

TABLE OF CONTENTS

	<u>PAGE</u>
EXECUTIVE SUMMARY	1
ARGUMENT	6
I. BACKGROUND.....	6
A. List of Issues	6
B. Winback and Win Tariffs.....	7
C. SWBT’s Proposed Residential NRC Waiver Promotion and Previously Approved NRC Waiver Promotions	8
D. SWBT’s Proposed Business Winback and Win NRC Waiver Promotion and Previously Approved Winback and Win NRC Waiver Promotions.....	10
II. SWBT’S PROPOSED TARIFFS ARE IN THE PUBLIC INTEREST	11
A. SWBT’s Tariffs Benefit Customers Through Lower Prices and Increased Options.....	11
B. SWBT’s Proposed Winback Tariffs Are In The Public Interest Because They Are A Form of Price Competition and Promote Competitive Intensity.....	13
III. SWBT’S PROPOSED WINBACK AND WIN NRC WAIVER PROMOTIONS ARE NOT DISCRIMINATORY.....	14
A. The Proposed Tariffs Are Consistent With Sections 392.200.2 and 392.200.3, RSMo. 2000	14
B. SWBT Is Not Seeking Approval Of Its Winback And Win NRC Waiver Promotions Pursuant To Section 392.200.4.....	15
C. The Commission’s Prior Approval Of Tariffs Demonstrates That The Proposed NRC Waivers Are Not Discriminatory	16
D. Actions In Competitive Markets Demonstrate That SWBT’s Proposed Tariffs Are Not Discriminatory.....	19

E.	If the Commission Determines That Winback Tariffs Are Discriminatory Such A Finding Must Be Applied Equally To All Telecommunications Providers.	22
F.	Winback Tariffs Are Permissible Under Federal Law Which Contains Similar Non-Discrimination Provisions.....	23
IV.	SWBT’S PROPOSED TARIFFS ARE NOT ANTI-COMPETITIVE.....	24
A.	No Party Has Presented Any Credible Evidence That The Competitive Marketplace Will Be Harmed By SWBT’s Proposed Winback Tariffs	24
B.	SWBT’s Proposed Tariffs Are Not Predatory	25
C.	The FCC Has Rejected Claims That Winback Tariffs Are Anti-Competitive	31
D.	Increased Competition When Prior Winback Tariffs Were In Effect Demonstrate The Proposed Tariffs Are Not Anti-Competitive.....	32
	CONCLUSION.....	40

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

In the Matter of Southwestern Bell Telephone)	Case No. TT-2002-472
Company's Tariff Filing to Initiate Residential)	Tariff No. 200200831
Customer Winback Promotion)	

In the Matter of Southwestern Bell Telephone)	Case No. TT-2002-473
Company's Tariff Filing to Initiate Business)	Tariff No. 200200828
Customer Winback Promotion)	

**SOUTHWESTERN BELL TELEPHONE, L.P.,
d/b/a SOUTHWESTERN BELL TELEPHONE COMPANY'S
INITIAL BRIEF**

EXECUTIVE SUMMARY

Southwestern Bell Telephone, L.P., d/b/a Southwestern Bell Company ("SWBT") has proposed tariffs to waive non-recurring charges ("NRC") for residential and business customers who seek to return to Southwestern Bell for local service after having received service from a competitive local exchange carrier ("CLEC").¹ Opponents of the tariffs contend they are anti-competitive and discriminatory, but neither allegation withstands scrutiny. To the contrary, the proposed tariffs are lawful, pro-consumer and pro-competitive. Accordingly, the Missouri Public Service Commission ("Commission") should approve them.

The parties that contend that the tariffs are anti-competitive have failed to produce any credible evidence to support this contention. These parties gloss over or ignore the most critical fact in this proceeding -- waivers of NRC for residential and business customers seeking to return to SWBT after receiving local service from a CLEC have been previously implemented without any "anti-competitive" effect. A tariff which waived NRC for residential winback customers was previously approved and in effect from August 4, 2000, through December 31,

¹ The business tariffs also propose to waive the NRCs for customers served by a CLEC even if the customer had not previously received local service from SWBT. T. 253, Regan.

2001, while a business winback tariff with a waiver of NRC was previously approved and in effect from April 9, 2001, through April 8, 2002.² Despite this, no party produced any evidence of any adverse impact on competition during the 20 months that these tariffs were in effect. During this same time period, the Commission determined the Missouri local markets are open to competition in Case No. TO-99-227,³ a finding that that Federal Communications Commission ("FCC") confirmed. SWBT, on the other hand, presented substantial evidence showing that competition continued to grow at a dramatic rate during the pendency of these prior tariffs. CLEC access lines increased from a minimum of 180,000 lines to a minimum of 332,000 lines, almost doubling.⁴ SWBT experienced a significant decline of almost 180,000 lines during this same period, a six percent loss.⁵ When CLECs are experiencing a dramatic growth in access lines and SWBT is experiencing a significant decrease, any claim that a similar tariff will have an "anti-competitive" impact is demonstrably false. The Commission should soundly reject the CLECs' unwarranted and unsupported demands for regulatory protection in the marketplace.

The FCC has previously reviewed the propriety of winback offers and has determined that such offers are pro-competitive. In CC Docket No. 96-115, et al., the FCC noted that "winback restrictions may deprive customers of the benefits of a competitive market" and "winback facilitates direct competition on price and other terms, for example, by encouraging carriers to outbid each other for a customer's business, enabling the customer to select the carrier that best suits the customer's needs."⁶ The FCC is correct -- winback offers are consistent with a competitive market and do benefit consumers.

² Ex. 4, Hughes D., pp. 4-5.

³ Id. at p. 10.

⁴ Ex. 4, Hughes D., p. 7.

⁵ Id. at pp. 6-7.

⁶ Order on Reconsideration and Petition for Forbearance, In the Matter of the Implementation of the Telecommunications Act of 1996, et al., CC Docket No. 96-115, et al., paragraph 68 ("FCC Winback Order").

Opponents of SWBT's proposed tariffs also refuse to employ any recognized legal or economic definition of the term "anti-competitive." While there is a wealth of economic and legal analysis concerning what actions can be termed "anti-competitive" in the antitrust arena, these opponents carefully avoid these recognized definitions precisely because these tariffs are not anti-competitive in any recognized legal or economic sense. The FCC expressly noted that winback campaigns will not be rejected absent the showing that they are truly predatory.⁷ No party has demonstrated that any prong of the test to determine predation has been met, as there has been no showing that (1) SWBT fails to recover its costs through revenues received from the bundle of services provided to customers taking advantage of the promotion, (2) SWBT could drive all competitors out of the market; or (3) that SWBT could keep competition out while raising its rates above the competitive level to recoup its losses.⁸ As the U.S. Supreme Court has noted, predation is rarely tried and even more rarely achieved precisely because of the nearly insurmountable hurdles to successfully implementing such a scheme.⁹ In a market as heavily regulated as the local exchange market, where competitors have guaranteed access to the incumbent's network elements and services at rates controlled by the Commission and where price caps effectively preclude recoupment, such a strategy could not be achieved and would not be attempted.

⁷ Id. at para. 70.

⁸ Ex. 1, Aron S., pp. 14-18.

⁹ Id. at pp. 15-16.

Only Staff proposes a definition of “anticompetitive” conduct, but its proposal is deficient.¹⁰ While Staff claims the Commission should proscribe any conduct that “may possibly discourage competition,” that “definition” finds no support in any recognized economic or legal literature.¹¹ There are no guidelines or principles to apply such an amorphous standard, and it is clear that such a standard would simply be used to arbitrarily approve or reject tariffs. The Commission has not been given authority to prohibit tariffs on the basis of such a standard, and it should not accept Staff’s proposal. But even if the Commission were inclined to accept Staff’s proposed “definition,” these tariffs should nonetheless be approved. The fact that competition continued to flourish during the period that similar tariffs were in effect conclusively establishes that competition was not “discouraged,” whatever that term might mean.

The second major claim with regard to these tariffs is that they are discriminatory in violation of Section 392.200 RSMo. 2000. These contentions are equally erroneous. Section 392.200.2 RSMo. 2000 provides that a telecommunications company should charge the same amount for providing a like and contemporaneous service under substantially the same circumstances and conditions. Section 392.200.3 RSMo. 2000 provides that a telecommunications company shall not give an undue or unreasonable preference or advantage or subject any person to an undue or unreasonable prejudice or disadvantage. In assessing

¹⁰ At the hearing, AT&T offered a non-specific definition of anti-competitive, i.e. "a business activity that is or might be harmful to competition in general, with the intended effect of creating or preserving market power" (T. 632, Kohly), that, like Staff's proposal, is not based in any legal or economics principles and lacks any clear guidelines. At the hearing, the Office of the Public Counsel witness Barbara Meisenheimer also offered a non-specific definition of anti-competitive, i.e. "behavior or acts can be considered to be anti-competitive if they meaningfully reduce the level of existing or potential competition in the relevant market, and that specifically, with respect to telecommunications in Missouri, I think that you can further direct that -- the application of that definition toward things -- it would be anti-competitive if it is inconsistent with the Telecommunications Act and other provisions of the federal law and with Missouri statutes" (T. 555-556, Meisenheimer). That definition suffers from the same infirmities as Staff's proposal. But even if accepted, the tariffs should be approved as they are clearly not inconsistent with federal or Missouri law.

¹¹ Ex. 1, Aron S., p. 10.

whether a particular tariff proposal violates either of these sections, the Commission should look to actions in competitive markets for guidance. In competitive markets, winback proposals are very common. Automobile manufacturers, for example, offer special discounts to customers who previously purchased one of their cars, while magazine publishers routinely offer special prices to former subscribers. It is not unusual for customers to pay different amounts for similar services, as discounts are routinely offered to senior citizens and to students by movie theaters, restaurants and airlines. The telecommunications market is no different. Long distance carriers routinely make special offers to former long distance customers to return for service. The FCC has noted with approval that winback tariffs facilitate direct competition by encouraging carriers to “out-bid” each other for a customer’s business.¹² It is simply not an undue or unreasonable preference to offer to waive NRC for returning customers, nor are those returning customers provided service under the same circumstances or conditions. These types of offers are expected in a competitive market and serve to encourage other carriers to develop more competitive prices and offers. Moreover, the existence of such promotions enhances a customer’s incentive to try the service of a CLEC, knowing that a return to SWBT without incurring NRCs is available.

