BEFORE THE PUBLIC SERVICE COMMISSION

OF THE STATE OF MISSOURI

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Missouri Public
Service Commission

In the Matter of the Application of AT&T Communications of the Southwest, Inc., TCG St. Louis, Inc., and TCG Kansas City, Inc., for Compulsory Arbitration of Unresolved Issues With Southwestern Bell Telephone Company pursuant to Section 252(b) of the Telecommunications Act of 1996.	))))))	**Case No. TO-2001-455**

ARBITRATION ORDER

Issue Date: June 7, 2001

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TABLE OF CONTENTS

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REGULATORY LAW JUDGE: **Kevin A. Thompson, Deputy Chief.**

ARBITRATION ORDER

Procedural History

On February 20, 2001, AT&T Communications of the Southwest, TCG St. Louis, Inc., and TCG Kansas City, Inc. (collectively, AT&T),[1] filed a joint petition for arbitration with the Commission pursuant to the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, codified as various sections of Title 47, United States Code (the Act), and its implementing regulations, and pursuant to Section 386.230, RSMo 2000.[2] The petition asked the Commission to arbitrate unresolved issues in the successor interconnection agreement between AT&T and Southwestern Bell Telephone Company (SWBT).

The Commission issued its Notice of Petition for Arbitration and Order Adding Parties, Setting Prehearing Conference and Requiring the Filing of a Proposed Procedural Schedule on February 27. The Commission made SWBT a party and directed that the Staff of the Missouri Public Service Commission (Staff) participate as a party. The Commission further set a prehearing conference for March 9 and directed that the parties prepare and jointly file a proposed procedural schedule by March 16.

The prehearing conference was held as scheduled on March 9. On March 15, AT&T filed its first and second motions to amend its petition, to reflect that certain issues had been settled and no longer required arbitration. On March 16, SWBT timely filed its response to AT&T's petition for arbitration. Also on March 16, the parties each submitted a

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[1] For convenience sake, the Commission will refer to the Petitioners in the singular.

[2] All references herein to the Revised Statutes of Missouri (RSMo), unless otherwise specified, are to the revision of 2000.

proposed procedural schedule. On March 27, Staff filed its statement of position regarding setting rates.

On April 5, 2001, the Commission issued its Order Adopting Procedural Schedule, in which the Commission adopted procedural rules for the conduct of the arbitration. On April 6, the Commission set a second prehearing conference for April 11 in order to clarify the application of the F.C.C. rules to this proceeding. That prehearing conference was conducted as scheduled. Also on April 6, the Commission by order provided guidance to the Staff concerning the nature of its participation in this case and the form which its contributions were expected to take.

The Protective Order:

Together with its petition, AT&T filed a motion for a protective order, seeking thereby a protective order of a more expansive nature than the Commission's standard protective order. As an example, AT&T enclosed a copy of a protective order used in administrative proceedings in Texas. On February 23, SWBT responded in opposition to AT&T's request for a Texas-style protective order. On March 7, AT&T replied to SWBT's response in opposition to AT&T's motion for a Texas-style protective order. On March 9, SWBT filed its suggestions in response to AT&T's reply of March 7.

The parties advised the Commission on April 3, 2001, that they had reached agreement on the protective order issue and desired the Commission to issue its standard protective order. The Commission did so on April 4.

Intervention:

On March 29, 2001, the Missouri Independent Telephone Group (MITG) filed its application for intervention pursuant to Commission Rule 4 CSR 240-2.075. SWBT

responded in opposition on April 4, as did AT&T on April 9. MITG replied on April 12 and SWBT filed a response to MITG's reply on April 23.

The MITG is a group of seven small, rural local exchange companies. Under the Act, they are Rural Telephone Companies. They sought to intervene because:

> [T]he prior interconnection agreement (IA) between AT&T and SWBT has been the pattern for most IAs in Missouri, these IAs have addressed access traffic originated by CLECs destined for termination to the MITG companies without MITG company consent thereto, and the MITG has no reason to believe that AT&T and SWBT will not similarly attempt to address this traffic in this proceeding, which could adversely impact, prejudice, or discriminate against the MITG companies in violation of 47 U.S.C. [Section] 252(e).

SWBT, in opposition to MITG's application, pointed out that the Commission has uniformly refused to permit intervention in arbitrations under the Act on the grounds that the Act does not contemplate the intervention of third parties into the private contract negotiations of the parties. AT&T concurred in SWBT's position. In its lengthy reply, MITG reiterated its position that it must be permitted to intervene because the resulting interconnection agreement will affect its members. SWBT's response to that reply restated the position of SWBT and AT&T that third parties have no place in this arbitration and suggested that the procedural rules adopted by the Commission for this arbitration, like the Act, do not contemplate intervention.

The Commission denied MITG's Application to Intervene on May 7, 2001, reasoning that there is no place in the arbitration scheme created by the Act for intervenors and that MITG might appropriately become involved at a later time.

The Arbitration Hearing:

The Commission conducted an evidentiary hearing on May 9, 10, 11, 14, and 15, 2001, at its offices in Jefferson City, Missouri. Each party was represented by counsel and

was permitted to offer the testimony of witnesses and other evidence. Cross-examination was permitted, although it was subject to time limitations pursuant to the Commission's Order Adopting Procedural Schedule of April 5. No party made any objection to the time limitations imposed on cross-examination by the Commission. To facilitate questioning by the Commission, all witnesses for a particular topic were generally required to be present throughout the hearing on that topic.

At the opening of the hearing, certain pending motions were granted.

Posthearing Proceedings:

On May 17, 2001, the presiding officer convened an on-the-record telephone conference call in order to inquire of the parties whether or not any of the decision points (DPs) in this case concerned matters not covered by the M2A.[3] AT&T stated that it could not respond immediately and requested an opportunity to review the M2A and the Decision Point List (DPL). The presiding officer directed AT&T to review the M2A and the DPL and to file a pleading listing any DPs that it believed were not reflected by provisions of the M2A. On May 23, AT&T filed its pleading as directed. On May 24, the Commission issued its Order Directing Filing, allowing other parties to respond to AT&T by May 31.

Meanwhile, the parties filed their initial briefs on May 25 pursuant to the procedural schedule. SWBT filed its response to AT&T's identification of non-M2A DPs on

[3] The M2A is an interconnection agreement extended by SWBT to any carrier in Missouri. It was developed in the context of Case No. TO-99-227, SWBT's Section 271 case. Because the M2A met all of the Commission's minimum criteria for finding the existence of competition, the Commission ultimately provided a favorable recommendation to the F.C.C. with respect to SWBT's Section 271 application.

May 31. On June 1, the parties filed their reply briefs and their proposed findings of fact and conclusions of law.

On June 4, 2001, the Commission again convened an on-the-record telephone conference call in order to address certain questions to the parties.

Discussion

The parties submitted the open issues requiring resolution in the form of a Decision Point List (DPL). This is a voluminous document containing over one hundred specific disputed points requiring resolution by the Commission.[4] These points fall into five topical categories:

1. Cost issues (17).[5]
2. General terms and conditions, including intellectual property issues (19).
3. Unbundled Network Elements (UNEs) terms and conditions (68).
4. Network interconnection issues (20).
5. Operations Support Systems (OSS) issues (4).

Findings of Fact

The Missouri Public Service Commission, having considered all of the competent and substantial evidence upon the whole record, makes the following findings of fact. The

[4] There are a total of 128 Decision Points.

[5] The parenthetical number is the number of Decision Points identified by the parties in each topical category.

positions and arguments of all of the parties have been considered by the Commission in making this decision. Failure to specifically address a piece of evidence, position or argument of any party does not indicate that the Commission has failed to consider relevant evidence, but indicates rather that the omitted material was not dispositive of this decision.

The Parties:

The parties are AT&T and SWBT, two telephone companies. SWBT is a local exchange carrier (LEC) and provides local exchange telephone service in Missouri and twelve other states. SWBT also provides intraLATA long-distance telephone service. AT&T provides intraLATA and interLATA long-distance telephone service in Missouri and also provides local exchange telecommunications services to business customers in Missouri. To the extent that AT&T provides local exchange telephone service in Missouri, it is a competitive local exchange carrier (CLEC).

Background to the Dispute:

The present arbitration must be considered within the larger context of the implementation of the Telecommunications Act of 1996 in Missouri and the previous arbitrations between AT&T and SWBT.

Previous Arbitrations Between AT&T and SWBT: Cases Nos. TO-97-40 and TO-98-115

The original arbitration between AT&T and SWBT in Missouri was Case No. TO-97-40, filed by AT&T on July 29, 1996.[6] Following a hearing and briefing by the

[6] Later consolidated with a similar petition filed by MCI on August 16, 1996, Case No. TO-97-67.

parties, the Commission issued its Arbitration Order on December 11, 1996.[7] In this order, the Commission rejected SWBT's cost studies because they "failed to provide adequate prices for the unbundled elements in an efficient, forward-looking network."[8] The Commission modified the results of SWBT's cost studies as recommended by Staff and then used the modified figures to set interim prices for various unbundled network elements (UNEs) and resold services, stating that "[a]t a later date the Commission will adopt a cost methodology to set permanent prices."[9]

Thereafter, on January 22, 1997, the Commission granted clarification and modification of its arbitration order, modifying eight items and setting a schedule for the development of permanent rates by the Commission's Arbitration Advisory Staff (AAS).[10] The AAS was directed to conduct an intensive, 16-week investigation of SWBT's costing models, including identification of critical inputs and analysis of the models.[11] To this end, the Commission directed the AAS to meet intensively with each party, privately, in order to facilitate the free exchange of confidential information. In the case of SWBT, at least, the meetings were held at SWBT's St. Louis offices, where data and personnel were readily available.

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[7] *In the Matter of AT&T Communications of the Southwest Inc.'s Petition for 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-97-40 (*Arbitration Order,* issued December 11, 1996).

[8] *Id.,* at 33.

[9] *Id.*

[10] *In the Matter of AT&T Communications of the Southwest Inc.'s Petition for 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-97-40 (*Order Granting Clarification and Modification and Denying Motion to Identify and Motions for Rehearing,* issued January 22, 1997).

[11] *Id.,* at 9-10.

On July 31, 1997, the Commission issued its Final Arbitration Order.[12] Concerning the efforts of the AAS, the Commission stated:

> The process of reviewing the costs, discounts and proposed rates was designed so that Southwestern Bell Telephone Company (SWBT), AT&T Communications of the Southwest, Inc. (AT&T) and MCI Telecommunications Corporation (MCI) could designate the appropriate subject matter expert (SME) or provide documentation in support of its position. As a result, the process led to a remarkable level of open communication and cooperation between SWBT, AT&T, MCI and the Arbitration Advisors. The work which has resulted from this effort consumes several hundred pages and constitutes a thorough and exhaustive review of each and every cost factor which the Commission finds relevant to this arbitration. This "Costing and Pricing Report" is Attachment C. A similar document containing highly confidential information has been filed and provided to the parties pursuant to the Commission's procedures set out in its Protective Order.[13]

The Final Arbitration Order set permanent rates. Attached to it, in addition to the extensive *Costing and Pricing Report* referred to above, were the *Resale Cost Study for Southwestern Bell Telephone Company* (Attachment A) and *Permanent Rates for Unbundled Network Elements* (Attachment B).

Several requests for reconsideration or clarification were filed in response to the Final Arbitration Order. On October 2, 1997, the Commission revisited some of the items contained in the Final Arbitration Order and directed the parties to file a conforming

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[12] *In the Matter of AT&T Communications of the Southwest Inc.'s Petition for 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-97-40 (*Final Arbitration Order,* issued July 31, 1997).

[13] *Id.*, at 2-3. The 8th Circuit, on the other hand, said this about the efforts of the AAS: "[W]e caution the PSC to be more circumspect in the process it employs, with particular attention to excessive reliance on staff reports, especially those reports compiled after unnecessary ex parte discussions with parties." *Southwestern Bell Telephone Company v. Missouri Public Service Commission et al.,* 236 F.3d 922, 925 (8th Cir. 2001).

interconnection agreement.[14] The parties complied on October 10 and the Commission approved the agreement on November 5, 1997.

