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STATE OF MISSOURI
PUBLIC SERVICE COMMISSION

TRANSCRIPT OF PROCEEDINGS
Hearing
September 26, 2002
Jefferson City, Missouri
Volume 5

In the Matter of Southwestern Bell)
Telephone Company's Tariff Filing to) Case No. TT-2002-472
Initiate Residential Customer) Tariff No. 200200831
Winback Promotion.)
In the Matter of Southwestern Bell)
Telephone Company's Tariff Filing to) Case No. TT-2002-473
Extend Business Customer Winback) Tariff No. 200200828
Promotions.)

MORRIS L. WOODRUFF, Presiding,
SENIOR REGULATORY LAW JUDGE.

SHEILA LUMPE,
STEVE GAW,
BRYAN FORBIS,
COMMISSIONERS.

REPORTED BY:
KELLENE K. FEDDERSEN, CSR, RPR, CCR
ASSOCIATED COURT REPORTERS

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P R O C E E D I N G S

JUDGE WOODRUFF: Let's come to order. We're back on live here, and we'll begin with Ms. Meisenheimer on the stand.

MS. ESCOBEDO: Your Honor, if I might address one housekeeping matter before we start.

WorldCom would like to offer into evidence Exhibit 13HC as demonstrative evidence to facilitate the Commissioners keeping up with the questions that I asked Mr. Regan, not -- certainly not for the truth of the matter asserted, but just to facilitate the Commission to be able to keep up with my cross of Mr. Regan.

JUDGE WOODRUFF: And it was given to the Commissioners at that time?

MS. ESCOBEDO: That's correct.

JUDGE WOODRUFF: Okay. Any objections to its receipt for that purpose?

MR. LANE: I'm sorry. I didn't hear that, your Honor. I apologize.

MS. ESCOBEDO: Offering into evidence 13HC as demonstrative evidence just to facilitate the Commissioners being able to keep up with the cross I did on Mr. Regan.

MR. LANE: I thought you already offered it.

MS. ESCOBEDO: And it was offered as evidence. This is being offered as demonstrative evidence.

1 MR. LANE: I have the same objection, your
2 Honor, from yesterday.

3 JUDGE WOODRUFF: Okay.

4 MR. LANE: I think the rule --

5 JUDGE WOODRUFF: I think -- go ahead and say
6 what you want to say. Give me some guidance.

7 MR. LANE: I thought that the rule was, and
8 the Commission's rule, that if a party offers evidence and
9 it's declined, it's nevertheless made part of the record for
10 purposes of appeal, but it's not to be considered by the
11 Commission in making its decision.

12 In this case, obviously, it's already been
13 marked as an exhibit and it will be part of the record in
14 the case for that purpose, but it's still inadmissible as
15 evidence in the case.

16 JUDGE WOODRUFF: I believe Mr. Lane is
17 correct, in that the exhibit is, in fact, already in the
18 record for that purpose. So if the Commissioners can use it
19 to track your cross-examination, I don't believe any other
20 purpose would be served by denominating it as demonstrative
21 evidence. So I'm going to deny your request or motion,
22 whatever you want to call it, and leave it as it is.

23 MS. ESCOBEDO: Thank you, your Honor.

24 JUDGE WOODRUFF: Thank you. All right.

25 (Witness sworn.)

1 JUDGE WOODRUFF: All right. You may proceed.

2 MR. DANDINO: Thank your Honor.

3 BARBARA A. MEISENHEIMER testified as follows:

4 DIRECT EXAMINATION BY MR. DANDINO:

5 Q. Please state your name and position.

6 A. Barbara A. Meisenheimer. I'm chief economist
7 in telecommunications with Missouri Office of the Public
8 Counsel.

9 Q. And are you the same Barbara Meisenheimer
10 that caused to be filed in this proceeding rebuttal
11 testimony that has been marked for identification purposes
12 as Exhibit 7?

13 A. Yes, I am.

14 Q. And do you have any corrections to Exhibit 7?

15 A. I have one.

16 Q. Okay. What is it, please?

17 A. On page 6 of that testimony, line 4, the
18 section number should be 392.200.

19 Q. Do you have any other corrections?

20 A. No, I do not.

21 Q. As corrected, is Exhibit 7 true and correct to
22 the best of your information, knowledge and belief?

23 A. Yes, it is.

24 Q. And if I would ask you the questions that are
25 contained in Exhibit 7, would your answers here today be the

1 same as they are in Exhibit 7?

2 A. Yes, they would.

3 MR. DANDINO: Your Honor, at this time I'd
4 like to offer Exhibit 7.

5 JUDGE WOODRUFF: All right. Exhibit 7 has
6 been offered into evidence. Are there any objections to its
7 receipt?

8 (No response.)

9 JUDGE WOODRUFF: Hearing none, it will be
10 received into evidence.

11 (EXHIBIT NO. 7 WAS RECEIVED INTO EVIDENCE.)

12 MR. DANDINO: Your Honor, I now tender the
13 witness for cross-examination.

14 JUDGE WOODRUFF: Thank you. And for
15 cross-examination, we will begin with Staff.

16 MR. HAAS: No questions, your Honor.

17 JUDGE WOODRUFF: WorldCom NuVox?

18 MR. CURTIS: No questions.

19 JUDGE WOODRUFF: AT&T?

20 MS. DeCOOK: No questions.

21 JUDGE WOODRUFF: Southwestern Bell?

22 MS. MacDONALD: Thank you.

23 CROSS-EXAMINATION BY MS. MacDONALD:

24 Q. Good morning, Ms. Meisenheimer.

25 A. Good morning.

1 Q. Ms. Meisenheimer, in preparation of your
2 rebuttal testimony, on page 3, line 7 to 9, you indicate
3 that you reviewed portions of the applicable Missouri
4 statute, the direct testimony of Thomas Hughes and John
5 Regan filed on behalf of Southwestern Bell, Southwestern
6 Bell Data Request responses, portions of previous Orders of
7 the Commission and the FCC. Do you see that?

8 A. Yes.

9 Q. Okay. Did you have the opportunity to review
10 the FCC's Order on Reconsideration and Petitions for
11 Forbearance in CC Docket Nos. 96-115 and 96-149 dated
12 September 3, 1999?

13 A. I believe that I did. Do you have a copy of
14 it, and I can verify that?

15 Q. I sure do. I'm going to hand you what has
16 been marked as Exhibit 27. And specifically with regard to
17 Exhibit 27, did you have the opportunity to read paragraphs
18 66 through 70 which address winback issues?

19 A. Yes, I did.

20 Q. Okay. And as I did with Mr. Thomas, I would
21 like to discuss with you that portion of the FCC's Order
22 that begins with winback, beginning at paragraph 66.

23 In that paragraph, did the FCC state that it
24 is persuaded that winback campaigns are consistent with
25 Section 222(c)(1), and in most instances facilitate and

1 foster competition among carriers, benefiting customers
2 without unduly impinging upon their privacy rights?

3 MR. DANDINO: Your Honor, I'm not necessarily
4 posing an objection at this point, but if it will facilitate
5 matters and if counsel's going to ask if this is what the
6 Order says or if this is what they said in paragraphs 66
7 through 70, Public Counsel will stipulate that Exhibit 27,
8 that those paragraphs, the FCC said what it said in those
9 paragraphs, you know.

10 JUDGE WOODRUFF: All right.

11 MR. DANDINO: We're not denying that, and
12 maybe we could, you know, move things along and not
13 overburden the record with this. I'm just trying to assist
14 counsel.

15 JUDGE WOODRUFF: Okay. You can proceed as you
16 wish.

17 MS. MacDONALD: I would prefer to go through
18 this before we just move on into exactly --

19 JUDGE WOODRUFF: That's certainly your right.

20 MS. MacDONALD: Thank you.

21 MR. DANDINO: Your Honor, then let me make an
22 objection, then, that the -- it's cumulative, it's already
23 in the testimony. This information will -- all it is doing
24 is burdening the record, and it's cumulative evidence of
25 information that's already in the record.

1 JUDGE WOODRUFF: I think she has a right to
2 lead this witness into her further questions. I'm going to
3 allow it. Your objection's overruled.

4 MR. DANDINO: Thank you, your Honor.

5 MS. MacDONALD: Thank you.

6 BY MS. MacDONALD:

7 Q. Maybe my memory's just bad, but I
8 don't remember whether you answered my question about
9 paragraph 66, so why don't I just start all over again.

10 In paragraph 66, did the FCC state that
11 it's persuaded that winback campaigns are consistent with
12 Section 222(c)(1), and in most instances facilitate and
13 foster competition among carriers, benefiting customers
14 without unduly impinging upon privacy rights?

15 A. Yes, and in the further paragraphs associated
16 with that discussion, they describe that that is a general
17 policy; however, the specifics need to be looked at in some
18 cases.

19 Q. And that's exactly why we're here today?

20 A. Yes.

21 Q. Okay. And in paragraph 68, did the FCC state,
22 Winback restrictions may deprive the customers of the
23 benefit of a competitive market. Winback facilitates direct
24 competition on price and other terms, for example, by
25 encouraging carriers to outbid each other for a customer's

1 business, enabling the customer to select the carrier that
2 best suits the customer's needs?

3 A. I'm sorry. I wasn't at the right place as you
4 read each word. I mean, I'm happy to read it in.

5 Q. Okay. Why don't you go ahead and do that?

6 A. Winback restrictions may deprive customers of
7 the benefits of a competitive market. Winback facilities
8 direct competition on price and other terms, for example, by
9 encouraging carriers to outbid each other for a customer's
10 business, enabling the customer to select the carrier that
11 best suits the customer's needs.

12 Is there more of it that you wanted?

13 Q. No, that's fine.

14 And in paragraph 69, did the FCC determine
15 that once a customer's no longer obtaining service from an
16 ILEC, the ILEC must compete with a new service provider to
17 obtain the customer's business?

18 A. Yes, that sentence is included in
19 paragraph 69. It's a continuation of the previous thought.

20 Q. Okay. And in that paragraph, did the FCC
21 conclude, We believe such competition is in the best
22 interest of the customer and see no reason to prohibit ILECs
23 from taking part in this practice?

24 A. Yes, and once again, that paragraph was a
25 discussion regarding as being a matter of policy or general

1 policy as I interpret it.

2 Q. Okay. Turning to paragraph 70, and
3 specifically the latter part of that paragraph, did the FCC
4 conclude, Because winback campaigns can promote competition
5 and result in lower prices to consumers, we will not condemn
6 such practices absent a showing that they're truly
7 predatory?

8 A. Yes.

9 Q. Okay. And, again, the FCC's Order that we've
10 just discussed was issued on September 3rd, 1999, almost a
11 full year before the Missouri Public Service Commission
12 approved Southwestern Bell's first winback tariff; is that
13 correct?

14 A. Characterization is the Commission approving
15 the winback tariff I'm not sure I'm comfortable with, but
16 relative to the time the tariff went into effect, yes.

17 Q. Okay. Well, let's talk about you're not sure
18 about whether the Commission approved Southwestern Bell's
19 first winback tariff. In preparation for today, did you
20 have an opportunity to review TT-2000-154?

21 A. I may have looked at it, but I'm not familiar
22 with the specific language in the Order. If you have it,
23 I'm happy to take a look at it.

24 Q. Sure.

25 MS. MacDONALD: May I approach the witness?

1 JUDGE WOODRUFF: You may.

2 BY MS. MacDONALD:

3 Q. Ms. Meisenheimer, I'm handing you an Order
4 denying motion to suspend tariff in TT-2000-154. Have you
5 had an opportunity to review that in the past?

6 MR. DANDINO: Do you have an extra copy of
7 that?

8 MS. MacDONALD: I don't. I didn't know this
9 was going to come up, but I'd be more than happy to provide
10 it to you.

11 THE WITNESS: I think that looking at it now I
12 could answer questions about it.

13 BY MS. MacDONALD:

14 Q. Okay. And would you agree with me in
15 TT-2000-154 Southwestern Bell filed its first residential
16 winback promotion, Staff moved to suspend that tariff, and
17 the Commission denied Staff's motion, thereby allowing
18 Southwestern Bell's first winback tariff to go into effect?

19 A. Yes, the Commission denied the Staff's motion.

20 Q. And the winback tariff went into effect?

21 A. Yes.

22 Q. Okay. Would you agree with me that this
23 Commission has approved at least a dozen winback tariffs on
24 behalf of Southwestern Bell?

25 A. This is the first case in which I've been

1 fairly involved on the issue, so I mean, the Commission's
2 Orders stand for themselves.

3 Q. Okay. Well, let me ask you this. In
4 preparation for your testimony today, did you have the
5 opportunity to read the direct testimony of Tom Hughes, and
6 specifically with regard to Schedules 4-1 and 4-2?

7 A. I did read Mr. Hughes' testimony.

8 Q. And would you agree with me that -- that in
9 Schedules 4-1 and 4-2, Mr. Hughes lays out at least a dozen
10 tariffs that this Commission has approved on Southwestern
11 Bell's behalf that involve winback provisions?

12 A. I don't remember the number. I know that he
13 had discussed them. I haven't independently verified that
14 information.

15 Q. Okay. And if I told you that he discussed a
16 dozen tariffs, you have no reason to believe that what he
17 said is not true?

18 A. I would feel uncomfortable accepting it
19 without verifying it myself.

20 Q. And you didn't think that it would be a good
21 idea to check that out in preparation for coming here to
22 testify today?

23 A. I am generally familiar with -- that there
24 have been winback tariffs in effect previously. Whether the
25 number is 12, that is the problem that I'm having.

1 Q. Okay. Well, I'll move it along. I think that
2 the Commission can determine exactly how many winback
3 tariffs we have, but of the ones that we have had approved,
4 would you agree with me that approximately half have been
5 for residential customers and half have been for business
6 customers?

7 A. Once again, I am familiar with that there have
8 been both types. The count, I'm sorry, I can't verify that.

9 Q. Okay. But you do know that the Commission has
10 approved both residential and business winback tariffs for
11 Southwestern Bell?

12 A. They have allowed them to go into effect.

13 Q. Okay. And, in general, the tariffs that
14 Southwestern Bell's currently proposing waive the
15 nonrecurring charges for winback customers who agree to
16 subscribe to certain services; is that correct?

17 A. In part, yes.

18 Q. From a customer's perspective, the waiver of
19 nonrecurring charges would save the customer money; is that
20 correct?

21 A. Those customers who might receive it, yes.

22 Q. Okay. And no party in this proceeding is
23 contending that the waiver of service and connection charges
24 will result in any of these services being offered below
25 cost?

1 A. Listening to Mr. Regan's testimony yesterday,
2 I do have concerns regarding the cost basis. I don't
3 believe that Southwestern Bell has presented anything that
4 demonstrates that these -- that this particular waiver of
5 this particular service, whether for an individual customer
6 or for residential customers as a class, would not cause the
7 service to be priced below its incremental cost.

8 Q. Well, that wasn't really my question. My
9 question was that no party in this proceeding has set forth
10 any evidence that Southwestern Bell's tariffs would result
11 in services being offered below cost?

12 A. I -- I think the concerns have been raised in
13 testimony. Regarding any particular cost study, no.
14 However I believe that burden of proof goes to Southwestern
15 Bell.

16 Q. And you -- can you point me out where in your
17 testimony you've said anything about Southwestern Bell's
18 promotions potentially being offered for below cost?

19 A. I believe that within my testimony I
20 specifically discuss a concern regarding cost shifting.

21 Q. Right.

22 A. I believe that I specifically stated in
23 my testimony toward the end that I felt that it was
24 Southwestern Bell's responsibility to make a cost
25 demonstration, and I will attempt to point you to that.

1 On page 11 of my testimony, lines 8 through
2 10, Southwestern-- or SWBT must also demonstrate that the
3 discounted rate associated with the promotional service must
4 cover the long-run incremental cost of the service for areas
5 where the service has not been designated as competitive.

6 Q. Okay. Would you agree with me that it is not
7 a standard practice that every single promotion that is
8 filed with this tariff has -- has an analysis of the cost
9 information?

10 A. I believe that for certain services, in the
11 past, depending on their competitive classification, in
12 fact, there is a requirement for a cost demonstration, and
13 specifically within the new regulatory regime that
14 Southwestern Bell operates under, they have specific
15 requirements regarding services to demonstrate cost.

16 Q. Once again, that wasn't my question. My
17 question was, wouldn't you agree with me that on a routine
18 basis companies are filing tariffs with this Commission that
19 are being approved without coming forth with cost
20 information?

21 A. I'm sorry if I was not, in your opinion,
22 responsive to your previous question. If the question is
23 regarding companies in general, as opposed to Southwestern
24 Bell specifically, then I can agree with that.

25 Q. Okay. Now, I want to talk to you a little

1 bit about the cost-shifting contention that you raise.

2 Would you agree with me that Southwestern Bell is not a rate
3 of return company?

4 A. Yes, I would agree with that.

5 Q. And would you agree with me that Southwestern
6 Bell rather is a price cap company and is subject to the
7 provisions contained in 392.245?

8 A. Yes.

9 Q. And would you agree with me that Southwestern
10 Bell incurs costs in the process of providing service to its
11 customers?

12 A. Certainly.

13 Q. And because Southwestern Bell incurs the cost
14 in providing service to its customers, SWBT has to account
15 for those situations in which it has a cost?

16 A. If you could clarify account in what sense?

17 Q. Well, I mean, for example, Southwestern Bell
18 would have no incentive to misreport the source of cost
19 causation with regard to any promotion?

20 A. I would not necessarily agree with that.

21 Q. Okay.

22 A. Would you like me to explain?

23 Q. Go ahead.

24 A. Southwestern Bell is a company that now
25 operates in for some -- in markets for some services which

1 are more competitive than others. Economic theory suggests
2 that companies that operate in markets, some of which are
3 more competitive than others, they may have an incentive to
4 shift cost to the customers that have less choice, and in
5 particular if it is an inescapable service.

