

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

In the Matter of Southwestern Bell Telephone Company's Proposed Revisions to PSC MO No. 26, Long Distance Message Telecommunications Service Tariff)	Case No. TT-2002-227 Tariff No. 200200300
In the Matter of MCI metro Access Transmission Services, LLC's Local NationwideOne Promotion)	Case No. TT-2002-235 Tariff No. 200200338
In the Matter of NuVox Communications of Missouri, Inc.'s "Free Month" Promotion for New Customers)	Case No. TT-2002-274 Tariff No. 200200453
In the Matter of American Communication Services Of Kansas City, Inc.'s Tariff Filing to Introduce New Product Packages for Basic Local Service Business Customers)	Case No. TT-2002-294 Tariff No. 200200364
In the Matter of MCI metro Access Transmission Services, LLC's Proposed Revisions to Its Local Exchange Service Tariff, MO P.S.C. Tariff No. 1)	Case No. TT-2002-304 Tariff No. 200200395
In the Matter of MCI WorldCom Communications, Inc.'s Proposed Revisions to Its MO P.S.C. Tariff No. 4)	Case No. TT-2002-305 Tariff No. 200200394
In the Matter of Brooks Fiber Communications of Missouri, Inc.'s Proposed Revisions to Its P.S.C. Tariff No. 2, General Exchange Services)	Case No. TT-2002-306 Tariff No. 200200396
In the Matter of TCG St. Louis' Proposed Revisions to Its P.S.C. Tariff No. 2, Local Exchange Services)	Case No. TT-2002-308 Tariff No. 200200515
In the Matter of TCG Kansas City's Proposed Revisions to Its P.S.C. Tariff No. 1, Local Exchange Services)	Case No. TT-2002-309 Tariff No. 200200516

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SOUTHWESTERN BELL TELEPHONE, L.P.'S

REPLY BRIEF

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C.	Claims That CLEC Tariffs Should Be Approved While SWBT's Tariff Should Be Denied And/Or That SWBT Should Be Limited To Term Contracts Of One Year Or Less While CLECs Should Face No Limitations Must Be Rejected As Unsound and Unlawful.....	20
<u>Issue 2:</u>	Should the Missouri Public Service Commission approve MCI metro's Local NationwideOne Promotion, which would apply to customers who make or have made term commitments that can exceed one year?	25
<u>Issue 3:</u>	Should the Missouri Public Service Commission approve NuVox's "Free Month" promotion tariff revision, which contains discounts for term commitments that can exceed one year?	26
<u>Issue 4:</u>	Should the Missouri Public Service Commission approve MCI metro's proposed revisions to its Local Exchange Service tariff, MO PSC Tariff No. 1, which contains promotional discounts for term commitments that can exceed one year?	26
<u>Issue 5:</u>	Should the Missouri Public Service Commission approve MCI WorldCom's Local NationwideOne Promotion, which would apply to customers who make or have made term commitments that can exceed one year?	26
<u>Issue 6:</u>	Should the Missouri Public Service Commission approve Brooks' Local NationwideOne Promotion, which would apply to customers who make or have made term commitments that can exceed one year?	26
<u>Issue 7:</u>	Should the Missouri Public Service Commission approve TCG St. Louis' proposed revisions to its Local Exchange Services Tariff, MO PSC Tariff No. 2, which contain discounts both for term commitments of one year and for other term commitments for more than one year?	27
<u>Issue 8:</u>	Should the Missouri Public Service Commission approve TCG Kansas City's proposed revisions to its Local Exchange Services Tariff, MO PSC Tariff No. 1, which contain discounts both for term commitments of one year and for other term commitments for more than one year?	27

<u>Issue 9:</u>	Should the Missouri Public Service Commission approve American Communications Services of Kansas City, Inc. d/b/a e.spire's Voice Internet Pack ("VIP") proposed tariff revision which would offer local, long distance, toll free services, custom calling and integrated 256 kb internet multi-year commitments with discounts?	27
CONCLUSION.....		27

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SOUTHWESTERN BELL TELEPHONE L.P.'S,
D/B/A SOUTHWESTERN BELL TELEPHONE COMPANY'S
REPLY BRIEF

Executive Summary

The Missouri Public Service Commission ("Commission") should: (1) assure equal treatment of all local exchange carriers ("LEC's") by approving all nine tariffs at issue in this proceeding that either contain term commitments or promote an already-approved tariff that contains term commitments;¹ and (2) provide clear direction that term discount plans offered by all LECs in the competitive telecommunications market will be presumed lawful. The Commission should also determine that there should be no restrictions on the length of term commitments that are contained in LECs' tariffs. In so doing, the Commission will allow customers to reap the benefits of a competitive market (e.g., lower prices and increased options), and will ensure that, with respect to tariffs that contain term commitments or promote an already-approved tariff that contains term commitments, all LECs compete on equal terms. That is what the state and federal legislatures contemplated when they approved SB 507 and the Telecommunications Act of 1996, respectively. The Commission should not succumb to the CLECs' requests for regulatory-imposed advantages. Such protectionism would be unlawful and poor public policy as it would put "competitors'" interests ahead of "customers'" interests, which will ultimately harm customers.

In reaching its decision in this case, the Commission should focus its attention not only on what evidence was presented in this case, but also on what evidence was not presented in this case. Although the competitive local exchange carriers ("CLECs") claim that SWBT's

¹ SWBT's CompleteLink Basic promotion falls into the latter category; it promotes an already-approved tariff that contains a term commitment, SWBT's Access Line Term Pricing Plan.

CompleteLink Basicsm promotion is "unreasonable and unlawful", the CLECs failed to present any credible evidence or valid legal theory to support this claim.

Turning first to the CLECs' purported "facts", the CLECs state that: "SWBT's proposed promotion of long-term commitment discounts is unreasonable and unlawful, given the resulting adverse impact of such pricing practices by SWBT on competition for basic local business telecommunications services."² Unlike many cases which this Commission is asked to decide based on theory or protection, the Commission has the benefit of deciding this case on actual results since the promotional tariff at issue here has been previously approved and offered to consumers, as has SWBT's underlying Access Term Pricing Plan that is currently in effect. Yet, the CLECs failed to present any evidence that there has been or will be an adverse impact on competition for basic local business telecommunications services from those tariffs. SWBT, on the other hand, demonstrated that the opposite is, in fact, true. The uncontroverted evidence is that since SWBT's optional Access Term Pricing Plan became effective over 17 months ago, and during the time the promotional tariff was previously in effect, CLECs have continued to increase their market presence and, correspondingly, the number of lines they serve. During this same period, the actual number of lines served by SWBT has declined. Thus, term discount plans, like SWBT's Access Line Term Price Plan, and promotional tariffs like that at issue here have not had an adverse impact on competition for basic local telecommunications services.

Another claim advanced by the CLECs is that "SWBT seeks to stall, or even reverse, the growth of competition for basic business services by promoting targeted long-term discounts meant to bind customers into contracts that would eliminate them as potential customers of

² (See Initial Brief of NuVox Communications of Missouri, Inc., MCI WorldCom Communications, Inc., Brooks Fiber Communications of Missouri, Inc., MCImetro Access Transmission Services, L.L.C., TCG St. Louis and TCG Kansas City, p. 2). NuVox Communications of Missouri, Inc., MCI WorldCom Communications, Inc., Brooks

competitors."³ However, CLECs failed to present any evidence that SWBT's proposed tariff would bind customers to long-term contracts that would eliminate them as potential customers of competitors. SWBT, on the other hand, demonstrated that the opposite is, in fact, true. The uncontroverted evidence is that SWBT has only a small percentage of its customers' lines committed to a term agreement. Of those customers' lines that are committed to a term agreement, the overwhelming majority are subject to short-term agreements (most less than ** ____ **). Further, SWBT presented evidence that each year 25-33% of its customers' term agreements expire. Thus, the uncontroverted evidence is the overwhelming majority of SWBT customer lines have been and will continue to be available to offers from CLECs each year.⁴ Further, under the 13-state generic resale agreement and SWBT's Missouri 271 agreement ("M2A"), CLECs may assume existing contracts at the term discount price without the end-user or the CLEC incurring early termination fees. This is a further reason why concerns of potential adverse competitive impacts from CompleteLink Basic are unfounded.

