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September 21, 2001

Dale Hardy Roberts
Secretary/Chief Regulatory Law Judge
Missouri Public Service Commission
200 Madison Street, Suite 100
P.O. Box 360
Jefferson City, Missouri 65102

RE: *Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance*; Case No. TA-99-47

Dear Mr. Roberts:

Enclosed for filing in the above-referenced matter are the original and eight (8) copies of Southwestern Bell Long Distance's Reply to the Responses of Staff Recommendation Filed By AT&T Communications of the Southwest, Inc., MCI WorldCom Communications, Inc., and Missouri Independent Telephone Group. A copy of the foregoing Reply has been hand-delivered or mailed this date to each party of record.

Thank you for your attention to this matter.

Sincerely,

James M. Fischer

James M. Fischer

/jr
Enclosures

cc: Office of the Public Counsel
Craig Johnson
Carl J. Lumley/Leland B. Curtis
Paul S. DeFord
Stephen F. Morris
Marc Poston
Mary Ann (Garr) Young/William Steinmeier
Dan Joyce, General Counsel
Kenneth A. Schifman
W.R. England, III/Sondra Morgan
Richard S. Brownlee
Mark W. Comley
Kevin Zarling

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

FILED[2]
SEP 2 1 2001
Missouri Public Service Commission

In the matter of the application of Southwestern Bell Communications Services, Inc., d/b/a Southwestern Bell Long Distance for a Certificate of Service Authority to provide Interexchange Telecommunications Services within the State of Missouri	))))))	Case No. TA-99-47

SOUTHWESTERN BELL LONG DISTANCE'S REPLY TO THE RESPONSES TO STAFF RECOMMENDATION FILED BY AT&T COMMUNICATIONS OF THE SOUTHWEST, INC., MCI WORLDCOM COMMUNICATIONS, INC., AND MISSOURI INDEPENDENT TELEPHONE GROUP

COMES NOW Southwestern Bell Communications Services, Inc., d/b/a Southwestern Bell Long Distance ("SWBLD"), by and through its attorneys, and, pursuant to 4 CSR 240-2.080(16), files its Reply to the Responses to Staff Recommendation filed in this matter on behalf of AT&T Communications of the Southwest, Inc. ("AT&T"), MCI WorldCom Communications, Inc. ("WorldCom"), and Missouri Independent Telephone Group ("MITG"). For its Reply, SWBLD respectfully states:

1. On September 7, 2001, the Staff filed its Staff Recommendation in this proceeding. On September 10, 2001, SWBLD filed its Response to Staff Recommendation, and SWBLD hereby re-alleges and incorporates by reference said Response. Also on September 10, 2001, the Commission issued its Order Shortening Response Time, wherein it ordered that responses to Staff's Recommendation shall be filed no later than 4:00 p.m. on September 12, 2001. Additional Responses to Staff Recommendation were filed by AT&T, WorldCom, and MITG.

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Reply To AT&T

2. In its Response, AT&T argued that SBCLD should be classified as "non-competitive." (AT&T Response at 1.) This recommendation should be summarily rejected since the Commission has previously found on more than 600 occasions that the interexchange market is competitive[1] and that interexchange carriers, including AT&T,[2] should be classified as competitive carriers, pursuant to Chapter 392.

3. The adoption of AT&T's recommendation that SWBLD should be classified as "non-competitive" would be totally unprecedented, and would constitute poor public policy. As previously mentioned, the Commission has already determined that the intrastate interexchange market is competitive, and that more than 600 interexchange carriers in Missouri are subject to sufficient competition to justify a lesser degree of regulation and that such regulation is consistent with the protection and promotion of the public interest. **In fact, all interexchange carriers in Missouri, including interexchange affiliates of local exchange carriers[3], have**

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[1]The Missouri Public Service Commission 2000 Annual Report reflects 608 Interexchange Companies among the Certificated Telecommunications Providers. 2000 Annual Report, p. 19. In addition, the Commission's standard order approving interexchange certificates of service authority and order approving tariffs has routinely included a finding that the interexchange carrier should be classified as a competitive carrier.

[2]In *Office of the Public Counsel vs. AT&T Communications of the Southwest, Inc.*, Case No. TC-94-86, 2 MoPSC 3d 384 (October 8, 1993), AT&T and its services were classified as competitive.

[3]*See e.g.*, Order Approving Interexchange Certificates of Service Authority And Order Approving Tariffs or similar orders in Re Sprint Communications Company, L.P., Case No. TA-87-45 (March 3, 1987); Re GTE Long Distance (formerly GTE Card Services), Case No. TA-95-83 (August 8, 1995); Re Alma Long Distance, LLC, Case No. TA-2000-240 (October 5, 1999); Re Bell Atlantic Communications d/b/a Verizon Long Distance, Case No. TA-97-208 (February 12, 1997); Re Chariton Valley L.D. Corp., Case No. TA-96-314 (May 28, 1996); Re Citizens Long Distance Company, Case No. TA-2000-178 (October 4, 1999); Re FDF Communications d/b/a BPS Long Distance, Case No. TA-2000-95 (September 15, 1999); Re Fiber Four Corporation, Case No. TA-96-376 (June 14, 1996); Re Fidelity Long Distance, Case No. TA-99-468 (July 2, 1999); Re First Fiber Corp. d/b/a IAMO Long Distance, Case No. TA-2000-765 (June 29, 2000); Re Grand River Communications, Inc., Case Nos. TA-2000-33 and TA-2000-35 (September 13, 1999); Re Green Hills Communications, Inc., Case No. TA-98-157 (September 12, 1998); Re Holway Long Distance Company, Case No. TA-2000-786 (May 26, 2000); Re Kingdom Telephone Company d/b/a

been granted competitive status and granted approval of standard waivers being sought by SWBLD in this proceeding.[4] For years, the Commission has routinely granted competitive status to interexchange carriers and their services, and waived the standard statutory provisions and regulations, with the following "boilerplate" language:

> The Commission finds that competition in the intrastate interexchange and nonswitched local exchange telecommunications markets is in the public interest and [company] should be granted certificates of service authority. The Commission finds that the services [company] proposes to offer are competitive and [company] should be classified as a competitive company. The Commission finds that waiving the statutes and Commission rules set out in the ordered paragraph below is reasonable and not detrimental to the public interest.

See e.g., Order Approving Interexchange Certificate of Service Authority and Order Approving Tariffs, Re One Call Communications, Inc. d/ba AdvenTel, Case No. TA-2002-53 (August 29, 2001). There is no reason for the Commission to reach any different conclusions for SWBLD in this proceeding.

Kingdom Long Distance, Case No. TA-2000-144 (September 27, 1999); Re KLM Long Distance Company, Case No. TA-2000-144 (July 10, 2000); Re LEC Long Distance, Inc. d/b/a Casstel Long Distance, Case No. TA-99-182 (December 17, 1998); Re Cell Five Corp.(subsequently Mark Twain Long Distance, Inc.), Case No. TA-95-328 (June 16, 1999); Re McDonald County Long Distance, Case No. TA-2000-135 (September 28, 1999); Re Missouri Network Alliance, LLC, Case No. TA-2001-348 (January 19, 2001); Re MoKan Communications, Inc., Case No. TA-2001-125 (October 15, 2000); Re Northeast Missouri Long Distance, LLC, Case No. TA-2000-242 (October 5, 1999); Re NYNEX Long Distance Company d/b/ Verizon Enterprises Solutions, Case No. TA-97-127 (November 6, 1996); Re Rock Port Long Distance, Case No. TA-2000-663 (April 18, 2000); Re Steelville Long Distance, Inc., Case No. TA-2000-194 (September 20, 1999).

