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Southwestern Bell

February 17, 1999

The Honorable Dale Hardy Roberts
Secretary/Chief Regulatory Law Judge
Missouri Public Service Commission
301 West High Street, Floor 5A
Jefferson City, Missouri 65101

Re: Case No. T0-99-227

Dear Judge Roberts:

Enclosed, for filing in the above-captioned case, are an original and fourteen copies of Southwestern Bell Telephone Company's Legal Memorandum Addressing the Effect of the United States Supreme Court's Decision in AT&T Corp. v. Iowa Utilities Board.

Thank you for bringing this matter to the attention of the Commission.

Very truly yours,

Anthony K. Conroy/tm

Anthony K. Conroy

Enclosure

cc: All Attorneys of Record

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

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

SOUTHWESTERN BELL TELEPHONE COMPANY'S LEGAL MEMORANDUM ADDRESSING THE EFFECT OF THE UNITED STATES SUPREME COURT'S DECISION IN AT&T CORP. v. IOWA UTILITIES BOARD

COMES NOW Southwestern Bell Telephone Company (SWBT), and pursuant to the Missouri Public Service Commission's (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, submits its legal memorandum addressing the effect of the United States Supreme Court's decision in AT&T Corp. v. Iowa Utilities Board, 67 U.S.L.W. 4104 (U.S. January 25, 1999 (Nos. 97-826 et al.)). As discussed below, the decision has little impact on SWBT's application for authority to provide long distance services, and should not result in a delay in the current procedural schedule in this case.

I. INTRODUCTION

The Supreme Court has now clarified the ground rules for local competition under the Telecommunications Act of 1996 (Act). Although additional issues may well arise with ongoing implementation of the Act, the framework for local competition in Missouri is in place and this Commission and the FCC can now take the final steps toward full interLATA competition. Together with this Commission's arbitration decisions and SWBT's voluntarily negotiated

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interconnection agreements, the holdings of AT&T Corp. v. Iowa Utilities Board provide a solid foundation for approval of SWBT's application for relief under section 271. Certainly, there is nothing in the Supreme Court's decision which should delay the Commission from proceeding expeditiously in early March to develop the record it needs to consult with the FCC regarding SWBT's Section 271 application.

II. THE SUPREME COURT'S DECISION

In a majority opinion by Justice Scalia, the Supreme Court addressed three broad aspects of the Eighth Circuit's decision in Iowa Utilities Board v. FCC, 120 F.3d 753 (8th Cir. 1997). First, the Supreme Court reviewed the Eighth Circuit's holding that the states, not the FCC, generally have jurisdiction over the prices and terms of intrastate facilities and services made available pursuant to the 1996 Act. See id. at 793-807. Second, the Court considered FCC rules that established terms and conditions under which incumbent LECs must make pieces of their networks available to new entrants. See id. at 807-18. Finally, the Court considered the legality of the FCC's "pick and choose" rule, which the Eighth Circuit had struck down as inconsistent with the Act's preference for voluntary negotiations between carriers. Id. at 800-01. Each of these separate aspects of the Supreme Court's decision is discussed in detail below.

A. Jurisdictional Issues

Like the Eighth Circuit, the Supreme Court considered jurisdictional issues principally in the context of pricing. Unlike the court of appeals, however, the Supreme Court found that the FCC does have jurisdiction under 47 U.S.C. § 201(b) to promulgate rules to guide state decisions on the pricing of unbundled network elements ("UNEs") and resold services. Slip op. at 9-17; see generally 47 C.F.R. §§ 51.501-51.515, 51.601-51.611, 51.701-51.717; see also 120 F.3d at 800 n.21 (excluding some provisions of FCC pricing rules from court's jurisdictional decision).

