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AT&T

Kevin K. Zarling
Senior Attorney

Missouri Public
Service Commission

Suite 900
919 Congress Avenue
Austin, Texas 78701-2444
512 370-2010
FAX: 512 370-2096

September 17, 2001

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

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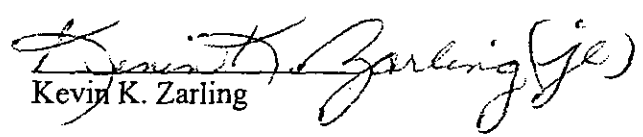
Re: Case No. TO-2001-467

Dear Judge Roberts:

Attached for filing with the Commission are the original and eight (8) copies of the Response of AT&T Communications of the Southwest, Inc.'s Surrebuttal Testimony of R. Matthew Kohly in the above referenced docket.

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

Very truly yours,


Kevin K. Zarling

Attachment
cc: All Parties of Record

Exhibit No. 23
Date 9/24/01 Case No. TO-01-467
Reporter KLM

Exhibit No:
Issue: Policy
Witness: Kohly
Type of Exhibit : Surrebuttal Testimony
Sponsoring Party: AT&T Communications of the
Southwest, Inc.
Case No: TO-2001-467

FILED

SEP 17 2001

IN THE MATTER OF THE TARIFF OF
INVESTIGATION OF THE
STATE OF COMPETITION IN THE
EXCHANGES OF SOUTHWESTERN BELL TELEPHONE COMPANY

*Missouri Public
Service Commission*

SURREBUTTAL
TESTIMONY

OF

R. MATTHEW KOHLY

Jefferson City, Missouri
September 17, 2001

AT&T COMMUNICATIONS OF THE SOUTHWEST, INC.

SURREBUTTAL TESTIMONY

OF

R. MATTHEW KOHLY

CASE NO TO-2001-467

1 Q. PLEASE STATE YOUR NAME AND BUSINESS ADDRESS.

2

3 A. My name is R. Matthew Kohly. My business address is 101 West McCarty
4 Street, Suite 216, Jefferson City, Missouri 65101.

5

6 Q. ARE YOU THE SAME R. MATTHEW KOHLY WHO HAS PREVIOUSLY
7 FILED DIRECT TESTIMONY IN THIS PROCEEDING?

8 A. Yes, I am.

9 Q. WHAT IS THE PURPOSE OF YOUR SURREBUTTAL TESTIMONY IN
10 THIS PROCEEDING?

11 A. The purpose of my surrebuttal testimony is to respond to the rebuttal testimony of
12 Staff witness William L. Voight. Specifically, I disagree that business local
13 exchange services in St. Louis and Kansas City, residential local exchange service
14 in St. Charles and Harvester, and intraLATA toll services should be declared
15 competitive. I will also respond to the Testimony of Barbara A. Meisenheimer
16 that addresses SWBT's intraLATA toll offerings.

17

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1 In addition, I will address the source of the CLEC line count data compiled and
2 used by SWBT and also provided Staff and OPC. This data was collected by
3 SWBT in violation of the AT&T-SWBT interconnection agreement, the M2A,
4 and in violation of the Commission rules governing access to E-911 data. The
5 blatant violation of these contractual restrictions and rules indicates there are not
6 sufficient safeguards in place to prevent SWBT from using its position as a UNE
7 provider to aid in its retail marketing and Winback efforts.

8
9 As I stated in my rebuttal testimony, AT&T believes the Commission should
10 establish rules to prohibit discriminatory Winback offers and prevent predatory
11 pricing prior to classifying any of SWBT's services as competitive. Based upon
12 the additional information reviewed in rebuttal testimony, I also believe that, at a
13 minimum, the Commission should establish a code of conduct to prevent SWBT
14 from using data collected in the course of fulfilling its federal Section 251
15 obligations and in its position as the E-911 service provider to inappropriately aid
16 in its retail marketing and Winback efforts.

