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June 1, 2001

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
445 Twelfth Street, S. W. – Room TWB-204
Washington, D. C. 20554

Re: *Ex parte*, CC Docket No. 01-88 Application of SBC Communications Inc. Pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-Region InterLATA Services in Missouri

Dear Ms. Salas:

On Thursday, May 31, 2001, Dina Mack and the undersigned of AT&T met with Kyle Dixon, Legal Advisor to Chairman Powell and William Quirk, an intern working in the Office of the Chairman. The purpose of the meeting was to review the attached written *ex parte* submission filed in the above-captioned proceeding on May 31, 2001.

Two copies of this Notice are being submitted to the Secretary of the FCC in accordance with Section 1.1206 of the Commission's rules.

Sincerely,

F S Simone

cc: K. Dixon
W. Quirk

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May 31, 2001

Ex Parte

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
445 12th Street, S.W. – Room TW-A325
Washington, D.C. 20554

Re: CC Docket No. 01-88, In the Matter of Application by SBC Communications, Inc., *et al.*, for Provision of In-Region InterLATA Services in Missouri

Dear Ms. Salas:

This letter, which is submitted at Staff's request, responds to a number of arguments made by SWBT for the first time in its reply comments regarding its compliance with its obligations with respect to advanced services. Specifically, the letter responds to SWBT's arguments that it has complied with its obligations: (1) to offer for resale at a wholesale discount the advanced telecommunications services that it offers at retail; (2) to furnish line sharing on fiber-fed DSL configured loops; and (3) to provide competing carriers with the ability to engage in line splitting arrangements.

I. SWBT HAS NOT COMPLIED WITH THE REQUIREMENTS OF SECTION 251(c) AND THE RECENT *ASCENT* DECISION WITH RESPECT TO THE PROVISION OF ADVANCED SERVICES.

Despite AT&T's evidence to the contrary, SWBT, in its Reply Comments, continues to insist that it has no obligation to offer DSL Transport for resale at a wholesale discount, because: (1) SWBT itself does not offer DSL Transport as a stand-alone service at retail to residential and business end-users; and (2) SWBT's affiliate, SBC Advanced Solutions, Inc. ("ASI"), is simply "a wholesale provider of DSL Transport service to Internet service

providers and a retail provider only to certain grandfathered services and specific contract arrangements with large, business customers."[1] These contentions are totally contrary to the facts.

At the time it filed its application, SWBT's web site offered DSL Transport to the public not only as part of a "package" of DSL Transport with Internet access, but also as a stand-alone service that it described as "DSL Transport only – *Order just the DSL feature* and use your current Internet Service Provider (ISP) or an ISP from our ISP Partners Program." AT&T Opening Comments at 5, 34; Finney Decl., ¶ 12 & Att. 1 at 3 (emphasis added). Following the filing of AT&T's comments, SWBT *deleted* that part of its web-page with respect to residential customers. Nevertheless, statements on SWBT's web-page continue to make clear that SWBT still holds itself out as a provider of DSL Transport in Missouri to residential, as well as business, customers – including SWBT's description of its unaffiliated "ISP partners" as "authorized DSL sales representatives for Southwestern Bell DSL Transport services." AT&T Reply Comments at 28-30 & Att. 2 at 1; AT&T Opening Comments, Finney Decl., ¶ 12 n.11 & Att. 2 at 1. Thus, SWBT's offering of DSL Transport clearly meets the Commission's definition of "retail transactions" – "direct sales of a product or service to the ultimate consumer for her own personal use or consumption."[2] Because the offering is not limited to ISPs, DSL Transport is a service subject to the wholesale discount requirements of Section 251(c)(4). *Second Advanced Services Order*, ¶¶ 3-4.

SWBT makes little effort to reconcile the obvious inconsistency between the offering of DSL Transport on its web-page to residential and business end-users and its denial that it is offering the service to the public at retail, because it cannot do so. Nor does SWBT mention, much less explain, its recent deletion of that offering from its retail list of residential services from its web-page, which was obviously done in reaction to the evidence submitted in AT&T's opening comments.[3] SWBT's deletion of this offering constitutes a discontinuance of a common carrier service without filing an application for Commission approval (which would have given CLECs an opportunity to comment) and, therefore, without having received prior Commission approval. That practice is clearly unlawful and contrary to the Commission's recent public admonition that common carriers are required to follow the procedures set forth in Part 63

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[1] *See* Reply Brief of Southwestern Bell In Support of InterLATA Relief in Missouri, filed May 16, 2001 ("SWBT Reply Br.") at ii-iii, 31-38; Joint Reply Affidavit of Lincoln E. Brown and John S. Habeeb ("Brown/Habeeb Reply Aff."), ¶¶ 6-11.

