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June 7, 2002

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

Re: Case No.: TT-2002-227, et al.

Dear Secretary of the Commission:

Enclosed please find for filing with your office an original and nine (9) copies of the Reply Brief of NuVox Communications of Missouri, Inc., MCI WorldCom Communications, Inc., Brooks Fiber Communications of Missouri, Inc., MCImetro Access Transmission Services, LLC, 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,



Carl J. Lumley

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

BEFORE THE MISSOURI PUBLIC SERVICE COMMISSION

In the Matter of Southwestern Bell Telephone Company's Proposed Revisions to PSC Mo. No. 26, Long Distance Message Telecommunications Service Tariff.	)	Case No. TT-2002-227
	)	Tariff No. 200200300
)	
In the Matter of MCImetro Access Transmission Services, LLC's Local NationwideOne Promotion.	)	Case No. TT-2002-235
	)	Tariff No. 200200338
)	
In the Matter of NuVox Communications of Missouri, Inc.'s "Free Month" Promotion for New Customers.	)	Case No. TT-2002-274
	)	Tariff No. 200200364
)	
In the Matter of American Communication Services of Kansas City, Inc.'s Tariff Filing to Introduce New Product Packages for Basic Local Service Business Customers.	)	Case No. TT-2002-294
	)	Tariff No. 200200364
)	
In the Matter of MCImetro Access Transmission Services, LLC's Proposed Revisions to its Local Exchange Service Tariff, MO P.S.C. Tariff No. 1.	)	Case No. TT-2002-304
	)	Tariff No. 200200395
)	
In the Matter of MCI WorldCom Communications, Inc.'s Proposed Revisions to its MO P.S.C. Tariff No. 4.	)	Case No. TT-2002-305
	)	Tariff No. 200200394
)	
In the Matter of Brooks Fiber Communications of Missouri, Inc.'s Proposed Revision to its P.S.C. Tariff No. 2, General Exchange Services.	)	Case No. TT-2002-306
	)	Tariff No. 200200396
)	
In the Matter of TCG St. Louis' Proposed Revisions to its P.S.C. Tariff No. 2, Local Exchange Services.	)	Case No. TT-2002-308
	)	Tariff No. 200200515
)	
In the Matter of TCG Kansas City's Proposed Revisions to its P.S.C. Tariff No. 1 Local Exchange Services.	)	Case No. TT-2002-309
	)	Tariff No. 200200516

REPLY BRIEF OF
NUVOX COMMUNICATIONS OF MISSOURI, INC., MCI WORLDCOM
COMMUNICATIONS, INC., BROOKS FIBER COMMUNICATIONS OF MISSOURI,
INC., MCImetro ACCESS TRANSMISSION SERVICES, LLC, TCG ST. LOUIS AND
TCG KANSAS CITY

COME NOW NuVox Communications of Missouri, Inc. ("NuVox"), MCI WorldCom Communications, Inc. ("MCI WorldCom"), Brooks Fiber Communications, Inc. ("Brooks"), MCImetro Access Transmission Services, LLC ("MCImetro" and, with MCI WorldCom and Brooks, collectively "WorldCom"), TCG St. Louis and TCG Kansas City (collectively "TCG") and for their Reply Brief state to the Commission:

The Commission should approve all of the CLECs' tariffs at issue in this case.

No party in this case contends that the CLECs' tariffs should be rejected on their independent merits.¹ Moreover, as discussed at length in the CLEC Initial Brief, such tariffs are essential components of CLECs efforts to compete. There is no evidence that would support a rejection of the CLECs' tariffs. Accordingly, the Commission should approve the CLECs' tariffs and abandon its prior obiter dictum statements about potential restrictions on CLEC long-term discount tariffs.

The Commission can and should regulate SWBT in a different manner than CLECs regarding long-term discounts for basic local service.

