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August 22, 2002

FILED³
AUG 23 2002
Missouri Public
Service Commission

Secretary of the Commission
Missouri Public Service Commission
200 Madison, Suite 100
Jefferson City, Missouri 65101

Via Federal Express
833736654169

Re: Case Nos. TT-2002-472 and TT-2002-473

Dear Secretary of the Commission:

Enclosed please find for filing with your office an original and nine (9) copies of Surrebuttal Testimony of Don Price on behalf of MCI metro Access Transmission Services, LLC, Brooks Fiber Communications of Missouri, Inc. and MCI WorldCom Communications, Inc., in connection with the above-referenced matter. Upon your receipt, please file stamp the extra copy received and return to the undersigned. If you have any questions, please do not hesitate to contact us.

Very truly yours,


Carl J. Lumley

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

BEFORE THE MISSOURI PUBLIC SERVICE COMMISSION

FILED³

AUG 23 2002

Missouri Public
Service Commission

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

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

SURREBUTTAL TESTIMONY OF

DON PRICE

MCIMETRO ACCESS TRANSMISSION SERVICES, LLC
BROOKS FIBER COMMUNICATIONS OF MISSOURI, INC.
MCI WORLDCOM COMMUNICATIONS, INC.

AUGUST 23, 2002

SURREBUTTAL TESTIMONY OF DON PRICE
ON BEHALF OF
MCIMETRO ACCESS TRANSMISSION SERVICES, LLC
BROOKS FIBER COMMUNICATIONS OF MISSOURI, INC.
MCI WORLDCOM COMMUNICATIONS, INC.

1 **Q. PLEASE STATE YOUR NAME.**

2 **A.** My name is Don Price.

3

4 **Q. ARE YOU THE SAME DON PRICE WHO PREVIOUSLY SUBMITTED**
5 **REBUTTAL TESTIMONY IN THIS PROCEEDING?**

6 **A.** Yes I am.

7

8 **Q. WHAT IS THE PURPOSE OF YOUR SURREBUTTAL TESTIMONY?**

9 **A.** The purpose of my surrebuttal testimony is to respond to the rebuttal testimonies
10 filed by Christopher C. Thomas of the Commission Staff, Barbara A.
11 Meisenheimer of the Office of the Public Counsel, and R. Matthew Kohly of
12 AT&T Communications. I discuss the consensus among the witnesses that
13 SWBT's claims regarding the extent of competition in the Missouri local
14 telecommunications markets appear to be exaggerated. I further point out the
15 agreement among the witnesses that the extent of competition is insufficient to
16 protect customers and the market from unreasonably discriminatory practices by
17 SWBT. I respond to Ms. Meisenheimer's discussion about bypass. As regards
18 the larger context within which SWBT's proposed tariffs should be considered, I
19 briefly discuss the responses SWBT has provided to WorldCom's discovery.

1 Q. HAVE YOU REVIEWED THE TESTIMONIES PRESENTED IN THIS
2 PROCEEDING BY CHRISTOPHER C. THOMAS OF THE
3 COMMISSION STAFF, BARBARA A. MEISENHEIMER OF THE
4 OFFICE OF THE PUBLIC COUNSEL, AND R. MATTHEW KOHLY OF
5 AT&T?

6 A. Yes, I have.

7

8 I. THE ADVANTAGES OF INCUMBENCY AND THE STATE OF
9 COMPETITION IN MISSOURI LOCAL TELECOMMUNICATIONS
10 MARKETS

11

12 Q. WHAT IS THE ASSESSMENT OF THE VARIOUS REBUTTAL
13 WITNESSES REGARDING THE STATE OF COMPETITION IN
14 MISSOURI LOCAL TELECOMMUNICATIONS MARKETS?

