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In the Matter of the Petition of CLEC Coalition for Arbitration against Southwestern Bell Telephone, L.P. d/b/a SBC Kansas under Section 252(b)(1) of the Telecommunications Act of 1996
In the Matter of the Application of AT&T Communications of the Southwest, Inc. and TCG Kansas City Inc. for Compulsory Arbitration of Unresolved Issues with SBC Kansas Pursuant to Section 252(b) of the Telecommunications Act of 1996
In the Matter of the Request of the CLEC Joint Petitioners for Arbitration with Southwestern Bell Telephone, L.P. d/b/a SBC Kansas for an Interconnection Agreement that Complies with Sections 251 and 271 of the Federal Telecommunications Act
In the Matter of the Petition of Navigator Telecommunications, LLC. for Arbitration against Southwestern Bell Telephone, L.P. d/b/a SBC Kansas Pursuant to Section 252(b)(1) of the Telecommunications Act of 1996

Docket No. 05-BTKT-365-ARB; Docket No. 05-AT&T-366-ARB; Docket No. 05-TPCT-369-ARB; Docket No. 05-NVTT-370-ARB

Kansas Corporation Commission

2005 Kan. PUC LEXIS 867

July 18, 2005, Dated

PANEL: **[*1]** Before Commissioners: Brian J. Moline, Chair; Robert E. Krehbiel; Michael C. Moffet

OPINION: ORDER NO. 15: COMMISSION ORDER ON PHASE II UNE ISSUES

The above-captioned matters come before The State Corporation Commission of the State of Kansas (Commission) for decision. Being familiar with the files and records and duly advised in the premises, the Commission finds and concludes as follows:

1. The hearings for Phase II of these proceedings were scheduled for March 22 through March 24, 2005. However, the Federal Communications Commission (FCC) issued its *TRRO* n1 on February 4, 2005. The parties were concerned that their unbundled network element (UNE) disputed point lists (DPLs) would not be entirely consistent with the *TRRO* and proposed moving the UNE hearing dates to April 26 -- 27, 2005. The Arbitrators adopted the proposal and determined that separate Arbitrator Determinations would be issued, one addressing sub-loops, inter-carrier compensation and 911 issues and the other addressing UNE issues.

n1 *In the Matter of Unbundled Access to Network Elements,* WC Docket No. 04-313, *Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338 (rel. Feb. 4, 2005) *(TRRO).*

[*2]

2. This Order governs the parties' Comments to the Arbitrator's Determinations of UNE Issues. To the extent an issue is not addressed in this Order, the Arbitrator's Determination of the issues is affirmed without further discussion.

"Lawful UNES"

AT&T UNE-1; CLEC Coalition 1(B) ***Passim;*** **Navigator UNE-1**

3. SBC Kansas (SWBT) proposed to use the term "lawful UNEs" throughout the successor interconnection agreements (successor agreements). The Arbitrator found the modifier "lawful" to be inappropriate because it provided SWBT with virtually sole discretion as to which UNEs were lawful and which ones were not. The Arbitrator further found that the UNE modifier "251(c)(3)" should be used in the successor agreements to avoid future disputes as to the meaning of "UNE" or "UNEs". n2

n2 Arbitrator's Determinations PP 8 -- 9.

4. Neither SWBT nor AT&T Communications of the Southwest, Inc. (AT&T) offered any comments on the Arbitrator's determination in this regard. However, the CLEC Coalition (Coalition) insisted **[*3]** that the Arbitrator had neglected to consider the Coaliton's issue 2(A). n3 The Commission disagrees. The Arbitrator's use of *"passim"* indicates that all issues regarding the UNE modifier "lawful" had been considered. Further, the Commission notes that, notwithstanding the claim by the Coalition that its issue 1(B) is directly related to 2(A), the Coalition's focal points in its proposed § 1.2.1 language for issue 2(A) are the declassification/reclassification processes and continued availability of Section 271 elements. n4

n3 Coalition Comments p. 20, section III.n4 Coalition UNE DPL pp. 7-9.

5. Navigator Telecommunications, LLC (Navigator) insisted in its Comments that the Arbitrator's substitution of "251(c)(3)" for the "lawful" UNE modifier was merely a "difference without a distinction." It would prefer, instead, to have no modifier to "UNEs". n5

n5 Navigator Comments P 1 p. 2.

[*4]
Decision

6. The Commission finds that, without the "251(c)(3)" modifier, the term "UNE" could be interpreted to include 271 elements. As the Commission discusses below, the successor agreements should not contain any terms and conditions related to Section 271 elements, unless the parties voluntarily choose to do so. The Commission also disagrees with Navigator's claim that, because SWBT's proposed "251(c)(3)" modifier was not raised until hearings were in progress, Navigator was deprived of its due process rights. As the Arbitrator discussed in his determinations, the parties had ample opportunity to challenge the matter during the hearing and before this Commission. Furthermore, the parties had notice prior to the hearing through SWBT's prepared testimony that SWBT had proposed the "lawful" modifier. SWBT had insisted it was required to unbundle only those network elements that had been found to meet federal standards for unbundling and required by the FCC to be unbundled pursuant to section 251(c)(3). n6 SWBT had also defined "lawful" UNEs in proposed language as part of the UNE Appendix. n7

n6 SWBT Silver Direct p. 6 line 1 -- p. 7 line 17. **[*5]**

n7 *Id.*, p. 6 lines 14-26.