[4]The toll services of Southwestern Bell Telephone Company (an incumbent local exchange telecommunications company) were classified as transitionally competitive in 1992. *Re Southwestern Bell Telephone Company's application for classification of certain services as transitionally competitive*, Case No. TO-93-116, 1 Mo.PSC 3d 479 (December 21, 1992). Following a three-year extension, Message Toll Service (MTS) has been classified as "competitive" since January 10, 1999. (See Testimony of Staff witness William L. Voight, p. 65, Case No. TO-2001-467) where he stated: "Her testimony [SWBT witness Barbara Jablonski] correctly establishes the transitionally competitive status afforded MTS as a result of Case No. TO-93-116, and the fact that MTS automatically became classified as competitive on January 10, 1999.")

4. SWBLD will enter this competitive marketplace with a 0% market share. It is difficult to understand how SWBLD, a new entrant to this interexchange market, could be considered "non-competitive" when it has no existing customers in Missouri. Apparently, AT&T believes that SWBLD's affiliation with Southwestern Bell Telephone Company (SWBT) alone makes it "not similarly situated to other IXCs." (AT&T Response, p. 1) However, this claim must be rejected. In its "Order Regarding Recommendation on 271 Application Pursuant to the Telecommunications Act of 1996 and Approving the Missouri Interconnection Agreement (M2A)", page 90-91 in Re Southwestern Bell Telephone Company to Provide Notice of Intent to File an Application for Authorization to Provide In-region InterLATA Services Originating in Missouri Pursuant to Section 271 of the Telecommunications Act of 1996, Case No. TO-99-227 (March 15, 2001)("271 Order"), the Commission has already found that SWBT has complied with the requirements of Section 272 of the federal Telecommunications Act of 1996. With the Section 272 safeguards in place, there is absolutely no basis for singling out this applicant for disparate regulatory treatment.[5] **To find that SBWLD's affiliation with SWBT alone**

[5]Indeed, in the Federal Communications Commission's ("FCC") recent Report and Order issued in CC Docket Nos. 96-61; 98-183, adopted March 22, 2001, the FCC reaffirmed its position that BOCs' section 272 affiliates (such as Southwestern Bell Long Distance) should be regulated as nondominant IXCs and afforded the same rights and regulations as those applied to other IXCs.

> We adopt our tentative conclusion that to the extent the BOCs' section 272 affiliates, as well as independent incumbent LECs' affiliates, are classified as nondominant in the provision of interstate, domestic, interexchange services, these carriers may bundle CPE with such services to the same extent as other nondominant carriers. As we explained in the Further Notice, the Commission has concluded that the requirements established by, and the rules implemented pursuant to, sections 271 and 272 of the Act, together with other Commission rules, limit sufficiently the ability of a BOC's section 272 affiliate to use the BOC's market power in the local exchange or exchange access market to raise and sustain prices of interstate, interLATA services above competitive levels. It has therefore determined that a BOC entering the in-region interLATA market

disqualified it from classification as a "competitive" carrier, would effectively negate and reverse legislative determinations by Congress that fulfilling the statutory requirements of Section 272 by RBOC affiliates was sufficient to protect the public interest and prevent anti-competitive abuses. As stated in previous pleadings filed in this matter, SWBLD seeks nothing more, and certainly nothing less, than the same, lawful treatment afforded the other hundreds of IXCs certified by this Commission to provide service in Missouri. Moreover, the Commission has determined on more than 20 occasions that the interexchange carrier affiliate of an incumbent local exchange telephone company should be classified as competitive, and there is no legal or sound public policy basis on which to impose a different regulatory regime on SWBLD.[6]

5. As explained below, the shackling of SWBLD with non-competitive status and the denial of the standard waivers would truly be the death knell for SWBLD's ability to provide services and effectively compete in the Missouri interexchange marketplace. No wonder AT&T would quickly embrace this classification recommendation. (AT&T Response, p. 1)

6. If the Commission adopted AT&T's recommendation that SWBLD be classified as "non-competitive," then SWBLD would be singled out and regulated substantially differently than all of its other 600 competitors in the interexchange market. Perhaps the most egregious

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> through a section 272 affiliate will be regulated as a nondominant interexchange carrier. BOCs providing out-of-region interstate, domestic, interexchange service are also nondominant. We agree with BellSouth that these findings demonstrate that, once a BOC has satisfied the requirements of sections 271 and 272 of the Act, its long distance affiliate has the same market characteristics as any other nondominant interexchange carrier and that there is no basis for denying them the same bundling relief that we grant to those other carriers. (Emphasis added).

CC Docket Nos. 96-91; 98-183, Par. 30, March 22, 2001.

[6]*See footnote 3, supra.*

difference would relate to the establishing of its rates. **As a "non-competitive" carrier, SWBLD would be the only interexchange telecommunications company in the state operating as a rate-base, rate-of-return regulated company, subject to a 30-day notice period, and the file and suspend method for any tariff changes, which could delay approval of tariff changes for up to eleven (11) months. In effect, SWBLD would be subjected to traditional rate cases that could last up to eleven (11) months.** ***See*** **Section 392.230(3), RSMo. 2000.** On the other hand, competitive interexchange carriers may increase rates upon ten (10) days notice, and reduce rates upon seven (7) days notice. *See* Section 392.500. In addition, SWBLD would be the only interexchange telecommunications company in the state which would be required to support its proposed rate changes by cost of service studies. *See* Section 392.370(4). By contrast, all other competitive interexchange carriers may change their rates without the submission of cost of service studies. *See* Section 392.500.

7. If the Commission adopted AT&T's recommendation that SWBLD be classified as a "non-competitive" carrier, then SWBLD would be the only interexchange telecommunication company in the state subject to the following rules and statutory provisions:

Statutes

392.210.2 - uniform system of accounts
392.240.1 - rates-rentals-service & physical connections
392.270 - valuation of property (ratemaking)
392.280 - depreciation accounts
392.290 - issuance of securities
392.300.2 - acquisition of stock
392.310 - stock and debt issuance
392.320 - stock dividend payment

392.330 - issuance of securities, debts and notes

392.340 - reorganization(s)

Commission Rules

4 CSR 240-10.020 - depreciation fund income

4 CSR 240-30.010(2)(C) - posting of tariffs

4 CSR 240-30.040 - uniform system of accounts

4 CSR 240-33.030 - minimum charges

4 CSR 240-35 - reporting of bypass and customer-specific arrangements

These above-referenced provisions would require, among other things, that SWBLD utilize the Uniform System of Accounts, obtain approval from the Commission for its various financings and depreciation rates, as well as comply with the minimum charge rule and reporting of bypass and customer-specific arrangements, when no other interexchange carrier in the state is being required to follow these provisions. It would be unlawful, discriminatory and a violation of equal protection principles for the Commission to apply these statutory and regulatory provisions to SWBLD when the Commission has routinely waived these provisions for other similarly situated interexchange carriers in Missouri.

8. In *Re AT&T Communications of the Southwest, Inc.'s Proposed Tariff to Establish a Monthly Instate Connection Fee and Surcharge*, Case No. TT-2002-129, AT&T recently argued:

> As stated previously, AT&T is a competitive telecommunications company. Any customer that wishes, can freely select any other long distance company. As the statutes and a competitive market dictate, it is the customer that determines whether AT&T charges are reasonable. OPC's own Motion acknowledges this by stating, "[T]he competitive marketplace determines to what extent the carrier will seek to recover all or any part of those costs in its rates." In contrast to its own

statements, OPC seeks to stand competitive classification on its head and impose rate regulation on competitive services offered by competitive carriers.[7]

In the Staff's Response[8] in the same proceeding, the Staff also described the statutory and regulatory framework for the competitive long distance market in Missouri as follows:

> 4. The Commission does not typically scrutinize the rate structure of competitive long distance providers beyond compliance with a few limited rate requirements identified in Missouri statutes. Statutes permit such a distinction in the treatment of competitive and strictly regulated entities. Section 392.185.5 "permit[s] flexible regulation of competitive telecommunications companies and competitive telecommunications services," and Section 392.185.6 "allow[s] full and fair competition to function as a substitute for regulation when consistent with the protection of ratepayers and otherwise consistent with the public interest[.]"
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> * * *
>
> 5. Customers have the ability to switch service providers. Over 600 long distance companies currently hold Commission certificates to provide service in Missouri, so customers can always change to one that does not apply this surcharge. For example, a minimum of 74 carriers serve with 1+ service in each Southwestern Bell Telephone Company exchange in Missouri. In short, if customers feel they are being "penalized" by remaining with AT&T for their service, they can choose to switch carriers. (*footnote omitted*)

