

VIII. Poles, Conduits, And Rights-of-Way:

The overriding issue with regard to the disputes concerning poles, conduits and rights-of-way pertains to access to these items and to the costs associated with SBC's efforts to ensure that CLECs' work does not compromise the safety and security of these items. SBC's network is a finite and fixed resource that is shared with the CLEC community; thus, SBC has an obligation to keep its poles, conduits and rights-of-way safe and secure for the benefit of all who rely on them to provide services to their customers.

1. Prior notice of entry:

CLEC Coalition P/C/ROW Issue 1: *Is it reasonable to require CC to notify SBC five days in advance before entering SBC conduit system to perform non-emergency work to allow SBC to schedule its work load appropriately?*

Discussion:

SBC contends that the Commission should approve SBC's proposed language ("5 business days") and reject the language offered by the CLEC Coalition ("48 hours"). The CLEC Coalition offered no testimony rebutting SBC's evidence that requiring notice from a CLEC at least 5 days before the CLEC's entry into SBC's conduit systems, for non-emergency work, best accommodates SBC's work crews, whose schedules are prepared on a weekly basis. Also unrebutted was SBC's evidence that absent this period of notice, SBC would be required to rearrange its crews' work schedules and that additional work would be required of SBC's supervisors to adequately manage these changes in schedules.¹ Finally, the CLEC Coalition did not challenge SBC's evidence that it would be reasonable for the CLEC Coalition to coordinate its own non-emergency work requests on

¹ Atwal Direct, pp. 13-14.

a weekly basis, particularly given that it likely has planned for this work several weeks in advance.²

SBC's request for 5 business days advance notice is both practical and reasonable. Moreover, there is no reason that the CLEC Coalition should enjoy an advance notice period longer than that required of other CLECs.³

Five business days notice is reasonable for non-emergency work. SBC Missouri schedules its work crews on a weekly basis. Unless five business days notice is given, SBC Missouri is put in a position to unnecessarily rearrange the work schedule of SBC Missouri employees for the CLEC Coalition's request. Rearranging work crew schedules to meet the CLEC Coalition's workers for non-emergency work with 48 hours notice is unreasonable. It creates additional work for a crew's supervisor to manage his/her work force. It is reasonable to expect the CLEC Coalition to similarly schedule its work force a week in advance for completing non-emergency work.

Non-emergency work operations should not be handled in an emergency mode. For emergency work operations, SBC Missouri will accommodate requests with shorter notices for CLECs to access SBC Missouri's conduit. SBC Missouri recognizes the need for these emergency, short interval requests and will do its best to meet the need of the CLEC Coalition. However, for non-emergency work, SBC Missouri would like to extend the time requirement for notice to 5 business days, which is both practical and reasonable. The CLEC Coalition should be able to coordinate its non-emergency work requests on that basis, particularly given that a CLEC likely has planned for this work several weeks in advance. The request for five business days advance notice is both practical and reasonable. For the reasons given above, this Commission should adopt SBC Missouri's proposed language.

The CLEC Coalition contends that the Commission should adopt language providing that the CLEC will notify SBC not less than 48 hours in advance before entering SBC's conduit system to perform non-emergency work. The CLECs' position is that such

² Atwal Direct, p. 14.

³ Atwal Direct, pp. 13 -14.

operations shall be conducted during normal business hours except as otherwise agreed by the parties. The CLECs further state that the notice shall state the general nature of the work to be performed. As a courtesy, the CLEC shall, when feasible, provide SBC with 10 working days advance notice before entering SBC's conduit system. The CLECs state that they are unaware of any specific problems under the parties' existing contract language that would justify a five day delay for CLEC to complete non-emergency repairs. The current language requiring CLEC to provide 48 hours notice is reasonable. The existing notice period has been in place and working well for at least the last three years. SBC has provided no compelling reason to justify a five-day delay for CLEC to begin work on non-emergency repairs. The 5 business day requirement proposal by SBC is excessive and discriminatory.

Decision:

The Arbitrator finds the direct testimony of SBC witness Rajinder Atwal to be persuasive.⁴ The Arbitrator concludes that SBC's language should be adopted.

2. Who should bear the cost of making sure that work is done correctly?

AT&T P/C/ROW Issue 2: *Should the cost of a single SBC Missouri employee who will review AT&T's maintenance work be shared by the parties or paid for by AT&T?*

CLEC Coalition P/C/ROW Issue 2: *Which party shall bear the cost of ensuring that work performed in manholes and SBC's conduit system by CC or personnel acting on CC's behalf is done correctly?*

SBC's Statement of the Issue: *Which party shall bear the cost of an SBC employee or representative that is on site ensuring that work performed in manholes and SBC Missouri's conduit system by AT&T is in compliance with industry standards and safety practices, as well as ensuring that SBC Missouri's network is secure?*

⁴ Atwal Direct, p. 13, lines 13-18, and p. 14, lines 1-7.

