LATHROP
GAGE

2345 Grand Boulevard
Suite 2500
Kansas City, Missouri 64108-2684
816-292-2000, Fax 816-292-2001

1050, 40 Corporate Woods
9401 Indian Creek Parkway
Overland Park, Kansas 66210-2007
816-292-2000, Fax 913-451-0875

June 30, 2000

Dale Hardy Roberts
Secretary/Chief Regulatory Law Judge
Missouri Public Service Commission
P.O. Box 360
Jefferson City, MO 65101

Re: Case No. TO-99-483

Dear Judge Roberts:

Attached for filing with the Commission is the original and eight (8) copies of AT&T Communications of the Southwest, Inc.'s Initial Brief in the above referenced matter.

I thank you in advance for your cooperation in bringing this to the attention of the Commission.

Very truly yours,

LATHROP & GAGE, L.C.

By: Paul S. DeFord (jz)
Paul S. DeFord

Attachment
cc: All Parties of Record

142

BEFORE THE PUBLIC SERICE COMMISSION

OF THE STATE OF MISSOURI

IN THE MATTER OF AN INVESTIGATION FOR THE PURPOSE OF CLARIFYING AND DETERMINING CERTAIN ASPECTS SURROUNDING THE PROVISIOING OF METROPOLITAN CALLING AREA SERVICE AFTER THE PASSAGE AND IMPLEMENTATION OF THE TELECOMMUNICATIONS ACT OF 1996	))))))))	Case No. TO-99-483

Initial Brief
of AT&T Communications of the Southwest, Inc., TCG – St. Louis, and TCG – Kansas City

Comes Now AT&T Communications of the Southwest, Inc., TCG – St. Louis. and TCG – Kansas City, ("AT&T or AT&T Companies") and submits their Initial Brief.

Introduction

Competitive Local Exchange Companies (CLEC) participation in the MCA is critical to the development of facilities-based, local competition in the optional tiers of the MCA. The evidence in this case demonstrates that numerous CLECs are presently authorized to provide both mandatory and optional MCA service. It also demonstrates that CLECs are currently able to provision optional MCA service by reselling Incumbent Local Exchange Companies's (ILEC) services, by providing local service using the Unbundled Network Element – Platform (UNE-P) arrangement, or by porting MCA numbers from the ILEC.

Currently, facilities-based CLECs relying upon their own numbers are unable to operationalize their optional MCA offerings. This situation exists because Southwestern

Bell Telephone Company (SWBT) has unilaterally determined that CLECs are not MCA participants unless they obtain "authorization" from SWBT. In order to obtain "authorization" from SWBT, a CLEC must sign a Memorandum of Understanding (MOU) and agree to compensate SWBT as a condition of offering its own MCA service. Absent authorization from SWBT, SWBT treats CLEC customers as non-MCA participants and requires its own customers to dial a 1 – toll call to complete a call that would otherwise be local under the MCA plan.

The evidence in this case demonstrates that SWBT's unilateral exclusion of some CLECs from the MCA is unlawful and anti-competitive. Further, it is clear that SWBT has no authority to determine which carriers are MCA participants and which carriers are not. In addition, the MOU that SWBT required CLECs to execute in order to be "authorized" by SWBT to participate in the MCA plan is anti-competitive and unlawful. In short, SWBT's unilateral actions have harmed its own customers, its CLEC competitors, and customers of its CLEC competitors.

The evidence also suggests that members of the Missouri Independent Telephone Group (MITG) and possibly Cass County, et al. may not allow their customers to place local MCA calls to CLEC customers. The principal reason cited for this behavior is that they are unaware of which NPA-NXX codes should be treated as MCA codes.

Irrespective of the reason, by not allowing customers to place local calls to CLECs according to the calling scope set forth in Case No. TO-92-302, CLECs have been and continue to be unable to offer all aspects of the MCA service. As a result <u>all</u> customers have been made worse off.

In order to preserve the MCA calling plan and provide CLECs with an opportunity to be competitive in the optional tiers, the Commission must affirm that CLECs are indeed MCA participants and provide for full CLEC participation in the MCA immediately. Full CLEC participation in the MCA can be accomplished quickly and easily with few, if any, changes at the retail level by making the following changes or clarifications.

1. Affirm the Commission's prior decisions that CLECs are indeed authorized to participate in the MCA service
2. Prohibit any MCA participant from imposing anti-competitive charges on other MCA participants.
3. Allow pricing flexibility for all MCA participants subject the regulatory framework that governs each company's operations.
4. Affirm that MCA traffic is defined as local traffic for purposes of compensation.
5. Specify that intercompany compensation for MCA traffic is "bill-and-keep" unless superceded by an agreement between MCA participants.
6. Set forth a process for LECs to notify other LECs of the NPA-NXX codes that should be considered as "MCA codes".

By making these clarifications or changes, the Commission can ensure that MCA subscribers are able to place local calls to other MCA subscribers without regard to their local provider. It will also ensure that all CLECs have the opportunity to participate in the MCA on equal footing with the ILEC MCA participants. These six clarifications and changes are described more fully below.

