

Control Number: 20400



Item Number: 755

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September 22, 2005

To the Honorable:
Paul Hudson, Chairman
Julie Parsley, Commissioner
Barry Smitherman, Commissioner
Public Utility Commission of Texas
1701 N. Congress Avenue
Austin, TEXAS, 78711-3326

Re: Letter of Protest and Request for Enforcement of Docket 20400, Order 45.
(Filed on behalf of SBC Competitors, and Citizens of the State of Texas)

Dear Commissioners:

On October 17, 2002, SBC was ordered (Docket 20400 Order 45) to remunerate its competitors and the State of Texas for improper "K-Table" exclusions in SBC's reporting of liquidated "PM" damages. SBC appealed this Order to the United States Federal District Court for the Western District of Texas, Case No. SA 03-CA-0249 FB. On March 31, 2003 this Commission was served with a citation and requested representation by the Office of the Texas Attorney General. (Attachment 1)

On or about April 22, 2003, representatives of the AG's office signed a legal agreement with SBC, styled as a "Joint Stipulation" in 03-CA-0249. (Attachment 2) In addition to routine filing matters, the parties agreed to the following:

4. *SBC-Texas shall not be required to (a) to pay the additional amounts that would be paid to competitive local exchange carriers under the challenged modifications to the K-Table provisions in those agreements pending a final decision in this cause. (Emphasis added)*

We believe the "Joint Stipulation" violates the Texas Open Records Act, as it was never publicly posted but clearly contains provisions in Sections 4a and 4b that relate to CLECs. These include provisions for SBC to notify CLECs of amounts owed upon request - clearly impossible when the agreement was never disclosed to them. In fact, I had to file an Open Records Act request to even get a copy of it since it is not available on PACER.

According to reports filed by SBC since early 2003 per the terms of this stipulation, SBC owes its competitors in excess of \$5 million dollars. This represents well over 20% of all the PM damages SBC has ever paid in Texas and the problem grows worse month by month. We believe this amount is immediately due and payable to SBC's competitors and the treasury of the State of Texas due to "this cause" being finally decided.

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On June 22, 2005, the Honorable Fred Biery, United States District Judge, issued "Order Concerning Plaintiff's Motion to Alter or Modify the Judgment," which upheld this Commission's Order 45. (Attachment 3) Even so, it was never posted in Docket 20400 and again had to be obtained through an Open Records request. SBC has since, to our understanding, appealed to the 5th Circuit Court, but "this cause" has been decided. SBC must be called to pay up effective 6/22/05 – the date of Judge Biery's order.¹

On the chance that this Commission wishes to enter into *another* dubious stipulation with SBC, it is surely aware the story won't end at the 5th Circuit. SBC can be expected to appeal all the way to the Supreme Court. This process would take years and effectively render Order 45 a moot point. Indeed many of the CLECs who would have been entitled to payment are already gone, and SBC's liability dries up further every day it delays.² This is to say nothing of the amounts SBC owes to the State of Texas under Order 45 which are significant.

Please let the Parties to this Docket know whether this Commission intends enforce its Order or whether it intends to enter into another stipulation. We respectfully request you weigh your decision carefully and post it prominently, in compliance with the Open Records Act.

I am available, if necessary, to discuss this with any party upon request.

Yours truly,



Leo A. Wrobel

CC: Distribution

¹ If SBC is successful with its 5th Circuit and presumably Supreme Court appeals, it can always try to collect back amounts like they are presently trying to do in Michigan. (K-Table is a topic of serious discussion there)

² SBC competitors like Accutel and Premiere Network Services enjoyed no such forbearance from this Commission. They were forced into bankruptcy in virtually the same month that this Commission signed the stipulation with SBC.

