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November 8, 2001

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FILED³

NOV 08 2001

Missouri Public
Service Commission

RE: Case No. TO-2001-467

Dear Mr. Roberts:

Enclosed for filing in the above-captioned case are an original and eight (8) conformed copies of the **INITIAL BRIEF OF STAFF**.

This filing has been mailed or hand-delivered this date to all parties of record.

Thank you for your attention to this matter.

Sincerely yours,

W m K Haas

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WKH:sw
Enclosure
cc: Parties of Record

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

In the Matter of the Investigation of the)
State of Competition in the Exchanges of)
Southwestern Bell Telephone Company)

Case No. TO-2001-467

FILED³

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Missouri Public
Service Commission

INITIAL BRIEF OF STAFF

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

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

INITIAL BRIEF OF STAFF

STATUTORY REVIEW

The Missouri Public Service Commission established this case for the purpose of investigating the state of competition in Southwestern Bell Telephone Company (SWBT) exchanges in accordance with § 392.245 RSMo 2000.¹ The first two sentences of subsection 5 of this statute read:

Each telecommunications service of an incumbent local exchange telecommunications company shall be classified as competitive in any exchange in which at least one alternative local exchange telecommunications company has been certified under Section 392.455 and has provided basic local telecommunications service in that exchange for at least five years, unless the Commission determines, after notice and a hearing, that effective competition does not exist in the exchange for such service. The Commission shall, from time to time, on its own motion or motion by an incumbent local exchange telecommunications company, investigate the state of competition in each exchange where an alternative local exchange telecommunication company has been certified to provide local exchange telecommunications service and shall determine, no later than five years following the first certification of an alternative local exchange telecommunications company in such exchange, whether effective competition exists in the exchange for the various services of the incumbent local exchange telecommunications company.

Section 386.020(53) defines "telecommunications service" as:

(53) "Telecommunications service", the transmission of information by wire, radio, optical cable, electronic impulses, or other similar means. As used in this definition, "information" means knowledge or intelligence represented by any

¹ Statutory references are to RSMo 2000 unless otherwise noted.

form of writing, signs, signals, pictures, sounds, or any other symbols. Telecommunications service does not include:

(a) The rent, sale, lease, or exchange for other value received of customer premises equipment except for customer premises equipment owned by a telephone company certificated or otherwise authorized to provide telephone service prior to September 28, 1987, and provided under tariff or in inventory on January 1, 1983, which must be detariffed no later than December 31, 1987, and thereafter the provision of which shall not be a telecommunications service, and except for customer premises equipment owned or provided by a telecommunications company and used for answering 911 or emergency calls;

(b) Answering services and paging services;

(c) The offering of radio communication services and facilities when such services and facilities are provided under a license granted by the Federal Communications Commission under the commercial mobile radio services rules and regulations;

(d) Services provided by a hospital, hotel, motel, or other similar business whose principal service is the provision of temporary lodging through the owning or operating of message switching or billing equipment solely for the purpose of providing at a charge telecommunications services to its temporary patients or guests;

(e) Services provided by a private telecommunications system;

(f) Cable television service;

(g) The installation and maintenance of inside wire within a customer's premises;

(h) Electronic publishing services; or

(i) Services provided pursuant to a broadcast radio or television license issued by the Federal Communications Commission;

Section 386.020(13) provides:

(13) "Effective competition" shall be determined by the commission based on:

(a) The extent to which services are available from alternative providers in the relevant market;

(b) The extent to which the services of alternative providers are functionally equivalent or substitutable at comparable rates, terms and conditions;

(c) The extent to which the purposes and policies of chapter 392, RSMo, including the reasonableness of rates, as set out in section 392.185, RSMo, are being advanced;

(d) Existing economic or regulatory barriers to entry; and

(e) Any other factors deemed relevant by the commission and necessary to implement the purposes and policies of chapter 392, RSMo;

Section 392.185 states that the provisions of this chapter shall be construed to:

(1) Promote universally available and widely affordable telecommunications services;

(2) Maintain and advance the efficiency and availability of telecommunications services;

(3) Promote diversity in the supply of telecommunications services and products throughout the state of Missouri;

(4) Ensure that customers pay only reasonable charges for telecommunications service;

(5) Permit flexible regulation of competitive telecommunications companies and competitive telecommunications services;

(6) Allow full and fair competition to function as a substitute for regulation when consistent with the protection of ratepayers and otherwise consistent with the public interest;

(7) Promote parity of urban and rural telecommunications services;

(8) Promote economic, educational, health care and cultural enhancements; and

(9) Protect consumer privacy.

SWBT argues that the word “services” as used in subsections (a) and (b) of Section 386.020(13) includes not only regulated “telecommunications services” but also includes alternate non-regulated communications services such as internet services, customer premises equipment, and wireless service.

