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September 14, 1998

Dale Hardy Roberts
Secretary/Chief Regulatory Law Judge
Missouri Public Service Commission
P.O. Box 360
Jefferson City, MO 65101

Re: Case Number TO-98-115

Dear Judge Roberts:

Attached for filing with the Commission is the original and fifteen (15) copies of AT&T Communications of the Southwest, Inc.'s Reply to Southwestern Bell Telephone Company's Motion to Strike and in the Alternataive to Supplement the Record in the above referenced matter.

I thank you in advance for your cooperation in bringing this to the attention of the Commission.

Very truly yours,

LATHROP & GAGE, L.C.

By: Paul S. DeFord
Paul S. DeFord

Attachment

Cc: Office of Public Counsel
General Counsel
Southwestern Bell Telephone Company

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

FILED
SEP 14 1998
Missouri Public Service Commission

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**

RESPONSE TO SOUTHWESTERN BELL TELEPHONE COMPANY'S MOTION TO STRIKE AND IN THE ALTERNATIVE TO SUPPLEMENT THE RECORD

COMES NOW, AT&T Communications of the Southwest, Inc. ("AT&T") and files its Response to Southwestern Bell Telephone Company's ("SWBT") Motion to Strike and in the Alternative to Supplement the Record, and would respectfully state as follows:

INTRODUCTION

1. The United States District Court for the Western District of Texas Austin Division candidly wrote in its August 31, 1998 order in SWBT's appeal of the Texas Public Utility Commission's approval of the Texas AT&T/SWBT interconnection agreements, "The voluminous briefing in this case—over seven hundred pages in total—could probably have been cut in half had SWBT not fought tooth and nail for every single obviously non-meritorious point."[1] So here, SWBT's motion raises obviously non-meritorious points — unduly burdening the Commission, the record and AT&T. Of course, SWBT's motion completely misses the mark insofar as SWBT claims the right to respond to AT&T's objections to the Arbitration Advisor Staff ("AAS") Report. The AAS Report is not SWBT's testimony, or official

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position or document. The Commission's procedure for this arbitration permits each party to respond to what the AAS has concluded in its report. The Commission then examined the parties' witnesses to determine the respective merits of their objections to the AAS Report. Nothing about this process legally, or inherently, entitles SWBT to a further response.

2. Overall, SWBT's motion recasts a familiar theme: the claim that SWBT has not had enough due process. SWBT has had as much due process in this proceeding as AT&T, more in fact, given the limitations on AT&T's access to SWBT's cost studies. AT&T has not been permitted to file rebuttal testimony, and surrebuttal, ad nauseam, any more than SWBT has. With the caveat about AT&T's access to SWBT's cost studies, the process has been equally fair to each party. However, as SWBT's conduct in Missouri, Texas, and elsewhere has demonstrated, rather than seeking the ends of genuine competition, for SWBT the process has become an end unto itself. As the Texas Public Utility Commission stated in discussing its rejection of SWBT's §271 application,[2] SWBT needs to change its attitude. And as this response will show, SWBT's motion demonstrates that SWBT is still more interested in litigating than in competing. Normally AT&T would not file such a lengthy response, but the logical outcome of granting SWBT's motion would be to eliminate AT&T as a participant in this arbitration, and it would eviscerate the record.

BACKGROUND

[1] *Southwestern Bell Telephone Company v. AT&T Communications of the Southwest, Inc., et al.*, No. A 97-CA-132 SS, slip op. at 31 (WD Texas).

[2] Public Utility Commission of Texas, Open Meeting Transcript, at 187-188, 207-08 (May 21, 1998).

3. On July 24, 1998 the Commission issued its Order Establishing procedural Schedule for Setting Permanent rates in Case No. TO-98-115. That order (at 1) reiterated elements of a December 23, 1997 order in this arbitration. The AAS was required under the terms of the December, 1997 order to submit to the Commission its report with proposed permanent rates "based on the same permanent rate costing approach adopted in Case No. TO-97-40" with comments "on the costing approaches proposed by the parties during the review process." Parties were also to "have an opportunity to file comments on the rates and costing model proposed by the AAS and to support their positions with affidavits and schedules." (See Report and Order, Case No. TO-98-115, Dated December 23, 1997, at 52)(emphasis added). Neither order of the Commission imposed any limits on the content of the comments to be filed by the parties.

