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July 20, 2005

Ms. Susan K. Duffy, Executive Director  
Kansas Corporation Commission  
1500 SW Arrowhead Road  
Topeka, Kansas 66604-4027

STATE CORPORATION COMMISSION

JUL 20 2005

Re: Docket No. 03-SWBT-330-IAT

 Docket  
Room

Dear Ms. Duffy:

Enclosed for filing with the Commission is an original and three (3) copies of an Application for Approval of a Modification to the Interconnection Agreement ("the Agreement") previously approved between Southwestern Bell Telephone, L.P. d/b/a SBC Kansas ("SBC") and American Fiber Systems, Inc. ("American") on January 17, 2003 in the above-captioned docket. Also enclosed is an Affidavit of Michael Scott, Area Manager-Regulatory Issues.

These modifications amend the Agreement to ensure that the terms and conditions of the Agreement related to specific network elements made available on an unbundled basis under Sections 251(c)(3) and (d)(2) are conformed so as to be consistent with applicable federal law. The attached amendment was approved by the Commission in an Order from Docket No. 05-SWBT-317-GIT. The Agreement, with this modification, and the attachments incorporated therein are an integrated package and are the result of negotiation and compromise. There are no outstanding issues between the parties that need the assistance of mediation or arbitration. American is registered as active and in good standing with the Kansas Secretary of State's office.

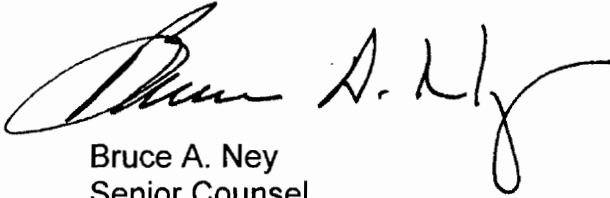
SBC files this modification to the Agreement seeking Commission approval of its terms and conditions consistent with the Federal Telecommunications Act of 1996. SBC represents and believes in good faith that the implementation of this modification to the Agreement is consistent with the public interest, convenience and necessity and does not discriminate against any telecommunications carrier. SBC specifically requests that the Commission refrain from taking any action to change, suspend or otherwise delay implementation of this modification to the agreement, in keeping with the support for competition previously demonstrated by the Commission.

Contact information for American is listed below.

CLEC Officer Name:	CLEC Attorney Name:
Mr. Bruce T. Frankiewicz	
VP-Legal and Regulatory Affairs	
100 Meridian Center, Suite 250	
Rochester, NY 14618	
Phone: 585-340-5400, ext. 135	
Fax: 585-756-1966	

The Commission's prompt attention to this matter would be appreciated.

Sincerely,

A handwritten signature in black ink, appearing to read "Bruce A. Ney". The signature is fluid and cursive, with a large initial "B" and a long, sweeping underline.

Bruce A. Ney  
Senior Counsel

Enclosures

cc: Ms. Eva Powers (transmittal letter only)  
Mr. Bruce T. Frankiewicz

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

STATE CORPORATION COMMISSION

JUL 20 2005

In the Matter of the Application of )  
Southwestern Bell Telephone Company for )  
Approval of Interconnection Agreement )  
Under The Telecommunications of 1996 )  
With American Fiber Systems, Inc. )

Docket No. 03-SWBT-330-IAT

*Susan K. Duffy* Docket  
Room

**APPLICATION OF SOUTHWESTERN BELL TELEPHONE COMPANY  
FOR APPROVAL OF A MODIFICATION TO INTERCONNECTION AGREEMENT**

Southwestern Bell Telephone, L.P., d/b/a SBC Kansas ("SBC") hereby files this Application for Approval of a Modification to the Interconnection Agreement ("the Agreement") under the Telecommunications Act of 1996 ("Federal Act") between SBC and American Fiber Systems, Inc. and would respectfully show the Kansas Corporation Commission ("Commission") the following:

**I. INTRODUCTION**

SBC presents to this Commission a modification to the Agreement previously negotiated, executed and filed with the Commission on October 23, 2002 pursuant to the terms of the Federal Act. The Commission issued an order approving the Agreement on January 17, 2003. These modifications amend the Agreement to ensure that the terms and conditions of the Agreement related to specific network elements made available on an unbundled basis under Sections 251(c)(3) and (d)(2) are conformed so as to be consistent with applicable federal law. A copy of the executed Amendment which reflects the parties' agreement to incorporate this modification to the Agreement, is attached hereto as Attachment I.

## **II. REQUEST FOR APPROVAL**

SBC seeks the Commission's approval of this modification to the Agreement, consistent with the provisions of the Federal Act. The implementation of this modification to the Agreement complies fully with Section 252(e) of the Federal Act because the modifications are consistent with the Commission's previous conclusion that the Agreement is consistent with the public interest, convenience and necessity and does not discriminate against any telecommunications carrier.

SBC respectfully requests that the Commission grant expeditious approval of this modification to the Agreement, without change, suspension or other delay in its implementation. The Agreement, with this modification, is a bilateral agreement, reached as a result of negotiations and compromise between competitors, and the parties do not believe a docket or intervention by other parties is necessary or appropriate.

## **III. STANDARD FOR REVIEW**

The statutory standards of review are set forth in Section 252(e) of the Federal Act which provides as follows:

Section 252(e) of the Federal Act:

### **(e) APPROVAL BY STATE COMMISSION**

- (1) APPROVAL REQUIRED.** -- Any interconnection agreement adopted by negotiation or arbitration shall be submitted for approval to the State commission. A State commission to which an agreement is submitted shall approve or reject the agreement, with written findings as to any deficiencies.
- (2) GROUNDS FOR REJECTION.** -- The State Commission may only reject --
  - (A)** an agreement (or any portion thereof) adopted by negotiation under subsection (a) if it finds that --

- (i) the agreement (or portion thereof) discriminates against a telecommunications carrier not a party to the agreement; or
- (ii) the implementation of such agreement or portion is not consistent with the public interest, convenience, and necessity . . .