9. SWBLD respectfully submits that imposing "non-competitive" status and the statutory and regulatory measures delineated in paragraph 7 above on an interexchange carrier indeed "stand[s] competitive classification on its head and impose[s] rate regulation on competitive services offered by competitive carriers." As discussed in previous pleadings, historically, the "non-competitive" classification has been reserved for incumbent local exchange carriers that provide basic local exchange services. To our knowledge, **no interexchange carrier in Missouri has ever been classified as "non-competitive" in a certificate**

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[7]Response Of AT&T Communications Of The Southwest, Inc. In Opposition To The Office Of Public Counsel's Motion To Suspend Tariff And For Evidentiary And Public Hearings, Case No. TT-2002-129 (filed September 7, 2001), p. 4.

[8]Staff's Response To Office Of The Public Counsel's Motion To Suspend Tariff And For Evidentiary And Public Hearings, Case No. TT-2002-129 (filed September 7, 2001), p. 2.

proceeding. It would be an abuse of discretion for the Commission to treat the Applicant in this proceeding as "non-competitive," when the Commission itself has found on hundreds of occasions that other similarly situated telecommunications companies should be classified as "competitive" carriers, pursuant to Section 392.361.[9] Furthermore, if market conditions change in the future, the Commission has the statutory authority to re-examine this issue. Section 392.361(7), RSMo. 2000, provides as follows:

> If necessary to protect the public interest, the commission may at any time, by order, after hearing upon its own motion or petition filed by the public counsel, a telecommunications company, or any person or persons authorized to file a complaint as to the reasonableness of any rates or charges under section 386.390, RSMo, reimpose or modify the statutory provisions suspended under subsection 5 of this section upon finding that the company or service is no longer competitive or transitionally competitive or that the lesser regulation previously authorized is no longer in the public interest or no longer consistent with the provisions and purposes of this chapter.

10. AT&T also indicates that it "does not agree the proposed tariff should be approved." (AT&T Response, p. 1) Apparently, AT&T believes SWBLD's rates should be higher than proposed, and that somehow SWBLD's rates "are predatory." (*Id.*) However, as AT&T must be aware, the Commission has already reviewed this argument in Case No. TO-99-227 and found:

> SWBT has no ability to impede long-distance competition by entering the interLATA market in Missouri. As the FCC has found, today's accounting safeguards and price regulation make misallocation of interLATA costs to local services hard to accomplish and relatively easy to detect. And any attempt to subsidize interLATA rates or to discriminate against competing long-distance carriers would be met with swift and stern action by the FCC.

[9]In the event that the Commission did not grant competitive status to SWBLD at this time, competitors may suggest that a two-year time period must elapse before SWBLD could apply for competitive status again. See Section 392.361(8).

> SWBT's entry into the interLATA market is likely to spur competition in the local exchange market as well. Once SWBT is able to offer bundled packages of local and long-distance service, all potential entrants will have to compete even more intensely for local business in Missouri. The FCC has acknowledged that the fear of losing long-distance profits to the BOC once it is able to be a one-stop provider "would surely give long distance carriers an added incentive to enter the local market."[10]

11. Make no mistake about it, under the banner of a bare allegation of predatory pricing, AT&T's interests in this proceeding are two-fold: (1) take whatever steps possible to continue the delay of SWBLD's entry into the Missouri interexchange marketplace[11]; and (2) utilize yet another forum as a collateral attack on the level of access charges in Missouri. As quoted in SWBLD's previous Response to Staff Recommendation, this Commission's comments in its Written Consultation of the Missouri Public Service Commission in FCC Docket No. CC-01-194, clearly reveal an understanding of the public interest and consumer benefits of SWBLD's favorable pricing rates. To the extent that any competitor wishes to allege anti-competitive activity, the Missouri statutes explicitly provide that: "Nothing in this chapter shall in any way preempt, modify, exempt, abrogate or otherwise affect any right, cause of action, defense, liability, duty or obligation arising from any federal, state or local law governing unfair business practices, antitrust, restraint of trade or other anticompetitive activity." Section 392.400.6, RSMo 2000. Even AT&T seems to acknowledge, as Public Counsel has stated, that:

[10]271 Order, pp. 87-88.

[11]AT&T continues to clamor for additional hearing to supplement the voluminous record that this Commission has already heard regarding the entry of SWBT and its affiliates into the interLATA market. SWBLD would respectfully recommend that the Commission take administrative notice of its findings of fact and conclusions of law in its 271 Order when it issues its Order Approving Interexchange Certificate of Service Authority and Order Approving Tariffs in this proceeding.

"The competitive marketplace determines to what extent the carrier will seek to recover all or any part of those costs in its rates."[12]

12. AT&T's arguments regarding "predatory pricing" must fail for other reasons. First, as the U.S. Supreme Court has repeatedly instructed, predatory pricing can only harm competition and consumers when the alleged predator has "a dangerous probability of recouping its investment in below-cost prices." *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 224 (1993). As the Supreme Court has made clear:

> Recoupment is the ultimate object of an unlawful predatory pricing scheme; it is the means by which a predator profits from predation. Without it, predatory pricing produces lower aggregate prices in the market, and consumer welfare is enhanced.

Id.;see also *National Parcel Service v. J.B. Hunt Logistics*, 150 F.3d 970, 971 (8th Cir. 1998).[13] The Supreme Court has also explained that: "For recoupment to occur, below-cost pricing must be capable, as a threshold matter, of producing the intended effects on the firm's rivals, whether driving them from the market, or . . . causing them to raise their prices to supracompetitive levels within as disciplined oligopoly." *Id.* at 225.

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[12] See Response Of AT&T Communications Of The Southwest, Inc. In Opposition To The Office Of Public Counsel's Motion To Suspend Tariff And For Evidentiary And Public Hearings, Case No. TT-2002-129 (filed September 7, 2001), p. 4.

[13] Missouri looks to federal law for guidance in interpreting Missouri antitrust law as directed by § 416.141 of the Revised Missouri Statutes. See, e.g., *North Kansas City Hospital Board of Trustees v. St. Lukes Northland Hospital*, 984 S.W.2d 113, 120 (Mo. Ct. App. 1998). This Commission should also look to federal law in interpreting the meaning of an alleged "predatory price." Virtually every other Commission to address such issues has looked to federal law for this purpose. See, e.g., *In re Exchanges of Ameritech Wisconsin*, Findings of Fact, Conclusions of Law, Interim Order and First Final Order, 67-TI-111, 1995 WL 481342, *8 (Wis. P.S.C., July 25, 1995); *In re MEBTEL, Inc.*, Order Authorizing Price Regulation, Docket No. P-35, 1999 WL 827719, at *13 (N.C.U.C., Sept. 10, 1999); *In re Application of Southern California Edison Co.*, Decision 97-11-075, 1997 WL 781766, at *7 (C.P.U.C. Nov. 19, 1997).

13. In its 1995 proceedings before the Federal Communication Commission ("FCC") seeking non-dominant status for itself despite its 60% market share, AT&T told the Commission that "predatory pricing" requires two elements: "price below costs in order to drive rival producers from the market" and "following such exit, the successful predator raises prices well above the competitive level in order ***to recoup*** the losses incurred during the period of predation."[14] Thus, there is no dispute here that recoupment is an essential element of predatory pricing.

14. AT&T also told the FCC that "there must be substantial barriers to entry to protect the predator from post-predation competition so that it can recoup its losses through future profits." *Id.* Thus, there is no dispute here that substantial barriers to entry are an essential element of predatory pricing.

