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May 16, 2003

Secretary of the Commission  
Missouri Public Service Commission  
200 Madison Street, Suite 100  
P.O. Box 360  
Jefferson City, Missouri 65102-0360

**FILED**<sup>4</sup>

MAY 16 2003

Missouri Public  
Service Commission

Re: Case No. TO-99-227

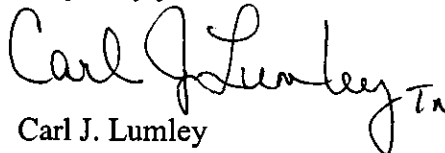
Dear Secretary of the Commission:

Enclosed please find for filing with your office in connection with the above-referenced proceeding an original and nine (9) copies each of the following:

1. Report of AT&T, NuVox, XO, and MCI regarding the Status of the Six Month Review Process and the Incorporation of Modifications to the Performance Remedy Plan and Performance Measurements
2. Memorandum filing Proposed Order

Upon your receipt, please process and return a file stamped copy of the enclosed. If you have any questions, please contact me.

Very truly yours,

  
Carl J. Lumley

CJL:dn  
Enclosures  
cc. Parties of Record (W/Enclosure)

**FILED<sup>3</sup>**

**BEFORE THE MISSOURI PUBLIC SERVICE COMMISSION**      **MAY 15 2003**

**Missouri Public  
Service Commission**

In The Matter of the Application of Southwestern      )  
Bell Telephone Company to Provide Notice of      )  
Intent to File an Application for Authorization to      ) Case No. TO-99-227  
Provide In-Region InterLATA Service      )  
Originating in Missouri Pursuant to Section 271      )  
Of the Telecommunications Act of 1996.      )

**REPORT OF AT&T, NUVOX, XO, AND MCI  
REGARDING THE STATUS OF THE SIX MONTH REVIEW PROCESS  
AND THE INCORPORATION OF MODIFICATIONS TO THE  
PERFORMANCE REMEDY PLAN AND PERFORMANCE MEASUREMENTS**

COME NOW AT&T Communications of the Southwest, Inc. ("AT&T"), NuVox Communications of Missouri, Inc., XO Missouri, Inc., MCI WorldCom Communications, Inc., and MCI WorldCom Network Services, Inc. (collectively the "Joint Reporters") and file the following report pursuant to the Commission's Order Directing Filing and Setting Oral Arguments, dated April 28, 2003. In the Order, parties were directed to file a status report on the effect of any significant changes in federal or state law that have occurred since the March 2002 filing of SBC's original motion to update performance measures in the M2A. The Order also directed the parties to report on the status of the pending related matters at the Texas Public Utility Commission and in Arkansas, Kansas and Oklahoma. The Joint Reporters are not aware of any changes in federal or state law that are dispositive of the issues before the Missouri Commission in this matter. The Joint Reporters will focus this report on the status of these issues here and before the Texas and other Commissions and recommend a course of action for this Commission.

## **BACKGROUND**

1. On March 18, 2002, SWBT (now SBC Missouri, herein “SBC”) filed a Motion in this proceeding requesting modifications to the performance remedy plan and performance measures contained in Attachment 17 of the Missouri 271 Agreement (“M2A”). Attachment 17 of the M2A is Version 1.7 of SBC’s Performance Remedy Plan (“PRP”). The plan governs the terms and conditions under which SBC will report performance to CLECs and compare that performance to SBC’s own performance or benchmark criteria, whichever is applicable.<sup>1</sup> The PRP also provides for enforcement through liquidated damages and assessments.<sup>2</sup> Section 6.4 of Attachment 17 to the M2A provides for a Six-Month Review process under which revisions to SBC’s performance measurements (“PMs”) and PRP may be effectuated. To date, all three of the six-month reviews have been facilitated by the Texas PUC in Austin, Texas. None of the agreed-to changes to the PMs and the PRP from the six-month reviews that have occurred since the approval of the M2A have been incorporated into the M2A. In addition, none of the issues that were disputed before and resolved by the Texas Commission since the approval of the M2A have been incorporated into the M2A.

2. In its Motion, SBC requested that the Commission approve certain revisions to Attachment 17 and related appendices of the M2A to incorporate revisions that resulted from what was then (March 2002) the most recent six-month review conducted in Texas. Even though this was a multi-state review, in which the Missouri Commission Staff participated together with staffs from the other SWBT states, SBC excluded three measures that had been ordered by the Texas Commission, which are discussed below. Accordingly, members of the Joint Reporters objected to SBC’s Motion. SBC subsequently indicated in its April 22, 2002 filing herein that it

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<sup>1</sup> See M2A Attachment 17, Introductory Statement.

would include one of the changes it had omitted if the Commission determined it should, namely the changes regarding PM 1.2 discussed below.

