Missouri Public Service Commission

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June 30, 2000

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

RE: TO-99-483

Dear Mr. Roberts:

Enclosed for filing in the above-captioned case are an original and eight (8) conformed copies of an **INITIAL BRIEF OF THE STAFF OF THE MISSOURI PUBLIC SERVICE COMMISSION.**

This filing has been mailed or hand-delivered this date to all counsel of record.

Thank you for your attention to this matter.

Sincerely yours,

Marc Poston

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MP/jb
Enclosure
cc: Counsel of Record

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BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

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

INITIAL BRIEF OF THE STAFF OF THE MISSOURI PUBLIC SERVICE COMMISSION

I. INTRODUCTION

The Staff of the Missouri Public Service Commission ("Staff") filed its Motion to Open Docket and Set Technical Conference on April 22, 1999, in response to issues raised by MoKan Dial, Inc. and Choctaw Telephone Company in their March 9, 1998 application concerning the Metropolitan Calling Area ("MCA") Plan that the Commission established in 1992.[1] The companies presented a list of questions and concerns regarding the MCA Plan to the Commission. The Staff and other parties saw the need to open an investigation and address these new issues. The Commission agreed and opened Case No. TO-99-483.

As the Commission indicated in its Order establishing this case, the passing of the Telecommunications Act of 1996[2] ("the Act") introduced competitive local exchange carriers ("CLECs") into the local service arena. This gave the Commission, the Staff, the Office of the

[1] The MCA Plan was established in the case, *In the Matter of the Establishment of a Plan for Expanded Calling Scopes in Metropolitan and Outstate Exchanges,* Case No. TO-92-306, *Report and Order,* December 23, 1992. (Exhibit 68). The MCA Plan expands the local calling scope in the metropolitan areas of Kansas City, Springfield and St. Louis "to address issues of expanded customer growth occurring in the outlying areas of the metropolitan areas." (Ex. 1, Voight Direct, page 3).
[2] 47 U.S.C. §§ 151-614.

Public Counsel ("OPC") and the industry participants reason to investigate the MCA Plan and how the MCA Plan should operate in light of the changing telecommunications market in Missouri.

The most important issues in this case are undoubtedly whether CLECs should be permitted to participate in the MCA Plan and if so, under what terms and conditions CLECs should provide MCA service. The parties included those issues among others that the Commission needs to address in light of the changes brought about by the Telecommunications Act.

II. ARGUMENT

a. CLECS SHOULD BE PERMITTED TO PARTICIPATE IN THE MCA PLAN.

In Missouri's large metropolitan areas of St. Louis, Kansas City, and Springfield, MCA service is an essential part of a customer's local service. (Ex. 6, Meisenheimer Direct, page 6). Residential and business customers benefit greatly from the MCA Plan, which recognizes the unique calling needs of a metropolitan area. MCA service was established in 1992 and is a minimum service standard for local service in the areas it is offered. (Ex. 1, Voight Direct, page 5). The introduction of competition into the local markets following passage of the Act did not change the services that constitute the minimum standard for service in a metropolitan area. As an essential service, it is important that the CLECs wishing to compete in Missouri's metropolitan markets offer MCA service on the same terms as do the incumbent local exchange carriers ("ILECs") with whom they seek to compete. To do otherwise would be contrary to the goals of the Act and to the intent of the MCA Plan. This is by far the most important issue to be decided in this docket, as many of the following issues depend on the Commission's ultimate resolution of whether CLECs should be allowed to participate in the MCA Plan.

Arguments against allowing CLECs the ability to offer MCA service are based on the claim that it would place the ILECs at a disadvantage, because the CLEC's customers would receive toll-free calling benefits, which are not extended to non-MCA subscribers of the ILEC. In his pre-filed direct testimony, Staff witness William L. Voight addressed this argument and testified that allowing CLECs to offer MCA services would further the benefits of competition:

> Again, Staff suggests that if competition brings about a situation where the customers of competitors are receiving MCA benefits not available to SWBT's non-MCA subscribers, SWBT should explore ways of extending additional benefits to its non-MCA subscribers, rather than exploring ways to deny MCA benefits to its competitors' customers. (Ex. 3, Voight Surrebuttal, page 33).

