BEFORE THE 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 Provide In-Region InterLATA Service Originating in Missouri Pursuant to Section 271 Of the Telecommunications Act of 1996.	))))))	Case No. TO-99-227

MEMORANDUM

COME NOW AT&T Communications of the Southwest, Inc., NuVox Communications of Missouri, Inc., XO Missouri, Inc., MCI WorldCom Communications, Inc., and MCI WorldCom Network Services, Inc. and herewith file their Amended Proposed Order in connection with the above-styled proceeding.

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CERTIFICATE OF SERVICE

A true and correct copy of the foregoin was mailed this 4th day of June, 2003, by U.S. Mail, postage paid, to the persons listed on the attached service list :

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ORDER REGARDING MOTION TO UPDATE ATTACHMENT 17

Syllabus: This order resolves pending disputes regarding updates to Attachment 17 of the M2A by directing SBC Missouri to submit an amendment to Attachment 17 that incorporates Version 3.0 (including prior changes which resulted in Version 2.0) of the performance remedy plan, performance measures and business rules in accordance with the six-month review process that has been conducted under the supervision of the Texas Public Utility Commission.

FINDINGS OF FACT

As demonstrated by the following summary of these proceedings and the parties' pleadings, there are no material facts in dispute regarding the need to update Attachment 17 to the M2A.

On March 15, 2001 the Commission herein issued its Order Regarding Recommendation on 271 Application Pursuant to the Telecommunications Act of 1996 and Approving the Missouri Interconnection Agreement (M2A). The M2A is a model interconnection agreement with SBC Missouri (formerly SWBT). The Commission concluded at page 17 in its Order that "CLECs may file with this Commission any

interconnection agreement that is substantively identical to the M2A and the interconnection agreement will be considered approved when filed."

In approving the M2A as a model agreement, the Commission found at page 12 that "SWBT has also made changes to the M2A to incorporate the latest performance measures and business rules as adopted in the state of Texas." Specifically, the Commission found at page 13 that "the revised set of performance measures is known as Version 1.7 of the business rules." The Commission also stated at page 13 as follows: "Notably, Version 1.7 also serves as the basis for the performance remedy plans that the Oklahoma Corporation Commission (OCC) and the Kansas Corporation Commission (KCC) have approved."

The Commission concluded at page 16 of its Order that "Version 1.7 of SWBT's performance remedy plan represents the latest and most accurate set of performance measurements developed." Accordingly, the Commission concluded at page 16 that "Version 1.7 should be implemented as part of the M2A."

At page 70 the Commission stated: "This Commission has adopted all changes to the performance measurements that were ordered by the Texas Commission in its recently completed six-month review process. See, SWBT's Dysart Reply Aff. PP 11-18. This is significant, because adoption of these changes ensures that the Missouri market will benefit from the evolving nature of SWBT's performance plan, which the FCC specifically identified as 'an important feature.' Texas Order P 425."

On September 4, 2001 this Commission re-opened this case for the express purpose of monitoring SBC's "continued performance". The Commission directed Staff to file periodic reports, including regarding recommended changes in performance

measures. See Order Denying Motions to Reconsider Recommendation and Opening Case for Monitoring Purposes.

On November 16, 2001, based on the recommendation of this Commission, the FCC granted SBC authority to provide in-region interLATA services in Missouri pursuant to Section 271 of the Telecommunications Act of 1996. (CC Docket No. 01-194).

In its Memorandum Opinion and Order, the FCC repeatedly emphasized the importance of the performance plan. P 26, 36. The FCC expressly encouraged this Commission to monitor SBC's performance. P 127. The FCC stated that it "recognize[s] the efficiency gained by all involved state commissions, SWBT and competing carriers from working together to develop and monitor common performance measures and similar remedy plans." P 128. The FCC acknowledged that modifications to the plan were under review by the Texas Commission. P 134. Further, the FCC stated: "If, in the future, market opening conditions have not been maintained, we maintain our ability to address backsliding under section 271(d)(6)." Id.

The FCC had previously also stressed the importance of an evolving performance plan in its June 30, 2000 decision granting SBC 271 authority in Texas. P. 417, 420, 425. (CC Docket No. 00-65).

