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November 9, 2001

Dale Hardy Roberts
Secretary/Chief Regulatory Law Judge
Missouri Public Service Commission
P.O. Box 360
Jefferson City, MO 65102

Re: Case No. TO-2001-467

Dear Judge Roberts:

Attached is the original and eight copies of AT&T Communications of the Southwest, Inc.'s, Initial Post Hearing Brief in the above referenced cases.

Should you have any questions on this matter, please contact me. Thank you for your assistance in this matter.

Sincerely,

Kevin K. Zarling (MK)

Kevin K. Zarling

Attachments
cc: all 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

AT&T COMMUNICATIONS OF THE SOUTHWEST, INC., TCG ST. LOUIS, AND TCG KANSAS CITY'S INITIAL POST-HEARING BRIEF

COMES NOW, AT&T Communications of the Southwest, Inc., TCG St. Louis, and TCG Kansas City (collectively "AT&T"), and respectfully submits its Initial Post-Hearing Brief in the above-referenced proceeding:

I. INTRODUCTION

It seems particularly ironic that at the outset of the hearing on the merits, in a case designed to investigate whether there is effective competition in various telecommunications markets in Missouri, counsel for a competitor announced that the competitor had withdrawn from the case because it had ceased operations in the state of Missouri. Tr., at 21:5 – 7. Only if the Commission has cancelled all of its newspaper and trade magazine subscriptions, and scrupulously avoided the financial reporting on television, would MPower's exit from the Missouri local exchange market appear to be both a unique event and a surprise. The telecommunications industry as a whole, including ILECs, are suffering, but CLECs in particular are struggling to succeed and in many cases to survive. *See* Ex. 22, Kohly Rebuttal, at 17:7 – 18:12. In this environment, prior to the FCC even concluding that Southwestern Bell Telephone Company ("SWBT") has truly *opened* its local exchange market to competition and approximately only four months after this Commission has decided that SWBT has finally *opened* the local

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exchange market to competition, SWBT nevertheless argues that **every** one of its services is subject to **effective competition**. That there is a significant difference between saying SWBT has opened its local exchange market to competition and saying that there is "effective competition" should be as obvious as the overreaching nature of SWBT's position in this case - - ask for the universe and you may get the moon, when what you should get is something far less than either.

The Office of Public Counsel ("OPC") noted in its opening statement the marked contrast between the position of SWBT and the positions of every other party. Tr., at 49:22 – 50:10. There is not one other party that comes even close to SWBT's position that ALL of SWBT's services should be classified as competitive - - even Staff and OPC, who support some limited competitive classification, do not even come close to SWBT's position. While such a contrast is not determinative of the outcome in this case, it should certainly cause the Commission to cast a wary eye at SWBT's position. Certainly the evidence in this case presents a picture that is a far cry from the seemingly "automatic" approval that SWBT seems to expect from its attempted broad-brush approach to proving that it faces effective competition for all of its services in every exchange.

From AT&T's perspective, there are number of SWBT's services where, as a competitor, AT&T might welcome the ability of SWBT to raise rates and improve the economics of market entry for AT&T. However, AT&T called it like it sees it in this case (*See* Position Statement of AT&T, September 18, 2001): even where AT&T might theoretically be advantaged by SWBT raising the price ceiling on certain services, such as for local residential service, we just don't think SWBT has proven its case. Of course, SWBT has also been remarkably coy about its plans for its sought-after pricing

flexibility, so neither the Commission nor AT&T know exactly what SWBT will do with its market power and its competitive service classifications rolled into one regulatory compact. The fact that the few "purposes" SWBT has hinted at, rate rebalancing and the nebulous "competitive response" ring hollow based on SWBT's past inaction (failure to rate rebalance) and present flexibility (to lower rates in response to competition) should raise suspicions about SWBT's true motives. The concerns about what SWBT could do, and might do, in an anti-competitive fashion, go to the heart of the specific services that AT&T's prefiled testimony focused on, e.g., access and toll services.

AT&T will not specifically address all of the specific services at issue in this case where AT&T's Statement of Position and prefiled testimony reflect opposition to competitive classification; AT&T anticipates that Staff and OPC will address basic residential and business services, as well as associated vertical features, in detail. AT&T will attempt to discuss the statutory framework for this case, and how that framework combined with the evidence leads to the conclusion that most of SWBT's services should not be classified as competitive in any exchange. AT&T's proposed findings of fact will address only the limited services with which AT&T has particular concern.

