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December 31, 1997

The Honorable Dale Hardy Roberts  
Secretary/Chief Regulatory Law Judge  
Missouri Public Service Commission  
301 West High Street, Floor 5A  
Jefferson City, Missouri 65101

RECEIVED  
DEC 31 1997  
MISSOURI  
PUBLIC SERVICE COMMISSION

Re: Case Nos. TO-98-115

Dear Judge Roberts:

Enclosed are an original and nine copies of Southwestern Bell Telephone Company's Application for Rehearing.

Thank you for bringing this matter to the attention of the Commission.

Very truly yours,

*Paul G. Lane /tm*

Paul G. Lane

Enclosure

cc: All Attorneys of Record

5.

BEFORE THE PUBLIC SERVICE COMMISSION  
OF THE STATE OF MISSOURI

FILED  
DEC 31 1997  
MISSOURI  
PUBLIC SERVICE COMMISSION

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

APPLICATION FOR REHEARING

COMES NOW Southwestern Bell Telephone Company ("SWBT") and hereby files an Application for Rehearing concerning the Missouri Public Service Commission's Report and Order which was issued on December 23, 1997, and states as follows:

**I. THE PROCESS USED TO ADOPT THE FINAL ORDER VIOLATED MISSOURI AND UNITED STATES CONSTITUTIONAL DUE PROCESS REQUIREMENTS, AND STATE AND FEDERAL ADMINISTRATIVE AND ARBITRATION PROCEDURAL REQUIREMENTS.**

The Commission is required to conduct its proceedings in a manner consistent with the requirements of due process mandated by Article I, Section 10 of the Missouri Constitution and the Fourteenth Amendment to the United States Constitution. But it failed to do so. Further, while it is not apparent from the Federal Telecommunications Act of 1996 ("FTA") whether Federal or State administrative process rules apply, the process adopted by the Commission does not comport with either Federal or State administrative or arbitration procedure requirements. Regardless of which set of administrative or arbitration rules apply to interconnection rate arbitrations under the FTA, all require notice and a hearing before rates can lawfully be adjudicated.

A. The Commission's Irregular Procedure Contravenes the Parties' Due Process Rights Guaranteed by the U.S. and Missouri Constitutions.

Whether the Commission is acting as an arbitrator or otherwise, it is a state agency that must comply with the requirements of due process mandated by Article I, Sec. 10 of the Missouri Constitution and the Fourteenth Amendment to the United States Constitution. See Elmore v. Chicago & Illinois Midland Ry., 782 F.2d 94, 96 (7th Cir. 1986). Accordingly, the rules governing the conduct of private, voluntary arbitration proceedings must be supplemented to the extent necessary to satisfy procedural due process.

At a minimum, due process requires in a proceeding of this type that the "parties be afforded a full and fair hearing at a meaningful time and in a meaningful manner." State ex rel. Fischer v. Public Service Commission, 645 S.W.2d 39, 43 (Mo. App. 1982). An "essential principle of due process is that a deprivation of life, liberty or property be preceded by notice and opportunity for hearing appropriate to the nature of the case." Cleveland Bd. of Ed. v. Loudermill, 470 U.S. 532, 542 (1985) quoting Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950) (emphasis supplied). The Supreme Court has described "the root requirement" of the Due Process Clause as being "that an individual be given an opportunity for a hearing before he is deprived of any significant property interest." Id., at p. 542 quoting Bobbie v. Connecticut, 401 U.S. 371, 379 (1971) (emphasis in original).

The absence of any hearing on the issues in this proceeding obviously fails to satisfy this minimum standard. State ex rel. Chicago, R.I. & P.R.R. v. Public Service Commission, 355 S.W.2d 45, 52 (Mo. banc 1962). The Commission's reliance on "evidence" gathered by the Special Master and the Arbitration Advisory Staff (AAS) without providing SWBT the

