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BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

In the Matter of	)	CC Docket No. 97-158
	)	CCB/CPD 97-67
Southwestern Bell Telephone Company	)	
Tariff F.C.C. No. 73	)	Transmittal No. 2633

OPPOSITION TO THE PETITION FOR RECONSIDERATION OF  
GST TELECOM, INC. AND KMC TELECOM, INC.

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January 12, 1998

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## SUMMARY

A grant of Southwestern Bell Telephone Company's ("SWBT") Petition for Reconsideration by the Commission is clearly unwarranted. First, SWBT merely restates previously considered arguments to support its position that Commission precedent does not bar application of the competitive necessity doctrine to SWBT's tariff Transmittal No. 2633. It is clear from the Commission's *Order Concluding Investigation and Denying Application for Review* that the Commission considered all relevant precedent, recognized that this precedent neither bars application of the competitive necessity doctrine nor compels such application, and properly rejected Transmittal No. 2633.

Second, the economic evidence allegedly supporting SWBT's Petition for Reconsideration is unconvincing and fails to dispel the serious anticompetitive concerns raised by Transmittal No. 2633. Again, the Commission already examined this economic evidence and correctly concluded that Transmittal No. 2633 could potentially hinder or foreclose competitive development of the local market. SWBT's production of a new affidavit is merely repetitive.

Finally, SWBT fails to explain why it should be granted pricing flexibility before the Commission concludes its investigation in the *Access Charge Reform* proceeding, which is considering pricing flexibility for incumbent carriers. SWBT has provided no evidence that would warrant reconsideration of the Commission's decision to reject Transmittal No. 2633 and, therefore, SWBT's Petition for Reconsideration should be denied.

## TABLE OF CONTENTS

SUMMARY .....	ii
I. SWBT'S PETITION FOR RECONSIDERATION MERELY REITERATES ARGUMENTS ALREADY CONSIDERED BY THE COMMISSION .....	2
II. COMMISSION PRECEDENT DOES <u>NOT</u> REQUIRE APPLICATION OF THE COMPETITIVE NECESSITY DOCTRINE TO TARIFF TRANSMITTAL 2633 .....	3
A. Telpak Proceeding .....	4
B. Private Line Guidelines Order .....	4
C. AT&T Tariff 15 Proceeding .....	5
D. Decrease Regulation of Certain Basic Telecommunications Services proceeding .....	7
E. Other Cases Cited by SWBT .....	8
F. The Commission Clearly Understood Its Precedent and Accordingly Chose to Reject the Application of the Competitive Necessity Doctrine to Transmittal No. 2633 .....	9
III. ECONOMIC EXPERT EVIDENCE PRESENTED IN THIS PROCEEDING IS UNPERSUASIVE AND UNREALISTIC .....	10
IV. CONCLUSION .....	12

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GST TELECOM, INC. AND KMC TELECOM, INC.**

GST Telecom, Inc. ("GST") and KMC Telecom, Inc. ("KMC") (together the "Parties"), through their undersigned counsel, hereby submit their Opposition to Southwestern Bell Telephone Company's ("SWBT") Petition for Reconsideration ("Petition") of the Federal Communication Commission's ("Commission") Order rejecting tariff Transmittal No. 2633 in the above-referenced proceeding.<sup>1</sup> GST and KMC oppose SWBT's Petition for Reconsideration and agree with the Commission that Transmittal No. 2633 poses a significant threat to competitive entry by new carriers into the local exchange market and that the competitive necessity doctrine ("doctrine") does *not* apply to Transmittal No. 2633. GST and KMC urge the Commission to retain its reasonable and necessary restrictions on the pricing flexibility of incumbent local exchange carriers, such as SWBT, to ensure the fulfillment of the Telecommunications Act's requirements designed to initiate and safeguard genuine competition in the local exchange market. The Commission reached the correct conclusion in its Rejection Order; with no new persuasive evidence to the contrary, the Commission now must reject SWBT's Petition.

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<sup>1</sup> In the Matter of Southwestern Bell Telephone Company Tariff F.C.C. No. 73, *Order Concluding Investigation and Denying Application for Review*, CC Docket No. 97-158, FCC 97-394 (released November 14, 1997) ("Rejection Order").

