

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

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

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

**SOUTHWESTERN BELL TELEPHONE, L.P.,
d/b/a SOUTHWESTERN BELL TELEPHONE COMPANY'S
REPLY BRIEF**

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

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EXECUTIVE SUMMARY

On October 21, 2001, AT&T Communications of the Southwest, Inc. ("AT&T"), the Office of Public Counsel ("OPC"), the Staff of the Missouri Public Service Commission ("Staff"), MCImetro Access Transmission Services, L.L.C. ("MCImetro"), Brooks Fiber Communications of Missouri, Inc. ("Brooks"), MCI WorldCom Communications ("MCIWC") (MCImetro, Brooks, and MCIWC will collectively be referred to as "WCOM"), NuVox Communications of Missouri, Inc. ("NuVox"), and Southwestern Bell Telephone, L.P., d/b/a Southwestern Bell Telephone Company ("SWBT") filed their Initial Briefs in this matter. When added together, AT&T's, OPC's, Staff's, WCOM's, and NuVox's Initial Briefs total 67 pages. Amazingly, none of the 67 pages addresses SWBT's past winback and win tariffs with regard to any purported anticompetitive effect that these tariffs may have had on the telecommunications market in Missouri. The reason AT&T, OPC, Staff, WCOM, and NuVox failed to address this issue is obvious. There was absolutely no anticompetitive effect when SWBT's prior winback tariffs were in effect. This statement is support by substantial and competent evidence that SWBT presented in its Pre-Filed Testimony and during the hearing of this matter.

Specifically, during the time when SWBT had winback and win tariffs in effect (August 2000 through April 2002), competitive local exchange carrier ("CLEC") access lines increased from a minimum of 179,708 to a minimum of 332,146, almost doubling. SWBT experienced a significant decline of 179,582 lines during this same period. At the end of July 2002, CLECs had 172,412 E-911 listings, 131,994 UNE-P lines, and 60,739 resold lines. These figures represent a minimum CLEC line count estimation of 365,145. Moreover, if SWBT's estimate is 45% understated (as was the case when Staff compared SWBT's access line estimates with access line counts provided by the CLECs in Case No. TO-99-227), the current CLEC access line count would be 529,460, which represents an 18% market share.

Despite this concrete evidence, AT&T and WCOM claim that SWBT's proposed winback and win tariffs would have a negative impact on competition in the state of Missouri. However, the Commission should ignore these claims because neither AT&T nor WCOM provides any evidentiary support for their claim and there is none. When CLECs are experiencing a dramatic growth in access lines and SWBT is experiencing a significant decrease in access lines, any claim that a similar tariff will have an anticompetitive impact is demonstrably false. The Commission should soundly reject the CLECs' unwarranted and unsupported demands for regulatory protection in the marketplace.

SWBT has also demonstrated that its proposed winback and win tariffs are in the public interest because they benefit customers through lower prices and increased options. Furthermore, SWBT's proposed winback and win tariffs are in the public interest because they encourage carriers to outbid each other for a customer's business thereby leading to further price competition. Despite SWBT's evidence that its proposed tariffs are in the public interest, no party presented any evidence that SWBT's proposed tariffs do not lower prices for consumers, do

not increase options for consumers, and do not promote competitive intensity. The reason the other parties failed to address this issue is obvious. SWBT's proposed tariffs are in the public interest -- as they offer lower prices to consumers, increase options for consumers and promote competitive intensity -- and there is absolutely no evidence to the contrary.

AT&T, OPC, Staff, WCOM and NuVox also contend that SWBT's proposed tariffs are discriminatory in violation of Section 392.200, RSMo. 2000.¹ These contentions are equally erroneous. Section 392.200.2 provides that a telecommunications company should charge the same amount for providing a like and contemporaneous service under the same or substantially the same circumstances and conditions. Section 392.200.3 provides that a telecommunications company shall not give an undue or unreasonable preference or advantage or subject any person to an undue or unreasonable prejudice or disadvantage. SWBT is not providing service to winback and win customers under the same or substantially the same circumstances and conditions as new customers. New customers, typically, have not previously received service from SWBT or a CLEC at the same residence or business in SWBT's service territory. All winback customers, on the other hand, have previously received service from SWBT at the same residence or business in SWBT's service territory. Similarly, all win customers have previously received service from a CLEC at the same residence or business in SWBT's service territory. The customers are clearly not similarly situated, nor are such offers unreasonably or unduly prejudicial. Missouri case law uniformly permits companies that are not providing service under the same or substantially the same circumstances or conditions, to charge different rates.

AT&T and WCOM also argue that any difference in price must be based on a difference in cost. Notably, no authority is cited for this radical interpretation of the non-discrimination

¹ All references to the statutes in this Brief are to the Revised Statutes of Missouri, 2000, unless otherwise specifically noted.

statutes, and none exists. The Commission has approved SWBT, AT&T, and WCOM tariffs that allow these companies to offer different services/prices to different classes of customers without a showing that a difference in cost justifies the different price, and the Commission should likewise find that these tariffs are not unlawfully discriminatory. Further, since the non-discrimination statutes apply with equal force to all telecommunications providers in Missouri, the Commission cannot permit interexchange carriers ("IXCs") to offer winback promotions to long distance customers while precluding SWBT from offering winback promotions to local exchange customers. Thus, Missouri case law uniformly supports SWBT's position and the Commission should approve SWBT's winback and win tariffs.

Realizing that SWBT's tariffs are consistent with Sections 392.200.2 and 392.200.3, Staff and WCOM contend that the Commission cannot approve SWBT's proposed winback and win tariffs under Section 392.200.4. However, as SWBT has repeatedly stated, it is not seeking approval of its winback and win tariffs pursuant to Section 392.200.4. Thus, the Commission need not address this issue.

AT&T, WCOM, and Staff also seek to derail SWBT's proposed tariffs on the basis of extraneous issues that are neither factually nor legally relevant. SWBT's ownership of its network and alleged uncertainty that could result from the Federal Communications Commission's ("FCC's") Triennial Review Docket cannot serve as a basis to reject SWBT's tariffs. Moreover, even if these claims were in any way relevant, SWBT notes that any purported advantage that SWBT has in owning its network is addressed by the Telecommunications Act of 1996 ("Act"), which obligates SWBT to allow CLECs to interconnect with and use its network. Further, if the FCC removes an unbundling obligation for a particular unbundled network element ("UNE") in a particular geographic area, it will be

because, as provided in the Act, lack of access to such element from the ILEC at regulated rates does not impair the ability of CLECs to compete. Thus, neither of these claims is a justifiable basis for rejection of SWBT's proposed tariffs.

Finally, both AT&T and WCOM address issues related to SWBT' winback and retention policies and practices, including SWBT's alleged misuse of CPNI and wholesale disconnect information. As the Commission is aware, in both its Order Regarding List of Issues and its Order Regarding Motions to Strike, it ruled that these issues are beyond the scope of this Docket. WCOM not only addressed these issues in its Initial Brief, it also cited testimony that the Commission struck. AT&T's and WCOM's conduct should not be countenanced. Rather, the Commission should grant SWBT's Motion to Strike Portions of AT&T's and WCOM's² Initial Briefs which accompanies this Reply Brief.

In summary, the Commission should approve SWBT's winback and win tariffs as these proposed tariffs benefit customers through lower prices and increased options and benefit competition since they encourage carriers to outbid each other for customer's service. SWBT's proposed tariffs are in the public interest and consistent with Missouri statutes. The Commission should reject pleas to impose restrictions on only one competitor, SWBT.

² SWBT notes that NuVox filed a Joint Brief with MCImetro, Brooks, and MCIWC. Thus, SWBT's Motion to Strike Portions of AT&T's and WCOM's Initial Briefs is also applicable to NuVox.

ARGUMENT

I. No Party Presented Any Evidence That SWBT's Past Winback and Win Tariffs And/Or Its Proposed Winback and Win Tariffs Will Have An Anticompetitive Effect.

When added together, AT&T's, OPC's, Staff's, WCOM's, and NuVox's Initial Briefs total 67 pages. Not surprisingly, none of the 67 pages addresses SWBT's past winback and win tariffs with regard to any purported "anticompetitive"³ effect that these tariffs may have had on the telecommunications market in Missouri.⁴ The reason these parties fail to address this issue is obvious. There was absolutely no anticompetitive effect when SWBT's prior winback tariffs were in effect. This statement is supported by substantial and competent evidence, as explained, in detail, below.

As the Commission is aware, it previously approved two residential winback NRC waiver promotions for SWBT.⁵ The first winback NRC waiver promotion was in effect from August 4, 2000, through December 31, 2000.⁶ The second residential winback NRC waiver promotion extended the first promotion until December 31, 2001.⁷ The Commission also approved a business winback and win NRC waiver promotion that was in effect from April 9, 2001, to April 8, 2002.⁸

Despite the fact that SWBT had both winback and win tariffs previously in effect, no party produced any evidence of any adverse impact on competition during the 20 months that

³ SWBT notes that opponents of SWBT's proposed tariffs 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. (SWBT's Initial Brief, p. 24). 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, therefore, an antitrust violation. *Id.* at 25.

⁴ AT&T argues that "SWBT continues to possess significant market power, and has the ability and the incentive to utilize its market power in ways that are harmful to the competitive process and, over the long run, to Missouri telecommunications users." AT&T's Initial Brief, p. 15. Importantly, AT&T cites no evidence to support this statement. The reason is clear--it is simply rhetoric.

⁵ Ex. 2, Regan D., p. 4; Ex. 4, Hughes D., p. 4.

⁶ Ex. 4, Hughes D., p. 4.

⁷ Ex. 4, Hughes D., p. 4; Schedule 5, attached to Ex. 4, Hughes D.

⁸ Ex. 4, Hughes D., p. 5.

these tariffs were in effect. No party presented any evidence that during the period August 2000 through April 2002, SWBT eliminated its competitors in the local exchange market or that any other recognized anti-competitive result occurred.⁹ During this same time period, the Commission determined that the Missouri local markets are open to competition in Case No. TO-99-227,¹⁰ a finding the FCC confirmed.

