PUC DOCKET NO. 24542

PETITION OF MCIMETRO ACCESS TRANSMISSION SERVICES, LLC, SAGE TELECOM, INC., TEXAS UNE PLATFORM COALITION, MCLEOD USA TELECOMMUNICATIONS SERVICES, INC., AND AT&T COMMUNICATIONS OF TEXAS, L.P. FOR ARBITRATION WITH SOUTHWESTERN BELL TELEPHONE COMPANY UNDER THE TELECOMMUNICATIONS ACT OF 1996	§ § § § § § § § §	**PUBLIC UTILITY COMMISSION** **OF TEXAS**

ARBITRATION AWARD

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ARBITRATION AWARD

This Arbitration Award (Award) establishes the terms of the interconnection agreement between Southwestern Bell Telephone Company (SWBT) and MCIMetro Access Transmission Services, LLC (MCIm). In this Award, the Arbitrators address a number of disputed issues, ranging from whether SWBT must continue to offer unbundled local switching and combined unbundled network elements (UNEs) to competitive local exchange carriers (CLECs), to whether the Public Utility Commission of Texas (Commission) should recalculate UNE loop costs and rates. Resolution of many of the issues required an assessment of the role of the UNE-P platform in Texas. The Arbitrators have determined that UNE-P remains a necessary option for CLECs in the Texas market.

SWBT and any CLEC that has requested arbitration in this proceeding pursuant to § 252 of the Federal Telecommunications Act of 1996[1] shall incorporate the decisions and language approved in this Award in any interconnection agreement that is subject to the outcome of this proceeding, including the language adopted by the Arbitrators, as reflected in the attached contract matrix.

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[1] 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).

I. EXECUTIVE SUMMARY

In this Arbitration Award, the Commissioners of the Public Utility Commission of Texas (Commission), Brett A. Perlman and Rebecca Klein, served as the arbitrators. The Arbitrators, with the assistance of Commission staff advisors, conducted the arbitration in accordance with the Commission's rules and FTA § 252(c). The issues resolved in this Award are limited to policy and substantive determinations, and the identification of terms to be included in the interconnection agreement that reflect those determinations. Issues related to pricing and cost shall be resolved in a subsequent cost proceeding. The specific contract terms adopted by the Arbitrators are set forth in a matrix attached to this Award.

This Executive Summary does not attempt to describe each of the determinations made in the Award. Instead, it seeks to highlight issues the Arbitrators consider to be of particular interest to the public, those most hotly contested by the parties, and overarching issues that affect the determination of multiple items in the parties' joint decision point list (DPL). This summary is not intended to serve in lieu of the more extensive discussions provided in the body of the Award and, if and to the extent this summary might be construed as deviating from the language of the Award, the language of the Award governs.

Application of the T2A and the Legitimately Related Provisions

In resolving the issues the parties raised in this arbitration, the Arbitrators answered two broad questions addressed to the Texas 271 Agreement (T2A).[2] First, the Arbitrators clarified the role of the T2A in this and future arbitrations and the deference to be accorded to the T2A.[3] Specifically, the T2A is an expression of Commission policy. The Arbitrators' reliance on a provision of the T2A is based on the Commission's judgment and rationale in originally adopting the relied-upon provision. Where a party can show that a different set of facts or some change in the relevant law or circumstances warrants a judgment or decision other than the one reached in the T2A, the Commission will not be bound by the terms of the T2A. Absent such a showing, however, the Commission is reluctant to repeatedly revisit the same policy issues.

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[2] *Investigation of Southwestern Bell Telephone Company's Entry into the Texas InterLATA Telecommunications Market*, Docket No. 16251, Order No. 55 (October 13, 1999) ("T2A").

[3] The Arbitrators' comments regarding T2A apply with equal force to Awards and Agreements arising out of other T2A-based proceedings, such as the *MCI WorldCom Agreement*.

Second, the Arbitrators considered the application of Attachment 26 and the legitimately related terms and conditions of the T2A. The Arbitrators conclude that a CLEC may opt into any provision of the T2A that is not legitimately related to any term or condition the CLEC seeks to arbitrate. Conversely, a CLEC may not opt into any term or condition of the T2A that is legitimately related to any term or condition the CLEC seeks to arbitrate. However, a CLEC may proffer, as the language it seeks through arbitration, language from the T2A. The fact that it is the same language as that found in the T2A is not, by itself, any basis to reject such language. To the contrary, the Commission's prior approval of the language is some indicia of the acceptability of the language. When faced with competing language, the Arbitrators adopt the language the Arbitrators conclude is best supported by the facts and the law. Where a CLEC offers language the same as or substantially identical to language from the T2A, and the ILEC offers neither competing language nor substantive basis for rejecting the proffered language, the Arbitrators may award language that mirrors language from the T2A, notwithstanding the fact that the CLEC was barred from automatic entitlement to the proffered language.

13-State and 12-State Language

The Arbitrators decline to adopt SWBT's proposed 12- and 13-State Agreement language. Notwithstanding whatever benefits SWBT might derive from the inclusion of such language, and even if such language might, in some instances, offer system-wide consistency, inclusion of the language is improper. First, some of the language pertains to issues not negotiated or expressly arbitrated by the parties in this proceeding. Second, inclusion of the proposed language improperly imposes on the Commission to discern and apply the law and contract terms applicable in other jurisdictions. Third, the language does not affect conduct in Texas and is therefore superfluous and poses the risk of confusion while unnecessarily adding to the length of the contract.

Unbundled Network Elements

The Arbitrators find that CLECs are impaired in Texas without access to local switching as an unbundled network element (UNE), and that there is competitive merit and it is the public interest to make local switching available on an unbundled basis. In addition, the Arbitrators find that the exception the FCC carved out to the requirement that ILECs provide local switching

as a UNE is triggered only when the ILEC provides nondiscriminatory, cost-based access to the enhanced extended link (EEL). Because SWBT has not satisfied this condition, the Arbitrators find that the exception is not currently applicable. Moreover, to increase market certainty and to ensure that CLECs in Texas would not be impaired without unbundled local switching for some or all Texas customers, the Arbitrators hold that implementation of the EEL requires Commission oversight to ensure that the EEL is properly available and that CLECs have an adequate opportunity to transition to market-based pricing or to seek alternative providers of local switching. The Arbitrators find, therefore, that if and when SWBT desires to invoke an FCC carve out or exception to treating local switching as a UNE, SWBT has the burden of initiating a proceeding before the Commission for that purpose. The Commission will then provide oversight of the proposed EEL transition, and evaluate the applicability of any FCC carve out in effect at that time. This process will allow all interested parties to present evidence on whether the exception should be applied as proposed by the FCC or in some other manner, consistent with FCC guidance and the state of applicable law at that time.

Similarly, the Arbitrators find that SWBT must continue to provide Directory Assistance and Operator Services (OS/DA) as UNEs. The *UNE Remand Order* requires ILECs to unbundle OS/DA services unless the ILEC provides customized routing to a requesting carrier to allow it to route traffic to alternative OS/DA providers. The Arbitrators find that SWBT has not accommodated technologies used by CLECs for customized routing. Therefore, the Arbitrators hold that SWBT shall continue providing OS/DA services as an unbundled network element until SWBT initiates a proceeding before the Commission to demonstrate that it has met the customized routing requirements. This process will allow all interested parties to inform the Commission's decision with evidence of the facts that exist at that time and, if necessary, allow the Commission to consider evidence regarding whether CLECs would be impaired in Texas without access to OS/DA from SWBT on an unbundled basis.

The Arbitrators further find that multiplexing shall be available as a UNE on a stand-alone basis to the extent that "stand-alone" refers to the whole of the multiplexing unit in combination with other UNEs. In addition, the Arbitrators hold that SWBT shall provision digital cross-connect systems (DCS) at forward-looking cost-based rates, and that SWBT cannot require MCIm to collocate in order to obtain DCS in association with unbundled dedicated transport (UDT).

With respect to certain issues, the Arbitrators find that SWBT must provide a service or feature because it is part of the features, functions, or capabilities of a UNE. For example, the Arbitrators find that the features, functions, and capabilities of the local switching network element include the routing of calls to voice-mail through I/O ports. Similarly, the Arbitrators hold that a line class code (LCC) is a feature, function, or capability of the unbundled local switch. However, if a new LCC is custom-configured in response to a CLEC request, a forward-looking cost-based rate shall apply for such custom configuration.

Because of SWBT's exclusive control over network elements, the Arbitrators find that SWBT must provide CLECs with nondiscriminatory access to combine UNEs before seeking to discontinue offering combinations of UNEs. Because SWBT has not satisfied this condition, SWBT must continue to offer new combinations to CLECs upon request at least until SWBT has demonstrated in a separate proceeding that it is providing nondiscriminatory access to UNEs in such a manner that allows CLECs to combine UNEs for themselves without having to collocate.

Access to the Databases as UNEs

The Arbitrators hold that SWBT shall continue to provide the call-related databases, including the directory assistance database, as UNEs. Although SWBT must provide access to the Line Information and Caller ID with Name databases as UNEs, SWBT is not required to provide access to these databases on a bulk download basis. SWBT is providing CLECs with nondiscriminatory access to these call-related databases on an unbundled basis for purposes of switch query and database response through the SS7 network at forward-looking, cost-based rates.

Re-evaluation of Rates

The Arbitrators find that changes in technology due to Project Pronto warrant reevaluation of UNE rates in a separate cost proceeding. The Arbitrators reject the suggestion that cost studies from other proceedings should dictate the rates set in this separate cost proceeding. However, relevant information developed in those proceedings should be considered.

On other related issues, both parties suggested re-apportioning the rate structure for ULS, but the Arbitrators find that the current structure, which is a hybrid of the different structures proposed by parties, is the most appropriate. Furthermore, the Arbitrators find that CLECs should pay SWBT for the daily usage feed, but determine that the amount of this fee should be evaluated in a separate cost proceeding.

The Arbitrators further find that the current rate structure for LIDB query access should stand, and that all LIDB query rates should continue to be based upon Texas-specific costs. Finally, the Arbitrators find that MCIm is not entitled to access SWBT's databases at TELRIC rates when acting as an IXC.

Deposits, Changes, and Special Requests

- The Arbitrators find that SWBT's proposal for a deposit is appropriate and commercially reasonable, but should be applied so as to avoid becoming a barrier to entry.
- The Arbitrators find that MCIm has agreed to use SWBT's Bona Fide Request (BFR) process as outlined in SWBT's CLEC on-line handbook. SWBT's proposed BFR process appears to provide a reasonable procedure for the recovery and allocation of the cost associated with CLEC requests. In addition, SWBT may charge a deposit, in an amount to be determined, to offset those costs.
- SWBT's network planning and design must be coordinated with other telecommunications carriers so as to facilitate "effective and efficient interconnection" as required by FTA §256. However, SWBT's duty to maintain the functionality and required characteristics of the elements purchased by a CLEC is limited to a period of not more than 12 months, exclusive of the required notice period, unless otherwise agreed by the parties.

Alternately Billed Services

The Arbitrators find that the issues related to Alternately Billed Traffic (ABT) should be addressed in a separate billing agreement between the parties and should not be incorporated into an interconnection agreement. Where parties are unable or unwilling to develop a comprehensive billing agreement to address ABT, then the provider of the Incollect or Outcollect services shall bill the end use customer directly. The Arbitrators adopt language to be

incorporated in a new Attachment 27-ABT, to provide guidance to the parties in addressing prospective ABT issues.

The Arbitrators also find that the existing contracts between SWBT and the CLECs do not make the CLECs liable for uncollectibles attributable to the CLECs' customers. The language and the consideration reflect the existence of a duty only to bill the customers, not to be responsible to SWBT for uncollectibles.

II. JURISDICTION

If an incumbent local exchange carrier (ILEC) and 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 Commission is a State regulatory body responsible for arbitrating interconnection agreements approved pursuant to the FTA. Pursuant to FTA § 252(b)(1), MCIm, a CLEC, petitioned the commission to arbitrate a dispute with SWBT, an ILEC, as described more fully below.

III. PROCEDURAL HISTORY

On August 22, 2001, MCIm filed its petition for arbitration of an interconnection agreement with SWBT under the FTA and pursuant to P.U.C. PROC. R. 22.305.[4] The petition requested the Commission's assistance on the issues of setting wholesale rates that reflect today's technology; allowing MCIm to market ubiquitous service to small business customers with greater than three lines; continuing the general availability of unbundled network elements (UNEs), including OS/DA and new combinations; and resolving contractual disputes that MCIm asserted threaten MCIm's ability to profitably provide telephone services to Texas customers.

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[4] *Petition of MCImetro Access Transmission Services, L.L.C. for Arbitration of an Interconnection Agreement with Southwestern Bell Telephone Company under the Telecommunications Act of 1996*, Docket No. 24542 (pending).

On September 4, 2001, Sage Telecom of Texas, LP (Sage)[5] filed a complaint against SWBT for implementation of billing procedures for incollect calls pursuant to P.U.C. PROC. R. 22.321.[6] Sage's complaint in Docket No. 24593 raised only one issue relating to billing terms, conditions, and procedures for Incollect Calls. This issue was deemed to be identical to Issue No. 12 in this docket.[7] Sage requested that its complaint be consolidated with this docket.

On September 7, 2001, the Texas UNE Platform Coalition (UNE-P Coalition),[8] AT&T Communications of Texas, L.P. (AT&T), and McLeod USA Telecommunications Services, Inc. (McLeod) (collectively CLEC Coalition) filed a joint petition in Docket No. 24631, requesting expedited resolution of disputed issues regarding unbundled network element platform (UNE-P) competition in Texas.[9] The CLEC Coalition requested that its petition be consolidated with this docket, or alternatively, that the Commission address the CLEC Coalition's petition in an industry-wide contested rulemaking proceeding.

On September 12, 2001, a prehearing conference was held for Docket Nos. 24542, 24593, and 24631. The parties agreed that the jurisdictional deadline in Docket No. 24542 was January 11, 2002. On September 20, 2001, the parties filed briefs regarding consolidation of these three dockets. After consideration at the October 3, 2001 open meeting, the Commission ordered that Docket Nos. 24542, 24593, and 24631 be consolidated under Docket No. 24542.[10] The Commission also excluded the associations Comp-Tel, ASCENT, and SWCTA as parties but allowed these associations to participate in an *amicus curiae* fashion.[11]

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[5] On February 27, 2002, the service provider certificate of operating authority held by Sage Telecom, Inc. was transferred to Sage Telecom of Texas, LP. *See Application of Sage Telecom, Inc. for an Amendment to its Service Provider Certificate of Operating Authority*, Docket No. 25331 (Feb. 27, 2002).

[6] *Complaint of Sage Telecom, Inc. Against Southwestern Bell Telephone Company for Implementation of Billing Procedures for Incollect Calls*, Docket No. 24593 (Oct. 16, 2001).

[7] Order No. 5 at 2 (Oct. 12, 2001).

[8] The Texas UNE Platform Coalition is composed of the following companies and their representative associations: Birch Telecom, ionex telecommunications, Logix, nii, Talk America, TXU Communications, Z-Tel Communications, Inc., the Competitive Telecommunications Association (CompTel), the Association of Communication Enterprises (ASCENT), and the Southwest Competitive Telecommunications Association (SWCTA).

[9] *Petition for Expedited Resolution of Disputed Issues Regarding UNE-P Competition in Texas*, Docket No. 24631 (Oct. 16, 2001).

[10] Order No. 5 (Oct. 12, 2001) closed Docket No. 24593; Order No. 6 (Oct. 16, 2001) closed Docket No. 24631.

[11] Order No. 6 at 1-2.

On October 10, 2001, Sage filed a petition for expedited resolution of disputed issues regarding UNE-P competition in Texas that incorporated the UNE-P petition in its entirety and incorporated Sage's grounds for justiciable interest filed in its motion to intervene in Docket No. 24542.[12] Sage requested that its petition in Docket No. 24814 be consolidated with Docket No. 24542. On October 15, 2001, SWBT filed its response to Sage's petition and a motion to dismiss, asserting that no federal or state law conferred jurisdiction upon the Commission to ignore the plain terms of Sage's existing T2A contract and that the contract did not authorize the relief Sage had requested.

On October 17, 2001, a determination was made that good cause existed to allow consolidation of Docket No. 24814 with Docket No. 24542 and to grant Sage's request for a good cause exception under P.U.C. PROC. R. 22.5 to the participation restrictions found in P.U.C. PROC. R. 22.305(e).[13] SWBT's motion to dismiss Docket No. 24814 was denied.[14]

After consolidation of these proceedings, the parties in this Docket No. 24542 are Southwestern Bell Telephone Company (SWBT), MCIMetro Access Transmission Service (MCIm), Sage Telecom of Texas, LP (Sage), UNE-P Coalition, AT&T Communications of Texas (AT&T) and McLeod USA Telecommunications Services, Inc. (McLeod). Accordingly, Docket No. 24542 was restyled as *Petition of MCImetro Access Transmission Services, L.L.C., Sage Telecom, Inc., Texas UNE Platform Coalition, McLeod USA Telecommunications Services, Inc., and AT&T Communications of Texas, L.P. for Arbitration with Southwestern Bell Telephone Company Under the Telecommunications Act of 1996.*

In addition, on October 17, 2001, a revised procedural schedule[15] was issued reflecting the parties' implicit agreement that negotiations in this proceeding would be deemed to have begun on July 6, 2001 thereby effectively extending the jurisdictional deadline to April 1, 2002, to accommodate a hearing conducted by the Commission in January 2002. On October 17, 2001, the parties requested approval of an agreed protective order to govern the use of any documents

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[12] *Petition of Sage Telecom, Inc. for Expedited Resolution of Dispute Issues Regarding UNE-P Competition in Texas*, Docket No. 24814 (Oct. 17, 2001).

[13] P.U.C. PROC. R. 22.305(e) states: "Only parties to the negotiation may participate as parties in the arbitration hearing. The arbitrator may allow interested persons to file a statement of position and/or list of issue to be considered in the proceeding."

[14] Order No. 7 (Oct. 17, 2001).

in this proceeding designated as confidential and exempt from public disclosure under Texas law.[16] The parties' request was granted.[17] The parties engaged in discovery through November 13, 2001. Direct testimony was filed on December 7, 2001; rebuttal testimony was filed on December 21, 2001. The hearing on the merits was held on January 28, 29, and 30, 2002. Post-hearing Initial Briefs were filed on February 15, 2002. Post-hearing Reply Briefs were filed on March 1, 2002. Subsequent to the March 21, 2002 Open Meeting, the parties agreed to treat the start of negotiations for this proceeding as August 6, 2001, effectively extending the jurisdictional deadline for an Award in this proceeding to May 2, 2002.

On November 26, 2001, the parties filed their initial joint decision point list (DPL), and on January 24, 2002, the parties filed their final DPL.[18] During the course of this proceeding, the parties settled, withdrew, or otherwise resolved DPL issues 1, 4, 27, 28, 29, 35, 44, and 52-55.[19] All of the decisions rendered in this Award are intended to resolve disputed issues identified by the parties to this proceeding. If the parties settled or withdrew an issue during the course of the proceeding, a decision on the issue is not included in this Arbitration Award.

IV. RELEVANT STATE AND FEDERAL PROCEEDINGS

Relevant Commission Decisions

SWBT Mega-Arbitration Awards

The Federal Telecommunications Act (FTA) became effective in February 1996. Soon thereafter, several proceedings—collectively referred to as the Mega-Arbitrations—were initiated and consolidated for the purpose of arbitrating the first interconnection agreements in Texas under the new federal statute. The first Mega-Arbitration Award, issued November 1996 in Docket No. 16189, established rates for interconnections, services, and network elements in

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[15] Order No. 8 (Oct. 17, 2001).

[16] *See* TEX. GOV'T CODE ANN. §§ 552.002-552.353 (Vernon 1994 & Supp. 2002).

[17] Order No. 9 (Oct. 17, 2001).

[18] Joint Exh. 2, Final Decision Point List. FTA § 252(b)(4) limits the issues that may be decided in arbitration to those set forth by the parties.

[19] *See* letter filed by SWBT on behalf of parties (Feb. 14, 2002).

accordance to the standards set forth in FTA § 252(d).[20] Interim rates were established and SWBT was ordered to revise its cost studies. The Second Mega-Arbitration Award, issued December 1997 in Docket No. 16189, approved cost studies and established permanent rates for local interconnection traffic.[21]

Texas 271 Agreement "T2A"

After a series of 'collaborative work sessions' between SWBT and CLECs, the Commission approved the T2A on October 13, 1999. As a condition of receiving approval pursuant to FTA § 271 to provide long-distance services within the state, SWBT agreed to offer this standard interconnection agreement to all CLECs for a period of four years.[22] Among other things, the T2A established: (1) a performance remedy plan with 132 performance measures relating to all aspects of SWBT's wholesale operations; (2) prices, terms and conditions for resale, interconnection, and the use of UNEs; (3) a commitment from SWBT to provide combinations of UNEs, including UNE-P for existing and new lines and enhanced extended links (EELs); (4) operations support systems (OSS) that provide CLECs with parity; and (5) minimal service disruptions associated with hot cut loop provisioning that affects end use customers. Pursuant to FTA § 252(i), many CLECs subsequently opted into the T2A.

MCI WorldCom Arbitration with SWBT

MCI WorldCom's interconnection arbitration with SWBT centered on whether MCI could take language directly from the T2A and propose it under its own contract without exercising the FTA's most favored nations (MFN) clause (also called the "pick and choose" rule).[23] The Commission found that a CLEC wishing to opt into T2A language, or something strikingly similar (including the terms and conditions of an attachment or appendix), is also required to opt into the legitimately related terms and conditions of the T2A.

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[20] *Petition of MFS Communications Company, Inc. for Arbitration of Pricing of Unbundled Loops Agreement Between MFS Communications Company, Inc. and Southwestern Bell Telephone Company,* Docket No. 16189, *et al.,* Award (Nov. 8, 1996) (First Mega-Arbitration Award).

[21] *Petition of MFS Communications Company, Inc. for Arbitration of Pricing of Unbundled Loops Agreement Between MFS Communications Company, Inc. and Southwestern Bell Telephone Company*, Docket No. 16189, *et al*., Award (Dec. 19, 1997) (Second Mega-Arbitration Award).

[22] Certain sections of the T2A expired October 13, 2001; others expire October 13, 2003.

Relevant Federal Communications Commission Decisions

Local Competition Order

In the *Local Competition Order*,[24] the FCC implemented FTA §§ 251 and 252. The FCC identified unbundled network elements (UNEs) that ILECs must make available to competitors, and established minimum requirements for nondiscriminatory interconnection and collocation arrangements. That order contained, among other things, default rates, a mandatory pricing methodology (total element long run incremental cost, or TELRIC), the FCC's interpretation of the FTA's MFN clause,[25] and guidelines for states to use when determining whether a competitor should have access to particular UNEs.

The UNE Remand Order

In late 1999, the FCC issued the UNE Remand Order in response to the Supreme Court's January 1999 decision,[26] which directed the FCC to reevaluate the unbundling obligations established by FTA § 251.[27] The Court required the FCC to revisit its application of the "necessary" and "impair" standards in FTA § 251(d)(2).[28] In applying the "necessary" and "impair" standard to individual network elements, the FCC made certain critical determinations. Among them, the FCC modified the definition of the loop network element to include all features, functions, and capabilities of the transmission facilities between an ILEC's central office and the loop demarcation point at the customer premises.[29]

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[23] *Petition of Southwestern Bell Telephone Company for Arbitration with MCI WorldCom Communications, Inc.*, Docket No. 21791, Arbitration Award at 5 (May 20, 2000) (*MCI WorldCom Agreement*).

[24] *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, and Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, First Report and Order, CC Docket. No. 96-98, CC Docket No. 95-185, FCC 96-325 (rel. Aug. 8, 1996) (*Local Competition Order*).

[25] FTA § 252(i).

[26] *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366 (1999) (*Iowa Utils. Bd.*).

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

[28] *UNE Remand Order* ¶ 1.

[29] *UNE Remand Order* at n.301, (revised definition retains the definition from the *Local Competition Order*, but replaces the phrase "network interface device" with "demarcation point," and makes explicit that dark fiber and loop conditioning are among the "features, functions, and capabilities" of the loop).

SBC/Ameritech Merger Conditions and Pronto Waiver Order

SWBT is subject to a set of conditions put in place by the FCC as part of its approval of SBC's merger with Ameritech.[30] The FCC's merger conditions were intended to uphold the FCC's statutory obligation under the Act to open local telecommunications networks to competition by attempting to alleviate the potential competitive harm associated with the SBC/Ameritech merger.[31]

Recent Rulemaking Proceedings

The FCC is currently conducting a broad review of its existing regulatory regime surrounding interconnection and competition. Specifically, the FCC is reexamining its national list of UNEs,[32] as well as national performance measurements for special access services,[33] UNEs, and interconnection.[34] The FCC is also considering the regulatory treatment of wireline broadband offerings, and has tentatively concluded that wireline broadband Internet access is an "information service" with a "telecommunications" component.[35] In addition, the FCC concluded that cable modem services also fall under the scope of information services.[36] The dominance of ILECs in the provision of broadband services, and how to develop regulations accordingly, is also being considered.[37]

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[30] *See In the Matter of Ameritech Corp. and SBC Communications, Inc. For Consent to Transfer Control of Corporation Holding Commission Licenses and Lines Pursuant to Sections 214 and 310(d) of the Communications Act and Parts 5, 22, 24, 25, 63, 90, 95, and 101 of the Commission's Rules,* Memorandum Opinion and Order, CC Docket No. 98-141 (rel. Oct. 8, 1999) (*Merger Order*).

[31] *Merger Order* at ¶ 357.

[32] *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Notice of Proposed Rulemaking*, CC Docket No. 01-338 (rel. Dec. 20, 2001) (*Triennial UNE Review)*.

[33] *Performance Measurements and Standards for Interstate Special Access Services, et al., Notice of Proposed Rulemaking*, CC Docket No. 01-321 (rel. Nov. 19, 2001).

[34] *Performance Measurements and Standards for Unbundled Network Elements and Interconnection, et al., Notice of Proposed Rulemaking*, CC Docket No. 01-318 (rel. Nov. 19, 2001).

[35] *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, Notice of Proposed Rulemaking* at ¶30, CC Docket No. 02-33 (rel. Feb. 15, 2002) (*Broadband Information Services NPRM*).

[36] *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities, Declaratory Ruling and Notice of Proposed Rulemaking*, GN Docket No. 00-185 (rel. Mar. 15, 2002).

[37] *Development of a Regulatory Framework for Incumbent LEC Broadband Services, Notice of Proposed Rulemaking*, CC Docket No. 01-337 (rel. Dec. 20, 2001) (*Broadband Dominance NPRM*).

Relevant Court Decisions

Iowa Utilities Board v. FCC Cases (Iowa I and Iowa II)

In *Iowa I*, the Eighth Circuit Court of Appeals ruled that the FCC lacked jurisdiction to issue rules regarding the wholesale prices an ILEC could charge competitors to use its facilities to provision local telephone service.[38] Additionally, the Eighth Circuit vacated the FCC's so called "pick and choose" rule and its rule requiring ILECs to recombine network elements upon request by a CLEC.[39]

The Supreme Court reversed the Eighth Circuit, holding that the FCC did have jurisdiction to design a pricing methodology;[40] reinstating the FCC's pick and choose rule;[41] effectively reinstating the FCC's rule prohibiting ILECs from separating UNEs that it currently combines;[42] and vacating the FCC's enumerated list of UNEs.[43] On remand in *Iowa II*, the Eighth Circuit held, in relevant part, that FTA § 252(d)(1) does not permit costs to be based on a hypothetical network,[44] and that FTA § 251(c)(3) obligates requesting carriers to combine previously uncombined UNEs.[45] *Iowa II* is currently on appeal to the Supreme Court.[46]

Supreme Court

In January 1999, the Supreme Court decided the appeal of *Iowa I*.[47] The Court found that the FCC did not adequately consider the "necessary" and "impair" standards in FTA § 251(d)(2) when devising rules for competitor access to network elements, and required the FCC to develop

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[38] *Iowa Utilities Board v. FCC*, 120 F.3d 753, 795, 800, 819 (8th Cir. 1997) (vacating 47 C.F.R. §§ 51.601-51.611) (*Iowa I*).

[39] *Id*. at 800-01, (vacating 47 C.F.R. §§ 51.809 and 51.315(b)-(f)).

[40] *Iowa Utils. Bd., 525 U.S. at 385*.

[41] *Id*. at 395-96.

[42] *Id*. at 395.

[43] *Id*. at 391-92.

[44] *Iowa Utils. Bd. v. FCC*, 219 F.3d 744, 751-752 (8th Cir. 2000) (vacating 47 C.F.R. §51.505(b)(1)) (*Iowa II*).

[45] *Id*. at 758-59 (reaffirming vacating of 47 C.F.R. § 51.315(c)-(f)).

[46] *Verizon Communications, Inc. v. FCC*, Nos. 00-511, 00-587, 00-590 and 00-602 (8th Cir. argued Oct. 10, 2001) (*Verizon v. FCC)*.

[47] *Iowa Utils. Bd*., 525 U.S. 366.

a limiting standard that is "rationally related to the goals of the Act."[48] The Court also reversed the Eighth Circuit Court and concluded that the FCC's pick and choose rule is a reasonable interpretation of FTA § 252.

V. DISCUSSION OF DPL ISSUES

This proceeding addresses the issues in the Joint Decision Point List (DPL) filed by the parties on January 24, 2002.

DPL ISSUE NO. 1

SWBT: Should MCIm be allowed to retain control of SWBT's facilities after MCIm's end user disconnects MCIm's service?

CLECs: Should MCIm be allowed to inventory SWBT's facilities after MCIm's end user disconnects MCIm's service?

CLEC and SWBT Position

Settled or otherwise resolved.

DPL ISSUE NO. 2

SWBT: Should SWBT be required to maintain obsolete equipment or systems for MCIm when SWBT upgrades its network?

CLECs: Should SWBT be required to maintain existing equipment or systems for MCIm for the term of this agreement when SWBT upgrades its network to permit CLEC to orderly transition to the upgrades of the network?

CLECs' Position

MCIm urged the Commission to enable a CLEC to request that certain UNE characteristics be maintained despite SWBT plans to change its network. According to MCIm, SWBT's issue statement disregards SWBT's FTA § 256 public interest obligation to ensure that SWBT's network planning and design are coordinated with other telecommunications carriers so as to facilitate "effective and efficient interconnection" of networks. MCIm added that its language limits SWBT's obligation to maintain UNE characteristics to those circumstances where the requested characteristics are specifically provided for in this Attachment, Technical

[48] *Id.* at 734.

Publication, or other written description. MCIm argued that, without this language, it would not be able to ensure its ability to continue to use certain characteristics of the SWBT network existing at the time the agreement is executed, and SWBT would thus be able to unilaterally change its network so as to deny CLECs their UNE rights.[49]

MCIm contended that it does not want to force SWBT to preserve obsolete equipment, but seeks instead to implement a cooperative approach similar to a change management process that would allow CLECs to request a reasonable time to migrate to new technology.[50] MCIm argued that the Bona Fide Request (BFR) process is inappropriate because the BFR process is designed to request something new, not to request that an existing network characteristic be maintained.[51] MCIm argued that the BFR process would allow SWBT to unilaterally change the network in a way that completely disrupts a UNE-based CLEC's business plan.[52]

SWBT's Position

SWBT urged the Commission to authorize SWBT to modify its network to maintain high quality service, to support new services or functions, to improve equipment performance, to streamline operations and improve efficiencies, to reduce equipment maintenance cost, and to meet statutory and regulatory requirements.[53] SWBT contended that it is required only to provide access to its network and to provide proper notice of network upgrades and changes that may impact interconnection. SWBT asserted that maintaining obsolete equipment for CLECs may cause SWBT to maintain separate networks for different interconnecting companies, which is cost prohibitive and would inappropriately limit SWBT's ability and incentive to upgrade the Public Switched Telephone Network (PSTN). SWBT averred that, if a CLEC desires a "characteristic" or element to be maintained at a specific level, it may use the BFR process to make that request.[54]

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[49] MCIm Exh. No. 1, Direct Testimony of Don Price at 17-18 (Price Direct).

[50] MCIm Exh. No. 2, Rebuttal Testimony of Don Price at 3, 24-25 (Price Rebuttal).

[51] Tr. at 1182.

[52] MCIm Post-Hearing Reply Brief at 30 (March 1, 2002) (MCIm Reply Brief).

[53] SWBT Exh. No. 14, Direct Testimony of Timothy Oyer at 7-11 (Oyer Direct).

[54] *Id*. at 10.

SWBT argued that the FTA does not require SWBT to maintain portions of the PSTN that SWBT does not maintain for itself. SWBT contended that the real issue is whether MCIm has the right to decide what equipment SWBT maintains in its network. SWBT argued that MCIm's vague definition of a "characteristic" could lead to dispute, because not all characteristics, as defined in a technical publication or written description, exist in all areas today. SWBT asserted that MCIm's proposed language exceeds SWBT's legal obligations by requiring SWBT to provide MCIm a superior network.[55]

In addition, SWBT contended that the FCC has already established the appropriate process for network disclosure and for CLEC objections to network changes.[56] SWBT maintained that, in addition to the process in place to notify CLECs through network disclosure, SWBT would commit to accept the BFR to evaluate providing CLECs with the lost characteristics.[57]

Arbitrators' Decision

The Arbitrators do not agree with SWBT's contention that a CLEC's request for maintenance of a network characteristic that SWBT is required to provide six or twelve months notice before modifying should be handled through the short term notice provisions of federal law. The process advocated by SWBT is, by its express terms, limited to instances in which an ILEC "wishes to provide less than six months notice of planned network changes."[58] The contract provision arbitrated by the parties, however, is limited to instances in which SWBT is required to provide six or twelve months notice of a proposed network change.[59] The Arbitrators therefore find that, by its express terms, § 51.333 does not apply to the circumstances to which MCIm's proposed section 2.17.4 of the UNE Attachment is addressed.

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[55] SWBT Exh. No. 13, Rebuttal Testimony of Michael D. Kirksey at 3-4 (Kirksey Rebuttal).

[56] SWBT Exh. No. 12, Kirksey Direct at 4, 6-7; Tr. at 1183.

[57] Tr. at 1183, 1185, 1190, 1191-92. SWBT clarified that any such process should not be considered the same as the change management process developed in the Commission's § 271 proceeding for OSS.

[58] 47 C.F.R. § 51.333(a) (2001).

[59] *See MCI WorldCom Agreement* at section 2.17.3 (incorporating the timelines established by the FCC in *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, and Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers,* Second Report and Order and Memorandum Opinion and Order, CC Docket 96-98, CC Docket No. 95-185, 92-237, NSD File No. 96-8, IAD File No. 94-102, FCC 96-333 (Rel. Aug. 8, 1996)).

Instead, the Arbitrators conclude that MCIm's proposed language ensures that SWBT's network planning and design are coordinated with other telecommunications carriers so as to facilitate "effective and efficient interconnection" as required by FTA §256. The MCIm language also ensures SWBT compliance with network element feature, function, or capability obligations found elsewhere in the agreement. The Arbitrators note that the requirement upon SWBT to maintain the functionality and required characteristics of the elements purchased by CLECs cannot be perpetual, and should be limited to a period of not more than 12 months, exclusive of the required notice period, unless otherwise agreed by the parties.

As discussed in connection with DPL Issue No. 30, the Arbitrators adopt a modified version of the bona fide request (BFR) process proposed by SWBT, instead of the Special Request Process proposed by MCIm. To the extent network characteristics requested by a CLEC are not specifically provided for in the UNE Attachment, Technical Publication, or other written description, the CLEC's request will be considered through the BFR process. Therefore, the Arbitrators adopt the language proposed by MCIm, modified to limit SWBT's obligation to maintain characteristics and to provide for the use of the BFR process.

DPL ISSUE NO. 3

CLECs: Should SBC be required to combine elements for CLECs that it ordinarily combines for itself even if those elements are not yet physically connected for a particular customer for the term of the new agreement?

SWBT: Should SWBT be required to combine UNEs not previously combined in its network?

CLECs' Position

a. MCIm

MCIm's position on new combinations of UNEs is twofold: First, MCIm argued that SWBT is obligated to perform all new combinations until it offers fair and nondiscriminatory access to UNEs.[60] Second, MCIm contended that the phrase "currently combined" in 47 C.F.R. § 51.315(b) means "ordinarily combined," and therefore SWBT is obligated to make such new

[60] MCIm Post-Hearing Initial Brief at 14-19 (Feb. 15, 2002) (MCIm Initial Brief); MCIm Reply Brief at 10-11.

combinations if it would ordinarily do so, notwithstanding that the particular elements being ordered are not actually physically connected when ordered.[61]

In support of its first argument, MCIm quoted from the *Amendment and Clarification of Arbitration Award* in the *Mega-Arbitration* in which the Commission said that in the event SWBT ceased combining UNEs, the Commission would revisit the issue of what constitutes fair and nondiscriminatory access to SWBT's network in a competitive environment.[62] MCIm argued that the *Mega-Arbitration* decision resulted from SWBT's refusal to furnish nondiscriminatory access to its network to allow CLECs to do their own combining of elements.[63]

According to MCIm, the Commission's announcement of its intention to revisit the issue of combining UNEs is relevant because it evidences SWBT's (1) historical aversion to providing nondiscriminatory access to its network; (2) disincentive to cooperate with CLECs; and (3) use of its perceived legal obligation to not combine elements as leverage to drive up CLECs' cost to compete with SWBT.[64] MCIm argued that SWBT's proposed three methods of allowing access to the network fails the nondiscriminatory test, because each requires either collocation or construction of facilities by the CLEC outside of the central office.[65] MCIm further argued that the Ninth Circuit's decision in *US West Communications* undermines SWBT's reliance on the Eighth Circuit's decision in *Iowa II* to vacate the FCC's requirement that SWBT make all new combinations.[66]

Regarding its "currently combined" argument, MCIm stated that its proposed language is appropriate because 47 C.F.R. § 51.315(b), the Supreme Court's decision in *AT&T v. Iowa Utilities Board*, and the *UNE Remand Order* require that SWBT perform the functions necessary

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[61] MCIm Initial Brief at 18-21; MCIm Reply Brief at 11-12.

[62] MCIm Initial Brief at 14-15 (quoting *Petition of MCI Telecommunications Corporation and its Affiliate MCImetro Access Transmission Services, Inc. for Arbitration and Request for Mediation Under the Federal Telecommunications Act of 1996*, Docket No. 16285, consolidated Docket Nos. 16189, 16196, 16226, 16285, 16290, 16455, 17065, 17579, 17587, and 17781, Amendment and Clarification of Arbitration Award at 6 (Nov. 24, 1997) (*MCI/MCImetro Agreement*, Docket No. 16285)).

[63] *Id*. at 27.

[64] *Id*. at 20-21.

[65] *Id*. at 16.

[66] *Id*. at 16-18 (citing *US West Communications v. MFS Intelenet, Inc.* 193 F.3d 1112 (9th Cir. 1999)).

to combine UNEs that are ordinarily combined in SWBT's network - regardless of whether those elements have been "previously combined."[67] According to MCIm, significant differences exist between the phrases "ordinarily combined" and "previously combined," notwithstanding SWBT's claim that it is only required to make available currently combined UNEs, but not those UNEs that are ordinarily combined.[68]

MCIm further argued that the Commission's decision on this issue is governed by 47 C.F.R. § 51.503 (General Pricing Standard) and § 51.315(b) (Combination of Unbundled Network Elements), which arose out of the FCC's decision in the *Local Competition Order* to allow competitors to provide local phone service relying "***solely*** on the elements in an incumbent's network."[69] According to MCIm, SWBT and other ILECs argued on appeal of the *Local Competition Order* that § 51.315(b) undermined the goal of encouraging entrants to develop their own facilities.[70] MCIm stated that the Eighth Circuit Court of Appeals, which heard the appeal, was of the view that the language of FTA § 251(c)(3) indicates that "a requesting carrier may achieve the capability to provide telecommunications service completely through access to the unbundled elements of an incumbent LEC's network."[71] But, according to MCIm, the Eighth Circuit ruled that the FCC had gone to far and therefore vacated 47 C.F.R. § 51.315(b). On appeal, MCIm noted that the Supreme Court in *Iowa Utils. Bd.* reversed the Eighth Circuit and reinstated § 51.315(b). MCIm argued that the Supreme Court's reinstatement comports with the proposition that a CLEC is not obligated to own any facilities in conjunction with UNEs leased from an ILEC. According to MCIm's interpretation, the Supreme Court opined that CLECs are entitled to an entire pre-assembled network.[72]

In the *UNE Remand Order*, which followed the decision in *Iowa Utils. Bd.*, MCIm asserted that the FCC did not address the "currently combines" requirement of § 51.315(b) because of pending issues before the Eighth Circuit, but did state that an ILEC must provision network element combinations where such elements are "ordinarily combined within [the]

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[67] *Id*. at 4, 30.

[68] *Id*. at 19-20.

[69] *Id*. (emphasis in original).

[70] *Id*.

[71] *Id*. (quoting 120 F.3d at 814).

network, in the manner which they are typically combined."[73] MCIm argued that this statement clearly indicates that "currently combines" should be read to mean "ordinarily combined in SWBT's network in the manner in which they are typically combined."[74]

Based on the foregoing, MCIm argued that the FCC's interpretation of § 51.315(b) allows CLECs to "purchase UNEs in combination, such as a loop and a port, even when the network elements supporting the underlying service are not physically connected at the time the service is ordered, because those UNEs are typically combined. CLECs can then obtain UNE combinations at UNE prices."[75]

Finally, MCIm argued that limiting the definition of "currently combines" would be more cumbersome and serve no purpose other than to complicate the ordering process.[76] Accordingly, MCIm claimed that SWBT was being disingenuous in asserting that MCIm's position will require SWBT to construct some, as-yet, nonexistent network.[77]

b. CLEC Coalition[78]

The CLEC Coalition asserted that SWBT's proposals promote inefficiency and impose unnecessary costs.[79] According to the CLEC Coalition, SWBT should be required to continue to combine those loops and ports for CLECs that it ordinarily combines for itself, including all such new combinations, because for UNE-P (and other combinations) to be practically useful, entrants must be able to efficiently access new, as well as existing, combinations.[80] The CLEC Coalition argued that the most efficient solution is for SWBT to combine these elements using the systems

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[72] *Id*. at 24.

[73] *Id*. (quoting *UNE Remand Order* ¶ 479).

[74] *Id*.

[75] *Id*. at 24-25 (citing *UNE Remand Order* ¶¶ 480, 486).

[76] MCIm Exh. No. 2A, Price Rebuttal at 26.

[77] *Id*.

[78] The position is that of Texas UNE-P Coalition (includes Birch Telecom, ionics, Logix, nii, Talk America, TXU Communications, and Z-Tel Communications, Inc.), AT&T Communications of Texas, L.P., and McLeodUSA Telecommunications Services, Inc; and is supported by the Southwest Competitive Telecommunications Association, the Competitive Telecommunications Association, and the Association of Communications Enterprises. (For reasons of convenience and clarity, the aforementioned parties will be referred to as the "CLEC Coalition.").

[79] Coalition Exh. No. 1, Direct Testimony of Joseph Gillan at 66-67 (Gillan Direct).

and processes that it has already established to efficiently and routinely combine these facilities, and then provide the entrant with the requested combination.[81]

The CLEC Coalition argued that the inefficiency created by SWBT's refusal to do the combining it "ordinarily combines for itself" impedes the entrants' ability to easily add lines or extend service to new locations.[82] The CLEC Coalition maintained that any proposal by SWBT to allow CLECs to combine elements themselves would require SWBT to perform more work, which the CLEC Coalition argued would be economically irrational in that it increases costs for both SWBT and the CLEC.[83] The CLEC Coalition argued that SWBT's interpretation of the phrase "currently combines" in § 51.315(b) leads to discriminatory, as well as arbitrary, results, and hinders competition, and contended that the phrase "currently combines" in § 51.315(b) requires SWBT to combine UNEs that it would ordinarily combine for itself, regardless of whether such elements are not physically connected.[84]

AT&T argued that network element combinations must be offered at cost-based rates and have the ability to be provided ubiquitously across the state in order for CLECs to compete effectively.[85] AT&T argued that it cannot limit its offering to locations where facilities are currently combined or where AT&T has deployed its own facilities, and that it needs to purchase UNE combinations from SBC/SWBT to assure optimum network efficiency.[86]

The CLEC Coalition also argued that, apart from the applicability of § 51.315(b), the Eighth Circuit's decisions in *Iowa I* and *Iowa II* do not prevent the Commission from eliminating the restrictions that SWBT is attempting to place on new combinations of UNEs. In support, the CLEC Coalition cited the Ninth and Fifth Circuits decisions in *MFS Intelenet* and *Waller Creek*.[87] The CLEC Coalition also contended that the state regulatory commissions of Michigan,

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[80] *Id.* at 10, 66.

[81] *Id*. at 66-67.

[82] *Id*. at 61.

[83] *Id*. at 60, 62.

[84] *Id*. at 37-43.

[85] AT&T Exh. No. 1, Rebuttal Testimony of Eva Fettig at 5 (Fettig Rebuttal).

[86] *Id*. at 3-4.

[87] Coalition Exh. 1, Gillan Direct at 44-46.

Wisconsin, Illinois, Kentucky, Georgia, and Tennessee agree that an ILEC must provide new UNE combinations.[88]

The CLEC Coalition disagreed with SWBT's assertion that the Commission is bound by the Hobbs Act to follow the Eighth Circuit's decisions in *Iowa I* and *Iowa II*. The CLEC Coalition argued that the Hobbs Act gives the Eighth Circuit exclusive jurisdiction over the validity of the FCC's regulations promulgated in the *First Report and Order*. However, the Hobbs Act does not empower the Eighth Circuit to be the sole interpreter of the FTA simply because it happened to construe the statute when assessing the FCC's rule.[89]

c. Sage

Sage asserted that SWBT should not only provide combinations of UNEs that already exist, but also should combine UNEs that it would combine for itself, to continually enable Sage to offer innovative and new services, particularly in rural and suburban areas.[90]

SWBT's Position

SWBT argued that it should not be required to provide "new" combinations at cost-based rates because MCIm's proposed language: (1) is taken from the T2A UNE Appendix, which MCIm cannot opt into because it did not accept certain other legitimately related provisions of the T2A; (2) would obligate SWBT to provide Unbundled Local Switching (ULS) where the FCC has determined no such obligation exists; and (3) would obligate SWBT to provide combinations that do not exist in SWBT's network at the time of MCIm's request.[91]

SWBT asserted that the Commission is bound by the Eighth Circuit's decisions in *Iowa I* and *Iowa II*.[92] According to SWBT, the Eighth Circuit has twice held that requiring ILECs to combine UNEs that are not presently connected in its network is inconsistent with the plain language of FTA § 251(c)(3).[93] SWBT also argued that, in the Commission's evaluation of

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[88] *Id*. at 46-49.

[89] CLEC Coalition Post-Hearing Reply Brief at 24 (Mar. 1, 2002) (CLEC Coalition Reply Brief).

[90] Sage Exh. No. 1, Direct Testimony of Gary P. Nuttall at 46-47 (Nuttall Direct).

[91] SWBT Exh. No. 9, Direct Testimony of Jerry L. Hampton at 6 (Hampton Direct).

[92] SWBT Post-Hearing Initial Brief at 17-18 (Feb. 15, 2002) (SWBT Initial Brief).

[93] *Id*.; SWBT Exh. No. 9, Hampton Direct at 8.

SWBT's application to provide In-Region, InterLATA service in Texas, it rejected MCIm's arguments that SWBT is obligated to create new combinations of UNEs.[94] Additionally, SWBT contended that the Commission in the MCI Worldcom, Level 3, and CoServ arbitrations reached the same conclusion that SWBT is not required to combine UNEs not previously combined in the network.[95] Indeed, according to SWBT, the Commission observed in its evaluation of SWBT's 271 Application that ILECs under the Eighth Circuit's decision in *Iowa I*, "continued to have no obligation to combine elements that were not already combined, although the law still required them to provide CLECs with access sufficient to combine such elements."[96] SWBT argued that the Hobbs Act makes the decisions in the *Iowa* cases binding upon the Commission, notwithstanding the decisions of the Ninth and Fifth circuits.[97] SWBT further contended that MCIm's proposed language would reinstate § 51.315(c)-(f), notwithstanding that they were vacated by the Eighth Circuit.[98]

Additionally, SWBT asserted that the FCC specifically refused to address the issue of "ordinarily combined" in the *UNE Remand Order*.[99] SWBT contended that the *UNE Remand Order* clearly indicates that the term "currently combines" means just that, and cannot be expanded to create affirmative obligations on SWBT to combine unbundled network elements for MCIm that are not already actually combined in SWBT's network.[100] Moreover, SWBT argued that the Commission has already addressed the issue of "ordinarily" in the MCI

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[94] SWBT Initial Brief at 18.

[95] SWBT Exh. No. 9, Hampton Direct at 9-11.

[96] *Id*. at 11 (quoting *In the Matter of Application of SBC Communications Inc., and Southwestern Bell Telephone Company, and Southwestern Bell Communications, Inc., d/b/a Southwestern Bell Long Distance for Provision of In-Region, InterLATA Services in Texas,* CC Docket No. 00-4, Evaluation of Texas Public Utility Commission, SBC-Texas (Jan. 31, 2000)).

[97] SWBT Post-Hearing Reply Brief at 11-14 (Mar. 1, 2002) (SWBT Reply Brief).

[98] SWBT Exh. No. 9, Hampton Direct at 7-8.

[99] *Id*. at 10 (quoting *UNE Remand Order*: "A number of commenters argue that we should reaffirm the Commission's decision in the *Local Competition Order*. In that order the Commission concluded that the proper reading of 'currently combines' in § 51.315(b) means 'ordinarily combined within their network, in the manner which they are typically combined.' ILECs, on the other hand, argue that § 51.315(b) only applies to unbundled network elements that are currently combined and not to elements that are 'normally' combined. Again, because this matter is currently pending before the Eighth Circuit, we decline to address these arguments at this time.").

[100] *Id*. at 11.

WorldCom arbitration. According to SWBT, the Arbitrators in that proceeding ruled that SWBT is not required to combine UNEs not previously combined in the network.[101]

According to SWBT, MCIm's proposed language would allow MCIm to combine UNEs with SWBT's access services or other SWBT tariffed service offerings, which SWBT claims is contrary to FCC precedent.[102] SWBT argued that not adopting MCIm's language will not prevent MCIm from purchasing existing combinations from SWBT.[103] In specific references, SWBT argued that MCIm's proposed language for section 2.4.1 improperly places specific conditions on SWBT in providing UNE combinations.[104] SWBT asserted that these conditions change the meaning of this section, obligate SWBT to understand the types of telecommunications services MCIm intends to offer their end users, and require SWBT to ensure that the UNEs that MCIm is ordering will provide that service.[105] SWBT also objected that MCIm's proposal to include the word "will" rather than "may" in section 2.6, which addresses where additional network elements are to be made available, could be read to require SWBT to offer UNEs where they do not already exist in SWBT's network.[106]

SWBT proposed to provide new combinations of UNEs under the terms and conditions provided in the SBC/Ameritech Merger Conditions, which provide for new loop/port combinations of residential POTS and residential ISDN-BRI.[107] According to SWBT, not offering new combinations of UNEs does not prevent a CLEC from adding second lines or providing service to new customers via UNE-P.[108]

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[101] *Id*. at 18 (quoting MCI WorldCom Arbitration Award, Docket No. 21791 at 23).

[102] *Id*. at 10-13 (citing *Bell Atlantic New York 271 Order*, Docket 99-925, FCC 99-404, ¶230, rel. Dec. 23, 1999). *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, Third Order on Reconsideration and Further Notice of Proposed Rulemaking, FCC No. 97-295 (rel. Aug. 18, 1997) at ¶39. *In the Matter of Implementation of the Local Competition Provisions in Telecommunications Act of 1996*, CC Docket No. 96-98, Supplemental Order, FCC No. 99-370, (rel. Nov. 24, 1999) at ¶¶ 2-6. *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, Supplemental Order Clarification, FCC No. 00-183, (rel. Jun. 2, 2000) (*Supplemental Order Clarification*)).

[103] *Id*. at 13.

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

[105] *Id*. at 14.

[106] *Id*. at 16-17.

[107] *Id*.

[108] *Id*. at 11-12.

Arbitrators' Decision

FTA §251(c)(3) obligates SWBT to provide CLECs with nondiscriminatory access to UNEs in a manner that allows CLECs to combine UNEs for themselves.[109] *Moreover, such access cannot be predicated upon requiring a CLEC to collocate.*[110] *Because of SWBT's exclusive control and dominion over network elements, the Arbitrators find that SWBT must, at a minimum, satisfy the condition precedent of providing CLECs with nondiscriminatory access before seeking to discontinue offering combinations of UNEs. To find otherwise would severely impair MCIm's ability to provide service using UNE-P or EEL, since SWBT could choose to cease making UNE combinations while simultaneously denying network access except through collocation.*

In the UNE Remand Order, the FCC determined that the phrase "nondiscriminatory access" means at least two things:

> *[F]irst, the quality of an unbundled network element that an incumbent LEC provides, as well as the access provided to that element, must be equal between all carriers requesting access to that element; second, where technically feasible, the access and unbundled network element provided by an incumbent LEC must be provided in "substantially the same time and manner" to that which the incumbent provides to itself.*[111]

In the Mega-Arbitration and the Commission's investigation of SWBT's entry into the Texas InterLATA market (the "271 Proceeding"), the Commission sought to give effect to SWBT's obligation to provide nondiscriminatory access to network elements. In both instances, the issue was made moot by SWBT's agreeing to make UNE combinations for a stated period of time. As the Commission noted in the Mega-Arbitration, SWBT made a business decision to

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[109] FTA § 251(c)(3).

[110] *In the Matter of the Application of BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc for Provision of In-Region, InterLATA Services in* Louisiana, 13 FCC Rcd 20599, 20703-05, ¶ 168, FCC Docket 98-271 (Oct. 13, 1998); *In the Matter of 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*, 15 FCC Rcd 3953, ¶ 229, FCC Docket 99-404 (Dec. 22, 1999); *In the Matter of Joint Application of SBC Communications Inc., Southwestern Bell Telephone Company and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance for Provision of In-Region, InterLATA Services in Kansas and Oklahoma*, 16 FCC Rcd 6237, ¶ 173, FCC Docket 01-29 (Jan. 21, 2001).

[111] *UNE Remand Order* ¶ 490.

combine UNEs rather than provide CLECs with direct access to its network.[112] *"Because of SWBT's commitment, the Arbitrators and the parties did not pursue the issue of appropriate terms and conditions for access to SWBT's network were LSPs [local service providers] to combine network elements themselves."*[113] *In the 271 proceeding, SWBT reaffirmed its commitment to combine UNEs that had been approved in the Mega-Arbitration.*[114]

In this proceeding, SWBT made it clear that it is not willing to make new combinations of UNEs outside of the T2A.[115] *Accordingly, the Arbitrators must "revisit the issue of what constitutes fair and nondiscriminatory access to SWBT's network in a competitive environment."*[116] *The only evidence offered by SWBT on the issue of access were three methods contained in its 13-State Generic Agreement.*[117] *The first two methods, however, expressly require MCIm to collocate in order to make new combinations of UNEs for itself, while the third appears to require a form of collocation that necessitates MCIm building a frame inside of a SWBT provided cabinet. Accordingly, the Arbitrators find that none of the methods proposed satisfy the nondiscriminatory access requirement.*

Since no other relevant evidence was presented on the issue of nondiscriminatory access, the Arbitrators are compelled to find that SWBT has not met the condition precedent.[118]

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[112] *Petition of MCI Telecommunications Corporation and its Affiliate MCImetro Access Transmission Services, Inc. for Arbitration and Request for Mediation Under the Federal Telecommunications Act of 1996,* Docket No. 16285, consolidated Docket Nos. 16189, 16796, 16226, 16285, 16290, 16455, 17065, 17579, 17587, and 17781, Amendment and Clarification of Arbitration Award at 4 (Nov. 24, 1997) (*Mega-Arbitration Clarification Award*).

[113] *Id*. at 6.

[114] *In the Matter of Application of SBC Communications Inc., and Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance for Provision of In-Region, InterLATA Services in Texas,* CC Docket No 00-4, Evaluation of Texas Public Utility Commission, SBC-Texas at 23.

[115] Pursuant to 47 C.F.R. § 51.315(b) (2001), SWBT is obligated to offer UNEs that it currently combines independent of the T2A or its obligation to provide CLECs with nondiscriminatory access to network elements. The Arbitrators express no opinion on the phrase "currently combines," other than to say that, at a minimum, it includes preexisting combinations as defined in UNE Attachment 6, section 14.2 (see discussion Defining "Currently Combines", infra). Accordingly, the Arbitrators' decision is specifically directed at new combinations as defined indirectly in UNE Attachment 6, section 14.2.

[116] *Mega-Arbitration Clarification Award* at 6.

[117] SWBT Exh. 41, Appendix UNE-SBC-13 State.

