

**BEFORE THE STATE CORPORATION COMMISSION
OF THE STATE OF KANSAS**

STATE CORPORATION COMMISSION

NOV 13 2000

In the Matter of the Complaint by Ionex)
Communications, Inc. Against Southwestern Bell)
Telephone Company for Charging Improper)
Rates for Line Unbundled Network Elements.)

Jeffrey S. Masaman Docket Room
Docket No. 01-SWBT-344-COM

**RESPONSE OF SOUTHWESTERN BELL TELEPHONE COMPANY
TO COMPLAINT OF IONEX COMMUNICATIONS, INC.**

COMES NOW Southwestern Bell Telephone Company ("SWBT"), pursuant to K.A.R. 82-1-219(b), and submits its response to the Complaint of Ionex Communications, Inc. ("Ionex"). For its response SWBT shows the Commission as follows:

1. Ionex filed its Complaint with the Commission on October 23, 2000.
2. SWBT was served with a copy of the Complaint by the Commission, pursuant to K.A. R. 82-1 -220, on November 1, 2000.

Ionex's Allegations

3. In the "Introduction" to its Complaint, Ionex makes certain general allegations to which SWBT is not required to respond. However, SWBT denies each and every allegation contained in the "Introduction."

4. SWBT is without sufficient knowledge or information to form a belief as to the truth of each and every allegation contained in Paragraph 1 of the Complaint, therefore the same are denied. SWBT does believe that Ionex has been granted a certificate of authority by the Commission to do business in the state of Kansas SWBT will more fully respond to the allegations as set forth below.

5. SWBT is without sufficient knowledge or information to form a belief as to the truth of each and every allegation contained in Paragraph 2 of the Complaint, therefore the same are denied. SWBT will more fully respond to the allegations as set forth below.

6. SWBT denies each and every allegation contained in Paragraph 3 of the Complaint. SWBT will more fully respond to the allegations as set forth below.

7. SWBT is without sufficient information or knowledge to form a belief as to the truth of the allegations contained in Paragraph 4 of the Complaint, therefore the same are denied. SWBT denies that it has engaged in any anti-competitive conduct as alleged by lonex. SWBT will more fully respond to the allegations as set forth below.

8. SWBT is without sufficient information or knowledge to form a belief as to the truth of the allegations contained in Paragraph 5 of the Complaint, therefore the same are denied. SWBT will more fully respond to the allegations as set forth below.

9. Paragraph 6 of the Complaint contains no specific allegations requiring a response by SWBT as the history of the Generic UNE Docket is well known to the Commission and is a matter of public record. Paragraph 6 is nothing more than lonex's interpretation of certain aspects of the proceedings in that docket, therefore the allegations contained therein are neither admitted nor denied.

10. Paragraph 7 of the Complaint contains no specific allegations requiring a response by SWBT as the history of the Generic UNE Docket is well known to the Commission and is a matter of public record. Paragraph 7 of the Complaint is nothing more than lonex's interpretation of certain aspects of the proceedings in that docket, therefore the allegations contained therein are neither admitted nor denied.

11. SWBT admits the allegations contained in the first and third sentences of Paragraph 8 of the Complaint. SWBT will more fully respond to the allegations as set forth below.

12. SWBT is without sufficient information or knowledge to form a belief as to the truth of the allegations contained in Paragraph 9 of the Complaint, therefore the same are denied. SWBT admits that lonex may have begun submitting UNE orders in approximately May, 2000. Further, SWBT admits that it has entered into a new interconnection agreement with lonex. SWBT will more fully respond to the allegations as set forth below.

13. SWBT denies the allegations contained in Paragraph 10 of the Complaint insofar as they represent lonex's interpretation and representation of the language cited and contained in the referenced pleadings. The referenced pleadings, when placed in the context of the proceedings in which they were filed, speak for themselves. SWBT will more fully respond to the allegations as set forth below.

14. SWBT denies the allegations contained in Paragraph 11 of lonex's Complaint. SWBT admits that the referenced federal and state court actions were stayed during the pendency of the Eight Circuit Court of Appeals' review of the FCC's pricing rules in *Iowa Utilities Board v. F. C. C.* SWBT further admits that it has recently entered into a Commission approved Stipulation and Agreement regarding the use of the hypothetical TELRIC pricing methodology. The Stipulation and Agreement was approved by Order of the Commission on October 13, 2000. SWBT believes the terms of the Stipulation and Agreement speak for themselves. SWBT will more fully respond to the allegations as set forth below.