6 Q. And with regard to the cost shifting, that
7 generally has applied to rate of return companies in
8 economic analysis?

9 A. Historically, within the local exchange
10 market, it has been a regulated rate of return environment.
11 However, the price cap does allow Southwestern Bell
12 increases for certain services, and so to that extent, I
13 think that incentive may still exist.

14 Q. Well, if Southwestern Bell incurs a cost of
15 providing a service and it's losing money, don't you think
16 it would be in Southwestern Bell's best interests to know
17 where it's losing money?

18 A. I think it would be in its best interest,
19 certainly, to identify where it's losing money. Where it
20 may have other opportunities to recover that loss is a
21 different issue that I was attempting to address.

22 Q. Okay. So your issue is not where we're --
23 not cost causation, your issue is cost recovery?

24 A. As I've testified to in other cases before
25 this Commission, I think the two are highly correlated.

1 Cost causation arguments that attempt to shift cost recovery
2 to less competitive services is a real concern for our
3 office.

4 Q. Well, I think we've agreed today that there's
5 been no evidence that the waiver of the nonrecurring charges
6 that Southwestern Bell in the promotions that Southwestern
7 Bell seeks to have approved would be offered below cost?

8 A. I can't agree with that, and I've already
9 explained why.

10 Q. Well, where is the evidence?

11 A. Mr. Regan's own testimony, in my opinion,
12 provides evidence, and there is certainly an economic
13 foundation for believing that that concern is real.

14 Q. Are you saying that you believe --

15 A. And Southwestern Bell did not provide any
16 evidence to the contrary in terms of a cost study in this
17 proceeding.

18 Q. And the Office of the Public Counsel neither
19 requested a cost study nor did it present any evidence that
20 this service offering would be offered below cost; is that
21 correct?

22 A. The information that I attempted to obtain
23 from Southwestern Bell in Data Request responses indicated
24 to me that Southwestern Bell had not had a very accurate
25 track of the experience they had had with the previous

1 winbacks.

2 Q. Let me ask the question again,

3 Ms. Meisenheimer.

4 Did you ever ask Southwestern Bell for a cost
5 study with regard to any of the promotions in this
6 proceeding?

7 A. I don't think that I did.

8 Q. Thank you.

9 Ms. Meisenheimer, would you agree with me that
10 from August 4th, 2000 through December 31st, 2001,
11 Southwestern Bell had a winback tariff in effect for
12 residential customers pursuant to which Southwestern Bell
13 agreed to waive the nonrecurring service and connection
14 charges?

15 A. I don't. I don't dispute that Southwestern
16 Bell has had a tariff in effect, and August 4th, 2000
17 through 2001 sounds like the correct time frame to me.

18 Q. And from August 9th, 2001 through April 8th,
19 2002, Southwestern Bell had multiple winback tariffs in
20 effect for business customers, pursuant to which
21 Southwestern Bell agreed to waive the nonrecurring service
22 and connection charges?

23 A. April 2001 through 2002?

24 Q. Yes.

25 A. I -- I'm not disputing that.

1 Q. Okay. And during the period when Southwestern
2 Bell had those winback tariffs in effect, would you agree
3 with me that the minimum number of access lines served by
4 competitive local exchange carriers nearly doubled from
5 approximately 180,000 access lines to approximately -- well,
6 to over 330,000 access lines?

7 A. I haven't verified that number, so I can't
8 agree with that.

9 Q. Okay. You can provide no evidence to the
10 contrary, can you?

11 A. I did do a rather extensive analysis in
12 TO-2001-467 where I examined the number of access lines that
13 Southwestern Bell served.

14 Q. And you didn't present that in this case, did
15 you?

16 A. No, I haven't.

17 Q. Okay. And during that same period from
18 approximately August 2000 through April 2002, would you
19 agree with me that Southwestern Bell's access lines declined
20 by nearly 180,000 access lines?

21 A. I can't agree with that because I have not
22 verified that.

23 Q. And you haven't offered any evidence to the
24 contrary either, have you?

25 A. No.

1 Q. Okay.

2 A. I have not.

3 Q. And no party to this proceeding presented any
4 evidence that during the period August 2000 to April 2002,
5 any CLEC lost access lines because customers were returning
6 to Southwestern Bell for service; is that correct?

7 A. I would have to let the other parties'
8 testimony speak for itself.

9 Q. But you couldn't point me to any, for example?

10 A. I haven't specifically addressed that in my
11 own testimony.

12 Q. Okay. And you didn't present any evidence
13 that any CLEC lost access lines because customers were
14 returning to Southwestern Bell; is that correct?

15 A. That is correct, and in part that is based on
16 the Data Request responses that I received from Southwestern
17 Bell.

18 Q. Likewise, no party presented any evidence that
19 from August 2000 to April 2002 Southwestern Bell recaptured
20 enough lines that it eliminated all of its competitors; is
21 that correct?

22 A. That is true -- or with respect to my own
23 testimony, that is true.

24 Q. Okay. And, in fact, today there are dozens of
25 competitive local exchange carriers competing against

1 Southwestern Bell for local service customers?

2 A. Yes, there are.

3 Q. Okay. And would you agree with me that
4 economists have recognized that attempts at predatory
5 pricing are rarely successful because of the difficulty in
6 recouping foregone profits that were incurred during the
7 period of exclusionary pricing?

8 A. I would agree with that as a general
9 statement. However, as I've described in my testimony, I
10 think that the specifics of this market make it potentially
11 one of those rare exceptions.

12 Q. Okay. Now, even if Southwestern Bell excluded
13 its rivals in the local telecommunication market, would you
14 agree with me that Southwestern Bell could not increase its
15 rates with impunity because Southwestern Bell's a price cap
16 company pursuant to 392.245?

17 A. With the qualification that you've included of
18 impunity, I would agree with you.

19 Q. Okay. And furthermore, Southwestern Bell
20 could not increase its wholesale rates with impunity because
21 those rates must comply with TELRIC guidelines and must be
22 approved by this Commission?

23 A. Once again, with the qualification of
24 impunity, I would agree with that.

25 Q. Finally, even in situations where Southwestern

1 Bell's services are not subject to price cap regulation, if
2 this Commission were to determine that effective competition
3 no longer existed, it could reimpose price cap regulation
4 pursuant to 392.245?

5 A. Yes.

6 Q. Okay. Now, even if Southwestern Bell were
7 able to increase its retail rates, would you agree with me
8 that new carriers could still enter the markets by
9 purchasing unbundled network elements?

10 A. Southwestern Bell can increase its rates and,
11 yes, new competitors can enter the market by buying
12 unbundled network elements.

13 Q. Okay. And no matter how much Southwestern
14 Bell lowers its retail rates, competitive local exchange
15 carriers could provide service to their customers by
16 purchasing Southwestern Bell wholesale services at a
17 discount off the retail rate and reselling these services to
18 their customers?

19 A. Yes, to the extent those services are
20 available for resale.

21 Q. Okay. And to the extent that any CLEC owns
22 its own facilities and uses those facilities to provide
23 service in the local telecommunications market, if a
24 specific CLEC were to decide that it was no longer going to
25 offer service, those facilities could be purchased by a new

1 competitor in the local exchange market; is that correct?

2 A. Yes.

3 Q. In your testimony on pages 6 and 7 you discuss
4 Section 392.200.

5 A. Yes.

6 Q. Okay. And does Section 392.361 address
7 classification of telecommunications companies and the
8 services such companies offer?

9 A. Let me look to 361.

10 Q. And I'm going to ask you specifically about
11 subsection 5, so feel free to read the whole thing, but
12 that's where I would like to -- what I would like to discuss
13 with you.

14 A. We can give it a try now.

15 Q. Okay. In subsection 5, does the statute
16 state, by its order classifying a telecommunications service
17 as competitive or transitionally competitive or a
18 telecommunications company as competitive or transitionally
19 competitive, the Commission may with respect to that service
20 or company and with respect to one or more providers of that
21 service suspend or modify the application of its rules or
22 the application of any statutory provision contained in
23 Section 392.200 to 392.340, except as provided in 392.390?

24 A. Yes, in part that's what it says.

25 Q. Okay. Now, can we turn to 392.390?

1 A. I'm there.

2 Q. Okay. Turning specifically to subsection 5,
3 does that section provide that all telecommunications
4 companies, meaning both ILECs and CLECs, must be subject to
5 the provisions of subsections 2, 3, 4 and 5 of 392.200?

6 A. So far as such provisions are applicable to a
7 telecommunications company.

8 Q. Okay. And would you agree with me that
9 winback offers are prevalent in the long distance market?

10 A. Yes, maybe more so in the past than recently.

11 Q. Okay. Now, I'm going to do a little par--

12 A. In the -- in the -- I'm sorry. In the
13 interstate long distance market, I would agree with that.

14 Q. Okay. I'm going to do a little paraphrasing
15 here, and to the extent I get it incorrect, go ahead and
16 clarify. But during Mr. Dandino's opening statement, did
17 you hear him say something to the effect of Southwestern
18 Bell's tariffs single out a single set of customers for a
19 one-time benefit?

20 A. I remember him saying something to that
21 respect, yes.

22 Q. Okay. And would you agree with me that there
23 is no provision in any of Southwestern Bell's tariffs that
24 states a customer could only receive the promotional offer
25 once?

1 A. That's true. Let me clarify as you told me
2 that I could.

3 Q. Okay.

4 A. I think that Mr. Dandino, based on my
5 discussions with Mr. Dandino, is well aware that a ca-- that
6 a customer might qualify for this. They might leave,
7 qualify for it, come back, leave, qualify for it again.

8 Q. And that was all I wanted to make sure. You
9 would agree that you could start at Southwestern Bell, go to
10 AT&T, come back to Southwestern Bell, waive the nonrecurring
11 charges, go to WorldCom, come back to Southwestern Bell, and
12 you'll still get a waiver of the nonrecurring charges so
13 long as the tariff is in effect?

14 A. That's my understanding of the tariff and my
15 under-- I shouldn't speak for him, but it's consistent with
16 my understanding of Mr. Dandino's understanding.

17 Q. Okay. Just wanted to make sure.

18 MS. MacDONALD: That's all the questions I
19 have. Thank you so much.

20 THE WITNESS: Thank you.

21 JUDGE WOODRUFF: All right. Thank you.

22 We'll come up to questions from the Bench.

23 Commissioner Lumpe?

24 QUESTIONS BY COMMISSIONER LUMPE:

25 Q. Ms. Meisenheimer, in looking at your

1 testimony, you more specifically address the issue, I think,
2 of discrimination that these -- this tariff or this
3 promotion may be discriminatory. You don't use the word
4 "anti-competitive", you use the term "discrimination"; is
5 that correct?

6 A. I --

7 Q. Is that your main issue and focus?

8 A. Yes. Price discrimination may or may not be
9 anti-competitive. Under certain circumstances I don't
10 necessarily think it is anti-competitive.

11 Say, for example, under a rate of return
12 regulated environment with gas companies that you regulate,
13 you might allow price discrimination based on different
14 customer classes or other factors that you deem are
15 reasonable, and I believe that Missouri statute allows that.
16 In and of itself, that's not necessarily anti-competitive to
17 potential entrants that might enter that market, if it's
18 currently not.

19 In other instances, the types of price
20 discrimination you might see might not tend to meaningfully
21 lessen the degree of competition in a market, and to that
22 extent they may not be anti-competitive, although it is a
23 form of price discrimination.

24 Q. Okay. And I think it's on page 8 of your
25 testimony, you also discuss the issue of cost shifting on

1 that page also. I think you cited page 11 maybe, but you
2 also address that there, do you not?

3 A. I have.

4 Q. Look at line 8 on page 8.

5 A. Yes.

6 Q. How its customers will be protected from any
7 cost shifting, and that is a concern; is that right?

8 A. Yes, it is.

9 Q. And then you also -- when you get down to
10 line 18, you discuss what I guess I would call -- you say
11 "threatening entry". Are you talking about barriers to
12 entry that -- would you discuss that?

13 A. It may constitute a barrier to entry for a
14 number of reasons. If, in fact, it is shown to be below
15 cost, then a facilities-based competitor that wanted to
16 offer a similar service but did not have perhaps the
17 resources to draw on to do cost shifting, it could pose a
18 barrier to that firm being able to enter and compete in the
19 market.

20 There are additional areas of economics that
21 talk about how an incumbent might attempt to protect its
22 market from competitive entry through signaling potential
23 entrants that it will fight to keep its market share. And
24 so to the extent that it would attempt to put prices at a
25 significantly lower level, that might be a signal to other

1 companies that this may not be a place where they want to
2 attempt to come in and tangle with the incumbent.

3 Q. And in reference to that, is that -- perhaps
4 not, but are you discussing Mr. Regan's testimony yesterday
5 with Ms. MacDonald, and he talked about the pricing or the
6 rates being in overall terms not specific to an individual
7 customer.

8 Did I get that correct? Was that your
9 concern?

10 A. Your characterization of his testimony agrees
11 with what -- what I remember of his testimony. They have --
12 Southwestern Bell appears to be focusing on, in total, will
13 this service, this particular discount on this particular
14 service that they provide be recovered through the rates and
15 charges that might be generated from those customers if they
16 come back and stay with Bell for a sufficiently long period
17 of time.

18 Q. Okay.

19 A. Or if that customer buys a lot of services. I
20 believe that if the service is offered at a discount, say,
21 for residential service in particular, Southwestern Bell --
22 and they're giving -- I mean, they're literally giving away
23 connection for free in this promotion. That's a zero rate
24 for that service, and I find it very hard to believe.

25 And I think that there was evidence presented

1 previously by their witnesses that, in fact, that really
2 isn't cost free, and so it raises a concern for me.

3 Q. So there is a cost to connection. At least we
4 see that in the tariffs, that there's a cost to connection,
5 and if you give that away, are you giving it away free and
6 not meeting that particular cost then?

7 A. That's --

8 Q. Is that correct?

9 A. That's a concern for me. We attempted to
10 find -- to obtain information regarding the number of
11 customers in the past that have taken advantage of these
12 programs, and that information that I received to talk about
13 specifics, it would probably be highly confidential, so I'll
14 try to avoid that.

15 But I can at least say that it was
16 insufficient for me to feel comfortable that I or
17 Southwestern Bell had a good grasp on the magnitude of
18 winbacks and, further, the cost issue.

19 Q. Look at page 9 of your testimony, starting at
20 line, I guess it would be 19, and you state there that while
21 we may have provided and given other winback promotions,
22 that -- additional knowledge or consideration of them since
23 previous decisions were made, that those did not have any
24 precedential value, and that if we have knowledge of what we
25 think may be, i'll use the word anti-competitive or we need

1 to look at whether it's anti-competitive, that that is an
2 appropriate thing to do is to look and see what may be going
3 on; is that correct?

4 A. Absolutely. And I think that within the
5 context of the case that reviewed the state of competition
6 in Southwestern Bell's exchanges, you had a pretty
7 exhaustive look at what is the level of competition for
8 various services, and you found that there were only limited
9 cases and for limited services where, in effect -- in
10 effect, effective competition exists.

11 Q. I'm going to ask you one more question, then,
12 and this is the definition of anti-competitive. Is there no
13 economics textbook in the whole world that identifies or
14 defines anti-competitive?

15 A. I feel fairly confident, based on my
16 experience, that you could find definitions of
17 anti-competitive. I would be happy to give you one that I
18 think is reasonable for use in this purpose.

19 Q. Okay.

20 A. I believe that behavior or acts can be
21 considered to be anti-competitive if they meaningfully
22 reduce the level of existing or potential competition in the
23 relevant market, and that specifically with respect to
24 telecommunications in Missouri, I think that you can further
25 direct that -- the application of that definition toward

1 things -- it would be anti-competitive if it is inconsistent
2 with the Telecommunications Act and other provisions of the
3 federal law and with Missouri statute.

4 Q. And in defining it also, it has mentioned no
5 legal definition, and neither you nor I are attorneys, but I
6 have observed, in Missouri anyway, that sometimes the courts
7 will go to a standard dictionary to define terms to get the
8 plain meaning of what the statute might say.

9 Have you read any cases along those lines
10 where you've seen that?

11 A. I actually have somewhat of a background in
12 this area, and my perception is and my experience is that
13 consideration of what is anti-competitive behavior or what
14 might be an anti-competitive act in the study of economics
15 is very broad relative to the limited application in
16 anti-trust, and even more specifically, the practice of
17 predatory pricing that has been offered, say, for example,
18 in Dr. Aron's testimony by Southwestern Bell.

19 So I -- No. 1, I don't think you're limited to
20 that narrow limited focus. And No. 2, certainly we could
21 look to the dictionary or a greater body of economic
22 literature to talk about what might be an anti-competitive
23 act or tend to be anti-competitive with respect to the
24 emergence of a competitive market in telecommunications in
25 the state of Missouri.

1 COMMISSIONER LUMPE: Thank you,
2 Ms. Meisenheimer. That's all I have.

3 JUDGE WOODRUFF: Commissioner Gaw?

4 QUESTIONS BY COMMISSIONER GAW:

5 Q. Thank you. Good morning.

6 A. Good morning.

7 Q. I want to go to your discussion of 392.200, if
8 I could, in your testimony. I note that you have a number
9 of lines or sentences underlined in that statute, and I
10 would like for you to go, starting on page 6, and discuss
11 how you believe this -- the text that you've underlined is
12 relevant or helpful in deciding this case and starting, if
13 you would, with 392.200.2 where you've underlined that text.

14 A. Well, let me first apologize for not putting
15 the complete text in. I believe that I've included the
16 parts that I felt were relevant. Typically I try to include
17 the whole thing, but this was pages and pages.

