

retail accounts SBC Texas reported performance on measures that address OTD, MTTR, and NCFR, and FF.<sup>174</sup>

SBC Texas believed that the above measures address the timeliness of its provisioning and how quickly service is restored.<sup>175</sup> However, SBC Texas cautioned that it not make any distinction in the level of service it seeks to provide to customers, whether the service is ordered from the intrastate or the interstate tariff. As a result its performance reports include a total of interstate and intrastate circuits.<sup>176</sup> SBC Texas further noted that it has provided individual customer tracking reports, to customers on a request basis and for some customers like WCOM on a routine basis<sup>177</sup> and volunteered to continue this practice.<sup>178</sup>

### ***WCOM's Position***

WCOM emphatically stated that SBC Texas' past and current performance in the provision of special access services justified the imposition of performance measures.<sup>179</sup> Although WCOM noted that there has been an overall improvement in SBC Texas' performance in 2003, WCOM believed that there was no guarantee that this performance improvement would continue in the future without regulatory monitoring.<sup>180</sup> WCOM asserted that without "regulatory transparency," it has no assurance if SBC Texas is providing service to WCOM comparable to

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<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

<sup>176</sup> *Id.* at 9.

<sup>177</sup> Watkins Rebuttal at 2.

<sup>178</sup> *Id.*

<sup>179</sup> Furbish Direct at 16.

<sup>180</sup> *Id.* at 17.

SBC Texas' affiliate or SBC Texas' retail end-user customers.<sup>181</sup> Furthermore, WCOM asserted that there is no way, under the current process, to determine if SBC Texas were acting discriminatorily in favor of its Section 271 affiliates.<sup>182</sup> WCOM believed that additional JCIG metrics are necessary for capturing "customer-affecting" and potential discriminatory activities.<sup>183</sup> WCOM elaborated on the JCIG metrics for Ordering, Provisioning and Maintenance, stating that it believed are necessary in addition to the performance metrics already in place.<sup>184</sup>

WCOM explained that SBC Texas's intrastate access tariff provides no performance measurements for customer-critical factors.<sup>185</sup> As an example, WCOM offered examples of the following metrics that are absent, but necessary, to providing satisfactory customer services: returning an order installation date confirmation in a timely manner, late confirmations, installing a circuit on time, late circuit installation, circuit failures within 30 days of installation, mean time to restore non-functioning circuits, or repeat trouble reports.<sup>186</sup> WCOM believed that the "performance plan" under the Federal tariff SBC Texas' "Managed Value Plan" is entirely insufficient to provide special access performance incentives to SBC Texas. Further, WCOM illustrated that even this plan is available only too few large carrier customers.<sup>187</sup>

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<sup>181</sup> *Id.*

<sup>182</sup> Furbish Rebuttal at 20-21.

<sup>183</sup> *Id.* at 21.

<sup>184</sup> *Id.* at 21-24.

<sup>185</sup> *Id.* at 16-17.

<sup>186</sup> *Id.*

<sup>187</sup> *Id.*

***Arbitrators' Decision***

*If past performance alone is the guiding factor, the Arbitrators conclude that SBC Texas' performance does not justify the imposition of performance measures on special access services.<sup>188</sup> SBC Texas provided aggregate and individual company reports to its special access customers that tracked various performance metrics. Other than for a brief period of time in 2000 for which extenuating circumstances existed, i.e., unanticipated demand, SBC Texas' provisioning of special access circuits has not been unsatisfactory. WCOM's argument that at some time in the future without a Commission-mandated performance measures SBC Texas' performance may deteriorate is not supported by the record. The Arbitrators believe the voluntary performance metrics tracked by SBC Texas and disclosed to customers upon request is more than adequate for purposes of monitoring SBC Texas' performance, and ensuring that SBC Texas' performance does not deteriorate to unacceptable levels in the future.*

**DPL ISSUE NO. 13.**

***What would be the effect upon the intrastate and interstate tariffs of implementation of Special Access performance measures? In particular, address impacts upon SBC Texas' FCC Tariff No. 73.***

***SBC Texas' Position***

SBC Texas maintained that special access performance measurements are unnecessary.<sup>189</sup> SBC Texas cited several sections from its Texas special access tariffs, arguing that these provide the incentive and motivation for SBC Texas to provide high quality and timely special access services.<sup>190</sup> For instance, both its state and federal tariffs provide credit allowances for

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<sup>188</sup> SBC Texas Exhibit 7, Watkins Direct, Confidential Exhibits RW-1, 2A, 2B, 3A, 3B, 3C, 4, 5 and 6. See also SBC Confidential Exhibits 13, 15, 16, 16A, 17, 18, and 19.

