concurrence, the decision to screen was his alone. See Fidelity Brief at p. 21; Testimony of R. Taylor.

D. IMPACT ON OTHER LECS OF FIDELITY'S USE OF CATS FOR IXC MESSAGES

Forcing Other LECs to Bill For Fidelity

Prior to when Southwestern Bell implemented the screen, Fidelity submitted 300,000 messages worth approximately $6.00 to $10.00 per message, or over 3 million dollars in total. Testimony of K. Matzdorff; R. Rowland. LEC messages normally settled through CATS generally average around $1.00 per message. Testimony of W. Micou; J. Yancey. During the Franklin county TRO alone, Fidelity submitted over $500,000 worth of IXC messages. Testimony of R. Taylor.

The 300,000 plus IXC messages Fidelity submitted to the CATS system during the spring of 1992 were billed and collected by potentially all of the 1200 local exchange companies throughout the nation. Notwithstanding that fact, Fidelity did not at any time, either prior to the initiation of its plan, nor after, contact any of the 1200 LECs, orally or in writing, to advise these "billing entities"[20] of its plan, nor to instruct these companies on how to handle the inevitable customer inquiries. Testimony of K. Matzdorff.

Witnesses from Southwestern Bell, Cincinnati Bell and Pacific Bell established that numerous inquiries have been made by confused and angry customers who are not accustomed to the appearance of high priced and in many cases old IXC messages (see D. Kerr

[20] The contracts with both CNSI and ATC expressly reference the 1200 LECs as the "billing entities" who will perform primary inquiry on Fidelity's purchased messages.

Deposition at p. 25) on their LEC bill pages, and who were unable to identify the carriers responsible for providing the service and rating the messages.[21] As explained by Southwestern Bell Area Manager-Contract Development, James Yancey, Southwestern Bell's business offices are not currently equipped to handle inquiries on Fidelity's IXC calls and could not be equipped to do so without considerable expense and the identification by Fidelity of the underlying carrier on each call. Sandy Salas a billing specialist at Pacific Bell testified that ninety percent of the Fidelity IXC calls which were submitted to her Company for billing were unbillable and had to be returned. To compound the problem, in order to answer customers' questions on these calls, Ms. Salas had to manually retrace the calls to Fidelity because Pacific Bell's business office is not equipped to handle inquiries on IXC traffic submitted to CATS. Testimony of S. Salas. Mr. Yancey, who wrote the computer program required at Divestiture to track IXC messages being billed by Southwestern Bell, explained that the modification required for Fidelity's IXC messages to be properly handled at Southwestern Bell would not be easy to create. Testimony of J. Yancey. It took 300 man years to create the existing program and to revise or duplicate it for use with CATS would be a time consuming and expensive undertaking. Id.

[21] The Court also has received the positions of the United States Telephone Association and The Telephone Cooperative Association expressing their opposition to Fidelity's use of CATS for IXC messages.

Bill Appearance Issues

The appearance of IXC messages on the bill pages of Southwestern Bell and other LECs is not just a customer confusion concern for these companies. Exhibits marked and received into evidence at the hearing demonstrate the degree of state regulation over the billing of IXC calls by LECs. See pp. 65-67, infra; Appendix B. These regulations require the identification on customer bills of the IXC who transported and rated a call in order to facilitate the ability of customers to make inquiries and to require the operator services industry to take responsibility for their own services and charges.[22] See Appendix B; Testimony of J. Yancey. Although Fidelity was, at the time of its submission of IXC messages to CATS, aware of at least four states which prohibited LECs from placing such messages on their bill pages without identification of the actual service provider, it did nothing to advise the affected LECs that the messages would be submitted to CATS so that these companies could take whatever action each might find necessary or appropriate to avoid violations of state law. Testimony of K. Matzdorff. In any event, it is doubtful that Fidelity could have then, or even now, provided these LECs with the information necessary to comply with their individual state subentity billing requirements, because as Mr. Matzdorff and Mr. Davis both testified Fidelity does not know the quantity, nor

[22] Unlike local exchange companies which are extensively regulated by both state and federal agencies, IXCs and operator services providers are subject to little regulatory oversight. Mr. Rowland testified that CNSI's rates are not regulated.

the identity of the IXCs whose calls Fidelity has caused to be billed by the LECs as a result of submission of its IXC messages to CATS.[23]

In addition to state subentity billing requirements, the RBOCs have unique MFJ restrictions on the billing of IXC messages. No RBOC may transport a call across LATA boundaries, nor may an RBOC do anything to give the appearance that it provides such a service. See Plaintiff's Exh. 33 (the MFJ). Fidelity's use of CATS for IXC messages which appeared on RBOC bill pages without any IXC identifier gives the appearance that an RBOC was transporting interLATA calls. Testimony of J. Yancey. Additionally, because the RBOCs, who together with Cincinnati Bell and SNET own the vehicle through which Fidelity has received IXC billing and collection services under substantially different terms and conditions than they are willing to provide to other IXCs, the RBOCs have been accused of having discriminated in favor of Fidelity's IXC customers. Id; see also, Defendant's Exhs. 31 & 32.

E. BILLING & COLLECTIONS SERVICES FOR IXCS

LEC Billing & Collections Services

Southwestern Bell, the other RBOCs, and many of the 1200 independent LECs throughout the nation offer billing and collection services for interexchange carrier transported calls. Testimony of

[23] ATC is a bill aggregator which purchases the messages of other IXCs and operator services providers and submits those messages to Fidelity pursuant to their contract. No one at Fidelity knows the identity of the companies for whom ATC aggregates.

J. Yancey. The services which include Billing Name and Address (BNA) agreements and traditional billing and collection agreements are offered pursuant to contracts or tariffs[24] at rates which are generally different and higher than the nickel rate reflected in the reciprocal CATS system. Testimony of J. Yancey; see also, testimony of Ron McClenan, Vice President of ATC. Contrary to Fidelity's claims that Southwestern Bell has engaged in a concerted refusal to deal, the testimony of four witnesses at the hearing demonstrated that Southwestern Bell has a BNA with both CNSI and ATC and a billing and collections contract with CNSI. Additionally, Southwestern Bell offered a billing and collections agreement to Fidelity in May 1992, which Fidelity declined. Testimony of J. Yancey; R. McClenan; R. Rowland, and K. Matzdorff. There was no evidence at the hearing that any RBOC has refused to provide billing and collections services to Fidelity or any of its partners, in fact Mr. Rowland and Mr. McClenan testified that their companies have agreements with all of the RBOCs.

The rates for the various billing and collections services are set by each individual company to cover that company's costs.[25]

---

[24] Billing and collection rates which are set by tariffs cannot be implemented without the approval of the state regulatory authorities.

[25] Fidelity's brief alleges that all of the RBOCs "fear the loss of the lucrative income stream," Brief at p.3, and that $700,000,000 per year in revenues to the RBOCs" is at stake. Brief at p. 15. The other RBOCs are not parties to this case because of Fidelity's preference in that regard, and there was no testimony at the hearing concerning the revenues or motivations of non-parties, particularly not a $700 million dollar figure; nevertheless SWB would agree that the other RBOCs will be substantially harmed by the issuance of an injunction.

Testimony of J. Yancey. Mr. McClenan agreed that LECs should be able to recover their individual costs when they do IXC billing. In most cases, billing & collections providers, like Southwestern Bell, strictly control the age and the type of messages for which they will bill. Notwithstanding the 350 day edit contained in CMDS, Southwestern Bell will not bill messages which are over 90 days old because collectibility diminishes significantly with age. Id. Other LECs have similar age restrictions. Id. Southwestern Bell also has special provisions in its billing and collections contracts to protect it against the liability associated with IXC uncollectibles which tend to be significantly higher than LEC uncollectibles. Id; see also, Defendant's Exh. 29, Southwestern Bell Billing Policy Guidelines.

IXC Billing & Collection Market

In addition to the services provided by LECs, IXCs can do their own billing, obtain billing through billing aggregators or use the services of independent company organizations like USINTELCO, NECA and USTA who act as aggregators on behalf of many of the smaller local exchange telephone companies. Testimony of R. Rowland; R. McClenan. Not every LEC in the nation desires to be in the business of billing and collecting for IXC traffic and, therefore some decline to enter into billing and collection arrangements with IXCs. The number of access lines (customers phones) which cannot be reached by IXCs through billing and collection contracts is only 2-5% because the LECs who do not wish

to engage in that business are the very small.[26] See Testimony of D. Little; R. Rowland. The issue of whether or not these companies should be required to provide billing and collections services to IXCs has been addressed by the FCC in recent dockets. Testimony of R. Rowland; Infra at pp. 58-59. Although that regulatory agency has expressed some concern that local exchange companies should, perhaps in the future if a need can be demonstrated, be required to provide the billing name and address information to IXCs so that the IXCs can do their own billing, the FCC has expressly declined to require LECs to themselves provide billing and collections services to IXCs. Testimony of R. Rowland.

In its Brief Fidelity takes the position that access to CATS for IXC billing will result in costs savings to customers. Brief at p. 16. Such a claim is purely speculative because the rates of IXCs and operator services providers like CNSI, ATC and the others that Fidelity could not identify, are not regulated by the state and federal regulatory agencies and thus these companies could not be forced to pass those savings on to their customers. In any event given the tremendous expense associated with transforming LECs billing systems, like Southwestern Bell's, to accommodate Fidelity's messages through CATS in a manner which would permit compliance with subentity billing requirements, it is unlikely that

---

[26] Mr. Rowland testified that the number of companies that do not provide billing and collection services may be as high as 400, but he did not know the number of access lines served by these companies.

the nickel rate and cost savings would continue.[27] Testimony of J. Yancey.

Southwestern Bell & Fidelity as Competitors

Fidelity witnesses John Davis and Ken Matzdorff testified that their company considers Southwestern Bell to be its competitor in the billing and collections market. Nevertheless, Mr. Matzdorff admitted that Southwestern Bell does not bill nationwide, as Fidelity hopes to do. Most importantly, Fidelity is seeking access to a system to facilitate the billing of IXC calls when it is undisputed that Southwestern Bell does not use BOC CATS to provide the billing and collections services to its 82 billing and collections customers.[28] Testimony of K. Matzdorff. The traditional billing and collections services which Fidelity provides to its customers, AT&T and MCI, do not use CATS either and the charge is more than the nickel rate charged in CATS settlements.[29] Finally, the markets of Southwestern Bell and

---

[27] The nickel rate after all is based on a variety of factors which would be destroyed if CATS were expanded as Fidelity proposes. The kinds of calls, volumes of calls, average dollar amounts per call and uncollectibles would change. Regulated and unregulated charges would be processed without distinction. The IXCs receiving billing and collection services from the LECs are in no position to provide billing and collections services to the LECs. In short, there would be no reciprocity and balance left in a settlement system which requires reciprocity and balance.

[28] Some of Southwestern Bell's contracts are with bill aggregators. The number of IXCs and operator services providers who obtain billing and collections services through Southwestern Bell directly and indirectly is 1045.

[29] Mr. Matzdorff testified that Fidelity sought to purchase messages from MCI for inclusion in CATS. Given the significant difference in price between the reciprocal CATS system and the nonreciprocal tradition billing and collection services, MCI's

Fidelity are not the same: Fidelity is acting as an aggregator by seeking the billing of services that it does not provide. Southwestern Bell rather than being a bill aggregator, is a bill renderer on behalf of IXCs and others.

III. ARGUMENT

A. PLAINTIFF MUST PREVAIL ON THE MERITS OF ITS SUIT IN ORDER TO QUALIFY FOR INJUNCTIVE RELIEF

Although Plaintiff's Brief does not acknowledge it, pursuant to the consent of the parties, the hearing on Plaintiff's request for preliminary injunctive relief was consolidated with the hearing on a permanent injunction per the provisions of Rule 65(a)(2). Therefore, in order to prevail on its request for a permanent injunction, Plaintiff is required to prove the four elements established by the Eighth Circuit in Dataphase Systems, Inc. v. C. L. Systems, Inc., 640 F.2d 109 (8th Cir. 1981), with one very important modification: the probability of success on the merits prong is replaced by the more stringent requirement that Plaintiff prove actual success on the merits of its cause of action. Current-Jacks Fork Canoe Rental Assoc. v. Clark, 630 F. Supp. 421, 424-425 (E.D. Mo. 1985).

The relaxed standard argued by Plaintiff in its brief may be proper in the context of some preliminary injunction proceedings, under much different claims of irreparable harm, but would clearly

---

disinterest in the cost savings suggests that traditional billing and collections alternative is quite viable for at least one large IXC.

not be apply in this case where the request is for a permanent injunction and the harm to the Defendants and third parties outweighs Plaintiff's damages. In this case Plaintiff must demonstrate that it has prevailed on at least one of its theories in order to be entitled to a permanent injunction. Fidelity has not demonstrated the elements of even one of the five counts under which injunctive relief has been sought, and thus its request must be denied. Additionally as set forth below, Fidelity has failed to sustain its burden of proof on the other three required Dataphase steps: irreparable harm to Plaintiff, that such harm outweighs any harm to the defendants, and that the interests of public policy will be furthered by issuance of an injunction. See Dataphase, supra at 114.

B. PLAINTIFF WILL NOT SUFFER IRREPARABLE "ARM BY THE DENIAL OF INJUNCTIVE RELIEF

The overwhelming majority of Fidelity's evidence on the issue of harm focused on the business needs and aspirations of its IXC partners, ATC and CNSI. The testimony of two of Fidelity's five witnesses, Mr. Rowland with CNSI and Mr. McClenan with ATC, stressed the arrangements which IXCs must make when they seek to obtain nationwide billing and collection arrangements. Both witnesses were very aware of how IXC billing can be done, and in fact how it is currently being done by hundreds of IXCs, but complained of the expense and difficulties inherent in dealing with a multiplicity of billing entities who, like Fidelity, wish to negotiate their own billing services arrangements with operator

service providers[30] and how easy and inexpensive billing and collections would be if all 1200 LECs had no choice, but to bill their non-rate regulated, higher priced[31] services on local exchange companies' bills. See Testimony of R. Rowland; R McClenan.

Mr. Rowland and Mr. McClenan expressed their hope that this Court would do what the FCC has refused to do by requiring all 1200 LECs to do billing for these IXCs.[32] While Fidelity has worked to create the illusion that this has been brought solely on its own behalf, rather than on behalf of its IXC partners, Fidelity would now have the Court look to the business discomfort of its partners to bootstrap irreparable harm.

