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Missouri Public
Service Commission

November 20, 2001

Secretary of the Public Service Commission
Missouri Public Service Commission
200 Madison Street, Suite 100
P.O. Box 360
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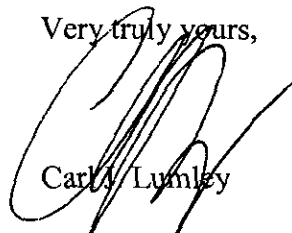
Via Federal Express

Re: Case No. TO-2001-467

Dear Secretary of the Commission:

Enclosed please find for filing with the Commission an original and nine (9) copies of NuVox Communications of Missouri, Inc.'s, MCImetro Access Transmission Services, LLC's, Brooks Fiber Communications of Missouri, Inc.'s and MCI WorldCom Communications, Inc.'s Joint Reply Brief in connection with the above-referenced matter. Upon your receipt, please file stamp the extra copy received and return to the undersigned in the enclosed, self-addressed, stamped envelope. If you have any questions, please do not hesitate to contact us.

Very truly yours,



Carl J. Lumley

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

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BEFORE THE MISSOURI PUBLIC SERVICE COMMISSION

In the Matter of the Investigation of the)
State of Competition in the Exchanges of) Case No. TO-2001-467
Southwestern Bell Telephone Company.)

NUVOX COMMUNICATIONS OF MISSOURI, INC.'S
MCImetro ACCESS TRANSMISSION SERVICES, LLC'S
BROOKS FIBER COMMUNICATIONS OF MISSOURI, INC.'S and
MCI WORLDCOM COMMUNICATIONS, INC.'S
JOINT REPLY BRIEF

COME NOW NuVox Communications of Missouri, Inc., MCImetro Access Transmission Services, LLC, Brooks Fiber Communications of Missouri, Inc., and MCI WorldCom Communications, Inc. and for their Joint Reply Brief state to the Commission as follows:

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The Commission must affirmatively decide whether "effective competition" exists

As more thoroughly explained in the NuVox and WorldCom Joint Initial Brief, the Commission must proceed under the second sentence of Section 392.245.5 (the price cap statute) and make an affirmative determination on an exchange-by-exchange and service-by-service basis, of "whether effective competition exists in the exchange for the various telecommunications services of SWBT." SWBT at times in its Brief erroneously attempts to invoke the provisions of the first sentence of subsection 5 of the price cap statute and pursuant thereto claim entitlement to relief absent a determination that "effective competition" does not exist. (SWBT Brief, p. 3-4).¹ At other times in its Brief, SWBT seems at least implicitly to concede that it is the second sentence that governs, by referring to the standard stated therein. (SWBT Brief, p. 5, 88). This concession is consistent with SWBT's ultimate concession on the record. (Tr. 438-39).

It is plain from the record that no CLEC has been continuously providing service in any exchange for a period of five years. Indeed, while the record does not affirmatively demonstrate the precise duration of CLEC service in each of the 160 SWBT exchanges, it does show that the earliest possible dates of conclusion of a five-year period of continuous CLEC operations in the various exchanges are about a year away.² (Ex. 19, Meisenheimer Rebuttal, p. 8-9). Given that CLECs have not yet been providing service in SWBT's exchanges for five years, SWBT cannot

¹ SWBT also incorrectly asserts that the statute contemplates elimination of price cap regulation at a specific time. (SWBT Brief, p. 3). To the contrary, the statute merely contemplates periodic investigation by the Commission, not the outcome thereof.

² It is also clear that Dial US, the first certificated CLEC, went out of business and hence it cannot be cited as a continuous operator in any exchange. (Ex. 19, Meisenheimer Rebuttal, p. 8; Ex. 18 Voight Rebuttal, p. 13; Tr. 456).

invoke the first sentence of subsection 5 of the statute. The Commission must instead proceed under the second sentence of subsection 5 of the price cap statute.³

SWBT Bears the Burden of Proof

Once the second sentence of subsection 5 is identified as the controlling provision, the question of burden of proof is easily resolved. Anyone asserting “effective competition” exists must prove it. Primarily, that means SWBT. To a lesser extent it includes Staff and Public Counsel. Further, absent competent and substantial proof, the Commission cannot make an affirmative finding that “effective competition” exists. See, e.g., State ex rel. Rice v. PSC, 220 S.W.2d 61, 64 (Mo. 1949). SWBT cannot dance around its burden of proof. It cites only to the first sentence of subsection 5, yet ultimately concedes that sentence does not apply. (SWBT Brief, p. 4-5, 88; Tr. 438-39).

