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June 30, 2000

The Honorable Dale Hardy Roberts
Secretary/Chief Regulatory Law Judge
Missouri Public Service Commission
P.O. Box 360
Jefferson City, MO 65102-0360

Re: Case No. TO-99-483

Dear Judge Roberts:

Enclosed for filing in the above-referenced matter please find the original and fourteen copies of the Initial Brief of Nextlink Missouri, Inc.

Please contact me if you have any questions concerning this filing. Thank you.

Very truly yours,

NEWMAN, COMLEY & RUTH P.C.

By: Mark W. Comley

MWC:ab
Enclosure
cc: Office of Public Counsel
Marc Poston
Carol Pomponio
All parties of record

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BEFORE THE PUBLIC SERVICE COMMISSION
FOR THE STATE OF MISSOURI

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

INITIAL BRIEF OF NEXTLINK MISSOURI, INC.

I. BACKGROUND

The parties identified ten disputed issues and prior to addressing them, NEXTLINK Missouri, Inc. (NEXTLINK) offers a narration of the background facts.

A. The MCA Plan

In December of 1992, the Commission ordered the implementation of an expanded calling scope in metropolitan and certain outstate exchanges. For the metropolitan areas the Commission adopted a Metropolitan Calling Area (MCA) service which expanded the Wide Area Service Plan of Southwestern Bell Telephone Company (SWBT) to include additional exchanges around the metropolitan areas, and set rates based upon the expanded calling scopes available under MCA Service. Since 1992, all incumbent telephone companies operating in Kansas City, Springfield, and St. Louis metropolitan areas have participated in the MCA. At hearing, Staff witness William Voight further explained:

> The MCA plan was initially established by the Commission primarily to address issues of expanded customer growth occurring in the outlying areas of the metropolitan areas. In addressing those needs, the Commission also determined that callers in the core metropolitan areas desired to be able to return calls to the outlying areas. Thus, MCA calling allows local dialing (i.e. not long-distance) over a wide area of the metropolitan areas and includes an aspect of calling known as the return

> calling feature. The return calling feature is used primarily by those in the core metropolitan areas to return calls to MCA subscribers in outlying areas.

Exhibit 1, Voight Direct, page 3. The return calling feature is also a major point of contention in this case.

The Commission decreed that the MCA would be structured on a foundation of zones. In the St. Louis and Kansas City there are six zones: MCA-Central, MCA-1, MCA-2, MCA-3, MCA-4 and MCA-5. In Springfield there are three zones: MCA-Central, MCA-1 and MCA-2. The zones can be further divided into inner and outer zones, as suggested by Gabriel Communications' witness, Edward Cadieux:

> For St. Louis and Kansas City, by inner zones I am referring to MCA-Central, MCA-1 and MCA-2, combined, and by outer zones I am referring to MCA-3, MCA-4 and MCA-5 combined. With respect to Springfield, I use "inner zones" to refer to MCA-Central and MCA-1 with "outer zone " referring to MCA-2. As established pursuant to the Commission's 1992 MCA decision, customers located in the inner zones of the respective MCAs pay a flat fee which allows calling to all customers located within the inner MCA zones and to MCA subscribers located in the outer MCA zones on a local dialing basis. For customers located in the inner zones of the MCAs, there is no optional element to MCA service. For calls to the outer MCA zones, the inner zone MCA customer's local calling scope depends on whether the called party is an MCA subscriber.
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> * * *
>
> In contrast, customers located in the outer zones of the respective MCAs have a choice to make regarding calling scope. A customer located in the outer zone can choose not to subscribe to MCA service, and instead purchase standard local exchange service.
>
> Alternatively, a customer in the outer zones can purchase "optional" MCA service which requires payment of the applicable standard local exchange service flat rate charge, plus a flat-rate additive.[1] The outer zone costumer gets a larger local calling scope for the flat-rate additive. The extent of the optional MCA service customer's local calling scope depends on which particular zone the customer is located in and,

[1] MCA has been tariffed as a local service. Exhibit, 11, Kohly Direct, page 6. "Customers in the optional tiers purchase MCA service for the ability to place local calls and to receive local calls." Exhibit 11, Kohly Direct, page 15.