Meanwhile, on September 10, 1997, AT&T filed a second petition for arbitration, Case No. TO-98-115, presenting for resolution various issues not included in the first case. Following proceedings including a preliminary mediation before the Commission's General Counsel, serving as a special master, the Commission issued its Report and Order on December 23, 1997.[15] Among other things, this order set interim prices for certain network elements and services not covered by Case No. TO-97-40.[16] The interim prices were simply those proposed by SWBT, without modification, adopted on an interim basis, subject to true-up.[17] The parties filed their conforming interconnection agreement on March 4, 1998, and the Commission approved it on March 19. The Commission has not yet set permanent prices in Case No. TO-98-115.

Both arbitrations were appealed to United States District Court pursuant to the provisions of the Act. The District Court affirmed the Commission's arbitration decisions, except that it remanded issues of dark fiber and subloops for further consideration by the

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[14] *In the Matter of AT&T Communications of the Southwest Inc.'s Petition for 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-97-40 (*Arbitration Order Regarding Motions for Clarification and Reconsideration and Joint Motion for Expedited Resolution of Issues,* issued October 2, 1997).

[15] *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 (*Report and Order,* issued December 23, 1997).

[16] *Id.,* at 23 ff.

[17] *See In the Matter of SBC Communications, Inc., Southwestern Bell Telephone Company, and South Western Bell Communications Services, Inc., d/b/a Southwestern Bell Long Distance for Provision of In-region, InterLATA Services in Missouri,* CC Docket No. 01-88 (*Evaluation of the United States Department of Justice,* May 9, 2001) at 18.

Commission and reversed the Commission on the issue of the limitation of SWBT's liability to AT&T's customers.[18]

Upon further appeal, the United States Court of Appeals reversed the District Court and vacated the Commission's decisions in TO-97-40 and TO-98-115.[19] The court took this action, not because of any error of interpretation or procedure by the Commission, but because the Commission had applied the F.C.C.'s mandated TELRIC costing and pricing methodology.[20] "We therefore conclude that the holding in *Iowa Utilities II* invalidating the TELRIC pricing methodology requires that the entire arbitrated agreement approved by the PSC in this case be vacated and that further proceedings (assuming that AT&T still wants access to SWBT's network in Missouri) be held."[21]

A further appeal was taken and is now pending before the United States Supreme Court. In the event of final success in its quest to invalidate the F.C.C.'s TELRIC costing methodology, SWBT anticipates that a "retroactive true-up" will be conducted.

Case No. TO-99-227 and the M2A

On November 20, 1998, SWBT notified the Commission that it intended to seek authority from the F.C.C. to provide interLATA telecommunications services in Missouri under Section 271 of the Act. This provision bars the Bell operating companies (BOCs),

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[18] *AT&T Communications of the Southwest, Inc., et al. v. Southwestern Bell Telephone Company et al.*, 86 F.Supp.2d 932 (W.D. Mo. 1999).

[19] *Southwestern Bell Telephone Company v. Missouri Public Service Commission et al.*, 236 F.3d 922, 924 and 927 (8th Cir. 2001).

[20] *Id.*

[21] *Id.*, at 924.

such as SWBT, from entering the interLATA long-distance market without prior approval from the F.C.C. F.C.C. approval is conditioned on its finding that certain statutory measures of competition have been met in the state in question.[22]

Thereafter, the Commission opened Case No. TO-99-227 and held proceedings in order to determine whether it could support SWBT's quest for authority to enter the interLATA long-distance market by giving a positive recommendation to the F.C.C. pursuant to Section 271(d)(2)(B) of the Act. That provision requires the F.C.C. to consult with the state commission "to verify the compliance of the Bell operating company with the requirements of subsection (c)." A positive recommendation could be made only if either the Commission determined that SWBT had entered into a binding interconnection agreement with at least one facilities-based competitor or the Commission approved a statement by SWBT of the terms and conditions upon which it generally offered to provide interconnection and access to UNEs.[23] In either case, the interconnection agreement or statement of terms and conditions was required to satisfy the 14-point checklist at Section 271(c)(2)(B) of the Act.

To meet the 14-point checklist and thereby secure a favorable recommendation from the Commission, SWBT tendered on June 28, 2000, a model interconnection agreement for Commission approval; this agreement is referred to as the M2A.[24] The M2A is modeled upon an agreement negotiated in the course of SWBT's Section 271

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[22] 47 U.S.C. Section 271(d)(3).

[23] 47 U.S.C. Section 271(c)(1), (A) and (B), and Section 252(f).

[24] The M2A is SWBT's statement of the terms and conditions upon which it generally offers access and interconnection.

proceeding in Texas, the T2A, which has been approved by the F.C.C.[25] The M2A was further modified after June 28 in response to comments by parties and interim position statements by the Commission.[26] The final revisions were filed on February 28, 2001.[27] The M2A includes binding terms for interconnection and for access to UNEs, including UNEs not currently combined in SWBT's network, and for the resale of services.[28]

On March 6, 2001, the Commission determined that the M2A met the 14-point checklist of Section 271, as well as the other requirements of the Act applicable to interconnection agreements.[29] The Commission further determined that the public interest supported SWBT's entry into the interLATA long-distance market in Missouri, so long as the M2A was made available to Missouri CLECs.[30] The M2A incorporates prices from the Commission's arbitration decisions in Cases Nos. TO-97-40 and TO-98-115.[31] Three "spin-off dockets" were also initiated, in order to determine costs and prices for certain other

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[25] *In the Matter of the Application of 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,* Case No. TO-99-227 (*Order Finding Compliance with the Requirements of Section 271 of the Telecommunications Act of 1996,* issued March 6, 2001) (hereinafter the *"271 Compliance Order"*) at 2.

[26] *Id.,* at 3.

[27] *Id.*

[28] *In the Matter of the Application of 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,* Case No. TO-99-227 (*Report & Order,* issued March 15, 2001) (hereinafter the *"271 Report & Order"*) at 17-19.

[29] *271 Compliance Order,* at 3-4.

[30] *Id.*

[31] *271 Report & Order,* at 16.

elements.[32] The results of these cases will be inserted into the M2A when they become available.[33]

SWBT's Section 271 Application

Having obtained a favorable recommendation from the Missouri Commission, SWBT filed a formal application under Section 271 with the F.C.C.[34] That application is pending and the F.C.C. has not yet ruled upon it, either favorably or unfavorably. The Act requires that the F.C.C. consult with the Attorney General of the United States as well as with the State commission prior to ruling on a Section 271 application.[35] To that end, the Department of Justice (DOJ) filed its Evaluation of May 9, 2001, a copy of which was received without objection in this proceeding as Exhibit 60.

The DOJ Evaluation focuses on the prices at which SWBT offers UNEs in Missouri.[36] In its Evaluation, DOJ urged the F.C.C. to "undertake an independent scrutiny of the prices at issue rather than rely on the Missouri Public Service Commission's . . .

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[32] *In the Matter of the Application of 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,* Case No. TO-99-227 (*Report & Order,* issued March 15, 2001), at 18. The cases are TO-2001-438 (certain UNEs); TO-2001-439 (xDSL-capable loops); and TO-2001-440 (line splitting and line sharing). A fourth pending case concerns collocation, TT-2001-298. The latter is distinct from the others as it concerns a tariff proposed by SWBT setting prices, terms and conditions for physical and virtual collocation.

[33] *Id.*

[34] *See* 47 U.S.C. Section 271(d)(1). SWBT's application is CC Docket No. 01-88.

[35] 47 U.S.C. Section 271(d)(2), (A) and (B). SWBT brought Case No. TO-99-227 in order to ensure that the Missouri Commission would provide a favorable recommendation upon consultation pursuant to 47 U.S.C. Section 271(d)(B).

[36] *In the Matter of SBC Communications, Inc., Southwestern Bell Telephone Company, and South Western Bell Communications Services, Inc., d/b/a Southwestern Bell Long Distance for Provision of In-region, InterLATA Services in Missouri,* CC Docket No. 01-88 (*Evaluation of the United States Department of Justice,* May 9, 2001) (hereinafter *"DOJ Evaluation"*) at 1.

price-setting decisions" because "[p]rices in Missouri are higher than those in neighboring states[.]"[37] Specifically, DOJ pointed out that "the UNE recurring rates set in Docket No. 97-40 exceed by a significant margin those rates set in states in which SBC has already obtained section 271 approval."[38] The Evaluation asserts that switch prices in Missouri exceed those in Texas and Kansas by 22 to 60 percent.[39] Loop rates also exceed those in other SWBT states, averaging 20 percent higher.[40] Some nonrecurring rates are also "significantly higher than those in other states."[41]

Likewise, "[t]he rates set in Docket No. 98-115 exceed by a vast margin the rates for similar UNEs set in states in which SBC has already obtained section 271 approval."[42] Recurring charges in Missouri are two to six times those in Texas, Kansas and Oklahoma.[43] Nonrecurring charges in Missouri are two to 13 times those in Texas, Kansas and Oklahoma.[44] DOJ concludes that differences in costs do not explain these disparities; indeed, the F.C.C.'s Universal Service Fund cost model suggests that Missouri costs are "nearly identical" to those of Kansas, an adjacent state.[45] As an additional matter of

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[37] *Id.*, at 2.

[38] *Id.*, at 10.

[39] *Id.*

[40] *Id.*, at 10-11.

[41] *Id.*, at 11.

[42] *Id.*, at 12.

[43] *Id.*

[44] *Id.*

[45] *Id.*

concern, DOJ states that there is a question "whether SBC is offering DSL services to end users without making those services available for resale at a wholesale discount."[46]

Resolution of Open Issues:

Costing and Pricing

1. Should all UNEs to be arbitrated by the Missouri PSC have price levels established based on costs?

All of the parties agree that the Act requires that UNE prices be based on costs.

2. What Cost Study Methodology should the Commission utilize in determining UNE rate levels?

All of the parties agree that the Commission must employ the F.C.C.'s TELRIC[47] pricing methodology in setting UNE rates.

4. What UNE rates should be adopted by the Missouri PSC for the AT&T/SWBT Agreement?

SWBT has proposed rates greater than the rates contained in the M2A.[48] These rates are supported by cost studies of various vintages.[49] AT&T, complaining vigorously that it has not had a sufficient opportunity to deconstruct SWBT's cost studies, proposes that the Commission adopt recurring rates developed in the Kansas Section 271 proceeding and nonrecurring rates developed in the Texas Section 271 proceeding as

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[46] *Id.*, at 20.

[47] Total Element Long Run Incremental Cost.

[48] Exhibit 22, the testimony of Staff witness Christopher Thomas, at 6.

[49] *Id.*, at 3.

interim rates and establish an adequate procedure for setting permanent rates.[50] Some of the Kansas and Texas 271 rates are lower than the corresponding rates contained in the M2A. Staff agrees in part with AT&T, advising the Commission to adopt the M2A rates as interim rates and to establish an adequate procedure for setting permanent rates.[51] In the alternative, Staff suggests that the Commission adopt the M2A rates as permanent rates for the term of this agreement.[52]

AT&T argues that the cost studies supporting SWBT's proposed "massive increase in basic UNE rates" contain critical flaws.[53] Additionally, the available interval for examining and analyzing these cost studies was inadequate.[54] AT&T asserts that the Commission ought not to set rates based on flawed and unexamined cost studies.[55] Staff agrees that there are problems with SWBT's cost studies, stating "[s]everal concerns center around discrepancies between new inputs and those utilized in the Commission approved M2A rates. These include the appropriate forward-looking cost of capital, annual charge

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[50] *Id.*, at 4; *In the Matter of the Application of AT&T Communications of the Southwest, Inc., TCG St. Louis and TCG Kansas City, Inc., for Compulsory Arbitration of Unresolved Issues with Southwestern Bell Telephone Company Pursuant to Section 252(b) of the Telecommunications Act of 1996,* Case No. TO-2001-455 (*AT&T Communications of the Southwest, Inc., TCG St. Louis and TCG Kansas City's Initial Post-Hearing Brief,* filed May 25, 2001) (hereinafter *"AT&T's Brief"*) at 1-3.

