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

In the Matter of	)	
	)	
Joint Application by SBC Communications	)	
Inc., Southwestern Bell Telephone Company,	)	
and Southwestern Bell Communications	)	
Services, Inc. d/b/a Southwestern Bell	)	CC Docket No. 01-194
Long Distance Pursuant to Section 271	)	
of the Telecommunications Act of 1996	)	
To Provide In-Region, InterLATA Services	)	
in Arkansas and Missouri	)	

MEMORANDUM OPINION AND ORDER

Adopted: November 16, 2001 **Released:** November 16, 2001

By the Commission: Commissioners Abernathy and Martin issuing separate statements; Commissioner Copps concurring and issuing a statement.

TABLE OF CONTENTS

Paragraph

I. INTRODUCTION

1. On August 20, 2001, SBC Communications Inc. (SBC) and its subsidiaries Southwestern Bell Telephone Company (SWBT) and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance (SBCS) -- collectively, Southwestern Bell or SWBT -- filed jointly applications pursuant to section 271 of the Communications Act of 1934, as amended,[1] for authority to provide in-region, interLATA service originating in the states of Arkansas and Missouri.[2] We grant these applications in this Order based on our conclusion that Southwestern Bell has taken the statutorily-required steps, as required by section 271, to open its local exchange markets in Arkansas and Missouri to competition.

[1] We refer to the Communications Act of 1934, as amended, as the Communications Act or the Act. 47 U.S.C. § 151 *et seq*.

[2] Joint Application by SBC Communications, Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance for Provision of In-Region, InterLATA Services in Arkansas and Missouri, CC Docket No. 01-194, filed August 20, 2001 (SWBT Application).

2. Indeed, according to Southwestern Bell, competing carriers in Arkansas serve approximately 98,500 lines, almost 40 percent of which are residential, using all three entry paths available under the Act.[3] Across the state, competitors serve more than 24,000 lines through unbundled network elements, and more than 34,000 lines through resale. Similarly, SWBT states that, in Missouri, competing carriers serve approximately 295,000 lines, just over 20 percent of which are residential, using all three entry paths available under the Act.[4] Across Missouri, competitors serve more than 76,000 lines through unbundled network elements, and more than 107,000 lines through resale.[5]

3. We recognize the hard work of the Arkansas Public Service Commission (Arkansas Commission) and the Missouri Public Service Commission (Missouri Commission) to facilitate the development of successful 271 applications. Using the model adopted in the *SWBT Kansas/Oklahoma Order*, both states have built upon the successful work of the Texas Public Utilities Commission (Texas Commission), which served as a starting point for the development of their own section 271 reviews. In many ways, Southwestern Bell's process of opening its local market and satisfying the requirements of section 271 in Texas serves as a precursor, and as a model, for the process it has followed in Arkansas and Missouri. This approach has allowed states within a single Bell Operating Company (BOC) region to conduct section 271 reviews without overwhelming their regulatory resources, primarily by building on the work of other successful states in the region.[6]

4. Both the Arkansas and Missouri Commissions have taken significant steps to facilitate the opening of markets in their states to competition. The Arkansas and Missouri Commissions conducted extensive proceedings concerning Southwestern Bell's section 271 compliance, which were open to participation by all interested parties.[7] In addition, the Commissions each adopted a broad range of performance measures and standards as well as Performance Remedy Plans designed to create a financial incentive for post-entry compliance with section 271. Moreover, once section 271 approval is granted to Southwestern Bell, we believe that the Arkansas and Missouri Commissions will continue their oversight of Southwestern Bell's performance through ongoing state proceedings. As the Commission has recognized, state

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[3] SWBT Application at iv.

[4] *Id.*

[5] *Id.* at 2, 9-15.

[6] We note that Southwestern Bell, as well as the Arkansas and Missouri Commissions, relies heavily on Southwestern Bell's statements that the non-pricing provisions of its model interconnection agreements -- including performance remedy plans -- are substantially similar to those adopted in Texas, Kansas, and Oklahoma, that it uses the same systems and processes for pre-ordering, ordering, billing, maintenance and repair, and change management, and that essentially the same measures are used to evaluate Southwestern Bell's performance. While our findings in the Texas, Kansas, and Oklahoma proceedings are a relevant factor in our analysis here, we make independent determinations of Southwestern Bell's compliance with section 271 for both Arkansas and Missouri.

[7] A list of parties filing comments in this proceeding is included as Appendix A (List of Commenters).

proceedings demonstrating a commitment to advancing the pro-competitive purpose of the Act serve a vitally important role in the section 271 process.[8]

II. BACKGROUND

5. In the 1996 amendments to the Communications Act, Congress required that the BOCs demonstrate compliance with certain market-opening requirements contained in section 271 of the Act before providing in-region, interLATA long distance service.[9] Congress provided for Commission review of BOC applications to provide such service in consultation with the affected state and the Attorney General.[10]

6. In November 1998, SWBT notified the Missouri Commission of its intent to file with the Federal Communications Commission (the Commission) an application to provide interLATA telecommunications service in Missouri.[11] In response, the Missouri Commission initiated a proceeding, which was open to participation by all interested parties, to examine SWBT's compliance with requirements of section 271.[12] On June 28, 2000, SWBT filed for approval of the Missouri 271 Interconnection Agreement (M2A).[13] On March 15, 2001, the Missouri Commission issued an order approving the M2A and recommending that the "FCC grant

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[8] *See, e.g., Application of Verizon New York Inc., Verizon Long Distance, Verizon Enterprise Solutions, Verizon Global Networks Inc., and Verizon Select Services, Inc., for Authorization to Provide In-Region, InterLATA Services in Connecticut*, CC Docket 01-100, FCC 01-208, Memorandum Opinion and Order, 16 FCC Rcd 14147, 14149 at para. 3 (2001) (*Verizon Connecticut Order*); *Application of Verizon New England Inc., Bell Atlantic Communications, Inc. (d/b/a Verizon Long Distance), NYNEX Long Distance Company (d/b/a Verizon Enterprise Solutions) and Verizon Global Networks Inc., for Authorization to Provide In-Region, InterLATA Services in Massachusetts*, CC Docket 01-9, FCC 01-130, Memorandum Opinion and Order, 16 FCC Rcd 8988, 8990, para. 2 (2001) (*Verizon Massachusetts Order*).

[9] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) (1996 Act).

[10] The Commission has summarized the relevant statutory framework in prior orders. *See, e.g., Joint Application by SBC Communications Inc., Southwestern Bell Tel. Co., and Southwestern Bell Communications Services, Inc., d/b/a Southwestern Bell Long Distance for Provision of In-Region, InterLATA Services in Kansas and Oklahoma*, CC Docket No. 00-217, Memorandum Opinion and Order, FCC 01-29, 16 FCC Rcd 6237, 6241-42, paras. 7-10 (2001) *(SWBT Kansas/Oklahoma Order); Application by SBC Communications Inc., Southwestern Bell Tel. Co., 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, Memorandum Opinion and Order, FCC 00-238, 15 FCC Rcd 18354, 18359-61, paras. 8-11 (2000*) (SWBT Texas Order); Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in the State of New York*, CC Docket No. 99-295, Memorandum Opinion and Order, FCC 99-404, 15 FCC Rcd 3953, 3961-63, paras. 17-20 (1999) *(Bell Atlantic New York Order), aff'd, AT&T Corp. V. FCC*, 220 F. 3d 607 (D. C. Cir. 2000).

[11] SWBT Application at 6.

[12] *Id.* at 7.

[13] The M2A is based on a model interconnection agreement developed by the Texas Commission.

SWBT's application for authorization to provide in-region, interLATA services in the state of Missouri."[14]

7. This is SWBT's second application to the Commission for authorization to provide in-region, interLATA services in Missouri.[15] SWBT filed its first application on April 4, 2001 and subsequently withdrew it on June 7, 2001.[16] As with the first application, the Missouri Commission has endorsed Southwestern Bell's application to provide in-region, interLATA services in Missouri.[17]

8. On July 24, 2000, SWBT filed with the Arkansas Commission an application for authorization to provide in-region, interLATA services and for approval of the Arkansas 271 Interconnection Agreement (A2A), requesting that the Arkansas Commission issue an order or report indicating its support.[18] In response to SWBT's request, the Arkansas Commission issued two consultation reports which find that "the A2A will satisfy the fourteen point checklist" set out in section 271.[19] Although the Arkansas Commission finds that the A2A satisfies the 14 point checklist, it declines to make a specific determination about whether SWBT meets the

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[14] Missouri Commission Missouri I Comments at 91.

[15] Commenters in this proceeding were permitted to incorporate by reference their comments from the initial Missouri Section 271 proceeding, CC Docket No. 01-88. A list of parties that incorporated their prior comments by reference is included in Appendix A (List of Commenters).

[16] Letter from Priscilla Hill-Ardoin, Senior Vice President, SBC Telecommunications Inc., to Magalie Salas, Secretary, Federal Communications Commission, CC Docket No. 01-88 (filed June 7, 2001); *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 Missouri*, CC Docket No. 01-88, Order, DA 01-1402, 16 FCC Rcd 12,036, 12,037, para. 2 (2001) *(First SWBT Missouri Order)*.

[17] Missouri Commission Comments at 1.

[18] Arkansas Commission Comments, *attaching Application of the Southwestern Bell Telephone Company For Authorization to Provide In-Region, InterLATA Services Pursuant to Section 271 of the Telecommunications Act of 1996 and For Approval of the Arkansas Interconnection Agreement*, Docket No. 00-211-U, Consultation Report of the Arkansas Public Service Commission to the Federal Communications Commission Pursuant to 47 USC Section 271(D)(2)(B), at 1-2 (Dec. 21, 2000) (Consultation Report).

[19] *See* Arkansas Commission Comments, *attaching Application of the Southwestern Bell Telephone Company For Authorization to Provide In-Region, InterLATA Services Pursuant to Section 271 of the Telecommunications Act of 1996 and For Approval of the Arkansas Interconnection Agreement*, Docket No. 00-211-U, Order No. 17 (Jun. 18, 2001) (Arkansas Commission Order No. 17); *Application of the Southwestern Bell Telephone Company For Authorization to Provide In-Region, InterLATA Services Pursuant to Section 271 of the Telecommunications Act of 1996 and For Approval of the Arkansas Interconnection Agreement*, Docket No. 00-211-U, Second Consultation Report of the Arkansas Public Service Commission to the Federal Communications Commission Pursuant to 47 USC Section 271(d)(2)(B), at 12 (May 21, 2001) (Second Consultation Report); Consultation Report at 24.

requirements of Track A.[20] The Arkansas Commission also strongly suggests that the Commission consider including potential anti-backsliding provisions, citing its "limited legal authority to ensure future performance."[21]

9. The Department of Justice does not oppose SWBT's section 271 application for Arkansas and Missouri, but states that it is unable fully to endorse it due to concerns about three issues.[22] First, the Department of Justice raises concerns about pricing of interconnection and unbundled network elements in Missouri. Specifically, the Department of Justice states that the permanent rates may not comply with total element long run incremental cost methodology (TELRIC) principles and that there are an impermissibly high number of interim rates.[23] Second, the Department of Justice raises concerns about SWBT's ability to provide nondiscriminatory access to its maintenance and repair functions.[24] Finally, the Department of Justice suggests that performance problems may occur after section 271 approval in Arkansas because of the limited enforcement authority of the Arkansas Commission.[25] However, the Department of Justice recognizes that the Commission may gather additional information on those issues during the pendency of the application, and "may therefore be able to assure itself the remaining questions have been answered and may be in a position to approve SBC's [SWBT] joint application by the close of these proceedings."[26]

III. CHECKLIST COMPLIANCE

A. Primary Issues In Dispute

10. In a number of prior orders, the Commission discussed in considerable detail the analytical framework and particular legal showing required to establish checklist compliance.[27] In this Order, we rely upon the legal and analytical precedent established in those prior orders. Additionally, as in the *Verizon Pennsylvania Order*,[28] we include comprehensive appendices

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[20] Arkansas Commission Comments, Second Consultation Report at 12.

[21] *Id.* at 12.

[22] Department of Justice Evaluation at 3.

[23] *Id.* at 6-7.

[24] *Id.* at 8.

[25] *Id.* at 12.

[26] *Id.* at 13-14.

[27] *See Bell Atlantic New York Order*, 15 FCC Rcd at 3961-63, 3966-69, 3971-76, paras. 17-20, 29-37, and 43-60; *SWBT Texas Order*, 15 FCC Rcd at 18359-61, 18365-72, 18373-78, paras. 8-11, 21-40, and 43-58.

[28] *See Application of Verizon Pennsylvania Inc., Verizon Long Distance, Verizon Enterprise Solutions, Verizon Global Networks Inc., and Verizon Select Services Inc. for Authorization To Provide In-Region, InterLATA Services in Pennsylvania*, CC Docket No. 01-138, Memorandum Opinion and Order, FCC 01-269, App. C (rel. (continued….)

containing performance data and the statutory framework for approving section 271 applications.[29]

11. In this application, we examine performance data as reported in carrier-to-carrier reports reflecting service in the most recent four months before filing (i.e., April through July 2001).[30] We also examine SWBT's August 2001 performance data in a few instances for the limited purpose of confirming the acceptable performance or a trend of improvement showing in earlier months' data.

12. As in our most recent orders on section 271 applications, we focus in this Order on the issues in controversy in the record.[31] Accordingly, we begin by addressing checklist items 2 and 14, which encompass access to unbundled network elements and resale of Southwestern Bell's service offerings, respectively. We find, as described below, that Southwestern Bell satisfies the requirements of both checklist item 2 and 14.

13. Next, we address checklist items 1, 4, 6, and 13, which cover interconnection and collocation issues, access to unbundled local loops, access to unbundled switching, and reciprocal compensation, respectively. We find that Southwestern Bell satisfies each of these checklist requirements.

14. The remaining checklist requirements are then discussed briefly, as they received little or no attention from commenting parties, and our own review of the record leads us to conclude that Southwestern Bell has satisfied these requirements. We then consider whether Southwestern Bell has satisfied the requirements for Track A in Arkansas and Missouri. Finally, we discuss issues concerning compliance with section 272 and the public interest requirement.

1. Checklist Item 2 – Unbundled Network Elements

a. Access to Operations Support Systems

15. Under checklist item 2, a BOC must demonstrate that it provides non-discriminatory access to the five operational support systems (OSS) functions: (1) pre-ordering; (2) ordering; (3) provisioning; (4) maintenance and repair; and (5) billing.[32] We find that SWBT

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Sept. 19, 2001) (*Verizon Pennsylvania Order*).

[29] *See* Appendices B (Arkansas Metrics), C (Missouri Metrics) and D (Statutory Requirements).

[30] *See* SWBT Application Arkansas App. A, Vol. 7, Affidavit of William R. Dysart (SWBT Dysart Arkansas Aff.), Tab B (SWBT Arkansas DOJ Performance Measurements Tracking Report); SWBT Application Missouri II App. A, Vol. 6, Affidavit of William R. Dysart (SWBT Dysart Missouri II Aff.), Tab B (SWBT Missouri DOJ Performance Measurements Tracking Report).

[31] *See Verizon Connecticut Order*, 16 FCC Rcd at 14151-52, para. 9; *Verizon Massachusetts Order*, 16 FCC Rcd at 8996, para. 15; *SWBT Kansas/Oklahoma Order*, 16 FCC Rcd at 6255-56, para. 39.

[32] *Bell Atlantic New York Order*, 15 FCC Rcd at 3989, para. 82. The Commission has defined OSS as the (continued….)

provides non-discriminatory access to its OSS in Arkansas and Missouri. Consistent with prior Commission orders, we do not address each OSS element in detail where our review of the record satisfies us there is little or no dispute that SWBT meets the nondiscrimination requirements.[33] Rather, we focus our discussion on those issues in controversy. We begin our analysis with a discussion of the threshold issue of whether SWBT's performance measurement data are reliable. We then turn to issues related to SWBT's maintenance and repair OSS arising out of the operation of SWBT's Loop Maintenance Operations System (LMOS). Finally, we specifically address other issues related to each of the other four OSS functions.

(i) Data Reliability

16. As a threshold matter, we are unpersuaded by the arguments of AT&T, WorldCom and El Paso-PACWEST that the detailed performance data submitted by SWBT are inherently unreliable and cannot form the basis for any meaningful assessment of SWBT's performance in Arkansas and Missouri. In particular, we conclude that SWBT need not undergo a comprehensive verification of its representations as requested by some parties.[34]

17. As part of SWBT's application, Ernst & Young evaluated and validated SWBT's data collection processes for performance measures.[35] AT&T, nevertheless, contends that SWBT's performance data, as a whole, are suspect because the Ernst & Young evaluation failed to uncover performance data anomalies arising from two performance data-related problems.[36]

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various systems, databases, and personnel used by incumbent LECs to provide service to their customers. *See SWBT Texas Order*, 15 FCC Rcd at 18396-97, para. 92; *Bell Atlantic New York Order*, 15 FCC Rcd at 3989-90, para. 83*; BellSouth South Carolina Order*, 13 FCC Rcd 539, 585, para. 82. In addition, a BOC must show that it has an adequate change management process in place to accommodate changes made to its systems. *See Bell Atlantic New York Order*, 15 FCC Rcd at 3999, para. 102 and n.277.

[33] *See Verizon Connecticut Order*, 16 FCC Rcd at 14151, para. 8. We find that SWBT provides competitive LECs in Arkansas and Missouri with access to loop qualification information in a manner consistent with the Commission's requirements set forth in the *UNE Remand Order*. *See Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Third Report and Order, 15 FCC Rcd 3696, 3885-3886, paras. 427-431 (*UNE Remand Order*). In both Arkansas and Missouri, the average response time for competitive LECs' receipt of DSL loop qualification information has surpassed the benchmark performance standard and has been comparable to the average response times experienced by ASI's retail operations. SWBT Application Missouri II App. A, Vol. 2a, Affidavit of William R. Dysart (SWBT Dysart Missouri II Aff.), paras. 42-43; SWBT Application Arkansas App. A, Vol. 2, Affidavit of William R. Dysart (SWBT Dysart Arkansas Aff.), paras. 69-71.

[34] *See* Letter of Richard E. Young , Sidley, Austin, Brown & Wood, to Magalie Roman Salas, Secretary, Federal Communications Commission, CC Docket No. 01-88, at 17 (filed May 24, 2001) (AT&T May 24, 2001 OSS *Ex Parte* Letter); WorldCom Missouri I Comments at 4.

[35] *See* SWBT Application Missouri II App. A., Affidavits of Thomas F. Hughes (SWBT Hughes Missouri II Aff.), paras. 17-18.

[36] AT&T Comments at 51; AT&T Comments Ex. E, Declaration of Walter W. Willard and Mark Van De Water (AT&T Willard/Van De Water Decl.), paras. 44-45. AT&T contends that SWBT's maintenance and repair performance measurements are faulty due to problems with LMOS. AT&T also asserts that SWBT has failed to (continued….)

AT&T supports this argument with specific complaints aimed at Ernst & Young's procedures and reports.[37] SWBT, however, notes that the audit, "conducted by Ernst & Young under the auspices of the Missouri PSC, concluded that SWBT's reported data accurately reflect its performance, and that SWBT's data gathering processes and controls were sufficient."[38] After reviewing AT&T's allegations, we find nothing sufficient to place in doubt either the correctness of the methodologies employed, or the conclusions reached in Ernst &Young's reports.[39]

18. We also conclude that AT&T's specific criticisms regarding the accuracy of SWBT's performance data do not warrant a finding of noncompliance with checklist item 2. AT&T's data-related complaints concern the lack of reliability of the maintenance and repair and flow-through performance metrics.[40] These measurements comprise a handful of the hundreds of measurements and submeasurements for which SWBT reported data from April 2001 through July 2001.[41] These two issues do not undermine the reliability of SWBT's massive data compilation. The data submitted by SWBT in this proceeding have been subject to substantial scrutiny and review by interested parties throughout the section 271 process and, for the most part, the accuracy of the specific performance data relied upon by SWBT is not contested. Furthermore, "[w]here particular SWBT data are disputed by commenters, we discuss these challenges in our checklist analysis, below."[42] While the Commission believes that a systematic failure in a BOC's data integrity may necessitate additional third party review, AT&T has not demonstrated a large-scale failure in the integrity of SWBT's data here.

19. We conclude that WorldCom's challenge to the accuracy of SWBT's performance data is overbroad. WorldCom argues that SWBT's inaccurate affidavits in prior section 271 proceedings and a lack of commercial experience in Arkansas and Missouri demonstrate that the Commission cannot rely on SWBT's own assertions and should instead insist on a comprehensive third-party review of SWBT's data.[43] While we agree that it is critical for SWBT (and other

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properly calculate the flow-through performance metric. These issues are individually discussed *infra*.

[37] AT&T Comments at 51-52; AT&T Willard Decl., paras. 44-61.

[38] *See* SWBT Application at 158.

