AT&T

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Missouri Public Service Commission

February 8, 1999

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

Re: Case No. TO-99-227

Dear Judge Roberts:

Attached for filing with the Commission is the original and fourteen (14) copies of AT&T Communications of the Southwest, Inc.'s Motion To Require Briefing and Allow for Supplemental Testimony Regarding AT&T Corp. V. Iowa Utilities Board and to Modify Procedural Schedule in the above-referenced case.

Please call me on 635-1320 if you have any questions. Thank you for your assistance in this matter.

Sincerely,

Michelle Sloane Bourianoff

Michelle Sloane Bourianoff
AT&T Attorney

Att.

cc: All Parties of Record

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

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| 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 |

**MOTION TO REQUIRE BRIEFING AND ALLOW FOR SUPPLEMENTAL TESTIMONY REGARDING *AT&T CORP. V. IOWA UTILITIES BOARD***

COMES NOW AT&T COMMUNICATIONS OF THE SOUTHWEST, INC., TCG ST. LOUIS, INC., an AT&T company, and TCG KANSAS CITY, INC., an AT&T company, (hereafter collectively "AT&T"), and files this Motion to Require Briefing and Allow For Supplemental Testimony Regarding *AT&T Corp. v. Iowa Utilities Board* and to Modify Procedural Schedule and in support whereof would show as follows:

**Introduction**

On January 25, 1999, the United States Supreme Court issued its decision in *AT&T Corp. v. Iowa Utilities Board*, 67 U.S.L.W. 4104, 1999 U.S. LEXIS 903. That decision has a direct and substantial impact on the issues to be decided in this proceeding. From AT&T's perspective, the decision adds clear and compelling grounds for rejecting Southwestern Bell Telephone Company's ("SWBT's") application for long-distance authority, because the case presented in SWBT's direct testimony cannot be squared with FCC rules that the Supreme Court has reinstated. SWBT, for its part, has reacted publicly to the decision with a statement that casts new doubt over the basic terms on which it will be willing to do business with competitive local exchange carriers

("CLECs"): "this decision's invalidation of 47 U.S.C. § 51.319 calls into question whether . . . CLECs are entitled to obtain from SWBT dark fiber **or any other UNE.**"[1]

Unfortunately, the Supreme Court decision was not available to the parties as they prepared their direct and rebuttal testimony. In order for this Commission to decide this case based on what we now know to be the Alaw of the land,@ rather than prior speculation about what the law ought to be, AT&T requests that the Commission provide all parties the opportunity to submit supplemental testimony and briefs addressing the Supreme Court decision. That process should begin with the requirement that the applicant, Southwestern Bell Telephone Company ("SWBT"), identify how it has or will modify the terms and conditions on which it offers Missouri competitors access to unbundled network elements ("UNEs) and other items, as a result of the Supreme Court decision.

## Procedural Background

The deadline for filing rebuttal testimony in this proceeding was January 25, 1999. The Supreme Court issued its decision in *AT&T Corp. v. Iowa Utilities Board* the morning of that day. As a result, no party was able to take account of the Supreme Court=s ruling in the testimony presented in their cases in chief. SWBT had filed its direct case well before the decision. Staff and other participants had to have their rebuttal testimony ready for filing on January 25. As AT&T explained in a letter accompanying its rebuttal filing, " . . . the timing of today=s announcement has made it impossible for AT&T to incorporate any consideration of today=s ruling in the rebuttal testimony being

[1] Texas PUC Docket Nos. 17922 and 20268, SWBT Reply Brief at 9, n. 3 (January 29, 1999)

filed today. The procedural schedule affords parties in AT&T=s position no further opportunity to submit testimony (anticipating that SWBT will not file testimony in rebuttal to its own direct case)." AT&T has not yet had the opportunity to review SWBT=s surrebuttal testimony to determine whether it has addressed the Supreme Court decision in that filing. Certainly no other party has had the opportunity to address that decision in testimony, and, under the present schedule, none will. Accordingly, AT&T now presents this motion.

## Analysis

The Supreme Court's decision impacts the present proceedings in two ways, each of which calls for opening the record to supplemental testimony.

