STATE OF MISSOURI
PUBLIC SERVICE COMMISSION
JEFFERSON CITY

December 23, 1997

CASE NO: TO-98-115

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Enclosed find certified copy of ORDER in the above-numbered case(s).

Sincerely,

Dale Hardy Roberts

Dale Hardy Roberts
Secretary/Chief Regulatory Law Judge

Uncertified Copy:

123.

BEFORE THE PUBLIC SERVICE COMMISSION

OF THE STATE OF MISSOURI

In the Matter of AT&T Communications of the Southwest, Inc.'s Petition for Second Compulsory Arbitration Pursuant to Section 252(b) of the Telecommunications Act of 1996 to Establish an Interconnection Agreement with Southwestern Bell Telephone Company.	)	**Case No. TO-98-115**

REPORT AND ORDER

Issue Date: December 23, 1997

Effective Date: January 2, 1998

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APPEARANCES

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Penny G. Baker, Deputy General Counsel, and **Stephen M. Gunn**, Assistant General Counsel, Missouri Public Service Commission, Post Office Box 360, Jefferson City, Missouri 65102, for the Staff of the Missouri Public Service Commission.

REGULATORY LAW JUDGE: **Amy E. Randles.**

REPORT AND ORDER

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Procedural History

Southwestern Bell Telephone Company (SWBT) and AT&T Communications of the Southwest, Inc. (AT&T) have been negotiating since March 14, 1996, to develop the terms for AT&T's interconnection with SWBT's facilities.

The parties' initial round of negotiations culminated in AT&T's first petition for arbitration, filed with the Commission on July 29, 1996, in Case No. TO-97-40[1].

The Commission issued its Arbitration Order in Case No. TO-97-40 on December 11, 1996, in which it resolved the issues presented by the parties and established interim rates for the resale of SWBT's services and for the sale of SWBT's unbundled network elements (UNEs) to AT&T. This order was modified on January 22, 1997[2]. The Commission's July 31 Final Arbitration Order set permanent rates. This order was modified in several respects on October 2, when the Commission ordered SWBT and AT&T (the parties[3]) to file an interconnection agreement incorporating the findings made by the Commission. The parties filed an agreement and, on November 5, the Commission issued an order approving the proposed interconnection agreement.

Meanwhile, AT&T initiated negotiations with SWBT on a new set of issues, but the parties were again unable to resolve all of their differences. AT&T filed its petition for a second round of arbitration on September 10, initiating this case. AT&T alleged that it had made its

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[1] The March 14, 1996, date was alleged by AT&T in its petition. Case No. TA-97-40 was consolidated with Case No. TA-97-67, a petition for arbitration of an interconnection agreement between MCI Telecommunications Corporation (MCI) and SWBT, on September 16, 1996.

[2] This and all subsequent references to dates in this order shall be to 1997, unless otherwise noted.

[3] "The parties" shall be used to refer collectively to SWBT and AT&T in this Report and Order. The Commission's Staff (Staff) assisted the Commission in its decision-making role and did not act as a party before the Commission in this case. The Office of Public Counsel (OPC) was also a party to this proceeding, but OPC shall not be subsumed in the phrase "the parties" in this Report and Order because OPC will not be party to the interconnection agreement to be filed by SWBT and AT&T.

second request for negotiations to SWBT on April 3. SWBT filed its response to the petition on October 3, concurring in the April 3 date.

On October 17, the Commission ordered the parties to meet with specific members of the Commission's Staff (Arbitration Advisory Staff). The parties were ordered to jointly submit a comprehensive well-defined list of the issues on which they were requesting a second round of arbitration by October 24, and to appear before the Commission on October 27 to address certain jurisdictional issues. The parties complied. The Joint Issues List filed by the parties on October 24 grouped the issues under headings numbered I through XI, according to topic.

Following the hearing on jurisdictional issues, by its order of October 30, the Commission issued a procedural schedule to govern the submission of evidence and argument on the disputed issues. Pursuant to the Commission's order, the parties were required to maintain the same group and issue number designations used in the Joint Issues List throughout the proceedings in order to facilitate tracking of the issues. On November 7, SWBT and AT&T simultaneously filed testimony containing their proposed language on each of the remaining unresolved issues identified in the Joint Issues List.

SWBT and AT&T met during the period of November 10 through 20 with the Arbitration Advisory Staff (AAS) and with Dana K. Joyce, a Special Master appointed by the Commission, for the purpose of resolving as many of the unresolved issues as possible. The parties then filed their Joint Settlement Document on November 21 which identified each of the issues from the Joint Issues list which had either been withdrawn or resolved by agreement by SWBT and AT&T during mediation. In accordance with the

Commission's October 30 order, the Joint Settlement Document set forth the specific language agreed to by the parties for implementing their accord.

Also on November 21, the parties and the Special Master filed their Commission ordered Joint Statement of Remaining Issues (Statement), which was amended by interlineation on November 24 and 25. This Statement was replaced by an Amended Joint Statement of Remaining Issues (Amended Statement) on November 26. The Amended Statement identified each of the unresolved issues from the Joint Issues List and, for each such issue, set forth 1) the language proposed by each party, 2) the Special Master's recommendations concerning which language to adopt, and 3) the Special Master's explanation of his recommendations. SWBT and AT&T each filed their responses to the Special Master's recommendations on November 26, and OPC filed its response to the Amended Statement on November 26. In its Response, SWBT requested a hearing with opportunities for cross-examination prior to issuance of this Report and Order.

Discussion

The arbitration proceedings in Case No. TO-97-40 and in this case were filed pursuant to the federal Telecommunications Act of 1996 (the Act). The Act establishes the following standards for State Commissions to follow in issuing arbitration orders mandating interconnection between incumbent and competitive local exchange carriers (ILECs and CLECs, respectively):

> (c) STANDARDS FOR ARBITRATION - In resolving by arbitration under subsection (b) of this section any open issues and imposing conditions upon the parties to the agreement, a State commission shall—
>
> > (1) ensure that such resolution and conditions meet the requirements of section 251, including the regulations prescribed by the Commission pursuant to section 251;

(2) establish any rates for interconnection, services, or network elements according to subsection (d) of this section; and

(3) provide a schedule for implementation of the terms and conditions by the parties to the agreement.

(d) PRICING STANDARDS -

(1) INTERCONNECTION AND NETWORK ELEMENT CHARGES - Determinations by a State commission of the just and reasonable rate for the interconnection of facilities and equipment for purposes of subsection (c)(2) of section 251, and the just and reasonable rate for network elements for purposes of subsection (e)(3) of such section—

(A) shall be—

(i) based on the cost (determined without reference to a rate-of-return or other rate-based proceeding) of providing the interconnection or network element (whichever is applicable), and

(ii) nondiscriminatory, and

(B) may include a reasonable profit.

* * *

(3) WHOLESALE PRICES FOR TELECOMMUNICATIONS SERVICES - For the purposes of section 251(c)(4), a State commission shall determine wholesale rates on the basis of retail rates charged to subscribers for the telecommunications service requested, excluding the portion thereof attributable to any marketing, billing, collection, and other costs that will be avoided by the local exchange carrier.

(e) APPROVAL BY STATE COMMISSION -

(1) APPROVAL REQUIRED - Any interconnection agreement adopted by negotiation or arbitration shall be submitted for approval to the State commission. A State commission to which an agreement is submitted shall approve or reject the agreement, with written findings as to any deficiencies.

(2) GROUNDS FOR REJECTION - The State commission may only reject

> (A) an agreement (or any portion thereof) adopted by negotiation under subsection (a) if it finds that–
>
> > (i) the agreement (or portion thereof) discriminates against a telecommunications carrier not a party to the agreement; or
> >
> > (ii) the implementation of such agreement or portion is not consistent with the public interest, convenience, and necessity; or
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> (B) an agreement (or any portion thereof) adopted by arbitration under subsection (b) if it finds that the agreement does not meet the requirements of section 251, including the regulations prescribed by the Commission pursuant to section 251, or the standards set forth in subsection (d) of this section.

47 U.S.C. § 252. Section 251 of the Act prescribes the duties of ILECs and CLECs in implementing competition in the local exchange telecommunications services market. *See* 47 U.S.C. § 251. These include duties relating to interconnection, compatibility, resale, number portability, dialing parity, access to rights-of-way, reciprocal compensation, unbundled access to network elements, and collocation. Id. Relevant language from Section 251 is set forth in the remainder of this Report and Order only as needed.

For the issues which SWBT and AT&T resolved by the time they filed their November 21 Joint Settlement Document, the Commission's review is limited to determining whether the nondiscrimination and public interest standards of 47 U.S.C. § 252(e) have been met. The Commission will defer making a ruling on whether the negotiated terms are non-discriminatory or against the public interest, convenience and necessity until a complete interconnection agreement is filed in this case. The Commission will not require the parties to initiate a separate case for approval of their resolution on those issues.

1. Findings of Fact

The Commission notes at the outset that it is not required to support its decision by findings in this case, as was explained in the Commission's January 22 and October 2 orders in Case No. TO-97-40. Furthermore, the Commission is not restricted in its use of information as a basis for its decision as it would be in a contested case, because this is an arbitration proceeding. Nevertheless, the Commission bases its decision on the pleadings and testimony filed in this case and in Case No. TO-97-40.

