AT&T

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Missouri Public Service Commission

February 17, 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 Brief Regarding Impact of AT&T Corp. V. Iowa Utilities Board 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 Bourianoff (KD)

Michelle Bourianoff
AT&T Attorney

Att.

cc: All Parties of Record

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Missouri Public
Service Commission

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

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

BRIEF OF AT&T REGARDING IMPACT OF
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, pursuant to this Commission's Order issued February 10, 1999, files this Brief Regarding Impact of *AT&T Corp. v. Iowa Utilities Board.*

INTRODUCTION AND SUMMARY

The Supreme Court's decision in *AT&T Corp. v. Iowa Utilities Board,* __ U.S. __, No. 97-826, 67 U.S.L.W. 4104, 1999 U.S. LEXIS 903, 1999 WL 24568 (Jan. 25, 1999), will have serious, and unfolding, impacts on the issues presented by SWBT's application for interLATA relief under section 271 of the Act. Two types of impacts appear readily.

First, the Supreme Court reinstated most of the FCC rules that the Eighth Circuit had vacated in *Iowa Utilities Board v. FCC* 120 F.3d 753 (8th Cir. 1997). The net effect of the Supreme Court's jurisdictional and merits rulings was to reinstate nearly all of the FCC's nationally uniform rules for implementing the local competition provisions of the Act. To obtain 271 relief, SWBT now must show that it meets the requirements of these reinstated rules. SWBT's application and testimony fail to demonstrate compliance with

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these rules -- in at least the areas of access to UNE combinations; UNE pricing; nondiscriminatory access to resale, UNEs, and interconnection terms offered to other carriers ("pick and choose"); and dialing parity. All parties should have the opportunity to develop a record of SWBT's compliance or noncompliance with section 271 requirements, in light of the reinstated FCC rules.

Second, the Supreme Court vacated FCC rule 319, which sets out a list of network elements to which ILECs must offer unbundled access. On remand, the FCC will be required to reconsider that list, applying the "necessary and impair" standards of section 251(d)(2) of the Act in a manner consistent with the Supreme Court's decision. The positions taken by SWBT and its parent in response to this aspect of the Supreme Court's ruling throw a heavy blanket of doubt over CLECs' continued access to UNEs in Missouri and throughout SWBT's traditional territory. According to SWBT, the vacating of Rule 319 "calls into question whether . . . CLECs are entitled to obtain from SWBT dark fiber **or any other UNE**."[1] SWBT's subsequent, more carefully crafted statements to the FCC and the Texas Commission offer only that "SWBT 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."[2] Upon scrutiny, these statements leave

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

[2] February 9, 1999 letter from SBC Telecommunications, Inc. by Dale Robertson, Senior Vice President, and Sandy Kinney, President-Industry Markets, to Lawrence E. Strickling, Chief, Common Carrier Bureau, Federal Communications Commission. A copy of this letter was attached as Exhibit A to SWBT's Response To Questions Regarding The Effect Of The Supreme Court's Decision In AT&T Corp. v. Iowa Utilities Board, filed in Texas PUC Docket No. 16251 (Texas 271 Proceedings) on February 15, 1999 ("SWBT's Texas Brief on Supreme Court Impact"). A copy of SWBT's Texas Brief on Supreme Court Impact is included as Appendix A to this brief.

CLECs with no assurance, and certainly no commitment, that SWBT will continue beyond the next few months to offer access even to those UNEs that are expressly referenced in the competitive checklist (e.g., switching, loops, transport). SWBT should be required to present proof, not merely argument, of how its Missouri UNE offerings will be affected by the Supreme Court's ruling. Then all parties should be entitled to the opportunity to present testimony and develop the record on the degree of uncertainty regarding UNE access that has been created by SWBT's posture, and on the consequences of that uncertainty for checklist compliance and for the emergence of competition in this state.

BACKGROUND: THE SUPREME COURT DECISION

The Supreme Court's opinion addresses five key issues. For the convenience of the Commission, the Supreme Court's holding on each of these issues is summarized below.

1. Jurisdiction: Pricing and other Local Competition Rules. The Supreme Court reversed the Eighth Circuit on the core issue of the FCC's jurisdiction to promulgate rules concerning rates for interconnection, network elements, and the resale of telecommunications services. *AT&T Corp. v. Iowa Utilities Board*, 1999 WL 24568, at *9. The Court held that "§ 201(b)[of the Act] means what it says: The FCC has rulemaking authority to carry out the 'provisions of this Act,' which include §§ 251 and 252, added by the Telecommunications Act of 1996." Id. at *6. Accordingly, the Court concluded that "the [FCC] has jurisdiction to design a pricing methodology." Id. at *8. Thus, all of the FCC's pricing rules vacated by the Eighth Circuit are now in effect. The ruling also had the effect of reinstating FCC rules implementing other aspects of the

Act's local competition requirements, such as dialing parity, which the Eighth Circuit had vacated on jurisdictional grounds.[3]

2. Rule 315(b). The Supreme Court reversed the Eighth Circuit and upheld the validity of Rule 315(b), which forbids incumbents from separating already-combined network elements before leasing them to new entrants. *Id.*, 1999 WL 24568 at *12-13; see also 47 C.F.R. § 51.315(b). The Court reasoned that in the absence of Rule 315(b) "incumbents could impose wasteful costs" on carriers who requested network elements, even if entrants did not seek access to the incumbents' entire preassembled networks, and that the FCC therefore had acted reasonably in preventing this "anticompetitive practice." *Id.*, 1999 WL 24568 at *13.

3. All Elements Rule. The Supreme Court agreed with the Eighth Circuit that the FCC's "refusal to impose a facilities-ownership requirement [on new entrants] was proper" and that new entrants therefore may provide telecommunications services "relying solely on the elements in an incumbent's network." *Id.* at *12.

4. Rule 319. Rule 319 contains a list of seven network elements that the FCC required incumbent LECs to make available. 47 C.F.R. § 319. Although the Supreme Court agreed with the Eighth Circuit that the FCC's definition of "network element" "is eminently reasonable," *AT&T Corp. v. Iowa Utilities Board*, 1999 WL 24568 at *10, the

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[3] The Supreme Court held that the FCC had jurisdiction to promulgate rules regarding dialing parity, exemptions for rural LECs, dispute resolution procedures, and state review of pre-1996 interconnection agreements. *Id.*, 1999 WL 24568 at *9. The issue of dialing parity was addressed by the FCC in its Second Report & Order, In re Implementation of the Local Competition Provision of the Telecommunications Act of 1996, 11 FCC Rcd. 19392 (1996). The Eighth Circuit vacated (in limited respects) the FCC's dialing parity rules in a separate opinion that also was addressed by the Supreme Court in *AT&T Corp. v. Iowa Utilities Board.* People of California v. FCC, 124 F.3d 934, 943 (8th Cir. 1997); *AT&T Corp. v. Iowa Utilities Board*, 1999 WL 24568 at *4 n.4. The Court also dismissed as unripe the incumbent LECs' claim that the FCC lacks authority to review interconnection agreements approved by state commissions. *Id.* at *9.

Court nonetheless reversed the Eighth Circuit and vacated Rule 319 because "the FCC did not adequately consider the 'necessary and impair' standards [of section 251(d)(2)] when it gave blanket access to these network elements, and others, in Rule 319." *Id.* at *10. The Court noted that the FCC's rule "may be supported by a higher standard," *id.* at *11, and left to the FCC the task of determining on remand what network elements must be made available.

5. Pick And Choose. Finally, the Supreme Court reversed the Eighth Circuit's decision to vacate the FCC's "pick and choose" rule, which requires incumbents to make available to all new entrants "any individual interconnection, service, or network element contained in any agreement to which it is a party . . . upon the same rates, terms, and conditions as those provided in the agreement." *Id.* at *13-14; see also 47 C.F.R. § 51.809.

ARGUMENT

I. SWBT MUST DEMONSTRATE COMPLIANCE WITH FCC RULES REINSTATED BY THE SUPREME COURT DECISION

On several subjects, the Supreme Court's reinstatement of FCC rules has confirmed or clarified an incumbent LEC's obligations under the Act, obligations that are incorporated into competitive checklist requirements or the public interest test that SWBT must meet to obtain section 271 relief. The reinstated FCC rules constitute binding federal law and must be applied in this 271 proceeding. The result of the Supreme Court's decision reinstating the portions of the *Local Competition Order* that had been vacated by the Eighth Circuit at the request of incumbents is that "all parties charged with applying that decision, whether agency or court, state or federal, must treat

it as if it had always been the law." *National Fuel Gas Supply Corp. v. Federal Energy Regulatory Comm'n*, 59 F.3d 1281, 1289 (D.C. Cir. 1995); *See generally, James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 549 (1991) (Scalia, J., concurring) ("judges make [law] as though they were 'finding' it -- discerning what the law is, rather than decreeing what it is today changed to, or what it tomorrow will be").

SWBT's application fails to demonstrate compliance with the reinstated FCC rules and thereby fails the corresponding section 271 requirements. Because the rules governing SWBT's application were changed in important respects after the time for preparing direct and rebuttal testimony in these proceedings had passed, the parties should have the opportunity to present evidence regarding the deficiencies of SWBT's offerings in light of the newly-reinstated FCC rules.

A. Availability of UNE Combinations.

1. SWBT has made no showing of compliance with Rule 315(b).

Competitive checklist item two requires SWBT to demonstrate that, as a legal and practical matter, it can make access to unbundled network elements available in a manner that satisfies the requirements of section 251(c)(3), including the requirement to provide access to UNEs "in a manner that allows requesting carriers to combine such elements in order to provide a telecommunications service." *BellSouth Second Louisiana Order* ¶ 165. In promulgating Rule 315(b), the FCC concluded that this quoted statutory text "bars incumbent LECs from separating elements that are ordered in combination, unless a requesting carriers specifically asks that such elements be separated." *Local Competition Order* ¶ 293. In reinstating this rule, the Supreme Court found that the rule was "entirely rational, finding its basis in section 251(c)(3)'s nondiscrimination requirement." *AT&T*

Corp. v. Iowa Utilities Board, 1999 U.S. LEXIS 903 at *44. Accordingly, in order to demonstrate compliance with checklist item two, SWBT

> must demonstrate that it has a concrete and specific legal obligation to furnish [unseparated UNE combinations] upon request pursuant to a state-approved interconnection agreement . . . and that it is currently furnishing, or ready to furnish, [unseparated UNE combinations] in the quantities that competitors may reasonably demand and at an acceptable level of quality.