17

18 **RESIDENTIAL LOCAL SERVICE**

19

20 **Q. STAFF RECOMMENDS THAT THE RESIDENTIAL LOCAL**
21 **EXCHANGE MARKET IN ST. CHARLES AND HARVESTER BE**
22 **DECLARED COMPETITIVE. WHAT IS YOUR RESPONSE?**

1 A. Staff recommends that the Commission grant SWBT's request for competitive
2 classification based on the belief that "economic indicators indicate that most
3 residential end users in those two exchanges have a viable choice in their local
4 service provider." (Voight, Rebuttal, page 55). He further states that these two
5 exchanges are the only known instance where a competitor has installed its own
6 facilities to compete with SWBT for residential service (Ibid.). Beyond the fact
7 that a known competitor has placed facilities, Mr. Voight does not provide any
8 further explanation of the "economic indicators" referenced in his testimony.
9 Absent a further explanation of the additional economic indicators, I do not
10 believe this constitutes sufficient evidence of "effective competition". Certainly
11 Mr. Voight's testimony does not in this instance address the statutory factors in
12 §386.020(13) to explain how the mere presence of an alternative service provider
13 results in "effective competition" facing SWBT's residential service in these
14 exchanges.

15

16 **BUSINESS LOCAL SERVICE**

17

18 **Q. STAFF RECOMMENDS THAT BUSINESS LOCAL EXCHANGE**
19 **SERVICE BE DECLARED COMPETITIVE. WHAT IS YOUR**
20 **RESPONSE?**

21

22 A. Staff recommends that business local exchange service (including high-capacity
23 services) be declared competitive in the St. Louis and Kansas City area.

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1 However, the only specific evidence put forth in support of this conclusion is a
2 Proximity Analysis for Competitive Fiber Networks compiled by SWBT and
3 attached to the Rebuttal Testimony of Mr. Voight. Based upon this chart, Mr.
4 Voight states that SWBT has demonstrated that a significant quantity of SWBT's
5 business and residential access lines are within 1,000 ft. of a CLEC fiber network
6 (Voight, Rebuttal Testimony, page 52). Staff concludes that customers not
7 directly connected to a fiber network may be served via unbundled loops or UNE-
8 P service.

9
10 I do not agree that this evidence is sufficient to justify complete price
11 deregulation. The term "significant quantity" is not defined so we do not know
12 how many businesses are located on fiber routes. There is also no indication of
13 whether or not the fiber is actually in use and represents a true alternate path.

14 Also, as I cited on pages 18 and 19 of my Rebuttal Testimony, SBC has
15 filed a joint petition with the FCC seeking to be relieved of its obligations to
16 provide unbundled High-Capacity Loops and Dedicated Transport. Regardless of
17 the proximity of fiber networks, approval of this Petition would have a profound
18 negative impact on Missouri CLECs' ability to continue to serve business
19 customers. CLECs that do have fiber backbones still rely upon SWBT's facilities
20 to reach customers and on SWBT's dedicated transport facilities to connect their
21 fiber backbones to various central offices. Other CLECs that follow a "smart
22 build" strategy and that have not deployed their own fiber networks have virtually
23 no option but to use incumbent LEC facilities. For example, in comments filed at

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1 the FCC, NuVox indicated that it obtains "virtually all" of its high-capacity
2 facilities from incumbent LECs. Uncertainty about whether or not UNEs will
3 continue to be available creates an economic barrier to entry and eliminates any
4 assurance that competitive entry in Missouri is sustainable.

5
6 I would again reiterate my concerns about the need to ensure sufficient regulatory
7 safeguards are in place to, at a minimum, protect against anti-competitive
8 behavior.

9
10 **INTRALATA TOLL SERVICE**

11
12 Q. WHAT IS YOUR REPOSENSE TO MS. MEISENHEIMER'S AND MR.
13 VOIGHT'S POSITION THAT SWBT'S INTRALATA TOLL SERVICE IS
14 COMPETITIVE?

