CC96-98

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FEDERAL COMMUNICATIONS COMMISSION
SECRETARY

March 25, 1996

Honorable Reed E. Hundt
Chairman, Federal Communications Commission
Washington, D.C. 20054

Dear Chairman Hundt:

The Association for Local Telecommunications Services ("ALTS") respectfully requests your help in resolving certain problems involving implementation of the Telecommunications Act of 1996 ("'96 Act"). We realize the Commission is working very hard to carry out its many duties under the '96 Act with limited resources and demanding time limits, so we are reluctant to add to that burden. However, the fundamental structure of the '96 Act assumes that competitive local exchange carriers ("CLECs") will be able immediately to seek interconnection from incumbent local exchange carriers ("ILECs"), and that interconnection agreements successfully completed under the '96 Act will play an important role in the Commission's review of requests from the Regional Bell Operating Companies ("RBOCs") to enter in-region interLATA service pursuant to Section 271. This fundamental assumption is being undercut by the following obstacles encountered by ALTS's members in their attempts to negotiate interconnection agreements:

- Although the '96 Act specifically imposes a duty of good faith negotiation upon incumbent local exchange carriers, several ILECs have asked CLECs to sign non-disclosure agreements which effectively shield the ILEC from the consequences of subsequently failing to bargain in good faith, and which also bar access to important information needed by state agencies to carry out their statutory duties.

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- The '96 Act carefully preserves the states' ability to impose pro-competitive requirements on ILECs which are consistent with the standards of the Act,[1] yet some ILECs are using adoption of the '96 Act as an excuse to withdraw existing interconnection tariffs, to call into question the availability of existing Federal virtual collocation tariffs, to terminate existing negotiations undertaken pursuant to state laws, and to defend their failure to comply with existing interconnection agreements.

- At least one ILEC has asked a CLEC to demonstrate its compliance with local entry requirements, and to describe the CLEC's intended services, prior to the commencement of negotiations.

We know all these acts will eventually be found unlawful because they so plainly violate the '96 Act. But the certainty of eventual relief -- whether from the Commission, state agencies, or from higher management in the ILECs -- will not help ALTS's members negotiate successful agreements within the narrow time frames contemplated by the '96 Act for the successful implementation of local competition. Accordingly, ALTS asks that the Commission speak out immediately, and make it unmistakably clear that: (1) all existing pro-competitive interconnection statutes, tariffs, agreements, and negotiations should continue until such time as they may be supplanted by Federally-mandated replacement arrangements at a CLEC's request; (2) any ILEC request for general non-disclosure agreements in negotiations covered by the statutory good faith bargaining requirement is a prima facie violation of Section 251(c)(1); and (3) ILEC requests for evidence of a CLEC's compliance with state entry requirements, or ILEC inquiries into a CLEC's intended services, are prima facie violations of Section 251(c)(1).

**Requests for General Confidentiality Agreements** - Members of ALTS have been asked by Southwestern Bell, as well as other ILECs, to sign general confidentiality agreements which permit either party to label information or documents as "Confidential Information" without limitation, and thereby preclude disclosure of even the most critical aspects of negotiation discussions (see Attachment A for a copy of the non-disclosure agreement requested by SWB). According to SWB, only the portions of agreements which are successfully negotiated should ever become public, and the bargaining

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[1] See Conference Report (H. REP. 104-456) on Section 251(d): " ... nothing precludes the enforcement of State regulations that are consistent with the requirements of new section 251."

behavior of the parties as to unresolved matters should be kept out of the sight of the states and the Commission (Attachment A at ¶ 1).

While no ILEC has yet required the signing of such an agreement as a condition for negotiations, it is manifest that even requesting such agreements has an impermissible chilling effect on negotiations. The '96 Act places a duty of good faith negotiations on both ILEC and CLEC negotiators (Section 251(c)(1)). A general confidentiality agreement effectively rips this provision out of the statute, since neither party would ever to able to submit evidence concerning even the most egregious instances of bad faith negotiation to arbitrators or state agencies. Absent access to this information, state implementation of disputed issues would be effectively crippled.