Importantly, the Supreme Court did not hold that the FCC's TELRIC, geographic deaveraging, and resale pricing rules are substantively valid. The Eighth Circuit had not yet ruled on that issue, see 120 F.3d at 800, and, as Justice Breyer pointed out in his dissent, the permissibility of the FCC's pricing approach was not before the Court. See slip op. at 17 (Breyer, J., concurring in part and dissenting in part). The issue of whether the FCC's pricing rules are consistent with the 1996 Act and otherwise lawful will be addressed following formal transmittal of the Supreme Court's judgment back to the Eighth Circuit. See Sup. Ct. R. 45.3 ("[A] formal mandate does not issue unless specifically directed; instead, the Clerk of this Court will send the clerk of the lower court a copy of the opinion or order of this Court and a certified copy of the judgment.").

The Supreme Court also affirmed FCC jurisdiction to issue other rules that the Eighth Circuit had struck down. These rules address state review of interconnection agreements that predate the 1996 Act, 47 C.F.R. § 51.303; exemptions to section 251's requirements for certain rural carriers, id. § 51.405; and intrastate dialing parity, id. §§ 51.205-215. See slip op. at 17. Again, future decisions will determine when, and how, the Supreme Court's orders on these issues will be given effect.

B. UNEs

The Supreme Court also addressed a series of related issues regarding the terms under which incumbent LECs must unbundle their local networks for new entrants.[1] The Court agreed

[1] The Supreme Court was not asked to – and did not – reconsider the Eighth Circuit's invalidation of several FCC rules concerning access to UNEs. The invalid rules are the FCC's requirement that incumbent LECs provide interconnection and UNEs of superior quality to what the incumbent itself uses (47 C.F.R. §§ 51.305(a)(4), 51.311(c)); the FCC's requirement that incumbent LECs combine UNEs in any technically feasible manner (47 C.F.R. § 51.315(c)); and the FCC's requirement that incumbent LECs combine their UNEs with the CLEC's own elements (47 C.F.R. § 51.315(d)). See 120 F.3d at 812-18 & n.38. Consequently, these rules remain vacated and unenforceable.

with the FCC that there is no absolute prohibition on defining UNEs to include items that are not part of the physical facilities and equipment used to provide local telephone service. Slip op. at 19-20. The Court made clear, however, that it was not approving the FCC's holdings that incumbent LECs must make particular UNEs available. The Court found that the FCC had essentially ignored Congress's dictate to take into account (1) whether "access to such network elements as are proprietary in nature is necessary;" and (2) whether "the failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer." 47 U.S.C. § 251(d)(2); see slip op. at 20-25. Accordingly, the Court vacated the FCC rule (47 C.F.R. § 51.319) that established the following mandatory UNEs: the local loop, the network interface device, switching, interoffice transport, signaling and call-related databases, OSS, operator services, and directory assistance. On remand, the FCC will determine the status of these UNEs. The FCC also might promulgate new rules for determining whether other network elements must be made available pursuant to section 251(c)(3).

The Court next turned to issues surrounding the so-called "UNE platform." It agreed with the FCC that CLECs need not own a piece of a network to obtain UNEs, and also that incumbents must, upon a CLEC's request, leave already-combined network elements physically assembled. Slip op. at 25-28. The Court observed, however, that debates about the availability of the UNE platform "may be largely academic" because – due to the invalidity of FCC Rule 51.319 – new entrants may no longer have a right to receive all the UNEs that make up incumbents' finished services. Slip op. at 25, 26.

C. Pick and Choose

Finally, the Supreme Court reversed the Eighth Circuit and upheld the FCC's "pick and choose rule," which implemented 47 U.S.C. § 252(i). See slip op. at 28-29. Under this rule, an incumbent LEC must "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," on the same terms as are provided in the approved agreement. 47 C.F.R. § 51.809(a). As the Supreme Court noted in its opinion, however, the FCC has stated that "an incumbent LEC can require a requesting carrier to accept all terms that it can prove are 'legitimately related' to the desired term."

