

**BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI**

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

**INTERMEDIA COMMUNICATIONS INC.'S
SUGGESTIONS FOR THE COMMISSION'S
FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Comes now Intermedia Communications Inc. ("Intermedia"), pursuant to the request of Judge Dippell in the above-captioned case, and for its Suggestions For The Commission's Findings Of Fact and Conclusions Of Law in the case, respectfully states as follows:

Intermedia anticipates that the other parties will be providing the Commission with their respective and no doubt lengthy and adequate proposed findings of fact and conclusions of law covering all the major issues raised in this case. Intermedia sees no need, and assumes the Commission has no desire, for Intermedia to duplicate the efforts of the several other CLEC parties on these same issues. As such, Intermedia herein has attempted to limit the focus of its proposed findings of fact and conclusions of law to Intermedia's very unique situation and specifically to Southwestern Bell Telephone Company's ("SWBT's) Memorandum of Understanding ("MOU"). Intermedia's proposed findings and conclusions are intended to fill in some possible gaps left by the other parties and as a supplement to be used in conjunction with the proposed findings and conclusions of the other CLEC parties in this proceeding. Intermedia's suggestions are as follows:

Proposed Findings of Fact

The uncontested evidence reflects that by the spring of 1999, Intermedia was offering toll-free expanded local calling service to its customers in and around the St. Louis metropolitan area, including exchanges located in the MCA-3 and MCA-4 tiers. Intermedia's switch translations and rate center configurations in use at that time, which had been programed by SWBT, allowed calls to and from Intermedia's NXX codes to be completed and rated as local calls just as if Intermedia's customers were SWBT MCA plan customers. On or about April 19, 1999, however, SWBT notified Intermedia that it had erroneously translated Intermedia's NXX codes and that it would begin re-translating Intermedia's NXX codes from local to toll the following week. Re-translation of Intermedia's NXX codes would have eliminated the toll-free return calling feature which was being provided to Intermedia's customers. At Intermedia's request, on April 26, 1999 SWBT agreed to postpone its switch re-translation of Intermedia's NXX codes to allow the parties time to negotiate a resolution to the matter.

The uncontested evidence further reflects that Intermedia and SWBT continued their negotiations through the following summer and fall. In September 1999, while the parties were still negotiating and without advance notice to Intermedia, SWBT began re-translating Intermedia's NXX codes. Shortly thereafter, Intermedia began receiving numerous complaints from its customers. SWBT subsequently reversed its September switch re-translations but on or about October 26, 1999 SWBT again notified Intermedia that it would again begin re-translating Intermedia's NXX codes from local to toll starting November 5, 1999. On December 3, 1999, Intermedia executed SWBT's Memorandum of Understanding ("MOU").

As a result of Intermedia's execution of the MOU, Intermedia's customers are continuing to receive the benefits of the MCA plan's toll-free return calling feature.

Intermedia witness Mellon testified that SWBT's September switch re-translations resulted in significant customer dissatisfaction, numerous customer complaints to Intermedia, and loss of business to Intermedia customers who could no longer receive toll-free business-related calls from their own customers within the St. Louis MCA. While there is some minor dispute over how long it took to return Intermedia's NXX codes to their former status, the record reflects that significant service disruptions did occur and that it took at least up to a week to have the customer's previous service restored.

As a result of Intermedia's execution of the MOU, Intermedia customers have continued to receive all the benefits and calling features of the MCA plan. Pursuant to the requirements contained in paragraph 2(a) of the MOU, Intermedia on December 22, 1999 filed a revision to its existing tariff which mirrored the customer rates, terms and conditions found SWBT's MCA tariff for service in the St. Louis area. The Commission approved Intermedia's tariff changes effective January 22, 2000. It is uncontroverted that this tariff change, however, resulted in an increase in rates for Intermedia's customers.

In addition to requiring Intermedia to file a tariff which mirrored SWBT's existing tariff, the MOU also required Intermedia to pay SWBT \$0.026 per minute of use per call "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". This compensation arrangement purports to apply to all calls made on or after July 20, 1999 to all Intermedia customers and purportedly is to remain in force until the Commission issues its

final order in this case. The MOU provides that the compensation to be paid by Intermedia to SWBT will be subject to a retroactive true-up but further provides that if the Commission has not issued its order prior to November 5, 2000, no retroactive true-up will be made and SWBT will be entitled to retain all compensation. The MOU also provides that any retroactive true-up will be subject to the terms and conditions of the Commission's final order in this case, including revisions as a result of any appeal by any party and/or remand of such decision.