[39] In particular, AT&T has provided no evidence that SWBT or the Missouri Staff sought to limit the scope of testing deemed necessary by Ernst & Young in their professional judgment to be able to render an independent opinion on SWBT's internal control environment and its compliance with applicable business rules/PM reporting requirements.

[40] *See* AT&T Comments at 51-52; AT&T Willard Decl. at paras. 43-46.

[41] On a monthly basis, SWBT has provided information relative to over 700 total measurements (including principal measurements and disaggregated submeasurements) in both Arkansas and Missouri. *See* SWBT Dysart Arkansas Aff., Tabs A-N; Dysart Missouri II Aff., Tabs A-N.

[42] *See SWBT Texas Order*, 15 FCC Rcd at 18377-78, para. 57.

[43] *See* WorldCom Missouri I Reply at 2. WorldCom contends that in the absence of third party testing, the Commission should not rely on "unilateral assertions that its OSS is adequate" or on SWBT's "longstanding (continued….)

BOCs) to present accurate evidence to the Commission during section 271 proceedings, WorldCom fails to raise a particularized complaint against the instant data submitted by SWBT. Like AT&T, WorldCom has not presented evidence of a systematic failure of SWBT's data. The Commission acknowledges the serious nature of WorldCom's data reliability issues that stem from SWBT's inaccurate statements in past applications.[44] Nevertheless, because there is no evidence to suggest that SWBT has made any false statements in its August 20, 2001 application, we do not believe it necessary to require a third-party review of SWBT's data.[45]

20. We are similarly not persuaded by El Paso-PACWEST's claim that SWBT's performance measurement submissions are suspect because the Arkansas Commission declined to perform an independent review of SWBT's performance data.[46] We acknowledge that the Commission has relied on the ability of state commissions to rigorously review performance data, identify problems, and work with applicants and competitors to improve performance and resolve disputes even before a section 271 application is filed with this Commission.[47] Indeed, in light of the statutory 90-day review process, the Commission encourages, and expects, careful review of performance data by state commissions. In this case, much of the record evidence of checklist compliance or lack of competitive significance is uncontroverted, and therefore the Department of Justice and Commission staff have been able to identify performance problems as discussed herein. Therefore, given the particular facts of this case, we decline to conclude that SWBT's data are inherently suspect.

(ii) Maintenance and Repair

(a) Overview

21. We conclude that SWBT has demonstrated that it provides nondiscriminatory access to maintenance and repair OSS functions.[48] As set out below, we find that, while

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auditor," Ernst & Young. *Id.* at 3; WorldCom Missouri I Comments at 12-14.

[44] *See, e.g., SBC Communications, Inc Apparent Liability for Forfeiture*, FCC 01-308 (rel. Oct. 16, 2001) (finding SBC apparently liable for a $2.52 million forfeiture for apparent violations of the SBC/SNET consent decree and 47 C.F.R. §§ 1.17 and 1.65).

[45] Notably, Ernst & Young submitted an attestation that confirms SWBT's assertion that it undertook corrections of the problem that results in orders posting out-of-sequence. *See* SWBT Application Arkansas and Missouri II Affs. A, Vol. 4, Affidavits of Michael Kelly (SWBT Kelly Arkansas Aff., SWBT Kelly Missouri II Aff.), paras. 2, 5. We note, however, that where we are presented with evidence that an applicant has established a pattern of providing inaccurate information, we are not precluded from requiring third-party review of such information.

[46] *See* El Paso-PACWEST Comments at 26.

[47] See *Bell Atlantic New York Order*, 15 FCC Rcd at 3958-59, para. 10 (commending the New York Public Service Commission for overseeing third party testing which "identified numerous shortcomings in Bell Atlantic's OSS performance that were subsequently corrected and re-tested.").

[48] *See Bell Atlantic New York Order*, 15 FCC Rcd at 4066-67, para. 211.

commenters raise questions about the functioning of SWBT's maintenance and repair databases, these potential deficiencies have not had a significant effect on competitive entry in Arkansas and Missouri and, as such, do not warrant a finding of noncompliance with checklist item 2. We base this conclusion both on the additional measures implemented by SWBT to ensure nondiscriminatory access, including electronic and manual process changes and on our finding that only a relatively small number of trouble tickets are affected in Arkansas and Missouri.

(b) Background

22. SWBT explains that competing carriers may electronically access its maintenance and repair functions for UNE-Loop, UNE-platform, and resale through either of two electronic interfaces. The two interfaces are the Electronic Bonding Trouble Administration Interface ("EBTA") and the Toolbar Trouble Administration ("TBTA") application available from the SWBT Toolbar platform.[49] SWBT's more widely used electronic maintenance and repair interface is TBTA. TBTA is a graphical user interface that SWBT makes available to competitive LECs so they may electronically submit and check on the status of trouble reports.[50]

23. SWBT uses LMOS on a five-state basis to accommodate the processing of trouble reports for competitive LEC resale and UNE-platform accounts.[51] SWBT explains that the processing of a UNE-platform order affects the LMOS line record for that telephone number in two ways. First, the "D," or disconnect, order changes the status of the line record in LMOS to disconnected.[52] Second, the "C," or change, order updates the line record to reflect the competitive LEC that placed the UNE-platform order as the customer's new service provider.[53]

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[49] *See, e.g.*, SWBT Application Arkansas and Missouri II Apps. A., Affidavits of Beth Lawson (SWBT Lawson Arkansas Aff., SWBT Lawson Missouri II Aff.), para. 202. SWBT offers EBTA as an application-to-application interface. EBTA permits competitive LECs to submit trouble reports, and to receive trouble status updates and closure information. Competitive LECs that employ EBTA have the opportunity to integrate the interface with their own back office systems. However, due to the intricacies and costs associated with EBTA, small and medium-size competitive LECs generally do not utilize the EBTA application. *See* SWBT Lawson Missouri II Aff., para. 210.

[50] SWBT Lawson Missouri II Aff., para. 205. In addition, TBTA can be used to initiate a Mechanized Loop Test (MLT) and receive the test results for resold POTS lines without initiating a trouble report. The TBTA application is also designed to flow through electronically to LMOS, a SWBT back office system.

[51] *See* SWBT Application Arkansas and Missouri II Apps. A, Affidavits of Daniel J. Coleman, William R. Dysart, and David R. Smith (SWBT Coleman/Dysart/Smith Arkansas Aff., SWBT Coleman/Dysart/Smith Missouri II Aff.), paras. 8-9.

[52] SWBT claims that the designation of "disconnected" affects only the LMOS record, and has no impact on service to the end user. Coleman/Dysart/Smith Missouri II Aff., para 11 n.2.

[53] There are also additional functions of the D and C orders. In particular, the D and C orders serve critical billing functions. The D order removes the current service provider – SWBT or a reseller – in the Customer Records Information System (CRIS) billing system, while the C order inserts the new service provider and moves the account to the Carrier Access Billing System (CABS). *See* SWBT Coleman/Dysart/Smith Missouri II Aff., (continued….)

24. During SWBT's initial section 271 application in Missouri, commenters alleged that TBTA was not functioning properly.[54] Subsequently, SWBT acknowledged that there were instances in which the C order posted to LMOS prior to the D order.[55] Because the C order encountered a working line, it would error out to the LMOS Data Resolution Center (LDRC) for manual handling.[56] When the D order subsequently posted to LMOS, it changed the status of the line record to disconnected. The disconnected status of the LMOS record would then prevent competitors from submitting electronic trouble reports, among other things.[57]

25. While the original Missouri application was pending, the Texas Commission determined that "SWBT failed to update competitive LEC circuit data in LMOS database in a timely manner" and that "performance data reported by SWBT understates a competitive LEC's trouble report rate and potentially overstates SWBT retail rate used for parity comparison."[58] Therefore, the Texas Commission ordered an audit of LMOS that has not yet commenced.[59]

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para 10.

[54] *See* AT&T Missouri I Comments at 43-44; El Paso-PACWEST Missouri I Comments at 18. SWBT withdrew its initial application for section 271 authority in Missouri, in part, because it determined that it was unable to address the many LMOS-related issues within the statutory 90-day review period. *See* Letter from Priscilla Hill-Ardoin to Magalie Roman Salas, Secretary, Federal Communications Commission, CC Docket No. 01-88 (filed June 7, 2001). Parties to this proceeding point out that the initial Missouri application was withdrawn because the Commission discovered that SWBT had filed inaccurate affidavits related to LMOS in prior section 271 proceedings. *See* Letter from Geoffrey M. Klineberg, Kellogg, Huber, Hansen, Todd & Evans, P.L.L.C. to Magalie Roman Salas, Secretary, Federal Communications Commission, CC Docket No. 01-88 (filed June 8, 2001) (SWBT June 8, 2001 Withdrawal Letter). The Commission takes these matters seriously and is investigating whether SWBT violated any Commission rules when it provided inaccurate affidavits related to LMOS in a separate proceeding.

[55] SWBT acknowledges the continuing existence of the sequencing problem when it indicates that every two weeks the company manually updates the UNE-platform information in LMOS with information from CABS. *See* SWBT Coleman/Dysart/Smith Missouri II Aff., para 15.

[56] There are two distinct LDRC teams. The LDRC team in the Oklahoma location handles LMOS errors for Arkansas, Kansas, Missouri and Oklahoma, while the LDRC teams in the Houston and San Antonio locations handle Texas errors. LDRC employees in both locations report to a single Area Manager-LMOS, who also is responsible for LMOS Staff system support and who, in turn, reports to Daniel Coleman, Interim General Manager – Repair Systems support. *Id.*, para. 49.

[57] SWBT explains that "[i]f a CLEC attempts to create an electronic trouble report via TBTA on a telephone number while the LMOS record is in disconnected status, TBTA will return the message '[t]his TN has been disconnected or ported out. No information available.'" *See* SWBT Coleman/Dysart/Smith Missouri II Aff., para. 13.

[58] *See* Texas Commission, TPUC Project No. 20400, Order No. 33 (June 1, 2000).

[59] Although the Texas Commission has issued a request for proposals for the LMOS –related audit, the auditor will not be selected until the Texas Commission's December 7, 2001 Open Meeting. *See* Public Utility Commission Request for Proposals for a Compliance Audit of Southwestern Bell Telephone Company Performance Measures, Project No. 20400.

(c) Discussion

26. We conclude, based on the record before us, that competitors are able to open trouble tickets in a manner that satisfies the nondiscriminatory access standard of checklist item 2. We affirm that the availability of systems that permit competitive LECs to process trouble tickets in a manner that is nondiscriminatory is important to ensuring that the incumbent LEC is complying with the Act and providing an adequate opportunity for competitive entry. In this case, we conclude, as described below, that there is currently no competitive impact caused by SWBT's handling of trouble tickets in Arkansas and Missouri, though we share commenters' concerns that there continue to be operational problems associated with the LMOS database. We find that SWBT has taken and continues to take steps to identify and correct problems, and we believe that the upcoming audit by the Texas Commission will further refine SWBT's maintenance and repair processes, if necessary. Although we do not find evidence of competitively significant problems in Arkansas and Missouri at this time, we will closely monitor SWBT's LMOS performance in the future and are prepared to take appropriate enforcement action should conditions associated with the process erode.

27. SWBT states that it has addressed concerns about the LMOS database – most notably concerns about the sequencing of C and D orders on retail and resale to UNE-platform conversions by taking several actions. First, on March 29, 2001, SWBT altered its procedures for updating the LMOS database. LMOS now receives a file containing the D order after it has completed in the Service Order Retrieval and Distribution (SORD) system rather than waiting for the D order to post to CRIS.[60] C orders, however, follow a less direct path first to SORD, then to the CABS billing system and finally to LMOS.[61] On May 11, 2001, SWBT implemented a second change, utilizing a feature in Telcordia's latest release of the Work Force Administration/Dispatch Out ("WFA/DO") software to send only D orders to SORD each morning, before any other order types, including C orders, are sent to SORD.[62] SWBT asserts that taken together, these changes

[60] Every night during the business week, SORD produces what it refers to as a BU340 file, which contains information on all service orders (including all completed C and D orders) distributed that business day. SORD then makes the BU340 file available for posting to downstream systems, including LMOS. *See* SWBT Coleman/Dysart/Smith Missouri II Aff., para. 16. Also on a nightly basis (during the business week), CRIS program BJ501 produces a file containing information on all service orders posted to CRIS and CABS for that business day (referred to as the "BJ501 file"). The BJ501 file is made available that night to other systems, including LMOS and SORD, for posting. SORD will reflect the next business day as the posted date. *See* Coleman/Dysart/Smith Missouri II Aff., para. 16.

[61] AT&T argues that SWBT's March 29, 2001 change in its handling of D orders is, in fact, the same change that SWBT proffered in the Texas section 271 proceeding to resolve problems that AT&T experienced with testing and reporting trouble on lines for combined loop and port orders. AT&T May 24, 2001 OSS *Ex Parte* Letter at 7 *quoting* SWBT Ham Texas Aff., CC Docket No. 00-4, para. 223 ("In June 1999, SWBT changed programming so that LMOS no longer waits for Disconnect orders to post to completion before processing them. Disconnect orders are now processed from SORD distribution."). The likely existence of discrepancies in SWBT's prior affidavits has been acknowledged by SWBT. *See* SWBT June 8, 2001 Withdrawal Letter. As indicated above, these statements are not part of the record in this proceeding.

[62] *See* SWBT Coleman/Dysart/Smith Missouri II Aff., para. 19. SWBT indicates that it has instituted a new (continued….)

are designed to ensure that the D and C orders arrive at LMOS in the correct sequence, thus, enabling competitors access to their customers' records for maintenance and repair purposes. In addition, SWBT conducts bi-weekly comparisons of information on UNE-platform lines in both CABS and LMOS and updates the UNE-platform information in LMOS as necessary.[63] According to SWBT, these bi-weekly comparisons will identify and update any UNE-platform record improperly reflecting a disconnected status in the LMOS database.

28. At the time of the Department of Justice's filing, prior to the receipt of reply comments and several *ex parte* filings related to LMOS, it concluded that "the record does not yet demonstrate that SBC has adequately resolved problems with its maintenance and repair systems."[64] Accordingly, the Department of Justice urged the Commission to "assure itself that these problems do not impede the competitive LECs' ability to compete."

29. Commenters in this proceeding contend that there continue to be operational problems associated with the LMOS database. Specifically, AT&T and other competitive LECs argue that: (i) SWBT has failed to resolve sequencing problems related to LMOS; (ii) timing delays in the posting of orders to LMOS prohibit electronic access; (iii) new LMOS related problems continue to occur; and (iv) SWBT's LMOS related performance measurements have not been adequately disclosed. We discuss these allegations and SWBT's responses below.

30. First, commenters argue that SWBT has not shown that its systems are updating LMOS records fully, correctly, and promptly.[65] These commenters note SWBT's admission that sequencing problems continue to occur: "[w]hile the systems are designed such that 'D' and 'C' orders will post to LMOS in the correct sequence on retail and resale to UNE- platform conversions, service order or other system errors may still occur that result in the LMOS record improperly remaining in disconnected status."[66] The Department of Justice also contends that "[t]he most recent evidence in the record suggests that on a regional basis, new LMOS errors

(Continued from previous page)
daily auto completion run – composed solely of D orders – beginning at 9:00 a.m. for Texas and 11:00 a.m. for Missouri, Oklahoma, Kansas and Arkansas. The early run is designed so that all D orders in the first run complete before any other order types are sent to SORD, including the C orders. According to SWBT, this change ensures that all of the day's D orders reach SORD before 6 p.m., when SORD sends completed D orders to LMOS and completed C orders to CABS. *See id.*, paras. 19-20, n.9. However, SWBT explains that orders received by SORD after 6 p.m. are held until the next day.

[63] *See* SWBT Coleman/Dysart/Smith Missouri II Aff., paras. 27-31.

[64] Department of Justice Evaluation at 3.

[65] AT&T Comments at 78-79; El Paso-PACWEST Comments at 24-26; WorldCom Comments at 15-17; Department of Justice Evaluation at 3.

[66] *See* SWBT Coleman/Dysart/Smith Missouri II Aff., para. 20 n.10, 27; AT&T Willard/Van De Water Decl., para. 18; *see also* Letter from Geoffrey M. Klineberg, Kellogg, Huber, Hansen, Todd & Evans, P.L.L.C. to Magalie Roman Salas, Secretary, Federal Communications Commission, CC Docket No. 01-194 at 1 (filed Oct. 1, 2001) (SWBT Oct. 1, 2001 LMOS *Ex Parte* Letter) ("It is surely the case that LMOS is not perfect.").

have continued to arise at an increasing rate."[67] In response to the specific concerns of the Department of Justice, SWBT provided updated LMOS data that it claims will properly state errors as a percentage of new orders because they do not include both the addition and disconnection of records in LMOS for a particular period.[68] Second, AT&T argues that despite SWBT's efforts related to sequencing, it has failed to demonstrate that C orders post to LMOS in a timely manner.[69] AT&T reasons that if the C orders post in the proper sequence, but not in a timely manner, competitive LECs would still be unable to submit electronic trouble tickets.[70] SWBT, nevertheless, contends that "CLECs are able to open a very high percentage of UNE-P trouble tickets electronically within the first 3-5 days after installation."[71]

31. Third, commenters highlight the fact that two additional LMOS-related problems have recently occurred. The first problem occurred between June 6 and July 19, 2001, when over 25,000 LMOS line records were disconnected.[72] In its October 1, 2001 *Ex Parte* Letter, SWBT explains that the errors occurred because "[r]ather than issuing C service orders for disconnection of the lines in question, three different LSC representatives erroneously issued CABS D orders."[73]

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[67] Department of Justice Evaluation at 3. The Department of Justice arrived at this conclusion by setting the number of new errors in LMOS against the monthly change in the total number of UNE-platform records in LMOS and found error rates of approximately 13 percent in May, 24 percent in June and the first two weeks of July, and 26 percent in the last two weeks of July. *See* SWBT Coleman/Dysart/Smith Missouri II Aff., Attachs. C, D & E. The Department, however, noted that because the denominator of its calculation includes SBC's churn -- *i.e.*, it reflects both the addition and disconnection of records in LMOS for a particular period -- it overstates errors as a percentage of new orders. Department of Justice Evaluation at 3. *See* SWBT Coleman/Dysart/Smith Missouri II Aff., para. 29.

[68] SWBT's data, nevertheless, raise concerns because its error rate continues to vary considerably among the five states. SWBT's LMOS error rate on September 10, 2001, for example, was 11.11% in Texas and .38% in Missouri. *See* Letter from Geoffrey M. Klineberg, Kellogg, Huber, Hansen, Todd & Evans, P.L.L.C. to Magalie Roman Salas, Secretary, Federal Communications Commission, CC Docket No. 01-194 at 1 (filed Oct. 22, 2001) (SWBT Oct. 22, 2001 *Ex Parte* Letter), Att. B at 2. If such state-by-state disparities continued to occur, it would "rais[e] questions about the consistency of SBC's manual error correction performance between states." *See* Department of Justice Evaluation at 10. SWBT, however, explains that these disparities are based on "specific systems issues with region-wide effects which SWBT either has corrected or is in the process of investigating." *See* Dysart/Noland/Rentler/Smith Reply Aff., para 35.

[69] AT&T Willard/Van De Water Decl., para. 17. AT&T explains that the timeliness of C orders is important because the update to an LMOS record on a migration to UNE-platform is only effective after both the D and C orders have been posted to LMOS.

[70] AT&T Willard/Van De Water Decl., para. 17.

[71] *See* Dysart/Noland/Rentler/Smith Reply Aff., para. 39.

[72] *See* SWBT Coleman/Dysart/Smith Missouri II Aff., para. 17.

[73] SWBT Oct. 1, 2001 LMOS *Ex Parte* Letter at 9. The CABS D order proceeded to disconnect an entire CABS Billing Account Number (BAN), instead of individual lines. SWBT Coleman/Dysart/Smith Missouri II Aff., para. 22.

SWBT represents that it has re-trained its personnel in an attempt to avoid similar errors in the future.[74] Similarly, AT&T submits that its July 28, 2001 and August 29, 2001 LMOS-related tests demonstrate that "LMOS records for Missouri UNE-P customers are not updated until at least 3 business days after completion of the UNE-P conversion."[75] In response, SWBT contends that AT&T's tests overstate the updating problem because "AT&T chose to run the test during the processing period for its CABS UNE-P bills."[76] SWBT notes, however, that during the processing period for its CABS UNE- platform bills, there is a three-to-four day period when service orders are held in "interim status" and not allowed to post to CABS until after the bill processing period ends.[77]

32. Finally, commenters argue that SWBT may not have fully disclosed the impact of LMOS problems on its performance measurements. Before the Texas Commission, SWBT acknowledged that eight performance measures "utilize the LMOS database for reporting purposes."[78] Nevertheless, SWBT has not recalculated four maintenance and repair performance metrics for this Commission.[79] This information, however, may not be available to SWBT. On reply, SWBT explained that it "is not able to provide a restatement of the performance measurements related to trouble reporting since there is no practical way from a historical basis to determine which tickets were mis-classified to the wrong CLEC."[80] Based on SWBT's sworn assertion that it cannot do the recalculation without significant CLEC input, we rely on the performance data that it has provided to the Commission as evidence of its compliance with these key metrics. Should the Commission determine that there is a material difference in these four

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[74] SWBT Oct. 1, 2001 LMOS *Ex Parte* Letter at 10.

