

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

In the Matter of Southwestern Bell Telephone Company's Tariff Filing to Initiate Residential Customer Winback Promotion	)	Case No. TT-2002-472 Tariff No. 200200831
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In the Matter of Southwestern Bell Telephone Company's Tariff Filing to Initiate Business Customer Winback Promotion	)	Case No. TT-2002-473 Tariff No. 200200828
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**SOUTHWESTERN BELL TELEPHONE, L.P.,  
d/b/a SOUTHWESTERN BELL TELEPHONE COMPANY'S  
PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW**

**PROCEDURAL HISTORY**

Case No. TT-2002-472

1. On March 27, 2002, Southwestern Bell Telephone Company ("SWBT") submitted a revision to its Local Exchange Tariff, P.S.C. Mo.-24. The purpose of the revision is to offer a promotion pursuant to which SWBT will waive the NRC associated with establishing local service for those residential customers who elect to return to SWBT after having been with another LEC.<sup>1</sup> SWBT's proposed tariff also provides additional benefits to those residential customers by waiving the NRCs associated with SWBT's more popular packages (e.g. the SBC Advantage<sup>sm</sup>, Essentials<sup>sm</sup>, BASICS<sup>sm</sup>, or WORKS® packages) of vertical services.<sup>2</sup> To qualify for the NRC waiver, the residential customer must not have (1) had service disconnected for non-payment, or (2) any past due bills for regulated service owed to SWBT.<sup>3</sup> SWBT proposed that its residential winback NRC waiver promotion would be offered for a period of approximately one-year, from April 9, 2002, through March 31, 2003.

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<sup>1</sup> Ex. 2, Regan D., p. 3.

<sup>2</sup> Id.

<sup>3</sup> Id.

2. On April 3, 2002, the Staff of the Missouri Public Service Commission ("Staff") filed its Motion to Suspend and Reject Tariff Filing.

3. On April 4, 2002, SWBT filed its Response to Staff's Motion to Suspend and Reject Tariff Filing.

4. On April 5, 2002, the Missouri Public Service Commission ("Commission") issued its Order Suspending Tariff and Establishing Time For Response, in which the Commission suspended SWBT's tariff until May 9, 2002, or until otherwise ordered by the Commission. The Commission also ordered that if SWBT, or any other interested party wishes to respond to Staff's Motion to Suspend and Reject Tariff Filing, it must do so no later than April 12, 2002.

5. On April 18, 2002, the Commission entered its Order Further Suspending Tariff and Directing Notice. In that Order, the Commission suspended SWBT's tariff until August 7, 2002, or until otherwise ordered by the Commission. The Commission ordered all people or entities desiring to intervene to do so no later than May 9, 2002.

6. On April 26, 2002, MCImetro Access Transmission Services, L.L.C., Brooks Fiber Communications of Missouri, Inc., and MCI WorldCom Communications, Inc. filed their Application to Intervene.

7. On May 9, 2002, AT&T Communications of the Southwest, Inc. filed its Application to Intervene.

8. On May 10, 2002, the Commission entered its Order Setting a Prehearing Conference and Directing Filing of a Procedural Schedule, in which the Commission ordered a pre-hearing conference be held on May 22, 2002. The Commission ordered the parties to file a procedural schedule by May 29, 2002.

9. That same day, May 10, 2002, the Commission entered its Order Granting Applications for Intervention, in which it granted the Applications to Intervene of MCImetro Access Transmission Services, L.L.C., Brooks Fiber Communications of Missouri, Inc., MCI WorldCom Communications, Inc., and AT&T Communications of the Southwest Inc.

Case No. TT-2002-473

10. On March 28, 2002, SWBT submitted its revision to its Local Exchange Tariff, P.S.C. Mo.-24, Sections 2 and 3 of the Integrated Services Tariff, P.S.C. Mo. No. 41, and Section 38 of its General Exchange Tariff in order to waive NRC for those business customers who (1) elect to return to SWBT after having established service with another local exchange carrier, or (2) seek to establish initial service with SWBT after having been served by a CLEC.<sup>4</sup> The business customer must not have (1) had service disconnected for non-payment, or (2) any past due bills for regulated service owed to SWBT.<sup>5</sup> SWBT proposed that the promotion would be offered for a period of one year, from April 9, 2002, to April 8, 2003.<sup>6</sup>

11. On April 4, 2002, Staff filed its Motion to Suspend and Reject Tariff Filing.

12. On April 5, 2002, the Missouri Public Service Commission ("Commission") issued its Order Suspending Tariff and Establishing Time For Response, in which the Commission suspended SWBT's tariffs until May 9, 2002, or until otherwise ordered by the Commission. The Commission also ordered that if SWBT, or any other interested party wishes to respond to Staff's Motion to Suspend and Reject Tariff Filing, it must do so no later than April 12, 2002.

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<sup>4</sup> Ex. 2, Regan D., pp. 3-4; T. 253, Regan.

<sup>5</sup> Ex. 2, Regan D., p. 4. As with SWBT's residential winback NRC waiver promotion, if the business customer has an outstanding balance owed to SWBT, the customer must either pay the outstanding balance or make acceptable payment arrangements before SWBT will offer to provide them new service. Once a customer has paid the outstanding balance or made acceptable payment arrangements with SWBT, then SWBT will make the NRC promotion available. Ex. 3, Regan S., p. 9; T. 254-255 and 282, Regan.

<sup>6</sup> Id.

13. On April 18, 2002, the Commission entered its Order Further Suspending Tariff and Directing Notice. In that Order, the Commission suspended SWBT's tariff until August 7, 2002, or until otherwise ordered by the Commission. The Commission ordered all people or entities desiring to intervene to do so no later than May 9, 2002.

14. On April 26, 2002, MCImetro Access Transmission Services, L.L.C., Brooks Fiber Communications of Missouri, Inc., and MCI WorldCom Communications, Inc. filed their Application to Intervene.

15. On May 6, 2002, NuVox Communications of the Missouri, Inc. filed its Application to Intervene.

16. On May 9, 2002, AT&T Communications of the Southwest, Inc. filed its Application to Intervene.

17. On May 10, 2002, the Commission entered its Order Setting a Prehearing Conference and Directing Filing of a Procedural Schedule, in which the Commission ordered a pre-hearing conference be held on May 22, 2002. The Commission ordered the parties to file a procedural schedule by May 29, 2002.

18. That same day, May 10, 2002, the Commission entered its Order Granting Applications for Intervention, in which it granted the Applications to Intervene of MCImetro Access Transmission Services, L.L.C., Brooks Fiber Communications of Missouri, Inc., MCI WorldCom Communications, Inc., NuVox Communications of Missouri, Inc. and AT&T Communications of the Southwest Inc.

Consolidated Case Nos. TT-2002-472 and TT-2002-473

19. On May 22, 2002, the Commission entered its Order to Consolidate, thereby consolidating Case Nos. TT-2002-472 and TT-2002-473.

20. On June 7, 2002, the Commission entered its Order Establishing Procedural Schedule.

21. On June 13, 2002, the Commission entered its Order Further Suspending Tariff, suspending both SWBT's residential and business promotions until November 7, 2002.

22. On June 17, 2002, the Commission entered its Order Granting Motion to Amend Procedural Schedule.

23. Direct Testimony was filed on June 28, 2002. Rebuttal Testimony was filed on July 26, 2002. Surrebuttal Testimony was filed on August 23, 2002.