It is this aspect of competition that was envisioned by Congress when it agreed to allow competition into the local exchange service industry. Congress did not envision a situation where an ILEC is able to unilaterally deny its competitors from offering a service. Accordingly, the Commission should avoid a situation where the ILEC can maintain a strong 97% market share of local service customers in the metropolitan areas due to its ability to prevent its competition from offering an essential service.[3] (Ex. 1, Voight Direct, pages 10-11). Such a tactic by incumbents:

> ...is anticompetitive because it imposes dialing disparity and rate disparity on the calling party based solely on the fact that the called party has chosen a local service provider other than SWBT. This dialing and rate disparity act as a severe deterrent to customers switching their local exchange service from SWBT to a competitor. (Ex. 23, Cadieux Direct, page 10).

When the Commission implemented the MCA Plan, it ordered all local exchange carriers ("LECs") operating in the metropolitan areas to offer MCA service.[4] When the term "LEC"

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[3] Mr. Voight testified, "Six of the nine ILECs in the MCA areas still control 100% of the market." (Ex. 3, Voight Surrebuttal, page 18).

[4] Exhibit 68: Case No. TO-92-306, *Report and Order.*

expanded to include both ILECs and CLECs with the passage of the Act, the needs of the metropolitan customers to receive MCA service remained unchanged. (Ex. 11, Kohly Direct, pages 8-9). For these reasons, which are substantiated by testimony in this proceeding that is overwhelmingly supportive of Staff's position on this issue, the Commission should issue an Order that allows CLECs to participate in the MCA Plan.

b. CLECS AND ILECS SHOULD BE ORDERED TO RECOGNIZE EACH OTHER'S NXX CODES AS MCA CODES, AND SEGREGATED MCA CODES SHOULD BE ELIMINATED.

An important aspect of the current MCA Plan is the ability to recognize NXX Codes as MCA codes. To embody facilities-based CLECs into the MCA Plan, it is important for all NXX Codes of CLECs to be recognized by ILECs as MCA codes, and for all CLECs to recognize the NXX Codes of ILECs as MCA codes.

One of the most obvious defects of the current MCA Plan is that it classifies all NXX Codes as either MCA codes or non-MCA codes, and segregates them.[5] Because of segregation, a single company is required to use two codes to serve customers in a single exchange when a single code may be capable of serving all of the customers in that exchange. The introduction of CLECs into the MCA Plan will only compound the problem since many CLECs serve only a small number of business customers. Staff witness Voight identified specific examples, using actual access line counts, to show that the current MCA Plan is extremely wasteful when it assigns 20,000 telephone numbers to a single exchange that may serve fewer than 1,000 access lines. (Ex. 1, Voight Direct, page 17). This waste of codes should be remedied, in light of the heightened concern to conserve numbers in Missouri due to the current exhaust dilemma. (Ex. 20, Starkey Direct, page 16). GTE Midwest, Inc. witness Dave Evan testified "The MCA has

[5] MCA codes have NXX codes separate from the NXX codes assigned to non-MCA codes, thus the codes are "segregated."

been described as a "number hog" and the proposal by Mr. Voight would alleviate that to a large extent." (Ex. 39, Evans Rebuttal, page 5).

Mr. Voight further testified that in the three metropolitan areas, facilities-based CLECs are using 2% of their assigned telephone numbers.[6] (Ex. 1, Voight Direct, page 19). Requiring CLECS "to segregate NXX codes into MCA and non-MCA would unnecessarily increase demand for more NXX codes to serve the competitors' potential customer base." (Ex. 1, Voight Direct, page 20). That demand would require 1,656 additional NXX codes to address the needs of the CLECs, which "represents a 424% increase in the number of codes which have already been issued to facilities-based competitors." (Ex. 1, Voight Direct, page 22). This, in turn, would *require two or more additional area codes* in Missouri. *Id.*

The problem of code segregation could be corrected if the Commission were to require ILECs to treat all NXX codes assigned to CLECs in the metropolitan areas as MCA NXXs and vice versa. *Id.* This is discussed in the Staff's MCA-2 proposal presented in the pre-filed testimony of Mr. Voight, and it offers a step towards developing an efficient MCA Plan that allows CLECs and ILECs to offer MCA service to their customers without unnecessarily depleting a limited resource of numbers. To accomplish this goal, it is important that the Commission specify how this segregation is to be accomplished to avoid ambiguity. The Staff suggests that the Commission:

> Order all incumbent local exchange carriers operating within the MCA to program their central office switch translations to recognize all NXX codes of all competitive local exchange carriers as part of the MCA... (Ex. 1, Voight Direct, page 9).

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[6] Mr. Voight testified that the facilities-based CLECs in the "metropolitan areas are using a total of 316 NXX Codes to collectively serve only 65,851 facilities-based customers. The 316 NXX codes are capable of being assigned to 3,160,000 telephone numbers." The 65,851 customers represent only 2% of the 3,160,000 available telephone numbers. (Ex. 1, Voight Direct, page 19-20).