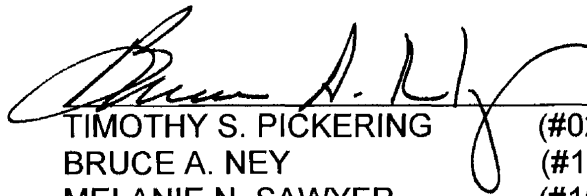
The affidavit of Michael Scott, Area Manager-Regulatory Issues, establishes that the modification to the Agreement submitted herein satisfies the standards for approval under the Federal Act. (Affidavit, Attachment II).

#### **IV. KANSAS LAW**

The negotiated and executed modification to the Agreement is consistent with the Kansas regulatory statutes.

#### **V. CONCLUSION**

For the reasons set forth above, SBC respectfully requests that the Commission approve this modification to the Agreement previously approved.

  
TIMOTHY S. PICKERING (#02003)  
BRUCE A. NEY (#15554) ◀  
MELANIE N. SAWYER (#19945)  
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Attorneys for Southwestern Bell Telephone, L.P.,  
d/b/a SBC Kansas

**AMENDMENT  
to  
INTERCONNECTION AGREEMENT UNDER  
SECTIONS 251 AND 252 OF THE  
TELECOMMUNICATIONS ACT OF 1996**

**by and between**

**SOUTHWESTERN BELL TELEPHONE, L.P., d/b/a**

**SBC KANSAS**

**and**

**AMERICAN FIBER SYSTEMS, INC.**

**(KANSAS)**

**KANSAS ORDER IN DOCKET 05-SWBT-317-GIT**  
**AMENDMENT TO THE INTERCONNECTION AGREEMENT**  
**BY AND BETWEEN**  
**SOUTHWESTERN BELL TELEPHONE, L.P. d/b/a SBC KANSAS**  
**AND**  
**AMERICAN FIBER SYSTEMS, INC.**

WHEREAS, the Federal Communications Commission ("FCC") released on August 21, 2003 a "Report and Order on Remand and Further Notice of Proposed Rulemaking" in CC Docket Nos. 01-338, 96-98 and 98-147, 18 FCC Rcd 16978 (as corrected by the Errata, 18 FCC Rcd 19020, and as modified by Order on Reconsideration (rel. August 9, 2004) (the "Triennial Review Order" or "TRO"), which became effective as of October 2, 2003; and

WHEREAS, by its TRO, the FCC ruled that certain network elements were not required to be provided as unbundled network elements under Section 251(c)(3) of the Telecommunications Act of 1996 ("Act"), and therefore, Southwestern Bell Telephone, L.P. ("**SBC KANSAS**") is no longer legally obligated to provide those network elements on an unbundled basis to CLEC under federal law; and

WHEREAS, the U.S. Circuit Court of Appeals, District of Columbia Circuit released its decision in *United States Telecom Ass'n v. F.C.C.*, 359 F3d 554 (D.C. Cir. 2004) ("*USTA II*") on March 2, 2004 and its associated mandate on June 16, 2004; and

WHEREAS, the *USTA II* decision vacated certain of the FCC rules and parts of the TRO requiring the provision of certain unbundled network elements under Section 251(c)(3) of the Act; and

WHEREAS, the FCC issued its Order on Remand, including related unbundling rules,<sup>1</sup> on February 4, 2005 ("TRO Remand Order"), holding that an incumbent LEC is not required to provide access to local circuit switching on an unbundled basis to requesting telecommunications carriers (CLECs) for the purpose of serving end-user customers using DSO capacity loops ("mass market unbundled local circuit switching" or "Mass Market ULS"), and holding that an incumbent LEC is not required to provide access to certain high-capacity loop and certain dedicated transport on an unbundled basis to requesting telecommunications carriers (CLECs);

NOW, THEREFORE, in consideration of the foregoing, and the promises and mutual agreements set forth in the Agreement and in this Amendment, the Agreement is hereby amended to ensure that the terms and conditions of the Agreement related to specific network elements made available hereunder on an unbundled basis under Sections 251(c)(3) and (d)(2) are conformed so as to be consistent with applicable federal law:

**1.1 TRO-Declassified Elements.** Pursuant to the TRO, nothing in the Agreement requires **SBC KANSAS** to provide to CLEC any of the following items, either alone or in combination (whether new, existing, or pre-existing) with any other element, service or functionality:

- (i) entrance facilities;
- (ii) DSO or OCn level dedicated transport;
- (iii) enterprise market (DS1 and above) local switching (defined as (a) all line-side and trunk-side facilities as defined in the TRO, plus the features, functions, and capabilities of the switch. The features, functions, and capabilities of the switch shall include the basic switching function of connecting lines to lines, lines to trunks, trunks to lines, and trunks to trunks, and (b) all vertical features that the switch is capable of providing, including custom calling, custom local area signaling services features, and Centrex, as well as any technically feasible customized routing functions);
- (iv) OCn loops;
- (v) the feeder portion of the loop;

<sup>1</sup> Order on Remand, *Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, WC Docket No. 04-313; CC Docket No. 01-338, (FCC released Feb. 4, 2005).

- (vi) line sharing;
- (vii) any call-related database, other than the 911 and E911 databases, to the extent not provided in conjunction with unbundled local switching;
- (viii) SS7 signaling to the extent not provided in conjunction with unbundled local switching;
- (ix) packet switching, including routers and DSLAMs;
- (x) the packetized bandwidth, features, functions, capabilities, electronics and other equipment used to transmit packetized information over hybrid loops (as defined in 47 CFR 51.319 (a)(2)), including without limitation, xDSL-capable line cards installed in digital loop carrier ("DLC") systems or equipment used to provide passive optical networking ("PON") capabilities; and
- (xi) fiber-to-the-home loops and fiber-to-the-curb loops (as defined in 47 C.F.R. § 51.319(a)(3)) ("FTTH Loops" and "FTTC Loops"), except to the extent that **SBC KANSAS** has deployed such fiber in parallel to, or in replacement of, an existing copper loop facility and elects to retire the copper loop, in which case **SBC KANSAS** will provide nondiscriminatory access to a 64 kilobits per second transmission path capable of voice grade service over the FTTH Loop or FTTC Loop on an unbundled basis to the extent required by terms and conditions in the Agreement.

