

placement of low caps; and, its deferral of Tier 2 penalties until SWBT has reported performance failure for CLECs in the aggregate (average) for three consecutive months. In all of these examples, the TRP allows serious performance failures to go without serious sanction.

The TRP does not provide adequate damages or penalties for performance measurements involving small transaction volumes. Because the TRP calculates both damages and assessments predominantly on a “per occurrence” basis, it necessarily produces limited sanctions at low volumes. Even if the TRP’s per occurrence multipliers were set at reasonably compensatory levels for liquidated damages purposes – and at \$25 to \$150 they are not – those same multipliers will have little deterrent effect so long as they are being multiplied against only dozens, or even hundreds of transactions. Nor does the prospect of Tier 2 assessments at a maximum of \$500 per occurrence offer significant deterrent effect. Compounding this shortcoming is the fact that SWBT obtains the greatest return from anti-competitive behavior in the early stages of market development. Nascent competition is the most vulnerable to anti-competitive conduct by monopolists, as new entrants struggle for a toehold in the market.

Second, the TRP’s “per occurrence” approach does not mean that sanctions will apply to each CLEC transaction in which SWBT missed the parity or benchmark requirement. When SWBT’s monthly performance on a measure shows that SWBT was sufficiently out of parity or off of the benchmark to yield a z-score worse than the critical z-value, the TRP uses a formula to determine how many “occurrences” will be used to calculate liquidated damages (the same formula applies in calculating Tier 2 assessments after three months of consecutive violation for all CLECs). SWBT first calculates the performance level that would have yielded a z-score equal to the critical value (*i.e.*, what is the worst performance SWBT could have had that month on that measure and still achieve a passing score on the z-test). The difference between SWBT’s actual reported performance for the CLEC and this minimum required performance level is compared

and expressed as a percentage of the minimum required performance level. That percentage then is multiplied by the number of CLEC observations reported by SWBT under the measure during the month to determine the number of “occurrences” on which damages or assessments will be based. Although this can lead to a number of occurrences that is greater than the total, the TRP truncates the occurrences to 100%. Thus, the methodology is mathematically inconsistent and flawed.

To illustrate, assume that SWBT reported a 1.5-day interval for its retail and a 3.0-day interval for a CLEC on an average installation interval measure, where SWBT had provisioned 100 units for the CLEC during the month. Assume that the z-test showed that these results represented a parity violation, and that the worst performance SWBT that would have passed the z-test on that month’s data was an average interval of 2.0 (*i.e.*, an average of 2.0 for the CLEC, compared to 1.5 for SWBT, would have produced a z-score equal to the critical z value). SWBT’s actual reported performance for the CLEC (3.0) exceeded this minimum required performance level (2.0) by 50%. Multiplying 50% times the 100 units provisioned for the CLEC that month under that measure, SWBT would pay damages based on 50 “occurrences.” Only the transactions reported for the CLEC within the specific geographic and product classification where the performance violation occurred are used in calculating the “occurrences.” Under this example, even if SWBT installed every CLEC order in 3 days, where 2 was required to meet the statistical parity test, SWBT would pay damages based on only half of those transactions.

Under the TRP, damages are determined by multiplying the number of occurrences, calculated as described above, by a fixed amount. The plan includes a table of these multipliers, which range from \$25 to \$150 per occurrence in the first month of violation, to an oddly computed maximum of \$400 to \$800 per occurrence in the sixth consecutive month of violation and thereafter. Within a given month, the multiplier

chosen depends on whether the measure is classified for Tier 1 purposes as “high,” “medium,” or “low.”

Also, any actual occurrences of poor performance associated with a measure that happened to pass the parity test (perhaps even by random variation) will remain unremedied. Thus, the ability of each of the measures to generate remedies effectively is capped. Even so, some of these per “occurrence” measures have additional, even smaller caps applied. Indeed, there are some measures that are not remedied on a per “occurrence” basis in the TRP. They are capped immediately as soon as they fail. There is no provision in the TRP for increasing consequences as a function of severity for those measures.

More egregiously, the TRP does not afford CLECs an opportunity to present evidence on what likely damages a CLEC would incur as a result of SWBT’s discriminatory treatment. The multipliers set in the liquidated damages table were adopted by the Texas PSC without any evidence, much less an evidentiary hearing and fact finding, regarding the damages that a CLEC is likely to sustain from SWBT performance violations on various measures. Liquidated damages of \$25 will not compensate a CLEC for late-provided loop qualification information if the CLEC loses an xDSL customer as a result. Even liquidated damages of \$150 are dubious compensation if a missed due date has that same result. Certainly these liquidated damages multipliers do not account for the consequential damage to CLECs whose entry into a developing market, such as the markets for advanced services, is thwarted or retarded by discriminatory wholesale support. These amounts also do not take into account the economic benefit to SWBT from essentially driving a customer back to SWBT as a result of poor wholesale service performance. This complicated computational scheme obscures the above observations.

