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February 17, 1999

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RE: Case No. TO-99-227

Dear Mr. Roberts:

Enclosed for filing in the above-captioned case are an original and fourteen (14) conformed copies of a **LEGAL MEMORANDUM**.

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

Thank you for your attention to this matter.

Sincerely yours,

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Enclosure
cc: Counsel of Record

FILED

FEB 17 1999

Missouri Public
Service Commission

BEFORE THE MISSOURI PUBLIC SERVICE COMMISSION

OF THE STATE OF MISSOURI

FILED
FEB 17 1999
Missouri Public
Service Commission

In the Matter of the 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

LEGAL MEMORANDUM

COMES NOW the Staff of the Missouri Public Service Commission ("Staff") and files this legal memorandum in response to the Commission's February 10, 1999 *Order Granting Interventions, Granting Participation, Requesting Briefing of Legal Issues, Notice of Ex Parte Contacts, and Notice of Time to Respond*.

Procedural Background

In its Motion to Require Briefing and Allow for Supplemental Testimony Regarding *AT&T Corp. v. Iowa Utilities Board*, AT&T Communications of the Southwest, Inc., TCG St. Louis, Inc., an AT&T company, and TCG Kansas City, Inc., an AT&T company (collectively referred to as "AT&T"), AT&T correctly notes that the *Iowa Utilities Board* decision was issued by the United States Supreme Court on January 25, 1999. However, no pleading was filed by AT&T until February 8, 1999 requesting that the Commission permit supplemental testimony and briefing **prior** to any hearings.

95.

The Staff agrees that the *Iowa Utilities Board* decision will have an impact on the final recommendation of the Commission. The Staff does not agree that additional testimony and briefing is necessary prior to the currently scheduled hearings that begin on March 1, 1999.

The parties were unable to reach agreement on a procedure to be used for the evidentiary hearings scheduled to begin March 1, 1999. Therefore, two alternatives were filed. Both proposed hearings would permit additional questions to be posed that would accomplish the same result as that requested by AT&T. Proposal A provided for traditional cross-examination as well as questioning of witnesses in panels, by issue. Proposal B was to utilize the panel method for questioning witnesses, by issue, exclusively. Either proposal would give the parties and Commission an opportunity to ask additional questions concerning SWBT's compliance/noncompliance with 47 U.S.C. § 271.

Analysis

While it is true that the reinstatement of the Federal Communications Commission ("FCC") rules may change "the premises on which SWBT and other parties filed their direct cases" as AT&T claims, SWBT is the applicant in this case. As AT&T points out in its Motion, SWBT bears the burden of showing that it meets the requirements of Section 271 of the Telecommunications Act of 1996. If SWBT believes that the evidence that it has presented as pre-filed testimony is sufficient to meet that burden, it should be permitted to go forward with its case. Similarly, if AT&T, or any other party, believes that SWBT has not met its burden, it should put those arguments in the post-hearing briefs.

If the Commission, in its Order, concludes that SWBT has not shown full compliance with the prerequisites for providing in-region InterLATA services, additional proceedings can be established at that time. The Staff recommends that the Commission go forward with the

hearings as currently scheduled, issue an Order describing its conclusions relating to SWBT's compliance, and, if necessary, order further proceedings to address those requirements that have not been met.

There are specific checklist items that will be impacted by the Supreme Court decision. These include any requirements relating to nondiscriminatory access to network items, those concerning pricing of unbundled network elements ("UNEs"), and SWBT's position on disassembling functions into component elements before providing them as UNEs.

These requirements could be impacted by several holdings of the Supreme Court. First, the Court invalidated the FCC's rule (47 CFR 51.319(1997)) which relates to what network elements must be made available to competitors.

The FCC held that:

To give effect to both sections 251(c)(3) and 251(d)(2), we conclude that the proprietary and impairment standards in section 251(d)(2) grant us the authority to refrain from requiring incumbent LECs to provide all network elements for which it is technically feasible to provide access on an unbundled basis. *First Report and Order*, ¶ 279.

The Court responded:

The Commission's premise was wrong. Section 251(d)(2) does not authorize the Commission to create isolated exemptions from some underlying duty to make all network elements available. It requires the Commission to determine on a rational basis which network elements must be made available, taking into account the objectives of the Act and giving some substance to the "necessary" and "impair" requirements. The latter is not achieved by disregarding entirely the availability of elements outside the network, and by regarding any "increased cost or decreased service quality" as establishing a "necessity" and an "impair[ment]" of the ability to provide . . . services. *Slip Op.* at 24.

Since the Supreme Court invalidated the FCC rule defining what network elements must be made available to competitors, it will be difficult to determine whether SWBT has complied with

requirements concerning access to network elements until a new list has been developed by the FCC.

Additionally, the Court reinstated the FCC's rules prohibiting Incumbent Local Exchange Company's ("ILECs") from disassembling functions into component elements before providing them as UNEs and the pick-and-choose provision of 47 U.S.C. 252(l). This section provides that ILECs "shall make available any interconnection, service, or network element provided under an agreement under this section to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement." Currently, SWBT requires that a requesting telecommunications carrier take the entire section(s) of an existing agreement, rather than allowing a company to "pick and choose" among several existing agreements.

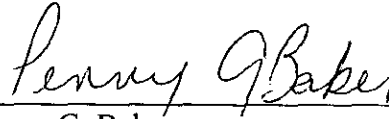
Conclusion

The Staff has not had the opportunity, since the Commission issued its February 10, 1999, *Order*, to evaluate the Supreme Court's decision as it relates to each individual checklist item. Staff has attempted to briefly address major areas of impact on the case as a whole that have arisen out of the Supreme Court's decision in *Iowa Utilities Board*.

The Staff recommends that the Commission go forward with the hearings as currently scheduled, issue an Order describing its conclusions relating to SWBT's compliance, and, if necessary, order further proceedings to address those requirements that have not been met.

Respectfully submitted,

DANA K. JOYCE
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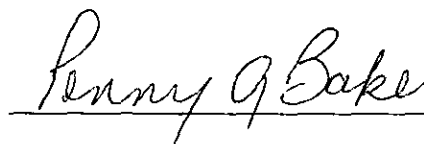
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Certificate of Service

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 17th day of February 1999.



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