15 A. Generally, the rebuttal witnesses all agree that while some competition exists in
16 some of the local markets, it is far from robust. Further, the extent of competition
17 is nowhere near sufficient to act as a control on Southwestern Bell Telephone
18 Company's (SWBT) ability to control prices. As described by Mr. Thomas:

19 As Staff has previously posited, the incumbent, SWBT, is in a position
20 to threaten the existence of competitors within its exchanges, while
21 those competitors are not yet in a similar position.¹

22 Similarly, Ms. Meisenheimer uses the term "bleak" in describing the current state
23 of local telecommunications competition in Missouri.² For his part, Mr. Kohly
24 notes the very well publicized problems in telecommunications generally, quoting

¹ Rebuttal Testimony of Christopher C. Thomas ("Thomas," hereinafter) at 4, lines 6-8.

² Rebuttal Testimony of Barbara A. Meisenheimer ("Meisenheimer," hereinafter) at 9, line 23.

1 FCC Chairman Powell's statement that "no sector ... needed less to be kicked in
2 the gut...."³

3 **Q. HAS THIS COMMISSION EXPRESSED ITS OPINION ON THE STATE**
4 **OF COMPETITION IN MISSOURI LOCAL TELECOMMUNICATIONS**
5 **MARKETS?**

6 **A.** Yes. As I discussed in my rebuttal testimony, the Commission's Report and
7 Order in consolidated Cases TT-2002-108 and TT-2002-130 clearly expresses
8 reservations about the viability of competition in the State's local
9 telecommunications markets, pointing out at page 16 that certain actions by
10 SWBT constitute "a threat to the long-term health of the competitive market for
11 local phone service."

12 **Q. IS THERE CONSENSUS AS TO THE ECONOMIC CONDITIONS THAT**
13 **UNDERLIE THE PRECARIOUS STATE OF COMPETITION IN THE**
14 **MISSOURI LOCAL TELECOMMUNICATIONS MARKETS?**

15 **A.** I believe there is. As I discussed in my rebuttal testimony, SWBT's enormous
16 market power derives in large part from its ubiquitous network, financed by
17 captive ratepayers during a period in which it held a legal monopoly, and with
18 virtually no financial risk to SWBT and its shareholders. This characterization is
19 consistent with the testimony of Mr. Thomas, who noted that the local
20 telecommunications market "has historically been characterized by very
21 substantial upfront capital investment in facilities and has been controlled by

³ Rebuttal Testimony of R. Matthew Kohly ("Kohly," hereinafter) at 18, lines 4-6.

1 protected monopoly providers, who possess very large economies of scale.”⁴ And
2 Mr. Kohly’s testimony likewise notes the disparity between the scale economies
3 of the incumbent versus new entrants, underscoring the enormous financial risk a
4 CLEC faces in making the large up-front network investments necessary to
5 compete with SWBT in the local telecommunications market in advance of
6 having paying customers to fund the investment.⁵

7 Both Mr. Thomas and Mr. Kohly point to the significant advantage the
8 incumbent has over the CLECs in terms of the scale economies enjoyed by
9 incumbents. And Mr. Kohly goes on to explain the effect of that advantage: as
10 an incumbent, SWBT’s marginal costs are lower than its competitors. That is
11 precisely the point made by the FCC in its Local Competition Order, as cited at
12 page 4 of my rebuttal testimony. More importantly, it is the point made by the
13 United States Supreme Court in its recent Verizon decision, wherein the Court
14 concluded that the incumbent has “an almost insurmountable competitive
15 advantage.” This conclusion, along with the above-referenced holding by the
16 FCC and this Commission’s own finding that “no CLEC has the resources to
17 attempt to duplicate Southwestern Bell’s telecommunications network,”⁶ leave
18 little room for debate as to the enormity of SWBT’s economic advantage in local
19 telecommunications markets. The facts are clear and support this Commission’s

⁴ Thomas at 4, lines 2-4.

⁵ Kohly at 13, lines 7-15.

⁶ Report and Order in Consolidated Cases TT-2002-108 and TT-2002-130 (“Report and Order,” hereinafter), at 9.