While opponents of the tariffs failed to present any evidence to support their claims of anti-competitive impact, SWBT presented substantial evidence that, during the time when it had winback and win tariffs in effect, the CLECs continued to compete effectively in Missouri and, in fact, experienced dramatic growth.¹¹ CLEC access lines increased from a minimum of 179,708 in July, 2000, to a minimum of 332,146 in April, 2002.¹² On the other hand, from August 2000, to May, 2002, SWBT's access line total actually declined by 179,582 or 6.8 percent.¹³ In June and July, 2002, SWBT lost another 32,500 retail lines.¹⁴ Thus, there is absolutely no indication that SWBT's past winback and win promotions had any anticompetitive effect on the local telecommunications market in Missouri. The failure of the opponents of these tariffs to present any evidence of anti-competitive impact is telling and should be determinative.

AT&T makes light of SWBT's access line loss, contending that "SWBT's witness could not explain how the line data that was compiled, so there was no way to verify the accuracy and reliability of the data."¹⁵ WCOM makes a similar claim stating that "SWBT's numbers are

⁹ T. 494-495, Thomas.

¹⁰ Ex. 4, Hughes D., p. 10; Ex. 5, Hughes S., p. 14. The Commission issued its Order in Case No. TO-99-227, following an extensive review of SWBT's 271 application. Ex. 4, Hughes D., p. 11, footnote 3. At the same time the Commission was reviewing SWBT's 271 application, it approved SWBT's residential winback tariff in August of 2000. Id. 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. Id.

¹¹ Ex. 4, Hughes D., pp. 2 and 6.

¹² Id. at p. 7.

¹³ Ex. 2, Regan D., p. 5; Ex. 4, Hughes D., p. 6.

¹⁴ Ex. 3, Regan S., p. 3.

¹⁵ AT&T's Initial Brief, p. 16.

suspect, however, as the total CLEC market share in last year's (sic) was 15 percent and in this case is a minimum of 12 percent."¹⁶ At the outset, SWBT notes that although AT&T sent SWBT 22 Data Requests in this matter (that contained over 50 subparts), AT&T made no attempt to conduct discovery regarding the accuracy and reliability of this data. Moreover, and more importantly, the Commission has already determined that SWBT's access line loss estimates are accurate and reliable on at least two occasions. In Case No. TO-99-227, the Commission found that CLECs serve approximately 12 percent of access lines in SWBT territory.¹⁷ Further, in Case No. TO-2001-467, the Commission determined that SWBT's access line loss estimates were only estimates and, therefore, CLEC market share may be greater than SWBT estimated.¹⁸ The Commission also determined that SWBT's estimates for the minimum number of access lines being served by CLECs are reasonable estimates reflecting the minimum CLEC residential and business market share throughout SWBT's exchanges.¹⁹ Further, based on prior analysis of CLEC data conducted by Staff in Case No. TO-99-227, the access line count based on figures reported by some (but not all) CLECs indicated that SWBT's estimates were understated by 45%.²⁰

WCOM also makes light of SWBT's access line loss claiming "CLECs have struggled since 1996 to compete and have gained only a 12% market share for basic local service."²¹ Clearly, WCOM is confused. SWBT's estimates represent the minimum market share that

¹⁶ WCOM's Initial Brief, p. 23.

¹⁷ Order Regarding Recommendation On 271 Application Pursuant To The Telecommunications Act Of 1996 And Approving The Missouri Interconnection Agreement, In the Matter of the Application of Southwestern Bell Telephone Company To Provide Notice Of Intent To Tile 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, March 15, 2001, p. 20.

¹⁸ Report and Order, In the Matter of the Investigation of the State of Competition in the Exchanges of Southwestern Bell Telephone Company, Case No. TO-2001, 467, December 27, 2001, p. 14.

¹⁹ Id. at 15.

²⁰ Ex. 4, Hughes D., p. 7, footnote 2.

²¹ WCOM's Initial Brief, p. 15.

CLECs have gained in Missouri. As indicated above, the CLECs market share may be 18% or higher.

However, if the Commission is truly interested in knowing the number of access lines that CLECs in Missouri serve, it could open an investigation and thereby discover the "true" level of competition in the local telecommunications market. This may be necessary because the CLECs appear reluctant to divulge such information as is evidenced by AT&T's testimony regarding the growth rate in its access lines.²² Although AT&T provided growth rates for its various companies providing local exchange services, it admitted that the growth rates it provided did not even include all of the local services that the AT&T companies offered in Missouri.²³ However, even looking at the numbers that AT&T did provide, it is clear that during the period July 1, 2001, to July 1, 2002, AT&T experienced sizable growth²⁴ in the local telecommunications market, while SWBT experienced a significant decline in access lines.²⁵ Even AT&T's incomplete analysis establishes that no anti-competitive impact resulted from the prior winback tariffs.

In connection with its access line loss discussion, WCOM claims that "the protection of a single competitor or even competitors, SWBT's economic expert claims, is impermissible: The Commission should not, 'confuse or equate the welfare of competitors with the welfare of Missouri consumers.'"²⁶ At the outset, SWBT notes that Dr. Aron did not state that the protection of a single competitor or even competitors is impermissible as is evidenced by the testimony that WCOM cited. Dr. Aron stated: "The Commission should not, however, confuse

²² T. 614-616, Kohly (HC Testimony).

²³ *Id.* at 617-618, Kohly.

²⁴ T. 614-616, Kohly (HC Testimony).

²⁵ Regan Schedule 4, attached to Ex. 2 Regan Direct. As indicated on this chart, during the period August, 2000, through May, 2002, SWBT has experienced a downward trend in the number of access lines it serves.

²⁶ WCOM's Initial Brief, p. 23.

or equate the welfare of competitors with the welfare of Missouri consumers."²⁷ This excerpt expressed Dr. Aron's theme that despite Staff and the CLECs objections to price competition from SWBT's winback offerings, this Commission should welcome that competition because it is good for Missouri consumers.²⁸ Dr. Aron explained that the idea that Missouri consumers should be required to forego short-term benefits in order to achieve some alleged long-term benefits is simply a false trade off, as there is no long-term benefit to be gained absent a showing that winback offers would exclude efficient competitors.²⁹ And, as SWBT has thoroughly explained in its Initial Brief, no such showing has been or could be made.³⁰

AT&T also claims that "if the market for local telecommunications services were one characterized by effective competition, SWBT would not attempt to compete by limiting such promotion to its 'former' customers. Rather, it would be compelled to try to attract *any* new customer, regardless of whether the customer was a former customer of SWBT or some other carrier."³¹ AT&T's claim is absolutely preposterous! AT&T has long contended that the interexchange market is competitive, yet AT&T has routinely offered winback promotions to former long distance customers. AT&T pioneered the practice of sending checks to customers for up to \$100, the redemption of which constitutes the customer's approval to return to AT&T for long distance.³² SWBT even presented evidence of a winback offer that AT&T sent to SWBT witness Mr. Thomas Hughes.³³ Thus, AT&T's claim that if effective competition exists, a telecommunications provider would not be limiting offers to former customers also fails miserably. SWBT is engaging in the same practice that AT&T pioneered and continues to use.

²⁷ Ex. 1, Aron S., p. 6.

²⁸ Id.

²⁹ Id.

³⁰ SWBT's Initial Brief, pp. 25-31.

³¹ AT&T's Initial Brief, p. 19.

³² SWBT's Initial Brief, p. 20.

³³ Id.

Thus, it is clear that even at a time when SWBT had winback and win tariffs in effect, CLECs continued to increase the number of customers they serve and CLECs continue to effectively compete in Missouri. Thus, while SWBT's winback tariffs provide lower prices and additional choices to customers, they have not impeded competition in the state of Missouri.³⁴

Finally, while the intervenors contend that SWBT's winback tariffs are somehow anticompetitive,³⁵ they refuse to employ any recognized legal or economic definition of anticompetitive. The reason is obvious; SWBT's tariffs are not anticompetitive in any recognized antitrust or economic sense.³⁶ Realizing this flaw in their argument, AT&T advances several reasons why the Commission should refrain from conducting an analysis of whether SWBT's winback and win tariffs are, in fact, anticompetitive.³⁷ First, AT&T claims that the Commission's competitive and public interest review is not in any way constrained by antitrust principles.³⁸ Yet AT&T fails to demonstrate that SWBT's winback and win tariffs are not in the public interest and/or that they will not spawn competition. SWBT, on the other hand, has provided substantial evidence that its proposed tariffs are in the public interest and will promote competition.³⁹

Next, AT&T contends that the principles and learnings that SWBT espouses have been applied under the very strict confines of federal antitrust law.⁴⁰ AT&T also argues that the use of

³⁴ SWBT's Initial Brief, p. 40.

³⁵ AT&T's Initial Brief, pp. 20-21; OPC's Initial Brief, pp. 5-6.

³⁶ SWBT's Initial Brief, p. 24.

³⁷ AT&T's Initial Brief, p. 21.

³⁸ *Id.*

³⁹ SWBT's Initial Brief, pp. 11-14 and Section II below.

⁴⁰ AT&T's Initial Brief, p. 21.

the term anti-competitive was not intended to be an accusation of antitrust violations.⁴¹ AT&T's arguments are without merit and are without support in any recognized literature. Moreover, AT&T's arguments fail for the same reason: 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, therefore, an antitrust violation.⁴² Thus, as is explained in SWBT's Initial Brief, SWBT's proposed winback and win tariffs comply with Missouri statutes⁴³ and are not anticompetitive.⁴⁴

The Commission should reject all claims that SWBT's tariffs are anti-competitive because they do not violate any recognized economic and antitrust principles.⁴⁵ Because there is no evidence that SWBT's proposed winback and win promotions would impede competition in the state of Missouri, and because they are consistent with the applicable provisions in Chapter 392 (discussed in Section III, *infra*), the Commission should approve SWBT's proposed winback and win tariffs.

II. SWBT's Proposed Tariffs Are In The Public Interest.

SWBT's proposed tariffs are in the public interest because they benefit customers through lower prices.⁴⁶ SWBT's proposed tariffs are also in the public interest because they benefit customers through increased options by allowing customers to freely move to another telecommunications provider and, if they are so inclined, to return to SWBT without incurring a

⁴¹ Id.