II. ARGUMENT

At the close of the hearing Judge Dippell asked the parties to address various issues, and as best reflected by counsel's notes regarding those issues AT&T will attempt to do so, in no particular order. Then AT&T will address its concerns over SWBT's requests for competitive classification of access and toll.

1. SWBT has the burden under §392.245.5 to prove that effective competition exists for each of its services in each of its exchanges.

Section 392.245.5 sets forth the statutory framework for the Commission's determination of whether effective competition exists for any SWBT service in any SWBT exchange. That section reads in part:

> Each telecommunications service of an incumbent local exchange telecommunication 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 telecommunication company in such exchange, whether effective competition exists in the exchange for the various services of the incumbent local exchange telecommunications company. If the commission determines that effective competition exists in the exchange, the local exchange telecommunications company may thereafter adjust its rates for such competitive services upward or downward as it determines appropriate in its competitive environment.

As can be seen, the statute provides for two distinct "triggers" for the Commission's investigation. First, if a CLEC has been certificated and providing basic local exchange service in a SWBT exchange for five years there appears to be a presumption that effective competition exists, and the Commission must find that effective competition does not exist, pursuant to the criteria in §386.020(13) if SWBT's services are to be denied competitive classification. However, there is no evidence in this case that a CLEC has been providing basic local exchange service in *any* SWBT exchange for five years, and the evidence is quite clear that none has. Ex. 19,

Meisenheimer Rebuttal, at 8:7. As of the date of filing of direct testimony, as of the date of the hearing, and presumably as of the date of a Commission decision in this case, no CLEC has had a basic local services tariff on file for the requisite five years and, as OPC suggests, it is questionable whether the mere existence of a tariff constitutes "providing" of service as the statute intends. Consequently, the Commission cannot be proceeding under the first sentence of §392.245.5.

The second sentence of the statute sets forth what must be the basis of the Commission's inquiry in this proceeding. Presumably five years have passed since the first *certification* of a CLEC (otherwise the Commission's initiation of this investigation could be considered premature), and so the Commission is conducting a general investigation. Under this provision, the Commission quite clearly must find that effective competition does exist. Although Staff, as an ostensibly neutral party, may support a finding of effective competition for a limited number of services in a limited number of exchanges, and OPC supports such a finding for intraLATA toll, no party is advocating for a finding of effective competition for every service except SWBT. In any event, based on the standard in the statute, it is the party advocating for a finding of effective competition that bears the burden, since the Commission must affirmatively find that effective competition exists. In this case, with the possible limited exceptions of Staff and OPC noted above, SWBT is the party advocating for a finding of effective competition in this case.

Finally, the statute also clearly requires a determination of "effective competition" on an exchange-by-exchange basis. SWBT provided some exchange-by-exchange data, in surrebuttal, (*See* Ex. 17, Hughes' Surrebuttal, Schedule 6-HC), but SWBT's basic

argument for most of its services seems to be that their market is *open* to competition so competitors will rush in and discipline SWBT's behavior with a competitive response. *See, e.g.,* Ex. 1, Aron Direct, at 19. Such an approach is inconsistent with some of the specific statutory criteria for determining if effective competition exists under §386.020(13). For example, paragraphs (a) and (b) of that subsection explicitly require the Commission to consider the extent to which services are "available" from CLECs and whether those services are "functionally equivalent" to those of the ILEC. Obviously the Legislature intended that alternatives services should actually *be available* to some extent, more than a de minimis amount, in order for there to be effective competition. A service is not "available" to a consumer if there is only a prospective provider who might potentially enter the market. Consequently, SWBT's "evidence" of an open market in general does not satisfy the statutory criteria for effective competition or the requirement of an exchange-by-exchange analysis.

2. How should the Commission interpret the criteria in §386.020(13) for determining if effective competition exists?

AT&T has already briefly discussed above the proper application of two of the criteria in §386.020(13). For the sake of completeness, all of the criteria are as follows:

1. Section 386.020(14)(a) - the extent to which services are available from alternative providers in the relevant market;

2. Section 386.020(14)(b) - the extent to which the services of alternative providers are functionally equivalent or substitutable at comparable rates, terms, and conditions.