Regardless of the adequacy of these multipliers for compensatory purposes, they are inadequate to serve as serious consequences for noncompliance. If the plan calls for

payments that do not reach a reasonable level of compensation, these penalties become essentially unenforceable. McLeodUSA is not the only party that feels that the remedy payments in the TRP are inadequate. In Michigan, the Michigan Commission shares these concerns that the TRP will not provide sufficient remedies and incentives. In fact, the Michigan Commission ordered in its April 17, 2001 Order that “the company shall incorporate into the remedy plan a multiplier of 2 for all Tier 1 liquidated damages and Tier 2 assessments.”⁸¹

Additionally, because SWBT has chosen a per occurrence approach, the TRP’s liquidated damages provisions (Tier 1) almost by definition cannot provide the type of penalty that would suffice to deter SWBT from providing inferior or inadequate wholesale support. Thus, the need for a separate (Tier 2) consequence structure under the plan.

Tier 2 of SWBT’s proposal, however, does not fill the gap so the TRP remains an effective deterrent to anti-competitive behavior. Tier 2 does not fill the gap in the plan’s deterrent impact because no Tier 2 penalty applies until after SWBT reports three consecutive months of failure on a measure. This fact represents one (of many) serious flaws in the TRP, particularly as it applies to nascent services, because, so far as the plan is concerned, SWBT can respond to an emerging CLEC service with two months of discriminatory wholesale support and face no penalty. By the time Tier 2 penalties come into play, the damage to CLECs’ nascent services may have been done.

Further, Tier 2 assessments are based on the same purportedly compensatory multipliers used in the liquidated damages table for violations that extend into a third month. This amount would be paid to the state, over and above liquidated damages paid to CLECs for those same violations. However, as long as total CLEC transactions are low, which may be the case for some time while new entrants gain a market toe-hold, particularly if

⁸¹ April 17, 2001 Michigan Commission Opinion and Order in Case No. U-11830, p. 17

CLECs have difficulty obtaining the required wholesale support, Tier 2 threatens SWBT with assessments of no more than a few hundred thousand dollars while it protects a statewide monopoly worth hundreds of millions of dollars. Moreover, not all the measures get into Tier 2, only a subset deemed by SWBT to be critical. This means that there are gaps in the ability of the Texas Tier 2 to associate consequences with discriminatory behavior. Furthermore the three-month requirement effectively reduces the chance of random variation type 1 errors to zero, while still allowing type 2 errors of virtually any magnitude. Again, given the complete lack of competitive activity in Missouri at this time due to SWBT's anticompetitive MCA actions, this necessarily means that SWBT's penalties in Missouri will be inconsequential to them – the cost of doing business in keeping CLECs out of the market.

The few exceptions for which the TRP sets sanctions on a “per measure” basis, *e.g.*, collocation, do not adequately address the lack of incentives provided under the plan as it applies to measures where CLEC observations are reported in small volumes. Also, it does not increase with severity. Not a single provisioning, maintenance, or ordering measure is subject to a per measure assessment under the plan. In practice, however, many measures are being reported in very small volumes. Given the state of competition in Missouri and the level of product and geographic disaggregation in the performance measures, SWBT is reporting very small volumes for many measures, even on an “all CLEC” basis. Without a broader set of minimum per measure sanctions, there is no basis for concluding that the TRP will act as a real deterrent to performance failures by SWBT in the nascent stages of competition over a new service or with a new market entrant.

4. The Texas Remedy Plan is a “penalty escape plan”.

The TRP combines layers upon layers of forgiveness and “protection” to *prevent* the payment of remedies. That is why SWBT supports the proposal here in Missouri. The plan includes arbitrary classification of performance measures into low, medium, and high categories for purposes of paying remedies, which govern the size per occurrence

damages or assessments associated with each measure. The Michigan Staff, for example, opposed the TRP's arbitrary classification of performance measurements into low, medium, and high categories for purposes of paying remedies. According to the Michigan Staff, "Ameritech's proposal to give different weights to each measurement is very subjective and controversial and there is no need to attempt to identify which measurement should be afforded more weight. Deficiencies in any area can result in a CLEC loss of customer."⁸²

Furthermore, in its April 17th order, the Michigan Commission ordered that "the Commission does not agree that priorities should be assigned to the performance measures. The Commission agrees that assigning priorities has different effects on different market strategies and creates numerous disputes about the priority for each of the more than 150 measures. Ameritech Michigan shall therefore collapse the priorities into a single category that will be treated as Ameritech Michigan proposed for the 'medium' priority"⁸³

Other areas of concern with the TRP include SWBTs attempt to use exclusions such as force majeure events and problems caused by third party systems and equipment for avoiding remedy responsibilities. In Michigan, the Michigan Commission orders in its April 17, 2001 order that "The Commission concludes that Ameritech Michigan's plan provides unjustified exclusions. As the Staff notes, the performance measure business rules should define when noncompliance is excused, and force majeure events should not affect Ameritech Michigan's service to the CLECs any differently than they affect its service to its retail customers. Furthermore, the May 27, 1999 order rejected the view that force majeure should be an excuse for discriminatory performance. May 27, 1999 order, p. 16. The same analysis holds for problems with third-party systems and equipment. If

⁸² November 24, 1998 Michigan Staff Comments in Case No. U-11830, p. 17-18

⁸³ April 17, 2001 Michigan Commission Opinion and Order in Case No. U-11830, p. 7

Ameritech Michigan has designed its systems so that unexpected events disproportionately affect service to the CLECs, or has permitted third parties to design its systems in that manner, that is not a reason to excuse the discriminatory conduct. The Commission therefore rejects the proposed exclusions of liability, except for the exclusions based on CLEC acts or omissions.”⁸⁴