[51] Exhibit 22 at 5.

[52] *Staff's Reply Brief* at 5.

[53] *AT&T's Brief* at 1.

[54] *Id.*, at 2.

[55] *Id.*

factors, and the common cost allocator to be utilized in a TELRIC-based cost study."[56] Even SWBT's witnesses admitted the inadequacy of some of their cost studies.[57]

SWBT asserts that the Commission must adopt its proposed rates because they are the only ones in evidence that are supported by Missouri cost studies employing the TELRIC methodology.[58] SWBT contends that adoption of AT&T's pricing proposal would be unlawful.[59] SWBT further argues that voluntary concessions made to obtain Section 271 relief cannot be imposed, in another state, via compulsory arbitration.[60] Rather, the Commission must adhere to the pricing standards contained in the Act and the evidence presented in this case.[61] Finally, SWBT points out that the short timeframe of the arbitration process is set by the Act.[62] SWBT also suggests that AT&T's long familiarity with its cost studies, as well as its considerable resources, act to mitigate any prejudicial affect of the arbitration timetable.[63]

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[56] Exhibit 22 at 7.

[57] Exhibit 5, testimony of SWBT's witness Thomas Makarewicz, at 3-4: "SWBT did not have time to update the remaining studies"; Exhibit 7, testimony of SWBT's witness Cherylann Mears, at 9: "SWBT did not have time to rerun all of the studies required for this arbitration."

[58] *In the Matter of the Application of AT&T Communications of the Southwest, Inc., TCG St Louis and TCG Kansas City, Inc., for Compulsory Arbitration of Unresolved Issues with Southwestern Bell Telephone Company Pursuant to Section 252(b) of the Telecommunications Act of 1996,* Case No. TO-2001-455 (*Initial Brief of Southwestern Bell Telephone Company,* filed May 25, 2001) (hereinafter *"SWBT's Brief"*) at 16.

[59] *Id.*, at 17.

[60] *Id.*, at 18.

[61] *Id.*

[62] At 47 U.S.C. Section 252(b)(4)(C).

[63] *Id.*, at 19.

The Commission will resolve this Decision Point (DP) by directing the parties to adopt the M2A rates. The Commission will not implement substantial increases in prices for basic UNEs based on the cost studies submitted in this case by SWBT. Many of these cost studies are of 1996 vintage and were rejected after close scrutiny in Case No. TO-97-40.[64] Others are of later vintage, but have never been thoroughly reviewed.[65] The Commission agrees that such review was not possible in the context of this arbitration because of the strict timeframe imposed by the Act.

Likewise, the Commission will not adopt the Kansas and Texas rates suggested by AT&T. Although these rates have been scrutinized and approved by other state commissions and the F.C.C., they are not supported by any evidence showing their relevance to Missouri. Indeed, the fact that they are lower than the corresponding M2A rates, which were recently reviewed by Staff and found to be justified[66] and recently approved by the Commission as compliant with the Act,[67] permits the inference that they are not accurate for Missouri.

The Commission takes notice of the M2A, including the rates contained therein. The M2A was the product of a lengthy proceeding and close scrutiny. The Commission has already determined that it complies with all of the standards applicable to interconnection agreements, including the 14-point checklist in Section 271.[68] The

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[64] Exhibit 17, testimony of AT&T's witness R. Matthew Kohly, at 4.

[65] *Id.*

[66] Exhibit 22 at 4.

[67] *271 Report & Order*, at 68.

[68] *Id.* and *271 Compliance Order* at 4.

Commission concludes that the M2A rates are appropriate for inclusion in the parties' agreement.

Because it is known to be compliant with both the Act and the F.C.C.'s regulations, the Commission concludes that the M2A is generally appropriate as a resolution of the parties' dispute. Many, if not most, of the provisions of the parties' agreement are drawn from the M2A.[69] On May 17, the Commission directed the parties to identify those DPs for which there is no corresponding provision in the M2A. AT&T filed its list on May 23; SWBT responded on May 31. The Commission will resolve all open issues not identified by AT&T as non-M2A issues in its filing of May 23 by directing the parties to adopt the corresponding provisions of the M2A. With respect to the Costing and Pricing category, DPs 3, 5-15, and 17 are so resolved.[70] The Commission will resolve the non-M2A DPs individually.

General Terms and Conditions

The Commission will resolve all open issues not identified by AT&T as non-M2A issues by directing the parties to adopt the corresponding provisions of the M2A. With respect to the General Terms and Conditions category, DPs 3, 7, and 12-16 are so

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[69] *In the Matter of the Application of AT&T Communications of the Southwest, Inc., TCG St. Louis and TCG Kansas City, Inc., for Compulsory Arbitration of Unresolved Issues with Southwestern Bell Telephone Company Pursuant to Section 252(b) of the Telecommunications Act of 1996,* Case No. TO-2001-455 (*AT&T Communications of the Southwest, Inc., TCG St Louis and TCG Kansas City's Proposed Findings of Fact and Conclusions of Law,* filed June 1, 2001) (hereinafter *"AT&T's Proposed Findings"*) at 8.

[70] DP 16 has been previously settled.

resolved.[71] The Commission specifically resolves the DPs identified by AT&T as non-M2A issues as follows:

1. Should the Agreement contain references to terms and conditions applicable to SBC entities not a party to the Agreement?

6. Should the IA acknowledge that some provisions are voluntary and some involuntary and thus "non-portable" to other jurisdictions?

SWBT takes the position that references to non-Missouri SBC entities and the identification of provisions as voluntary or involuntary are necessary to provide guidance to CLECs as to which provisions are "portable" to other states and which are "non-portable" under the terms of the SBC-Ameritech merger.[72] AT&T objects to references to non-Missouri SBC entities and also objects to the identification of provisions as voluntary or involuntary. AT&T objects to the former as potentially confusing and as unnecessary clutter; AT&T objects to the latter as unnecessary to this Missouri-specific agreement. Staff takes AT&T's position as to DP 1 but, as to DP 6, recommends a modified version of the language preferred by SWBT. The M2A lacks corresponding provisions because Section 271 interconnection agreement commitments are not portable to other states under the terms of the SBC-Ameritech merger.[73]

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[71] DP 17 has been previously settled.

[72] *Application of Ameritech Corp., Transferor, and SBC Communications, Inc., Transferee, for Consent to Transfer Control of Corporations holding Commission Licenses and Lines Pursuant to Sections 214 and 310(d) of the Communications Act and Parts 5, 22, 24, 25, 63, 90, 95, and 101 of the Commission's Rule,* CC Docket No. 98-141, *Memorandum Opinion and Order,* 14 F.C.C. Rcd 14712 (1999) (hereinafter the *"SBC-Ameritech Merger Order"*).

[73] *Id.*, at Para. 43 of Appendix C.

The Commission will resolve these DPs by directing the parties to adopt the positions suggested by Staff. Whatever the interest of non-Missouri entities in this agreement, the Commission's concern is necessarily with Missouri. Therefore, the Commission agrees with AT&T and Staff that references to other states and to non-Missouri SBC entities must be excluded unless necessary to the function of this agreement as an agreement between Missouri carriers that will be implemented in Missouri. On the other hand, the identification of voluntary and nonvoluntary provisions is potentially useful to the implementation and interpretation of this agreement in Missouri and so should be adopted in the form proposed by Staff.

2. Should the Agreement set forth its purpose in a series of "Whereas" clauses?

It is customary for contracts to include an opening series of clauses, each beginning "whereas," which express the intent of the parties in making the agreement. These clauses can be helpful if it is necessary later to determine the intent of the parties. AT&T objects to certain of the "whereas" clauses proposed by SWBT on the grounds that they misstate AT&T's intent and improperly seek to limit the scope of this agreement. SWBT contends that the questioned language is necessary to accurately express the parties' intent and objects to any intention by AT&T to use this agreement for purposes other than those contemplated by the Act. The Staff agrees with AT&T that certain of the "whereas" clauses proposed by SWBT are unnecessary. The M2A states that its purpose is local exchange competition; parties may not interconnect under the M2A as an IXC or other nonlocal provider.

The Commission will resolve this DP by directing the parties to adopt the position suggested by Staff. This agreement is fundamentally unlike traditional commercial

contracts in that the parties are brought to the table by operation of law and not by the coincidence of their mutual self-interest. Therefore, "whereas" clauses are not important for determining the intent of the parties because there is no coincidence of self-interest to define. Rather, it is apparent that AT&T as a CLEC is seeking as much advantage as the law permits, while SWBT as an ILEC is seeking to give away only as much as the law demands. Thus, while some introductory recitations are helpful, they are not generally of much importance in the present circumstances.

4. (A) (AT&T's version) What should the term length be of this Agreement, and what terms and conditions should govern its renewal, termination and expiration, and any transition following termination or expiration? What liability will continue after the expiration of the term?

4. (B) (SWBT's version) What should be the term length of the non-M2A provisions of this Agreement, and what terms and conditions should govern the Agreement's renewal, termination and expiration, and any transition following termination or expiration? What liability will continue after the expiration of the term?

The parties do not agree on the exact issue for determination here. Many, if not most, of the provisions in this agreement derive from the M2A.[74] AT&T and SWBT refer to these as "Elected Provisions" to distinguish them from the other provisions of this agreement, whether negotiated or arbitrated, which do not derive from the M2A. SWBT favors different terms for different provisions. For the non-Elected Provisions, SWBT proposes a term of one year plus 90 days. For the Elected Provisions, SWBT argues that a term of "conditionally four years" is required by the M2A.

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[74] *AT&T's Proposed Findings* at 8.

What term length is required by the M2A? Attachment 26 of the M2A identifies the terms and conditions "legitimately related" to various provisions or attachments of the M2A; it requires that CLECs adopting any part of the M2A also adopt certain sections of the M2A's General Terms and Conditions.[75] One of these—Section 4.1—provides that the agreement will expire one year after approval by this Commission, except that SWBT may extend it for three more years if the F.C.C. has, in the interim, approved SWBT's Section 271 application for Missouri. Thus, the term in question is "conditionally four years" as described by SWBT.

AT&T, in turn, favors a term of three years, renewable for two one-year periods, to "avoid slipping into a continuous re-negotiation time-table."[76] Staff recommends a three-year term for every provision of the agreement. Staff further recommends that the Commission adopt the language recommended by AT&T, with a single modification which limits the period of liability after the expiration of the agreement. Section 4 of the M2A contains provisions setting the term of the agreement and regulating the relationship of the parties upon expiration.

The Commission will resolve this DP by directing the parties to adopt the position and language recommended by Staff. It is needlessly complex and confusing to assign different term lengths to different provisions of the same agreement.

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[75] Sections 2.1, 2.2, 4.1, 4.1.1, 4.1.2, 4.2, and 4.2.1.

[76] *AT&T's Proposed Findings* at 6.

5. Should the parties have the right to terminate the Agreement for material breach, subject to a notice and cure period, and excepting breach in the form of non-payment, which is addressed by agreed provisions elsewhere in the Agreement?

AT&T proposes, at Section 4.2, that the agreement will continue in effect on a month-to-month basis during negotiations by the parties and, if such negotiations are unsuccessful, during arbitration by the Commission. SWBT, in turn, proposes at Section 2.3 to grant to each party a right of unilateral termination upon material breach by the other party that goes uncured for 45 days.

AT&T opposes any right of unilateral termination for material breach because service disruption to customers is a potential result of any such right. AT&T, instead, favors referral of any such disputes to the Commission for resolution. SWBT supports the inclusion of a right to terminate if a material default remains uncured after 45 days. SWBT points out that its proposed language does not prevent dispute resolution as provided for in the agreement. Further, the right to terminate for material breach is "customary and prudent" in commercial contracts.[77] Staff supports AT&T's position on this point. The M2A, at Section 10 of its General Terms and Conditions, provides a right of termination only for nonpayment.