1. Affirm the Commission's prior decisions that CLECs are indeed authorized to participate in the MCA service

CLECs are currently authorized to provide and, in many cases, are actually providing mandatory and optional MCA service to their customers. There is simply no evidence that would support a finding to the contrary. Because CLECs are currently authorized to provide MCA services, the Commission only needs to affirm that CLECs are proper MCA participants. That affirmation is necessary because several companies have refused to acknowledge that CLECs are MCA participants. This continued refusal is the reason that calls are blocked and AT&T customers cannot receive locally dialed toll-free calls (Kohly, Tr. p. 519).

There is no doubt that the Commission has previously authorized CLECs to participate in the MCA. The Commission explicitly addressed CLEC participation in the MCA plan during the process of approving the first interconnection agreement in Missouri[1]. During that proceeding, several parties raised the issue of CLEC participation in the MCA calling plan. In response, the Commission found that, "MCA service, where mandatory, is an essential part of basic local telecommunications service and as such is part of the service that LECs must provide to competitors under the Act."[2] As a result, "the Commission affirmed that MCA should be available for resale" to CLECS and SWBT did in fact make MCA service available for resale to Dial U.S. (Hughes, Tr. p. 1000).

Subsequently, the Commission approved Dial U.S.'s application for service authority to provide basic local and local exchange services within in the state of Missouri with no limitation on the type of retail services Dial U.S. could offer. The

[1] Case No. TA-96-440, In the Matter of the Application of Southwestern Bell Telephone Company for Approval of Interconnection Agreement under the Telecommunications Act of 1996 With Communications Cable-Laying Company, d/b/a Dial US

[2] Case NO-96-440, In the Matter of the Application of Southwestern Bell Telephone Company for Approval of Interconnection Agreement under the Telecommunications Act of 1996 With Communications Cable-Laying Company, d/b/a Dial US., Report and Order, September 6, 1996, page 6.

Commission also approved the local exchange tariff proposed by Dial U.S. that explicitly offered MCA service at rates different those established in Case No. TO-92-306.

Since that first interconnection agreement was approved, numerous CLECs, including the AT&T Companies, have been certificated by the to provide basic and non-basic local exchange service in Missouri. In addition to routinely granting certificates of service authority that allow CLECs to provide switched local service. the Commission has approved numerous local exchange tariffs for CLECs, including AT&T Communications of the Southwest Inc., and TCG – St. Louis Inc., that explicitly authorize each entity to provide optional MCA service. In approving TCG St. Louis Inc.'s tariff to introduce MCA service, the Commission found "that TCG St. Louis' [MCA] tariff is consistent with its interconnection agreement with SWBT and simply allows TCG to offer service already offered by other CLECs in the St. Louis market" (Kohly, Ex. 13, pages 2 -3).

The evidence in this case also demonstrates that CLECs are actually providing both mandatory and optional MCA service. CLECs are currently able to resell SWBT's mandatory and optional MCA service (Hughes, Tr. p. 999). In addition, facilities-based CLECs that provide local services via the UNE-P arrangement are also able to provide mandatory and optional MCA service (Hughes, Tr. p. 999). To the extent that a facilities-based CLECs may rely upon ported MCA numbers, those CLECS, including AT&T and TCG- St. Louis, are also able to provide the full functionality of mandatory and optional MCA service (Hughes, Tr. p. 1000). One CLEC, Intermedia is also able to provide the full functionality of mandatory and optional MCA service using its own

NPA-NXX because it has gained "approval" from SWBT to provide the service by signing the MOU.

SWBT is the principal party that has contends that facilities-based CLECs are presently not authorized to provide MCA service. Indeed, this issue is this basis for SWBT's claim that it has the authority to prevent its customers from placing local calls to CLEC MCA subscribers within the calling scopes established in Case No. TO-92-302 unless the CLEC signs the MOU.

It is simply disingenuous for SWBT to claim that it never considered CLECs to be authorized to provide MCA service. Since the passage of the Telecommunication Act of 1996 (TA96) over four years ago, SWBT has routinely participated in proceedings involving CLEC applications for service authority to provide basic local and local exchange service cases (Hughes, Tr. p. 1004). In those proceedings, SWBT routinely signed stipulations that have led to the issuance of certificates (Hughes, Tr. p. 1004). At no time in those proceedings did SWBT contend that the issuance of a certificate of service of authority did not authorize CLECs to participate in the MCA calling plan. Beyond a certificate of service authority from the Commission, SWBT is unable to identify any additional authority from a Commission that a CLEC would need to obtain before being allowed to provide MCA service (Hughes, Tr. p. 1004 – 1005).

SWBT also acknowledged that CLECs relying upon resale are authorized to provide MCA service (Hughes, Tr. 1000). CLECs that resell local service possess the same grant of authority from the Commission as CLECs that provision local service through means other than resale of ILEC services. Likewise, the tariffs of CLECs that resell local services appear the same as the tariffs of CLECs that provision local service through means other than reselling an ILECs services. In many cases, the same CLEC provisions local services through resale and over its own facilities under the same certificate of service authority and from the same local exchange tariff. There is simply no basis for SWBT to claim that CLECs relying upon resale are authorized to provide MCA service while CLECs relying upon their own facilities, including UNEs, are not authorized to provide MCA service.

SWBT has also arbitrated the terms of intercompany compensation for the exchange of MCA traffic with AT&T under Section 252(b) of the Telecommunications Act of 1996. It is inconceivable that SWBT would arbitrate the issue of intercompany compensation for the exchange of MCA traffic between itself and AT&T while not believing that AT&T could offer the service.