The Staff disagrees with SWBT’s argument. The Staff reads “services” in subsections (a) and (b) as synonymous with regulated telecommunications services. The Staff’s reading is

consistent with the statutory definition of "service" which is set forth in § 386.020(47) as follows:

(47) "Service" includes not only the use and accommodations afforded consumers or patrons, but also any product or commodity furnished by any corporation, person or public utility and the plant, equipment, apparatus, appliances, property and facilities employed by any corporation, person or public utility in performing any service or in furnishing any product or commodity and *devoted to the public purposes* of such corporation, person or public utility, and to the use and accommodation of consumers or patrons. (Emphasis added.)

In *State ex rel. M.O. Danciger & Co. v. Public Service Commission*, 205 S.W. 36 (Mo. 1918), the Court examined the question of whether the sale of surplus electricity generated by a brewery was subject to regulation by the Public Service Commission. Under the facts of the case, the Court concluded that it was not. In reaching this conclusion, the Court held that electric plant must be "devoted to a public use" before it is subject to public regulation. *Id.* at 40.

Customer premises equipment and wireless service are specifically excluded under subsection (a) and (c) of Section 386.020(53) from the statutory definition of "telecommunications service" set out above. Had the legislature intended to include these and other "unregulated" services in subsections (a) and (b) of Section 386.020(13), it would have said so instead of using the word "services" which by definition refers to regulated services.

The second sentence of § 392.245.5 directs the Commission to determine whether effective competition exists in the exchange for the "various services" of the incumbent local exchange company. SWBT divided its testimony by "service categories." (Hughes Direct Testimony, Exh. 16, p. 5). Arguably, each pricing option of SWBT could constitute a telecommunications "service." This would entail an examination of roughly 5,000 SWBT "services" in each SWBT exchange – an undertaking that in Staff's opinion would be impractical. For this reason, it seems necessary to categorize SWBT's various "services" into

categories. By placing the various services into categories, the task of examining competition of each SWBT "service" is made more manageable. The Staff generally agrees with SWBT's method of categorizing its services. (Voight Rebuttal Testimony, Exh. 18, pp. 6-7). The Staff, on behalf of the parties, filed on September 14, 2001, an agreed list of issues that grouped SWBT's services into service categories.

In the Staff's opinion, there is no one objective criteria by which the Commission may determine whether SWBT faces effective competition for a given service in a given exchange. From Staff's perspective, it is entirely appropriate for the Commission to consider the degree to which a competitive service may act as a substitute for a SWBT service. However, the Commission need not be bound by the same criteria for each and every service. Because of the nature of individual services, it would be entirely appropriate for the Commission to give greater weight to certain criteria when examining, for example, basic local residential access service as compared to special access service. (Voight Rebuttal Testimony, Exh. 18, pp. 16-18).

In Case No. TO-93-116, the Commission, just as in the instant case, was required to investigate the extent of competition in SWBT's service area.² In Case No. TO-93-116, just as in the instant case, the Commission was being asked to make decisions based upon economic theories designed to gauge the degree to which one service could be substituted for another. In its Findings of Fact in the Report and Order in Case No. TO-93-116, the Commission stated:

SWB takes the position that "substitutable" should be given a broad meaning so that if one service can be regarded as a replacement for another, then it is substitutable. Other parties argue for a stricter standard which could be generally referred to as a "close substitute." The dispute, then, among the parties is how close a substitute must SWB's services be and what criterion should the Commission consider in determining what a "close substitute" is.

The following factors have been proposed by the parties for determining whether a service is "substitutable" or a "close substitute":

² In the Matter of Southwestern Bell Telephone Company's Application for Classification of Certain Services as Transitionally Competitive, Report and Order, December 21, 1992.

1. interchangeability;
2. the Department of Justice merger guidelines;
3. market share;
4. costs of providing the service;
5. pricing policies;
6. market dynamics;
7. dialing disparities;
8. equal access;
9. financial strength of the companies;
10. entry barriers;
11. embedded customer base;
12. market segmentation;
13. cross-elasticity analysis;
14. no features obviously different;
15. replacement;
16. quality of service;
17. compensatory price differentials;
18. movement of prices together;
19. control of access;
20. number of lines;
21. sales volumes;
22. essentially the same;
23. customer choice based solely on price;
24. effective restraint on market power;
25. public interest in Section 392.530;
26. consumer acceptance;
27. existence of suppliers;
28. willingness of customers to use other service; and
29. "I know it when I see it."

The Commission has reviewed the above criteria and finds that none is determinative of substitutability in all instances....The Commission finds that substitutability must be considered separately for each service and for each noncompetitive company. Different criteria may be given greater weight when considering one service than another. This case-by-case consideration is necessary because of the different characteristics of each service and each company. Although the same basic criteria will be reviewed, the weight given those criteria may differ.³

³ Re: *In the Matter of Southwestern Bell Telephone Company's application for classification of certain services as transitionally competitive*. Report and Order, beginning at page 9.

There is a dispute among the parties as to who has the burden of proof in this case. This is a question of first impression. Must SWBT prove that it faces effective competition? Or must the other parties prove that SWBT does not face effective competition?