15 A. I absolutely disagree. OPC's Witness, Ms. Meisenheimer provides no basis for
16 her conclusion that interexchange services offered by SWBT should be classified
17 as competitive (Rebuttal Testimony of Barbara Meisenheimer, page 22). With no
18 supporting rationale, the only rebuttal that I am able to make to her unsupported
19 conclusions is that I think she is incorrect.

20 Staff's conclusion is based mainly upon the number of carriers providing
21 retail intraLATA toll services (Rebuttal Testimony of William L. Voight, page
22 66). If all carriers were similarly situated and paid the same access rates as the
23 other carriers, I would agree with the Staff conclusion.

1 However, the number of retail carriers is completely irrelevant when it
2 comes to concerns about predatory pricing when SWBT provides both wholesale
3 access services and retail toll services. Each of the 74 carriers providing
4 intraLATA toll service in Westphalia cited by Mr. Voight has one thing in
5 common: each is relying upon SWBT, either directly or indirectly, to provide the
6 switched access services necessary to originate and terminate interexchange calls.
7 Elsewhere in his testimony, Mr. Voight recognizes that switched access is a
8 monopoly service. It is the monopoly market in the upstream market (switched
9 access) combined with rates that are priced above incremental costs that prohibits
10 the downstream market (retail toll) from offering competition where SWBT is
11 concerned.

12 Each IXC that provides interexchange service in competition with SWBT
13 must purchase switched access services from SWBT and must base its pricing
14 decisions upon the access rates that a carrier is required to pay. Those access
15 rates are approximately 3 cents per minute for each end of the call or 6 cents per
16 minute for both ends of the call.

17 As a toll provider, SWBT also relies upon its own access services.
18 However, SWBT does not base its pricing decision upon the access rates but
19 instead bases its pricing decisions upon the incremental cost of switched access,
20 which is generally considered to be about 1/2 cent per minute. It is this
21 competitive advantage granted by virtue of its monopoly control of switched
22 access that sets SWBT apart from other interexchange carriers. Because of this

1 advantage, SWBT's interexchange services should never be classified as
2 competitive services until switched access rates are priced at incremental costs.

3

4 Q. HOW WOULD PRICING ACCESS SERVICES AT COST PREVENT
5 PREDATORY PRICING?

6 A. If access services were priced at cost, IXC's and SWBT would both base their
7 pricing decisions on the same access costs and there would be no competitive
8 advantage. The FCC has recognized the need to drive access to cost in order to
9 eliminate the competitive advantage. In its approval of the CALLS Proposal for
10 interstate access rates, the FCC stated "by driving switched access usage charges
11 closer to their actual costs more quickly than would occur under the existing price
12 cap regime, the CALLS Proposal will minimize the competitive advantages BOC
13 affiliates would have over IXC's in offering long-distance services while switched
14 access rates were significantly above cost."¹ Just as was necessary in the
15 interstate market, intrastate access should be priced at incremental cost prior to
16 any finding that intraLATA toll service is competitive.

17

18 Q. WHAT EVIDENCE IS THERE THAT SWBT PRICES ITS INTEREXCHANGE
19 SERVICES BASED UPON INCREMENTAL COST OF SWITCHED ACCESS
20 RATHER THAN UPON SWITCHED ACCESS RATES?

21

¹ CALLS Order, paragraph 158.

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1 A. This fact has long been recognized by regulators and is why an imputation
2 standard has been applied, in the past, to SWBT's toll offerings. Further,
3 SWBT's own witnesses have testified in Missouri that SWBT's own decisions for
4 interexchange services are based upon incremental cost and do not take into
5 account the imputed cost of switched access.²

6

7

8 Q. IN MAKING HIS RECOMMENDATION, MR. VOIGHT STATES THAT
9 SAFEGUARDS ARE PRESENT TO PREVENT SWBT FROM UNJUSTLY
10 PRICING MTS BELOW COST. DO YOU AGREE?