BellSouth Second Louisiana Order ¶ 54.

SWBT's application offers anything but an unqualified commitment to supply combined elements without separating them, as demanded by reinstated Rule 315(b). Certainly SWBT offers no demonstration that it is supplying such combinations, or that it is ready to supply such combinations in commercial quantities.

Rather, SWBT has built its case regarding access to UNEs for combining almost entirely on the five collocation-type methods of access described in the testimony of William Deere. Deere Direct at 31-63. Each of these methods requires a CLEC to combine elements manually, at a location remote from the main distributing frame of the local switch; each assumes –unlawfully -- that any pre-existing combination ordered by a CLEC will be separated by SWBT and extended to the "point of access" for recombining by the CLEC. *See* Deere Direct at 31-33. SWBT's principal network witness views the requirement that CLECs manually combine UNEs at a point of access as an appropriate cost to impose on them, Deere Direct at 51-52, and as part of the burden that any local exchange carrier should be prepared to undertake, even if that carrier chooses to provide service without owning or controlling its own network facilities. Deere Direct at 53-54.

SWBT's proposed methods of UNE access, as described by Mr. Deere, plainly do not offer access to combinations in a manner consistent with Rule 315(b). SWBT has not otherwise acknowledged a concrete, specific legal obligation to refrain from separating elements that are ordered in combination. Instead SWBT offers guarded testimony, almost in passing, asserting that it will comply in a qualified way with this Commission's arbitration ruling, made on the basis of contract law, which prohibits SWBT from "unbundling currently bundled elements." Bailey Direct at 18-19; *see also* Auinbauh Direct at 27. SWBT does not offer to make this "no separation" term available to CLECs upon request, without precondition. SWBT admits that it will not sign an agreement containing this requirement without being ordered to do so by this Commission. Bailey Direct at 19. That is, SWBT offers Missouri CLECs only one way to obtain a "no separation" term -- adopt AT&T's approved interconnection agreement. *Id.* Conditioning access to pre-existing UNE combinations on a requirement to accept a single form of interconnection agreement, regardless of the CLEC's business plan, does not show compliance with Rule 315(b).

SWBT's application also makes clear that any compliance with this Commission's contract ruling is offered only on an interim basis and under protest, while SWBT pursues appeal of that ruling. In that appeal, SWBT characterizes the Commission's ruling as "clearly unlawful."[4] SWBT makes plain its opposition to any requirement that it refrain from separating elements: "Southwestern Bell has not and does not consent to provide preassembled combinations of unbundled network elements

[4] *Southwestern Bell Telephone Company v. Missouri Public Service Commission*, Civil Action No. 98-0450-CV-W-9, W. D. Mo., Western Division, Complaint For Declaratory and Injunctive Relief ¶ 49 (April 17, 1998).

when ordered by AT&T." Until SWBT offers proof that it does consent to provide preassembled UNEs to AT&T and other CLECs, and that it is prepared to provide such UNEs in commercial quantities and at a quality equal to what it achieves in its own retail provisioning, SWBT cannot show compliance with reinstated Rule 315(b) or checklist item two.[5]

If SWBT now wishes to reverse these positions, to withdraw its appeal of this Commission's "no separation" ruling, and to propose to comply with Rule 315(b), then it should be required to do so in testimony that can be tested in cross-examination, to determine the extent of SWBT's commitment and how that commitment may be qualified, with CLECs having the opportunity to submit responsive supplemental testimony. Unless SWBT takes a different position in Missouri than it took in Texas earlier this week, its post-*AT&T Corp. v. Iowa Utilities Board* position will not offer a reliable commitment to refrain from separating UNEs that are combined in its network. In its Texas filing, even as SWBT professed that it will comply with Rule 315(b), it asserted an ambiguous "general right to control its own network."[6] The implication was that this right may somehow limit CLEC access to pre-existing combinations, but how was not explained.

More generally, in response to Texas Commission Staff questions about whether SWBT would make the UNE platform available to a CLEC today or in the immediately foreseeable future, SWBT offered only that the terms and conditions of existing

[5] SWBT has affirmed very clearly and recently that it will not renew UNE combination terms included in its AT&T Texas agreement 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).

[6] SWBT's Texas Brief on Supreme Court Impact at 14.

contracts, to the extent they provide access to UNE combinations, will continue to apply "until the parties mutually agree to alternate terms or alternate terms are approved through the standard regulatory and judicial processes."[7] SWBT's surrebuttal testimony here is similarly qualified: "SWBT already has contracts under which it is obligated to combine such UNEs in Missouri and those contracts will continue unless the terms of those contracts are replaced by terms agreed to by the parties and approved by this Commission." Deere Rebuttal at 4. CLECs are entitled to further explanation of this about-face and to the opportunity to offer evidence regarding its limitations, of the sort discussed below.

In SWBT's view, the Supreme Court "cast doubt upon whether the UNE platform concept retains any viability."[8] On the contrary, by reinstating Rule 315(b) and affirming the FCC's determination that a CLEC need not own or control its own network facilities to use UNEs, the Supreme Court has made it the law of the land that ILECs must provide access to the UNE platform, certainly where the elements already are connected in the ILEC network when ordered.[9] The dicta to which SWBT alludes would limit the availability of the UNE platform in only one event – if the FCC on remand substantially reduces the list of elements that incumbents are required to unbundle under the Act.[10]

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[7] *Id.* at 12.

[8] *Id.*

[9] Access to UNE combinations that are not already combined in the ILEC's network when ordered by the CLEC is discussed below.

[10] *See AT&T Corp. v. Iowa Utilities Board*, 1999 U.S. LEXIS 903 at 40-43. SWBT's characterization is exaggerated. Justice Scalia says only that the ILECs concerns about the "all elements" and the "no separation" rules "may" be "academic," if the FCC on remand makes fewer network unconditionally available through the unbundling requirement. *Id.* And he makes clear that the Court's ruling on the "all

Thus, SWBT's Texas comment, that it will continue to offer UNE combination terms under existing agreements until alternate terms are agreed or adjudicated, should be understood to offer CLECs nothing more than access to the status quo during the next few months, while the FCC reviews Rule 319 on remand.

More disturbingly, SWBT's expectation that "alternate terms" will be forthcoming from negotiations or litigation can only mean that SWBT expects to restrict access to one or more of the elements that comprise the platform. The only aspect of the UNE platform left open by the Supreme Court decision is the list of elements to be unbundled upon reconsideration of Rule 319. It bears emphasizing that each of the elements required to provide POTS-type service to residential and simple business customers – UNE loops, switching, interoffice transport, signaling and call-related databases, operator services and directory assistance – is independently listed as a component of the competitive checklist under section 271. If SWBT were not trying to preserve the option to retract access to one or more of these elements, there would be no basis for the hedged response that it offered the Texas Commission regarding CLEC access to the UNE platform. If SWBT is trying to preserve the option to retract access to even one of these elements, it will run headlong into the express requirements of section 271. At a minimum, it will raise an issue that cannot be resolved before the FCC proceedings on remand are completed.

If CLECs have no assurance that the complete set of already-combined elements providing service to SWBT customers will be available to them for more than a few

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elements" rule and Rule 315(b) are in no way dependent on this comment. Thus he observes that the Commission acted reasonably in omitting a facilities ownership requirement "whether a requesting carrier

months, they will not have a basis for using this route of entry into the Missouri marketplace. SWBT could elect to provide such assurance and commit to providing access to the UNE platform for a competitively meaningful period. If instead SWBT elects to hedge its position until the FCC remand is complete, as its Texas filing suggests, in hopes of reducing its UNE obligations, then Missouri CLECs will have no basis for executing a UNE-based business plan, and SWBT should not be heard to complain if its 271 application is not resolved, or is resolved against SWBT, until the FCC has restated the set of elements to which unbundled access must be offered. All these uncertainties are matters more properly developed in a matter of this magnitude through prepared testimony and cross-examination, not through simultaneous briefing on short notice.

2. SWBT's opposition to combining elements that are not connected when ordered should be reassessed through supplemental testimony.

In its Texas filing, SWBT asserts that nothing "in the Supreme Court's opinion requires SWBT to combine UNEs that presently are not assembled in SWBT's network. To the extent SWBT may perform such work, therefore, SWBT should be compensated at competitive levels" [i.e., non-TELRIC].[11] SWBT's surrebuttal implies that SWBT will

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can access the incumbent's network in whole or in part," *id.* at 41, and that Rule 315(b) "could allow entrants access to an entire preassembled network." *Id.*at 44-45.

[11] SWBT's Texas Brief On Supreme Court Impact at 13. With respect to the combination of unbundled loop and dedicated transport sometimes referred to as an "extended link," SWBT goes so far as to say that it has not entered into any voluntary agreement that requires it to provide such a combination, "nor has SWBT been ordered to combine these elements in arbitration proceedings under sections 251 and 252." *Id.* at 11-12. SWBT's assertion contradicts the arbitrated terms of its Missouri agreement with AT&T. That agreement, by this Commission's order, includes this statement: "the provisions of this agreement that require SWBT to combine unbundled network elements for AT&T (e.g., Attachment 6, Section 11.2, Attachment 7, Section 1.5.1) will remain in effect, independent of the decisions of the United States Court of Appeals for the 8th Circuit in Iowa Utilities Board v. FCC." AT&T/SWBT Interconnection Agreement, Attachment 6, section 2.24. Other provisions of Attachment 6 clearly provide AT&T the right to obtain a loop to dedicated transport combination. Section 11.1 identifies cross-connects as the means by which UNEs are connected to one another or to collocation. Section 11.2 makes available a cross-connect between a UNE loop and multiplexing. Section 11.4 makes available (indeed, requires AT&T to order) cross-connects associated with each type of dedicated transport. Section 8.2.1.6.1 offers AT&T access to

not combine UNEs that are not currently combined, limiting CLECs to SWBT's proposed methods of access for manual combining remote from the MDF. Deere Surrebuttal at 5. While the Supreme Court's decision does not expressly address FCC Rule 315(c), which required ILECs to combine elements for CLECs and which was vacated by the Eighth Circuit, the Court's analysis, like the statute itself, supports a requirement that the ILEC combine elements as needed to provide CLECs with access to UNEs that is genuinely nondiscriminatory in competitive terms.

