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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

Ms. Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12<sup>th</sup> Street, S.W.  
Washington, DC 20554

**Re: CC Docket Nos. 01-338, 96-98, 98-147, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers – Ex Parte Filing**

Dear Ms. Dortch:

El Paso Networks, LLC (“EPN”), through its undersigned counsel, submits as an ex parte filing in this docket a copy of the Texas Public Utilities Commission Interim Ruling granting EPN the right to obtain access to circuits to wireless carrier cell sites as unbundled network elements and EPN’s November 13, 2002 Response, Counterclaim and Request for Interim Ruling filed with the Public Utilities Commission of Texas (“PUCT”) both in the docket *Complaint of Southwestern Bell Telephone Company, LP for Post Interconnection Agreement Dispute Resolution with El Paso Networks, LLC*, Docket No. 26904.<sup>1</sup> EPN urges the Commission to revise its unbundling rules and related definitional terms to prohibit incumbent local exchange carriers (“ILECs”) from limiting the locations at or customers for which competitive local exchange carriers (“CLECs”) may request unbundled network elements (“UNEs”). Specifically, EPN requests that the Commission modify its unbundling requirements to remove any doubt that the Act and FCC rules permit requesting telecommunications carriers to request and use UNEs to provide telecommunications services to all customers, including other telecommunications carriers. The Commission’s current rules permit ILECs to manipulate terms in the Commission’s unbundling rules such as “end user” in the definition of local loop?

<sup>1</sup> EPN notes that the Arbitrators’ decision in the Interim Ruling, is not an indication of the likelihood of success on the merits.

<sup>2</sup> 47 U.S.C. § 319(a)(1)

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or “wire center” in the definition of transport: into limits on the specific locations at or CLEC customers to which ILECs must make UNEs available to requesting telecommunications carriers.

As described in the attached Response, competitive carriers, such as EPN, seek to purchase UNEs to provide telecommunications services to CMRS providers and other carriers. The requested facilities are necessary to enable the CMRS providers to connect their mobile switching centers to subtending cell sites or base stations. The comments filed in this proceeding by CMRS providers demonstrate that these facilities are a critical component of their wireless networks.<sup>4</sup> In addition, as noted in those comments, because, in many instances, the ILEC’s ubiquitous network, which are a legacy of their history as state sanctioned monopolies, makes the ILEC the primary or the only sources for facilities to a CMRS providers’ cell sites and switches, an ILEC’s refusal to provide such facilities as UNEs significantly increases the cost of the CMRS providers’ networks and impedes their ability to compete.

ILEC facilities providing access to cell sites and CMRS providers’ switches clearly meet the definition of “network element,” as they are “facilit[ies] or equipment used in the provision of telecommunications service.” These facilities are functionally and technically identical to high-capacity loops and/or dedicated transport entrance facilities. Indeed, the Commission has specifically identified loops and dedicated transport as network elements that ILECs must make available to requesting telecommunications carriers on an unbundled basis. ILECs have played definitional games to avoid their unbundling obligations or otherwise impede CLEC access to these facilities; first labeling such facilities loops, then defining them as dedicated transport, and finally stating that they are not UNEs at all, but are special access facilities. The Commission should revise its rules to prevent ILECs using such definitional gamesmanship to avoid their unbundling obligations.

Rather than providing CLECs high-capacity facilities as UNEs for telecommunications service to CMRS providers, as required by the Act and the Commission’s rules, ILECs focus on the nature of the requesting carrier’s customers and the definition of “end user” or “wire center” to refuse to provide the facilities as UNEs. EPN does not believe that the Commission intended for the ILEC’s unbundling obligation to depend on the identity of the requesting carrier’s customer, the nature of that customer’s business, or the technology used by that customer.<sup>6</sup> The discussion of UNEs in the *Local Competition Order* and the *UNE Remand Order*, as well as in

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<sup>3</sup> 47 U.S.C. § 319(d)(1)

<sup>4</sup> *See, e.g.*, Comments of Voicestream Wireless Corporation, Docket Nos. 01-338, 96-98, 98-147; Comments of AT&T Wireless Services, Inc., Docket Nos. 01-338, 96-98, 98-147.

<sup>5</sup> 47 U.S.C. § 153(29).

<sup>6</sup> The use of the terms “wire centers” and “switches” in the definition of dedicated transport, 47 CFR § 51.319(d)(1)(i), unfortunately tends to connote particular technologies based upon traditional ILEC network designs that often do not have direct counterparts in the networks of requesting carriers or their customers. Neither of these terms is defined in § 51.5, leaving the ILECs free to adopt the most restrictive possible interpretation unless and until a requesting carrier litigates the issue.

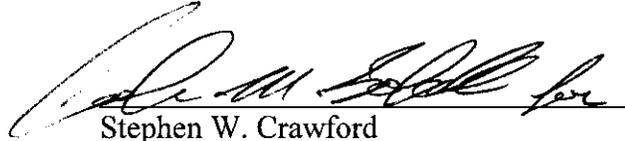
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the terms of § 51.319 of the Commission's rules as adopted in those orders, is consistently based on the functionality and capability of the network elements, not on any characteristics of the customer whom the requesting carrier proposes to serve. The Commission can mitigate the potential for such ILEC manipulation, and account for continuing shifts in technology, by implementing unbundling rules that are technologically and competitively neutral. EPN urges the Commission to do so in this proceeding.

We are submitting the original and two copies of this Memorandum and position paper to the Secretary in accordance with Section 1.1206 of the Commission's rules.