Discussion:

SBC states that the Commission should approve SBC's proposed language that would require AT&T and the CLEC Coalition to "reimburse SBC Missouri for costs associated with the presence of an SBC-authorized employee or representative" when these CLECs "enter or perform work within SBC Missouri's conduit system."⁵ AT&T and the CLEC Coalition do not dispute that SBC may have a representative present while the work is being performed – they dispute only who should pay for the associated costs.

SBC asserts that AT&T's opposing position is untenable. While AT&T says that it "has offered to pay half" of the associated costs,⁶ such cost allocation terms are conspicuously absent in AT&T's proposed language, which otherwise mirrors SBC's except with regard to reimbursement. Likewise unacceptable is the CLEC Coalition's proposed language; while it would require the CLEC Coalition to "share the cost of a single SBC Missouri employee," it is unacceptably vague because it does not identify any method for determining how the costs would be shared. Likewise unacceptably vague is its proposed language that SBC would absorb all the costs only where SBC's presence "is integral for the successful completion of the work."

SBC owns and is ultimately responsible for the maintenance of the conduit systems, as well as most, if not all, of the cables and air pressure piping, and SBC and CLECs other than those complaining here rely on these systems. SBC identified specific examples of poor craftsmanship by CLECs and the need to ensure that such instances do not affect other users of SBC's conduit system.⁷ It identified instances in which spare

⁵ Atwal Direct, pp. 19-23; Atwal Rebuttal, pp. 5-8.

⁶ Henson Direct, p. 6.

⁷ Atwal Direct, p. 21.

conduit was wasted due to poor rodding work, which resulted in additional future work. On other occasions, cables or inner ducts have been racked, or formed, around the side of a manhole that blocked access to the spare conduits, or existing splices located in the manhole. There have been instances where contractors have climbed on racked cables, which could or may have resulted in damage to the splices and or cables.”⁸ Neither AT&T nor the CLEC Coalition denied that these specific instances had occurred. SBC’s required presence during a CLEC’s work is caused by the installation of a CLEC’s facilities. Since the CLEC is the cost causer of the review, it should bear the cost of the SBC representative on site.⁹

Importantly, SBC conducts inspections of its own contractors’ work to ensure that it is performed properly. SBC only seeks to treat work performed by or on behalf of AT&T and the CLEC coalition in the same manner.¹⁰

AT&T responds that there is no disagreement that AT&T’s personnel working in SBC’s conduit systems must be properly certified based on industry standards and that AT&T contractors will be pre-approved by SBC to do the type of work involved. This requirement is contained in the existing ICA between the parties at section 6.11(e) of the ICA Appendix, Poles, Conduits, & ROW. The disagreement between the parties in this issue is who should incur the cost of additional personnel that SBC, in its discretion, deems necessary to be present to review work performed by AT&T’s properly qualified and trained personnel.

⁸ Atwal Direct, p. 21.

⁹ Atwal Direct, p. 20; Atwal Rebuttal, p. 8.

¹⁰ Atwal Direct, p. 22.

If SBC, at its own option and for its own reassurance, sends its employees to review the work performed by certified AT&T personnel, then SBC should, at a minimum, share the costs associated with such employee or contractor.¹¹ SBC's proposed language allows it to drive up CLEC costs when it has not claimed or established that AT&T does not use good workmanship when performing work in manholes and the like.¹² If SBC voluntarily and without cause chooses to send personnel to observe AT&T's work, it should, in fact, bear the entire cost. Thus, AT&T has suggested a reasonable compromise in agreeing to pay half the cost of a cost that AT&T does not even believe is unnecessary.

The CLEC coalition states that its proposed language in this issue is identical to the existing ICA language at section 6.11(e) of the ICA Appendix, Poles, Conduits, & ROW. In fact, the CLECs' proposed language is also found in the M2A, which was a product of a collaborative industry effort that included SBC and was approved by the Missouri Commission and has been in place between SBC and CLECs for at least the last several years. As such, SBC bears the burden to demonstrate why the existing language should be changed. SBC has provided no compelling reason to justify why all the costs associated with its own verification of the Coalition's work should be borne solely by the CLECs in all instances.