5. The TRP does not employ appropriate statistical methodology.

The TRP adds arbitrary layer of forgiveness by applying a statistically unjustified version of the z-test to measures for which the performance standard is a fixed benchmark. In fact, in Michigan, the Michigan Commission ordered in their April 17, 2001 order that “statistical tests should not be applied to the benchmark standards. Those are set at less than 100%, which leaves sufficient flexibility for the random errors that are addressed by the statistical tests applied to the parity standards.”⁸⁵ The plan chooses a fixed critical value approach, which is more appropriate for controlled experimentation than to the observational data collection technique that characterizes the adopted performance measures in Missouri, for all sub-measures. Furthermore, the plan concentrates too narrowly on controlling the statistical errors that negatively affect SWBT and completely ignores statistical errors that harm CLECs’ potential to become viable competitors.

Additionally, McLeodUSA believes that the TRP should require that the parity standard be implemented by comparing the service provided to the CLECs to the service that SWBT provides to its retail customers and its affiliates. The TRP does not include this comparison to its affiliates. In Michigan, the Michigan Commission ordered in its April 17, 2001 order that “The Commission concludes that the comparison to service

⁸⁴ April 17, 2001 Michigan Commission Opinion and Order in Case No. U-11830, p. 13-14

⁸⁵ April 17, 2001 Michigan Commission Opinion and Order in Case No. U-11830, p. 11

provided to Ameritech Michigan’s affiliates as well as service to its own retail customers should be part of the performance remedy plan. Section 251 of the FTA requires that Ameritech Michigan not provide inferior service to the CLECs as compared to its affiliates.....A comparison to the performance it provides its affiliates or retail customers, whichever is better, shall therefore be part of the remedy plan.”⁸⁶

6. The TRP is not self-executing.

The TRP stipulates that SWBT will not be liable for the payment of either Tier 1 damages or Tier 2 assessments until the Commission approves an Interconnection Agreement between a CLEC and SWBT containing the terms of the TRP in its Agreement. McLeodUSA believes that such a plan should be available to CLECs regardless whether they are interconnecting with SWBT via an interconnection agreement or a tariff. The Michigan Commission agrees, as it states in its April 17, 2001 Order that “The Commission agrees with the Staff that the remedy plan should be available whether a CLEC interconnects by agreement or tariff.”⁸⁷

The TRP leaves Missouri CLECs facing the likely prospect of protracted and contentious legal proceedings merely to realize the meager damages and assessments offered by the plan. Under the TRP, SWBT has no liability for damages or assessments to the extent that its noncompliance with a performance measurement is the result of non-SWBT problems associated with third-party systems or equipment, which could not have been avoided by SWBT in the exercise of reasonable diligence.

Given SWBT’s widespread reliance on systems and equipment that have been designed, manufactured, and/or serviced by third parties, this added exemption has the potential to turn every instance of reported noncompliance into a negligence issue – *i.e.*, could SWBT have avoided the parity or benchmark failure by exercising reasonable care

⁸⁶ April 17, 2001 Michigan Commission Opinion and Order in Case No. U-11830, p. 13

⁸⁷ April 17, 2001 Michigan Commission Opinion and Order in Case No. U-11830, p. 16

(reasonable diligence). There is every likelihood that SWBT will invoke this provision with frequency, if only to defer the realization of liquidated damages liability and discourage CLECs from attempting to collect. This term alone has the potential to eviscerate self-enforcement from the plan, and it forecloses any conclusion that the TRP provides for damages and assessments that are “automatically triggered,” “without resort to lengthy regulatory or judicial intervention.”

The TRP also excuses SWBT from paying liquidated damages or assessments for reported noncompliance that is “the result of an act or omission by a CLEC that is in bad faith.”⁸⁸ Fewer phrases have proved more pregnant with litigation than “bad faith.” The TRP offers examples of “bad faith,” such as a CLEC’s unreasonable failure to provide forecasts to SWBT, that threaten to equate that term with simple negligence. Again, this excuse is wholly unjustified in the context of the TRP, which separately protects SWBT to the extent that reported noncompliance results from CLEC acts or omissions in breach of contract or that otherwise are unlawful. Adding the “bad faith” excuse will do nothing other than foster disputes and create the opportunity for SWBT to claim “bad faith dumping” or “unreasonable failure to forecast” whenever new CLEC products, geographical expansions, or increasing CLEC volumes tax SWBT’s systems. Additionally, when there are disputes in terms of performance, that includes remedy ramifications, the TRP proposes that remedy payments be held in an escrow until after the timely commencement of a show cause proceeding. McLeodUSA believes it is wrong to permit SWBT to delay fulfilling its requirement to make remedy payments. The Michigan Commission Order agrees that at an early stage of the development of competition, the that withholding of payments by SWBT could adversely affect the development of competition.”⁸⁹

⁸⁸ **T2A Remedy Plan – Attachment 17, section 7.2, p. 7**

⁸⁹ **April 17, 2001 Michigan Commission Opinion and Order in Case No. U-11830, p. 14-15**

7. SWBT's effort to secure a rubber-stamping of the SBC Remedy Plan should be rejected.

There is a recurrent theme in Randy Dysarts affidavit that, because a similar plan was approved by Texas, a couple of neighboring states, and accepted by the FCC, there is a need to rubber stamp the TRP in Missouri. McLeodUSA urges the Commission to conduct an independent examination of the TRP in light of the non-existence of the lack of competition in Missouri.