**I. SWBT'S PETITION FOR RECONSIDERATION MERELY REITERATES ARGUMENTS ALREADY CONSIDERED BY THE COMMISSION**

SWBT fails to provide the Commission with a scintilla of new evidence justifying reconsideration of the issues presented in this proceeding and, therefore, its Petition should be denied.<sup>2</sup> SWBT claims that "Commission precedent, as well as all of the expert economic evidence submitted in [the] proceeding"<sup>3</sup> support its Petition. To that end, SWBT refers to the various orders cited by the Commission in its Rejection Order to demonstrate that Commission precedent does not prohibit the Commission from applying the competitive necessity doctrine to Transmittal No. 2633.<sup>4</sup>

SWBT further contends that the affidavit of Douglas Mudd ("Mudd Affidavit"), together with the affidavit of Robert G. Harris ("Harris Affidavit")<sup>5</sup> and the article attached to SWBT's Direct Case, negate the Commission's conclusion that Transmittal No. 2633 will foreclose competition and is not in the public interest.<sup>6</sup> As demonstrated below, these contentions have already been thoroughly examined by the Commission and the Commission reached the correct conclusion when it rejected

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<sup>2</sup> SWBT presented the same argument in its Direct Case filed in this proceeding that it argues now in its Petition -- that the competitive necessity doctrine never explicitly excluded the offerings of dominant local exchange carries and, therefore, "the Commission cannot now determine the opposite holds." In the Matter of Southwestern Bell Telephone Company Tariff F.C.C. No. 73, *Direct Case of Southwestern Bell Telephone Company*, CC Docket No. 97-158, FCC 97-394, at 4-6 (released November 14, 1997) ("Direct Case").

<sup>3</sup> In the Matter of Southwestern Bell Telephone Company Tariff F.C.C. No. 73, *Petition for Reconsideration of Southwestern Bell Telephone Company*, CC Docket No. 97-158, FCC 97-394, at 2 (filed December 15, 1997) ("Petition").

<sup>4</sup> *Id.* at 3-4.

<sup>5</sup> U S West, Inc. attached the affidavit of Robert G. Harris ("Harris Affidavit") to its comments filed in this proceeding on August 28, 1997.

<sup>6</sup> Petition at 5.

Transmittal No. 2633. SWBT has failed to provide any valid reason for the Commission to depart from its conclusion, and thus reconsideration is unwarranted.

**II. COMMISSION PRECEDENT DOES NOT REQUIRE APPLICATION OF THE COMPETITIVE NECESSITY DOCTRINE TO TARIFF TRANSMITTAL 2633**

It is clear that the Commission acted properly in light of Commission precedent when it rejected Transmittal No. 2633. In its Petition, SWBT argues that “under the cases cited by the Commission, there is ample reason to use the competitive necessity doctrine to allow Transmittal No. 2633 to take effect.”<sup>7</sup> In relying upon the fact that Commission precedent does not actually prohibit application of the doctrine to Transmittal No. 2633, SWBT succeeds only in telling the Commission what it already knows. While precedent may not *prohibit* application of the doctrine to Transmittal No. 2633, it certainly does not follow that precedent requires the Commission to *apply* the doctrine.

In the Rejection Order, the Commission specifically determined that no Commission precedent addressed the precise circumstances involved in this proceeding and, therefore, the Commission was not required to apply the doctrine to Transmittal No. 2633.<sup>8</sup> The Commission did not state that application of the doctrine in general is prohibited, but rather that it was not required in this particular situation. Since “Commission precedent did not address the *specific* circumstances at issue,”<sup>9</sup> the Commission correctly exercised its discretion and refrained from applying the doctrine to Transmittal No. 2633. Because the Commission has already considered the contentions argued in

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<sup>7</sup> Petition at 3.

<sup>8</sup> Rejection Order at para. 31.

<sup>9</sup> *Id.*

the Petition and because the Commission precedent does not require application of the doctrine under these circumstances, SWBT's argument is without merit and should be rejected.

