

Exhibit No:

Issue: IX. Contract Poles, Ducts,
Conduits, and
Rights-of-Way

Witness: Barnes

Type of Exhibit : Direct Testimony

Sponsoring Party: AT&T Communications of
the Southwest, Inc.

Case No: TO-98-115

PETITION FOR
SECOND ARBITRATION

DIRECT TESTIMONY
OF
LARRY BARNES

Jefferson City, Missouri
November 7, 1997

File Date: November 7, 1997

**IX. CONTRACT POLES, DUCTS, CONDUITS AND RIGHTS-OF-WAY ISSUES
CONTRACTUAL DISPUTED ISSUES
AT&T-SWBT INTERCONNECTION AGREEMENT - MISSOURI**

ISSUE 1:

Issue removed.

ISSUE 2.a:

Issue resolved.

ISSUE 2b: WHEN AT&T AND AUTHORIZED CONTRACTORS SELECTED BY AT&T PERFORM FACILITIES MODIFICATIONS, CAPACITY EXPANSION, AND MAKE-READY WORK ON SWBT'S FACILITIES, SHOULD THE WORK BE DONE IN ACCORDANCE WITH SWBT'S PLANS, SPECIFICATIONS, STANDARDS, AND PRACTICES AND SHOULD AT&T BE RESPONSIBLE FOR DAMAGE RESULTING FROM THEIR ACTIVITIES?

AT&T LANGUAGE

ATTACHMENT 13 - APPENDIX POLES

The parties have agreed to the following language to define the term "authorized contractor":

3.06 Authorized contractor. "Authorized contractors" are contractors selected by AT&T who may, subject to AT&T's direction and control, perform facilities modification or make-ready work which would ordinarily be performed by SWBT or persons acting on SWBT's behalf. As used in this Appendix, the term "authorized contractor" does not refer to contractors performing routine installation, maintenance, or repair work on AT&T's behalf or other contractors who may be selected by AT&T to perform work on AT&T's behalf without SWBT's approval. More specifically, the term "authorized contractor" refers only to those contractors included on a list of contractors mutually approved by AT&T and SWBT to perform one or more of the following tasks within a specified SWBT construction district: (a) installation of those sections of AT&T's ducts or facilities which connect to SWBT's conduit system as provided in Section 6.08(c); (b) installation of inner duct as provided in Section 10.02(b); (c) excavation work in connection with the removal of retired or inactive (dead) cables as provided in Section 10.02(c); or (d) make-

1 ready work as provided in Section 10.04 and 10.05. A person or entity approved as an
2 authorized contractor is only an authorized contractor with respect to those tasks for which such
3 person or entity has been approved by both parties and is an authorized contractor only in those
4 SWBT construction districts agreed to by both parties. Designation of an authorized contractor
5 for a specific category of tasks shall not be deemed to be the designation of such person or entity
6 as an authorized contract for other purposes, nor shall approval of an authorized contractor by
7 one SWBT construction district constitute approval of such authorized contractor for the area
8 served by a different SWBT construction district; provided, however, that if a specific
9 construction job extends beyond the boundaries of a single construction district, an authorized
10 contractor shall, for the purposes of that job, be deemed to have been approved by all SWBT
11 construction districts in which the work is to be performed. The parties have previously agreed
12 that AT&T shall be considered to be an authorized contractor for all tasks specified in this
13 section as tasks which may be performed by an authorized contractor.

14
15 10.04(c) From time to time, additional contractors, subcontractors or other vendors may be
16 approved by AT&T and SWBT to perform make-ready work in the event that the workload
17 exceeds the capacity of the authorized contractors on the approved list to perform the make-ready
18 work in a timely manner.

19
20 10.04(d) Make-ready work performed by AT&T, by an authorized contractor selected by
21 AT&T, or by a contractor, subcontractor, or other vendor jointly approved by the parties under
22 subsection (c) shall be performed in accordance with SWBT's specifications, which shall be
23 consistent with the same standards and practices which would be followed if such make-ready
24 work were being performed by SWBT or SWBT's contractors. Neither AT&T nor authorized
25 contractors selected by AT&T to perform make-ready work under this section shall conduct such
26 work in any manner which jeopardizes or degrades the integrity of SWBT's structures or
27 interferes with any existing use of SWBT's facilities.

1 10.05(c) AT&T shall have 20 days (the "acceptance period") after receiving SWBT's estimate
2 of make-ready charges to authorize completion of the make-ready work proposed by SWBT or
3 to advise SWBT of its willingness to perform the proposed make-ready work itself. If
4 AT&T advises SWBT that it is willing to perform the make-ready work proposed by
5 SWBT in accordance with a design approved by SWBT and SWBT's specifications, SWBT
6 will not, without due cause and justification, refuse to accept AT&T's offer to perform the
7 work. Authorization shall be accomplished by AT&T's signing the estimate and returning it to
8 SWBT within the 20-day acceptance period.

10 6.08(c) Where AT&T's duct or facility physically connects with SWBT's manhole, the section
11 of AT&T's facility which connects to SWBT's manhole shall be installed by SWBT or its
12 contractor at AT&T's expense (which shall be SWBT's actual costs or the price charged SWBT
13 by the contractor). SWBT will perform this work in an interval consistent with the intervals
14 SWBT performs work for itself. If SWBT's interval for beginning or completing this work does
15 not meet AT&T's needs, AT&T as an authorized contractor may perform the work itself or
16 arrange for the work to be performed by an authorized contractor selected by AT&T from a list,
17 jointly developed by AT&T and SWBT, of mutually agreed contractors qualified to perform such
18 work.

20 10.02(b) SWBT will, at its expense, install inner-duct in a timely manner to accommodate
21 AT&T's space needs in accordance with the same time interval SWBT provides to itself. If
22 SWBT's interval for beginning or completing make-ready work does not meet AT&T's needs,
23 AT&T, as an authorized contractor, may perform the inner-duct installation itself or arrange for
24 the work to be performed by an authorized contractor selected by AT&T from a list, jointly
25 developed by AT&T and SWBT, of mutually agreed contractors qualified to perform such work.
26 When inner duct is installed in SWBT's conduit system by AT&T or an authorized contractor

1 selected by AT&T, SWBT shall provide the inner-ducting materials to be installed and AT&T
2 shall bear all other installation expenses. AT&T shall give SWBT sufficient advance notice of
3 the materials needed to enable SWBT to provide such materials to AT&T on a timely basis.
4 AT&T shall return all unused materials, including unused inner duct and reels, to SWBT or
5 purchase them from SWBT. Inner duct installed by AT&T or an authorized contractor selected
6 by AT&T shall be installed in accordance with the same standards and practices which would be
7 followed if the inner duct were being installed by SWBT or SWBT's contractors. AT&T will
8 indemnify SWBT for any damages resulting from the installation of inner duct by AT&T
9 or any authorized contractor selected by AT&T to install inner duct under this subsection.

10 AT&T shall not arrange for inner duct installation to be performed under this section by
11 subcontractors who are not authorized contractors.

12
13 10.02(c) SWBT shall, at its expense, remove cables that are retired or inactive (dead) to free-up
14 requested duct and pole space, provided that such removal is reasonably feasible (i.e. cable pulls
15 easily without incident). If a section of cable is "frozen" in a duct and would require excavation
16 to remove, AT&T, at its option, may request that SWBT excavate the obstruction. In the
17 alternative, AT&T may (as an authorized contractor) excavate the obstruction itself or arrange for
18 the work to be performed by an authorized contractor selected by AT&T from a list, jointly
19 developed by AT&T and SWBT, of mutually agreed contractors qualified to do such work. Such
20 excavations will be at AT&T's expense; removal of the remainder of the cable will be at
21 SWBT's expense. AT&T shall not conduct conduit excavation activities in any manner which
22 jeopardizes or degrades the integrity of SWBT's structures. AT&T shall indemnify SWBT
23 under Section 7.2.1 of the Terms and Conditions of the Agreement for injuries or damages

1 that are the result of the performance of excavation work under this subsection by AT&T or any
2 authorized contractor selected by AT&T.

3 AT&T POSITION

4 AT&T believes that the parties have resolved the dispute as to the definition of "authorized
5 contractor" in Section 3.06 by adoption of the language similar to that agreed to by the parties in
6 Texas (that is, AT&T has accepted SWBT's additional restrictions on which contractors may be
7 used by AT&T).

8
9 In Section 10.04(d), the parties have resolved their dispute regarding performance of make-ready
10 work in a manner consistent with SWBT's standards and practices. Similarly, in Section
11 10.05(c), the parties have resolved their dispute regarding proposals by AT&T to perform make-
12 ready work itself.

13
14 In Section 10.04(c), SWBT desires to include yet another provision regarding choice of
15 subcontractors. AT&T has adopted all of SWBT's restrictions on the choice of authorized
16 contractors by adopting SWBT's definition of "authorized contractor" virtually verbatim in
17 Section 3.06. In light of the fact that AT&T has agreed to adopt all of SWBT's restrictions, the
18 reason for SWBT's insistence on additional language in 10.04(c) is not altogether clear. If
19 SWBT is simply stating that the subcontractors added to the list of approved contractors must
20 meet the requirements of Section 3.06, then the language is superfluous. If SWBT is attempting
21 to further restrict who AT&T can use as subcontractors, then the language is an impermissible
22 attempt to dictate which contractors AT&T may use on a particular job. In its First Report and
23 Order, the FCC found that while a utility does have a legitimate interest in ensuring that only
24 trained persons should work in the proximity of utilities' lines, "we will not require parties
25 seeking to make attachments to use the individual employees or contractors hired or pre-
26 designated by the utility." FCC First Report and Order ¶1182. The FCC reasoned, "[a]llowing a
27 utility to dictate that only specific employees or contractors be used would impede the access that
28 Congress sought to bestow on telecommunications providers and cable operators and would

1 inevitably lead to disputes over rates to be paid to the workers.” The danger of including
2 SWBT’s language is that it is not clear what more is required in addition to the restrictions
3 already agreed to in Section 3.06. SWBT’s language should be rejected.

4
5 Also in 10.04(d) and 10.02(c), AT&T believes that all indemnity provisions in the Appendix
6 (with specific, limited exceptions) should be covered in one place in the contract (see discussion
7 in reference to Article 21 below).

8
9 In Section 6.08(c), AT&T believes that the reference to both parties’ standards in SWBT’s
10 proposed language is confusing. It will be difficult for contractors to adhere to two sets of
11 provisions, which may well be in conflict.

12
13 Section 10.02(a) is addressed in Issue 15 below.

14 AT&T believed that the issue regarding standards in Section 10.02(c) had been resolved. As to
15 the last sentence of 10.02(c) AT&T objects to its inclusion because it is unclear what SWBT
16 means by “qualified contractors”. This is not a term that is used elsewhere in the Poles
17 Appendix.

18
19 In Section 10.02(b), SWBT has attempted to rewrite language on which the parties had been in
20 agreement. AT&T originally agreed to install inner duct according to the same standards that
21 would be followed if the inner duct were being installed by SWBT. SWBT now wants to require
22 installation that is also in accordance with “SWBT’s specifications.” SWBT does not include
23 any language describing how SWBT would provide these “specifications” to AT&T. Further,
24 SWBT requires compliance with *both* these “specifications” and the “standards” already

1 referenced, even though SWBT could have specifications that are different from the standards.
2 The same problem exists with SWBT's proposed revisions to Section 10.02(c). SWBT's
3 proposed language further expands the indemnification far beyond the parties' stipulation that
4 required AT&T to indemnify SWBT from "damages resulting from AT&T's self-provisioning of
5 inner duct" to "all injuries, losses, damages, claims, or liabilities directly resulting from the
6 installation of inner duct by AT&T or any authorized contractor selected by AT&T under this
7 subsection." SWBT's new indemnification in Section 10.02(c) is even broader. The parties'
8 original intent in Section 10.02(c) was to allow excavation of cable that is "frozen" in a duct, in
9 accordance with a Texas stipulation. SWBT's rewriting of this section seems to imply that
10 AT&T is planning to conduct extensive "excavation work" for which stringent specifications and
11 indemnities are necessary. SWBT's proposed language is confusing, while the original language
12 was tailored to a specific task.

13
14 **ISSUE 3: SHOULD THE DEFINITIONS OF "CONDUIT," "DUCT," "POLE," AND**
15 **"RIGHTS-OF-WAY" BE DEFINED TO REFER TO ALL CONDUITS, DUCTS, POLES,**
16 **AND RIGHTS-OF-WAY SUBJECT TO THE POLE ATTACHMENT ACT AND THE**
17 **PROVISIONS OF THE TELECOMMUNICATIONS ACT OF 1996 CODIFIED AS 47**
18 **U.S.C. §§251(B)(4) AND 271(C)(2)(B)(III)?**

19
20 **AT&T LANGUAGE**

21 ATTACHMENT 13 - APPENDIX POLES

22 3.09 Conduit. The term "conduit" refers to all SWBT conduits subject to the Pole Attachment
23 Act and the provisions of the Telecommunications Act of 1996 codified as 47 U.S.C.
24 §§251(b)(4) and 271 (c)(2)(B)(iii). [remainder of definition not disputed; same text would be
25 used in definition of "duct" in Section 3.14, "pole" in Section 3.33, and "rights-of-way" in
26 Section 3.39]

1 If SWBT is not agreeable to using the Texas language, then AT&T proposes deletion of the
2 entire sentence in each section.

3
4 **AT&T POSITION**

5 AT&T is willing to resolve this issue by adoption of the language agreed to by the parties in
6 Texas, and believed that SWBT was also willing to adopt this solution, as the compromise
7 language was included as agreed in the contract filed with this Commission on October 10, 1997.

8 If SWBT is not willing to resolve the issue with the Texas language, AT&T proposes that the
9 definitions contain no statutory references, rather than SWBT's proposal of referring only to the
10 Pole Attachment Act. This incomplete statutory reference would mean that if a court or agency
11 interprets the scope of the terms "pole," "conduit," "duct," or "right-of-way" under the
12 Telecommunications Act, that interpretation may not be applicable to this document. The
13 Telecommunications Act of 1996 significantly amended the Pole Attachment Act; referring to
14 the Pole Attachment Act alone is an incomplete statutory reference. Further, the FCC's First
15 Report and Order, ¶1226, recognizes that telecommunications carriers "seeking access to the
16 facilities or property of a LEC may invoke section 251(b)(4) [part of the Telecommunications
17 Act of 1996] in lieu of, or in addition to, section 224(f)(1) [part of the Pole Attachment Act]." It
18 is therefore important that any statutory interpretations regarding poles, ducts, conduits, and
19 rights-of-way under the Telecommunications Act of 1996 be applicable to AT&T's access to
20 SWBT's poles, conduits, or rights-of-way under this Appendix.

21
22 **ISSUE 4: SHOULD ACCESS TO CENTRAL OFFICE VAULTS BE PROVIDED**
23 **UNDER THE TERMS OF APPENDIX POLES, AS AT&T PROPOSES, OR SHOULD**
24 **SUCH ACCESS BE PROVIDED AS PART OF THE COLLOCATION**
25 **ARRANGEMENTS THROUGH WHICH AT&T'S ACCESS TO SPACE IN SWBT'S**
26 **CENTRAL OFFICES WILL BE GOVERNED?**

1 AT&T LANGUAGE

2 ATTACHMENT 13 - APPENDIX POLES

3 5.03 Access to Associated Rights-of-Way. Each pole attachment and conduit occupancy license
4 made under this Appendix shall include access to and use of all associated rights-of-way,
5 including, but not limited to, rights-of-way required by AT&T for ingress, egress, or other access
6 to any sites where SWBT's solely or partly owned or controlled poles, manholes, conduit, ducts,
7 or other parts of SWBT's solely or partly owned or controlled conduit system are located, but
8 only to the extent, if any, that SWBT has the legal authority to grant such access and use. SWBT
9 also agrees to provide nondiscriminatory access to rights-of-way containing Controlled
10 Environment Vaults (CEVs), huts, cabinets, and other similar structures to the extent that
11 collocation to such facilities is agreed or required by order of any court or governmental agency
12 having jurisdiction over the subject matter. SWBT agrees that it shall place no restrictions on
13 AT&T's ability to construct, maintain, and monitor its facilities at these sites that are more
14 restrictive than those SWBT places on itself. Such access to these sites shall be provided by
15 SWBT in an expeditious manner. This section relates only to access to the rights-of-way and not
16 the CEVs, huts, cabinets, and similar structures placed by SWBT on such rights-of-way. Neither
17 this section nor any other part of this Appendix establish collocation rights with respect to CEVs,
18 huts, cabinets, and similar structures.

19
20 a. Although SWBT shall afford access to rights-of-way owned or controlled by it and permit
21 AT&T to utilize SWBT's rights-of-way to the extent that SWBT has legal authority to do so,
22 AT&T acknowledges that SWBT may not own or control certain rights-of-way to the extent
23 necessary to permit AT&T full access to such rights-of-way. . The following general
24 principles shall be applied with respect to access to rights-of-way on third-party real estate:

25 (1) AT&T shall first attempt to obtain right-of-way directly from the property owner.

26 (2) If SWBT has legal authority to permit access by AT&T to a right-of-way on third-party
27 property, SWBT will not restrict AT&T's use of the right-of-way.

28 (3) If AT&T has the right of eminent domain under state law, AT&T shall independently

1 attempt to obtain the right-of-way it seeks through the exercise of that right.

2 (4) If AT&T is unable to obtain access to a right-of-way under paragraphs (1), (2), and (3)
3 above, AT&T will request in writing that SWBT exercise its right of eminent domain to
4 condemn the right-of-way for AT&T's use and SWBT shall respond to AT&T's written
5 request within 45 days. SWBT shall exercise its right of eminent domain on AT&T's
6 behalf only if permitted to do so under applicable state law, and only if AT&T agrees to
7 bear all costs and expenses, including but not limited to legal fees arising out of or in
8 connection with the condemnation proceedings.

9 AT&T objects to the inclusion of SWBT's proposed Section 2.08.

10 3.48 Vault. The term "vault" generally refers to central office vaults and controlled environment
11 vaults ("CEVs").
12

13 **AT&T POSITION**

14 AT&T simply wants to be able to do a complete job when installing cable that terminates at a
15 SWBT central office building. AT&T wants to be able to make the final connection of its cable
16 in SWBT's central office vaults (subject to SWBT's security measures and collocation
17 requirements) so that it will not be necessary to leave cable coiled in a manhole or in the street.
18 SWBT's technical publication on collocation precludes AT&T from installing cable in the last
19 segment of SWBT's conduit system, so that transferring this matter to the collocation appendix
20 does not solve the problem. SWBT's exclusion of central office entrance conduit has a strategic
21 competitive significance as well. This is the aggregate point for all local service infrastructure
22 for a given area: for at least the short to medium term future, every AT&T facility will have to
23 pass through SWBT's central office conduit. SWBT's ability to control the timing of that
24 potential competition allows SWBT to use its control of facilities and property to impede
25 installation of equipment by those seeking to compete, in violation of the 1996 Act's directive of
26 non-discriminatory access. FCC First Report and Order, ¶1123. While AT&T's definition of
27 "conduit" as well as language in Section 5.03 recognize that the collocation of equipment will be
28 governed primarily by separate collocation agreements or tariffs, the language of the Appendix
29 should not preclude AT&T from access for the limited purposes noted here, especially where

1 AT&T will be bound by SWBT's security measures for its collocated space. Regarding SWBT's
2 section 3.47 (actually 3.48 in the Poles Appendix), AT&T's concern is that the Interconnection
3 Agreement does not overlook access to the piece of conduit extending from the "last manhole" to
4 the central office vault. It has been AT&T's position that since this conduit is unquestionably
5 considered to be "conduit" then the appropriate appendix in which to address this issue is the
6 Poles Appendix. However, if SWBT will assure AT&T that the piece of conduit in question is
7 provided for in the collocation provisions of the agreement between AT&T and SWBT, then
8 AT&T will consider this issue resolved.

9 The parties have resolved their dispute with respect to the language in Section 4.01, "Scope of
10 Agreement." It is not clear why SWBT has included an argument regarding Section 4.01 here.

