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November 8, 2001

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FILED³

NOV 08 2001

Missouri Public
Service Commission

RE: Case No. TO-2001-467

Dear Mr. Roberts:

Enclosed for filing in the above-captioned case are an original and eight (8) conformed copies of **STAFF'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW**.

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

Thank you for your attention to this matter.

Sincerely yours,

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WKH:sw
Enclosure
cc: Parties of Record

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

FILED³
NOV 08 2001

Missouri Public
Service Commission

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

Case No. TO-2001-467

STAFF'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

Findings of Fact

The Commission, having considered all relevant evidence in this case, makes the following findings of fact:

1. Southwestern Bell Telephone Company (SWBT) is a large incumbent local telecommunications company subject to price cap regulation under § 392.245 RSMo.¹

2. January 1, 2002, is the first date at which an alternative local exchange telecommunications company (ALEC or CLEC) certified under § 392.455 could have provided basic local telecommunications service in any SWBT exchange for at least five years.

3. The resale by ALECs of Southwestern Bell's telecommunications services does not constitute effective competition for such services. Resellers are additional retail outlets for SWBT's services. Southwestern Bell is providing the resold service and is getting paid for it, albeit at a discount off its retail price.

4. Customers receiving "prepaid" basic local service pay in advance for service. Prepaid basic local service does not provide effective competition to SWBT. First, prepaid basic local service is a resold service which the Commission finds above does not constitute effective competition. Second, SWBT does not provide this service in Missouri. Third, customers who

¹ Statutory references are to RSMo 2000 unless otherwise noted.

subscribe to prepaid basic local service in Missouri pay rates that are many times higher than SWBT's basic local rate and do so because of problematic credit histories.

5. The Commission considers alternative non-Commission regulated communications such as e-mail, cable broadband, and mobile phones, etc., as "other factors" under § 386.020(13)(e) RSMo that might be relevant and necessary to implement the purposes and policies of Chapter 392. However, the evidence did not persuade the Commission that the generalized presence of such alternative communications throughout the state constitutes, in the absence of CLEC-owned facilities-based competition, effective competition to SWBT's telecommunications services.

6. Many CLECs have tariffs under which they purport to provide service in all of SWBT's Missouri exchanges. The mere existence of such "paper competition" does not constitute effective competition, in the absence of CLEC-owned facilities-based competition.

7. The Commission finds that a substantial number of business customers are being provided functionally equivalent or substitutable basic local service from widely available CLEC-owned facilities in the St. Louis and Kansas City exchanges. Accordingly, the Commission finds that effective competition exists for SWBT's core business switched services which are hereby classified as competitive pursuant to § 392.245 RSMo in these two exchanges.

With due consideration to all factors set forth under § 386.020(13), the Commission finds that SWBT's core business services do not face effective competition in its other exchanges. In particular, the evidence did not establish that a substantial number of business customers were being provided service from widely available CLEC-owned facilities in any of SWBT's other exchanges.

8. The "vertical" services associated with CLASS (Customer Local Area Signaling Services) and custom calling features are inseparable from dial tone. Accordingly, the Commission finds that Southwestern Bell's business line related services face effective competition and are hereby classified as competitive pursuant to § 392.245.5 in only the Kansas City and St. Louis exchanges. It also follows that because SWBT's core business services have not been shown to face effective competition in its other exchanges, that its business line related services do not face effective competition in its other exchanges either.

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

This statute provides:

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

10. Section 392.200.8 RSMo allows Southwestern Bell to have individual case basis pricing for Plexar (i.e., Centrex) service in all of its exchanges.

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

12. The Commission finds that a substantial number of residential customers are being provided functionally equivalent or substitutable basic local service from widely available CLEC owned cable telephony facilities in the St. Charles and Harvester exchanges. Accordingly, the Commission finds that efficient competition exists for SWBT's residential access line services which are hereby classified as competitive pursuant to § 392.245.5 in these two exchanges.

With due consideration to all factors under § 386.020(13), the Commission finds that SWBT's residential access line services do not face effective competition in its other exchanges. In particular, the evidence did not establish that a substantial number of residential customers were being provided service from widely available CLEC-owned facilities in any of SWBT's other exchanges.

13. As noted above, vertical services and custom calling features are inseparable from dial tone. Accordingly, the Commission finds that Southwestern Bell's residential access line related services face effective competition and are hereby classified as competitive pursuant to § 392245.5 in only the St. Charles and Harvester exchanges. It also follows that because SWBT's residential access line services have not been shown to face effective competition in its other exchanges, that its residential access line related services do not face effective competition in its other exchanges either.