15. Finally, AT&T told the FCC in unequivocal terms that:

> ***Clearly, neither of these conditions exists in the interexchange market. As a result, predatory pricing is extremely unlikely to occur in this industry.***
>
> To see how far-fetched the concern over predatory pricing really is, one has only to consider what would have to occur under the scenario envisioned. First, AT&T would have to run more than 450 other firms out of business by charging unjustifiable low rates while the FCC and antitrust authorities stood by without intervening. Moreover, all of the transmission and switching capacity owned by these other firms . . . would have to be purchased by AT&T to keep it out of the hands of new competitors. Then, AT&T would have to raise its rates above the competitive level to regain losses without attracting entry (or reentry), again while the FCC and antitrust authorities stood idly by. ***Obviously, this sequence of events is extremely improbable.***

Id. at 52-53. (emphasis added).

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14 Kasserman & Mayo, IS AT&T "DOMINANT"? AN ASSESSMENT OF THE EVIDENCE (filed with the FCC by AT&T June 15, 1995 in Docket 79-252) ("1995 AT&T Paper") at 52 (emphasis added)(Attachment No. 1).

16. Here, AT&T has not even alleged that either of these results are likely to occur. This is not a mere oversight on AT&T's part. AT&T has repeatedly represented to this Commission, to the Federal Communications Commission, and to the public at large, that: "Competition in the interexchange market is . . . 'thriving' and 'robust.'"[15] In 1995, AT&T told the FCC that the long distance business is now "one characterized by a multitude of aggressive, well-financed rivals creating a vigorously competitive marketplace and significant consumer benefits."[16] Indeed, as the quotation above shows, AT&T told the FCC that ***"predatory pricing is extremely unlikely to occur in this industry"*** – even by a firm like AT&T which had 60% of the long distance business in the entire U.S. at the time. Just a few weeks ago, AT&T again represented to the FCC and the public that: "The long distance market is hotly competitive and consumers know it . . . . If they don't one company's rates, they can easily switch companies or calling plans and they readily do so."[17]

17. As a result, AT&T has already conceded that the marketplace conditions make it extremely unlikely that SBCLD could ever recoup an investment in predatory prices and thereby injure Missouri consumers. In this circumstance, even below cost prices cannot injure competition or consumers because: if recoupment cannot occur, then "the consumer is an unambiguous beneficiary even if the current price is less than the cost of production."[18] This alone should end this matter.

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15 Motion for Reclassification of American Telephone & Telegraph Company As A Non-Dominant Carrier, FCC Dkt. 79-252 (Sept. 22, 1993)(Attachment No. 2).

16 Letter from R. Gerard Salemme, AT&T Vice President Government Affairs to Kathleen Wallman, Chief, FCC Common Carrier Bureau (April 24, 1995) at 1 (Attachment No. 3).

17 Communications Daily, July 19, 2001 at 6. (Attachment No. 4)

18 *A.A. Poultry Farms, Inc. v. Rose Acre Farms, Inc.*, 881 F.2d 1396, 1401 (7th Cir. 1989); see also *Caller-Times Publ'g Co. v. Triad Communications*, 826 S.W.2d 576, 582 (Tex. 1992) ("Consumers cannot lose if the market does not allow recoupment.").

18. AT&T does not allege that SBCLD is likely to dominate the long distance business in Missouri for other reasons as well. To begin with, SBCLD has not yet even entered the long distance business in Missouri. It has no Missouri long distance customers and it has a zero share of the Missouri long distance residential business. AT&T, by comparison, has been in the long distance business in Missouri for nearly a century. Even following the breakup of AT&T and the growth of competition in the long distance business, the FCC reports that as of the year 2000, AT&T has 46.5% of residential, direct dial long distance in Missouri.[19] Together with the other of the so-called Big Three (WorldCom and Sprint), they collectively have more than 70% of the Missouri residential long distance business. *Id.* It is extremely unlikely that a brand new entrant like SBCLD with no market share and no customers could drive the Big Three, with more than 70% share, out of Missouri and keep them out long enough to raise prices to consumers. This factor alone should also end this matter.[20]

19. In the usual predatory pricing case, the new entrant accuses the entrenched incumbent of predatory pricing to keep the new competitor out. [21] Here, the roles are reversed which makes AT&T's claims all the more implausible.[22]

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19 FCC, Common Carrier Bureau, Trends in Telephone Service (August 2001), Table 10.11.

20 "Without any share in the relevant market as described by plaintiffs, there can be no inference that defendants hold sufficient economic power in that market to create a dangerous probability of monopoly." *Pastore v. National Security Systems,* 24 F.3d 508, 513 (3d Cir. 1994).

21 See, e.g., *United States v. AMR Corp.*, 140 F. Supp.2d 1141 (D. Kansas April 27, 2001).

22 Such challenges by an established incumbent are even rarer than typical predatory pricing suits. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 589 (1986) ("there is a consensus among commentators that predatory pricing schemes are rarely tried, and even more rarely successful"). The courts have been especially skeptical of such claims brought by entrenched incumbents. See, e.g., *Pastore v. Bell Telephone Co. of Pennsylvania*, 24 F.3d 508, 513 (3d Cir. 1994) ("It is ironic that [plaintiffs] seek to protect their own monopoly power . . . by use of an antitrust suit."); *Buffalo Courier-Express, Inc. v. Buffalo Evening News*, 601 F.2d 48, 55 (2d Cir. 1979) ("Courts must be on guard against efforts of plaintiffs to use the antitrust laws to insulate themselves from the impact of competition.").

20. The Courts and state regulatory commissions have also considered the barriers to new entry in determining whether recoupment is likely. "If it is easy to enter the [market], [the alleged predator's] scheme is doomed to failure: any attempt to recoup by charging supracompetitive prices . . . simply will attract new (or old) [rivals] who will undercut the [firm] and force prices back down to competitive levels."[23] As the U.S. Supreme Court has explained, "where new entry is easy, . . . summary disposition of the case is appropriate."[24] AT&T has repeatedly represented to the FCC that "there are virtually no barriers to entry . . . into the interexchange market . . . ."[25] This factor alone should also end this matter. It is also worth recalling that the FCC declared AT&T to be non-dominant in the long distance business at a time when it had 60% of the long distance residential market precisely because the market was open and there were no substantial barriers to entry.

21. As the U.S. Supreme Court has explained it:

> These prerequisites to recovery are not easy to establish, but they are not artificial obstacles to recovery; rather, they are essential components of real market injury.

Brooke at 226. These ingredients are key to distinguishing between low prices that benefit and low prices that injure Missouri consumers. The reason is that:

> [T]he mechanism by which a firm engages in predatory pricing – lowering prices – is the same mechanism by which a firm stimulates competition; because "cutting prices in order to increase business often is the very essence of competition . . . [;] mistaken inferences . . . are especially costly, because they will chill the very conduct the antitrust laws are designed to protect."

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23 *Advo, Inc. v. Philadelphia Newspapers, Inc.*, 51 F.3d 1191, 1200 (3d Cir. 1995).

24 *Brooke Group LTD v. Brown & Willamson Tobacco Corp.*, 509 U.S. 209, 226 (1993).

25 AT&T's Reply *In Re Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorization Therefor*, CC Docket No. 79-252, at 23 (filed June 30, 1995).

Cargill, Inc. v. Monfort of Colorado, 479 U.S. 104, 121 n.17 (1986). As the court noted in dismissing the predatory pricing claim against American Airlines last April:

> Unless we have some powerful tools to separate predation from its cousin, hard competition, any legal inquiry is apt to lead to more harm than good. Given the general agreement that almost all price reductions . . . are beneficial, we need a very good ground indeed to treat a particular instance of such conduct as unlawful.

United States v. AMR Corp., 140 F. Supp.2d 1141 ¶ C.2 (D. Kansas April 27, 2001), quoting F. Easterbrook, *Predatory Strategies and Counterstrategies*, 48 U. Chi. L. Rev. 263, 266-67 (1981).