D. Separate Opinions

Three Justices wrote separate opinions. Justice Souter disagreed with the majority's rejection of the FCC's guidelines for determining what UNEs must be provided to CLECs. Justice Thomas (joined by Chief Justice Rehnquist and Justice Breyer), dissented from the Court's jurisdictional findings, on the basis that "the majority takes the Act too far in transferring the States' regulatory authority wholesale to the Federal Communications Commission." Slip op. at 2 (Thomas, J., concurring in part and dissenting in part). Justice Breyer wrote a separate opinion faulting the majority's jurisdictional analysis, but also rejecting the proposition that the 1996 Act compels use of a TELRIC-like, forward-looking pricing methodology. See slip op. at 13-17 (Breyer, J., concurring in part and dissenting in part). Justice Breyer did agree with the majority's invalidation of Rule 51.319, noting that the FCC's sweeping unbundling requirements threatened to stifle competition. He explained:

> Rules that force firms to share every resource or element of a business would create, not competition, but pervasive regulation, for the regulators, not the marketplace, would set the relevant terms. . . . Regulatory rules that go too far, expanding the definition of what must be shared beyond that which is essential to that which merely proves advantageous to a single competitor, risk costs that, in terms of the Act's objectives, may make the game not worth the candle.

Id. at 19-20 (emphasis in original).

III. THE DECISION'S IMPACT ON SWBT'S SECTION 271 APPLICATION INTERLATA ENTRY IN MISSOURI

The Supreme Court's decision does not affect SWBT's commitment to open local markets in Missouri. As described below, the Supreme Court's decision should not delay the Commission's consideration of SWBT's Section 271 application.

By invalidating Rule 51.319, the Supreme Court eliminated the legal requirement that SWBT provide the mandatory UNEs listed by the FCC. The Court's decision calls into question state orders mandating the unqualified provision of UNEs, where the statute's "necessary" and "impair" standards were not fully applied. As explained below, however, SWBT is prepared to continue operating under the interconnection, resale, and UNE requirements previously set by this Commission unless the parties mutually agree to alternative terms, or alternative terms are approved in accordance with the regulatory and judicial processes. All items required under the competitive checklist (including access to local loops, switching, transport, directory assistance, operator services, signaling, and call-related databases) thus remain available to SWBT's CLEC customers in Missouri, just as they were prior to the Supreme Court's decision. SWBT likewise

is continuing to make available other UNEs not specified in Rule 51.319, in accordance with SWBT's Missouri interconnection agreements.[2]

SWBT also is prepared to preserve the status quo with respect to provisioning end-to-end service at UNE rates under existing agreements, even though the Supreme Court expressly cast doubt upon whether the UNE platform concept retains any viability after Iowa Utilities Board. See slip op. at 25, 26. The effect of these commitments is straightforward: the Supreme Court's decision will have no current impact on any CLEC's ability to obtain particular network elements from SWBT under existing agreements. To the extent contracts may be modified in the future, such modifications will be done in accordance with the negotiation or regulatory and judicial processes.

Similarly, the applicable UNE prices previously approved by this Commission in the AT&T arbitrations will continue to apply unless and until they are replaced with prices set in accordance with the negotiation or regulatory and judicial processes. As SWBT witness J. Michael Moore pointed out in his direct and surrebuttal testimony filed in this proceeding, SWBT's cost studies for UNEs satisfied the FCC's TELRIC methodology, and these studies were adopted by the Commission based on the recommendation of the Arbitration Advisory Staff (AAS). (Moore Direct, pp. 3-7). The Commission adopted a TELRIC standard since it utilized SWBT's TELRIC cost studies, with modifications recommended by the AAS. Id.; (Moore Surrebuttal, p. 1).

[2] SWBT, like other parties, has not and does not forfeit its right to pursue timely appeals of arbitrated agreements under section 252, nor is SWBT limiting the range of claims it may bring with respect to arbitrated agreements that are subject to judicial review.