In the subject proceeding, SWBT insisted that it was not trying to keep competitors out of the MCA plan but was only concerned about the issue of compensation. During the hearing, Vice Chair Drainer and Mr. Bailey had the following question and answer exchange;

> Q. All right. What about on page 9 of your rebuttal testimony, I'm not sure I'm interpreting correctly, but you seem to advocate keeping the new competitors out of the MCA and EAS arrangements. Is that what you are advocating?
>
> A. No. No, not at all. First of all, we're willing to resell MCA service as a resold service.
>
> Okay. So we're not talking about that. What I'm trying to demonstrate in this particular answer, and the issue is whether or not we should be charging AT&T, for example, terminating rates that we're introducing in this proceeding or access rates[3].

This response clearly indicates that SWBT contemplated the situation where competitors would provide MCA service (Kohly, Ex. 11, pages 9 – 10).

Finally, SWBT has "acknowledged Intermedia as a full MCA participant" (Hughes, Tr. p. 1012). SWBT can point to no authority granted by the Commission that would differentiate Intermedia from other CLECs as being authorized to provide MCA service (Hughes, Tr. p. 1005). Intermedia possess the same certificate of service authority as other CLECS in Missouri. Intermedia has tariffs approved that set forth the terms and conditions of its MCA offering. Likewise, AT&T, TCG – St. Louis and other CLECs have tariffs that explicitly set forth the terms and conditions of their own MCA offerings.

SWBT cannot point to any grant of authority from the Commission or even an agreement among the ILEC MCA participants that would allow SWBT to determine which CLECs are authorized to provide MCA service (Hughes, Tr. p. 1015-1-16). In setting its local calling scopes, SWBT operates under the authority of its tariffs. (Unruh, Tr. p. 1085). Yet, SWBT can point to nothing in its own tariffs that would differentiate Intermedia's MCA subscribers from those of other ILECs or CLECs (Hughes, Tr. p. 1014). When SWBT determined that Intermedia became authorized to participate in the MCA calling plan, it did not make any changes to its own tariffs that would reflect the fact that Intermedia's CLEC customers were now "MCA subscribers" (Hughes, Tr. p. 1014). In fact, according to effective date of the MOU and of Intermedia's MCA tariff, SWBT made the determination that Intermedia was authorized to provide MCA service prior to Intermedia's MCA tariffs becoming effective. Obviously, neither SWBT's tariffs nor Intermedia's tariffs were critical in SWBT's determination to begin recognizing Intermedia as a MCA participant even though those tariffs provide the authority under which SWBT and Intermedia may operate.

The sole determinative factor between a CLEC that SWBT considers to be to authorized to provide MCA service and one that SWBT does not consider to be authorized to provide MCA service is whether the CLEC has executed the MOU (Hughes, Tr. p. 1014 – 1015). According to SWBT, that agreement is not subject to the Telecommunications Act of 1996 and does not need state Commission approval.

Therefore, even according to SWBT, the MOU has absolutely no effect on the authority granted to Intermedia by the Commission.

In short, SWBT cannot point to single factor that would explain why Intermedia is authorized by the Commission to participate in the MCA calling plan while the AT&T Companies and other CLECs are not authorized to participate in the MCA calling plan. SWBT cannot point to any grant of authority by the Commission that would allow it to determine which companies "are full MCA participants" and which are not. The only differentiating factor that SWBT can point to is the fact that Intermedia signed the MOU with SWBT. On its own, that agreement has absolutely nothing to do with the authority granted by the Commission. The only thing SWBT can do is point to the MOU as the reason Intermedia is able to provision optional MCA service to its customers while the AT&T Companies and other CLECS are not unable to provide MCA service. It is clear that SWBT's actions have absolutely nothing to do with the authority granted to SWBT or to a CLEC. There is no lawful basis for SWBT to act as gatekeeper to the MCA.

In Summary, it is clear that the Commission's actions have already determined that CLECs are authorized to provide MCA service. Those actions include

- approving CLEC applications for service authority with no restrictions on the retail offerings of a CLEC;
- approving tariffs that explicitly allow CLECs to sell mandatory and optional MCA service;
- finding that approving a CLECs tariffs to provide MCA service would be consistent with its interconnection agreement with SWBT and allow it to provide services that other CLECs are currently providing;
- requiring SWBT to make MCA service available for resale; and
- arbitrating intercompany issues between ILECs and CLECs related to the provision of MCA service.

It is also clear the SWBT has previously recognized and continues to recognize that CLECs are authorized by the Commission to provide MCA service. SWBT's decision to exclude certain facilities-based CLECs from the MCA has absolutely nothing to do with the authority granted by the Commission. It is also clear that SWBT unilateral actions of excluding certain facilities based CLECs are anti-competitive and unlawful. Finally, it has been clearly shown that CLECs are presently providing both mandatory and optional MCA service. For these reasons, the Commission only needs to affirm its prior decisions to allow CLECs to participate in the MCA. Again, this is necessary so that ILECs will stop the practice of blocking calls so that all customers can receive the benefits of the MCA calling plan.

