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CASE NO: TO-98-115

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BEFORE THE PUBLIC SERVICE COMMISSION

OF THE STATE OF MISSOURI

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

DISSENTING OPINION OF COMMISSIONER HAROLD CRUMPTON

I am deeply concerned about the regulatory process that produced this agreement. My concerns fall into two categories. The first is the impact of the regulatory strategy of unbundling network elements. The second is the impact of our implementation of that strategy.

I am concerned that the regulatory scheme to unbundle the incumbent's network will have an adverse impact on the State of Missouri. To promote competition in the local exchange market, the Telecommunications Act of 1996 adopted a regulatory scheme that keeps competitors connected to and dependent on the incumbents' network. Sadly, this dependency has been structured in a way which may harm the competitors, the incumbents, and the public in that the Act mandates unbundling network elements. Unbundling a network means breaking it down to its functional components and Section 251 (c) (3) of the Act requires that network elements be offered only on an unbundled basis.

The unbundling of an incumbent's network elements may prove detrimental to us all.

First, it may prove physically harmful to the network on an everyday basis as technicians are required to tinker and tweak it over and over again in order to recombine the unbundled elements. The network has some very sensitive components and the less that happens to those components, the better. The fewer tweaks and adjustments that are made to it, the fewer interruptions in service. In the end, unbundling represents a waste of effort and a threat to service, especially unbundling into sub-elements.

Second, regulators such as ourselves, are then required to make the incumbent sell its network elements at inappropriate prices. The prices are inappropriate because they do not reflect the market value of the elements and they do not allow the incumbent to recover its embedded costs or give it an incentive to continue to invest in the network upoon which we all depend.

It is blatantly unfair to require the incumbent to sell its network elements at unbundled prices (one of the effects of unbundling is that the elements will be sold to the new competitor below cost) when we know that, after the purchase competitors are going to reap the benefits of combining elements without paying a proper price.

A regulatory strategy that has grasped the importance of a fully operational and well-maintained network is a strategy that makes sure that the network is left alone as much as possible. Such a strategy will not divvy up the network into individual parts, but simply sell interconnection to it at deeply discounted prices on high margin elements only. Access or connection through discounts means the physical network can be protected while the

competitors pool the capital necessary to build their own value -added networks. Since the effect of the present regulatory scheme seems to be to keep competitors dependent on this all-important incumbent asset, it only makes sense to take appropriate precautions to protect the asset for all to use. The best way to protect the network and promote true competition is to give competitors deep discounts so they can pool enough money to build their own networks while giving discounts only on high-margin elements so that the incumbent will have sufficient revenues to maintain the existing network.

We cannot change the regulatory scheme of unbundling network elements; however, I fear we have implemented it in a way that has done damage to the incumbent and in turn to the very backbone of competition: the network itself. I am concerned that the process by which we arrived at the interconnection charges may constitute a taking of the incumbent's network and that such a taking will affect and harm every Missourian.

My first concern is how we are implementing the Act's directive of unbundling the incumbent's network elements. In regards to this concern, I think we are unbundling the network elements to too great a degree. We have reduced these elements to too finea level that will place the incumbent in danger's way. The incumbent's network may be injured because of the excessive tinkering that takes place when the elements have been broken down too far. The competitors may be injured as they struggle to recombine the too finely disaggregated parts. The level to which the Staff has taken unbundling is not necessary to

foster competition in the local exchange market. Therefore the risks such atomistic unbundling sets loose outweighs any benefits.

Also, I believe that the majority is incorrect in its view that SWBT should be bound to contract provisions to which it "agreed" to combine network elements for AT&T.

On page 21 of the Report and Order, the majority states:

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

My reading of Section 251 (c) (3), the Eighth Circuit decision and my understanding of the facts forces me to dissent from the findings within this paragraph.

I read Section 251 (c) (3) to require that the network elements be sold only on an unbundled basis. First of all, the subsection is entitled "unbundled access" and is listed as one of the additional duties of the incumbent local exchange carrier. In the first sentence, the section states that it is a "duty" to provide nondiscriminatory access to network elements on a "unbundled basis." The first part of the next sentence states that the incumbent "**shall** [emphasis added] provide such unbundled network elements. . ." That's what the incumbent has to provide: unbundled network elements. The second part, or end of the sentence tells,

the incumbent how it is to provide unbundled network elements: ". . . in a manner that allows requesting carriers to combine such elements in order to provide telecommunications service."

Therefore, my reading of Section 251(c) (3) leads me to believe that: 1) the incumbent has to provide unbundled network elements; 2) it has to do it in a way that lets the competitors combine them so they can provide telecommunications service; and 3) it is the competitors that will be doing the combining.