SWBT has no current plans to seek to modify the prices in its voluntarily negotiated interconnection agreements. SWBT also will charge the prices set by this Commission in arbitration proceedings or agreed to by the parties until SWBT is authorized to modify those rates to alternate rates that are deemed, under regulatory and judicial processes, to comply with the Act and governing FCC and/or Commission rules. As discussed above, the prices for interconnection and UNEs set by the Commission in arbitration proceedings, and subsequently incorporated directly or indirectly through "MFNing" into other agreements, were based on cost studies that the Commission deemed to comport with the FCC's TELRIC requirements. Although SWBT believes that these prices are more generous to SWBT's wholesale customers than is required by the FCC's TELRIC rules, it will continue to comply with the terms of its agreements until revised in accordance with regulatory or judicial proceedings..

On February 9, 1999, SBC Communications Inc. informed the FCC by letter of its intentions regarding the provision of UNEs following the Supreme Court's decision. A copy of that letter is attached hereto as Attachment A. As set forth in this letter, SWBT (an SBC subsidiary) will continue to provide UNEs in accordance with its existing local interconnection agreements until the parties mutually agree to alternative provisions or until alternative provisions are approved through the regulatory and judicial processes.

SWBT's long term obligations to provide access to UNEs will depend upon an informed consideration of the criteria set forth in 47 U.S.C. § 251(d)(2) and the objectives of the 1996 Act. Slip op. at 20-25. Before the FCC can construct a new list of UNEs to which CLECs may obtain access, it must at least consider with respect to each network element: (1) whether the element is available from sources outside incumbent LECs' networks, and (2) whether lack of access to the

element would increase competitors' costs or decrease the quality of their service sufficiently to "impair" their ability to provide the service in question. Id.

The FCC has not yet had the opportunity to reformulate its rules to comply with the standards of section 251(d)(2). Pending the FCC's promulgation of such rules and the approval of those rules through the judicial process if necessary, the extent to which CLECs will be required to demonstrate a "necessity and impaired ability" in order to gain access to UNEs is unsettled. As discussed above, however, SWBT intends to provide the UNEs set forth in its existing local interconnection agreements until the parties mutually agree to alternative provisions or until alternative provisions are approved through the regulatory and judicial processes. SWBT will also continue to negotiate in good faith with any party seeking to enter into a new local interconnection agreement. New entrants in any event can obtain through the MFN process the same UNEs that are available to CLECs with approved, unexpired interconnection agreements.

With respect to the combination (or "bundling") of UNEs, certain SWBT contracts provide CLECs access to combinations of UNEs where the CLEC orders the UNEs with sufficient specificity for SWBT to be able to provide the UNEs in the manner requested by the CLEC. See, e.g., SWBT/AT&T Interconnection Agreement, Attachment 6 (UNEs), section 2.2, 2.4 and Attachment 7 (Ordering and Provisioning/UNE), section 5.10.1. The applicable terms and conditions, including prices, are set forth in those contracts. These terms and conditions will continue to apply until the parties mutually agree to alternate terms or alternate terms are approved through the regulatory and judicial processes. As elsewhere discussed, SWBT offers terms from its unexpired contracts with other CLECs in accordance with the Act and the Supreme Court's recent decision.

Nothing in the Supreme Court's decision affects the requirement that CLECs order in accordance with the terms of their contracts. Thus, the contractual terms and conditions will continue to apply when CLECs order a combination of elements for use in providing a finished retail service. Those terms and conditions will continue to apply until the parties mutually agree to alternate terms or alternate terms are approved through the standard regulatory and judicial processes.

With respect to the Supreme Court's decision regarding the FCC's "pick and choose" rules, CLECs may adopt the entire approved interconnection agreement of another carrier, but CLECs are not obligated to accept the entire agreement in order to obtain a portion of it. SWBT will provide interested CLECs with an individual interconnection, service, or network element arrangement from an unexpired contract, provided that the CLEC also accepts all related terms and conditions. As a practical matter, a particular interconnection, service, or network element arrangement and most of its related terms and conditions are usually located together in the same section, appendix, or attachment of an interconnection agreement. In such a case, the CLEC will adopt the entire section, appendix, or attachment along with any related terms. This practice has been followed with respect to many interconnection agreements, including some entered into after the Eighth Circuit's decision vacating the pick and choose rule. (Auinbauh Direct, pp. 7-8). SWBT therefore believes that the "section-by-section" approach set out in many of its approved agreements is consistent with the requirements of section 252(i) and the FCC's pick and choose rule.