[75] *See* AT&T's Willard/Van de Water Decl., para. 23.

[76] *See* SWBT Dysart/Noland/Rentler/Smith Reply Aff., para. 15.

[77] AT&T argues that this process delay means that competitive LECs will be unable to electronically enter trouble tickets 20 percent of the time in Arkansas and Missouri and even more so in Texas where there are two billing cycles each month. Letter of Richard E. Young, Sidley, Austin, Brown and Wood, to Magalie Roman Salas, Secretary, Federal Communications Commission, CC Docket No. 01-194 (filed Oct. 16, 2001) (AT&T Oct. 16, 2001 OSS *Ex Parte* Letter) at 2. SWBT, however, explains that UNE-P orders are not affected by multiple billing cycles because "[a]ny given UNE-P service order is associated with only one billing date." SWBT Oct. 22, 2001 *Ex Parte* Letter at 3.

[78] SWBT Comments (Texas Commission - Apr. 19, 2001). The eight performance metrics are: PM 35 -- Percent POTS/UNE-P Trouble Report within 10 Days of Installation; PM 37 -- Trouble Report Rate; PM 37.1 -- Trouble Report Rate Net of Installation and Repeat Reports; PM 41 -- Percent Repeat Reports; PM 38 -- Missed Repair Commitments; PM 39 -- Receipt To Clear Duration; PM 40 -- Percent Out of Service Less Than 24 Hours; PM 35.1 – Percent UNE-P Trouble Reports On the Completion Date.

[79] See SWBT Coleman/Dysart/Smith Missouri II Aff., para. 59.

[80] SWBT Dysart/Noland/Rentler/Smith Reply Aff., para. 58. We note, however, that the Texas Commission audit will attempt to recalculate all eight performance data measurements that SWBT indicated were affected by the LMOS updating problem. *See* Texas Commission, TPUC Project No. 20400, Order No. 33 (June 1, 2000).

measures, we retain authority to review our determination that SWBT provides nondiscriminatory access to maintenance and repair OSS functions.

33. Although commenters raise legitimate concerns about whether competitors consistently are able to open electronic trouble tickets for newly converted UNE-platform customers within the first few days after an order is placed, we conclude that the actual competitive impact of the noted LMOS problems appears limited. According to SWBT's data, the overall number of trouble tickets that are likely to be affected by the LMOS problems is relatively small in Arkansas and Missouri.

34. Specifically, it appears that the potential programmatic problems impact a very small number of competitive LEC trouble reports in Arkansas and Missouri and there is no evidence before us that any end user's repairs were delayed as a result of the described LMOS problems.[81] Data from Missouri demonstrate this point. In Missouri in July, SWBT processed 3,929 UNE-platform service orders that could have generated a trouble report within the first 5 days. During the June through August time period, only 1.14 percent of all UNE-platform service orders had a trouble ticket submitted within the first five days. Applying that percentage to Missouri's July UNE-platform service order activity results in approximately 45 trouble tickets issued on these service orders within the first five days after provisioning. SWBT further contends that over 85% of all trouble tickets submitted within the first five days can be processed electronically.[82] Thus, according to SWBT, in the month of July only approximately 6 or 7 trouble tickets required manual handling for all competitive LECs, combined, in the state of Missouri.[83] These assertions are unchallenged on the record.[84] Accordingly, we do not believe that this degree of manual processing warrants a finding of non-compliance with checklist item 2.

35. We find that there is compliance with checklist item 2 based on our evaluation of the competitive impact of the posting errors in Arkansas and Missouri. Those errors are extremely small in number and can readily be resolved by manual processing. Under these specific circumstances, we find no adverse competitive impact from any processing errors that may now exist. No credible record evidence suggests that the need to manually process such a limited number of orders would result in discriminatory access to maintenance and repair functions. We nonetheless urge commenting parties to inform the Commission if SWBT's LMOS performance falls below section 271's nondiscrimination standard in Arkansas or Missouri.[85] Moreover, we

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[81] *See* SWBT Reply at v ("no commenter has identified in its comments a single instance in which it was unable to open an electronic trouble ticket to report an *actual* end-user trouble").

[82] *See* SWBT Dysart/Noland/Rentler/Smith Reply Aff., para. 45.

[83] *See* SWBT Dysart/Noland/Rentler/Smith Reply Aff., paras. 47-48.

[84] *See* SWBT Oct. 22, 2001 *Ex Parte* Letter at 1.

[85] In theory, there are several competitive problems that may result if competitive LECs are unable to resolve maintenance problems on a nondiscriminatory basis. For example, if competitive LECs cannot resolve their customers' maintenance problems on the same mechanized, timely basis that SWBT is able to achieve for its own (continued….)

are encouraged by the active involvement of the Texas Commission, which is currently supervising an audit of the LMOS database and associated performance measurements used by SWBT in Arkansas and Missouri.[86] As stated, we arrive at the conclusion that SWBT's LMOS problems present limited competitive significance, in large part, due to the limited demand for UNE-platform lines in Arkansas and Missouri.

36. We will closely monitor the state of SWBT's LMOS for the foreseeable future. We are prepared to take appropriate enforcement action should the number of lines disconnected in LMOS become more commercially significant or widespread in Arkansas or Missouri. For all these reasons, we conclude that SWBT complies with checklist item 2 as it relates to maintenance and repair of OSS systems.

(iii) Pre-ordering

37. We find that SWBT provides carriers in Arkansas and Missouri nondiscriminatory access to all pre-ordering functions and enables these carriers to integrate pre-ordering and ordering functions through DataGate and VeriGate. Navigator, nevertheless, suggests that it experiences a variety of problems when attempting to reserve a telephone number using Verigate.[87] Because these arguments are based on unsupported evidence alone, we find that they are insufficient to warrant a finding of checklist noncompliance. Such unsupported evidence does not overcome the detailed affidavit and performance data evidence submitted by SWBT that indicates that Verigate and other SWBT systems operate properly.[88]

(iv) Ordering

38. For those functions of the ordering systems for which there is a retail analogue, we find that SWBT demonstrates, with performance data and other evidence, that it provides competing carriers with access to its OSS systems in substantially the same time and manner as it provides to its retail operations. For those ordering functions that lack a direct retail analogue,

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customers; LMOS problems may result in discriminatory delay. AT&T alleges that even after "the delay necessitated by the duplicative, manual submission, further delay inevitably results as SWBT and the CLEC resolve the confusion over who is the true 'owner of the circuit.'" *See* AT&T Willard/Van de Water Decl., para. 28. We agree that this practice, if true, would appear to violate the section 271 requirement that SWBT provide nondiscriminatory access to network elements. 47 U.S.C. § 271(B)(ii). AT&T, however, fails to support this allegation with specific evidence. These concerns about the process of submitting electronic trouble tickets are particularly important because the inability to submit trouble tickets may result in loss of customers and damage competitors' reputations. AT&T Willard/Van De Water Decl., paras. 11-12, 31-32. In addition, manual processing exposes competitors to the increased likelihood of error and imposes increased costs on competitive LECs for training of personnel.

86 *See* Texas Commission TPUC Project No. 20400, Order No. 33 (June 1, 2000).

87 *See* Navigator Comments at 8-9.

88 *See* SWBT Dysart Missouri II Aff., Tab F, F-1 (PMs 1-16 through 1-27); SWBT Reply at 7.

we find that SWBT's systems and performance allow an efficient carrier a meaningful opportunity to compete. Consistent with these findings, we specifically discuss below SWBT's performance related to order confirmation notices, order rejection notices, and order flow-through rates.

(a) Order Confirmation Notices

39. We find that SWBT provides order confirmation notices in a manner that affords competitors a meaningful opportunity to compete.[89] In making this determination, we rely on data that indicate that SWBT provides competing carriers access to confirmation notices for orders for resale, UNE-platform, unbundled loop, xDSL, and number portability. For example, SWBT demonstrates that it returns timely order confirmation notices to competing carriers in Missouri that either use mechanized interfaces (EDI and LEX) to submit orders or that submit orders for "manual" processing (i.e., via fax). In fact, SWBT met the relevant performance benchmark for each service type in the months most relevant for the instant application with only scattered exceptions.[90] Absent evidence of discrimination or competitive harm, we find that SWBT's performance in returning timely order confirmation notices provides efficient competitors with a meaningful opportunity to compete. We reject the arguments to the contrary by El Paso-PACWEST and McCleodUSA for lack of a systematic failure of SWBT's order confirmation notice process.[91]

(b) Order Rejection Notices

40. Based on the evidence in the record, we conclude that SWBT provides competing carriers with timely order rejection notices in a manner that allows them a meaningful opportunity to compete. Specifically, SWBT's performance data demonstrate that it returns order rejection notices in a timely manner over both EDI and LEX, and manually.[92] We are unpersuaded by

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[89] *See SWBT Texas Order*, 15 FCC Rcd at 18438-40, paras. 171-73; *Bell Atlantic New York Order*, 15 FCC Rcd at 4035-37, para. 164, 4047-48, para. 180.

[90] *See* SWBT Dysart Missouri II Aff., Tabs F, F-2 (PM5). El Paso-PACWEST argue that SWBT's failure to meet PM 5-18 in Missouri demonstrates that CLECs experienced difficulties in ascertaining the status of their orders. El Paso-PACWEST Missouri I Comments at 17-18. SWBT, however, has consistently met the parity measurement for PM 5-18 since March 2001. Based on the totality of the circumstances, the limited and historical failures raised by El Paso-PACWEST appear to be temporary, rather than systemic conditions. Similarly, in Missouri, SWBT narrowly missed PM 5-30 in July 2001 and in Arkansas, it missed 5-14 in May 2001 and 5-22 in April 2001. Despite these limited problems, SWBT's performance provides competitors with a meaningful opportunity to compete.

[91] El Paso-PACWEST Missouri I Comments at 17-18; McLeod Missouri I Comments at 28.

[92] From April 2001 to July 2001, SWBT's EDI rejection rate remained below 31.2% in Missouri and 33.9% in Arkansas. These reject rate are considerably lower than both the 40.5% reject rate for EDI in August 2000 for Kansas and the 38.6% reject rate for the same month in Oklahoma as set out in SWBT's Kansas/Oklahoma 271 application. The Missouri reject rates for LEX during the same months were 43.7% and 47% between April and July 2001. In Arkansas, the LEX rejection rates were between 36.7 and 43.7%. *See* SWBT Dysart Arkansas and Missouri II Affs., Tab F, Measurement Nos. 10.1 and 11.1.

McLeod's bare allegation that SWBT is discriminating by manually rejecting some of its LEX orders.[93] McLeod has not provided any evidence that meaningfully challenges the data provided by SWBT. Thus, we conclude that SWBT provides competing carriers with timely order rejection notices in a manner that allows them a meaningful opportunity to compete.[94]

(c) Order Flow-Through Rate

41. Based on the evidence in the record, we find that competing carrier orders flow through SWBT's systems in substantially the same time and manner as they flow through for SWBT's orders.[95] Despite some minor disparities in SWBT's performance, we find sufficient evidence to conclude that SWBT's systems are capable of achieving high overall levels of order flow-through.[96] We are unpersuaded by El Paso-PACWEST's assertion that SWBT discriminates against competing carriers because its LEX flow-through rate in Missouri is lower than its analogous retail flow-through rate.[97]

42. Specifically, El Paso-PACWEST argues that the restated data for PM 13-02 (Order Process Percent Flow Through – LEX) demonstrate that SWBT has not met the standards for parity performance since September 2000.[98] However, LEX flow-though rates have increased significantly in Arkansas from 66.3% in January 2001 to over 80% in June 2001.[99] In Missouri, the same rates have increased from 68.0% in January 2001 to over 83% in each of the most recent three months.[100] Thus, flow-through rates for competitors are experiencing a positive trend upward. Furthermore the flow-through rate for both Arkansas and Missouri competitive LECs using LEX was less than four percentage points below SWBT's retail order flow-through rate.

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93 McLeod Missouri I Comments at 26 (claiming that 15-20 percent of its LEX are rejected for "no valid reason" because a SWBT manager will eventually accept the order).

94 *See, e.g.*, SWBT Application Arkansas App. A, Vol. 5, Affidavit of Brian D. Noland (SWBT Noland Arkansas Aff.), para. 42; SWBT Application Missouri II App. A, Vol. 6, Affidavit of Brian D. Noland (SWBT Noland Missouri II Aff.), para. 44.

95 Competing carriers' orders "flow-through" if they are submitted electronically and pass through SWBT's ordering OSS into its back office systems without manual intervention. The Commission traditionally uses order "flow-through" as a potential indicator of a wide range of problems that we consider in determining whether a BOC provides nondiscriminatory access to its OSS. *Bell Atlantic New York Order*, 15 FCC Rcd at 4033, n.488.

96 *See* SWBT Dysart Arkansas Aff., Tab B at B-46, Measurement 13 (Order Process % Flow Through); SWBT Dysart Missouri II Aff., Tab B at B-46, Measurement 13 (Order Process % Flow Through).

97 *See* El Paso-PACWEST Missouri I Comments at 16.

98 *See* El Paso-PACWEST Missouri I Comments at 23. With the exception of March and April 2001, El Paso-PACWEST's assertions are correct. SWBT's rates are constantly near or above 90% flow-through. *See* SWBT Dysart Missouri II Aff., Tab B, Measurement No. 13.

99 *See* SWBT Dysart Arkansas Aff., para. 46.

100 *See* SWBT Dysart Missouri II Aff., para. 46.

Notably, flow-through rates are not the sole factor the Commission uses to determine whether a BOC has treated its competitors in a nondiscriminatory manner.[101] In any event, the Arkansas and Missouri flow-through rates are better than those accepted by the Commission in the *SWBT Kansas/Oklahoma Order.*[102] Thus, the record in this proceeding, taken as a whole, does not reflect that SWBT's LEX flow-through fails to provide competitors with nondiscriminatory access to its OSS. Moreover, as in the *SWBT Texas Order*, we place more weight on EDI flow-through results than on the LEX flow-through results because EDI is the industry standard application-to-application interface.[103]

43. We also reject AT&T's contention that SWBT's flow-through rates are unreliable because the performance data were calculated in a manner inconsistent with the applicable business rules.[104] SWBT's Arkansas/Missouri II Application demonstrates that even when the data are recalculated consistent with AT&T's interpretation of the business rules, SWBT's overall flow-through numbers are acceptable.[105] Furthermore, under the Texas Commission's current interpretation of the flow-through measure, SWBT's performance is consistent with performance accepted in prior section 271 orders.

(v) Provisioning

44. Based on the evidence in the record, we conclude SWBT provisions unbundled network elements in a nondiscriminatory fashion. Accordingly, we disagree with El Paso-PACWEST, which argues that "[t]here are serious concerns about the functionality and capacity of SWBT Missouri systems."[106] Specifically, El Paso-PACWEST contends that SWBT's success ratio[107] in Missouri impermissibly remains below ninety percent.[108] The Commission does not use

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[101] *See SWBT Texas Order*, 15 FCC Rcd at 18444, para. 179.

[102] *See SWBT Kansas/Oklahoma Order*, paras. 145-46.

[103] *See SWBT Texas Order*, 15 FCC Rcd at 18444, para. 180, n.489.

[104] AT&T Missouri I Comments at 47; AT&T Willard Missouri I Decl. paras 34-43; AT&T May 24, 2001 OSS *Ex Parte* Letter at 12-15. According to AT&T, SWBT has calculated the data using a methodology that overstates EDI and LEX flow-through for CLECs and may underestimate SWBT's own flow-through rates for Easy Access Sales Environment (EASE). AT&T Willard Missouri I Decl. at paras. 37-40. Specifically, AT&T asserts that SWBT excluded from the denominator of the flow through PM (13) any UNE- platform order that is not designed to flow-through, but would flow through EASE if submitted by SWBT retail operations. Thus, AT&T suggests that SWBT's flow-through data does not accurately compare similar orders.

[105] SWBT Reply at 37 n.42; *see also Verizon Pennsylvania Order*, para. 49; *Verizon Massachusetts Order*, para. 78.

[106] El Paso-PACWEST Missouri I Comments at 15.

[107] A success ratio represents the ratio of "met" PMs to PMs with a z-score and sample size of 10 or more. A PM is "missed" if it has a z-score of 1.68 or higher. *See* El Paso-PACWEST Missouri I Comments at 15.

[108] *Id.;* El Paso-PACWEST Comments at 22.

a BOC's success ratio as an indicator of adequate performance. Rather, the Commission focuses on key performance metrics rather than the success ratio as a whole. El Paso-PACWEST also questions whether SWBT has the capability to scale its OSS to handle the increased volumes[109] but provides no evidence to substantiate this concern. El Paso-PACWEST fails to explain why the Commission should not continue to rely on the capacity and stress tests conducted in Texas.[110] Absent such a showing, we find that SWBT's OSS remain scalable.

(vi) Billing

45. We find that SWBT provides competing carriers nondiscriminatory access to the functionality of its billing systems.[111] We reject El Paso-PACWEST's claim that SWBT must demonstrate a period of "sustained compliance" concerning billing completeness because it did not meet the metric for billing completeness in 12 out of the 16 months prior to January 2001.[112] We find that competitors were provided with parity performance related to billing completeness in the months most relevant for the purpose of the instant application.[113] Moreover, SWBT's current trend of parity performance outweighs any concerns about historical deficiency.[114]

46. We also reject McLeod's argument that, because it has allegedly had unreasonably protracted billing disputes with SWBT, SWBT fails to provide nondiscriminatory access to billing functions. McLeod itself acknowledges that these problems were resolved well before SWBT's application was filed.[115] Accordingly, we conclude that SWBT's systems provide competing carriers with wholesale bills in a manner that enables them a meaningful opportunity to compete.

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[109] El Paso-PACWEST Missouri I Comments at 16; El Paso-PACWEST Comments at 21.

[110] *SWBT Texas Order*, 15 FCC Rcd at 18401, para 101. The Texas Commission retained Telcordia as an independent third party to oversee a carrier-to-carrier test of the operational readiness of SWBT's OSS and to evaluate the efficacy of the documentation and other processes SWBT makes available to competing carriers in Texas. With the help of several interested parties, Telcordia developed a Master Test Plan that outlined the general structure of the testing, and framed the specific requirements necessary for testing certain SWBT systems. The test consisted of a "functionality" test designed to evaluate and validate the ability of SWBT's OSS systems to process different types of orders, and a "capacity" test designed to evaluate the ability of SWBT's systems to handle reasonably foreseeable volumes of orders.

[111] SWBT provides competing carriers with billing information through the Usage Extract process and carrier wholesale bills, using the same processes and systems as it uses in Texas, Kansas, and Oklahoma. *See* SWBT Dysart Missouri II Aff., Tab B, Measurements 14, 16, 17, and 19.

[112] *See* El Paso Network/PACWEST Missouri I Comments at 20.

[113] *See* SWBT Dysart Arkansas Aff., Tab B, Measurement No. 17; SWBT Dysart Missouri II Aff., Tab B, Measurement No. 17. SWBT provided competing carriers billing functions on parity with itself for April through July 2001.

[114] *See* Dysart Arkansas Aff. at 49; Dysart Missouri Aff., at 47.

[115] *See* McLeod Missouri I Comments at 28. We also reject the billing arguments presented by Navigator because (continued….)

(vii) OSS of the Advanced Services Affiliate

47. We conclude based on the record before us that ASI provides nondiscriminatory access to its OSS. SWBT explains that ASI makes available for resale a wholesale DSL telecommunications services, and it does so through the same OSS (whether manual or electronic) that ASI uses to serve these retail customers.[116] AT&T argues that SWBT is engaged in discrimination because "CLECs are given access only to ASI's OSS – a completely different OSS that SWBT itself describes as 'extremely limited.'"[117] SWBT, however, explains that ASI's OSS is the only OSS through which anyone can order advanced services. SWBT also explains that this is typical because "[n]ot all OSS can be used for all services."[118] Given the limited number of ASI DSL customers available for resale in Arkansas and Missouri, we believe that SWBT's processes are sufficient under the circumstances. We note that neither the Arkansas nor the Missouri Commissions have adopted performance metrics to evaluate whether ASI's OSS provides nondiscriminatory access. Accordingly, we rely on SWBT's affidavit evidence that it complies with the statutory requirements.[119] We encourage state commissions to develop performance measures that will capture whether SWBT continues to provide nondiscriminatory access to its OSS as demand for these services increases.

b. Pricing of Unbundled Network Elements

(i) Recurring Charges

(a) Background

48. Section 252(d)(1) requires state determinations regarding the rates, terms, and conditions for unbundled network elements to be based on cost and to be nondiscriminatory, and allows the rates to include a reasonable profit.[120] The Commission's pricing rules require, among other things, that an incumbent LEC provide unbundled network elements based on the TELRIC

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they lack support. *See* Navigator Comments at 6-7.

