

THE STATE CORPORATION COMMISSION
OF THE STATE OF KANSAS

Before Commissioners: John Wine, Chair
 Cynthia L. Claus
 Brian J. Moline

In the Matter of the General Investigation to)
Determine Conditions, Terms and Rates for)
Digital Subscriber Line Unbundled Network) Docket No.01 -GIMT-032-GIT
Elements, Loop Conditioning, and Line)
Sharing)

**ORDER 1: OPENING DOCKET, ESTABLISHING
PROCEDURAL SCHEDULE AND ASSESSING COSTS**

The above-captioned matter comes before the State Corporation Commission of the State of Kansas (Commission) for consideration and decision. Having reviewed the files and being fully advised of all matters of record, the Commission summarizes the arguments of the parties and finds and concludes as follows:

A. BACKGROUND

1. The Commission previously issued an Order on June 30, 2000, in Docket No. 97-SCCC-149-GIT, granting a motion filed by Dieca Communications, Inc. d/b/a Covad Communications Company (Covad) to bifurcate determination of terms and rates for Digital Subscriber Line (DSL) Unbundled Network Elements (UNEs), loop conditioning and line sharing from the generic proceeding involving Southwestern Bell Telephone Company's (SWBT) terms and rates for interconnection, unbundled elements, transport and termination, and resale. Because of the unique issues associated with DSL services and technology, the Commission believes a proceeding

involving all providers of DSL services will enable a more expeditious resolution of issues concerning the provision and cost of these advanced services than would occur if carriers must each arbitrate separate agreements. Furthermore, as evidenced by events in the marketplace, DSL-type services are an emerging group of services important to consumers who seek higher speed data transmission rates. Accordingly, this group of services would be highly important to incumbent and competitive telecommunications service providers alike, as each seeks to provide services that meet customer needs. It is critical from several vantage points that we do our best to expeditiously resolve issues regarding rates, terms and conditions for DSL-related network elements.

2. The unique questions involving DSL services arise because telecommunications carriers are increasingly transmitting electronic communications in digital, rather than analog, form. Digital subscriber line technology (xDSL) is used to send signals over copper wires to packet switches.⁷ Advancements in xDSL make it affordable for ordinary citizens to use existing copper telephone lines to have high-speed connections to an incumbent local exchange carrier's (ILEC) central office.

B. AUTHORITY

3. When the Kansas Legislature enacted the Kansas Telecommunications Act in 1996 (Kansas Act), it declared the public policy of the state to include the promotion of consumer access to a full range of telecommunications services, "including advanced telecommunications services that are comparable in urban and rural areas throughout the state." K.S.A. 1999 Supp. 60-2001(c). Public policy also ensures every Kansan "access to a first class telecommunications infrastructure

⁷The small "x" in xDSL is a space holder used to signify the generic transmission technology, rather than a specific type, or flavor, of DSL, such as ADSL (asymmetric digital subscriber line) or HDSL (high-speed digital subscriber line). Unless otherwise indicated, use of DSL in this order will have the generic meaning associated with xDSL.

that provides excellent services at an affordable price.” K.S.A. 1999 Supp. 60-2001(a). We consider xDSL services to be a clear example of “advanced telecommunications services.” Reasonable prices and provisioning of UNEs by ILECs, which support the deployment of xDSL services by competitive local exchange carriers (CLECs), obviously will be beneficial for the deployment of xDSL in Kansas.

4. The Commission has the duty to determine prices for unbundled facilities. The Commission is required to encourage telecommunications carriers to build or install telecommunications facilities, including, but not limited to, local loop and switching facilities. Prices are to be established “on a nondiscriminatory basis, to permit the recovery of costs and a reasonable profit.” K.S.A. 1999 Supp. 66-2003(c).

5. To determine prices for UNEs, this Commission has consistently applied a forward-looking cost methodology known as Total Element Long Run Incremental Costs (TELRIC). The Commission believes TELRIC principles best estimate the costs a forward-looking, efficient competitor would incur. Thus, TELRIC principles are appropriate for establishing unbundled network element (UNE) rates and promoting the goals of the Kansas Act. Docket No. 97-SCCC-149-GIT, Order Regarding Issues Subject to Comment Under the Reconsideration Order, Issued April 27, 2000, 3-4. The Commission is aware of the recent decision of the United States Court of Appeals for the Eighth Circuit that vacated FCC Rule 51.505(b)(1), which applied TELRIC methodology by measuring “the most efficient telecommunications technology currently available and the lowest cost network configuration, given the existing location of the incumbent LEC’s wire centers.” *Iowa Utilities Board, et al., v. Federal Communications Commission and United States of America*, Case No. 96-3321, filed July 18, 2000, 6 (quoting 47 C.F.R. § 51.505(b)(1)). The Court, however, approved the use of the forward-looking TELRIC methodology if it “is based on the

incremental costs that an ILEC actually incurs or will incur in providing the interconnection to its network or the unbundled access to its specific network elements requested by a competitor[.]” *Iowa Utilities Board*, Slip. Op. at 12. This recently filed decision is not final. Also, this Commission has adopted, and continues to apply, TELRIC methodology based on independent state grounds, regardless of the challenge to the FCC pricing rules. The Commission will apply TELRIC methodology in this generic proceeding concerning xDSL technology.