<sup>189</sup> Bibbings Direct at 16.

<sup>190</sup> *Id.*

substandard performance in the providers for special access services.<sup>191</sup> SBC Texas stated that if the Commission still determines that performance measurements are necessary for intrastate special access services, then SBC Texas believed that existing provisions for credit would have to be deleted to avoid the assessment of double penalties on SBC Texas.<sup>192</sup> Regardless, SBC Texas reiterated its position that the Commission has no authority to direct a change to an FCC tariff.<sup>193</sup>

### ***WCOM's Position***

WCOM believed that there would be no effect on SBC Texas' interstate or interstate tariffs, upon the implementation of special access performance measures.<sup>194</sup> WCOM argued that several CLECs and large end-user have requested the FCC to establish national performance metrics, standards and penalties applicable to federally tariffed special access services.<sup>195</sup> Furthermore, WCOM noted that several states have already determined that state-ordered measurements and monitoring of ILEC special access performance metrics and standards would not intrude or otherwise interfere with the FCC's regulation of the rates, cost allocation requirements or tariff-specific terms and conditions of federally-tariffed ILEC special access services.<sup>196</sup> WCOM believed that even if the FCC were eventually to establish national standards, state commissions would still play a vital, critical role in the monitoring and reporting of ILEC special access services.<sup>197</sup>

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<sup>191</sup> *Id.*

<sup>192</sup> *Id.*

<sup>193</sup> *Id.* at 17.

<sup>194</sup> Furbish Direct at 19.

<sup>195</sup> Furbish Rebuttal at 12.

<sup>196</sup> *Id.*

<sup>197</sup> *Id.*

WCOM asserted that SBC Texas' intrastate access tariff provides no performance measurements for customer-critical factors.<sup>198</sup> To illustrate, WCOM offered examples of certain metrics that are necessary to providing satisfactory customer services, but which are missing from SBC Texas' tariff: returning an order installation date confirmation in a timely manner; late confirmations; installing a circuit on time; late circuit installation; circuit failures within 30 days of installation; mean time to restore non-functioning circuits; and repeat trouble reports.<sup>199</sup> WCOM claimed that, under the federal tariff, SBC Texas' "Managed Value Plan" the "performance plan" is entirely insufficient to provide special access performance incentives to SBC Texas. Further, WCOM illustrated that even this plan is available only to a few large carrier customers.<sup>200</sup>

### ***Arbitrators' Decision***

*The Arbitrators conclude that additional special access performance measures are unnecessary. SBC Texas' intrastate and interstate tariffs currently provide credit allowances for missed due dates and service interruptions.<sup>201</sup> Section 2.5.5 of the intrastate access tariff provides for credit allowances for access service interruptions, including interruptions in special access services.<sup>202</sup> Further, under Section 7.2.1(E) of the SBC Texas intrastate access tariff, a*

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<sup>198</sup> *Id.* at 16-17.

<sup>199</sup> *Id.*

<sup>200</sup> *Id.*

<sup>201</sup> Bibbings Direct at 17.

<sup>202</sup> SWBT Access Service Tariff, Section 2.5.5, Credit Allowance for Service Interruptions.

