Control Number: 24515

Item Number: 182

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PUC DOCKET NO. 24515

PETITION OF SOUTHWESTERN BELL TELEPHONE COMPANY FOR ARBITRATION REGARDING THE IMPLEMENTATION OF SPECIAL ACCESSS PERFORMANCE MEASURES	§ § § § §	**PUBLIC UTILITY COMMISSION OF TEXAS**

ARBITRATION AWARD

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PETITION OF SOUTHWESTERN BELL TELEPHONE COMPANY FOR ARBITRATION REGARDING THE IMPLEMENTATION OF SPECIAL ACCESSS PERFORMANCE MEASURES	**§ § § § §**	**PUBLIC UTILITY COMMISSION OF TEXAS**

ARBITRATION AWARD

Pursuant to this Arbitration Award (Award), the Arbitrators decline to impose performance measures upon tariffed special access services provided by Southwestern Bell Telephone, L.P. d/b/a SBC Texas (SBC Texas). The record demonstrates that WorldCom (WCOM) is using special access services, instead of unbundled network elements, in those instances where it cannot satisfy the Federal Communications Commission's (FCC's) local usage requirements. These local usage requirements are a prerequisite for obtaining certain unbundled network elements. Moreover, the Arbitrators decline to impose performance measures on tariffed special access services because SBC Texas's existing provisioning of special access services, including its self monitoring and reporting thereof, is not unsatisfactory.

I. JURISDICTION

If an incumbent local exchange carrier (ILEC) and competitive local exchange carrier (CLEC) cannot successfully negotiate rates, terms and conditions in an interconnection agreement, FTA § 252(b)(1) provides that either of the negotiating parties "may petition a State commission to arbitrate any open issues." The Public Utility Commission of Texas (Commission) is a state regulatory body responsible for arbitrating interconnection agreements approved pursuant to the FTA.

II. PROCEDURAL HISTORY

This proceeding has had a long and complex procedural history, with numerous extensions. On August 17, 2001 SBC Texas filed its petition for arbitration pursuant to

Paragraph 6.4, Attachment 17, of the Texas 271 Agreement (T2A), requesting a determination of the appropriateness of requiring Performance Measures (PMs) on the provisioning of Special Access services. In its pleading, SBC Texas explained that the parties had negotiated throughout the second six-month Performance Measurement Review, which began formally on April 4, 2001. Workshop negotiations ceased on June 1, 2001 with the issuance of the Commission's Order No. 33 in Project No. 20400,[1] which stated:

> The Commission finds that, to the extent a CLEC orders special access in lieu of UNEs, SWBT's performance shall be measured as another level of desegregation in all UNE measures. The Commission also finds it appropriate to conduct a workshop, consistent with the discussion at the May 24, 2001, Open Meeting, on the issue of special access and UNEs.

Prior to requesting arbitration, on July 2, 2001 SBC Texas filed a motion for rehearing and clarification of Order No. 33 in Project No. 20400. SBC Texas opposed being required to implement new measurements that would assess its performance under the interstate and intrastate tariffs for the provisioning of retail special access services, arguing that special access services are provided through tariffs, and are not, therefore, part of the T2A. Moreover, SBC Texas cited to Section 6.4, Attachment 17 of the Performance Remedy Plan, which states:

> Any changes to existing performance measures and this remedy plan shall be by mutual agreement of the parties and, if necessary, with respect to new measures and their appropriate classification, by arbitration.

Pursuant to this section, SBC Texas filed its request for arbitration in this proceeding, Docket No. 24515.

Various parties in Project No. 20400 filed responses to SBC Texas' motion for rehearing and clarification. However, as to the issues specifically raised in this request for arbitration, only Time Warner Telecommunications Corporation (TWTC) and WCOM proffered testimony in this

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[1] *Section 271 Compliance Monitoring of Southwestern Bell Telephone Company of Texas*, Project No. 20400.

case. They filed their joint response on July 6, 2001. On July 13, 2001, SBC Texas filed its reply to the parties' responses, including a response on the specific issue of a Special Access PM.

At its Open Meeting of September 19, 2001, the Commission considered the request for arbitration and the motion for rehearing and clarification. The Commission voted to reconsider Order No. 33 issued in Project No. 20400 and to allow the issue of special access to be developed as a separate arbitration in this proceeding.[2] Accordingly, the abatement issued in Order No. 1 was lifted and the proceeding in this docket was reinstated. A pre-hearing conference was scheduled for October 4, 2001.

At the pre-hearing conference, several parties asserted that there were significant questions regarding the appropriate scope of this proceeding, particularly whether the issue of special access was limited to "stand-alone" performance measures, or whether special access in a disaggregated format under existing PMs was also the subject of the SBC Texas petition. The Arbitrators determined that only issues related to special access were within the scope of this proceeding.[3] To assist in clarifying these and other issues, the Arbitrators requested that the parties outline the issue of special access and required the parties to provide a brief on the jurisdiction as part of a party's statement of position, due on October 22, 2001, with replies thereto due on November 5, 2001.[4]

On November 19, 2001, SBC Texas filed a Motion for Summary Decision, followed by a Supplement to its Motion on November 29, 2001. Responses were filed by WCOM and TWTC

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[2] Open Meeting Tr. at 178 (Sept. 19, 2001).

[3] *See* Order No. 3 at 2 (Oct. 9, 2001). The Arbitrators held that any questions relating to PM 1.2 and PM 13, as reflected in SWBT's Motion for Reconsideration of Order No. 33 in Docket No. 20400 and parties' responses thereto, were neither included within SWBT's petition for arbitration initiating this docket nor ruled upon by the Commission. Therefore, the Arbitrators held that no issues relating to PM 1.2 and PM 13 were properly within the scope of this proceeding.

[4] On October 30, 2001, the parties filed a letter indicating agreement, requesting that the deadline for Replies to Statements of Position be extended from November 5 to November 7. The extension was granted in Order No. 4, on October 31, 2001.

on December 5, 2001. On September 6, 2002, SBC Texas' Motion for Summary Decision was denied. The Arbitrators held that, to the extent that a CLEC orders special access in lieu of UNEs the Commission had sufficient jurisdiction and authority to consider this issue in the context of an arbitration brought pursuant to Paragraph 6.4, Attachment 17, of the T2A for new PMs. The parties were directed to provide a proposed procedural schedule no later than October 1, 2002 or to indicate that they wished to stay the proceeding until such time as the Federal Communications Commission (FCC) issues its Order *In the Matter of Performance Measurements and Standards for Interstate Special Access Services.*[5]

On October 1, 2002, SBC Texas filed its Motion for Abatement, requesting that this proceeding be fully abated until the FCC concluded its pending action on related issues, *In the Matter of Performance Measurements and Standards for Interstate Special Access Service* or, in the alternative, partially abated until the beginning of 2003. On October 1, 2002, TWTC and WCOM filed their Joint Proposed Procedural Schedule, asserting that this matter should be resolved quickly, that no discovery was necessary and that the issue was not factually complex, but instead involved a policy decision.

The Arbitrators denied SBC Texas' motion for abatement based on uncertainty as to the FCC's conclusion of its pending action, because of the importance of this matter to the parties and due to the need to investigate Texas-specific instances of usage of special access in lieu of unbundled network elements (UNEs). The Arbitrators also denied SBC Texas' alternative approach, a limited abatement until January, 2003. The Arbitrators found merit in moving ahead to scope this proceeding and to undertake discovery.

During a telephone conference held on October 7, 2002, the parties discussed their varying viewpoints of the proper scope of this proceeding. Given the different perspectives and the need to clarify the proper scope of this case before discovery could efficiently proceed, the parties were directed to provide a Joint Decision Point List (DPL) no later than October 29,

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[5] Notice of Proposed Rulemaking, FCC 01-339, CC Docket No. 01-321 (rel. Nov. 19, 2001).

2002[6] which was required to (1) provide specific reference to parties' arguments in their previously-filed Statements of Position; (2) be organized into two parts—policy and remedy issues—to allow for streamlined assessment of the proper scope of this case; and (3) identify areas of agreement/disagreement with the national Joint Competitive Industry Group (JCIG) proposal on the issue of special access. Parties were also directed to provide a joint proposed procedural schedule no later than October 31, 2002,[7] with a conference call scheduled for the morning of November 1, 2002 to resolve the procedural schedule.

After reviewing the parties' individual DPLs, the Arbitrators developed a DPL[8] to outline the scope of this proceeding which divided the DPL into two "phases." The first phase was designed to address legal, factual and policy questions regarding whether, and to what extent, the Commission has authority to implement performance measures for special access circuits. Upon a finding that the law, facts and policy support the development of a remedy, the parties could thereafter undertake the second phase—the remedy phase. Parties were directed to provide a joint proposed procedural schedule by December 30, 2002.[9]

Under the parties' jointly-revised procedural schedule,[10] discovery was set for February 5, 2003 through March 14, 2003, thereafter extended by agreement until March 21, 2003.[11] A

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[6] The parties were granted an extension of the deadline from October 29, 2002 until November 1, 2002, based upon the parties' agreement. *See* Order No. 9 (Oct. 30, 2002).

[7] SWBT was granted a one-week extension until November 7, 2002 to file its proposed procedural schedule, based upon a request that was not opposed. *See* Order No. 8 (Oct. 25, 2002).

[8] *See* Order No. 10 (Dec. 12, 2002).

[9] Parties requested two extensions of the deadlines for filing a joint procedural schedule, first from December 30, 2002 until January 6, 2003 [*See* Order No. 12 (Dec. 20, 2002).], and then again from January 6, 2003 until January 13, 2003 [*See* Order No. 13 (Jan. 7, 2003).].