24. The hearing in this matter was held from September 24th-26th, 2002.

#### **FINDINGS OF FACT**

25. A winback tariff is one that proposes special rates or terms for a customer who has left one competing provider (e.g. SWBT) to receive service from a different competing provider (e.g. a CLEC) to incent that customer to return to the original provider (e.g. SWBT) for local service.<sup>7</sup>

26. A win tariff is one that proposes special rates or terms for a customer who has never established service with that provider (e.g. SWBT) but has established service with another competing provider (e.g. a CLEC) to incent that customer to obtain service from the first-mentioned competing provider (e.g. SWBT).<sup>8</sup>

27. Firms market winback and win offers to attract customers by making the customer aware of a service or pricing package that is responsive to the competitor's offers and the

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<sup>7</sup> Ex. 4, Hughes D., p. 3.

<sup>8</sup> T. 253, Regan.

customer's needs.<sup>9</sup> Firms provide winback and win pricing to convey to customers the firm's willingness to compete for their business in a way that is responsive to their competition.<sup>10</sup>

28. SWBT's residential tariff proposes to waive the NRC associated with establishing local service for those residential customers who elect to return to SWBT after having been with another LEC.<sup>11</sup> SWBT's proposed tariff also provides additional benefits to those residential customers by waiving the NRCs associated with SWBT's more popular packages (e.g. the SBC Advantage<sup>sm</sup>, Essentials<sup>sm</sup>, BASICS<sup>sm</sup>, or WORKS® packages) of vertical services.<sup>12</sup> To qualify for the NRC waiver, the residential customer must not have (1) had service disconnected for non-payment, or (2) any past due bills for regulated service owed to SWBT.<sup>13</sup> SWBT proposed that its residential winback NRC waiver promotion would be offered for a period of approximately one-year, from April 9, 2002, through March 31, 2003.<sup>14</sup> If the Commission approves SWBT's tariffs, SWBT indicated that it would refile this tariff and would request that it be in effect for approximately one year.<sup>15</sup>

29. SWBT clarified its credit policy. If a residence or business customer has an outstanding balance owed to SWBT, then the customer must either pay that outstanding balance or make acceptable payment arrangements before SWBT will offer to provide them new service.<sup>16</sup> Once a customer has paid their outstanding balance or made acceptable payment arrangements with SWBT, then SWBT will make the NRC waiver available.<sup>17</sup> Finally, even

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<sup>9</sup> Ex. 1, Aron S., p. 8.

<sup>10</sup> Id.

<sup>11</sup> Ex. 2, Regan D., p. 3.

<sup>12</sup> Id.

<sup>13</sup> Id.

<sup>14</sup> Id.

<sup>15</sup> T. 297, Hughes.

<sup>16</sup> Ex. 3, Regan S., p. 9; T. 254-255 and 282, Regan. Staff witness Chris Thomas indicated that if SWBT modified its tariff language to reflect SWBT's position, Staff would not be concerned about the non-payment provisions. T. 505, Thomas.

<sup>17</sup> Ex. 3, Regan S., p. 9; T. 282, Regan.

former customers that are considered a high credit risk are eligible for this winback promotion; however, they may require different terms and conditions in terms of deposits, etc.<sup>18</sup>

30. SWBT's proposed residential winback NRC waiver promotion is similar to others previously approved by the Commission.<sup>19</sup> Specifically, the Commission approved two residential winback NRC waiver promotions.<sup>20</sup> This first winback NRC waiver promotion was in effect from August 4, 2000, through December 31, 2000.<sup>21</sup> The second residential winback NRC waiver promotion extended the first promotion until December 31, 2001.<sup>22</sup> The only difference between the tariff that is currently at issue and the prior residential winback NRC waiver promotions is that the current proposed tariff adds an additional benefit to customers; specifically, that SWBT will waive the NRC for designated vertical feature packages in addition to the previously offered waiver of the access line NRC.<sup>23</sup>

31. SWBT's business tariff proposes to waive NRC for those business customers who (1) elect to return to SWBT after having established service with another local exchange carrier, or (2) seek to establish initial service with SWBT after having been served by a CLEC.<sup>24</sup> The business customer must not have (1) had service disconnected for non-payment, or (2) any past due bills for regulated service owed to SWBT.<sup>25</sup> SWBT proposed that the promotion would be offered for a period of one year, from April 9, 2002, to April 8, 2003.<sup>26</sup> If the Commission

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<sup>18</sup> T. 257, Regan.

<sup>19</sup> Ex. 4, Hughes D., p. 4.

<sup>20</sup> Ex. 2, Regan D., p. 4; Ex. 4, Hughes D., p. 4.

<sup>21</sup> Ex. 4, Hughes D., p. 4.

<sup>22</sup> Ex. 4, Hughes D., p. 4; Schedule 5, attached to Ex. 4, Hughes D.

<sup>23</sup> Ex. 2, Regan D., p. 4; Ex. 4, Hughes D., p. 5.

<sup>24</sup> Ex. 2, Regan D., pp. 3-4; T. 253, Regan.

<sup>25</sup> Ex. 2, Regan D., p. 4. As with SWBT's residential winback NRC waiver promotion, if the business customer has an outstanding balance owed to SWBT, the customer must either pay the outstanding balance or make acceptable payment arrangements before SWBT will offer to provide them new service. Once a customer has paid the outstanding balance or made acceptable payment arrangements with SWBT, then SWBT will make the NRC promotion available. Ex. 3, Regan S., p. 9; T. 254-255 and 282, Regan.

<sup>26</sup> Id.

approves SWBT's tariffs, SWBT indicated that it would refile this tariff and would request that it be in effect for approximately one year.<sup>27</sup>

32. SWBT's proposed business winback and win NRC waiver promotion is similar to one previously approved by the Commission.<sup>28</sup> Specifically, the Commission approved a winback and win NRC waiver promotion that was in effect from April 9, 2001, to April 8, 2002.<sup>29</sup> SWBT's proposed winback and win NRC waiver promotion was designed, in part, to be an extension of the business winback and win tariff that expired on April 8, 2002.<sup>30</sup>

33. Since the Commission approved SWBT's first residential winback tariff in 2000, the Commission has approved a dozen winback and/or win tariffs offered by SWBT.<sup>31</sup>

34. SWBT's proposed tariffs are in the public interest because they benefit customers through lower prices.<sup>32</sup> Specifically, SWBT's residential winback NRC waiver promotion proposes to waive the NRC when a customer returns to SWBT for local service after having been served by a CLEC.<sup>33</sup> SWBT's residential winback NRC waiver promotion also proposes to waive the NRC for designated vertical feature packages.<sup>34</sup> Additionally, SWBT's business winback and win NRC promotion propose to waive the NRC for customers establishing new service with SWBT or returning to SWBT, after having received services from a CLEC.<sup>35</sup>

35. SWBT's proposed tariffs are also in the public interest because they benefit customers through increased options.<sup>36</sup> Many CLECs allow a customer to migrate to their local

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<sup>27</sup> T. 297, Hughes.

<sup>28</sup> Ex. 4, Hughes D., p. 5.

<sup>29</sup> *Id.*

<sup>30</sup> Ex. 2, Regan D., p. 4; Ex. 4, Hughes D., p. 5; Schedule 5 attached to Ex. 4, Hughes D.

<sup>31</sup> Ex. 2, Regan D., p. 6; Ex. 4, Hughes D., p. 4; Schedule 4, attached to Ex. 4, Hughes D.

<sup>32</sup> Ex. 4, Hughes D., p. 2; Ex. 5, Hughes S., pp. 3-4.

<sup>33</sup> Ex. 4, Hughes S., p. 4.

<sup>34</sup> Ex. 2, Regan D., p. 3; Ex. 4, Hughes D., p. 5.