As it did in Case No. TT-2002-108, the Commission should again reject SWBT's arguments and conclude that the Commission can regulate SWBT as a non-competitive company

¹ Notwithstanding its repeated assertions that the CLEC tariffs should be approved on their merits, SWBT does make the outlandish assertion that the Commission should be more concerned about use of term discounts by CLECs than by SWBT because, according SWBT, CLECs use long-term contracts more often than SWBT on a percentage basis. (SWBT Brief, p. 18). SWBT makes deft use of the games one can play with percentages. SWBT ignores the fact that when one multiplies its term contract penetration rate times its 787,497 business access lines in

in a different manner than it regulates competitive CLECs with regard to long-term discounts for basic local service. SWBT trots out the same erroneous argument that it made unsuccessfully in Case No. TT-2002-108, contending that because Section 392.200 applies to all telecommunications companies, it must also be applied “equally” by the Commission to all telecommunications companies. SWBT offers a flawed and false syllogism. The statute does not require the Commission to ignore the substantial differences between incumbent SWBT and entrant CLECs and arbitrarily apply “one-size-fits-all” regulation. As previously held by the Commission in Case No. TT-2002-108, the statute allows for heightened scrutiny of the pricing practices of an incumbent like SWBT.

The fallacy of SWBT’s argument is made plain by expressly stating the implicit constraints within which SWBT would have the Commission believe it must regulate. SWBT would have the Commission believe that notwithstanding compelling evidence that SWBT’s tariffs should be rejected and that the CLECs’ tariffs should be approved, the Commission must choose either to reject all of the tariffs or to approve all of the tariffs. The Commission should be loath to reach such a conclusion, especially in the absence of any statutory language that could in any way be said to compel such a conclusion. The Commission is charged with regulating telecommunications to protect the public interest, not with flipping coins to make Hobson’s choices.

At bottom, a rejection of SWBT tariffs that is based upon substantial and competitive evidence does not mandate and cannot result in a rejection of CLECs tariffs that is not based upon substantial and competent evidence.

Missouri, the resulting figure is akin to the total market share of the largest CLEC. (SWBT Brief, p. 4, Tr. 163, Ex. 23 HC).

The Commission can restrict SWBT's use of long-term discounts regarding basic local service.

SWBT acknowledges, notwithstanding its status as a price cap regulated company, that its tariffs can be scrutinized and rejected under Section 392.200. (SWBT Brief, p. 27). As the Commission concluded in Case No. TT-2002-108, and as the CLECs demonstrated again in their Initial Brief herein, Section 392.200 authorizes rejection of SWBT's proposed promotion of long-term discounts for basic local service.

Furthermore, SWBT and Staff both acknowledge that Section 392.200 applies to SWBT even as to services offered in exchanges in which the Commission has determined that it faces "effective competition" under the price cap statute. (SWBT Brief, p. 33, Staff Witness Cecil, Tr. 337 (Section 392.200 applies to all companies and cannot be waived)). The Commission should adhere to its conclusion that "if effective competition in the local telecommunications market is to survive and prosper in Southwestern Bell's exchanges, Southwestern Bell must be subject to heightened regulatory oversight." Report and Order, Case No. TT-2002-108 (Ex. 16, p. 10). The Commission should reject Staff's "compromise" invitation to abandon that conclusion, particularly in light of the facts that the Commission reached the conclusion based in part on Staff's testimony in the preceding case which was based on the same evidence that led to findings of effective competition in another contemporaneous case, that Staff concedes that there has been no change in market conditions, and that Staff has offered no explanation for its new willingness to compromise its prior recommendation. (Ex. 16, p.10; Ex. 18, p. 12; Tr. 326-27).

The Commission should restrict SWBT's use of long-term discounts for basic local service.

In its Initial Brief, SWBT completely ignores the Commission's decision in Case No. TT-2002-108. Yet, in their Initial Brief, the CLECs demonstrated that all of the Commission's findings and conclusions concerning SWBT's use of long-term discounts made six months ago in that case remain accurate. (CLEC Brief, p. 30-32). SWBT resurrects the same arguments that the Commission rejected in Case No. TT-2002-108 (Ex. 16), and makes no effort to address the prior rejection of those arguments. Even if SWBT makes some effort to address the prior decision in its Reply Brief, its failure to do so in its Initial Brief makes the telling admission that it does not believe its arguments can withstand reply by its opponents.