[10] *See* Order No. 14 (Jan. 30, 2003).

[11] *See* Order No. 20 (Mar. 19, 2003).

Protective Order was issued on February 27, 2003[12] and revised on March 3, 2003.[13] Direct testimony was filed on April 10, 2003.[14] Rebuttal testimony was filed on May 9, 2003.[15] Objections and motions to strike testimony were filed on May 29, 2003. The parties' Joint DPL was filed on June 2, 2003. The hearing on the merits was conducted by the Arbitrators on June 2 and 3, 2003. Initial post-hearing briefs were provided by the parties on July 9, 2003.[16] The parties filed reply briefs on August 1, 2003.[17]

By agreement, the current parties to this docket are SBC Texas and WCOM. After discussion on the record,[18] SBC Texas agreed to the party status of AT&T Communications of Texas, L.P. (AT&T) so long as AT&T filed its statement of position. AT&T did so, but thereafter decided to not participate in this first phase of the proceeding, choosing instead to

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[12] *See* Order No. 16 (Feb. 27, 2003).

[13] *See* Order No. 17 (Mar. 3, 2003).

[14] *See* Order No. 21 (Apr. 7, 2003). Pursuant to Order No. 20, direct testimony was due on April 7, 2003 and rebuttal testimony on May 2, 2003, based on parties' request of March 18, 2003 for additional time to review discovery responses. However, on April 4, 2003, the parties again requested an extension, specifically as to the filing of direct testimony, until April 10, 2003, due to the illness of a witness. The deadline for rebuttal testimony was similarly extended.

[15] *See* Order No. 24 (May 7, 2003). On May 6, 2003, parties jointly requested an extension of the deadline for filing rebuttal testimony from May 7 to May 9, 2003.

[16] *See* Order No. 27 (Jun. 23, 2003). Initially, pursuant to Order No. 26, at parties' request, the date for initial briefing was established as June 26, with reply briefs due on July 15, 2003. However, on June 20, 2003, parties requested an extension of the briefing schedule, moving the deadline for initial briefs from June 26, 2003 to July 9, 2003, and the deadline for reply briefs from July 15 to July 28, 2003.

[17] *See* Order No. 30 (Jul. 23, 2003). On July 21, 2003, SBC Texas requested an extension to the schedule for reply briefs from July 28 to August 1 to accommodate a scheduling conflict. SBC Texas' request was unopposed and the request was granted.

[18] Pre-Hearing Conference Tr. at 39-41 (Oct. 4, 2001).

participate in any subsequent "remedy" phase.[19] As to other parties, notice was sent to all parties to Docket No. 20400, and the deadline for intervention was established as October 22, 2001. Sprint Communications Company L.P. (Sprint) was also granted party status, following its request for intervention, given that Sprint asserted that it was a purchaser of special access and as no party objected to Sprint's intervention in this proceeding.[20] However, like AT&T, Sprint chose not to participate in this proceeding, reserving their right to participate in any subsequent "remedy" phase.[21] TWTC participated in this proceeding, up to and including the hearing on the merits. However, on July 7, 2003, TWTC filed its motion to withdraw, citing limited resources and the cost of its participation in other critical proceedings before the Commission and in court. No party opposed TWTC's request. As such, TWTC's motion to withdraw was granted.[22]

III. EXECUTIVE SUMMARY

The Arbitrators decline to impose §271-like PMs on SBC Texas' special access services, i.e., services that are not UNEs, provided pursuant to various state and federal tariffs. The fundamental goal of this proceeding was to determine whether new PMs should be imposed upon tariffed special access services based upon WCOM's allegations that SBC Texas' failure to provide UNEs, as required under the T2A, forced WCOM to then obtain the necessary circuits from SBC Texas' special access tariffs.

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[19] AT&T Notice of Non-Participation in Phase 1 (Feb. 18, 2003).

[20] *See* Order No. 11 (). Although it was not a party to Docket No. 20400, nor did it opt in to the T2A, Sprint timely filed its Motion to Intervene and Statement of Position on October 22, 2001, seeking intervention as Sprint/Centel and Sprint/United, asserting that it provided special access service on a retail basis pursuant to interstate and intrastate tariffs, as well as providing unbundled network elements (UNEs) under interconnection agreements with other carriers. Further, Sprint Communications Company L.P. explained that it purchased special access from SWBT and other providers of special access, and was negotiating an interconnection agreement with SWBT under which it will continue to purchase UNEs.

[21] Sprint Notice of Non-Participation in Phase 1 (Feb. 12, 2003).

[22] *See* Order No. 31 (Jul. 23, 2003).

Commission Order No. 33 in Project No. 20400 observed that a special access PMs were appropriate "to the extent a CLEC orders special access in lieu of UNEs." As noted during the discussion at the Open Meeting of May 24, 2001, the Commission distinguished between special access services ordered for the same reasons they had always been ordered and special access services ordered because a party cannot get the UNEs under the T2A:

> ...I mean, people may order special access just for the same reasons thy have for 15 years. But if they're ordering it because they can't get the UNEs under the T2A as envisioned, in other words, and in lieu of an entitlement under the T2A, then it should be treated as if it were under the T2A. So I wouldn't say just categorically every special access goes this way.[23]

In other words, the Commission indicated that PMs would not be imposed on all special access circuits, but that the Commission would consider the imposition of PMs on special access circuits where such circuits were ordered because UNEs are not available as contemplated by the T2A.

The record in the instant proceeding demonstrates that WCOM is not using SBC Texas' tariffed special access services "in lieu of UNEs" because of some unilateral action or inaction on the part of SBC Texas, in violation of the parties' interconnection agreement. Instead, the record shows that CLECs order special access circuits instead of UNEs, at the outset, because they cannot meet the FCC's local use restrictions. On cross examination, the WCOM witness testified that in most circumstances WCOM cannot meet the FCC's local usage requirements, and therefore must order special access circuits instead of UNEs.[24] When asked if it was her testimony that WCOM really orders special access in lieu UNEs that WCOM is not legally entitled to, the WCOM witness admitted she wasn't looking at it in terms of the legal aspects.[25]

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[23] Chairman Pat Wood, Open Meeting Transcript at 23 (May 24, 2001).

[24] Transcript, Hearing on the Merits at 427, 431, & 182 (Jun. 3, 2003).

[25] *Id.* at 428.

The WCOM witness also testified that, to her knowledge, WCOM has not been refused any UNE circuit in Texas that has significant local usage.[26]

The FCC's local use restrictions require a requesting carrier to certify that it is providing a "significant amount of local exchange service" (in addition to exchange access service) when UNE loop-transport combinations [also referred to as enhanced extended links (EELs)] are involved. The restrictions are intended to prevent requesting carriers from substituting functionally-equivalent, lower-priced UNE loop-transport combinations for the higher-priced special access services when no, or only an incidental, amount of local exchange service traverses any given circuit.

The record also demonstrates that: 1) WCOM is not using special access services in lieu of UNEs because of any inappropriate or improper provisioning barriers imposed by SBC Texas, but rather because WCOM cannot meet the aforementioned legal requirements for UNE provisioning in the first place; 2) SBC Texas has a comprehensive monitoring process in place to address the provisioning of special access services and reports its results to interested customers; and 3) despite some lackluster performance on the part of SBC Texas which coincided with its entry into the interLATA long distance market, SBC Texas' provisioning of special access services is currently satisfactory, and has been satisfactory but for that brief period of time in 2000.[27] Accordingly, the record does not support the imposition of PMs on tariffed special access services.

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[26] *Id.* at 440.

[27] *Id.* at 222 – 224.

II. RELEVANT STATE AND FEDERAL PROCEEDINGS

Relevant Commission Decisions

Project No. 20400: ***Section 271 Compliance Monitoring of Southwestern Bell Telephone Company***

As noted above, this proceeding had its genesis during negotiations held in Project No. 20400, throughout the second six-month Performance Measurement Review, which began formally on April 4, 2001. Workshop negotiations ceased on June 1, 2001 with the issuance of the Commission's Order No. 33 in Project No. 20400, which stated:

> The Commission finds that, to the extent a CLEC orders special access in lieu of UNEs, SWBT's performance shall be measured as another level of desegregation in all UNE measures. The Commission also finds it appropriate to conduct a workshop, consistent with the discussion at the May 24, 2001, Open Meeting, on the issue of special access and UNEs.

On July 2, 2001 SBC Texas filed a motion for rehearing and clarification of Order No. 33, opposing being required to implement new measurements that would assess its performance under the interstate and intrastate tariffs for the provisioning of retail special access services. SBC Texas argued that special access services are provided through tariffs, and are not, therefore, part of the T2A. Accordingly, SBC Texas filed a request for arbitration pursuant to Section 6.4, Attachment 17 of the Performance Remedy Plan, which states:

> Any changes to existing performance measures and this remedy plan shall be by mutual agreement of the parties and, if necessary, with respect to new measures and their appropriate classification, by arbitration.

At its Open Meeting of September 19, 2001, the Commission considered the request for arbitration and the motion for rehearing and clarification. The Commission voted to reconsider Order No. 33 issued in Project No. 20400 and to allow the issue of special access to be

developed as a separate arbitration in this proceeding.[28] Accordingly, the abatement issued in Order No. 1 was lifted and the proceeding in this docket was reinstated. Thus, although Order No. 33 in Project No. 20400 provides guidance on the issue of special access PMs, it is not dispositive of the question.