11
12 The parties have resolved other disputes in Section 5.03 presented in the April matrix filed with
13 the Commission. However, SWBT now attempts to add new language to Section 5.03 that was
14 not negotiated in either the sessions leading up to the April filing or the most recent set of
15 negotiations leading up to the filing of the October 10, 1997 agreement. Similarly, SWBT did
16 not propose its language in Sections 2.08 and 3.48 (definition of "vault"; SWBT shows as
17 Section 3.47) in the most recent set of negotiations. From the time of the parties' original
18 negotiations and agreement in Texas, the purpose of Section 5.03 was to embody the parties'
19 stipulation regarding access to rights-of-way. SWBT now proposes new language to alter that
20 stipulation. Further, as explained in more length under Issue 31, SWBT is asking the
21 Commission to approve an entirely different statement of purpose than that agreed to by the
22 parties. This approach by SWBT of proposing new language after negotiations have been
23 completed has been a recurring problem throughout the parties' five-state negotiations. SWBT
24 has drafted, and has desired to use in every state, a generic form "Master Agreement" to apply to
25 all parties in all states, regardless of the hours, days, and months spent in individual negotiations
26 with AT&T. In every other state except Arkansas, where the Arkansas Public Service
27 Commission made an explicit ruling that SWBT's "Master Agreement" would not control,
28 SWBT has attempted to supersede the parties' negotiated agreement with this "Master
29 Agreement." The "Master Agreement" unnecessarily complicates AT&T's access to SWBT's

1 poles, ducts, conduits, and rights-of-way, and AT&T has never agreed to the Master Agreement
2 in its entirety in any of the states. It rewrites (in AT&T's opinion, to SWBT's advantage)
3 agreed-upon contractual language embodying the parties' negotiated agreements that were
4 designed to simplify the process of access to poles, ducts, conduits, and rights-of-way. The
5 "Master Agreement" imposes numerous terms, conditions, and procedures to which AT&T has
6 never agreed. It is not specific to the negotiations between AT&T and SWBT. It contains
7 numerous provisions that either conflict with or are redundant of provisions in the Terms and
8 Conditions of the Interconnection Agreement. In Texas, the Commission-approved document
9 was approximately 60 pages; SWBT's insertion of its Master Agreement text in a negotiation
10 draft almost doubled the contract's size. AT&T has accommodated SWBT's quest for
11 uniformity by countless reviews and discussion of Master Agreement language, as well as
12 acceptance of certain Master Agreement provisions for inclusion in the contracts between SWBT
13 and AT&T. In this filing, AT&T has accepted Master Agreement language (originally presented
14 as disputed in AT&T's April matrix) for Missouri on significant issues in a good faith effort to
15 resolve some of the parties' long-standing disputes. The remaining Master Agreement language
16 that has been proposed by SWBT in this proceeding should not supersede the parties' carefully-
17 negotiated agreements. There is no reason under the Telecommunications Act of 1996 or the
18 Pole Attachment Act that AT&T should be forced to accept language that SWBT has either
19 included in agreements with other parties or unilaterally inserted in its Master Agreement to
20 erode negotiated provisions or give additional rights and privileges to SWBT without AT&T's
21 agreement.

22 The Poles, Conduits, and Rights-of-Way Appendix negotiated by the parties and submitted to
23 this Commission in April (the "April Poles Appendix") was an intensively-negotiated document
24 which includes the parties' agreements and the Commission's rulings on disputed issues (with
25 disputes still remaining for the Commission's resolution highlighted). In the negotiations that
26 led up to the April Poles Appendix, the parties had exhaustively discussed the issues relating to
27 the terms and conditions under which SWBT would afford access to SWBT's poles, ducts,
28 conduits, and rights-of-way, not only for Missouri, but for the other four states in which SWBT
29 does business as well. The starting point for the Missouri negotiations was the Poles Appendix
30 that had been approved by the Public Utility Commission of Texas and signed by the parties.

1 Both parties made concessions in an effort to reach agreement. The parties conducted additional
2 negotiations leading up to the filing of the October 10, 1997 agreement in which additional
3 Master Agreement language was accepted by AT&T; further, the parties negotiated additional
4 resolutions to disputes presented to the Commission in April.

5 The Texas and Arkansas Commissions have ruled that the parties' negotiated language, not the
6 Master Agreement, should control. The Arkansas Commission concluded: "The ALJ finds that
7 access to poles, conduits, and rights-of-way should be a part of the interconnection agreement
8 and should not be governed by the separate Master Agreement of SWBT. The arbitration is for
9 the purpose of resolving issues specific to the negotiations between SWBT and AT&T. No other
10 parties may participate in the arbitration and the issue of access to poles, conduits, and rights-of-
11 way is specific to the two parties and the Interconnection Agreement between those parties."
12 Arkansas Public Service Commission, Docket No. 96-395-U, Order No. 5, February 28, 1997, at
13 pp. 42-43. Similarly, in the most recent Texas arbitration, the Texas Commission granted
14 AT&T's Motion to Strike testimony and Master Agreement language that SWBT proposed to
15 insert into the parties' negotiated agreement that had been approved by the Commission (which
16 also included additional language inserted by agreement between the parties after the
17 Commission approved and the parties signed the Interconnection Agreement in January, 1997).
18 The Texas Commission held that the "Master Agreement" provisions would not control over the
19 language approved by the Commission and/or agreed to by the parties, and could not be added to
20 the Poles Appendix over AT&T's objection.

21 Therefore, while the negotiated portions of the Poles Appendix are not perfect from either party's
22 perspective, they are the product of negotiation and compromise, as well as rulings by this
23 Commission. Further Master Agreement provisions should be rejected. This argument is
24 applicable to numerous sections throughout this issues list, and will be referred to as the "Master
25 Agreement argument" in subsequent issues. AT&T respectfully refers the Commission to this
26 discussion where cross-referenced below rather than repeating the arguments presented here each
27 time a "Master Agreement" provision is proposed by SWBT.

1 ISSUE 5: SHOULD THE TERM "COST/COSTBASED" BE DEFINED AS AGREED TO
2 BY THE PARTIES IN TEXAS, AND SHOULD THE SECTION CAPTIONED
3 "CHARGES FOR WORK PERFORMED BY SWBT EMPLOYEES" AND AGREED TO
4 BY THE PARTIES IN TEXAS BE INCORPORATED IN THE MISSOURI POLES
5 APPENDIX?

6
7 AT&T LANGUAGE

8 ATTACHMENT 13 - APPENDIX POLES

9 3.13 Cost/Cost-based. The terms "cost" and "costs" refer to costs determined in a manner
10 consistent with the Pole Attachment Act and applicable rules, regulations, and commission
11 orders. The term "cost-based" refers to rates, fees, and other charges which are based on costs
12 and determined in a manner consistent with the Pole Attachment Act and applicable rules,
13 regulations, and commission orders.

14
15 19.06 Charges for Work Performed by SWBT Employees: Except as otherwise specifically
16 required by applicable commission orders, SWBT's charges to AT&T for work performed by
17 SWBT employees pursuant to this Appendix shall be computed by multiplying the fully loaded
18 hourly rates for such employees times the number of hours required to perform the work.
19 Disputes over SWBT's charges for work performed by SWBT employees, including disputes
20 between the parties concerning the number of hours required to perform the work, shall be
21 subject to the dispute resolution procedures applicable to this Appendix. Notwithstanding the
22 execution of this Appendix, AT&T shall have the right to challenge the methodology utilized by
23 SWBT to determine hourly rates for SWBT employees at any time in any forum having
24 jurisdiction over the subject matter.

25
26 The parties have agreed to the following language for the sentence at issue in Section 7.03:

27 AT&T shall reimburse SWBT for all reasonable costs incurred by SWBT in granting AT&T's
28 access to records and information under this section.

1 **AT&T POSITION**

2 The parties have resolved their disputes regarding the definition of "cost" and "cost-based" in
3 Section 3.13, and regarding charges for work performed by SWBT employees in Section 19.06,
4 as well as the reference to "cost" in Section 7.03. Therefore, this issue appears to be resolved.

5
6 **ISSUE 6: ISSUE RESOLVED.**

7
8 **AT&T LANGUAGE**

9 ATTACHMENT 13 - APPENDIX POLES

10 The parties have agreed to the following language for Section 3.30:

11 3.30 Overlashing. The term "overlashing" refers to the practice of placing an additional cable or
12 inner duct by lashing such cable or inner duct with spinning wire over existing cable(s) and
13 strands.

14 **AT&T POSITION**

15
16 AT&T accepted revised wording from SWBT on this definition and simply wants to ensure that
17 overlashing of more than one cable is permitted by the Appendix, a practice utilized by SWBT
18 frequently to avoid the need to deploy taller poles.

19
20 **ISSUE 7: WHAT SHOULD THE POLES APPENDIX PROVIDE CONCERNING THE**
21 **RIGHTS OF THE PARTIES AND THIRD-PARTY TRANSFEREES (SUCH AS**
22 **ELECTRIC UTILITIES) IN THOSE CASES IN WHICH SWBT TRANSFERS ITS**
23 **INTEREST IN PROPERTY TO WHICH AT&T HAS ATTACHED FACILITIES?**

24
25 **AT&T LANGUAGE**

26 4.03 No Effect on SWBT's Right to Convey or Transfer Property. Nothing contained in this
27 Appendix shall in any way affect SWBT's right to convey or transfer to any other person or
28 entity any interest in real or personal property, including any poles, conduit, or ducts to or in
29 which AT&T has attached or placed facilities pursuant to this Appendix **provided that the**
30 **transferee of such real or personal property shall be subject to AT&T's rights under this**

1 Appendix and licenses subject to this Appendix.

2
3 AT&T POSITION

4 If SWBT transfers its interest in real or personal property to or in which AT&T has attached or
5 placed facilities, there should be some assurance that AT&T's investment will be protected to
6 assure that such transfers do not interfere with AT&T's provision of service to end user
7 customers. The transferee's agreement to be bound by the terms and conditions of the Poles,
8 Conduits, and Rights-of-Way Appendix, or a transfer made subject to AT&T's rights, would
9 provide this assurance. Because nondiscrimination includes the concept that SWBT should treat
10 competitors as it treats itself, SWBT should agree to restrictions and terms governing
11 abandonment and transfer, that protect not only its investment but AT&T's investment as well.
12 SWBT's proposed language adds numerous conditions, including that AT&T must enter re-
13 negotiation of the terms and conditions of access with each transferee to which SWBT conveys
14 property. Regarding SWBT's language about the "joint use" agreements with electric utilities,
15 SWBT asks AT&T not to "abridge the rights of SWBT or any electric utility" under these
16 agreements when poles to which AT&T facilities have been attached, are transferred. SWBT has
17 not provided even a sample copy of one of these agreements to AT&T (despite AT&T's request
18 that it do so) so that AT&T can understand what it is being asked to do. AT&T cannot agree to
19 abide by contracts it has not seen, which may alter the rates, terms, and conditions of its access
20 after it has installed facilities in accordance with the Poles Appendix. SWBT's proposed
21 language should be rejected. Further, SWBT's language is non-negotiated Master Agreement
22 language added to water down a ruling by another State's Commission granting AT&T's request
23 that transfers be subject to AT&T's rights. This language should also be rejected for the reasons
24 set forth in the Master Agreement argument in Issue 4.

25
26 AT&T believes that the parties are in agreement on the language of Section 4.02 other than the
27 language related to the dispute reflected in Issue 29.

1 **ISSUE 8: WHICH PARTY'S LANGUAGE, IF ANY, CONCERNING "NO RIGHT TO**
2 **INTERFERE" SHOULD APPLY?**

3
4 **AT&T LANGUAGE**

5 **4.05 No Effect on AT&T's Rights to Manage its Own Facilities. This Appendix shall not**
6 **be construed as limiting or interfering with AT&T's right to conduct its normal business**
7 **operations in serving its customers or to avail itself of new business opportunities except to**
8 **the extent expressly provided in this Appendix or by the Telecommunications Act of 1996**
9 **or other applicable laws, rules, or regulations.**

10
11 **4.06 No Right to Interfere with Facilities of Others. Except to the extent expressly**
12 **provided by the provisions of this Appendix or by the Telecommunications Act of 1996 or**
13 **other applicable laws, rules, or regulations, the provisions of this Appendix shall not be**
14 **construed as authorizing either party to this Appendix, or persons acting on their behalf, to**
15 **rearrange or interfere in any way with the facilities of the other party or joint users or with**
16 **the use of or access to such facilities by the other party or joint users.**

17
18 **AT&T POSITION**

19 In Section 4.05, AT&T simply requests language that grants AT&T the right to manage its own
20 facilities, as SWBT grants itself the right to manage its poles, ducts, conduits, and rights-of-way
21 in the preceding Section 4.04. AT&T should be able to conduct its normal business operations in
22 serving its customers, and to avail itself of new business opportunities without interference,
23 unless the parties have expressly agreed to the contrary, or unless the Telecommunications Act of
24 1996 or other applicable laws, rules, or regulations so provide. AT&T's proposed language is
25 needed to ensure that this agreement is not interpreted to interfere with such normal business
26 operations. It provides a balance to the language, throughout the Appendix, granting SWBT
27 some degree of control over AT&T's activities to ensure that the control does not result in
28 interference with AT&T's management of its own facilities. SWBT's proposed Section 4.06 is
29 Master Agreement language which should be rejected for the reasons stated above in the Master

1 Agreement argument in Issue 4. AT&T's proposed Section 4.06 was agreed to in negotiations
2 prior to the filing of the April agreement; SWBT has objected to the agreed language now
3 because it is not in conformance with the Master Agreement. This Master Agreement language
4 should also be rejected for the reasons set forth in the Master Agreement argument in Issue 4.

5
6 **ISSUE 9: SHOULD SWBT BE REQUIRED, UPON NOTICE FROM AT&T, TO**
7 **SUSPEND ACTIVITIES ON, WITHIN, OR IN THE VICINITY OF ITS POLES, DUCTS,**
8 **OR CONDUITS THAT CREATE AN UNREASONABLE RISK OF INJURY TO**
9 **PERSONS OR PROPERTY (INCLUDING UNREASONABLE RISKS OF SERVICE**
10 **INTERRUPTIONS TO AT&T'S CUSTOMERS)?**

11
12 **AT&T LANGUAGE**

13 **6.09(g) SWBT shall promptly suspend activities on, within, or in the vicinity of its poles,**
14 **ducts, or conduits if notified by AT&T that such activities create an unreasonable risk of**
15 **injury to persons or property (including unreasonable risks of service interruptions to**
16 **AT&T's customers). SWBT shall not resume such activities on or in the vicinity of its poles**
17 **until it is satisfied that the work may safely proceed and that any hazardous conditions at**
18 **the site have been rectified and shall not resume such activities within or in the vicinity of**
19 **SWBT's conduit system until both AT&T and SWBT are satisfied that the work may**
20 **safely proceed and that any hazardous conditions at the site have been rectified. In the**
21 **event that AT&T requires SWBT to suspend work activities and it is later determined that**
22 **the there was no reasonable basis for the work suspension, AT&T agrees to compensate**
23 **SWBT for the cost resulting from the delay.**

24
25 **AT&T POSITION**

26 This provision parallels the language of paragraph 6.09(f) which immediately precedes it.
27 Subsection (f) requires AT&T to promptly suspend activities on, within, or in the vicinity of
28 SWBT's poles, ducts, conduits, or rights-of-way if notified by SWBT that such activities create
29 an unreasonable risk of injury to persons or property (including unreasonable risks of service
30 interruptions). If AT&T becomes aware of similar risks around its facilities, it should be able to

1 request that SWBT suspend work until the hazardous conditions have been rectified. It is
2 important to note that in a competitive arena, AT&T and SWBT will both have facilities (cables
3 and wires) present on SWBT's poles. It is in the best interest of the public that both company's
4 facilities be safeguarded equally.

5
6 **ISSUE 10: ISSUE RESOLVED**

7
8 **ISSUE 11: ISSUE RESOLVED**

9
10 **ISSUE 12: SHOULD EITHER PARTY RELIEVE ITSELF FROM LIABILITY FOR**
11 **INTRODUCING HAZARDOUS SUBSTANCES TO OR DISCHARGING HAZARDOUS**
12 **SUBSTANCES FROM SWBT'S SITES? SHOULD SWBT'S DEFINITION OF THE**
13 **TERM "HAZARDOUS SUBSTANCES" BE APPROVED AND SHOULD THAT**
14 **DEFINED TERM REPLACE THE TERM "ENVIRONMENTAL CONTAMINANTS"**
15 **PROPOSED BY AT&T?**

16
17 **AT&T LANGUAGE**

18 In an attempt to resolve the parties' dispute, AT&T can accept SWBT's language in the first
19 sentence of the definition of hazardous substances:

20
21 3.20 Hazardous substances. The term "hazardous substances" refers to hazardous and toxic
22 substances, waste, pollutants, contaminants, and materials as defined in the Comprehensive
23 Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. § 9601(14),
24 as amended, and other federal, state, and local health, safety, and environmental laws,
25 ordinances, statutes, rules, and regulations applicable to sites subject to this Appendix, including
26 but not limited to the Occupational Safety and Health Act ("OSHA").

27
28 6.13 **Environmental Contaminants in SWBT's Conduit System.** AT&T acknowledges that,
29 from time to time, **environmental contaminants (e.g., hazardous materials and toxic**
30 **substances)** may enter SWBT's conduit system and accumulate in manholes or other conduit

1 facilities, and that environmental contaminants may be present at other sites where SWBT's
2 poles, ducts, conduits, or rights-of-way are located.

3
4 (a) AT&T may, at its expense, perform such inspections and tests at the site of any pole,
5 duct, conduit, or right-of-way occupied by or assigned to AT&T as AT&T may deem necessary
6 to determine the presence at such sites of environmental contaminants.

7
8 (b) SWBT makes no representations to AT&T or personnel performing work on AT&T's
9 behalf that SWBT's poles, ducts, conduits, or rights-of-way will be free from environmental
10 contaminants at any particular time. Before entering a manhole or performing any work within
11 or in the vicinity of SWBT's conduit system or any other site subject to access under this
12 Appendix, AT&T or personnel acting on AT&T's behalf shall independently determine, to their
13 satisfaction, whether such contaminants are present and conduct their work operations
14 accordingly.

15
16 (c) Each party shall promptly notify the other of environmental contaminants known by
17 such party to be present within or in the vicinity of poles, ducts, conduits, or rights-of-way
18 occupied by or assigned to AT&T pursuant to this Appendix if, in the sole judgment of such
19 party, such environmental contaminants create a serious danger to (1) the health or safety of
20 personnel working at the site or (2) the physical integrity of the other party's facilities placed or
21 to be placed on, within, or in the vicinity of such poles, conduits, or rights-of-way.

22
23 (d) The acknowledgments and representations set forth in the two preceding sections
24 are not intended to relieve SWBT of any liability which it would otherwise have under
25 applicable law for the presence of environmental contaminants in its conduit facilities.

26
27 6.14 Compliance with Environmental Laws and Regulations. AT&T and SWBT agree to

1 comply with the following provisions relating to compliance with environmental laws and
2 regulations:

3
4 All persons acting on AT&T's or SWBT's behalf, including but not limited to AT&T's and
5 SWBT's employees, agents, contractors, and subcontractors, shall, when working on, within or
6 in the vicinity of SWBT's poles, ducts, conduits, or rights-of-way, comply with all applicable
7 federal, state, and local environmental laws, including but not limited to all environmental
8 statutes, ordinances, rules, and regulations.

9 The parties have agreed on wording to resolve their dispute regarding notice of hazardous
10 substances in Section 10.01.

11 AT&T objects to inclusion of SWBT-proposed Section 21.10.

12
13 **AT&T POSITION**

14 SWBT proposes an extremely broad definition of "hazardous substances" to be used in the Poles
15 Appendix. By criticizing AT&T for not accepting this overly broad definition, SWBT implies
16 that AT&T is attempting to absolve itself of responsibility for a clean environment. This is
17 simply not the case. From the outset, the Poles Appendix has provided a clear and simple
18 statement that AT&T and all persons acting on its behalf will abide by *all applicable federal,*
19 *state, and local environmental laws, including statutes, ordinances, rules, and regulations.*
20 Further, the Terms and Conditions section of the Interconnection Agreement contains provisions
21 under which AT&T and SWBT will indemnify each other regarding certain environmental
22 issues. SWBT's overly broad definitions and proposed contractual language regarding
23 environmental liability add nothing to these already-existing provisions and instead can be read
24 to impose liability upon AT&T, even if SWBT's negligence played a part in the environmental
25 contamination. The language proposed by AT&T is clear, brief, and strikes a balance of
26 responsibilities. SWBT's proposed modifications and proposed new language, on the other
27 hand, obscures these responsibilities and attempts to establish in this contract language that shifts
28 the advantage to SWBT in any possible future lawsuits.

1 Similarly, in Sections 6.13 and 6.14, SWBT's proposed language is simply an attempt to provide
2 grounds for future lawsuits between the parties regarding negligence liability for environmental
3 contamination. The language agreed to by the parties (among other provisions, that AT&T
4 would comply with all federal, state, and local environmental laws; that AT&T may conduct its
5 own testing; that each party should notify the other of known environmental contamination that
6 is a health or safety threat; and that nothing in the Appendix is intended to relieve either party
7 from its responsibilities under the environmental laws) is clear and balanced. SWBT's proposed
8 modifications and proposed new language, on the other hand, obscures these responsibilities and
9 further attempts to dictate AT&T's internal procedures for compliance without accepting
10 responsibility for doing so. SWBT's revisions to Section 6.13 and 6.14 should be rejected.