Please include a copy of this submission in the record of the above-listed proceedings. Also, please date-stamp and return the extra provided copy to confirm your receipt. You may contact me at 713-420-5896 should you have any questions.

Respectfully,



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DOCKET NO. 26904

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COMPLAINT OF SOUTHWESTERN §  
BELL TELEPHONE L.P. FOR POST §  
INTERCONNECTION AGREEMENT §  
DISPUTE RESOLUTION WITH EL  
PASO NETWORKS, LLC

PUBLIC UTILITY COMMISSION  
OF TEXAS

ORDER NO. 2

ORDER GRANTING INTERIM RELIEF AND SETTING ENTRY  
FOR THE PROCEDURAL SCHEDULE AND PROTECTIVE ORDER

This order grants the request of El Paso **Networks, LLC** (EPN) for interim relief pending the resolution of the merits of its dispute with Southwestern Bell Telephone Company (SWBT) in this proceeding.' SWBT is ordered to continue to provision Digital Signal (DS-1) loops ordered by EPN to Commercial Mobile Radio Service (CMRS) carrier cell locations at the Unbundled **Network** Element (UNE) loop rate during the interim period. **SWBT is** further ordered, to the extent possible, to aid EPN in verifying cell site addresses that reside in SWBT's records **as** a part of the standard processing of EPNs orders for **the** provisioning of additional lines **to** cell sites. **The** Arbitrators find that there is, insufficient evidence which justifies the need for the establishment of an escrow account. **Thus,** EPN shall not be required to escrow any disputed sums billed by SWBT for **the** provisioning of loops to **CMRS** carrier cell sites while **this** dispute is pending. Furthermore, pending resolution of **this** complaint, both parties shall **be** subject to a true up, **as** appropriate, for the disputed amounts.

I. BACKGROUND

**On** November 5, 2002, Southwestern Bell Telephone L.P. (SWBT) initiated a complaint for post-interconnection agreement dispute resolution pursuant to PUC PROC.

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R. 422.326 alleging that El Paso Networks (EPN) was attempting to order special access private lines to cellular towers as DS-1 loops by submitting local service requests that misrepresent its customers' addresses and characterize them as "end-users". SWBT contends that this activity is in violation of the existing interconnection agreement (ICA) and prevailing federal law.

On November 13, 2002, EPN filed its Response, Counterclaim and a Request for Interim Ruling under PUC PROC. R. §22.328. EPN disputes SWBT's allegations and states that EPN's practices are proper and that it is acting pursuant to previous business practices with SWBT. EPN further states that the ordered circuits are unbundled network elements (UNEs) and as such, its practices were lawful. EPN has requested an interim ruling as it alleges that SWBT has refused to provision service and made it impossible for EPN to fulfill its customers' request for service and could impact Texas customers receiving cellular service. Moreover, EPN states that SWBT is requiring that EPN place the difference between the special access and UNE loop prices in escrow, which EPN contends would cause it undue financial harm.

An Interim Relief Hearing was held on November 21, 2002 under PUC PROC. R. 422.328. Both EPN and SWBT were present and presented documentary and testimonial evidence in support of its respective positions. EPN presented testimony and exhibits from its witness, Mr. Pantios Manias, Vice President for Carrier relations, Regulatory and Business Development to support its request. SWBT offered testimony and exhibits from its witnesses, Mr. David Smith, SWBT Area Manager of SWBT Local Service Center and Area Manager of SWBT Local Operations and Mr. Robert Bryan, SWBT Area Manager of Network Regulatory to establish its position. Both parties presented oral argument to the Arbitrators.

## II. INTERIM REMEDY STANDARD

An interim remedy is available in post-interconnection arbitrations "when the dispute compromises the ability of a party to provide uninterrupted service or precludes

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<sup>1</sup> The Arbitrators considered evidence that was relevant to Section 22.328 of the Commission's Procedural Rules in reaching its decision on interim relief. The merits of the parties' positions will be addressed where appropriate at a subsequent Hearing on the Merits.

the provisioning of scheduled service.” Factors to be examined include, but are not limited to, the type of service requested, the economic and technical feasibility of providing that service, and the potential harm in providing the service?

### III. DISCUSSION

This matter concerns a dispute over whether El Paso Networks’ (EPN) practice of ordering SWBT DS-1 loops to cellular towers or similar cellular facilities as unbundled loops rather than as special access private lines is authorized under the parties’ current interconnection agreement. SWBT contends that this activity is in violation of the existing interconnection agreement (ICA) and prevailing federal law.

EPN disputes SWBT’s allegations and states that EPN’s practices are proper and that it is acting pursuant to previous business practices with SWBT and within the terms of the ICA and the previous Commission decision in the *Waller Creek Reconsideration Order*, that, according to EPN, allows CLECs to obtain UNEs from SWBT and use them for wholesale access services to other telecommunications providers, including cellular carriers! EPN further states that the ordered circuits are unbundled network elements (UNEs) under existing state and federal law and as such, its practices were lawful.

The Arbitrators, for the purposes of this hearing under PUC PROC. R. §22.328, must find sufficient evidence of the existence of one of two main conditions in order to grant interim relief. First, does the dispute between the parties compromise EPN’s ability to provide uninterrupted service to the “cellular company”?\* The record evidence indicated that there would not be a service interruption to the cellular company during the pendency of this docket. In fact, Pantios Manias, EPN Senior Vice President, testified

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<sup>2</sup> P.U.C. PROC. R. 22.328(a); cf. P.U.C. PROC. R. 22.125

<sup>3</sup> P.U.C. PROC. R. 22.328(d).