RESPONSE REGARDING RHINEHART TESTIMONY

4. SWBT's motion suggests that SWBT's "understanding of the scope [of this proceeding may be] incorrect." That may be so, but it is clear that SWBT does have an incorrect understanding of AT&T Witness Mr. Rhinehart's testimony. SWBT complains that a number of issues decided in the Commission's first arbitration order of July, 1997 are before the federal district court and therefore should not be relitigated in this arbitration. AT&T agrees and it is not seeking a change in any Unbundled Network Element rate or charge previously approved by this Commission. (See testimony of Daniel P. Rhinehart, pages 27-28) What AT&T does do is identify additional flaws in SWBT's methods not previously recognized by this Commission as they relate to the permanent rates to be established in this arbitration.

5. SWBT requests that pages 2 to 44 of the testimony of Daniel Rhinehart be stricken. SWBT makes specific arguments related to the testimony of Mr. Rhinehart for pages 6-8, 8-20, 22-39, and 39-42. Each of SWBT's specific objections will be addressed below. To the extent SWBT makes no argument whatsoever relative to striking Mr. Rhinehart's testimony on pages 2-5 and 43-44, its request should be summarily denied, however, these portions of Mr. Rhinehart's testimony will also be addressed below.

6. On pages 2 to 5, Mr. Rhinehart makes a number of general statements and summarizes his testimony. He also explains that in the months since the first arbitration, SWBT has been required to inform parties in other jurisdictions of more aspects of its cost methodology – aspects which were not considered or reviewed previously by this Commission. Since the cost study methodology used by SWBT in Missouri is essentially the same as it uses elsewhere, AT&T's more recent findings from other states are applicable to Missouri as well. Mr. Rhinehart's testimony argues that, for the studies and rates presently under consideration, additional corrections beyond those adopted in the first arbitration are warranted. Since SWBT has provided no argument to strike this portion of Mr. Rhinehart's testimony, nor has it identified the portions of these pages related to other parts of the testimony it wishes to strike, SWBT's motion should be denied.

7. On pages 6 to 8, Mr. Rhinehart describes the process by which AT&T has attained significant expertise and knowledge of the inner workings of SWBT's cost study methodology. Mr. Rhinehart does not request or advocate the use of AT&T's alternate processing capability for the restatements of SWBT's cost studies. Mr.

Rhinehart does not challenge the use of the SWBT models. Since this testimony does nothing but demonstrate AT&T's competence in making the additional comments, there is no legitimate reason to strike this portion of Mr. Rhinehart's testimony. SWBT does incorrectly state that the "previously concluded second arbitration exhaustively addressed SWBT's cost study methods." If that were true, then there would have been no need to have a subsequent cost proceeding, or an AAS Report – all that SWBT would have had to do is file cost studies to support their proposed rates. SWBT's oversimplification of the process would obscure the very purpose of this subsequent cost proceeding, which is to correctly establish the rate elements at issue in this phase of the AT&T/SWBT arbitration.

8. On pages 8 to 20, Mr. Rhinehart provided extensive discussion about specific failings of SWBT's labor rate development. Contrary to SWBT's assertion in its motion, the development of SWBT's labor rates was not previously addressed by this Commission in the first AT&T/SWBT arbitration. Mr. Rhinehart's testimony in Case TO-97-40 was severely constrained by lack of access to SWBT data and labor rates, per se, was not addressed. In reviewing the July 31, 1997 order in Case TO-97-40, the most logical place to find any discussion on labor rates would be in the section on non-recurring costs. There is no discussion of labor rates there. The evidence presented by Mr. Rhinehart is the result of many months of additional scrutiny of SWBT's cost development processes and should remain in this record. At an absolute minimum, Mr. Rhinehart's conclusion can be seen as support for the AAS Report, which recommends cutting most SWBT non-recurring charge rates in half.