ALTS is not issuing a broad challenge here to all ILEC requests for confidentiality. Depending on the circumstances, there may be situations involving sensitive business data where specific confidentiality requests could be appropriate. But it is plain that asking for agreements which give either party the blanket ability to require non-disclosure through mere labeling has a negative effect on negotiations. CLECs which receive such requests have to weigh the possibility of retaliation if they decline to sign, or, at a minimum, face the possibility that their negotiations will trail behind the negotiations of those CLECs which do accept such proposals. The Commission should prevent such an obvious attempt to circumvent the '96 Act, and find that any requests for blanket confidentiality agreements, even on a so-called "voluntary" basis, is a prima facie violation of Section 251(c)(1).

**Frustration of Existing State Pro-Competitive Initiatives** - Congress could not possibly have intended to undercut the existing interconnection right of CLECs pending issuance of the Commission's Section 251 regulations, because the '96 Act is intended to further local competition by increasing the interconnection rights of CLECs. Accordingly, it should be obvious that all existing interconnection tariffs should continue to remain in effect at both the state and Federal levels, and that all on-going state-sponsored competitive initiatives continue unimpaired until new, CLEC-requested arrangements are available to replace them without interruption. But, incredibly enough, some ILECs are attempting to turn this aspect of the '96 Act upside down:

- US WEST stopped its on-going negotiations with Electric Lightwave, Inc. for several weeks following passage of the '96 Act, claiming that state-sponsored negotiations had to be conformed with the new Federal legislation.

- US WEST and GTE have submitted petitions for "clarification" and rehearing in the Oregon PUC's proceedings dealing with local competition,[2] as well as in Minnesota concerning MCImetro's application for local authority,[3] in which they assert that: "Nothing in the Federal Act suggests or contemplates interim or temporary arrangements. Rather, the Federal Act directs the parties to devote their energy toward reaching a comprehensive and permanent arrangement;" (Initial Comments of US WEST filed March 18, 1996, at p. 7 (Attachment B); emphasis supplied).

- US WEST also attempted to withdraw an interconnection tariff in Utah which it had filed pursuant to a pro-competitive state enactment, claiming its provisions needed to be coordinated with the '96 Act ("The tariff currently filed by US WEST is an inappropriate vehicle for the Commission to rule on these issues, and has, therefore, been withdrawn;" Comments of US WEST in Docket No. 95-2206-01, filed February 27, 1996, at p. 3; emphasis supplied).

- Ameritech recently implied in Michigan that the passage of the '96 Act terminated an interconnection arrangement it had negotiated under state agency supervision with Brooks Fiber (formerly City Signal).

- Ameritech temporarily demurred about continuing to offer service under its existing virtual collocation tariffs (Attachment C). While higher management subsequently retreated on this issue, there remains a serious issue as to whether Ameritech's implementation of the '96 Act comports with the philosophy expressed in its "Customers First" Plan.

**Compliance With Local Entry Requirements, and Disclosure of Services** - SWB has taken upon itself the task of reviewing CLECs' compliance with local entry requirements as part of responding to interconnection requests, and has even asked prospective competitors to describe the services they intend to offer (see Attachment D).

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[2] ***In the Matter of the Application of Electric Lightwave, Inc. For a Certificate of Authority to Provide Telecommunications Services in Oregon***, OR CP 1, CP 14, CP 15.

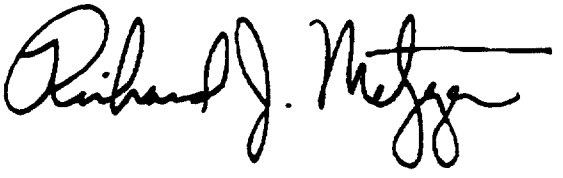
[3] ***In the Matter of the Application of MCImetro Access Transmission Services, Inc. For a Certificate of Authority***, MN Docket No. P5321/NA-96-170.

The time is long past when local monopoly providers could try to carry out their view of "public policy" by burdening their competition with "protective coupling devices" (in the case of customer premises equipment), or by denying interconnection to competitors (in the case of specialized common carriers). The issue of compliance with what few local entry requirements may remain under the '96 Act is certainly an important issue, and needs to be resolved appropriately. However, SWB's obligation to commence negotiations under Sections 251 and 252 is not qualified in any fashion by SWB's desire to enforce its own particular reading of Section 253. Indeed, because CLECs are currently able to offer interstate access without any express authorization, discussion of state authorization is unwarranted and plainly anti-competitive.