In determining whether these tariffs are permissible under Missouri law, the Commission should also consider that winback offers are clearly permissible under federal law and that federal law is substantially the same as Missouri law with regard to anti-discrimination provisions. 47 U.S.C. Section 202(a) contains prohibitions against unjust or unreasonable discrimination through giving of an undue or unreasonable preference or advantage or subjecting any person to undue or unreasonable prejudice or disadvantage. This language is remarkably similar to Section 392.200.3 RSMo. 2000. Just as the FCC has appropriately interpreted federal law to permit such offers, so should this Commission approve winback offers under state law.

¹² FCC Winback Order, para. 68.

If, however, the Commission disagrees with SWBT's analysis, it is absolutely clear that it cannot have different rules for incumbent local exchange carriers ("ILECs") than exist for CLECs or interexchange carriers ("IXCs"). The statutory provisions of Sections 392.200.2 and 392.200.3 RSMo. 2000 apply to all telecommunications companies. Pursuant to Sections 392.361(5) and 392.390(5), the provisions of Section 392.200.2 and 392.200.3 cannot be waived for a competitive company. Moreover, Section 392.380.2 also provides that the provisions of Section 392.200 must be applied fully and equally to all telecommunications companies. There is simply no room for debate on this issue, and if the Commission determines that these tariffs are unlawful it may not approve winback tariffs for any telecommunications company.

The regulatory process should be designed to maximize customer benefits in a competitive market. When parties are opposing tariffs that have previously been in effect without adverse consequences, the Commission should consider these objections with skepticism. The regulatory process is not designed to protect CLECs from competition or to allocate customers or market share to CLECs. The Commission should make clear that winback offers such as proposed here are beneficial to customers and encourage carriers to compete. The tariffs should be approved as they are in the public interest and comply with the statutes.

ARGUMENT

I. Background

A. List of Issues

The Commission adopted two issues for the purpose of this case:

1. Should the Commission approve SWBT's proposed revision to Local Exchange Tariff, P.S.C. Mo.-24, to offer a waiver of Service and Equipment Charges to residential customers who have disconnected their access lines with SWBT for the purpose of establishing service with another local exchange carrier ("LEC") within the SWBT service area and who now wish to return to service with SWBT?

and

2. Should the Commission approve proposed revisions to Local Exchange Tariff P.S.C. Mo.-24, Sections 2 and 3 of the Integrated Services Tariff P.S.C. Mo.-41, and Section 38 of the General Exchange Tariff P.S.C. Mo.-35 to offer a waiver of Service and Equipment Charges to business customers who have disconnected their access line with SWBT for the purpose of establishing service with another LEC within the SWBT service area and who now wish to return service with SWBT?¹³

At the outset, SWBT notes that the primary reasons that the Commission should approve SWBT's proposed tariff revisions are because they are in the public interest and are consistent with Missouri statutes. Since SWBT's proposed tariff revisions to (1) its Local Exchange Tariff, P.S.C., Mo.-24, (2) Sections 2 and 3 of its Integrated Services Tariff P.S.C. Mo.-41, and (3) Section 38 of its General Exchange Tariff P.S.C. Mo.-35, each offer a waiver of the NRC to residential or business customers returning to SWBT,¹⁴ for purposes of SWBT's Initial Brief, SWBT will address Issue Numbers 1 and 2 simultaneously.

B. Winback And Win Tariffs

A winback tariff is one that proposes special rates or terms for a customer who has left one competing provider (e.g. SWBT) to receive service from a different competing provider (e.g. a CLEC) to incent that customer to return to the original provider (e.g. SWBT) for local service.¹⁵ A win tariff is one that proposes special rates or terms for a customer who has never established service with that provider (e.g. SWBT) but has established service with another competing provider (e.g. a CLEC) to incent that customer to obtain service from the first-mentioned competing provider (e.g. SWBT).¹⁶ SWBT witness John Regan explained the

¹³ Order Regarding List of Issues, Case Nos. TT-2002-472 and TT-2002-473, September 22, 2002.

¹⁴ The business tariff also applies to new SWBT customers formerly served by a CLEC. T. 253, Regan.

¹⁵ Ex. 4, Hughes D., p. 3.

¹⁶ T. 253, Regan.

difference between winback and win offers during questions propounded by Commissioners Lumpe and Gaw.¹⁷

Firms market winback and win offers to attract customers by making the customer aware of a service or pricing package that is responsive to the competitor's offers and the customer's needs.¹⁸ Firms provide winback and win pricing to convey to customers the firm's willingness to compete for their business in a way that is responsive to their competition.¹⁹ While the objectives of winback and win offers are clearly counter to the interests of *competitors*, they are neither anticompetitive nor antithetical to consumer welfare.²⁰ To the contrary, they are the very epitome of competition and are beneficial to consumers.²¹

C. SWBT's Proposed Residential NRC Waiver Promotion And Previously Approved NRC Waiver Promotions.

SWBT's residential tariff proposes to waive the NRC associated with establishing local service for those residential customers who elect to return to SWBT after having been with another LEC.²² SWBT's proposed tariff also provides additional benefits to those residential customers by waiving the NRCs associated with SWBT's more popular packages (e.g. the SBC Advantagesm, Essentialssm, BASICSsm, or WORKS® packages) of vertical services.²³ To qualify for the NRC waiver, the residential customer must not have (1) had service disconnected for non-payment, or (2) any past due bills for regulated service owed to SWBT.²⁴ SWBT proposed that its residential winback NRC waiver promotion would be offered for a period of approximately

¹⁷ T. 252-254, Regan.

¹⁸ Ex. 1, Aron S., p. 8.

¹⁹ Id.

²⁰ Id.

²¹ Id.

²² Ex. 2, Regan D., p. 3.

²³ Id.

²⁴ Id.

one-year, from April 9, 2002, through March 31, 2003.²⁵ If the Commission approves SWBT's tariffs, SWBT would refile this tariff and would request that it be in effect for approximately one year.²⁶

In both pre-filed testimony and during the hearing, there was some confusion with regard to the qualifications required for eligibility for the NRC waiver. SWBT witness John Regan clarified SWBT's credit policy as follows.²⁷ If a residence or business customer has an outstanding balance owed to SWBT, then the customer must either pay that outstanding balance or make acceptable payment arrangements before SWBT will offer to provide them new service.²⁸ Once a customer has paid their outstanding balance or made acceptable payment arrangements with SWBT, then SWBT will make the NRC waiver available.²⁹ Finally, even former customers that are considered a high credit risk are eligible for this winback promotion; however, they may require different terms and conditions in terms of deposits, etc.³⁰

SWBT's proposed residential winback NRC waiver promotion is similar to others previously approved by the Commission.³¹ Specifically, the Commission approved two residential winback NRC waiver promotions.³² This first winback NRC waiver promotion was in effect from August 4, 2000, through December 31, 2000.³³ The second residential winback

²⁵ Id.

²⁶ T. 297, Hughes.

²⁷ Ex. 3, Regan S., p. 9; T. 254-255, Regan.

²⁸ Ex. 3, Regan S., p. 9; T. 254-255 and 282, Regan. Staff witness Chris Thomas indicated that if SWBT modified its tariff language to reflect SWBT's position, Staff would not be concerned about the non-payment provisions. T. 505, Thomas.

²⁹ Ex. 3, Regan S., p. 9; T. 282, Regan.

³⁰ T. 257, Regan.

³¹ Ex. 4, Hughes D., p. 4.

³² Ex. 2, Regan D., p. 4; Ex. 4, Hughes D., p. 4.

³³ Ex. 4, Hughes D., p. 4.

NRC waiver promotion extended the first promotion until December 31, 2001.³⁴ The only difference between the tariff that is currently at issue and the prior residential winback NRC waiver promotions is that the current proposed tariff adds an additional benefit to customers.³⁵ Specifically, as previously stated, under the terms of the proposed tariff, SWBT will waive the NRC for designated vertical feature packages in addition to the previously offered waiver of the access line NRC.³⁶

D. SWBT's Proposed Business Winback And Win NRC Waiver Promotion And Previously Approved Winback And Win NRC Waiver Promotions.

SWBT's business tariff proposes to waive NRC for those business customers who (1) elect to return to SWBT after having established service with another local exchange carrier, or (2) seek to establish initial service with SWBT after having been served by a CLEC.³⁷ The business customer must not have (1) had service disconnected for non-payment, or (2) any past due bills for regulated service owed to SWBT.³⁸ SWBT proposed that the promotion would be offered for a period of one year, from April 9, 2002, to April 8, 2003.³⁹ If the Commission approves SWBT's tariffs, SWBT would refile this tariff and would request that it be in effect for approximately one year.⁴⁰

SWBT's proposed business winback and win NRC waiver promotion is similar to one previously approved by the Commission.⁴¹ Specifically, the Commission approved a winback

³⁴ Ex. 4, Hughes D., p. 4; Schedule 5, attached to Ex. 4, Hughes D.

³⁵ Ex. 2, Regan D., p. 4.

³⁶ Ex. 2, Regan D., p. 4; Ex. 4, Hughes D., p. 5.

³⁷ Ex. 2, Regan D., pp. 3-4; T. 253, Regan.

³⁸ Ex. 2, Regan D., p. 4. As with SWBT's residential winback NRC waiver promotion, if the business customer has an outstanding balance owed to SWBT, the customer must either pay the outstanding balance or make acceptable payment arrangements before SWBT will offer to provide them new service. Once a customer has paid the outstanding balance or made acceptable payment arrangements with SWBT, then SWBT will make the NRC promotion available. Ex. 3, Regan S., p. 9; T. 254-255 and 282, Regan.