9. On pages 20 to 27 Mr. Rhinehart discusses the development of recurring cost maintenance factors in SWBT studies. His principal criticism focuses on the fact that SWBT's cost study process has been proven – and SWBT has admitted so in other jurisdictions – to incorporate non-recurring costs in recurring cost factors. As stated earlier, AT&T does not challenge SWBT's cost study processes in general, just the specific inputs used in the development of factors used for the cost studies under consideration in this arbitration.

10. On pages 27 to 39, Mr. Rhinehart addressed the development of the common cost factor. He raises specific concerns and recommends a factor for use in this arbitration of less than 11.5%. While the AAS report to the Commission did address the common cost factor in Case TO-97-40, stating that "Staff has no specific concerns or proposed modifications", it must once again be remembered that AT&T's testimony in Case TO-97-40 was limited because of restricted access to SWBT data and further that AT&T has been afforded significantly improved access to SWBT data in other states since the time of Case TO-97-40. Mr. Rhinehart presented credible evidence that SWBT's common cost factor is significantly overstated because it does not take into account known and measurable trends in unit common costs, it does not recognize the effects of the SBC/Pacific Telesis Merger, it improperly incorporates certain costs previously recognized for financial purposes, and its computation is flawed mathematically. Each of these concerns have been discovered and/or evaluated in detail subsequent to the close of Case TO-97-40. AT&T does not seek to change the results of the previously approved rates from Case TO-97-40, but does seek to obtain more accurate results for the cost studies under consideration in this

arbitration. SWBT's motion to strike this portion of Mr. Rhinehart's testimony should be denied.

11. Mr. Rhinehart addresses certain utilization factors on pages 39 to 42. Contrary to SWBT's assertion, Mr. Rhinehart makes no representation as to the utilization factors used in SWBT's cost studies in this arbitration. He does, however, relate to the Commission AT&T's experience in Texas and elsewhere that SWBT has consistently misused the computer program which computes investment costs using signaling system fill factors. The point of Mr. Rhinehart's testimony is that as SWBT reruns its study to produce final results in this arbitration, SWBT must prove to the Commission that it has indeed corrected the use of the particular computer program – as it was required to do so in Texas. AT&T does not challenge the utilization factors adopted by the Commission in Case TO-97-40. As Mr. Rhinehart's testimony is simply a warning to the Commission to be aware of what could be considered to be a clerical error by SWBT, there is no reason to strike this testimony from the record.

12. Mr. Rhinehart addresses certain aspects of SWBT's inclusion of computer assets in its cost studies on pages 42 to 45. While no specific arguments were made by SWBT for the exclusion of this testimony, it might be assumed that SWBT believes that the issues were somehow already addressed in Case TO-97-40. They were not. As with the rest of Mr. Rhinehart's testimony, AT&T is addressing these issues as they relate to the cost studies to be done and the rates to be established in this arbitration. SWBT's motion to strike this portion of Mr. Rhinehart's testimony should also be denied.

13. AT&T's continuing efforts to fully understand SWBT's cost model have revealed numerous flaws that have not previously been addressed by this Commission. It is reasonable and appropriate to recognize these flaws and to correct them in the cost studies under consideration in this arbitration. SWBT has been fully apprised of AT&T's positions and concerns in these matters in other jurisdictions prior to this time. SWBT should have reasonably expected AT&T to raise similar issues in this arbitration and its failure to do so should not be rewarded by the striking of relevant testimony. AT&T is providing the Commission with new, reasonable, credible evidence and SWBT's motion to strike Mr. Rhinehart's testimony is wholly inappropriate.