The Commission will resolve this DP by directing the parties to adopt the position and language suggested by AT&T. This agreement is not like traditional commercial

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[77] *In the Matter of the Application of AT&T Communications of the Southwest, Inc., TCG St. Louis and TCG Kansas City, Inc., for Compulsory Arbitration of Unresolved Issues with Southwestern Bell Telephone Company Pursuant to Section 252(b) of the Telecommunications Act of 1996,* Case No. TO-2001-455 (*Southwestern Bell Telephone Company's Proposed Findings of Fact and Conclusions of Law,* filed June 1, 2001) (hereinafter *"SWBT's Proposed Findings"*) at 8.

contracts and a provision typically included in such is not necessarily appropriate here. This agreement exists only because Congress has given CLECs like AT&T power to force SWBT to the table. Therefore, the appropriate remedy for a material and continuing breach is not termination but application to this Commission for a remedy.

8. May SWBT recover its costs for implementing name changes initiated by AT&T?

A name change by a business entity interconnected with SWBT can require the alteration of literally hundreds of records, resulting in significant costs to SWBT. SWBT initially proposed language permitting it to recover any such costs. Later, SWBT modified its position and proposed that AT&T could have one free name change per 12-month period. Staff supports SWBT's modified position. AT&T, on the other hand, argues that such name changes will be a rare event and that any associated costs are an ordinary cost of doing business to SWBT. AT&T objects to paying for these costs. The M2A does not provide for name changes and, therefore, does not provide for the recovery of associated costs.

The Commission will resolve this DP by directing the parties to adopt SWBT's original position and proposed language. It is appropriate and equitable that the cost causer should underwrite costs resulting from name changes. These costs are not properly a cost of doing business to SWBT, but a cost of doing business to the CLEC that is changing its name.

9. Should Non-Voluntary provisions (i.e., provisions that result from arbitration) be subject to invalidation or modification in accordance with legally-binding regulatory or judicial rulings?

SWBT proposed language in Section 3.4 that permits a party, upon the modification of any Non-Voluntary provision by judicial or administrative action, to trigger

renegotiation of affected provisions of this agreement by giving written notice. The parties' subsequent failure to successfully negotiate appropriate modifications of this agreement within 60 days would permit recourse to the dispute resolution provisions in Section 9. AT&T, in turn, contends that this proposal conflicts with the general intervening law provision at 3.1. Staff contends that other language in Section 3.4 addresses this point. The M2A contains specific change of law provisions at Sections 18.2 to 18.4 of its General Terms and Conditions.

The Commission will resolve this DP by directing the parties to adopt the position and language suggested by Staff. The additional language proposed by SWBT is unnecessary.

10. May the parties reserve their rights to appeal or seek other relief from regulatory and legal rulings related to this Agreement, even though they have entered into this Agreement?

SWBT proposed reservation of rights language at Section 3.3 of the General Terms and Conditions of the agreement in order to make it clear that, by entering into this agreement, the parties do not waive their right to pursue various ongoing appeals, such as SWBT's appeal to the United States Supreme Court of the F.C.C.'s TELRIC pricing rules. AT&T, in turn, believes that this language is unnecessary because intervening judicial decisions can be implemented through the intervening law provision at 3.1. AT&T also objects to SWBT's attempt to reserve rights to a retroactive true-up which may never eventualize. Staff agrees with AT&T that Section 3.1 covers this point adequately. The M2A contains specific change of law provisions at Sections 18.2 to 18.4 of its General Terms and Conditions.

The Commission will resolve this DP by directing the parties to adopt AT&T's position. The parties' entry into a compulsory agreement cannot be read as a waiver of their right to pursue pending litigation, particularly where, as here, the agreement contains no language purporting to state such a waiver. Therefore, the language proposed by SWBT is unnecessary. The effect of the resolution of any pending litigation is adequately covered by Section 3.1.

11. Will a ruling by the Commission on a provision in the interconnection agreement of other carriers be applicable to the substantially similar language in this Agreement?

AT&T contends that the issue is whether Missouri Commission rulings on non-M2A provisions in the interconnection agreements of other carriers will be applied to the similar non-M2A provisions in this agreement. The M2A has a provision, Section 31.1, on this point, but it applies only to M2A provisions. AT&T believes that it is most efficient to extend this treatment to the non-M2A provisions as well.

SWBT believes this treatment, while appropriate for the M2A provisions, is inappropriate for the non-M2A provisions. SWBT believes that disputes regarding those provisions should be resolved on a case-by-case basis by the Commission. Staff agrees with AT&T's position.

The Commission will resolve this DP by directing the parties to adopt SWBT's position because it is not clear what "substantially similar language" means. How are the parties to determine whether or not a provision in another agreement is so similar to a provision in this one that a Commission decision regarding it should automatically be applied to this agreement? It seems better to simply let the parties bring these disputes, should any arise, to the Commission on a case-by-case basis.

18. Should AT&T be able to avoid limitation of liability provisions required by its adoption of portions of the M2A?

This DP also arises out of Attachment 26 to the M2A. Attachment 26 requires that any CLEC adopting M2A Attachment 25--DSL, must also adopt the limitation of liability language at Section 7.1.1, which in turn refers to Sections 7.3.1 and 7.3.6. AT&T has agreed to adopt Section 7.3.1, but objects that Section 7.3.6 is not specifically identified in Attachment 26 as a "legitimately related" provision that must be adopted. AT&T asserts that SWBT is attempting to expand the scope of Attachment 26 by insisting that the agreement include Section 7.3.6. AT&T also objects that the scope of Section 7.3.6 is broad and that it applies to more than simply Attachment 25—DSL.

SWBT, in turn, takes the position that AT&T must adopt all legitimately-related language when it adopts portions of the M2A. SWBT asserts that, by approving the M2A, this Commission has already determined that Section 7.3.6 is legitimately related to Attachment 25--DSL. Staff agrees with SWBT that Section 7.3.6 should be included in the agreement.

The Commission will resolve this DP by directing the parties to adopt SWBT's position and to include Section 7.3.6 in their agreement. The language in question releases, indemnifies and holds SWBT harmless from any damages arising out of a claim that AT&T's access to SWBT's network under this agreement violates the intellectual property rights of any third party. While it is true that this provision is not limited to DSL, it is also true that it is an appropriate component of the parties' agreement.

19. Should M2A language related to M2A UNE Attachment 6 be included in this Agreement, even though AT&T did not adopt M2A UNE Attachment 6?

This is another issue arising out of Attachment 26 of the M2A. Attachment 26 requires that Section 18.2 of the M2A's General Terms and Conditions be adopted by CLECs adopting portions of the M2A adopted herein by AT&T. However, the first sentence of Section 18.2 refers to Attachment 6--UNEs of the M2A, which AT&T has not adopted for this agreement. Therefore, SWBT contends that Section 18.2 should be modified by the inclusion of language expressly providing that the first sentence of Section 18.2 does not apply to this agreement. Staff agrees with SWBT.

AT&T, in turn, asserts that SWBT should be bound by any ambiguities it has written into the M2A. However, AT&T is not strongly opposed to SWBT's position on this point and has offered to yield if it wins on DP 18, above. In its Proposed Findings and Conclusions, AT&T recommends that the Commission find "that SWBT's modification is appropriate."[78]

The Commission will resolve this DP by directing the parties to adopt the position recommended by SWBT and to include SWBT's proposed modification in Section 18.2. The parties may also consider whether they would rather modify Section 18.2 by omitting the first sentence, in which case SWBT's modification would be unnecessary. No purpose is served by including language applicable only to a provision not included in the agreement, particularly if that provision could be manipulated to produce a result never originally intended.

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[78] *AT&T's Proposed Findings* at 26. This recommendation is conditioned on the Commission finding for AT&T on DP 18.

Unbundled Network Elements (UNEs) Terms and Conditions

The Commission will resolve all open issues not identified by AT&T as non-M2A issues by directing the parties to adopt the corresponding provisions of the M2A. With respect to the UNEs Terms and Conditions category, DPs 1-24, 26-29, 33-34, and 38-68 are so resolved.[79] The Commission specifically resolves the DPs identified by AT&T as non-M2A issues as follows:

25. Should AT&T's Single Point of Interconnection language be included in the Agreement?

AT&T proposes in Section 5.9 language which would permit a single point of interconnection at a multiunit premises with pricing based on TELRIC principles. SWBT maintains that language at Section 5.8.8 already would permit a single point of interconnection at a multiunit premises with pricing to be determined under the Bona Fide Request (BFR) process. Staff proposes a compromise version of Section 5.9 which would permit a single point of interconnection at a multi-unit premises with pricing to be determined under the BFR process, with a wider range of choices for resolving disputes. The M2A addresses a single point of interconnection at Attachment 11—Network Interconnection Architecture, Sections 1.2 and 1.3, and at Attachment 6—UNEs, Sections 3.2 and 4.6.1.[80] SWBT suggests that one subissue related to this point is not resolved by the M2A, pointing to Section 1.3 of Attachment 11—Network Interconnection

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[79] DP 35 has been previously settled.

[80] Attachment 6—UNEs of the M2A has not been adopted for this agreement.

Architecture, which provides only that the parties will attempt to negotiate a solution and, if unsuccessful, will refer the matter to the Commission for resolution.

The Commission will resolve this DP by directing the parties to adopt the position proposed by Staff and to incorporate the language proposed by Staff into their agreement. The Commission agrees that the BFR process is appropriate where nonstandard work is concerned and believes a provision additional to Section 5.8.8 is appropriate.

30. What type of traffic will SWBT route over shared transport?

The parties disagree as to whether SWBT should be required to route AT&T's intraLATA toll traffic over shared transport. SWBT contends that shared transport is, by definition, appropriate for local traffic only. SWBT states that it is appropriate to route AT&T's UNE-P intraLATA calls to the appropriate tandem to be handed off to the intraLATA toll provider's Point of Presence. AT&T, in turn, asserts that both local traffic and AT&T's intraLATA toll traffic, upon request, are appropriately routed on shared transport. AT&T characterizes SWBT's position as an "attempt to retain its residual monopoly power over the intraLATA toll market."[81] Staff suggests that AT&T's proposed language is applicable only where there are existing trunks and lines and that there is no regulatory impediment to SWBT's routing of AT&T's intraLATA toll traffic over such trunks and lines. The M2A addresses this point at Sections 2.4.1, 2.20 and 5.2.1 of Attachment 6—UNEs, which SWBT interprets to permit the routing of AT&T's intraLATA toll traffic over shared transport in cases where AT&T is providing local service to the originating end user via UNEs.

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[81] *AT&T's Proposed Findings*, at 36.

SWBT's witness Bryan Gonterman testified that the routing of intraLATA toll traffic over shared transport, as requested by AT&T, would require customized routing.[82] Gonterman testified that the shared transport UNE does not include customized routing.[83] Gonterman relied on the F.C.C.'s Third Reconsideration Order for the proposition that shared transport "requires a requesting carrier to utilize the routing table contained in the incumbent LEC's switch."[84] Likewise, SWBT's witness Michael Kirksey testified that, without customized routing, SWBT's switch would deliver the traffic in question directly to the dialing customer's PIC.[85] In fact, SWBT asserts that this is the appropriate result.[86]

AT&T's witness Scott Finney, in turn, testified that SWBT is required to provide UNEs without the imposition of restrictions and limitations such as this one.[87] Finney relied on the F.C.C.'s Local Competition Order, which states that Section 251(c)(3) of the Act "bars incumbent LECs from imposing limitations, restrictions, or requirements on requests for, or the sale or use of, unbundled elements that would impair the ability of requesting carriers to offer telecommunications services in the manner they intend."[88] Finney denied that DPs 30 and 31 turn on customized routing, as SWBT asserts, but rather on

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[82] Exhibit 40 at 52-54.

[83] *Id.*

[84] *Id.* at 53. No more detailed citation to the Third Reconsideration Order is provided.

[85] Exhibit 42 at 5

[86] *Id.*

[87] Exhibit 48 at 14-15.

[88] *First Report and Order, Implementation of the Local Competition Provisions in the Telecommunications Act of 1996,* CC Docket No. 96-98 (released August 8, 1996) (hereinafter the *"Local Competition Order"*) at Para. 292.