The term "burden of proof" has been used to describe two related but distinct concepts: the burden of production and the burden of persuasion. To satisfy the burden of production is also sometimes referred to as making out a *prima facie* case; and the term is sometimes used in legislation for this purpose. The burden of persuasion aspect of the burden of proof describes the obligation of a party to introduce evidence that persuades the factfinder, to a requisite degree of belief, that a particular proposition of fact is true.⁴

When the law underlying a lawsuit is legislative in origin, courts generally attempt to resolve burden allocation questions by deferring, when possible, to legislative intent. It is often said that the burden of production and persuasion lie upon the party who, absent meeting his burden, is not entitled to relief, or upon the party that would be unsuccessful if no evidence were introduced on either side. Similarly, courts observe that the burdens of production and persuasion generally fall upon the party seeking a change in the status quo, or upon the party that asserts the claim.⁵

Burden of proof and presumption embody distinct legal concepts. They are related in that presumption may shift the burden of proof as to a particular fact from one party to another and may aid the party with the ultimate burden of persuasion to satisfy that burden. As a rule, a presumption does not shift the burden of persuasion.⁶

When a rebuttable presumption arises, the person against whom the presumption operates is confronted with a rule of law which casts upon him the burden of producing substantial

⁴ 29 Am. Jur. 2d, Evidence § 155.

⁵ 29 Am. Jur. 2d, Evidence § 158.

evidence to controvert the presumed fact, and upon the introduction of such substantial evidence, the existence or nonexistence of the fact once presumed is to be determined from the evidence as if no presumption had ever been operative in the case.⁷

Section 392.245.5 provides that if the Commission determines that effective competition exists in the exchange, the local exchange company may thereafter adjust its rates upward or downward as it determines appropriate in its competitive environment. Allowing a price cap regulated ILEC, like SWBT, the ability to adjust rates as the ILEC determines appropriate would be a change in the status quo. Therefore, SWBT bears the burden of persuasion.

There is evidence in the present case from which the Commission could find that as of January 1, 2002, an alternative local exchange telecommunications company (ALEC) will have been certified and providing basic local telecommunications service in SWBT's Springfield exchange for five years. (Voight Rebuttal Testimony, Exh. 18, p.12). The dates on which an ALEC will have been certified and providing basic local service in SWBT's other exchanges follow that date. (Meisenheimer Rebuttal Testimony, Exh. 19, p. 9).

As to each of these five-year anniversaries, the first sentence of § 392.245.5 creates a presumption that effective competition exists in that exchange. Those parties who oppose that presumption should have the burden of producing substantial evidence to controvert the presumption. Accordingly, following the Staff's and other parties' presentations of substantial evidence identifying those services for which there is not effective competition, the existence or nonexistence of effective competition at the five-year anniversaries is to be determined from the evidence as if no presumption had ever been operative in the case.

⁶ 29 Am. Jur. 2d, Evidence, § 156.

⁷ *Mercantile Bank and Trust Company v. Vilkins*, 712 S.W.2d 1, 3 (Mo. App. WD 1986).

SWBT speculates that it cannot, while under price cap regulation, rebalance its rates. (Douglas Surrebuttal Testimony, Exh. 8, pp. 1-2; Hughes Surrebuttal Testimony, Exh. 17 NP, pp. 29-30).

Section 392.245.8 RSMo provides:

8. An incumbent local exchange telecommunications company regulated under this section may reduce intrastate access rates, including carrier common line charges, subject to the provisions of subsection 9 of this section, to a level not to exceed one hundred fifty percent of the company's interstate rates for similar access services in effect as of December thirty-first of the year preceding the year in which the company is first subject to regulation under this section. Absent commission action under subsection 10 of this section, an incumbent local exchange telecommunications company regulated under this section shall have four years from the date the company becomes subject to regulation under this section to make the adjustments authorized under this subsection and subsection 9 of this section. Nothing in this subsection shall preclude an incumbent local exchange telecommunications company from establishing its intrastate access rates at a level lower than one hundred fifty percent of the company's interstate rates for similar access services in effect as of December thirty-first of the year preceding the year in which the company is first subject to regulation under this section.

Whether SWBT may rebalance its rates is a question of first impression. An argument can be made from the last sentence of subsection 8 that SWBT is not precluded from rate rebalancing. But the issue is neither ripe because SWBT has not sought to rebalance its rates while under price cap regulation nor relevant to the Commission's determination in this case of where and whether SWBT's services face effective competition.

ARGUMENT

1. In which Southwestern Bell Telephone Company exchanges, if any, should Southwestern Bell's core business switched services be classified as competitive pursuant to Section 392.245.5 RSMo 2000?

Southwestern Bell's core business switched services should be classified as competitive pursuant to Section 392.245.5 RSMo 2000 in only the Kansas City and St. Louis exchanges.

Maps depicting known CLEC fiber networks in SWBT's Kansas City and St. Louis exchanges demonstrate effective competition for business telephone service. Given the presence of alternative fiber optic distribution cables, corresponding CLEC central office switches, and the number of access lines actually being served by competitors with these facilities, the Staff is convinced that the majority of business customers have viable choices for local telephone service. For business customers in St. Louis and Kansas City who as yet are unable to connect directly to one of the alternative fiber networks, the Staff believes such customers can be effectively served through the use of an unbundled loop or through the UNE-Platform. (Voight Rebuttal, pp. 5, 44, 52-53, Sch. 6; Hughes Surrebuttal Testimony, Exh. 17, HC Sch. 2, lines 81, 143, Business E911 Listings).