⁴² Ex. 1, Aron S., p. 10.

⁴³ SWBT's Initial Brief, pp. 14-15.

⁴⁴ Id. at 24-40.

⁴⁵ Id. at p. 25.

⁴⁶ Ex. 4, Hughes D., p. 2; Ex. 5, Hughes S., pp. 3-4; SWBT's Initial Brief, p. 11.

NRC.⁴⁷ 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.⁴⁸ 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.⁴⁹ 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, the customers have increased their options because they will be more likely to "try" service from SWBT.⁵⁰

SWBT's winback tariffs are also in the public interest because they are a form of price competition.⁵¹ Specifically, SWBT's winback offers encourage carriers to out bid each other for a customer's business.⁵² This leads to further price competition.⁵³ Clearly, it is customers that ultimately benefit from this increased competitive activity.⁵⁴ Indeed, the Telecommunications 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.⁵⁵

The Commission should note that although SWBT presented substantial evidence that its proposed winback and win tariffs are in the public interest⁵⁶, no party presented any evidence

⁴⁷ Ex. 2, Regan D., p. 10; Ex. 3, Regan S., p. 2; Ex. 4, Hughes D., p. 2; Ex. 5, Hughes S., p. 4; SWBT's Initial Brief, p. 11.

⁴⁸ Ex. 5, Hughes S., p. 5; T. 283-284, Regan; T. 306, Hughes.

⁴⁹ T. 253, Regan.

⁵⁰ SWBT's Initial Brief, p. 12.

⁵¹ Ex. 1, Aron S., p. 8; Ex. 2, Regan D., p. 9.

⁵² Ex. 2, Regan D., p. 9.

⁵³ *Id.*

⁵⁴ *Id.* at p. 10.

⁵⁵ Ex. 1, Aron S., p. 8. The statutory objection is articulated in the preamble of the Act 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."

⁵⁶ This evidence is summarized in SWBT's Initial Brief at pages 11-14.

that SWBT's proposed tariffs do not lower prices for consumers, do not increase options for consumers, and do not promote competitive intensity. In fact, every party other than SWBT completed avoided the fact that SWBT's proposed tariffs provide lower prices to customers. Again, the reason for the failure to address these issues is obvious. SWBT's proposed winback and win tariffs are in the public interest because they lower prices for consumers, they increase options for consumers, and they promote competitive intensity by encouraging carriers to outbid each other for a customer's business. Because SWBT's proposed winback and win tariffs are in the public interest, and are otherwise consistent with the applicable provisions in Chapter 392 (discussed in Section III, *infra*), the Commission should approve SWBT's proposed winback and win tariffs.

III. SWBT's Proposed Winback And Win NRC Waiver Promotions Are Not Discriminatory.

A. SWBT's Proposed Winback And Win NRC Waiver Promotions Do Not Violate Sections 392.200.2 and 392.200.3, RSMo.

Approval of SWBT's proposed winback and win NRC waiver promotions is consistent with Sections 392.200.2 and 392.200.3, RSMo. 2000. As SWBT explained in its Pre-Filed Testimony, during the hearing, and in its Initial Brief,⁵⁷ SWBT's tariffs should be analyzed under these sections. Section 392.200.2 provides that a tariff, which establishes uniform charges to similarly situated customers, is permissible.⁵⁸ SWBT's proposed tariffs do just that since SWBT proposes to offer the same discount to all similarly situated customers.⁵⁹ 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

⁵⁷ SWBT's Initial Brief, pp. 14-15.

⁵⁸ Ex. 4, Hughes D., p. 2.

⁵⁹ Ex. 4, Hughes D., p. 2; Ex. 5, Hughes S., p. 7-8.

electing to return to SWBT for local service.⁶⁰ 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.⁶¹

Section 392.200.3 specifies that only undue or unreasonable preferences are prohibited.⁶² SWBT's proposed tariffs do not provide any undue or unreasonable preference.⁶³

Although it is clear that SWBT's proposed tariffs: (1) establish uniform charges to similarly situated customers and they are, therefore, permissible under Section 392.200.2; and (2) do not provide any undue or unreasonable preference, opponents of SWBT's tariffs argue otherwise. SWBT will briefly address those contentions.

AT&T contends that winback customers, win customers, and new customers receive the same service.⁶⁴ Specifically, AT&T contends that the services covered by the promotions are the same for both eligible and ineligible customers (i.e. both customers are seeking like and contemporaneous service).⁶⁵ AT&T also contends that both eligible and ineligible customers are located in SWBT's local service territory, are not presently serviced by SWBT, and are making the same purchase decision (i.e. whether or not to purchase service from SWBT).⁶⁶ AT&T's analysis fails, however, because AT&T has not employed the appropriate legal standard.

As indicated above, Section 392.200.2 specifies that a telecommunications company shall charge, demand, collect or receive the same amount from all customers for doing a like and contemporaneous service with respect to telecommunications under the same or substantially the

⁶⁰ Ex. 5, Hughes S., p. 8.

⁶¹ T. 253, Regan.

⁶² Ex. 4, Hughes D., pp. 2-3.

⁶³ Id. at p. 3.

⁶⁴ AT&T's Initial Brief, p. 8.

⁶⁵ Id.

⁶⁶ Id.

same circumstances and conditions. Thus, it is not enough that the services are the same, they must also be provided under the same or substantially the same circumstances or conditions.⁶⁷

Service to new customers is not provided under the same or substantially the same circumstances or conditions as service to winback customers.⁶⁸ New customers, typically, have not previously received service from SWBT at the same residence or business in SWBT's service territory. All winback customers, on the other hand, have previously received service from SWBT at the same residence or business in SWBT's service territory. Thus, service provided to winback customers is not provided under the same or substantially the same circumstances or conditions as service provided to a new customer.

⁶⁷ WCOM claims that SWBT fails to meet the statutory mandate and the Commission's legal standard since two former SWBT customers, one who went to a CLEC and another who went to a wireless provider, would not be treated the same. WCOM's Initial Brief, p. 21. Specifically, the customer who went to a CLEC would receive a waiver of the NRCs whereas the customer who went to a wireless provider would not be treated the same. *Id.* Winback customers as defined in SWBT's tariffs are customers who have disconnected their local network access line service with SWBT for the purpose of establishing service with another local exchange carrier within the SWBT service territory and who now wish to return to SWBT for service. Customers who go to a wireless provider are not winback customers since they do not disconnect their local network access line service with SWBT for the purpose of establishing service with another local exchange carrier within the SWBT service territory. T. 318, Hughes. As such, wireless customers who return to SWBT for service are not receiving service under the same or substantially the same circumstances or conditions pursuant to Section 392.200.2.

⁶⁸ SWBT notes that OPC argues that ratepayers are not protected if one segment of the market is unreasonably singled out for preferential treatment while those same benefits are not extended to similarly situated customers and there is no reasonable basis for distinguishing between the groups of customers. OPC's Initial Brief, p. 3. SWBT's discussion of why winback and win customers are not similarly situated to new customers is equally applicable to OPC's arguments. WCOM claims that SWBT's proposed winback tariffs constitute rebates or special rates for doing a like and contemporaneous service under the same or substantially the same circumstances or conditions. WCOM's Initial Brief, p. 11. SWBT's discussion of why winback and win customers are not similarly situated to new customers is equally applicable to WCOM's arguments.

Service to new customers is also not provided under the same or substantially the same circumstances or conditions as service to win customers.⁶⁹ All win customers, unlike other new customers, have previously received service from a CLEC at the same residence or business in SWBT's service territory. Thus, service provided to win customers is not provided under the same or substantially the same circumstances or conditions as service provided to a new customer. The difference between winback and win customers and new customers is that winback and win customers have made the decision to receive service from a CLEC, whereas a new customer has necessarily not made this decision. Since SWBT's proposed tariffs offer the same discount to all similarly situated customers, SWBT's tariffs do not violate Section 392.200.2. AT&T's claims to the contrary should be summarily dismissed.

SWBT notes that AT&T cites two cases regarding rate differences: State ex rel. DePaul Hosp. S. of N. v Public Serv. Com'n, 464 S.W.2d 737 (Mo. App. 1970) ("DePaul") and City of Grain Valley v. P.S.C., 778 S.W.2d 287 (Mo. App. 1989) ("Grain Valley").⁷⁰ Staff and WCOM similarly cite DePaul.⁷¹ Contrary to the Staff's and intervenors' position, the DePaul decision supports SWBT's position.

In DePaul, the hospital filed a complaint with the Commission charging that SWBT was discriminating against it because it should be charged for "hotel" service instead of "commercial branch" service (hotel service was less expensive than commercial branch service).⁷² DePaul

⁶⁹ See footnote 67.

⁷⁰ AT&T's Initial Brief, pp. 6-7.

⁷¹ Staff's Initial Brief, p. 7; WCOM's Initial Brief, p. 12.

⁷² State ex rel. DePaul Hosp. S. of N., v. Public Serv. Com'n, 464 S.W. 2d, 737, 738 (Mo App. 1971).

argued that it had a hotel license, which was required by the City of St. Louis.⁷³ It also argued that it should be charged hotel rates, which were paid by the Missouri Athletic Club and the Evangelical Residence, both in the City of St. Louis, and by other hotels in the City because it was receiving the same identical service under the same or substantially the same circumstances and conditions.⁷⁴ The Court determined that SWBT charged DePaul a different and higher rate than it charged Evangeline Residence, the Missouri Athletic Club and various hotels, although it furnished to each and all the same, or substantially the same, service under substantially the same conditions.⁷⁵

As AT&T notes, the DePaul Court cited another decision, State ex rel. City of St. Louis v. Public Service Commission, 327 Mo. 318, 36 S.W.2d 947, 950 (this case is discussed in detail in footnote 92 below).⁷⁶ Specifically, the Court stated:

In State ex rel. City of St. Louis v. Public Service Commission, 327 Mo. 318, 36 S.W.2d 947, 950, it was said that arbitrary discriminations alone are unjust but, if the difference in rates be based upon a reasonable and fair difference in conditions which equitably and logically justify a different rate, it is not an unjust discrimination. In the instant case the overwhelming weight of the evidence is to the effect that the service rendered to complainant was of a like character and under virtually the same conditions as those provided in Southwestern's service to Evangelical and Athletic Club, as well as to those other customers mentioned in evidence. However, the rates charged complainant were nearly three times those charged to the aforementioned customers under the "hotel-motel" rate.⁷⁷

As is apparent from reading this paragraph, the first sentence is referring to what is today Section 392.200.3's prohibition against undue or unreasonable preferences. The second sentence is referring to what is today Section 392.200.2, which requires companies to establish uniform charges to similarly situated customers.