<sup>35</sup> T. 253, Regan.

<sup>36</sup> Ex. 2, Regan D., p. 10; Ex. 3, Regan S., p. 2; Ex. 4, Hughes D., p. 2.

service without incurring NRC.<sup>37</sup> Customers expect to be able to return to SWBT for service without incurring an NRC.<sup>38</sup> In some cases, customers who want to come back to SWBT for local service have decided not to do so because they do not want to incur an NRC.<sup>39</sup>

36. The type of tariffs at issue in this proceeding benefit customers by allowing customers to freely move to another telecommunications provider and, if they are so inclined, to return to SWBT without incurring a NRC.<sup>40</sup> If customers are allowed to return to SWBT for local service without incurring a NRC, they have increased their options because they will be more likely to "try" service from a CLEC.<sup>41</sup>

37. Further, SWBT's proposed business NRC waiver promotion benefits customers by allowing customers who have never established service with SWBT, but who have established service with a CLEC in SWBT's service territory, to establish service with SWBT.<sup>42</sup> If customers who have established service with a CLEC in SWBT's service territory are allowed to establish service with SWBT without incurring a NRC, they have increased their options because they will be more likely to "try" service from SWBT.

38. SWBT's winback tariffs are in the public interest because they are a form of price competition.<sup>43</sup> Specifically, SWBT's winback offers encourage carriers to out bid each other for a customer's business.<sup>44</sup> This leads to further price competition.<sup>45</sup> Clearly, it is customers that ultimately benefit from this increased competitive activity.<sup>46</sup> Indeed, the Telecommunications

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<sup>37</sup> Ex. 5, Hughes S., p. 4.

<sup>38</sup> Ex. 2, Regan D., pp. 2 and 7; Ex. 5, Hughes S., p. 4.

<sup>39</sup> Ex. 2, Regan D., p. 8; T. 87-90, Regan.

<sup>40</sup> *Id.* at p. 10; Ex. 5, Hughes S., p. 4.

<sup>41</sup> Ex. 5, Hughes S., p. 5; T. 283-284, Regan; T. 306, Hughes.

<sup>42</sup> T. 253, Regan.

<sup>43</sup> Ex. 1, Aron S., p. 8; Ex. 2, Regan D., p. 9.

<sup>44</sup> Ex. 2, Regan D., p. 9.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at p. 10.

Act of 1996 ("the Act") is based on the belief that market-driven price competition is a viable alternative to regulation and will benefit telecommunications consumers.<sup>47</sup>

39. Price cutting is always detrimental to competitors, but only very rarely is it detrimental to competition.<sup>48</sup> Socially harmful price-cutting scenarios are very much the exception rather than the norm; while beneficial, pro-consumer and pro-competitive price-cutting is the norm rather than the exception.<sup>49</sup>

40. SWBT's winback tariffs also promote competitive intensity because they increase the incentives for customers to leave SWBT to try a CLEC.<sup>50</sup> There are three reasons for this. First, just by leaving, customers make themselves eligible for more attractive offers from SWBT and, possibly, other carriers as well.<sup>51</sup> Second, by signaling their willingness to switch providers, customers enhance their own bargaining power and attractiveness to carriers, who, in turn, will more aggressively pursue their business.<sup>52</sup> And third, a customer's perceived risk of leaving SWBT to try a new carrier is reduced if the customer knows he can return to SWBT without paying a non-recurring charge.<sup>53</sup>

41. The ability to move freely between carriers encourages customers to "test the waters," to the benefit of the CLECs, and to the benefit of full, fair, and open competition.<sup>54</sup> The

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<sup>47</sup> Ex. 1, Aron S., p. 8. The statutory objection is articulated in the preamble of the Telecommunications Act of 1996 as follows: "To promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies."

<sup>48</sup> Ex. 1, Aron S., p. 8.

<sup>49</sup> Id.

<sup>50</sup> Ex. 1, Aron D., p. 34; Ex. 5, Hughes S., p. 5.

<sup>51</sup> Ex. 1, Aron S., p. 34.

<sup>52</sup> Id.

<sup>53</sup> Id.

<sup>54</sup> Id. Ex. 2, Regan D., 10.

ease by which a customer can move among local exchange providers improves competition; it does not stifle it.<sup>55</sup>

42. Approval of SWBT's proposed winback and win NRC waiver promotions is consistent with Missouri statutes. Specifically, SWBT's proposed tariffs comply with the Missouri statutes since SWBT proposes to offer the same discount to all similarly situated customers.<sup>56</sup> Here, a similarly situated winback customer represents a customer who has received local service from SWBT in the past, subsequently elected to receive local service from a CLEC, and is now voluntarily electing to return to SWBT for local service.<sup>57</sup> A similarly situated win customer represents a customer that never established service with SWBT, had obtained service from a CLEC in SWBT's service territory, and now desires to obtain service from SWBT.<sup>58</sup>

43. SWBT seeks approval of its winback and win NRC waiver promotions pursuant to Sections 392.200.2 and 392.200.3.

44. Section 392.200.2 provides that a tariff, which establishes uniform charges to similarly situated customers, is permissible.<sup>59</sup>

45. Section 392.200.3 specifies that only undue or unreasonable preferences are prohibited.<sup>60</sup>

46. The fact that SWBT's proposed tariffs comply with Missouri statutes is evident since, as discussed above, SWBT's proposed tariffs have either been previously approved by the

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<sup>55</sup> Ex. 2, Regan D., p. 2.

<sup>56</sup> Ex. 4, Hughes D., p. 2; Ex. 5, Hughes S., p. 7-8.

<sup>57</sup> Ex. 5, Hughes S., p. 8.

<sup>58</sup> T. 253, Regan.

<sup>59</sup> Ex. 4, Hughes D., p. 2.

<sup>60</sup> *Id.* at pp. 2-3.

Commission or substantially similar tariffs have been previously approved by the Commission.<sup>61</sup> When the Commission previously approved SWBT's winback and win tariffs, the Commission found those tariffs to be lawful and appropriate, pursuant to Section 392.200, and consistent with the policies and purposes of Chapter 392.<sup>62</sup> As the legislature expressed in Section 392.200.4(2), the intent of SB 507 is to bring the benefits of competition to all customers and to ensure that incumbent and alternative local exchange companies have the opportunity to price and market telecommunications services to prospective customers in any geographic area in which they compete.<sup>63</sup>

47. At the outset, SWBT notes that it is not seeking approval of its winback and win NRC waiver promotions pursuant to Section 392.200.4. Section 392.200.4 was added to the statute as part of SB 507.<sup>64</sup> The provisions of Section 392.200.4 were designed to provide additional flexibility to telecommunications companies that may not have already existed under Section 392.200.2 and 392.200.3. Further, under Section 392.200.4(2)(b), the legislature granted LECs additional authority to propose price changes that would apply to an area smaller than a given exchange.<sup>65</sup>

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<sup>61</sup> See Ex. 4, Hughes Dir., p. 3; Ex. 5, Hughes S., p. 7. SWBT's proposed residential tariff is similar to the ones previously approved by the Commission. The only substantive difference between the residential tariff currently at issue and those previously approved by the Commission is that in addition to waiving the NRC, SWBT's current proposed residential tariff also allows returning customers to sign up for one of SWBT's selected vertical services packages without incurring any NRC for those services. SWBT's proposed business winback tariff is also similar to the one previously approved by the Commission. The substantive difference between SWBT's current tariff and the one previously approved by the Commission is that the two year term commitment required in the previous SmartTrunk and SuperTrunk Winback Nonrecurring Charge Waiver promotion was removed.