³⁹ Id.

⁴⁰ T. 297, Hughes.

⁴¹ Ex. 4, Hughes D., p. 5.

and win NRC waiver promotion that was in effect from April 9, 2001, to April 8, 2002.⁴² SWBT's proposed winback and win NRC waiver promotion was designed, in part, to be an extension of the business winback and win tariff that expired on April 8, 2002.⁴³

Since the Commission approved SWBT's first residential winback tariff in 2000, the Commission has approved a dozen winback and/or win tariffs offered by SWBT.⁴⁴

II. SWBT's Proposed Tariffs Are In The Public Interest.

A. SWBT's Tariffs Benefit Customers Through Lower Prices and Increased Options

SWBT's proposed tariffs are in the public interest because they benefit customers through lower prices.⁴⁵ Specifically, SWBT's residential winback NRC waiver promotion proposes to waive the NRC when a customer returns to SWBT for local service after having been served by a CLEC.⁴⁶ SWBT's residential winback NRC waiver promotion also proposes to waive the NRC for designated vertical feature packages.⁴⁷ Additionally, SWBT's business winback and win NRC promotion propose to waive the NRC for customers establishing new service with SWBT or returning to SWBT, after having received services from a CLEC.⁴⁸

SWBT's proposed tariffs are also in the public interest because they benefit customers through increased options.⁴⁹ Many CLECs allow a customer to migrate to their local service without incurring NRC.⁵⁰ Customers expect to be able to return to SWBT for service without incurring an NRC.⁵¹ In some cases, customers who want to come back to SWBT for local

⁴² Id.

⁴³ Ex. 2, Regan D., p. 4; Ex. 4, Hughes D., p. 5; Schedule 5 attached to Ex. 4, Hughes D.

⁴⁴ Ex. 2, Regan D., p. 6; Ex. 4, Hughes D., p. 4; Schedule 4, attached to Ex. 4, Hughes D.

⁴⁵ Ex. 4, Hughes D., p. 2; Ex. 5, Hughes S., pp. 3-4.

⁴⁶ Ex. 4, Hughes S., p. 4.

⁴⁷ Ex. 2, Regan D., p. 3; Ex. 4, Hughes D., p. 5.

⁴⁸ T. 253, Regan.

⁴⁹ Ex. 2, Regan D., p. 10; Ex. 3, Regan S., p. 2; Ex. 4, Hughes D., p. 2.

⁵⁰ Ex. 5, Hughes S., p. 4.

⁵¹ Ex. 2, Regan D., pp. 2 and 7; Ex. 5, Hughes S., p. 4.

service have decided not to do so because they do not want to incur an NRC.⁵² When a customer seeks to re-establish service, SWBT is currently unable to offer any special promotion for the "winback" customer.⁵³ To the customer, SWBT appears to be unresponsive and non-sensitive to the competitive forces of the marketplace.⁵⁴ Customers expect companies to earn their business and do not fully understand the legal and regulatory issues surrounding SWBT tariff filings.⁵⁵

In a competitive marketplace such as the local telecommunications marketplace in Missouri, carriers will develop unique offerings and promotions (such as SWBT's proposed tariffs) in order to win customers in the marketplace.⁵⁶ The type of tariffs at issue in this proceeding benefit customers by allowing customers to freely move to another telecommunications provider and, if they are so inclined, to return to SWBT without incurring a NRC.⁵⁷ If customers are allowed to return to SWBT for local service without incurring a NRC, they have increased their options because they will be more likely to "try" service from a CLEC.⁵⁸

Further, SWBT's proposed business NRC waiver promotion benefits customers by allowing customers who have never established service with SWBT, but who have established service with a CLEC in SWBT's service territory, to establish service with SWBT.⁵⁹ If customers who have established service with a CLEC in SWBT's service territory are allowed to establish service with SWBT without incurring a NRC, they have increased their options because they will be more likely to "try" service from SWBT. As explained in Section B below, this

⁵² Ex. 2, Regan D., p. 8; T. 87-90, Regan.

⁵³ Ex. 2, Regan D., p. 8.

⁵⁴ Id.

⁵⁵ Id.

⁵⁶ Id.

⁵⁷ Id. at p. 10; Ex. 5, Hughes S., p. 4.

⁵⁸ Ex. 5, Hughes S., p. 5; T. 283-284, Regan; T. 306, Hughes.

⁵⁹ T. 253, Regan.

benefits competition, as such offers encourage carriers to out bid each other for a customer's business.

B. SWBT's Proposed Winback Tariffs Are In The Public Interest Because They Are A Form Of Price Competition And Promote Competitive Intensity.

SWBT's winback tariffs are in the public interest because they are a form of price competition.⁶⁰ Specifically, SWBT's winback offers encourage carriers to out bid each other for a customer's business.⁶¹ This leads to further price competition.⁶² Clearly, it is customers that ultimately benefit from this increased competitive activity.⁶³ Indeed, the Telecommunications Act of 1996 ("the Act") is based on the belief that market-driven price competition is a viable alternative to regulation and will benefit telecommunications consumers.⁶⁴

Price cutting is always detrimental to *competitors*, but only very rarely is it detrimental to *competition*.⁶⁵ Socially harmful price-cutting scenarios are very much the exception rather than the norm; while beneficial, pro-consumer and pro-competitive price-cutting is the norm rather than the exception.⁶⁶

SWBT's winback tariffs also promote competitive intensity because they increase the incentives for customers to leave SWBT to try a CLEC.⁶⁷ There are three reasons for this. First, just by leaving, customers make themselves eligible for more attractive offers from SWBT and, possibly, other carriers as well.⁶⁸ Second, by signaling their willingness to switch providers,

⁶⁰ Ex. 1, Aron S., p. 8; Ex. 2, Regan D., p. 9.

⁶¹ Ex. 2, Regan D., p. 9.

⁶² Id.

⁶³ Id. at p. 10.

⁶⁴ Ex. 1, Aron S., p. 8. The statutory objection is articulated in the preamble of the Telecommunications Act of 1996 as follows: "To promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies."

⁶⁵ Ex. 1, Aron S., p. 8.

⁶⁶ Id.

⁶⁷ Ex. 1, Aron D., p. 34; Ex. 5, Hughes S., p. 5.

⁶⁸ Ex. 1, Aron S., p. 34.

customers enhance their own bargaining power and attractiveness to carriers, who, in turn, will more aggressively pursue their business.⁶⁹ And third, a customer's perceived risk of leaving SWBT to try a new carrier is reduced if the customer knows he can return to SWBT without paying a non-recurring charge.⁷⁰ This encourages customers to "test the waters," to the benefit of the CLECs, and to the benefit of full, fair, and open competition.⁷¹ The ease by which a customer can move among local exchange providers improves competition; it does not stifle it.⁷²

III. SWBT's Proposed Winback And Win NRC Waiver Promotions Are Not Discriminatory.

A. The Proposed Tariffs Are Consistent With Sections 392.200.2 and 392.200.3, RSMo. 2000.

Approval of SWBT's proposed winback and win NRC waiver promotions is consistent with Missouri statutes. Specifically, SWBT's proposed tariffs comply with the Missouri statutes since SWBT proposes to offer the same discount to all similarly situated customers.⁷³ Here, a similarly situated winback customer represents a customer who has received local service from SWBT in the past, subsequently elected to receive local service from a CLEC, and is now voluntarily electing to return to SWBT for local service.⁷⁴ A similarly situated win customer represents a customer that never established service with SWBT, had obtained service from a CLEC in SWBT's service territory, and now desires to obtain service from SWBT.⁷⁵

SWBT seeks approval of its winback and win NRC waiver promotions pursuant to Sections 392.200.2 and 392.200.3. Section 392.200.2 provides that a tariff, which establishes uniform charges to similarly situated customers, is permissible.⁷⁶ Section 392.200.3 specifies

⁶⁹ Id.

⁷⁰ Id.

⁷¹ Id. Ex. 2, Regan D., 10.

⁷² Ex. 2, Regan D., p. 2.

⁷³ Ex. 4, Hughes D., p. 2; Ex. 5, Hughes S., p. 7-8.

⁷⁴ Ex. 5, Hughes S., p. 8.

⁷⁵ T. 253, Regan.

⁷⁶ Ex. 4, Hughes D., p. 2.

that only undue or unreasonable preferences are prohibited.⁷⁷ SWBT's proposed tariffs do not provide any undue or unreasonable preference.⁷⁸

The fact that SWBT's proposed tariffs comply with Missouri statutes is evident since, as discussed above, SWBT's proposed tariffs have either been previously approved by the Commission or substantially similar tariffs have been previously approved by the Commission.⁷⁹ When the Commission previously approved SWBT's winback and win tariffs, the Commission found those tariffs to be lawful and appropriate, pursuant to Section 392.200, and consistent with the policies and purposes of Chapter 392.⁸⁰ As the legislature expressed in Section 392.200.4(2), the intent of SB 507 is to bring the benefits of competition to all customers and to ensure that incumbent and alternative local exchange companies have the opportunity to price and market telecommunications services to prospective customers in any geographic area in which they compete.⁸¹

B. SWBT Is Not Seeking Approval Of Its Winback And Win NRC Waiver Promotions Pursuant To Section 392.200.4.

At the outset, SWBT notes that it is not seeking approval of its winback and win NRC waiver promotions pursuant to Section 392.200.4. Section 392.200.4 was added to the statute as part of SB 507.⁸² The provisions of Section 392.200.4 were designed to provide additional flexibility to telecommunications companies that may not have already existed under Section

⁷⁷ Id. at pp. 2-3.

⁷⁸ Id. at p. 3.