The Coalition further notes that the Texas PUC recently adopted the language proposed by AT&T on this ROW issue as part of the Texas proceedings on a successor ICA between the parties.¹³ the Coalition thus urges the Commission to adopt its proposed language, that represents a compromise between the parties' positions.

¹¹ Henson Direct at 5.

¹² *Id.*

¹³ Texas PUC Docket No. 28821, Arbitration Award—Track 1 Issues, ROW Issue 3 (February 22, 2005).

Decision:

The Arbitrator finds that it is unreasonable for AT&T and the CLECs to bear all of the costs of an SBC employee who is present while maintenance work is being done; particularly when the AT&T or CLEC worker is certified by industry standards to perform the required maintenance. The Arbitrator agrees that the current ICA-language¹⁴ proposed by AT&T is reasonable and should be adopted.

3. Occupancy:

CLEC Coalition P/C/ROW Issue 4: Should CLEC be required to apply to SBC for occupancy in advance of occupying the space to ensure a non-conflicted arrangement?

Discussion:

SBC states that the Commission should reject the CLEC Coalition's unfair and discriminatory proposed language that would allow it to "lock up" pole, duct and conduit in advance of other CLECs whose applications would be trumped by the CLEC Coalition's notice of "provisional" assignment. The CLEC Coalition makes no secret that "[s]pace provisionally assigned" to it "shall not be made available for assignment to any other person or entity," as is provided for in its proposed language. Moreover, the CLEC Coalition's proposed language provides that the CLEC Coalition's obligation to pay pole attachment and conduit occupancy fees would be put off "until the date the assignment is recorded."

SBC asserts that all attachers, including the CLEC Coalition, should adhere to the application process so that SBC may allow them access in a non-discriminatory manner and so that SBC can best be in a position to properly manage its infrastructure. Requiring all CLECs to adhere to the application process would best allow SBC to determine if the

¹⁴ Henson Direct at 6, lines 7-15.

space occupancy will comply with all applicable safety, network reliability, and engineering standards before the attachment is made, rather than afterwards, when a safety, network reliability, or engineering issue may have already been created.¹⁵

The Coalition responds that, under the current ICA, for certain ducts, conduits or pole spaces that are not currently assigned to an entity, CLEC has the ability to take immediate occupancy so long as it complies with applicable procedures and rules. The CLEC Coalition's proposed language is from the existing ICA between the parties. The process was approved by the Missouri Commission and has been in place and working well for at least three years.

The CLEC coalition is not aware of any specific problems under the parties' existing contract language that would justify SBC's removal of this extensive and important language that provides CLECs with immediate and nondiscriminatory access to poles and structures. SBC has not established that it cannot provide immediate access or that it is caused hardship or harm. On the other hand, it is the CLEC Coalition's experience in many states that poles and conduit owners, especially when they are competitors, seek to delay access to structures for anticompetitive purposes. SBC's proposal to eliminate this language with no corresponding replacement strongly argues for retention of the CLEC Coalition's proposed language.

Decision:

The potential for confusion and dispute is greater under the CLECs' position on this issue. The CLECs' arguments on this issue are not persuasive. The need for order

¹⁵ Atwal Direct, pp. 7-8.

outweighs the CLECs' fear that SBC will use this as an opportunity to hamper competition. The Arbitrator finds that SBC's language should be adopted.

4. Must the CLEC submit its calculations with its application?

CLEC Coalition P/C/ROW Issue 5: Is it appropriate to require CC to submit the standard engineering calculations and specifications used for the attachments it plans to place on SBC's poles with its application?

Discussion:

SBC states that its language – which would require a CLEC's application to provide “wind loading, bending moment, vertical loading and associated strand maps” – should be approved. Of all the CLECs represented in this case, only the CLEC Coalition objects to this language. Even so, the CLEC Coalition presented no testimony rebutting SBC's evidence that these requirements would enable SBC to ensure that the additional cables placed on SBC's facilities would not cause pole loadings to exceed safety limits and create a safety hazard.¹⁶ The calculations and specifications are part of the National Electrical Safety Code (“NESC”) maintained by the Institute of Electrical and Electronics Engineers. The purpose of the NESC is “the practical safeguarding of persons during the installation, operation, or maintenance of electric supply and communication lines and associated equipment.”¹⁷ The Commission's own rules expressly require electric utilities, telecommunications companies and rural electric cooperatives to adhere to NESC standards. See, Commission Rule 18.010 (4 CSR 240-18.010).