Significantly, the Supreme Court rejected the ILEC argument that providing access to elements "on an unbundled basis" under section 251(c)(3) means "physically separated." *See AT&T Corp. v. Iowa Utilities Board*, 1999 U.S. LEXIS 903 at *44 (noting that the only dictionary definition of "unbundled" matches the FCC's interpretation – i.e., separately priced). Finding the statute ambiguous on whether leased elements may or must be separated, the Court pointed to the nondiscrimination requirements of section 251(c)(3) to uphold the FCC's prohibition on separating already-connected elements as "entirely rational," designed to prevent ILECs from imposing wasteful reconnection costs on new entrants. *Id.*

With the Supreme Court having eliminated any talismanic significance to providing physically separated elements under the Act, the parties should have an opportunity to address the discrimination that would result if CLECs are denied the

multiplexing in connection with dedicated transport. Accordingly, AT&T may order, and SWBT is obligated to provide, a combination that consists of an unbundled loop, a cross connect to multiplexing, any required multiplexing, a dedicated transport cross connect to link the multiplexer to a dedicated transport facility, and dedicated transport. In the absence of evidence to contradict SWBT's Texas statement and affirm the availability of this combination in Missouri, SWBT's Texas filing appears to take it out of compliance with the access to UNE combinations that this Commission already has ordered.

economies that are available to SWBT when it combines elements for its retail operations. The Court's analysis of Rule 315(b), applied more broadly, will lead to the conclusion that section 251(c)(3) itself, and fulfillment of the goals of the Act, require SWBT to make available to CLECs any combination of elements that it uses to provide service to its own customers, whether the combination ordered by the CLEC in order to serve a particular customer is already assembled in SWBT's network or not. .SWBT should not be permitted to argue that it need not perform the work necessary to connect a loop and a switch port (or other sets of elements) in a manner similar to the way it connects those same elements for itself and its own customers.

At a minimum, however, the Court's rationale in upholding Rule 315(b) reinforces the importance of permitting CLECs to use any technically feasible method for combining elements, not restricting them to collocation or other inefficient combination methods. The methods available to CLECs must include electronic means (such as recent change) similar to the methods incumbents use to combine elements for themselves, without any obligation to pass the elements or associated wiring through a collocation space or other manual arrangement. Similarly, CLECs must be given an opportunity to enter ILEC premises to perform any work needed to combine elements on nondiscriminatory terms (i.e., direct access to the MDF for trained technicians, at parity with SWBT). *See Iowa Utilities Board v. FCC*, 120 F.3d at 813.

B. Pricing

The Supreme Court has held that the FCC has full authority to establish the methodology that must be followed to establish prices for obtaining UNE access. *AT&T Corp.*, 1999 WL 24568, pp. 6-9 (§ II). The Court rejected arguments by the States and

BOC's that the FCC's pricing rules were invalid because states were entrusted with the task of establishing rates:

> The FCC's prescription through rulemaking, of a requisite pricing methodology no more prevents the States from establishing rates than do the statutory "Pricing Standards" set forth in § 252(d). It is the States that will apply those standards and implement that methodology, determining the concrete result in particular circumstances. That is enough to constitute the establishment of rates.

Id. at 9.

Under the reinstated FCC pricing rules, all rates – both recurring rates to recover the forward-looking economic cost of the facilities and functions that comprise each UNE as well as the non-recurring cost of provisioning a UNE or UNE combination – must be based on the TELRIC methodology promulgated by the FCC. See 47 C.F.R. §§ 51.503 & 51.505. The FCC also specifically concluded that Congress intended the pricing rules it adopted to apply to interconnection, UNEs and collocation: "This legal conclusion that there should be a single set of pricing rules for interconnection, unbundled network elements, and collocation provides greater consistency and guidance to the industry, regulators and the courts." First Report and Order at ¶ 629. The FCC's pricing rules specifically provide that "[n]onrecurring charges ... shall not permit an incumbent LEC to recover more than the total forward-looking economic costs of providing the applicable element." 47 C.F.R. § 51.507.

This requirement has at least two implications relevant to the setting of non-recurring charges for provisioning UNEs, interconnection or collocation. First, this means that the methodology and assumptions (e.g., regarding what constitutes a properly forward-looking network) must be consistent when setting either recurring or non-recurring UNE charges. Second, forward-looking non-recurring charges must be set by

assuming that UNEs, interconnection or collocation will be provided in the most efficient manner possible, using "the most efficient telecommunications technology currently available and the lowest cost network configuration...." 47 C.F.R. § 51.505(b)(1).

As outlined in the rebuttal testimony of Robert Flappan filed in this proceeding, there are a number of respects in which the rates established by this Commission do not comply with the FCC's reinstated TELRIC pricing rules. The most serious deficiency surrounds the UNE non-recurring charges. The Missouri Commission has set the service order charge at $5.00, and all other non-recurring charges are set at one-half of what was originally proposed by SWBT. The $5.00 service order charge does not comply with the FCC's TELRIC pricing rules. The rate simply mirrors a rate for switching interexchange carriers – a rate that itself has no basis in cost. AT&T introduced evidence in the underlying cost proceeding that the actual cost of the service order charge should be $0.21. See Direct Testimony of Robert Flappan at p. 41, Case No. TO-98-115. Moreover, the $5.00 service order charge is being reexamined in the pending cost proceeding in Missouri (Case No. TO-98-115) and cannot be considered permanent. SWBT has proposed a charge of $21.85. In addition, the MPSC has recognized that $5.00 is "likely to be in excess of the cost of electronic ordering."[12]

The remaining NRCs are also set at rates that fail to conform with the FCC's TELRIC pricing rules. It is AT&T's position, as reflected in the rebuttal testimony of Mr. Flappan and the testimony filed in the underlying cost proceeding, that the prices for NRCs are not TELRIC-based. The July 31, 1997 Order in TO-97-40 contained an

[12] Id., page 122.

expression of Staff's concern, adopted by the MPSC, that the non-recurring prices were not based on cost and would present significant barriers to entry for local competition.

> Staff is concerned that the primary source of the cost data for the NRCs is based upon the opinion of Subject Matter Experts not on actual time and motion studies or cost information. Additionally Staff is concerned that these charges present significant barriers to entry for local competition.[13]

The FCC's pricing rules require rates to be cost based, without reference to embedded rate-of-return costs, and to be non-discriminatory. This means that the studies should reflect the costs of an efficient new entrant. SWBT's filed cost studies are embedded cost studies and thus violate these requirements of the Act. Even reducing the studies' prices by 50% does not make them represent the efficient costs of a new entrant. In fact, in the July 24, 1998 Costing and Pricing Report filed by Staff there are numerous examples of Staff recommending, after having carefully reviewed the information presented by the parties to the Arbitration, that SWBT's proposed NRCs be reduced by over 90%. Until all the SWBT's NRC rates are permanently set on a TELRIC basis, SWBT cannot be found to have met its pricing obligations in the competitive checklist.

Another clear area in which the rates are not consistent with the FCC's reinstated TELRIC pricing rules is the rates the Missouri Commission established for Operator Services and Directory Assistance. Instead of basing Operator Services and Directory Assistance rates on TELRIC, SWBT offers these services to CLECs at its lowest existing contract rate, but defines "existing" as only those contracts entered into by SWBT after August 28, 1996. SWBT has not and cannot demonstrate that its existing contract rates, however defined, are cost based as required by the Act. Additionally, ignoring SWBT

contracts entered into prior to August 28, 1996 expressly violates the Section 251(c)(2) non-discrimination requirements. If SWBT is providing Directory Assistance and Operator Services to other parties at a lower rate, it is discriminatory to provide the same service to AT&T at a higher rate.

AT&T raised these defects and many others in the rebuttal testimony of Robert Flappan. However, because that testimony was filed on the same day that the Supreme Court opinion was released, the testimony does not reflect all of the inconsistencies between the rates and the FCC's TELRIC rules, which prior to that date had been stayed by the Eighth Circuit. Additional testimony is necessary to allow the complete development of the record regarding the lack of cost-based pricing. SWBT has had an opportunity to address the impact of the Supreme Court decision in its surrebuttal testimony, filed 10 days after the Supreme Court decision was released. See Surrebuttal testimony of Bill Bailey. It has taken the position that the recent Supreme Court ruling regarding the FCC's requirement for TELRIC cost support does not impact in any way SWBT's position. Bailey surrebuttal at 8. CLECs should also be allowed an opportunity to file supplemental testimony to rebut this conclusory statement

C. Pick and Choose

The FCC's reinstated "pick and choose" rule 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.

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[13] Id., Attachment C page 10.

47 C.F.R. § 51.809. In reversing the Eighth Circuit, the Supreme Court expressly rejected the arguments of SBC and other BOCs that this rule threatened the give and take of negotiations because every concession by an ILEC would automatically become available to every other potential CLEC. The Supreme Court held that the FCC's rule allowed an ILEC to require a CLEC to accept all terms that are "legitimately related" to the desired term, and that section 252(i) of the federal Act required nothing more.

Despite this clear legal ruling, SWBT has offered direct testimony in this case 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 7. In support of that position, Mr. Auinbauh stated that the Eighth Circuit opinion has clarified "that CLECs may take and entire agreement under Section 252(I) and may not 'pick and choose' favorable portions from different agreements." Id. SWBT also clarified that because of the difficulty of administering MFN provisions that allowed a CLEC to pick and choose less than an entire agreement, "SWBT now only offers MFN provisions in contracts that allow the CLEC to obtain the entire terms of another agreement." Id. at 8.

SWBT's position plainly contradicts the FCC's "pick and choose" rule, which was reinstated by the Supreme Court on January 25, 1999. Despite the fact that SWBT filed surrebuttal testimony on February 4, 1999, 10 days after the Supreme Court's decision was released, SWBT failed to file any surrebuttal testimony indicating that it had modified its position on MFN/"pick and choose" in light of the Supreme Court ruling. Accordingly, the only evidence in the current record indicates that the interconnection options that SWBT makes available to CLECs in Missouri are inconsistent with the

federal Act, as interpreted by the Supreme Court. At a minimum, until SWBT demonstrates that it is complying with the Supreme Court's ruling on the type of nondiscriminatory access to interconnection terms offered to carriers, it cannot be found that SWBT complied with the non-discrimination obligations incorporated in the checklist, or that granting SWBT interLATA authority would be in the public interest.