Relevant Federal Communications Commission Decisions

***In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996,* Third Report and Order and Fourth Further Notice of Proposed Rulemaking (FNPRM), Supplemental Order and Supplemental Order Clarification.**

In its UNE Remand Order,[29] the FCC declined to define the enhanced extended link (EEL) as a separate network element,[30] and held that, as an initial matter, under existing law, a requesting carrier is entitled to obtain existing combinations of loop and transport between the end user and the ILEC's serving wire center on an unrestricted basis at UNE prices.[31] Moreover, the FCC found that to the extent those UNEs are already combined as a special access circuit, it would be impermissible for an ILEC to require that a requesting carrier provide a certain amount of local service over such facilities.[32] However, the FCC also concluded that its record was insufficient to determine whether or how the FCC rules should apply in the discrete situation

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[28] Open Meeting Tr. at 178 (Sept. 19, 2001).

[29] *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, FCC 99-238, Third Report and Order and Fourth Notice of Proposed Rulemaking (rel. Nov. 5, 1999) (UNE Remand Order).

[30] *Id.* at ¶ 478.

[31] *Id.* at ¶ 486.

[32] *Id.*

involving the use of dedicated transport links between the ILEC's serving wire center and an interexchange (IXC) carrier's switch or point of presence (or "entrance facilities").[33]

Thereafter, in a Supplemental Order,[34] the FCC concluded that, until resolution of its Fourth FNPRM, IXCs could not convert special access services to combinations of unbundled loops and transport network elements, whether or not the IXCs self-provided entrance facilities or obtained them from third parties. The FCC found that this constraint did not apply if an IXC used combinations of UNEs to "provide a *significant amount of local exchange service*, in addition to exchange access service, to a particular customer."[35]

In its Supplemental Order Clarification,[36] the FCC took three actions to extend and clarify the temporary constraint it had adopted in the Supplemental Order. First, the FCC extended the temporary constraint on EELs imposed in the Supplemental Order. Second, the FCC clarified what it meant by the phrase "significant amount of local exchange service." And third, the FCC clarified that ILECs must allow requesting carriers to self-certify that they are providing a significant amount of local exchange service over combinations of UNEs.[37]

This local use requirement was a prerequisite for obtaining EELs in lieu of tariffed special access services. The FCC recognized the need to distinguish between a requesting carrier that has taken affirmative steps to provide local exchange service to a particular end user and one that is seeking to use unbundled loop-transport combinations solely to bypass tariffed special

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[33] UNE Remand Order at ¶ 489.

[34] *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996,* CC Docket No. 96-98, FCC 99-370, Supplemental Order (rel. Nov. 24, 1999).

[35] *Id.* at ¶ 2 (emphasis added).

[36] *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996,* CC Docket No. 96-98, FCC 00-183, Supplemental Order Clarification (rel. Jun. 2, 2000).

[37] *Id.* at ¶ 1.

access service.[38] In order to meet this requirement, the FCC concluded that a requesting carrier is providing a "significant amount of local exchange traffic" to a particular customer if it meets any one of the three following circumstances:

1) the CLEC must certify: that it is the end-user's exclusive provider of local exchange service; that the EEL terminates in a collocation arrangement; and that the EEL is not connected to a tariffed service;[39]

2) the CLEC must certify: that it handles at least one-third of the customer's local traffic; for DS1 circuits and above, that at least 50% of the loops have at least 5% of local voice traffic individually and the entire EEL has at least 10% of local voice traffic; that the EEL terminates in a collocation arrangement; and that the EEL is not connected to a tariffed service;[40] or

3) the CLEC must certify: that at least 50% of the channels on a circuit are used for local dial tone service and at least 50% of the traffic on each channel is local voice traffic; that the entire EEL has at least 33% local voice traffic; and that the EEL is not connected to a tariffed service.[41]

The FCC also rejected numerous proposals. For example, the FCC found that there was no basis to assume that every circuit that terminates in a certain type of switch is being used exclusively for local traffic, and thus did not adopt WCOM's proposal that ILECs should presume that any circuit that a CLEC connects to a port on a Class 5 switch or its equivalent is

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[38] *Id.* at ¶ 21.

[39] *Id.* at ¶ 22(1).

[40] *Id.* at ¶ 22(2).

[41] *Id.* at ¶ 22(3).

used exclusively to provide local service.[42] Similarly, the FCC interpreted its rules to find that a 10% threshold is *de minimis* and, thus, could not support an argument that 10% represented "significant local usage." [43] The FCC also expressly rejected the suggestion that they eliminate the prohibition on "co-mingling" (*i.e.* combining loops or loop-transport combinations with tariffed special access services) in the local usage options discussed above.[44]

***In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338; *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98; *In the Matter of Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, FCC 03-36, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking (rel. Aug. 21, 2003) (Triennial Review Order).**

In its Triennial Review Order,[45] the FCC amended the eligibility criteria associated with DS1 and DS3 loops, which are functionally equivalent to tariffed special access circuits. The FCC adopted additional eligibility criteria with respect to combinations of high-capacity loops (DS1 and DS3) due to concerns over the potential for "gaming" by non-qualifying providers.[46] While these criteria are somewhat different than those contained in the Supplemental Order Clarification, the basic principle remains the same. Specifically, 47 C.F.R. Section 51.318(b) states that an ILEC need not provide access to DS1 or DS3 loops unless that CLEC certifies that all of the following conditions are met:

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[42] *Id.* at ¶ 25.

[43] *Id.* at ¶ 26.

[44] *Id.* at ¶ 28.

[45] *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338; *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98; *In the Matter of Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, FCC 03-36, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking (rel. Aug. 21, 2003) (Triennial Review Order).

[46] *Id.* at ¶ 591.

1) the CLEC has received state certification to provide local voice service, or in the absence of any state-required certification, the CLEC has complied with other applicable requirements for local service; and

2) each circuit provided over a DS1 loop, DS3 loop, DS1 EEL, and DS3 EEL will: have its own assigned local number; have 911 access; terminate in a collocation arrangement within the same LATA as the customer's premises; be served by an interconnection trunk that transmits the calling party's number; and be served by a switch capable of switching local voice traffic.

The FCC indicated that a central goal of the service eligibility criteria established in the Triennial Review Order was to safeguard the ability of bona fide providers of qualifying service to obtain access to high-capacity EELs while simultaneously addressing the potential for gaming. For that reason, the FCC focused on local voice service due to its verifiability and its role as the core competitive offering in direct competition to traditional ILEC service. The FCC recognized that it must go beyond superficial indicia and require satisfaction of multiple network-specific and circuit-specific criteria to ensure that the requesting carrier demonstrates a commitment to the local voice market.[47] In particular, the FCC noted that its adopted criteria demonstrate that a qualified requesting carrier has undertaken substantial regulatory and commercial measures to provide local voice service. Thus, the criteria would allow access to high-capacity EELs to an integrated communications provider that sells a bundle of local voice, long-distance voice, and Internet access to small businesses, because such a provider is competing against the ILEC's local voice offerings. In contrast, a provider of exclusively long-distance voice or data services that seeks to use high-capacity UNE facilities without providing any local services would fall short of one of the tests, if not all. Moreover, the FCC expressly clarified that these requirements apply "to all wholesale as well as retail service offerings over high-capacity EELs."[48]

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[47] *Id.* at ¶ 595.

[48] *Id.* at ¶ 598.

III. DISCUSSION OF DPL ISSUES

This proceeding addresses the issues in the Joint Decision Point List (DPL) filed by the parties on December 12, 2002.

DPL ISSUE NO. 1.

Does the Commission have jurisdiction and the authority, under state and/or federal law, to direct the implementation of performance measurements for the provisioning of interstate Special Access Services? Provide specific citation to state and/or federal law, including FTA 271.

SBC Texas' Position

SBC Texas argued that, as a fundamental matter, the Commission lacks the jurisdiction and authority to impose any reporting and performance measurement requirements upon SBC Texas' special access services in this proceeding, which is being conducted under the auspices of Section 271 of the federal Telecommunications Act of 1996 (FTA).[49] According to SBC Texas, such jurisdiction and authority is lacking because Section 271 has no relationship to SBC Texas' provision of special access services.[50] Nothing in the Section 271 14-point checklist, the Commission's orders in Project No. 16251,[51] the Texas 271 Interconnection Agreement (T2A), the Performance Remedy Plan, or the FCC's order granting approval of SBC Texas' Section 271 application is linked to its provision of special access services. Consequently, as a legal matter,

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[49] SBC Texas Post-Hearing Brief at 21 (Jul. 9, 2003) *citing* Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified as amended in scattered sections of 15 and 47 U.S.C.)(FTA).

[50] SBC Texas Post-Hearing Brief at 21, *quoting:* "Given that Section 271 embodies the local competition obligations under Section 251 and 252 of the FTA, it stands to reason that the Commission would also lack the jurisdiction and authority to consider special access services under Sections 251 or 252." *Application by SBC Communications Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance*, CC Docket No. 00-65, Memorandum Opinion and Order at Paragraph 22, 15 F.C.C.R. at 18366 (June 30, 2000).

[51] Project No. 16251, *Investigation Into Southwestern Bell Telephone Company's Entry Into In-Region InterLATA Service Under Section 271 of the Telecommunications Act of 1996.*

SBC Texas claimed that the Commission cannot rely upon Section 271 as the basis for imposing special access service reporting and performance measurement requirements upon SBC Texas.

