

CURTIS, OETTING, HEINZ, GARRETT & SOULE, F.C.

Attorneys at Law  
130 South Bemiston, Suite 200  
St. Louis, Missouri 63105  
(314) 725-8788  
(314) 725-8789 Facsimile  
[www.cohgs.com](http://www.cohgs.com)

Carl J. Lumley

Email Address  
clumley@cohgs.com

May 23, 2002

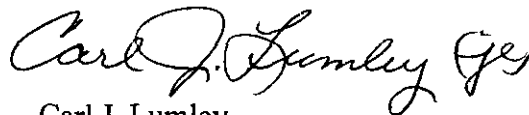
Secretary of the Commission  
200 Madison Street, Suite 100  
P.O. Box 360  
Jefferson City, Missouri 65102-0360

Re: Case No.: TO-2002-397

Dear Secretary of the Commission:

Enclosed please find for filing with your office an original and nine (9) copies of the Pre-Hearing Initial Brief of MCI WorldCom Communications, Inc., Brooks Fiber Communications of Missouri, Inc., MCImetro Access Transmission Services, LLC, NuVox Communications of Missouri, Inc, XO Missouri, Inc., AT&T Communications of the Southwest, TCG St. Louis and TCG Kansas City. Upon your receipt, please file stamp the extra copy received and return to the undersigned in the enclosed, self-address, stamped envelope. If you have any questions, please contact me.

Very truly yours,

A handwritten signature in cursive script that reads "Carl J. Lumley".

Carl J. Lumley

CJL:dn  
Enclosures  
cc. Parties of Record (W/Enclosure)

BEFORE THE MISSOURI PUBLIC SERVICE COMMISSION

In the Matter of the Determination of Prices     )     Case No. TO-2002-397  
of Certain Unbundled Network Elements.         )

**PRE-HEARING INITIAL BRIEF**

Come Now MCI WorldCom Communications, Inc., Brooks Fiber Communications of Missouri, Inc., MCImetro Access Transmission Services, LLC, NuVox Communications of Missouri, Inc., XO Missouri, Inc., AT&T Communications of the Southwest, Inc., TCG St. Louis and TCG Kansas City and for their Pre-Hearing Initial Brief pursuant to the Commission's Notice dated May 3, 2002 state to the Commission as follows:

**I.     Introduction.**

The Commission first considered unbundled network element (UNE) prices in 1996 in Case No. TO-97-40. After an initial arbitration proceeding, the Commission set interim rates on December 11, 1996.<sup>1</sup> The Commission concluded that the time constraints imposed by Section 252 of the federal Telecommunications Act of 1996 (the "Act") upon such arbitrations "did not permit the detailed analysis the Commission considers necessary for establishing permanent rates for unbundled elements."<sup>2</sup> Accordingly, after the statutory arbitration period was over the Commission instructed an advisory staff to conduct a sixteen-week investigation.<sup>3</sup> Upon the conclusion of the investigation and the filing of a detailed report, the Commission issued its Final Arbitration Order setting final UNE rates on July 31, 1997.<sup>4</sup>

In that Final Arbitration Order, the Commission stated:

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<sup>1</sup> Arbitration Order, Case No. TO-97-40 (Dec. 11, 1996).

<sup>2</sup> Order Granting Clarification and Modification and Denying Motion to Identify and Motions for Rehearing, p. 8 Case No. TO-97-40 (Jan. 22, 1997).

<sup>3</sup> Id. p. 9.

<sup>4</sup> Final Arbitration Order, Case No. TO-97-40 (July 31, 1997).