2. Prohibit any MCA participant from imposing anti-competitive charges on other MCA participants.

It is inappropriate for any carrier to assess charges upon another carrier as a condition of being "authorized" as an MCA participant. SWBT has proposed a compensation arrangement found in the MOU that would require a CLEC wishing to offer MCA service to pay SWBT 2.6¢ per minute when a SWBT MCA customer places local calls to a CLEC's MCA customer. Such a charge violates the FCC rules governing reciprocal compensation, violates the duty to establish dialing parity found in Section 251(b)(3) of the TA96, and constitutes a barrier to entry under 253(b).

SWBT's proposed MOU compensation arrangement violates 47 C.F.R. § 51.703(b) which prohibits a LEC from assessing charges on any other telecommunications carrier for local telecommunications traffic that originates on the LEC's network. Under SWBT's proposal, a CLEC would be required to pay SWBT 2.6c per minute for traffic that SWBT's customers originate and that SWBT sends to the CLEC for termination. This is absolutely prohibited by the FCC rule codified in 47 C.F.R. § 51.703(b).

Section 251(b)(3) of the TA96 establishes the duty to provide dialing parity to competing providers of telephone exchange service and telephone toll service. Section 271(c)(2)(B)(xii) of the competitive checklist requires Regional Bell Operating Companies to meet the obligations imposed by Section 251(b)(3) as a condition of entry into the interLATA toll market. As it relates to MCA service, Section 251(b)(3) requires LECs to implement local dialing parity in such a manner as not to cause CLEC customers to dial any greater number of digits that its own customers are required to dial to complete the same local call. ILECs cannot allow their customers to dial 7 or 10 digits to reach another ILEC customer while requiring customers to dial 1+ to reach CLEC customers. Excluding CLECs from the MCA does just that. It requires ILEC customers to dial 1+ and incur toll charges to reach a CLEC customer while that same ILEC customer is allowed to place a local call to reach another ILEC customer in the same exchange. Additionally, the MCA service as it operates today constitutes a barrier to entry. Because CLECs are unable to operationalize their offerings of MCA service, their ability to offer competitive local services in the optional tiers of the MCA is hindered, if not eliminated. Section 253 of the TA96 prohibits any state or local statutes or local regulation to prohibit or to have the effect of prohibiting the ability of any entity to provide service. As it presently operates the MCA service has the effect of prohibiting the ability of CLECs to provide service and it constitutes a barrier to entry.

As blatantly unlawful as SWBT's actions and its proposed compensation arrangement in MOU are, the Commission must affirmatively prohibit any carrier from assessing such a charge as condition of recognizing a CLEC as an MCA participant.

Prohibition of the compensation arrangement contained in the MOU or of similar surcharges is absolutely necessary to allow CLECs to compete in the MCA calling plan.

3. Allow pricing flexibility for all MCA participants subject the regulatory framework that governs each company's operations.

One of the goals of implementing competition in the local exchange market is to provide better services at lower prices. To achieve that goal with regard to MCA service, it is quite obvious that continued price competition is necessary.

Currently, CLECs that provide MCA service are allowed to do so at rates that vary from those originally set in Case No. TO-92-306. There is no statutory or practical basis to require CLECs to mirror the prices established in Case No. TO-92-306. CLECs operating in Missouri are classified as competitive companies. As competitive companies, Section 392.500 RSMo governs CLEC's rate setting authority. Under these statutory provisions, CLECs have complete flexibility in setting retail prices.

Imposing pricing mandates upon competitive companies would be inconsistent with the grant of authority and the lawfully approved tariffs that CLECs currently operate under. Staff witness Voight testified that CLECs are currently providing optional MCA service on at least 65,000 access lines at rates that are different from those established in Case No. TO-92-306. If the Commission were to impose a requirement that CLECs must charge the same rates as those set in Case No. TO-92-306, those rates will have to be increased and customers will have to be notified of the increase (Voight, Tr. 203).

Similarly, companies regulated under price cap regulation as set forth in Section 392.245 RSMo. are afforded pricing flexibility for basic and non-basic services according to the provisions of that chapter. SWBT's Witness Mr. Hughes testified that under price cap regulation SWBT is able to file a tariff to either increase or decrease MCA rates (Hughes, Tr. 1020 – 1021). Once under price cap regulation, the Commission has no statutory authority to mandate prices for companies regulated under this section. For that reason, the Commission cannot lawfully impose pricing mandates upon companies regulated under Section 392.245 RSMo.

It would be discriminatory for the Commission to impose pricing mandates upon competitive companies while companies operating under price cap regulation are allowed pricing flexibility under Section 392.245 RSMo. In order to ensure full and fair competition with regard to MCA service, the Commission should continue to allow pricing flexibility for mandatory and optional MCA rates. As long as pricing flexibility is allowed for all MCA participants according to the regulatory scheme under which they operate, competitive neutrality is maintained and no party can use pricing to gain an unfair advantage over another provider.

4. Affirm that MCA traffic is defined as local traffic for purposes of compensation.

MCA service is currently classified and tariffed by all LECs offering the MCA service as a local service. As a local service, MCA traffic is local traffic. Under no circumstance, can carriers be required to pay switched access rates for the transport and termination of local traffic. In Case No. TO-99-428, the Commission recently determined that local traffic is not subject to switched access charges regardless of the number of carriers involved and regardless of whether there is an interconnection agreement or traffic termination agreement in place (Kohly, Ex. 11, page 32). Just as the Commission did in Case No. TO-99-428, the Commission should reject the MITG's attempts to impose switched access charges upon MCA traffic.