⁷⁹ See Ex. 4, Hughes Dir., p. 3; Ex. 5, Hughes S., p. 7. SWBT's proposed residential tariff is similar to the ones previously approved by the Commission. The only substantive difference between the residential tariff currently at issue and those previously approved by the Commission is that in addition to waiving the NRC, SWBT's current proposed residential tariff also allows returning customers to sign up for one of SWBT's selected vertical services packages without incurring any NRC for those services. SWBT's proposed business winback tariff is also similar to the one previously approved by the Commission. The substantive difference between SWBT's current tariff and the one previously approved by the Commission is that the two year term commitment required in the previous SmartTrunk and SuperTrunk Winback Nonrecurring Charge Waiver promotion was removed.

⁸⁰ Ex. 4, Hughes, D., p. 3; Ex. 5, Hughes S., p. 7.

⁸¹ Ex. 4, Hughes D. p 3; T. 289-290, Hughes.

⁸² T. 637, Kohly.

392.200.2 and 392.200.3. For example, Section 392.200.4(2)(a) provides for exchange-specific pricing.⁸³ This subsection specifically provides that it shall be presumed that exchange-specific pricing is reasonably necessary to promote the public interest and purposes and policies of Chapter 392.⁸⁴ Section 392.200.4 was added in SB 507 to make it clear that if a company wanted to offer a service like call waiting, for example, with a special price in the St. Louis market, it could do so.⁸⁵ Further, under Section 392.200.4(2)(b), the legislature granted LECs additional authority to propose price changes that would apply to an area smaller than a given exchange.⁸⁶

SWBT's winback tariffs are permissible under Section 392.200.2 and 392.200.3.⁸⁷ They are also permissible under Section 392.200.4, although the Commission does not need to decide that issue since SWBT's proposed winback tariffs are permissible under Sections 392.200.2 and 392.200.3 and the latter sections are those pursuant to which SWBT seeks approval of its tariffs.⁸⁸

C. The Commission's Prior Approval Of Tariffs Demonstrates That The Proposed NRC Waivers Are Not Discriminatory.

The Commission has approved other SWBT tariffs that allow SWBT to offer different services/prices to different classes of customers without finding the tariffs to be unlawfully discriminatory.⁸⁹ One example is the approval of tariffs that offer different prices to different classes of customers is in the residential arena versus the business arena.⁹⁰ While the service offered to the customers in the same exchange can be the same (e.g., the same calling scope), the

⁸³ T. 637-638, Kohly.

⁸⁴ T. 638, Kohly.

⁸⁵ T. 638-639, Kohly.

⁸⁶ T. 639, Kohly.

⁸⁷ Ex. 5, Hughes S., p. 7.

⁸⁸ Id.

⁸⁹ Id. at p. 8.

⁹⁰ Id.

price the customer pays for the service varies by the customer's "class of service."⁹¹ This is an example of the type of customer classifications that are permissible under Missouri statutes.⁹²

Not only has the Commission approved tariffs that allow SWBT to offer different services/prices to different classes of customers, it has allowed other LECs to do so as well. AT&T and WCOM have also proposed tariffs that seek to charge different rates to different customers.⁹³ In Case No. TT-2002-129, the Commission approved AT&T's Instate Access fee.⁹⁴ Pursuant to AT&T's tariff, AT&T charges \$1.95 to its long distance customers, but exempts those that are local customers of AT&T, are Lifeline subscribers, and those who have less than \$1.00 in toll billing in a month.⁹⁵ WCOM has proposed a similar tariff to charge a \$1.95 Instate Access Recovery Fee to its customers.⁹⁶

Since the Commission has approved AT&T's tariff, AT&T may impose its \$1.95 charge on all customers (except those specifically exempted) regardless of the level of toll calls the individual customer makes or the level of access charges AT&T incurs in providing toll service to the individual customer.⁹⁷ Nevertheless, the exemptions are limited to designated customer classes, including the customer group which has chosen AT&T to provide local service.⁹⁸ If AT&T's tariff does not unlawfully discriminate between classes of customers, then neither do SWBT's proposed tariffs.⁹⁹ Tariffs that establish reasonable classes of customers comply with Missouri statutes and are not unlawfully discriminatory.¹⁰⁰

⁹¹ Id.

⁹² Id.

⁹³ Id.

⁹⁴ Id.

⁹⁵ Ex. 5, Hughes S., p. 8; Hughes Schedule 2, attached to Ex. 5.

⁹⁶ Ex. 5, Hughes S., p. 8; Hughes Schedule 3, attached to Ex. 5.

⁹⁷ Ex. 5, Hughes S., p. 9.

⁹⁸ Id.

⁹⁹ Id.

¹⁰⁰ Id.

Certain CLECs appear to contend that any differences in prices must be based on differences in costs. No authority is cited for this radical interpretation of the statutes, and none exists. Cost differentiation is simply one of a number of factors that may be considered. SWBT notes that AT&T did not make any cost showing when it filed its Instate Access Fee Tariff that exempted certain groups of customers from the \$1.95 monthly fee.¹⁰¹ AT&T witness Mr. Matthew Kohly testified that AT&T did not present any cost support to justify waiving the \$1.95 for long distance customers who also subscribed to AT&T local service.¹⁰² Moreover, WCOM similarly did not make a cost showing when it filed its Instate Access Recovery Fee that exempted certain groups of customers.¹⁰³ Thus, although AT&T and WCOM are critical of SWBT in this regard, they demonstrated no cost difference in providing service to their similarly situated customers.¹⁰⁴

While a difference in cost may be one basis for differentiating customers, it is not a requirement nor necessary condition that cost differences exist.¹⁰⁵ Such a conclusion would run counter to past Commission action. For example, the Commission has approved SWBT tariffs that offer lower rates to higher cost customers.¹⁰⁶ One example of this is the lower residential rates that SWBT offers for flat rated local service in Rate Group D versus Rate Group A.¹⁰⁷ The basic local residential rate SWBT charges a Rate Group D customer in MCA 2 is \$12.30 while

¹⁰¹ T. 622-626, Kohly.

¹⁰² T. at 625-626, Kohly.

¹⁰³ Ex. 5, Hughes S., p. 9.

¹⁰⁴ Id.

¹⁰⁵ Id. at p. 10.

¹⁰⁶ Id.

¹⁰⁷ Id.

the rate that SWBT charges a residential Rate Group A customer is \$7.42.¹⁰⁸ Although SWBT charges a Rate Group A customer a lower rate than a Rate Group D customer, the cost to serve the Rate Group A customer is greater than the cost to serve the Rate Group D customer.

While the Commission need not base its approval of these tariffs on the basis of a cost difference between the groups of customers, a cost difference does exist.¹⁰⁹ All of the eligible winback customers for SWBT's proposed promotions have previously received service from SWBT.¹¹⁰ By virtue of this fact, SWBT can be reasonably certain that facilities exist to the customer's premise a greater percentage of the time than for new customers.¹¹¹ In many cases, the CLEC is utilizing SWBT's facilities to provide service to the end user (i.e., resale or the purchase of unbundled network elements ("UNEs")).¹¹² In these instances, there would be no network cost to place new facilities associated with the end user electing to receive the same services from SWBT.¹¹³

D. Actions In Competitive Markets Demonstrate That SWBT's Proposed Tariffs Are Not Discriminatory.

In assessing whether a particular tariff proposal violates Sections 392.200.2 and 392.200.3, the Commission should look to actions in competitive markets for guidance as to whether a proposed tariff is unduly or unreasonably preferential or prejudicial. In competitive markets, winback proposals are common.¹¹⁴ For example, cable TV companies offer to buy back satellite dishes for customers who have chosen to drop their traditional cable TV service and

¹⁰⁸ Id.

¹⁰⁹ Id.

¹¹⁰ Id.

¹¹¹ Id.

¹¹² Id.

¹¹³ Id.

¹¹⁴ Ex. 4, Hughes D., p. 2.

purchase service from a satellite cable provider.¹¹⁵ Winback offers are also common in markets such as computer software, magazine subscription, and Internet Access.¹¹⁶

Winback offers have also been prevalent in the long distance market for many years.¹¹⁷ As many consumers are aware, AT&T pioneered the practice of sending checks to customers for up to \$100, and the redemption of the checks constitutes the customer's approval to return to AT&T for long distance.¹¹⁸ AT&T reportedly differentiates among customers by varying the amount of the offer according to individual characteristics, such as age, income, and education, or perhaps by making no offer at all.¹¹⁹

SWBT presented evidence of one such winback offer that AT&T sent to SWBT witness Mr. Thomas Hughes.¹²⁰ The offer includes a check for \$75.00.¹²¹ The letter accompanying the check makes it clear that AT&T is not offering this to all new customers; rather, AT&T is only offering this check to former AT&T customers.¹²² The letter's heading reads: "[H]ere's An Offer Just For You -- A Valued Former Customer."¹²³ The letter itself states:

[T]housands of customers switch to AT&T every week, even without receiving the offer I'm about to present to you.

But we're particularly interested in winning you back to the quality of AT&T Residential Long Distance Service, so I wanted to give you a good reason to come back right now.¹²⁴

¹¹⁵ Ex. 2, Regan D., p. 9.

¹¹⁶ Ex. 1, Aron S., p. 12.

¹¹⁷ Ex. 2, Regan D., p. 9; T. 504, Thomas.

¹¹⁸ Ex. 1, Aron S., p. 12.

¹¹⁹ Id.

¹²⁰ Ex. 5, Hughes S., p. 6.

¹²¹ Ex. 5, Hughes S., p. 6; Hughes Schedule 1, attached to Ex. 5.

¹²² Id.

¹²³ Id.

¹²⁴ Id.

Additionally, carriers have offered customers NRC waivers (PIC change charge waivers) to return.¹²⁵ They have also offered waivers of monthly fees, gift certificates to local merchants, and cash.¹²⁶ Some IXCs will provide a "signing bonus" for the value of the remaining term liability of an existing contract or bonuses for long distance voice or data services.¹²⁷ Others, including WCOM, offer a number of hours of free long distance service to winback customers.¹²⁸ The long distance market provides an excellent example of what telecommunications customers have grown to expect and SWBT is merely attempting to do the same thing now in the local exchange market.¹²⁹ These forms of targeted marketing are no more or less "discriminatory" than the winback tariffs at issue in this proceeding.¹³⁰

Like SWBT, CLECs have the authority under Missouri statutes to make winback and win offers similar to those that SWBT has previously offered, as well as those SWBT is currently proposing.¹³¹ While the decision to make a winback or win offering is a business decision, the Commission should recognize that many carriers are competing for individual customers.¹³² CLECs are not only competing for customers against SWBT; they are competing for customers against other CLECs as well.¹³³ It is in the public interest to permit customers to benefit from offers made by carriers competing for their service.¹³⁴

¹²⁵ Ex. 5, Hughes S., p. 6; T. 462, Price.

