

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Performance Measurements and Standards for Unbundled Network Elements and Interconnection)	CC Docket No. 01-318
)	
Performance Measurements and Reporting Requirements for Operations Support Systems, Interconnection, and Operator Services and Directory Assistance)	CC Docket No. 98-56
)	
Deployment of Wireline Services Offering Advanced Telecommunications Capability)	CC Docket No. 98-147
)	
Petition of Association for Local Telecommunications Services for Declaratory Ruling)	CC Docket Nos. 98-147, 96-98, 98-141

REPLY COMMENTS OF BIRCH TELECOM, INC.

Birch Telecom, Inc., (“Birch”) submits the following reply comments in response to the *Notice of Proposed Rulemaking* (“NPRM”) issued in the above-captioned docket on November 19, 2001.

The purpose of these reply comments is both to respond to statements made by some commenters in the initial comment period and to reiterate the continued need for the detailed performance measurements in effect at the state and/or regional level today, given the critical juncture in the evolution of the competitive telecommunications marketplace.

RESPONSE TO SBC COMMUNICATIONS, INC.

Birch's headquarters are located in the state of Missouri, one of the core states in SBC's Southwestern Bell ("SWBT") traditional five-state territory. In fact, a significant portion of Birch's operations, including its customer base, is located throughout four of the five SWBT states. Suffice it to say that Birch is intimately familiar with SWBT, from its marketing strategies to its OSS to its ever-changing regulatory policy advocacy. Birch has operated in the SWBT territory in both a pre and post-271 environment. When Birch supported SBC's 271 applications in Kansas, Oklahoma and Missouri, Birch believed it had taken the "regulatory high road," due in large part to its belief that all compromises achieved through the extensive 271 collaborative processes in Texas would yield a viable operational framework within which Birch could operate throughout the SWBT region. The cornerstone for Birch's decision to support SBC's 271 applications in three states was the comprehensive performance measurement plan implemented through the Texas 271 Agreement ("T2A"). When SWBT advocated the adoption of the Texas performance measurement plan throughout its region, Birch's comfort level regarding the ability to compete with its "vendor/competitor" grew.

SBC's initial comments are tangible proof of why Birch is now disillusioned to have ever placed its trust in its largest vendor/competitor to follow through on its commitment to ensuring a level playing field. Needless to say, Birch is extremely disappointed and troubled by SBC's initial comments herein. SBC advocates the abdication of existing state performance measurements,¹ in favor of those adopted at a national level, when SBC agreed to abide by such plans developed at the state level in

¹ Comments of SBC Communications, Inc. at pp. 2-3, 8-10. ("SBC Comments").

exchange for favorable recommendations from state commissions to this Commission for its 271 applications throughout the region. Further, to the extent that performance measurement plans have been incorporated into interconnection agreements between SBC affiliates and CLECs, SBC asserts that such measurements would continue to apply per the agreement unless one of the parties chose to invoke a change of law clause contained within any such agreement “to conform the contractual performance measurement plan to any rules the Commission here adopts.”²

“Trust Us”

Essentially, SBC wants to renege on the commitments it made to regulators during the 271 process. Interestingly, the only caveat SBC proposes to its suggestion to abdicate state performance measurement plans in favor of a national framework is to continue to apply state performance measurements during pre-271 evaluations. Apparently, SBC wants this Commission to “trust them” that once their markets have been declared sufficiently opened for 271 purposes, the nine measurements proposed by SBC will completely capture their wholesale vendor performance and effectively deter backsliding and discriminatory treatment of its competitors from an operational standpoint.

Forgive Birch for being skeptical. The amount of penalties paid out by SBC for performance measurement failures, just in its five-state SWBT territory, is enormous.³ This fact alone should raise the Commission’s suspicions regarding SBC’s “trust us” mentality. SBC cannot consistently meet the performance levels currently in effect under

² *Id.* at p. 3.