opportunity to present testimony in support of its own proposals or to cross-examine AT&T witnesses or the Special Master or the AAS on their proposals denies to the parties the right to a meaningful hearing. As the United States Supreme Court stated in Morgan v. United States, 304 U.S. 1 (1938): "a case in which [an agency] accepts and makes as [its] own the findings which have been prepared by the active prosecutors for the Government after an *ex parte* discussion with them and without according any reasonable opportunity to the respondents in the proceeding to know the claims thus presented and to contest them...is more than an irregularity in practice; it is a vital defect." See also Ohio Bell Tel. Co. V. Public Utilities Commission, 301 U.S. 292 (1937) (reliance on evidence not placed on record and not subject to scrutiny by affected parties violates fundamental requirements of due process); United Food & Commercial Workers International Union, AFL-CIO v. SIPC Co., Inc., 1992 U.S. Dist. LEXIS 21332, at \*29 (S.D. Iowa 1992), *aff'd* 8 F.3d 10 (8th Cir. 1993) (arbitrator's reliance on *ex parte* evidence without "opportunity to examine, object to, and cross-examine the evidence on grounds of relevance and accuracy" deprived parties of their right to a fair hearing); Totem Marine Tug & Barge, Inc. v. North American Towing, 607 F.2d 649, 651 (5th Cir. 1979) (same).

Moreover, it is clear that the procedures employed in this proceeding fail to satisfy the requirements of due process as articulated in the United States Supreme Court's decision in Matthews v. Eldridge, 424 U.S. 319 (1976). The nature of the parties' interests and the grave risk of error inherent in the Commission's reliance on *ex parte* evidence in this complex proceeding clearly lead to the conclusion that the parties were not afforded the process due them under the Missouri Constitution and the United States Constitution.

That the Commission allowed the parties to submit testimony in support of their positions

and to object to the Special Master's recommendations does not remedy these serious constitutional and administrative defects. The "testimony" submitted in this proceeding was never made part of a record for the Commission's review. No right to object to the "testimony" was given, and no opportunity for cross-examination was offered. Moreover, the mediation process employed by the Special Master resulted in substantial changes in position of the parties, making the "testimony" largely irrelevant. Further, the Commission heard none of the mediation proceedings and no record was prepared. On most issues, all the Commission was able to review was the opinion and recommendation of the Special Master and the AAS, whose opinions and recommendations were not subject to any cross-examination or rebuttal testimony. This type of filtering process prevented the Commission from gaining a proper understanding of the issues and deprived SWBT of its constitutional and statutory rights.

B. The Commission's Failure to Follow its Own Procedural Orders Violated Sections 386.410 and 386.420.1 RSMo.

The Commission also violated Section 386.410 RSMo (1994), which requires that "[a]ll hearings before the Commission . . . shall be governed by rules to be adopted and prescribed by the commission." The proceeding is not consistent with the requirements of 4 CSR 240-2.110. Nor was the Report and Order adopted in compliance with the requirements of Section 386.420.1 which entitles the parties to this arbitration the right to be heard and to present evidence. SWBT has consistently raised these issues throughout this and the companion cases (TO-97-40 and TO-97-67). It is not too late for the Commission to follow the statutes under which it is authorized to act and its own rules which govern when and how hearings will be conducted.

C. The Commission's Failure to Follow Contested Case Procedures Violated the Missouri Administrative Procedure Act.

The Commission's Report and Order is unlawful because it was issued without observing the procedural requirements of the Missouri Administrative Procedure Act (MAPA), RSMo, Ch. 536. While the Commission's jurisdiction over this proceeding arises under Section 252 of the FTA, 47 U.S.C. Section 252, that legislation neither mandates particular procedures to be followed by the Commission nor preempts, expressly or by implication, otherwise applicable procedural requirements mandated by state law. (See 47 U.S.C. Section 252(e)(3)). The Commission itself has acknowledged that state procedural law applies to this proceeding in that it has allowed the Office of the Public Counsel to participate in this proceeding as required by Section 386.710 RSMo (1994).

As an agency of the state within the meaning of Section 536.010(1) RSMo (1994), the Commission is subject to the requirements of the MAPA. See State ex rel. St. Louis Public Service Co. v. Public Service Commission, 365 Mo. 1032, 291 S.W.2d 95, 98 (Mo. banc 1956); State ex rel Fischer v. Public Service Commission, 645 S.W.2d 39, 42 n.3 (Mo. App. 1982). As explained in State ex rel. Monsanto Company v. Public Service Commission, 716 S.W.2d 791, 796 (Mo. 1986): "The Public Service Commission is a creature of statute and can function only in accordance with statutes. Where a procedure before the Commission is prescribed by statute, that procedure must be followed."