<sup>62</sup> Ex. 4, Hughes, D., p. 3; Ex. 5, Hughes S., p. 7.

<sup>63</sup> Ex. 4, Hughes D. p 3; T. 289-290, Hughes.

<sup>64</sup> T. 637, Kohly.

<sup>65</sup> T. 639, Kohly.

48. The Commission has approved other SWBT tariffs that allow SWBT to offer different services/prices to different classes of customers without finding the tariffs to be unlawfully discriminatory.<sup>66</sup>

49. One example is the approval of tariffs that offer different prices to different classes of customers is in the residential arena versus the business arena.<sup>67</sup> While the service offered to the customers in the same exchange can be the same (e.g., the same calling scope), the price the customer pays for the service varies by the customer's "class of service."<sup>68</sup> This is an example of the type of customer classifications that are permissible under Missouri statutes.<sup>69</sup>

50. Not only has the Commission approved tariffs that allow SWBT to offer different services/prices to different classes of customers, it has allowed other LECs to do so as well. AT&T and WCOM have also proposed tariffs that seek to charge different rates to different customers.<sup>70</sup>

51. In Case No. TT-2002-129, the Commission approved AT&T's Instate Access fee.<sup>71</sup> Pursuant to AT&T's tariff, AT&T charges \$1.95 to its long distance customers, but exempts those that are local customers of AT&T, are Lifeline subscribers, and those who have less than \$1.00 in toll billing in a month.<sup>72</sup>

52. WCOM has proposed a similar tariff to charge a \$1.95 Instate Access Recovery Fee to its customers.<sup>73</sup>

53. Since the Commission has approved AT&T's tariff, AT&T may impose its \$1.95 charge on all customers (except those specifically exempted) regardless of the level of toll calls

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<sup>66</sup> Id. at p. 8.

<sup>67</sup> Id.

<sup>68</sup> Id.

<sup>69</sup> Id.

<sup>70</sup> Id.

<sup>71</sup> Id.

<sup>72</sup> Ex. 5, Hughes S., p. 8; Hughes Schedule 2, attached to Ex. 5.

the individual customer makes or the level of access charges AT&T incurs in providing toll service to the individual customer.<sup>74</sup> Nevertheless, the exemptions are limited to designated customer classes, including the customer group which has chosen AT&T to provide local service.<sup>75</sup>

54. Certain CLECs contend that any differences in prices must be based on differences in costs. While a difference in cost may be one basis for differentiating customers, it is not a requirement nor necessary condition that cost differences exist.<sup>76</sup> For example, the Commission has approved SWBT tariffs that offer lower rates to higher cost customers.<sup>77</sup> One example of this is the lower residential rates that SWBT offers for flat rated local service in Rate Group D versus Rate Group A.<sup>78</sup> The basic local residential rate SWBT charges a Rate Group D customer in MCA 2 is \$12.30 while the rate that SWBT charges a residential Rate Group A customer is \$7.42.<sup>79</sup> Although SWBT charges a Rate Group A customer a lower rate than a Rate Group D customer, the cost to serve the Rate Group A customer is greater than the cost to serve the Rate Group D customer.

55. A cost difference does exist between the classes of customers SWBT has identified.<sup>80</sup> All of the eligible winback customers for SWBT's proposed promotions have previously received service from SWBT.<sup>81</sup> By virtue of this fact, SWBT can be reasonably certain that facilities exist to the customer's premise a greater percentage of the time than for new

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<sup>73</sup> Ex. 5, Hughes S., p. 8; Hughes Schedule 3, attached to Ex. 5.

<sup>74</sup> Ex. 5, Hughes S., p. 9.

<sup>75</sup> Id.

<sup>76</sup> Id. at p. 10.

<sup>77</sup> Id.

<sup>78</sup> Id.

<sup>79</sup> Id.

<sup>80</sup> Id.

<sup>81</sup> Id.

customers.<sup>82</sup> In many cases, the CLEC is utilizing SWBT's facilities to provide service to the end user (i.e., resale or the purchase of unbundled network elements ("UNEs")).<sup>83</sup> In these instances, there would be no network cost to place new facilities associated with the end user electing to receive the same services from SWBT.<sup>84</sup>

56. In competitive markets, winback proposals are common.<sup>85</sup> For example, cable TV companies offer to buy back satellite dishes for customers who have chosen to drop their traditional cable TV service and purchase service from a satellite cable provider.<sup>86</sup> Winback offers are also common in markets such as computer software, magazine subscription, and Internet Access.<sup>87</sup>

57. Winback offers have also been prevalent in the long distance market for many years.<sup>88</sup> As many consumers are aware, AT&T pioneered the practice of sending checks to customers for up to \$100, and the redemption of the checks constitutes the customer's approval to return to AT&T for long distance.<sup>89</sup> AT&T reportedly differentiates among customers by varying the amount of the offer according to individual characteristics, such as age, income, and education, or perhaps by making no offer at all.<sup>90</sup>

58. SWBT presented evidence of one such winback offer that AT&T sent to SWBT witness Mr. Thomas Hughes.<sup>91</sup> The offer includes a check for \$75.00.<sup>92</sup> The letter accompanying the check makes it clear that AT&T is not offering this to all new customers;

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<sup>82</sup> Id.

<sup>83</sup> Id.

<sup>84</sup> Id.

<sup>85</sup> Ex. 4, Hughes D., p. 2.

<sup>86</sup> Ex. 2, Regan D., p. 9.

<sup>87</sup> Ex. 1, Aron S., p. 12.

<sup>88</sup> Ex. 2, Regan D., p. 9; T. 504, Thomas.

<sup>89</sup> Ex. 1, Aron S., p. 12.

<sup>90</sup> Id.

<sup>91</sup> Ex. 5, Hughes S., p. 6.

<sup>92</sup> Ex. 5, Hughes S., p. 6; Hughes Schedule 1, attached to Ex. 5.

rather, AT&T is only offering this check to former AT&T customers.<sup>93</sup> The letter's heading reads: "[H]ere's An Offer Just For You -- A Valued Former Customer."<sup>94</sup> The letter itself states:

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

But we're particularly interested in winning you back to the quality of AT&T Residential Long Distance Service, so I wanted to give you a good reason to come back right now.<sup>95</sup>

59. Additionally, carriers have offered customers NRC waivers (PIC change charge waivers) to return.<sup>96</sup> They have also offered waivers of monthly fees, gift certificates to local merchants, and cash.<sup>97</sup> Some IXCs will provide a "signing bonus" for the value of the remaining term liability of an existing contract or bonuses for long distance voice or data services.<sup>98</sup> Others, including WCOM, offer a number of hours of free long distance service to winback customers.<sup>99</sup>

100. The long distance market provides an excellent example of what telecommunications customers have grown to expect.<sup>100</sup>

101. Like SWBT, CLECs have the authority under Missouri statutes to make winback and win offers similar to those that SWBT has previously offered, as well as those SWBT is currently proposing.<sup>101</sup>

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<sup>93</sup> Id.

<sup>94</sup> Id.

<sup>95</sup> Id.

<sup>96</sup> Ex. 5, Hughes S., p. 6; T. 462, Price.

<sup>97</sup> Ex. 5, Hughes S., p. 6.

<sup>98</sup> Ex. 2, Regan D., p. 9.

<sup>99</sup> T. 464, Price.

<sup>100</sup> Ex. 2, Regan D., p. 9.

<sup>101</sup> Ex. 5, Hughes S., p. 6.

