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November 21, 2001

Dale Hardy Roberts
Secretary/Chief Regulatory Law Judge
Missouri Public Service Commission
P.O. Box 360
Jefferson City, MO 65101

Re: Case Number T0-2001-467

Dear Judge Roberts:

Attached for filing with the Commission is the original and eight (8) copies of AT&T Communications of the Southwest, Inc., TCG St. Louis, Inc. and TCG Kansas City, Inc.'s Post-Hearing Reply Brief

I thank you in advance for your cooperation in bringing this to the attention of the Commission.

Very truly yours,

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Attachment
cc: Office of Public Counsel
General Counsel

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 POST-HEARING REPLY BRIEF

COMES NOW, AT&T Communications of the Southwest, Inc., TCG St. Louis, and TCG Kansas City (collectively "AT&T"), and respectfully submits its Post-Hearing Reply Brief in response to the Initial Brief of Southwestern Bell Telephone Company ("SWBT"):

ARGUMENT

Reading SWBT's Initial Brief, it is remarkable how much they rely on the wireless industry. "Thank goodness for the wireless competitor," must be the theme of SWBT's case. Wireless "competition" is the pervasive backstop for SWBT's underwhelming data on wireline competition. The potential for wireless carriers, and Voice over IP, to provide competing voice services does exist, but SWBT uses the mere prospect of such competitors as a rationale for finding "effective competition" for services ranging from business to residential to exchange access. *See, e.g.,* SWBT Initial Brief, pgs. 25 – 26, 70. SWBT's exchange-level data on wireline competition is what it is, and as AT&T pointed out in its Initial Brief, on the basis of a simple market share analysis, which SWBT provided for the first time in surrebuttal, the data shows less competition in every SWBT exchange than what SWBT contends is not competitive in the long distance industry. AT&T Initial Brief, pgs. 7 – 8. SWBT must rely on the nebulous "evidence" of non-traditional, unregulated "competitors" in order to make its

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case for effective competition for the most significant services at issue: business local, residential local, vertical features related to local service, and exchange access. Yet, not only has SWBT not provided any credible exchange-level or even Missouri-specific data on these non-traditional "competitors," it asks the Commission to "not check its common sense at the door when evaluating" the impact of wireless on SWBT's business local service (SWBT Reply Brief, p. 26), but then expects the Commission to leave its common sense in the parking lost when considering that SWBT has one of the largest wireless affiliates in Missouri. Common sense dictates that the Commission should not ignore that for each of these non-traditional forms of "competition," SWBT has the ability to create an unregulated affiliate to compete on an "equal footing" with the competitors. Moreover, common sense dictates that Legislature would not intend SWBT's wireline service to be price deregulated on the basis of competition from an unregulated SWBT affiliate. Just think of the circularity of SWBT's position: create an unregulated affiliate so that you can generate competition against yourself so that you can become [essentially] unregulated like your affiliate. If the affiliate really is an effective competitor with your regulated operations, then you would just focus on the business of the unregulated affiliate. SWBT's wireline competitors have the same freedom that SWBT does to create unregulated affiliates in the wireless, Internet, and cable broadband industries. What makes the most sense is to focus on the industry, the market, that SWBT really competes in and is dominant in: regulated wireline services.

The Legislature also gave an indication that this is the proper scope of the inquiry when the triggering event in §392.245.5 was made [at a minimum] the certification of a competitive local exchange carrier. If the Legislature truly expected a competitive threat

from non-traditional "competitors" to suffice, it would have simply triggered the Commission's inquiry five years after the passage of SB 507, or would have allowed the Commission to entertain a price cap ILEC's petition for competitive classification at any time and in any exchange, regardless of whether a CLEC is actually certificated in that exchange.