⁷³ Id.

⁷⁴ Id. at 738-739.

⁷⁵ Id. at 739.

⁷⁶ AT&T's Initial Brief, p. 6.

⁷⁷ Id. at 740.

As SWBT explained above, SWBT is not offering telecommunications service with respect to winback and win customers under the same or substantially the same circumstances or conditions as it offers service to new customers. Moreover, SWBT's waiver of the service and connection charges for winback and win customers (and not to all new customers) is not unjust or unreasonable.⁷⁸ The reason that it is not unjust or unreasonable is that SWBT's tariffs are targeted at the same customers that the CLECs targeted to win from SWBT.⁷⁹ While CLECs typically choose to selectively enter SWBT markets and focus their marketing efforts on high end customers, SWBT's proposed tariffs are available to all winback customers. SWBT must be allowed to compete for the customers that it has lost in the local service market;⁸⁰ any decision otherwise would simply amount to market allocation since the Commission would be determining that CLECs can target certain customers but SWBT can provide no competitive response.

AT&T also cites a portion of the Court's decision in City of Grain Valley v. P.S.C., 778 S.W.2d 287 (Mo. App. 1989) ("Grain Valley"). Importantly, AT&T omitted the second half of the Court's language; language which supports SWBT's position in this case.

In Grain Valley, the city filed a complaint against SWBT alleging discrimination against its customers in Grain Valley because its telephones were served by the same equipment as Blue Springs telephones and there was no greater cost incurred by SWBT in serving Grain Valley customers.⁸¹ The Commission determined that Grain Valley customers received the same service as Blue Springs customers but that the service was not provided under the same

⁷⁸ Ex. 4, Hughes D., pp. 2-33.

⁷⁹ T. 473-475, Price; T. 577-578, Kohly; SWBT's Initial Brief, pp. 36-39.

⁸⁰ T. 396, Hughes.

⁸¹ Id. at 288-289.

circumstances.⁸² The Commission dismissed the complaint.⁸³ The circuit court affirmed the decision and Grain Valley appealed.⁸⁴

The Court of Appeals determined:

The differences pointed out by the Commission between Blue Springs and Grain Valley do exist, but there is no relation between those differences and the conditions under which telephone service is furnished to the two areas. The telephone customers in Grain Valley received their dial tone from the Blue Springs office, received the same telephone service, were billed monthly just as the Blue Springs customers and were entitled to the same service from Bell as the Blue Springs customers. Bell did nothing differently in furnishing telephone service for the Grain Valley customers than it did for the Blue Springs customers. Both customers had their calls routed through the Blue Springs office with no difference in cost to Bell. In the face of this undisputed evidence there was no substantial and competent evidence upon which the Commission could base a finding that the telephone service to Grain Valley customers was not given under the same conditions as service to the Blue Springs customers. **The difference pointed out by the Commission do not address the question of whether the telephone service was furnished under the same condition.** There was no evidence of any difference in conditions under which service was given to the two areas which would equitably and logically justify a different rate.⁸⁵ (Emphasis added). (The portion that is underlined is language that AT&T omitted in its Initial Brief. The portion that is underlined and bolded is directly applicable to the instant case).

Importantly, the Grain Valley decision found that the Commission did not address the question of whether the telephone service was furnished under the same conditions. It, therefore, reversed the case and remanded it to the Circuit Court with directions to remand the case to the Commission for further proceeding, i.e. proceedings which would determine if the service was furnished under the same condition.

⁸² Id. at 288.

⁸³ Id.

⁸⁴ Id.

⁸⁵ Id. at 291.

As explained above, SWBT has provided substantial evidence that the service it provides to new customers is not a like and contemporaneous service under the same or substantially the same circumstances or conditions as winback and win customers. Thus, the case law that AT&T cites supports SWBT's position and the Commission should approve SWBT's proposed tariffs as they are consistent with Sections 392.200.2 and 392.200.3.⁸⁶

Staff cites State ex rel. McKittrick v. Missouri Public Service Commission, 175 S.W.2d 857, 866 (Mo. banc 1943) ("McKittrick") for the proposition that "a utility may have two or more rates if they be for different character of service, but to have two or more rates for the same service is the thing forbidden by the non-discrimination statute."⁸⁷ The Commission should carefully review this case as it does not interpret Sections 392.200.2 or 392.200.3, the proposition that Staff cites is merely dicta, and the Court actually allowed two different rates to be in effect on an interim basis.

In McKittrick, Laclede Power & Light Company ("Laclede Electric"), the Laclede Gas Light Company ("Laclede Gas"), and the Phoenix Light, Heat & Power Company applied to the Commission for authority to sell the property, rights, and franchises then used by Laclede Power in St. Louis, except certain property owned by Laclede Gas, to Union Electric Company for \$8,600,000, under specified terms and conditions.⁸⁸ The Commission approved the

⁸⁶ Apparently realizing that Missouri case law supports approval of SWBT's winback and win tariff, AT&T suggests that the Commission should take guidance from the District of Columbia Court of Appeals interpreting Section 202(a) of the Telecommunications Act of 1996. AT&T's Initial Brief, p. 9. As AT&T admits, the test for interpreting the term "like" that has been used by the FCC and Courts applying Section 202(a) of the Act is not dispositive. Further, the "functional equivalency test" is not the appropriate legal standard under 392.200.2. Rather, the test is whether a company is furnishing like and contemporaneous service with respect to telecommunications under the same or substantially the same circumstances and conditions. Thus, AT&T's discussion on pages 9 and 10 of its Initial Brief should be summarily dismissed.

⁸⁷ Staff's Initial Brief, p. 4.

⁸⁸ Id. at 858.

application.⁸⁹ On appeal, the Attorney General contended that the Commission's order violated Section 5645(2,3) by continuing in force the separate rates of Laclede Electric and Union Electric until such rates were later changed by the Commission.⁹⁰ The Attorney General argued that since interim rates were permitted to stand, the lower Laclede Electric rates was a special rate, rebate, drawback, or special advantage.⁹¹ The proposition that Staff cites is merely dicta, and the Court actually allowed two different rates to be in effect on an interim basis. The Court stated as follows:

This court has held several times that the Commission may establish test or experimental rates pro tempore; and that a utility may have two or more rates if they be for different characters of service. It was point out in the Buzard case just cited that having two or more rates for the same service is the thing forbidden by the non-discrimination statute, Sec. 5645, supra, on which the Attorney General relies. But he thereby assumes the service rendered by the Laclede Electric and the Union Electric is the same, notwithstanding the greater assurance of uninterrupted and efficient service which the customers of the latter company enjoy because of its superior position in equipment and financing-as found by the Commission; and ignores the fact that there is as yet no intelligent basis for fixing a common rate. Until the unification of the two systems is accomplished or the effect thereof is reasonably discernible, we think and hold the Commission in its reasonable discretion is justified in treating the two systems as separate units for rate purposes, notwithstanding the ownership and control of both have come into the same hands. This disposes of the other kindred assignments that the question of rates involved; and the cause should be remanded to receive evidence thereon.⁹² (Emphasis added. Footnotes omitted).

Thus, the Court found that the services were not like and contemporaneous services that were provided under the same or substantially the same circumstances or conditions and allowed the different rates to be in effect.

For the reasons stated above, SWBT has provided substantial evidence that the service it provides to new customers is not a like and contemporaneous service under the same or

⁸⁹ Id.

⁹⁰ Id. at 865.

⁹¹ Id.

⁹² Id. at 866.

substantially the same circumstances or conditions as winback and win customers. Missouri case law uniformly permits companies that are not providing service under the same or substantially the same circumstances or conditions, to charge different rates. Thus, the case law uniformly supports SWBT's position and the Commission should approve SWBT's winback and win tariffs.⁹³

B. SWBT Is Not Seeking Approval Of Its Winback And Win NRC Waiver Promotions Pursuant To Section 392.200.4.

Staff and WCOM contend that the Commission cannot approve SWBT's proposed winback and win NRC waiver promotions pursuant to Section 392.200.4.⁹⁴ However, as SWBT

⁹³ Staff and WCOM also cite State v. Public Service Commission, 36 S.W.2d 947 (Mo. 1931). Staff's Initial Brief, p. 4. WCOM's Initial Brief, p. 12. In that case, the City of St. Louis argued that SWBT was charging discriminatory rates for P.B.X. subscribers as compared to individual line subscribers because individual line subscribers were not required to pay a charge for a dial that P.B.X. subscribers were required to pay. Id. at 950. The Court held: "Nor are we persuaded that the rate is discriminatory as between P.B.X. and individual line subscribers. As found by the Commission: 'The service is not furnished under the same or substantially the same circumstances and conditions, and the service itself is of an entirely different character.'" Id. The Court explained that the individual line subscriber pays for direct access to SWBT's central office and to get it must have the dial on his telephone. Id. The P.B.X. subscriber pays for access through the instrumentality of his own operator, and is furnished a dial on the switchboard for the use of the operator, thus giving the subscriber the service to which his P.B.X. rates entitles him. Id. The Court held that no unlawful discrimination exists because dials are furnished to individual line subscribers without extra charge and are not so provided for individual telephones of P.B.X. subscribers. Id. For the reasons stated in this section, SWBT has provided evidence that the service it provides to new customers is not a like and contemporaneous service under the same or substantially the same circumstances or conditions as winback and win customers. Thus, the difference in rates is based on a reasonable and fair difference in conditions which equitably and logically justifies a different rate and, therefore, there is no unjust discrimination.