3. Section 386.020(14)(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. as set out in section 392.185 RSMo. are being advanced;

4. Section 386.020(14)(d) - existing economic or regulatory barriers to entry; and

5. Section 386.020(14)(e) - any other factors deemed relevant by the Commission and necessary to implement the purposes and policies of Chapter 392 RSMo. 2000.

The prefiled rebuttal testimony of AT&T Witness Kohly thoroughly addressed the first four of these criteria. Ex. 22, at 5 – 16. The first two criteria can be discussed in tandem, since to the extent that an alternative service is not really functionally equivalent to SWBT's, then its simple "availability" should be a less relevant inquiry. One measure of "availability" is the market share of competitors. Id., at 6. Although SWBT did present some market share data in Mr. Hughes surrebuttal, a high percentage of the CLEC market share is attributable to resold lines, which neither AT&T (Ex. 22, at 7:24) nor Staff (Ex. 18, Voight Rebuttal, at 18:15 – 19:18)[1] believe should be given any weight as alternatives to SWBT's services - - resold service simply does not provide sufficient pricing discipline to be effective competition to SWBT's services. Furthermore, the market share data presented by SWBT demonstrates that in nearly all of SWBT's exchanges the amount of CLEC market share, including resold lines, is in the single digits. Ex. 17, Hughes Surrebuttal, Schedule 4 HC. The resulting market share for SWBT in each of these exchanges vastly exceeds the market share of AT&T in the interLATA market that SWBT representatives have previously declared made the interLATA market non-competitive. Ex. 22, Kohly Rebuttal, at 6:20 – 7:13. SWBT never cross-examined AT&T Witness Mr. Kohly, or provided any surrebuttal, on this point of extreme conflict in SWBT's position. As Mr. Kohly's rebuttal testimony pointed out, it is disingenuous for SWBT to argue in one forum that a market (interLATA) where

[1] Mr. Voight points out at page 19 of his testimony SWBT's previous strong arguments that "resale is not real competition.

3 competitors are serving 80% of the market is not competitive, but then argue in another forum that a market where SWBT serves, overall, 85% - 90% of the market is competitive. Based on SWBT's reasoning in the interLATA market, there are no exchanges in SWBT's territory where this Commission could find that effective competition exists.

SWBT also tries to bolster its case by citing to the presence of some novel alternative and non-traditional "competitors," such as the Internet. To some degree all communications are fungible - - smoke signals and overnight mail could be seen as competing with SWBT's regulated telecommunications services. Surely when the Legislature required the Commission to examine the functional equivalency of competitors' services it was envisioning services that provide the same features and performance as SWBT's services. The statute defines "basic interexchange telecommunications service" and "basic local telecommunications service" as being, at a minimum, voice services, so any form of communications that does not at least transmit the voice cannot possibly be functionally equivalent to SWBT's services. Furthermore, it is hard to imagine that any service that does not provide the basic elements required by §386.020(4) could be the functional equivalent of basic local telecommunications service. Wireless service does not provide the same 911 service as basic local wireline service, and voice over the Internet at a minimum suffers from poor signal quality. Ex. 19, Meisenheimer Rebuttal, at 14:16 – :20. Even assuming, *arguendo*, that the Commission could consider such novel "competitors," perhaps under §386.020(13)(e), SWBT has provided no meaningful Missouri specific (let alone exchange specific) data on these providers. To the extent that SWBT has provided any data, such as in the case of

national data allegedly showing that 3% of wireless subscribers do not have a wireline phone, such data is wholly underwhelming when it clearly demonstrates that 97% of all wireline subscribers have determined that wireless service is not substitutable for wireline, either due to quality, reliability, price, or a combination of all those factors. *See* Ex. 22, Kohly Rebuttal, at 10:10 - :20. Similarly, it would be ironic if the Legislature intended that SWBT should be granted competitive pricing flexibility based on competition from a form of alternative provider, e.g., wireless carriers, when SWBT has a wireless affiliate that already competes against other wireless carriers. *See* Ex. 18, Voight Rebuttal, at 20:11 - :20. This lends credence to Staff's argument that it is competition from regulated providers that the statute contemplates (*E.g.,* Id., at 21:18) - - it would be illogical for the Legislature to allow SWBT to obtain relief from price cap regulation as a result of "competition" with a corporate sibling, particularly when SWBT's parent has the freedom to create an affiliate to compete in *any* non-regulated market.