3. As a result of the aforesaid second six-month review, the Texas Commission required that SBC 1) implement special access performance measures; 2) implement sampling regarding the accuracy of the loop qualification database (PM 1.2); and 3) pay damages for the corrected data it was to report under PM 13 at a Tier 1 High rate on a per occurrence basis without a measurement cap. These requirements were set forth in the Texas Commission's Order No. 33 in Project No. 20400 (June 1, 2001). SBC filed a Motion for Reconsideration of Order No. 33 with the Texas Commission asking it to reconsider these requirements. SBC's Motion was denied in part in Order No. 39, with certain modifications made to Order No. 33.<sup>3</sup> Specifically, the Texas Commission 1) deferred consideration of remedies under PM 13 until completion of an independent audit; 2) ordered implementation of PM 1.2 using specific criteria that were set forth in a matrix attached to the Order;<sup>4</sup> and 3) ordered modifications to the xDSL PMs, which required SBC to calculate damages for xDSL on a per measurement bases, removing the K-value exclusion from the calculation methodology in instances where the individual measurement is missed for two consecutive and then reinstating the K-value once SBC meets the applicable standard again for two consecutive months.<sup>5</sup> In a separate ruling, the Texas Commission concluded that it would take up the issue of special access performance measures in a separate proceeding. Upon a request for reconsideration from SBC, the Texas Commission decided to defer consideration of the aforesaid xDSL measures.<sup>6</sup>

(..continued)

<sup>2</sup> *Id.*

<sup>3</sup> See Texas PUC Order No. 39, attached to Staff's April 11, 2002 filing.

<sup>4</sup> Sampling methodology to be used in implementing PM 1.2 was subsequently agreed to by SBC and IP Communications of the Southwest. See Agreement attached to Staff's April 11, 2002 filing.

<sup>5</sup> See Texas PUC Order No. 39.

<sup>6</sup> See Texas PUC Order No. 42, attached to SBC's August 8, 2002 filing.

4. At that point (circa the beginning of August 2002), there were no remaining disputed changes regarding updating Version 1.7 to Version 2.0. However, to date, none of the agreed-to and ordered changes to Version 1.7 have been made to the M2A.

5. A number of significant events have occurred since the beginning of August 2002. Another six-month review workshop was conducted in Texas on August 13-15, 2002. At that review a number of substantial revisions were made to the performance measures.<sup>7</sup> Many of the changes made as a result of the workshop were agreed to by SBC. Those changes that were not agreed to by SBC were presented to the Texas Commission. All interested parties filed post-workshop comments supporting or objecting to the disputed changes. On October 17, 2002, the Texas PUC issued Order No. 45 in Project 20400. In that Order, the Texas Commission resolved all disputed issues and ordered SBC to file the agreed-to, as well as the disputed changes as modifications to the PRP and PMs to be incorporated into Attachment 17 of the T2A by November 1, 2002. The agreed-to and disputed changes and the parties' positions on the disputed issues, as well as the substance of the Texas Commission's decision on each disputed change, are set out in Attachment A to Order 45.<sup>8</sup> On November 1, 2002, SBC made a filing with the Texas Commission as directed by Order No. 45.<sup>9</sup>

6. As AT&T noted in its Response to SBC's Response to Staff's Report, AT&T has objected to the compliance filing made by SBC in Texas, because SBC's filing should be modified to correct a significant deviation from the requirements of Order No. 45.<sup>10</sup> Specifically, Appendix 2 to the business rules lists certain "series 13" disposition codes used by SBC in response to trouble reports. Consistent with the agreement reached during the

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<sup>7</sup> The revisions stemming from this six-month review workshop were made to Version 2.0 of the PRP, resulting in Version 3.0.

<sup>8</sup> Texas PUC Order 45 has been filed in this proceeding as an attachment to Staff's Report and Recommendation on the Public Utility Commission of Texas Orders Nos. 45 and 46 Approving Modifications to Performance Remedy Plan and Performance Measurements, dated November 22, 2003, Appendix 1 and 2.

<sup>9</sup> See Staff's November 22, 2002 Report, Appendix 3.

workshops, SBC's compliance filing revised the language of Appendix 2 to provide that codes may not be added to the appendix without CLEC consent or Commission approval<sup>11</sup>. However, SBC went on to include in Appendix 2 several codes that have not been agreed to by CLECs or approved by a Commission. SBC has included in its compliance filing a series of codes that it has used to exclude transactions from the performance measures, without ever obtaining agreement or approval for adding them to Appendix 2. The Texas Commission ruled on this point as follows: "The Commission clarifies that Appendix 2 may not be unilaterally modified by SWBT. If SWBT determines that additional disposition "13" codes should be added to Appendix 2 prior to the next PM review, SWBT shall file a request for review in Project No. 20400 and the Commission will address it at that time."<sup>12</sup> Pursuant to that ruling, SBC should not have unilaterally added code 1328 or any other codes to Appendix 2. The Texas Commission has not approved SBC's filing or ruled on AT&T's objections to that filing.

7. IP Communications, L.P., and SBC filed motions for reconsideration of Order No. 45. In SBC's Motion, SBC sought reconsideration of the Texas Commission's decision relating to the K table, EEL disaggregation, PM 5, PM 13, PM 115.2 and disaggregation for line splitting.

8. On November 22, 2002, the Staff of the Missouri Commission filed its Report and Recommendation on the Public Utility Commission of Texas' Orders Nos. 45 and 46 Approving Modifications to Performance Remedy Plan and Performance Measurements. In that Report, Staff recommended the Commission adopt the decisions made by the Public Utility Commission of Texas in Orders Nos. 45 and 46 for updating the performance measures contained in the M2A to Version 3.0.

(..continued)

<sup>10</sup> Response of AT&T to SBC's Response, dated December 12, 2002, p. 2.

<sup>11</sup> See SBC Compliance Filing in Project 20400, PM Business Rules Version 3.0, Appendix 2, attached to Staff's Report as Appendix 3.

<sup>12</sup> Texas Order No. 45, Att. A, p. 74.