14. Southwestern Bell's intraLATA toll services (i.e., long distance message telecommunications service) were previously declared transitionally competitive in Case No. TO-93-116.² In Case No. TC-95-246, the Commission extended the initial three-year period for the transitionally competitive classification from January 10, 1996, to January 10, 1999,³ when the services became classified as competitive.

15. Southwestern Bell's Local Plus service is an optional 1-way expanded calling plan that provides subscribers with flat rate unlimited calling to all customers within the LATA. SWBT's Local Plus services do not face effective competition in any exchanges. Competitors cannot provide Local Plus via their own switch or unbundled network elements because, unlike SWBT, competitors cannot avoid the access charges payable to SWBT. Southwestern Bell does

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

not pay itself access charges when Local Plus calls terminate to its own customers, but a competitor trying to provide a facilities-based alternative to Local Plus would pay SWBT access charges for calls terminating to SWBT's customers. To mitigate this circumstance, the Commission previously found in Case No. TT-98-351 that "in order to enable customers to obtain this type of service by using the same dialing pattern, the dialing pattern functionality should be made available for purchase to IXC's [interexchange telecommunications companies] and CLECs on both a resale and unbundled network element basis."⁴ In Case No. TO-2000-667, the Commission determined "that SWBT had not made its Local Plus service available for resale by companies providing service to their customers through the use of UNE's or through the use of their own facilities."⁵ The Commission specifically ordered SWBT to make its Local Plus service available for resale to companies providing service to their customers through the purchase of switching from SWBT or through the use of the company's own switch.⁶ SWBT has petitioned the circuit court to review the Commission's Report and Order in Case No. TO-2000-667. So long as the issue of whether SWBT must ultimately make Local Plus service available to facilities-based carriers remains pending, the risk that predatory pricing may endanger competition remains, and SWBT cannot be said to face effective competition for Local Plus.

16. Southwestern Bell's optional Metropolitan Calling Area (MCA) service is an optional plan available in the St. Louis MCA, the Kansas City MCA and the Springfield MCA. This optional plan provides subscribers with a calling area which includes the respective Metropolitan Exchange and certain customers in other exchanges where MCA service is also

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

⁴ *In the matter of Southwestern Bell Telephone Company's Tariff Revisions Designed to Introduce a LATA-Wide Extended Area Service (EAS) Called Local Plus, and a One-Way COS Plan*, Report and Order issued September 17, 1998, at 39-40.

⁵ *In the Matter of the Investigation into the Effective Availability for Resale of Southwestern Bell Telephone Company's Local Plus Service by Interexchange Companies and Facilities-Based Competitive Local Exchange Companies*, Case No. TO-2000-667, Report and Order issued May 1, 2001, at 14.

available. SWBT's optional MCA service is not classified as interexchange message telecommunications service. Rather, MCA is similar to basic local telephone service. SWBT's optional MCA service cannot be unlinked from SWBT's corresponding basic local service. Accordingly, the Commission finds that Southwestern Bell's optional MCA services face effective competition and are classified as competitive pursuant to § 392.245.5 only for residential customers in the St. Charles and Harvester exchanges. It also follows that because SWBT's residential access line services have not been shown to face effective competition in its other exchanges, that its optional MCA services do not face effective competition in its other exchanges either.

17. Southwestern Bell's WATS and 800 services were previously declared transitionally competitive in Case No. TO-93-116. In Case No. TC-95-246, the Commission extended the initial three-year period for the transitionally competitive classification from January 10, 1996, to January 10, 1999, when the services became classified as competitive.

18. Section 392.200.8 RSMo allows Southwestern Bell to have individual case basis pricing for special access services in all of its exchanges.

19. Southwestern Bell's switched access services do not face effective competition and are not classified as competitive in any exchanges. Switched access by its very nature is a situational monopoly bottleneck service. IXCs have no choice but to pay exchange access rates in order to complete their subscribers' calls. An IXC cannot select a lower cost alternative because there is no lower cost alternative.

20. Southwestern Bell's Common Channel Signaling/Signaling System 7 (SS7) faces effective competition from TSI Telecommunications Services, Inc., and IDN, LLC and is hereby classified as competitive in all of SWBT's exchanges.

⁶ Id. at 14-15.

21. Southwestern Bell's Line Information Data Base (LIDB) services face effective competition from TSI Telecommunications Services, Inc., and IDN, LLC, and are hereby classified as competitive pursuant to § 392.245.5 in all of its exchanges.