11
12 In subsection 6.13(d), SWBT should not be able to relieve itself of liability for environmental
13 contaminants on its own property and somehow transfer that liability to AT&T simply by
14 requiring that AT&T perform its own testing before placing facilities on that property. SWBT
15 also objects to the use of the term "environmental contaminants" and desires to replace it with
16 the statutory phrase "hazardous substances." However, the phrase "hazardous substances" is
17 defined in different ways in different statutes and the use of such phrase could lead to confusion.
18 Since the parties have not agreed to a definition of "hazardous substances," the contractual
19 language should be left as is in this paragraph. Finally, AT&T has requested notification (rather
20 than SWBT merely "advising" AT&T) as part of the application process when SWBT is aware
21 of hazardous materials and toxic substances at the site where AT&T has applied for access. This
22 is a reasonable request that will save both parties time and planning expense if AT&T decides to
23 withdraw its application due to the contamination.

24
25 AT&T objects to the indemnity provisions included in Section 21.10 for the reasons set forth in
26 relation to Article 21 below, and for the reasons set forth in the Master Agreement argument
27 above.

1 **ISSUE 13:**

2
3 **13.a: ISSUE RESOLVED**

4
5 **13.b: ISSUE RESOLVED**

6
7 **13.c: WHEN AT&T AVAILS ITSELF OF THE "IMMEDIATE OCCUPANCY"**
8 **PROVISIONS OF THE POLES APPENDIX, SHOULD THE FIELD INSPECTION**
9 **PORTION OF THE "PRELICENSE SURVEY" BE REPLACED WITH A POST-**
10 **INSTALLATION INSPECTION OF THE FACILITIES INSTALLED?**

11
12 **13.d: WHAT PROVISIONS RELATING TO INSPECTIONS AND CHARGES FOR**
13 **INSPECTIONS SHOULD BE INCLUDED IN THE POLES APPENDIX?**

14
15 **AT&T LANGUAGE**

16 AT&T objects to the inclusion of SWBT's proposed language in Sections 9.05(a) and (c).

17 16.01 SWBT's Right to Make Periodic or Spot Inspections. SWBT shall have the right, but not
18 the duty, to make periodic or spot inspections at any time of AT&T's facilities attached to
19 SWBT's poles or placed within SWBT's poles, ducts, conduits, or rights-of-way. Such
20 inspection may be conducted for the purpose of determining whether facilities attached to
21 SWBT's poles or placed in SWBT's conduit system are in compliance with the terms of this
22 Appendix and licenses hereunder. SWBT may charge AT&T for inspection expenses only if the
23 inspection reflects that AT&T is in substantial noncompliance with the terms of this Appendix.
24 If the inspection reflects that AT&T's facilities are not in compliance with the terms of this
25 Appendix, AT&T shall bring its facilities into compliance promptly after being notified of such
26 noncompliance and shall notify SWBT in writing when the facilities have been brought into
27 compliance.

28 AT&T objects to the inclusion of SWBT's proposed Section 16.03.

1 AT&T POSITION

2 The Arbitrator ruled that: "SWBT shall make available to the LSP for immediate occupancy any
3 duct, conduit, or pole space that is not currently assigned to an LSP or other entity. Availability
4 shall be based on space assignment/occupancy records to be maintained by SWBT but which will
5 be made available for viewing by the LSP upon request within two business days notification."
6 SWBT took the position in negotiations that "immediate" meant something other than
7 "immediate," that is, "immediate" meant "after the issuance of a license." SWBT then proposed
8 a lengthy "immediate occupancy" procedure, which AT&T accepted in its entirety in order to
9 ensure that the Arbitrator's ruling would in fact be carried out without dispute. SWBT now
10 wants unfettered discretion to conduct an additional inspection of AT&T's facilities installed
11 under the immediate occupancy procedure, at AT&T's expense, and without AT&T's
12 authorization, despite the fact that SWBT's immediate occupancy procedure calls for AT&T to
13 present detailed information both at the time space is assigned and in an application to be
14 submitted within 24 hours of the occupancy. SWBT will have a great amount of information
15 about the occupancy. Unless SWBT has a genuine concern about the particular occupancy, it can
16 simply review the paperwork it has required or contact AT&T for an answer. AT&T should not
17 be expected to absorb the cost of SWBT personnel conducting an unnecessary inspection,
18 especially when AT&T is not first given the opportunity to respond to any genuine concerns on
19 the part of SWBT about the occupancy. These arguments apply to Sections 9.05(a) and (c) and
20 16.03.

21 In Section 16.01, after a great deal of negotiation, the parties agreed that SWBT may charge
22 AT&T for an inspection where AT&T has not complied with the Appendix, but may not charge
23 AT&T for routine inspections. The long-agreed language in Section 16.01 provided that AT&T
24 will pay for a SWBT inspection only when the inspection reflects that AT&T is in "substantial
25 non-compliance with the terms of the Appendix." SWBT now proposes to add new language by
26 which AT&T would pay for an inspection if the inspection "benefits" AT&T. The term
27 "benefiting" proposed by SWBT is vague and would be very difficult to apply in practice.
28 Further, this is not the parties' longstanding agreement, but rather is "Master Agreement"

1 language which should be rejected for the additional reasons set forth in the Master Agreement
2 argument above.

3
4 Regarding Section 10.01(d), SWBT appears to believe that AT&T objects to that portion of
5 Section 10.01(d) which states that AT&T will bear all risks resulting from the possibility that
6 space which appears from the records to be available is not in suitable condition to be used by
7 AT&T. AT&T does not object to this provision and will agree to the language proposed by
8 SWBT.

9
10 **ISSUE 14: ISSUE RESOLVED**

11
12 **ISSUE 15a: DOES THE DECEMBER, 1996 ARBITRATION ORDER REGARDING**
13 **50%/50% PAYMENT APPLY WHEN SWBT INCURS SUBSTANTIAL OUT-OF-**
14 **POCKET COSTS IN CONNECTION WITH FACILITIES MODIFICATION,**
15 **CAPACITY EXPANSION, OR MAKE-READY WORK AUTHORIZED BY AT&T, AND,**
16 **IF NOT, IS IT APPROPRIATE THAT SWBT HAVE THE OPTION OF BILLING**
17 **AT&T'S FOR SUCH COSTS AS THEY ARE INCURRED INSTEAD OF WAITING**
18 **UNTIL 50% COMPLETION AND 100% COMPLETION?**

19
20 **ISSUE 15.b: WHAT ROLE SHOULD EACH PARTY PLAY IN ENFORCING**
21 **REIMBURSEMENT RIGHTS FROM THIRD PARTIES AND WHO BENEFITS FROM**
22 **MODIFICATIONS FOR WHICH AT&T HAS PAID?**

23
24 **AT&T LANGUAGE**

25 10.02(a) SWBT agrees to modify its outside plant facilities to the extent that AT&T agrees to
26 pay for the modification at cost as long as such modifications are consistent with capacity, safety,
27 reliability, and engineering considerations which SWBT would apply to itself if the work were
28 performed for SWBT's own benefit. SWBT may recover from AT&T the costs of modifying its
29 outside plant facilities for AT&T's space. **SWBT may not require payment of the full**
30 **amount in advance. AT&T will pay half of the contractors' costs after 50% completion of**
31 **work, and the remainder at completion. To facilitate the sharing of costs by all parties**
32 **benefiting from the modification, SWBT will establish a methodology whereby AT&T will**

1 be reimbursed on a pro rata basis for any portion of the facility later used by SWBT and
2 other telecommunications providers, including, but not limited to, telecommunications
3 carriers and cable television systems.

4
5 10.08 Reimbursement for the Creation or Use of Additional Capacity. AT&T acknowledges
6 that as a result of make-ready work performed to accommodate AT&T's facilities, additional
7 capacity may become available on SWBT's poles or in its conduit system. In such event, AT&T
8 shall not have any preferential right to utilize such additional capacity in the future and shall not
9 be entitled to any monies which may subsequently be paid to SWBT for the use of such
10 additional capacity by any joint user; provided, however, SWBT must establish a
11 methodology whereby AT&T is reimbursed on a pro-rata basis for any portion of the
12 capacity later used by SWBT or another telecommunications provider, including, but not
13 limited to, telecommunications carriers and cable television systems.

14
15 19.03 Make-Ready Charges. SWBT may not require payment of the full amount of make-
16 ready charges in advance. AT&T will pay half of SWBT's make-ready charges after 50%
17 completion of work, and the remainder at completion. Bills and invoices submitted by SWBT to
18 AT&T for make ready charges shall be due and payable 30 days after the date of the bill or
19 invoice.

20 21 AT&T POSITION

22 The Arbitrator ruled that AT&T should be allowed to pay SWBT half of its make-ready charges
23 for make-ready work at 50 percent job completion, and the remainder at 100 percent completion.
24 SWBT, however, attempts to impose additional conditions regarding payment of invoices by
25 requiring, at SWBT's option, payment of out-of-pocket costs and outside contractor costs on a
26 schedule not consistent with the Arbitrator's ruling of 50 percent payment at 50 percent job
27 completion and the remainder at 100 percent job completion. Further, SWBT leaves to AT&T
28 the determination regarding reimbursement for modifications made by AT&T that later benefit

1 others, including SWBT. If AT&T has borne the entire cost of a modification that benefits
2 others, pro rata reimbursement is fair and appropriate. See FCC First Report and Order, ¶1214.
3 The requirement that SWBT establish a methodology for the reimbursement is also appropriate,
4 because SWBT will be the only party in possession of applications and records relating to the use
5 of the space affected by the modification. SWBT is the only entity that knows the identities of
6 other attachées to capacity provided by AT&T, and thus it should provide the methodology.
7 Further, SWBT is attempting to introduce generic Master Agreement language that undercuts the
8 Arbitrator's ruling. This Master Agreement language should be rejected for the additional
9 reasons stated in the Master Agreement argument set forth in Issue 4.

10
11 **ISSUES 16, 24, 25, AND 28: SHOULD THE POLES, CONDUITS, AND RIGHTS-OF-**
12 **WAY APPENDIX, WHICH IS PART OF THE INTERCONNECTION AGREEMENT**
13 **BETWEEN SWBT AND AT&T, CONTAIN PROVISIONS REGARDING**
14 **INDEMNIFICATION, LIMITATION OF LIABILITY, CONSEQUENTIAL DAMAGES,**
15 **NOTICE, DISPUTE RESOLUTION, ASSIGNMENT, AND GENERAL LEGAL**
16 **PROVISIONS?**

17
18 **AT&T LANGUAGE**

19 10.02(c) [First six sentences not in dispute] **AT&T shall indemnify SWBT under Section**
20 **7.X of the Terms and Conditions of the Agreement for injuries or damages that are the**
21 **result of the performance of excavation work under this subsection by AT&T or any**
22 **authorized contractor selected by AT&T.**

23
24 [AT&T objects to the inclusion of SWBT's indemnification language in Sections 6.08(c),
25 10.02(b), 10.02(c), and 10.04(d) (numbered in SWBT's response as 10.05(d)).]

26
27 25.01 **Termination of Appendix Due to Non-Use of Facilities.** AT&T shall, by written notice to
28 SWBT, terminate this Appendix and all licenses subject to this Appendix if AT&T ceases to do
29 business in this State, ceases to have authority to provide cable television or telecommunications

1 services in this State, or ceases to make active use of or have intent to use SWBT's poles, ducts,
2 conduits, and rights-of-way in this State.

3
4 25.02 Limitation, Termination, or Refusal of Access for Certain Material Breaches. AT&T's
5 access to SWBT's poles, ducts, conduits, and rights-of-way shall not materially interfere with or
6 impair service over any facilities of SWBT or any joint user, cause material damage to SWBT's
7 plant or the plant of any joint user, impair the privacy of communications carried over the
8 facilities of SWBT or any joint user, or create serious hazards to the health or safety of any
9 persons working on, within, or in the vicinity of SWBT's poles, ducts, rights-of-way or to the
10 public. Upon reasonable notice and opportunity to cure, SWBT may limit, terminate or refuse
11 access if AT&T violates this provision; provided, however, that such limitation, termination or
12 refusal will be limited to AT&T's access to poles, ducts, conduits, and rights-of-way located in
13 the SWBT engineering or construction district in which the violation occurs, shall be as narrowly
14 limited in time and geographic scope as may be necessary to enable AT&T to adopt suitable
15 controls to prevent further violations, and shall be subject to review, at AT&T's request, pursuant
16 to the dispute resolution procedures set forth in the Agreement or, as permitted by law, before
17 any court, agency, or other tribunal having jurisdiction over the subject matter. In the event that
18 AT&T invokes dispute resolution procedures or seeks review before a court, agency, or other
19 tribunal having jurisdiction over the subject matter, the limitation, termination, or refusal of
20 access may be stayed or suspended by agreement of the parties or by order of the tribunal having
21 jurisdiction over the parties' dispute.

1 25.03 Notice and Opportunity to Cure Breach. In the event of any claimed breach of this
2 Appendix by either party, the aggrieved party may give written notice of such claimed breach as
3 provided in this section.

4 (a) The notice shall set forth in reasonable detail:

5 (1) the conduct or circumstances complained of, together with the complaining
6 party's legal basis for asserting that a breach has occurred;

7 (2) the action believed necessary to cure the alleged breach; and

8 (3) any other matter the complaining party desires to include in the notice.

9 (b) Except as provided in Section 25.02 and subsection (c) of this section, the complaining
10 party shall not be entitled to pursue any remedies available under this Appendix or relevant law
11 unless such notice is given and (1) the breaching party fails to cure the breach within 30 days of
12 such notice, if the breach is one which can be cured within 30 days, or (2) the breaching party
13 fails to commence promptly and pursue diligently a cure of the breach, if the required cure is
14 such that more than 30 days will be required to effect such cure; provided, however, that nothing
15 contained in this section shall preclude either party from invoking the dispute resolution
16 procedures applicable to this Appendix, or any dispute resolution procedures offered by the FCC
17 or Missouri Public Service Commission, at any time.

18 (c) Nothing contained in this section shall preclude either party from filing a complaint or
19 bringing suit in any court, agency, or other tribunal of competent jurisdiction to restrain or enjoin
20 any conduct of the other party which threatens the complaining party with irreparable injury,
21 loss, or damage without first giving the notice otherwise required by subsection (b).

22 [AT&T objects to SWBT's proposed Section 25.04 in its entirety.]

1 [AT&T objects to Articles 21, 22, 24, 28, 29, 31 and 32 in their entirety.]

2

3 **AT&T POSITION**

4 In their original Texas negotiations, the parties agreed that they would refer to the Terms and
5 Conditions of the Interconnection Agreement as controlling the parties' respective rights
6 regarding indemnity, assignment, notice, and general legal provisions. The advantage of this
7 approach is that the parties can look in one place in the Interconnection Agreement to determine,
8 for example, indemnification rights, and there is no risk that there will be conflicting legal
9 provisions in two different parts of the Agreement that will confuse both the parties attempting to
10 solve a problem under the Agreement and any courts or commissions attempting to interpret the
11 agreement. SWBT proposes that the Poles, Conduits, and Rights-of-Way Appendix contain its
12 own provisions regarding indemnity, limitations of liability, consequential damages, notice,
13 dispute resolution, assignment, and general legal provisions. Especially where potential legal
14 liability is involved, it is important that the Interconnection Agreement as a whole clearly set out
15 the rights and obligations of the parties. SWBT's proposal on the topics listed above is different
16 from the language used in the Terms and Conditions section of the Interconnection Agreement.
17 If AT&T and SWBT are attempting in good faith to resolve a dispute or answer a question that
18 has arisen under the Interconnection Agreement, two sets of provisions on the same subject are,
19 at best, confusing. At worst, differing or conflicting provisions create complicated, lengthy, and
20 expensive legal or administrative disputes. While AT&T has negotiated in good faith as an
21 accommodation to SWBT to include separate provisions on subjects such as performance and
22 payment bonds, and confidentiality, AT&T's strong preference is to have only one set of
23 provisions covering each subject. AT&T originally agreed to portions of SWBT's proposed
24 articles on dispute resolution and assignment as an accommodation to SWBT; however, there are
25 now so many disputes in relation to these articles that AT&T recommends that the parties agree
26 to abide by the assignment and dispute resolution procedures in the Terms and Conditions
27 Section of the Interconnection Agreement.

1 AT&T also has specific objections to the language proposed by SWBT in these articles (21
2 [indemnity], 22 [limitation of liabilities and consequential damages], 24 [assignment], 25
3 [termination], 28 [notices], 29 [dispute resolution], 31 [access to AT&T's poles and conduits] and
4 32 [general legal provisions]. In general, these sections are Master Agreement language which
5 should be rejected for the reasons set forth in the Master Agreement argument in Issue 4. Mostly
6 as an accommodation to SWBT's desire to keep uniform numbering with the Master Agreement,
7 AT&T has proposed some simple language for these articles that cross-references the Terms and
8 Conditions of the Interconnection Agreement and that is consistent with the Terms and
9 Conditions. AT&T does not insist on inclusion of this language if the Commission decides that
10 it would be clearer to simply have the Poles Appendix silent on these issues.

11
12 As to indemnity in SWBT's proposed Article 21, much of SWBT's proposed language either
13 conflicts with or repeats previously agreed-upon liability and indemnity provisions contained in
14 the Terms and Conditions of the Agreement. For example, SWBT proposes provisions on third
15 party beneficiaries, environmental indemnification, taxes, intellectual property rights, tariff
16 protections, and defense of suits, as well as general indemnity principles, all of which are
17 specifically covered in the general Terms and Conditions. As a general proposition, SWBT's
18 proposed language in Article 21 reflects SWBT's desire to exonerate itself from its own
19 negligence, potentially including intentional misconduct and gross negligence as well. In most
20 cases, SWBT attempts to assign responsibilities (or to avoid them) according to the type of
21 claimant involved, the type of claim, the presence of a party at a particular place, or the doing of
22 a particular thing. The problem with this approach is that it would eliminate entirely SWBT's
23 conduct, acts, or omissions from the determination of liability and indemnification
24 responsibilities. In other portions of the Terms and Conditions the conduct of the parties is the
25 key determinate for liability and indemnification responsibilities; thus, SWBT's proposals
26 conflict with the way the Agreement is designed to work in all other areas. Further, while SWBT
27 has always insisted that AT&T follow very precise and specific SWBT rules and procedures for
28 many activities, SWBT's provisions attempt to make AT&T the party "in control" of premises
29 (and therefore responsible for what happens there) that are in fact owned and controlled by

1 SWBT. Moreover, no legitimate justification exists to treat outside plant occurrences differently
2 from liability and indemnification responsibilities elsewhere in the Interconnection Agreement.

3
4 The provisions on limitation of liability in SWBT's proposed Article 22 also conflict with the
5 agreements of the parties on limitation of liability in the Terms and Conditions section of the
6 Interconnection Agreement. Under Article 22, AT&T is basically required to assume all risk of
7 loss, injury, or damage to AT&T's facilities on SWBT's poles or in SWBT's conduit system.
8 Under Article 22, AT&T is not even granted the same status as a trespasser, to whom SWBT
9 would at least be liable for its own gross negligence. SWBT exonerates itself from liability
10 based upon the status of the person making a claim, rather than based upon who caused the
11 damage, the key factor in the Terms and Conditions. If SWBT has a pole that is rotten and that it
12 has failed to inspect or maintain, and the pole falls and injures someone, SWBT can attempt to
13 dodge liability through the provisions of Article 22. The Terms and Conditions already contain
14 commercially reasonable, workable liability provisions that embody the concept of fault and
15 wrongdoing as they should. These should be the controlling provisions, not SWBT's proposed
16 Articles 21 and 22.

17
18 AT&T originally attempted to accommodate SWBT's desire to include assignment provisions in
19 the Poles Appendix. SWBT was unwilling, however, to make its proposed one-sided language in
20 Article 24 more balanced to give equivalent assignment rights to both parties. AT&T did agree
21 in the October 10 filing to include subsection 24.01(c) and Section 24.02 (very basic provisions
22 about assignment and notice), but does not agree to the other sections shown as disputed, and
23 which if accepted would most likely fundamentally change the application of the agreed
24 language. Therefore, AT&T will accept 24.01(c) and 24.02 only if the other language in Article
25 24 is rejected. As both parties most likely would concede, the telecommunications industry is in
26 a state of flux, and corporate reorganizations and other mergers and asset transfers are likely to
27 occur. Article 24 makes such transfers easy only for SWBT. Under Article 24, SWBT may
28 assign its rights and delegate its duties under the Poles Appendix almost without restriction. On
29 the other hand, AT&T must comply with numerous requirements, including notice, consent, and

1 payment of fees even to change a "Co." to an "Inc." in its name. (Section 24.02 requires that all
2 changes in the legal identity of a corporation be treated like an assignment, but only for AT&T.
3 Under Section 24.01(a), SWBT is permitted to make assignments to related companies without
4 even giving notice to AT&T.) Further, SWBT's Article 24 contains provisions regarding "bona
5 fide loan transactions" which have no application to AT&T and are simply part of the Master
6 Agreement. The one-sided provisions of Article 24 are unreasonable and should be rejected.

