

and issued an NPRM to rectify the situation. Internet Traffic Order at ¶¶ 1, 9, 21; NPRM at ¶¶ 28-36. However, for the interim period, the FCC made it clear that states could continue to determine how compensation for this traffic should be structured. While the Internet Traffic Order grants broad discretion over this compensation issue to the states for this interim period, this discretion is not unlimited. Thus, while it may be appropriate for a state to continue reciprocal compensation for contractual, policy or equitable considerations, or to develop and implement some other inter-carrier compensation mechanism, we have difficulty interpreting the FCC's order as authorizing a rate of "zero"<sup>6</sup> for this traffic, for the following two reasons. First, the Act requires local exchange carriers to compensate each other for the transport and termination of traffic that originates on one carrier's network and terminates on another carrier's network. 47 U.S.C. § 251(b)(5). Second, a carrier's transport and termination of this traffic has some non-zero associated costs, as the majority acknowledges.<sup>7</sup> D.T.E. 97-116-C at 28-29. Thus, we believe that inter-carrier compensation

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<sup>6</sup> We note that Bell Atlantic has voluntarily offered, and the majority has accepted, to continue paying reciprocal compensation for traffic up to an imbalance of 2:1. The majority notes that because there is no technological means to segregate legitimate local traffic from illegitimate ISP-bound traffic, this ratio "is generous to the point of likely including some ISP-bound traffic." D.T.E. 97-116-C at 28 n.31. However, according to the majority, there is no legal requirement that Bell Atlantic pay any reciprocal compensation to one another for this traffic; accordingly, the effective legal "rate" is zero. Id. at 25.

<sup>7</sup> The majority's reference to a possible impact on Bell Atlantic's ratepayers (via a price cap exogenous cost) if Bell Atlantic was ordered to continue paying reciprocal compensation is premature and speculative at best. Whether Bell Atlantic would be eligible for such exogenous cost recovery is dependent on a number of complex factors which we would not presume to prejudge.

is due but recognize that the ultimate level of this compensation remains to be determined. Accordingly, we would have continued escrow in recognition of the legitimate dispute regarding these funds and to preserve them for immediate payment upon final decision or settlement. Accord D.T.E. 97-116-B (authorizing Bell Atlantic to escrow certain reciprocal compensation payments because escrow constitutes an accepted method to preserve disputed payments during a commercial dispute, and because various interconnection agreements require escrow of funds in the event of a dispute).

D. Discussion Concerning Negotiation and Settlement of this Dispute

While we agree with the majority that a negotiated settlement is the ideal outcome, we have concerns about the process that it would use to reach such a resolution. The process the majority articulates lacks any meaningful incentives for the parties to reach a settlement for two reasons. First, the elimination of Bell Atlantic's obligation to pay reciprocal compensation into escrow for ISP-bound traffic provides a sure recipe for delay and non-settlement because Bell Atlantic now has little incentive to negotiate<sup>8</sup> and the CLECs have reduced leverage. Second, without an active adjudication proceeding concurrent with the negotiation/mediation/arbitration process established by § 252 of the 1996 Act, no route exists for the Department to end the dispute by issuing a final order.

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<sup>8</sup> Given its conclusion that Bell Atlantic has no obligation to pay reciprocal compensation for ISP-bound traffic, it is not clear to us why the majority thinks Bell Atlantic would engage in negotiation, as it encourages Bell Atlantic to do, because if such discussions were to lead to an agreement for compensation, then Bell Atlantic would begin to pay its local competitors for traffic that, according to the majority, it has no obligation to pay.

E. Competition and Efficient Entry

Finally, we respond to the majority's colloquy on competition and efficient entry. In our view, this discussion is not directly related to the dispute before the Department in the instant proceeding. The substance of the discussion was not addressed directly by the parties or by the Commission as a whole in our deliberations. Therefore, we do not consider it to be a useful or appropriate addition to the Order.<sup>9</sup>

The majority does attempt to make a connection between the discussion in Section IV.B. and the issue of payment of reciprocal compensation for ISP-bound traffic, for example on page 32 where it states, "we do not prejudge any potential renewal of the dispute before us last October, where such a renewal might rest 'on contractual principles or other legal or equitable considerations' and not on substantive policy or economic issues." The majority appears to make this statement because it has reached a conclusion on the substantive policy and economic issues, to borrow its words, "in a vacuum."<sup>10</sup> In fact, one can infer from this

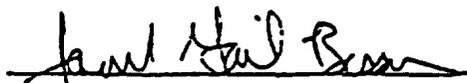
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<sup>9</sup> We note that the Department occasionally provides general guidance at the close of an order on a specific adjudication, but the guidance is directly related to the substance of the order. For example, in Essex County Gas Company, D.T.E. 98-27 (1998), the Department included direction on the showing proponents of a merger should make to ensure expeditious consideration of their petitions. This type of guidance, directly related to the specific case at hand and flowing from the evidence presented, is, of course, appropriate.

