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February 17, 1999

Dale Roberts
Secretary/Chief Regulatory Law Judge
Missouri Public Service Commission
Truman State Office Building, 5th Floor
301 West High Street
Jefferson City, Missouri 65101-1517

Re: Case No. TO-99-227

Dear Mr. Roberts:

Enclosed herewith for filing in the above-referenced case please find an original and fifteen (15) copies of Joint Memorandum Regarding Effect of United States Supreme Court Decision and Joint Motion to Alter Procedural Schedule. Please file stamp the extra copy and return in the enclosed self-addressed, postage prepaid envelope to the undersigned for our records.

Very truly yours,

Carl J. Lumley

CJL:dn
Enclosures
cc. Parties of Record (W/Enclosures)

BEFORE THE MISSOURI PUBLIC SERVICE COMMISSION

Application of Southwestern Bell Telephone Company to Provide Notice of Intent to File an Application for Authorization to Provide In-Region InterLATA Services Originating in Missouri Pursuant to Section 271 of the Telecommunications Act of 1996.	))))))	Case No. TO-99-227

JOINT MEMORANDUM REGARDING EFFECT OF UNITED STATES SUPREME COURT DECISION AND JOINT MOTION TO ALTER PROCEDURAL SCHEDULE

COME NOW MCI Telecommunications Corporation, MCImetro Access Transmission Services, LLC, Brooks Fiber Communications of Missouri, Inc., and WorldCom Technologies, Inc., all MCI WorldCom companies (collectively hereinafter referred to as "MCIW"), and jointly submit the following Memorandum Regarding Effect of United States Supreme Court Opinion and Motion to Alter Procedural Schedule in response to Ordered paragraphs numbers 7 and 8 of the Commission's February 10, 1999, order in this case.

Memorandum Regarding Effect of United States Supreme Court Decision

MCIW concurs generally in AT&T's Motion to Require Briefing and Allow for Supplemental Testimony Regarding *AT&T Corp. v. Iowa Utilities Board.*[1] As particularly relevant to this case, the decision in *AT&T v. Iowa Utilities Board* has significant implications in at least three areas: (1) Availability of combinations of unbundled network elements; (2) Continued availability of individual unbundled network elements; and (3) Ability of carriers to opt-into individual terms of other interconnection

[1] 1999 WL 24568, U.S. Jan. 25, 1999 (hereinafter, "*AT&T v. Iowa Utilities Board*").

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agreements under the FCC's "Pick and Choose" rule.[2] Each of these areas will be briefly addressed below.

1. **Combinations of Network Elements – FCC Rule 315(b)**

As part of its decision in *AT&T v. Iowa Utilities Board*, the Supreme Court reinstated FCC Rule 315(b) which forbids an incumbent LEC from separating already-combined network elements before leasing them to a CLEC. This rule had been vacated by the United States Court of Appeals for the Eighth Circuit. The Supreme Court held that the Telecommunications Act does not stand for the proposition pressed by the incumbent LECs – i.e., that the Act contemplates the leasing of network elements only in discrete pieces, finding,

> It was entirely reasonable for the Commission to find that the text [of the Act] does not command this conclusion. It forbids incumbents to sabotage network elements that *are* provided in discrete pieces, and thus assuredly contemplates that elements *may* be requested and provided in this form (which the Commission's rules do not prohibit). But [the Act] does not say, or even remotely imply, that elements *must* be provided only in this fashion and never in combined form. (emphasis in original). *AT&T v. Iowa Utilities Board* at 27.

The Court went on to explain:

> The reality is that §251(c)(3) is ambiguous on whether leased network elements may or must be separated, and the rule the Commission has prescribed is entirely rational, finding its basis in §251(c)(3)'s nondiscrimination requirement. As the Commission explains, it is aimed at preventing incumbent LECs from "disconnect[ing] previously connected elements, over the objection of the requesting carrier, not for any productive reason, but just to impose wasteful reconnection costs on new entrants." [quoting the FCC's Reply Brief]. It is true that Rule 315(b) could allow entrants access to an entire preassembled network. In theabsence of Rule 315(b), however, incumbents could impose wasteful costs on even those carriers who requested less than the whole network. It

[2] The Supreme Court's decision addresses other issues, as well, including the FCC's authority under Section 201(b) of the Communications Act, and the FCC's jurisdiction to adopt rules regarding interconnection and unbundled network element pricing, dialing parity and rural exemptions.

is well within the bounds of the reasonable for the Commission to opt in favor of ensuring against an anticompetitive practice. *Id.* at 27-28.

In addition to clarifying the obligations of incumbent LECs under Section 251 of the Act, the Supreme Court's reinstatement of Rule 315(b) flows into the standard for evaluating SWBT's compliance with Section 271's requirements, because just, reasonable and nondiscriminatory access to unbundled network elements is embodied in the competitive checklist. See, Section 271(c)(2)(B)(ii). In other words, putting aside for the moment all other issues raised in the testimony regarding SWBT's non-compliance with the competitive checklist, SWBT must – in order to have any chance of meeting Section 271's requirements -- demonstrate that its current practices do not run afoul of the prohibition against separating already-combined network elements.

However, as AT&T points out in its motion, SWBT's testimony is premised on the assumption – now conclusively rejected -- that separation of already-combined elements is permissible. In this regard, the Supreme Court's decision is a changed circumstance from those prevailing at the time of SWBT's initial filing in this case. Given that fundamental change in circumstances, SWBT's filing in this case is now patently defective.