9. On December 2, 2002, SBC filed its Response to the Staff's Report ("SBC Response"). Generally, SBC opposed Staff's recommendation on the grounds that Order No. 45 was not final because SBC had filed a Motion for Reconsideration and Clarification of Order No. 45. SBC continued to assert the position that it will only make changes to performance measures and the Performance Remedy Plan when it agrees with those changes. SBC asked the Commission to "approve an updated version of Attachment 17 (and its appendices) of the M2A, to include modifications and changes to M2A Performance Remedy Plan which resulted from the recent six-month review (i.e., Version 3.0) conducted by the Texas PUC, containing the modifications and changes with which SBC agrees, as provided in Section 6.4 of Attachment 17 of the M2A but not including modifications and changes with which SBC does not agree." (SBC, Response, pg. 5). The result is that SBC is requesting that this Commission accept modifications to Attachment 17 that do not fully comport with the changes it has made to the T2A at the direction of the Texas Commission pursuant to the six-month review process.

10. On December 19, 2002, the Texas Commission held an open meeting at which the parties' motions for reconsideration were discussed, and at that meeting the Texas Commission rejected these motions. The Texas Commission issued Order No. 47 on March 5, 2003 in which it denied SBC's and IP's motions for reconsideration.<sup>13</sup>

11. On March 28, 2003, SBC filed an appeal of certain aspects of Order Nos. 45 and 47 in the United States District Court for the Western District of Texas (San Antonio Division), Civil Action No. SA03CA249. Specifically, SBC has challenged the Texas Commission's modification of the K-Table. In that appeal, SBC sought a temporary injunction. To settle the request for injunction, SBC reached an agreement with the Texas Attorney General's Office, which provides that during the pendency of the appeal, SBC will record and escrow penalties

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<sup>13</sup> The Texas Commission clarified the "tail test" to be used for PM 5. A copy of Order 47 is attached hereto.

resulting from the modification of the K-Table, but would not yet pay any CLEC such penalty payments, pending resolution of the appeal.

12. The changes reflected in Version 3.0 that have been ordered by the Texas Commission are critical to ensuring that the plan and the performance measures function in the manner initially contemplated by the parties. They also provide the requisite incentive for SBC to provide compliant performance to CLECs. For example, the changes adopted by the Texas Commission to the K value are critical to the proper operation of the plan and are a necessary incentive to achieve the level of performance contemplated by regulators.

13. As AT&T explained to the Texas Commission, the K value should be eliminated or substantially circumscribed and restricted to the situations for which it was intended because experience has shown that the K value operates to excuse both chronic violations of the same measurement (if it has not yet been added to the list in section 8.3) and extreme departures from a performance standard.<sup>14</sup> When a performance violation is repeated, the explanation is not random variation in the data. When a performance violation is extreme, the high K-value shows that the probability that random variation caused the result (as opposed to a true difference in SBC's performance for CLECs and its retail operations) is miniscule. In addition, it became apparent that the plan in its present form frequently results in SBC paying damages for performance measures with a total transaction volume of fewer than 10, while the terms for applying the K value permit SBC to excuse large damage payments for parity and benchmark violations of high-volume measurements. This anomaly should be eliminated.

14. Further, the way the K value has been applied under the plan frequently has resulted in relatively severe violations being excused, while small damages payments have been

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<sup>14</sup> AT&T Recommendation for the Performance Measurements Review, dated June 15, 2002, pp. 7-12; AT&T Post Workshop Comments on the 2002 Performance Measurements Review, dated September 10, 2002, pp. 13-22.



required for relatively minor departures for parity or benchmark standards. Such results have occurred because the K value is not applied to excuse first those violations that would result in smaller payments. Rather, it is applied to excuse first those violations associated with measurements with a lower total count of measured transactions.

15. Experience has shown that these features of the remedy plan - in particular, the K value and the rules surrounding its application - rob the plan of much of the deterrent effect that was anticipated by regulators when the "X2A" agreements were approved. The K table authorizes SBC to excuse violations for between 6 and 8 per cent of the total Tier 1 measurements that SBC reports to a CLEC each month. For example, if SBC reports 100 measurements to a CLEC, the K table permits SBC to excuse 8 violations.<sup>15</sup> However, to calculate K, the plan requires SBC to count only measurements for which the volume of reported CLEC transactions (sample size) is 10 or greater.<sup>16</sup> Then, when SBC applies K to excuse violations, it is permitted under the plan to ignore these small sample size measurements (which require SBC to pay typically only tens or hundreds of dollars). SBC instead applies K only to excuse violations with a sample size greater than 10, starting with the "Low" measurement with the smallest number of data points greater than 10.<sup>17</sup> In short, measurements with a sample size smaller than 10 are not affected by the K value under the terms of the plan. Instead, K serves to protect SBC from higher-dollar sanction on between 6 and 8% of the measurements it reports each month with transaction volumes greater than 10.

16. To eliminate such anomalies, AT&T advocated to the Texas Commission that the plan should be modified so that K is applied to excuse the least severe violations first, judged by

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<sup>15</sup> See M2A, Attachment 17, § 9.3.

<sup>16</sup> See M2A, Attachment 17, § 8.1.

<sup>17</sup> *Id.* at § 11.1.1.

the size of the damages payment required for the violation under the plan.<sup>18</sup> The formulas under the plan are far from perfect, but they are the formulas that are in place for assessing the relative severity of a violation. The greater the violation, the greater the Tier 1 damages payment. Therefore, when applying K, SBC should rank the violations in order of their potential Tier 1 damages payments, without regard to the number of underlying transactions and without regard to whether the measurement is classified as high, medium or low (severe violations of a “low” measurement can be more damaging than minor violations of a “high” measurement). If K is 10 for a CLEC in a given month, SBC should excuse the 10 violations that would have resulted in the smallest Tier 1 payments and pay on the remainder.