¹²⁶ Ex. 5, Hughes S., p. 6.

¹²⁷ Ex. 2, Regan D., p. 9.

¹²⁸ T. 464, Price.

¹²⁹ Ex. 2, Regan D., p. 9.

¹³⁰ Ex. 1, Aron S, pp. 12-13.

¹³¹ Ex. 5, Hughes S., p. 6.

¹³² Id.

¹³³ Id.

¹³⁴ Id. at pp. 6-7.

E. If the Commission Determines That Winback Tariffs Are Discriminatory Such A Finding Must Be Applied Equally To All Telecommunications Providers.

The statutory provisions in Sections 392.200.2 and 392.200.3 apply equally to all telecommunications companies.¹³⁵ WCOM conceded this during the hearing.¹³⁶ Section 392.200.2 and 392.200.3 do not draw a distinction between IXCs and LECs, except with respect to the provision of lifeline connection assistance plans as promulgated by the FCC, an issue that this tariff proposal does not address.¹³⁷ WCOM further admitted that sections 392.200.2 and 392.200.3 do not draw a distinction between ILECs and CLECs.¹³⁸

Section 392.361(5) provides that the Commission can waive portions of the statutes in Sections 392.200 to 392.400, except as provided in Section 392.390.¹³⁹ Section 392.390(5) precludes a waiver as it provides that, at a minimum, a telecommunications company shall be subject to the provisions of subsections 2, 3, 4, and 5 of section 392.200.¹⁴⁰ Further, Section 392.380(2) also provides that the provisions of Section 392.200 must be applied fully and equally to all telecommunications companies. Thus, if the Commission determines that these tariffs are unlawful, it may not approve winback or win tariffs for any telecommunications company. IXC winback offers, which typically involve both interstate and intrastate interLATA calls, must be rejected. This will require affirmative action on the part of the Commission for those carriers, like AT&T, which do not file winback tariffs in Missouri, but only reference corresponding interstate offers to which the intrastate offering is an “add on”.¹⁴¹

¹³⁵ T. 300, Hughes; T. 403, Hughes; T. 498, Thomas.

¹³⁶ T. 465, Price.

¹³⁷ T. 465-466, Price.

¹³⁸ T. 465, Price.

¹³⁹ T. 466-467, Price; T. Kohly, 581.

¹⁴⁰ T. 465, Price.

¹⁴¹ T. 587, Kohly.

Any local or combined long distance/local winback offers by a CLEC must be similarly rejected if SWBT's winback offer is rejected as violative of the non-discrimination obligations of 392.200. At the hearing, AT&T opined that if it wanted to offer an \$80 check to a former customer to come back to AT&T for long distance service and also to take AT&T's regional toll and local toll services, that would be permissible.¹⁴² AT&T also opined that it would be acceptable for AT&T to give an \$80 check to a customer who agreed to come back to AT&T for long distance and also to take AT&T's local service even though the same offer would not be extended to new customers.¹⁴³

The statutes are clear. AT&T cannot have its cake and eat it too. While the better course of action would be to permit winback offers, the Commission cannot subject SWBT to disparate treatment under the law. If ILECs cannot offer winback or win offers to their customers, neither can IXC's or CLEC's. Thus, SWBT urges the Commission to approve its winback and win NRC waiver promotions and to give the industry guidance that offers like those proposed by SWBT are acceptable under Missouri law. But if SWBT's winback tariffs are rejected, all IXC/CLEC winback offers must also be declared unlawful.

F. Winback Tariffs Are Permissible Under Federal Law Which Contains Similar Non-Discrimination Provisions.

In determining whether SWBT's proposed tariffs are permissible, the Commission should consider that winback tariffs are clearly permissible under federal law and that federal law is substantially the same as Missouri law with regard to anti-discrimination provisions. 47 U.S.C. Section 202(a) contains prohibitions against unjust or unreasonable discrimination through giving of an undue or unreasonable preference or advantage or subjecting any person to an undue

¹⁴² T. 595-596, Kohly.

¹⁴³ T. 599-601, Kohly.

or unreasonable disadvantage. The provisions in Section 202(a) of the Act are substantially similar to the provisions that are contained in Section 392.200.2 RSMo. 2000.¹⁴⁴ Just as the FCC has appropriately interpreted federal law to permit such offers, so too, should this Commission approve such offers under state law.

IV. SWBT's Proposed Tariffs Are Not Anti-Competitive

A. No Party Has Presented Any Credible Evidence That The Competitive Marketplace Will Be Harmed By SWBT's Proposed Winback Tariffs.

While the intervenors contend that SWBT's winback tariffs are somehow anticompetitive, no credible evidence has been presented to demonstrate that SWBT's tariffs would harm the competitive marketplace.¹⁴⁵ While the lower prices resulting from SWBT's winback tariffs might be disadvantageous to "competitors" (as are all marketing efforts in competitive markets) they certainly will not harm the competitive marketplace or consumers.¹⁴⁶ In fact, the evidence demonstrates that customers will benefit from SWBT's proposed tariffs.

Despite the fact that customers will benefit from SWBT's proposed tariffs, opponents of SWBT's tariffs claim they are "anti-competitive." Yet opponents refuse to employ any recognized legal or economic definition of anticompetitive because SWBT's tariffs are not anticompetitive in any recognized antitrust or economic sense. See Section VI(B), below. For example, Staff admits that SWBT's tariffs are not anticompetitive in an antitrust sense.¹⁴⁷ Thereafter, Staff defines anticompetitive to "describe actions that may possibly discourage competition in a given marketplace."¹⁴⁸ Staff's view is without merit and is without support in

¹⁴⁴ T. 513-514, Thomas; T. 589, Kohly.

¹⁴⁵ T. 307, Hughes.

¹⁴⁶ Ex. 1, Aron S., p. 6.

¹⁴⁷ Ex. 6, Thomas R., p. 3.

¹⁴⁸ Id.

any recognized economic or antitrust literature.¹⁴⁹ The long history of antitrust analysis and practice in the United States has been focused on defining and distinguishing those behaviors that are in fact anticompetitive and are, therefore, an antitrust violation.¹⁵⁰

Moreover, Staff's proposed definition is, as Staff admits, problematic.¹⁵¹ For example, Staff did not give the Commission or any of the parties any guidelines with regard to how they would know which actions "may possibly discourage competition in the local market."¹⁵² Further, Staff's definition of anti-competitive is ambiguous.¹⁵³ As such, as Staff admits, its definition could be the subject of numerous proceedings wherein the Commission would have to make a subjective determination of whether a particular action may possibly discourage competition in the local exchange market.¹⁵⁴ The Commission should, therefore, reject such unprecedented definitions and should determine that SWBT's proposed tariffs are not anticompetitive, utilizing recognized economic and antitrust principles. In that light, SWBT's proposed tariffs are a competitive response to the marketplace and should be approved.

B. SWBT's Proposed Tariffs Are Not Predatory

From an economic perspective, there is only one appropriate basis by which to evaluate winback offers, and that is by their anticipated effects on consumer welfare and economic efficiency.¹⁵⁵ Anything else simply favors individual competitors over genuine market competition, to the detriment of consumers themselves.¹⁵⁶

¹⁴⁹ Ex. 1, Aron S., p. 10.

¹⁵⁰ Id.

¹⁵¹ T. 490, Thomas.

¹⁵² Id.

¹⁵³ Id.

¹⁵⁴ T. 491, Thomas.

¹⁵⁵ Ex. 1, Aron S., p. 9.

¹⁵⁶ Id.

In this case, Staff and intervenors opine that SWBT's winback offers are harmful to competitors and that the harm inflicted on competitors will ultimately be borne by consumers via a reduction in or elimination of competition.¹⁵⁷ Although Staff and intervenors never explicitly acknowledge it, their complaint is essentially one of predatory pricing.¹⁵⁸ Predatory pricing is the term used to describe alleged behavior in which a firm attempts to exclude competition by setting so low a price that its only motivation could be exclusion.¹⁵⁹ Claims of predatory pricing are viewed with great skepticism under antitrust analysis.¹⁶⁰ Because market-driven price decreases are universally beneficial to customers in the short run (and are an inherent feature of competition), the courts have taken a cautious approach to inferring that cutting prices is anticompetitive.¹⁶¹

As SWBT witness Dr. Debra Aron testified, history is replete with false claims of competition being overly fierce and of competition being "ruinous" not only to individual firms but also to the very market process itself.¹⁶² Competitors always want to discourage one another from decreasing prices because all firms can benefit if they can jointly sustain higher prices in a given market.¹⁶³ Thus, given the opportunity, competitors will bring their suspicions and grievances to a sympathetic governing arm.¹⁶⁴ The universal remedy suggested by the aggrieved party in such instances is a price maintenance plan that is sponsored, rather than attacked, by

¹⁵⁷ Id. at p. 13.

¹⁵⁸ Id.

¹⁵⁹ Id.

¹⁶⁰ Id.

¹⁶¹ Id.

¹⁶² Id. at p. 14.

¹⁶³ Ex. 1, Aron S., p. 14 in which she references Areeda, Phillips, and Herbert Hovenkamp. Antitrust Law: An Analysis of Antitrust Principles and Their Application, Aspen Publishers, Inc. (2002), Volume III, p. 282.