SBC states further that its own engineers follow the same safety guidelines and standards that the CLEC Coalition is being asked to follow. If the requested calculations

¹⁶ Atwal Direct, pp. 11-12.

¹⁷ Atwal Direct, at p. 11, citing, *Introduction to the National Electrical Safety Code*, National Electrical Safety Code, New York: Institute of Electrical and Electronics Engineers, 2001, p. 1.

are not done, or are not done properly, there is no way to know whether the existing poles are strong enough to support the additional facilities and potentially jeopardizing the integrity of the existing structure. Only by the CLEC Coalition's having performed the required calculations and then providing such documentation for cross check can SBC minimize the probability of safety hazards being created.¹⁸

The CLEC Coalition responds that its proposed language is identical to the language contained in the existing ICA between the parties. This language has been in place for at least the last three years and should not be changed.

Decision:

The only support the CLEC Coalition offers for its position on this issue is that the language now in place has been in place for three years. SBC's position however, is driven by the National Electrical Safety Code. SBC has an obligation to comply with this code. SBC, in turn, should be in a position to require those who use its facilities to also comply. The Arbitrator finds that SBC's language is reasonable and that it should be adopted.

5. Should the attacher pay SBC to determine who owns the pole?

AT&T P/C/ROW Issue 3: *If AT&T cannot determine whether a pole is owned or controlled by SBC Missouri, and therefore is unable to identify all pole ownership in its application, should AT&T pay SBC Missouri to perform this function?*

SBC's Statement of the Issue: *If AT&T does not determine whether a pole is owned or controlled by SBC Missouri, and therefore is unable to identify all pole ownership in the application, should AT&T pay SBC Missouri to perform this function?*

CLEC Coalition ROW Issue 6: *If CLEC does not determine whether pole is owned or controlled by SBC Missouri, and therefore is unable to identify all pole ownership in its application, should CLEC pay SBC Missouri to perform this function?*

¹⁸ Atwal Direct, p. 12.

Discussion:

SBC states that the Commission should approve SBC's proposed language that the CLEC must identify the owner of the poles in its application or it must compensate SBC to do that work.¹⁹ There are thousands of utility poles in Missouri and information as to who may own any given pole is not always available to SBC without its undertaking research. While AT&T claims that SBC "should be readily able to identify ownership and control of poles it does not own or control," AT&T provides no hard evidence that this is so,²⁰ much less evidence disputing that "that there are thousands of utility poles that have been around for decades and records may or may not be accurate," which is why AT&T agreed to the language in 7.03(b) stating that the information on the drawings "may not accurately reflect" information which must be assessed before it can be determined that space is available.²¹ Research of pole ownership information thus represents a portion of "the additional costs of providing pole attachments," Section 224(d)(1), and SBC should be permitted to recover them.

AT&T is free to perform its own review of SBC's records regarding pole ownership – which are the same as those which SBC's engineers use to determine pole ownership. AT&T can also go to the field to determine ownership based on pole markings – the same as SBC must do. Finally, AT&T can research electric company records – the same as SBC must do.²² But if AT&T wants SBC to do this work for it, then AT&T should

¹⁹ Atwal Direct, pp. 15-16; Atwal Rebuttal, pp. 9-10.

²⁰ Henson Direct, p. 7.

²¹ Atwal Rebuttal, p. 10.

²² Atwal Rebuttal, p. 9.

pay for that work. To the extent that AT&T suggests that such costs are not significant,²³ AT&T is wrong.

AT&T responds that its proposed language is from the existing ICA between the two parties. This language is from the M2A, which was a product of an industry collaborative effort that included SBC and was approved by the Missouri Commission and has been in place between the parties for the last three years. SBC should bear the burden to prove why the existing language needs to be changed.

There is no disagreement that SBC may be required to rearrange its facilities or perform make-ready work on non-SBC poles in order to accommodate AT&T's request for pole access. It is certainly more reasonable for SBC to be able to identify ownership and control of such non-SBC poles. AT&T should not have to pay SBC to determine which poles it owns or controls. The Administrative Law Judge in the Kansas Corporation Commission's successor ICA proceedings issued findings in favor of AT&T's position for this issue.²⁴

The CLEC Coalition responds that its proposed language is identical to the language contained in the existing ICA between the parties. This language has been in place for at least the last three years. SBC now proposes that it be compensated to determine whether it owns or controls poles at issue. SBC has not demonstrated that there are any costs associated with providing information about its own facilities and, if there are such costs, has not provided a compelling reason to justify why CLEC should bear the costs of SBC accessing its own information.

²³ Henson Direct, p. 8.