The Staff disagrees with SWBT's proposition that it faces effective competition for business services in the remainder of the state. The Staff does not agree that non-regulated alternative providers satisfy the statutory requirement for effective competition. Even assuming arguendo that these alternative suppliers could qualify SWBT for price cap deregulation, SWBT does not make an exchange-by-exchange showing of effective competition for business services. Also, the Staff does not consider resellers as constituting effective competition, much less prepaid resellers. Resellers are unable to differentiate their product from SWBT's offerings. As SWBT's witness points out: (1) there is no functional difference between a reseller's business service and that of SWBT (Fernandez Direct Testimony, Exh. 11, p. 15); and (2) Resellers' tariffs contain statements indicating concurrence with SWBT's tariff meaning that the reseller provides service under the exact same terms and conditions as SWBT (Id. at p. 17). (Voight Rebuttal Testimony, Exh. 18, pp. 44-51). Finally, if an ALEC is reselling SWBT's services, SWBT is getting paid, albeit at a discount. (Fife, Tr. 311).

2. In which Southwestern Bell Telephone Company exchanges, if any, should Southwestern Bell's business line related services be classified as competitive pursuant to Section 392.245.5 RSMo 2000?

Southwestern Bell's business line related services should be classified as competitive pursuant to Section 392.245.5 RSMo 2000 in only the Kansas City and St. Louis exchanges, if the underlying basic local services are classified as competitive. (Voight Rebuttal, Exh. 18, pp. 5, 44-51). The "vertical" services associated with CLASS (Customer Local Area Signaling Services) and custom calling features are inseparable from dial tone. In the Staff's view, there is little or no point in dividing business service into two categories: dial tone and line-related services. As SWBT's witness explains, "[t]he customer must retain their . . . access line to have any of our vertical services." (Fite Direct Testimony, Exh. 13, p. 18) (Voight Rebuttal Testimony, Exh. 18, p. 56).

3. In which Southwestern Bell Telephone Company exchanges, if any, should Southwestern Bell's high capacity exchange access line services be classified as competitive pursuant to Section 392.245.5 RSMo 2000?

Section 392.200.8 RSMo 2000 allows Southwestern Bell to have individual case basis pricing for high capacity exchange access line services in all of its exchanges.

This statute provides:

Customer specific pricing is authorized for dedicated, non-switched, private line and special access services and for central office-based switching systems which substitute for customer premise, private branch exchange (PBX) services, provided such customer specific pricing shall be equally available to incumbent and alternative local exchange telecommunications companies.

The Staff recommends that the Commission's Report and Order in this case recognize Section 392.200.8 as granting SWBT the ability to have individual case basis pricing for non-switched "High Capacity Service." (Voight Rebuttal Testimony, Exh. 18, pp. 4, 54-55).

4. In which Southwestern Bell Telephone Company exchanges, if any, should Southwestern Bell's Plexar services be classified as competitive pursuant to Section 392.245.5 RSMo 2000?

Section 392.200.8 RSMo 2000 allows Southwestern Bell to have individual case basis pricing for Plexar (i.e., Centrex) service in all of its exchanges. The Staff recommends that the Commission's Report and Order in this case recognize Section 392.200.8 as granting SWBT the ability to have individual case basis pricing for Plexar service. (Voight Rebuttal Testimony, Exh. 18, pp. 4, 51-51).

5. In which Southwestern Bell Telephone Company exchanges, if any, should Southwestern Bell's intraLATA private line/dedicated services be classified as competitive pursuant to Section 392.245.5 RSMo 2000?

Section 392.200.8 RSMo 2000 allows SWBT to have individual case basis pricing for intraLATA private line/dedicated services in all of its exchanges.

The Staff recommends that the Commission's Report and Order in this case recognize Section 392.200.8 RSMo 2000 as granting SWBT the ability to have individual case basis pricing for all private line services specifically including the following services: MegaLink II, MegaLink III, and MegaLink Data Service. (Voight Rebuttal Testimony, Exh. 18, pp. 4, 54-55).

6. In which Southwestern Bell Telephone Company exchanges, if any, should Southwestern Bell's residential access line services be classified as competitive pursuant to Section 392.245.5 RSMo 2000?

Southwestern Bell's residential access line services should be classified as competitive pursuant to Section 392.245.5 RSMo 2000 only in the St. Charles and Harvester exchanges. (Voight Rebuttal Testimony, Exh. 18, pp. 5-6, 55-64).