SWBT says its tariffs are "pro-consumer". SWBT focuses on the individual customer, and ignores the negative impact of its use of long-term discounts on all customers and the market as a whole.² The Commission has wisely already rejected this argument, stating:

The Commission's concern is not with protecting the individual business customer. Rather, it is concerned about protecting the viability of the overall market for local exchange telecommunications services.

Indeed the problem may be that these promotions will be such a good deal for individual business customers that Southwestern Bell will be able to claim, and lock up for an extended period, so many customers that its competitors will be weakened, or even driven out of the market entirely. If that happens, competition will have failed and business customers will ultimately lose the benefits of competition.

(Ex. 16, p. 16). The evidence in this case supports exactly the same conclusion as the Commission reached in Case No. TT-2002-108 on this argument.

² Of course, SWBT ignored the "demands of consumers" until local competition was about to be authorized. (Tr. 83-84).

SWBT says its tariffs are “pro-competition”. SWBT says CLECs do not seek to protect the market, but rather seek to gain an advantage. SWBT ignores the fact that Staff opposes its tariff, and again SWBT further ignores the fact that the Commission itself has recently ruled that SWBT’s tariffs are anti-competitive. The Commission stated:

The Commission has previously found, as a matter of fact, that Southwestern Bell’s proposed promotional tariffs will be detrimental to the health and development of competition in Missouri’s local exchange market. Those tariffs are therefore unjust and unreasonable. In keeping with the Commission’s obligations under Section 393.200, R.S.Mo. 2000, the Commission must reject Southwestern Bell’s tariffs.

(Ex. 16, p. 15). The evidence in this case supports exactly the same conclusion as the Commission reached in Case No. TT-2002-108 on this point.

Contrary to SWBT’s Initial Brief, this case is not about the general use of term discounts in non-regulated markets, nor is it about use of term discounts in PBX, long distance and wireless markets. Moreover, this is not a case about markets in other states.³ Rather, as was true in Case No. TT-2002-108, this case is about SWBT’s use of long-term discounts for basic local (wireline) service in Missouri.

The CLECs and Staff have proved that SWBT’s use of long-term discounts has impaired the development of basic local competition in Missouri. SWBT disagrees, arguing that it does not have that many customers that are willing to make long-term commitments. (SWBT Brief, p. 4). Yet, SWBT concedes that customers are not simply fungible, one for another, stating “there are a substantial number of customers who seek telecommunications services on a term basis in order to receive the benefit of lower and guaranteed prices.” (SWBT Brief, p. 4).⁴ “For these

³ And in any event, other states are investigating similar concerns (Ex. 14, Kohly Rebuttal, p. 30).

⁴ Although truly tangential, SWBT’s assertion that its term contract “penetration rate” would actually be lower if CLEC customers were included in the calculation is patently false. The uncontroverted evidence shows that CLECs have a higher penetration rate among their customers. Hence, mathematically the inclusion of such customers

customers, one of their primary determinants of who they choose as a provider of telephone service is the availability of a term contract.” (SWBT Brief, p. 31). Further, SWBT concedes the facts underlying the CLECs’ testimony that these are the very group of customers that CLECs’ must be able to serve, because as new entrants the CLECs must serve a high percentage of customers by means of long-term contracts. (SWBT Brief, p. 17-18).⁵ When incumbent SWBT locks up its customers, it directly impairs CLECs ability to survive in the market.⁶

Next, SWBT says growth in CLEC market share means that SWBT’s use of long-term discounts must not be impairing competition. However, on cross-examination, SWBT’s witnesses conceded a contradictory change in the rate of CLEC market share growth. (Tr. 99 (HC)). Further, on cross-examination SWBT’s witness conceded they could not say that SWBT’s use of long-term discounts has not slowed the growth of CLEC market share. (Tr. 122-23). In short, SWBT’s witnesses admitted they have no idea whether its use of long-term discounts has impaired CLEC competition. SWBT’s simplistic gross market share “analysis” has no merit, and completely fails to contradict the CLECs’ compelling evidence of the negative impact SWBT’s practices have had on basic local competition.