According to Staff's April 7, 2003 report, through January 2003 SBC had issued CLECs an aggregate of $2,452,402 in Tier I credits and paid into the Missouri State Treasury an aggregate of $1,341,256 in Tier II payments under the plan. According to Staff's May 23, 2003 report, through March 2003 SBC has paid an aggregate of $4,171,302 in credits and payments.

On March 18, 2002 SBC filed its Motion to Update Attachment 17 of the Missouri 271 Interconnection Agreement (M2A). Therein, SBC quoted the provisions of Section 6.4 of Attachment 17 of the M2A, which describes a process for six-month reviews of the performance measures and remedy plan, and changes thereto by agreement or arbitration. SBC stated that various parties including Staff (and staff from Texas, Arkansas, Kansas, and Oklahoma also participated) had participated in the second six-month review in Texas in April 2001, resulting in approval of Version 2.0 of the business rules of the performance plan by the Texas PUC and the Arkansas PSC. SBC also noted that at the time that its motion was filed the staff of the Kansas Corporation Commission had recommended approval of Version 2.0.

In its Motion, SBC noted that the foregoing process resulted in some changes to which it did not agree, and accordingly had sought reconsideration by the Texas Commission. Because of its objections, SBC asked this Commission to approve an updated Appendix 3 to Attachment 17 to the M2A, substituting a modified form of Version 2.0 of the business rules for Version 1.7. SBC also sought approval of corresponding changes to the general provisions of Attachment 17 and Appendices 1 and 2 thereto.

Specifically, SBC objected to and did not include in its modified Version 2.0 the following: (1) new measurements that would assess its performance under interstate and intrastate tariffs for the provisioning of retail special access services; (2) implementation of performance measure 1.2 (PM 1.2) regarding loop makeup information; and (3) the level of penalties to apply upon restatement of date relating to PM 13 in all states.

In its Motion SBC asserted that upon approval, the modified M2A would be available for adoption by CLECs, would apply to payment of penalties to the State of Missouri, and could be incorporated into existing interconnection agreements.

On April 11, 2002 Staff filed its Response to SBC's Motion. Staff indicated that it did not object to the changes proposed by SBC. However, Staff informed the Commission that in its Order No. 33, the Texas PUC addressed the matter of monitoring SBC's provision of special access, stating: "to the extent a CLEC orders special access in lieu of UNEs, SWBT's performance shall be measured as another level of disaggregation in all UNE measures." Staff filed a copy of this order. Staff also informed the Commission in its response that the Texas PUC had adopted a joint proposal by SWBT and IP Communications regarding PM 1.2. Staff filed a copy of that agreement. Further, Staff advised that the Texas PUC had issued its Order No. 39 wherein it set aside the provisions of Order No. 33 regarding penalties under PM 13. Staff filed a copy of this order.

Staff also informed the Commission that the Arkansas PSC had ordered SBC to make changes to the Arkansas performance plan as such changes are made in Texas.

Staff recommended that the Commission incorporate the complete Version 2.0, including on the three points to which SBC objected, as in place in Texas.

AT&T Communications of the Southwest, Inc. also filed a response to SBC's Motion on April 11, 2002. AT&T informed the Commission that the Texas Commission had deferred consideration of remedies under PM 13 until completion of an independent audit, ordered implementation of PM 1.2 using specific criteria (and had approved the agreement regarding sampling methodology made by SBC and IP), and ordered

modifications to xDSL PMs. AT&T also informed the Commission that the Texas Commission had decided to take up the issue of special access performance measures in a separate proceeding.

AT&T opposed SBC's request to adopt less than all of the results from the six-month review process held in Texas into the M2A. AT&T asserted that all the results should be included. AT&T also argued that this Commission can issue an order requiring inclusion of all the results of six-month reviews into the M2A. AT&T pointed out that such a ruling was necessary to prevent the review process from breaking down. AT&T informed the Commission that the Staff of the KCC made a similar recommendation to its Commission.