The CLECs' claims that SWBT's CompleteLink Basic promotion is unlawful are also unfounded. The uncontroverted evidence is that the Commission previously approved the exact same SWBT CompleteLink Basic promotion that is at issue in this docket. Even the CLEC witnesses admit that the Commission acted lawfully and determined that the tariff was in the public interest when it approved the prior promotion. Nothing has changed in the statutes that would justify a different conclusion at this time. And the market is even more competitive than when this Commission approved the earlier promotion.

Fiber Communications of Missouri, Inc., MCImetro Access Transmission Services, L.L.C., TCG St. Louis and TCG Kansas City will be collectively referred to as "CLECs."

³ CLECs' Initial Brief, pp. 2-3.

⁴ This is not true of CLEC customers' lines, the substantial majority of which are subject to long term agreements.

The CLECs further claim that the Commission "must recognize that it cannot reject the CLECs' tariffs simply because it rejects SWBT's tariff."⁵ To the contrary, that is exactly what the statutes demand. Section 392.200, RSMo. provides the framework under which carriers have been permitted to offer term discount plans. Section 392.390(5) clearly requires that the applicable provisions of Section 392.200, including subsections 2 and 3, apply to all telecommunications companies. Pursuant to Section 392.361.5, the Commission may not waive the provisions of Section 392.390, even for CLECs. Thus, the statutes reflect that the Commission may not treat carriers in a disparate manner with respect to term discount plans. If the Commission permits CLECs to offer term plans under Section 392.200.2 through 392.300.5, it cannot prohibit SWBT from also offering lower prices to customers through optional term plans. Since Sections 392.200.2 through 392.200.5 apply equally to all telecommunications companies, and cannot be waived even for CLECs, SWBT cannot be treated in a disparate manner. Moreover, under the price cap statute, SWBT is permitted to set its prices at any level below the maximum allowable price so long as it is consistent with the provisions of Section 392.200, and the Commission may not reject this tariff.

The CLECs also attack Staff's proposal under which SWBT would be allowed to use long-term contracts for basic local service in exchanges where the Commission has determined that it faces effective competition.⁶ Although SWBT does not believe the Commission may lawfully limit its ability to operate in this manner, nor should the Commission do so even if it were lawful, as it would restrict customer choice and prevent customers from receiving the benefits of competition (e.g., reduced prices and increased choice), it is clear that there should be no such restrictions in exchanges where SWBT's services have become competitively classified.

⁵ Initial Brief of CLECs, p. 3.

⁶ Id at p. 4.

Finally, the Commission should reject the CLECs' suggestion that the Commission "commence a rulemaking to codify restrictions against incumbent LECs using long-term discounts and other anti-competitive targeted pricing practices such as winback and retention discounts."⁷ The CLECs have failed to present any substantial evidence that SWBT's CompleteLink Basic promotion is anti-competitive. Moreover, SWBT has presented substantial evidence that it is not.

The time has come for the Commission to dismiss the CLECs' blatant requests for protectionism and allow competition to proceed as the Missouri legislature intended.

Argument

At the outset, SWBT notes that the Initial Brief of CLECs fails to comply with the Commission's Order Granting Motion to Consolidate and Adopting Procedural Schedule, which the Commission issued on January 30, 2002. In that Order, the Commission specified that all "[b]riefs shall follow the same list of issues as filed in the case. . . ." CLECs' Initial Brief fails to do so. Moreover, of CLECs' 40-page Initial Brief, the first 33 pages are devoted exclusively to procedural matters and the CLECs' inaccurate recitation of the facts. Thus, only 7 pages of the CLECs' Initial Brief is devoted to legal argument. Because SWBT believes that the CLECs' version of the "facts" is often inaccurate and/or misleading, SWBT has included, as Attachment SWBT-1 to its Reply Brief, a summary correcting some of the factual inaccuracies and misleading statements set forth in the CLECs' Initial Brief. SWBT devotes the body of its Reply Brief to presenting its substantive legal arguments while refuting those presented by the CLECs and the Staff of the Missouri Public Service Commission ("Staff").

1. Should the Missouri Public Service Commission approve Southwestern Bell Telephone, L.P.'s, d/b/a Southwestern Bell Telephone Company's, CompleteLink Basic Promotion

⁷ Id.

which offers business customers, who sign an Access Term Pricing Plan, postalized intraLATA toll for \$0.12 per minute?

A. SWBT's CompleteLink Basic Promotion

1. Background

SWBT thoroughly explained its CompleteLinksm Basic promotion and its associated procedural history in its Initial Brief. (See SWBT's Initial Brief, pp. 8-10). No party disputes this evidence. SWBT, therefore, will not repeat it here.

2. SWBT's CompleteLink Basic Promotion Is A Voluntary And Optional Promotion For Business Customers

SWBT thoroughly explained that its CompleteLink Basic promotion is a completely voluntary and optional service for business customers. (See SWBT's Initial Brief, p. 10). No party disputes this evidence.

3. SWBT's CompleteLink Basic Promotion Is A Response To Customer Demand

SWBT thoroughly explained that its CompleteLink Basic promotion is a response to customer demand. (See SWBT's Initial Brief, p. 10). No party disputes this evidence.

4. SWBT's CompleteLink Basic Promotion Is A Competitive Response To Competitors' Initiatives

SWBT thoroughly explained that its CompleteLink Basic promotion is a competitive response to competitors' initiatives. (See SWBT's Initial Brief, pp. 10-11). SWBT presented evidence of fifteen (15) competing services from nine (9) CLECs that feature volume and/or term discounts. (Ex. 4, Getz Direct, pp. 12-13). No party disputes this evidence. With this general background in place, SWBT presents its four reasons why the Commission should approve its CompleteLink Basic promotion.

B. The Commission Should Approve SWBT's CompleteLink Basic Promotion Because It Is Pro-consumer, Pro-competition, Consistent With SWBT's Rights As A Price Cap Company, And Promotes Social Welfare

1. SWBT's CompleteLink Basic Promotion Is Pro-consumer

The Commission should approve SWBT's CompleteLink Basic promotion because it is pro-consumer. Specifically, SWBT's CompleteLink Basic promotion is pro-consumer in that it offers business customers increased choice regarding their intraLATA toll needs and the option of lower prices. (Ex. 1, Aron Direct, p. 17; Ex. 2, Aron Rebuttal, p. 5; Ex. 4, Getz Direct, pp. 5 and 16).

The Staff wants to curb customer choice because it believes that SWBT's CompleteLink Basic promotion will effectively remove customers from the pool of potential customers for a specified period of time. (Initial Brief of Staff, p. 3). But Staff completely fails to establish how the tariff at issue here which offers an intraLATA toll postalized rate, can have any such anticompetitive effect. To the contrary, even considering the underlying access term pricing plan, which is already approved and not at issue here, and all other SWBT term tariffs previously approved by the Commission, SWBT has demonstrated that the vast majority of its customer lines are open to competing offers by CLECs every year. (Ex. 4, Getz Direct, p. 9). With regard to the small percentage of its lines subject to a term agreement, SWBT acknowledges that any time a customer makes a choice to buy from one firm rather than another, the "pool" of customers is reduced and a rival is excluded from making the sale. (Ex. 3, Aron Surrebuttal, p. 7). However, Staff's conclusion that this is harmful to the competitive environment, is erroneous. As SWBT explained in its Initial Brief, the concept of choice means that some firms are excluded as a consequence of a transaction. Id. However, competition generally is not inhibited by the consequences of choice, it is enhanced by it. Id. A firm realizes that when it

loses a sale, it loses revenues and profits. Id. This encourages firms to improve their products and reduce their prices. Id. Rather than being harmful to the competitive environment, choice, and the consequent "exclusion" encourage competition. Id. For these reasons, the Commission should approve SWBT's CompleteLink Basic promotion.