22. Given the wealth of precedent from this Commission's own decisions regarding the competitive nature of Missouri's interexchange marketplace, SWBLD respectfully requests that the Commission reject AT&T's recommendations on the classification issue, and instead grant SWBLD's request that it be classified as a "competitive" carrier providing "competitive" services. It is critically important that Missouri consumers receive the benefits that the Commission itself has recognized will accrue by allowing SWBLD to provide intrastate interexchange services in Missouri.

Reply to WorldCom

23. In its Response, WorldCom agrees that any certificate of service authority granted herein should be conditional upon obtaining FCC approval of SBC's Section 271 Application for the state of Missouri, and further notes that the proposed tariffs of SWBLD should not be allowed to take effect prematurely on September 15, 2001. (WorldCom Response, p. 1) SWBLD believes that WorldCom's recommendations are appropriate and should be adopted by the Commission.

24. On September 11, 2001, SWBLD filed its letter herein extending the effective date of its tariff from September 15, 2001, to October 20, 2001. Said letter also contained the

following acknowledgment: "As noted in our Application, the company will not provide interexchange telecommunications services within Missouri until the required authorizations are received from this Commission and the Federal Communications Commission." The subject tariff was filed pursuant to Commission Rule 4 CSR 240-2.060(6)(C), which provides that applications for a certificate of service authority to provide interexchange telecommunications service shall include a proposed tariff with an effective date which is not fewer than forty-five (45) days after the tariff's issue date. SWBLD consistently has represented to the Commission that it would extend the effective date of said tariff, as required, pursuant to 4 CSR 240-2.065(5) and, as reflected in the Staff Recommendation, has done so numerous times.[26]

The Commission should approve SWBLD's certificate of service authority and tariffs to be effective on the date that the FCC's approval of SWBT's Section 271 Application is effective. It is critical that SWBLD be granted a certificate of service authority and that its tariffs be approved so that SWBLD may provide service in Missouri as soon as permitted under federal law.

Reply To MITG

25. The MITG Response suggests that the "Staff's recommendation fails to address the issues raised by the MITG in its Application to Intervene and Motions to Suspend the tariffs in question." SWBLD respectfully would point out that the Staff previously addressed the purported issues MITG attempts to interject in this proceeding, in the Staff Filing In Response To Commission Order ("Staff Filing") filed in this matter on May 10, 2001. In its initial and supplemental motions, MITG asserted that it had an interest in assuring that SWBLD's traffic "is

[26]Response of Southwestern Bell Long Distance to Motion to Intervene and Suspend, March 26, 2001, p. 2; Staff Recommendation, September 7, 2001, p. 2.

originated, transported, and terminated on FGD [Feature Group D] facilities utilizing FGD protocols, record creation, record exchange and intercompany compensation business relationship structures, and it also raised the issue of geographic deaveraging.[27] The following three paragraphs of the Staff Filing succinctly address the concerns raised by MITG in this matter:

> 7. SBLD filed responses to MITG's motions to suspend on March 26, 2001 and May 7, 2001. In paragraph 2 of its first response to the motions to suspend, SBLD states that it will, at least initially, provide interexchange telecommunications services by resale of the services of an underlying carrier and that it "will utilize Feature Group D signaling of the underlying interexchange carrier whose services will be resold." The Commission could dispel any concerns MITG might have on this issue by directing SBLD to refrain from using Feature Group C absent subsequent Commission approval.
>
> 8. On May 7, 2001, SBLD submitted a substitute tariff sheet removing the following language which appears in Section 2.1.1, Original Sheet 35, "Unless otherwise indicated in this Tariff, Service is available on a statewide basis," and inserting in lieu thereof, "Unless otherwise indicated in this Tariff, Service is available where facilities permit throughout the geographic area served by Southwestern Bell Telephone Company." This change addresses and removes MITG's concern about geographic deaveraging.
>
> 9. The Staff, therefore, recommends that the Commission deny the Motion to Suspend. **The two concerns raised by MITG in its filings, that SBLD should not use Feature Group C and that SBLD should not geographic deaverage, are adequately addressed as indicated in paragraphs 7 and 8 above.** (Emphasis added). *Id*, p. 3.

26. SWBLD agrees with Staff that the two concerns raised by MITG have been fully addressed. First, SWBLD intends to provide interexchange telecommunications services by resale of the services of an underlying carrier and will utilize Feature Group D signaling of the

[27]Staff Filing In Response To Commission Order, May 10, 2001, p. 2. SWBLD also would note that the Small Telephone Company Group (STCG) raised similar Feature Group C/D concerns in its application for intervention in Case No. TA-2001-475 (*See*, Order Granting Interventions, Case No. TA-2001-475, September 13, 2001, pp. 2-3) and, for the first time, AT&T attempts to interject the issue in its September 12th Response (Par. 5). As with MITG, such concerns have been fully addressed herein, as set forth above, *infra*.

underlying interexchange carrier whose services will be resold. In addition, all SWBLD services will be available where facilities permit throughout the geographic area served by Southwestern Bell Telephone Company, thereby eliminating any concerns regarding geographic de-averaging. As a result, the MITG concerns have already been fully addressed.

WHEREFORE, having replied to the Responses to the Staff Recommendation filed in this matter by AT&T, MCI WorldCom, and MITG, Southwestern Bell Communications Services, Inc., d/b/a Southwestern Bell Long Distance respectfully renews its requests that the Missouri Public Service Commission grant it a Certificate of Service Authority to provide Interexchange Telecommunications within the state of Missouri, conditioned on federal authority to provide in-region interLATA services; approve its tariffs, rules and regulations; classify it as a competitive telecommunications company providing competitive services; and waive the rules and statutory provisions typically waived for other interexchange carriers, pursuant to Section 392.420. Should the Commission have further questions that would keep it from granting the competitive status as requested herein, SWBLD would respectfully request an On-the-Record Presentation to address such concerns.

Respectfully submitted,

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Attorneys for Southwestern Bell Communications Services, Inc., d/b/a Southwestern Bell Long Distance

CERTIFICATE OF SERVICE

I do hereby certify that a true and correct copy of the foregoing Response has been hand-delivered or mailed, First Class mail, postage prepaid, this 21st day of September, 2001, to:

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June 12, 1995

RECEIVED

JUN 12 1995

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, NW, Room 222
Washington, D. C. 20554

Re: Ex Parte
CC Docket 79-252

Dear Mr. Caton,

I am filing for inclusion in the record of this proceeding a paper prepared by Professors David Kasserman and John Mayo, which supports, from an economic perspective, the positions in AT&T's April 24, 1995 ex parte presentation. In particular, it demonstrates that the long distance market is fully competitive and that structural conditions in the market preclude any reasonable possibility that long distance providers could engage in tacit price collusion. In addition, I have attached a paper released June 9, 1995, by the Economics Strategy Institute that provides a framework and quantitative analysis of the competitiveness of the long distance market.

We have served all parties that filed Comments on June 9, with a copy of this ex parte material. Two copies of this Notice are being submitted to the Secretary of the FCC in accordance with Section 1.1206(a)(1) of the Commission's Rules. Thank you for your cooperation.

Sincerely,

Charles L. Ward

attachments

ATTACHMENT NO. 1

IS AT&T "DOMINANT"? AN ASSESSMENT OF THE EVIDENCE

by

David L. Kaserman and John W. Mayo*

June 1995

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* The views expressed in this paper represent those of the authors, who are solely responsible for any errors it may contain.

reclassifying it as nondominant. In so doing, more aggressive competition will be fostered, and the likelihood of tacit collusion will be reduced.

Predatory Pricing. Another concern that has been raised is the possibility of predatory pricing by AT&T. This concern vanishes completely as soon as one recognizes how predatory pricing must operate and the industry characteristics that must be in place for the strategy to succeed.[79] Predatory pricing involves a two-step process. First, a firm reduces its price below costs in order to drive rival producers from the market. Then, following such exit, the successful predator raises price well above the competitive level in order to recoup the losses incurred during the period of predation.