<sup>4</sup> *Petition of Waller Creek Communications for Arbitration of an Interconnection Agreement Pursuant to Section 252 of the Telecommunications Act of 1996 with Southwestern Bell Telephone Company, Docket No. 17922, Complaint of Waller Communications for Post-Interconnection Agreement Dispute Resolution with Southwestern Bell Telephone Company, Docket No. 20268, Order on Reconsideration of Second Order of Appeal of Order Nos. 2 & 9 (June 9, 1999)*, at 11 (“*Waller Creek Reconsideration Order*”)

<sup>5</sup> The identity of the cellular company being serviced by EPN is confidential. Thus, it will be referred to as the “cellular company”.

that he did not believe that there was an immediate concern about service interruption to the cellular company as a consequence of the dispute between EPN and SWBT. In turn, SWBT witness Robert Bryan testified that SWBT has not threatened to terminate service to EPN due to the current dispute. Thus, the Arbitrators deem that this issue is not relevant to its determination in this matter.

In the alternative, in order for interim relief to be granted to a movant under PUC PROC. R. §22.328, the movant must show that the dispute precludes the provisioning of scheduled service. The Arbitrators found that there was sufficient record evidence presented by EPN to further examine this condition precedent to the granting of interim relief.

In its deliberations, The Arbitrators considered factors, including but not limited to (1) the type of service requested, (2) the economic and technical feasibilities of providing that service; and (3) the potential harm in providing that service.

*(A) Type of Service Requested*

The evidence indicated that the type of service requested by EPN were DS-1 loops that were ordered under SWBT's mechanized ordering process through Local Service Requests tendered by EPN. These loops would be provisioned to cellular towers or similar cellular facilities in order to allow EPN's cellular carrier customer to deliver cellular calls to the Public Switched Telephone Network (PSTN). The record evidence indicated that these loops were predominately available only from SWBT. The record evidence showed that this service was necessary for EPN to meet the order demands from its cellular carrier customer or it could lose significant business from the cellular company. Thus, EPN placed 83 DS-1 loop orders to provision lines to the cellular company's cell sites, which were processed by SWBT and those lines were turned up. At present, the evidence indicated that there were approximately 26 outstanding DS-1 loop orders for which SWBT has refused to process due to its position that the lines to the cell sites should be ordered as special access lines rather than as UNE loops.<sup>6</sup>

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<sup>6</sup> See SWBT Ex. No. 6 and EPN Ex. No. 14. Mr. Manias testified that EPN has additional firm orders from this cellular company that, if not fulfilled in the near future, the cellular customer would be forced to find another carrier to fill the order for additional lines to its cell sites, which would impair EPN economically and tarnish its business reputation in the telecommunications market.

**(B) Economic and Technological Feasibility of Providing the Service**

The record evidence showed that SWBT has the network elements in place to provide the service to EPN in the interim. SWBT did not produce sufficient evidence to show that it could not technically provide the DS-I loops to EPN nor was there significant evidence that, from an economic standpoint, it would not be feasible for SWBT to provide the DS-1 lines on an interim basis. SWBT witness Robert Bryan testified that EPN had other options available to it in order to provide the scheduled service to its cellular customer. Mr. Bryan stated that EPN could either (1) order the additional lines under the SWBT Special Access Tariff Rate; (2) find another third-party carrier to provision the necessary lines; or (3) build its own lines to supply the service to its carrier customer. However, even if these options were "available" or "possible" to EPN, the question that the Arbitrators must decide is if the options are "feasible" for the movant to accomplish during the interim period in order to provision scheduled service to the cellular company. The Arbitrators find that these options are not reasonable for EPN to accomplish in the interim and still provide the scheduled service to the cellular company. The record evidence indicated that it, at present, would not be economically feasible for EPN to order the additional lines from the Special Access Tariff. The evidence indicated a significant increase in price for a special access line compared to the UNE loop price? The record evidence also showed that EPN could not reasonably order additional lines from third party carriers as there were no such carriers within the areas necessary to fulfill its scheduled service to the cellular company. Lastly, EPN witness Manias testified that it would not be economically feasible for the company to lay sufficient lines in order to supply the immediate needs and scheduled orders of its cellular customer or any such customers in the future.

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<sup>7</sup> See EPN Ex. No. 11. The evidence showed that the special access prices for DS-I loops under the SWBT Long Term Discount Plan would be higher than the UNE rates, although not as high as indicated on EPN Ex. No. 11. However, Mr. Manias testified that EPN would suffer an economic detriment if ordering special access lines under the Long Term Discount Plan as that would be a 5 year commitment to pay for those circuits regardless of whether EPN had a customer using those lines or not. Mr. Manias indicated

© *Potential Harm in Providing that Service*

The record evidence indicated that there was, at present, little harm to SWBT to provide the additional **DS-1** loops to EPN during the interim period. There is no dispute that **EPN** is currently compensating SWBT for the **83** provisioned DS-1 loops to the cellular company. There is no evidence in the record that SWBT will not continue to receive such payments. Moreover, pending the outcome of the forthcoming Hearing on the Merits, the difference in price between the special access private line prices and the UNE rate will be subject to a true-up, if appropriate. Consequently, SWBT, if it prevails on the merits of the case, will be able to recover its claimed lost monies? However, the record evidence shows that the potential harm to EPN could be significant. If the additional lines are not made available to EPN at the current price, the evidence shows that EPN could lose substantial current and future business with the cellular company and other cellular companies. Further, EPN noted that its reputation in the business community could be irreparably tarnished if it could not meet the scheduled order of the cellular company.