22. Directory assistance services are a form of situational monopoly associated with basic local service. Directory assistance is historically accessed when customers dial "411." When customers dial in this manner, the calls are routed to the local exchange carrier. In this regard, directory assistance is too closely linked to basic local service to stand independently. Accordingly, the Commission finds that SWBT's directory assistance services face effective competition and are hereby classified as competitive pursuant to § 392.245.5 for business customers in only the Kansas City and St. Louis exchanges and for residential customers in only the St. Charles and Harvester exchanges. It also follows that because SWBT's business and residential services have not been shown to face effective competition in its other exchanges, that its directory assistance services do not face effective competition in its other exchanges either.

23. Southwestern Bell's Station to Station, Person to Person and Calling Card Services were previously declared transitionally competitive in Case No. TO-93-116. In Case No. TC-95-246, the Commission extended the initial three-year period for the transitionally competitive classification from January 10, 1996 to January 10, 1999, when these services became classified as competitive.

SWBT's other operator services are busy line verification and busy line verification interrupt. These services are a form of situational monopoly associated with basic local service. Operator service is historically accessed when customers dial "0." When customers dial in this manner, the calls are routed to the local exchange carrier. In this regard, operator service is too closely linked to basic local service to stand independently. Accordingly, the Commission finds

that SWBT's busy line verification and busy line verification interrupt services face effective competition and are hereby classified as competitive pursuant to § 392.245.5 for business customers in only the Kansas City and St. Louis exchanges and for residential customers in only the St. Charles and Harvester exchanges. It also follows that because SWBT's business and residential services have not been shown to face effective competition in its other exchanges, that its busy line verification and busy line verification interrupt services do not face effective competition in its other exchanges either.

24. In no Southwestern Bell exchange has an alternative local exchange telecommunications company been certified and provided basic local service for at least five years.

Conclusions of Law

1. The Commission has jurisdiction under § 392.245.5 RSMo to determine whether effective competition exists for each telecommunications service of Southwestern Bell in each of its exchanges. The first two sentences of subsection 5 of this statute read:

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

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

(53) "Telecommunications service", the transmission of information by wire, radio, optical cable, electronic impulses, or other similar means. As used in this definition, "information" means knowledge or intelligence represented by any form of writing, signs, signals, pictures, sounds, or any other symbols. Telecommunications service does not include:

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

(b) Answering services and paging services;

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

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

(e) Services provided by a private telecommunications system;

(f) Cable television service;

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

(h) Electronic publishing services; or

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

Section 386.020(13) provides:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(9) Protect consumer privacy.

2. A finding under § 392.245.5 RSMo that competition exists in an exchange for a service would authorize SWBT to thereafter adjust its rates for such competitive service upward

or downward as it determines appropriate in its competitive environment. Because such authorization is a change in the status quo, SWBT bears the burden of persuasion.⁷

3. The first sentence of § 392.245.5 RSMo creates a rebuttable presumption that each of SWBT's telecommunications services shall be classified as competitive in any exchange in which at least one alternative local exchange telecommunications company has been certified under § 392.455 and has provided basic local telecommunications service in that exchange for at least five years. Those parties who oppose that presumption have the burden of producing substantial evidence to controvert the presumption. Those parties who oppose that presumption have produced substantial evidence to controvert the presumption, and the Commission is determining whether effective competition exists for a service in an exchange from the evidence as if no presumption had ever been operative in the case.⁸

4. The word "services" as used in subsections (a) and (b) of § 386.020(13) RSMo means regulated "telecommunications services." This is because the definition of "services" at § 386.020(47) RSMo includes the phrase "devoted to the public purposes." This phrase can be restated as "subject to public regulation."

5. Sections 392.361 and 392.370 RSMo, pertaining to the classification of services as transitionally competitive and competitive, are not inimical⁹ to § 392.245 RSMo, price cap regulation. Therefore, SWBT's conversion to price cap regulation did not terminate the previous classification of its services under §§ 392.361 and 392.370 RSMo.

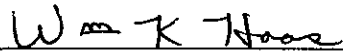
⁷ See, 29 Am. Jur. 2d, Evidence § 158,

⁸ See, *Mercantile Bank and Trust Company v. Wilkins*, 712 S.W.2d 1, 3 (Mo. App. WD 1986).

⁹ See, *Bartley v. Special School District of St. Louis County*, 649 S.W.2d 864, 867 (Mo. banc 1983).

Respectfully submitted,

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Certificate of Service

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



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