17. With respect to the K-table, the Texas Commission concluded that the K-table contained in the remedy plan should be retained, but the Texas Commission found that the K-exclusion was not appropriate for PMs that are missed for two consecutive months. Missing a measure for two consecutive months would not be considered random, thus excluding such measures from payment by attributing those misses to chance is not appropriate. Accordingly, the Texas Commission found that:

the Remedy Plan be modified so that if any performance measurement designated a Tier-1 is missed for two consecutive months, SWBT shall not exclude that PM from Tier-1 payment under the K-table, beginning with the second month of the miss. Additionally, SWBT shall not use the “missed” measures in determining the K-value. However, if SWBT provides parity or compliant performance for two subsequent consecutive months, the K-exclusion will resume. This method of self enforcement provides an incentive to SWBT to provide improved and compliant performance.<sup>19</sup>

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<sup>18</sup> AT&T Recommendation for the Performance Measurements Review, dated June 15, 2002, pp. 7-12; AT&T Post Workshop Comments on the 2002 Performance Measurements Review, dated September 10, 2002, pp. 13-22.

<sup>19</sup> Staff’s November 22, 2002 Report, Appendix 2, p. 163

18. The Texas Commission also noted concern with the selection of PMs that are excludable under the K table based on the PMs weight, i.e., high, medium or low, rather than the potential damage calculation. Accordingly, the Texas Commission found that:

the remedy plan be modified by changing the ranking system for K-exclusion purposes to dollar amounts, thereby the potential liability will take into account the severity, the volume and the level of per unit penalty classification of the PM.<sup>20</sup>

19. Finally, the Texas Commission concluded that “PMs that have less than 10 transactions not be included in determining the K value.” As a result, SBC will have to make damage payments for any substandard performance delivered under a PM that has less than or equal to ten (10) transactions.<sup>21</sup>

20. In the Order Directing Filing in this matter, parties were requested to file comments on the status of similar updates in other SBC states besides Texas. Kansas has already adopted the agreed-to and disputed and resolved changes that were ordered by the Texas Commission to Version 1.7 resulting in Version 2.0. In fact, the Kansas Commission has adopted a process through which modifications are to be filed by SBC within ten days of the date they are implemented in Texas. The modifications will be effective 15 days after the date they are filed unless the Commission issues an Order staying the effective date. A party must file a motion to stay the effective date within three days of the date the modifications are filed.<sup>22</sup>

21. SBC sought clarification of this Order, seeking guidance as to when modifications to the Plan adopted through the Six-Month Review process are to be filed in Kansas. On December 12, 2002, the Kansas Commission ordered that modifications to the Plan are to be filed in Kansas ten days after the “effective date” of the modifications in Texas.<sup>23</sup>

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<sup>20</sup> *Id.*, pp. 164-65.

<sup>21</sup> *Id.*, p. 165.

<sup>22</sup> Docket No. 01-SWBT-999-MIS, *June 27 Order*, Page 5, ¶ 12

<sup>23</sup> Docket No. 01-SWBT-999-MIS, *December 12 Order*, Pages 2-3, ¶ 4.

22. Pursuant to these orders, on March 17, 2003, SBC filed in Kansas an application for approval of the modifications approved by the Texas PUC in Orders 45 and 47. SBC stated that its application was filed pursuant to the orders issued by the Kansas Commission, and that the filing did not waive SBC's right to request a stay or appeal the decision adopting the modifications.

23. On March 20, 2003, SBC filed a Motion for Stay of and Objection to Implementation of Changes to Attachment 17; Performance Remedy Plan of the Kansas Section 271 Interconnection Agreements with the Kansas Commission. In that filing, SBC only objected to the implementation of the K-Table modifications ordered by the Texas Commission.

24. Thereafter, pursuant to the Kansas Commission's order of April 1, 2003, SBC filed a Status Report to address specific questions regarding the status of the proceedings in Texas. The Kansas Commission has not yet acted on SBC's Motion for Stay.

25. Arkansas has ordered the adoption of whatever is ordered by Texas, but afforded SWBT the right to object to anything that is ported in from Texas. On or about March 26, 2003 SBC filed Version 3.0 in Arkansas.

26. Oklahoma accepted SBC's initial update of Version 1.7 to Attachment 17 in the same form it was filed in Missouri. The Joint Reporters are not aware of any other action on performance measures or the PRP in Oklahoma.

### **DISCUSSION**

27. This Commission should move expeditiously to direct SBC to incorporate all agreed-to changes into the M2A. SBC is currently operating under Version 3.0 in Texas, but has yet to even put into operation Version 2.0 in Missouri, even though there are no remaining disputes over that Version. SBC should be required to synch the Missouri PRP with the Texas

Plan. SBC should, at a minimum be required to modify Version 1.7 to implement the changes that have been agreed to since Version 1.7 was implemented. SBC should also be required to implement the changes ordered by Order 39 of the Texas Commission to the extent those ordered changes are not superceded by Orders 45 and 46.

28. In addition, the Joint Reporters support Staff's recommendation to follow the decisions made by the Texas Commission in Orders Nos. 45 and 46 for updating the performance measures contained in the M2A. SBC should be required to file in Missouri Version 3.0 of the Performance Remedy Plan. The results of the six-month performance review process conducted in Texas should be adopted on a uniform basis throughout the SBC region.