RESPONSE REGARDING FLAPPAN TESTIMONY

1. SWBT's motion at paragraph 8 states that AT&T Witness Mr. Flappan's testimony should be stricken because he is not an expert on the operational methods of all of SWBT's individual operation support systems ("OSS") or on future OSS. Mr. Flappan has worked closely with the Arbitration Advisory Staff on all of the outstanding issues in this arbitration from its inception. Mr. Flappan is AT&T's designated subject matter expert responsible for all non-recurring pricing issues in Arkansas, Kansas, Missouri, Oklahoma and Texas. Mr. Flappan filed testimony in Kansas covering essentially the same issues that his testimony in Missouri covered, and SWBT did not file any objections to Mr. Flappan's testimony in Kansas.
2. At the hearing on September 4, SWBT brought thirteen witnesses to the hearing and AT&T brought just two. Most of the questions raised by the Commissioners and the Judge pertained to issues contained in Mr. Flappan's testimony. Mr. Flappan

responded, through approximately four hours, to each and every issue raised by the bench and by the thirteen SWBT witnesses. Mr. Flappan's comments were intelligent, enlightened, informed, knowledgeable and cogent—demonstrating an abundance of expertise on the pertinent OSS issues.

3. If Mr. Flappan's performance at the September 4 hearing were not enough, it should be pointed out that Mr. Flappan need not be a certified expert on SWBT's embedded OSS because this arbitration is not about SWBT's embedded OSS. This arbitration is about SWBT's obligation under the Act to provide non-discriminatory access to OSS at rates that are based on forward looking cost, non-discriminatory and may include a reasonable profit. Mr. Flappan has been an AT&T expert witness on proper pricing under the Federal Telecommunications Act[3] ("Act") for three years. He has provided pricing testimony in Missouri arbitrations as well as those in Arkansas, Kansas, Oklahoma and Texas. Mr. Flappan has also provided Section 271 pricing testimony in Arkansas, Kansas, Oklahoma and Texas.

4. Mr. Flappan is the AT&T subject matter expert for Missouri, as well as Arkansas, Kansas, Oklahoma and Texas for the AT&T/MCI Non-recurring Cost Model ("NRCM"). During the many months when AT&T was working cooperatively with the AAS, Mr. Flappan presented the model to the AAS and answered questions from the AAS regarding the model. Mr. Flappan's role is to convey the essence of the many subject matter experts that have developed the NRCM. The information provided to the AAS contained a list of the developers of the model as well as

[3] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (*codified as amended in scattered sections of* 15 *and* 47 USC) ("FTA" or "the Act").

biographies of those developers. The developers include managers with over 20 years experience in network operations and OSS operations. Mr. Flappan's expertise on OSS is, therefore, further derived from his familiarity with an OSS cost model that was developed by experts with as much experience as any SWBT witness. AT&T would be pleased to provide a complete list of those developers' qualifications if the Commission desires further support on this issue, however, the resumes are over 80 pages in total so they have not been attached.

5. Mr. Flappan's testimony references his experience with AT&T starting in 1982. His background in marketing from 1982 – 1984 gives him keen insight into the customer interface functions that SWBT claims in its studies will be done by SWBT personnel. Mr. Flappan can understand and explain to the Commission based on his experience, that the customer interface functions will not be done by SWBT for AT&T customers. Since 1984 SWBT, as the monopolist local exchange carrier, has provided many customer interface functions for AT&T such as billing. In an environment where AT&T and SWBT are competitors in the local market, it makes no sense for SWBT to perform customer interface functions for AT&T.

6. Mr. Flappan's testimony references his time spent from 1984 to 1987 in AT&T's network organization. During this time period Mr. Flappan actually placed orders with SWBT for access capacity. This experience with SWBT's access OSS gives Mr. Flappan keen insight into mechanized ordering processes, which are parallel to those that must be in place for the ordering of unbundled network elements and for resale orders. Mr. Flappan also worked on the Network Division Staff during that period of his career. Mr. Flappan was responsible for the operations results for the Midwest

Region. Mr. Flappan gained keen insight to what is an acceptable level of quality in the network environment. Mr. Flappan was sent to and graduated from the Crosby Quality College in Winter Park, Florida during that time and Mr. Flappan learned that getting things right 99.9% of the time is often not enough. Zero defects should be the goal. This is insight that Mr. Flappan brings to the OSS and NRC pricing conversation that obviously is greater than that brought by any of SWBT's thirteen witnesses at the hearing—those witnesses obviously being willing to accept flow through levels which do not even approach 50% of orders.