Finally, AT&T will address the fourth criteria, barriers to entry. Mr. Kohly's prefiled rebuttal testimony referred to general data indicating that there is a lack of local exchange competition in Missouri, relative to other states, which suggests that there are barriers to entry of one degree or another. Ex. 22, at 13:16 – 14:3. OPC provided a laundry list of factors that in its opinion evidence barriers to entry, such as slower than expected development of local competition, SWBT's regulatory gamesmanship delaying CLEC access to MCA and Local Plus, and inflated UNE rates. Ex. 19, Meisenheimer Rebuttal, at 15:3 - :23. The fact that the Commission does not have any expedited dispute resolution process in place to formally address interconnection disputes under

existing interconnection agreements is also an impediment to CLECs market entry - - the delay in resolving the MCA disputes is a perfect example of that. All SWBT has been able to point to in an attempt to refute that there are barriers is the Commission's decision in Case No. TO-99-227 and the fact that there actually are some CLECs in the market. Even if the FCC ultimately grants SWBT's §271 application, that does not mean SWBT will still not be able to periodically throw-up road blocks to its competitors and then count on regulatory lag to give itself a competitive advantage. And the presence of CLEC's operating in Missouri should be no more significant than the evidence of CLECs who have given up and left the state, such as Mpower and Dial US. *See,* Ex 18, Voight Rebuttal, at 13:2. As Mr. Kohly pointed out, CLECs currently face significant economic barriers given the economic slowdown and restricted access to capital. Ex. 22, Kohly rebuttal, at 17:7 – 18:12; *See also* Ex. 18, Voight rebuttal, at 61:9, Schedule 8. Barriers to entry exist in Missouri, and even as some are removed it is all too easy for SWBT to erect new ones.

3. Rate rebalancing, and other questionable motives for SWBT seeking competitive classification.

In general, SWBT spun two primary themes for why it should be granted competitive classification, although it did not appear to tie either to a specific factor related to effective competition. First, SWBT says it needs the flexibility to rebalance rates since competition will ultimately drive rates toward costs. Ex. 17, Hughes Surrebuttal, at 29:17. Second, SWBT has continually made the very generalized argument that it must be able to respond to competition and that regulatory parity is a legislative goal. *See, e.g.,* Ex. 16, Hughes Direct, at 2:19 – 3:3.

Taking the second point first, it was pointed out by numerous witnesses that SWBT has all the regulatory flexibility it needs to lower rates and provide innovate bundles of services and promotions in response to competition. Ex. 18, Voight Direct, at 9:3 - :20; Tr., at 276:6 – 278:10 (Staff Counsel cross of SWBT Witness Jablonski - - Staff Counsel established through cross examination with virtually every SWBT witness that the price cap statute did not prohibit, or significantly impair, SWBT's ability to provide innovate bundles of services and promotions in response to competition.) Staff Witness Mr. Voight hit the nail on the head in his rebuttal testimony: "[SWBT's] call for deregulation of prices is little more than a euphemism to raise prices." Ex. 18, at 9:13. As for regulatory parity, SWBT is putting the cart before the horse. The statute evinces no great objective of obtaining regulatory parity, certainly the purposes and policies of Chapter 392, as set forth in §392.185, do not include the goal of regulatory parity. To the extent that §392.245.5 supports regulatory parity by allowing price cap ILECs to be treated like CLECs, it does so after a finding of effective competitive is made. An objective of regulatory parity does not relate in any way to whether effective competition exists today - - the issue before the Commission is whether SWBT's services face effective competition and the statutory scheme clearly contemplates that until they do SWBT will not receive the same regulatory treatment as CLECs.