2. SWBT's CompleteLink Basic Promotion Is Pro-competition

The Commission should approve SWBT's CompleteLink Basic promotion because it is pro-competition. As SWBT indicated in its Initial Brief, no party presented any credible evidence that SWBT's CompleteLink Basic promotion is anticompetitive from an antitrust or economic perspective. (See SWBT's Initial Brief, pp. 12-13). The only credible evidence is that term contracts are prevalent in both the business and consumer markets, and term contracts have not impeded competition. Id. at 13-15. SWBT presented the only quantified evidence related to term market penetration rates. Specifically, SWBT provided market penetration rates related to term contracts in SBC Ameritech-Michigan, SBC Ameritech, and SWBT-Missouri regions. Although SBC-Ameritech Michigan has been offering term contracts for more than six years, only ** __%** of its business customers' Billed Telephone Numbers ("BTNs") have committed to a term and volume agreement for ValueLink, ValueLink Plus, ValueLink Extra, ValueLink Extra Select, ValueLink Local, CompleteLink, and SimpleLink. Id.

In SBC-Ameritech, only ** __%** of SBC Ameritech's business customers' BTNs subscribe to an optional term plan. (Ex. 4, Getz Direct, p. 9). Turning to SBC SWBT Missouri, as of January, 2002, only ** __%** of SWBT's Missouri business customers were committed to term and volume agreements for CompleteLink Basic, SWBT's Access Term Pricing Plan, SmartTrunk, Plexar I, Plexar II, and SuperTrunk. (Ex. 4, Getz Direct, p. 9). Further, of these customers that have signed a term agreement, the majority of these customers have signed a

short-term agreement. Specifically, **__%** of SWBT's customers committed to a one-year term, **__%** of SWBT's customers committed to a two-year term, **__%** of SWBT's customers committed to a three-year term, **__%** of SWBT's customers committed to a four-year term, and **__%** of SWBT's customers committed to a five year-term. (T. 97, Getz).

Each year, roughly 25-33% of these business customers' agreements expire. Id. Thus, despite Staff's claims to the contrary⁸, the vast majority of SWBT customer lines are open to competitive offers each year. The vast majority of the market remains uncommitted despite the availability of term agreements, allowing all LECs to compete for a significant group of customers for whom term agreements are an important requirement.

Thus, based on market penetration rates related to SWBT term contracts in Missouri, there is no legitimate concern that SWBT will lock up the market via long-term contracts. (Ex. 1, Aron Direct, p. 12). Although SWBT does not believe that there is any possibility that its term contracts would "lock up" the market, if the Commission is concerned about this possibility, it could monitor the telecommunications market to see whether SWBT, in fact, begins to "lock up" the market. (T. 153, Unruh). If a threshold level was met (for example if 40% of SWBT's access lines were under a term agreement in an environment in which SWBT has greater than 60% of the local telecommunications market share), it would trigger a further examination to see if the Commission needed to take any corrective action. Id. at 154, Unruh. Although SWBT believes the better path is to allow competitive forces to take effect, this compromise position may assuage any concern that the Commission may have that SWBT's term contracts would lock up the market.

In contrast to the relatively small percentage of business customers who have executed a

⁸ Initial Brief of Staff, p. 3.

SWBT term contract, the CLECs have an overwhelming majority of their customers in SWBT's Missouri service territory committed to term agreements. (T. 169, 174, Cadieux; T. 237, Morris; T. 312-314, Kohly; T. 410, Cecil). With respect to the AT&T family of companies, AT&T represents that TCG has approximately over **__%** of its access lines committed to a term agreement. Id. With respect to NuVox, **__** of its customer lines (**__**) in SWBT's Missouri service territory are committed to a term agreement. (T. 193, Cadieux). Finally, with respect to WCOM family of companies, WCOM represents that a **__** of its lines are subject to a term pricing plan with a term commitment of greater than one year. Id. at 240.

This unrefuted evidence demonstrates that if the Commission believes that any unlawful lock up of the market is occurring, it is on behalf of the CLECs who are effectively preventing each other, as well as SWBT, from competing for their customers by locking them up into long-term contracts. Although SWBT believes that there should be no constraints on any LEC from offering long term contracts, if the Commission believes that any unlawful lock up of the market is occurring, it should place a prohibition against long-term contracts on the CLECs, not SWBT. The unrefuted evidence is that SWBT has a lower percentage of its customer lines under a term contract in Missouri than the CLECs.

Moreover, claims that the CLECs need to be able to use long-term discounts in order to succeed as a new entrant into the basic local market,⁹ are not only blatantly misleading, but factually inaccurate. NuVox witness Ed Cadieux testified at the hearing of this matter that if the decision became whether all LECs should be allowed to have term contracts or no LECs should be allowed to have term contracts, NuVox would prefer that all LECs be prohibited from having

⁹ Initial Brief of CLECs, p. 14.

term contracts.¹⁰ (T. 209-211, Cadieux). Thus, NuVox effectively concedes that CLECs do not need term commitments to compete.

Additionally, the evidence is uncontroverted that while term agreements have been offered both by SWBT and various CLECs, competitors have continued to make substantial inroads into the local telecommunications market in SWBT's Missouri service territory. SWBT Missouri's 2001 annual net competitive line loss rate reflects a ** _____%** increase over annual 2000 net competitive losses. (Ex. 4, Getz Direct, p. 12). Further, the measures available to estimate the level of competition, including use of unbundled network elements ("UNEs"), ported numbers, and 911 listings, all demonstrate a continued increase in estimated CLEC market share. (Ex. 7, Unruh Direct, p. 7).

SWBT estimates that CLECs gained at least 74,993 business access lines in 2001, which represents a growth of 41% in just one year. (Ex. 7, Unruh Direct, p. 8). During that same one-year period (2001), the number of business access lines served by SWBT declined by 50,322, which represents a 6% decrease. Id. Overall, business access lines in Missouri only grew 2% (24,671) during 2001. Id. This demonstrates that while the overall business access line market remained relatively flat in 2001, the CLECs continued to increase the number of lines they serve and gained an additional 7% market share during a year where the economy was either in or near a recession. Id.

SWBT estimates that the CLECs' collective market share is at least twenty-five (25) percent and, more likely, closer to thirty-two (32) percent. CLECs argue that Exhibit 23

¹⁰ SWBT finds CLECs' claim that NuVox re-filed its proposed promotional tariff, restricting the discount to one-year commitments, in order to be able to do something pending resolution of this case (Initial Brief of CLECs, p. 14) incredulous. NuVox's Free Month Promotion for New Customers, that NuVox filed after its tariff was suspended in this docket, was only effective for seven days--from February 22, 2002, to March 1, 2002. (NuVox Communications of Missouri, Inc., P.S.C. Mo. Tariff No. 1, 1st Revised Page 71.02, Replacing Original Page 71.02).

indicates that the lower figure is more accurate. (Initial Brief of CLECs, p. 27). CLECs' claims are contrary to the evidence that was presented in this case. Specifically, SWBT's estimates were consistent with those presented by Staff (utilizing older data from a previous case, Staff estimated that CLECs serve twenty-six percent (26%) of the business access lines in SWBT's Missouri service area). (T. 382-383, Cecil). However, Staff admits that its data was at times more than a year old. (Ex. 23, page 1). Staff further admits that not all CLECs responded to Staff's data requests and the information on many of the CLECs is dated, resulting in an underestimation of actual market share. (T. 329, Cecil). Staff, therefore, readily conceded that the number of business access lines served by CLECs today would be higher. (T. 329, Cecil). Staff confirmed that SWBT's estimation of CLEC market share is "fair." (T. 382-3, Cecil).

