

1 no reason to believe that the addition of SBC to the competitive mix would create  
2 additional price reductions of anything like the 20% assumed for the WEFA.  
3 Thus, the WEFA projection of economic benefits is vastly overstated.  
4

5 **III. SWBT'S IMPLEMENTATION AND REMOVAL OF PIC FREEZES**

6 **Q. CAN YOU PLEASE DEFINE A PIC FREEZE?**

7 **A. Yes. A PIC Freeze or a Preferred Carrier Freeze prevents a change in a**  
8 **subscriber's preferred carrier selection unless the subscriber gives the carrier from**  
9 **whom the freeze was requested his or her consent. The purpose of a PIC Freeze**  
10 **is to prevent unauthorized carrier changes.**  
11

12 **Q. CAN YOU SUMMARIZE THE RULES GOVERNING FREEZES?**

13 **A. Yes. The Commission rules governing freezes are found in CSR 240-33.150(5).**  
14 **Generally, the rules require any LEC implementing a freeze to obtain the**  
15 **customer's written and signed authorization, an appropriate electronic**  
16 **authorization, or receive authorization from an appropriate third-party that has**  
17 **obtained the subscriber's oral authorization to impose the freeze. LECs**  
18 **administering freezes are required to lift the freeze upon receiving written or oral**  
19 **authorization from the customer. They must also offer a mechanism that allows a**  
20 **submitting carrier to conduct a three-way conference call with the carrier**  
21 **administering the freeze and the subscriber in order to lift the freeze.**

---

<sup>37</sup> "Since telecommunications and information technology products and services are used by all US industries, changes in the prices and quality will affect input costs and eventually output prices of all the end-user industries." See *Ramondi Aff. Ex. A* at 3.

1 **Q. HAS AT&T'S EXPERIENCE INDICATED THAT SWBT IS COMPLYING**  
2 **WITH THESE RULES?**

3 **A. No. SWBT's implementation of PIC freezes violates both the letter and the**  
4 **intent of Commission's rules. PIC freezes are intended to protect customers from**  
5 **unauthorized changes to the their selected carrier. Freezes are not supposed to be**  
6 **used to protect the carrier implementing the freeze from competition nor are they**  
7 **to be used in any retail effort to retain or acquire customers or to interfere with**  
8 **any customer's lawful right to change telecommunications providers.**

9  
10 Within SBC, the organization that administers the removal of PIC freezes  
11 identifies itself as a "Winback" Unit. The purpose of a Winback Unit is to retain  
12 customers. The administration of PIC freezes should be completely separate from  
13 any retail customer retention and acquisition efforts. AT&T customer service  
14 representatives report that SBC Winback representatives ask the customer the  
15 reason for switching to AT&T and, in some cases, offer promotions in an effort to  
16 retain the customers. This is an unlawful use of a consumer protection device to  
17 engage in retail market research and retail customer retention.

18  
19 Prior to mid-June, the SBC's Winback unit was accepting three-way calls from  
20 AT&T customer services representatives and the customer to request the removal  
21 of the PIC freeze. Since that time, the SBC Winback unit has refused to allow  
22 such three-way calls and insists the customer contact them directly without an  
23 AT&T representative on the line. This is a direct violation of 4 CSR240-  
24 33.150(5)(E)(2) which requires SWBT to offer a mechanism that allows the  
25 submitting carrier to conduct a three-way conference call with SWBT and the  
26 customer to lift the freeze.

27

1 **Q. ARE THERE OTHER CONCERNS BEYOND THE INVOLVEMENT OF**  
2 **THE WINBACK UNIT IN REMOVING FREEZES?**

3 **A. Yes. Just as problematic as the fact that freezes are being improperly**  
4 **administered by a Winback unit, SWBT's procedures for removing PIC freezes**  
5 **are woefully inadequate. In many instances, SWBT fails to remove the freeze**  
6 **from the customer's account after the customer contacts SWBT. In this situation,**  
7 **the customer is required to make multiple contacts with the Win-Back unit to**  
8 **have the PIC freezes lifted because SBC fails to remove the freeze. In a one**  
9 **month period from mid-May to mid-June, SWBT failed to remove a PIC freeze**  
10 **from a potential AT&T customer's account when originally requested over 30%**  
11 **of the time. In many instances, these customers were required to make three or**  
12 **more contacts before the freeze was finally lifted.**

13  
14 **Q. ARE THERE ANY CONCERNS WITH SWBT'S IMPOSITION OF PIC**  
15 **FREEZES?**

16 **A. Yes. In many instances, customers switching to AT&T who are told there is a**  
17 **freeze on their account by AT&T indicate that they were unaware that a freeze**  
18 **had been placed on their account. The Commission's rules require SWBT to**  
19 **obtain customer authorization prior to imposing a freeze on their account. The**  
20 **fact that customers are unaware a freeze has been placed on their accounts**  
21 **indicates that either SWBT is not obtaining the necessary approval or that**  
22 **customers do not fully understand that a freeze being placed upon their account.**  
23 **Either way, the consequence is the same - a barrier to customer choice is being**  
24 **placed upon customer accounts without their approval or their understanding.**

25

1 **Q. WHAT ARE THE CONSEQUENCES OF SWBT'S ACTIONS?**

2 **A. In essence, SWBT has turned a customer protection tool into an anti-competitive**  
3 **customer retention device. SWBT improperly uses a Winback unit to administer**  
4 **freezes and in many case fails to remove the PIC freeze when requested to do so.**  
5 **The use of the Winback unit provides SWBT with an opportunity to dissuade the**  
6 **customer from switching providers. The failure to remove the PIC freeze**  
7 **increases the customer's hassle associated with switching local providers and**  
8 **most likely increases the probability the customer may not switch providers.**  
9 **SWBT's failure to timely lift freezes also provides the Winback unit with multiple**  
10 **opportunities to dissuade the customer from switching local service providers. In**  
11 **many instances, the failure to remove PIC freezes from a customer's account**  
12 **forces AT&T to reschedule the installation and increases AT&T costs associated**  
13 **with provisioning local service.**

14 **Q. WHAT RECOMENDATION DO YOU HAVE REGARDING PIC**  
15 **FREEZES?**

17 **A. Currently, SWBT's imposition of PIC freezes is serving as barrier to customers**  
18 **seeking to change service providers. This is not in the public interest and is a**  
19 **direct violation of the Commission's rules. SWBT should be required to**  
20 **immediately take action to ensure that it does indeed remove PIC freezes from**  
21 **customer accounts when requested to so. SWBT must also begin accepting three-**  
22 **way calls to have freezes lifted from customer accounts as required by 4 CSR240-**  
23 **33.150(5)(E)(2). SWBT must not be allowed to engage in any customer retention**  
24 **efforts in the course of removing PIC freezes. SWBT should simply verify the**

1 necessary information and promptly remove the PIC freeze. Any information  
 2 about customers changing providers that is obtained as a result of having the  
 3 freeze lifted must not be shared with SWBT's retail operations. This is simply  
 4 an abuse of a tool designed to protect customers.

5  
 6 With regards to customers who are not aware a freeze has been placed upon their  
 7 account, SWBT should be ordered to conduct an audit to verify that it does indeed  
 8 have the proper written, electronic or third-party verification as required by the  
 9 Commission rules. In addition, the materials SWBT uses to solicit freezes must  
 10 be reviewed to make sure they fully explain the purpose of the freeze, the impact  
 11 the freeze will have on the customer's account, and the procedures for removing  
 12 the PIC freeze.