[118] MCIm and AT&T did provide anecdotal evidence showing the inefficiencies and increased costs that would be occasioned were SWBT to cease making new combinations. The Arbitrators, while acknowledging such possibilities, do not, however, find them to be compelling reasons to require SWBT to continue making new

Accordingly, SWBT is obligated to continue making new combinations of UNEs until such time as it has, at a minimum, demonstrated in a separate proceeding that it is providing nondiscriminatory access to UNEs in such a manner that allows MCIm to combine UNEs for itself without having to collocate. To implement this decision, the Arbitrators have modified MCIm's proposed language as shown in the attached contract matrix.[119]

Based on the Arbitrators' finding that SWBT has not satisfied the condition precedent of providing nondiscriminatory access, the question of what is meant by currently combines is not ripe. Accordingly, the Arbitrators express no opinion on the meaning of the phrase except to say that it undoubtedly includes preexisting combinations as defined in T2A Attachment 6 – UNE, section 14.2. (See discussion of DPL Issue No. 7, infra.)

Likewise, the Arbitrators do not address the parties' arguments regarding the Iowa Utilities Board line of cases or the binding effect thereof as required by the Hobbs Act. FCC rule 47 C.F.R. § 51.315(c)-(f) requires ILECs to combine UNEs at a CLEC's request, provided that the requested combination is technically feasible and would not impair other carriers from obtaining access to UNEs or to interconnect with the ILECs network. Section 51.315(c)-(f) was vacated by the Eighth Circuit in Iowa II.[120] *That decision is currently on appeal to the Supreme Court.*[121] *Additionally, the Fifth and Ninth Circuits have held that while §251(c)(3) cannot under the holding in Iowa II be read as mandating that an ILEC combine UNEs, it does not prohibit the inclusion of a contractual provision mandating such combinations.*[122] *Because the Arbitrators find that SWBT does not offer nondiscriminatory access to its network elements, the Arbitrators do not reach the issue of whether SWBT can be required to make new combinations. The Arbitrators do acknowledge, however, that in the event the Supreme Court reinstates 47 C.F.R. §51.315(c)-(f), SWBT will be required to make new combinations in accordance with*

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combinations. Inherent in providing a CLEC with access to make its own new combinations is the likelihood of increased costs for CLECs and SWBT alike, as well as a period of greater inefficiency for both while CLECs' ability to combine UNEs reaches parity with that of SWBT.

[119] Joint Exh. 1, Joint Contract Matrix at 3-7.

[120] *Iowa II*, 219 F.3d 744.

[121] *Verizon v. FCC*.

[122] *Southwestern Bell Telephone Company v. Waller Creek Communications, Inc.*, 221 F.3d 812, 820-21 (5th Cir. 2000); *MCI Telecommunications v. U.S. West*, 204 F.3d 1262, 1268 (9th Cir. 2000).

such rules notwithstanding SWBT's satisfaction of the condition precedent of offering CLECs nondiscriminatory access to its network elements.

DPL ISSUE NO. 4

SWBT: Should language be added to the Interconnection Agreement to address reconfigurations of special access to loop/transport combinations?

CLECs: Should language be added to the Interconnection Agreement to address conversions of special-access-to-loop-transport combinations (i.e., Enhanced Extended Loops (EELs)?

CLEC and SWBT Position

Withdrawn or otherwise resolved.

DPL ISSUE NO. 5

SWBT: Is SWBT required to provide stand-alone multiplexing as a UNE?

CLECs: Should multiplexing and the use of the DCS as a cross connect or multiplexer, combined with UNEs be priced at TELRIC?

CLECs' Position

MCIm agreed with SWBT's assertion that the FCC does not classify stand-alone multiplexing as a UNE, but argued that this does not mean SWBT lacks an obligation to provide multiplexing to CLECs, because CLECs would be otherwise denied the ability to utilize all features, functions, and capabilities of either the loop or transport transmission facilities.[123] MCIm contended that 47 C.F.R. § 51.319 of the FCC's rules make clear that CLECs are to be furnished with all features, functions, and capabilities of either the loop or transport transmission facilities.[124] MCIm contended that SWBT should not be allowed to implement language that ignores the plain language of those rules requiring SWBT to make multiplexing functionality available to requesting carriers as a component of other elements obtained by the CLEC.[125]

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[123] MCIm Exh. No. 1, Price Direct at 48.

[124] *Id.* at 48-49.

[125] MCIm Exh. No. 2A, Price Rebuttal at 29.

MCIm contended that without its proposed language, multiplexing would essentially be unavailable with the loop in those instances where MCIm self-supplied the transport.[126]

SWBT's Position

SWBT asserted that stand-alone multiplexing is multiplexing without any other components, and is not provided in conjunction with or as a part of unbundled loops or unbundled transport.[127] SWBT argued that it is not required to provide stand-alone multiplexing because the FCC addresses multiplexing in two situations: 1) DCS multiplexing associated with unbundled interoffice facilities, which is further described in Issue 14; and 2) in association with unbundled Loops.[128] SWBT contended that the FCC has never required multiplexing be offered as a stand-alone UNE, nor has it required an ILEC to provide multiplexing as a stand-alone service.[129] SWBT complained that MCIm's language specifically creates a stand-alone multiplexing UNE, and that SWBT makes available optional multiplexing on unbundled interoffice transport and unbundled loops as required by the FCC.[130] SWBT maintained that, as required by the FCC, multiplexing necessary to provide the requested service on unbundled Loops is included in those rates, which are TELRIC based, and that the optional multiplexing available with Dedicated Transport is also priced at TELRIC rates.[131]

SWBT argued that stand-alone multiplexing would not meet the necessary and impair requirements to be considered a UNE.[132] SWBT asserted that, as discussed by the FCC in the *UNE Remand Order*, the fact that MCIm has available the ability to provide its own multiplexing means that SWBT cannot prevent MCIm from offering service. Therefore, according to SWBT, MCIm is not impaired without stand-alone multiplexing.[133]

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[126] Tr. at 634-35. MCIm conceded that it had no situation where MCIm would bring its own loop and transport to Southwestern Bells' wire center and ask for the stand-alone multiplexing to join those two parts of their network together.

[127] SWBT Exh. No. 15, Oyer Rebuttal at 6.

[128] SWBT Exh. No. 9, Hampton Direct at 18.

[129] *Id*. at 19.

[130] *Id*.

[131] *Id*.

[132] *Id*. at 20.

[133] *Id*.

SWBT argued that the FCC's ruling in the *UNE Remand Order* confirms that stand-alone multiplexing is not subject to the unbundling requirements of the FTA.[134] According to SWBT, the FCC determined that multiplexing (attached electronics) by itself (stand-alone) is not a UNE, and the FCC stated that the loop facility includes attached electronics, including multiplexing equipment, but not as a stand-alone UNE.[135] SWBT contended that the multiplexing function needed for loop capacity includes the conversion or combining function by "multiplexing" and also the segregation or separating of the signals, by "demultiplexing," at the other end of the transmission.[136] SWBT maintained that it is required to provide multiplexing as part of unbundled loop and transport.[137] SWBT asserted that MCIm agrees that stand-alone multiplexing is not a UNE, but the language that MCIm proposes in the interconnection agreement inappropriately designates stand-alone multiplexing as a UNE at 8.2.1.5.1 and 8.2.1.5.2.[138]

SWBT also argued that no CLEC can pick and choose provisions of the T2A in contravention to the T2A's own terms, including T2A Attachment 26, for purposes of such a bilateral agreement.[139] SWBT asserted that the Commission made a decision in Docket No. 17922/20268 to include the "stand-alone" multiplexing" language in the T2A based on pre-existing contract language.[140]

Arbitrators' Decision

The Arbitrators find that MCIm's proposed contract language is appropriate in that it calls for unbundled forward-looking, cost-based rates for stand-alone multiplexing for Voice Grade-to-DS1 and DS1-to-DS3 multiplexing and demultiplexing in addition to Unbundled Dedicated Transport rates and charges. The Arbitrators note two parts to this issue: (1) whether multiplexing should be available on a stand-alone basis; and (2) whether multiplexing, when

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[134] SWBT Exh. No. 14, Oyer Direct at 13.

[135] *Id*.

[136] *Id*.

[137] SWBT Exh. No. 10, Hampton Rebuttal at 12.

[138] *Id*. at 12-13; SWBT Exh. No. 15, Rebuttal Testimony of Timothy Oyer at 5-6 (Oyer Rebuttal).

[139] SWBT Exh. No. 1, Rebuttal Testimony of Michael C. Auinbauh at 13 (Auinbauh Rebuttal).

[140] Tr. at 641.

combined with other UNEs, should be priced on a forward-looking cost-basis. The Arbitrators find that (1) multiplexing should be available on a stand-alone basis to the extent that "stand-alone" refers to the whole unit, and (2) that multiplexing in combination with other UNEs should be priced at forward-looking, cost-based rates.[141]

First, SWBT appears to be confusing the question relating to multiplexing on a stand-alone basis by implying that stand-alone multiplexing means physical unbundling, rather than unbundling for the purposes of separate cost-based pricing.[142] *The Arbitrators do not agree that the use of the "stand-alone" language in this context suggests an unconnected unit by itself. Instead, the phrase "stand-alone" is used here to mean that CLECs should be able to purchase the whole unit on an unbundled basis when used in combination with other UNEs. The Arbitrators note that MCIm's language regarding the provisioning of stand-alone multiplexing only requires SWBT to provide the equipment in the context of providing local service through the network. The Arbitrators find that SWBT is required to provide the multiplexer as a stand-alone unit upon a CLEC's request, regardless of whether all the ports are fully connected, so that a CLEC can plan and manage its service provisioning activities through UNEs.*

Second, the Arbitrators conclude that CLECs should be able to purchase multiplexing in combination with other UNEs at forward-looking, cost-based rates. Multiplexing, when combined with other UNEs, is clearly one of the features, functions, and capabilities of the loop or transport transmission facilities, and must therefore be priced at forward-looking, cost-based rates. Without multiplexing, the loop and transport will not function. Indeed, even the EEL would not function without access to multiplexing. Consistent with the Arbitrators' decision in DPL Issue No. 3, SWBT must continue to combine multiplexing with other UNEs until it provides CLECs with nondiscriminatory access to UNEs in a manner that allows CLECs to combine UNEs for themselves without having to collocate. The Arbitrators further note that, in providing EELs to a requesting carrier, SWBT must provide that carrier with at least one of several possible configurations of stand-alone multiplexing, so that a CLEC can provide competitive local service using its own switch without having to collocate in every central office.

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[141] The Arbitrators note that the second part of this issue appears to be uncontested by either party. *See* MCIm Exh. No. 1, Price Direct at 48; SWBT Exh. No. 9, Hampton Direct at 19; SWBT Exh. No. 10, Hampton Rebuttal at 12.

[142] *See Iowa Utils Bd.*, 525 U.S. at 393.

Therefore, the Arbitrators adopt MCIm's proposed language as reflected in the attached contract matrix, and SWBT shall provide stand-alone multiplexing at forward-looking cost-based rates.

DPL ISSUE NO. 6

SWBT: Should Unbundled Dedicated Transport be defined and provided as specified in the FCC Rules?

CLECs: Should SWBT be required to continue to provide Unbundled Dedicated Transport (UDT) in accordance with the Commission's decision in Docket No. 18117 and the Mega-Arbitration?

Should SWBT be required to provide UDT and/or local trunking between itself and a third party acting on behalf of CLEC as ordered in Docket No. 18117?

Should SWBT be required to continue to provide common transport in addition to shared and dedicated transport as interoffice facilities?

CLECs' Position

MCIm urged the Arbitrators to find that its proposed language regarding unbundled dedicated transport (UDT) is appropriate because it implements the Commission's prior orders requiring SWBT to make UDT available to CLECs.[143] According to MCIm, the Commission's decisions in Docket No. 18117 and the *Mega-Arbitration* require SWBT to provide (1) UDT and/or local trunking between itself and a third party acting on behalf of CLEC; and (2) common transport in addition to shared and dedicated transport as interoffice facilities.[144] In support, MCIm quoted from the Arbitration Award in Docket No. 18117 that use of interoffice facilities "is equally applicable when UDT connects wire centers or switches of two different ILECs as it does when it connects wire centers of switches of the same ILEC, e.g., where UDT is available, CLECs need access to the piece parts of the ILEC's network to the same extent the incumbent LEC has such access."[145]

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[143] MCIm Exh. No. 1, Price Direct at 14.

[144] *Id.* at 49.

[145] *Id.* (quoting *Complaint of MCI Telecommunications Corporation and MCImetro Access Transmission Service, Inc. Against SWBT for Violation of Commission Order in Docket Nos. 16285 and 17587 Regarding Provisioning Unbundled Dedicated Transport*, Docket No. 18117, Arbitration Award (Mar. 23, 1998) at 5 (*Docket No. 18117 Arbitration Award*)). At the hearing on the merits, MCIm acknowledged that it was the resulting contract language in Docket 18117, rather than the Arbitration Award, that authorized UDT trunking between SWBT and a third party acting on behalf of a CLEC. Tr. at 1199-1200.

MCIm argued that the FCC found in the *UNE Remand Order* "that CLECs are impaired without access to transport as a UNE."[146] MCIm asserted that the FCC has made clear that states can go beyond the minimum requirements imposed by the FCC's unbundling rules, and that this Commission should affirm its prior decision(s).[147] Finally, MCIm contended that SWBT's language should be rejected because it would nullify a prior order by this Commission, and because SWBT is clearly obligated to provide transport on an unbundled basis to requesting carriers.[148]

SWBT's Position

SWBT posited that the interconnection language proposed by MCIm impermissibly expands the FCC's definition of UDT to include the facilities of third parties acting on behalf of a CLEC.[149] According to SWBT, MCIm's proposed language erases the FCC's distinction between UDT, which is a facility that exists only between the two carrier offices, and unbundled loops, which exist between a carrier's office and an end user customer premise.[150] To resolve the issue, SWBT proposed to incorporate the FCC's rule defining UDT into the parties' interconnection agreement.[151]

Additionally, SWBT argued that there is nothing in MCIm's excerpt from Docket 18117 that addresses the situation involving UDT between an ILEC's wire centers/switches and those of a third party acting on behalf of the CLEC. SWBT contended that incorporating the FCC's definition of UDT in the Interconnection Agreement is, therefore, not inconsistent with the ruling in Docket No. 18117.[152]

Arbitrators' Decision

The Arbitrators find that SWBT's obligation to provide UDT is limited to transport between wire centers and switches of ILECs, MCIm, or third party telecommunications carriers

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[146] MCIm Exh. No. 1, Price Direct at 50.

[147] MCIm Exh. No. 2, Price Rebuttal at 30.

[148] MCIm Exh. No. 1, Price Direct at 50.

[149] SWBT Exh. No. 9, Hampton Direct at 20.

[150] SWBT Exh. No. 14, Oyer Direct, at 16.

[151] Tr. at 1201; SWBT Exh. No. 14, Oyer Direct at 14.

acting pursuant to a contractual relationship with MCIm. UDT specifically does not include transport to end user third parties.

47 C.F.R. § 51.319(d)(1) defines UDT as:

> *[I]ncumbent LEC transmission facilities, including all technically feasible capacity-related services including, but not limited to, DS1, DS3 and OCn levels, dedicated to a particular customer or carrier, that provide telecommunications between wire centers owned by incumbent LECs or requesting telecommunications carriers, or between switches owned by incumbent LECs or requesting telecommunications carriers.*[153]

The Commission expounded upon UDT in the SWBT/MCI interconnection proceeding and found it to be a:

> *UNE that provides unbundled access to dedicated transmission facilities between ILEC central offices or between such offices and those of competing carriers. This includes, at a minimum, interoffice facilities between end offices and serving wire centers (SWCs), SWCs and IXC POPs, tandem switches and SWCs, end offices or tandems of the incumbent LEC, and the wire centers of ILEC, and the wire centers of the ILECs and requesting carriers.*[154]

In the SWBT/MCIm Interconnection proceeding, the Commission deferred to Docket No. 18117 the question of whether UDT in Texas should go beyond the FCC's minimum requirements.[155] *As noted, the parties in this case agree that Docket No. 18117 is controlling, but differ in their interpretations.*[156] *This divergence of interpretations perhaps results from the somewhat limited scope in Docket No. 18117. In Docket No. 18117, the issue of extending UDT to third-parties was limited to other ILECs. The rationale, however, is equally applicable to end user third parties.*

In Docket No. 18117, the Arbitrator found that the intent of offering UDT as a UNE was to "reduce entry barriers into the local exchange market by enabling new entrants to establish efficient local networks by combining their own interoffice facilities with those of the incumbent

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[152] SWBT Exh. No. 10, Hampton Rebuttal at 13.

[153] 47 C.F.R. § 51.319(d)(1) (2001).

[154] *MCI/MCImetro Agreement*, Docket No. 16285, Order Approving Amendments to Interconnection Agreement, Appendix A at 3 (Feb. 27, 1998).

[155] *Id*.

[156] SWBT Exh. No. 10, Hampton Rebuttal at 13; MCIm Exh. No. 1, Price Direct at 50.

LEC."[157] *The Arbitrator found this principle to be "equally applicable when UDT connects wire centers or switches of two different ILECs as it does when it connects wire centers or switches of the same ILEC, e.g. where UDT is available, CLECs need access to the piece parts of the ILEC's network to the same extent the incumbent LEC has such access."*[158]

For the same reasons, UDT cannot extend to end user third parties. UDT involves transmission facilities between carriers, not customers. Extending UDT to end user third parties eliminates the distinction between loop and transport for all third parties that lack the facilities to which UDT would ordinarily be provisioned, e.g., wire centers or switches.

Although the parties focused primarily on whether SWBT is required to provide UDT to a third-party acting on behalf of a CLEC, the parties also offered competing language regarding the technical requirements and additional charges for dedicated transport diversity.[159] *The Arbitrators find that, when a CLEC requests dedicated transport diversity, SWBT will provide such physical diversity, if it exists. The additional cost, if any, for providing such physical diversity shall be determined in the subsequent cost proceeding. Where physical diversity does not exist for dedicated transport, SWBT shall provide such diversity through the BFR process.*

Therefore, the Arbitrators adopt MCIm's proposed language, with modifications to reflect the decision herein.

DPL ISSUE NO. 7

SWBT: Is SWBT obligated to provide the promotional offering found in Section 14 of the T2A Agreement?

CLECs' Position

a. MCIm

MCIm proposed adopting a modified version of UNE Attachment 6, section 14 from the MCI Worldcom Agreement.[160] MCIm's modifications would require SWBT to combine UNEs

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[157] *Docket No. 18117, Arbitration Award* at 5 (quoting *Local Competition Order* ¶ 440).

[158] *Id*.

[159] Joint Exh. 1, Joint Contract Matrix at 10-21.

[160] Tr. at 487-88.

and would treat local switching, operator services, and directory assistance as UNEs.[161] MCIm disagreed with SWBT's characterization of section 14 of the T2A's Attachment 6 – UNE as consisting of "promotional offerings" that it is not obligated to offer outside of the T2A.[162] According to MCIm, the only provision that is arguably voluntary is SWBT's agreement to waive application of the necessary and impair standards in section 14.8. According to MCIm, if the Commission deletes SWBT's waiver it should delete all of section 14.8, which includes CLEC's agreement to waive its "pick and choose" rights under FTA § 252(i).[163]

MCIm argued that SWBT is seeking to undo the key elements of the commitments it made to obtain this Commission's support for its FTA § 271 application to the FCC.[164] Additionally, MCIm contended that the provisions regarding the EEL, though not specifically arbitrated in this proceeding, must be retained because SWBT dropped its request to arbitrate the issue.[165]

b. AT&T

AT&T argued that section 14 provides for a process of eliminating new combinations to business customers after October 13, 2001.[166] According to AT&T, SWBT's proposed elimination of Section 14, not only eliminates SWBT's obligation to continue to provide new combinations for business customers, but also eliminates SWBT's obligation to notify CLECs of its intent to discontinue new combinations, as well as its obligation to provide the process for common area assembly.[167] AT&T contended that SWBT's proposal violates the FCC's *UNE Remand Order* and other decisions that stipulate that SBC/SWBT cannot implement provisions that prevent competition by imposing inefficient or uneconomic conditions on CLECs.[168] Moreover, AT&T argued that section 14 contains other obligations such as EELs, the providing

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[161] *Id*.

[162] MCIm Exh. No. 1, Price Direct at 50.

[163] *Id*. at 50-51.

[164] MCIm Exh. No. 2, Price Rebuttal at 30.

[165] MCIm Initial Brief at 22 (citing MCIm Exh. No. 1, Price Direct at 31-48).

[166] AT&T Exh. No. 1, Fettig Rebuttal at 4.

[167] *Id*.

[168] *Id*.

of new combinations, and the secured frame alternative that have been authorized by the Commission and should be retained in order to prevent SWBT from limiting competition.[169]

SWBT's Position

Although SWBT admitted that "there are provisions within [section] 14 that might be acceptable,"[170] SWBT proposed to delete all of section 14 on the basis that it constitutes promotional offers that were made available as a result of the Texas 271 proceeding.[171] SWBT asserted that the T2A resulted from a complex set of "gives" and "takes," and that to protect the integrity of the T2A, the negotiating process that led to it, and the Commission's approval thereof, this Commission has refused to allow modification to the T2A under the guise of negotiating a separate agreement. SWBT argued that because MCIm did not opt into all of the provisions legitimately related to section 14, MCIm should not be allowed to reap the benefits of the promotional offering provisions found therein.[172]

Arbitrators' Decision

The Arbitrators agree with SWBT that the T2A was the result of a series of negotiations, compromises, and concessions between SWBT, various CLECs, and the Commission.[173] *The Arbitrators do not agree, however, that the negotiated nature of the T2A renders the provisions of section 14 nothing more than a "promotional offer" by SWBT that cannot be adopted outside of the T2A. In fact, much of the language the Arbitrators incorporate into, or delete from, section 14 is a function of the Arbitrators' decisions on other DPL Issues. For example, section 14.3.1.2 (purchasing of OS/DA) is the subject of the Arbitrators decision in DPL Issue No. 25. Similarly, 14.3.3 through 14.4 (combining UNEs) is addressed by the Arbitrators in DPL Issue No. 3. Accordingly, the Arbitrators find it appropriate to include section 14 in the parties' interconnection agreement and further find that the contract language as determined by the Arbitrators is not the result of T2A negotiations but rather of the Arbitrators' specific findings and decisions in this Arbitration Award.*

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[169] *Id.* at 4-8.

[170] Tr. at 486.

[171] SWBT Exh. No. 9, Hampton Direct at 21.

[172] *Id.* at 22.

Therefore, the Arbitrators adopt MCIm's proposed language and modify it as follows. Section 14.1 is modified to remove language limiting SWBT's duties to the duration of this agreement. This Award conditions several of SWBT's duties on proof to be adduced and decisions to be made in the course of future Commission Proceedings.[174] *The Arbitrators adopt new section 14.2.1 to reflect the Arbitrators' findings and decision in DPL Issue No. 3. Section 14.3, which concerns provisions applicable only to business customers after October 13, 2001, is deleted because the Arbitration Award makes no distinction between business and residential customers. Section 14.3.1.1 is modified and new section 14.3.1.1.1 is adopted to reflect the Arbitrators' findings and decision on DPL Issue Nos. 8 and 8a. Section 14.3.1.2 is modified and new section 14.3.1.2.1 is adopted to reflect the Arbitrators' findings and decision on DPL Issue 25. Sections 14.3.3 - 14.3.4, which concerned the ordering and combining of UNEs at the optional secured frame, are deleted because the Arbitrators' findings and decision on DPL Issue No. 3 eliminates the secured frame alternative. Sections 14.4 - 14.4.2, which addressed provisions applicable only to residential customers after October 13, 2002, are deleted because the Arbitration Award makes no distinction between business and residential customers. Section 14.6, which deals with dark fiber, is modified to remove references to deleted sections 14.3 and 14.4.*

Sections 14.7-14.7.4, which concern EEL, are modified to delete sections and references to 14.7.3 and 14.7.3.1, add references to new sections, and to reference the FCC criteria for determining the availability of EEL.[175] *The Arbitrators find, however, that modified sections 14.7-14.7.4 must be retained in order to implement the Arbitrators' decision in DPL Issue No. 3 regarding SWBT's obligation to combine UNEs. As defined by the FCC, EEL consists of unbundled loop, multiplexing/concentrating equipment, and transport.*[176] *Multiplexing/concentrating equipment, while not separately defined as UNEs, are essential to providing functionality to the combination of UNE loop and UNE transport. Simply stated, the EEL cannot exist without the equipment needed to give it functionality. Accordingly, the*

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[173] SWBT Initial Brief at 20.

[174] *See* Arbitrators' Decisions in connection with DPL Issue Nos. 3, 8, 22, and 25.

[175] Prior to the hearing on the merits, the parties dropped the issue dealing with EEL. *See* Joint Exh. No. 1, Joint Contract Matrix at 8 (DPL Issue No. 4).

[176] *UNE Remand Order* at 12, and ¶¶ 475, 477, 480, 481.

Arbitrators find that multiplexing/concentrating equipment, including DCS in the context of EEL, is part of the features, functions, and capabilities of the loop-transport combination that together form EEL.[177] *The availability of EEL is subject to the FCC's criteria for determining when a carrier may use combinations of UNEs, including EEL, to provide exchange access service.*[178]

Section 14.8 is deleted. This section included: (1) SWBT's waiver of its rights to assert that a network element available under the agreement did not meet the "necessary and impair" standards of 47 U.S.C. § 251(d)(2); (2) SWBT's waiver of its rights with regard to combining network elements that are not already assembled; (3) the CLECs' agreement that the UNE provisions in the agreement are non-severable and "legitimately related" for purposes of 47 U.S.C. § 252(i); and (4) the CLECs' agreement to take the UNE provisions of the agreement in their entirety, without change, alteration or modification, waiving its rights to "pick and choose" UNE provisions from other agreements under §252(i). The mutual waiver of rights were additional consideration for the agreement. The Arbitrators find that no such mutual consideration is necessary given that the parties have arbitrated rather than negotiated this interconnection agreement.

Therefore, the Arbitrators adopt MCIm's proposed language, with modifications as described herein and shown in the attached contract matrix.

DPL ISSUE NO. 8

CLECs: Are CLECs impaired without access to local switching as a network element?

SWBT: Is SWBT required to provide local switching as a UNE contrary to the UNE Remand Order?

CLECs' Positions

a. Birch

Birch argued that to eliminate the availability of local switching as an unbundled network element (UNE) would severely limit the certainty associated with one of the most critical

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[177] *See* 47 C.F.R. § 51.319(a)(1) and (d)(2)(i-ii) (2001); *UNE Remand Order* ¶ 175.

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

components of UNE-P.[179] Birch stated that currently over 98% of its total lines and all of its Texas local dial tone lines are served via UNE-P.[180] Its typical customer is a business with roughly four lines, although Birch serves many customers with more than four lines; the company also serves residential customers utilizing UNE-P.[181] Birch stated that while a relatively small percentage of its current revenue is represented in the ten central offices in question, if local switching were no longer available as a UNE, Birch would have to evaluate whether or not to retain those customers.[182] Birch argued that the continued availability of UNE-P is critical for it to fully implement its long-term business plan to deploy next-generation facilities from which it will serve its own customers.[183]

Birch argued that its growth proves that UNE-P is the only viable market entry mechanism that is readily scalable to varying sized markets and to serve the mass market.[184] Birch explained that, early on in its evolution, it deployed circuit switches in Kansas City, St. Louis, and Wichita. However, according to Birch, the high cost and provisioning difficulties of handling large volumes of small orders made it infeasible to use circuit switches and UNE loops to serve small business and residential customers. Birch explained that provisioning service to a customer required taking the SWBT loop and cross-connecting it to the Birch switch, a more complex process than ordering and having provisioned an assembled group of UNEs.[185] As a result of that experience, Birch explained that it turned to UNE-P as an interim solution until it realizes the appropriate cash flow break-even point where it is economically feasible to deploy soft switches; at this time the company estimates that will occur in late 2002 or early 2003.[186] With UNE-P, Birch was able to justify to its investors its plans to serve mass market customers, such as very small businesses, in large urban as well as smaller markets. Birch argued that heavy capital expenditures and the complex operational environment that accompanies facilities-based

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[179] Coalition Exh. No. 3, Direct Testimony of John M. Ivanuska at 14 (Ivanuska Direct).

[180] *Id* at 5.

[181] *Id.* at 6.

[182] Tr. at 355.

[183] Coalition Exh. No. 3, Ivanuska Direct at 6, 8-10.

[184] *Id.* at 8.

[185] Coalition Exh. No. 3 at 6-7; Tr. at 365.

[186] Coalition Exh. No. 3, Ivanuska Direct at 6-8; Tr. at 369.

market entry would have limited its geographic expansion, and Birch's marketing efforts would have concentrated on densely populated areas within large cities.[187]

Birch disagreed with SWBT that other local switching alternatives — including CLECs with switches, its own switches, wireless alternatives, or upgraded cable networks — are available.[188] Birch stated that while it may be conceivable that it could purchase wholesale local switching from a vendor other than SWBT, it has no knowledge of any CLEC providing switching to another CLEC, and has never been contacted by a provider other than SWBT offering switching in any of SWBT's markets.[189] Birch disputed evidence submitted by SWBT regarding the number of CLEC switches in the 4 MSAs in question. Birch contacted several of the switch-based CLECs — e.spire, Grande, ICG, KMC, Logix, and WinStar — and stated that the number of switches that the companies reported they own and operate in those markets clearly conflicts with the switch information presented by SWBT.[190] Birch argued that even if another CLEC were willing to provide local switching on a wholesale basis, it would be wholly impractical from an operational standpoint.[191] Birch itself would never consider offering switching on a wholesale basis in conjunction with its three switches because it has neither the resources nor the expertise to develop its business to make switching available to other CLECs.[192]

Birch argued that, because of the lack of competing vendors, the loss of local switching as a UNE would force Birch to enter into negotiations with SWBT without leverage or recourse. Birch expressed concern that this would result in the loss of investor confidence in the stability of its business plan, and that if it cannot make a solid showing of how it will maintain its current growth and how it will effectively compete using next-generation technologies, it will appear to be too risky of an investment.[193]

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[187] Coalition Exh. No. 3, Ivanuska Direct at 7-8.

[188] Coalition Exh. No. 4, Rebuttal Testimony of John M. Ivanuska at 4 (Ivanuska Rebuttal).

[189] Coalition Exh. No. 3, Ivanuska Direct at 10-11.

[190] Tr. at 318.

[191] Coalition Exh. No. 3, Ivanuska Direct at 10-11, 13.

[192] *Id.* at 11.

[193] *Id*. at 13. Birch did not respond to the Texas UNE-P Coalition's proposal to establish the bright line at the DS-1 level. Tr. at 355.

b. MCIm

MCIm argued that the FCC's local switching UNE exception creates an administratively unworkable bright line,[194] and impairs the ability of CLECs to serve business customers with more than three lines.[195] MCIm stated that SWBT is not entitled to the local switching UNE exception, and CLECs can meet the requirements of the FCC's impairment test in Texas.[196] MCIm argued that its proposed language is appropriate because CLECs are impaired without access to local switching as a network element for business customers with more than 3 lines in the top 50 MSAs, and SWBT refuses to provide reasonable access to enhanced extended links (EELs).[197] MCIm averred that the Commission should conduct its own impairment analysis and require SWBT to provide UNE switching without exception.[198]

According to MCIm, switching for businesses with four or more lines in the top 50 MSAs meets the FCC's tests of "material diminishment" and "substantive differences."[199] MCIm stated that its ability to provide local service to smaller businesses with four or more lines is materially diminished by lack of access to the switching element because of the costs and operational difficulties associated with extending a single voice grade loop to its switches on a repeated but sporadic basis.[200] In addition, MCIm maintained there are substantive differences between CLECs' and ILECs' abilities to utilize single voice grade loops to connect to their respective switches – i.e., the cost and operational issues associated with CLECs' ability to utilize a high volume of sporadic coordinated cutovers.[201] MCIm argued that the processes for handling the smooth conversion of significant numbers of orders from SWBT's switches to CLEC switches do not exist.[202]

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[194] MCIm Exh. No. 1, Price Direct at 57.

[195] MCIm's Initial Brief at 5.

[196] MCIm Exh. No. 1, Price Direct at 56.

[197] *Id.* at 5.

[198] *Id.* at 54.

[199] *Id.* at 58-59.

[200] *Id.*

[201] *Id.*

[202] Tr. at 103.

MCIm argued that CLECs have consistently demonstrated that offering service to consumers via the use of their own switching facilities – except for high capacity services (DS-1 and above) – is entirely uneconomical and is unsustainable on a long term basis without significant scope in customer lines.[203] MCIm stated that it provides local services to business customers using its own switches in the Houston and Dallas markets, and that in virtually every instance a DS-1 circuit is the smallest capacity circuit used for a variety of reasons, including ease of channelization and ability to configure bandwidth to accommodate the customer.[204] MCIm stated that it continues to press for access to local circuit switching without restriction even though it has significant investments in local infrastructure in Texas because: (1) of the potential for disrupting the service provided to small business customers when using a manual cut-over process; and (2) it should be the competitor (i.e., MCIm) rather than SWBT who has the ability to choose how it wishes to provide service.[205] MCIm explained that although it does not provide services today to small business customers, if local switching were not available as a UNE in the ten central offices in question, it would be precluded from rolling out a new product targeted at that customer segment.[206]

MCIm argued that CLECs that rely today on using unbundled local switching (ULS) would be significantly impaired if they were required to use the facilities of alternative switch-based providers as switching is not generally available from alternative providers.[207] According to MCIm, operational barriers remain to offering wholesale switching to UNE-P providers. While UNE-P providers and SWBT have established electronic interfaces to handle volumes or orders, these electronic interfaces do not exist between UNE-P CLECs and wholesale switching providers.[208] If local switching were no longer available as a UNE, CLECs would have to purchase wholesale switching from alternative providers using inefficient manual interfaces.[209] MCIm explained that the difficulties regarding the lack of electronic systems for operations

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[203] MCIm Exh. No. 3, Direct Testimony of Steven E. Turner at 11 (Turner Direct).

[204] MCIm Exh. No. 1, Price Direct at 58-59.

[205] MCIm Exh. No. 2, Price Rebuttal at 21.

[206] Tr. at 356.

[207] MCIm Exh. No. 3, Turner Direct at 18.

[208] *Id.* at 18-19.

[209] *Id.* at 19.

between UNE-P CLECs and wholesale switch providers would be multiplied by the numerous network providers with whom the UNE-P CLECs would have to interface.[210] MCIm stated that it is not aware of any remaining CLECs that offer wholesale switching to UNE-Platform CLECs, and given the electronic system challenges and the general frailty of facilities-based CLECs at present, it is unlikely that a wholesale market for switching is going to develop that can be ordered efficiently in small volumes by UNE-P providers.[211] According to MCIm, only SWBT has the scope of network to provide for the reasonable provisioning of switching, and operational barriers preclude the use of alternative vendors for the foreseeable future.[212]

MCIm stated that CLECs who use their own switching in combination with unbundled loops cannot seamlessly migrate customers, therefore the growth in competition will be hindered by service interruptions.[213] MCIm explained that the hot cut process is not designed for large volumes of small line orders, and that the system would not be able to handle the large volume of orders that are required for small businesses.[214]

MCI argued that the switching UNE exception does not apply unless the Commission concludes that SWBT is providing "nondiscriminatory cost-based access to" EELs.[215] MCIm adduced evidence that SWBT has obstructed its attempts at obtaining EELs, and MCIm is no closer now to obtaining EELs than when it first requested them four years ago.[216]

MCIm contended that EELs are uneconomic on a mass market basis.[217] MCIm explained that EELs take an unbundled loop at one SWBT central office and extend it to another SWBT central office where the CLEC has a collocation arrangement. The economics of these arrangements are prohibitive particularly when addressing service to 2-wire voice grade customers.[218] MCIm's analysis of EEL loop costs compared to a 2-wire voice grade loop

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[210] *Id.* at 20.

[211] *Id*. at 20-21.

[212] *Id.* at 4.

[213] *Id.* at 19.

[214] *Id*. at 19-20.

[215] MCIm Exh. No. 1, Price Direct at 54.

[216] *Id.* at 54-55.

[217] Tr. at 103.

[218] MCIm Exh. No. 3, Turner Direct at 22.

showed that a 2-wire voice grade EEL will cost the CLEC 49% more per month than if that same loop had been provided in combination with unbundled local switching, not including costs associated with collocation.[219] MCIm also stated that in Texas, if a CLEC orders a UNE-P loop that is a migration order, meaning the loop and the switch port are already connected, there is no nonrecurring charge for the loop. However, if the CLEC orders that same loop to be connected to its own switch, the CLEC must pay the nonrecurring charge for the loop, which costs 3,598% more than if that same loop had been provided in combination with unbundled local switching, not including collocation costs.[220] MCIm stated that without access to unbundled switching, business customers with four or more lines will not be able to receive local service from CLECs in any comprehensive way because the economics of EELs for voice grade services – the FCC's alternative to providing access to unbundled switching – is economically cost prohibitive.[221]

According to MCIm, it would take a CLEC at least ten years to construct a duplicate distribution network to compete over facilities independent of those of SWBT, and pointed to Grande Communications' estimates that it will take "the next five to seven years" for its construction activities to reach the intended "more than 1.6 million homes" in Central Texas.[222]

MCIm asserted that it is likely that as CLECs build scope in terms of the number of customers that they acquire in a market, they may begin to substitute unbundled access to local switching with use of their own facilities. MCIm claimed that, although that point has not yet been reached, CLECs will naturally make this choice when the economic and operational benefits of using their own facilities outweigh those of using SWBT's facilities.[223]

MCIm agreed with the UNE-P Coalition's redrawing of the bright line to the digital DS-1 level because MCIm contended it is consistent with the way in which the market actually operates.[224] MCIm explained that what happens in the practical world is that customers will have 17 or 18 analog lines, and they will keep adding analog lines rather than growing into a

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[219] *Id.* at 23.

[220] *Id.* at 24 (citing data provided in Exhibit SET-6).

[221] *Id*. MCIm clarified that in its EEL cost study, the assumption was made that the EEL was an analog loop.

[222] MCIm Exh. No. 2, Price Rebuttal at 13 (citing Grande's November 29, 2001 press release).

[223] MCIm Exh. No. 3, Turner Direct at 21-22.

[224] Tr. at 357.

DS-1.[225] MCIm explained that part of the reason is that converting to digital DS-1 requires the customer to change out equipment — e.g., go from a key system to a PBX — and this can be expensive. MCIm recommended that the effective port for a digital DS-1, which is a PRI port and is in the contract, be differentiated from 24 analog ports, which is configured as 24 individual lines with 24 individual ports on the switch.[226]

c. nii communications

nii argued that anything that reduces the availability of local switching and the UNE-P is an impairment to the growth of its business, and that any restriction on a carrier's ability to use UNE-P to serve analog customers would severely restrict, if not eliminate, competition for these customers.[227] nii stated that it serves a little less than 8,000 small business across the state of Texas and about 197 different municipalities, and that if it were required to deploy its own network in order to serve these analog customers, it would go broke.[228] nii maintained that without local switching available as a UNE, several of its existing customers would be forced off its network because they would become "over-qualified," and the best alternative for nii would be to disconnect these customers.[229] nii explained that, while less than 10% of its current revenues would be affected, future revenues and growth would be impacted greatly; even though the local switching UNE restriction affects ten wire centers, it effectively kills a CLEC's ability to compete in the entire MSA.[230]

In addition, nii argued that its ability to expand would be severely constrained.[231] nii argued that the expense associated with deploying one's own local switching, as well as the geographic limitations associated with such a strategy, preclude use of that strategy to serve analog small business consumers that are widely dispersed throughout the State, particularly given the state of today's capital markets. nii maintained that a carrier using its own switching

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[225] Tr. at 359. MCIm stated that it is important to distinguish between a digital DS-1 and 24 analog lines, so that customers continue to have the option to grow with analog lines.

[226] Tr. at 360.

[227] Tr. at 109-10; Coalition Exh. No. 5, Burk Direct at 7.

[228] Tr. at 109; Coalition Exh. No. 5, Burk Direct at 7.

[229] Tr. at 353.

[230] Tr. at 353-54.

[231] Coalition Exh. No. 5, Burk Direct at 6.

can only compete for larger customers in major metropolitan areas desiring more specialized services.[232] nii's argued that its inability to use UNE-P to serve customers with more than three lines located in Zone 1 offices in San Antonio, Houston, Dallas, and Forth Worth would make it far less economically feasible for nii to offer service in higher cost areas such as Hereford and Mount Pleasant.[233]

nii stated that it had actively solicited rate quotes for local switching from a number of facilities-based CLECs in Texas. nii specifically said it would accept rates not lower than TELRIC, and was interested in finding a reliable supplier that was cooperative.[234] nii explained that it has attempted to purchase switching within a packages of services, and a number of different ways, similar to the manner in which switching is purchased in the interexchange world, where there is a competitive market.[235] To date, no switched-based CLEC has approached nii, with its 26,000 switch ports currently under lease from SWBT, with a wholesale solution or alternative to the RBOC.[236] nii maintained that it is unaware of any CLEC that has been able to get a competitive bid of any kind for local switching, despite numerous requests.[237] nii stated that it offers switching as a stand-alone product and does not necessarily associate a loop with it. Thus, according to nii and contrary to statements by other parties, this can be done.[238] nii concluded that there are no other switching alternatives available to a UNE-P provider serving the analog market, even in the top 50 MSAs.

nii explained that UNE-P allows it to provide unique bundled service offerings that incorporate local, long distance, and Internet service.[239] nii argued that UNE-P and resale are not provided on the same platform, and that one can not be moved to the other.[240] According to nii,

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[232] *Id.* at 5.

[233] *Id.* at 7.

[234] Tr. at 282-83.

[235] Tr. at 331.

[236] Coalition Exh. No. 5, Burk Direct at 7.

[237] Tr. at 282-83.

[238] Tr. at 351.

[239] Tr. at 351-52.

[240] Tr. at 352.

UNE-P is provided on a unique platform where all the service is taken down and rebuilt, all the signaling comes through an AIN platform and is not on the same platform.[241]

nii stated that the UNE-P Coalition's proposed DS-1 local switching restriction and EEL without the FCC's special access local restriction makes sense.[242] nii maintained that digital switching is commercially viable, but a CLEC could not serve multiple end offices without a useful EEL.[243] According to nii, for analog services there is no commercially viable alternative right now.[244] The real issue according to nii is how to provide analog services to small businesses and whether or not there is going be a competitive market in Texas, and providing EELs will not help.[245]

d. Sage

Sage recommended that the Commission reaffirm the list of UNEs currently available so that SWBT cannot invoke the provisions of Attachment 6: UNE, sections 14.1 through 14.7 of its existing interconnection agreement with SWBT.[246] Sage maintained that it must have continued availability of the UNE-P and all of the components of the platform. Sage urged the Commission to consider the costs, timeliness, ubiquity, quality of service, and availability of alternatives to obtaining the UNEs, including local switching. Sage argued that the alternatives are not viable.[247]

Sage stated that it uses UNE-P to provide local service to its customers, over 92.7% of which are rural residential customers.[248] Sage explained that, in examining strategies to enter the local market, it found that the most cost-efficient and time efficient method was to utilize UNE-P, which allowed Sage to reach customers in rural areas that would not be reached if it

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[241] Tr. at 352.

[242] Tr. at 354.

[243] Tr. at 330.

[244] Tr. at 330.

[245] Tr. at 331.

[246] Sage Post-Hearing Initial Brief at 24 (Sage Initial Brief) (referring to Sections 14.1-14.7 of Attachment 6: UNE, approved in *Joint Application of Southwestern Bell Telephone Company and Sage Telecom, Inc. for Approval of an Amendment to the Interconnection Agreement Under PURA and the Telecommunications Act of 1996,* Docket No. 23527 (Feb. 9, 2001)).

[247] Sage Exh. No. 1, Nuttall Direct at 43.

required building a network or investing in facilities.[249] Through the use of UNE-P, Sage was able to make a business case for the rural market entry because of the UNE rates that allowed Sage to remain economically viable as an ongoing business.[250] Sage explained that UNE-P has allowed it to expand, and without it, Sage would not be able to continue implementation of this business plan in a cost or time efficient manner.[251]

Sage expressed concern with the uncertainty created or perceived due to the provisions in Attachment 6: UNE of its existing interconnection agreement with SWBT, which potentially would allow SWBT to limit its provisioning of unbundled local switching and other combinations.[252] Commission affirmation of the current list of UNEs and UNE-P would defer contractual and implementation uncertainty for CLECs, which currently causes concern to financial investors.[253] In addition, Sage cannot afford delay. Sage currently provides service in Texas to over 225,000 end use customers and Sage is required to purchase its own switches or build loops or collocate in SWBT central offices to interconnect with SWBT. If SWBT were to invoke the section 14.0 provisions today, Sage would not be able to invest, finance, order, or implement its own facilities in a manner that would allow continued provisioning of services to Sage's existing customer base within sixty days.[254]

Sage argued that it would not be viable for Sage to purchase, build, or contract with another party for any UNE that is no longer available to Sage, nor is it viable to invest in facilities to reach a dispersed customer base in rural and suburban areas. Thus, a large number of consumers and locations would not have competition, particularly in certain rural areas, if local switching were no longer available as a UNE.[255]

Sage stated that, while its has been successful deploying competitive bundled offerings in Texas, the success is due in large part to the fact that Sage could deploy to a SWBT footprint and

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[248] *Id.* at 39.

[249] *Id.* at 40.

[250] *Id.* at 43-44.

[251] *Id.* at 40-41.

[252] *Id.* at 42 (referring to Sections 14.1-14.7 of Attachment 6: UNE, approved in Docket No. 23527).

[253] *Id.*

[254] *Id.* at 45-46.

[255] *Id.* at 47.

create innovative product offerings to offer consumers and reach a larger geographically ubiquitous segment of the population. Sage stated that its only alternatives to UNE-P would be resale or facilities investment, and that neither option is viable.[256] Resale is not a long-term economically viable method of providing services because resale limits Sage to simply reselling SWBT services with little or no product differentiation, and the margins are too small for Sage to competitively price products.[257] UNE-P allows Sage to create unique product offerings without having to invest in facilities where it would not make financial sense to do so.[258] Without local switching as a UNE, Sage argued that it would not be able to economically provide competitive service in rural and suburban areas.[259]

e. CLEC Coalition

The CLEC Coalition argued that CLECs will face material impairment if any restrictions are placed upon the local switching UNE, and that the FCC's restrictions lack competitive merit and are not in the public interest.[260] The CLEC Coalition stated that under federal rules, the Commission may require SWBT to offer a network element if the Commission determines that entrants would be "impaired" without access to that element.[261] In addition, under PURA, the Commission may require the additional unbundling (i.e., beyond the federal minimum) of any network element that has "competitive merit" or is in the "public interest."[262] The CLEC Coalition stated that the Texas Commission is closer than the FCC to local conditions, and therefore is in a better position to assess the effect of placing limits on the availability of local switching as a UNE.[263]

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[256] *Id.* at 44.

[257] *Id.*

[258] Sage Exh. No. 2, Nuttall Rebuttal at 34.

[259] *Id.* at 35.

[260] Texas UNE Platform Coalition, AT&T Communications of Texas, L.P., and McLeodUSA Telecommunications Services, Inc. Post-Hearing Initial Brief at 5 (Feb. 15, 2002) (CLEC Coalition Initial Brief).

[261] Coalition Exh. No. 1, Gillan Direct at 9 (citing *UNE Remand Order*).

[262] *Id*. (citing the Public Utility Regulatory Act, TEX. UTIL. CODE ANN. §§ 11.001-64.158 (Vernon 1998 & Supp. 2002) (PURA), § 60.022).

[263] *Id.* at 11.

The CLEC Coalition contended that the uncertainty facing CLECs is that CLECs need to know what the competitive conditions are going to be in Texas regardless of what the FCC determines in its UNE review and, therefore, the Commission should conduct its own impairment analysis.[264] The CLEC Coalition maintained that this arbitration is really about how to find switching for analog customers so that CLECs know with certainty that this entry strategy will continue to be available in Texas.[265]

The CLEC Coalition argued that current federal law provides a mechanism for States to require additional unbundling according to specific standards, in particular a finding that CLECs would be impaired without access to the network element in question.[266] The CLEC Coalition argued that impairment requires an examination of: (1) leasing capacity in the incumbent's switch; and (2) an externally supplied switch, either self-provisioned or obtained from a third-party.[267] According to the CLEC Coalition, the comparison must consider the difference between these alternatives in its effect on (a) the entrant's cost, (b) speed to market, (c) quality, (d) ubiquity, and (e) impact on network operations.[268]

The CLEC Coalition argued that there is a clear material diminishment in the entrant's ability to offer service using external switches that are not fully integrated into the local network or ubiquitously deployed.[269] The CLEC Coalition stated that: (1) UNE-P is the reason that Texas sees the competition it does today; (2) entrants need the local switching network element to offer competitive services; and (3) UNE-P provides the necessary foundation for the evolution of additional facilities, new technologies, and innovative services.[270] The CLEC Coalition argued that entrants are impaired without access to local switching to serve analog lines, which, according to the CLEC Coalition, define the "mass market."[271] The CLEC Coalition maintained

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[264] Tr. at 166-67.

[265] Tr. at 321.

[266] Coalition Exh. No. 1, Gillan Direct at 13-14 (citing 47 C.F.R. § 51.317(b)(1) (2001)).

[267] *Id.* at 31 (citing 47 C.F.R. § 51.317(b)(1) (2001)).

[268] *Id*. (citing 47 C.F.R. § 51.317(b)(2) (2001)).

[269] *Id*.

[270] *Id.* at 7.

[271] *Id.* at 40.

that local switching is necessary to offer ubiquitous service.[272] The CLEC Coalition argued that the FCC's local switching carve out ignores the critical importance of ubiquity to the mass market entry strategies that UNE-P makes possible.[273]

The CLEC Coalition recommended that the Commission find that competitors are materially diminished in their ability to compete for analog customers throughout Texas without access to unbundled local switching, irrespective of the customer's location or number of analog lines.[274] The CLEC Coalition argued that the cost and reliability problems associated with manual provisioning render it a threshold requirement to competition. The CLEC Coalition argued that loop provisioning systems are not automated — in order to transition an SBC customer to a CLEC, the process is handcrafted and requires a technician to implement the change at the switch – a slow, expensive, and unreliable process.[275] The CLEC Coalition maintained that in a UNE-P environment, converting customers from one CLEC to another is possible because the transaction is implemented by SWBT.[276] However, the CLEC Coalition stated that the conversion of one facilities-based CLEC customer to another facilities-based CLEC customer is complicated because, although the CLECs may have implemented systems to interface with SWBT, they may not necessarily have figured out systems to work with each other.[277]

The CLEC Coalition stated that that while analog services are unequivocally impaired without access to local switching throughout the market – at least until switching and backhaul costs are reduced and loop-provisioning systems are automated to accommodate commercial volumes of orders at a comparable cost – high-capacity digital services may not require access to local switching, at least in some areas.[278] The CLEC Coalition suggested that, where an efficient aggregation capability exists, the largest cities in Texas may be able to sustain competition for

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[272] *Id.* at 32.

[273] *Id.* at 40, n.51.

[274] *Id.* at 40.

[275] Tr. at 361-62.

[276] Tr. at 364.

[277] Tr. at 363.

[278] Coalition Exh. No. 1, Gillan Direct at 39.

digital services if the concentration of DS-1 (and above) customers is sufficiently great.[279] The CLEC Coalition maintained that this proposed DS-1 bright line would promote reduced regulation, provide needed certainty, and is far more administratively practical than the existing federal approach.[280] Under its proposal, the sole limitation on local switching is that a high-speed digital loop could not be ordered with unbundled local switching in these four markets, a limitation that could easily be implemented by SWBT.[281]

The CLEC Coalition recommended that any "non-impairment" finding for high-speed digital services be limited to central offices in the four cities in Texas that are part of the 50 largest markets: Dallas, Fort Worth, San Antonio, and Houston, provided that SWBT proves it is offering the so-called real EEL or REEL.[282] The CLEC Coalition explained that its interpretation of an EEL significantly differs from SWBT's. First, dedicated transport would extend to the CLEC's location, not just to a CLEC collocation, as identified by SWBT in its EEL diagram.[283] Second, under the proposed REEL, CLECs would be able to aggregate DS-1 level loops and then perform multiplexing where multiple DS-1s would be built up into a DS-3.[284] Third, a CLEC should be able to use the pipeline – i.e., DS-1 - for whatever purpose it chooses.[285] The CLEC Coalition argued that the EEL is only useful if the customer is big enough to be at least a DS-1 customer; UNE-P works for analog customers, and there is not much overlap between the two groups.[286]

The CLEC Coalition recommended that the Commission only authorize SWBT to deny access to local switching where a REEL is made available and is demonstrated to be fully operational, and it should not be subject to the FCC's restrictions and limitations.[287] The CLEC Coalition contended that SWBT should be required to demonstrate that it is supplying digital

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[279] *Id.* at 41, n.52.

[280] *Id.* at 56-57.

[281] *Id.* at 58.

[282] *Id.* at 43-44.

[283] SWBT Exh. No. 35 (Diagram for Enhanced Extended Loop (EEL) for Providing Significant Local Service).

[284] Tr. at 297-98.

[285] Tr. at 298.

[286] Tr. at 299-300.

loop/transport combinations as cost-based network elements that enable CLECs to reach additional customers without incurring the cost of collocation.[288] The CLEC Coalition argued that this is not the same EEL obligation that the FCC requires, because the loop/transport obligation (EEL) may not be practically available. The CLEC Coalition stated that the REEL is a digital DS-1, 1.544 mbps channel, not a 24 analog line surrogate.[289] The REEL option should mean that an externally supplied CLEC switch in these four cities is able to reach other large digital customers in the MSA in an efficient manner. Because this is more assumption than proven fact, however, the CLEC Coalition urged the Commission to not expand this policy beyond the four markets recommended above. The CLEC Coalition argued that, by establishing the boundary of a digital-restriction in this way, the Commission will create the opportunity to do a comparative analysis of competitive conditions between these markets and other areas in Texas later, and use that information to decide whether to expand (or eliminate) the restriction.[290]

SWBT's Position

According to SWBT, the dispute framed by this DPL issue concerns SWBT's proposed language for section 5.4 of UNE Attachment 6 and MCIm's proposed language in section 14.3.1.1 of UNE Attachment 6. SWBT stated that MCIm proposes to take a portion of the T2A language from the UNE Appendix and then add a new section to it, section 14.3.1.1, and it should not be allowed to do so. [291] SWBT asserted that the issue is whether the interconnection agreement should contain language detailing exception territory for unbundled local switching consistent with the FCC's *UNE Remand Order*.[292] SWBT argued that it is not attempting to remove local switching from the UNEs available in the Interconnection Agreement, but seeking inclusion of language that reflects the FCC's determination of when local switching is no longer

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[287] Coalition Exh. No. 1, Gillan Direct at 43.

[288] *Id.* at 42.

[289] Tr. at 360.

[290] Coalition Exh. No. 1, Gillan Direct at 43-44.

[291] SWBT Exh. No. 9, Hampton Direct at 22-23.

[292] SWBT Exh. No. 13, Kirksey Rebuttal at 5 (citing *UNE Remand Order* ¶ 253).

required to be offered as a UNE; that is, the circumstances in which the "necessary and impair" standard is not met.[293]

SWBT maintained that the T2A constituted a "sweetheart" deal for CLECs, well above and beyond legal requirements otherwise available to CLECs.[294] SWBT averred that it still provides local switching as a UNE under the T2A, even though the obligation expired as to business customers on October 13, 2001. SWBT explained that, even if it invoked the ULS exception, it would still be required under the T2A to offer local switching in the four MSAs in question at market-based rates for CLECs serving business customers with more than four lines. Thus, notwithstanding the FCC's carve-out, SWBT claimed that no CLEC who has the T2A would be denied unbundled local switching by SWBT for any customers in any wire centers in Texas.[295]

SWBT characterized the question facing the Commission as whether it is appropriate to create an environment that might cause Texas not to get investment because it has created a disincentive to investment.[296] SWBT argued that the T2A allowed for a certainty period because CLECs had maintained at that time that UNE-P was a transition strategy that would lead to their investment in facilities.[297]

SWBT explained that, in its *UNE Remand Order*, the FCC included the following top 50 Metropolitan statistical areas in Texas that qualify for the local switching UNE exception: Houston, Dallas, Fort Worth-Arlington, and San Antonio.[298] SWBT concurred that, based on Coalition testimony, only ten central offices are located within density zone 1 in the four MSAs, and the total number of lines in those ten offices is 1,148,709.[299] Of those lines, it is reasonable to assume that a smaller subset of the end users served by those ten offices would have four or

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[293] SWBT Exh. No. 10, Hampton Rebuttal at 15.

[294] SWBT Exh. No. 1, Auinbauh Rebuttal at 14.

[295] Tr. at 127.

[296] Tr. at 324.

[297] *Id*.

[298] SWBT Exh. No. 9, Hampton Direct at 24.