Moreover, in Case No. TT-2002-108 the Commission rejected the same market share “analysis” that SWBT resurrects in this case.

Southwestern Bells’ fourth argument is that it is offering its Business MCA promotion and CompleteLink service offer in response to the competitive market and that its proposed offerings will increase rather than harm competition. Southwestern Bell argues that this Commission

would raise the rate. SWBT’s witness ultimately admitted his error of omission on cross-examination (Tr. 56), yet SWBT perpetuates the error in its Brief (p. 15-16).

⁵ Indeed, SWBT also concedes that it is not much affected by the Commission’s current policy of limiting it to use of one-year terms, admitting that most of its term customers only seek one-year terms anyway. (SWBT Brief, p. 17). SWBT raises concerns about its ability to serve the State, but this case is about business contracts, not governmental. Governmental contracts must be addressed another day, perhaps by rulemaking.

⁶ SWBT was “allocated” 100% of the market for over a century. None of that market share has been “allocated” to CLECs. They struggle to earn every customer. It is not an “allocation” of the market to preclude SWBT from impairing such competitive efforts through long-term contracts with the customers most likely to change providers.

and the Federal Communications Commission have recently found that Southwestern Bell has opened its local market in Missouri to competition when they approved Southwestern Bell's application to provide interLATA long distance service in Missouri. Southwestern Bell also points to the fact that ever larger numbers of CLECs are offering competitive services in its exchanges, testimony indicated that approximately 22 percent of the business market is now controlled by CLECs.

While the Commission and the FCC have found that Southwestern Bell satisfied the fourteen-point checklist found in Section 271 of the Telecommunications Act of 1996, that finding only indicates that the local telecommunications market in Missouri is open to competition. It does not mean that the competitive market is mature enough to withstand the pressures that would be placed on it by the promotions proposed by Southwestern Bell. Unless the Commission acts to protect competition, the local exchange market may be open to competitor, but have no surviving competitors.

(Ex. 16, p. 17-18). The evidence in this case supports exactly the same conclusion.

SWBT contends that it has shown that it is not "theoretically possible" for it to impair competition by using long-term discounts for basic local service. (SWBT Brief, p. 5). True enough: SWBT's witness constructed a theoretical world in which presumably there would not even be a need for a PSC. In contrast, the CLEC witnesses demonstrated the real-world negative impacts of SWBT's practices.

SWBT's expert testimony rests upon neo-classical economics, which is "blackboard economics in which the firm and market being studied appear by name but lack any semblance to reality." Coase, Ronald H. 1992, The Industrial Structure of Production, American Economic Review 82 (September): 713-19. Dr. Aron posited a market in which people have no reluctance towards changing their basic local service provider and view companies as interchangeable. The CLEC witnesses provided real-world evidence to the contrary, consistent with our everyday lives and experiences. The

Commission recognized the reality of customer inertia in its decision in Case No. TT-2002-108. (Ex. 16, p. 9-12).

SWBT also failed to prove the assumptions of its own theoretical analysis. As explained in CLECs' Initial Brief, SWBT's long-term arrangements with basic local customers are effectively exclusive, notwithstanding resale and assumption "opportunities" that do not make business sense. SWBT itself labeled existing entrants as "inefficient" (SWBT Brief, p. 25), even though it asserted that only such inefficiency can result in anticompetitive incumbent term contracts. SWBT fallaciously attempts to extrapolate CLEC financial difficulties into a conclusion that CLECs do not price above cost, but there is no evidence suggesting that basic local business rates of any company have been driven down to economic cost. Further, Mr. Kohly refuted SWBT's theoretical analysis. (Ex. 14, Kohly Rebuttal, p. 12-13; Ex. 15 Kohly Surrebuttal, p. 9-10, 15-16).