The process of reviewing the costs, discounts and proposed rates was designed so that [SWBT, AT&T and MCI] could designate the appropriate subject matter expert (SME) or provide documentation in support of its position. As a result, the process led to a remarkable level of open communication and cooperation between SWBT, AT&T, MCI and the Arbitration Advisors. The work which has resulted from this effort consumes several hundred pages and constitutes a thorough and exhaustive review of each and every cost factor which the Commission finds relevant to this arbitration."<sup>5</sup>

On the heels of the Commission's final decision in Case No. TO-97-40, it undertook a second arbitration between SWBT and AT&T that involved a dispute as to whether additional UNE feature rates were required beyond those set in the first case. In this second proceeding, in a decision in December 1997 the Commission again set certain interim rates, stating an intent at that time to conduct a similar process to investigate and set permanent rates as it did in Case No. TO-97-40.<sup>6</sup> Such a process began, but it was not concluded in Case No. TO-98-115. Instead, these interim rates ultimately became subject to Case No. TO-2001-438, which remains pending before the Commission.

The Commission then approved 1998 arbitration agreements between AT&T and SWBT, and between MCI and SWBT.<sup>7</sup>

When the terms of these agreements ran their course, new arbitrations began. In both the AT&T and WorldCom<sup>8</sup> arbitrations, the Commission concluded (as it had done the first time around) that its strict interpretation of arbitration timeframes under the Act precluded a thorough

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<sup>5</sup> Id p. 3.

<sup>6</sup> Report and Order, p. 23-24 Case No. TO-98-115 (December 23, 1997).

<sup>7</sup> Order Approving Interconnection Agreement, Case No. TO-98-115 (Mar. 19, 1998)(a prior ATT agreement was approved in Nov. 1997); Order Approving Interconnection Agreement, Case No. TO-98-200 (July 22, 1998).

<sup>8</sup> The initial MCI agreement was made on behalf of MCI Telecommunications Corporation and its affiliates including MCImetro Access Transmission Services, Inc. Subsequently, WorldCom, Inc. became the parent corporation and several other reorganizations occurred, resulting in MCI WorldCom (which includes former operations of MFS and MCI Telecommunications Corporation), Brooks, and MCImetro Access Transmission Services LLC (which includes the former MCImetro corporate operations) all being part of the WorldCom corporate family.

review of UNE rates. The Commission directed the parties to use the rates contained in SWBT's Missouri 271 Agreement (M2A).<sup>9</sup>

The M2A rates were incorporated from the Commission's decisions in Case Nos. TO-97-40 and TO-98-115. SWBT reduced some of the rates, with approval by the Commission, in order to obtain FCC approval of its Missouri 271 application for interLATA authority. In addition to interim rates from Case No. TO-98-115, the M2A also contains certain other interim UNE rates that are the subject of further inquiry in three separate cases that remain pending before the Commission:

Case No. TO-2001-438, regarding certain UNE rates (including the TO-98-115 interim rates);

Case No. TO-2001-439, regarding conditioning of xDSL-capable loops; and

Case No. TO-2001-440, regarding line sharing and line splitting.

The term of the M2A runs through March 5, 2005. It has been adopted by numerous CLECs.<sup>10</sup>

As noted by Commissioner Gaw in his concurring opinion to the Order which approved SWBT's proposal to reduce M2A rates in order to obtain FCC 271 authority for Missouri, the Missouri rates are inexplicably higher than SWBT 271 agreement UNE rates established in Texas, Kansas, and Arkansas. Further, Commissioner Gaw observed that "this Commission has heard no evidence as to the appropriateness of these rates as of the date [August 30, 2001] of this order."<sup>11</sup>

In rendering its decisions in Case Nos. TO-97-40 and TO-98-115, the Commission indicated that it was striving to rely upon and utilize the FCC's total element long run incremental cost (TELRIC) costing and pricing methodology. The United States Court of Appeals invalidated

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<sup>9</sup> Arbitration Order, Case No. TO-2001-455 (June 7, 2001); Arbitration Order, Case No. TO-2002-222 (Feb. 28, 2002).