[116] *See* SWBT Habeeb Reply Aff., paras. 26-27.

[117] AT&T Finney Decl., para. 36 (emphasis omitted); s*ee also* ASCENT Reply at 8.

[118] SWBT Reply at 25. Competitive LECs may use EASE for preordering, ordering, and provisioning resale services, however, they cannot use EASE for ordering UNE-Ps. Similarly, competitive LECs may use Complex Products Service Order System ("CPSOS") for preordering, ordering and provisioning of resale DSL services, but they cannot use other OSS that are neither designed nor capable of performing those functions. *Id.; see also Verizon Connecticut Order*, para. 41 *(*rejecting argument that the telephone company's OSS had to be made available for ordering and provisioning of advanced services). *See SWBT Texas Order*, 15 FCC Rcd at 18401, para. 101.

[119] SWBT Reply at 25.

[120] 47 U.S.C. § 252(d)(1).

pricing methodology.[121] Although the U.S. Court of Appeals for the Eighth Circuit stayed the Commission's pricing rules in 1996,[122] the Supreme Court restored the Commission's pricing authority on January 25, 1999, and remanded to the Eighth Circuit for consideration of the merits of the challenged rules.[123] On remand from the Supreme Court, the Eighth Circuit concluded that while TELRIC is an acceptable method for determining costs, certain specific rules contained within the Commission's pricing rules were contrary to congressional intent.[124] The Eighth Circuit has stayed the issuance of its mandate[125] pending appeal before the Supreme Court, which has granted certiorari in the case.[126] Accordingly, the Commission's rules remain in effect for purposes of this application.

49. *Missouri.* In setting rates, the Missouri Commission has conducted numerous proceedings that have culminated in three rate proceedings.[127] In the first proceeding, SWBT filed cost studies with the Missouri Commission in order to determine the forward-looking economic costs of providing services to competitive LECs. The Missouri Commission staff recommended numerous changes to cost studies, and in July 1997 it adopted the *Final Arbitration Order*[128] with permanent prices based upon revisions suggested by staff.[129] In the second proceeding, the

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[121] *See* 47 C.F.R. §§ 51.501-09.

[122] *Iowa Utils. Bd. v. FCC*, 120 F.3d 753, 800, 804, 805-06 (8th Cir. 1997).

[123] *American Tel. & Tel Co. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999) (*AT&T v. Iowa Utils. Bd.*). In reaching its decision, the Court acknowledged that section 201(b) "explicitly grants the FCC jurisdiction to make rules governing matters to which the 1996 Act applies." *Id.* at 380. Furthermore, the Court determined that section 251(d) also provides evidence of an express jurisdictional grant by requiring that "the Commission [shall] complete all actions necessary to establish regulations to implement the requirements of this section." *Id.* at 382. The Court also held that the pricing provisions implemented under the Commission's rulemaking authority do not inhibit the establishment of rates by the states. The Court concluded that the Commission has jurisdiction to design a pricing methodology to facilitate local competition under the 1996 Act, including pricing for interconnection and unbundled access, as "it is the States that will apply those standards and implement that methodology, determining the concrete result." *Id.*

[124] *Iowa Utils. Bd. v. FCC*, 219 F.3d 744 (8th Cir. 2000), *petition for cert. granted sub nom. Verizon Communications v. FCC*, 121 S. Ct. 877, 148 L.Ed.2d 788, 69 USLW 3269, 69 USLW 3490, 69 USLW 3495 (U.S. Jan 22, 2001).

[125] *Iowa Utils. Bd. v. FCC*, No. 96-3321 *et al.* (8th Cir. Sept. 25, 2000).

[126] *Verizon Communications v. FCC*, 121 S. Ct. 877, 148 L.Ed.2d 788, 69 USLW 3269, 69 USLW 3490, 69 USLW 3495 (Jan 22, 2001).

[127] SWBT Application at 26-29.

[128] SWBT Missouri I Application, App. G, Vol. I, Tab 11, Missouri Commission, Case Nos. TO-97-40 and TO-97-67, *AT&T's Petition for Arbitration to Establish an Interconnection Agreement with Southwestern Bell Telephone Company; MCI's Petition for Arbitration to Establish an Interconnection Agreement with Southwestern Bell Telephone Company (*Missouri Commission July 31, 1997 Final Arbitration Order*).*

[129] *See* SWBT Application Attach. C at 3, Missouri Commission Costing and Pricing Report (Missouri (continued….)

Missouri Commission adopted interim rates, subject to true-up, for other UNEs, pending permanent resolution no later than July 1, 1998.[130] Third, the Missouri Commission adopted 95 UNE rates in 2001 from the Texas interconnection agreement (T2A) on an interim basis, subject to true-up.[131] To address concerns expressed by some commenters to SWBT's first Missouri section 271 application that its permanent recurring rates are too high, SWBT voluntarily reduced many of its recurring rates in August, 2001, before it filed its second Missouri section 271 application.[132]

50. *Arkansas.* The Arkansas Commission conducted two primary arbitrations involving price and cost issues, beginning in 1996.[133] The Arkansas Commission arbitrator's price determinations were affirmed by the Commission in 1997.[134] However, in February 1998, the Arkansas Commission reversed its earlier orders and stated that it had reviewed certain portions of Arkansas state telecommunications legislation and interpreted those provisions as restricting its ability to establish rates.[135] Due to its perceived lack of authority under state law, the Commission determined that it could not require SWBT to provide any interconnection terms and conditions beyond what SWBT was willing to offer, as long as SWBT's offered terms and conditions complied with the minimum requirements under state law.[136] The Arkansas Commission also determined that it had no authority to investigate any financial information of SWBT, including cost studies, to verify the accuracy of SWBT's UNE pricing.[137]

51. SWBT filed its section 271 application with the Commission in April, 1998 and its proposed A2A in July, 2000.[138] The Arkansas Commission reviewed portions of SWBT's

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Commission Costing and Pricing Report).

[130] SWBT Missouri I Application, App. C, Vol. 19, Tab 8, Missouri Commission, Case No. 98-115, *AT&T's Petition for Second Compulsory Arbitration Pursuant to Section 252(b) of the Telecommunications Act of 1998 to Establish an Interconnection Agreement with Southwestern Bell Telephone Company, Interim Pricing Order* at 52 *(*Missouri Commission Dec. 23, 1997 Interim Pricing Order*).*

[131] SWBT Missouri I Application, App. C, Vol. 19, Tab 8, Missouri Commission Case No. TO-99-227, Application of Southwestern Bell Telephone Company to Provide Notice of Intent to File an Application for Authorization to Provide In-Region InterLATA Services Originating in Missouri Pursuant to Section 271 of the Telecommunications Act of 1996 at 34.

[132] *See* para. 61, *infra*, for a further discussion of SWBT's voluntary discounts.

[133] SWBT Allis Aff. at paras. 5-6.

[134] *Id*.

[135] *Id*.

[136] *Id*. at paras. 6, 25-26.

[137] *Id*. at para. 6.

[138] SWBT Application at 3.

application but reiterated its interpretation that it lacked authority under state law to investigate SWBT's rates and terms.[139] SWBT modified its prices to mirror cost input changes ordered by the Texas Commission, and later adopted some of its Missouri UNE rates.[140] On March, 2001, after the Commission adopted the *SWBT Kansas/Oklahoma Order*, SWBT modified its A2A to reflect all of its Kansas UNE rates, noting that pursuant to the Commission's *SWBT Kansas/Oklahoma Order*, a BOC may be entitled to a presumption of TELRIC compliance if it adopts another state's rates that have been approved during the course of a section 271 application, and it can prove that the costs in the applicant state are the same as, or higher, than those in the previously-approved state.[141] In May, 2001, the Arkansas Commission concluded that SWBT passes checklist item 2 pursuant to the Commission's presumption test, as SWBT had modified its A2A to mirror adopted Kansas UNE prices, and the Commission's record "clearly reveals that costs in Arkansas are equal to or above Kansas costs."[142]

(b) Discussion

52. Based on the evidence in the record, we find that SWBT's recurring charges for UNEs made available in both Missouri and Arkansas are just, reasonable, and nondiscriminatory in compliance with checklist item 2. As discussed below, we find that SWBT's voluntarily-reduced rates in Missouri fall within a reasonable range of what TELRIC-based ratemaking would produce, based on a comparison between SWBT's rates in Missouri and SWBT's previously-approved rates in Texas. Additionally, we find that SWBT passes this checklist item in Arkansas by adopting in whole Kansas rates, which we previously reviewed and accepted in SWBT's Kansas section 271 proceeding, and by showing that Arkansas costs are the same as or higher than costs in Kansas. The Missouri Commission and Arkansas Commission conclude separately that SWBT satisfies the checklist item. The Department of Justice originally expressed concerns about SWBT's recurring rates in SWBT's first Missouri section 271 application and urged the Commission to independently determine whether the prices were appropriately cost-based, but did not specifically recommend denial based on pricing.[143] In its comments to SWBT's second Missouri application, the Department of Justice states that its original concerns will be moot if the Commission determines that the current rates are set within a reasonable TELRIC range.[144]

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139 SWBT Allis Aff., para. 9.

140 *Id*. at paras. 9-11.

141 SWBT Application at 17-18, *citing* Arkansas Commission Comments, Consultation Report at 11.

142 Arkansas Commission Comments, Second Consultation Report at 9. In order to remove any doubt about the appropriateness of adopting Kansas rates in Arkansas, SWBT voluntarily agreed to adjust its geographic zone definitions in Arkansas to more closely match the Kansas zone definitions. The remaining concern that the Arkansas Commission set forth was that it required SWBT to adopt the results of the SAGE/ALTS arbitration award from Texas involving line class codes. *See* Section III(B)(3), *infra*, for a discussion of this issue.

143 Department of Justice Evaluation at 7-18.

144 Department of Justice Evaluation at 9.

53. *Missouri*. We find that the Missouri Commission generally followed TELRIC principles.[145] The Missouri Commission's *Final Arbitration Order* set permanent recurring rates, and the Missouri Commission submits that its final rates "comply with the total element long run incremental cost methodology (TELRIC)"[146] and are based on "forward-looking levels of demand" and "the use of the latest technology," designed to "resemble the costs that an efficient competitor would face if entering the market today."[147]

54. The orders of the Missouri Commission provide numerous indicia that it has followed a forward-looking approach that is consistent with TELRIC. For instance, the Missouri Commission used the same cost model and cost methodologies used by SWBT in the other states in which SWBT filed section 271 applications and which the Commission approved: Texas, Kansas, and Oklahoma.[148] Additionally, the Missouri Commission made a number of modifications to SWBT's proposed cost model inputs in order to more closely reflect costs incurred by an efficient, forward-looking network. For instance, the Missouri Commission increased SWBT's proposed distribution fill factor and fiber feeder fill factor to more accurately reflect "forward-looking utilization levels" and "shorter economic asset lives" that SWBT would be using.[149] The Missouri Commission increased SWBT's dark fiber fill factor to encourage SWBT to "make dark fiber available to other carriers" and to recover its investment "by leasing it to other carriers or through its own use."[150] Additionally, the Missouri Commission modified SWBT's proposed cost recovery for certain types of switches to ensure that such costs were not double-recovered as both end-office and tandem switches.[151] The vast majority of the specific decisions made by the Missouri Commission are consistent with the TELRIC methodology and are not challenged here.

55. We note that commenters allege several specific TELRIC violations.[152] Even if some or all of the commenters' allegations are correct and that specific inputs might not be

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[145] Missouri Commission Comments at 9-10.

[146] *Id.* at 9.

[147] Missouri Commission Costing and Pricing Report.

[148] *See* SWBT BT Smith Reply Aff. at para. 8.

[149] Missouri Commission Costing and Pricing Report at 7.

[150] *Id.* at 9.

[151] *Id.* at 8.

[152] Specifically AT&T and WorldCom allege the following mistakes to SWBT's cost inputs: 1) incorrect switching vendor discount; 2) incorrect hardware factor; 3) incorrect asset lives used for depreciation factor; 4) low fill factor; 6) low cost sharing of poles and conduit; 7) incorrect ratio of universal loop carrier to more efficient integrated digital loop carrier costs; 8) miscalculation of feeder cable costs; 9) impermissible cost assumptions based on historic rather than efficient network; and 10) high common cost allocation. *See* AT&T Comments at 9-45, WorldCom Comments at 20-27.

TELRIC-compliant, we conclude that SWBT's voluntarily-discounted rates are within a TELRIC-based range. Thus, in light of SWBT's voluntary discounts to its rates, and after comparing relevant rates and costs in Missouri with those in Texas, we find that SWBT satisfies this checklist item in Missouri, as discussed below.

56. In examining the rates adopted by Missouri Commission, we must determine whether Missouri loop and non-loop recurring UNE rates fall outside the range that a reasonable TELRIC-based ratemaking would produce.[153] The Commission has stated that when a state commission does not apply TELRIC or does so improperly (e.g., it made a major methodological mistake or incorrect input or several smaller mistakes or incorrect inputs that collectively could render rates outside the reasonable range that TELRIC would permit), then we will look to rates in other section 271-approved states to see if rates nonetheless fall within the range that a reasonable TELRIC-based ratemaking would produce.[154] A comparison is permitted when the two states have a common BOC; the two states have geographic similarities; the two states have similar, although not necessarily identical, rate structures for comparison purposes; and the Commission has already found the rates in the comparison state to be reasonable.[155] Here, we find that Texas meets this test and is a permissible state for comparison. The two states have a common BOC, similar rate structures, and sufficient geographical similarities, and the Commission has already found Texas rates to be within a reasonable TELRIC range.[156] We disagree with AT&T's assertion that Kansas should be used for a rate comparison with Missouri's recurring charges rather than Texas.[157] SWBT need only show that the Missouri rates fall within a reasonable range that TELRIC would produce. The rates we have approved in both Kansas and Texas provide some definition to the reasonable range of rates. In meeting our test by comparing its Missouri rates to Texas rates, SWBT has demonstrated that Missouri rates fall within the reasonable TELRIC range. Although Kansas might also be an appropriate state for comparison, SWBT need not demonstrate that Missouri rates pass the benchmark test for each for each and every state that it might be compared with to show that its rates are within the reasonable range of what TELRIC would produce.

57. As the Commission has previously noted, our USF cost model provides a reasonable basis for comparing cost differences between states.[158] For recurring charges,[159] if the

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153 *See Verizon Pennsylvania Order*, para. 62.

154 *See SWBT Kansas/Oklahoma Order*, 16 FCC Rcd at 6276, para. 82. This test is related but separate from the TELRIC presumption test used in Arkansas, as discussed below.

155 *See Verizon Massachusetts Order*, 16 FCC Rcd at 9002, para. 28; *see also SWBT Kansas/Oklahoma Order*, 16 FCC Rcd at 6276, para. 82; *Verizon Pennsylvania Order*, para. 64. We note, however, that in the *Verizon Pennsylvania Order*, we found that several of these criteria should be treated as indicia of the reasonableness of the comparison. *Id.*

156 *SWBT Texas Order*, 15 FCC Rcd at 18474-77, paras. 234-242.

157 AT&T Comments at 40-42.

158 *SWBT Kansas/Oklahoma Order*, 16 FCC Rcd. at 6277, para. 84; *see also Federal-State Joint Board on* (continued….)

percentage difference between the applicant state's rates and the benchmark state's rates does not exceed the percentage difference between the applicant state's costs and the benchmark state's costs, as predicted by the USF model, then we will find that the applicant has met its burden to show that its rates are TELRIC-compliant.[160]

58. We consider the reasonableness of recurring loop and non-loop rates separately. Where the Commission finds that the state commission correctly applied TELRIC for one category of rates, it will only compare the rates of the other category. If, however, there are concerns about the application of TELRIC for both loop and non-loop rates, then the same benchmark state must be used for all rate comparisons to prevent a BOC from choosing for its comparisons the highest of approved rates for both loop and non-loop UNEs.

59. We conclude that Missouri's recurring UNE rates fall within the range that TELRIC-based ratemaking would produce. With respect to loops, in taking a weighted average in Missouri and Texas, we find that Missouri's rates are slightly higher than those in Texas. The weighted average rates for a 2-wire analog loop in Missouri and Texas are $15.18 and $14.10, respectively. The Missouri loop rate is just under 8 percent higher than the Texas loop rate. The USF cost model, however, suggests that Missouri loop costs are nearly 20 percent higher than the Texas loop costs. Because the percentage difference between Missouri's rates and Texas' rates

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Universal Service, CC Docket No. 96-45, Ninth Report and Order and Eighteenth Order on Reconsideration, 14 FCC Rcd. 20432, 20455-56, paras. 41-42 (1999).

[159] We cannot rely on the USF model to provide guidance in examining non-recurring rates, because it does not examine these costs.

[160] Example 1: State X's rates are 20 percent higher than benchmark state B's rates, and X's costs are 25 percent higher. Because the 20 percent difference in rates is less than the 25 percent relative difference in costs, X's rates would be found to be within the reasonable range that TELRIC would produce. Example 2: State Y's rates are 15 percent less than benchmark state B's rates, and Y's costs are 10 percent lower. Because the -15 percent difference in rates is less than the -10 percent relative difference in costs, X's rates would be found to be within the reasonable range that TELRIC would produce.

In making this analysis, we make a number of adjustments to the USF cost model. *See* http://www.fcc.gov.ccb/apd/hcpm. The overhead costs used in the model are adjusted to reflect the fact that the UNE-P is a wholesale offering, while USF costs are for a retail offering. Specifically, the overhead cost is reduced and spread across all network elements. *See* letter from Robert W. Quinn, Jr., Vice President, Federal Government Affairs, AT&T, to Magalie Roman Salas, Federal Communications Commission, CC Docket No. 01-9, at Attach. (filed Feb. 1, 2001); *Universal Service Tenth Report and Order*, 14 FCC Rcd at 20421-23, Appendix D.

The USF end office switching, common and direct transport, and signaling costs are adjusted to include, in addition to local traffic costs, costs for intrastate and interstate access, and intraLATA toll traffic. This adjustment is made because a competitive LEC might use the UNE-P for access and intraLATA toll traffic in addition to local traffic, and the USF cost model excludes these costs. In addition, the allowance for retail uncollectible revenues reflected in the USF costs is removed, and allowances for wholesale uncollectible revenues costs and for carrier-to-carrier customer service costs are added to the USF costs.

does not exceed the percentage difference between Missouri's costs and Texas' costs, SWBT has met its burden regarding the benchmark test using our USF cost model for recurring loop rates.

60. We also conclude that non-loop rates fall within a reasonable TELRIC range. We find that non-loop rates in Missouri are slightly higher than the rates in Texas, and Missouri costs are also higher by a roughly equal amount. The Missouri non-loop rate is 13.16 percent higher than non-loop rates for Texas, while Missouri's non-loop costs are 13.30 percent higher than Texas' non-loop costs, according to the USF cost model.[161] We conclude that the difference in rates and costs between Missouri and Texas are roughly equal and SWBT meets its burden regarding this checklist item.[162]

61. We find that SWBT's voluntary rate reductions were reasonable and designed to encourage competition, and we disagree with AT&T's assertion that SWBT's remaining rates are outside a reasonable TELRIC range and cause SWBT to fail this checklist item.[163] SWBT voluntarily reduced rates as follows. Recurring loop rates were reduced an average of 10 percent, with greater reductions for two-wire analog loops in the rural zone and no reduction for two-wire analog and digital loops in the urban zone.[164] Recurring local switching and tandem switching rates were reduced by 18.5 percent.[165] Recurring blended transport, common transport and certain dedicated transport rates were reduced, on average, by 18.5 percent.[166] Recurring charges for SS7 transport and STP port-per-port were reduced by 18.5 percent.[167] These reductions occur if the resulting, discounted rate is not below the corresponding Texas rate.[168] For loops, SWBT focused its reductions on those rates that were highest in relation to Texas rates and in

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[161] These figures are based on monthly usage assumptions derived from SWBT's ARMIS system. See AT&T Comments Attach. A, Lieberman Aff. at paras. 10-13. In our *Verizon Pennsylvania Order*, we used different assumptions than had been proposed by WorldCom. In that order, however, which usage assumptions we used did not affect the outcome of the analysis. *Verizon Pennsylvania Order*, para. 67, n.252. We believe the assumptions used here, which are based on publicly available data, are more reliable. ARMIS data is more reliable because it is based on publicly available reported data, rather than assumptions that vary among companies.

[162] Although this analysis does not include certain dedicated transport elements, permanent rates for these elements were established using the same methodology as the shared transport elements and received similar voluntary discounts. *See* SWBT Hughes Aff. at para. 56. We therefore conclude that they also fall within the reasonable range TELRIC would produce.

[163] AT&T Comments at 13-14.