IP and NuVox Communications of Missouri, Inc. also filed a response to SBC's Motion on April 11, 2002. Like AT&T, they argued that all the results of the Texas six-month review should be included in the M2A. If changes are stayed during an appeal in Texas, there should be a stay here as well. If a change is reversed on appeal in Texas, the result should be the same here as well. These parties also advised the Commission that IP and SWBT had resolved the dispute over sampling methodology under PM 1.2. They recommended that the M2A be amended to reflect the results of the six-month review, to enable CLECs to adopt the new Attachment 17.

On April 22, 2002 SBC filed its Reply to Staff, AT&T, IP and NuVox. SBC argued that changes to which it did not agree could only be incorporated after an arbitration. SBC also noted that the FCC had commenced a rulemaking regarding performance measures for the provisioning of special access services. SBC stated it was now agreeable to implementing the changes regarding PM 1.2 if the Commission

determines it is appropriate. SBC stated that the issues regarding PM 13 had been deferred in Texas. SBC stated that it opposes any form of automatic importation of changes from Texas, such as has been ordered in Arkansas.

On August 1, 2002 the Commission held a prehearing conference to discuss the pending issues and possible further procedural schedules. The following parties attended: SBC, NuVox, XO Missouri, MCI WorldCom Communications, MCI WorldCom Network Services, Inc., MCImetro Access Transmission Services, LLC, Brooks Fiber Communications of Missouri, Inc., AT&T, Staff, Public Counsel. These parties discussed the arguments raised in the pleadings on file.

After the prehearing conference, SBC submitted additional information on August 8, 2002. SBC stated that the Texas Commission had granted its request for reconsideration of Order No. 39 and deferred consideration of the xDSL performance measures mentioned by AT&T to a subsequent six-month review. SBC filed a copy of Texas Order No. 42.

AT&T replied to SBC, agreeing that the issue regarding xDSL PMs should be deferred.

NuVox, XO and the WorldCom (now MCI) companies also replied, reiterating their argument at the prehearing that the Commission retains full jurisdiction to require SBC to update the model M2A.

At this point, there were no remaining disputes regarding Version 2.0 and the parties were in agreement that Attachment 17 should be updated to incorporate Version 2.0 in accordance with the six-month review process in Texas.

On October 1, 2002, Staff filed a Report on the status of review of the performance plan in Texas. Staff reported that another six-month review had been held in August 2002 in Texas to consider changes to Version 2.0.

On the same day, Staff filed its Recommendation to Delay Decision on Changing Version 1.7 of the Performance Remedy Plan Business Rules Found in Attachment 17 of the Missouri 271 Agreement. Staff recommended that the Commission delay ruling on SBC's pending Motion to Update, in anticipation of further changes coming out of the latest six-month review.

On November 22, 2002 Staff 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. Staff advised the Commission that the Texas PUC had issued its Orders Nos. 45 and 46 approving changes to Version 2.0 and that SBC had filed documents in an effort to comply with those orders. Staff filed copies of the orders and SBC's filing. Staff indicated it was not aware of any reason these changes should not be applied in Missouri. Staff recommended that the Commission should consider adopting these changes after providing parties with notice and an opportunity to be heard.

On December 2, 2002 SBC responded to Staff's November report. SBC advised that the result of the changes in Texas is Version 3.0. SBC indicated that its compliance filing in Texas included changes to which it did not agree. SBC also advised that it had filed for reconsideration of Order No. 45, and attached a copy of that pleading. SBC indicated that it was seeking reconsideration in Texas of the following: (1) modifications to the "K Table"; (2) disaggregation of performance measurements relating to enhanced

extended loops; (3) retention of the "tails test" portion of the firm order commitment calculation for electronically submitted and processed LSR as part of PM 5; (4) retention of LEX/EDI disaggregations for PM 13 at the Tier 2 level; (5) reduction of the PM 115.2 benchmark from 5% to 2%; and (6) disaggregation for line splitting for PMs 55.1, 56, 58, 59, 60, 62, 65, 65.1, 67, and 69. SBC stated it opposed such changes in Missouri as well. SBC submitted with its response documents incorporating the revisions to which it has agreed regarding Versions 2.0 and 3.0. SBC requested that the Commission approve these changes.