## 1.2 TRO Remand-Declassified Elements (Mass Market Unbundled Local Switching and UNE-P)

- 1.2.1 Notwithstanding anything in the Agreement, pursuant to Rule 51.319(d) as set forth in the TRO Remand Order, effective March 11, 2005, CLEC is not permitted to obtain new Mass Market ULS, either alone or in combination (as in with "UNE-P"). Accordingly, pursuant to Rule 51.319(d)(2)(iii), although **SBC KANSAS** shall continue to provide access to Mass Market ULS or Mass Market UNE-P to CLEC for CLEC to serve its embedded base of end-user customers (i.e., only Mass Market ULS or Mass Market UNE-P ordered by CLEC before March 11, 2005), the price for such Mass Market ULS and UNE-P shall be the higher of (A) the rate at which CLEC obtained such Mass Market ULS and UNE-P on June 15, 2004 plus one dollar, or (B) the rate the applicable state commission established(s), if any, between June 16, 2004, and March 11, 2005, for such Mass Market ULS and UNE-P, plus one dollar. For purposes of this Paragraph, "Mass Market" shall mean 1 – 23 lines, inclusive (i.e. less than a DS1 or "Enterprise" level.) CLEC shall be fully liable to **SBC KANSAS** to pay such pricing under the Agreement, including applicable terms and conditions setting forth penalties for failure to comply with payment terms, notwithstanding anything to the contrary in the Agreement.
- 1.2.2 CLEC will complete the transition of embedded base Mass Market ULS and Mass Market UNE-P to an alternative arrangement by the end of the transition period defined in the TRO Remand Order (i.e. by March 11, 2006).
- 1.2.3 Paragraphs 1.2.1 and 1.2.2, above, apply and are operative regardless of whether CLEC is requesting Mass Market ULS or Mass Market UNE-P under the Agreement or under a state tariff, if applicable, and regardless of whether the state tariff is referenced in the Agreement or not.
- 1.2.4 **SBC KANSAS'** transitional provision of embedded base Mass Market ULS or Mass Market UNE-P under this Section 1.2 shall be on an "as is" basis, except that CLEC may continue to submit orders to add, change or delete features on the embedded base Mass Market ULS or Mass Market UNE-P, or may re-configure to permit or eliminate line splitting.
  - 1.2.4.1 Concurrently with its provision of embedded base Mass Market ULS or Mass Market UNE-P pursuant to this Amendment, and subject to this Section 1.2, and subject to the conditions set forth in Section 1.2.4.1.1 below, **SBC KANSAS** shall also continue to provide access to call-related databases, SS7 call setup, ULS shared transport and other switch-based features in accordance with and only to the extent permitted by the terms and conditions set forth in the Agreement, and only to the extent such items were already being provided before March 11, 2005, in conjunction with the embedded base Mass Market ULS or Mass Market UNE-P.
    - 1.2.4.1.1 The Agreement must contain the appropriate related terms and conditions, including pricing; and the features must be "loaded" and "activated" in the switch.



### 1.3 TRO Remand Declassified Elements (High-capacity Loop and Transport)

- 1.3.1 Notwithstanding anything in the Agreement, pursuant to Rule 51.319(a) and Rule 51.319(e) as set forth in the TRO Remand Order, effective March 11, 2005, CLEC is not permitted to obtain the following new unbundled high-capacity loop and dedicated transport elements, either alone or in combination:

Dark Fiber Loops;

DS1/DS3 Loops in excess of the caps or to any building served by a wire center described in Rule 51.319(a)(4) or 51.319(a)(5), as applicable;

DS1/DS3 Transport in excess of the caps or between any pair of wire centers as described in Rule 51.319(e)(2)(ii) or 51.319(e)(2)(iii), as applicable; or

Dark Fiber Transport, between any pair of wire centers as described in Rule 51.319(e)(2)(iv).

The above-listed element(s) are referred to herein as the "Affected Element(s)."

- 1.3.2 Accordingly, pursuant to Rules 51.319(a) and (e), although SBC KANSAS shall continue to provide CLEC's embedded base of the Affected Element(s) (i.e., only Affected Elements ordered by CLEC before March 11, 2005), if and as provided by the Agreement, the price for the embedded base Affected Element(s) shall be the higher of (A) the rate CLEC paid for the Affected Element(s) as of June 15, 2004 *plus 15%* or (B) the rate the state commission has established or establishes, if any, between June 16, 2004 and March 11, 2005 for the Affected Element(s), *plus 15%*. CLEC shall be fully liable to SBC KANSAS to pay such pricing under the Agreement, including applicable terms and conditions setting forth penalties for failure to comply with payment terms, notwithstanding anything to the contrary in the Agreement.
- 1.3.3 CLEC will complete the transition of embedded base Affected Elements to an alternative arrangement by the end of the transition period defined in the TRO Remand Order (12 or 18 months from the TRO Remand Order's effective date, as applicable). For Dark Fiber Affected Elements, CLEC will remove all CLEC services from such Dark Fiber Affected Elements and return the facilities to SBC KANSAS by the end of the transition period defined in the TRO Remand Order for such Dark Fiber Affected Elements.
- 1.3.4 Paragraphs 1.3.1 and 1.3.2, above, apply and are operative regardless of whether CLEC is requesting the Affected Element(s) under the Agreement or under a state tariff, if applicable, and regardless of whether the state tariff is referenced in the Agreement or not.