13  
 14 **IV. SECTION 271(C)(3)(B)(XII) - DIALING PARITY**

15 **Q. IS SWBT OBLIGATED TO PROVIDE DIALING PARITY?**

16 **A.** Section 251(b)(3) of the Federal Act establishes the duty to provide dialing parity  
 17 to competing providers of telephone exchange service and telephone toll service.  
 18 Section 271(c)(2)(B)(xii) of the competitive checklist requires Regional Bell  
 19 Operating Companies to meet the obligations imposed by Section 251(b)(3) as a  
 20 condition of entry into the interLATA toll market. Local dialing parity means that  
 21 telephone exchange service customers within a local calling area may dial the  
 22 same number of digits to make a local telephone call, regardless of the identity of  
 23 the customer's or the called party's local exchange carrier

24

1 **Q. DOES SWBT'S FAIL TO PROVIDE DIALING PARITY IN**  
2 **ACCORDANCE WITH THE FEDERAL ACT?**

3 **A. Yes. SWBT's violation of the requirement to provide dialing parity stems from**  
4 **its implementation of the Metropolitan Calling Area (MCA) established by the**  
5 **Missouri PSC in Case No. TO-92-306. These practices were a primary focus of**  
6 **evidence and argument submitted in Case No. TO-99-483, which is now pending**  
7 **decision by the Missouri PSC. However, SWBT's discriminatory practices**  
8 **continue and, as a result, AT&T continues to lose customers because of those**  
9 **practices. Since SWBT has chosen to pursue the support of the Missouri PSC for**  
10 **its entry into the Missouri interLATA market while continuing to blatantly engage**  
11 **in the anti-competitive behavior of forcing its customers to incur toll charges to**  
12 **place calls to CLEC customers, AT&T is compelled to address this matter in the**  
13 **record of this proceeding. Beyond what is specifically raised in this testimony,**  
14 **the Commission should consider the entirety of the record in Case No. TO-99-483**  
15 **in making its determination regarding whether SWBT is providing dialing parity**  
16 **and complying with the requirements of the competitive checklist.**

17

18 **For background purposes, I will provide a summary of the MCA calling plan**  
19 **established by the Commission and then describe how SWBT's implementation**  
20 **of that plan has resulted in the disparate treatment of CLEC customers and**  
21 **violated SWBT's obligation to provide dialing parity. I will also briefly**  
22 **highlight the consequences of SWBT's unilateral decision to treat CLEC**  
23 **customers as non-MCA subscribers.**

1 **Q. CAN YOU PROVIDE A BRIEF SUMMARY OF THE MCA SERVICE AS**  
2 **ORDERED BY THE MISSOURI PSC?**

3 **A. Yes. The Commission established Case No. TO-92-306 with the stated goal "to**  
4 **fashion new expanded calling scope services that will address existing customer**  
5 **complaints, desires and needs, and that also will put in place services that will**  
6 **adequately meet customers' long term requirements."<sup>32</sup> In achieving this goal,**  
7 **one of the expanded calling services established by the Commission was the**  
8 **MCA plan.**

9  
10 **As established, the MCA plan was a flat-rated, two-way interexchange calling**  
11 **service on a geographically defined basis that allowed subscribers to purchase**  
12 **unlimited interexchange calling. The MCA service and calling scope crossed**  
13 **exchange boundaries, local calling scopes of individual exchanges, and individual**  
14 **company boundaries. MCA service was available in the Kansas City, St. Louis,**  
15 **and Springfield metropolitan areas. The Commission required all LECs within**  
16 **the geographic area of the MCA to participate.**

17  
18 **The MCA plan included five tiers of exchanges radiating out from the MCA-**  
19 **Central exchanges in St. Louis (35 exchanges total) and Kansas City (40**  
20 **exchanges total) and two tiers in the Springfield MCA (16 exchanges total).**  
21 **MCA service is mandatory in MCA-Central, MCA-1 and MCA-2 in Kansas City**  
22 **and St. Louis and in MCA-Central and MCA-1 in Springfield. MCA service is**  
23 **optional in the other tiers of all MCA exchanges. In the optional tiers, MCA**  
24 **service is billed as an additive to customers' bills.**

<sup>32</sup> Case No. TO-92-306, *In the matter of the establishment of a plan for expanded calling scopes in metropolitan and outstate exchanges.*, Report and Order, page 5.

1 As established by the Commission, all local customers within the optional MCA  
2 territory had the opportunity to purchase MCA service, the opportunity to receive  
3 the same calling scope, both outbound and inbound, and were otherwise treated  
4 the same regardless of which LEC provided the MCA. A GTE local customer  
5 located in MCA Tier 3 paid the same rate for optional MCA as a SWBT local  
6 customer located in a MCA Tier 3 exchange and each enjoyed the same calling  
7 scope.

8  
9 **Q. CAN YOU SUMMARIZE THE CALLING SCOPE OF THE MCA**  
10 **CALLING PLAN?**

11 **A. Yes. In the mandatory tiers, all local exchange customers were provided MCA**  
12 **service at no additional charge to their basic local rate. The MCA calling scope**  
13 **became their Commission established basic local calling scope. All customers in**  
14 **the mandatory zone were allowed to call all local exchange customers within the**  
15 **mandatory zone as well as MCA subscribers in the optional tiers. Generally, in**  
16 **the optional tiers, MCA subscribers were allowed to call all local exchange**  
17 **customers in the inward tiers and in their own tier. They were also allowed to call**  
18 **other MCA subscribers in the outward tiers. For example, a MCA subscriber in**  
19 **Tier 3 of the Kansas City MCA could call any local exchange customer in the**  
20 **Central zone, Tier 1, Tier 2, as well as in their own zone - Tier 3. The MCA**  
21 **subscriber in Tier 3 could also call other MCA subscribers in Tier 4 and Tier 5.**

22

1 To complicate matters, however, there was an exception to the general rule. The  
2 exception is the ability to call all local exchange customers located in the same  
3 tier as the customer subscribing to MCA service, and this exception only applies  
4 in Tier 5 of both the St. Louis MCA and the Kansas City MCA. When calling  
5 within Tier 5 of the MCA, MCA subscribers can only make flat-rated calls to  
6 other MCA subscribers. For example, an MCA subscriber in Tier 5 can call  
7 every local exchange customer in the Primary Zone and in Tiers 1 through 4, but  
8 can only call other MCA subscribers in Tier 5 without paying toll charges.

9  
10 **Q. HOW ARE MCA CUSTOMERS IDENTIFIED IN THE OPTIONAL**  
11 **TIERS?**

12 **A.** MCA customers in the optional tiers are assigned phone numbers with distinct  
13 NXX codes that identify customers as an MCA subscriber. LECs program their  
14 switches so that certain NXX codes that are considered "MCA codes" were  
15 included in the local calling scope of an MCA customer. If an NXX code is not  
16 considered an MCA code, that code is considered to be outside of the subscriber's  
17 local calling area unless it is within the calling scope assigned to non-MCA  
18 subscribers.

19 **Q. HOW IS THE MCA SERVICE CLASSIFIED?**

20 **A.** In Case No. TO-92-306, the Commission classified MCA service as a local  
21 service. In exchanges where the MCA service is mandatory, it replaced basic  
22 local service.<sup>23</sup> MCA subscribers were allowed to dial 7 or 10 digits to place local

<sup>23</sup> Case No. TO-92-306, *In the matter of the establishment of a plan for expanded calling scopes in metropolitan and  
outside exchanges*, Report and Order, page 23.

1 calls within their defined MCA calling scope. From the inbound perspective,  
2 MCA subscribers were allowed to receive calls that were dialed and billed as  
3 local calls from other MCA subscribers.

4  
5 **Q. CAN A LEC OFFER MCA SERVICE OR A SIMILAR TWO-WAY**  
6 **SERVICE ON ITS OWN?**

7 **A. No. MCA service is two-way service. A LEC can control its own outbound**  
8 **calling scope. However a LEC has no ability to decide whether an inbound call is**  
9 **dialed as a local call or as a toll call. That is the reason why implementing the**  
10 **MCA requires the cooperation of numerous LECs.**

11  
12 **Q. HAS AT&T OR ANY OF ITS AFFILIATES BEEN AUTHORIZED BY**  
13 **THE MISSOURI PSC TO PROVIDE MCA SERVICE BY THE MISSOURI**  
14 **PSC?**

15 **A. In the mandatory zones of the MCA, the MCA service replaced basic local service**  
16 **in those zones. As TCG-St. Louis, Inc. and TCG Kansas City, Inc. are authorized**  
17 **to provide and do provide basic local service in mandatory zones of St. Louis,**  
18 **MO and Kansas City, MO respectively, both entities are authorized to provide**  
19 **mandatory MCA service.**

20  
21 In addition, the MO PSC has approved tariffs that authorize both TCG St. Louis,  
22 Inc. and AT&T to provide optional MCA service. In approving the TCG St.  
23 Louis tariff to introduce optional MCA service, the Commission found "that TCG  
24 St. Louis' [MCA] tariff is consistent with its interconnection agreement with  
25 SWBT and simply allows TCG to offer service already offered by other CLECs in

1 the St. Louis market.<sup>234</sup> In an effort to implement those tariffs, TCG St. Louis  
2 sent a letter to SWBT and other ILECs operating in the St. Louis MCA notifying  
3 them of TCG St. Louis's tariff approval and the NPA-NXX codes that were to be  
4 considered part of the mandatory and optional MCA. In its response, SWBT  
5 refused to treat TCG St. Louis's NPA-NXX codes as optional MCA codes.