The MAPA mandates extensive procedures governing any contested case. See, Sections 536.063, 536.067, 536.070, 536.073, 536.077, 536.070, 536.090 RSMo (1994). This proceeding is a "proceeding before an agency in which legal rights, duties or privileges of specific parties are

required by law to be determined after hearing,” Section 536.010(2) RSMo (1994), and thus, is a “contested case” with the meaning of the MAPA. As explained by the Missouri Supreme Court in State ex rel Yarber v. McHenry, 915 S.W.2d 325, 328 (Mo. 1995), if any proceeding before any agency involves issues in which a hearing is mandated by law, including “any statute or ordinance, or any provision of the state or federal constitutions” that hearing “must be conducted according to contested case procedures.” Clearly, in a proceeding involving the establishment of permanent rates or terms of service, a hearing is mandated by several sources of law including, but not limited to, Section 252 of the FTA, Sections 386.410 and 386.420 RSMo, Article I, Section 10 of the Missouri Constitution, and Section 1 of the Fourteenth Amendment to the U.S. Constitution. See State ex rel. Chicago, R.I. & P.R.R. v. Public Service Commission, 355 S.W.2d 45, 52 (Mo. banc 1962); State ex rel. Fischer v. Public Service Commission, 645 S.W.2d 39, 42-44 (Mo. App. 1982); Morgan v. United States, 304 U.S. 1 (1938); Ohio Bell Telephone Company v. Public Utilities Commission, 301 U.S. 292 (1937); Interstate Commerce Commission v. Louisville & Nashville R. Co., 227 US. 88 (1913).

The Commission plainly failed to comply with the MAPA’s requirements governing contested cases by, inter alia, failing to conduct a hearing, depriving the parties of an opportunity to examine the evidence upon which the Commission relied for its order, failing to provide an opportunity to the parties to present evidence and cross-examine opposing witnesses, failing to provide an opportunity to cross-examine the Special Master or the AAS on the proposed recommendation and failing to provide an opportunity for the parties to submit briefs and argument after an appropriate contested case proceeding. Accordingly the Commission’s Report and Order is unlawful.

D. The Commission's Procedure Violated the Missouri Uniform Arbitration Act and the Federal Arbitration Act Which Provides the Right to Be Heard, Present Evidence and Cross-Examine Witnesses.

Even if it should be determined that the statutory procedures described above are inapplicable to this proceeding, the Report and Order is nonetheless unlawful for failing to comply with appropriate procedural requirements. The Commission's procedures exceeded the Commission's powers because such procedures violate the requirements of the Missouri Uniform Arbitration Act, Section 435.370 RSMo (1994). That section provides the parties to an arbitration with a right to a hearing in which "the parties are entitled to be heard, to present evidence material to the controversy and to cross-examine witnesses appearing at the hearing." Moreover, the Commission's failure to conduct the proceedings in a manner consistent with these requirements substantially prejudiced the rights of Southwestern Bell within the meaning of Section 435.405(4) RSMo (1994).

The Federal Arbitration Act similarly requires a hearing. Under 9 U. S.C. Section 10(a)(3), awards are to be set aside when, inter alia, the arbitrators are "guilty of misconduct . . . in refusing to hear evidence pertinent and material to the controversy, or of any other misbehavior by which the rights of any party have been prejudiced." Parties to an arbitration are entitled to a full and fair hearing on the merits, and the courts will not hesitate to overturn an award when such rights are violated. See, e.g., Korikar Maritime Enterprises S.A. v. Compagnie Belge D'Affretement, 668 F.Supp. 267, 271 (S.D.N.Y. 1987); Petrol Corp. V. Groupement D'Achat Des Carburants, 84 F.Supp. 446, 448 (D.C.N.Y. 1949).