18 Q. Yes.

19 A. Beginning with 392.200.2, there is very
20 specific language included in the statute, and I believe
21 here more so than with respect to other issues in the
22 statute, in my own experience of reading, that attempts to
23 identify what are all the specific things that a company
24 cannot do with respect to giving preferential price
25 treatment.

1 No telecommunications company shall directly
2 or indirectly. I mean, some thought went into that, in my
3 opinion, or by any special rate, rebate, drawback or other
4 device or method charge, demand, collect or receive from any
5 person or corporation a greater or less compensation for any
6 service rendered or to be rendered with respect to
7 telecommunications or in connection therein, except as
8 authorized in this chapter than it does from any like person
9 or corporation.

10 I believe that what Southwestern Bell is
11 proposing in this case falls squarely within that
12 description, in my reading. I'm not an attorney, but in my
13 reading, it falls squarely in there. It -- it later does
14 identify that promotional programs are acceptable for a
15 period of time, but still requires that they be consistent
16 with the provisions of this chapter and approved by the
17 Commission.

18 Q. All right. And do you believe that this
19 particular winback program is in violation of that section?
20 Is that Public Counsel's position?

21 A. I believe there are a number of provisions in
22 this section and, yes, in particular I believe that it
23 violates this. I believe it is a --

24 Q. And I'm not asking if it's limited to this.
25 I'm just asking if you believe it's a violation in any way

1 of that subsection?

2 A. Yes, I believe -- I believe they're doing a
3 like and contemporaneous service in hooking up customers,
4 and I don't understand why the customers that have been with
5 a CLEC should qualify for this discount, whereas new
6 customers moving into the area that have never had service
7 should not be eligible for this.

8 Q. Or maybe a customer that has gone wireless and
9 come back?

10 A. Yes. I think that there were a few examples.

11 Q. How is this -- if you consider this winback a
12 promotional program, how is it inconsistent with the
13 provisions of Chapter 392?

14 A. I believe that it is inconsistent with the
15 portion underlined in that section, and I believe that the
16 language regarding promotions says that they -- that they
17 have to be otherwise consistent with the provisions of this
18 chapter. So I don't view promotions necessarily as an
19 exception to the requirements the company has to operate
20 in the state of Missouri. I think that specifically there
21 are -- I believe that it was clarifying language.

22 Q. All right. Go to subsection 3, if you would,
23 and explain to me how you think that is relevant to the
24 determination of this case.

25 A. It says that no telecommunications company

1 shall make or give any undue or unreasonable preference or
2 advantage. I believe that this -- that the winbacks
3 actually do that. There is a limitation with respect to
4 different class of messages, but I don't think that's what
5 we're talking about.

6 Q. What is that referring to when it says
7 telecommunications messages, if you know?

8 A. Well, classes of messages, there may be
9 messages that perhaps utilize different facilities, messages
10 that traverse different distances across the network.
11 Historically toll rates in Missouri, for example, have
12 been -- there have been differences based on mileage that
13 those calls travel.

14 Now, the -- the technology of the network may
15 have made that where the cost differential
16 isn't as much and postage-type rates are more appropriate,
17 but . . .

18 Q. And you think that's the kind of thing it's
19 talking about when it's referring to telecommunications
20 messages?

21 A. I do.

22 Q. All right. Why don't you go to 4?

23 A. I didn't mean to say that that was exhaustive
24 in terms of different types of messages.

25 Q. I understand.

1 A. But that's a prime example, I think.

2 I firmly believe, and I believe that in
3 reading Mr. Hughes' testimony, that Southwestern Bell is
4 attempting to segment the market. They're attempting to in
5 some manner claim that these particular customers are
6 similarly situated distinctly from the other customers that
7 they may hook up for service, and I personally don't feel
8 that that is a fair characterization.

9 Customers initiating service as a rule in many
10 cases the facilities used may be the same, the process could
11 be the same, and I -- I don't think that it is a fair market
12 segmentation.

13 And I don't believe that Southwestern Bell in
14 this instance has shown by clear and convincing evidence
15 that the definition of such services based on that market
16 segmentation within which they intend to offer it is
17 necessary or consistent with the public interest.

18 COMMISSIONER GAW: I apologize, counsel and
19 others, but I have got to go to agenda. I do have a few
20 more questions. If there is time later on, I'll try to get
21 them in.

22 JUDGE WOODRUFF: All right. Well, I don't
23 have any other questions, so at this time we'll go to
24 recross based on questions from the Bench. If Commissioner
25 Gaw is able to return after agenda, we'll give him a chance

1 to ask his questions and we'll recross again as necessary.

2 All right. For recross, then, beginning with
3 Staff.

4 MR. HAAS: No questions.

5 JUDGE WOODRUFF: WorldCom NuVox?

6 MR. CURTIS: No questions.

7 JUDGE WOODRUFF: AT&T?

8 MS. DeCOOK: Thank you.

9 RECROSS-EXAMINATION BY MS. DeCOOK:

10 Q. Good morning, Ms. Meisenheimer.

11 A. Good morning.

12 Q. You received some questions from Commissioner
13 Lumpe about your definition of anti-competitive. Would you
14 agree with me that this Commission is oftentimes called to
15 make predictive judgments?

16 A. Absolutely. I would -- I would liken it
17 almost to medicine. In some instances, you may need a
18 general practitioner. In other instances, you may need a
19 specialist. It depends on what ails you.

20 I think that this Commission is responsible
21 both under Missouri statute and under federal law to do
22 preventative medicine on the local exchange market in
23 Missouri with respect to promoting competition.

24 Q. And they oftentimes make those predictive
25 judgments in terms of public interest as well, which could

1 include an analysis of competitive -- the competitive market
2 and impacts on competition?

3 A. Absolutely. And I believe that that is fully
4 consistent with the responsibilities and actions of
5 regulatory bodies, both at the federal and state level.

6 Q. And when they're reviewing a tariff or a
7 proposal such as the tariff -- tariffs that are at issue in
8 this proceeding, is it your opinion that one of the
9 predictive judgments that they need to make is whether the
10 tariff or the proposal has the potential to harm the
11 development of competition in the State of Missouri?

12 A. Absolutely.

13 Q. Is it your opinion that a definition of
14 anti-competitive should include or allow the Commission to
15 make that kind of predictive judgment by including some
16 provision that allows them to assess the potential for
17 competitive harm?

18 A. Absolutely. I believe that in the definition
19 that I gave to Commissioner Lumpe I talked about potential
20 entry and I --

21 Q. Is it limited just to potential entry? I
22 guess I wasn't sure with your definition whether you were
23 looking at current conduct, previous conduct, prospective
24 conduct, so that was the genesis of my questions.

25 A. I believe that it is appropriate for the

1 Commission to consider both the current competitive
2 environment and the future competitive environment. And so
3 to the effect that particular actions or policies might
4 meaningfully restrict the potential for the full development
5 of competition in the state, that the Commission certainly
6 should be concerned about that and has the authority to act
7 to do what the statute says, to promote full and fair
8 competition.

9 Q. Based upon your reading of FCC orders, is it
10 your opinion that the FCC has engaged in a similar review of
11 the potential impact of proposals and conduct on
12 competition?

13 A. I believe that the FCC and other federal
14 regulatory agencies have done that.

15 MS. DeCOOK: Thank you. That's all I have.

16 JUDGE WOODRUFF: And for Southwestern Bell?

17 RE-CROSS-EXAMINATION BY MS. MacDONALD:

18 Q. Good morning again, Ms. Meisenheimer. I want
19 to go over your definition of anti-competitive a little bit
20 with you, too, and I believe -- and, again, I'm probably
21 paraphrasing -- that you said it would be -- it would be --
22 behavior or acts may be anti-competitive if they would
23 meaningfully reduce the level of existing or potential
24 competition in the market.

25 I want to turn specifically with regard to

1 the level of existing. Would you agree with me that
2 Southwestern Bell has presented evidence with regard to the
3 number of access lines that the CLECs have had during the
4 course of the time that Southwestern Bell had winback
5 promotions in effect?

6 A. I would agree that you -- that Southwestern
7 Bell did present numbers of access lines.

8 Q. Okay. And you would agree with me that those
9 numbers that Southwestern Bell presented indicated that
10 during the period that Southwestern Bell had winback
11 promotions in effect, the number of estimated -- the minimum
12 number of estimated CLEC access lines nearly doubled?

13 A. Once again, I didn't verify Southwestern
14 Bell's numbers.

15 Q. But that, nevertheless, is the evidence that
16 Southwestern Bell put forth?

17 A. Southwestern Bell's evidence speaks for
18 itself.

19 Q. Okay.

20 A. I would point out that that is not a measure
21 of what potentially could have existed in terms of the
22 movement of access lines between companies.

23 MS. MacDONALD: I'm going to move to strike
24 that last phrase as nonresponsive to the question that I
25 asked.

1 JUDGE WOODRUFF: It was nonresponsive to the
2 question. It will be stricken -- or stricken or struck.

3 BY MS. MacDONALD:

4 Q. Okay. Now, there's been no showing at all in
5 this case that the prior tariffs in -- had any effect on
6 reducing the level of competition; is that correct?

7 A. I have not within my own testimony identified
8 any specific amount of lines or something like that that I
9 thought that it has affected.

10 Q. Okay. And no other party to your knowledge
11 presented any such evidence either?

12 A. Once again, their testimony speaks for itself.

13 Q. Okay. And did you review their testimony in
14 preparation for today's hearing?

15 A. Yes, I did, and I'm --

16 Q. And you couldn't point me to anywhere in
17 their testimony where they presented any evidence that
18 Southwestern Bell's prior tariffs reduce the level of
19 competition, could you?

20 A. I can't point you to a specific place in their
21 testimony. However, I'm not claiming that that testimony
22 isn't there.

23 MS. MacDONALD: Okay. Thank you.

24 JUDGE WOODRUFF: Redirect?

25 REDIRECT EXAMINATION BY MR. DANDINO:

1 Q. Ms. Meisenheimer, counsel for Southwestern
2 Bell was asking you about any -- what evidence in the
3 reduction of access lines from Southwestern Bell from the
4 competitors or from CLECs. Does the number of lines
5 Southwestern Bell gains or loses constitute the entire
6 status or level of competition in the state of Missouri for
7 telecommunications services?

8 A. No, it does not.

9 Q. And there are other factors. What other
10 factors would you want to look at other than just the --
11 just simply the number of access lines won or gained by
12 Southwestern Bell or the CLECs?

13 A. In addition to the particular access lines, I
14 think that it is relevant to look at the impact on price
15 that consumers pay for services, the quality of services
16 that the customers receive, the fairness with which
17 particular rates are applied to different customer classes
18 and subgroups within those classes.

19 Q. That's sufficient. Would the gain or loss in
20 the number of access lines, would that be equivalent to or
21 looking at market share?

22 A. It is one potential measure of market share,
23 yes.

24 Q. Okay. And hasn't this Commission -- or let me
25 reword it into a nonleading question.

1 Is -- what has the Commission said about
2 market share as the indicia of the status of competition in
3 Missouri?

4 A. If memory serves me, I believe the Commission
5 said that it is not the only factor that is relevant in
6 determining the state of competition in Missouri. Within
7 the case where they examined the state of competition in
8 Southwestern Bell's exchanges in particular, certainly there
9 was information provided by various parties, Southwestern
10 Bell, Public Counsel and the Staff, that provided access
11 line estimates.

12 Within my own testimony, I also talked about
13 the accessibility of carriers to Missouri consumers. I had
14 done a survey where I had called the various CLECs that were
15 said to be operating in the state and found that, in fact,
16 many of them really weren't there or they didn't offer the
17 variety of services that they were claiming to be offering.

18 Also, you know, certainly there's an issue of
19 the potential viability of competitors that are in or may
20 provide potential competition in the future.

21 Q. And is there also a question of whether or not
22 the CLEC lines were for prepaid providers?

23 A. Absolutely. The degree to which a particular
24 form of competition actually disciplines the price or
25 promotes a wider variety of services is also very

1 significant, and I believe it's an issue that both Public
2 Counsel and the Staff have addressed in previous cases.

3 Q. Are you suggesting to the Commission that it
4 should look at its decision in -- is it TT-2001-467? Is
5 that the investigation into the status of competition in
6 Southwestern Bell exchanges?

7 A. I believe it was TO-2001-467.

8 Q. Okay. And that the Commission ought to look
9 at their decision in there as a backdrop to this case?

10 A. Certainly. I mean, that is fairly recent
11 information that was scrutinized by various parties. The
12 Commission made decisions and those decisions still stand.
13 To my knowledge, I don't think Southwestern Bell has come in
14 and petitioned for competitive status in any other exchanges
15 since then.

16 Q. So just because there are dozens of
17 competitors, you'd have to look at who the competitors are?
18 Would that make a difference or not?

19 A. Absolutely. You may have a startup company
20 that does not have a history, certainly wouldn't think that
21 they could potentially at least initially be as robust a
22 competitor as a company with greater experience and
23 financial resources.

24 Q. Counsel for Southwestern Bell, Ms. MacDonald,
25 asked you about whether or not Public Counsel introduced or

1 even asked for cost studies from Southwestern Bell. What
2 was your reason for not asking for cost studies?

3 You mentioned something about the DR
4 responses. What was the -- what in the DR responses led you
5 to think that asking for a cost study -- why didn't you ask
6 for it?

7 A. I have an answer that's highly confidential.

8 Q. Without getting into numbers, just the overall
9 reason why.

10 A. As I stated, without being able to use the
11 specific numbers, which would really be relevant to be able
12 to mention, the information that I was provided with in
13 response to Data Request was insufficient to in I -- or in
14 my belief evaluate the previous experience with Southwestern
15 Bell's winback programs.

16 And further, the fact that Southwestern Bell
17 is specifically talking about waiving a charge so, in fact,
18 the rate for that charge will be zero, yet it is very
19 reasonable, based on my own experience and, I think, some of
20 the testimony by Southwestern Bell in this case, that, in
21 fact, there will be cost associated with providing winback,
22 that I have cost concerns.

23 However, the Data Requests indicated to me
24 that it would be very difficult, in fact impossible, based
25 on historic performance to figure out the extent to which

1 the total service offering for a class would be below cost.

2 Q. Ms. MacDonald from Southwestern Bell also
3 asked you about the ability of this Commission to reimpose
4 price or to terminate price cap regulation and reimpose rate
5 of return regulation, and you said something in response to
6 counsel for AT&T about preventative medicine. Is that --
7 would that be preventative medicine -- adequate preventative
8 medicine to reimpose rate of return regulation?

9 MS. MacDONALD: Your Honor --

10 JUDGE WOODRUFF: Before you answer, we have an
11 objection.

12 MS. MacDONALD: I'm going to object to that
13 question because --

14 MR. DANDINO: I'll withdraw it.

15 MS. MacDONALD: Thank you.

16 BY MR. DANDINO:

17 Q. Counsel asked you about the ability to
18 reimpose rate of return regulation. Is that an acceptable
19 remedy?

20 MS. MacDONALD: Your Honor, I'm going to
21 object again, because I never asked a question about
22 reimposing rate of return regulation.

23 MR. DANDINO: Your Honor, I think she asked
24 reimposing rate of return regulation if effective
25 competition no longer existed.

1 JUDGE WOODRUFF: I seem to recall a similar
2 question, if not from you, perhaps from the Bench. I'm
3 going to overrule the objection.

4 BY MR. DANDINO:

5 Q. Can you answer the question or do you need me
6 to repeat it?

7 A. Please do.

8 Q. Is the ability to reimpose rate of return
9 regulation, terminate price cap regulation if effective
10 competition no longer exists, do you consider that an
11 acceptable and adequate remedy for the consumers and
12 ratepayers to protect them, to protect the public interest?

13 A. Yes, I do.

14 Q. Should the Commission take any steps to assure
15 that effective competition remains in effect before it comes
16 to the point where they have to reimpose rate of return
17 regulation?

18 MS. MacDONALD: Your Honor, I would object
19 again, just for the record, because I never asked about
20 reimposing rate of return regulation. I asked about
21 reimposing price cap statutes pursuant to 392.245,
22 subsection 11.

23 MR. DANDINO: Oh, okay. I'm -- I understand
24 now.

25 MS. MacDONALD: Okay. Thank you.

1 MR. DANDINO: I understand. Okay. I'm going
2 to withdraw the question, your Honor.

3 I understand. We were talking about
4 competitive classification.

5 MS. MacDONALD: Right.

6 MR. DANDINO: Excuse me.

7 THE WITNESS: That -- that was my
8 understanding when I answered the previous question also.
9 I'm not a lawyer, so . . .

10 BY MR. DANDINO:

11 Q. The way I've been asking the questions, I'm
12 not sure I am.

13 A. I was speaking under the price cap statute.

14 Q. Let me move on to your response about
15 signaling, about whether behavior signals potential entrants
16 to come in and fight for part of -- for their market. Is
17 that a -- could you explain why that's an important
18 consideration in determining anti-competitive behavior?

19 A. It is wholly appropriate to expect that a
20 carrier would do or would take reasonable measures to
21 attempt to protect its market share, and one primary method
22 for doing that is signaling potential entrants that they're
23 going to have a fight on their hands if they want to enter
24 the incumbent's market. It is natural behavior that would
25 be expected of an incumbent provider under economic theory.

1 The issue is to what extent is that behavior
2 acceptable and reasonable from a public interest standpoint?
3 Some things that might be done may not rise to the level of
4 meaningfully reducing competition. In other cases it very
5 well might.

6 And in a market, as we're dealing with, that
7 for a very long time has been a monopoly, a regulated
8 monopoly where the service is a necessary good for consumers
9 and where there are high capital costs and a great deal of
10 technology and knowledge that are necessary for competitors
11 to enter this market and be successful in this market, I
12 think it's very relevant.