However, the Arbitrators, having examined the relevant evidence and testimony presented at hearing and the arguments of counsel, in applying the standards as presented in PUC PROC. R. §22.328, rule that EPN has presented evidence sufficient to grant its request for interim relief pending a final resolution of this docket.

#### IV. ESCROW

The Arbitrators find that **EF** presented sufficient evidence to convince the Arbitrators that if escrow of the disputed mounts is required, it would preclude EPN's ability to provide scheduled service to the cellular company. EPN witness Manias testified that the placing of monies into an escrow account was tantamount to paying the special access price for the **DS-I** loops. Such additional payment, according to Manias, would significantly affect its provision of service to the current cellular company for the **26** disputed loops as well as additional orders that were forthcoming, as well as affect its

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that the contracts signed with cellular companies were typically one year in duration. Thus, according to EPN, ordering from the Discount Plan would not be sound for the long term business standing of EPN.

ability to enter into this sector of the market as a viable competitor. The Arbitrators find that the evidence shows that SWBT is currently receiving its payments for the current DS-1 loops presently provisioned and there is insufficient record evidence to show the Arbitrators that SWBT will not continue to receive payments from EPN for current and future DS-1 loop orders. Moreover, if the Commission finds in favor of SWBT, a “true-up” proceeding for the costs will be necessary and SWBT will recover in that manner. Consequently, in light of the relevant evidence, the Arbitrators find no need for the establishment of an escrow account during the interim period. In reaching this decision regarding the escrow issue, the Arbitrators also considered EPN’s current payment for its other DS-1 loops and the lack of evidence that such payment will not continue. The Arbitrators expect that prompt and proper payments will continue throughout this proceeding. If not, SWBT may make this known and the Arbitrators may re-examine whether an escrow account is warranted.

#### V. INTERIM REMEDY

The Arbitrators, having considered all relevant evidence from the parties and arguments of counsel GRANT EPN’s request for interim relief. The Arbitrators find that EPN is entitled to interim relief under Section 22.328 of the Commission’s Procedural Rules? Therefore, SWBT is hereby ORDERED to provision DS-I loops ordered by EPN to CMRS carrier cell locations at the UNE loop rate during the interim period. SWBT is further ORDERED, to the extent possible, to aid EPN in verifying cell site addresses that reside in SWBT’s records as a part of the standard processing of EPN’s orders for the provisioning of additional lines to cell sites. The Arbitrators find that there is insufficient evidence which justifies the need for the establishment of an escrow account. Thus, EPN shall not be required to escrow any disputed sums billed by SWBT for the provisioning of DS-I loops to CMRS carrier cell sites while this dispute is pending.

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<sup>8</sup> The Arbitrators suggest that the parties submit proposed Protective Orders and a Procedural Schedule as soon as possible in order to reduce the possible costs to the parties.

<sup>9</sup> P.U.C. Proc. R. 22.328(a).

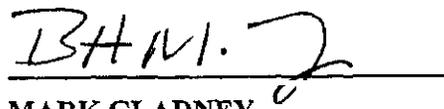
**VI. ESTABLISHMENT OF A PROCEDURAL SCHEDULE AND PROTECTIVE ORDER**

The Arbitrators further **ORDER** that the parties will consult and submit a joint proposed procedural schedule and protective order for this docket no later than **December 6, 2002**. The parties' prompt attention to this matter is important to minimize ongoing costs to the parties.

SIGNED AT AUSTIN TEXAS the 22nd day of November, 2002

FTA \$252 ARBITRATION PANEL

  
BRYAN KELLY  
ARBITRATOR

  
MARK GLADNEY  
ARBITRATOR

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COMPLAINT OF SOUTHWESTERN BELL TELEPHONE, LP FOR POST INTERCONNECTION AGREEMENT DISPUTE RESOLUTION WITH EL PASO NETWORKS, LLC § § § § §

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EL PASO NETWORKS, LLC RESPONSE, COUNTERCLAIM, AND REQUEST FOR AN INTERIM RULING

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DOCKET NO. 26904

COMPLAINT OF SOUTHWESTERN  
BELL TELEPHONE, LP FOR POST  
INTERCONNECTION AGREEMENT  
DISPUTE RESOLUTION WITH  
EL PASO NETWORKS, LLC

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PUBLIC UTILITY COMMISSION  
  
OF TEXAS

**EL PASO NETWORKS, LLC**  
**RESPONSE, COUNTERCLAIM, AND REQUEST FOR AN INTERIM RULING**

El Paso Networks, LLC (“El Paso” or “EPN”), by its undersigned counsel, pursuant to PUC PROC. R. § 22.326(b) hereby responds to SWBT’s Complaint in the instant proceeding, and pursuant to PUC PROC. R. § 22.328 hereby files its Counterclaim and Request for an Interim Ruling to resolve specific disputes with Southwestern **Bell** Telephone, L.P. d/b/a Southwestern Bell Telephone Company (“SWBT”). EPN respectfully requests that the Commission determine that circuits to wireless carrier cell sites are available **as** UNEs and that SWBT cannot unilaterally bar them being ordered **as** UNEs. In its Counterclaim, EPN also requests **an** Interim Ruling allowing EPN to continue to obtain circuits to cell sites **as** UNEs during the pendency of this proceeding, because SWBT’s actions in this dispute, as set forth in detail herein, compromise EPN’s “ability to provide uninterrupted service” and “preclude[] the provisioning of a scheduled service.”