Thus, in order for predatory pricing to occur, existing rivals must have relatively low sunk costs so that their exit can be encouraged at reasonable expense. Also, there must be substantial barriers to entry to protect the predator from post-predation competition so that it can recoup its losses through future profits. Clearly, neither of these conditions exists in the interexchange market. As a result, predatory pricing is extremely unlikely to occur in this industry.

To see how far-fetched the concern over predatory pricing really is, one has only to consider what would have to occur under the scenario envisioned. First, AT&T would have to run more than 450 other firms out of business by charging unjustifiably low rates while the FCC and antitrust authorities stood by without intervening. Moreover, all of the transmission and switching capacity owned by these other firms (much of which represents sunk costs) would have to be purchased by AT&T in order to keep it out of the hands of new competitors. Then, AT&T

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[79] A more complete discussion of both the theory and empirical evidence relating to predatory pricing may be found in Kaserman and Mayo (1995), pp. 128-142.

would have to raise its rates above the competitive level to regain its losses without attracting entry (or reentry), again while the FCC and antitrust authorities stood idly by. Obviously, this sequence of events is extremely improbable.

The argument that predatory pricing might arise in a less regulated environment is also rebutted by observed behavior at the state level. If relaxed regulation leads to predation then those states that have implemented such a policy should have realized a reduction in the number of interexchange carriers as AT&T lowers rates to predatory levels.[80] A recent empirical analysis of the impact of relaxed regulation on the number of long-distance firms competing within each state, however, reveals no significant effect.[81] That is, reduced and/or symmetric regulation of this firm has not resulted in significant exit by rival producers. Consequently, it has not led to predation. The authors of this study conclude:

> In this paper, we have attempted to buttress the theoretical argument against the predatory pricing hypothesis with empirical evidence. Our findings yield no support for the argument that reduced regulation has resulted in predation. In conjunction with the prior empirical literature relating to this market, the evidence strongly suggests that: (1) long-distance prices have fallen with divestiture and increased competition; (2) these prices have fallen more where regulatory constraints on AT&T have been relaxed; and (3) the price reductions observed have had no predatory effects. [Kahai, Kaserman, and Mayo, 1995 (b)].

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[80] Under current antitrust standards, a claim of predatory pricing must pass what has come to be known as an incentive logic filter if it is to withstand a motion for summary judgment. Where a prolonged period of alleged predation has not resulted in substantial exit, the allegation fails to pass this filter, because the alleged behavior simply does not make sense economically under these circumstances. See Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574 (1986). A summary of the economics of this case is presented in Kenneth G. Elzinga, "Collusive Predation: Matsushita v. Zenith," in The Antitrust Revolution, John E. Kwoka and Lawrence J. White, eds., Scott, Foresman, Glenview, IL, 1989.

[81] See Kahai, Kaserman, and Mayo (1995 (b)).

Thus, predatory pricing by AT&T has not occurred and, under any plausible examination of evolving industry conditions, will not occur under relaxed and symmetric regulation.

Low Volume/Rural Customers. A common concern among regulators considering reduced regulation for AT&T has been that, with increased pricing flexibility, AT&T may be able to raise its rates to certain customer groups above competitive levels without experiencing a sufficient decline in sales to render such rate increases unprofitable.[82] That is, while the overall interexchange market may be subject to effective competition, there could remain pockets of customer groups that are susceptible to abuse. If so, relaxed regulation might lead to lower rates for some groups and higher (than competitive) rates for others. In particular low volume residential customers and rural customers have been perceived to be at risk. These concerns, however, are unfounded.

First, the fundamental premise of the argument is inaccurate. In order for specific customer groups to be subject to abuse, they must first be confronted with monopoly or near-monopoly supply. That is, these groups must have a limited number of long-distance firms from which they can buy, or they must be unwilling to switch suppliers in response to a significant price increase. Neither of these conditions exists in the long-distance market. The empirical evidence pertaining to this industry reveals that: (1) substantial competitive choices are available to all customer

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[82] Regulators should not be concerned about AT&T raising its rates to competitive levels under a more relaxed regulatory environment. Moving prices toward marginal cost is generally welfare-improving regardless of whether that movement is upward or downward from the existing level.

groups, regardless of their geographic location or volume of usage;[83] and (2) a disaggregated breakdown of industry churn numbers reveals that low volume users do, in fact, frequently switch carriers, and these users are spread across all demographic groups.[84] Thus, the view that low volume or rural customers face a limited choice of carriers, that they will not change carriers, or that they fit some specific demographic group, is simply a myth. These customers do have choices, they do exercise those choices, and they span all demographic groups. Therefore, they do not need special regulatory protection.

Second, from an economic perspective, concerns about adverse pricing to specific customer groups ultimately involve concerns about price discrimination. Price discrimination occurs where different prices are charged to different groups of customers, with the price differences not based upon differences in the costs of serving those groups. For price discrimination to occur, two necessary conditions must exist: (1) the firm practicing price discrimination must hold some degree of market power; and (2) arbitrage across customer groups must be prevented.[85] In the long-distance market, neither condition is met. All customer groups face effective competition and are, therefore, not susceptible to discriminatory prices. And arbitrage opportunities exist

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[83] Moreover, note that the demographic characteristics of low volume long distance customers is very similar to the demographic profile of other long distance consumers. Thus, there is no sound basis for using volume-sensitive regulation to attempt to promote income redistribution goals. See Attachment O to the "Ex Parte Presentation in Support of AT&T's Motion for Reclassification as a Nondominant Carrier," CC Docket No. 79-252, April 24, 1995.

[84] See AT&T March 8, 1995, ex parte presentation to the FCC in CC Docket 79-252, two charts labeled "The Consumer Profile of Light Users is Comparable to Heavy Users."

[85] See Hal R. Varian, "Price Discrimination," Chapter 10 in the Handbook of Industrial Organization, R. Schmalensee and R. D. Willig, eds., North-Holland, 1989, p. 599.

through the ability to resell. As a result, any attempt to raise rates to low volume or rural customers by an amount that is not justified by underlying differences in the costs of serving these customers will be defeated by the supply response of competitors and/or arbitrage by resellers. Therefore, market conditions will not tolerate the sort of behavior that would subject these groups to abuse.

Third, all of the empirical studies surveyed above [Mathios and Rogers (1989), Kaestner and Kahn (1990), Ward (1993), and Kahai, Kaserman, and Mayo (1995)] have used the basic schedule tariff rates as their price variables in the empirical analyses. These are the maximum rates that low volume and residential customers pay when they place a long-distance call. Customers enrolled in a discount program pay a lower rate. As a result, these studies' findings that reduced regulation leads to significant price reductions and that AT&T does not hold significant market power are not limited to large volume or urban customers. These findings apply to all customers, including those paying the full tariffed (non-discounted) rates.

Finally, identical concerns about these same customer groups have been voiced previously at the state level as well. Despite such concerns, however, many states have implemented reduced/symmetric regulatory policies, and the feared abuse of these customer groups has not occurred. Here again, the fact that state regulatory agencies have continued to monitor performance and have not reinstituted prior regulatory controls provides compelling evidence that these groups are not at risk. In fact, the empirical evidence strongly suggests that they stand to gain from reduced regulation. As a result, the combined evidence shows that continued

asymmetric regulation of AT&T, which is ostensibly intended to protect these customer groups, actually has the affect of harming them.

VI. CONCLUSION

In this paper, we have drawn together and assessed a wide array of evidence relevant to AT&T's classification under existing FCC rules. This evidence comes from a decade of experience during which market conditions have evolved rapidly, many states have implemented a variety of relaxed (and symmetric) regulatory policies, and the FCC has applied reduced regulation to AT&T's business services. Such evidence consists of: (1) descriptive data pertaining to the underlying economic determinants of market power; (2) empirical studies of the effects of relaxed regulation at the state level on the prices charged in the interexchange market; (3) experience in the provision of AT&T's interstate business services under streamlined regulation; and (4) empirical studies that directly estimate the degree of market power held by AT&T.