"fundamental issues of parity."[89] Finney testified that SWBT should route traffic in an identical manner regardless of which carrier provides the local service, that is, that the call path should be similar.[90]

SWBT's witness Gonterman testified that the real issue is an attempt by AT&T to avoid paying exchange access.[91] Normally, when a customer makes a long distance or toll call, the IXC charges the dialing customer and the LECs originating and terminating the call charge the IXC for originating and terminating access.[92] Gonterman testified that, by requiring that SWBT carry toll traffic on shared transport, AT&T was seeking to avoid the payment of terminating access to SWBT.[93] AT&T's witness Finney admitted as much under cross-examination.[94]

The Commission will resolve this DP by directing the parties to adopt the position suggested by Staff in its Reply Brief.[95] SWBT shall carry local traffic on shared transport and also intraLATA toll calls upon request, but only where AT&T provides local service to the end user.

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[89] Exhibit 49 at 19.

[90] *Id.*

[91] Exhibit 41 at 33-35.

[92] *Id.*

[93] *Id.*

[94] Tr. at 845.

[95] *In the Matter of the Application of AT&T Communications of the Southwest, Inc., TCG St Louis and TCG Kansas City, Inc., for Compulsory Arbitration of Unresolved Issues with Southwestern Bell Telephone Company Pursuant to Section 252(b) of the Telecommunications Act of 1996,* Case No. TO-2001-455 (*Reply Brief of Staff,* filed June 1, 2001) (hereinafter *"Staff's Reply Brief"*) at 5-6.

31. How will PICed calls by AT&T customers be routed?

SWBT contends that this DP includes two issues. First, where will SWBT hand off an intraLATA toll call dialed by an AT&T customer to that customer's PIC?[96] Second, can AT&T require SWBT to provide intraLATA toll service to AT&T's customers by specifying shared transport over Feature Group D?

AT&T proposes that SWBT will route intraLATA toll calls dialed by AT&T's customers to the end user's PIC's Point of Presence (POP) using Feature Group D signaling. SWBT agrees that all such intraLATA toll calls will be routed to the end user's PIC for intraLATA toll service, but suggests additional language stating that SWBT is not an authorized PIC for an AT&T customer utilizing unbundled local switching. SWBT points out that toll traffic is delivered to the PIC's Feature Group D trunks at the end office or tandem of the IXC's choice and carried from there by the IXC to its network.[97] Staff suggests that AT&T's language is appropriate because SWBT's language does not make it clear how such calls will be completed. Staff proposes language which is a hybrid of AT&T's and SWBT's suggestions. The M2A addresses this at Sections 5.2.2.2.1.2-5.2.2.2.1.3 of Appendix—Pricing (UNEs) to Attachment 6—UNEs.

The Commission will resolve this DP by directing the parties to adopt the position and language suggested by Staff. Staff's proposed language incorporates wording proposed by both AT&T and SWBT and appropriately makes it clear that SWBT will not provide intraLATA toll to AT&T's customers.

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[96] PIC is Presubscribed InterLATA Carrier or Presubscribed IntraLATA Carrier as the context demands.

[97] IXC is interexchange carrier.

32. Should AT&T's customized routing language be included in the Agreement?

This DP concerns the customized routing of direct dialed, intraLATA Directory Assistance calls dialed from a foreign NPA pursuant to Section 6.4.14 of the UNE Appendix. SWBT contends that AT&T's proposed language extends beyond SWBT's standard dialing arrangements. Such a call should be routed to the end user's PIC like any other toll call.[98] The UNE Remand Order identifies that the ILEC's current routing tables are to be used in provisioning the customized routing service. SWBT will route Operator Service/Directory Assistance (OS/DA) traffic on a customized basis, but not intraLATA toll traffic.

AT&T contends that this DP represents another attempt by SWBT to improperly impose usage limitations on UNEs.[99] AT&T also asserts that this issue is, in part, a matter of dialing parity.[100] If a SWBT local service customer can reach Directory Assistance in a foreign NPA by dialing "(NPA) 555-1212" and an AT&T local service customer must dial "1010XXX-(NPA) 555-1212," AT&T is clearly placed at a competitive disadvantage.[101] The Act requires LECs to "provide dialing parity to competing providers of telephone exchange service and telephone toll service[.]"[102] Staff agrees that AT&T's language is appropriate.

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[98] Exhibit 42 at 8-9.

[99] Exhibit 48 at 12-15.

[100] Exhibit 48 at 27.

[101] *Id.*

[102] 47 U.S.C. Section 251(b)(3).

The M2A addresses customized routing in detail in Sections 5.2.3 and 5.2.4 of Attachment 6—UNEs.

The Commission will resolve this DP by directing the parties to adopt SWBT's position. The issue appears to be whether a foreign NPA Directory Assistance call is viewed as a toll call or as an OS/DA call. SWBT characterizes such a call as a toll call and AT&T characterizes it as an OS/DA call. The Commission concludes that SWBT's characterization is the more reasonable.

36. Should AT&T be allowed to overflow its traffic to SWBT's shared or common transport?

AT&T proposes, at Section 6.5.9.4.3, language that will permit its dedicated trunk groups with ULS custom routing to overflow to SWBT's shared or common transport. SWBT objects to this arrangement in the absence of any parameters governing the amount of overflow traffic or the duration of the overflow.[103] SWBT further contends that AT&T is attempting to shift the burden of providing sufficient network capacity to SWBT. AT&T, in turn, argues that this arrangement would not unduly burden SWBT's network and that it would enhance network efficiency.[104] Staff recommended a modified version of AT&T's language, including a caveat that "the overflow does not infringe upon SWBT or its network integrity."[105] The M2A provides at Section 5.2.3.1 of Attachment 6—UNEs that the custom routing of any traffic other than OS/DA be handled as a special request.

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[103] Tr. 731-732.

[104] Exhibit 49 at 21.

[105] Exhibit 2-C at 45.

The Commission will resolve this DP by directing the parties to adopt the position of SWBT. In the absence of any limitations, the overflow arrangement proposed by AT&T is inappropriate.

37. According to [what] schedule will SWBT implement customized routing for AT&T?

AT&T has proposed inclusion of a schedule for the implementation of customized routing at Sections 6.6.1 and 6.6.2.5. AT&T asserts that this schedule is in use in California and was originally proposed by SBC. SWBT contends that the schedule is unnecessary because SWBT has already provided an implementation schedule in the language relating to OS/DA and that, in the event of any requests for other custom routing through the BFR process, an implementation schedule will be developed. SWBT further suggests that AT&T's language will lead to additional litigation. Staff recommends adoption of SWBT's proposed language. The M2A provides for customized routing at Sections 5.2.3 and 5.2.4 of Attachment 6—UNEs.

The Commission will resolve this DP by directing the parties to adopt SWBT's position. AT&T's suggested implementation schedule is unnecessary.

Network Interconnection and Architecture

The Commission will resolve all open issues not identified by AT&T as non-M2A issues by directing the parties to adopt the corresponding provisions of the M2A. With respect to the Network Interconnection and Architecture category, DPs 1, 2, 4, 6, 7, 11, and 13-15 are so resolved. The Commission specifically resolves the DPs identified by AT&T as non-M2A issues as follows:

3. Should [the] financial obligations of interconnection be shared on an equitable basis?

SWBT proposes that each party bear responsibility for approximately half of the financial obligations of interconnection; this position may be characterized as a "50:50 split." AT&T, in turn, proposes that each party bear all costs on its side of the Point of Interconnection (POI). AT&T suggests that SWBT's proposal would impose an unfair burden on the party contributing the smaller volume of traffic. The M2A addresses this point in Section 1.2 of Attachment 11—Network Interconnection Architecture. This provision makes each party responsible for all costs on its side of the POI but also requires an interconnection in each SWBT exchange in which a CLEC seeks to offer services.

Staff proposes language drawn from both parties' proposed language. Under Staff's proposal, some costs would be shared equally and others would be based on traffic volume. Staff suggests that, for the nonrecurring costs of constructing the interconnection, a 50:50 split is most equitable because both parties, and their customers, will benefit from the interconnection. As to the recurring costs of operating the interconnection, Staff suggests that a traffic volume-based approach is most equitable.

The Commission will resolve this DP by directing the parties to adopt the position and language suggested by Staff. Staff has accurately analyzed the equities of the situation and the Commission agrees that separate treatment is required for recurring costs and nonrecurring costs.

5. With respect to jointly provided exchange access service to IXC customers, should the same terms apply to both parties as co-LECs regardless of which party is providing the tandem switching function to the IXC?

SWBT opposes AT&T's proposed language on the grounds that detailed terms and conditions relating to IXC traffic do not belong in an agreement providing for local

competition. SWBT asserts that the traffic AT&T seeks to include is access traffic, properly handled under the access tariff. AT&T contends that its language specifies who is responsible for transporting the IXC traffic regardless of who provided the switching. AT&T believes the IXC should be permitted to choose who will provide the tandem switching function. Staff recommends that AT&T's language be adopted because it promotes competition, but that additional language be inserted to prohibit the use of AT&T's proposed arrangement to avoid access charges. The M2A addresses this issue at Section 2.2 of Attachment 11—Network Interconnection Architecture. That provision provides for the transport of the traffic at issue over a meet point trunk group distinct from other trunk groups, subject to the terms of applicable access tariffs.

The Commission will resolve this DP by directing the parties to adopt the position and language suggested by Staff. The Commission notes that AT&T, in its Proposed Findings, urges the Commission to adopt Staff's suggestion.[106]

8. Should AT&T be required to establish direct end-office trunk groups when the usage between itself and other carriers requires 24-voice grade paths (trunks) or more?

9. Should AT&T be required to establish direct end-office trunks when traffic volume requires 24 or more trunks?

20. Should AT&T be required to establish a local trunk group from AT&T's switch to each SWBT end-office in a local exchange area that has no local tandem?

These are closely related DPs. SWBT proposes language at Part C, Sections 5.1, 6.0, 7.0, and 9.2.3, requiring AT&T to construct direct trunk groups when a 24-trunk traffic threshold is reached. SWBT explains that it is willing to allow AT&T

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[106] *AT&T's Proposed Findings* at 61.

reasonable use of SWBT's tandems to exchange traffic with SWBT or with third party carriers, including transit traffic. However, in order to avoid premature exhaustion of SWBT's tandems, SWBT seeks to impose on AT&T the same 24-trunk threshold that it applies to itself. Under this rule, when the traffic in question reaches the 24-trunk threshold, AT&T would be required to construct a direct trunk group that would avoid the tandem altogether. In exchange, SWBT would undertake to accept AT&T's overflow traffic through its tandem.

AT&T objects to SWBT's language, arguing that it essentially allows SWBT to design AT&T's network, it permits SWBT to impose a business plan upon AT&T, it permits SWBT to evade its interconnection obligations under the Act, and that the 24-trunk threshold is too low. AT&T proposes language at Part A, Section 1.0, that asserts AT&T's right to interconnect with SWBT at any technically feasible point. Staff agrees with AT&T. The M2A does not impose a direct trunking obligation upon reaching a 24-trunk threshold, but provides at Section 5.3 of the Interconnection Trunking Requirements Appendix to Attachment 11—Network Interconnection Architecture, that the parties might agree to establish a direct trunk group at that point.

The Commission will resolve these DPs by directing the parties to adopt the positions and language suggested by AT&T. SWBT is obligated to interconnect with AT&T at any technically feasible point, without regard to traffic volume. AT&T is free to design its own network and to capitalize on any competitive advantages conferred by its network architecture in conjunction with SWBT's interconnection duty. The Commission agrees with Staff, as to the proposed direct trunking obligation between AT&T and third party carriers, that this agreement is not able to impose any obligation upon non-party carriers.

10. Should traffic be routed in a manner that is consistent with each party's Local Exchange Routing Guide (LERG) entries?

SWBT proposes that traffic be routed pursuant to the LERG and that traffic on end-office trunks should only be for the end office and that the end office should not perform any tandem functions. AT&T agrees that traffic should be routed pursuant to each party's LERG entries and objects to SWBT's proposed language as unnecessary because the parties have already agreed to such language at Attachment 11—Network Interconnection Architecture, Part C, Section 22.0. Staff agrees with SWBT, but would modify SWBT's proposed language by removing multistate references. The M2A at Section 1.1.1 of Attachment 12—Compensation, requires that traffic be routed pursuant to the LERG unless the Commission orders otherwise.