13 Q. This signaling could be something like the big
14 dog barking and growling?

15 A. That's correct, or being held at bay while the
16 little dog scurries up on the porch to get his tasty morsel
17 and then being loosed once he's got it.

18 MR. DANDINO: Thank you. That's all I have,
19 your Honor.

20 JUDGE WOODRUFF: Thank you.

21 All right. You can step down now, and I'd ask
22 that you -- I assume you're probably going to be sticking
23 around anyway. If Commissioner Gaw does come down before we
24 finish the hearing, we may recall you.

25 THE WITNESS: Okay.

1 JUDGE WOODRUFF: Before we go ahead with the
2 next witness, it's time for a break. Let's come back at 10
3 after 10. Thank you.

4 (A BREAK WAS TAKEN.)

5 JUDGE WOODRUFF: All right. Let's go back on
6 the record, and Mr. Kohly has taken the stand during the
7 break.

8 (Witness sworn.)

9 JUDGE WOODRUFF: All right. And you may
10 proceed.

11 MATTHEW KOHLY testified as follows:

12 DIRECT EXAMINATION BY MS. DeCOOK:

13 Q. Thank you. Could you state your name and
14 business address for the record?

15 A. My name is Matthew Kohly; that's K-o-h-l-y.
16 My business address is 101 West McCarty Street, Suite 216,
17 Jefferson City, Missouri 65109.

18 Q. And by whom are you employed and in what
19 capacity?

20 A. I'm employed by AT&T as the district manager
21 for regulatory affairs.

22 Q. Have you caused to be filed rebuttal testimony
23 that's been marked as Exhibit 10 in this proceeding?

24 A. Yes, I have.

25 Q. And on whose behalf was that rebuttal

1 testimony filed?

2 A. It was filed on behalf of AT&T Communications
3 of the Southwest, Incorporated.

4 Q. And do you have any changes or corrections to
5 that testimony?

6 A. Just a few. On page 6, line 3 -- I'm sorry.
7 It's line 13. Delete the word "is" after the word "there."
8 So the question should begin with "Is there a cost
9 difference"?

10 On line 10 -- I'm sorry. Page 10, line 5,
11 delete the semi-colon after the words "case number."

12 Then on page 17, line 2, a period should be
13 inserted after the word "entrance."

14 And then, pursuant to the Commission's motion
15 to strike, on page 20, lines 1 through 8, line 1, beginning
16 with the word "even," continuing down through the end of
17 line 8 needs to be deleted.

18 Q. With those changes, is your testimony true and
19 correct to the best of your knowledge, information and
20 belief?

21 A. Yes, it is.

22 Q. And would those changes, if I were to ask you
23 the same questions that are contained in your -- in
24 Exhibit 10, would your answers be the same as reflected in
25 Exhibit 10?

1 A. Yes.

2 MS. DeCOOK: I would offer the admission of
3 Exhibit 10.

4 JUDGE WOODRUFF: Exhibit 10 has been offered
5 into evidence. Are there any objections to its receipt?

6 (No response.)

7 JUDGE WOODRUFF: Hearing none, it will be
8 received into evidence.

9 (EXHIBIT NO. 10 WAS RECEIVED INTO EVIDENCE.)

10 JUDGE WOODRUFF: And for cross-examination, we
11 will begin with Staff.

12 CROSS-EXAMINATION BY MR. HAAS:

13 Q. Hello, Mr. Kohly.

14 A. Good morning.

15 Q. Have you heard testimony from Southwestern
16 Bell witnesses in this case that CLECs are selectively
17 entering Southwestern Bell's markets?

18 A. Yes, I have.

19 Q. Is that an appropriate strategy for CLEC
20 entry?

21 A. Yes, it is. It makes financial sense. CLECs
22 are going to go anywhere their business plans will allow
23 them to compete. That's similar to what SBC has done when
24 it was going to enter the local markets outside of its own
25 territory with local strategy. CLECs will go to where they

1 can compete and then move from there.

2 Q. Is this strategy similar to the strategy
3 employed by entrants into the long distance markets after
4 1984?

5 A. Yes, it is. World-- I'm sorry. MCI
6 originally focused on business customers in certain markets
7 and then moved nationwide. We've seen recently Southwestern
8 Bell Long Distance in Missouri only focuses on the low-cost
9 area of the state. So it continues today with new entrants
10 to the long distance market.

11 Q. At page 5 of his direct testimony, Mr. Hughes
12 states that the proposed winback tariffs at issue are
13 available for resale by the CLECs. How would resale by
14 CLECs work on these winback tariffs?

15 A. I am assuming by that -- by his question
16 and answer that you -- to be able to resell it, you are
17 reselling all basic local services. You can't just
18 resell that promotion on a stand-alone basis, so you're
19 reselling -- or at least SWBT's local service. I don't know
20 how a discount would apply to a service that waives the
21 charge. I mean, the new rate is zero, so I don't know if
22 you pay 20 percent or 19.2 percent off of zero, which
23 obviously is zero.

24 I'm also not sure of the terms and conditions
25 under how that would apply. Do you have a tariff that says

1 if you're served by a CLEC, you leave Southwestern Bell --
2 I'm sorry. You leave Southwestern Bell, you're served by a
3 CLEC, you want to return to Southwestern Bell? I'm not sure
4 where the CLECs fits into that.

5 And I would note, AT&T is not reselling basic
6 local service in Missouri, and I think by seeing how the
7 numbers are declining, it's not a viable entry strategy. So
8 I've not analyzed it extensively, simply because it's not in
9 our business plan.

10 MR. HAAS: Thank you. No other questions.

11 JUDGE WOODRUFF: All right. Then for Public
12 Counsel?

13 MR. DANDINO: I have no questions, your Honor.

14 JUDGE WOODRUFF: NuVox WorldCom?

15 MR. CURTIS: No questions.

16 JUDGE WOODRUFF: And Southwestern Bell?

17 CROSS-EXAMINATION BY MR. LANE:

18 Q. Good morning, Mr. Kohly.

19 A. Good morning.

20 Q. In your rebuttal testimony on page 3, you
21 make the assertion that the proposed winback offers are
22 unreasonably discriminatory. Is that a fair
23 characterization?

24 A. Yes.

25 Q. And you specifically discuss

1 Section 392.200.3, right?

2 A. Throughout my testimony, I talk about 392.3
3 and 392.200.4.

4 Q. And I'm focusing on page 3 where you're making
5 the claim of discrimination. That's in reference to
6 392.200.3, is it not?

7 A. Yes.

8 Q. Would you agree that Section 392.200.3, by its
9 terms, applies to all telecommunications companies?

10 A. It -- can I see the statutes?

11 MR. LANE: May I approach the witness, your
12 Honor?

13 JUDGE WOODRUFF: You may.

14 THE WITNESS: I would -- it applies to all
15 telecommunications carriers.

16 BY MR. LANE:

17 Q. Thank you.

18 A. It is not applied equally.

19 Q. It's also fair to say, is it not, that the
20 provisions of Section 392.200.3 cannot be waived for any
21 telecommunications company, even one that's classified as
22 competitive, right?

23 A. It's my understanding that it cannot be
24 waived, but again they are applied -- they're not applied
25 equally and do not have to be applied equally.

1 MR. LANE: Your Honor, I'd ask that the last
2 part of that be stricken. It's not responsive to my
3 question.

4 JUDGE WOODRUFF: You're correct, it was not
5 responsive. The last portion of the answer will be
6 stricken.

7 Please confine your answers to the questions
8 that you are asked.

9 THE WITNESS: I apologize.

10 BY MR. LANE:

11 Q. You're aware that Section 392.361.5
12 provides that the Commission may waive the provisions of
13 Section 392.200 through Section 392.340, except as provided
14 in Section 392.390, right?

15 A. Yes.

16 Q. And that Section 392.390, subdivision 5,
17 provides that the portions of Section 392.200.2 through 25
18 cannot be waived, right?

19 A. That's not a complete reading of that section.
20 I'd like to see the statute.

21 Q. Sure.

22 MR. LANE: May I approach the witness, your
23 Honor?

24 JUDGE WOODRUFF: You may.

25 THE WITNESS: In addition to what Mr. Lane

1 just said in the record, the statute also says, so far as
2 such provisions are applicable to a telecommunications
3 company. And I think that language, combined with the
4 purposes of 392.200, one of which permits flexible
5 regulation of competitive companies, is why that statute is
6 not applied equally to all companies.

7 BY MR. LANE:

8 Q. But in fact --

9 MS. DeCOOK: Your Honor, if you're going to
10 keep using the statute, I have one we can give to him so he
11 can have it there.

12 JUDGE WOODRUFF: That will be helpful. Thank
13 you.

14 BY MR. LANE:

15 Q. In fact, Mr. Kohly, while you say that it
16 doesn't need to be applied equally to all telecommunications
17 companies, would you agree that Section 392.380,
18 subdivision 2 says that provisions of various sections of
19 the statute, including 392.200, are fully and equally
20 applicable to competitive and transitionally competitive
21 telecommunications services and to all telecommunications
22 companies and the regulation thereof?

23 A. It says that, but again, leads off with,
24 except to the extent modified or supplemented by specific
25 provisions of Sections 392.361 and 392.530, the provision of

1 36, and then it goes on.

2 Q. And we just covered, didn't we, that
3 provisions 392.361.5 and 392.390, subdivision 5, make clear
4 that the provisions of Section 392.200 cannot be waived for
5 any competitive telecommunications company, right?

6 A. Cannot be waived, but I do believe that
7 392.390 does not require them to be applied equally.

8 Q. Okay. But Section 392.380 makes it clear that
9 they have to be applied equally, correct?

10 A. I don't agree with that. I mean, you're
11 starting out with something that says, except to the extent
12 modified by 392.361 through 530.

13 Q. Right.

14 A. I think 392.361 -- I'm sorry 392 -- I think
15 392.361.5 -- can you -- can we start over?

16 Can you restate your question? I've got all
17 my numbers jumbled in my head.

18 Q. Sure. Section 392.380 makes it clear,
19 contrary to your claim, that Section 392.200.3 is fully and
20 equally applicable to competitive and transitionally
21 competitive telecommunications companies and to all
22 telecommunications companies and the regulation thereof,
23 right?

24 A. Except as modified by 392.361 to 392.530.

25 Q. And as we just discussed, Section 392.361

1 and Section 392.390 make clear that the provisions of
2 Section 392.200.3 are not modified for competitive
3 telecommunications companies, right?

4 A. But, again, you've got language in 392.361
5 that allows statutes to be modified, and 392.200 -- 392.340,
6 pursuant to 392.390. If you look at 390, my view reading it
7 as a layman and from a policy perspective is they do not
8 apply equally to all carriers.

9 Q. You haven't read Section 392.380 before today,
10 had you?

11 A. I probably had. I had not thought of it
12 lately.

13 Q. Okay. It's also true, is it not, that
14 competitive local exchange companies must file and maintain
15 tariffs just like incumbent local exchange companies, right?

16 That's the provisions of Section 392.450.2,
17 subdivision 1.

18 A. 450.2.1?

19 Q. Uh-huh.

20 A. They're required to file and maintain tariffs
21 in the same manner and form as the Commission requires of
22 the ILEC.

23 Q. Would you agree that if a winback tariff filed
24 by Southwestern Bell violates Section 392.200, then an
25 otherwise identical winback tariff offered by a CLEC would

1 also violate that section?

2 A. No. Again, I believe that they're applied
3 differently, based upon the position of one is a competitive
4 company and the position of Southwestern Bell is an
5 incumbent.

6 Q. So that's the distinction that you draw that
7 makes it, you view, acceptable for the Commission to
8 regulate an incumbent differently than a competitive
9 company?

10 A. Let me restate incumbent. As a noncompetitive
11 company.

12 Q. How about a winback offer by an interexchange
13 carrier in Missouri, do they have to comply with the
14 provisions of Section 392.200?

15 A. Yes, as they're applied to competitive
16 companies.

17 Q. But not equally as to a incumbent local
18 exchange company, right? That's your view?

19 A. As to a noncompetitive company.

20 Q. You read Mr. Hughes' surrebuttal testimony in
21 this case, did you not?

22 A. Yes, I did.

23 Q. And you probably looked with particular
24 interest at Schedule 1 of his surrebuttal testimony?

25 A. That caught my eye.

1 Q. What did you do after you saw Schedule 1, in
2 terms of checking out how it was sent and applied to
3 somebody like Mr. Hughes here in Missouri?

4 A. Generally, those types of offers are
5 interstate offers. I didn't do a lot to look at it,
6 actually.

7 Q. Did you verify that it was an offer that AT&T
8 was making?

9 A. I didn't ask for an original copy of the
10 check, if that's what you mean.

11 Q. You confirmed and verified yourself that it
12 was a legitimate offer that AT&T was making to customers
13 like Mr. Hughes in Missouri, right?

14 A. No. I realize it's something AT&T does or has
15 done on a -- I don't know if nationwide, but has done in the
16 past, probably on a nationwide basis. I didn't run down the
17 details of that specific offer.

18 Q. And you noticed, did you not, in Schedule 1 of
19 Mr. Hughes' surrebuttal that the copy of the check indicates
20 an issue date of July 22nd of 2002, right?

21 A. I believe that was the date.

22 Q. That was just -- strike that.

23 If Mr. Hughes had signed and cashed the check,
24 would his interstate long distance service have been
25 switched over to AT&T?

1 A. Yes.

2 Q. How about his intrastate interLATA service,
3 would that have been switched over to AT&T?

4 A. Yes. The way the PICs work in Missouri, there
5 is only an intraLATA PIC.

6 Q. So a call that Mr. Hughes would have made
7 after signing this check from St. Louis to Kansas City would
8 have been carried by AT&T, right?

9 A. Had he cashed the check and switched to AT&T,
10 yes.

11 Q. It's cashing the check that authorizes AT&T to
12 go ahead and make the change with Southwestern Bell or
13 whomever the customer's local service provider is, correct?

14 A. That is the language on the check.

15 Q. Is there a tariff in Missouri, then, to
16 authorize this type of winback proposal to Mr. Hughes?

17 A. Yes.

18 Q. There's a Missouri tariff that AT&T filed that
19 specifically discusses providing a \$75 check to a winback
20 customer like Mr. Hughes?

21 A. No. The tariff would have indicated that the
22 in-state piece is an add-on to an interstate piece, and it
23 would have set out the in-state rate for that service, which
24 if you look at it, that was not specified on that check, so
25 the tariff would have set that out.

1 Q. Is the \$75 that's being paid, does that come
2 from the interstate side of AT&T's business, the intrastate
3 side of AT&T's business or both?

4 A. I don't know.

5 Q. Did you try to check that out in preparation
6 for this case?

7 A. No. I believe the application of winback in
8 the local exchange market is irrelevant to winback in the
9 interexchange market, especially as it relates to
10 interstate. So no, I did not.

11 MR. LANE: Your Honor, I'd ask that that be
12 stricken other than the, no, I did not.

13 JUDGE WOODRUFF: It will be stricken.

14 BY MR. LANE:

15 Q. Let me ask you this: Are you aware of
16 whether the federal statutes prohibit discrimination by
17 telecommunications providers like AT&T?

18 A. I've not reviewed them recently. I believe
19 there are provisions in the federal Telecommunications Act
20 to that effect.

21 MR. LANE: Your Honor, if I may approach the
22 witness?

23 JUDGE WOODRUFF: You may.

24 BY MR. LANE:

25 Q. Mr. Kohly, I'm going to show you Section

1 202(a) of the Communications Act of 1934, which is 47 U.S.C,
2 Section 202(a), and ask you if you agree with me that the
3 provision there is very similar to Section 392.200.3, in
4 terms of prohibiting unjust and unreasonable discrimination
5 by telecommunications providers?

6 A. The federal statute under 202(a) talks about
7 unjust or unreasonable discrimination. The Missouri statute
8 talks about undue or unreasonable preference or prejudice or
9 disadvantage.

10 Q. Okay. And looking again at Section 202(a),
11 would you agree that that section also prohibits undue or
12 unreasonable preference or advantage?

13 A. Yes, it does.

14 Q. And it also prohibits any undue or
15 unreasonable prejudice or disadvantage just as
16 Section 392.200.3, correct?

17 A. Yes. I think that arguably point -- well,
18 would be what's unjust and unreasonable.

19 Q. Okay. And on the federal side, it would be
20 AT&T's position that the offer that it made to Mr. Hughes
21 that's reflected on his Schedule 1-1 is not an unjust or
22 unreasonable or undue or unreasonable preference, right?

23 A. Can you restate that? It's got the double
24 negatives in there.

25 Q. You would agree with me that it's AT&T's

1 position that the offer that it made to Mr. Hughes that's
2 reflected on Schedule 1-1 of his surrebuttal testimony is
3 not unjust or unreasonable discrimination, nor is it undue
4 or unreasonable preference or advantage?

5 A. I believe that would be AT&T's position on the
6 interstate issue.

7 Q. And to the extent that this offer that applies
8 to Mr. Hughes would also switch his intrastate interLATA
9 service, would it be AT&T's position that that offer does
10 not create any violation of Section 392.200.3?

11 A. Yes, that would be AT&T's position to the
12 effect it applied to the intrastate piece.

13 Q. You would agree with me that the offer of a
14 \$75 check to Mr. Hughes to come back to AT&T for long
15 distance service is not an offer that AT&T extends to all
16 new customers or prospective customers of AT&T, right?

17 A. I have not looked at it enough to be able to
18 agree or disagree. There's numerous interstate promotions
19 out there and in-state promotions that I have not reviewed.

20 Q. All right. You're aware, are you not that
21 Schedule 1-1 of Mr. Hughes' surrebuttal testimony
22 specifically states that it's a winback offer, right?