29. This Commission has jurisdiction to require SBC to make the changes required by the Texas Commission. The terms of the M2A establish a process for the review and modification of performance measures and the PRP.<sup>24</sup> Indeed, SBC has used the six-month review process to propose changes to the PRP. (SBC proposed changes to Section 11.1.2.1 and 12.1.2 in the first six-month review process.)

30. SBC asserts that the next-to-last sentence of Section 6.4 of Attachment 17, by referring to arbitration of unresolved issues, allows SBC to reject any decisions made by the Texas Commission in the six-month review and require a separate Missouri (and other states as well) arbitration of those issues.

31. The Joint Reporters have always understood that the six-month review process itself, with opportunities to develop the issues before Commission Staffs from multiple states, have those Staffs make recommendations on the issues on which the parties could not agree and present them to the Texas Commission for review and resolution, and have that Commission issue an Order containing the requisite changes to the performance measures and the remedy

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<sup>24</sup> See Section 6.4 of Attachment 17 of the M2A.

plan, constituted the "arbitration" referenced in section 6.4. Without such an understanding of the six-month review process, there is little incentive for any CLEC to expend increasingly scarce resources engaging in a process that does nothing more than develop a Commission "proposal" for SBC's discretionary consideration, with CLECs required to separately arbitrate in multiple other states any issues where SBC declines to accept the involved Commission's recommendation. SBC's contrary interpretation – under which the Order at the conclusion of a six-month review is merely a device for commencing further arbitration proceedings in other states – would so protract the process of changing SBC performance measures as to render the six-month review useless except as a means for making changes that happen to be agreeable to SBC.

32. SBC had a full and fair opportunity to present its position and contest the modifications proposed by the CLECs at the six-month review process. SBC presented pre-workshop comments supporting its position. At the six-month review workshop held in August 2002, SBC was permitted free reign to present evidence on the remedy plan issues. SBC presented expert witness and questioned the evidence presented by other parties' witnesses. SBC submitted a post workshop brief addressing the remedy plan issues. In addition, SBC objected to a formal hearing proposed by AT&T to be conducted at the conclusion of the workshop. As the Texas Commission stated in Order 47, in rendering its decision in Order 45, the Commission considered the testimony at the workshops and the written pleadings filed prior to and after its workshops in making its findings on the outstanding disputed issues.<sup>25</sup> In short, SBC has had the "arbitration" contemplated in Section 6.4.

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<sup>25</sup> Texas PUC Order 47, p. 1.

33. Section 6.4 refers to an "arbitration" in the singular. It does not refer to multiple arbitrations. It does not require a specific state commission to conduct the arbitration. It does not preclude a consolidated, multi-state proceeding.

34. SBC's interpretation would reduce the six-month review process (or any other matter addressed in Texas Project No. 20400 or similar collaborative process) to nothing more than a supervised negotiation, to be followed by separate arbitration proceedings in multiple states on disputed issues. If SBC were free to compel a separate arbitration proceeding in each state before complying with provisions of orders like Orders 45 and 46, SBC's incentive to reach agreement on any point of concern to CLECs would be virtually eliminated. At the same time, a CLEC who may have identified a serious flaw in the performance measures or SBC's implementation thereof will have to add the expense of a separate arbitration in each state in which it operates to the already considerable effort required to participate in the collaborative process, if it is to have any serious prospects for bringing about a change that SBC is likely to dispute.

35. Uniformity of performance measures was SBC's goal throughout the entire M2A approval process<sup>26</sup>. The Joint Reporters have agreed with SBC regarding the need for uniformity among the performance measures across what once was the SWBT operating region. All the results of the Texas six-month performance review process should be included in the agreements in other states such as Missouri, not just those that are agreeable to SBC.

36. In concluding that the public interest would be met by grant of SBC's Texas 271 application, the FCC relied on its finding that the performance remedy plan in the T2A "provides additional assurance that the local market will remain open after SWBT receives section 271 authorization." *SBC Texas Order* ¶¶ 417, 420. In reaching that conclusion, the FCC rejected

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<sup>26</sup> Transcript of Prehearing Conference, August 1, 2002, Volume 19, pg. 3436.

CLEC objections to the scope and meaningfulness of SBC's performance measures, finding that "the plan is not static." *Id.* at ¶ 425. The FCC cited this Commission's report that "a six month review process is in place to assure that the plan is not static in nature. The Texas Commission, in conjunction with SWBT and the competitive LECs, will engage in comprehensive review of the performance measures to determine if commercial experience indicates that changes are necessary." *Id.* at n. 1243. Regular, meaningful review of the measurements was important to the FCC's conclusions about the Texas remedy plan: "[t]his continuing ability of the measurements to evolve is an important feature because it allows the Plan to reflect changes in the telecommunications industry and in the Texas market." *Id.* at ¶ 425.

37. In seeking FCC approval of SBC's 271 Application for Missouri, both SBC and the Missouri Public Service Commission relied heavily upon the six-month performance reviews conducted by the Texas PUC. For example, the Missouri Public Service Commission explained that the Missouri PSC Staff "has regularly participated in the six-month performance measurement review process held by the Public Utility Commission of Texas."<sup>27</sup> In addition, in addressing performance related issues raised during this proceeding, SBC previously argued herein, "that the performance measure issues were more appropriately addressed in the six-month review process as set out in the Performance Remedy Plan, thus allowing the collaborative process to work."<sup>28</sup> In response, the Missouri Commission accepted SBC's view and directed its Staff to participate in the six-month performance reviews held by the Texas PUC. If SBC's view of the six-month review process is allowed to prevail, then SBC will have the discretion to forestall any evolution of the performance measurements that is not to its liking,

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<sup>27</sup> CC Docket No. 01-194 - In the Matter of Application of SBC Communications, Inc. Pursuant to Section 271 of the Telecommunications Act of 1996 To Provide In-Region, InterLATA Services in Arkansas and Missouri, Written Consultation Of The Missouri Public Service Commission, September 10, 2001, pg. 25

<sup>28</sup> Order Denying Motions To Reconsider Recommendation And Opening Case For Monitoring Purposes, September 4, 2001, pgs. 4 and 5.



unless and until that change is established through the effort and expense of a separate arbitration in Missouri and each of the other states, outside of the six-month review process itself.