The Commission will resolve this DP by directing the parties to adopt the position and language proposed by Staff. There is no dispute among the parties that the LERG should govern traffic routing. There is also no dispute among the parties that traffic on an end-office trunk should be limited to traffic intended for that end office. The only dispute appears to be AT&T's argument that, if SWBT's LERG is properly programmed, then the language concerning the end office trunks is surplusage. The Commission believes that the language, if indeed surplusage, does no harm and is useful in defining the appropriate use of end office trunks.

12. Should AT&T be required to duplicate SWBT's network architecture to provide local exchange?

SWBT has proposed language at Section 15.0 of Part C that would assign responsibility for facilities transporting foreign exchange (FX) traffic. SWBT maintains that AT&T should be responsible for all facilities that carry AT&T's FX traffic. At hearing, SWBT

suggested an example in which AT&T assigned a New Madrid NPA NXX code number to a St. Louis customer in order to permit that customer to receive toll free calls from New Madrid callers.[107] SWBT states that, while it does not object to that practice, it wants to ensure that AT&T bears the associated costs. AT&T, in turn, argues that its network architecture is fundamentally different from SWBT's and that SWBT should deliver all traffic destined for the same NPA NXX to the same AT&T switch. AT&T will then transport the traffic to the end user and charge the same reciprocal compensation rate, regardless of the physical location of the customer. Staff recommends adoption of a modified version of SWBT's language. Under the M2A, at Section 1.1 of Attachment 12—Compensation, a call such as described in the example would not be classified as a local call.

The Commission will resolve this DP by directing the parties to adopt the position and language suggested by Staff.

16. Is SWBT's language requiring that trunk migration from one-way to two-way or from two-way to one-way be "agreed" appropriate for inclusion in the attachment?

The parties dispute over Section 5.0(c) of Part E is limited to a single word. SWBT contends that the word "agreed" should appear in the section at issue to reflect SWBT's position that migration is not mandatory. AT&T argues that the word "agreed" is inappropriate because it could prevent AT&T from using one-way trunks. Staff agrees with AT&T. The M2A, at Section 2.1.1 of Attachment 11—Network Interconnection Architecture, follows the Commission's decision in TO-97-40, which ordered two-way trunking where feasible.

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[107] Tr. 991-996.

The Commission will resolve this DP by directing the parties to adopt the position and language suggested by AT&T.

17. Should six months or three months of consecutive under 75 percent call capacity trunk groups be used for [a] resizing threshold?

19. Should the Agreement contain definitions of under- and over-utilization of trunks and facilities, and provide for what will happen if AT&T is unresponsive to SWBT requests for resizing?

These DPs relate to the management of network facilities. Network facilities which are dedicated to a particular purpose, but which are not fully used in that function, represent stranded assets. Efficient network management requires that such stranded assets be recovered and redeployed where they are needed. The first issue concerns how long should the underutilization of a trunk group persist before it is resized? The second concerns the definitions of underutilization and whether SWBT should possess unilateral authority to manage its network if AT&T does not cooperate.[108]

With respect to the duration of underutilization before a trunk group is resized, SWBT argues that three months is long enough. SWBT proposes language at Section 3.0, Part F, containing both the 75 percent threshold and the three-month threshold. SWBT's witness Craig Mindell testified, for example, that Local AT&T used less than one-third of its trunk group capacity during its highest use month over the last year.[109] AT&T, on the other hand, believes that three months is too short and that a six-month period is required because many important factors may not manifest in a three-month window. AT&T's

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[108] Despite the wording of DP 19, SWBT's proposed language nowhere states a definition of overutilization.

[109] Exhibit 51 at 27.

witness Dennis Humes testified that the short window proposed by SWBT would likely lead to many unnecessary usage studies.[110] Staff agrees with AT&T because a CLEC, as a new entrant, should be afforded some latitude in developing business forecasts and plans. The M2A does not set a threshold for resizing.

The Commission will resolve DP 17 by directing the parties to adopt AT&T's position and related language. The Commission agrees with Staff that a new entrant should be afforded some latitude in developing business forecasts and plans. Additionally, as the M2A does not include a resizing threshold, it cannot be as important as SWBT suggests here.

As to the second issue, SWBT proposes to add language to Section 3.0, Part F, that defines underutilization. Additionally, SWBT proposes language at Section 4.0, Part F, that authorizes it to unilaterally resize trunk groups if AT&T does not cooperate. AT&T opposes this language because it does not contain any provisions as to SWBT's failure to cooperate with a CLEC request to resize a trunk group. AT&T also asserts that Section 3.0 contains an adequate definition of underutilization. Staff suggests that part of this DP was resolved under DP 17; as for the rest, Staff opposes SWBT's proposed language at Section 4.0 as contrary to the Act. The M2A, while addressing the underutilization of trunks and facilities at Section 2-3 of Appendix Network Interconnection Methods, does not grant SWBT unilateral authority to resize trunk groups.

The Commission will resolve DP 19 by directing the parties to adopt AT&T's position. The absence of any unilateral resizing power in the M2A persuades the

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[110] Exhibit 53 at 34.

Commission that SWBT does not need it in this agreement, either. The proposed additional language for Section 3.0 adds nothing useful to that provision.

18. Should SWBT's language requiring that the party requesting a unilateral change from the existing interconnection arrangement to a new interconnection arrangement based on the new interconnection agreement bear the conversion costs for the new arrangement be included in the attachment?

The parties agree that each of them will bear its own costs of converting from the previous interconnection arrangement to the new interconnection arrangement specified by this agreement. However, SWBT proposes additional language, at Section 2.2 of Part B, providing that any party seeking to *unilaterally* change the network architecture from one previously agreed by the parties must bear all conversion costs. SWBT contends that this language prevents the party causing such costs from unfairly imposing some of them on the other party. AT&T objects to SWBT's additional language. AT&T explains that this DP relates to its desire to utilize a one-way trunking arrangement under this agreement rather than the two-way trunking arrangement used previously. AT&T contends that the additional language sought by SWBT would impose the full cost of conversion on AT&T. AT&T argues that, should the Commission's arbitration decision select AT&T's proposed one-way trunking alternative, then it would be appropriate that each party bear its own costs to convert. Staff agrees with AT&T. The M2A does not impose conversion costs on the party seeking to change network architecture.

The Commission will resolve this DP by directing the parties to adopt the position and language suggested by SWBT. The Commission has resolved the interconnection trunking issue by directing the parties to adopt the corresponding provision of the M2A. That provision requires two-way trunking where feasible.

Operations Support Systems (OSS)

With respect to the Operations Support Systems (OSS) category, AT&T identified all of the DPs as non-M2A issues. The Commission resolves these DPs as follows:

1. Should SWBT have the ability to audit AT&T where it believes AT&T is violating Customer Proprietary Network Information (CPNI) protective measures or otherwise misusing SWBT's OSS?

SWBT proposes language granting it the right to audit AT&T's use of CPNI. SWBT asserts that it has a duty under Section 222 of the Act to protect CPNI and that the audit function is necessary to implement that duty. SWBT's witness John Mitchell testified, as an example, that on one occasion, the access of SWBT's OSS by a CLEC in violation of stated line limits resulted in the temporary shut down of the entire system, thus depriving all users of access.[111] AT&T opposes SWBT's proposed language as overly broad, invasive, and subject to abuse by SWBT. AT&T states that it will comply with all applicable laws and regulations governing the use of CPNI and cooperate with SWBT in the investigation of any claims of misuse. Staff suggests a modified version of SWBT's suggested language, removing all references to non-Missouri SBC entities.

The Commission will resolve this DP by directing the parties to adopt Staff's position and Staff's suggested language. The Act states that "[e]very telecommunications carrier has a duty to protect the confidentiality of proprietary information[.]"[112] A reasonable audit right in the event of possible misuse is necessary to protect the integrity of the CPNI. AT&T's witness, Daniel Rhinehart testified that "AT&T recognizes SWBT's obligation to

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[111] Exhibit 30 at 4. This occurred in a state other than Missouri.

[112] 47 U.S.C. Section 222(a).

monitor and control how its OSS are used to insure that the systems are properly used and not subject to abuse from any system user."[113]

2. (A) (SWBT) Should AT&T be allowed access to CPNI even though it is not and will not be providing local exchange service to the end user?

2. (B) (AT&T) Should AT&T be permitted access to CPNI to support orders for services such as Local Plus or vertical features for resale on a stand alone basis?

3. Should the terms and conditions that afford access to OSS interfaces be clarified to explicitly include access that is required to process orders for telecommunications services such as vertical features or services like Local Plus where AT&T is one of several local service providers to an end user account?

These DPs are closely related. SWBT states that it is only required to permit CLECs to access the CPNI of another carrier's end user when the CLEC has been authorized by the end user to become the local service provider. AT&T, in turn, complains that SWBT's proposed language prohibits AT&T from accessing CPNI for legitimate reasons, such as reselling SWBT's vertical services. Staff evidently sides with AT&T, at least with respect to the resale of stand-alone vertical services.

SWBT points out that, under the M2A's Resale Appendix, which AT&T has adopted in Missouri, a CLEC cannot order vertical services or Local Plus unless the CLEC is the local exchange service provider for the end user in question. SWBT further asserts that AT&T has disguised a resale issue as an OSS issue because, given that resale is not permitted in the circumstances under consideration, there is no need for access to CPNI. AT&T, on the other hand, characterizes these DPs as turning on the issue of non-discriminatory access to CPNI. AT&T argues that SWBT's refusal to permit the resale of

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[113] Exhibit 18 at 68.

vertical features and Local Plus on a stand-alone basis constitutes an impermissible resale restriction. AT&T contends that other State commissions have required SWBT to permit the resale of vertical services and Local Plus on a stand-alone basis.

Staff points to a recent decision by this Commission that requires SWBT to provide Local Plus either as a service for resale or as a UNE.[114] Staff evidently believes that this decision resolves the issue because it requires SWBT to unbundle Local Plus and, by extension, vertical services.

The Commission will resolve these DPs by directing the parties to adopt SWBT's position and language. The Act further provides that a carrier may "use, disclose, or permit access" to CPNI only in the provision of the service from which the information derives or of some necessary and related service, "[e]xcept as required by law or with the approval of the customer[.]"[115] This Commission has never determined that ILECs must permit the stand-alone resale of vertical services and does not do so here. Therefore, the access to CPNI sought by AT&T is not at this time required by law. In any event, AT&T has adopted the M2A's Resale Appendix, under which a CLEC cannot order vertical services or Local Plus unless the CLEC is the local exchange service provider for the end user in question.

4. Ordering of Enhanced Extended Loops (EELS).

SWBT states that, pursuant to the UNE Remand Order, an EEL is not a UNE. Therefore, SWBT contends that it has no obligation to make EELS available and the

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[114] *In the Matter of the Investigation into the Effective Availability for Resale of Southwestern Bell Telephone Company's Local Plus Service by Interexchange Companies and by Facilities-based Competitive Local Exchange Companies*, Case No. TO-2000-667 (*Report and Order*, issued May 1, 2001).

[115] 47 U.S.C. Section 222(c)(1).

ıge proposed by AT&T for inclusion in the OSS Attachment is not appropriate. Staff s that AT&T is attempting to define an EEL as a UNE, contrary to the UNE Remand . AT&T responds that the UNE Remand Order does require SWBT to make EELS ble under certain conditions and that its proposed language, far from attempting to rt an EEL into a UNE, simply creates an ordering mechanism for EELS. SWBT s that those limited conditions do not exist and will not exist during the term of this ment. Staff recommends that SWBT's position be adopted because AT&T has stently opposed the inclusion of multistate language elsewhere and because the . has not defined an EEL as a UNE.[116] The M2A contains specific provisions ling the ordering of EELS at Section 14.7 of Attachment 6—UNEs.