23 MR. LANE: May I approach the witness, your
24 Honor?

25 JUDGE WOODRUFF: You may.

1 THE WITNESS: The marketing material talks
2 about winning you back.

3 BY MR. LANE:

4 Q. And the marketing material also states that
5 thousands of customers switch to AT&T every week even
6 without receiving the offer I'm about to present you, right?

7 A. Yes.

8 Q. So it's pretty clear, isn't it, that AT&T does
9 not extend the offer of the \$75 check to all new customers
10 who agree to come to AT&T for service, but it's limited to
11 those customers that were former AT&T long distance
12 customers that want to come back, right?

13 A. To answer that I would need to look at
14 everything that was offered. You're asking me about one
15 offer in the marketing till. I have not reviewed the
16 interstate tariffs or the other interstate promotions or
17 offerings.

18 Q. Okay. How about in Missouri where you have a
19 tariff that permits you to offer this, is there something in
20 Missouri that says that all new customers of AT&T receive a
21 \$75 check?

22 A. The tariff filed with the Commission does
23 state, I believe -- and I'm paraphrasing -- that this is an
24 add-on to an interstate offer and the rate is 14 cents or
25 12 cents. I can't remember the rate.

1 Q. AT&T's in the habit of communicating fairly
2 and accurately with its prospective customers and former
3 customers, right?

4 A. I believe that to be the case.

5 Q. And if AT&T says to its former customer,
6 Mr. Hughes, that thousands of customers switch to AT&T every
7 week even without receiving the offer I'm about to present
8 you, you would expect that to be a fair and accurate
9 characterization, right?

10 A. Yes.

11 Q. And so you would expect that there's customers
12 out there that come to AT&T and don't receive the \$75 check,
13 right?

14 A. Yes.

15 Q. Because otherwise the offer would have said
16 any customer that wants to come to AT&T, whether they're a
17 former customer or not, gets a \$75 check, right?

18 A. The mark -- that would depend on the marketing
19 material. I don't know.

20 Q. Okay. When we talked about Section 202(a) of
21 the Federal Act and its prohibition against unjust and
22 unreasonable discrimination and its prohibition against
23 undue and unreasonable preferences, you do agree with me
24 that that statute existed and was in effect when AT&T was
25 considered to be a dominant interexchange carrier, right?

1 A. I don't know.

2 Q. You would agree with me, would you not, that
3 AT&T was not prohibited from making winback offers during
4 the time that it was considered to be a dominant carrier by
5 the FCC, right?

6 A. It was my understanding that AT&T did not
7 offer winback offers as a dominant carrier. And, again,
8 that was on the interstate side and I have not fully
9 investigated that. That was my general understanding.

10 Q. So you didn't go and specifically determine
11 when AT&T started to make winback offers on the long
12 distance side, right?

13 A. No, I didn't, because the markets are very
14 different.

15 Q. Okay. And to go back to my question, you're
16 not aware of any prohibition or restriction on winback
17 offers that apply to AT&T during the time that it was
18 considered to be a dominant carrier by the FCC, right?

19 A. Based on my understanding, AT&T did not offer
20 winback offers.

21 Q. And I'll try it one more time. You're not
22 aware of any restriction that prohibited AT&T from making
23 winback offers during the time it was considered to be a
24 dominant carrier by the FCC, are you?

25 A. I'm not aware of a specific prohibition.

1 Q. And not having investigated it, you can't say
2 for a fact as you sit here today that AT&T did not make
3 winback offers during the time that it was considered a
4 dominant carrier by the FCC, right?

5 A. I can only tell you what my general
6 understanding was.

7 Q. Okay. And while you had a general
8 understanding, you didn't specifically verify that for
9 purposes of this case, right?

10 A. No, I didn't see it as relevant.

11 Q. All right. It's also fair to say that AT&T
12 has winback offers that apply to customers that come back to
13 AT&T for long distance and local service, right?

14 A. I would need to see the specific offer.

15 Q. I'm asking first if you're aware of that.

16 A. I'm not aware of that.

17 Q. Okay. Did you investigate at all to determine
18 whether AT&T made offers that applied to customers that
19 wanted to come back to AT&T for long distance and also take
20 local service from AT&T?

21 A. No.

22 Q. Okay.

23 (EXHIBIT NO. 31 WAS MARKED FOR
24 IDENTIFICATION.)

25 BY MR. LANE:

1 Q. I want you to have a chance to read this. Let
2 me know when you've had an opportunity.

3 A. I've reviewed it.

4 Q. Okay. It would appear to me that Exhibit 31
5 appears to be an offer from AT&T of an \$80 check to come
6 back to AT&T for residential long distance regional toll and
7 local toll services?

8 A. It does, but this is not a -- from what I can
9 tell, this is not a Missouri offer. So I don't -

10 Q. That was going to be my question. Have you
11 made such an offer in Missouri?

12 A. I'm not aware of any.

13 Q. When you were preparing for the case, did you
14 inquire to try to determine whether AT&T had made an offer
15 like this in Missouri?

16 A. I generally went through a tariff looking for
17 one, to see if there was one in there. I didn't see one.

18 Q. Did you check with anybody at the AT&T
19 corporate level with whom you work to determine whether an
20 offer like this was made in Missouri at all?

21 A. No, I didn't.

22 Q. Let me ask you this: If AT&T wanted to make
23 an offer like that contained in Exhibit 31 to give an \$80
24 check to someone to come back to AT&T for long distance
25 service and also to take AT&T's regional toll and local

1 services, would that be permissible?

2 A. I believe that as a competitive company that
3 would be permissible.

4 Q. And that's based on your view that
5 Section 392.200.3 applies differently to competitive
6 companies than it does to an incumbent local exchange
7 company; is that a fair statement?

8 A. I guess that's the legal basis, but there's
9 another policy basis that goes along with that that would
10 support, I guess, the legal analysis. But, yes, you're --
11 there's more to it than just the statute you cited.

12 Q. If AT&T were to make such an offer like
13 contained in Exhibit 31 in Missouri, would it be your view
14 that it would be giving a preference or advantage to a
15 customer that had AT&T long distance service in the past and
16 was coming back relative to a new customer of AT&T that was
17 going to sign up for the same services but not receive the
18 \$80 check?

19 A. Assuming no other offers in place for that, it
20 would be a difference. That doesn't make it undue or
21 unreasonable.

22 Q. And that's my question to you. Do you
23 consider that to be a preference or an advantage to the
24 customer that would receive an offer like that as compared
25 to a customer who's going to take the same services from

1 AT&T but not receive the \$80 check?

2 A. It could be.

3 Q. Okay. And would it be a prejudice or
4 disadvantage to the customer not receiving the \$80 check as
5 compared to one that's doing it when they're receiving it --
6 when they're otherwise receiving the same services from
7 AT&T?

8 A. It could be.

9 Q. You say "it could be." What other facts do
10 you need to know, to know whether it is or isn't?

11 A. There may be other offers there. There may be
12 different usage. There may be a myriad of other factors
13 that I don't have before me when considering your
14 hypothetical.

15 Q. Okay. Give me just whatever factors you want
16 that would make it, in your view, not a preference or
17 advantage and not a prejudice or disadvantage.

18 A. Let's take the hypothetical one customer
19 spends \$20 a month, one spends \$80 a month. One gets \$20,
20 one gets \$80. Is that an advantage? I don't know.

21 You could look at that and you could say, Oh,
22 one gets more money. That's an advantage. But you could
23 look at it and say, Well, that kind of equates to free
24 service for a period of time. So I don't know that I would
25 agree that's an advantage.

1 So that's why I'm saying I believe so.

2 Q. Okay. I've got to admit, I'm confused, so I'm
3 going to have to ask again. Describe to me again what would
4 make it not a preference or advantage and not a prejudice or
5 disadvantage with one customer receiving an \$80 check and
6 the other not receiving it but otherwise subscribing to the
7 same services from AT&T.

8 A. Again, as I stated, there could be other
9 offers out there. Okay. If you have an \$80 coupon, does
10 that make one advantage versus the other one? And how much
11 do you spend a month? What is your spending you'll do with
12 AT&T? If you spend \$80 in a given time and you get an \$80
13 check, someone spends \$20 and gets a \$20 check, is that a
14 preference? I would need to consider all the other offers
15 out there. That's why I'm saying it could be.

16 Q. Okay. And if there's not another offer out
17 there, if AT&T just has local service, long distance
18 service, one customer comes back from AT&T -- comes back to
19 AT&T and gets the \$80 check, and a new customer comes to
20 AT&T and doesn't, in your view, does that create a prejudice
21 or advantage to either of those parties?

22 A. Sir, are you asking me to assume all else
23 being equal?

24 Q. Yeah.

25 A. Why didn't you just say ceteris paribus?

1 Q. Didn't think of it.

2 A. It would be a difference.

3 Q. Okay. But I'm trying to get it into the
4 statutory language here at 392.200.3, and get your view on
5 whether that would be an undue or unreasonable preference or
6 advantage or would it be an undue or unreasonable prejudice
7 or disadvantage to either one of the parties?

8 A. I Think when a competitive company such as
9 AT&T offers, it's not unreasonable or undue. And your
10 questions before have not -- I've answered them assuming you
11 were not bringing in the undue and unreasonable part, but
12 you were just saying an advantage and not bringing in the
13 unreasonable. So I want to qualify any previous answer with
14 that.

15 Q. All right. And that wasn't -- okay. Let's go
16 ahead and do this again, just to be clear. Your view is
17 that an offer like that to AT&T or by AT&T giving an \$80
18 check to one customer who's coming back to AT&T for long
19 distance and taking local as well would not be violative of
20 Section 392.200.3, even though that same offer wouldn't be
21 extended to all new customers, right?

22 A. Correct.

23 Q. Okay. And that's because, in your view, it
24 would be acceptable for AT&T to create a class of customers
25 and make a special offer to one -- or to those customers

1 that fall into the category of formerly having received long
2 distance service from AT&T and now subscribing to AT&T local
3 and long distance services?

4 A. We wouldn't be creating a different class of
5 customer. You'd have to look to was the check or whatever
6 offer made undue or unreasonable or whatever the statute
7 says. And when it's made by a competitive company, that's
8 very different. So no, I don't think that would be unjust
9 and unreasonable, but we're not necessarily creating a new
10 class.

11 Q. Okay. You have a difference, as we said
12 before, a difference in treatment, right?

13 A. Yes.

14 Q. But it's not undue or unreasonable, in your
15 view, under 392.300 because it's being made by a competitive
16 company. Is that your position?

17 A. Did you mean to say 200?

18 Q. I did. If I didn't --

19 A. I thought you said 300. I was, like, what's
20 that one?

21 Q. I'll restate it. I was saving that one for
22 later.

23 A. Transfer the stock to AT&T. We won't oppose.

24 Q. In your view, the offer that we just
25 described, an \$80 check for customers returning to AT&T for

1 long distance service and also subscribing to local service,
2 would not be violative of Section 392.200.3, even though not
3 all new customers of AT&T would be receiving that check,
4 right?

5 A. I don't believe so.

6 Q. Okay. And that's because, in your view,
7 competitive companies may be treated differently under
8 Section 392.200.3?

9 A. Can be, and then from a policy perspective,
10 should be. That's why competitive companies have a lesser
11 degree of regulation. There's a sound reason for that.

12 Q. Okay. Now, on page 4 of your -- I'm going to
13 change topics here. Page 4 of your rebuttal testimony,
14 lines 11 through 13, there you discuss Southwestern Bell
15 contacting former customers who switched to a CLEC, stating
16 they may have been slammed by their new provider. Do you
17 see that discussion there?

18 A. Yes.

19 Q. And you make the claim that these marketing
20 efforts are not designed to promote value, customer benefit
21 or choice, right?

22 A. Correct.

23 Q. Would you agree with me that in the letters
24 that Southwestern Bell sends to customers that inform them
25 that their local service provider has been changed and that

1 if that's not what they wanted, to call this number, that
2 the letters go on to make offers to customers of services
3 that Southwestern Bell would provide to them?

4 A. Looking at a letter dated March 15th, yes.

5 MR. LANE: And if I may approach the witness?

6 JUDGE WOODRUFF: You may.

7 BY MR. LANE:

8 Q. Showing you Exhibits 14 and 15 that were
9 introduced into evidence yesterday, would you agree that in
10 addition to informing customers that their local service has
11 been changed, that the letters also go on to make offers to
12 the customer of services that Southwestern Bell is willing
13 to provide to them?

14 A. Yes.

15 Q. Now, with regard to slamming, would you agree
16 that that's a serious problem in the telecommunications
17 industry today?

18 A. I'm not aware -- it is a -- it is a problem in
19 the interexchange business. I'm not aware of significant
20 slamming occurring at the local level, and I'm not aware of
21 any that I've heard of in Missouri, especially at the local
22 level.

23 Q. All right. And on the interstate level,
24 companies like AT&T and WorldCom have been accused of
25 engaging in slamming, have they not?

1 A. In the past, yes.

2 Q. And, in fact, have paid fines or penalties in
3 various states with regard to slamming activities, right?

4 A. It's my understanding in the interexchange
5 market.

6 Q. And AT&T and WorldCom both have entities in
7 Missouri that also operate to provide local service to
8 customers, right?

9 A. AT&T has entities or affiliates that provide
10 local exchange service to business customers in Missouri.

11 Q. And WorldCom, to your knowledge, does as well,
12 right?

13 A. In general, yes.

14 Q. And would you agree with me that this
15 Commission has adopted rules that prohibit slamming and
16 provide directions to telecommunications companies on how to
17 handle slamming problems?

18 A. Yes, the Commission has rules in place.

19 Q. Let's assume that there's a Southwestern Bell
20 customer that's been slammed on its local service by a CLEC.
21 That can happen, can't it?

22 A. It could happen.

23 Q. Is it likely that the CLEC which engaged in
24 the slamming is going to call the customer to tell them
25 that?

1 A. Doubtful.

2 Q. The way slamming often happens, isn't it, is
3 that, you know, a marketing representative, maybe a
4 telemarketing firm becomes overzealous in some respect and
5 transfers the customer when the customer really hasn't
6 authorized it, right? Isn't that the typical way that
7 slamming can occur?

8 A. I've not typically slammed customers, so I
9 don't know. The one time I was slammed, it just showed up
10 on my bill.

11 Q. Okay.

12 A. So I don't know if it's from a marketing
13 contact or what.

14 Q. And that gets to my next question then. Isn't
15 it true that if a customer is slammed for its local service,
16 that the first time they'll find out about it is, like you,
17 when they receive their bill from the new carrier?

18 A. That could be the first instance.

19 Q. And that could be up to 30 days after service
20 has been switched over to that new provider, right?

21 A. It could be.

22 Q. If anyone is going to advise the customer that
23 they may have been slammed, it would be the former provider,
24 wouldn't it?

25 A. Well, I think there's been proposals at

1 the interstate level to have a third-party-type PIC
2 administrator that could do it. When it -- so it doesn't
3 have to be the former provider. There are options out
4 there, and the Commission needs to consider the former
5 provider's incentives and if slamming really is a problem.

6 Q. And today as we sit here, the only way the
7 customer is going to be advised that he may have been
8 slammed prior to the time they receive the bill from a new
9 customer (sic) is if the former provider makes some sort of
10 contact, right?

11 A. That's a likely time.

12 Q. That's the likely entity, isn't it?

13 A. Yes.

14 Q. The only one that knows whether the customer
15 has been slammed is the customer him or herself, right?

16 A. Can you -- I'm confused. Can you restate?

17 We just went through a series of questions
18 where you said the customer didn't know they were slammed.

19 Q. Right.

20 A. And now you're asking me if they know they're
21 slammed.

22 Q. No. I may have miscommunicated. During this
23 period prior to the time that the customer receives the bill
24 from the new provider, the former provider doesn't know the
25 customer has been slammed at that point, right?

1 A. I don't believe so.

2 Q. Okay. The former provider knows that the
3 service has been changed, but doesn't know if that was at
4 the customer's direction or not, right?

5 A. Ignoring the instance where a customer might
6 call in and say, I'm switching to this other carrier, I
7 mean, that is an option that's out there and that does
8 happen. Absent that, the former carrier may not know if
9 they've been slammed or not.

10 Q. Okay. And when the former provider contacts
11 the former customer, it's the former customer that knows
12 whether or not they've been slammed at that point, right?
13 They make the decision or they -- they know whether they've
14 changed their provider voluntarily or not, right?

15 A. Yes. But one of the concerns has been, for
16 example, you call a household where one spouse decides to
17 change the local carrier and you reach the other spouse who
18 said, I don't know what you're talking about, but slamming
19 sounds bad, I want to switch back, and that is one concern.

20 Q. Now, AT&T is able to contact prior customers
21 that have disconnected from its local service, right?

22 A. Yes.

23 Q. Does AT&T receive any report from Southwestern
24 Bell when Southwestern Bell has been the one that works an
25 order from another provider or itself to switch that

1 customer's service?

2 A. Mr. Hughes' testimony identifies two reports,
3 two different reports that a CLEC may receive.

4 Q. And I was asking specifically about AT&T.
5 Does AT&T receive such a report from Southwestern Bell with
6 regard to customers that have disconnected AT&T's local
7 service?

8 A. Are you assuming an instance where AT&T is
9 serving the customer through UNE-P?

10 Q. I'm assuming an instance where Southwestern
11 Bell has worked an order to change AT&T's local service as a
12 result of either its own retail organization or another CLEC
13 having submitted an order.

14 A. It's my understanding in a UNE-P-type
15 environment that there is a report on UNE-L where the switch
16 actually belongs to AT&T. I'm not sure what report is
17 generated. I assume there is one, but I don't know.