Additionally, SWBT's assertion that its Plan somehow has support outside of Texas and a couple of neighboring states is incorrect. In Michigan, the staff opposed essential elements of the TRP. The Michigan Staff filed comments in MPSC Case No. U-11830 opposing virtually every element of the

8. Remedy payments should be made via check, not bill credits.

The TRP also provides for remedies by bill credits by stating. Requiring payments via check is a far more pro-competitive requirement than using a bill credit because CLECs should not be placed in the uncomfortable circumstance of having to transact a certain amount of business with SWBT in order to receive remedies for past poor performance. In Michigan, the Michigan PSC ordered that payments should be by check or other direct payment method, which simplifies administration and enforcement and provides for payment soon after Ameritech Michigan provides substandard performance.⁹⁰

9. The TRP confers upon SWBT unfettered discretion to use permutation testing for small sample sizes.

SWBT asserts permutation testing, which is used to more accurately calculate remedies for small sample sizes, is part of the TRP. SWBT does not mention, however,

⁹⁰ April 17, 2001 Michigan Commission Opinion and Order in Case No. U-11830, p. 14

that it, rather than the Missouri PSC, has the ability to use (or not use) permutation testing as it sees fit. Furthermore, in the TRP, remedies are assessed on a per-occurrence basis, based on the volume of CLEC transactions. This necessarily means that when transaction volumes are small that the remedies will not deter SWBT from discriminating against CLECs. Certainly, an effective remedy plan should adequately deter SWBT from discriminating ;irrespective of order volume.

10. The TRP should include a mechanism that will hold SWBT accountable to provide service at minimum levels for both wholesale as well as retail customers.

If SWBT were given 271 approval, the possibilities are very real that service quality provided by SWBT could deteriorate for both its wholesale and retail customers. Most states have employed minimum standards of performance for retail customers, and if SWBT were to fail to meet these minimum service levels, it would cause the CLEC to be in violation of the state regulation as well.

This failure to meet a state's minimum required service level is of significant concern to McLeodUSA because it causes harm in multiple ways -- (a) the McLeodUSA customer's frustration, which rightfully should be directed at SWBT, is aimed at the McLeodUSA, leading many times to loss of that customer; (b) the wrongfully placed ill-will against any particular CLEC often balloons into mistrust of all new competitors by the harmed customers and the many others with which he/she shares the poor service story; (c) McLeodUSA, as a telecommunications provider in Missouri may be held responsible for the violation of regulations through fines or credits and waivers to customers; and (d) the public interest calls for regulators to promote choice between good quality, not equally poor quality service providers. Even beyond the limited number of services for which retail end user standards exist, some performance areas are so critical, such as prompt restoration of high capacity loops for the business customers whose

livelihoods depend on them, that minimum acceptable performance intervals are also required.

Due to these concerns, McLeodUSA has proposed a "Parity with a Floor" concept to be put in place as a backstop for key measures where parity is used as the performance standard, which concept has been endorsed by recent state commission rulings.

McLeodUSA views this proposal as a means to obligate SWBT to provide a minimum level of service to all customers and to motivate SWBT to improve upon that base level wherever possible. For these key measures, parity will be the primary performance standard, however, for the sake of both retail and wholesale customers; parity must be at a minimum level to be considered as reasonably adequate service. Simply stated, parity of poor performance is still poor performance. The TRP does nothing to address this legitimate concern which is imperative to development of competition.

The TRP proposed by SWBT does not provide legitimate incentive to provide CLECs such as McLeodUSA with acceptable service quality after they gain 271 approval. Moreover, the meager remedies payable under the TRP ensures future service deterioration is likely to occur. Thus, SWBT would continue to have an incentive to hamstring the development of local exchange competition, and to offer poor retail services. SWBT has one reason, and one reason only, for proposing the TRP: Remedy payments under the TRP are so low as to constitute only a "cost of doing business," and thus would not prevent anti-competitive behavior and, therefore, would allow SWBT to offer low quality wholesale services to CLECs. This, in turn, will slow down – if not altogether stymie – the development of local exchange competition in Missouri.

A remedy plan must incept SWBT to provide acceptable wholesale services to the CLECs. A remedy plan with nominal penalties, like the TRP, is not a remedy plan at all, but is really nothing more than phony window dressing that enables SWBT to continue to monopolize the local telecommunications market in Missouri.