The Commission should preserve EPN’s existing right to order unbundled network elements (“UNEs”) necessary to provide service to its customers, consistent with this Commission’s rules and the Telecommunications Act of 1996 (the “Act”), and prevent irreparable harm to EPN by SWBT’s refusal to comply with its obligations during the pendency of *this* proceeding. EPN respectfully requests that the Commission grant EPN’s Request for **an** Interim Ruling to allow

EPN to provide scheduled service to its national level wireless carrier customer and to continue to compete in the Texas telecommunications market.

## I. INTRODUCTION

By filing a complaint accusing EPN of improperly ordering UNEs, SWBT has demonstrated yet again its willingness to take positions **of** no legal merit, in hopes that this Commission will grant it some relief, thereby **further** lessening its legal obligations to support competition in Texas. SWBT has consistently flouted this Commission's oft-cited policy of "provision now; litigate later" with its own policy of "refuse now; litigate forever." Specifically, SWBT breached its statutory and contractual obligations to provide unbundled **network** elements to EPN; now, it files a complaint accusing EPN of acting improperly in seeking to exercise its contractual rights. **The** importance of this proceeding can hardly be underestimated; should SWBT prevail, SWBT will succeed in denying the wireless industry and all Texas mobile phone users the competitive benefits of the Federal Telecommunications Act.

The dispute in this proceeding involves EPN's ability to order UNEs to **serve** a national wireless carrier, which has ordered service from EPN to connect its wireless tower sites (or "cell sites") to its switching center. Beginning on May 7, 2002, EPN submitted **83** orders for DS1 UNE loops to serve this customer's cell sites. SWBT provisioned these **83** circuits, but beginning in September, 2002, rejected 26 similar requests, and advised EPN that it would not provide any more UNE loops that **serve** cell sites?

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<sup>1</sup> See PUC PROC. R. § 22.328(a).

<sup>2</sup> Letter from Mark S. Chamberlain, SWBT to Tony Sanna, EPN, October 11, 2002, copy attached hereto as Exhibit 1 (to **keep** the identity of EPN's customer confidential, EPN has redacted the customer's name from this **letter**).

EPN submits that SWBT facilities that provide access to cell sites are elements of SWBT's network, used to provide telecommunications services, and therefore are subject to SWBT's obligation to offer unbundled network elements under federal Telecommunications Act of 1996, 47 USC § 251(c)(3).<sup>3</sup> SWBT has taken *the* position that these facilities cannot be ordered as "loops" because they do not terminate to end user customer premises. If this were the case, then SWBT should provision the requested circuits as unbundled transport entrance facilities, because they terminate to a telecommunications carrier's facilities. In the past, however, SWBT has consistently required EPN to order UNEs to carrier locations where no switch is present as UNE loops rather than UNE entrance facilities. SWBT now insists that, by doing exactly what SWBT has told EPN to do, EPN is improperly ordering UNE loops.

Regardless of what type of UNEs these circuits are, they are UNEs, and SWBT should provision them accordingly. Importantly, SWBT's refusal to provision UNEs to wireless carrier cell sites effectively denies the benefits of competition under the FTA to wireless carriers and to cell phone users in Texas. Rather than provision the requested circuits as UNE loops while it disputed its obligation to provide such loops, SWBT has refused to provision the requested facilities at all, and has unilaterally demanded that EPN order facilities to EPN's customer's cell sites as special access services. SWBT's only offer of compromise has been to place the difference between the special access and UNE loop prices in escrow, which does nothing to remove the financial risk that EPN would incur by ordering special access service.

There are ample grounds for the Commission to order the relief EPN requests. First, SWBT's refusal to provide these UNEs violates the Commission's *Waller Creek Reconsidera-*

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<sup>3</sup> Hereinafter, the federal Telecommunications Act of 1996 codified in Title 47 U.S.C. will be cited as "FTA."

*tion Order*, which under the Revised Arbitration Award in Docket No. 25188 remains the law in Texas! In that Order, the Commission established that CLECs may obtain UNEs from SWBT and use them to provide wholesale access services to other telecommunications providers.<sup>5</sup> Second, the parties' existing Interconnection Agreement does not allow SWBT to deny EPN access to a network element because the element is being used to serve a wireless carrier. Third, SWBT's position under the current Interconnection Agreement, as expressed in its October 11 letter to EPN, completely contradicts SWBT's longstanding policy of requiring EPN to obtain UNEs to telecommunications carrier locations as loops rather than as Unbundled Dedicated Transport Entrance Facilities. Regardless of what SWBT today decides to label this element, at the very least, SWBT must provision it now as a UNE pending resolution of this dispute.

Interim relief is appropriate under PUC PROC. R. § 22.328(a) because SWBT has refused to provision service and made it impossible for EPN to fulfill its customer's request for service. The impact of denying EPN access to UNEs to serve its customers in this instance would be severe. SWBT's policy is apparently designed to keep EPN from competing in the market to serve wireless carriers since SWBT refuses to provision the requested elements as either loops or transport entrance facilities, using definitional trickery to evade its legal obligation to provide unbundled access to its ubiquitous local network. EPN thus requests that the Commission issue

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<sup>4</sup> *Petition of El Paso Networks, LLC for Arbitration of an Interconnection Agreement with Southwestern Bell Telephone Company*, Docket No. 25188, Revised Arbitration Award, (July 31, 2002) at 14-15

<sup>5</sup> *Petition of Waller Creek Communications for Arbitration of an Interconnection Agreement Pursuant to Section 252 of the Telecommunications Act of 1996 with Southwestern Bell Telephone Company*, Docket No. 17922, *Complaint of Waller Creek Communications for Post-Interconnection Agreement Dispute Resolution with southwestern Bell Telephone Company*, Docket No. 20268, Order on Reconsideration of Second Order on Appeal of Order Nos. 9 and 2 (June 9, 1999), at 11 (“*Waller Creek Reconsideration Order*”).

an interim order requiring SWBT to continue provisioning loops to canier locations that lack switches (including wireless carrier cell sites) as UNE loops. Such an interim order will maintain the status quo between the parties and allow Texas customers to receive service until such time as the Commission completes its hearing of this dispute or the parties have a new Interconnection Agreement in place that would render SWBT's complaint moot.

