

ACI argues that as a direct result of the discovery misconduct committed by SWBT, it has expended a tremendous amount of resources in an effort to complete the extended discovery, conduct numerous new depositions, review the newly produced documents, and reformulate its case. As a sanction for SWBT's discovery abuses, ACI requests that the Arbitrators: (1) strike all of SWBT's direct and rebuttal testimony, and responses given on cross-examination concerning Decision Point List Nos. 1 through 22 and 27 through 32;⁴⁹ (2) adopt ACI's proposed contract language concerning these same DPL items as part of the interconnection agreement contract language; (3) declassify the documents contained in ACI and Covad's Motions to Declassify; and (4) reimburse all reasonable expenses, including attorney's fees, consultant's fees, and the additional travel and other expenses incurred by the continuance of this hearing.

Covad argues that the appropriate sanction for SWBT's conduct is to strike SWBT's answer to Covad's petition, find SWBT's defenses to Covad's positions to lack merit, and order SWBT to enter into an interconnection agreement containing the terms advanced by Covad in the underlying proceeding. Covad also requests that it be reimbursed for all costs, expenses and attorneys' fees incurred as result of SWBT's misconduct in this proceeding.

SWBT responds that the Petitioners have not met their burden to show sanctions are appropriate, and the Petitioners failed to show prejudice as a result of SWBT's conduct. SWBT contends that there has been no showing of a factual, legal, or public policy basis for any sanctions beyond the suspension of the hearing and the additional discovery ordered by the Arbitrators. SWBT further contends that subsequent production of documents after April 14, 1999, cured any harms that Petitioners may have suffered. SWBT also argues that relief sought by Petitioners is excessive and inappropriate under the legal standard set out in *TransAmerican Natural Gas Corp. v. Powell*,⁵⁰ particularly in light of SWBT's good faith effort throughout the discovery process. SWBT contends that the delay that may be experienced by the Petitioners into the Texas xDSL market is not associated with the failure to produce ACI Exhibit 17a. In closing arguments, SWBT argued that the interim agreements allowed ACI and Covad to enter

⁴⁹ The Decision Point List is attached to this order as Attachment A.

⁵⁰ 811 S.W.2d 913, 917 - 918 (Tex. 1991).

the DSL market in a timely fashion, which had the effect of curing any harm resulting from the delay of the hearing on the merits.⁵¹

The Arbitrators' rationale for their ruling on the five allegations is discussed separately below.

Violation Of The Protective Order

Factual Summary

The first ground for Petitioners' motions concerns SWBT's alleged overbroad designation of confidential documents in violation of the Protective Order. ACI contends that SWBT violated the Protective Order by designating huge quantities of documents as "Confidential" in an effort to thwart open discussion of the issues. ACI argues that there is a presumption of openness and that SWBT must justify its excessive confidential designation. ACI provides examples of documents stamped "Confidential" that are public documents or have been sent to other telecommunications carriers.⁵² ACI claims it is abusive to force parties to expend resources seeking to declassify documents, as well as a waste of the Commission's resources to review and make such determinations as to the confidential designation. ACI argues that SWBT was overly broad in applying the protective order to documents in spite of the Arbitrators' admonitions to limit the confidential designation to certain categories of documents.⁵³

ACI also claims that SWBT abused its claim of privilege because SWBT provided no basis for its assertions of privilege in its privilege log. ACI argues that SWBT's privilege log does not provide adequate information to ascertain whether SWBT's claims are proper or

⁵¹ Order No. 5 clearly states ". . . the Arbitrators hereby clarify that the terms of this interim Order are not intended to be a grant of relief in response to the sanctions motions." Order No. 5, at 2. It should also be noted that SWBT appealed Order No. 5 to the Commission, then withdrew their appeal after reaching agreement with the Petitioners on interim interconnection terms.

⁵² Brief of ACI on Sanctions Issues at 22.

⁵³ Order No. 9 delineates that documents related to the *physical implementation of xDSL* should not be designated "Confidential." (emphasis added) Order on ACI's and 's Discovery Dispute Related to Proprietary Documents and Claim of Privilege and 's Motion to Compel (May 20, 1999).

appropriate, and that ACI should not have to request an *in camera* review of the over 800 documents contained in the log to make this determination.

SWBT argues that the “Confidential” designation was properly made and that it followed accepted steps in designating documents as exempt from public disclosure. SWBT contends that Petitioners’ concerns about improper designation are inappropriate for sanctions.

Analysis

The Arbitrators defined which documents were to be treated as confidential in the Protective Order in both dockets.⁵⁴ The purpose behind the Protective Order is to protect from public disclosure a narrow category of information, while still making such information available for use in the proceeding.⁵⁵ According to the Protective Order, the party designating material as confidential must clearly identify each portion of the material alleged to be confidential information, and provide a written explanation of the claimed exemption. Such explanation may be accompanied by affidavits providing appropriate factual support for any claimed exemption. The claim must also state the reasons why the material is not subject to the Open Records Act. Further, there is a rebuttable presumption that all information is non-confidential and the burden of establishing confidentiality is on the party proposing confidential treatment. All parties are bound by the protective order, which provides that documents designated as confidential cannot be disclosed for any purpose other than use during the proceeding. If used during the proceeding, the transcripts are marked confidential and that portion of the record is sealed.

The designation of any information as confidential information may be challenged to the Arbitrators, the Commission, or a court having competent jurisdiction for a determination, after hearing, as to whether said material should be so classified. Finally, the party asserting confidentiality bears the burden of proving that the alleged confidential information should be admitted under seal.

⁵⁴ Order No. 2, Memorializing Prehearing Conference, Establishing Procedural Schedule and Issuing Protective Order (January 19, 1999).

⁵⁵ In contrast, documents for which a party claims a privilege from production, and therefore from availability for use in a proceeding, are governed by the procedures in P.U.C. PROC. R. 22.144 (d)-(g), and TEX. R. CIV. PROC. 193.2 and 193.3.