Table 1:

Data for Missouri from ARMIS 43-01 (2000)						
(Downloaded from FCC Web Site: http://www.fcc.gov/ccb/armis/)						
Year	Company Name	Row_#	Row_Title	Total_b	State_g	Interstate_h
2000	Missouri Bell	1090	Total Operating Revenues	2,002,884	1,271,597	482,949
2000	Missouri Bell	1190	Total Operating Expenses	1,358,954	824,497	298,403
2000	Missouri Bell	1290	Other Operating Income/Losses	25,070	-12,390	-5,234
2000	Missouri Bell	1390	Total Non-operating Items (Exp)	98,824	26,314	-297
2000	Missouri Bell	1490	Total Other Taxes	124,904	102,736	18,608
2000	Missouri Bell	1590	Federal Income Taxes (Exp)	120,533	73,281	43,279
2000	Missouri Bell	1915	Net Return	N/A	N/A	117,722
2000	Missouri Bell		Access Lines (ARMIS 43-08)	2,236,603		

FCC's Net Return Calculation*

		Net Return	36% Net Return	44% Net Return
Missouri Bell	"Net Return"	350,101	126,036	154,044

*Calculations in testimony based on FCC NY 271 Order at ft. 1332: "To arrive at a total "Net Return" figure that reflects both interstate and intrastate portions of revenue derived from local exchange service, we combined line 1915 (the interstate "Net Return" line) with a computed net intrastate return number (total intrastate operating revenues and other operating income, less operating expenses, non-operating items and all taxes)." Following the FCC's guidelines, the 'Net Return' is $[117,722 + 1,271,597 - 12,390 - (824,497 + 26,314 + 102,736 + 73,281)] = \$350,101$.

VII. SWBT HAS FAILED TO SATISFY THE PUBLIC INTEREST ANALYSIS

A. Section 271(d)(3)(C)

The public interest analysis contained in Section 271(d)(3)(C) of the Telecom Act is an independent element of the 14-point checklist.⁹¹ SWBT has argued otherwise, indicating that compliance with the 14-point checklist alone is all that is necessary for

⁹¹ FCC Texas Order ¶417; FCC New York Order ¶423.

approval of its application. “The public interest is truly that, the public interest, and it should not be used as a means to add to the 14-point checklist.”⁹² To the extent SWBT is arguing that the MPSC or the FCC should not consider relevant factors outside the checklist, SWBT clearly then has misinterpreted the FCC’s ruling in this regard. As indicated by the FCC:

The public interest analysis is an independent element of the statutory checklist and, under normal canons of statutory construction, requires an independent determination. Thus, we view the public interest requirement as an opportunity to review the circumstances presented by the application to ensure that no other relevant factors exist that would frustrate the congressional intent that markets be open, as required by the competitive checklist, and that entry will therefore serve the public interest as congress expected. Among other things we may review the local and long distance markets to ensure that there are not unusual circumstances that would make entry contrary to the public interest under the particular circumstances of this application. Another factor that could be relevant to our analysis is whether we have sufficient assurance that markets will remain open after grant of the application.⁹³

Thus, the FCC could find that SWBT had satisfied each and every item on the 14-point checklist and still deny SWBT’s renewed application if the public interest analysis requirements are not met.⁹⁴ The FCC has indicated that all relevant factors are to be

⁹² MPSC Case No. TO-99-227, Transcript of Proceedings, p. 2496. (SWBT Witness Hughes)

⁹³ FCC Texas Order ¶416; FCC New York Order ¶423.

⁹⁴ In addition to the language contained in the FCC’s New York and Texas Orders concerning the public interest analysis the FCC has also indicated that “although the competitive checklist prescribes certain, minimum access and interconnection requirements necessary to open the local exchange to competition, we believe that compliance with the checklist will not necessarily assure that all barriers to entry to the local telecommunications market have been eliminated, or that a BOC will continue to cooperate with new entrance after receiving in-region, interLATA authority.” Application of *Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, To Provide In-Region, InterLATA Services in Michigan*, Memorandum Opinion and Order, 12 FCC Rcd. 20542, ¶30 (1997) (“FCC Michigan Order”).

considered in the public interest analysis and has indicated a number of factors as being probative. These factors include: performance monitoring with self executing enforcement mechanisms to ensure compliance, optional payment plans for new entrant CLECs for the payment of non-recurring charges to lessen unreasonably high up-front costs, whether all pro-competitive entry strategies are available to new entrants in different geographic regions in different scales of operation, and whether such strategies are available to other requesting carriers upon the same rates terms and conditions, state and local laws that impact on competition, and the existence of discriminatory or anticompetitive conduct on the part of the RBOC.⁹⁵

The record of this case reflects that it is not in the public interest, for a variety of reasons, to recommend that SWBT be granted interLATA authority.

B. SWBT's Refusal to Recognize CLECs as MCA Participants

SWBT's conduct concerning the MCA plan demonstrates a high degree of discriminatory and anticompetitive behavior. SWBT unilaterally and without warning to CLECs began programming its switches to screen CLEC MCA NXX prefixes such that CLEC MCA customers were not treated like participants in the MCA plan. SWBT engaged in this behavior despite the fact that numerous previous MPSC orders recognized CLECs as MCA plan participants. SWBT engaged in this behavior despite the fact that it, itself, had recognized CLECs as participants in the MCA plan with respect to resold services, UNE-P services, and ported numbers. SWBT refused for months to negotiate a solution for CLECs, and resisted every effort the CLECs made to obtain expedited relief from the MPSC. When it did finally come to the table, SWBT attempted to circumvent the MPSC's authority and impose an improper 2.6 cent MCA surcharge on CLECs which also violated several provisions of the Telecom Act. Additionally, as a condition for CLEC participation in the MCA, SWBT overrode existing interconnection agreements

⁹⁵ FCC Michigan Order ¶387, 391, and 393-397.

proving for bill-and-keep intercompany compensation and imposed reciprocal compensation. SWBT's willingness to act unilaterally and circumvent the Commission's authority in such blatant violation of the Telecom Act creates a very uncertain competitive environment for Missouri CLECs.