The Commission will resolve this DP by directing the parties to adopt SWBT's position. The Commission sees no need to establish an ordering mechanism for a service that will not, in fact, be ordered.

Conclusions of Law

The Missouri Public Service Commission has reached the following conclusions

ration Under the Telecommunications Act of 1996:

The Telecommunications Act of 1996 was enacted by Congress to bring stition to the telecommunications industry and thereby to reap such benefits as lower

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aff's *Reply Brief* at 7.

rates, more efficient service, and a quickened pace of technological innovation.[117] Key to the scheme created by the Act are various provisions requiring the incumbent local telephone companies—the ILECs—to share their networks with competitors. Thus every carrier, of whatever type, is required to interconnect, directly or indirectly, with other carriers.[118] All local carriers, whether old and entrenched or new and upstart, are obligated to permit competitors to resell their services, to provide number portability and dialing parity, to establish reciprocal compensation arrangements for the transport and termination of traffic, and to allow access to their poles, conduits and rights-of-way.[119] Most importantly, the ILECs are required to negotiate "in good faith" and to make agreements with competitors as to interconnection, access to network elements on an unbundled basis (UNEs), and the sale of telecommunications services at wholesale rates for resale by competitors.[120] Finally, the Act imposes on ILECs, such as SWBT, the duty to provide for such physical collocation of facilities and equipment as is necessary for interconnection or access to UNEs.[121]

The Act favors agreements reached voluntarily, by negotiation, and permits these to be made "without regard to the standards set forth in subsections (c) and (d) of

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[117] *Iowa Utilities Bd., et al., v. F.C.C. et al.*, 120 F.3d 753, 791-92 (8th. Cir. 1997) (*Iowa Utilities Bd. I*), *aff'd in part, rev'd in part*, 525 U.S. 366 (1999); "Congress sought 'to promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies.' Telecommunications Act of 1996, Pub. L. No. 104-104, purpose statement, 110 Stat. 56, 56 (1996)."

[118] 47 U.S.C. Section 251(a)(1).

[119] 47 U.S.C. Section 251(b).

[120] 47 U.S.C. Section 251(c), (2), (3) and (4).

[121] 47 U.S.C. Section 251(c)(6).

section 251."[122] Such voluntary agreements must be submitted to the state commission for approval and the state commission may only reject such a voluntary agreement on a finding that it discriminates against a non-party carrier or that its implementation "is not consistent with the public interest, convenience, and necessity[.]"[123]

Congress recognized, however, that it would not always be possible for competing carriers to reach agreement through voluntary negotiation. Therefore, the Act creates a scheme of compulsory arbitration.[124] The state commission must resolve each open issue by "imposing appropriate conditions as required to implement subsection (c) upon the parties to the agreement[.]"[125] Arbitrated agreements must also be approved by the state commission, which may reject them if they do not meet the requirements of Section 251 of the Act, or the standards at Section 252(d) of the Act, or the requirements of the F.C.C.'s regulations interpreting and implementing Section 251 of the Act.[126]

Jurisdiction under the Telecommunications Act of 1996

The Commission's jurisdiction to arbitrate under the Act is conditioned upon proper invocation by the party seeking arbitration.[127] Therefore, although no party herein disputes that AT&T properly invoked this Commission's authority to arbitrate, the Commission must nonetheless satisfy itself that it has subject matter jurisdiction.

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[122] 47 U.S.C. Section 252(a)(1).

[123] 47 U.S.C. Section 252, (a)(1) and (e), (1) and (2)(A).

[124] 47 U.S.C. Section 252(b), *passim*.

[125] 47 U.S.C. Section 252(b)(4)(C).

[126] 47 U.S.C. Section 252(e), (1) and (2)(B).

[127] 47 U.S.C. Section 252(b)(1).

A party seeking compulsory arbitration must file its petition with the state commission "during the period from the 135th to the 160th day (inclusive) after the date on which an incumbent local exchange carrier receives a request for negotiation under this section[.]"[128] The parties agree that AT&T requested negotiations on September 14, 2000, and that the interval during which compulsory arbitration could be requested ran from January 27, 2001, through February 21, 2001. Therefore, the Commission concludes that AT&T's petition for arbitration was timely filed on February 20, 2001.

Additionally, a party seeking compulsory arbitration must, simultaneously with its petition for arbitration, "provide [to] the State commission all relevant documentation concerning (i) the unresolved issues; (ii) the position of each of the parties with respect to those issues; and (iii) any other issues discussed and resolved by the parties."[129] Attached to AT&T's petition were extensive exhibits, including matrices setting out the disputed issues, the parties' positions on those issues, and AT&T's proposed successor interconnection agreement, divided into topical attachments. The Commission concludes that AT&T complied with Section 252(b)(2)(A) of the Act.

Finally, a party seeking compulsory arbitration must "provide a copy of the petition and any documentation to the other party or parties not later than the day on which the State commission receives the petition."[130] Attached to AT&T's petition was a certificate showing service by United States Mail upon SWBT, as well as the General Counsel of

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[128] *Id.*

[129] 47 U.S.C. Section 252(b)(2)(A).

[130] 47 U.S.C. Section 252(b)(2)(B).

the Commission and the Public Counsel, on February 20, 2001, the day on which the petition was filed with the Commission. The Commission concludes that AT&T complied with Section 252(b)(2)(B) of the Act.

Because AT&T complied with all of the Act's prerequisites for compulsory arbitration by a state commission, the Commission concludes that it is authorized under the Act to arbitrate this dispute.

State Law Jurisdiction

SWBT, as a provider of local exchange and intraLATA long-distance telephone service, is a "telecommunications company" and a "public utility" within the intendments of Section 386.020, (32) and (42), and is therefore subject to the jurisdiction of the Commission under Chapters 386 and 392, RSMo. In the terms of the Act, SWBT is a Bell operating company (BOC) and an incumbent local exchange carrier (ILEC).[131]

AT&T, as a provider of intraLATA and interLATA long-distance telephone service, is also a "telecommunications company" and a "public utility" within the intendments of Section 386.020, (32) and (42), and is also therefore subject to the jurisdiction of this Commission pursuant to Chapters 386 and 392, RSMo.

Arbitration Standards

The Act provides:[132]

> In resolving by arbitration under subsection (b) any open issues and imposing conditions upon the parties to the agreement, a State commission shall—

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[131] 47 U.S.C. Sections 3(4)(A) and 251(h)(1).

[132] 47 U.S.C. Section 252(c), "Standards for Arbitration."

(1) ensure that such resolution and conditions meet the requirements of section 251, including the regulations prescribed by the Commission pursuant to section 251;

(2) establish any rates for interconnection, services, or network elements according to subsection (d); and

(3) provide a schedule for implementation of the terms and conditions by the parties to the agreement.

Arbitration Procedures:

The Act does not specify any particular procedure for arbitrations by state commissions. This Commission has experimented with different procedural models in the past. The Commission is authorized by its organic law to arbitrate disputes.[133] However, that provision also does not specify any particular procedure, other than to require "due notice" and a hearing.[134] AT&T did not indicate any strong procedural preference in its pleadings, but suggested certain guidelines: that all evidence be taken on the record and that Staff, if used in an advisory capacity, be prohibited from *ex parte* contacts with parties. SWBT, on the other hand, insisted that the proceedings be conducted according to the contested case model. SWBT also suggested that cross-examination be time-limited.

The F.C.C. Arbitration Procedures

Having considered the arguments of the parties, the Commission on April 5, 2001, adopted for this case the arbitration procedures used by the F.C.C., 47 C.F.R.

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[133] Section 386.230.

[134] "[T]he commission . . . shall proceed to **hear** such controversy[.]" *Id.* (emphasis added). The applicability of this section to arbitrations under the Act is also open to some question as this section expressly requires the written agreement of all parties to submit the dispute to arbitration. Arbitration under the Act, however, is compulsory.

Section 51.807 (October 2000), as supplemented by the F.C.C.'s *Public Notice of the Establishment of Procedures for Arbitration of Interconnection Agreements Between Verizon and AT&T, Cox, and WorldCom,* (DA 01-270, Feb. 1, 2001). These procedures were modified to reflect the fact that the petition and response had already been filed in this case, that a prehearing conference had been held, and to incorporate the procedural dates agreed upon by the parties. Because this matter had been pending for some weeks and the petition and response had already been filed, the Commission on April 6, 2001, set a second prehearing conference for April 11 in order to clarify the application of the F.C.C. rules to this proceeding and to provide the parties an opportunity to raise any concerns they might have. No party raised any objection to the procedures adopted by the Commission for this arbitration.

The F.C.C. rules are constructed around the concept of final offer arbitration, also referred to as "baseball" arbitration. In that model, each of the two contending parties must submit its final offer and all supporting evidence for consideration by the arbitrator. The arbitrator then selects from among the offers submitted by the parties. The Commission modified the F.C.C.'s final offer arbitration procedure by requiring that the Commission's Staff participate as a third party as discussed in more detail below. The Commission retained authority to require the parties to submit new final offers if those already submitted

were unsatisfactory or to adopt a result not submitted by any party if necessary to reach an agreement consistent with the requirements of the Act.[135]

The Role of the Commission's Staff

Given the highly technical nature of the matters at issue in this case and the Commission's obligation to safeguard and promote the public interest, as opposed to the private interests of the contending carriers who are the parties to this arbitration, the Commission determined that it required access to the neutral technical expertise of its Staff.[136] Therefore, Staff was required to file Rebuttal Testimony in response to the Direct Testimony filed by the parties.[137] Staff was also required to file an evaluation of each of the final offers filed by the parties.[138] In that evaluation, Staff was directed to consider the technical feasibility and public interest impact of each issue contained in each final offer.[139] Staff was directed to file with its evaluation all necessary supporting material.[140] Finally, to the extent that the public interest so required, Staff was authorized to file a proposed resolution as to any issue within the scope of this arbitration, in the form of a final offer.[141]

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[135] *In the Matter of the Application of AT&T Communications of the Southwest, Inc., TCG St Louis and TCG Kansas City, Inc., for Compulsory Arbitration of Unresolved Issues with Southwestern Bell Telephone Company Pursuant to Section 252(b) of the Telecommunications Act of 1996,* Case No. TO-2001-455 (*Order Adopting Procedural Schedule,* issued April 5, 2001), Attachment A at Paragraph D(3).

[136] *In the Matter of the Application of AT&T Communications of the Southwest, Inc., TCG St Louis and TCG Kansas City, Inc., for Compulsory Arbitration of Unresolved Issues with Southwestern Bell Telephone Company Pursuant to Section 252(b) of the Telecommunications Act of 1996,* Case No. TO-2001-455 (*Order Adopting Setting Prehearing Conference and Directing Filing,* issued April 5, 2001).

[137] *Id.*

[138] *Id.*

[139] *Id.*

[140] *Id.*

[141] *Id.*

Staff's Evaluation was offered and admitted at hearing as Exhibit 2. No party made any objection to the participation of the Commission's Staff.

The Scope of the Arbitration:

The Arbitration Timeline

In its petition, AT&T stated that it expected the Commission to conduct a two-phase arbitration such as this Commission and certain other state commissions have conducted in the past.[142] AT&T took the position that, while the arbitration of various non-cost-related issues could be completed by the statutory deadline, the arbitration of the costs of certain UNEs could not realistically be completed within the statutory timeframe, particularly as AT&T expected the development of this issue to require extensive discovery and access to SWBT's own highly confidential costing models. Therefore, AT&T proposed that the Commission arbitrate the non-cost-related issues by the statutory deadline and simply adopt as interim prices UNE prices established in Cases Nos. TO-97-40 and TO-98-115, with final prices to be set after the costs were fully litigated. AT&T relied upon the prior practice of this and other state commissions and certain paragraphs of the F.C.C.'s *Local Competition Order,* 11 FCC Rcd. 154999, CC Docket No. 96-98 (released August 8, 1996).

SWBT, in turn, took the position that all issues, including final prices for UNEs, must be resolved by the Commission by the statutory deadline or the Commission would

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[142] By "two-phase arbitration," AT&T meant that open cost and price issues would be resolved by the adoption of interim figures by the end of the nine-month statutory deadline, with permanent costs and prices to be adopted following an open-ended litigation likely to extend over many months.

lose jurisdiction. In support of its position, SWBT cited the regulations of the F.C.C. and several federal district court decisions.