<sup>10</sup> The majority concludes, "Clearly, continuing to require payment of reciprocal compensation along the lines of our October Order is not an opportunity to promote the general welfare" without the Department having examined this question. D.T.E. 97-116-C at 34.

conclusion that the majority has determined that there is no other basis for paying reciprocal compensation without consideration of evidence or argument.

Not only did the Department's October Order not reach the question whether there were bases for payment of reciprocal compensation other than the "local call" basis on which we relied then, but we also did not address any of the substantive policy or economic issues that, as a public utilities commission charged with protecting the public interest, it is our job to address. Doing our job - that is, taking evidence and hearing argument before reaching a reasoned decision - is not "cast[ing] about for . . . any reason to sustain [a] questionable result." Id. at 38. Rather, it is doing the work necessary to determine whether a result is, in fact, questionable or not questionable. As we have already indicated, continuing the current proceeding or opening a new one to address whether there are other bases - including consideration of substantive policy or economic issues - for payment of reciprocal compensation for ISP-bound traffic should be the Department's next step in resolving the current dispute.

  
Janet Gail Besser, Chair

  
Eugene J. Sullivan, Jr., Commissioner

SEPARATE STATEMENT OF JANET GAIL BESSER, CHAIR

In addition, while I question the value of including general pronouncements in an order such as this, I cannot let what I see as the majority's incomplete or inaccurate characterization of the Department's policy on competition go unaddressed. When the majority quotes from a previous Department order on the subject, I obviously take no issue with its restatement of Department policy. The Department's deliberations in Gas Unbundling, D.T.E. 98-32-B (1999), centered on the prerequisites and regulatory framework for promoting competition in the gas industry. The passage quoted by the majority on the role of entrants was part of a larger discussion of what constitutes full and fair competition -- an oft-stated goal of the Department in the context of both electric industry restructuring, Electric Restructuring, D.P.U. 95-30 (1995) and Electric Industry Restructuring, D.P.U. 96-100 (1997) and gas unbundling, D.T.E. 98-32-B at 4. There are also other individual statements in this section with which I agree.

However, I am concerned that the overall tone of the discussion does not capture the Department's policy on competition and efficient entry. In the current context, the passage from Gas Unbundling appears to be used to bolster criticism of new entrants for pursuing their own self-interest, despite the majority's assertions to the contrary.<sup>11</sup> The majority's narrow focus on the actions of new entrants here does not do justice to the Department's policy on

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<sup>11</sup> See, e.g., D.T.E. 97-116-C at 32-33 ("There is, however -- and we emphasize this point -- nothing illegal or improper in taking advantage of an opportunity such as the one presented by our October Order. One would not expect profit-maximizing enterprise[s] like CLECs and ISPs, rationally pursuing their own ends, to leave it unexploited.").

competition, a broad and comprehensive policy that we have spent much of our time developing over the last several years to enable the utility industries to make the transition from traditional regulation to competitive markets and to open these markets to new entrants who will bring with them innovation and pressures for efficient operation. In my view, the Department's policy on competition is best and most succinctly captured in the principles we articulated in 1995 to guide the restructuring of the electric industry, D.P.U. 95-30, and used again in 1997 to lead off the Department's gas unbundling initiative. Department Letter to Gas Local Distribution Companies, D.T.E. 98-32 (July 18, 1997). In this Order, I fear that the majority has fallen into the trap it identified of the "[l]oose, misleading, or self-serving usage [that] often underlies disputes and sows confusion." D.T.E. 97-116-C at 31. Therefore, I must respectfully disagree with its overall characterization of Department policy on competition and efficient entry.

  
Janet Gail Besser, Chair

**EXHIBIT 2**

**BEFORE THE PUBLIC SERVICE COMMISSION  
OF THE STATE OF MISSOURI**



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 ) **Case No. TO-97-40**  
1996 to Establish an Interconnection Agreement with )  
Southwestern Bell Telephone Company. )

)  
In the Matter of the Petition of MCI Telecommunica- )  
tions Corporation and Its Affiliates, Including )  
MCI metro Access Transmission Services, Inc., for )  
Arbitration and Mediation Under the Federal Tele- ) **Case No. TO-97-67**  
communications Act of 1996 of Unresolved Intercon- )  
nection Issues With Southwestern Bell Telephone )  
Company. )

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**FINAL ARBITRATION ORDER**

**Issue Date:** July 31, 1997

**Effective Date:** August 20, 1997

**STATE OF MISSOURI**

**PUBLIC SERVICE COMMISSION**

At a session of the Public Service

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held  
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Jeffe  
City  
on  
the  
31st  
day  
of  
July,  
1997.

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**Attachment B: Permanent Rates for Unbundled Network Elements**

**Attachment C: Costing and Pricing Report**

## **FINAL ARBITRATION ORDER**

### **I. Procedural History**

On December 11, 1996, the Commission issued its Arbitration Order in this case. Within that order the Commission established the basis upon which prices and discounts would be established. In response to that order, numerous motions were filed requesting various forms of relief, rehearing, reconsideration or clarification.