C. Competitive Environment in Missouri

As a result of SWBT's MCA conduct CLECs are left to wonder as to when the next MCA-like shoe will drop, i.e., when will SWBT next decide to unilaterally circumvent the MPSC's authority and/or engage in conduct in violation of the Telecom Act. SWBT's anticompetitive conduct creates uncertainty for CLECs attempting to compete in Missouri. Uncertainty is also caused by the regulatory environment in Missouri as well.

D. Regulatory Relief

There appears to be two different time tracts for obtaining relief from the Missouri PSC: one for SWBT and another for CLECs. Recent proceedings before the Commission demonstrate this disparity.

In case TO-99-483 (the (MCA case) the Commission did not provide a hearing date until a year had expired from the date the case was commenced, and for over 2 years after the MPSC was first made aware (in MPSC Case No. TO-98-379) of the existence of competitive issues concerning the MCA affecting CLECs. Attempts made by the CLECs to obtain expedited relief in order to gain at least interim access to the MCA plan was rejected by the MPSC. In sharp contrast, in Case No. TC-2001-20, in a case where SWBT was on the opposite end of a call blocking situation, similar to the one it created for CLECs in the MCA, SWBT obtained a hearing and order from the MPSC within 3 and 7 days, respectively, from the date it filed its complaint. Furthermore, even though TC-2001-20 centered on whether SWBT would be directed to block certain CLEC traffic,

McLeodUSA did not receive notice from the MPSC of the hearing until after the hearing was held.⁹⁶

Additionally, the Commission granted SWBT's request for an expedited schedule in Case no. TO-99-227, over the objection of CLECs, Staff, and Office of the Public Counsel, at a time when the Commission had not yet issued its Report and Order in the MCA case.

As previously discussed, the Missouri PSC has had the TELRIC docket submitted for a decision since January 1999. Obviously, it is extremely difficult to make business decisions on investing in a state if the underlying UNE cost is unknown. This delay is intolerable and again evidences the Missouri PSC's indifference for promoting development of UNE-based competition in Missouri.

CLECs must be able to obtain timely relief under the same time frames as SWBT regarding competitive issues, or the ability of CLECs to compete in Missouri is greatly restricted.

E. Disparate Treatment Of CLECs Regarding Municipal Rights Of Way

Although SWBT is not required to obtain telecommunications franchises before installing or operating its facilities in the public rights of way McLeodUSA and other CLECs are. McLeodUSA has been the victim of onerous franchise requirements imposed by Missouri municipalities. McLeodUSA has often been charged excessive franchise fees that have no relationship to the municipality's costs of maintaining the right of way, and has often experienced unreasonable and costly delays in obtaining a franchise. Since such onerous requirements are not imposed on SWBT by Missouri municipalities, local governments are not managing their rights of way on a competitively neutral basis in violation of Section 253(c).

⁹⁶ MPSC Case No. TO-99-227, Transcript of Proceedings, p. 2924.

The November Q&A Session highlighted the degree to which onerous franchise requirements and charges imposed by some municipalities create barriers for CLECs wishing to serve Missouri markets. SWBT attempted to downplay the competitive affect of such barriers, by suggesting that SWBT, itself, is not treated much differently than CLECs with respect to obtaining municipal rights-of-way.⁹⁷ SWBT does admit, however, that it believes it is exempt from the requirement of obtaining a franchise from each municipality.⁹⁸ Indeed, SWBT routinely notifies Missouri municipalities that it obtained statewide franchise from the Missouri Secretary of State in 1882 that exempts it from onerous franchise charges and terms which many Missouri municipalities seek to impose on other carriers.

Although SWBT may not be the direct cause of the disparate treatment of CLECs by Missouri municipalities, the fact remains, however, that SWBT routinely and affirmatively seeks disparate treatment from Missouri municipalities and is, in fact, the beneficiary of such disparate treatment. The fact also remains that such disparate treatment by many Missouri municipalities constitutes a violation of Section 253 of the Telecom Act, and creates adverse competitive conditions for CLECs which do not exist for SWBT.

Although not directly part of the fourteen-point checklist, disparate treatment of CLECs regarding municipal rights-of-way relates very directly and significantly to the public interest analysis set forth in Section 271 of the Telecom Act. Clearly Missouri markets can not be said to be open nor guaranteed to remain open if CLECs are effectively barred from offering service in various Missouri municipalities as the result of onerous franchise requirements and charges.

⁹⁷ *Id.* at pp. 2766-68.

⁹⁸ *Id.*

It has been McLeodUSA's experience and the experience of other CLECs⁹⁹ that franchise requirements and charges imposed by many municipalities constitute a barrier to entry for CLECs wishing to do business in Missouri markets. McLeodUSA has experienced indefinite delays and/or onerous charges to obtain and keep franchises for municipal rights-of-way from Missouri municipalities. Such conditions make serving such municipalities virtually impossible. As a result of onerous franchise requirements, McLeodUSA has been forced to completely circumvent some Missouri municipalities.