102. The statutory provisions in Sections 392.200.2 and 392.200.3 apply equally to all telecommunications companies.<sup>102</sup> WCOM conceded this during the hearing.<sup>103</sup>

103. Section 392.361(5) provides that the Commission can waive portions of the statutes in Sections 392.200 to 392.400, except as provided in Section 392.390.<sup>104</sup> Section 392.390(5) precludes a waiver as it provides that, at a minimum, a telecommunications company shall be subject to the provisions of subsections 2, 3, 4, and 5 of section 392.200.<sup>105</sup> Further, Section 392.380(2) also provides that the provisions of Section 392.200 must be applied fully and equally to all telecommunications companies. A determination by this Commission that SWBT's proposed tariff are unlawful, would result in the denial of winback tariffs for all telecommunications companies.

104. Winback tariffs are clearly permissible under federal law, which is substantially the same as Missouri law with regard to anti-discrimination provisions. 47 U.S.C. Section 202(a) contains prohibitions against unjust or unreasonable discrimination through giving of an undue or unreasonable preference or advantage or subjecting any person to an undue or unreasonable disadvantage. The provisions in Section 202(a) of the Act are substantially similar to the provisions that are contained in Section 392.200.2 RSMo. 2000.<sup>106</sup>

105. While the intervenors contend that SWBT's winback tariffs are somehow anticompetitive, no credible evidence has been presented to demonstrate that SWBT's tariffs would harm the competitive marketplace.<sup>107</sup> While the lower prices resulting from SWBT's winback tariffs might be disadvantageous to "competitors" (as are all marketing efforts in

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<sup>102</sup> T. 300, Hughes; T. 403, Hughes; T. 498, Thomas.

<sup>103</sup> T. 465, Price.

<sup>104</sup> T. 466-467, Price; T. Kohly, 581.

<sup>105</sup> T. 465, Price.

<sup>106</sup> T. 513-514, Thomas; T. 589, Kohly.

<sup>107</sup> T. 307, Hughes.

competitive markets) they certainly will not harm the competitive marketplace or consumers.<sup>108</sup> In fact, the evidence demonstrates that customers will benefit from SWBT's proposed tariffs.

106. Despite the fact that customers will benefit from SWBT's proposed tariffs, opponents of SWBT's tariffs claim they are "anti-competitive." Yet opponents refuse to employ any recognized legal or economic definition of anticompetitive because SWBT's tariffs are not anticompetitive in any recognized antitrust or economic sense. The long history of antitrust analysis and practice in the United States has been focused on defining and distinguishing those behaviors that are in fact anticompetitive and are, therefore, an antitrust violation.<sup>109</sup>

107. From an economic perspective, there is only one appropriate basis by which to evaluate winback offers, and that is by their anticipated effects on consumer welfare and economic efficiency.<sup>110</sup>

108. In this case, Staff and intervenors opine that SWBT's winback offers are harmful to competitors and that the harm inflicted on competitors will ultimately be borne by consumers via a reduction in or elimination of competition.<sup>111</sup> Although Staff and intervenors never explicitly acknowledge it, their complaint is essentially one of predatory pricing.<sup>112</sup>

109. Predatory pricing is the term used to describe alleged behavior in which a firm attempts to exclude competition by setting so low a price that its only motivation could be exclusion.<sup>113</sup> Claims of predatory pricing are viewed with great skepticism under antitrust analysis.<sup>114</sup> Because market-driven price decreases are universally beneficial to customers in the

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<sup>108</sup> Ex. 1, Aron S., p. 6.

<sup>109</sup> Id.

<sup>110</sup> Ex. 1, Aron S., p. 9.

<sup>111</sup> Id. at p. 13.

<sup>112</sup> Id.

<sup>113</sup> Id.

<sup>114</sup> Id.

short run (and are an inherent feature of competition), the courts have taken a cautious approach to inferring that cutting prices is anticompetitive.<sup>115</sup>

110. There are three necessary elements to a claim of predatory pricing.<sup>116</sup> First, the price must be below the provider's own cost of providing the product or service.<sup>117</sup> Second, there must be a reasonable likelihood that the alleged predatory behavior will in fact drive out all of the competitors in the market.<sup>118</sup> And third, because pricing below cost necessitates incurring a loss for the period of predatory behavior, there must be a realistic likelihood of recouping the foregone profits, after the other providers have been driven from the marketplace.<sup>119</sup>

111. Economists have long recognized that attempts at predatory or exclusionary pricing are rarely successful because of the difficulty of recouping foregone profits that were incurred during the period of exclusionary pricing.<sup>120</sup> If the firm cannot recoup these losses, the pricing strategy can only harm the firm adopting it, although it benefits consumers.<sup>121</sup> Recouping losses requires that the firm be able to set prices substantially above costs for an extended period of time after successful exclusion.<sup>122</sup> This requires that the firm have the ability to set high retail prices and erect sufficient entry barriers that these high retail prices would not induce (re)entry.<sup>123</sup> In practice, these circumstances have not often been found in unregulated markets, and the regulatory requirements for interconnection, unbundling, and resale (all at

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<sup>115</sup> Id.

<sup>116</sup> Id.

<sup>117</sup> Id.

<sup>118</sup> Id.

<sup>119</sup> Id.

<sup>120</sup> Id. at p. 15.

<sup>121</sup> Id.

<sup>122</sup> Id.

<sup>123</sup> Id.

regulated rates imposed on ILECs) under the Act, make these conditions even less likely to be satisfied in local telecommunications markets in the United States.<sup>124</sup>

112. If neither exclusion nor recoupment is plausible, predatory pricing is not rational and the observed prices are generally assumed not to be anticompetitive even without evaluating whether the prices are below cost.<sup>125</sup> One reason that predatory pricing is found infrequently is that the kind of market and regulatory scheme that would permit recoupment is uncommon.<sup>126</sup>

113. The market structure in telecommunications in Missouri makes recoupment improbable, if not impossible.<sup>127</sup>

114. First, even if SWBT were to succeed in excluding its rivals, it could not increase retail rates with impunity.<sup>128</sup> SWBT operates under price caps for most residential and business local exchanges services<sup>129</sup> that precludes the ability to recoup costs.<sup>130</sup> This makes it essentially impossible for any would-be predator to recoup the foregone profits.<sup>131</sup> Moreover, even in those instances where SWBT's services are not subject to price caps,<sup>132</sup> there are regulatory constraints in place to prevent recoupment.<sup>133</sup> Section 392.245.5 RSMo. 2000 grants the Commission the ability to re-impose price-cap regulation if it determines that effective competition no longer exists.<sup>134</sup>

115. Second, even if SWBT were able to increase retail prices, new carriers could (re)enter via purchasing UNEs, which would still be available at cost-based rates as established

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<sup>124</sup> Id.

<sup>125</sup> Id.

<sup>126</sup> Id.

<sup>127</sup> Ex. 1, Aron S., p. 16.

<sup>128</sup> Ex. 1, Aron S. p. 16; T. 546, Meisenheimer.

<sup>129</sup> Section 392.245, RSMo. 2000.

<sup>130</sup> Ex. 1, Aron S., pp. 16-17; T. 546, Meisenheimer.

<sup>131</sup> Ex. 1, Aron S., p. 17.