1 conclusion in the 108/130 docket that “Southwestern Bell is still in a position to
2 dominate its CLEC rivals.”⁷

3 **Q. DO YOU HAVE A RESPONSE TO THE DISCUSSION IN MS.**
4 **MEISENHEIMER’S TESTIMONY REGARDING THE POSSIBLE**
5 **ANALOGY TO A “BYPASS CUSTOMER” IN THE NATURAL GAS**
6 **INDUSTRY?**

7 A. Yes. First, I completely agree with Ms. Meisenheimer’s assessment that the
8 situation in the natural gas sector is “significantly different” from the
9 telecommunications industry.⁸ The distinction she provides regarding how, in the
10 natural gas sector the rationale for allowing such rate differentiation is done to
11 preserve revenue streams for a rate-regulated monopoly is, I think, highly relevant
12 to the issues in this proceeding. For example, in the instance of natural gas
13 (and/or the electric industry), a decision to permit rate differentiation between
14 otherwise similarly situated customers is based on a public interest assessment by
15 the regulator. That is, the regulator assesses the implications of the loss of a given
16 customer on the remainder of the ratepayers. Typically, the decision is to permit
17 the utility to charge a lower rate, because the general body of ratepayers is better
18 off by having a positive “contribution” from that customer, as opposed to having
19 no “contribution” if the customer obtained service from the competitive supplier.

⁷ Id.

⁸ Meisenheimer at 10, lines 13 through 20.

1 That public interest assessment is not relevant to the issues in this
2 proceeding, however, for at least three reasons. First, SWBT has opted out of
3 traditional rate base regulation –and it should be presumed that SWBT’s decision
4 to do so was based on an assessment that its profits would be higher under the
5 price cap regulatory structure. But SWBT’s decision also means that, unlike the
6 public interest assessment in the natural gas or electric industries, the “loss” of a
7 customer to a CLEC should have no effect whatsoever on the prices paid by the
8 remaining SWBT customers.

9 Second, for all the reasons discussed in my rebuttal testimony, CLECs
10 continue to rely on SWBT’s ubiquitous network for access to the vast majority of
11 the CLECs’ customers. Stated differently, SWBT would not face the prospect of
12 “stranded investment” in the case of a competitive loss except in a very few
13 instances where a CLEC’s network enables it to serve the customer using entirely
14 its own facilities. For that reason, SWBT will continue to derive revenues from
15 virtually all of its competitive losses, by way of the charges to the CLECs for the
16 “last mile facilities” used to serve their customers.

17 Third, the Act changes significantly the way regulators have traditionally
18 looked at “costs.” As noted by the Supreme Court in its recent decision:

19 Under the local-competition provisions of the Act, Congress called for
20 ratemaking different from any historical practice, to achieve the
21 entirely new objective of uprooting the monopolies that traditional rate-
22 based methods had perpetuated.

23 ...

24 For the first time, Congress passed a rate-setting statute with the aim
25 not just to balance interests between sellers and buyers, but to
26 reorganize markets by rendering regulated utilities’ monopolies

1 vulnerable to interlopers, even if that meant swallowing the traditional
2 federal reluctance to intrude into local telephone markets. [...] ⁹

3 Thus, to permit SWBT to differentiate its prices between customers solely on the
4 basis of the fact that one customer had previously been “lost” to a competitor
5 would run afoul of the Act’s goal of “rendering regulated utilities’ monopolies
6 vulnerable to interlopers....” Furthermore, it would permit SWBT to reap the
7 financial rewards of price cap regulation, while at the same time obtaining the
8 protections of the rate-of-return regulation from which it expressly walked away.