15. SWBT denies each and every allegation contained in Paragraph 12 of Ionex's complaint. SWBT will more fully respond to the allegations as set forth below.

SWBT's Response

16. Ionex's Complaint fails to provide the Commission with an accurate or complete recitation of the facts surrounding the agreement upon which the Complaint appears to be based. The history of the agreement is complex and somewhat confusing, however, SWBT believes a clearer understanding of that history is necessary in order for the Commission to view this Complaint in its proper context.

17. On April 15, 1997 SWBT and Feist Long Distance Service, Inc. ("Feist"), filed their Local Resale Agreement (hereinafter the "Feist Resale Agreement") with the Commission in Docket No. 97-FLDT-590-IAT. The Commission subsequently approved the Feist Resale Agreement by its Order dated May 14, 1997. The Feist Resale Agreement contained a negotiated resale discount of 14.9 percent.

18. By letter dated January 26, 1998, SWBT confirmed for Feist that, pursuant to Feist's request under the terms of the Feist Resale Agreement, SWBT would apply the 21.6 percent discount for certain resold services ordered by the Commission in the SWBT/AT&T arbitration to Feist's Resale Agreement effective January 24, 1998.

19. On March 23, 1999, the Commission, in Docket No. 99-SWBT-431-IAT, approved an interconnection agreement between SWBT and Advanced Communications Group, Inc. ("ACG") (the "ACG Agreement"). The ACG Agreement is the result of ACG's election to MFN, pursuant to Section 252(i) of the Telecommunications Act of 1996, into the Sprint Communications Company, L.P.,

Interconnection Agreement that had been previously approved in KCC Docket No. 97-SCCC-167-ARB (the "Sprint Agreement"). The ACG Agreement had been filed with the Commission for approval on December 23, 1998. The ACG Agreement incorporated, as is the case in a MFN'd agreement, the UNE Pricing Attachment and the 14.9 percent resale discount from the underlying Sprint Agreement. It is the prices from that UNE Pricing Attachment that are the source of Ionex's complaint in this proceeding.

20. Subsequent to the Commission's March 1999 approval of the ACG Agreement, that agreement was amended by the parties for various reasons on five separate occasions. The first negotiated amendment ("Amendment No. 1"), was filed with the Commission on June 9, 1999 by SWBT and ACG. Amendment No. 1 replaced the Directory Assistance Service ("DA") and Operator Services ("OS") Appendices, as well as added a new section to the General Terms Conditions of the Agreement. Amendment No. 1 made no changes to the Appendix Pricing – UNE Schedule of Prices. Amendment No. 1 was approved by Commission Order dated July 16, 1999.

21. The second negotiated amendment ("Amendment No. 2") to the ACG Agreement was submitted to the Commission by SWBT and ACG on August 12, 1999. Amendment No. 2 added an Operations Support Systems ("OSS") Appendix and amended portions of the General Terms and Conditions of the agreement, as well as the Appendix Pricing – UNE Schedule of Prices. Amendment No. 2 added certain OSS prices to the Appendix Pricing – UNE but made no other changes to the prices contained in the Appendix, the same prices that are now in dispute.

22. On August 30, 1999, while Amendment No. 2 was pending before the Commission, ACG, through counsel, provided SWBT with written notice of its intention

to assign the ACG Agreement to “its wholly owned subsidiary, Feist Long Distance Services, Inc.” Further, the notice stated that pursuant to the terms of the Feist Resale Agreement, Feist was providing notice of its intent to terminate the Feist Resale Agreement. “Accordingly, Feist’s termination of its Resale Agreement will occur simultaneously with the assignment of ACG’s interconnection agreement to Feist.” See Letter of August 30, 1999 to Ezekiel Vaughn, Account Manager, Southwestern Bell Telephone Co., from Kemal M. Hawa, counsel for Advanced Communications Group, Inc. and Feist Long Distance Services, Inc. (A copy of the August 30, 1999 letter is attached hereto as “Attachment A” and incorporated herein by this reference.)

23. On October 25, 1999, the Commission issued its Order approving Amendment No. 2 to the ACG Agreement, including changes to the Appendix Pricing – UNE Schedule of Prices.