11

12 A. No. Mr. Voight's own testimony controverts this statement about reliance upon
13 sufficient statutory safeguards. In response to a question concerning the
14 Commission's ability to regulate SWBT's wholesale rates, Mr. Voight, in Case
15 No. TO-98-351, the Commission permitted SWBT to offer Local Plus below the
16 imputed cost of access on the condition that SWBT made the service available to
17 IXCs and CLECs on both a resale and unbundled network element basis. After
18 three years and several contested cases since the Commission made that decision,
19 SWBT still fails to comply with that decision. The Commission is well aware of
20 this failure and has acknowledged the harm to competition that has resulted from
21 SWBT's refusal to comply with the Commission Order:

22

² Case No. TO-99-254, In the Matter of an Investigation Concerning the Primary Toll Carrier Plan and

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1 As a result, those companies seeking to compete against SWBT in
2 the Basic Local Service market through the use of their own
3 facilities, or through the use of unbundled network elements, have
4 been placed at a competitive disadvantage. That disadvantage has
5 continued for nearly three years. To permit SWBT to avoid its
6 obligation to resell Local Plus to these competitors while
7 conducting an imputation test would simply perpetuate SWBT's
8 competitive advantage.³

9
10 Rather than comply with the Commission's Order, Mr. Voight indicates that
11 SWBT is now appealing the Commission's decision. While I think the
12 determination that SWBT is not complying with the Commission's requirements
13 for waiving an imputation standard is correct, that decision alone does not rectify
14 the competitive harm caused by predatory pricing. In short, the problem has been
15 identified but not yet fixed. This example supports the notion that, even today,
16 there are not sufficient safeguards against predatory pricing. Easing those
17 safeguards will quite obviously not improve the situation.

18
19 Looking forward, granting competitive classification to a service offered by
20 SWBT would eliminate the pricing standard contained in Section 392.200(2)(c).
21 This statute prohibits an incumbent local exchange carrier from pricing a non-
22 competitive and transitionally-competitive service below its long run incremental
23 cost. Competitive services are not subject to this standard. Given SWBT's past
24 behavior, various pending win-back filings by SWBT, and the status of

IntraLATA Dialing Parity, Testimony of William C. Bailey, Transcript, page 1682.

³ Case No. TO-2000-667, In the Matter of the Investigation in to the Effective Availability for Resale of Southwestern Bell Telephone Company's Local Plus Service by Interexchange Companies, and Facilities-based Competitive Local Exchange Companies, Order Denying Application for Rehearing, <http://68.166.4.147/orders/05310667-01.htm>, May 31, 2001.

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1 competition generally, I believe it is premature to lift this standard. Lastly, as
2 SWBT's testimony notes, SWBT will be able to file tariffs with a seven-day
3 effective date. This shortened time period provides little, if any, opportunity to
4 review whether the proposed tariff constitutes predatory pricing. Because of the
5 monopoly position of SWBT in the switched access market and the above cost
6 access rates, full and fair competition is not possible and will not function as a
7 substitute for regulation in the intraLATA toll market.

8

9 Q. DO BOTH MR. VOIGHT AND MS. MEISENHEIMER RECOGNIZE THAT
10 SWBT HAS THE ABILITY TO HARM THE COMPETITION IN THE
11 INTRALATA MARKET?

12

13 A. Yes, Mr. Voight and Ms. Meisenheimer both recommend that Local Plus remain a
14 non-competitive service. In making his recommendation, Mr. Voight
15 acknowledges that competitive harm that results from providing a service below
16 an imputed cost of switched access. This harm also applies to MTS as well as LP.

17

18 From a standpoint of predatory pricing, the only distinction one can draw between
19 Local Plus and other interexchange services is that Local Plus is priced at a flat
20 monthly rate while "normal" MTS is priced on a per minute basis. However, in
21 the context of predatory pricing, this distinction does not warrant disparate
22 treatment. SWBT has the same ability to engage in predatory pricing on a per
23 minute basis as it does on a per month basis. I think the fact that both Staff and

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1 OPC recommend that Local Plus be treated as non-competitive services supports
2 the position that SWBT's other interexchange services should also remain
3 classified as a non-competitive service.