*customer can obtain credit for a full month of service (1.544 Mbps Access Service) when service interruptions occur.*<sup>203</sup>

*Similarly, SBC Texas' interstate access tariff, FCC Tariff No. 73, provides for credit allowances for substandard performance in the provision of special access services. For instance, Section 2.5.5 provides credit for missed due date, Section 2.5.6 provides credit allowance for service interruptions and Section 2.5.7 provides service assurance warranties of SAWs.*<sup>204</sup>

#### **DPL ISSUE NO. 14.**

***Are the provisions of SBC Texas' wholesale and retail special access tariffs sufficient to ensure non-discriminatory treatment of its competing carrier customers versus SBC Texas' own retail customers, or its Sec. 272 affiliate?***

#### ***SBC Texas' Position***

SBC Texas believed that the provisions in its wholesale and retail special access tariffs are sufficient to ensure nondiscriminatory treatment of its competing carriers.<sup>205</sup> SBC Texas explained that any customer that purchases special access services from SBC Texas must do so pursuant to one of SBC Texas' special access tariff, under the same terms and conditions as all other customers purchasing special access services from the same tariff.<sup>206</sup> SBC Texas noted that it currently provides WCOM with tracking reports outlining the details and trends of SBC

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<sup>203</sup> SWBT Access Service Tariff, Section 7.2.1(E), Availability and Allowance for Interruptions on 1.544 Mbps Access Service.

<sup>204</sup> SWBT Interstate Tariff No. 73, Section 2.5.5 Missed Installation on Confirmed Due Date; SWBT Interstate Tariff No. 73, Section 2.5.6 Credit Allowances for Service Interruptions; SWBT Interstate Tariff No. 73, Section 2.5.7 Special Assurance Warranty Schedule (SAWS)

<sup>205</sup> Bibbings Direct at 17.

<sup>206</sup> *Id.*

Texas's performance on special access.<sup>207</sup> SBC Texas claimed that these reports are delivered to WCOM on a monthly basis and have evolved over several years. SBC Texas explained that customers that are not set up to receive the reports like WCOM can make a request to do so. SBC Texas also stated that it has provided comparisons between a company's specific metric and SBC Texas', non-confidential, aggregate special access performance metrics against their specific metrics, SBC Texas can and has provided aggregate data for this type of comparison.<sup>208</sup>

### ***WCOM's Position***

WCOM asserted that SBC Texas' relevant tariffs do not contain any provisions relating to nondiscriminatory treatment.<sup>209</sup> WCOM stated that the FCC-mandated biennial audit report pursuant to Section 272 of the FTA was not properly structured to determine whether SBC Texas is in compliance with the nondiscriminatory provisions of Section 272.<sup>210</sup> Furthermore, WCOM believed that "sunsetting" the Section 272 affiliate requirements three years after a BOC receives Section 271 approval could potentially relieve SBC Texas of its affiliate related obligations under Section 272, including the related special access performance reporting and biennial auditing requirements.<sup>211</sup> Therefore, WCOM concluded that in the absence of action from the Texas Commission, competing carriers will not be in a position to determine if SBC Texas is engaging in discriminatory activities in favor of its affiliates or its own retail customers.<sup>212</sup>

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<sup>207</sup> Watkins Direct 3-7

<sup>208</sup> *Id.*

<sup>209</sup> Furbish Direct at 20.

<sup>210</sup> *Id.*

<sup>211</sup> *Id.*

<sup>212</sup> *Id.*

***Arbitrators' Decision***

*The Arbitrators disagree with WCOM that current provisions in the interstate and intrastate Tariffs are not sufficient to ensure non-discriminatory access to services. WCOM's arguments hinge on its belief that after the "sunsetting" of SBC Texas' Section 272 affiliate requirements, competing carriers will not be able to determine if SBC Texas is discriminating in favor of its affiliate. The Arbitrators find that the "sunsetting" of SBC Texas' Section 272 affiliate requirements will, in and of itself, not relieve SBC Texas of the non-discriminatory service provisions of Section 272(e), i.e., to provide service in a period that is not longer than it provides such services to itself. The Arbitrators believe that SBC Texas' existing monitoring and reporting of its special access services will provide each of its special access customers with sufficient information, with or without the Section 272 separate affiliate requirement, to monitor their individual company's experience and compare same to the aggregate of all of SBC's special access customers including itself.*

**DPL ISSUE NO. 15.**

***Assuming the Commission has the jurisdiction and authority to adopt special access service performance measurements, should those performance measurements be limited to only intrastate special access services that CLECs must order from SBC Texas in lieu of UNEs?***

***SBC Texas' Position***

SBC Texas explained that there is no verifiable way by which to determine with certainty that a special access circuit is ordered in lieu of requested UNEs that are otherwise unavailable to the carriers.<sup>213</sup> SBC Texas added that even if that were the case, the number of special access circuits that would fall in this category would be relatively few.<sup>214</sup> SBC Texas explained that generally a special access circuit can carry a mixture of different types of traffic, i.e. local, long-

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<sup>213</sup> Bibbings Direct at 11.