[299] SWBT Exh. No. 10, Hampton Rebuttal at 14 (citing Coalition Exh. No. 1, Gillan Direct at 19, 32).

more lines. SWBT estimated that the local switching UNE exception would apply to less than 2.0% of SWBT's offices in Texas and less than 12% of SWBT's lines in the state.[300]

SWBT argued that its proposed inclusion of the FCC's exception relating to the local switching UNE would not preclude a CLEC from using unbundled local switching for residential and small business customers with less than four lines. SWBT disagreed with the CLECs' argument that they need access to ULS to serve these groups of customers, and stated that this need will not be frustrated by the inclusion of the exception language SWBT proposed.[301]

SWBT argued that this proceeding is not about the availability of local switching, but the transition to market-based prices.[302] SWBT explained that under the T2A, UNE-P continues, but SWBT is allowed to move to market-based pricing of local switching.[303] SWBT maintained that if there is any demand for unbundled local switching, that demand is concentrated around the loop, as carriers do not want to buy switching by itself.[304] SWBT argued that it offered language that would make the LS UNE available at a market-based price, which is not required by the FCC. SWBT is competing for wholesale customers - there is a lot of investment in other networks and competition from other technologies.[305] SWBT has not invoked the FCC's exception, but does not want a contract that creates an environment in which it cannot reach commercial agreements because CLECs have entitlements beyond what the FCC intended in its rules; this creates an environment in which CLECs have no incentive to reach an agreement with SWBT.[306] SWBT maintained that the FCC's UNE exception is "the first 'baby step'" to encouraging more competitive independence, and urged the Arbitrators to adopt the same approach.[307]

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[300] *Id.* at 14 (citing total lines in Texas of 10,236,332 as reported in *Scope of Competition in Telecommunications Markets of Texas Biennial Reports to the Texas Legislature Public Utility Commission of Texas*, Appendix F: List of ILECs, Project No. 21167 (Jan. 2001) (Scope of Competition Report)).

[301] *Id*. at 15.

[302] Tr. at 131.

[303] Tr. at 311.

[304] Tr. at 312.

[305] Tr. at 314.

[306] Tr. at 315.

[307] SWBT's Initial Brief at 5.

SWBT contended that the issue in this proceeding is contained to the removal of the unbundled local switching requirement for customers with four or more lines in a small number of geographic areas, where CLECs have already invested in relatively large numbers of local switches. In these geographic areas, there is no question about the ability of CLECs to invest in switches—they already have invested.[308]

SWBT stated that in its *UNE Remand Order*, the FCC based its unbundling analysis on "the ability of a requesting carrier to self-supply switching."[309] The FCC did not make its determination based on the ability of competitors to purchase this element from other competitors. [310] SWBT stated that MCIm provided testimony that "MCIm and its affiliates have local switches in both the Houston and Dallas markets—both of which are included in the top 50 MSAs—that are used to provide switched local services to business customers."[311] SWBT argued that CLECs have demonstrated through their extensive self-provision of switching that they are not impaired without access to unbundled switching.[312] SWBT stated that MCIm can deploy its facilities in optimal, modern configurations, serve the most profitable customers, and leave less profitable or unprofitable customers to be served by the incumbents. The mere existence of an ILEC asset is not justification for unbundling that asset. Required unbundling of non-essential facilities is contrary to promoting efficient innovation and investments.[313]

SWBT stated that the FCC correctly concluded that access to ILEC switching on an unbundled basis to business customers with four or more lines in major metropolitan areas is not essential for a CLEC to compete. The fact that MCIm and other CLECs have already invested in numerous switches capable of providing local service in major metropolitan areas demonstrates that access to unbundled switching from SWBT is not essential for these competitors. Unbundling is meant to promote, not replace, investment in CLEC facilities.[314]

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[308] SWBT Exh. No. 8, Fitzsimmons Rebuttal at 30.

[309] *Id.* at 22 (citing MCIm Exh. No. 1, Price Direct at 54).

[310] *UNE Remand Order* ¶ 276.

[311] SWBT Exh. No. 8, Fitzsimmons Rebuttal at 22 (citing Price Direct at 58).

[312] SWBT Exh. No. 7, Fitzsimmons Direct at 44.

[313] *Id.* at 44-45.

[314] *Id.* at 42.

SWBT conceded that 47 C.F.R. § 51.317 provides the ability for a state commission to make UNEs available beyond those identified in 47 C.F.R. § 51.319. However, in the case of unbundled local switching, the FCC has created very specific rules and has already deemed the "impair" standard is no longer met under specific circumstances.[315] According to SWBT, each argument offered by the CLECs to establish impairment without unbundled local switching in the four Texas MSAs in question was explicitly considered by the FCC in the *UNE Remand Order*. Because the FCC has previously determined that there is no impairment, the Commission should not consider impairment in this proceeding.[316] SWBT argued that, more importantly, while state commissions retain the authority to impose additional unbundling obligations on ILECs, the exercise of that authority has to be consistent with the Act and the FCC's rules. To the extent that the FCC has already addressed a particular issue in establishing its unbundling rules (*e.g.*, the circumstances under which ILECs must unbundle local switching), the FCC's conclusion on that issue is controlling. This is consistent with the Public Utility Regulatory Act ("PURA"), which requires that decisions of this Commission "not conflict" with decisions of the FCC.[317]

SWBT explained that if it is not required to sell unbundled local switching, then it is not required to offer UNE-P. SWBT contended that unless there is a strong case that CLECs cannot self-supply switching, then unbundled local switching should not be required. According to SWBT, in the face of the facts, it is not credible to claim that CLECs cannot self-supply switching, at least in major metropolitan areas to customers with four or more lines. The indisputable fact is that there are numerous competitors with their own local switches in Texas and around the nation. This is why the FCC removed the unbundling restriction for a specific class of customers in the densest metropolitan areas.[318]

SWBT stated that there is no basis for MCIm's surmise that SWBT will discontinue offering ULS, and therefore, UNE-P for end users with more than 3 lines in the 4 Texas MSAs

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[315] SWBT Exh. No. 9, Hampton Direct at 24-25.

[316] Tr. at 126.

[317] SWBT Exh. No. 1, Auinbauh Rebuttal at 16 (citing PURA §§ 11.009 (PURA to be applied "so as to not conflict" with federal authority), 53.001(b) (a rule or order of the Commission "may not conflict" with a ruling of a federal regulatory body), and 60.003(d) (Commission may not "implement a requirement that is contrary to federal law or rule.")); Tr. at 126.

[318] SWBT Exh. No. 8, Fitzsimmons Rebuttal at 4-5.

after October 13, 2001, the expiration date for those particular T2A provisions. SWBT explained that, before it can avail itself of the ULS exception, it must offer EELs at cost-based rates. Additionally, SWBT has provided for a notification process.[319]

SWBT stated that, contrary to the CLEC Coalition's concerns, the FCC's exception would not create a situation in which a CLEC serving an end user with three lines using unbundled local switching would have to return the end user to the ILEC if the customer added a fourth line. SWBT argued that if the local switching UNE were no longer available to a CLEC, the CLEC would need to select another method of serving the end user, such as converting the customer to resale.[320] Thus, SWBT maintained, if local switching were no longer available to CLECs, there would be no issue regarding the physical arrangements or provisioning for an existing customer. Instead, it would simply be a price change.[321]

SWBT argued that it offers the EEL in the context of the T2A, but in order to take advantage of the FCC's exception, it would have to offer the EEL to everyone. SWBT stated that it has not chosen to offer an EEL in the four Texas MSAs and take advantage of the ULS carve out.[322] SWBT explained that it has not chosen to take advantage of the ULS exception because it would prefer, in this environment, to negotiate commercially viable agreements between the parties. SWBT stated that it has the discretion as to whether to offer the EEL.[323] SWBT stated that taking away the availability of the LS UNE and implementing availability of the EEL would occur simultaneously.[324]

SWBT stated that it did not disagree with the CLEC Coalition's diagram of an EEL,[325] and agreed that multiplexing is not a part of dedicated transport and would not be available in an

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[319] SWBT Exh. No. 9, Hampton Direct at 23.

[320] SWBT Exh. No. 10, Hampton Rebuttal at 16 (citing Coalition Exh. No. 1, Gillan Direct at 58); Tr. at 341-42.

[321] Tr. at 344.

[322] Tr. at 291.

[323] Tr. at 292.

[324] Tr. at 293.

[325] Coalition Exh. No. 11, Simplified Digital Enhanced Extended Loop (EEL) Schematic; DS-1 Loop Combined with OC-x Transport.

EEL situation.[326] SWBT stated that certain EELs, existing combinations, are available under the FCC's rules, and conversion of these existing special access EELs can occur under the very specific set of three criteria laid out by the FCC. In order to initiate the switching carve-out, SWBT would have to make new combinations of loops and transport, which would be an EEL, and SWBT has no plans to do that at this time.[327] SWBT does not plan to offer switching generically or to offer the EEL as a new combination outside of the T2A, where both are available today.[328]

SWBT argued that the testimony of its witness Mr. Hampton, where he stated that SWBT has not chosen to provide the EEL, is attempting to show the difference between what would be available in an agreement that would be negotiated and arbitrated outside of the T2A as opposed to what is available today in the T2A.[329] SWBT explained that it agreed to provide EELs as a condition for approval to enter the long-distance market in Texas.[330] SWBT stated that it is not asking to stop providing switching as a UNE, but is asking to put the FCC's exception in the contract language.[331]

SWBT stated that it found curious nii communications' statement that it has been unable to obtain switching from other sources.[332] However, SWBT also stated that it was not aware of any transactions in Texas in which local switching is being provided by a third-party supplier.[333] SWBT stated that the price of UNE-P would be a factor as to why local switching is not available from alternative sources, because the TELRIC-based local switching rate is low compared to the price at which other vendors would find it profitable to sell it.[334]

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[326] Tr. at 304.

[327] Tr. at 305-06.

[328] Tr. at 306.

[329] Tr. at 308.

[330] *Id*.

[331] Tr. at 309-10, 313.

[332] SWBT Exh. No. 8, Fitzsimmons Rebuttal at 27 (citing Coalition Exh. No. 5, Burk Direct at 7).

[333] Tr. at 281-82.

[334] Tr. at 282.

SWBT averred that one reason that no other facilities-based providers are offering unbundled local switching is that there is little demand for the service.[335] SWBT stated that it is not rational to expect other facilities-based competitors to offer unbundled local switching. SWBT is required to offer unbundled local switching, but there are few takers aside from UNE-P providers who buy finished services at UNE prices, but do not actually buy UNEs. It is unlikely, therefore, that a business plan would succeed based on the expectation that there is a large market for unbundled switching. Given the large number of CLEC-owned local switches, it appears that most firms requiring local switching as a stand-alone network component invest in their own switches; they do not purchase switching on a per minute basis from other CLECs or SWBT.[336] SWBT argued that even if there were other firms with finished services to offer to UNE-P providers, it is highly unlikely that any non-regulated competitor would agree to sell finished services at UNE prices.[337]

SWBT stated that it was not aware of any evidence provided by the CLECs in this proceeding that would actually support their proposal to impose additional unbundling obligations on SWBT.[338] SWBT argued that, although numerous CLECs in this proceeding claim they are impaired without local switching as a UNE, they never mention leasing unbundled switching as a stand-alone network element.[339]

SWBT further argued that Birch and Sage have existing interconnection agreements in effect that include language that states that SWBT may decide to no longer provide unbundled local switching as a UNE pursuant to the exception specified by the FCC. SWBT stated that Birch and Sage are attempting to use this proceeding to improperly renegotiate this provision in their existing interconnection agreements prior to the agreements' expirations.[340]

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[335] SWBT Exh. No. 8, Fitzsimmons Rebuttal at 30.

[336] *Id*.

[337] *Id*.

[338] SWBT Exh. No. 1, Auinbauh Rebuttal at 15 (citing direct and rebuttal testimony of other SWBT witnesses, including Mr. Smallwood, Mr. Hampton, Dr. Fitzsimmons, and Dr. Harris).

[339] SWBT Exh. No. 11, Harris Rebuttal at 23 (citing Coalition Exh. No. 5, Burk Direct at 5; Coalition Exh. No. 1, Gillan Direct at 31; Coalition Exh. No. 3/3A, Ivanuska Direct at 14; Sage Exh. No. 1, Nuttall Direct at 43-47; MCIm Exh. No. 1, Price Direct at 55; MCIm Exh. No. 3/3A, Turner Direct at 17).

[340] SWBT Exh. No. 10, Hampton Rebuttal at 16-17.

SWBT also argued that there are industry standards for migrating end users from one CLEC to another.[341] The Local Service Request (LSR) process created by the Ordering and Billing Forum (OBF)[342] encompasses all LEC-to-LEC interaction. The LSR process addresses the necessary steps that must occur between current service provider, new service provider, and network provider, regardless of who they may be. The LSR process is designed for use by all local telecommunication service providers to transact business with each other.[343]

SWBT disagreed with the CLEC Coalition's statements that backhaul/aggregation costs only make sense for at least DS-1 customers, and only in those central offices where sufficient penetration of services provided by a CLEC justifies collocation.[344] SWBT disagreed with the CLEC Coalition's recommendation that the sole limitation on local switching be that a high-speed loop could not be ordered with unbundled local switching in four markets.[345] According to SWBT, it is not entirely clear what the CLEC Coalition's limitation proposes, since it fails to elaborate on exactly how the high-speed digital loop would be utilized along with unbundled local switching. [346]

SWBT maintained that the FCC's carve out has virtually no effect on the ability to use UNE-P to offer service to residential and small business customers, and applies only in wire centers where "literally dozens" of CLECs have their own switches and are already collocated.[347] SWBT stated that as of November 14, 2001, 44 CLECs were collocated in SWBT's wire centers in Texas.[348] SWBT maintained that 91% of its access lines were in wire centers with at least one collocated competitor, and 83% of its access lines were in wire centers with three or more

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[341] *Id.* at 17.

[342] *Id*. SWBT explained that the OBF is an industry forum sponsored by the Alliance for Telecommunications Industry Solutions (ATIS). The OBF provides a venue for customers and providers in the telecommunications industry to identify, discuss and resolve national issues that affect ordering, billing, provisioning and exchange of information about access services and other connectivity and related matters. The Local Service Request (LSR) and Access Service Request (ASR) guidelines are developed by this national forum.

[343] *Id*.

[344] SWBT Exh. No. 13, Kirksey Rebuttal at 6 (citing Gillan Direct at 36).

[345] *Id.* at 7 (citing Coalition Exh. No. 1, Gillan Direct at 57).

[346] *Id*.

[347] Tr. at 125.

[348] SWBT Exh. No. 7, Fitzsimmons Direct at 34.

collocated competitors.[349] SWBT opined that this collocation information provides a clear picture of the extent of SWBT's customer base that can be easily reached by competitors.[350] According to SWBT, a CLEC with one switch in an MSA can serve the entire area. For example, a CLEC could serve the all five Dallas wire centers with one switch, if it is collocated in each wire center, can use its own fiber or leased fiber, and its own transport or can purchase transport from SWBT.[351]

SWBT stated that it has not determined how to define access lines for the purposes of invoking the FCC's exception because SWBT has no plans to invoke the exception.[352] In terms of accounting for the number of lines a customer has and providing a CLEC with real-time feedback so that a CLEC's order could be rejected or accepted in real time, SWBT stated that it is not aware of any operation support system programming that has been developed.[353]

Arbitrators' Decision

The Arbitrators find that CLECs are impaired without access to local switching as a UNE. SWBT is therefore required to provide unbundled local switching. Moreover, the imposition of this requirement is not contrary to the terms of the UNE Remand Order.

The FCC's Exception Is Not Applicable

According to the FCC, incumbent local exchange carriers (ILECs) must provide local switching as an unbundled network element (UNE) "except for local circuit switching used to serve end users with four or more lines in access density zone 1 in the top 50 Metropolitan Statistical Areas (MSAs), ***provided that*** *the ILEC provides nondiscriminatory, cost-based access*

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[349] *Id.* at 34-35.

[350] *Id.*

[351] Tr. at 317-18. According to Dr. Fitzsimmons, the CLEC switch data provided in Rebuttal and Corrected testimonies was derived from the LERG. Tr. at 256. Dr. Fitzsimmons acknowledged that the switch data presented in his Direct Testimony was incorrect, and explained that the analysis had been originally conducted by SWBT and then provided to him and his staff. Tr. at 266-69. Dr. Fitzsimmons explained that when he and his staff recognized that the data analysis seemed inaccurate, they requested the raw data from SWBT and his staff conducted its own analysis, and presented the revised data analysis in his Corrected Testimony. Tr. at 266-71.

[352] Tr. at 357. SWBT suggested that the FCC may have defined access lines.

[353] Tr. at 358.

to the enhanced extended link (EEL) throughout zone 1."[354] *The FCC's decision to carve out an exception to the requirement that ILECs provide local switching as a UNE is expressly predicated on the availability of the EEL,*[355] *and the exception is therefore triggered* ***only*** *when the ILEC provides nondiscriminatory, cost-based access to the EEL.*

The Arbitrators find that SWBT has failed to prove that it provides nondiscriminatory cost-based access to the EEL. Indeed, SWBT conceded that it does not provide nondiscriminatory access to the EEL, and therefore the exception does not apply. [356] *In addition, MCIm presented unrefuted evidence that SWBT has obstructed MCIm's attempt to obtain EELs.*[357] *The Arbitrators note that SWBT has not asked the FCC or the Commission to determine that any Texas market qualifies for the UNE Remand Order EEL exception. Because the express condition precedent to the application of the exception has not been met, the Arbitrators conclude that the exception is not now applicable and SWBT is required to provide unbundled local switching (ULS) throughout Texas without exception.*

Commission Oversight of EEL Implementation

The Arbitrators conclude that finding only that the FCC's exception to unbundled local switching has not been triggered does not reach SWBT's proposal to include in the interconnection agreement language reflecting the exception and threatens to leave unanswered questions that could diminish market certainty. Therefore, the Arbitrators further find that implementation of the EEL requires Commission oversight to ensure that the EEL is properly available, and that CLECs have an adequate opportunity to transition to market based pricing or to seek alternative providers of local switching. Consequently, the Arbitrators decline to adopt SWBT's proposed contract language.

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354 *UNE Remand Order* ¶ 12.

355 *Id.* ¶ 288.

356 SWBT Exh. No. 10, Hampton Rebuttal at 15 ("[T]he exception only applies when an ILEC provides CLECs with access to EELs, which SWBT has chosen not to do to date."). *See also* Tr. at 291 (SWBT witness stated that the EEL is available, but on a discriminatory basis to CLECs that opted into the T2A.).

357 MCIm Exh. No. 1, Price Direct at 54-55.

The Arbitrators note that compelling and unrefuted evidence was presented that the EEL may, in fact, be cost prohibitive for CLECs.[358] *SWBT also had provided the FCC with evidence that, over time, distance-sensitive EEL costs can exceed the cost of collocation.*[359] *The Arbitrators find, therefore, that if and when SWBT desires to invoke an FCC carve out or exception to treating LS as a UNE, SWBT has the burden of initiating a proceeding before the Commission for that purpose. The Commission will then provide oversight of the proposed EEL transition, and evaluate the applicability of any FCC carve out in effect at that time. This process will allow all interested parties to present evidence on whether the exception should be applied as proposed by the FCC or in some other manner, consistent with FCC guidance and the state of the applicable law at that time. The Arbitrators therefore decline to adopt either SWBT's proposed section 5.4 or MCIm's proposed section 14.3.1.1, and have instead adopted language consistent with this discussion, as reflected in the attached contract matrix.*

Commission Review of FCC Exception's Applicability in Texas

The Arbitrators accord considerable deference to the FCC's broad national perspective and significant experience and expertise. Indeed, the Arbitrators depart from the FCC's conclusions only where circumstances specific to Texas appear to differ from those addressed by the FCC. The Arbitrators believe that the FCC's exception to ULS may be such an instance. Both the facts before the FCC in September 1999, when the UNE Remand Order was issued, and the factual circumstances in Texas today raise questions regarding the applicability of the exception in Texas at this time. In its UNE Remand Order, the FCC explained that without access to ULS, CLECs are impaired in their ability to serve the mass market.[360] *The FCC also concluded that, to the extent that CLECs are not serving a market segment with self-provisioned switches, there is probative evidence of impairment; hence, the FCC stated that the above-mentioned exception would serve as a "proxy" by which to determine "when competitors are impaired in their ability to provide the services they seek to offer."*[361]

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[358] MCIm stated that a two-wire voice grade EEL costs 49% more in recurring charges ($18.06 rather than $12.14, on average) and 3,598% more in nonrecurring charges ($44.01 rather than $1.19, on average) than the same loop if instead combined with unbundled switching. MCIm Exh. No. 3, Turner Direct at 24-25.

[359] *UNE Remand Order* ¶ 289, n.572.

[360] *Id*. ¶¶ 291, 294.

[361] *Id*. ¶ 276.

In creating the subject exception, the FCC conceded that the use of a 3-line rule in removing unbundling obligations from an ILEC could be somewhat under or over-inclusive given individual factual circumstances, and could therefore fail to accurately draw the distinction between the mass market and the medium and large business markets.[362] *The FCC acknowledged that no party to its proceeding identified the "characteristics that distinguish medium and large business customers from the mass market."*[363] *Consequently, the FCC relied at least in part on a letter submitted by Ameritech indicating that, in September 1999, the market segment for business customers with three lines or less accounted for approximately 72% of Ameritech's business customer base.*[364] *Thus, the FCC concluded that "a rule that provides unbundled local switching for carriers when they serve customers with three lines or less captures a significant portion of the mass market."*[365]

The Arbitrators are reluctant to rely solely on this 2½-year old letter to determine whether or not to require SWBT to provide ULS in Texas. First, owing to the manner in which the FCC gathers information, there are evidentiary questions that would arise if the letter was introduced in this proceeding.[366] *Second, the Arbitrators have concerns regarding the content of the letter. If the analysis of the mass market is performed on the basis of the total number of business customers' lines in Ameritech's market, the information presented by Ameritech would leave less than 34% of the total business lines within the so-called mass market.*[367] *Given the questions reasonably addressed to the fallibility of the Ameritech data, the Arbitrators would hesitate to adopt a mass market definition that, based on Ameritech data, might place the vast majority of Texas business customers' lines outside of that definition, and therefore outside the benefits afforded by ULS.*

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[362] *Id.* ¶ 294.

[363] *Id.*

[364] *Id.* at n.580.

[365] *Id.* ¶ 293.

[366] Ameritech apparently filed the letter on an *ex parte* basis very late in the proceeding, without verification or attestation; the validity of the claims in the letter were not tested through any cross-examination.

[367] Letter from James K. Smith, Director – Federal Relations, Ameritech, to Magalie R. Salas, Secretary, Federal Communications Commission, CC Docket No. 96-98 (filed Sept. 8, 1999) (estimated total business access lines calculated using Ameritech Business Customer Base by Linesize).

In addition, the Arbitrators find the evidence in this proceeding does not suggest that a 3-line exception in Texas would differentiate among "discrete market segments or customer classes," as the FCC sought to do by establishing its standard. Indeed, the evidence suggests that SWBT is unclear as to the process by which it would accurately and consistently count lines for the purposes of invoking the exception.[368] *Based on the evidence in this docket, the Arbitrators are unable to conclude that the application of a 3-line test provides a measure of the mass market in Texas that is accurate and practicable.*

The Arbitrators concur with the FCC's observation that there are "several methods [it] could use to distinguish between the mass market and medium and large business market."[369] *The FCC specifically noted that "revenues, number of employees, number of lines, or some other factor" could be used to draw the distinction.*[370] *The Arbitrators find some consensus among the CLECs that, if a bright line is to be drawn, it might be drawn so as to limit the availability of local switching for customers served at the digital DS-1 level or above.*[371] *Indeed, the CLEC Coalition conceded that it would be reasonable to assume non-impairment for high-speed digital customers in the four largest markets in Texas, once SWBT is providing the EEL.*[372]

However, the Arbitrators acknowledge that indicators of impairment based on the number or type of lines used by particular customers (i.e., 3-4 analog lines, digital DS-1) appear to reflect only potential gross revenue available from that customer, while failing to measure CLEC assets and the strength of either competition or of a particular competitor – factors SWBT contends are determinative of whether a CLEC should be required to deploy facility-based services. Although the Arbitrators agree that CLEC strength may be a valid consideration, the Arbitrators disagree with SWBT that the sole standard for removing unbundled switching is the

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[368] Tr. at 357.

[369] *UNE Remand Order* ¶ 292.

[370] *Id*.

[371] For example, a DS-1 (rather than "four lines") is the smallest capacity circuit MCIm uses with its own switch to provide local service to business customers. MCIm presented evidence that this strategy provides ease of channelization and configurability of bandwidth, that a DS-1 is typically the minimum circuit used with a PBX, and that PBX vendors are often onsite to help ensure cutover goes smoothly. Customers without PBXs and without such support thus have a smaller safety net in case cutover goes badly. MCIm Exh. No. 1, Price Direct at 58-59. The Arbitrators use the phrase "digital DS-1" to include only those lines that are provisioned as DS-1s, rather than those that result from the aggregation of analog voice grade lines.

[372] Coalition Exh. No. 1, Gillan Direct at 43-44.

ability of CLECs to self-supply switching.[373] *Even if this were so, however, the Arbitrators find that determining the number of CLEC-owned switches, a seemingly simple factual matter, was the source of considerable dispute in this proceeding.*[374] *The uncertainty over counting customer lines and CLEC-owned switching lends further support for Commission supervision of SWBT's assertion of the applicability of an exception to the unbundling requirement.*

SWBT Must Provide ULS in Zones 1, 2, and 3

Although the FCC created an exception to the general requirement of ULS, the exception is geographically limited in scope to lines located within density zone 1 in the top 50 MSAs. As SWBT concedes, the FCC has determined that, generally, ILECs must provide unbundled access to local switching.[375] *The FCC has found that lack of access to ULS materially raises entry costs, delays broad-based entry, and limits the scope and quality of new entrants' service offerings.*[376] *Therefore, the FCC concluded that ULS meets the impairment standard, and requires ILECs to provide local switching on an unbundled basis.*[377]

Nevertheless, as explained below, the Arbitrators decline to rely solely on the FCC's determination regarding ULS.[378] *Instead, the Arbitrators independently find that CLECs would be impaired in zones 1, 2, and 3 in Texas if local switching were not available as a UNE.*[379] *Therefore, even if in its Triennial UNE Review proceeding the FCC were to remove local*

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[373] SWBT Exh. No. 7, Fitzsimmons Rebuttal at 27. The FCC also considered third-party ULS suppliers, but found that its record could not support a finding that CLECs can obtain switching from any carriers other than the ILEC. *UNE Remand Order* ¶ 253.

[374] *See* Tr. at 253-71, 318; Coalition Exh. No. 3, Ivanuska Direct at 10-11, 13.

[375] *UNE Remand Order* ¶ 253. An ILEC must provide nondiscriminatory access to local circuit switching capability and local tandem switching capability on an unbundled basis, except as set forth in § 51.319(c)(2). 47 C.F.R. § 51.319(c) (2001). *See also* SWBT's Initial Brief at 5.

[376] *UNE Remand Order* ¶ 252.

[377] *Id.*

[378] Given the FCC's determination, it would be unnecessary, in a vacuum, for the Commission to determine whether local switching must be unbundled. *See, e.g., In re Generic Proceeding to Establish Long-Term Pricing Policies for Unbundled Network Elements*, Docket No. 10692-U, Order at 5 (Georgia PSC Feb. 1, 2000) (*Georgia UNE Pricing Order*) ("For UNEs on the national list, there is no need . . . to consider the necessary and impair standard since the FCC already made that determination."). However, because SWBT seeks to have language included in the interconnection agreement that incorporates the FCC exception, the Arbitrators have conducted an impairment analysis.

[379] For the purpose of this analysis, the Arbitrators follow the FCC usage of zone 1 to indicate highest density, even though this Commission has historically designated zone 1 as the least dense zone.

switching from the national list, or create a new exception standard, the Arbitrators nonetheless find that on this specific factual record CLECs in Texas would be impaired without the availability of local switching on an unbundled basis.

CLECs Would Be Impaired Without Access to ULS.

The Arbitrators considered the evidence in light of each of the factors specified in 47 C.F.R. § 51.317: cost; timeliness; ubiquity; impact on network operations; rapid introduction of facilities; facilities-based competition; investment and innovation; certainty to requesting carriers regarding availability; administrative practicality; and reduced regulation.

The Arbitrators find that fixed infrastructure costs — including the switch itself, electronic interfaces, collocation arrangements, provisioning, and cutovers — associated with providing service to residential and small business customers remain a barrier to market entry unless the CLEC is able to generate sufficient economies of scale in a given market, which is achieved in part through serving large business customers through UNE-P.[380] *Sage presented unrefuted evidence that UNE-P provided the most, and perhaps only, viable entry strategy for the company to serve rural and suburban zones.*[381]

In addition, the Arbitrators find that the delay and expense associated with deploying facilities and capturing a significant scale of customers using their own facilities remains a time-consuming process for CLECs that takes years.[382] *The Arbitrators also conclude that non-ILEC ULS is clearly not ubiquitously available. For example, both SWBT and the CLECs presented clear cut evidence that no non-ILEC switch-based provider offers wholesale local switching in any market in Texas.*[383] *The Arbitrators are concerned with SWBT's clear lack of preparation to integrate in any administratively practical or meaningful way local switching obtained by a*

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[380] *See* Coalition Exh. No. 1, Gillan Direct at 34-37; Coalition Exh. No. 2, Gillan Rebuttal at 16-19; Coalition Exh. No. 3, Ivanuska Direct at 6-7, 12-13; Coalition Exh. No. 5, Burk Direct at 5; MCIm Exh. No. 1, Price Direct at 56-57; MCIm Exh. No. 3, Turner Direct at 21-25.

[381] Sage Exh. No. 1, Nuttall Direct at 40-44.

[382] *See* MCIm Exh. No. 1, Price Direct at 57; MCIm Exh. No. 2, Price Rebuttal at 13-14, 16; Coalition Exh. No. 1, Gillan Direct at 38; Sage Exh. No. 1, Nuttall Direct at 40-41, 47.

[383] *See* Coalition Exh. No. 3, Ivanuska Direct at 10-11; Coalition Exh. No. 5, Burk Direct at 7; MCIm Exh. No. 3, Turner Direct at 18, 20-21; SWBT Exh. No. 8, Fitzsimmons Rebuttal at 30; Tr. at 281-82.

CLEC from a third-party with SWBT's network.[384] *Likewise, the Arbitrators are also concerned with the potential detrimental impact on network operations that provisioning large numbers of small orders may have on SWBT's network.*[385]

The Arbitrators are not persuaded by SWBT's arguments that UNE-P would create a disincentive to investment and innovation, or that the FCC based its unbundling analysis solely on the ability of CLECs to self-supply switching in the largest markets without considering the availability of switching from other providers.[386] *The Arbitrators find that lack of non-ILEC ULS would hinder the rapid deployment of facilities, as well as investment in innovative technologies and product offerings.*[387] *The Arbitrators are also concerned with statements by the CLECs that if ULS were not available, they would simply stop serving customers.*[388] *The Arbitrators conclude that inclusion of SWBT's proposed language would create a lack of certainty. Sage and Birch were particularly concerned that this would result in the loss of investor confidence, and the CLEC Coalition stated that this was a primary concern for the CLECs.*[389]

The Arbitrators find valid today the FCC's observation in the UNE Remand Order — "[I]t is too early to know whether self-provisioning is economically viable in the long run".[390] *Therefore, the Arbitrators conclude that CLECs in Texas would be impaired without unbundled*

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[384] Tr. at 341-44.

[385] CLECs expressed particular concern regarding this issue. *See* Tr. at 103; MCIm Exh. No. 1, Price Direct at 58-59; Coalition Exh. No. 3, Ivanuska Direct at 12.

[386] Tr. at 324; SWBT Exh. No. 8, Fitzsimmons Rebuttal at 30.

[387] Both Birch and MCIm expressed concern that lack of ULS could *de facto* require CLECs to invest in "legacy" equipment reflecting current technologies, which may soon be obsolete, instead of in *innovative* next generation network architecture, which may afford greater technical and economic efficiencies. *See* MCIm Exh. No. 2, Price Rebuttal at 15-16; Coalition Exh. No. 3, Ivanuska Direct at 8-10. Birch is also currently testing soft switching equipment with SWBT, and plans to deploy a softswitch in Kansas City next year depending on two factors: success of the testing, and opening up of the capital markets for financial investments. Tr. at 368-369. According to Sage, ULS allows it to offer unique and innovative product offerings to its rural and suburban customers rather than mirroring SWBT's services through resale. Sage Exh. No. 1, Nuttall Direct at 34.

[388] According to MCIm, lack of ULS will hinder competition. MCIm Exh. No. 3, Turner Direct at 22-23. nii stated that, not only would it stop serving its customers rather than invest in facilities, it may go out of business Coalition Exh. No. 5, Burk Direct at 67. Birch stated that it would have to reevaluate the cost of serving customers affected by the UNE exception. Tr. at 355.

[389] Coalition Exh. No. 1, Gillan Direct at 57, Coalition Exh. No. 3, Ivanuska Direct at 13, Sage Exh. No. 1, Nuttall Direct at 42.

[390] *UNE Remand Order* ¶ 256.

local switching from the ILEC. The Arbitrators have adopted language shown in the attached contract matrix that provides for continued ULS until and unless a subsequent determination by the Commission.

DPL ISSUE NO. 8a

CLECs: Is there competitive merit, and is it in the public interest, for local switching to be available as a network element?

SWBT: Is SWBT required to provide local switching as a UNE contrary to the UNE Remand Order?

CLECs' Position

a. MCIm

MCIm argued that the fragile competition that exists for residential and small business customers is based on UNE-P, and SWBT's ultimate goal of eliminating the switching UNE would eliminate broad-based competition for these customers in Texas.[391] MCIm stated that one critical factor in support of policies encouraging geographically broad-based competition is PURA § 54.251(a)(1), which imposes on CLECs holding Certificates of Operating Authority an obligation to offer basic local telecommunications service to any and all persons who request such service within the area for which the CLEC is certified.[392] MCIm stated that CLECs simply cannot today operationally or financially compete for residential or small business customers on a "mass markets" basis using unbundled loops or other facilities-based approaches.[393] MCIm stated during the 18 months from January 2000 to June 2001, UNE-P lines represented 87% of the growth in competitive lines in Texas, and significantly reducing access to unbundled switching for customers with four or more lines would cripple competition.[394]

MCIm further averred that it would take a CLEC at least ten years to construct a duplicate distribution network to compete over facilities independent of those of SWBT.[395] MCIm argued that the Commission's preference for facilities-based competition over other entry

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[391] MCIm Exh. No. 2, Price Rebuttal at 2-3.

[392] *Id.* at 8.

[393] *Id.* at 2-3.

[394] MCIm Exh. No. 3, Turner Direct at 4.

methods permitted by the Act will mean a wait of five to seven years for such competition to develop even in selected metropolitan area markets. Furthermore, MCIm stated that such time frames apply to CLECs as well as to cable companies and voice telephony solutions based on Internet Protocol.

MCIm stated that in making the decision as to whether to utilize its own switching capability or that of SWBT, however, MCIm must be cognizant of the possibility of disrupting the customer's service during the cutover because of a reliance on manual cut-over processes would weigh heavily in that decision.[396] MCIm argued that the fact that there are no electronic means to accomplish cutovers of customers to CLECs' local class 5 switches, and that CLECs depend on the cooperation of SWBT for each step of a transition from SWBT's local services to that of the CLEC, underscore how much more difficult it is for entrants in the local market to gain market share than it is for SWBT to gain long distance market share.[397]

MCIm argued that there are considerable operational hurdles to be crossed before alternative access to wholesale switching can be used in lieu of unbundled switching from SWBT. Operations systems simply do not exist to permit CLECs to order switching in an electronic fashion from multiple CLEC providers. Further, the processes for handling the smooth conversion of significant numbers of orders from SWBT's switches to CLEC switches simply do not exist. MCIm stated that only SWBT has the scope of network to provide for the reasonable provisioning of switching, and operational barriers preclude the use of alternative vendors for the foreseeable future. [398]

MCIm averred that although the FCC sees EELs as an acceptable alternative to unbundled switching for small business customers, it is not a viable economic alternative. The average recurring cost of a 2-wire voice grade EEL is 49% higher than using a 2-wire analog loop in combination with a SWBT switch port. Further, and perhaps more damaging is that the

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[395] MCIm Exh. No. 2, Price Rebuttal at 13 (citing Grande's November 29, 2001 press release).

[396] *Id.* at 21.

[397] *Id.* at 23.

[398] MCIm Exh. No. 3, Turner Direct at 4.

average nonrecurring cost for this same EEL is almost 3,600% higher than using a 2-wire analog loop in combination with a SWBT switch port.[399]

MCIm argued that if CLECs do not have access to the local switching UNE, SWBT would continue to use pricing flexibility to raise prices for services.[400] MCIm stated that CLECs are vulnerable in the current market, local competition is in its infancy, and without UNE-P, more CLECs will be made vulnerable.[401]

b. Birch

Birch stated that the continued availability of UNE-P is critical for it to fully implement its long-term business plan, which is to deploy a next-generation facilities-based network that finally will allow facilities-based competition to serve the "mass market" – customers like Birch's very small business customers. Birch stated that its typical customer is a business with roughly four lines, although Birch serves many customers with more than four lines. Birch stated that it also serves residential customers utilizing UNE-P.[402]

Birch explained that, early on in its evolution, it deployed circuit switches in Kansas City, St. Louis and Wichita. However, Birch discovered that it was nearly impossible to use those circuit switches and individual UNE loops to serve the lower end of the market – small business and residential customers because of both the high cost and the provisioning difficulties of handling large volumes of small orders (as compared to many other CLECs with circuit switches, which concentrated on small numbers of very large customers). As a result of that experience, Birch tested and then implemented the provision of retail local dial tone service via the use of UNE-P provided by SWBT.[403]

With UNE-P as the primary procurement vehicle, Birch was able to justify to its investors its plans to: (1) serve mass market customers, such as very small businesses; (2) serve everywhere in a city, not just in the downtown business district or densely populated suburban business parks; and (3) serve small markets like Beaumont, Waco, Tyler and Amarillo, not just

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[399] *Id.* at 5.

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

[401] *Id.* at 16-17.

[402] Coalition Exh. No. 3, Ivanuska Direct at 6.

Houston, Dallas-Ft. Worth, Austin, and San Antonio. Conversely, the heavy capital expenditures and more complex operational environment that accompanies facilities-based market entry would have limited Birch's otherwise robust geographic expansion, and would have required a concentration of Birch's marketing efforts to a relatively small area of large cities.[404]

Birch disagreed with SWBT that UNE-P does "little to advance the central goals of telecommunications public policy.[405] Birch argued that while SWBT may try to diminish the importance of UNE-P, it has allowed Birch to develop a fairly sizeable subscriber base in Texas that would otherwise not have been attainable.[406] Birch stated that its successful growth has proven that UNE-P is the only viable market entry mechanism that is readily scalable to varying sized markets and to serve the mass market.[407] However, Birch explained that upon completion of its plans to implement an operational next-generation switched-based network, it intends to migrate its voice and data customers to that network.[408] Birch argued that the loss of local switching as a UNE would force Birch to enter into negotiations with SWBT over the definition of "acceptable commercial arrangement" and would create uncertainty thereby reducing Birch's attractiveness to investors.[409] Birch argued that eliminating or severely limiting the certainty associated with one of the most critical components of UNE-P, unbundled local switching, will likely result in the elimination of the level of local service competition enjoyed by Texas consumers today, and likely result in Birch's inability to maintain its competitive existence. [410]

c. Sage

Sage stated that it uses UNE-P to provide local service to its customers, over 92.7% of whom are rural residential customers.[411] Sage explained that in examining strategies to enter the local market, it found that the most cost-efficient and time efficient method was to utilize

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

[404] *Id.* at 7-8.

[405] Coalition Exh. No. 4, Ivanuska Rebuttal at 3 (citing SWBT Exh. No. 7, Fitzsimmons Direct at 40).

[406] *Id.*

[407] Coalition Exh. No. 3, Ivanuska Direct at 8.

[408] *Id.*

[409] *Id.* at 13.

[410] *Id.* at 14.

UNE-P, thus using the same network elements that SWBT used to provide service to the end use customer. UNE-P also allowed Sage to reach customers in rural areas that ultimately would never be reached if it required building a network or investing in facilities. Sage contended that UNE-P enabled it to provide competitive choices for rural residential and business customers, as well as to expand the areas where Sage was able to financially and economically provision service.[412]

Sage argued that UNE-P allowed it to provide competitive choices to a niche that few CLECs are interested in pursuing – rural and residential end use customers. Through the use of UNE-P, Sage was able to make a business case for the rural market entry because of the UNE rates that allowed Sage to remain economically viable as an ongoing business.[413] Sage stated that its only other options to UNE-P would be resale or facilities investment.[414] Sage contended that neither option is viable for Sage because resale does not allow Sage to differentiate itself from SWBT, making Sage reliant on SWBT's product service offerings, decisions to terminate those services, and SWBT's business plans. Finally, there is very little margin involved in offering resold services to an end use customers, which prevents Sage from offering competitively priced products.[415]

Sage argued that the other option, for Sage to go out and purchase, build, or contract with another party for any network element that is no longer available to Sage, is not viable for three reasons: (1) Sage's business plan does not anticipate the need for significant capital outlay for facilities, including switches, or for delay in the ability to provide services to customers;[416] (2) Sage argued that it could not justify service to many of its existing customers if required to provide equipment due to a dispersed customer base in rural and suburban areas resulting in limited or no competition in certain rural areas; and (3) Sage contended it would experience

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411 Sage Exh. No. 1, Nuttall Direct at 39.

412 *Id.* at 40.

413 *Id.* at 43-44.

414 *Id.* at 44.

415 *Id.*

416 *Id.* at 44-45.

delay if it had to seek alternatives that might, and likely would, prevent Sage from expanding its offering of service in additional rural and suburban areas in Texas.[417]

Sage maintained that Sage's ability to procure UNEs, even through UNE-P, enables it to differentiate itself in a reasonable and economic method. Sage disagreed with SWBT that UNE-P is another word for resale because Sage combines UNEs, features, and services together in its own manner to produce Sage's offerings – they do not resemble SWBT's offerings, nor are they intended to. What UNE-P really allows Sage to do is to provide its own service offerings to customers in over 300 exchanges in Texas (largely rural and suburban) without having to drop or invest in facilities where it would not make financial sense to do so.[418] Sage stated that if UNE-P and the components of the platform were not available in there current form, Sage would not be able to economically provide competitive service in rural and suburban areas.[419]

d. CLEC Coalition

The CLEC Coalition stated that: (1) UNE-P is the reason that Texas sees the competition it does today; (2) entrants need the local switching network element to offer competitive service to the typical Texas residential or business customer; and (3) UNE-P provides the necessary foundation for a competitive evolution to additional facilities, new technologies, and innovative services.[420]

The CLEC Coalition averred that only UNE-P has demonstrated, through actual market results, the ability to support mass-market competition. If SWBT can stop competition from developing in this core market, then the competitive evolution in other market segments will be derailed as well.[421] The CLEC Coalition stated that actual market experience since 1999 demonstrates that access to unbundled local switching is a necessary prerequisite to local competition, particularly for customers desiring conventional phone. These "mass market" offerings require entry strategies with electronic provisioning systems that can reliably accommodate large volumes at a relatively small transactions cost, and which enable entrants to

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[417] *Id.* at 45-46.

[418] Sage Exh. No. 2, Nuttall Rebuttal at 34.

[419] *Id.* at 35.

[420] Coalition Exh. No. 1, Gillan Direct at 7.

[421] *Id.*

offer their services across an entire market footprint. Only UNE-P satisfies these basic, threshold needs.[422] Incumbents understand the importance of UNE-P to mass market competition; SBC's out-of-region entry strategy was premised on the use of UNE combinations to serve the residential and small business market.[423]

The CLEC Coalition, argued that UNE-P accounts for more than 97% of the net gain in local competition among the mass market strategies of resale, UNE-P and UNE-Loops since January 2000.[424] The CLEC Coalition stated that from January 2000 to July 2001, Texas UNE-P lines grew by 731%, interconnection trunks which are an indirect measure of customers served using CLEC facilities in Texas grew by only 58%.[425] The CLEC Coalition maintained that UNE-P is made possible because of the local switching network element.[426] The unparalleled success of UNE-P as a strategy to serve the analog mass market can be attributed to its efficiency at handling large volumes at low transaction cost.[427]

The CLEC Coalition stated that the incumbent's local switch enjoys a number of legacy advantages due to its integration into the exchange network, including ubiquity and the ability to migrate customers between different providers through automated provisioning systems. In contrast, external switches require manual handcrafting of every connection, a process that is more expensive, unreliable and inherently capacity-constrained.[428]

The CLEC Coalition maintained that UNE-P promotes the deployment of new technologies resulting in immediate competitive benefit and creating a lasting foundation for competitive investment. Moreover, UNE-P creates a foundation of competitive providers that will attract additional capital, and continue to grow and innovate to differentiate themselves from SWBT and each other.[429]

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[422] *Id.* at 21.

[423] *Id.* at 29.

[424] *Id.* at 22.

[425] *Id.* at 25 (citing Affidavit of Deborah O. Heritage, SBC/Ameritech Director of Compliance, before the Public Utilities Commission of Ohio, CASE No. 00-942-TP-COI (filed Aug. 2, 2001)).

[426] *Id.* at 30.

[427] *Id.* at 33.

[428] *Id.* at 33-34.

[429] *Id.* at 51-52.

The CLEC Coalition maintained that UNE-P provides a critical catalyst to additional network deployment in three ways. First, because UNE-P enables entrants to use SWBT's inherited narrowband network for the voice component of their service, they are able to direct their investment capital to broadband investments that complement their product-line. For instance, UNE-P can be used by an entrant to provide voice service in a package with xDSL service using either its own investment, or the investment of a strategic partner. In this way, the entrant can offer the customer a package of voice and advanced data services, without having to replicate the voice network.[430] Second, once a competitive layer gets firmly established – with customers, revenues and traffic – that layer will encourage the deployment of additional facilities by others, however, if a competitive local layer fails to emerge, equipment vendors will develop only those products that cater to the largest providers.[431] Finally, providers that use UNE-P will begin facilities-replacement wherever efficient and appropriate to the customers' needs.[432]

The CLEC Coalition stated that there would be a number of competitive harms if the Commission does not determine that local switching should be offered as network elements in Texas. Foremost would be the collapse of mass market local competition. With an ability to jointly offer competitive services, such as long distance and Internet access with its local services, SWBT is positioned to recapture the position it had prior to divestiture as a fully integrated monopoly.[433] For instance, where authorized to offer long distance service, SBC and Verizon gained, in less than two years, a market share substantially greater than that which took MCI and Sprint *together* more than two decades to achieve.[434]

The CLEC Coalition argued that its data demonstrates that business plans that rely on UNE-Loops (connected to CLEC switching) have limited geographic application, and achieve low market penetration, showing that it is impossible to conclude that CLEC switching is a reasonable substitute for UNE-P.[435] The CLEC Coalition maintained that SWBT's claim that the

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[430] *Id.* at 53, n.62.

[431] This process has already begun with Lucent, which announced it will focus its sales efforts on the "world's 30 largest telecom service providers." *Id.* at 54 (citing TR Daily, Aug. 28, 2001).

[432] *Id.*

[433] *Id.* at 55.

[434] Coalition Exh. No. 2, Gillan Rebuttal at 8-9 (citing Table 1).

[435] *Id.* at 21-22 (citing Table 1).

mere presence of a CLEC switch demonstrates that CLECs are not impaired without access to local switching is false and no data was provided as to whether CLEC switches are, in fact, viably offering reasonable substitutes to the services that form the core of the mass market.[436]

SWBT's Position

SWBT stated that the FCC correctly concluded that access to ILEC switching on an unbundled basis to business customers with four or more lines in major metropolitan areas is not essential for a CLEC to compete. The fact that MCIm and other CLECs have already invested in numerous switches capable of providing local service in major metropolitan areas demonstrates that access to unbundled switching from SWBT is not essential for these competitors. Unbundling is meant to promote, not replace, investment in CLEC facilities.[437]

SWBT stated that, as of September 30, 2001, 45 CLECs were collocated in SWBT's wire centers in Texas. SWBT stated that by leasing unbundled loops, a CLEC can compete for all of the customers within a wire center in which it is collocated. According to SWBT, 85% of its access lines were in wire centers with at least one collocated competitor, and 82% of its access lines were in wire centers with three or more collocated competitors. SWBT opined that collocation information provides a clear picture of the extent of SWBT's customer base that can be easily reached by competitors.[438]

SWBT argued that using the UNE-P to provide service is more akin to resale than of facilities-based competition. A CLEC with none of its own facilities can provide local service to a customer with UNE-P, just as it can with resale, and without installing any facilities, a CLEC can choose between resale and UNE-P depending on which price is less. SWBT stated that, except as an interim step toward facilities-based entry, UNE-P does little to advance the central goals of telecommunications public policy.[439] SWBT further opined that because UNE-P offers a strategy that permits resellers to cream skim revenues that would otherwise provide funding for facilities-based competitors, it alters resale from a transitional strategy to a long-term strategy. This chills incentives for resellers to make the transition to facilities-based competition to serve

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[436] *Id.* at 18.

[437] SWBT Exh. No. 7, Fitzsimmons Direct at 42.

[438] *Id.* at 34-35.

small business and residential customers, and it chills the incentives for all other competitors to target these customers with innovations and investments.[440]

SWBT argued that continuing to require unbundled local switching where it is clearly no longer necessary severs the fundamental competitive connection between risks and rewards and discourages otherwise efficient investment in plant and equipment, which contravenes this Commission's stated position supporting facilities investment as "the most powerful means to develop competition in local wireline telephony."[441] SWBT argued that unnecessary unbundling requirements can severely reduce the incentives of entrants to make sunk investments, and it reduces the incumbent's incentive to invest in innovation or development of new product ideas.[442]

SWBT argued that UNE-P also removes any urgency for a CLEC to build its own facilities. SWBT noted that Sage has stated that its "business plan does not anticipate the need for significant capital outlay for facilities, including switches."[443] Birch stated its intention "to implement an operational next-generation switched-based network" sometime in the future,[444] however, SWBT argued that Birch makes no prediction about how long it will take before next-generation switched-based networks will become viable and how long after it will take the risks connected with investing in these facilities. SWBT argued that the obvious financial attractiveness of UNE-P resale diminishes the likelihood that UNE-P resellers will take unnecessary investment risks for years to come.[445]

SWBT averred that consumer benefits from the telecommunications industry depend critically upon enormous annual investments in plant and equipment and a steady stream of innovation.[446] SWBT argued that regulatory policy that allows competitors to capture the rewards of the enormous investments that SWBT makes in the telecommunications infrastructure

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[439] *Id.* at 40; SWBT Exh. No. 11, Harris Rebuttal at 5.

[440] SWBT Exh. No. 8, Fitzsimmons Rebuttal at 6.

[441] *Id*. at 6-7, (citing Scope of Competition Report at 81).

[442] SWBT Exh. No. 7, Fitzsimmons Direct at 44; SWBT Exh. No. 11, Harris Rebuttal at 14.

[443] SWBT Exh. No. 8, Fitzsimmons Rebuttal at 8 (citing Sage Exh. No. 1, Nuttall Direct at 45).

[444] *Id*. (citing Coalition Exh. No. 3, Ivanuska Direct at 8).

[445] *Id.* at 8-9.

[446] *Id.* at 13.

in Texas and leave all of the risks with SWBT creates a major disincentive to investment and innovation.[447]

SWBT disagreed with the CLEC Coalition's portrayal of local telecommunications entry strategies.[448] SWBT stated that glaring in its absence from its description of local telecommunications entry strategies is any mention of competition from high-capacity fiber systems, narrowband and broadband wireless, and cable-based competitors.[449] SWBT argued that as many as 900,000 customers in Texas using their wireless phones as partial or complete substitutes for wireline service is a successful entry strategy that cannot be ignored. In contrast to UNE-P, wireless competitors are making substantial investments in the state's telecommunications infrastructure, as are cable-based competitors providing broadband service, presumably to small business and residential customers.[450]

SWBT stated that with ongoing facilities-based competition, setting prices or conditions to favor one group of competitors will harm others. Progressive regulatory policies related to UNE-P resale begin with the recognition that the tension between UNE-P and efficient facilities investment is a product of the tension between regulation and competition. In the transition to a competitive industry, over-regulation can create conditions that disrupt ongoing developments of genuine facilities-based entry. UNE-P is stimulating greater amounts of resale of SWBT's facilities. Maintaining the unbundled local switching requirement for all customers, however, requires unnecessary unbundling, which is devaluing existing investments in plant and equipment and dampening future incentives for competitors to extend innovations and investments. While UNE-P resale provides the superficial appearance of burgeoning competition, the negative impact that this form of resale has on future incentives to invest and innovate will eventually result in a substandard infrastructure in Texas and noticeably lower quality services, especially for small business and residential customers.[451]

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[447] SWBT Exh. No. 8, Fitzsimmons Rebuttal at 13-14; SWBT Exh. No. 11, Harris Rebuttal at 14.

[448] SWBT Exh. No. 8, Fitzsimmons Rebuttal at 18-19 (citing Coalition Exh. No. 1, Gillan Direct at 24).

[449] *Id.* at 19 (citing Scope of Competition Report at 69, 83).

[450] *Id.* at 20.

[451] *Id.* at 24; SWBT Exh. No. 11, Harris Rebuttal at 14.

SWBT argued that the current downturn in the business cycle is not justification to maintain a ubiquitous requirement for unbundled local switching. The current downturn will effect the pace of entry in most industries and markets, not only local telecommunications. It would not be appropriate to attempt to counteract the current downturn with policies that are contrary to the development of long term facilities-based competition. In economic downturns, entry and expansion slows. This is not justification for maintaining unnecessary unbundling requirements that are artificially accelerating resale and dampening incentive to invest.[452]

SWBT argued that the Commission should be concerned that UNE-P creates a disconnect between legitimate business risks and rewards for three reasons. First, as described by nii communications, the prices and conditions of providing UNE-P allow nii to select customers who provide sufficient contributions from non-basic services, such as access charges, thereby enabling nii to serve all of its customers at a profit. [453] SWBT argued that there are clearly few real benefits to consumers from receiving the same service produced with exactly the same facilities as SWBT. Second, there are real costs to the immediate and long-run health of the telecommunications infrastructure from UNE-P CLECs siphoning contributions from high-revenue customers while serving none of the low-revenue customers. This is no more than a transfer of cash from SWBT. Third, UNE-P discourages facilities investments by enabling UNE-P resellers to: 1) target contributions from business customers who pay basic service prices that are more than double the prices paid by residential customers; 2) capture contributions from access and vertical features, such as call waiting, which they cannot capture with the wholesale discount; and 3) accomplish all of this without investing $1 in network facilities or adding value with service innovations.[454]

SWBT stated that competitive merit is the net benefit of subtracting out cost from the gross benefit.[455] SWBT argued that UNE-P may generate some benefits, but the unintended and undesirable effect of discouraging more rapid investment in competing modes of

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[452] SWBT Exh. No. 8, Fitzsimmons Rebuttal at 32-33.

[453] SWBT Exh. No. 11, Harris Rebuttal at 13.

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

[455] Tr. at 339.

communications should be netted out.[456] SWBT also argued that the availability of UNE-P is incompatible with the incentive for investing in infrastructure. SWBT agreed, however, that substantial infrastructure investments have been made while UNE-P has been available as an entry strategy. SWBT clarified that the tension is between UNE-P and infrastructure investment in the analog loop.[457]

Arbitrators' Decision

PURA § 60.021 requires, at a minimum, that an ILEC unbundle its network to the extent required by the FCC. PURA § 60.022(a) allows the Commission to adopt an order relating to the issue of unbundling of local exchange company services in addition to the unbundling required by § 60.021. PURA § 60.022(b) requires the Commission to consider the public interest and competitive merits before ordering further unbundling. Additionally, P.U.C. SUBST. R. 26.272(a) requires the Commission to ensure that all providers of telecommunications services interconnect in order that the benefits of local exchange competition are realized. In adopting this rule, the Commission determined that interconnection is necessary to achieve competition in the local exchange market and is, therefore, in the public interest.

The Arbitrators' decision requiring SWBT to continue to provide unbundled local switching does not appear to exceed the requirements established by the FCC. However, because the Arbitrators declined to include in the parties' interconnection agreement language SWBT asserted would implement the FCC's exception to ULS, the Arbitrators also conclude that there is competitive merit in requiring SWBT to provide unbundled local switching. The competitive merit or benefits include providing consumers with the ability to choose alternative providers, lower prices, higher quality, and innovative service packaging due to the presence of competitive pressure; and more infrastructure investment in the next generation, digital, packet-based, high-bandwidth network.[458]

Over the short run, the Arbitrators find compelling the evidence that UNE-P is the only viable market entry mechanism that readily scales to varying sized exchanges to serve the mass

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[456] *Id.*

[457] Tr. at 333.

[458] Tr. at 335-40.

market, while minimizing capital outlays and permitting a CLEC to gain a foothold.[459] *In particular, UNE-P is the only viable option for providing competitive analog local service to small business customers.*[460] *The Arbitrators conclude that at least some CLECs rely almost exclusively on UNE-P to serve customers.*[461] *Resale gives CLECs little or no means to differentiate themselves from SWBT, while UNE-P provides CLECs with a meaningful opportunity to differentiate their products and services to consumers.*[462] *Consequently, the Arbitrators conclude that the continued availability of ULS increases the number and availability of alternative providers.*

The Arbitrators believe that the continued availability of UNE-P and all of its components will also facilitate CLEC creation of innovative product offerings. Such a policy continues the benefit of customer choice in service providers and service packaging to a large geographic segment of the population. Therefore, it is in the public interest for SWBT to continue to unbundle its local switches regardless of the geographic area or density zone.