18 Q. Did you check on that for purposes of
19 preparing for your testimony in this case?

20 A. No, I did not.

21 Q. Now, you're aware that substantially similar
22 winback tariffs were previously approved by the Commission
23 in this case, right?

24 A. Yes.

25 Q. A residential winback tariff was in effect

1 that waived nonrecurring charges from August 4th of 2000 to
2 December 31st of 2001, right?

3 A. Yes.

4 Q. And a business winback tariff which waived
5 nonrecurring charges was in effect from April 9th of 2001
6 through April 8th of 2002, right?

7 A. Yes.

8 Q. And it's fair to say that AT&T has presented
9 theoretical arguments about the impact of such tariffs but
10 hasn't provided actual data to show what happened to AT&T
11 during the period of time that those tariffs were in effect,
12 right?

13 A. No, we did not.

14 Q. Can you tell us today for any of the AT&T
15 companies that provide local exchange service in Missouri
16 what happened to their access line counts during the period
17 that any of these winback tariffs were in effect?

18 A. I could tell you that.

19 Q. Okay. Is that highly confidential?

20 A. Given the way the Protective Order is, yes.
21 And the way it's used, yes.

22 Q. Do you consider it highly confidential?

23 A. I'm going to say it is consistent with how the
24 Protective Order is.

25 Q. I'm -- apart from that, the way the Protective

1 Order is written, do you believe it qualifies as highly
2 confidential under the Protective Order?

3 A. I don't know. I'd like to talk to my attorney
4 before we decide if it's proprietary or highly confidential.

5 MR. LANE: Could we take just a short break,
6 your Honor?

7 JUDGE WOODRUFF: We'll go off the record while
8 the witness consults with his counsel.

9 (AN OFF-THE-RECORD DISCUSSION WAS HELD.)

10 JUDGE WOODRUFF: Okay. We're back on the
11 record, and the witness has had a chance to consult with his
12 attorney.

13 MS. DeCOOK: I just want to make a comment for
14 the record, because I think this is information, if I
15 understand what Mr. Kohly has, that other parties would
16 classify typically in Missouri as highly confidential. We
17 don't believe it fits that definition. We don't think that
18 a lot of things that are designated as highly confidential
19 in Missouri do, in fact, rise to the level of being HC. So
20 we're going to mark this as proprietary.

21 JUDGE WOODRUFF: Okay.

22 BY MR. LANE:

23 Q. Okay. What information do you have and about
24 which AT&T companies?

25 MR. LANE: I guess we need to -- nobody has to

1 leave as I understand it, but I don't know what you do.

2 JUDGE WOODRUFF: So we're going to go into an
3 in-camera session to discuss proprietary information. Okay.

4 (REPORTER'S NOTE: At this point, an in-camera
5 session was held, which is contained in Volume No. 6, pages
6 611 through 616 of the transcript.)

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1 JUDGE WOODRUFF: Let's go back on the record,
2 then, at this time. We're out of the in-camera session, and
3 I'll try and get somebody down here to get us back online.

4 BY MR. LANE:

5 Q. Mr. Kohly, just a couple of clarifying
6 questions without going into the growth rates themselves.
7 Was the growth rate for the period that you gave us for AT&T
8 Communications, was that for all of the local services that
9 AT&T offers in Missouri?

10 A. No.

11 Q. What did it exclude?

12 A. I looked at the growth rate of one that was
13 for AT&T Communications of the Southwest, and then I looked
14 at the growth rate of one general product line. I don't
15 know that that's all of our local offers.

16 Q. What was that product line for AT&T
17 Communications of the Southwest?

18 A. AT&T All in One.

19 Q. Okay. And so do you have --

20 A. We're getting kind of specific here.

21 Q. You either have or may have other local
22 services that AT&T Communications of the Southwest offers,
23 and to the extent there are other services, you did not
24 include them in your calculation of growth rate?

25 A. No, I didn't.

1 Q. And same questions with regard to the TCG
2 companies. Did you provide the growth rate for all of the
3 services, all of the local exchange services that those
4 companies offer or only a subset?

5 A. Only a subset.

6 Q. And, again, tell me what the subset was and
7 what's excluded from that.

8 A. Services provisioned via UNE loop. Any other
9 services would not be included, such as pure facilities.

10 Q. And does -- do the TCG companies offer local
11 services that do not use UNE loop?

12 A. Yes, they do.

13 Q. And so it's clear, you don't have any
14 information to provide us today about the growth rate for
15 those services; is that correct?

16 A. Did not look at those.

17 Q. And are AT&T Communications of the Southwest
18 and the TCG companies, they comprise all of the entities of
19 AT&T that offer local exchange service in Missouri?

20 A. All that I'm aware of.

21 Q. I wanted to explore the discrimination
22 issue again and focus on some of AT&T's offerings. You're
23 aware -- you've read, have you not, Mr. Hughes' surrebuttal
24 testimony to the extent that it refers to the \$1.95 charge
25 that AT&T imposes on certain customers who subscribe to

1 AT&T's long distance service?

2 A. Yes.

3 Q. And it's fair to say that AT&T has a tariff
4 that's attached as Hughes Schedule 2- -- Schedule 2-1 and
5 2-2 that outline the circumstances under which AT&T assesses
6 a \$1.95 charge, right?

7 A. Yes.

8 Q. And what was the rationale behind AT&T's
9 decision to file a tariff to assess a \$1.95 charge on
10 certain of its long distance customers?

11 A. The general rationale -- and I'm sure there
12 may be others that are -- that probably people looked at
13 that I was not involved in, but the general rationale was
14 looking at the differential between the intrastate switched
15 access rates and the interstate switched access rates, and
16 based on that differential creating a flat-rated monthly
17 charge to try to recover some of that differential.

18 Q. And these are access charges that are assessed
19 by either other ILECs or CLECs in Missouri on AT&T when its
20 long distance customer originates or terminates a call
21 within Missouri?

22 A. Yes.

23 Q. A long distance call?

24 Now, the tariff applies the \$1.95 charge to
25 customers that make a dollar or more of long distance calls

1 in Missouri in a given month, right?

2 A. Yes.

3 Q. And customers that make 99 cents or less worth
4 of toll calls in a given month are exempted from the charge,
5 right?

6 A. Yes, and I think it's a billable amount of
7 less than a dollar is the actual wording on the tariff or
8 actual wording on -- yes, on the tariff.

9 Q. And is there a cost difference between a
10 customer who makes billable calls of 99 cents versus a
11 customer that makes billable calls of a dollar in terms of
12 the \$1.95 charge? Is that a cost-based charge?

13 A. The \$1.95 is based on -- I think there's two
14 questions here. The \$1.95 is based on an aggregate
15 differential based upon other factors as well. But you're
16 asking is there a cost difference between a 99 cent --
17 customer who bills 99 cents and a customer who bills a
18 dollar?

19 Q. Yes.

20 A. There's a penny.

21 Q. Okay. And in terms of the applicability,
22 then, of the \$1.95 charge, we have a difference in treatment
23 of customers that make less than a dollar worth of billable
24 calls and those that make over a dollar, right?

25 A. Yes.

1 Q. And certainly on a customer-by-customer basis
2 the difference in treatment of those that make under a
3 dollar billable calls and those that make a dollar or more
4 is not cost based, right?

5 A. On that increment, probably not.

6 Q. And is there a cost difference overall of
7 \$1.95 between those customers that make a dollar or more of
8 billable toll calls and those that make a dollar or less,
9 less than a dollar?

10 A. There will be a difference in cost, I guess.
11 We pay access on a per-minute basis, so there could be a
12 slight difference in cost.

13 Q. Okay. And maybe my question wasn't clear.
14 Let me try again. Does AT&T contend that the charge of
15 \$1.95 for those customers that make a dollar or more of
16 billable calls is cost justified, relative to customers that
17 make less than a dollar of billable toll calls?

18 A. I hate to do this. Can you restate that?
19 Restate your question, please.

20 Q. Sure. Does AT&T contend that there is a cost
21 basis for the difference in treatment of customers that make
22 a dollar or more of toll calls versus those customers that
23 make less than a dollar of billable toll calls?

24 A. That cost was one of the reasons that those
25 customers -- all customers below a dollar were exempted from

1 the charge, because they were low-volume users. We didn't
2 make a specific -- well, and that was the basis for that
3 complete exemption.

4 Q. So is it your view and testimony that there is
5 a difference in cost and it may or may not equal \$1.95 for
6 customers generally?

7 A. There is a cost -- I'm sorry.

8 Q. Sure.

9 A. I'm having trouble following this.

10 Q. Maybe my questions aren't precise. I'm trying
11 to understand if there is a cost basis for treating one
12 group of customers differently and if that cost basis is
13 exactly \$1.95.

14 A. There is a cost basis. I don't know and I
15 wasn't involved with setting the \$1.95. So I don't know if
16 that increment is based on that or not. There is a cost
17 difference that was looked at in total, and that was one of
18 the reasons given for exempting low-volume users.

19 Q. Okay. AT&T didn't present cost data to show
20 that there was a difference of \$1.95 in terms of costs to
21 AT&T to serve customers that made more than a dollar or more
22 of billable calls versus those that made less than a dollar?

23 A. We weren't asked to. As a competitive
24 company, rates don't have to be cost based, so we did not do
25 so. We did address many of the discrimination claims raised

1 by other parties.

2 Q. In AT&T's view, is there a preference or
3 advantage to a customer that makes less than a dollar of
4 billable toll calls who doesn't pay the \$1.95 versus the
5 customer that makes a dollar or more of toll calls and pays
6 the \$1.95?

7 A. I mean, one -- one's a higher volume user than
8 the other. So there is a difference. It was looked at,
9 though, and determined to be reasonable by the Commission
10 when they approved the tariff.

11 Q. And I'm assuming that AT&T believes that that
12 is not an undue or unreasonable preference or advantage; is
13 that correct?

14 A. Right. The Commission agreed.

15 Q. And it's not, in AT&T's view, an undue or
16 unreasonable prejudice or disadvantage, right?

17 A. Correct. And the Commission agreed.

18 Q. Now, there's also an exception created in the
19 tariff for long distance customers of AT&T that are also
20 local exchange customers, right?

21 A. Yes. I would note we have no residential
22 local customers in Missouri anymore.

23 Q. This was developed and prepared at a time when
24 AT&T was providing competitive local exchange service to
25 residential customers in Harvester and St. Charles through

1 its cable operations, right?

2 A. As well as other exchanges in the Verizon
3 territory.

4 Q. And during that period of time, then, that you
5 were making -- providing local service, then at some point
6 this tariff that assessed \$1.95 and exempted local customers
7 was in effect?

8 A. Actually, I don't know that it was. We
9 completed the sale and the transfer of all of the local
10 exchange customers, residential local exchange customers.
11 At the end of the year, I can't remember when the tariff
12 actually went in, because once we had approval, I believe we
13 had to change -- and I'm going by memory -- change some of
14 the dates to get the billing systems ready to bill. I don't
15 know when that crossover was. It may actually not have been
16 at the same time.

17 Q. Okay. Well, there was a purpose, I take it,
18 for AT&T to file a tariff that included an exemption for
19 those that took AT&T's local service, right?

20 A. That's the general exception, yes.

21 Q. And what was the purpose of that from AT&T's
22 view?

23 A. Well, it's a recognition that, one, when
24 you're the local exchange carrier as well as interexchange
25 carrier, you don't pay the same bloated access rates that

1 you pay when you're only the interexchange carrier.

2 And the second reason is, like most companies,
3 you want to sell bundles of service. So those are the two
4 reasons given at the Commission's question and answer
5 session.

6 Q. Okay. Customers that are local customers of
7 AT&T Communications under the tariff would not pay the
8 \$1.95, regardless of the level of toll or access charges
9 that they cause AT&T to incur, correct?

10 A. Correct.

11 Q. A customer may cause AT&T to incur \$50 or
12 \$100 worth of access charges or the customer may cause AT&T
13 to incur no access charges, right?

14 A. That's correct.

15 Q. Does AT&T maintain that there is a cost basis
16 to assess a charge on non-local customers of \$1.95 and not
17 assess the same charge on local customers?

18 A. As a general matter, there is a cost
19 difference, and that was recognized. Was it \$1.95? I don't
20 know that that was, but as a general practice -- or as a
21 general principle, there is a cost difference that we
22 believe in.

23 Q. And the cost difference, AT&T didn't present
24 evidence and you don't know today that that equaled the
25 \$1.95 charge, right?

1 A. We weren't asked to provide any cost
2 difference. We did not provide any. The Commission looked
3 at it, found it was not unduly discriminatory, and approved
4 the tariff.

5 Q. And it's AT&T's view, isn't it, that it --
6 that treating long distance customers who are also local
7 customers differently from customers that are just long
8 distance customers in terms of assessing this \$1.95 is
9 consistent with Section 392.200.3, right?

10 A. Yes.

11 Q. Does the difference in treatment of customers
12 that are local customers of AT&T, is that treating them as a
13 separate class of customers from those that are simply long
14 distance customers?

15 A. I don't believe so. When you say class, there
16 you assume a legal analysis with showing that this is a
17 different class of customers. We didn't do that. We didn't
18 attempt to. We just said, here's the rate and here's the
19 tariff. We didn't try to create a new customer class.

20 Q. So in your view, it's not an appropriate
21 identification of a customer class to treat AT&T local
22 customers different than AT&T long distance customers,
23 right?

24 A. We weren't trying to create a new class of
25 service when we filed the tariff. That was not our intent,

1 and I don't think one was created.

2 Q. Okay. Now, in your surrebuttal testimony, you
3 have discussion of an FCC decision. Do you recall that?

4 It's on pages 13 and 14.

5 A. Yes.

6 Q. And part of 15 as well.

7 And I want to focus on that a little bit. As
8 I understand it, are you citing to an FCC decision that
9 rejected a tariff of Southwestern Bell to provide dedicated
10 access facilities on a customer-specific basis? Is that a
11 fair assessment of what that case dealt with?

12 A. It was contingent in the case. And based on
13 my reading of the Order, at one point -- well, it may not be
14 customer-specific because that offer will be available to
15 all similarly situated customers. When the FCC looked at
16 it, they found that the offer, the services that would have
17 to be purchased are too specific to one individual customer,
18 and that's why they rejected it.

19 So I don't know that it was necessarily
20 proposed as customer-specific pricing, that's what the FCC
21 kind of decided it would -- it would create.

22 Q. Okay. The FCC's Order determined that, in its
23 view, it was a customer-specific pricing proposal which was
24 prohibited under the FCC's rules?

25 A. Right, and I don't believe that was

1 Southwestern Bell's position going into the case, was that
2 it was customer-specific pricing.

3 Q. Okay. And would you agree with me that in the
4 Order that you cite that the Commission also noted that it
5 was considering the same issue in its access reform docket?

6 A. I recall that being in the Order.

7 Q. You do not?

8 A. I do recall.

9 Q. Okay.

10 MR. LANE: And if I may approach the witness,
11 your Honor?

12 JUDGE WOODRUFF: You may.

13 BY MR. LANE:

14 Q. Showing you a copy of the Order that you
15 cited in your testimony of November 14th of '97 in CC
16 Docket 97-158, Transmittal No. 2633, would you agree with me
17 that paragraph 8 of that Order advises the parties that the
18 Commission is considering whether to allow special RFP
19 tariff or contract tariff rates in TC Docket 96-262?

20 A. Yes.

21 Q. Okay. And in preparation of your testimony in
22 this case, did you go to CC Docket No. 96-262 to determine
23 what the FCC ultimately did in that regard?

24 A. Actually, no. I looked at kind of a general
25 summary of the access reform orders.

1 Q. And in reviewing the general summary of the
2 access charge reform order, did you determine that the
3 Commission has changed its position and now permits ILECs
4 like Southwestern Bell to offer customer-specific pricing
5 under the same circumstances that was at issue in the case
6 that you cited in your testimony?

7 A. As I understand the access reform order, it
8 limited it to certain markets where there was a showing that
9 there were competitive alternatives, is my understanding of
10 that order, and that was for special or dedicated access.

11 Q. And so the decision that the Commission
12 reached that you cited in Transmittal No. 2633 was revised
13 by the FCC in the access charge reform order in Docket
14 No. 96-262, right?

15 A. Yeah, it was revised -- or changed, overridden
16 in part.

17 Q. Okay. And that decision in that case was
18 issued on August 27th of 1999, right?

19 A. I believe that was generally the date.

20 Q. Okay. And can you explain why you didn't
21 consider it appropriate to advise this Commission that the
22 FCC had changed its direction from the case that you cited
23 in Transmittal No. 2633?

24 A. I was citing this case where the FCC looked at
25 a proposal and really had some language in there about the

1 incumbent's ability to foreclose the market and to create
2 reputational advantages from customer-specific pricing. I
3 wasn't looking at the access markets and, no, I didn't go
4 look at that Order and include all of it.

5 I think that the Commission's conclusions that
6 they drew in the original Order are directly applicable to
7 this case, and that's why they're in here.

8 Q. Thank you.

9 And the Commission's decision or the FCC's
10 decision that underlie the revisions to that Order you don't
11 think are important for this Commission to consider; is that
12 your view?

13 A. I didn't include them in my testimony, no.

14 Q. Okay. And to clarify the case that you did
15 cite, Transmittal No. 2633 had nothing whatsoever to do with
16 a winback tariff, correct?

17 A. Correct.

18 Q. Okay. And in the Reconsideration Order in
19 that case that you did cite involving Transmittal No. 2633,
20 the FCC made clear that in other cases it recognized that it
21 permits identification of classes of customers such as
22 schools, libraries and eligible health care providers as
23 constituting a separate class that special prices could be
24 offered to without violating the anti-discrimination
25 provisions of the Federal Act, right?