On April 5, 2001, having considered the arguments of the parties, the Commission adopted the position urged by SWBT, in view of the express language of the Act providing that the state commission "shall conclude the resolution of any unresolved issues not later than 9 months after the date on which the local exchange carrier received the request under this section."[143]

AT&T renewed its objection to this conclusion of the Commission at hearing.

Issues for Determination

The Act expressly limits the issues subject to resolution by the state commission to those framed by the petition for arbitration and the response to the petition.[144] AT&T's petition was accompanied by a matrix showing the disputed issues and the parties' positions on each of them. On March 16, SWBT timely filed its response to AT&T's petition for arbitration.[145] SWBT's response was also accompanied by a matrix showing the disputed issues and the parties' positions on each of them. At the arbitration hearing, the parties jointly tendered a corrected DPL which was admitted without objection as Exhibit 1.

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[143] 47 U.S.C. Section 252(b)(4)(C).

[144] 47 U.S.C. Section 252(b)(4)(A).

[145] 47 U.S.C. Section 252(b)(3) provides that the "non-petitioning party . . . may respond to the other party's petition and provide such additional information as it wishes within 25 days after the State commission receives the petition." The Commission received the petition on February 20, 2001, and the 25th day thereafter was Saturday, March 17, 2001. Thus, SWBT's response filed on March 16 was timely.

Resolution of Open Issues:

In the procedures adopted by the Commission for this arbitration, Paragraph D(3) provides in part that, "[i]f a final offer submitted by one or more parties fails to comply with the requirements of this section, the arbitrator has discretion to take steps designed to result in an arbitrated agreement that satisfies the requirements of section 252(c) of the Act, including requiring parties to submit new final offers within a time frame specified by the arbitrator, or adopting a result not submitted by any party that is consistent with the requirements of section 252(c) of the Act, and the rules prescribed by the Commission[146] pursuant to that section."[147] Time does not permit the Commission to direct the parties to submit new final offers. Therefore, the Commission has adopted some results from the M2A, which were not submitted by any party but that are consistent with the requirements of section 252(c) of the Act, and the rules prescribed by the F.C.C. pursuant to that section. The Commission takes this action because of a pervasive inadequacy in the evidence adduced by the parties in support of their positions, perhaps resulting from the strict timeline imposed by the Act.

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[146] *I.e.*, the F.C.C.

[147] *In the Matter of the Application of AT&T Communications of the Southwest, Inc., TCG St Louis and TCG Kansas City, Inc., for Compulsory Arbitration of Unresolved Issues with Southwestern Bell Telephone Company Pursuant to Section 252(b) of the Telecommunications Act of 1996*, Case No. TO-2001-455 (*Order Adopting Procedural Schedule*, issued April 5, 2001), Attachment A at Paragraph D(3).

Costing and Pricing

In resolving by compulsory arbitration the open issues presented to it by the parties, the Commission must establish rates pursuant to the specific requirements of the Act:[148]

> (d) Pricing standards.—
>
> (1) Interconnection and network element charges.--Determinations by a State commission of the just and reasonable rate for the interconnection of facilities and equipment for purposes of subsection (c)(2) of section 251 of this title, and the just and reasonable rate for network elements for purposes of subsection (c)(3) of such section—
>
> (A) shall be--
>
> (i) based on the cost (determined without reference to rate-of-return or other rate-based proceeding) of providing the interconnection or network element (whichever is applicable), and
>
> (ii) nondiscriminatory, and
>
> (B) may include a reasonable profit.
>
> (2) Charges for transport and termination of traffic.—
>
> (A) In general.--For the purposes of compliance by an incumbent local exchange carrier with section 251(b)(5) of this title, a State commission shall not consider the terms and conditions for reciprocal compensation to be just and reasonable unless--
>
> (i) such terms and conditions provide for the mutual and reciprocal recovery by each carrier of costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carrier; and
>
> (ii) such terms and conditions determine such costs on the basis of a reasonable approximation of the additional costs of terminating such calls.

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[148] 47 U.S.C. Section 252(d).

(B) Rules of construction.--This paragraph shall not be construed –

(i) to preclude arrangements that afford the mutual recovery of costs through the offsetting of reciprocal obligations, including arrangements that waive mutual recovery (such as bill-and-keep arrangements); or

(ii) to authorize the Commission or any State commission to engage in any rate regulation proceeding to establish with particularity the additional costs of transporting or terminating calls, or to require carriers to maintain records with respect to the additional costs of such calls.

(3) Wholesale prices for telecommunications services.--For the purposes of section 251(c)(4) of this title, a State commission shall determine wholesale rates on the basis of retail rates charged to subscribers for the telecommunications service requested, excluding the portion thereof attributable to any marketing, billing, collection, and other costs that will be avoided by the local exchange carrier.

Additionally, the United States Supreme Court has held that rates set by a state commission in a compulsory arbitration under the Act must also comply with the pricing tions of the F.C.C.[149] These rules provide that "[a]n incumbent LEC's rates for each ıt it offers shall comply with the rate structure rules set forth in Secs. 51.507 .509, and shall be established . . . [p]ursuant to the forward-looking economic cost pricing methodology set forth in Secs. 51.505 and 51.511[.]"[150] Additionally, the ɟ-looking economic cost of an element is defined as the sum of its total element

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"&T Corp. *et al. v. Iowa Utilities Board et al.*, 525 U.S. 366, 384-85, 119 S.Ct. 721, 732-33, 1.2d 835, ___ (1999).

C.F.R. Section 51.503(b)(1).

long-run incremental cost plus a reasonable allocation of forward-looking common costs.[151] The TELRIC of an element is "the forward-looking cost over the long run of the total quantity of the facilities and functions that are directly attributable to, or reasonably identifiable as incremental to, such element, calculated taking as a given the incumbent LEC's provision of other elements."[152] This is calculated based on a hypothetical network, using the most efficient technology available and the lowest cost network configuration imposed on the LEC's existing wire centers, and employing forward-looking costs of capital and economic depreciation rates.[153]

The Commission concludes that the rates contained in the M2A, which it has directed the parties to adopt, meet all the requirements of the Act and the regulations of the F.C.C. The Commission further concludes that the other provisions of the M2A, which it has directed the parties to adopt in resolution of the remaining DPs under this topic, also meet all applicable provisions of the Act and the regulations of the F.C.C.

General Terms and Conditions

The Commission concludes that its resolution of the open issues under this category meet all the requirements of the Act and the regulations of the F.C.C.

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[151] 47 C.F.R. Section 51.505(a). The total element long-run incremental cost method is referred to by the acronym "TELRIC."

[152] 47 C.F.R. Section 51.505(b).

[153] 47 C.F.R. Section 51.505(b), (1)-(3). The Eighth Circuit Court of Appeals invalidated 51.505(b)(1) in *Iowa Utilities Bd. II, Iowa Utilities Bd. v. F.C.C.*, 219 F.3d 744, 751 (8th Cir. 2000), but stayed its mandate pending appeal to the United States Supreme Court.

Unbundled Network Elements (UNEs) Terms and Conditions

The Act imposes on ILECs[154]

> The duty to provide, to any requesting telecommunications carrier for the provision of a telecommunications service, nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory in accordance with the terms and conditions of the agreement and the requirements of this section and section 252 of this title. An incumbent local exchange carrier shall provide such unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service.

The rules promulgated by the F.C.C. define a "network element" as[155]

> a facility or equipment used in the provision of a telecommunications service. Such term also includes, but is not limited to, features, functions, and capabilities that are provided by means of such facility or equipment, including but not limited to, subscriber numbers, data-bases, signaling systems, and information sufficient for billing and collection or used in the transmission, routing, or other provision of a telecommunications service.

The F.C.C.'s rules further provide that[156]

> (a) The terms and conditions pursuant to which an incumbent LEC provides access to unbundled network elements shall be offered equally to all requesting telecommunications carriers.
>
> (b) Where applicable, the terms and conditions pursuant to which an incumbent LEC offers to provide access to unbundled network elements, including but not limited to, the time within which the incumbent LEC provisions such access to unbundled network elements, shall, at a minimum, be no less favorable to the requesting carrier than the terms and conditions under which the incumbent LEC provides such elements to itself.

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[154] 47 U.S.C. Section 251(c)(3).

[155] 47 C.F.R. Section 51.5.

[156] 47 C.F.R. Section 51.313, (a) and (b).

The Commission concludes that its resolution of the open issues under this category meet all the requirements of the Act and the regulations of the F.C.C.

Network Interconnection and Architecture

The Act imposes on all carriers a duty "to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers[.]"[157] The Act additionally imposes on ILECs[158]

> The duty to provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the local exchange carrier's network -
>
> (A) for the transmission and routing of telephone exchange service and exchange access;
>
> (B) at any technically feasible point within the carrier's network;
>
> (C) that is at least equal in quality to that provided by the local exchange carrier to itself or to any subsidiary, affiliate, or any other party to which the carrier provides interconnection; and
>
> (D) on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, in accordance with the terms and conditions of the agreement and the requirements of this section and section 252 of this title.

The Commission concludes that its resolution of the open issues under this category meet all the requirements of the Act and the regulations of the F.C.C.

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[157] 47 U.S.C. Section 251(a)(1).

[158] 47 U.S.C. Section 251(c)(2).

Operations Support Systems (OSS)

The F.C.C. rules provide that[159]

> An incumbent LEC must provide a carrier purchasing access to unbundled network elements with the pre-ordering, ordering, provisioning, maintenance and repair, and billing functions of the incumbent LEC's operations support systems.

The Commission concludes that its resolution of the open issues under this category meet all the requirements of the Act and the regulations of the F.C.C.

IT IS THEREFORE ORDERED:

1. That the motion of Southwestern Bell Telephone Company to exceed the page limitation imposed on the brief is granted.

2. That AT&T Communications of the Southwest, Inc., TCG St. Louis and TCG Kansas City, Inc., and Southwestern Bell Telephone Company shall incorporate the Commission's resolution of each open issue as described in this Order into their interconnection agreement and provide a draft of their conformed interconnection agreement to the Staff of the Missouri Public Service Commission within 30 days following the effective date of this Order.

3. That the Staff of the Missouri Public Service Commission shall review the draft conformed interconnection agreement of the parties and determine whether or not the agreement complies with this Order. In the event that Staff determines that the agreement tendered by the parties does not comply with this Order, Staff shall so advise the parties and they shall cooperate with Staff in amending the draft agreement to comply with this

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[159] 47 C.F.R. Section 51.313(c).

Order, modifying language in all sections of the agreement to avoid potentially contradictory provisions.

4. That the parties shall file the conformed interconnection agreement with the Commission for approval upon notification by Staff that the agreement is in compliance with this Order.

5. That Staff shall file a Memorandum advising the Commission that it has reviewed the agreement and determined that it complies with this Order no later than the seventh day following the filing of the agreement with the Commission. The Staff shall further advise the Commission in its Memorandum whether or not the Commission should reject the agreement pursuant to 47 U.S.C. Section 252(e)(2)(B).

6. That this Arbitration Order shall become effective on June 14, 2001.

BY THE COMMISSION

Dale Hardy Roberts

Dale Hardy Roberts
Secretary/Chief Regulatory Law Judge

(S E A L)

Lumpe, Ch., Murray, Simmons, and Gaw, CC., concur and certify compliance with the provisions of Section 536.080, RSMo 2000.

Dated at Jefferson City, Missouri, on this 7th day of June, 2001.

STATE OF MISSOURI
PUBLIC SERVICE COMMISSION
JEFFERSON CITY
June 7, 2001

CASE NO: TO-2001-455

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Enclosed find certified copy of an ORDER in the above-numbered case(s).

Sincerely,

Dale Hardy Roberts

Dale Hardy Roberts
Secretary/Chief Regulatory Law Judge

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 7th day of June 2001.

Dale Hardy Roberts
Secretary/Chief Regulatory Law Judge