**II. THE COMMISSION FAILED TO ISSUE A REASONED DECISION SUPPORTED BY COMPETENT AND SUBSTANTIAL EVIDENCE ON THE RECORD AS A WHOLE BUT INSTEAD ACTED IN AN ARBITRARY AND CAPRICIOUS MANNER AND ABUSED ITS DISCRETION.**

Pursuant to the statutes which govern the Commission, Chapters 386 and 392 RSMo., the Commission must conduct an appropriate evidentiary hearing and issue a reasoned decision which comports with the applicable law and is supported by competent and substantial evidence on the record as a whole. Similar requirements are imposed by the Missouri Administrative Procedure Act and federal administrative procedure statutes and rules. Since the Commission failed to conduct any evidentiary hearing, it clearly could not issue a reasoned decision supported by competent and substantial evidence on the record as a whole. There simply is no proper evidentiary record on which a decision could be based.

These same statutes and rules further require the Commission to act in a manner which is not arbitrary or capricious. Because the process utilized by the commission prevented SWBT from providing evidence in opposition to the Special Master's recommendation, or to cross-examine AT&T witnesses or the Arbitration Advisory Staff (including the Special Master), it is not surprising that the decisions of the Commission are arbitrary and capricious.

Further, in many critical areas, the Commission has completely failed to even address critical issues raised by SWBT in response to the Special Master's Recommendations, instead choosing to simply approve those recommendations. The decisions are frequently in violation of the FTA, as interpreted by the Eighth Circuit, and cannot be permitted to stand. The Commission's adoption of this procedure has assured that it cannot issue a decision consistent with its statutory obligations, since it has deprived itself of almost all relevant information other

than the Special Master's recommendation and the parties' responses. Moreover, in areas which are committed to the Commission's discretion, the Report and Order constitutes an abuse of discretion.

While the entirety of the Commission's decision, and the resolution of each individual issue, are subject to these objections, a few issues are examined in detail below. By focusing on these issues, SWBT does not waive its objections to the entirety of the commission's Report and Order, but expressly incorporates by reference herein the entirety of its Response to the Recommendations of the Special Master in the Joint Statement of Issues Remaining (SWBT's Response) and to the testimony it previously filed in this docket.

A. Group 1 Issues - IntraLATA Toll/Access/OS/DA

1. IntraLATA Toll

The PSC stated that "the Act provides no basis for SWBT to exclude intraLATA toll services from the category of services that a CLEC may provide using UNEs." (PSC Report and Order, p. 12). Had it conducted a hearing, the PSC would have understood that the Special Master's decision is directly contrary to the facts.

The issue is not whether AT&T can provide intraLATA or interLATA calling to its customers (which it can), but is an issue of price. (SWBT's Response, p. 3) AT&T can provide and bill and collect for intraLATA toll for its customers. The issue is the amount that AT&T should pay SWBT for reselling SWBT's intraLATA toll. AT&T is using SWBT's intraLATA toll network and should pay for such usage at the retail rate less the 19.2% discount established by the commission for resold services. AT&T is in fact engaged in resale of SWBT's intraLATA toll services when it offers services using unbundled local switching, but is permitted

to pay only a fraction of the retail rates less the 19.2% discount. This violates the FTA which requires that resold services be priced at retail less avoided costs. Contrary to the PSC's Report and order, SWBT does not seek to prevent AT&T from using the "full functionality" of unbundled local switching, but instead seeks to collect its intraLATA toll rates (less the discount) when AT&T uses that functionality to access and use SWBT's intraLATA toll network. The decision also violates Section 271(e)(2)(B) of the FTA which preserves an RBOC's 1+ intraLATA toll until it is permitted into the interLATA market (or February 6, 1999, whichever comes first).

## 2. Access

This issue involves whether AT&T can usurp SWBT's intraLATA and interLATA access network and claim the revenues for common transport on SWBT's network as its own. As demonstrated in SWBT's Response on pages 5 through 7, both the terminating and the originating side of the call must be analyzed. The Commission failed to analyze either situation but merely accepted the Special Master's recommendation as it did on substantially all the issues presented to it.

On the terminating side, AT&T wants to receive the access revenues associated with the transport between the tandem and the end office serving AT&T's local customer when, for example, an MCI long distance customer from New York calls an AT&T local service customer in St. Louis who is served via unbundled local switching. AT&T should not be allowed to claim such access revenues as their revenue. The long distance company is utilizing SWBT's interLATA access network and should be required to pay SWBT, not AT&T, for such use.