Moreover, the Commission, having considered all of the competent and substantial evidence upon the whole record, voluntarily makes the following findings of fact in order to elucidate the reasons for its decision for the benefit of the parties. The positions and arguments of SWBT, AT&T, OPC and the Special Master have been considered by the Commission in making this decision. Failure to specifically address a piece of evidence, position or argument of any party does not indicate that the Commission has failed to consider relevant evidence, but indicates rather that the omitted material was not dispositive.

The following findings address all of the remaining issues in dispute as of November 21 (as they were presented in the November 26 Amended Statement). Some of the issues are discussed as a group. However, the Commission identifies all of the issues in this Report and Order by using the same heading and issue numbers as were used by the parties in their October 24 Joint Issues List and all subsequent filings.

For each issue discussed below, the Commission has reviewed the relevant pleadings and testimony and applied the standards enunciated in §§ 251 and 252(c), (d) and (e) of the Act to the facts to arrive at its

findings. Although the Special Master was required to recommend adoption of either the language proposed by SWBT or the language proposed by AT&T *in toto*, the Commission has considered, in the course of making its findings, whether language other than that proposed by either party should be adopted and whether any special conditions on the solutions proposed by the parties should be adopted.

A. Group I Issues - INTRALATA TOLL/ACCESS

Issue 1 (Receipt of Toll Revenue) and Issue 2 (IntraLATA toll - OS/DA)

These two issues involve the manner in which AT&T is entitled to participate in the intraLATA market before SWBT is authorized to provide in-region interLATA services.

AT&T takes the position that, when AT&T purchases local switching as an unbundled network element (UNE), AT&T should be recognized as the intraLATA toll provider and therefore receive access and toll revenue, prior to implementation of a dual primary interexchange carrier (PIC) system. AT&T maintains that when it purchases unbundled local switching from SWBT, it purchases the ability to originate and terminate all types of calls, including intraLATA toll calls. For the same reason, AT&T argues that intraLATA toll traffic that SWBT routed to AT&T's Operator Services and Directory Assistance (OS/DA) platform should not be returned to SWBT for completion of the call.

SWBT takes an opposite position, citing § 271(e)(2)(b) of the Act. SWBT's position is that it cannot be required to provide intraLATA toll dialing parity under the Act until the earlier of either three years or the time it obtains authority to provide interLATA interexchange services. According to SWBT, when AT&T purchases unbundled local switching, a 1+ intraLATA toll call is automatically routed over SWBT's intraLATA toll

network, and AT&T is effectively reselling SWBT's intraLATA toll and should be required to pay SWBT the retail rate for such usage less the resale discount rate established by the Commission. SWBT states that the Special Master has incorrectly understood the issue to be which company will be the intraLATA toll provider, and that the issue is actually over pricing. (*See* SWBT's November 26 response). SWBT states in its November 26 response that § 271(e)(2)(b) of the Act "effectively protects SWBT's intraLATA toll revenues for the duration of the applicable time period, but that protection would be eroded if AT&T were permitted to use SWBT's intraLATA toll network without paying intraLATA toll rates (less the 19.2 percent discount) merely because it purchased unbundled local switching."

On these two issues, the Special Master takes the position that AT&T's proposed language should be adopted because the FCC recognizes that § 251(c)(3) of the Act anticipates carriers requesting interconnection to purchase UNEs for the purpose of offering exchange access services (*See the FCC's First Report and Order, In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, et al., ¶ 356 (Aug. 1, 1996))* (hereinafter referred to as the *FCC's First Report and Order*). The Special Master also points out that the unbundled local switching rates contained in this Commission's July 31 Final Arbitration Order in Case No. TO-97-40, et al., were intended to include the ability to originate and terminate all types of calls. The Special Master states that when AT&T purchases unbundled local switching at the rates ordered by the Commission, it is purchasing the full functionality of the switching element, and SWBT's position would deny AT&T the full functionality of this element by limiting AT&T's use of the element.

The Commission agrees with the Special Master that the Act provides no basis for SWBT to exclude intraLATA toll services from the category of services that a CLEC may provide using UNEs. The provision cited by SWBT does not "effectively protect" SWBT's intraLATA toll revenues. This provision addresses the point in time at which SWBT must offer intraLATA toll dialing parity, whereas the language which AT&T seeks to include in an interconnection agreement with SWBT deals only with AT&T's ability to handle intraLATA toll calls when it has purchased local switching as a UNE from SWBT. The Commission finds that when it established prices for AT&T to purchase unbundled local switching capabilities in Case No. TO-97-40, the prices covered the full functionality of the local switch, which includes the ability to originate and terminate all types of calls. The Commission finds that AT&T's proposed language on Issues 1 and 2 correctly implement the requirements of the Act and the Commission's prior orders and should be adopted.

Issue 3 (Tandem Switching and Transport)

This issue concerns whether AT&T or SWBT is entitled to bill access charges to interexchange carriers (IXCs) for calls which are originated by an AT&T customer served by unbundled local switching and for calls terminating to an AT&T customer served by unbundled local switching. SWBT opposes the language proposed by AT&T because in SWBT's view, AT&T's language would permit AT&T to usurp SWBT's intraLATA and interLATA access network and claim the revenues for common transport as its own. SWBT relies on § 251(d)(3) and (g) of the Act to support its argument that access arrangements to IXCs are intended to be unchanged by local interconnection.

The Special Master recommends the adoption of AT&T's language, emphasizing that IXCs currently have a choice of terminating over their own dedicated access facilities or over SWBT's network. The Special Master points out that AT&T's language will allow it to provide access transport for calls originated by an AT&T local customer or terminating to an AT&T local customer, and that when AT&T performs these services, it will pay the appropriate UNE rates established by the Commission to SWBT. The Special Master states that this is consistent with ¶ 356 of the *FCC's First Report and Order*, which allows CLECs to purchase UNEs to provide exchange access service.

The Commission finds that the language proposed by AT&T should be adopted. The portions of the Act which SWBT cites do not provide that access arrangements to IXCs are intended to be unchanged by local interconnection. Rather, § 251(d)(3) simply limits the FCC's jurisdiction to interfere with access charges established by states. Section 251(g) is designed, *inter alia,* to prevent ILECs such as SWBT from cutting off exchange access services in the wake of competition in order to prevent CLECs from effectively participating in the local markets.

B. Group III Issues - OPERATIONAL ISSUES

Issue 1 (UNE Ordering and Provisioning - Use of EASE)

This issue presents the question of whether SWBT should be required to provide access to Easy Access Sales Environment (EASE) as an interim solution for UNE ordering. The Special Master recommends adoption of SWBT's language. According to the Special Master, AT&T desires a modified version of EASE as an interim method for processing UNE transactions, but the time and expense necessary to implement another interim method is not a productive use of resources. There is already an

interim method (LSR Exchange System (LEX)) in place by virtue of Case No. TO-97-40 and the permanent Electronic Data Interchange (EDI) solution will be ready in the near future. The Special Master states that the most appropriate solution is to continue the current interim method until EDI is fully developed.

AT&T emphasizes in its November 26 response that the capabilities of LEX have not been tested, whereas EASE has been used in the Texas market to provision resale customers with little or no manual work on the SWBT side of the interface. AT&T alleges that SWBT has stated that LEX will not provide flow-through capability for UNE orders. According to AT&T, LEX will at best be inferior at processing UNE loop with port orders to the EASE interface that SWBT uses to provision retail POTS (plain old telephone service), which also uses loops with ports. However, AT&T acknowledges that EASE is itself only a partial and interim UNE solution.

AT&T further points out that the language which SWBT proposes to add would limit the types of conversion orders that can be placed using LEX. AT&T states that elsewhere in the Amended Statement the Special Master recommends that SWBT be required to provide already intact UNE combinations to AT&T and that SWBT's language would deny AT&T any interim interface for placing the CLEC Simple Conversion Order authorized by the Commission's July 31 order in Case No. TO-97-40.

The Commission finds that the language proposed by SWBT should be adopted with some modifications because EDI, which is a permanent solution to UNE ordering and provisioning, will be available in the near future and the parties' resources should not be wasted on a new partial, interim solution when a LEX is already available as an interim solution and a permanent solution is imminent. The Commission agrees with AT&T that

SWBT's language could be used by SWBT as authority not to provide LEX ordering for facilities-based conversion orders, whether conversions with changes or conversions as specified. The Commission will require processing of such orders as discussed below. Therefore, the Commission finds that SWBT's language should be adopted, but modified to replace the phrase "Conversion (resale only)" with the phrase "Conversion (resale or using unbundled network elements as specified)."

Issue 2 (UNE Ordering and Provisioning - Data for Conversion as Specified Orders)

This issue involves the data that AT&T must provide to SWBT on a conversion as specified order.

The Special Master recommends adoption of AT&T's language because when AT&T identifies and orders UNEs, and SWBT proposes to delete all customer database records associated with the requested UNEs (with the exception of Line Information Database (LIDB)) before providing the UNEs to AT&T. This would require the purchaser to reenter the data before being able to use UNE components. The Special Master opines that SWBT's position presents a barrier to access because it results in unnecessary and costly redundant work for both parties. In addition, the deletion and reentry of the data (including 911 information) would increase the potential for human error. SWBT maintains data on closed customer accounts and it clearly can continue to do so with AT&T bearing the responsibility of updating for accuracy. The Special Master states that SWBT should not be allowed to purge the database and thus require AT&T to reenter the same data.