¹⁶⁴ Ex. 1, Aron S., p. 14.

governmental authority.¹⁶⁵ The Commission should recognize the intervenors' position as a plea for government sanctioned price protection that harms consumers.¹⁶⁶

Moreover, no party presented any evidence that SWBT's proposed winback and win NRC waiver promotions are truly predatory. There are three necessary elements to a claim of predatory pricing.¹⁶⁷ First, the price must be below the provider's own cost of providing the product or service.¹⁶⁸ Second, there must be a reasonable likelihood that the alleged predatory behavior will in fact drive out all of the competitors in the market.¹⁶⁹ And third, because pricing below cost necessitates incurring a loss for the period of predatory behavior, there must be a realistic likelihood of recouping the foregone profits, after the other providers have been driven from the marketplace.¹⁷⁰

Economists have long recognized that attempts at predatory or exclusionary pricing are rarely successful because of the difficulty of recouping foregone profits that were incurred during the period of exclusionary pricing.¹⁷¹ If the firm cannot recoup these losses, the pricing strategy can only harm the firm adopting it, although it benefits consumers.¹⁷² Recouping losses requires that the firm be able to set prices substantially above costs for an extended period of time after successful exclusion.¹⁷³ This requires that the firm have the ability to set high retail prices and erect sufficient entry barriers that these high retail prices would not induce (re)entry.¹⁷⁴ In practice, these circumstances have not often been found in unregulated markets,

¹⁶⁵ Id.

¹⁶⁶ Id.

¹⁶⁷ Id.

¹⁶⁸ Id.

¹⁶⁹ Id.

¹⁷⁰ Id.

¹⁷¹ Id. at p. 15.

¹⁷² Id.

¹⁷³ Id.

¹⁷⁴ Id.

and the regulatory requirements for interconnection, unbundling, and resale (all at regulated rates imposed on ILECs) under the Act, make these conditions even less likely to be satisfied in local telecommunications markets in the United States.¹⁷⁵

If neither exclusion nor recoupment is plausible, predatory pricing is not rational and the observed prices are generally assumed not to be anticompetitive even without evaluating whether the prices are below cost.¹⁷⁶ One reason that predatory pricing is found infrequently is that the kind of market and regulatory scheme that would permit recoupment is uncommon.¹⁷⁷ This economic principle has been recognized by the courts:

The success of any predatory scheme depends on *maintaining* monopoly power for long enough both to recoup the predator's losses and to harvest some additional gain. Absent some assurances that the hoped-for monopoly will materialize, *and* that it can be sustained for a significant period of time, "[t]he predator must make a substantial investment with no assurance that it will pay off." For this reason, there is a consensus among commentators that predatory pricing schemes are rarely tried, and even more rarely successful. (Emphasis in original).¹⁷⁸

The market structure in telecommunications in Missouri makes recoupment improbable, if not impossible.¹⁷⁹ First, even if SWBT were to succeed in excluding its rivals, it could not increase retail rates with impunity.¹⁸⁰ SWBT operates under price caps for most residential and business local exchanges services¹⁸¹ that precludes the ability to recoup costs.¹⁸² This makes it essentially impossible for any would-be predator to recoup the foregone profits.¹⁸³ Moreover,

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ Ex. 1, Aron S., pp. 15-16, citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 594 (1986) (citations omitted), as quoted in ABA Section of Antitrust Law, *Antitrust Law Developments*, 4th ed. (1997), Volume I, pp. 264-265.

¹⁷⁹ Ex. 1, Aron S., p. 16.

¹⁸⁰ Ex. 1, Aron S. p. 16; T. 546, Meisenheimer.

¹⁸¹ Section 392.245, RSMo. 2000.

¹⁸² Ex. 1, Aron S., pp. 16-17; T. 546, Meisenheimer.

¹⁸³ Ex. 1, Aron S., p. 17.

even in those instances where SWBT's services are not subject to price caps,¹⁸⁴ there are regulatory constraints in place to prevent recoupment.¹⁸⁵ Section 392.245.5 RSMo. 2000 grants the Commission the ability to re-impose price-cap regulation if it determines that effective competition no longer exists.¹⁸⁶

Second, even if SWBT were able to increase retail prices, new carriers could (re)enter via purchasing UNEs, which would still be available at cost-based rates as established by the Commission.¹⁸⁷ Since this Commission ultimately controls the pricing of UNEs, it can ensure that any predatory strategy would not succeed. The Commission and the FCC have verified that SWBT has complied with the market opening requirements of the Act when they approved SWBT's petition for 271 relief.¹⁸⁸

Third, while price caps and UNEs protect against recoupment, resale is an important element that protects against exclusion.¹⁸⁹ No matter how low retail rates fall, CLECs can provide service by purchasing available wholesale services at a discount off of the retail rate.¹⁹⁰ In fact, the winback offerings at issue in this proceeding are available to CLECs for resale.¹⁹¹ Consistent with the intent of Congress in drafting the Act, the FCC made clear that it considers the wholesale requirements imposed on the RBOCS to be "powerful tools to dismantle the legal, operational and economic barriers that frustrated competitive entry in the past."¹⁹²

¹⁸⁴ In Case No. TO-2001-467, SWBT sought and achieved competitive classification for certain business and residential local services in designated geographic areas in Missouri. The effect of this decision was to remove the services from price-cap regulation.

¹⁸⁵ Ex. 1, Aron S., p. 17.

¹⁸⁶ Ex. 1, Aron S. p. 17; T. 547, Meisenheimer.

¹⁸⁷ Ex. 1, Aron S., p. 17; T. 547, Meisenheimer.

¹⁸⁸ Ex. 1, Aron S., p. 17.

¹⁸⁹ Ex. 1, Aron D., p. 17. As SWBT witness Thomas F. Hughes testified, both SWBT's residential winback and business winback and win NRC waiver promotions are available for resale by the CLECs. Ex. 4, Hughes D., p. 5.

¹⁹⁰ Ex. 1, Aron S., p. 17.

¹⁹¹ Ex. 1, Aron D., p. 17; Ex. 4, Hughes D., p. 5; T. 547, Meisenheimer.

¹⁹² Ex. 1, Aron S., pp. 17-18, citing Federal Communication Commission, Memorandum Opinion and Order, FCC No. 97-346, related October 1, 1997, paragraph 2.

Fourth, to the extent that CLECs have invested in their own facilities, much of this investment (such as outside plant) may be sunk.¹⁹³ Thus, the facilities will not disappear if a CLEC leaves the market, making re-entry relatively low-cost.¹⁹⁴ Hence, the necessary conditions precedent to a claim of primary line price discrimination are simply not credible in this market.¹⁹⁵ Under such conditions, the undeniable short-run benefits to consumers of the lower winback prices are not in danger of being reversed by recoupment later.¹⁹⁶

Moreover, no party has presented any evidence that SWBT's promotions are below cost.¹⁹⁷ The proper method to examine a waiver of installation and other NRC would be to consider the anticipated profit on the entire package of services purchased by the customer over the timeframe the customer is expected to be a subscriber and determine whether that revenue flow is adequate to cover the provider's incremental costs of providing these services.¹⁹⁸ No party has conducted an actual analysis to establish that prices are below cost.¹⁹⁹ To the contrary, CLECs frequently waive NRC to their customers, which provides further indication that SWBT's promotions are not predatory.²⁰⁰ Just as the FCC has determined that because winback campaigns can promote competition and result in lower prices to consumers, it would not condemn such practices absent a showing that they are truly predatory, the Commission should draw the same conclusion. Moreover, since no party has demonstrated that SWBT's winback and win NRC promotions are truly predatory, the Commission should reject Staff's, Office of

¹⁹³ Ex. 1, Aron S., p. 18.

¹⁹⁴ Ex. 1, Aron S., p. 18; T. 547-548, Meisenheimer.

¹⁹⁵ Ex. 1, Aron S., p. 18.

¹⁹⁶ Id.

¹⁹⁷ Id.

¹⁹⁸ Id.

¹⁹⁹ Id.

²⁰⁰ Id.

Public Counsel's, and intervenors' claims that SWBT's proposed tariffs are anticompetitive and the Commission should approve SWBT's tariffs.

C. The FCC Has Rejected Claims That Winback Tariffs Are Anti-Competitive.

SWBT's proposed winback tariffs are consistent with the FCC's views regarding winback tariffs. Specifically, the FCC has determined that: (1) winback campaigns are consistent with the Act; (2) winback campaigns facilitate and foster competition among carriers; (3) ILECs should be allowed to make winback offers; and (4) winback campaigns are not a predatory practice designed to prevent effective market entry by new competitors.²⁰¹ Specifically, the FCC stated:

[O]n reconsideration, we conclude that all carriers should be able to use CPNI [Customer Propriety Network Information] to engage in winback marketing campaigns to target valued former customers that have switched to other carriers. After reviewing the fuller record on this issue developed on reconsideration, we are persuaded that winback campaigns are consistent with section 222(c)(1) and in most instances facilitate and foster competition among carriers, benefiting customers without unduly impinging upon privacy rights. (Emphasis added).²⁰²

The FCC went on to state:

[C]ustomers expect carriers to attempt to win back their business by offering better-tailored service packages, and that such precise tailoring is most effectively achieved through use of CPNI. Winback restrictions may deprive customers of the benefits of a competitive market. Winback facilitates direct competition on price and other terms, for example, by encouraging carriers to "out bid" each other for a customer's business, enabling the customer to select the carrier that best suits the customer's needs. (Footnotes omitted. Emphasis added).²⁰³

The FCC continued:

Some commenters argue that ILECs should be restricted from engaging in winback campaigns, as a matter of policy, because of the ILEC's unique historic position as regulated monopolies. Several commenters are concerned that the vast stores of CPNI gathered by ILECs will chill potential local entrants and thwart competition in the local exchange market. We believe that such action by an ILEC is a significant concern during the time subsequent to the customer's

²⁰¹ FCC Winback Order, paragraph 66; Ex. 5, Hughes S., pp. 25-27.

²⁰² FCC Winback Order, paragraph 66; Ex. 5, Hughes S., pp. 25-26; T. 440 Price (winback campaigns can promote competition).