As stated in Order No. 19, the proceedings before this Commission are open and held in the public interest. Primarily for that reason, the presumption, as clearly stated in the Protective Order, is that all documents in this proceeding are public and not entitled to be veiled in secrecy. However, it must be noted that the Petitioners had full disclosure of the documents at issue. SWBT produced the majority of documents without redaction and the Petitioners had the opportunity to use the documents in the preparation of their cases. Further, the documents were not withheld from production under a claim of privilege.⁵⁶ Petitioners contend that SWBT's overbroad designation is an abuse of the protective order and is meant to thwart open discussion of issues in this proceeding.

Conclusion

The Arbitrators are still in the process of reviewing the documents at issue on a page-by-page basis to determine whether SWBT has met its burden in proving that those documents should be designated as "Confidential" and whether those documents should be declassified. Based on the specific examples provided by the Petitioners, the Arbitrators have concerns that SWBT's frequent use of "Confidential Information" may tend to robe these proceedings in a veil of secrecy.⁵⁷ Claims of confidential information must be made judiciously and carefully to avoid any appearance that these proceedings are not public proceedings. Although the examples of unsupported claims for protection appear to represent a violation of the Protective Order, the Arbitrators nevertheless believe the declassification of those documents that are found to not have been properly designated will resolve the issues in dispute, and that such violation is not a proper ground for discovery sanctions under TEX. R. CIV. PROC. 215.

Improper Designation Of Witnesses

Factual Summary

The second ground for sanction is Covad's allegation that SWBT intentionally misdesignated witnesses so that they could "plausibly deny" knowledge of key technical

⁵⁶ Other than ACI Exhibit 153.

⁵⁷ Brief of ACI on Sanctions Issues at 22.

information.⁵⁸ Covad argues that SWBT deliberately designated, in response to Covad's RFIs, certain SWBT employees as expert witnesses who were unable to answer specific questions in their claimed areas of expertise. Covad contends this is an improper defensive strategy utilized by SWBT, allowing SWBT to "plausibly deny" knowledge of critical technical issues on xDSL implementation. Because the designation was made in response to an RFI, Covad claims it is sanctionable conduct, because SWBT's designation of most knowledgeable persons was misleading.

SWBT did not respond to Covad's allegation of intentionally designating witnesses who were unable to answer questions on specific areas of SWBT's xDSL retail implementation.

Analysis

The scope of the relevant information missing from the RFI responses was not evident until SWBT produced ACI Exhibit 17. Thus, Petitioners were without critical information responsive to numerous RFIs until after the hearing commenced.

The discovery process that took place after April 14, 1999 was Petitioners' first opportunity to question SWBT's SMEs concerning spectrum management in the field. Additionally, this was the opportunity for ACI and Covad to depose a number of DSL core team members. ACI and Covad deposed approximately 20 additional witnesses in a matter of several weeks.

SWBT offers no defense to the allegations that SWBT failed to initially designate witnesses properly.⁵⁹

Conclusion

The Arbitrators conclude that the designation of witnesses by SWBT in this proceeding was improper. If SWBT chooses to use witnesses for technical and factual matters who do not

⁵⁸ ACI counsel put forward a similar allegation at the hearing on the merits. Tr. at 792-797 (June 2, 1999).

⁵⁹ On page 22 of its Brief for Motion on Sanctions, SWBT stated that "... the volume and complexity of the RFIs, together with the short turnaround time, caused those participating in the process to not thoroughly canvas all relevant employees in preparing their answers to certain RFIs." The timeline to which they refer applied after April 14, 1999.

have personal knowledge of the facts, but instead are policy witnesses, then SWBT must ensure that such witnesses somehow are given access to the relevant information in a proceeding. Clearly, under the record, SWBT had access to numerous employees with direct knowledge of the central facts at issue in this proceeding, but chose not to designate such individuals as witnesses. Instead, SWBT chose to designate witnesses who did not have knowledge of the core critical issues in this case and who could therefore not answer questions on these issues. The end result was that SWBT's witnesses presented an inaccurate and incomplete picture of the facts, which is misleading at best, and does not allow Petitioners to ascertain the truth nor adequately prepare for the arbitration. The discovery process and designation of SMEs is not new to SWBT, and the company should have proper procedures in place to efficiently and effectively designate witnesses and ensure they are aware of the company's activities. Failure to completely answer discovery is treated the same as not answering at all.⁶⁰ SWBT's failure to provide fully responsive SMEs in response to Petitioners' RFIs and in the presentation of its case is an abuse of discovery.

Failure To Produce Documents

Factual Summary

Next, the Arbitrators address the central ground for sanctions, SWBT's uncontroverted failure to produce documents prior to April 14, 1999. ACI asserts that it suffered harm because of SWBT's failure to produce key documents on issues that go to the heart of the interconnection dispute. Specifically, ACI points to ACI Exhibits 17 and 17a, which are the DSL Methods and Procedures that SWBT uses in its retail xDSL offerings. ACI requested in RFI 2-36 all documents containing methods and procedures for how SBC will monitor, track and administer for itself various xDSL offerings. However, ACI claims that SWBT produced no documents in response to this RFI. ACI asserts that ACI Exhibits 17 and 17a would have been responsive to RFI No. 2-36, as well as RFI Nos. 2-1, 2-2, 2-3, 2-11, 2-15, 2-19, 2-31, 2-63, and 3-16.⁶¹

⁶⁰ TEX R. CIV. PROC. 215 (1)(c).

⁶¹ Brief of ACI on Sanctions Issues at 12, 13.

ACI claims it was apparent from testimony during the hearing on the merits on April 14, 1999, that documents requested by ACI existed at the time of the RFI, yet were not produced by SWBT. ACI asserts there was a substantial number of RFIs that SWBT either did not respond to, responded to incompletely, or responded to with false or misleading information. Although SWBT eventually produced responsive documents in accordance with the Arbitrators' order,⁶² ACI argues that SWBT should still be sanctioned for its misconduct because of the harm it caused Petitioners.