²⁴ See *Arbitrator's Determination of Issues*, KCC Docket No. 05-AT&T-366-ARB, para. 277, February 16, 2005.

The CLEC Coalition-proposed language recognizes that SBC is in the best position to determine which poles it owns and controls and which poles it does not own or control. SBC should have little or no difficulty in readily identifying ownership and control of poles it does not own or control. Requiring a CLEC to pay SBC to determine which poles it owns or controls saddles CLECs with additional costs. SBC would also have unfettered discretion to determine the amount of such costs and would have no incentive to provide the requested information in an efficient manner.

Decision:

As the CLEC Coalition and AT&T points out, SBC *is* in a better position to determine whether a pole is owned by SBC. With regard to CLECs in particular, if they are required to pay SBC to determine whether a pole is owned by SBC, their cost of doing business would increase. Under SBC's position, every time it had to be determined whether a pole belonged to SBC and a CLEC requested SBC help in doing so, SBC would collect a "pole-determination fee." This proposition appears to be an attempt by SBC to thwart competition. Competition is the premise upon which interconnection agreements rest. The Arbitrator finds in favor of the CLEC Coalition and AT&T.

6. Who should remove dead cable?

CLEC Coalition P/C/ROW Issue 7: *If retired or dead cables block access for placements of CLEC's which party is responsible for the cost to remove those cables in order to free space for CLEC?*

Discussion:

SBC states that the Commission should approve SBC's proposed language that removal of retired or dead cables in order to make room for the CLEC coalition's access request should be at the CLEC Coalition's expense, not SBC's. The FCC has found that

with respect to the allocation of modification costs, “to the extent the cost of a modification is incurred for the specific benefit of any particular party, the benefiting party will be obligated to assume the cost of the modification, or to bear its proportionate share of cost with all other attaching entities participating in the modification.”²⁵ Clearly, the FCC intends that the “cost causer” should bear the expense of the modification. The work that the CLEC Coalition would ask SBC to do is clearly for its own specific benefit, and thus the CLEC Coalition should be required to assume the cost of that work.

SBC contends that the CLEC coalition offers no reason why it should be better treated than other CLECs. Furthermore, it is no answer, as the CLEC Coalition’s position statement argues, that SBC should remove dead or retired cables at its own expense if the removal is “reasonably feasible.” No testimony was offered to support this argument. More importantly, the argument does not address the fact that the cost-causer should be made to pay, as Congress intended, regardless of whether the work is feasible.

The CLEC Coalition states that the language regarding removal of retired or dead cables should remain the same. Currently, SBC bears the cost of such removal unless excavation is needed; and, then the CLEC bears the cost.

Decision:

As SBC points out, but for the CLEC’s need for structure access, the cost of removing retired or dead cable would not be an issue. However, the FCC’s “*Local Competition Order*,” used by SBC to support its position, is not clearly applicable. The FCC’s order has to do with modifications, an example of which, as given by the FCC, would be the installation of a taller pole to accommodate an access request. The removal of dead

²⁵ Atwal Direct, p. 16, citing, *In re Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 11 FCC Rcd. 15499 (1996) (“*Local Competition Order*”), ¶ 1211.

cable might better be exemplified by the situation where a tenant intends to move into a property but there is furniture left over from the last tenant. Although ultimately the last tenant should be responsible for removing the left over furniture, as between the new tenant and the landlord, the landlord must bear the cost of removal. For this reason, the Arbitrator finds that the language proposed by the CLEC Coalition should be adopted.

7. Who should pay for periodic inspections?

AT&T P/C/ROW Issue 4: *How should CLECs be required to compensate SBC Missouri for the costs associated with the Periodic Inspection when they are found in non-compliance?*

CLEC Coalition ROW Issue 8: *How should CLECs be required to compensate SBC Missouri for the costs associated with the Periodic Inspection when they are found in non-compliance?*

Discussion:

SBC states that the Commission should approve SBC's language proposing limited instances in which CLECs would pay for periodic inspections. Periodic inspections occur at least two years apart and are for the purpose of inspecting CLECs' facilities attached to SBC's structures.²⁶ SBC's proposed method of charging is fair, equitable and carefully calibrated to the degree of noncompliance found during an inspection. The higher the percentage of violations by an Attaching Party, the greater the burden of the charge that the Attaching Party would -- and should -- have to bear.²⁷

SBC contends that, on the one hand, AT&T relies on the parties' current ICA under which "AT&T acknowledges SBC Missouri's right to make periodic inspections," and that "SBC Missouri may charge AT&T for the inspection expenses if 'substantial

²⁶ Atwal Direct, p. 6.