²⁰³ FCC Winback Order, paragraph 68; Ex. 5, Hughes S., p. 26.

placement of an order to change carriers and prior to the change actually taking place. Therefore, we have addressed that situation in Part V.C.3 *infra*. However, once a customer is no longer obtaining service from the ILEC, the ILEC must compete with the new service provider to obtain the customer's business. We believe that such competition is in the best interest of the customer and see no reason to prohibit ILECs from taking part in this practice. (Footnote omitted. Emphasis added).²⁰⁴

Finally, the FCC stated:

We are also unpersuaded by the allegations that an incumbent carrier's use of CPNI in winback campaigns amounts to a predatory practice designed to prevent effective market entry by new competitors. Contrary to the commenters' suggestions, we believe such use of CPNI is neither a *per se* violation of section 201 of the Communications Act, as amended, nor the antitrust laws. While excessively low pricing and other exclusionary practices may contravene antitrust laws, commenters proffer neither facts nor convincing arguments that their legal conclusion is a realistic concern. Prior to the adoption of the rules promulgated under 1996 Act, incumbent carriers were able to use CPNI to regain customers lost to competitors. Assuming incumbent LECs have sufficient market power to engage in predatory strategies, they are constrained in their ability to raise and lower prices by our tariff rules and non-discrimination requirements. Because winback campaigns can promote competition and result in lower prices to consumers, we will not condemn such practices absent a showing that they are truly predatory. (Footnotes omitted. Emphasis added).²⁰⁵

These comments express the FCC's views that winback efforts by ILECs such as SWBT are not predatory.²⁰⁶ In fact, the FCC states that a showing must be made that a winback offering is predatory.²⁰⁷ No such showing has been made in this proceeding by any intervenor.²⁰⁸

D. Increased Competition When Prior Winback Tariffs Were In Effect Demonstrate The Proposed Tariffs Are Not Anti-Competitive.

The Commission does not need to determine whether SWBT's tariffs are anti-competitive in a vacuum because the Commission has the benefit of evaluating the effect of past Commission

²⁰⁴ FCC Winback Order, paragraph 69; Ex. 5, Hughes S., p. 26; T. 440-441, Price (the FCC determined that ILECs should not be precluded from engaging in winback campaigns because of their historic monopoly position).

²⁰⁵ FCC Winback Order, paragraph 70; Ex. 5, Hughes S., p. 27.

²⁰⁶ Ex. 5, Hughes S., p. 27.

²⁰⁷ Id.

²⁰⁸ Id.

approved SWBT tariffs that similarly waived NRC for both residential and business customers.²⁰⁹ No party presented any evidence that during the period August 2000 through April 2002 that CLECs lost access lines because customers were returning to SWBT for service.²¹⁰ Further no party presented any evidence that during the period August 2000 through April 2002, SWBT eliminated its competitors in the local exchange telecommunications market.²¹¹

Even though the Commission has previously approved winback offers from SWBT, the CLECs continue to compete effectively in Missouri.²¹² Telecommunications customers are examining their options for local telecommunications service and are switching their service from SWBT to CLECs in growing numbers.²¹³

SWBT estimates that the minimum market share gained by CLECs as of April, 2002, is 12% or a minimum of 332,146 lines in Missouri.²¹⁴ This is an increase in the minimum number of lines being served by CLECs of 152,438 (a growth rate of 85%) from July, 2000, to April, 2002.²¹⁵ On the other hand, from August, 2000, to May, 2002, SWBT's access line total actually

²⁰⁹ T. 491-492, Thomas.

²¹⁰ T. 494, Thomas.

²¹¹ T. 494-495, Thomas.

²¹² Ex. 4, Hughes D., pp. 2 and 6.

²¹³ Ex. 3, Regan S., p. 3.

²¹⁴ *Id.* at p. 7. The approximate 12% market share gained is based on the number of resold lines, UNE-P, and E-911 listings the CLECs have reported. *Id.* at 8. This is the minimum level of market share since it does not take into account all the lines served by CLECs on a facilities basis. *Id.* SWBT knows when a CLEC resells its service and when a CLEC purchases UNEs from SWBT to provision its services. *Id.* However, SWBT does not know the number of lines served by CLECs on a pure facilities basis. *Id.* While SWBT can identify the number of E-911 listings of CLECs, the number of CLEC E-911 listings understates the number of access lines served by facilities-based CLECs since only outbound lines have 911 listings associated with them. *Id.* Therefore, certain lines served by the CLECs (e.g., those at a call center receiving inbound calls) are not reported. *Id.* Further, a significant number of access lines are served with telephone numbers that have been ported from SWBT. *Id.* When a telephone number is ported from SWBT to a CLEC, the telephone number is still associated with SWBT in the 911 database. *Id.* Therefore, access lines with ported numbers are not included in this minimum level of market share gained by the CLECs. *Id.* SWBT has ported over 359,000 telephone numbers. *Id.* While this number reflects the cumulative number of ported numbers, SWBT expects that a significant percentage of these ported numbers represent access lines that are undercounted in SWBT's data reflecting current CLEC lines. *Id.* The CLECs themselves are the only ones who know for sure how many access lines they are serving. *Id.* Assuming SWBT's current minimum CLEC line count estimation is still roughly 45% understated, then the current CLEC access line count would be 481,612, which represents an over 16% market share. *Id.* at 8-9.

²¹⁵ Ex. 4, Hughes D., p. 7.

declined by 179,582 or 6.8 percent.²¹⁶ In June and July, 2002, SWBT lost another 32,500 retail lines.²¹⁷

Other measures of competitive entry show similar gains during the time the prior SWBT Commission approved winback tariffs were in place. From July 2000 (before SWBT's first winback tariff was approved), to April 2002 (when the last winback tariff expired), the number of E-911 listings and UNE-P lines, which do not even capture all of the lines served by CLECs, more than doubled.²¹⁸ Specifically, E-911 listings increased from 72,737 to 157,200 (a 116% growth rate) and UNE-P lines increased from 26,069 to 103,002 (a 295% growth rate).²¹⁹ During the same time period, interconnection trunks increased from 85,249 to 121,412, and cumulative ported numbers increased from 163,338 to 359,572.²²⁰

During May and June, 2002, CLECs purchased an additional 19,240 UNE-P lines and 3,297 interconnection trunks from SWBT.²²¹ During this same two-month period, the number of E-911 listing increased by 12,409.²²² At the end of July, 2002, CLECs had 172,412 E-911 listings, 131,994 UNE-P lines, and 60,739 resold lines.²²³ These figures represent a minimum CLEC line count estimation of 365,145. Assuming SWBT's current minimum CLEC line count estimation is still roughly 45% understated when compared to the actual partial count conducted by Staff in prior proceedings, then the current CLEC access line count would be 529,460 which represents nearly an 18% market share. Moreover, at the end of July, 2002, 76 CLECs were passing orders to SWBT.²²⁴

²¹⁶ Ex. 2, Regan D., p. 5; Ex. 4, Hughes D., p. 6.

²¹⁷ Ex. 3, Regan S., p. 3.

²¹⁸ Ex. 4, Hughes D., p. 6.

²¹⁹ Id.

²²⁰ Id.

²²¹ Ex. 5, Hughes S., p. 13.

²²² Id.

²²³ T. 376 and 416, Hughes.

²²⁴ Id.

SWBT notes that these numbers do not reflect any additional lines the CLECs have sold to their customers, nor do they reflect any new customers who elected to receive telecommunications service directly from one of SWBT's competitors rather than from SWBT.²²⁵ SWBT faces effective competition from a variety of carriers including resellers, CLECs purchasing UNEs, pure facilities-based CLECs (e.g., cable TV providers), and wireless carriers.²²⁶ This data indicates that competition in Missouri is strong and that the number of local service customers that are leaving SWBT has increased significantly.²²⁷ Thus, it is clear that while SWBT's winback offers have provided SWBT an opportunity to meet customer demand, SWBT's winback offers have not prevented CLECs from competing in the local market in Missouri.²²⁸

Not only does SWBT estimate that the CLECs' minimum market share increased, CLECs are actively competing for local service throughout the state.²²⁹ Based on detailed exchange specific analysis performed during In the Matter of the Investigation of the State of Competition in the Exchanges of Southwestern Bell Telephone Company, Case No. TO-2001-467, CLECs serve customers in every SWBT exchange.²³⁰ They are serving customers via a combination of resale, the purchase of UNEs, and entirely over the facilities of CLECs.²³¹ It should be noted, however, that the CLECs are free to select the exchanges they operate in and the customers they desire to serve.²³²

²²⁵ Ex. 2, Regan D., p. 5.

²²⁶ Id. at p. 6.

²²⁷ Ex. 2, Regan D, pp. 5-6; Ex. 3, Regan S., p. 2.

²²⁸ Ex. 4, Hughes D., p. 7.

²²⁹ Id. at p. 9.

²³⁰ Id.

²³¹ Id.

²³² Id.

CLECs are not obligated to provide service to all customers.²³³ This allows them to cherry pick the most profitable customers (e.g., business customers, customers that subscribe to vertical features) while leaving SWBT to serve the customers they do not desire to serve.²³⁴ For example, WCOM's Neighborhood plan is an "all you can eat" local/long distance offering for \$55.99 per month in Missouri, which is geared to heavy residential telecommunications users in Missouri who are willing to pay for features such as voice mail, who make a lot of long-distance calls, and who therefore contribute the most to the financing of the underlying network; and is specifically designed not to appeal to those residential customers who have less revenue-generating patterns.²³⁵ Moreover, WCOM's Neighborhood plan is targeted at, and only available to, residential customers that reside in St. Louis and Kansas City.²³⁶ Under the Neighborhood Plan, WCOM has announced that it has achieved over one million customers nationwide in just six months under that plan.²³⁷ Further, WCOM expects to gain another million customers nationwide under the Neighborhood Plan by the end of the year.²³⁸ WCOM witness Don Price testified that MCImetro (WCOM's only provider of residential local service in Missouri)²³⁹ does not target or seek to acquire residential customers that utilize just a basic access line without vertical features and without substantial long distance service.²⁴⁰ In other words, WCOM only wants residential customers that have a basic access line, vertical features, and substantial long

²³³ Ex. 5, Hughes S., p. 23

²³⁴ Ex. 5, Hughes S., pp. 23-24.