SWBT argues in its November 26 response that it only seeks to require AT&T to update the customer information databases (excluding LIDB) utilizing the same processes and procedures that SWBT uses for provisioning

service to its own end users. For example, SWBT prepares a disconnect order and then reenters the customer information into the customer information databases after a new connect is prepared, in order to refresh the information in the database. SWBT suggests that AT&T's language would permit AT&T, contrary to the practice used by SWBT, to assume all previous customer service information remains accurate without verifying the information with the customer. SWBT alleges that, without requiring AT&T to update the databases when AT&T converts customers to its service, the Commission would permit AT&T to destroy the accurate databases which SWBT has maintained. SWBT suggests that this could result in a tragedy in instances where AT&T fails to confirm and reenter a change of address and the 911 database is inaccurate.

The Commission finds that AT&T's proposed language should be adopted. AT&T's language does not pose the threats which SWBT alleges. SWBT ignores the fact that AT&T will have an incentive to maintain accurate telephone and address information so that it can bill its customers and contact them in the event of disconnection. AT&T's language merely prevents SWBT from purging information that SWBT already has in its databases and will require AT&T to provide a complete information update whenever AT&T wishes to change any information in SWBT's database. The Commission agrees with the Special Master's assessment of the issue.

Issue 3 (UNE Ordering and Provisioning - Industry Guidelines)

This issue involves the standards to be followed for UNE ordering and provisioning in light of the fact that the Ordering and Billing Forum (OBF) has not finalized industry standards for UNE ordering and provisioning.

The Special Master points out that those standards are anticipated to be finalized shortly and that AT&T's proposed language allows for an interim method to transmit the necessary data so that service is not delayed. The Special Master recommends adoption of AT&T's proposed language.

In its November 26 response, SWBT argues that OBF has defined the ordering requirements for some UNEs, such as loop and port, and that it should not be required to expend resources on interim solutions that are specific to AT&T that are not contained in the finalized industry standards set out by OBF.

The Commission finds that AT&T's proposed language would only require SWBT to use industry guidelines when they are available, and that AT&T's proposed language should be adopted.

C. Group IV Issues - UNE PARITY

Issue 1 (Parity: Overview) and Issue 2 (Ordering, Provisioning, and Maintenance: Access to Information)

These issues require the Commission to determine how the parity standards in the existing interconnection agreement and in the Act apply to UNEs. For both issues, the Special Master recommends that AT&T's proposed language be adopted. Under Issue 1, the parties dispute whether SWBT can charge separately for each UNE ordered by AT&T, even when such UNEs are to be used in combination, and whether SWBT is required to meet performance quality standards for combinations or platforms of elements. Under Issue 2, the parties dispute whether SWBT must provide AT&T information concerning dispatch and due date requirements when it provides other pre-service ordering information for unbundled elements ordered in combination.

According to the Special Master, the issues in dispute concern parity for UNEs when used in combination, and AT&T's proposed language is consistent with the Act. The Special Master asserts that without parity standards applied to UNEs used in combination, AT&T cannot be guaranteed nondiscriminatory access and comparable performance and quality. The Special Master points to relevant Federal Communications Commission (FCC) rules, the Act, and the recent decision of the United States Court of Appeals for the Eighth Circuit in *Iowa Utilities Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1997) (hereinafter *Iowa Utilities Bd.*), as well as specific contract language in the approved interconnection agreement between SWBT and AT&T as support. With regard to Issue 2, the Special Master states that dispatch and due date functionality must be included with UNE ordering and provisioning terms or there will be no parity between SWBT's services and AT&T's.

SWBT's November 26 response to the Special Master objected to his recommendation on Issue 1 because the *Iowa Utilities Bd.* court has decided that UNEs must be combined by CLECs, not ILECs. SWBT argues further that, even if it were required to combine UNEs for AT&T, the service being provided for AT&T customers would not be "equivalent" because UNEs are not equivalent to any SWBT service. SWBT reaches this conclusion because "UNEs are provided on an unbundled basis and only to CLECs." SWBT opposes any performance parameters that differ from those specified in Attachment 17 of the existing agreement for individual UNEs. AT&T's response does not add to its prior filings. However, the Commission notes on its own that AT&T's proposed language explicitly limits performance standards to those already set forth in Attachment 17.

With regard to dispatch and due date requirements, SWBT argues that standard intervals for AT&T to obtain access to this information are already set forth in Attachment 17. SWBT alleges that, while resold services are subject to dispatch and due date requirements, UNEs are not and so there is no reason to establish new dispatch and due date access processes when UNEs are ordered in combination. SWBT does not cite any legal authority for its position. AT&T has not responded to the Special Master's recommendation on Issue 2, but the Commission notes that AT&T's proposed language for resolving Issue 1 would preserve the standards set forth in Attachment 17. This should alleviate SWBT's concerns about new standards.

The Commission notes first that § 251(c)(3) of the Act states that ILECs have:

> [t]he duty to provide, to any requesting telecommunications carrier for the provision of a telecommunications service, nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory in accordance with the terms and conditions of the agreement and the requirements of this section and section 252. An incumbent local exchange carrier shall provide such unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service.

47 U.S.C. § 251(c)(3). Both the *Iowa Utilities Bd.* decision and § 251(c)(3) of the Act require the ILEC to provide UNEs in a nondiscriminatory manner that permits the CLEC to combine the elements as it sees fit. They do not go so far as to require the CLEC to purchase UNEs separately and then recombine them, at the time of the order, if the ILEC already uses the elements specified by the CLEC in the same combination that the CLEC requests. SWBT has not pointed to any provision requiring disassembly and

then reassembly of identical service, and nothing in AT&T's language attempts to force SWBT to combine elements for AT&T.

Moreover, Section 2.1 of Attachment UNE (Attachment 6) of the approved SWBT/AT&T interconnection agreement states:

> SWBT will permit AT&T to designate any point at which it wishes to connect AT&T's facilities or facilities provided by a third party on behalf of AT&T with SWBT's network of access to unbundled Network Elements for the provision by AT&T of a Telecommunications Service. If the point designated by AT&T is technically feasible, SWBT will make the requested connection.

Additionally Section 2.4 of Attachment UNE of the approved SWBT/AT&T interconnection agreement states:

> SWBT will provide AT&T access to the unbundled Network Elements provided for in this Attachment, including combinations of Network Elements, without restriction.

Finally, Section 2.8 of Attachment UNE of the agreement states that:

> Except upon request, SWBT will not separate requested network elements that SWBT currently combines.

The Commission finds that SWBT's proposed language is contrary to agreed-upon and approved language.

The Commission finds that AT&T's proposed language on Issue 1 implements the prior agreement of the parties and should be adopted. In addition, the Commission finds that it should adopt the language proposed by AT&T for resolution of Issue 2 in order to ensure UNE parity. If AT&T does not have dispatch and due date requirements available to it as with other pre-service ordering information, AT&T cannot provide service to its customers that is equivalent to SWBT's.

Issue 3 (Interconnected and Functional Network Elements), Issue 4 (Service Disruption With IDLC), Issue 7 (Automated Testing), Issue 10 (Automated Testing Through EBI), Issue 14b (Input-Output Port) and Issue 16 (Combining Elements)

For all six of these issues, the Commission must address the extent of SWBT's obligation to provide combined UNEs. Issue 3 involves SWBT's ability to disconnect elements that are ordered in combination by AT&T when those elements are already interconnected and functional at the time of the order. Issue 4 addresses whether SWBT may interrupt service to rearrange loop facilities on working service served by Integrated Digital Loop Carrier (IDLEC) technology when AT&T orders the loop and switch port in combination. Issue 7 addresses whether SWBT must provide automated loop testing through the local switch rather than install a loop test point when AT&T utilizes a SWBT unbundled local loop and SWBT unbundled switch port in combination. Under Issue 10, the dispute is over AT&T's right to initiate and receive test results through EBI, and under Issue 14b, the parties dispute AT&T's right to have access to Input/Output ports at locations other than in AT&T's collocation space. Issue 16 is whether the agreement should provide for SWBT to combine those elements that are not interconnected in the SWBT network at the time of AT&T's order.

For all of these issues, the Special Master recommends adoption of AT&T's proposed language because SWBT has already agreed not to separate requested network elements that SWBT currently combines, referring to Sections 2.1, 2.4 and 2.8 of Attachment UNE (Attachment 6). Moreover, the Special Master states that Issues 3 and 4 involve functions included within the full functionality of the switching element already purchased by AT&T. If there is to be parity, SWBT must provide the functions requested by AT&T

in the manner that it provides such functions to itself. Parity is required for the reasons set forth under Issues 1 and 2, above.

The Commission finds that SWBT is bound by this contractual language because the Eighth Circuit's recent ruling in *Iowa Utilities Bd.* has not made SWBT's and AT&T's contract provisions illegal. The decision simply vacated FCC rules which required that ILECs combine elements; it did not prevent ILECs from volunteering to combine such elements. Also, the Commission concurs with the Special Master's reasoning on Issues 3 and 4 related to parity. The Commission finds that AT&T's proposed language should be adopted for Issues 3, 4, 7, 10, 14b and 16.