Even more remarkable is that SWBT would have an entire service category, such as residential service, classified as competitive on the basis that cable modem service competes with SWBT's second line penetration for data services, i.e., access to the Internet. SWBT Initial Brief, p. 49 (obviously this would also extend to business local service too). SWBT's local voice service may be able to transmit data, but it seems unlikely that when SB 507 was passed the legislature contemplated "data service" as the basis for deregulating SWBT's voice service. The definition in §386.020(3), (4) of basic local and basic interexchange telecommunications services *explicitly* refers to voice service - - data transmission is not a part of local voice service, so the Commission cannot price deregulate voice service on the basis of competition for data services, such dial-up Internet access. After benefiting from the growth in second lines attributable to Internet access, yet fighting against payment of any reciprocal compensation to CLECs for terminating SWBT's ISP-bound traffic on the basis that such data access was not local traffic, and now that the FCC has agreed with SWBT that ISP-bound traffic is predominantly interstate traffic,[1] the Commission should reject SWBT's outrageous argument that competition for data lines used to access the Internet amounts to

[1] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996* and *Intercarrier Compensation for ISP-Bound Traffic* (CC Docket No. 96-98, FCC 01-131), Order on Remand and Report and Order, Released: April 27, 2001. (*"Order on Remand"*)

competition for residential or business local service. If there is any competition in the arena of Internet access, it is for higher speed access, which SWBT provides via DSL through, you guessed it, an unregulated affiliate. The Commission has ample basis to determine that §§392.245.5 and 386.020(13) do not require consideration of such non-traditional "competitors." And, in any event, SWBT has not provided any evidence on such non-traditional "competitors" that satisfies the statutory standard applicable to this case.

The Commission should also look askance at the market share data SWBT has provided on competition from regulated wireline competitors. Consistent with SWBT's testimony presented in this case, SWBT's Initial Brief is replete with references to "specific market share for CLECs serving business and residential access lines in Missouri". SWBT Initial Brief, p. 14. SWBT presented estimates of CLEC market share separately for business and for residential customers. Ex 17 HC, Hughes Surrebuttal, p. 8, SWBT's Initial Brief, p. 14. SWBT also presented estimates of CLEC market share by exchange and by provisioning method (self-provisioned facilities, UNE-P, resale, etc.). Ex. 23, Kohly Surrebuttal, p. 11-12; Ex. 17HC, Hughes Surrebuttal, Schedules 4-1, 4-2, 4-4, and 4-4 HC.

SWBT obtained this information in the course of fulfilling its Section 251 obligations under the Telecommunications Act of 1996 (TA96) and used that data here to provide data about CLECs that resell or lease UNEs from SWBT. Ex. 23, Kohly Surrebuttal, p. 13. In its Initial Brief, SWBT plainly acknowledged that it "knows when a CLEC resells SWBT's service and when a CLEC purchases unbundled network elements." SWBT Initial Brief, p. 13. SWBT also gathered information about CLECs

that rely upon their own facilities through information contained in the E-911 database. Ex. 23, Kohly Surrebuttal, p. 15, Ex. 17HC, Hughes Surrebuttal, pgs. 5-6; Ex. 2, Aron Surrebuttal, p. 16.

AT&T presented uncontroverted evidence that the compilation and use of this data clearly violates the confidentiality provisions contained in the M2A and numerous other interconnection agreements including the one between AT&T and SWBT. Ex. 23, Kohly Surrebuttal, p. 13-14. Likewise, AT&T presented uncontroverted evidence that SWBT also violated the Commission's rules governing access to and the use of information contained in the E-911 database. Ex 23, Kohly Surrebuttal, p. 16.