<sup>132</sup> In Case No. TO-2001-467, SWBT sought and achieved competitive classification for certain business and residential local services in designated geographic areas in Missouri. The effect of this decision was to remove the services from price-cap regulation.

by the Commission.<sup>135</sup> Since this Commission ultimately controls the pricing of UNEs, it can ensure that any predatory strategy would not succeed. The Commission and the FCC have verified that SWBT has complied with the market opening requirements of the Act when they approved SWBT's petition for 271 relief.<sup>136</sup>

116. Third, while price caps and UNEs protect against recoupment, resale is an important element that protects against exclusion.<sup>137</sup> No matter how low retail rates fall, CLECs can provide service by purchasing available wholesale services at a discount off of the retail rate.<sup>138</sup> In fact, the winback offerings at issue in this proceeding are available to CLECs for resale.<sup>139</sup>

117. Fourth, to the extent that CLECs have invested in their own facilities, much of this investment (such as outside plant) may be sunk.<sup>140</sup> Thus, the facilities will not disappear if a CLEC leaves the market, making re-entry relatively low-cost.<sup>141</sup> Hence, the necessary conditions precedent to a claim of primary line price discrimination are simply not credible in this market.<sup>142</sup>

118. Moreover, no party has presented any evidence that SWBT's promotions are below cost.<sup>143</sup> The proper method to examine a waiver of installation and other NRC would be to consider the anticipated profit on the entire package of services purchased by the customer over the timeframe the customer is expected to be a subscriber and determine whether that

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<sup>133</sup> Ex. 1, Aron S., p. 17.

<sup>134</sup> Ex. 1, Aron S. p. 17; T. 547, Meisenheimer.

<sup>135</sup> Ex. 1, Aron S., p. 17; T. 547, Meisenheimer.

<sup>136</sup> Ex. 1, Aron S., p. 17.

<sup>137</sup> Ex. 1, Aron D., p. 17. As SWBT witness Thomas F. Hughes testified, both SWBT's residential winback and business winback and win NRC waiver promotions are available for resale by the CLECs. Ex. 4, Hughes D., p. 5.

<sup>138</sup> Ex. 1, Aron S., p. 17.

<sup>139</sup> Ex. 1, Aron D., p. 17; Ex. 4, Hughes D., p. 5; T. 547, Meisenheimer.

<sup>140</sup> Ex. 1, Aron S., p. 18.

<sup>141</sup> Ex. 1, Aron S., p. 18; T. 547-548, Meisenheimer.

<sup>142</sup> Ex. 1, Aron S., p. 18.

revenue flow is adequate to cover the provider's incremental costs of providing these services.<sup>144</sup> No party has conducted an actual analysis to establish that prices are below cost.<sup>145</sup> To the contrary, CLECs frequently waive NRC to their customers, which provides further indication that SWBT's promotions are not predatory.<sup>146</sup>

119. SWBT's proposed winback tariffs are consistent with the FCC's views regarding winback tariffs. Specifically, the FCC has determined that: (1) winback campaigns are consistent with the Act; (2) winback campaigns facilitate and foster competition among carriers; (3) ILECs should be allowed to make winback offers; and (4) winback campaigns are not a predatory practice designed to prevent effective market entry by new competitors.<sup>147</sup> Specifically, the FCC stated:

[O]n reconsideration, we conclude that all carriers should be able to use CPNI [Customer Propriety Network Information] to engage in winback marketing campaigns to target valued former customers that have switched to other carriers. After reviewing the fuller record on this issue developed on reconsideration, we are persuaded that winback campaigns are consistent with section 222(c)(1) and in most instances facilitate and foster competition among carriers, benefiting customers without unduly impinging upon privacy rights. (Emphasis added).<sup>148</sup>

The FCC went on to state:

[C]ustomers expect carriers to attempt to win back their business by offering better-tailored service packages, and that such precise tailoring is most effectively achieved through use of CPNI. Winback restrictions may deprive customers of the benefits of a competitive market. Winback facilitates direct competition on price and other terms, for example, by encouraging carriers to "out bid" each other for a customer's business, enabling the customer to select the carrier that best suits the customer's needs. (Footnotes omitted. Emphasis added).<sup>149</sup>

The FCC continued:

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<sup>143</sup> Id.

<sup>144</sup> Id.

<sup>145</sup> Id.

<sup>146</sup> Id.

<sup>147</sup> FCC Winback Order, paragraph 66; Ex. 5, Hughes S., pp. 25-27.

<sup>148</sup> FCC Winback Order, paragraph 66; Ex. 5, Hughes S., pp. 25-26; T. 440 Price (winback campaigns can promote competition).

<sup>149</sup> FCC Winback Order, paragraph 68; Ex. 5, Hughes S., p. 26.

Some commenters argue that ILECs should be restricted from engaging in winback campaigns, as a matter of policy, because of the ILEC's unique historic position as regulated monopolies. Several commenters are concerned that the vast stores of CPNI gathered by ILECs will chill potential local entrants and thwart competition in the local exchange market. We believe that such action by an ILEC is a significant concern during the time subsequent to the customer's placement of an order to change carriers and prior to the change actually taking place. Therefore, we have addressed that situation in Part V.C.3 *infra*. However, once a customer is no longer obtaining service from the ILEC, the ILEC must compete with the new service provider to obtain the customer's business. We believe that such competition is in the best interest of the customer and see no reason to prohibit ILECs from taking part in this practice. (Footnote omitted. Emphasis added).<sup>150</sup>

Finally, the FCC stated:

We are also unpersuaded by the allegations that an incumbent carrier's use of CPNI in winback campaigns amounts to a predatory practice designed to prevent effective market entry by new competitors. Contrary to the commenters' suggestions, we believe such use of CPNI is neither a *per se* violation of section 201 of the Communications Act, as amended, nor the antitrust laws. While excessively low pricing and other exclusionary practices may contravene antitrust laws, commenters proffer neither facts nor convincing arguments that their legal conclusion is a realistic concern. Prior to the adoption of the rules promulgated under 1996 Act, incumbent carriers were able to use CPNI to regain customers lost to competitors. Assuming incumbent LECs have sufficient market power to engage in predatory strategies, they are constrained in their ability to raise and lower prices by our tariff rules and non-discrimination requirements. Because winback campaigns can promote competition and result in lower prices to consumers, we will not condemn such practices absent a showing that they are truly predatory. (Footnotes omitted. Emphasis added).<sup>151</sup>

120. The FCC has determined that winback efforts by ILECs such as SWBT are not predatory, unless a specific showing is made.<sup>152</sup> No such showing has been made in this proceeding by any intervenor.<sup>153</sup>

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<sup>150</sup> FCC Winback Order, paragraph 69; Ex. 5, Hughes S., p. 26; T. 440-441, Price (the FCC determined that ILECs should not be precluded from engaging in winback campaigns because of their historic monopoly position).

<sup>151</sup> FCC Winback Order, paragraph 70; Ex. 5, Hughes S., p. 27.

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

121. No party presented any evidence that during the period August 2000 through April 2002 that CLECs lost access lines because customers were returning to SWBT for service.<sup>154</sup>

122. Further no party presented any evidence that during the period August 2000 through April 2002, SWBT eliminated its competitors in the local exchange telecommunications market.<sup>155</sup>

123. Even though the Commission has previously approved winback offers from SWBT, the CLECs continue to compete effectively in Missouri.<sup>156</sup> Telecommunications customers are examining their options for local telecommunications service and are switching their service from SWBT to CLECs in growing numbers.<sup>157</sup>

124. The minimum market share gained by CLECs as of April, 2002, is 12% or a minimum of 332,146 lines in Missouri.<sup>158</sup> This is an increase in the minimum number of lines being served by CLECs of 152,438 (a growth rate of 85%) from July, 2000, to April, 2002.<sup>159</sup> On

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<sup>154</sup> T. 494, Thomas.

<sup>155</sup> T. 494-495, Thomas.

<sup>156</sup> Ex. 4, Hughes D., pp. 2 and 6.