Issue 14c (Switch Capability)

This issue involves the information SWBT should be required to provide to AT&T concerning the features, functions and capabilities of each end office. The difference between the parties is primarily over AT&T's access to information concerning the identity of the specific programs installed, rather than just information concerning the capabilities of the network.

The Special Master recommends adoption of SWBT's language because AT&T's proposed language may require SWBT to provide its competitors with proprietary business information. SWBT's proposed language would provide AT&T with adequate information to operate effectively. The Commission has reviewed the language proposed by both parties and their arguments in support and agrees that SWBT's proposed language should be adopted.

Issue 14d (Expedited Special Request Process)

This issue is limited to a determination of the amount of time that SWBT should have to respond to an expedited special request made by

AT&T. AT&T would like for the price quote response time to be 20 days, while SWBT proposes 60 days.

The Special Master recommends adoption AT&T's language, stating that because the UNE is already operational, twenty days is sufficient time for a price quote. In the other four states where SWBT is the incumbent local provider, SWBT is required to provide the price within ten days.

The Commission sees no reason for SWBT to need more than 20 days to provide this information and therefore finds that AT&T's proposed language should be adopted.

D. Group V Issues - PRICING

In general, AT&T alleges that the rates proposed by SWBT are for features that are included in the full functionality of the unbundled elements for which the Commission established permanent rates in either its July 31 or October 2 orders in Case. No. TO-97-40. In its November 26 response, AT&T requests the Commission to avoid making a final determination at this point in time about whether rates should be imposed for any of the following UNEs. AT&T would like for the Commission to delegate its authority to the Special Master to set a procedural schedule for determining whether any rates should be imposed and, if so, what the rates should be. AT&T also urges the Commission to make clear to the AAS and Special Master that SWBT is required to provide a Total Element Long Run Incremental Cost (TELRIC) study to support the rates it proposes, and to permit the Special Master to issue protective orders as needed so that AT&T can have access to the SWBT study.

The Commission finds that it is appropriate to adopt interim prices for some, but not all, of the UNEs in dispute, as set forth below. The establishment of interim rates shall not be construed as a final

determination by the Commission that a rate is appropriate. Similarly, the failure to establish interim rates shall not be construed as a final determination by the Commission that no rate is appropriate.

The Commission does not find it appropriate to have the Special Master set a procedural schedule or issue protective orders. The Commission finds that the Commission should adopt a schedule for setting permanent prices that is similar, but not identical, to the process used in Case No. TO-97-40, for the elements identified below as not being covered by the prices already established in Case No. TO-97-40. Also, the Commission finds that it is unnecessary to order SWBT to provide the TELRIC studies to the AAS to the extent that such studies have already been provided. However, the Commission will order SWBT to provide the AAS with any and all cost studies that are directly or indirectly relevant to the rate issues to be reviewed by the AAS pursuant to this order. The details of the process are set forth below.

Issue 1a (EAS Port Additive Charges)

The issue presented is whether the Commission's October 2 order precludes SWBT from assessing an Extended Area Services (EAS) Port Additive Charge when AT&T requests a telephone number with an NXX[4] which has an expanded area calling scope. The Special Master recommends adoption of AT&T's proposal. Neither SWBT nor AT&T made any arguments specific to this issue in their November 26 responses. According to the Special Master, SWBT's proposed language would allow AT&T to have the option of purchasing this port additive, but that during the mediation sessions, AT&T indicated they did not want to purchase this port additive.

[4] The term "NXX" or "NXX code" refers to the first three digits dialed in a seven digit number.

The Commission finds that AT&T's proposal to reject SWBT's language should be adopted, and AT&T's proposal to leave this issue unaddressed in the parties' final interconnection agreement should be approved. The Commission notes that its finding is based upon AT&T's lack of interest in the port additive at this time. The Commission's finding should not be construed as resolving the issue of whether a port additive charge would be appropriate if AT&T were to request this port additive in the future.

Issue 1b (Multiplexing Charges), Issue 1c (Digital Cross Connect (DCS) Charges), Issue 1j (Dedicated Transport Cross-Connect Charges), Issue 4 (NXX Migration) and Issue 7 (Pricing for Additional Elements)

Issue 1b poses the question of whether the Commission's October 2 order precludes SWBT from assessing multiplexing charges in addition to the dedicated transport charges approved by the Commission. Issue 1c is whether the Commission's October 2 order precludes SWBT from assessing Digital Cross Connect Systems (DCS) charges when AT&T controls the DCS. To resolve Issue 1j, the Commission must decide whether SWBT may assess dedicated transport cross-connect charges other than the DS3 transport cross-connect charge established by the Commission in its July 31 Final Arbitration Order in Case No. TO-97-40. Issue 4 is whether NXX migration is a form of interim number portability and, if not, the appropriate rate to be charged for NXX migration. Under Issue 7, the parties have requested that the Commission determine which of the following elements need to be priced[5]: 7b) 4-wire PRI loop to multiplexer cross-connect, 7c) dedicated

[5] The Commission notes that, although the description of Issue 7a in the Amended Statement states that the Commission should decide whether Optical Transport (including multiplexing) needs to be priced, and the parties' Joint Settlement Document does not mention that Issue 7a has been settled, neither party's proposed language addresses this issue. Therefore, the (continued...)

transport entrance facility when this element is actually utilized, 7d) SS7 links-cross connects, and 7e) call branding for Directory Assistance and Operator Services.

The Special Master urges the Commission to adopt SWBT's language for each of these issues, and neither SWBT nor AT&T has responded specifically to the Special Master's recommendations for resolution of these three issues in their November 26 responses.

For each of these issues, the Special Master asserts that both parties believe the AAS should review the applicable cost studies to determine the appropriate permanent rate, if any. AT&T believes there are no additional rate elements, while SWBT believes the rates should be those set forth in its proposed language. The AAS has examined the relevant cost studies and believes a rate is appropriate to address each issue, and so the Special Master concludes that SWBT's language should be adopted as it includes interim rates. In the event the permanent rates are different than the interim rates, SWBT's proposed language includes a true-up process.

The Commission finds that, because the AAS has made a preliminary determination that rates will be applicable and the language proposed by SWBT would provide AT&T with a true-up process in the event the Commission eventually determines that a rate is not appropriate or that a different rate should be applied, the Commission determines that interim rates are appropriate at the levels proposed by SWBT. The language proposed by SWBT for resolution of Issues 1b, 1c, 1j, 4 and 7(b, c, d and e) should be adopted.

(...continued)
Commission will treat Issue 7a as resolved.

Issue 1d (LIDB Services Management System, Fraud Monitoring System and Service Order Charges)

The parties question whether the Commission's October 2 order precludes SWBT from assessing charges for the LIDB Services Management System and the Fraud Monitoring System, and a Service Order Charge when AT&T has a new switch or orders a new type of access to LIDB for query origination, in addition to LIDB and Calling Name (CNAM) query/query transport charges approved by the Commission. The Special Master recommends that the Commission adopt AT&T's language, and neither party addressed this recommendation specifically in its response.

As with Issues 1b, 1c, 1j, 4 and 7, SWBT's proposal includes proposed interim rates and a true-up provision in the event that the Commission establishes different permanent rates or finds that no rate should be imposed. However, the factual data submitted on this issue is not as complete as for Issues 1b, 1c, 1j, 4 and 7. The Special Master indicates that during the cost study review ordered pursuant to Case No. TO-97-40, SWBT failed to provide these cost studies along with the other signaling cost studies reviewed by AAS. SWBT presented the cost studies as a part of this arbitration, but the AAS has not formed a preliminary determination regarding whether a rate is appropriate. Therefore, the Special Master states that AT&T's language should be adopted as it does not include rates for these elements.

The Commission finds that interim rates should not be imposed without additional opportunity for the AAS to review SWBT's cost studies. Because AT&T's language does contain a process for arriving at permanent rates but does not impose interim rates, the Commission finds that AT&T's language should be adopted.

Issue 1e (Non-recurring Charges for Conversion)

The issue presented is whether the Commission's October 2 order precludes SWBT from assessing non-recurring charges (NRC), in addition to the CLEC Simple Conversion Charge approved by the Commission, when AT&T converts a SWBT customer to AT&T service using all the network elements required to provide the service.

The Special Master states that this issue was already resolved in the Final Arbitration Order in Case No. TO-97-40 issued July 31, and refers the Commission to Attachment C of the order, in which the AAS recommended "that there be no additional NRC for a CLEC Simple Conversion. The Staff Proposed Service Order Charge of $5.00 would still apply."

SWBT's November 26 response asserted that the Special Master's recommendation is contrary to the Commission's November 5 order approving the interconnection agreement filed by SWBT and AT&T to implement the Commission's arbitration orders in Case No. TO-97-40. SWBT points to the following language from the Commission's November 5 order to support its argument:

> The Agreement sets a $5.00 customer change charge which SWBT will charge AT&T for switching an end user from SWBT to AT&T. If an end user adds features or services at the time the customer is switched from SWBT to AT&T, SWBT will also charge AT&T *any applicable* wholesale *non-recurring charges for the features and services* added.

See Southwestern Bell Telephone Company's Response to the Recommendations of the Special Master in the Joint Statement of Issues Remaining, p. 20 (emphasis added).

