

PUC DOCKET NO. 24515

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

ORDER APPROVING ARBITRATION AWARD

This Order approves, with modification, the Arbitration Award (Award) issued in this proceeding. As discussed below, the Commission agrees with the Arbitrators that the Commission has authority to adopt performance measures in circumstances where special access is discriminatorily substituted for unbundled network elements (UNEs), but that the evidence in this proceeding did not warrant the imposition of such measures.

I. Jurisdiction

The Telecommunications Act of 1996 (FTA)¹ authorizes state commissions to arbitrate open issues between an incumbent local exchange carrier (ILEC) and a requesting telecommunications carrier.² The FTA also grants state commissions authority to approve or reject interconnection agreements adopted by negotiation or arbitration.³ The FTA's authorization to approve or reject these interconnection agreements carries with it the authority to interpret and enforce the provisions of agreements that state commissions have approved.⁴ The Public Utility Commission of Texas is a state commission responsible for approving interconnection agreements pursuant to the FTA.

¹ Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) (codified at 47 U.S.C. § 151 *et seq.*).

² 47 U.S.C. § 252(b).

³ 47 U.S.C. § 252(e).

⁴ *BellSouth Telecomm., Inc. v. MCIMetro Access Transmission Services, Inc.*, 317 F.3d 1270, 1274-1276 (11th Cir. 2003); *Southwestern Bell Tel. Co. v. Public Util. Comm'n of Tex.*, 208 F.3d 475, 479-480 (5th Cir. 2000); *see also Michigan Bell Tel. Co. v. MCIMetro Access Transmission Services, Inc.*, 323 F.3d 348, 356 (6th Cir. 2003).

II. Procedural History

On August 17, 2001, SBC filed a petition for arbitration, requesting that the Commission determine whether it is appropriate to require performance measures for the provisioning of special access services. The petition was the result of the Commission's Order No. 33, Project No. 20400, which found that, to the extent a CLEC orders special access in lieu of unbundled network elements (UNEs), SBC's performance shall be measured as another level of disaggregation in all UNE measures.⁵ In response, SBC Texas filed a motion for rehearing and clarification, arguing that services sold pursuant to its interstate or intrastate tariffs, such as special access services, are not subject to its Texas 271 (T2A) or any other interconnection agreement. In addition, because T2A Section 6.4, Attachment 17 indicates that changes to performance measures to require mutual agreement of the parties or arbitration, SBC filed a request for arbitration. At its September 19, 2001 open meeting, the Commission voted to allow the issue of special access to be developed as a separate arbitration in this proceeding.⁶

Although several parties were allowed to participate in this proceeding – including Time Warner, AT&T and Sprint – many declined participation pending the Commission's decision on the jurisdictional issue; thus, the primary participants were MCI WorldCom (WorldCom) and SBC. On October 4, 2001, October 7, 2002, and June 2, 2003, the Arbitrators held prehearing conferences, and a hearing on the merits was held on June 3, 2003. The initial Arbitration Award was filed on February 27, 2004.

III. Discussion

Based in part on WorldCom's allegations that it was forced to purchase circuits from SBC's special access tariffs when SBC failed to provide UNEs, the primary issue before the Arbitrators was whether to impose FTA § 271-like performance measures on tariffed special access services in such circumstances. The Arbitrators concluded that the Commission has authority under FTA § 271 to direct the implementation of performance measures for the

⁵ *Section 271 Compliance Monitoring of Southwestern Bell Telephone Company of Texas, Project No. 20400*, Order No. 33 at 1 (June 1, 2001).

⁶ Open Meeting Tr. at 178 (Sept. 19, 2001).

provisioning of UNEs.⁷ The Arbitrators then concluded that the Commission “has the authority and jurisdiction to direct the implementation of performance measurements for the provisioning of both interstate and intrastate special access services if it determines that such special access services are being discriminatorily substituted for UNEs.”⁸

The Commission concurs with the Arbitrators’ finding that FTA § 271 provides the Commission with the authority to implement performance measures for the provisioning of UNEs. The Commission further concurs with the Arbitrators’ conclusion that such measures can be imposed on special access when it is discriminatorily substituted for UNEs. The Commission additionally finds that it has authority to adopt performance measures pursuant to FTA §§ 251 and 252. These sections give the Commission broad authority to oversee the interconnection obligations of local exchange carriers.⁹

The Commission further concurs with the Arbitrators’ decision to decline to exercise the Commission’s jurisdiction and impose performance measurements on these circuits, as the evidence in this proceeding showed that WorldCom was not purchasing SBC’s tariffed special access services in “lieu of UNEs,” but instead was unable to purchase the services as UNEs because of its inability to meet the FCC’s “local use restriction.”¹⁰

The Commission acknowledges, however, notwithstanding its decision in this proceeding, that carriers have found other, more efficient means, such as post-interconnection disputes, to remedy similar situations. The Commission does not intend this ruling to discourage such alternative means to ensure the provisioning of UNEs.

⁷ Arbitration Award at 22.

⁸ Arbitration Award at 23.

⁹ See FTA § 252(b)(4)(C), which allows the Commission to impose conditions necessary to implement an interconnection agreement. See also *MCI Telecommunications Corp. v. BellSouth Telecommunications, Inc.*, 298 F.3d 1269, 1274 (11th Cir. 2002).

¹⁰ Arbitration Award at 8-9, 13.

IV. Commission Findings

1. The FTA's authorization to approve or reject interconnection agreements carries with it the authority to interpret and enforce the provisions of agreements that state commissions have approved.
2. The Commission is a state commission responsible for approving interconnection agreements pursuant to the FTA.
3. The Commission has reviewed the Award and the pleadings filed by SBC Texas and WorldCom.
4. The Commission finds that the Award is consistent with 47 U.S.C. §§ 251 and 252.

V. Ordering Paragraphs

1. The Award is approved with modifications.
2. All other motions, requests for relief, general or specific, not expressly granted herein are denied.

SIGNED AT AUSTIN, TEXAS the _____ day of _____ 2004.

PUBLIC UTILITY COMMISSION OF TEXAS

JULIE PARSLEY, COMMISSIONER

PAUL HUDSON, CHAIRMAN