My reading of the Eighth Circuit decision leads me to a very different conclusion than that drawn by the majority. Earlier this year, the Eighth Circuit in ***Iowa Utilities Board v. FCC***, 120 F.3d 753 (July 18, 1997 and amended October 14, 1997) vacated FCC rule, 47 C.F.R. Section 51.315. As the majority stated, the Court ruling vacated the FCC rule which required that the incumbent local exchange carrier (ILEC) to combine network elements. However, what is not noted, is why the Court vacated the rule. The reason the Court vacated 47 C.F.R. Section 51.315 is the exact reason I must dissent from the majority's finding that the contract provisions are legal.

In vacating the FCC rule, the Court stated that the rule was contrary to the language of Section 251 (c) (3). In explaining its perception of this section, the Court stated:

> Section 251 (c) (3) requires an incumbent LEC to provide access to the elements of its network **only** on a unbundled (as opposed) to a combined basis. Stated another way, Section 251(c) (3) **does not permit** a new entrant to purchase the incumbent LEC's assembled platform(s) of combined network elements (or any lesser existing combination of two or more elements) in order to offer competitive telecommunications services. (Emphasis Added) 120 F.3d 753, 813 (as amended on October 14, 1997)

This view of Section 251 (c) (3) is why the Court said that "[d]espite the Commission's arguments, the plain meaning of the Act indicates the requesting carriers will combine the unbundled elements **themselves**. . ." Ibid; Emphasis Added.

The Court interpreted Section 251 (c) (3) to require competitive local exchange carriers (CLECs) to do the combining themselves. The Court interpreted the section to only allow purchases of an incumbent's network elements on an unbundled basis. It went so far as to state that:

> To permit acquisition of already combined elements at cost based rates for unbundled access would obliterate the careful distinctions Congress has drawn in subsections 251 (c) (3) and (4) between access to unbundled network elements on the one hand and the purchase at wholesale rates of an incumbent's telecommunications retail services for resale on the other. Ibid.

The Court then stated:

> Accordingly, the Commission's rule, 47 C.F.R. Section 51.315 (b) is contrary to Section 251 (c) (3) **because the rule would permit the new entrant access to the incumbent LEC'S network elements on a bundled rather than unbundled basis.** Ibid; Emphasis Added.

Clearly, the Court did not believe that an ILEC could offer combined network elements. Therefore, it concluded and ruled that a ILEC could not be "forced" to do

something that was impermissible for it to do in the first place. Stated another way, an ILEC cannot be forced to combine its network elements *because* a CLEC is supposed to do that itself. An ILEC cannot even agree to, or in this case be forced to, do the combining because network elements must be sold on an unbundled basis and a CLEC is supposed to do the combining itself.

Even if the Court is reversed and told it is mistaken that network elements must be sold on an unbundled basis and that CLECs must do the combining thereby making it impermissible for an ILEC to even agree to do the combining, my understanding of the facts is that there has been no such agreement.

In its response to the recommendations of the Special Master filed on November 26, 1997, SWBT outlined the facts that caused it to submit to the terms we gave them. We mandated certain provisions when we directed SWBT to submit an agreement that kept within the language of our Orders dated December 11, 1996, July 31, 1997 and October 2, 1997. Moreover, the "agreements" were made under the shadow of a FCC rule that has now been vacated. Any agreement that SWBT made to combine elements for AT&T was not a voluntary agreement but "voluntary" compliance to our directives and FCC rules. Therefore, I must disagree from the majority's position that SWBT "agreed" to these provisions. Ultimately, whether SWBT agreed to do the combining or was forced to, those provisions should be voided and the majority should have rejected AT&T's proposed language for Issues 3, 4, 7, 10, 14b and 16.

Our implementation of unbundling network elements also concerns me because of our pricing strategy. Our current process of pricing network elements is one in which we may leave the incumbent without significant revenues to properly maintain the network. Historically, bundling has allowed LECs to spread costs associated with network elements over all the elements, thereby allowing some elements to be overpriced and others to be underpriced. For example, even given the deep discounts on business circuits, our process did not take into consideration that the prices on such circuits were super-inflated over costs to begin with. They were super-inflated with regulatory approval. The wide regulatory margins that our process seemed so intent on removing were, in fact, the incumbent's source of revenue to maintain the network. These margins were permitted by regulators in pursuit of social policies. Without a sufficient level of revenue, the network suffers. The decline of the network does not just mean losses for the incumbent, but also for the competitors who depend on the local network to terminate their traffic.

A declining network means unreliable service which can create heavy losses to businesses, individuals and ultimately a lowering of the standard of living we hoped would belong to all Missourians. I believe that competitors would be given the help they really need if we, as regulators, simply give them deeper discounts on high margin elements while allowing smaller or no discounts on products that are priced below costs.