Regarding the issue of rate rebalancing, as mentioned above SWBT contends that it needs the flexibility to raise some rates while lowering other rates in response to competition that will drive rates to cost. More accurately, as competition eats into SWBT's revenues, it will also erode the implicit subsidies in certain above-cost rates that provide those subsidies, such as business services and vertical features. If SWBT has

rates that are supposedly below the costs of providing service, then in theory the rates on those services would need to go up as the implicit subsidies are lost. Since the advent of the federal Telecommunications Act of 1996 this concern has been addressed by the implementation of high-cost universal service funds; AT&T would contend that the anticipation of this competitive effect on rates was the impetus of SB 507's mandate for the implementation of a Missouri state universal service fund under §392.248. However, this concern should be very hypothetical to SWBT, given that in Case No. TO-98-329 SWBT has prefiled the direct testimony of Mr. Craig Unruh arguing that there is no immediate need for a high cost universal service fund. Case No. TO-98-329, Prefiled Direct Testimony of Craig Unruh, at 9 – 10, August 15, 2001. Dr. Aron for SWBT argued that an explicit and targeted universal service mechanism would be a critical component to ensuring that competitive classification for SWBT doesn't cause havoc for residential consumers, (Tr., at 173:16 – 174:4) but current low-income type funds, such as the federal Lifeline mechanism, only provide a limited amount of support to individuals who meet specific and limited low income criteria, such as being on Welfare or being eligible for food stamps. A person living in a relatively high-cost area will not have to be near the federal poverty level to find that rates for basic local residential service will be unjust, unreasonable, and unaffordable if SWBT has the unfettered ability to raise its local rates toward their costs. SWBT has always contended that the UNE rates established by this Commission are not SWBT's true costs; with that in mind, the M2A rate just for the UNE loop in rural Zone 3 is $33.29. The Commission should ask itself where SWBT's rate "rebalancing" will end if it is permitted to start?

However, as was labored over at the hearing, if SWBT is so concerned about rate rebalancing then it is remarkable that it has not been more aggressive in pursuing it to date. SWBT has demonstrated remarkable flair for aggressive and "flexible" interpretations of §392.245 in its search for competitive classification, but it has been remarkably timid in its interpretation of the price cap statute where rate rebalancing is concerned. *See* Tr., at 378:22 – 383:12 (AT&T cross examination of Mr. Hughes). The last sentence of §392.245.8 lets SWBT reduce its intrastate switched access rates to a level at or below 150% of SWBT interstate switched access rates. Even if at the time SWBT elected price cap regulation its intrastate switched access rates were already below 150% of its interstate rate, subsection 8 explicitly authorizes SWBT to still reduce its intrastate access rates further. Then, when we look at the first sentence of subsection 9, there is the inviting language "other provisions of this section to the contrary notwithstanding" and then a clear authorization for SWBT to recover the lost revenue from any reduction to intrastate switched access rates pursuant to subsection 8 by increasing its maximum allowable rates for basic local telecommunications service by an amount not to exceed $1.50. Consequently, if at the time of its price cap election SWBT's intrastate access rates were at 140% of its interstate rates, SWBT could have still reduced its intrastate rates to produce a revenue reduction in an amount that would have been commensurate with, and recovered by, a $1.50 local rate increase. This is a simple and straightforward interpretation of the price cap statute, yet SWBT eschewed it despite their stated interest in this case in having the flexibility to rate rebalance. SWBT never even made an application to the Commission to test out this interpretation, or any other interpretation that might have allowed it to rate rebalance.

As SWBT Witness Dr. Aron stated, a firm will be doing a disservice to its shareholders if it earns less profits than it otherwise could (Tr., at 127:14 – 16) - - put simply, a rational firm will seek to maximize its profits. Based on that concept, and SWBT's past behavior concerning rate rebalancing, there is no reason to believe that SWBT would ever *voluntarily* decrease certain rates while it simultaneously increased other rates. Only rate decreases driven by competition would occur, while rates for bottleneck services like access would never come down, and unless there is true, sustainable competition there will be nothing to constrain SWBT's rate increases for allegedly below-cost services - - or for any service where there really is no competition. That is why there is a statutory framework for rate rebalancing in §392.245 and the matter was not left to SWBT's discretion. But the point should be clear, rate rebalancing is not SWBT's true objective.[2]

4. SWBT should not receive competitive classification of its switched access service.

SWBT's position changed in its surrebuttal, to where it is not requesting full pricing flexibility for its intrastate switched access, but now only requests "equal" treatment with CLECs, ostensibly so that SWBT can restructure its rates if not actually raise the total rate for switched access. Tr., at 253: - :23; 256:4 – 257:11. AT&T has addressed above the notion of regulatory parity - - in the context of switched access, while even AT&T contends that switched access is a locational monopoly for all carriers who serve the end user, the CLECs admittedly were granted competitive classification for