Covad claims that SWBT failed to produce all responsive documents to Covad's RFIs until after the Arbitrators ordered further discovery after April 14, 1999. In particular, Covad asserts that SWBT failed to produce responsive documents to Covad's RFI Nos. 1-9, 1-11, 1-27, 2-1, 2-3, 2-42, 2-41, 2-48, 2-49, 2-52, 2-54, 3-17, 6-1, and 6-2 until after the hearing convened on April 14, 1999.⁶³ Covad claims that during the second round of discovery, SWBT produced for the first time hundreds of documents that it should have produced in response to Covad and ACI's pre-April 14 RFIs, many of which go directly to critical issues in this proceeding.

SWBT admits that it failed to produce documents in response to Petitioners RFIs; however, it contends that it was an oversight and unintended. Further, SWBT replies that it has complied with subsequent discovery requests, including those directed by the Arbitrators, since April 14, 1999. SWBT also asserts that after the April 14, 1999, hearing, the Arbitrators reduced the response time to RFIs to five days, creating a tremendously burdensome timeline for SWBT to comply, given the volume of the documents produced. SWBT also notes that it has taken internal steps to prevent this problem from occurring again.⁶⁴

Analysis

The information contained in ACI Exhibits 17 and 17a are central to the parity issues in the interconnection dispute. Prior to April 14, 1999, SWBT produced few or no documents in response to several RFIs concerning loop conditioning, SWBT retail/wholesale xDSL offerings,

⁶² Tr. at 642 (April 15, 1999).

⁶³ Covad's Brief in Support of Motion and Amended Motion for Sanctions, Exhibit A., claims that Attachment A contains a small selection of critical documents SWBT did not produce until after April 14, 1999 .

⁶⁴ SWBT Brief on Motions for Sanctions at 22-23; Tr. at 82 (June 2, 1999).

and xDSL ordering and implementation issues. Only after the Arbitrators ordered the parties to undergo further discovery as a result of the discovery of ACI Exhibits 17 and Exhibit 17a, did ACI receive more responsive documents on these issues. The record clearly shows, and SWBT admits, that they did not produce documents in response to discovery requests for documents and information prior to April 14, 1999.

Whether discovery abuse occurred is not in question.⁶⁵ Petitioners' request for sanctions is timely and conforms to the requirements of TEX. R. CIV. PROC. 215. SWBT bears the burden of proof to show that either the misconduct did not occur, or that good cause existed for the misconduct. SWBT, having admitted to the misconduct, claims it was not intentional. TEX. R. CIV. PROC. 215 does not require a finding of intent for a party to be sanctioned for discovery abuse.

Failure to timely and completely answer requests for information, produce documents, supplement answers, appear at depositions or produce documents in response to a *subpoena duces tecum* at a deposition, or otherwise abuse the discovery process is considered sanctionable conduct under TEX. R. CIV. PROC. 215. Answering a discovery request for documents incompletely is considered to be a failure to answer,⁶⁶ including a claim that a similar document or documents containing the same information was produced. *City of Dallas v. Ormsby*, 904 S.W.2d 707, 710 - 711 (Tex.App.—Amarillo 1995) writ denied. Further, the failure to supplement discovery requests in a timely manner has been held to be an abuse of discovery. *Foster v. Cunningham*, 825 S.W.2d 806, 808 - 809 (Tex.App.--Fort Worth 1992) writ denied. (Where party had convenient opportunity to share requested information, but did not do so, withholding information was sanctionable conduct). It is undisputed by SWBT that it failed to produce all responsive documents prior to the initial day of the hearing on the merits.⁶⁷ Given

⁶⁵ The parties concur and the record reflects that SWBT did not produce any M&P documents, as requested, stating that there were none to be produced.

⁶⁶ TEX. R. CIV. PROC. 215(1)(c).

⁶⁷ Tr. at 620-621 (April 15, 1999). Mr. Leahy states: "Based upon our review of the RFIs and our questions last night to other employees of Southwestern Bell Telephone Company, it's our position this should have been turned over prior to this afternoon. So it is responsive to a particular RFI, and I think it's labeled on the cover, and so that is our position, and it's regretful that we did not have this document sooner. You know, when we get these requests, we ask the Company at large, but then we try to figure out who would likely have this document, and it was missed."

these facts, to avoid sanctions for its discovery misconduct, SWBT must show good cause for its failure to produce.

Good Cause Exception

To avoid sanctions, SWBT must make a showing of good cause. TEX. R. CIV. PROC. 215. *Remington Arms Co. v Canales*, 837 S.W.2d 624, 625 (Tex. 1992). Generally, excuses that the party was unaware of the existence of responsive documents, or that an employee/agent failed to follow instructions of the attorney or client, which resulted in incomplete production of documents has not been held to be a sufficient showing of good cause. *Garcia Distr., Inc. v. Fedders Air Conditioning, USA, Inc.*, 773 S.W.2d 802, 805 - 806 (Tex.App.—San Antonio 1989) writ denied.

The good cause exception is limited to situations where one could not in good faith and by due diligence immediately respond, or where difficult or impossible circumstances prevented one from supplementing discovery. *Foster* at 807. SWBT has not claimed in any way difficult or impossible circumstances that prevented it from complying with Petitioners' pre-April discovery requests. Moreover, SWBT's claim that Petitioners were not harmed and that subsequent production "cured" their misconduct is not good cause for its failure to produce documents in the first place. To relax the good cause standard would impair its purpose. *See Alvarado v. Farah Mfg. Co.*, 830 S.W.2d 911, 915 (Tex. 1992).

SWBT's only apparent defense is that it made a honest mistake and that its failure to timely produce what became ACI Exhibit 17 (and 17a) and other forthcoming documents was an administrative oversight.⁶⁸ Prior to April 14, 1999, SWBT claims that it had no knowledge of the existence of such information. However, through testimony developed after April 14, 1999, it became clear that those who were responsive to the RFIs in question were aware of "core teams" for within SWBT.⁶⁹ These core teams produced documents that would have been responsive to the ACI's and Covad RFI's on methods and procedures. Despite the knowledge of

⁶⁸ Tr. at 620-621 (April 15, 1999); Tr. at 82 (June 2, 1999).

