

X. Performance Measurements:**1. Should the ICA include performance measurements for § 271 activities?**

CLEC Coalition Performance Measures Issue 1: *What wholesale activities should SBC be required to include in the performance measurement plan?*

SBC's Statement of the Issue: *Whether SBC is legally obligated to include, in this interconnection agreement, performance measures for network elements when SBC is no longer required to unbundled such elements under the Act?*

Discussion:

SBC states that the Commission should decline to consider the CLEC Coalition's issue and its position that SBC's performance measurements ("PMs") must measure § 271 activities.¹ First, SBC states that no CLEC disputes that SBC's Version 4.0 PMs result from comprehensive collaborative workshops in Texas including SBC and many CLEC participants, including at least two members of the CLEC Coalition in Missouri.² Second, SBC states that there is likewise no dispute that the Version 4.0 PMs, as reflected in SBC's PM Appendix, sufficiently capture SBC's § 251 wholesale performance and are intended to ensure that its performance is nondiscriminatory between SBC's wholesale and retail operations.³ Thus, even the CLEC Coalition recommends that the Commission approve the Version 4.0 PMs and incorporate them in the parties' ICAs.⁴ Third, there is no need to measure SBC's § 271 performance. SBC has routinely performed at in excess of 95%. The Coalition concedes that, "with respect to the vast majority of the measures, SBC has met and sometimes exceeded the standards set by the Commission to ensure non-discriminatory treatment of CLECs compared to SBC's delivery of service to its own retail

¹ Sauder Rebuttal, p. 6.

² Dysart Direct, pp. 3-7 & n.1, Schedule WRD-4.

³ Dysart Direct, pp. 4-5, 14.

⁴ Sauder Rebuttal, p. 10.

customers.”⁵

The Coalition responds that the CLECs consider it essential that the measures encompass all of the wholesale services that they rely on in serving their customers, irrespective of whether those services are provided as unbundled network elements under § 251 or § 271 of the Act. SBC proposes to eliminate every measure for any network element that no longer is a § 251 UNE.

SBC is not proposing to eliminate the measures on interconnection trunks, on resold services, or on local number portability, even though these wholesale services are not part of its unbundling requirements under § 251. SBC is proposing to eliminate the measures for UNE-P, and it appears that the measures for high-capacity loops and transport, and for EELs comprised of these loops and transport, presumably would be affected as well. SBC seems to be taking this position on performance measurements because of its opposition to including its unbundling requirements under § 271 in this ICA. The Act requires unbundling of local switching, local loops and local transport under § 271.

The Coalition's focus on PMs is their effectiveness. The Act requires that SBC provide services to CLECs that are in parity with those SBC provides to its retail customers and to its affiliates. The purpose of the PMs is to track SBC's delivery of services to CLECs and facilitate that comparison. The goal of detecting and preventing discriminatory treatment applies equally to network elements obtained under § 251 and § 271 unbundling. The objective always has been to encourage SBC to serve its CLEC wholesale customers at parity with the service quality and timeliness that SBC gives to its own customers so that all users of telecommunications services benefit.

⁵ Sauder Rebuttal, p. 12.

SBC replies that it is beyond this Commission's compulsory arbitration jurisdiction to impose PMs relating to wholesale activities that are not -- or are no longer required to be -- § 251 unbundled network elements.⁶ The courts have recognized that §§ 251 and 271 have different purposes and impose different obligations. Thus, while "Sections 251 and 252 set out procedures to facilitate entry into local service markets[,] § 271 goes "in the other direction" and "sets forth the process a Bell operating company must go through in applying to the FCC for authority to provide long-distance service."⁷ Under this process, "[t]he state commission makes a recommendation, which is merely advisory, as to whether the BOC has satisfied the requirements."⁸ Stated another way, § 271 "contemplates only a consulting, and perhaps investigatory, role for state commissions," and no more."⁹ These differences underscore the carefully prescribed scope of the Commission's § 251 jurisdiction, which does not include imposing § 271-related PMs or, for that matter, PMs applied to wholly voluntary wholesale services. This Commission fully discharged its § 271-related responsibilities when, after devoting extensive time and effort, it performed the consultative function contemplated by § 271(d)(2)(B) of the Act in connection with SBC's long distance application.

In summary, SBC states that the Commission need not consider the CLEC Coalition's lone PM issue. The Coalition presents no performance data or other evidence demonstrating any cause for concern. Furthermore, the Commission does not have sufficient authority to impose § 271-related PMs on SBC.

⁶ Dysart Direct, pp. 8-11.

⁷ *Indiana Bell Tel. Co. v. Indiana Util. Regulatory Comm'n*, 359 F. 3d 493, 495 (7th Cir. 2004).

⁸ *Id.*

⁹ *Indiana Bell Tel. Co., Inc. v. Indiana Util. Reg. Comm'n*, 2003 U.S. Dist. LEXIS 6452, p. 5 (S.D. Ind. Mar. 11, 2003).

Decision:

Contrary to SBC's assertion, the Arbitrator and the appointing state commission are vested with all necessary authority to resolve the open issues brought to the table by the parties. SBC does not deny that it has obligations under § 271. Although this Commission cannot add to those obligations, subtract from them or enforce them, it can arbitrate open issues in the parties' ICAs relating to them.

The Arbitrator concludes that the public interest favors the inclusion in the ICA of performance measurements designed to track SBC's fulfillment of its admitted obligations under § 271. The inclusion of such performance measurements in the ICA would greatly facilitate review of SBC's performance by the FCC if necessary.