The Commission disagrees with the Special Master that the Commission foreclosed the possibility of SWBT assessing non-recurring charges for a CLEC Simple Conversion when it issued its July 31 order in

TO-97-40. The Commission's November 5 order approving the interconnection agreement submitted in that case clearly left open the possibility that non-recurring charges could be established. However, SWBT's language is not acceptable because it would impose an interim rate without any assessment having been made by the AAS and the Special Master about the appropriateness of the rate. The Commission finds that AT&T's language provides for a process to establish any appropriate permanent rates and does not establish interim rates, and so AT&T's proposed language should be adopted as recommended by the Special Master. The AAS should review the cost studies that are pertinent to SWBT's proposed charges as a part of the permanent rate development process discussed below.

Issue 1f (Mechanized Service Order Charges for UNEs)

This issue involves whether SWBT should be permitted to charge additional non-mechanized service order charges for services where they do not currently have a mechanized process. The Special Master indicates that the AAS is not in a position to make a recommendation on the appropriate costs, if any, at this time. SWBT's proposed language allows for the AAS to review these cost studies and recommend an appropriate rate, and the Special Master recommends that SWBT's language be adopted on an interim basis until AAS has completed a review of the cost studies and recommended appropriate rates. The Special Master points out that AT&T's proposed language does not allow for a review of the cost studies and that SWBT's proposed language includes a true-up mechanism.

The Commission agrees with the Special Master's recommendation to adopt SWBT's proposed language but finds that SWBT's language should be modified, because the AAS has not yet had an opportunity to make a preliminary assessment of those charges based on SWBT's cost studies. The

language proposed by each of the parties is faulty because the SWBT language imposes an interim rate not reviewed by the AAS and the AT&T language fails to include any process for establishing any appropriate *permanent rates. While the Special Master was ordered to recommend* adoption of one of the party's language *in toto*, the Commission is not so constrained.

Therefore, the Commission finds that the SWBT language should be adopted with the following modifications to the first and second paragraphs to resolve this issue:

> SWBT shall not impose charges for nonmechanized service order types in those situations where SWBT does not have a mechanized process in place for its own customers unless and until such time as the arbitration advisory *staff has reviewed the cost, made their recommendation to* the Commission, and the Commission has ordered final cost based rates. If the Commission orders final cost based rates, AT&T will remit any amounts owed for the interim period to SWBT within a reasonable period. In accepting this procedure, the parties preserve all rights to appeal any Commission order, including the right to contest the process used in establishing the rates, terms and conditions between the parties.
>
> SWBT offers the following order types.

The remaining paragraphs proposed by SWBT will remain intact, except that the rates listed in the chart entitled "Service Order Charges - Unbundled *Element" should all be changed to "$0.00" and all of SWBT's statements to* the effect that charges will apply in the final two paragraphs should be deleted.

Issue 1h (Rate Quotation Service Charges)

The parties also seek resolution of the issue of whether SWBT may assess charges in addition to the Operator Services and Directory Assistance charges established by the Commission when SWBT provides rate quotation service to AT&T, either in a UNE or resale environment. The

Special Master recommends that the Commission adopt AT&T's language because AT&T's proposed language allows for the AAS to review these cost studies and recommend appropriate rates and for a true-up following establishment of any applicable rates, while SWBT's proposed language does not allow for a review of the cost studies. The Special Master states that the AAS is not in a position to make a recommendation on the appropriate costs at this time, and that no interim rates should be adopted until AAS has completed a review of the cost studies and recommended appropriate rates. SWBT's and AT&T's November 26 responses did not specifically address this issue.

The Commission finds that, consistent with its findings on Issues 1d, 1e and 1f, no interim rate should be implemented where the AAS has not had a sufficient opportunity to make even a preliminary assessment concerning their appropriateness. Therefore, the Commission finds that AT&T's proposed language should be adopted.

Issue 3a (Rates for White Pages-Resale, White Pages-Other and Directory Listings)

The Special Master states that the Commission should adopt AT&T's proposed language as it allows for the AAS to review these cost studies and recommend appropriate rates and also allows for a true-up mechanism. SWBT's proposed language does not allow for a review of the cost studies. According to the Special Master, the AAS is not in a position to make a recommendation on the appropriate costs, if any, at this time. Neither SWBT nor AT&T included a specific response to the Special Master's recommendation on this issue.

This issue is similar to Issue 1f in that the only party proposing a process for establishing permanent rates and a true-up at the end of that process (SWBT) is also proposing establishment of interim rates, even

though the Special Master has indicated that the AAS has not had sufficient time to review the appropriateness of the proposed interim rates. However, this issue is in a different posture from Issue 1f because both SWBT and AT&T are proposing adoption of the same rate of $3,191.73 for a single sided informational white page per year in any book covering a geographic area. For this reason, the Commission finds that it should adopt the interim rate and implementing language proposed by AT&T, with one modification to correct an apparent typographical error. AT&T's second paragraph under "Appendix White Pages - Resale" should have the appropriate section number inserted following the word "Section."

Issue 8 (Additional Pricing Issues)

Finally, Issue 8 is whether the Commission's October 2 order covers pricing for the following items:

a. Loop Cross Connect without testing to DCS
b. Loop Cross Connect with testing to DCS
c. Subloop Cross Connect
d. Nonrecurring Charge for Unbundled Switch Port-Vertical Features
e. Access to Directory Assistance database
f. Dark Fiber cross connect
g. Dark Fiber record research

The Special Master states that, consistent with SWBT's position on combining UNEs, the cross-connects in Issues 8a and 8b were withdrawn by SWBT, and AT&T did not object[6].

For issues 8c, 8e, 8f, and 8g, the Special Master recommends that SWBT's rates be adopted on an interim basis because the AAS believes that a rate may be appropriate. The Special Master noted that SWBT's proposed language provides for the imposition of interim rates while AT&T's does

[6] As with Issue 7a, the parties did not identify Issues 8a and 8b as settled in their Joint Settlement Document. Nevertheless, the Commission will treat these issues as resolved.

not, but both parties recommend that a procedure be established to determine any applicable permanent rates for items 8c, 8e, 8f and 8g with a true-up process at the end. Neither SWBT nor AT&T responded to this recommendation.

However, for Issue 8d, the Special Master recommends that SWBT's proposed rates be rejected and no additional rates for the functionality of unbundled local switching be applied. The Special Master relies on the Commission's Final Arbitration Order in Case No. TO-97-40, in which the Commission found that prices for the unbundled network elements include the full functionality of each element. In the Special Master's opinion, SWBT's proposed rates under Issue 8d are for activating the functionality of unbundled local switching. In its response, SWBT made the same arguments as it did for Issue 1e.

For the reasons stated above for Issues 1b, 1c, 1j, 4 and 7, the Commission finds that SWBT's proposed interim rates and language should be adopted to resolve Issues 8c, 8e, 8f and 8g.

As with Issue 1e, the Commission does not adopt the Special Master's conclusion that the Commission foreclosed the possibility of SWBT assessing the non-recurring charges identified in Issue 8d when it issued its July 31 order in TO-97-40. However, SWBT's language is not acceptable because it would impose an interim rate without any assessment having been made by the AAS and the Special Master about the appropriateness of the rate. The Commission finds that SWBT's language should be adopted except that the interim charges listed under the section entitled "d. Nonrecurring Charge for Unbundled Switch Port - Vertical Features" should all be changed to $0.00. The AAS should review the cost studies that are pertinent to

SWBT's proposed charges as a part of the permanent rate development process discussed below.

E. Group VI Issues - NETWORK EFFICIENCY

Issue 2 (Flexibility in Establishing Trunk Groups)

Issue 2 is whether AT&T should be allowed to combine all traffic, including local and toll, on a single trunk group over its interconnection facility with SWBT. Under the Commission's December 11, 1996 Arbitration Order in Case No. TO-97-40, AT&T may combine intraLATA and local traffic onto the same trunk group. The issue has now been expanded to include interLATA traffic.

The Special Master recommended adoption of AT&T's proposal to allow it to combine interLATA, intraLATA and local traffic over a single trunk group, noting that allowing AT&T to combine interLATA traffic with intraLATA and local traffic provides the most efficient use of network resources and is therefore consistent with the intent of the Commission's December 11, 1996, order in Case No. TO-97-40.

SWBT is opposed to AT&T's proposal because it is concerned about its ability to record data and bill properly for various types of traffic in one trunk. SWBT argues that the Special Master's recommendation is not limited to intrastate interLATA traffic and therefore is beyond the PSC's jurisdiction. SWBT asserts that the Commission's December 11, 1996, order in Case No. TO-97-40 rejected such a proposal made by MCI in that proceeding. Finally, SWBT suggests that AT&T could use combined trunking facilities to avoid access charges owed to SWBT.

AT&T responded to the Special Master's recommendation by asserting that the efficiency to be achieved by its proposal goes to the heart of one of the key benefits to be gained by introducing competition. AT&T stated

affirmatively in its November 26 response that it does not intend to avoid paying access charges when it functions as an interexchange carrier only.

The Commission notes that AT&T's language specifies the use of percentage of jurisdictional use factors reports as an interim method to identify traffic types for billing purposes and that AT&T has stated that it will pay all applicable access charges in its proposed language. The interim billing method proposed by AT&T is consistent with Commission's order of December 11, 1996, in Case No. TO-97-40. Contrary to SWBT's assertion, the order was silent on the specific issue of combining interLATA traffic with intraLATA and local traffic.