⁶⁹ Tr. at 1117 (June 3, 1999).

the existence of the core teams for DSL,⁷⁰ the team members were either not canvassed, or in instances where they did,⁷¹ failed to produce responsive documents.⁷²

Furthermore, from depositions that were later obtained from SWBT employees, it became clear that several SBC employees who were most knowledgeable in SBC in responding to certain RFI requests from ACI and Covad, were never contacted to assist in document production, and in many instances, were not even aware of this proceeding.⁷³

Conclusion

SWBT's failure to produce documents on the central, critical issues in these dockets cannot be excused by SWBT's ignorance of its own internal operations. Were the threshold for a showing of good cause lowered to allow excuses such as these, the good cause exception would become the rule, not the exception, thus undermining the purpose behind TEX. R. CIV. PROC. 215. For this reason the good cause exception is a narrow one and should not be enlarged. *Foster* at 807. The mere fact that only general inquiries were made by the SWBT document production staff, which then failed to turn up all responsive documents, is not enough to justify SWBT's lack of diligence in pursuing what should have been a thorough and complete search to locate responsive information. The Arbitrators decline to enlarge good cause to include mere mistakes, and find that SWBT failed to show good cause for its failure to produce documents prior to April 14, 1999.

ACI Exhibit 17A

Factual Summary

The fourth ground for the Petitioners' motion for sanctions concerns whether ACI Exhibit 17 was altered when it was redacted. ACI Exhibit 17 was submitted as a redacted document on April 15, 1999. The Arbitrators ordered that the unredacted version be provided as ACI Exhibit

⁷⁰ *Id.*

⁷¹ Tr. at 1126 (June 3, 1999).

⁷² See Confidential Attachment C, Paragraph 11.

⁷³ See Confidential Attachment C, Paragraphs 12 and 13.

17a. ACI contends that when SWBT provided ACI Exhibit 17, it had unilaterally revised the original unredacted ACI Exhibit 17a, because the redacted version and the unredacted version differ substantively. ACI claims SWBT masked certain data, changed the name, renumbered pages and headnotes, creating the illusion that ACI Exhibit 17a was something different than what was originally submitted in redacted form. Moreover, ACI submits that the changes were made to information that was damaging to SWBT's previous testimony and case. ACI claims SWBT unilaterally revised five pages of information, although the renumbering made it appear that only one or two pages were redacted.

SWBT alleges that any redaction missteps were corrected when the unredacted version was delivered to the parties, curing any mechanical mistakes that were made. SWBT also argues that any mistakes that were made were not material, were harmless, and were acknowledged by SWBT at the hearing on April 16, 1999.⁷⁴

Analysis

ACI alleges that SWBT improperly revised ACI Exhibit 17 when it was redacted from ACI Exhibit 17a. ACI has the burden to prove its allegation beyond mere suspicion. ACI points to irregularities between the two documents. There is evidence by comparing ACI Exhibits 17 and 17a that would indicate that it was revised improperly. In addition, Mr. Samson's testimony of April 16, 1999, explained the incorrect process he undertook in redacting the document. However, Mr. Samson's testimony also provides a reasonable explanation for the method of redaction and the intent behind the changes.

Conclusion

The Arbitrators find that SWBT intentionally revised or altered ACI Exhibit 17. However, the Arbitrators find that SWBT provided a reasonable explanation for the redactions. Therefore, it is clear that the document was not properly redacted, but there is no evidence that SWBT improperly redacted ACI Exhibit 17 with intent to mislead. The Arbitrators find that no sanctionable misconduct was involved.

⁷⁴ Tr. at 706-708 (April 16, 1999).

ACI Exhibit 153

Factual Summary

The final ground for sanctions involves ACI Exhibit 153. In the joint Amended Motion for Sanctions, Petitioners assert that SWBT gave a directive described in Confidential Attachment C, Paragraph 1, as evidenced by ACI Exhibit 153. This action, ACI claims, shows SWBT intended to prevent ACI, the Commission staff, and the Arbitrators from discovering key documents regarding parity provisioning of xDSL capable loops.

Regarding the directive contained in ACI Exhibit 153, SWBT claims that Petitioners offered no evidence that the directive was improper or had any negative impact on discovery in these dockets. SWBT argues that no improper action took place, and makes other arguments shown in Confidential Attachment C, Paragraph 14.

Analysis⁷⁵

While there is no evidence other than ACI Exhibit 153 itself that any action was actually taken in response to the directive contained in ACI Exhibit 153, SWBT presented no evidence that action was not taken by recipients. SWBT has made no showing to ascertain whether the directive was followed. The e-mail was sent, however, and it is possible that it was acted upon, especially since it was sent to dozens of SBC employees. Although the document speaks for itself, there is no additional evidence that the e-mail was intended to defraud the Commission during the discovery process in this proceeding.⁷⁶

Conclusion⁷⁷

ACI Exhibit 153 is clearly dated after the Petitioners in this arbitration propounded the first set of RFIs. The subject matter of the communication relates to the issues in this arbitration. The Arbitrators rule that, while there is no corroborative evidence that SBC employees

⁷⁵ See Confidential Attachment C, Paragraph 16 for confidential analysis on this issue.

⁷⁶ See Confidential Attachment C, Paragraph 15.

⁷⁷ See Confidential Attachment C, Paragraph 17 for confidential conclusions on this issue.

responded to the directive in ACI Exhibit 153, the intent of the communication contained in the exhibit is unsettling. At the very least, the communication sent in ACI Exhibit 153 indicates a general disregard on the part of SBC for matters pending in litigation at the Commission. Therefore, the Arbitrators find that ACI Exhibit 153 provides an additional independent ground for sanctions. The testimony relating to ACI Exhibit 153 supports a finding of discovery abuse against SWBT.⁷⁸

III. SANCTIONS AWARDS

A. DISCUSSION ON SANCTIONS

This proceeding involves highly technical issues related to the provision of competitive advanced services under the FTA. It is essential that the Arbitrators and the Commission know the whole truth about these issues prior to ruling on the merits in the arbitrations. The Arbitrators have found that SWBT abused the discovery process in this proceeding on three separate and independent grounds: (1) by failing to produce requested documents, (2) by failing to provide witnesses who were knowledgeable about SWBT's activities on which they were filing testimony, and (3) by issuing the directive contained in ACI Exhibit 153.