7. At paragraph nine of its motion, SWBT moves to strike numerous schedules from Mr. Flappan's testimony on the grounds that proper foundation has not been established. Although this is a case of SWBT grasping at straws, as will be discussed below, SWBT's own testimony would be equally objectionable. Mr. Bailey's testimony contains references to the 8th Circuit decision and SWBT interpretation of that order. There is no more foundation for Mr. Bailey's testimony regarding court orders than there is for Mr. Flappan's. Mr. Bailey also makes statements regarding Staff's proposal violating the Act by preventing SWBT from recovering legitimate costs. There is no more foundation for Mr. Bailey's testimony regarding the Act than there is for Mr. Flappan's testimony and schedules. Mr. Michalczyk provides no foundation that his times, which are not even provided in his testimony, even consider the requirements under the Act for setting prices. Mr. Hearst's testimony completely ignores the highly relevant testing that SWBT performs on its own loop and port combinations. AT&T is guaranteed access to the SWBT UNEs on a parity basis with SWBT. Mr. Hearst's testimony lacks a foundation in the requirements of the Act.

Ms. Owens provides no foundation that her times, which are not even provided in her testimony, even consider the requirements under the Act for setting prices. Mr. White provides no foundation that his times, which are not even provided in his testimony, even consider the requirements under the Act for setting prices. These are just some examples that illustrate that SWBT's own affidavits would not satisfy the non-meritorious points raised in its motion to strike.

8. At paragraph nine of its motion, SWBT also moves to strike Schedule 2, Requirement of Section 252(D)(1) of the Federal Act, from Mr. Flappan's testimony. SWBT states that a proper foundation has not been laid and cannot be laid by an AT&T witness. This is perhaps the most preposterous of all the unmeritorious points raised by SWBT. It is the Federal Act Section 252(D)(1) that is the reason for this entire proceeding. The Commission must have a complete understanding of this section of the Act to be able to render a decision that complies with the Act. The three recent, two of them having been issued in May of this year and the third in January of this year, federal court decisions that interpret the Act strongly reinforce AT&T's position in this arbitration that rates must be based on forward looking costs, not embedded costs. If there is one clear line that can be drawn between the positions of AT&T and SWBT in this arbitration, it is the line between SWBT's position that rates should reflect SWBT's embedded equipment and cost and AT&T's position that rates should reflect forward looking equipment and costs that would be incurred by a new entrant in a competitive environment. The Act itself and the Federal Court decisions that interpret the Act is critical evidence that should be heavily relied on in determining the merits of this arbitration. AT&T's witness Mr. Flappan has testified on this

section of the Act, the Federal Communications Commission's interpretation of this section, and court decisions regarding disputed interpretations of the Act multiple times in multiple jurisdictions.

9. SWBT also seeks to strike Mr. Flappan's Schedule 4 which is a copy of pages of testimony filed by SWBT's own witness, Dr. Dale Lehman, not even three months ago in neighboring state Kansas. Dr. Lehman's testimony refers to the exact same cost study methodology used by SWBT in Missouri. Nowhere has SWBT denied that the methodology it uses in Missouri is different from what it used in Kansas. While SWBT chose not to provide any economic testimony in this arbitration, it cannot hide from extremely relevant sworn testimony on the public record, which reveals SWBT's philosophical approach. As was made clear by Mr. Bailey at the hearing, SWBT does not believe that prices should reflect competitive market conditions. Mr. Flappan's Schedule 4 merely illustrates that SWBT has taken this same position over the course of time; had Mr. Flappan not included this Schedule 4, Mr. Bailey's statement would likely never have come out at the hearing and the Commission would have been forced to make its determination without this explicit statement of SWBT's position that underlies all of the costs/prices that SWBT offers in this proceeding. Knowing SWBT's explicit position is invaluable to understanding the disputes in this arbitration. By knowing SWBT's explicit position, it can be contrasted to such authoritative sources as the United States District Court August 31, 1998 order cited above, which on page 24 states, "Because the TELRIC methodology simulates competitive, as opposed to monopolistic, forces, it facilitates rapid entry

into the local telephone service market and thereby serves the overriding and principal goal of the Act."