5. Specify that intercompany compensation for MCA traffic is "bill-and-keep" unless superceded by an agreement between MCA participants.

In instances where an ILEC and a CLEC have an approved interconnection agreement or a traffic termination agreement that governs reciprocal compensation for the exchange of local traffic, that agreement determines the reciprocal compensation for the exchange of MCA traffic. There is no compelling evidence for the Commission to set aside prior arbitration decisions and previously approved interconnection agreements to adopt another compensation mechanism in this proceeding.

In AT&T/MCI arbitration with SWBT (Case No. TO-97-40/TO-97-67), the Commission established the reciprocal compensation arrangement for the exchange of local traffic within the entirety of the MCA and determined that is should be per minute reciprocal compensation rates. The Commission approved the interconnection agreement that resulted from that arbitration, including the reciprocal compensation arrangement, based upon a finding that the agreement was neither discriminatory nor inconsistent with the public interest.

In addition to the arbitrated agreements, the Commission has approved numerous other interconnection agreements that were mutually agreed to by the signatory parties that set forth per minute reciprocal compensation arrangements. Many of those agreements have higher per minute reciprocal compensation rates than those established in arbitration proceedings.

In this case, SWBT has argued that the Commission should set aside those agreements in favor of a bill-and-keep compensation mechanism. If SWBT or any party to an agreement is dissatisfied with the terms of the agreement, they are free to renegotiate those agreements under the TA96. The TA96 establishes a very explicit procedure for negotiating rates, terms, and conditions, to be included in interconnection agreements between ILECs and CLECs, and arbitrating any interconnection issues which parties cannot resolve.

SWBT's argument to move to bill-and-keep as the compensation mechanism for MCA traffic is inconsistent with the Commission's determination in the AT&T/MCA arbitration with SWBT (Case No. TO-97-40/Case No. TO-97-67). SWBT has failed to explain why the Commission should abandon this framework when those agreements are working today. Additionally, if the parties to an interconnection agreement do not believe they are being appropriately interpreted or implemented, either party are free to pursue their grievance through the dispute resolution process contained in those agreements.

Lastly, in approving the current Interconnection Agreements, the Commission was required by the TA96 to make a finding that the agreements were not discriminatory to any other telecommunications carriers. With that finding, nothing in an approved interconnection agreement discriminates against a third-party. Likewise, no third party's desire for terms and conditions that differ from those contained in an approved agreement between two other parties are relevant. If a company wishes to use bill-and-keep as the compensation mechanism for local traffic, then it should pursue that arrangement through negotiation under the TA96 with the appropriate carrier. It is simply not appropriate for

SWBT or any party to attempt to undo the existing interconnection agreements in this proceeding.

In instances where no interconnection agreement or traffic termination agreement is in place, the Commission should adopt a bill-and-keep arrangement as the "default" compensation arrangement. This is the arrangement that is currently in place between the ILECs participating in the MCA and is consistent with the FCC's rules. This is also the "de facto" compensation arrangement that exists today between CLECs and the independent LECs where there is no traffic termination agreement in place.

Going forward, it is not appropriate for the Commission to mandate bill-and-keep for all MCA participants. All LECs should be free to pursue the lawful compensation arrangement that it deems appropriate. Any compensation arrangement imposed by the Commission should be consistent with the FCC's rules governing reciprocal compensation for local traffic. Those rules are set forth in Title 47 C.F.R. § **51.705.** That section states;

> **§ 51.705 Incumbent LECs' rates for transport and termination.**
>
> (a) An incumbent LEC's rates for transport and termination of local telecommunications traffic shall be established, at the election of the state commission, on the basis of:
> (1) the forward-looking economic costs of such offerings, using a cost study pursuant to §§ 51.505 and 51.511 of this part;
> (2) default proxies, as provided in § 51.707 of this part; or
> (3) a bill-and-keep arrangement, as provided in § 51.713 of this part.

Under these rules, the Commission require compensation based upon forward-looking economic costs as defined by the FCC, the FCC's default proxies, or through a bill-and-keep arrangement. All three of these mechanisms are available under the TA96.

The Commission cannot and should not limit the options available under the TA96 in favor of bill-and-keep.

Bill-and-keep is not a panacea that cures all ills in all situations. Every compensation arrangement creates its own set of incentives. To the extent that a compensation arrangement does not reflect the true economic cost of providing either originating or terminating service, it will create incentives to seek a disproportionate distribution of traffic. Mandating bill-and-keep in lieu of monetary compensation will not eliminate that incentive to seek a disproportionate balance of traffic (Kohly. Ex. 13, p. 10).

Terminating compensation that exceeds the true economic cost creates the incentive to seek callers who receive a disproportionate share of terminating calls. Bill-and-keep creates the opposite incentive. That is, it creates the incentive to market to customers or regions that make a disproportionate number of originating calls. Bill-and-keep is only appropriate between competitors where the traffic is presumably balanced or the number of minutes exchanged and the resulting cost is *de minimis*.