On the originating side of the call, AT&T wants to usurp SWBT's revenue for the

transport of such calls from the originating end office to the selected interexchange carrier (IXC). SWBT's proposed language would permit AT&T to bill access for carrier common line (assuming AT&T provided its own loop or purchased unbundled local loops from SWBT) and for local switching if AT&T purchased unbundled local switching from SWBT. Contrary to the PSC's Order, SWBT should be allowed to bill and collect for the transport services it provides over its access network to IXCs.

The PSC completely ignores the undisputed fact that SWBT does not have the network ability to permit AT&T to claim the access revenues from the IXCs for traffic terminating to a local customer served by AT&T through unbundled local switching. The Eighth Circuit has made it abundantly clear that CLECs must take SWBT's network as it exists and cannot require SWBT to build a superior network to meet the desires of the CLECs. The Eighth Circuit specifically stated:

We also agree with the petitioners' view that subsection 251(c)(3) implicitly requires unbundled access only to an incumbent LEC's existing network -- not a yet unbuilt superior one.

Iowa Utilities Board v. FCC, 120 F.2d 753, 813 (8th Cir., July 8, 1997).

There was no "testimony" contradicting SWBT's position that SWBT would have to develop a system designed to allow AT&T, not SWBT to bill IXCs for such terminating traffic. A computer system would need to be developed to screen billions of call records each month by CLEC and then again by IXC per CLEC (since AT&T only wants to bill those IXCs which are good credit risks, while requiring SWBT to bill and attempt to collect from IXCs which have bad payment histories). Under the FTA, the PSC cannot require SWBT to develop such a currently nonexistent system in order to accommodate AT&T's desires to claim SWBT's access revenues.

Nor can this Commission impose such a requirement without even addressing SWBT's position.

On both originating and terminating access, the FTA expressly preserves the existing federal and state access charge system. See, e.g., Sections 251(d)(3) and (g). But the PSC's determination here eviscerates both the federal and state access charge scheme, requiring SWBT to provide access services on behalf of AT&T at a fraction of the rate for services established by the FCC for interstate traffic and the PSC for intrastate traffic. The PSC cannot change or override SWBT's state access tariffs in the proceeding and has no authority whatsoever over SWBT's interstate access charges. The PSC's decision is thus beyond the scope of its authority under the FTA and in violation of specific terms of the FTA ensuring the continuation of the existing access charge system.

**B. Group III Issues - Operational Issues**

Issue 2: UNE Ordering and Provisioning - SWBT incorporates by reference its Response to Recommendations of the Special Master, pages 7-9, as if fully set forth here, and requests the PSC to reconsider its Report and Order. The PSC's Order states that AT&T can assume that all previous customer service information remains accurate without verifying the information with the customer. The PSC states that "AT&T's language does not pose the threats which SWBT alleges." The PSC ignores the fact that customers may switch CLECs and that AT&T will have no incentive to ascertain the accuracy of an end user's information if the end user switches to another CLEC. SWBT will not be able to ascertain which CLEC the end user chose after the end user transfers to another CLEC unless each CLEC is required to verify and revise customer information each time the end user switches CLECs. If the CLEC is not required to verify and refresh all customer information, the customer information will quickly be inaccurate, and

therefore so will SWBT's databases, especially if the customer frequently changes CLECs. Not only will this decision adversely affect other CLECs, who will be required to deal with inaccurate information, it may have major repercussions on the provision of 911 service, with the potential of a tragic result.

Issue 3: UNE - Ordering and Provisioning Industry Guidelines - SWBT incorporates by reference its Response to Recommendations of the Special Master, pages 9-10, as if fully set forth here, and requests the PSC to reconsider its Report and Order. The Commission misinterprets AT&T's language and the issue arising from AT&T's proposed language. The issue is whether there is a need for any AT&T proposed interim solution because the OBF has defined the ordering requirements via Local Service Ordering Guidelines (LSOG). It is unclear from the PSC's Order whether SWBT is required to spend resources on AT&T's specific "interim" solutions which are not contained in the finalized industry standards set out by OBF. If that is the intent of the Commission, it violates the FTA by requiring SWBT to build a superior network to serve AT&T, contrary to the determination of the Eighth Circuit Court of Appeals in Iowa Utilities Board v. FCC, *supra*. The PSC's finding that "SWBT only needs to use industry guidelines when they are available" simply does not address the issue raised by SWBT.