³ Birch will not reveal the actual number as SWBT deems it proprietary, but as the number is a multi-million dollar figure, there is no comfort that SWBT is able to meet performance levels required of it

the regional SWBT performance measurement plan but somehow wants this Commission to believe that a less comprehensive framework will produce adequate performance for its competitors. The fact that SBC is advocating a position directly contrary to that which it supported in each of SWBT's 271 applications at both the state and federal level – a comprehensive performance measurement framework and remedy plan in place that effectively captures wholesale performance and deters backsliding – is concerning, at the least. SBC's strategy is becoming increasingly clear - if a ruling, mandate, process, etc. does not inure to the benefit of SBC, it simply changes its message to support a proposition that does. The Commission should indeed be leery of the message being promulgated by SBC herein.

The Current Frameworks are just too Difficult to Maintain

SBC contends that the implementation and maintenance of the current, more comprehensive performance measurement frameworks to which it has agreed to adhere, is too burdensome and costly,⁴ and therefore contrary to the goal of reduced regulatory burdens of Incumbent Local Exchange Carriers (“ILECs”). In fact, SBC claims that its cost to merely track performance measurement results is over \$33 million per year.⁵ The legitimacy of this figure notwithstanding, it is inconceivable to Birch that a company that boasts gross revenues of \$54.3 billion for Fiscal Year 2001,⁶ an increase of over \$1 billion from Fiscal Year 2000 results, argues that it is too costly to comply with current performance measurement frameworks. It would seem that the cost SBC associates with

currently, nor any comfort that SWBT will even attempt to do the same without a comprehensive plan in place.

⁴ See SBC Comments, discussion at pp. 5-7.

⁵ *Id.* at p. 6.

⁶ See SBC Press Release on Fourth-Quarter Earnings, released January 24, 2002; excluding one-time items.

performance measurement tracking, which represents less than one percent of SBC's gross revenues, is simply the cost of doing business in the current environment.

SBC's comments make no mention of its entry into the in-region interLATA interexchange market in its SWBT five-state region. Surely, the omission of this information, amidst all of the other data presented by SBC to support its contention that current performance measurement frameworks are overly burdensome and too costly, is deliberate. SBC underestimates this Commission's ability to comprehend the quid pro quo integrated into Section 271 of the FTA. That is, in exchange for opening its local market to competition, as required by and enumerated in the Act, SBC would be allowed to enter its in-region interLATA interexchange market – a market from which it has been precluded since divestiture. It is very telling that since June 30, 2000, the date on which SBC received its first 271 approval from this Commission for Texas, SBC reports to have acquired 4.9 million in-region long distance customers⁷ in the six states in which it has been granted 271 authority. Without a specific breakdown by state, it is logical to conclude that the majority of this market share is concentrated in just *four states*, since SBC did not receive 271 approval in Missouri and Arkansas until late in the fourth quarter 2001.

Although SBC expects this Commission to believe that it has incurred all of the burden of the FTA, and apparently no benefit, SBC's extremely successful penetration of its in-region interLATA interexchange market is proof positive of the rewards it has reaped as a result of the efforts undertaken to become and remain 271 worthy. While it

⁷ See SBC Press Release on Fourth-Quarter Earnings, released January 24, 2002. Compare SBC's numbers to Birch's total access line count of less than 500,000 for the ten states in which it operates. Clearly, in its position as a legacy monopolist, SBC's market power causes it to rapidly flourish in any

may be impossible to uncover what the actual value of those 4.9 million long distance subscribers is to SBC, it is difficult not to apportion at least some part of SBC's steady incline of gross revenues to this newfound market sector.

This Commission must not be fooled by SBC's contention that adhering to its performance measurement plans already in place is just too difficult. Frankly, if SBC would adhere to the SWBT plan as intended, each regional six-month review held in Texas would continue to result in fewer measurements. Consistent achievement of target performance levels breeds confidence in SBC from CLECs. However, variance from the plan as it was intended to be implemented⁸ continues to breed skepticism regarding SBC's wholesale commitments. Birch strongly believes that the comprehensive plan developed in Texas, and voluntarily exported by SWBT to its other states, is crucial to any further evolution of local competition. Erasing or drastically reducing the only true barometers of SBC's wholesale performance, in still the infancy of competition, would be grossly premature.