6  
7 AT&T Communications of the Southwest, Inc. originally offered optional MCA  
8 service under a trial tariff. The Missouri PSC approved AT&T's permanent tariff  
9 that included an optional MCA offering on July 30, 2000.

10  
11 In addition, numerous other CLECs have had tariffs approved to offer both  
12 mandatory and optional MCA service as well.

13  
14 **Q. CAN YOU SUMMARIZE THE SITUATION THAT RESULTS IN SWBT**  
15 **NOT PROVIDING DIALING PARITY AS REQUIRED BY THE**  
16 **FEDERAL ACT AND THE FCC RULES.**

17 **A. As dialing parity relates to MCA service, Section 251(b)(3) requires SWBT to**  
18 **implement local dialing parity in such a manner as ensures that its own not to**  
19 **cause its own customers are not required to dial any greater number of digits to**  
20 **place calls to CLEC customers than are required to dial and complete the same**  
21 **local call to its own ILEC customers. ILECs cannot allow their customers to dial**  
22 **7 or 10 digits to reach another ILEC customer while requiring customers to dial**  
23 **1+ to reach CLEC customers.**

24  
<sup>24</sup> Case No. TT-2000-353, In the Matter of TCG St. Louis' Tariff Filing to Introduce Optional MCA Service, Report and Order, page \_\_\_.

1 SWBT has unilaterally made the decision that facilities-based CLECs are not  
2 MCA participants. Excluding CLECs from the MCA violates the dialing parity  
3 requirements because it requires ILEC customers to dial 1+ and incur toll charges  
4 to reach a CLEC customer while that same ILEC customer is allowed to place a  
5 local call to reach another ILEC customer in the same exchange.

6  
7 Because of SWBT's actions, the sole determinative factor of whether the call  
8 from the SWBT customer in the mandatory zone is dialed on a 1+ plus basis or a  
9 7 or 10 digit locally dialed call is the carrier serving the called party.

10

11 For example, when a customer chooses AT&T for local service and AT&T  
12 assigns that customer an AT&T NXX code, SWBT treats that customer as a non-  
13 MCA customer. SWBT programs its switches so that its customers in the  
14 mandatory zone are required to dial 1+ and pay SWBT's toll rates to reach AT&T  
15 customers in the optional tiers. However, the same SWBT customer in the  
16 mandatory zone is allowed to place local calls to SWBT MCA subscribers in the  
17 optional tier.

18

19 Facilities-based CLECs that rely upon ported numbers and CLECs that rely upon  
20 the UNE-P arrangement are able to fully implement their MCA offerings at this  
21 time. This is because SWBT has not yet engaged in MCA screening beyond the  
22 NXX code.

23

24 **Q. DOES SWBT RECOGNIZE CLECS RELYING UPON RESALE AS MCA**  
25 **PARTICIPANTS?**

26 **A. Yes. SWBT has acknowledged that under the Telecommunications Act of 1996,**  
27 **it is obligated to make both mandatory and optional MCA service available for**

1 resale for CLECs. SWBT does not contest the authority of CLECs relying upon  
2 resale to participate in the MCA calling plan and to provide MCA service. SWBT  
3 does recognize CLECs that provision MCA service via resale as MCA  
4 participants and does allow its own ILEC customers to place locally dialed and  
5 billed calls to the CLEC resellers customers in accordance with the calling scope  
6 of the MCA plan.

7

8 **Q. IS THERE ANY BASIS TO THE DISTINCTION BETWEEN CLECS**  
9 **RELYING UPON RESALE AND FACILITIES-BASED CLECS?**

10 **A.** From a regulatory standpoint, the answer is no. There is absolutely no distinction  
11 in the authority granted by the Commission to a CLEC relying upon resale versus  
12 a facilities-based CLEC. Likewise, the tariffs of CLECs that resell local services  
13 contain the same provisions as the tariffs of CLECs that provision local service  
14 through means other than reselling an ILECs services. In many cases, the same  
15 CLEC provisions local services through resale and over its own facilities under  
16 the same certificate of service authority and under the same local exchange tariff.  
17 There is simply no basis for SWBT to claim that CLECs relying upon resale are  
18 authorized to provide MCA service while CLECs relying upon their own  
19 facilities, including UNEs, are not authorized to provide MCA service.

20

21 **Q. WILL SWBT DEVIATE FROM ITS PRACTICE OF REFUSING TO**  
22 **PROVIDE DIALING PARITY TO CLECS?**

23 **A.** Yes. SWBT has agreed to provide dialing parity and treat facilities-based CLECs  
24 as MCA participants if a CLEC signs a Memorandum of Understanding (MOU)  
25 with Southwestern Bell Telephone Company. Under the MOU, a CLEC must  
26 agree to pay SWBT 2.6¢ per minute for MCA traffic SWBT sends to the CLEC.  
27 The CLEC also has to agree that the MOU is not subject to Section 251 and 252

42

1 of the Federal Act. Finally, the CLEC must agree to provide optional MCA  
2 service under the same terms and conditions and at the same rates as SWBT. In  
3 exchange, SWBT agrees not to assess its local customers toll charges when they  
4 attempt to reach CLEC customers in the optional tiers. This agreement is not  
5 reciprocal. SWBT will not pay the CLEC anything for traffic the CLEC sends to  
6 SWBT.  
7

8 **Q. IS THE PROPOSED CHARGE LAWFUL?**

9 **A.** On its face, the proposed charge is clearly unlawful. It is clearly discriminatory  
10 in that it requires one class of companies, facilities-based CLECs, to pay SWBT  
11 for its competitive losses. ILECs participating in the MCA calling plan and are  
12 not required to compensate SWBT for any competitive losses or alleged lost toll.  
13 Likewise, SWBT has not required CLECs that rely upon resale for the provision  
14 of local service to reimburse it for competitive losses.  
15

16 SWBT has not alleged any additional costs associated with the transport and  
17 termination of MCA traffic and has offered no cost support for the proposed rate.  
18 It is nothing more than attempt to force SWBT's competitors to reimburse SWBT  
19 for competitive losses.  
20

21 The compensation arrangement found in the MOU where a CLEC pays SWBT for  
22 traffic SWBT terminates to the CLEC is prohibited by 51.703(b) - Reciprocal  
23 compensation obligation of LECs, which states;

1  
2  
3  
4

**§ 51.703(b) A LEC may not assess charges on any other telecommunications carrier for local telecommunications traffic that originates on the LEC's network.**

5  
6  
7  
8  
9  
10

The compensation arrangement in the MOU is precisely the arrangement that is prohibited by this rule. Under the MOU compensation arrangement, SWBT is imposing a charge of 2.6¢ per minute for traffic originated by SWBT and terminated to a CLEC. This rule clearly states that no LEC can assess another LEC this type of charge for local traffic.

11  
12  
13

**Q. CAN SWBT POINT TO ANY AUTHORITY GRANTED BY THE COMMISSION THAT WOULD AUTHORIZE SWBT TO DETERMINE WHICH CLECS ARE ALLOWED TO PROVIDE MCA SERVICE?**

14  
15  
16

**A. No. SWBT is unable point to any grant of authority from the Commission or even an agreement among the ILEC MCA participants that would allow SWBT to determine which CLECs are allowed to provide MCA service**

17  
18

**Q. HAS AT&T OR ANY OF ITS AFFILIATES FILED A COMPLAINT WITH THE MISSOURI PSC ON THIS ISSUE?**

19  
20  
21  
22  
23  
24  
25

**A. Yes. On July 13, 1999, AT&T and TCG St. Louis filed a Complaint and Request for Declaratory Ruling because of SWBT's refusal to recognize AT&T and TCG St. Louis as MCA participants. On July 16, 1999, the Missouri PSC issued a notice of complaint and on August 16<sup>th</sup>, 1999, SWBT filed a response to the complaint. On April 4, 2000, the Commission issued an Order Directing Filing requiring the Staff of the Missouri PSC to make a written report to the Commission. Because of the pendency of Case No. TO-99-483, the Staff**

1 recommended the complaint be postponed until after the Commission makes its  
2 decision(s) in Case No. TO-99-483.