The Arbitrators do not agree with Petitioners that the appropriate remedy for such discovery abuse is to strike SWBT's testimony on all of the DPL issues and adopt Petitioners' recommendations in full. Such an extreme remedy is not appropriate in this instance, where the Arbitrators are not basing the decision a finding of intentional discovery abuse by SWBT. Sanctions must bear direct relationship to offensive conduct, not be excessive and less stringent sanctions should be imposed before imposing "death penalty," or case-determinative sanctions, if it will fully promote compliance, act as a deterrence, and discourage further abuse. *TransAmerican Natural Gas* at 917-918; *Braden v. Downey*, 811 S.W.2d 922, 929 (Tex. 1991). The court has discretion in imposing sanctions, but sanctions must be "just." *Chrysler Corp. v. Blackmon*, 841 S.W.2d 844, 849 (Tex. 1992). Purposes of sanctions are to secure compliance, deter others from similar misconduct, and to punish violators. *CRSS Inc. v. Montanari*, 902 S.W.2d 601, 609 (Tex.App.—Hous. [1st Dist.] 1995) writ denied, *citing Bodnow* at 840.

⁷⁸ See Confidential Attachment C, Paragraph 18, for confidential conclusions.

Whenever possible, lesser sanctions should be imposed. In exceptional cases, case-determinative sanctions may be imposed in the first instance, but only where the sanction is clearly justified and it is fully apparent that no lesser sanction would promote compliance. *GTE Communications Systems. v. Tanner*, 856 S.W.2d 725, 729 (Tex. 1993). The record must reflect that the availability of lesser sanctions was considered. *Otis Elevator Co. v. Parmelee*, 850 S.W.2d 179, 181 (Tex. 1993). Lesser sanctions can be an order to compel, threats of dismissal before striking, striking or limiting evidence, penalties, costs, expenses and attorneys' fees, and contempt. TEX. R. CIV. PROC. 215(d) *See Andras v. Memorial Hospital System*, 888 S.W.2d 567, 572 (Tex.App.—Hous. [1st Dist.] 1994) writ denied.

Therefore, the Arbitrators believe lesser, non-case-determinative, but nonetheless firm sanctions against SWBT are appropriate for its abuse of the discovery process in this proceeding. SWBT is ordered to pay all attorneys' fees, costs, and expenses the Petitioners have incurred as a direct result of SWBT's failure to produce the information and documents associated with this hearing. An award of these amounts is a legitimate lesser sanction, directly related to SWBT's failure to answer Petitioners' discovery requests, their failure to provide sufficiently knowledgeable witnesses, and their issuance of the directive in ACI Exhibit 153. The intent of the award is to promote compliance, deterrence, and discourage further abuse of this nature in other interconnection dispute proceedings before this Commission. The schedule for developing the precise amount is included in the following section.

The Arbitrators note Petitioners' requests for redress for economic harm arising from SWBT's abuse of the discovery process and the resultant delay in entering Texas xDSL markets. Petitioners seek payment for lost opportunity costs, including the loss of the "first to market" advantage in the new xDSL market. The Arbitrators acknowledge Petitioners' claims of economic harm; however, the Arbitrators decline to address these claims.

Although not part of the sanctions award, the Arbitrators encourage SWBT to take remedial action to improve its process for communicating "the whole truth" to the Commission.⁷⁹ When discovery is conducted in a case, the parties and the Commission must

⁷⁹ See, e.g., SBC Compliance Plan Regarding FCC Rules and Regulations, Report to SBC Communications, Inc. Regarding Compliance with Provisions of the Telecommunications Act of 1996 Related to

have confidence that the company searched for information and provided as accurate a response as possible on a timely basis. It is not enough for the company to present witnesses and respondents that simply convey the company's official position, without seriously inquiring into the issues involved in order to provide a proper response to the questions posed. The Arbitrators have attempted to mitigate the harm caused by SWBT's abuse of the discovery process in this proceeding. The sanctions contained herein are designed to prevent further abuse in future proceedings.

B. PHASE TWO

Parties are hereby notified of the following schedule for phase two of these proceedings.

Petitioners file direct testimony and documentation regarding expenses resulting from the sanctions proceeding	August 9, 1999
SWBT file reply testimony and documentation regarding expenses resulting from the sanctions proceeding	September 9, 1999
Hearing on Sanction Award	September 23, 1999
Parties file post hearing briefs	September 30, 1999
Parties file reply post hearing briefs	October 7, 1999
Award of expenses issued	October 14, 1999

Copies of all filings should be hand delivered to the Arbitrators.

the Acquisition of Southern New England Telecommunications Corporation (May 3, 1999). A similar educational program for SWBT employees is encouraged here to address issues such as lack of familiarity with official document retention and production policies, proper designation of witnesses, inclusion of pending PUC dockets within the definition of pending litigation, and inclusion of drafts within the definition of documents.

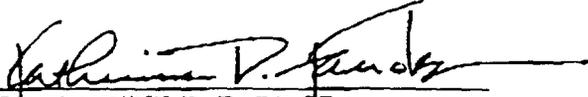
IV. CONCLUSION

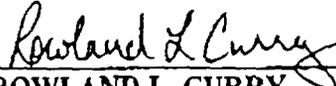
Compliance with Commission rules and applicable state and federal law is not optional in matters of litigation before the Commission. It is in the public interest that the Commission make informed decisions based on complete discovery and whole truths. Through its actions, intentional or not, SWBT has failed to comply with rules of discovery that exist to require parties to bring forward the truth in public proceedings. Parties involved in interconnection disputes before the Commission have the duty to bring forward the whole truth. Therefore, a party before the Commission may not choose to totally ignore Commission rules related to discovery requests.

Pursuant to P.U.C. Proc. R. 22.161(e), any sanction imposed by the presiding officer shall be automatically stayed to allow the party to appeal the imposition of the sanction to the Commission. Accordingly, this Order is stayed to allow SWBT the opportunity to appeal to the Commission.

SIGNED AT AUSTIN, TEXAS the 27th day of July, 1999.