2. Continued Availabilty of Unbundled Network Elements Pending Remand of Rule 319.

The FCC's Rule 319 identifies a minimum set of seven unbundled network elements which an incumbent LEC must provide to requesting carriers. In *AT&T v. Iowa Utilities Board* the Supreme Court held that the FCC did not properly construe and apply the "necessary and impair" standard of Section 251(d)(2) of the Act when

identifying those UNEs, and has remanded Rule 319 to the FCC for reconsideration under the statutory criteria as now construed by the Court.

As noted by AT&T in its motion, SWBT's position regarding the extent to which it will make the seven originally-identified UNEs available pending resolution of the remand of Rule 319 has not been explained in its testimony. Uncertainty regarding the availability of UNEs pending resolution of the remand will put a chill on competitive entry. Worse still would be the effect of explicit retrenchment by SWBT regarding the number of UNEs it will make available, or possible attempts to offer the set of the original seven UNEs but only at changed rates or conditions. In this context, reaffirmation by SWBT of UNE availability pending the FCC remand -- at the rates and under the conditions determined in the Commission's arbitration decisions and in interconnection agreements -- is necessary. Failure by SWBT to make that reaffirmation would, under the circumstances, constitute a denial of just, reasonable and nondiscriminatory access to unbundled network elements under Sections 251 and 252 of the Act, and a failure to comply with the unbundled network element checklist item of Section 271. As it stands, SWBT's Application in this case is defective due its lack of reaffirmation of UNE availability pending the FCC remand on Rule 319.

3. "Pick and Choose" Rule

The Supreme Court also reversed the Eighth Circuit by reinstating the FCC's so-called "Pick and Choose" rule, which provides:

> An incumbent LEC shall make available without unreasonable delay to any requesting telecommunications carrier any individual interconnection, service, or network element arrangement contained in any agreement to which it is a party that is approved by a state commission pursuant to

> section 252 of the Act, upon the same rates, terms, and conditions as those provided in the agreement.

In upholding the validity of the FCC's rule, the Supreme Court observed that, "it is hard to declare the FCC's rule unlawful when it tracks the pertinent statutory language almost exactly," that the FCC's interpretation of the statute "is not only reasonable, it is the most readily apparent," and that "in some respects the FCC's rule is more generous to incumbent LECs than §252(i) [the underlying provision of the Act] itself."

Like its policy regarding separation of already-combined network elements, SWBT's current policy with respect to allowing parties to opt-into other interconnection agreements, and its testimony in this case explaining that policy, is premised on the Eighth Circuit's invalidation -- now superseded -- of the relevant FCC Rule. SWBT's current policy in this area is at odds with the FCC's Rule and the underlying provision of the Act – Section 252(i) -- which it implements. As relevant to this case, SWBT's now outdated policy is at odds with various checklist items, because by denying carriers the option of adopting "any individual interconnection, service, or network element arrangement contained in any agreement", SWBT effectively impedes carriers from obtaining just, reasonable and nondiscriminatory access to the various items which are included within the checklist.

Motion To Alter Procedural Schedule

For the reasons explained above, SWBT's attempt to demonstrate fulfillment of the competitive checklist by its testimony in this case is patently defective due to the changed circumstances of the Supreme Court's decision in *AT&T v. Iowa Utilities Board* and the resulting reinstatement and/or remand of various FCC rules. In the absence of

SWBT's announcement of revised policies and practices consistent with the FCC's Rules and the new landscape after the Supreme Court's decision, SWBT's filing must be dismissed. So, the question is presented, how best to proceed under these circumstances, when all prefiled testimony has been filed and hearings are quickly approaching – beginning March 1? MCIW offers the following recommendations:

(a) SWBT should be required to timely inform the Commission whether it intends to revise its policies and practices concerning the issues implicated by the decision in *AT&T v. Iowa Utilities Board*. (Presumably that indication may be provided in an SWBT filing made today in response to the Commission's February 10 Order);

(b) If SWBT fails to promptly indicate its intent to revise its policies and practices consistent with the Supreme Court's decision, the Commission need proceed no further, but instead should dismiss this case due to the resulting patent defects in SWBT's qualifications for authority under Section 271;

(c) If SWBT expresses an intent to revise its policies to conform to the Supreme Court's decision, the Commission should cancel the current hearing and convene a second prehearing conference to permit the parties an opportunity to construct a new procedural schedule which will accommodate the submission of supplemental testimony by SWBT, and responsive testimony by all other parties. At this time, it is difficult for MCIW to propose a specific revised procedural schedule without knowledge of how much time SWBT will require to develop revised policies and file supplemental testimony explaining those revised policies. Given the nature of the issues, MCIW would suggest that other parties be allotted several weeks to develop responsive testimony.

WHEREFORE, MCIW respectfully requests the Commission to: (a) direct SWBT to confirm that it intends to submit supplemental testimony explaining how it has revised its policies and practices to achieve consistency with the Supreme Court's decision in *AT&T v. Iowa Utilities Board*; (b) Cancel the remainder of the current procedural schedule in this case and set a second prehearing conference for purposes of the parties' recommending a revised procedural schedule which will accommodate the submission of supplemental testimony and responsive testimony; or (c) dismiss this case if SWBT fails

to confirm its intent to revise its policies and practices and submit supplemental testimony to achieve consistency with the Supreme Court's decision.

Respectfully Submitted,

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Certificate of Service

A true and correct copy of the foregoing was served upon the parties identified on the attached service list on this 17 day of July, 1999, by placing same in the U.S. Mail, postage paid.

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