Staff and WCOM also cite State v. Public Service Commission, 34 S.W.2d 37 (Mo. 1931). Staff's Initial Brief, p. 4. WCOM's Initial Brief, p. 12. In that case, Laundry, Inc. and the Overland Laundry Company (collectively referred to as "Laundry") filed a complaint with the Commission in which Laundry argued that it should not have to pay water rates that are in effect for individual users and consumers; rather, it should have been charged the lower manufacturer's rate for water. Id. at 37-38. The statute at issue in that case was Section 10477(2,3), which was applicable to water companies and contained provisions substantially similar to Sections 392.200.2 and 392.200.3. Id. at 44. The Court cited Commissioner Eugen McQuillin, an eminent Missouri lawyer and a distinguished test-writer on a wide variety of subject who said, in pertinent part: "However, laws designed to enforce equality of service and charges and prevent unjust discrimination, such as the Missouri act, require the same charge for doing a like and contemporaneous service under the same or substantially similar circumstances or conditions. . . Accordingly, even at common law, it is not admissible for a public service company to demand a different rate, charge or hire from various persons for an identical kind of service under identical conditions." Id. (Emphasis added). As explained above, SWBT is not providing identical service to new customers as it is providing to winback and win customers under identical conditions. For these reasons, the case law that Staff and WCOM cite supports SWBT's position and the Commission should approve SWBT's winback and win tariffs.

⁹⁴ Staff's Initial Brief, pp. 5-7; WCOM's Initial Brief, pp. 13-14 and pp. 19-20.

has repeatedly stated, it is not seeking approval of its winback and win NRC waiver promotions pursuant to Section 392.200.4.⁹⁵ Thus, the Commission need not address this issue.

Although the Commission need not address the issue of whether SWBT's proposed winback and win tariffs are permissible under Section 392.200.4 because they are permissible under Sections 392.200.2 and 392.200.3, SWBT is compelled to respond to a portion of WCOM's Brief on this point. Specifically, WCOM states:

SWBT insisted that Section 392.200.4 also permits it to create a class consisting of people who live in brick houses, if, within SWBT's exchanges, brick houses constitute 35 percent of the homes. (Vol. 4, Tr. 405-406, l. 24-25). It also can create a class composed of solely SWBT customers subscribing to vertical services but excluding CLEC customers. (Vol. 4, Tr. 390, l. 10-23).

Pressed during cross-examination, SWBT reveals the unreasonableness of its reading:

Q. Could you also say that households in which you can produce one family member who has red hair would be entitled to a discount under your theory?

A. I guess, theoretically, only, I can do that, but -- yes.

Q. You could do that?

A. I think you could.

Q. Black skin?

A. I think the statutes allow for that yes. (Vol. 4, Tr. 406, l. 6-15).⁹⁶

At the outset, SWBT notes that Mr. Hughes was responding to a series of hypotheticals and responding to such hypotheticals pursuant to Chapter 392 and in particular Sections 392.200.2 and 392.200.3.⁹⁷ Whether Mr. Hughes is correct in his answer to these hypotheticals

⁹⁵ Ex. 5, Hughes S., p. 7; T. 321, Hughes; SWBT's Initial Brief, pp. 15-16.

⁹⁶ WCOM's Initial Brief, p. 18 (citations omitted).

⁹⁷ Questioning of Mr. Hughes on this subject began with questions from Commissioner Gaw. T. 389-393, Hughes. It continued during questions from Mr. Curtis. T. 405-407, Hughes.

is irrelevant. SWBT has not nor would it propose tariffs that were only available to people who live in houses painted red, who live in brick houses, who have red hair, or who have black skin. What is at issue in this case is whether SWBT's proposed winback and win tariffs are permissible. As SWBT has explained in Section III(B) above, SWBT's proposed winback and win tariffs are permissible under Sections 392.200.2 and 392.200.3 and, therefore, should be approved.

C. The Commission's Prior Approval Of Tariffs Demonstrates That The Proposed NRC Waivers Are Not Discriminatory.

The Commission has approved SWBT, AT&T, and WCOM tariffs that allow these companies to offer different services/prices to different classes of customers without finding the tariffs to be unlawfully discriminatory.⁹⁸ Despite this fact, AT&T and WCOM suggest that any difference in price must be based on a difference in cost.⁹⁹ Notably, no authority is cited for this radical interpretation of the statutes, and none exists. Cost differentiation is simply one of a number of factors that may be considered.

As SWBT states in its Initial Brief, neither AT&T nor WCOM made a cost showing when they filed their instate access recovery fees which exempt certain groups of customers from the monthly fee.¹⁰⁰ Moreover, as SWBT also stated in its Initial Brief, while a difference in cost may be one basis for differentiating customers, it neither has been nor should it be a necessary condition that cost differences exist. Thus, just as the Commission has approved AT&T, SWBT, and WCOM tariffs in the past that allow these companies to offer different services/prices to different classes of customers without finding the tariffs to be unlawfully discriminatory, so too

⁹⁸ SWBT's Initial Brief, pp. 16-17.

⁹⁹ AT&T's Initial Brief, pp. 10-12; WCOM's Initial Brief, pp. 11 and 18-19.

¹⁰⁰ SWBT's Initial Brief, pp. 17-18; T. 286, Hughes.

should the Commission approve SWBT's proposed winback and win promotions because these tariffs are not unlawfully discriminatory.

D. The Fact That SWBT's Proposed Tariffs Comply With Missouri Statutes Is Evident Since SWBT's Proposed Tariffs Have Either Been Previously Approved By The Commission Or Substantially Similar Tariffs Have Been Previously Approved By The Commission.

The fact that SWBT's proposed tariffs comply with Missouri statutes is evident since SWBT's proposed tariffs have either been previously approved by the Commission or substantially similar tariffs have been previously approved by this Commission.¹⁰¹ When the Commission previously approved SWBT's winback and win tariffs, the Commission found those tariffs to be lawful and appropriate, pursuant to 392.200, and consistent with the policies and purposes of Chapter 392.¹⁰²

AT&T argues that SWBT's logic is flawed since the Commission has never 'approved' any of the prior winback tariffs; rather it allowed them to go into effect.¹⁰³ AT&T is incorrect. The Commission voted to allow SWBT's residential winback tariffs to go into effect as is indicated in the Commission's Order Denying Motion to Suspend Tariff, in Case No. TT-2001-54, August 3, 2000. In voting to allow SWBT's tariff to go into effect, the Commission clearly found that tariff to be lawful and appropriate, pursuant to 392.200, and consistent with the policies and purposes of Chapter 392. Thus, SWBT's logic is not flawed; AT&T's is.

Next, AT&T argues that the Commission is not bound by its past decision.¹⁰⁴ AT&T misses the point. The fact that the Commission previously approved similar tariffs is clear and

¹⁰¹ SWBT's Initial Brief, p. 15.

¹⁰² Id.

¹⁰³ AT&T's Initial Brief, p. 12.

¹⁰⁴ AT&T's Initial Brief, p. 12.

unequivocal evidence that winback tariffs are not unlawfully discriminatory. AT&T is also inconsistent in its analysis as it cites the Commission's decision in Case No. TT-2002-108 with approval and argues: "the legal and factual landscape that existed when the Commission made this ruling has not changed in Missouri, and, therefore, the SWBT tariff sheets that are at issue in this proceeding should be rejected for the same reasons the prior winback offer was previously rejected."¹⁰⁵ OPC, Staff, and WCOM similarly cite Case No. TT-2002-108 with approval.¹⁰⁶

As the Commission is aware, in Case No. TT-2002-108, SWBT proposed two tariffs.¹⁰⁷ One was a Business Metropolitan Calling Area Service promotion and the other was a proposed new, optional business offering called CompleteLinksm.¹⁰⁸ Both of those proposed offerings included term components.¹⁰⁹ The proposed CompleteLink tariff also included retention and winback provisions.¹¹⁰ Unlike the CompleteLink tariff, SWBT's current proposed winback and win tariffs do not include retention or term components.¹¹¹ Thus, the tariffs at issue in this proceeding are substantially different than those that were at issue in Case No. TT-2002-108.¹¹² Moreover, a majority of the Commission may not have addressed the winback provisions in the CompleteLink tariff.¹¹³ Commissioners Murray and Gaw issued separate opinions. Commissioner Gaw, in particular, noted that he was expressing no opinion on whether tariffs with winback provisions not associated with term agreements exceeding one year should be approved.¹¹⁴

¹⁰⁵ AT&T's Initial Brief, p. 13.

¹⁰⁶ OPC's Initial Brief, p. 4; Staff's Initial Brief, pp. 7-8; WCOM's Initial Brief, pp. 8-9.

¹⁰⁷ Ex. 5, Hughes S., p. 18.

¹⁰⁸ *Id.* at pp. 18-19.

¹⁰⁹ *Id.* at p. 19.

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.* at pp. 19-20.

Moreover, SWBT adamantly disagrees with AT&T's contention that the legal and factual landscape that existed when the Commission made its ruling in Case No. TT-2002-108 has not changed in Missouri,¹¹⁵ a claim which is not supported by any competent evidence. SWBT, on the other hand, presented substantial evidence that even since the Commission issued its opinion in Case No. TT-2002-108, CLECs have continued to gain access lines and SWBT has continued to lose access lines, as discussed in detail in Section I above.

Finally, WCOM also cites Case No. TO-2002-227 with approval stating: "[I]n its Report and Order in TT-2002-227, this Commission succinctly recited the applicable law and the appropriate legal standard for reviewing discriminatory promotional tariffs: . . ."¹¹⁶ SWBT is puzzled with WCOM's citation to this case for, although SWBT agrees that the Commission recited the appropriate legal standard for reviewing discriminatory tariffs, the Commission rejected not just SWBT's tariffs, but all of the CLECs' tariffs, including WCOM's.¹¹⁷ Moreover, WCOM appealed that case to the Circuit Court of Cole County, where it is currently pending. Thus, while SWBT acknowledges that the Commission is not bound by its past decisions, SWBT maintains that the Commission's past actions in allowing a dozen winback and win promotions to go into effect, as well as the appearance that the majority of the Commission did not address the winback provisions in the CompleteLink tariff, lend support for SWBT's position that the Commission should approve SWBT's proposed winback and win provisions.