With only two exceptions, the Staff does not believe competition has sufficiently developed for residential service to be price deregulated. The two exceptions occur in the

exchanges of St. Charles and Harvester. The Staff believes data show that most residential end users in those two exchanges have a viable choice in their local service provider. These two exchanges represent the only known instances where a competitor has installed its own facilities to compete with SWBT for residential basic local service. In other SWBT exchange areas, SWBT appears to rely on resale as a basis for its claim that effective competition exists for residential service. As explained in Argument 1 above, the Staff disagrees that resale constitutes effective competition. (Voight Rebuttal Testimony, Exh. 18, p. 55; Hughes Surrebuttal Testimony, Exh. 17 HC, Sch. 2, lines 69, 140, Residential E911 Listings).

SWBT's witness opines that SWBT is experiencing increased competition from the prepaid market. (Fite Direct Testimony, Exh. 13, p. 4). The Staff does not agree that prepaid service provides effective competition to SWBT. First, SWBT does not provide prepaid service in Missouri. Second, customers who subscribe to prepaid basic local telephone service in Missouri pay rates that are many times higher than SWBT's basic local rate and do so because of problematic credit histories. (Voight Rebuttal Testimony, Exh. 18, pp. 57-58).

SWBT's witness also touts free e-mail, Hotmail, Yahoo Mail, cable broadband, instant messaging, Voice over IP, mobile wireless and fixed wireless as offering communications substitutable for SWBT's basic local residential telephone service. (Fite Direct Testimony, Exh. 13, pp. 4-8). The Staff is not convinced that these ancillary products and nascent technologies constitute viable competition for residential telephone service. (Voight Rebuttal Testimony, Exh. 18, pp. 59-61). The Staff does not agree that these technologies satisfy the statutory requirement for effective competition. Even SWBT's witness opined that whether a cable company is considered effective competition to SWBT would depend on whether the cable company had upgraded its facilities to be two-way voice capable. (Aron, Tr. 90-91). Second,

even assuming arguendo that these technologies could qualify as competitive services to SWBT's telecommunications services, SWBT does not make an exchange-by-exchange showing of effective competition. (Hughes, Tr. 347-48).

SWBT's witness testifies that there are many competitors with approved tariffs to provide service in all of SWBT's exchanges. (Fite Direct Testimony, Exh. 13, p. 16). In Staff's opinion, tariffs are not a good indicator of a competitor's willingness and ability to offer basic local telephone service in a given exchange. In Staff's experience, it is very common for the regulatory practices of competitive local exchange carriers to lag considerably behind the actual marketing practices of the competitors. This is true for resellers and it's particularly true for facility-based carriers who cannot possibly construct facilities to all areas at once. It is also true for UNE providers who, due to the history of interconnection agreements in Missouri, continue to face uncertainties of providing service via UNEs. Staff's experience leads it to conclude that carriers are far more prone to list exchanges in anticipation of future plans to commence service, rather than omitting an exchange where service is actually being provided. It is unfortunate, but a reality, that tariffs often reflect little more than paper competition. (Voight Rebuttal Testimony, Exh. 18, pp. 62-64).

In conclusion, due to the presence of cable telephony, the Staff supports price deregulation for residential service only in the SWBT exchanges of St. Charles and Harvester.

7. In which Southwestern Bell Telephone Company exchanges, if any, should Southwestern Bell's residential access line related services be classified as competitive pursuant to Section 392.245.5 RSMo. 2000?

Southwestern Bell's residential access line related services should be classified as competitive pursuant to § 392.245.5 RSMo in only the St. Charles and Harvester exchanges, if the underlying basic local services are classified as competitive. (Voight Rebuttal, Exh. 18, pp.

5-6, 55-64). The "vertical" services associated with CLASS (Customer Local Area Signaling Services) and custom calling features are inseparable from dial tone. In the Staff's view, there is little or no point in dividing residential service into two categories: dial tone and line-related services. As SWBT's witness explains, "[t]he customer must retain their residential access line to have any of our vertical services." (Fite Direct Testimony, Exh. 13, p. 18).

8. In which Southwestern Bell Telephone Company exchanges, if any, should Southwestern Bell's IntraLATA toll services be classified as competitive pursuant to Section 392.245.5 RSMo 2000?

Southwestern Bell's intraLATA toll services (i.e., long distance message telecommunications service) were previously declared transitionally competitive in Case No. TO-93-116. (Exh. 32, Report and Order, p. 26). In Case No. TC-95-246, the Commission extended the initial three-year period for the transitionally competitive classification from January 10, 1996, to January 10, 1999, when the services became classified as competitive.⁸ (Voight Rebuttal Testimony, Exh. 18, pp. 3-4, 65-67).

Sections 392.361 and 392.370 establish a procedure for a telecommunications service offered by a transitionally competitive or noncompetitive telecommunications company to move first to a transitionally competitive classification and then to move to a competitive classification. These statutes were enacted as part of House Bill 360 in 1987.

Section 392.245, the price cap statute, establishes a procedure for telecommunications services offered by an incumbent local exchange company to move to a competitive classification. This statute was enacted as a part of Senate Bill 507 in 1996.

⁸ *The Office of the Public Counsel vs. Southwestern Bell Telephone Company*, 4 Mo. P.S.C. 3d 26 (1995).