4

5 **INAPPROPRIATE ACCESS AND USE OF CONFIDENTIAL CLEC AND E-911**

6 **DATA**

7

8 Q. IS THERE AN ADDITIONAL CONCERN THAT YOU WISH TO RAISE?

9

10 A. Yes, the Direct Testimony of Tom Hughes and Sandra Douglas includes several
11 attachments, and inferences based upon those attachments, which contain data
12 based upon CLEC wholesale orders (resale, UNE-P, UNE-L) and data taken from
13 the E-911 database maintained by SWBT in its capacity as an E-911 service
14 provider. While this did cause me some initial concern, my concern was greatly
15 increased by the rebuttal testimony of both Mr. Voight and Ms. Meisenheimer,
16 who each refer to those SWBT attachments and additional data provided by
17 SWBT to Staff and OPC that is also based upon CLEC wholesale orders and the
18 E-911 database. Now, after reviewing both the direct and rebuttal testimony, it is
19 apparent that SWBT collected, relied upon for its own testimony, and also
20 provided at least the following information to Staff and OPC:

21

22 1. Identification of the wire centers in which CLECs have placed
23 UNE-P Orders by CLEC.

- 1 2. The number of CLEC access lines provisioned via resale by
- 2 exchange.
- 3 3. The number of CLEC access lines provisioned via UNE-L by
- 4 exchange.
- 5 4. The number of CLEC access lines provisioned via UNE-P by
- 6 exchange.
- 7 5. The number of CLEC access lines provisioned via CLEC owned
- 8 facilities by exchange.
- 9 6. The number of CLEC collocation arrangements provided by
- 10 SWBT.
- 11 7. The number of interconnection trunks provisioned by SWBT.
- 12 8. The number of CLEC E-911 listings taken from the E-911
- 13 database by exchange.

14

15 For example, Ms. Meisenheimer supports her conclusion that the residential and
16 business local exchange markets should not be declared “effectively competitive”
17 with a market concentration analysis of SWBT and CLEC market share by
18 exchange. According to her testimony, the data for this analysis was estimated
19 based upon E-911 listings provided by SWBT (Rebuttal Testimony of Barbara
20 Meisenheimer, page 17). Similarly, in his testimony, Mr. Voight acknowledges a
21 number of trends in competition, including the growth in unbundled switch ports,
22 E-911 listings, and interconnection trunks. These trends cited by Mr. Voight are

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1 from Mr. Hughes' testimony and appear to be based upon data collected by
2 SWBT in its capacity as a UNE provider and as an E-911 service provider.

3

4 Q. HOW DID SWBT OBTAIN THIS DATA AND ARE THERE ANY
5 LIMITATIONS ON SWBT'S USE OF THIS DATA?

6

7 A. SWBT obtained the CLEC UNE data in the course of fulfilling its Section 251
8 obligations under the Telecommunications Act of 1996 (TA96). The use of this
9 data is governed by the various interconnection agreements between SWBT and
10 the various CLECs, including the AT&T Companies. The Interconnection
11 Agreement ("ICA") between the AT&T Companies that was in effect at the time
12 Direct and Rebuttal Testimony was filed contains provisions designed to protect
13 this type of data from misuse by SWBT. According to the ICA, information
14 provided during the negotiation and execution of the agreement is considered
15 Confidential Information of the discloser, in this case, the CLEC. By way of
16 example and not limitation this includes all orders for Resale Services, Network
17 Elements, or Combination placed by AT&T and information that would constitute
18 Customer Proprietary Network Information (CPNI). CPNI includes the E-911
19 listing data of CLEC customers. The recipient of this information (SWBT) is
20 required to:

21

22 ▪ use the information only for purposes of this agreement;

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- 1 ▪ hold the information in confidence and only disclose it to
2 employees that have a need to know for the purpose of performing
3 under this agreement; and
4 ▪ to safeguard it from unauthorized use or disclosure.