The Ability to Re-impose Price Caps is Irrelevant

The Commission cannot act prematurely to lift price cap regulation simply because it might be able to re-impose the caps later. The statute does not permit premature deregulation. The Commission should ignore invitations to err in this manner. As WorldCom witness Donald Price testified, premature deregulation of SWBT’s prices would cause “harm to the public, competitors, and the competitive process.” (Ex. 24, p. 4).

³ Given SWBT’s concessions (Tr. 438-39; SWBT Brief, p. 5, 88), this may have become an undisputed issue. Staff
... footnote continued on next page

The ICB Pricing Statute is Not Determinative

The price cap statute expressly applies to all of SWBT's services. The statute does not provide any exception. Specifically, it does not provide any exception for services that are subject to customer-specific (ICB) pricing under Section 392.200.8. Hence, the Commission must determine whether "effective competition" exists for each of SWBT's services in each of its exchanges, including services subject to ICB pricing flexibility under Section 392.200.8.⁴

The HB360 Classification System is Not Determinative

Again, the price cap statute expressly applies to all of SWBT's services. There is no stated exception for services that were classified as competitive or transitionally competitive under Section 392.361 or 392.370 prior to the commencement of price cap regulation. Likewise, there is no stated opportunity for a service to become exempt from price cap regulation by a subsequent request for classification under Sections 392.361 or 392.370.

The standards of the price cap statute are different from the standards of Section 392.361 and 392.370. The Commission can only lift price cap regulation if "effective competition" exists. In contrast, under Sections 392.361 and 392.370, the Commission is directed to evaluate whether there is "sufficient competition" to justify "a lesser degree of regulation". Even the statutory definition of "competitive" only applies to actions under Sections 392.361 and 392.370. See Section 386.020.

The limitations on price changes under the price cap statute are different from the limitations operative pursuant to classification under Sections 392.361 and 392.370. Under the

and OPC certainly indicate agreement on this point with NuVox and the WorldCom Companies in their Briefs.

⁴ To the extent Staff simply asks the Commission to confirm that SWBT can utilize ICB pricing flexibility under Section 392.200.8 so long as it stays within the applicable price caps and otherwise abides by the price cap statute, Staff raises a matter that is not at issue in this case.

price cap statute, all changes must be made subject to the ultimate price cap (as adjusted from time to time) and cost floors, and must first be approved by the Commission (within 30 days of filing). See Sections 392.245.4(5). There is no provision that would allow SWBT as a price-cap-regulated ILEC to avoid the 30-day filing and approval requirement and instead invoke the pricing flexibility that Sections 392.500 and 392.510 make available to companies and services classified under Sections 392.361 and 392.370.

In short, Section 392.245 sets forth a different path towards deregulation of prices than the path established by Sections 392.361 and 392.370. By its own request, SWBT changed paths and became subject to Section 392.245. The Commission must accordingly make a determination whether “effective competition” exists for each SWBT service in each SWBT exchange, regardless of any prior service classifications SWBT obtained under Sections 392.361 and 392.370.

Competition does not equal “Effective Competition”

SWBT contends that all of its services, except switched access services,⁵ are subject to “effective competition” in all of its exchanges. Staff contends that only a few of SWBT’s services are subject to “effective competition”, and in some cases only in a few exchanges. Public Counsel only contends that certain of SWBT’s toll services are subject to “effective competition.”

Yet, all of the foregoing contentions are based solely on the fact that competition exists (or in some instances, only on the supposed lack of evidence that competition does not exist).

⁵ SWBT Brief, p. 71 (switched access services should remain subject to price cap regulation). SWBT’s discussion regarding potential pricing flexibility for switched access services, within the applicable price caps and cost floors, is not ripe or pertinent. When and if SWBT presents a specific price proposal for switched access services, the Commission can decide whether the proposal is lawful and reasonable.

Such evidence is clearly insufficient. The presence of competition only authorizes the commencement of price cap regulation. "Effective competition" is required before the Commission can deregulate SWBT's pricing practices further under the provisions of Section 392.245.5. As Mr. Price testified "the presence of competitors is a necessary condition for competition to exist, but that fact alone is not sufficient to determine that effective competition actually exists for any service or in any geographic area." (Ex. 24, p. 5).