On January 22, 1997, the Commission issued its Order Granting Clarification And Modification And Denying Motion To Identify And Motions For Rehearing. This order modified approximately eight items from the Arbitration Order and, inasmuch as the Commission = s Arbitration Order identified the rates as interim, this order set a schedule for the development of permanent rates. That schedule established a complex list of weekly tasks for the Commission = s Arbitration Advisory Staff to undertake beginning February 10 with a targeted concluding date of June 30 for the issuance of permanent rates.

The complexity of the issues which were being reviewed by the Arbitration Advisory Staff and the depth of information which was available on each issue compelled the Commission to extend its own deadline in order to ensure a complete and thorough review of all cost, pricing and rate issues. As a result, on June 9 the Commission issued a Notice Regarding Schedule For Development Of Permanent Rates. At that time the Commission reiterated its original intent to announce proposed permanent rates and to allow the parties 30 days in which to respond to

those proposed rates.

The Commission finds it appropriate to establish permanent rates at this time so that this matter may be resolved in such a way as to maximize the opportunities for these parties to move Missouri toward local competition. Rather than delay this matter by an additional 30 days for comment, the Commission will make this its final order. However, in the interests of due process, the Commission will allow the parties twenty days to move for reconsideration or clarification.

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 ACosting 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.

## **II. Discussion and Findings**

The Commission finds that the discount rate for resold services should be reduced from 20.32 percent to 19.2 percent for all services except operator services and 13.91 percent for operator services only. In light of the extensive review and analysis by the Commission=s Advisory Staff (see Attachment C), the Commission finds that a 19.2 percent discount rate for all services except operator services and a 13.91 percent for operator services only results in just and reasonable rates for resold basic local telecommunications services. The parties shall prepare an interconnection agreement that incorporates the rates selected in Attachment A to this Final Arbitration Order which is entitled AResale Study for SWBT.@

The Commission finds that, in light of the extensive review and analysis by the Commission=s Advisory Staff (see Attachment C), certain modifications should be made to the interim rates previously ordered for unbundled network elements (UNEs). The Commission finds that the permanent rates for UNEs, included with this Final Arbitration Order as Attachment B entitled A Permanent Prices for Unbundled Network Elements, @ result in just and reasonable rates. The parties shall prepare an interconnection agreement that incorporates the rates in Attachment B.

Prices for the unbundled network elements include the full functionality of each element. No additional charges for any such element, the functionalities of the element, or the activation of the

element or its functionalities shall be permitted.

The Commission will direct the parties to complete interconnection agreements in full conformance with the attached document in 60 days.

The Commission finds that the attachments to this order constitute a final reconciliation of all pending issues from the original Arbitration Order as issued on December 11, 1996. The original Arbitration Order shall remain effective to the extent that it is not inconsistent with this order.

In this regard, the Commission rejects all proposed interconnection agreements previously tendered by any party. It also denies SWBT=s motion to strike, AT&T=s motion to establish a procedural schedule and OPC=s motion agreeing to AT&T=s as moot.

**IT IS THEREFORE ORDERED:**

1. That the issues set out by the parties shall be resolved consistent with this order and the attachments hereto. Southwestern Bell Telephone Company, AT&T Communications of the Southwest, Inc. and MCI Telecommunications Corporation shall negotiate a final interconnection agreement for submission to the Missouri Public Service Commission consistent with this order.

2. That the rate schedules attached to this Final Arbitration Order as Attachments A and B shall be the approved permanent rates for all the elements and services listed therein.

3. That the parties shall have until August 20, 1997 to move for reconsideration or clarification.

4. That the parties shall prepare and submit to the Commission for approval an interconnection agreement reflecting the findings embodied in this order and the permanent rates embodied in Attachments A and B.

5. That the agreement described in Ordered Paragraph 4 shall be submitted to the Commission no later than September 30, 1997.

6. That the parties shall comply with the Commission=s findings on each and every issue.

7. That the Arbitration Order issued in this case on December 11, 1996 shall remain effective to the extent that it is not inconsistent with this order.

8. That any proposed interconnection agreements filed herein are rejected and all pending motions which have not been previously addressed are hereby denied.

9. That this Final Arbitration Order shall become effective on August 20, 1997.

**BY THE COMMISSION**

( S E A L )

**Cecil I. Wright**

**Executive Secretary**

DON= T FORGET ATTACHMENTS A , B AND CCrumpton, Drainer, Murray

and Lumpe, CC., concur.

Zobrist, Chm., concurs,

with concurring opinion to

follow.

ALJ: Roberts

## CERTIFICATE OF SERVICE

I, Elinor W. McCormick, hereby certify that on this 5<sup>th</sup> day of April 2000, I caused a copy of the foregoing Application for Review to be sent via Hand Delivery (\*) or Federal Express to the following:

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