The simple reality is that CATS is and has always been a LEC-to-LEC settlement system which Fidelity has the right to use for

---

[30] John Davis testified that Fidelity did not allow USINTELCO to negotiate billing and collections arrangements for operator services providers on Fidelity's behalf, as USINTELCO does for hundreds of small LECs, because Fidelity likes to negotiate directly with such companies.

[31] Despite Mr. Rowland's refusal to admit that his company, CNSI, was cited by the FCC as one of the 12 worst offenders in the operator services industry in terms of high prices and insufficient customer information, FCC Docket No. CC 91-226 (copy attached), evidences that fact and indicates the type of company that Fidelity is seeking to force all LECs to deal with in a blind business arrangement.

[32] The number 400 was used by attorneys for Plaintiffs, but as Southwestern Bell currently serves 1045 indirect billing and collections customers, the real number is much higher. These IXCs and others throughout the nation are currently accomplishing their own billing without resort to an end run around the FCC's refusal to force LECs to provide billing and collections services in a very competitive market where other alternatives exist.

its LEC messages just like all other LECs. It borders on the frivolous for Fidelity to argue that it will now be irreparably harmed if this Court does not order Southwestern Bell to permit use of BOC CATS in a way that it has never been used (for IXC messages) in a market in which hundreds of interexchange carriers have been using many alternative billing options for many years to bill countless billions of IXC messages. The evidence at the hearing clearly established that notwithstanding Mr. Matzdorff's unsubstantiated suspicions, which were refuted by Cincinnati Bell witness, Gary Scheffel, and William Micou of Bellcore, every LEC is being treated exactly the same, as is every IXC.

The evidence of Fidelity's irreparable harm was limited to the conclusory testimony of Fidelity President, John Davis stating that he had no way of estimating Fidelity's damages due to his inability to project the volume of messages Fidelity would be purchasing from its IXC partners in the future. Testimony of J. Davis. Nevertheless, Fidelity obtained a twelve month projection from CNSI of the number and dollar value of messages CNSI would be submitting to CATS in October of 1991 well before the project got off the ground. Testimony of K. Matzdorff; see also, Defendant's Exh. 3. That information was used to establish the purchase price under their contract. Testimony of K. Matzdorff. Additionally Fidelity's testimony referenced bank loans and the financing of the purchase of CNSI messages which could not have been accomplished without some projections regarding the anticipated volume of business and profits. See generally Testimony of J. Davis; K.

Matzdorff. The estimation of future growth in business is a common commercial undertaking and such lost future profits are the precise type of damage for which litigants are routinely compensated with monetary awards in commercial disputes. Fidelity's position is that it will not estimate its damages, when it is clearly able to do so, and is in the sole position to do so. That is not the same as where damages cannot be quantified and is thus not the type of damage for which injunctive relief is a necessary alternative.

John Davis also testified about his fear that his company's business opportunities would be lost by its inability to use the CATS system to process IXC messages. The IXC venture is a new line of business for Fidelity and one which they recognized all along was at risk as can be seen from the way in which they negotiated their contracts. See Defendant's Exhs. 9 & 10. Mr. Davis testified that Fidelity exercised an option in its contracts with CNSI and ATC to cease performance due to an inability to use CATS to obtain billing and collection on the IXC messages.

In any event, Fidelity's IXC partners testified that notwithstanding the existence of other billing alternatives which they must currently use during Southwestern Bell's screen, that their companies would be back at Fidelity's doorstep in a minute if the CATS system were opened to their IXC traffic. Testimony of R. Rowland; R. McClenan. The long term viability of Fidelity's plan will not be harmed by the denial of an injunction because there will always be IXCs and operator service providers ready to do business with the least cost billing alternative, even if it means

forcing companies which have heretofore refused to do business with such companies to do business with them on terms which are not negotiable.

C. FIDELITY HAS NOT PRESENTED PROOF SUFFICIENT TO PREVAIL ON THE MERITS OF THE CLAIMS IDENTIFIED IN ITS MOTION FOR INJUNCTIVE RELIEF

Fidelity's Motion For Issuance of Temporary Restraining Order, Preliminary Injunction and Permanent Injunction relies upon Counts I (Breach of Contract, Third Party Beneficiary), III (Specific Performance), VI (Attempt to Monopolize, Conspiracy), VII (Essential Facilities), and VIII (Concerted Refusal to Deal) as grounds for the requested relief. Accordingly, Plaintiff is required to prevail on the merits of at least one of those counts to be entitled to a permanent injunction. Because each of the counts upon which Fidelity seeks injunctive relief before this Court arise, if at all, from the screening of Fidelity's IXC messages, Fidelity's entire case is barred by the doctrine of res judicata, which under Missouri law requires a Plaintiff to bring all causes of actions arising from a single transaction in one suit, the judgment from which suit will bar any additional suits on the same transaction. The doctrine is applicable here, notwithstanding the fact that Fidelity is actively pursuing its state court case on appeal, because an appeal does not prevent the application of the preclusive affect of a prior judgment. Consumers Oil Company v. Spiking, 171 S.W.2d 245, 251 (Mo. App. 1986). Beyond the doctrine of res judicata, Plaintiff is still not

entitled to injunctive relief from this Court, because a careful examination of the evidence demonstrates that Plaintiff has been unable to sustain its burden of proof on any one Count.

1. Plaintiff has not established success on the merits on Counts I & III.

Count I of Plaintiff's Second Amended Complaint alleges that Fidelity has a third party beneficiary right under the Administrator Agreement between Southwestern Bell and Bellcore for the maintenance of the CMDS and CATS systems. See Plaintiff's Exh. 5. Count III seeks specific performance based upon the Administrator Agreement and the EMR. Both of these claims are barred by the doctrines of res judicata and collateral estoppel as a result of Fidelity's failure to prevail under these same theories in the state court proceedings.

Res Judicata & Collateral Estoppel

Federal Courts are required to give state court judgments the same preclusive effect as the judgment would receive in the courts of the rendering state. Gahr v. Trammel, 796 F.2d 1063, 1066 (8th Cir. 1986). Accordingly, Missouri principals of claim preclusion govern. See Medina v. Wood River Pipe Line Co., 809 F.2d 531, 533 (8th Cir. 1987). Under Missouri law any claim that arises from the same act, contract or transaction must be brought at the same time or be precluded in future litigation. Grue v. Hensley, 210 S.W.2d 7, 10 (1948); see also, Barkley v. Carter County State Bank, 791 S.W.2d 906,910-911 (Mo. App. 1990).

Plaintiff's suit in Franklin County focused upon the perceived

obligation of Southwestern Bell to provide Fidelity with access to the CATS system for IXC messages. However, the evidence at both injunction hearings revealed that no written contract exists.[33] Based upon that evidence Judge Brackman found that no contractual obligation existed. Accordingly, he granted Southwestern Bell's Motion to Dismiss at the close of Plaintiff's case at the June 25, 1992 preliminary injunction hearing.[34]

Merits of Fidelity's Contract Theories

Even without the doctrine of res judicata, Fidelity could not prevail on Counts I & III because the evidence at the permanent injunction hearing does not support the existence of a contractual right which allows Fidelity to use the CATS system for messages transported by unidentified IXCs to be billed by all 1200 local exchange companies throughout the nation.

Under Missouri law a contract without a termination date is terminable at will, and Southwestern Bell terminated any "contract" allowing the use of CATS for IXC messages when it began to screen the IXC messages more than three months ago. See Paisley

---

[33] Mr. Abjornson testified in both that court and in this, the EMR is not a static document, it has no parties, nor signatures, nor even a termination date.

[34] Subsequently at a hearing held on July 1, 1992, again before Judge John Brackman, Fidelity's Motion to Set Aside the Dismissal was overruled. The grounds Fidelity urged included the same third party beneficiary right under the Administrator Agreement set forth in Counts I & III of its Second Amended Complaint before this Court, and the obligation of Southwestern Bell pursuant to the Modification of Final Judgment to provide access to CATS for Fidelity's IXC messages. Fidelity apparently repudiated its MFJ theory in argument at the hearings before this Court.

v. Lucas, 143 S.W.2d 262, 271 (Mo. 1940) (holding that a written agreement without a specific duration is terminable at will by either party). In Knox County Court v. Benson, 706 S.W.2d 215 (Mo. App. 1985) the court reversed an order for specific performance of a contract to maintain bridges because the written contract did not contain a termination date and the defendant had terminated the agreement. In this case specific performance would be equally inappropriate because the "contract," if any, was clearly terminated. See Plaintiff's Exh. 13, May 7, 1992 letter from R. Taylor to K. Matzdorff.

Similarly, the law with regard to third party beneficiary rights under contract does not support Fidelity's claim. One who is not a party or in privity with a party to a contract may maintain an action for breach of contract only if it can established that the contracting parties intended to make the contract for his benefit. Volume Services, Inc. v. C. F. Murphy & Associates, Inc., 656 S.W.2d 785 at 794-795 (Mo. App. 1983). In this case where all of the evidence established that CATS was designed for services provided by local exchange companies exclusively and that no company, other than Fidelity, has ever believed otherwise, and where the plain language of the Administrator Agreement does not provide otherwise, Plaintiff cannot create a third party beneficiary interest in that contract which is contrary to the intent and performance of the parties to that contract: Southwestern Bell and Bellcore.

In Volume Services, Inc., supra, the court held that the question of intent to benefit a third part is a question of fact:

> Such an allegation can only be proven either through express provisions in each contract, or through ambiguous contractual language coupled with surrounding circumstances demonstrating that the defendants would assume a direct obligation to plaintiff sufficient to overcome the presumption that absent express declaration, parties do not contract for the benefit of others.

656 S.W.2d at 795. In this case where the plain language of the contract does not demonstrate an intent to benefit Plaintiff by allowing it the right to use CATS in a unique way, and where the evidence demonstrates that the purpose of the CATS system is and has always been for the benefit of LECs settling with each other for like messages, Fidelity cannot sustain its burden to transform the Administrator Agreement into a vehicle through which Fidelity can force 1200 LECs to provide billing and collections services to Fidelity's partners on terms and conditions that these LECs would not otherwise agree upon.

The utter absurdity of Fidelity's contract claims is Fidelity's own admission that it could not submit IXC messages into the BOC CATS system without miscoding them so as to falsify the identity of the company that carried the calls and other information. See discussion of Fidelity's miscoding of messages supra at p. 18. Fidelity's need to miscode these messages proves the lack of a contract between Southwestern Bell and Fidelity for the processing of IXC messages through CATS.

2. Plaintiff has not proved its claims under Counts VI, VII, or VIII.

In state court, Fidelity did not seek relief under the Missouri antitrust statutes (§§ 416.031, 416.121 RSMo 1986) prohibiting unlawful restraints of trade, monopolization, attempts to monopolize, and conspiracy to monopolize. In this suit, Fidelity's antitrust counts were not even included in Fidelity's original complaint. Fidelity now states: "This is principally an antitrust case." See Brief at 2. If so, it is only because Fidelity has no other pretext for seeking injunctive relief and not because there is any basis for Fidelity's antitrust claims.

Although it has now cloaked its claims in the language of federal antitrust law, Fidelity has made no attempt to support its antitrust claims with anything remotely resembling conventional antitrust analysis. For that reason, Fidelity's antitrust claims are virtually unintelligible and it is difficult to respond to them. Nevertheless, Southwestern Bell would respectfully show that there is no merit to any of Fidelity's antitrust claims.

Res Judicata

Before addressing Fidelity's antitrust claims on the merits, Southwestern Bell reasserts its position that all such claims are barred by the doctrine of claim preclusion. If Fidelity had filed suit in this Court originally, Fidelity could have litigated all of its state and federal claims against Southwestern Bell -- including its so-called "antitrust" claims -- in a single suit. Instead, Fidelity deliberately filed suit in the Franklin County Circuit Court -- a court with no jurisdiction over federal antitrust claims. In that suit, Fidelity chose not to assert state law antitrust claims -- claims which would have been identical to the

federal antitrust claims now before this Court. See §§416.031 and 416.121, RSMo (1986).

Southwestern Bell submits that the Missouri Supreme Court, if given a chance to decide the issue, would hold that res judicata bars Fidelity's federal as well as its state antitrust claims. That result would be consistent with Marrese v. American Academy of Orthopaedic Surgeons, 470 U.S. 373, 380, 105 S.Ct. 1327, 84 L.Ed.2d 274 (1985), in which the Court stated: "Our decisions indicate that a state court judgment may in some circumstances have preclusive effect in a subsequent action within the exclusive jurisdiction of the federal courts."

The Eighth Circuit has not yet decided whether federal antitrust claims are barred by prior state court adjudications under the circumstances presented by this case. In Brannan v. Eisenstein, 804 F.2d 1041 (8th Cir. 1986), the Court held that a federal securities act claim would not be barred as a compulsory counterclaim which should have been filed in state court. The state court defendants in Brannan had not selected the original forum and were not guilty of claim splitting. In holding that their federal securities claims were not barred, the Court concluded that the Missouri Supreme Court would not interpret Missouri's compulsory counterclaim rules as requiring defendants to file counterclaims over which the Missouri courts could not possibly exercise jurisdiction. Id. at 1044-45. Nothing in Brannan suggests that the Eighth Circuit would hold that forum-shopping plaintiffs may split federal and state claims to circumvent Missouri's anti-claim-splitting policies.

Antitrust Analysis

Fidelity has wholly failed to prove that competition has been injured by the defendants' conduct. To begin with, Fidelity has not adequately defined relevant product and geographic markets. Fidelity's antitrust claims must therefore fail. See Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp., 382 U.S. 172, 177, 86 S.Ct. 347, 15 L.Ed.2d 247 (1965) (without an adequate market definition, there is no way to measure the defendant's ability to lessen or destroy competition); United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 76 S.Ct. 994, 100 L.Ed. 994 (1956) (illegal power must be appraised in terms of the competitive market for the product); Consul, Ltd. v. Transco Energy Co., 805 F.2d 490-492 (4th Cir. 1986) (in antitrust litigation, the plaintiff bears the burden of defining and proving the existence of product and geographic markets subject to monopolization).