¹¹⁵ AT&T's Initial Brief, p. 13.

¹¹⁶ WCOM's Initial Brief, pp. 9-10.

¹¹⁷ Report and Order, Case No. TT-2002-227, June 27, 2002, pp. 23-25.

E. If The Commission Determines That Winback Tariffs Are Discriminatory Such A Finding Must Be Applied Equally To All Telecommunications Providers.

As SWBT explains in its Initial Brief, if the Commission determines that winback tariffs are discriminatory, such a finding must be applied equally to all telecommunications providers--ILECs, CLECs, and IXCs.¹¹⁸ AT&T indicates that it disagrees with SWBT's interpretation of the law,¹¹⁹ however AT&T fails to provide any legal analysis. The reason for this is clear. Sections 392.200.2 and 392.200.3 apply equally to **all** telecommunications companies, as both Staff and WCOM conceded at the hearing.¹²⁰ Any claim to the contrary is absurd as the statute is clear on its face. While SWBT acknowledges that the only tariffs noticed for consideration in this case are SWBT's and, therefore, consideration of other parties' tariffs is beyond the scope of this proceeding,¹²¹ if the Commission determines that SWBT's proposed winback and win tariffs are unlawful, it may not approve winback or win tariffs, or tariffs that improperly use other methods for targeting the desired customer base,¹²² for any telecommunications company.¹²³ This will require affirmative action on the part of the Commission for those carriers, like AT&T, which do not file winback tariffs in Missouri, but only reference corresponding interstate offers to which the intrastate offering is an "add on."¹²⁴ For these reasons, SWBT urges the Commission to approve its winback and win NRC waiver promotions and to give the industry guidance that offers like those proposed by SWBT are acceptable under Missouri law.

¹¹⁸ SWBT's Initial Brief, pp. 22-23.

¹¹⁹ AT&T's Initial Brief, p. 9, footnote 2.

¹²⁰ T. 498, Thomas; T. 465-466, Price.

¹²¹ AT&T's Initial Brief, p. 9, footnote 2.

¹²² Other carriers may use methods other than "winback" tariffs to target their preferred customer segment. For example, Sage's local tariff indicates that the price it charges a residential customer for basic local service is \$25.00 (see Sage Telecom, Inc.'s Missouri P.S.C. Tariff No. 1, Original Page 28 and 55) while SWBT's corresponding prices are between \$7.42 and 12.30 (see SWBT's P.S.C. Mo. No. 24, Local Exchange Tariff, 25th Revised Sheet 3). It is clear from this pricing, that Sage is not interested in customers who only want to purchase basic local service.

¹²³ SWBT's Initial Brief, p. 22.

¹²⁴ Id.

IV. The FCC Has Rejected Claims That Winback Tariffs Are Anti-Competitive.

As SWBT explained in its Pre-Filed Testimony, at the hearing, and in its Initial Brief, 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.¹²⁵ Despite the clear relevance of the FCC's rulings, AT&T argues that the FCC's policy statements are simply not germane to this case.¹²⁶ SWBT adamantly disagrees.

The FCC has provided state regulatory commissions with strong guidance that winback campaigns facilitate and foster competition among carriers, benefiting customers without unduly impinging upon privacy rights.¹²⁷ The FCC has also provided state regulatory commissions with strong guidance that winback restrictions may deprive customers of the benefits of a competitive market.¹²⁸ The FCC has determined that winback facilitates direct competition because winback campaigns can promote competition and result in lower prices to consumers; thus, the FCC provided strong guidance that such practices should not be condemned absent a showing that they are truly predatory.¹²⁹

While this Commission is not bound by the FCC's policy statements regarding winback activities, the Commission should be guided by the principles the FCC has espoused. The Commission should determine that winback campaigns promote competition and will result in

¹²⁵ SWBT's Initial Brief, pp. 31-32.

¹²⁶ AT&T's Initial Brief, p. 14.

¹²⁷ SWBT's Initial Brief, p. 31.

¹²⁸ *Id.*

¹²⁹ *Id.* at 32.

lower prices to consumers and, therefore, they will not be condemned absent a showing that they are truly predatory. No such showing has been made in this proceeding by any party.¹³⁰

V. SWBT's Ownership Of Its Network Is Not A Justifiable Basis For Rejecting SWBT's Proposed Winback And Win Tariffs.

AT&T and WCOM contend that SWBT's network represents an asset of enormous strategic value to SWBT.¹³¹ As SWBT explained in its Surrebuttal Testimony, SWBT's network is not a protected monopoly.¹³² Since 1997, SWBT has been regulated via the price-cap statute, Section 392.245.¹³³ Under this method of regulation, the risk of investment is borne by the company, not the ratepayer.¹³⁴ This is no different than the CLECs.¹³⁵ SWBT, in managing its business, evaluates where to invest based upon the return it will receive on its investment.¹³⁶ In fiscal year 2001, SBC invested over \$400 million in its Missouri infrastructure.¹³⁷ This benefits not only SWBT, it also benefits other carriers (e.g. ILECs , IXCs, wireless carriers, and CLECs) who use SWBT's network to originate, transport and/or terminate a telephone call (or the passage of data) between its customer and the customer of another carrier.¹³⁸

Moreover, AT&T's citation to the Verizon decision¹³⁹ reflects how one-sided AT&T's argument is. In the paragraph directly after the paragraph cited by AT&T, the Supreme Court

¹³⁰ SWBT's Initial Brief, pp. 25-32. SWBT notes that WCOM contends that the intervenors' position is consistent with the FCC's Winback Order. WCOM's Initial Brief, pp. 24-25. WCOM's claim defies credulity because the FCC stated that it would not condemn winback campaigns absent a showing that they are truly predatory and, not only did WCOM fail to provide any evidence that SWBT's winback tariffs are predatory, SWBT demonstrated that its winback and win tariffs are not predatory. SWBT's Initial Brief, pp. 25-32.

¹³¹ AT&T's Brief, pp. 15-16; WCOM's Initial Brief, p. 2.

¹³² Ex. 5, Hughes S., p. 11.

¹³³ Id.

¹³⁴ Id.

¹³⁵ Id.

¹³⁶ Id.

¹³⁷ Id.

¹³⁸ Id. at pp. 11-12.

¹³⁹ AT&T's Initial Brief, p. 16.

discusses the Telecommunications Act of 1996, which obligates ILECs, like SWBT, to allow CLECs to interconnect with its network and to use its network.¹⁴⁰ The Supreme Court stated:

the 1996 Act both prohibits state and local regulation that impedes the provision of "telecommunications service," §253(a), and obligates incumbent carriers to allow competitors to enter their local markets, §251(c). Section 251(c) addresses the practical difficulties of fostering local competition by recognizing three strategies that a potential competitor may pursue. First, a competitor entering the market (a "requesting" carrier, §251(c)(2)), may decide to engage in pure facilities-based competition, that is, to build its own network to replace or supplement the network of the incumbent. If an entrant takes this course, the Act obligates the incumbent to "interconnect" the competitor's facilities to its own network to whatever extent is necessary to allow the competitor's facilities to operate. §§251(a) and (c)(2). At the other end of the spectrum, the statute permits an entrant to skip construction and instead simply to buy and resell "telecommunications service," which the incumbent has a duty to sell at wholesale. §§251(b)(1) and (c)(4). Between these extremes, an entering competitor may choose to lease certain of an incumbent's "network elements" which the incumbent has a duty to provide "on an unbundled basis" at terms that are "just, reasonable, and nondiscriminatory." §251(c)(3).¹⁴¹

Thus, whatever "advantage" SWBT may have by virtue of having its own network is completely eviscerated by the obligation to make unbundled network elements available to its competitors. The obligation to make its network available creates a disadvantage to SWBT since according to Dr. Aron's analysis, SWBT is required to provide its network elements to CLECs at rates that are below the cost it incurs to provide those elements.¹⁴² Thus, any purported advantage that SWBT has in owning its network is addressed by the Act and, certainly, is not a basis for rejecting SWBT's winback and win tariffs. Whether or not SWBT's network represents an "advantage" is completely irrelevant to the issue of whether SWBT's proposed tariffs are discriminatory or "anti-competitive."

¹⁴⁰ Verizon Communications Inc. v. Federal Communications Commission, 535 U.S. _____, 152 L.Ed. 2d 701, 122 S.Ct. _____ (May 13, 2002).

¹⁴¹ Verizon Communications Inc. v. Federal Communications Commission, 535 U.S. _____, 152 L.Ed. 2d 701, 725, 122 S.Ct. _____ (May 13, 2002). See also Ex. 5, Hughes, pp. 12-13.

¹⁴² T. 72, Aron.

VI. The Pendency of the FCC's Triennial Review Docket Is Not A Justifiable Basis For Rejecting SWBT's Proposed Winback And Win Tariffs.

Staff argues that SWBT is in a position to threaten the existence of competitors within its exchanges while those competitors are not yet in a similar position.¹⁴³ Staff continues: "As an example, the Federal Communications Commission has recently initiated its Triennial Unbundled Network Element (UNE) Review Docket that could potentially result in the removal of incumbent unbundling obligations, resulting in increased regulatory uncertainty or (sic) many competitive companies."¹⁴⁴ Staff contends that this is largely due to the fact that many carriers have relied on the use of UNEs and resale in order to enter the marketplace.¹⁴⁵

As Dr. Aron explained in her Surrebuttal Testimony, if the FCC removes an unbundling obligation for a particular element in a particular geographic area, it will be because, as provided in the Act, lack of access to such element from the incumbent at regulated rates does not impair the ability of CLECs to compete.¹⁴⁶ Moreover, elimination of an unbundling obligation may be harmful to particular CLECs (who have built their business plans around uneconomically low regulated UNE prices), it would not be harmful to competition but rather would be a step in the direction of increased competition.¹⁴⁷ In any event, the FCC's actions in implementing the Act provide no basis for rejection of SWBT's proposed winback and win tariffs which benefit consumers.¹⁴⁸ The FCC's actions in the Triennial Review proceeding will not determine whether SWBT's proposed winback tariffs are discriminatory or "anti-competitive."

¹⁴³ Staff's Initial Brief, p. 7.

