

**REPLY DECLARATION OF  
DANIEL P. RHINEHART  
ON  
BEHALF OF AT&T CORP.**

**ATTACHMENT 3**

AT&T  
5/6/98

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**POST-HEARING BRIEF OF AT&T COMMUNICATIONS  
OF THE SOUTHWEST, INC.**

Brief

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cc: Katherine D. Farroba, Administrative Law Judge, PUC, Office of Policy Development  
Donna Nelson, Assistant General Counsel  
Southwestern Bell Telephone Company

*That test period would provide an opportunity for SWBT to demonstrate that it has put into practice nondiscriminatory access to UNEs.*

**C. SWBT's Nonrecurring UNE Charges Are Not Cost-Based**

**I can kind of fast forward to the end of the 271 proceeding saying that's a precondition for me, just as the New York Commission has found and I think other commissions that are going to have any chance of success before the FCC that there has to be an agreement to rebundle UNEs at cost based rates.**

**Chairman Wood, Waller Creek Open Meeting, Tr. 254 (April 22, 1998)**

**Is it [virtual collocation of loop/switch port cross-connect] more laughable than charging several dollars a month for a piece of wire on a recurring basis?**

**Tr. 535 (Washington; responding to Mr. Deere's rejection of virtual collocation of cross-connect as "laughable"; *id.*)**

**I think our rates are high.**

**Tr. 536 (Chairman Wood)**

AT&T has addressed above the importance of identifying how CLECs may access SWBT UNEs for purposes of combining them, on terms that are not tied to the specific UNE combination ruling incorporated in the amended AT&T/SWBT contract. *See* section V.A. It also is true that, even under the Commission's ruling that holds SWBT to its commitment to provide UNE combinations for the term of that contract, AT&T (and other CLECs who may opt in by exercising MFN rights) does not obtain access to the elements at cost-based rates, contrary to the requirements of section 252(d)(1) of the Act. That is so because the nonrecurring charges

authorized by the Commission are not cost justified as applied to conversions of SWBT customers to new providers.

The Commission's December 19, 1997 Order established a set of UNE rates that in most cases are just and reasonable. However, that Order includes certain non-recurring charges which are not cost-based and for which no cost justification was included in the record. AT&T Ex. 14 at ¶¶ 18-19 (Rhinehart/Flappan ). Specifically, the Commission authorized a Central Office Access Charge ("COAC"), as well as non-recurring charges for the Analog Loop to Switch Port Cross-Connect, the 2-Wire Analog Loop, and the Analog Line Port. These charges, when applied in the context of converting a SWBT customer to UNE-based service (including, without limitation, conversions involving residential POTS and simple business service) are either "phantom" charges, recovering no actual cost incurred by SWBT, or are charges for trivial functions that are recovered separately by SWBT in the general "Service Order Charge" authorized by the Commission. *Id.* at ¶ 20.

The \$16.35 Central Office Access Charge is, by SWBT's assertion, designed to cover costs incurred in establishing an access line between a central office and a customer's premises, including dispatch, field cross connect, central office cross connect, network interface, and completion recording. In the context of converting an existing SWBT customer to a CLEC's UNE-based service, none of these items are necessary. In effect, the COAC will compensate SWBT merely for leaving intact existing connections between its network components. Worse, it will recompensate SWBT for costs it already has recovered from its former customer. Not surprisingly, no cost study, and no other cost justification, was offered by any party to support

the COAC during the permanent price proceedings. *Id.* at ¶¶ 21-28.<sup>58</sup> “There’s no cost to recover.” Tr. 756 (Rhinehart). Indeed, even if the cross-connect was not in place at the time of the order, the COAC charge would double-recover costs already covered in the loop to switch port cross connect non-recurring charge and the switch port non-recurring charge. A CLEC paying the COAC in those circumstances “would still be paying twice for – for this work..” Tr. 757 (Flappan).

The loop to switch port cross connect similarly represents a charge for work – sending an installer to the central office to connect a loop and switch port – that SWBT will not (certainly need not) perform in the context of a conversion, for the item to be installed is already in place. This charge, in addition, is duplicative of the COAC central office cross connect component. AT&T Ex. 14 at ¶¶29-32. The 2-wire analog loop and analog line port non-recurring charges also permit SWBT to recover costs that SWBT will not actually incur (installing a loop that already in place, activating a switch port that already is activated). *Id.* at ¶¶ 33-35.