C. PENDING ARBITRATIONS

6. Although the Kansas Act gives the Commission the responsibility of determining prices for unbundled facilities, K.S.A. 1999 Supp. 2003(c), the Federal Telecommunications Act of 1996 (Federal Act) in Section 252(b) allows any party who has requested negotiation with an ILEC under Section 252(a) to petition a state commission to arbitrate any open issues. The request must be made within a time period specified in the statute. 47 § 252(b)(1). The Kansas Act also provides for arbitration and follows the language of the Federal Act to set the time frame for filing an arbitration. Concerning the procedures to be used in arbitrations, the Kansas Act merely states: “Arbitration shall occur in conformance with the provisions of section 252 of the federal act.” K.S.A. 1999 Supp. 66-2003(e).

7. This Commission has previously noted it has no intent to preclude parties from negotiating rates different from those established in a generic proceeding if the agreement is nondiscriminatory and is consistent with public interest, convenience and necessity. The Commission has recognized TELRIC costs assume the total market is served, which makes it difficult to imagine that an ILEC would offer prices below the TELRIC level. Docket No. 97-SCCC-149-GIT, Order on Reconsideration, Issued September 17, 1999, 17-18.

8. The Commission is concerned about what impact opening a generic docket on xDSL issues will have on pending arbitrations. The Commission has identified four ongoing arbitrations that involve xDSL issues. Two are between Covad and SWBT, Docket No. 00-DCIT-389-ARB and Docket No. 00-DCIT-997-ARB; the other two involve Sprint Communications Company L.P. (Sprint) and SWBT, Docket No. 99-SCCC-710-ARB and Docket No. 00-SCCC-1046-ARB.

9. In Docket No. 00-DICT-389-ARB, Covad filed a timely petition to arbitrate rates, terms and conditions for 2-Wire Digital ISDN Digital Subscriber Line; Loop Qualification Process and Rates; and Non-Recurring Cross-connect to Collocation Charges for ADSL Shielded Cross-connect, 2-Wire Analog Cross-connect, 2-Wire Digital Cross-connect and 4-Wire Analog Cross-connect. The Arbitrator's Order was filed May 9, 2000. The Arbitrator made the following findings: (1) Covad and S WBT are in unqualified agreement on Recurring Charges for 2-wire analog/digital cross-connects and for 4-wire analog cross-connect. (2) Covad abandoned the issue regarding ADSL Shielded Cross-connect Recurring charges. (3) On 2-wire ISDN Digital Subscriber Line, the Arbitrator found Next Generation Digital Loop Carrier equipment was currently available, less expensive and more efficient than SWBT's configuration; until SWBT has rerun its loop cost studies relating to ISDN based on Next Generation Digital Loop Carrier technology, interim rates detailed by the Arbitrator will be used. (4) SWBT's Loop Qualification process pricing was not based on the most efficient technology currently available and, therefore, Covad's final and best offer of \$0 for loop qualification was adopted. (5) The Arbitrator adopted Covad's Non-recurring Cross-connect charges, which he found to be more reasonable than SWBT's. Arbitrator's Order, Issued May 9, 2000, 15-18, 20, 23, 24-25.

10. After receiving comments and responses from SWBT and Covad, the Commission deferred action on the Arbitrator's recommended decision until the Arbitrator had an opportunity

to respond to the comments. The Arbitrator's Evaluation of Comments was filed June 20, 2000. The Commission has not acted further on the Arbitrator's Order or Evaluation of Comments.

11. In the other Covad arbitration, Docket No. 00-DCIT-997-ARB, Covad seeks to arbitrate rates, terms, conditions and related arrangements for line sharing. In an order issued May 25, 2000, the Commission granted Covad's petition for arbitration and appointed an arbitrator for the proceedings. In that order the Commission did not address Covad's request for bifurcation already pending in Docket No. 97-SCCC-149-GIT. The parties have filed testimony and briefs and are awaiting the Arbitrator's decision.

12. In Docket No. 99-SCCC-710-ARB, the arbitration between Sprint and SWBT was to establish rates to be charged for removing interferers, examples of which are load coils and repeaters. DSL-based services are dedicated, point-to-point network access technologies that allow multiple forms of data, voice and video to be carried over twisted-pair copper wire on local loops. Normally DSL services are provided between a network service provider's central office and the end user's site. Provision of xDSL service is dependent upon use of SWBT's unbundled DSL-capable loops. For xDSL service to work, the DSL loop must be free of load coils, which reduce signal loss, and of repeaters, which support certain digital services but block voice transmission. Arbitrator's Order, Issued March 15, 2000, 3, n.6.