Similarly, it is quite important that the technical details of a requested interconnection agreement be fully explained, but it is no business of SWB's what "services" a CLEC intends to provide pursuant to an agreement. The Commission should declare that ILECs have no right to investigate the business of their competitors, nor their compliance with remaining entry requirements.

We understand that resolving these issues is a burden that would have to be added to the many pro-competitive tasks the Commission needs to complete successfully in the next few weeks. But these problems are seriously impeding the negotiation process, and cannot be cured promptly without Commission intervention. We appreciate your consideration of these important matters, and we would be pleased to discuss them further with you at your convenience.

Best regards,



cc: Hon. James H. Quello
Hon. Andrew C. Barrett
Hon. Rachelle B. Chong
Hon. Susan Ness
Ms. Regina Keeney
Mr. Richard Metzger
Mr. James Schlichting
Mr. Richard Welch
Counsel for each RBOC

**ATTACHMENT A**

## MUTUAL CONFIDENTIALITY AND NONDISCLOSURE AGREEMENT

WHEREAS, IntelCom Group (U.S.A.), Inc. and its subsidiary companies, and Southwestern Bell Telephone Company (collectively, the "Parties") desire to enter into negotiations regarding the rates, terms, and conditions under which SWBT will provide interconnection to ICG pursuant to the Telecommunications Act of 1996 (the "Act"); and

WHEREAS, the Parties' negotiations will necessarily include the disclosure of trade secrets and other highly confidential and/or proprietary information and data by the Parties;

NOW, THEREFORE, in consideration of mutual promises exchanged and other good and valuable consideration, the receipt and adequacy of which are hereby acknowledged, the Parties agree to the following terms governing the confidentiality of certain information one party ("Owner") may disclose to the other party ("Recipient"). As used in this Agreement, the term "Recipient" includes any of the Recipient's employees or agents;

1. DEFINITIONS. For purposes of this Confidentiality and Nondisclosure Agreement ("Agreement"), "Confidential Information" means all information of Owner or another party whose information Owner has in its possession under obligations of confidentiality, in whatever form transmitted, relating to business plans or operations, network design, systems and procedures and/or the sale, purchase, and use of services, which is disclosed by Owner or its affiliates to Recipient or its affiliates indicating its confidential and proprietary nature and marked confidential or proprietary. The term "affiliate" shall mean any person or entity controlling, controlled by or under common control with a party. The information, if in tangible form, shall be marked prominently with a legend identifying it as confidential. If the information is oral, then it shall be presumed by the Recipient to be confidential.

Notwithstanding the foregoing, Confidential Information shall not include any information of Owner that (a) was in the public domain at the time of the disclosing party's communications thereof to the receiving party; (b) entered the public domain through no fault of the receiving party subsequent to the time of the disclosing party's communication thereof to the receiving party; (c) was in the receiving party's possession free of any obligation of confidence at the time of disclosure by the other party; or (d) was disclosed to the receiving party by a nonparty source, free of any obligation of confidence, after disclosure by the party; or (e) was developed by employees or agents of the receiving party independently or and without reference to any of the Confidential Information that the disclosing party has provided to the receiving party. This Agreement shall not preclude either Party from exercising its rights to seek mediation or arbitration in accordance with the Act with respect to these negotiations; however, in the event of such mediation or arbitrations, the Parties agree to seek confidential treatment of information disclosed in that process. In the event the Parties reach an interconnection agreement which is approved by the applicable State regulatory commission, the Parties agree to file that approved agreement as a public record in accordance with the Act.

2. **OWNERSHIP.** All Confidential Information in whatever form (including, with limitation, information in computer software or held in electronic storage media) shall be and remain property of Owner. All such Confidential Information shall be returned to Owner promptly upon written request and shall not be retained in any form by Recipient.