7. The Commission affirms the Arbitrator's determination with respect to using 251(c)(3) as the UNE modifier and rejecting the modifier "unlawful".

271 Checklist Items

Coalition UNE-1(A) *Passim;* AT&T UNE-2(B)

8. The Arbitrator concluded that the FCC possessed preemptive jurisdiction over 271 matters. The Arbitrator, therefore, found that 271 matters should not be incorporated into successor agreements. n8

n8 Arbitrator's Determinations P 20.

9. The Coalition disputed the Arbitrator's determination of this issue because, according to the Coalition, the Arbitrator concluded that the requirements of Section 271(c)(2)(A) expired upon the FCC awarding interLATA authority to a Bell Operating Company (BOC). n9

n9 Coalition Comments p. 9, citing Determination P 16.

[*6]
Decision

10. The Commission disagrees with the Coalition. The Arbitrator made no such conclusion; rather, he pointedly described pertinent law. A BOC, like SWBT, must have entered into a binding § 271(c)(1)(A) Agreement n10 that has been "approved under section 252 specifying the terms and conditions under which the Bell operating company is providing access and interconnection to its network facilities for the network facilities of one or more unaffiliated competing providers of telephone exchange service". § 271(c)(1)(A). The BOC applying for interLATA authority must be providing access and interconnection, pursuant to the 271(c)(1)(A) agreement, that includes the checklist items. § 271(c)(2)(A). The BOC clearly must provide these qualifying requirements before the FCC can grant the BOC interLATA authority. The Coalition errs in focusing on the process rather than the substance of the requirements. It is clear that, after a reclassification of UNEs as in the *TRRO,* SWBT must still provide the 271 checklist items, but on an independent basis and not governed by successor agreements.

n10 § 271(c)(1) requires that a BOC either enter into an ICA or, if there is no request for access and interconnection, a general statement of terms and conditions that would apply. Because there is no need to consider SWBT's general statement in these proceedings, the Commission will address the ICA requirement only, as did the Arbitrator.

[*7]

11. The Coalition was also incorrect when it alleged that the Arbitrator concluded "§ 271 does not require continuous compliance with the unbundling obligations in the checklist". n11 The Arbitrator never made such a conclusion. In fact, he stressed, with pertinent references to FCC orders, that SWBT had a continued obligation to provide 271 checklist items but on a basis independent from § 251 unbundling requirements.

n11 Coalition Comments p. 12

12. The Coalition then cited *English v. General Electric Co., 496 U.S. 72 (1990)* for support that Congress did not intend to preempt the states from deciding 271 issues.

13. The *English* court explained that state law is pre-empted in three circumstances: (1) Congress can define explicitly the extent to which its enactments preempt state law; (2) in the absence of explicit statutory language, state law is pre-empted where it regulates conduct in a field that Congress intended the Federal Government to occupy exclusively; or, (3) state law **[*8]** is pre-empted to the extent that it actually conflicts with federal law. *Id., at 79. Shaw v. Delta Air Lines, 43 U.S. 85 (1983),* cited by the *English* court, was more definitive with respect to Congressional intent:

> In deciding whether a federal law pre-empts a state statute, our task is to ascertain Congress' intent in enacting the federal statute at issue. Pre-emption may be either express or implied, and is compelled whether Congress' command is explicitly stated in thestatute's language or implicitly contained in its structure and purpose.

Shaw at 95, notes omitted. The FTA's 271 provisions explicitly provide that a BOC, desirous of entering the interLATA marketplace, may apply to the FCC for authorization to do so (§ 271(d)(1)); the FCC determines a BOC's qualification for interLATA authority (§ 271(d)(3)); and, it is the FCC that possesses the sole authority to determine if the BOC continues to abide by the 271 requirements (§ 271(d)(6)). The only state participation in the 271 qualification inquiry is consultation with the FCC to verify BOC compliance with 271 requirements. The clear implication here **[*9]** is that there is no place for independent state action.

14. The Commission concludes for the foregoing reasons, and those expressed by the Arbitrator, that the FCC has preemptive jurisdiction over 271 matters. The Arbitrator's determination is affirmed. As such, the Commission need not address the UNE-P or 271 pricing issues raised by the Coalition, except to note that the FCC observed that carriers remain free to negotiate alternative arrangements superseding the UNE-P transition plan. n12

n12 *TRRO* P 1228.