> in some circumstances, whether the called party is also an optional MCA service customer. Optional MCA service customers receive a local calling scope that includes all customers located within the same MCA zone (except in the outer-most zone, in which calling is limited to other optional MCA subscribers in that zone); and all customers located in lower numbered MCA zones; and optional MCA service subscribers in higher numbered MCA zones.

Exhibit 23, Cadieux Direct, page 6-7. [2]

The Commission's decision establishing the MCA plan was rendered at a time when there were no competitive or alternative local exchange telephone companies. The matter was decided in a season when companies accustomed to traditional rate regulation were doing business. Since the passage of the Federal Telecommunications Act of 1996,[3] competition has emerged in the markets where the MCA plan is available. Alternatives to LEC service come from companies engaging in resale and some who are facilities based. Some would claim that SWBT has not been receptive in general to the arrival of competition, but as the record shows in his case, SWBT unmistakably acted unreasonably with respect to its competitors who have tried to compete with MCA service.

B. SWBT, CLECs and the MCA

In an effort to control its competition, SWBT, began a process of "screening" calls made by its customers within the inner zones (mandatory zones) of the MCA to customers of SWBT's competitors in the outer zones. With respect to those calls SWBT refuses to allow them to be dialed on a local basis, but rather will process them as long distance calls, thus necessitating the 1+ dialing

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[2] A list of the rates charged for the MCA service, as well as a description of the calling scope for each, can be found in Exhibit 1, Voight Direct, pages 27-28.

[3] 47 USC §251 et seq. herinafter referred to as "the Act."

sequence and attendant toll charges. The effects are devastating to competitors who have won customers in the outer zones.

It should be remembered at this point, that an optional MCA customer in the outer zone enjoys a very broad calling scope. That customer may call any customer in the inner zones and may call any MCA subscriber in the outer zones. Most notably, customers in the inner zones may call the optional MCA customer in the outer zones without toll charges. So, as a result of the "screening" engaged in by SWBT, the new CLEC customer in the outer zone is confronted by the unexpected situation that he or she can no longer be reached from the inner tiers by means of a local call. Rather, those in the inner tiers who would do business with the new CLEC customer, must pay a toll call. This occurs for no other reason than the customer's choice to switch its supplier from SWBT to a competing basic local company. It is no surprise then that the customer will sense tremendous pressure to cancel CLEC service and return to its former supplier. Exhibit 23, Cadieux Direct, pages 10-12.

SWBT has devised a means by which CLECs can avoid the screening of the calls however. On December 21, 1999, SWBT issued an Accessible Letter to CLECs with whom it has an interconnection agreement explaining that it would waive toll charges on direct dialed calls to a CLEC's MCA plan subscribers if the CLEC would agree to pay SWBT $0.026 per minute of use. Exhibit 1, Voight Direct, page 38. Such an arrangement had been made already with Intermedia Communications, Inc. in a Memorandum of Understanding (the MOU) which is attached as Schedule 6 to Exhibit 1, Voight Direct. This arrangement has not been approved by the Commission in accord with provisions of the Act. SWBT contends that it is not an interconnection agreement.

II. THE ISSUES

1. Are CLECs currently included in the MCA Plan, and, if not, should CLECs be permitted/required to participate in the MCA Plan?

NEXTLINK submits that most definitely, CLECs are currently included in the MCA plan. There are several reasons. First, there is no avoiding the fact that CLECs were not in existence at the time the Commission entered its report and order in Case No. TO-92-306. However, it cannot now be denied that CLECs are under the supervision and jurisdiction of the Commission and are subject to all Commission orders. Therefore, they must submit the obligations of the order in Case No. TO-92-306, but in turn they are entitled to enjoy its benefits.