²⁷ Atwal Direct, p. 27.

noncompliance' is found."²⁸ On the other hand, however, AT&T "intentionally left blank" the portion of the DPL in which the current ICA language could have been inserted – thus, AT&T offers no language that would provide for the charges AT&T agrees are within SBC's rights. For this reason alone, SBC's proposed language must be approved. Moreover, the CLEC Coalition's preliminary position reflected in the DPL (it offered no testimony) is unfair because it would force SBC to absorb all of its costs unless the CLEC's noncompliance rose to the level of "substantial noncompliance." SBC's proposed language is better calibrated to the actual level of noncompliance (even if less than substantial). The language provides on its face that it would apply where the CLEC's noncompliance exceeds "2% or greater of their attachments in violation," and the actual amount charged would be "the percentage that their total violations bear to the total violations of all Attaching Parties found during the inspection."

These two issues are related, and involve SBC's proposal to include language regarding periodic and spot inspections, as well as language requiring AT&T to pay for these inspections in certain circumstances. AT&T believes that SBC's proposed language in 3.29, 3.41 and 16.01(a) is all superfluous and unnecessary. AT&T has already agreed to language in Section 16.01 that allows SBC the expansive right to "make inspections at any time . . . for the purpose of determining whether facilities attached to SBC Missouri's poles or placed in SBC Missouri's conduit system are in compliance." Given the broad right of SBC to inspect, including specific provisions regarding periodic and spot inspections is unnecessary. In fact, it is impossible to expand SBC's right to inspect "at any time." AT&T

²⁸ Henson Direct, p. 9.

can only assume that the true purpose of SBC's language is to create distinct forms of inspections that SBC can charge for.

The CLEC Coalition states that its proposed language is identical to the language contained in the existing ICA between the parties. It has been in place for the last three years and should remain in place.

Decision:

As pointed out by SBC in its position statement concerning the removal of dead cable, the party benefiting should bear the cost. If SBC were to remain consistent with this general premise, then SBC should bear the cost associated with inspections. These inspections are conducted to give SBC peace of mind. The CLECs should not have to bear this cost, this is particularly so when the work has been performed by a certified worker.

However, where a violation has occurred, SBC's language requires the attaching party to incur the cost of inspection. If the Attaching Party has no attachment in violation, then the attaching party will not incur bear the cost of inspection. This is reasonable. The Arbitrator finds that the language proposed by SBC is reasonable should be adopted.

8. Who should pay for post-construction inspections?

AT&T P/C/ROW Issue 5: *Should the ICA include post-construction inspection language requiring AT&T to pay for SBC Missouri's expenses associated with such activity?*

SBC's Statement of the Issue: *(a) Should SBC be allowed to make a post-construction inspection to ensure network reliability and Conformance? (b) Which Party is responsible to pay the expense for the post-construction inspection?*

CLEC Coalition P/C/ ROW Issue 9: *Should SBC be allowed to make a post-construction inspection to ensure network reliability and conformance?*

SBC's Statement of the Issue: *Which Party is responsible to pay the expense for the post-construction inspection?*

Discussion:

SBC states that the Commission should approve SBC's language allowing it to perform a post-construction inspection of a CLEC's attachment, at the CLEC's expense, to confirm that the attachments conform with the occupancy permit. SBC's evidence identified that there have been instances in which a contractor overlooked work that needed to be performed or misunderstood the work needed to be done, or the work otherwise failed to meet applicable engineering standards. SBC is only asking that CLECs be treated the same way SBC treats itself, to ensure the continued safety and reliability of the network.²⁹

SBC further states that, to the extent that both a "during construction" and "post-construction" inspection is performed, CLECs would not be charged twice for the same work. SBC provided evidence that "due to workload constraints, SBC Missouri may not be able to have an employee on site for the entire time that work is being done. In this case, the SBC Missouri employee monitoring AT&T's contractors will have to decide whether his observation of the work performed was sufficient and he is confident in the quality of work performed as of that time or, on the other hand, whether a post-construction inspection is justified. Depending on his decision, AT&T will either be charged for the time the employee was actually at the job site observing the work being done or for the time for an SBC employee to complete a post-construction inspection, but not both."³⁰ Thus, neither AT&T nor the CLEC coalition have any valid "double recovery" concerns.

AT&T responds that there is no rationale to support SBC's additional language to impose another fee on AT&T for additional inspections when the parties have already

²⁹ Atwal Direct, pp. 23-24; Atwal Rebuttal, p. 8.