To be sure, Fidelity has invoked some of the terminology of antitrust law. In its Second Amended Complaint, Fidelity alleged that the defendants were attempting to monopolize and conspiring to monopolize what it called "the market in the United States for the collection, distribution and billing of collect, credit-card and third-number calls on behalf of LECs." Fidelity now states:

> Fidelity is seeking to enter a relative [sic] market defined as "the settlement of charges for '0+' dialed telephone calls originating in one of the 50 states."

Brief at 15. These attempts at market definition, however, are wholly unsupported by evidence and provide no assistance in

explaining the economic realities of competition in any relevant market.

Fidelity states that "The record is clear that Fidelity and Southwestern Bell are competitors in the relevant market as are Fidelity and the other RBOCs and AT&T." Brief at 24. Having proclaimed that the record is "clear," Fidelity makes no attempt to explain how Fidelity competes in any relevant market with Southwestern Bell, the other RBOCs, or AT&T. Instead the evidence demonstrated that Fidelity seeks to compete as a billing aggregator, whereas Southwestern Bell is a bill renderer. Further, Fidelity testified that it seeks to obtain billing and collection services nationwide, but Southwestern Bell only provides bill rendering services in five of the fifty states. Testimony of J. Yancey.

Aside from these and similar generalizations -- which are contrary to the evidence at the hearing -- Fidelity has made no attempt to identify relevant markets or to demonstrate how the defendants have monopolized, attempted to monopolize, conspired to monopolize, or conspired to restrain trade in any such markets.

Essential Facilities

Fidelity states that "for Fidelity to be able to enter the relevant market, it must have access to CATS." Brief at 24. The record reflects, however, that it has not been essential for Fidelity's competitors to have access to CATS. In seeking a temporary restraining order, Fidelity assured the Court that it could and would prove that CATS was being used to settle messages attributable to calls transported to AT&T and that Fidelity was at

a competitive disadvantage because CATS was not being made available to settle messages attributable to calls transported by IXCs other than AT&T. Fidelity claimed that this discrimination in providing access to an essential facility violated the Sherman Act. The evidence shows that CATS has not been used by Southwestern Bell, the other RBOCs, or by any other firm in the settlement of messages attributable to AT&T-transported calls or other IXC-transported calls. For that reason, Fidelity has shifted the focus of its essential facilities claim and now asserts that access to CATS is essential in order for Fidelity to bill a variety of 0+ messages even though Fidelity's competitors do not have access to CATS for that purpose.

At the heart of Fidelity's essential facility claim is the assertion that Fidelity has "created a concept" and that without access to CATS "Fidelity cannot bring its new concept to the relevant market." Brief at 14-15. Fidelity virtually concedes that access to CATS is not essential for the collection, distribution and billing of collect, credit-card and third-number calls and is not essential to "the settlement of charges for '0+' dialed telephone calls originating in one of the 50 states." Access to CATS is only essential to Fidelity's novel scheme to force other LECs to provide Fidelity with billing and collection services at rates lower than those the LECs would offer under separately negotiated billing and collection contracts. Nor would any authority support Fidelity's claim (based on an "essential facilities" argument) for access to a facility (BOC CATS) for IXC messages that even this Defendant does not use for such messages.

No authority would support such an unprecedented application of the essential facilities doctrine.

Courts applying the essential facilities doctrine generally state that four requirements must be proved in order to establish liability under that doctrine. Fidelity has failed to prove any of them. The four requirements are:

(1) the existence of an essential facility and control of that facility by a monopolist;

(2) a competitor's inability practically or reasonably to duplicate the essential facility;

(3) the monopolist's denial of the use of the facility to a competitor; and

(4) the feasibility of providing the facility.

See MCI Communications Corp. v. American Telephone & Telegraph Co., 708 F.2d 1081, 1132-33 (7th Cir.), cert. denied, 464 U.S. 891, 104 S.Ct. 234, 78 L.Ed.2d 226 (1983).

The first fallacy of Fidelity's argument is that the facility claimed to be essential is not "essential" and has never been used for the purposes which Fidelity proposes. Large and small interexchange carriers, 0+ providers, and the many firms which provide billing and collection services to them have operated successfully without CATS for years. Southwestern Bell alone has 1045 customers which are provided billing and collections services without resort to BOC CATS. Testimony of J. Yancey.

The second fallacy of Fidelity's argument is that the facility claimed to be essential is claimed to be essential only because it achieves results which could not be achieved if the system were opened up as Fidelity proposes. Fidelity argues that

it must have access to CATS in order to obtain the benefit of the 5¢/message intercompany settlement rate -- a rate based on mutual undertakings among the nation's 1200 LECs to provide reciprocal services to each other's customers and to charge each other reciprocal rates for the billing and collection services they provide each other. The 5¢/message rate does not exist in a vacuum and applies only as part of a larger package in which each participating LEC agrees to charge its co-participants low rates in consideration for the co-participants' agreement to charge it the same low rates.

In this regard, it does not logically follow that arrangements which make sense in reciprocal billing situations will also make sense in non-reciprocal billing situations or that the LECs would agree to maintain a 5¢/message billing rate if the intercompany settlement procedures were opened up to new categories of services. To illustrate, it may make sense for physicians to offer low courtesy rates to each other on a reciprocal basis, but that does not mean that it makes sense for physicians to offer those same low rates to patients who will not reciprocate by offering medical services of their own at low courtesy rates. Although it may be efficient for LECs to provide low reciprocal billing and collection rates to each other for limited categories of LEC-transported toll calls, it does not logically follow that it would make economic sense for the LECs to provide those same reciprocal rates to each other or to other firms with respect to

different categories of communications services[35] where there is no possibility of receiving reciprocal benefits from the arrangement.

The third fallacy of Fidelity's argument is that the present defendants "control" the so-called essential facility. The assertion that the defendants control an essential facility is based on a misunderstanding of what CATS is and how it fits into the intercompany settlements process as a whole. CATS is a reporting system which facilitates the intercompany settlement arrangements among more than 1200 LECs. In reality, the intercompany settlement process -- and not the computer systems through which that process is supported -- is the "facility" which Fidelity deems "essential." It makes no difference what computer equipment or systems are used to facilitate the settlement of accounts as long as the companies agree upon the terms of settlement.

Under the existing intercompany settlement arrangements, the participating LECs have agreed to provide certain services for each other's subscribers in return for an agreement that they will provide each other with reciprocal billing and collection services to collect charges owing with respect to such services. By these

---

[35] Such services could include all IXC-transported calls, "1+" services, "0+" services of all kinds (including those furnished by Operator Services Providers or "OSPs"), or toll information services such as "1-900-number" services. Many of the firms providing these services are unregulated and the rates they charge may be considerably higher than the regulated rates charged by the LECs. Fidelity has not only failed to show why LECs should charge reciprocal billing and collection rates to firms which do not provide reciprocal billing and collections services to the LECs but has also failed to show why the LECs should be compelled to bill for these unregulated categories of service at all.

arrangements, the participating LECs have agreed to settle accounts with respect to two primary categories of calls: LEC-transported credit card calls and LEC-transported third number calls. The present arrangements do not provide for the settlement among LECs of IXC-related or 0+ services in general. Fidelity has not proved that Bellcore or Southwestern Bell have the power to force the nation's 1200 LECs to enter into new intercompany settlement procedures or to force the LECs to collect IXC-related accounts or 0+ accounts for Fidelity through the CATS settlement procedures. In this regard, neither Bellcore (as owner of the CATS system) nor Southwestern Bell (as CATS administrator or as Fidelity's host) can unilaterally expand the permitted uses of LEC intercompany settlement procedures by altering CATS hardware or software without the consent of the LECs participating directly or indirectly in CATS. Therefore, it is inaccurate to describe the defendants as "controlling" the facility which Fidelity claims to be "essential" in this case.

The fourth fallacy of Fidelity's argument is that the defendants are acting as Fidelity's competitors in the context of this case. As stated above, Fidelity is not in the position of an essential facilities "competitor" seeking equal or reasonable access to facilities being used by its competitors. Fidelity has failed to prove that <u>any</u> firm -- whether labeled as a "competitor" or otherwise -- uses CATS for the purposes which Fidelity claims to be "essential." Moreover, Fidelity is not actually seeking to provide billing and collection services <u>in competition with</u> its fellow LECs. Fidelity does not plan to send its own bills to other

LECs' subscribers with respect to the IXC-related or 0+ messages which Fidelity has acquired. Instead, Fidelity wants the LECs which it calls "competitors" to bill their subscribers on Fidelity's behalf and charge Fidelity rates lower than the rates the LECs would charge other firms for the same or similar billing and collection services. In this context, Fidelity is not a "competitor" seeking to provide its own billing and collection services but is merely an arbitrageur seeking to exploit a differential between the reciprocal rates the LECs charge each other for limited categories of LEC-transported calls and the rates the LECs charge each other and other firms for non-reciprocal billing and collection services. If there is "competition" between Fidelity and other LECs in this context, it is not the kind of "competition" contemplated by the essential facilities doctrine.[36]

The fifth fallacy of Fidelity's argument is that Fidelity has demonstrated its inability to duplicate those facilities required for Fidelity to provide billing and collection services to IXCs and 0+ providers. Fidelity has access to CATS on the same terms and conditions offered to its fellow LECs. By its own admission,

---

[36] Southwestern Bell offers billing and collection services only within its franchised service area. To the extent that Fidelity seeks to collect accounts owed by Southwestern Bell's subscribers, Fidelity proposes that SWBT directly bill those subscribers on Fidelity's behalf at rates lower than those currently offered to Fidelity's IXC partners and other firms. In this context, Southwestern Bell is a supplier of billing and collection services to Fidelity, not a competitor. If Fidelity has "competitors" in the IXC and 0+ billing and collection arena, those competitors are firms competing with Fidelity's IXC partners. Two of those firms have complained to Southwestern Bell that Fidelity and its partners, through the use of CATS, have obtained unfair competitive advantages for themselves. See Defendant's Exhs. 31 and 32.

Fidelity also has equal access to CMDS to route billing information to other LECs. Fidelity claims, however, that there are other LECs which are unwilling to provide IXCs with billing and collection services. If so, those companies should pursue whatever legal claims they believe they may have against those LECs rather than Fidelity suing the present defendants. Neither Southwestern Bell nor Bellcore are responsible for the billing and collection policies of those LECs which will not deal with Fidelity's partners.

The sixth fallacy of Fidelity's argument is that Fidelity has demonstrated that it is feasible for the defendants to provide Fidelity with expanded access to CATS. In this regard, Fidelity's analysis of the "feasibility" requirement misses the point entirely. Based upon the testimony at the hearing it is clear that it would be technically complex and very expensive for the CATS to be reprogrammed in order to process falsely coded IXC-related or 0+ messages. However, the real feasibility questions in this case are not technical feasibility questions, but rather economic feasibility questions. In determining whether it would be economically feasible to maintain intercompany settlement procedures such as those proposed by Fidelity, one would have to determine:

(1) whether it would be economically feasible for the nation's 1200 LECs to open the CATS settlement procedures to Fidelity and all other purchasers of IXC-related and 0+ messages;

(2) if so, whether it would be economically feasible to treat non-reciprocal billing and collection services provided with respect to IXC-related and 0+ messages in the same manner as reciprocal billing and collection services provided with respect to LEC-transported calls; and

(3) if so, whether it would be economically feasible to charge the same 5¢/message rate presently charged for reciprocal billing and collection services provided only with respect to LEC-transported calls or whether different (and higher) rates should be built into the system.

Fidelity has made no attempt to prove what arrangements with respect to IXC-related and 0+ calls would be economically reasonable or feasible under CATS. Fidelity's simplistic analysis addresses only what would happen in the short run if no firm other than Fidelity were permitted to use CATS for the purposes proposed. Fidelity has merely asserted that it is technically possible for the CATS system to process miscoded billing messages on a relatively small scale without disrupting the entire CATS system, and then incorrectly suggested that it is the defendants' burden of proof to disprove its assertions. See Brief at p. 29. Fidelity's analysis is totally divorced from the business and economic realities of the market place, and the defendants have conclusively shown that it would make no economic sense for the LECs to conduct business in the manner Fidelity proposes. Testimony of W. Micou. In short, Fidelity has failed to prove any of the required elements of an essential facility claim.

Monopolization, Attempt to Monopolize, and Conspiracy to Monopolize

Fidelity has not briefed its Sherman Act § 2 claims (other than its essential facilities claim) and has not demonstrated that any relevant market has been monopolized or is susceptible to

monopolization. Moreover, Fidelity has not demonstrated how any allegedly improper actions taken by the defendants have resulted or could possibly result in the monopolization of any relevant market.

In this regard, Fidelity is not claiming that it is improper for the LECs to bill their customers for services rendered by other LECs, IXCs, or 0+ providers. Fidelity's case is built on the proposition that it is not only efficient and desirable but legally mandatory for LECs to bill their customers for services provided by other telecommunications providers, a result rejected by the FCC the MFJ Court and various state regulatory authorities. In essence, Fidelity claims that other LECs should be forced to bill their customers to collect amounts owing to Fidelity with respect to any IXC-related and 0+ messages which Fidelity purchases and that such services must be provided without a contract requiring the delivery of such services. Testimony of K. Matzdorff.

Fidelity has stated no economic or legal reason why LECs should not, in the absence of regulatory compulsion, be free to determine for themselves the terms and conditions under which they will bill their own customers for services provided to those customers by other telephone companies. Nevertheless, at the heart of Fidelity's case is the unexplained proposition that the antitrust laws compel the nation's LECs to participate in intercompany settlement arrangements which establish uniform procedures and uniform prices for the provision of billing and collection services with respect to IXC-related and 0+ messages. Fidelity seems to be suggesting that the nation's LECs should have established a single, uniform rate for billing and collecting IXC

and 0+ receivables and agreed to settle accounts relating to such receivables through the CATS settlement procedures or through similar clearinghouse procedures. Fidelity claims that the LECs' failure to enter into such agreements either constitutes "monopolization" or evidences "attempted monopolization" or a "conspiracy to monopolize."