In the event a CLEC that has a Commission-approved interconnection agreement with SWBT requests a divisible portion of another CLEC's approved agreement, SWBT and the CLEC would create and sign a contract amendment that would be filed with the Commission for

its approval. This amendment would be patterned after the CLEC's own agreement, but the applicable provisions that the CLEC wishes to adopt along with any related provisions would replace the corresponding provisions in the CLEC's own agreement. If a CLEC desires to opt into an interconnection, service, or network element arrangement of an approved interconnection agreement, the CLEC must take all the "rates, terms, and conditions" of the arrangement, any related provisions and any applicable definitive interpretations of those terms and provisions. 47 C.F.R. § 51.809; see generally First Report and Order, Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, 11 FCC Rcd 15499, 16137-39, ¶¶ 1310-1315 (1996) (requesting carriers must take all provisions relating to requested items). For example, a CLEC interested in adopting resale terms from an approved interconnection agreement must accept all associated terms and conditions, such as those for the ordering and provisioning, maintenance, and billing of the resold service(s) made available under the approved agreement.

IV. CONCLUSION

The law governing local competition in Missouri will never be static. Prescience about future requirements thus is not a prerequisite for interLATA relief under section 271. SWBT has committed to abide by existing agreements containing the terms and conditions previously approved by this Commission as conforming to the requirements of the FTA, and as adequate for opening the local markets in Missouri. This commitment has been made notwithstanding rulings from the Supreme Court suggesting that SWBT's wholesale offerings may be more generous to CLECs than required under the Act. SWBT thus is doing everything reasonably possible to ensure its satisfaction of all future requirements that may be articulated by the FCC or the courts

In light of the commitments outlined above, this Commission can and should proceed quickly to a favorable recommendation on SWBT's Section 271 application. As the back-and-

forth of the various Iowa Utilities Board decisions shows, it simply would not be fruitful to guess at what rules ultimately will emerge after remand from the Supreme Court. In any event, new local carriers and Missouri consumers are protected, in the near term, by SWBT's commitment to operate in accordance with existing agreements and, in the long term, by the ongoing powers of this Commission, the FCC, and the courts.

Respectfully submitted,

SOUTHWESTERN BELL TELEPHONE COMPANY

By Anthony K. Conroy /tm

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing document were served to all parties on the Service List by first-class postage prepaid, U.S. Mail on February 17th, 1999.

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Anthony K. Conroy

ATTACHMENT A

February 9, 1999

BY COURIER

Lawrence E. Strickling, Esq.
Chief
Common Carrier Bureau
Federal Communications Commission
1919 M Street, N.W., Room 500
Washington, D.C. 20554

Dear Mr. Strickling:

This responds to your request for confirmation of SBC Communications Inc.'s position on the provision of network elements following the U.S. Supreme Court decision in Iowa Utilities Board. We understand the industry faces a period of potential uncertainty in light of the vacation of Rule 319. Accordingly, in an effort to assist the Commission and the industry, SBC makes the following commitment during this interim period.

Notwithstanding the Supreme Court's vacation of Rule 319, which identified what network elements should be made available by ILECs, SBC will continue to provide network elements in accordance with its existing local interconnection agreements until the parties mutually agree to alternative provisions or alternative provisions are approved through the regulatory and judicial process. However, in the event other parties to our existing interconnection agreements attempt to invalidate these agreements based upon Iowa Utilities Board, we reserve the right to respond as appropriate without regard to this commitment. Furthermore, pending the Commission's proceeding on remand regarding network elements, SBC will continue to negotiate in good faith with any party seeking to enter into a new local interconnection agreement.

If you have any questions, please call me.

Sincerely,

Dale Robertson

Dale (Zeke) Robertson
Senior Vice President
SBC Telecommunications, Inc.