10. SWBT also seeks to strike Mr. Flappan's Schedule 7, the sworn Deposition of SWBT witness Jackie Richardson, taken in St. Louis on July 30, 1997. SWBT also seeks to strike the sworn testimony of Ms. Elizabeth A. Ham filed on February 25, 1998, Mr. Flappan's Schedule 13. Schedule 7 is highly relevant to the instant arbitration. In this deposition, SWBT's witness swears that the flow through rate for electronic orders for unbundled network elements should be the same as it is for EASE resold services. In Schedule 13, Ms. Ham states that SWBT has achieved a residential EASE flow-through rate of 99%. This 1% figure was for all five SWBT states, not just for Oklahoma. This is a key figure because the Act requires that CLECs have parity access to the same SWBT OSS as SWBT uses internally. It is very important that the Commission knows the levels of flow through already being achieved by SWBT and from that information the Commission can make a better judgement regarding the level of flow through that SWBT will achieve on a forward looking basis once it becomes efficient at working UNE orders. Taken together, these two SWBT witnesses indicate that a 99% flow-through rate for new entrants, to be used in the forward looking cost studies, would be reasonable. This is information that SWBT has not come forth within its testimony in the current arbitration, but SWBT cannot hide from public, extremely relevant sworn statements made by its witnesses in other arbitrations. The exact same Deposition of Jackie Richardson was filed by Mr. Flappan in Kansas Docket No. 97-SCCC-149-GIT and SWBT did not object to the filing in that proceeding.

11. SWBT also asks the Commission to strike the Texas PUC Project No. 16251 Recommendation on OSS, Mr. Flappan's Schedule 8. This exact same attachment was included in Mr. Flappan's Kansas Cost testimony and SWBT did not object that AT&T could not establish a proper foundation for the attachment. This is an order by the Texas Commission that states that SWBT will not be allowed into the interLATA market in Texas until certain specific improvements are made to the OSS offered to competitive LECs. These same OSS will be useful in Missouri. SWBT never denies or justifies using an inferior OSS in Missouri than that which will be used in Texas. The Missouri Commission needs to know what improvements SWBT has been ordered to make to its OSS since those improvements will effect the OSS it offers in Missouri. SWBT often argues that AT&T's cost study approach is to assume forward-looking changes that are not feasible. AT&T presents the Texas order as evidence for the Missouri Commission that in fact SWBT will be developing an OSS that will provide flow-through of orders from CLECs. This is important information to be considered in the Missouri Commission's decision as to what percentage of flow-through to reflect in the Missouri prices.

12. SWBT seeks to strike Mr. Flappan's Schedule 9; important excerpts from the response of SWBT witness Leonard Ellis. The testimony of Mr. Ellis is extremely relevant to this proceeding. This is the first time since the passage of the Act that a SWBT witness has clearly stated on the record that "When the analog switch port UNE is combined with a standard analog loop UNE, as offered in various CLEC contracts, the resulting combination equates to the same physical arrangement as regular retail telephone service, and therefore can be provisioned via SWITCH,

without the special functions TIRKS provides." This is one of the major contentions that AT&T has with SWBT's cost study methodology. An examination of the transcript of the September 4th hearing will show that Mr. Bailey insisted that TIRKS must be used even in the case of combinations that equate to the same physical arrangement as regular retail telephone service. It is critical that the Commission is aware that SWBT has public sworn testimony from just one month ago that clearly answers the question regarding whether TIRKS must be used by SWBT in provisioning a UNE loop and port combination. Furthermore, the response of Mr. Ellis is critical because it is the only documentation that SWBT has put in the public record regarding its objective flow through rate for special services. The AAS, in its discussions with SWBT, had reached the tentative conclusion that all of SWBT's complex orders have to be worked manually. Mr. Ellis testifies SWBT's internal objective is 64%. Since SWBT has not volunteered this information in Missouri on a timely basis, per the Act, the Commission must use the best information available to reach a determination. In this arbitration, that information comes from a SWBT witness in Kansas. Furthermore, there is no conceivable justification for objective forward-looking flow-through rates being any different in Missouri and Kansas. Lastly, SWBT offers in Missouri what it purports to be times that it would take for its technicians to perform tasks. It is imperative that the times produced represent forward-looking efficient times. On the public record in Kansas, Mr. Ellis has stated that the times used in the UNE nonrecurring costs are for SWBT's five state area. His Kansas response shows that there was nothing scientific or statistically valid about the methodology used by SWBT in gathering the data. This is critical for the