38. If the Commission allows SBC's view to prevail, establishing and enforcing performance measurements in a time frame that is competitively relevant to fast-changing technology -- which has been difficult enough to date -- will become an impossibility because whenever the issue is significant, SBC could force separate arbitration proceedings in multiple states. Accordingly, the Commission should adopt Staff's recommendation to adopt the decisions made by the Public Utility Commission of Texas in Orders Nos. 45 and 46 for updating the performance measures contained in the M2A. The Commission should also reject SBC's assertion of the right to selectively disregard features of an order resolving a six-month review proceeding. In so doing, the Commission should make clear that the results of the six-month review process are binding on SBC and other parties to interconnection agreements that include Attachment 17 of the M2A, without the need for a separate arbitration in Missouri or other further proceedings.

39. This Commission's decision (and the parallel decisions in other SBC states) will determine whether the periodic review of SBC's measurements -- a key feature of the M2A and its counterparts -- can serve its intended function. SBC's attempt to include only those changes that are acceptable to SBC treats the six-month review as an exercise that produces nothing more than non-binding recommendations from the Texas Commission, which SBC is free to accept or reject (or, at best, to take to "arbitration" after the six-month review has concluded). However, section 6.4 of Attachment 17 expressly recognizes that the PMs are subject to addition, deletion, or modification at the six-month review. In other words, the six-month review, and the possibility that a commission (Texas or otherwise) or other arbitrator will impose changes in the

event of disagreement, is a feature of the contract to which SBC has assented, and under which SBC received 271 relief.

40. Because the Commission approved the M2A in connection with its review of SBC's request for 271 relief, there is an indisputable connection between the ongoing sufficiency of the M2A and SBC's ongoing compliance with its obligations under Section 271. Both the FCC and this Commission have expressly acknowledged their responsibility to guard against any backsliding by SBC after obtaining 271 relief. There is no room for doubt that if this Commission determines that SBC is refusing to make necessary changes to the M2A, particularly in the area of performance assurances, the Commission can present such concerns to the FCC under Section 271(d)(6) for action up to and including revocation of 271 authority.

41. But the Commission can do much more than complain to the FCC about deficiencies in SBC's performance under the M2A. Section 252(f) specifically permits state commissions to establish or enforce other requirements of state law in its review of model agreements like the M2A, including requiring compliance with intrastate telecommunications service quality standard or requirements. In addition, courts have determined that state commissions have the authority to require performance standards and penalties as part of the Section 252 interconnection review process. *See, MCI Telecommunications, Inc. v. BellSouth Telecommunications, Inc.*, 298 F.3d 1269, 1274 (11<sup>th</sup> Cir. 2002); *US West Communications, Inc. v. Hix*, 57 F.Supp.2d 1112, 1121-22 (D.Colo.1999). The Eighth Circuit has made clear that state commissions have the authority to enforce provisions of interconnection agreements, pursuant to its plenary authority to accept or reject these agreements under Section 252. *Iowa Utilities Board v. FCC*, 120 F.3d 753, 804 (8<sup>th</sup> Cir. 1997). Such authority extends to all interconnection agreements approved by state commissions under Section 252 of the Act, including negotiated

and arbitrated agreements, and model interconnection agreements that are approved by the state commissions under Section 252 (f) of the Act.

42. Further, Section 261 of the Act provides, that:

Nothing in this part precludes a State from imposing requirements on a telecommunications carrier for intrastate services that are necessary to further competition in the provision of telephone exchange service or exchange access, as long as the States' requirements are not inconsistent with this part or the Commission's regulations to implement this part.

Section 261 clearly authorizes the state commission to take whatever action it deems necessary to further competition, so long as it is not inconsistent with the Act or the FCC's regulations. Nothing in the Act or FCC regulations prohibits the Commission from imposing a performance plan or penalties or modifying a previously approved plan or penalties. In fact, as discussed above, the FCC has concluded that performance remedy plans provide "additional assurance that the local market will remain open after SWBT receives section 271 authorization." *SBC Texas Order* ¶¶ 417, 420.

43. Experience has shown that SBC's remedy plan, incorporated in Attachment 17 of SBC's "271 Agreements," has proven in practice to excuse SBC from any sanction for an excessive number of performance failures, including recurring and severe failures that cannot be attributed to chance. The Texas Commission has cured these problems. The Missouri Commission should put the CLECs on the same footing they are in Texas and order SBC to implement the revisions to the K Table and the other changes to the PRP and the PMs that were ordered by the Texas Commission.