[164] SWBT Hughes Aff. at para. 56 and SWBT Application, Attach. C, *Motion of Southwestern Bell Telephone Company for Approval of Revised Missouri 271 Interconnection Agreement Rates* (Aug. 16, 2001) at para. 4.

[165] *Id*.

[166] *Id*.

[167] *Id*.

[168] SWBT Hughes Aff. at para. 56.

areas in which less competition currently exists. The urban-zone two-wire analog and digital loop rates that were not reduced were already very similar to corresponding Texas rates, and more vigorous competition exists in Missouri's urban areas.[169] SWBT, however, made greater reductions for two-wire analog loops in rural areas, where less competition exists. For instance, SWBT reduced its recurring charge for a two-wire analog loop in its rural zone from $33.29 to $19.74, a reduction of approximately 40 percent.[170] Likewise, SWBT made overall reductions of 18.5 percent to non-loop rates, but did not reduce its port rates, which were already lower than Texas rates. The overall rate for the UNE-P is Missouri is $22.29, compared to $20.32 in Texas.[171] We think it was reasonable for SWBT to focus reductions on those rates that were highest in relation to Texas, and in those areas in which less competition exists. SWBT has demonstrated that its voluntarily-discounted permanent recurring UNE rates in Missouri are within the reasonable TELRIC range.

62. We disagree with AT&T's assertion that SWBT's rates in Missouri were set several years ago and the decline in costs over the years causes SWBT's existing rates to be out-of-date and not TELRIC-compliant.[172] We approve SWBT's rates based on our determination that its voluntarily-discounted rates fall within a range of what TELRIC would produce. As noted above, the Missouri Commission has demonstrated its commitment to TELRIC, and is in the process of reexamining a number of rates in ongoing rates cases.[173] Rate-making is a complex endeavor, and it is common for state rate cases to last many months. We are confident that the Missouri Commission will make any future rate modifications in compliance with our TELRIC standard. The D.C. Court of Appeals stated, "state-agency-approved rates [are] always subject to refinement" and "rates may often need adjustment to reflect newly discovered information. . . . If new information automatically required rejection of section 271 applications, we cannot imagine how such applications could ever be approved in this context of rapid regulatory and technological change."[174]

63. We reject the contention of some commenters that SWBT's alleged failure to provide access to its cost studies is fatal to this checklist item.[175] Although the lack of access to

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[169] SWBT figures indicate that competitive LECs lease 56,260 business UNE-P lines in Missouri. *See* SWBT Tebeau Aff. at Table 3, p. 5 and Attach. A, p. 2. *See also* AT&T Comments at n.8 (" . . .no rate discounts are offered in zones where competition is most likely to occur. For instance, SWBT's [sic] offers no discounts to loops in urban zones.")

[170] *See* SWBT Missouri I Application App. B, Vol. 2, Attach. 6 (UNE Pricing); SWBT Hughes Aff. at Attach. D.

[171] The UNE-platform is a combination of unbundled elements composed of loops, switching, and transport. *See Bell Atlantic-New York Order*, 15 FCC Rcd at 3960, n.23.

[172] AT&T Comments at 39-49.

[173] Missouri Commission Comments at 28-30.

[174] *American Tel. & Tel. v. FCC*, 220 F.3d 607 at 617 (D.C. Cir. Aug. 1, 2000).

[175] AT&T Comment at 10; WorldCom Comments at 20.

SWBT's cost model makes it more difficult to evaluate the rates originally adopted by the Missouri Commission, it is not necessary under the circumstances here, because we are approving SWBT's voluntarily-reduced Missouri rates on the basis of our benchmark test, as discussed above. We also note that SWBT used an identical cost model in Texas, Kansas, Oklahoma, and Missouri.[176] Although the Missouri Commission used different inputs, some of which have been challenged here, our benchmark test confirms that the rates in effect, including SWBT's voluntary reductions, are within the reasonable range that TELRIC would produce.

64. We disagree with commenters who argue that SWBT's interim rates cause it to fail this checklist item.[177] We note that no UNE-P rates are interim, and the vast majority of interim recurring rates are zero and apply to "feature" charges, such as call waiting.[178] Additionally, many of the remaining interim rates not set at zero are set at T2A rates, which the Commission previously reviewed and determined were within a reasonable TELRIC range.[179] The Department of Justice expresses concerns about the large number of interim rates in effect, but does not specifically recommend denial based on this factor.[180] The Commission has previously held that interim rates may be acceptable as part of a section 271 application if: 1) the interim solution to a particular rate dispute is reasonable under the circumstances; 2) the state commission has demonstrated its commitment to our pricing rules; and 3) provision is made for refunds or true-ups once permanent rates are set.[181] SWBT passes the test. The Missouri Commission has demonstrated its commitment to TELRIC.[182] All of SWBT's interim rates are subject to refund or true-up once the permanent rates are set.[183] The Missouri Commission has scheduled hearings for December 2001 to conclude the setting of permanent rates in Missouri.[184] We find the interim rates in question are reasonable under the circumstances.

65. We need not analyze the merits of AT&T's assertion that it cannot make a sufficient profit by entering the residential market in Missouri, which causes SWBT to fail this

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176 SWBT Hughes Aff. at para. 39.

177 AT&T's Comment at 11; El Paso Networks/PacWest Comments at 4.

178 *See* SWBT Missouri I Application App. B, Vol. 2, M2A, Attach. 25, at 19. We note that the recurring charges for these features were set at zero on a permanent basis when SWBT filed its 271 applications in Texas, Kansas, and Oklahoma.

179 *SWBT Texas Order*, 15 FCC Rcd at 18474-77, paras. 234-242.

180 Department of Justice Evaluation at 8.

181 *See SWBT Kansas/Oklahoma Order*, 16 FCC Rcd. at 6359, para. 238.

182 *See* para. 54, *supra*.

183 Missouri Commission Comments at 28.

184 *Id.* at 28-29.

checklist item.[185] The Commission has repeatedly stated that incumbent LECs are not required, pursuant to the requirements of section 271, to guarantee competitors a certain profit margin. In the *SWBT Kansas/Oklahoma Order*, the Commission held that this profitability argument is not part of the section 271 evaluation of whether an applicant's rates are TELRIC-based.[186] The Act requires that we review whether the rates are cost-based, not whether a competitor can make a profit by entering the market. In this case, we have conducted an analysis of SWBT's recurring UNE rates and concluded that their rates meet this requirement. Questions of profitability are independent of this determination.

66. In addition, conducting a profitability analysis would require us to consider the level of a state's retail rates, because such an analysis requires a comparison between the UNE rates and the state's retail rates. Retail rate levels, however, are within the state's jurisdictional authority, not the Commission's.[187] Conducting such an analysis would further require a determination of what a "sufficient profit margin" is. We are hesitant to engage in such a determination. Moreover, even if this were a relevant consideration, AT&T has not demonstrated that the rates set by the Missouri Commission do not allow for profitable entry. AT&T's own submission indicates that the state average rate provides a gross margin of roughly sixteen percent for residential lines, and the margin is substantially higher for fifty-six percent of the residential lines.[188] Further, we note that AT&T's analysis ignores universal service support available in the highest-cost UNE zones. AT&T does not provide any evidence with respect to business lines, where we expect the profitability is even greater. AT&T's contentions notwithstanding, we note that competition currently exists in Missouri through the use of the UNE-P.[189]

67. *Arkansas.* The Arkansas Commission has adopted, as a whole, SWBT's UNE rates set for Kansas.[190] AT&T and WorldCom assert that SWBT impermissibly relies on its rates in Kansas, that SWBT did not produce cost studies to support its Arkansas rates, and that SWBT's Kansas are outside a reasonable TELRIC range, which makes them inappropriate for use in Arkansas.[191] The Commission has previously determined that rates in Kansas are TELRIC-

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185 AT&T Missouri I Comments at 59.

186 *SWBT Kansas/Oklahoma Order*, 16 FCC Rcd at 6269, 6280-81, paras. 65, 92. *See also Verizon Massachusetts Order*, 16 FCC Rcd at 9008-09, paras. 41-42.

187 *See id*.; *see also Local Competition First Report and Order*, 11 FCC Rcd at 15922, para. 848 (declining to implement an imputation rule that would prevent price squeezes because doing so would impose substantial burdens on states to rebalance their retail rates. The issue of retail rates would similarly apply to any profitability analysis for a specific region of the state.).

188 AT&T Lieberman Aff. at Ex. 1.

189 SWBT figures indicate that competitive LECs lease 1,833 residential UNE-P lines and 56,260 business UNE-P lines in Missouri. *See* SWBT Tebeau Aff. at Table 3, p. 5 and Attach. A, p. 2.

190 Arkansas Commission Comments, Second Consultation Report at 8.

191 AT&T Comments at 45-47; WorldCom Comments at 27-28.

compliant.[192] Pursuant to the presumption test set forth in our *SWBT Kansas/Oklahoma Order*, we must now determine only whether Arkansas' costs are equal to or above the costs in Kansas.[193] The Arkansas Commission accepted SWBT's undisputed testimony that costs are higher in Arkansas than in Kansas, and no party takes issue with that conclusion here.[194] Further, our USF cost model suggests that Arkansas' loop costs are more than 20 percent higher than corresponding costs in Kansas. With respect to non-loop elements, the model indicates that Arkansas' non-loop costs are about 4 percent higher than Kansas. As stated earlier, rates are identical because Arkansas adopted all of Kansas' rates.[195] Thus, SWBT meets the TELRIC presumption test set forth in our *SWBT Kansas/Oklahoma Order*.

68. This application presents a novel issue of how an applicant may pass a section 271 test if the relevant state commission determines that it does not have authority to impose rates or investigate cost data. We disagree with the commenters' assertion that the lack of cost studies and review by the Arkansas Commission causes SWBT to fail this checklist item.[196] As the Commission stated in the *SWBT Kansas/Oklahoma Order*, it is not "appropriate to make a distinction between cost-based rates and rates that equal cost-based rates. Such a distinction would promote form over substance, which, given the necessarily imprecise nature of setting TELRIC-based pricing, is wholly unnecessary."[197] In the *SWBT Kansas/Oklahoma Order*, the Commission specified that in a state with limited resources, a section 271 applicant could rely on the "existing work product" of another state in which the BOC previously obtained section 271 authority if it could demonstrate its costs were at or above the costs in that state whose rates were adopted.[198] That demonstration has been made here.

(ii) Nonrecurring Charges

(a) Background

69. In its *Final Arbitration Order*, the Missouri Commission found that SWBT failed to justify its proposed nonrecurring charges ("NRCs") with adequate supporting data and that AT&T and MCI failed to provide a reasonable cost alternative.[199] Therefore, the Missouri

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[192] *See SWBT Kansas/Oklahoma Order*, 16 FCC Rcd 6276, para. 82 n.244.

[193] *Id*.

[194] *See* Arkansas Commission Comments at 3, *citing* Arkansas Commission Order at 3 (June 18, 2001).

[195] We also note that Arkansas rates would pass a benchmark test using Texas as the benchmark. This provides further evidence that the recurring rates in Arkansas are reasonable.

[196] WorldCom Comments at 18; El Paso-PAC WEST Comments at 17.

[197] *SWBT Kansas/Oklahoma Order*, 16 FCC Rcd at 6277, para. 84.

[198] *SWBT Kansas/Oklahoma Order*, 16 FCC Rcd at 6276, n.244.

[199] Missouri Commission Costing and Pricing Report at 123-124.

Commission, in an attempt to comply with TELRIC principles, and on the recommendation of its staff, reduced SWBT's proposed NRCs by 50 percent.[200] The Missouri Commission concluded that the discounted NRCs complied with the TELRIC methodology set forth by the Commission.[201] Additionally, pursuant to its voluntary rate reduction outlined in its application, SWBT further reduced all NRCs by 25 percent, or down to the applicable Texas NRC rate, whichever is higher.[202] Finally, to allay continued concerns of some competitive LECs that Missouri rates are still too high, SWBT again voluntarily reduced its analog line port charge by 95 percent.[203] The Department Of Justice states that its original pricing concerns expressed in SWBT's first Missouri section 271 application will be moot if the Commission concludes that current rates are within a reasonable TELRIC range.[204]

70. The Arkansas Commission has adopted SWBT's UNE rates from Kansas, including its nonrecurring rates.[205]

(b) Discussion

71. *Missouri*. We reject the allegations of commenters that NRCs in Missouri fall outside a reasonable TELRIC range. AT&T asserts that TELRIC violations in SWBT's cost studies inflate all of SWBT's UNE rates, including NRCs.[206] We note that NRCs for new combinations for the UNE-P offering in Missouri ($46) are slightly higher than in Texas ($39), but less than NRCs for new combinations of a UNE-P offering in Oklahoma ($64) and Kansas ($62). For existing combinations, the charge is much less than the charge for new combinations, only five ($5) dollars. No party challenges the NRCs for an existing combination. The Commission has reviewed each of these sets of rates in prior section 271 orders and found them to be within a reasonable TELRIC range. The fact that NRCs for the UNE-P in Missouri are slightly higher than NRCs for the UNE-P in Texas does not, in itself, indicate that the rates are outside a reasonable range of what TELRIC would produce.[207] We find that the Missouri NRCs are within a reasonable range of what TELRIC would produce.

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200 *Id.* at 123-124.

201 Missouri Commission Comments at 9.

202 SWBT Application at 43.

203 *Id.* at 47.

204 Department Of Justice Evaluation at 8.

205 Arkansas Commission Comments, Second Consultation Report at 8.

206 AT&T Comments at 13.

207 We also reject Nuvox's and Sprint's contention that the NRCs for DS1 and DS3 entrance facilities and multiplexing are a basis for rejecting this application. Nuvox Comments at 4; Sprint Comments at 24. The fact that the NRCs for these few isolated elements are more than in other SWBT states is not sufficient grounds for us to deny the application. The Missouri Commission applied the same approach in setting these rates as it did for (continued….)

72. We disagree with El Paso-PACWEST's assertion that SWBT has too many interim nonrecurring rates and this should cause the application to fail. The Commission has previously stated that interim rates may not cause a section 271 application to fail if an interim solution to a particular rate dispute is reasonable under the circumstances; the state commission has demonstrated its commitment to our pricing rules; and provision is made for refunds or true-ups once permanent rates are set.[208] The Missouri Commission has recently set permanent rates in other proceedings and has scheduled hearings for December 2001 to set permanent rates for the remaining UNEs, subject to true-up.[209] Additionally, 102 of 136 charges for interim-based UNEs are currently set at zero.[210] The Missouri Commission has demonstrated its commitment to our pricing rules.[211] We find that these measures are reasonable under the circumstances and do not cause SWBT to fail this checklist item.

73. We reject commenters' arguments that SWBT should fail this checklist item because loop conditioning rates are unreasonably high,[212] not subject to true-up,[213] not TELRIC-based,[214] and that line sharing rates are interim. First, it is impossible for loop conditioning rates to be too high, as they are currently set at zero.[215] The Commission has previously approved interim rates set at zero, pending resolution by the state commission.[216] We are reluctant to deny a section 271 application because a BOC is engaged in an unresolved rate dispute with its competitors and the state commission, which has primary jurisdiction over the matter.[217] SWBT's interim solutions of setting rates at zero affords the competitors the current benefit of the doubt on the rates, subject to the possibility that the Missouri Commission will ultimately find a charge greater than zero.[218] Second, El Paso-PACWEST is incorrect that loop conditioning rates are not

(Continued from previous page)

NRCs used in providing the platform. We note that the NRCs in Missouri for many other elements not used in the platform are lower than in other SWBT states. When compared to the recurring cost of the element and the length of time the NRC would likely be amortized, the price differences Nuvox complains of are less significance.

208 *See SWBT Texas Order*, 15 FCC Rcd at 18475, para. 236.

209 Missouri Commission Comments at 29.

210 SWBT Application at 44-45.

211 *See* para. 54, *supra*; Missouri Commission Comments at 28-29.

212 El Paso-PACWEST Missouri I Comments at 6; AT&T Comments at 31.

213 El Paso-PACWEST Missouri I Comments at 6.

214 El Paso-PACWEST Missouri I Comments at 6; AT&T Comments at 31. We also note that El Paso-PACWEST contends that all interim NRCs are not subject to true-up. This is not correct, as discussed above.

215 SWBT Reply at 21.

216 *SWBT Texas Order*, 15 FCC Rcd at 18475, para. 237.

217 *Id.* at para. 236.

218 *Id.*

subject to true up. SWBT and the Missouri Commission have both stated that the loop conditioning charges are subject to true-up.[219] We note that the Missouri Commission has established a schedule to set permanent rates, terms, and conditions for loop conditioning.[220] Additionally, line sharing rates are set at Texas rates on an interim basis, subject to true-up, while the Missouri Commission completes its review of the rates.[221] This interim solution seems reasonable to us under the circumstances. The Missouri Commission has demonstrated its commitment to TELRIC, has established a schedule to review these rates, and has set line sharing rates at either zero or Texas levels, subject to true-up.

74. We reject AT&T's argument that SWBT's voluntary discount to its NRCs in Missouri was arbitrary and thus violates our rules that prices be set at cost-based rates.[222] Likewise, we are not persuaded by AT&T's contention that reducing NRCs by fixed percentage discounts cannot establish their lawfulness unless there is evidence that the reduction corrects a defect in the original rates.[223] The Missouri Commission found rates to be reasonable and TELRIC-based even before SWBT implemented voluntary discounts.[224] While we acknowledge that the voluntary discount SWBT implemented is not based on a TELRIC methodology because it was derived by applying a percentage discount to the permanent rates, we find that such reduction does not cause SWBT to fail this checklist item.[225] With SWBT's most recent voluntary reduction in Missouri, including the analog line port charge, Missouri's NRCs for the UNE-P are lower than the corresponding NRCs in Kansas and Oklahoma and are comparable to the corresponding NRCs in Texas. Additionally, legitimate differences in how states resolve disputes can account for differences in NRCs. For example, NRCs in Texas do not include certain installation and maintenance activity NRCs ("trip charge"), but such charges are recovered in Kansas and Oklahoma NRCs.[226] No party alleges that the nonrecurring costs of providing UNEs in Missouri are less than the nonrecurring costs of providing the same elements in Kansas or Oklahoma. Because the nonrecurring charges for the UNE-P in Missouri are below the levels we previously approved in Kansas and Oklahoma and close to those in Texas, we find that the NRCs in Missouri are within the reasonable range that TELRIC would produce.

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219 SWBT Reply at 21; Missouri Commission Comments at 10.

220 Missouri Commission Comments at 29.

221 SWBT Application at 24, n.25.

222 AT&T Comments at 14.

223 *Id*.

224 Missouri Commission Comments at 9.

225 *SWBT Kansas/Oklahoma Order*, 16 FCC Rcd at 6269, para. 66.

226 *SWBT Kansas/Oklahoma Order*, 16 FCC Rcd at 6267, para. 61 and n.170.

75. *Arkansas*. We disagree with AT&T's contention that the Arkansas Commission's adoption of Kansas rates causes SWBT to fail this checklist item because the Kansas rates are not within a reasonable TELRIC range.[227] The Commission has already determined that Kansas' rates are within a reasonable TELRIC range.[228] The Arkansas Commission supports SWBT's offer of Kansas rates because the Commission had already found the rates TELRIC compliant.[229] No party challenges SWBT's assertion that the NRCs in both states consist of the same types of inputs in the same basic proportions; the activities are the same for each UNE from state-to-state; the times are the same for each activity; and the work group and task occurrence factors are the same for each state.[230] The Arkansas Commission accepted SWBT's undisputed testimony that nonrecurring costs are no lower in Arkansas than in Kansas.[231] SWBT has demonstrated that the Arkansas NRCs are within a reasonable range that TELRIC would produce.[232]

c. Provision of UNE Combinations

76. We conclude, based upon the evidence in the record, that SWBT demonstrates that it provides nondiscriminatory access to network element combinations as required by the Act and our rules.[233] In order to comply with checklist item 2, a BOC must demonstrate that it provides nondiscriminatory access to network elements in a manner that allows requesting carriers to combine such elements and that the BOC does not separate already-combined elements, except at the specific request of the competitive carrier.[234] In Arkansas and Missouri, SWBT provides access to both combinations of the loop to switch port elements (UNE-platform) and the loop to interoffice transport elements (enhanced extended loop or EEL).[235] We note also that the

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[227] AT&T Comments at 50.

[228] *See Kansas/Oklahoma Order*, 16 FCC Rcd at 6269, para. 66.

[229] *Id*.

[230] SWBT Application Arkansas App. A Vol. 5, Affidavit of Dale Lundy (SWBT Lundy Arkansas Aff.) at para. 20.

[231] Arkansas Commission Comments, Second Consultation Report at 3.

[232] We also reject AT&T's argument that Kansas NRCs far exceed the NRCs of all other section 271 approved states, including Texas, which proves that Arkansas rates, which are identical to Kansas rates, are not within reasonable TELRIC range. AT&T Comments at 45. SWBT may rely on our previous determination that the NRCs in Kansas are reasonable. *See SWBT Kansas/Oklahoma Order*, 16 FCC Rcd at 6276, para 82., n.244.