271 Commingling

AT&T UNE-10; Coalition UNE-3,5,7,10 -- 12, 14, 29, 61, 48

15. AT&T is concerned that SWBT's proposed language would be interpreted as a blanket prohibition against 271 commingling, including situations outside of the successor agreement. n13

n13 AT&T Comments pp. 7-9.

16. The Coalition, on the other hand, complains **[*10]** that the Arbitrator's conclusion -- that Coalition members are not entitled to obtain commingled arrangements that consist of § 251 UNEs and § 271 checklist items -- is incorrect and must be reversed. The Coalition includes the same argument about the *TRO*'s n14 commingling double-strike and why that double-strike clearly entitled CLECs to 271 commingling. n15

n14 *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Act of 1996, CC Docket Nos. 01-338, 96-98, 98-147, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978 (2003) (TRO), corrected by Errata, 18 FCC Rcd 19020 (2003), vacated and remanded in part, affirmed in part, United States Telecom Ass'n v. FCC, 359 F.3d 554 (D.C. Cir. 2004) (USTA II) cert. denied, 125 S.Ct. 313 (2004).*n15 Coalition Comments pp. 3-5.

[*11]
Decision

17. With respect to AT&T's concern, the Commission notes that the Arbitrator found only that SWBT was not under the obligation to include 271 commingling provisions in successor agreements. SWBT's proposed language was not specifically adopted. n16 The parties, of course, are required to conform the language of the final version of successor agreements to the Commission's determinations. n17

n16 Arbitrator's Determinations P 29.n17 *See,* Phase II Tr. p. 701 lines 9-13.

18. The Coalition's double-strike argument is of no consequence to commingling issues here and appears to have been taken up by the Arbitrator only because the Coalition raised it. The Arbitrator neither concluded that Coalition members were not entitled to 271 commingling nor adopted SWBT's proposed language. What the Arbitrator did find -- consistent with his other 271-related determinations -- was that 271 commingling terms and conditions had no home in the successor agreements. The Commission notes that, if it did entitle **[*12]** Coalition members to 271 commingling under the successor agreements and SWBT refused to provide such commingling, it would have no enforcement authority against SWBT because that authority has been resides with the FCC. n18

n18 *See, TRO* P 665; § 271(d)(6).

19. The Commission affirms the Arbitrator's determination.

Transition Plan

AT&T UNE-2; Coalition UNE-1(D), 2(A), 27

20. The Arbitrator rejected all of the parties' proposed language relating to declassification/reclassification because, among other reasons, the proposed implementation schedules were not realistic, particularly when compared to the *TRRO* transition plans. n19

n19 Arbitrator's Determinations PP 34, 38.

21. Although SWBT recognized that the FCC will likely construct a reasonable transition plan for future declassifications/reclassifications, it proposed a default **[*13]** process in the unlikely event the FCC does not provide a transition plan. SWBT also noted that its original 30-day transition plan had been extended in its brief to 90 days. n20

n20 SWBT Comments PP 4-5.

Decision

22. The Commission appreciates SWBT's proposed compromise; however, the Commission may not adopt such offers. Rather, they must be accepted by the other party(ies); otherwise, a due process claim could arise because other parties would not have the opportunity to critique such offers on the record. Moreover, in view of the *TRRO,* the Commission believes it unlikely that the FCC would fail to provide a transition plan in future declassifications/reclassifications. Even if it did, SWBT's 90-day flash-cut could well be inappropriate for the affected UNEs. The Arbitrator's determination is affirmed.

Combinations

Coalition UNE-(1)(E), 3, 5, 7, 28, 29, 61

23. The Coalition indicated that it had proposed 2.18 language pertaining to UNE combinations. The Coalition insisted that it was entitled **[*14]** to certain combinations during the transition period. n21 The Arbitrator was unable to find that proposed language. n22

n21 Coalition UNE DPL Preliminary Position p. 6.n22 Arbitrator's Determinations P 41 note 55.

24. In its Comments, the Coalition explained that its proposed "language actually appears in DPL Issue # 1(E), but on page 7 of the DPL, as Section 2.18.6." n23

n23 Coalition Comments p. 33.

Decision

25. The Commission can empathize with the Arbitrator's frustration with the occasional confusing nature of the parties' DPLs. Contrary to the Coalition's explanation -- as well as the Commission can understand it -- the proposed 2.18.6 language does not appear in DPL Issue # 1(E). The proposed 2.18.6 is contained on page 7 of the DPL; but, it bears mention that "Issue 1(E)" referred the Arbitrator to "Section 2.18", not 2.18.6. n24 **[*15]** At any rate, the Arbitrator found that, due to his determination that the Transition Plan should be detailed in a rider, rather than in successor agreements, he would reject the Coalition's proposed language.

n24 Coalition UNE DPL Preliminary Position p. 6.