9
10 **II. “MARKET CONDITIONS” CANNOT BE RELIED ON TO PROTECT**
11 **THE MARKET FROM ANTICOMPETITIVE BEHAVIOR AND TO**
12 **PROTECT CUSTOMERS FROM UNREASONABLY DISCRIMINATORY**
13 **PRACTICES**

14
15 **Q. WHAT IS THE SIGNIFICANCE OF THE FACT THAT**
16 **“SOUTHWESTERN BELL IS STILL IN A POSITION TO DOMINATE**
17 **ITS CLEC RIVALS?”**

18 **A.** It is generally understood that in markets that are operating effectively, no single
19 provider is in a position to dominate its competitors. For example, competition
20 between automobile manufacturers to sell new cars and trucks is highly prominent
21 in various forms of media advertising. In the automotive world, the competitors
22 each have their own production and assembly facilities, and seek to distinguish
23 their products on such factors as style, safety, function, and so on. In the market
24 for local telecommunications, however, the “facilities of production” are

⁹ Verizon Communications Inc. v. FCC, slip opinion at 15-16.

1 dominated by the incumbent, with its ubiquitous, last mile network connecting to
2 all of the homes and businesses. Thus, regulatory mechanisms – such as the
3 requirements of §251(c)(3) of the Telecommunications Act – and their
4 enforcement constitute the primary means by which would-be competitors can
5 achieve something remotely resembling “equal footing” with SWBT.

6 Also, in a market where no competitor possesses a significant artificial
7 advantage, none of the providers is in a position to engage in practices harmful to
8 customers, because actions by one provider perceived as distasteful by customers
9 would cause customers to seek other alternatives. Thus, a competitive market
10 operating effectively serves to protect customers by ensuring that various service
11 or product alternatives exist.

12 The fact that SWBT can dominate its rivals in the local
13 telecommunications market means that effective competition in the market is
14 tenuous or non-existent, and thus, the “market” does not and cannot serve to
15 protect customers. Rather, until such time as the artificial advantages that SWBT
16 enjoys as a result of its historic monopoly have been eroded, the curbing of
17 anticompetitive behavior by SWBT is a goal this Commission must pursue. This
18 conclusion is consistent with Mr. Thomas’ testimony at page 4 where he points
19 out that regulation is critical to promoting competition in local
20 telecommunications markets, and indeed, the mechanism chosen by our elected
21 officials in passing the Telecommunications Act of 1996. Most importantly, this
22 conclusion expressly has been endorsed by this Commission, stating:

1 ... that sound public policy requires that [the Commission] take the
2 steps necessary to preserve the existence of the competitive market for
3 local exchange telecommunications services.¹⁰

4
5 **Q. IS THERE AGREEMENT THAT THE SWBT TARIFF PROPOSALS AT**
6 **ISSUE IN THIS PROCEEDING DEMONSTRATE THE NEED FOR**
7 **REGULATORS TO PROTECT CONSUMERS AND THE MARKET**
8 **FROM UNREASONABLY DISCRIMINATORY PRACTICES?**

9 **A.** Yes. In Mr. Thomas' testimony, he questioned whether there is a "reasonable and
10 fair difference in condition which equitable (sic) and logically justifies" the
11 disparate rate treatment proposed by SWBT.¹¹ In her testimony, Ms.
12 Meisenheimer noted that the "benefit" of the waivers proposed by SWBT would
13 obtain to "only a targeted subset of customers...."¹² Mr. Kohly's testimony
14 concluded that "there is no reasonable basis for differentiation created by the
15 eligibility limitations in the proposed tariffs."¹³ Thus, each of the rebuttal
16 witnesses independently reached the same conclusion: that SWBT's proposed
17 tariffs are contrary to the requirements of Sections 392.200.2 and 392.200.3 that
18 different rates shall not be charged to customers in "the same or substantially the
19 same circumstances and conditions."¹⁴ Given SWBT's proposed tariffs, the only
20 thing standing between Missouri telecommunications customers and SWBT's

¹⁰ Case No. TT-2002-108, Report and Order at 19.

¹¹ Thomas at 6, lines 21-24.

¹² Meisenheimer at 8, line 6.

¹³ Kohly at 8, lines 7-8.

¹⁴ Price at 26, lines 4-9.