There is simply no dispute that SWBT violated these provisions and rules in an effort to support its retail activities. Clearly this is inappropriate conduct that negatively affects CLEC's ability to compete and their ability to protect competitively sensitive data from use by competitors. For example, AT&T is providing retail services via its own facilities in the Harvester and St. Charles exchanges in Missouri. Tr., p. 851. As Staff Witness Mr. Voight noted, "these two exchanges represent the only known instances whereby a competitors has installed its own facilities to compete with SWBT for residential basic local service." Ex. 18, Voight Rebuttal, p. 55. Through the use of the E-911 database, SWBT presented estimates of CLEC market share for residential service in these two exchanges and identified the number of residential E-911 listings associated with CLECs that have self-provisioned their own facilities. Ex. 17HC, Hughes Surrebuttal, p. 11 and Schedule 6HC. These facts basically mean that SWBT has compiled and presented evidence about AT&T's market share in those two exchanges. This is information that AT&T considers to be Highly Confidential. Certainly, when

AT&T provided this information to Staff in response to data reqeusts, AT&T designated its access line counts by exchange to be Highly Confidential. Under the protective order in this case, only attorneys for SWBT would be allowed to see this information. SWBT, as the E-911 database administrator, effectively circumvented the protective order and gathered AT&T's Highly Confidential information on its own. SWBT is now using that information to benefit its retail operations that compete against AT&T.

Ironically, SWBT treats its own market share data and CLEC market share estimates as Highly Confidential, meaning that non-attorneys employed by AT&T are unable to review SWBT's estimates. The basic theme of SWBT's case in this proceeding was the need for regulatory parity. Consistent with that theme, if SWBT is going to be permitted to use the E-911 database for competitive intelligence, CLECs should also be permitted access to the E-911 database for that purpose as well. Alternatively, all of SWBT's E-911 data should be disregarded, since CLECs do not have access to it at parity with SWBT's access.

First, it should be obvious that there cannot be "effective competition" if competition is so nascent that an individual CLEC's market share can be determined simply by identifying the means the CLEC use to provision facilities. Second, SWBT's improper use of CLEC wholesale data to support its retail operations strikes at the heart of whether there are barriers to entry and whether competition will be sustainable. The purpose of the confidentiality provisions contained in an interconnection agreement is to prevent SWBT's competitive "snooping" and the subsequent use of CLEC confidential information in marketing activities. SWBT has, of its own volition, simply ignored these provisions and is using CLEC confidential information to support its retail operations.

The use of this data permits SWBT to know the extent and location of competitors operations, competitors means of provisioning, competitors costs, and even the names, addresses and services each customer purchases. This information could also allow SWBT to know when a CLEC attempts to win a customer since the CLEC will examine the Customer Service Record. SWBT will also know when the customer actually decides to switch since the CLEC will place a UNE or resale order or an E911 listing. This type of information is certainly vital in forming competitive strategy and in Winback efforts. Ex. 23, Kohly Surrebuttal, pgs. 16-19.

SWBT blasé response, which can be expected, is to let the CLECs file a complaint. That may yet occur, but pending before the Commission now is an opportunity to address the severity of SWBT's transgressions when weighing SWBT's evidence and considering the appropriate outcome in this case. The Commission certainly should not reward SWBT by permitting SWBT to rely upon information that was inappropriately obtained. It would be well within the Commission's discretion to decide this information was inappropriately obtained and not rely upon this data at all. The Commission should also take steps to enforce the M2A and its own rules. As long as SWBT is able to ignore these existing provisions and rules, there cannot be any meaningful competition. Finally, prior to any serious consideration of whether there is effective competition, the Commission should, through a rulemaking, establish a code of conduct that would prohibit SWBT from abusing its position as a wholesale UNE provider and as an E-911 service provider. Once rules are in place, the Commission must be assured the rules are being adhered to and, if necessary, look at stronger remedies. Ex. 23, Kohly Surrebuttal, p. 21.

CONCLUSION

When considering the nature of how SWBT obtained its evidence in this case, and how its case relies so heavily on very generalized evidence of non-traditional "competitors" who should in fact not be considered as competitors by this Commission, it is clear that for the vast majority of SWBT's services, particularly significant services like business local, residential local, and exchange access, there is no effective competition. AT&T respectfully requests that the Commission issue an Order consistent with AT&T's position as set forth in the record.

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 19th 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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