3. **NONDISCLOSURE.** Recipient shall not disclose any Confidential Information to any person or entity except employees or affiliates of Recipient who have a need to know and who have been informed of and agree to abide by Recipient's obligations under this Agreement. Neither recipient shall disclose Confidential Information to its affiliates without prior written notice to the other. Prior to any such access, the Recipient shall inform each such representative of the proprietary and confidential nature of the information and of the Recipient's obligations under this Agreement. Each such representative shall also be informed that by accepting such access, he thereby agrees to be bound by the provisions of this Agreement. Furthermore, by allowing any such access, the Recipient agrees to be and remain jointly and severally liable for any disclosure by any such representative which is not in accordance with this Agreement. Recipient shall use not less than the same degree of care to avoid disclosure of Confidential Information as Recipient uses for its own confidential information of like importance and, at a minimum shall exercise reasonable care. The Parties agree that this Agreement does not prohibit the disclosure of Confidential Information where applicable law requires, including but not limited to, in response to subpoenas and/or orders of a governmental agency or court of competent jurisdiction. In the event the Recipient receives an agency or court subpoena or order requiring such disclosure of Confidential Information, Recipient shall immediately, and in no event later than five (5) days after receipt, notify Owner in writing. All rights and obligations under this Agreement shall survive the expiration or termination of any contract or other agreement between Owner and Recipient. The obligations of the Parties under this Agreement shall continue and survive the completion of the aforesaid discussion sand shall remain binding for a period of two (2) years from the date of execution of this Agreement. This provision shall remain binding for the above-stated period, even if the Parties abandon their efforts to undertake a possible business transaction together.

4. **REMEDIES.** The Parties agree that, in the event of a breach or threatened breach of the terms of this Agreement, Owner may seek any and all relief available in law or equity as a remedy for such breach, including but not limited to, monetary damages, specific performance, and injunctive relief. The Parties acknowledge that Confidential Information is valuable and unique and that disclosure will result in irreparable injury to Owner. In the event of any breach of this Agreement for which legal or equitable relief is sought, all reasonable attorney's fees and other reasonable costs associated therewith shall be recoverable by the prevailing Party.

5. **DISCLAIMER.** This Agreement and the disclosure and receipt of Confidential Information do not create or imply (i) any agreement with respect to the sale, purchase, or pricing of any product or service; or (ii) any right conferred, by license or otherwise, in any Confidential Information or in any patent, trademark, service mark, copyright, or other intellectual property.

6. **COMPLETE AGREEMENT.** This Agreement (i) is the complete agreement of the Parties concerning this subject matter and supersedes any prior such agreements; (ii) may

not be amended except in writing signed by the Parties; and (iii) is executed by authorized representatives of each party.

7. **GOVERNING LAW.** This Agreement is governed by the laws of the state of Texas.

8. **SUCCESSORS AND ASSIGNS.** This Agreement shall benefit and be binding on the Parties below and their successors and assigns.

| INTELCOM GROUP (U.S.A.), INC. | SOUTHWESTERN BELL TELEPHONE COMPANY |
|---|---|
| By _____ | By Richard Zamora |
| Print Name _____ | Print Name Richard Zamora |
| Address _____ | Address One Bell Center Suite 4208 |
| _____ | St. Louis, MO 63101 |
| Date _____ | Date 3/1/96 |

**ATTACHMENT B**

STATE OF MINNESOTA
BEFORE THE PUBLIC UTILITIES COMMISSION

| | |
|---|---|
| Joel Jacobs | Chair |
| Thomas Burton | Commissioner |
| Marshall Johnson | Commissioner |
| Dee Knaak | Commissioner |
| Don Storm | Commissioner |

In the Matter of the Application of MCImetro Access Transmission Services, Inc. for a Certificate of Authority to Provide Local Exchange Telecommunications Services; Local Resale Services; Private Line and Switched and Special Access Services

Docket No. P5321/NA-96-170

**Initial Comments of U S WEST Communications, Inc., on the Application for a Certificate of Authority by MCImetro**

U S WEST Communications, Inc. ("U S WEST") submits the following initial comments on the application by MCImetro Access Transmission Services, Inc. ("MCImetro") for a certificate of authority. Minn. Stat. § 237.16 and the Federal Telecommunications Act of 1996 (the "Act") § 253 indicate that new entrants such as MCImetro may receive authority to provide local services in exchanges served by incumbent local exchange carriers such as U S WEST. The issues the Commission must address in this docket relate to the adequacy of MCImetro's filing under applicable statutes, how the Commission will be assured that MCImetro will meet all of its obligations under the Act and under Minn. Stat. Ch. 237, and the terms and conditions

Commission should require that MCImetro address these obligations before granting a certificate.