The Commission finds that AT&T's proposed language should be adopted. The Commission's order should not be construed as affecting interstate interLATA traffic outside of its jurisdiction.

F. Group IX Issues - POLES, CONDUITS, AND RIGHTS-OF-WAY

Issue 31 (Compensation for Use of Rights-of-Way)

Under this issue, SWBT seeks to have AT&T compensate it for costs incurred in obtaining exclusive rights-of-way, and AT&T opposes the addition of this language to the parties' agreement. The Special Master notes that the language SWBT proposes should be adopted, as nothing in the existing section 5.03 allows for SWBT to be compensated for AT&T's access to exclusive rights-of-way. AT&T did not respond to the Special Master's recommendation.

The Commission finds that where SWBT has purchased exclusive rights-of-way, AT&T must share the cost when and to the extent that AT&T uses those rights-of-way. SWBT's language fairly allocates costs for such use and should be adopted.

G. Group X Issues - CONTRACT TERMS AND CONDITIONS AND OTHER ISSUES

Issues 3a, 3b, 3c and 4 (Limitation of Liabilities and Indemnification), Issue 15 (Intellectual Property Rights Associated with UNEs) and Issue 8 (Responsibility for Environmental Contamination)

These issues are related because they deal with the allocation of responsibilities toward end users and other third parties between SWBT and AT&T and correlated limitation of liability and indemnification arrangements. Issues 3a and 15 require a determination of whether SWBT or AT&T should be responsible for obtaining copyrights, licenses and any other required intellectual property rights before AT&T provides service using SWBT's facilities. Issue 3b relates to the length of time to be used in measuring the liability cap for damages to be paid by the parties to one another for negligent acts other than those specifically addressed elsewhere. Issue 3c and 4 involve the parties' responsibilities to indemnify one another for damages sought by their end users. Finally, Issue 8 addresses what the agreement should provide regarding responsibility for the presence or release of environmental hazardous at an affected work location that was introduced by a third party.

SWBT proposes to address Issue 3b by capping each party's damages for harm to one another to the amounts paid for the affected services as defined in the Performance Criteria section of the agreement, which corresponds to the amount of time that service is interrupted. SWBT's language also proposes damages to recover the injured party's collocated equipment or property that was destroyed or damaged by the injuring party. AT&T's language would permit damages up to the total amount paid for the entire contract for a given contract year. The Special Master comments that AT&T's language permits damages that are too high because the annual

contract amount might be greater than actual damages in many instances, and AT&T's language fails to permit recovery for the value of any damaged collocated equipment or property. While SWBT did not respond to the Special Master's recommendations, AT&T commented that SWBT's approach would treat AT&T as an end user with an outage rather than as a competitor with potentially large consequential damages.

The Commission finds that SWBT's language is most appropriate. AT&T has ignored the fact that, under SWBT's proposed language, SWBT and AT&T are to be treated equally. Therefore, if this provision treats AT&T as an end user with an outage whenever SWBT causes damage to AT&T, the reverse is also true. Each party will have an incentive to avoid causing the other to incur consequential damages because each party will be subject to the same limitation of liability amounts. The Commission does not agree with the Special Master's statement that AT&T's language would permit AT&T to recover damages beyond actual damages, but agrees that AT&T's proposed liability limit is too high because the limitations of liability imposed by most telecommunications carriers on their customers are similar to the limits proposed by SWBT. There is no reason that companies should be permitted to limit the damages their end users can obtain against them while preserving much higher claims for themselves. The Commission finds SWBT's proposed language preferable to AT&T's for this reason and for the reason that SWBT's language would permit the companies to recover their costs for any damaged collocation equipment or property as a cost of interconnection. The Commission finds that SWBT's language should be adopted.

The Special Master also recommends the Commission adopt SWBT's language for resolution of Issues 3a and 15. The Commission notes that

SWBT's proposed language would place the responsibility for obtaining all licenses, copyrights and other intellectual property rights required by law on AT&T when SWBT provides UNEs to AT&T that are purchased from third parties and protected by intellectual property laws. SWBT does promise to assist AT&T in identifying the applicable licenses, but AT&T bears ultimate responsibility for compliance with intellectual property laws. By contrast, AT&T's language would require SWBT to indemnify AT&T for any infringements of intellectual property rights by AT&T. AT&T responded to the Special Master's recommendation by alleging that SWBT could use its proposed language to prevent AT&T's use of unbundled elements by claiming that AT&T has failed to purchase the necessary copyrights, and such actions by SWBT would violate the Act.

The Commission disagrees with AT&T's assessment of the language proposed by SWBT. SWBT's proposed language would not make AT&T's purchase of the necessary copyrights a condition precedent to provisioning UNEs, but merely clarifies that SWBT cannot be held responsible to third parties for AT&T's copyright infringements. Also, AT&T's argument is undercut by SWBT's promise to assist AT&T in locating the applicable intellectual property rights. It is difficult to see how SWBT could successfully prevent AT&T's use of UNEs on the ground that AT&T failed to seek necessary licenses when SWBT would itself be under an obligation to disclose any known intellectual property rights to AT&T. The Commission finds that SWBT's proposed language merely exculpates SWBT and requires AT&T to defend, hold harmless and indemnify SWBT for AT&T's infringements. This does not violate the Act. The Commission finds that SWBT's language should be adopted to resolve Issues 3a and 15.

With respect to Issues 3c and 4, the Special Master recommends that AT&T's language be adopted, because AT&T's proposed language suggests that each party be responsible for the damage it causes toward its end users. By contrast, SWBT's proposed language seeks to protect itself from damages to AT&T's end users caused by SWBT, and to protect AT&T from damages that AT&T causes to SWBT's end users. The Special Master asserts that SWBT should not be permitted to abrogate its liability for its own actions. AT&T does not respond to this specific recommendation. However, SWBT argues that AT&T's proposed language would present a departure from the Commission's longstanding practice of permitting companies to limit their liability toward end users. SWBT suggests that, with AT&T in control of its tariff provisions and contracts with customers, AT&T can limit its own liability toward its customers, but SWBT does not have a direct contractual relationship with AT&T's customers and cannot do likewise. The reverse is also true. Therefore, SWBT advocates an agreement term requiring each party to indemnify the other for damages alleged by its own customers, so that each party will have an incentive to limit liability to customers for both itself and the other party.

The Commission finds that AT&T's proposed language for resolving Issues 3c and 4 is reasonable and should be adopted. SWBT has not explained how the language proposed by AT&T is more favorable toward AT&T than it is toward SWBT, as SWBT could likewise limit its damages toward its end users and encourage them to sue AT&T. The Commission acknowledges SWBT's concerns about its exposure to liability but finds that SWBT's proposed system would create much worse incentives. If each party could avoid responsibility for harm that it caused to the other party's customers

there would be little incentive for either party to work together on providing customers with quality service.

Finally, the Special Master believes that the Commission should adopt AT&T's proposed language for resolution of Issue 8. AT&T believes that neither party should be responsible for hazards which it has not introduced to the affected work location and attempts to introduce language that would protect it from responsibility for hazards introduced at a work site by any person, including SWBT. SWBT likewise believes that each party should only be responsible for hazards it has introduced, but SWBT would only limit each party's responsibility in the event of hazards introduced by the other; SWBT's proposed language would not address responsibility for hazards introduced by third parties. Neither SWBT nor AT&T responded to the Special Master's recommendation to adopt AT&T's language.

The Commission finds that SWBT's proposed language is not broad enough because it would allow SWBT to sue AT&T for damages due to hazards introduced at a work site by a third party rather than suing the responsible third party. While neither party can limit its liability to the federal or state government or prevent the government from suing all responsible parties for environmental harm and then allowing them to indemnify one another appropriately, AT&T's proposed language at least addresses the allocation of responsibility as between SWBT and AT&T. The Commission finds that AT&T's proposed language should be adopted.

Issue 6 (Local Exchange Carrier Selection/"Slamming")

SWBT proposes to add language concerning the procedures for investigating charges of slamming. This language would require each party to provide to the other party any customer authorization without charge when a request is made to investigate claims of unauthorized changes. The

Special Master has recommended that the Commission adopt SWBT's proposed language, and AT&T has responded to this recommendation by pointing out that it is opposed to SWBT's proposal because it fears that SWBT could use this language to interfere with competition by requesting customer authorizations on its own initiative.

The Commission finds that AT&T's fears are unjustified. The existing language, when read together with SWBT's proposed new language, would clearly require an end user request for a slamming investigation before either party could demand customer authorizations, for free or for a charge, from one another. The Commission finds that SWBT's proposed language should be adopted.

Issue 16 (Dispute Resolution Process)

AT&T proposes to add language to the agreement that requires the parties to seek arbitration before the Commission of any disputes arising from either party's desire to add terms to their agreement. SWBT opposes this new language. The Special Master endorses AT&T's position, and neither party has responded to that recommendation. The Commission finds that AT&T's language restates the requirements of the Act. To the extent that the Act gives the Commission jurisdiction over any particular disputes, either party can force the other to arbitrate before the Commission pursuant to § 252(b) if the party acts within the time frames established under the Act. To the extent that the Commission lacks jurisdiction over any particular disputes, the proposed language will be unenforceable.