I am disconcerted that despite all of the information the incumbent provided on its costs, we arrived at rates that will likely not allow SWBT to maintain its network.

I recall the affidavit of SWBT employee, William Bailey, expressing the incumbent's concerns. Mr. Bailey stated as follows:

> The proposed rates do not cover SWBT's embedded costs which reflect the actual cost of operating the network as it exists today. Nor do the rates cover SWBT's forward-looking TELRIC costs which themselves do not permit recovery of SWBT's actual or embedded costs. A company which cannot cover its costs of doing business, either actual or forward-looking, does not have the incentive to continue to maintain a modern and high quality network.

Like Mr. Bailey, I am concerned that the Commission's adopted rates will have a significant and negative effect on the incentive and ability of SWBT to continue to invest in its network in Missouri. I share his concern that a failure to use actual costs could force SWBT to not recover millions of dollars every year. SWBT's documentation showed these unrecovered costs could be as high as 335 million dollars a year. While I believe that this dollar figure is exaggerated and while I do not want my comments construed as an endorsement for this amount, the point that SWBT was trying to make when it offered this figure is quite valid.

Such a shortfall is not a "Bell" issue. It is an issue of securing the communications network of this state and ensuring the continued welfare of its citizens who depend on that network. To put SWBT in a position to lose the millions of dollars that it needs to maintain its network is to "take" its network. Such a taking is not a promotion of the kind of competition envisioned by the Act but instead risks of the most ruinous kind of competition.

It could be ruinous to an incumbent who cannot provide reliable service to its customers.

It could be ruinous to competitors dependent on the incumbent's network for the termination of their traffic. Interruptions in service could be devastating to new entrants whose customers will probably be the least tolerant of disruptions in service. It could be ruinous for businesses whose lifeblood is their ability to communicate with customers, vendors, banks, and creditors. The effect on these businesses should be considered because they are customers themselves and provide jobs and tax revenues that are used to serve all Missourians. It could be ruinous to this state's efforts to attract investments, businesses and people who have the skills that will help our economy grow. In this increasingly technological age, few will come to a state with a communications network that is inadequately maintained and is undependable. Finally, it could be ruinous on a very personal and private level for those individuals trying to make a living and trying to keep in touch with loved ones if they are connected to a network that is poorly maintained and experiencing disinvestnment.

My concerns should not be regarded as exaggerated to make a point. But they should be carefully considered as coming from someone, who like my esteemed colleagues, is looking to the future and from someone who strongly believes that the underpinning of that future is a properly maintained, modern and reliable network.

We as Commissioners would have been greatly aided in these very complicated

matters if we had been able to give ourselves more time to think and had been willing to give the parties more time to speak. Staff and the Commissioners labored under unreasonably short time frames. While I acknowledge such time limits were externally imposed by the FCC, I suspect that such time limitations often left us without time to engage in the level of review and reflection we thought was required. But we did not help ourselves as we could have. Unbundled network element pricing is extremely complex requiring extensive technical knowledge and economic insight. The Commission could have been aided in this area by allowing the parties to present their cases in the context of evidentiary hearings. The parties did request such an opportunity and rightfully expressed disappointment when their requests were denied. The benefit of evidentiary hearings would have been enjoyed by everyone. Certainly such hearings would have supplemented the Staff's and the Commissioners' knowledge about network elements and in turn increased our ability to make reasoned decisions based on technical insight and economic foresight. Again, I want to go on the record to urge my esteemed colleagues to review their interpretation of the applicable arbitration statutes. Given the stakes, I believe it is in the public interest to provide the parties with opportunities to speak that are as full and extensive as possible.

I believe our worst mistake, in this very high stakes endeavor, was to engage in pricing and unbundling strategies that do not reflect preservation of the network as a priority. Without such a priority, it will become increasingly difficult to implement the letter and the spirit of the Telecommunications Act of 1996. In the long run, we may find that as

regulators we have failed in our duty to protect the public interest because we have failed to protect the public network. It is this concern of mine that forces me to dissent from the majority. It is my hope that future proceedings will incorporate the concerns I have expressed herein so that we can truly fulfill our mission to provide competition in the telecommunications industry and provide Missourians the full benefits of such competition.

Respectfully,

Harold Crumpton, Commissioner

Dated at Jefferson City, Missouri
on this 6th day of January, 1998.

STATE OF MISSOURI
OFFICE OF THE PUBLIC SERVICE COMMISSION

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

WITNESS my hand and seal of the Public Service Commission, at Jefferson City, Missouri, this 8th day of January, 1998.

Dale Hardy Roberts

Dale Hardy Roberts
Secretary/Chief Regulatory Law Judge