7
8 Regarding Article 25, AT&T believed that the parties were in agreement on the provisions of
9 Section 25.02 and 25.03 as shown in the October 10, 1997 filing. AT&T objects to Sections
10 25.01 and 25.04. As to Section 25.01, SWBT seeks broad provisions regarding when the Poles
11 Appendix or licenses issued under the Appendix can be terminated. Termination of the
12 Appendix or specific licenses is drastic and affects service to end-user customers; therefore, the
13 circumstances under which the Appendix or a license is terminated should be limited. SWBT
14 originally requested a provision that AT&T terminate the Appendix if AT&T ceased to do
15 business in the state or ceased to make active use of SWBT's poles, ducts, conduits, or rights-of-
16 way. SWBT now attempts to unilaterally impose expanded conditions for termination and to
17 create contractual liability upon AT&T if AT&T fails to meet these conditions. These provisions
18 are unreasonable and should be rejected. AT&T objects to SWBT Section 25.04 because it guts
19 the parties' agreements in Section 25.02 and 25.03. In these sections, AT&T's primary concern
20 was that SWBT not be able to terminate AT&T's access to poles, conduits, and rights-of-way, or
21 terminate the Poles Appendix, absent dire circumstances. The parties agreed that these
22 circumstances specifically include material interference with service, impairment of privacy of
23 communications, and other serious problems. These circumstances provide the foundation for
24 termination of access after notice and opportunity to cure, but Section 25.02 provides that the
25 termination of access shall be "as narrowly limited in time and geographic scope to enable
26 AT&T to adopt suitable controls to prevent further violations." The parties also agreed in
27 Section 25.03 to provide notice and opportunity to cure other breaches. SWBT's proposed
28 Section 25.04 destroys these agreements by allowing termination of Appendix "in the event of a
29 material breach," without further conditions.

1 SWBT proposes that the Poles Appendix contain its own provisions regarding notice. As noted
2 above, where potential legal liability is involved, it is especially important that the
3 Interconnection Agreement as a whole clearly set out the rights and obligations of the parties.
4 SWBT's language regarding notice is different from the language used in the Terms and
5 Conditions section of the Interconnection Agreement. It is especially crucial that notices of a
6 lawsuit are served upon the proper person to avoid delay and a possible default. If the notice
7 provisions in the Poles Appendix are different from those in the Terms and Conditions of the
8 Interconnection Agreement, service of a lawsuit involving breach of the entire Interconnection
9 Agreement might sit on the desk of a person in charge of outside plant for a local area, depriving
10 the party served of adequate time to answer the lawsuit, as well as creating a great risk that
11 default will occur. SWBT's Article 28 should be rejected.

12
13 The provisions of the Terms and Conditions of the Interconnection Agreement regarding dispute
14 resolution should control over the provisions of SWBT's proposed Article 29. Disputes may
15 arise affecting the entire Interconnection Agreement; resolution of those disputes should apply to
16 the Poles Appendix as well as to the rest of the contract. There are issues to be resolved by the
17 Commission regarding the dispute resolution procedures in the Terms and Conditions section.
18 The Commission should be able to make one set of rulings regarding how disputes are to be
19 handled under the Interconnection Agreement. SWBT's proposed Article 29 should be rejected.
20 SWBT's proposed Article 31 on reciprocal access to AT&T's poles, conduits, and rights-of-way
21 has no place in this Interconnection Agreement which is entered into under the
22 Telecommunications Act of 1996 to provide AT&T nondiscriminatory access to SWBT's poles,
23 ducts, conduits, and rights-of-way.

24
25 The general legal provisions in SWBT's proposed Article 32 are duplicative of provisions in the
26 Terms and Conditions section covering the same subjects. The Terms and Conditions should
27 control to avoid potential conflicts and confusion. AT&T especially objects to the "prior
28 agreements superseded" provision to the extent SWBT intends it to nullify any prior agreements
29 between AT&T's long distance operations and SWBT. SWBT seems insistent that this Poles

Appendix cover AT&T's long distance services, a view unsupported by either the Telecommunications Act of 1996 (including the Pole Attachment Act) or the FCC's First Report and Order.

Further argument regarding Section 10.02(b) is found in Issue 2(b) above.

ISSUE 17: SHOULD POLES APPENDIX INCLUDE A PROVISION WHICH WOULD ALLOW AT&T TO HAVE A CONTRACTUAL RIGHT TO INSPECT SWBT'S FACILITIES AFTER SWBT'S COMPLETION OF STRUCTURAL FACILITIES WORK?

AT&T LANGUAGE

12.07 Review of Work of Other Party to Ensure Facility Integrity. Where AT&T and SWBT both have facilities present in a particular segment of SWBT's conduit system, either party may review the facilities work of the other party after its completion to ensure the integrity of its own facilities. The reviewing party shall conduct its review at its own option and expense. Each party shall limit its exercise of such review to those work operations whose size or scope of work would lead to reasonable expectation that damage to its facilities has occurred or may be imminent.

AT&T POSITION

Throughout the Appendix, there are numerous safeguards to protect the integrity of SWBT's structures and facilities. As AT&T begins to install facilities in SWBT's conduit system, a risk is created that others working in that segment of the conduit system may damage AT&T's facilities placed there. AT&T therefore requests the right to review SWBT's facilities work where AT&T has facilities in the same segment of the conduit system and where the size or scope of work would lead to the expectation that damage has occurred or may be imminent. AT&T's proposed language requires the reviewing party to bear its own expense in conducting such review.

1 **ISSUE 18: ISSUE RESOLVED**

2 **AT&T LANGUAGE**

3 The language agreed to by the parties is as follows:

4 13.02(c) results in the facilities attached being different from those described as authorized
5 attachments in AT&T's present application, current license, notice of intent to occupy, or license
6 application and supplemental documentation (e.g., different duct or size increase causing a need
7 to re-calculate storm loadings, guying, or pole class); or

8
9 **AT&T POSITION**

10 The parties have agreed to resolve this issue by the language shown in the October 10, 1997
11 filing.

12
13 **ISSUE 19: SHOULD THE APPENDIX CONTAIN PROVISIONS REGARDING FEES**
14 **FOR ATTACHMENTS MADE IN THE PAST BY AT&T OR ITS PREDECESSORS, AS**
15 **PART OF A COMPLICATED AND EXPENSIVE PROCEDURE TO IDENTIFY**
16 **POSSIBLE "UNAUTHORIZED ATTACHMENTS"?**

17
18 **AT&T LANGUAGE**

19 AT&T objects to the inclusion of SWBT's proposal on this issue, including the language in
20 Section 17.01(d), 17.XX, and 17.04 through 17.12.

21
22 **AT&T POSITION**

23 SWBT has proposed for inclusion in the Poles Appendix language requiring that AT&T
24 undertake a complex investigation to identify possible "unauthorized attachments." Article 17
25 includes a series of SWBT provisions long rejected by AT&T regarding attachments made prior
26 to the date of the Appendix (i.e., prior to the date of the Telecommunications Act of 1996 and
27 thus under a different statutory framework). These provisions are premised upon AT&T
28 identifying all attachments made by it or any of its predecessors on any SWBT structure at any

1 time in the past and verifying that the attachment is subject to a license issued by SWBT. This
2 procedure alone places significant burdens on AT&T, and it is accompanied by notice, dispute
3 resolution, fees, and other complex procedures that consume a great deal of time and expense.
4 Impositions such as the one proposed here by SWBT only serve to complicate and frustrate
5 AT&T's entry into the local exchange market. SWBT argues that no "complicated procedure" is
6 involved to identify possible "unauthorized attachments." If AT&T is to make any real
7 verification, however, it will need to go through the cumbersome process of trying to identify
8 what is currently on SWBT's poles and match it to prior agreements with SWBT; otherwise,
9 SWBT's proposed "verification" would be meaningless. While it may be possible that other
10 business units of AT&T have facilities located on or in SWBT's poles, conduits, or rights-of-
11 way, there is no reason to believe that AT&T is not paying the appropriate charges for these
12 facilities, and there is no reason for SWBT to impose on AT&T the responsibility for attempting
13 to reconcile any discrepancies. SWBT has within its control all of the records and resources
14 necessary to accomplish such a reconciliation if SWBT believes it is necessary to do so.

15
16 **ISSUE 20: SHOULD SWBT BE CALLED ON TO REMOVE FACILITIES NO LONGER**
17 **IN SERVICE PRIOR TO A REQUEST FOR ACCESS BY AT&T OR ANOTHER**
18 **PARTY ENTITLED TO ACCESS?**

19
20 **AT&T LANGUAGE**

21 18.04 Removal Following Replacement of Facilities. Except as provided in Section 18.02,
22 **SWBT and** AT&T shall **each** remove facilities no longer in service from SWBT's poles or
23 conduit system within 60 days, or within such other period of time as shall be mutually agreeable
24 to the parties, after the date AT&T **or SWBT** replaces existing facilities on a pole or in a conduit
25 with substitute facilities on the same pole or in the same conduit; provided, however, that
26 removal of facilities from the maintenance duct shall be governed by Sections 12.04, 13.03, and
27 15.02 of this Appendix and not by this subsection.

1 **AT&T POSITION**

2 The rationale for a provision on removal of facilities no longer in service is to make as much
3 space available as possible for all users. This rationale applies equally to all: regardless of
4 ownership, facilities that are no longer used should be moved out of the way to make space
5 available for new facilities that will be used. If SWBT requires that AT&T remove facilities no
6 longer in service within a specific period of time, SWBT should be willing to remove its own
7 unused facilities within that same period of time, in accordance with the principle of non-
8 discriminatory access.

9
10 **ISSUE 21: SHOULD SWBT'S RATES BE SUBJECT TO ANNUAL COST-BASED**
11 **ADJUSTMENTS IN ACCORDANCE WITH THE POLE ATTACHMENT ACT AND**
12 **RULES, REGULATIONS, AND ORDERS THEREUNDER, OR SHOULD THEY BE**
13 **FIXED FOR THE TERM OF THE PARTIES' AGREEMENT, A TERM WHICH**
14 **REMAINS UNSPECIFIED? SHOULD A HALF-DUCT RATE APPLY TO INNER**
15 **DUCTS, AS STIPULATED BY THE PARTIES IN TEXAS, WHERE AT&T**
16 **SPECIFICALLY STIPULATED TO A HALF-DUCT RATE FOR INNER DUCT? WERE**
17 **EITHER OF THESE ISSUES SPECIFICALLY ADDRESSED BY THE ARBITRATOR?**
18

19 **AT&T LANGUAGE**

20 **19.01 Rates and Administrative Fees.**

21 **(a) Rates for Pole Attachment and Conduit Occupancy. In accordance with the Missouri**
22 **Public Service Commission's arbitration order in Case No. TO-97-40, AT&T shall pay to**
23 **SWBT rates of \$2.35 per pole per year and \$0.40 per conduit foot per year for conduit,**
24 **until such time as the Federal Communications Commission promulgates rules governing**
25 **pole attachment and conduit occupancy rates. Pole attachment and conduit occupancy**
26 **rates charged by SWBT to AT&T under this Appendix will then be determined in**
27 **accordance with the FCC's rules on a going-forward basis.**

28
29 **(b) Administrative Fees. As provided by the Missouri Public Service Commission's**
30 **arbitration order in Case No. TO-97-40, SWBT shall be allowed to charge administrative**
31 **fees to AT&T. The amount charged by SWBT to AT&T for administrative fees shall be**

1 identical to the amount charged by SWBT to CATV providers for administrative fees as of
2 the date of the arbitration order, December 11, 1996. Further in accordance with the
3 Missouri Public Service Commission's order in Case No. TO-97-40, if the FCC
4 promulgates rules governing the assessment of administrative fees, those rules shall apply
5 to administrative fees charged by SWBT to AT&T on a going-forward basis.

6
7 (c) Rates for Occupancy of Inner Duct and Partitioned Conduit. As provided by 47 U.S.C.
8 § 224(g), SWBT shall impute to itself conduit and inner-duct rates equal to that which it
9 would charge a non-affiliated entity. To avoid the collection of compensation in excess of
10 the just and reasonable rates prescribed under the Telecommunications Act of 1996,
11 occupancy of inner ducts or partitioned conduit will be no greater than a fractional rate
12 proportional to the number of inner ducts or subducts contained in the full-sized conduit of
13 an AT&T-occupied conduit. Conduit occupancy rates apply to manhole and CEV
14 occupancy, calculated to the center point of the manhole or CEV being occupied.

15
16 AT&T POSITION

17 The Arbitrator clearly ruled that rates of \$2.35/pole/year and \$0.40/conduit foot/year were
18 adopted, and that SWBT could recover administrative fees identical to those applied to CATV
19 providers. Arbitrator's Order, pages 28-29. The Arbitrator also appeared to rule that when the
20 FCC completes its determination of charges for pole attachments, those rates and charges should
21 apply for both rates and administrative fees. The Arbitrator said nothing about allowing SWBT
22 to adjust either the rates or the fees in the interim; she referred to SWBT's "current rates in effect
23 for cable television systems" in her discussion of the parties' positions. Further, the ruling is
24 silent as to fees for inner ducts. SWBT proposes to charge a half-duct rate regardless of whether
25 AT&T is actually using or has even been assigned one-third of a duct or some other fractional
26 portion. AT&T's proposal of charging a rate proportional to the number of inner ducts contained
27 in the conduit is more reasonable and fair. In fact, Section 6.07 of the Appendix (originally
28 proposed by SWBT in the Master Agreement attached to the testimony of Mr. Hearst) provides:

1 "To ensure efficient use of conduits SWBT will, when cable diameters permit, install inner ducts
2 in multiples that fully utilize duct space (typically 3 or 4 inner ducts in a full four-inch duct)."
3 This statement recognizes that it will be more common for duct to be divided into 3 or 4 inner
4 ducts so that the half-duct rate proposed by SWBT will result in overcollection by SWBT.

5
6 **ISSUE 22: SHOULD THE APPENDIX INCLUDE ADDITIONAL TERMS REGARDING**
7 **PAYMENT OF INVOICES?**

8
9 **AT&T LANGUAGE**

10 19.04 Due Date for Payment. For all fees and charges other than make-ready charges, each bill
11 or invoice submitted by SWBT to AT&T for any fees or charges under this Appendix shall state
12 the date that payment is due, which date shall be not less than 60 days after the date of the bill or
13 invoice. AT&T agrees to pay each such bill or invoice on or before the stated due date.

14
15 **AT&T POSITION**

16 In negotiations in other states, SWBT originally agreed to payment terms like those in Article 19
17 as proposed by AT&T, but now objects to these sections because they do not include provisions
18 regarding interest on past due amounts, dispute resolution, termination and other remedies
19 benefiting SWBT. These Master Agreement provisions should be rejected for the reasons set
20 forth in the Master Agreement argument in Issue 4. Further, SWBT is attempting to unilaterally
21 impose requirements on AT&T that AT&T has not accepted during negotiations and SWBT has
22 not been awarded in the arbitration hearing. It is reasonable for AT&T to have as much certainty
23 as possible regarding rates and fees it has agreed to pay, rather than granting SWBT significant
24 discretion and flexibility in the amounts it may charge. Under SWBT's proposed language, if
25 AT&T does not pay or dispute a charge within SWBT's timetable, SWBT may terminate the
26 entire Poles Appendix and deny AT&T access to other poles, conduits, and rights-of-way, a
27 draconian remedy whereby all access rights in the State can be terminated for failure to pay by
28 disputing a fee for a single pole attachment, no matter the amount. Dispute resolution and

1 termination are already covered in the Terms and Conditions section of the Interconnection
2 Agreement and should not be repeated in Article 19. SWBT's language should be rejected.

3
4 **ISSUE 23: UNDER WHAT CONDITIONS, IF ANY, SHOULD SWBT BE PERMITTED**
5 **TO MODIFY THE RATES, FEES, AND CHARGES CONTAINED IN THE POLES**
6 **APPENDIX?**

7
8 **AT&T LANGUAGE**

9 [AT&T objects to the inclusion of Section 19.12, which allows SWBT to modify rates and fees
10 at its discretion.]

11
12 **AT&T POSITION**

13 See the discussion of Section 19.01 above. Because the Arbitrator ruled that the rates and fees to
14 be charged by SWBT would be effective only until a ruling by the FCC on the subject, it is
15 unreasonable to assume that she intended that SWBT would be able to increase the temporary
16 rates and fees at will. Further, AT&T's agreement to accept SWBT's pole attachment and
17 conduit occupancy rates, which are at the high end of the permissible range, was in part based
18 upon an understanding that rates would not be adjusted further and that a multitude of record-
19 keeping and administrative fees would not be charged. Adoption of SWBT's language in these
20 sections would undermine the basis for AT&T's agreement to SWBT's rates. SWBT's proposed
21 language should be rejected.

22
23 **ISSUE 24: THIS ISSUE IS A SUBSET OF ISSUE 16 AND WILL BE MERGED AS 16A.**

24
25 **AT&T LANGUAGE**

26 **ARTICLE 21: INDEMNIFICATION**

27 **21.00 Indemnification. Except as otherwise specifically provided in Sections 10.02(b) and**
28 **10.03(c) of this Appendix, the parties agree that their respective rights and obligations as to**

1 indemnification are set forth in Sections 7.X (Obligation to Indemnify), 38.X
2 (Governmental Compliance), 39.X (Responsibility for Environmental Contamination), 7.X
3 (Obligations to Defend; Notice; Cooperation), and 7.X (OSHA Statement) of the Terms and
4 Conditions of the Agreement.

5
6 21.01 No Indemnification for Negligence or Intentional Acts. Notwithstanding any other
7 provisions of this Appendix, the parties agree that in no event is either party obligated to
8 indemnify and hold the other party harmless from the other party's negligent acts or
9 omissions, or intentional or willful misconduct, including gross negligence.

10
11 AT&T POSITION

12 See Issue 16.

13
14 ISSUE 25: THIS ISSUE IS A SUBSET OF ISSUE 16 AND WILL BE MERGED AS 16B.

15
16 AT&T LANGUAGE

17
18 ARTICLE 22: LIMITATION OF LIABILITIES;

19 CONSEQUENTIAL DAMAGES

20 22.X Limitation of Liabilities. The parties agree that their liability to each other is limited
21 according to the terms of Section 7.X (Limitation of Liabilities) of the Terms and
22 Conditions of the Agreement.

23
24 AT&T POSITION

25 See Issue 16
26

1 **ISSUE 26: ISSUE RESOLVED.**

2 **AT&T LANGUAGE**

3 See Article 23.01 of the October 10, 1997 filing.

4 **AT&T POSITION**

5 The parties have agreed to resolve this dispute by adoption of language negotiated and agreed to
6 for another state. This agreement is reflected in the language of the October 10, 1997 filing.

7
8 **ISSUE 27: SHOULD THE POLES APPENDIX CONTAIN TERMINATION**
9 **PROVISIONS WHICH ARE DIFFERENT FROM OR SUPPLEMENT THE**
10 **TERMINATION PROVISIONS CONTAINED IN THE GENERAL TERMS AND**
11 **CONDITIONS IN SECTION IN THE INTERCONNECTION AGREEMENT?**

12
13 **AT&T LANGUAGE**

14 27.04 Elective Termination. Either party may terminate this Appendix by giving the other party
15 at least twelve months prior written notice as provided in this section. AT&T may terminate this
16 Appendix with or without cause. During the first five years following the effective date,
17 SWBT may only terminate this Appendix for cause. Thereafter, SWBT may terminate this
18 Appendix with or without cause. Any termination of this Appendix by SWBT will not require
19 removal of AT&T facilities from SWBT-owned or -controlled poles, ducts, conduits, and
20 rights-of-way, and shall be subject to the provisions of 27.X below. [remainder of language in
21 this section is not disputed]

22
23 **AT&T POSITION**

24 In the event SWBT chooses to terminate the Poles, Ducts, Conduits, and Rights-of-Way
25 Appendix, it should not be able to demand that all of AT&T's facilities in place under the
26 Appendix be removed. SWBT's obligation to provide non-discriminatory access to its poles,
27 ducts, conduits, and rights-of-way is not dependent on the existence of a written agreement; in
28 fact, the FCC First Report and Order, ¶1160 has stated that a written agreement is not required.