An ambiguity could occur if the Commission simply ordered the parties to allow CLECs into the MCA without additional direction from the Commission on how to accomplish that end. However, if the Commission specifically orders the parties to reprogram their switch translations so that all ILECs recognized all NXX codes of CLECs as MCA codes, and that all CLECs recognize all NXX codes of ILECs as MCA codes, this ambiguity would be eliminated. (Ex. 15, Mulvany Rebuttal, page 7).

An additional problem caused by segregating MCA codes from non-MCA codes is the customer confusion that takes place when a customer cannot determine whether a specific number is an MCA number or a non-MCA number. Furthermore, the MCA service has a unique defect when it requires customers to obtain a new telephone number if the customer decides to discontinue or subscribe to the service. This inconvenience should be eliminated so that customers are not penalized for making a change to their existing local services by canceling an essential (for most), yet optional, calling-scope service. A separate problem occurs when a customer cannot determine whether a call is an MCA call or a non-MCA code and is uncertain whether to treat the call as local or toll. This is an unnecessary burden that should be lifted.

The problem of segregating codes was identified, but not resolved, in 1992. The Commission now has the opportunity to make the appropriate corrections to the MCA Plan. As the Commission explores ways to improve upon the highly successful MCA Plan, the Staff recommends that the Commission consider the merits of eliminating the segregation of NXX codes.

c. INTERCOMPANY COMPENSATION SHOULD REMAIN AS IT CURRENTLY EXISTS.

Intercompany compensation should remain "bill and keep"[7] for the ILECs, and should remain subject to the terms of interconnection agreements between ILECs and CLECs. (Ex. 24, Cadieux Rebuttal, page 44, agrees with the Staff's position). Where the parties have not entered into an interconnection agreement, intercompany compensation should be bill and keep. This is true also for "transiting traffic" that terminates on the network of a 3rd party unless an interconnection agreement is controlling. The Staff concurs with the testimony of AT&T witness R. Matthew Kohly when he testified that:

> …the Commission should adopt the existing bill-and-keep arrangement as a "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.[8] This is also the "de facto" compensation arrangement that exists today between CLECs and some of the independent LECs where there is no traffic termination agreement in place. (Ex. 11, Kohly Direct, page 33).

Mr. Voight gave additional reason why the Commission should maintain the existing intercompany compensation when he stated "keeping existing local compensation arrangements in place causes the least disruption to revenue streams upon which all carriers have planned for, and upon which all carriers depend." (Ex. 1, Voight Direct, page 49).

The Commission should avoid mandatory reciprocal compensation arrangements or switched access charges for MCA traffic since the per-minute of use charges create an imbalance. As outlined in the direct testimony of Mr. Voight:

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[7] "Bill and keep arrangements are those in which neither of the two or more interconnection carriers charges the other carrier for terminating traffic that was originated by the other carrier. Instead, each carrier recovers the cost of both originating traffic delivered to the other carrier and terminating traffic received from the other carrier from its own end users." (Kohly Direct, page 7).

[8] 47 C.F.R. 51.705.

> Staff would be concerned that an imbalance in traffic could negatively impact smaller, traditional rate-of-return carriers. Given that the smaller carriers tend to serve outlying areas, and competitors tend to primarily serve the metropolitan exchanges, the traffic imbalance could be even greater than the access line count reveals. Furthermore, to the extent that some competitors provide considerable amounts of service to Internet Service Providers (ISPs), the long holding times associated with internet calls might contribute significantly to a traffic imbalance. (Ex. 1, Voight Direct, page 57).

This imbalance could result in a situation where the flat rate charged by the LEC originating the call does not cover the per-minute charge paid out by the LEC. It is not difficult to perceive how a flat rate local service charge cannot flex to cover the minutes of use charges that accumulate for lengthy calls. The same example holds true for the 2.6¢ minute-of-use charge contained in the MOU of SWBT. If a carrier is required to pay SWBT 2.6¢ per minute, the flat rate for MCA service may not cover the cost incurred by the carrier that is paying per-minute compensation to SWBT.

The most intelligible intercompany compensation is one that does not create a compensation imbalance due to a traffic imbalance. Keeping intercompany compensation bill and keep unless there is an interconnection agreement in place is the best compensation mechanism at this time.

d. THE INTERCOMPANY COMPENSATION SOUGHT IN THE MOU IS NOT APPROPRIATE.