[2] *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Second Report and Order, 14 FCC Rcd. 19237 (1999), ¶ 13 (*"Second Advanced Services Order"*).

[3] *See* AT&T Reply Comments at 28 & Att. 1 at 3.

of its rules, and to obtain Commission authorization, "before discontinuing, reducing, or impairing domestic common carrier services."[4]

Rather than address or explain these matters, SWBT obfuscates the issue of its retail offering of stand-alone DSL service with irrelevant arguments. For example, although SWBT accuses AT&T of "twisting the language of the SWBT web-site to its own ends" (Brown/Habeeb Reply Aff., ¶ 6), SWBT never explains why the "DSL Transport only" offer has appeared on its web-page if, as SWBT contends, "ASI simply does not sell DSL Transport services to the ultimate end user consumers," (SWBT Reply Br. at 38), or that DSL Transport is "a product that SWBT does not offer" and "SWBT has no DSL service offerings." SWBT Reply Br. at 35-36 & n.31.

SWBT suggests that the "DSL Transport only" entry on its web page is simply part of "marketing and sales services" that it is performing pursuant to an arrangement with ASI permitted under the *SBC/Ameritech Merger Order*. *See* SWBT Reply Br. at 35-36; Brown/Habeeb Reply Aff., ¶¶ 6, 8. This explanation, however, does not remove SWBT's offering from the requirements of Section 251(c)(4). Under the *ASCENT* decision, SWBT and ASI are to be viewed as one entity for purposes of Section 251(c), and "the Commission may not permit an ILEC to avoid § 251(c) obligations by setting up a wholly-owned affiliate to provide those services."[5] Thus, it makes no difference whether the actual party offering the service at retail is SWBT or ASI.

SWBT also implies that the "DSL Transport only" offering on its web-page is consistent with ASI's alleged status as a wholesaler, because the web-page "makes clear that in order for the end-user to use the 'DSL Transport only' service, he/she must use an ISP," which alone can combine that service with the ISP's Internet Access Service and sell that "package" to the public. *See* Brown/Habeeb Reply Aff. ¶ 8; *see also* SWBT Reply Br. at 34. SWBT's response, however, merely begs the question. While SWBT states that its DSL Transport offering must always be combined with Internet service to be taken by the consumer, the Commission was fully aware in the *Second Advanced Services Order* that ILECs can market DSL services *either* directly to residential and business end-users *or* to ISPs who package it as part of a high-speed Internet service. *Second Advanced Services Order*, ¶ 6. The *Order* made clear that an ILEC's obligations under Section 251(c)(4) depends on *which* of these methods it is employing and, therefore, on the persons to whom it is offering the service. To the extent that

[4] See DA 01-1173, *Reminder To Common Carriers Regarding Discontinuance of Domestic Service Under Section 214 of the Communications Act* (released May 8, 2001).

[5] *See Association of Communications Enterprises v. FCC*, 235 F.3d 662, 668 (D.C. Cir. 2001) (*"ASCENT"*). Moreover, although SWBT's Reply Br. and supporting Brown/Habeeb Reply Affidavit repeatedly refer to the purported distinctions between SWBT, ASI, and SBIS, AT&T's evidence – which SWBT does not dispute – showed that end-users are *not* advised of any distinctions when they call SWBT concerning the purchase of DSL Transport for combination with Internet service provided by an unaffiliated ISP. *See* Garroway Decl., ¶¶ 2-6 (Att. 3 to Finney Decl.).

the ILEC offers DSL services to end-users at retail, it must offer those services for resale at a wholesale discount. Only to the extent that the ILEC is offering the DSL service directly and exclusively to ISPs as an input component for a service that the ISP markets to the public is the service exempt from the wholesale discount requirement. *Id.*, ¶¶ 3-22.[6] In this case, because SWBT offers DSL as a stand-alone service to both residential and business end-users on its web-page, that service must be provided at resale at the wholesale discount.

SWBT's retail offering of DSL as a stand-alone service to the public is further confirmed by its practice of "split-billing" – sending a separate bill directly to DSL/Internet customers of some independent ISPs for the DSL Transport, while the customers pay the ISP a separate charge for the Internet service. *See* AT&T Comments at 34 & Finney Decl., ¶ 13; SWBT Reply Br. at 37-38; Brown/Habeeb Reply Aff., ¶ 9 & n.7. SWBT admits that in such an arrangement, "ASI collects DSL Transport charges, including installation, monthly recurring charges, and termination charges from end-users." Brown/Habeeb Reply Aff., ¶ 9; *see also* SWBT Reply Br. at 37-38.[7] SWBT simply attempts to dismiss the split-billing arrangement as a "*de minimis* billing arrangement" which it agrees to provide in order "to assist ISPs who need it, particularly small ISPs with limited resources." SWBT Reply Br. at 37-38; Brown/Habeeb Reply Aff., ¶ 9. SWBT, however, cites no authority – whether in the *Second Advanced Services Order* or otherwise – for the proposition that there is a "*de minimis*" exception to the discount obligations of Section 251(c)(4). In any event, far from being the *de minimis* arrangement that SWBT describes, split-billing is an arrangement that SWBT offers voluntarily to *all* ISPs. *Id.*