C. **The Negotiation Process In the Federal Act Preempts the Interim Negotiation Process in State Law.**

MCImetro has requested interconnection negotiations with U S WEST under Minn. Stat. § 237.16, subd. 10, which sets forth a process for interim arrangements for interconnection. U S WEST believes that this interim interconnection procedure is in conflict with the negotiation process outlined in section 252 of the Act. As such, the Federal Act dictates the process and timeframes under which U S WEST and MCImetro will establish interconnection arrangements.

If the state and federal laws conflict, then the state law must yield to the federal law. The Minnesota statute, which was enacted before the Federal Act, must now be interpreted in light of the new federal obligations, structure and process. The Federal Act contains the following provisions that have a bearing on the relationship of that law to the Minnesota Statute:

- Section 251(c)(1) establishes a mutual duty on both the new entrant and the incumbent LEC to negotiate in good faith in accordance with the procedures set forth in section 252 to fulfill the obligations outlined in the Federal Act.
- Section 252(b) gives the parties 135 days to attempt to negotiate the many complex issues before a third party can begin to impose a resolution. If arbitration is necessary, it must be completed within 9 months after the process began. Thus, the statute sets an expeditious schedule, but also

recognizes that the multiple, complex and interrelated issues will require several months to resolve.

- Nothing in the Federal Act suggests or contemplates interim or temporary arrangements. Rather, the Federal Act directs the parties to devote their energy toward reaching a comprehensive and permanent arrangement.
- Section 252(c) provides that if arbitration is required, then the arbitrator must apply the new regulations to be prescribed by the FCC as the decision-making criteria. These regulations, however, will not be available until about six months after the Federal Act was enacted.
- Section 251(g) provides that until the FCC adopts new regulations, the preexisting rules and obligations will continue to apply. Thus, the parties today are operating under the same obligations with respect to interconnection, unbundling, etc., as applied prior to enactment of the Federal Act.

The Minnesota structure must be evaluated in light of these provisions. Section 237.16, subd 10(a), permits a new entrant to obtain a certificate of authority before the Commission completes its competition rules on August 1, 1997. However, section 237.16, subd. 10(c), provides that during that interim time, the same rules and time frames as established by the FCC for interconnection should be applied to intrastate services. As described in the points listed above, the Federal Act provides that the new obligations do not take effect until the FCC issues its new regulations, and after that time

# ATTACHMENT C

March 6, 1996

J. P. Arambula
Manager
Ameritech
337 North Abbott
East Lansing, MI 48823

Dear Jesse,

I am writing to inquire about schedules for the virtual interconnection applications of the locations listed below that were submitted on February 29 and March 1. There is high interest to provide service in these locations and we would like to schedule construction to achieve the earliest possible service dates.

| LOCATION | APPLICATION SENT | AMERITECH ENGINEERING INFORMATION DUE | REQUESTED SERVICE DATE |
|---|---|---|---|
| Holland-Main | February 29, 1996 | March 9, 1996 | March 29, 1996 |
| Zeeland | February 29, 1996 | March 16, 1996 | April 19, 1996 |
| Grand Rapids-Empire | February 29, 1996 | March 29, 1996 | May 3, 1996 |
| Grand Rapids-West | February 29, 1996 | April 12, 1996 | May 10, 1996 |
| Dutton | March 1, 1996 | March 16, 1996 | April 26, 1996 |
| Hudsonville | March 1, 1996 | April 26, 1996 | May 24, 1996 |
| Comstock Park | March 1, 1996 | May 10, 1996 | June 7, 1996 |

Please provide me a schedule of dates that Ameritech intends to meet based on the service dates requested in the applications.

If you have any questions please call (616) 224-4403

Sincerely,

Roger L. Hurley
Engineering Manager-Collocation Services
Brooks Fiber Communications, Inc.
575 56th Street, SW
Grand Rapids, MI 49548

# ATTACHMENT C

March 6, 1996

J. P. Arambula
Manager
Ameritech
337 North Abbott
East Lansing, MI 48823

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If you have any questions please call (616) 224-4403

Sincerely,

Roger L. Hurley
Engineering Manager-Collocation Services
Brooks Fiber Communications, Inc.
575 56th Street, SW
Grand Rapids, MI 49548

March 7, 1996

Roger,

In light of the Telecommunications Act of 1996, I have just been instructed not proceed with any new AMDIS service orders requests received after 02-07-96 until further notice.