26. In its Comments, the Coalition requested that the Commission include the proposed 2.18.6 language in the Rider, even though it had not briefed the issue. The Coalition explains that the language "is simply a clarification that assures CLECs of the ability to obtain a UNE combination -- § 251 UNEs -- for so long as the individual UNEs making up the combination are available to the CLEC" and does not impose on SWBT any obligation inconsistent with the *TRRO*. n25 The Commission disagrees with SWBT's Reply Comments that the proposed language is unnecessary. n26 The argument between SWBT and the Coalition is very much like the disagreement between the two with respect to SWBT's proposed "lawful" modifier to "UNE". The Commission is concerned that, without the **[*16]** proposed language, disputes will arise as to which 251 UNE combinations SWBT believes the Coalition is entitled during the FCC's transition period.

n25 Coalition Comments p. 33.n26 SBC Kansas' Phase II Reply Comments on UNE Issues (Other than Subloops) (SWBT Reply Comments) P 61.

27. The Commission directs SWBT to include this language in the Rider.

Conversions; Conversion Charges

AT&T UNE-8

28. The Arbitrator adopted AT&T's proposed 2.10.1.1 and 2.10.1.2 language because SWBT had not objected to those two sub-sections.

29. Both AT&T and SWBT maintained in their comments that there were no sub-sections 2.10.1.1 or 2.10.1.2.

Decision

30. The misunderstanding looks to have arisen from page 22 of the rebuttal testimony of AT&T witness Daniel Rhinehart, wherein Mr. Rhinehart laid out AT&T's proposed 2.10.1.1 and 2.10.1.2 language. That language must have been tossed out by AT&T's revised DPL, which did not contain those two sub-sections. The confusion was further compounded by the revised AT&T DPL **[*17]** that included SWBT's objection to AT&T's proposed 2.10.1 language. n27 There was no language proposed by AT&T for 2.10.1 in the revised AT&T DPL; but, there was proposed 2.10.1 language in Mr. Rhinehart's rebuttal testimony.

n27 Revised AT&T DPL SBC Preliminary Position p. 37.

31. In view of SWBT's and AT&T's comments, the Commission takes it that the parties intended for the Arbitrator to consider only the proposed 2.10.1 *et seq.* language in the revised DPL. The Commission, therefore, grants SWBT's request that P 73 of the Arbitrator's Determinations be struck for the foregoing reasons.

32. AT&T also disagrees with the Arbitrator's statement that AT&T had not opposed SWBT's proposed language for other sub-sections. AT&T pointed out that it had objected to the proposed language in its brief. In particular, AT&T claimed that (1) the 2.10.6 proposed language grants SWBT the unilateral right to determine whether AT&T is in compliance with the FCC's restrictions n28; (2) the 2.10.6.1 proposed language expanded SWBT's **[*18]** "unilateral review authority" to every UNE combination regardless of whether it had been a conversion or not; (3) the 2.10.6.2 proposed language dealt with audits already expressly defined under section 2.12; and (4) the 2.10.6.3 proposed language could be read to prevent conversion until certain contracts or tariff arrangements had been completed. n29

n28 The FCC restrictions prohibit the use of converted UNEs or UNE combinations to provide long distance or mobile wireless service exclusively by the requesting carrier. *TRRO* P 230.n29 AT&T Comments p. 6.

33. The Commission does not share AT&T's concerns. SWBT's proposed 2.10.6 language sets out the service consequences should AT&T not meet the applicable eligibility necessary for a particular conversion of a wholesale service to a 251(c)(3) UNE or UNE combination. SWBT does not suggest that it determine whether AT&T is eligible, or remains eligible, for conversion of services. Even if it did, though, the Commission would still favor SWBT's language, because **[*19]** clearly someone must determine a CLEC's eligibility to convert services. With respect to proposed 2.10.6.2 language, the Commission does not find offensive SWBT's reference to its right to audit for applicable eligibility criteria. The Commission is unable to read the proposed 2.10.6. language in the fashion that AT&T suggests. The Commission does, however, strike SWBT's proposed 2.10.6.1 language. The language either was misplaced, and intended for another ICA section, or mistakenly referenced "2.16.6" instead of "2.10.6". Even if it could be sure what SWBT intended, the Commission would still strike the language because its scope reaches far beyond that of any FCC conversion rule or order.

34. The Arbitrator also reminded SWBT not to assess AT&T any non-recurring (NRC) charges, including service and change orders, in accordance with FCC directives. n30 AT&T commented that the Arbitrator's reminder was consistent with its 2.10.5 language proposed in its revised DPL. As such, AT&T requested the Commission approve AT&T's proposed 2.10.5 language. n31 SWBT, on the other hand, criticizes the Arbitrator's NRC decision because he did not cite any authority. SWBT also noted that the Coalition **[*20]** recognized two separate categories of NRCs -- physical reconfiguration and service processing order. SWBT, therefore, encouraged the Commission to reject the Arbitrator's determination. n32

n30 Arbitrator's Determinations P 72.n31 AT&T Comments p. 5.n32 SWBT Comments P 8.