Commission to know in determining how much weight to give to SWBT's purported times.

13. SWBT seeks to strike Mr. Flappan's Schedule 12, important excerpts from the rebuttal testimony of SWBT's Mr. Randal Vest. This attachment contains testimony filed by Mr. Vest that touts the outstanding results achieved by SWBT through the use of advanced OSS technology and management decisions regarding how to use the technology. The testimony also describes the SWITCH system which "provides the complex function of inventorying and assigning switch ports." SWBT cannot be a national leader in its use of OSS in Oklahoma and not so in Missouri. This is important information for the Commission to have in knowing whether SWBT will be inclined to implement forward looking state of the art OSS that will deliver high percentages of flow-through orders.

14. Finally, SWBT moves to strike a USA Today newspaper article, Schedule 14. This exact same article has been used by Mr. Flappan in cost proceedings in Kansas and Oklahoma, and 271 proceedings in Arkansas, Kansas and Oklahoma. SWBT has never before moved to strike this attachment. Mr. Flappan explains the use of the article in his Schedule 5 page ix. It illustrates that embedded costs are irrelevant in setting prices in a competitive market. In another jurisdiction, SWBT witness Dr. Lehman even agreed in testimony with Mr. Flappan that the article correctly describes the workings of a competitive market. The article is an excellent tool for making clear a concept that may not be intuitive for one not well-versed in economics – the difference between using embedded cost and forward looking cost in setting prices. The FCC and the federal courts have stated that the Act requires prices based on

forward looking costs, not embedded costs. This article from a widely read daily newspaper further illustrates and supports the decisions by those authoritative bodies. This is a hotly contested issue in the instant arbitration and one that SWBT would like very much to cloud and not lose. Having such a clear and easy to read and understand example is obviously not is SWBT's interest. While it is clear to see why SWBT would want this article removed from the record, it is also clear that the article is extremely relevant and belongs in the facts that are used to guide the Commission toward issuing prices that reflect prices based on forward looking costs.

15. SWBT claims that the above-cited documents are irrelevant and that Mr. Flappan has no personal knowledge regarding them. This is patently false. Mr. Flappan has been personally involved in the arbitrations containing the testimony cited by SWBT in its motion, in many cases as AT&T's subject matter expert opposing the SWBT witness. As demonstrated above, each and every one of these schedules is highly relevant to this arbitration. Without all these documents the Commission would be in a much weaker position to make an informed decision regarding the permanent prices which are the object of this arbitration. SWBT's only real objections to Mr. Flappan's schedules are that they are hearsay. Not only is the testimony of SWBT witnesses in other proceedings in other jurisdictions extremely relevant, but they are either not hearsay or are otherwise admissible. All of these SWBT witness statements, since SWBT objects to them, should constitute admissions by a party opponent. The testimonies of Messrs. Ellis and Vest should also be considered prior statements by a witness, unless SWBT wishes to now stipulate to the applicability of their prior testimony to Missouri as well, for there is no reason that such testimony should differ

for Kansas and Oklahoma, respectively. As an expert witness in this proceeding, Mr. Flappan would also be entitled to rely upon such facts or data as sworn statements by SWBT employees, in order to formulate his expert opinion. The Commission should be no less entitled to rely on such sworn statements. For all of SWBT's rhetoric about Mr. Flappan's supposed lack of credentials, it is nearly axiomatic in an administrative proceeding (and probably more true of an arbitration) that such issues go more to the weight of the evidence rather than to its admissibility. That SWBT would assert such a basis for striking Mr. Flappan's testimony could easily been seen as frivolous.