[2] AT&T would welcome a genuine effort at true rate rebalancing by SWBT, as recently occurred in Kansas. However, SWBT's reluctance to avail itself of the rebalancing provisions of §392.245 and its general cold shoulder to the "rebalancing" that a Missouri USF would provide makes clear to AT&T that SWBT is not serious about true rate rebalancing in Missouri.

their switched access services in Case No. TO-99-596.[3] Only a little more than a year ago this Commission found that switched access was a locational monopoly, a bottleneck service. However, as the Order in TO-99-596 also notes, no party opposed competitive classification as long as CLEC's access rates were capped at a reasonable level. That outcome in that case was particularly appropriate because of the awkward statutory requirement that every service of a company must be classified as competitive in order for the company to be classified as competitive. §392.361.3. It would be illogical to otherwise classify new entrant CLECs, with no market power, as non-competitive or transitionally competitive. However, §392.361 did provide the Commission with a means to accomplish the goals of the chapter calling for appropriate regulatory flexibility while safeguarding the public interest. Section 392.361.6 allows the Commission to place any conditions reasonably necessary to protect the public interest upon the grant of competitive classification, which it did by imposing the cap.

While SWBT's appeal to the equities of the situation may have some superficial attraction, SWBT and the Commission must apply a different statutory framework in this case. Section 392.361 only requires that the Commission find that the service is subject to "sufficient competition to justify a lesser degree of regulation," and then provides a framework for the Commission to provide whatever classification is feels is appropriate but with whatever regulatory conditions it also feels is appropriate. In contrast to §392.361, §392.245.5 *requires* that the Commission find that SWBT's switched access is subject to effective competition. The evidence is clear, both from this case and from Commission precedent, that there is no effective competition for switched access. *See,*

[3] *In the Matter of Access Rates to be Charged by Competitive Local Exchange Telecommunications Companies in the State of Missouri,* Case No. TO-99-596, Report and Order, June 1, 2000.

e.g., Ex. 22, Kohly Rebuttal, at 23:19 – 26:9; Ex. 18, Voight Rebuttal, at 33:13 – 35:28; Ex. 25, Rippentrop Rebuttal, at 12:17; Tr., at 260:3 – :13 (Sprint cross examination of SWBT Witness Douglas). Again, for the many alleged alternative competitors for switched access, such as Wireless carriers and Voice over IP, SWBT put on no exchange specific data. Tr., at 251:4 – 16 (Staff counsel cross of Ms. Douglas); at 255:16 – 25 (AT&T cross of Ms. Douglas). Finally, if competition did exist, SWBT provides no explanation for how its current price cap status prevents it from lowering its access rates to discourage bypass of its network. Tr., at 256:1 – :19. The Commission cannot possibly find, under the statute guiding this inquiry, that SWBT's switched access service is subject to effective competition. Moreover, *if* the Commission were to somehow ignore the evidence and decide that competitive classification were appropriate for SWBT's switched access, then it would have to ignore the statute further in order to impose a cap. Section 392.245.5 is very clear that upon a finding of effective competition the ILEC "may thereafter adjust its rates for such competitive services upward or downward as it determines appropriate for its competitive environment." There is no statutory basis to impose a "condition" as §392.361.6 allowed for the CLEC's access rates. The evidence, and the statutory framework, preclude the Commission from classifying SWBT's switched access rates as competitive.

5. SWBT should not receive competitive classification for its intraLATA toll services.

With the singular exception of Local Plus, AT&T's concerns about SWBT's (and its IXC affiliate's) below-cost pricing of its long distance services has generally fallen on deaf ears at this Commission. Both Staff and OPC oppose competitive classification for SWBT intraLATA hybrid service Local Plus (OPC generally opposes competitive

classification for all of SWBT's flat-rated unlimited usage interexchange services) (Ex. 18, Voight Rebuttal, at 72:13 – 73:14; Ex. 19, Meisenheimer Rebuttal, at 22:11 - :15), yet both support competitive classification for SWBT's intraLATA toll (MTS) service without acknowledging that the same below-cost pricing concerns exist for that service. Neither Staff nor OPC provides any rationale for why there should be a distinction between flat-rated below-cost pricing and per-minute below-cost pricing.