In contrast to the sparse record existing in this Missouri 271 proceeding, SWBT has recently taken the position in a Texas 271 proceeding that SWBT has changed its policy on MFN/pick and choose in light of the recent Supreme Court decision. See SWBT's Response to Questions Regarding the Effect of the Supreme Court's Decision in AT&T Corp. v. Iowa Utilities Board, Texas PUC Docket No. 16251 at p. 15 (February 15, 1999). In that filing, SWBT stated that "CLECs are not obligated to accept the entire agreement in order to obtain a portion of it. SWBT will provide interested CLECs with individual interconnection, service, or network element arrangement, provided that the CLEC also accepts all legitimately related terms and conditions." Id. Supplemental testimony should be allowed in this proceeding to provide SWBT with an opportunity to clarify whether it will take the same position in Missouri it has taken in Texas, and if so, for CLECs to file testimony regarding whether SWBT has indeed changed its position and is actually following the reinstated FCC rule in negotiations.

D. Dialing Parity

In the Supreme Court decision, the Court addressed, *inter alia*, the authority of the FCC to issue its dialing parity rules in its Second Report and Order,[14] and the Court

[14] *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, Second Report and Order and Memorandum Opinion and Order, rel. Aug. 8, 1996.

reversed the Eighth Circuit's decision[15] that the FCC's rules were invalid in part because they exceeded the FCC's jurisdiction insofar as they related to intrastate intraLATA dialing parity.[16] The Supreme Court not only held that the FCC's rules were a valid exercise of the FCC's jurisdiction, but also that the FCC's rules established the boundaries of permissible state commission action.[17] The reinstated FCC rule specifically notes that implementation of intraLATA dialing parity by February 8, 1999 is required.[18] Consequently, SBC (and therefore SWBT) is bound by the FCC's determination that all local exchange companies, including SWBT, must provide intrastate and interstate intraLATA dialing parity no later than February 8, 1999.[19]

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15 *California v. FCC*, 124 F.3d 934 (8th Cir. 1997).

16 ____ U.S. at ____, slip op. at 17.

17 ____ U.S. at ____, slip op. at 17 and n. 5 and 10.

18 See 47 C.F.R. 51.211(a).

19 Any suggestion by SWBT that the substance of the FCC's intraLATA presubscription rules remains at issue before the Eighth Circuit should be rejected. *See* SWBT's Reply to Exceptions to AT&T filed January 28, 1999 at 3-4. SWBT's parent and the other Bell Operating Companies (BOCs) challenged the FCC's intraLATA dialing parity rules exclusively on jurisdictional grounds, while challenging on substantive grounds the FCC's other rules issued in the *Second Report and Order*. *See California*, 124 F.3d at 943-44. None argued that the February 8, 1999 deadline for implementing intraLATA dialing parity was inconsistent with, or a violation of, the FTA's dialing parity provisions. Rather, the *sole* basis of their challenge to the FCC's interpretation of § 251(b)(3) was jurisdictional. *Id.* at 939-43. The Eighth Circuit thus did not question the substantive validity of the rules and did not vacate them to the extent they govern interstate intraLATA traffic. *Id.* at 943 & n.6. Rather, the Eighth Circuit agreed with the jurisdictional challenge and vacated the FCC's dialing parity rules *only* insofar as they applied to the intrastate calls that the court concluded were in the state's jurisdiction. *Id.*

Thus, while the Supreme Court remanded *California* (and all the consolidated cases) for further proceedings consistent with its decision (*AT&T*, ____ U.S. ____, slip op. at 30), the only action that the Eighth Circuit may take on remand with respect to dialing parity is to vacate its prior order that invalidated the FCC regulation. Since elementary principles of *res judicata* establish that the BOCs were required to raise all of their challenges to these rules in their petitions, the Commission should reject any assertion that such claims may now be raised at this late date.

SWBT has failed to implement intraLATA dialing parity in Missouri by February 8, 1999. The Missouri PSC is currently in the process of establishing a procedural schedule in Case No. TO-99-125 to discuss customer notice and implementation issues. SWBT has proposed a schedule that would delay a hearing on these issues until June of this year. SWBT has also suggested that the Missouri Commission should delay attempting to determine the impact of the Supreme Court decision until the 8th Circuit and/or FCC addresses the issue. SWBT contends that its proposed procedural schedule would "permit the 8th Circuit and FCC the time to take appropriate steps in response to the Supreme Court's decision concerning intraLATA dialing parity" and would also "avoid the very real possibility that subsequent orders from the 8th Circuit or the FCC would impact the Commission's decision and require revisions." See SWBT's Proposed Procedural Schedule at 8. SWBT has also suggested that section 271(e)(2)(B) "gives the states the authority to establish the timing of intraLATA dialing parity on or after February 8, 1999."

Because the Supreme Court opinion reinstated the FCC's dialing parity rules and there are no substantive issues surrounding dialing parity on remand to the Eighth Circuit, AT&T vehemently disagrees with SWBT's suggestion that either Eighth Circuit or FCC proceedings are necessary in connection with intraLATA dialing parity. SWBT's argument that section 271 somehow provides states with authority to establish the timing of intraLATA dialing parity after February 8, 1999 is also specious; in contrast, the actual language of section 271(e)(2)(B) provides that a State can issue an order requiring intraLATA toll dialing parity prior to February 8, 1999, as long as it does not take effect until February 8.

SWBT's arguments in Case No. TO-99-125, however frivolous they might be, highlight both shortcomings in its 271 application and the need for supplemental testimony on this issue. SWBT has not submitted any testimony in this proceeding demonstrating compliance with the FCC's dialing parity rule and section 271(e)(2). Indeed, because the February 8, 1999 deadline has passed and SWBT has not implemented dialing parity in Missouri, SWBT is technically unable to demonstrate such compliance. Additionally, supplemental testimony is necessary to develop when SWBT's systems will be ready to implement intraLATA dialing parity, what type of implementation plan SWBT will use, and the type of customer notice that will be involved. Without such supplemental testimony, this Commission can only conclude that SWBT has not complied with the requirements of section 271.

II. SWBT'S RESPONSE TO THE VACATING OF FCC RULE 319 RAISES SERIOUS DOUBT THAT MISSOURI CLECS WILL HAVE CONTINUED ACCESS TO UNES ON TERMS THAT MEET CHECKLIST REQUIREMENTS AND ARE RELIABLE ENOUGH TO SUPPORT COMPETITIVE ENTRY

The Supreme Court's decision to vacate Rule 319 and to require the FCC to reconsider the list of UNEs that incumbents must provide to requesting carriers has created the opportunity for incumbents to create new uncertainty about the UNEs that will be available and the terms on which they will be available. SWBT's public statements on this aspect of the ruling have created just such uncertainty.

The Supreme Court's decision should not reduce unbundling requirements that have been recognized by the FCC in passing on other 271 applications. That is so, first, because most of the elements that were identified in Rule 319 also are specifically

referenced in section 271 as requirements of the competitive checklist for RBOCs that seek to provide interLATA services. *See* section 271 (c)(2)(B) (specifically requiring the provision of local loops, local switching, local transport, signaling and databases, and oerpator services and directory assistance). Congress surely intended that at least these specific elements be unbundled.

In addition, the FCC has ample grounds to conclude that all seven of the elements that were included in Rule 319 as vacated should be included as required elements upon reconsideration. The Court faulted the FCC's application of the "necessary" and "impair" standards of section 251(d)(2) for failure to provide "*some* limiting standard, rationally related to the goals of the Act." 1999 U.S. LEXIS 903 at *34. The lesson of the Court's decision is that the FCC may not conclude that the mere presence of some difference in cost or quality between the use of a network element and the use of a substitute functionality from an alternative source satisfies either of the section 251(d)(2) standards. Rather, it must inquire whether such differences effectively reduce CLECs' abilities to provide the services they want to offer. Applying the latter limiting principle, the FCC should reach the conclusion that unbundled access to all seven elements still is required.

However, the outcome of the FCC's remand rulemaking will not be known for some months (without consideration of any subsequent judicial challenges to the FCC's decision). Yet for this Commission to make a recommendation on SWBT's application, it must determine what UNEs SWBT has committed to make available to Missouri CLECs and the terms (including duration) on which those UNEs will be made available. Then it must compare SWBT's offerings to the statutory requirements.

SWBT's public statements on this aspect of the Supreme Court ruling have created significant uncertainty. SWBT certainly believes it has some discretion to reduce the scope of its present UNE offerings. According to SWBT, the vacating of Rule 319 "calls into question whether . . . CLECs are entitled to obtain from SWBT dark fiber **or any other UNE.**"[20] SWBT's recent Texas brief on this subject asserts that SWBT has made a voluntary commitment to abide by existing interconnection agreement terms (until changed) "notwithstanding rulings from the Supreme Court suggesting that SWBT's wholesale offerings may be more generous than are required under the Act."[21]

When asked by the Texas Commission what it will do, rather than what it could do, SWBT carefully equivocated: "SWBT 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."[22] In context, that statement must be understood as reserving the right to assert that "alternative provisions" should be adopted to conform to any reductions in the list of elements required by the FCC on remand, either at the time of the FCC decision (by operation of intervening law provisions of SWBT contracts) or no later than the expiration of the initial contract terms (late next year, in AT&T's case in Missouri).[23]

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

[21] SWBT's Texas Brief On Supreme Court Impact at 2.

[22] *Id.* at 9, Appendix A.

[23] AT&T does not concede that SWBT could properly invoke the intervening law provisions of its agreements with AT&T for this purpose, as SWBT did not oppose recognition of the seven UNEs in Rule 319 during arbitration proceedings with AT&T (i.e., recognition of these UNEs was not a matter resolved against SWBT by arbitration, a prerequisite to invoking the intervening law provisions). However, there is a real marketplace difference to CLECs between knowing, hypothetically, that SWBT will continue to offer these seven elements for the next 3 to 5 years and knowing, as appears more likely, that SWBT may be

SWBT scrupulously avoided, in its Texas filing this week, any commitment to provide any UNE for a specific period of time. It offered no commitment to provide UNEs, except on existing contract terms, and its commitment to abide by those terms lasts only until "alternative provisions" may be adopted by agreement or through legal or regulatory processes. Much like its posture of avoiding "voluntary commitments" to provide UNE combinations in Missouri, SWBT's Texas filing indicated that the only way a CLEC may obtain UNEs that the FCC and state commissions have required SWBT to provide in the past will be for the CLEC to "MFN" into an existing interconnection agreement.[24]

SWBT's failure to make a more specific commitment to provide UNEs for a time certain is telling in the context of the Texas proceedings. In asking for that filing, both Texas Commissioners made clear that an understanding of the terms on which SWBT would offer UNE access for a competitively meaningful period, measured in years, not months, was essential to their evaluation of the marketplace and SWBT's 271 application. Texas 271 Proceedings, Tr. at 52 (Feb. 4, 1999) ("we need to know, as you said, what effect Southwestern Bell believes that the decision has on these contracts that we're relying on to move forward in this proceeding and what their posture is going to be as we move into going into new contracts. Because if we're going back to square one here, then I think this proceeding goes back to square one, too.") (Commissioner Walsh); *id.* at 61-62 ("just so y'all know up front, for me to sign off on this deal, I want to just know how the next five years are going to play out at least as far as kind of the minimum

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lobbying the FCC to reduce the UNE list and may take aggressive legal or regulatory action to exploit any latitude that the FCC might provide to enable it to reduce its UNE offerings

[24] SWBT's Texas Brief on Supreme Court Impact at 10.

legal – minimum obligations on your part as far as the incumbent LEC to provide certain things. . . . I guess my thought would be what's kind of the miminum y'all are willing to commit to independent of what the FCC winds up doing?) (Chairman Wood).