## II. PARTIES

EPN is a competitive local exchange carrier ("CLEC") based in Houston, Texas. EPN holds a Service Provider Certificate of Operating Authority ("SPCOA") issued by this Commission.<sup>6</sup> It is a subsidiary of the El Paso Corporation, a publicly traded, Houston-based company providing energy and telecommunications services across the nation. EPN's primary business address is 1001 Louisiana Street, Houston, Texas 70022. EPN is **sewing** wholesale customers and constructing a state of the *art* high-capacity broadband telecommunications network in Texas.

In December of 2000, the El Paso Corporation acquired Waller Creek Communications, Inc. ("Waller Creek") and EPN became the successor to Waller Creek's Interconnection Agreement with SWBT. In January of 2001, the Commission approved the El Paso Corporation's acquisition of Waller Creek's SPCOA and its name change to El Paso Networks, LLC.<sup>7</sup> Consistent with the change of the name on the SPCOA, SWBT and EPN filed a joint application, which

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<sup>6</sup> Docket No. 17255, *Application of Waller Creek Communications, Inc. for a Service Provider Certificate of Operating Authority*, Order (June 27, 1997).

<sup>7</sup> Docket No. 23410, *Application of Waller Creek Communications, Inc. for an Amendment to its SPCUA*, Notice of Approval, January 29, 2001.

the Commission approved, that changed the name on the interconnection agreement from Waller Creek to EPN.<sup>8</sup>

EPN and SWBT are currently litigating two other proceedings before the Commission: Docket 25004, EPN's Complaint for Post-Interconnection Agreement Dispute Resolution filed on November 13, 2001; and Docket 25188, EPN's Petition for Arbitration of an Interconnection Agreement, filed on December 20, 2001. The Commission consolidated the two dockets, and conducted a joint hearing April 23-25, 2002. The Arbitrators issued an Award in the Arbitration on July 2, 2002, and a Revised Award on July 31, 2002. The Parties submitted a Matrix of Disputed Conforming Language on August 22, 2002 and are awaiting an order on those disputed issues. There has been no award in the Post Interconnection Agreement proceeding as of this date. EPN's designated representatives for purposes of this complaint are:

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<sup>8</sup> Docket No. 24050, *Application of SWBT and Waller Creek Communications, Inc. for an Amendment to an Interconnection Agreement*, Order, June 6, 2001.

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SWBT is an incumbent local exchange carrier (“ILEC”) as defined in the FTA § 251(h). SWBT’s offices are located at Four Bell Plaza, Dallas, Texas, 75202. EPN understands that SWBT’s designated representatives for purposes of this complaint **are**:

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### **III. RESPONSE TO SWBT’S COMPLAINT**

#### **A. Introduction**

EPN generally denies SWBT’s contentions set forth in its Introduction. EPN **denies** that it “misrepresented the address for which it sought UNE loops.” EPN denies that under the language of its Interconnection Agreement (“Agreement”) the UNEs it ordered from SWBT were “inappropriately ordered as unbundled loops” and contends that SWBT’s policies and practice **require** EPN to order such UNEs as **loops**. EPN denies SWBT’s suggestion that EPN’s ordering practices were improper.

**B. SWBT's Representations Regarding Efforts To Resolve The Dispute By Negotiation**

EPN denies SWBT's contention that EPN's order for UNE loops represented "telecommunications arbitrage." EPN **further** denies that SWBT's offer preserved EPN's interest during dispute resolution. Although SWBT offered what it contends was **an** interim remedy, it was a remedy disguised as a requirement that EPN pay special access rates for facilities that are UNEs and thus precluded EPN from providing the service its customer sought from EPN. EPN filed a request for Commission intervention through EPN's ongoing dispute resolution proceeding with SWBT, but the arbitrators in that docket declined to act on procedural grounds and suggested that EPN file a complaint under Subchapter Q of the Commission's rules to obtain the relief it requested.

Counsel for EPN and SWBT discussed the possibility of resolving part of the dispute before EPN filed this pleading. Despite these efforts the parties were not able to resolve the dispute, in whole or in part.

**C. SWBT's Statement Of Relevant Law**

EPN generally agrees that the Commission has jurisdiction to resolve this dispute under PUC PROC. R. § 22.321 *et seq.* EPN similarly agrees with SWBT's contention that the resolution of the dispute should be guided by the terms of the Agreement and be consistent with federal law and this Commission's determinations regarding the availability **of** UNEs, particularly the FTA's mandate that ILECs provide CLECs with nondiscriminatory access to network elements on an unbundled basis. Although EPN concurs that the *Waller Creek Reconsideration Order* is of pivotal importance to resolve this dispute, EPN disputes SWBT's interpretation of the *Waller Creek Reconsideration Order*. EPN denies that this Order stands for the principle that a loop

must run to an end user customer premise.’ Instead, EPN would show that the *Waller Creek Reconsideration Order* allows EPN to obtain UNEs to provide wholesale telecommunications services, including access services to other telecommunications carriers, including wireless carriers, regardless of where they are located.”