If SWBT's usage sensitive toll is classified as competitive, statutory protections against below-cost pricing will be eliminated for that service. Neither the below-cost protections of §392.200.4(2)(c) or §392.400.5 apply to a competitively classified service. Yet SWBT's unique position as the dominant access provider means that it can charge rates for intraLATA toll that barely recover its true cost of access, e.g., a rate of $0.01 per minute, and the Staff and OPC apparently wouldn't believe that such a rate was anti-competitive even though the service's price clearly does not include the imputed cost of access. Yet the logic of the Commission's Local Plus decisions declare that such pricing would be anti-competitive, and SWBT has acknowledged that its toll pricing does not necessarily include the imputed cost of access. Ex. 23, Kohly surrebuttal, at 8:3 - :5, FN 2. As long as switched access is priced above its true long run incremental cost then the long run cost of providing toll service for any CLEC or intraLATA toll carrier will include the imputed cost of access, consequently SWBT's long run incremental cost of providing a toll service should include the imputed cost of access. By classifying SWBT's intraLATA toll service as competitive the Commission would eliminate even the prospect of a competitive safeguard provided by an imputation standard. Neither Kansas, Oklahoma, nor Texas, have gone as far as removing the price floor from

SWBT's intraLATA toll service, even where the service is otherwise treated as "competitive." Ex. 22, Kohly rebuttal, at 32:3 - :10; 33:10: -:28. SWBT's unique position as the dominant access provider means that there can be no effective competition for its per-minute intraLATA toll services unless a rigorous service-specific imputation standard is applied, and competitive classification would remove that safeguard.

III. PROPOSED FINDINGS OF FACT

As noted in the Introduction, AT&T will not attempt to provide every finding of fact that would be applicable to the outcome of this case, including descriptions of parties and the Commission's jurisdiction. For example, AT&T has addressed why SWBT's data in support of some of its services is wholly inadequate, but AT&T will not propose a specific finding on that point regarding specific services. Based on AT&T's view of the case, there are more relevant conclusions of law than findings of fact. In many instances, there simply is insufficient evidence upon which the Commission can find the facts that SWBT contends supports their position, e.g., that Wireless carriers provide competition to SWBT in its Missouri exchanges, inasmuch as the only evidence in the record is based on nationwide data. AT&T's proposed findings track the arguments and the focus above.

1. Dial US became certified as an alternative local exchange telecommunications company authorized to provide basic local exchange telecommunications service on December 20, 1996.

2. Having a valid tariff does not constitute proof that a carrier is actually providing a particular service in a particular exchange. No alternative local exchange telecommunication company has been certified to provide service and has actually been

providing basic local exchange service in any SWBT exchange for five years as of the date of this order.

3. SWBT has 160 exchanges.

4. SWBT has presented market share data that demonstrates that with the exception of two exchanges, alternative local exchange telecommunication companies have captured less than 10 percent of the residential local service market in every individual exchange.

5. SWBT has presented market share data that demonstrates that with the exception of 14 exchanges, alternative local exchange telecommunication companies have captured less than 20 percent of the business local service market in every individual exchange. In 99 exchanges alternative local exchange telecommunication companies have captured less than 10 percent of the business local service market.

6. SWBT has contended that the interLATA toll market is not competitive based on market share concentrations that are significantly less than the market share concentration that SWBT currently enjoys for the services at issue in this case.

7. Alternative local exchange telecommunication companies experience barriers to entering the local exchange market due to current economic conditions, including limited access to capital and the current retail rate structures of ILECs. Although economic conditions and regulatory proceedings generally do not constitute insurmountable barriers to entry, such barriers do impede the ability of alternative local exchange telecommunication companies to enter the market, to expand their operations, and to provide competitive alternatives to SWBT.

8. Alternative local exchange telecommunication companies that provide service via resale of SWBT's services are limited in their ability to differentiate their service offerings based on price. Because the minimum cost that a reseller incurs to provide service is directly tied to SWBT's retail rate for the resold service, resellers are incapable of providing a meaningful competitive alternative to SWBT's services based on price.

9. SWBT has both lowered and raised its retail rates since SWBT was granted price cap regulation in September, 1997.

10. SWBT has not attempted to rebalance its rates since it was granted price cap regulation.

11. Exchange access service is a locational monopoly, and the purchasers of exchange access service, principally interexchange carriers, are captive customers with no choice other than the choice not to serve the end-user customer.