CONCLUSION

1. Not only is it appropriate to deny SWBT's Motion to Strike, but it is entirely inappropriate to allow SWBT to further respond or to cross examine AT&T witnesses. Contrary to SWBT's statement in its motion, "basic fairness" has been served. Neither AT&T nor SWBT had any advantage in the Commission's ordered filing schedule. There is nothing in any of the testimony or schedules attached to Mr. Flappan's and Mr. Rhinehart's testimonies that goes beyond the bounds of the Commission's orders in this arbitration establishing the procedural schedule for setting permanent rates. There was no real surprise or prejudice to SWBT's procedural rights by AT&T's testimony.[4] In fact, SWBT should have reasonably

[4] The same cannot be said of SWBT's Motion to Strike, which was not even served on AT&T until the hearing. The certificate of service on SWBT's Motion inexplicably shows only the MOPSC General Counsel, Office of Public Counsel, and representatives of MCI! However, should SWBT be permitted to supplement the record in response to AT&T's comments on the AAS Report, then AT&T should be permitted to respond to SWBT's further submission. However, rather than engaging in endless rounds of testimony and debates about when SWBT's due process has been satisfied, the Commission should

anticipated most of AT&T's testimony and schedules because they were sponsored by AT&T in the recently completed permanent unbundled network element cost proceeding in Kansas. In the Kansas UNE proceeding, SWBT did not feel compelled to file a motion to strike the same testimony as being beyond AT&T's ability to lay a foundation. SWBT brought thirteen witnesses, two attorneys and a docket manager to the hearing in Missouri on September 4. Surely one more of those experts could have been prepared to respond to any substantive issue raised in the prefiled testimony of AT&T. Indeed, the Commission's order clearly states that the "practice of prefiling testimony is designed to give parties notice of the claims, contentions and evidence in issue and to avoid unnecessary objections and delays caused by allegations of unfair surprise at the hearing." SWBT had ample time to prepare responses to AT&T's testimony and attachments at the hearing. As can be seen from the transcript of the hearing, the hearing examiner provided the parties with wide latitude in responding to questions from the bench and SWBT easily could have addressed the substance of any issues for which it presently moves to strike. Unfortunately, in this arbitration as in the Texas federal court case, in spite of the Commission's order and the pre-filed testimony, SWBT raises unnecessary objections anyway in pursuit of every argument, no matter how unmeritorious.

2. Section 252(b)(4)(B) of the Act provides as follows:

> The State commission may require the petitioning party and the responding party to provide such information as may be necessary for the State commission to reach a decision on the unresolved issues. If any party refuses or fails unreasonably to respond on a timely basis to any reasonable request from the State commission, then the State

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proceed to sort the wheat from the chaff within the parties' testimony, in lieu of further legal maneuvering by SWBT.

commission may proceed on the basis of the best information available to it from whatever source derived.

The Commission should proceed on the basis of the information that it has been given. The Act does not restrict the information which the Commission may use in making its determination to that which has come solely from this docket in Missouri. The Act empowers the Commission to proceed on the basis of the best information available to it "from whatever source derived." In its July 24th order, the parties in this arbitration were asked to provide "comments on the rates and the costing model proposed by the AAS and to support their positions with affidavits and schedules." SWBT was given ample time to respond to this request from the Commission. The Commission is under no obligation to give more time to SWBT to further supplement and burden the record.

WHEREFORE, AT&T urges the Commission to deny SWBT's motion to strike in its entirety. Furthermore, with the exception of allowing the complete Direct Testimony of Dr. Dale Lehman in Kansas Docket Number 97-SCCC-149-GIT to be entered into the record, as requested by SWBT and conditionally agreed to by AT&T at the hearing, SWBT's motion to supplement the record (i.e., rebuttal testimony) and to cross examine Mr. Flappan on these issues should be denied as exceeding the scope of the procedural schedule prescribed in the Commission's July 24 order in this docket, under which all parties have been dutifully bound.

Respectfully Submitted,

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