3  
4 **Q. HOW HAS SWBT'S EXCLUSION OF FACILITIES-BASED CLECS**  
5 **IMPACTED AT&T AND TCG ST. LOUIS, INC.?**

6 **A. Exclusion from the optional MCA zones has worked as SWBT hoped it would. It**  
7 **has negatively impacted CLEC customers and the ability of facilities-based**  
8 **CLECs to compete in the local market in the optional zones of the MCA service.**

9  
10 **As referenced above, AT&T and TCG St. Louis filed a complaint on this issue.**  
11 **As part of that complaint, an affidavit was submitted by C.J. Smith, President of C**  
12 **J Smith Machinery Company who was a customer of TCG St. Louis at that time.**  
13 **In that affidavit, Mr. Smith stated;**

14  
15 **Forcing my customers to now place toll calls to reach my business**  
16 **increases their costs and adversely affects my business. Most of**  
17 **these customer who can no longer reach my business on a toll-free**  
18 **local basis are SWBT customers.<sup>35</sup>**

19 **Mr. Smith went on to say that his employees were no longer able to call their**  
20 **place of employment on a toll-free basis but instead incur toll charges for a call**  
21 **that used to be part of their MCA service. Finally, Mr. Smith stated, "The effect**  
22 **of this was to punish my business for changing phone companies."<sup>36</sup>**

23  
24 **From the competitors' standpoint, SWBT's refusal to provide dialing parity has**  
25 **severely hindered their ability to compete. TCG St. Louis has made network**  
26 **investments in the optional tiers to provide facilities-based service to business**

<sup>35</sup> Case No. TO-2000-22, *AT&T Communications of the Southwest, Inc., et al Complainants, v. Southwestern Bell Telephone Company, Respondent, Complaint and Request for Declaratory Ruling, Appendix B, Affidavit of Charles J. Smith, C J Smith Machinery Company, page 1.*

<sup>36</sup> *Id.*, page 2.

1 customers. However, TCG - St. Louis has stopped providing local service to  
2 new business customers in the optional tiers because of problems stemming from  
3 its exclusion from the MCA service.

4  
5 Additionally, AT&T is offering facilities-based residential digital telephone  
6 service in parts of the optional MCA service territory. SWBT's exclusion of  
7 AT&T from the local calling scope of its MCA subscribers has negatively  
8 impacted AT&T's ability to attract and retain customers, increased AT&T's costs,  
9 and irreparably harmed AT&T's image in the market. For example, during the  
10 week of August 14, 2000, four customers in a single exchange disconnected local  
11 service from AT&T because of their inability to receive local calls from SWBT  
12 MCA subscribers. As compared to SWBT's 2 million plus local customers, four  
13 customers may not seem that like a significant number of customers. However,  
14 that is four customers in one week who disconnected local service from AT&T  
15 because of the MCA issue. AT&T spent time and money on acquiring those  
16 customers' business, on installing customer premise equipment, and on  
17 provisioning service to those customers. Those customers tried AT&T's local  
18 service, had a bad experience because of the MCA issue, and most likely will not  
19 be willing to try AT&T again. They will most likely relate their experience to  
20 family, friends, neighbors, and co-workers. Unfortunately, because of SWBT's  
21 MCA screening, their experience with AT&T local service was short-lived and far  
22 from positive.

23  
24 **Q. BEYOND THE OBVIOUS CONCLUSION THAT SWBT'S ANTI-**  
25 **COMPETTIVE BEHAVIOR IN REGARDS TO THE MCA MUST BE**  
26 **STOPPED, ARE THERE ANY OTHER LESSONS THAT SHOULD BE**  
27 **LEARNED FROM THE "MCA EXPERIENCE"?**

1    **A. Absolutely. I believe the "MCA experience" highlights the need for an**  
2    **interconnection agreement to be fully implemented before anyone can conclude**  
3    **that the local market is inevitably open. I also believe this experience**  
4    **highlights the need for an expedited complaint resolution process for customer**  
5    **affecting issues.**

6  
7    **The interconnection agreement between AT&T and SWBT resulted from two**  
8    **arbitration proceedings before the Missouri PSC. The partial agreement that**  
9    **resulted from the first arbitration was approved in October 1997 and the final**  
10   **agreement was approved in March 1998. It was not until early 1999 that TCG St.**  
11   **Louis, which was operating under the AT&T-SWBT ICA, first began**  
12   **experiencing problems with the provisioning of the MCA service. SWBT did**  
13   **not make its intentions to exclude facilities-based CLECs from the MCA known**  
14   **prior to taking unilateral action. In fact, SWBT originally recognized TCG St.**  
15   **Louis's NXX codes in the Chesterfield exchange as part of the MCA calling**  
16   **scope, which is located in the optional MCA-3 zone. Once TCG St. Louis began**  
17   **servicing the Fenton exchange, SWBT implemented its decision to treat all TCG St.**  
18   **Louis customers as non-MCA subscribers. It took almost a year from the time the**  
19   **ICA was signed to implementation of the ICA to reveal the MCA problems, a**  
20   **problem that still persists today.**

21  
22    **One of the disturbing things about SWBT's proposed "MCA agreement" is that**  
23    **SWBT will not implement and operationalize that agreement until the**  
24    **Commission has made a favorable Section 271 recommendation to the FCC. It is**

1 impossible to review an interconnection agreement that has yet be implemented  
2 and conclude that it will provide for a local market that is irreversibly open to  
3 local competition, or even that the agreement fully implements the competitive  
4 checklist. The "MCA experience" clearly highlights that fact.

5  
6 In addition, the Commission should establish an expedited dispute resolution  
7 process to resolve customer-affecting disputes. As the local market becomes  
8 more competitive and companies become increasingly interconnected or rely on  
9 other carriers to provide necessary network elements and services, the likelihood  
10 for inter-company disputes increases. In many cases, the nature of these disputes  
11 will become increasingly customer affecting. AT&T recommends the  
12 Commission adopt rules that provide for expedited complaint resolution so that  
13 these customer affecting issues can be resolved expeditiously.

14  
15 This is especially important if the Commission is going to rely upon a yet untried  
16 and untested contract as the basis for a recommendation that the local market is  
17 irreversibly open to local competition. In Case No. AX-2000-114, AT&T  
18 recommended the Commission adopt rules for expedited dispute resolution for  
19 customer affecting complaint and proposed rules to accomplish that. It is  
20 interesting to note that SWBT was the only party from any industry regulated by  
21 the Missouri PSC that filed comments in opposition to an expedited dispute  
22 resolution process. SWBT's own experience with Mid-Missouri Telephone  
23 Company in the recent complaint involving MMTC's threat to begin blocking

1 SWBT's intraLATA should highlight the importance of expedited treatment of  
2 intercompany disputes that adversely impact customers.<sup>37</sup>

3  
4 **V. INTELLECTUAL PROPERTY**

5 **Q. WHAT DOES THE TELECOMMUNICATIONS ACT REQUIRE WITH**  
6 **RESPECT TO INTELLECTUAL PROPERTY RIGHTS?**

7 **A. Section 251(c)(3) requires ILECs to provide nondiscriminatory access to UNEs.**  
8 **In response to a Petition by MCI for Declaratory Judgment, the FCC recently**  
9 **determined that SWBT must, in order to meet the nondiscrimination requirements**  
10 **of Section 251(c)(3), use its best efforts to obtain any necessary licenses from its**  
11 **vendors to enable CLECs to use UNEs in the same manner as SWBT.<sup>38</sup>**

12  
13 **More specifically, in MCI, the FCC announced its expectation that "in nearly all**  
14 **cases, requesting carriers [CLECs] will be able to access UNEs without the need**  
15 **for additional licenses,"<sup>39</sup> at least for "uses that are within the scope of the**  
16 **original license."<sup>40</sup> The FCC then stated that in the "unlikely event that the need**  
17 **for additional rights should become an issue," SWBT is obligated to use its best**  
18 **efforts to secure whatever rights are necessary from equipment manufacturers and**  
19 **software suppliers for CLECs necessary to permit a CLEC to utilize unbundled**

<sup>37</sup> Case No. TC-2001-20, Southwestern Bell Telephone Company's complaint against Mid-Missouri Telephone Company (MOTC) concerning MOTC's plan to disconnect the LEC-to-LEC common trunk groups, and request for order prohibiting MOTC from disrupting customer traffic.