As stated above, Fidelity has made no attempt to prove these §2 claims through anything resembling traditional antitrust analysis. Fidelity's §2 claims fail for another, equally fundamental reason. The antitrust laws were enacted to protect competition, not to further the special and peculiar interests of individual firms. See Cargill, Inc. v. Monfort of Colorado, Inc., 479 U.S. 104, 110, 107 S.Ct. 484, 93 L.Ed.2d 427 (1986). In this case, Fidelity has wholly failed to show how the defendants have injured or threatened to injure competition, or that the defendants have intended to injure competition by their actions. At most, Fidelity has proven that the defendants have not permitted Fidelity to misuse the CATS intercompany settlement procedures to obtain services from other LECs under false pretenses or under terms and conditions which those LECs would not freely negotiate with Fidelity. In short, Fidelity has not established that the defendants have violated the "essential facilities" doctrine or otherwise monopolized, attempted to monopolize, or conspired to monopolize any relevant market in violation of §2.

Refusal to Deal

Fidelity's "refusal to deal" claim is nothing more than a restatement of its "essential facilities" claim as a claim under

Sherman Act §1 (15 U.S.C. §1). In this regard, the defendants have not refused to deal with Fidelity and have not denied Fidelity access to an essential facility. Fidelity has access to CATS and to CMDS under the same terms and conditions as other LECs. Fidelity has offered no evidence to show that the defendants have, in concert with each other or other firms, engaged in a "concerted refusal to deal" with Fidelity to prevent Fidelity from buying IXC-related or 0+ accounts receivable and collecting those receivables through the same channels through which other firms collect them. Fidelity remains free to negotiate billing and collection contracts with individual LECs, and there is no evidence that the conduct of either defendant has interfered with Fidelity's ability to collect the IXC-related or 0+ messages which Fidelity has already purchased or may purchase in the future.

Fidelity's complaint is not that the defendants are refusing to provide it with goods or services which are provided to other firms but that the defendants will not provide Fidelity with services under CATS which are not presently available to anyone under CATS. This is not a "concerted refusal to deal" on the part of the defendants but is simply a refusal to make unilateral changes in long-standing intercompany settlement procedures in response to demands from one out of the 1200 LECs participating in the LEC intercompany settlement procedures.

Basically, what Fidelity requests is that the Court play a regulatory role which the agencies vested with regulatory authority over the telecommunications industry have refused to play: the role of setting LEC billing and collection rates with respect to IXC-

related and 0+ messages. More specifically, Fidelity asks the Court, in the guise of enforcing the antitrust laws, to order the LECs to set a 5¢/message billing rate for billing and collection services provided by LECs with respect to IXC-related and 0+ messages. Fidelity has provided the Court with no rationale explaining why such a rate would be reasonable -- let alone necessary -- to protect competition.

3. Fidelity has not proven its cause of action under Count VI, and there is no legal or regulatory obligation which would mandate that Southwestern Bell bill and collect for Fidelity's IXC messages in the manner demanded.

Southwestern Bell's MFJ Obligation

Notwithstanding the fact that Southwestern Bell has offered to provide its traditional billing and collections services to Fidelity on the same terms and conditions that it provides such services to all others seeking to bill IXC messages; and that Southwestern Bell has a billing and collections contract with one Fidelity partner (CNSI); that it offered such a contract to Fidelity's other partner (ATC), but that ATC chose to enter into a Billing Name and Address (BNA) contract instead, Fidelity still represents to the Court that Southwestern Bell and the other the Regional Bell Operating Companies (RBOCs)[37] are required, to provide it with billing and collection services through CATS. Testimony of J. Yancey.

[37] Additionally, there was no evidence at the hearing that any RBOC has refused to provide traditional billing and collections services to Fidelity or any of its partners.

Fidelity is a local exchange company (LEC). There is no obligation of any kind imposed upon the RBOCs in favor of the LECs, by the Modification of Final Judgment (MFJ or the Decree) or any other concept of law. Moreover, while the RBOCs must make a good faith effort, consistent with the Decree, to provide interexchange carriers (IXCs) with equal access to their telecommunications networks, Fidelity is not an IXC and access to telecommunications facilities is not at issue in this case. More to the point, the MFJ specifically states the RBOCs are not required to provide billing and collection services to IXCs. In any event, Southwestern Bell does not discriminate between IXCs. Testimony of J. Yancey. What Fidelity is seeking is not equal treatment, but rather discriminatory treatment in its favor. It is the treatment Fidelity is seeking, rather than which Fidelity now has that poses the MFJ concern.

The MFJ, which divested AT&T from the former Bell System local exchange companies, was the culmination of a series of antitrust complaints against AT&T. See United States v. American Tel. & Tel. Co., 552 F.Supp. 131, 135-136 (1982). (Plaintiff's Exh. 33). There was no allegation or evidence of unfair dealings with independent telephone companies and, as a result, no Order entered establishing any AT&T or the Regional Bell Operating Company "obligation" with regard to independents. Moreover, no mention is made of BOC CATS, whatsoever, either in the Decree or any of Judge Greene's subsequent Orders, and the only official reference to CMDS is found in a footnote to the Plan of Reorganization (POR or Plan). The POR concerns the distribution of what had been AT&T assets to

be made at divestiture and was filed with the Court on December 16, 1982 by AT&T. Footnote 375 at page 367 of the Plan states the ownership of "the Centralized Message Data System [CMDS] which collects data on message telephone calls" would be transferred to the Central Staff Organization (Bellcore). No "rights" to CMDS, much less BOC CATS, were thereby created for independent telephone companies, such as Fidelity.

Plaintiff cannot direct this Court's attention to, nor is there any provision in the MFJ, which creates an obligation on the part of Southwestern Bell to Fidelity as a local exchange carrier with regard to billing and collection or otherwise. There are actually only four references in the Decree to the entire subject of billing and all relate to IXCs, not LECs.

The most important reference is in Appendix B(C)(2), wherein it states:

> Nothing in this Modification of Final Judgment shall either require a BOC to bill customers for the interexchange services of any interexchange carrier or preclude a BOC from billing its customers for the interexchange services of any interexchange carrier it designates, provided that when a BOC does provide billing services to an interexchange carrier, the BOC may not discontinue local exchange service to any customer because of nonpayment of interexchange charges unless it offers to provide billing services to all interexchange carriers, and provided further that the BOC's cost of any such billing shall be included in its tariffed access charges to that interexchange carrier.

See United States v. American Tel. & Tel., 552 F.Supp. 131, 228-29, 232 and 234 (D.C.C. 1982) (Emphasis added). (Plaintiff's Exh. 33).

Billing is an activity performed in a competitive arena. It is for this very reason that the FCC does not regulate the

provision of billing services by telephone companies. See e.g., the Tariffing of Billing and Collection Services, 102 F.C.C. 2d 1150 (1986). Likewise, the federal courts have consistently held that billing is not an "essential facility" and that, therefore, telephone companies have no obligation under the antitrust laws to bill for unaffiliated entities. See e.g., Directory Sales Management Corp. v. Ohio Bell, 833 F.2d 606, 612-13 (6th Cir. 1987), aff'g 1986-2 Trade Cases p. 67, 250 (E.D. Ohio 1986); [Billing by Ohio Bell for yellow page advertising held not to be an "essential facility."] Illinois Bell v. Haines Co., No. 85-C-7644, slip. op. (N.D. Ill. May 15, 1989).

In keeping with the FCC's finding that billing and collection is a competitive service, Judge Greene concluded, by Order dated December 23, 1986, that the Regional Bell Operating Companies are permitted to provide billing and collection services to interexchange carriers on an untariffed basis. United States v. Western Electric, No. 82-0192, slip op. (D.D.C. December 23, 1986).

More recently, a question was raised as to whether Bell Atlantic could limit its IXC billing and collection efforts for "adult" entertainment messages to those subscribers who had affirmatively agreed to pay for the charges associated with such calls. Finding in favor of Bell Atlantic, Judge Greene held:

> [T]o be sure, Regional Company billing services may be cheaper than some other alternatives; [footnote] but that, in and of itself, does not suggest, much less demonstrate that the elimination of Regional Company billing services (for all providers of this type of service) with respect to those who do not affirmatively agree to pay for the particular charges at issue here constitutes a violation of the non-discrimination provisions of the Decree.

United States v. Western Electric, No. 82-0192, slip op. at page 6 [Memorandum and Order], (D.D.C. June 26, 1989).

The Department of Justice has also repeatedly confirmed its position that billing is a competitive service. The Department's opinion in this area is to be afforded great weight, as it instituted the antitrust case against AT&T which resulted in the MFJ and it is the "primary enforcement agency" for the Decree.[38]

On November 4, 1986, the Department filed a Motion and Proposed Order for Waiver to permit the Bell Operating Companies to provide billing and collection services to IXCs on an untariffed basis. In that Motion, the Department noted that billing is a competitive service, with "no barriers" of entry.[39]

---

[38] In the words of Judge Greene, "The Department has substantial enforcement powers under the Decree, and it was always intended to be the primary enforcement agency. Thus, for purposes of determining and securing compliance, the Department is authorized under Section VI to compel the production of information and documents from AT&T and the Operating Companies, and under Section VII to apply to this Court for orders to enforce compliance with the Decree." United States v. Western Electric, 578 F. Supp. 677, 679 at footnote 7 (D.D.C. 1983).

[39] By opinion letter dated January 7, 1992 (a copy of which was provided to the Court and of which judicial notice was taken at the hearing), the Department found "nothing in the Decree creates a general obligation for a Regional Company to provide billing and collection services." The opinion letter specifically noted:

> The mere fact that an Operating Company may be able to provide billing and collection services more cheaply than some alternatives does not create an obligation for it to provide billing services for its information services competitors. United States v. Western Electric Co., Civil No. 82-0192, slip op. at 6 (D.D.C. June 26, 1989). ...billing and collection is generally a competitive service that normally can be obtained from other sources without competitive disadvantage.... We conclude that U S WEST is not obligated to provide billing and collection services to TeleConnect and that

In conclusion, there is nothing in the MFJ which requires Southwestern Bell to provide any services, particularly not billing and collections services for IXC messages, to local exchange companies, such as Fidelity.

FCC Billing and Collections Policy Does Not Require Injunctive Relief

The FCC has reviewed the issue of requiring all LECs to provide billing and collections services to IXCs on a number of occasions and has declined to require the offering of such services, but instead has found the market for IXC billing and collections is sufficiently competitive and that reasonable alternatives exist to billing services provided by LECs. In In the Matter of Detariffing of Billing and Collection Services, CC Docket No. 85-88 (released January 29, 1986) the FCC concluded:

> Because there is sufficient competition to allow market forces to respond to excessive rates or unreasonable billing and collection practices on the part of [local] exchange carriers, no statutory purpose would be served by continuing to regulate billing and collection services for an indefinite period. Although we cannot quantify the market shares of the various billing and collection vendors, the record clearly indicates that sufficient competition exists and will continue to develop. It is important to recognize that competition is defined not only by credit card companies, collection agencies, service bureaus and the LECs, by the customers (ICs) [IXCs] themselves. To the extent the ICs [IXCs] are able to meet their own billing and collection needs, the market acts on the LEC in much the same way as competition from other third party billing vendors does. In either case, the effect is to put downward pressure on LEC rates.

---

its refusal to do so does not violate the Decree.

Opinion letter, at p. 2.

Order at pp 23-24.[40]

Additionally in a separate docket, Docket No. 91-115, the FCC entertained the Comments of CNSI and CompTel, an IXC industry coalition, urging the FCC to find that billing and collections services are monopoly services and require all LECs to provide such services all IXCs. In the Matter of Policies and Rules Concerning Local Exchange Carrier Validation and Billing Information for Joint Use Calling Cards, CC Docket No. 91-115 (released May 24, 1991) at p. 6. The Commission concluded however:

> To grant this aspect of the Comptel CNSI Petition would be tantamount to a reconsideration of the Detariffing of Billing and Collection order [CC-85-88] and we decline to do that.

Order at p. 9. From the language of the FCC's opinions addressing the same relief sought by Fidelity in this case, an order requiring all LECs to provide billing and collections services for IXC messages on Fidelity's terms and conditions, would be contrary to the policy of the FCC to allow market forces to regulate LEC billing for IXCs. This Court should not allow Fidelity to undermine that important FCC policy.

D. THE HARM TO DEFENDANTS AND TO THIRD PARTIES OUTWEIGHS ANY HARM TO FIDELITY

In order to qualify for injunctive relief a party must prove that the harm it will suffer without such relief outweighs harm to

---

[40] The Commission notes later in the opinion that the only "potential bottleneck" was an IXCs inability to get name and address information. Southwestern Bell has consistently provided BNA to any company seeking such service.

the defendants. Further, a party must show that public policy favors the issuance of injunctive relief, which at least in part, requires an examination of the impact issuance of an injunction will have on persons who are not parties to the case. See Dataphase Systems, Inc., supra at p.114. The evidence demonstrated that Southwestern Bell will be severely and irreparably harmed by the issuance of the injunction sought by Fidelity in this case.

That harm will include: possible destruction of Southwestern Bell's traditional billing and collections product, harm to its revenue streams associated with billing and collections; harm to the Company's image and loss of customer good will caused by a loss of control over the types of messages it is required to bill and the manner of billing; and the serious risk that Southwestern Bell will be violating state and federal regulatory objectives having to do with the appearance of Fidelity's IXC messages on its bill page without identification of the actual service provider.

Southwestern Bell's billing and collections product

Southwestern Bell currently has 82 direct and 1045 indirect billing and collections customers. Testimony of J. Yancey. The services to these customers are provided through a combination of contracts and tariffs.[41] Id. The product accounts for a $10,000,000 annual revenue stream which is utilized not only to recover costs associated with the product itself, but also to provide profits which are use by the various state regulatory

[41] In some states rates are tariffed, but the terms and conditions are set forth in a contract. In other states rates and terms and conditions are all governed by contract.

agencies to support the provision of affordable basic local telephone service to Southwestern Bell's customers. See e.g., In the matter of the cost service study of Southwestern Bell Telephone Company, 21 Mo. P.S.C.(N.S.) 397, at p. 399 (1977). Fidelity seems to find it abhorrent that Southwestern Bell would be motivated by a desire to protect its revenues at stake in this case, but that is exactly what Southwestern Bell stockholders and regulators have a right to expect from the Company. In any event its hard to see a distinction between Southwestern Bell's motivation in that regard and that of Fidelity.