C. Group IV Issues - UNE Parity

SWBT incorporates by reference herein its Response to Recommendations of the Special Master, pp. 10-20, as if fully set forth here, and requests the Commission to reconsider its Report and Order. The PSC has misinterpreted 47 U.S.C.A. 251(c)(3) and the 8th Circuit's July and October 1997 Orders and as a result has issued an Order which directly and clearly violates the FTA.

In an October order on reconsideration, the Eighth Circuit Court of Appeals in Iowa Utilities Board v. FCC, *supra*, considered the validity of 47 C.F.R. 51.315(b) which provided that, “[A]n incumbent LEC shall not separate requested network elements that the incumbent LEC currently combines.” The Eighth Circuit’s October order found the FCC rule to be unlawful, as the FTA requires CLECs like AT&T to combine unbundled network elements and permits incumbent LECs to separate currently combined network elements. The PSC’s Report and Order refuses to follow this clear directive and is in direct conflict with the FTA.

The PSC incorrectly concluded that the wording of § 251(c)(3) and the fact the Court vacated the prohibition against a LEC separating network elements that the LEC currently combines somehow means that SWBT must offer to combine elements for the CLEC if SWBT already uses the “same combination that the CLEC requests.” Report and Order, p. 19. Even though SWBT cited the Eighth Circuit’s holding that the FCC’s rule prohibiting LECs from separating requested network elements that the incumbent LEC currently combines was unlawful and vacated the rule (see SWBT’s Response, pp. 11-12), the PSC incorrectly determined that SWBT did not point to any provision allowing SWBT to separate network elements that SWBT currently combines. See PSC Report and Order, pp. 19-20. Such PSC findings are blatantly wrong and in direct contravention of the explicit directives of the Eighth Circuit.

The PSC also determined that SWBT’s proposed language is contrary to “agreed-upon and approved language.” PSC Report and Order, p. 20. The PSC is wrong both with regard to separating unbundled network elements and combining such elements. As explained by SWBT in its Response to Recommendation, SWBT did not voluntarily agree not to separate elements or to combine elements on behalf of AT&T. With regard to separating unbundled network

elements, the Report and Order fails to acknowledge that the interconnection "agreement" was submitted four days BEFORE the 8th Circuit's Reconsideration Order which vacated the then-existing FCC rule prohibiting SWBT from separating elements which were already combined in SWBT's network. With regard to combining unbundled network, the only portions of the "agreement" which could be construed as requiring SWBT to perform such combinations were directly ordered by the Commission. Prior to the PSC's Order approving the interconnection agreements, SWBT informed the PSC of the Eighth Circuit's decision vacating the FCC rule and informed the PSC that SWBT could not be lawfully required to combine network elements on behalf of AT&T or be lawfully prohibited from separating network elements which were already combined in SWBT's network. The Report and Order does not and cannot explain how compliance with a then existing FCC rule and a Commission Order is a voluntary relinquishment of a known legal right. Moreover, SWBT explicitly advised the Commission that it refused to perform such combinations, or to refrain from separating elements, before the order was approved. The PSC determination is thus contrary to the undisputed facts and clearly unlawful. The PSC's Report and Order concerning UNE parity, combining and separating of network elements, and imposition of further requirements for combining by SWBT on behalf of AT&T are completely contrary to the Federal Act and the 8th Circuit's July and October 1997 Orders.

Since SWBT cannot lawfully be required to combine network elements on behalf of AT&T, SWBT cannot be required to "guarantee AT&T comparable performance and quality"<sup>1</sup> for the end-to-end service which AT&T is responsible for provisioning from the unbundled

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<sup>1</sup>See PSC Report and Order, pp. 18-19.



network elements it receives from SWBT. Such a "SWBT guarantee" would require SWBT to "guarantee" that AT&T employees in combining UNEs meet all the requirements, due dates, and performance standards that SWBT's employees previously met in provisioning the end-to-end service offered by SWBT to its end users. Such a "SWBT guarantee" cannot be required and is arbitrary and capricious as well as in violation of the FTA.