³⁰ Atwal Rebuttal, p. 8.

agreed to language that provides SBC assurances that AT&T's attachment to SBC's structure conforms to necessary standards. In fact, read together with SBC's proposed Section 16.01 (which AT&T independently disputes), it appears that SBC is looking to charge for the same event twice. The Administrative Law Judge in the Kansas Corporation Commission's successor ICA proceedings issued findings in favor of AT&T's position for this same issue. The Arbitrator essentially reasoned that "yet another inspection charge is not reasonable" in light of charges related to work inspection conducted contemporaneously with performance of the work.³¹ Similarly, the Administrative Law Judge in the Oklahoma Corporation Commission's proceedings on a successor ICA found in favor of AT&T on this same issue.³² Finally, the Texas PUC recently adopted the language proposed by AT&T on this issue as part of the Texas proceedings on a successor ICA between the parties.

AT&T's proposed language defining and permitting post-construction inspections is identical to SBC's language. The only difference is SBC's desire to insert the words "at AT&T's expense" into the language. For all the reasons discussed herein, those three SBC-proposed words should not be included in the successor ICA.

The CLEC Coalition states that there is no rationale for the additional language allowing SBC to conduct post-construction inspections and to impose a fee for the inspection.

³¹ See KCC Docket No. 05-AT&T-366-ARB, *Arbitrator's Determination of Issues*, para. 286, February 16, 2005.

³² See Oklahoma Corporation Commission PUD Docket No. 2004-493, ALJ's annotated Master List of Issues, Attachment 13, Issue 6, April 13, 2005.

Decision:

While post-construction inspections are beneficial, it is unreasonable that SBC would have the CLEC or AT&T bear the costs of the inspections. There are other measures in place to ensure that work is done properly – for instance, that work be done by a certified worker. Also, the language of 16.01 provides assurance that work will be done properly. For these reasons, the Arbitrator concurs with the CLECs.

9. Should various types of inspections be defined in the ICA?**AT&T P/C/ROW Issue 1: Should the Agreement include definitions for periodic and spot inspections to differentiate these types of inspections?****Discussion:**

SBC states that the Commission should approve SBC's proposed definitions because they clarify periodic and spot inspections for purposes of identifying, in other portions of the Appendix, when fees charged to a CLEC would apply and when they would not. As noted earlier, periodic inspections are generally scheduled at least two years apart. On the other hand, SBC's proposed language indicates that spot inspections are initiated when SBC observes a safety hazard associated with a CLEC's attachment to an SBC structure. AT&T opposes to the applicable charges for the inspections.³³

AT&T agrees that SBC has the right to inspect its facilities at any time.³⁴ The definitions add needed clarity to an agreement which heretofore has not identified the separate inspections. Moreover, for the reasons stated earlier regarding these charges, AT&T's opposition to the charges and when they apply, should be dismissed.

³³ Atwal Direct, p. 6.

³⁴ Henson Direct, p. 4.

AT&T responds that it has already agreed to language in Section 16.01 that allows SBC the expansive right to “make inspections at any time . . . for the purpose of determining whether facilities attached to SBC Missouri’s poles or placed in SBC Missouri’s conduit system are in compliance.” Given the broad right of SBC to inspect, the specificity SBC now requests is unnecessary. In fact, it is impossible to expand SBC’s right to inspect “at any time”. While SBC represents this issue to be separate and distinct from Issue 4 in this DPL, AT&T wishes to make clear that the two issues are in fact part of the same issue. The true purpose of SBC’s language is to create distinct forms of inspections for which SBC can charge. As AT&T explains in further detail in relation to Issue 4, below, these fees bear no relation whatsoever to the cost of the work performed by SBC and should be rejected by the Commission.

Decision:

For the reasons stated above, the Arbitrator concurs with AT&T.

10. Overlashing:

Sprint Structure Access Issue 2: *(a) Should Sprint be allowed to overlash an Attaching Party’s facilities with only a notice to SBC -- or is Sprint required to obtain prior approval from the SBC? (b) Should Sprint be required to pay an additional fee for overlashing as listed in Appendix I or the Pricing Appendix, whichever is applicable?*

Discussion:

SBC states that its proposed language should be approved. SBC is not asking that the third party overlasher obtain its consent. However, SBC has the right to know the identity of the parties who will be placing its facilities on SBC’s structures, and proposed Section 11.1.2.1 is consistent with the FCC’s comments in the Pole Attachments Reconsideration Order stating that “it would be reasonable for a pole attachment

agreement to require notice of third party overloading. The utility pole owner has a right to know the character of, and the parties responsible for, attachments on its poles, including third party overlashers.”³⁵ Consistent with this, agreed upon language in Section 11.1.2.2 provides that the overloading entity have consent (written approval) from the attaching party and provide a copy (notice) to SBC. However, the additionally proposed language would allow SBC to update its records and know who is attached to its structures, as well as an opportunity to verify that the structure can handle the added load of the new facilities, i.e., to consider whether to allow or deny access to its structures “for reasons of safety, reliability and generally applicable engineering purposes.”³⁶ SBC is not treating Sprint or any third party any differently.