It is also important to consider Southwestern Bell's customers. Loss of the billing and collections revenue stream will not only injure Southwestern Bell, but also its customers who may be required to pay higher rates for other services to allow Southwestern Bell to obtain its revenue requirement as allowed by the regulatory agencies which establish Southwestern Bell's revenue requirement and rates.[42]

Two of Southwestern Bell's current customers, Zero Plus Dialing, Inc. (ZPDI) and OAN have already complained that Fidelity's use of CATS is an unfair advantage and have demanded that Southwestern Bell treat their companies the same as Fidelity by providing them with access to CATS if Fidelity is permitted to use it for IXC billing. See Defendant's Exhs. 31 & 32. Therefore

[42] In Southwestern Bell's most recent rate examinations in the five states in which it operates the billing and collection revenues were considered when the commissions set rates for all of the Company's services to allow recovery of the Company's intrastate revenue requirement.

Fidelity's use of CATS, if ordered, would impair Southwestern Bell's existing billing and collection arrangement with other IXCs.

Another aspect of Southwestern Bell's billing and collections product which will be harmed by the issuance of an injunction by this Court is the loss of control over the terms and conditions under which the Company is willing to do business. James Yancey testified that Southwestern Bell has provisions in its billing and collections contracts that protect the Company's image and the effectiveness of its service by controlling the types and age of messages for which the Company will bill. See Defendant's Exh. 29. Additionally, Southwestern Bell closely controls the way in which uncollectibles are handled so that each of its customers retain responsibility for theirs own uncollectibles instead of passing that risk on to Southwestern Bell to spread among all of its customers and ratepayers. Id. Mr. Yancey also testified that the revenues which Southwestern Bell would receive if all of its current IXC billing and collections were settled through BOC CATS would not cover the annual level of uncollectibles which it presently manages through its current billing and collections practices. Unless Southwestern Bell were to destroy the symmetry of CATS by substantially raising rates to cover its normal billing and collections cost, including uncollectibles, it would have to exit the billing and collections market altogether because its costs would far exceed its revenues.

State and Federal Regulations Governing Bill Appearances

MFJ Bill Appearance Issues

Fidelity's actions have potentially placed Southwestern Bell and the other Regional Bell Operating Companies in violation of their MFJ obligations in that Fidelity, by altering of the IXC transported messages which Fidelity has forced into BOC CATS has caused these messages to appear on Southwestern Bell's and the other RBOC's bill pages with no notation identifying the name or even the existence of the interexchange carrier who transported the call. Thus, an appearance has been given that Southwestern Bell and the other RBOCs are providing interLATA, interstate services in violation of the Decree. See MFJ, Section VIII(E), 552 F. Supp. 131 at 232 (D.D.C. 1982) (Plaintiff's Exh. 33) and United States v. Western Electric Co., 698 F. Supp. 348, 356-359 (D.D.C. 1988). An injunction will put Southwestern Bell and the other RBOCs in continuing risk of violating the Decree.

Plaintiff alleges that a telephone credit card call from St. Louis to Dallas placed by one of Plaintiff's attorneys, Eddie Pope, appeared on Mr. Pope's bill from Southwestern Bell Telephone Company, and is no different from the situation outlined above. However, the call in question is noted on the face of the bill, and the corresponding legend, which appears on the reverse side of the applicable bill page, indicates that the billing of the interLATA, interstate call in question was provided as a service to AT&T. See Plaintiff's Exh. 49. The language employed was specifically endorsed by the MFJ Court at divestiture. Section VIII(E) of the MFJ states:

If a separated BOC provides billing services to AT&T pursuant to Appendix B(C)(2), it shall include upon the portion of the bill devoted to interexchange services the following legend:

> This portion of your bill is provided as a service to AT&T. There is no connection between this company and AT&T. You may choose another company for your long distance telephone calls while still receiving your local telephone service from this company.

See United States v. American Tel. & Tel., 552 F. Supp. 131, 232 (D.D.C. 1982), See also, Plaintiff's Exh. 33. Although the MFJ Court approved the language in question, Plaintiff has argued Southwestern Bell's notation is not as clear as it might be. There is, however, no comparison between the approved language and the lack of any information on customers bills as to the identity of the IXC service providers, which occurs as a result of Fidelity's obliteration of all references in the message to the involvement of an IXC in the transport of the calls when such messages are submitted to CATS.

Fidelity also made other references to the MJF on a number of occasions throughout the hearing. For example, Fidelity told the Court, that the MJF requires Southwestern Bell to provide billing and collection services to Fidelity's IXC messages through BOC CATS. Not only is this statement entirely without merit, but further, by Order dated December 21, 1983, Judge Greene acknowledged the need for continued enforcement of the Decree and noted that his Court had "retained jurisdiction to enforce the Decree and to take various other actions with respect thereto at the request of the Department of Justice, AT&T, or any of the

operating companies, as well as on the Court's own Motion." See United States v. Western Electric Co., 578 F. Supp. 677, 679 (D.D.C. 1983).[43]

While Southwestern Bell Telephone believes that it has no obligation under the MFJ to provide Fidelity with a conduit onto the BOC CATS system for the processing of IXC messages such a claim would be a matter solely within the jurisdiction of the Department of Justice, which the MFJ Court has decreed to be the "primary enforcement agency" for the Decree and with the Federal District Court for the District of Columbia.

State Subentity Billing Issues

In addition to concerns about potential violations of the MJF caused by Fidelity's actions, Southwestern Bell is also concerned about potential violations of state subentity billing requirements. According to Mr. Matzdorff, Fidelity's legal research revealed only four states which had regulations precluding Fidelity's scheme. Fidelity's legal research overlook at least 22 other states with similar prohibitions. Fidelity also failed to examine state tariffs, which Mr. Matzdorff acknowledged have the force and effect of law. Worse still, Fidelity disregarded its own legal research and consciously sent altered IXC messages to local exchange companies in all of the four states it had identified as having regulations which would be violated by Fidelity's actions.

---

[43] Federal courts have consistently recognized and deferred to MFJ Court's jurisdiction. See SafeCard Services, Inc. v. Ohio Bell Telephone Co., No. C2-85-903 (S.D. Ohio November 10, 1986) and Indiana Bell Telephone Co. v. The New American Phone Co., No. IP 84-1641-C (S.D. Ind. February 26, 1987).

At hearing, Southwestern Bell offered into evidence Defendants' Exhs. 40-45. These exhibits constitute exemplars of state tariffs, public utility commission orders, and rules and regulations which mandate that the interexchange carrier who transports a call be clearly identified on the customers' bills.[44] A detailed analysis of those exhibits which demonstrate that a significant number of state tariffs, rules and regulations will be violated as a result of Fidelity's submission of Fidelity's recoded IXC messages to CATS is attached hereto as Appendix B.

The considerable risk to Southwestern Bell and other local exchange companies associated with violations of state and federal laws could never be compensated by money damages. Given the fact that Fidelity has demonstrated a callous disregard for the ability of its 1200 "billing entities" to comply with such laws Southwestern Bell is uncomfortable with Fidelity controlling its own ability to so comply.

E. ISSUANCE OF AN INJUNCTION WOULD BE CONTRARY TO PUBLIC POLICY

Fidelity suggest at p. 38 of its Brief that "The public interest usually is implicated in situations where an injunction is sought to restrain enforcement of a statute of regulation designed to further the public interest." Even looking at that one

[44] Defendant's Exhs. 40-45 do not constitute an all inclusive list of all such requirements. Rather, those exhibits are simply a compilation of as many applicable state tariffs, orders, rules, and/or regulations as Southwestern Bell could gather within the short period of time available prior to the commencement of the hearing.

rationale alone, Fidelity should not be granted an injunction because the multitude of regulations and tariffs contained in Appendix B and discussed above were all enacted to protect the public interest by requiring that the bills of telephone customers clearly identify the company which provided the service and whose rates applied to provision of such service so that customers would have the ability to pursue concerns about such calls with the proper entity. Thus on Fidelity's own standard of what would serve the public interest injunctive relief should be denied.

There are other public policy considerations which must be examined in this case. Mr. Matzdorff testified that he does not believe that the 1200 LECs who participate in the CATS system have any choice but to bill Fidelity's IXC messages, even if the insertion of IXC messages into CATS has changed the way the system previously operated. These companies are, in Mr. Matzdorff's view of this case, required to do business with Fidelity on terms they were never willing to agree to before and with companies unknown to the LECs or even Fidelity. There is no concept in law or business which supports this blind man's bluff view of contractual obligations.

Another public policy consideration revolves around the need for consistent communications policy throughout the nation. The FCC was created and given primary jurisdiction over national telecommunications policy because Congress saw a need for uniformity. Although the federal courts throughout the nation must keep their doors open to litigants with claims that center upon

telecommunication issues, that need must be balanced with the public policy consideration weighing in favor of consistency and fairness to nonparties. When a case will have a nationwide impact upon parties not before the court (in this case all 1200 LECs, and many IXCs), and where the FCC has already issued opinions addressing the same relief sought before the federal court, and where to grant the relief sought by the litigant, would require overruling or modifying existing FCC policy, the doctrine of primary jurisdiction should apply. See Defendant's Rule 12 Motion. All of those factors are present in this case.

IV. CONCLUSION

Notwithstanding the fact that Fidelity was only able to effectuate its plan by:

- -the intentional miscoding of IXC messages;
- -by forcing the 1200 LECs throughout the nation to bill IXC messages without their knowledge and consent;
- -by doing so without the benefit of contracts, written or otherwise which would require Southwestern Bell to provide Fidelity with unique access to CATS or require the 1200 LECs to provide the demanded billing services.

Further, notwithstanding the fact that no other company has ever used CATS in the way sought by Fidelity; and that to grant Fidelity's request would:

- -undermine the countless contracts willingly entered into between IXCs and their billing entities throughout the nation,
- -cause LECs nationwide to be in violation of state laws, regulations and tariffs;
- -override national telecommunications policy established by

the FCC.

Fidelity still urges this Court to grant it extraordinary equity relief in the form of a mandatory injunction. For all the foregoing reason and those set forth in detail in this Brief, Southwestern Bell urges the Court to deny Fidelity's Motion.

Respectfully submitted,

Alfred G. Richter #27444
Katherine C. Swaller # 34271
Madeleine E. Dabney # 39708
100 North Tucker, Suite 630
St. Louis, Missouri 63101

and

Deacy and Deacy

Spencer J. Brown #18616
Patrick C. Cena #25018
1000 Bryant Building
1102 Grand Avenue
Kansas City, Missouri 64106

Attorneys for Defendant Southwestern Bell Telephone Company

CERTIFICATE OF SERVICE

A copy of Post-Hearing Brief of Defendant Southwestern Bell Telephone Company was overnight delivered to the attorney(s) for Bellcore, Mr. Truman K. Eldridge, Jr., ARMSTRONG, TEASDALE, SCHLAFLY & DAVIS, 1700 City Center Square, 1100 Main Street, Kansas City, Missouri 64105 and Plaintiff, Mr. James D. Shields, SHIELDS, BRITTON & FRASER, 14643 Dallas Parkway, Suite 920, Dallas, Texas 75240 and Mr. Steven S. Brown, NIEWALD, WALDECK & BROWN, One Kansas City Place, 1200 Main, Suite 4100, Kansas City, Missouri 64105, this 10 day of September, 1992.

Katherine C. Swaller

Attachment 18

Mr. Mazdorff Arrest Warrant

EOC:TAF/ERK

M04-1008

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------X

TO BE FILED UNDER SEAL

UNITED STATES OF AMERICA

v.

KENNETH M. MATZDORFF,

Defendant.

AFFIDAVIT IN SUPPORT OF ARREST WARRANT

(18 U.S.C. § 1956(h))

----------X

EASTERN DISTRICT OF New York, SS.:

BETH AMBINDER, being duly sworn, deposes and says that she is a Special Agent of the Federal Bureau of Investigation, duly appointed according to law and acting as such.

Upon information and belief, there is probable cause to believe that in or about and between 1996 and 2002, within the Eastern District of New York and elsewhere, the defendant KENNETH M. MATZDORFF did commit an offense against the United States, to wit: conspiring to conduct or attempting to conduct financial transactions, affecting interstate and foreign commerce, which in fact involved the proceeds of specified unlawful activity, namely mail fraud, in violation of Title 18, United States Code, Section 1341, wire fraud, in violation of Title 18, United States Code, Section 1343, and credit card fraud, in violation of Title 18, United States Code, Section 1029(a)(5), knowing that the property involved in the financial transactions represented the proceeds

of some form of unlawful activity, with the intent to promote the carrying on of specified unlawful activity, and knowing that the transactions were designed in whole or in part to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity, in violation of Title 18, United States Code, Sections 1956(h), 1956(a)(1)(A)(i) and (a)(1)(B)(i). The bases for my belief are set forth below[1].

(Title 18, United States Code, Section 1956(h)).

1. I have been a Special Agent with the Federal Bureau of Investigation ("FBI") for approximately 8 years. In this capacity, I have investigated traditional organized crime, also known as "La Cosa Nostra" in the New York metropolitan area as well as white-collar violations committed by members and associates of organized crime. As an FBI Special Agent, I have participated in numerous investigations and conducted and participated in physical and electronic surveillance, reviewed numerous electronically intercepted conversations and executed search warrants. I have also interviewed and debriefed numerous confidential sources and cooperating witnesses.

2. I am currently serving as case agent in the

[1/] Because the purpose of this affidavit is solely to establish probable cause in support of the requested arrest warrant, I have not set forth all of the information I have developed in the course of this investigation.

investigation and prosecution of United States v. Salvatore LoCascio et al., 03-CR-304 (S-3)(CBA). A copy of the indictment in this case (hereinafter "the Indictment") is attached hereto and incorporated herein by reference. As set forth in the Indictment, the LoCascio case involves two frauds committed by and on behalf of the Gambino organized crime family of La Cosa Nostra and the laundering of approximately $400 million in illegal proceeds from those schemes. The fraud schemes alleged in the Indictment and the laundering of the proceeds are summarized below. In my capacity as case agent, I have debriefed dozens of witnesses, reviewed subpoenaed documents, and exchanged information with investigating agents from other law enforcement agencies participating in this investigation. The facts set forth below are drawn from all of these sources.