FTA § 252 ARBITRATION PANEL


KATHERINE D. FARROBA
ARBITRATOR


ROWLAND L. CURRY
ARBITRATOR

ATTACHMENT "A"
Dockets 20226/20272
Revised Decision Point List

1. How should a 2-wire xDSL capable loop be defined?
- 2(a). Can a clean copper loop support multiple DSL technologies?
- 2(b). If so, is SWBT required to provide a loop that can support more DSL technologies than ADSL, at the option of the CLEC?
- 2(c). New DPL Issue: Should CLECSs provisioning of non standard technologies be obligated to indemnify and hold SWBT harmless for any claims arising due to any harm or degradation to any carrier or customer's service and/or to SWBTs or any third party's network or equipment.
3. Can SWBT be permitted to limit xDSL capable loops to the provision of ADSL?
- 4(a). What is the physical makeup of a DSL capable loop that SWBT is required to provide?
- 4(b). Is SWBT required to provide a copper loop without interfering devices (load coils, bridge taps, and repeaters)?
5. Can DSL loops retain repeaters at the CLEC's option?
6. If a copper loop is not available from the customer premises to the SWBT central office, does ACI have the right to place appropriate equipment such as DSLAMs at the fiber/copper interface point in SWBT's network?
7. Is SWBT permitted to require shielded cable (versus non-shielded cable) for central office wiring when provisioning DSL technologies?
8. Should national standards be applicable to the provisioning of DSL services for the purposes of standards for this Interconnection Agreement, or can SWBT be permitted to impose its unique standards on DSL services via its own technical publication(s)?
9. Can SWBT be permitted to install equipment at its own discretion that may interfere with the provision of DSL services by a CLEC?
10. Is it appropriate for SWBT to impose limitations on the transmission speeds of DSL services?
11. From a parity perspective, is SWBT required to conform to the same technical standards as CLECs for competing DSL retail services?
- 12(a). Is there an industry consensus that there is a technically sound basis to implement Binder Group Management Plan?
- 12(b). If not, should a Binder Group Management plan be imposed on CLECs in the interconnection agreement?
- 12(c). Should SWBT be allowed to reserve loop complements for ADSL services exclusively?

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13. Should SWBT be required to provide disclosure of the causes for loop nonavailability associated with a BGM program?
14. In the event a technically reasonable BGM process can be developed, can SWBT unilaterally impose its own interference tables or should a neutral third party be empowered to do so?
- 14(a). Should the Interconnection Agreement adopt all the requirements of the March 31, 1999 First Order in CC Docket No 98-147 regarding spectrum compatibility and management?
- 14(b). Should SWBT be required to keep CLEC deployment information confidential from any people involved in SWBT's or any affiliate's retail DSL offerings?
15. Is SWBT required to provide real time access to OSS for loop makeup information qualification, preordering, provisioning, repair/maintenance and billing?
- 15(a). What is the appropriate interval for SWBT's xDSL-capable loop qualification process?
16. Upon request from ACI, is SWBT required to provide loop length and makeup data regarding specific central offices within a reasonable period of time from all central offices?
17. What data should be included in the makeup data?
18. Can SWBT impose a loop qualification process rather than provide information concerning loop makeup?
- 19(a). Should SWBT be required to deploy a mechanized loop makeup information process for DSL capable loops?
- 19(b). Until SWBT deploys the mechanized loop makeup information process, what should the process be for a manual process?
- 20(a). Should the CLEC be allowed to make the business decision as to the need for loop conditioning based on information provided by SWBT?
- 20(b). Should SWBT be allowed to make all determinations regarding loop conditioning for CLEC needs within its sole discretion?
21. Should SWBT be permitted to limit availability to loops over 17.5k ft only on a ICB basis?
22. What is the appropriate provisioning interval for 2-Wire xDSL capable loops?
23. Should all performance measures and penalties adopted in SWBT's §271 proceeding be incorporated into the Interconnection Agreement?
24. Should ACI be permitted to incorporate into the interconnection agreement the results, agreements and decisions reached in the §271 proceeding?
25. Should ACI be entitled to "pick and choose" on a piecemeal basis rates and conditions from other, already approved, interconnection contracts?

Cost Studies and Rates

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26. Should rates associated with xDSL capable loops be TELRIC-based?
27. What are the appropriate TELRIC-based xDSL rates?
- 28(a). Is it appropriate to charge a rate for shielded cross connect that is higher than the rate for unshielded cross connect?
- 28(b). If so, what are the appropriate rates for DSL Shielded Cross Connect to Collocation?
29. Should SWBT be allowed to charge additional ADSL "Conditioning" charges?
30. Should SWBT be allowed to charge for a Loop Qualification Process?
31. Is it appropriate to charge for loop makeup information?
32. If SWBT is permitted to require shielded cable for DSL technologies, is there any additional cost associated with shielded intraoffice versus non-shielded cable?
33. Should SWBT be required to offer cageless collocation?
- 33(a). Should SWBT be required to provide collocation at a remote terminal site?
- 33(b). Should the interconnection agreement include new collocation provisions that reflect the requirements of the FCC's March 31, 1999 First Order in CC Docket No. 97-147?
34. What is the appropriate provisioning interval for cageless collocation?
35. How should cageless collocation be priced?
36. Should SWBT be required to permit collocation of ATM cross-connect equipment?
37. Given that xDSL is a newly developing service, should SWBT be required to give to ACI analogous preferential rates adopted after this proceeding?
38. Should the interconnection agreement continue to require dispute resolution before the Commission in light of the Supreme Court's recent decision in *Iowa Utilities Board v. AT&T Corp.*?
39. Should agreed-to commercial arbitrations alternate between SWBT's home and Covad's?