The CLECs additionally claim that Staff's figures appear inflated when compared to the specific numbers reported by the CLECs in this case. (Initial Brief of CLECs, p. 27). The Commission should closely examine the numbers that the CLECs presented in this case. Specifically, on August 17, 2001, TCG St. Louis and TCG Kansas City reported to Staff that they had **_____** voice grade equivalent business access lines in SWBT's Missouri service territory. (Ex. 23, p. 2). However, during the hearing of this matter TCG St. Louis and TCG Kansas City reported to SWBT that they had **_____** voice grade equivalent business access lines in SWBT's Missouri service territory. (Ex. 23; T. 312, Kohly). Although SWBT asked for an explanation regarding this large discrepancy, the only explanation that the TCG entities have offered is that the discrepancy is based on wholesale lines provided to other telecom providers, test lines, and internal lines provided to the TCG entities or affiliates. AT&T, which is the only entity which possesses the underlying data, failed to provide any explanation of the number of

test lines or internal lines. It certainly defies logic that AT&T has three internal or test lines for every line it provides to a customer.

The other CLECs' numbers demonstrate an increase in the number of voice grade equivalent access lines which suggests that SWBT's estimates may, in fact, be understated. Specifically, on August 8, 2001, NuVox reported to Staff that it has ** ____ ** voice grade equivalent business access lines in SWBT's Missouri service territory. During the hearing of this matter, NuVox testified that it had ** ____ ** voice grade equivalent business access lines in SWBT's Missouri service territory. (T. 193, Cadieux). This is approximately a ** __%** increase in just 8 months. Similarly, on August 6, 2001, the WCOM family of companies reported to Staff that they had ** ____ ** voice grade equivalent business access lines in SWBT's Missouri service territory. (Ex. 23). During the hearing of this matter, the WCOM family of companies reported that they had ** ____ ** voice grade equivalent business access lines in SWBT's Missouri service territory. (T. 238-239, Morris). This is approximately a ** __%** increase in just 8 months.

Nevertheless, at the end of the day, only the CLECs know how many lines they actually serve. (Ex. 7, Unruh Direct, p. 10). If the Commission wants a more accurate picture of market share, it would need to obtain the relevant information from the CLECs themselves. (Ex. 7, Unruh Direct, p. 10; T. 119-120 and 166, Unruh). However, the evidence is clear that SWBT neither enjoys a "near monopoly" or "de facto monopoly"¹¹, as claimed by SWBT's competitors. (Ex. 8, Unruh Rebuttal, p. 6). The Commission decision in Case No. TO-2001-467, which found effective competition for business services in the St. Louis and Kansas City exchanges, further rebuts the CLECs' unsupported claims.

¹¹ Initial Brief of CLECs, pp. 18, 21, and 24.

The uncontroverted evidence is that since SWBT's optional Access Term Pricing Plan became effective over 17 months ago, CLECs have continued to increase their market presence and correspondingly, the number of lines they serve. (Ex. 7, Unruh Direct, pp. 12 and 19; Ex. 8, Unruh Rebuttal, p. 7; Ex. 9, Unruh Surrebuttal, p. 15; T. 126-127, Unruh). During this same period, the actual number of lines served by SWBT has declined. *Id.* Thus, term discount plans have not prevented the CLECs from competing and the Commission should have even less concern about purported "anti-competitive" effects of term agreements now than when it previously approved SWBT's CompleteLink Basic promotion. (T. 127-128, Unruh).

Moreover, the uncontroverted evidence also establishes that there is not even the theoretical possibility of term contracts being anticompetitive in the local telecommunications market because the prerequisites for term contracts to pose a threat to competition do not exist. (T. 54-55, Aron). The first prerequisite is "exclusivity" which means that the contract must commit both parties not to deal with the entrant. *Id.* at 55. SWBT's underlying Access Term Pricing Plan, is not exclusive. *Id.* CLECs can, under the terms of the SBC 13-state generic resale agreement or the M2A, assume an existing retail contract with term and/or volume commitments without triggering an early termination fee on the part of the end-user or the

CLEC.¹² Id. Moreover, under the access term pricing plan customers are not required to give all of their business to SWBT. Id. Customers are free to give some of their lines to SWBT and some to other CLECs. Id.

The second prerequisite is that the buyer must expect the entrant to have some measure of monopoly market power and the ability to charge prices in excess of costs. Id. at 56. This is, of course, a counter-intuitive requirement, and one which finds no support in the evidence. This conclusion is supported by the CLECs' claims that they are not making money at all. (T. 55-57, Aron). Thus, not only do the penetration levels regarding term contracts reflect that term contracts have not had an adverse impact on competition, there is not even the theoretical possibility of term contracts being anticompetitive in the local telecommunications market in Missouri because the prerequisites for term contracts to pose a threat to competition (exclusivity and the expectation of supra competitive profits by the entrant) do not exist.

SWBT presented uncontroverted evidence that its CompleteLink Basic promotion is pro-competition. In Missouri, CLECs can and do offer their own competing plans, which either

¹² Thus, any suggestion that the Commission's conclusion in Case Nos. TT-2002-108 and TT-2002-130, specifically, that "[a]ny CLEC attempting to persuade a customer to leave Southwestern Bell while subject to a term agreement would have to offer a better rate but would also have to find a way to convince the customer to pay a large upfront penalty for leaving Southwestern Bell"¹² lacks merit. While SWBT disagrees with the decision that the Commission rendered in those cases, it is not just SWBT that is requesting the Commission to take a hard look at that decision. The CLECs similarly do so. (Initial Brief of CLECs, p. 32). Although the CLECs contend that the Commission did not have any CLEC tariffs before it in that case and accordingly made no findings of fact regarding such tariffs, the CLECs' are merely splitting hairs. The Commission stated:

While it [the Commission] does not wish to prejudice those cases, for guidance of the telecommunications industry, the Commission will set forth its views regarding term agreements. The Commission believes that term agreements exceeding one year in length are an unacceptable threat to the health of competition. Term agreements that do not exceed one year in length may be acceptable. (Emphasis added).

Id. at 19. Thus, SWBT respectively suggests that the Commission should determine that term agreements for all LECs would be beneficial because: (1) they benefit customers through decreased prices and increased options; and (2) provide incentives for LECs not only to lower prices but also to differentiate their products and increase innovation. For these reasons, the Commission should determine that all tariffs that contain term commitments or promote tariffs that contain term commitments are presumed to be lawful.

contain term provisions or promote a tariff that contains a term provision. (Ex. 7, Unruh Direct, p. 13). Additionally, CLECs can offer SWBT's term discount plans to their own customers on a resale basis and at a resale discount. (Ex. 4, Getz Direct, p. 16; Ex. 7, Unruh Direct, p. 13). Finally, SWBT's CompleteLink Basic promotion is pro-competitive because under the 13-state generic resale agreement and the M2A agreement, CLECs may assume existing contracts at the term discount price without the end-user or the CLEC incurring early termination fees. (Ex. 1, Aron Direct, p. 8; ex. 9, Aron Surrebuttal, p. 4; Ex. 7, Unruh Direct, p.14; Ex. 9, Unruh Surrebuttal, p. 16). In this case, the end user customer would pay no penalty to SWBT for leaving SWBT and taking service from a CLEC. (Ex. 9, Unruh Surrebuttal. p. 16).