Second, from the inception of CLEC certification in this state, CLECs have been authorized to offer MCA service. The certification of Dial U.S. and the approval of its interconnection agreement are convincing proof that this Commission did not intend to restrict CLECs in the services they can offer in competition with incumbent local exchange companies. As AT&T witness Matthew Kohly observed:

> In Case No. TO-96-440, the Commission addressed the issue of a CLEC, [Dial U.S.], offering MCA service. In that case the Commission approved the interconnection agreement between SWBT and Dial U.S. During the proceeding, several parties raised the issue of CLECs providing MCA service. In response to that issue, 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."

Exhibit 11, Kohly Direct, page 7. Dial U.S. filed tariffs which included provision of the MCA service and those tariffs were approved. Other CLECs have followed suit.

Last, if the CLECs were not included in the MCA and were not participating, SWBT would not have invented the MOU. It is precisely because CLECs were participating in the MCA that SWBT drafted a method to arrest competition in that service. NEXTLINK submits that despite the quantity of examination this issue received at hearing, no party should be able to argue that the MCA excludes and has excluded CLECs. The history of the service and CLEC certification and participation directly contradict the point.

2. If permitted to participate in the MCA Plan, should CLECs be required to follow the parameters of the MCA Plan with regard to (a) geographic calling scope, (b) bill and keep inter-company compensation, (c) use of segregated NXXs for MCA service, and (d) price?

NEXTLINK 's witness, Carol Pomponio, concurred in Mr. Ed Cadieux's testimony[4] in which the Commission will find an entire section devoted to recommendations on the sub-topics set out in this issue. Exhibit 23, Cadieux Direct, pages 33- 48. Highlights of those recommendations are included in following discussion.

a. **Geographic calling scope**

It is NEXTLINK's position that if they choose to participate in the MCA Plan, CLECs should be required to offer, at a minimum, the current geographic calling scope of the MCA Plan, but should not be restricted from offering a larger calling scope. NEXTLINK would not propose any changes to the calling scopes of the incumbent LEC calling scopes. CLECs should have the discretion to set their own calling scopes based upon their respective judgment as to the profitability of a specific market, and their own business plan. NEXTLINK would not oppose however, a decision that required CLECs to offer a calling scope at least as large as that offered by the incumbent LECs as long as the CLEC's MCA service numbers have been properly identified.

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[4] Exhibit 27, Pomponio Rebuttal, page 2

b. **Bill and keep inter-company compensation.**

Inter-company compensation should be in accordance with the companies' interconnection agreement, or absent an interconnection agreement, by other agreement between the parties. If the parties have no agreement in place, which generally is the case between CLECs and independent LECs, inter-company compensation should "default" to bill and keep. By selecting this recommendation, the Commission preserves the integrity of the interconnection agreements which have been arbitrated or negotiated and approved pursuant to the Act. Additionally, with respect to the relationship between a CLEC and an independent LEC, the default to bill and keep recognizes that the amount of traffic terminating on independent LEC exchanges is *de minimis,*[5] and would not justify the expense of negotiating an interconnection agreement between the parties. Moreover, reciprocal compensation might prove more expensive for the independent LEC. It is conceded that "[b]ecause mandatory MCA tiers are the target of more calls that are the optional tiers, there is more traffic going from the optional tiers to the mandatory tiers than vice versa." Exhibit 8, Stowell Direct, page 15. In such an environment, independent LECs, like MoKan Dial, would be adversely affected by a reciprocal compensation arrangement.

c. **Use of segregated NXXs for MCA service**

CLECs should have the same ability as ILECs to designate NXXs as MCA NXXs. A means of notifying incumbent LECs of the numbers utilized by CLECs for MCA service can easily be established. One such way was the use of the Commission's own web site. Tr.840-841. After

[5]Of all the CLECs questioned about the amount of traffic terminated on independent LEC switches, only NEXTLINK was able to report any definite number. According to NEXTLINK's records, the Company terminated one call in a three-month period in an Orchard Farm exchange to an optional MCA subscriber. Tr. 862-863.

notification, the incumbent LEC would be required to recognize the CLECs classification of the number as an MCA subscriber and process calls to that number on the locally dialed and billed basis.

d. **Price**

CLECs should be allowed to price MCA service competitively. Incumbent LECs should have flexibility in the pricing of the service as well, within the boundaries of their regulatory framework, whether rate of return or price cap. The Commission should not set a price for the service that fits all. More will be said on this topic under Issue 4, below.