Finally, the MOU states that the MOU is not subject to the federal Telecommunications Act of 1996, "including the requirements of Section 251 and 252 of the Act, based on SWBT's position that it involves compensation for charges which SWBT would otherwise collect from its own retail customers". SWBT has taken the position that the MOU was not required to be filed for approval with the Commission before becoming effective. Intermedia, the Staff and several other CLEC parties contest that position. Intermedia submitted the MOU to the Commission as an informational filing on January 13, 2000 but this is the first time the Commission has been provided the opportunity to review and rule upon the MOU.

SWBT argues for the necessity and reasonableness of the MOU and has made the MOU available to other CLECs through an accessible letter. SWBT contends that the Commission should adopt the MOU as part of the framework governing full CLEC participation in the MCA plan in the future. SWBT characterizes the MOU executed by Intermedia as resulting from voluntary negotiations between the parties.

Intermedia, Staff and the CLEC parties strongly contest the appropriateness of the MOU and have alleged that it is unreasonable, anti-competitive, and unlawful. Despite SWBT making the MOU available to other CLECs, no other CLEC to date has availed itself of its

terms. Intermedia, Staff and other CLEC parties argue that Intermedia's acquiescence to the MOU was not the result of true voluntary negotiations between the parties but rather the result of superior bargaining power of SWBT and Intermedia's immediate need to be able to continue to provide a service it was already providing to its existing customers. No party contested Intermedia witness Mellon's contention that SWBT's switch re-translation would have adversely impacted over 1,000 existing Intermedia customer access lines and over 700 other Intermedia access lines which were at the time on reserve and scheduled to be activated. Likewise, it was uncontested that Intermedia would have suffered adverse competitive and business consequences had SWBT actually re-translated Intermedia's NXX codes.

Based on the weight of the evidence presented, the Commission concludes that Intermedia execution of the MOU could hardly be characterized as purely voluntary on Intermedia's part. Had Intermedia not had existing customers who were already accustomed to receiving full MCA plan calling features, and had Intermedia not been under SWBT's threatened switch re-translations, it is highly doubtful that Intermedia would have acted any differently than any other CLEC in rejecting SWBT's proposed MOU. The terms of the MOU permitted Intermedia to contest the appropriateness of the MOU in this and other similar proceedings. Even though Intermedia executed the MOU, Intermedia in this case has argued that the MOU is unreasonable and unlawful, both in terms of Intermedia specifically, and generally as it might be used as a condition of MCA plan participation by other CLECs.

The fact that no other CLEC voluntarily has yet to agree to the MOU is at least some indication of the chilling effect the MOU has had on emerging competition and the MOU's substantive unreasonableness given that execution of the MOU by the CLECs would arguably

allow the CLECs to quickly expand its service offerings to include MCA toll-free return calling. The record shows that customers desire to receive MCA service and that CLECs wish to offer MCA service, but that CLECs have not yet been able to offer the full benefits of MCA service to their customers due to SWBT's refusal to recognize CLECs as full MCA plan participants and SWBT's refusal to provide the MCA plan's toll-free return calling feature unless the CLEC agrees to the terms of the MOU. SWBT requests that the Commission now codify and perpetuate this current situation in the Commission's order in this case. The Commission declines to do so.

The Commission first finds that if it would adopt the MOU it would result in drastic modifications to the Commission's existing MCA plan. The Commission in Case No. TO-92-306 previously found that the toll-free return calling feature is an integral part and significant customer benefit of the MCA plan. The evidence in this case clearly shows that MCA customers have grown accustomed to and expect this feature as part of their MCA service. Under the existing plan, all participating carriers are required to provide toll-free return calling to their own MCA customers when those customers call another MCA plan customer. Under the MOU, however, SWBT grants itself the option of not providing toll-free return calling to its own MCA customers based on whether the person to be called is a customer of SWBT or a customer of a CLEC. The existing MCA plan is based on the customer and the tier in which that customer is located, not on the identity of that customer's local exchange provider. This is fundamental departure from the existing MCA plan, and if the MOU mechanism is now adopted by the Commission, it would result in discrimination and MCA service disparity between MCA plan customers where none previously existed and also an overall diminution in

the overall public value of the MCA plan itself.

Under the existing MCA plan, no participating carrier is required to compensate another carrier for the toll-free return calling feature. The MOU, however, would require CLECs to pay such compensation as a condition of participation in the MCA plan. Requiring CLECs to pay SWBT an additional charge which currently is not required for other incumbent carriers is contrary to the existing MCA plan and is, therefore, discriminatory and unreasonable.