### 2.1 Conditions for Access to UNEs, Conversions, Commingling and Criteria

- 2.1.1 Conditions for Access to UNEs. In order to access and use UNEs, CLEC must be a Telecommunications Carrier (Section 251(c)(3)), and must use the UNE(s) for the provision of a Telecommunications Service (Section 251(c)(3)). Together, these conditions are the "Statutory Conditions" for access to UNEs. Accordingly, CLEC hereby represents and warrants that it is a Telecommunications Carrier and that it will notify SBC KANSAS immediately in writing if it ceases to be a Telecommunications Carrier. Failure to so notify SBC KANSAS shall constitute material breach of this Agreement.
- 2.1.1.1 By way of example, use of a UNE (whether on a stand-alone basis, in combination with other UNEs, with a network element possessed by CLEC, or otherwise) to provide service to CLEC or for other administrative purpose(s) does not constitute using a UNE pursuant to the Statutory Conditions.
- 2.1.1.2 By way of further example, CLEC may not access UNEs for the exclusive provision of mobile wireless services, long distance services, or interexchange services (telecommunications service between different stations in different exchange areas).
- 2.1.1.3 Other conditions to accessing and using any UNE (whether on a stand-alone basis or in combination with other network elements or UNEs) may be applicable under lawful and effective FCC rules and associated lawful and effective FCC and judicial orders and will also apply.

## 2.1.2 Conversion of Wholesale Services to UNEs

- 2.1.2.1 Upon request, SBC KANSAS shall convert a wholesale service, or group of wholesale services, to the equivalent UNE, or combination of UNEs, that is available to CLEC under terms and conditions set forth in this Agreement, as amended, so long as the CLEC and the wholesale service, or group of wholesale services, and the UNEs, or combination of UNEs, that would result from the conversion, meet the eligibility criteria that may be applicable. (By way of example only, the Statutory Conditions would constitute one such eligibility criterion.)
- 2.1.2.2 Where processes for the conversion requested pursuant to this Amendment are not already in place, SBC KANSAS will develop and implement processes, subject to any associated rates, terms and conditions. The Parties will comply with any applicable Change Management guidelines.
- 2.1.2.3 Except as agreed to by the Parties or otherwise provided hereunder, SBC KANSAS shall not impose any untariffed termination charges, or any disconnect fees, re-connect fees, or charges associated with establishing a service for the first time, in connection with any conversion between a wholesale service or group of wholesale services and a UNE or combination of UNEs. SBC KANSAS may charge applicable service order charges and record change charges.
- 2.1.2.4 This Section 2.1.2 only applies to situations where the wholesale service, or group of wholesale services, is comprised solely of UNEs offered or otherwise provided for in the Agreement, as amended.
- 2.1.2.5 If CLEC does not meet the applicable eligibility criteria or, for any reason, stops meeting the eligibility criteria for a particular conversion of a wholesale service, or group of wholesale services, to the equivalent UNE, or combination of UNEs, CLEC shall not request such conversion or continue using such the UNE or UNEs that result from such conversion. To the extent CLEC fails to meet (including ceases to meet) the eligibility criteria applicable to a UNE or combination of UNEs, or Commingled Arrangement (as defined herein), SBC KANSAS may convert the UNE or UNE combination, or Commingled Arrangement, to the equivalent wholesale service, or group of wholesale services, upon written notice to CLEC.
- 2.1.2.5.1 This Section 2.1.2.5 applies to any UNE or combination of UNEs, including whether or not such UNE or combination of UNEs had been previously converted from an SBC KANSAS service.
- 2.1.2.5.2 SBC KANSAS may exercise its rights provided for hereunder and those allowed by law in auditing compliance with any applicable eligibility criteria.
- 2.1.2.6 In requesting a conversion of an SBC KANSAS service, CLEC must follow the guidelines and ordering requirements provided by SBC KANSAS that are applicable to converting the particular SBC KANSAS service sought to be converted.
- 2.1.2.7 Nothing contained in this Amendment or Agreement provides CLEC with an opportunity to supersede or dissolve existing contractual arrangements, or otherwise affects SBC KANSAS' ability to enforce any tariff, contractual, or other provision(s), including those providing for early termination liability or similar charges.

## 2.1.3 Commingling

- 2.1.3.1 "Commingling" means the connecting, attaching, or otherwise linking of a UNE, or a combination of UNEs, to one or more facilities or services that CLEC has obtained at wholesale from SBC KANSAS, or the combining of a UNE, or a combination of UNEs, with one or more such facilities or services. "Commingling" means the act of commingling.
- 2.1.3.1.1 "Commingled Arrangement" means the arrangement created by Commingling.