44. There is no factual dispute before the Commission. The parties agree that the Texas Commission has required SBC to implement Version 3.0 pursuant to the six-month review process. This Commission should review the legal dispute presented by the parties and rule that the proceedings before the Texas Commission satisfy the requests of Section 6.4 of Attachment

17 to the M2A for an arbitration to resolve any disputes over such changes to the performance measures. Accordingly, this Commission should also require SBC to implement Version 3.0 in Missouri. The Commission should prohibit SBC from making any unilateral changes, including to the “series 13” disposition codes in Appendix 2 to the business rules pending further action on that issue in Texas. To the extent SBC has concerns about changes regarding the K-Table, it can seek a stay and related trueup measures as it has done in Texas and Kansas.

45. The Commission should also establish requirements for SBC to timely submit future changes arising from the six-month review process.

WHEREFORE, the Joint Reporters respectfully request that the Commission consider this report and require SBC to file a new version of the Performance Remedy Plan that incorporates all revisions that have been agreed to in the six-month review workshops. In addition, the Joint Reporters urge the Commission to adopt the recommendation made by Staff in its November 22, 2002 Report to adopt the decisions made by the Public Utility Commission of Texas in Orders Nos. 45 and 46 for updating the performance measures contained in the M2A and to update the Performance Remedy Plan in accordance with Order 45 by submitting Version 3.0, without the contested series 13 disposition codes in Appendix 2 to the business rules or any other unilateral changes. The Commission should also establish requirements for SBC to timely submit future changes arising from the six-month review process, and grant such other relief as the Commission deems proper.

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**CERTIFICATE OF SERVICE**

A true and correct copy of the foregoin was mailed this \_\_\_\_\_ day of \_\_\_\_\_, 2003, by U.S. Mail, postage paid, to the persons listed on the attached service list :

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**PROJECT NO. 20400**

<b>SECTION 271 COMPLIANCE</b>	<b>§</b>	<b>PUBLIC UTILITY COMMISSION</b>
<b>MONITORING OF SOUTHWESTERN</b>	<b>§</b>	<b>OF TEXAS</b>
<b>BELL TELEPHONE COMPANY OF</b>	<b>§</b>	
<b>TEXAS</b>	<b>§</b>	

2002-5-5 PM 2:00  
PUBLIC UTILITY COMMISSION  
FILING CLERK

**ORDER NO. 47**  
**RULING ON MOTIONS FOR RECONSIDERATION OF ORDER NO. 45**

On October 17, 2002, the Public Utility Commission of Texas (the Commission) issued Order No. 45 in this proceeding. On October 30, 2002, IP Communications, Inc. (IP) filed a Motion for Rehearing of Order No. 45, and on November 1, 2002, Southwestern Bell Telephone Company (SWBT) filed a Motion for Reconsideration of Order No. 45. Interested persons filed responses to the motions on November 8, 2002 and on November 14, 2002, SWBT replied to the responses. At the Open Meeting on November 21, 2002, the Commission took up the Motions and extended the time for ruling until January 16, 2003. Thereafter, at the December 19, 2002 Open Meeting the Commissioners considered the motions. This Order memorializes the Commission's decisions and rules on all aspects of the motions.

**I. BACKGROUND**

Order No. 45 contains the Commission's decisions relative to its Third Six-Month Review of SWBT's performance measurements and Performance Remedy Plan as contained in Attachment 17 to the Texas 271 Agreement (T2A). Commission Staff conducted workshops on August 12-14, 2002 and following the conclusion of the workshops, on August 30, 2002, the parties jointly filed a matrix identifying all changes to Attachment 17 that were agreed to by the parties as well as all changes to Attachment 17 that were disputed by one or more parties and the parties' respective positions. At the October 10, 2002 Open Meeting the Commission considered the testimony provided at the workshops as well as the written pleadings filed prior to and after the workshops and made its findings on the outstanding disputed issues. These findings were memorialized in Order No. 45.

## II. MOTIONS

### A. IP's Motion

In its Motion for Rehearing, IP requested that the Commission reconsider Order No. 45 as to its rulings on PM 2 and line sharing/line splitting PMs.<sup>1</sup>

### B. SWBT's Motion

In its Motion SWBT raised several issues surrounding the decisions made by the Commission in Order No. 45 relative to the K Table; the disaggregation for Enhanced Extended Loops (EELs); the benchmark for Electronic-Electronic FOCs (PM 5); the disaggregation of LEX and EDI performance (PM 13); the benchmark for coordinated hot cuts (PM 115.2); and disaggregation for line splitting LSRs.<sup>2</sup>

## III. DISCUSSION

### A. IP's Motion

IP requested that the Commission reconsider its rulings as to two specific issues. With regard to PM 2, IP argued that SWBT failed to provide data to support its recommendation, and the Commission's decision, to allow SWBT more time to respond to request for loop make-up data for requests greater than 5 loops. IP argued that there should be no segmentation of queries, and that all queries should be subject to the "95% within 30 seconds" benchmark. With regard to the line sharing/line splitting PMs (PM 55.1 et seq.), IP argued that the Commission should have required parity for the PMs rather than setting benchmarks.

After considering the arguments presented by IP, the Commission denies IP's motion. The Commission has determined that IP failed to present any arguments that were not considered by the Commission prior to the issuance of Order No. 45. The Commission finds that the record

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<sup>1</sup> Motion for Rehearing relating to the Six Month Review of Southwestern Bell Telephone Company's ("SWBT's") Performance Measurements at 3-8 (Oct. 30, 2002).

<sup>2</sup> Southwestern Bell Telephone, L.P. D/B/A Southwestern Bell Telephone Company Motion for Reconsideration and Clarification of Order No. 45 at 2-13 (Nov. 1, 2002).

evidence is sufficient to support its decisions in Order No. 45 relative to both PM 2 and the line sharing/line splitting PMs.<sup>3</sup>

## **B. SWBT's Motion**

The Commission has considered the arguments presented by SWBT in its motion and determines that SWBT's motion is granted in part and denied in part as discussed below.