24. The assignment of the ACG Agreement to Feist became effective on or about November 1, 1999. As a result, the Feist Resale Agreement terminated upon the effectiveness of the assignment.

25. On February 16, 2000, Ionex Telecommunications, Inc. (“Ionex Telecom”) and Feist, by letter from their counsel, requested Commission permission to change the name of Feist to Ionex Communications, Inc. (“Ionex”). The Commission granted the request in an Order dated March 20, 2000 in Docket No. 00-ICIT-758-CCN.

26. On April 14, 2000, SWBT and Ionex filed a negotiated Amendment No. 3 to the ACG Agreement which had been assigned to Feist, now Ionex. Amendment No. 3 added a FCC Merger Conditions Appendix to the Agreement. Ionex, once again, did

not request that SWBT make changes to the Appendix Pricing – UNE Schedule of Prices. By Order dated May 4, 2000 the Commission approved Amendment No. 3.

27. On May 10, 2000, SWBT and lonex filed a negotiated Amendment No. 4 to the ACG Agreement which had been assigned to Feist, now lonex. Amendment No. 4 added a Collocation Attachment and amended portions of the Agreement's General Terms and Conditions to reflect the addition of the Collocation Attachment. Again, lonex did not request any changes to the Appendix Pricing – UNE Schedule of Prices. By Order dated June 23, 2000 the Commission approved Amendment No. 4.

28. On September 6, 2000, SWBT and lonex filed a negotiated Amendment No. 5 to the ACG Agreement that had been assigned to Feist, now lonex. Amendment No. 5 proposed to change the name of the ACG Agreement to reflect lonex's certificate of convenience and authority. lonex did not propose any changes to the Appendix Pricing – UNE Schedule of Prices in Amendment No. 5. The Commission, by Order dated September 29, 2000, approved Amendment No. 5. By lonex filing Amendments 2, 3, 4, and 5 to their agreement it is clear that lonex understood that to revise the terms of their agreement they were required to file such amendments to their interconnection agreement.

29. On September 7, 2000, while Amendment No. 5 to the ACG Agreement was pending before the Commission, SWBT and lonex filed an Application in Docket No. 01 -SWBT-214-IAT for Commission approval of a new lonex interconnection agreement (hereinafter the "lonex Agreement"). The lonex Agreement is the result of lonex's election to MFN with modifications into the AT&T Communications of the Southwest, Inc., interconnection agreement in Docket No. 97-AT&T-290-ARB.

30. On October 25, 2000, the Commission approved the Ionex Agreement in Docket No. 01 -SWBT-214-IAT. The Ionex Agreement supersedes and replaces the ACG Agreement.

31. Ionex's statements and allegations in its Complaint are untrue. During the term of the ACG Agreement SWBT fully complied with the Commission's orders in the Generic UNE Cost Docket, Docket No. 97-SCCC-149-GIT. SWBT filed the Master List of UNEs, as ordered by the Commission, and made those rates that are effective available to CLECs.¹ *Webster's II New College Dictionary* defines "available" as "[a]ccessible for use : at hand."² There can be no dispute that the UNE rates have been made "available" to any CLEC that requests them.³ Ionex misleads the Commission when in its Complaint it cites to a position take by SWBT in a prior arbitration with Covad concerning the applicability of UNE rates. Ionex purposefully fails to tell the Commission that SWBT's argument, the very one Ionex relies upon and quotes so authoritatively here, was ultimately rejected by this Commission. In rejecting the SWBT position, the Commission stated that "[a]s long as the parties negotiate

¹ See Order Regarding Issues Subject to Comment Under The Reconsideration Order Dated June 23, 2000, *In the Matter of the Joint Application of Sprinf Communication Company, L.P., et al., for the Commission to Open a Generic Proceeding on Southwestern Bell Telephone Company's Rates for Interconnection, Unbundled Elements, Transport and Termination and Resale*, KCC Docket No. 97-SCCC-149-GIT, dated April 28, 2000, at p. 24 ¶ (B) (ordering update of Master UNE List and accepting prices previously filed on SWBT's Master UNE List); see also Kansas Master List, filed May 8, 2000, KCC Docket No. 97-SCCC-149-GIT.