UNE Loop and Port Combination Measurements

Consistent with its track record of speaking out of both sides of its corporate mouth, SBC de-emphasizes the importance of the Unbundled Network Platform ("UNE-P") to the numbers of lines held by competitors today. SBC contends that performance

sector of the telecommunications industry – a luxury that will never be enjoyed by its competitors under the existing framework.

⁸ See Order No. 33 issued June 1, 2001 in Project No. 20400 at the Texas Public Utility Commission for a review of the Commission-ordered audit of SBC-SWBT's reporting of Performance Measurement 13 data in accord with the accompanying Business Rule, as well as an audit of the performance of SWBT's LMOS database. SBC's position to supplant any existing state performance measurements with any adopted by this Commission through this proceeding can easily be construed as an ulterior motive to circumvent any unfavorable outcomes resulting from this regional audit.

measurements for UNE loop and port combinations are unnecessary.⁹ In fact, SBC concludes that UNE loop and port combinations are really nothing more than resale of the ILEC's service.¹⁰ Again, SBC advocates a position contrary to that which it supported in its 271 applications. Specifically, in SBC witness John S. Habeeb's Texas 271 Affidavit, filed with this Commission, SBC drew the following conclusions about UNE loop and port combinations:

9. Facilities-based providers are a particularly important part of local telephone service competition in Texas. These companies have:

- received 16.9 billion minutes of traffic from SWBT customers to their customers between January 1997 and September 1999;
- sent more than 1.1 billion minutes of traffic from their customers to SWBT customers; and,
- used approximately 140,000 of SWBT's unbundled loops, including more than 103,000 loop/port combos (or UNE Platforms) and more than 36,000 stand-alone loops, to provide local service in Texas.¹¹

To recap, UNE loop and port combinations, or UNE-P, is considered facilities-based competition when SBC is seeking 271 relief from the regulators, but considered resale when 271 authority has been obtained and SBC is required to hold up its end of the bargain regarding operational performance. SBC should not be permitted to contend that certain data might be characterized however SBC chooses, in order to support its instant regulatory need.

⁹ SBC Comments at p. 30.

¹⁰ *Id.* at pp. 30-31.

¹¹ *Application by SBC Communications Inc., Southwestern Bell Telephone Company, And Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance Pursuant to Section 271 of the Telecommunications Act of 1996 To Provide In-Region, InterLATA Services In Texas, Affidavit of John S. Habeeb, ¶ 9, CC Docket No. 00-4, February 22, 2000.*

Further, in concluding that UNE-P is equivalent to resale, SBC fails to mention the variances in the ordering process, variances that are all too familiar to this Commission. If UNE loop and port combinations are nothing more than resale, then surely three different orders would not be necessary to provision the UNE-P-based service, as is the case with SBC today. As CLECs provision more complex service offerings, the operational difficulties and inefficiencies encountered increase exponentially when three separate orders are required to provision service, with the hope that the orders complete in proper sequence. These are difficulties and inefficiencies not encountered when provisioning resold services. Although the distinction is minimized by SBC, the potential failures that exist on the production line are very real and must continue to be closely monitored.

In addition, SBC downplays the magnitude of UNE loop and port combination orders that are processed by SBC, as evidenced by the number of access lines served via this configuration.¹² In fact, in its initial comments in this proceeding, the Texas Public Utility Commission advocated the need for UNE-P and resale performance measurements and noted that “the apparent omission of resale and UNE-P from the proposed measurements will have a chilling effect on a significant segment of the competitive market.”¹³ Birch urges the Commission to recognize the importance of implementing UNE-P performance measurements and to disregard SBC’s attempt to trivialize the most significant form of local competition in the marketplace today.

¹² See Petition of MCIMetro Access Transmission Services, LLC, Sage Telecom, Inc., Texas UNE Platform Coalition, McLeod USA Telecommunications Services, Inc. and AT&T Communications of Texas, L.P. for Arbitration with South western Bell Telephone Company under the Telecommunications Act of 1996, Project No. 24542, Direct Testimony of Joseph Gillan on Behalf of The Texas UNE-P Coalition, AT&T Communications of Texas, L.P. and McLeod Telecommunications Service, Inc., p. 24, filed December 7, 2001.