SWBT notes that the CLECs argue that their concerns about SWBT's ability to impede competition by using multi-year arrangements with its incumbent customer base are not mitigated by the legal ability of competitors to assume and resell SWBT arrangements. (Initial Brief of CLECs, pp. 15 and 22). The CLECs further argue that resale is not feasible because of the restrictive margins (i.e. the CLECs contend that they cannot earn a profit) and the inability to differentiate products. Id. at 15, 18, 22 and 32. The CLECs contend that resale is "sham competition." (Id. at 18). One CLEC, AT&T, went so far as to claim: "that the theoretical potential for some customers to use multiple local providers does not mitigate the practical exclusivity of SWBT's term arrangements for most customers." (Id. at 22). These arguments are misleading and factually inaccurate.

As Dr. Aron explained in her Surrebuttal Testimony, the CLECs' position is that if there is no immediate profit margin on the specific term contract then it makes no economic sense to assume it. (Ex. 3, Aron Surrebuttal, p. 3). This position is misleading to the Commission because an economic opportunity is properly evaluated by considering the discounted present

value of all of the net benefits that it is expected to provide over the relevant time horizon. Id. The fact that a customer obtained by the CLEC through the assumption of an existing SWBT term contract may provide no margin for some part of the relevant time and for some services offered by the CLEC is an incomplete evaluation of the true value of the assumability option. Id.

The CLECs have argued throughout this proceeding that customers are reluctant to change suppliers, even absent term contracts. Id. This very argument undercuts the CLECs' assertion of the worthlessness of the option to assume SWBT term contracts. Id. Customers' loyalty (or lock in) implies that obtaining entrée with the customer is useful and valuable. Id. Having the ability to assume a SWBT term contract without triggering the early termination fee provides a CLEC with the ability to build its future business relationship with customers. Id. Thus, even if the contract provides a small margin initially, viewed over the entirety of the relationship, the contract may have significant economic value. Id.

Moreover, a CLEC can subsume a SWBT term contract into a longer or broader agreement with the customer. Id. at 4. For example, a CLEC may assume an existing SWBT term contract that has only eight months to run, but sign the customer to a three-year contract. Id. The CLEC would temporarily serve the customer via resale (the first eight months), and then migrate the customer to unbundled network elements ("UNEs"), the UNE "platform", or its own facilities for the remainder of the three year term of the new contract. Thus, only for the first eight months of the 36 month contract might there be "no margin" on the term contract. Id. The relevant period for evaluating the contract is the entire term over which the CLEC reasonably anticipates keeping the customer. Id. Additionally, the relevant scope of the services may extend beyond those specified in the assumed contract. Id. The CLEC can offer the customer

additional services such as: (1) growth lines; (2) vertical/other features; and (3) bundles of local, long-distance, and/or data/Internet services that provide additional margin. Id.

Further, it is not a "theoretical possibility" that some customers will use multiple telecommunications providers; it is an unrefuted fact. According to a Morgan Stanley survey of the business telecommunications marketplace, large companies (250+ employees) use an average of 5.5 carriers and medium customers (i.e. 50-250 employees) typically employ 2.5. (Ex. 2, Aron Rebuttal, p. 9). Thus, the Commission should not be side-tracked by the CLECs' arguments that merely seek to benefit the CLECs at the expense of the public and SWBT.

In summary, given the relatively small number of term agreements entered into by SWBT's business customers in Missouri, the availability of term agreements in Missouri for over 14 years, the rapid turnover or expiration of SWBT's existing business customer agreements, and the availability of the agreements for resale and assumption, the competitive marketplace has not been adversely affected by the existence of term agreements offered by SWBT. (Ex. 4, Getz Direct, p. 10). The Commission should approve SWBT's CompleteLink Basic promotion because it is pro-competition.

3. SWBT's CompleteLink Basic Promotion Is Consistent With Its Rights As A Price Cap Company

The Commission should approve SWBT's CompleteLink Basic promotion because it is consistent with SWBT's rights as a price cap company. Under Section 392.245.4(5), SWBT is permitted to price its services at any level below the maximum allowable price, so long as it is consistent with the provisions of Section 392.200. The postalized intraLATA toll rate does not exceed the maximum allowable price, nor violate Section 392.200 and, therefore, it must be approved. Term agreements in general do not violate Section 392.200 as such tariffs have been routinely approved by the Commission for both SWBT and CLECs in the past and term tariffs

remain in effect today for both SWBT and CLECs. Even the CLECs admit that the Commission had to find that SWBT's CompleteLink Basic tariff was lawful, just and reasonable in order to have previously approved it. (T. 300, Kohly; see also T. 332, Cecil). Since there is nothing in the statutes that has changed since the Commission acted lawfully in approving SWBT's CompleteLink Basic promotion, the Commission should approve SWBT's CompleteLink Basic promotion that is currently under submission. (T. 165, Unruh).

4. SWBT's CompleteLink Basic Promotion Promotes Social Welfare

Finally, the Commission should approve SWBT's CompleteLink Basic promotion because it promotes social welfare. Specifically, term agreements promote social welfare because they: (a) reduce the scope of opportunistic behavior and thereby encourage and protect efficient investment; (b) define the respective rights and duties of the parties; (c) create the ability to shift or reduce certain kinds of risk; (d) provide a way to spread fixed costs and thereby offer lower prices; (e) encourage efficient long-term investment; (f) meet the competition; and (g) provide investors with the assurances that they need to provide capital to firms such as SWBT. (Ex. 1, Aron Direct, pp. 18-19; Ex. 2, Aron Rebuttal, p. 21; Ex. 3, Aron Surrebuttal, pp. 6, 16 and 29; T. 64-65, Aron). This helps to ensure that a LEC, like SWBT, has the incentive to maintain and modernize its network.

C. Claims That CLEC Tariffs Should Be Approved While SWBT's Tariff Should Be Denied And/Or That SWBT Should Be Limited To Term Contracts Of One Year Or Less While CLECs Should Face No Limitations Must Be Rejected As Unsound and Unlawful

Staff and the CLECs recommend that: (1) the CLEC tariffs should be approved while SWBT's tariff should be rejected; and (2) SWBT should be limited to term contracts of one year or less while CLECs should face no such limitation. (Ex. 18, Cecil Rebuttal, pp. 11-13; Initial Brief of Staff, pp. 3-4). These recommendations should be rejected as unsound and unlawful.

Recommendations for disparate treatment are unsound because they deny customers the full benefits of a competitive environment (choice regarding service provider, services provided, and price). Staff states that allowing CLECs to use term commitments of more than one year in length would be appropriate, as such commitments would not materially harm SWBT because of its dominant market share in Missouri.¹³ Staff presented absolutely no evidence that allowing CLECs to use term commitment more than one year in length while constraining SWBT's ability to do so would not materially harm SWBT. Further, the reverse is true.

Although only **__%** of business customers have committed to SWBT's discount plans, SWBT values each and every one of these customers and is not prepared to dismiss their individual importance based on the fact that their cumulative number is low. (Ex. 5, Getz Rebuttal, p. 6). Furthermore, limiting SWBT's ability to offer optional multi-year agreements to customers would have the practical effect of limiting SWBT's ability to offer lower prices to customers. (Ex. 6, Getz Surrebuttal, p. 9). Offering lower prices to customers is in the public interest and Staff's suggestion that CLECs should have an advantage over SWBT is not consistent with the public interest principle. Id. at pp. 9-10. By limiting SWBT's ability to offer term agreements, the customers would be deprived of another carrier competing for their business. Id. at p. 10. While the number of customers who may be interested in term discount agreements may be small, this does not mean that SWBT should be restricted from competing for this, or any other, group of customers. Id.

Moreover, if SWBT term agreements were limited to one year as proposed by Staff, SWBT would not be a viable choice for customers seeking longer term agreements. (Id. at p. 11). There is a substantial group of customers that are interested in term agreements. For these customers, one of their primary determinants of who they choose as a provider of telephone

¹³ Initial Brief of Staff, p. 4.

service is the availability of a term contract that is in excess of one year. (T. 355, Cecil). An arbitrary limitation on SWBT would serve to deny business customers of a bidder for their business. Id. The Commission would be essentially allocating the market to the CLECs because SWBT would be prohibited from serving customers that want term contracts in excess of one year. (T. 356, Cecil).