<sup>10</sup> Arbitration Order, p. 10-11 Case No. TO-2002-222 (Feb. 28, 2002). See also Order Granting Motion to Accept Revised Missouri Interconnection Rates, Case No. TO-99-227 (Aug. 30, 2001)(loop, switching, transport, SS7, STP, and port rates reduced).

part of the FCC's methodology in the *Iowa Utilities II* decision and subsequently, citing that decision, vacated the Commission's UNE rate decisions in Case Nos. TO-97-40 and TO-98-115.<sup>12</sup> However, on May 13, 2002 the United States Supreme Court reversed the Court of Appeals and upheld the FCC's decision to adopt the TELRIC methodology.<sup>13</sup>

Hence, the current situation in Missouri is that: the only thorough and completed consideration of UNE rates was conducted in 1996-97; those rates have been incorporated into the M2A (with some reductions) and thereupon by both adoption and arbitration incorporated into CLEC agreements that have less than three years left; and certain (but not all) UNE rates are undergoing further evaluation in Case No. TO-2001-438.

In the recent WorldCom/SWBT arbitration, Case No. TO-2002-222, the Commission agreed with WorldCom and Staff that a reevaluation of loop and switching UNE rates, among others, was in order, but as indicated above the Commission decided that such a reevaluation was not possible in the context of an arbitration. The Commission stated that UNE rates such as loops and switching could be better examined in a generic proceeding.<sup>14</sup>

Accordingly, the Commission opened this case to "review the unbundled network elements at issue in Case No. TO-2002-222."<sup>15</sup> The Commission indicated that "this review may also include all pricing issues that are not part of Case Nos. TO-2001-438, TO-2001-439, and TO-2001-440, and any other issues the Commission determines to be appropriate."<sup>16</sup> The Commission left the scope and impact of this case to be decided after consideration of briefs from the parties.<sup>17</sup>

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<sup>11</sup> Concurring Opinion, Case No. TO-99-227 (Aug. 30, 2001).

<sup>12</sup> SWBT v. MoPSC, 236 F. 3d 922 (8th Cir. 2001).

<sup>13</sup> Verizon v. FCC, \_\_ US \_\_ (May 13, 2002).

<sup>14</sup> Arbitration Order, p 39-42 Case No. TO-2002-222 (Feb 28, 2002).

<sup>15</sup> Order Establishing Case and Directing Notice, Case No. TO-2002-397 (Mar. 14, 2002).

<sup>16</sup> Id.

<sup>17</sup> Id.

**II. The scope of this case should include loop and switching UNEs, as well as any other UNE that a party wants to present for review, except that it does not currently appear that UNE rates to be addressed in Case Nos. TO-2001-438, 439 and 440 should be addressed again in this case.**

The scope of this case should certainly include all types of loops, including high capacity loops, and switching UNE rates. During WorldCom's most recent arbitration, WorldCom presented expert evidence in that case, through witness Steve Turner, that loop and switching rates should be reexamined. Specifically, Mr. Turner identified four reasons to reexamine loop rates: (1) the investments and expenses used in the studies underlying rates currently in use are significantly dated; (2) new economies of scale are not reflected in those studies; (3) new process improvements are not reflected in those studies; and (4) the deployment of Next Generation Digital Line Carrier (NGDLC) has significantly lowered costs. Likewise, he explained that switching rates should be reexamined and also restructured by eliminating usage elements and using only a flat rate port element, in reflection of the fact that port utilization, rather than minutes of use, drives costs.

By order issued October 9, 2001 in Case No TO-2001-440, the Commission found "that the appropriate place to address SWBT's proposed deployment of the Project Pronto architecture, and the CLECs' claims regarding the unbundling of that architecture, is in a separate, new case." This case is an appropriate forum to address the costs of unbundling of that architecture.

Further, in general the Commission would be best served by allowing any party to present evidence regarding any UNE that it contends should be reexamined. It has been over five years since the first (and only) examination of all UNE rates. A thorough examination of UNE rates simply cannot be completed in an arbitration before this Commission, as this Commission has

consistently held. Hence, the Commission should generally wait until the record in this case is submitted before it makes any decision as to whether UNEs in addition to loops and switching should not be re-determined.