¹⁴⁴ Id.

¹⁴⁵ Id.

¹⁴⁶ Ex. 1, Aron S., p. 11.

¹⁴⁷ Id.

¹⁴⁸ Id.

VII. The Issue Of Market Power Is A Red Herring; Not A Justifiable Basis For Rejecting SWBT's Proposed Winback And Win Tariffs.

Market power is "the ability. . .to raise prices above the competitive level without losing so many sales so rapidly that the price increase is unprofitable and must be rescinded."¹⁴⁹ As Dr. Aron explained, no party to this proceeding is charging SWBT with increasing its prices, but rather, the other parties object to SWBT reducing its prices to those customers that SWBT has lost to a competitor.¹⁵⁰ The other parties to this proceeding allege that, while SWBT's behavior is beneficial to consumers in the near term, it hinders the development of competition and, thereby, harms consumers in the long term.¹⁵¹ As Dr. Aron explained, this argument is tantamount to a contention that SWBT has the ability to engage in predation, i.e. that SWBT has the ability to drive its competitors from the market and keep them out while raising its prices to recoup the losses by earning monopoly profits.¹⁵²

However, as SWBT explained in detail in its Initial Brief, 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 efficiency.¹⁵³ Thus, despite WCOM's claims to the contrary,¹⁵⁴ it is not appropriate to look at whether SWBT will gain or lose money when it offers its winback and win proposals with regard to a particular customer. Rather, one must look at whether SWBT will gain or lose money in the aggregate when it offers its winback and win promotions. Clearly, there is no evidence that SWBT will lose money if it is allowed to offer its

¹⁴⁹ Id. at p. 27.

¹⁵⁰ Id. at 28.

¹⁵¹ Id.

¹⁵² Id.

¹⁵³ Id. at 9.

¹⁵⁴ WCOM's Initial Brief, p. 21.

winback and win proposals to its customers. Moreover, SWBT has demonstrated that claim of predatory pricing fails¹⁵⁵ and no party has presented any evidence to the contrary.

Nevertheless, various parties to this proceeding suggest that SWBT could use its market power to cross-subsidize the winback offers from its other local exchange services.¹⁵⁶ A cross-subsidy argument is without merit. First, there is no economic theory, nor has any party even articulated any cognizable logic, of a claim that a firm can shift competitive costs.¹⁵⁷ The idea of cost shifting is a relic of rate-of-return regulation, which does not apply to SWBT.¹⁵⁸ Except in the context of rate-of-return regulation, costs are not shifted, but are incurred in the process of providing a service(s), and there is no incentive to misreport or misspecify the source of cost causation for the purpose of affecting prices.¹⁵⁹

Second, if winback prices are not below cost, and no party has established that the prices are below cost, there is no cost that requires shifting.¹⁶⁰ Third, presuming that services provided to some of SWBT's (non-winback) customers secure a margin greater than that earned on the SWBT's proposed winback offers, such an outcome creates a profit opportunity for CLECs and an invitation to CLECs to compete.¹⁶¹ The dynamics of competition, the process by which competition works to drive prices toward cost and drive profits down, attracts entrants to markets or customers with supra-competitive prices.¹⁶² Entrants can profitably undercut prices in such markets to attract customers, at the expense of the higher-priced provider.¹⁶³ As long as there are supra-competitive prices in the market, CLECs have profit opportunities to pursue and should be

¹⁵⁵ SWBT's Initial Brief, pp. 25-31.

¹⁵⁶ AT&T's Initial Brief, p. 18; OPC's Initial Brief, p. 3; WCOM's Brief, p. 21.

¹⁵⁷ Ex. 1, Aron S., p. 29.

¹⁵⁸ Id.

¹⁵⁹ Id.

¹⁶⁰ Id.

¹⁶¹ Id.

¹⁶² Id.

¹⁶³ Id.

encouraged to pursue them rather than seek regulatory protection.¹⁶⁴ Thus, the market power argument is a red herring, not a justifiable basis for rejecting SWBT's winback and win tariffs.

VIII. Issues That Are Beyond The Scope Of This Proceeding.

As the Commission is aware, in its Order Regarding List of Issues, dated August 22, 2002, it held that issue number 3 (Should the Commission commence an investigation regarding SWBT's winback and retention practices, including but not limited to SWBT's use of CPNI and wholesale disconnect information?) proposed by WCOM and AT&T, was beyond the scope of this case, which was established to consider whether to approve two particular tariffs offered by SWBT. Subsequently, in its Order Regarding Motions to Strike Testimony, dated September 17, 2002, the Commission struck certain testimony that was related to this issue.

Despite the fact that the Commission has twice clearly ruled that issues related to SWBT's winback and retention practices, including SWBT's alleged misuse of CPNI and wholesale disconnect information, are beyond the scope of this docket, AT&T and WCOM once again seek to expand the scope of this docket in their Initial Briefs. AT&T's and WCOM's actions should not be countenanced; rather SWBT's Motion to Strike Portions of AT&T's and WCOM's Initial Briefs, filed simultaneously with this Reply Brief, should be granted. However, since SWBT does not know whether the Commission will grant its motion, SWBT responds to those improper portions of AT&T's and WCOM's Brief.

A. AT&T's Contentions That The Commission Should Consider The Effect Of SWBT's Winback Practices and Procedures.

AT&T contends that "[W]hile SWBT's proposed tariffs should be rejected for all of the above reasons alone the Commission should also consider the effect of SWBT's winback

¹⁶⁴ Id. at pp. 29-30.

practices and procedures on competition."¹⁶⁵ As previously stated, AT&T's claim that the Commission should consider the effect of SWBT's winback practices and procedures on competition, is beyond the scope of the case.¹⁶⁶ SWBT stands by its winback practices and procedures as an appropriate marketing response, especially in a market where its competitors, admittedly, are aggressively only seeking to win SWBT's high-end customers.¹⁶⁷ SWBT's practices and procedures are similar to those of AT&T which also routinely uses winback letters to attempt to winback customers.¹⁶⁸

AT&T attempts to muddy the waters by claiming that it is critical to know what SWBT's trigger is for sending its first winback letter because it would be patently unlawful for SWBT to commence winback activities before the customer is converted to the CLEC.¹⁶⁹ However, AT&T's attempt at misdirection, however, fails because SWBT repeatedly testified that it sends winback letters only after a customer has migrated to a CLEC.¹⁷⁰ For example, Mr. Regan was asked the following question and gave the following answer:

- Q. So in order for there to be a winback process flow, the end user would already have had to have migrated to the CLEC, correct? Isn't that what you just told me?
- A. That's -- that is my understanding.¹⁷¹

Next, AT&T contends that if a customer contacts SWBT in response to one of its winback letters, SWBT has no way to determine if the CLEC properly converted the customer.¹⁷² AT&T objects to SWBT taking the customer at its word, although it is the customer alone which

¹⁶⁵ AT&T's Initial Brief, p. 22.

¹⁶⁶ Order Regarding List of Issues, p. 3.

¹⁶⁷ T. 473, Price.

¹⁶⁸ Ex. 31. Hughes Schedule 1-1, attached to Ex. 5, Hughes S.

¹⁶⁹ AT&T's Initial Brief, p. 22.

¹⁷⁰ T. 96-100, p. 126, Regan

¹⁷¹ T. 126, Regan. Although this portion of the hearing was in camera, this particular question and answer do not involve any proprietary or highly confidential data.

¹⁷² AT&T's Initial Brief, p. 23.

knows whether his or her service was improperly switched.¹⁷³ SWBT's communications with its former customers are designed, in part, to ensure that the customer actually made the choice to switch providers.¹⁷⁴ The letter SWBT sends to its former customers is consistent with ensuring that the customer is receiving service from the provider of his or her choice.¹⁷⁵ Where the customer has chosen to receive service from a CLEC, SWBT also wants to let the customer know that it is interested in earning back his or her business if they are inclined in the future to change their local service provider.¹⁷⁶ When a customer calls in and indicates that he/she has been slammed, of course, SWBT will work with the customer to return to SWBT.

However, to the extent that AT&T disagrees with SWBT's winback practices and procedures, the Commission has already advised AT&T that the appropriate forum to raise such concerns would be in a complaint against SWBT as permitted by Section 386.330, RSMo. 2000, and 4 CSR 240-2.070.¹⁷⁷ Even if SWBT were engaged in inappropriate practices, which it is not, this would still not justify rejection of SWBT's winback tariffs. The proper course of action in such a case would be to correct the inappropriate practice. For these reasons, the Commission should summarily dismiss the first two full paragraphs on page 3, page 22, and page 23 of AT&T's Initial Brief.

B. WCOM's Contentions That The Commission Should Consider The Effect Of SWBT's Winback Practices and Procedures.

WCOM continues its improper efforts to raise issues concerning SWBT's winback practices that the Commission has already determined are not appropriately addressed in this proceeding. In support of its position, WCOM cites portions of Dr. Aron's testimony in which

¹⁷³ Id.

¹⁷⁴ Ex. 3, Regan S., p. 5.

¹⁷⁵ Id.

¹⁷⁶ Id.

¹⁷⁷ Order Regarding List of Issues, Case Nos. TT-2002-472 and TT-2002-473, August 22, 2002, p. 3.

she was asked whether SWBT could engage in conduct that was harmful to competition.¹⁷⁸

Contrary to the implication in WCOM's Initial Brief, Dr. Aron did not concede that any improper winback actions had been undertaken by SWBT, nor that precluding SWBT tariffs would be the appropriate response to any showing of harmful winback activities.

Q. Dr. Aron, good morning. I'm Pat Escobedo representing WorldCom. I have actually just one question for you. Can Southwestern Bell engage in back office activity that would be harmful to competition?

A. In theory, I believe that that is possible. Those allegations have not been made here, and I'm not aware of any allegations being made in this context.

Q. So that if facts were presented during this proceeding that established that Southwestern Bell were engaged in back office activity, it in your opinion would harm competition?

A. No. I didn't say that. I said in principle it could harm competition, but I would also point out that would not mean that limiting winback offers, which would directly disadvantage consumers, would be the right response to an actual showing of harm to competition from anti-competitive back office behaviors.