F. SWBT's Anti-Competitive Conduct Was Intended To Restrict CLECs From Offering Facilities-Based Service In Missouri Until SWBT Was Ready To Obtain 271 Approval

The MPSC Staff indicated that it is "extremely disappointed...that no residential customers are being served over unbundled network elements," and that the level of local competition occurring in Missouri is disappointing.¹⁰⁰ There is little wonder as to the cause of Staff's disappointment. SWBT has systematically engaged in a pattern of anti-competitive conduct in Missouri that has precluded meaningful facilities-based service competition from developing. This is a fact that SWBT does not dispute. Indeed, SWBT's conduct and its testimony in this proceeding demonstrate that it intended to keep competitive local exchange carriers ("CLECs") from engaging in facilities-based competition until it received approval to provide in-region, interLATA service. SWBT refused to recognize CLEC facilities-based customers as MCA participants even though it recognized CLEC resale, UNE-P and ported customers as MCA participants. SWBT refused to negotiate a good faith solution to its screening of CLEC MCA NXX codes, and resisted every effort of the CLECs to obtain access to the MCA via interim relief in the MCA docket (Case No. TO-99-483). SWBT imposes excessive rates and

⁹⁹ *Id.* at pp. 2773-75

¹⁰⁰ MPSC Case No. TO-99-227, *Staff Response to October Q & A Session* filed October 26, 2000, Affidavit of William Voight, par. 24.

anti-competitive terms for provisioning of UNEs and collocation services, and has resisted every effort of the CLECs to require it to file a collocation tariff until just recently and, then, only as a result of events in this proceeding.

At the Q&A Session, however, SWBT essentially promised to clean up its act – *but only on the condition of a favorable recommendation from the Commission re 271 approval!* SWBT witness Thomas Hughes highlighted the fact that SWBT had not at the time of the hearing in TO-99-227 satisfied the Competitive Checklist, by indicating that if the M2A is approved, SWBT would then be in compliance with the Competitive Checklist. (SWBT, Hughes, Tr. 2314). SWBT witness Becky Sparks confirmed that the availability of the M2A (and, thus, SWBT’s compliance with the Competitive Checklist) is conditioned on a favorable recommendation from the Commission on SWBT’s 271 application. (SWBT, Sparks, Tr. 2597). This testimony, together with SWBT’s above-noted history of creating barriers to CLEC facilities-based competition, leads to the inescapable conclusion that SWBT intended to delay and block CLEC efforts to provide facilities-based services in Missouri until it was granted authority to provide interLATA services in Missouri. This conduct has been very harmful to CLECs operating in Missouri, as the ability to offer facilities-based services is crucial.

G. Impact of SWBT’s Anti-Competitive Conduct

The ability of CLECs to provide facilities-based services in a particular market is essential to the analysis of whether such market is truly open to competition and as to whether such market will remain open. Absent an entire lack of competition in its markets, the next best alternative for SWBT is for its competitors to provide resale services, instead of facilities-based services. This is better for SWBT financially, since competitors must purchase service from SWBT with only a thin margin, if any. It is also better for SWBT competitively, since CLECs are forced to sell the same products and services offered by SWBT, with only a very limited ability to offer competitive choices to customers. Conversely, a CLEC providing facilities-based services has much better

margins and is able to offer its customers significantly greater choices of products and services. It is virtually axiomatic that the resale of an incumbent local exchange carrier's (ILEC) services, though a means to market entry, is not a viable long term business option for CLECs. SWBT understands this. By blocking or delaying the ability of CLECs to provide facilities-based services, SWBT undermines the viability of the entire CLEC industry to compete in its markets.

VIII. THE CONSULTANT REPORT OF ERNST AND YOUNG IS NOT AN ADEQUATE BASIS FOR RECOMMENDING 271 APPROVAL

The Ernst and Young Interim Report raises numerous questions about SWBT's performance and indicates that SWBT's performance measures system has failed to portray accurately the actual experience of CLECs in Missouri. The report also indicates that significant and material problems exist with respect to SWBT's meeting of key performance measures. The report also indicates that far too many assumptions have been made for Missouri CLECs based upon Texas information. The Report lacks sufficient information to enable parties to understand how Ernst and Young arrived at its conclusions. It is virtually impossible for parties other than Southwestern Bell to be able to look at how Ernst and Young got from the procedures they say they executed to their ultimate conclusion. Transcript of Proceedings Case No. TO-99-227, pp. 2737-38, 2761, 2762.

The Ernst and Young Report indicates that SWBT's performance measures system has failed to portray accurately the actual real world experience of CLECs in Missouri and identifies significant and material problems with respect to SWBT's meeting of key performance measures. Furthermore, the Report relies too heavily on SWBT's experiences in Texas. SWBT's performance measures and OSS should be tested more specifically and extensively in Missouri after SWBT has established a track

record of operating under an interconnection agreement that complies with applicable laws and regulations.

IX. CONCLUSION

As this Commission has indicated that Bell Operating Companies “hold the keys of their success with respect to Section 271 approval in their own hands.”¹⁰¹ McLeodUSA respectively submits that if SWBT would not have spent the better part of the last two years attempting to prevent CLECs from offering facilities-based services in MCA markets and in resisting (up until only very recently) the efforts of CLECs to require SWBT to file a collocation tariff, SWBT would likely have a much better, if not the requisite, record for obtaining Section 271 approval. SWBT’s conduct toward CLECs has prevented CLECs from obtaining the requisite adequate knowledge of SWBT’s OSS systems and loop provisioning abilities. Furthermore, SWBT’s anti-competitive conduct is not in the public interest and should not be rewarded with 271 approval.