SBC Texas noted that in granting it authority to provide in-region, interLATA long distance service pursuant to Section 271, the FCC found that the provision of special access services was not relevant to its evaluation of the company's compliance with the Section 271 14-point checklist:

> As we found in the *Bell Atlantic New York Order*, we do not consider the provision of special access services pursuant to a tariff for purposes of determining checklist compliance. We do not believe that checklist compliance is intended to encompass the provision of tariffed interstate access services simply because these services use some form of the same physical facilities as a checklist item. The fact that the competitive LECs can use interstate special access service in lieu of the EEL [enhanced extended loop], a combination of unbundled loops and transport, and can convert special access service to EELs, does not persuade us that we should alter our approach and consider the provision of special access for purposes of the checklist compliance.[52] (Footnotes omitted)

According to SBC Texas, the FCC has reached the same conclusion with regard to two other RBOC applications for Section 271 relief.[53] In the latter of those two FCC orders, which addressed Verizon's Massachusetts application, the FCC stated:

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[52] SBC Texas Post-Hearing Brief at 24, *citing Application by SBC Communications Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance*, CC Docket No. 00-65, Memorandum Opinion and Order at Paragraph 335, 15 F.C.C.R. at 18520 (June 30, 2000).

[53] SBC Texas Post-Hearing Brief at 24, *citing Application of Verizon New England Inc., Bell Atlantic Communications, Inc. (d/b/a Verizon Long Distance), NYNEX Long Distance Company (d/b/a Verizon Enterprise Solutions) and Verizon Global Networks, Inc., For Authorization to Provide In-Region, InterLATA Services in Massachusetts*, CC Docket No. 01-9, Memorandum Opinion and Order at Paragraph 205 (April 16, 2001); *Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act To Provide In-Region, InterLATA Service in the State of New York*, CC Docket No. 99-295, Memorandum and Order at Paragraph 340 15 F.C.C.R. at 4126-27 (Dec. 22, 1999).

> As we held in the *SWBT Texas* and *Bell Atlantic New York Orders*, we do not consider the provision of special access services pursuant to tariffs for purposes of determining checklist compliance.[54]

SBC Texas asserted that, by virtue of this precedent, the FCC has left no doubt that a RBOC's special access services are not within the scope of Section 271.

SBC Texas maintained that under the FTA, no interstate performance measures are required as a condition of obtaining Section 271 relief.[55] SBC Texas opined that in Section 3(41) of the Federal Telecommunications Act, Congress defined "state commission" in a manner that clearly intended for the states to have regulatory jurisdiction over intrastate matters, not interstate matters.[56] Furthermore, SBC Texas stated that under 47 C.F.R. Section 36.154(a), a special access circuit is classified as "interstate" when the interstate traffic on the circuit constitutes more than ten percent of the total traffic on the circuit. In Texas, SBC Texas argued that both the Texas special access service tariff and Tariff FCC No. 73 require the customer to certify the jurisdiction of the special access circuits, which determines the classification of those lines as either intrastate or interstate in nature.[57]

SBC Texas rejected WCOM's arguments comparing special access circuits and UNEs,[58] asserting that while a special access circuit and a circuit provisioned as a UNE may be technically the same in some instances, there are myriad differences between the two from a

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[54] SBC Texas Post-Hearing Brief at 24, *citing Application of Verizon New England Inc., Bell Atlantic Communications, Inc. (d/b/a Verizon Long Distance), NYNEX Long Distance Company (d/b/a Verizon Enterprise Solutions) and Verizon Global Networks, Inc., For Authorization to Provide In-Region, InterLATA Services in Massachusetts*, CC Docket No. 01-9, Memorandum Opinion and Order, n. 489 (April 16, 2001)(*citing SWBT Texas Order*, 15 F.C.C.R. at 18520, Paragraph 335; *Bell Atlantic New York Order,* 15 F.C.C.R. at 4126-27, Paragraph 340).

[55] SBC Texas Exhibit 4, Direct Testimony of Roman A. Smith at 8 (Apr. 10, 2003) (Smith Direct).

[56] *Id.* at 9.

[57] SBC Texas Exhibit 2, Direct Testimony of Clint Bibbings at 5 (Apr. 10, 2003) (Bibbings Direct).

[58] WCOM Exhibit 15, Direct Testimony of Karen K. Furbish at 22 (Apr. 10, 2003) (Furbish Direct).

regulatory and legal perspective.[59] SBC Texas stated that its special access circuits are provisioned pursuant to state and federal tariffs, while UNEs are provisioned through interconnection agreements, pursuant to the FTA and FCC rules promulgated under the FTA, and are not classified on an interstate/intrastate basis.[60] Furthermore, SBC Texas argued that its special access services are subject to pricing flexibility, as specified by federal and state statutes and rules, while UNE pricing is based on a total element long-run incremental costs (TELRIC) methodology, as specified by FCC rules.[61] Additionally, SBC Texas stated that certain UNEs (e.g., extended enhanced loops or "EELs") are subject to specific requirements imposed by the FCC (e.g., the EELs must carry a "significant amount of local exchange service"), while special access circuits are not subject to such requirements.[62] SBC Texas also argued that to convert a special access circuit to a UNE, certain FCC requirements must be met to determine if a "significant amount of local exchange service" is being provided, whereas a special access circuit need not meet these requirements.[63] SBC Texas asserted that to be available as a UNE, a circuit must physically exist; neither federal nor state law requires SBC Texas to build a requested UNE when it neither exists nor is available, and that no such requirement applies to SBC Texas's provision of special access circuits, that is, SBC Texas will construct a special access circuit upon a customer's request. [64]

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[59] SBC Texas Exhibit 6, Rebuttal Testimony of Roman A. Smith at 4-6 (May 9, 2003) (Smith Rebuttal).

[60] *Id.* at 4.

[61] *Id.* at 5.

[62] *Id.*

[63] *Id.*

[64] *Id.*

WCOM's Position

WCOM asserted that there is no impediment to a state's ability to require performance measurements and reporting on interstate special access services.[65] WCOM explained that special access circuits are functionally equivalent to UNEs and are purchased from SWBT in Texas to service customers in Texas, and can carry local or intrastate traffic.[66] WCOM noted that monitoring SBC Texas's interstate and intrastate special access services would provide the Commission with a complete picture of all competing carriers' ability to competitively serve the "last-mile" needs of Texas customers.[67] WCOM argued that CLECs compete with each other and SBC Texas to provide end-user customers with a mix or "bundles" of local, intrastate, interstate and data services, rendering the traditional regulatory distinctions of ordering those circuits as UNEs versus intrastate special access versus interstate special access largely superfluous.[68]

With respect to SBC Texas' federally tariffed special access service offering, WCOM argued that the Commission has jurisdiction under PURA §§ 14.001, 14.151, 14.201, 14.207, 55.002, 60.001, 60.002 and 60.161, asserting that, in most respects, the broad grant of authority that this Commission has under PURA and which applies to SBC Texas' intrastate offering, also applies to its interstate special access offering.[69] It was WCOM's position that any discrimination or preferential treatment by SBC Texas related to its interstate special access service which occurs within the state of Texas, and which has not been preempted by the FCC, would fall under the Commission's authority as provided by statute.[70] WCOM contended that

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[65] Furbish Direct at 22 (Apr. 10, 2003).

[66] *Id.* at 23.

[67] *Id.* at 23.

[68] *Id.* at 21.

[69] WCOM Initial Post-Hearing Brief at 12 (Jul 9, 2003).

[70] *Id.*

this Commission necessarily has authority over transactions and traffic that occur within the state, and that CLECs certificated in Texas purchase special access circuits from SBC Texas' federal tariff to provide service to customers located in Texas. As such, WCOM argued that, under PURA § 60.161, the Commission has ample authority to require reporting of SBC Texas' interstate special access performance to monitor possible discrimination or preferential treatment that occurs within the state.[71]

WCOM contended that the Commission shares authority with the FCC over SBC Texas' interstate special access circuits because there is no federal decision or FCC order that indicates that the Commission does not share such authority with the FCC. WCOM observed that, while circuits tariffed as "interstate" are generally thought of as transporting traffic outside of the state, the FCC's 10% Rule, 47 C.F.R. § 36.154, brings these "interstate" circuits under the purview of this Commission because the traffic is generally jurisdictionally mixed. WCOM opined that the interstate circuits that competitive carriers and IXCs purchase from SBC Texas could carry significant (up to 90%) levels of local, intrastate traffic, but would need to be purchased from SBC Texas' federal tariff.[72] Therefore, although a competing carrier may order a special access circuit from SBC Texas' interstate tariff, a significant portion of the traffic on that circuit may be used to transport traffic solely within the state of Texas.[73]

Thus, according to WCOM, the state and the FCC share jurisdiction over issues related to this traffic unless the FCC expressly and clearly pre-empts state authority.[74] WCOM asserted that nothing in the language, context, or purpose of the FCC's 10% Order expresses any intent to pre-empt state law reporting requirements; typically, when the FCC has chosen to exercise its authority to pre-empt particular provisions of state law, it has expressly stated so.[75]

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[71] *Id.* at 12-13.

[72] *Id.* at 13.

[73] *Id.* at 13-14.

[74] *Id.* at 13.

[75] *Id.* at 15.

Arbitrators' Decision

The Arbitrators find, first and foremost, that the Commission has the authority to direct implementation of performance measurements for the provisioning of UNEs. Under FTA §271(d), Congress directed the FCC to rely on the state commissions for their detailed evaluation of a Bell operating company's commitment to opening its network to competition. Specifically, before making any determination on a Bell company's 271 application, the FCC must consult with the state commission "in order to verify the compliance of the Bell operating company with the requirements of [the 14-point competitive checklist in] subsection [(c)]"[76] *Although under FTA §271(d)(6) the FCC is granted express enforcement powers, the Arbitrators do not find that the Texas Commission is precluded from acting in tandem with the FCC, particularly on the issue of checklist compliance. After all, the Texas Commission is in the best position to address checklist compliance, given that the Commission developed and approved the Texas-specific Performance Remedy Plan to prevent SBC Texas from backsliding on its responsibilities to provide nondiscriminatory access to its network. In granting the 271 application of SBC Texas, the FCC understood that the Texas Commission would "continu[e] to monitor and refine" the Remedy Plan after 271 approval.*[77] *Thus, the FTA's express grant of state commission authority under section 271 to work with the FCC to "verify the compliance of the Bell operating company with the requirements of [Section 271's competitive checklist]"*[78] *implicitly includes the power to work with both the parties and, if necessary, the FCC, to monitor and enforce continued compliance with the competitive checklist after the Bell company's application has been approved.*

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[76] *See* FTA §271(d)(2)(B).