On December 12, 2002 AT&T responded to Staff and SBC. AT&T advised that it had filed pleadings in opposition to SBC's request for reconsideration in Texas regarding Order No. 45. It attached a copy. AT&T also noted that it had identified a significant defect in SBC's purported compliance filing in Texas regarding some unilateral changes that SBC made to "series 13" disposition codes in Appendix 2 of the business rules, which violated directives of the Texas Commission in Order 45.[1] AT&T indicated it supports Staff's recommendation for this Commission to adopt the changes resulting from Orders Nos. 45 and 46 in Texas.

Also on December 12, 2002 the MCI companies replied to SBC. These companies supported Staff's proposal to incorporate the changes from Texas Orders Nos. 45 and 46 into the M2A and otherwise argued in support of bringing the model M2A current with respect to changes made to the performance plan during the six-month review process. They noted that SBC had committed to make the same performance

[1] Specifically, in its pleadings, AT&T identified that SBC had unilaterally added codes 1315, 1327, 1328, 1329, 1340, 1356, 1374, and 1375 to Appendix 2 of Version 3.0, contrary to the directives of the Texas PUC.

measures approved in Texas available in Missouri when seeking 271 relief. They argued that the Commission has continuing jurisdiction under Section 271(d)(6)(A) to determine whether the model M2A (and the recommendations made to the FCC in reliance thereon) remains appropriate, including regarding performance measures. They argued the Commission has jurisdiction to consider changes to existing agreements in conjunction with monitoring the status of the model. They noted that like AT&T they had opposed SBC's request for reconsideration in Texas, and provided a copy of their pleading. They argued that the proceedings in Texas fulfilled any requirement for an arbitration of these issues.

On December 23, 2002 SBC replied to AT&T and MCI. SBC reiterated its prior arguments that this Commission must hold an arbitration to resolve the disputes regarding changes to the M2A performance plan.

On January 9, 2003 Staff responded to SBC. Staff reiterated its prior arguments that the Commission is not limited to conducting an arbitration in order to direct changes to the M2A in connection with monitoring SBC's compliance with Section 271. Staff also pointed out there are various arbitration provisions in the M2A. Staff repeated its recommendation that the Commission consider adopting the changes resulting from Texas Orders Nos. 45 and 46.

On January 16, 2003 SBC replied to Staff. SBC argued that Staff's January 9, 2003 pleading was untimely. SBC otherwise reiterated its prior arguments and again sought approval of the modified Version 3.0 that it had filed on December 2, 2002.

On April 18, 2003 the Commission ordered the parties to file a status report regarding the effect of any changes in law which have occurred since SBC filed its

original motion to update Attachment 17 on March 18, 2002. The Commission indicated that the report should include the status of pending related matters in Texas, Arkansas, Kansas, and Oklahoma. The Commission also ordered the parties to file a proposed order resolving the issues in their favor. Finally, the Commission ordered the parties to appear for oral argument on May 28, 2003.

Various parties filed reports as directed on May 16, 2003. These reports reflect the following additional undisputed facts.

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.[2] The Texas Commission has not yet ruled on SBC's compliance filing or AT&T's objection thereto.

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

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[2] The Texas Commission clarified the "tail test" to be used for PM 5. A copy of Order No. 47 was filed.

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.[3]

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.[4]

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 that or equal to ten (10) transactions.[5]

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[3] Staff's November 22, 2002 Report, Appendix 2, p. 163
[4] *Id.*, pp. 164-65.
[5] *Id.*, p. 165.

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. The Kansas Commission has also 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.[6]

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.[7]

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.

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. Thereafter, pursuant to the Kansas Commission's order of April 1,

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[6] Docket No. 01-SWBT-999-MIS, *June* 27 *Order,* Page 5, ¶ 12

[7] Docket No. 01-SWBT-999-MIS, December *12 Order,* Pages 2-3, ¶ 4.

2003, SBC filed a Status Report to address specific questions regarding the status of the proceedings in Texas.

Arkansas has ordered the adoption of changes implemented in Texas, but has 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.

Oklahoma accepted SBC's initial update of Version 1.7 to Attachment 17 in the same form it was filed in Missouri.