¹³ Comments of the Public Utility Commission of Texas at p. 5.

RESPONSE TO BELLSOUTH CORPORATION

BellSouth, similar to SBC, advocates that a mandatory federal plan be created to “supplant” existing state plans. Part of BellSouth’s concern is that it must adhere to multiple state plans throughout its region. While some similarities exist between some plans, the variances between each of the plans render them burdensome and costly for BellSouth to implement and maintain.¹⁴ Birch would agree that the different state plans in place in the BellSouth region are an inefficient approach to measuring BellSouth’s performance. As recommended by Birch in its initial comments, the uniform, regional approach utilized by SBC in its SWBT states has paid tremendous dividends to SBC in that it has now obtained 271 authority in all five SWBT states. Further, the regional approach seems to support the RBOCs’ contentions that their OSS systems are regional in nature and creates many resource efficiencies for both the RBOCs and the CLECs in tracking performance.

It seems that the OSS testing being conducted in conjunction with the Florida Public Service Commission and KPMG will be the most comprehensive and up-to-date test completed in the BellSouth region to date. The Florida test, coupled with the collaborative performance measurement plan process developed with the Georgia Commission will likely produce the level of assurances incorporated into the New York and Texas plans that ultimately resulted in 271 approvals for Bell Atlantic/Verizon and SBC. BellSouth should have supported the more comprehensive testing of its OSS in Florida much sooner. The combined efforts of the Florida and Georgia Commissions

¹⁴ Comments of BellSouth Corporation at pp. 3-4. (“BellSouth Comments”)

seems likely to result in a comprehensive performance measurement framework that will be easy for BellSouth to export around its region, thereby reducing its costs and regulatory burdens. So it seems that the solution to BellSouth's problem of having to adhere to multiple state plans is actually in its own hands.

Inclusion of Service Order Accuracy Measurement

Birch applauds BellSouth's proposal to expand any national performance measurement list adopted through this proceeding to include a Service Order Accuracy measurement. It is indisputable that manual intervention continues to pervade the process to provision a CLEC's orders. It is also a fact that the less an RBOC provisioning process is mechanized, the more room there is for human error in processing orders. Birch has experienced alarmingly high service order accuracy error rates in both SWBT's and BellSouth's regions. Birch strongly believes that such a measurement, with appropriate penalties attached, incents RBOCs to integrate a level of quality control in its provisioning arenas that probably would not be there otherwise. Without such emphasis on the quality of the production of service orders in an environment overly reliant on manual intervention, history demonstrates that the results suffer, and CLECs will not attain a level of parity provisioning. Birch therefore fully supports BellSouth's inclusion of the Service Order Accuracy measurement into any national performance measurement framework that may result from this proceeding.

UNE-P Specific Measurements

BellSouth proposes that performance measurements would no longer be required for unbundled network elements at the point in time when such were deemed competitive, or removed from the mandatory UNE list. For reasons stated in Birch's

initial comments and also stated previously herein, Birch believes the importance of UNEs and UNE-P specifically to the levels of competition that exist today warrants appropriate performance measurements being designed to address RBOCs' provisioning of the same.

BellSouth's Proposed Sunset Provision

BellSouth also proposes that any national plan that is developed should only remain in existence for a period of between one and three years following the implementation of such a plan. Birch fully agrees and acknowledged in its initial comments that as competition evolves, a streamlined framework of performance measurements (national or otherwise) will be appropriate. At the present rate of that evolution, however, Birch doubts that such an approach will be viable in the near term, and would suggest that any arbitrary sunset date without regard to actual circumstances is dangerous. BellSouth's proposal is particularly troubling to Birch given that, to date, BellSouth has failed to satisfy this Commission that its local markets are sufficiently opened to competition, in accord with Section 271 of the FTA, in any of its nine states.