**Interim Agreement between Southwestern Bell Telephone Company and
Accelerated Connections, Inc.**

1.0 Introduction

The Parties acknowledge and agree that they are entering into the terms of this Interim Agreement as a result of Order No. 5, Interim Order ("Interim Order"), entered by the Arbitrators in the following consolidated arbitration proceedings pending before the Texas Public Utility Commission ("PUC"): Petition of Accelerated Connections, Inc., d/b/a ACI Corp. ("ACI") for Arbitration to Establish an Interconnection Agreement with Southwestern Bell Telephone Company ("SWBT"), Docket No. 20226 and Petition of DIECA Communications, Inc., d/b/a Covad Communications Co. ("Covad") for Arbitration of Interconnection Rates, Terms and Conditions and Related Arrangements with SWBT, Docket No. 20272 ("the Arbitration"). The Parties agree not to advocate or represent that the rates, terms and conditions set forth in this Interim Agreement are available for adoption by any other carrier (other than ACI or Covad) under Section 252(i) of the Act. The Parties further acknowledge and agree that the rates, terms and conditions set forth in this Interim Agreement are interim (as more specifically set forth below) and subject to the outcome of the Arbitration (subject to any appeals and associated judicial review), and a decision by the Texas PUC on the revised Physical Collocation Tariff recently filed in Project No. 16251, *Investigation of Southwestern Bell Telephone Company's Entry into Texas InterLATA Telecommunications Market*, (subject to any appeals and associated judicial review). Following the issuance of a final Order by the PUC in the Arbitration and a decision by the PUC of the revised Physical Collocation Tariff filed in Project No. 16251, the Parties shall meet within thirty days and expend diligent efforts to arrive at an agreement on terms and conditions which comply with the final Order(s). Disputes between the Parties concerning the interpretation of the actions required or the provisions affected in said Sections shall be handled under the Dispute Resolution procedures set forth in the underlying Interconnection Agreement. The results of the Arbitration shall be effective the date the PUC's Order(s) becomes final, unless the Order(s) is stayed pending appeal. The revised Physical Collocation Tariff shall be effective when approved by the Texas PUC, unless the effectiveness of the Tariff is stayed pending appeal. When such PUC Order(s) becomes final, all of the rates, terms and conditions set forth in this Interim Agreement (with the exception of the delivery Schedules set forth on Exhibit "A"), shall be subject to true-up retroactively to the effective date of the Interim Order.

Nothing in this Interim Agreement shall constitute a waiver by either Party of any positions it may have taken or will take in the pending Arbitration or any other regulatory or judicial proceeding. This Interim Agreement also shall not constitute a concession or admission by either Party and shall not foreclose either Party from taking any position in the future in any forum addressing any of the matters set forth herein. The Parties acknowledge and agree that they are entering into this Interim Agreement as a result of the Interim Order entered in the Arbitration on an interim basis only. The Interim Agreement shall not be used by either party in the Arbitration or any other regulatory or

judicial proceeding to characterize that the terms in this agreement are appropriate on an ongoing basis.

2.0 Collocation Requests

2.1 SWBT will deliver to ACI physical collocation space under the following schedule: 37 offices in June, including 27 caged and 10 cageless arrangements; 33 offices in July, including 9 caged and 24 cageless arrangements; and 25 offices in August, all of which will be cageless arrangements. These arrangements will be delivered in accordance with the Schedules attached hereto as Exhibit "A." As reflected on the attached Schedules, all caged arrangements will be turned over to ACI on the specific dates set forth on Exhibit "A" in accordance with the rates, terms and conditions set forth in the existing Texas Physical Collocation Tariff (as modified in Section 2.2 below). All cageless arrangements will be turned over to ACI no later than the last day of the month in which they are scheduled for turnover. SWBT will advise ACI during the course of the month the exact date that each cageless arrangement will be turned over to ACI. All turnover dates set forth on Exhibit "A" constitute the date construction will be completed by SWBT and the space will be turned over to ACI to begin installing its equipment. For offices listed on Exhibit "A," SWBT agrees to provide ACI access up to 30 calendar days prior to the turnover date for purposes of conducting a site survey. SWBT will make its best efforts to work with ACI on those offices listed in Exhibit "A" to enable ACI to place its equipment in advance of the scheduled turnover date as workload and office conditions permit.

2.2 Any requests by ACI for caged collocation arrangements in SWBT central offices other than those collocation arrangements identified on Exhibit "A" shall be handled in accordance with the rates, terms and conditions of the applicable Texas Physical Collocation Tariff in effect at the time the requests are received by SWBT.

2.3 Any requests by ACI for cageless collocation arrangements in SWBT central offices other than those collocation arrangements identified on Exhibit "A" shall be handled in accordance with the rates, terms and conditions in place for all other CLECs at the time the requests are received by SWBT. For example, following the effective date of the FCC's *First Report and Order and Further Notice of Proposed Rulemaking*, issued in CC Docket No. 98-147, *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, on June 1, 1999, any requests received by SWBT from ACI will be treated in accordance with such Order based upon the expedited intervals set forth above with respect to caged collocation arrangements. Any requests for cageless collocation received by SWBT from ACI after the effective date of the revised Texas Physical Collocation Tariff filed in Project No. 16251, will be handled in accordance with the rates, terms and conditions of such revised Tariff.

3.0 Rates for Physical Collocation Arrangements

3.1 SWBT shall provide caged collocation arrangements to ACI at the rates set forth in the existing Texas Physical Collocation Tariff.

3.2 SWBT's interim rates for cageless collocation shall be as follows:

Two Framed Bay Collocation	\$10,000*
Four Framed Bay Collocation	\$15,000*
Six Framed Bay Collocation	\$25,000*

* The Parties acknowledge and agree that all of the rates for cageless collocation set forth above are interim and subject to true-up pending the establishment of permanent rates by the Texas PUC.

4.0 Transport

4.1 ACI shall be entitled to order DS-1 and/or DS-3 transport under this Interim Agreement based upon the rates, terms and conditions set forth below.

4.2 In ordering DS-1 and/or DS-3 transport under this Interim Agreement, ACI shall specify the two end points of the circuits, which at a minimum, shall include: (1) an interoffice circuit between two SWBT central offices; or (2) a dedicated circuit between ACI's collocation facilities and any point designated by ACI to be consistent with Section 11.2, Appendix UNE of the underlying Interconnection Agreement agreed to by the Parties.

4.3 Under this Interim Agreement, ACI shall order transport as special access which may be converted to UNEs at no charge when its Texas Interconnection Agreement with SWBT becomes effective. The Parties acknowledge and agree that all of the rates for transport provisioned under this Interim Agreement are interim and subject to true-up upon final approval of the parties' Interconnection Agreement by the Texas PUC.