Additionally, the disparate treatment being advocated by Staff and the CLECs is unlawful since the Missouri legislature, as reflected in the Missouri statutes, did not grant the Commission authority to limit SWBT's ability to lower its prices through term discount plans nor discriminate against SWBT relative to the CLECs with regard to the ability to offer term discount plans. (Ex. 9, Unruh Surrebuttal, pp. 10-11). Section 392.200, RSMo. provides the framework under which carriers have been permitted to offer term discount plans. (Ex. 7, Unruh Direct, p. 15; Ex. 9, Unruh Surrebuttal, p. 8). Section 392.390(5) clearly requires that the applicable provisions of Section 392.200, including subsections 2 and 3, apply to all telecommunications companies. (Ex. 7, Unruh Direct, p. 15; Ex. 9, Unruh Surrebuttal, p. 8; T. 135, Unruh). Thus, Staff's claim that "there is nothing in the relevant statutory authority requiring this Commission to treat ILECs and CLECs in an identical manner"¹⁴ is legally erroneous. Further, pursuant to Section 392.361.5, the Commission may not waive the provisions of Section 392.390, even for competitive telecommunications companies. (Ex. 7, Unruh Direct, p. 15; Ex. 9, Unruh Surrebuttal, p. 8).

If the Commission permits CLECs to offer term plans under Section 392.200.2 through 392.200.5, it cannot prohibit SWBT from making similar offerings. (Ex. 9, Unruh Surrebuttal, p. 9). Since Section 392.200.2 through 392.200.5 apply equally to all telecommunications

¹⁴ Initial Brief of Staff, p. 3.

companies, and cannot be waived even for competitive companies, SWBT cannot be treated in a disparate manner from CLECs. Id. at pp. 9-10. The Missouri legislature, quite simply, did not give the Commission the authority to treat ILECs and CLECs differently with regard to term discount plans. (Ex. 9, Unruh Surrebuttal, p. 9).

The CLECs fail to address the fact that the Missouri legislature did not give the Commission the authority to treat ILECs and CLECs differently with regard to term discount plans. Instead, the CLECs contend that the Commission must determine whether SWBT's CompleteLink Basic promotion is "reasonable" and, therefore, lawful. (Initial Brief of CLECs, p. 35). Thereafter, the CLECs again argue that SWBT possesses a high percentage of the market share and the CLECs are struggling to compete. (Id. at p. 36). The CLECs assert that the Commission cannot analyze the reasonableness of SWBT's proposed tariff in a theoretical vacuum, but rather must consider the actual market conditions in Missouri in which SWBT's tariff would take effect. (Id. at pp. 35-36). The actual market conditions reflect that the CLECs continue to increase the number of access lines that they serve while the number of lines SWBT serves is declining. (SWBT's Initial Brief, p. 21). Correspondingly, SWBT's Missouri 2001 annual net competitive line loss reflects a **____%** increase over annual 2000 net competitive loss. (Ex. 4, Getz Direct, p. 12). Further, in contrast to some CLECs which almost **__%** of their customers committed to a term agreement, SWBT has only **__%** of its customers committed to a term agreement. (SWBT's Initial Brief, p. 16).

The actual market conditions also reflect that the legislature enacted legislation that included constraints on ILECs (for example price cap regulation). However, the legislature did not enact any legislation that would allow the Commission to treat ILECs and CLECs differently with regard to their ability to offer term discount plans and/or promotions related to tariffs that

offer term discount plans. The time has come for the Commission to dismiss the CLECs' requests for protectionism and allow competition to proceed as the Missouri legislature intended.¹⁵

SWBT notes that although Staff does not support SWBT's ability to generally offer term discount plans, Staff suggests that SWBT should have the authority to offer term discount plans of greater than one year in exchanges where the Commission has determined that effective competition exists (to date, St. Louis and Kansas City for business services) and SWBT has been granted a competitive classification for its services. (Ex. 18, Cecil Rebuttal, p. 18; Ex. 9, Unruh Surrebuttal, p. 11; Initial Brief of Staff, p. 6). The Commission should not limit SWBT's ability to operate in this manner, as it would restrict customer choice and prevent suburban and rural business customers from receiving the benefits of competition--reduced prices and increased choices of potential vendors. (Ex. 6, Getz Surrebuttal, p. 12).

Further, there is no statutory provision which would allow only competitively classified companies to offer term discount plans. (Ex. 9, Unruh Surrebuttal, p. 11). In fact, SWBT, which is not classified as a competitive company, has several term discount plans that have already been approved by the Commission. Id. While SWBT does not believe that it should be limited in its ability to offer lower prices to customers through term discount plans independent of the competitive classification of services, it is clearly the case that there should be no such restrictions in exchanges where SWBT's business services have become competitively classified (St. Louis and Kansas City). Id.

¹⁵ The Missouri legislature's intentions are reflected in Section 392.185(6) and Section 392.200.4(2). In Section 392.185(6), the legislature expressed its intention to "allow full and fair competition to function as a substitute for regulation when consistent with the protection of the ratepayers and otherwise consistent with the public interest." The legislature also expressed its intentions in Section 392.200.4(2), in which the legislature indicated its desire "to bring the benefits of competition to all customers and to ensure that incumbent and alternative local exchange telecommunications companies have the opportunity to price and market telecommunications services to all prospective customers in any geographic area in which they compete."

Finally, SWBT notes that if the Commission were to determine that either SWBT or all LECs were prohibited from offering tariffs that contain term provisions or promotions that build on existing tariffs that contain term provisions, the result would be that the Commission would be prohibiting SWBT and/or CLECs from matching term agreements that are available today. In other words, the Commission would be effectively denying providers the ability to effectively compete in the marketplace.

In summary, restricting SWBT by prohibiting it from offering term agreements in excess of one year while allowing CLECs to offer term agreements in excess of one year may benefit competitors, but it would be unlawful and poor public policy. For these reasons, recommendations that the Commission should treat SWBT in a disparate manner in this docket must be rejected.

2. Should the Missouri Public Service Commission approve MCImetro's Local NationwideOne Promotion, which would apply to customers who make or have made term commitments that can exceed one year?

As long as SWBT is permitted to offer term discount plans, SWBT does not oppose the ability of CLECs to also offer term discount plans. (SWBT's Initial Brief, p. 37, Ex. 7 Unruh Direct, p. 14). However, if SWBT is denied the ability to offer term discount plans, or is in any way limited in the types of discount plans that it can offer, then its competitors must share the same restrictions because: (1) Section 392.200 applies to all telecommunications companies and there is no provision for different treatment of CLECs; and (2) public policy considerations mandate this result. Restricting one provider's (e.g. SWBT's) ability to compete in the marketplace by restricting its ability to offer lower prices to customers is not good public policy because it would deprive customers of the full benefits of a competitive market (choice and

price) and would cause the CLECs to become more dependent on SWBT. (Ex. 7, Unruh Direct, p. 18). In summary, SWBT does not oppose the approval of the above-referenced tariff so long as SWBT's CompleteLink Promotion is approved and the Commission treats SWBT and the CLECs the same with regard to the offering of term contracts.

3. Should the Missouri Public Service Commission approve NuVox's "Free Month" promotion tariff revision, which contains discounts for term commitments that can exceed one year?

SWBT's position, which is set forth in response to Issue Number 2, is equally applicable to this issue and is, therefore, incorporated herein by reference.

4. Should the Missouri Public Service Commission approve MCImetro's proposed revisions to its Local Exchange Service tariff, MO PSC Tariff No. 1, which contains promotional discounts for term commitments that can exceed one year?

SWBT's position, which is set forth in response to Issue Number 2, is equally applicable to this issue and is, therefore, incorporated herein by reference.