[77] *In the Matter of Application of SBC Communications Inc., and Southwestern Bell Telephone Company, et al., for Provision of In-Region, InterLATA Services in Texas,* CC Docket No. 00-4, before the Federal Communications Commission, Evaluation of the Public Utility Commission of Texas, at ¶ 11 (Jan. 31, 2000) (FCC 271 Order).

[78] *See* FTA § 271(d)(2)(B).

Consistent with both SBC Texas' ongoing obligation to provide nondiscriminatory access to its network, and the Commission's continuing authority to require SBC Texas to comply with that obligation, the Commission has made necessary modifications to the Performance Remedy Plan in the T2A. Notably, in Order No. 33 issued in Project No. 20400, the Commission held that, to the extent a CLEC orders special access in lieu of UNEs, SBC Texas' performance shall be measured as another level of disaggregation in all UNE measures. Although the Commission essentially abated the effect of Order No. 33 in recognition of the parties' right under Section 6.4, Attachment 17 of the Performance Remedy Plan to pursue arbitration over the imposition of new performance measures, that decision does not negate the Commission's intent in issuing Order No. 33 in the first place. The Commission did not distinguish between intrastate and interstate special access and, instead, focused on SBC Texas' obligation to provision UNEs to requesting carriers under the FTA. Similarly, the Arbitrators do not find it helpful to draw a distinction between the jurisdictional nature of intrastate and interstate special access circuits, as SBC Texas argues, or to focus solely on the functional equivalency of special access circuits and UNEs, as WCOM proposes.

For purposes of this docket, the relevant inquiry is not whether, absent other circumstances, the Commission has jurisdiction and authority to implement performance measures for the provisioning of special access circuits, whether interstate or intrastate; instead, the relevant inquiry is whether the Commission can impose performance measures upon the provisioning of special access circuits that are ordered in lieu of UNEs. Put another way, the question becomes whether SBC Texas can escape its UNE performance measure obligations by forcing a CLEC to order special access circuits. Based upon the foregoing analysis, the Arbitrators find that the Commission has authority and jurisdiction to direct the implementation of performance measurements for the provisioning of both interstate and intrastate special access services if it determines that such special access services are being discriminatorily substituted for UNEs. However, in the absence of such a finding related to SBC Texas' continuing provisioning obligations under the FTA, the Arbitrators do not find it necessary or relevant to address the imposition of special access performance measures and, as such, do not reach that question.

DPL ISSUE NO. 2.

Does the Commission have jurisdiction and the authority, under state and/or federal law, to direct the implementation of performance measurements for the provisioning of intrastate Special Access Services? Provide specific citation to state and/or federal law, including FTA 271.

SBC Texas' Position

SBC Texas maintained that the Commission does not have the authority to implement performance measures in this proceeding, asserting that there is nothing in the T2A, the Performance Remedy Plan, the 14-point checklist in Section 271 of the FTA, the Commission's orders in Project No. 16251, or the FCC's order granting approval of SBC Texas's Section 271 application that would authorize the imposition of special access performance measures.[79] SBC Texas opined that there is nothing in the T2A or any interconnection agreement that contractually obligates SBC Texas to provide special access services to any carrier, since special access service is a service provided on a retail basis, pursuant only to interstate and intrastate tariffs. [80] SBC Texas stated that the Texas Legislature designated special access service as a "non-basic" service.[81] Further, SBC Texas argued that while Order No. 33 and Order No. 6 in Project No. 20400 indicate that performance measures on intrastate special access circuits ordered from SBC Texas when requested UNEs are unavailable might be imposed on SBC Texas, the Commission has not definitively addressed the jurisdictional and authority issues to impose such measures.[82] SBC Texas asserted that these issues are subject to resolution after a hearing and that SBC Texas has a right to arbitrate these issues under Paragraph 6.4 in

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[79] Smith Direct at 9 – 10.

[80] *Id.*

[81] *Id.* at 13.

[82] *Id.* at 10 - 11.

Attachment 17 of the T2A and the express statement of Phase 1 issues in Order No. 10. [83] Additionally, SBC Texas argued that adoption of new performance measurements for non-UNEs would be contrary to the intent of Section 6.5; Attachment 17 of the T2A which seeks to reduce performance measures by 50% no later than two years after SBC Texas receives Section 271 approval.[84]

SBC Texas maintained that of the total special access services ordered in 2002 in Texas, about 97.7% were interstate in nature, and consequently, while the FCC has jurisdiction over SBC Texas's special access services, the extent of the Commission's intrastate jurisdiction over those services is relatively small and very limited in nature.[85] Furthermore, SBC Texas argued that the amount of effort that would be necessary to undertake the implementation of intrastate performance measures would exceed any value gained, particularly if the performance measures required a disaggregation of special access service type (e.g. DS-1, DS-3) and/or required a determination of the rationale for their use (e.g. in lieu of the requested UNEs that are unavailable).[86]

Even assuming that the Commission has the jurisdiction and authority to impose special access reporting and performance measurement requirements on SBC Texas, SBC Texas contended that the application of any such requirements to all SBC Texas special access circuits would make no sense in the context of Section 271.[87] SBC Texas emphasized that, as noted by the FCC in its order granting Section 271 relief to SBC Texas, the terms in the statutory provision's competitive checklist "generally incorporate by reference the core local competition

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[83] *Id.* at 10 - 11.

[84] *Id.* at 12.

[85] Bibbings Direct at 6 - 9.

[86] *Id.* at 10.

[87] SBC Texas Post-Hearing Brief at 28.

obligations" imposed in Sections 251 and 252 of the FTA.[88] (Emphasis added). SBC Texas claimed that to the extent that special access circuits are used for purposes other than the provision of local service—i.e., they are used to provide interexchange service—such circuits should not be subject to any Section 271 reporting or performance measurement requirements, as a matter of law and policy.[89]

Notwithstanding SBC Texas' jurisdictional concerns, it asserted that the application of any reporting and performance measurement requirements to solely those special access circuits ordered in lieu of UNEs links such requirements to local exchange service.[90] SBC Texas maintained that, under such a narrowly defined universe of reporting requirements and performance measurements, if a CLEC (and not an IXC, which by definition, does not provide local exchange service) is eligible to purchase a UNE such as an EEL--that is, the EEL will carry a significant amount of local exchange service—but must instead purchase a special access circuit because the UNE is not available, then the special access circuit would be subject to reporting and performance measurement requirements. This discrete approach essentially extends the Performance Remedy Plan to a select group of non-UNEs that CLECs must order out of necessity, rather than choice, treating UNEs and a narrowly defined group of special access circuits interchangeably for regulatory purposes.

But even if a discrete group of special access circuits were to be carved out for monitoring purposes, as discussed in the rebuttal testimonies of SBC Texas witnesses Mr. Smith and Mr. Bibbings, SBC Texas averred that UNEs and special access circuits are not one and the same, from legal and regulatory perspectives.[91] Specifically, SBC witness Bibbings testified that

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[88] *Id.* at 28, *citing Application by SBC Communications Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance*, CC Docket No. 00-65, Memorandum Opinion and Order at Paragraph 22, 15 F.C.C.R. at 18366 (Jun. 30, 2000).

[89] *Id.* at 28.

[90] *Id.* at 31.

[91] SBC Texas Post-Hearing Brief at 31, 32, *citing, e.g.*, SBC Texas Exhibit 3 (Rebuttal Testimony of Clint R. Bibbings, Jr.) at 7-9; SBC Texas Exhibit 6 (Rebuttal Testimony of Roman A. Smith) at 4-6.

SBC Texas does not track special access circuit orders in this manner. Mr. Bibbings stated that there is no verifiable way by which to determine, with any certainty, that a special access circuit is ordered in lieu of requested UNEs that are otherwise unavailable.[92] In that same vein, SBC Texas asserted that there is no verifiable way to ascertain that the ordered special access circuit will be subsequently used in manner consistent with the "significant amount of local exchange service" requirement for EEL UNEs, absent some type of audit. SBC Texas observed that companies such as WCOM do not appear to track or retain data relating to special access circuits ordered in lieu of UNEs.[93]

Overall, SBC Texas claimed that the number of special access circuits that would fall into the category of circuits subject to this narrowly-defined universe of reporting and performance measurement requirements would be relatively few, if any. SBC Texas averred that a special access circuit ordered in lieu of a UNE would be intrastate in nature, given the "significant amount of local exchange service" requirement for EEL UNEs. SBC Texas stated that the number of SBC Texas intrastate special access circuits is fairly limited in number.[94] Of this limited number of intrastate special access circuits, SBC Texas believed that it is reasonable to assume that not all of them are ordered due to UNE unavailability. Therefore, because special access circuits ordered in lieu of UNEs are a subset of an already small universe of ordered special access circuits, SBC Texas asserted that the number of circuits ordered in lieu of UNEs is likely *de minimis*.[95]

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[92] SBC Texas Post-Hearing Brief at 32, *citing* SBC Texas Exhibit 2 (Direct Testimony of Clint R. Bibbings, Jr.) at 11.