Sandy Kinney

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ENGLEWOOD, CO 80112

KARL ZOBRIST
BLACKWELL SANDERS PEPER MARTIN
TWO PERSHING SQUARE
2300 MAIN STREET
KANSAS CITY, MO 64108

BARTEL COMMUNICATIONS, INC.
14 CLIF-SIDE
GLENDALE, MO 63122

CAMARATO DISTRIBUTING, INC
900 CAMARATO DR
HERRIN, IL 62948

CHOCTAW COMMUNICAITONS, LC
D/B/A/ SMOKE SIGNAL COMMUNICAITONS
8400 S GESSNER
HOUSTON, TX 77074

DIAL & SAVE OF MISSOURI, INC
8750 N CENTRAL EXPRESSWAY
SUITE 1500
DALLAS, TX 75231

GABRIEL COMMUNICATIONS OF
MISSOURI, INC
16650 CHESTERFIELD GROVE RD
SUITE 110
CHESTERFIELD, MO 63005

ANDY DALTON
CITY UTILITIES OF SPRINGFIELD
P.O. BOX 551
SPRINGFIELD, MO 65801-0551

JATO COMMUNICAITONS CORP
5660 GREENWOOD PLAZA BLVD
SUITE 220
ENGLEWOOD, CO 80111

LEVEL 3 COMMUNICAITONS, LLC
1450 INFINITE DRIVE
LOUISVILLE, CO 80027

NEX-TEL CORPORATION
3050 K STREET, N.W., SUITE 250
WASHINGTON, DC 20007

THE PAGER COMPANY
5321 E 9TH ST
KANSAS CITY, MO 64124

SIMPLY LOCAL SERVICES, INC.
11406 GRAVOIS ROAD, SUITE 100
ST. LOUIS, MO 63126

SUPRA TELECOMMUNICAITONS &
INFORMATION SYSTEMS, INC.
2620 S.W. 27TH AVE
MIAMI, FL 33133

TRANSWIRE MISSOURI OPERATIONS,
LLC
8 W 19TH STREET
NEW YORK, NY 10011

UNITED STATES TELECOMMUNICATIONS INC.
D/B/A/ TEL COM PLUS
13902 N. DALE MABRY
SUITE 212
TAMPA, FL 33618

UNIVERSAL TELEPHONE
2611 E. HARRY
WICHITA, KS 67211

AMERITECH COMMUNICATIONS
INTERNATIONAL
9525 W RYN MAWR
SUITE 600
ROSEMONT, IL 60018

AT&T COMMUNICAITONS OF THE
SOUTHWEST, INC
101 W MCCARTY
SUITE 216
JEFFERSON CITY, MO 65101

ATLAS COMMUNICAITONS, LTD
482 NORRISTOWN RD
SUITE 200
BLUE Bell, PA 19422

BELLSOUTH BSE, INC
2727 PACES FERRY RD
ATLANTA, GA 30339

BIRCH TELCOM OF MISSOURI, INC.
1004 BALTIMORE AVE
SUITE 900
KANSAS CITY, MO 64105

MICHAEL FERRY
GATEWAY LEGAL SERVICES, INC.
4232 FOREST PARK AVENUE, SUITE 1800
ST. LOUIS, MO 63108

CHRIS LONG
ASSOCIATED INDUSTRIES OF MISSOURI
411 JEFFERSON STREET, PO BOX 1709
JEFFERSON CITYT, MO 65101

GARY L. MANN
ADVANCED COMMUNICATIONS GROUP, INC.
390 SOUTH WOODS MILL ROAD, SUITE 150
CHESTERFIELD, MO 63017

DIANE MILLER
SHOW ME COMPETITION
112 E HIGH STREET
JEFFERSON CITY, MO 65101

RICHARD S. BROWNLEE, III
HENDREN AND ANDRAE, L.L.C.
221 BOLIVARD STREET
PO BOX 1069
JEFFERSON CITY, MO 65102

CHARLES BRENT STEWART
STEWART & KEEVIL, LLC
1001 CHERRY STREET, SUITE 302
COLUMBIA, MO 65201