[233] SWBT Application at 86-89; SWBT Sparks Arkansas Aff., paras. 94-107; SWBT Sparks Missouri Aff., paras. 97-110.

[234] 47 U.S.C. § 271(c)(2)(B)(ii); 47 C.F.R. § 51.315(b).

[235] *See* SWBT Application at 86; SWBT Sparks Arkansas Aff., paras. 94-101; SWBT Sparks Missouri Aff., paras. 97-104.

Arkansas Commission and the Missouri Commission found SWBT's provisioning of UNE combinations to be compliant with the requirements of this checklist item.[236]

77. We find that McLeod's allegations regarding SWBT's provisioning of UNE-platform lines in the Missouri Metropolitan Calling Areas (MCAs) do not warrant rejection of SWBT's application.[237] In its comments, McLeod states that it has experienced significant problems with ordering UNE-platform from SWBT.[238] According to McLeod, its UNE-platform customers who had chosen to switch from SWBT were disconnected from the MCA Plan after they were moved from SWBT to McLeod.[239] McLeod states that SWBT first contended that MCA service was not available to McLeod with UNE-platform service.[240] Later, SWBT notified McLeod that it did in fact offer MCA service with UNE-platform service.[241] Indeed, it appears from McLeod's most recent comments that their UNE-platform orders requesting MCA service have been properly processed since May 24, 2001.[242] Thus, we conclude from the record that McLeod's concern regarding this issue has been addressed and that SWBT is providing UNE combinations in compliance with our rules.

2. Checklist Item 14 – Resale

78. Section 271(c)(2)(B)(xiv) of the Act requires that a BOC make "telecommunications services . . . available for resale in accordance with the requirements of section 251(c)(4) and section 252 (d)(3)."[243] Section 251(c)(4) imposes on incumbent LECs the duty to offer for resale at wholesale rates "any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers." We find that SWBT demonstrates that it is in compliance with the requirements of this checklist item in Arkansas and Missouri. SWBT has a concrete and specific legal obligation in its interconnection agreements and tariffs to make its retail telecommunications services available for resale to competing carriers at wholesale rates.[244] None of the commenting parties question SWBT's showing of compliance

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[236] *See* Arkansas Commission Comments, Second Consultation Report at 8-9; Missouri Commission Comments at 6-7.

[237] McLeod Comments at 16-17.

[238] *Id.*

[239] *Id.* at 16.

[240] *Id.*

[241] *Id.*

[242] *See id.* at 17.

[243] 47 U.S.C. § 271(c) (2)(B)(xiv). *See* Appendix D, para. 67.

[244] *See* SWBT Application at 48-63; SWBT Reply at 23-34.

with the requirements of this checklist item except in the area of resale of advanced services, which we discuss below.

79. We disagree with commenters who argue that SWBT fails to comply with checklist item 14 in its provision of DSL services.[245] SWBT states that it provides three categories of DSL-related service: (1) retail telecommunications service which it offers for resale at discount, (2) wholesale telecommunications services which it offers to unaffiliated ISPs, and (3) retail information service.[246] With respect to the second and third categories of service, SWBT argues that it is not providing DSL telecommunications service at retail and, thus, has no obligation to make these services available for resale pursuant to the section 251(c)(4) discount.

80. The category of services subject to the provisions of section 251(c)(4) is determined by whether those services are: (1) telecommunications services that an incumbent LEC provides (2) at retail, and (3) to subscribers who are not telecommunications carriers.[247] SWBT offers for resale at a wholesale discount those DSL telecommunications services that it offers at retail to grandfathered end-user customers and via customer service arrangements.[248] In addition, SWBT offers a tariffed DSL telecommunications transport service to unaffiliated Internet service providers (ISPs), which we conclude is a wholesale service offering as articulated by the Commission in the *AOL Bulk Services Order*.[249] Because that offering is not a

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[245] *See e.g.*, ASCENT Comments at 3-16; ASCENT Reply at 2-11; AT&T Comments at 61-68; AT&T Reply at 18-26; El Paso-PACWEST Comments at 26-29; El Paso-PACWEST Reply at 23-26; WorldCom Comments at 1-12; WorldCom Reply at 5-10.

[246] SWBT Application at 50, 58 (stating that "[t]he third category of DSL services that SBC offers is a high-speed DSL Internet access service").

[247] 47 U.S.C. § 251(c)(4).

[248] SWBT Application at 50-54. *See also* 47 C.F.R. 51.615 ("When an incumbent LEC makes a telecommunications service available only to a limited group of customers that have purchased such a service in the past, the incumbent LEC must also make such a service available at wholesale rates to requesting carriers to offer on a resale basis to the *same limited group of customers that have purchased such a service in the past.*") (*emphasis added*).

[249] *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, Second Report and Order, CC Docket No. 98-147, Second Report and Order, FCC 99-330, 14 FCC Rcd 19237 (1999) (*AOL Bulk Services Order*). In the *AOL Bulk Services Order*, the Commission analyzed the circumstances under which DSL transport services provided by incumbent LECs to ISPs would be considered services provided "at retail" and concluded that "advanced telecommunications services sold to Internet Service Providers as an input component to the Internet Service Providers' retail Internet service offering shall not be considered to be telecommunications services offered on a retail basis that incumbent LECs must make available for resale at wholesale rates to requesting telecommunications carriers." 47 C.F.R. § 51.605(c). We disagree with AT&T that SWBT's past practice of providing "split-billing" for unaffiliated ISPs merits a finding of noncompliance with checklist item 14. AT&T Comments at 61; AT&T Reply at 18. To the extent that these practices may have indicated that SWBT was offering a retail service to unaffiliated ISPs, we note that SWBT has discontinued this practice. Accordingly, we need not make specific findings about whether this practice transformed SWBT's offering into a retail service.

telecommunications service sold at retail, SWBT is not required to offer it at a resale discount pursuant to section 251(c)(4).[250]

81. With respect to SWBT's third category of service -- its high-speed Internet access service -- we find that there is no violation of checklist item 14. Commenters contend that SWBT, in combination with its affiliated ISP (SBIS), makes this Internet access service available to end users "at retail" and, thus, must also make the underlying DSL transport component available to competitive LECs for resale pursuant to section 251(c)(4).[251] In response, SWBT argues that it provides end users with an information service that is not subject to section 251(c)(4).[252]

82. We conclude that neither the Act nor Commission precedent explicitly addresses the unique facts or legal issues raised in this case. As the Commission observed in the *AOL Bulk Services Order*, Congress did not define the term "at retail" as used in section 251(c)(4) and "the meaning of the term 'at retail' is not clear and unambiguous from the language of the [A]ct."[253] In particular, the *AOL Bulk Services Order* does not explicitly address the sale of DSL transport to affiliated ISPs.[254] The Commission has not addressed the situation where an incumbent LEC does not offer DSL transport at retail, but instead offers only an Internet access service. Moreover, we expect that how we decide questions about the regulatory treatment of the underlying transmission facilities provided by incumbent LECs to their affiliate information service providers[255] could have far-reaching implications for a wide range of issues that would be more appropriately handled separately.[256] Accordingly, because Commission precedent does not

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[250] *See generally AOL Bulk Services Order*, 14 FCC Rcd 19237.

[251] *See, e.g.*, AT&T Comments at 61; Worldcom Comments at 2.

[252] SWBT Application at 58-62; SWBT Reply at 33.

[253] *AOL Bulk Services Order*, 14 FCC Rcd at 19243, para. 12.

[254] *AOL Bulk Services Order*, 14 FCC Rcd at 19241, para. 8.

[255] *See, e.g.*, SWBT Reply Brief at 32-33 (discussing the application of the *Universal Service Report to Congress* to SBC's provision of high speed internet access service); AT&T Reply Comments at 22-23.

[256] For example, in an April 1998 Report to Congress, the Commission stated that, because of the complicated issues raised by the self-provisioning of transmission facilities, it would consider in a separate proceeding "the status of entities that provide transmission to meet their internal needs." *Federal-State Joint Board on Universal Service*, Report to Congress, CC Docket No. 96-45, FCC 98-67, paras. 66-75 (rel. Apr. 10, 1998) (*Universal Service Report to Congress*). In addition, characterizing the regulatory status of the underlying transmission facility in the instant context could potentially have implications for the *Cable Access* proceeding, in which we have sought comment on the appropriate legal classification of cable modem services. *See, e.g.*, *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, Notice of Inquiry, GN Docket No. 00-185, FCC 00-355, paras. 14-24, 43-46 (rel. Sept. 28, 2000) (*Cable Access Notice*) (seeking comment, *inter alia*, on whether and how the Commission might adopt uniform requirements for high-speed services provided using different platforms).

address the specific facts or legal issues raised here, we decline to reach a conclusion in the context of this section 271 proceeding. We note that the Commission has typically deferred resolution of such novel interpretive issues to separate proceedings.[257] We will initiate this proceeding by the end of this year, and will endeavor to complete the proceeding as soon as possible next year.

83. We note that commenters object to various terms and conditions included in SWBT's tariff and Logix agreement.[258] For example, commenters raise concerns about whether language in the Logix agreement limiting DSL transport resale to "similarly situated" customers will be used to discriminate against competitors.[259] Similarly, commenters argue that SWBT's termination liability provisions and limitations on liability for improper installation and maintenance are unreasonable.[260] The Commission has stated, in past orders, that it may have concerns about how such terms are applied in specific instances, however, we do not believe that these provisions warrant a finding of non-compliance with the requirements of checklist item 14.[261] Should parties have continuing concerns about these provisions, we believe that questions about whether these terms are discriminatory as applied would best be considered in the context

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[257] *See, e.g.*, *Verizon Pennsylvania Order*, para. 92 ("As we have stated in other section 271 orders, new interpretative disputes concerning the precise content of an incumbent LEC's obligations to its competitors, disputes that our rules have not yet addressed and that do not involve *per se* violations of the Act or our rules, are not appropriately dealt with in the context of a section 271 proceeding."), para. 97 (concerning resale of DSL in combination with UNE-platform voice service) and para. 100 (concerning single points of interconnection). *See also Verizon Massachusetts Order*, 16 FCC Rcd at 8993, para. 10; *SWBT Texas Order*, 15 FCC Rcd at 18366, para. 23. Courts have held that the Commission is not required to solve all ambiguities in the context of a 271 proceeding. *See, e.g.*, *Bell Atlantic New York Order*, paras. 316-336, *aff'd AT&T v. FCC*, 220 F.3d 607, 622-625 (D.C. Cir. 2000) (agreeing with the Commission that "the statute is ambiguous with respect to the precise issue [nondiscriminatory access to DSL loops]" and upholding the Commission's decision not to require a separate evidentiary showing with respect to DSL loops).

[258] We further note that ASCENT urges the Commission to find noncompliance with checklist item 14 because ASI's advanced services tariff includes a Remote LAN DSL Transport offering that is sold directly to end users, but the tariff does not include specific terms under which competitive LECs may resell this service pursuant to the section 251(c)(4) discount. ASCENT Reply at 3-11. *See also* El Paso-PACWEST Reply at 23 (raising concerns about the availability of other advanced services for resale). We disagree with ASCENT because, under the terms of the ASI-Logix Interconnection agreement, competitive LECs may resell pursuant to the section 251(c)(4) discount SWBT's retail telecommunications services, which we expect would include the Remote LAN offering. *See* SWBT Habeeb Missouri II Aff., para. 41, 45; ASI-Logix Agreement § 11.

[259] *See e.g.*, AT&T Comments at 67; ASCENT Reply at 7; WorldCom Reply at 6-7.

[260] *See e.g.*, AT&T Comments at 68 (raising concerns about SWBT's restricting the purchase of DSL transport to where there is existing capacity); ASCENT Reply at 8; WorldCom Reply at 8.

[261] *See, e.g. Application of BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc., for Provision of In-region, InterLATA Services in Louisiana*, Memorandum Opinion and Order, CC Docket No. 98-121, FCC 98-271, 13 FCC Rcd 20,599, 20,781-83, paras. 316-17 (1998) (*Second BellSouth Louisiana Order*); *SWBT Texas Order*, 15 FCC Rcd at 18,545, para. 389.

of fact-specific proceedings, such as the complaint process available to carriers pursuant to section 208.

84. AT&T and Worldcom argue that because SWBT's tariffed DSL transport offering only allows competitive LECs to resell DSL service over lines where SWBT provides the voice service that SWBT is in violation of section 251(c)(4) and, thus, checklist item 14.[262] Because we have determined that SWBT does not have a present obligation to offer DSL transport service for resale to end users, with the exception of the specific retail DSL telecommunications services that SBC concedes are subject to the resale obligation in section 251(c)(4),[263] SWBT's line sharing restriction cannot, by definition, constitute a violation of section 251(c)(4) in this case.

B. Other Items

1. Checklist Item 1 – Interconnection

a. Non-Pricing Aspects of Interconnection

85. Based on our review of the record, we conclude that SWBT demonstrates that it is in compliance with the requirements of this checklist item.[264] Section 271(c)(2)(B)(i) requires the BOC to provide equal-in-quality interconnection on terms and conditions that are just, reasonable and nondiscriminatory in accordance with the requirements of sections 251 and 252.[265] We also note that both the Arkansas and Missouri Commissions find that SWBT satisfies this checklist item in their respective states.[266]

86. We reject McLeod's argument that SWBT does not satisfy its checklist item 1 obligation to provide collocation. McLeod argues that SWBT cannot demonstrate a track record in Missouri of compliance with the section 271 requirements concerning collocation.[267] We note, however, that McLeod also states that SWBT's revised collocation tariff "presents a great opportunity for CLECs to obtain collocation under prices, terms and conditions that will comply with the Telecommunications Act."[268] Indeed, McLeod does not assert that SWBT is currently

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[262] *See, e.g.*, AT&T Reply at 19-20; WorldCom Reply at 9-10. *See also* ASCENT Reply at 4-5.

[263] SWBT Application at 50-54.

[264] SWBT Application at 74-85; SWBT Deere Arkansas Aff., paras. 12-65; SWBT Sparks Arkansas Aff., paras. 32-81; SWBT Dysart Arkansas Aff., paras. 24-29; SWBT Deere Missouri Aff., paras. 12-65; SWBT Sparks Missouri Aff., paras. 35-84; SWBT Dysart Missouri Aff., paras. 25-30.

[265] *See* Appendix D at paras. 17-24.

[266] Arkansas Commission Comments, Second Consultation Report at 7; Missouri Commission Comments at 3-5.

[267] *See* McLeod Comments at 13-15.

[268] *Id.* at 14.

not in compliance with the section 271 requirements concerning collocation. Based on the record in this proceeding, we believe that SWBT has demonstrated compliance with this checklist item.

87. We also reject McLeod's argument raised in the initial Missouri proceeding that SWBT does not meet this checklist item due to its interconnection installation performance.[269] In particular, McLeod alleges that SWBT demonstrates an extremely high missed due date rate for installing interconnection trunks.[270] We find that McLeod's experience is not borne out in current performance measures which indicate that SWBT is providing installation of interconnection trunks to competitive LECs with far fewer missed due dates than it provides to itself.[271] McLeod's allegations rest on testimony presented before the Missouri Commission and focus on interconnection installation performance rendered over a year ago, in September 2000.[272] We find SWBT's recent performance to be more probative for purposes of our analysis. Thus, we conclude that McLeod's concerns do not warrant a finding of noncompliance with this checklist item.

88. SWBT further shows that, for purposes of interconnection to exchange local traffic, a competitive LEC may choose a single, technically feasible point of interconnection within a LATA.[273] In this regard, McLeod's contention in the initial Missouri proceeding that SWBT fails to provide for a single point of interconnection in LATAs outside of metropolitan calling areas (MCAs) appears to be factually inaccurate.[274] Thus, we find that SWBT has demonstrated that it has a legal obligation to allow requesting telecommunications carriers to interconnect at any technically feasible point.

b. Interconnection Pricing

(i) Background

89. As discussed above, checklist item 1 requires a BOC to provide "interconnection in accordance with the requirements of sections 251(c)(2) and 252(d)(1)."[275] Section 251(c)(2)

[269] McLeod Comments at 24.

[270] *Id.*

[271] SWBT Dysart Missouri Aff., para. 28.

[272] McLeod Missouri Comments at 24.

[273] SWBT Application at 75-76; SWBT Deere Arkansas Aff., para. 31; SWBT Deere Missouri Aff., para. 65; SWBT Sparks Arkansas Aff., para. 32; SWBT Sparks Missouri Aff., para. 35. *See also Developing a Unified Intercarrier Compensation Regime*, Notice of Proposed Rulemaking, FCC 01-132, CC Docket No. 01-92, paras. 112-114 (seeking comment on appropriate intercarrier compensation for single point of interconnection arrangements.)

[274] McLeod Missouri Comments at 25.

[275] 47 U.S.C. § 271(c)(2)(B)(i).

requires incumbent LECs to provide interconnection "at any technically feasible point within the carrier's network … on rates, terms, and conditions that are just, reasonable, and nondiscriminatory."[276] Section 252(d)(1) requires state determinations regarding the rates, terms, and conditions of interconnection to be based on cost and to be nondiscriminatory, and allows the rates to include a reasonable profit.[277] The Commission's pricing rules require, among other things, that in order to comply with its collocation obligations, an incumbent LEC provide collocation based on TELRIC.[278]

90. In Missouri, SWBT filed its tariff with its terms and conditions for physical and virtual collocation on October 24, 2000. While the case was pending before the Missouri Commission, the Missouri Commission ordered SWBT to offer Kansas collocation prices and Texas collocation terms and conditions on an interim basis.[279] The Missouri Commission has ordered that the interim rates be subject to true-up[280] and has scheduled cost proceedings to set permanent rates for collocation.[281] On August 24, 2001, the parties to the cost proceeding filed a unanimous joint stipulation as to terms and conditions, including prices, for both physical and virtual collocation tariffs. On September 6, 2001, the Missouri Commission suspended its collocation tariff investigation and approved the unanimous joint stipulation, which became effective September 16, 2001.[282]

91. On December 21, 2000, the Arkansas Commission filed its *Consultation Report* in response to SWBT's section 271 application and request for approval of its proposed A2A.[283] The *Consultation Report* stated that SWBT failed to meet checklist item number 1 and raised a

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[276] 47 U.S.C. § 251(c)(2).

[277] 47 U.S.C. § 252(d)(1).

[278] *See* 47 C.F.R. §§ 51.501-07, 51.509(g); *Local Competition First Report and Order*, 11 FCC Rcd at 15812-16, 15844-61, 15874-76, 15912, paras. 618-29, 674-712, 743-51, 826. *See* also Section III.A.1.b (discussing status of litigation over the Commission's pricing rules).

[279] SWBT Missouri I Application, App. C, Tab 86, Missouri Commission, Case No. TO –99-227, *Application of Southwestern Bell Telephone Company to Provide Notice of Intent to File An Application for Authorization to Provide In-region InterLata Services Originating in Missouri Pursuant to Section 271 of the Telecommunications Act of 1996*, Missouri Commission Interim Order re: the Missouri Interconnection Agreement at 4 (Feb. 13, 2001)(*Missouri Commission Interim Order for M2A*).

[280] Missouri Commission Interim Order for M2A at 4.

[281] Missouri Commission Comments at 28 ("the Missouri Public Service Commission expressed its intention to expeditiously determine permanent rates, terms, and condition for collocation . . . ." (internal quotations omitted)).

[282] Missouri Commission Comments, Attach. 2, Case No. TT-2001-298, *In re Southwestern Bell Telephone Company's Proposed Tariff PSC Mo. No. 42 (Local Access Service Tariff) Regarding Physical and Virtual Collocation*, Order Approving Second Stipulation and Agreement and Suspending Procedural Schedule at 2. (Missouri Collocation Tariff Order), (Sept. 6, 2001).

[283] Arkansas Commission Comments, Consultation Report.

number of concerns about specific rates, terms and conditions contained in the A2A.[284] In response, SWBT modified its A2A to include rates, terms and conditions from the Kansas collocation tariff.[285] Although the collocation rates in the Kansas tariff are currently interim and subject to true-up,[286] SWBT has committed to revise the A2A to parallel Kansas' final rates when they are adopted.[287] On May 21, 2001, in its *Second Consultation Report*, the Arkansas Commission approved this approach and states that SWBT satisfies checklist item 1.[288]

(ii) Discussion

92. We find, based on the evidence in the record, that SWBT offers interconnection in Missouri to other telecommunications carriers at just, reasonable, and nondiscriminatory rates, in compliance with checklist item 1. The Missouri Commission concludes that SWBT meets the requirements of this checklist item.[289]

93. We find that McLeod's concerns regarding the large number of collocation rates that are interim or determined on an individual case basis ("ICB") have become moot.[290] At the time that SWBT filed its section 271 application, its collocation rates in Missouri were interim. Seventeen days after SWBT filed its section 271 application, however, the Missouri Commission adopted permanent rates, terms and conditions for both physical and virtual collocation.[291] We commend the Missouri Commission for its diligent efforts in setting these permanent rates. We also find that this modification to SWBT's application after it was filed did not substantially burden commenters as it was made before comments were filed. The Department of Justice also noted that the adoption of permanent collocation rates addressed its earlier concerns about interim rates.[292]

94. We reject McLeod's argument that the new collocation tariff does not provide a track record of collocation performance necessary for section 271 checklist compliance.[293] The

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284 Arkansas Commission Comments, Consultation Report at 13-15.