Distribution was made via fax, mail, or electronic media on 9/22/05:

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Parties of Record, Docket 20400

Attachment 1

Rebecca Klein
Chairman
Brett A. Perlman
Commissioner
Julie Caruthers Parsley
Commissioner
W. Lane Lanford
Executive Director



Public Utility Commission of Texas

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March 31, 2003

Attorney General, Greg Abbott
ATTN: Jeffrey S. Boyd & Karen W. Kornell
P.O. Box 12548
Austin, Texas 78711

Re: *Case No. SA03CA0249 - Southwestern Bell Telephone, L.P. d/b/a SBC Texas v. PUC*

Dear Mr. Boyd & Ms. Kornell:

The Public Utility Commission of Texas was served with a citation in the above referenced number on March 31, 2003. This letter is to request representation by the Attorney General in this matter. A copy of the citation is enclosed.

This lawsuit relates to PUC Docket No. 20400 - *Section 271 Compliance Monitoring of Southwestern Bell Telephone Company of Texas.*

If you need further information, please call me at 936-7245.

Sincerely,

Pamela Pruitt Whittington
Division Director
Policy Development Division

/s/

cc: Tom Hunter w/o attachments
Paula Mueller w/o attachments
Steve Baron

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Attachment 2**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
(San Antonio Division)**

Southwestern Bell Telephone, L.P., d/b/a
SBC-Texas,

Plaintiff,

v.

Public Utility Commission of Texas;
Rebecca Klein, in her official capacity as
Chairman of the Public Utility Commission
of Texas; Brett A. Perlman, in his official
capacity as Commissioner of the Public
Utility Commission of Texas; and Julie C.
Parsley, in her official capacity as
Commissioner of the Public Utility
Commission of Texas,

Defendants.

No. SA 03-CA-0249 FB

JOINT STIPULATION

NOW COME Southwestern Bell Telephone, L.P., d/b/a SBC-Texas ("SBC-Texas"), Public Utility Commission of Texas ("Texas Commission"), Texas Commission Chairman Rebecca Klein and Texas Commissioners Brett A. Perlman and Julie C. Parsley, by and through their respective counsel of record, and enter into and respectfully request the Court's approval of the following stipulation.

1. In this cause, SBC-Texas has challenged the validity of those portions of Order No. 45 issued in Texas Commission Project No. 20400 in which the Texas Commission has ordered SBC-Texas to make modifications to the K-Table that is found in Attachment 17 of

interconnection agreements that SBC-Texas has entered into with hundreds of competitive local exchange carriers pursuant to 47 U.S.C. §§ 251 and 252. The challenged modifications are identified in Paragraph 38, subparagraphs (a) - (c) of the Complaint filed by SBC-Texas. SBC-Texas has requested a preliminary injunction to enjoin implementation of the modifications. Under Order No. 45, the K-Table changes would affect calculations of performance measurement penalties under those interconnection agreements beginning in May of 2003. The Texas Commission and Commissioners have requested an extension of time to file an answer to the Complaint filed by SBC-Texas. All parties agree that the filing of motions for summary judgment is appropriate in this case and that the page and time limits imposed by the rules are not adequate to provide for appropriate briefing of the issues to the Court.

2. SBC-Texas, the Texas Commission and its Chairman and Commissioners agree as follows regarding (a) extending the time for filing an answer, (b) the implementation of the K-Table modifications during the pendency of this cause, and (c) the parties joint submission of a proposed briefing schedule and page-limit extension for any motions for summary judgment to be filed in this case.

3. The due date for the Texas Commission and its Chairman and Commissioners to file an answer in this cause shall be extended to May 8, 2003.

4. SBC-Texas shall not be required (a) to pay the additional amounts that would be paid to competitive local exchange carriers under the challenged modifications to the K-Table provisions in the affected interconnection agreements or (b) to modify the K-Table provisions in those agreements pending a final decision in this cause.

a. SBC-Texas shall calculate and determine the additional amounts that would be paid to competitive local exchange carriers under the challenged

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modifications to the K-Table and shall accrue these amounts in a separate, identifiable account that shall be maintained on the books and records of SBC-Texas. SBC-Texas shall file monthly reports with the Texas Commission that show the amounts accrued to this account. If individual CLECs request information regarding this account, SBC-Texas shall and the Commission may inform those CLECs of the total dollar amount accrued to the account and/or the particular dollar amounts accrued to the requesting CLEC.

b. In the event SBC-Texas prevails in its challenge to the validity of the Commission's Order No. 45, the amounts accrued in the above-referenced account shall be deemed the property of SBC-Texas. In the event the Texas Commission and its Chairman and Commissioners prevail in defending Order No. 45, SBC-Texas will disburse the funds accrued in the above-referenced account, plus interest calculated at the rate of 1.79 per cent per annum, compounded annually, to the competitive local exchange carriers pursuant in compliance with Order No. 45.

c. SBC-Texas' motion for preliminary injunction is withdrawn.

d. This Stipulation may not be used to suggest an admission by any party as to the validity or invalidity of Order No. 45.