Since expanding into BellSouth's region in early 2001, Birch has had an opportunity to interface daily with BellSouth on an operational basis. Based on its experiences, Birch has been a vocal opponent of BellSouth's most recent 271 filing with this Commission, ably identifying and justifying many of BellSouth's operational deficiencies. It is difficult to imagine eradicating any performance measurement plan anytime soon, particularly in the BellSouth region, with the realistic expectation that local competition would develop any further than it has. Simply put, if performance measurement plans expire as suggested by BellSouth, Birch strongly believes that

BellSouth will have no incentive to improve its operational deficiencies as required by the Act. If BellSouth's sunset proposal is adopted, local competition will come to a screeching halt, not only in BellSouth's region but also nationally.

BIRCH'S PROPOSAL

As enumerated in its initial round of comments in response to the NPRM, Birch strongly advocates the regional approach to performance measurement frameworks, as utilized by SBC in its SWBT territory. This approach has proven to be streamlined and straightforward – from its implementation in successive states to the multi-SWBT state 6 month review process. In addition, Birch can attest that it has created its own resource efficiencies in monitoring consistent plans across the SWBT states. There is no reason to believe SBC has not enjoyed those same resource efficiencies. It is difficult to believe that SBC would have voluntarily agreed to export the plan developed in Texas to its other SWBT states, without factoring in the resource efficiencies and the streamlined nature of the process. That is, if the process were not advantageous to SBC from an economic and resource perspective, it surely never would have been advocated by SBC. SBC cannot deny that the six-month reviews of its SWBT plan have resulted in fewer measurements as the industry and state commissions begin to focus on the core measurements needed to assess and monitor SBC's performance.

Birch believes that the regional approach it has proposed in this proceeding is responsive to the concerns identified by various RBOCs, as well as the stated objectives of the NPRM. It is evident from many state commissions' comments that local regulators believe "supplanting" the well-developed state plans created under their auspices is not a

favorable alternative at this time.¹⁵ Birch submits that each state has the ability to gauge the level of competition within its borders. However, Birch recognizes that 50 separate state performance measurement plans may not be the most efficient solution. Rather, a regional approach that acknowledges that an individual RBOC has common and regional OSS systems and processes would effectively streamline an otherwise cumbersome process, as well as minimize any undue regulatory burden.

Specific Measures for Inclusion in any National Plan

Under any scenario (supplant, overlay, or a regional approach) in which this NPRM forms a National Performance Measurement plan, the applicable “core” measures must be thorough enough to detect and remedy performance failures by competitor/vendor RBOCs. Many different commentors in this proceeding have expressed opinions on what measurements should be included in the National Plan. In the initial comment period, Birch did not propose specific measurements to be included in any National “core” plan that may be developed from this proceeding. Birch opted instead to suggest the formation of a workshop to develop core measurements.

To the extent a National Plan is formulated without the collaboration of a workshop, Birch provides strong support to a few of the measurements proposed by WorldCom (measures in addition to those that are already outlined in the NPRM and overlap with WorldCom’s proposed list). Specifically, service order accuracy, flow through, and percent system availability should be included in any National Plan formulated. Service order accuracy, which is supported by at least one RBOC (BellSouth), measures the quality of an RBOC’s performance when manual intervention

¹⁵ See generally Comments of the Public Utility Commission of Texas (“TPUC Comments”), Comments of the Public Utility Commission of the State of Colorado, Comments of the New York State

is needed to process CLEC orders. Flow through, as this Commission has recognized in various 271 orders, can be an indication of problems with an RBOC's OSS.¹⁶ As such, order flow through is critical to the ability of CLECs to meet consumer expectations. When orders flow through an RBOC's OSS, many other ordering and provisioning problems simply do not and will not occur (i.e. service order accuracy is much less of an issue when a high percentage of orders flow through an RBOC's OSS). Finally, OSS system availability is crucial to the daily production interactions between an RBOC's OSS and a CLEC's OSS. Without the oversight that this measurement provides, CLECs are simply at the mercy of their RBOC vendor/competitor to gain important information needed to provide customer service to end users.