285 SWBT Response to Consultation Report of Arkansas Public Service Commission, Docket No. 00-211-U (Mar. 23, 2001); SWBT Application at 4.

286 *See SWBT Kansas/Oklahoma Order*, 16 FCC Rcd at 6359, para. 238.

287 SWBT Allis Arkansas Aff., paras. 48-49.

288 Arkansas Commission Comments, Second Consultation Report at 7.

289 Missouri Commission Comments at 5.

290 Mcleod Comments at 13-14.

291 Missouri Collocation Tariff Order at 2.

292 Department Of Justice Evaluation at 8.

293 McLeod Comments at 15.

Commission has previously stated that a section 271 application must be in compliance with the requirements of the checklist at the time of its filing, but it does not require TELRIC-based prices to have been in effect for a certain period of time before filing. McLeod's assertions do not indicate a failure on SWBT's part to meet the requirements of this checklist item.

95. We also find that SWBT offers interconnection in Arkansas to other telecommunications carriers at just, reasonable, and nondiscriminatory rates, in compliance with checklist item 1. We agree with the Arkansas Commission's conclusion that SWBT's reliance on its Kansas collocation tariffs in Arkansas is adequate to satisfy its checklist requirements. Pursuant to the test articulated in the *SWBT Kansas/Oklahoma Order*, a BOC's rates will be entitled to a presumption of TELRIC compliance if they are adopted in whole from another state whose rates have been found to comply with TELRIC and if costs are demonstrated to be at or above the costs in the state whose rates were adopted.[294] The Commission has found Kansas rates to be TELRIC compliant.[295] The Arkansas Commission concludes that the costs in Arkansas are at or above the costs in Kansas, and no party has challenged this finding.[296]

96. We reject El Paso-PACWEST's argument that SWBT impermissibly used its Kansas rates instead of Texas rates because rates in Kansas are higher.[297] SWBT asserts that Kansas is a more appropriate basis for comparison because it is more similar to Arkansas in network make-up than Texas.[298] We agree with SWBT that Kansas is an appropriate comparison for Arkansas due to size and population density. Although it might have chosen to use Texas instead, we find no reason to disagree with SWBT's reliance on Kansas' rates for purposes of its Arkansas section 271 application.

2. Checklist Item 4 – Unbundled Local Loops

97. Section 271(c)(2)(B)(iv) of the Act requires that a BOC provide "[l]ocal loop transmission from the central office to the customer's premises, unbundled from local switching or other services."[299] We conclude that SWBT demonstrates that it provides unbundled local loops in accordance with the requirements of section 271 and our rules. Our conclusion is based on our

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294 *SWBT Kansas/Oklahoma Order*, 16 FCC Rcd at 6276, n.244.

295 *SWBT Kansas/Oklahoma Order*, 16 FCC Rcd at 6359, para. 237

296 Arkansas Commission Comments, Second Consultation Report at 3.

297 El Paso-PACWEST Comments at 17.

298 SWBT Lundy Arkansas Aff., para. 24.

299 47 U.S.C. § 271(c)(2)(B)(iv). The Commission has defined the loop as a transmission facility between a distribution frame, or its equivalent, in an incumbent LEC central office, and the demarcation point at the customer premises. Dark fiber and loop conditioning equipment are among the features, functions, and capabilities of the loop. *UNE Remand Order*, 15 FCC Rcd at 3772-73, paras. 166-167, n.301. *See* Appendix D, paras. 48-52, regarding requirements under checklist item 4.

review of SWBT's performance for all loop types--which include, as in past section 271 orders, voice grade loops, hot cuts, xDSL-capable loops, digital loops, and high capacity loops--and on our review of SWBT's processes for line sharing and line splitting.

98. In analyzing SWBT's compliance with this checklist item, we note first that both the Arkansas and Missouri Commissions determined that SWBT's performance meets the requirements of section 271.[300] We also recognize that, as of the date of SWBT's application, competitors had acquired from SWBT and placed into use more than 18,760 loops in Missouri, and 18,486 loops in Arkansas.[301] Finally, we note that, with the exception of technical questions about the scope of SWBT's line sharing and line splitting obligations, no commenters raise any significant issues regarding SWBT's provisioning, maintenance or repair of unbundled loops.[302] As in past section 271 proceedings, in the course of our review, we look for patterns of systemic performance disparities that have resulted in competitive harm or that have otherwise denied new entrants a meaningful opportunity to compete.[303] Isolated cases of performance disparity, especially when the margin of disparity is small, generally will not result in a finding of checklist noncompliance.

99. Using these criteria, we find that SWBT provides nondiscriminatory access to loops. We also find that SWBT has demonstrated that it adequately provisions line-splitting, although line-sharing in Missouri has been subject to some implementation problems.

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[300] *See* Missouri Commission Comments at 7-9, 15-18; Arkansas Commission Comments, Second Consultation Report at 9-11, 18-20.

[301] *See* SWBT Dysart Arkansas and Missouri II Affs. Tab B at B-160-162, Measurement 65-01 ("Percent Trouble Report Rate--8.0 dB Loops"), 65-02 ("Percent Trouble Report Rate--5.0 dB Loops"), 65-03 ("Percent Trouble Report Rate--BRI Loops"), 65-05 ("Percent Trouble Report Rate--DS1 Loops"), 65-07 ("Percent Trouble Report Rate—ISDN PRI"), 65-08 ("Percent Trouble Report Rate—DSL—No Line Sharing"), and 65-09 ("Percent Trouble Report Rate—DSL—Line Sharing").

[302] For example, El Paso-PACWEST raises dated and non-specific claims, and Navigator raises claims about provisioning quality or timeliness for service that SWBT states it did not provide to Navigator. We address both commenters *infra*. *See* El Paso-PACWEST Missouri II Comments at 11; Navigator Missouri II Comments at 10. In Arkansas, as of July 2001, SWBT had provisioned 195 BRI loops; 871 DSL loops (no line sharing); no DSL line shared loops (65-09); 662 of the 5 dB loops (with test access); 15,889 of the 8 dB loops and 896 DS1 loops. *See* SWBT Dysart Arkansas Aff. Tab B at B-160-162, Measurements 65-01 ("Percent Trouble Report Rate--8.0 dB Loops"), 65-02 ("Percent Trouble Report Rate--5.0 dB Loops"), 65-03 ("Percent Trouble Report Rate--BRI Loops"), 65-05 ("Percent Trouble Report Rate--DS1 Loops"); 65-08 ("Percent Trouble Report Rate—DSL—No Line Sharing"), and 65-09 ("Percent Trouble Report Rate—DSL—Line Sharing"). In Missouri, as of July 2001, SWBT had provisioned 1,298 BRI loops; 4,015 DSL loops (no line sharing); 742 DSL line shared loops; 681 of the 5.0 dB loops (with test access); 10,378 of the 8 dB loops; and 2,094 DS1 loops. *See* SWBT Dysart Missouri II Aff. Tab B at B-160-162, Measurements 65-01 ("Percent Trouble Report Rate--8.0 dB Loops"), 65-02 ("Percent Trouble Report Rate--5.0 dB Loops"), 65-03 ("Percent Trouble Report Rate--BRI Loops"), 65-05 ("Percent Trouble Report Rate--DS1 Loops"), 65-08 ("Percent Trouble Report Rate—DSL—No Line Sharing"), and 65-09 ("Percent Trouble Report Rate—DSL—Line Sharing").

[303] *See SWBT Kansas/Oklahoma Order*, 16 FCC Rcd at 6325-26, paras. 179-180.

Furthermore, as described above in Section III.A.2, we find that SWBT provides access to loop makeup information in compliance with our rules.

100. *xDSL-Capable Loops.* We find that SWBT demonstrates that it provides stand-alone xDSL-capable loops in accordance with the requirements of checklist item 4. SWBT makes available xDSL-capable loops in Arkansas and Missouri through interconnection agreements and pursuant to tariffs approved by the Missouri Commission and the Arkansas Commission.[304] In analyzing SWBT's showing, we review performance measures comparable to those we have relied upon in prior section 271 orders: order processing timeliness, installation timeliness, missed installation appointments, installation quality, and the timeliness and quality of the maintenance and repair functions.[305]

101. We reject El Paso-PACWEST's claims, asserted both in the Missouri I proceeding and in this proceeding, that SWBT's provisioning of stand-alone xDSL capable loops is deficient.[306] Data provided by SWBT for each of the measurement categories listed above demonstrate that SWBT generally meets the established benchmarks and parity standards and provisions xDSL-capable loops in a nondiscriminatory fashion in Arkansas and Missouri. Among the performance metrics El Paso-PACWEST cites is "Percentage Missed Due Dates Due to Lack of Facilities," which compares percentage of missed due dates for SWBT's advanced services affiliate to the percentage of missed due dates for competitive LECs. We note, however, that SWBT's percentage of missed due dates for competitive LECs for June, July and August never totaled more than half of one percent.[307] Absent more evidence, we cannot conclude that competitive LECs are competitively disadvantaged when the percentage of missed due dates due to lack of facilities is so small.

102. *Hot Cut Activity.* We find that SWBT is providing voice grade loops through hot-cuts in Arkansas and Missouri in accordance with the requirements of checklist item 4.[308] We conclude that SWBT's performance in both Arkansas and Missouri for the four-month period,

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[304] *See* Arkansas Commission Comments, Attach. 1 at 2; Missouri Commission Comments at 18.

[305] *See Verizon Connecticut Order*, 16 FCC Rcd at 15153-56, paras. 15-20; *Verizon Massachusetts Order*, 16 FCC Rcd at 9056, para. 123, and 9059, para. 130; *SWBT Kansas/Oklahoma Order*, 16 FCC Rcd at 6326-27, paras. 181-182. We note that individual states and BOCs may define performance measures in different ways. We look to those measurements, however, that provide data most similar to data we have relied upon in past orders.

[306] El Paso-PACWEST Missouri I Comments at 22-24. In the Missouri II proceeding, El Paso-PACWEST further claims that provisioning of BRI loops in Arkansas and Missouri is deficient. El Paso-PACWEST Comments at 11.

[307] *See* SWBT Dysart Missouri II Reply Aff. Attach. D, D-142, Measurement 60-08 ("Percent Missed Due Dates Due to LOF—DSL—No Line Sharing").

[308] In the Missouri I proceeding, El Paso-PACWEST argued that SWBT's hot cut performance was deficient. El Paso-PACWEST Missouri I Comments at 24-27. Given that SWBT has satisfactorily met the relevant hot cut performance standards for the past four months, we disagree with El Paso-PACWEST. *See* n.307, *infra*.

April to July 2001, met or exceeded the checklist requirements, and no commenter raised concern regarding SWBT's hot-cut provisioning activity.[309]

103. *Voice Grade Loops.* We find that SWBT provides voice grade loops to competitors in Arkansas and Missouri in accordance with the requirements of checklist item 4. In both Arkansas and Missouri, SWBT has generally met the benchmark and parity standards for 8.0 dB loop order processing and installation timeliness, missed installation appointments, installation quality, and the timeliness and quality of the maintenance and repair functions. With respect to 5.0 dB loops in Arkansas and Missouri, SWBT also has generally met the benchmarks for order processing timeliness, installation timeliness, missed installation appointments, and installation quality for 5.0 dB loops in Arkansas and Missouri. While SWBT failed in two out of the four relevant months to meet the parity standard for the timeliness and quality of the maintenance and repair functions for 5.0 dB loops in Arkansas and Missouri, this performance does not change our overall finding for voice grade loops.[310] We also note that no commenter raises issues relating to voice grade loops.

104. *Line Sharing.* We find that SWBT demonstrates that it provides nondiscriminatory access to the high-frequency portion of the loop. SWBT offers line sharing in Missouri and Arkansas pursuant to its interconnection agreements in accordance with the Commission's *Line Sharing Order* and *Line Sharing Reconsideration Order*.[311] According to

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[309] *See* SWBT Dysart Arkansas Aff. Tab B at B-206-208, Measurement 114-01 ("Percent of Premature Disconnects for CHC"); Measurement 114.1-01 ("CHC LNP with Loop Provisioning Interval 1-10 Lines"); Measurement 115-01 ("Percent Provisioning Trouble Reports for CHC"); Measurement 115-02 ("Percent Provisioning Trouble Reports for FDT"). *See also* SWBT Dysart Missouri II Aff. Tab B at B-207-209, Measurement 114-01 ("Percent of Premature Disconnects for CHC"), Measurement 114-02 ("Percent of Premature Disconnects for FDT"), 115-01 ("Percent Provisioning Trouble Reports for CHC"), Measurement 114.1-01 ("CHC LNP with Loop Provisioning Interval 1-10 Lines"); Measurement 115-02 ("Percent Provisioning Trouble Reports for FDT"). *See also* SWBT Dysart Arkansas Aff., para. 100-104; SWBT Application Missouri App. A, Vol. 2a, Affidavit of William R. Dysart (SWBT Dysart Missouri Aff.) para. 110-114.

[310] In Arkansas, we find that the difference between the reported trouble report rates of 5.0 dB loops for competitors and its own retail customers is insignificant and thus, not competitively significant. *See* SWBT Dysart Arkansas Aff. Tab B at B-160, Measurement 65-02 (Percent Trouble Reports 5.dB Loops with Test Access). In Missouri, though the trouble report measurements are out of parity, we agree with SWBT that "this problem with satisfying the statistical standard for parity appears to be due to the relatively small number of 5.0 dB loops ordered by the competitive LECs as compared to the larger quantity of circuits ordered by SWBT's retail customers." SWBT Dysart Missouri II Aff., para. 102. *See also* SWBT Dysart Missouri Aff. Tab B at B-160, Measurement 65-02 ("Percent Trouble Reports--5 dB Loops—with Test Access").

[311] *See* SWBT Application at 111, n.87; SWBT Sparks Missouri II Aff., para. 13; SWBT Sparks Arkansas Aff., paras. 4, 70-98. *See also Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, Third Report and Order and Fourth Report and Order, CC Docket No 96-98, 14 FCC Rcd 20912 (1999) (*Line Sharing Order*); *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, Third Report and Order on Reconsideration and Fourth Report and Order on Reconsideration, CC Docket No. 96-98, Third Further Notice of Proposed Rulemaking, CC Docket No. 98-147, Sixth Further Notice of Proposed Rulemaking, CC Docket No. 96-98, 16 FCC Rcd 2101 (2001) (*Line Sharing Reconsideration Order*).

(continued….)

SWBT, no line-shared DSL loops are currently in service in Arkansas.[312] While we agree with El Paso-PACWEST and McLeod that SWBT has had some implementation problems with its line sharing performance,[313] based on a careful review of the record, we conclude that SWBT's performance overall satisfies our standard for nondiscriminatory access to loops. We note that SWBT's performance for a key line-sharing measure in Missouri, PM 58-10 (Percentage of SWBT-Caused Missed Due Dates), has been statistically out of parity during the relevant four month period.[314] SWBT acknowledges that it has failed to achieve parity for the provisioning of DSL line sharing to its Missouri competitors, but attributes the disparity to problems related to the inventory and acquisition of "miscellaneous equipment," particularly splitters.[315] SWBT first identified these problems in its initial Missouri application and assured the Commission in May 2001 that the problem had been addressed.[316] While SWBT acknowledges that its performance

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[312] SWBT Dysart Ark. Aff., para. 33.

[313] *See* El Paso-PACWEST Missouri I Comments at 21-22 (arguing that SWBT's provisioning, timeliness and quality of line shared loops is deficient); McLeod Missouri I Comments at 35.

[314] *See* SWBT Dysart Missouri II Reply Aff. Tab D at D-132, Measurement 58-10 ("Percent SWBT Caused Missed Due Dates—DSL—Line Sharing"). In addition, results for two other line sharing performance metrics also indicate out-of-parity performance in Missouri. However, with regard to Measurement 60-09 ("Percent SWBT Missed Due Dates Due to Lack of Facilities") we note that while SWBT failed to meet statistical parity, its actual performance resulted in only four missed due dates throughout the entire state during a four-month period from May to July, 2001. We cannot conclude that this performance resulted in a competitive disadvantage for competitive LECs. *See id*. at D at D-142, Measurement 60-09 (Percent Missed Due Dates Due to LOF). With regard to Measurement 65-09 (Percentage Trouble Report Rate—DSL—Line Sharing), we note that competitive LECs reported more troubles on DSL line-shared loops than did SWBT's retail affiliate. The disparity between ASI's percentage trouble report rate and competitive LECs' trouble report rate was less than one percentage point in May, approximately 1.1 percentage point in June, and less than one percentage point in July. In the absence of evidence of competitive harm from commenters, we cannot conclude that these minor disparities merit a finding of checklist noncompliance. *See* SWBT Dysart Missouri II Reply Aff. Tab D at D-172, Measurement 65-09 ("Percent Trouble Reports—DSL—Line Sharing"). In addition, SWBT states that this disparity is explained by the "miscellaneous equipment" problem identified by SWBT, which we describe further *infra*. Accordingly, we expect that with SWBT's implementation of process changes to address the "miscellaneous equipment" problem, performance for this measure should come into parity. Moreover, commenters have failed to explain how any discrepancy in performance has resulted in a competitive disadvantage for the companies. *See also* El Paso-PACWEST Comments at 11.

[315] *See* SWBT Application Missouri II App. A, Vol. 7, Affidavit of Bill E. VanDeBerghe (SWBT VanDeBerghe Missouri II Aff.) paras. 46-55. SWBT points out that when a competitive LEC uses a SWBT splitter to facilitate line sharing, SWBT is responsible for the inventory and assignment of that splitter. An incorrect assignment on a competitive LEC line sharing order can result in a SWBT-caused miss. According to SWBT, a central office engineer had failed to pass the relevant inventory information to the database manager responsible for the inventory of the "miscellaneous equipment." In addition, SWBT explains that when there is no miscellaneous equipment available to assign to the order, an Error Service Order Input (ESOI) notice is produced and an investigation process is initiated to review the order for accuracy. SWBT indicates that this error order resolution process had not been performed in a timely fashion.

[316] *See* SWBT VanDeBerghe Missouri I Reply Aff., paras. 5-12 (incorporated from CC Docket No. 01-88). *See* (continued….)

with respect to the missed due dates metric has not come into parity, we note that from May to August 2001, SWBT's overall provisioning performance improved significantly.[317] The percentage of missed due dates decreased from 8.1 percent to 2.1 percent during this period.[318] Moreover, in addition to the improved performance as measured by percentages, the actual number of missed dates decreased from 8 days in May to just 3 days in August.[319] We examine SWBT's performance for line-shared loops in the context of its overall performance for all loop types, and do not find that lack of parity on the missed due dates measurement warrants a finding that SWBT fails to meet checklist item 4, particularly in light of strong evidence that service to competitive LECs is improving.[320]

105. While not addressing specific instances of line-shared performance disparities, AT&T and WorldCom raise broader policy and legal issues regarding SWBT's line-sharing obligations.[321] These commenters argue that SWBT fails to offer competitive LECs the ability to engage in line sharing over fiber-fed loops and, on that basis, assert that we should find that SWBT has not complied with the checklist's line sharing requirements. We reject AT&T and WorldCom's allegations because although incumbent LECs are required to provide unbundled access to the entire loop, we have found that "the high frequency portion of the loop network element is limited by technology, *i.e.*, is only available on a copper facility."[322] To the extent that AT&T and WorldCom in fact seek to expand SWBT's obligations to unbundle packet switching, this issue is the subject of proceedings currently pending before the Commission.[323] Furthermore, competitive LECs may provide data services to SWBT voice customers served by Digital Loop

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also SWBT VanDeBerghe Missouri II Aff., para. 48.

317 *See* SWBT Dysart Missouri II Reply Aff. Tab D at D-132, Measurement 58-10 ("Percent SWBT Caused Missed Due Dates—DSL—Line Sharing").

318 *Id*.

319 *Id*.

320 *See* SWBT VanDeBerghe Missouri II Aff. paras. 54-55 (stating that loops purchased and processed via the "Yellow Zone Proposal" process are purchased on an "as is" basis, and would not result in a missed due date if conditioning is required, whereas orders processed outside this system could lead to an out-of-parity result compared to ASI orders, when conditioning is required).

321 AT&T Comments at 69-76; AT& T Declaration of Scott L. Finney at 17-24; WorldCom Comments at 10-12. *See* SWBT Reply Comments 54-59. *See also* AT&T Missouri I Comments at 69-72.