Continued availability of local switching is also in the public interest due to the operational barriers and economic barriers of using non-SWBT wholesale switching providers or self-provisioning. Specifically the Arbitrators conclude that, unlike the generally seamless migration between SWBT and a UNE-P CLEC, facilitated by the use of electronic OSS interfaces for CLECs ordering from SWBT, there is not yet a comparable electronic OSS among CLECs. Customers may experience or perceive undesirable service quality or even a disruption when not using SWBT-provisioned LS. In addition, the record reflects an absence of both the willingness and ability of any switch-based CLEC to serve as a wholesale switching alternative to SWBT provisioned LS. Finally, the EEL or self-provided local switching can be cost prohibitive, particularly for two-wire voice grade customers.[463]

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[459] Coalition Exh. No. 3, Ivanuska Direct at 8-9, 14; Sage Exh. No. 1, Nuttall Direct at 43-44.

[460] Coalition Exh. No. 5, Burk Direct at 4.

[461] Sage Exh. No. 1, Nuttall Direct at 39-40 (over 92.7% of Sage's customers are rural and residential customers).

[462] Sage Exh. No. 2, Nuttal Rebuttal at 34-35.

[463] As discussed above, MCIm witness Turner testified that loops ordered as part of the UNE-Platform have an average non-recurring cost of about $1.19, assuming that about 90% of all small business orders are migration orders, while EELs have an average non-recurring cost of $44.01 – 3,598% more than if that same loop had been provided in combination with unbundled local switching. MCIm Exh. No. 3, Turner Direct at 25.

With regard to the long run impact on the incentive for infrastructure investment, the Arbitrators were not convinced by SWBT's argument that the availability of UNE-P will crowd out investment in the analog network.[464] *Moreover, the Arbitrators find that continued duplication of the existing legacy analog network may constitute an inefficient use of scarce industry resources. Inefficient use of available resources is not in the public interest. Additionally, the Arbitrators recognize that the telecommunications industry has changed significantly since the UNE Remand Order was issued. Specifically, telecommunication acquisitions and bankruptcies have resulted in a smaller number of competitors as well as a decrease in the overall market capitalization.*[465] *The Arbitrators conclude that the continued availability of UNE-P will allow competitive market forces to provide better guidance and incentive for carriers to make sound and prudent investment decisions regarding the type of technologies to be deployed prospectively.*

The Arbitrators therefore determine that local switching is a vital part of UNE-P, which in turn is an effective vehicle for bringing consumers immediate and long-term benefits of geographically broad-based competition. Therefore, the Arbitrators find that requiring local switching to be made available as a UNE in all zones in Texas, without restriction, has competitive merit and is in the public interest.

DPL ISSUE NO. 9

SWBT: Should SWBT's proposed language for ULS be adopted?

CLECs: Should SWBT be required to present call flows in the UNE pricing Appendix when SWBT is the retail intraLATA toll provider?

Should a CLEC be entitled to incorporate the results of a prior Commission decision into its interconnection agreement?

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[464] SWBT Exh. No. 8, Fitzsimmons Rebuttal at 6; SWBT Exh. No. 11, Harris Rebuttal at 16. Tr. at 332-33. Dr. Fitzsimmons clarified that the tension is between UNE-P and infrastructure investment in the analog loop. *See* Tr. at 333.

[465] Tr. at 241-46.

CLECs' Position

a. MCIm

MCIm argued that, if the Commission rules on DPL Issue No. 37 such that SWBT must allow UNE-P customers to presubscribe SBC/SWBT as their intraLATA toll provider, then the UNE Pricing Appendix should reflect the applicable rate elements that SWBT would charge MCIm for using SWBT's network.[466] MCIm clarified that this testimony addressed UNE Pricing Appendix §§ 5.2.2.1.2 – 5.2.4.1.[467] MCIm argued that, once the issues are decided about the routing mechanisms for intraLATA toll service in DPL Issue No. 37, the call flow diagrams should be representative of all scenarios.[468]

MCIm dismissed SWBT's argument regarding MCIm's ineligibility to opt into the T2A as irrelevant and clarified that the UNE Pricing Appendix should reflect what SWBT can charge MCIm for MCIm's handing off traffic to SWBT's retail intraLATA entity.[469] MCIm argued for inclusion by MFN of language approved in Commission arbitrations involving Waller Creek and MCI WorldCom formerly MFS — so-called "opting in" — and contended that the language proposed for UNE Appendix § 2.2 was lawfully available under FTA § 252(i).[470] MCIm contended that, contrary to SWBT's assertion, it is taking legitimately related terms and conditions.[471]

b. AT&T

AT&T argued that SWBT's language appears to provide for intraLATA toll to be routed to the pick of the intraLATA carrier of choice rather than routing that intraLATA toll over shared transport. According to AT&T, SWBT's proposed language is inconsistent with the Commission's decision in the Waller Creek arbitration.[472]

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[466] MCIm Exh. No. 11A, Direct Testimony of Daniel Aronson at 2-3 (Aronson Direct).

[467] MCIm Exh. No. 16A, Rebuttal Testimony of Michael W. Schneider at 17-19 (Schneider Rebuttal).

[468] Tr. at 1209.

[469] MCIm Exh. No. 12, Rebuttal Testimony of Daniel Aronson at 2-3 (Aronson Rebuttal).

[470] MCIm Exh. No. 15A, Direct Testimony of Michael W. Schneider at 13-14 (Schneider Direct).

[471] Tr. at 1225-26.

[472] Tr. at 1209-10.

SWBT's Position

SWBT argued that MCIm's proposed language copies the T2A without accepting legitimately related provisions, and maintained that SWBT's generic non-T2A language should be used.[473] SWBT disputed that MCIm's proposed language reflects situations where SWBT is the retail intraLATA toll provider, and contended that MCIm's language addresses basic call flows for the unbundled local switching product.[474] SWBT contended that its proposed intraLATA and interLATA toll language is essentially identical to that proposed by MCIm.[475] According to SWBT, the *UNE Remand Order* is an intervening event that would give the Commission reason to revisit its decision in the Waller Creek arbitration, and that some of MCIm's proposed language is directly related to the Waller Creek arbitration.[476]

Arbitrators' Decision

The Arbitrators find that SWBT did not present any evidence to support its lengthy proposed language affecting ULS, intraLATA and interLATA toll, and toll free calls, and thus the Arbitrators reject SWBT's proposed language for those sections. SWBT's proposed language regarding Optional Two-Way Extended Area Service, however, directly comports with the Arbitrator's decision in DPL Issue No. 11, and therefore, the Arbitrators adopt, with modifications, SWBT's language for section 5.2.4 of the UNE Pricing Appendix.

Turning to the CLECs' phrasing of this DPL, the Arbitrators note that neither party offered evidence to adequately address the first of the CLEC statements of the DPL issue. With respect to the CLEC's second question, the Arbitrators hold that parties to arbitrations should generally be entitled to rely on and seek to incorporate the results of a prior Commission decision into an arbitrated interconnection agreement. The exception to this general provision is where a party can show that a different set of facts or some change in the relevant law or circumstances warrants a judgment or decision other than the one reached in the Commission decision upon which the party seeks to rely. Here, MCIm's proposed language for section 2.2 of the UNE Attachment makes reference to the policy established in the Waller Creek proceedings,

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[473] SWBT Exh. No. 9, Hampton Direct at 25.

[474] *Id.* at 26.

[475] *Id.*

P.U.C. Docket Nos. 17922 and 20268, that CLECs may use UNEs to carry traffic for any other telecommunications provider. The language further reserves to SWBT the right to appeal the Waller Creek Order, but establishes that SWBT will comply with it absent a stay or reversal.

The Arbitrators find that SWBT did not present adequate evidence to warrant that this Commission revisit the language referencing the Waller Creek Order. Indeed, the only argument that SWBT offered in relation to this language was the statement that the UNE Remand Order is an intervening event that would give the Commission reason to revisit this decision, but SWBT failed to present any evidence or specify any particular section of the UNE Remand Order to support this assertion. Therefore, the Arbitrators adopt MCIm's proposed language for section 2.2 of Attachment 6, with some minor clerical modifications proposed by SWBT.

DPL ISSUE NO. 10

CLECs: Should the Commission apply the forward-looking loop rates that it is establishing in Docket Nos. 22168 and 22469 to all two-wire analog loop rates, including loops used for UNE-P?

SWBT: Should analog loop rates reflect all of the forward-looking technology used to provide them?

CLECs' Position

a. MCIm

MCIm stated that the Commission currently has a proceeding underway in Docket No. 22469 in which the cost issues for a copper-only DSL capable loop and for a Project Pronto loop are being evaluated. MCIm stated that a primary consideration in that proceeding will be to ensure that the Project Pronto forward-looking technology is fully incorporated into the price of these loops. MCIm recommended that the approach to develop this price would be to blend the cost of the copper only loop with the cost for the fiber-fed Project Pronto loop, consistent with forward-looking engineering principles, so that a weighted-average generic loop price could be

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[476] Tr. at 1228-29.

established.[477] MCIm claimed that if CLECs are not permitted to purchase these loops at SWBT's cost, real and lasting competition will not be developed.[478]

Responding to SWBT's concern related to reevaluating costs that have a long recovery period, MCIm maintained that this is an issue that cuts both ways. MCIm contended that there are many assets in SWBT's network that are either fully depreciated or very nearly so, but when evaluated from a TELRIC perspective, the assets are priced as if they were just installed. MCIm stated that SWBT may have installed a copper loop 20 years ago that is still providing service today but that SWBT has fully recovered the investment for this loop and is now effectively bearing only the cost associated with its maintenance. However, MCIm asserted that if SWBT leases this same loop to a CLEC, SWBT recovers the cost (including full recovery of the investment) for that loop not at the price in effect when it was installed 20 years ago, but recovers the cost as if it were installed today with the higher commodities prices and higher labor costs.[479]

MCIm stated that the 1997 Mega-Arbitration calculation of the recovery of investment cost represented a significant percentage of the estimated total cost of the loop. As such, MCIm concluded that the economies of scale on this significant percentage of the loop plant will have a meaningful impact on the resulting cost of the unbundled local loop.[480] MCIm maintained that "the investments and expenses used to set the current loop rate are significantly dated" because most of the inputs and engineering assumptions related to the unbundled loop were derived from 1995 data and earlier.[481] MCIm asserted that electronics in this industry generally have rapidly declining cost, especially in the area of loop electronics.[482]

MCIm stated that, in the 1997 Mega-Arbitration, SWBT's costs and purchasing power were evaluated in the context of a company serving five states. Now, MCIm argued, SWBT is part of a company (SBC) serving 13 states, and the post-merger SBC has significantly greater

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[477] MCIm Exh. No. 3, Turner Direct at 38.

[478] MCIm Exh. No. 4, Rebuttal Testimony of Steven E. Turner at 8 (Turner Rebuttal).

[479] *Id.* at 9.

[480] MCIm Exh. No. 3, Turner Direct at 29-30.

[481] *Id.* at 28.

[482] Tr. at 726.

purchasing power and lower common costs than SWBT alone.[483] MCIm argued that SWBT therefore enjoys significant economics of scale that will reduce the cost of the unbundled loop.[484] Furthermore, MCIm represented that SBC is undertaking a large-scale upgrade of its plant - especially its loop plant - throughout its 13-state region.[485] MCIm argued that "Project Pronto" has further increased SWBT's purchasing power for loop plant, particularly for next generation digital loop carrier (NGDLC) equipment and fiber facilities. MCIm also claimed that, based on application of the engineering rules that SWBT identified for the deployment of Project Pronto, SWBT would actually use a higher percentage of remote terminals and fiber feeder than what was modeled in 1997 cost studies. MCIm asserted that substituting fiber feeder for copper feeder will reduce the cost of the loop.[486] MCIm stated that SWBT is also proportionately shortening the copper portion of the loop relative to the fiber portion, which would reduce the loop cost under the average basis.[487]

MCIm asserted that SWBT has outlined numerous investment and operation related savings associated with deployment of Project Pronto (confidential).[488] In addition, MCIm stated that SWBT has identified numerous outside plant process changes that will result in significant cost savings associated with the deployment of Project Pronto. First, MCIm stated, that the deployment of Project Pronto will allow SWBT to significantly reduce the number of dispatches that are required to provision its outside plant infrastructure and reported an amount and percentage (confidential). Second, MCIm stated that the deployment of Project Pronto allows SWBT to simplify the loop related service order and maintenance process for Project Pronto served wire centers (confidential).[489]

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[483] MCIm Exh. No. 3, Turner Direct at 29 (quoting SWBT's statement predicting increases in volume discounts and reporting estimated amount of annual capital expenditure reductions of 250 million because of the merger between SBC and Ameritech).

[484] *Id*. at 28.

[485] MCIm Exh. No. 3, Turner Direct at 29. MCIm contended that SWBT is not using Project Pronto as an overlay network that just serves data services. MCIm claimed that the technology can be used to serve voice-only application, a data and voice combination, or a data-only application and SWBT is migrating customer base. Tr. at 744-46.

[486] Tr. at 697.

[487] Tr. at 698.

[488] MCIm Exh. No. 3, Turner Direct at 32.

[489] *Id.* at 31.

MCIm asserted that both improving data capability and cost reduction were goals with Project Pronto.[490] MCIm stated that SBC's business analysis was an expense-saving analysis, a customer-retention analysis, and revenue-generation analysis. According to MCIm, if Project Pronto results in earlier retirement of the existing network, both expense saving and improved data capability would be among the factors. However, MCIm averred that expense savings appear to be the prime criterion.[491]

MCIm represented that Illinois, Michigan, and New York each conducted an independent evaluation of the cost of unbundled loops. MCIm asserted that in each of these cases, the Commissions established unbundled loop rates that are substantially lower than rates in Texas.[492]

b. CLEC Coalition

The CLEC Coalition stated that UNE-P is responsible for 90% of the unbundled loops in Texas, and that it fully endorses the Commission reexamining local loop rates. The CLEC Coalition asserted that SWBT should not dismiss the relevance of a loop rate comparison to Illinois and Michigan, simply because the rates were set prior to the SBC-Ameritech merger. The CLEC Coalition argued that when SBC chose to acquire Ameritech, it fundamentally decided to sell loops at the prior rates rather than buy them. The CLEC Coalition argued that if SBC was convinced that the rates in these states were too low, then SBC should have chosen the role of entrant, rather than incumbent.[493]

The CLEC Coalition stated that SWBT's assertion that a flat-rate structure would result in low-usage customers subsidizing high-usage customers and uneconomic incentives for CLECs to develop applications that increase network usage at no additional cost confuses cause with effect. The CLEC Coalition argued that SWBT's points are only relevant if local switching costs are usage sensitive and do not address whether usage plays a role in cost causation. The CLEC Coalition asserted that imposing usage charges would create the same consequences asserted by SWBT but in reverse.[494]

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[490] Tr. at 716.

[491] Tr. at 718.

[492] MCIm Exh. No. 4, Turner Rebuttal at 11.

[493] Coalition Exh. No. 2, Gillan Rebuttal at 6-7.

[494] *Id.* at 30-31 (citing SWBT Exh. No. 7, Fitzsimmons Direct).

The CLEC Coalition argued that common sense and economics suggest that entrants should compensate SWBT for leasing capacity in these switches on the same basis that SWBT pays for switching, i.e., flat-rate. The CLEC Coalition also asserted that SWBT's testimony validates the view that usage levels below design capacity impose no additional cost, usage or otherwise.[495] The CLEC Coalition argued that SWBT acknowledges that only usage above design parameters could impact switch costs and offered no evidence that exceeding design parameters is even plausible, much less a commonplace occurrence. The CLEC Coalition stated that Texas should join Wisconsin and Illinois in requiring a flat-rate structure for local switching, rejecting SWBT's assertion that usage determines cost.[496]

SWBT's Position

SWBT argued that it would be inappropriate for the Commission to simply apply rates from another proceeding for all two-wire analog loop rates as MCIm is suggesting. SWBT stated that the rates being established in Docket Nos. 22168 and 22469 (Line Sharing Proceeding) are related to the provisioning of combined voice and data over the broadband infrastructure being deployed under SBC's Project Pronto. SWBT asserted that the cost studies supporting those rate elements only consider the loop characteristics associated with SBC's Project Pronto and not the entire SWBT Texas network.[497] SWBT argued that the rates under consideration in the Line Sharing Proceeding are for DSL and line shared loops, not two-wire analog loops.[498] SWBT claimed that the UNE loop rates established in the Mega-Arbitration are in no way above TELRIC rates.[499] SWBT also claimed that both this Commission and the FCC in the FTA 271 proceedings deemed the current UNE loop rates in Texas to be TELRIC compliant.[500]

SWBT stated that its UNE loop cost projections developed in 1997 assumed that there were far more fiber and digital loop carrier systems in the network than was actually in the

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[495] *Id.* at 32 (citing SWBT Exh. No. 7, Fitzsimmons Direct at 46).

[496] *Id.* at 33.

[497] SWBT Exh. No. 18, Direct Testimony of James R. Smallwood at 23 (Smallwood Direct).

[498] SWBT Exh. No. 9, Hampton Direct at 26.

[499] SWBT Exh. No. 18, Smallwood Direct at 6.

[500] *Id.* at 7.

network then, or today.[501] SWBT argued that Project Pronto will help to move its embedded cost structure closer to the forward-looking cost structure developed under TELRIC standards, and concluded that this change in its embedded cost structure does not render invalid SWBT's existing forward-looking UNE loop rates in Texas.[502] SWBT stated that Project Pronto's design guidelines call for loop plant to be engineered to ensure that loops contain no more than 12,000 feet of copper. SWBT asserted that this design criterion is the same as was used in the cost study developed to support the UNE loop rates currently in the T2A.[503] SWBT stated that in the 1997 cost study, its maintenance cost was based on a forward-looking design similar to Project Pronto. Furthermore, maintenance factors then were plant specific, DLC maintenance factors were already used and in essence modeled on a Pronto-type architecture.[504] In response to questions regarding whether there were any historical elements in the 1997 cost study, SWBT did admit that the maintenance factors would have been developed based on the previous year's data, and the architecture was based on a previous generation of DLC.[505]

SWBT stated that during the 1997 Mega-Arbitration, SWBT agreed that if a customer is served over a DLC, when a CLEC wishes to serve the customer using UNE-P, SWBT can not move the customer off of the DLC.[506] SWBT agreed that there is language to that effect in Attachment 6 of the T2A and in the AT&T/SWBT interconnection agreement. SWBT stated that it intends to follow this contract language with regards to NGDLC deployed with Project Pronto.[507]

SWBT stated that resetting UNE prices based on a re-estimation of TELRIC brings forth a significant issue. SWBT explained that to translate single-vintage investment costs into monthly costs for the purpose of setting UNE prices, investments were amortized across the depreciation lives of the assets, which extend over relatively long periods of time. According to

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[501] SWBT Exh. No. 19, Rebuttal Testimony of James R. Smallwood at 8 (Smallwood Rebuttal).

[502] *Id.* at 9.

[503] SWBT Exh. No. 18, Smallwood Direct at 24.

[504] Tr. at 721.

[505] Tr. at 721.

[506] Tr. at 608.

[507] Tr. at 609.

SWBT, trying to reapply this methodology creates a logical disconnect between the single-vintage assumption and the depreciation lives used to amortize network investments.[508]

SWBT maintained that in order for efficient competition to develop, UNE prices must adequately compensate the ILEC that owns the asset. SWBT stated that this condition is met by cost-based UNE prices that replicate competitive prices to the extent possible. Therefore, SWBT maintained that, to promote efficient investment and innovation by entrants and incumbents, UNE prices should replicate prices that would prevail in a competitive telecommunications market.[509] SWBT agreed that the TELRIC standard adequately compensates SWBT.[510] However, SWBT maintained that a rate comparison across states is not meaningful to the question of SWBT's TELRIC prices.[511]

Arbitrators' Decision

The Arbitrators conclude that UNE loop costs and rates should be re-evaluated. First, pursuant to FTA §252(b), either party to a negotiation may request arbitration of open issues, including rates. MCIm has requested arbitration of unbundled network element rates, which is within MCIm's rights under §252. Further, the evidence showed that SWBT's deployment of Project Pronto has changed loop plant technology, technology mix, and processes regarding loop deployment and maintenance.[512] *There is also evidence that engineering assumptions (such as higher percentage of the use of remote terminals and fiber feeder) have changed as a result of Project Pronto. Therefore, the Arbitrators conclude Project Pronto has caused the use of more fiber, declining cost of electronics, lower cost structure for NGDLC, and a reduction of the number of dispatches in maintenance processes and lower overall costs.*[513] *The evidence of such*

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[508] SWBT Exh. No. 7, Fitzsimmons Direct at 14-15.

[509] *Id.* at 13.

[510] Tr. at 690.

[511] Tr. at 667.

[512] *See, e.g.*, MCIm Exh. No. 3A, Turner Direct at 27-38; Tr. at 672–88 ("But they also indicate that they are going to be able to do fewer dispatches because they will be able to remotely test the loops and, therefore, be able to avoid sending out a technician to find that there's no trouble found."); Tr. at 695–713, ("It's actually a replacement of existing copper facilities with new technology that shortens the copper portion."); Tr. at 720–55 ("So there's quite a bit more detail that indicates that what we were studying pre-Pronto and what we're now going to be dealing with are two different technologies with very different cost characteristics and even different maintenance characteristics.").

[513] *See* Tr. at 695–713, 720-55.

changed circumstances is sufficiently compelling to merit an investigation of SWBT's forward-looking loop costs and, therefore, the UNE rates.[514]

Conversely, there was insufficient evidence introduced by SWBT for the Arbitrators to conclude that the current rates, based on the previous cost studies and data from the 1996 Mega-Arbitration, are appropriate. Although SWBT has argued that various changes to loop plant technology, technology mix, and processes attributable to Project Pronto were already incorporated in the Mega-Arb cost study assumptions, the Arbitrators find that there is inadequate evidence to support the assertion that assumptions built into the 1997 Mega-Arbitration cost studies sufficiently address current deployment. For example, the Arbitrators share MCIm's concerns relating to SWBT's representations in the Mega-Arbitration regarding the percentage of loops provisioned on fiber.[515] *As pointed out by MCIm, it is unclear that SWBT's sampling techniques provide an accurate indication of the inventory of loops that SWBT has available to serve over fiber.*[516] *Moreover, MCIm has raised significant questions regarding the fundamental shift in technology represented by deployment of Project Pronto, which places NGDLC at remote terminals, a shift that MCIm observed was not incorporated into the engineering principles underlying the assumptions made in the Mega-Arbitration.*[517]

Therefore, the Arbitrators conclude that sufficient evidence exists in the record of this proceeding to support the reevaluation of loop costs in a subsequent cost proceeding. However, the Arbitrators also note that, until cost study evaluations are conducted, it is unclear whether or in which direction forward-looking loop costs might move. Loop rates are a function of numerous costs, some of which may have increased over time and others which may have decreased.

The Arbitrators do not, however, think the Commission should apply new loop rates being developed in Docket Nos. 22168 and 22469 to this Docket. First, this docket represented a series of policy decisions, with all costing and pricing decisions from this docket deferred to a subsequent cost proceeding. Accordingly, insufficient evidence has been developed in this

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[514] In addition, CLECs can petition the Commission at any time with a complaint regarding the reasonableness of rates under FTA § 251.

[515] *See* MCIm's Response to Order No. 22 at 7 (Mar. 5, 2002).

[516] *See* Affidavit of Steven E. Turner at 2 (Mar. 7, 2002).

record to support the application of rates to be developed in other dockets. Second, the cost information in Docket Nos. 22168 and 22469 is not necessarily dispositive of all cost issues in this docket, although the Arbitrators acknowledge that there may be overlap. Consequently, the Arbitrators conclude that both the timing and applicability of decisions yet to be made in Docket Nos. 22168 and 22469 negate reliance in this Docket on those decisions.

Therefore, the actual costs and rates, and the consequent direction of any change, will be determined in a subsequent cost proceeding. The Arbitrators encourage the parties in a subsequent cost proceeding to take advantage of the efficiencies and consistencies available through reliance on appropriate evidence adduced and rates developed in Docket Nos. 22168 and 22469. However, for the reasons stated above, the Arbitrators find it inappropriate to decide in advance that loop rates which are, as yet, undeveloped, should automatically replace rates in the parties' existing contract. Rather, in a subsequent cost proceeding, all relevant cost information, including appropriate cost studies and their inputs, will be evaluated.

DPL ISSUE NO. 11

CLECs: What is the appropriate rate structure for the unbundled local switching (ULS) network element?

What is the appropriate interim price for ULS?

SWBT: Should SWBT's local switching rates continue to contain a MOU component consistent with current TELRIC cost?

Should the Commission reject an interim price for ULS in favor of the existing permanent ULS rate developed in the Mega-Arbitrations?

CLECs' Position

a. CLEC Coalition

The CLEC Coalition contended that the basic goal for any rate structure is to appropriately reflect the manner in which costs are incurred.[518] The CLEC Coalition recommended that the Commission adopt an interim rate (and a permanent rate structure) designed to produce the same average compensation as SWBT would receive under the flat-plus-

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[517] *Id.*

[518] Coalition Exh. No. 1, Gillan Direct at 67.

usage rate structure currently in place in Texas.[519] The CLEC Coalition averred that the ULS network element is not the purchase of individual *functions* in the switch, it is lease of *capacity* in the switch.[520] The CLEC Coalition asserted that for each port purchased by an entrant, the entrant obtains an exclusive right to access all of the local switch port's features, functions, and capabilities.[521] The CLEC Coalition maintained that what is important is that the price of each port reflects the cost of this committed capacity. The CLEC Coalition argued that since the switch's cost is a function of its design-capacity – and the available capacity is essentially the same for each port -- the most reasonable rate structure is one that recovers cost through a per-port charge.[522]

The CLEC Coalition contended that legacy switch cost models are "biased" by the incumbent's retail orientation of assigning costs to particular services. The CLEC Coalition claimed that SWBT, like most incumbents, estimates its switching "costs" using the SCIS model, which was developed by BellCore (now Telcordia) in the 1970s. The CLEC Coalition asserted that SCIS was designed to assign the investment cost of a local switch among the individual services that would share the switch's common resources so that individual feature prices could be justified.[523] The CLEC Coalition claimed that the original SCIS architects adopted a bias to treat a number of switch-costs as usage-related. The CLEC Coalition argued that a relative-use perspective enabled SCIS to "model" the cost of individual services because it justified the allocation of switching resources among different uses. The CLEC Coalition also argued that SCIS produces minutes-of-use-based switching charges because it was designed to produce minutes-of-use-based switching charges.[524]

According to the CLEC Coalition, the principal cost-driver of local switching is the number of ports (line or trunk), not usage. The CLEC Coalition asserted that peak usage does play a role in switch costs not usage more generally. The CLEC Coalition argued that to the

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[519] *Id.* at 75-76.

[520] *Id.* at 69-70.

[521] *Id.* at 68.

[522] *Id.* at 68-70. The Coalition described the ULS network element as the leave of switching capacity on a per-port basis.

[523] *Id.* at 70.

[524] *Id.* at 71-72.

extent that any costs can plausibly be "associated" with usage, the relevant measure would be busy-hour usage. The CLEC Coalition averred that the capacity of a switch is designed to meet its peak needs and that additional use of the switch during other periods imposes no additional design cost since the switch would otherwise sit idle.[525]

The CLEC Coalition described SWBT's testimony on the local switching rate structure as "circular." The CLEC Coalition contended that SWBT's testimony principally criticizes a flat-rate structure for the following reasons: first, with flat-rate pricing, low-usage customers would subsidize high-usage customers; and second, requiring flat-rate pricing of unbundled local switching would provide an uneconomic incentive for CLECs to develop applications that increase network usage, since they would not incur any of the additional costs that would be caused by a significant increase in usage per line.[526] The CLEC Coalition contended that this points out that lines are concentrated and thus end users share common capacity. The CLEC Coalition stated that the capacity is based on anticipated usage, however, if usage were to increase, clearly so would the need for additional shared capacity and related costs.[527]

The CLEC Coalition asserted that SWBT offered two very short explanations as to how usage might affect local switching cost.[528] First, according to the CLEC Coalition, SWBT confirmed that it pays for switching in flat-rate-per-line prices. The CLEC Coalition asserted that if flat-rate pricing is how SWBT pays for switching, then common sense and economics would suggest that entrants should compensate SWBT for leasing capacity in these same switches on the same flat-rate basis. Second, according to the CLEC Coalition, SWBT's testimony validated the view that usage levels below design capacity impose no additional cost, usage or otherwise, and that this circumstance makes flat-rate pricing more appropriate, not less. Finally, the CLEC Coalition argued that to the extent usage could cause a new and higher-priced switch to be purchased, the new (and presumably higher) price would still be a flat-rate.

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[525] *Id.* at 74.

[526] SWBT Exh. No. 7, Fitzsimmons Direct at 47.

[527] SWBT Exh. No. 12, Kirksey at 9.

[528] SWBT Exh. No. 7, Fitzsimmons Direct at 46.

b. MCIm

MCIm asserted that once the usage parameters regarding the switch are determined, the investment decisions are all based on a per-port criterion. MCIm proposed that flat-rate port-only switching should be implemented by this Commission.[529] MCIm argued that the division of switching costs into a port component and usage (or minute of use) component is an artificial construct that does not reflect the manner in which SWBT actually incurs switching costs. MCIm claimed that it is the quantity of ports required on the switch that drive the determination to grow the switch, and not the level of utilization on those ports.[530]

MCIm also contended that usage bears no impact in the investment decisions for switches. MCIm explained that clearly the busy hour (or peak) minutes of use, call attempts, and other usage criteria play a role in determining the overall configuration of the switch. MCIm asserted, however, that once these parameters are evaluated for the switch, it is the number of ports required for that switch that drives the investment decisions for the switch. Hence, MCIm claimed that SWBT's switching cost structure is essentially a per-port cost structure. MCIm alleged that SWBT takes this straightforward cost structure and converts it into a hybrid of port cost and usage cost under the current rate structure incorporated in the interconnection agreements for Texas. MCIm contended that this inconsistency should not be retained on a going-forward basis in Texas.[531]

MCIm averred that if the switch is not operating at peak capacity (which is virtually always the case), the switching usage-based cost (in this context) consistently over-recovers costs that SWBT is not incurring. MCIm contended that the rate structure that CLECs are required to pay to SWBT for unbundled switching becomes the cost structure that the CLEC must bear in providing local services to its retail customers. MCIm asserted that the market reality is that virtually all of the customer lines that CLECs would attract using unbundled local switching utilize "flat rated" services. MCIm claimed that Texas consumers demand local service that is not price dependent on usage. MCIm alleged that the CLEC's primary competitor – SWBT – operates under a flat-rate switching cost structure. MCIm contended that CLECs

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[529] MCIm Exh. No. 4, Turner Rebuttal at 18-19.

[530] MCIm Exh. No. 3, Turner Direct at 39.

[531] *Id.* at 39.

must, therefore, compete for customers that demand flat-rated services with a usage-based cost structure against a competitor (SWBT) that has a flat-rate cost structure.[532]

MCIm disagreed with SWBT's assertion that with flat rate-pricing, low usage customers would subsidize high-usage customers. MCIm argued that SWBT's position directly contradicts SWBT's own position regarding the pricing of retail services. MCIm argued that switches are sized for the demand that will be placed on the switch during the busy hour and that, as such, if demand is placed on the switch outside of the busy hour, it does not cause any incremental cost in any way. According to MCIm, if the usage that is realized on the switch is within the demand that is anticipated during the busy hour, then the investment per port that SWBT pays for the switch will fully recover the cost of the switch. MCIm explained that this is the circumstance that allows SWBT to appropriately charge its retail customers on a flat-rate basis. MCIm contended that this is also the basis that requires that SWBT charge CLECs for unbundled switching on a port-only basis.[533]

MCIm asserted that the Commission made exactly these types of generic decisions in the 1997 Mega-Arbitration and explained that in DPL Item No. 13 in Appendix A to the Mega-Arbitration Award, the Commission determined that the trunking ratio would be 6:1 for urban switches and 12:1 for rural switches for an overall ratio of 8.021:1.[534] MCIm said that these types of forward-looking factors can be accounted for in determining the investment per port for switching and that once these parameters are established, the investment decisions regarding the switch are all driven by the number of ports required – not the usage on the switch.[535] MCIm asserted that Illinois is not the only state that has adopted a flat-rate switching approach. MCIm averred that the Wisconsin Commission recently voted to utilize flat-rate port-only switching as the rate structure for unbundled switching in that state.[536]

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[532] *Id.* at 40.

[533] MCIm Exh. No. 4, Turner Rebuttal at 17.

[534] MCIm Exh No. 3, Turner Direct at Exhibit SET-3 (Appendix A of Mega-Arbitration Award).

[535] MCIm Exh. No. 4, Turner Rebuttal at 18-19.

[536] *Id*. at 17-18; Coalition Exh. No. 2, Gillan Rebuttal at 33-34.

SWBT's Position

SWBT contended that the appropriate pricing for Unbundled Local Switching (ULS) is on a per minute basis.[537] SWBT contended that the existing ULS rates in Texas, which include a usage sensitive component, were previously reviewed and approved by this Commission in Docket No. 16226, (the Mega-Arbitration) completed in December 1997.[538] SWBT proposed that the Commission should maintain a rate structure that contains both a flat-rate charge for the cost of the dedicated line port, and the small usage based (MOU) charge for the cost of using the switching capacity of the switch, and that this is the only proposal that allows SWBT to fairly recover its switching costs.[539]

SWBT asserted that in the short run, it may purchase switches on a flat-rate-per-line basis, but it is incorrect to infer that the forward-looking cost of providing switching is independent of customers' usage. SWBT argued that greater amounts of usage cause greater amounts of equipment, which in turn translates into higher costs. SWBT stated that implicit in the flat-rate-per-line prices that SWBT pays for switches are assumptions that the vendor will provide switching functionality up to a certain capacity.[540] SWBT opined that if usage per line on a switch significantly exceeds the usage that was expected when the switch was purchased, a higher cost switch will be required, and a rational vendor will eventually adjust its prices upward to recover the increase in its costs.

SWBT explained that high-use customers, such as day traders, might stay on-line all day and cause a disproportionate amount of switching costs. SWBT stated that this would discourage UNE-based competition for lower-usage customers. SWBT argued that requiring flat-rate pricing of ULS would provide an uneconomic incentive for CLECs to develop applications that increase network usage, since they would not incur any of the additional costs that would be caused by a significant increase in usage per line.[541]

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[537] MCImetro Petition at 17.

[538] SWBT Exh. No. 9, Hampton Direct at 29.

[539] SWBT Exh. No. 10, Hampton Rebuttal at 26.

[540] SWBT Exh. No. 7, Fitzsimmons Direct at 46.

[541] *Id.* at 47.

SWBT explained that based on ULS cost studies, SWBT incurs usage sensitive costs when providing ULS. SWBT argued that flat rate pricing merely causes users with below average switching usage to subsidize others with above-average switching usage. SWBT stated that a usage sensitive ULS rate follows the "cost-causer pays" principle and is appropriate.[542] SWBT agreed that it is important that the charges for ULS be established correctly in order to encourage innovation and promote efficient competition. SWBT argued that flat rate pricing would mean an increase in usage, because a rational CLEC would only be interested in flat rate pricing when it believes that it will have a higher amount of usage than others on average. SWBT claimed that this type of action is not appropriate in a competitive environment, nor does it meet with the principle of "cost causer pays."[543]

SWBT contended that since capacity is based on anticipated usage, increase in usage would need additional shared capacity and related costs.[544] SWBT argued that switching imposes two kinds of switching costs: one for the line port and one for the switch matrix. SWBT explained that the switch matrix is the equipment inside the switch that transmits the signal from the line port on one side, through the switch to a line or trunk port on the other side (or vice versa). SWBT contended that from an engineering perspective, as the usage of a switch increases, additional trunk ports must be installed to serve that usage. SWBT argued that a heavily utilized switch may require one trunk for every three or four lines, while a lower usage switch may require only one trunk for every eight lines. In order to channel these calls from the line side to the trunk side of the switch, SWBT stated that it must install additional equipment inside the switch, not cited by MCIm, such as umbilicals, line units, and extra switching modules. SWBT reiterated that, in short, a switch requires more equipment than just ports as implied by MCIm.[545]

Regarding peak usage, SWBT argued that the CLECs' principal customers are and will be high-use customers – medium and large businesses. SWBT explained that these high use business customers make much greater use of the shared switching equipment and use more of the switch's capacity than does the average SWBT customer. SWBT concluded that it is clear

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[542] SWBT Exh. No. 9, Hampton Direct at 29.

[543] *Id.* at 30.

[544] SWBT Exh. No. 12, Kirksey Direct at 9-10.

that CLEC usage caused switch investment costs that would be borne by SWBT alone under the CLECs' proposal.[546] SWBT argued that, with respect to the rate structure for ULS, the FCC mandated that ILEC charges reflect two components: (1) a combination of a flat rate charge for line ports, which are dedicated to single new entrants; and (2) either a flat-rate or per minute usage charge for the switching matrix and trunk ports, which constitute shared facilities.[547]

SWBT disagreed with MCIm's contention that CLECs would be disadvantaged because they would be paying usage-sensitive rates for local switch usage while Texas consumers demand flat-rated local services. SWBT argued that SWBT also incurs usage sensitive costs and has customers who prefer flat-rated services. SWBT explained that it deals with the problem by establishing flat-rate packages that recover the costs of an assumed average level of usage. If the assumed level of usage reflected in the flat rate is too high, SWBT will over–recover its usage sensitive costs. If the assumed level of usage is too low, it will under recover its long-run usage-sensitive costs. SWBT averred that Texas CLECs could develop similar flat rate structures based on average usage, and CLECs would face the same risks and problems as SWBT in addressing rate structure issues. SWBT contended that under the CLECs' usage-free scenario, SWBT would bear all the risks associated with under-estimating the average peak usage of the CLEC's customers.[548]

SWBT also disputed the CLEC Coalition's assertion that CLECs are entitled to the exclusive right to provide all features, functions, and capabilities of the switch. SWBT argued that switches utilize line side concentration, and thus certain components of the switch are shared. Because components are shared, increased utilization requires increased capacity, and causes additional costs. SWBT contended that the CLEC Coalition's assertion does not address the issue. SWBT averred that the real issue is that such capabilities are usage sensitive and thus SWBT should be able to recover its costs.[549]

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[545] SWBT Exh. No. 10, Hampton Rebuttal at 21.

[546] *Id.* at 21-22.

[547] SWBT Exh. No. 10, Hampton Rebuttal at 24 (citing *Local Competition Order* ¶ 810; 41 C.F.R. § 51.509(b) (2001)).

[548] SWBT Exh. No. 10, Hampton Rebuttal at 24.

[549] SWBT Exh. No. 13, Kirksey Rebuttal at 8.

SWBT contended that the CLEC Coalition's statement that ULS is a lease of the capacity of the switch supports SWBT's position that capacity is usage sensitive, and that CLECs should be charged on a usage sensitive basis. In addition, SWBT cited relied on the CLEC Coalition's statement that the cost of the switch is a function of design capacity, and the available capacity is the same for each port. SWBT contended that the CLEC Coalition's statement confirms SWBT's position that additional usage requires additional capacity. SWBT also contended that as long as components are shared, the potential for congestion exists. However, SWBT argued that it is not economically feasible to provide sufficient capacity within the switch so that all end users may have unlimited usage at all times.[550]

Arbitrators' Decision

The Arbitrators find that the existing rate structure is the most appropriate rate structure. Under the current structure, the ULS is composed of both a fixed charge for the line ports and minute of usage or a usage-sensitive component that is TELRIC compliant as approved by the Commission and the FCC. Specifically, FCC rule 51.509(b) authorizes states to adopt ULS rates that consist both of a flat-rated charge for line ports and a per minute usage charge.

While the Arbitrators recognize that investments are made on a per-port basis, as contended by the CLECs, the Arbitrators conclude that the ULS is subject to the effects of increased usage of the switches. The increased use of the ULS exhausts the shared matrix component that will require load balancing or additional switching capacity. Without the attendant additional investments in switching capacity, degradation of service will ensue due to the congestion of the matrix component. In addition, the Arbitrators note that a flat rate for a ULS line port does not reflect the calling scope of ULS. For example, if multiple switches are deployed in a large exchange, the usage sensitive inter-office trunking component, that may vary depending upon the size of the exchange, cannot be captured readily on flat rate basis. Consequently, a flat rate fails to fully capture the cost associated with multiple switches and risks overcharging customers in a smaller exchange to recover those costs.

Therefore, the Arbitrators adopt contract language to the effect that when the CLEC purchases switch ports, the applicable switching prices contained in Appendix Pricing UNE -

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[550] *Id.* at 9.

Schedule of Prices will apply on an interim basis until the Commission sets permanent rates pursuant to a subsequent cost proceeding.

DPL ISSUE NO. 12

CLECs: What rate, if any, should apply for the daily usage feed (DUF)?

SWBT: Is SWBT entitled to be compensated for providing daily usage feed (DUF) to MCIm at the existing rate of $.003 per message approved in the Mega-Arbitrations?

CLEC's Position

a. MCIm

MCIm argued that there should be no additional separate DUF rate.[551] MCIm asserted that SWBT's "provision of message detail per record"/DUF charge is inappropriate for at least the following reasons: (1) the Commission's Mega-Arb Award ordered the $0.003 DUF charge to be applied only for access usage records (AURs) and only then when SWBT was performing the access billing function for the CLEC in accordance with Attachment 24 to the Mega-Arb Award; (2) based on SWBT testimony in the Mega-Arb, the Commission rejected a SWBT proposal to add charges for local switching recording by determining that the issue was mooted due to SWBT's use of AIN customized routing (with a rate of $0.0002333 per query) to accomplish recording functions, thus establishing that the cost for recording is already recovered in the recurring local switching rates, and the cost of record generation is recovered by the AIN query charge; (3) any additional costs for post-recording manipulation of calling records are recovered by the support assets factor that is applied to all recurring rate elements and most nonrecurring rate elements; (4) T2A Attachment 24's purpose statement refers only to "services specially selected" by the CLEC and only to access usage records (AURs), and the seven rate elements in T2A Attachment 24 Appendix IIIA directly correspond to that language; and (5) SWBT's DUF charge causes CLECs to pay an extra 31% more than the local switching rates that already recover SWBT's costs. Regarding AIN customized routing, MCIm further offered that, because both SWBT and the CLEC benefit from this solution, SWBT should also bear some portion of the cost for AIN queries. Finally, MCIm contended that "SWBT has arbitrarily

implemented a rate for local switching records that was not ordered by the Commission for costs that SWBT did not even file a cost study for in [the Mega-Arb]" -- and that SWBT should be required to refund these four years of over-charges immediately.[552]

MCIm alleged that SWBT provided little explanation or basis for the DUF charge of $0.003.[553] MCIm reiterated the Mega-Arb Award's explicit rejection of a separate charge for DUF records because the rates for unbundled switching and AIN queries already recover the cost of generating these records, thus compensating SWBT for its work.[554] MCIm also disputed SWBT's claim that the Commission ordered a DUF charge in Phase II of the Mega-Arb and noted that SWBT provided only a one-sentence assertion without any sound basis.[555] MCIm pointed to SWBT's Missouri DUF rate of $0.00, a rate proposed by SWBT in one proceeding and not challenged by SWBT in another proceeding, as more relevant than an out-of-region North Carolina rate.[556]

b. Sage

Sage argued that a CLEC should be able to stop receipt of DUF records that it does not need, and should not be subject to charges for records it neither needs nor uses.[557]

SWBT's Position

SWBT argued that the Commission approved the existing rate of $0.003 per message for providing DUF charges in Mega-Arb Phase II, and the application of the charge to MCIm in the T2A.[558] SWBT claimed that a cost study is in progress for this service, but that in the interim, SWBT has offered to reduce the current rate without true up until the Texas cost study is

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[551] MCIm defined the DUF as "a set of records that SWBT provides to CLECs on a daily basis that identifies the calls that the CLEC's customers have made using unbundled switching" and stated that DUF information is generated via local switch capabilities. MCIm Exhibit No. 3A, Turner Direct at 42.

[552] *Id.* at 6-7, 42-55.

[553] MCIm Exh. No. 4, Turner Rebuttal at 5, 20-23.

[554] *Id.* at 5, 20-21.

[555] *Id.* at 22.

[556] *Id.* According to MCIm, in three separate proceedings in Missouri, SWBT neither proposed an element for DUF nor produced a cost study for DUF.

[557] Sage Exh. No. 1, Nuttall Direct at 48.

complete.[559] SWBT stated that other state commissions have approved agreements with DUF charges, and that the North Carolina Commission, in particular, expressly determined that a DUF charge is permitted by federal law and consistent with the FCC's *UNE Remand Order*.[560]

SWBT asserted that the direct testimony of MCIm witness Turner was inaccurate because it inappropriately relied on T2A Attachment 24, which applies only to facilities-based providers (*i.e.*, switch deployers) and is therefore irrelevant to MCIm as a UNE-P provider.[561] SWBT maintained that T2A Attachment 10, § 3.1 "plainly states that DUF should not be limited to Access" and "therefore clearly means that DUF charges are explicitly assessed on all messages."[562] SWBT asserted that AIN and DUF are "apples and oranges" because the DUF charge relates to numerous complex steps in building, maintaining, and processing the message record that are separate from, and subsequent to, the AIN query.[563] SWBT claimed that the $0.003 rate was initially set for Access Usage Records (AURs), and that the AURs and the DUF are processed by the same system and use the same or similar processes. Therefore, each should have the same rate.[564] SWBT argued that it would be inappropriate and illegal for the Commission to order a refund of past charges because it would void an existing, binding contract.[565] SWBT noted that its cost study for DUF is now scheduled to be completed in the next few weeks, and that SWBT will agree to begin charging the new rate.[566]

SWBT contended that MCIm witness Turner was wrong to relate AIN and DUF, because they do not overlap -- DUF activities do not include AIN queries, and AIN queries do not include DUF activities, so AIN query costs do not include DUF costs, and vice versa.[567] He defined

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[558] SWBT Exh. No. 20, Direct Testimony of Roman A. Smith at 4 (Smith Direct) (SWBT described DUFs generally as "contain[ing] detailed call records that are used by [a CLEC] to bill its end users.").

[559] *Id*. at 4.

[560] *Id.* at 5.

[561] SWBT Exh. No. 21, Rebuttal Testimony of Roman A. Smith at 2-6 (Smith Rebuttal).

[562] *Id*. at 3.

[563] *Id.* at 4.

[564] *Id.*

[565] *Id.* at 5.

[566] *Id*.

[567] SWBT Exh. No. 4A, Rebuttal Testimony of Dr. Kent Currie at 15-16 (Currie Rebuttal); Tr. at 620, 622, 625.

DUF activities as including "the extraction of data from various billing databases, reformatting the data, and backing up the transmitted data," but not including the "activation of usage information through AIN queries, and the creation of the usage information accomplished by the switch." SWBT also disputed MCIm witness Turner's assertion that DUF costs are included in the support assets factor.[568]

SWBT argued that MCIm witness Turner mischaracterized DUF and failed to recognize that billing is a process of which AIN is only a part.[569] SWBT elaborated that, when a CLEC end user makes a call, the SWBT switch uses an AIN trigger to initiate a query to appropriate signal control point (SCP), which then returns instructions to the SWBT switch causing the switch to create an automatic message accounting (AMA) record.[570] Though the AMA record contains information (calling number, called number, time of call, and duration of call) used to develop the DUF file, it is not itself, a DUF file; rather, the AMA record raw data must be converted and processed to create a DUF file.[571] In addition, according to SWBT, the AMA record contains only a portion of the information found in a completed DUF file.[572]

SWBT described the provisioning of DUF records in detail and offered a confidential chart of a DUF record, plus a confidential diagram of DUF provisioning.[573] SWBT described the start of the process as the switch's capture of originating number, terminating number, time, duration, type of call, and "data" to form the AMA record.[574] SWBT noted that the AMA record does not provide CLEC name, type of service, or a call rating, but instead goes on to the billing system.[575] SWBT asserted that several billing systems/modules then perform functions like screens for unrated calls, rating table look-ups, reviews of called numbers to determine whether CABS or CRIS billing systems should be used, and conversion to the standard EMI format that

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[568] SWBT Exh. No. 4A, Currie Rebuttal at 15-16.

[569] SWBT Exh. No. 13, Kirksey Rebuttal at 10-11.

[570] *Id.* at 10.

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

[572] *Id.* at 11.

[573] SWBT Exh. No. 3A, Rebuttal Testimony of June Burgess at 18-20 (Burgess Rebuttal), Attachments A & B.

[574] *Id*. at 18.

[575] *Id.* at 18-19.

is in support of the Ordering and Billing Forum (OBF) guidelines.[576] SWBT posited that the DUF record layout is an OBF industry standard developed with the input of both ILECs and CLECs, and that CLECs must go to the OBF if they seek changes to the DUF record format.[577] SWBT also contended that SWBT invests significant funds and human resources to maintain and improve the DUF system.[578]

Arbitrators' Decision

Based on the pre-determined division of issues raised in this docket into policy and costing issues, the Arbitrators order that the aspect of this DPL that relates to the amount of the applicable DUF rate is deferred to a subsequent cost proceeding. That decision is reinforced by the lack of record evidence in this docket regarding the forward-looking cost of the DUF function. At best, SWBT offered testimony that the rate should remain $0.003, which was originally set for Access Usage Records (AUR), because the AURs and the DUF are processed by the same system and use the same or similar processes.[579] *The CLECs countered with the position that the incremental cost is actually zero, because costs incurred are already recovered through the use of factors applied in developing other rates.*[580] *The Arbitrators conclude that a forward-looking cost study, analyzed by parties and the Commission, is necessary and appropriate for proper determination of the rate. SWBT asserted that its cost study for DUF is near completion.*[581] *Therefore, the Arbitrators conclude that a subsequent cost proceeding will provide a proper forum in which to examine a SWBT DUF cost study.*

The Arbitrators further determine that, until completion of a subsequent cost proceeding, SWBT shall continue to be compensated for providing DUF records at the current rate of $0.003. The Arbitrators agree with SWBT that the direct testimony of MCIm witness Turner inappropriately relies on T2A Attachment 24, which applies only to facilities-based providers

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[576] *Id.* at 19.

[577] *Id.* at 20.

[578] *Id.*

[579] SWBT Exh. No. 21, Smith Rebuttal at 4.

[580] Tr. at 623

[581] Tr. at 626-27.

(i.e., switch deployers) and is therefore irrelevant to MCIm as a UNE-P provider.[582] *Rather, the Arbitrators conclude that Attachment 10 applies, which states, "1.1 Attachment 10: Provision of Customer Usage Data – Unbundled Network Elements sets forth the terms and conditions for SWBT's provision of usage data (as defined in this Attachment) to CLEC. Usage Data will be provided by SWBT to CLEC when CLEC purchases Network Elements from SWBT. 1.2 Charges for the relevant services provided under this Attachment are included in Appendix Pricing – UNE to Attachment 6."*[583]

The parties agreed that there are separate or external DUF functions that occur, but disagreed as to whether there are any incremental costs associated with those functions.[584] *Although the CLECs asserted that external (DUF) systems costs are captured with factors which would support implementing no rate, or a rate of zero, the CLECs failed to present sufficient evidence to support this conclusion.*[585] *SWBT, on the other hand, provided a detailed itemization of separate, incremental DUF functions and warrants at least an interim rate until a cost study analysis can be done.*[586] *Consequently, although the Arbitrators are deferring rate setting to a subsequent cost proceeding, the Arbitrators adopt contract language requiring the CLEC to pay SWBT an interim per transaction charge of three tenths of one cent ($0.003) for SWBT's transmission of the change notification until the outcome of the cost proceeding.*

The Arbitrators cannot grant Sage's request that unwanted DUF records not be sent and Sage not be required to pay for such records.[587] *No evidence was offered by either Sage or SWBT regarding the cost impact of non-inclusion of certain records of the DUF. It is possible, for example, that it would impose additional costs on SWBT to comply with Sage's request. In addition, Sage did not offer any contract language for resolution of this issue.*[588] *The Arbitrators conclude that, on this record, it is impossible to properly evaluate Sage's request. To the extent*

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[582] SWBT Exh. No. 21, Smith Rebuttal at 2-6.

[583] T2A Attachment Provision, Customer Usage Data – UNE – TX, Page 1.

[584] Tr. at 620, 623, 625-26.

[585] Tr. at 623.

[586] SWBT Exh. No. 3, Burgess Rebuttal at 4-5; Tr. at 620, 622, 625-26.

[587] Sage Exh. No. 1, Nuttall Direct at 48.

[588] Joint Exh. No. 1, Joint Contract Matrix at 26-27.

Sage (or another party) has a problem with unwanted DUF records, the issue and appropriate cost information should be addressed in a subsequent cost proceeding.

DPL ISSUE NO. 13

SWBT: Should the Commission adopt SWBT's definition of LIDB?
CLECs: Which proposed definition of LIDB, MCIm's or SWBT's, is appropriate?

CLECs' Position

MCIm argued that there are at least two major problems with SWBT's definition. First, SWBT's proposed LIDB definition ignores the fact that LIDB is a UNE. Second, SWBT's definition includes references to the calling name (CNAM) database, and thereby confuses the issue that the CNAM database is also a UNE.[589] MCIm claimed that there is no need to change the definition of LIDB, other than noting that the LIDB contains information as to whether a subscriber number is a valid working line, telephone line type, call screening information and validation information for calling cards.[590]

SWBT's Position

SWBT stated that section 9.4.1. of Appendix 6 - UNE provides the definition of LIDB.[591] SWBT asserted that whether LIDB is a UNE or not has nothing to do with SWBT's definition. Instead, SWBT argued that its definition of "network elements" was appropriate because SWBT accepted queries from all network elements capable of querying, rather than accepting queries only from unbundled network elements.[592] SWBT also represented that its LIDB contains calling name information and Originating Line Number Screening information, rather than serving only as a validation database for alternate billing. For these reasons, SWBT argued that its language more accurately describes LIDB and its current functions.[593]

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[589] MCIm Exh. No. 5, Direct Testimony of Michael Lehmkuhl at 2-3 (Lehmkuhl Direct).

[590] *Id*. at 14.

[591] SWBT Exh. No. 5, Direct Testimony of Linda De Bella at 5 (De Bella Direct).

[592] *Id.* at 6.

[593] *Id.* at 6. SWBT clarified that the CNAM is a field component within the LIDB database. Tr. at 907-08.

Arbitrators' Decision

The Arbitrators find that SWBT's use of the word "service" may be confusing in that it suggests that the LIDB database is not a UNE. The Arbitrators also conclude that SWBT's proposed inclusion of a reference to CNAM queries could confuse LIDB and CNAM. Moreover, inclusion of the reference is unnecessary because CNAM is defined elsewhere in the interconnection agreement.[594] *Therefore, the Arbitrators adopt MCIm's proposed language.*

DPL ISSUE NO. 14

SWBT: Should SWBT provide Digital Cross-Connect Systems (DCS) in accordance with the FCC's rules?

CLECs' Position

MCIm argued that SWBT does not provide DCS in accordance with the FCC's rules because SWBT refuses to provide DCS functionalities associated with unbundled loops.[595] As discussed in DPL Issue No. 5, MCIm claimed that 47 C.F.R. §51.319 makes clear that CLECs are to be furnished with all features, functions, and capabilities of either the loop or transport transmission facilities.[596] According to MCIm, DCS functionality is one of those capabilities, and SWBT's proposed language would allow SWBT to avoid its obligation under § 51.319.[597]

According to MCIm, although CLECs could use collocation to obtain DCS functionality, they should not be required to collocate in order to have access to loop and transport or the associated DCS functionalities.[598] MCIm claimed that requiring collocation only serves to drive up competitors' costs by making them collocate in every SWBT wire center in order to transport traffic to their switch using DCS.[599]

MCIm further maintained that the FCC rules state that SWBT should provide DCS in the same manner that SWBT provides DCS functionality to IXCs. MCIm contended that SWBT's

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[594] *See* UNE Attachment 6, section 9.5.

[595] MCIm Exh. No. 2, Price Rebuttal at 31.

[596] MCIm Exh. No. 1, Price Direct at 60.

[597] *Id.*

[598] Tr. at 1142.

[599] Tr. at 1150-51, 1164.

arrangements with IXCs do not require collocation in order to obtain DCS functionality.[600] Finally, MCIm argued that SWBT's proposal to simply cite to its Network Management Services Tariff (Access Tariff) is not viable because SWBT can substantively harm CLECs by amending said tariff.[601]

SWBT's Position

SWBT argued that the *Local Competition Order* requires it to provide CLECs with access to SWBT's DCS in conjunction with unbundled dedicated transport (UDT) in the same manner that SWBT provides such functionality to IXCs.[602] SWBT stated that it provides DCS functionality to IXCs through its Access Tariff, which provides all of the terms and conditions surrounding the offering of DCS to IXCs.[603] SWBT asserted that referencing the Access Tariff in its proposed language prevents the inadvertent creation of differences between the DCS available to IXCs and CLECs.[604] As the Access Tariff is enhanced and changed over time, such modifications will be automatically available to the CLECs.[605]

SWBT asserted that MCIm's proposed language is inappropriate because it seeks to impose greater unbundling obligations on SWBT than required by federal law or the FCC, and may include functionalities that are not supported by SWBT's DCS.[606] According to SWBT, the FCC did not require it to provide DCS in association with unbundled loops.[607] SWBT argued that MCIm's proposed language positions DCS as a stand-alone service, instead of associated with interoffice transport, which, according to SWBT, directly contravenes the FCC's requirement for DCS availability.[608] SWBT further contended that MCIm's proposed language does not track the language in SWBT's network management services Access Tariff, and that if

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[600] MCIm Exh. No. 39, Diagram by Don Price: Loop/Channel Termination Between Customer Premises, SWBT, and CLEC; SWBT Exh. No. 24, Diagrams by Oyer of CLEC Access to DS/DCS at 3.