Against this background, SWBT's Texas filing can only be understood as declining to offer the full current complement of UNEs for any minimum period of time to Texas (or Missouri) CLECs, at least any period beyond the time required for the FCC to issue its rule on remand. In context, SWBT has opted to maximize its opportunity to take advantage of any reduction in its UNE offerings that might be permitted under the FCC's remand order. The consequence of SWBT taking that position is to interject serious uncertainty into the terms on which any CLEC could contemplate providing UNE-based service. The parties should have the opportunity to develop an evidentiary record that describes this uncertainty and explains its consequences, both for checklist compliance and the public interest inquiry.

SWBT's stated willingness to provide UNEs in accordance with existing local interconnection agreements until alternative provisions are agreed to or imposed is subject to a further limitation. If other parties to such existing agreements "attempt to invalidate these agreements, however, SWBT reserves the right to respond as appropriate."[25] The statement is vague, but appears to threaten that a CLEC who seeks to hold SWBT to compliance with a reinstated FCC rule that may not be captured in its agreement may find SWBT demanding to reform the UNE terms of the agreement in unspecified ways. The point is simple – more uncertainty for CLECs attempting to use UNEs.

III. SWBT HAS TAKEN POSITIONS THAT WOULD SUPPORT MODIFICATION OF THE PROCEDURAL SCHEDULE EITHER TO ALLOW FOR DEVELOPMENT OF THE RECORD OR TO AWAIT FCC ACTION ON REMAND

Through this brief AT&T has been able to offer preliminary legal argument and analysis of the record to illustrate the impact of the Supreme Court's decision on SWBT's application. The legal issues have not all been identified, and none has been addressed in any comprehensive way. More fundamentally, the procedural schedule has not permitted CLECs, nor required SWBT, to develop factual, technical, contractual, and policy testimony regarding the impact of the Supreme Court rulings on the requirements that SWBT must meet for 271 relief and the adequacy of the demonstration that SWBT has made. It has not permitted the development of evidence regarding the public interest consequences of the uncertainty that now surrounds the terms on which CLECs in this state may obtain access to UNEs and UNE combinations.

As the Commission considers AT&T's pending motion to allow supplemental testimony and modify the procedural schedule, it would be appropriate to consider several recent related statements and actions by SWBT. First, SWBT is resisting providing discovery to AT&T regarding its positions on the impact of the Supreme Court decision, closing that route of access to material with evidentiary value on these issues. SWBT yesterday served AT&T with objections to the four data requests AT&T had tendered on this subject, asserting that they "improperly call for SWBT to convey its legal analysis of the United States Supreme Court's very recent decision." SWBT

[25] SWBT's Texas Brief on Supreme Court Impact at 11.

proposes to limit its response to a legal memorandum to be filed today.[26] At the same time SWBT seeks to block AT&T access to evidence of SWBT's positions, SWBT itself

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[26] Letter dated February 16, 1999 from Anthony K. Conroy, SWBT Senior Counsel, to Kathleen LaValle, et al. The data requests to which SWBT objected read as follows:

> 1. In a recent SWBT filing in Texas, SWBT made the following statement: "WCC also suggests that its position is supported by the United States Supreme Court's recent decision in AT&T Corporation v. Iowa Utilities Board, Nos. 97-826, et al. (1999). In fact, this decision's invalidation of 47 U.S.C. § 51.319 calls into question whether WCC and other CLECs are entitled to obtain from SWBT dark fiber or any other UNE. Id., slip op. at 20."
>
> *Texas PUC Docket Nos. 17922 and 20268*, SWBT Reply Brief (1/29/99), p. 9 n. 3. Identify any network elements that SWBT contends it need not provide to CLECs based on the Supreme Court's ruling on section 51.319. Answer at least as to each network element currently available to AT&T under its current interconnection agreement with SWBT. For any network element that SWBT contends need not be offered to CLECs in SWBT's serving area on an unbundled basis, provide an explanation for SWBT's position.
>
> 2. Identify any provisions in the current Missouri interconnection agreement between AT&T and SWBT that SWBT believes may be subject to modification under intervening law provisions following the Supreme Court's decision in *AT&T v. Iowa Utilities*. For any such provision, provide an explanation of SWBT's position.
>
> 3. Identify any provisions in the current Missouri interconnection agreement between AT&T and SWBT which SWBT believes should not be included in a re-negotiated and/or re-arbitrated interconnection agreement with AT&T (after the current interconnection agreement expires) based on the Supreme Court's decision in *AT&T v. Iowa Utilities*. For any such provision, provide an explanation of SWBT's position.
>
> 4. For CLECs who may be negotiating with SWBT now or in the immediately foreseeable future on interconnection agreement terms, explain SWBT's policy position on the following issues:
>
> - the ability of a CLEC to order all network elements necessary to provide a finished retail service to local service customers
> - the ability of a CLEC to order already connected network elements without payment of any "glue charge"
> - the ability of a CLEC to order on an unbundled basis each of the network elements covered by the interconnection agreement between AT&T and SWBT
> - the ability of a CLEC to MFN into an existing interconnection agreement on a section-by-section basis (including, for example, what terms SWBT would require be included if a CLEC wanted to adopt the AT&T agreement provisions on UNE pricing, combinations, and other provisions, and what impact the duration of the agreement might have on the ability to MFN).

has sought to develop evidence on these issues. SWBT has served two data requests that request AT&T's positions on the impact of the Supreme Court decision on its interconnection agreement; these requests parallel AT&T requests to which SWBT has objected. *See* RFIs included in Appendix B. SWBT served that discovery on February 12, 1999, however, with the result that the 20-day response time does not expire until after the hearing is underway. It would be more appropriate to recognize that all parties require some time to analyze this critical, long-awaited decision and to develop testimony that will best illuminate the impact of the decision on the issues to be decided by this Commission.

SWBT's filing in Texas this week contains repeated reservations of rights and qualifications of position based on its need for further evaluation of the Supreme Court ruling: "SWBT's responses, however, are based on legal rulings that have only recently been rendered and factual information that is not yet complete. SWBT accordingly is unable to answer fully some of the Commission's questions at this time and must reserve the right to alter or modify positions based upon future circumstance and new information."[27] SWBT, for example, was "unable to state for the record which elements it considers 'proprietary.'"[28] Ultimately, SWBT offered that "it simply would not be fruitful to guess at what rules ultimately will emerge after remand from the Supreme Court."[29]

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[27] SWBT's Texas Brief On Supreme Court Impact at 7.
[28] *Id.* at 10.
[29] *Id.* at 19.

Where SWBT's purposes are served thereby, SWBT suggests that state commission action should await lower court or FCC action on remand from this Supreme Court decision. Thus, SWBT offered in Texas that it would be "premature to implement the Commission's geographically deaveraged prices based on speculation about the final FCC pricing rules that ultimately will result from the Supreme Court's decision."[30] In this state, SWBT is opposing MCI's proposal to proceed with dialing parity issues on the basis of the reinstated FCC rules. Instead, SWBT urges that the Commission permit the 8th Circuit and the FCC to consider the dialing parity issues on remand "before this Commission attempts to determine the impact of the Supreme Court decision." Mo. PSC Case No. TO-99-125, Southwestern Bell Telephone Company's Proposed Procedural Schedule at ¶ 6 (February 8, 1999).

While AT&T does not concur with SWBT's suggestions in either the Texas or Missouri proceedings that the FCC's pricing or dialing parity rules are not immediately effective and delay is appropriate, AT&T would suggest that such considerations are appropriate in the instant case. At a minimum, there should be an opportunity for the parties to develop evidence on these issues, so that the record created here will conform to the legal framework that the Supreme Court now has established. If SWBT remains unwilling to put forward UNE terms that will last beyond the issuance of an FCC remand rule expected this summer, SWBT's application may be better addressed after that rulemaking, to "avoid the very real possibility that subsequent orders from the 8th Circuit or the FCC would impact the Commission's decision and require revisions." *Id.* at ¶ 13.

CONCLUSION

[30] *Id.* at 8.

The incumbent LECs' challenges to the FCC's local competition rules have contributed much to the delay and uncertainty that have surrounded implementation of the Act over the past two and one-half years. With the Supreme Court's decision in *AT&T Corp. v. Iowa Utilities Board*, the LEC's challenges have largely been rejected. Rules that could have been recognized as the governing rules and implemented by RBOCs long ago now set new parameters against which RBOC compliance with section 271 requirement must be assessed. SWBT does not meet those standards under the record it has put forward. At the same time, SWBT and other RBOCs have seized on the vacating of Rule 319 to create new, competition-inhibiting uncertainty over which UNEs, even those listed in the competitive checklist, will continue to be available to CLECs, and on what terms. That uncertainty must be resolved before SWBT's entitlement to section 271 relief could be determined, and that uncertainty cannot be resolved on the present record. The need for supplemental testimony to address the impact of the Supreme Court's decision in these proceedings is real, and directly related to the quality of competition that Missouri consumers can expect to enjoy. Whether that testimony can provide a basis for resolving SWBT's application for 271 relief prior to the conclusion of FCC remand proceedings regarding Rule 319 will depend on how forthcoming SWBT is in making commitments to provide UNEs on terms that CLECs can rely on for a sustained enough period to support competitive entry. If, as in Texas, SWBT hedges its commitments so that it may attempt to reduce its offerings to the minimum scope required by the FCC on remand, then CLECs will have no assurance what UNEs may be available in this state beyond the next few months, and this Commission will not have a basis for finding that SWBT has satisfied the competitive checklist or for determining

that the marketplace is "irretrievably open to competition" and that SWBT's long-distance entry would be in the public interest.