#### **D. SWBT’s Factual Background**

EPN admits that on May 7, 2002, EPN submitted the first batch of requests for DS1 UNE Loops to serve cell sites in Texas for a national level wireless customer. **As** discussed in the attached Manias affidavit (Exhibit 3 hereto), EPN’s 109 requests were not submitted simultaneously.” EPN’s requests can be grouped into two clusters. EPN sent the first cluster of requests as orders to SWBT in May and June of 2002. The first order in this cluster was ordered on May 7, 2002. The last order from this cluster was submitted on June 27, 2002. SWBT provisioned *all* 83 of these orders for EPN.<sup>12</sup> The second batch contained 26 requests that EPN forwarded to SWBT in September, 2002. EPN could not complete the order for loops to the addresses for these 26 requests because SWBT’s OSS would not recognize the addresses EPN’s customer provided to EPN. EPN then asked SWBT to validate 26 addresses on September 5, 2002 so it

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<sup>9</sup> SWBT’s argument on this issue is truly cryptic. SWBT asserts that the *Waller Creek Reconsideration Order* acknowledges a “principle” that the definition of UNE loop “requires a facility to run to an end user’s premises before it can constitute a loop[,]” but merely cites page 11 of the Order without explaining what language on that page might support the so-called “principle.” In fact, not only is nothing on page 11 of the Order even remotely relevant to SWBT’s argument, but the word “loop” does not appear *anywhere* in the Order except in footnote 22 (in a discussion of the PICC charge), and the word “premises” is not used at all. SWBT’s “principle” appears to be a fictional invention.

<sup>10</sup> *Waller Creek Reconsideration Order* at 7, 11.

<sup>11</sup> Manias Affidavit ¶ 6.

<sup>12</sup> *Id.*

could place orders through SWBT's mechanized OSS. SWBT would not provide the data based on its new cell site policy.

EPN denies that it treated facilities to cell sites as special access, and lacks any **knowl-**edge regarding whether other carriers have done so. EPN does not deny that other carriers may order such facilities from SWBT's Special Access Tariff if they wish, although that fact is irrelevant to the question whether EPN, under its Agreement, can order those facilities as UNEs. EPN has no information allowing it either to admit or deny whether other carriers ordered facilities to cell sites under a specific SWBT tariff, or what designation was made regarding the inter or intrastate nature of the traffic. EPN has no information whether such carriers have interconnection agreements with SWBT that provide for access to UNEs. Again, these allegations, if true, are irrelevant to determining whether SWBT must provision the facilities as UNEs and whether the Commission's orders interpreting that agreement allow EPN to use UNEs to provide access **services**.<sup>13</sup>

EPN denies SWBT's suggestion that EPN's orders for its customers were a ploy. Rather, EPN's orders adhered to SWBT's longstanding practice of requiring EPN to order facilities to

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The jurisdictional designation of circuits ordered by other carriers is irrelevant for purposes of this case. First, EPN may order UNEs to provide interstate or intrastate services, or both. *Local Competition Order*, 11 FCC Record 15499, ¶ 356. Second, under FCC rules and SWBT's tariff, any dedicated facility (such as a DS1 access facility) must be designated as "interstate" if at least 10% of the usage of the circuit is for interstate communications. *See 47 CFR § 36.154(a); Amendment of Part 36 of the Commission's Rules and Establishment of a Joint Board*, Decision and Order, 4 FCC Rcd 5660 (1989). Therefore, for SWBT's purposes, if 10.1% of the traffic carried over a circuit is interstate, the carrier must designate it as 100% interstate. Southwestern Bell Telephone Company Tariff 73, section 2.4.3.(a)(1), p. 2-53. Thus, even if SWBT's allegation is true, it would merely mean that the intrastate usage of the circuits ordered by other carriers was less than 90%, which proves nothing about whether these circuits are subject to unbundling under FTA § 251(c)(3).

carrier locations as UNE loops rather than as UNE Entrance Facilities (a subset of Unbundled Dedicated Transport or “UDT”).

EPN admits that it submitted its orders using SWBT’s mechanized OSS. However, EPN denies that SWBT provisioned 83 of these loops “before SWBT realized what EPN was doing.” At least four of the Local Service Requests (“LSR”) EPN submitted in May of 2002 included notations that informed SWBT that the customer premises was a cell site.<sup>14</sup> One LSR clearly states ““this location is a cell site.”” Further, a number of those 83 orders required SWBT to cooperate with EPN to verify the address resident in SWBT’s OSS to allow SWBT to provision the order.“ Such address verification is a manual process that required active intervention of SWBT’s Local Service Center (“LSC”) personnel. SWBT personnel **h e w full** well they were provisioning UNE loops to cell sites.” For example EPN’s provisioning notes reflect that SWBT informed EPN that one of its customer cell sites was located on a water tower.<sup>18</sup> Further, if as SWBT contends, the carrier customer currently uses SWBT Special Access circuits to these cell sites, SWBT would again know that the addresses EPN provided served these cell sites. EPN denies that it failed to submit proper addresses, but admits that for some loops the addresses

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<sup>14</sup> EPN LSR for PON Number 1ULQ0217, attached as Exhibit 6; EPN LSR for PON Number 1ELQ2226, attached as Exhibit 7, EPN LSR for PON Number 1ULQ2228, attached as Exhibit 8; EPN LSR for PON Number 1ULQ2214, attached as Exhibit 9; Manias Affidavit ¶ 7.

<sup>15</sup> EPN LSR for PON Number 1ULQ0217 attached as Exhibit 6; Manias Affidavit ¶ 7.