[93] SBC Texas Post-Hearing Brief at 32-33, *citing* SBC Texas Exhibit 4 (Direct Testimony of Roman A. Smith) at 11; SBC Texas Exhibit 22.

[94] SBC Texas Post-Hearing Brief at 33, *citing* SBC Texas Exhibit 2 (Direct Testimony of Clint R. Bibbings, Jr.) at 11; SBC Texas Exhibit 4 (Direct Testimony of Roman A. Smith) at 21. Based on SBC special access services revenue data in 2002, only 2.3 percent of those revenues were billed as intrastate revenues, which indicates that a significant percentage of SBC Texas special access services are interstate in nature, while a much smaller percentage of those services are intrastate in nature. SBC Texas Exhibit 2 (Direct Testimony of Clint R. Bibbings, Jr.) at 6-7; SBC Texas Exhibit 4 (Direct Testimony of Roman A. Smith) at 12.

[95] SBC Texas Post-Hearing Brief at 33, *citing* SBC Texas Exhibit 4 (Direct Testimony of Roman A. Smith) at 12.

WorldCom's Position

WCOM argued that the Commission's conclusion that it has jurisdiction and authority to adopt special access performance measures is well-supported, given the Commission's general authority over intrastate telecommunications services under PURA §§ 14.001, 14.003, 14.151, 14.154, 14.201, 14.207, 55.002, 60.001, 60.002, and 60.161.[96] WCOM interpreted these provisions to allow the Commission to require SBC Texas to report its intrastate special access performance and concluded that they also give the Commission authority to require payment of liquidated damages if SBC Texas has failed to meet established performance measurement requirements.[97] WCOM quoted PURA § 14.001, stating that the Commission's "general power to regulate and supervise the business of each public utility within its jurisdiction and to do anything specifically designated or implied by this title that is necessary and convenient to the exercise of that power and jurisdiction" was intended by the Legislature to allow the Commission to exercise broad authority over all public utilities.[98] In addition to § 14.001, WCOM cited PURA § 14.003, claiming that it enables the Commission to require a public utility to report to the Commission information relating to "the utility; and a transaction between the utility and an affiliate inside or outside this state, to the extent the transaction is subject to the commission's jurisdiction." This broad authority is also reflected in a number of provisions that would provide authority to the Commission to require dominant telecommunications carriers to report intrastate (and interstate) special access performance.[99] WCOM cited PURA Sections 14.001 and 14.003 as reflective of the Commission's broad grant of authority over affiliate transactions. In addition, WCOM claimed that §§ 14.201, 14.207 and 14.151 permit the Commission to exercise extensive authority over dominant carriers such as SBC Texas with

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[96] WCOM Initial Post-Hearing Brief at 10.

[97] *Id.* at 11.

[98] *Id.* at 11.

[99] *Id.*

respect to the reporting of "all [of the] business transacted" by the utility in Texas, consistent with the Legislature's determination that the Commission has the broadest constitutional authority over dominant communications carriers.[100]

WCOM argued that, pursuant to § 55.002, the Commission has jurisdiction to establish the appropriate standards to accompany the § 14.003 reporting requirements. PURA § 55.002 allows the Commission to "adopt adequate and reasonable standards for measuring a condition, including quantity and quality, relating to the furnishing of service" and the ability to "adopt reasonable rules for examining, testing, and measuring a service." Section 14.003 permits the Commission to require SBC Texas to report the service and quality of performance SBC Texas provides to its affiliates when the affiliates purchase intrastate special access services from SBC Texas.[101] WCOM also asserted that, under § 60.002, the Commission has extensive jurisdiction to implement competitive safeguards and § 60.002 expressly provides that "Section 58.025 does not prevent the commission from enforcing this chapter." Consistent with the nature and quantity of special access service purchased by CLECs such as WCOM, the implementation of special access PMs falls within the Commission's necessary and implied powers which are in accord with the Commission's general grant of power to fulfill its regulatory duties.[102]

Arbitrators' Decision

See Arbitrators' Decision on DPL Issue No.1.

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[100] *Id.*

[101] *Id.* at 12.

[102] *Id.*

DPL ISSUE NO. 3.

What is the appropriate definition of special access?

SBC Texas' Position

SBC Texas defined special access service as a dedicated service that can be used to connect two premises on a point-to-point basis, or to connect multiple premises on a multipoint basis; in either instance, one of the points in the connection will be an IXC's premise.[103] SBC Texas stated that special access circuits, whether intrastate or interstate in nature, are used to carry voice, data, and video applications, and are capable of carrying long-distance and local traffic. SBC Texas argued that since it has no interaction with the traffic traversing a special access circuit, it has no operational knowledge of whether the traffic is voice, data, or video traffic, and what type of service (*e.g.*, local, long-distance) being provided through the circuit.[104] SBC Texas refuted WCOM's argument that the FCC definition does not capture all the means by which special access is used or provided.[105]

WCOM's Position

WCOM maintained that special access services are functionally equivalent to certain UNEs and are offered at a number of connection speeds.[106] WCOM made reference to the definition of special access services contained in the FCC's *Pricing Flexibility Order* which states that "special access services do not use local switches; instead they employ dedicated facilities that run directly between the end user and the IXC's [interexchange carrier] point of

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[103] Bibbings Direct at 3.

[104] *Id.*

[105] SBC Texas Exhibit 3, Rebuttal Testimony of Clint Bibbings at 4-5 (May 9, 2003) (Bibbings Rebuttal).

[106] Furbish Direct at 6 (Apr. 10, 2003).

presence (POP)." [107] WCOM cautioned, however, that the FCC's definition is narrow and did not capture all the means by which special access is used or provided, including the ILEC's ability to provide to a retail end user a dedicated circuit connecting the end user's premises to an ILEC network or to an IXC or CLEC POP.[108] WCOM also argued that SBC Texas's definition omits other uses of special access services.[109]

Arbitrators' Decision

The Arbitrators find that the definition of special access is not dispositive of the question of whether or not to impose PMs on tariffed special access services. The Arbitrators also find that state and federal tariffs generally describe special access circuits in terms of providing a transmission path connecting customer designated premises, either directly or through a telephone company hub. Unlike switched access services, special access services do not use local switches; instead they employ dedicated facilities that generally run directly between end-user premises and an IXC's POP.[110]

The Arbitrators further find that it is irrelevant that special access services may be functionally equivalent to certain UNEs since the FCC's imposition of local use restrictions was explicitly intended to prohibit the use of UNE combinations in lieu of special access services in order to deter substantial market dislocations and to preserve an important source of universal service funding. Moreover, the Arbitrators are evaluating the need for special access PMs against the backdrop of the Commission's directive, namely that special access PMs, if imposed at all, are to be imposed where special access circuits are ordered in lieu of UNEs. Whether special access circuits are functionally equivalent to UNEs is also not the fundamental issue in the examination of whether, as WCOM has claimed, CLECs have been forced to order special

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[107] *Id.* at 5.

[108] *Id.* at 6.

[109] WCOM Exhibit 16, Rebuttal Testimony of Karen K. Furbish at 10-11 (May 9, 2003) (Furbish Rebuttal).

[110] *In the Matter of Access Charge Reform*, Fifth Report and Order and Further Notice of Proposed Rulemaking, CC Docket No. 98-147, at 6, ¶ 8 (rel. Aug. 27, 1999) (Access Charge Reform Order).

access circuits in lieu of UNEs. Accordingly, the Arbitrators find it unnecessary to define special access for purposes of the proceeding.

DPL ISSUE NO. 4.

Can any special access circuit, whether interstate or intrastate, be used or is it able to be used to provide local service, as well as data and long distance services?

SBC Texas' Position

SBC Texas claimed that special access circuits, whether intrastate or interstate in nature, can be used to carry voice, data, and video applications, and are capable of carrying long-distance and local traffic.[111]

WCOM's Position

WCOM argued that, while intrastate special access operates in the same manner as interstate special access, the FCC's rules "mixed use" rule requires that any circuits carrying 10% or more interstate traffic be purchased out of an ILEC's interstate access tariff.[112] Thus, WCOM asserted that an assessment must be made to determine if functionally-equivalent loop and transport UNEs can be ordered, because UNEs are priced based on TELRIC or some other forward-looking cost method, unlike inter- or intrastate special access services, which are not.[113]

Arbitrators' Decision

The evidence makes clear that, from a technical standpoint, special access circuits, whether interstate or intrastate, can carry voice, data and video applications, including both

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[111] Bibbings Direct at 3.

[112] Furbish Direct at 7.

[113] *Id.*

long distance and local traffic. However, from a legal standpoint the Arbitrators find that there are differences. For example, if the traffic on a special access circuit is comprised of at least 10% interstate traffic, the circuit is deemed to be an interstate circuit and it is then ordered, provisioned and billed pursuant to the ILEC's interstate tariff. On the other hand, if a special access circuit carries less than 10% interstate traffic, it is deemed to be an intrastate circuit and is ordered, provisioned and billed pursuant to the ILEC's intrastate tariff. In any case, "mixed use" rule is not relevant to the central issue before this commission. This matter turns on the FCC's local use restrictions. In order for an arguably functionally-equivalent circuit to be ordered as a UNE, instead of a special access circuit, the carrier must satisfy the FCC's local use restrictions. Thus, the Arbitrators find that a purely technical approach to the technological capabilities of a special access circuit does not take into consideration the very real legal and policy distinctions established by the FCC. Accordingly, the issue of whether any special access circuit, whether interstate or intrastate, can technically be used or is it able to be used to provide local service, as well as data and long distance services is not the relevant inquiry.

DPL ISSUE NO. 5.

Is the current process by which CLECs order special access circuits competition- and/or customer-affecting?