<sup>157</sup> Ex. 3, Regan S., p. 3.

<sup>158</sup> *Id.* at p. 7. The approximate 12% market share gained is based on the number of resold lines, UNE-P, and E-911 listings the CLECs have reported. *Id.* at 8. This is the minimum level of market share since it does not take into account all the lines served by CLECs on a facilities basis. *Id.* SWBT knows when a CLEC resells its service and when a CLEC purchases UNEs from SWBT to provision its services. *Id.* However, SWBT does not know the number of lines served by CLECs on a pure facilities basis. *Id.* While SWBT can identify the number of E-911 listings of CLECs, the number of CLEC E-911 listings understates the number of access lines served by facilities-based CLECs since only outbound lines have 911 listings associated with them. *Id.* Therefore, certain lines served by the CLECs (e.g., those at a call center receiving inbound calls) are not reported. *Id.* Further, a significant number of access lines are served with telephone numbers that have been ported from SWBT. *Id.* When a telephone number is ported from SWBT to a CLEC, the telephone number is still associated with SWBT in the 911 database. *Id.* Therefore, access lines with ported numbers are not included in this minimum level of market share gained by the CLECs. *Id.* SWBT has ported over 359,000 telephone numbers. *Id.* While this number reflects the cumulative number of ported numbers, SWBT expects that a significant percentage of these ported numbers represent access lines that are undercounted in SWBT's data reflecting current CLEC lines. *Id.* The CLECs themselves are the only ones who know for sure how many access lines they are serving. *Id.* Assuming SWBT's current minimum CLEC line count estimation is still roughly 45% understated, then the current CLEC access line count would be 481,612, which represents an over 16% market share. *Id.* at 8-9.

<sup>159</sup> Ex. 4, Hughes D., p. 7.

the other hand, from August, 2000, to May, 2002, SWBT's access line total actually declined by 179,582 or 6.8 percent.<sup>160</sup> In June and July, 2002, SWBT lost another 32,500 retail lines.<sup>161</sup>

125. Other measures of competitive entry show similar gains during the time the prior SWBT Commission approved winback tariffs were in place. From July 2000 (before SWBT's first winback tariff was approved), to April 2002 (when the last winback tariff expired), the number of E-911 listings and UNE-P lines, which do not even capture all of the lines served by CLECs, more than doubled.<sup>162</sup> Specifically, E-911 listings increased from 72,737 to 157,200 (a 116% growth rate) and UNE-P lines increased from 26,069 to 103,002 (a 295% growth rate).<sup>163</sup> During the same time period, interconnection trunks increased from 85,249 to 121,412, and cumulative ported numbers increased from 163,338 to 359,572.<sup>164</sup>

126. During May and June, 2002, CLECs purchased an additional 19,240 UNE-P lines and 3,297 interconnection trunks from SWBT.<sup>165</sup> During this same two-month period, the number of E-911 listing increased by 12,409.<sup>166</sup> At the end of July, 2002, CLECs had 172,412 E-911 listings, 131,994 UNE-P lines, and 60,739 resold lines.<sup>167</sup> These figures represent a minimum CLEC line count estimation of 365,145. Assuming SWBT's current minimum CLEC line count estimation is still roughly 45% understated when compared to the actual partial count conducted by Staff in prior proceedings, then the current CLEC access line count would be 529,460 which represents nearly an 18% market share. Moreover, at the end of July, 2002, 76 CLECs were passing orders to SWBT.<sup>168</sup>

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<sup>160</sup> Ex. 2, Regan D., p. 5; Ex. 4, Hughes D., p. 6.

<sup>161</sup> Ex. 3, Regan S., p. 3.

<sup>162</sup> Ex. 4, Hughes D., p. 6.

<sup>163</sup> Id.

<sup>164</sup> Id.

<sup>165</sup> Ex. 5, Hughes S., p. 13.

<sup>166</sup> Id.

<sup>167</sup> T. 376 and 416, Hughes.

<sup>168</sup> Id.

127. SWBT faces effective competition from a variety of carriers including resellers, CLECs purchasing UNEs, pure facilities-based CLECs (e.g., cable TV providers), and wireless carriers.<sup>169</sup> This data indicates that competition in Missouri is strong and that the number of local service customers that are leaving SWBT has increased significantly.<sup>170</sup>

128. Not only does SWBT estimate that the CLECs' minimum market share increased, CLECs are actively competing for local service throughout the state.<sup>171</sup> Based on detailed exchange specific analysis performed during In the Matter of the Investigation of the State of Competition in the Exchanges of Southwestern Bell Telephone Company, Case No. TO-2001-467, CLECs serve customers in every SWBT exchange.<sup>172</sup> They are serving customers via a combination of resale, the purchase of UNEs, and entirely over the facilities of CLECs.<sup>173</sup> CLECs are free to select the exchanges they operate in and the customers they desire to serve.<sup>174</sup>

129. CLECs are not obligated to provide service to all customers.<sup>175</sup> This allows them to cherry pick the most profitable customers (e.g., business customers, customers that subscribe to vertical features) while leaving SWBT to serve the customers they do not desire to serve.<sup>176</sup> For example, WCOM's Neighborhood plan is an "all you can eat" local/long distance offering for \$55.99 per month in Missouri, which is geared to heavy residential telecommunications users in Missouri who are willing to pay for features such as voice mail, who make a lot of long-distance calls, and who therefore contribute the most to the financing of the underlying network; and is specifically designed not to appeal to those residential customers who have less revenue-

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<sup>169</sup> Id. at p. 6.

<sup>170</sup> Ex. 2, Regan D, pp. 5-6; Ex. 3, Regan S., p. 2.

<sup>171</sup> Id. at p. 9.

<sup>172</sup> Id.

<sup>173</sup> Id.

<sup>174</sup> Id.

<sup>175</sup> Ex. 5, Hughes S., p. 23

<sup>176</sup> Ex. 5, Hughes S., pp. 23-24.

generating patterns.<sup>177</sup> Moreover, WCOM's Neighborhood plan is targeted at, and only available to, residential customers that reside in St. Louis and Kansas City.<sup>178</sup> Under the Neighborhood Plan, WCOM has announced that it has achieved over one million customers nationwide in just six months under that plan.<sup>179</sup> Further, WCOM expects to gain another million customers nationwide under the Neighborhood Plan by the end of the year.<sup>180</sup> WCOM witness Don Price testified that MCImetro (WCOM's only provider of residential local service in Missouri)<sup>181</sup> does not target or seek to acquire residential customers that utilize just a basic access line without vertical features and without substantial long distance service.<sup>182</sup> In other words, WCOM only wants residential customers that have a basic access line, vertical features, and substantial long distance use.<sup>183</sup>

130. Typically, CLECs are not serving customers who only have a basic access line.<sup>184</sup> CLECs are serving customers who have many features, lots of toll, etc.<sup>185</sup>

131. The CLECs' business plans will dictate where (and to whom) they choose to provide service.<sup>186</sup> As a group, the CLECs also are attempting to win the customers that provide the highest profit margin.<sup>187</sup> Some CLECs choose to serve only business customers while other CLECs may only attempt to win residential customers who purchase packages (e.g., access line, vertical services, voicemail, intraLATA and interLATA toll).<sup>188</sup>

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<sup>177</sup> Ex. 1, Aron S., p. 11.

<sup>178</sup> T. 468, Price. See MCImetro Access Transmission Services, LLC Local Exchange Service Missouri P.S.C. Tariff No. 1, Original Page No. 63.18, section 3.9.12.

<sup>179</sup> T. 431-432, Price.