Furthermore (although SWBT refrains from addressing the issue), if a customer in a split-billing arrangement failed to pay SWBT for the DSL Transport, SWBT – not the ISP – surely would have the responsibility, and the right, to collect the applicable charges or to terminate the Service for nonpayment. SWBT's assertion that "ASI has no contractual relationship with the end-users in Missouri that are customers of ISPs who elect split-billing" is flatly wrong. *See* Brown/Habeeb Reply Aff., ¶ 10(j). In Missouri, as in other states,[8] contracts

[6] *See also Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act To Provide In-Region, InterLATA Service in the State of New York*, 15 FCC Rcd. 3953 (1999), ¶ 393 (*"New York 271 Order"*) (*Second Advanced Services Order* "found that, although DSL services designed for and sold to residential and business end-users are subject to the discounted resale obligations of section 251(c)(4), where the incumbent LEC offers DSL services as an input component to ISPs who combine the DSL service with their own Internet service, the discount obligations of section 251(c)(4) do not apply").

[7] Although SWBT asserts that the billing and collection is performed by ASI, rather than by SWBT itself, that distinction is irrelevant under the *ASCENT* decision. In any event, SWBT's contention is totally contrary to prior representations made by SWBT itself, and by one of the independent ISPs with which SWBT has a split-billing arrangement, that *SWBT* performs these functions. Finney Decl., ¶ 12 & Att. 3 (Garroway Decl., ¶¶ 5-7) (describing statement by SWBT that customer "would receive a bill from Southwestern Bell and a separate bill from the ISP" in a split-billing arrangement," and attaching the web page of Brick Network, which states that "You purchase the ADSL service from Southwestern Bell" and describes the monthly charges that the customer will pay to SWBT for the ADSL).

[8] *See, e.g.*, *Restatement (Second) Contracts*, § 19; E. A. Farnsworth, *Farnsworth on Contracts*, § 3.10 (1990).

may be "implied-in-fact" from the conduct of the parties even absent the creation of a "formal" contract by spoken or written words.[9] Thus, "one who holds out goods may be taken to be offering them for sale" and "[o]ne who begins to perform services for another in expectation of payment may be taken to be offering them for sale."[10] The critical issue is whether a "reasonable person" would understand that the one party intended to undertake an obligation or performance in expectation of payment (or return performance) by the other.[11]

Here, the conduct of SWBT and consumers purchasing its services clearly gives rise to an "implied-in-fact" contract. SWBT holds itself out to the public as providing stand-alone DSL Transport service. A reasonable person viewing the listing of "DSL Transport only – Order just the DSL feature" on SWBT's web page would understand SWBT to be offering DSL Transport as a stand-alone service to residential and business end-users for a fee. Even with the deletion of this entry by SWBT, a reasonable person would interpret SWBT's statement on its web-page that independent ISPs "act as authorized DSL sales representatives for Southwestern Bell DSL Transport services" would understand SWBT to be offering DSL Transport for a fee to end-users. And, in many instances, customers write a check directly to SWBT for that service under the split-billing arrangements. *See also* AT&T Reply Comments at 29 & Att. 3; Finney Decl. Att. 3 (Garroway Decl., ¶¶ 5-6). Thus, a "reasonable person" in these circumstances would understand that SWBT was offering to sell customers DSL Transport service and that those customers paying SWBT for that service have accepted that offer.[12] Indeed, the failure to imply a contract in a split-billing arrangement would create anomalous results: SWBT would have no recourse against customers that refused to pay for DSL service, while customers would have no recourse against SWBT if SWBT decided to stop providing DSL service or experienced network problems that impaired the quality of the DSL Transport. Furthermore, because the alleged purpose of the split-billing arrangement is to relieve the ISPs of the costs of billing their customers for DSL service, it would be illogical for the ISPs to assume responsibility for collection of unpaid DSL Transport charges. *See* SWBT Reply Br. at 37-38.

SWBT's recitation of various "indicia of a wholesale relationship" to show that the split-billing option is "merely a wholesale offering" is irrelevant. *See* Brown/Habeeb Reply Aff., ¶¶ 9-10; SWBT Reply Br. at 36-37. In the *Second Advanced Services Order*, the

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[9] *See, e.g.*, *Dailing v. Hall*, 1 S.W.3d 490, 491 (Mo.App. 1999); *Westerhold v. Mullenix Corp.*, 777 S.W.2d 257, 263 (Mo.App. 1999); *Kosher Zion Sausage Co. v. Roodman's Inc.*, 442 S.W.2d 543 (Mo.App. 1969); *Bennett v. Adams*, 362 S.W.2d 277, 280-81 & nn.3, 4 (Springfield Ct. of App. 1962); *Roper v. Clanton*, 258 S.W.2d 283, 288 (Springfield Ct. of App. 1953).