All of the work actually required of SWBT to convert a customer to AT&T UNE-based service is more than covered in the \$ 2.56 “Service Order Charge” authorized by the Commission. *Id.* at ¶ 45. However, SWBT will require AT&T to pay an additional \$ 36.82, per customer converted, in the four charges discussed above, without any corresponding cost being

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<sup>58</sup>SWBT cannot justify this charge by reference to provisioning activity for unbundled loops, including tracking in TIRKS. See Moore Draft Aff. at ¶ 40; Tr. 755 (Moore). SWBT elsewhere has acknowledged that the combination of an 8 dB loop with a loop start analog switch port is an exception to the designed services order flow, because “no TIRKS inventoried equipment or facilities are involved in these cases.” AT&T Ex. 7 at RVF/NRK-82 (in Attachment RVF/NRK-1) (SWBT Response to RFI No. 25, sponsored by Elizabeth Ham). Whether SWBT ultimately plans to apply the designed services order flow to these order types or not, which remains unclear, Ms. Ham’s data response confirms that fact that, as AT&T has previously urged, that order flow (and the related provisioning work alluded to by Mr. Moore) is unnecessary for these loop/port combinations.

incurred by SWBT. These charges represent a substantial discriminatory barrier to competition, as well as a windfall subsidy to SWBT's monopoly position. *Id.* at ¶¶ 47-54.

Accordingly, SWBT does not provide CLECs access to UNEs that will enable them to use those UNEs at cost-based rates. The access that SWBT has suggested that it will provide for CLECs to do their own combining has all the deficiencies address in section IV.A above, and the combinations available to AT&T for the term of its agreement are not available at cost-based rates.<sup>59</sup>

*Proposed Processes. The Commission has opened a review of the application of the Central Office Access Charge. This review should include consideration of the application of all non-recurring charges in the context of converting existing customers to a CLEC's UNE-based service.*

#### VI. UNBUNDLED LOOPS (CHECKLIST ITEM 4)

SWBT has not shown that it delivers unbundled loops to competing carriers within a reasonable time frame, with a minimum of service disruption, and with the same quality afforded by the loops it uses to serve its own customers. AT&T Ex. 7 (Krabill/Falcone Aff.), ¶¶ 89-91, Tr. 668, 674-678 (Falcone). SWBT has not shown that its proposed three-day installation interval

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<sup>59</sup>During the hearing SWBT alluded to the availability of the equivalent of UNE combinations through a Network Component Service ("NCS") that had been absent from its Texas 271 application, in contrast to its recent filings in other states. This service has not been incorporated into any Texas agreement, nor priced for application in Texas. Tr. 709 (Auinbauh). Pricing for this service would be at SWBT's discretion: "we would, quite frankly, price it as we feel is the appropriate way to price it, not under the jurisdiction of 252(d)(1)." Tr. 710-11 (Auinbauh); Tr. 525 (Krabill) ("if you go into the NCS and they held do the combining for you, you're held hostage to their prices. You pay what they want you to pay."). SWBT's NCS service, virtually undeveloped on this record, plainly does not offer CLECs the ability to use UNEs in combination at cost-based rates. The deficiencies of SWBT's NCS proposal are more fully developed in Ms. Krabill's supplemental affidavit, incorporating the affidavit she and Mr. Falcone offered in Oklahoma, where NCS was a part of SWBT's formal section 271 application. *See* Krabill April 28 Aff. at Ex. NRK-1.

**REPLY DECLARATION OF  
DANIEL P. RHINEHART  
ON  
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**ATTACHMENT 4**

AT&T  
02/22/99

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**AT&T'S RESPONSE TO SOUTHWESTERN BELL TELEPHONE  
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cc: All Parties of Record

'necessary and impair' standards [of section 251(d)(2)] when it gave blanket access to these network elements, and others, in Rule 319." *Id.* at \*10. The Court noted that the FCC's rule "may be supported by a higher standard," *id.* at \*11, and left to the FCC the task of determining on remand what network elements must be made available.