If the Commission determines that it can and should mandate bill-and-keep now or in the future for MCA traffic exchanged between MCA participants, the Commission should affirmatively state that the bill-and-keep arrangements between the participants would be the same bill-and-keep arrangement that exists today. As is currently done between the ILEC MCA participants, CLEC should not be required to exchange traffic records for MCA traffic and CLEC should not be required to pay a transit charge for MCA traffic. If CLECs are required to go to bill and keep, in the interest of being fair for every party then that arrangement needs to the same for all parties. There is no reason to adopt bill-and-keep in the interest of fairness and then treat CLECs differently than ILECs (Kohly, Tr. p. 533)

The bill-and-keep arrangement being proposed by SWBT in this case is different than the bill-and-keep mechanism currently in place between the ILECs (Hughes, Tr. p. 954). Under SWBT's proposed bill-and-keep arrangement, CLECs operating within the MCA, would be required to provide traffic records for MCA traffic and to pay a transit charge when SWBT routes a call from a CLEC's MCA customers to an ILEC's MCA participant. In addition, other ILECs have indicated that they would like to receive traffic records for MCA traffic as well (Kohly, Tr. p. 430).

It would be discriminatory to require CLECs to provide traffic records for MCA traffic to ILECs and not require traffic records to be exchanged between the current ILEC MCA participants. It would be discriminatory to require CLECs to pay SWBT a transit fee for carrying MCA traffic when ILEC MCA participants are not required to pay a transit fee in the same situation.

6. Set forth a process for LECs to notify other LECs of the NPA-NXX codes that should be considered as "MCA codes".

For now, each carrier should be responsible for notifying the other MCA participants of which NPA-NXX codes should be treated within the MCA calling scope. This can be accomplished through a letter to each carrier operating in the MCA territory identifying which NPA-NXX codes should be treated as MCA codes. Gabriel Communications Inc.'s witness Mr. Cadieux suggested attaching a sworn statement verifying that the outbound local calling scope of the carrier making the request is at least as large as the MCA plan local calling scope from the 1992 order and also attesting that every NXX on the list is associated with a rate center that is located within the bounds of the MCA (Cadieux, Tr. p. 829). Additionally, Mr. Matzdorff suggested that a list of carriers and the appropriate contacts be created and disseminated to aid in the notification of MCA codes (Matzdorff, Tr. p. 1203). Each of these are options the Commission should consider.

If the commission decides to retain the existing MCA format that requires MCA participant to be segregated from non-MCA subscribers, the Commission should consider contracting with a third party to develop and maintain a centralized process.

Staff's Proposed MCA-2

Staff's proposed MCA-2 proposal has merit and should be seriously considered and a subsequent docket. The evidence in this case shows that such a proposal could significantly reduce the number of NPA-NXX codes required by a carrier to offer MCA service an optional service and reduce the administrative work associated with defining a calling scope based upon an NPA-NXX rather than exchange. It could also eliminate the need to change phone numbers based upon whether or not a customer subscribes to MCA service and eliminate the customer confusion about which NPA-NXX codes within an exchange can be reached toll-free and which cannot (Voight Tr. p. 100).

If the Commission pursues a proposal such as MCA-2, the Commission should adopt Staff's Witness Mr. Voight's recommendation to allow CLECs the flexibility to rely upon a single NPA-NXX code even in instances where a CLEC may offer MCA service as an optional service. This would prevent CLECs from obtaining duplicate codes and inefficient use of numbers during an interim period in which MCA-2 service is developed.

Response to Commission Questions

1. THE COMMISSION DOES NOT HAVE AUTHORITY TO OVERRIDE EXISTING RECIPROCAL COMPENSATION ARRANGEMENTS IN SOME EXISTING INTERCONNECTION AGREEMENTS EITHER RETROACTIVELY OR PROSPECTIVELY.

The Commission does not have the authority to undo existing the compensation arrangements in existing interconnection agreements. Altering existing interconnection agreements is clearly beyond the scope of the Commission's authority to implement the Telecommunications Act of 1996 ("Act"). Similarly, requiring all future interconnection to use only the "bill and keep" pricing method also exceeds the authority of the Commission to implement the Act. The Commission, therefore, would exceed its permitted authority by taking either of the contemplated actions.

A. THE COMMISSION DOES NOT HAVE THE POWER TO ALTER THE EXISTING PRICING TERMS CONTAINED IN APPROVED INTERCONNECTION AGREEMENTS.

The Commission would exceed its authority if it were to attempt to "override" the compensation arrangements of existing and approved interconnection agreements. The Commission does not have before it all parties that would be effected by altering existing interconnection agreements and the terms of these interconnection agreements are not issues properly before the Commission in the present case. Moreover, altering existing interconnection agreements is impermissible because such an action would, in essence, be an adjudication of a contract dispute, which the Commission has previously determined it does not have authority to do. The Commission, therefore, should avoid overstepping its authority by altering existing interconnection agreements.

This case is not the appropriate forum for altering approved interconnection agreements. The Commission does not have before it in this case many parties that have approved interconnection agreements. If the Commission were to take the sweeping action of overriding reciprocal compensation arrangements in all interconnection agreements in this case it would be deciding the rights of parties who would not have been provided an opportunity to be heard. By deciding the rights of non-parties, the Commission would be acting in an arbitrary and capricious manner and the Commission would be imposing requirements beyond the scope of its authority.