Southwestern Bell converted to price cap regulation on September 26, 1997.⁹ At that time, several of SWBT's services had been classified as transitionally competitive under §§ 392.361 and 392.370. AT&T and the Office of the Public Counsel claim that after SWBT converted to price cap regulation that the "transitionally competitive" designation for regulated services was no longer applicable. (Kohly Rebuttal Testimony, Exh. 22, pp. 21-22; Meisenheimer Surrebuttal Testimony, Exh. 21, pp. 4-6). The Staff disagrees with this interpretation regarding this question of first impression.

If the legislature enacts two laws on the same subject that are irreconcilable, the latter has the effect of repealing the former. But for repeal of a statute by implication, the statutes must be so inimical to each other that both cannot stand and the legislature, in fact, intended repeal although it did not do so. And where two acts are seemingly incompatible, they must, if feasible, be so construed that the later act will not operate as a repealer by implication, since if they are not irreconcilably inconsistent, both must stand.¹⁰

The legislature has not expressly, nor in the Staff's opinion has it by implication, repealed the applicability of §§ 392.361 and 392.370 to price cap regulated companies. There is nothing inimical about some SWBT services achieving competitive classification under §§ 392.361 and 392.370 while other services achieve competitive classification under § 392.245, particularly where the standards are so similar. Under §§ 392.361 and 392.370, the Commission must find that a telecommunications service is sufficiently competitive to justify a lesser degree of regulation and that such lesser regulation is consistent with the protection of ratepayers and promotes the public interest, and that SWBT's telecommunications service is the same,

⁹ *In the Matter of the Petition of Southwestern Bell Telephone Company for a Determination that it is Subject to Price Cap Regulation Under Section 392.245, RSMo Supp. 1996*, Case No. TO-97-397, Report and Order issued September 16, 1997, 6 Mo. P.S.C. 3d 493.

¹⁰ *Bartley v. Special School District of St. Louis County*, 649 S.W.2d 864, 867 (Mo. banc 1983).

substitutable or equivalent. By comparison, the factors by which the Commission determines effective competition under § 392.245 are as set out at § 386.020(13):

(a) the extent to which services are available from alternative providers in the relevant market;

(b) the extent to which the services of alternative providers are functionally equivalent or substitutable at comparable rates, terms and conditions;

(c) the extent to which the purposes and policies of Chapter 392, RSMo, including the reasonableness of rates, as set out in Section 392.185, RSMo, are being advanced;

(d) existing economic or regulatory barriers to entry; and

(e) any other factors deemed relevant by the commission and necessary to implement the purposes and policies of Chapter 392, RSMo.

Therefore, there is no inconsistency for SWBT's previously declared transitionally competitive service to have achieved competitive classification following SWBT's conversion to a price cap regulated company.

9. In which Southwestern Bell Telephone Company exchanges, if any, should Southwestern Bell's Local Plus services be classified as competitive pursuant to Section 392.245.5 RSMo 2000?

Southwestern Bell's Local Plus services should not be classified as competitive in any exchange. As has frequently been pointed out in hearings involving Local Plus and similar services, competitors cannot provide Local Plus "via their own switch or unbundled network elements" because, unlike SWBT, competitors cannot avoid the access charges payable to SWBT. (Voight Rebuttal Testimony, Exh. 18, pp. 6, 72-73). SWBT does not pay itself access charges when Local Plus calls terminate to its own customers, but a competitor trying to provide a facilities-based alternative to Local Plus would pay SWBT access charges for calls terminating to SWBT's customers. (Jablonski, Tr. 286-87). To mitigate this circumstance, the Commission

previously found that "in order to enable customers to obtain this type of service by using the same dialing pattern, the dialing pattern functionality should be made available for purchase to IXC's and CLEC's on both a resale and unbundled network element basis."¹¹ Recently, the Commission determined "that SWBT has not made its Local Plus service available for resale by companies providing service to their customers through the use of UNE's or through the use of their own facilities."¹² The Commission ordered SWBT to make its Local Plus service available for resale to companies providing service to their customers either through the purchase of switching from SWBT or through the use of the company's own switch.¹³ SWBT has petitioned the circuit court to review the Commission's Report and Order in Case No. TO-2000-667. So long as the issue of whether SWBT must ultimately make Local Plus service available to facilities-based carriers remains pending, the risk that predatory pricing may endanger competition remains, and SWBT cannot be said to face effective competition for Local Plus.

10. In which Southwestern Bell Telephone Company exchanges, if any, should Southwestern Bell's Optional Metropolitan Calling Area (MCA) services be classified as competitive pursuant to Section 392.245.5 RSMo 2000?

Southwestern Bell's optional MCA services should be classified as competitive pursuant to § 392.245.5 RSMo only for residential customers in the St. Charles and Harvester exchanges, if the underlying basic local services are classified as competitive.