The Commission adopts the language proposed by AT&T and notes that its finding should not be construed as an attempt to confer upon the Commission any jurisdiction which it does not have. This finding is not

contrary to the Commission's October 30 order in this case because the proposed language deals with the parties' obligations to submit their disputes for arbitration, and not with the Commission's authority or obligation to resolve such disputes. As the Special Master states, the Commission should determine its responsibility to address any such disputes on a case by case basis.

Issue 18 (Custom Routing to Multiple SWBT End Offices)

According to the Special Master, the Commission should adopt AT&T's language requiring SWBT to custom route AT&T local calls to multiple SWBT end offices. The Special Master states that SWBT currently employs various routing methodologies to route local calls to multiple destinations, and that it is technically feasible for SWBT to route certain local calls over its common transport to a tandem end office, or to route certain local calls over dedicated facilities to a specified end office. The Special Master concludes that AT&T's proposed routing arrangement utilizes network facilities more efficiently, and that SWBT should provide the same routing functionality to AT&T as SWBT provides itself.

AT&T's response to the Special Master's recommendation emphasizes in addition that SWBT's proposed language would be discriminatory because it would significantly restrict AT&T's access to basic functions of the local switch such as connecting lines to lines, lines to trunks, trunks to lines, and trunks to trunks. AT&T suggests that if SWBT only permits AT&T to route local calls to one location, this could result in line blocking during busy periods and in order to avoid this result AT&T would have to order inefficiently large trunks out of the local switch.

SWBT alleges that AT&T's proposed language would be inefficient and would use up an unjustified amount of SWBT's network facilities because

a greater number of trunks is required to carry the same amount of traffic when the traffic is routed over multiple trunk groups rather than a single trunk group.

The Commission finds that AT&T's proposed language should be adopted because the Act requires the Commission to address AT&T's discrimination concerns, and because SWBT's efficiency concerns are countered by AT&T's efficiency and blocking concerns. AT&T's proposed language ensures that the full functionality of local switching capabilities will be available to AT&T on the same basis as they are available to SWBT, while SWBT's proposed language would implement a discriminatory regime and be likely to result in either the blocking of AT&T customers' calls or the purchase by AT&T of unnecessarily large numbers of trunks. Nondiscriminatory access is a primary duty under § 251 of the Act. SWBT may be correct that certain inefficiencies could result from routing local calls to multiple end offices, but the Commission finds that it is just as likely that inefficiencies will result if AT&T is forced to direct all calls over a single trunk group.

Issue 20 (Separate NXX Codes for Each SWBT Exchange)

This issue addresses the NXX codes to be used by AT&T for assignment of numbers to its end users and encompasses both billing and Numbering Plan Area (NPA) exhaustion concerns shared by the parties. Both parties propose language that would require AT&T to obtain a separate NXX code for each SWBT exchange or group of exchanges that share a common mandatory calling scope as defined in SWBT's tariffs in metropolitan exchange areas where AT&T intends to offer service. This would permit the parties to identify the jurisdictional nature of traffic for purposes of intercompany compensation for the foreseeable future.

However, the parties disagree about how to address any NPA number exhaustion that may develop in those areas. SWBT would use NXX codes for billing identification purposes until both of the parties have implemented billing and routing capabilities to determine traffic jurisdiction on a non-NXX code basis, and would resort to industry forums or the Commission for a solution if NPA exhaustion occurs before that time. By contrast, AT&T does not provide for termination of the NXX code based billing approach outside of an NPA exhaustion context. However, in the event of NPA exhaustion, AT&T would establish a substitute billing method involving use of certain fields in SWBT's "92-99" billing record if the parties could not agree to an alternative method by March 31, 1998. The Special Master recommends adoption of AT&T's language because it is proactive in that it establishes a deadline for voluntarily resolution of NPA exhaustion problems and a precise and feasible alternative billing method to be implemented by the parties without the need for Commission intervention.

AT&T did not respond to the Special Master's recommendation. However, SWBT did respond. SWBT alleges that AT&T's proposed solution involving SWBT's "92-99" billing record would allow AT&T to originate calls without accepting responsibility for processing all of the types of calls that AT&T is obligated by law to terminate for its end users under § 386.020(4) of the Revised Statutes of Missouri (Supp. 1996). According to SWBT, AT&T's proposal does not provide any billing solution for calls made by AT&T's customers to companies other than SWBT. SWBT insists that, at a minimum, AT&T should be required to explain this billing method completely and to assure the Commission that AT&T will provide full local service even if AT&T is allowed to use SWBT's NXX codes in assigning numbers.

The Commission finds that the level of service to be provided to AT&T's customers is an issue best resolved in connection with the tariffs filed by AT&T. The Commission also finds that AT&T's proposal provides a permanent solution, rather than a temporary solution, to a problem that both of the parties acknowledge could develop. AT&T's proposal, like SWBT's, requires the parties to work toward alternative solutions before resorting to the "92-99" billing record field approach, and so SWBT will have an opportunity to address any remaining feasibility concerns with AT&T even if SWBT's language is not adopted. The Commission finds that it should adopt AT&T's proposed language for the reasons stated above.

Issue 22 (Timing of AT&T Service to Business and Residential Customers)

SWBT seeks to insert language into the agreement that would require AT&T to provide telephone exchange service to business and residential customers within a specified period after approval of the PSC, and AT&T opposes this requirement. The Special Master recommends adoption of AT&T's position that no language should be inserted. The Special Master notes that the Commission has found in prior cases that serving either business customers or residential customers is acceptable, and that AT&T has already filed tariffs to provide residential service. Neither party responded to the Special Master's recommendation.

The Special Master correctly describes the approach adopted by the Commission in prior cases with respect to providing service to both residential and business customers. SWBT has not provided the Commission with a good reason for changing its interpretation of the applicable law, and so the Commission finds that AT&T's proposal to reject SWBT's additional language is adopted.

H. Group XI Issues - COLLOCATION

Issue 33e (Environmental, Health and Safety Questionnaires)

The parties are in agreement that SWBT must comply with all federal and state laws regarding environmental, health and safety issues applicable to SWBT. Their disagreement is over additional language that AT&T would like to insert in the agreement to force SWBT to complete an "Environmental, Health & Safety Questionnaire" for each eligible structure in which AT&T applies for collocated space.

The Special Master recommends adoption of SWBT's language without the additional language suggested by AT&T, stating that SWBT should not be required to bear the burden of completing such questionnaires in order to satisfy AT&T's insurance requirements. In the Special Master's opinion, however, SWBT should be required to provide AT&T a copy of any such questionnaires that SWBT previously completed or is required to complete in the future for its own purposes. Neither SWBT nor AT&T responded to the Special Master's recommendation on this issue.

The Commission finds that the language proposed by SWBT should be adopted but the additional language proposed by AT&T should be rejected, for the reasons given by the Special Master. The Commission notes in addition that AT&T's proposed language might unfairly shift responsibility to SWBT for compliance with environmental laws, without AT&T assuming a concomitant responsibility for its equipment that is collocated in SWBT's space, and is therefore unreasonable.

The Commission notes that the Special Master has complied with the Commission's order to choose between the alternatives presented by the parties, but he has also suggested that it would be appropriate for SWBT to provide copies to AT&T of any questionnaires which it completes in the

course of its regular business. The Commission finds that it should fully implement the Special Master's recommendation by adding the following language to that proposed by SWBT: "SWBT is required to provide AT&T a copy of any environmental, health and safety questionnaires that SWBT has previously completed or is required to complete in the future for its own purposes."

Issue 43 (Equipment Removal)

The parties agree that if AT&T fails to remove any of the equipment, property or other items that it has brought into the collocated space, SWBT may perform removal at AT&T's cost. The issue remains unresolved because SWBT wishes to add language that would require AT&T to indemnify and hold harmless SWBT for any claims, expenses, fees or other costs related to removal. The Special Master states that the Commission should adopt SWBT's language, and neither party responded to this recommendation.

The Commission agrees with the Special Master that it would be unreasonable to require SWBT to bear risks for AT&T's failure to meet its responsibility to remove items it brings into the collocated space or any part of the eligible structure, except when SWBT acts willfully or negligently in causing damage to SWBT. The Commission notes that the language agreed to by the parties gives AT&T 30 days to remove its equipment on its own and finds that, under these circumstances, it is fair to limit SWBT's liability for taking care of AT&T's equipment. In addition, SWBT's responsibility for its willful or negligent acts should be maintained because of the language to be adopted for resolution of Issue 48 (see below). Therefore, the Commission adopts SWBT's proposed language to resolve this issue.

Issue 48 (Restoration, Repair or Replacement of AT&T's Improvements, Equipment and Fixtures)

This issue concerns SWBT's responsibility to rebuild, restore, repair or replace AT&T's improvements, equipment or fixtures that are damaged due to casualties or due to SWBT's negligence or intentional misconduct. The parties agree that SWBT should not be responsible for casualty losses, but AT&T wishes to insert language to retain SWBT's liability for negligent or intentional acts of SWBT, its agents and employees. The Special Master recommends adoption of AT&T's additional language, reasoning that it is fair and reasonable to permit AT&T to seek recompense for any acts of intentional misconduct or acts of negligence or omission by SWBT's employees or agents. Neither SWBT nor AT&T commented on the Special Master's recommendation.