Further, the issue of the reciprocal compensation arrangements in existing interconnection agreements is not before the Commission in this case. Compensation arrangements in existing interconnection agreements was not and is not the reason for hearing this case. The Commission would be issuing an advisory opinion were it to override approved interconnection agreements since all needed parties are not before the Commission and the issue is not in controversy in the present case.

Moreover, the Commission would be exceeding its authority by altering existing contracts between companies. The Commission has held as follows with respect to its authority to rule on issues of contract: "It is well settled law that this Commission has no authority to adjudicate contract disputes." *In re MCI's Petition for Arbitration of Directory Assistance*, Case No. TO-99-319 (March 16, 1999) (citing *Gaines v. Gibbs*, 709 S.W.2d 541 (Mo. App. 1996). "The Public Service Commission is not a court . . . and it has ***no power to construe or enforce contracts***." *Id.* (Citations omitted) (emphasis added). By mandating a change to all existing approved interconnection agreements, the Commission would be construing and enforcing contracts by unwinding the deal between the parties to the agreement, inserting a new set of provisions not agreed to or bargained for by the parties, and by requiring the parties to be bound by the new provisions. Certainly if the Commission does not have the power to construe or enforce an existing contract it is clearly beyond the scope of the Commission's authority to create and enforce new contracts.

B. THE COMMISSION DOES NOT HAVE THE AUTHORITY TO REQUIRE ALL FUTURE INTERCONNECTION AGREEMENTS TO BE BASED ON THE "BILL AND KEEP" COMPENSATION METHOD.

The Act, coupled with its implementing regulations, does not allow the Commission to mandate "bill and keep" compensation arrangements for all future interconnection agreements. The Act provides for three pricing standards only one of which contemplates a "bill and keep" arrangement. *See* 47 U.S.C. § 252(d)(1-3). The Federal Communications Commission established regulations to guide the state public utility commissions regarding implementation of the various pricing standards. With respect to "bill and keep" the controlling regulations are found in 47 C.F.R. 51.713 and 51.711(b). The requirements for a state commission to impose "bill and keep" are as follows:

> (b) A state commission may impose bill-and-keep arrangements if the state commission determines that the amount of local telecommunications traffic from one network to the other is roughly balanced with the amount of local telecommunications traffic flowing in the opposite direction, and is expected to remain so, ***and no showing has been made pursuant to § 51.711(b)***.

Id. (Emphasis added). The Commission, therefore, can only impose "bill and keep" if "no showing has been made pursuant to § 51.711(b)" by the parties who would be required to use the "bill and keep" pricing standard. As the Commission knows, the "showing" referred to in 47 C.F.R. 51.713(b) is a forward-looking economic cost study. *See* 47 C.F.R. 51.711(b). The Commission is required by federal regulations to provide any party that may be subjected to "bill and keep" pricing the opportunity to make a "showing" of forward-looking economic costs. If a forward-looking economic cost study is presented to the Commission, 47 C.F.R. § 51.713 clearly prohibits imposition of a "bill and keep" arrangement. The Commission, therefore, would be acting beyond the scope of its authority if it were to simply impose "bill and keep" as the pricing standard on all future interconnection agreements because this would deny the parties the chance to offer evidence of actual future costs in the form of a forward-looking price study.

Moreover, federal regulations do not permit an absolute "bill and keep" regime, a party is always entitled to rebut an assumption that "bill and keep" provides balanced compensation. In 47 C.F.R. 51.713(c) it states as follows: "Nothing in this section precludes a state commission from presuming that the amount of local telecommunications traffic from one network to the other is roughly balanced with the amount of local telecommunications traffic flowing in the opposite direction and is expected to remain so, ***unless a party rebuts such a presumption***." *Id.* (Emphasis added). In other words, while it is true that "bill and keep" is a permissible standard of that a commission may impose to determine compensation, it is also true that a party subjected to "bill and keep" has the right under the Act and its implementing regulations to rebut the presumption that "bill and keep" fairly compensates. If the Commission were to require "bill and keep" as the only pricing standard for all future (or even current for that matter) interconnection agreements it would be eliminating the right of a party to rebut the assumptions of "bill and keep" and negotiate compensation through one of the two other pricing standards approved by the Act. By mandating "bill and keep" the Commission would clearly violate both the letter and the spirit of the Act..

2. CAN THE COMMISSION LAWFULLY INSTRUCT A LEC WITH WHOM A CLEC HAS AN INTERCONNECTION AGREEMENT TO BLOCK CALLS THAT ARE DESTINED TO TERMINATE TO AN ILEC IF THERE IS NO AGREEMENT IN PLACE BETWEEN THE CLEC AND THE SUBJECT ILEC.

The Commission should not contemplate ordering or in any way allowing LECs to block or otherwise interfere with the delivery of CLEC traffic. There already exist too many opportunities for LECs to abuse their superior position to interfere with and delay CLEC market entry. Allowing LECs to determine which CLEC calls to transit for termination would most likely create significant and complex issues that would have to be repeatedly addressed by the Commission.