The Staff, as well as the overwhelming majority of the parties to this proceeding, contests the legality and appropriateness of the Memorandum of Understanding ("MOU") between SWBT and Intermedia Communications, Inc. ("Intermedia').[9] The evidence presented in this proceeding indicates that Intermedia was pressured into agreeing to the MOU, and that

[9] A copy of the MOU is attached as Schedule 6 to the Direct Testimony of William L. Voight, Exhibit 1.

Intermedia would not have entered the agreement if SWBT had not threatened to block toll-free return calls from SWBT customers to Intermedia's customers. (Ex. 14, Mellon Rebuttal, page 7). Ms. Mellon testified that Intermedia did not sign the MOU as a mutually agreed upon understanding, but rather, that Intermedia signed the MOU to prevent "irreparable damage" that would have occurred had the toll-free return call feature been terminated. (Ex. 14, Mellon Rebuttal, page 8; Ex. 1, Voight Direct, page 39-40).

The preceding section of this Brief explained that the appropriate intercompany compensation between an ILEC and a CLEC should be established in bill and keep arrangements or in interconnection agreements. As between Intermedia and SWBT, an interconnection agreement exists, which should govern the compensation between the carriers. As Mr. Voight testified, the 2.6¢ per-minute charged to Intermedia under the MOU is improper, in light of an interconnection agreement between these two carriers. (Ex. 1, Voight Direct, pages 41-48). In fact, the interconnection agreement between SWBT and Intermedia does more than just reject the use of such charges. The interconnection agreement establishes that "mandatory and *optional* MCA traffic should be classified as local for the purposes of compensation." (Ex. 1, Voight Direct, page 43). The 2.6¢ MOU charge, on the other hand, purports to compensate SWBT for lost toll on a call that, under the terms of the interconnection agreement, should be considered local. Furthermore, even if the parties had mutually agreed to the MOU, without compulsion, the MOU would require approval of the Commission pursuant to 47 U.S.C. § 252(e) of the Act that requires all interconnection agreements meet Commission approval.[10] To this date SWBT and Intermedia have not submitted the agreement for approval by the Commission pursuant to

[10] Section 252(e)(1) states: "Any interconnection agreement adopted by negotiation or arbitration shall be submitted for approval to the State commission. A State commission to which an agreement is submitted shall approve or reject the agreement, with written findings as to any deficiencies."

Section 252 of the Act. It is difficult to accept the argument that the MOU does not specify the terms for interconnection, when the Act describes the pertinent interconnection obligation as the duty to provide for the "transmission and routing of telephone exchange service and exchange access."[11] MCA service is an exchange service (local service) that is transmitted and routed by SWBT, thus falling under the interconnection obligations. In addition, SWBT attempted to include a similar port additive charge in the interconnection agreement between SWBT and AT&T that was adopted by Intermedia, which is further indication that SWBT itself considered such compensation to be subject to Commission approval under the Act. (Ex. 1, Voight Direct, pages 41-43).

The Commission must also consider the section of the Act that prevents a LEC from assessing charges to another carrier for local telecommunications traffic that originates on the LEC's network.[12] In TO-92-306 the Commission determined that MCA was a local service, thus prohibiting a LEC from assessing charges similar to the 2.6¢ charge. (Exhibit 68).

For these reasons, the Commission should not allow SWBT to charge any form of port additive for the provisioning of MCA service. The additive is merely an attempt by SWBT to recover competitive losses when a customer switches from SWBT to a CLEC, thus taking away the revenues that SWBT would have received for those calls. (Ex. 1, Voight Direct, pages 45-46; Ex. 11, Kohly Direct, pages 25-26; Ex. 15, Mulvany Rebuttal, page 6). No ILEC "is entitled to be insulated from the revenue impacts of competition." (Ex. 28, Phillips Rebuttal, page 9).

e. THE MCA PLAN SHOULD BE FREE OF RESTRICTION.

One issue of this case is whether restrictions on resale, payphones, wireless, and Internet

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[11] 47 U.S.C. § 252(c)(2)(a).

[12] 47 C.F.R. § 51.703(b) states "A LEC may not assess charges on any other telecommunications carrier for local telecommunications traffic that originates on the LEC's network."

access should be included in the MCA Plan. As for wireless restrictions, the Commission does not regulate wireless telecommunications and cannot lawfully place restrictions on wireless provisioning of services similar to the MCA. As for resale, payphones, and Internet access, no evidence was presented that would give good reason for imposing such restrictions.

f. PRICING FLEXIBILITY SHOULD BE ALLOWED FOR ALL CLECS AND FOR ILECS IN RESPONSE TO COMPETITON.