1 Removal of all facilities could cause great disruption of customer service as well as considerable
2 expense. For example, in order to avoid interruption of service to its customers, AT&T may be
3 forced to negotiate at a disadvantage where it has significant facilities on SWBT poles or in the
4 conduit system. SWBT can control the timing of its elective termination of the Appendix. The
5 sixty-day time period in which to begin renegotiations or remove facilities is extremely short and
6 puts AT&T at an extreme disadvantage. Because of these concerns, at least twelve months'
7 advance notice is necessary prior to termination, and SWBT should be able to terminate the
8 Appendix only for cause for at least some significant period of time after the Appendix becomes
9 effective.

10
11 AT&T believes that the parties are in agreement on the language of Sections 27.02 and 27.03,
12 even though SWBT has marked them as disputed.

13
14 **ISSUE 28: THIS ISSUE IS A SUBSET OF ISSUE 16 AND WILL BE MERGED AS 16C.**
15

16 **AT&T LANGUAGE**

17 AT&T objects to the inclusion of SWBT's Article 28 and Exhibit VI regarding notices.

18
19 **AT&T POSITION**

20 See Issue 16.
21

22 **ISSUE 29: SHOULD THE POLES APPENDIX INCLUDE GENERAL LEGAL**
23 **PROVISIONS WHICH ARE UNIFORMLY APPLICABLE TO AT&T AND OTHER**
24 **PARTIES WHO HAVE OR SEEK ACCESS TO SWBT'S POLES, DUCTS, CONDUITS,**
25 **AND RIGHTS-OF-WAY? SHOULD THE POLES APPENDIX REPLACE EARLIER**
26 **AGREEMENTS BETWEEN SWBT AND AT&T CONCERNING ACCESS TO POLES,**
27 **DUCTS, CONDUITS, AND RIGHTS-OF-WAY? SHOULD LICENSES ISSUED TO**
28 **AT&T UNDER PRIOR AGREEMENTS BE MADE SUBJECT TO THE RATES,**
29 **TERMS, CONDITIONS, AND PROCEDURES SET FORTH IN THE POLES APPENDIX**
30 **AND, IF SO, SHOULD REFERENCES IN THE POLES APPENDIX TO "LICENSES**

1 HEREUNDER" BE CHANGED TO "LICENSES SUBJECT TO THIS APPENDIX"?
2 SHOULD SWBT'S PROPOSED "CHANGES IN THE LAW" SECTION BE
3 APPROVED?

4
5 AT&T LANGUAGE

6 ARTICLE 32: GENERAL PROVISIONS

7 32.X General Provisions. The parties agree that their respective rights and obligations as
8 to completeness of agreement, force majeure, severability, and choice of law are set forth in
9 Sections 32.X (Complete Terms), 13.X (Force Majeure), 42.X (Severability), 26.X (Multiple
10 Counterparts), 43.X (Survival of Obligations), 3.X (Intervening Law) and 44.X (Governing
11 Law) of the Terms and Conditions of the Agreement.

12 In addition, AT&T would insert the phrase "licenses issued hereunder" for "licenses subject to
13 this Appendix" in Sections 4.02, 6.06, and 6.08, and any other sections in which it appears.

14
15 AT&T POSITION

16 See Issue 16.

17 In addition, regarding applicability of this Poles Appendix to prior agreements, please see Issue
18 19. Further, AT&T is concerned about possible legal implications associated with the phrase
19 "licenses subject to this Appendix." It appears that SWBT is again attempting to include
20 language in this Appendix that expands its scope beyond that which is needed for AT&T's local
21 market entry. SWBT is attempting to make any prior agreements regarding poles and conduits
22 that SWBT may have with AT&T or related companies regarding long distance services "subject
23 to this Appendix," as discussed above in reference to Issue 19. AT&T does not believe that this
24 Appendix should be used by SWBT or AT&T as a forum in which to address any and all
25 agreements previously made between AT&T, its predecessors, or related companies. As
26 previously stated, AT&T believes that clear and simple provisions best serve fair and rapid
27 market entry. The October 10, 1997 filing reflected that SWBT had dropped its objection to the

1 phrase "licenses issued hereunder." However, the issue is presented in this Issue 29 and so is
2 addressed here.

3
4 **ISSUE 30: SHOULD THE PROVISIONS OF SECTION 14.02(B) PROPOSED BY SWBT,**
5 **AND DEALING WITH EMERGENCY REARRANGEMENTS OF FACILITIES AT**
6 **SWBT'S REQUEST, BE APPROVED?**

7
8 **AT&T LANGUAGE**

9 14.02(b) **AT&T shall make all rearrangements of its facilities within 60 days after receiving**
10 **written notification by SWBT of the required rearrangements, provided, however, that the**
11 **60-day period may be extended upon request by AT&T, which request will not be**
12 **reasonably refused by SWBT, if AT&T advises SWBT of the reason for the need for the**
13 **extension and proposes an appropriate completion date. SWBT may request that such**
14 **modification be made within a shorter period of time, in which event AT&T shall not reject**
15 **such request without due cause and justification. In determining due cause and**
16 **justification, the following factors, among others, may be considered:** [remainder of
17 subsection not in dispute]

18
19 **AT&T POSITION**

20 AT&T was concerned that the original language of 14.02(b) would not provide enough time for
21 rearrangement of its facilities; it therefore requested in negotiations that the 60-day period could
22 be extended. SWBT agreed to extend the period as long as AT&T also gave a reason for the
23 extension and proposed a new completion date. SWBT, however, rewrote the provision so that
24 60-day notice would be given only "whenever feasible," thus giving AT&T even less than 60
25 days' notice, even though the original provision already allowed SWBT to request that
26 modifications be made in less than 60 days upon "due cause and justification" (that is, with good
27 reason). Although AT&T prefers the provision giving it the option of an extension of time, it
28 cannot agree to SWBT's other revisions in this subsection. As a practical matter, in many cases

1 60 days is simply not enough time to rearrange facilities. AT&T cannot agree to a provision
2 potentially giving it even less time, based on SWBT's discretion.

3
4 ISSUE 31: (first of two issues numbered 31) SHOULD SECTION 2.06 (ADDITIONAL
5 NEGOTIATIONS), PROPOSED BY SWBT, AND OPPOSED BY AT&T, BE ADDED TO
6 THE POLES APPENDIX?
7

8 SHOULD SECTION 2.07 (RELATIONSHIP TO INTERCONNECTION AGREEMENT),
9 PROPOSED BY SWBT, AND OPPOSED BY AT&T, BE ADDED TO THE POLES
10 APPENDIX?
11

12 SHOULD SECTION 4.06 (REQUIRED FRANCHISES, PERMITS, CERTIFICATES
13 AND LICENSES), PROPOSED BY SWBT, AND OPPOSED BY AT&T, BE ADDED TO
14 THE POLES APPENDIX?
15

16 SHOULD SECTION 4.07 (DISCLAIMER OF WARRANTIES), PROPOSED BY SWBT,
17 AND OPPOSED BY AT&T, BE ADDED TO THE POLES APPENDIX?
18

19 SHOULD SECTION 5.06 (ACCESS TO BUILDING ENTRANCE FACILITIES,
20 BUILDING DISTRIBUTION FACILITIES AND EQUIPMENT ROOMS), PROPOSED
21 BY SWBT, AND OPPOSED BY AT&T, BE ADDED TO THE POLES APPENDIX?
22

23 SHOULD SECTION 6.16 (DIFFERENCES IN SPECIFICATIONS), PROPOSED BY
24 SWBT, AND OPPOSED BY AT&T, BE ADDED TO THE POLES APPENDIX?
25

26 SHOULD SECTION 18.05 (REMOVAL TO AVOID FORFEITURE), PROPOSED BY
27 SWBT, AND OPPOSED BY AT&T, BE ADDED TO THE POLES APPENDIX?
28

29 SHOULD SECTION 20.02 (PAYMENT AND PERFORMANCE BONDS IN FAVOR OF
30 CONTRACTORS AND SUBCONTRACTORS), PROPOSED BY SWBT, AND OPPOSED
31 BY AT&T, BE ADDED TO THE POLES APPENDIX?

1 AT&T LANGUAGE

2 ARTICLE 2: PURPOSE OF APPENDIX

3 (Relevant to SWBT proposed Sections 2.06 and 2.07)

4 The Communications Act of 1934, as amended by the Telecommunications Act of 1996, states
5 that each local exchange carrier has the duty to afford access to the poles, ducts, conduits, and
6 rights-of-way of such carrier on rates, terms, and conditions that are consistent with the Pole
7 Attachment Act, 47 U.S.C. § 224, as amended by the Telecommunications Act of 1996. The
8 Missouri Public Service Commission has stated that the FCC's First Report and Order in CC
9 Docket No. 96-98 clearly requires a utility to provide access that does not favor itself over new
10 entrants and that nondiscriminatory access means more than requiring incumbent local exchange
11 carriers to treat all new entrants equally. This Appendix has been drafted and shall be construed
12 to effectuate these principles. The primary purpose of this Appendix is to set forth the basic
13 rates, terms, conditions, and procedures under which AT&T shall have access to SWBT's
14 poles, ducts, conduits, and rights-of-way. SWBT shall provide AT&T with
15 nondiscriminatory access to poles, ducts, conduits, or rights-of-way owned solely or in part
16 by it, or controlled by it, as the term "nondiscriminatory access" is defined in the
17 Telecommunications Act of 1996. This Appendix is intended by the parties to implement,
18 rather than abridge, their respective rights and remedies under federal and state law.

19
20 **Section 4.06**

21 No Right to Interfere with Facilities of Others. Except to the extent expressly provided by
22 the provisions of this Appendix or by the Telecommunications Act of 1996 or other
23 applicable laws, rules, or regulations, the provisions of this Appendix shall not be
24 construed as authorizing either party to this Appendix, or persons acting on their behalf, to
25 rearrange or interfere in any way with the facilities of the other party or joint users or with
26 the use of or access to such facilities by the other party or joint users.

27 **Section 4.07**

1 No language proposed. AT&T asserts that the provision proposed by SWBT is not required.

2 **Section 5.06**

3 No language proposed. AT&T asserts that the provision proposed by SWBT is not required.

4 **Section 6.16**

5 No language proposed. AT&T asserts that the provision proposed by SWBT is not required.

6 **Section 18.05**

7 No language proposed. AT&T asserts that the provision proposed by SWBT is not required.

8 **Section 20.02**

9 No language proposed. AT&T asserts that the provision proposed by SWBT is not required.

10

11 **AT&T POSITION**

12 Sections 2.06 and 2.07

13 SWBT asks the Commission to approve an entirely different statement of purpose than that
14 agreed to by the parties. The purpose statement in the Poles Appendix was the result of lengthy
15 negotiations and compromise by the parties. AT&T submits that the language found in the
16 original Article 2 of the Poles Appendix succinctly addresses the "Purpose of Appendix" without
17 obscuring its dominant motive with additional, unneeded language. AT&T believed that the
18 parties had reached agreement on the statement of purpose during negotiations. The language
19 proposed by SWBT is an example of the frustration caused by SWBT continuously presenting
20 AT&T with a moving target through adding and deleting language that AT&T had believed was
21 already resolved through negotiations. SWBT has desired and negotiated for an extremely
22 detailed agreement for an extremely simple subject; AT&T's non-discriminatory access to
23 SWBT's poles, conduits and rights-of-way. Because of this detail, the "Purpose" section of the
24 contract becomes extremely important in determining the parties' intent throughout the
25 agreement. For this reason, the parties' carefully negotiated language previously agreed to in
26 Article 2 should determine how the Poles Appendix is applied; SWBT's additional language is
27 unnecessary. The Commission should keep in mind that rapid and unfettered market entry by

1 new entrants, such as AT&T, is best served through simple straightforward agreements. That is
2 what AT&T has consistently bargained for in negotiations and is requesting the Commission to
3 adopt here. Further, the topic of additional negotiations is already addressed in the Terms and
4 Conditions of the Interconnection Agreement.

5
6 Section 4.06

7 AT&T believes this provision is superfluous. AT&T further believes that the parties would be
8 better served if the language in this contract focuses on what the Poles Appendix is intended to
9 be rather than what it is not intended to be. There are many things that this Appendix should not
10 be construed to be. However, listing all of the things it is not is a meaningless and endless task.
11 Therefore, AT&T submits that the language proposed by SWBT should be rejected by the
12 Commission.

13
14 Section 4.07

15 This topic (disclaimer of warranties) is already covered in the Terms and Conditions section of
16 the Interconnection Agreement, and need not be repeated here.

17
18 Section 5.06

19 The language proposed by SWBT in Section 5.06 is problematic in that it leaves undecided the
20 issue of the "last piece of conduit" that extends from the last manhole to a central office vault or
21 a building owned by SWBT. SWBT's position appears to be that conduit such as this should be
22 addressed in a document other than this Appendix. AT&T believes that since the issue involves
23 "conduit" the appropriate place for it is in this Appendix, which is specifically designed to
24 address conduit issues. SWBT should not be allowed to include contract language that excludes
25 any section of conduit. For some reason, SWBT attempts to treat this particular type of conduit
26 differently from all other conduit. The additional procedures proposed by SWBT for access to
27 this conduit are unnecessary as this Appendix already includes detailed provisions for AT&T's

1 access to conduits. The only remaining issue is whether AT&T may have access to conduits and
2 ducts leading up to the collocated space and whether AT&T may have access to ducts under
3 SWBT's control that reside within buildings (e.g., riser ducts within apartment complexes). Both
4 the FTA 96 and the FCC First Report and Order require access to "any" or "all" poles, ducts,
5 conduits, and rights-of-way owned or controlled by the utility. 42 U.S.C. §224(f)(1); FCC First
6 Report and Order, ¶1123, See also ¶1185 (intent of Section 224(f)(1) is to allow
7 telecommunications carriers to "piggy-back" along distribution networks owned or controlled by
8 utilities). Entrance conduits and riser ducts are critical "choke points" in the network. While
9 SWBT's construction crews have full access to all of the conduit system, gaining access to
10 building entrance pathways is a tremendous hurdle for others in the industry of facilities-based
11 providers. To exclude certain critical segments of conduit from competitors, or to impose
12 conditions that would delay access or make it more expensive for others than for SWBT, is not
13 consistent with the intent of the FTA 96 to implement local competition by removing the barriers
14 to entry for CLECs. SWBT's exclusion of central office entrance conduit has a strategic
15 competitive significance as well. This is the aggregate point for all local service infrastructure
16 for a given area. For at least the short to medium term future, every AT&T facility will have to
17 pass through SWBT's central office conduit. SWBT would have the ability to control the timing
18 of potential competition allowing SWBT to use its control of facilities and property to impede
19 installation of equipment by those seeking to compete, in violation of the FTA 96's directive of
20 non-discriminatory access. FCC First Report and Order, ¶1123.

21 22 Section 6.16

23 SWBT's proposed section on "differences in specifications" should be rejected because it
24 imposes requirements that are difficult, if not impossible, to meet. SWBT proposes that when
25 differences in specifications exist, the "most stringent" specification should apply. That which is
26 the "most stringent" is open to opinion and can be a matter of disagreement. In order for AT&T
27 to fully comply with this provision, it would have to consult with SWBT on each and every
28 matter where a possible conflict could exist, which at the very least would cause unnecessary
29 delay in AT&T's access.

1 Section 18.05

2 This provision covers a situation unlikely to occur. It is not necessary, therefore, to include this
3 provision in the poles appendix. The appendix is far too detailed as it is without adding
4 provisions to cover unlikely eventualities. It seems extremely unlikely that the presence of
5 AT&T facilities would cause a forfeiture of any of SWBT's rights. In the event this situation
6 should arise, it should be very clear that AT&T's facilities are the direct cause of the problem
7 before removal is required.

8
9 Section 20.02

10 At SWBT's request, AT&T agreed to Section 20.01 regarding performance and payment bonds
11 as a method for ensuring the quality of contractors working on SWBT sites. Section 20.01 sets
12 forth the terms under which bonds may be required. Section 20.02, however, goes much further
13 and allows SWBT unfettered discretion in requiring bonds of AT&T and its contractors if a
14 claim is made. AT&T has not agreed to the provisions of Section 20.02. Further, Section 20.02
15 is repetitive of the Terms and Conditions section of the Interconnection Agreement, under which
16 each party is responsible for payment of its own employees and contractors, as referenced in the
17 discussion of Section 6.09 above. SWBT's proposed Section 20.02 should be rejected.

18
19 In addition, each of these sections are from SWBT's Master Agreement; please refer to the
20 Master Agreement argument under Issue 4, as it is equally applicable here.

21
22 **ISSUE 31: (Second of two issues numbered 31) SHOULD SECTION 5.03 BE AMENDED**
23 **TO INCLUDE LANGUAGE STATING HOW COMPENSATION FOR THE USE OF**
24 **RIGHTS-OF-WAY WILL BE HANDLED?**

25
26 **AT&T LANGUAGE**

27 AT&T objects to the inclusion of SWBT's proposed language in Section 5.03.

1 **AT&T POSITION**

2 AT&T has addressed SWBT's proposed changes to Section 5.03 in its discussion of Issue 5
3 above. Further, the Telecommunications Act of 1996 and the FCC's First Report and Order deal
4 with poles, ducts, conduits, and rights-of-way *owned or controlled by* SWBT. AT&T believes
5 that the issue presented here by SWBT is outside the circumstances contemplated in the Act and
6 the First Report and Order. Moreover, as acknowledged by SWBT, this issue will be addressed
7 by the FCC within a year. AT&T submits that the circumstance raised by SWBT will be very
8 uncommon and is unlikely to occur before the issue is addressed by the FCC. Therefore AT&T
9 believes that this matter need not be addressed by this Commission at this time.

10
11 **ISSUE 32: SHOULD SECTION 6.08(C) APPLY TO CONNECTIONS WITH SWBT'S**
12 **CONDUIT SYSTEM DUCTS OR ONLY TO CONNECTIONS WITH MANHOLES?**

13
14 **AT&T LANGUAGE**

15 Sentence at issue in subsection 6.08(c):

16 Where AT&T's duct or facility physically connects with SWBT's **manhole**, the section of
17 AT&T's facility which connects to SWBT's manhole shall be installed by SWBT or its
18 contractor at AT&T's expense (which shall be SWBT's actual costs or the price charged SWBT
19 by the contractor).

20
21 **AT&T POSITION**

22 SWBT's proposed language, substituting the term "conduit system" for the term "manhole" in
23 Section 6.08(c) appears to be contrary to the parties' agreements in Missouri and in other states
24 that AT&T as an authorized contractor, may perform such work on its own behalf. The manner
25 in which SWBT proposes to rewrite subsection (c) does not include AT&T as an authorized
26 contractor who can perform such work. This is a significant departure from the framework of the
27 parties' agreements regarding when AT&T will be permitted to perform work on its own behalf.
28 This change was not negotiated; in fact, it was not even flagged as an issue in the October 10

1 filed contract. SWBT's language should be rejected.

2
3 **ISSUE 33: SHOULD THE POLES APPENDIX INCLUDE LANGUAGE ALLOWING**
4 **SWBT TO CHARGE AT&T FCC-PERMITTED RATES IF AT&T OCCUPIES SPACE**
5 **BOTH AS A TELECOMMUNICATIONS CARRIER AND AS A CABLE OPERATOR?**
6

7 **AT&T LANGUAGE**

8 AT&T objects to the inclusion of SWBT's proposed language.

9
10 **AT&T POSITION**

11 SWBT is attempting to put the cart before the horse. There are a myriad of issues that may arise
12 that are not addressed in this Appendix and should not be until they are identified and the
13 specifics of them are known. It may very well be that the language proposed by SWBT could be
14 in direct conflict with an FCC ruling. AT&T will abide by any future rulings the FCC may make
15 on this matter. However, the Missouri Commission should not permit SWBT to load this
16 Appendix with provisions such as the one at issue here that are speculative and not required and
17 that have not been agreed to by AT&T during negotiations.

18
19 **ISSUE 34a: SHOULD SWBT'S PROPOSED ARTICLES 24 (ASSIGNMENT)**
20 **PROPOSED BY SWBT AND OPPOSED BY AT&T BE INCLUDED IN THE POLES**
21 **APPENDIX?**
22

23 **ISSUE 34b: SHOULD SWBT'S PROPOSED ARTICLES 25 (TERMINATION AND**
24 **REMEDIES FOR BREACH) PROPOSED BY SWBT AND OPPOSED BY AT&T BE**
25 **INCLUDED IN THE POLES APPENDIX?**
26

27 **ISSUE 34c: SHOULD SWBT'S PROPOSED ARTICLES 30 (DISPUTE RESOLUTION)**
28 **PROPOSED BY SWBT AND OPPOSED BY AT&T BE INCLUDED IN THE POLES**
29 **APPENDIX?**
30

31 **ISSUE 34d: SHOULD SWBT'S PROPOSED ARTICLES 31 (NO RECIPROCAL USE**
32 **OF AT&T'S FACILITIES) PROPOSED BY SWBT AND OPPOSED BY AT&T BE**

1 INCLUDED IN THE POLES APPENDIX?

3 AT&T LANGUAGE

4 Please see Issues 16 and 27 above.

6 AT&T POSITION

7 These issues have all been addressed under Issues 16 and 27 above. AT&T respectfully refers
8 the Commission to that discussion. AT&T notes that as to Issue 34(c), the dispute resolution
9 article number is 29, not 30.