Wherefore, premises considered, AT&T requests that the Commission to provide for supplemental testimony and to modify the procedural schedule for these purposes, as more specifically set forth in AT&T's Motion To Require Briefing And Allow For Supplemental Testimony Regarding *AT&T Corp. v. Iowa Utilities Board* And To Modify Procedural Schedule. At this stage, AT&T submits that fairness to all parties and to the public requires that SWBT be provided three weeks to prepare its supplemental testimony addressing Supreme Court impact, and that the other parties have a like period to respond, with the hearing to be reset at the Commission's next convenience thereafter, unless it appears on the basis of the testimony that these issues cannot be effectively addressed until the FCC issues a restated list of required UNEs.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of February 1999, a true and correct copy of the foregoing was served upon all counsel of record on the attached service list.

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February 15, 1999

PROJECT NO. 16251

INVESTIGATION OF	§	
SOUTHWESTERN BELL TELEPHONE	§	PUBLIC UTILITY COMMISSION
COMPANY'S ENTRY INTO THE	§	
INTERLATA TELECOMMUNICATIONS	§	OF TEXAS
MARKET	§	

SWBT'S RESPONSE TO QUESTIONS REGARDING THE EFFECT OF THE SUPREME COURT'S DECISION IN AT&T CORP. v. IOWA UTILITIES BOARD

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APPENDIX A

PROJECT NO. 16251

INVESTIGATION OF SOUTHWESTERN BELL TELEPHONE COMPANY'S ENTRY INTO THE INTERLATA TELECOMMUNICATIONS MARKET	§ § § § §	PUBLIC UTILITY COMMISSION OF TEXAS

SWBT'S RESPONSE TO QUESTIONS REGARDING THE EFFECT OF THE SUPREME COURT'S DECISION IN AT&T CORP. v. IOWA UTILITIES BOARD

The Supreme Court has clarified the ground rules for local competition under the Telecommunications Act of 1996 (the "1996 Act" or "Act"). Although additional issues may arise with ongoing implementation of the Act, the framework for local competition in Texas is in place and this Commission and the FCC can now take the final steps toward full interLATA competition. Together with this Commission's decisions and SWBT's voluntarily negotiated agreements, the holdings of AT&T Corp. v. Iowa Utilities Board, 67 U.S.L.W. 4104 (U.S. Jan. 25, 1999 (Nos. 97-826 et al.)), provide a solid foundation for approval of SWBT's application for relief under section 271. Nothing in the decision should delay the Commission from crossing the section 271 finish line it recently noted is within sight.

SWBT recognizes that the law governing local competition in Texas will never be static. Accordingly, SWBT will continue to negotiate in good faith to resolve issues regarding interconnection and network access as they arise. Furthermore, as described in this Response, SWBT has committed to abide by existing agreements containing terms and conditions previously approved by this Commission as conforming to the requirements of the 1996 Act and Texas law. SWBT has made this voluntary commitment notwithstanding rulings from the Supreme Court suggesting that SWBT's wholesale offerings may be more generous than are 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. Just as important,

SWBT is providing assurance to this Commission and its CLEC customers that SWBT intends to finish successfully the work of the collaborative process.

BACKGROUND

I. 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 793-805. 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. We discuss these separate aspects of the Supreme Court's decision 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 has 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 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 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 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 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. Rather, the Court found that the FCC essentially ignored Congress's dictate to take into account whether (1) "access to such network elements as are proprietary in nature is necessary;" and (2) "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

[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 include 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 incumbentLECs 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.

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).

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 not only faulting the majority's jurisdictional analysis, but also expressing skepticism 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).

II. THE DECISION'S IMPACT ON SWBT'S INTERLATA ENTRY

The Supreme Court's decision does not affect SWBT's commitment to open local markets. Nor does it provide any basis for slowing this Commission's progress toward authorizing full interLATA competition in Texas.

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 provision of additional 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 normal 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 Texas. SWBT likewise is continuing to make available other UNEs not specified in Rule 51.319, in accordance with SWBT's Texas interconnection agreements.[2]

[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 is bringing or may bring with respect to arbitrated agreements that are subject to judicial review.

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, that will be done in accordance with the negotiation or regulatory and judicial processes.

RESPONSES TO THE COMMISSION'S QUESTIONS

SWBT has done its best to answer the questions presented by the Commission. SWBT's responses, however, are based on legal rulings that have only recently been rendered and factual information that is not yet complete. SWBT accordingly is unable to answer fully some of the Commission's questions at this time and must reserve the right to alter or modify positions based upon future circumstances and new information.

I. Pricing

Whether SWBT intends to seek a change in the rates established by this Commission or agreed to by the parties for any of the agreements upon which SWBT relies in seeking Section 271 relief.

SWBT has no current plans to seek to modify the prices in its voluntarily negotiated interconnection agreements. SWBT will abide by 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.

Whether SWBT intends to assert that the rates set by this Commission for any of the agreements upon which SWBT relies in seeking Section 271 relief were not set according to TELRIC. If so, please explain the legal basis upon which SWBT relies.

The prices for interconnection and UNEs set by the Commission in arbitration proceedings, and subsequently incorporated directly or indirectly through "MFNing" into arbitrated agreements, were based on cost studies that the Commission deemed to comport with the FCC's and this Commission's TELRIC requirements. See Project No. 16251, SWBT's Moore Aff. ¶¶ 7-51 (filed Mar. 2, 1998). Indeed, this Commission noted in Phase I of the Mega Arbitration that its TELRIC methodology was similar to the

FCC's approach. Arbitration Award, Petition of MFS Communications Co., Inc. for Arbitration of Pricing of Unbundled Loops, Docket No. 16189, at 25-31 (Nov. 7, 1996); see also Brief of the Texas PUC, Southwestern Bell Tel. Co. v. AT&T Communications, No. A-98-CA-197 SS, at 19 (W.D. Tex. filed Aug. 24, 1998) (stating that the Commission "set permanent rates based on revised TELRIC cost studies"). Even though SWBT believes the prices in its arbitrated agreements are more generous to SWBT's wholesale customers than the Act requires, SWBT will (as stated above) abide by these prices until such time as new prices are adopted through negotiation or by regulatory or judicial order.

Please also discuss whether the current non-geographically deaveraged loop prices and the rates for reciprocal compensation must be changed to comply with the FCC's pricing rules.

This Commission approved averaged loop prices that it found consistent with the requirements of the Act. With regard to FCC rules, it would be premature to implement the Commission's geographically deaveraged prices based on speculation about the final FCC pricing rules that ultimately will result from the Supreme Court's decision.

Like SWBT's interim and UNE prices, the reciprocal compensation rates in SWBT's arbitrated agreements are based on TELRIC and thus do not appear to require any revisions. It should be noted, however, that the scope of a BOC's reciprocal compensation obligation -- particularly with respect to Internet traffic -- is currently the subject of judicial and regulatory proceedings.

II. Access to UNEs

A. Whether SWBT intends to continue to provide Unbundled Network Elements (UNEs) pursuant to pending (signed and filed) and approved interconnection agreements, including those agreements upon which SWBT relies in seeking Section 271 relief. If so, for what period of time? If SWBT intends not to provide one or more UNEs, please list and explain the legal basis. Please explain SWBT's intent with regard to the UNEs provided during any period of contract renegotiation and under the terms of the contract.

On February 9, 1999, SBC Communications Inc. informed the FCC of its intentions regarding the provision of UNEs following the Supreme Court's decision. A

copy of that letter is attached hereto as Exhibit A. As set forth in the 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.

B. State whether a competitive local exchange company (CLEC) is legally required to demonstrate a "necessity and impaired ability" in order to gain access to one or more UNEs approved by the Commission pursuant to Section 251(d)(2).

As discussed above, SWBT intends to provide the UNEs set forth in its existing local interconnection agreements until the parties mutually agree to alternative contractual provisions or until alternative provisions are approved for inclusion in the agreement through the regulatory and judicial processes. SWBT also will continue to negotiate in good faith with any party seeking to enter into a new local interconnection agreement.

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. At a minimum, before the FCC can construct a new list of UNEs to which CLECs may obtain access, it must consider with respect to each network element whether (1) the element is available from sources outside incumbent LECs' networks, and (2) 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. See Iowa Utils. Bd., slip op. at 20-25.

If the answer [to Question B] is yes:

1. Set forth the specific UNEs.

Pending the approval of provisions replacing 47 C.F.R. § 51.319 through the regulatory and judicial processes, SWBT will continue to provide the UNEs that the FCC and this Commission have ordered it to provide, and will comply with its current UNE contractual obligations.

2. Discuss whether the requirement applies equally to CLECs that have an approved interconnection agreement and to CLECs that have not entered into an interconnection agreement with SWBT.

New entrants can obtain the same UNEs that are available to CLECs that have approved interconnection agreements with SWBT through the MFN process. SWBT also will negotiate in good faith with new entrants interested in UNEs that are not available through existing agreements.

3. Discuss how SWBT believes the FCC and PUC should interpret and apply the terms "necessary," "impair," and "proprietary" used in Section 251(d)(2), including any procedural processes and time frames that should apply.

The Supreme Court's decision makes clear that before the FCC can construct a new list of network elements that must be provided on an unbundled basis, it must carefully consider as part of its section 251(d)(2) inquiry with respect to each network element (1) whether the element is available from sources outside the incumbents' 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.

SWBT will more fully develop its positions regarding the proper interpretation of the terms "necessary," "impair," and "proprietary," as well as its procedural positions, in the remand proceedings to be conducted by the FCC.

4. Set forth all of the network elements SWBT considers to be "proprietary," including OSS and other databases.

As just stated, SWBT has not yet fully developed its position regarding how the term "proprietary," as used in section 251(d)(2), should be interpreted. Nor has the FCC ruled on this issue in the wake of the Supreme Court's decision. At this time, therefore, SWBT is unable to state for the record which elements it considers "proprietary."

5. Discuss the policy SWBT will follow in the interim before the FCC has implemented a revised Rule 319.

As set forth in SBC's February 9, 1999 letter to the FCC, SWBT intends to 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. In the event that other parties to existing interconnection agreements attempt to invalidate these agreements, however, SWBT reserves the right to respond as appropriate. New entrants can obtain the same UNEs that are available to CLECs that have approved interconnection agreements with SWBT through the MFN process. SWBT also will negotiate in good faith with new entrants interested in UNEs that are not available through existing agreements. In addition, SWBT will consider in good faith any requests for new UNEs, pursuant to the special request and other provisions of existing agreements.