[601] MCIm Exh. No. 2, Price Rebuttal at 31-32.

[602] SWBT Exh. No. 14, Oyer Direct at 17; SWBT Exh. No. 9, Hampton Direct at 33.

[603] SWBT Exh. No. 9, Hampton Direct at 34.

[604] *Id.* at 33-35.

[605] *Id.* at 35.

[606] SWBT Exh. No. 9 at 33; SWBT Exh. No. 14, Oyer Direct at 17-18.

[607] SWBT Exh. No. 9, Hampton Direct at 33.

[608] *Id.*

MCIm's approach is utilized, an amendment to the interconnection agreement would be required to ensure compliance with the FCC's rules anytime the DCS tariff offering is altered.[609]

As SWBT explained, DCS has a multiplexing and a switching function that switches circuits from one to another.[610] DCS has high speed outputs and lower speed inputs and outputs and can take multiple signals from different places, unlike a multiplexer, which typically has a single high speed output and many low speed outputs. Additionally, DCS can be configured by multiple users at multiple levels of security, whereas the multiplexer can be remotely configured, but it is typically by one user.[611] SWBT agreed that it has to provide DCS multiplexing, but argued that it is not required to make the connections between the DCS and the loop.[612] SWBT asserted that CLECs should have to collocate in a SWBT central office and combine the loop and the DCS themselves using SWBT provided cross-connects and cross-connect loops.[613] SWBT admitted that providing DCS in association with the loop is technically feasible, in fact SWBT does so for itself, and that it would not require a new arrangement for DCS to be provided to CLECs in association with the loop.[614]

SWBT agreed with MCIm that SWBT's Access Tariff refers to the local channel; and further agreed that loops are similar to entrance facilities, which are similar to channels, and that all of those terminologies are actually billing labels for rate elements.[615] SWBT distinguished between loop and entrance facilities by arguing that a loop runs between an end user's premises and a central office, while entrance facilities run between a wire center and a central office.[616] SWBT explained that the same facility has different names because different rules and regulations apply.[617] SWBT admitted that in some circumstances, the DCS is used in association

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[609] *Id.* at 34-35.

[610] Tr. at 1128.

[611] Tr. at 1130-31.

[612] Tr. at 1138.

[613] Tr. at 1150, 1172.

[614] Tr. 1152-53.

[615] Tr. at 1155.

[616] *Id.*

[617] Tr. at 1158.

with the loop when SWBT serves IXCs.[618] SWBT admitted that IXCs are not required to collocate because the DCS is an access service.[619]

Arbitrators' Decision

The Arbitrators find that SWBT cannot require MCIm to collocate in order to obtain DCS functionality in association with UDT, and that DCS shall be provisioned at forward-looking cost-based rates. The Arbitrators' decision is based upon the requirement in 47 C.F.R. § 51.319(d)(2)(iv) that SWBT "[p]ermit, to the extent technically feasible, a requesting telecommunications carrier to obtain the functionality provided by the ILEC's digital cross-connect systems in the same manner the ILEC provides such functionality to interexchange carriers."

Based on the evidence, including SWBT's Access Tariff, SWBT imposes no requirement upon IXCs to collocate in order to receive DCS functionality in association with their entrance facilities.[620] Thus, the Arbitrators find that the "same manner" requirement contained in § 51.319(d)(2)(iv) precludes SWBT from requiring MCIm to collocate in order to obtain the functionality of DCS in association with UDT. Furthermore, the Arbitrators find that § 51.319(d)(2)(iv) addresses the technical requirement of providing DCS and, therefore, cannot be read as requiring DCS to be charged at the rates in the Access Tariff.[621] Accordingly, the Arbitrators find that DCS shall be provisioned at forward-looking cost-based rates.

The Arbitrators recognize that even though 47 C.F.R. § 51.319(d)(2)(iv) addresses DCS in the context of interoffice transmission facilities, the FCC addresses other uses of DCS.[622] Consistent with the Arbitrators' reasoning in DPL Issue No. 7,[623] the Arbitrators concur with MCIm that DCS functionality associated with the loop and transport is necessary in provisioning enhanced extended link (EEL) to a requesting carrier. DCS is part of the features, functions,

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[618] Tr. at 1160.

[619] Tr. at 1173.

[620] *Id. See also* SWBT Exh. No. 24, Diagrams by Oyer of CLEC Access to DS/DCS, and SWBT Exh. No. 54, Diagram by Oyer re: DCS for IXC POP.

[621] *See Local Competition Order* ¶¶ 440, 441, 445, 447.

[622] *See* 47 C.F.R. § 51.319(a)(1) and (d)(2) (i-ii) (2001); *UNE Remand Order* ¶ 175.

[623] *See* discussion in connection with DPL Issue No. 7, contract section 14.7-14.7.4.

and capabilities of EEL. Finding otherwise would impair CLECs' ability to compete by forcing them to collocate in SWBT central offices in order to obtain DCS functionality.

Consistent with the decision herein, the Arbitrators reject SWBT's proposal to adopt language from its Access Tariff. Although the Access Tariff may result in a proper provisioning of DCS in the context of interoffice transmission facilities, it fails to recognize the Arbitrators' decision with respect to DCS as part of the EEL. Moreover, the terminology used in the Access Tariff, which is designed for IXCs, does not have clearly established local service equivalents. The Arbitrators do note, however, that the Access Tariff and MCIm's proposed language are substantially similar, other than the different terminology.

Based on the foregoing, the Arbitrators adopt and modify MCIm's proposed language.[624] *The modifications account for the two ways in which MCIm may obtain DCS functionality. The Arbitrators further determine that the issue of final pricing shall be determined in a subsequent proceeding, which will allow SWBT the opportunity to demonstrate that the costs associated with providing DCS require a change in the UNE Appendix Pricing -- UNE -- Schedule of Prices.*

DPL ISSUE NO. 15

SWBT: Is SWBT required to provide LIDB and CNAM databases to MCIm on a bulk basis?

CLECs: Should a CLEC be prohibited from using LIDB and CNAM in the same manner as SWBT uses LIDB, CNAM?

Is a CLEC impaired without access to LIDB and CNAM as a UNE?

CLECs' Position

MCIm claimed that its proposed language is appropriate because under the FCC's precedent, the LIDB and CNAM databases are UNEs.[625] MCIm explained that LIDB is a call-related database used for validating calling card, collect call, and third party information. When a 0+ or 0- call is initiated, a billing number service (BNS) validation query is initiated. After checking WorldCom's own internal servers, queries are aggregated by switch location and sent out over the SS7 network to one of several service control points around the country hosting the

[624] The Arbitrators note that SWBT's proposed language for section 11.1 provides a reasonable clarification of the language, and consequently adopt SWBT's proposed language for section 11.1.

[625] MCIm Exh. No. 5, Lehmkuhl Direct at 3.

LIDB database. The query provides automatic number identification (ANI) information from both the caller and recipient, as well as the point code from the originating carrier to identify which entity is initiating the query. Once received, the LIDB database provider initiates a positive or negative authorization code. The call proceeds if a positive response code is received and blocked if a denied response code is returned.[626]

MCIm described the CNAM as a call-related database used by exchange carriers to offer caller identification (caller ID) services. MCIm explained that as an incoming call is routed and terminates at a customer's phone, a query is sent from the terminating switch to a database to retrieve information about the calling party. The information retrieved from the database is then routed over the network so that it is viewable on a subscriber's equipment to identify the caller. The industry standard requires that the information be provided to the subscriber before the second ring cycle.[627]

MCIm argued that both the LIDB and CNAM are call-related databases. MCIm argued that as call-related databases, both the LIDB and the CNAM are considered UNEs. MCIm alleged that the ILECs have exclusive control over the generation of the information that comprises these databases through the service order process. MCIm argued that, as the ILEC in Texas with the clear majority of subscribers in Texas, SWBT has a clear monopoly on the information that comprises these databases. MCIm explained that when a customer signs up with SWBT for service, the information taken from that order is routed to different databases, such as the directory assistance listing information (DALI), CNAM, and LIDB databases.[628]

MCIm further argued that SWBT's statement that other companies provide LIDB services is only partially true, because other companies only provide partial access to LIDB records of Texas end users. MCIm explained that, instead of building its own signaling network to accommodate its facilities-based customers, MCIm outsources this service to Illuminet, which stores LIDB and CNAM data for these facilities-based customers. MCIm maintained that in a UNE-P configuration, the LIDB and CNAM databases are inextricably tied to SWBT's network,

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[626] *Id.* at 4.

[627] *Id.* at 4-5.

[628] *Id.* at 5.

and that it must use SWBT's facilities to store LIDB information for MCIm's UNE-P customers because these customers are on SWBT's network, not MCIm's facilities-based network.[629]

MCIm maintained that access to the LIDB and the CNAM databases is essential to allow CLECs to offer telecommunications services such as call validation and caller ID. MCIm further argued that this information comes from the customer service order process when SWBT's customers sign on with SWBT, and SWBT is the only entity that has access to this information. MCIm maintained that companies like Illuminet cannot provide access to the LIDB and CNAM information of SWBT's customers. MCIm stated that, for example, the only way to access CNAM information of SWBT's customers in order to provide caller ID information to MCIm's customers is through SWBT.[630] MCIm claimed that, as a consequence, the FCC identified the LIDB and the CNAM databases as UNEs. MCIm cited the FCC's conclusion in its *UNE Remand Order* that "there are no alternatives of comparable quality and ubiquity available to requesting carriers, as a practical, economic, and operational matter, for the ILEC's call-related databases."[631]

MCIm stated that it is confused by SWBT's argument that less than 50% of the information in SWBT's LIDB database belongs to SWBT and that LIDB and CNAM are not part of SWBT's network. MCIm expressed concern that SWBT has transferred the databases to an unregulated entity to circumvent its unbundling obligations.[632] MCIm argued that at the time the FCC's *Local Competition Order* was written, batch download access to call-related databases was not technically feasible, and that the FCC's conclusions on direct access were clearly subject to reconsideration if it became technically feasible.[633] MCIm argued that SWBT has the obligation under FTA §251(c)(3) to provide these databases as UNEs.[634] MCIm requested that SWBT's CNAM database be transferred to MCIm as a "batch" file instead of being relegated to

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[629] MCMm Exh. No. 6, Lehmkuhl Rebuttal at 4-5.

[630] *Id.* at 5.

[631] MCIm Exh. No. 5, Lehmkuhl Direct at 5.

[632] MCMm Exh. No. 6, Lehmkuhl Rebuttal at 5-6.

[633] *Id.* at 8.

[634] *Id.* at 12.

per query access, because batch access would allow MCIm to use the database in exactly the same readily accessible manner as SWBT enjoys.[635]

SWBT's Position

SWBT stated that MCIm wants to be allowed to download (i.e., make a copy of) the data from SWBT's entire LIDB database (including CNAM). SWBT argued that such downloading should not be allowed. SWBT asserted that MCIm should access the LIDB database and CNAM information only on a per query basis, just as SWBT provides the information to all other CLECs and as it provides to itself.[636]

SWBT contended that access on a query basis provides all carriers, including SWBT, access to a real-time query of the LIDB/CNAM database to validate a pending end user transaction. SWBT claimed that batch-access, as MCIm calls it, would provide a download of the LIDB/CNAM database and provide unrestricted access to the downloaded LIDB/CNAM database. SWBT also claimed that this database would be outdated at the moment it was downloaded.[637]

SWBT asserted that LIDB responds only with the answer to a specific query, rather than all of the information on the end user's account. If, for example, a query concerned whether an end user has authorized acceptance of collect calls, SWBT stated that the LIDB response is limited to only that question. LIDB informs the query originator if the account is valid and whether the collect calls are authorized. LIDB does not, according to SWBT, provide information regarding whether that account can participate in Directory Assistance Call Completion Services or information regarding the customer's confidential calling card PIN number. SWBT acknowledged that the LIDB has that information, but provides it only in response to a specific query for specific services that call for it.[638]

SWBT asserted that bulk access and/or batch download is not possible through the STP because the SS7 network in not designed for bulk access. SS7 is a call processing, transaction-

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[635] MCIm Exh. No. 5, Lehmkuhl Direct at 6.

[636] SWBT Exh. No. 5, De Bella Direct at 7.

[637] *Id.*

[638] *Id.* at 7-8.

based network and is not designed to download batches of data according to SWBT. SWBT stated that STP was designed to be a "traffic cop," not a "parking lot."[639]

According to SWBT, the FCC requires LECs to provide nondiscriminatory access to their call-related databases on an unbundled basis for the purpose of switch query and database response through the SS7 network.[640] SWBT claimed that the FCC has clearly defined how carriers may access LIDB/CNAM – "through the SS7 network." SWBT further stated that the SS7 network does not allow bulk access. Thus, by definition, LIDB/CNAM access must proceed on a per query basis. SWBT alleged that MCIm is asking for the ability to obtain the data in CNAM and LIDB in bulk, and without restriction. SWBT argued that this is contrary to the FCC's requirement that access to call-related databases must be through interconnection at the STP, and that direct access to the databases would not be required.[641]

SWBT claimed that MCIm incorrectly asserted that because MCIm is entitled to receive batch downloads for the directory assistance listing (DAL or DALI), it must be entitled to receive them for CNAM.[642] SWBT stated that CNAM is part of LIDB, a call-related database, while DAL is not, and that significant ramifications flow from that distinction.[643] First, SWBT claimed that call-related databases like LIDB are, by definition, used in signaling networks on a per-query basis—which is exactly how SWBT uses them. Second, SWBT stated that the obligations on SWBT with regard to the DAL database flow from an independent section of the Act, § 251(b)(3), which specifically addresses directory assistance.[644] SWBT argued that these obligations are not relevant to LIDB/CNAM.[645]

SWBT asserted that MCIm was also incorrect in stating that SWBT is the only entity in Texas with such a comprehensive database. SWBT claimed that Verizon and Sprint also have LIDBs and that Verizon and Sprint are not obligated to provide SWBT with a download from

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[639] *Id.* at 9.

[640] *Local Competition Order* ¶ 484.

[641] SWBT Exh. No. 5, De Bella Direct at 9. *See* also *Local Competition Order* ¶ 485, which states: "We, therefore, emphasize that access to call-related databases must be provided through interconnection at the STP and that we do not require direct access to call-related databases."

[642] SWBT Exh. No. 6, De Bella Rebuttal at 7.

[643] *Id.*

[644] *Id.*

their LIDBs.[646] Likewise, SWBT claimed that MCIm incorrectly claimed that full access to the CNAM database results in increased quality of service to MCIm customers and allows MCIm more control over the quality of service it offers.[647] SWBT claimed that the date and time of a call is not obtained from the database; rather, it is obtained from the SS7 that provides the call set up.[648] SWBT further claimed that a download of the data would not give MCIm this information. SWBT argued that MCI WorldCom has lost this issue repeatedly in several states, and that this Commission should reject it as well.[649]

Arbitrators' Decision

The Arbitrators find that SWBT is providing CLECs, including MCIm, with nondiscriminatory access to its call-related databases on an unbundled basis for purposes of switch query and database response. This access is provided through the signaling system 7 (SS7) network, at forward-looking cost-based rates, in accordance with the Local Competition Order and related rules. The Arbitrators further find that SWBT is not required to provide LIDB and CNAM databases on a bulk basis. The Arbitrators acknowledge that the FCC has found that CLECs would be impaired without access to LIDB and CNAM databases for switch query and data response purposes.[650] However, the Arbitrators find that CLECs do have access to the LIDB and CNAM databases in the same manner as SWBT. The Arbitrators find that even if batch downloads of CNAM information is or becomes technically feasible, per query access as it exists today is not discriminatory.[651]

The Arbitrators reject MCIm's argument that CNAM information must be available on a bulk or batch download basis because of the FCC requirement regarding DAL. The FCC unambiguously required only per-query access to CNAM database through the SS7 network, and

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[645] *Id.*

[646] *Id.*

[647] *Id.* at 7 (citing MCIm Exh. No. 5, Lehmkuhl Direct at 12).

[648] SWBT Exh. No. 6, De Bella Rebuttal at 7-8.

[649] *Id.* at 9.

[650] *Local Competition Order* ¶ 491.

[651] Tr. at 1079. The MCIm witness is admittedly neither an engineer nor technical specialist.

batch downloads for DAL only.[652] *While call-related databases are UNEs, the data in such databases are not, by extension, also UNEs. The Arbitrators further find that the FTA and the FCC's rules and regulations do not entitle CLECs to download or make a copy of the contents of the CNAM or LIDB information residing in SWBT's LIDB call-related database. Therefore, the Arbitrators generally adopt the interconnection language proposed by MCIm regarding LIDB access on a per query basis, and reject the batch download language proposed by MCIm (proposed sections 9.4.1.1.1 and 9.5.1.1.2).*

DPL ISSUE NO. 16

SWBT: Should language be added to the Interconnection Agreement to address changes in LIDB and CNAM access?

CLECs: Should language be added to the Interconnection Agreement to expand coverage to all types of LIDB queries?

Should the interconnection agreement be amended to change the term "data owner" to "account owner?"

CLECs' Position

MCIm asserted that the specific contractual issue is whether to use "ROA" or "0/1XX" (or both terms) in Attachment 6, sections 9.4.1.9, 9.4.4.1.2, 9.4.4.1.3, and 9.4.4.1.10.[653] MCIm stated that "RAO 0/1XX" is the appropriate indicator in the sections of Attachment 6 that address LIDB entries. MCI explained the combined form RAO 0/1XX is correct when related to special line numbers.[654] MCIm argued that its proposed contract language, unlike SWBT's, specifically implements Telcordia's Revenue Accounting Office Code (ROA) Guidelines; therefore, it should be adopted.[655]

MCIm asserted that the NPA-NXX combination is used when LIDB entries are associated with accounts with existing physical line numbers, and that the RAO 0/1XX combination is used when special calling numbers are listed that have no associated true physical

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[652] *Local Competition Order* ¶ 485.

[653] MCIm Exh. No. 11A, Aronson Direct at 3. MCIm asserted that the more accurate issue description is found in the original decision point list (DPL) for Attachment 6, sections 9.4.1.9, 9.4.4.1.2, 9.4.4.1.3, and 9.4.4.1.10. MCIm asserted that this corresponded to Issue No. 71 in SWBT's original DPL that it attached to its response to MCIm's petition for arbitration.

[654] MCIm Exh. No. 11A, Aronson Direct at 3.

line number.[656] MCIm stated that the presence of a 0 or a 1 in the fourth positions denotes the presence of an RAO 0/1XX substitution of an NPANXX combination that would be used when a true line based billing number is present.[657] MCIm supported their conclusions by stating that the Telcordia Technologies' Revenue Accounting Office (RAO) Code Guidelines define the specifications for the use of RAO 0/1XX codes in place of NPA-NXX identifiers for special billing numbers.[658] MCIm argued that additional support specific to special calling cards is also found in Telcordia's RAO guidelines. [659] MCIm stated that no SWBT witness addressed the "RAO 0/1XX" issue and urged the commission to use the indicator "RAO 0/1XX" for the reasons outlined in its direct testimony.[660]

MCIm argued that FTA § 251(c)(3) requires SWBT to provide just, reasonable, and nondiscriminatory access to the LIDB and CNAM call-related databases. MCIm further argued that SWBT may not restrict MCIm's use of either of these databases to provide telecommunications service.[661] MCIm objected to the language SWBT proposed that would restrict the use of the LIDB database to "local" only validation. MCIm argued that such restrictions would not only run afoul of the nondiscriminatory access provisions of the FTA, but would restrict MCIm's right to combine such elements in order to provide a telecommunication service. MCIm stated that SWBT's argument that access by itself is the network element is untenable. MCIm argued that the definition of network element under section 3 of the Act includes databases but does not include access.[662]

MCIm alleged that SWBT describes access as a UNE to intentionally confuse the fact that these databases are primarily used over signaling networks to deliver caller ID and call validation with the databases themselves. MCIm concluded that if SWBT's definition is accepted, the result restricts MCIm to offer a particular telecommunications service in the

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[655] *Id.* at 2.

[656] *Id.* at 4.

[657] *Id*.

[658] *Id*.

[659] *Id.* at 4-5.

[660] MCIm Exh. No. 12, Aronson Rebuttal at 3.

[661] MCIm Exh. 5, Lehmkuhl Direct at 5-6.

[662] *Id.* at 7.

manner in which SWBT dictates rather than allowing MCIm to provide any telecommunications service with these databases as the FTA clearly allows.[663]

The CLECs generally did not object to SWBT's proposed contract language to delete the term "validation" and replace it with "LIDB" in section 9.4.1 in order to cover not only validation but operator line number screening and calling name and number queries, if the "local only" restriction were removed.[664] MCIm argued in its post-hearing initial brief that issue 16 presents the same issues as DPL 13.[665] MCIm requested the same relief as in DPL 13: striking references to LIDB "Service" since LIDB is a UNE, and clarifying that CNAM data has different characteristics than LIDB data.[666] MCIm stated that it could accept the phrase "[v]alidation [and] OLNS provide CLEC with certain line information that CLEC may use to facilitate completion of costs or services" for section 9.4.2.1.[667] MCIm claimed that its proposed language on the issue of RAO 0/1XX designations was appropriate because, unlike SWBT's proposed language, MCIm had specifically implemented Telcordia's Revenue Accounting Office Code Guidelines.[668] MCIm further stated that it was unclear as to the basis on which SWBT had inserted the term "Account Owner."[669] MCIm requested that the Commission keep the language previously approved by the Commission.[670]

SWBT's Position

SWBT stated that it proposed language for certain sections of the UNE Appendix to update language from the T2A because the language was written before SWBT developed a new query for LIDB called OLNS (Operator Line Number Screening).[671] SWBT proposed deleting the term "validation" and replacing it with "LIDB" to expand the coverage of this paragraph to

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[663] *Id.* at 7-8.

[664] Tr. at 1028-1032.

[665] MCIm Initial Brief at 55.

[666] *Id.*

[667] *Id.*

[668] *Id.*

[669] *Id.*

[670] *Id.*

[671] Joint Exh. No. 1, Joint Contract Matrix at 31-34. *See* Subsections 9.4.1.5; 9.4.2; 9.4.2.1; 9.4.2.2; 9.4.2.3; 9.4.2.5; 9.4.2.7; 9.4.3.1; 9.4.3.2; 9.4.3.5; 9.4.3.7; 9.4.4.2.7.

cover validation, OLNS, and CNAM queries. SWBT stated that MCIm's proposed revisions only address validation queries. SWBT claimed that its proposal appropriately updates the language to address other query types and their responses. SWBT claimed that its language simply adds new technology, and SWBT is confused as to why MCIm would oppose SWBT's proposed language.[672]

SWBT claimed that its language updates the Agreement at a number of locations that refer to the term LIDB validation service. SWBT claimed that this revision is a more efficient way to update the Agreement than to change all other occurrences of the LIDB language. SWBT stated that its language covers all three types of LIDB queries (validation, OLNS, and CNAM). According to SWBT, validation queries refer to calling card and billed number screening only. SWBT claimed that MCIm's inclusion of the word "validation" in this paragraph limits the application to only validation queries and can generate confusion regarding SWBT's provisioning of other query types (e.g., OLNS and CNAM queries).[673]

In response to MCIm's question regarding the use of whether the term "RAO" which stands for Revenue Accounting Office should be used with "0/1XX" rather than SWBT's proposed language of NPA/01/1XX, SWBT stated that the RAO directs billing message from the network of the LEC to the Billing Company.[674] SWBT further asserted that MCIm apparently agreed that RAO was the correct indicator because RAO 0/1XX is the manner in which Telcordia Technologies represents a numeric RAO, as noted in MCIm's reference to Telcordia Technologies Revenue Accounting Office (RAO) Guidelines.[675]

SWBT asserted that MCIm was correct, but missed the point. SWBT stated that the purpose of the Telcordia document is to define a numeric RAO. SWBT asserted that MCIm should have referenced another Telcordia document GR-1158-CORE, which defines the coding scheme for the records addressed in SWBT's language.[676] SWBT claimed that MCIm does not understand the issue and raises a dispute over what should be a mutually acceptable clerical

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[672] SWBT Exh. No. 5, De Bella Direct at 14.

[673] *Id*. at 14-15.

[674] SWBT Exh. No. 6, De Bella Rebuttal at 10.

[675] *Id*.

[676] *Id.*

adjustment. SWBT stated that MCIm seeks to remove the NPA in SWBT's proposed language of "NPA 0/1XX." SWBT further stated that the indicator of RAO 0/1XX is a valid indicator if an RAO code is all numeric. However, the indicator may create confusion. SWBT alleged that it was not trying to define an RAO, rather it was trying to define a group record in LIDB of which RAO was only a part of the complete group record.[677] SWBT claimed that if they were to eliminate the NPA provision, it could run the risk of having conflicts and errors with respect to calling cards and PINs, which could then result in fraud.[678] SWBT stated that if the NPA were eliminated, SWBT might lose the ability to offer calling card services to a given set of customers out of the same RAO.[679]

SWBT further stated that MCIm agreed with SWBT's language on validation in section 9.4.2.1 and apparently did not disagree with SWBT's RAO language.[680] SWBT proposed the use of the term "Account Owner" because it is the industry standard term and provides a more flexible definition for use in LIDB.[681] SWBT stated that MCIm offered no evidence to show any problem with this language and, therefore, SWBT's language should be adopted.[682]

Arbitrators' Decision

The Arbitrators find that references in the UNE Appendix should be changed to reflect the use of the term "Account Owner" instead of the term "Data Owner." The terms "Data Owner" and "Account Owner" refer to the same entity, since the entity that services/controls the account also owns/controls the related line information data stored in the LIDB. The Arbitrators find that the term "Account Owner" more accurately depicts the relationship between the service-providing entity and the related LIDB data. The Arbitrators do not find the current terminology regarding queries to be confusing and that SWBT has not persuaded the Arbitrators

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[677] *Id.*

[678] Tr. at 1025.

[679] Tr. at 1026-27.

[680] SWBT Reply Brief at 40.

[681] *Id.*

[682] *Id.*

to replace the Telcordia Accounting Office Code Guidelines.[683] *Thus, the Arbitrators conclude that the NPA designation should be retained with regard to the identity of LIDB queries.*

In addition, the Arbitrators find that the use of the term LIDB services as proposed by SWBT creates confusion as to the treatment of the LIDB database as a UNE. Likewise, the Arbitrators find SWBT's proposed references to CNAM inappropriate for the same reasons discussed in connection with DPL No. 15. However, the Arbitrators recognize LIDB's expanded capabilities, such as OLNS. Therefore, as set forth in the contract matrix, the Arbitrators accept SWBT's proposed language for OLNS and validation queries. The Arbitrators further conclude that the language proposed by MCIm is appropriate with regard to Special Billing Numbers. [684]

DPL ISSUE NO. 17

SWBT: Are existing limits on proprietary information provided by call related databases appropriate?

CLECs: Should a CLEC be prohibited from using the UNE LIDB in the same manner SWBT uses that same UNE?

CLECs' Position

MCIm asserted that FTA § 251(c)(3) makes clear that MCIm can use UNEs for the provision of any telecommunications service including exchange access. The FCC has noted that "section 251(c)(3) provides that carriers may request unbundled elements to provide a telecommunications service, and interexchange services are a telecommunications service." Consequently, MCIm is entitled to access the LIDB database as an UNE for use in the provision of all telecommunications services.[685] MCIm argued that when MCIm, as a CLEC, seeks access to SWBT's unbundled LIDB in order to provide exchange access services to interexchange carriers (IXCs), SWBT is legally required to provide that access. MCIm asserted that the

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[683] Matters relating to changes in LIDB and CNAM access and queries, including use restrictions, are specifically addressed in the context of other DPL issues.

[684] Special Billing Numbers (special calling cards) use a Telcordia administered Revenue Accounting Office (RAO) code as the first three digits of the special calling card number, instead of a line-based NPA-NXX.

[685] MCIm Exh. 5, Lehmkuhl Direct at 15.

Commission ruled in a similar manner for other UNEs in an arbitration between Waller Creek and SWBT.[686]

MCIm disagreed with SWBT's claim that MCIm should have access to LIDB at TELRIC rates only for use in completing local calls. MCIm argued that § 51.309 of the FCC's rules makes clear that ILECs are not allowed to place use restrictions on CLECs' access to UNEs. [687] MCIm stated that, as a practical matter, the use restriction proposed by SWBT is equivalent to denying MCIm access to this UNE altogether because LIDB is used almost exclusively in connection with toll calls. MCIm explained that the FCC expressly identified LIDB as a database that must be unbundled, thus SWBT's proposal effectively violates a clear FCC ruling.

MCIm further explained that, in the *Local Competition Order*, the FCC specifically rejected the various use restrictions proposed at that time. The FCC stated that: "The ILECs are arguing in effect, that we should read into the current statute a limitation on the ability of carriers to use unbundled network elements, despite the fact that no such limitation survived the Conference Committee's amendments to the 1996 Act."[688] MCIm asserted that the restriction proposed by SWBT is inconsistent with SWBT's own operations. MCIm argued that SWBT has access to LIDB for billing its toll as well as local traffic. Moreover, SWBT provides access to LIDB to IXCs for use in connection with toll calls. Since SWBT offers this service, MCIm has the right to do likewise. SWBT uses the LIDB network element to offer LIDB functionality to IXCs as a service in its access tariff. MCIm claimed that the nondiscriminatory provisions of the Act, and FCC rules, require SWBT to provide MCIm access to the LIDB network element to be afforded the opportunity to provide the same exchange access service. MCIm asserted that the use restriction proposed by SWBT is prohibited by its obligation to provide "nondiscriminatory access to network elements on an unbundled basis." The FCC's rules also make it dear that a CLEC's access to a UNE must be equal to that which the ILEC provides to itself.[689]

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[686] *Id.* at 16.

[687] *Id.* at 15.

[688] *Id.* at 16.

[689] *Id.* at 17.

SWBT's Position

SWBT stated that much of the data in LIDB and CNAM does not belong to SWBT. Other companies have elected to store their data in SWBT's database. SWBT stated that it is not authorized to, and should not be required to, hand over to MCIm on a bulk basis the data that belongs to these other companies. SWBT contended that MCIm is permitted to *access* the database for switch query and database response. SWBT stated that MCIm's position implies that the databases are part of SWBT's network, and, thus, MCIm should be allowed unrestricted access to the databases. SWBT stated, however, that it does not own LIDB or CNAM, and LIDB and CNAM are not part of the SWBT network.[690]

SWBT stated that MCIm has suggested that it should have unrestricted access to LIDB because LIDB is a UNE. SWBT disagreed and stated that MCIm is confusing *access* to the databases with the databases themselves. SWBT stated that LIDB and CNAM are not part of SWBT's network and the data they contain is not a UNE. SWBT argued the FCC found that *access* to call-related databases is a UNE, *not* the databases themselves. SWBT further stated that the FCC made this all the more clear in the rules it promulgated in its *UNE Remand Order*.[691]

SWBT stated that the FCC defined this particular UNE narrowly to be access to databases at the STP, which would not include downloading of the entire database. SWBT emphasized that access to LIDB and CNAM databases shall be through the STP of the SS7 network which is, in and of itself, a UNE. The FCC, stated SWBT, has put limitations on access to this particular UNE by limiting the point of access to the STP. SWBT also pointed out that, recognizing the sensitive nature of the end user information stored in these databases, the FCC has placed limitations how LIDB and CNAM database information can be used. SWBT claimed that it is restricting MCIm's access to LIDB and CNAM to the access MCIm needs in order to provide such services as are provided by those databases.[692]

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[690] SWBT Exh. No. 5, De Bella Direct at 9.

[691] *Id*. at 10 (citing *Local Competition Order* ¶ 484; *UNE Remand Order* (No ¶ cited); 47 C.F.R. § 51.319(e)(2)(A) (2001)).

[692] *Id.* at 11; SWBT Exh. No. 6, De Bella Rebuttal at 6.

SWBT stated that the data stored in CNAM and LIDB is proprietary in nature. SWBT explained that the Account Owners that have entrusted their proprietary data to CNAM and LIDB expect SWBT to safeguard the data, and SWBT does so. If MCIm were allowed to obtain the data in bulk, rather than to access the data for the permissible purposes the FCC has recognized, SWBT claimed that its ability to protect the data would be severely compromised. SWBT asserted that wholesale release of proprietary customer data is not what the FCC intended.[693] Instead, SWBT contended, FCC Rule § 51.319(e)(2)(E) requires that access to LIDB/CNAM be provided in a manner that protects customers' privacy in §222. SWBT stated that the unrestricted bulk access proposed by MCIm is inconsistent with that requirement.[694]

In practice, SWBT claimed that if CLECs could obtain unrestricted access to the proprietary customer information in CNAM and LIDB, customer confidentiality would be meaningless. SWBT claimed that customers' private PIN numbers would become public information. SWBT further stated that non-published numbers would be available to anyone and that restrictions on use of calling cards would be obliterated. SWBT stated that it would no longer be able to provide its end users any assurance that they will receive and pay for the services they want and avoid the services they do not want, i.e., cramming.[695]

SWBT further stated that MCIm's proposal would be unfair to other carriers. SWBT contended that competitors in the database market have built up their information storage by winning carrier customers. SWBT claimed that these customers place their confidential customer data on the database and make the database more attractive, and hence competitive, for per query access. SWBT stated that MCIm attempts to short circuit the competitive process by obtaining all of SWBT's LIDB data in a single download by regulatory fiat, rather than building a database through the competitive process.[696]

SWBT asserted that MCIm is incorrectly claiming that the FCC's decision focused on technical feasibility. SWBT argued that the FCC determined that CLECs need access to CNAM (and other call-related databases) in order to provide certain telecommunications services; thus,

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[693] SWBT Exh. No. 5, De Bella Direct at 12, 13; *See* 47 C.F.R. § 51.319(e)(2)(E) (2001).

[694] *Id.* at 13.

[695] *Id.*

[696] *Id.*

ILECs must provide that access.[697] SWBT further asserted that nothing in the logic or application of the 1996 Act has the least bit to do with technical feasibility.[698]

SWBT stated that MCIm objected to SWBT's proposed language to restrict the use of the LIDB to "local-only" validation.[699] SWBT contended that the interconnection agreement between the parties enables MCIm to compete with SWBT in the provision of telecommunications services in SWBT's service territory in Texas.[700] SWBT argued that this included per query access to the information in the LIDB and CNAM for MCIm's use in the provision of local exchange service and exchange access in that area.[701] Consequently, SWBT claimed that the parties' agreement will allow MCIm to obtain per query access to LIDB and CNAM at UNE rates so that MCIm can compete on an equal footing with SWBT in the provision of local exchange service and exchange access in SWBT's Texas service territory.[702] SWBT characterized section 9.5.2.4 to mean: SWBT's LIDB (and/or CNAM) service is provided under this agreement only (1) when SWBT is the incumbent local exchange carrier, and (2) only when the service is used for CLECs' (MCIm) LSP activities on behalf of its Texas local service customers.[703] SWBT further claimed that any use of SWBT's LIDB (and/or CNAM) service by MCIm for any other purpose is not subject to the terms, conditions, rates and charges in this appendix.[704]

SWBT claimed that MCIm incorrectly asserted that the definition of network element under section 3 of the Act includes databases, but does not include access.[705] SWBT argued that it has no obligation to provide contents of a call-related database apart from the associated signaling.[706] Instead, SWBT stated that its obligation under § 271(c)(2)(B)(x) is to provide the

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[697] SWBT Exh. No. 6, De Bella Rebuttal at 4.

[698] *Id.*

[699] *Id.* at 5.

[700] *Id.*

[701] *Id.*

[702] *Id.*

[703] *Id.*

[704] *Id.*

[705] *Id.*

[706] *Id.*

same nondiscriminatory access to call-related databases and associated signaling that it provides to itself.[707] SWBT claimed that it fulfills that obligation by offering per-query access for call routing and completion—the same per-query access SWBT uses. LIDB/CNAM is designed to respond on a query-by-query basis, and that is how SWBT uses LIDB/CNAM in its own operations.[708] SWBT further stated that the information contained in the LIDB/CNAM database is available to CLEC end office switches on a query-by-query basis, together with the associated signaling, just as that information is available to SWBT's end office switches.[709]

Thus, SWBT argued that the FCC already considered and rejected what MCIm's language is attempting to require.[710] According to SWBT, its proposed language tracks the FCC's statement and rule closely.[711] Therefore, SWBT urged the Commission to adopt SWBT's proposed contract language.[712]

Arbitrators' Decision

The Arbitrators recognize that § 51.309 of the FCC's rules clearly states that ILECs are not allowed to place use restrictions on CLECs' access to UNEs, and that access to call-related databases is considered a UNE.[713] Contrary to MCIm's claims for unrestricted access to databases as UNEs, however, the Arbitrators determine that the FCC implicitly limited access to these databases. The FCC recognized that access to the LIDB and CNAM databases is available only through the STP. Because downloading is not possible through the STP, the Arbitrators find that the FCC necessarily recognized that access to the databases would be limited and not include downloading of the entire database. Moreover, the FCC expressly allowed an ILEC to "mediate or restrict access [to the LIDB and CNAM databases] to that necessary for the competing provider to provide such services as are supported by the database."[714] Having found in connection with DPL Issue No. 15 that SWBT does not prevent CLECs from using the

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[707] *Id.*

[708] *Id.* at 5-6.

[709] *Id.* at 6.

[710] *Id.*

[711] *Id.* at 4.

[712] SWBT Exh. No. 5, De Bella Direct at 13-14.

[713] *Local Competition Order* ¶ 484.

LIDB and CNAM databases in the same manner as SWBT, the Arbitrators determine that the existing limitations on proprietary information are appropriate.

Accordingly, the Arbitrators reject MCIm's proposed deletion of the existing contract language at 9.4.2.6 in the UNE Appendix pertaining to the local use restriction. On the other hand, the Arbitrators conclude that SWBT failed to prove that its proposed language to address the use of LIDB data and assumptions regarding the identity of originating queries when CLECs use a single originating point code (OPC) is necessary. Consequently, the Arbitrators are not persuaded to include such language in this agreement. Therefore, the Arbitrators adopt MCIm's proposed section 9.4.2.7 with modifications to reflect the use of the BFR process and SWBT's proposed sections 9.4.2.1 and 9.5.2.4.1 with modifications.

DPL ISSUE NO. 18

CLECs: Is SWBT required to provide nondiscriminatory access to its LIDB/CNAM databases, including removing the local use restriction?

SWBT: Is SWBT required to provide LIDB to MCIm on a bulk basis?

CLECs' Position

MCIm argued that its proposed language is appropriate because under the FCC's precedent, SWBT must provide CNAM to MCIm on a bulk basis.[715] MCIm argued that since the CNAM is a UNE under the FTA, SWBT is required to make this element available in a manner to provision any service it wants consistent with the FTA. MCIm explained that this database and the information it contains must also be made available to MCIm in the same manner as SWBT makes the information available to itself and other telecommunications carriers. MCIm urged the Commission to find that SWBT cannot act in a discriminatory manner and restrict access to its CNAM database to a per-query or per-dip basis only. MCIm argued that competitors, such as MCIm, need access to the CNAM database in a bulk, downloadable format that allows for efficient competition and improved service quality to customers.[716]

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[714] *Local Competition Order at* n.1127.

[715] MCIm Exh. No. 5, Lehmkuhl Direct at 3.

[716] *Id*. at 14.

MCIm asserted that granting full access to the CNAM database would give MCIm the same control over the database enjoyed by SWBT and allow it to use this UNE to provision any telecommunications service as contemplated under the FTA. MCIm explained that giving it the information in a readily accessible format would facilitate the incorporation of the data into MCIm's facilities with no dialing delays. MCIm stated that, for instance, when a SWBT caller makes multiple calls to an MCIm customer with caller-ID, MCIm must query SWBT's database for the same caller ID information each and every time that call is terminated. But when a SWBT customer calls another SWBT customer within its operating territory, SWBT may query its own database, but certainly does not pay for that information each and every time it terminates a call. MCIm claimed that if it has the bulk access to the CNAM database in a downloadable format, it would only pay for the data once for the listing and then for any updates made to that listing.[717]

MCIm argued that the FCC has determined that a query-only access to other databases is discriminatory. MCIm stated that an analogy can be made between access to the CNAM database and the DALI. MCIm argued that with respect to DALI databases, the FCC specifically found that "LECs must transfer directory assistance databases in readily accessible electronic, magnetic tape, or other format specified by the requesting LECs, promptly on request. . . ." MCIm argued that the FCC specifically held that LECs may not restrict competitive access to the DALI database by restricting access to per-query access only.[718] MCIm explained that the CNAM database is also a call-related database and competitors' access to this database should not be limited to a per-query or per-dip basis only. To allow such a restriction to stand allows SWBT to discriminate against competing carriers through limited access to the CNAM database.[719]

MCIm asserted that it seeks access to the line number, 15-digit name identifier, and the privacy indicator associated with the record. Any other information that SWBT may hold in its CNAM database is irrelevant for purposes of providing caller-ID services. The fact that SWBT

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[717] *Id.* at 8.

[718] *Id*. at 9.

[719] *Id.*

may hold the CNAM data in its LIDB is also irrelevant since the pertinent data can be extracted from whichever database SWBT is holding the information.[720]

MCIm argued that SWBT's assertion that a download of the CNAM data would somehow violate its duty to protect proprietary customer information under FTA § 222 is a red herring. MCIm argued that FTA § 222 imposes the same duty on all telecommunications carriers, including MCIm. MCIm alleged that SWBT would somehow have the Commission believe that any carrier other than SWBT would automatically misuse the CNAM database by exploiting customer information. MCIm, contended that as a telecommunications carrier, it is bound by the same laws as SWBT. MCIm claimed that SWBT would rather keep the query-by-query access in place because it gives SWBT complete control over the data, and enables SWBT to discriminate by charging CLECs every time they dip the SWBT database. MCIm stated that allowing a CLEC to make full use of the data as a UNE as defined under the FTA, however, will not change CLECs' obligations to comply with the law and similarly protect customer information in the same manner as SWBT.[721]

MCIm also asserted that it is important to note that as long as MCIm has the privacy indicator associated with the CNAM record, it will be able to block release of the caller-ID information at the switch the same way SWBT would. MCIm explained that for those customers who have not requested a privacy indicator, they can do so on a per-call basis by dialing *67, the same way SWBT's customers may do so presently.[722] MCIm further argued that the CNAM database does not contain information that is specifically proprietary to any particular company. MCIm argued that the directory assistance listing feeds it currently receives from SWBT contain other CLECs' data, and that CNAM data should be treated the same way. MCIm stated this third party data could be provided by SWBT, or could be stripped from the data feed and obtained by MCIm, independently from SWBT, from the other CLECs just like other CLECs' DALI is obtained today. MCIm stated that the company generating the information could be duly compensated for the information.[723]

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[720] *Id.*

[721] *Id.* at 9-10.

[722] *Id.* at 10.

[723] MCIm Exh. No.6, Lehmkuhl Rebuttal at 9.

MCIm asserted that SWBT is the only entity in Texas with such a comprehensive database. If MCIm is to compete effectively in the Texas local exchange and exchange access market, it must be allowed to have access to the same database in the same manner. MCIm argued that SWBT's claim that it only has dip access to its CNAM database is not true. MCIm claimed that SWBT is able to make changes to the database, utilize the database any way it likes, and charge other carriers for use of the database. MCIm argued that under the present situation MCIm cannot utilize the entire database to provide more efficient service to its customers, and MCIm cannot resell access to the database for use by other carriers.[724]

MCIm contended that SWBT garners critical proprietary and competitive information through the dip process. MCIm argued that by requiring dip only access, SWBT is able to follow MCIm's use of this database, which reflects competitive information with respect to MCIm's overall service and growth.[725] MCIm stated that from a practical standpoint, requiring MCIm to dip SWBT's database or access the database on a "per query" basis only forces MCIm to incur development costs associated with a complex routing scheme within MCIm's UNE platform to provide quality service to its customers. MCIm argued that since SWBT already has its own database, it does not incur the same costs associated with implementing and maintaining this routing scheme.[726]

MCIm asserted that the economics of per query versus batch access is not difficult to demonstrate. For example, each MCIm subscriber typically has a few people that are repeat callers to their MCIm household. For example, spouses call each other every day from work. Since MCIm's access is limited to per query for CNAM information, it would possibly dip and pay SWBT for access to its CNAM database 20 times a month for the same information. With download access, MCIm might pay for that same information once.[727]

MCIm argued that full or batch access to SWBT's CNAM database helps increase innovation and competitive offerings. MCIm claimed limited access to the CNAM database, such as per-query access only, prevents MCIm from controlling the service quality and

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[724] MCIm Exh. No. 5, Lehmkuhl Direct at 10-11.

[725] *Id.* at 11.

[726] *Id.* at 11-12.

[727] *Id.*

management of the database, but such a limitation also restricts MCIm's ability to offer other innovative service offerings that may be provided more efficiently, quickly, and cheaply. MCIm argued that without competition in this regard, SWBT has no incentive to upgrade its CNAM service or the technology that drives it.[728]

MCIm asserted that if MCIm could operate its own database to support services for its end users, it would not be bound by SWBT's restrictions and could develop the capability to offer CNAM database services to other carriers via other signaling methods that could be more efficient and less costly. For example, it could offer CNAM over TCP/IP rather than on the costly SS7 network. The provisioning of CNAM through TCP/IP might also facilitate the development of new services and the integration of this service with emerging voice over Internet applications. MCIm stated that SWBT's superior access to its CNAM data limits MCIm to an inferior service.[729]

MCIm stated that there are at least two state commissions, Michigan and Georgia, that ordered ILECs to provide the CNAM database in a downloadable format.[730]

SWBT's Position

SWBT stated that the interconnection agreement subject to this arbitration is for the sole purpose of enabling MCIm to compete with SWBT in the provision of local exchange service and exchange access in SWBT's Texas service territory. SWBT claimed that, if MCIm wants access to the LIDB and/or CNAM database for other purposes, it can obtain such access, but not on the terms and conditions or rates set forth in this agreement.[731]

SWBT asserted that the interconnection agreement between the parties enables MCIm to compete with SWBT in the provision of telecommunications services in SWBT service territory in Texas; this includes per query access to the information in the LIDB and CNAM for MCIm's use in the provision of local exchange service and exchange access in that area. SWBT also stated that the parties' agreement will allow MCIm to obtain per query access to LIDB and

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[728] *Id.* at 13.

[729] *Id.*

[730] *Id.*

[731] SWBT Exh. No. 5, De Bella Direct at 24.

CNAM at UNE rates, so that MCIm can compete on an equal footing with SWBT in the provision of local exchange service and exchange access in SWBT's Texas service territory. SWBT claimed that section 9.5.2.4 simply provides: (1) SWBT's LIDB (and/or CNAM) service is provided under this agreement only when SWBT is the local exchange carrier, and (2) any use of SWBT's LIDB (and/or CNAM) service by MCIm where SWBT is not the local exchange carrier is not subject to the terms, conditions, rates and charges in this appendix.[732]

SWBT stated that it will provide MCIm access to LIDB or CNAM in order to provide other services, but not on the terms and conditions contained in this interconnection agreement, and not at TELRIC rates. SWBT claimed that requiring it to do so would improperly expand the scope of this interconnection agreement, as well as the scope of the call-related database UNEs, i.e., beyond the purposes for which they are intended. SWBT asserted that it offers arrangements for LIDB access for purposes outside the scope of the interconnection agreement, and MCIm is free to take advantage of such arrangements and obtain access to LIDB under the terms and conditions set forth in the applicable tariffs.[733]

SWBT disputed MCIm's claim that two state commissions have found that the ILEC is obligated to provide full or batch access to the CNAM database in a downloadable format.[734] SWBT asserted that the Michigan ruling is under appeal, and the Georgia Commission imposed use restrictions that precluded MCIm from its actual goal in seeking download – the resale of LIDB data that it hoped to obtain by regulatory order rather than through competition.[735] SWBT claimed that MCIm failed to inform the Commission about the number of states that have ruled against downloading of the LIDB and CNAM.[736] SWBT asserted that MCIm offered almost identical arguments in recent arbitrations in California and Connecticut, and MCIm lost both.[737] SWBT also asserted that state commissions have denied WorldCom's (MCIm) request for

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[732] *Id*.

[733] *Id.* at 24-25.

[734] SWBT Exh. No. 6, De Bella Rebuttal at 8.

[735] *Id*.

[736] *Id.*

[737] *Id.*

CNAM download in Arizona, Colorado, Montana, Iowa, New Mexico, North Dakota, Nebraska, and Oregon.[738]

SWBT asserted that LIDB/CNAM access was considered during the 271 process in Texas. SWBT stated that LIDB/CNAM is item 10 of the 271 checklist.[739] SWBT claimed that it could not have gotten long distance approval in the states of Texas, Missouri, Oklahoma, Arkansas, and Kansas if the FCC and the state commissions had determined that SWBT was not providing access to its LIDB and CNAM in the manner in which the FCC required, which was on a per query basis.[740] SWBT claimed that both the FCC and this Commission expressly concluded that SWBT met this checklist item.[741]

Arbitrators' Decision

The Arbitrators find that MCIm is not entitled to access SWBT's database on a bulk basis for the same reasons relied upon by the Arbitrators in resolving DPL Issue No. 15. Furthermore, the Arbitrators find that SWBT is providing nondiscriminatory access to the LIDB/CNAM databases as discussed above in connection with DPL Issue No. 17.

On the other hand, SWBT has failed to prove its proposed language is necessary and appropriate. Consequently, the Arbitrators are not persuaded to include such language in this agreement at this time. Instead, the Arbitrators adopt the existing language in the MCI WorldCom Agreement.

DPL ISSUE NO. 19

SWBT: Should specific liability language be added to the Interconnection Agreement to address call related database information?

CLECs: Should specific liability language regarding call-related databases be added to attachments and/or appendices of the Interconnection Agreement beyond those already contained in the General Terms and Conditions Attachment?

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[738] *Id.*

[739] *Id.* at 9.

[740] *Id.*

[741] *Id.*

CLECs' Position

a. MCIm

MCIm contended that the limitation of liability language proposed by SWBT goes far beyond standard limitation of liability language.[742] MCIm argued that the General Terms and Conditions (GT&Cs) contain broad disclaimer-of-warranty language in section 51.1 that disclaims warranties with respect to services provided under the Agreement, and that the GT&Cs disclaimer would also apply to the call-related database-information services provided in the UNE Attachment.[743] MCIm maintained that SWBT should provide its calling-name information to CLEC and its end users with the same accuracy and completeness that it provides to itself and its own end users.[744]

MCIm observed that the GT&Cs apply to all appendices of the interconnection agreement.[745] MCIm maintained that through the GT&Cs, the CLECs would indemnify SWBT against any third-party errors.[746] MCIm contended that SWBT offered no substantiation for its claim that the LIDB and CNAM databases are so unique as to require different treatment outside of the GT&Cs of the interconnection agreement.[747]

b. AT&T

AT&T argued that the current liability language found in the General Terms and Conditions section of the contract should apply to LIDB as well as the other UNEs, and that SWBT has provided no reason why LIDB is different than directory listings, resale, loops, or any other UNE.[748] AT&T agreed with SWBT that each party can only be liable for accuracy of the LIDB database to the extent that the end user provides the telecommunications carrier with

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[742] MCIm Exh. No. 15, Schneider Direct at 15.

[743] *Id.;* Tr. at 1111.

[744] MCIm Exh. No. 15, Schneider Direct at 15-16.

[745] MCIm Exh. No. 16, Schneider Rebuttal at 14.

[746] Tr. at 1112.

[747] MCIm Exh. No. 6, Lehmkuhl Rebuttal at 15.

[748] AT&T Exh. No. 1, Fettig Rebuttal at 10.

accurate information, and contended that one way to arrive at compromise is to stipulate that each party is not liable for inaccurate information provided by an end user.[749]

SWBT's Position

SWBT maintained that, since LIDB is a competitive service, it is reasonable to limit liability incurred in connection with it to the revenues received from it.[750] SWBT clarified that by "competitive service" it meant that there are at least a dozen other LIDB providers operating nationwide.[751] SWBT argued that since this Appendix stands apart from the GT&C, it is appropriate to have separate and distinct liability provisions within this Appendix.[752] SWBT argued that this liability protection is consistent with the SWBT's wholesale and retail tariffs, as cited in SWBT's Access Service Tariff, section 2 and General Exchange Tariff, section 8.[753]

SWBT maintained that the LIDB/CNAM databases contain millions of subscriber records, updated based on information provided by a wide variety of LECs, and the accuracy of the database is dependent upon the accuracy of the information submitted by various carriers.[754] SWBT proposed that each party's liability be limited to actual direct damages up to the amount paid for the LIDB and/or CNAM service, which, it asserted, is consistent with liability limitations elsewhere in this agreement.[755] SWBT argued that, while it requires additional liability protection for losses and damages that may result from MCIm's use of LIDB, it accepts full responsibility for all damages resulting from its gross negligence or willful misconduct.[756]

SWBT contended that the information available to CLECs from LIDB and CNAM is the same information available to SWBT.[757] SWBT stated that the LIDB database is updated through the service order process, and that, to the extent the CLEC has provided a service order,

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[749] *Id.* at 11.

[750] SWBT Exh. No. 5, De Bella Direct at 15.

[751] Tr. at 1107, 1110.

[752] SWBT Exh. No. 5, De Bella Direct at 15.

[753] *Id.* at 16-17.

[754] *Id.* at 15.

[755] *Id.* at 15-16.

[756] *Id.* at 16.

[757] *Id.* at 17.

SWBT could track the originator of a record.[758] SWBT contended that MCIm has already argued for and lost the "negligence standard" issue in California.[759]

Arbitrators' Decision

The Arbitrators reject SWBT's proposed limitation of liability language and find that MCIm's proposed General Terms and Conditions apply generally to all provisions of the agreement, including those that address call-related databases. Further, the Arbitrators find that the General Terms and Conditions provide liability language sufficient to address SWBT's responsibility for the LIDB database and CNAM information.

Although SWBT argued that its LIDB/CNAM language stands apart from the GT&Cs, the Arbitrators find that LIDB is not so distinctive a service that it requires specific liability provisions. Moreover, SWBT failed to persuade the Arbitrators that the mere existence of a limited nationwide market for LIDB service would affect SWBT's liability to customers of its own LIDB service. Therefore, the Arbitrators reject SWBT's proposed limitation of liability language.

DPL ISSUE NO. 20

SWBT: Should Local Service Request (LSR) language for LIDB database updates be added to the Interconnection Agreement to reflect network changes since the Commission approved the Texas 271 Agreement?

CLECs: Should MCIm have direct access to its records stored in LIDB?

CLECs' Position

MCIm stated that it disagreed with SWBT's proposed language (sections 9.4.3.10.2 and 9.4.3.10.3) that states that CLECs do not have the ability to view their records when utilizing the LSR process, regardless of the method used to update LIDB. MCIm opined that SWBT's language would make it impossible for MCIm to verify if its customer's LIDB records have been accurately entered and would be at the mercy of the SWBT local service center (LSC) to obtain such LIDB information.[760]

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[758] Tr. at 1113-14.

[759] SWBT Exh. No. 6, De Bella Rebuttal at 14.

[760] MCIm Exh. No. 13, Direct Testimony of Roseann Kendall at 4 (Kendall Direct).

MCIm agreed that the LSR is an industry standard compilation of forms used by CLECs to order wholesale services and UNEs. However, MCIm argued that a CLEC must populate those forms with data elements that are governed by the requirements of SWBT's back-end systems.[761] MCIm asserted that, because many of the data elements on the LSR come directly from SWBT's back-end systems, a CLEC can submit information on the LSR that is erroneous because the information was erroneous in SWBT's back-end databases. In this instance, MCIm argued that SWBT should be held accountable for the error.[762]

MCIm explained that it has configured its computer systems to satisfy SWBT's LIDB requirements, which contain the applicable data elements needed to properly update LIDB. MCIm argued that default information should be populated by SWBT if the LSR does not contain the required elements as outlined by SWBT.[763]

MCIm did not agree with SWBT's proposed language (section 9.4.3.10.4) which states that SWBT should not be held responsible for the use of such default information. MCIm argued that SWBT fails to recognize in the language that the potential exists for manual error by the SWBT LSC representative. MCIm asserted that it has experienced instances when a field that may have been sent to SWBT correctly was then incorrectly re-entered into SWBT's back end systems by the LSC due to manual intervention.[764]

MCIm also did not agree with SWBT's statement that LSR's are not provisions for OSS.[765] MCIm asserted that SWBT's argument that the LIDB database is outside the definition of OSS is inconsistent with the Commission's analysis in the 271 proceeding.[766]

SWBT's Position

SWBT explained that an LSR is an industry standard compilation of forms used by a CLEC to order Resale Services Network Elements (UNEs). SWBT further stated that each form is comprised of a number of data fields and is populated based on the specific request type and

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[761] MCIm Exh. No. 14, Rebuttal Testimony of Roseann Kendall at 3 (Kendall Rebuttal).

[762] *Id*.

[763] MCIm Exh. No. 13, Kendall Direct at 4.

[764] *Id.* at 5.