[10] *Farnsworth on Contracts, supra*, § 3.10. *See also Kohn v. Cohn*, 567 S.W.2d 441, 446 (Mo.App. 1978); *Kosher Zion Sausage*, 442 S.W.2d 543; *Bennett*, 362 S.W.2d at 280-81 & nn. 3, 4.

[11] *Farnsworth on Contracts, supra*, § 3.10.

[12] *See Kosher Zion Sausage*, 442 S.W.2d 543 (finding implied contract based on course of dealings between distributor and producer); *Roper*, 258 S.W.2d at 288 (finding implied contract between real estate owners and tenant based on course of performance).

Commission made clear that the critical issue, for purposes of Section 251(c)(4), is whether the ILEC is offering and selling DSL services at retail directly to residential and business end-users.[13] In any event, SWBT's "indicia" do not survive scrutiny. SWBT (or ASI) performs a number of the functions performed by the ISP purchasers of "bulk DSL services" cited in the *Second Advanced Services Order* – including marketing, ordering, and billing. *See Second Advanced Services Order*, ¶ 15. As previously stated, SWBT performs the marketing functions for DSL Transport, offering it as a stand-alone service on its web-page to the general public. As SWBT acknowledges, SWBT takes orders for DSL Transport directly from end-users and then, after the order is completed, passes them on to the ISPs designated by the customers. Brown/Habeeb Reply Aff., ¶ 10(a)-(c). SWBT separately bills the end-user for the DSL Transport whenever the ISP so desires. Brown/Habeeb Reply Aff., ¶¶ 9, 10(e). And, despite SWBT's suggestion to the contrary, the evidence shows that the price for the DSL Transport service is set by SWBT itself.[14] SWBT also does not assert that maintenance and repair of the DSL Transport is solely the responsibility of the ISP, but contends only that end-users are "encouraged" to call their ISPs when they experience trouble with "their Internet service." *Id.*,¶ 10(g).[15]

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[13] *See Second Advanced Services Order*, ¶ 9 ("The category of services subject to the provisions of section 251(c)(4) is determined, therefore, by whether those services are telecommunications services that an incumbent LEC provides (1) at retail and (2) to subscribers who are not telecommunications carriers"); *id.*, ¶ 15 ("the DSL services that incumbents are offering to Internet Service Providers specifically contemplate that the Internet Service Provider will be the entity providing to the ultimate end-user many services typically associated with retail sales, thus *reinforcing our conclusion* that the bulk DSL services are not retail services offered to the ultimate end-users") (emphasis added).

[14] SWBT's contentions that that its sales representatives direct a customer who wishes to use an unaffiliated ISP as its Internet access provider "to contact the specified ISP for Internet pricing information, including prices for the DSL Transport service," Brown/Habeeb Reply Aff., ¶ 10(a), and that "the ISP determines what price the end-user will pay for DSL Transport Service" are both contrary to fact and highly misleading. *See* Brown/Habeeb Reply Aff., ¶ 10(d). AT&T's evidence showed that *SWBT* determines the charges for DSL Transport, and communicates those charges directly to the end user without requiring the end user to contact the ISP. Specifically, AT&T's testimony showed – and SWBT does not dispute – that in telephone conversations with AT&T, SWBT quoted a charge of $39 per month for the DSL under a year-long commitment, $59 per month under a monthly arrangement, and $129 for "premium" DSL service. *See* Finney Decl., ¶ 13 & Att. 3 (Garroway Decl., ¶ 6). If, as SWBT contends, the charges are determined through SWBT's negotiations with individual ISPs, SWBT could not have unequivocally quoted such blanket charges to AT&T. SWBT's own testimony shows that ISPs have virtually no voice in the determination of the rate for DSL Transport, even when the ISP bills the end-user for *both* the DSL Transport and Internet service. *See* Brown/Habeeb Reply Aff., ¶ 10(d) n.11 (stating that, whether or not ISP executes a separate DSL services agreement with ASI, the ISP must agree to receive a price at or below $39.00 per month for the DSL Transport service).

[15] *See also* SWBT Reply Br. at 37. SWBT would certainly perform any repairs when the trouble reported by the customer is due to a problem with the DSL Transport, as SWBT effectively admits. *See* Brown/Habeeb Reply Aff., ¶ 10(g) (stating that unaffiliated ISPs "can submit trouble reports to ASI on end-user lines even when the DSL Transport is split-billed").