<sup>214</sup> *Id.*



distance, voice, and/or data.<sup>215</sup> According to SBC Texas, CLECs like WCOM that seek to provide their customers with multiple types of services, often on a bundled basis, resort to using special access services ordered from SBC Texas for practical and economic reasons.<sup>216</sup> As a result, SBC Texas does not monitor or govern the type of traffic that is provided using a special access circuit provisioned to a CLEC.<sup>217</sup> Therefore, SBC Texas stated that it would be difficult to verify whether a special access circuit was actually used in lieu of UNEs.<sup>218</sup>

### ***WCOM's Position***

WCOM argued that the Commission must not limit the performance measurement to only intrastate special access services that CLECs must order from SBC Texas in lieu of UNEs.<sup>219</sup> WCOM explained that the amount of intrastate special access ordered by competing carrier customers from SBC Texas is *de minimis* and would not provide an adequate basis for determining the quality of service SBC Texas provides.<sup>220</sup> WCOM alleged that, without including the interstate circuits in the universe of Texas circuits to be monitored, SBC Texas could discriminate against CLECs but show data, if limited to intrastate circuits, that it was providing excellent service.<sup>221</sup> Furthermore, WCOM explained that CLECs compete with each other and with SBC Texas with bundled offerings, that include a mix of local, intrastate, interstate, and data services, rendering the traditional regulatory distinctions of ordering those

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<sup>215</sup> Bibbings Rebuttal at 6.

<sup>216</sup> *Id.*

<sup>217</sup> *Id.*

<sup>218</sup> *Id.*

<sup>219</sup> Furbish Direct at 21-22.

<sup>220</sup> *Id.*

<sup>221</sup> *Id.*

circuits as UNEs versus intrastate special access services versus interstate special access services irrelevant.<sup>222</sup> Therefore, WCOM urged the Commission to join other states and require SBC Texas to measure and report its performance on both intrastate and FCC-tariffed special access services, and to do so separately for SBC Texas' Sec. 272 affiliates, non-affiliated carrier customers, and its retail end-user.<sup>223</sup>

### ***Arbitrators' Decision***

*As noted previously in DPL Issue No. 1, the Arbitrators find, first and foremost, that the Commission has the authority to direct implementation of performance measurements for the provisioning of UNEs. However, the record does not support a conclusion that CLECs order special access in lieu of UNEs. Accordingly, because the threshold criterion has not been established, there is no point to addressing the question of to which special access services performance measurements should be applied.*

## **IV. CONCLUSION**

The Arbitrators conclude that the decisions outline in the Award and the Award matrix, as well as the conditions imposed on the parties by these decisions, meet the requirements of FTA § 251 and any applicable regulations prescribed by the FCC pursuant to FTA § 251.

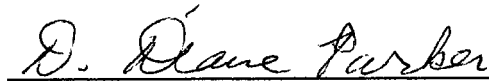
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<sup>222</sup> *Id.*

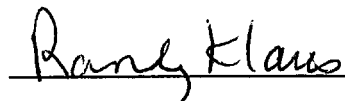
<sup>223</sup> *Id.*

**SIGNED AT AUSTIN, TEXAS the 27th day of February, 2004.**

**FTA § 251 PANEL**

A handwritten signature in cursive script, reading "D. Diane Parker", written over a horizontal line.

**D. DIANE PARKER  
ARBITRATOR**

A handwritten signature in cursive script, reading "Randy Klaus", written over a horizontal line.

**RANDY KLAUS  
ARBITRATOR**

**Staff Arbitration Team Members:**

**Elango Rajagopal  
Tina Donahoo**