5. **Pick And Choose.** Finally, the Supreme Court reversed the Eighth Circuit's decision to vacate the FCC's "pick and choose" rule, which requires incumbents to make available to all new entrants "any individual interconnection, service, or network element contained in any agreement to which it is a party . . . upon the same rates, terms, and conditions as those provided in the agreement." *Id.* at \*13-14; see also 47 C.F.R. § 51.809.

## ARGUMENT

### **I. PRICING**

The Supreme Court has held that the FCC has full authority to establish the methodology that must be followed to establish prices for obtaining UNE access. *AT&T Corp.*, 1999 WL 24568, pp. 6-9 (§ II). Thus, all UNE rates – both recurring rates to recover the forward-looking economic cost of the facilities and functions that comprise each UNE as well as the non-recurring cost of provisioning a UNE or UNE combination – must be based on the FCC's recently reinstated TELRIC methodology. See 47 C.F.R. §§ 51.503 & 51.505. The FCC's pricing rules specifically provide that "[n]onrecurring charges . . . shall not permit an incumbent LEC to recover more than the total forward-looking economic costs of providing the applicable element." 47 C.F.R. § 51.507. This requirement has at least two implications relevant to the setting of non-recurring charges for provisioning UNE-P and other UNE combinations. First, this means that the methodology and assumptions (e.g., regarding what constitutes a properly forward-looking network) must be consistent when setting either recurring or non-recurring UNE

charges. Second, forward-looking non-recurring charges must be set by assuming that UNEs or UNE combinations will be provided in the most efficient manner possible, using "the most efficient telecommunications technology currently available and the lowest cost network configuration...." 47 C.F.R. § 51.505(b)(1).

In general, the *recurring* rate for a combination of network elements should be the sum of the properly calculated TELRIC investment costs for the elements comprising the combination. In contrast, it would violate the TELRIC principles mandated by the FCC to set a *non-recurring* charge for a UNE combination by adding the non-recurring charges that would be appropriate if the individual network elements were provided separately.

For elements that are already combined in the incumbents' network, most, if not all, of the nonrecurring costs associated with provisioning the individual elements will never be incurred. For example, the nonrecurring charges for provision of individual loop element and an individual switch element consist almost entirely of costs for rewiring them back together within the central office after SWBT has gratuitously taken them apart before agreeing to lease them to a CLEC. Now that SWBT must provide UNE-P, however, no disassembling of any of the combined elements will be necessary, and no costs to rewire them (or to assign new facilities, or to coordinate any such work) will be incurred. As AT&T has demonstrated, the proper non-recurring charge for providing a combined loop and switch element (i.e. UNE-P) in accordance with the Supreme Court's decision is more in the neighborhood of the \$2.56 service order charge, and not the \$36.82 ordered by the Texas Commission.

In sum, as a general matter only the actual nonrecurring costs incurred in the efficient provision of the requested combination can be included in the nonrecurring charge for the combination. The nonrecurring charge for providing UNE-P or another UNE combination must

reflect the properly calculated TELRIC costs for the most efficient provisioning of the combination, without charges for disconnecting and reconnecting elements already combined in the network or any other avoidable and unnecessary make-work.

A. **SWBT's Commitment to Complying with the Supreme Court's pricing decision is qualified and uncertain**

SWBT's Response to the Commission's Questions on the Impact of the Supreme Court Opinion does not demonstrate that SWBT will comply with the Supreme Court's recent ruling regarding pricing, nor does it provide certainty to CLECs. When asked whether it intends to seek a change in rates, SWBT responded only that it has "no current plans to seek to modify the prices in its voluntarily negotiated interconnection agreements." With regard to prices set by the Commission in arbitration proceedings, SWBT will agree to abide by those prices only until such times as "SWBT is authorized to modify those rates to alternate rates that are deemed, under regulatory and judicial processes, to comply with the Act and governing FCC and/or Commission rules." Response at p. 7. SWBT explicitly avoids making a commitment to abide by those prices either for a time certain, or even for the length of the current interconnection agreements. Instead, SWBT's response ominously portends of modifications to the rates when allowed by "regulatory and judicial processes."