<sup>180</sup> T. 432-433, Price.

<sup>181</sup> T. 467, Price.

<sup>182</sup> T. 471, Price.

<sup>183</sup> T. 473, Price.

<sup>184</sup> T. 303, Hughes.

<sup>185</sup> Id.

<sup>186</sup> Ex. 4, Hughes D., p. 9.

<sup>187</sup> Id.

<sup>188</sup> Id.

132. CLECs in the aggregate continue to gain market share, even though all CLECs may not hold themselves out as a telecommunications provider to all customers in all exchanges.<sup>189</sup>

133. Moreover, the Commission has previously found the local market in Missouri to be open to CLECs.<sup>190</sup> In In the Matter of the Application of Southwestern Bell Telephone Company to Provide Notice of Intent to File an Application for Authorization to Provide In-Region InterLATA Services Originating in Missouri Pursuant to Section 271 of the Telecommunications Act of 1996), Case No. TO-99-227, the Commission determined that the Missouri local markets are open to competition.<sup>191</sup> In its March 15, 2001, Order in Case No. TO-99-227, the Commission stated:

[T]he 14-point competitive checklist sets out the steps that a BOC must take to open the local market to its competitors. See 47 U.S.C. §271(c)(2)(B)(i)-(xiv). SWBT has satisfied the requirements of the competitive checklist by providing or offering access to and interconnection with its network on terms and conditions that satisfy each of the checklist items. Id. at 66.<sup>192</sup>

The Commission also approved the Missouri 271 Agreement ("M2A"), which provides a convenient interconnection agreement that contains favorable terms for CLECs seeking to compete.<sup>193</sup> Moreover, on August 16, 2001, in a presentation to the Commission, SWBT agreed to voluntarily lower rates for certain UNEs.<sup>194</sup> The Commission approved SWBT's voluntarily

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<sup>189</sup> Id.

<sup>190</sup> Ex. 4, Hughes D., p. 10; Ex. 5, Hughes S., p. 14.

<sup>191</sup> Id.

<sup>192</sup> The Commission issued its Order in Case No. TO-99-227, following an extensive review of SWBT's 271 application. At the same time the Commission was reviewing SWBT's 271 application, it approved SWBT's residential winback tariff in August of 2000. Shortly after the Commission issued its Order in Case No. TO-99-227, the Commission approved SWBT's business winback tariff, a substantially similar tariff to that at issue in this proceeding.

<sup>193</sup> Ex. 4, Hughes D., p. 11.

<sup>194</sup> Id.

reduced UNE rates on August 30, 2001.<sup>195</sup> These reduced rates provide an additional benefit to CLECs.<sup>196</sup>

### CONCLUSIONS OF LAW

134. While the objectives of winback and win offers are clearly counter to the interests of competitors, they are neither anticompetitive nor antithetical to consumer welfare.<sup>197</sup> To the contrary, they are the very epitome of competition and are beneficial to consumers.<sup>198</sup>

135. SWBT's tariff are consistent with 392.200.2 and 392.200.3 since they establish uniform charges to similarly situated customers and they do not provide any undue or unreasonable preference. The fact that SWBT's proposed tariffs comply with Missouri statutes is evident since, as discussed above, SWBT's proposed tariffs have either been previously approved by the Commission or substantially similar tariffs have been previously approved by the Commission.<sup>199</sup>

136. SWBT's winback tariffs are permissible under Section 392.200.2 and 392.200.3.<sup>200</sup> They are also permissible under Section 392.200.4.

137. Tariffs that establish reasonable classes of customers comply with Missouri statutes and are not unlawfully discriminatory.<sup>201</sup> Just as AT&T's Instate Access fee tariff does

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<sup>195</sup> Id.

<sup>196</sup> Id.

<sup>197</sup> Id.

<sup>198</sup> Id.

<sup>199</sup> See Ex. 4, Hughes Dir., p. 3; Ex. 5, Hughes S., p. 7. SWBT's proposed residential tariff is similar to the ones previously approved by the Commission. The only substantive difference between the residential tariff currently at issue and those previously approved by the Commission is that in addition to waiving the NRC, SWBT's current proposed residential tariff also allows returning customers to sign up for one of SWBT's selected vertical services packages without incurring any NRC for those services. SWBT's proposed business winback tariff is also similar to the one previously approved by the Commission. The substantive difference between SWBT's current tariff and the one previously approved by the Commission is that the two year term commitment required in the previous SmartTrunk and SuperTrunk Winback Nonrecurring Charge Waiver promotion was removed.

<sup>200</sup> Ex. 5, Hughes S., p. 7.

<sup>201</sup> Id.

not unlawfully discriminate between classes of customers, SWBT's proposed tariffs do not unlawfully discriminate between classes of customers.

138. While a difference in cost may be one basis for differentiating customers, it is not a requirement nor necessary condition that cost differences exist.<sup>202</sup>

139. The statutory provisions in Sections 392.200.2 and 392.200.3 apply equally to all telecommunications companies.

140. Section 392.361(5) provides that the Commission can waive portions of the statutes in Sections 392.200 to 392.400, except as provided in Section 392.390.<sup>203</sup> Section 392.390(5) precludes a waiver as it provides that, at a minimum, a telecommunications company shall be subject to the provisions of subsections 2, 3, 4, and 5 of section 392.200.<sup>204</sup> Further, Section 392.380(2) also provides that the provisions of Section 392.200 must be applied fully and equally to all telecommunications companies. Since the statutes make clear that the provisions of Section 392.200 must be applied fully and equally to all telecommunications companies, if the Commission were to reject SWBT's proposed tariff, all telecommunications companies would be prevented from offering winback promotions. The Commission declines to take such drastic action.

141. While the intervenors contend that SWBT's winback tariffs are somehow anticompetitive, no credible evidence has been presented to demonstrate that SWBT's tariffs would harm the competitive marketplace or that its past winback tariffs, in fact, did harm the competitive marketplace.<sup>205</sup> Specifically, no party presented any evidence that SWBT's proposed winback and win NRC waiver promotions are truly predatory. Moreover, even though

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<sup>202</sup> *Id.* at p. 10.

<sup>203</sup> T. 466-467, Price; T. Kohly, 581.

<sup>204</sup> T. 465, Price.


<sup>205</sup> T. 307, Hughes.

the Commission has previously approved winback offers from SWBT, the CLECs continue to compete effectively in Missouri.<sup>206</sup>

142. Since SWBT's winback offers have provided SWBT an opportunity to meet customer demand and SWBT's winback offers have not prevented CLECs from competing in the local market in Missouri, the Commission hereby approves SWBT's tariffs as consistent with the provisions in Chapter 392.<sup>207</sup>

Respectfully submitted,

SOUTHWESTERN BELL TELEPHONE, L.P.

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

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

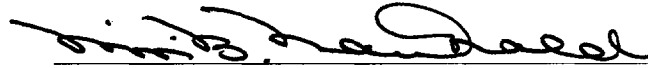
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<sup>206</sup> Ex. 4, Hughes D., pp. 2 and 6.

<sup>207</sup> Ex. 4, Hughes D., p. 7.

**CERTIFICATE OF SERVICE**

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



Mimi B. MacDonald

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

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

CARL LUMLEY  
CURTIS, OETTING, HEINZ, GARRETT &  
SOULE, P.C.  
130 S. BEMISTON, SUITE 200  
CLAYTON, MO 63105  
J. STEVE WEBER  
AT&T COMMUNICATIONS  
OF THE SOUTHWEST  
101 WEST MCCARTY, SUITE 216  
JEFFERSON CITY, MO 65101

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

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