The "Cramming Scheme"

3. As alleged in the Indictment, between approximately 1996 and 2002, the defendants Richard Martino, Norman Chanes, Daniel Martino, Andrew Campos, Thomas Pugliese, Lawrence Nadell, Yitzhak Levy, Kenneth Schaeffer and a corporate entity named USP&C, which is located in Overland Park, Kansas, devised and executed a scheme to defraud consumers by placing unauthorized charges on local telephone bills and collecting payment on those unauthorized charges. (Indictment at ¶ 21). To execute this scheme, Richard Martino, a soldier in the Gambino

family, and Gambino family associate Norman Chanes, together with employees at Chanes' company, Harvest Advertising, Inc., produced advertisements offering free samples of adult entertainment services such as psychic hotlines, dating services, and sexually oriented talk-lines over various "1-800" telephone numbers. (Indictment at ¶ 22). Victims who called the "1-800" telephone numbers heard pre-recorded "front-end" programs. (Indictment at ¶ 23). When a victim expressed a desire to obtain a sample of the advertised entertainment service, the front-end program triggered a recurring monthly charge on the victim's local telephone bill for a voice mail service without the knowledge, consent or authorization of the victim. (Indictment at ¶ 23). The "bill phrases" describing these charges on the victims' local telephone bills were designed to look like innocuous, standard telephone charges and to conceal the fact that the charges were actually triggered by the calls to the "1-800" adult entertainment telephone lines. (Indictment at ¶ 23).

4. In order to conceal this scheme, defendants Richard Martino and Chanes caused to be prepared dual sets of advertisements, front-end programs, and related materials. (Indictment at ¶ 24). One set, referred to as "marketing" materials, consisted of the actual materials that were used to solicit and defraud customers. (Indictment at ¶ 24). The second set, referred to as "approval" materials, appeared properly to

seek the customer's authorization for voice-mail services, and to disclose that the charges would be billed on a recurring monthly basis. (Indictment at ¶ 24). These approval materials were submitted to local telephone companies, also known as local exchange carriers ("LECs"), in order to conceal the existence and fraudulent nature of the "marketing" materials. (Indictment at ¶ 24).

5. The success of the scheme depended on the operation of several other companies specially created by the defendants for their criminal purposes. For example, Richard Martino, Daniel Martino and Chanes created Overland Data Center in Overland Park, Kansas (located in an office adjacent to USP&C), for the purpose of receiving and processing calls to the "1-800" numbers. (Indictment at ¶ 27). At the direction of Richard Martino, Daniel Martino, Chanes, Nadell, Levy and Schaeffer, Overland employees programmed voice-response units ("VRUs") located at Overland to play the front-end programs and thereby trigger the unauthorized charges on the consumers' telephone bills. (Indictment at ¶ 27). Richard Martino, Daniel Martino and Chanes, together with others, also formed USP&C and secretly controlled it for the purpose of placing the unauthorized charges generated by the fraudulent front-end programs onto the victims' local telephone bills. (Indictment at ¶ 29).

6. Campos, Richard Martino, Daniel Martino and Chanes also caused the creation of various companies (collectively, the "Campos Companies"). (Indictment at ¶ 30). The Campos Companies purported to be independent companies operated by Campos for the purpose of providing "1-800" telephone services, but were, in fact, shell companies whose real purpose was to conceal the participation of Richard Martino, Daniel Martino and Chanes in this part of the scheme. (Indictment at ¶ 30). Richard Martino and Chanes caused the Campos companies to enter into contracts with USP&C to provide billing and collection services for the "1-800" telephone numbers used in the scheme and then submitted, ostensibly on behalf of the Campos Companies, the "approval" version of the materials to USP&C and the LECs, rather than the "marketing" versions that were actually used to solicit customers. (Indictment at ¶ 32).

7. A large portion of the cramming scheme victims complained to the LECs and to USP&C about the unauthorized charges appearing on their local telephone bills. (Indictment at ¶ 35). Therefore, Richard Martino, Daniel Martino and Norman Chanes, together with others, caused a "call center" affiliated with USP&C to be established to handle the large volume of victim complaints internally, to prevent the LECs from learning the actual extent of customer complaints regarding the unauthorized charges. (Indictment at ¶ 35).

8. Telephone operators at the call center were directed first to attempt to persuade victims that the charges were in fact authorized and to induce customers to agree to pay the charges. (Indictment at ¶ 36). When victims persisted in their complaints, the call center operators offered refunds. At first, victims were offered partial refunds, but if they complained adamantly and persistently, full refunds were often provided. (Indictment at ¶ 36). The purpose of offering refunds was to reduce the likelihood that victims would complain directly to the LECs or to regulatory agencies and law enforcement agencies. (Indictment at ¶ 37). The call center operators were further instructed that if victims asked them to provide the telephone number that triggered the charge on the USP&C page of their local telephone bill, the operators were to provide a "1-800" number that then connected them to the "approval" version of the front-end program, (Indictment at ¶ 37), instead of connecting to the "marketing" front-end program that the customer had actually called. (Indictment at ¶ 37).

9. In approximately 2001, because of complaints received by various LECs and regulatory agencies about the Campos companies, defendants Richard Martino, Chanes and Pugliese formed new shell companies to replace the Campos companies as "clients" of USP&C. (Indictment at ¶ 38). Like the Campos companies, these new shell companies were secretly controlled by Richard

Martino, Chanes and Daniel Martino. (Indictment at ¶ 38). In addition, through Overland and USP&C, the defendants caused unauthorized charges for voice-mail services to appear on the phone bills of victims who never even called the "1-800" numbers. (Indictment at ¶ 33). In total, the cramming scheme generated at least approximately $400 million in gross revenues and $100 million in profits.

The Internet Pornography Scheme

10. As also alleged in the Indictment, the defendants also designed and executed a scheme to defraud internet users who visited pornographic websites designed and operated by the defendants and others. Through these websites, the defendants fraudulently obtained visitors' credit and debit card information, ostensibly for age-verification purposes, and then billed the victims' cards without the victims' knowledge or consent. (Indictment at ¶ 47).

11. The Internet pornography scheme was centered around purportedly "free tours" of the defendants' websites. Although the websites represented that visitors to the websites could take a "free tour" of each website without being billed, in actuality they designed and operated the websites so that victims would be billed without their knowledge or consent. (Indictment at ¶ 48). Through the websites, the defendants and others billed and caused to be billed the credit and debit cards of thousands

of victims in the United States, including victims in the Eastern District of New York, Europe and Asia, without their authorization. The bills were charged at a recurring monthly rate of up to $90.00 each, for an approximate total amount of more than $230 million. (Indictment at ¶¶ 43, 51).

The Laundering of the Proceeds of the Cramming and Internet Pornography Schemes

12. During the course of its operation, the cramming scheme induced millions of victims throughout the United States, including numerous victims in the Eastern District of New York, to place telephone calls to the "1-800" telephone numbers operated by Overland. (Indictment at ¶¶ 21, 58). Overland transmitted the billing information for the unauthorized charges to USP&C for submission to the LECs for inclusion on the victim's local telephone bills. USP&C collected the payments for the unauthorized charges from the LECs, and in turn paid the bulk of the proceeds to the Campos companies and, after approximately January 2001, to new shell companies that replaced the Campos companies, net of expenses and refunds to complaining victims. (Indictment at ¶ 58). These companies in turn paid the proceeds to Overland and Fairfax, another shell company nominally operated by defendant Thomas Pugliese, but in fact controlled by Richard Martino for the purposes of laundering money. (Indictment at ¶ 58). Overland in turn paid the vast bulk of the proceeds to Richard Martino's companies, Mical and Telcom. Id.

13. Overland also paid some of the proceeds (approximately $6.8 million) to a company called Local Exchange Company L.L.C., also known as "LEC L.L.C.," which was owned, in part, both directly and indirectly through trusts, by Gambino family captain Salvatore LoCascio, Gambino family soldier Richard Martino, and Gambino family associates Zef Mustafa, Norman Chanes, and Daniel Martino. (Indictment at ¶ 58). LEC L.L.C. was also used as a receptacle for the receipt of illegal proceeds from the Internet pornography scheme. (Indictment at ¶ 58). Finally, between approximately 1996 and 2002, more than $40 million in illegal proceeds from both schemes were funneled to Creative Programs Communications Inc. ("Creative"), an entity owned by Salvatore LoCascio, Salvatore LoCascio's uncle, Joseph LoCascio, and Zef Mustafa. (Indictment at ¶ 58). These payments were made by Chanes and Richard Martino in fulfillment of Richard Martino's obligations as a soldier in the Gambino family to "kick up" a portion of his illegal profits to his Gambino family captain, Salvatore LoCascio. (Indictment at ¶ 60).

14. As alleged in the Indictment, several of the money laundering transactions pursuant to which money was funneled to Creative were effected through transfers made at the direction of Richard Martino from the bank account of Multimedia Forum, Inc. ("Multimedia"), at North Fork Bank on Long Island. These transfers were made to another company, Westford, which was

secretly controlled by Richard Martino through one of his business associates. (Indictment at ¶¶ 45, 59). As alleged in the Indictment, in 1999 five transfers were made from Multimedia's account at North Fork Bank on Long Island to Westford's account in New Jersey pursuant to this money laundering scheme. (Indictment at ¶¶ 90-91).

KENNETH M. MATZDORFF's Facilitation of the Criminal Activity of the Gambino Crime Family

15. As set forth below, investigation has revealed that KENNETH M. MATZDORFF has played an integral role, as an associate of the Gambino crime family, in both (i) the cramming scheme and (ii) the laundering of proceeds from both schemes.

USP&C

16. Investigation has revealed that MATZDORFF was instrumental in establishing and operating USP&C, which, as set forth above, was the primary vehicle that the Gambino family used to submit false billing charges to the LECs. I have interviewed several confidential sources who previously worked at USP&C. The information provided by each of these sources has been corroborated by other confidential sources and by other documentary information and by information provided by cooperating witnesses and has proven to be reliable in all regards. In sum, five confidential sources (CS's 1-5), all of whom previously worked at USP&C, have informed me that at all times during their employment at USP&C, which spanned the period

from in or about and between 1996 and 1999, MATZDORFF held himself out as President of USP&C.

17. MATZDORFF also falsely represented himself to be the owner of USP&C. For example, in the course of my investigation, I have also reviewed documents executed in connection with the acquisition by MATZDORFF and others of Garden City Bank in 2000 (described in more detail infra). In these documents, MATZDORFF identified himself as the Chairman and Founder of USP&C. Similarly, when USP&C was sold in December 1999, MATZDORFF signed the stock purchase agreement effecting the sale of the company and identified himself as President and Owner. I have also reviewed a deposition given by MATZDORFF in civil litigation between Southwestern Bell and PAC Bell in 2000. In this deposition, MATZDORFF falsely identified himself as the sole owner of USP&C.

18. My investigation has revealed that, in fact, all important decisions concerning the business of USP&C were ultimately made not by MATZDORFF, but by Richard Martino, Norman Chanes and others. For example, CS's 1-5 have all stated that, during the course of their employment at USP&C, all important decisions regarding the operation of the business were made by Richard Martino, Daniel Martino, Norman Chanes and their associates in New York. In addition, when deposed in connection with the Southwestern Bell litigation against USP&C in 2000,

MATZDORFF acknowledged that he did not know the individual who purchased USP&C and said that he was informed simply that the buyer was a person with capital who came from the East Coast. MATZDORFF further acknowledged that, despite being the purported owner, he did not receive any money from the sale.

19. Investigation has also revealed that MATZDORFF knew that USP&C was being used by Richard Martino, Norman Chanes and others to place unauthorized charges on customers' telephone bills. For example, one of the confidential sources referred to supra ("CS-1") has informed me that during the course of CS-1's employment at USP&C, CS-1 repeatedly told MATZDORFF that USP&C was receiving numerous calls from customers complaining that unauthorized charges were being placed on their telephone bills by USP&C. CS-1 further stated that, on several occasions, CS-1 transferred calls from complaining victims to MATZDORFF when CS-1 believed that the callers were truthfully representing that they had not authorized any charge. According to CS-1, MATZDORFF took this information and never informed CS-1 of what he did in response to these complaints.

20. Investigation has also revealed that MATZDORFF knew that USP&C was being used to circumvent LEC regulations regarding billing for adult entertainment services. For example, CS-1 has stated that when CS-1 began working at USP&C, MATZDORFF told CS-1 that USP&C's customers were in the business of

providing psychic and phone sex services. In the Southwest Bell litigation, however, MATZDORFF acknowledged his familiarity with billing and collection agreements, a fact which indicates that he knew of standard LEC policy against billing for adult entertainment services. Accordingly, if MATZDORFF knew that USP&C's customers were providing adult entertainment services, he also knew that USP&C was deceiving the LECs as to the nature of services its customers provided.

21. Another one of the confidential sources referred to above ("CS-2") has also informed me that, in or about 1999, CS-2 explicitly told MATZDORFF that CS-2 believed that USP&C was being used to bill customers for unauthorized voice mail services triggered by calls to USP&C's psychic and sex lines. According to CS-2, MATZDORFF responded that that was because some of the programs in question were "more heavily marketed." A third confidential source ("CS-3") has informed me that CS-3 came to believe that MATZDORFF was selected to play the role of "front man" at USP&C because of his connections in the local telephone industry.

22. By holding himself out as the President and Owner of USP&C when he, in fact, knew that USP&C was being used by Richard Martino, Norman Chanes and others to defraud customers and deceive LECs, MATZDORFF facilitated the cramming scheme and allowed Richard Martino, Norman Chanes and others to conceal

their roles in this scheme.

LEC L.L.C.

23. Investigation has further revealed that MATZDORFF has also been instrumental in the operation of LEC L.L.C., which, as revealed by investigation, has been one of the main vehicles for laundering proceeds of both the cramming scheme and the internet pornography scheme to Richard Martino, Salvatore LoCascio, Norman Chanes and other participants in the schemes.

24. Examination of subpoenaed documents has revealed that LEC L.L.C. is a corporation located in Peculiar, Missouri that manages and owns, in whole or in part, three local telephone companies including Cass County Telephone.