1 A. That language was in there, and I think it
2 talked about pursuant to specific statutes in the federal
3 act, if I remember right. I don't have that Order for
4 Reconsideration in front of me.

5 Q. Okay.

6 A. But there are specific statutes that address
7 that issue.

8 MR. LANE: May I approach the witness, your
9 Honor?

10 JUDGE WOODRUFF: You may.

11 BY MR. LANE:

12 Q. Let me show you the Memorandum, Opinion and
13 Order on Reconsideration in CC Docket No. 97-158,
14 Transmittal No. 2633 that was released on March 13 of 1998,
15 and with specific attention to paragraph 9 of that Order,
16 and ask if you agree that the FCC noted there that in other
17 cases it had identified schools, libraries, eligible health
18 care providers as classes of customers that were eligible
19 for preferential rate treatment without violating the
20 nondiscrimination provisions of Section 202(a)?

21 A. Yes.

22 Q. Okay.

23 A. There are, I think, specific statutes that
24 talk about that, and there are specific Missouri statutes
25 that talk about that as well.

1 Q. And Section 202(a) is what we covered earlier,
2 and it contains the same language that prohibits undue and
3 unreasonable preferences, prejudices and advantages, right?

4 A. Right.

5 Q. The same as 392.200.3, right?

6 A. Generally the same.

7 MR. LANE: Thank you. That's all I have.

8 JUDGE WOODRUFF: Thank you. And we'll come up
9 then for questions from the Bench.

10 And Commissioner Gaw?

11 COMMISSIONER GAW: I'm going to pass. I'm
12 sorry. I just walked in.

13 JUDGE WOODRUFF: Okay. Commissioner Lumpe
14 asked me to ask one question for her. Actually, it's the
15 same question that she asked the previous witness.

16 QUESTIONS BY JUDGE WOODRUFF:

17 Q. She's asking if there's a definition of
18 anti-competitive somewhere in the economic literature that
19 would be helpful to the Commission.

20 A. I think generally when you look at Commission
21 and regulatory decisions, the definition that would come to
22 mind would be an activity or a business activity that is or
23 might be harmful to competition in general, with the
24 intended effect of creating or preserving market power.

25 And I think if you look at past Commission

1 decisions where they looked at the public interest, that
2 general definition is included in that and you can look at,
3 for example, the local plus case where the Commission looked
4 at that, were concerned about it, made a forward-looking
5 finding that we should adopt two or three conditions on this
6 tariff and that way it will not be harmful to competition
7 and then we could do it.

8 And so when you look at some of the past
9 decisions, you see that definition at least implicit in
10 them. And I don't know that there's an explicit definition
11 that I could think of right now in any textbook, but I think
12 that's a general definition the Commission could and should
13 use and has been used.

14 Q. Just mostly drawn from what the Commission's
15 done in the past?

16 A. Not just this Commission but other
17 commissions; the FCC, for example.

18 JUDGE WOODRUFF: Okay. Commissioner Gaw?

19 COMMISSIONER GAW: Thank you.

20 QUESTIONS BY COMMISSIONER GAW:

21 Q. Mr. Kohly, I'm sorry. I have to catch up a
22 little on the examination because of agenda, but let me ask
23 you, I know you heard a bit of the tail end regarding the
24 similarity of the federal and state law. What is your --
25 what is your take on the portion of the statute in 392.200

1 where it refers to market segmentation? What -- what is
2 AT&T's position in regard to what that's referring to?

3 A. Under Section 4?

4 Q. Yeah. In particular I note that you've
5 underlined that in your -- in your testimony. So if you
6 want to deal with it there, that would be fine. I think
7 it's on page 11, if that's helpful.

8 A. I think that our position on 4 is that if a
9 company wants to come in and create a different class of
10 customer, segment the market by creating a different class
11 of customer, either in -- the statute talks about some
12 geographic issues, as well as just general customer
13 segmentation, then they must do so pursuant to this section.

14 And this section sets out what they have to do
15 to create kind of more of an explicit class of customer.
16 And it has to be consistent with -- first of all, the
17 company has to make an application to do so, and then to
18 find it, you can allow them to do that, you've got to meet
19 the provisions of the statutes which require clear and
20 convincing evidence and other factors.

21 Q. Are you aware whether or not Southwestern Bell
22 has made any application for that in this case?

23 A. No, and I think Mr. Hughes' testimony
24 indicated that they were not seeking approval of this tariff
25 under this section, and they certainly made no application

1 to do so.

2 Q. Is the -- is there some -- but you believe
3 that this subsection of 200 does apply in this case?

4 A. If they were seeking approval of this tariff
5 under this section, I think it does. When I read
6 Mr. Hughes' testimony, he had quoted part of 392.4, and I
7 was concerned that, well, maybe they are seeking approval of
8 it under this statute and I wanted to respond to that, and
9 that's why that was in my testimony. His testimony, I
10 think, made it clear that they are not seeking approval
11 under this statute.

12 Q. How do you avoid the statute if you're
13 segmenting part of the market?

14 A. I don't know. I guess the response could be,
15 well, if you think it's market segmentation, they need to
16 seek approval under the statute. And when they do so, this
17 is what applies. You can't bypass it.

18 Q. I guess what I'm asking you is, is AT&T's
19 position that what Southwestern Bell is attempting to do
20 here is market segmentation?

21 A. Yes, and that was my concern in reviewing
22 Mr. Hughes' testimony where he cited this section is that
23 was what they were intending to do, and that is why it was
24 cited in his direct testimony.

25 Q. And if it is market segmentation, then I can't

1 ask you to argue their case, but how do you avoid this
2 provision?

3 A. If you determine that it is market
4 segmentation, then you can't avoid the statute.

5 Q. All right. Now let me ask you this: Is there
6 a definition of market segmentation somewhere that you're
7 aware of? I recognize this can be brief.

8 A. I don't -- I don't believe there's a
9 definition in 386.020, but let me just double check.
10 There's not. I guess where I would have
11 thought market segmentation would come into effect is when
12 they -- when a company tries to create a new class of
13 customer, a specific class, then that would be a market
14 segmentation.

15 Q. Yes. In this case, isn't there arguably a
16 class that is a group that is eligible for this promotional,
17 or the winback, to be more specific?

18 A. Yes, there is a group of customers that are
19 eligible and a group that are not.

20 Q. Again, I assume this will be brief, but is
21 that term "market segmentation" used in the federal law, to
22 your knowledge?

23 A. Not that I'm aware of.

24 COMMISSIONER GAW: That's all I have.

25 JUDGE WOODRUFF: We'll go to recross, then,

1 and beginning again with Staff.

2 MR. HAAS: No questions.

3 JUDGE WOODRUFF: Public Counsel?

4 MR. DANDINO: No questions, your Honor.

5 JUDGE WOODRUFF: WorldCom NuVox?

6 MR. CURTIS: No questions, thank you.

7 JUDGE WOODRUFF: Southwestern Bell?

8 RECROSS-EXAMINATION BY MR. LANE:

9 Q. I'm going to ask you some follow-up questions
10 to Commissioner Gaw's questions and 392.200.4. You were
11 around in 1996 when the Missouri Legislature passed SB 507,
12 correct?

13 A. Yes.

14 Q. Would you agree with me that the provisions
15 of Section 392.200.4 were added to the statute as part of SB
16 507?

17 A. I believe that to be the case.

18 Q. And it's a fair statement that the provisions
19 of Section 392.200.4 were designed to provide additional
20 flexibility to telecommunications companies that may not
21 have already existed under Section 392.200.2 and .3, right?

22 A. This sets out a process. I don't know that it
23 was to create additional flexibility.

24 Q. Well, specifically it provides for
25 exchange-specific pricing under Section 392.200.4(2)(a),

1 right?

2 A. Yes.

3 Q. And it specifically provides in that section
4 that exchange-specific pricing is presumed to be in the
5 public interest, right?

6 A. Where are you getting the presumption that's
7 just ended?

8 Q. 392.200.4(2)(a). For services proposed on an
9 exchange-wide basis, it shall be presumed that a tariff
10 which defines and establishes prices for a local exchange
11 telecommunications service, et cetera. Do you see that?

12 A. Yes. I wasn't seeing the word "presumed."
13 Yes, it does say that.

14 Q. And that made it clear, unlike the past, that
15 if a company wanted to offer a service like call waiting,
16 for example, with a special price in the St. Louis market,
17 that it could do so, right, in the St. Louis exchange?

18 A. This statute, I guess, would presume to be
19 necessary. I don't know what the process was in the past.
20 I kind of came into this right about when 507 passed.

21 Q. All right.

22 A. I do know that -- I mean, you had exchange
23 specific or pricing differently in exchanges prior to that,
24 but I don't know --

25 Q. Prices for basic local exchange service may

1 have differed based on value of service concepts in
2 different rate groups, but services like call waiting, call
3 forwarding and other vertical services were priced on a
4 statewide basis, right?

5 A. Generally.

6 Q. In this particular statute, then, under
7 subsection .42A would permit exchange-specific pricing for
8 services like that, right?

9 A. Yes.

10 Q. Okay. And under subsection B, there was even
11 additional authority granted to propose prices changed --
12 prices that would apply to an area smaller than a given
13 exchange, right?

14 A. Smaller than an exchange or other market
15 segmentation.

16 Q. Right. And wouldn't you agree that it appears
17 to be the Legislature's directive to try to provide some
18 additional flexibility in subsection 4 by adding it in SB
19 507, that had not existed before as a direction to the
20 Commission?

21 A. I don't know what was there before, what
22 process was in place. I can't say flexibility. It
23 obviously has a process in it. I don't know if that's more
24 or less flexible than in the past.

25 Q. All right. Then let's look at subsections 2

1 and 3 again, and talk about that. Would you agree that it
2 is very common in the telecommunications industry and in
3 Missouri to have tariffs which offer to provide different
4 prices to customers, depending on their particular
5 circumstances?

6 A. Yes.

7 Q. And the question was whether it's an undue or
8 unreasonable preference, right?

9 A. Right. And that's going to come down to a
10 judgment call, I guess.

11 Q. And for all of these judgment calls, you're
12 trying to identify a particular group of customers that you
13 think is reasonable from a company's perspective to treat
14 differently with regard to price, right?

15 A. The Commission would have to look -- determine
16 if it's just and reasonable.

17 Q. Okay. But any type of identification of a
18 group of customers under subsection 3 does not automatically
19 equate to a market segmentation under subsection 42B, does
20 it?

21 A. It would if -- not necessarily, but if you're
22 trying to define it as a different service based upon that
23 segmentation, then that section would --

24 Q. Let me take you --

25 A. -- would apply.

1 Q. Let me take you back then to your -- to our
2 discussion earlier that AT&T's \$1.95 tariff in which you
3 created the exceptions to the application of that charge to,
4 A, customers that made less than a dollar's worth of toll
5 calls, and B, customers subscribed to AT&T's local service,
6 right? Do you recall that discussion?

7 A. As well as Lifeline or low-income customers.

8 Q. Okay. And you've made the distinction
9 there that you believe that was permissible under
10 Section 392.200.3 because, in your view and as accepted by
11 the Commission, that was not an undue or unreasonable
12 preference, right?

13 A. Right.

14 Q. But did you segment the market? Did you treat
15 a group of customers differently depending upon whether they
16 were or were not a local exchange customer of AT&T in
17 addition to being a subscriber to your long distance
18 service?

19 A. We didn't try to define the service as
20 something different.

21 Q. Okay.

22 A. We filed a tariff that had the terms and
23 conditions, and we sought approval. We did not seek
24 application for nor did it -- as I recall, I don't know that
25 it came up.

1 Q. Okay.

2 A. But it certainly was not approved under .4,
3 and we were is not seeking to call it a different service.

4 Q. Your position there with regard to the
5 application of Section 392.200.3 and .4 is exactly the same
6 as the position that Southwestern Bell is advancing here
7 with regard to its tariffs, correct?

8 A. In Mr. Hughes' direct testimony, he cited .4
9 and provided a partial quote of intent of the Act. We
10 didn't do that, that I recall, in seeking approval of our
11 in-state connection fee.

12 Q. All right. Separating out Mr. Hughes'
13 reference to that, would you agree with me that Southwestern
14 Bell's position that's been expressed in this case,
15 including in Mr. Hughes' surrebuttal testimony, is that
16 Southwestern Bell is proceeding under Section 392.200.2 and
17 .3 and is not proceeding under Section 392.200.4, right?

18 A. That is what Mr. Hughes said.

19 Q. And that's just the same as AT&T did with
20 regard to its \$1.95 charge, correct?

21 A. We -- we generally sought approval. I mean, I
22 don't know that we cite our specific statutes.

23 Q. You haven't segmented the market, in your
24 opinion, in deciding to assess the \$1.95 charge to AT&T long
25 distance customers generally and excluding those that take

1 AT&T's local service, right?

2 That's not a market segmentation in your
3 opinion, is it?

4 A. No. And it appears that .4 or --

5 Q. You weren't trying to take advantage of the
6 additional flexibility given in Section 392.200.4, but were
7 proceeding under the basis of Section 392.200.2 and .3,
8 right?

9 A. No. And I guess I'd look at 2, and I hadn't
10 realized that. I don't think that applies to interexchange
11 carriers. So, no, we wouldn't have been. Two is the
12 process you go through if you wish to segment the market.

13 Q. That's interesting.

14 Let me talk about the winback offer that you
15 made to Mr. Hughes that's reflected in his Schedule 1, I
16 believe, to his surrebuttal testimony. You agreed in that
17 that if Mr. Hughes had signed and cashed the check, that you
18 would have changed not only his interstate long distance
19 provider, but you would have changed his intrastate long
20 distance provider as well for interLATA services?

21 A. For interLATA, yes.

22 MS. DeCOOK: Your Honor, that question's
23 beyond the scope of the Commission's questions.

24 MR. LANE: No, it's not.

25 JUDGE WOODRUFF: How is it within the scope?

1 MR. LANE: I'm addressing this in terms of
2 market segmentation, your Honor.

3 JUDGE WOODRUFF: Okay. I'll overrule the
4 objection.

5 BY MR. LANE:

6 Q. It's a fair characterization of what the
7 tariff does, right?

8 A. Can you restate that?

9 Q. All right.

10 A. I kind of assumed I'd get out of that
11 question.

12 MS. DeCOOK: There's still hope.

13 (THE REQUESTED TESTIMONY WAS READ BY THE
14 REPORTER.)

15 BY MR. LANE:

16 Q. Now, did that create a market segmentation by
17 AT&T when it made the winback offer to Mr. Hughes for
18 intrastate interLATA services but not to other prospective
19 new customers of AT&T's intrastate interLATA long distance
20 service?

21 A. We weren't trying to define it as a new
22 service, no.

23 Q. So in your view, if the company announces
24 that it's not trying to define it as a new service under
25 392.200.4, then the Commission shouldn't analyze it on that

1 basis?

2 A. If the Commission looks at it and says, hey,
3 this is a market segmentation, we need to analyze under
4 this, I think they have that ability. And then they could
5 ask you to file an application, or if they reject the tariff
6 and say file it under this.

7 Q. And I guess, likewise, with regard to your
8 \$1.95 tariff, the Commission could go back and look at that
9 and decide, well, that really is a market segmentation and
10 AT&T needs to make that showing and we're going to have a
11 proceeding to determine whether that's appropriate or not?

12 A. Arguably they could.

13 Q. And you wouldn't have any objection to that,
14 right?

15 A. Again, we're going to differ on how you apply
16 these statutes to competitive companies, and our argument
17 would probably be, hey, we're a competitive company and we
18 should be permitted to do that pursuant to the statutes,
19 which generally give greater flexibility to competitive
20 companies.

21 Q. Despite the provisions of Section 392.280 that
22 says they're applied equally to all telecommunications
23 companies?

24 A. And I disagree with you about the
25 interpretation of those with respect to different companies.

1 Q. Okay. That was the section that you hadn't
2 read before today, right?

3 A. That was the new one.

4 Q. Okay.

5 A. But --

6 MR. LANE: That's all I have. Thank you.

7 JUDGE WOODRUFF: Thank you. And redirect?

8 MS. DeCOOK: Thank you.

9 REDIRECT EXAMINATION BY MS. DeCOOK:

10 Q. Mr. Kohly, you were asked by Staff some
11 questions about CLECs selectively entering markets. Do you
12 recall that testimony?

13 A. Yes.

14 Q. What is it about certain markets that permit a
15 CLEC or induce a CLEC to enter and compete?

16 A. There will be a number of factors. One will
17 be the size of the market, is there a sufficient scale? As
18 you enter that market, will you be able to attract a
19 sufficient number of customers? So you'll look at that.

20 You will also look at your cost of entry, as
21 well as your expected revenue from entering that market.
22 And you will look at those annual and you will make the
23 decision whether or not to enter.

24 Q. And is it unusual in a new and -- in a market
25 that's just been opened or in a new area for competition,

1 for new entrants to enter on a smaller scale?

2 A. No, it's not, and especially when you start
3 talking about facilities, especially in the local exchange
4 market where you're placing your own facilities. You
5 obviously cannot go out through the entire state and put in
6 a network. So you will start in an area, and if you're
7 successful in that area and if you succeed in that, then
8 you'll expand your operations outward. And that is what was
9 also seen in the long distance markets with MCI.

10 Q. Is it a fact that if a particular market is
11 open to competition sufficient to elicit entry by a
12 competitor?

13 A. No, it's not. The market there could be other
14 factors that would apply, such as -- when you say open, I'm
15 assuming low barriers to entry. There could be low barriers
16 to entry, but other factors such as being nonprofitable or
17 among others that would not allow entry.

18 Q. Well, let's assume this Commission has deemed
19 a market area open to competition. That doesn't necessarily
20 mean that there is actual or effective competition, right?