SBC Texas' Position

SBC Texas maintained that all orders submitted to the Access Service Center (ASC), regardless of the customer's identity, are processed on a first-come, first-service basis.[114] SBC Texas stated that there are minor differences regarding provisioning and maintenance for special access customers' orders processed through the Business Communications Services (BCS)

[114] SBC Texas Exhibit 1, Direct Testimony of David B. Barnes at 6 (Apr. 10, 2003) (Barnes Direct).

process (for CLEC/End-User retail customers) versus the ASC process (for IXC customers).[115] SBC Texas argued that because the standard due date intervals in the tariffs applies equally to all customers, there is no preferential or discriminatory treatment in favor of one customer over another in the ordering processing for retail end-users and CLECs versus the ordering process applicable to IXCs.[116]

WCOM's Position

WCOM disagreed with SBC Texas's assertions, arguing that the processes by which each type of customer orders special access circuits from SBC Texas differ, and these differences, along with the economic incentive inherent in the relationship between SBC Texas and its affiliates, present opportunities for SBC Texas to provide more favorable special access performance to its own operations.[117] WCOM expressed concern regarding SBC Texas's process system for retail customers versus IXCs, arguing that "(f)air and equitable treatment would mean that all of SBC Texas's customers are subject to the same level of hand-holding, oral discussions, or resolutions by email, or all are subject to the same type of automated system currently associated with the ASR processes."[118] Further, WCOM argued that all CLECs rely on the ILEC's last-mile facilities to serve higher-volume customers, since "to date no carrier has been able to make a business case sufficient to attract the capital necessary to duplicate the ILEC's networks built over several decades under traditional embedded cost-based rate of return regulation."[119] Furthermore, WCOM opined that customers rely on incumbent facilities, either

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[115] SBC Texas Exhibit 7, Direct Testimony of Ronald A. Watkins at 11 (Apr. 10, 2003) (Watkins Direct).

[116] Barnes Direct at 8.

[117] Furbish Rebuttal at 5.

[118] *Id.* at 6-7.

[119] Furbish Direct at 9.

directly or indirectly, since some portion of their telecommunications and/or data transmission needs are met via a competing carrier's interconnection to the ILEC's special access circuits.[120]

Arbitrators' Decision

Here again, the Arbitrators find that the disposition of this DPL is not dispositive of whether or not to impose PMs on special access, given the FCC's local use restrictions. The Arbitrators find that the voluntary performance monitoring and reporting to its customers currently employed by SBC Texas for its special access services contradicts WCOM's apprehensions regarding favorable treatment of its affiliates and retail customers by SBC Texas. Aside from expressing concerns regarding SBC Texas' inherent economic incentives, and pointing out differences in ordering processes between retail, end-use customers and IXC, WCOM did not provide any meaningful, factual evidence to illustrate that the existing ordering processes are adversely affecting competition or are customer-affecting.[121] The automated mechanisms for ordering special access circuits by IXCs have been in use for many years. As SBC Texas noted, while there may small differences between the system used by IXCs and its retail customers, the standard due date intervals from the appropriate tariffs apply to all the customers.

DPL ISSUE NO. 6.

Are special access performance measures needed for all intrastate and interstate special access circuits to further the development of facilities-based local competition?

SBC Texas' Position

SBC Texas argued that based on the percentages provided by WCOM regarding special access facility-based services (including local service), it appears that carriers are meeting their

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[120] *Id.* at 10.

[121] Transcript, Hearing on the Merits, at 183 (Jun. 3, 2003).

special access requirements through self-provisioning.[122] Therefore, SBC Texas opined special access performance measures are not necessary for furthering the development of facilities-based competition, including local competition.[123]

WCOM's Position

WCOM argued that "regulatory oversight is necessary to make certain that SBC Texas' opportunities and ability to engage in discriminatory activities in favor of their own wholesale affiliates and retail end-use customers--because of their ubiquitous facilities--no longer exists."[124] WCOM stated that "until the special access facilities market becomes irreversible and robustly competitive, SBC Texas and other ILECs will remain dominant in the marketplace and have the ability and opportunity to discriminate between their affiliates and competing carriers."[125]

Arbitrators' Decision

The Arbitrators find that the imposition of PMs on special access circuits is unnecessary in order to further the development of facilities-based local competition. While special access circuits can technically carry local traffic, the Arbitrators believe that if a CLEC was, indeed, providing significant amounts of local exchange service, it could meet the FCC's local use restrictions and thereby order UNEs instead of special access.

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[122] Smith Direct at 16.

[123] *Id.*

[124] Furbish Rebuttal at 15 – 16.

[125] *Id.*

DPL ISSUE NO. 7.

Are special access performance measures applicable to all intrastate and interstate special access circuits needed for any other reason, e.g. ensuring compliance with the FTA?

SBC Texas' Position

SBC Texas opined that there is nothing in the FTA, especially Section 271, which obligates SBC Texas to adopt performance measurements on interstate and/or intrastate special access circuits.[126] SBC Texas refuted WCOM's arguments regarding the Section 272 audit, stating that the auditor was not required to examine or express an opinion on SBC Texas' compliance with Section 272 requirements as part of the Audit.[127] SBC Texas further questioned whether the audit was insufficient as WCOM states, if WCOM can state that the audit shows that SBC Texas has provided better performance to its Section 271 affiliate than to non-affiliated carrier customers or retail customers.[128]

WCOM's Position

WCOM urged the Commission to adopt special access performance measures to ensure that SBC Texas provides good quality, non-discriminatory special access and/or dedicated services to all its customers.[129] WCOM argued that SBC Texas is still dominant in the provision of last-mile facilities and as a result, a competing carrier must order SBC Texas' facilities as UNEs, or EELs, or intrastate special access, or as interstate special access to serve larger volume customers.[130] WCOM opined that Congress was aware that meeting the Section 271 checklist

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[126] Smith Direct at 16.

[127] SBC Texas Exhibit 3, Rebuttal Testimony of Clint R. Bibbings, Jr. at 18-19 (May 9, 2003) (Bibbings Rebuttal).

[128] Bibbings Rebuttal at 18-19.

[129] Furbish Direct at 23.

[130] *Id.* at 13-14.

requirements did not necessarily mean that the local market was fully competitive. WCOM argued, rather, that Congress enacted Section 272 to require a BOC to provide long distance and other services through independent and separate affiliates, and to afford competing carriers the same treatment a BOC provides to itself and its affiliate.[131] WCOM further asserted that recent Section 272 audit report results were insufficient to determine whether SBC Texas complied with Section 272 or the FCC's non-accounting safeguards.[132] WCOM further stated that the "Joint FCC-State Audit of SBC Texas' compliance with the provisions contained in Section 272 indicates that SBC may have favored its affiliate over non-affiliated competing carrier customers in the provision of special access services."[133]

Arbitrators' Decision

The Arbitrators find that the FTA does not require the imposition of PMs on special access circuits.

DPL ISSUE NO. 8.

Is SBC Texas contractually obligated to provide special access services to any carrier pursuant to the T2A or any interconnection agreement?

SBC Texas' Position

SBC Texas argued that the T2A is a Commission-approved interconnection agreement that allows CLECs to obtain local interconnection and service arrangements via resale or UNEs, for the purpose of providing local telecommunications service to end users. SBC Texas stated

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[131] *Id.* at 13.

[132] *Id.* at 17-19.

[133] *Id.* at 17.

that since divestiture, SBC Texas has provided special access services via federal and state tariffs, and thus, SBC Texas is not contractually obligated to provide special access services to any carrier pursuant to any interconnection agreement.[134]

WCOM's Position

No position expressed.

Arbitrators' Decision

The Arbitrators find that the record does not support a finding that SBC Texas is contractually obligated to provide special access services pursuant to the T2A or any other interconnection agreement. However, the Arbitrators do find that SBC Texas is obligated to provide special access services pursuant to applicable state and federal special access tariffs.

DPL ISSUE NO. 9.

Can CLECs obtain special access services from carriers other than SBC Texas, i.e., are those services competitively available?

SBC Texas' Position

SBC Texas claimed that the special access market in Texas is competitive and the number of alternative providers for special access has increased in the last ten years.[135] SBC Texas stated that its review of Internet websites reveled that there were at least 21 providers that offer special access (or special access-like services and products) in SBC Texas' service area.[136]

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[134] Smith Direct at 17 - 18.

[135] Bibbings Direct at 12-13, *citing In the Matter of Expanded Interconnection with Local Telephone Company Facilities and Amendment of the Part 69 Allocation of General Support Facility Costs,* CC Docket Nos. 91-141 and 92-222, Report and Order and Notice of Proposed Rulemaking, ¶ 4 (rel. Oct. 19, 1992).

[136] Bibbings Direct at 13.

SBC Texas corroborated its assertion by referencing FCC Orders which conclude that several CAPs have entered the special access market place and that the market place is competitive.[137,138] SBC Texas urged that since the FCC has acknowledged that special access services are competitive services, and because CLECs have choices when purchasing such services, it would not be meaningful to impose performance measures on such services.[139] Furthermore, SBC Texas noted that Section 58.151(17) of PURA, which classifies special access as a "nonbasic service" subject pricing flexibility, is an additional indicator of a healthy market for special access services in Texas.