<sup>38</sup> In the Matter of Petition of MCI for Declaratory Judgment the New Entrants Need Not Obtain Separate License or Right-to-use Agreements Before Purchasing Unbundled Elements (CCBPd. 97-4) and Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 (CC Docket No. 96-98), (April 27, 2000) (hereinafter "MCI").

<sup>39</sup> *Id.*, ¶. 2

<sup>40</sup> *Id.*

1 network elements in the same manner as SWBT. The FCC stated that it is "highly  
2 skeptical" that SWBT could not meet its nondiscrimination obligations pursuant  
3 to section 251(c)(3) through the use of its best efforts.<sup>41</sup>  
4

5 **Q. PLEASE EXPLAIN WHAT SWBT'S OBLIGATION TO USE "BEST**  
6 **EFFORTS" MEANS IN THE CONTEXT OF THE FCC DECISION.**

7 **A.** The FCC's Order is very clear that an ILEC is expected to act to obtain, at the  
8 lowest reasonable cost, licensing for requesting carriers on the terms that it has  
9 obtained for itself. The FCC is also very clear that it expects ILECs to be  
10 successful in obtaining the necessary licensing.<sup>42</sup> The FCC's statement that it is  
11 "highly skeptical that ILECs will not succeed in meeting their nondiscrimination  
12 obligations through the use of their best efforts"<sup>43</sup> and its purposeful reiteration  
13 that ILECs "are under a rigorous and continuing obligation to negotiate in good  
14 faith with requesting carriers seeking access to unbundled network elements  
15 pursuant to section 251(c)(1)"<sup>44</sup> suggests that it likewise believes the standard is  
16 stringent. In this context, "best efforts" can only fairly be construed to mean that  
17 SWBT will do what is necessary to assure itself that either no additional license is  
18 required, or obtain additional licenses from its vendors where necessary.  
19

20 **Q. HAS SWBT OFFERED ANY EVIDENCE THAT, SINCE THE MCI**  
21 **ORDER WAS ISSUED, IT HAS UTILIZED "BEST EFFORTS" TO**

---

<sup>41</sup> Id., at ¶13.

<sup>42</sup> Id., ¶ 13.

<sup>43</sup> Id., ¶ 13

<sup>44</sup> Id., ¶ 18

1           **DETERMINE WHETHER ADDITIONAL LICENSES ARE NECESSARY**  
 2           **AND TO OBTAIN ANY NECESSARY LICENSES?**

3    A.    No. There is no evidence in the record whatsoever that SWBT has made any  
 4           effort on its own to determine whether additional licenses are necessary for  
 5           CLECs to utilize UNEs, or to approach its vendors to seek confirmation that  
 6           licenses are not required, or to obtain any additional licenses that are necessary for  
 7           CLECs to have nondiscriminatory access to UNEs. SWBT's filing does not  
 8           contain any provisions regarding when it will comply with its duty. To the  
 9           contrary, the only activity that is apparent on SWBT's part is its decision to  
 10          enhance the existing roadblocks to local competition by taking the position that it  
 11          will not provide access to the UNEs until it has determined whether licenses are  
 12          necessary and any necessary licenses have been obtained.

13  
 14    Q.    **INSTEAD OF REFUSING TO PROVIDE UNES WHILE IT SATISFIES**  
 15           **ITS OBLIGATIONS TO OBTAIN ANY NECESSARY LICENSES, WHAT**  
 16           **SHOULD SWBT BE REQUIRED TO DO TO ENSURE**  
 17           **NONDISCRIMINATORY ACCESS TO UNES?**

18    A.    To ensure that SWBT complies with its obligation to provide nondiscriminatory  
 19           access, SWBT should indemnify CLECs against any infringement claims brought  
 20           by SWBT's vendors for CLEC's use of UNEs in the same manner as SWBT uses  
 21           those UNEs.<sup>45</sup> This is necessary to place the proper incentives on SWBT to  
 22           pursue any necessary negotiations with competitors as quickly and vigorously as  
 23           possible. SWBT must bear any risk until such time. Any other approach would  
 24           place improper incentives on SWBT to delay pursuing the necessary rights  
 25           consistent with the burden placed on SWBT by the FCC's order, and leave  
 26           CLECs exposed to a risk that is entirely within the control of SWBT and outside  
 27           the control of the CLEC.

<sup>45</sup> AT&T's proposed language incorporating the requirements of the *MCI* decision is included with its Comments on the MZA.

1 **Q. DOES THE LANGUAGE IN THE M2A AS PROPOSED BY SWBT MEET**  
2 **THE REQUIREMENTS OF THE MCI DECISION?**

3 **A. Definitely not. I believe that most of SWBT's positions and its proposed**  
4 **Intellectual Property language contained in the M2A<sup>46</sup> are fundamentally at odds**  
5 **with the Act and the recent FCC intellectual property order in CC Docket 96-98**  
6 **(Order)<sup>47</sup> and therefore, should be rejected.**

7  
8 **Q. IN GENERAL, HOW IS SWBT'S LANGUAGE AT ODDS WITH THE**  
9 **ACT AND THE RECENT FCC ORDER?**

10  
11 **A. SWBT would completely sidestep its responsibilities to ensure that AT&T has co-**  
12 **extensive intellectual property rights until the FCC's Order is no longer subject to**  
13 **appeal, which could be years.<sup>48</sup> Further, by requiring AT&T to indemnify SWBT**  
14 **from any claims, SWBT would also impose on AT&T the ultimate responsibility**  
15 **to obtain all rights from SWBT's vendors to use equipment or intellectual**  
16 **property in ways that are no different from the ways in which SWBT is permitted**  
17 **to use them. SWBT would have CLECs "release, indemnify and hold SWBT**  
18 **harmless" from any charge that a CLEC's use "violates or infringes upon any**  
19 **third party's Intellectual Property rights or constitutes a breach of contract rights**  
20 **of any third party."<sup>49</sup> That is so, even when AT&T's use is identical to SWBT's**  
21 **or is within the scope of use afforded to SWBT by the third party. That is also so**  
22 **even when SWBT has not been found to have exercised its best efforts. And that**

23

<sup>46</sup> See M2A, General Terms and Conditions § 7.3.2, et. seq.

<sup>47</sup> In the Matter of Petition of MCI for Declaratory Ruling the New Entrants Need Not Obtain Separate License or Right-to-use Agreements Before Purchasing Unbundled Elements (CCBPo. 97-4) and Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 (CC Docket No. 96-98), Adopted: April 17, 2000. Released: April 27, 2000, FCC 00-199

<sup>48</sup> See M2A, General Terms & Conditions § 7.3.3.1

<sup>49</sup> See id. at § 7.3.6

1 is also so even when SWBT advises AT&T (correctly or incorrectly) that it  
2 believes the licensing issues have been addressed with its vendors. In all of these  
3 circumstances, SWBT would require AT&T to agree that AT&T's right to  
4 interconnect to SWBT's network may be limited.<sup>50</sup>

5  
6 **Q. PLEASE ADDRESS SWBT'S PROPOSED PARAGRAPH 7.3.2 OF THE**  
7 **MZA.**

8 **A. SWBT's introductory paragraph regarding intellectual property states:**

9 **7.3.2 CLEC acknowledges that its right under this Agreement to**  
10 **interconnect with SWBT's network and to unbundle and/or**  
11 **combine SWBT's network elements (including combining with**  
12 **CLEC's network elements) may be subject to or limited by**  
13 **Intellectual Property rights (including without limitation, patent,**  
14 **copyright, trade secret, trade mark, service mark, trade name and**  
15 **trade dress rights) and contract rights of third parties.**  
16

17 SWBT would inject a threat that AT&T might not be permitted to interconnect  
18 with SWBT's network based on uncertain and unspecified risks of infringement  
19 or limitation of use. The provision appears to establish as a general rule that  
20 AT&T has no rights to interconnect or obtain access to UNEs, while establishing  
21 an exception to that general rule if, when and to the extent SWBT complies with  
22 its obligations under the Act. In this regard, SWBT has it backwards. The  
23 general rule is that AT&T enjoys the same rights as SWBT. The only exception  
24 is when SWBT obtains an adjudication that it has been unable to secure such  
25 rights notwithstanding the exercise of its best efforts – a contingency that the FCC  
26 expressly stated would be remote. SWBT's proposed paragraph 7.3.2 should be  
27 rejected.