11 ISSUE 35a: SHOULD THE ADDITIONAL LANGUAGE SWBT PROPOSED FOR
12 SECTION 6.03 (INFREQUENT CONSTRUCTION TECHNIQUES AND
13 CONNECTIVITY SOLUTIONS) PROPOSED BY SWBT AND OPPOSED BY AT&T BE
14 INCLUDED IN THE POLES APPENDIX?

16 ISSUE 35b: SHOULD THE ADDITIONAL LANGUAGE SWBT PROPOSED FOR
17 SECTION 6.07 (EFFICIENT USE OF CONDUIT) PROPOSED BY SWBT AND
18 OPPOSED BY AT&T BE INCLUDED IN THE POLES APPENDIX?

20 ISSUE 35c: SHOULD THE ADDITIONAL LANGUAGE SWBT PROPOSED FOR
21 SECTION 6.09 (GENERAL REQUIREMENTS RELATING TO PERSONNEL,
22 EQUIPMENT, MATERIALS, AND PUBLIC SAFETY) PROPOSED BY SWBT AND
23 OPPOSED BY AT&T BE INCLUDED IN THE POLES APPENDIX?

25 ISSUE 35d: SHOULD THE ADDITIONAL LANGUAGE SWBT PROPOSED FOR
26 SECTION 6.10 (SPECIFIC REQUIREMENTS RELATING TO PERSONNEL,
27 EQUIPMENT, MATERIALS, AND CONSTRUCTION PRACTICES WITHIN OR IN
28 THE VICINITY OF SWBT'S CONDUIT SYSTEMS) PROPOSED BY SWBT AND
29 OPPOSED BY AT&T BE INCLUDED IN THE POLES APPENDIX?

31 ISSUE 35e: SHOULD THE ADDITIONAL LANGUAGE SWBT PROPOSED FOR
32 SECTION 6.11 (OPENING OF MANHOLES AND ACCESS TO CONDUITS)
33 PROPOSED BY SWBT AND OPPOSED BY AT&T BE INCLUDED IN THE POLES
34 APPENDIX?

1 **ISSUE 35f: SHOULD THE ADDITIONAL LANGUAGE SWBT PROPOSED FOR**
2 **SECTION 8.02 (POLE, DUCT AND CONDUIT SPACE ASSIGNMENTS) PROPOSED**
3 **BY SWBT AND OPPOSED BY AT&T BE INCLUDED IN THE POLES APPENDIX?**

5 **ISSUE 35g: SHOULD THE ADDITIONAL LANGUAGE SWBT PROPOSED FOR**
6 **SECTION 18.06 (NOTICE OF COMPLETION OF REMOVAL ACTIVITIES)**
7 **PROPOSED BY SWBT AND OPPOSED BY AT&T BE INCLUDED IN THE POLES**
8 **APPENDIX?**

10 **ISSUE 35h: SHOULD THE ADDITIONAL LANGUAGE SWBT PROPOSED FOR**
11 **SECTION 18.07 (NOTICE OF SWBT'S INTENT TO REMOVE FACILITIES)**
12 **PROPOSED BY SWBT AND OPPOSED BY AT&T BE INCLUDED IN THE POLES**
13 **APPENDIX?**

15 **AT&T LANGUAGE**

16 AT&T objects to inclusion of SWBT's proposed language in all of the designated sections
17 except Sections 6.10 and 18.06.

19 **AT&T POSITION**

20 Section 6.03

21 Once again, SWBT attempts to re-work and re-write the terms of an agreement (based upon an
22 early Texas stipulation that was the basis for section 6.03) that it dislikes. Here, SWBT attempts
23 to place additional restrictions on construction techniques that can create extra space for access
24 on existing poles and in existing conduit systems. Any concerns SWBT may have about safety
25 or about payment for creation of capacity are covered by other sections of the Poles Appendix
26 and need not be addressed here.

28 Section 6.07

29 SWBT's language regarding installation of inner duct "in advance of need" makes no sense.
30 AT&T will attempt to have facilities in place "in advance of need" so that customers will have
31 service at the time they need it, not after. Thus, AT&T may request that SWBT install inner duct

1 "in advance of need." Any concerns SWBT may have regarding AT&T's good faith in
2 requesting installation of inner duct should be allayed by Section 6.02 which provides that
3 AT&T will attempt to minimize its need to use SWBT ducts and conduits. It was AT&T's
4 understanding from the October 10 filing that SWBT was planning to revise this language; the
5 revised language in that document is acceptable to AT&T on this point. Regarding SWBT's
6 proposed language that requires the use of inner duct when cable diameters permit, AT&T does
7 not object to this concept in principle; however, there could be factors to consider other than just
8 the diameter of the cable. AT&T objects to SWBT's proposed language because it is too
9 restrictive.

10
11 Section 6.09

12 AT&T objects to subsection (b) as it is extremely vague and will be impossible to enforce in
13 practice. Subsection (b) requires that only "properly trained" persons shall perform work, and
14 that AT&T is responsible for assuring that persons acting on its behalf are "properly trained."
15 The original subsection (a) is much clearer as it requires that persons working on poles or in the
16 conduit system have "the training, skill, and experience to recognize potentially dangerous
17 conditions relating to the pole or conduit system and to perform the work safely." This more
18 specific standard is readily enforceable and adequately covers safety concerns; the more vague
19 language in SWBT's subsection (b) adds nothing except potential legal liability for AT&T.
20 SWBT's remaining changes to section 6.09 are in the introductory paragraph and new subsection
21 (a), regarding responsibility for subcontractors. This new language is unnecessary. AT&T has
22 already accepted SWBT's rewriting of the definition of "authorized contractor," which includes a
23 statement that "authorized contractors" work under AT&T's "direction and control" and restricts
24 the work an authorized contractor can perform. Further, the indemnity issues and AT&T's
25 responsibility for its contractors are fully addressed in the Terms and Conditions section of the
26 Interconnection Agreement (e.g., the Terms and Conditions make each party responsible for the
27 employment, direction, and compensation of its own employees, including compliance with tax
28 law) and thus are unnecessary here.

1 Section 6.10

2 AT&T will accept SWBT's sentence regarding the ability to fax a request for assignment.
3 AT&T accepted this language in Texas; it does not appear that it was presented for AT&T's
4 consideration in Missouri during the last round of negotiations, and that SWBT therefore marked
5 it as objected to in an abundance of caution. This issue can be shown as resolved.

6
7 Section 6.11

8 The issue of construction inspectors has been hotly disputed since the outset of the parties'
9 negotiations. The Commission ruled on a compromise under which the parties share the cost of
10 the inspectors, and this ruling was incorporated into Section 6.11 of the Poles Appendix by
11 agreement. SWBT now proposes to rewrite this section and relegate the Commission's ruling to
12 an Exhibit, so that it is no longer clear from a review of the contract itself under what
13 circumstances AT&T is to pay for a SWBT construction observer. Subsection 6.11(b) originally
14 contained a simple statement that a representative of SWBT could be present when AT&T enters
15 a SWBT manhole. SWBT now proposes language that expands the role of this representative to
16 include inspections and advice to AT&T regarding the work, but disclaims any liability if AT&T
17 follows this advice. AT&T views such a proposed relationship as intrusive. SWBT's revisions
18 should be rejected.

19
20 Section 8.02

21 Regarding SWBT's proposed language in Section 8.02(a), the parties had agreed that space will
22 be assigned "on receipt of" AT&T's application, which establishes with certainty the time period
23 within which SWBT is required to record pole, duct, and conduit assignments. SWBT now
24 proposes assignment at some unspecified time "after" receipt, a vague provision that grants
25 SWBT complete discretion in choosing the time to assign space. Regarding SWBT's proposed
26 language in 8.02(j), throughout negotiations SWBT has insisted that it be permitted to control the
27 process of recording assignments for space on poles and ducts and conduits. Therefore, the
28 Commission should not permit SWBT to include language in the contract that waters down that

1 responsibility and disclaims any liability for negligent performance, which could favor SWBT
2 over its competitors, or favor one of SWBT's competitors over another.

3
4 Section 18.06

5 AT&T will accept SWBT's proposed language regarding pull mandrels (slugs). This issue can
6 be shown as resolved.

7
8 Section 18.07

9 This section as originally agreed allowed SWBT, upon notice, to remove AT&T's facilities if
10 AT&T had failed to remove facilities in accordance with Sections 18.01 to 18.05. SWBT now
11 wants to revise this section to allow it to remove and store AT&T's facilities without any liability
12 for negligence. It is possible, however, that the parties may have a bona fide dispute regarding
13 AT&T's compliance with Sections 18.02-19.05. For example, AT&T may maintain that it has
14 "due cause and justification" for not removing the facilities under Section 18.02, while SWBT
15 disagrees. If SWBT is permitted to remove the facilities without any responsibility for its own
16 carelessness, and it is later determined (through dispute resolution, for example) that removal by
17 AT&T was not required, AT&T could be left with damaged facilities and no recourse.

18 In all of these sections except the two which AT&T has indicated it will accept, the Master
19 Agreement argument set forth in Issue 4 also applies.

20
21 Sponsoring Witness: Larry Barnes

Exhibit No:

Issue: X. Contract Terms and
Conditions and Other
Issues

Witness: Chambers and Gaddy

Type of Exhibit : Direct Testimony

Sponsoring Party: AT&T Communications of
the Southwest, Inc.

Case No: TO-98-115

PETITION FOR
SECOND ARBITRATION

DIRECT TESTIMONY
OF
JULIE CHAMBERS AND
PHILLIP GADDY

Jefferson City, Missouri
November 7, 1997

File Date: November 7, 1997

X. CONTRACT TERMS AND CONDITIONS AND OTHER ISSUES
CONTRACTUAL DISPUTED ISSUES
AT&T-SWBT INTERCONNECTION AGREEMENT - MISSOURI

ISSUE 1: WHOLESALE DISCOUNT

Issue resolved.

ISSUE 2: SWBT's RIGHT TO JUDGE THE LAWFULNESS OF INTERCONNECTIONS
WITH AT&T UNDER THE AGREEMENT

Should Section 1.2 of the agreement contain the phrase "in any lawful manner"?

AT&T LANGUAGE:

Terms and Conditions

The language should remain as follows:

1.2 The Network Elements, Combinations or Resale services provided pursuant to this Agreement may be connected to other Network Elements, Combinations or Resale services provided by SWBT or to any network components provided by AT&T itself or by any other vendor. Subject to the requirements of this Agreement, AT&T may at any time add, delete, relocate or modify the Resale services, Network Elements or Combinations purchased hereunder.

AT&T POSITION:

No. The current language in section 1.2 of the proposed interconnection agreement assures AT&T's rights to connect the services provided under the Agreement with other services provided by SWBT, or to network components provided by AT&T or another vendor. SWBT wants to insert the phrase "in any lawful manner" to language agreed to by AT&T and SWBT in

1 contract Section 1.2 of the Terms and Conditions in the proposed Agreement submitted to the
2 Commission.

3
4 SWBT's language places it in the role of a private Attorney General enabling it to decide
5 unilaterally whether it will implement the terms of the Interconnection Agreement depending
6 upon whether new entrants have satisfied SWBT's interpretations of the universe of laws. The
7 terms contained in the Interconnection Agreement, once approved by the Commission, should be
8 presumed lawful. Therefore, SWBT's proposed language does not clarify anything; instead, it
9 invites SWBT to make judgments and interpretations that can affect AT&T's ability to provide
10 services.

11
12 SWBT's additional language at first appears to be innocuous. However, this very broad and
13 general language will be employed by SWBT in a variety of ways to unfairly limit AT&T's
14 rights under the Agreement. Purported changes in the law and SWBT's interpretations could also
15 be employed as a way to refuse to provide UNEs or interconnection. AT&T intends to comply
16 with the Missouri laws but looks to this Commission, the Attorney General and other state
17 governmental agencies to determine lawfulness and compliance—not SWBT.

18
19 Sponsoring Witnesses: Julie Chambers and Phillip Gaddy

20
21 **ISSUE 3a: LIMITATIONS OF LIABILITY**

22 Whether SWBT's liability to AT&T under its indemnification obligations associated with
23 intellectual property claims should be limited.

1 **AT&T LANGUAGE:**

2 **Terms and Conditions**

3 7.1.1 The Parties' liability to each other during any Contract Year resulting from any and all
4 causes, other than as specified below in Sections 7.3.1, **7.3.2** and 7.3.3, following, and other than
5 for willful or intentional misconduct will not exceed the total of any amounts due and owing to
6 AT&T pursuant to Section 45 (Performance Criteria) and the Attachment referenced in that
7 Section, plus the amounts charged to AT&T by SWBT **under this Agreement during the**
8 **Contract Year in which such cause accrues or arises.** For purposes of this Section, the first
9 Contract Year commences on the first day this Agreement becomes effective and each
10 subsequent Contract Year commences on the day following that anniversary date.

11
12 **AT&T POSITION:**

13 Yes. SWBT is attempting to confuse this simple procedural matter brought before the
14 Commission by bringing the dispute raised in Issue X-15 into X-3a. The dispute in Issue 15 is
15 basically that SWBT wants its proposed language regarding intellectual property rights to be
16 adopted, and AT&T proposes that its version of intellectual property language be adopted.
17 AT&T's intellectual property language in Issue 15A contains a form of indemnification. SWBT's
18 does not. Issue 3a concerns whether indemnification associated with intellectual property rights
19 should be excluded from limits of liability and does not concern intellectual property rights *per*
20 *se*; rather, AT&T believes that here, a numerical cross-reference to AT&T's intellectual property
21 rights paragraph should be included, simply because it is in the form of an indemnity. In other
22 words, the substantive issue in dispute concerning intellectual property rights associated with
23 UNE is dealt with in Issue 15, not here. Should AT&T's language be adopted in Issue 15, a

1 numerical reference to Section 7.3.2 should be included here. SWBT has agreed that the other
2 indemnification provisions, Sections 7.3.1 and 7.3.3, should be excepted from the limitations of
3 liability language, as is traditionally done. Simply put, depending on the Commission's decision
4 regarding AT&T's proposed indemnification language shown in Issue 15, a reference to that
5 section should be included or excluded from this contract section.

6
7 Sponsoring Witnesses: Julie Chambers and Phillip Gaddy
8

9 **ISSUE 3b: LIMITATION OF LIABILITIES**

10 Should the parties' liability to each other be limited to an amount representing what AT&T is
11 charged by SWBT under the contract for a year, or only the amount AT&T is charged by SWBT
12 in a contract year for a particular service or business practice?
13

14 **AT&T LANGUAGE:**

15 **Terms and Conditions**

16 7.1.1 The Parties' liability to each other during any Contract Year resulting from any and all
17 causes, other than as specified below in Sections 7.3.1, **7.3.2** and 7.3.3, following, and other than
18 for willful or intentional misconduct will not exceed the total of any amounts due and owing to
19 AT&T pursuant to Section 45 (Performance Criteria) and the Attachment referenced in that
20 Section, plus the amounts charged to AT&T by SWBT **under this Agreement during the**
21 **Contract Year in which such cause accrues or arises.** For purposes of this Section, the first
22 Contract Year commences on the first day this Agreement becomes effective and each
23 subsequent Contract Year commences on the day following that anniversary date.

1 **AT&T POSITION:**

2 The limit should be the amount AT&T is charged by SWBT under the contract for a year.

3 AT&T's bolded and underlined language in the second portion of the first sentence of this section
4 should be included, and SWBT's proposed additional language should be excluded.

5
6 SWBT's proposed language would impose an unreasonably low overall limit of liability for
7 SWBT and basically exempt SWBT from consequences of its own negligence. With SWBT's
8 proposal included, the liability limit would only be what AT&T was charged by SWBT during a
9 contract year for an affected service or business practice, rather than the entire amount that
10 AT&T would be charged by SWBT under the Agreement during a contract year. Including
11 AT&T's proposed language, but without SWBT's additional language, makes the provision
12 commercially reasonable.

13
14 SWBT's language seeks to limit its liability to amounts accruing "for the affected service or
15 business practice," which adds confusion at best and is likely unworkable. What is an "affected
16 service?" Is it the unbundled network element, the features and functionality associated with that
17 element, or the provision of that service to one customer or all customers? What is a "business
18 practice?" Under SWBT's proposal it would be difficult, if not impossible, to connect claims to
19 an affected service or business practice without disputes arising about the meaning of these
20 terms. The result of SWBT's language will inevitably lead to further litigation, arbitration, and
21 dispute resolution.

1 Also, SWBT argues that its proposed limitation allows SWBT to keep its rates low and thus
2 ensures affordable telephone service for all Missourians. This monopolistic statement is
3 anticompetitive on its face – it would force the LSP to increase its rates to care for SWBT's
4 wrongdoing. The limitation cap proposed by AT&T -- which would apply to both parties -- will
5 represent only a fraction of SWBT's revenues. AT&T's proposal should be adopted.

6
7 Sponsoring Witnesses: Julie Chambers and Phillip Gaddy
8

9 **ISSUE 3c: LIMITATION OF LIABILITIES**

10
11 Should the liability of either party for third party claims, other than end user claims, be limited
12 according to the degree of negligence of that party?
13

14 **AT&T LANGUAGE:**

15 **Terms and Conditions**

16 SWBT's proposal should be rejected.
17

18 **AT&T POSITION:**

19 There should be no exception for end user claims. The existing Interconnection Agreement
20 provisions ensure that each party will be responsible for its own negligence. In contrast, the
21 effect of SWBT's proposed language would require AT&T to indemnify SWBT against SWBT's
22 own negligence if a suit is brought by an AT&T end user customer. Specifically, this SWBT
23 proposal would not allow AT&T to offset such claims by the amount of SWBT's negligence.
24 AT&T does not have control over SWBT's ability to guard against negligence. Therefore, the

1 party who controls the risk should be held responsible if there is a wrongdoing. Requiring AT&T
2 to bear all risks of loss which are associated with SWBT's negligence, which also would tend to
3 increase AT&T's prices, is unreasonable and discriminatory. SWBT's proposal should not be
4 adopted.

5
6 Sponsoring Witnesses: Julie Chambers and Phillip Gaddy
7

8 **ISSUE 4: INDEMNIFICATION**

9 Should each party indemnify the other party against claims made by the indemnifying party's
10 end users, including claims arising out of the indemnified party's negligence, but excluding cases
11 of gross negligence or intentional or willful misconduct?
12

13 **AT&T LANGUAGE:**

14 **Terms and Conditions**

15 SWBT's proposed language should be rejected.
16

17 **AT&T POSITION:**

18 No. The existing Agreement's Terms and Conditions, section 7.3.1 represents a commercially
19 reasonable type of indemnification provision which should apply. Accordingly, SWBT's
20 proposal should be rejected. SWBT seeks to require AT&T to indemnify SWBT, without any
21 limit of AT&T's liability, against SWBT's own negligence for end user claims. This is an
22 unreasonable and discriminatory requirement. The effect is to leave AT&T entirely responsible
23 for any claims that might be made against AT&T, SWBT or both, by AT&T's end users, that are
24 caused by SWBT's negligence in providing the services under this Agreement. SWBT, not

1 AT&T, controls the acts and omissions of its employees, agents, and contractors. Yet, under
2 SWBT's proposed language, AT&T would bear the entire responsibility for SWBT's own
3 negligence in this respect.

4
5 The affect of SWBT's position is anticompetitive because it places the burden on AT&T instead
6 of accepting its responsibility for its own conduct. SWBT's purported concern that SWBT's
7 rates would increase as a result of the lack of this provision is hardly a justifiable reason for
8 accepting its position. SWBT's proposal would simply tend to increase AT&T's rates instead.
9 There is no justification for that result. Competition will eventually result in more choices and a
10 variety of prices for customers. Therefore, the provisions should be pro-competition rather than
11 pro-SWBT.

12
13 Sponsoring Witnesses: Julie Chambers and Phillip Gaddy
14

15 **ISSUE 5: INTERFERENCE WITH OTHER CONTRACTS**

16 Should AT&T be required to attest that this Agreement does not interfere with any other
17 contractual relationships it has with any other party, and that it will indemnify SWBT against any
18 such claims?