WCOM's Position

In general, WCOM claimed that special access services in Texas are not competitive. WCOM asserted that most of the services are not competitively available from facilities-based providers other than the incumbents.[140] WCOM explained that its practice is to seek circuits from its own facilities first, and then attempt to obtain those facilities from a CAP. [141] According to WCOM, CAPs provide superior circuits and services and are usually priced lower than incumbent LECs.[142] WCOM stated that it orders facilities from the incumbent LEC, whose

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[137] Bibbings Direct at 12 *citing In the Matter of Expanded Interconnection with Local Telephone Company Facilities and Amendment of the Part 69 Allocation of General Support Facility Costs,* CC Docket Nos. 91-141 and 92-222, Report and Order and Notice of Proposed Rulemaking, ¶ 4 (rel. Oct. 19, 1992). In that Order, the FCC found "a growing number of Competitive Access Providers (CAPs) have entered the access market...deploying fiber-optic rings...to serve the needs of large communications-intensive businesses."

[138] Smith Direct at 20, *citing In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996,* CC Docket No. 96-98, Supplemental Order Clarification, FCC No. 00-183, ¶ 18 (June 2, 2000). In that Order the FCC concluded that the "Competitive access, which, originated in the mid-1980s, is a mature source of competitive in telecommunications markets."

[139] Smith Direct at 20.

[140] Furbish Direct at 10, 24-25.

[141] Furbish Direct at 11, 1 -3.

[142] *Id.*

facilities are ubiquitous, only if no other competitive providers are available[143] WCOM noted that despite the above policy, in reality only a small portion of its nationwide "off-net" requirements are met by CAPs or other CLECs.[144] WCOM claimed that as a result, it must rely on SBC Texas to serve more than 80% of the commercial and institutional buildings where its customers are located.[145]

WCOM rebutted SBC Texas' assertions that the Texas special access market is competitive. [146] WCOM asserted that it can meet only 23.9% of its special access circuit needs via its own facilities and about 3.1% through the use of other competing carriers' facilities.[147] WCOM offered the Dallas MSA as an example, where 90% of its special access needs must be purchased from SBC Texas.[148]

Arbitrators' Decision

Here again, the Arbitrators find that the resolution of this DPL is not dispositive of whether or not to impose PMs on special access. Although SBC Texas has presented evidence that appears to indicate that the special access marketplace in Texas is mature and competitive, the Arbitrators believe that this finding is largely irrelevant. The Arbitrators conclude that the competitive nature of the special access services is not the litmus test for making a determination on the core issue, i.e. whether to impose performance measures on those special access services that are supposedly used in lieu of UNEs. As discussed earlier, the FCC's local use restrictions determine if a circuit qualifies as a UNE, and if so, PMs apply. CLECs' dependency on SBC

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[143] Furbish Direct at 11, 6-8.

[144] *Id.*

[145] *Id.* at 11, 9-13.

[146] Furbish Rebuttal at 14, 1-14.

[147] Furbish Rebuttal at 14, 16.

[148] Transcript, Hearing on the Merits at 516:16-19, and 516-517; *see also* Furbish Rebuttal at 16:6-8.

Texas' special access circuits does not automatically trigger the imposition of PMs on special access circuits.

DPL ISSUE NO. 10.

If a CLEC cannot obtain UNEs from SBC Texas, is the CLEC's only option to use SBC Texas' special access services in lieu of UNEs or are other options available to the CLEC in order to provide service to its end-user customers?

SBC Texas' Position

SBC Texas maintained that special access service marketplace is highly competitive, and that many CLECs provide special access services to other carriers as competitive access providers (CAPs).[149] In addition, SBC Texas asserted that a CLEC may also self provision the services.[150] SBC Texas claimed that its review of Internet websites revealed that there were at least 21 providers that offer special access (or special access-like services and products) in SBC Texas' service area.[151] SBC Texas corroborated its assertion by referencing FCC orders which conclude that several CAPs have entered the special access market place and that the market place is competitive.[152,153] SBC Texas urged that since the FCC has acknowledged that special

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[149] Smith Direct at 21.

[150] *Id.*

[151] Bibbings Direct at 13.

[152] Bibbings Direct at 12 *citing In the Matter of Expanded Interconnection with Local Telephone Company Facilities and Amendment of the Part 69 Allocation of General Support Facility Costs,* CC Docket Nos. 91-141 and 92-222, Report and Order and Notice of Proposed Rulemaking, ¶ 4 (rel. Oct. 19, 1992). In that Order, the FCC found "a growing number of Competitive Access Providers (CAPs) have entered the access market...deploying fiber-optic rings...to serve the needs of large communications-intensive businesses."

[153] Roman Smith Direct at 20 referring to *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996,* CC Docket No. 96-98, Supplemental Order Clarification, FCC No. 00-183, para. 18 (June 2, 2000). In that Order the FCC concluded that the "Competitive access, which, originated in the mid-1980s, is a mature source of competitive in telecommunications markets."

access services are competitive services, and because CLECs have choices when purchasing such services, it would not be meaningful to impose performance measures on such services.[154] Furthermore, SBC Texas noted that Section 58.151(17) of PURA, which classifies special access as a "nonbasic service" subject pricing flexibility, is an additional indicator of a healthy market for special access services in Texas.

WCOM's Position

WCOM stated that if it cannot self-provision special access circuits or order them from other CLECs, it must rely on SBC Texas' facilities.[155] WCOM claimed that, due to a number of factors, its ability to order UNEs was limited.[156] WCOM explained that, while occasionally it might order a high-capacity UNE loop, like other CLECs, it not only needs the loop, but the transport to connect customers to its network.[157] WCOM observed that ordering EELs was problematic and therefore, WCOM is forced to order higher-priced special access services from SBC Texas.[158] Furthermore, because of the FCC's "10% rule," WCOM noted that it must order a vast majority of its off-net special access circuits from SBC Texas' federal Tariff.[159] Therefore, WCOM urged the Commission to adopt performance metrics for both intrastate and interstate special access circuits.[160]

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[154] Smith Direct at 20.

[155] Furbish Direct at 12.

[156] *Id.* at 12, 22-25.

[157] *Id.* at 13.

[158] *Id.* at 12-13.

[159] *Id.* at 13.

[160] *Id.*

Arbitrators' Decision

The Arbitrators find that CLECs are able to obtain UNEs from SBC Texas where facilities exist and the CLEC can meet the FCC's local use restrictions. The Arbitrators also find that where the CLEC cannot meet the FCC's local use restrictions for UNEs, they can self-provision such circuits, obtain circuits from other CLECs or CAPs where such facilities exist, or have circuits provisioned pursuant to SBC Texas' special access tariffs.

DPL ISSUE NO. 11.

To the extent CLECs must order special access services from SBC Texas in lieu of UNEs, to what extent are those special access services lines interstate and/or intrastate lines?

SBC Texas' Position

SBC Texas maintained that the distinction between intrastate and interstate special access circuits remains the same, regardless of the type of entity obtaining the special access circuits or the type of service for which those special access circuits are used.[161] SBC Texas explained that classification of a special access circuit as intrastate or interstate dictates whether SBC Texas provisions the circuit pursuant to its state special access tariff or its federal special access tariff. [162] SBC Texas emphasized that even when a CLEC orders a special access circuit in lieu of UNEs, the distinction between intrastate and interstate special access circuits would remain. [163]

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[161] Bibbings Direct at 10.

[162] *Id.*

[163] *Id.* at 11.

WCOM's Position

WCOM stated that intrastate special access operates in the same manner as interstate special access services.[164] WCOM explained that most of its special access services lines were interstate due to the FCC's "mixed user rule" which requires that any circuits carrying 10% or more interstate traffic should be purchased out of an ILEC's interstate access tariff.[165] WCOM concluded that, as a result of the FCC's "mixed user rule," the percentage of SBC Texas' intrastate special access circuits compared to its embedded base of FCC-tariffed circuits is *de minimis.*[166]

Arbitrators' Decision

The Arbitrators find that the disposition of this DPL is not dispositive of whether or not to impose PMs on special access. The Arbitrators further find this DPL to be irrelevant since it is erroneously premised on the notion that CLECs must order special access services in lieu of UNEs. As discussed earlier, a circuit is either a UNE or a special access circuit. If the FCC's local use restrictions are met, the circuit qualifies as a UNE. If the circuit does not qualify as a UNE, it's a special access circuit. The FCC's mixed use rule is dispositive of whether special access circuits are ordered out of either the interstate or intrastate tariffs. See DPL Issue No. 4 regarding the mixed use rule.

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[164] *Id.* at 7.

[165] *Id.* referring to 47 C.F.R. 36.154.

[166] Furbish Direct at 7.

DPL ISSUE NO. 12.

To the extent CLECs must order special access services from SBC Texas in lieu of UNEs, does SBC Texas' past and current performance in the provision of such Special Access services justify the imposition of performance measurements?

SBC Texas' Position

SBC Texas noted that its performance measure over the last three years has improved and continues to improve.[167] Specifically, SBC Texas argued that its high-quality performance in the provision of special access services in the year 2002 demonstrates that additional performance measurements are not necessary.[168] SBC Texas provided a chart on its overall special access performance for years in key performance categories, for DS1 services, from 2001 forward.[169] The chart shows an improvement in performance since 2001.[170] SBC Texas indicated, however, that it is continuously looking for ways to improve on its performance.[171] Next, SBC Texas explained that it provides individual customers reports on request to any special access customers.[172] SBC Texas stated that presently it reports for IXC customers on the following measurements: On time Delivery (OTD), Mean Time to Repair, (MTTR), New Circuit Failure Rate (NCFR) and Failure Frequency (FF).[173] For major retail accounts and small and medium

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[167] Watkins Rebuttal at 20.

[168] Bibbings Direct at 15; *see also* Smith Rebuttal at 15.

[169] Watkins Rebuttal at 20.

[170] *See* Confidential Attachment RWR-1 to Watkins Rebuttal at 21.

[171] Watkins Direct at 4.

[172] Watkins Direct at 5.

[173] *Id.*