The Commission should not treat MCA service differently from the standard of allowing pricing flexibility for CLECs and requiring ILECs to price pursuant to statute. To restrict pricing flexibility for competitive companies is contrary to the purposes of the Act. Pricing restrictions prevent CLECs from reducing prices to their consumers, which they must be able to do if Missouri consumers are to reap the benefits of competition. It would be harmful to ILECs and to competition in general if the Commission were to prevent ILECs from responding in kind to the competitive prices of CLECs. Mr. Voight testified that:

> ...there have been numerous examples where an ILEC has, pursuant to statute, been granted flexible pricing for an ILEC's services which come under competitive pressure. While there are no examples to cite where a price cap company, such as Sprint, has petitioned the Commission for transitionally competitive classification of a service while under price caps, Staff believes such flexibility is still possible. As such, Sprint should follow procedures outlined in the statutes to gain pricing flexibility. (Ex. 3, Voight Surrebuttal, page 6).

Therefore, the Commission should allow ILECs to change their MCA service charges in response to competition brought on by flexible pricing for MCA service by CLECs.

g. THE STAFF'S PROPOSAL ELIMINATES THE NEED TO CHOOSE A NUMBER ADMINISTRATOR.

As discussed in Section (b) above, the need to find a number administrator is eliminated if the Commission orders the parties to discontinue the practice of segregating between MCA and non-MCA codes. Mr. Evans testified that the MCA-2 plan "eliminates" the need for a number administrator "by eliminating the dependence on knowing the status of the called party." (Ex. 39, Evans Rebuttal, page 5).

h. THE COMMISSION SHOULD CONSIDER THE MERITS OF THE MCA-2 PLAN.

The details of the Staff's MCA-2 proposal are outlined in the testimony of Mr. Voight. The Staff agrees with the OPC that the most pressing issue in this case is whether or not CLECs should be allowed immediate participation in the existing MCA. If the Commission wishes to further explore the merits of MCA-2 or some other variation of the current MCA Plan, those merits should be investigated following an order that allows CLECs into the MCA Plan. Further investigation will dismiss criticisms of MCA-2, such as the unfounded claim that customers will lose the "return call" feature of MCA. As testified by Mr. Voight, there are no instances under MCA-2 where a call, which is local today, would be a toll call under MCA-2. No party has proven otherwise.

The need to make changes to the MCA is evident, and the Staff addressed those much-needed changes by assembling a plan that aims to do the following:

1. Increase code utilization and efficiency by eliminating segregated MCA codes;
2. Eliminate the burden placed on customers who must change telephone numbers when subscribing or canceling MCA service;
3. Eliminate customer confusion of not knowing whether a number is local MCA or non-local non-MCA;
4. Allow competitors to be included in the MCA; and
5. Alleviate difficulties surrounding the administration of Missouri-specific MCA NXX codes.

Until these concerns are addressed, competition in the metropolitan areas will not be realized and certain aspects of the MCA discussed herein will continue to burden Missouri's consumers.

i. REVENUE NUETRALITY FOR ILECS IS APPROPRIATE IF THE CURRENT MCA PLAN IS MODIFIED.

The Staff supports revenue neutrality for ILECS *only* if the Commission opts to *modify* the current MCA plan. Such revenue neutrality should be done on a company-specific basis. "It is appropriate for rate-of-return carriers to charge rates pursuant to Commission-ordered rate design, and, if need be, for price-cap carriers to increase rates pursuant to Section 392.245 RSMo [Supp. 1999]." (Ex. 1, Voight Direct, page 59). The Staff does not support revenue neutrality for merely allowing CLECs to participate in the MCA Plan. Competitive market loss by SWBT, Sprint and GTE does not automatically trigger revenue neutrality for these price cap companies. Indeed, it is precisely because these carriers have competition in certain exchanges that the Commission granted these carriers price cap status.

III. CONCLUSION

For these reasons, the Staff asks that the Commission make the appropriate changes to the MCA as necessary to advance competition and to address the needs of consumers. Most importantly, the Staff asks the Commission to include CLECs in the MCA and require ILECs to treat all NXX codes assigned to competitors in the metropolitan areas as MCA NXXs and vice versa. If the Commission determines that the merits of the Staff's MCA-2 proposal deserve further investigation, the Staff recommends that a separate proceeding be established to explore that proposal.

Respectfully submitted,

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Certificate of Service

I hereby certify that copies of the foregoing have been mailed or hand-delivered to all counsel of record as shown on the attached service list this 30th day of June 2000.

Marc Poston

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