Given both the economic and regulatory definitions of dominance, the principal criterion for the FCC's reclassification decision is the presence or absence of significant market power on the part of AT&T. The weight of the evidence we have considered here overwhelmingly supports the conclusion that AT&T does not possess significant market power in the interexchange market. The various studies and indicia we have reviewed paint a consistent picture of a firm that faces very effective competition. As a result, continued classification of this firm as a "dominant" carrier cannot be supported on economic grounds.

We have also considered several other competitive concerns that have arisen over the years regarding likely market performance under a more relaxed, symmetric regulatory policy. Here, too, the evidence strongly suggests that these residual concerns cannot support a continuation of the classification of AT&T as a dominant firm or the continuation of a regulatory scheme which applies more stringent rules to AT&T than to its competitors. The market conditions that exist in this industry simply are not conducive to the sort of behavior that these concerns must postulate. Moreover, actual market experience also demonstrates that the feared consequences of relaxed regulation will not materialize. Therefore, both economic theory and empirical evidence reject continuation of the current classification and demonstrate that there is no principled basis on which to perpetuate this policy.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Policy and Rules Concerning	)	CC Docket No. 79-252
Rates for Competitive Common	)	
Carrier Services and Facilities	)	
Authorizations Therefor	)	

MOTION FOR RECLASSIFICATION OF AMERICAN TELEPHONE & TELEGRAPH COMPANY AS A NONDOMINANT CARRIER

Francine J. Berry
R. Steven Davis
Roy E. Hoffinger

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Attorneys for
American Telephone
and Telegraph Company

September 22, 1993

SUMMARY

Nearly fourteen years ago, the Commission opened this docket to adapt its regulation to the introduction of competition to the telecommunications industry, to classify carriers as dominant or nondominant depending on whether they had market power, and to establish different rules and procedures appropriate to each such classification. The Commission's initial classification of carriers was completed thirteen years ago. The Commission then recognized, however, that change was "inevitable" and promised that it would be "receptive" to evidence of "changed circumstances" warranting the reclassification of particular carriers. This motion shows that, in the case of AT&T, such a reclassification is now appropriate -- indeed, it is long overdue.

When the Commission classified AT&T as dominant (and all of its long distance competitors as nondominant), it did so because AT&T owned nearly 80% of this nation's bottleneck local facilities, and because AT&T's competitors, though "financially sound and able," were "infant[s]" that lacked "maturity." These conditions are long gone, and gone with them are the factual and legal bases for continuing to classify AT&T as dominant or regulating AT&T any differently than its competitors. This conclusion is compelled not merely by events of the last two decades, but by the record

before the Commission documenting those events, and the Commission's findings based on that record.

Competition in the interexchange market is, in the Commission's own words, "thriving" and "robust." AT&T completely relinquished ownership and control of the Bell System's bottleneck local facilities nearly ten years ago. There are now hundreds of interexchange carriers, several of which have constructed their own nationwide fiber-optic networks over which they provide a complete array of business, residential, domestic and international services in competition with AT&T. Indeed, AT&T's competitors now have substantially more fiber-optic route miles than AT&T.

AT&T's competitors are no longer "infants." They include some of this nation's largest and most visible enterprises, with billions of dollars in assets and annual revenues. They continue to expand through growth, acquisitions and strategic alliances. Indeed, one of AT&T's largest competitors, MCI, has recently agreed to a multi-faceted "strategic alliance" with British Telecommunications that calls for a $4 billion equity investment by BT in MCI, the formation of a global joint venture for all but basic international direct dial and private line services, and the appointment of MCI as the exclusive distributor of these services for BT in North and South America. The financial and operational integration of these two telecommunications powers is utterly inconsistent with any notion that AT&T

retains dominance as a matter of law or economics. It offends common sense to hold otherwise.

Continuing to classify AT&T as dominant, or regulating AT&T as if it were a dominant carrier, is not merely unnecessary, but counterproductive. The Commission has repeatedly found that direct economic regulation of carriers lacking market power interferes with the operation of competitive market forces and "imposes both direct and indirect costs on users." In addition to the imposition of costs on carriers and customers, such regulation also "wastes" Commission resources that should instead be utilized in areas where regulation may be more appropriate, such as the local exchange, and opening foreign markets. For all of these reasons, AT&T should be classified as nondominant, and regulated in the same manner as its interexchange competitors.

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RECEIVED
APR 24 1995
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

April 24, 1995

Kathleen Wallman
Chief, Common Carrier Bureau
Federal Communications Commission
1919 M Street NW, room 500
Washington, DC, 20554

Re: CC Docket No. 79-252

Dear Ms. Wallman:

In the eleven years since the break-up of the Bell System, the interexchange market has undergone a phenomenal and irreversible evolution. The long distance business has moved from a highly concentrated, heavily regulated industry to one characterized by a multitude of aggressive, well-financed rivals creating a vigorously competitive marketplace and significant consumer benefits. The dramatic price reductions, the deployment of multiple facilities-based networks and the wide availability of innovative customer choices have made long distance the model for developing competition in other telecommunications markets.

The Commission has often stated that regulation in competitive markets imposes unnecessary costs on consumers and reduces the vigor of the competitive process. However, despite the intense competitiveness of the interexchange market, one carrier remains heavily regulated: AT&T. Burdensome and unnecessary regulations add hundreds of millions of dollars of direct and indirect costs which ultimately must be borne by consumers. The Commission should establish parity in its regulation of long distance carriers and permit consumers to receive the benefits and cost savings of the fully competitive interexchange market.

Over eighteen months have passed since AT&T filed its Motion for Reclassification as a "Nondominant" Carrier ("Motion") in this proceeding. The evidence presented in 1993 showed that competition in the interexchange market was thriving, that AT&T lacked all indicia of market power and that customers would be better served by reclassifying AT&T as nondominant. AT&T clearly demonstrated that, under the Commission's own standards, it should be classified as nondominant. The passage of time has only made more vivid the fact that AT&T lacks the market power underlying the Commission's fifteen year old decision to regulate it as a "dominant" carrier. The public interest is best served by eliminating needless regulatory impediments that serve to pick winners and losers when applied in a competitive market.

The enclosed materials summarize and update the showings made in support of AT&T's 1993 Motion. They conform to the Commission's standards for analysis that were established in this proceeding and have been followed in subsequent proceedings, including the Commission's recent decision to streamline AT&T's Commercial Long Distance Services and its decision to forbear from many regulations for Commercial Mobile Radio Services (CMRS) providers.

From a *supply elasticity* perspective, technological advances and enormous network capital expenditures now give AT&T's competitors even more excess capacity than a few years ago. Using existing fiber capacity and spare switch ports, MCI, Sprint, and the new LDDS/Wiltel combination together could absorb virtually one-third of AT&T's switched traffic in only 90 days. These three competitors alone could absorb almost two-thirds of AT&T's switched traffic within one year with only modest expense. Moreover, the infusion of foreign capital ($4.3B to MCI by British Telecom and $4.2 B pending to Sprint by the governments of France and Germany) gives AT&T's competitors enhanced capability to increase their capital expenditures. In all events, the enormous amounts of fungible, spare capacity make it impossible for AT&T or any other IXC to exercise control over the supply of interexchange services, or to charge non-competitive prices in any market segment.

From a *demand responsiveness* perspective, customers -- including residential users -- now have more choices than ever before from a growing list of competitors. Competitive choices abound in every market segment, including consumer services, business services, international services and operator services. A typical American household receives 330 contacts each year advertising long distance service options. Moreover, customers at all usage levels are exercising their choice in record numbers. Last year, almost one in five residential customers changed carriers one or more times resulting in a total of over 27 million carrier changes. This 50% increase over 1993 reflects the intense and ongoing rivalry in the residential market segment. Furthermore, 40% of the carrier changes over the past two years were made by customers who averaged $10 a month or less in long distance charges.[1] This irrefutably demonstrates that competition has reached every corner of the interexchange marketplace and that no carrier can exercise market power.