It has been established that the Public Service Commission is purely a creature of statute and its powers are limited to those conferred by statutes, either expressly, or by clear implication as necessary to carry out the powers specifically granted. *State, ex rel. Utility Consumers Council of Missouri, Inc. v. Public Service Commission*, 585 S.W.2d 41, 47 (Mo. Banc 1979); *State, ex rel, City of West Plains v. Public Service Commission*, 310 S.W.2d 925, 928 (Mo. Banc 1958). Section 392.530 RSMo instructs that the statutory provisions applicable to the regulation of telecommunications companies shall be construed to:

1. Promote universally available and widely affordable telecommunications services;

2. Maintain and advanced the efficiency and availability of telecommunication services;

3. Promote diversity in the supply of telecommunication services and products throughout the State of Missouri;

4. Ensure that customers pay only reasonable charges for telecommunication service;

5. Permit flexible regulation of competitive telecommunications companies and competitive telecommunication services; and

6. Allow full and fair competition to function as a substitute for regulation when consistent with the protection of ratepayers and otherwise consistent with the public interest.

It would be most difficult if not impossible to reconcile the foregoing guidelines for statutory construction with a decision permitting LECs to block the transit and termination of CLEC traffic. This is especially true in light of the fact that no CLECs has expressed an unwillingness to appropriately compensate ILECs for the transport and termination of local traffic.

Section 251(c)(2) of the Act imposes a duty on all incumbent LECs to provide interconnection with LEC networks for the transmission and routing of telephone exchange service and exchange access. There is no evidence in this record which could possibly justify the Commission's interference with the LECs duty to transmit and route calls for termination established by § 251(c)(2)..

Conclusion

If Missouri is to have facilities-based local competition, CLECs must to be allowed to compete in the optional tiers of the MCA on a competitively neutral basis. The Commission should take immediate action to open the MCA to competition. The current state of affairs is seriously damaging the long-term prospects for competition by frustrating the critical initial efforts of competitors. To enable CLECs to effectively compete in the MCA service, AT&T believes the Commission merely needs to affirm its prior decisions. The Commission has already authorized CLECs to provide MCA service. The Commission has already allowed pricing flexibility in the MCA. The Commission has already ruled on the appropriate intercompany compensation between CLECs and SWBT. Those decisions simply need to be implemented and enforced.

Respectfully submitted,

LATHROP & GAGE, L.C.

Paul S. DeFord (ya)

Paul S. DeFord #29509
LATHROP & GAGE, L.C.
2345 Grand Boulevard
Kansas City, MO 64108
Phone: 816-292-2000
FAX: 816-292-2001
pdeford@lathropgage.com

ATTORNEY FOR AT&T
COMMUNICATIONS OF THE
SOUTHWEST, INC.

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing document in Docket No. TO-99-483 were served upon all parties on the following Service List by first-class postage prepaid, U.S. Mail, on June 30, 2000.

Paul S. DeFord

General Counsel
Missouri Public Service Comm.
PO Box 360
Jefferson City, MO 65102

Stephen F. Morris
MCI Telecommunications Corp.
701 Brazos, Ste. 600
Austin, TX 78701

W. R. England, III/Brian McCartney
Brydon, Swearengen & England
PO Box 456
Jefferson City, MO 65102

Linda K. Gardner
Sprint Missouri, Inc.
5454 West 110th Street
Overland Park, KS 66211

Brent Stewart
Stewart & Keevil, L.L.C.
1001 Cherry Street, Ste. 302
Columbia, MO 65201

Mark W. Comley
Newman, Comley & Ruth, P.C.
PO Box 537
Jefferson City, MO 65102-0537

Mary Ann Young
2031 Tower Drive
PO Box 104595
Jefferson City, MO 65102-4395

Office of Public Counsel
PO Box 7800
Jefferson City, MO 65102

Kenneth A. Schifman
Sprint Communications Co., L.P.
8140 Ward Parkway, 5E
Kansas City, MO 64114

Charles W. McKee
Sprint Spectrum LPd/b/a Sprint PCS
Legal/Regulatory Dept.
4900 Main Street
Kansas City, MO 64112

MCI Telecommunications Corp.
100 South Fourth Street
St. Louis, Mo 63102

Pete Mirakian
1000 Walnut Street, Ste. 1400
Kansas City, MO 64106-2140

Colleen M. Dale
Broadspan Communications, Inc.
409 Cedar Lane
Columbia, MO 65201-6509

Carol Pomponio
Nextlink Missouri, Inc.
2020 Waterport Center Drive
Maryland Heights, MO 63146

Carl Lumley/Leland Curtis
Curtis, Oetting, Heinz, et al
130 S. Bemiston, Ste. 200
Clayton, MO 63105

Paul G. Lane/Leo Bub, Anthony
Conroy/Mimi B. MacDonald
Southwestern Bell Telephone Co
One Bell Center, Room 3536
St. Louis, MO 63101-1976

Edward J. Cadieux
Gabriel Communications, Inc.
16090 Swingley Ridge, Rd. Ste.5
Chesterfield, MO 63006

Craig S. Johnson
Anereck, Evans, Milne, et al
PO Box 1438
Jefferson City, Mo 65102

Tracy Pagliara
GTE
601 Monroe Street, Ste. 304
Jefferson City, Mo 65101

Bradley R. Kruse
McLeodUSA Telecommunicatio
PO Box 3177
Cedar Rapids, IA 52406-3177