If there were such a showing made, I think that, without knowing what those behaviors are, the logical response would be to address the harmful back office behaviors directing and get them corrected.

Q. And in your opinion, any such bad acts would require correction?

A. Anti-competitive acts that are demonstrated to be harmful to competition should be addressed. I don't think that's a controversial statement.¹⁷⁹

Next, WCOM contends that its position is consistent with the FCC's Winback Order decision.¹⁸⁰ WCOM's attempts to twist the FCC decision into one supporting its position simply doesn't square with the FCC's determination. WCOM cites paragraph 71 of the FCC's Winback Order stating: "The Winback Order expressly refers to 'excessively low pricing and other

¹⁷⁸ WCOM's Initial Brief, p. 25.

¹⁷⁹ T. 58-59, Aron.

¹⁸⁰ WCOM's Initial Brief, pp. 24-25.

exclusionary practices' and does not address predatory pricing."¹⁸¹ Paragraph 71 of the FCC's Winback Order does not even contain the words excessively low pricing and other exclusionary practices; rather it states:

Thus, we conclude that the statute permits a carrier evaluating whether to launch a winback campaign to use CPNI to target valued former customers who have switched service providers. The carrier legitimately obtained that CPNI in its capacity as the customer's telecommunications provider. Importantly, such CPNI does not impact customer privacy in any substantial respect because the former customer-carrier relationship previously enabled the carrier to use this same telecommunications usage information. We believe this interpretation of section 222(c)(1) best comports with notions of consumer privacy, competition and customer control. (Footnotes omitted).¹⁸²

Perhaps WCOM meant to cite paragraph 70; however, even that paragraph clearly rejects the position which WCOM espouses. The FCC stated: "While excessively low pricing and other exclusionary practices may contravene antitrust law, commenters proffer neither facts nor convincing arguments that their legal conclusion is a realistic concern." (Emphasis added).¹⁸³ Moreover, WCOM's claim that the FCC's Winback Order does not address predatory pricing¹⁸⁴ is preposterous. In paragraph 70, the FCC explicitly states: "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."¹⁸⁵ It is abundantly clear that the FCC's Winback Order provides a clear rejection of the same arguments the intervenors present here, and that intervenors' position lack any evidentiary support just as the FCC determined.

¹⁸¹ WCOM's Initial Brief, p. 25.

¹⁸² Ex. 26, FCC's Winback Order, paragraph 71.

¹⁸³ Ex. 26, FCC's Winback Order, paragraph 70.

¹⁸⁴ WCOM's Initial Brief, p. 25.

¹⁸⁵ Ex. 26, FCC's Winback Order, paragraph 70.

Again, in contravention of the Commission's determination that winback practices are not at issue in this proceeding, WCOM claims that its Data Requests "explored SWBT exclusionary practices, specifically that SWBT's winback practices are likely based on an anticompetitive abuse of information to which SWBT has preferential access to by virtue of its historic monopoly." (Ex. 8, Price Rebuttal, p. 14, l. 1-3; *see also* Ex. 10, Kohly Rebuttal, p. 21, 9-12).¹⁸⁶ As previously stated, WCOM's claim that the Commission should consider the effect of SWBT's winback practices and procedures on competition is beyond the scope of this case.¹⁸⁷ Further, SWBT is appalled that WCOM had the audacity to cite Price's testimony, which the Commission struck in its Order Regarding Motions to Strike Testimony, p. 5. However, setting that aside, there was absolutely no evidence put forth in this case that SWBT's winback practices are based on an anticompetitive abuse of information to which SWBT has preferential access to by virtue of its historic monopoly. Thus, WCOM's claim fails.

Next, WCOM claims that the FCC's Winback Order:

prohibits use by carriers of Customer Propriety Network Information (CPNI) 'to retain soon-to-be former customers where the carrier gained notice of a customer's imminent cancellation of service through the provision of carrier-to-carrier service.' (Winback Order, ¶71). Prohibited is the use of carrier-to-carrier information, such as switch or PIC orders, to trigger retention marketing campaigns.¹⁸⁸

As the Commission can clearly see in reading paragraph 71 (which is set forth in full above), that paragraph contains no such language. Perhaps WCOM intended to cite paragraph 76. If so, WCOM's contention is still incorrect. In paragraph 69, the FCC explicitly held:

Some commenters argue that ILECs should be restricted from engaging in winback campaigns, as a matter of policy, because of the ILECs' unique historic

¹⁸⁶ WCOM's Initial Brief, p. 25.

¹⁸⁷ Order Regarding List of Issues, p. 3.

¹⁸⁸ WCOM's Initial Brief, p. 25.

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. 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 at 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. (Footnotes omitted). (Emphasis added).¹⁸⁹

Moreover, SWBT has repeatedly testified that it sends winback letters only after a customer has migrated to a CLEC.¹⁹⁰ Thus, SWBT has not engaged in any inappropriate winback activities and claims to the contrary should be summarily dismissed.

WCOM claims that it was "hampered, however, by not having full access to the Highly Confidential documents until the morning of the hearing, September 24, 2002, although SWBT did allow escorted review of documents at SWBT-designated occasions."¹⁹¹ WCOM's statements are inaccurate and misrepresent the access that WCOM was provided. SWBT complied with all terms of the Commission's Protective Order. It produced its Highly Confidential documents for WCOM's review each time WCOM requested to view them (August 21st, Mr. Curtis reviewed SWBT's documents at One SBC Center; August 22, Mr. Curtis reviewed SWBT's documents at One SBC Center; August 28th, Ms. Escobedo reviewed documents at One SBC Center; August 29th, Ms. Escobedo reviewed documents at One SBC Center; and September 23, Ms Escobedo reviewed documents at The Capitol Plaza). SWBT copied and transported documents from St. Louis to Jefferson City that WCOM had requested copied for use during cross-examination. On September 23, 2002, WCOM requested SWBT to copy additional materials for use during cross-examination. SWBT complied with WCOM's

¹⁸⁹ Ex. 26, FCC's Winback Order, paragraph 69.

¹⁹⁰ T. 96-100 and 126, Regan.

¹⁹¹ WCOM's Initial Brief, pp. 25-26.

request and brought the copies to the hearing on September 24, 2002. During the cross-examination of Dr. Aron, WCOM left the hearing room with additional SWBT Highly Confidential documents and brought them to the copy store next door to be copied, in violation of the Commission's Protective Order. SWBT chose not to call WCOM's violation of the Protective Order to the Commission's attention, but instead requested a short recess to try to correct the violation.¹⁹² SWBT then agreed to copy yet a third set of documents for use by WCOM during cross-examination.¹⁹³ SWBT made its Highly Confidential documents available for WCOM each time WCOM requested to view the documents. Thus, WCOM attempt to blame SWBT for being "unable to prepare fully for the hearing, including setting the necessary foundation that permitted the introduction of the documents as evidence of SWBT anticompetitive activity"¹⁹⁴ is completely false.

Next, WCOM complains about SWBT's winback letters.¹⁹⁵ Again, SWBT stands by its winback practices and procedures as an appropriate marketing response, especially in a market where its competitors, admittedly, are entering markets on a selective basis and aggressively targeting SWBT's high-end customers.¹⁹⁶ SWBT's practices and procedures appear to be in line with WCOM's practices and procedures as WCOM also routinely uses winback letters to attempt to winback customers.¹⁹⁷

Finally, SWBT notes that WCOM contends "[I]ntervenors assert that 'SWBT is able to engage in winback attempts so fast [i.e. within 2-3 days] because it is actually commencing such activity before the customer actually has left (i.e. retention.)' (Ex. 8, Price Rebuttal, p. 17, l. 13-

¹⁹² T. 83, Lane.

¹⁹³ T. pp. 100-101, Lane.

¹⁹⁴ WCOM's Initial Brief, p. 26.

¹⁹⁵ *Id.* at pp. 26-28.

¹⁹⁶ T. 473, Price.

¹⁹⁷ Exhibits 28, 29, and 30.

15).¹⁹⁸ WCOM also claims that "SWBT is using prohibited CLEC-to-CLEC information in its winback activity."¹⁹⁹ Again, WCOM should be admonished for citing testimony that the Commission struck in its Order Regarding Motions to Strike Testimony. Moreover, WCOM cites no evidentiary support for its accusation and there is none. Rather, the evidence is completely to the contrary. SWBT has repeatedly testified that it sends winback letters only after a customer has migrated to a CLEC.²⁰⁰ SWBT identifies those customers by comparing its disconnect orders and reason codes and its billing records, i.e. SWBT assumes that customers once served by SWBT have gone to a CLEC based on disconnect reason codes.²⁰¹ SWBT's retail organization does not use wholesale data to identify potential winback candidates.²⁰²

However, to the extent that WCOM disagrees with SWBT's winback practices and procedures, the Commission has already advised WCOM that the appropriate forum to raise such concerns would be in a complaint against SWBT as permitted by Section 386.330, RSMo. 2000, and 4 CSR 240-2.070.²⁰³ For these reasons, the Commission should summarily dismiss the first full paragraph on page 25 through page 28 (right before WCOM's conclusion).

CONCLUSION

The Commission should approve SWBT's proposed winback and win tariffs because they are in the public interest, are consistent with Missouri statutes (and the same or similar tariffs have been previously approved by the Commission), are consistent with the FCC's views regarding winback tariffs, and there has been no showing that they will harm competition. The

¹⁹⁸ WCOM's Initial Brief, p. 28.

¹⁹⁹ Id.

²⁰⁰ T. 96-100 and p. 126, Regan.

²⁰¹ Ex. 3, Regan S., pp. 6-7.


²⁰² Id. at 6.

²⁰³ Order Regarding List of Issues, Case Nos. TT-2002-472 and TT-2002-473, August 22, 2002, p. 3.

Commission should make clear that winback offers such as those proposed here are beneficial to customers and encourage carriers to compete.

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

CERTIFICATE OF SERVICE

Copies of this document were served on the following parties by e-mail on October 28, 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

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

J. STEVE WEBER
AT&T COMMUNICATIONS
OF THE SOUTHWEST
101 WEST MCCARTY, SUITE 216
JEFFERSON CITY, MO 65101

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