5
6 The ICA between the AT&T Companies approved by the Commission on
7 September 15, 2001 contains similar provisions, as does the M2A.

8 Q. SWBT'S USE OF THIS DATA APPEARS TO VIOLATE THE PROVISIONS
9 YOU CITED ABOVE. WHAT IS YOUR RESPONSE?

10 A. Yes. SWBT clearly violated the confidentiality provisions of the AT&T-SWBT
11 ICA, as well as other ICAs, in the course of compiling data to support its position
12 in this case. SWBT's improper use of the AT&T Companies' Confidential
13 information goes well beyond the purposes of the ICA and was provided to
14 SWBT employees that do not have a need to know for purposes of performing
15 under this agreement. This case involves the deregulation of SWBT's retail
16 operations and has nothing to do with SWBT's performance of the ICA between
17 the AT&T Companies and SWBT, except to the extent that SWBT's misuse of
18 AT&T data indicates that even a binding interconnection agreement is insufficient
19 to discipline SWBT's behavior as a monopoly provider of wholesale services.
20 SWBT has essentially stolen confidential data obtained in the provision of its
21 wholesale obligations and used that data for the sole purpose of benefiting its
22 retail operations. That goes well beyond the performance of the ICA and raises
23 numerous questions on SWBT internal use (or misuse) of wholesale data.

1

2 Q. IN ADDITION TO STEALING CLEC WHOLESALE DATA TO BENEFIT ITS
3 RETAIL OPERATIONS, YOU MENTIONED ANOTHER SOURCE OF DATA
4 THAT SWBT IS ALSO USING INAPPROPRIATELY?

5

6 A. Based upon the direct and rebuttal testimony filed in this case, SWBT appears to
7 also be using E-911 listings of customers to analyze competitors.

8

9 Q. **HOW DOES SWBT OBTAIN THIS DATA?**

10

11 A. With few exceptions, SWBT acts as the E-911 service provider in the exchange
12 where it also provides local exchange service. As the E-911 service provider,
13 SWBT maintains the database where customer (subscriber) automatic location
14 information is stored. The automatic location information contains the
15 subscriber's name, street address, emergency service number, and other customer
16 specific data.

17

18 As an E-911 service provider, SWBT is required by 4CSR 240-030(1)(B) to
19 restrict access to the E-911 database for use by basic local exchange providers
20 (both ILECs and CLECs) solely for the use of updating subscriber records. The
21 purpose of these restrictions is to prevent local exchange companies from using
22 this data for competitive analysis and marketing purposes. SWBT's use of E-911
23 data to analyze competitors and competition, to aid its retail activities and,

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1 possibly, aid its Winback activities violates this rule. In addition, one of the
2 legislative public policy goals listed in Section 392.185 is to protect consumer
3 privacy. The lack of adequate safeguards to prevent the misuse of, and the actual
4 misuse of, E-911 data is inconsistent with this legislative policy. As you will
5 recall, the determination of effective competition requires the determination to be
6 consistent with these legislative public policy goals.

7

8 **Q. DID AT&T TRY TO IDENTIFY THE EXTENT OF SWBT'S MISUSE OF**
9 **WHOLESALE ORDERING AND E-911 LISTING DATA?**

10

11 A. Yes. After reviewing the direct and rebuttal testimony and realizing the extent of
12 SWBT's competitive snooping, AT&T submitted several data requests to SWBT.
13 Those data requests sought information about the SWBT employees that compiled
14 and reviewed the CLEC ordering and E-911 data in SWBT's testimony and also
15 which functional entities within SWBT that have access to that data or reports
16 derived from this data. AT&T did not allege anywhere in those data requests that
17 SWBT has violated the ICA or was improperly using "AT&T Confidential
18 Information". SWBT objected to those data requests on the grounds that they
19 were not relevant and indicated that if AT&T believed SWBT was inappropriately
20 using AT&T data; AT&T should pursue dispute resolution under the parties' ICA.
21 While AT& may yet pursue the matter in separate proceeding, SWBT's
22 recognition that AT&T believed the data was inappropriately obtained is telling,

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1 as is its objection to a simple request to know who looked at and was responsible
2 for compiling the data SWBT considers relevant to making its case.