Finally, the Commission should reject SWBT's proposed solution of discontinuing its option of split-billing if such an arrangement is found to constitute a retail service offering. *See* Brown/Habeeb Reply Decl., ¶ 11. As a procedural matter, SWBT's eleventh-hour threat would not cure SWBT's violation of Section 251(c)(4) because, under the Commission's complete-when-filed rule, an application must be judged according to the circumstances that existed at the time of filing and post-comment factual changes may not be considered. *See* AT&T Reply Comments at 30-31 n.29. But in any case, SWBT's abandonment of split-billing would be only a half-measure. It would not address the core problem, which is that SWBT is holding itself out to the public as a provider of DSL Transport service, yet is denying CLECs the ability to do the same through resale, at a wholesale discount. So long as SWBT (or ASI) continues to market a DSL transport service directly to end-users, it must make a wholesale DSL transport service available to CLECs. To hold otherwise would be to indulge SWBT in its plainly anticompetitive strategy of offering a DSL transport service to its customers while denying CLECs the resale opportunity that Congress clearly intended them to have. See 47 U.S.C. § 251(c)(4); *Second Advanced Services Order,* ¶¶ 1, 18, 20.

II. SWBT'S REPLY COMMENTS CONFIRM THAT SWBT HAS NOT COMPLIED WITH ITS OBLIGATION TO PROVIDE UNBUNDLED ACCESS TO LINE SHARING OVER FIBER-FED LOOPS AT THE CENTRAL OFFICE.

In its reply comments, SWBT mischaracterizes the *Line Sharing Reconsideration Order* to mean that it may limit unbundled access to line sharing at the central office to all-copper loops. *See* SWBT Reply Br. at 29. It may not. The *Order* clarifies that an ILEC must provide line sharing over fiber facilities as well as copper, and requires that an ILEC must provide access to line sharing at either the central office or the remote terminal, at the CLEC's request. *Line Sharing Reconsideration Order,* ¶ 10. It does not permit SWBT, or any other ILEC, to dictate a technology-specific limitation over the manner in which a CLEC may access any loop at the central office for line sharing purposes. Specifically, the *Order* (¶ 11) indicates that a CLEC must have the option to access fiber-fed loops at either the remote terminal or the central office, "not [the location] that the incumbent chooses as a result of network upgrades entirely under its own control." Thus, as explained in AT&T's comments, the Commission cannot find that SWBT is in compliance with checklist items (ii) and (iv).

SWBT's position that the *Line Sharing Reconsideration Order* does not obligate it to provide unbundled access to line sharing over fiber-fed loops at the central office is completely inconsistent with two fundamental legal principles that have guided the Commission's definition of the loop as an unbundled network element. First, the Commission recognized that the loop provides essential transmission functionality needed for a customer to send and receive telecommunications signals between his location and a centralized point in the serving ILEC central office where it is technically feasible for a CLEC to connect to the loop

facility.[16] Second, the Commission has always recognized that the local loop, as all network elements, is defined by its functionality and is not limited to particular services or technologies.[17] Indeed, the *Line Sharing Reconsideration Order* (¶ 10) clearly reiterates that principle, noting that the definition of the loop itself as a "transmission facility" was "specifically intended to ensure that this definition was technology-neutral."

SWBT's fiber-fed loops, which are being deployed to provide its customers with access to both voice and data services, are not immune from application of these fundamental principles. Presumably, SWBT would not, and could not, argue that it may deny a competitor seeking to provide voice services over its Project Pronto facilities from gaining unbundled access to fiber-fed loops at the central office. Indeed, the Commission's past rulemakings make it abundantly clear that the loop unbundling obligations extend to fiber-fed, DLC-equipped, loops.[18] Pursuant to the Commission's technology- and service-neutrality principles, SWBT's obligation to provide a competitor with unbundled access to fiber-fed loops at the central office must also necessarily extend to the telecommunications signals they need to provide advanced services via line sharing.

SWBT claims that it complies with "all of its line sharing obligations" because it permits CLECs to access the high-frequency portion of the copper portion of the loop in two ways: (1) by provisioning all-copper loops, where available; and (2) by permitting a CLEC to collocate a DSLAM at or near the central office and utilize dark fiber or fiber feeder subloops. *See* SWBT Reply Br. at 28-29. SWBT is wrong on both counts. First, SWBT's "all-copper" loop proposal is not an adequate substitute to line sharing over fiber-fed loops. As AT&T demonstrated in its opening comments, SWBT's obligation to provide nondiscriminatory access to loop facilities cannot conceivably be met when SWBT or its affiliates have access to fiber-fed, DLC-equipped loops (and very short runs of copper), while nonaffiliates are constrained to use only the aged, all-copper plant that SWBT finds inadequate for its own purposes.