Similarly, when asked whether SWBT intends to assert that the rates set by this Commission were not set according to TELRIC, SWBT takes away with its left hand what it gives with its right. SWBT begins by seeming to affirm that the rates the Texas Commission set in arbitration proceedings were consistent with TELRIC methodology, but immediately follows that with the seemingly incongruous statement that "SWBT believes the prices in its arbitrated agreements are more generous to SWBT's wholesale customers than the Act requires," qualified

only by its hackneyed reassurance that it will “abide by those prices until such time as new prices are adopted through negotiation or by regulatory or judicial order.” Response at p. 8.

**B. SWBT has not committed to comply with the Supreme Court’s ruling eliminating glue charges**

With respect to the elimination of glue charges, SWBT says that it will abide by contract terms that provided for the automatic elimination of the central office access charge (“COAC”) upon Supreme Court reversal of the Eighth Circuit decision on Rule 315(b), *see* AT&T/SWBT Interconnection Agreement, Attachment 6, Appendix Pricing-UNE section 3.3, but leaves open the possibility that it will assert that charge against CLECs whose contracts may lack that term. That same contract term provides AT&T an explicit right to petition this Commission for reconsideration of other non-recurring charges in light of the Supreme Court’s decision. Will SWBT regard such a request as an attempt to “invalidate” the existing agreement, to which SWBT “reserves the right to respond as appropriate”? SWBT Response at 11. Indeed, SWBT states that “UNE prices may not adequately compensate SWBT for its cost” and threatens to seek to reopen cost and pricing issues related to access to the platform, even as it says it will abide the contract terms eliminating the COAC. SWBT Response at 13.

It is AT&T’s position that given the Supreme Court’s recent decision, SWBT no longer has the right to impose a glue charge for providing elements in combination. In the Affidavit of Daniel Rhinehart and Robert Flappan introduced in this proceeding last April, AT&T demonstrated how the non-recurring charges for (1) the Central Office Access Charge (“COAC”), (2) the Analog Loop to Switch Port Cross-Connect, (3) the 2-Wire Analog Loop, and (4) the Analog Line Port are not cost-based and fail to comply with the FCC’s TELRIC methodology. These non-recurring charges – in the context of UNE-based conversions – are

frequently “phantom” charges. In other instances, they are simply charges for trivial functions that are already recovered in the general “Service Order Charge.”

1. The COAC.

Under the December 19 Arbitration Order, SWBT is authorized to impose a \$16.35 non-recurring Central Office Access Charge for keeping combined certain UNEs such as the loop and the port that allow competing local exchange carriers seeking to enter local markets to provide a finished service. (December 19 Order, Appx. B at 17.) The COAC has been defined by SWBT as including “the costs incurred in establishing an access line between the central office and the customer’s premises.” (See SWBT Schedule N6-87, Supplemental: “Texas 1991 Multi-Element Cost Study”, p. 2.) The COAC consists of the following components:

Dispatch – “data processing costs associated with the system used for dispatching service orders to installers”;

Field Cross Connect – “the installer’s work effort expended in the performance of outside plant cross connections and line and station transfers . . . [and the] travel associated with the cross connect work”;

Central Office Cross Connect – “the labor costs incurred to perform cross connections, and related test work at the central office main distributing frame and line equipment frame as well as the data processing cost associated with the operation of the Memory Management System (MMS) in ESS Central Offices”;

Network Interface – “the material and labor costs associated with the installation of a Network Interface jack at the customer’s premises”; and

Completion Recording – “the costs associated with service order completion reporting and administrative work performed by the technician.” (Id. pp. 2-4.)

Although the constituent elements of the COAC may appear substantive in the context of the work that SWBT may perform for its end user customer, the COAC is, in the context of loop and port combination UNEs, (1) a “phantom” charge which will, in effect, compensate SWBT for doing nothing other than permitting existing UNE combinations to remain intact, and (2) a

charge for costs which SWBT has already recovered from its former customer. As was determined during the cost proceedings, the loop and the port are connected via a jumper wire at the main distribution frame ("MDF"). For existing SWBT customers, that jumper wire already exists; the loop and the port are already connected. The COAC violates both the cost based requirement of the Act by charging new entrants for work that will never be performed, and the anti-discrimination provisions of the Act by charging new entrants for work that SWBT does not perform for (nor incur cost for) itself.