The Commission further finds the MOU's requirement that a CLEC compensate SWBT \$0.026 per minute of use for all toll-free return calling from SWBT's MCA customers to a CLEC's MCA customers is not supported by the evidence and is otherwise unreasonable. SWBT attempts to justify the imposition of its proposed \$0.026 per minute charge on the basis of SWBT's claim of entitlement to revenue neutrality and under that theory SWBT's need to recoup lost toll revenues which would occur when a former SWBT MCA customer switched service to a CLEC. The Staff and the CLECs, on the other hand, presented evidence to show that SWBT by imposing this charge was actually attempting to wrongfully seek recovery of non-compensable lost revenues due to competition. While not presenting specific evidence, Sprint and MITG took the position that imposition of SWBT's proposed charge was inappropriate and should not be a condition of CLEC participation in the MCA plan. Public Counsel and GTE took no position on the issue.

By its terms the MOU requires a CLEC to compensate SWBT for *all* calls originating from SWBT's own MCA customers to any CLEC MCA customers. The record reflects, however, that MCA service for *all* customers located within the mandatory MCA zones of

MCA-Central, MCA-1 and MCA-2 is a mandatory service and part of that customer's basic local service. As such, calls originating and terminating within the mandatory zone cannot possibly be generating any toll revenue for SWBT under the current MCA plan so there can be no lost toll revenues to recoup when those customers switch service to a CLEC. During the hearing SWBT's witnesses conceded that even SWBT now believed that imposition of the \$0.026 per minute charge for calls within the mandatory MCA zones would be inappropriate and offered to not impose such a charge on a going forward basis. Aside from this verbal concession, the MOU executed by Intermedia remains unchanged, however, and SWBT's witness further testified that SWBT nevertheless still intends to require Intermedia to pay this admittedly unreasonable charge unless otherwise ordered by the Commission. The Commission finds that compensating SWBT for lost toll revenues for calls originating and terminating in the mandatory MCA tiers is unsupportable, unjust, anti-competitive and in all respects unreasonable, both in terms of Intermedia's past and future MCA traffic, and more broadly, in terms of some market entry requirement for other CLECs.

Assuming, *arguendo*, that SWBT would be entitled to be compensated for lost toll revenues arising out of the CLEC's provision of MCA service in the optional MCA tiers, it is clear that SWBT currently is not experiencing any actual lost toll revenues. The record reflects that SWBT currently is not providing to its MCA customers toll-free return calling to any CLEC customers in the optional tiers; SWBT has to date refused to recognize any CLEC MCA customers as being true MCA plan subscribers, and accordingly, SWBT is not currently providing the toll-free return calling feature except for SWBT to SWBT or SWBT to incumbent LEC traffic anywhere within the MCA plan's boundaries. The only exception is

Intermedia, and in that case, SWBT presumably is or intends to be compensated pursuant to the MOU for all SWBT customer toll-free return calls to Intermedia's customers anywhere within the MCA.

In addition to the lack of a showing of an actual revenue loss, the record seems to indicate that any future losses SWBT might experience due to SWBT providing toll free return calling from its customers to CLEC customers in the optional MCA tiers may not have as significant an adverse impact on SWBT's overall revenues as at first might be presumed. The record reflects that 83% of all current MCA customers are located in the mandatory MCA tiers, with MCA service customer take rates declining from the mandatory zones outward to the outer MCA tiers. Logically, this means that most new CLEC MCA customers, since they necessarily would be former SWBT MCA customers, would be located in the mandatory, not the optional tiers, and any such revenue losses would be due directly to competition, not arguably compensable lost toll.

Taken together, the evidence indicates SWBT's request that the Commission impose any kind of lost toll revenue compensation obligation on CLECs as a pre-condition of fully participating in the MCA plan is, at best, premature and not supported by the weight of the evidence available to the Commission at this time. However, since the MOU by its terms goes further than just the optional MCA tiers and also includes the mandatory tiers as well, the Commission must reject the compensation scheme set forth in the MOU.

The Commission finds that adoption of the MOU in this case would further wrongfully delay CLEC participation in the MCA plan, would be inconsistent with and contrary to the existing MCA plan, and would result in discriminatory treatment among carriers and more

importantly, discrimination and service disparity among MCA plan customers. The \$0.026 per minute of use compensation arrangement contained in the MOU is unreasonable, is not supported by the weight of the evidence in this case, and should not be required of any carrier as a pre-condition of participation in the MCA plan. SWBT's imposition of the MOU on Intermedia as a condition for Intermedia to continue to provide the full benefits of MCA service to its customers, is anti-competitive, is unfair to Intermedia and is otherwise unreasonable in all respects. For all these reasons, the Commission finds the MOU to be unreasonable, anti-competitive, and not in the public interest and the Commission will not adopt SWBT's proposed MOU as a part of the terms and conditions for CLEC MCA plan participation.