**A. *Telpak Proceeding***<sup>10</sup>

SWBT claims that the Telpak proceeding does not prevent the Commission from applying the competitive necessity doctrine to Transmittal No. 2633.<sup>11</sup> SWBT points out that in the Telpak proceeding, the Commission permitted application of this doctrine to an AT&T tariff at a time when AT&T was a dominant carrier and further argues that, contrary to the Commission's analysis in its Order, the competitive necessity doctrine was not rejected in the 1977 Telpak case. Rather, SWBT claims that neither the Commission nor AT&T discussed using the doctrine to defend AT&T's tariffed rates.<sup>12</sup> Whether or not the doctrine was applied is irrelevant. The circumstances surrounding the Telpak proceeding differ from the circumstances in the instant proceeding. Again, the Commission rejected Transmittal No. 2633 stating that under the particular circumstances presented by Transmittal No. 2633, it is not required by precedent to apply the doctrine.

**B. *Private Line Guidelines Order***<sup>13</sup>

SWBT argues that the Commission permitted the application of the doctrine in the Private Guidelines proceeding and, therefore, the *Private Line Guidelines Order* does not contradict the

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<sup>10</sup> Telpak Tariff Sharing Provisions, 23 FCC2d 606 (1970), *rev'd sub nom.*, AT&T v. FCC, 449 F.2d 439 (2d Cir. 1971).

<sup>11</sup> Petition at 3.

<sup>12</sup> *Id.*

<sup>13</sup> Private Line Rate Structure and Volume Discount Practices Guidelines, CC Docket No. 79-246, *Report and Order*, 97 FCC2d 923 (1984) ("*Private Line Guidelines Order*").

application of the doctrine to Transmittal No. 2633.<sup>14</sup> Again, the Commission recognized that it made the doctrine available as a defense to the discriminatory pricing of private line and special access offerings in the specific situation presented in the Private Line Guidelines proceeding.<sup>15</sup> However, due to the difference in circumstances, the Commission concluded that this case does not serve as precedent *requiring* application of the doctrine. While SWBT is correct that this proceeding does not preclude application, it also does not require application and the Commission, clearly aware of this, chose not to apply the doctrine here.

**C. *AT&T Tariff 15 Proceeding***<sup>16</sup>

SWBT attempts (but fails) to create a parallel between its Transmittal No. 2633 and AT&T Tariff 15, which was initially rejected by the Commission, but eventually permitted to take effect, notwithstanding the Commission's objections to applying the doctrine.<sup>17</sup> Without explaining how AT&T Tariff 15 relates to Transmittal No. 2633, SWBT merely notes that the Commission failed to provide a reason for the disparate treatment between the two tariffs and, therefore, Transmittal No. 2633 should similarly take effect.<sup>18</sup>

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<sup>14</sup> *Id.*

<sup>15</sup> Rejection Order at para. 34; The Commission specifically notes that in the *Private Line Guidelines Order* indicates that "carriers could make competitive necessity showings to attempt to justify volume discounts for generally available *private line* and *special access services*." *Id.* (emphasis added).

<sup>16</sup> In the Matter of AT&T Communications Tariff F.C.C. No. 15, Competitive Pricing Plan No. 2, Resort Condominiums International, *Memorandum Opinion and Order*, 6 FCC Rcd 5648 (1991) ("AT&T Tariff 15").

<sup>17</sup> Petition at 4.

<sup>18</sup> *Id.*

In its Rejection Order, the Commission states that in considering AT&T Tariff 15, it never reached AT&T's competitive necessity argument and rejected AT&T Tariff 15 on other grounds.<sup>19</sup> The Commission rejected AT&T Tariff 15 because price matching practices created serious potential anticompetitive consequences.<sup>20</sup> The Commission found that AT&T Tariff 15 undermined price competition in the interstate, interexchange communications services market.<sup>21</sup> Concluding that "[c]ompetition does not justify an anticompetitive response[,]" the Commission never reached AT&T's competitive necessity argument.<sup>22</sup>

Following a grant of stay by the U.S. Court of Appeals for the District of Columbia Circuit, the Commission requested a voluntary remand of the case. During this period, AT&T revised its Tariff 15 to respond to the Commission's competitive concerns.<sup>23</sup> For example, the revised tariff was made available to all similarly situated customers.<sup>24</sup> In contrast to revised AT&T Tariff 15, Transmittal No. 2633 is not available to similarly situated customers. AT&T also revised the general price matching language.<sup>25</sup> With these revisions, the Commission allowed the tariff to take effect, subject

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<sup>19</sup> Rejection Order at para. 38.