35. The Commission denies AT&T's request for adoption of its proposed 2.10.5 language. AT&T proposed that SWBT provide service conversions "in a seamless manner without any customer disruption or adverse effects to service quality." n33 The FCC did not expect conversions to be quite that trouble-free, stating that conversions "should be" a seamless process. The FCC also recognized that conversions may increase the risk of service disruptions to CLEC customers because the CLEC must groom long distance traffic off circuits to comply with eligibility criteria. n34

n33 Revised AT&T DPL p. 36.n34 *TRO* P 586.

[*21]

36. SWBT was correct in that the Arbitrator should have cited *TRO* P 587 for the proposition that incumbents were instructed not to assess NRCs on a CLEC converting a UNE or UNE combination to a wholesale service or vice versa:

> We recognize . . . that once a competitive LEC starts serving a customer, there exists a risk of wasteful and unnecessary charges, such as termination charges, re-connect and disconnect fees, or non-recurring charges associated with establishing a service for the first time . . . Because incumbent LECs are never required to perform a conversion in order to continue serving their own customers, we conclude that such charges are in-consistent with an incumbent LEC's duty to provide nondis-criminatory rates, terms and conditions. Moreover, we conclude that such charges are inconsistent with section 202 of the Act, which prohibits carriers from subjecting any person or class of persons *(e.g.,* competitive LECs purchasing UNEs or UNE combinations) to any undue or unreasonable prejudice or disadvantage.

Id., footnotes omitted.

37. The Commission affirms the Arbitrator's determination that SWBT may not assess CLECs NRCs, including service and change **[*22]** orders, in the conversion process. The FCC's foregoing conclusion is quite specific -- there are to be no NRCs assessed a CLEC in converting a wholesale service to a UNE or UNE combination. SWBT attempts to convince the Commission that the FCC prohibited only "provisioning" charges -- not service order or record changes. n35 However, SWBT witness Michael Silver agreed with Coalition witness Ed Cadieux that there were no physical reconfigurations involved in the conversion process. n36 Thus, the only NRCs that would be associated with a conversion of a wholesale service to a UNE or combination of UNEs would be those incurred with establishing a service for the first time -- service order and record change charges.

n35 SWBT Comments P 8.n36 Phase II Tr. p. 577 lines 12-18.

EELs

Coalition UNE-9

38. The Coalition explained that it was raising four discrete issues regarding contract language for enhanced extended links (EELs): (1) the Arbitrator rejected language limiting eligibility requirements only **[*23]** to high-capacity EELs, not to DSO loops combined with DS1 or DS3 transport, citing Arbitrator's Determination PP 55 -- 56; (2) the Arbitrator approved SWBT language that prevents Coalition members from commingling EELs with any other services, contrary to the *TRO,* citing Arbitrator's Determination P 56; (3) the Arbitrator approved SWBT language that required 28 local voice telephone numbers assigned to each DS3, citing Arbitrator Determination P 60; and, (4) the EELs rule requires only that the circuit be capable of providing 911 and does not condone SWBT's requirement of some unspecified proof, again citing Arbitrator Determination P 60. n37

n37 Coalition Comments pp. 24 -- 26.

Decision

39. The Commission is unable to follow the Coalition's argument here. Paragraphs 55 -- 56 of the Arbitrator's Determinations addressed the Coalition's belief that its members were entitled to 271 unbundled local switching under the successor agreements, not DSO loops or commingling. Paragraph 60 of the Arbitrator's Determinations **[*24]** addressed proposed language pertaining to SWBT's refusal to combine and the CLECs' ability to combine. It did not refer to DS3 local number requirements or proof that new EEL circuits will provide 911 as pled by the Coalition. n38

n38 If the Coalition intended to cite the *TRO,* those paragraph (or page) citations are equally irrelevant.

40. In its Comments, SWBT complains that the Arbitrator's concern about SWBT requiring specific local numbers for each EEL circuit from CLECs is unfounded. SWBT insisted that its witness clarified on Tr. 610 that such requirement is contained in SWBT's proposed language.

41. SWBT's witness appears to have supported the Arbitrator's concern rather than SWBT's position n39:

> It is not required under the FCC rules to identify the specific telephone number to SBC. SBC requires that as part of the contract language, that we have to provide the telephone number.

n39 SWBT Silver testimony Phase II Tr. p. 610 lines 3-7.

[*25]

42. The Arbitrator's determination, therefore, is affirmed.

Entrance Facilities

Coalition UNE-2(B)

43. The Coalition complained in its Comments that the Arbitrator failed to recognize there is a factual and legal distinction between interconnection facilities and entrance facilities. Citing Tr. 1001 -- 1004, the Coalition maintained that interconnection facilities transmit traffic between switches (traffic exchanged between ILEC and CLEC) while entrance facilities are a form of dedicated transport, used exclusively by the CLEC to connect its customers to the CLEC switch. n40

n40 Coalition Comments p. 27.