- 2.1.3.1.2 Neither Commingling nor a Commingled Arrangement shall include, involve, or otherwise encompass an SBC KANSAS offering pursuant to 47 U.S.C. § 271 that is not a UNE under 47 U.S.C. § 251(c)(3).
- 2.1.3.1.3 Commingling is not permitted, nor is SBC KANSAS required to perform the functions necessary to Commingle, where the Commingled Arrangement (i) is not technically feasible, including that network reliability and security would be impaired; or (ii) would impair SBC KANSAS' ability to retain responsibility for the management, control, and performance of its network; or (iii) would place SBC KANSAS at a disadvantage in operating its own network; or (iv) would undermine the ability of other Telecommunications Carriers to obtain access to UNEs or to interconnect with SBC KANSAS' network.
- 2.1.3.1.4 Where processes for any Commingling requested pursuant to this Agreement (including, by way of example, for existing services sought to be converted to a Commingled Arrangement) are not already in place, SBC KANSAS will develop and implement processes, subject to any associated rates, terms and conditions. The Parties will comply with any applicable Change Management guidelines.
- 2.1.3.1.5 Any commingling obligation is limited solely to commingling of one or more facilities or services that CLEC has obtained at wholesale from SBC KANSAS with UNEs; accordingly, no other facilities, services or functionalities are subject to commingling, including but not limited to facilities, services or functionalities that SBC might offer pursuant to Section 271 of the Act.
- 2.1.3.2 Except as provided in this Amendment and, further, subject to the other provisions of this Agreement, SBC KANSAS shall permit CLEC to Commingle a UNE or a combination of UNEs with facilities or services obtained at wholesale from SBC KANSAS to the extent required by effective FCC rules and associated effective FCC and judicial orders.
- 2.1.3.3 Upon request, and subject to other applicable Sections, SBC KANSAS shall perform the functions necessary to Commingle a UNE or a combination of UNEs with one or more facilities or services that CLEC has obtained at wholesale from SBC KANSAS (as well as requests where CLEC also wants SBC KANSAS to complete the actual Commingling), except that SBC KANSAS shall have no obligation to perform the functions necessary to Commingle (or to complete the actual Commingling) if (i) Section 2.1.3.1.3 applies to the Commingled Arrangement sought by CLEC; or (ii) the CLEC is able to perform those functions itself. Where CLEC is a new entrant and is unaware that it needs to Commingle to provide a Telecommunications Service, SBC KANSAS' obligation to commingle ceases if SBC KANSAS informs CLEC of such need to Commingle.
- 2.1.3.3.1 For purposes of Section 2.1.3 and without limiting other instances in which CLEC may be able to Commingle for itself, CLEC is deemed able to Commingle for itself when the UNE(s), UNE combination, and facilities or services obtained at wholesale from SBC KANSAS are available to CLEC, including without limitation:
- 2.1.3.3.1.1 at an SBC KANSAS premises where CLEC is physically collocated or has an on-site adjacent collocation arrangement;
- 2.1.3.3.1.2 for SBC CALIFORNIA only, within an adjacent location arrangement, if and as permitted by the Agreement.
- 2.1.3.3.2 Section 2.1.3.3(i) shall only begin to apply thirty (30) days after notice by SBC KANSAS to CLEC. Thereafter, SBC KANSAS may invoke Section 2.1.3.3(i) with respect to any request for Commingling.
- 2.1.3.4 In accordance with and subject to the provisions of this Section 2.1.3, any request by CLEC for SBC KANSAS to perform the functions necessary to Commingle (as well as requests where

CLEC also wants **SBC KANSAS** to complete the actual Commingling), shall be made by CLEC in accordance with the Agreement, as amended.

2.1.3.4.1 **SBC KANSAS** is developing a list of Commingled Arrangements that will be available for ordering, which list will be made available in the CLEC Handbook and posted on "CLEC Online." Once that list is included in the CLEC Handbook or posted, whichever is earlier, CLEC will be able to submit orders for any Commingled Arrangement on that list. The list may be modified, from time to time.

2.1.3.4.2 Any CLEC request for a Commingled Arrangement not found on the then-existing list of orderable Commingled Arrangements must be submitted via the bona fide request (BFR) process. In any such BFR, CLEC must designate among other things the UNE(s), combination of UNEs, and the facilities or services that CLEC has obtained at wholesale from **SBC KANSAS** sought to be Commingled and the needed location(s), the order in which such UNEs, such combinations of UNEs, and such facilities and services are to be Commingled, and how each connection (e.g., cross-connected) is to be made between them.

2.1.3.4.3 In addition to any other applicable charges, CLEC shall be charged a reasonable fee for any Commingling work done by **SBC KANSAS** under this Section 2.1.3 (including performing the actual Commingling). Such fee shall be calculated using the Time and Material charges as reflected in the applicable Appendix Pricing. **SBC KANSAS'** Preliminary Analysis to the BFR shall include an estimate of such fee for the specified Commingling. With respect to a BFR in which CLEC requests **SBC KANSAS** to perform work not required by this Section 2.1.3.4, CLEC shall be charged a market-based rate for any such work.

2.1.3.5 **SBC KANSAS** shall not be required to, and shall not, provide "ratcheting" as a result of Commingling or a Commingled Arrangement. As a general matter, "ratcheting" is a pricing mechanism that involves billing a single circuit at multiple rates to develop a single, blended rate. **SBC KANSAS** shall charge the rates for UNEs (or UNE combinations) Commingled with facilities or services obtained at wholesale (including for example special access services) on an element-by-element basis, and such facilities and services on a facility-by-facility, service-by-service basis.

2.1.3.6 Nothing in this Agreement shall impose any obligation on **SBC KANSAS** to allow or otherwise permit Commingling, a Commingled Arrangement, or to perform the functions necessary to Commingle, or to allow or otherwise permit CLEC to Commingle or to make a Commingled Arrangement, beyond those obligations imposed by the Act, as determined by lawful and effective FCC rules and associated lawful and effective FCC and judicial orders. The preceding includes without limitation that **SBC KANSAS** shall not be obligated to Commingle network elements that do not constitute UNEs, or where UNEs are not requested for permissible purposes. If CLEC does not meet the applicable eligibility criteria or, for any reason, stops meeting the eligibility criteria for a particular UNE involved or to be involved in a Commingled Arrangement, CLEC shall not request such Commingled Arrangement or continue using such Commingled Arrangement.

2.1.3.7 In the event that Commingling also involves **SBC KANSAS** performing the functions necessary to combine UNEs (e.g., make a new combination of UNEs), and including making the actual UNE combination, and the Agreement requires combining, then the applicable sections of the Agreement related to combining shall govern with respect to the UNE combining aspect of that particular Commingling and/or Commingled Arrangement.

2.1.3.8 Subject to this 2.1.3, **SBC KANSAS** shall not deny access to a UNE or a combination of UNEs on the grounds that one or more of the UNEs is connected to, attached to, linked to, or combined with, a facility or service obtained at wholesale from **SBC KANSAS**.

2.1.3.9 Commingling in its entirety (including its definition, the ability of CLEC to Commingle, **SBC KANSAS'** obligation to perform the functions necessary to Commingle, and Commingled

Arrangements) shall not apply to or otherwise include, involve or encompass **SBC KANSAS** offerings pursuant to 47 U.S.C. § 271 that are not UNEs under 47 U.S.C. § 251(c)(3).

#### 2.1.4 Mandatory Eligibility Criteria for Access to Certain UNEs

2.1.4.1 Except as provided below in this Section 2.1.4 or elsewhere in the Agreement and subject to this Section and Section 2.1.2, Conversion of Wholesale Services to UNEs, of this Amendment, **SBC KANSAS** shall provide access to UNEs and combinations of UNEs without regard to whether the CLEC seeks access to the UNEs to establish a new circuit or to convert an existing circuit from a service to UNEs.