19
20 **AT&T LANGUAGE:**

21 **Terms and Conditions**

22 SWBT's proposed language should be rejected.

1 **AT&T POSITION:**

2 No. SWBT's proposal would require AT&T to attest that the Agreement does not interfere with
3 any contractual arrangement SWBT has with any other party, and that AT&T will indemnify
4 SWBT if such a claim is brought. SWBT's proposed contract language is certainly not
5 commercially reasonable and should be rejected. Under SWBT's proposed language, AT&T
6 would be required to indemnify SWBT if the Interconnection Agreement is claimed by a third
7 party to be an interference with some other contract SWBT might have had with that third party.
8 Under the proposed Interconnection Agreement, if a third party claims that this Agreement
9 interfered with its contractual relationship against one of the parties, then that party can and
10 should resist that claim by virtue of the Federal Act's provisions, as the Federal Act should
11 override such claims. SWBT, however, would have AT&T act as an insurer against such claims;
12 a proposition which is both unreasonable and contrary to the Federal Act.

13
14 The contract contains adequate limitation of liability and indemnification provisions. SWBT's
15 language simply adds another layer of indemnification and does not accomplish what SWBT
16 states is the objective. SWBT's language is written to be reciprocal. Therefore, just as SWBT
17 claims to have no knowledge of the contract which AT&T has with third parties, AT&T has no
18 knowledge of SWBT's contracts with another party. The practical result of SWBT's proposed
19 language is that AT&T would be required to indemnify SWBT if the Interconnection Agreement
20 is claimed by a third party to be an interference with some other contract that *SWBT* might have
21 had with a third party. Therefore, the reasonable solution is to reject SWBT's proposal and

utilize the current indemnification provisions in the Agreement and allow the Federal Act to preside over this relationship.

Sponsoring Witnesses: Julie Chambers and Phillip Gaddy

ISSUE 6: LOCAL EXCHANGE CARRIER SELECTION/"SLAMMING"

Should the Agreement be amended to include SWBT's proposed additional provisions dealing with local exchange switching/slamming issues?

AT&T LANGUAGE:

Terms and Conditions

17.1 With respect to Resale services and unbundled Network Elements provided to end users, each Party must obtain end user authorization prior to requesting a change in the end users' provider of local exchange service (including ordering end user specific Network Elements) and must retain such authorizations for twelve (12) months. The authorization must conform with federal rules regarding changes of presubscribed interexchange carriers until such time as there are federal or state rules applicable to changes of local exchange service providers. Thereafter, the authorization must comply with each such rule. The party submitting the change request assumes responsibility for applicable charges as specified in Section 258(b) of the Telecommunications Act of 1996.

17.2 Only an end user can initiate a challenge to a change in its local exchange service provider.

In connection with such challenges each Party will follow procedures which conform with federal rules regarding challenges to changes of presubscribed interexchange carriers until

1 such time as there are federal or state rules applicable to challenges to changes of Local
2 Exchange Service Providers. Thereafter, the procedures each Party will follow concerning
3 challenges to changes of local exchange service providers will comply with such rule.
4

5 17.3 When an end user changes or withdraws authorization, each Party will release customer
6 specific facilities in accordance with the end user customer's directions, or the directions of the
7 end user's agent. Further, when an end user abandons the premises, SWBT is free to reclaim the
8 facilities for use by another customer and is free to issue service orders required to reclaim such
9 facilities.
10

11 **AT&T POSITION:**
12

13 No. The current Interconnection Agreement language employs the current federal rules
14 applicable to IXCs for local exchange purposes, until otherwise applicable local exchange rules
15 are implemented. There is no justification for new slamming language at this time. As this
16 Commission is aware, the FCC is in the process of formulating rules which will apply to the
17 local exchange carrier selection process. Therefore, industry-wide rules will likely be in effect
18 in the near future. Where possible, issues such as slamming should be dealt with through such
19 Commission rulemakings which establish broad public policy applications and not on a
20 company-by-company basis. If any language were to be included in the Agreement, it should
21 indicate that the parties agree to conduct their business in a manner consistent with the applicable
22 FCC and Commission rules.

1 AT&T's proposed language for section 17.2 (which SWBT has previously agreed to) employs
2 the current federal rules applicable to IXC's for local exchange purposes, until otherwise
3 applicable local exchange rules are implemented. SWBT's language, as proposed in
4 negotiations, following the end of Section 17.2 would allow end users' notification to either
5 AT&T or SWBT to allow the party receiving the request to immediately begin providing service.
6 It also would permit SWBT to connect an end user to another LSP based on the LSP's request
7 and assurance that end user authorization has been obtained. SWBT's proposed Section 17.4
8 would oblige neither party to investigate allegations of slamming by the other or a third party,
9 but would allow the parties to agree to make such investigations for a fee.

10
11 There is no justification for inclusion of these provisions at this time. As this Commission is
12 aware, the FCC is in the process of formulating rules which will apply to the local exchange
13 carrier selection process. SWBT's proposal is premature because it is not consistent with current
14 rules and could well be inconsistent with the rules that are ultimately established.

15
16 In addition, certain of the language SWBT proposes is inappropriate. For example, SWBT's
17 proposed language would require AT&T to furnish customer change authorizations to SWBT at
18 no charge. It is unclear that this language relates to "slamming", which must be raised by the
19 end-user customer. Rather, it appears to have been drafted as a device to allow SWBT to delay
20 or refuse to process customer change orders, to burden AT&T through an otherwise unauthorized
21 process, and to do so at AT&T's expense. SWBT should not be the policing party to the
22 industry. This language should be rejected.

1 Further, SWBT's proposed language only provides for SWBT to charge AT&T if SWBT agrees
2 to investigate slamming complaints, and is silent as to AT&T's ability to charge SWBT if AT&T
3 investigates such complaints. Moreover, the \$50 proposed fee is an arbitrary amount; any such
4 fee should be cost-based or mutually agreed-to, and the language should so reflect.

5
6 There simply is no reason to amend the agreement with company-specific provisions which may
7 or may not be consistent with those promulgated by the Commission and/or the FCC.

8
9 Sponsoring Witnesses: Julie Chambers and Phillip Gaddy

10
11 **ISSUE 7a: OS/DA FACILITIES; SWBT'S PROVISION OF DIRECTORY ASSISTANCE**
12 **AND OPERATOR SERVICES**

13 Is a one year minimum term reasonable when AT&T uses SWBT's OS and DA platform and
14 should SWBT be the sole provider of OS/DA when AT&T uses SWBT's OS/DA platform?
15

16 **AT&T LANGUAGE:**

17 SWBT's proposed language should be rejected.
18

19 **AT&T POSITION:**

20 No, any set term which differs from that which is otherwise provided for in the Interconnection
21 Agreement is unreasonable. The Act requires SWBT to carry out defined duties including the
22 duty to provide nondiscriminatory access to operator services and directory assistance services
23 See §251(b)(3). SWBT's proposal would commit AT&T to a one year term for OS or DA
24 services and SWBT would then be able to terminate its obligations to provide DA and OS
25 services on 120 days notice following the end of that term. AT&T also would be required to pay

1 early termination penalties to SWBT. SWBT claims that it seeks certainty in planning, but that
2 does not justify a one-year term when the solution is totally within SWBT's control.

3
4 While AT&T may wish to request SWBT to provide DA and OS services at different places and
5 for different periods of time, SWBT's overall obligations to provide DA and OS services should
6 be governed by the general term of the agreement.

7
8 Secondly, SWBT's language regarding "sole provider" is anti-competitive to the extent that it
9 requires AT&T to commit to using SWBT as the "sole provider" of OS and DA for any set term
10 and under any other circumstances. The essential issue is whether SWBT may disregard its
11 obligations under the Act and refuse to provide DA and OS services to AT&T, in a UNE or
12 facilities based environment, when customized routing is available. First, SWBT's proposal
13 implies that SWBT would only provide DA and OS services to AT&T where customized routing
14 is not technically feasible. Under SWBT's proposal, if it becomes feasible, AT&T would be
15 forced to convert to customized routing.

16
17 SWBT's proposal would have anti-competitive effects on AT&T and is inconsistent with the Act.
18 SWBT has the potential to price customized routing artificially high so that to utilize it as
19 proposed would be extremely detrimental to AT&T. SWBT's proposal appears to be another
20 way to leverage AT&T into a position that may be very harmful to AT&T. From a broader
21 perspective, this language appears to reflect SWBT's position that the Act's provisions in this
22 respect do not apply to SWBT if it is dealing with AT&T in a facilities-based environment as
23 well as in UNE. The Act requires SWBT to carry out defined duties including the duty to

1 provide nondiscriminatory access to operator services and directory assistance services. See
2 §251(b)(3). SWBT's proposals should be rejected.

3
4 Sponsoring Witnesses: Julie Chambers and Phillip Gaddy
5

6 **ISSUE 7B: TERMS OF THE ATTACHMENT**

7 See 7a.

8 Sponsoring Witnesses: Julie Chambers and Phillip Gaddy
9

10 **ISSUE 8: RESPONSIBILITY FOR ENVIRONMENTAL CONTAMINATION**

11 What should the Agreement provide regarding responsibility for the presence or release of
12 environmental hazardous, at an affected work location that was introduced by a third party?
13

14 **AT&T LANGUAGE:**

15 **Terms and Conditions**

16 39.1 AT&T will in no event be liable to SWBT for any costs whatsoever resulting from the
17 presence or Release of any Environmental Hazard that AT&T did not introduce to, or
18 knowingly use, at the affected Work Location. SWBT will indemnify, defend (at AT&T's
19 request) and hold harmless AT&T, each of its officers, directors and employees from and against
20 any losses, damages, claims, demands, suits, liabilities, fines, penalties and expenses (including
21 reasonable attorneys' fees) that arise out of or result from (i) any Environmental Hazard that
22 SWBT, its contractors or agents introduce to the Work locations or (ii) the presence or Release of
23 any Environmental Hazard for which SWBT is responsible under applicable law.
24

1 39.2 SWBT will in no event be liable to AT&T for any costs whatsoever resulting from the
2 presence or Release of any Environmental Hazard that SWBT did not introduce to, or
3 knowingly use, at the affected Work Location. AT&T will indemnify, defend (at SWBT's
4 request) and hold harmless SWBT, each of its officers, directors and employees from and against
5 any losses, damages, claims, demands, suits, liabilities, fines, penalties and expenses (including
6 reasonable attorneys' fees) that arise out of or result from i) any Environmental Hazard that
7 AT&T, its contractors or agents introduce to the Work Locations or ii) the presence or Release of
8 any Environmental Hazard for which AT&T is responsible under applicable law.

9
10 **AT&T POSITION:**

11 Terms and Conditions Sections 39.1 and 39.2 contain mirror-image first sentence statements to
12 the effect that a party is not liable to the other party for costs associated with the presence or
13 release of environmental hazards that the party did not introduce to, or knowingly use, at the
14 Work Location.

15
16 SWBT in negotiations proposed to omit the "knowingly use" aspect. Its absence, in the context
17 of other provisions in these sections, implies that AT&T might be liable to SWBT for the
18 presence or Release of an environmental hazard that AT&T did not introduce, to, or knowingly
19 use, at the Work Location. SWBT's proposal should be rejected and the "knowingly use"
20 language should be included. The party who controls access to its premises is in the best
21 position to know what hazards may exist. If an environmental hazard was introduced to a Work
22 Location by some third party and the Work Location then was purchased by SWBT, under
23 SWBT's proposal SWBT might argue that AT&T is responsible to SWBT if AT&T or its agents

1 unknowingly released the hazard. In contrast, the language in the Agreement should be focused
2 upon a party's actual introduction or knowing use of a hazard.

3
4 In the bottom portions of these sections, SWBT would also add language allowing it to avoid
5 entirely any indemnification responsibilities if AT&T caused, or contributed to, any loss or claim
6 in the slightest degree, which would ignore SWBT's own conduct. SWBT's proposal should be
7 excluded.

8
9 Sponsoring Witnesses: Larry Barnes and Phillip Gaddy

10
11 **ISSUE 9: OTHER LIMITATION OF LIABILITY AND INDEMNIFICATION**
12 **PROVISIONS**

13 Should SWBT's proposed additional provisions concerning indemnification and limitations of
14 liability be included in the following: Appendix DA Resale, Appendix OS Resale, Attachment
15 15: 911, Attachment 18: Mutual Exchange of Directory Information, Attachment 19: White
16 Pages-Other, Attachment 22: DA Facilities, Attachment 23: Operator Services Facilities,
17 Attachment 6: UNE, Attachment 24: Recording-Facilities Based.

18
19 **AT&T LANGUAGE:**

20 AT&T requests that SWBT's proposal be stricken in its entirety in each section listed herein.

21 However, in the event that the Commission desires to clarify that the current indemnification
22 provisions apply to all of the listed Attachments/Sections, AT&T proposes the following
23 language: **Indemnification and limitation of liability provisions covering the matters**
24 **addressed in this Appendix are contained in the General Terms and Conditions portion of**
25 **the Agreement.**

26 (language proposed only if Commission desires to amend Agreement)

1 **Appendix DA-Resale**

2 **6.X Indemnification and limitation of liability provisions covering the matters addressed in**
3 **this Appendix are contained in the General Terms and Conditions portion of the**
4 **Agreement.**

5 (language proposed only if Commission desires to amend Agreement)

6
7 **Appendix OS-Resale**

8 **14.X Indemnification and limitation of liability provisions covering the matters addressed**
9 **in this Appendix are contained in the General Terms and Conditions portion of the**
10 **Agreement.**

11 (language proposed only if Commission desires to amend Agreement)

12
13 **Attachment 15: 911**

14 **7.X Indemnification provisions covering the matters addressed in this Attachment are**
15 **contained in the General Terms and Conditions portion of the Agreement.**

16 (language proposed only if Commission desires to amend Agreement)

17
18 **Attachment 18: Mutual Exchange Directory of Listing Information**

19 **7.X Indemnification and limitation of liability provisions covering the matters addressed in**
20 **this Attachment are contained in the General Terms and Conditions portion of the**
21 **Agreement.**

22 (language proposed only if Commission desires to amend Agreement)

1 Attachment 19: WP-Other

2 7.X Indemnification and limitation of liability provisions covering the matters addressed in
3 this Attachment are contained in the General Terms and Conditions portion of the
4 Agreement.

5 (language proposed only if Commission desires to amend Agreement)

6
7 Attachment 22: DA-Facilities

8 9.X Indemnification and limitation of liability provisions covering the matters addressed in
9 this Appendix are contained in the General Terms and Conditions portion of the
10 Agreement.

11 (language proposed only if Commission desires to amend Agreement)

12
13 Attachment 23: OS-Facilities

14 9.X Indemnification and limitation of liability provisions covering the matters addressed in
15 this Appendix are contained in the General Terms and Conditions portion of the
16 Agreement.

17 (language proposed only if Commission desires to amend Agreement)

18
19 Attachment 6: UNE

20 7.X Indemnification and limitation of liability provisions covering the matters addressed in
21 this Attachment are contained in the General Terms and Conditions portion of this
22 Agreement.

(language proposed only if Commission desires to amend Agreement)

7.X Indemnification and limitation of liability provisions covering the matters addressed in this Attachment are contained in the General Terms and Conditions portion of this Agreement.

(language proposed only if Commission desires to amend Agreement)

AT&T POSITION:

No. SWBT should not be allowed to amend the Agreement to avoid liability as already provided for in the Agreement. In response to SWBT's proposal in negotiations to insert numerous sections pertaining to limits of liability throughout the Agreement, AT&T proposes language to explicitly state that the terms of indemnification/liability are reflected in the General Terms and Conditions. AT&T's bolded and underlined language should be included only in the event the Commission determines that further clarification is needed.

In addition to SWBT's attempts to include language in the Terms and Conditions which would impose on AT&T all responsibility for SWBT's own negligence in performing under this Agreement, especially as to claims by AT&T's end users, SWBT has proposed in negotiations additional language, which would have similar effects, in nine other separate appendices or attachments to the Agreement. In each case, AT&T's proposed language or shown above, consisting of a single sentence which states that such matters are governed by the Terms and Conditions, is identical or nearly so. However, SWBT employs several variations of its proposed language among these nine attachments/ appendices. This can only inject confusion

1 and complexity into the Agreement. To facilitate the Commission's review, AT&T has analyzed
2 each and finds that the language employed for four attachments/ appendices is virtually identical,
3 and that the language for three others is also virtually identical. The explanation provided below
4 is applicable to all SWBT proposals, in all of the referenced attachments or appendices.
5

6 SWBT's only stated reason for including these provisions to shift to AT&T the costs associated
7 with SWBT's negligence for end user and other claims. This, of course, would tend to increase
8 AT&T's prices, and for no justifiable reason. In a situation such as this, the party able to manage
9 the risk of negligence should bear responsibility for it. Moreover, in a number of instances those
10 provisions (e.g., Appendix DA-Resale) seek to insulate SWBT from liability for all claims
11 arising out of its negligence, not just end user claims, and in some cases from its gross
12 negligence or intentional misconduct, if that conduct is not the "direct cause" of a claim (see
13 Attachment 15: 911).
14

15 The contract contains limitation of liability and indemnification provisions in the General Terms
16 and Conditions. AT&T believes that these provisions apply to all portions of the Interconnection
17 Agreement. Accordingly, none of the changes SWBT proposes should be made to the contract.
18

19 In summary, this dispute arises because SWBT seeks to eliminate any responsibility on SWBT's
20 part for its own negligence in providing the services under this Agreement. SWBT would place
21 all of those risks on AT&T. This is not only commercially unreasonable, but unfair and contrary
22 to the Federal Act's requirements that the services be provided to AT&T in a nondiscriminatory
23 fashion. It is unreasonable and, in AT&T's view, unlawful to require AT&T to be responsible for

1 SWBT's negligence. All of the SWBT provisions in question should be excluded from the
2 Agreement, and AT&T's language should be included.

3
4 Sponsoring Witnesses: Julie Chambers and Phillip Gaddy
5

6 **ISSUE 10: PER TRANSACTION CHARGE**

7 Is \$.003 the appropriate fee assessment for transmitting carrier data per order between AT&T and
8 SWBT?
9

10 **AT&T LANGUAGE:**

11 **Attachment 5: Provision of Customer Usage Data-Resale**

12 8.2 When any AT&T local service customer changes their local service provider to another LSP
13 or SWBT, AT&T will be notified as described in the LSP notification change process, contained
14 in Local Account Maintenance Methods and Procedures, dated July 29, 1996, or as otherwise
15 agreed to by the parties. AT&T will pay to SWBT a per transaction charge of **three tenths of**
16 **one cent (\$.003)** for SWBT's transmission of the change notification.
17

18 **Attachment 10: Provision of Customer Usage Data-UNE**

19 7.1 When AT&T purchases certain Network Elements from SWBT, SWBT will provide AT&T
20 with Local Account Maintenance. When SWBT is acting as the switch provider for AT&T,
21 where AT&T is employing UNEs to provide local service, SWBT will notify AT&T whenever
22 the local service customer disconnects switch port (e.g., WTN) service from local service
23 customer discounts switch port (e.g., WTN) service from AT&T to another local service
24 provider. SWBT will provide this notification via a mutually agreeable 4 digit Local Use

1 Transaction Code Status Indicator (TCSI) that will indicate the retail customer is terminating
2 local service with AT&T. SWBT will transmit the notification, via the Network Data Mover
3 Network using the CONNECT: Direct protocol, within five (5) days of SWBT reprovisioning
4 the switch. The TCSI, sent by SWBT, will be in the 960 byte industry standard CARE record
5 format. AT&T will pay to SWBT a per transaction charge of three tenths of one cent (\$0.003)
6 for SWBT's transmission of the change notification.
7

8 **AT&T POSITION:**

9 Yes. Three tenths of one cent accurately reflects the cost per transaction for transmitting a carrier
10 change notification. In a competitive environment, all local exchange providers are going to be
11 in need of notifying each other about customer's changing from carrier to carrier. The cost for
12 notification should not be an opportunity for the incumbent LEC to make additional money for a
13 simple transaction.
14

15 The Parties previously agreed (not in error) on the \$.003 cents charge for the change notification
16 transmission in another state in Attachment 5: Provision of Customer Usage Data-Resale. In
17 negotiations, SWBT proposed to dramatically increase the charge. SWBT has provided no cost
18 justification for the proposed increase in price for this service.
19

20 AT&T's alternative counter language proposed in Attachment 10 is identical to that which was
21 agreed upon in another state in Resale. AT&T finds no justification for why the transmission
22 would be any different in Resale than for UNE because it is system generated to provide a

1 change notification for carrier changes by working telephone number ("WTN") and is not
2 dependent on whether it is a UNE or Resale customer.

3
4 Sponsoring Witnesses: Julie Chambers and Phillip Gaddy

5
6 **ISSUE 11:**

7 Should liquidated damages be the sole remedy available for breach of performance criteria?
8 Issue resolved.

9
10 **ISSUE 12:**

11 Issue resolved.

12
13 **ISSUE 13: SPECIAL REQUEST PROCESS**

14 Whether, if an unbundled Network Element or combination is not available in every area of
15 Missouri, the same would be supplied to AT&T via the "Special Request" process described in
16 Attachment 6: UNE.