13. The Arbitrator's Order in Docket No. 99-SCCC-710-ARB was issued on March 15, 2000. The parties filed comments to this Order. On April 13, 2000, the Commission issued an order deferring action of the Arbitrator's recommended decision until after the Arbitrator had responded to the comments. The Commission noted the parties had previously waived the federal statutory suspension date for completion of the arbitration.

14. On June 6, 2000, Sprint filed an Amended Petition for Arbitration in Docket No. 00-SCCC- 1046-ARB that lists ten unresolved interconnection issues between Sprint and SWBT. All issues appear to relate to xDSL issues. In an Amended Petition, Sprint asks the Commission to arbitrate the unresolved interconnection issues and order SWBT to enter into and sign an agreement with Sprint for interconnection, unbundled network elements, resale and collocation. Sprint requests the Commission assign an arbitrator, and asks for the parties to meet with the arbitrator to establish a schedule for discovery. Sprint supports bifurcation of issues involving charges for loop conditioning for xDSL-capable loops and for line sharing and agrees to defer resolution of these issues until the Commission has had an opportunity to conduct a generic proceeding. (Amended Petition, 6-7.) Sprint notes it is willing to discuss other dispute resolution procedures and urges the Commission to consider mediation. (Amended Petition, 11-12.) An Order Granting Petition for Arbitration and Appointing Arbitrators was issued on July 18, 2000.

15. In Docket No. 97-SCCC- 149-GIT, Covad in its reply to the responses of SWBT and Commission Staff (Covad's Reply) reassured the Commission it was not trying to get two separate dockets on xDSL pricing issues. It noted the Arbitrator's Order in Docket No. 00-DCIT-389-ARB required SWBT to refile cost studies addressing ISDN/IDSL pricing. Covad suggested these revised pricing studies could be considered in a separate proceeding addressing xDSL issues. (Covad Reply, 2, n.1 .) Concerning DSL loop conditioning rates, Covad notes it invoked a provision of the SBC/Ameritech Merger Conditions that requires SWBT to make available the conditioning rates from any effective interconnection agreement to which an SBC/Ameritech incumbent is a party if the state has not held a cost proceeding to address such rates. (Covad Reply, 3.) Covad agreed to address all issues regarding line sharing pricing, including recurring and nonrecurring rates in a bifurcated UNE pricing docket. (Covad Reply, 6-7.)

D. FINDINGS AND CONCLUSIONS

16. In this proceeding the Commission will examine DSL issues to determine conditions, terms and rates for xDSL UNEs, loop conditioning and line sharing. The parties' filings in Docket No. 96-SCCC-149-GIT, which discuss a generic docket on xDSL issues, show the need to specifically determine which issues to address in this proceeding. Because of the unique issues associated with xDSL services and technology, the Commission will not attempt to define the issues further at this time. The Commission directs local exchange carriers interested in xDSL issues to participate in a Prehearing Conference to define issues and set schedules. Prior to that conference, the Commission asks interested local exchange carriers to file comments to help define the issues. We intend to look at conditions, terms and rates for xDSL UNEs, loop conditioning and line sharing provided by SWBT, but it is unclear whether other carriers' DSL services also should be considered in this generic proceeding. We anticipate at least the issues identified in the various pleadings regarding Covad's Motion to Bifurcate will be encompassed in this proceeding. We will rely on the parties to advise us whether those issues still need to be addressed, and whether additional issues not specified in the earlier pleadings should be considered. Once issues are defined, all local exchange carriers will be served and given an opportunity to participate in further proceedings.

17. In its recent order on petitions for reconsideration and clarification in Docket No. 97-SCCC-149-GIT, the Commission discussed the purpose of a generic proceeding that results in a Master List of UNE prices. The Master List of UNEs sets prices, which were developed using TELRIC principles, that the CLECs can consider in negotiating with the ILEC, here SWBT. The Commission recognized special circumstances may exist between SWBT and a CLEC that will cause the parties to negotiate or arbitrate prices different than those set by the Master List. Furthermore, if either an ILEC or a CLEC believes prices contained in the Master list are too high

or low because of passage of time, changes in technology, or special circumstances, the Commission can be asked to review the prices initially set in the Master List. (Order of Petition for Reconsideration/Clarification of Order Regarding Issues Subject to Comment Under the Reconsideration Order, Issued June 23, 2000, 3.)