[765] MCIm Exh. No. 14, Kendall Rebuttal at 3.

activity initiated by the CLEC.[767] SWBT stated that it agreed in the context of the T2A to create an interface for LIDB data administration that uses an LSR. SWBT has proposed language that revises two paragraphs of the T2A that SWBT contends have become obsolete because it has met its commitment for the LSR interface for LIDB administration.[768] SWBT claimed that the provisions of section 9.4.3.10 through 9.4.3.10.9 merely address the terms and conditions of this interface, as it exists today.[769] SWBT stated that its language should be adopted because it sets forth the terms and conditions for SWBT's LSR interface that are now in place.[770] SWBT asserted that MCIm is in agreement with SWBT that LSR language for LIDB updates should be added to the Interconnection Agreement to reflect network changes since the Commission approved the Texas 271 Agreement.[771] SWBT stated that it has proposed changes to the LSR language in the Agreement because LSRs are not provisions for OSS; rather, they are provisions for an LSR-based interface for CLECs to administer data in SWBT's LIDB.

SWBT explained that in the course of the T2A, through an extended collaboration process, SWBT and the CLECs developed interfaces for LIDB updates, which included unbundled direct access through GUI and LSR access.[772] SWBT asserted that LSR access is incompatible with a direct interface because the company that administers the data records for numerous CLECs must have control over access and modification.[773] SWBT claimed that MCIm wants a new interactive hybrid interface that is not available today.[774] According to SWBT, the interface it developed as part of the collaborative efforts allows each entity to view only its own customer records. An interactive interface could give MCIm and others access to

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[766] *Id*. at 3-4.

[767] SWBT Exh. No. 5, De Bella Direct at 18.

[768] Contract Reference: Sections 9.4.3.10 through 9.4.3.10.9.

[769] SWBT Exh. No. 5, De Bella Direct at 19.

[770] *Id.*

[771] SWBT Exh. No. 6, De Bella Rebuttal at 15.

[772] *Id.*

[773] *Id.* at 15 - 16.

[774] *Id.* at 16.

proprietary information of other entities.[775] SWBT argued, therefore, that MCIm's request for yet another LIDB interface should be rejected.[776]

Arbitrators' Decision

The Arbitrators conclude that SWBT agreed in the T2A to create an interface for LIDB data administration that uses the LSR. The Arbitrators find that SWBT has met its commitment for the LSR interface for LIDB administration, and it is therefore necessary to revise contract language that has become obsolete.[777] Therefore, the Arbitrators adopt language to reflect completion of SWBT's T2A commitments with regard to the LSR interface for LIDB administration.

In addition, the Arbitrators agree with SWBT that the proposed LSR language is related to updating data and SWBT's LIDB through a CLEC LSR interface.[778] Specifically, the Arbitrators find that, to the extent that SWBT's proposed sections 9.4.3.10 through 9.4.3.10.9 address the terms and conditions of the interface as it exists today, it is appropriate to adopt such language. The Arbitrators also note that MCIm is in agreement with SWBT that LSR language for LIDB updates should be added to the Interconnection Agreement to reflect network changes since the Commission approved the T2A.

The Arbitrators appreciate that CLECs should be able to view their own records regardless of the method used to update LIDB. Direct access to LIDB would enable MCIm to verify whether its customers' LIDB records have been accurately entered, especially since many of the data elements on the LSR come directly from SWBT's back-end system. A CLEC can submit information on the LSR that is erroneous because the information was erroneous in SWBT's back-end systems.

The Arbitrators find, however, that LSR access is not designed to be an interactive interface. The Arbitrators agree with SWBT's claim that it has developed a direct LVAS interface to allow CLECs to view the updated data. As noted earlier, the Arbitrators agree with

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[775] *Id.*

[776] *Id.*

[777] Contract Reference: Sections 9.4.3.10 through 9.4.3.10.9.

[778] SWBT Exh. No. 5, De Bella Direct at 19.

SWBT that the proposed changes provide for an LSR-based interface for CLECs to update data in SWBT's LIDB which imply joint responsibility for the accuracy of the data input in the LIDB when SWBT-provided default data is used in the LSR process. The Arbitrators therefore adopt SWBT's proposed language regarding the LSR process, with modifications generally intended to eliminate references to SBC-12 State. In addition, SWBT's language is modified to reflect that SWBT failed to persuade the Arbitrators that it should be relieved of liability for its own negligence.

DPL ISSUE NO. 21

SWBT: What obligations should MCIm have for the information it stores in SWBT's LIDB?

CLECs: Should MCIm be responsible for the accuracy of its data in SWBT's LIDB if it has no direct access to LIDB.

CLECs' Position

MCIm argued that it should not be held responsible for the accuracy of its customers' LIDB records if SWBT prevents MCIm from viewing the records during the LIDB update process. MCIm did not agree with SWBT's position that it is an appropriate function for LIDB to also confirm whether MCIm has a Billing & Collection (B&C) arrangement with the originating carrier for local and IntraLATA alternately billed traffic (ABT). MCIm contended that LIDB is utilized by all types of carriers and for all operator services traffic and that the originating or transporting carrier should know whether or not they have a B&C Agreement with MCIm.[779]

MCIm also argued that SWBT has failed to define the term "appropriate charges" in its proposed section 9.5.2.1, and contended that SWBT's proposed requirement that MCIm provide "all" necessary billing information stating is an overly broad requirement.[780] If SWBT is looking for billing name and address (BNA), MCIm explained that this information is available to SWBT as well as other third-party carriers.[781] MCIm clarified that its BNA must be purchased, but was

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[779] MCIm Exh. No. 13, Kendall Direct at 6.

[780] *Id.* at 7.

[781] *Id.*

unable to identify whether the rates were priced at TELRIC; however, these rates are tariffed.[782] MCIm was also unsure how often its BNA information is updated.[783]

MCIm disagreed with SWBT's proposed ABT language in Appendix ABS and proposed that terms and conditions regarding ABT be set forth in a separate attachment to the interconnection agreement.[784] At the hearing, MCIm was unable to clarify its position on SWBT's proposed section 16, however, as MCIm's witness, Ms. Kendall, had not reviewed the proposed language.[785]

SWBT's Position

SWBT explained that it is critical that MCIm provide the proper blocking information to SWBT so that the LIDB can function in connection with blocking collect calls or other ABS calls from terminating to an MCIm end user. SWBT argued that it must be MCIm's responsibility to provide accurate LIDB data concerning blocking of alternately billed service (ABS) calls.[786] SWBT maintained that the purpose of its proposed section 9.5.5.2 was to provide clarity that the responsibility lies with MCIm to provide information on its end user's privacy options.[787] SWBT also stated that the purpose of proposed section 9.5.5.2 is to identify MCIm's responsibility for the LIDB regardless of who places a call to MCIm's end users.[788]

SWBT argued that its proposed section 16 allows a CLEC to be compensated for any query in the LIDB database that accesses the CLEC's subscriber information.[789] SWBT stated that the proposed language also provides for SWBT to charge a price for data storage if the CLEC does not elect compensation when other carriers query its subscriber information.[790] SWBT clarified that its proposed ABT Appendix applies specifically to those ABS calls that

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[782] Tr. at 1049.

[783] Tr. at 1050.

[784] MCIm Exh. No. 13, Kendall Direct at 7.

[785] Tr. at 1052-53.

[786] SWBT Exh. No. 2, Burgess Direct at 16; Tr. at 1047.

[787] Tr. at 1047.

[788] Tr. at 1052.

[789] Tr. at 1045.

[790] Tr. at 1044.

SWBT handles, while section 16 applies to all carriers.[791] SWBT stated that it does not have access to MCIm's BNA information and has not purchased MCIm's BNA information.[792]

Arbitrators' Decision

The Arbitrators find that all CLECs, including MCIm, should be responsible for the accuracy of the customer (end user) record information they enter into SWBT's LIDB despite the technical inability to review and/or edit such records during the LSR update process. The inability to review such records on real-time basis does not in and of itself absolve CLECs of their responsibility to correctly update customer records. Therefore, the Arbitrators find that SWBT's proposed new sections 2.7.2 – Operator Services Appendix and 3.3 – Directory Assistance Appendix reasonably require MCIm to maintain end user records in SWBT's LIDB, and should be included in the interconnection agreement.

The Arbitrators conclude that SWBT's proposed new Appendix 6: UNE - 9.5.5.2 through 9.5.5.3, would de facto *require MCIm to establish a billing and collection arrangement between SWBT and other third-party carriers in regard to alternately billed traffic (ABT). The Arbitrators will address these issues in connection with DPL issue Nos. 41 and 42. Therefore, the Arbitrators reject the aforementioned amendments proposed by SWBT in this DPL.*

The Arbitrators also reject SWBT's proposed new sections 9.5.5.1 and section 16 – Compensation Option. These proposed sections appear to create an optional multi-state compensation arrangement for LIDB and CNAM queries. The Arbitrators find no compelling reason to include such provisions in this interconnection agreement at this time.

DPL ISSUE NO. 22

SWBT: Is SWBT required to provide MCIm access to proprietary AIN features developed by SWBT?

CLECs: Should SWBT be required to provide MCIm access to proprietary AIN features developed by SWBT?

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[791] Tr. at 1052.

[792] Tr. at 1050.

CLECs' Position

MCIm asserted that SWBT should be required to provide MCIm access to proprietary advanced intelligent network (AIN) features developed by SWBT. MCIm stated that with proprietary network elements, the FCC's standard is whether the element is necessary to CLECs, and that in this instance the answer is yes.[793] MCIm stated that AIN functionalities are those built into SWBT's legacy voice network that allow parties to configure the network in unique ways. MCIm offered, as an example, that some CLECs use AIN functionalities to route operator service and directory assistance (OS/DA) calls to the CLEC's own OS/DA network.[794] MCIm asserted that access to these AIN functionalities is necessary to a CLEC's reasonable network development, particularly given SWBT's refusal to provide alternatives (e.g. customized routing for OS/DA) in a manner that is practical for the CLEC.[795] MCIm further stated that the ability of CLECs to use AIN features permits the CLEC to use "all other features that the switch is capable of providing," as required by the FCC's 319 rules.[796]

MCIm argued that while SWBT noted that the FCC has already found that proprietary AIN features are not UNEs, the FCC's conclusion is not binding on the Commission.[797] MCIm argued that the Commission has authority under 47 C.F.R. § 51.317 to independently unbundle proprietary AIN features.[798] MCIm also argued that some AIN features – such as number portability and customized routing – are not proprietary.[799] MCIm argued that even with SCE, MCIm would not have the capability to duplicate customized routing, therefore SWBT should not be able to claim that that functionality is proprietary.[800] MCIm explained that it is proposing to adopt the language in the MCI WorldCom Agreement as is, which provides for use of SWBT's AIN, and that SWBT is the one requesting contract changes.[801]

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[793] MCIm Exh. No. 1, Price Direct at 60.

[794] *Id.*

[795] *Id.*

[796] *Id.* at 60-61.

[797] MCIm Exh. No. 2, Price Rebuttal at 32.

[798] *Id.*

[799] Tr. at 1055-57.

[800] Tr. at 1056.

[801] Tr. at 1060, 1062.

SWBT's Position

SWBT argued that ILECs should not be required to unbundle AIN service software. SWBT asserted the FCC determined in the *UNE Remand Order* that AIN service software such as "Privacy Manager" is proprietary, and does not meet the "necessary and impair" standard of FTA § 251(d)(2)(A).[802] SWBT contended that MCIm's arguments fail to demonstrate that the AIN software meets the "necessary" standard required for unbundling.[803] SWBT added that MCIm does not dispute the proprietary nature of SWBT's AIN software.[804]

SWBT argued MCIm claimed it should have access to SWBT's AIN because of FCC Rule 319, which provides that CLECs may utilize features, functions, and capabilities of the switch.[805] SWBT argued that MCIm's reference to FCC Rule 319 is misleading, because MCIm's AIN features are separate from what the switch provides. SWBT explained that AIN features are implemented as a result of AIN proprietary software providing instructions to the SWBT switch. In other words, the switch does not provide AIN capabilities; the AIN software provides the AIN capabilities.[806] SWBT further argued that its AIN service software is developed through the "intellectual effort" of SWBT employees for use by SWBT customers, and is therefore proprietary.[807]

SWBT claimed that MCIm argues the unbundling of AIN is necessary because SWBT does not offer alternatives such as customized routing of OS/DA. SWBT contended that it does offer customized routing of OS/DA.[808] SWBT added that customized routing would utilize software developed by SWBT for MCIm as opposed to SWBT's proprietary AIN software. However, SWBT stated that it offers OS/DA via AIN. [809] SWBT argued that it gave up certain

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[802] SWBT Exh. No. 12, Kirksey Direct at 11 (citing *UNE Remand Order* ¶ 419).

[803] SWBT Exh. No. 13, Kirksey Rebuttal at 12.

[804] *Id*.

[805] *Id.* at 13.

[806] *Id*.

[807] Tr. at 1057-58.

[808] SWBT Exh. No. 13, Kirksey Rebuttal at 12.

[809] Tr. at 1054.

concessions as part of the T2A, and this is one of them; therefore, SWBT explained that it is negotiating a contract outside of the T2A and is proposing new language.[810]

Arbitrators' Decision

The Arbitrators do not concur with SWBT's assertion that all AIN-based features are excepted from unbundling by the UNE Remand Order. The specific language used by the FCC and relied upon by SWBT pertains only to databases used to provide "services ***similar to*** *Privacy Manager."*[811] *SWBT offered no evidence on which the Arbitrators could rely to distinguish the types of AIN-based services that are similar to Privacy Manager. Therefore, the Arbitrators find that, on this record, it is impossible to conclude that the services in question are excused from the unbundling requirements established in the UNE Remand Order.*

Even if SWBT adduces evidence showing, and the Commission concludes, that the services in question are proprietary, SWBT must continue to provide such services on an unbundled basis. The UNE Remand Order requires an ILEC to provide a requesting carrier the same access to design, create, test, and deploy AIN based services at the Service Management System (SMS), through a service creation environment (SCE) that the ILEC provides to itself, consistent with FTA § 222.[812] *The Arbitrators find that SWBT has failed to prove that it provides the required access. To the contrary, SWBT implicitly conceded that it does not provide the required access, and has instead agreed that "... SWBT* ***will*** *provide MCIm access to SWBT's Service Creation Environment."*[813]

Therefore, the Arbitrators adopt the language as proposed by MCIm for sections 9.7, 9.7.3, and 9.7.4. The language shall remain in effect and SWBT shall provide the subject services on an unlimited basis until SWBT initiates a proceeding with the Commission for the purpose of showing both that subject services are proprietary, and that SWBT provides the required nondiscriminatory access to the SMS through an SCE. This process allows all interested parties to present evidence on what constitutes nondiscriminatory access to SCE and

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[810] Tr. at 1060-61.

[811] *UNE Remand Order* ¶ 419.

[812] *Id.* ¶ 412.

[813] Joint Exh. No. 2, Final Decision Point List at 20 (citing SWBT Exh. No. 12, Kirksey Direct at 13-15; SWBT Exh. No. 13, Kirksey Rebuttal at 11-13) (emphasis added).

SMS that allows a CLEC to create and deploy its own AIN-based services. In addition, the Commission will be able to evaluate whether such access will degrade network integrity.

DPL ISSUE NO. 23

SWBT: Should SWBT be required to take responsibility for AIN CLEC service creations?

CLECs: Should SWBT be required to provide MCIm in a UNE-P environment, access to vertical features provided via AIN that SWBT provides its own retail customers?

CLECs' Position

MCIm stated that SWBT should be required to provide MCIm, in a UNE-P environment, with access to the vertical features provisioned via AIN that SWBT provides its own retail customers. MCIm stated that the ability of CLECs to use AIN features allows the CLEC to use "all other features that the switch is capable of providing" as required by the FCC's 319 rules.[814]

MCIm stated that MCI has developed its own AIN software and deployed it to its facilities-based customers, but for its customers served via UNE-P, MCIm has not yet sought access to the SCE to create its own proprietary AIN services.[815] MCIm asserted that SWBT claims to offer customized routing, but that SWBT has not proven that it provides customized routing. According to MCIm, SWBT has stated in the past that its preferred method for providing customized routing is through AIN. MCIm stated that SWBT will not assist CLECs' effort to actually implement AIN-based solutions.[816] MCIm opined that SWBT's offer of AIN-based customized routing for OS/DA, or any other AIN solution, is therefore not meaningful.

SWBT's Position

SWBT explained that SWBT's AIN features are available to a CLEC's customers on a resale basis, but not to CLEC customers served via UNE-P.[817] SWBT argued the Commission should adopt SWBT's proposed language to clarify that SWBT is not responsible for assisting

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[814] MCIm Exh. No. 1, Price Direct at 61.

[815] Tr. at 1058-59.

[816] MCIm Exh. No. 2, Price Rebuttal at 33.

[817] Tr. at 1053-54.

MCIm in the development of MCIm's AIN Service software. SWBT argued the FCC placed such responsibility with the CLEC.[818]

SWBT explained that the Service Creation Environment (SCE) is SWBT's service development area in which MCIm would develop MCIm-specific AIN service software for use by MCIm's end users.[819] SWBT acknowledged that the FCC has ordered that ILECs' SCE be unbundled, so that CLECs may make use of it to develop services. SWBT explained that because it is unbundling its AIN databases, SCE, SMS, and STPs, requesting carriers that provision their own switches or purchase unbundled switching from the incumbent will be able to use these databases to create their own AIN software solutions to provide services similar to Ameritech's "Privacy Manager." Thus, MCIm has the option of developing and implementing its own AIN-based services to its end users.[820]

Arbitrators' Decision

For the reasons discussed in connection with DPL Issue No. 22, the Arbitrators conclude that the vertical services related to ULS created under the AIN platform, that are not determined by this Commission to be proprietary, shall be included as part of the feature and functionality of the switch as required by the UNE Remand Order.[821] Therefore, the Arbitrators adopt MCIm's proposed language. With respect to the question posed by SWBT, the Arbitrators agree that SWBT is not required to take responsibility for AIN service created by CLECs. However, the Arbitrators find that the language proposed by MCIm, and employed in the Mega-Arb, the T2A, and the MCI WorldCom Agreements, does not impose such a responsibility and SWBT has failed to show that the language it proposes is necessary.

DPL ISSUE NO. 24

SWBT: Is SWBT required to provide the Directory Assistant (DA) database as a UNE?

CLECs: Should SWBT be required to provide Directory Listing Information (DLI) database as a UNE?

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[818] SWBT Exh. No. 12, Kirksey Direct at 12.

[819] *Id.* at 13.

[820] Tr. at 1053, 1054.

[821] *UNE Remand Order* ¶ 319.

CLECs' Position

MCIm defined the DALI database as the residential, business, and government subscriber records used by the ILECs to create and maintain databases for the provision of live and/or automated directory assistance services. MCIm added that DALI data is information that enables telephone exchange carriers to swiftly and accurately respond to requests for directory information including, but not limited to, name, address, and phone numbers.[822]

MCIm urged the Commission to require SWBT to provide the DALI database as a UNE. MCI asserted that FCC determined the DALI database to be a UNE under FTA § 251(c)(3) in its *Local Competition Order* and in the *UNE Remand Order*. MCIm commented that, in the *UNE Remand Order*, the FCC stated that LECs must offer unbundled access to call-related databases. MCI argued that that DALI fits the FCC's definition in the *Local Competition Order*, which stated that call-related databases are "databases, other than operations support systems, that are used in signaling networks for billing and collection or the transmission, routing, or other provision of telecommunications service."[823]

MCIm asserted that although the FCC de-listed OS/DA services as UNEs in the *UNE Remand Order*, this decision was based on the availability of alternative providers and the provision of customized routing by ILECs. MCIm contended that there is no such alternative for the underlying Directory Listing Information database. MCIm maintained that it may choose alternative providers of OS/DA services (including itself), but it cannot obtain the necessary database from other providers. MCIm asserted that SWBT is the only comprehensive listing provider in Texas, by virtue of its incumbent status and the subscriber base it continues to hold in Texas.[824]

MCIm argued that if the Commission determines that DALI is a UNE, the provisions of FTA § 251(c)(3) require that UNEs are to be provided at TELRIC or forward-looking, cost-based rates.[825] According to MCIm, DALI is a monopoly bottleneck service, and therefore

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[822] MCIm Exh. No. 5, Lehmkuhl Direct at 17.

[823] *Id.* at 17-18.

[824] MCIm Exh. No. 6, Lehmkuhl Rebuttal at 16-17.

[825] MCIm Exh. No. 5, Lehmkuhl Direct at 18.

market-based pricing is discriminatory to competitive providers.[826] MCIm explained that ILECs, such as SWBT, are in control of the subscriber service order process (from which DALI is derived) for the vast majority of subscribers in Texas, and because SWBT's line share represents a majority of the marketplace, SWBT is able to garner the vast majority of DALI listings in the state of Texas.[827] MCIm contended that incumbents like SWBT have a competitive advantage in the provisioning of critical directory assistance service through their legacy as monopoly providers and thus their access to a more complete, accurate, and reliable database than their competitors.[828]

MCIm asserted that the nondiscriminatory access requirement of FTA § 251(b)(3) requires the Commission to consider the costs based on a cost study and to reject a market-based methodology. MCIm maintained that SWBT did not support its proposed market-based rates because there is no real market upon which to base such prices. MCIm asserted that the Commission recognized this when it required SWBT to provide cost-based access to DALI to competing carriers in SWBT's Nationwide Listing Service tariff proceeding (Docket No. 19461).[829]

MCIm contended that the FCC, in its DAL Provisioning Order, found that FTA § 251(b)(3) prohibits ILECs from charging discriminatory and unreasonable rates to CLECs and other eligible directory assistance providers. According to MCIm, nondiscriminatory pricing applies, not only to what SWBT might charge other carriers, but also to what SWBT charges or imputes to itself. MCIm argued that a price cannot be nondiscriminatory if it allows SWBT to charge everyone else in the marketplace a higher rate than what it would charge itself.[830]

MCIm argued that the FCC's DAL Provisioning Order found that states could establish a specific pricing structure for directory assistance information. MCI asserted that, based on a SWBT cost study, the Commission has already set a cost-based price for initial listings at

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[826] *Id.* at 19.

[827] *Id.* at 18.

[828] *Id*. at 20.

[829] MCIm Exh. No. 6, Lehmkuhl Rebuttal at 18.

[830] MCIm Exh. No. 5, Lehmkuhl Direct at 20.

$0.0011 and for updates at $0.0014. MCIm contended that this price should continue to apply, whether for local or nonlocal listings.[831]

SWBT's Position

SWBT argued that it is not required to provide the DA database as a UNE. SWBT drew a distinction between nondiscriminatory access to the DA database and provision of the database as a UNE. SWBT argued that the only difference between the two is the price, which is at TELRIC cost-based rates for UNEs and otherwise at market prices.[832]

SWBT contended it is not obligated to provide DA listings as unbundled network elements under the 251(c)(3) UNE requirement.[833] SWBT argued that the FCC's *UNE Remand Order* reinforced that DA listings, as distinct from wholesale DA services, are not unbundled network elements.[834] SWBT concluded that market based rates apply to SWBT's wholesale DA listings in bulk with daily updates. Since MCIm purchases SWBT's DA listings in bulk with daily updates via SWBT's DAL tariff instead of an interconnection agreement, SWBT contended that this arbitration issue is moot.[835]

SWBT argued that it has fulfilled its obligations under FTA § 251(b)(3) to provide nondiscriminatory access to its OS and DA services and DA listings on a wholesale basis.[836] SWBT asserted that it provides nondiscriminatory access to DA services in Attachment DA of the T2A, and that it also provides nondiscriminatory access to its DA listings in bulk in Attachment DLI/DAL for those CLECs wishing to provide DA services. SWBT contended that it provides direct access to its DA database for access to its DA listings on a query-by-query basis for those CLECs wishing to provide DA services without developing their own database. SWBT asserted that MCIm has not requested direct access to its DA database.[837]

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[831] *Id.* at 20-21.

[832] SWBT Exh. No. 16, Direct Testimony of Jan D. Rogers at 4 (Rogers Direct).

[833] *Id*. at 4-5.

[834] SWBT Exh. No. 17, Rebuttal Testimony of Jan D. Rogers at 3 (Rogers Rebuttal).

[835] SWBT Exh. No. 16, Rogers Direct at 6.

[836] SWBT Exh. No. 17, Rogers Rebuttal at 3.

[837] SWBT Exh. No. 16, Rogers Direct at 5-6.

Arbitrators' Decision

The Arbitrators find that SWBT shall continue to provide the DALI database as a UNE. Pursuant to the FCC's Local Competition Order, ILECs are required, upon request, to provide nondiscriminatory access on an unbundled basis to their call-related databases for the purpose of switch query and database response through the SS7 network.[838] *The FCC described the switch query role as follows: "[T]he SS7 network also employs signaling links (via STPs) between switches and call-related databases, such as the Line Information Database (LIDB), Toll Free Calling (i.e., 800, 888 number) database, and AIN databases. These links enable a switch to send queries via the SS7 network to call-related databases, which return customer information or instructions for call routing to the switch."*[839]

The FCC defined call-related databases in its Local Competition Order as "those SS7 databases used for billing and collection or used in the transmission, routing, or other provision of a telecommunications service."[840] *In the UNE Remand Order, the FCC again concluded that lack of access to call-related databases on an unbundled basis would materially impair the ability of a requesting carrier to provide the services it seeks to offer in the local telecommunications market.*[841] *The FCC specifically included the Calling Name (CNAM) and Operator Services/Directory Assistance (OS/DA) databases as examples of a call-related database in the UNE Remand Order.*[842] *All parties agree that DALI is a directory assistance database.*[843] *Consequently, the Arbitrators conclude that DALI matches the FCC's description of a call-related database, and thus shall be provided by ILECs on an unbundled basis.*

Therefore, the Arbitrators conclude that SWBT shall continue to provide the DALI database as a UNE. The Arbitrators accordingly adopt MCIm's proposed language.

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838 *Local Competition Order* ¶ 484.

839 *Id*. ¶ 457.

840 *Id*. at n.1126.

841 *UNE Remand Order* ¶ 410.

842 *Id*. at Executive Summary at 13.

843 MCIm Exh. No. 5, Lehmkuhl Direct at 17-18; SWBT Exh. No. 16, Rogers Direct at 4.

DPL ISSUE NO. 25

CLECs: Are CLECs impaired without access to OS and DA?

SWBT: Is SWBT required to provide OS and DA as UNEs, contrary to the UNE Remand Order?

CLECs' Position

a. MCIm

MCIm defined Operator Services (OS) as any automatic or live assistance to a customer to arrange for billing and/or completion of a telephone call.[844] MCIm stated that ILECs are required to allow customers to connect with their chosen local service provider by dialing "0" plus the desired telephone number.[845] MCIm defined Directory Assistance (DA) as a service in which users are provided with the numbers and sometimes addresses of telephone exchange service subscribers who have not elected to have unpublished numbers.[846] MCIm argued that to provide OS/DA to its customers, it could either purchase OS/DA from SWBT or provide its own OS/DA.[847] MCIm asserted that it is dependent upon SWBT to route MCIm's UNE-P customers' OS/DA calls to MCIm's OS/DA facilities.[848]

MCIm stated that the FCC's *UNE Remand Order* requires an ILEC to continue to offer OS/DA as a UNE when the ILEC does not provide customized routing.[849] MCIm contended that SWBT has not shown that it will be able to provide customized routing to MCIm for MCIm's OS/DA calls. MCIm stated that it requested SWBT to route MCIm's OS/DA traffic to existing shared-access Feature Group D trunks between SWBT's local network and WorldCom's (MCIm's parent company) long distance network.[850] MCIm defined "Feature Group D" trunks as industry-standard trunks put into place after divestiture to allow competitive long distance to

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[844] MCIm Exh.No. 7, Direct Testimony of Edward Caputo at 3 (Caputo Direct).

[845] *Id.*

[846] *Id.* at 4.

[847] *Id.*

[848] *Id.*

[849] *Id.* at 6.

[850] *Id.*

provide service.[851] MCIm asserted that it is technically feasible for a CLEC to use Feature Group D functionalities to route OS/DA traffic to its facilities-based OS/DA platform.[852]

MCIm asserted that it proposed a customized routing solution to SWBT that uses line class codes and standard switch table routing features and functions to meet MCIm's business needs.[853] MCIm claimed that its proposal to use Feature Group D allows MCIm to designate the outgoing trunks provided by SWBT and meets the requirements set out in the *UNE Remand Order*.[854] MCIm contended that until SWBT actually provides customized routing to MCIm in a manner consistent with the FCC's rules, paragraph 462 of the *UNE Remand Order* requires SWBT to continue to offer OS/DA as UNEs.[855]

MCIm stated that although SWBT's proposed language indicates that customized routing will be made available to MCIm through Advance Intelligent Network (AIN) capabilities, MCIm has not received any indications that SWBT can provide the type of customized routing MCIm requested.[856] MCIm stated SWBT has advised MCIm that SWBT would provide customized routing only to the extent that MCIm establishes Feature Group C trunks to each end office from which MCIm seeks origination of OS/DA traffic. MCIm argued that SWBT's proposal is inconsistent with the FTA and with the *UNE Remand Order*, because MCIm would not have the ability to designate the particular outgoing trunks for routing its outbound traffic.[857]

MCIm contended that the FCC's approval of SWBT's 271 applications does not prove that SWBT provides customized routing to MCIm for MCIm's OS/DA calls according to MCIm's needs and the FCC rules.[858] MCIm further argued that because it is requesting shared access, Feature Group D routing of its calls during this proceeding, SWBT must offer OS/DA as a UNE to MCIm at least until SWBT provides this customized routing arrangement.[859]

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[851] *Id*.

[852] *Id*.

[853] *Id*.

[854] *Id.* at 7.

[855] *Id.* at 8.

[856] *Id*. at 7.

[857] *Id*.

[858] MCIm Exh.No. 8, Rebuttal Testimony of Edward Caputo at 4 (Caputo Rebuttal).

[859] *Id*. at 5.

MCIm argued that the Commission may require SWBT to continue to provide OS/DA as a UNE if the Commission concludes that CLECs are impaired without access to OS/DA.[860] MCIm contended that CLECs are impaired because they are unable to provide ubiquitous OS/DA to Texas consumers because SWBT has not shown that it can implement a workable customized routing solution.[861]

b. Sage

Sage argued that it does not currently have customized routing for OS/DA. Sage contended that it is not interested in pursuing this option because it would require dedicated transport through SWBT's network which would increase its costs and investments required for a small amount of traffic.[862] Sage argued that it would be required to withdraw the OS/DA service from a large number of users and locations.[863]

c. CLEC Coalition

The CLEC Coalition argued that the FCC determined that ILECs could remove OS/DA services from the list of mandatory network elements only if the ILEC implemented customized routing to enable CLECs to direct OS and DA traffic to alternative providers.[864] The CLEC Coalition stated that SWBT's offer of customized routing requires each CLEC to establish dedicated transport network at each of SWBT's five hundred central offices, and because CLECs entering the market generally only win a small percentage of the market at any particular switch, these entrants will not have the OS/DA traffic volumes necessary to justify such a large interoffice network.[865] The CLEC Coalition argued that SWBT's requirement that CLECs establish dedicated trunk groups before using alternative providers of OS/DA services imposes a substantial impairment on the CLECs' ability to compete.[866] The CLEC Coalition contended that because there is no practical alternative to the ILEC's OS/DA service, the UNE-P provider

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[860] MCIm Exh. No. 7, Caputo Direct at 8.

[861] *Id.* at 9.

[862] Sage Exh. No. 1, Nuttall Direct at 46.

[863] *Id.*

[864] Coalition Exh.No. 1, Gillan Direct at 45.

[865] *Id.* at 47.

[866] *Id.* at 47-48.

must have the ability to purchase these services as network elements.[867] The CLEC Coalition concluded, therefore, that the Commission should continue to require SWBT to offer OS/DA as network elements until SWBT can demonstrate that it has implemented an efficient aggregation scheme and entrants can custom route and transport OS/DA to alternative providers without impairment.[868] The CLEC Coalition added that the Commission has independent authority to require additional unbundling and additional flexibility to consider other factors under the FCC rules.[869]

SWBT's Position

SWBT defined Operator Services as the means of getting assistance during a call from either an automated program or a live operator and Directory Assistance as 'calling information' such as dialing 1411 to acquire a telephone number from DA.[870] SWBT stated that in the *UNE Remand Order*, the FCC determined that where an ILEC provides customized routing of OS/DA, the ILEC is not required to provide OS/DA Service as unbundled network elements.[871] SWBT stated that SWBT offers customized routing of OS/DA in order for the SWBT switch to direct the calls to MCIm or MCIm's third party provider. SWBT contended that the customized routing is provided in the same manner in which SWBT self-provisions.[872]

SWBT acknowledged that it committed to providing OS/DA as UNEs to CLECs for residential customers through the end of the T2A.[873] SWBT stated, however, that the T2A was approved prior to the effective date of the *UNE Remand Order*.[874] SWBT contended that after the *UNE Remand Order* became effective, SWBT has offered OS/DA services at market-based prices, pursuant to FTA § 251(b)(3).[875] SWBT stated that the FCC approved SWBT's 271 applications in Arkansas, Kansas, Missouri, and Oklahoma, in which SWBT offers OS and DA

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867 *Id.* at 48.

868 *Id.* at 49.

869 *Id.*

870 SWBT Exh. No. 12, Kirksey Direct at 16.

871 *Id.* at 16 (citing *UNE Remand Order* ¶ 441).

872 SWBT Exh.No. 12, Kirksey Direct at 16.

873 SWBT Exh.No. 16, Rogers Direct at 8.

874 *Id.*

services at market prices rather than as UNEs.[876] SWBT concluded that the FCC's actions confirmed that SWBT is not obligated to provide OS, DA, or DLI as UNEs.[877]

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DPL ISSUE NO. 26

SWBT: What is the appropriate rate structure for LIDB query access?

CLECs: If MCIm uses SWBT's OS platform, do the OS charges reflected in the UNE Pricing Appendix include the charges for LIDB Query access?

CLECs' Position

MCIm argued that SWBT's proposed multi-state blended rates, in which the origin of the LIDB query cannot be identified, are inconsistent with FCC and Commission decisions. MCIm contended that, as states set different, possibly higher rates, MCIm is then subjected to a resultant higher blended rate. MCIm asserted that as there may be only one database in the SWBT region that would respond to queries, the costs to provide the service would not vary from state to state, and SWBT should recover its costs by using the lowest state rate until the identification process can be developed.[878]

SWBT's Position

SWBT stated that each of the five SWBT ILECs, and the five Ameritech ILECs, has its own TELRIC-based charge for a LIDB query, based on a state-specific TELRIC study.[879] In theory, SWBT claimed that the per-query rate for a LIDB query would be the TELRIC rate for a LIDB query in the state of origin of the query. However, SWBT claimed that it is impossible for it to know the state of origin of an MCIm LIDB query. [880] Accordingly, SWBT argued that the most equitable way to apply the rate is to apply the weighted average of the LIDB query rates in

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[875] *Id.*

[876] *Id.* at 9.

[877] *Id.*

[878] MCIm Exh. 6, Lehmkuhl Rebuttal at 13.

[879] SWBT Exh. No. 6, De Bella Rebuttal at 17.

[880] SWBT Exh. No. 5, De Bella Direct at 19-20.

the five SWBT states.[881] SWBT claimed that this approach has the benefit of providing consistency in pricing for all CLECs in the SWBT region and is the easiest, most efficient, and fairest approach to pricing LIDB database queries.[882]

SWBT claimed that both parties appear to agree on those basic facts, but disagree over the rate that SWBT should consequently charge MCIm for a LIDB query. SWBT asserted that MCIm has proposed that the rate should be the lowest rate for a LIDB query that can be found in any SWBT state. SWBT proposed that the rate should be the weighted average of the LIDB query rates in the five SWBT states.[883] SWBT claimed that MCIm's approach would reward MCIm and punish SWBT by allowing MCIm to pay the lowest rate anywhere in the region.[884]

SWBT stated that the geographic origin of a LIDB query cannot be identified for the following reasons: (a) SWBT knows what service platform launched the query, because it is to that platform that the response must be returned, but SWBT has no way of knowing where that platform is located; (b) the SS7 protocol that pertains to LIDB queries requires the use of an originating point code and these point codes are the SS7 version of CLLI codes;[885] (c) unlike CLLI codes (which have a state location embedded in them) the coding scheme that standards bodies developed for SS7 does not specify the state, thus when SWBT receives a LIDB query from MCIm the jurisdictional/geographic component of the query is not included, and SWBT is unable to obtain that information from any other source; and (d) databases bill for queries: consequently, no record is made of the telephone number being queried. The only record created is of the type of query that was made.[886]

Therefore, SWBT claimed that only two pieces of information are available for the billing system on database queries: (1) the point code of the query originator; and (2) the company code identifying whose database was accessed. SWBT stated that MCIm does not

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[881] SWBT Exh. No. 6, De Bella Rebuttal at 17.

[882] SWBT Exh. No. 5, De Bella Direct at 22.

[883] *Id.* at 20.

[884] *Id.* at 20-21.

[885] CLLI stands for Common Language Location Identification (CLLI Codes) and are essential to the quick and precise exchange of information that enables interconnection with customers and carriers. A CLLI code is an 11-character standardized geographic identifier that uniquely identifies the geographic location of places and certain functional categories of equipment unique to the telecommunications industry.

appear to disagree with any of these facts.[887] SWBT claimed that the inability to determine the geographic point of origin of a query is not a design flaw on the part of SWBT or MCIm. SWBT stated that the SS7 protocol, which is set by an industry standards body, fails to provide for jurisdictional/geographic information to be passed from the querying party to the queried party.[888]

SWBT asserted that it is inappropriate to use the lowest rate in the five-state SWBT region, as proposed by MCIm, because it would be unfair and inaccurate. SWBT stated that each SWBT operating company in each state has conducted a cost study and submitted it to the appropriate State commission, and each State commission has determined what the state LIDB rate should be. SWBT stated that it would be completely contrary to the purpose of a cost-based pricing approach to allow MCIm to choose the lowest rate in the five-state region, and would result in a waste of the efforts of five states. SWBT claimed that MCIm's approach prohibited SWBT from recovering all of its costs, because Texas is not the state with the lowest rate. SWBT stated that its proposal would, on average, allow proper cost recovery and maintain the relevance of each state's efforts to set prices. SWBT proposed weighing each of the five state's rates according to the percentage of use of each state's data, to create an equitable regional rate.[889]

Arbitrators' Decision

The Arbitrators find that the status quo should be maintained with respect to the rate structure for LIDB query access. The Arbitrators also find that all LIDB query rates should continue to be based upon Texas-specific costs.

The existing MCI Worldcom Agreement requires the parties to weight certain state-specific LIDB rates once cost proceedings have been completed. However, neither SWBT nor MCIm provided any evidence regarding specific-state LIDB rates or weights to be applied thereto. Even though it is plausible that the costs (not rates) could or should be the same across the SWBT five-state serving area given the use of one database, the record is void of state-

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[886] SWBT Exh. No. 5, De Bella Direct at 21.

[887] *Id.*

[888] *Id.* at 21-22.

specific costs or rates. Given the lack of any meaningful information regarding rates and weights, the Arbitrators are reluctant to adopt another scheme to address the technical inability to identify the jurisdictional origin of LIDB queries.

The Arbitrators also reject MCIm's proposal to set LIDB rates at the lowest level found in the SWBT five-state serving area until the identification process of the query origin can be developed. This proposal is clearly one-sided, not supported by any evidence of cost, and fails to accord proper deference to other states' rate setting authority. Moreover, given that the tariffed LIDB query (validation) rate is apparently the same throughout SWBT's five-state serving area, and the likelihood of the utilization of Texas-specific rates in other jurisdictions, the Arbitrators question whether there is any difference in the remaining LIDB rates. It may well be that Texas-specific LIDB rates, the lowest LIDB rates in the five-state area, and the weighted average of such rates are one and the same. On this record, therefore, the parties have failed to provide a basis on which the Arbitrators can rely in altering the reasonable terms adopted in the MCI Worldcom Agreement.

With regard to the CLEC question of whether OS charges reflected in the UNE Pricing Appendix include the charges for LIDB Query access when MCIm uses SWBT's OS platform, the Arbitrators make no decision because the parties adduced no evidence this issue. For these reasons, the Arbitrators affirm the existing rate structure and the continued use of Texas-specific costs when setting LIDB-related rates.

DPL ISSUE NO. 27

SWBT: Should SWBT's OSS Appendix replace the OSS language in UNE Attachments 7 and 8?

CLECs: Should the Commission modify existing language regarding OSS previously approved in Attachment 7 and 8?

CLEC and SWBT Position

Withdrawn or otherwise resolved.

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[889] *Id.* at 22.

DPL ISSUE NO. 28

SWBT: Should the Interconnection Agreement reference the electronic order process for DA service?

CLECs: Given that DA listings are not being submitted electronically, should the interconnection agreement refer to the electronic order process for DA service?

CLEC and SWBT Position

Withdrawn or otherwise resolved.

DPL ISSUE NO. 29

SWBT: Should subscriber listing information restrictions be outlined within the DLI attachment?

CLEC and SWBT Position

Settled or otherwise resolved.

DPL ISSUE NO. 30

SWBT: Should SWBT's Bona Fide Request process and associated language replace the Special Request section?

CLECs: Should SWBT's proposed BFR language replace the Special Request language approved by the Commission in the Mega-Arbitration?

CLECs' Position

a. MCIm

MCIm stated that it would be willing to accept the terms of SWBT's BFR process language contained in SWBT's CLEC Online Handbook. MCIm did not object to submitting a specific form for each Special Request, so long as the form is clear and the information requested does not go beyond that which is reasonable to allow SWBT to respond to a request.[890]

However, MCIm stated that SWBT also proposes to replace the existing Special Request process with 32 paragraphs of new BFR language, most of which does not apply to Texas, starting at section 2.22 of Attachment UNE. MCIm argued that incorporation of language that applies to other states is confusing to those who must interpret, apply, and enforce the

contract.[891] In addition, MCIm asserted that SWBT's proposed new process includes the addition of a direct deposit requirement for which SWBT has provided no justification, and elimination of two provisions from the Special Request process.[892]

MCIm stated that the effect of SWBT's proposal would limit SWBT's obligation to even consider a request to provide certain types of loops via the Special Request process. MCIm further argued, because that process is intended to permit SWBT to consider a request based on factors such as technical feasibility, the entire process is conditional.[893] According to MCIm, there is no need for SWBT to have language in section 4.3 allowing it to unilaterally decide whether to even consider a CLEC's request in the Special Request process.[894]

MCIm argued that SWBT would need to provide a cost study to complement the BFR process that SWBT is attempting to introduce.[895] MCIm explained that only then would it be able to review the cost study and its relationship to the BFR process to determine if SWBT's proposal is appropriate or not.[896]

b. Sage

Sage argued that it appears SWBT wants to replace the existing Special Request provisions in section 2.22 with its 13-State Bona Fide Request process but that SWBT has never addressed this issue with Sage.[897] Sage rejected the use of the 13-State Generic Agreement as a starting point for interconnection because it contained a significant number of provisions that took several steps backward from where Texas was as with the T2A.[898]

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[890] MCIm Exh. No. 17, Direct Testimony of Michael A. Beach at 17 (Beach Direct).

[891] *Id.*at 15-16.

[892] *Id.* at 15. (See Sections 2.22.10 and 2.22.11 of Attachment 6: UNE of WorldCom's proposed Agreement.)

[893] MCIm Exh. No. 1, Price Direct at 61.

[894] *Id.* at 61-62.

[895] MCIm Exh. No. 4, Turner Rebuttal at 25.

[896] *Id.* at 26.

[897] Sage Exh. No. 1, Nuttall Direct at 52.

[898] *Id.*

Sage contended that SWBT's proposed process cannot be used to obtain UNEs that are not listed in FCC rules and that SWBT's proposed process established fees that have not been reviewed for any cost-basis.[899]

SWBT's Position

SWBT explained that in order to be efficient and avoid preferential treatment of one CLEC over another, SWBT needs to have one process to address situations where a CLEC requests a new UNE not covered by the agreement. SWBT argued its proposed language provides a more detailed process that insures a smooth implementation and recovery of the cost for developing a product as specified by MCIm.[900]

SWBT stated that there are two major differences between SWBT's BFR language and the Special Request language: cost recovery and a standard request format.[901] Regarding cost recovery, SWBT explained that the BFR process looks at the evaluation, development, and implementation of the request. Each of these phases of development requires the expenditure of resources by SWBT. SWBT contended that the best method to pay for these expenses is to recover the cost from the party who caused them to occur. According to SWBT, placing the expense on the requestor deters frivolous requests that are intended to consume limited resources but never result in an actual order for service.[902]

Conversely, SWBT argued that the Special Request process has no mechanism to recover these costs unless and until the product is actually purchased by the CLEC.[903] Additionally, SWBT stated that the Special Request process does not provide for a means to recover costs that are incurred by SWBT should the request be determined technically infeasible or if a CLEC simply decides it no longer desires the product it requested.[904]

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[899] *Id.* at 53.

[900] SWBT Exh. No. 9, Hampton Direct at 35.

[901] *Id*.

[902] *Id.* at 36.

[903] *Id*.

[904] *Id*. at 36-37.

SWBT disagreed with MCIm's contention that the BFR process includes an unjustified additional deposit requirement.[905] SWBT explained that the cost recovered by this charge of $2,000 is intended to cover at least a portion of the costs incurred by SWBT to develop a high-level identification of rate structure, terms and conditions, availability of network components, and system changes upon a CLEC's initiation of a BFR.[906] SWBT noted that the deposit is optional and that if the CLEC chooses to pay the deposit, then the amount it pays for the preliminary analysis of the BFR will not exceed $2,000.[907]

SWBT argued that since MCIm chose not to opt into the T2A, MCIm should not be allowed to rely on the inclusion of the Special Request process, as found in the T2A, as justification for the inclusion of that process in the Interconnection Agreement with SWBT.[908] Further, SWBT explained that to the extent its proposed provisions pertain to one or more states other than Texas, the language clearly specifies such, so that anyone who interprets, applies, or enforces the interconnection agreement will be able to ascertain the provisions that apply to Texas.[909]

SWBT opined that proposed section 2.22.2.13 of the BFR process addresses MCIm's concern with regard to a CLEC's ability to pursue dispute resolution in the context of the BFR process. SWBT stated that this provision would allow a CLEC to initiate the resolution of any dispute over a price or cost quote.[910] With regard to MCIm's concern over the shortened time interval, SWBT stated that, given the amount and level of work that must be done, trying to provide a price quote within ten days is extremely difficult and often not possible.[911]

SWBT sought to reassure Sage that it is not attempting to withdraw or change any of the terms of the Sage interconnection agreement through this arbitration. SWBT's witness testified

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[905] SWBT Exh. No. 10, Hampton Rebuttal at 30.

[906] *Id.* at 30-31.

[907] *Id.* at 31.

[908] *Id.* at 28.

[909] *Id.* at 30.

[910] *Id*. at 31.

[911] *Id.* at 31-32.

that SWBT will abide by the terms of the Sage interconnection agreement, including the term reflecting the Special Request process, for the duration of the agreement.[912]

Arbitrators' Decision

MCIm has agreed to use SWBT's BFR process language as outlined in SWBT's CLEC online handbook, as well as SWBT's 5-page BFR/interconnection or network element request application form for Special Requests.[913] SWBT's language is more detailed than the Special Request language and the term "BFR" has become an industry standard.[914] Therefore, the Arbitrators find that the parties agree to use, and the interconnection agreement shall include, language generally implementing these processes.

The Arbitrators further find that SWBT's proposed BFR language appears to provide a reasonable procedure for cost recovery that was lacking in the Special Request language. The Arbitrators find merit in SWBT's reasoning regarding the need for cost recovery in the BFR process and service of all CLECs in a nondiscriminatory manner. SWBT demonstrated that the deposit provided a cost recovery mechanism, deterred frivolous requests, and helped to properly and fairly allocate costs associated with the implementation of a CLEC UNE request. The Arbitrators also find that a standardized process for making such requests helps prevent discriminatory treatment of CLECs.

SWBT's BFR process looks at the evaluation, development, and implementation of the request. By contrast, the Special Request process has no mechanism to recover these costs unless and until the product is actually purchased by the CLEC.[915] Cost recovery, as proposed here, promotes a standardized process for making tailored UNE requests and the Arbitrators find that such a cost recovery process ensures SWBT is compensated for its costs that result from CLEC requests. MCIm, on the other hand, offered no convincing evidence that this process is detrimental to CLECs or that the cost recovery was harmful to CLECs. Therefore, the Arbitrators find it reasonable to accept much of SWBT's proposed BFR language. However, SWBT offered no substantiation for the amount ($2000) of its proposed deposit. Therefore, the

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[912] *Id.* at 32.

[913] MCIm Exh. No. 17, Beach Direct at 17.

[914] SWBT Exh. No. 9, Hampton Direct at 35-36.

maximum amount of the BFR deposit shall be negotiated by the parties or determined in a subsequent cost proceeding.

Based on the discussion above, the Arbitrators adopt, with modifications, SWBT's proposed language, for sections 2.22 – 2.22.2.13, 4.3, 5.2.3.1, 5.2.4.2.2, 5.2.4.3, 5.2.11, 5.2.13, 5.3.1.3, 8.2.1.3, and 9.2.3.3 of UNE Attachment 6 and sections 1.4 and 2.2 of the UNE Pricing Appendix, as set forth in the contact matrix. As discussed in more detail in connection with DPL Issue Nos. 49 and 57, the Arbitrators reject SWBT's proposed 13-state language. In addition, the Arbitrators reject SWBT's proposed language for sections 2.22.14 – 2.22.17 and sections 2.22.2.4 – 2.22.2.5. The Arbitrators adopt, with modifications, MCIm's proposed language for section 2.17.1 of Attachment 6 - UNE, as this language is more complete than SWBT's proposed language. The Arbitrators address SWBT's proposed sections 2.4 and 2.4.1 in DPL Issue No. 3.

DPL ISSUE NO. 31

SWBT: Must SWBT deliver emergency messages for MCIm to end users that have nonpublished numbers at TELRIC rates?

CLECs: Should SWBT be required to deliver emergency messages to end users that have nonpublished numbers for a CLEC at TELRIC rates?

CLECs' Position

MCIm contended that, because SWBT does not provide MCIm with non-published (NP) numbers, MCIm has no way to notify NP subscribers of an emergency when a caller tries to reach them through directory assistance.[916] Moreover, MCIm contended that MCIm is precluded from offering this service itself, because SWBT does not make the directory assistance listing information (DALI) available for NP numbers. Therefore, SWBT should charge a cost-based rate for emergency notification service, and not be unjustly enriched.[917] MCIm asserted that, rather than wanting its own special procedures for Emergency Non-Published Notification Service (ENUM), it merely wants SWBT's procedures in a transparent and easily verifiable format, such as in writing, to reduce the possibility of discrimination. Moreover, MCIm

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[915] *Id.* at 36.

[916] Tr. at 1265; MCIm Exh. No. 5, Lehmkuhl Direct at 23.

[917] MCIm Exh. No. 5, Lehmkuhl Direct at 23.

represented that other SBC companies have reduced this procedure to written form in other states.[918]

SWBT's Position

SWBT contended that NP numbers are private, and it does not release them to its operators, nor to any carrier or end user.[919] SWBT stated that it currently has procedures in place that MCIm utilizes to handle NP emergency message requests. SWBT averred that it provides operator services on a nondiscriminatory basis to all CLECs and their subscribers, and that it is not appropriate for SWBT to treat any CLEC differently than another CLEC or itself. SWBT asserted that MCIm's proposal would have specific procedures for MCIm included in Attachment 18-Mutual Exchange of Directory Listing Exchange.[920]

SWBT contended that it has no obligation to provide any Operator or Directory Assistance services at UNE prices. SWBT explained that its emergency notification service is a special, labor-intensive process that requires a significant amount of time by a supervisor in a SWBT operator service center.[921] SWBT averred that this process should be compensated at the reasonable market-based price on a wholesale basis.[922]

Arbitrators' Decision

The Arbitrators find that SWBT should deliver emergency messages for MCIm to end users that have non-published numbers. Further, SWBT shall deliver such messages at a forward-looking cost-based rate. SWBT provided no evidence that MCIm has any alternatives other than to rely on SWBT for delivering an emergency message to a non-published customer. MCIm cannot provide this service itself because SWBT does not provide the non-published number to any other carriers, even in emergency circumstances. The Arbitrators find that the forward-looking cost-based rate is reasonable because it would duly compensate SWBT for the cost incurred, consistent with the Commission's previous decision in the Mega-Arbitration.

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[918] MCIm Exh. No. 6, Lehmkuhl Rebuttal at 21.

[919] Tr. at 1269-70.

[920] SWBT Exh. No. 16, Rogers Direct at 7-8.

[921] *Id*.

[922] SWBT Exh. No. 17, Rogers Rebuttal at 6-7.

The Arbitrators find MCIm's language appropriate, as the language seeks to establish a transparent, verifiable, and nondiscriminatory procedure that would facilitate the delivery of emergency messages from MCIm end users to SWBT customers with non-published numbers.

DPL ISSUE NO. 32

SWBT: Should SWBT's terms and conditions for billing and collections & deposits be adopted?

CLECs: Should SWBT's proposed changes to the language adopted in the Mega-Arbitration regarding terms and conditions for billing and collections, and deposits be adopted?

CLECs' Position

a. MCIm

MCIm contended that SWBT's proposal to change contract language describing the due date for payments from "within 30 days of receipt of an invoice" to "by the bill due date" creates this absurd possibility of putting MCIm in the position of being delinquent in the payment of bills that have not yet been received.[923] MCIm contended that SWBT uses the argument of legitimately related language to suggest an additional 21 paragraphs of contract language for Billing & Collections and Deposits that are in no way directly related to MCIm's proposed changes in three areas of Attachment 6 to the contract in effect for MCIW.[924]

Although MCIm appreciates SWBT's need to protect itself against non-payment from companies that do not have a payment history with SWBT, MCIm considers SWBT's proposed deposit requirements unreasonable, as applied to MCIm, in light of the parties' ongoing commercial relationship.[925] MCIm argued that SWBT does not require deposits of its retail customers who have established payment history and should not be allowed to do otherwise with competitive carriers.[926]

MCIm also argued that neither the CLEC nor the Commission should be placed in the position of having to examine activity in other states in order to determine whether a deposit is

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[923] MCIm Exh. No. 17, Beach Direct at 18.

[924] *Id.* at 19.

[925] *Id*. at 18.

[926] *Id*.

required in Texas, although SWBT's proposal would require that a CLEC maintain good credit with all SBC affiliates, which could involve operations in 12 other states.[927] MCIm contended that important terms and conditions for services rendered to a CLEC should be provided pursuant to the interconnection agreement, rather than tariffs, as doing so would leave the CLEC without an equal voice in proposing or opposing future changes in terms and conditions.[928] MCIm argued that there is no reasonable rationale for SWBT's proposal that CLECs be required to provide two separate deposits.[929]

b. Sage

Sage argued that it is not aware of any problem with payment of properly sent invoices to SWBT that would necessitate such a change in Sage's Interconnection Agreement, and that unless SWBT can establish a reason to modify this section because of some problem that Sage has caused, SWBT should not be allowed to modify section 8.3.[930]

SWBT's Position

SWBT contended that typically both parties are clear as to when the payment is due, but MCIm's language makes it variable, depending on when they actually receive the bill in the mail.[931] SWBT argued that proposed section 8.1.1 defines late payment interest, and the purpose of the interest and deposit provisions is to protect SWBT against the losses it incurs when it provides services to CLECs that do not pay bills they indisputably owe.[932] SWBT asserted that SBC-owned ILECs have suffered significant losses as a result of such non-payment of bills.[933] SWBT maintained that, under subsections 8.3.5 and 8.3.6, the amount of the deposit is two to four months' of SWBT's projected average monthly billings to the CLEC, while Subsection

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[927] *Id*. at 19-20.

[928] *Id.* at 20.

[929] *Id*.

[930] Sage Exh. No. 2, Nuttall Rebuttal at 35.

[931] SWBT Exh. No. 6, De Bella Rebuttal at 22-23.

[932] SWBT Exh. No. 5, De Bella Direct at 26.

[933] *Id*.

8.3.2.4 excuses the CLEC from the deposit requirement if it has established a good credit history with SWBT.[934]

According to SWBT, MCIm need not be exempted from the deposit requirement as set forth in section 8, because section 8.3.2.4 already takes into account that if the CLEC has established twelve months' good credit history with SWBT, the CLEC does not have to make a deposit.[935] SWBT asserted that it requires deposits from its retail customers and wholesale customers alike, and there is no reason to excuse MCIm from this nondiscriminatory requirement.[936] SWBT argued that MCIm's admission that SWBT is entitled to have deposit provisions in some interconnection agreements, coupled with the fact that SWBT cannot do so if MCIm is not subject to the same deposit provisions, leads to the conclusion that MCIm cannot be exempted from the deposit provisions.[937] SWBT contended that its proposal appropriately distinguishes more creditworthy CLECs from less creditworthy CLECs, a point which SWBT represented has been recognized by the California Commission.[938]

Arbitrators' Decision

The Arbitrators find that SWBT's proposed change in billing due date is unnecessary. The Arbitrators conclude that there is no circumstance in which the bill due date would be less than 45 days from the date on which the bill is sent, regardless of whether the due date is triggered by the postmark of the bill or the date on which it is received. Therefore, the Arbitrators adopt MCIm's proposed language.