Perhaps most importantly, SWBT has already charged its own retail customer (i.e., the customer converting to AT&T's UNE-based service) for the work represented by the COAC when service was established initially. Accordingly, SWBT will now be receiving a second payment from its local competitors for precisely the same work. Also, most of the COAC components are included in other non-recurring charges SWBT recovers from CLECs. Thus, the Central Office Cross Connection component of the COAC, which covers cross connections "at the central office" would duplicate the analog Loop to switch port cross-connect (if it were required at all); the "Dispatch" component is completely duplicative of the separately assessed "Service Order Charge," and the Field Cross Connect and Network Interface components are included in the 2-Wire analog loop non-recurring charge.

As one might expect – given the "phantom" nature of this charge – there was no evidence in the Arbitration record to support the proposition that the COAC was "based on the cost . . . of providing the . . . network element" as required by the federal Act and the Commission's December 19 Order. No cost study was offered by any party in support of the COAC; nor was any cost justification provided at all.

2. **The Analog Loop to Switch Port Cross-Connect Charge.**

Under the December 19, 1997 Arbitration Order, SWBT is also authorized to impose a \$4.17 cross connect charge. This charge theoretically covers the activity required when SWBT sends an installer to install the equipment necessary to connect the loop from the customer's premises to the port in the central office switch. It includes the installer's time for travel, installation and checking. (SWBT Component Cross Connect Cost Study, January 15, 1997.)

In fact, this cross connect is once again, a "phantom charge" in the context of any conversion of an existing SWBT customer to a UNE-based service offered by a competing local exchange carrier. As discussed above, a customers' current telephone service already includes this connection. If a SWBT customer switches to AT&T, there is no need for SWBT to send an installer (with the corresponding bill to AT&T) to install something that already exists. Even if this were not a phantom charge, it would nonetheless be duplicative of the Central Office Cross Connect component of the COAC.

3. **2-Wire Analog Loop.**

The December 19 Order authorized SWBT to assess a \$15.03 non-recurring loop charge for all loops ordered by new entrants. The costs associated with providing a customer with an analog loop include, among other things, sending an installer to the customer's premises to install the loop, connecting it to the network interface and testing the connection. (SWB Unbundled Loop Cost Study, January 15, 1997.)

This too is a "phantom charge" for any conversion of an existing SWBT customer to a UNE offering of a CLEC. A current SWBT customer's telephone service is already attached through a loop to the central office. If that customer switches to AT&T, there is, once again, no need for SWBT to send an installer out to install something that already exists. At most, this

charge should be assessed only when the work is (1) necessary and (2) actually performed, as the Commission has already ordered. By permitting SWBT to recover NRCs for all loops, the Commission failed to establish cost-based rates, and failed to follow its own order, to establish rates which are nondiscriminatory.

4. **Analog Line Port.**

The December 19 Order authorized SWBT to assess a \$1.27 non-recurring charge for the analog line port. This item generally covers the labor cost of having a technician activate the port in the switch. (SWBT Analog Line-Side Port Study 291, January 15, 1997.) As with the cross connect and loop charge, however, this port charge represents a phantom cost in the context of a conversion, because the port will already be activated, and no further work is needed at the time of the conversion.

C. **These Phantom or Glue Charges are Clearly Contrary to the Recent Supreme Court decision**

The Commission – even as it approved the non-recurring charges noted above – specifically recognized that SWBT should not generally be allowed to assess non-recurring costs “when (1) work is not performed, or (2) work [is] performed when not necessary.” December 19 Order, Appendix A at 13. But the Commission appears to have concluded that the application of these principles in the context of UNE combinations was subject to “SWBT’s right to disconnect pursuant to the 8th Circuit.” *Id.* This is clearly a reference to the Eighth Circuit’s decision in *Iowa Utilities Board v. F.C.C.*, 120 F.3d 753 (8th Cir. 1997), in which the court held, among other things, that the federal Act did not authorize the Federal Communications Commission to require incumbent local exchange carriers to combine UNEs at the request of potential competing local exchange carriers. 120 F.3d at 813. When asked to clarify the issue of the