### **1. K Table**

With regard to SWBT's arguments surrounding the Commission's decisions relating to the K Table, the Commission finds that the application of the K Table was intended to address issues related to random variation. The removal of the K value application from measures that are missed for two consecutive months is appropriate, because missing the same measure for two consecutive months cannot be attributed to random variation. Additionally, the Commission's decision on ranking PMs for the purpose of K-exclusion is well-balanced in that it appropriately accounts for severity, volume of transaction and the relative importance of the measure, not just the per unit penalty amount level. Therefore, SWBT's Motion as to the K Table modifications is denied.

### **2. EEL Disaggregation**

With regard to the EEL disaggregation, the Commission reiterates that it is critical for facilities-based providers to have the EEL in providing service to its end user customers. Thus, it is imperative that appropriate performance measurements capture the activities related to different components of the EEL.

SWBT's Motion as to the required EEL disaggregation is denied. The Commission clarifies that by virtue of its ruling in Order No. 45 to include disaggregations for EELs containing transport DS0 and OCx, the Commission was not making a finding as to the inclusion or exclusion of these elements in the T2A or any other interconnection agreement to which Attachment 17 is a part. Rather, the Commission finds in this proceeding that to the extent such

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<sup>3</sup> Order No. 45 at 8-9, 85-86.

EELs are provisioned, the relevant data must be collected and reported with the appropriate performance measurements.

### **3. PM 5**

SWBT sought reconsideration of PM 5, specifically, the Commission's decision relating to the benchmark applicable to the remaining 5% of electronically submitted and electronically processed LSRs, or the "tail test". In Order No. 45, the Commission stated, "[T]he Commission adopts a 95% within 45 minutes benchmark for Electronic – Electronic, with the tail test applicable...." In its Motion, SWBT requested reconsideration so that the Commission would clarify the tail test.

The Commission finds that to be consistent with its earlier ruling the tail test should be 5% at an average of 72 minutes. Therefore, the PM 5 benchmark applicable to electronically submitted and electronically processed LSRs is as follows: "95% in 45 minutes and the remaining 5% at an average of 72 minutes."

### **4. PM 13**

SWBT requested reconsideration of the Commission's finding that SWBT continue to disaggregate LEX and EDI for the purposes of Tier-2 payment calculations. The Commission finds that maintenance of both LEX and EDI are critical for competition in state of Texas, and thus Tier-2 level penalty for each is appropriate. Therefore, the Commission denies SWBT's Motion as to this issue.

### **5. PM 115.2**

SWBT requested that the Commission reconsider its decision as to the benchmark in PM 115.2 for coordinated conversions. The Commission set the benchmark at 2%. The Commission finds that SWBT's historical performance data supports the 2% benchmark. Benchmarks are set based on the best information available at that time and should be adjusted accordingly. Additionally, PM 115.2 is one of increasing importance as facilities-based competition becomes more prevalent, therefore, the Commission denies SWBT's Motion as to PM 115.2.

## 6. Line Splitting

SWBT requested that the Commission reconsider its decision to require SWBT to provide a disaggregation for line splitting. The Commission's order required SWBT to add that disaggregation to PMs 55.1, 56, 58, 59, 60, 62, 65, 65.1, 67 and 69. SWBT argued that it does not provide "line splitting" and thus has no methods available to measure the process.

The Commission finds that it is critical to have this disaggregation for CLECs that engage in line splitting for providing DSL services. SWBT did not provide sufficient evidence to show that the line splitting process cannot be measured. Consistent with Order No. 45, the Commission notes that SWBT has agreed to a one-LSR process for the ordering of line splitting, therefore, it is incumbent upon SWBT to develop a method for tracking those LSRs. It is important for the Commission and CLECs to have data to evaluate in determining whether the CLECs are provided a meaningful opportunity to compete in the DSL market. Therefore, SWBT's Motion as to this issue is denied.

## IV. ORDERING PARAGRAPHS

1. Consistent with the discussion set forth herein, the Commission denies IP's Motion for Rehearing of Order No. 45.

2. SWBT's Motion for Reconsideration of Order No. 45 is granted as to PM 5. The benchmark for electronically submitted, electronically processed LSRs is as follows: "95% in 45 minutes and the remaining 5% at an average of 72 minutes."

3. SWBT's Motion for Reconsideration of Order No. 45 is denied as to the issues relating to the K Table; the disaggregation for Enhanced Extended Loops (EELs); the disaggregation of LEX and EDI performance (PM 13); the benchmark for coordinated hot cuts (PM 115.2); and disaggregation for line splitting LSRs.

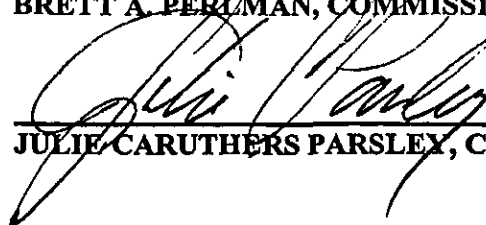
4. All other relief not expressly granted herein is denied.

SIGNED AT AUSTIN, TEXAS the 5th day of March, 2003.

PUBLIC UTILITY COMMISSION OF TEXAS

  
REBECCA KLEIN, CHAIRMAN

  
BRETT A. PERLMAN, COMMISSIONER

  
JULIE CARUTHERS PARSLEY, COMMISSIONER