<sup>20</sup> AT&T Tariff 15 at para 22.

<sup>21</sup> *Id.* at para. 14.

<sup>22</sup> *Id.* at para 16. The Commission concluded that the tariff containing a discriminatory provision which operated to "discourage competitive pricing behavior" and "to facilitate anticompetitive behavior" to be unreasonable. *Id.*

<sup>23</sup> In the Matter of AT&T Communications Tariff F.C.C. No. 15, Competitive Pricing Plan No. 2, Resort Condominiums International, *Order*, 7 FCC Rcd 818 (1992) ("RCI Order").

<sup>24</sup> *Id.* at 1.

<sup>25</sup> In the Matter of AT&T Communications Tariff F.C.C. No. 15, Competitive Pricing Plan No. 2, Resort Condominiums International, *Order*, 7 FCC Rcd 3036, at para. 6 (1992).

to the remand proceeding, concluding that “no compelling argument has been presented that the tariff revisions are so patently unlawful as to require rejection.”<sup>26</sup> The Commission did not address the competitive necessity doctrine in reaching this conclusion.<sup>27</sup>

Furthermore, on August 1, 1991, the Commission adopted the IXC Rulemaking Order, which revised regulations and policies to reflect the growth of competition in the interstate, interexchange marketplace.<sup>28</sup> This *IXC Rulemaking Order* demonstrated the competitive status of the interexchange market at the time the Commission reconsidered on remand the AT&T Tariff 15. A similar competitive environment does not exist in the current local market. Therefore, unlike AT&T Tariff 15, Transmittal No. 2633 is being considered in a market that has yet to realize true competition.

In its Rejection Order, the Commission never claimed that the AT&T Tariff 15 proceeding barred use of the doctrine in the current proceeding. Rather, the Commission chose not to apply the competitive necessity doctrine and was not required to.

**D. *Decrease Regulation of Certain Basic Telecommunications Services proceeding***<sup>29</sup>

SWBT attempts to use this proceeding as evidence of the Commission’s positive attitude toward competitive pricing by incumbent carriers and requests that the Commission follow its tentative conclusions in that proceeding.<sup>30</sup> SWBT fails to address the Commission’s reason stated in its

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<sup>26</sup> RCI Order at para 6.

<sup>27</sup> *Id.*

<sup>28</sup> Competition in the Interstate Marketplace, CC Docket No. 90-132, *Report and Order*, 6 FCC Rcd 5880 (1991) (“*IXC Rulemaking Order*”).

<sup>29</sup> 2 FCC Rcd 645 (1987).

<sup>30</sup> In an October 9, 1997 letter to the Commission, SWBT expressed its belief that this proceeding recognized the need to reduce regulation for dominant carriers and concluded that no further proof of competition was necessary other than the fact that “such a [competitive] bidding

Rejection Order for not following this proceeding. The Commission explained that it terminated the docket “in light of ‘sufficient changes in the telecommunications marketplace and regulation’ that had occurred since 1987 . . .”<sup>31</sup> The Commission concluded that the case is of no decisional significance in this proceeding. SWBT fails to explain why this case is of decisional significance.

**E. Other Cases Cited by SWBT**

In its Petition, SWBT requests that the Commission reconsider other cases cited in the Rejection Order. For example, SWBT argues that the *OCP Guidelines*<sup>32</sup> proceeding did not foreclose the application of the doctrine.<sup>33</sup> SWBT further argues that in *DS-3 ICB Order*<sup>34</sup> the doctrine was available to the carriers, but the carriers failed to demonstrate that sufficient competition existed.<sup>35</sup> The Commission is aware of its application of the doctrine in both these proceedings and noted the difficulty for a carrier to satisfy the three part test of the doctrine.<sup>36</sup> Specifically, the Commission stated that “in those rare instances when the Commission has considered the doctrine as a defense . .

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process takes place.” *Ex parte*, Letter from Thomas A. Pajda, Attorney for Southwestern Bell Telephone Company, to William F. Caton, Secretary, Federal Communications Commission, October 9, 1997, at 2-3.

<sup>31</sup> Rejection Order at para. 55.