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[16] *See* 47 C.F.R. § 51.319(a)(1) ("[t]he local loop network element is defined as a *transmission facility* between a distribution frame (or its equivalent) in an incumbent LEC central office and the loop demarcation point at an end-user customer premises") (emphasis added).

[17] *See Implementation of the Local Competition Provisions of the Telecommunications Act of 1996,* Third Report and Order, 15 FCC Rcd. 3696 (1999) *("UNE Remand Order"),* ¶ 167 ("[o]ur intention is to ensure that the loop definition will *apply to new as well as current technologies*, and to ensure that competitors will continue to be able to access loops as an unbundled network element as long as access is required") (emphasis added); *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd. 15499 (1996),, ¶ 292, *aff'd in part and vacated in party sub nom. Iowa Utils. Bd. v. FCC,* 120 F.3d 753 (8th Cir. 1997), *aff'd in part and rev'd in part sub nom. AT&T Corp. v. Iowa Utils. Bd.,* 119 S. Ct. 721 (1999) *("Local Competition Order")* ("section 251(c)(3) requires incumbent LECs to provide requesting carriers with all of the functionalities of a particular element, so that requesting carriers can provide *any telecommunications services* that can be offered by means of the element") (emphasis added).

[18] *See, e.g., UNE Remand Order,* ¶ 175; *Local Competition Order,* ¶ 383.

Second, SWBT cannot require a CLEC to collocate a DSLAM at the remote terminal in order to satisfy its obligation to provide line sharing over fiber-fed loops. As noted above, the *Line Sharing Reconsideration Order* (¶ 11) recognized that a competitor may not be required to collocate a DSLAM at the incumbent's remote terminal in order to gain access to line sharing over fiber-fed subloops. The mere fact that subloop unbundling -- which is an option available to the CLECs -- may be available in some limited circumstances has no impact on the ILEC's obligation to provide line sharing functionality over the "entire loop, even where the incumbent has deployed fiber in the loop." *See Line Sharing Reconsideration Order,* ¶ 10.

In a similar argument, SWBT maintains that so long as it provides one or both of these alternatives, it is not required to unbundle certain remote terminal electronics, which SWBT considers a form of "packet switching" functionality, pursuant to conditions set forth in the *UNE Remand Order*. SWBT Reply Br. at 30-31. SWBT's argument is fatally flawed for several reasons. First, as AT&T has explained in great detail in several proceedings, the electronics associated with SWBT's upgraded loop architecture provide core transmission functionality (multiplexing, etc.) that is not, and cannot, be considered packet switching.[19] No competitor -- even one that has provisioned its own packet switch in the central office -- can provide voice or data services -- unless it has access to its customers' telecommunication signals. Such signals are delivered over the "entire loop" element, which necessarily includes all of SWBT's facilities between the customer's premise and its central office. Thus, SWBT's position is solely designed to frustrate a competitor's access to the unbundled loop for line sharing (or line splitting) purposes when SWBT deploys next-generation loop architecture. In doing so, SWBT is using its upgraded loop architecture -- which is entirely under its own control -- to dictate the access point for line sharing over fiber-fed loops at the remote terminal. SWBT's actions are flatly prohibited by Paragraph 11 of the *Line Sharing Reconsideration Order*.

Moreover, even if the electronics associated with SWBT's upgraded loop architecture were considered, for the moment, subject to the Commission's rules regarding "packet switching," the severe limitations associated with SWBT's all-copper loops and RT-based collocation alternatives mean that, even under the *UNE Remand Order* exception, unbundling of these electronics will be required in virtually all circumstances where SWBT has deployed fiber-fed, DLC-equipped loops. As explained in AT&T's comments and, as noted above, the mere availability of spare copper does not discharge SWBT's unbundling obligation, because competitors will not be able to use those facilities to offer "the same level of quality for advanced services" as that offered by the ILEC (or its data affiliate). *See UNE Remand Order,* ¶ 313. Likewise, the physical, technical, and economic limitations associated with SWBT's

[19] *See, e.g., Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 2nd FNPRM in CC Docket No. 98-147, 5th FNPRM in CC Docket No. 96-98, AT&T Comments at 44-47 and Declaration of Joseph P. Riolo, ¶¶ 44-47 (attachment to AT&T's Comments), AT&T Reply, at 46-49 (filed Nov. 14, 2000); *see also* 3rd FNPRM in CC Docket No. 98-147, 5th FNPRM in CC Docket No. 96-98, AT&T Comments at 11-14 (filed Feb. 27, 2001).

vague RT-based collocation alternative make clear that competitors will rarely, if ever, be able to collocate its DSLAM in SWBT remote terminal on a nondiscriminatory basis.[20]

In all events, SWBT's interpretation of its obligations under the *Line Sharing Reconsideration Order* must be rejected. If adopted, SWBT's interpretation would introduce an unlawful service- and technology-based distinction between the unbundling of underlying transmission functionality associated with voice and advanced telecommunications services. Neither the Act nor the Commission's prior rulings make any distinction between the transmission functionality used to provide advanced telecommunications services (primarily DSL) and voice services between the customer's premises and the central office. Both are "telecommunications services" and thus both are expressly covered by the unbundling obligations of Section 251.