MCA service is not classified as interexchange MTS service. Rather, MCA is much more similar to basic local telephone service. It is impossible to unlink SWBT's optional MCA service from SWBT's corresponding basic local service. The Staff cannot accept that effective

¹¹ In the Matter of Southwestern Bell Telephone Company's Tariff Revisions Designed to Introduce a LATA-wide Extended Area Service (EAS) Called Local Plus, and a One-Way COS Plan, Case No. TT-98-351, Report and Order issued September 17, 1998, at 39-40.

competition exists in all of SWBT's optional MCA exchanges to the extent that would allow complete pricing flexibility. However, because optional MCA service is so closely tied to basic local service, the Staff does support removing the price cap for MCA service in SWBT's St. Charles and Harvester exchanges for residential customers. Staff reasons that most end users in St. Charles and Harvester have two facility-based carriers from whom they can choose. (Voight Rebuttal Testimony, Exh. 18, pp. 5, 70-72).

11. In which Southwestern Bell Telephone Company exchanges, if any, should Southwestern Bell's Wide Area Telecommunications Services (WATS) and 800 services be classified as competitive pursuant to Section 392.245.5 RSMo 2000?

Southwestern Bell's WATS and 800 services were previously declared transitionally competitive in Case No. TO-93-116. (Exh. 32, Report and Order, p. 26). In Case No. TC-95-246, the Commission extended the initial three-year period for the transitionally competitive classification from January 10, 1996, to January 10, 1999, when the services became classified as competitive. (Voight Rebuttal, Exh. 18, pp. 4, 65-67).

12. In which Southwestern Bell Telephone Company exchanges, if any, should Southwestern Bell's special access services be classified as competitive pursuant to Section 392.245.5 RSMo 2000?

Section 392.200.8 RSMo allows Southwestern Bell to have individual case basis pricing for special access services in all of its exchanges. The Staff recommends that the Commission's Report and Order in this case recognize § 392.200.8 as granting SWBT the ability to have individual case basis pricing for special access services. (Voight Rebuttal, Exh. 18, pp. 4, 54-55).

¹² In the Matter of the Investigation into the Effective Availability for Resale of Southwestern Bell Telephone Company's Local Plus Service by Interexchange Companies and Facilities-Based Competitive Local Exchange Companies, Case No. TO-2000-667, Report and Order issued May 1, 2001, at 14.

¹³ *Id.* at 14-15.

13. In which Southwestern Bell Telephone Company exchanges, if any, should Southwestern Bell's switched access services be classified as competitive pursuant to Section 392.245.5 RSMo 2000?

Southwestern Bell's switched access services should not be classified as competitive in any exchange. (Voight Rebuttal Testimony, Exh. 18, pp. 5, 33-43).

Switched access by its very nature is a situational monopoly bottleneck service. The Commission has recognized the unique circumstances of switched access service by conditioning the operating certificates of competitors by placing an upper limit, or cap, on the rates that CLECs are permitted to charge long distance carriers (absent a showing of cost). As was pointed out by witnesses for Sprint and AT&T in Case No.TO-99-56, price deregulation of switched access service ultimately leads to skyrocketing rate increases placed upon interexchange carriers who have no choice but to pay the monopoly rents in order to serve customers through the local exchange carrier's bottleneck access connection.¹⁴ Beginning on page 17 of its Report and Order in that case, the Commission addressed the monopolies of switched access under a heading titled "A Bottleneck Service":

...exchange access rates are not subject to competitive pressure because IXC's have no choice but to pay them in order to complete their subscribers' calls. An IXC cannot select a lower cost alternative because there is no lower cost alternative. Additionally, because access charges are not billed directly to individual LEC subscribers, the access charges are further insulated from competitive pressure. The LECs thus enjoy a locational or situational monopoly with respect to exchange access services. The IXC's are captive customers, with no choice other than the choice not to serve the customers of a LEC whose access rates are considered to be too high. There was testimony that, in jurisdictions where no cap is imposed on exchange access rates, CLECs have tended to set them very high, as much as 20 times the level of the directly competing ILEC. There was also testimony that Missouri CLECs have tended to set their access rates as high as permitted.

¹⁴ In the Matter of the Access Rates to be Charged by Competitive Local Exchange Telecommunications Companies in the State of Missouri, Report and Order issued June 1, 2000.

SWBT's witness agreed that an interexchange carrier (IXC) cannot bypass SWBT's terminating access and offered the simplistic suggestion that the IXC could bypass SWBT's originating access by the IXC providing local service to that customer if the IXC can win the local customer. (Aron, Tr. 119-20). This same witness also agreed that the access prices that SWBT charges are probably not a true cost that SWBT experiences. (Aron, Tr. 125).

14. In which Southwestern Bell Telephone Company exchanges, if any, should Southwestern Bell's Common Channel Signaling/Signaling System 7 (SS7) services be classified as competitive pursuant to Section 392.245.5 RSMo 2000?

Southwestern Bell's SS7 services should be classified as competitive pursuant to § 392.245.5 RSMo in all of its exchanges.

The competition for SS7 is significant. For example, Illuminet offers SS7 signaling connectivity on a nationwide basis as well as nationwide transport of SS7 messages. TSI Telecommunications Services, Inc., offers SS7 on a nationwide basis; and IDN, LLC also offers SS7. (Douglas Direct Testimony, Exh. 7 NP, p. 18, Sch. 13). The Staff finds SWBT's arguments persuasive and recommends statewide price deregulation for these services. (Voight Rebuttal Testimony, Exh. 18, pp. 4, 43).