<sup>32</sup> Guidelines for Dominant Carriers’ MTS Rates and Rate Structure Plans, 59 Rad.Reg.2d 70 (1985) (“*OCP Guidelines*”).

<sup>33</sup> Petition at 3.

<sup>34</sup> Local Exchange Carriers Individual Case Basis DS-3 Service Offerings, 4 FCC Rcd 8634 (1989) (“*DS-3 ICB Order*”).

<sup>35</sup> Petition at 3-4.

<sup>36</sup> Rejection Order at paras. 35 - 36.

the Commission rejected the proposal as unlawfully discriminatory in violation of section 202(a), finding that the carrier was unable to satisfy its burden under<sup>37</sup> the doctrine.

SWBT argues that in the *AT&T CPP Order*<sup>38</sup> the AT&T tariff was initially too broad, but eventually took effect.<sup>39</sup> SWBT fails to explain why this case compels reconsideration and makes no effort to demonstrate a similarity between the AT&T tariff and Transmittal No. 2633. The Commission is clearly aware of its treatment of the AT&T tariff and considered this case in denying the application of the doctrine to Transmittal No. 2633.<sup>40</sup>

It is unclear why SWBT believes these cases warrant reconsideration. SWBT merely restates the Commission's treatment of the competitive necessity doctrine in each case without explaining how or why such treatment should be applied to Transmittal No. 2633. SWBT's discussion replicates the Commission's discussion in its Rejection Order, thereby providing nothing that would justify reconsideration of the issue by the Commission.

**F. *The Commission Clearly Understood Its Precedent and Accordingly Chose to Reject the Application of the Competitive Necessity Doctrine to Transmittal No. 2633***

It is clear that the Commission understood the precedent established by the above cited cases. The Commission specifically stated that "our precedent does not *compel* us to apply the competitive necessity doctrine in this case." The Commission never based its conclusion on the premise that these

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<sup>37</sup> Rejection Order at para. 32.

<sup>38</sup> AT&T Communications Tariff F.C.C. No. 15 Competitive Pricing Plans, 4 FCC Rcd 7933 (1989) ("*AT&T CPP Order*").

<sup>39</sup> Petition at 4.

<sup>40</sup> Rejection Order at para. 37 (in its Rejection Order, the Commission confirms that it applied the competitive necessity doctrine to the AT&T tariff and that the AT&T tariff failed initially since it was not equal in scope to the MCI tariff).

cases prohibited application, but rather, that they did not *compel* application. Furthermore, the Commission noted that it historically applied the doctrine where the tariff was generally available to similarly situated customers, a situation not present here.<sup>41</sup> Where the Commission applied the doctrine to “individualized offerings not generally available to similarly situated customers, the Commission rejected the proposals as unlawful without reaching the questions of whether the doctrine even should be available to [these] carriers.”<sup>42</sup> SWBT does not address the Commission’s actions in this respect, thereby failing to address the substance of the Commission’s reasons for rejecting the application of the doctrine to Transmittal No. 2633.

### **III. ECONOMIC EXPERT EVIDENCE PRESENTED IN THIS PROCEEDING IS UNPERSUASIVE AND UNREALISTIC**

The Commission’s decision not to apply the competitive necessity doctrine to Transmittal No. 2633 was further buttressed by the Commission’s concerns that the Transmittal may potentially hinder or foreclose competitive development of the local market. In its Petition, SWBT attempts to rebut this conclusion by offering the Mudd affidavit. SWBT argues that the Mudd Affidavit,

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<sup>41</sup> Rejection Order at para. 40; *See* Rejection Order at para 44 (the Commission concludes that “based on the restrictive language of Transmittal No. 2633 and [its] knowledge of the interstate access market, . . . the likelihood of more than the original requesting customer requiring the same quantities of the same services at the same central office is negligible if not non-existent. . . . Because the terms of Transmittal No. 2633 in practice prevent the possibility of a similarly situated customer, [the Commission] [found] that Transmittal No. 2633 is not ‘generally available to similarly situated customers.’”