6. Discuss whether SWBT believes that the "necessary and impair" standard requires or supports placing limitations on the availability of UNEs by carrier, customer class, geography, or duration.

At this early point in its examination of the issue, prior to the FCC's proceedings, SWBT believes that application of the "necessary and impair" standard may depend upon a variety of factors. These might include (but are not limited to) the geographic location of the UNE, the characteristics of the customer the CLEC intends to serve with the UNE, the duration of the requested use of the UNE, and the availability of alternatives from SWBT and/or other providers. Consideration of these and other potentially relevant factors likely will occur before the FCC in the first instance.

C. Explain whether and the extent to which the Supreme Court decision affects the Commission's establishment of the extended link as a stand alone UNE.

SWBT does not believe that FCC rules require SWBT to combine unbundled loop elements and unbundled transport elements that are not currently combined in SWBT's network. SWBT has not entered into any voluntarily negotiated agreements that contain such a requirement, nor has SWBT been ordered to combine these

elements in arbitration proceedings under sections 251 and 252. To the extent this issue may be considered in connection with the Commission's public interest examination under section 271, however, SWBT notes that its provision of special access, which is reasonably interchangeable with extended links, may be relevant. In many SWBT service areas, there also may be other alternatives that are reasonably interchangeable with SWBT's loop and transport elements.[3]

III. Bundling of UNEs

A. State whether a CLEC that is negotiating with SWBT now or in the immediately foreseeable future on interconnection terms and conditions will be able to order the combination of network elements necessary to provide a finished retail service (typically referred to as the UNE platform or UNE-P) to local service customers, state the rate that would apply, and explain the legal basis for your response.

SWBT 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. 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. E.g., AT&T Agreement Attach. 6 § 2.4.1. The applicable terms and conditions are set forth in those contracts. These terms and conditions, including prices and ordering with specificity, will continue to apply until the parties mutually agree to alternate terms or alternate terms are approved through the standard regulatory and judicial processes. As elsewhere discussed, SWBT offers terms from its existing contracts to other CLECs in accordance with the Act and the Supreme Court's recent decision.

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[3] In light of the Supreme Court's decision to vacate the FCC rule that established certain mandatory UNEs (47 C.F.R. § 51.319), the FCC's obligation on remand to determine the status of these UNEs, and FCC Chairman Kennard's recent statement that his Commission intends to conclude its proceeding on remand this summer, this Commission should await the FCC's decision before making any determinations regarding the availability of particular potential UNEs.

B. State the process a CLEC operating under an approved interconnection agreement will need to follow to order the combination of network elements necessary to provide a finished retail service (typically referred to as the UNE platform or UNE-P) to local service customers and explain the legal basis for your response.

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. See also SWBT's response to Question III.C.

C. State whether SWBT will require a CLEC that orders a combination of previously combined network elements to pay a "glue charge," discuss which charges (recurring and nonrecurring) are included as part of the "glue charge," and explain the legal basis for your response.

The same charges related to UNE combinations that are set out in SWBT's contracts will continue to apply until the parties mutually agree to alternate terms or alternate terms are approved through the standard regulatory and judicial processes. Certain contracts provide that the central office access charge ("COAC") would not be applied to any UNE or resale order if the Supreme Court vacated the Eighth Circuit's holding regarding an incumbent LEC's authority to separate already combined UNEs. SWBT will comply with those contracts in accordance with the commitments set forth above with respect to SWBT's continuing provision of UNEs. SWBT nevertheless believes the UNE prices may not adequately compensate SWBT for its cost. SWBT therefore reserves the right to seek appropriate cost recovery in negotiations and any required regulatory or judicial proceedings.

Nothing in the Supreme Court's opinion requires SWBT to combine UNEs that presently are not assembled in SWBT's network. To the extent SWBT may perform such work, therefore, SWBT should be compensated at competitive levels.

D. State whether SWBT will bundle UNEs that are not already connected at the time of request for a CLEC, indicate what the rate will be for such combining, and explain the legal basis for your response.

As explained in response to Question III.A. and throughout this Response, SWBT is abiding by the terms of those contracts in Texas which at the present time have been deemed to require SWBT to combine UNEs until the parties mutually agree to alternative terms or until alternative terms are approved through the standard regulatory and judicial processes. See also SWBT's response to Question III.C.

E. Explain whether and the extent to which the Supreme Court decision affects a facilities-based CLEC that combines a SWBT UNE with one or more of its own UNEs, including the legal basis for your response.

As explained above, the Supreme Court's decision does not affect the Eighth Circuit's prior holding that incumbent LECs are not required to combine their UNEs with CLECs' network facilities. Also as described above, the Supreme Court's invalidation of FCC Rule 51.319 ultimately may affect the range of UNEs to which CLECs will have access.

F. Explain whether and the extent to which SWBT believes it has the legal ability to separate UNEs that are combined.

Under the Supreme Court's decision, FCC Rule 51.315(b) will govern requests for access to currently assembled facilities that must be made available as UNEs under sections 251(c)(3) and 251(d)(2). That rule provides: "Except upon request, an incumbent LEC shall not separate requested network elements that the incumbent LEC currently combines." 47 C.F.R. § 51.315(b). Despite this specific requirement, however, SWBT retains a general right to control its own network and to utilize and engineer that network as necessary for efficient provision of services to SWBT's wholesale and retail customers.[4]

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[4] Cf. U S West Communications Inc. v. AT&T Communications of the Pac. N.W., Inc., Civil No. 97-1575-JE, 1998 U.S. Dist. LEXIS 20076, at *48 (D. Ore. Dec. 9, 1998) ("U S West is not a division of AT&T. . . . U S West ordinarily has no obligation under the Act to modify its network to comply with AT&T standards and procedures except as described above.").

Certain SWBT contracts currently require SWBT to provide UNEs on a combined basis. SWBT will honor those contractual obligations, as stated above, and will abide by Rule 51.315(b).

IV. MFN/PICK AND CHOOSE

A. Discuss how SWBT will implement the Supreme Court's ruling on pick and choose, including the legal basis upon which SWBT relies:

1. The extent to which SWBT will allow a CLEC to adopt specific provisions and sections from approved interconnection agreements without having to adopt the entire agreement;

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 individual interconnection, service, or network element arrangement, provided that the CLEC also accepts all legitimately 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 typically 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 additional related terms. 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. See, e.g., MCI Agreement § 19; AT&T Agreement § 31; Time Warner Agreement Art. XX.

In the event a CLEC that has a Texas PUC-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 would replace the corresponding provisions in the CLEC's own agreement.

2. The extent to which a CLEC will have the ability to choose previously approved terms and conditions in combination with its own additional, unique provisions;

A CLEC may adopt from an approved agreement any individual interconnection, service, or network element arrangement and its related terms and conditions, and combine them with other negotiated or arbitrated provisions. But where a carrier with an existing agreement exercises this right, such an arrangement can be adopted without negotiation only if the "MFNed" terms do not modify and are not modified by remaining terms of that carrier's existing agreement. In addition, any requested modifications to the "MFNed" language would in effect be a request for new negotiations. A CLEC's request for modified language would be subject to negotiation and mediation or arbitration if necessary, and would enable SWBT to seek its own modifications to language in the reopened contract.

3. The extent to which restriction(s) on the use of UNEs and interconnection facilities in an approved interconnection agreement will apply to a CLEC that MFNs into the agreement or a portion thereof;

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 related "rates, terms, and conditions" of the arrangement, along with any definitive interpretations of those 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.

4. The effect on the term of an interconnection agreement when the agreement is formed by "picking and choosing" terms from various agreements that have different expiration dates;

An interconnection agreement that does not have a single expiration date would impose serious administrative burdens on CLECs as well as SWBT, and might be unworkable in practice. Thus, SWBT will negotiate – as it does today – a single expiration date for any interconnection agreement that incorporates sections from multiple agreements with different expiration dates. In the event that SWBT and the CLEC cannot arrive at a mutually agreeable expiration date, the expiration date of the new agreement should be the earliest expiration date found in any of the agreements from which the adopted sections were drawn. This date is the appropriate one because, in this situation, SWBT would not have agreed with any carrier, nor been ordered by this Commission, to abide by each term in the new contract beyond that earliest expiration date.

5. The effect the Supreme Court's decision has, if any, on the "section by section" MFN provisions contained in current interconnection agreements;

SWBT has not reviewed the MFN provisions of every approved agreement for consistency with the Supreme Court's decision. However, as explained in response to Question IV.A.1., the MFN provisions in SWBT's contracts are generally consistent with the holding of Iowa Utilities Board.

6. The extent to which a CLEC can "adopt" performance measures and damage provisions from an approved interconnection agreement;

A CLEC may adopt performance measures and damages provisions from an approved interconnection agreement, provided that the CLEC concurrently adopts the terms and conditions governing any facilities or services that are legitimately related to those performance measures and damages provisions.

7. **The extent to which SWBT will reopen an approved interconnection agreement to renegotiation of if a CLEC attempts to take advantage of its right to pick and choose;**

SWBT does not intend to reopen an approved interconnection agreement if a CLEC wishes to adopt, without modification, legitimately related provisions of another interconnection agreement. However, as explained in response to Question IV.A.2, SWBT does not believe a CLEC can opt into an interconnection, service, or network element arrangement of an approved interconnection agreement while also seeking revisions to the rates, terms, and conditions that are legitimately related to that arrangement.

B. **State whether SWBT believes any of its outstanding interconnection agreements are no longer subject to MFN because they have been in effect longer than a "reasonable period of time" as stated in FCC rule 809, and discuss how SWBT interprets the term "reasonable period of time," including the legal basis for that interpretation.**

The "reasonable period of time" provision of FCC Rule 51.809 has yet to be applied or interpreted. Yet there are some agreements, including those that have expired, that certainly should not be available to other CLECs under this provision. As the Commission has recognized, CLECs cannot have a right to "perpetual renewal," of the terms of interconnection agreements, in part because "certain terms . . . may need renegotiation." Brief of the Texas PUC, Southwestern Bell Tel. Co. v. AT&T Communications, No. A-98-CA-197 SS, at 46-47 (W.D. Tex. filed Aug. 24, 1998); accord Order at 6, Southwestern Bell Tel. Co. v. AT&T Communications (Nov. 9, 1998) (holding that "MCI should not be granted a perpetual unilateral option to renew").