---

<sup>50</sup> See id. at § 7.3.2

1 **Q. PLEASE ADDRESS SECTION 7.3.3 OF THE GENERAL TERMS &**  
2 **CONDITIONS OF THE M2A.**

3 **A. SWBT's proposed section 7.3.3 states:**

4 **7.3.3 The Parties acknowledge that on April 27, 2000, the FCC**  
5 **released its Memorandum Opinion and Order in CC Docket No.**  
6 **96-98 (File No. CCBPol. 97-4), *In the Matter of Petition of MCI***  
7 ***for Declaratory Ruling. Absent any stay, reconsideration or appeal,***  
8 **such Order will become effective thirty (30) days following the**  
9 **future publication of such Order in the Federal Register. The**  
10 **Parties further acknowledge and agree that by executing this**  
11 **Agreement, neither Party waives any of its rights, remedies, or**  
12 **arguments with respect to such decision and any remand thereof,**  
13 **including its right to seek legal review or a stay pending appeal of**  
14 **such decision.**

15 **This paragraph provides an acknowledgement that the FCC has made a decision**  
16 **regarding the use of intellectual property by CLECs. Yet SWBT seems compelled**  
17 **to put everyone on notice that the FCC's Order may be stayed, reconsidered, or**  
18 **appealed. This paragraph, in connection with others offered by SWBT,<sup>51</sup> sets**  
19 **SWBT up to ignore the requirements of the FCC Order until all appeals are**  
20 **exhausted. Indeed, SWBT's proposed language appears to effectively nullify the**  
21 **FCC's order even absent a stay from a court of appeals. The FCC's Order will be**  
22 **effective by the time this interconnection agreement arbitration is concluded, and**  
23 **binds this Commission in arbitrating the pending agreement between AT&T and**  
24 **SWBT. To the extent there is a subsequent change in the law, that would be the**  
25 **time for SWBT to invoke the change in law provisions of the agreement to**  
26 **determine whether the contract language should be changed. SWBT's proposed**  
27 **language serves no purpose other than to insert uncertainty into the agreement.**

28

<sup>51</sup> See *id.* at §§ 7.3.3.1, 7.3.3.3 and by reference to § 7.3.3.1, §§ 7.3.4, 7.3.5, and 7.3.7.

1 Q. PLEASE RESPOND TO SWBT'S PROPOSED PARAGRAPH 7.3.3.1.

2 A. SWBT's proposed paragraph 7.3.3.1 states:

3 7.3.3.1 When the Order referenced in Section 7.3.3 (or any  
4 reconsideration or appeal therefrom) is effective, SWBT agrees to  
5 use its best efforts to obtain for AT&T, under commercially  
6 reasonable terms, Intellectual Property rights to each unbundled  
7 network element necessary for AT&T to use such unbundled  
8 network element in the same manner as SWBT.

9  
10 As previously discussed in connection with SWBT's proposed paragraph 7.3.3,  
11 SWBT would decline to use its best efforts to obtain co-extensive intellectual  
12 property use rights for AT&T until a final, non-appealable order is in place.  
13 Thus, to the extent that any of SWBT's vendors may today or in the intervening  
14 time assert an infringement claim, SWBT would be under no obligation to do  
15 anything to ensure that AT&T need not enter into unnecessary or cost-prohibitive  
16 agreements with such vendors.

17  
18 Q. DO YOU HAVE ANY OTHER CONCERNS WITH SWBT'S PROPOSED  
19 SECTION 7.3.3.1?

20 A. Yes. The insertion of the phrase "commercially reasonable terms" is plainly  
21 unjustified under the FCC's Order. The whole point of that Order was to  
22 implement SWBT's nondiscrimination obligations. SWBT's duty is to use its  
23 best efforts to obtain co-extensive rights on the same terms that SWBT enjoys.  
24 That is an objective and easily identifiable standard, in contrast to the amorphous,  
25 subjective standard proposed by SWBT. Indeed, SWBT's proposed standard of  
26 "commercially reasonable" invites gamesmanship by SWBT in arguing that it has  
27 discharged its obligation under the agreement when it has procured use rights for

1 CLECs that can loosely be deemed "commercially reasonable" even though those  
 2 rights fall far short of the co-extensive rights that the FCC ordered SWBT to  
 3 procure. This would clearly violate the Act and the FCC's Order. Based on the  
 4 concerns outlined herein, SWBT's proposed paragraph 7.3.3.1 should be rejected.

5  
 6 **Q. PLEASE COMMENT ON SWBT'S PROPOSED SECTION 7.3.3.2.**

7 **A. SWBT's proposed section 7.3.3.2 states:**

8 SWBT shall have no obligation to attempt to obtain for CLEC any  
 9 Intellectual Property right(s) that would permit CLEC to use any  
 10 unbundled network element in a different manner than used by  
 11 SWBT.

12 Again, SWBT's proposal misstates its obligation, which is to obtain co-extensive  
 13 rights to use, not to provide for co-extensive actual use. Stated another way, if  
 14 SWBT has a right to use a UNE a certain way, then CLECs should have that same  
 15 right, regardless of whether SWBT has chosen to actually use the UNE in that  
 16 particular manner. It is important that the agreement make clear that if SWBT's  
 17 use rights extend to specific functions not presently used by SWBT, AT&T would  
 18 be enabled under this interconnection agreement to fully exercise its co-extensive  
 19 rights. SWBT's approach could dramatically restrict competition by precluding  
 20 any CLEC from using SWBT's network elements, even when permissible under  
 21 the existing vendor agreement, in a manner that was different from the way  
 22 SWBT was using them including by adding CLEC-provided features or  
 23 functionality that offered superior services or quality.

24  
 25 **Q. DOES AT&T OBJECT TO SWBT'S PROPOSED PARAGRAPH 7.3.3.2?**

1 A. Yes. The ambiguity surrounding "different" use makes SWBT's proposed  
 2 paragraph 7.3.3.2 unacceptable and inappropriate.

3  
 4 Q. PLEASE COMMENT ON SWBT'S PROPOSED SECTION 7.3.3.3.

5 A. SWBT's proposed section 7.3.3.3 states:

6 7.3.3.3 When the Order referenced in Section 7.3.3 (or any  
 7 reconsideration or appeal therefrom) is effective, to the extent not  
 8 prohibited by a contract with the vendor of the network element  
 9 sought by CLEC that contains Intellectual Property licenses,  
 10 SWBT shall reveal to CLEC the name of the vendor, the  
 11 Intellectual Property rights licensed to SWBT under the vendor  
 12 contract and the terms of the contract (excluding cost terms). When  
 13 the Order referenced in Section 7.3.3 (or any reconsideration or  
 14 appeal therefrom) is effective, SWBT shall, at CLEC's request,  
 15 contact the vendor to attempt to obtain permission to reveal  
 16 additional contract details to CLEC.

17 SWBT includes language designed to avoid its performance until a final, non-  
 18 appealable order from the FCC is in place. SWBT goes on to suggest that SWBT  
 19 would be under no obligation to even contact its vendors to seek disclosure of  
 20 even the bare minimum of contract terms until the non-appealable order is in  
 21 place. I also note that SWBT's proposed language sets no performance intervals  
 22 on SWBT even when there is an effective FCC order. For these reasons, SWBT's  
 23 proposed section 7.3.3.3 should be rejected.