### 1. The Parties Should Have An Opportunity To Present Testimony Regarding SWBT's Compliance With FCC Rules Reinstated By The Supreme Court

In *AT&T Corp. v. Iowa Utilities Board*, the Supreme Court reinstated two FCC rules that had been vacated by the Eighth Circuit – Rule 315(b), which forbids an incumbent to separate already-combined network elements before leasing them to a competitor, and the FCC's "pick and choose" rule, which enables a carrier to demand access to any individual interconnection, service, or network arrangement on the same terms and conditions that the incumbent has given anyone else in an approved interconnection agreement, without having to accept the other provisions of that agreement. 1999 U.S. LEXIS 903 at *41-47. The Supreme Court also reversed the Eighth Circuit's decisions that the FCC had lacked jurisdiction to issue its rules regarding

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(emphasis added).

pricing, dialing parity, and certain other intrastate telecommunications matters. *Id.* at *18-30.

The reinstatement of these rules changes the premises on which SWBT and other parties filed their direct cases. SWBT must show that it meets the requirements of the Act in areas governed by these now-reinstated rules: e.g., access to UNE combinations; dialing parity. Other parties are entitled to an opportunity to put forward testimony identifying the additional deficiencies that now can be seen in SWBT's application as a result of the reinstatement of these rules.

For example, under one of the Eighth Circuit rulings reversed by the Supreme Court, incumbent LECs would have had some discretion to "separate" network elements before providing them to CLECs, who would then have to recombine them. SWBT has offered the direct testimony of William Deere, describing how SWBT proposes to provide the separated elements to CLECs for combining. AT&T has submitted the testimony of Robert Falcone, showing that the methods SWBT has chosen – requiring CLECs to physically reconnect elements in collocation-type arrangements remote from the main distributing frame of the local switch – are discriminatory and competitively unworkable. Now, however, the Supreme Court has reversed the underlying assumption that SWBT has any discretion to separate network elements before providing them to CLECs. The Supreme Court reinstated the FCC's rule prohibiting such separation, finding that rule "entirely rational," grounded in section 251(c)(3)'s nondiscrimination requirement, and serving to prevent incumbent LECs from "disconnecting 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." *Id.* at *44 (quoting FCC reply brief). The parties should have the opportunity to make a record of how SWBT's Missouri offerings fail to demonstrate compliance with the reinstated prohibition on separating elements.[2]

Similarly, SWBT offered direct testimony affirming that, on a going-forward basis, it will not offer a CLEC the option to obtain the terms of another party's interconnection agreement, unless the CLEC opts to take the entire terms of that agreement. Auinbauh Direct at 8. That position plainly contradicts the FCC's "pick and choose" rule, which also was reinstated by the Supreme Court. 1999 U.S. LEXIS 903 at *45-47. Here, too, the parties should be entitled to make a record of SWBT's noncompliance. SWBT, for its part, surely will have some new explanation or position to offer on this subject. Developing a record for the FCC that tests SWBT's application against all of the reinstated FCC rules is in the interest of all parties and this Commission. Supplemental prepared testimony offers the best means for developing that record efficiently and comprehensively.

### 2. The Commission Should Have An Understanding Of How The Supreme Court Decision Will Affect The Terms On Which SWBT Will Do Business With Its Competitors

A second aspect of the Supreme Court decision – or, more precisely, SWBT's reaction to that decision -- calls for opening the record to supplemental testimony. The

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[2] SWBT's direct testimony makes clear that the most it offers is grudging, temporary compliance with this Commission's arbitration ruling enforcing SWBT's contractual undertaking not to separate already-connected UNEs, while it appeals that ruling (and the experience of other carriers may call into question even that limited compliance). Meanwhile, it will not voluntarily enter into any agreement that contains those terms, but requires any carrier who wishes such terms to adopt AT&T's interconnection agreement in full. Bailey Direct at 18-19. SWBT has affirmed very clearly and recently that it will not renew UNE combination terms included in its AT&T Texas contract under a similar arbitration ruling, and it can be expected to take the same position here. *See* Texas 271 Proceedings, Affidavit of Michael C. Auinbauh at ¶ 18 (December 1, 1998).

Supreme Court vacated FCC Rule 319, which identifies a minimum of seven network elements that an ILEC must provide to requesting carriers; the Court determined that the FCC did not adequately consider the "necessary and impair" standards of section 251(d)(2) of the Act in promulgating that rule. *AT&T Corp. v. Iowa Utilities Board*, 1999 U.S. LEXIS 903 at *32-40. On remand, the FCC will have to reconsider the list of network elements that an ILEC must make available to requesting carriers.