12. SWBT enjoys a unique position in the intraLATA toll market based on its status as the dominant provider of exchange access services within its service territory. SWBT does not pay itself exchange access rates, therefore it is able to gain an unfair competitive advantage over other intraLATA toll carriers if SWBT's retail intraLATA toll rates are not subject to a price floor set at long run incremental cost including the imputed cost of exchange access.

13. Alternative intraLATA toll carriers will not be able to provide an effective competitive response to SWBT's intraLATA toll services if they must pay exchange access rates to SWBT but SWBT is not subject to a price floor that includes the imputed cost of exchange access.

IV. PROPOSED CONCLUSIONS OF LAW

1. The requirement in Section 392.25.5 that an alternative local exchange telecommunication company be providing service refers to the actual provisioning of service, and not merely to a company holding itself out to provide service.

2. Because no alternative local exchange telecommunication company has been certified to provide and has actually been providing basic local telecommunications service in a SWBT exchange for five years, the Commission is charged under §392.245.5 with investigating whether effective competition exists for any SWBT service in any SWBT exchange. In order to grant SWBT any relief under §392.245.5, the Commission must affirmatively find that effective competition does exist for a particular service in a particular exchange.

3. Section 392.245.5 requires an exchange-by-exchange and service-by-service determination. It is possible to group certain services into logical categories. A blanket determination of effective competition based on statewide or nationwide data is not permissible under §392.245.5.

4. Based on the provision in §392.245.5 that provides for the Commission's jurisdiction over this investigation, any party seeking a finding of effective competition has the burden of proof.

5. Pursuant to §386.020(13)(a), one of the criteria for the Commission to consider in determining if there is effective competition for a service in a SWBT exchange is the extent to which services are available from alternative providers. Alternative providers do not include providers unregulated by the Commission.

6. Pursuant to §386.020(13)(b), one of the criteria for the Commission to consider in determining if there is effective competition for a service in a SWBT exchange is the extent to which the services of alternative providers are functionally equivalent or substitutable at comparable rates, terms, and conditions. At a minimum an alternative service cannot be functionally equivalent or substitutable for SWBT's voice services if the alternative service is not a voice service. In addition, for a statutorily defined service, such as "basic local telecommunications service," the alternative service must provide all of the statutory features and elements of that service for the alternative service to be considered functionally equivalent. Comparable terms and conditions also include comparable, although not necessarily identical, quality and reliability.

7. Pursuant to §392.245.8, .9, a price cap ILEC may initially lower its intrastate access rates to a level below 150% of its interstate access rates in effect as of December 31 of the year preceding the year in which the ILEC is first subject to regulation under §392.245. As a result of this initial lowering of intrastate access rates, the ILEC may recover its lost revenue attributable thereto by increasing its maximum allowable prices for basic local exchange telecommunications services by an amount not to exceed $1.50 per line.

III. CONCLUSION

Certainly no one, except perhaps SWBT, thought that the development of local competition in Missouri would be this slow. The fact that the statute requires an investigation into the state of competition for SWBT's services in no way establishes a presumption that SWBT's services should be deemed competitive. Indeed, while the Commission recently concluded that SWBT's markets are open to competition, there is

ample evidence that for each of its services in each of its exchanges SWBT still enjoys the kind of market power that requires significant regulatory oversight in order to protect consumers, and to protect competitors so that consumers will eventually obtain the benefits of true competition. SWBT has shown no need for the extent of pricing flexibility it is seeking. SWBT's evidence in this case has demonstrated, at most, that there is competition for some of its services in some of its exchanges. However, based on the statutory criteria the Commission must consider, AT&T submits that SWBT has not conclusively demonstrated that it faces effective competition anywhere. The consequences of awarding competitive classification to SWBT's services at this time are too severe based on the risks presented by the regulatory safeguards that will be removed.

Respectfully Submitted,

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CERTIFICATE OF SERVICE BY MAIL

A true and correct copy of the foregoing in Docket TO-2001-467 was served upon the parties identified on the following service list on this 9th day of November, 2001 by either hand delivery or placing same in a postage paid envelope and depositing in the U.S. Mail.

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