24  
 25 Q. PLEASE COMMENT ON SWBT'S PROPOSED SECTION 7.3.4.

26 A. SWBT's proposed section 7.3.4 states:

27 7.3.4 SWBT hereby conveys no licenses to use such Intellectual  
 28 Property rights and makes no warranties, express or implied,  
 29 concerning CLEC's (or any third party's) rights with respect to  
 30 such Intellectual Property rights and contract rights, including  
 31 whether such rights will be violated by such interconnection or  
 32 unbundling and/or combining of network elements (including

1 combining with CLEC's network elements) in SWBT's network or  
 2 CLEC's use of other functions, facilities, products or services  
 3 furnished under this Agreement. Any licenses or warranties for  
 4 Intellectual Property rights associated with unbundled network  
 5 elements are vendor licenses and warranties and are a part of the  
 6 Intellectual Property rights SWBT agrees in Section 7.3.3.1 to use  
 7 its best efforts to obtain.

8 SWBT's proposed language is the antithesis of what is expected by the FCC in its  
 9 Order on intellectual property. Based on the evidence presented, the FCC  
 10 concluded that it expects that, "in nearly all cases, requesting carriers will be able  
 11 to access unbundled network elements without the need for additional licenses"<sup>52</sup>  
 12 and that "we expect that incumbent LECs will obtain any necessary intellectual  
 13 property rights for competing carriers in keeping with their statutory obligation  
 14 under section 251(c)(3)."<sup>53</sup> SWBT is under an obligation to use its best efforts to  
 15 obtain co-extensive intellectual property rights "from the vendor on terms and  
 16 conditions that are equal in quality to the terms and conditions under which the  
 17 incumbent LEC has obtained these rights."<sup>54</sup> By their very nature, "co-extensive"  
 18 rights should include all use of intellectual property consistent with SWBT's  
 19 permitted uses, to which warranties and indemnifications should automatically  
 20 attach. My understanding is that it is not uncommon for suppliers to represent to  
 21 their customers that use of the supplier's product will not infringe the intellectual  
 22 property rights of third parties, and such assurances are standard in large  
 23 commercial supply arrangements between sophisticated parties. In further  
 24 opposition to the reasonable requirements placed on it, SWBT also includes  
 25 language in its proposed paragraph that would excuse it from performance until

---

<sup>52</sup> FCC Order at ¶ 2.  
<sup>53</sup> *Id.*, at ¶ 13.

1 there is a final non-appealable order. SWBT's proposed section 7.3.4 should be  
 2 rejected.

3  
 4 **Q. PLEASE RESPOND TO SWBT'S PROPOSED SECTION 7.3.5.**

5 **A. SWBT's proposed section 7.3.5 states:**

6 7.3.5 SWBT does not and shall not indemnify, defend or hold  
 7 CLEC harmless, nor be responsible for indemnifying or defending,  
 8 or holding CLEC harmless, for any Claims or Damages for actual  
 9 or alleged infringement of any Intellectual Property right or  
 10 interference with or violation of any contract right that arises out  
 11 of, is caused by, or relates to CLEC's interconnection with  
 12 SWBT's network and unbundling and/or combining SWBT's  
 13 network elements (including combining with CLEC's network  
 14 elements) or CLEC's use of other functions, facilities, products or  
 15 services furnished under this Agreement. Any indemnities for  
 16 Intellectual Property rights associated with unbundled network  
 17 elements shall be vendor's indemnities and are a part of the  
 18 Intellectual Property rights SWBT agrees in Section 7.3.3.1 to use  
 19 its best efforts to obtain.

20 As with the prior paragraph, SWBT's language would ensure that SWBT has no  
 21 responsibility whatsoever to ensure that AT&T receives co-extensive intellectual  
 22 property rights and SWBT, once again, sets up a provision that would nullify any  
 23 obligation it has to use its best efforts to obtain co-extensive intellectual property  
 24 rights for AT&T until after a final non-appealable decision on the subject is in  
 25 place. SWBT's proposed language seems designed to protect SWBT from its  
 26 failure to procure co-extensive intellectual property rights for AT&T, and  
 27 eliminates all of the risk associated with failing to fulfill its obligations (and  
 28 therefore, any incentive to fully comply with those obligations). This will leave  
 29 AT&T open to unnecessary claims by third party vendors that AT&T had  
 30 somehow infringed on third party intellectual property or violated a contract

---

<sup>34</sup> id., at para. 2.

1           between SWBT and the third party, even though AT&T has no control  
 2           **whatsoever (and SWBT has virtually complete control) over those risks.**  
 3  
 4           SWBT controls the choice of third party vendors, the scope of contracts with  
 5           those vendors, and, along with the vendors, is well-situated to interpret ambiguous  
 6           portions of those contracts. SWBT and its vendors are in the best position to  
 7           determine whether existing contracts (taking into account factors such as the  
 8           language of the contract, the negotiating history, and the past pattern of dealing  
 9           between SWBT and the vendor) permit requesting carriers to use unbundled  
 10          elements without modifying the contract to permit an extension of the right to use  
 11          the intellectual property, to renegotiate the existing contracts if an extension is  
 12          required, and to negotiate future contracts to ensure that competing carriers' use of  
 13          intellectual property present in an element is contemplated.<sup>35</sup> AT&T and other  
 14          CLECs have none of this information, may well have no existing relationships  
 15          with the vendors, and have none of the negotiating leverage that SWBT has to  
 16          modify existing agreements or properly structure all new agreements to satisfy  
 17          SWBT's obligation under the FCC Order. Therefore, it is inappropriate for  
 18          SWBT to place on AT&T the responsibility to ensure that AT&T will not be in  
 19          violation of any of SWBT's agreements. SWBT's proposed section 7.3.5 should  
 20          be rejected.

21

---

<sup>35</sup> FCC Order at para. 10.

1 SWBT also appears to be setting up an argument that will allow it to construe its  
2 licenses to distinguish between use of UNEs with intellectual property in  
3 combination with SWBT's network and facilities, and use of such UNEs  
4 combined with AT&T's own network or facilities. Again, these distinctions are  
5 meritless. The identity of the user or owner of the facilities is irrelevant under the  
6 Act and the FCC's order. The adoption of SWBT's language will encourage  
7 SWBT to construe its licenses to reflect these distinctions for no reasons other  
8 than to limit competition.

9  
10 **Q. PLEASE RESPOND TO SWBT'S PROPOSED SECTION 7.3.6.**

11 **A. SWBT's proposed section 7.3.6 states:**

12 7.3.6 CLEC hereby agrees to release, indemnify and hold SWBT  
13 harmless from and against all Damages arising out of, caused by,  
14 or relating to any Claim that AT&T's interconnection with  
15 SWBT's network, or CLEC's use of SWBT's network elements, or  
16 unbundling and/or combining of SWBT's network elements  
17 (including combining with CLEC's network elements) or CLEC's  
18 use of other functions, facilities, products or services furnished  
19 under this Agreement violates or infringes upon any third party's  
20 Intellectual Property rights or constitutes a breach of contract  
21 rights of any third party. In no event shall SWBT be liable for any  
22 actual or consequential damages that CLEC may suffer arising out  
23 of any such Claim.

24 SWBT's proposed section 7.3.6 is a companion to its proposed 7.3.5. In its 7.3.5  
25 SWBT refuses to protect AT&T from unnecessary intellectual property claims  
26 from SWBT's vendors. In proposed section 7.3.6, SWBT would completely turn  
27 the tables and impose on AT&T a requirement to "release, indemnify and hold  
28 SWBT harmless" from any claim by SWBT's providers of intellectual property.  
29 Thus, where SWBT may not have exercised its best efforts to ensure that AT&T's  
30 intellectual property rights are co-extensive with SWBT's, AT&T must pay for all

1 damages and claims that might be brought against SWBT resulting from SWBT's  
2 failure! Even where SWBT believes it has satisfied its duties and obtained  
3 coextensive rights for AT&T and other CLECs, SWBT would require AT&T to  
4 indemnify SWBT in the event its vendor contends otherwise.