Decision

44. It might have been helpful for the Commission to ascertain what the expert witnesses thought of the Coalition's perceived difference between entrance facilities and interconnection facilities on Tr. pp. 1001 -- 1004. However, the Phase I transcript finished at page 819 and the Phase II transcript at p. 784. Thus, the Commission is, again, stymied in the understanding of the Coalition's **[*26]** position by the Coalition's citations. Even looking for help from the Coalition's Phase II Post-Hearing Brief was not helpful as the "Entrance Facilities" section is not at p. 66 as indicated in the Brief's Table of Contents.

45. The Commission certainly understands the press that the parties were under to complete the arbitration in a timely manner. However, the Commission must make its decision upon established facts, not guesswork at what a party may have intended to say. The Commission affirms the Arbitrator.

Building

Coalition UNE-17

46. In its Comments, the Coalition accuses the Arbitrator of inconsistency. According to the Coalition, the Arbitrator determined that a connecting walkway does not turn multiple buildings into a single building but then approved SWBT's proposed language that "combined multiple buildings into a single building' if they are connected by a passageway." n41

n41 *Id.* pp. 30-31.

Decision

47. The CLEC Coalition failed to accurately portray the Arbitrator's discussion **[*27]** about the definition of a building. The Arbitrator described a walkway near Crown Center, Kansas City, Missouri, that connected several buildings but that was *independent* of the buildings it connected. n42 And, SWBT defined "same building" as "a structure under one roof or two or more structures *on one premises* which are connected by an enclosed or covered passageway." n43 On the other hand, the Coalition's definition of a building contained many exceptions not contained in the FCC's analysis.

n42 Arbitrator's Determinations P 135.n43 Coalition UNE DPL SWBT Language p. 65, emphasis added.

48. The Commission agrees with the Arbitrator that SWBT's definition is closer to the ordinary meaning of "building" than that of the Coalition's. n44

n44 Coalition UNE DPL p. 7.

Ratcheting

Coalition UNE-32

49. The Arbitrator found that the **[*28]** record supported SWBT's position because SWBT had provided testimony of this issue, while the Coalition had not.

50. In its comments, the Coalition observed that, with the number of issues before the Arbitrator, that it was understandable that the Arbitrator would overlook p. 44 of Coalition Joint Direct testimony. n45 There is no ratcheting testimony on p. 44. In fact, that page solely addresses the witnesses' reservation of right to file additional testimony.

n45 Coalition Comments p. 34 with footnote 55.

51. Thus, the record still supports SWBT's position. The Commission affirms the Arbitrator's determination.

Routine Network Modifications

Coalition UNE-19

52. The Arbitrator found the Coalition's proposed network modification language to be more consistent with FCC rules than SWBT's. SWBT had attempted to limit the network modifications, to which CLECs are entitled at no charge, to those routine network modifications performed for its "retail customers". The FCC, on the other hand, defined routine network **[*29]** modifications as activities that an *IEC* regularly undertakes for its own customers, including carriers. n46

n46 Arbitrator's Determination P 114.

Decision

53. In its Comments, SWBT complains that its proposed language pertaining to network is closer to the FCC's definition rules contained in *47 C.F.R. § 51.319(a)(7)(ii)* and (e)(4)(ii). The Arbitrator correctly observed that SWBT's use of "retail customer" is a significant departure from the FCC's rules. The Arbitrator is confirmed.

54. With respect to SWBT's request for clarification that it be able to price network modifications on an ICB basis, that request is denied. The test should be, until the completion of the pricing portion of these proceedings, whether

SWBT's customers are charged for the work or not. If those customers are billed an amount for the work, SWBT shall charge the CLECs the same rate.

Sole UNE Source

SWBT UNE-15

55. SWBT had proposed language that the UNE Attachment would be the sole **[*30]** governing source of terms and conditions by which AT&T could obtain UNEs from SWBT. Among those terms and conditions was a full and irrevocable waiver required by SWBT of AT&T and AT&T's affiliates of their right and ability to purchase any UNE from SWBT and combine it with a network element possessed by them. n47

n47 AT&T UNE DPL SWBT Language p. 66

56. The Arbitrator rejected SWBT's proposed language because AT&T's affiliates were not parties to the successor agreement. n48

n48 Arbitrator's Determinations P 126.

Decision

57. In its Comments, SWBT insists that the federal Telecommunications Act of 1996 does not permit CLECs to pick and choose between tariff and interconnection agreements. SWBT claims that the successor agreement should be the sole and binding statement of the parties' rights and obligations. However, SWBT never disputed the **[*31]** Arbitrator's determination that AT&T entities were not parties to these proceedings and that SWBT's proposed language was, therefore, unenforceable.