2.1.4.1.1 “Enhanced Extended Link” or “EEL” means a UNE combination consisting of an unbundled loop(s) and unbundled dedicated transport (to the extent both elements are still required to be unbundled under Section 251(c)(3) and are required under the Agreement), together with any facilities, equipment, or functions necessary to combine those UNEs (including, for example, multiplexing capabilities). A DS1 or higher EEL is required to terminate in a collocation arrangement that meets the requirements of Section 2.1.4.3 of this Amendment (e.g., the end of the unbundled dedicated transport that is opposite the end connected to the UNE local loop, must be accessed by CLEC at such a CLEC collocation arrangement via a cross-connect).

2.1.4.2 **SBC KANSAS** is not obligated, and shall not, provide access to (1) an unbundled DS1 loop in combination, or Commingled, with a dedicated DS1 transport facility or service or a dedicated DS3 or higher transport facility or service, or an unbundled DS3 loop in combination, or Commingled, with a dedicated DS3 or higher transport facility or service, or (2) an unbundled dedicated DS1 transport facility in combination, or Commingled, with an unbundled DS1 loop or a DS1 channel termination service, or to an unbundled dedicated DS3 transport facility in combination, or Commingled, with an unbundled DS1 loop or a DS1 channel termination service, or to an unbundled DS3 loop or a DS3 or higher channel termination service (collectively, the “Included Arrangements”), unless CLEC certifies that all of the following conditions are met with respect to the arrangement being sought:

2.1.4.2.1 CLEC (directly and not via an Affiliate) has received state certification to provide local voice service in the area being served or, in the absence of a state certification requirement, has complied with registration, tariffing, filing fee, or other regulatory requirements applicable to the provision of local voice service in that area.

2.1.4.2.2 The following criteria are satisfied for each Included Arrangement, including without limitation each DS1 circuit, each DS3 circuit, each DS1 EEL and each DS1 equivalent circuit on a DS3 EEL:

2.1.4.2.2.1 Each circuit to be provided to each End User will be assigned a local telephone number (NPA-NXX-XXXX) that is associated with local service provided within an **SBC KANSAS** local service area and within the LATA where the circuit is located (“Local Telephone Number”), prior to the provision of service over that circuit (and for each circuit, CLEC will provide the corresponding Local Telephone Number(s) as part of the required certification); and

2.1.4.2.2.2 Each DS1 equivalent circuit on a DS3 EEL or on any other Included Arrangement, must have its own Local Telephone Number assignment, so that each DS3 must have at least 28 Local voice Telephone Numbers assigned to it; and

2.1.4.2.2.3 Each circuit to be provided to each End User will have 911 or E911 capability prior to the provision of service over that circuit; and

2.1.4.2.2.4 Each circuit to be provided to each End User will terminate in a collocation arrangement that meets the requirements of Section 2.1.4.3; and

2.1.4.2.2.5 Each circuit to be provided to each End User will be served by an interconnection trunk that meets the requirements of Section 2.1.4.4; and

2.1.4.2.2.6 For each 24 DS1 EELs, or other facilities having equivalent capacity, CLEC will have at least one active DS1 local service interconnection trunk that meets the requirements of Section 2.1.4.4; and

2.1.4.2.2.7 Each circuit to be provided to each End User will be served by a switch capable of providing local voice traffic.

By way of example only, the application of the foregoing conditions means that a wholesale or retail DS1 or higher service/circuit (whether intrastate or interstate in nature or jurisdiction) comprised, in whole or in part, of a UNE local loop-Unbundled Dedicated Transport(s)-UNE local loop (with or without multiplexing) cannot qualify for at least the reason that the UNE local loop-Unbundled Dedicated Transport combination included within that service/circuit does not terminate to a collocation arrangement. Accordingly, **SBC KANSAS** shall not be required to provide, and shall not provide, any UNE combination of a UNE local loop and Unbundled Dedicated Transport at DS1 or higher (whether as a UNE combination by themselves, with a network element possessed by CLEC, or pursuant to Commingling, or whether as a new arrangement or from a conversion of an existing service/circuit) that does not terminate to a collocation arrangement that meets the requirements of Section 2.1.4.3 of this Amendment. Section 2.1.4.2 shall apply in any arrangement that includes more than one of the UNEs, facilities, or services set forth in that Section, including, without limitation, to any arrangement where one or more UNEs, facilities, or services not set forth in Section 2.1.4.2 is also included or otherwise used in that arrangement (whether as part of a UNE combination, Commingled Arrangement, or otherwise), and irrespective of the placement or sequence of them.

2.1.4.3 A collocation arrangement meets the requirements of this Section 2.1.4 if it is:

2.1.4.3.1 Established pursuant to Section 251(c)(6) of the Act and located at **SBC KANSAS'** premises within the same LATA as the End User's premises, when **SBC KANSAS** is not the collocator; or

2.1.4.3.2 Located at a third party's premises within the same LATA as the End User's premises, when **SBC KANSAS** is the collocator.

2.1.4.4 An interconnection trunk meets the requirements of Sections 2.1.4.2.2.5 and 2.1.4.2.2.6 if CLEC will transmit the calling party's Local Telephone Number in connection with calls exchanged over the trunk and the trunk is located in the same LATA as the End User premises served by the Included Arrangement.

2.1.4.5 For a new circuit to which Section 2.1.4.2 applies, CLEC may initiate the ordering process if CLEC certifies that it will not begin to provide any service over that circuit until a Local Telephone Number is assigned and 911/E911 capability is provided, as required by Section 2.1.4.2.2.1 and Section 2.1.4.2.2.3, respectively. In such case, CLEC shall satisfy Section 2.1.4.2.2.1 and/or Section 2.1.4.2.2.3 if it assigns the required Local Telephone Number(s), and implements 911/E911 capability, within 30 days after **SBC KANSAS** provisions such new circuit. CLEC must provide **SBC KANSAS** with sufficient proof that such assignment and/or implementation has occurred by the end of such 30<sup>th</sup> day.