² **WEBSTER'S II NEW COLLEGE DICTIONARY 77 (1995).**

³ See amendment to Birch Telecom of Kansas, Inc. interconnection agreement filed on February 10, 2000 in Docket No. 99-SWBT-470-IAT and approved by the Commission on March 27, 2000. See also amendment to US West Interprise America, Inc. interconnection agreement filed on March 21, 2000 in Docket No. 00-SWBT-410-IAT and approved by the Commission on April 27, 2000.

terms and conditions that do not discriminate against a non-party telecommunications carrier and which are consistent with the public interest, convenience, and necessity, the Commission may not reject negotiated agreements.”⁴ The Commission went further and in discussing the general availability of Generic UNE Cost Docket Rates, stated that “the rates we established in our September 17, 1999 order are available to competitive carriers who wish to purchase SWBT’s unbundled network elements, but they do not preclude competitors from negotiating different rates with SWBT.”⁵

32. Nothing in the ACG Agreement imposes an affirmative duty upon SWBT to unilaterally apply the UNE Generic Cost Docket rates absent a request from ACG/Feist/Ionex. In fact, ACG/Feist/Ionex’s history of amending the ACG Agreement, including the Pricing Appendix -UNE Pricing Schedule without requesting a change to the actual prices, after both the February and September, 1999 Orders, indicates that Ionex had the ability to request modifications and amendments to its Interconnection Agreement when it so chose. It was Ionex’s responsibility to request modifications to the prices in the UNE Pricing Appendix in its Agreement - not SWBT’s responsibility to impose changes to a contract that had no affirmative obligation that SWBT do so.

⁴ Order On Motion for Expedited Commission Review Filed by DIECA Communications, Inc., In the Matter of the Petition of DIECA Communications, Inc. d/b/a Covad Communications Company for Arbitration of Interconnection Rates, Terms, Conditions and Related Arrangements with Southwestern Bell Telephone Company, KCC Docket No. 00-DICT-389-ARB, at ¶ 20.

⁵ *Id.* at ¶ 25. (Emphasis added); see also Order Granting Southwestern Bell Telephone Company’s Petition for Reconsideration of Order on Reconsideration/Clarification Dated June 23, 2000, In the Matter of the Joint Application of Sprint Communication Company, L.P., et al., for the Commission to Open a Generic Proceeding on Southwestern Bell Telephone Company’s Rates for Interconnection, Unbundled Elements, Transport and Termination and Resale, KCC Docket No. 97-SCCC-149-GIT, dated July 27, 2000, at ¶ 6 (stating that the Master UNE List is “available for CLECs to consider in negotiating with the ILEC, here SWBT.”). (Emphasis original).

33. ACG voluntarily elected to take the Sprint Agreement in December, 1998. Thereafter, as is reflected above, ACG voluntarily negotiated and filed several amendments to its Agreement since that time, including an amendment to its Schedule of Pricing – UNE. Amendment No. 1 was filed in June, 1999, and Amendment No. 2, which included the UNE pricing change, was filed with the Commission in August, 1999, both within six months after the Commission’s non-final February 19, 1999 Order. If ACG/Feist/Ionex believed it was entitled to rates from the February, 1999 Generic UNE Cost Docket Order, it had every opportunity to request those rates, negotiate on that basis, and arbitrate if it was not able to reach resolution with SWBT. ACG, which admits in its Complaint that it actively participated in the Generic UNE Cost Docket, however, claims SWBT had a duty to unilaterally amend or change the Agreement to reflect those rates. Neither the ACG Agreement nor the Commission’s February or September, 1999 Orders impose such an obligation. In fact, the Agreement requires that any amendment to the Agreement be in writing and signed by an officer of the party against whom the amendment is claimed.⁶ SWBT could not at any time unilaterally amend the Agreement as Ionex claims, nor did SWBT owe Ionex an affirmative duty or obligation to perform any business, legal or regulatory functions for Ionex.

⁶ “Except as otherwise provided in this Agreement, no amendment . . . of any provision of this Agreement . . . will be effective unless the same is in writing and signed by an officer of the Party against who such amendment, . . . is claimed.” Interconnection Agreement between Southwestern Bell Telephone Company and Advanced Communications, KCC Docket No. 99-SWBT-431-IAT, approved March 23, 1999, General Terms and Conditions, p. 20, ¶ 19.1 ; see also *Id.* at p. 25, ¶ 34.2 . “Neither party will be bound by an amendment, modification or additional term unless it is reduced to writing signed by an authorized representative of the Party sought to be bound.”