In its May 16 report to this Commission, SBC indicated that it was now willing to incorporate all changes related to Version 3.0 except for the changes regarding the K-table. The CLECs filed a joint report, in which they indicated that SBC should be required to implement Version 3.0 including the changes to the K-table. But they also indicated that SBC could seek a stay regarding the changes to the K-table, as it has done in other states. The CLECs also indicated that SBC should not be allowed to implement unilateral changes to the "series 13" disposition codes pending further action on that issue in Texas. The CLECs requested the Commission to establish requirements for SBC to promptly submit future changes arising from the six-month review process.

Oral argument was held on in this case before the Commission on May 28, 2003. The parties by and large reiterated points made in their pleadings, as well as responded to questions from the Commission and RLJ. Staff and SBC indicated that there was a typographical error on Appendix 2, in the sentence that indicates that the Texas Commission shall resolve any dispute over disposition codes, stating that "Texas" should be changed to "Missouri". Staff advised the Commission that it joined in the CLECs

opposition to the unilateral changes SBC had made to the list of disposition codes included on Appendix 2.

CONCLUSIONS OF LAW

This Commission concludes it 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.

In addition, it is appropriate 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.

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. See Section 6.4 of Attachment 17 of the M2A.

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.

The six-month review process, 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 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.

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. 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.[8] In short, SBC has had the "arbitration" contemplated in Section 6.4.

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.

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.

Uniformity of performance measures was SBC's goal throughout the entire M2A approval process[9]. 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.

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

[8] Texas PUC Order 47, p. 1.

[9] Transcript of Prehearing Conference, August 1, 2002, Volume 19, pg. 3436.

"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 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.

In seeking FCC approval of SBC's 271 Application for Missouri, both SBC and this Commission relied heavily upon the six-month performance reviews conducted by the Texas PUC. For example, this 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.[10] 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

[10] 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

collaborative process to work."[11] In response, this 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, 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.

If the Commission were to allow 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 -- would become an impossibility because whenever the issue is significant, SBC could force separate arbitration proceedings in multiple states. Accordingly, the Commission concludes it 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 also concludes it should reject SBC's assertion of the right to selectively disregard features of an order resolving a six-month review proceeding. 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.

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

[11] Order Denying Motions To Reconsider Recommendation And Opening Case For Monitoring Purposes, September 4, 2001, pgs. 4 and 5.

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.

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.

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 (11th 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 (8th 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.

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.

This Commission concludes that it 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.

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 has reviewed the legal dispute presented by the parties and ruled that the proceedings before the Texas Commission satisfy the requirements of Section 6.4 of Attachment 17 to the M2A for an arbitration to resolve any disputes over such changes to the performance measures and remedy plan. Accordingly, this Commission has determined that it should also require SBC to implement Version 3.0 (including the prior changes that resulted in Version 2.0) in Missouri. The Commission further concludes that it 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 true-up measures as it has done in Texas and Kansas.

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

IT IS THEREFORE ORDERED:

1. That on or before _____ SBC Missouri shall file a new version of Attachment 17 that incorporates all revisions that have been agreed to in the six-month review workshops or have been directed to be made by the Texas Commission, including the changes described as Version 3.0 (including the Version 2.0 changes

incorporated therein). Specifically, SBC Missouri shall include in its filing the changes regarding the K-table including changes to Sections 8.3 and 11.1.1 of Attachment 17.

2. That SBC Missouri shall not include in such filing the contested changes to the "series 13" disposition codes in Appendix 2 to the business rules or any other unilateral changes. Specifically, SBC Missouri shall delete codes 1315, 1327, 1328, 1329, 1340, 1356, 1374, and 1375 from its filing.

3. Other parties may file any objection to SBC Missouri's filing within ten (10) days after the filing date.

4. SBC Missouri may respond to any such objections within five (5) days after the filing date. SBC Missouri may also seek a stay as to the changes to the K-table, if it so chooses, either with its filing or within ten (10) days thereafter. Other parties shall have ten (10) days to respond to any request for stay that may be filed and SBC Missouri may reply within five (5) days thereafter.

5. Within 10 days of the filing an update to Attachment 17 in Texas (or any other state that may take the lead on such process) as a result of the six-month review process, SBC Missouri shall file the same update for approval in Missouri.

6. That this order shall become effective on _____.

BY THE COMMISSION