D. Group V - UNE Pricing

In Issues 1(d), (e), (f), (g) and 8(d), the Commission has required SWBT to provide services at no cost, pending a subsequent decision by the Commission. The Commission must comply with the pricing standard of the FTA, and cannot set prices at zero. This not only violates the FTA, but is clearly confiscatory in violation of SWBT's federal and state constitutional rights. The Commission should utilize SWBT's interim rates, subject to true-up upon final resolution of the pricing issues.

E. Group VI - Network Efficiency

SWBT incorporates by reference its arguments from its Response to Recommendations of the Special Master, pp. 21-22 as if fully set forth herein. The PSC's Order allowing AT&T to combine interLATA traffic on the same trunk group as local and intraLATA traffic is inconsistent with the PSC's December 11, 1996, Order and would prevent SWBT from knowing the jurisdiction of the traffic in order to accurately bill. This issue was raised in the October, 1996 Arbitration with AT&T. The PSC's Order did not allow AT&T to combine interLATA traffic on the same trunk group as local and intraLATA. The Commission cannot now vary from that Order, at least without a full evidentiary hearing and a reasoned explanation of the change in position. It has done neither. Nor does the Commission have the authority to override SWBT's

interstate tariffs which do not contemplate such trunking. The Commission's qualifier that its Order should not be construed as affecting interstate traffic is nonsensical - the combining of interstate traffic is the entire thrust of the issue.

F. Group X - Contract Terms And Conditions

Issue 3c: Limitation of Liabilities - The PSC upheld the Special Master's Recommendation that does not allow each party to be indemnified by the other party against claims made by the indemnifying party's end user, excluding cases of gross negligence or intentional or willful misconduct. SWBT incorporates its Response to Recommendations, pp. 22-25.

The PSC states that "SWBT has not explained how the language proposed by AT&T is more favorable toward AT&T than it is toward SWBT, as SWBT would likewise limit its damages toward its end users and encourage them to sue AT&T." PSC Report and Order, p. 39. SWBT's end users would rarely have any cause of action against AT&T since SWBT, unlike AT&T serves its customers via SWBT facilities and is not using AT&T's network elements or reselling any of the tariffed services offered by AT&T. Unlike SWBT end users, AT&T's end users could bring a cause of action against SWBT whenever SWBT is providing the network elements used to AT&T or when AT&T resells SWBT's services. AT&T's "reciprocal" language is, therefore, essentially worthless to SWBT since SWBT is not using AT&T's facilities and services to provide service to SWBT's end users. The PSC completely misunderstands the implications of refusing to require AT&T to indemnify SWBT for causes of action brought by AT&T's end users. SWBT has all the potential risk of loss since SWBT provides the service to AT&T for resale or owns the facilities used to provide UNEs to AT&T.

SWBT cannot "encourage its end users to sue AT&T" for SWBT services which AT&T has absolutely nothing to do with provisioning. How could a SWBT customer sue AT&T for SWBT's provision of local service? AT&T's end user could easily bring suit against SWBT alleging a problem in any facility or service which SWBT provided to AT&T.

The PSC's Report and Order completely ignores the actual relationship between AT&T, SWBT, and AT&T's end user and is based on a misunderstanding of SWBT's role as the service provider. As SWBT stated, the PSC's Report and Order completely strips SWBT of the ability to protect itself from any end user claim, while allowing AT&T to completely isolate itself to a risk of a few dollars from its end user. In both Texas and Oklahoma, the only SWBT states to consider this issue, the respective commissions both adopted SWBT's proposed resolution for the same reasons SWBT has advanced here.<sup>2</sup> The PSC's Report and Order on this issue should be changed to accept SWBT's proposed contract language.

G. Custom Routing And Separate NXX Codes

SWBT incorporates by reference its arguments from its Response to Recommendations of the Special Master, pp. 25-28. The PSC's Report and Order on these issues should be reconsidered. The Commission has simply failed to adequately address SWBT's position.

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<sup>2</sup>In Issue 14(d) of Group IV, the Commission adopted a special request process because it had been ordered by other commissions. That same rationale should apply here.

WHEREFORE, SWBT requests the PSC to grant SWBT's Application for Rehearing and accept SWBT's proposed language.

Respectfully submitted,

SOUTHWESTERN BELL TELEPHONE COMPANY

By Paul G. Lane /tm

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing document were served on all parties on the Service List below by first-class, postage prepaid, U.S. Mail on December 31, 1997.

  
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