The applicable fee – also objected to only by Sprint – should likewise apply. The FCC quote on which Sprint relies, “We have stated that the third party overlasher is not separately liable to the utility for the usable space,” only deals with the recurring pole rental.³⁷ SBC does not seek to charge a third party overlasher an annual recurring attachment fee and thus “double recover.” However, under Section 224(d)(1), SBC may recover the additional costs of providing access, and SBC should be allowed to recover its actual costs for an entity attaching to its structure, not recurring costs.³⁸

Sprint states that prior notice only is sufficient. Sprint’s position is that the FCC has jurisdiction with regard to Pole Attachments in the state of Missouri. The SBC

³⁵ Atwal Rebuttal, p. 16, citing, *Amendment of the Commission's Rules and Policies Governing Pole Attachments*, CS Docket Nos. 97-98 and 97-151, *Consolidated Partial Order on Reconsideration and Decision on Complaint*, 16 FCC Rcd 12103 (2001) (“*Pole Attachments Reconsideration Order*”).

³⁶ 47 C.F.R. Section 1.1403(a); Atwal Direct, p. 19; Atwal Rebuttal, pp. 17-18.

³⁷ Atwal Rebuttal, p. 19; Gates Direct, p. 5.

³⁸ Atwal Rebuttal, p. 19.

language in this section is inconsistent with the FCC Consolidated Partial Order on Reconsideration of May 22, 2001, which clearly states that a pole owner should get just notice of the overlashing whether it be from a third party or not and that permission is not necessary. Requiring an overlasher to sign an agreement with SBC is an attempt for SBC to have more control and condition its consent on the ability of the overlasher to overlash to the Attaching Party facilities.

Decision:

The Arbitrator finds that it is reasonable for the attaching party to have to give only notice to SBC when overlashing. The Arbitrator also agrees that, because Sprint is already paying SBC for the use of the facility, that it is not necessary for the overlasher to pay any further fees. Sprint's position should be adopted.

11. Evidence of Easements:

Sprint Structure Access Issue 3: *Is SBC Missouri obligated to provide Sprint documentation evidencing the grant of any interest or right in any easement made by SBC 13-STATE to Attaching Party?*

Discussion:

SBC states that the Commission should reject Sprint's language out of hand. While Sprint refers vaguely to documents reflecting "underlying grants," existing language in the agreement already gives Sprint the right to inspect SBC's redacted structure access records and these records already provide Sprint the information it needs for Sprint to place its facilities and use them to provide service to its customers. SBC has provided, and will continue to provide, access to the redacted structure access records to Sprint for its review. These records enable Sprint to view the availability of conduit, innerduct and space in manholes for placement of Sprint's facilities. These records are the same records that SBC

engineers use to engineer their working drawings, with the exception that proprietary and confidential information is redacted from them.³⁹ Moreover, once SBC issues a structure access license to Sprint, that license serves as written documentation evidencing the rights granted to Sprint.⁴⁰ Sprint needs nothing more.

Sprint responds that its language is simply asking SBC to provide documentation with regard to any grants of interest it may pass onto Sprint by operation of Article 15.1. This information has already been accounted for by underlying grants in SBC's possession. Sprint contends that SBC should cooperate in reasonably assisting Sprint in determining what right-of-way and easement rights it needs to acquire and which have already been accounted for by underlying grants in SBC's possession.

Decision:

Although the Arbitrator agrees with Sprint that it would be uncooperative for SBC not to provide documentation regarding grants of easements and rights-of way, SBC should not be obliged to do so. The information Sprint seeks is publicly available. It may be time-consuming and inefficient, but Sprint and SBC are in competition with one another. If SBC does not want to make things easy for Sprint, it should not be forced to. The Arbitrator agrees with the language proposed by SBC.

³⁹ Atwal Direct, pp. 8-9.

⁴⁰ Atwal Rebuttal, p. 19.