²³⁵ Ex. 1, Aron S., p. 11.

²³⁶ T. 468, Price. See MCImetro Access Transmission Services, LLC Local Exchange Service Missouri P.S.C. Tariff No. 1, Original Page No. 63.18, section 3.9.12.

²³⁷ T. 431-432, Price.

²³⁸ T. 432-433, Price.

²³⁹ T. 467, Price.

²⁴⁰ T. 471, Price.

distance use.²⁴¹ In response to questioning by Commissioner Gaw, WCOM witness Don Price testified as follows:

- Q. Yeah. But is it -- would it be more accurate to say that in doing marketing to potential customers out there, that your company might be stressing packages that are -- that include those high-end kinds of services, including vertical services and other things in the packages and seeking to sell those particular services as opposed to just trying to sell basic service itself?
- A. I think so. I think the process -- in other words, when the customer is on the line with the sales representative, the process would probably involve some questions about how much do you normally spend on telecommunications services, and, you know, would you believe that you could get the following, you know for less money or whatever. I haven't seen the scripts, but I can envision that type of approach.
- Q. And would it be fair to say, then, that at least from one standpoint, that if you end up with customers who tend to purchase your services because of the marketing that you have done which promotes the sale of things like vertical services and other things, that in essence you would end up with, hopefully, a greater percentage of your customers as compared to Bell's customer base that have the high-end vertical services as a component of their service?
- A. I think that's true, and we've seen in other ILEC territories, in fact, a focus towards feature packages. And I neglected to mention this in response to Mr. Lane's question, but I think in part the putting together of the packages that way was in part recognition of the fact that people like to buy their services in packages as opposed to having to decide A, B, C, and D, and if that package is fairly priced and includes a number of features that are desirable, the fact that it includes some that you may never have used before is not really a big deal to the customer.
- Q. Now, you may be selling some of these -- some of these higher-end packages to customers that may not have those kinds of similar services while they're with Bell.
- A. Possibly.
- Q. But the percentages again you believe would be higher with your customer base after you finish those kind of marketing endeavors than what Bell would have to begin with?

²⁴¹ T. 473, Price.

- A. Intuitively -- intuitively, I think so, yes.
- Q. So if I were -- if I were -- if I were shopping for those kinds of customers from other companies that might be out there, would it be fair to say that CLEC customers would be fairly fertile ground in knowing that those particular customers at least would tend to have those higher-end packages.
- A. Again, on average, I think that is a fair assumption.²⁴²

Typically, CLECs are not serving customers who only have a basic access line.²⁴³ CLECs are serving customers who have many features, lots of toll, etc.²⁴⁴ SWBT provided an illustrative example of this during the re-direct examination of Mr. Thomas F. Hughes. Mr. Hughes was asked the following questions and gave the following answers:

- Q. You were asked a series of questions this morning by Mr. Dandino regarding basic local customers that are solely -- solely want basic local service without any vertical features? Are those the types of customers that CLECs are trying to win?
- A. I don't believe so.
- Q. Can you give me an example of any CLEC that would lead you to believe that they are specifically not interested in serving those customers?
- A. Yes. I've reviewed the tariff of Sage, and in their tariff they have an offering for basic line around \$25 and a basic line with features and toll for in the neighborhood of \$29 for residential customers.

That leads me to believe they have no interest in serving a customer who only subscribes to a basic line when our basic line rates for residential customers are in the \$7.50 to \$12.50 range.²⁴⁵

The CLECs' business plans will dictate where (and to whom) they choose to provide service.²⁴⁶ As a group, the CLECs also are attempting to win the customers that provide the

²⁴² T. 473-475, Price.

²⁴³ T. 303, Hughes.

²⁴⁴ Id.

²⁴⁵ T. 414, Hughes.

²⁴⁶ Ex. 4, Hughes D., p. 9.

highest profit margin.²⁴⁷ Some CLECs choose to serve only business customers while other CLECs may only attempt to win residential customers who purchase packages (e.g., access line, vertical services, voicemail, intraLATA and interLATA toll).²⁴⁸

The CLECs' business plans will impact their individual market share number.²⁴⁹ Since the CLECs are free to select the exchanges they elect to compete in and the customers they desire to market to, it is possible that an individual CLEC's market share may not seem that "large."²⁵⁰ However, the Commission should look at the CLEC market share number in aggregate to assess how competition is progressing.²⁵¹ Some CLECs have chosen to focus their efforts in a particular part of the state.²⁵² The evidence provided by SWBT demonstrates that CLECs in the aggregate continue to gain market share, even though all CLECs may not hold themselves out as a telecommunications provider to all customers in all exchanges.²⁵³ SWBT's proposed tariffs are designed to allow SWBT to compete for the customers the CLECs have chosen to serve.²⁵⁴

Moreover, the Commission has previously found the local market in Missouri to be open to CLECs.²⁵⁵ In In the Matter of the Application of Southwestern Bell Telephone Company to Provide Notice of Intent to File an Application for Authorization to Provide In-Region InterLATA Services Originating in Missouri Pursuant to Section 271 of the Telecommunications Act of 1996), Case No. TO-99-227, the Commission determined that the Missouri local markets

²⁴⁷ Id.

²⁴⁸ Id.

²⁴⁹ Id.

²⁵⁰ Id.

²⁵¹ Id. at p. 10.

²⁵² Id.

²⁵³ Id.

²⁵⁴ Ex. 5, Hughes S., p. 24; T. 283, Regan; T. 418, Hughes.

²⁵⁵ Ex. 4, Hughes D., p. 10; Ex. 5, Hughes S., p. 14.

are open to competition.²⁵⁶ In its March 15, 2001, Order in Case No. TO-99-227, the Commission stated:

[T]he 14-point competitive checklist sets out the steps that a BOC must take to open the local market to its competitors. See 47 U.S.C. §271(c)(2)(B)(i)-(xiv). SWBT has satisfied the requirements of the competitive checklist by providing or offering access to and interconnection with its network on terms and conditions that satisfy each of the checklist items. Id. at 66.²⁵⁷

The Commission also approved the Missouri 271 Agreement ("M2A"), which provides a convenient interconnection agreement that contains favorable terms for CLECs seeking to compete.²⁵⁸ Moreover, on August 16, 2001, in a presentation to the Commission, SWBT agreed to voluntarily lower rates for certain UNEs.²⁵⁹ The Commission approved SWBT's voluntarily reduced UNE rates on August 30, 2001.²⁶⁰ These reduced rates provide an additional benefit to CLECs.²⁶¹

It is clear that even at a time when SWBT had winback tariffs in effect, CLECs continued to increase the number of customers they serve and CLECs are effectively competing in Missouri. Thus, while SWBT's winback tariffs provide lower prices and additional choices to customers, they have not impeded competition in the state of Missouri.²⁶²

CONCLUSION

Customers will benefit from SWBT's promotions and the public interest is served by SWBT's ability to compete in the marketplace. The Commission should reject the intervenors'

²⁵⁶ Id.

²⁵⁷ The Commission issued its Order in Case No. TO-99-227, following an extensive review of SWBT's 271 application. At the same time the Commission was reviewing SWBT's 271 application, it approved SWBT's residential winback tariff in August of 2000. Shortly after the Commission issued its Order in Case No. TO-99-227, the Commission approved SWBT's business winback tariff, a substantially similar tariff to that at issue in this proceeding.

²⁵⁸ Ex. 4, Hughes D., p. 11.

²⁵⁹ Id.

²⁶⁰ Id.

²⁶¹ Id.


²⁶² Id. at p. 12.

pleas to impose restrictions on only one competitor. The Commission should remember that the goal of SB 507 is to promote full competition, not to artificially support CLECs. Restricting SWBT's ability to offer these types of tariffs would be counter to the principles of a free, open, and fully competitive marketplace and bad for consumers.

Because SWBT's proposed tariffs are in the public interest, are consistent with the Missouri statutes (and the same or similar tariffs have been previously approved by the Commission), are consistent with the FCC's views regarding winback tariffs, and there has been no showing that they will harm competition, there is absolutely no basis for rejecting SWBT's proposed tariffs and, therefore, the Commission should approve SWBT's proposed winback tariffs.

Respectfully submitted,

SOUTHWESTERN BELL TELEPHONE, L.P.

By: 
PAUL G. LANE #27011
LEO J. BUB #34326
ANTHONY K. CONROY #35199
MIMI B. MACDONALD #37606

Attorneys for Southwestern Bell Telephone, L.P.
One SBC Center, Room 3510
St. Louis, Missouri 63101
314-235-4094 (Telephone)
314-247-0014 (Facsimile)
mimi.macdonald@sbc.com

CERTIFICATE OF SERVICE

Copies of this document were served on the following parties by e-mail on October 21, 2002.



Mimi B. MacDonald

DAN JOYCE
MISSOURI PUBLIC SERVICE COMMISSION
PO BOX 360
JEFFERSON CITY, MO 65102

MICHAEL F. DANDINO
OFFICE OF THE PUBLIC COUNSEL
PO BOX 7800
JEFFERSON CITY, MO 65102

CARL LUMLEY
CURTIS, OETTING, HEINZ, GARRETT &
SOULE, P.C.
130 S. BEMISTON, SUITE 200
CLAYTON, MO 63105

STEPHEN F. MORRIS
WORLD COM COMMUNICATIONS
701 BRAZOS, SUITE 600
AUSTIN, TX 78701

J. STEVE WEBER
AT&T COMMUNICATIONS
OF THE SOUTHWEST
101 WEST MCCARTY, SUITE 216
JEFFERSON CITY, MO 65101

REBECCA B. DECOOK
AT&T COMMUNICATIONS
OF THE SOUTHWEST
1875 LAWRENCE ST., STE. 1575
DENVER, CO 80202