¹⁰¹ Staff Response to Second Q&A Session p. 32, “Application of Bell South Corporation et al for provision of in-region, inter-LATA services in Louisiana”, cc Docket No. 98-121, FCC 98-271, Memorandum Opinion and Order, 13 F.C.R. 2059 (October 13, 1998) (Second Bell South Louisiana Order), p.9.

For the reasons stated above McLeodUSA respectfully requests that the Commission deny SWBT's Application or, in the alternative, that the Commission withhold approval of SWBT's Application until SWBT is in compliance with the Competitive Checklist and is able to demonstrate that its provision of interLATA service is in accordance with the public interest.

Respectfully submitted,

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ATTORNEY FOR MCLEODUSA
TELECOMMUNICATIONS SERVICES, INC.

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C.**

In the Matter of)
)
Application by SBC Communications, Inc.,)
Southwestern Bell Telephone Company, and)
Southwestern Bell Communications Services, Inc.)
d/b/a Southwestern Bell Long Distance for)
Provision of In-Region, InterLATA Services in)
Missouri)

CC Docket No. 01-88

AFFIDAVIT OF FRANK E. SCHWARTZ

STATE OF IOWA)
) ss
COUNTY OF)

Frank E. Schwartz, being first duly sworn on oath, deposes and states as follows:

1. I am over 18 years of age and I am personally familiar with the facts and circumstances stated herein and I am competent to testify thereto as a witness.
2. I am employed by McLeodUSA as Senior Manager, Service Delivery and am responsible for overseeing orders submitted to Southwestern Bell Telephone Company ("SWBT") for processing.
3. The purpose of this Affidavit is to discuss the significant problems that McLeodUSA continues to experience with SWBT's operational support systems that McLeodUSA must use to submit orders to provide service to McLeodUSA's end user customers.
4. Based on my experience, I believe approximately 15-20% of McLeodUSA orders submitted to SBC that are accepted through its automated LEX system are manually rejected by SBC's order writers without a valid reason. When McLeodUSA

has sought additional information to explain these manual rejections, SBC personnel have been extremely uncooperative toward McLeodUSA.

5. For those orders rejected by SBC without adequate explanation, McLeodUSA typically has to make several additional unsuccessful attempts at submitting the order to SBC until the order is finally permitted to be escalated to an SBC manager. My experience is that the SBC manager typically accepts the order as first submitted by McLeodUSA, but not before McLeodUSA has experienced much delay and frustration in submitting the order.

6. Additionally, many orders submitted correctly to SBC by McLeodUSA are incorrectly entered by SBC order writers. I believe this type of error occurs on approximately 15-20% of all orders submitted by McLeodUSA for basic business (1FB) and UNE-P platform orders.

7. The impact of the poor order processing performance to McLeodUSA and its customers is harmful. McLeodUSA's customers experience significant service impacting issues such as loss of features, loss of long distance access, along with the resulting delays occasioned by SBC requiring McLeodUSA to resubmit the order.

8. SBC also routinely fails to properly execute supplemental change order dates. These types of orders are submitted when a new McLeodUSA customer seeks to change the initial cut-over date set unilaterally by SBC to a new date. In these instances, SBC fails to recognize the change order and proceeds to process the disconnect order on the original cut-over date, which causes loss of dial tone, immense customer confusion and frustration for McLeodUSA's new customer. This problem happens on approximately 90% of all supplemental change order dates and causes huge competitive problems for McLeodUSA, as its new customer typically perceives this as a problem caused by McLeodUSA, when in fact it is solely the fault of SBC.

9. SBC consistently provisions service to its own new customers faster than it provisions service for McLeodUSA's new customers. This results in new customer losses of at least ten (10) percent in its Missouri markets.

10. SBC is currently rejecting all orders from McLeodUSA for UNE-P service for McLeodUSA's MCA customers. Prior to this blanket rejection policy, any McLeodUSA customers who selected MCA service in the optional tiers and who were provisioned service via UNE-P, automatically lost MCA service and had to have service re-ordered via resale. SBC has not provided an explanation for why this is occurring, and has not otherwise corrected the problem. SBC's order system is rejecting all orders for UNE-P submitted by McLeodUSA on which an MCA option is indicated. The error message provided by SBC's system to McLeodUSA indicates that an invalid feature request has been submitted. Information provided by SBC's toolbar system lists available features for one FB resale and UNE-P. However, when this database is accessed with an MCA prefix the system indicates that the MCA feature is available for resale but not for UNE-P.

FURTHER AFFIANT SAYETH NOT.

/s/ Frank E. Schwartz
FRANK E. SCHWARTZ

SUBSCRIBED AND SWORN TO before me on this 24th day of April, 2001.

Notary Public for Iowa
Residing at Linn County
My Commission Expires _____

CERTIFICATE OF SERVICE

I, Deborah A. Walker, hereby certify that on April 25, 2001, I caused to be served upon the following individuals the Comments of McLeodUSA in CC Docket No. 01-88:

BY COURIER:

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