25. Examination of subpoenaed documents has also revealed that, in or about and between 1998 and 2002, approximately $ 6.6 million was transferred from bank accounts held by Overland Data Center to bank accounts held by LEC L.L.C. These funds were ostensibly paid by Overland to LEC L.L.C. as "management and consulting fees." In the course of my investigation, I have extensively interviewed and debriefed CS-6, who served in a high-level management capacity at Overland between 1996 and 2003. The information provided by CS-6 has been corroborated by other evidence and has always proven reliable. According to CS-6, LEC performed no management or consulting services for Overland during the period the period 1996 to 2003

that would justify the payment of anything more than nominal fees, and has performed no services at all for Overland since 1997.

26. Examination of subpoenaed documents has revealed that the majority of the shares of LEC L.L.C. are owned by Gambino family captain Salvatore LoCascio, Gambino family soldier Richard Martino, and Gambino family associates Daniel Martino, Norman Chanes, Zef Mustafa.

27. In sworn documents executed in connection with the acquisition by MATZDORFF and others of Garden City Bank in 2000, MATZDORFF stated that he has been the President of LEC L.L.C. since its founding in 1994. In these same documents, he further identified himself as Managing Partner and 7.4% owner of LEC L.L.C. In a hearing before the Public Service Commission of the State of Missouri in April 2004, MATZDORFF testified under oath that he is the President of LEC L.L.C.

28. In this same hearing, MATZDORFF denied knowing of any relationship between USP&C and Overland Data Center. In fact, as MATZDORFF well knew and believed, USP&C and Overland were both created out of an entity owned by Richard and Daniel Martino called Info Access for the purpose of concealing the Martinos' continued control over those assets. In addition, the companies' operations continued to be intertwined on a daily basis, even after the separation. For example, Overland

regularly submitted billing information for all of the victims of the cramming scheme to USP&C for inclusion in bills issued by the LECs. In addition, MATZDORFF, through LEC L.L.C. received substantial fees for "consulting and management services" from Overland.

29. By operating and managing LEC L.L.C. and providing false testimony about the operations of the companies involved in the cramming scheme, MATZDORFF facilitated the laundering of proceeds from the cramming scheme to Richard Martino, Norman Chanes, Salvatore LoCascio, Zef Mustafa and others and facilitated their concealment of their roles in these crimes.

Cass County Telephone

30. Examination of subpoenaed documents reveals that Cass County Telephone Company, a local exchange carrier in Missouri, is owned by LEC L.L.C. In a hearing before the Public Service Commission of the State of Missouri in April 2004, MATZDORFF testified under oath that he is the President of Cass County Telephone Company.

31. According to CS-6, in or about and between 1997 and 2003, Overland Data Center performed certain computer consulting work for Cass County. According to CS-6, however, the amount that Cass County paid Overland for this work was approximately five to ten times the true value of the invoiced services. According to CS-6, these funds were first transferred

from Cass County to FSE Consulting, a consulting company owned and operated by Richard Martino's brother, Daniel Martino, and then from FSE Consulting to Overland. Examination of subpoenaed documents reveals that these funds were then sent back to Cass County.

32. This arrangement had the effect of defrauding the Universal Service Fund ("USF"), a federal government program established to assist high-cost and/or rural telephone service providers: Under federal regulations, participants in the USF program are entitled to reimbursement on a "cost-plus" basis for expenditures incurred in order to improve services offered to their customers. Examination of subpoenaed documents has revealed that between 1996 and 2003, Cass County received millions of dollars from USF as a result of claims submitted for services received from Overland.

33. Because Cass County is owned by LEC L.L.C., these funds, in turn, were received by the owners of LEC L.L.C., including Gambino family captain Salvatore LoCascio, Gambino family soldier Richard Martino and Gambino family associates Norman Chanes, Zef Mustafa, Daniel Martino and KENNETH M. MATZDORFF.

Garden City Bank

34. In addition, KENNETH MATZDORFF also acted as a front man for Richard Martino in connection with the acquisition

of Garden City Bank, a federally insured bank located in Garden City, Missouri. Records indicate that on or about February 15, 2001, Garden City Bank was purchased by MATZDORFF, and MATZDORFF's wife, Rebecca Malcolm Matzdorff, through Garden City Bank Shares Acquisition Corp., for approximately $3,000,000, consisting of approximately $526,000 in cash and a loan in the amount of $2,500,000. As a result of this purchase, approximately 83% of Garden City Bank is currently nominally owned by MATZDORFF and MATZDORFF's wife.

35. Investigation has revealed that the funds used to purchase Garden City Bank represent, at least in part, the proceeds of the cramming scheme.

36. On or about February 9, 2001, a deposit in the amount of $500,000 was made into the joint account of Rebecca Matzdorff and KENNETH MATZDORFF at United Missouri Bank ("UMB") by means of wire transfer from an entity called Caller Requested Transfer, Inc. ("Caller Requested"). Examination of subpoenaed documents has revealed that the Executive Officer of Caller Requested is Anthony Marano. Investigation has revealed that Marano is an employee of Richard Martino's companies, Mical and Telcom Online. Examination of subpoenaed documents has also revealed that two months prior to the transfer from Caller Requested to the Matzdorff account at UMB, approximately $500,000 was wire transferred from Overland to Caller Requested.

Investigation has further revealed that on or about November 17, 2000, LEC L.L.C. made a $2,500,000 loan commitment for the purchase of Garden City Bank.

37. In October 2003, I participated in the execution of a search warrant at the offices of Richard Martino's company, Mical/Telcom Online, located at 666 Third Avenue, New York, New York. Among the documents recovered in the search were bank documents from Garden City Bank and correspondence discussing the possibility of using Garden City Bank as a merchant bank for purposes of credit card processing. As set forth in the Indictment, an integral part of the internet pornography scheme was the use of merchant banks to bill victims' credit cards.

Wherefore, I respectfully request that an arrest warrant be issued for KENNETH MATZDORFF so that he may be dealt with according to law. I further respectfully request that the arrest warrant and this affidavit be filed and maintained under seal until the defendant KENNETH MATZDORFF is arrested and that these documents be unsealed upon execution.

BETH AMBINDER
SPECIAL AGENT
FEDERAL BUREAU OF INVESTIGATION

Sworn to before me this
22nd day of July, 2004

UNITED STATES MAGISTRATE JUDGE
EASTERN DISTRICT OF NEW YORK

Attachment 19

Oregon Farmers' Comments to the Staff's Report

LAW OFFICES
BRYDON, SWEARENGEN & ENGLAND
PROFESSIONAL CORPORATION

DAVID V.G. BRYDON
JAMES C. SWEARENGEN
WILLIAM R. ENGLAND, III
JOHNNY K. RICHARDSON
GARY W. DUFFY
PAUL A. BOUDREAU
SONDRA B. MORGAN
CHARLES E. SMARR

312 EAST CAPITOL AVENUE
P.O. BOX 456
JEFFERSON CITY, MISSOURI 65102-0456
TELEPHONE (573) 635-7166
FACSIMILE (573) 635-0427

DEAN L. COOPER
MARK G. ANDERSON
GREGORY C. MITCHELL
BRIAN T. MCCARTNEY
DIANA C. CARTER
JANET E. WHEELER

OF COUNSEL
RICHARD T. CIOTTONE

January 20, 2005

Mr. Nathan Williams
Missouri Public Service Commission
P. O. Box 360
Jefferson City, Missouri 65102

Re: Oregon Farmers Mutual Telephone Company

Dear Nathan:

This correspondence is in response to your email dated December 30, 2004, seeking review and feedback by Oregon Farmers Mutual Telephone Company (Oregon Farmers) on the section of Staff's draft Investigative Report as it relates to Oregon Farmers. Accordingly, this response is limited to Oregon Farmers and does not purport to respond on behalf of any other entity.

In the third paragraph under Section A entitled "Company Operations," the Report notes that the owners of Oregon Farmers entered into a stock purchase agreement whereby all of the outstanding common stock of Oregon Farmers would be sold to another telecommunication company. This transaction was thoroughly reviewed and approved by the Commission in its Case No. IM-2004-0461. The sale closed on September 23, 2004. As a result, Mr. Robert Williams no longer holds an ownership interest in Oregon Farmers nor is he an elected officer of that Company. (Mr. Williams does retain the honorary title of President.)

The last paragraph in Section A notes that Oregon Farmers receives billing services from LEC, LLC, a firm with the majority of its owners involved in the Federal litigation in New York. Please be advised that as of January 1, 2005, LEC, LLC no longer performs billing functions for Oregon Farmers (nor does it perform any other services for Oregon Farmers).

In the first paragraph under the section entitled "Affiliate and Related Party Transactions," the Report notes that Oregon Farmers bills and collects payments from customers on behalf of South Holt Cablevision, Inc. and further notes that the principal owner of South Holt Cablevision, Inc. is Robert Williams. This is no longer true. Mr. Williams sold the Cable Television assets to Northwest Missouri Holdings Inc. at the same time he sold his stock in Oregon Farmers. Accordingly, Mr. Williams no longer has an ownership interest in the Cable Television operations for which Oregon Farmers performs billing and collection services. Similarly, the Report indicates that Oregon Farmers contracts with South Holt Communications, Inc. for the performance of plant maintenance, administrative and management services. Again, as a result of the sale of stock, Oregon Farmers no longer contracts with South Holt Communications for these services.

The draft Report goes on to speculate that former payments by Oregon Farmers to South Holt Communications Inc. may be in lieu of payment of dividends or other distribution of capital and that this may "circumvent" dividend restrictions contained in Oregon Farmers' mortgage notes. This is simply not true. Oregon Farmers' lender is well aware of these payments, and there has been no question raised by the lender in this regard. In fact, during Mr. Williams ownership, Oregon Farmers met all the covenants of its loan and was current on all principal and interest payments. Accordingly, for the Staff to speculate that these payments to South Holt Communications may be a way to circumvent dividend restrictions in the mortgage loan is not only unfounded, it is highly prejudicial and inflammatory.

Section B of the Report is entitled "Firm's Involvement in Inappropriate Activities," and by its terms suggests that Oregon Farmers was involved in "inappropriate activities." The Report notes that Mr. Williams has joint business dealings with Mr. Matzdorff and if Mr. Matzdorff has engaged in inappropriate activities then concerns regarding Mr. Williams' activities are likely to be increased. This is pure conjecture and speculation. It is simply not true and is highly prejudicial and inflammatory. Mr. Williams is a long time, highly respected owner/manager of an independent telephone company. Simply because he has joint business dealings with Mr. Kenneth Matzdorff is no basis on which to speculate that he is engaged in any improper activity. In fact, neither Mr. Williams nor Oregon Farmers has been involved with, let alone mentioned in, any of the activities described in the Federal indictments regarding Mr. Kenneth Matzdorff.

Finally, at Section C of the Report entitled "Impact on Missouri Consumers," the Report concludes that "there is a risk to Missouri consumers is (sic) that certain cost of service rates may be too (sic) due to consideration of inappropriate costs." While the sentence obviously has some typographical errors, the intent appears to be that there is a risk to Missouri consumers that certain cost of service rates charged by Oregon Farmers may include inappropriate costs. Again, this is rank speculation and conjecture. There is absolutely no evidence that any of the limited transactions Oregon Farmers engaged in with entities associated with Mr. Kenneth Matzdorff were inappropriate. In fact, the draft Report later states that Oregon Farmers' independent external auditors have raised no questions regarding these transactions. Also, the Staff fails to note that it has engaged in at least two earnings investigations of Oregon Farmers in the last six (6) years, and at no time did Staff question the appropriateness of these affiliate transactions.

In conclusion, the Staff should revise its Report to reflect the misstatements noted above and further refrain from engaging in speculation and conjecture that appears to be designed to do nothing more than raise suspicion and prejudice the Company in the minds of the reader.

If you have any questions regarding these comments or would like to discuss them more thoroughly, please feel free to call me at your convenience.

Sincerely,

W.R. England, III

WRE/da

Attachment 20

New Florence Telephone Company's Comments to the Staff's Report

LAW OFFICES
BRYDON, SWEARENGEN & ENGLAND
PROFESSIONAL CORPORATION
312 EAST CAPITOL AVENUE
P.O. BOX 456
JEFFERSON CITY, MISSOURI 65102-0456
TELEPHONE (573) 635-7166
FACSIMILE (573) 635-0427

RECEIPT COPY

DAVID V.G. BRYDON
JAMES C. SWEARENGEN
WILLIAM R. ENGLAND, III
JOHNNY K. RICHARDSON
GARY W. DUFFY
PAUL A. BOUDREAU
SONDRA B. MORGAN
CHARLES E. SMARR

DEAN L. COOPER
MARK G. ANDERSON
GREGORY C. MITCHELL
BRIAN T. MCCARTNEY
DIANA C. CARTER
JANET E. WHEELER

OF COUNSEL
RICHARD T. CIOTTONE

January 18, 2005

Mr. David Winter
Missouri Public Service Commission
P.O. Box 360
Jefferson City, MO 65102

RE: **New Florence Telephone Company**

Dear Dave:

This correspondence is in response to your email dated December 27, 2004, seeking review and feedback by New Florence Telephone Company (New Florence) on the draft section of Staff's Investigative Report as it relates to New Florence. Accordingly, this response is limited to New Florence and does not purport to respond on behalf of any other entity.

We have identified several statements that are inaccurate or incomplete as follows (References will be to the Draft Report attached to your December 27, 2004 email.):

In the second paragraph of Section 11.A, the Report indicates that Mr. Kenneth Matzdorff was President and Director of New Florence Telephone Company until August 12, 2004. At that time, Mr. Matzdorff voluntarily resigned both his position as President and Director. Accordingly, on and after August 12, 2004, Mr. Robert Williams became the President of New Florence and its sole Director. Thus, Mr. Matzdorff is no longer an officer of the Company nor is he a director of the Company. In other words, he has completely removed himself from the management of New Florence.

In the second paragraph under the Section entitled "Affiliate/Related Party Transactions," the Report indicates that New Florence "has two officers that have authority to approve purchases or fund disbursements that also have a separate business relationship with third party vendors doing more than $10,000 annually with New Florence Telephone Company. These individuals are Kenneth Matzdorff and Robert Williams." As noted above, while that may have been the case prior to August 12, 2004, that is no longer true. As of August 12, 2004, Mr. Williams is the only individual with authority to approve purchases or fund disbursements of any kind for New Florence.