<sup>16</sup> EPN Provisioning Notes, Order Q 2234, page 2 of exhibit, attached as Exhibit 10; EPN Provisioning Notes, Order Q 2525, page 2-3 of exhibit, attached as Exhibit 11; EPN Provisioning Notes, Order Q 2214, page 6 of exhibit, attached as Exhibit 12; Manias Affidavit ¶ 7.

<sup>17</sup> *Id.*

<sup>18</sup> EPN Provisioning Notes, Order Q 2234, page 2 of exhibit, attached as Exhibit 10.

its customer provided to EPN (which EPN then provided to SWBT) were different than the addresses resident in SWBT's OSS.<sup>19</sup>

EPN denies that this address discrepancy allowed SWBT to discover that EPN was ordering UNE loops to cell sites because, as stated above, SWBT possessed information that these loops were to cell sites and actively assisted EPN in resolving address conflicts on several of the 83 orders that it did provision to EPN.<sup>20</sup> EPN **further** denies that it made any misrepresentations when ordering the requested UNE loops. EPN has no information regarding SWBT's contention that its OSS relies on the veracity of information provided. EPN denies that its orders represented either an artifice, gaming the system, or anything other than ordering UNEs consistent with SWBT's policies and EPN's rights under its Agreement to use UNEs to provide wholesale access service to other telecommunications carriers.

#### **E. SWBT's Statement of the Disputed Issue**

EPN generally denies SWBT's entire statement under its Section VI, "Disputed Issue." EPN denies that it has any disregard for its obligations under the Agreement, rather it is SWBT that has continually implemented policies to undermine EPN's ability to use the Agreement and the Commission's orders interpreting the Agreement to bring competitive choices to customers in Texas.

EPN denies SWBT's statement of the issue. The issues in this proceeding are:

- 1) whether the Agreement permits EPN to order UNEs from SWBT to serve wireless carrier cell site locations; and

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<sup>19</sup> With respect to the 26 loop addresses that SWBT refuses to verify, EPN does not know the reason SWBT's OSS will not **recognize** the address EPN's customer provided.

<sup>20</sup> Manias Affidavit ¶ 7.

- 2) Whether SWBT can refuse to provide EPN with the address SWBT has on record for a particular cell site.

EPN's position is that these facilities are UNEs. As UNEs, SWBT must provide them and EPN may use them to provide wholesale access services to wireless customers. As UNEs, SWBT is required to provide EPN with the OSS functionality, both mechanized and manual *so* that EPN may fulfill its customer's request and order such UNEs.<sup>21</sup>

SWBT does not want to admit that circuits serving cell sites are either UNE loops or UNE entrance facilities, and instead appears to argue that they are not UNEs at all. EPN denies SWBT's contention regarding the Agreement and prevailing law, and maintains that facilities to cell sites are UNE loops. EPN further denies that the circuits it ordered are special access. EPN affirms the definition of loop and the term "end user" in the Agreement. EPN denies SWBT's contention regarding the "essence" of the term "end user" as that term is used in the Agreement. EPN likewise denies that the terms of the Agreement and relevant law present the inescapable purpose that SWBT claims. EPN affirms that the wireless carrier customer is a telecommunications carrier, but denies SWBT's argument regarding whether the carrier "consumes the service for its own use" because such language appears nowhere in the definition of end user provided by SWBT in its Complaint, and does not appear in the Agreement.

EPN denies it is using "gamesmanship," and denies SWBT's contention that EPN's interpretation of the term end-user would lead to absurd results. Indeed, what is absurd is SWBT's attempt to twist the definitions in the FCC's **rules** and the parties' Agreement to create a category of transmission facilities that are "network elements" but do not have to be unbundled. EPN

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<sup>21</sup> Agreement, Attachment **6** UNE § 10; Attachment **7** Ordering **and** provisioning Unbundled Network Elements §§ 1.5, **3.5, 4.2 & 8.4**.

generally denies the remainder of SWBT's arguments concerning interpretation of the Agreement, and submits that the Agreement should be interpreted in a manner consistent with its purpose, which is to implement SWBT's statutory obligation to offer its network elements on an unbundled basis. If SWBT has facilities providing telecommunications service to a customer at any location (or, if SWBT prefers, any "man-made item"), that location is a customer premise.

EPN asks the Commission to find that the Agreement allows EPN to use UNEs to provide wholesale access services to other carriers including wireless carriers. Such a finding is expressly supported by the Commission's previous ruling interpreting EPN's rights under the agreement in the *Wuller Creek Reconsideration Order*; in the plain language of the Agreement's definition of end user; and by SWBT's practices in its dealing with EPN which are consistent with the Commission's *Wuller Creek Reconsideration Order* and the definition of end user in the Agreement.

#### **F. SWBT's Relief Requested**

EPN generally denies SWBT's contentions in this paragraph. Instead, for the reasons described under EPN's Counterclaim below, the Commission should find that facilities to carrier cell sites are UNEs, either loops or entrance facilities, and require SWBT to process such orders without delay.

#### **IV. EPN's COUNTERCLAIM**

EPN hereby requests that the Commission deny SWBT's Complaint and instead grant affirmative relief on the merits in favor of EPN.<sup>22</sup> In addition, EPN requests that the Commission

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<sup>22</sup> Subchapter Q of the Commission's Procedural Rules does not expressly provide for counterclaims. As a matter of administrative efficiency, EPN makes its request for affirmative relief in the form of a counterclaim, since it arises out of precisely the same facts and the same transactions as SWBT's complaint. In the event that the Commission finds that a separate  
(continued)