The Commission finds that AT&T's additional language should be adopted so that SWBT has an incentive to act with care when handling AT&T's equipment, fixtures and improvements in the collocated space. SWBT may have a duty to avoid negligence and intentional acts causing harm to AT&T's property under the Act, but permitting AT&T to recover damages for such harm will provide incentive for compliance with the Act's collocation requirements and is consistent with the Commission's resolution of Issue 3b (Limitation of Liabilities and Indemnification) under Section G above.

Issue 52 (Liability for Acts and Omissions of "Others")

This issue relates to SWBT's responsibility to AT&T for any damage caused to AT&T by the acts of third parties. SWBT proposes to add extremely broad language that would insulate SWBT from liability to AT&T for the acts and omissions of such third parties regardless of the degree of culpability of SWBT. SWBT's proposed language would also require AT&T

to save and hold SWBT harmless for any claims made against SWBT that are associated with the acts or omissions of third parties who act on behalf of AT&T. AT&T opposes the adoption of this new language, given that it has already acknowledged that its equipment and fixtures in collocated space may be subjected to harm by third parties under the parties' collocation arrangements. AT&T would have the General Terms and Conditions portion of the agreement cover collocation, as well.

The Special Master recommends adoption of AT&T's language and rejection of SWBT's language, stating that he believes SWBT's language is over broad. The parties did not respond to this recommendation.

The Commission finds that it should adopt the AT&T proposed language without the additional language proposed by SWBT. The Commission finds that the SWBT language is unreasonably broad because it seeks to insulate SWBT from the actions of others even where SWBT shares culpability with them. This would create an incentive for SWBT to act irresponsibly. Also, there is no reason that the allocation of liability under the General Terms and Conditions portion of the agreement should not apply to collocation issues, as well.

Issue 54a (Damage to Vehicles of AT&T and its Employees, Contractors, Invitees, Licensees or Agents)

On this issue, the parties agree that AT&T should be required to maintain automobile liability insurance for its own automobiles located on SWBT's property and that AT&T should hold SWBT harmless for any damage that occurs to its employees' vehicles. However, SWBT would like for AT&T to be responsible for also indemnifying SWBT for any damages that SWBT must pay to AT&T's employees for harm to their automobiles, and SWBT would expand the hold harmless and indemnification clause to AT&T's contractors,

invitees, licensees or agents, as well. The Special Master recommends that the Commission adopt SWBT's proposed language, and neither party responded to this recommendation.

The Commission finds that SWBT's proposed language should be adopted because SWBT should not be responsible for the automobiles of any individuals or companies who are on SWBT's property in order to serve AT&T's business purposes.

Issue 54d (Lost Profits and Revenues)

SWBT seeks to include language in the Appendix on collocation that clarifies that SWBT should not be required to pay AT&T for lost profits and revenues due to service interruptions. AT&T opposes inclusion of this language. The Special Master recommends adoption of SWBT's proposed language, noting that lost profits and revenues are speculative and difficult to quantify, and that in many instances if AT&T's services are interrupted, SWBT's will probably be interrupted too. Neither party responded to this recommendation.

For the reasons enunciated by the Special Master, the Commission finds that it should adopt SWBT's proposed language to resolve this issue.

2. Conclusions of Law

The Missouri Public Service Commission has reached the following conclusions of law:

The Commission concludes that the recommendations of the Special Master should be adopted, with the minor modifications specified above. The Commission has determined that the rates established in this arbitration shall be interim rates only and that further proceedings shall be conducted to establish permanent rates.

3. Procedure for Establishment of Permanent Rates

In order to implement permanent rates, the AAS in its capacity as advisor to the Commission is instructed to conduct an investigation beginning on January 5, 1998, with a special focus on identifying the critical inputs and analyzing the costing models. The AAS and SWBT personnel shall meet in SWBT offices in St. Louis where software, data and subject matter experts responsible for critical input values will be readily available. Because SWBT will perhaps be required to disclose confidential information, including trade secrets and other proprietary matter, AT&T will not participate in these meetings. Similarly, the AAS shall meet with AT&T during this investigation period at a mutually agreed upon location to analyze cost data provided by AT&T. SWBT will not participate in these meetings. Because of its status under Missouri law, OPC will be allowed to participate in these meetings. See § 386.710, RSMo 1994. If either of the parties desires access to specific information produced by the other party during the review process it may use data requests, and any disputes over the production of such data may be brought to the Commission's attention in the form of a motion for protective order.

This process will allow the parties the opportunity to work with the AAS to explain in a thorough, detailed and analytical fashion their costing models and final costing inputs. The parties are expected to provide full cooperation with the AAS in this effort, including providing necessary training of the AAS, documentation for all inputs and calculations, and access to each of its cost models. The parties shall allow the AAS to analyze the models using various inputs and assumptions and make available all necessary data including data it considers to be proprietary.

The AAS should then submit to the Commission, SWBT, AT&T and OPC its report containing proposed permanent rates based on the same permanent rate costing approach adopted in Case No. TO-97-40 and commenting on the costing approaches proposed by the parties during the review process. The parties will be given an opportunity to file comments on the rates and the costing model proposed by the AAS and to support their positions with affidavits and schedules. The parties may seek protective orders from the Commission prior to filing these.

The Commission will then hold a hearing for the sole purpose of providing the Commissioners with an opportunity to ask questions of the parties, the AAS and OPC. There will be no opportunity for cross-examination by the parties, but the Commission will permit the filing of briefs following the hearing.

The Commission anticipates that it will issue a final order establishing permanent rates no later than July 1, 1998. The specific dates for the parties and OPC to respond to the AAS report, for the hearing, and for briefing will be established in a subsequent order.

The Commission notes that, by permitting SWBT and AT&T to file comments and by holding a hearing in this case, the Commission is not making a finding that it is required to do so under the Act, contrary to the arguments made by SWBT in its November 26 response. The Act's provisions governing State Commission arbitration proceedings do not mention the word "hearing" and do not otherwise suggest that a hearing is required. *See* 47 U.S.C. § 252(b). Moreover, the Act permits the Commission to use information from any source to make its determinations. *See* 47 U.S.C. § 252(b)(4)(B). This order should not be construed as finding that the Commission is required to permit the parties to each

present a case as in a contested case. SWBT's request for a contested case hearing with opportunity for cross-examination prior to issuance of this Report and Order and prior to the establishment of permanent rates should be denied.

IT IS THEREFORE ORDERED:

1. That the issues remaining in dispute as of the date of filing of the parties' Joint Statement of Remaining Issues on November 21, 1997, are resolved by the adoption of implementing language as set forth in this Report and Order.

2. That the language adopted by this Report and Order shall be incorporated by the Southwestern Bell Telephone Company and AT&T Communications of the Southwest, Inc. into the interconnection agreement that they are required to submit pursuant to Ordered Paragraph 3.

3. That Southwestern Bell Telephone Company and AT&T Communications of the Southwest, Inc. shall file an interconnection agreement implementing the language they have agreed to and the language adopted by the Commission in this Report and Order by February 1, 1998.

4. That the Commission will defer ruling on the language agreed to by the parties for the issues resolved following the filing of AT&T Communications of the Southwest, Inc.'s petition until it has reviewed the interconnection agreement required to be filed in accordance with Ordered paragraph 3.

5. That the scope of the evidentiary hearing to be scheduled in a subsequent Commission order shall be limited as described in this order and that Southwestern Bell Telephone Company's request for a hearing with opportunity for cross-examination is denied.

5. That the following procedural schedule is established for the purpose of determining permanent rates for the pricing issues described in this Report and Order:

Begin cost study review process - January 5, 1998

7. That any objections to the process established in this Report and Order for the setting of permanent rates shall be filed no later than December 29, 1997.

8. That Southwestern Bell Telephone Company and AT&T Communications of the Southwest, Inc. shall use the interim rates approved in this Report and Order pending the development of permanent rates for these elements.

9. That Southwestern Bell Telephone Company and AT&T Communications of the Southwest, Inc. shall comply with the Commission's finding on each and every issue and shall comply with the procedure for determining permanent rates set forth in this order.

10. That this Report and Order shall become effective on January 2, 1998.

BY THE COMMISSION

(S E A L)

Dale Hardy Roberts

Dale Hardy Roberts
Secretary/Chief Regulatory Law Judge

Lumpe, Ch., Drainer and Murray,
CC., concur.
Crumpton, C., dissents, with
dissenting opinion to follow.

Dated at Jefferson City, Missouri,
on this 23rd day of December, 1997.

ALJ/Secy: R Payne

12-17 — Date Circulated

TO-98-115 — CASE NO.

Lumpe, Chair

Crumpton, Commissioner

Murray, Commissioner 9, 29, 31, 37, 43, 45, 52

Commissioner

Drainer, Vice-Chair 51, 52, 54

~~12-17~~ cont'd to 12-23

Agenda Date

Action taken: 3-1 Crumpton voting no with dissent to follow

Must Vote Not Later Than _____

STATE OF MISSOURI
OFFICE OF THE PUBLIC SERVICE COMMISSION

I have compared the preceding copy with the original on file in this office and I do hereby certify the same to be a true copy therefrom and the whole thereof.

WITNESS my hand and seal of the Public Service Commission, at Jefferson City, Missouri, this 23rd day of December, 1997.

Dale Hardy Roberts

Dale Hardy Roberts
Secretary/Chief Regulatory Law Judge