The Report makes reference to the fact that "Overland Data Center did not provide any data functions to New Florence," and correctly notes that New Florence could not provide copies of agreements between Overland Data Center and LEC, LLC as that information is not in New Florence's possession or control. The Report, however, fails to mention the fact that there are no direct charges from Overland Data Center to New Florence. In fact, the Report leaves the opposite impression by saying "the possibility exists that New Florence does make Overland Data Center payments through its LEC, LLC payments." There is absolutely no evidence that LEC, LLC has charged any costs associated with Overland Data Center to New Florence. To speculate that that may be the case is highly prejudicial and inflammatory. Moreover, no allegation has been made in any of the Federal proceedings that would link New Florence to Overland Data Center (or USP&C). In fact, New Florence is never mentioned in the Federal proceedings.

Also, under the section entitled, "Firm's Involvement in Inappropriate Activities," the Report states as follows: "There is no evidence that New Florence Telephone Company had any involvement in the activity cited in the Federal indictments in New York with the possible exception of money laundering." Not only is there no evidence that New Florence had any involvement in the activity cited in the Federal indictments in New York, there is not even any mention of New Florence in those indictments. For the Staff to imply that there is a possibility of money laundering involving New Florence Telephone Company is contrary to the facts and, again, prejudicial and inflammatory.

While the Report recognizes that New Florence paid LEC, LLC for various services, such as billing and collection, it fails to mention that all payments from New Florence to LEC, LLC ceased as of January 1, 2005 and that LEC, LLC no longer provides any services to New Florence.

Finally, the draft Report does not reflect the additional information which was recently provided to Staff by New Florence such as the audit and additional data request responses. The independent, third-party audit report only identified one area of concern with respect to New Florence's transactions with affiliates. More importantly, this area of concern had no impact upon New Florence's submissions to, and receipt of, Universal Service Fund monies.

In conclusion, we hope that you will make the necessary corrections and add the additional information indicated above. If there are any questions regarding this correspondence, you may direct them to me at the above number.

Sincerely,

W.R. England, III

WRE/da

Attachment 21

Cass County Telephone's Comments to the Staff's Report

LAW OFFICES
BRYDON, SWEARENGEN & ENGLAND
PROFESSIONAL CORPORATION
312 EAST CAPITOL AVENUE
P.O. BOX 456
JEFFERSON CITY, MISSOURI 65102-0456
TELEPHONE (573) 635-7166
FACSIMILE (573) 635-0427

DAVID V.G. BRYDON
JAMES C. SWEARENGEN
WILLIAM R. ENGLAND, III
JOHNNY K. RICHARDSON
GARY W. DUFFY
PAUL A. BOUDREAU
SONDRA B. MORGAN
CHARLES E. SMARR

DEAN L. COOPER
MARK G. ANDERSON
GREGORY C. MITCHELL
BRIAN T. MCCARTNEY
DIANA C. CARTER
JANET E. WHEELER

OF COUNSEL
RICHARD T. CIOTTONE

January 19, 2005

Mr. Nathan Williams
Missouri Public Service Commission
P. O. Box 360
Jefferson City, Missouri 65102

Re: Cass County Telephone Company

Dear Nathan:

This correspondence will respond to your email dated December 30, 2004 seeking review and feedback by Cass County Telephone Company on draft sections of Staff's Investigation Report. This response is limited to Cass County Telephone Company (CassTel) and does not purport to respond on behalf of any other entity, affiliated or non-affiliated with CassTel. As a general matter, we believe the Report is deficient and inaccurate. It is deficient in that it fails to give a complete and balanced view of CassTel. It is inaccurate in certain respects and we will attempt to identify those inaccuracies later. We would also note that the Report includes a great deal of conjecture and speculation and then appears to draw conclusions and inferences based upon that conjecture and speculation.

The Report is deficient in that it fails to give a complete and unbiased view of CassTel. For example, the Staff Report completely ignores the history and accomplishments of CassTel since its inception. As the Commission is well aware, Cass County started operations on April 1, 1996, by acquiring six exchanges from GTE Corporation. At the time of sale, the telephone properties were comprised of six exchanges, serving approximately 5,700 access lines covering approximately 500 square miles of serving territory.

Customers were served primarily through 1961-1963 vintage step-by-step (XY) switches. Further, over 2,600 of the access lines were 4-party lines. Maintenance and customer support were provided in remote locations with little to no local management available in the area.

In a span of four years, CassTel replaced the existing Central Office Equipment (COE) with digital switching equipment. CassTel installed Siemens switches and today these switches are equipped with the latest software release. At the time of acquisition, CassTel's customers could not order vertical services, class features or equal access services as they do today. All of the switches are Communications Assistance for Law Enforcement Act (CALEA) compliant and have Signaling System 7 (SS7) available. Further, CassTel at the time of acquisition assisted the counties in the financing of E-911 efforts. CassTel now serves approximately 8,100 access lines, all single-party service.

At the time of acquisition, the outside plant was at exhaust for much of the serving territory. As noted above, outside plant included 4-party service in four of the six exchanges. CassTel reinforced and

replaced much of the cable plant with jell-filled, buried cable and fiber optic cable. To date, CassTel has invested over $22 million in new plant facilities to meet the needs of one of the states fastest growing counties.

CassTel provides some of the most advanced telecommunications service in the state. It has deployed DSL service capability to over 90% of its customer base. CassTel provides local customer service support and local community involvement.

To date, CassTel employs either directly or indirectly approximately 46 full-time employees and it has established a local business office in Peculiar, Missouri, where customers may come in and talk face-to-face with a Company representative.

All of these efforts and expenditures have been made without any increase in rates to customers. In fact, in August of 1999, the Company filed revised tariffs with the Commission that expanded MCA service to customers in the Creighton exchange which, prior to that time, did not have such service. This resulted in a substantial revenue loss to the Company. Up until May of 2004, the rates the Company charged its customers were the same as those charged by GTE in 1996 at the time of sale. Of particular significance is the fact that up until May 16, 2004, the rates which CassTel was authorized to charge its customers were not based upon any costs which CassTel actually incurred in providing service to its customers. In May, 2004, the Company reduced its rates as a result of a stipulation with Staff by approximately $320,000 annually.

The inaccuracies in Staff's Report are as follows: (References will be to page numbers in the draft Report attached to your December 30, 2004 email. Some inaccuracies that occur more than once in the Report are noted only once.)

- At page 7 of the Report under "Initial Conclusions", the second paragraph begins with the following sentence,

  "This initial report will show that there has been negative impact on service provided to Missouri customers of Cass County Telephone . . ."

There is absolutely no evidence that service to CassTel subscribers has been negatively impacted. In fact, as indicated above, service has been significantly enhanced and expanded since CassTel took control of these properties in 1996. To the best of CassTel's recollection, it has met or exceeded every quality of service criteria contained in Commission rules and regulations. For example, at the time of acquisition, the number of trouble reports per 100 access lines was approximately 6 troubles per 100 per month. Today that service index is .5 troubles per 100 per month. The Company has not experienced a held order in over four and one-half years for a regulated service. CassTel is unaware of any formal complaints that have been brought regarding its service, and, to the extent it has received informal complaints, they have been resolved quickly and satisfactorily.

- At page 12 of the Report, Staff begins a lengthy discussion of "Telephone Cramming."

What it fails to mention is that there has been absolutely no allegation, let alone evidence, that Cass County has engaged in any telephone cramming. The Staff's discussion of telephone cramming in its Report is irrelevant to and has no bearing on the operations of CassTel.

- At page 23, under the heading "Missouri Exposure to Overpayment for Goods & Services," the Staff begins with the following sentence:

"There are significant transactions with affiliates and owners involving Cass County Telephone Company LLP . . . that influence . . . [the Company's] cost structure."

While as an abstract matter, the statement would appear to be correct, the fact of the matter is that until May of 2004, the intrastate rates which CassTel charged its customers were rates it inherited from GTE and which were not based on CassTel's costs. Accordingly, to the extent CassTel engaged in transactions with affiliates during this period of time, the costs which CassTel incurred from such transactions had no bearing on, or relationship to, the intrastate rates it charged customers.

- At page 29, in the first paragraph at the top of the page, there is a sentence that reads as follows:

  "It is known at this time Cass County Telephone Company, LLP, is (sic) transferred funds to; Haug Construction, Local Exchange Company, LLC, LEC Long Distance, Inc., New Florence Telephone Company, Pegasus Communications, Inc. and VideoNet, LLP, during the last three years."

The use of the term "transferred funds" suggests that CassTel did not receive value for the payments it made to these entities. On the contrary, all of these entities provided goods and/or services to CassTel for which payments were made. And, in addition, in the case of LEC, LLC, payments were made in the form of distributions, which is a perfectly legitimate transaction.

- At page 40, under the section entitled "Overland and Cass Telephone," there is the following statement:

  ". . . Cass County indicated that these expenditures [to Overland] were on-going and for IT and Cass County's customer billing system."

However, in the CassTel response to Data Request No. 9 also quoted on that same page, CassTel made it clear that it has not utilized Overland Data's services since July of 2002. Thus, Cass Tel did not represent that payments to Overland Data were "on going," since they ceased in 2002.

- At page 41, Staff states as follows:

  ". . . it appears that Cass County's original representations to the Staff were misleading and rates are overstated by the amount paid to Overland ($679,022). If combined with the original stipulated rate reduction of $319,998, Cass County's rates should have been reduced by a total of $999,020."

This is simply not correct. First of all as Staff is well aware, even if the entire amount paid to Overland is disallowed, a corresponding reduction in Universal Service Funds is also appropriate. Thus, in order to correctly reflect the intrastate revenue requirement effect of the disallowance of this payment, Staff has to "net" the corresponding reduction in Federal USF funds against the reduced or disallowed expense. In short, Staff has only looked at one side of the equation. Secondly, Staff conveniently ignores the fact that this was a stipulated rate reduction and as part of that stipulation, CassTel chose not to pursue certain issues which it would have pursued had the matter gone to hearing. For example, Staff disallowed all income tax expense in its revenue requirement calculation. If an income tax expense were properly allowed, it would have offset the amount paid to Overland (i.e., $679,022). Similarly, CassTel did not dispute Staff's proposed depreciation rates and rate of return which it would have done had the matter gone to hearing. Accordingly, it is neither fair nor accurate to state that had the Overland payment been disallowed, the rate reduction would have been increased by the disallowed amount.

- At page 48, the last sentence in the top paragraph, Staff states as follows:

  "Attachment 15 to this report shows that there is no Cass County Telephone Company, L.P. employee position that can effectively negotiate fees with LEC, LLC. The LEC, LLC fees are basically established by LLC, LLC (sic) and imposed on Cass County Telephone Company, L.P."

First of all, Attachment 15 is simply an organizational chart of CassTel and contains no substantive information regarding the duties, responsibilities, capabilities, etc. of the individual employee positions. It is unclear how Staff can draw this conclusion from an organizational chart. Second, and more importantly, this statement leaves the impression that the Company performs no review of charges it pays to affiliates for various goods and services. This is misleading and directly contrary to CassTel's response to Staff Data Request No. 24 which is reproduced at the bottom of page 51 and top of page 52 of the Staff Report. It is clear from this response that CassTel uses various methods to review transactions with affiliated companies and ensure that the terms and conditions of those transactions are commercially reasonable. Third, the fairness of affiliate transactions under Part 32 of the CFR is a matter on which CassTel's annual audits focus, which provides independent verification of the appropriateness of payments made to LEC, LLC. Finally, it is worth noting that Staff's statement about effective negotiating leverage is true in all parent-subsidiary situations, from SBC and its subsidiaries down to the smallest local phone company and its subsidiaries. The question in those circumstances is never whether the negotiations were conducted at arm's length; the question is whether the results of the negotiations were fair.

- Similarly, at page 50 under the section entitled "Impact on Missouri Consumers," the last sentence of the first paragraph reads as follows:

  "The important item to note in this section is the fact that LEC, LLC can engage in a transaction with any firm or individual and cover the transaction through a billing to Cass County Telephone Company L.P. . . . as LEC, LLC charge."

Again, this leaves the impression that CassTel does nothing to review the charges it receives from LEC, LLC for goods and services LEC, LLC provides to it. That is simply not true in light of the Company's response to Staff Data Request No. 24. More importantly, the Staff has presented an incomplete picture to the Commission regarding Cass County's transactions with affiliates. Nowhere does Staff look at the total cost of service incurred by CassTel by functional account and make a comparison with other similarly situated telecommunications companies. The Staff Report leaves the impression that the Company's costs are excessively or unreasonably high when, in fact, there is no evidence of such. In fact, CassTel believes that if the Commission Staff were to perform a comparative analysis, it would find that CassTel's costs, relative to other telecommunications companies either on a per access line or per customer basis, are relatively low.

- At page 53 of the Report, under "Scope of Operations," second sentence, first paragraph, the Report states:

  "LEC, LLC is currently charging Cass County Telephone Company Limited Partnership over $4 million annually based on an unexecuted service agreement that exceeds LEC, LLC's costs to provide those services."

First of all, LEC is not currently charging CassTel over $4 million annually. In calendar year 2004, LEC, LLC billed $2,300,540 to CassTel for goods and services. Second, these charges are not based on an unexecuted service agreement. Rather, they are based upon an executed service agreement, a copy of

which the Company has lost and cannot find. Third, and most importantly, the charges from LEC, LLC do not exceed its costs to provide those services and there is no evidence of that fact in the draft Report.

- At page 57, under the heading "Firm's Involvement in Inappropriate Activities," the first sentence of the first paragraph states as follows:

  "There is no evidence that Cass County Telephone L.P. had an involvement in the activities cited in the Federal indictments in New York with the possible exception of money laundering."

This statement is incomplete. It should also acknowledge that the Federal indictments in New York do not make any mention of CassTel and, more importantly, there is absolutely no allegation in the indictment that CassTel engaged in money laundering or cramming.

CassTel is a viable, effective provider of telephone services in rural Missouri. It has unfortunately become entangled in a difficult and complicated situation. For the Commission to reach appropriate conclusions, Staff's Report (and any subsequent statements it makes to the Commission) must deal very carefully with the factual matters it raises. It is equally important for the Report to avoid speculation. CassTel is making no effort in this letter to comment on factual statements relating to persons other than itself, and this letter does not comment directly on statements in the Report that appear to be speculative; nevertheless, CassTel hopes that the corrections it is offering will improve the Commission's understanding of the situation.

Sincerely,

W.R. England, III

WRE/da