Proposed Conclusions of Law

Intermedia is a competitive facilities-based local telecommunications company authorized by the Commission to provide basic local telecommunications service within the Company's approved service territory within the State of Missouri. Intermedia received Commission approval of its first interconnection agreement with SWBT in Case No. TO-97-260 by order issued on March 7, 1997 and Commission approval of its second interconnection agreement with SWBT, which was an adoption of the SWBT/AT&T arbitrated agreement, in Case No. TO-2000-364 by order issued on January 25, 2000. Intermedia received its conditional certificate of service authority to provide facilities-based basic local telecommunications service in Case No. TA-97-264 by order issued on September 10, 1997. Intermedia's certificate was made fully effective when the Commission approved Intermedia's Missouri Local Telecommunications Tariff, P.S.C. Mo. No. 3, effective December 12, 1997.

Intermedia was providing its customers with MCA service, complete with toll free return calling from SWBT MCA customers, prior to the time Intermedia received Commission approval of its MCA tariff revisions, which became effective January 22, 2000, arising out of Intermedia's obligations to submit such revisions pursuant to the terms of the MOU.

§252 of the Telecommunications Act of 1996 ("the Act") requires all interconnection agreements between incumbent local exchange carriers and CLECs be submitted to the Commission for approval. SWBT's MOU with Intermedia constitutes an interconnection agreement under § 252 of Act because it involves "the transmission and routing of telephone exchange service and exchange access" under §251(c)(2)(a) of the Act and because it purports to modify the inter-company compensation arrangements for the exchange of local traffic specified in the then existing and Commission-approved SWBT/Intermedia interconnection agreement. As a matter of state law, the Commission's order issued in Case No. TO-97-260 required the parties to submit any amendments or modifications to their existing interconnection agreements to the Commission for approval. The MOU by its terms purports to modify the terms of the parties' existing Commission-approved interconnection agreement and is therefore also an amendment to the parties' existing agreement. The failure of the parties to submit the MOU is a direct violation of a prior Commission order and is therefore unlawful under §386.570 RSMo 1994. The Commission concludes that the MOU between SWBT and Intermedia is unlawful, void and of no effect since it should have been but was not submitted to the Commission for approval under applicable federal and state law.

The MOU between SWBT and Intermedia further is in violation of Federal Communication Commission rules, specifically, 47 C.F.R. §51.703(b), since it purports to

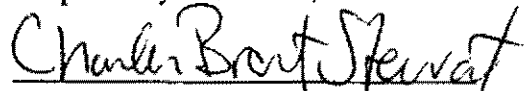
allow SWBT to charge Intermedia for calls originating on SWBT's network. The MOU further violates the dialing parity requirements of 47 U.S.C. § 251(b)(3) and would, if ultimately approved and ratified by the Commission, constitute an unlawful barrier to entry under 47 U.S.C. § 253(b). The Commission therefore concludes that the MOU is unlawful on these additional grounds. '

SWBT is required by its Commission-approved tariffs and the Commission's Report and Order issued in Case No. TO-92-306 to provide toll free return calling to its own MCA plan customers when those customers call any other MCA plan customer. In the case of Intermedia, SWBT for a period of time actually did not provide this service to its own MCA customers when those customers attempted to make toll-free calls to Intermedia's MCA customers and it threatened to do so again on a permanent basis had Intermedia not agreed to execute the MOU. SWBT continues to deny this service to its own MCA customers when those customers seek to make toll free return calls to MCA customers of all CLECs other than Intermedia. As such, SWBT's actions and its MOU are in violation of a prior Commission order under §386.570 RSMo 1994.

The Commission has determined that the terms contained in the MOU between SWBT and Intermedia are unreasonable, anti-competitive and permit discrimination and MCA service disparity between MCA plan customers by SWBT solely based on the identity of the customer's carrier. The \$0.026 cents per minute compensation required by the terms of the MOU was not approved by the Commission although SWBT purports to charge such compensation to Intermedia as a condition of providing toll-free return calling to SWBT's MCA customers. Through its MOU SWBT further violates §392.200(1) RSMo Supp. 1999 in

that the charges being demanded by SWBT are not just and reasonable or allowed by order or decision of the Commission, and as such, the MOU by statute is declared to be unlawful.

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned certifies that a true copy of the foregoing was sent to counsel for all parties of record in Case No. TO-99-483 by depositing same in the U.S. Mail, first class postage prepaid, or by hand-delivery, this 17th day of July, 2000.