Concerning the UNEs that are presently at issue in Case Nos. TO-2001-438, 439 and 440, however, it does not currently appear that it will be necessary or efficient to reconsider in this case the issues that are about to be decided in those cases. However, in the absence of final decisions in these cases, it is not possible to make a completely definitive statement on this point.

### **III. A working group should be established.**

The Commission and all parties would benefit from the efforts of a working group. At a minimum, exchanging cost studies and facilitating discussions about them prior to the development of testimony would create the best opportunity to eliminate mistakes in the studies, misconceptions about the studies, and otherwise narrow discovery, testimony and the case as a whole to matters that are truly in dispute. To this end, working groups should be used as a forum for any party presenting a cost model in support of UNE rates to present that cost model and answer questions in workshop forum. Testimony could then be more focused, with all parties addressing all proposed cost studies in their direct, presenting full responses in rebuttal, thereby requiring limited surrebuttal, if any

Staff in particular would benefit from a working group. It would be able to conduct the type of detailed analysis that the Commission demanded in the original UNE proceedings. The Commission would in turn benefit from having a fully informed neutral advisory party presenting its views on the issues, while still hearing and deciding for itself the arguments of each party.

While the exchange of discovery and testimony is important, matters as complex as the cost studies involved in these cases require a more open and interactive dialogue to achieve the most thorough results possible.



**IV. The results of this case should be used for any legitimate purpose.**

The results of this case can and should be available for a number of uses. At a minimum, the Commission should direct SWBT to incorporate the results into the M2A or a successor model agreement, for adoption by CLECs. CLECs and SWBT could agree to incorporate the results into existing interconnection agreements, or extensions thereof. Under certain circumstances the Commission might be able to order such a use of the results. CLECs and SWBT could agree to use the results in new interconnection agreements. CLECs and/or SWBT could use the results as benchmark evidence of appropriate rates in future arbitrations, as the Commission has done with M2A rates in recent arbitrations. . The Commission and/or CLECs could present the results to the FCC under Section 271(d)(6)(A) regarding an evaluation of SWBT's ongoing obligation to meet the requirements of Section 271 by offering UNEs at cost-based rates. The results could be incorporated into a Statement of Generally Available Terms (SGAT) under Section 252(f). The Commission could order SWBT to incorporate the results into a UNE tariff, as has been done in other states.

While the Commission could endorse all of the foregoing potential uses of the results of this case, it should not foreclose the possibility of other uses. The Commission will be better able to address the propriety of any specific proposal after this case is over and the proposal is actually made.

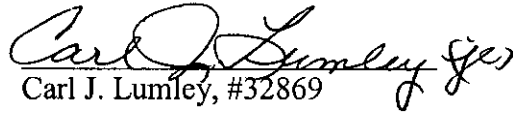
**V. Conclusion.**

The Commission should consider loop and switching UNE rates in this case, together with any other UNE rate presented by a party. The only exception should be for UNE rates being addressed in Case Nos. TO-2001-438, 439 and 440, which currently do not appear to require consideration herein.

A working group would be an effective means of assuring the parties present the most focused and informative case possible to the Commission.

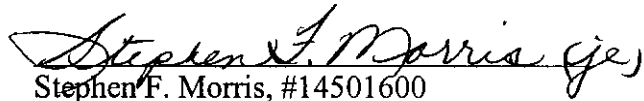
The end results of this case can and should be used for a number of legitimate purposes. It would be premature to place any limits upon such uses.

Respectfully submitted,



Carl J. Lumley, #32869  
Leland B. Curtis, #20550  
130 S. Bemiston, Suite 200  
Clayton, MO 63105  
(314) 725-8788  
(314) 725-8789 (FAX)  
[clumley@cohgs.com](mailto:clumley@cohgs.com)  
[lcurtis@cohgs.com](mailto:lcurtis@cohgs.com)

Attorneys for MCI WorldCom Communications, Inc.  
Brooks Fiber Communications of Missouri, Inc.,  
MCI metro Access Transmission Services, LLC,  
NuVox Communications of Missouri, Inc., and  
XO Missouri, Inc.