58. The Commission affirms the Arbitrator.

Digital Cross-Connect System (DCS)

AT&T UNE-20; Coalition UNE-24

59. AT&T and the Coalition both proposed language that would require SWBT to provide DCS as part of the dedicated transport UNE. The Arbitrator found for AT&T because DCS was a functionality of dedicated transport. However, the Arbitrator rejected the Coalition's nearly identical language because it referenced 271 transport. n49

n49 *Id.*, P 142.

60. SWBT did not believe that the Arbitrator was correct because DS1 and DS3 loop and transport elements are frequently provided by SWBT without the use of DCS. SWBT explained that DCS aggregates and disaggregates high speed traffic carried between another carrier's point of presence and an incumbent switching offices -- a connection often described as "entrance facilities" or "backhaul facilities". SWBT also **[*32]** noted that these facilities had been declassified by the *TRRO*. Even if the Commission disagreed with its position, SWBT requested clarification that the Commission did not establish DCS as a separate UNE and that DCS would not be required to be provided in those instances where SWBT is not required to provide dedicated transport. n50

n50 SWBT Comments PP 32 -- 35.

61. In its comments, the Coalition thought the Arbitrator's determination was a bit harsh in that its proposed language referenced 271 elements only once. The Coalition encouraged the Commission to step outside of the "baseball style" arbitration and order the adoption of the Coalition's proposed language with the deletion of "provided by SBC Kansas pursuant to Section 251 or pursuant to Section 271" from proposed subsection 11.1.2. n51

n51 Coalition Comments pp. 36 -- 37.

Decision [*33]

62. The Commission finds SWBT's comments to be vague and uncertain. Not all DS1 and DS3 applications are entrance facilities. SWBT cites the *Virginia Verizon Order* for the proposition that DCS is not a separate UNE. Yet, that very order directs the ILEC Verizon to provide DCS and/or multiplexing together with dedicated transport. n52 Moreover, the *Virginia Verizon Order* noted that Verizon had admitted that multiplexing is an inherent part of dedicated transport. n53 AT&T's testimony is consistent with the *Virginia Verizon Order* in that AT&T witness Mr. Nurse described DCS as a device that enables access to, and management of, digital signals of loop and transport facilities and will often provide multiplexing functions. Furthermore, DCS allegedly enables a carrier to groom facilities, thereby optimizing trunk and facility utilization. n54

n52 *Virginia Verizon Order* P 500.n53 *Id.*, 496.n54 AT&T Nurse Direct p. 52 lines 1 -- 9.

63. The Commission agrees with the Arbitrator's determination **[*34]** that a requesting carrier is entitled to a UNE, along with all of the UNE's features, functions and capabilities, in a manner that allows the requesting telecommunications carrier to provide any telecommunications service that can be offered by means of that network element. DCS is clearly a functionality of dedicated transport. The Arbitrator is affirmed.

64. With respect to the Coalition's request, the Commission rejects its argument. The Coalition defined UNEs as those elements required to be unbundled under 251 or 271. n55 Permitting the Coalition to strike "provided by SBC Kansas pursuant to Section 251 or pursuant to Section 271" would have no effect upon the objectionable language of the Coalition's preliminary position. The Arbitrator is affirmed.

n55 Coalition UNE DPL p. 1.

Coalition UNE-2(C) (DSO transport)

65. SWBT argued in its Comments that the Arbitrator was incorrect that the FCC had at some point required DSO transport to be provided by SWBT as a UNE. Even if the FCC had required ILECs to **[*35]** unbundle DSO transport, *United States Telecom Association v. FCC, 290 F.3d 415* (D.C. Circuit) (2002) *(USTA 1)* would have eliminated any such unbundling requirements with the "total vacatur of *all* of the FCC's prior rules." n56

n56 SWBT Comments PP 36 -- 37, emphasis in original.

66. SWBT is wrong on the first count. The *Local Competition Order* n57 specifically stated, "The Incumbent LEC must also provide, to the extent discussed below, all technically feasible transmission capabilities, such as DS1, DS3, and Optical Carrier levels . . . that the competing provider could use to provide telecommunications." n58 It would appear to the Commission that the use of "technically feasible transmission capabilities" would include DSO.

n57 *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98, First Report and Order, 11 FCC Rcd 15499 (1996)* (Local Competition Order). **[*36]**

n58 *Id.*, P 440.

67. Second, the FCC would appear to be in disagreement with SWBT. In the *TRRO,* the FCC defined dedicated transport as "facilities dedicated to a particular competitive carrier that the carrier uses for transmission between or among incumbent central offices and tandem offices, and to connect its local network to the incumbent LEC's network." *Id.*, P 67. Furthermore, the FCC observed that CLECs "continue to enjoy unbundled access to DSO and high-capacity loops, dedicated transport and EELs". *Id.*, P *223*.