2.1.4.5.1 Section 2.1.4.5 does not apply to existing circuits to which Section 2.1.4.2 applies, including conversions or migrations (e.g., CLEC shall not be excused from meeting the Section 2.1.4.2.2.1 and Section 2.1.4.2.2.3 requirements for existing circuits at the time it initiates the ordering process).

2.1.4.6 CLEC must provide the certification required by Section 2.1.4 on a form provided by **SBC KANSAS**, on a circuit-by-circuit/service-by-service/Included Arrangement-by-Included Arrangement basis.

- 2.1.4.6.1 If the information previously provided in a certification is inaccurate (or ceases to be accurate), CLEC shall update such certification promptly with SBC KANSAS.
- 2.1.4.7 In addition to any other audit rights provided for in this Agreement and those allowed by law, SBC KANSAS may obtain and pay for an independent auditor to audit CLEC, on an annual basis, applied on a State-by-State basis, for compliance with this Section 2.1.4. For purposes of calculating and applying an "annual basis", it means for a State a consecutive 12-month period, beginning upon SBC KANSAS' written notice that an audit will be performed for that State, subject to Section 2.1.4.7.4.
- 2.1.4.7.1 Unless otherwise agreed by the Parties (including at the time of the audit), the independent auditor shall perform its evaluation in accordance with the standards established by the American Institute for Certified Public Accountants (AICPA), which will require the auditor to perform an "examination engagement" and issue an opinion regarding CLEC's compliance with the qualifying service eligibility criteria.
- 2.1.4.7.2 The independent auditor's report will conclude whether CLEC complied in all material respects with this Section 2.1.4.
- 2.1.4.7.3 Consistent with standard auditing practices, such audits require compliance testing designed by the independent auditor, which typically include an examination of a sample selected in accordance with the independent auditor's judgment.
- 2.1.4.7.4 To the extent the independent auditor's report concludes that CLEC failed to comply with this Section 2.1.4, CLEC must true-up any difference in payments beginning from the date that the non-compliant circuit was established as a UNE/UNE combination, in whole or in part (notwithstanding any other provision hereof), CLEC must convert the UNE or UNE combination, or Commingled Arrangement, to an equivalent or substantially similar wholesale service, or group of wholesale services, (and SBC KANSAS may initiate and affect such a conversion on its own without any further consent by CLEC), and CLEC shall timely make the correct payments on a going-forward basis, and all applicable remedies for failure to make such payments shall be available to SBC KANSAS. In no event shall rates set under Section 252(d)(1) of the Act apply for the use of any UNE for any period in which CLEC does not meet the conditions set forth in this Section 2.1.4 for that UNE, arrangement, or circuit, as the case may be. Also, the "annual basis" calculation and application shall be immediately reset; e.g., SBC KANSAS shall not have to wait the remaining part of the consecutive 12-month period before it is permitted to audit again in that State.
- 2.1.4.7.4.1 To the extent that the independent auditor's report concludes that CLEC failed to comply in all material respects with this Section 2.1.4, CLEC must reimburse SBC KANSAS for the cost of the independent auditor and for SBC KANSAS' costs in the same manner and using the same methodology and rates that SBC KANSAS is required to pay CLEC's costs under Section 2.1.4.7.4.2.
- 2.1.4.7.4.2 To the extent the independent auditor's report concludes that the CLEC complied in all material respects with this Section 2.1.4, SBC KANSAS must reimburse CLEC for its reasonable staff time and other reasonable costs associated in responding to the audit (e.g., collecting data in response to the auditor's inquiries, meeting for interviews, etc.).
- 2.1.4.7.5 CLEC will maintain the appropriate documentation to support its eligibility certifications, including without limitation call detail records, Local Telephone Number assignment documentation, and switch assignment documentation.
- 2.1.4.8 Without affecting the application or interpretation of any other provisions regarding waiver, estoppel, laches, or similar concepts in other situations, CLEC shall fully comply with this Section 2.1.4 in all cases and, further, the failure of SBC KANSAS to require such compliance, including if

**SBC KANSAS** provides a circuit(s), an EEL(s), or a Commingled circuit that does not meet any eligibility criteria, including those in this Section 2.1.4, shall not act as a waiver of any part of this Section, and estoppel, laches, or other similar concepts shall not act to affect any rights or requirements hereunder.

2.1.5 Where processes for any UNE requested pursuant to this Agreement, whether alone or in conjunction with any other UNE(s) or service(s), are not already in place, **SBC KANSAS** will develop and implement processes, subject to any associated rates, terms and conditions. The Parties will comply with any applicable Change Management guidelines.

2.1.6 The Parties intend that this Agreement, as amended, contains the sole and exclusive terms and conditions by which CLEC will obtain UNEs from **SBC KANSAS**. Accordingly, CLEC and its affiliated entities hereby fully and irrevocably waive any right or ability any of them might have to purchase any unbundled network element (whether on a stand-alone basis, in combination with other UNEs, with a network element possessed by CLEC, or pursuant to Commingling or otherwise) directly from any **SBC KANSAS** tariff, to the extent such tariff(s) is/are available, and agree not to so purchase or attempt to so purchase from any such tariff. Without affecting the application or interpretation of any other provisions regarding waiver, estoppel, laches, or similar concepts in other situations, the failure of **SBC KANSAS** to enforce the foregoing (including if **SBC KANSAS** fails to reject or otherwise block orders for, or provides or continues to provide, unbundled network elements under tariff) shall not act as a waiver of any part of this Section, and estoppel, laches, or other similar concepts shall not act to affect any rights or requirements hereunder. At its option, **SBC KANSAS** may either reject any such order submitted under tariff, or without the need for any further contact with or consent from CLEC, **SBC KANSAS** may process any such order as being submitted under this Agreement/Amendment and, further, may convert any element provided under tariff, to this Agreement/Amendment, effective as of the later in time of the (i) Effective Date of this Agreement/Amendment, or (ii) the submission of the order by CLEC.