AT&T submits that the full complement of elements should be retained in Rule 319 on remand. However, no CLEC in SWBT territory can take for granted that SWBT will continue to provide access to those elements, for SWBT has taken a different view. In a disputed proceeding before the Texas Commission, SWBT has filed a brief that contains a very broad statement about this aspect of the Supreme Court decision: "this decision's invalidation of 47 U.S.C. § 51.319 calls into question whether WCC [the party to the Texas dispute] or other CLECs are entitled to obtain from SWBT dark fiber **or any other UNE**."[3]

What elements, in SWBT's opinion, will CLECs no longer be entitled to obtain in Missouri and elsewhere after the Supreme Court decision? Dark fiber? Subloop components? Local loops themselves? Local switching? Dedicated and common transport? It is impossible to say. And, regardless of what SWBT believes that CLECs are entitled to, what elements is SWBT committed to providing? And for how long? Until existing contract terms expire?

When the Supreme Court decision and these types of concerns were raised at a

[3] Texas PUC Docket Nos. 17922 and 20268, SWBT Reply Brief at 9, n. 3 (January 29, 1999) (emphasis added).

February 4, 1999 Open Meeting before the Texas Commission in pending 271 proceedings, that Commission directed a procedure that will begin with the parties submitting questions to SWBT, through Staff, regarding the impact of this decision on SWBT's positions, will require SWBT to identify the network elements that it will commit to provide in Texas for the next five years, regardless of the outcome of FCC remand proceedings, and will provide for briefing on the impact of the Supreme Court decision by the end of the month.[4] A similar procedure is called for here, in order for this Commission to be able to make a recommendation that is based on an understanding of the true state of the marketplace faced by SWBT's would-be competitors in Missouri. Such an understanding only can be reached by probing the terms on which SWBT will provide access to UNEs in the wake of the Supreme Court decision vacating Rule 319. Will SWBT attempt to invoke the intervening law provisions of its existing agreements and retract access to certain UNEs? What UNEs will SWBT make available to a carrier who approaches it for a new agreement today? What UNEs will SWBT make available in late 2000, when the initial term of the AT&T agreement expires? Answers to these questions are essential to a judgment about whether the local telecommunications marketplace is irretrievably open to competition. The procedural schedule should be modified to require SWBT's answers to a comprehensive list of such questions and to allow supplemental testimony from the parties to explain and respond to those answers.[5]

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[4] Texas PUC Project No. 16251, Open Meeting (Feb. 4, 1999) (transcript not yet available).

[5] AT&T served SWBT on February 4, 1999 with a set of data requests that, *inter alia*, seek information about how the Supreme Court decision has affected SWBT's offerings and policy positions, and those questions would serve as a suitable starting point for developing the record that is required here. *See* AT&T Communications of the Southwest, Inc.'s First Set of Data Requests To Southwestern Bell Telephone Company, Request Nos. 1-4. However, answers to those requests will not be due until the eve

## Relief Requested

Supplemental testimony and briefing is warranted to address the impact of this long-awaited Supreme Court decision. The necessary first step is for SWBT to make a formal statement of how its positions on relevant issues are or will be modified as a result of this decision. For all the reasons stated above, AT&T requests the Commission to enter an order providing for the following:

- $ Southwestern Bell will be required to file testimony stating how it has or will modify its positions regarding the terms and conditions on which it offers Missouri competitors access to unbundled network elements and other items, as a result of the Supreme Court decision (this could be accomplished by obtaining SWBT's answers to Request Nos. 1-4 of AT&T's First Set of Data Requests or, alternatively, by reference to the statement SWBT is being required to make on these subjects in Texas, which may be due as early as February 12 -- unless SWBT proposes to offer different terms in Missouri); SWBT's statement may be accompanied by supplemental testimony regarding other aspects of the impact of the Supreme Court decision on the issues in this proceeding;

- $ the opposing parties will then have the opportunity to file supplemental testimony addressing SWBT's statement and the issues raised by the Supreme Court decision;

- $ all parties than may brief the impact of the Supreme Court decision on the issues to be decided in this proceeding, taking account of the supplemental testimony.

AT&T further requests such modification to the procedural schedule at the Commission may deem necessary to accomplish these steps. Schedule matters can best be addressed once SWBT determines how quickly it will be prepared to provide a formal statement of how the terms and conditions offered to Missouri competitors will be changed by *AT&T Corp. v. Iowa Utilities Board.*

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of hearing. A schedule for supplemental testimony and briefing will more efficiently and effectively

Wherefore, premises considered, AT&T requests that the Commission provide for supplemental testimony and briefing to address the impact of the Supreme Court decision, and to modify the procedural schedule for these purposes, as more specifically set forth above.

Respectfully submitted,

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**ATTORNEYS FOR AT&T**

## CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of February 1999, a true and correct copy of the foregoing was served upon all counsel of record on the attached service list.

Michelle Sloane Bourianoff

develop the record than cross-examination on the basis of last-minute discovery responses.