5. The parties agree that the following briefing schedule and page-limit extensions are appropriate and agree to make a joint request to the Court for their approval:

a. Motions for summary judgment up to 35 pages in length, exclusive of appendices, shall be filed by June 5, 2003.

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b. Responses to any motions for summary judgment shall be filed by June 26, 2003. Page limits for responses shall be 20 pages, exclusive of appendices; provided that, in the event parties intervene in opposition to SBC-Texas and file motions or supportive briefing, the page limit for a response filed by SBC-Texas to the Commission's and intervenors' motions and briefing shall be extended to 25 pages.

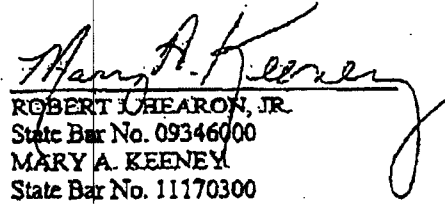
c. Replies to responses to said motions shall be filed by July 15, 2003. Page limits for replies shall be 10 pages, exclusive of appendices; provided that, in the event parties intervene in opposition to SBC-Texas and file motions or briefing, the page limit for a response filed by SBC-Texas to Commission and intervenors' motions and briefing shall be extended to 15 pages.

AGREED TO:


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State Bar No. 01797200
KRISTEN L. WORMAN
Assistant Attorney General
State Bar No. 00795730

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COUNSEL FOR SOUTHWESTERN
BELL L.P. d/b/a SBC-Texas

with this Court's conclusion that "Congress gave the state commissions the power to approve or reject interconnection agreements and thereby intended to 'include the power to interpret and enforce,'" SBC continues to contend the language of the agreement at issue restricts the Texas Commission's authority and the action taken was clearly arbitrary and capricious and should be reversed. The Court disagrees.

As pointed out by both AT&T and the Public Utility Commission, the Court did not rely on the FCC Order as the sole basis of its decision but instead found it "persuasive" in determining the PUCT's actions challenged by SBC were not arbitrary and capricious. The Court also relied on the arguments and authorities presented by the PUCT and AT&T in their motions and therefore finds plaintiff's motion should be denied with respect to the Court's granting of summary judgment in favor of the defendant and intervenor-defendant.

The Court has also considered plaintiff's request in footnote 1 of its motion that the Court revise the judgment to reflect that judgment on the merits was rendered in favor of the Public Utilities Commission of Texas and AT&T Communications of Texas, L.P. The PUCT, in footnote 5 of its response, concurs in this request. The Court assumes the parties are concerned with the language in the judgment following the granting on the merits of the summary judgment motions filed by the PUCT and AT&T and the denial of the motion for summary judgment by SBC that "all of plaintiff's claims are DISMISSED." As the parties correctly noted, the Court did rule on the merits of the claims presented and it was never this Court's intention to indicate otherwise.

Accordingly, **IT IS HEREBY ORDERED** that Plaintiff's Motion to Alter or Modify the Judgment (docket #29) with respect to SBC's request to set aside the Order and Judgment of this

Court granting defendant PUCT's motion for summary judgment and intervenor-defendant AT&T motion for summary judgment on the merits and denying plaintiff's motion for summary judgment is DENIED. IT IS FURTHER ORDERED the language in the judgment "and all of plaintiff's claims are DISMISSED" is hereby stricken from the judgment as inadvertent language and never intended to reflect the Court's judgment as anything but a judgment on the merits.

It is so ORDERED.

SIGNED this 22nd day of June, 2005.



FRED BIERY
UNITED STATES DISTRICT JUDGE