3.1 **Notice and Transition.** In addition to the network elements identified in this Amendment as being no longer subject to unbundling under the Agreement, if the FCC determines that one or more additional network elements are no longer required to be unbundled under Section 251(c)(3), then **SBC KANSAS** is not required to provide the element(s) on an unbundled basis, either alone or in combination (whether new, existing, or pre-existing) with any other element, service or functionality, to CLEC under this Agreement, and the following notice and transition procedure shall apply:

3.1.1 **SBC KANSAS** will provide written notice to CLEC of the fact that the network element(s) and/or the combination or other arrangement in which the network element(s) had been previously provided on an unbundled basis is no longer required to be provided. During a transitional period of thirty (30) days from the date of such notice, **SBC KANSAS** agrees to continue providing such network element(s) under the terms of this Agreement.

3.1.1.1 Upon receipt of such written notice, CLEC will cease new orders for such network element(s) that are identified in the **SBC KANSAS** notice letter. **SBC KANSAS** reserves the right to monitor, review, and/or reject CLEC orders transmitted to **SBC KANSAS** and, to the extent that the CLEC has submitted orders and such orders are provisioned after this 30-day transitional period, such network elements are still subject to this Paragraph 3.1, including the CLEC options set forth in subparagraph 3.1.1.2 below, and **SBC KANSAS'** right of conversion in the event the CLEC options are not accomplished by the end of the 30-day transitional period.

3.1.1.2 During such 30-day transitional period, the following options are available to CLEC with regard to the network element(s) identified in the **SBC KANSAS** notice, including the combination or other arrangement in which the network element(s) were previously provided:

(i) CLEC may issue an LSR or ASR, as applicable, to seek disconnection or other discontinuance of the network element(s) and/or the combination or other arrangement in which the element(s) were previously provided; or



- (ii) SBC KANSAS and CLEC may agree upon another service arrangement (e.g. via a separate agreement at market-based rates or resale), or may agree that an analogous resale service or access product or service may be substituted, if available.

Notwithstanding anything to the contrary in the Agreement, including any amendments to the Agreement, at the end of the thirty (30) day transitional period, unless CLEC has submitted a disconnect/discontinuance LSR or ASR, as applicable, under subparagraph 3.1.1.2(i), above, and if CLEC and SBC KANSAS have failed to reach agreement, under subparagraph 3.1.1.2(ii), above, as to a substitute service arrangement or element, then SBC KANSAS will convert the subject element(s), whether alone or in combination with or as part of any other arrangement to an analogous resale or access service or arrangement, if available, at rates applicable to such analogous service or arrangement.

- 4.1 Nothing in this Amendment shall affect the general application and effectiveness of the Agreement's "change of law," "intervening law," "successor rates" and/or any similarly purposed provisions. The rights and obligations set forth in this Amendment apply in addition to any other rights and obligations that may be created by such intervening law, change in law or other substantively similar provision.

IN WITNESS WHEREOF, this Amendment to the Agreement was exchanged in triplicate on this 12<sup>th</sup> day of July, 2005, by Southwestern Bell Telephone, L.P. d/b/a SBC Kansas, signing by and through its duly authorized representative, and CLEC, signing by and through its duly authorized representative.

American Fiber Systems, Inc.

By: Bruce T. Frankiewicz

Printed: Bruce T. Frankiewicz

Title: VP of Legal Regulatory

Date: 6/30/05

Southwestern Bell Telephone, L.P. d/b/a SBC Kansas  
by SBC Operations, Inc., its authorized agent

By: Mike Auinbaub

Printed: Mike Auinbaub

Title: AVP-Local Interconnection Marketing

Date: 7-12-05

FACILITIES-BASED OCN # 786C

ACNA MFY

BEFORE THE KANSAS CORPORATION COMMISSION  
OF THE STATE OF KANSAS

In the Matter of the Application of )  
Southwestern Bell Telephone Company for )  
Approval of Interconnection Agreement ) Docket No. 03-SWBT-330-IAT  
Under The Telecommunications of 1996 )  
With American Fiber Systems, Inc. )

AFFIDAVIT OF MICHAEL SCOTT

STATE OF KANSAS )  
 ) ss  
COUNTY OF SHAWNEE )

Before me, the Undersigned Authority, on the 20<sup>th</sup> day of July, 2005, personally appeared Michael Scott of Southwestern Bell Telephone, L.P., d/b/a SBC Kansas ("SBC") who, upon being by me duly sworn on oath deposed and said the following:

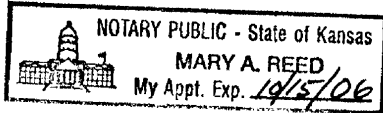
1. My name is Michael Scott. I am over the age of 21, of sound mind and competent to testify to the matters stated herein. I am the Area Manager-Regulatory Issues for SBC, and I have personal knowledge concerning the Interconnection Agreement ("the Agreement") between SBC and American Fiber Systems, Inc. which was approved by the Commission on January 17, 2003, and the proposed modification to that Agreement.
2. These modifications amend the Agreement to ensure that the terms and conditions of the Agreement related to specific network elements made available on an unbundled basis under Sections 251(c)(3) and (d)(2) are conformed so as to be consistent with applicable federal law.
3. There are no outstanding issues between the parties that need the assistance of mediation and arbitration relating to the modification to the Agreement.
4. The implementation of this modification to the Agreement is consistent with the public interest, convenience and necessity.

5. This modification to the Agreement does not discriminate against any telecommunications carrier. The modification is available to any similarly situated local service provider in negotiating a similar agreement.
6. The negotiated and executed modification to the Agreement is consistent with Kansas law.

*Michael Scott*

Michael Scott

Subscribed and sworn to before me this 20<sup>th</sup> day of July, 2005.



*Mary A. Reed*

Notary Public

My Commission Expires: *October 15, 2006*