“[a]pplication of phantom combining charges where no combining is required,”<sup>6</sup> the Commission responded: “SWBT has the right to ‘uncombine’ and then recombine UNEs. Thus, the rates in Appendix B [including UNE non-recurring rates] reflect the recombining of uncombined UNEs.” (December 19 Order, Appx. C, p. 1.) Other references in the record make it quite clear that the Commission – despite its recognition that phantom charges should not be assessed – believed that the Eighth Circuit’s opinion required it to make an exception in the case of the non-recurring charges discussed above and to allow SWBT to charge its competitors for “hypothetical” recombining of UNEs, “as if” that work had been done – even though it had not. (See, e.g., Transcript of 12/1/97 Open Meeting at 33.)

Given the Supreme Court’s recent reversal of the Eighth Circuit opinion, it is clear that SWBT does not, in fact, have the “right to ‘uncombine’ and then recombine UNEs,” nor does it have the right to recover charges for such activities. In light of the fact that SWBT has no right to “uncombine” UNE elements (and, in fact, has an enforceable duty not to “uncombine”), it is clearly contrary to the federal Act – which requires cost-based, non-discriminatory pricing (§ 252(d)) – and the Commission’s own TELRIC-based rules to permit SWBT to assess a fee for doing nothing. A fee for doing nothing cannot be cost based. Moreover, a fee for doing nothing is inherently “discriminatory” (contrary, once again, to § 252(d)), because it imposes a cost on AT&T, a would-be local competitor, for which there is no reciprocal cost for SWBT. As demonstrated below, these phantom charges create a very substantial barrier to local exchange competition in Texas, at a time when such barriers need to be removed if competition is to be sustainable.

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<sup>6</sup> See AT&T’s and MCI’s Request for Clarification Regarding Costing and Pricing Matrix and Scenarios, Dkt. No. 16189, et al., filed December 10, 1997, pp. 5-8.

The phantom non-recurring charges identified above are very substantial. This can be illustrated by considering them as a percentage of the total non-recurring costs approved by the Commission in the context of providing residential POTS to a pre-existing SWBT customer. The Commission approved the following recurring and non-recurring costs for a “UNE complete migration with no changes: flat rate residential with call waiting and caller ID”:

	<u>Monthly Recurring</u>	<u>Non- Recurring</u>
2-Wire Analog Loop	\$ 14.15	\$ [15.03]
Analog Loop to Switch Port Cross-Connect		\$ [4.17]
Analog Line Port	\$ 2.90	\$ [1.27]
Local Switching	\$ 2.71	
Call Waiting		\$ 0.04
Calling Number Delivery		\$ 0.04
Tandem Switching	\$ 0.43	
Common Transport – Termination	\$ 0.21	
Common Transport – Facility, per Mile	\$ 0.01	
SS7 Signaling	\$ 0.03	
White Pages Directory		\$ 3.84
Central Office Access Charge		\$ [16.35]
Service Order Charge		<u>\$ 2.56</u>
Total:	<u>\$ 20.44</u>	<u>\$ 43.30<sup>7</sup></u>

The phantom non-recurring charges are bracketed in the numbers set forth above. They total \$36.82. This constitutes 85% of the total non-recurring charges associated with this common type of service if the customer requests the white pages, and 94% if the white pages are not ordered. As a practical matter, all of the work that SWBT needs to do – or will, in fact, do – upon a simple conversion is more than covered in the \$2.56 “Service Order Charge” noted

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<sup>7</sup> These numbers were included in “Costing and Pricing Scenario 3”, used by the Commission in its December 1 open meeting.

above. According to SWBT, this charge "includes the non-recurring service ordering costs associated with the data processing and the labor effort necessary to provide Unbundled Network Elements to LSPs." (SWBT Unbundled Service Order Cost Study, July 2, 1997.)