3

4 **Q. HOW IS SWBT'S USE OF CLEC DATA AND E-911 LISTINGS RELATED**
5 **TO EFFECTIVE COMPETITION?**

6 A. As I stated in my Rebuttal Testimony, in order for competition to be effective, it
7 must be sustainable. SWBT's improper use of CLEC wholesale data to support
8 its retail operations strikes at the heart of whether competitors have an opportunity
9 to compete and whether competition is sustainable. SWBT's misuse of this data
10 to benefit its retail operations inappropriately creates a barrier to entry. In this
11 case, SWBT, on its motion, collected, compiled, analyzed, and relied upon data it
12 inappropriately took from CLECs. Many of the witnesses sponsoring testimony
13 in this case are involved in the retail operations of SWBT and have
14 inappropriately seen data that would be competitively useful.⁴ Ms. Douglas is
15 the product manager for switched access services. Another SWBT affiant, Mr.
16 Anvin, is the Associate Director of Competitive Intelligence. He is responsible
17 for monitoring and analyzing new and changing competitive environments
18 affecting SBC. The remaining SWBT affiants are either retail product managers
19 or directly involved and responsible for SWBT's retail marketing activities.
20 Under the terms of the protective order in this case, each SWBT affiant has

⁴ Attachment 6 to Sandra Douglas' Direct Testimony identifies the wire centers where CLECs have submitted UNE-P Orders. This attachment was filed as "Highly Confidential". Under the terms of the Protective Order, as an AT&T employee, I am unable to review the "Highly Confidential" information, even that of the AT&T Companies, while every SWBT Affiant is able to review AT&T's and every other CLECs data. However, under the AT&T-SWBT ICA, this data is considered "Confidential Data of AT&T" and none of the SWBT affiants should be able to view this data.

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1 complete access to all of SWBT's testimony, including the confidential
2 information of the AT&T Companies and other CLECs.

3 Their access to this data is completely inappropriate and unacceptable.
4 The purpose of the confidentiality provisions of the ICA is to prevent SWBT's
5 competitive snooping and the inappropriate use of CLEC confidential information
6 in its retail marketing and Winback activities. SWBT has, of its own volition,
7 simply ignored the contractual and regulatory limitations to the use of confidential
8 information and is using confidential wholesale and E-911 data to support its
9 retail operations. The use of this data permits SWBT to know the extent and
10 location of competitors' operations, competitors' means of provisioning service,
11 competitors' costs, and even the names addresses, and services of each CLEC
12 customer. To take the poker analogy suggested by a representative from e*spire
13 Communications; it is like a poker game in which SWBT is both the dealer and a
14 player at the table who knows what cards everyone else is holding.⁵ Even the
15 most astute poker player will not play under these conditions.

16 Consider the example of a CLEC relying upon UNE-P to serve customers.
17 When the CLEC approaches the customer, the CLEC, with customer consent, will
18 obtain the Customer Service Record (CSR) from SWBT. The CSR identifies the
19 customer information and the service(s) that customer is currently receiving. If
20 the CLEC wins that customer, the CLEC will submit its UNE order to transfer the
21 customer to the CLEC. Absent adherence to the contractual limitations in the
22 ICA, SWBT's retail operations will know exactly which customers a CLEC is

⁵ The Wall Street Journal, BellSouth Faces Probes by States On Win-Back, August 31, 2001, page. B3.