The ultimate question facing the Commission is whether there is sufficient competition to justify releasing SWBT from price cap controls. Accordingly, as further explained in the Initial Brief submitted by NuVox and the WorldCom companies, the Commission should determine whether existing competition is "effective" to discipline SWBT's prices and move them to the competitive level of true economic cost, on a sustainable basis, such that price caps are no longer necessary.⁶

The record in this case does not demonstrate that SWBT's services are subject to "effective competition." Indeed, there is no evidence that competition has had any specific impact on SWBT's pricing practices. Rather, the record reflects that SWBT remains the dominant market participant and price leader. SWBT's witnesses consistently testified that it had no present pricing plans, had not much used existing pricing flexibility, but nonetheless wants more flexibility. (Hughes, Ex. 16, p. 32, Ex. 17, p. 30, Tr. 361, 445, 459; Fernandez, Ex. 12, p. 7, 34; DeHahn, Ex. 3, p. 12; Fite, Ex. 13, p. 23, Ex. 14, p. 8, Tr. 329; Jablonski, Ex. 9, p. 17-19, Ex. 10, p. 5, Tr. 276-79; Douglas, Ex. 8, p. 1-2; Moore, Ex. 5, p. 18, 30, Tr. 235). SWBT's witnesses

⁶ The price cap statute does not permit the Commission to lift price cap regulation based on wholesale obligations (UNE or resale) established under the Federal Telecommunications Act of 1996. Rather, it requires a finding of "effective competition". Moreover, the evidence in the case regarding the potential and theoretical impact of wholesale charges upon SWBT's retail rates did not rise to the level of proof that wholesale charges are actually having an impact on SWBT's retail rates. To the contrary, the evidence uniformly demonstrates that SWBT has not changed its rates in any significant manner, and largely only as mandated by the price cap statute. (Ex. 29).

went to great lengths to insist that it has no current pricing plans that it is willing to disclose to the Commission, even though they acknowledged that some rates are significantly above or below cost. (Fernandez, Ex. 12, p. 7; Douglas, Ex. 8, p. 1; Aron, Tr. 172-74).

The Commission needs more than just evidence that competition exists before it can lawfully lift price cap regulation of SWBT under the statute. The statute requires proof that competition is actually exerting effective discipline on SWBT's prices and moving them towards the competitive level of true economic cost. Actions speak louder than words, and SWBT's actions confirm that it remains free to price as it chooses, subject to the boundaries of price cap controls, without much, if any, regard to competition.

Conclusion

The ultimate issue or decision point in this case as to each SWBT exchange is "whether effective competition exists in the exchange for the various telecommunications services of SWBT." See Section 392.245.5 (second sentence).

When considered in the full context of Sections 392.245.5 and 386.020(13), "effective competition" as used in subsection 5 of the price cap statute refers to competition that is adequate to accomplish the purposes that were previously to have been accomplished by the statutory cost floors and maximum prices and to produce the intended or expected results. In other words, the statute refers to competition that is capable of accomplishing the "purposes and policies of chapter 392 RSMo, including the reasonableness of rates, as set out in section 392.185", over a sustained period running up to five years into the future (when the effectiveness of competition is to be re-examined by the Commission). As witnesses including SWBT witness Dr. Aron testified, this means that "effective competition" is competition that exerts sustainable discipline

on prices and moves them to the competitive level of true economic cost. (Ex. 1, p. 11, 17, 19, 27; Ex. 2, p. 35, 52; Tr. 30, 139-41).

SWBT's telecommunications services are not now subject to "effective competition", as that phrase is used in Section 392.245.5, in any SWBT exchange. Certainly there is no evidence of "effective competition" exerting discipline on SWBT's pricing practices. Consequently, SWBT must remain subject to price cap regulation under Section 392.245.5 at this time. Only when the market is capable of exerting long-term discipline on SWBT's pricing practices can the Commission safely and lawfully remove current price cap controls.

Respectfully submitted,

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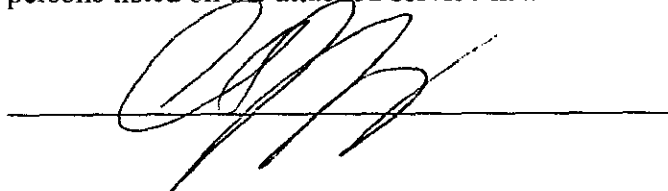


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CERTIFICATE OF SERVICE

A true and correct copy of the foregoing was mailed this 20 day of November, 2001, to the persons listed on the attached service list.



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