Although AT&T believes this \$2.56 charge is not TELRIC based,<sup>8</sup> AT&T nonetheless acknowledges that the charge represents – albeit on an inefficient and non-TELRIC basis – underlying work that must be performed by SWBT when one of its customers switches to a competing local exchange carrier.<sup>9</sup> However, the activity covered by this charge is the only work that SWBT needs to do--or will do--upon a simple customer conversion.

## II. ACCESS TO UNES: SWBT'S RESPONSE OFFERS NO ASSURANCE THAT CLECS WILL HAVE CONTINUED ACCESS TO UNES ON TERMS THAT WILL SUPPORT COMPETITION

The Supreme Court's decision to vacate Rule 319 and to require the FCC to reconsider the list of UNEs that incumbents must provide to requesting carriers has given incumbent LECs the opportunity to create new uncertainty about the UNEs that will be available and the terms on which they will be available. SWBT's Response and other public statements on this aspect of the ruling have created just such uncertainty.

AT&T submits that the Supreme Court's decision should not reduce unbundling requirements that have been recognized as prerequisites to 271 relief in prior FCC decisions. That is so, first, because most of the elements that were identified in Rule 319

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<sup>8</sup> As to the Service Order Charge, AT&T believes that the \$2.56 rate adopted by the Commission assumes inefficient processes (manual labor, order fall-out, etc.) that are not TELRIC. Accordingly, AT&T believes that the correct cost-based rate is significantly lower.

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**ATTACHMENT 5**

AT&T  
4/28/99

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**COMMENTS OF AT&T COMMUNICATIONS OF THE SOUTHWEST, INC.  
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cc: Chairman Pat Wood  
Commissioner Judy Walsh  
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SWBT has undertaken a concrete, specific legal commitment to supply the relevant checklist items on terms that are satisfactory as a matter of law and policy. (Of course, the MOU, as nothing more than a summary of promises to come, also cannot evidence operational readiness to supply any of the covered items). Indeed, the MOU does not even purport to resolve some issues, but defers them to future developments in other proceedings (e.g., establishing benchmark intervals for pre-order response times that will provide CLECs a meaningful opportunity to compete, numerous collocation terms to be established in proceedings to revise the physical collocation tariff, xDSL terms to be developed in Dockets 20226 and 20272).

Second, the MOU is substantively deficient. It contains specific terms that will not satisfy checklist or other requirements under the Act, terms on which CLECs have had no opportunity for comment. To take but one example here, the terms surrounding UNE combinations would allow SWBT to continue to collect nonrecurring charges associated with individual UNEs when a CLEC orders a "preexisting" UNE combination (e.g., conversion of a SWBT retail customer to CLEC UNE platform service). These terms are at odds with the Supreme Court decision in *AT&T Corp. v. Iowa Utilities Board*, because they would allow SWBT to collect what essentially amounts to a prohibited glue charge – NRCs based on manual work that does not occur on an electronic conversion. In addition, permitting collection of those NRCs would contradict AT&T's express contract right, approved by this Commission, to seek review of those charges. Indeed, before the MOU was filed, the SWBT account team had confirmed to AT&T its understanding that the \$ 2.56 electronic order service charge would be the total nonrecurring charge on migration orders to UNE platform service from

SWBT retail or AT&T resale. The account team was to report to AT&T if it became aware of conflicting information. It did not. Then, when AT&T contacted the account team after release of the MOU, the SWBT account team reversed itself and, consistent with the objectionable terms of the MOU, said that other nonrecurring charges would apply. None of this dialogue appears to have been considered in the development of these MOU terms. AT&T never had the opportunity to challenge the SWBT policy group's development of terms that are at odds with the information supplied to AT&T by its own SWBT account team, because CLEC input was not provided for in the unilateral negotiations on this issue after March 19, 1999, the date of CLECs' last meeting with Staff on the UNE issues or collocation issues that the MOU purports to resolve. This is but one example of new terms contained in the MOU, which threaten serious adverse consequences to CLECs and their entry plans, but which have been developed without meaningful opportunity for CLEC input. Before the Commission passes judgment on the substance of the new terms presented in the MOU, and before the contractual rights of parties are diminished, CLECs should have the opportunity to comment. That opportunity will not be available in a meaningful way prior to the April 29, 1999 Open Meeting.