1 express intent to unreasonably discriminate is this Commission and its supervision
2 over tariffs.

3 **Q. ARE THERE OTHER CONCERNS RAISED IN THE OTHER**
4 **TESTIMONIES THAN THE PRICE DISCRIMINATION YOU HAVE**
5 **DISCUSSED?**

6 A. Yes. As Mr. Kohly noted, the winback tariffs proposed by SWBT do not exist “in
7 a vacuum.”¹⁵ Indeed, there is evidence that SWBT may be engaging in a variety
8 of anticompetitive practices with regard to its treatment of information to which it
9 has superior access by virtue of its historic monopoly.¹⁶ As regards SWBT’s
10 policies and practices surrounding winback and retention efforts, this Commission
11 recently issued an Order compelling SWBT to respond to WorldCom’s discovery
12 on these and related matters. In its Order, the Commission concluded that:

13 While information about the manner in which SWBT uses information
14 about migration of customers may not be directly relevant to the
15 winback tariffs that have been suspended, it is connected to the issue of
16 whether those winback tariffs will be harmful to competition.¹⁷

17 **Q. HAVE YOU BEEN ABLE TO REVIEW THE RESPONSES TO**
18 **WORLDCOM’S DISCOVERY PROVIDED BY SWBT?**

19 A. I have been able to briefly review the portions of SWBT’s responses that it
20 classified as “non-proprietary.” These materials were only provided a day before
21 this testimony was completed (and were provided two days after the due date
22 established by the Commission).

¹⁵ Kohly at 19, line 17.

¹⁶ See, Price rebuttal at page 14, line 9 through 15, line 4.

¹⁷ Order Regarding Motion to Compel, issued August 8, 2002, at 18.

1 Q. **BASED ON YOUR INITIAL REVIEW OF THESE MATERIALS IS**
2 **THERE INFORMATION IN THE NON-PROPRIETARY RESPONSES**
3 **THAT BEAR ON THE ISSUES IN THIS PROCEEDING?**

4 A. Yes. Again, my review of the materials furnished by SWBT has been extremely
5 limited given the short time between receipt of the information and the deadline
6 for surrebuttal. One of the non-proprietary responses was particularly interesting.
7 Specifically, SWBT's response to RFI No. 11a. That response provides what
8 SWBT describes as the "script for the current customer service message left for
9 Missouri [residential] customers," and the script reads:

10 This is SBC Southwestern Bell Telephone calling with an important
11 message regarding your service. Your local service has been changed
12 from Southwestern Bell to another local service provider. If you
13 requested the change no action is required. If the change was made
14 without your knowledge, you may have been "slammed." Please
15 contact a customer service representative for assistance toll free at 1
16 866 877-1091. M-F 8-7 or Sat 9-6. Thank you from Southwestern
17 Bell.

18 This message is somewhat ambiguous. The "Please contact a customer service
19 representative" sentence easily can be viewed as an instruction for the customer to
20 call SWBT whether or not the customer had authorized the change in local service
21 provider. This ambiguity, masquerading under the guise of a "public service"
22 message, provides SWBT with the opportunity to receive inbound calls it would
23 not otherwise receive. If there were evidence that the only action one of SWBT's
24 customer service representatives would take would be to confirm whether the
25 customer had indeed authorized the change in provider, the ambiguity would be
26 less damaging. Absent such evidence, however, this should be seen as nothing
27 more than an inappropriate and unfair marketing effort.

1 Q. WHAT RELIEF IS WORLDCOM SEEKING OF THE COMMISSION AS
2 REGARDS SWBT'S PRACTICES IN THE AREA OF WINBACKS?

3 A. As stated in my rebuttal testimony, we believe an investigation is in order. With
4 or without an investigation, SWBT's proposed tariffs should be rejected.

5

6 III. CONCLUSION

7

8 Q. DOES THIS CONCLUDE YOUR SURREBUTTAL TESTIMONY?

9 A. Yes, it does.