Indeed, it is critical to the future of meaningful residential competition in Missouri that the Commission reject SWBT's position that it need not provide unbundled access to fiber-fed loops at the central office for line sharing purposes. For far too long, both SBC and SWBT have been permitted to deprive consumers of competitive choice for advanced telecommunications through their general intransigence and foot-dragging regarding their line sharing obligations. At the time AT&T first brought line sharing issues to the Commission's attention, SBC had roughly 100,000 DSL customers.[21] Now SBC has approximately ten times as many.[22] Moreover, the pace of SBC's entry grows monthly, with SBC likely to be self-

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[20] The Commission itself recently recognized this fact in the *Line Sharing Reconsideration Order*, stating that as fiber deployment by ILECs is increasing, "collocation by competitive LECs at remote terminals is likely to be costly, time consuming and often unavailable." *Line Sharing Reconsideration Order*, ¶ 13.

[21] *See* SBC Press Release, "*SBC Partners with Concentric for DSL Service*" (Nov. 15, 1999) (noting that as of November 1999, a month before the release of the Commission's *Line Sharing Order*, SBC was "[a]lready the nation's top provider of DSL service with sales to more than 100,000 subscribers").

[22] The dominance that SBC holds in its DSL markets is apparent by its ability to halt indefinitely deployment of DSL facilities in states that determine that SBC's unbundling obligations extend to its Project Pronto facilities, such as Illinois. *See* Letter from Terry S. Harvill, Commissioner, Illinois Commerce Commission, to The Honorable J. Dennis Hastert, Speaker of the House, at 1-2 (AT&T Opening Comments, Att. 6) ("Harvill Letter"). In the Harvill Letter, Commissioner Harvill correctly describes the power that SBC has over broadband services in Illinois, and consequently broadband consumers: "Ameritech Illinois controls the market so completely that it can determine if more than a million customers in Illinois will have access to broadband services." *Id.* at 2. Now SBC (through SWBT) is holding the threat of halting deployment of Project Pronto over the heads of the Kansas State Corporation Commission. *See General Investigation to Determine Conditions, Terms and Rates for Digital Subscriber Line Unbundled Network Elements, Loop Conditioning, and Line-Sharing,* Docket No. 01-GIMT-032-GIT, State Corporation Commission of the State of Kansas, Additional Brief of Southwestern Bell Telephone Company, at 2 (filed May 21, 2001) ("SBC has withdrawn its Project Pronto deployment in Illinois as a result of an unbundling order in that state. SWBT wishes to avoid the same protracted regulatory proceedings, and potential cessation of Project Pronto deployment in the state of Kansas"). *See also id.*, Reply of Southwestern Bell To the Responses of Covad Communications Company and Sprint Corporation to Southwestern Bell Telephone Company's Motion To File Additional Brief and Allowing Other Parties To File Responses Thereto, at 3 (filed April 30, 2001) (stating that SWBT's proposed "compromise" will "eliminate the potential for the halting of Project Pronto in Kansas as a result

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provisioning over 3,500 orders per business day by the end of this year, with a national base by then of over 1.5 million customers.[23] In contrast, CLECs have no present ability to access line sharing over fiber-fed loops on a nondiscriminatory basis. If SBC can continue to prevent CLECs from line sharing over the fiber facilities that will soon predominate in its local network, CLECs' ability to compete against SBC (or its affiliates') voice and advanced services will be seriously impaired.

Accordingly, SWBT cannot satisfy the checklist requirement for providing access to loops on non-discriminatory terms and conditions.[24]

III. SWBT HAS MISSTATED THE SCOPE OF ITS OBLIGATION TO PROVIDE CLECs WITH THE ABILITY TO ENGAGE IN LINE SPLITTING ARRANGEMENTS.

SWBT's representations concerning its development of a single-order process for CLECs to add xDSL service to UNE-P voice customers are highly misleading. *See* SWBT Reply Br. at 62-63; Chapman Reply Aff., ¶¶ 10-12. SWBT incorrectly asserts that "nothing more is required under the *Line Sharing Reconsideration Order*" than for SWBT to begin work on developing a single-order process when a CLEC first requests it. SWBT Reply Br. at 62-63. The *Line Sharing Reconsideration Order* not only held that incumbent LECs are "*required* to make all network modifications to facilitate line splitting, including providing nondiscriminatory access" for "ordering," but specifically clarified that such access included a single-order process. *Line Sharing Reconsideration Order*, ¶ 20-21 (emphasis added). Thus, the Order did not give SWBT unfettered discretion to decide for itself when to make such a process available.[25]

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of an unbundling order"). SBC's message to these state regulators is clear: "Play our way, or we will not play at all."