Third, approval of the MOU on the terms proposed by SWBT would unduly restrict this Commission's discretion and judgment as it proceeds with OSS testing and the validation and review of SWBT performance data. The MOU would tie the Commission to findings that are not consistent with the facts as they continue to develop; the MOU recites, for example, that flow-through development is complete for phases I through III, even though SWBT is just now beginning to share new information about

**REPLY DECLARATION OF  
DANIEL P. RHINEHART  
ON  
BEHALF OF AT&T CORP.**

**ATTACHMENT 6**

AT&T  
5/28/99

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**COMMENTS OF AT&T COMMUNICATIONS OF THE SOUTHWEST, INC.  
ON SWBT'S PROPOSED INTERCONNECTION AGREEMENT  
AND COLLOCATION TARIFFS**

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cc: Chairman Pat Wood  
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Commissioner Brett Perlman  
Administrative Law Judge Katherine Farroba  
Nara Srinivasa, Office of Regulatory Analysis

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overreaching by SWBT. (e.g., provision requiring CLEC to agree that spectrum management is “essential”).

AT&T’s comments document these and other deficiencies in volume and in detail. The Commission should proceed with its review of the PIA and the collocation tariffs with extreme caution, with no party or circumstance dictating the schedule. The process needs to allow for full review of these contract terms, old and new. Once the PIA is approved, there can be no expectation of negotiating changes with SWBT, absent the resolve to proceed with a full-blown arbitration. The process for PIA review needs to provide adequate opportunity to address the comments of CLECs, for SWBT to revise and supplement the contract where appropriate, and to arrive at a contract that, while reflecting the dubious policy choices represented in the MOU, is comprehensive, current, workable, and fair as can be within the MOU framework. AT&T is prepared to contribute a serious effort toward creating such a form of contract, even as it sharply disagrees with terms of the MOU. Nevertheless, with the stakes as high as defining terms for competition in Texas over the next four years, SWBT’s drafts of the PIA and tariffs are a poor match for a process that allows for one round of comment and two days of discussion on each.

**II. AT&T Reserves Its Objections To The MOU And To The Procedure Being Followed To Close This 271 Proceeding**

In making these comments, AT&T must restate its view that the terms of the MOU do not provide the basis for a conclusion that, if implemented, SWBT will be in compliance with its 271 obligations nor for a conclusion that the local market is irretrievably open. AT&T has not repeated these objections in its detailed comments on the PIA, because of the limited scope prescribed by the Commission for PIA review.

However, AT&T does reserve and reurge the objections that were set out in its comments on the MOU. The product of a flawed (however well-intentioned) procedure, the MOU allows SWBT to fall short of the Act's requirements, and it fails to offer reliable conditions for competition.

MOU terms that run contrary to the Act include:

- allowing SWBT to continue to collect nonrecurring charges for individual UNEs in connection with UNE platform orders for pre-existing combinations, amounting to a glue charge for manual work that does not occur on such orders;
- failing to require SWBT to combine elements for CLECs where necessary to provide nondiscriminatory access to UNEs, while providing instead for CLECs to combine manually under a "secured frame" method that is unsupported by specific terms and procedures or empirical demonstration;
- providing CLEC access to virtual collocation only at SWBT's discretion where space for physical collocation is available; and
- requiring a CLEC who seeks to deploy loop technologies approved by other commissions or an industry standards body to prove that deployment has not caused substantial degradation of other services, a showing not required under the FCC Advanced Services Order.

MOU terms that add marketplace uncertainty include:

- possible contract expiration on July 1, 2000, with no commitment to extend the MOU terms beyond that date until SWBT wins 271 approval at the FCC;
- potential restrictions on access to UNEs for business customers in 2 years and residential customers in 3 years;
- pricing uncertainty; and
- heavy reliance on proceedings to be completed in the future for development of terms of access to DSL-capable loops.

### **Conclusion**

The MOU and the PIA do not provide a basis that is authorized in the Act for closing a 271 proceeding. The PIA is not a negotiated agreement between real parties in interest. It is not the product of an arbitration brought by interested parties. It is not a statement of generally available terms and conditions, though it is closer to this form than any other. Constraints on CLEC participation during final negotiations on key policy