Should you have any questions or require further information, please contact Brooks Fiber Account Executive for details.

J.P. Arambula
Ameritech Collocation Manager
(517) 337-3532

## *First Point of Contact*
## SWBT
## Local Service Provider Account Team

Southwestern Bell Telephone (SWBT) has established a Local Service Provider (LSP) Account Team to address the needs of all LSPs. The members of the LSP Account Team possess diverse backgrounds in the area of telecommunications and are available to address LSP inquires regarding service establishment. The LSP Account Team serves as the first point of contact for potential LSPs and works in tandem with many other telecommunications experts throughout SWBT to ensure LSP service needs are met.

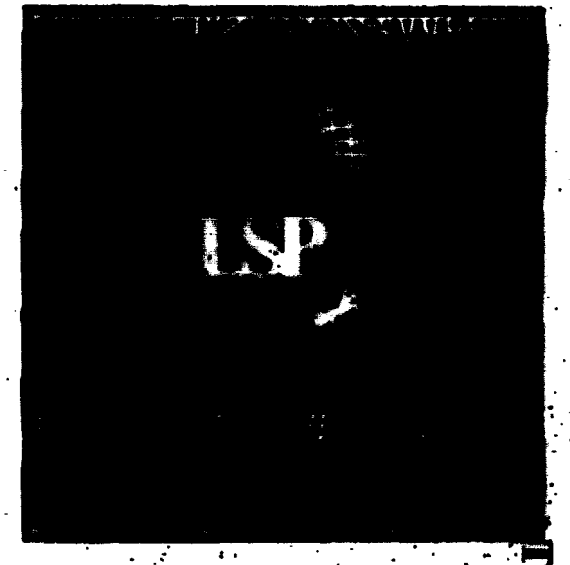
*LSP Account Team*

**Southwestern Bell Telephone**
**One Bell Plaza**
**Suite 0525**
**Dallas, TX 75202**

**Phone: 214-464-1665**
**Fax: 214-464-1486**



## Entry Into The Local Telephone Exchange Business




## Doing Business With Southwestern Bell Telephone Company

ATTACHMENT D

## *What are the requirements to enter the local telephone exchange market?*

[redacted]

### *Certification*

In order to provide local exchange telephone service, basic local telecommunications service, or switched access service, certification must be obtained from the applicable State Commission.

Copies of the application forms can be obtained by contacting the State Commission directly. Contact numbers for each Commission are included in this informational packet.

To express interest in initiating negotiations for local interconnection, an LSP should submit a written request to SWBT. This request should outline requirements for the desired interconnection arrangements. Once a request is received, SWBT will promptly schedule an initial meeting to begin negotiations.

### *Additional Requirements*

In order to facilitate successful provisioning for the resale of local exchange telephone services and/or interconnection arrangements with SWBT, an LSP must also provide the following:

☑ ***Operating Company Number (OCN)***

☑ ***Confirmation of End User Authorization***

☑ ***Toll Free Means of Communication (For Service Order & Repair Coordination)***

In addition, facility based LSPs will need to obtain the following:

☑ ***NXX Assignments***

☑ ***Common Language Location Identification Codes (CLLI™)***

In addition to the items noted above, an LSP may find it helpful to obtain other information pertaining to the provisioning of local exchange telephone service in the state(s) which the LSP intends to do business.

### *Other Available Information*

Other resource information regarding entry into the local exchange telephone business is also available. An LSP may wish to obtain one or several of these resources.

☑ ***State Statutes or Rules***

☑ ***Tax Exemption Forms***

☑ ***Local Exchange Routing Guide (LERG)***

☑ ***SWBT Tariffs***

- ***Local Access Service Tariff***
- ***Local Exchange Tariff***
- ***General Exchange Tariff***
- ***Intrastate Access Tariff***
- ***Interstate Access Tariff***

Specific information and applicable forms are included in this informational packet.