34. Contrary to the inaccurate statements contained in the Complaint, the rates set forth in the February 19, 1999 Generic UNE Cost Docket Order were not final, nor were they “permanent” as lonex suggests. The Order on Reconsideration setting “permanent” recurring rates did not issue until September 17, 1999. The Commission’s order setting “permanent” nonrecurring UNE rates did not issue until November 3, 2000, after the termination of the ACG Agreement and after the approval of the new lonex Agreement which is an MFN into the SWBT-AT&T interconnection agreement. Further, as the Commission noted in its October 19, 1999 Order in the Generic UNE Cost Docket, the nonrecurring prices contained in the February 1999 Order were applicable only “[t]o the extent that interconnection agreements do not establish prices for nonrecurring costs . . .” The ACG Agreement contained the same nonrecurring rates as the Sprint Agreement as a result of ACG’s decision to MFN into that arbitrated agreement. SWBT clearly complied with the Commission’s orders.

35. The history of the ACG Agreement tracks closely with developments in the Commission’s Generic UNE Cost Docket, however, nothing in the language of Section 13 of Attachment UNE relied upon by lonex requires SWBT to unilaterally amend the Agreement. The Appendix Pricing – UNE schedule simply states that the prices are “interim and will apply until further action by the Kansas Corporation Commission.” Again, nothing in the language directs SWBT to unilaterally make changes to the prices contained in the contract. Further, the language is unclear as to what constitutes “further action” of the Commission. Section 4.3.2 of the ACG Agreement states that “to the extent specified in the arbitration award, some rates are interim. Such interim rates will be replaced with subsequent rates, as determined by

the Commission. Interim rates will be subject to true up only where specifically required by the arbitration award.” Again, the language of this provision does not direct SWBT to make unilateral changes to the contract language. The process for making changes to the ACG Agreement is through an amendment as provided in Section 34.2 of the General Terms and Conditions of the agreement. ACG/Feist/Ionex never requested that the ACG Agreement be amended to reflect the UNE Generic Cost Docket rates until October, 2000.

36. Contrary to Ionex’s allegations, neither the Commission’s February 19, 1999 nor September 17, 1999 order in the UNE Generic Cost Docket directed SWBT to unilaterally conform any and all negotiated interconnection agreements with the terms of those orders. The prices set in those orders are generally available to CLECs to use in negotiating with SWBT, however, the parties remain free to negotiate prices higher or lower than those set in those orders. Had the prices contained in the UNE Generic Cost Docket orders at issue been higher than those in the ACG Agreement, one must question whether ACG/Feist/Ionex would argue that SWBT should have unilaterally amended the contract to increase the Appendix Pricing – UNE rates.

WHEREFORE, SWBT respectfully requests an order of the Commission denying Ionex’s requested relief and finding that SWBT has fully complied with the terms of the ACG Agreement and the Commission’s February 19, 1999 and September 17, 1999 Generic UNE Cost Docket orders.

Affirmative Defenses

Paragraphs 1 through 36 above are incorporated herein and made a part hereof by this reference as though fully restated here.

37. Ionex's Complaint fails to state a claim upon which relief may be granted.

38. Ionex's Complaint is barred by the doctrines of estoppel, laches and unclean hands.

39. SWBT reserves the right to assert any further, additional affirmative defenses it becomes aware of during the course of discovery in this proceeding.

Countercomplaint

Paragraphs 1 through 39 above are incorporated herein and made a part hereof by this reference as though fully restated here.

40. On or about January 24, 1998 SWBT agreed to make a resale discount of 21.6 percent on services available to Feist under the terms of the then existing Feist Resale Agreement with SWBT.

41. The Feist Resale Agreement terminated at the request of Feist/ACG/Ionex on or about November 1, 1999 when the assignment of the ACG Agreement, including a 14.9 percent resale discount, to Feist became effective and Feist began operating under the ACG Agreement.

42. On or about November 1, 1999 Feist/Ionex began placing orders under the assumed ACG Agreement for the resale of services. At that time and going forward SWBT continued to apply the 21.6 percent discount from the terminated Feist Resale Agreement to the Feist/Ionex resale orders, rather than the 14.9 percent discount provided for in the ACG Agreement, due to the fact that Ionex's orders continued to carry the Feist Operating Company Number ("OCN") identification.