4.4 For the 37 physical collocation arrangements SWBT is scheduled to deliver to ACI in June, SWBT will provide to ACI the necessary ordering information, including ACTL and CFA information, by June 3, 1999, for ACI's use in submitting its Access Service Requests ("ASRs") for transport. ACI will submit ASRs for transport at these collocation arrangements by June 10, 1999. SWBT will employ its best efforts to turnover tested and operational transport to ACI no later than ten (10) business days following the scheduled turnover of each physical collocation arrangement as defined on Schedule "A," but in no case will transport turnover be later than thirty (30) days after ASR receipt, provided that network facilities are available. If network facilities are not available, SWBT will employ its best efforts to honor the committed due date by expediting engineering and construction of new facilities, and/or proposing alternate routes for the blocked circuit(s).

For the 33 physical collocation arrangements SWBT is scheduled to deliver to ACI in July, and the 25 arrangements scheduled to be delivered in August as specified on Exhibit "A," ACI shall submit to SWBT its ASRs to SWBT's Local Service Center for its desired transport a minimum of thirty (30) calendar days prior to SWBT's scheduled turnover of collocation arrangements as specified on Exhibit "A." SWBT agrees to provide necessary ordering information, including ACTL and CFA information, a minimum of thirty seven (37) calendar days prior to scheduled collocation turnover, in order for ACI to place its ASRs 30 days prior to scheduled collocation turnover. Upon receipt of the requisite thirty (30) calendar days notice from ACI, SWBT shall deliver transport to ACI two (2) business days following the scheduled turnover date of each physical collocation arrangement to ACI as specified on Exhibit "A." By the second (2nd) business day, the circuits will be tested and will be operational, provided that network facilities are available. If network facilities are not available, SWBT will employ its best efforts to honor the committed due date by expediting engineering and construction of new facilities, and/or proposing alternate routes for the blocked circuit(s).

5.0 DSL

5.1 General Terms and Conditions Relating to Unbundled DSL-Capable Loops:

The Parties acknowledge and agree that with the exception of the issues presented to the Texas PUC for Arbitration in Docket Nos. 20272 and 20226, SWBT and ACI have reached an Agreement with respect to the rates, terms and conditions set forth in the underlying Interconnection Agreement negotiated between the Parties. For purposes of this interim Agreement, the Parties hereby incorporate the agreed-to rates, terms and conditions set forth in the underlying Interconnection Agreement into this Interim Agreement - DSL.

5.2 Unbundled DSL-Capable Loop Offerings:

During the interim period, ACI will advise SWBT of the type of equipment it will use to provision its DSL-based services over SWBT unbundled loops, along with the maximum power and speed it plans to operate such equipment. ACI will provide SWBT its maximum power and speeds within 48 hours of the Parties execution of this Interim Agreement. Where possible, such technologies should be identified by the PSD mask approved or proposed by T1.E1. Such identification will be provided by ACI service representatives by checking a box on the order form. ACI's loop technologies include: ADSL, RADSL, IDSL, SDSL, and HDSL.. ACI will order loop types as specified by SWBT, and attached hereto as Schedule B during the interim period. However, ACI may order 2-wire digital loops for its IDSL service.

During this interim period, SWBT shall not deny ACI's request to deploy any of the loop technologies or speeds that ACI is successfully deploying or has successfully deployed elsewhere in the territory of SWBT's sister company Pacific Bell. ACI's deployment of loop technologies other than which have been successfully deployed

elsewhere during the interim period by itself shall not be deemed a successful deployment of the technology under the FCC's Order issued on March 31, 1999 in CC Docket 99-48.

5.3 4.0 Pre-qualification of Loops

The Parties acknowledge and agree that this is a disputed item in the current Arbitration proceeding between the Parties. Without waiving its arguments or positions with respect to access to OSS for pre-qualification of loops, ACI agrees for purposes of this Interim Agreement only that SWBT will provide ACI with the same access to the operations support systems ("OSS") functions for pre-ordering, ordering, and provisioning DSL-capable loops that SWBT is providing any other CLEC and SWBT's own retail ADSL service representatives. The provisions relating to OSS, set forth in Appendix OSS of the underlying Agreement agreed to between the Parties, shall govern the Parties' respective rights and obligations with respect to OSS.

5.4 Loop Qualification

Until a mechanized process is in place for Loop Qualification, requests for Loop Qualification shall be submitted to SWBT on a manual basis. A standard Loop Qualification interval of 3-5 business days is available, but in no case will be longer than the interval(s) for SWBT's own retail DSL service. When a mechanized Loop Qualification system is deployed by SWBT, ACI will be given nondiscriminatory access to the OSS functions for pre-ordering, ordering and provisioning DSL-capable loops at parity with SWBT's retail DSL operations. Upon receipt of an accurate LSR from ACI, SWBT does hereby agree to provide loop make-up data, including loop length stated as a 26-gauge equivalent; presence of load coils; presence of repeaters; presence of digital loop carrier, digital added main line, or other pair gain devices; and length of bridged tap ("loop make-up data") within 3-5 business days during the interim period. At ACI's request, Design Layout Records (DLR) will be available 7-8 business days following receipt of an accurate and complete LSR.

If the results of the Loop Qualification indicate that the loop is less than 12,000 feet and meets the Technical Parameters without additional conditioning, ACI will be notified, and will be provided loop makeup data. Should the loop meet SWBT design requirements but not function as desired by ACI, ACI may request, and must pay for, any requested conditioning at the rates set forth below. Loops less than 12,000 feet that do not meet SWBT's design criteria for its tariffed ADSL service but that could be conditioned to meet the minimum requirements through the removal of load coils, bridged tap and/or repeaters will be so conditioned at no charge to ACI.

If the results of the Loop Qualification indicate that the loop is between 12,000 feet and 17,500 feet and does otherwise meet the Technical Parameters, ACI may order and SWBT will provide the loop and the associated loop makeup data. ACI may order loop conditioning. The charges set forth below will apply.