5. Should the Missouri Public Service Commission approve MCI WorldCom's Local NationwideOne Promotion, which would apply to customers who make or have made term commitments that can exceed one year?

SWBT's position, which is set forth in response to Issue Number 2, is equally applicable to this issue and is, therefore, incorporated herein by reference.

6. Should the Missouri Public Service Commission approve Brooks' Local NationwideOne Promotion, which would apply to customers who make or have made term commitments that can exceed one year?

SWBT's position, which is set forth in response to Issue Number 2, is equally applicable to this issue and is, therefore, incorporated herein by reference.

7. Should the Missouri Public Service Commission approve TCG St. Louis' proposed revisions to its Local Exchange Services Tariff, MO PSC Tariff No. 2, which contain discounts both for term commitments of one year and for other term commitments for more than one year?

SWBT's position, which is set forth in response to Issue Number 2, is equally applicable to this issue and is, therefore, incorporated herein by reference.

8. Should the Missouri Public Service Commission approve TCG Kansas City's proposed revisions to its Local Exchange Services Tariff, MO PSC Tariff No. 1, which contain discounts both for term commitments of one year and for other term commitments for more than one year?

SWBT's position, which is set forth in response to Issue Number 2, is equally applicable to this issue and is, therefore, incorporated herein by reference.

9. Should the Missouri Public Service Commission approve American Communications Services of Kansas City, Inc. d/b/a e.spire's Voice Internet Pack ("VIP") proposed tariff revision which would offer local, long distance, toll free services, custom calling and integrated 256 kb internet multi-year commitments with discounts?

SWBT's position, which is set forth in response to Issue Number 2, is equally applicable to this issue and is, therefore, incorporated herein by reference.

Conclusion

Despite the CLECs' claims to the contrary, it is clear that the CLECs are requesting the Commission to allocate SWBT's market share to them. If SWBT is denied the ability to offer

term contracts while the CLECs are allowed to offer term contracts, there is an identifiable class of business customers, including the State of Missouri, for whom SWBT will no longer be allowed to compete because such customers demand term contracts. Thus, if the Commission adopts the CLECs' request for disparate regulatory treatment, the Commission would be effectively allocating this market share to the CLECs. The Commission must stop and ask itself, where is it going to stop? Should SWBT provide the CLECs with lists of its customers or lists of its customers' credit ratings and average revenues so that the CLECs only serve what they deem to be "desirable" customers? Or should SWBT be limited in lowering prices in general, or perhaps SWBT should be required to reduce its level of customer service to give CLECs additional regulatory-imposed advantages? Or, should all LECs be allowed to compete for these customers as the legislature envisioned when it enacted Chapter 392? The latter path is the proper course.

As SWBT has aptly demonstrated, optional term discount plans and offers related to existing term discount plans, are designed to meet customer expectations and reflect the type of competitive environment that the legislature sought to foster when it approved local exchange competition in Missouri. Given the clear customer benefits offered through term discount plans, primarily lower prices, and the lack of evidence that SWBT's offering of term discount plans will somehow harm the competitive marketplace, the Commission should determine that SWBT's proposed optional CompleteLink Basic promotion specifically, and term discount plans or promotions that promote term discount plans generally, are appropriate.

The Commission should approve SWBT's optional CompleteLink Basic promotion and should provide clear direction that term discount plans offered by all carriers in the competitive marketplace will be presumed lawful. Additionally, the Commission should determine that there

should be no restrictions on the length of term commitments that are contained in local exchange carriers' tariffs.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Copies of this document were served on the following parties by first-class, postage prepaid, U.S. Mail or via hand-delivery on this 7th day of June, 2002.

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ATTACHMENT SWBT-1



**Attachment SWBT-1: A Summary Correcting The Factual Inaccuracies and
Misleading Statements Set forth in CLECs' Initial Brief**

As SWBT noted at the outset of its Reply Brief, SWBT believes that the CLECs' version of the "facts" is often inaccurate and/or misleading. SWBT, therefore, seeks to correct these inadequacies in this attachment. SWBT notes that it has not provided the Commission with an exhaustive list of all of the instances wherein it believes the CLECs' version of the "facts" is inaccurate and/or misleading. Rather, SWBT has identified eight such instances which will be examined in detail, below.

1. Control of Bottleneck Facilities Is Irrelevant To The Question Of Whether A Local Exchange Carrier Should Be Allowed To Offer Tariffs Which Contain Term Commitments Or Promote An Already-Approved Tariff Which Contains Term Commitments

The CLECs argue that NuVox does not have market power because, unlike SWBT, it does not control "bottleneck facilities" that other carriers depend upon and cannot interfere with competitors by impairing the quality or availability of such facilities or overcharging for them. (See Initial Brief of CLECs, p. 13). While NuVox may not control wholesale telecommunications facilities, Mr. Cadieux readily conceded that there are ample avenues, both regulatory and through immediate litigation, for CLECs to address any alleged impropriety. (T. 183-184, Cadieux). Specifically, if NuVox felt that SWBT impeded it through practices that discriminate regarding the quality or availability of those wholesale facilities, NuVox could: (a) avail itself of the dispute resolution plan in the parties' interconnection agreement; (b) request mediation; (c) file a complaint with the Commission; (d) seek binding arbitration; (e) seek a temporary restraining order; or (f) seek an injunction. (T. 183-184, Cadieux). Further, if NuVox felt that SWBT sought to impose excessive prices for use of its telecommunications facilities, it could file for

arbitration under Section 252 of the federal Telecommunications Act of 1996. (T. 186, Cadieux). In other words, any claim of discrimination and excessive pricing of facilities is appropriately addressed in other proceedings. (Ex. 2, Aron Rebuttal, p. 6).

The claim of potential discrimination and/or excessive pricing, however, does not justify every conceivable plea for special CLEC treatment. Id. A proposal to asymmetrically preclude term contracts (by prohibiting SWBT from offering them while permitting NuVox and other CLECs to do so) would not address problems of discrimination, but instead would only serve to harm business customers who would not reap the full benefits of a competitive marketplace (lower prices and increase options).

2. Market Share Is Not A Good Barometer Of Market Power

The CLECs also contend that NuVox does not have market power because its market share is too small. (Initial Brief of CLECs, p. 13). As Dr. Aron explained during the hearing of this matter, market share is not a good determinant of market power. (T. 60, Aron). A firm may have a very high market share, with little or no market power. Id. This is particularly true in the telecommunications market because of all of the regulatory restrictions that require an incumbent local exchange carrier ("ILEC") to open its markets to competition.

3. NuVox is Not Just Striving Towards Positive EBIDTA, Positive Cash Flow and Positive Earning for Shareholders, It Expects To Achieve These Goals In the Short Term

The uncontroverted evidence in this case is that NuVox's revenues increased 487% from December 31, 2000, to December 31, 2001. (T. 179, Cadieux). During that same one-year period, NuVox's on-net access lines in service grew by 294% from ** _____ ** lines in December 2000, to ** _____ ** lines in December, 2001. Id. at

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180. NuVox's access line churn decreased from 2% in the first quarter of 2001 to 1% in the fourth quarter 2001. Id. Further, from December 31, 2000, to December 31, 2001, NuVox was able to secure \$87 million of additional equity financing. Id. NuVox has made the commitment to be EBITDA positive by sometime in the fourth quarter of 2002. Id. at 181. NuVox also expects to attain positive cash flow by the end of 2003. Id. at 182. Thus, NuVox is succeeding in the marketplace and fully expects to continue to succeed in the marketplace at a time when SWBT, as well as NuVox and other CLECs, have tariffs which contain term commitments.