3. Should there be any restrictions on the MCA Plan (for example resale, payphones, wireless, internet access, etc.)?

There should be no restrictions on the MCA Plan with respect to resale or internet access. NEXTLINK has no position regarding whether restrictions on payphone or wireless providers would be appropriate.

4. What pricing flexibility should the ILECs and/or CLECs have under the MCA Plan?

As mentioned above, ILECs should be allowed pricing flexibility subject to statutory and Commission established safeguards against predatory pricing. CLECs should be allowed to price MCA service competitively.

5. How should MCA codes be administered?

Each LEC should have the responsibility of notifying other LECs which NXXs are MCA NXXs.

6. What is the appropriate inter-company compensation between LECs providing MCA service?

NEXTLINK treated this issue extensively under 2(b) above.

7. Is the compensation sought in the proposed MOU appropriate

The compensation SWBT seeks through its MOU is utterly inappropriate. The MOU suffers from several failings not the least of which is its unlawfulness. NEXTLINK, like Gabriel Communications, has entered an interconnection agreement with SWBT and that agreement controls the reciprocal compensation to be exchanged. The MOU charge of 2.6¢ per minute is a carrier to carrier charge which is imposed "as a condition of providing dialing parity and interconnection–it is not a charge which SWBT assesses to its end-users." Exhibit 23, Cadieux Direct, page 16. Section 252(e) of the Act provides in part that any interconnection agreement adopted by negotiation or arbitration shall be submitted for approval to the State commission. In effect, the MOU constitutes SWBT's effort to amend existing interconnection agreements without following the procedures set forth in the Act. The MOU with Intermedia should be invalidated by the Commission.

The charge itself is proposed for anti-competitive purposes. SWBT claims that the 2.6 ¢ per minute is designed to recover:

> the lost toll associated with a customer who would have made a toll call previously that now is making a local call to a CLEC subscriber by virtue of the fact that they have been given authority to be participants in the MCA.

Tr. 1042-1043 This justification for the charge must fail. Staff witness William Voight accurately points out that the rates for MCA were residually priced. Tr. 86-87. There was no component in the rate which was designed to recover the toll revenues which LECs would have received if MCA had not been implemented. Moreover, the manner in which this "toll recovery" mechanism was designed under the terms of the MOU illustrates that its was not just a toll substitute. Intermedia's payment obligations are set out in Section 2.(b) as follows:

> Intermedia agrees to pay SWBT at the rate of $0.026 per minute of use, as measured on a per call basis, consistent with the billing Terms and Conditions in the Missouri Interconnection Agreement (or the Successor Agreement referenced in paragraph 7 below) for all calls from SWBT's MCA subscribers in Tiers 3-5 and its customers in the Principal Zone and Tiers 1-2 to Intermedia's MCA Plan subscribers in the Principal Zone and Tiers 1-5.

Exhibit 1, Voight Direct, Schedule 6-2.

As written, the MOU provides that not only calls between a SWBT customer in the "inner zones" to an Intermedia MCA customer in an outer zone are subject to the charge, but all calls, whether they previously would have been toll calls or not, are subject to the per minute compensation rate. This is an over-recovery of any toll which SWBT could claim to lose.