<sup>42</sup> *Id.*

together with the Harris affidavit<sup>43</sup> and the article attached to its Direct Case<sup>44</sup> (both of which the Commission has already considered in its Rejection Order), negate the Commission's conclusion that Transmittal No. 2633 will foreclose competition and is not in the public interest.<sup>45</sup> However, while the Mudd Affidavit may provide theories of how a competitive, free market *should* work, in reality, the market works differently. By offering the affidavit, SWBT may have provided the Commission with an additional theory, but nonetheless has failed to demonstrate that competition actually exists in the access market; a demonstration which the Commission specifically requested of SWBT in its *Order Designating Issues for Investigation*.<sup>46</sup> The Commission assessed the current telecommunications access market and determined that Transmittal No. 2633 threatened competitive development in the market. The Mudd affidavit may paint a portrait of a theoretical, perfect competitive market, but, as the Commission found, SWBT was unable to prove that competition actually exists.<sup>47</sup>

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<sup>43</sup> Similar to the Mudd Affidavit, the Harris Affidavit provides a discussion based on economic theory of how an industry should work under competition.

<sup>44</sup> The article attached to SWBT's Direct Case provides a detailed analysis of the competitive necessity and pricing regulations in the telecommunications industry. The article, published in 1989, does not provide evidence that the telecommunications local market is experiencing true competition. Furthermore, the Commission has examined this article as part of SWBT's Direct Case obviously finding it unpersuasive. See SWBT Direct Case attaching Alexander C. Larson, *et al.*, *Competitive Necessity and Pricing in Telecommunications Regulation*, Federal Communications Law Journal, UCLA School of Law, December 1989.

<sup>45</sup> *Id.* at 5.

<sup>46</sup> Southwestern Bell Telephone Company Tariff F.C.C. No. 73, CC Docket No. 97-158 (released July 14, 1997).

<sup>47</sup> Rejection Order at paras. 46-48.

The Mudd Affidavit presents the “ideal world” of a truly competitive market; however, the telecommunications market is not yet truly competitive. As the Commission correctly notes, Transmittal No. 2633 will allow SWBT the “unfettered” discretion to enter into numerous bilateral negotiations with customers seeking to obtain service at prices below tariffed rates, rather than participating in a bona fide competitive RFP procedure.<sup>48</sup> In fact, through Transmittal No. 2633, SWBT could entirely bypass the beneficial bidding environment described in the Mudd Affidavit. As a result, the Commission correctly declined to grant SWBT this “unfettered” discretion.<sup>49</sup>

The Rejection Order demonstrates that the Commission understands the market, the issues faced by new entrants, and the potential damage an unregulated incumbent may inflict at this juncture in the infant local market. As the Commission recognizes, “SWBT’s proposal would allow it to respond to any RFP within its region, even in areas in which new competition is incipient or is absent altogether.”<sup>50</sup> Given this possibility, the Commission has wisely chosen to deny SWBT the opportunity to price its access services discriminatorily through the use of Transmittal No. 2633.

#### IV. CONCLUSION

For all the reasons stated above, a grant of SWBT’s Petition for Reconsideration by the Commission is clearly unwarranted. First, SWBT merely restates previously considered arguments. Second, the economic evidence touted by SWBT is unconvincing and fails to dispel the serious anticompetitive concerns raised by Transmittal No. 2633. Furthermore, SWBT fails to explain why it should be granted pricing flexibility before the Commission concludes its investigation in the *Access*

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<sup>48</sup> *Id.* at para. 45.

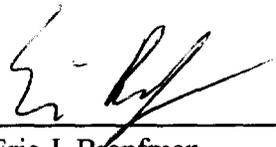
<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at para. 50.

*Charge Reform* proceeding, which is considering pricing flexibility for incumbent carriers. SWBT has provided no evidence that would warrant reconsideration of the Commission's decision to reject Transmittal No. 2633 and, therefore, SWBT's Petition should be denied.

For the foregoing reasons, GST and KMC respectfully request that the Commission reject SWBT's Petition for Reconsideration.

Respectfully submitted,



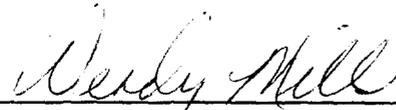
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Dated: January 12, 1998

**CERTIFICATE OF SERVICE**

I, Wendy Mills, hereby certify that the Opposition to the Petition for Reconsideration of GST Telecom, Inc. and KMC Telecom, Inc., has been sent via first class mail on this 12th day of January, 1998, to the Parties of Record.

  
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January 12, 1998

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