68. The Commission affirms the Arbitrator.

Issues Parties Believe not Addressed in Arbitrator's Determinations

Coalition UNE-4, 28, 59, 61, 68, 69, 72

69. SWBT and/or the Coalition do not believe that these issues were addressed by the Arbitrator. The underlying basis for the Coalition's assertions in all of these issues is the provision of 251 and 271 elements. The Arbitrator's discussion, findings and conclusions contained in PP 8 -- 14 of the Arbitrator's Determinations, and affirmed by the Commission, settle these issues in favor of SWBT.

Coalition [*37] UNE-39, UNE-40

70. It is the Commission's understanding that these two issues were settled by the Coalition and SWBT. Therefore, the Commission will make no determinations with respect to them.

Coalition UNE-47

71. The Arbitrator did not address this issue because the Coalition accepted SWBT's proposed compromise language. n59

n59 Coalition UNE DPL CLEC Preliminary Position p. 237.

Coalition UNE-66 (disputed billing resolution)

72. The Coalition proposed disputed billing language that would require SWBT to complete its investigation of such a dispute within 90 days of receipt of CLEC dispute submission. n60 SWBT proposed the language to which it and the Coalition had agreed in Texas. n61

n60 Coalition UNE DPL § 8.1 pp. 296 -- 297.n61 *Id.*, SBC Kansas Preliminary Position.

73. Neither SWBT nor the Coalition appears to have **[*38]** offered testimony of this issue. SWBT did brief the matter, although the Coalition did not.

74. With the record being so scant on this issue, the Commission finds SWBT's proposed language to be reasonable and adopts same.

Coalition UNE-70

75. According to the Table of Contents of the Coalition's witnesses, none of the witnesses addressed the emergency restoration issue. The Coalition listed this issue as contained in Section IX of its post-hearing brief. n62 However, the Commission was not able to find any such discussion in that section of the Coalition's brief

n62 Coalition Brief p. 60.

76. SWBT, on the other hand, provided testimony on n63, and briefed, the matter. n64 The record, therefore, favors SWBT and the Commission adopts SWBT's language.

n63 SWBT Witness Constable Direct pp. 30 -- 32.n64 SWBT Brief pp. 160-162

Coalition [*39] UNE-71

77. The Coalition proposed language with regard to joint testing upon certain circumstances. n65 However, based upon the Coalition's witness Table of Contents, it would appear that the Coalition did not provide testimony relative to this issue. Even though the Coalition listed Issue 71 under Network Modifications of its Brief, joint testing was not addressed there.

n65 Coalition UNE DPL pp. 307 -- 308.

78. SWBT complained that the Coalition had not defined "joint test" and had not provided terms and conditions for such a test. n66 SWBT is also concerned that adoption of the Coalition's proposed language would force SWBT to maintain the Coalition's network in some regard. n67

n66 SWBT Witness Hatch Direct p. 31.n67 SWBT Brief P 302.

79. The Commission finds that the record supports SWBT and adopts its proposed language.

Coalition [*40] UNE-77 (employee monitoring)

80. The Coalition UNE DPL does not contain an Issue 77. The Commission, therefore, has nothing to rule upon with respect to that issue.

AT&T UNE-4 (use of UNEs)

81. SWBT proposed language that limited AT&T's use of a UNE or a combination of UNEs to the provision of a telecommunication service. n68

n68 AT&T Revised UNE DPL SWBT Proposed Language pp. 25 -- 27.

82. AT&T challenged that language because it would "severely limit the utility of any UNE that AT&T obtains from SBC by precluding AT&T from connecting that UNE to a 271 UNE element or service." n69 AT&T also cited P 148 of the *TRO* for the proposition that access to UNEs is not limited to telecommunications service exclusively. n70

n69 AT&T Brief p. 14.n70 *Id.*, note 19.

83. The Commission has ruled above that successor agreements should not **[*41]** contain 271 terms and conditions. Moreover, the *TRO's* P 148 quote that AT&T cites refers to the use of information services along with telecommunications services and does not support AT&T's broader proposition.

84. The Commission finds for SWBT and adopts its proposed language.

IT IS, THEREFORE, BY THE COMMISSION ORDERED THAT:

A. The Arbitrator is affirmed or reversed as set out above. To the extent that a determination by the Arbitrator is not addressed as requested in a party's Comments, the Commission has deemed discussion unnecessary in affirming the Arbitrator.

B. It is not clear whether a petition for reconsideration is required before seeking judicial review, if any party is considering such a step. Any party wishing to seek reconsideration has fifteen days from the date this Order is served within which to petition the Commission for reconsideration of any final issue or issues decided herein. If this Order is mailed, service is complete upon mailing and three days may be added to the fifteen-day time frame. Petitions for reconsideration shall be served upon the Commission's Executive Director.

C. The Commission retains jurisdiction over the subject matter and the **[*42]** parties for the purpose of entering such further order, or orders, as it may deem necessary.

BY THE COMMISSION IT IS SO ORDERED.

Moline, Chr.; Krehbiel, Com.; Moffet, Com.

Dated: July 18, 2005