4. AT&T's Comments Regarding Status Quo Bias Must Be Dismissed As Inapplicable To The Business Environment

AT&T witness R. Matthew Kohly stated that economists recognize that economic entities have a strong tendency to remain at the status quo, even if a change would be in their best interest. (Initial Brief of CLECs, p. 19). Mr. Kohly states that this behavior is labeled "status quo bias." Id.

AT&T's definition of "status quo bias" is factually inaccurate and, even if accurately defined, is not applicable to the business environment. SWBT witness Dr. Debra Aron testified that "status quo bias" is an effect observed in some experimental settings where, for psychological or other reasons, people make inconsistent choices that favor the status quo. (Ex. 2, Aron Rebuttal, p. 7). Regardless of what the status quo is, people tend to weigh the disadvantages of losing it greater than the advantages of alternatives, even if status quo is assigned randomly in the experiments. Id. These choice patterns are considered anomalies because they are contrary to the standard economic theory under which an individual's choices should be internally consistent. Id.

Dr. Aron explained that in the experimental settings that are the basis of the research, status quo bias arises in cases where the subjects are offered choices that involve genuine tradeoffs. Id. at 8. For example, a customer may be offered the choice of buying a low-priced insecticide that carries a relatively high risk of poisoning, or a higher priced insecticide with a lower risk of poisoning. Id. A customer with status quo bias may be influenced in his selection by which offer is presented as the status quo. Id. However, the experiment does not involve a scenario in which the subject is offered choices where one is clearly inferior (e.g. higher priced and more poisonous) or is "not in the best interest" of the subject in any objective sense. Id. The anomaly arises because the choices that subjects make appear to depend on which choice is framed as the status quo, not because any subjects appear to make choices inimical to their interests, as Mr. Kohly claims. Id. The premise that the status quo is not in their best interest simply is not part of these experiments. Id. One, therefore, cannot conclude that people remain with the status quo when it is not in their best interest; quite the reverse is true; it is assumed that in each case their choice reflects what is in their best interest in their own eyes, and the anomaly is that their evaluation of their own best interest appears to be influenced by which choice is presented as the status quo. Id.

Further, aside from the fact that AT&T improperly defines "status quo bias," the status quo bias research has no applicability to the business environment. The evidence is uncontroverted that the subjects of the "status quo bias" experiments were not "economic entities." Id. at 9. The subjects of the status quo bias experiments are individuals, not firms, organizations, or other economic decision makers. Id. There is no reason to believe on the basis of this research that economic entities such as business

firms would exhibit the behavioral inconsistency that these researchers term "status quo bias." Id. Indeed, one would not necessarily expect firms, especially medium and larger firms, to exhibit the same inconsistent choice patterns as individuals because firms, as institutions, can create checks and balances that may serve to offset the effects of status quo bias, and can affirmatively create financial incentives for managers to seek better deals and try new offers. Id. Businesses may use formalized procurement procedures to help the collective enterprise make better decisions. Id. As a result, while individuals may exhibit status quo bias and other anomalies in an experimental setting, businesses may not. Id. Indeed, contrary to status quo bias, business customers also may have an incentive to deal with multiple providers, including new entrants, to help generate some additional price competition. Id. A larger business may throw some of its telecommunications business to an upstart precisely as a way of obtaining comparative and competitive prices with its main supplier. Id. According to a Morgan Stanley survey of the business telecommunications marketplace, large companies (i.e., 250+ employees) use an average of 5.5 carriers to provide voice services and medium companies (i.e. 50-250) typically employ 2.5. Id. A multiple supplier strategy works in direct opposition to status quo bias, and it is an action that is available to a business (especially a larger business) that is generally unavailable to the individual customer (at least for local exchange service). Id. at 10. Because businesses have a different set of options available to them than do typical consumers, and because businesses operate under different incentives and constraints, one cannot extrapolate from the experimental results performed on individuals and make serious conclusions about the decision processes of the firm. Id.

5. SWBT Began Using Term Discount Programs for Basic Local Service Long Before the Passage of the Federal Telecommunications Act That Enabled Local Competition in 1996

The CLECs argue that SWBT began using term discount programs for basic local service just before the passage of the federal act that enabled local competition in 1996. (Initial Brief of CLECs, p. 27). The CLECs' citations to SWBT witness Mr. Steven W. Getz are misleading at best. SWBT witness Mr. Craig A. Unruh testified that term contracts have been a feature of the telecommunications environment even before the initiation of basic local exchange competition brought about by the 1996 Federal and state telecommunications acts. (Ex. 7, Unruh Direct, p. 6). For example, SWBT has offered term discount plans for its Plexar® service for many years in response to competition in the Centrex/PBX market that existed and continues to exist, between SWBT's central office-based solution (i.e. Plexar) and other providers who offer customer premise equipment solutions (e.g. PBXs). Id. SWBT also offers term discounts on its private line and special access services in response to competition in the dedicated circuit marketplace that existed prior to the basic local exchange competition brought about by the Telecom Acts. Id. at 7-8.

6. No LEC Informs Competitors When Its Term Commitments Are Going to Expire

The CLECs argue that SWBT does not inform competitors when SWBT's term commitments are going to expire. (Initial Brief of CLECs, p. 27). While this is true, it is also true that no CLEC posts the expiration dates of its contracts for its business customers so that its competitors know when its term commitments are going to expire. (T. 110, Getz). This argument simply points out the ridiculous nature of the CLECs' claims for regulatory-imposed advantages in the competitive marketplace. Perhaps the

CLECs would also prefer that SWBT inform them each time a SWBT customer calls to complain about an issue so the CLEC has the opportunity to target that particular customer.

7. SWBT Has Not Inappropriately Relied on 911 Data

CLECs contend that SWBT has improperly used confidential 911 data in efforts to promote its retail offerings before the Commission. (Initial Brief of CLECs, p. 27). At the outset, SWBT notes that whether it has improperly used confidential 911 data is not germane to the issue of whether the Commission has the authority to prohibit SWBT from offering lower prices to its business customers through an optional promotion that is tied to a term discount plan. (Ex. 9, Unruh Surrebuttal, p. 12). However, to the extent that the CLECs believe SWBT is acting inappropriately in this case, SWBT adamantly denies such allegations. Id.

In qualifying market share information for this case, SWBT has not inappropriately shared any CLEC specific information with employees in retail marketing. Id. SWBT has only used aggregate data to estimate the CLEC market share in this case. Id. No underlying data has been disclosed to any SWBT retail marketing personnel. Id.

Further, the CLECs misinterpret the Commission's 911 rules. Id. at 12. SWBT, as a 911 service provider, has the obligation to protect access by use of a password to the E-911 database for use by basic local exchange companies for updating subscriber records. Id. This rule does not prohibit SWBT from using aggregated 911 data to assist the Commission in its evaluation of the presence of competition. Id. at 12-13. SWBT

has routinely provided this type of information to both state and federal regulatory agencies for their review and consideration. Id. at 14.

Moreover, the Commission requests wholesale information in SWBT's annual report. Id. Specifically, the Commission requires SWBT to identify the number of resold lines and the quantity of UNE loops and UNE switch ports (i.e. UNE-P) by exchange in its annual report. Id. If the Commission would like a more accurate measure of the level of competition, it should direct the CLECs to provide such information. Id. at 14-15. Only the CLECs know the number of access lines they are serving in SWBT's territory in Missouri. Id. Raising issues related to SWBT's use of 911 data is simply another attempt by the CLECs to divert the Commission's focus in this case from the issues at hand.

8. AT&T's Brand Name Recognition Is Unsurpassed By Any Other Local Exchange Carrier

The CLECs contend that SWBT witness Dr. Debra Aron testified that the incumbent's strong brand name could form a barrier to entry. (Initial Brief of CLECs, p. 29). What Dr. Aron actually stated was that according to a recent study, the tenth most valuable brand name in the world is AT&T's. (T. 48, Aron). Neither SWBT, nor any other telecommunications company, had a brand name that ranked in the top ten. Id.