Stephen F. Morris, #14501600

WorldCom

701 Brazos, Suite 600

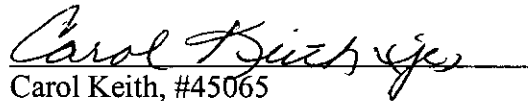
Austin, Texas 78701

(512) 495-6721

(512) 495-6706 (FAX)

[stephen.morris@wcom.com](mailto:stephen.morris@wcom.com)

Attorney for MCI WorldCom Communications, Inc.  
Brooks Fiber Communications of Missouri, Inc.,  
MCImetro Access Transmission Services, LLC,



Carol Keith, #45065

NuVox Communications

16090 Swingley Ridge Road, Suite 500

Chesterfield, Missouri 63017

(636) 537-7337

(636) 728-7337 (FAX)

[ckeith@nuvox.com](mailto:ckeith@nuvox.com)

Attorney for NuVox Communications of Missouri, Inc.



Rebecca B. DeCook, Colorado Bar No. 014890

1875 Lawrence Street, Suite 1575

Denver, CO 80202

(303) 298-6357

(303) 298-6301 (FAX)

[rdecook@lga.att.com](mailto:rdecook@lga.att.com)

Attorneys for AT&T Communications of the Southwest, Inc.  
TCG St. Louis and TCG Kansas City

**Certificate of Service**

A true and correct copy of the foregoing was served upon the parties identified on the attached service list on this 23rd day of May, 2002, by placing same in the U.S. Mail, postage paid and e-mail.

Carl J. Sumley Jr.

Office of Public Counsel  
P.O. Box 7800  
Jefferson City, MO 65102  
[mdandino@mail.state.mo.us](mailto:mdandino@mail.state.mo.us)

Lisa Creighton Hendricks  
Sprint  
Mail Stop KSOPHN0212-2A253  
6450 Sprint Parkway, Bldg. 14  
Overland Park, KS 66251  
[lisa.c.creightonhendricks@mail.sprint.com](mailto:lisa.c.creightonhendricks@mail.sprint.com)

Carol Keith  
NuVox Communications  
16090 Swingley Ridge Road  
Chesterfield, MO 63017  
[ckeith@nuvox.com](mailto:ckeith@nuvox.com)

Sondra B. Morgan  
Brydon, Swearingen & England  
P.O. Box 456  
Jefferson City, MO 65102  
[smorgan@brydonlaw.com](mailto:smorgan@brydonlaw.com)

General Counsel  
Missouri Public Service Commission  
P.O. Box 360  
Jefferson City, MO 5102  
[whaas01@mail.state.mo.us](mailto:whaas01@mail.state.mo.us)

Mark P. Johnson, Trina R. LeRiche  
Sonnenschein, Nath & Rosenthal  
4520 Main Street, Suite 1100  
Kansas City, MO 64111  
[mjohnson@sonnenschein.com](mailto:mjohnson@sonnenschein.com)

Rebecca B. DeCook  
AT&T  
1875 Lawrence Street, Room 1575  
Denver, CO 80202  
[decook@att.com](mailto:decook@att.com)

Paul H. Gardner  
Goller, Gardner & Feather, P.C.  
131 E. High Street  
Jefferson City, MO 65101  
[info@gollerlaw.com](mailto:info@gollerlaw.com)

David J. Stueven  
IP Communications  
6405 Metcalf, Suite 120  
Overland Park, KS 66202  
[dstuevan@ip.net](mailto:dstuevan@ip.net)

Paul Lane  
Southwestern Bell Telephone Co.  
One Bell Center, Room 3520  
St. Louis, MO 63101  
[paul.lane@sbc.com](mailto:paul.lane@sbc.com)