17
18 **AT&T LANGUAGE:**

19 **Terms and Conditions**

20 1.6 Unless otherwise provided in the Agreement, SWBT will perform all of its obligations
21 concerning its offering of Resale services and unbundled Network Elements under this
22 Agreement throughout the entire service area where SWBT is the incumbent local exchange
23 carrier; provided, that SWBT's obligations to provide Ancillary Functions or to meet other
24 requirements of the Act covered by this Agreement are not necessarily limited to such service
25 areas, **provided, that if an unbundled Network Element or Combination is not available in**
26 **an area, AT&T's request for same will be subject to the provisions of Sections 2.X through**
27 **2.X of Attachment 6: Unbundled Network Elements.**

1 **AT&T POSITION:**

2 In negotiations SWBT proposed language in Section 1.6 of the Terms and Conditions portion of
3 the Agreement to the effect that the services and UNEs involved in this Agreement may not be
4 available in all parts of the state, due to technical reasons. AT&T's additional language would
5 ensure that, in such circumstances, AT&T would be able to utilize the "Special Request" process,
6 set out in Attachment 6: UNE, which allows AT&T to ask SWBT to provide such UNEs or
7 Combinations. AT&T's additional language is reasonable and necessary; its absence, in the
8 context of SWBT's proposal, suggests that the unavailability of UNEs and combinations in a
9 particular area may relieve SWBT of any obligation to consider supplying the same in that area,
10 which is not the case. AT&T's language is necessary to enable AT&T to provide service to
11 customers in all areas of Missouri.

12
13 Any SWBT amendment to this effect should be excluded unless AT&T's bolded and underlined
14 language also is included.

15
16 Sponsoring Witnesses: Julie Chambers and Phillip Gaddy

17
18 **ISSUE 14: INTERVENING LAW**

19 What should the Agreement provide concerning intervening law?

20
21 **AT&T LANGUAGE:**

22 **Terms and Conditions**

23 **3.1 This Agreement is entered into as a result of both private negotiation between the**
24 **Parties and arbitration by the State Commission, acting pursuant to FTA96. If the actions**

1 of Missouri or federal legislative bodies, courts, or regulatory agencies of competent
2 jurisdiction invalidate, modify, or stay the enforcement of laws or regulations that were the
3 basis for a provision of the contract required by the Arbitration Award approved by the
4 State Commission, the affected provision will be invalidated, modified, or stayed as
5 required by action of the legislative body, court, or regulatory agency. In such event, the
6 Parties will expend diligent efforts to arrive at an agreement respecting the modifications to
7 the Agreement required. If negotiations fail, disputes between the Parties concerning the
8 interpretation of the actions required or provisions affected by such governmental actions
9 will be resolved pursuant to the dispute resolution process provided for in this Agreement.
10 The invalidation, stay, or modification of the pricing provisions of the FCC's First Report
11 and Order in CC Docket No. 96-98 (August 8, 1996) and the FCC's Order on
12 Reconsideration (September 27, 1996) will not be considered an invalidation, stay, or
13 modification requiring changes to provisions of the Agreement required by the Arbitration
14 Award, in that the FCC's pricing provisions are not the basis for the costing and pricing
15 provisions of the Arbitration Award.

16
17 3.2 In the event a court or regulatory agency of competent jurisdiction should determine that
18 modifications of this Agreement are required to bring the services being provided hereunder into
19 compliance with the Act, the affected Party will promptly give the other Party written notice of
20 the modifications deemed required. Upon delivery of such notice, the Parties will expend
21 diligent efforts to arrive at an agreement respecting such modifications required, and if the
22 Parties are unable to arrive at such agreement within sixty (60) days after such notice, either
23 party may invoke the Dispute Resolution process set forth in Section 9.4.2 of this Agreement.

1 **AT&T POSITION:**

2 SWBT's proposal as discussed in negotiations would allow the entire Agreement to be terminated
3 if the Parties could not successfully negotiate modifications following agency, court or
4 legislative actions, which is both unreasonable and inconsistent with the Act. Such an event,
5 moreover, would severely harm AT&T's customers, not to mention taxing the Commission's
6 resources in terms of responding to the outcry from consumers. Both AT&T and SWBT share an
7 equal risk that agency, court or legislative action may "upset the balance" of agreed-upon terms
8 that formed the basis for other terms, and so on. SWBT's proposal would also likely lead to
9 additional arbitrations and additional Commission time re-deciding issues that are not explicitly
10 ruled on by the courts. SWBT's proposal also would inappropriately forbid either party from
11 exercising constitutional or statutory rights it might otherwise have, in addition to those set out in
12 the Agreement, to seek changes in the Agreement. In contrast, AT&T's proposal would not
13 terminate the Agreement but would invoke dispute resolution processes to be used if an impasse
14 is reached. AT&T notes that SWBT has agreed to language in Section 3.2 of Terms and
15 Conditions, which generally covers issues raised by SWBT's proposal, without the termination
16 of the agreement clause.

17
18 AT&T's language should be included and SWBT's proposal to this effect should be excluded.

19
20 Sponsoring Witnesses: Julie Chambers and Phillip Gaddy
21
22

1 **ISSUE 15: INTELLECTUAL PROPERTY RIGHTS ASSOCIATED WITH UNE**

2 Whether SWBT should indemnify AT&T against intellectual property claims resulting from
3 AT&T's purchase of UNEs, or whether instead AT&T must certify to SWBT that it has obtained
4 intellectual property rights associated with UNEs from SWBT's suppliers of UNE facilities and
5 software before AT&T can purchase UNEs.
6

7 **AT&T LANGUAGE:**

8 **Terms and Conditions**

9 **7.3.2 SWBT will, at AT&T's request, indemnify AT&T, its officers, directors, employees,**
10 **agents, affiliates and subsidiaries, against any damages arising out of, resulting from,**
11 **relating to, or based on any claim for actual or alleged infringement or other violation or**
12 **breach of any Intellectual Property Rights, to the extent that such claim arises out of,**
13 **results from, relates to, or is based upon, AT&T's use, or the use by an AT&T customer, of**
14 **the Network Elements, Combinations, Ancillary Functions and Resale Services, or other**
15 **services, elements, functions, or combinations provided under this Agreement. For**
16 **purposes of this Section the term "AT&T customer" means any entity or person who**
17 **receives, uses, sells, resells or distributes any product or service furnished by AT&T,**
18 **whether directly or indirectly (through a reseller, distributor, authorized agent or dealer).**
19 **The term "Intellectual Property Rights" means rights in any patent, copyright, trademark,**
20 **service mark, trade name, trade dress, trade secret or any other intellectual property right,**
21 **now existing or later created.**
22

1 **AT&T POSITION:**

2 Under AT&T's proposed language SWBT would allow AT&T to purchase unbundled Network
3 Elements, and would indemnify AT&T from third party intellectual property claims from
4 vendors which supply those elements to SWBT. AT&T has the right to expect SWBT to deal
5 with such intellectual property issues. End users of telephone service are not expected to seek
6 intellectual property rights from SWBT's vendors before they can use SWBT's services. They
7 rightly expect that SWBT will indemnify them if an intellectual property claim is made against
8 them simply because they purchase SWBT's service. AT&T is entitled to expect SWBT to meet
9 the same type of obligations when AT&T purchases UNE. So also should SWBT meet its
10 obligations for the provision of services and UNEs by indemnifying AT&T from such claims.
11 Thus, AT&T's language should be included.

12
13 In contrast, under SWBT's proposal, in order for AT&T to purchase UNE, SWBT asserts that
14 AT&T must obtain intellectual property rights from SWBT's vendors. The FCC's First Report
15 and Order thoroughly examined proprietary information issues associated with UNEs (See First
16 Report & Order, Paragraphs. 388, 393, 419, 425, 446, 481, 490, 497, 498, 521, 539), and
17 required LECs such as SWBT to furnish UNEs to LSPs such as AT&T under the Act, not subject
18 to the condition SWBT would impose. SWBT's proposal, which gives vendors effective veto
19 powers over the federal law's grant of access to UNE, is directly contrary to the Act.

20
21 AT&T recommends the Commission order SWBT to provide unbundled network elements
22 unencumbered with additional costs of intellectual property rights and unnecessary delays in

1 providing competitive services to consumers. SWBT as the provider of the unbundled network
2 elements is responsible to provide all features, functions and capabilities of the individual
3 elements purchased by new entrants. AT&T's bolded and underlined language should be
4 included; SWBT's proposal to this effect should be excluded.

5
6 Sponsoring Witnesses: Julie Chambers and Phillip Gaddy

7
8 **ISSUE 16: DISPUTE RESOLUTION PROCEDURES**

9 Whether mandatory arbitration provisions should apply to all issues involving matters not
10 specifically addressed elsewhere in the Agreement which require renegotiation, modifications of
11 or additions to the Agreement.
12

13 **AT&T LANGUAGE:**

14 **Terms and Conditions**

15 **9.5.2 Dispute Resolution Procedure (DRP) 2** - - Except as otherwise specifically set forth in
16 the Agreement, for all other disputes involving matters which represent more than one (1)
17 percent of the amounts charged to AT&T by SWBT under this Agreement during the Contract
18 Year in which the dispute arises, whether measured by the disputing Party in terms of actual
19 amounts owed or owing, or as amounts representing its business or other risks or obligations
20 relating to the matter in dispute, then either Party may proceed with any remedy available to it
21 pursuant to law, equity or agency mechanisms; provided that upon mutual agreement of the
22 Parties, the dispute may be submitted to binding arbitration under Section 9.6. During the first
23 Contract Year the Parties will annualize the initial months up to one year.
24

1 9.5.3 Dispute Resolution Procedure (DRP) 3 - Except as otherwise specifically set forth in
2 this Agreement, for all disputes involving matters not specifically addressed elsewhere in
3 this Agreement which require renegotiation or modifications of or additions to this
4 Agreement, the Parties agree that the dispute will be submitted to binding arbitration
5 under Section 9.X of this Agreement. The Parties agree that the sixty (60) day informal
6 resolution period provided in Section 9.X will be deemed to have commenced at the time
7 the demand for arbitration is made.

8
9 AT&T POSITION:

10 At the time the FTA was adopted, few if any expected that multiple arbitrations might be
11 necessary in order to achieve workable Interconnection Agreements. The reality is that such a
12 need exists. AT&T is mindful of the Commission's limited resources and its receptiveness to
13 requests for additional arbitration. At the same time, AT&T needs to be able to have prompt
14 rulings made on significant issues, particularly those involving needed additions to the
15 Interconnection Agreement. For this reason, AT&T has proposed the language contained in
16 Section 9.5.3 which would follow the Dispute Resolution Procedure 1 (DRP1) and DRP2
17 provisions contained in the Agreement. AT&T's proposed language for DRP3 (Section 9.5.3)
18 would require binding arbitration for disputes involving additions to this Agreement, and matters
19 requiring renegotiation and modifications to the Agreement. The language also ensures that
20 these types of disputes may be placed before an arbitrator within 60 days. SWBT would have all
21 such disputes fall under the provisions of DRP2.

1 As the Commission is well aware, a substantial need exists to ensure that parties to
2 interconnection agreements are able to have disputes, including critical market-entry-impacting
3 implementation issues, resolved in a swift, effective manner. AT&T believes that for disputes of
4 this sort, that require modification or renegotiation of the current agreement, the 60 day provision
5 allows for a more timely resolution of the issues.

6
7 Sponsoring Witnesses: Julie Chambers and Phillip Gaddy
8

9 **ISSUE 17: TERM OF AGREEMENT**
10 Issue resolved.

11
12 **ISSUE 18:**
13 Is SWBT required to customize route AT&T local calls to multiple SWBT end offices?
14

15 **AT&T LANGUAGE:**

16 SWBT's proposed language limiting the routing capability to one location should be rejected.
17

18 AT&T further proposes the language that follows:
19

20 Attachment 6:

21 5.2.3.1: Subject to the above, SWBT will provide Customized Routing with unbundled local
22 Switching or Resale only according to the following conditions: Customized Routing will only
23 be permitted on a class of call basis (i.e., all Directory Assistance Calls and /or all Operator
24 Services Calls (or all local calls for Unbundled Local Switching only) must be routed to the same

1 dedicated facility), provided that, for local calls over unbundled switching, AT&T may establish
2 dedicated transport between SWBT end offices to route local traffic to those end offices. For
3 each end office, ("terminating end office") to which AT&T establishes such dedicated transport
4 from a SWBT end office ("originating end office"), SWBT will selectively route local calls for
5 the NXX code served by the terminating end office onto AT&T's dedicated transport to that end
6 office. Local calls for all NXX codes other than those served by terminating end offices to which
7 selective routing has been established will be transported and terminated over SWBT's common
8 transport network. AT&T may request additional types of customized routing for local calls
9 through the special request process.

10
11 **AT&T POSITION:**

12 One of the most critical functions that a local switch provides is the ability to route calls to
13 multiple locations. It is through this function that a customer's calls can be routed to the
14 appropriate location in a local exchange or to the appropriate long distance provider. It is also
15 through this function that if one route to a terminating location is currently full, the switch can
16 route the call to an alternate route through the tandem.

17
18 The FCC defined in ¶412 of its First Report and Order that the "features, functions and
19 capabilities of the local switch include the basic switching function of connecting lines to lines,
20 lines to trunks, trunks to lines, trunks to trunks." Connecting to trunks would have to include the
21 same capability that the local switch already possesses. SWBT has significantly restricted
22 AT&T's access to this function in the way that it has implemented customized routing. SWBT
23 has determined, without any input from AT&T, that it would only permit AT&T to customize

1 route local calls to one location. Not only is this restriction clearly discriminatory in that SWBT
2 can use the local switch to route to multiple locations, but it is also bad for customers. If SWBT
3 were permitted to impose this restriction on customized routing, the impact on customers would
4 be to have their calls blocked (inability to complete the call) or AT&T or another LSP would
5 have to order inefficiently large trunks out of the local switch. On the other hand, if SWBT were
6 required to implement customized routing in a way that was at parity with how SWBT is able to
7 use its own switch, AT&T could implement a customized routed network with the same
8 efficiencies, capabilities, and cost that SWBT itself enjoys.

9 In short, SWBT's proposed language limiting the capabilities of customized routing should be
10 rejected and SWBT should be required by this Commission to implement a form of customized
11 routing that is at parity with what SWBT provides for itself.

12
13 Sponsoring Witnesses: Steve Turner and Phillip Gaddy
14

15 **ISSUE 19:**

16 Once either party reaches an interconnection agreement with a CMRS provider, will SWBT
17 continue to revenue share?
18

19 Issue resolved.
20

21 **ISSUE 20:**

22 Where AT&T operates its own switch, should AT&T obtain a separate NXX code for each
23 SWBT exchange:
24

1 **AT&T LANGUAGE:**

2 AT&T proposes that any amendments to the proposed interconnection agreement that SWBT
3 may offer to this effect in this proceeding be rejected.

4
5 **AT&T POSITION:**

6 SWBT has proposed that AT&T be required to obtain a separate NXX code for each SWBT rate
7 center. SWBT contends that separate NXX codes are required to enable LSPs and SWBT to
8 identify the jurisdictional nature of traffic for intercompany compensation. These comments will
9 demonstrate that SWBT's requirement is entirely unnecessary and that it is another example of
10 SWBT's attempt to delay the development of competition in Missouri.

11
12 The billing record that identifies the jurisdictional nature of traffic for intercompany
13 compensation is known as a 92-99 record. This billing record contains the NPA-NXX of the
14 originating caller. SWBT intends to use this field to determine the LSP originating the call and
15 the jurisdiction of the call. SWBT would accomplish this by having the LSP insert the
16 originating LSP's NPA-NXX into the field rather than the originating caller's NPA-NXX (in a
17 case where the originating caller has "ported" his or her number). SWBT would then use the
18 inserted NPA-NXX to identify the LSP and the jurisdiction of the call.

19
20 The proposed NPA-NXX insertion and associated requirements are entirely unnecessary because
21 the 92-99 record contains two fields that should be used instead. First, the 92-99 record contains
22 the "Originating LEC NECA Code Field." This field contains the four digit code for the LSP
23 originating the call. SWBT could and should, as will be pointed out later, use this field to

1 identify the LSP to bill for compensation. Second the 92-99 record contains the "Traffic Type
2 Field." This field contains the two digit code identifying the jurisdictional nature of the traffic.
3 Using this field, SWBT could identify whether to bill local compensation for the call or
4 intraLATA access. Again, the insertion of the LSP's own NPA-NXX is unnecessary.

5
6 SWBT should handle compensation billing using the above method for two reasons: (1) use of
7 the fields in the 92-99 record as described above enables compensation billing without the need
8 for more NPA-NXX codes; and (2) it prepares SWBT's billing platform for long term Local
9 Number Portability (LNP) and forms of interim number portability other than Remote Call
10 Forwarding (RCF) such as Flex DID. Flex DID does not require the LSP to acquire its own
11 NPA-NXX codes to provide the end user customer with interim number portability, and it is this
12 form of interim number portability that AT&T would like to use for its local customers.

13
14 One final consideration for this Commission is that SWBT's insistence regarding the NPA-NXX
15 codes is another attempt to delay the development of competition. NPA-NXX code exhaust is a
16 recurring problem in telecommunications, at present. As an example, AT&T has worked
17 diligently to acquire the necessary NXX codes to serve its customers in the 972 NPA in Texas
18 under SWBT's requirements for acquiring NPA-NXX codes. To date, AT&T has been able to
19 obtain only two NPA-NXX codes in the 972 NPA. At a bare minimum, AT&T would need 36
20 such codes to serve its customers. The remaining 34 NPA-NXX codes are held up as a result of
21 "NPA exhaust" in the 972 NPA. When an NPA is near exhaust, SWBT's practice, based on
22 Bellcore requirements, restricts code issuance to a limited number of NXX codes in an NPA per
23 month, no more than one of which can go to a particular LSP. Currently, SWBT is limiting

1 NXX code issuance in the 972 NPA to four NXXs per month. At this rate, AT&T expects that it
2 would have to wait over three years to have the necessary NPA-NXX codes to serve customers in
3 Texas and meet SWBT's requirements. (One final note: In October, 17 LSPs requested 33
4 NXXs from SWBT in the 972 NPA. Only four LSPs received NXXs. AT&T was not one of
5 those LSPs.) As AT&T begins to pursue NPA-NXX codes in Missouri, similar conditions may
6 develop. When other compensation billing alternatives as described above are available that
7 mitigate the need for additional NPA-NXX codes, this Commission should require that SWBT
8 pursue those alternatives with AT&T. In short AT&T recommends that this Commission reject
9 the amendments to the proposed interconnection agreement put forth by SWBT related to this
10 issue.

11
12 Sponsoring Witnesses: Steve Turner and Phillip Gaddy

13
14 **ISSUE 21:**

15 Issue removed.

16
17 **ISSUE 22:**

18 Should this agreement require AT&T to provide telephone exchange service to business and
19 residential customers within a specified period after approval of the PSC?
20

21 **AT&T LANGUAGE:**

22 AT&T objects to SWBT's proposed language.
23

24 **AT&T POSITION:**

25 No. The Federal Act does not allow an incumbent to condition its obligations under the Act and
26 the Interconnection Agreement by making such a demand. The Federal Act was designed to

1 create an environment conducive to competition in the local market. The Missouri Commission
2 should not force any LSP into any specific operations based on the desires of the incumbent
3 LEC. The proprietary decisions to enter a specific market should not be subject to this
4 arbitration. AT&T has every intention of pursuing local entry. In this volatile market,
5 telecommunication companies are making strategic decisions daily on how to effectively
6 compete as a comprehensive telecommunications provider. AT&T has put intensive time and
7 effort into negotiating towards a comprehensive Interconnection Agreement that would support
8 its entry plans in the state of Missouri. The outcomes of this arbitration are critical to AT&T's
9 ability to provide service to various markets in the state of Missouri. Any requirement imposed
10 on AT&T is unnecessary and unlawful and therefore, SWBT's proposal should be rejected.

11
12 Furthermore, the SWBT proposal is inappropriate because SWBT itself holds the key to
13 AT&T's local service entry through its performance under the Agreement. As negotiations both
14 before and after the Commission's approval of Interconnection Agreements in other states well
15 illustrate, SWBT can and will use its control over essential facilities and services to deny AT&T
16 the implementation it is due under the letter and spirit of the Interconnection Agreement and the
17 Federal Act. It would therefore be wholly inappropriate to require AT&T or any other new
18 entrant to commit in advance to specific market entry dates as to which AT&T is completely
19 dependent upon SWBT's performance.

20
21 Sponsoring Witnesses: Julie Chambers and Phillip Gaddy