AT&T's decline in *market share* reflects this heightened competition and further illustrates its lack of market power. AT&T's overall revenue share has declined from 90% in 1984 to 59% in 1994, and its share in all market segments has dropped comparably. Concomitantly, MCI and Sprint now are multi-billion dollar corporations, and other billion dollar competitors such as LDDS/Wiltel and Frontier/ALC are emerging as the result of mergers and consolidations. In addition, over 450 smaller competitors are growing on a regional basis, providing additional choice, capacity, and competition to the industry. These

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[1] Incentives to encourage customers to change carriers often involve cash or long distance credits of $10 to $50. For example, customers averaging only $3 per month in usage and receiving a $10 credit, this equates to almost a 30% savings for a full year. Thus, low volume users proportionally receive some of the best incentives from interexchange competitors.

competitive forces have driven the overall prices of long distance down more than 60% in this time frame, including 55% in reductions to residential customers and over 70% in reductions to business customers. As a result AT&T's and the industry's average revenue per minute continues to fall.

In spite of the loss of market power, AT&T continues to be subjected to burdensome and unequal regulatory rules that give its competitors the opportunity to advantage their own efforts while injuring customers and the competitive process. Marketplace experience throughout the industry confirms that customers benefit from equal and reduced regulation. For example, competition for interstate business services only intensified after AT&T's business services were subjected to streamlined regulation. In addition, most states already have adopted some form of reduced and equal regulation for interexchange carriers, which has in turn benefited customers and lowered costs. Further, the Commission's recent decision regarding regulation of mobile services clearly demonstrates its recognition of the need for symmetrical and reduced regulation in a competitive marketplace. Thus, market experience and recent Commission precedent also fully support the conclusion that consumers will benefit from declaring AT&T nondominant.

It is important to note that AT&T does not here seek any changes in current Commission rules. Rather, it seeks only to be reclassified as nondominant under the Commission's existing framework. As a nondominant carrier, AT&T -- like all other IXCs -- will remain subject to a plethora of statutory and other requirements that afford the Commission ample opportunity to monitor and to regulate the rates, terms and conditions for interstate long distance services. For example, all IXCs will still be forbidden, under Sections 201 and 202 of the Communications Act, to have unjust or unreasonable rates or to unreasonably discriminate. Sections 203-205 will still require IXCs to file tariffs, providing the Commission the ability to review and act upon them appropriately. The Commission also retains authority under Sections 206-209, which establish and maintain the integrity of the Commission's complaint process, and other Title II provisions allow the Commission to address other important interests.[2]

In addition to the Title II requirements, many other Commission rules and policies will also continue to operate, irrespective of AT&T's reclassification. For example, the Commission's CI-II and CI-III rules will continue to require advance disclosure of new network interface information and forbid the bundling of interexchange services with CPE. Universal service policies will continue to assure that interexchange services are reasonably available to all. Network outage and quality reporting requirements give the Commission the tools to ensure telecommunications service quality.

Finally, the reclassification of AT&T will not affect the current rules that apply to dominant interexchange carriers. Thus, if AT&T, or any other interexchange carrier ever were determined to exercise market power in the future, the Commission expeditiously could

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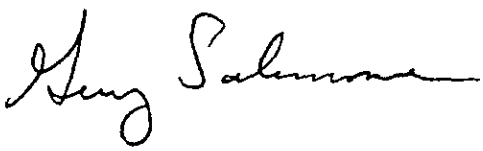
2 E.g., Section 225 provides protections for hearing-impaired and speech-impaired individuals, Section 226 provides protections regarding operator services, and Section 228 governs pay-per-call services.

reclassify the carrier on the basis of such conduct. These and other existing rules give the Commission ample opportunity to assure that the interexchange market remains competitive.

AT&T believes that the current rules and policies cited above that apply to all nondominant carriers are more than adequate to protect all legitimate interests in today's robustly competitive interexchange environment. The Commission therefore should act quickly to declare AT&T nondominant. Reclassification of AT&T as nondominant could serve as the catalyst for a subsequent review of all of the Commission's regulations applicable to the entire IXC market. A review of the current fifteen-year old regime could provide a modernization of regulatory techniques that would be more consistent with the fully competitive interexchange market. Such an examination, consistent with the "re-inventing government" initiative of the Administration, should evaluate and focus on rules that allow the Commission to assure the continued deployment of telecommunications technology and the universal availability of high quality service. These objectives or others easily could be accomplished through, for example, targeted data collection, such as revenues and demand, investment program data and equal access availability from all carriers and continued service outage reporting by all carriers.

In summary, AT&T's competitors now control over 40% of the market and have the capacity to absorb more than two-thirds of AT&T's existing traffic, while customers are exercising their choice by switching long distance carriers in record numbers. The evidence indicates that the interexchange market is competitive and that AT&T is no longer dominant. AT&T again urges the Commission to act quickly on AT&T's 1993 Motion and reclassify it to nondominant status based upon the Comments received in response to the original Public Notice, the attached materials and, if necessary, an additional, but brief comment cycle based upon these materials.

Sincerely,



TELECOM

Consumer groups asked FCC to investigate whether long distance companies were passing savings to consumers that they gained through access charge reductions mandated by CALLS reform plan. Under CALLS plan, consumers now pay higher subscriber lines charges to local companies but were supposed to get lower long distance rates in return. Consumers Union and Consumer Federation of America sent letter to FCC Chmn. Powell Tues. charging that AT&T, for example, raised rates for basic service as much as 11% July 1, even though it experienced reductions in access payments: "In a functioning market, consumers would see savings as firms compete. Instead, long distance companies like AT&T are lining one pocket with a regulatory cost reduction and lining another by raising consumers' rates." Letter said "it appears that the vast majority of consumers are being denied the benefits they were promised when the CALLS plan was approved." It's also apparent that "competition in long distance is not strong enough to translate lower costs into lower prices," letter concluded. In answer to long distance companies' arguments that they were passing through savings with introduction of new calling plans and features, Consumers Union spokesman said reductions should be clearly evident in current rates paid by consumers. "It should be easy for consumers to see the savings" without having to change calling plans, he said. In addition, there's no evidence of "dramatic reductions" in any calling plans and consumers paying basic rates are benefiting the least, he said. AT&T responded that access reductions enabled companies to design lower cost calling plans better suited to consumers' needs. "The long distance market is hotly competitive and consumers know it," AT&T said. "If they don't like one company's rates they can easily switch companies or calling plans and they readily do so." — *EH*

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In continued exchange between public safety community and CTIA on thorny Enhanced 911 issues, CTIA Pres. Tom Wheeler wrote to 2 groups this week, elaborating on remaining challenges to implementation of Phase 2 before Oct. 1 deadline. Letter is follow-up to strongly worded July 2 missive by CTIA to Assn. of Public Safety Communications Officials (APCO) and National Emergency Number Assn. (NENA), from which some wireless carriers had distanced themselves. Wheeler wrote July 17 to NENA and APCO that he wants to "continue our dialogue" on joint E911 challenges. "The purpose of my previous letter was to inquire of your organizations how you intend to establish equivalent deliverable expectations for your members," Wheeler wrote. Wheeler cited assertion by groups that public safety answering points (PSAPs) not ready to roll out Phase 2 of E911 today will be ready within 6 months after they submit Phase 2 request to particular wireless carrier. "With all due respect, that is exactly the heart of the problem I was trying to raise in my earlier correspondence," Wheeler said. "With carrier-enabled handsets or networks available, consumers will expect location capability whether or not a particular PSAP has determined it wants to make a Phase 2 request." Wheeler said wireless carriers will know whether they buy E911-capable handset or have

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