21 A. Absolutely not. When you say it's open, that
22 means there's a possibility a carrier could enter, but that
23 doesn't mean they have entered, they are competing, they are
24 successfully competing, and customers are able to freely
25 move among carriers.

1 Q. Now, Mr. -- my mind went blank -- Lane asked
2 you some questions about the document that's attached to
3 Mr. Hughes' surrebuttal testimony.

4 A. Yes.

5 Q. And he asked you whether you had done any
6 investigation regarding whether the check comes from the
7 interstate long distance or whether it is generated by the
8 interstate long distance business or the intrastate long
9 distance business. Do you recall that?

10 A. Yes.

11 Q. And why didn't you conduct that investigation?

12 A. Well, one, I did not think winbacks in the
13 interexchange market were at all relevant. That's a
14 competitive market. They've been done for some time in that
15 market, and so I deem the whole issue completely irrelevant.
16 So starting with that, I did look at our in-state tariffs to
17 see, was this a tariffed offer? Yes, it was. And I really
18 did not go beyond that because it was at the interstate
19 level.

20 Q. All right. I'd like to point you to -- and
21 now I'm having trouble -- 392.380.2.

22 A. Yes.

23 Q. And Mr. Lane pressed you to concede that
24 somehow that 392.361 was an exception to this provision.
25 Isn't it true that section 2 of 392.380 excepts out the

1 provisions of Section 392.361?

2 A. I hate to do this, but I lost the numbers in
3 there. Can you restate your question?

4 Q. Is it true that -- let me rephrase it.

5 Isn't it true that the first section of
6 section 2 of 392.380 states, except to the extent
7 modified or supplemented by the specific provisions of
8 Section 392.361 through 392.530?

9 A. Yes.

10 Q. And is it your opinion that 392.361 provides
11 an exception to the remainder of the provision that appears
12 in subsection 2 of this section?

13 A. Yes, it does.

14 Q. And what is the impact of that, in your
15 opinion, of that exception?

16 A. I think that exception allows the statutes to
17 be applied differently to competitive companies than it's
18 applied to noncompetitive companies, both, I guess, applied
19 and interpreted.

20 Q. I'm sorry. Say that again. Must be lunch
21 time.

22 A. Okay. I believe that by including the
23 language extent -- to the extent modified by 361 -- 392.361
24 to 530, then that language would allow the modifications
25 contained in that range of sections to modify this statute.

1 If you look at 361, that contains in .5 some
2 of the language Mr. Lane cites to about the applicability of
3 392.200, which then says, except as provided in Section
4 392.390. So then in this section, you jump to 390, and
5 that's where we believe it allows the flexible regulations,
6 more flexible regulation.

7 Q. Does it not also say in the last sentence of
8 361.5 that the Commission may suspend different requirements
9 for different telecommunications if such different treatment
10 is reasonable and not detrimental to the public interest?

11 A. Yes, it does.

12 Q. Now, the check that is attached to the
13 schedule in Mr. Hughes' testimony, does that in any way
14 specifically target Southwestern Bell customers?

15 A. No, it does not. First of all, Mr. Hughes, I
16 believe, is served by Sprint local, so obviously it's not
17 any kind of Southwestern Bell customer, because they don't
18 provide long distance here. But it incents a customer to
19 come back because the customer could have gone to a wireless
20 carrier, the customer could have gone to a no-PIC situation.
21 So it's not targeted to any competitor.

22 Q. Now, you were asked some questions about
23 whether you were aware of any prohibitions or restrictions
24 on AT&T when it was a dominant carrier in the interstate
25 market. Do you recall that?

1 A. Yes.

2 Q. Do you know one way or the other whether there
3 are any or were any restrictions or prohibitions on AT&T at
4 that point?

5 A. It was my general understanding from talking
6 to people within AT&T that AT&T was not allowed to do
7 winback offers prior to being declared a nondominant
8 provider.

9 Q. So that's just your general understanding?

10 A. Right.

11 Q. My question was -- to instruct my own
12 witness -- do you know one way or the other whether there
13 are any specific prohibitions or restrictions placed on AT&T
14 by the FCC during the period of time in which AT&T was
15 designated as a dominant carrier?

16 A. No.

17 Q. Thank you.

18 I'd like -- do you still have in front of you
19 the exhibits that were marked as 14 and 15?

20 A. Can you refresh my memory as to what --

21 Q. Those are the two slamming letters.

22 A. I do not have those. I think those were
23 not --

24 MS. DeCOOK: Can we just take a minute and
25 I'll grab my copy, your Honor?

1 JUDGE WOODRUFF: That will be fine.

2 BY MS. DeCOOK:

3 Q. You were asked some questions about
4 Mr. Lane -- by Mr. Lane about this document. I'll ask you
5 questions now about Mr. Lane.

6 And he correlated his questions to your claim
7 in your testimony that this letter doesn't add any value.
8 And my question to you is, can you tell in any way whether
9 the offers that are made in these two letters are any
10 different than the offers that are available to any other
11 customer that seeks service from Southwestern Bell?

12 A. No, you cannot.

13 Q. So you can't tell if this offers any unique
14 value to the customer or not?

15 A. No, you cannot.

16 Q. Now, is there anything in the statutes or the
17 rules in Missouri that allows Southwestern Bell to contact
18 the customer and ask them if they've been slammed?

19 A. No, there's not.

20 Q. Do you have any concerns about Southwestern
21 Bell, given its position in the market, contacting customers
22 that are now apparently with a CLEC and asking them whether
23 they've been slammed?

24 A. Yes. And you have an incentive issue when you
25 have the former provider contacting the former customer

1 saying, have you been slammed? And that -- you know, the
2 former provider should not be the slamming police. The
3 statutes set forth rules -- directives for the Commission to
4 adopt slamming rules, and that is who governs slamming.

5 And you've also -- as I articulated in my
6 earlier testimony, you've got issues where if the former
7 provider calls them and maybe reached a different person in
8 the household, that can create the implication that there
9 was a slamming when there really wasn't, just because of the
10 negative connotations of slamming that that could be harmful
11 to competition.

12 Q. Are there any controls in place that would
13 protect the CLEC's customers from the incentive that you
14 described by Southwestern Bell acting in this role?

15 A. No, there are not.

16 Q. Do you believe such controls should be in
17 place in order to ensure that Southwestern Bell doesn't use
18 its incentives to convince the customer that they've been
19 slammed when perhaps they haven't been slammed?

20 A. Yes.

21 MR. LANE: Your Honor, I'm going to object to
22 this line. This is the type of thing that was excluded by
23 the Commission under its order determining that there were
24 two issues in this case and that all of these other things
25 were not at issue in this case.

1 JUDGE WOODRUFF: Is this in response to
2 earlier testimony?

3 MS. DeCOOK: Yes, it is.

4 JUDGE WOODRUFF: Which testimony?

5 MS. DeCOOK: Well, it's actually in response
6 to Mr. Lane's questions which were trying to legitimize
7 Southwestern Bell's activity in sending out this letter and
8 inquiring about whether the customer's been slammed.

9 This testimony is in Mr. Kohly's rebuttal
10 testimony. It was explicitly not stricken by your order.

11 JUDGE WOODRUFF: I'm going to overrule the
12 objection. You can answer the question.

13 THE WITNESS: Yes.

14 BY MS. DeCOOK:

15 Q. Now, you also had discussions regarding the
16 prior winback tariffs of Southwestern Bell in Missouri. Do
17 you recall that?

18 A. Yes.

19 Q. I believe you were asked, have they been
20 approved? Do you know whether they've been approved or not?

21 A. My understanding, hopefully what I articulated
22 earlier, is they've been allowed to go into effect.

23 Q. So have any been approved, to your knowledge?

24 A. Not that I'm aware of.

25 Q. Now, you also provided some growth rates to

1 Mr. Lane in response to his questions. I won't go
2 in-camera. I don't want to reference the rates themselves.
3 My question to you is, given the state of the market in
4 Missouri, did these growth rates surprise you?

5 A. They do, and even the growth rates in general.
6 I mean, when -- when you take a target that was a monopoly
7 market and introduce competition to it, you would expect to
8 see a high growth rate initially, at some point hopefully
9 well into the market, flattening out. And at this stage
10 where you -- even a total market of 15 percent, you're
11 seeing signs that the growth rate is decreasing, and that's
12 evident in Mr. Hughes' testimony.

13 So that does surprise me that it's too low.
14 It may stabilize in the 15 to 20 percent range, and I think
15 that's incredibly low.

16 Q. When you started out by saying when I looked
17 at these growth rates and the growth rates in general, the
18 growth rates in general that you were referring to are what?

19 A. They're the growth rates contained in
20 Mr. Hughes' direct testimony showing the growth in
21 competition, comparing those to earlier growth rates, and
22 looking at the growth rates kind of from actually starting
23 with January 1st, 1998, when Bell first provided the data
24 and watching that growth curve over time.

25 Q. Mr. Kohly, in your opinion, is it a preference

1 or an advantage where you have different rates for customers
2 that have different underlying costs?

3 A. No.

4 Q. Now, there was some discussion about the FCC
5 decision that you cite in your testimony?

6 A. Yes.

7 Q. And is it your understanding that when the
8 FCC reviewed the tariff or the contracts that were at issue
9 in that case, that they were looking at it from the
10 perspective of the impact that those tariffs would have --
11 or I'm sorry -- those contracts would have, given the status
12 of the provider as a dominant provider in the market?

13 A. Yes, and a lot of language that I quoted from
14 that went strict-- went to that issue.

15 Q. And is that why you attached or cited it in
16 your testimony?

17 A. Yes.

18 Q. Did you believe that it had some parallel to
19 this -- to the Commission's review of this proceeding?

20 A. I believe it does, in that Southwestern Bell
21 is still a noncompetitive company, which is synonymous with
22 dominant in my mind, provider, so there's some very good
23 parallel.

24 Q. You were also asked to read a section of the
25 Order on Reconsideration -- Memorandum, Opinion and Order

1 on Reconsideration in that docket which was CC Docket
2 No. 97-158, I think in your response to Mr. Lane's question
3 in which you said you thought there was a reference to the
4 Telecom Act in that section. Do you recall that?

5 A. Yes.

6 MS. DeCOOK: May I approach my witness?

7 JUDGE WOODRUFF: You may.

8 MS. DeCOOK: Thank you.

9 BY MS. DeCOOK:

10 Q. Could you read the sentence that I've pointed
11 to in paragraph 9 of that Order?

12 A. Yes. In paragraph 9, the Order goes on to
13 say, Thus the Commission stated that we hereby designate
14 communications to organizations such as schools, libraries
15 and health care providers eligible for preferential rates
16 under Section 254, as a class of communications eligible for
17 different rates notwithstanding the nondiscrimination
18 provisions of Section 202(a).

19 Q. So based on that excerpt, it appears, does it
20 not, that the Telecom Act already sets out an eligibility
21 status for schools, libraries and health care organizations?

22 A. Yes.

23 Q. Now, Mr. Lane also asked you some questions
24 regarding your -- the in-state connection fee tariff. Do
25 you recall that?

1 A. Yes.

2 Q. Now, as I understand that tariff, AT&T was not
3 attempting -- is it your view that AT&T was attempting to
4 create a separate class of service?

5 A. No, we were not.

6 Q. And is local service a separate class of
7 service already today as compared to long distance service?

8 A. It is a different service, yes.

9 Q. And are there tariffs today that treat
10 Lifeline customers differently?

11 A. Yes.

12 Q. In Missouri?

13 A. In Missouri.

14 Q. And what's the basis of that difference? You
15 can just say statutory, if that's --

16 A. Statutory.

17 Q. Thank you.

18 A. Thank you.

19 Q. Not to lead you, but just to speed this up.
20 And when that statutory difference was
21 created, do you know if that was considered a market
22 segmentation?

23 A. I don't know if it was considered a market
24 segmentation. It was created to further universal service
25 goals.

1 Q. Do you understand -- well, I think you had
2 this discussion with Commissioner Gaw. There is no
3 definition of market segmentation, right?

4 A. None in the statutes.

5 Q. That's still to be defined, right?

6 A. To be defined.

7 Q. So as we sit here today, we can't determine
8 what exactly would fall within the statutory definition of
9 market segmentation; isn't that fair?

10 A. Right.

11 Q. Now, just turning back to the schedule that --
12 the letter that was sent out by AT&T to Mr. Hughes. In your
13 opinion, is the service -- services that are reflected in
14 that document a market segmentation under Missouri statute
15 392.400?

16 A. No.

17 Q. And did I -- as I read the statute, it appears
18 that market segmentation appears to only apply to local
19 services?

20 A. That's -- when I was looking through it,
21 that's what I realized.

22 Q. And was the offer that was sent to Mr. Hughes
23 in any way related to local service?

24 A. No, it was not.

25 MS. DeCOOK: Thank you. That's all I have.

1 JUDGE WOODRUFF: Thank you. And you may step
2 down.

3 (Witness excused.)

4 JUDGE WOODRUFF: Commissioner Gaw has
5 indicated that he did not have further questions for
6 Ms. Meisenheimer, so that will conclude the testimony in
7 this case.

8 There's a couple matters that we need to take
9 care of. In looking at my chart, Exhibits 28, 29, 30 and 31
10 have never been offered into evidence. They were all
11 Southwestern Bell exhibits.

12 MR. LANE: I'm sorry, your Honor. I'd offer
13 those into evidence.

14 MS. DeCOOK: Do you know what 31 is, your
15 Honor?

16 JUDGE WOODRUFF: 31 was the AT&T offer that
17 Mr. Lane presented this morning.

18 MS. DeCOOK: This one?

19 JUDGE WOODRUFF: That one. The one in blue.

20 MS. DeCOOK: I do object to this one. I don't
21 believe that he laid foundation that this witness had even
22 seen the document and it has no relationship to Missouri.
23 He couldn't establish it as an offer that was even made in
24 Missouri.

25 JUDGE WOODRUFF: Response, Mr. Lane?

1 MR. LANE: Well, Judge, I was offering that
2 and I think there were a series of questions around that
3 that assumes it as a hypothetical. I agree that Mr. Kohly
4 didn't know whether or not it had been offered in Missouri,
5 but that doesn't affect whether it's entitled to be admitted
6 into evidence.

7 MS. DeCOOK: I don't think he laid the
8 foundation the witness could testify that it was an accurate
9 document issued by AT&T. I think that's the problem. I
10 don't see how you can lay it out as a hypothetical unless --
11 you know, without establishing that there's some foundation
12 for the document getting in through this witness in the
13 first place.

14 MR. CURTIS: Your Honor, if we could, we would
15 join in, and we would note at the bottom, this is an offer
16 that applied to the state of New York by the very terms, and
17 no other state, and it clearly is not relevant.

18 JUDGE WOODRUFF: I'm going to sustain the
19 objection as to 31, and 31 will not be admitted into
20 evidence.

21 MS. DeCOOK: Can I just ask on the other
22 documents -- I meant to ask when he moved for admission and
23 I never did do that. There is a date stamp on each one of
24 the documents that are Exhibits 28, 29 and 30, and there's
25 no other date. And I'm just -- I'm curious as to what that

1 date stamp is.

2 JUDGE WOODRUFF: The date stamp says June 5th,
3 2001, I believe.

4 MS. DeCOOK: No, there's three different ones.

5 JUDGE WOODRUFF: Three different ones. Okay.
6 Ms. MacDonald, I think these were yours. Do you know what
7 that was?

8 MR. LANE: They were probably mine, Judge.
9 That was how it was when I received the document. So I
10 don't know specifically the answer.

11 JUDGE WOODRUFF: There are other dates down at
12 the bottom about when the offer expires.

13 MS. DeCOOK: Well, I guess my only concern is
14 I have an objection to the documents themselves, so long as
15 they're not being offered for purposes of this particular
16 date that's referenced there, since we can't establish what
17 that date refers to. If Mr. Lane is willing to stipulate
18 that he's not offering it for the purpose of -- not going to
19 use that date for any purpose, then I don't have any
20 objection.

21 MR. LANE: That's fine, Judge. That wasn't
22 the purpose of it. There's dates on the bottom of it that
23 says how long that offer is in effect through. So if we
24 need dates, I'll use those.

25 JUDGE WOODRUFF: All right. Exhibits 28, 29

1 and 30 will be admitted into evidence.

2 (EXHIBIT NOS. 28, 29 AND 30 WERE RECEIVED INTO
3 EVIDENCE.)

4 JUDGE WOODRUFF: And I believe that took care
5 of all the exhibits.

6 One other matter we need to take care of, and
7 that is the filing of the transcript and the Briefs. The
8 tariffs at the moment are only suspended until November 7th,
9 so we need to move fairly quickly on this. We will have the
10 transcript prepared seven working days after conclusion of
11 the hearing. I believe that puts it on October 7th.

12 I propose having Initial Briefs due on the
13 21st of October, and Reply Briefs due on the 28th of
14 October. And that would allow me a couple weeks to write
15 the decision.

16 We may need to extend the suspension of the
17 tariffs for a few days just to give the decision a ten-day
18 effective date.

19 Any response to that?

20 MS. DeCOOK: Just a question. Is there an
21 electronic exchange of Briefs in Missouri? I think that
22 would --

23 JUDGE WOODRUFF: That's certainly permissible
24 and would be encouraged. I don't think it would be a
25 problem for anyone. If that is a problem, speak now.

1 MS. DeCOOK: Just given the short time between
2 the initial and reply, I would ask that we do that.

3 JUDGE WOODRUFF: Okay. In fact, I will issue
4 an Order directing that and also establishing for the record
5 the dates that I just indicated.

6 Are there any other matters anyone wants to
7 bring up while we're still on the record?

8 (No response.)

9 JUDGE WOODRUFF: All right. Then this hearing
10 is adjourned. Thank you.

11 WHEREUPON, the hearing of this case was
12 concluded.

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