18. The Commission expects a similar master list of prices for UNEs related to xDSL services will be developed in this generic proceeding. Also, this proceeding may result in standards for terms and conditions relating to loop conditioning and line sharing. The Commission anticipates the ILEC and CLECs will use the resulting prices and standards relating to xDSL issues in negotiating interconnection agreements although special circumstances may cause the parties to negotiate or arbitrate a result different than the generic prices and standards. As with the Master List of UNEs, if any local exchange carrier believes prices, terms or conditions set in this generic proceeding need to be revised up or down because of passage of time, changes in technology, or special circumstances, the carrier can ask the Commission to review the findings made in this proceeding.

19. The Commission believes all pending arbitrations should continue. However, an arbitrated determination of any conditions, terms and prices relating to xDSL issues will be considered interim subject to modification, and true up if necessary, based on determination of xDSL issues in this generic proceeding. This will allow arbitrations to continue without delay caused by the generic proceeding. Furthermore, parties involved in arbitration may agree to suspend further arbitration until this generic proceeding is resolved. Any parties who desire to suspend arbitration must consent to waive time limitations of the Federal Act.

20. This proceeding will be facilitated by participation of the parties in a prehearing conference to establish the issues to be considered, set a procedural schedule, and discuss interim

conditions, terms and rates, if necessary or desirable. To assist in determining which issues to consider in this generic proceeding, interested parties are to submit by August 11, 2000, comments about what DSL issues the Commission should address. Staff should summarize the comments for the Commission by August 28, 2000. A prehearing conference will be held at 10:00 a.m. on August 31, 2000, in the First Floor Hearing Room at the Commission's offices, 1500 S.W. Arrowhead Road, Topeka, Kansas. Advisory Counsel will preside as hearing examiner at the prehearing conference. All parties are directed to be prepared to address the need for conducting discovery, the preparation of testimony, and estimates of time needed for hearing. After the issues for this docket are determined, all local exchange carriers will be advised of the issues to be addressed, provided the procedural schedule, and given an additional opportunity to file an entry of appearance.

E. ASSESSMENT OF COSTS

21. K.S.A. 1999 Supp. 66-1502(a) authorizes the Commission to assess the expenses of an investigation, opened on its own motion or upon an application to it, against the public utilities if the expenses reasonably attributable to such investigation exceed the sum of \$100. The Commission makes all local exchange carriers, including competitive local exchange carriers, operating in the state parties to this investigation. The Commission will utilize members of its Staff in this investigation, and as deemed appropriate by the Commission, employ special assistants and consultants to investigate all matters connected with this proceeding. The Commission finds the expenses reasonably attributable to this investigation will exceed \$100. The Commission concludes that the costs of this proceeding should be assessed to the local exchange carriers operating in the state. This order constitutes notice of the assessment of costs, and the assessment will begin three business days after the date this order is mailed. Local exchange carriers are hereby given notice that

they may request a hearing as to the necessity of the investigation or the assessment of costs, in accordance with the provisions of the Kansas Administrative Procedure Act.

22. The Commission finds it likely confidential information will be requested in one or more discovery requests. Accordingly, the Commission, concurrent with this Order, will issue a protective order consistent with those utilized in recent Commission proceedings.

23. All certificated local exchange carriers, including competitive local exchange carriers, will be served with this order and any other order making substantive decisions. All parties that want to participate actively in the docket and address the Commission on xDSL issues must file an entry of appearance to be included on a restricted service list, which will assure receipt of copies of testimony and procedural orders. Entries of appearance shall be filed no later than July 26, 2000. Thereafter, Staff shall prepare a service list and provide it to all parties that have entered appearances for service of testimony and pleadings. After the issues have been defined, all local exchange carriers will be served, advised of the issues and procedural schedule, and given an additional opportunity to file an entry of appearance. The restricted service list will be revised to include all additional local exchange carriers who desire to participate within the time designated in the procedural schedule.

IT IS, THEREFORE, BY THE COMMISSION ORDERED THAT:

(A) The Commission hereby directs this docket be opened for the purpose of determining xDSL issues, including whether further UNEs should be designated, terms and pricing for conditioning of xDSL appropriate lines, and terms and pricing for line sharing.

(B) The procedural schedule set out above is adopted.

(C) All certificated local exchange carriers are made parties to this docket and costs are assessed as set out above.

(D) Entries of appearance shall be filed as set out above.

(E) Pursuant to K.S.A. 1999 Supp. 66-118b, the parties have fifteen days, plus three days if service of this Order is by mail, from the date of this Order in which to petition the Commission for reconsideration of any matter decided herein.

(F) The Commission retains jurisdiction over the subject matter and parties for the purpose of entering such further order or orders as it may deem necessary.

BY THE COMMISSION IT IS SO ORDERED.

Wine, Chr.; Claus, Corn.; Moline, Corn.

Dated: **JUL 21 2000**

ORDER MAILED

JUL 24 2000

 Executive Director

Jeffrey S. Wagaman
Executive Director

mjc