C. **State whether SWBT believes that one or more of the UNEs it currently provides would be more costly to provide to a particular class of carriers. If so, please discuss the legal basis for SWBT's belief.**

SWBT has not undertaken cost studies analyzing the cost of providing UNEs to particular classes of carriers. Therefore, SWBT has insufficient information to answer this question at the present time.

CONCLUSION

In light of the commitments outlined above, this Commission can and should proceed quickly to a favorable recommendation on SWBT's proposed 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 Texas 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,

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CERTIFICATE OF SERVICE

I, Melanie S. Fannin, Vice President and General Counsel-External Affairs Texas for Southwestern Bell Telephone Company certify that a true and correct of this document was been served on all parties of record in this proceeding on February 15, 1999 in the following manner: via facsimile and/or e-mail.

SBC

February 9, 1999

RECEIVED FEB 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,

Zeke Robertson

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

Sandy Kinney

Sandy Kinney
President-Industry Markets
SBC Telecommunications, Inc.

BEFORE THE PUBLIC SERVICE COMMISSION

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
FIRST SET OF DATA REQUESTS

COMES NOW Southwestern Bell Telephone Company (SWBT) and propounds the following Data Request (Nos. 1-7) to AT&T in accordance with the rules of the Missouri Public Service Commission. These requests are continuing in nature and the responses must be updated as needed to remain accurate. Each response will be subject to the following conditions:

A. SWBT requests the data requests/data information pursuant to Rule 4 C.S.R. 240-2.090.

B. "You" and "your" refers to each individual member of AT&T, its agents, employees and any person acting on behalf of the responding company.

C. In answering these requests, all information is to be divulged which is possessed by or available to you. If in your response you state you relied upon or in any manner used, in whole or in part, SWBT supplied data or information, please set forth the specific data/information relied upon and the source of that information, including but not limited to: the name of the individual supplying the information and the date supplied, the number of the data request from which the data/information was obtained, and the response document relied upon together with the page, section and line number within the document.

APPENDIX B

D. "Documents" or "documentation" include writings, drawings, memoranda, correspondence, graphs, charts, photographs and other data compilations from which information can be obtained and translated, if necessary, through detection devices into reasonably usable form. This request includes the original or principal copy in your possession, custody or control, and any non-identical copy (which is different from the original because of notations on such copy or otherwise), and any drafts, copies or other preliminary material different in any way from the final document.

E. For each document produced, identify the numbered data request to which it responds.

F. "Person" shall mean the plural as well as the singular and shall include any natural person and any firm, association, partnership, joint venture, corporation, governmental or public entity, department, agency, office or any other form of legal entity.

G. To "identify" a person shall mean to state with respect thereto: (1) his, her, or its name and last known address and, in addition, if a natural person, his or her last know non-business address; and (2) if a natural person, the name and last known business address of his or her employer, the employment position held by such employee with each employer and the date when such employment began or ceased.

H. To "identify" a document means to state its type or otherwise describe it, and in addition to supply the following information where applicable: (1) the name of the person who prepared it; (2) the name of the person who signed it or in whose name it was issued; (3) the name of each person to whom it was addressed or distributed; (4) the nature and substance of the writing, with sufficient particularity to enable it to be identified; and (5) its date, or if it bears no date, its approximate date.

I. When asked for a rational or explanation for a position shall mean to relate as completely as possible each and every act, omission, incident, event, condition, circumstance, or thing directly or indirectly concerning the subject matter of the description, listing all pertinent dates, documents, communications, persons and locations applicable to the event or occurrence that is the subject of the data request.

J. The term "AT&T" shall include all employees, representatives and agents, of AT&T.

K. These requests are intended to be of a continuing nature, requiring you to serve timely supplemental answers setting forth any information subsequently discovered which would add to or alter the accuracy or completeness of the information originally provided. Objections will be made at the time of the hearing to any attempt to try to introduce evidence which is directly sought by this data request and to which no disclosure has been made.

L. For each response provided, identify the name of the individual responding and the date supplied. The person signing or identified as responsible for the response certifies that the information provided to SWBT in response to the information requested is accurate and complete and contains no material misrepresentations or omissions based upon present facts known to the person(s) who signs as responsible for the answers

Respectfully submitted,

SOUTHWESTERN BELL TELEPHONE COMPANY

By 

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RECEIVED TIMEFEB. 12. 3:58PM PRINT TIMEFEB. 12. 4:02PM

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing document were faxed and placed in first class mail to AT&T on the 12th day of February 1999.

Attorney

CASE NO. TO-99-227

SOUTHWESTERN BELL TELEPHONE COMPANY
DATA REQUEST NO. 1

Requested From: AT&T

Date Requested: February 11, 1999

Information Requested:

Produce all reports, calculations, analyses and other documents prepared by or for AT&T that compare the potential additional revenues for AT&T from offering local exchange service with potential lost revenues from the long distance market once SWBT or another RBOC receives intraLATA authority.

Requested by: Alan Kern

Information Provided:

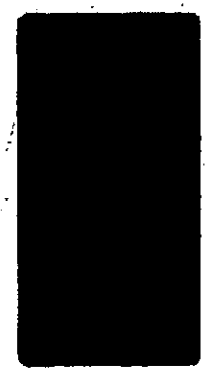
Southwestern Bell Telephone Company (SWBT) requests the above data/information pursuant to Rule 4 C.S.R. 240-2.090.

The information provided to Southwestern Bell Telephone Company in response to the above data request is accurate and complete, and contains no material misrepresentations or omissions based upon present facts known to the undersigned. The undersigned agrees to immediately inform Southwestern Bell Telephone Company if any matters are discovered which would materially affect the accuracy or completeness of the information provided in response to the above information.

Date Response Received: _____

Signed By: _____

Prepared By: _____



CASE NO. TO-99-227

SOUTHWESTERN BELL TELEPHONE COMPANY
DATA REQUEST NO. 3

Requested From: AT&T

Date Requested: February 11, 1999

Information Requested:

For the years 1996, 1997, 1998 and 1999, identify the number of AT&T personnel dedicated to AT&T local operations in Missouri and also in SWBT territory. Identify by name and title the top five ranking AT&T employees assigned to local operations in MO and also in the SWBT five states.

Requested by: Alan Kern

Information Provided:

Southwestern Bell Telephone Company (SWBT) requests the above data/information pursuant to Rule 4 C.S.R. 240-2.090.

The information provided to Southwestern Bell Telephone Company in response to the above data request is accurate and complete, and contains no material misrepresentations or omissions based upon present facts known to the undersigned. The undersigned agrees to immediately inform Southwestern Bell Telephone Company if any matters are discovered which would materially affect the accuracy or completeness of the information provided in response to the above information.

Date Response Received: _____

Signed By: _____

Prepared By: _____

CASE NO. TO-99-227

SOUTHWESTERN BELL TELEPHONE COMPANY
DATA REQUEST NO. 4

Requested From: AT&T

Date Requested: February 11, 1999

Information Requested:

For the years 1996, 1997, 1998 and 1999, identify the funds AT&T budgeted to operate AT&T local operations in Missouri and also in SWBT territory.

Requested by: Alan Kern

Information Provided:

Southwestern Bell Telephone Company (SWBT) requests the above data/information pursuant to Rule 4 C.S.R. 240-2.090.

The information provided to Southwestern Bell Telephone Company in response to the above data request is accurate and complete, and contains no material misrepresentations or omissions based upon present facts known to the undersigned. The undersigned agrees to immediately inform Southwestern Bell Telephone Company if any matters are discovered which would materially affect the accuracy or completeness of the information provided in response to the above information.

Date Response Received: _____

Signed By: _____

Prepared By: _____

CASE NO. TO-99-227

SOUTHWESTERN BELL TELEPHONE COMPANY
DATA REQUEST NO. 5

Requested From: AT&T

Date Requested: February 11, 1999

Information Requested:

Identify any provisions in the current Missouri interconnection agreement between AT&T and SWBT that AT&T believes may be subject to modification under intervening law following the Supreme Court's decision in AT&T v. Iowa Utilities. For any such provisions, provide an explanation of AT&T's position.

Requested by: Alan Kern

Information Provided:

Southwestern Bell Telephone Company (SWBT) requests the above data/information pursuant to Rule 4 C.S.R. 240-2.090.

The information provided to Southwestern Bell Telephone Company in response to the above data request is accurate and complete, and contains no material misrepresentations or omissions based upon present facts known to the undersigned. The undersigned agrees to immediately inform Southwestern Bell Telephone Company if any matters are discovered which would materially affect the accuracy or completeness of the information provided in response to the above information.

Date Response Received: _____

Signed By: _____

Prepared By: _____

CASE NO. TO-99-227

SOUTHWESTERN BELL TELEPHONE COMPANY
DATA REQUEST NO. 6

Requested From: AT&T

Date Requested: February 11, 1999

Information Requested:

Based on the Supreme Court's decision in AT&T v. Iowa Utilities identify any provisions which AT&T believes should be included in a renegotiated and/or rearbitrated interconnection agreement with SWBT. For any such provision, provide an explanation of AT&T's position.

Requested by: Alan Kern

Information Provided:

Southwestern Bell Telephone Company (SWBT) requests the above data/information pursuant to Rule 4 C.S.R. 240-2.090.

The information provided to Southwestern Bell Telephone Company in response to the above data request is accurate and complete, and contains no material misrepresentations or omissions based upon present facts known to the undersigned. The undersigned agrees to immediately inform Southwestern Bell Telephone Company if any matters are discovered which would materially affect the accuracy or completeness of the information provided in response to the above information.

Date Response Received: _____

Signed By: _____

Prepared By: _____

CASE NO. TO-99-227

SOUTHWESTERN BELL TELEPHONE COMPANY
DATA REQUEST NO. 7

Requested From: AT&T

Date Requested: February 11, 1999

Information Requested:

What percent of local market share would SWBT or another incumbent have to lose to satisfy AT&T that the local market has been opened to competition?

Requested by: Alan Kern

Information Provided:

Southwestern Bell Telephone Company (SWBT) requests the above data/information pursuant to Rule 4 C.S.R. 240-2.090.

The information provided to Southwestern Bell Telephone Company in response to the above data request is accurate and complete, and contains no material misrepresentations or omissions based upon present facts known to the undersigned. The undersigned agrees to immediately inform Southwestern Bell Telephone Company if any matters are discovered which would materially affect the accuracy or completeness of the information provided in response to the above information.

Date Response Received: _____

Signed By: _____

Prepared By: _____