As discussed above, SWBT argues that it has an inalienable right to use long-term discounts as a price cap company. Yet SWBT readily concedes that it remains subject to Section 392.200. (SWBT Brief, p. 6). The CLECs and Staff have shown that SWBT's tariffs should be rejected under Section 392.200. The Commission reached the same conclusion in Case No. TT-2002-108 and the evidence dictates that it should adhere to that conclusion in this case.

SWBT also argues that the Commission is somehow bound by its prior approval of an earlier version of SWBT's proposed tariffs. The Commission expressly rejected this argument in Case No. TT-2002-108, recognizing that it is not bound by stare decisis (citing State ex rel. GTE North v. PSC, 832 S.W.2d 356 (Mo. App. 1992)). (Ex. 16, p. 18-19). However, the most interesting aspect of this argument by SWBT is its failure to

concede that the Commission's most recent decision, in Case No. TT-2002-108, dictates rejection of SWBT's proposed tariffs. Obviously, the argument cuts both ways, but SWBT conveniently chose to ignore the most recent Commission decision and failed to attempt to distinguish it in its Initial Brief, thereby avoiding the critique of a reply by its opponents.

Lastly, SWBT makes a "social welfare" and "public policy" argument. SWBT resorts to platitudes and generalities. In contrast, the CLEC evidence demonstrates the actual adverse effects of SWBT's long-term discount practices. The evidence is clear and unmistakable: SWBT neither needs nor uses long-term contracts to the same extent as CLECs, but rather employs them to impair the ability of CLECs to make inroads in its overwhelming market share. Unlike CLECs, SWBT has an existing ubiquitous network and customer base that allows it to make network investments without the certainty of long-term service arrangements. (Ex. 2 Aron Rebuttal, p. 3 (SBC covers capital expenditures out of revenues and will continue to do so despite depressed capital markets)). SWBT indeed remains a "near monopoly", accounting for its classification as a non-competitive company.

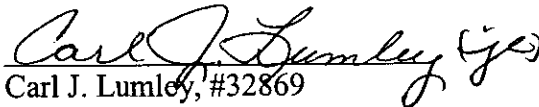
SWBT erroneously contends that limitations on its use of long-term contracts will make CLECs more dependent upon SWBT's network. To the contrary, the record demonstrates it is through use of long-term contracts that CLECs gain the ability to invest in their own facilities and become more independent from SWBT and its network.

For all the reasons stated herein and in CLECs' Initial Brief, the Commission should approve the CLEC tariffs and reject SWBT's tariffs.

As CLECs and Staff indicated in their Initial Briefs, a rulemaking is clearly in order. Continued case-by-case analysis of tariffs is burdensome and inefficient. Moreover, a rulemaking will enable the Commission to address concerns about existing tariffs. Even SWBT acknowledges that existing tariffs must be examined to effectuate a complete policy. (SWBT Brief, p. 5, 36-37). A rulemaking is the appropriate means to that end.

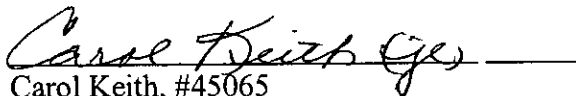
Respectfully submitted,

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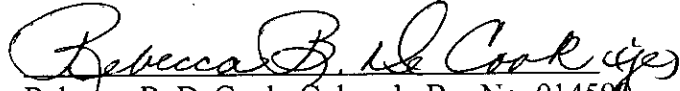
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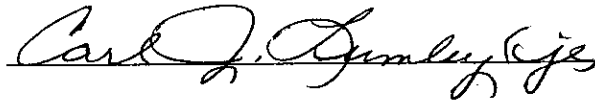
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Certificate of Service

A true and correct copy of the foregoing was served upon the parties identified on the attached service list on this 7th day of June, 2002, by e-mail and by placing same in the U.S. Mail, postage paid.



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