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1 pursuing. For example, if SWBT's retail operations are aware of when the CLEC
2 requests the CSR, SWBT will know that the customer is at least considering
3 switching to a CLEC. When the CLEC submits the UNE order, SWBT's retail or
4 Winback unit will immediately know they lost a customer. SWBT's use of this
5 information inappropriately provides its retail unit with a competitive advantage
6 or "leg-up" on the competition. Consider SWBT's recently filed Complete-Link
7 Tariff. This is a Winback tariff that offers a discount if the customer is
8 considering switching to a CLEC (CLEC requests CSR?) and a greater discount if
9 the customer actually switches to a CLEC (CLEC submits UNE order?). In order
10 to obtain these discounts, SWBT requires the customer to enter into a term
11 contract with early termination penalties. Under this tariff, if SWBT recaptures
12 the customer that is considering a CLEC or that has actually switched to a CLEC,
13 that customer is effectively off the market for quite awhile. The misuse of this
14 information creates a barrier to entry. Competition cannot be effective and
15 sustainable under these circumstances.

16 SWBT's response to AT&T's data requests seem to indicate that SWBT compiled
17 CLEC wholesale data and E-911 data while knowing it violated various
18 interconnection agreements. I think this speaks of an even greater problem. That
19 problem is SWBT's complete disregard for the Commission's authority and its
20 willingness to act unilaterally with complete disregard of statutes, rules, and
21 contractual limitations. There cannot be effective competition as long as this
22 behavior is tolerated.

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1 Q. IS AT&T RAISING THIS ISSUE SIMPLY IN AN EFFORT TO PREVENT
2 SWBT FROM RECEIVING COMPETITIVE CLASSIFICATION FOR SOME
3 OF ITS SERVICES?

4 A. No. The misuse of confidential wholesale information and E-911 listings is a
5 very serious issue. Much of my rebuttal testimony addressed the need to establish
6 safeguards to prevent predatory pricing and other anti-competitive behavior prior
7 to deregulating any of SWBT's services. The misuse of CLEC wholesale data
8 and E-911 data only supports the need for those safeguards.

9 In my rebuttal testimony, I also cited the need to perform a market share
10 analysis similar to what Ms. Meisenheimer seems to provide. In her analysis,
11 Ms. Meisenheimer relied upon the wholesale CLEC and E-911 data
12 inappropriately gathered and provided by SWBT to support her conclusion that
13 effective competition did not exist. Regardless of the conclusion of her analysis,
14 SWBT still violated contractual obligations and Commission rules in gathering
15 that data. The use of this data should not be permitted.

16 Q. BASED UPON THE MISUSE OF WHOLESALE AND E-911 DATA, WHAT
17 IS YOUR RECOMMENDATION?

18 A. SWBT's actions in this case clearly indicate there are not sufficient contractual
19 protections against the improper use of CLEC confidential information. In
20 several other states and at the national level, policy makers are considering
21 functional separation and structural separation. One of the reasons is to prevent
22 this type of abuse by the ILEC. SWBT's actions in this case clearly indicate that
23 contractual and regulatory limitations are ineffective at preventing SWBT from

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1 using its role as a UNE provider and an E-911 service provider to benefit its retail
2 operations. The misuse of this information creates a barrier to entry and is
3 inconsistent with protecting the privacy of consumers and promoting of full and
4 fair competition. Thus, the Commission cannot find that effective competition
5 exists. Prior to a determination that any of SWBT's services face "effective
6 competition", the Commission should, through a rulemaking, establish a code of
7 conduct that would prohibit SWBT from abusing its position as a wholesale UNE
8 provider and as an E-911 service provider. Once rules are in place, the
9 Commission must be assured that these safeguards are being adhered to. If
10 SWBT violates these provisions, the Commission should look at stronger
11 remedies.

12 **Q. DOES THIS CONCLUDE YOUR SURREBUTTAL TESTIMONY?**

13 **A.** Yes, it does.