43. Therefore, since November 1, 1999, until October 25, 2000, the date of approval of the new Ionex Interconnection Agreement which now contains the 21.6%

discount, SWBT has undercharged Feist/Ionex under the terms of the ACG Agreement for resold services. Pursuant to the ACG Agreement, SWBT is entitled to recover from Feist/Ionex the amount that should have been paid to SWBT by Feist/Ionex, in an amount to be proved at trial.

WHEREFORE, SWBT respectfully requests an order of the Commission determining that the appropriate rate for services resold to ACG/Feist/Ionex under the terms of the ACG Agreement after November 1, 1999 was 14.9 percent and that SWBT is entitled to recover the difference between the contract amount and the amount charged Feist/Ionex.

FURTHER, SWBT requests the Commission direct the parties to participate in a Commission mediated settlement conference to determine whether a mutually agreeable resolution of the contractual matters at issue herein can be reached.

Respectfully submitted,



APRIL J. RODEWALD (KS #99007)
BRUCE A. NEY (KS #15554) ✓
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ATTORNEYS FOR SOUTHWESTERN BELL
TELEPHONE COMPANY

VERIFICATION

I, Brett Sayre, of lawful age, and being first duly sworn, now states: I am Area Manager-Regulatory Issues, and have read the above Response on behalf of Southwestern Bell Telephone Company and verify the statements contained herein to be true and correct to the best of my knowledge and belief.


Brett Sayre

Subscribed and sworn to before me this 13th day of November, 2000.




Notary Public

My Appointment Expires: January 26, 2003

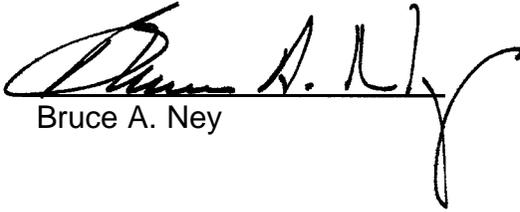
CERTIFICATE OF SERVICE

I hereby certify that a correct copy of the above Response was sent via U.S. Mail or hand-delivered on this 13th day of November, 2000 to:

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August 30, 1999

VIA FACSIMILE

Ezekiel Vaughn
Account Manager
Southwestern Bell Telephone Co.
Four Bell Plaza, 7th Floor
311 S. Akard St.
Dallas, Texas 75202-5398

**Re: Advanced Communications Group Notice of Assignment to Feist
 Long Distance and Feist Long Distance Notice of Termination**

Dear Mr. Vaughn:

Pursuant to our conversation on August 25, 1999, Advanced Communications Group, Inc. ("ACG") gives notice of its intent to assign its interconnection agreement with Southwestern Bell Telephone ("SWBT") for the State of Kansas to its wholly owned subsidiary, Feist Long Distance Services, Inc. ("Feist"). Also, as discussed in our conversation, Feist hereby submits notice of its intent to terminate its resale agreement with SWBT for the State of Kansas. These transactions are described more fully below.

In accordance with section 6.0 of the Kansas Interconnection Agreement between ACG and SWBT, which is attached, ACG hereby gives notice of its intent to assign the above referenced agreement to Feist, a wholly owned subsidiary of ACG. In accordance with the terms of section 6. 0, this assignment will become effective 60 days from SWBT's receipt of this letter.

Pursuant to section XXVI of the Kansas Resale Agreement between Feist and SWBT, which is attached, Feist hereby gives notice of its intent to terminate that agreement. Section XXVI provides for termination of the Resale Agreement on 60 days notice. Accordingly, Feist's termination of its Resale Agreement will occur simultaneously with the assignment of ACG's interconnection agreement to Feist.

Attachment A

Swidler Berlin Shereff Friedman, LLP
August 30, 1999
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Please date stamp and return the enclosed copy of this letter in the self-addressed stamped envelope provided. If you have any questions or need to discuss this matter **further**, please do not hesitate to contact me,

Sincerely,



Kemal M. Hawa

Counsel for Advanced
Communications Group, Inc. and
Feist Long Distance Services, Inc.

cc: Kansas Corporation Commission
Neil Schmid (ACG)
Grace Chiu
Alexander M. Stokas