In addition to the aforementioned measurements to be included in any National Plan, Birch also suggest one billing measurement that should be adopted – percentage of service orders that post to the billing systems within 5 business days.¹⁷ In the RBOC regions in which Birch operates (SBC and BellSouth), the RBOC billing systems drive updates to many other legacy systems. Until RBOC internal service orders have posted to the respective billing systems, many legacy systems are not updated with current information regarding the new service provider and/or services. Without updates to the RBOC's systems, many transactions between competitors and RBOCs must occur via manual processes because the CLEC customer does not yet exist in those RBOC legacy systems. As Birch stated in the initial comments, the most current example of how

Department of Public Service and Comments of the Missouri Public Service Commission.

¹⁶ *Memorandum Opinion and Order*, In the Matter of Application by SBC Communications Inc., Southwestern Bell Telephone Company, And Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance Pursuant to Section 271 of the Telecommunications Act of 1996 To Provide In-Region, InterLATA Services In Texas, CC Docket No. 00-65, at ¶ 179, June 30, 2000.

¹⁷ See TPUC Comments, Measurement 17.1 of Attachment A.

CLECs are affected by service order posting is the LMOS database that insures parity access to the maintenance and repair function in those states. With this measurement in place, many functions and transactions that occur between companies can occur over electronic means because SWBT's legacy systems have been updated from the posted service order. Timely posting of service orders also increases the accuracy and timeliness of the bills RBOCs produce for CLECs. Much like the flow through measurement for ordering and provisioning, the number of service orders that post within 5 business days is a strong indication of how well the provisioning and billing functions work together.

CONCLUSION

This is a very critical time in the evolution of telecommunications competition. A host of unsustainable business plans has resulted in the evaporation of hundreds of CLECs over the last year and a half. Thus, competition for the RBOCs is getting thin. Although Congress could never have envisioned the current environment, it is the reality today. Market penetration by competitive providers is clearly not yet pervasive enough to declare the Telecommunications Act of 1996 a success. Rather, RBOCs still have an overwhelming stronghold on the local exchange service markets. And the big have gotten bigger in the meantime. And, the legacy local monopolists have re-entered the long distance arena. How distant is their stronghold on the long distance markets?

At times, it is difficult to blame the Bells' for their regulatory advocacy efforts. Essentially, if they want into the long distance markets, they are required to open their own networks for lease, for use by competitors. So, they play the role of vendor and competitor simultaneously. It must be difficult for the monopolist mentality to adapt to

“a brave new telecommunications world.” It must be difficult to rationalize that a group of people in the next building are charged with allowing “our customers” to choose a competitor. It must be difficult to adapt to all of the new rules and regulations of the business, as well as actually having to worry about retaining or winning back a customer. It is unlikely that a mere six years later, the mentality of a loyal employee has completely adapted to this new world.

These are but a few of the obstacles faced by CLECs like Birch every day of the week. Each day, CLECs attempt to compete against multi-billion dollar companies who serve as both vendor and competitor. Birch and other carriers, however, choose to be competitive telecommunications providers in spite of these obstacles, in part because Congress’ vision deserves a chance to be successful. Realistically though, it is difficult to fully buy into the philosophy that the wholesale side of an RBOC will implement policy decisions to improve its service to its competitors, absent regulatory oversight, particularly if such policy decisions will have any impact, financial or otherwise, on its retail side of the house. Quite frankly, the retail segment means too much to shareholders.

SBC argues that rather than being mandated to adhere to comprehensive performance measurement plans, plans that were developed with its collaboration at the state level, plans that are the cornerstone of its “x2As,” SBC would prefer to have the flexibility to enter into commercial arrangements with competitors that have negotiated performance measurement frameworks. Apparently, SBC would encourage its customer/competitors, with relatively little or no bargaining power, to “negotiate” with its multi-billion dollar vendor/competitor. SBC’s suggestion is not all bad. What SBC’s suggestion incorrectly assumes, however, is that there are alternative vendors to SBC

who could compete in a bid to provide access to legacy monopolist telephone networks. Until such a competitor exists or until competition has at least made it to adolescence, current, comprehensive performance measurement frameworks are the only effective assurance a CLEC has that an RBOC will to meet its wholesale obligations.

WHEREFORE, Birch Telecom, Inc. respectfully requests that these reply comments be considered by the Commission in its determination of the issues presented herein.

Respectfully submitted,

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