The Commission should find that the 2.6¢ per minute charge is SWBT's effort to recoup losses due to the effects of competition. The label of "competitive loss surcharge" coined by Mr. Cadieux is most appropriate to describe this charge. He explained:

> SWBT has characterized the charge as being designed to "partially offset lost toll", and as involving compensation for charges which SWBT would otherwise have collected from its own retail customers. [citation omitted] While I have not seen a description of the precise method use by SWBT to derive the 2.6 cent per minute rate, it is clear from that statement and from the manner in which the charge is levied that SWBT is attempting to have a competitor which succeeds in the marketplace -- i.e., a CLEC that convinces a SWBT customer in the outer MCA zones to switch to the CLEC's dial tone-- to pay a charge back to SWBT to partially offset the revenue which SWBT has "lost" as a result of that customer's decision to switch its dial tone service away form SWBT. Having "lost " the MCA outer zone customer to one of its competitors in the normal operation of a market that is open to competition, SWBT demands that the CLEC pay a penalty for being successful – by paying 2.6 cents per minute on MCA traffic. Thus I believe it is apt to characterize the 2.6 cent per minute charge as a competitive loss surcharge.

Exhibit 23, Cadieux Direct, page 18.

Mr. Voight agrees that "SWBT should not seek to recoup competitive revenue losses by charging its competitor 2.6 cents per minute for the loss of revenue it other would have received prior to the advent of competition. Exhibit 1, Voight Direct, page 45. The Commission should forbid the charge.

8. Should the MCA Plan be retained as is, modified (such as Staff's MCA-2 proposal) or eliminated?

In order for there to be facilities-based competition in Missouri, there must be clear direction from the Commission which unequivocally establishes the operating procedures between LECs participating in the MCA Plan. Retaining the MCA Plan but clarifying the operating procedures between LECs would appear to be the least disruptive to consumers, and would presumably be able to be implemented expeditiously.

9. If the current MCA Plan is modified, are ILECs entitled to revenue neutrality? If so, what are the components of revenue neutrality and what rate design should be adopted to provide for revenue neutrality?

ILECs are not entitled to revenue neutrality for competitive losses. If it is found that ILECs are entitled to revenue neutrality due to other, appropriate losses, the revenue replacement should not be collected from the CLECs via an MOU surcharge or otherwise.

10. Should MCA traffic be tracked and recorded, and if so, how?

Traffic which is subject to reciprocal compensation would need to be tracked and recorded. Traffic which is subject to bill-and-keep should not have to be tracked or recorded.

II. THE COMMISSION'S ISSUES

During the hearing, Commissioner Drainer asked the parties to address in their briefs the following issues.

A. **Does the Commission have the authority to override the existing reciprocal compensation arrangements in existing interconnection agreements. If not, does the Commission have authority to direct for future interconnection agreements that with respect to MCA services, compensation between the parties shall be by bill and keep, and not other types of reciprocal compensation.**

B. **Does the Commission have the authority to direct the CLECs to enter interconnection agreements with independent LECs.**

C. **Does the Commission have authority to direct incumbent LECs to block CLEC traffic that transits a third party's facilities absent proof that the CLEC has an interconnection agreement with that third party.**

NEXTLINK will address these issues in its reply brief.

CONCLUSION

Competitive local exchange telecommunications companies have been participants in the MCA plan since the first was certificated in this state. They are entitled to participate in the MCA plan on terms and conditions which are consistent with federal and state law. That the MCA plan was created before passage of the Act does not diminish a CLEC's right to provide its local customers services which this Commission has approved for, and directed, all local companies to provide. SWBT's efforts to restrict the participation of the CLECs in the MCA cannot be allowed to continue. The Memorandum of Understanding is anti-competitive and is only a method by which SWBT seeks to recover competitive losses to which it is not entitled. The Commission should invalidate the MOU. The MCA should not be disassembled, but rather the Commission should implement the recommendations set out in this brief so that the MCA plan can continue under terms and conditions fair to all companies and consumers alike.

Respectfully submitted,

By: [signature]

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Certificate of Service

I hereby certify that a true and correct copy of the above and foregoing document was sent by U.S. Mail, postage prepaid, on this 30th day of June, 2000, to:

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