15. In which Southwestern Bell Telephone Company exchanges, if any, should Southwestern Bell's Line Information Database (LIDB) services be classified as competitive pursuant to Section 392.245.5 RSMo 2000?

Southwestern Bell's LIDB services should be classified as competitive pursuant to § 392.245.5 in all of its exchanges.

The competition for LIDB is significant. TSI Telecommunications Services, Inc., offers LIDB on a nationwide basis; and IDN, LLC also offers LIDB transport. (Douglas Direct Testimony, Exh. 7 NP, p. 18, Sch. 13). The Staff finds SWBT's arguments persuasive and

recommends statewide price deregulation for these services. (Voight Rebuttal Testimony, Exh. 18, pp. 4, 43).

16. In which Southwestern Bell Telephone Company exchanges, if any, should Southwestern Bell's directory assistance (DA) services be classified as competitive pursuant to Section 392.245.5 RSMo 2000?

Southwestern Bell's DA services should be classified as competitive only if the underlying basic local service is classified as competitive. The Staff views these services as a form of situational monopoly associated with basic local service. Directory assistance is historically accessed when customers dial "411." When customers dial in this manner, the calls are routed to the local exchange carrier. In this regard, directory assistance is too closely linked to basic local service to stand independently. (Voight Rebuttal Testimony, Exh. 18, pp. 5, 74-75).

17. In which Southwestern Bell Telephone Company exchanges, if any, should Southwestern Bell's operator services (OS) be classified as competitive pursuant to Section 392.245.5 RSMo 2000?

Southwestern Bell's Station to Station, Person to Person, and Calling Card Services were previously declared transitionally competitive in Case No. TO-93-116 (Exh. 32, Report and Order, p. 26). In Case No. TC-95-246, the Commission extended the initial three-year period for the transitionally competitive classification from January 10, 1996 to January 10, 1999, when these services became classified as competitive. SWBT's other operator services are busy line verification and busy line verification interrupt. (Moore, Tr. 233). The Staff views these services as a form of situational monopoly associated with basic local service. Operator service is historically accessed when customers dial "0." When customers dial in this manner, the calls are routed to the local exchange carrier. In this regard, operator service is too closely linked to basic local service to stand independently. (Voight Rebuttal Testimony, Exh. 18, pp. 6, 74-75).

These other operator services should be classified as competitive pursuant to § 392.245.5 RSMo only if the underlying basic local service is classified as competitive. (Voight Rebuttal Testimony, Exh. 18, pp. 5-6).

18. In each exchange served by SWBT, which if any alternative local exchange telecommunications company has been certified under Section 392.455 and has provided basic local telecommunications service in that exchange for at least five years (or if none, what is the longest period of time that a certified alternative local exchange company has provided basic local telecommunications service in that exchange)?

In no SWBT exchange has an alternative local exchange telecommunications company been certified and provided basic local telecommunications service for at least five years. (Voight Rebuttal, Exh. 18, p. 12). This issue is not ripe until Southwestern Bell makes a filing stating that an alternative local exchange company has provided basic local telecommunications service in an exchange for at least five years. The Staff's brief examines the significance of this five-year threshold under the burden of proof discussion above.

CONCLUSION

Southwestern Bell's testimony in favor of classifying all of its services as competitive repeats the refrain that relief from price cap regulation will allow SWBT to roll out innovative services and technologies that better meet the needs of its customers. (e.g., see Fite Direct Testimony, Exh. 13, p. 23). The Staff has a two-fold response to this refrain.

First, price regulation does not prevent SWBT from introducing new services. Section 392.245.11 provides, in part, "This subsection shall not preclude an incumbent local exchange telecommunications company from proposing new telecommunications services and establishing prices for such new services." If SWBT wishes to introduce a new service, it should file a tariff to offer that service. (Voight Rebuttal Testimony, Exh. 18, pp. 68-70). SWBT's witnesses could not identify any examples of where the introduction of a new service was hindered by price cap

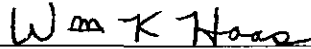
regulation. (Aron, Tr. 94; Moore, Tr. 232; Hughes, Tr. 355-57). SWBT understands that it has the ability to decrease prices under price cap regulation. (Hughes, Tr. 354-55). What is lacking under price cap regulation is the ability for SWBT to raise rates at will.

Second, that customers may benefit from a competitive classification in those exchanges for those services where SWBT faces effective competition is irrelevant to a determination of those exchanges and services. From the Staff's perspective, the most important point in this proceeding is to avoid the inevitable backlash from consumers and commercial interests as a result of run-away price increases in the absence of viable choices for basic local telecommunications service. (Voight Rebuttal Testimony, Exh. 18, pp. 30-33).

In closing, the Staff requests that the Commission adopt the Staff's positions in its Report and Order in this case.

Respectfully submitted,

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Certificate of Service

I hereby certify that copies of the foregoing have been mailed or hand-delivered to all counsel of record as shown on the attached service list this 8th day of November, 2001.

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