[23] *See* SBC Investor Briefing, *Strong Growth in Data, Wireless and Long Distance Highlights SBC's First-Quarter Results*, at 4-5 (AT&T Reply Comments, Att. 5) (noting that SBC "[e]xpanded its DSL in-service subscriber base to 954,000" as of the end of the first quarter 2001, and that "daily net gain in subscribers" is expected to be in the "3,500-4,000 range").

[24] For similar reasons, the Commission must also clarify immediately the ILECs' unbundling and line sharing (as well as line splitting) obligations in circumstances where the ILEC upgrades its loops.

[25] Moreover, contrary to SWBT's assertion, the Commission has not held that "there is no obligation" for ILECs to provide splitters under any circumstances." Chapman Reply Aff., ¶ 13. In the *SBC Texas Order* that SWBT cites, the Commission stated that it intended to give "prompt and thorough consideration" to the CLECs' request for imposition of such a requirement in its reconsideration of the *UNE Remand Order*. *See Application by SBC Communications Inc., et al. Pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-Region, InterLATA Services in Texas*, 15 FCC Rcd. 18354 (2000), ¶ 328 (*"SBC Texas Order*); *see also Line Sharing Reconsideration Order*, ¶ 25 (indicating that Commission is committed to resolving splitter ownership issues expeditiously).

Indeed, in light of AT&T's experience to date in trying to obtain a single-order process for line splitting, it is particularly important that the Commission *not* provide SBC with a blank check to determine when to comply with its line splitting obligations. Although SWBT asserts that it "began work on developing these process improvements when CLECs first requested it," that is false. SWBT Reply Br. at 62. AT&T first requested implementation of a single-order process during a meeting with SWBT on February 1, 2001, and asked that the process be implemented in the September/October timeframe to support AT&T's planned offer of voice and advanced services to AT&T's UNE platform customers in SWBT's region.[26] Instead of committing to meet this date and beginning work on implementation, SWBT equivocated. It initially stated that it could not promise a single-order process before December 2001, then said that it would delay implementation until after March 2002, and finally said, over two months later, that it would meet an October 20, 2001 implementation date for SWBT states only.[27] Thus, left to its own devices, SWBT delayed providing a commitment for a single-order process to AT&T for several months. Because CLECs' ability to provide DSL services is so essential to the development of local competition, the Commission should make clear that significant delay in providing a single-order process that results in a failure to meet CLECs' market entry needs would be a checklist violation.[28]

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[26] Although AT&T first requested implementation of the single-order process in February 2001, it has discussed – and raised objections to – SWBT's proposed "interim" process (described below) for a much longer period. AT&T, for example, described the deficiencies in the "interim" process in testimony that it filed last June with the Texas PUC. *See* Direct Testimony of Steven E. Turner at 19-21 & n.19, filed June 15, 2000 on behalf of AT&T, *et al.*, in TPUC Docket No. 22315, *Petition of Southwestern Bell Telephone Company for Arbitration With AT&T Communications of Texas, L.P., TCG Dallas, and Teleport Communications, Inc., Pursuant To Section 252(B)(1) of the Federal Telecommunications Act of 1996.*

[27] SBC, however, has not agreed to implement the single-order process in its Pacific Bell or Ameritech regions by that date, nor has it proposed an alternative date.

[28] The inadequacy of SWBT's interim process for line splitting compounds the problems associated with delay of implementation of the single-order process. SWBT's interim process requires three LSRs, is poorly documented, and by SWBT's own admission, creates serious risk of service disruption. *See, e.g.*, Attachment 1 hereto (SBC's official documentation for the interim process, provided to AT&T at a California workshop on April 12); Chapman Reply Aff., ¶ 12 (stating that SWBT has "committed to manage" the separate LSRs involved in the interim process "to ensure service disruption is limited to that experienced when adding line sharing to an existing POTS line"); Transcript of proceedings held April 4, 2001, before California PUC in CPUC Docket Nos. R. 93-04-003., *et al*, at 12454-12460 (testimony of Sarah DeYoung, AT&T, and Carol Chapman, SBC); Direct Testimony of Steven E. Turner, *supra*, at 19-21 & n.19. Thus, SWBT's claim that no CLEC has used its interim process for ordering line splitting (Chapman Reply Aff., ¶12) is highly misleading.

Respectfully submitted,

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Attachments

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