On the other hand, the Arbitrators find that inclusion of language regarding deposits is acceptable in this agreement. Although SWBT has agreed that its proposed deposit language will most likely not apply to MCIm, SWBT stated in its brief that a significant number of CLECs in Texas have had outstanding bills, which justifies adding deposit language to the contract. Because contracts are fluid arrangements, the language should hold provisions to cover circumstances that may not exist at any given time, but that can be reasonably anticipated.

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[934] *Id.*

[935] *Id.* at 27.

[936] *Id.*

[937] SWBT Exh. No. 6, De Bella Rebuttal at 21.

[938] *Id.* at 21-22.

Moreover, the Arbitrators deem the inclusion of deposit language commercially reasonable. However, to ensure that no barriers to entry are included in the language, the Arbitrators find that the agreement should provide flexibility for CLECs to meet the requirement. In addition, the Arbitrators have sought to ensure that the amount of the deposit does not constitute a barrier to entry by modifying the language to limit the amount of the deposit required to one-half of the amount of a projected monthly bill for a CLEC not exempted from the deposit requirement. Finally, the Arbitrators reject SWBT's proposed language that would require a CLEC to satisfy the creditworthy requirement with all SBC companies. Accordingly, the Arbitrators adopt MCIm's proposed section 8.1 and SWBT's proposed section 8.3, with modifications as shown in the attached contract language matrix.

DPL ISSUE NO. 33

SWBT: Should SWBT's terms and conditions for Billing Disputes be adopted?

CLECs: Should SWBT's proposed changes to the language adopted in the Mega-Arbitration regarding terms and conditions for billing disputed be adopted?

CLECs' Position

a. MCIm

MCIm contended that the language proposed by SWBT requires MCIm to pay disputed amounts into an escrow account prior to raising any disputes and that failure to do so within 29 days of the bill due date would result in MCIm's waiver of its right to dispute the bill.[939] According to MCIm, SWBT's proposal should be rejected because it is unreasonable and because the terms are not related to the changes MCIm has proposed to Attachment 6.[940] Moreover, according to MCIm, SWBT's proposed language ignores the Commission's continuing jurisdiction over disputes arising under an interconnection agreement. MCIm is willing to negotiate the use of escrow accounts in resolving billing disputes, but objected to the provision that would make a failure to do so a waiver of its right to dispute a bill.[941]

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[939] MCIm Exh. No. 17, Beach Direct at 21 (citing SBC-SWBT's proposed section 9.4.5).

[940] *Id*. at 22.

[941] *Id*.

In addition, MCIm's urged the Arbitrators to reject SWBT's proposal to limit any dispute to billings from the preceding 12 months.[942] MCIm contended that, because of the complexity of the bills it receives from SWBT, a 24-month period is more appropriate. If the Commission agrees with SWBT on this issue, however, MCIm asked that the period for which SWBT can render back-bills be reduced to the same period of time.[943]

According to MCIm, the provisions a CLEC must include in its agreement that are legitimately related to provisions the CLEC seeks to change, as part of its most favored nation exercise under Order No. 50 from Docket No. 16251, are listed in Attachment 26. MCIm argued that SWBT's proposed language should be rejected both because it is unreasonable and because the proposed terms are not related to the changes MCIm has proposed to Attachment 6.[944]

b. Sage

Sage's witness argued that there is no reason to change sections 9.4.4 and 9.4.5 of the General Terms and Conditions, dealing with billing disputes.[945] According to Mr. Nuttall, Sage negotiated these terms and does want to lose the benefit of those negotiations. Specifically, and although it is not clear to Sage that SWBT seeks to change this term, Sage is concerned about any changes to the provision that currently provides that Sage is not required to pay or escrow amounts for charges that both it and SWBT agree arise from incorrect billing resulting from an operations failure.[946] Moreover, Sage rejected SWBT's contention that its proposed modifications to the billing dispute provisions provide clarification. To the contrary, Sage contended that the current method provides a clear method and that no change is required.[947]

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[942] *Id.* at 21.

[943] *Id.* at 21-22.

[944] *Id.* at 22.

[945] Sage Exh. No. 1, Nuttall Direct at 54.

[946] *Id.* at 54-55.

[947] Sage Exh. No. 2, Nuttall Rebuttal at 36.

SWBT's Position

SWBT contended that the language it has added serves to clarify the billing language and thereby helps to avert misunderstandings and disputes.[948] According to SWBT, California adopted SWBT's proposed language and agreed that it provided "additional precision" and "should serve to lessen disputes between the Parties."[949]

Arbitrators' Decision

The Arbitrators find merit in MCIm's argument that SWBT's proposed requirement to pay disputed amounts into an escrow account within 29 days of the bill due date as a condition precedent to raising any disputes is unreasonable. On the other hand, SWBT's proposed language for sections 9.4 and 9.5 does serve to clarify the billing language and the Arbitrators believe that the language generally helps to avoid misunderstandings and disputes. However, given the complexity of the bills sent to MCIm by SWBT, the Arbitrators find that a 12-month time period to allow MCIm to provide SWBT with the disputed information required by section 9.4.5 is more appropriate. Therefore, the Arbitrators adopt SWBT's proposed language with modifications. The Arbitrators reject SWBT's proposed change to section 1.2 of the UNE Price Attachment. SWBT failed to show that the proposed new language is necessary.

DPL ISSUE NO. 34

SWBT: Should SWBT's Disclaimer of Warranty clause be adopted?

CLECs: Should SWBT's proposed changes to the language adopted by the Commission in the T2A and in the MCI WorldCom interconnection agreement regarding disclaimer of warranty be adopted?

CLECs' Position

MCIm argued that section 51.1 of the GT&C is not identified in Attachment 26 as being "legitimately related" to any of the sections of the MCI WorldCom Agreement into which MCIm is "MFN'ing", and therefore, because section 51.1 is not legitimately related to any of the

[948] SWBT Exh. No. 5, De Bella Direct at 27.

[949] SWBT Exh. No. 6, De Bella Rebuttal at 24.

provisions MCIm proposes to amend, the Commission should not allow SWBT to make any changes to this section.[950]

SWBT's Position

SWBT argued that this GT&C clause is "legitimately related" to the UNE sections of the proposed agreement that MCIm seeks to modify because this provision deals with the accuracy of data in the LIDB/CNAM and DAL databases and other SWBT databases that may be provided or accessed by third parties.[951] SWBT contended that this disclaimer of warranty is needed because if third parties intervene to provide or access data, neither MCIm nor SWBT should be required to warrant the actions of that third party in handling the data.[952]

Arbitrators' Decision

The Arbitrators reject SWBT's proposed disclaimer of warranty language. SWBT's proposed language could allow SWBT to avoid liability for LIDB/CNAM errors for which it bears responsibility. The General Terms and Conditions language proposed by MCIm, on the other hand, adequately addresses the disclaimer of warranty that SWBT seeks in instances of negligence or willful misconduct.[953] *The GT&Cs apply generally to all provisions of the agreement, including those that address call-related databases. Therefore, the Arbitrators adopt MCIm's proposed disclaimer of warranty language.*

DPL ISSUE NO. 35

SWBT: Should section 56.2 of the General Terms & Conditions be clarified to include appropriate cross-references in the Interconnection Agreement?

CLEC and SWBT Position

Withdrawn or otherwise resolved.

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[950] MCIm Exh. No. 15, Schneider Direct at 11.

[951] SWBT Exh. No. 6, De Bella Rebuttal at 24.

[952] *Id.* at 24-25.

[953] *See* General Terms and Conditions, Sections 7.0, Liability and Indemnification, and 51.0, Disclaimer of Warranties.

DPL ISSUE NO. 36

SWBT: Is SWBT required to collect, format and deliver paper copies of every emergency number in SWBT to MCIm?

CLECs: MCIm: Should SWBT be required to provide via an electronic feed, emergency public agency numbers to CLECs?

CLECs' Position

MCIm explained that there is actually no dispute regarding receiving paper copies, as MCIm does not want paper copies, but rather is requesting periodic electronic transmission of the information from SWBT.[954] MCIm contended that it is in the public interest for it to receive this information.[955] MCIm disagreed with SWBT's argument that MCIm could readily obtain this information from other sources.[956] MCIm maintained that it wants the information provided by SWBT periodically in electronic format to avoid human or administrative errors.[957]

SWBT's Position

SWBT stated that it is not required to provide this information, lacks the means to administer this type of information for MCIm or any other CLEC, and has no means to ensure that the information is accurate and current. SWBT maintained that the public agency should ensure that their published information is accurate and current, and SWBT should not have this unnecessary burden placed on it.[958] SWBT asserted that it does not provide itself with paper copies of emergency numbers, and the same logic applies to electronic copies.[959]

Arbitrators' Decision

The Arbitrators conclude that the availability of accurate emergency numbers to all local telecommunications carriers serves the public interest. Although SWBT currently provides this information to CLECs, MCIm could not cite a legal requirement for SWBT to provide the

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[954] MCIm Exh. No. 1, Price Direct at 62.

[955] *Id.*

[956] MCIm Exh. No. 2A, Price Rebuttal at 34.

[957] *Id.*

[958] SWBT Exh. No. 5, De Bella Direct at 30-31.

[959] *Id.* at 31; SWBT Exh. No. 6, De Bella Rebuttal at 27.

numbers to CLECs.[960] *Moreover, these emergency phone numbers are available to CLECs without a feed from SWBT. Therefore the Arbitrators conclude that the public interest is best served by SWBT continuing to provide such an electronic feed while CLECs transition, in a non-disruptive manner, to self-provisioning of the numbers. CLECs shall complete the transition within 12 months of this Order.*

Therefore, the Arbitrators adopt MCIm's proposed language, with the addition of language requiring CLECs to self-provision within twelve months, in a non-disruptive fashion, as reflected in the attached contract matrix.

DPL ISSUE NO. 37

CLECs: Absent a billing and collection agreement with MCIm, is SWBT obligated to bill its own retail intraLATA toll customers?

SWBT: Is SWBT obligated to provide retail intraLATA toll to MCIm's customers?

CLECs' Position

MCIm argued that SWBT should be obligated to bill MCIm's local customers who select SWBT as their retail intraLATA toll provider for those intraLATA toll services. MCIm contended that SWBT cannot elect to refuse to provide retail intraLATA toll services to MCIm's local customers.[961] MCIm sought clarification that SWBT must bill its own intraLATA toll customers when SWBT (or SBC) serves as the intraLATA Primary Interexchange Carrier (LPIC) for one of MCIm's local customers, until or unless MCIm affirmatively selects the option available through the Sage/Birch arbitration of providing intraLATA toll through UNEs.[962] MCIm stated that because of the significant anticompetitive impacts associated with selective blocking of customers, SWBT should be required to get permission from the Commission and notify its LPIC'ed customers before any call blocking can occur.[963] MCIm asserted that SWBT expects MCIm to pay for the customers' retail intraLATA toll usage and expects MCIm to bill the end users for the toll calls, despite the fact that SWBT has not approached MCIm about a

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[960] Tr. at 1243.

[961] MCIm Exh. No. 12, Aronson Rebuttal at 4.

[962] MCIm Exh. No. 11, Aronson Direct at 7.

[963] *Id.*

billing and collection agreement.[964] MCIm contended that all LECs, including itself, are subject to the FCC's intraLATA toll dialing parity requirements, which requires them to allow local exchange customers to choose the intraLATA toll provider of their choice.[965] MCIm contended that SWBT's refusal to offer a service offered pursuant to Commission-approved tariffs, presumed available to the public, to a consumer solely because that consumer chooses a CLEC as its local service provider is discriminatory.[966]

MCIm asserted that SWBT's website and tariff provide evidence that SWBT offers retail intraLATA toll services in Texas.[967] MCIm contended that the California Public Utilities Commission ruled in its September 2001 order in the MCIm/Pacific Bell arbitration that in a two-PIC environment, Pacific Bell is a carrier of choice and must provide intraLATA toll service as a retail product to MCIm's local customers if the customer selects Pacific Bell as his or her intraLATA toll provider.[968] MCIm argued that SWBT took the position that MCIm had to deliver intraLATA calls to an IXC in the past, and contended that MCIm typically does so with its UNE-P customers, unless the customers independently choose SWBT as their intraLATA toll provider.[969] MCIm conceded in hearing that it believes it could use SBC Long Distance's LPIC instead of SWBT's LPIC.[970]

SWBT's Position

SWBT contended that any questions regarding the proper scope of SWBT's retail tariffs and SWBT's retail obligations to end users in Texas is a retail issue governed by SWBT's retail tariffs, not wholesale contracts.[971] SWBT maintained that, in accordance with the ruling of this Commission in Docket No. 20755 (the Sage/Birch arbitration), it offers the use of its intraLATA toll network via SWBT's ULS product, which carries MCIm's intraLATA toll calls over the

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[964] *Id.* at 5.

[965] *Id.* at 7.

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

[967] MCIm Exh. No. 12, Aronson Rebuttal at 5-6.

[968] *Id.* at 7.

[969] *Id.* at 7-8.

[970] Tr. at 1236.

[971] SWBT Exh. No. 9, Hampton Direct at 39.

SWBT shared transport network.[972] SWBT argued that, in this scenario, SWBT is providing a wholesale product and appropriately bills MCIm, and that, like all other UNE products that MCIm purchases from SWBT, MCIm is responsible for end user billing.[973] SWBT argued that in those situations where MCIm's end users chose an IXC to carry intraLATA toll traffic, the traffic would not route over SWBT's shared transport network.[974]

SWBT contended that it allows all CLECs to use its shared transport network for the provision of their intraLATA toll traffic.[975] SWBT asserted that CLECs indicate that they are utilizing this wholesale service by populating SWBT's intraLATA LPIC on their end user accounts.[976]

SWBT argued that it does not have an obligation under FTA § 251 to offer an intraLATA toll service directly to MCIm's local service customers because § 251 dictates SWBT's responsibilities to provide wholesale services to MCIm.[977] SWBT contended that the service where SWBT is billing MCIm's end users is a retail service, and, therefore, SWBT's obligation to provide a retail intraLATA toll product to MCIm's end users is an issue that is outside of the requirements of the FTA and this agreement.[978] SWBT asserted that it has made no indication to MCIm that MCIm should be offering its local end users an LPIC option for SWBT intraLATA service, and, therefore, MCIm should not be indicating SWBT as an LPIC choice on any order unless MCIm is availing itself of the results of the Birch/Sage arbitration.[979]

SWBT contended that MCIm's local end users have the ability to choose the interLATA and intraLATA carrier of their choice in the same manner as SWBT end users, with the qualification that the carrier makes itself available for such service.[980] SWBT asserted that this practice is no different from those of other LECs that create various packages of service with

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[972] *Id.* at 38.

[973] *Id.*

[974] SWBT Exh. No. 10, Hampton Rebuttal at 33.

[975] *Id.*

[976] *Id.*

[977] SWBT Exh. No. 9, Hampton Direct at 38.

[978] *Id.* at 39.

[979] SWBT Exh. No. 10, Hampton Rebuttal at 34.

[980] *Id.*

specific discounts for combinations of local and toll services, or from those of IXCs that offer discounts for combinations of interLATA and intraLATA toll.[981] SWBT clarified that SBC Long Distance offers calling plans to end users throughout the state no matter the identity of the local service provider and bills those end users directly for that service, but that SWBT does not offer intraLATA calling plans except to those end users to whom it also provides local service.[982]

Arbitrators' Decision

Under PURA §55.009(c), "[i]f federal law allows all local exchange companies to provide interLATA telecommunications services, the commission shall ensure that a customer may designate a provider of the customer's choice to carry the customer's "0-plus" and "1-plus" dialed intraLATA calls…." Yet, SWBT contended that it provides retail intraLATA toll service only to its own local service customers and it is not available as a choice for CLEC local service customers unless and until SWBT decides to make itself available for that choice.[983] The Arbitrators cannot discern how SWBT is avoiding its obligations under PURA as a CLEC local service customer's provider of choice for intraLATA calls.[984]

SWBT is the dominant carrier in many geographical areas of this state, and SWBT offers intraLATA toll service.[985] Regardless of whether any particular customer receives local service from an ILEC or CLEC, a carrier of intraLATA toll service must offer its service in a nondiscriminatory manner to allow the customer a full range of choices. The only way an intraLATA toll carrier can avoid this requirement is if it is a nondominant carrier and has specific Commission approval to abandon service, pursuant to PURA §§ 52.105 and 52.108.[986] The Commission has previously held that all carriers offering interexchange service, whether on

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[981] *Id.* at 34-35.

[982] *Id.* at 34.

[983] *Id.*

[984] Although MCIm conceded during the hearing that it believes it could use SBC Long Distance's LPIC instead of SWBT's LPIC, SBC Long Distance has not weighed in on the issue, and the Arbitrators do not find the availability of this alternative a substitute for SWBT's compliance with its duty to offer intraLATA toll service to CLEC local service end users.

[985] SWBT appears to suggest that it can tie its local exchange telephone service to its intraLATA toll service. To the extent that SWBT is the dominant carrier for both types of service, such a result could raise anti-trust and other competitive concerns.

[986] *See Complaint of XIT Telecommunications and Technology, Inc. Against AT&T Corporation*, Docket No. 22385, Order at 12 (Jun. 4, 2001) (Docket No. 22385).

an interstate or intrastate basis, must provide this service on a nondiscriminatory basis to all end use customers in the same geographic area in which it is certificated to provide local service, regardless of whether any particular customer is served by an ILEC or a CLEC. In Docket No. 22385, the Commission observed that the FCC's Access Charge Reform Order *sets forth an obligation for IXCs to provide interstate access to all LEC customers within the same geographic area, should the IXC provide service to any LECs customer in that area.*[987] *The Commission held that this "obligation to serve interstate customers applies equally to intrastate customers."*[988] *Consequently, the Arbitrators conclude that SWBT must provide intraLATA toll service to CLEC local service end users.*

In addressing the question of whether SWBT is obligated to bill its own retail intraLATA toll customers absent a billing and collection agreement with MCIm, the Arbitrators note that carriers are free to enter into the Sage/Birch arrangement for such billing. However, the Arbitrators determine that, absent a billing and collection agreement with a LEC, intraLATA toll carriers must bill local service customers of that LEC directly, similar to the Arbitrators' decision in DPL Issues No. 40 and 41.

DPL ISSUE NO. 38

SWBT: Should SWBT's call branding language be adopted?
CLECs: Are the costs for call branding included in the OS and DA per call charges?

CLECs' Position

MCIm initially asserted that call branding charges were included in the OS/DA.[989] During the hearing, MCIm retracted this position and agreed to pay TELRIC prices for branding.[990] MCIm also stated that the provider of OS/DA and branding has to be the same.[991]

MCIm argued that, regardless of whether SWBT's proposed language would actually require MCIm to buy branding from SWBT, SWBT based its argument on its flawed assumption

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[987] Docket No. 22385, Order at 13 (referring to *In the Matter of Access Charge Reform*, CC Docket No. 96-262, Seventh Report and Order and FNPRM (FCC 01-146) (rel. April 27, 2001) ¶ 94).

[988] *Id*.

[989] MCIm Exh. No. 5, Lehmkuhl Direct at 22.

[990] Tr. at 1259, 1262.

that OS and DA are no longer UNEs.[992] MCIm maintained that OS and DA are UNEs to the extent SWBT does not provide customized routing.[993] MCIm argued that, at least until such time as SWBT provides customized routing, OS and DA services must continue to be provided as UNEs and this language should not be stricken from the agreement.[994]

Moreover, regardless of whether or not OS and DA are UNEs, MCIm argued that any services required for the provisioning of OS and DA must adhere to the nondiscriminatory access requirements identified under FTA § 251(b)(3).[995] MCIm stated that for the same or similar reasons stated in DPL Issue No. 24 with respect to DALI, SWBT's proposed market-based price structure for branding of DA and OS services is not cost-based and is discriminatory.[996]

SWBT's Position

SWBT asserted that its language describes the steps that MCIm must undertake to implement branding and acknowledges the price structure for the service.[997] SWBT maintained that when a CLEC chooses SWBT as its wholesale OS and/or DA provider, it is appropriate for the CLEC's subscribers to hear his or her local provider's name when calling 411 or dialing "zero."[998] SWBT asserted that it is a federal requirement for providers of operator services to brand their end users' calls in the provider's name, and customers expect to hear the name of the company that will charge them for the service.[999] SWBT asserted that it makes branding available for its wholesale customers so they can comply with federal rules and differentiate themselves in the local exchange market.[1000]

SWBT explained that section 49.1 identifies each Appendix that contains terms and conditions for branding. Therefore, SWBT proposed that Appendix OS and Appendix DA be

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[991] Tr. at 1259.

[992] MCIm Exh. No. 6, Lehmkuhl Rebuttal at 20.

[993] *Id*.

[994] *Id*.

[995] *Id*.

[996] *Id.* at 20-21.

[997] SWBT Exh. No. 16, Rogers Direct at 8.

[998] *Id.* at 8-9.

[999] *Id.* at 9.

added to this list and that Attachments 7 & 8 be deleted.[1001] SWBT believed that Appendices OS and DA must be referenced in section 49.1 because OS and DA are not UNEs.[1002]

SWBT contended that MCIm's assertions that costs for branding calls are included in the per-call charge for OS and DA services are incorrect.[1003] SWBT stated that branding charges apply to the work involved to record MCIm's unique brand, to update operator switches with MCIm's brand and to determine which brand name to "play" before the MCIm subscriber's call reaches an operator after dialing "zero" or "411".[1004] SWBT stated that charges for OS and DA services (after the call reaches the operator) are based on operator work-second.[1005] According to SWBT, OS/DA services provided by an operator are unrelated to work involved in branding a call before it reaches an operator.[1006] SWBT asserted that MCIm has a mere belief and no evidence to support its position.[1007] SWBT stated that the steps and process involved in CLEC-specific branding of CLEC subscribers' OS/DA calls are reflected in SWBT's proposed language and prices.[1008]

Arbitrators' Decision

In DPL Issue Nos. 25/25A, the Arbitrators concluded that OS/DA will continue to be UNEs because SWBT has not met the condition precedent of providing customized routing that accommodates technologies specified by the CLEC. The Arbitrators reject SWBT's attempt to reclassify call branding costs as based on market pricing. MCIm has stated that branding has to be provided by the same provider that provides OS/DA. SWBT did not provide any evidence to the contrary. The Arbitrators note that MCIm has retracted its position that costs for branding are included in the OS/DA charge and has agreed to accept forward-looking cost-based prices.

[1000] *Id.*

[1001] *Id.*

[1002] *Id.*

[1003] SWBT Exh. No. 17, Rogers Rebuttal at 7.

[1004] *Id.* at 7-8.

[1005] *Id.* at 8.

[1006] *Id.*

[1007] *Id.*

[1008] *Id.*

Accordingly, the Arbitrators conclude that, since OS/DA will continue to be UNEs, call branding will continue to be charged at forward-looking cost-based rates. To the extent that MCIm contends that prices for branding are included in OS/DA charges or that prices listed in the T2A are no longer forward-looking cost-based rates, MCIm is free to raise such specific arguments in a subsequent cost proceeding.

SWBT's proposed changes to section 3 of the DA Attachment 22 are rejected for the following reasons: First, SWBT's proposed section 3.1 contains unnecessary references to SBC-13State. SWBT's proposed language for section 3.1.1 appears to be identical to the language already contained in the MCIm WorldCom agreement. To the extent SWBT urges a change, it has failed to identify that change or persuade the Arbitrators of the need for the proposed change. The Arbitrators also decline to accept SWBT's proposed language for section 3.1.2 because it is an unnecessary reiteration of PURA and Commission rules. In section 3.1.3, SWBT sought to add language referencing Operator Service Questionnaire (OSQ). The Arbitrators have not been persuaded that the parties should be required to use the OSQ and therefore decline to adopt SWBT's proposed change. The language proposed by SWBT for inclusion as section 3.1.4 has already been adopted by the Arbitrators as section 3.3, as explained in connection with DPL No. 21. The inclusion of the same language here would be duplicative and unnecessary and is therefore rejected. SWBT failed to persuade the Arbitrators of the wisdom of removing from section 3.1.5 the term "load." Therefore, the Arbitrators reject SWBT's proposed change. Finally, the Arbitrators decline to add SWBT's proposed section 6.3.1 to Attachment 22. Existing section 6.3 in the MCI Worldcom Agreement allows options for updating DA records "via a local manual service order, T-TRAN, magnetic tape or by any other mutually agreed to format or media." New section 6.3.1 removes these options. No evidence was provided to support removing a CLEC's options.

SWBT's proposed new language for sections 4.1.1, 4.1.3, 4.4.5 and 4.1.5.1 – 4.1.5.1 of the OS Attachment is adopted to the extent it parallels language included in the DA Attachment. Specifically, section 4.1 parallels the language of section 3.1 of the DA Attachment and is adopted. SWBT's proposed section 4.1.1 parallels section 3.1.1 of the DA Attachment and is adopted. The Arbitrators decline to accept SWBT's proposed language for section 4.1.2, which parallels SWBT's proposed section 3.1.2, and likewise is an unnecessary reiteration of PURA and Commission rules. The Arbitrators adopt SWBT's proposed section 4.1.3, with the reference

to the Operator Service Questionnaire deleted, to make the section parallel to section 3.1.1. The Arbitrators decline to adopt SWBT's proposed language for section 4.1.4 because it is identical to language SWBT proposed for section 2.7.2 of the OS Attachment and that the Arbitrators adopted in connection with DPL Issue No. 21. Finally, the Arbitrators adopt SWBT's proposed section 4.1.5.1, with modification to conform to similar language in Section 3.1.4.1 of the DA Attachment.

DPL ISSUE NO. 39

SWBT: Is SWBT required to provide Emergency non-published telephone notification for InterLATA toll numbers?

CLECs: Should SWBT be required to provide emergency non-published telephone notification for interLATA toll numbers?

CLECs' Position

MCIm contended that SWBT should be required to provide emergency non-published (NP) telephone notification for InterLATA toll numbers. MCIm explained that it does not have access to the NP numbers to offer the service itself. MCIm argued that if the NP numbers reside in the SWBT's DA database, then, under the principle of nondiscriminatory access, MCIm should be entitled to the service covering the same numbers available to SWBT. MCIm claimed that it cannot provide the service itself because SWBT refuses to provide NP numbers to MCIm as part of the DALI. Thus, MCIm alleged that it has not alternative but to rely on SWBT to provide the emergency notification.[1009]

MCIm supported SWBT's refusal to provide Emergency Non-published Notification Service (ENUM), if this refusal means that SWBT would block calls for this service to its operators in another state. However, MCIm contended that SWBT has not clarified this language and that SWBT could block the use of this service for people calling from out of state looking for a listing in Texas. MCIm argued that SWBT provides this service to itself, and questioned whether SWBT would refuse such service at the expense of imperiling someone's life or property when the call originated outside of the LATA.[1010] MCIm stated that if SWBT does

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[1009] MCIm Exh. No. 5, Lehmkuhl Direct at 23.

[1010] MCIm Exh. No. 6, Lehmkuhl Rebuttal at 21.

not want to provide this service, perhaps the NP numbers should be released to MCIm for this purpose and MCIm would not need to rely on SWBT for this service at all.[1011]

SWBT's Position

SWBT contended that although it is not required to provide emergency NP telephone notification for interLATA toll numbers, it provides this service for local and intraLATA toll subscribers.[1012] SWBT argued that it does not provide this service for its own subscribers, as it does not and is not permitted to provide such interLATA service. SWBT asserted that this issue is inappropriate to address in a local interconnection agreement arbitration.[1013]

SWBT argued that although it is banned under FTA §272 from providing an interLATA service, it provides this service to any interexchange carrier that buys the service out of its Federal Access Tariff.[1014] SWBT averred that the CLEC Handbook spells out a process that involves not only an operator taking the initial call, but a supervisor handling the emergency and trying to reach the end user over a 30-minute time frame.[1015] SWBT argued that the Commission's decision in Docket No. 19075 prevents SWBT from providing non-published listings to anybody.[1016]

Arbitrators' Decision

The Arbitrators find that SWBT should provide emergency non-published telephone notification for interLATA toll numbers to CLECs at cost-based pricing, and adopt MCIm's language accordingly. Notwithstanding SWBT's argument that it is banned by FTA § 272 from providing interLATA services, the Arbitrators note that SWBT provides emergency non-published notification to any interexchange carrier that buys the service out of its Federal Access Tariff. Moreover, the Arbitrators find that, in interactions between CLECs and ILECs, this service is not an interLATA service. Despite SWBT's arguments that this Commission's

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[1011] *Id.*

[1012] SWBT Exh. No. 16, Rogers Direct at 9-10.

[1013] SWBT Exh. No. 17, Rogers Rebuttal at 8.

[1014] Tr. at 1237.

[1015] Tr. at 1273.

[1016] Tr. at 1269-70.

decision in Docket No. 19075 prevents SWBT from providing non-published listings, the Arbitrators find that there is an existing process for emergency non-published telephone notification in the CLEC Handbook that pre-existed SWBT's entry into the InterLATA toll market.

As in DPL Issue No. 31, SWBT provided no evidence that MCIm has any alternatives other than to rely on SWBT for delivering an emergency message to a non-published customer. MCIm cannot provide this service itself because SWBT does not provide the non-published number to any other carriers, even in emergency circumstances. Consequently, the Arbitrators determine that SWBT is required to provide emergency non-published notification at cost-based pricing, rather than according to SWBT's Federal Access Tariff. The Arbitrators find MCIm's language appropriate, as the language seeks to establish a transparent, verifiable, and nondiscriminatory procedure that would facilitate the delivery of emergency messages from MCIm end users to SWBT customers with non-published numbers.

DPL ISSUE NO. 40

CLECs: Is MCIm's proposed contract language for Alternately Billed Traffic (ABT) reasonable?

a. Should CLECs be required to collect SWBT incollect charges for CLEC-customer accepted third party calls?

b. If the answer to a. is "yes", then should the CLEC be considered SWBT's billing agent for the purpose of collecting the incollect charges?

c. If the answer to b. is yes, then should the CLEC be responsible or liable to SWBT for any in-collect charges that are uncollectible?

d. If the answer to c. is yes, how should the term "uncollectible" be defined?

e. Should the definition of "uncollectible" include fraudulent charges?

SWBT: Should the Commission adopt SWBT's proposed contract language for Alternately Billed Traffic (ABT)?

a. Should MCIm be allowed to recourse any bill as an "uncollectible"?

b. Should the Daily Usage File be used as the standardized record exchange format for alternately billed calls?

c. Should MCIm be required to order blocking of alternately billed calls for end users that fail to pay for such services?

d. Is it appropriate for SWBT to provide specialized settlement and message exchange processes to MCIm?

e. Is it appropriate to exempt certain alternately billed calls from the settlement process?

CLECs' Position

See DPL Issue No. 41.

SWBT's Position

See DPL Issue No. 41.

Arbitrators' Decision

See DPL Issue No. 41.

DPL ISSUE NO. 41

SWBT: Should the Commission reject Sage's Proposed Interpretation of the ABT language in Sage's Interconnection Agreement with SWBT?

Sage: If CLECs are required to bill for alternately billed traffic, including in-collect calls, what should be the contractual terms and provisions for billing and payment of SWBT in-collect charges?

CLECs' Position

a. MCIm

MCIm explained that uncollectible charges are the most visible dispute between SWBT and the CLEC community, but that the existing T2A language is silent on this issue. MCIm recommended that, if the Arbitrators choose not to adopt MCIm's Alternately Billed Traffic (ABT) language, the Arbitrators should interpret the existing T2A language to require the originating party to bear the burden of uncollectible charges, or at least supplement the existing

T2A language on the key issue of uncollectible charges by requiring the parties to develop procedures for debiting uncollectible charges.[1017]

MCIm maintained that recent data shows SWBT has nearly twice as many ABT messages to bill to MCIm end users as MCIm has for SWBT to bill to its customers. This traffic includes a greater mix of high risk ABT, since over 75% of SWBT ABT is prison payphone traffic.[1018] MCIm contended that the party that generates the revenue for the ABT service should bear the burden of uncollectible ABT charges. To do otherwise, MCIm explained, places unwarranted business risk on the billing party when they are not the party generating revenue, earning profit, or providing the telephone service. MCIm added that it should have the same recourse rights that the ILECs demand from IXCs.[1019] MCIm asserted that it is common practice in the IXC industry for the revenue-earning party to bear the burden of uncollectibles.[1020]

MCIm stated that SWBT's proposed language does not clearly define ABT.[1021] As an example, MCIm stated that SWBT's language in Attachment 6 and 10 is so broad that it can include IXC alternately billed calls which are completely unrelated to the interconnection agreement.[1022] MCIm stated further that there is no distinction provided for CATS vs. non-CATS ABT, which require different operational processing.[1023] MCIm stated that its proposed language carefully defines ABT (section 1, Attachment 27) and sets forth the unique processes and settlement (sections 3, 5-9 of Attachment 27).[1024] MCIm added that there is no language in SWBT's proposal that covers both what is and is not included under this billing and collection relationship. MCIm maintains its proposed language in section 2 of Attachment 27 clearly indicates which traffic is and is not covered by this interconnection agreement.

[1017] MCIm Exh. No. 9, Direct Testimony of Mike McKanna at 12-13 (McKanna Direct).

[1018] *Id.* at 17.

[1019] *Id.* at 14.

[1020] *Id.* at 17.

[1021] *Id.* at 23.

[1022] *Id.*

[1023] *Id.*

[1024] *Id.*

MCIm argued that SWBT's proposal does not adequately address MCIm's ABT that is billable to SWBT.[1025] MCIm stated that SWBT has only included language that allows itself or participating ILECs/CLECs to receive payment from MCIm for ABT billable to our end users. MCIm stated that in section 8.2 of Attachment 10, SWBT provides an obtuse reference indicating that MCIm will be compensated by the billing company for its revenue due, but that no further detail or settlement process is provided or set forth in the T2A or supplemental Appendix ABS as to how this is accomplished.[1026]

MCIm disagreed with SWBT's contention that SWBT does not have a relationship with the MCIm end user, asserting that SWBT is allowing its end users to originate calls on their network with the intention of billing the calls to MCIm end users. Thus, argued MCIm, SWBT has the obligation to protect its network by querying the LIDB before completing the operator service call to prevent fraudulent or additional unpaid usage. MCIm asserted that because it cannot suspend or terminate an end user's local service for failure to pay ABT charges from another service provider, it has the exact same leverage for non-payment of ABT as SWBT, that is, requesting SWBT to block the ability of anyone originating calls on SWBT's network to charge or bill the ABT message to the non-paying MCIm ANI.[1027] However, while MCIm agreed with SWBT that blocking is the way to alleviate financial risk due to non-payment, MCIm disagreed that the CLEC holds the "key" to ABT blocking.[1028] MCIm argued that SWBT owns the UNE or resale network that MCIm leases and thus, has the operational ability to block, but simply does not want the responsibility of doing so.[1029] MCIm expressed willingness to give SWBT (and/or any participating ILEC/CLEC) the contractual right to disable the ability for its end users to originate local and intraLATA calls on SWBT's network (and/or participating ILEC/CLECs' networks) and bill the charges to MCIm ANIs that do not pay, have excessive adjustments, or are involved in fraudulent usage.[1030]

[1025] *Id.* at 27.

[1026] *Id.*

[1027] *Id.* at 19.

[1028] *Id.*

[1029] *Id.* at 20.

[1030] *Id.*

MCIm disagreed with SWBT's claim that SWBT may face irreparable harm if the Commission allows MCIm to recourse uncollectibles. MCIm stated that the Centralized Message Data System (CMDS) network could be utilized for the return of adjustments and bad debt, just as it is currently used for the recourse of rejects and unbillables to the transporting ILEC/CLEC (i.e., revenue earning party) or CMDS could utilize the industry standard record types for recoursing adjustments and bad debt through CMDS. MCIm asserted that SBC has a substantial influence among the other BOC members if it wanted to adjust the CMDS system to enable recourse of adjustments and bad debt.[1031] MCIm stated that the issue of whether or not SWBT has the contractual right to charge back recourse items to participating LECs is SWBT's problem and not MCIm's issue if SWBT made a poor business decision when entering into its third party clearinghouse or CMDS arrangements with the participating LECs. MCIm stated that SWBT is trying to play a game of "hot potato", whereby if it pays 100% for traffic through the clearinghouse/CMDS process without the right of recourse for all uncollectibles, it wants to pass the traffic to MCIm and get 100% reimbursement from MCIm with MCIm having no right to recourse uncollectibles.[1032]

MCIm stated that there is no disagreement between the parties about the difference between an unbillable and an uncollectible (the term SWBT uses to describe bad debt), notwithstanding the parties' differing use of the term "uncollectible" appears to generate some confusion.[1033] MCIm contended the real issue is whether the party providing the billing can be reimbursed for all types of recourse items such as rejects, unbillables, adjustments, and bad debt.[1034] MCIm asserted that it is appropriate that both parties can recourse rejects, unbillables, adjustments, and bad debt to the revenue earning company (i.e., transporting or originating LEC).[1035]

[1031] *Id*.

[1032] *Id*. at 20-21.

[1033] MCIm generically refers to rejects, unbillables, adjustments, and bad debt collectively as "uncollectibles," whereas SWBT's use of the term "uncollectible" only incorporates the idea of bad debt as a recourse item.

[1034] MCIm Exh. No. 9, McKanna Direct at 22.

[1035] *Id*.

MCIm opposed SWBT's proposed uncollectible cap of 10%.[1036] MCIm argued there is no valid economic reason for the billing party to absorb any uncollectibles (i.e., rejects, unbillables, adjustments and bad debt), when the billing party is not the revenue earning party and is paid a very nominal fee per message for billing and collection services ($0.05 per message). In addition, it has been MCI's (the IXC's) experience that bad debt on prison payphone traffic averages 15% with a total uncollectible rate of 22%. MCIm stated that, according to recent data from SWBT, more than 75% of its ABT traffic in Texas is prison payphone. With a bad debt cap of 10% and no ability to recourse any other uncollectibles (i.e., rejects, unbillables, and adjustments), MCIm maintained it will lose at least $.41 per prison payphone message billed ($.05 B&C charges – 12% or $.46 unrecoursed uncollectibles).[1037]

MCIm stated that it is not reasonable for SWBT or any other participating ILEC/CLEC to send retroactive or old traffic to MCIm without regard for the age of toll (section 7.1 of Attachment 20).[1038] MCIm stated that its experience indicates that billing traffic records older than 90 days leads to additional customer inquiry, confusion, denial of knowledge and a much greater percentage of overall uncollectibles. MCIm added that the industry standard is 90 days for domestic calls and 180 days for international calls, and that many states have rules indicating that messages more than 90 days old cannot be billed.[1039]

MCIm refuted SWBT's claim that it lacks any information on the customer that would allow SWBT to direct bill the customer. MCIm responded by saying that, if SWBT desires to bill the customer directly, it can purchase billing name and address (BNA) from MCIm. MCIm added that this situation is no different than what is encountered by all IXCs when billing long distance ABT or dial-around traffic (e.g., 10-10-220).[1040]

b. Sage

Sage expressed willingness to bill SWBT's incollect charges and to make reasonable and parity efforts to collect those charges, but solely as a billing and collection agent for SWBT

[1036] *Id.* at 39.

[1037] *Id.*

[1038] *Id.* at 31.

[1039] *Id.*

[1040] MCIm Exh. No. 10, Rebuttal Testimony of Mike McKanna at 14 (McKanna Rebuttal).

under the terms of section 8.3 of Attachment 10 of the Interconnection Agreement.[1041] Sage asserted that it should be considered only SWBT's billing and collection agent as to incollect charges because it is performing no function other than billing and collecting SWBT charges for these calls.[1042] In describing its limited role in the incollect call process, Sage explained that: it provides no service to the end use customer; receives no service from SWBT; has no control over the rates, terms, or conditions for SWBT's tariff collect call services; and has no way of responding to inquiries about the incollect charges since it relies solely upon SWBT's rates messages for billing incollect calls to Sage customers.[1043]

Sage asserted that having the Commission find it to be only a billing and collection agent for SWBT is critical to Sage and that it cannot and should not be held completely financially liable for charges that it flows through at the request of SWBT for services that are provided by SWBT, not Sage.[1044] Sage asserted that, based upon four invoices received from SWBT for incollect charges, the amounts in question total approximately $750,000.[1045]

Sage argued that, as to incollect charges that are uncollectible, Sage should not be held responsible or liable to SWBT, because SWBT should have to bear its own losses for services that SWBT, and not Sage, provided to the end use customer. Sage proposed a definition of "uncollectible" which would exclude charges that Sage cannot collect—either after reasonable and parity collection efforts or if the end use customer is no longer a Sage customer—to ensure that Sage would not be held financially responsible for such charges.[1046] Sage supported the inclusion of fraudulent charges in the definition of uncollectible.[1047]

Sage agreed with SWBT's proposed concept that the end user should be responsible for the Incollect charges. Sage believed this premise is true irrespective of whether the end user is a Sage customer or any other carrier's customer and whether the service at issue is collect calls

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[1041] Sage Exh. No. 1, Nuttall Direct at 28 (Sage defined an incollect call as one that originates from one number and terminates at a different number that is billable to Sage's end use customer).

[1042] *Id*.

[1043] *Id*.

[1044] *Id.* at 10.

[1045] *Id.* at 22.

[1046] *Id.* at 34.

[1047] *Id.* at 34-35.

service or local service or any other service.[1048] Sage stressed, however, that SWBT's proposed ABS appendix does not encourage responsibility of the end users; instead, it shifts the financial burden from SWBT to Sage. There is no difference in the manner that the end user would be affected.[1049] Sage suggested that the Commission should formulate a process that holds the end user accountable for use or acceptance of SWBT's collect services (or services that SWBT has agreed to bill for). Sage noted that the Commission's Interim Order handles that process in a reasonable manner.[1050]

Sage disagreed with SWBT's characterization of its proposed Appendix as "custom-designed" to meet a UNE-P provider's needs.[1051] Sage argued that the only thing that is "custom" about SWBT's proposal is that it is more applicable to UNE-P providers because they rely on the rated DUF records to bill the end user. Sage added the rest of the Appendix is designed to shift the financial responsibility from SWBT to Sage under the "theme" that Sage has a business relationship with its end use customer.[1052]

Sage noted that the CLEC Accessible Letter CLEC 01-210[1053] offered CLECs two different blocking options. Sage believed these options provide a reasonable way to block certain calls from inmate facilities. Sage recognized that this option can only be implemented in SWBT-owned facilities and that as of the hearing on interim relief, SWBT testified that it had implemented the blocking option in only about 60% of its facilities, but Sage believed that this is an appropriate method of blocking and should be implemented in all of SWBT-owned facilities on a permanent basis. Sage noted, however, that the blocking options will not help Sage reduce the amount of uncollectibles.[1054]

Sage concluded that because the SWBT-proposed ABS Appendix is premised on the wrong set of assumptions – primarily that Sage will be financially responsible for all Incollect charges (or up to 90%) – Sage did not believe that "marking up" this appendix would be helpful

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[1048] Sage Exh. No. 2, Nuttall Rebuttal at 5.

[1049] *Id.* at 16.

[1050] *Id.* at 6.

[1051] *Id.* at 13.

[1052] *Id.* at 14.

[1053] Sage Exh. No. 1, Nuttall Direct at Attachment GPN-7.

because it would basically be a rewrite of the appendix from beginning to end. Therefore, Sage recommended that the Arbitrators adopt Sage's proposed amendments to section 8.0 of Attachment.[1055]

SWBT's Position

SWBT asserted that its Alternate Billed Services (ABS)[1056] Appendix is the only valid method for handling the ABS settlement process relevant to MCIm. SWBT argued its ABS Appendix sets forth a clear settlement process and provides detailed definitions and provisions for handling billing via the Daily Usage File (DUF), for addressing billing disputes, for making adjustments, and for ordering blocking. [1057]

SWBT explained that the billing settlement process at issue is a means by which service providers apportion responsibility for payment of charges attributable to their respective end users.[1058] According to SWBT, the process relies on the provision of recorded call detail information to the billing carrier to enable that carrier to bill the end user responsible for the charge.[1059] SWBT testified that call record flows and associated processes are quite different depending on the type of service provider involved.[1060] The ABS settlement process in the proposed SWBT ABS Appendix applies only to UNE-P CLECs like MCIm.[1061] As such, SWBT believed that there is no need to define terms such as "CMDS host" which apply only to settlement for facilities-based CLECs and are, therefore, irrelevant to UNE-P CLECs.[1062] SWBT argued that the established process for UNE-P providers works was custom designed to meet the needs of UNE-P providers, and is universally employed among UNE-P CLECs; therefore, no

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[1054] Sage Exh. No. 2, Nuttall Rebuttal at 27.

[1055] *Id.* at 21-22.

[1056] SWBT Witness June Burgess indicated that "Alternate Billing Services" or ABS, "Alternately Billed Traffic" or ABT and "Alternatively Billed Services" represent the same concept; SWBT's proposed contract language employs the term "Alternate Billed Services," while the parties' Joint DPL refers to "Alternately Billed Traffic" or ABT. *See* SWBT Exh. No. 2, Burgess Direct at 4, n.1. SWBT also indicated that "incollect calls," as they are referred to in Sage's Complaint, are ABS calls. *See Id*. at 19.

[1057] *Id*. at 13; *See also* SWBT Exh. No. 20, Smith Direct at 6.

[1058] SWBT Exh. No. 2, Burgess Direct at 4.

[1059] *Id.*

[1060] *Id.* at 9.

[1061] *Id.* at 6; *See also* SWBT Exh. 20, Smith Direct at 7.

good policy justification exists for one CLEC (MCIm) to be permitted to operate under a different system.[1063]

SWBT maintained that because facilities-based providers have their own switches and do their own call-detail recording, they are able to exchange call records with SWBT through a CMDS hosting arrangement. For intraLATA toll collect calls, SWBT stated it utilizes a settlement process referred to as "Clearinghouse" (CH).[1064]

SWBT noted that the CH process requires identification of the CLEC, either by telephone number or indicator, which is not present with a UNE-P CLEC.[1065] SWBT asserted that, because resellers lack their own switches and cannot, therefore, have their own call detail recording, SWBT simply bills the reselling CLEC for ABS calls just as it bills the CLEC for all other services the CLEC buys from SWBT at a wholesale rate, leaving the reseller to determine how to bill the end user.[1066] SWBT argued the settlement process available for resellers is inappropriate for UNE-P CLECs because the pricing structure is entirely different between resale and UNE-P.[1067] Similarly, for UNE-P CLECs that also have no means of recording call detail on their own, SWBT maintained that it provides ABS call detail recordings in the form of rated messages, which the CLEC then places on its end user's bill. It is SWBT's position that the UNE-P CLEC must reimburse SWBT for the rated messages, but the CLEC is credited a billing and collection fee for billing its end users for the calls.[1068]

SWBT averred that the use of DUF (Daily Usage File) records containing recorded call detail information is the cornerstone of the settlement process for UNE-P CLECs.[1069] SWBT maintained that DUF records, sent electronically by SWBT to CLECs on a daily basis, typically contain multiple types of detailed records, or "messages", showing the date, time and length of call, the originating, terminating, and billing number, among other characteristics. The messages

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[1062] SWBT Exh. No. 2, Burgess Direct at 18.

[1063] *Id.* at 9.

[1064] *Id.* at 7.

[1065] *Id.* at 8.

[1066] *Id.* at 7-8.

[1067] *Id.* at 9.

[1068] *Id.* at 8.

[1069] *Id.* at 9.

for ABS calls are also rated. SWBT stated that, in the case of ABS calls, only those calls that are accepted by the CLEC's end user are included in the DUF. CLECs then use DUF records to place charges on an end user's bill.[1070] SWBT testified that DUF records apply to all CLEC billing, not just to ABS calls, and are universally utilized in the telecommunications industry. DUF records are provided under national exchange message interface (EMI) standards.[1071]

SWBT claimed that, consistent with industry practice in an ILEC-to-ILEC context, SWBT cannot recourse the uncollectible back to the originating carrier.[1072] SWBT disagreed with MCIm's assertion that it is the industry standard for originating carriers to bear the burden of absorbing uncollectible charges. SWBT reiterated that it is MCIm's end user who authorized and accepted the ABS calls. SWBT asserted that it lacks leverage to deal with an MCIm customer who fails to pay, because it lacks the information necessary to enable SWBT to bill the customer, and it lacks the authority to suspend or terminate the end user's local service.[1073]

SWBT further opposed MCIm's definition of the term "uncollectible" as overly broad because it would include rejects, unbillable calls, adjustments, and bad debts. Of particular concern to SWBT were unbillable calls, calls that are never billed to an end user for a variety of reasons, including situations where information is missing from the DUF records. SWBT asserted that in such cases, bill message information can be corrected, enabling SWBT to resubmit the charge. But if unbillables are included under the term "uncollectible" SWBT would never be able to bill for the charge and unbillables represent a large portion of ABS calls historically billed to MCIm.[1074]

SWBT objected to the exemption of certain ABS calls from the settlement process and, in particular, the exemption of calls that originate from a correctional facility.[1075] SWBT stated that MCIm is seeking to exclude several types of calls from the settlement process that are clearly ABS calls, such as: "pay per call" service charges (900 or 976); information charges (sweepstakes, credit cards); charges to cellular services; and messages originating from

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[1070] *Id.*

[1071] *Id.* at 11.

[1072] *Id.* at 14.

[1073] SWBT Exh. No. 20, Smith Direct at 15.

[1074] *Id.* at 16.

correctional facilities.[1076] SWBT argued that, just like other ABS calls, the UNE-P CLEC end user has accepted the call and agreed to assume responsibility for the charge; excluding these calls from the settlement process would simply encourage ongoing non-payment by MCIm end users. SWBT averred that unbilled collect calls from SWBT payphones in correctional institutions account for about 90% of the lost revenues SWBT is facing, costing SWBT millions of dollars.[1077]

In addition, SWBT argued that it was inappropriate for MCIm to exclude the billing of messages that are over 90 days old from the ABS settlement process.[1078] SWBT asserted that regardless of any MCIm internal policy on backbilling, P.U.C. SUBST. R. 26.27(b)(3)(B) allows certificated telecommunications utilities (CTUs) to backbill a customer for an amount that was underbilled, including failure to bill at all, for up to six months from the date the initial error was discovered.[1079]

SWBT contended MCIm has improperly defined what an uncollectible is, which caused its estimated level of uncollectibles to be exaggerated.[1080] SWBT stated that uncollectibles should be defined as charges that have been correctly billed by a CLEC, but through reasonable collection efforts, the CLEC has been unable to collect payments from its end user.[1081] SWBT added that the definition of uncollectibles should not include unbillables, rejects, or adjustments.[1082]

SWBT noted that Sage differs from MCIm in that Sage has existing T2A-based language. Thus, SWBT argued the proper focus for Sage is the T2A and especially Attachment 10, section 8.3 - not the ABS Appendix.[1083] SWBT argued that Sage's end users accept ABS calls and should pay for them. If Sage can recourse uncollectibles, its end users have no incentive to pay

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[1075] SWBT Exh. No. 2, Burgess Direct at 16.

[1076] SWBT Exh. No. 20, Smith Direct at 17.

[1077] SWBT Exh. No. 2, Burgess Direct at 17.

[1078] SWBT Exh. No. 20, Smith Direct at 18.

[1079] *Id*.

[1080] SWBT Exh. No. 3, Burgess Rebuttal at 2-3.

[1081] *Id.* at 6.

[1082] *Id.* at 3.

[1083] *Id.* at 11.

and Sage has no incentive to collect.[1084] SWBT concluded that Sage is the local service provider of its end users, and it is fully responsible for the ABS charges those end users have willingly accepted and authorized.[1085]

SWBT asserted that 900, 976, and other PPC services do not belong in the ABS Appendix or the ABS settlement process. 900 calls by their very nature are not even completed unless the end user accepting responsibility for the call agrees to pay the attendant charges.[1086]

SWBT maintained it is unreasonable to require SWBT to develop a specific type of blocking option so that MCIm's end users could continue to receive IXC collect and third party billed calls. If MCIm is truly serious about minimizing its financial risk on ABS calls, SWBT stated that MCIm will send requests to block its end users that do not pay and abuse this service from receiving all collect and third party billed calls.[1087]

SWBT disagreed with MCIm that it has the same leverage as MCIm on an end user that fails to pay ABS charges. SWBT stated that the end user is MCIm's local service customer, not SWBT's.[1088] SWBT asked the Arbitrators to find that SWBT does not have the business relationship with the end user.[1089]

SWBT objected to an interpretation of the existing Sage/SWBT interconnection agreement that requires SWBT to provide ABS calls to Sage end users at no charge. SWBT stated that it has offered Sage the same ABS Appendix SWBT is offering MCIm, but that Sage has rejected it.[1090] SWBT asserted that Sage fully agreed to all provisions associated with ABS calls by opting into the T2A and operating under this agreement for well over 18 months, since Commission approval on February 2, 2000.[1091]

[1084] *Id.* at 11-12.

[1085] SWBT Exh. No. 21, Smith Rebuttal at 10.

[1086] SWBT Exh. No. 3, Burgess Rebuttal at 13.

[1087] SWBT Exh. No. 21, Smith Rebuttal at 13.

[1088] *Id.* at 23.

[1089] *Id.* at 25.

[1090] SWBT Exh. No. 2, Burgess Direct at 19.

[1091] SWBT Exh. No. 20, Smith Direct at 22.

SWBT maintained that, in the existing Sage/SWBT agreement, section 8.3, Attachment 10 is the primary language governing this issue. SWBT asserted that this language requires Sage to utilize the rated ABS messages it receives from SWBT in the DUF, to place the charges on Sage's end users' bills, and to pay SWBT for the charges, less a billing and collection fee. SWBT claimed that Sage, like MCIm, refused to cooperate with SWBT and bill for ABS calls through alternative means before certain billing system problems preventing SWBT from passing rated messages were corrected. SWBT stated that, since August 8, 2001, it has been providing the rated messages necessary for Sage to bill its end users for ABS calls for which those end users have accepted responsibility for payment and that Sage is now billing its end users for ABS calls pursuant to the Interim Order issued in Docket No. 24593. [1092] Prior to that time, Sage's end users had not been billed for "incollects" or ABS calls; thus, the end users had been able to receive collect calls and other incollect services at no charge. SWBT averred that the interconnection agreement clearly does not envision SWBT's providing incollect services to Sage's end users at no charge.[1093]

Arbitrators' Decision

The Arbitrators take up DPL Issue Nos. 40 and 41 together, but reach slightly different conclusions regarding language for the proposed going-forward interconnection agreements and interpretation of the existing Sage/SWBT interconnection agreement for purposes of resolving their post-interconnection dispute. First, as to the proposed going-forward interconnection agreements, the Arbitrators find that the detail and complexity of the issues related to Alternately Billed Traffic (ABT), the parties' disagreements over even the basic definitions of terms, and the fact that ABT issues involve multiple carriers, not merely the parties to the interconnection agreement, all support a finding that ABT matters should be addressed in a separate billing agreement between the parties and should not be incorporated into an interconnection agreement. Where parties are unable or unwilling to develop a comprehensive billing agreement to address ABT, then the provider of the Incollect or Outcollect services shall bill the end use customer directly.

[1092] SWBT Exh. No. 2, Burgess Direct at 20.

[1093] SWBT Exh. No. 20, Smith Direct at 23.

Regardless of whether, or under what terms, a comprehensive billing agreement is developed external to this interconnection agreement, the parties must provide the information required to facilitate billing by other parties. These requirements, liabilities, and penalties regarding non-performance are detailed in the contract language provided by the Arbitrators.

Further, the Arbitrators reach the following conclusions regarding the specific questions posed by the CLECs:

(a) Yes, CLECs should be required to collect SWBT incollect charges for CLEC-customer accepted third-party calls. The express terms of the T2A, as signed by both Sage and MCI WorldCom, indicate that the CLEC accepted this responsibility.

(b) Yes, the CLEC should be considered SWBT's billing agent for purposes of collecting the incollect charges. Existing § 8.3 of Attachment 10 generally describes an arrangement whereby SWBT will provide rated messages and the CLEC will bill the Incollects in return for a billing and collection fee.

(c) No, the CLEC should not be responsible or liable to SWBT for any Incollect charges that are uncollectible. Section 8.3 of Attachment 10 establishes a billing arrangement only. This conclusion is buttressed by the specification in the contract language of compensation for the CLEC at the rate of $0.05 per billed message. The relatively small amount of compensation paid to the CLEC, while presumably sufficient consideration for billing, defeats the suggestion that CLECs have liability for uncollectible charges.

(d) Uncollectible should be defined to not include rejects, unbillables, or adjustments.

"Uncollectible charges are defined as ABT charges billed to CLEC by SWBT which are not able to be collected by CLEC from CLEC's End Users despite collection efforts by CLEC. This term does not include "rejects", "unbillables," or "adjustments." CLEC is obligated to timely return all rejects and unbillables to SWBT to allow SWBT to correct the bill message information and resubmit the charge for billing."

(e) Yes, the definition of "uncollectible" should include fraudulent charges to the extent that the fraudulent charges otherwise also meet the criteria in the above definition of "uncollectible".

The Arbitrators find that, both under the terms of the existing contract between Sage and SWBT, and as set forth in the interim ruling in Docket No. 24593, it is appropriate for Sage to bill for alternately billed traffic provided by SWBT, the payphone provider, to a Sage end use customer. Regardless of whether Sage received rated DUF messages from the inception of its contract in 1997, the fact remains that Sage agreed to bill its customers in return for a per-record fee. That is not to say, however, that Sage agreed to be fully responsible for all amounts not paid by its customers. The existing contract is silent on this issue, and there is no basis for concluding from the contract's silence that Sage assumed this responsibility. The Arbitrators therefore conclude that Sage agreed only to bill its customers for alternately billed traffic.