5  
6 Clearly, the FCC expects that, in nearly all cases, requesting carriers will be able  
7 to access unbundled network elements without the need for additional licenses<sup>56</sup>  
8 because in most cases, the incumbent LEC's contract with a vendor already  
9 permits it to provide access to competing carriers.<sup>57</sup> While the FCC anticipated  
10 that there may be rare instances where it may be necessary to negotiate for  
11 additional licenses,<sup>58</sup> it also expressed that it is highly skeptical that incumbent  
12 LECs will not succeed in meeting their nondiscrimination obligations pursuant to  
13 section 251(c)(3) through the use of their best efforts<sup>59</sup> (i.e., the incumbent LECs  
14 are expected to succeed in obtaining co-extensive intellectual property rights).  
15 The FCC also allowed for a mechanism whereby the incumbents could recover  
16 their reasonable costs associated with obtaining the necessary extensions of  
17 intellectual property rights to AT&T and others.<sup>60</sup> Ultimately, if SWBT does its  
18 job, there is no reason for AT&T or any interconnecting party to bear any of the  
19 risk SWBT hopes to assign to AT&T via SWBT's proposed section 7.3.6.  
20 SWBT's proposed language should be rejected.

21

---

<sup>56</sup> FCC Order at para. 8.

<sup>57</sup> Id., at para 9.

<sup>58</sup> Id.

<sup>59</sup> Id., para. 13.

<sup>60</sup> Id. at para. 11.

1 **Q. PLEASE RESPOND TO SWBT'S PROPOSED SECTION 7.3.7.**

2 **A. SWBT's proposed section 7.3.7 states:**

3 **7.3.7 All costs associated with the extension of Intellectual**  
4 **Property rights to AT&T pursuant to Section 7.3.3.1, including the**  
5 **cost of the license extension itself and the costs associated with the**  
6 **effort to obtain the license, shall be a part of the cost of providing**  
7 **the unbundled network element to which the Intellectual Property**  
8 **rights relate and apportioned to all requesting carriers using that**  
9 **unbundled network element including SWBT.**  
10

11 **As I just mentioned, the FCC expressly provides that SWBT may recover its**  
12 **reasonable costs in obtaining license extensions necessary to provide AT&T with**  
13 **intellectual property rights that are co-extensive with SWBT's. However,**  
14 **SWBT's proposed language fails in two respects. First, it does not limit SWBT's**  
15 **cost recovery to "reasonable" amount and, second, SWBT once again suggests, by**  
16 **its link to its proposed section 7.3.3.1, that it will have no requirement to perform**  
17 **under this contract until the FCC's intellectual property order is final and non-**  
18 **appealable. Both of these aspects of SWBT's proposed section 7.3.7 are**  
19 **unreasonable and inconsistent with the FCC's Order and should be rejected.**

20  
21 **Q. DOES YOU HAVE CONCERNS THAT SWBT WILL FULFILL ITS**  
22 **OBLIGATIONS UNDER THE FEDERAL ACT AND THE FCC'S**  
23 **INTELLECTUAL PROPERTY ORDER TO OBTAIN CO-EXTENSIVE**  
24 **RIGHTS FOR AT&T'S USE OF SWBT'S EQUIPMENT AND**  
25 **FACILITIES?**

26 **A. Yes. In connection with the arbitration of AT&T's successor interconnection**  
27 **agreement with SWBT in Texas, SWBT has continued to emphasize its view that**

1 it is AT&T that must obtain any necessary rights to use intellectual property in  
 2 order to avoid the potential risk of a third-party claim of infringement.<sup>61</sup> SWBT  
 3 has also implied that since AT&T is "building" its network through the use of  
 4 UNEs in combination with elements of AT&T-owned facilities, that AT&T "is  
 5 ultimately responsible for its network and its configuration and must therefore  
 6 assume the responsibility to configure it in such a way as to not exceed the scope  
 7 of any use rights it [AT&T] obtains."<sup>62</sup> As suggested earlier, SWBT appears to be  
 8 setting up an argument that will allow it to construe its licenses to distinguish  
 9 between use of UNEs with intellectual property in combination with SWBT's  
 10 network and facilities, and use of such UNEs combined with AT&T's own  
 11 network or facilities. These distinctions are meritless. The identity of the user or  
 12 owner of the facilities is irrelevant under the Act and the FCC's order.

13 SWBT has also contended that AT&T's may use SWBT's facilities in a way that  
 14 SWBT is unaware and possibly extend beyond the uses granted to SWBT.<sup>63</sup>

15 SWBT's concern has already been evaluated and found to lack merit by the FCC:

16  
 17 Moreover, we are not persuaded that incumbent LECs' lack of  
 18 knowledge about a requesting carrier's intended use of the  
 19 unbundled element justifies requiring new entrants themselves to  
 20 obtain intellectual property rights from third-party vendors.  
 21 Section 251(c)(3) requires only that the intellectual property rights  
 22 provided to a requesting carrier will entitle that carrier to use the  
 23 element for the same uses as the incumbent LEC.<sup>64</sup>  
 24

<sup>61</sup> See TPUC Docket No. 22315, Direct Testimony of Donald Pabner, page 4, lines 14 to 16, page 9 at lines 5 to 9 and 13 to 14.

<sup>62</sup> Id., page 9, line 26 to page 10 line 6.

<sup>63</sup> Id. at page 5, lines 3 to 7 and page 6 lines 6 to 10.

<sup>64</sup> FCC Order at para. 16.

1 SWBT's testimony in Texas on the intellectual property issue clearly displays  
2 SWBT's continuing unwillingness to meet its responsibilities under the federal  
3 Act and the FCC's Order.

4  
5 **Q. SHOULD THIS COMMISSION BE CONCERNED ABOUT SWBT'S**  
6 **OUTLOOK?**

7 **A. Yes. While SWBT has not yet "pulled the plug" on any interconnection**  
8 **arrangements because of intellectual property concerns, the risk to the entire**  
9 **industry that SWBT may act on its beliefs will remain if the Commission**  
10 **approves the language proposed by SWBT in the MZA.**

11  
12 In sum, the FCC's Order contemplates that SWBT will have little difficulty, if  
13 any, obtaining third party intellectual property rights for AT&T. This  
14 presupposes, of course, that SWBT has the incentive to exercise the "best efforts"  
15 the FCC requires. SWBT's proposal clearly does not implement the requirements  
16 of the FCC's Order, or appropriately allocate the responsibilities to ensure that  
17 SWBT has every incentive to meet its nondiscrimination obligations under  
18 Section 251(e)(3) of the Act. As such, this Commission should reject SWBT's  
19 proposed language in the MZA and find that SWBT has failed to provide  
20 nondiscriminatory access to UNEs, in violation of the competitive checklist.

21 **Q. DOES THIS CONCLUDE YOUR DISCUSSION OF THE**  
22 **INTELLECTUAL PROPERTY ISSUE?**

23 **A. Yes.**  
24

1 **VI. SUMMARY**

2 **Q. WOULD YOU PLEASE SUMMARIZE YOUR TESTIMONY?**

3 **A. My testimony has shown that SWBT's entry into the long distance market in**  
4 **Missouri is not in the public interest at this time. SWBT's intrastate access**  
5 **charges are priced well above any reasonable representation of economic cost.**  
6 **These monopolistic rates allow SWBT to engage in a price squeeze of its captive**  
7 **competitors. SWBT's decision to not offer its long distance services to Kansans**  
8 **in the largely rural independent telephone company service areas or those served**  
9 **by CLECS illustrates that SWBT is not focused on broadly bringing competition**  
10 **to Missouri, but rather on perpetuating its monopoly power in its home territory.**  
11 **SWBT's limited offers will allow it to put an indirect price squeeze on its**  
12 **competitors that serve the state ubiquitously, in addition to the direct price**  
13 **squeeze. SWBT's long distance offers do not provide substantial new benefits to**  
14 **Kansans. Finally, SWBT must satisfy its intellectual property obligations under**  
15 **the FTA and FCC Orders before it can be deemed to have completely satisfied the**  
16 **competitive checklist. AT&T respectfully urges the Commission to advise the**  
17 **FCC that SWBT's entry into the interLATA market in Missouri would not be in**  
18 **the public interest at this time.**

19

20 **VII. CONCLUSION**

21 **Q. DOES THIS CONCLUDE YOUR TESTIMONY?**

22 **A. Yes.**