SWBT's reliance on its own Accessible Letters is misplaced. The Accessible Letter is a tool used by SWBT to convey to CLECs operational changes to its processes. The Accessible Letter does not vest SWBT with authority to unilaterally change the terms of a bilateral contract.

Given that the Arbitrators have found that Sage is a billing and collection agent and is not responsible for uncollectibles, the Arbitrators conclude that there is no longer a reason to allow Sage (or any other party to the same T2A contract) to unilaterally block calls, either through a toll billing exception or selective blocking from inmate facilities. However, the Arbitrators acknowledge that Sage has been making efforts to redress past billing practices, and has relied upon the availability of selective blocking from inmate facilities. Consistent with the Interim Award in Docket No. 24593 and under this Award, SWBT shall continue to provide selective blocking from inmate facilities to Sage until June 15, 2002. From that date forward, Sage shall bill for all Incollect calls, whatever their source, and it is the obligation of SWBT, upon a showing of non-payment, to request Sage to initiate call blocking, as set forth in the call blocking language set forth below.

The Arbitrators find MCIm's request to "opt out of this entire mess by blocking SWBT-originated ABT,"[1094] *with SWBT bearing the entire cost of developing a blocking mechanism,*

[1094] *See* MCIm's Initial Brief at 46.

patently unfair. Ensuring that customers pay for collect calls they choose to accept, whether or not such calls originate in prison facilities, should be a mutual goal for all competitors. Moreover, allowing MCIm to unilaterally prevent its customers from receiving any SWBT-originated ABT, regardless of a customer's payment history, would not be in the public interest. The Arbitrators conclude that clarification of the responsibilities of the CLEC regarding blocking is needed. Accordingly, the Arbitrators incorporate language for a new Attachment 27-ABT to the interconnection agreement, as shown in the attached contract matrix.

DPL ISSUE NO. 42

SWBT: Should SWBT be allowed to recover the cost associated with call blocking in end offices where AIN is deployed?

CLECs: Should CLEC be responsible for charges incurred when blocking provided by SWBT fails?

CLEC's position

a. MCIm

According to MCIm, whether or not SWBT charges its retail customers for some forms of call blocking is irrelevant to a determination of whether SWBT should be permitted to charge MCIm for those forms of call blocking. MCIm contended that in a UNE environment, unbundled switching already provides the capabilities of provisioning call blocking. Therefore, according to MCIm, no additional charge is required.[1095] MCIm asserted that its position is consistent with the Commission's order regarding call blocking in the Mega-Arbitration and the evidence adduces by SWBT is addressed to cost recovery for call blocking where AIN is *not* deployed rather than where AIN is deployed.

MCIm agreed that SWBT should be allowed to recover the cost associated with call blocking in end offices where AIN is deployed. MCIm further stated that because an AIN solution allows CLECs to avoid replicating all the line class codes when implementing call blocking, the cost of call blocking was already recovered in the query rate, and there is thus no

[1095] MCIm Exh. No. 4, Turner Rebuttal at 26-28.

need for a separate, recurring charge.[1096] MCIm referenced the Appendix Pricing—UNE, Schedule of Prices that the Commission ordered at the Mega-Arbitration in 1997.[1097] The pricing schedule shows a recurring charge of $0.00 and a non-recurring charge of $0.05 for Class of Service Restriction,[1098] the type of call blocking at dispute in this DPL issue. Furthermore, MCIm explicitly stated that the existing charges the Commission established in the Mega-Arbitration suffice.[1099]

MCIm argued that California properly determined that if a carrier makes an error in the provisioning of service for a CLEC, the carrier, including the incumbent, should be responsible for that error and not require the CLEC to pay costs that it would not have incurred if the incumbent had properly implemented the service.[1100] MCIm stated that SWBT might even argue that it should be allowed to recover the cost for UNEs even when it implements call blocking improperly.[1101] MCIm contended that T2A language precluded additional charges for call blocking because the incremental cost associated with call blocking is already recovered via the AIN query cost and the other aspects of local switching that are required for call blocking.[1102]

b. Sage

Sage stated that it was not certain whether this issue deals with blocking of incollect calls or whether it relates to AIN blocking for other types of calls. Sage stated that if the purpose of the issue is to seek a policy decision about whether Sage should have to pay SWBT for an AIN blocking for incollect calls, the answer would be no.[1103] In support of this position, Sage argued that it should not have to pay for a blocking option that is implemented because SWBT does not want to provide collect calls to certain persons or facilities.[1104] Where a blocking option is implemented to reduce the financial risk to SWBT for uncollectible incollect calls, Sage asserted

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[1096] Tr. at 859-60.

[1097] Tr. at 859.

[1098] *See* T2A: Appendix Pricing—UNE, Schedule of Prices at 5.

[1099] *See* MCIm Initial Brief at 48.

[1100] MCIm Exh. 3A, Turner Direct at 58.

[1101] *Id*. at 57-58.

[1102] *Id.* at 56-57.

[1103] Sage Exh. No. 1, Nuttall Direct at 37.

that it, as the billing agent, should not have to pay for blocking options imposed on a SWBT service that are not imposed to benefit Sage.[1105] Sage emphasized that it should not be held financially responsible for a blocking option over which it has neither control, nor independent method to determine whether the option is properly implemented.[1106]

Sage acknowledged that this issue solely relates to AIN blocking for 900, 976, or toll calls. Sage stated that the blocking options used for Incollects are not AIN blocking solutions. Sage urged the Commission to limit its determination on this issue to the disputed AIN blocking issue, and not make policy determinations that go beyond this particular issue.[1107]

SWBT's Position

SWBT contended that at dispute is MCIm's proposed inclusion of language in section 5.2.4.2.1 of the UNE Appendix, which provides that there will be no additional charge for call blocking in offices where AIN is deployed. SWBT argued that it charges its own end users for call toll restriction, and that the Commission should therefore reject MCIm's proposed language.[1108]

SWBT stated that it is not proper for MCIm to opt into T2A language without accepting legitimately relating provisions. SWBT argued that it must utilize resources on behalf of the requesting CLEC in order to provide the blocking/screening. These expenses should be borne by the requesting carrier, not SWBT.[1109] SWBT contended that MCIm failed to acknowledge that the Mega-Arbitration ordered non-recurring charges associated with call blocking of toll calls. SWBT stated that the Commission should reject MCIm's proposed language so that SWBT may recover the costs associated with call blocking in end offices where AIN is not deployed.[1110]

[1104] *Id.*

[1105] *Id.* at 38.

[1106] *Id.* at 38-39.

[1107] Sage Reply Brief at 20.

[1108] SWBT Exh. No. 12, Kirksey Direct at 17.

[1109] SWBT Exh. No. 9, Hampton Direct at 40.

[1110] SWBT Exh. No. 13, Kirksey Rebuttal at 15.

SWBT disagreed with Sage's characterization of why blocking may become necessary and rejected Sage's speculation regarding whether SWBT's blocking is ineffective.[1111]

SWBT agreed with MCIm that there is no recurring charge for AIN.[1112] SWBT further stated that it is only the non-recurring charge for establishing the toll restriction type of call blocking that SWBT is seeking to recover. SWBT commented that the non-recurring charge was waived in end offices where AIN is deployed in the context of the T2A, but that external to the T2A agreement, SWBT incurred a cost for establishing the toll restriction. The non-recurring cost incurred by SWBT was determined by the Commission in the Mega-Arbitration and is TELRIC compliant.[1113]

Arbitrators' Decision

The Arbitrators conclude that MCIm's contract language should be adopted with modifications. SWBT should be allowed to recover its non-recurring cost associated with call blocking for blocking calls in end offices where AIN is deployed consistent with the rates established in the Mega-Arbitration. To the extent SWBT disputes that the rates as established recover the costs for call blocking in end offices where AIN is deployed, it should contest this in a subsequent cost proceeding. Furthermore, the Arbitrators find that CLECs should not be held responsible for charges incurred if blocking fails and it is determined that SWBT implemented the call blocking improperly.

DPL ISSUE NO. 43

SWBT: Should the Separate Affiliate Commitments section apply to all sections of the Agreement?

CLECs: Should a CLEC have the right to opt into a provision of a contract previously approved by the Commission?

CLECs' Position

MCIm asserted that it has the right to opt into section 60 of the General Terms and Conditions (GT&Cs)of the MCI WorldCom Agreement. MCIm disagreed with SWBT's

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[1111] SWBT Exh. No. 3, Burgess Rebuttal at 17-18.

[1112] Tr. at 860 (SWBT witness Hampton, agreeing with MCIm witness Turner).

[1113] Tr. at 861.

proposal to change that provision by adding the following language to the Separate Affiliate Commitments provision, section 60: "This section 60.0 shall only apply to the T2A elected provisions as referenced in section 4.1.1."[1114]

MCIm contended that it is opting into the MCI WorldCom Agreement rather than the T2A. MCIm acknowledged that, in Docket No. 21791, the Commission concluded that MCI WorldCom had "virtually" opted into the T2A. MCIm disputed SWBT's argument that section 60.0 applied only to the T2A; MCIm claimed that, if SWBT believed section 60.0 did not apply to non-T2A provisions, SWBT should have raised that concern in the MCI WorldCom arbitration, during which all of the GT&Cs were at issue. MCIm asserted that it has requested no changes to the GT&Cs in this petition. MCIm further claimed that SWBT made a similar proposal regarding DPL Issue No. 34 – *i.e.*, a proposal to change sections that are not listed in Attachment 26 as being legitimately related to sections that MCIm proposes to amend (based on opting into the MCI WorldCom Agreement).[1115]

MCIm argued that section 60 of the GT&Cs is not identified in Attachment 26 as being "legitimately related" to any of the sections that MCIm proposes to amend.[1116] Thus, MCIm contended that it may opt into section 60.[1117] Furthermore, MCIm claimed that SWBT has not provided any persuasive reason to amend the language previously approved by the Commission in the MCI WorldCom arbitration.[1118]

SWBT's Position

SWBT asserted that MCIm admitted it proposed to adopt only some sections of the T2A, while proposing new and different provisions in a number of areas. SWBT then stated that its T2A offerings, such as section 60, must be tailored to exclude proposed sections not taken from the T2A.[1119]

[1114] MCIm Exh. No. 15A, Schneider Direct at 11-12.

[1115] *Id.* at 12; MCIm Exh. No. 16A, Schneider Rebuttal at 12-13.

[1116] MCIm Initial Brief at 70-71; MCIm Reply Brief at 36.

[1117] MCIm Initial Brief at 71.

[1118] *Id.*

[1119] SWBT Exh. No. 5, De Bella Direct at 27-28.

SWBT challenged MCIm's claim that SWBT cannot change section 60. SWBT argued that MCIm has opened section 60 for negotiation and arbitration through the numerous changes MCIm has requested in other legitimately related areas of the agreement.[1120] SWBT claimed that MCIm's admission that it did not accept the T2A as a whole justifies correction of section 60 to reflect that some sections will no longer be T2A sections.[1121]

SWBT argued in its post-hearing initial brief that MCIm's claims that SWBT cannot revise T2A language (here, section 60 of the GT&Cs) because this section was also present in a prior Commission-approved interconnection agreement must fail.[1122] SWBT asserted that the United States Supreme Court ruled that a carrier attempting to opt in to a prior interconnection agreement under the FTA may be required to accept all language that is "legitimately related" to the desired terms.[1123] SWBT argued that, because MCIm has put at issue many of the other provisions (most notably Attachment 6 - UNE) that are legitimately related to the T2A's GT&Cs, SWBT may propose new language in this arbitration to substitute for section 60.[1124]

Arbitrators' Decision

The Arbitrators find that MCIm may opt into section 60 of the General Terms and Conditions of the MCI WorldCom Agreement, because section 60 is not legitimately related to any provision of either the T2A or the MCI WorldCom Agreement that is being arbitrated. The Arbitrators further find that, even if section 60 were legitimately related to the provisions of the T2A, MCIm would prevail in its effort to arbitrate the contested language in section 60. SWBT has not proven that its proposed language is appropriate, logically related to, or would materially alter SWBT's separate affiliate commitments. In addition, the commitments recited in section 60 arise from FTA § 272. Therefore, SWBT's obligation to comply with these provisions is not contract-based and cannot be defeated by inclusion of SWBT's proposed language. For these reasons, the Arbitrators reject SWBT's proposed language and adopt MCIm's proposed language.

[1120] SWBT Exh. No. 6, De Bella Rebuttal at 25.

[1121] *Id.*

[1122] SWBT Initial Brief at 65.

[1123] *Id.*

[1124] *Id.*

DPL ISSUE NO. 44

SWBT: Under what terms and conditions must SWBT provide its Technical Publications?

CLECs: Should the Commission make changes to language it approved in the Mega-Arbitration regarding SWBT's Technical Publications?

CLEC and SWBT Position

Subsequently settled or otherwise resolved.

DPL ISSUE NO. 45

SWBT: Is MCIm allowed to access SWBT's database at TELRIC rates when acting as an IXC?

CLECs' Position

MCIm argued that FTA § 251(c)(3) allows it to use UNEs for the provision of any telecommunications service including exchange access. MCIm cites the FCC's *Local Competition Order* for the proposition that "section 251(c)(3) provides that carriers may request unbundled elements to provide a telecommunications service, and interexchange services are a telecommunications service."[1125]

SWBT's Position

SWBT claimed that MCIm has wrongly characterized SWBT's proposed language as a "use restriction," because SWBT will provide MCIm, as an IXC, with access to LIDB under a separate arrangement for the purposes that are not covered by this agreement. SWBT thus contended that the Commission should adopt SWBT's proposed section 9.5.2.4 of the UNE Appendix, and reject MCIm's invitation to expand the scope of the parties' interconnection agreement beyond the purpose for which it is intended, i.e., *local* competition.[1126]

SWBT argued that MCIm's reliance on FCC rule § 51.309 as justification for accessing LIDB at TELRIC rates for non-local calls is misplaced.[1127] According to SWBT, MCIm's claim that the rates that apply to its use of CNAM and LIDB databases when MCIm is acting as a local

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[1125] MCIm Exh. No. 5, Lehmkuhl Direct at 15 (citing *Local Competition Order* ¶ 342).

[1126] SWBT Exh. No. 5, De Bella Direct at 25.

[1127] SWBT Exh. No. 6, De Bella Rebuttal at 18 (citing MCIm Exh. No. 5, Lehmkuhl Direct at 15).

exchange service provider in SWBT's incumbent territory should apply to MCIm, regardless of the capacity in which MCIm accesses those databases, ignores the fact that MCIm it is arbitrating an agreement for the provision of local exchange service and exchange access in SWBT's service area, not for any and all telecommunications services throughout the United States.[1128] SWBT stated that it has an obligation under the FTA to provide MCIm this access at discounted, TELRIC-based rates so that MCIm can compete with SWBT as a local exchange carrier. SWBT argued that nothing compels it to offer a discount so that MCIm can better compete with other Texas carriers, with SWBT Arkansas, or with long distance service providers.[1129]

SWBT stated that it will provide MCIm access to LIDB and CNAM to provide interexchange services, only at different tariff or contract rates (and not at the TELRIC rates now applicable for local service provisions).[1130] SWBT claimed that its position does not discriminate against MCIm in any way. SWBT argued that, if anything, MCIm is the carrier demanding unequal treatment; MCIm is seeking to obtain interexchange service at a discount to which it is not entitled, and to which other companies that deal with SWBT in providing other telecommunications services (such as interexchange service) could not and do not receive.[1131]

SWBT claimed that MCIm is wrong to characterize SWBT's proposed language as a "use restriction," because SWBT will provide MCIm, acting as an IXC, with access to LIDB under a separate arrangement for the purposes that are not covered by this Agreement.[1132] SWBT argued, therefore, that the Arbitrators should adopt SWBT's proposed language, and reject MCIm's invitation to expand the scope of the parties' interconnection agreement beyond the purpose for which it is intended, i.e., *local* competition.[1133]

Arbitrators' Decision

The Arbitrators find that MCIm is not entitled to access SWBT's databases at forward-looking cost-based rates when acting as an IXC. This issue is closely related to DPL Issue Nos.

[1128] *Id*. at 18-19.

[1129] *Id*. at 19.

[1130] *Id*.

[1131] *Id*.

[1132] *Id*.

[1133] *Id*. at 19-20.

17 and 18. This issue is not so much a use restriction as characterized by MCIm, as it is a pricing issue. MCIm has sought to obtain toll-related LIDB queries at forward-looking cost-based rates, instead of the applicable tariff rates. The Arbitrators have already rejected this argument by MCIm, and continue to do so here. Therefore, the Arbitrators affirm the existing rate structure and use restriction for local-related LIDB queries and adopt sections 9.4.2.6.3 and 9.4.4.7.3 from the MCI WorldCom Agreement.

The Arbitrators reject SWBT's proposed section 9.4.2.6.2, as there was no evidence submitted to prove that the charges for OLNS and/or LIDB Validation are not included in OS charges. Therefore, the Arbitrators adopt MCIm's proposed section 9.4.2.6.2 with modifications that reflect that no charge will be made for OLNS other than applicable OS charges until evidence is evaluated in a subsequent cost proceeding. As a result, OLNS and Validation queries will be treated similarly. In addition, the Arbitrators reject SWBT's proposed 12-state language, for the same reasons discussed in DPL Issue Nos. 49 and 57. The Arbitrators note that SWBT indicated an objection to section 9.4.7.3 (sic) with regard to this DPL, however, SWBT provided no justification for such opposition.[1134]

DPL ISSUE NO. 46

SWBT: Should SWBT be required to offer Line Class Codes in conjunction with Local Switching?

CLECs: Should the Commission make changes to the language it approved in Dockets 20025 and 20170 regarding the availability of Line Class Codes in conjunction with unbundled local switching?

Is the cost for Line Class Codes included in the cost of the local switching UNE?

CLECs' Position

a. MCIm

MCIm contended that the Commission had already decided this issue in MCIm's favor in Docket Nos. 20025 and 20170.[1135] MCIm asserted that SWBT's proposed language would

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[1134] The record does not reflect language proposed by MCIm in connection with this DPL for section 9.4.7.3 of the UNE Attachment. Section 9.4.7.3 of the *MCI WorldCom Agreement* pertains to LVAS.

[1135] MCIm Exh. No. 1, Price Direct at 63 (citing Docket Nos. 20025 and 20170, *Complaint of Sage Telecom, Inc. and American Local Telecommunications, LLC Against Southwestern Bell Telephone Company*

nullify that prior decision, while the public policy rationale underlying the Commission's previous decision remains valid.[1136]

While MCIm agreed that SWBT was correct in asserting that line class codes (LCCs) are not separately identified as a specific UNE, MCI contended that the FCC rules make clear that the "local circuit switching capability network element" includes all the features, functions, and capabilities of the switch.[1137] MCIm maintained that the Commission recognized that LCCs are the means by which a LEC provides access to the "features that the switch is capable of providing" when the Commission concluded that, "LCCs are included as part of the [switching] UNE."[1138] Then, MCIm contended that the Commission has already found that CLECs are impaired without access to LCCs for EAS.[1139]

MCIm claimed that SWBT's LCCs are not proprietary.[1140] MCIm asserted that SWBT had not demonstrated that its extended area service (EAS) LCCs are protected by patent, copyright, or trade secret law, and thus the appropriate standard is impairment, not necessity.[1141]

b. Sage

Sage stated that the Commission's Award in Docket Nos. 20025 and 20170 included LCCs for optional extended area calling scopes as part of the local switching elements and that implementing language is also found in the T2A.[1142] Sage disagreed with SWBT's claim that its offer of LCCs was voluntary by pointing to the Sage/ALT arbitration, together with the § 271

Regarding Parity Provisioning of One-Way Optional Extended Area Service, and *Petition of American Local Telecommunications, LLC, d/b/a ALT Communications, LLC Against Southwestern Bell Telephone Company Regarding Parity Provisioning of One-Way Optional Extended Area Service*, Arbitration Award *(Sage/ALT Award)* (Mar. 8, 1999)).

[1136] *Id*. at 63-65.

[1137] *Id.* at 63-64 (citing 47 C.F.R. § 51.319(c)(1)(A)(iii) (2001)).

[1138] *Id*. at 64-65 (citing *Sage/ALT Award*).

[1139] MCIm Exh. No. 2, Price Rebuttal at 35-36; *See also Sage/ALT Award* at 9-10 ("The Arbitrators believe the current situation represents an instance that could define a barrier to entry that would not allow a competitor to effectively compete if access to existing optional one-way local calling area LCCs is denied within the SWBT switch.").

[1140] MCIm Exh. No. 2, Price Rebuttal at 35-36.

[1141] *Id.* at 35.

[1142] Sage Exh. No. 1, Nuttall Direct at 49-51.

proceeding requirement that SWBT make arbitration results available to all CLECs.[1143] Sage also contended that no party had asked for LCCs as a separate UNE, thus mooting SWBT's claim that LCCs are not a separate UNE.[1144] Sage further asserted that LCCs are vital to Sage's ability to offer services in rural and suburban areas.[1145] Sage also strongly contested SWBT's apparent attempt to delete LCCs from SWBT's existing interconnection agreement with Sage.[1146]

SWBT's Position

SWBT defined LCCs as software tables within the SWBT switch that identify the types of permissible calls that an end user may originate.[1147] SWBT argued that LCCs are the result of SWBT's product development and are thus proprietary; MCIm could develop its own LCCs or ask SWBT to do so for MCIm through the Bona Fide Request (BFR) process.[1148] The availability of the BFR process, SWBT claimed, demonstrated that CLECs are not impaired without access to SWBT's service-specific LCCs.[1149]

SWBT agreed that SWBT must provide LCCs associated with ULS but not LCCs that were developed specifically to provide a service.[1150] SWBT said that, as required by the FCC's *UNE Remand Order*, SWBT makes available the existing routing tables used for local calling, which include existing line class codes.[1151] SWBT claimed, however, that if CLECs get access to service-specific LCCs, SWBT would be unable to alter or change the existing service without also altering the service provided to the other carriers, thus possibly resulting in arbitrage due to this commingled service offering.[1152]

[1143] *Id.* at 50.

[1144] *Id*.

[1145] *Id*.

[1146] *Id.* at 51.

[1147] SWBT Exh. No. 12, Kirksey Direct at 18-19.

[1148] *Id.* at 18.

[1149] SWBT Exh. No. 13, Kirksey Rebuttal at 16; SWBT Exh. No. 10, Hampton Rebuttal at 36-37.

[1150] SWBT Exh. No. 13, Kirksey Rebuttal at 16.

[1151] SWBT Exh. No. 9, Hampton Direct at 41 (citing *UNE Remand Order* ¶¶ 246-52).

[1152] SWBT Exh. No. 13, Kirksey Rebuttal at 16.

SWBT contested the use of T2A language without taking the entire T2A.[1153] While SWBT opposed MCIm's language for a new interconnection agreement, SWBT insisted it is neither attempting to withdraw or change the terms of its existing interconnection agreement with Sage, nor attempting to alter language in the T2A (or any existing interconnection agreement) or retreat from any of the numerous commitments and agreements that it made in that context.[1154]

Arbitrators' Decision

The Arbitrators conclude that a line class code is a feature, function, or capability of the local switching UNE, unless it is a new LCC custom-configured in response to a CLEC request. This conclusion is consistent with the FCC's statement that "…the term network element includes physical facilities, such as loop, switch, or other node, as well as logical features, functions, and capabilities that are provided by, for example, software located in a physical facility such as a switch."[1155] Relying upon this same language in its Award in Docket Nos. 20025 and 20170, the Commission concluded that all of the LCCs that define both customized or basic calling scopes, once installed in a switch, become part of the available pool of LCCs to choose from when ordering the unbundled switching element.[1156] Moreover, the Commission determined in that same proceeding that a separate, nonrecurring charge was appropriate when a CLEC requests either the continuation of or the addition of an existing "customized" LCC to the switching UNE.[1157]

SWBT acknowledged that it was not aware of any changes in fact or in law on this issue since the decisions reached in Docket Nos. 20025 and 20170.[1158] The Arbitrators reject SWBT's claim that LCCs associated with EAS are a service that is subject to change,[1159] and that a

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[1153] SWBT Exh. No. 9, Hampton Direct at 40-41.

[1154] SWBT Exh. No. 10, Hampton Rebuttal at 36-37.

[1155] *Local Competition Order* ¶ 260.

[1156] *Sage/ALT Award* at 4.

[1157] *Id.*

[1158] Tr. at 1281-82.

[1159] Tr. at 1280-81.

change might cause a "possible conflict."[1160] *The Arbitrators find, as MCIm countered, that the LCC, as configured within the switch, is what allows the differentiation between calling scopes.*[1161] *Based upon the foregoing, the Arbitrators adopt MCIm's proposed contract language. The appropriate cost for any newly-created LCCs will be deferred to a subsequent cost proceeding.*

DPL ISSUE NO. 47

SWBT: Should SWBT be required to provide MCIm with Input/Output (I/O) ports?

CLECs: Are I/O ports part of the features, functions and capabilities of the local switching element?

CLECs' Position

MCIm stated that SWBT should be required to provide I/O ports because such ports provide the interface that is required to deploy viable centralized voice-mail capability over UNE-P.[1162] MCIm explained that I/O ports are required in order to notify customers - via a "stutter dial tone" - that they have a message in the voice-mail system. Absent an I/O port, MCIm's centralized voice mail system would not have the capability to advise customers of such messages.[1163]

MCIm also argued that the FCC defines the local switching UNE as including "[a]ll features, functions and capabilities of the switch…" and that SWBT's argument that the port is not needed to provide local service is irrelevant.[1164] MCIm further stated that this Commission has consistently held that SWBT should not be the "gatekeeper" deciding which services can or should be provided by CLECs, and that SWBT has an obligation to make certain components of its network available for requesting carriers' use.[1165]

MCIm characterized SWBT's legal position regarding this issue as "going back" on the commitments it made to obtain the Commission's support for its FTA § 271 application. Now

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[1160] Tr. at 1282.

[1161] Tr. at 1284.

[1162] MCIm Exh. No. 1, Price Direct at 65.

[1163] *Id*.

[1164] *Id.* at 65-66.

that SWBT's FTA § 271 application has been approved and it has entered the long distance market, MCIm claimed that SWBT is trying to undo as many of its obligations as possible.[1166]

SWBT's Position

SWBT stated that the issue in dispute is whether sections 5.3.1.6 and 5.3.1.7 of the UNE Appendix require it to provide access to I/O ports that function as physical interfaces to SWBT's central office switches.[1167] SWBT stated that I/O ports are not required by MCIm to provide local service.[1168] SWBT claimed that it is not obligated to provide I/O ports as a part of the FTA, but that it had agreed to provide such ports only under the specific terms and conditions of the T2A.[1169] SWBT asserted that it would be inappropriate to require SWBT to provide such functionality outside of the T2A.[1170]

While acknowledging that I/O ports are interfaces to switches, SWBT further claimed that the FTA does not require it to unbundle an "interface."[1171] SWBT stated that voice mail is an "enhanced service" sometimes provided by enhanced service providers (ESP), and argued that voice mail is not "local exchange service," and thus not subject to the unbundling requirements of the FTA.[1172]

SWBT characterized its T2A obligation to provide voice-mail related I/O ports as voluntary and asserted that the FCC had never found that ILECs must provide unbundled access to I/O ports. SWBT also argued that the "necessary and impair" standard must be met before SWBT could be required to offer any additional UNEs. SWBT stated that an I/O port is not a feature of a switch, but is a physical interface to a switch port that is not required to provide local telephone service. [1173]

[1165] *Id.* at 66.

[1166] MCIm Exh. No. 2, Price Rebuttal at 36.

[1167] SWBT Exh. Nos. 12, Kirksey Direct at 19.

[1168] *Id*.

[1169] *Id*.

[1170] *Id*.

[1171] SWBT Exh. No. 13, Kirksey Rebuttal at 18.

[1172] *Id*.

[1173] SWBT Initial Brief at 66-67.

Arbitrators' Decision

The Arbitrators find that the features, functions, and capabilities of the local switching network element include the routing of calls to voice-mail (or Simplified Message Desk Interface, a.k.a. SMDI) related input/output (I/O) ports, and must be provided by SWBT to requesting carriers at forward-looking cost-based rates. This finding is consistent with FCC Rule 51.319(c)(1)(a)(iii) which states that the local switching UNE includes "[a]ll features, functions, and capabilities of the switch…." This finding is also consistent with the FCC's Local Competition Order, which expressly found that the local switching UNE included the capabilities and features associated with various vertical and Custom Local Area Signaling Services (CLASS) services/features.[1174]

The Arbitrators find that requesting carriers, such as MCIm, would be incapable of provisioning a competitive voice-mail service in conjunction with SWBT-provided local switching without access to voice-mail related I/O ports.[1175] *Specifically, requesting carriers would not have the capability to record messages, nor alert customers of such messages in the voice-mail system via a stutter dial tone.*[1176] *The routing associated with voice mail and the associated stutter dial tone can only be provided through voice-mail related I/O ports in the same switch from which the end user customer receives local dial tone. Moreover, the FTA defines network element as a "facility or equipment used in the provision of a telecommunications service" and "the features, functions, and capabilities that are provided by means of such facility or equipment." Voice-mail related I/O ports are clearly a feature, function, and/or capability of the local switching facility and/or equipment used to provide a telecommunications service.*

The Arbitrators find that SWBT's characterizations of its provisioning of voice-mail related I/O ports as voluntary, that I/O ports are physical interfaces, that voice mail is an enhanced service, and that voice mail is not necessary to provide local service are not persuasive. First, SWBT's representation that its provisioning of voice-mail I/O ports is voluntary under the T2A appears to be in error. The Arbitrators note that SWBT had a pre-T2A

[1174] *Local Competition Order* ¶¶ 410-13.

[1175] MCIm Exh. No.1, Price Direct at 65-66.

[1176] *Id.*

obligation to provide such I/O ports pursuant to the 1998 decision in the Mega-Arbitration.[1177] *The Arbitrators find that these I/O ports are not a new or additional UNE, but rather a feature, function, and capability of the facility/equipment providing local switching. Second, the fact that retail, voice-mail service is denoted an "enhanced service" is not dispositive of this issue. The "enhanced service" label merely means that such retail service is not price regulated. As explained above, however, the underlying I/O ports are essential for enabling CLECs to route calls and provide service to voice mail service providers. Thus, while voice-mail related I/O ports are not necessary to provide local telephone service per se, the same could be said of the features, functions, and capabilities associated with other telecommunications services such as vertical and CLASS services/features, yet ILECs are explicitly required to provide such capabilities pursuant to FTA rules and regulation.* [1178] *Consequently, the Arbitrators also reject SWBT's argument that the necessary and impair standard must be met.*

The Arbitrators accordingly adopt the language proposed by MCIm, as reflected in the attached contract matrix.

DPL ISSUE NO. 48

SWBT: Should LVAS interfaces be offered for UNE switch ports?
CLECs: Should SWBT be required to provide CLEC LVAS interfaces for UNE switch ports?

CLECs' Position

MCIm disagreed with SWBT's proposed section 9.4.4.4.1, which speaks to the Service Order Entry Interface for the SBC Pacific, Ameritech and SNET regions, and argued that this language is irrelevant to a Texas proceeding.[1179]

SWBT's Position

SWBT explained that its proposed language captures unique differences in data administration interfaces among SBC's other regions for MFN purposes. SWBT further stated that the proposed language concerns the SBC Service Order Entry Interface to requesting CLECs

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[1177] *See* Mega-Arbitration, Docket No. 17587, Attachment III, Sec. 6.2.1.13, dated 1998.

[1178] *See Local Competition Order* ¶¶ 410-14.

[1179] MCIm Exh. No. 13, Kendall Direct at 8.

that use SBC's local switch ports, and sets forth the differences in Pacific Bell, Ameritech, and SNET data administration interfaces. SWBT claimed that, for MFN reasons, the language should cover other SBC regions.[1180] SWBT argued that the differences in interactive interfaces for Ameritech, Pacific Bell, and SNET need to be referenced in the interconnection agreement for Texas. A carrier that adopts a section of this agreement in another state may thereby have language that correctly addresses the particular interfaces present in those other states.[1181]

SWBT claimed that it is not proposing this language to avoid obligations under the SBC/Ameritech merger conditions. SWBT argued that the merger conditions deal with the ability of carriers to obtain interconnection through an MFN process.[1182] SWBT argued that its proposed language enables this process to be done effectively because it accommodates the differences in the affected states.[1183]

Arbitrators' Decision

The Arbitrators conclude that this issue does not relate specifically to whether LVAS interfaces should be offered for UNE switch ports, as described by the parties in the DPL questions. The parties do not dispute this issue, and the language proposed by both parties indicates that "the Service Order Entry Interface provides CLEC with unbundled access to SWBT's LVAS that is equivalent to SWBT's own service order entry process to LVAS."[1184] The Arbitrators find that SWBT's additional sentence regarding SWBT's provision of the Service Order Entry Interface is accurate and is adopted. The Arbitrators find that SWBT has failed to prove that its proposed additional language regarding 13-state use of LVAS is necessary and appropriate. The differences in data administration that are unique to the various states are irrelevant to this Texas arbitration. On a more general basis, the Arbitrators reject SWBT's 13-state language for the reasons discussed in connection with DPL Issue Nos. 49 and 57. Consequently, the Arbitrators are not persuaded to include 13-state language regarding the

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[1180] SWBT Exh. No. 5, De Bella Direct at 25-26.

[1181] SWBT Exh. No. 6, De Bella Rebuttal at 20

[1182] *Id.*

[1183] *Id.* at 21.

[1184] Joint Exh. No. 1, Joint Contract Matrix at 125.

offering of LVAS interfaces for UNE switch ports in this agreement. Accordingly, the Arbitrators adopt SWBT's proposed language as modified in the attached contract matrix.

DPL ISSUE NO. 49

SWBT: Should the Commission retain language in the contract that addresses interactive interfaces for SNET and Ameritech?

CLECs: Should the language regarding Interactive Interfaces previously approved by the Commission be modified by SWBT to include references to Pacific Bell, Ameritech and SNET?

CLECs' Position

MCIm argued that the references to Pacific Bell, Ameritech, and SNET in SWBT's proposed language are irrelevant to a Texas proceeding. MCIm reiterated its global objection to SWBT's proposed use of its 13-state language.[1185]

SWBT's Position

SWBT argued that the interconnection agreement identifies unique differences in data administration interfaces among SBC's other regions and that the proposed language merely sets forth the differences in Pacific Bell, Ameritech, and SNET data administration interfaces.[1186] SWBT contended that a carrier who adopts a section of the agreement in another state can have language that addresses the particular interfaces present in the other states.[1187] SWBT argued that it is not proposing this language to avoid obligations under the merger conditions, but argued that this language enables a more effective process which accommodates the differences in the affected states.[1188]

Arbitrators' Decision

The Arbitrators conclude that the Commission is without the authority or responsibility to interpret the laws of other states. Moreover, inclusion of language concerning interpretation of the status of the laws of other states adds unnecessary length to the agreement and creates a risk

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[1185] MCIm Exh. No. 13, Kendall Direct at 8.

[1186] SBWT Exh. No. 6, De Bella Rebuttal at 20.

[1187] *Id.*

[1188] *Id*. at 21.

of confusion. Accordingly, the Arbitrators reject SWBT's proposed contract language. The Arbitrators note that the only difference between SWBT's proposed language and MCIm's proposed language is SWBT's proposed reference to other SBC entities. Therefore, the Arbitrators adopt MCIm's proposed language for section 9.4.4.5.1.

DPL ISSUE NO. 50

SWBT: Is SWBT required to treat CLEC loop test reports as its own?

CLECs: Should language regarding MLT testing approved the Commission in the Mega-Arbitration be retained as proposed by MCIm?

CLECs' Position

MCIm argued that language regarding mechanized loop testing (MLT) approved by the Commission in the Mega-Arbitration should be retained as proposed by MCIm. MCIm stated that part of the Commission's endorsement of SWBT's FTA §271 application depended on the availability of workable operations support systems ("OSS").[1189] MCIm opined that there was nothing voluntary about SWBT's requirement to provide MLT and that the requirement remains an important aspect of SWBT's obligations under SWBT's post-271 requirements.[1190]

SWBT's Position

SWBT argued that it should not be required to treat MCIm's tests of loop trouble reports as its own. SWBT explained that it has no way of verifying whether MCIm's test is accurate, unless SBWT performs its own test or actually dispatches a technician to investigate the loop.[1191] SWBT opined that if it is required to respond to MCIm's tests without control over the testing procedures or the ability to conduct its own tests, SWBT may needlessly waste limited resources by making available a technician that otherwise could be addressing actual loop problems.[1192]

SWBT asserted that it would be entitled to cost recovery for dispatching a technician only to discover that the trouble was in MCIm's portion of the network. SWBT opined that if SWBT technicians are tied up on unnecessary dispatches, performance measures for SWBT could be

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[1189] MCIm Exh. No. 1, Price Direct at 66.

[1190] *Id*.

[1191] SWBT Exh. No. 14, Oyer Direct at 19.

violated.[1193] SWBT contended that inaccurate tests by MCIm could adversely affect SWBT's ability to address loop trouble reports efficiently because SWBT only has a limited number of technicians available to dispatch on trouble reports and SWBT claims it constantly strives to limit unnecessary dispatches.[1194]

Arbitrators' Decision

The Arbitrators find that the language proposed by MCIm is consistent with the Commission's conclusions in the Mega-Arbitration that SWBT must provide CLECs with access to mechanized loop tests.[1195] In addition, the Arbitrators find that SWBT did not provide any evidence supporting its argument that performance measures would be violated if SWBT technicians were tied up on unnecessary dispatches initiated as a result of a false CLEC report. Moreover, SWBT conceded that it has mistakenly sent out its own technicians to troubleshoot problems that were nonexistent.[1196] In any event, maintenance costs are already accounted for in the associated UNEs.[1197] The Arbitrators note that SWBT can raise its concerns during the six-month performance review process in Project No. 20400.[1198] Consequently, the Arbitrators do not agree with SWBT's assessment that potentially false reports from CLECs would lead to violations of performance measures for SWBT, or otherwise harm SWBT. Therefore, the Arbitrators adopt the contract language proposed by MCIm.

DPL ISSUE NO. 51

SWBT: May MCIm adopt sections of the T2A without all of the legitimately related terms and conditions?

CLECs: May a CLEC adopt sections of the T2A and be required to also adopt only those sections expressly set forth in Attachment 26 as having been found by the Commission to be

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[1192] *Id.*

[1193] *Id.*

[1194] *Id.* at 20.

[1195] MCIm Exh. No. 1, Price Direct at 66.

[1196] Tr. at 1203.

[1197] *Id.*

[1198] *See Section 271 Compliance Monitoring of Southwestern Bell Telephone Company of Texas*, Docket No. 20400, Order No. 41, Scheduling Workshops on Performance Measurements and Informal SWBT/CLEC Performance Measurement Worksessions (Apr. 4, 2002).

legitimately related terms and conditions to those sections the CLEC wishes to adopt, as set forth in Order No. 50 in Docket 16251?

CLECs' Position

MCIm contended that it should be allowed to opt into or "MFN" (most favored nation) into most of the MCI WorldCom Agreement and negotiate or arbitrate only issues of MCIm's choosing, plus those legitimately related provisions as stated in Attachment 26, without having to negotiate or arbitrate any additional issues raised by SWBT.[1199]

In particular, MCIm said that it opted into the MCI WorldCom (formerly MFS) agreement, except for the following attachments and appendix:[1200]

Attachment 6: UNE

Appendix Pricing UNE – Schedule of Prices

Attachment 10: Provision of Customer Usage Data – UNE

Attachment 18: Mutual Exchange of Directory Listing Information

Attachment 27: Alternately Billed Traffic (new).

MCIm asserted that Attachment 26 identifies provisions that are legitimately related to the provisions into which a CLEC is opting. MCIm argued that, pursuant to Order No. 50 in Docket No. 16251, if a CLEC elects to negotiate and then arbitrate certain provisions, the arbitration is limited to the provisions the CLEC has identified and to the provisions Attachment 26 identifies as legitimately related.[1201] MCIm claimed that this approach is consistent with the Commission's intent, which is reflected in statements made by (a) the Commission in Order No. 50: "CLECs need to know which sets of T2A sections go together;" and (b) a Commission staff person in Docket No. 16251: "It is to everyone's benefit to get some sort of clarity on what is considered Legitimately Related to avoid excess need to have to arbitrate that issue later on."[1202] MCIm asserted that SWBT's "take-it-[all-]or-leave-it"

[1199] MCIm Exh. No. 15, Schneider Direct at 3-6.

[1200] *Id.* at 3-4.

[1201] *Id.* at 4.

[1202] *Id.* at 5.

approach: (a) defeats the intent of Order No. 50 and FTA §252(i), (b) leads to a stalemate in negotiations, and (c) results in a full-fledged arbitration of hundreds of issues.[1203]

MCIm contended that SWBT failed to recognize an important distinction regarding the UNE attachments at issue in MCIm's testimony: MCIm is arbitrating Attachments 6 and 10 of the Commission-approved MCI WorldCom agreement, rather than the T2A.[1204] MCIm recognized that, pursuant to Attachment 26 of the MCI WorldCom Agreement, Attachments 7, 8, and 9 are legitimately related to Attachments 6 and 10 and, because MCIm is seeking to modify UNE Attachments 6 and 10, MCIm cannot opt into Attachments 7, 8, and 9. Nonetheless, MCIm proposed that the Commission approve the related Attachments 7, 8, and 9 as written, because: (a) the Commission found Attachments 7, 8, and 9 to be reasonable only a few months ago, (b) no materially changed circumstances warrant a modification to Attachments 7, 8, and 9; and (c) because SWBT has raised no substantive objections to Attachments 7, 8, and 9.

SWBT's Position

SWBT argued that MCIm is attempting to adopt certain terms from the T2A, or from a T2A-based agreement, without accepting legitimately related terms. That is, SWBT argued that MCIm is not entitled to adopt Attachments 7, 8, and 9, and then seek to modify or replace Attachments 6 and 10 and Appendix Pricing UNE - Schedule of Prices, without regard to Attachment 26. SWBT claimed that T2A Attachment 26 specifically provides that if a carrier desires to adopt any of the T2A UNE provisions or their legitimately related provisions (including Attachments 7, 8, and 9), then that carrier must adopt Attachments 6-10 of the T2A, related Appendices, those general terms and conditions specified in Attachment 26, all applicable pricing, and Attachment 26 itself.[1205] Stated another way, SWBT claimed that, if MCIm wants to negotiate any UNE rates, terms, or conditions, then all UNE rates, terms, and conditions (Attachments 6-10, including associated pricing) are open to negotiation or arbitration.[1206]

SWBT concurred with MCIm by acknowledging that, in approving the T2A, including Attachment 26, the Commission anticipated that some CLECs would "sectionally" adopt from

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[1203] *Id.* at 5-6.

[1204] MCIm Exh. No. 16, Schneider Rebuttal at 3-4.

[1205] SWBT Exh. No. 20, Smith Direct at 26.

the T2A – *i.e.*, opt only into certain portions of the T2A, while at the same time retaining portions of their existing agreements or electing to adopt sections of other Commission-approved interconnection agreements pursuant to FTA § 252(i).[1207] SWBT then argued, however, that this Commission has repeatedly made clear that CLECs are required to accept legitimately related portions of the T2A.[1208] SWBT asserted that this topic was heavily debated in the Project No. 16251 work sessions and in many briefs, and that MCI was one of the most vocal opponents of the "legitimately related" provisions concept. SWBT claimed that MCI recognized that the T2A provisions would not allow the kind of adoption process MCIm now urges, that MCIm presented the issue for decision, and that MCIm lost its policy goal of excluding from the T2A any language setting out agreed "legitimately related" provisions.[1209] SWBT asserted that the Commission addressed this "legitimately related" requirement in Attachment 26 in a way to avoid future arbitrations on which sections of the T2A belong together, and the end result was that CLECs that do not agree to legitimately related terms cannot "bootstrap" into the T2A benefits.[1210]

SWBT stated that the Project No. 16251 collaborators clearly recognized that the UNE sections were "non-separable," and that MCIm's attempt here to "cherry pick" and to separate interrelated, non-severable UNE sections directly contradicts the agreements made in the T2A process.[1211] SWBT noted that the state regulatory commissions in Oklahoma, Kansas, Arkansas, and Missouri have each incorporated Attachment 26 from the T2A into the respective state §271 Agreements, and that the FCC approved the various §271 agreements, including Attachment 26, in approving SWBT's § 271 Applications.[1212] SWBT further claimed that the United States Supreme Court, in *AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366 (1999), specifically found

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[1206] SWBT Exh. No. 21, Smith Rebuttal at 28.

[1207] SWBT Exh. No. 20, Smith Direct at 27.

[1208] *Id.* at 28.

[1209] *Id.* at 29.

[1210] *Id.* at 28.

[1211] *Id.* at 29.

[1212] *Id.* at 31.

that an ILEC can require a requesting carrier seeking to adopt terms pursuant to FTA § 252(i) to accept all terms that it can prove are legitimately related to the desired term.[1213]

Arbitrators' Decision

Although expressly focused on Attachments 7, 8, and 9, the larger issue framed by the parties' statement of this DPL concerns the extent to which MCIm can opt into certain provisions and Attachments of the MCI Worldcom Agreement.[1214] The FCC has said that an ILEC can require a CLEC to accept all terms that it can prove are legitimately related to a requested term.[1215] This determination is reflected in the MFN Policy incorporated into the T2A and MCI WorldCom Agreement as Attachment 26.[1216] Thus, under the FCC's Local Competition Order, and the Commission's Order No. 50 in Docket No. 16251, to the extent that MCIm adopts T2A based attachments/appendices, it is required to accept the terms and conditions identified in Attachment 26 as legitimately related to the terms MCIm seeks to adopt. Conversely, if a CLEC proposes changes to any term, and then seeks to arbitrate that term, it has implicitly chosen to negotiate and arbitrate all terms and conditions identified by Attachment 26 as legitimately related to that term. This finding is consistent with Order No. 50 in Docket No. 16251 which stated "[i]f a CLEC wants to opt into less than the full T2A, and negotiate the remaining provisions under FTA § 252, the Commission's approval process set forth in P.U.C. PROC. R. 22.308 shall apply." This allows the parties to MFN into parts, but not all, of a given interconnection agreement and negotiate and arbitrate remaining provisions, thereby allowing the parties and the Commission to focus on controversial issues, and not arbitrate every detail anew.

MCIm has sought to negotiate and to arbitrate the terms of Attachment 6 - UNE. Pursuant to T2A Attachment 26, Attachments 7, 8, 9, and the UNE Pricing Appendix are legitimately related to Attachment 6. Thus, SWBT is correct in its assertion that MCIm cannot opt into these Attachments. However, MCIm may seek precisely these same provisions through

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[1213] *Id.*

[1214] The parties specifically identified Attachments 6, 7, 8, 9, and the UNE Pricing Appendix. *See* Joint Exh. No. 1, Joint Contract Matrix at 127.

[1215] *Local Competition Order* ¶ 1315.

[1216] *See* T2A, Order No. 50 at 3.

negotiation and arbitration. That is exactly what MCIm has done with respect to Attachments 7, 8, and 9. SWBT, on the other hand, did not address the substance of Attachments 7, 8, and 9. While SWBT's assertion that MCIm cannot opt into these Attachments is correct, SWBT has not provided the Arbitrators with either a basis for rejecting the language of those Attachments, or a preferable substitute for them. Therefore, the Arbitrators find that there is no evidence to suggest Attachments 7, 8, and 9 should not be adopted as proposed by MCIm, and the Arbitrators adopt MCIm's proposed language.

Although MCIm has prevailed in its effort to include the precise terms of Attachments 7, 8, and 9, this outcome is readily distinguishable from permitting MCIm to opt into these provisions and does not defeat the purpose of identifying legitimately related terms and conditions. Procedurally, the parties negotiated and arbitrated the terms of these Attachments and SWBT did not persuade the Arbitrators that it proposed terms preferable to those proposed by MCIm. Thus, MCIm did not avoid the effect of Attachment 26. Rather, SWBT failed to provide a policy basis or evidence that persuaded the Arbitrators to include alternative language.

With regard to the contract language relating to DPL Issue No. 51, the Arbitrators adopt sections 2.1, 13, and 13.1 from Attachment 6 - UNE of the MCI Worldcom Agreement, and reject SWBT's proposed revisions and new SBC-12 State Price and Payment provisions. SWBT adduced neither evidence nor argument regarding these provisions that persuaded the Arbitrators that such changes are necessary. However, the Arbitrators might consider the propriety of such pricing and payment changes in the context of the subsequent cost proceeding, provided the evidence supports such action.

DPL ISSUE NO. 52

SWBT: Should Attachments 6-10, 12, & 18 of this Agreement be considered parts of the T2A?

CLEC and SWBT Position

Settled or otherwise resolved.

DPL ISSUE NO. 53

SWBT: Should SWBT's language that limits the applicability of section 4.2.1 of the General Terms & Conditions to the T2A provisions of this Agreement be adopted?

CLECs: Should a CLEC have the right to opt into a provision of a contract previously approved by the Commission?

CLEC and SWBT Position

Settled or otherwise resolved.

DPL ISSUE NO. 54

SWBT: Is SWBT obligated to waive its rights to the "necessary and impair" test for providing new UNEs or new combinations of UNEs?

CLECs: Should a CLEC have the right to opt into a provision of a contract previously approved by the Commission?

CLEC and SWBT Position

Settled or otherwise resolved.

DPL ISSUE NO. 55

Should SWBT's or MCIm's Intervening Law clause be adopted?

CLEC and SWBT Position

Settled or otherwise resolved.

DPL ISSUE NO. 56

SWBT: Should the Directory Listing Information (DLI) Appendix include specific Breach of Contract language?

CLECs: Should breach-of-contract language be added to the Directory Listing Information (DLI) Appendix or be left as found in the General Terms and Conditions of the agreement?

CLECs' Position

MCIm argued that breach-of-contract language should not be added to the DLI Appendix because the General Terms and Conditions (GT&Cs) already contain breach-of-contract

language that applies to the entire agreement.[1217] MCIm also maintained that SWBT cannot license this public information to MCIm, because SWBT does not and could not have copyright protection for the DLI, according to a decision of the United States Supreme Court.[1218] MCIm contended that SWBT's remedy for a DLI-specific breach should be for SWBT to cease providing DLI updates (because the lack of updates would cause MCIm's then-existing DLI to lose value) and for MCIm to be required to cure the breach as soon as practicable.[1219] MCIm claimed that it would be motivated to cure any breach as soon as possible so as to minimize any claim under the liability and indemnification section of the GT&Cs.[1220] MCIm argued that SWBT's remedy should not be to require MCIm to stop using information that MCIm has already paid for and received.[1221]

SWBT's Position

SWBT argued that the DLI appendix should include specific breach-of-contract language because the generic breach of contract language applicable to the entire contract would not afford SWBT the rights and remedies that should be associated with this specific type of breach. SWBT argued that its proposed language is reasonable because it gives both parties the right to terminate the breaching party's license.[1222] Moreover, SWBT contended that the proposed language is appropriate in order to protect the commercial value of the data and SWBT's potential for monetary loss.[1223]

Arbitrators' Decision

SWBT has not persuaded the Arbitrators of the need for its proposed specific breach of contract language relating to the DLI database. The Arbitrators agree with MCIm that SWBT is adequately protected by the provisions included in the GT&Cs. First, section 10 allows SWBT to

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[1217] MCIm Exh. No. 15, Schneider Direct at 17; MCIm Exh. No. 16, Schneider Rebuttal at 19.

[1218] MCIm Exh. No. 15, Schneider Direct at 17-18; MCIm Exh. No. 16, Schneider Rebuttal at 19-20 (each citing *Feist Publications v. Rural Telephone Service Company*, 499 U.S. 350 (1991)).

[1219] MCIm Exh. No. 15, Schneider Direct at 18; MCIm Exh. No. 16, Schneider Rebuttal at 20.

[1220] MCIm Exh. No. 16, Schneider Rebuttal at 20-21.

[1221] MCIm Exh. No. 15, Schneider Direct at 18; MCIm Exh. No. 16, Schneider Rebuttal at 20.

[1222] SWBT Exh. No. 16, Rogers Direct at 10; SWBT Exh. No. 17, Rogers Rebuttal at 9.

[1223] SWBT Exh. No. 17, Rogers Rebuttal at 9.

discontinue the service in the event of MCIm's non-payment.[1224] *Second, section 9 of the GT&Cs allows SWBT to seek a temporary restraining order. Third, both parties operate under the good faith performance obligation imposed by section 36.1.*[1225]

In addition, the Arbitrators find that the Feist decision casts considerable doubt on SWBT's copyright claims. In any event, SWBT's proposed language prohibiting the use of the DLI database that MCIm has already paid for is over-reaching.[1226] *The Arbitrators agree with MCIm's assertion that the appropriate remedy in the event of its breach is for SWBT to cease providing updates.*[1227] *Accordingly, contract language reflecting this determination is included in the attached contract matrix for new section 9.1 of the DLI Attachment.*

DPL ISSUE NO. 57

CLECs: Should the Commission require a CLEC to include in its interconnection agreement language from SBC's 13-state agreement where the CLEC's agreement applies only to Texas?

SWBT: Are there legitimate reasons for including 13-state language in an interconnection agreement between SWBT and MCIm in Texas?

CLECs' Position

MCIm opposed SWBT's proposed inclusion of language SWBT represented as applicable in one or more of the states in which SBC operates as an ILEC (13-state language). According to MCIm, the inclusion of the 13-state language, couched in terms of alternative applicability, obfuscates which of the myriad provisions actually applies in this agreement.[1228] MCIm argued that SWBT included all of the provisions in an effort to avoid the requirement of the MFN provision for in-region arrangements detailed in paragraph 43 of the FCC's SBC-Ameritech merger conditions, which would require SWBT to offer to all other competitors any provision it voluntarily offered to competitors in Texas, presumably as compared to any provision it has been *ordered* to offer to competitors in Texas.[1229] Indeed, according to MCIm,

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[1224] MCIm Reply Brief at 37.

[1225] *Id.*

[1226] MCIm Initial Brief at 73; Joint Exh. No. 1, Joint Contract Matrix at 133.

[1227] MCIm Initial Brief at 73.

[1228] MCIm Exh. No. 17, Beach Direct at 6-7.

[1229] *Id.* at 7-8.

SWBT has acknowledged that its purpose in inserting multi-state language is to ensure that it would not be bound to offer an arrangement across its entire service area.[1230] Consequently, MCIm claimed that SWBT's strategy not only renders the agreement confusing, but also nullifies the MFN benefits of Order No. 50 in Docket No. 16251, SWBT's FTA § 271 application in Texas.[1231]

MCIm also claimed that SBC-SWBT's inclusion of the 13-state language creates an incentive for gaming by establishing different conditions for different CLECs operating in the various states. As such, MCIm argued that inclusion of the 13-state provisions is unreasonable and constitutes bad faith and therefore violates paragraph 360 of the FCC's Merger Order.[1232]

Finally, MCIm asserted that the parties to this matter have not negotiated, and should not be required to negotiate, the terms for the other 12 states in which SBC operates. Moreover, according to MCIm, the Commission does not have authority to approve contract language that applies only in other states and not in Texas. MCIm suggested that, if the 13-state provisions are included in this agreement, the Commission would improperly be required to determine whether each provision is consistent with decisions rendered by the states in which each provision is presumably applicable, and be burdened with amendment and maintenance of the agreement to track changes and amendments to the agreements entered into in other states.[1233]

SWBT's Position

SWBT contended that it included 13-state language to ensure that SBC's merger conditions are implemented appropriately based on state-specific merger requirements.[1234] According to SWBT, these references provide notice to MCIm and other carriers of the differences in practices across the SBC 13-state region.[1235] SWBT argued that, omission of the language could be confusing and harmful. SWBT claimed that it has presented MCIm with language that clarifies that both parties reserve the right to negotiate terms and conditions

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[1230] *Id.* at 9.

[1231] *Id.* at 8.

[1232] *Id.* at 10-11.

[1233] *Id.* at 12-13.

[1234] SWBT Exh. No. 5, De Bella Direct at 29; SWBT Exh. No. 6, De Bella Rebuttal at 26.

[1235] SWBT Exh. No. 5, De Bella Direct at 29.

applicable to other states. Moreover, SWBT argued that the Commission has previously approved interconnection agreements containing similar references.[1236]

Arbitrators' Decision

The Arbitrators conclude that the inclusion of SWBT's 13-state language unnecessarily complicates the interconnection agreement at issue in this case. The 13-state language is not necessary to this interconnection agreement, and the determination and enforcement of contract provisions between other parties in other states is beyond the jurisdiction of the Commission and outside of the scope of this proceeding. Therefore, the Arbitrators decline to include the language proposed by SWBT and instead adopt MCIm's proposed language, as reflected in the attached contract matrix.

[1236] *Id.* at 30.

VI. CONCLUSION

The Arbitrators conclude that the decisions outlined 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.

SIGNED AT AUSTIN, TEXAS the 29th day of APRIL, 2002.

FTA § 251 PANEL

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BRETT A. PERLMAN
ARBITRATOR

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REBECCA KLEIN
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