322 *See Line Sharing Reconsideration Order*, 16 FCC Rcd at 2107, para. 10; *see also* SWBT Missouri II App. A, Vol 1a, Reply Affidavit of Carol A. Chapman (SWBT Chapman Missouri II Aff.), paras. 6-20.

323 *See* AT&T Comments, Declaration of Scott L. Finney, at 25-31. *See Deployment of Wireline Services Offering Advanced Telecommunications Capability and Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket Nos. 98-147, 96-98, Order on Reconsideration and Second Further Notice of Proposed Rulemaking in CC Docket No. 98-147, and Fifth Further Notice of Proposed Rulemaking in CC Docket No. 96-98, FCC 00-297, 15 FCC Rcd 17,806 (Aug. 10, 2000) (*Collocation Order and NPRM*); *Line Sharing Reconsideration Order and NPRM*, 16 FCC Rcd 2101.

Carriers by either collocation in the remote terminal or, in the event that the Commission's four-part test for packet switching is met, access to unbundled packet switching.[324] Therefore, we disagree with AT&T and WorldCom that SWBT's policies and practices concerning the provisioning of line sharing, as explained to us in the instant proceeding, violate the Commission's unbundling rules.[325] As we have stated in other section 271 orders, new interpretative disputes concerning the precise content of an incumbent LEC's obligations to its competitors, disputes that our rules have not yet addressed and that do not involve *per se* violations of the Act or our rules, are not appropriately dealt with in the context of a section 271 proceeding.[326] Indeed, many of these allegations with respect to competitive access to fiber-fed loops are being addressed in pending proceedings before the Commission.[327] Accordingly, we decline to find that these allegations warrant a finding of checklist non-compliance.

106. *Line Splitting.* Based on the evidence in the record, we find that SWBT complies with its line-splitting obligations and that SWBT demonstrates it provides access to network elements necessary for competing carriers to provide line splitting.[328] We reject McLeod's assertions, submitted in the initial Missouri section 271 proceeding, that SWBT's M2A precludes competitive LECs from engaging in line splitting.[329] We find that the M2A contains the same terms for line splitting that the Commission previously approved in Texas, Oklahoma and

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[324] Incumbent LECs are not required to unbundle packet switching technology under section 251(c)(3) unless all four of the following conditions are present: (i) the incumbent LEC has deployed digital loop carrier systems; (ii) there are no spare copper loops capable of supporting xDSL services the requesting carrier seeks to offer; (iii) the incumbent LEC has not permitted a requesting carrier to deploy a DSLAM; and (iv) the incumbent LEC has deployed packet switching capability for its own use. *See UNE Remand Order*, 15 FCC Rcd 3696, 3838, para. 313; SWBT Reply Aff. at 56. We note that SWBT claims no Arkansas or Missouri competitive LECs have requested either remote terminal collocation or unbundled packet switching. *See* SWBT Chapman Missouri II Reply Aff., paras. 25, 29; SWBT Chapman Missouri II Aff., para. 120.

[325] AT&T Comments at 69-76; WorldCom Comments at 10-12. *See also* SWBT Reply Comments at 54-59.

[326] *See Verizon Massachusetts Order*, 16 FCC Rcd at 8993, para. 10; *SWBT Texas Order*, 15 FCC Rcd at 18366, para. 23.

[327] *See Collocation Order and NPRM*, 15 FCC Rcd 17,806, 17,856-62, paras. 118-133; *Line Sharing Reconsideration Order and NPRM*, 16 FCC Rcd at 2127-30, paras. 55-64. *See, e.g.*, Letter from Frank S. Simone, Director, Government Affairs, AT&T, to Magalie Roman Salas, Secretary, Federal Communications Commission, (Oct. 22, 2001) at 1-3 (arguing that end-to-end line sharing is technically feasible).

[328] *See Line Sharing Reconsideration* Order, 16 FCC Rcd at 2111, para. 20 n.36. *See also* Missouri Commission Comments at 8. SWBT's M2A provides for line splitting on an interim basis, in accordance with the Texas Commission decision in Arbitration Case No. 22315. *See* SWBT M2A, Optional Appendix to Attachment 25.

[329] McLeod Missouri I Comments at 32-35. *See also* Letter from Michael F. Dandino, Senior Public Counsel, Missouri Office of the Public Counsel, to Henry L. Thaggert, Attorney, Common Carrier Bureau, Federal Communications Commission, CC Docket No. 01-194 (filed Oct. 11, 2001); Missouri Office of the Public Counsel Comments at 2. The Missouri Public Counsel asserts that "SWBT has failed to answer a number of questions about DSL provisioning . . . including questions about line-splitting." Without further analysis or substantiation, we are unable to afford these allegations significant weight.

Kansas.[330] Accordingly, there is no basis for McLeod's claim. We also disagree with McLeod's claims that SWBT must provide splitters for voice competitive LECs that seek to engage in line splitting.[331] Unlike line sharing, which uses the high frequency portion of the loop as an unbundled network element, line splitting makes use of the full features and functionalities of the unbundled loop network element.[332] As we concluded in the *Line Sharing Reconsideration Order*, incumbent LECs have no obligation to provide splitters to competitive LECs that obtain voice services on the same line from a competing carrier.[333]

107. *High Capacity Loops.* Given the totality of the evidence, we find that SWBT's performance with respect to high capacity loops does not result in a finding of noncompliance for checklist item 4. SWBT's performance data for maintenance and repair functions indicates comparable performance for SWBT's retail customers and competitors in Missouri. Although SWBT's performance with respect to installation timeliness for high capacity loops has been poor in Missouri, SWBT met the parity standard for the first time in July 2001, after a four-month improvement trend.[334] In Arkansas, SWBT's mean time to repair DS-1 service for its Arkansas competitors has been consistently longer than those for its retail customers for high capacity loops.[335] However a closer examination of the underlying data indicates this disparity reflects a minimal time difference to restore service for Arkansas competitive LECs than for SWBT retail customers, which by itself we do not find sufficient to warrant a checklist failure.[336] Moreover,

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330 SWBT Chapman Missouri II Aff., paras. 107-119.

331 McLeod also claimed in its Missouri I comments that SWBT failed to submit evidence that SWBT provides line-splitting on a non-discriminatory basis. *See* McLeod Missouri I Comments at 34-35.

332 *See also SWBT Texas Order*, 15 FCC Rcd at 18516-517, paras. 327-28 (concluding that "the *UNE Remand Order* cannot fairly be read to impose on incumbent LECs an obligation to provide access to their splitters"); *see also Line Sharing Order*, 14 FCC Rcd at 20940, para. 76.

333 *Line Sharing Reconsideration Order*, 16 FCC Rcd at 2109-110.

334 In fact, with respect to DS-1 provisioning quality and maintenance in Missouri, SWBT missed two months in a four-month period for only one performance metric, 56-04.1 ("Percent Installed Within the Customer Requested Due Date DS-1 Loops (1-10)"). SWBT Dysart Missouri II Reply Aff. Tab D at D-124, Measurement 56-04.1 ("Percent UNEs Installations Completed Within the Customer Requested Due Dates"). During the 4-month period from April to July 2001, SWBT's 3-day installation rate of DS-1 loops was worse for competitors in May and June, than for its own retail operation. SWBT achieved better-than-parity results in July. We cannot conclude, however, that poor performance in two out of four months for this one performance metric indicates competitively significant disparity in treatment, particularly in light of the improvement trend.

335 *See* SWBT Dysart Arkansas Reply Aff. Tab C at C-181, Measurement 67-05 ("DS-1 Mean Time to Restore—Dispatch, with test access, hours"). During the four month period from April to July 2001, SWBT's repair time for DS-1 loops in Arkansas was worse for competitors than for SWBT's retail operation. However, we note that the volumes for each of these months were low (17 orders in April; 23 orders in May; 17 orders in June; and 31 orders in July). Any missed performance among such low volume orders would exaggerate the statistical disparity. *See* SWBT Dysart Missouri II Reply Aff. Tab C at C-181, Measurement 67-05 (Hours Mean Time to Restore-DS1 Loops—Dispatch).

336 During the relevant four month period, the time difference to restore service did not average more than 2 hours (continued….)

high capacity loops represent a small percentage of all loops ordered by competitors in Arkansas. Given the relatively low volume of orders for high capacity loops compared to all loop types in Arkansas, and the *de minimis* difference in performance on an isolated number of performance metrics overall, we do not find that SWBT's performance for high capacity loops warrants a finding of checklist noncompliance for all loop types in Arkansas or Missouri.

108. We reject NuVox's request, raised in the Missouri I proceeding, and incorporated herein by reference, that the Commission should examine SWBT's performance in provisioning DS1 loops in the state's two largest "markets," Kansas City and St. Louis.[337] The relevant performance metrics, in this case, are based on statewide performance. Where available, we have generally found performance metrics established by states to provide valuable evidence regarding BOC compliance. Indeed, a performance metric based upon statewide provisioning may provide a more accurate picture of BOC compliance with section 271. Furthermore, as we have noted, the data for loop installation indicates a positive improving trend. NuVox also claims that SWBT has been unresponsive to its requests to address in a coordinated fashion SWBT's installation of DS1 circuits."[338] Notwithstanding SWBT's improved performance over recent months, NuVox may seek relief through a Commission enforcement action if its claims of discriminatory treatment can be substantiated.[339]

109. We reject El Paso-PACWEST's claim that SWBT failed to provision DS1 loops in a timely fashion.[340] Similarly, Navigator's vague allegations that "SWBT has shown repeated inability to correctly install complex services such as a UNE T1" are not substantiated in the record.[341] Our review of the performance measures indicates that SWBT has achieved parity in all four of the relevant months in Missouri and has achieved a high level of performance in Arkansas for PM 58-06 ("Percent SWBT Missed Due Dates—DS1 Loop with Test Access").[342] Moreover, according to SWBT, it has not completed a single DS1 loop provisioning order for Navigator within the last twelve months in Arkansas or Missouri.[343] Therefore absent substantiation, we reject its claim that SWBT has been unable to install UNE T1s correctly.

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longer for Arkansas competitive LECs than for SWBT retail customers. *See* SWBT Dysart Arkansas Reply Aff. Tab C at C-181, Measurement 67-05 ("DS-1 Mean Time to Restore—Dispatch, with test access, hours").

337 NuVox Missouri I Comments at 11-13.

338 *Id.* at 14.

339 *Id.* at 13-15.

340 El Paso-PACWEST Comments at 11.

341 We assume that Navigator uses the term T-1 and DS-1 interchangeably. Navigator Comments at 10, 12.

342 SWBT Dysart Arkansas and Missouri II Reply Affs. Tabs C and D at 131, Measurement 58-06 ("Percent SWBT Caused Missed Due Dates—DS1").

343 SWBT Missouri II Dysart Reply Aff., paras. 32-33.

110. *Other Issues*. We find that McLeod's assertions that SWBT has systematically disconnected McLeod IDSL customers without notice are, to the extent they may be valid, evidence of an isolated incident and not evidence of widespread systematic failure to provide loops in compliance with the checklist requirement. Thus, such assertions do not require a finding of noncompliance.[344] McLeod asserts that SBC unilaterally disconnected McLeod's customers without notice on July 18, 2001 and began rejecting new orders. Service was not restored until August 7, 2001.[345] According to McLeod, 66 percent of its IDSL customers who were disconnected declined to reestablish DSL service with McLeod.[346] SWBT states that "there is no merit" to McLeod's assertion that SWBT has systematically disconnected IDSL service to McLeod customers, though it admits to disconnecting "a small number" of McLeod's IDSL customers after learning that McLeod placed these orders before obtaining authority from the Missouri Commission to provide IDSL service.[347] According to SWBT, McLeod has acknowledged that it did not have the Missouri Commission's approval necessary to purchase UNEs for IDSL service.[348] Although SWBT states that it properly disconnected this unauthorized service, it has been unable to verify whether it properly notified McLeod before doing so, and that SWBT has made repeated requests to reconcile its internal records with McLeod.[349] We believe that this dispute appears to be an isolated incident that would be best addressed in the context of a more fact-specific adjudicatory proceeding. Furthermore, we note that McLeod may file a complaint with the Missouri Commission to address the allegations that it should have received notice prior to the disconnection of IDSL customers.

3. Checklist Item 6 – Switching

111. Section 271(c)(2)(B)(vi) of the 1996 Act requires a BOC to provide "[l]ocal switching unbundled from transport, local loop transmission, or other services."[350] Based on the evidence in the record, we conclude that SWBT demonstrates that it complies with checklist item

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344 According to McLeod, SBC Missouri and McLeod entered an amendment to the Interconnection Agreement that permitted McLeod to order IDSL services for resale in Missouri. McLeod Comments at 17; McLeod Comments, Affidavit of Diane Bowers, paras. 5-6 (McLeod Bowers Aff.).

345 McLeod Comments at 18.

346 *Id.* at 18.

347 SWBT Reply at 60; SWBT Hughes Reply Aff., paras. 49-53.

348 SWBT Hughes Reply Aff., para. 51, Att. B (Letter of David R. Conn, Attorney, McLeod Telecommunications Services, Inc., to Dale Hardy Roberts, Judge, Missouri Public Service Commission (June 29, 2001)).

349 SWBT Reply at 60-61; SWBT Reply, Tab 6, Vol. 2, Aff. of Michael E. Flynn, Beth Lawson, and Brian D. Noland, (SWBT Reply Flynn/Lawson/Noland Aff.), paras. 33-36.

350 47 U.S.C. § 271(c)(2)(B)(vi); *see also SWBT Texas Order*, 15 FCC Rcd at 18520, para. 336; *Second BellSouth Louisiana Order*, 13 FCC Rcd at 20722; *SWBT Kansas/Oklahoma Order*, 16 FCC Rcd at 6361, para. 241.

6.[351] We also note that the Arkansas Commission and the Missouri Commission found that SWBT satisfies this checklist item.[352]

112. We reject Sage's argument that the Commission should deny SWBT's section 271 application for Missouri because SWBT refuses to allow Sage access to line class codes needed to provide "one-way extended area calling scopes" in Missouri -- such as SWBT's Local Plus service.[353] We note that SWBT was ordered in Texas to provide the line class codes to Sage as a result of a post-interconnection dispute.[354] In addition, Sage states that SWBT voluntarily included contract language and rates that would enable any competitive LEC to obtain access to the line class codes for the provision of one-way extended area service in Arkansas and Kansas.[355] Furthermore, the Oklahoma Commission has recently ordered SWBT to provide line class codes to Sage.[356]

113. SWBT responds that competitive LECs "may acquire the capability to offer a Local Plus-type service *through UNEs*, or may resell Local Plus, at the retail rate less the wholesale discount."[357] Thus, it appears that SWBT does not actually refuse to provide line class codes on a UNE basis in Missouri and thereby complies with this aspect of its unbundled switching obligation established in the *UNE Remand Order*.[358] Because there appears to be a factual dispute with regard to Sage's allegation and it has not been fully addressed by the Missouri

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[351] SWBT Application at 132-134; SWBT Deere Arkansas Aff., paras. 147-188; SWBT Deere Missouri II Aff., paras 147-188; SWBT J.G. Smith Arkansas Aff. Attach. A; SWBT Sparks Arkansas Aff., paras. 117; SWBT Sparks Missouri II Aff., paras. 120; SWBT Tebeau Missouri II Aff. Attach. A; SWBT Reply at 59-60; SWBT Hughes Reply Aff., para. 44; SWBT Sparks Reply Aff., paras. 11-16.

[352] Arkansas Commission Comments, Second Consultation Report at 6; Missouri Commission Comments at 19.

[353] Sage Comments at 2. There are two extended area calling plans in Missouri: the Metropolitan Area Calling Plan (MCA) and Local Plus. We understand Sage's use of the term "one-way extended area calling scopes" to refer to services that are comparable to SWBT's Local Plus service offered in Missouri.

[354] *Id.*

[355] *Id.*; Sage Reply at 2.

[356] Petition of Sage Telecom, Inc. for Expedited Compulsory Arbitration to Establish an Interconnection Agreement with Southwestern Bell Telephone Company (Cause No. PUD 200100294) and Application of Sage Telecom. Inc. for Approval of an Interconnection Agreement Pursuant to § 252(e) of the Telecommunications Act of 1996 (Cause No. PUD 200100482), Order on Arbitrated Issues, Oklahoma Commission Order No. 457316 (2001).

[357] SWBT Sparks Reply Aff., para.12 (*emphasis added*).

[358] *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, FCC 99-238, 15 FCC Rcd 3696, 3805 at para 244 n.475 (1999) (holding that the local switching element includes customized routing functions) (*UNE Remand Order*).

Commission, we do not believe we have a sufficient basis for finding that this concern warrants a finding of noncompliance.

4. Checklist Item 13 – Reciprocal Compensation

114. Section 271(c)(2)(B)(xiii) of the Act requires that a BOC enter into "[r]eciprocal compensation arrangements in accordance with the requirements of section 252(d)(2)."[359] In turn, section 252(d)(2)(A) specifies when a state commission may consider the terms and conditions for reciprocal compensation to be just and reasonable.[360]

115. Based on the evidence in the record, we conclude that SWBT demonstrates that it provides reciprocal compensation as required by checklist item 13. We find that e.spire's allegations that SWBT illegally refused to allow e.spire to opt into state-commission-approved interconnection agreements in Missouri and Arkansas do not cause SWBT to fail this checklist item. In Missouri, e.spire contends that SWBT deliberately delayed a response to e.spire's May 2, 2001 opt-in request until after the May 15, 2001 publication date of the *Reciprocal Compensation Order*[361] to afford e.spire less favorable terms. In Arkansas, e.spire attempted to opt into an agreement between SWBT and AT&T, but was informed by SWBT that the AT&T interconnection agreement was no longer available for adoption.[362] We find that both of these allegations are best resolved before the appropriate state commission. We note that while we have an independent obligation to ensure compliance with the checklist, section 271 does not compel us to preempt the orderly disposition of intercarrier disputes by state commissions.[363] Here, e.spire presents no evidence that it has pursued its claims before the appropriate state commission. We have confidence in both the Missouri and Arkansas Commissions' ability to resolve these allegations consistent with our rules.

C. Remaining Checklist Items (3, 5 and 7-12)

116. In addition to showing that it is in compliance with the requirements discussed above, an applicant under section 271 must demonstrate that it complies with checklist item 3 (access to poles, ducts, and conduits),[364] item 5 (transport),[365] item 7 (911/E911 access and

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[359] 47 U.S.C. § 271(c)(2)(B)(xiii).

[360] 47 U.S.C. § 252(d)(2)(A).

[361] *Intercarrier Compensation for ISP-Bound Traffic*, Order on Remand and Report and Order, CC Docket No. 96-98, paras. 82-83 (rel. Apr. 27, 2001) (Reciprocal Compensation Order).

[362] e.spire Comments at 7.

[363] *SWBT Texas Order*, 15 FCC Rcd at 18541, para. 383.

[364] 47 U.S.C. § 271(c)(2)(B)(iii).

[365] *Id.* § 271(c)(2)(B)(v). El Paso-PACWEST's generalized concerns about whether SWBT makes available dark fiber to competitive LECs on a nondiscriminatory basis do not warrant a finding of noncompliance with checklist (continued….)

directory assistance/operator services),[366] item 8 (white page directory listings),[367] item 9 (numbering administration),[368] item 10 (databases and associated signaling),[369] item 11 (number portability),[370] and item 12 (local dialing parity).[371] Based on the evidence in the record, we conclude that SWBT demonstrates that it is in compliance with checklist items 3, 5, 7, 8, 9, 10, 11, and 12 in Arkansas and Missouri.[372] We also note that the Arkansas Commission and the Missouri Commission concluded that SWBT complies with the requirements of each of these checklist items.[373]

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item 5. El Paso-PACWEST Reply at 24 (suggesting that SWBT may be transferring its available dark fiber to its affiliates "thereby limiting the amount that is available to CLECs on an unbundled basis"). We note, however, that the Commission's rules state that where a BOC transfers to an affiliate entity ownership of network elements that must be provided on an unbundled basis pursuant to section 251(c)(3), that affiliate entity is considered an "assign" of the BOC with respect to that network element. 47 C.F.R. § 53.207. Accordingly, in the absence of any specific allegations to the contrary, we rely on SWBT's affidavit evidence that it provides nondiscriminatory access to dark fiber as an unbundled network element to provide dedicated transport. *See* SWBT Application at 131; SWBT Deere Arkansas Aff., para. 135; SWBT Deere Missouri Aff., para. 135.

[366] *Id.* § 271(c)(2)(B)(vii).

[367] *Id.* § 271(c)(2)(B)(viii).

[368] *Id.* § 271(c)(2)(B)(ix).

[369] *Id.* § 271(c)(2)(B)(x).

[370] *Id.* § 271(c)(2)(B)(xi).

[371] *Id.* § 271(c)(2)(B)(xii).

[372] *See* SWBT Application at 103-106 (checklist item 3), 130-132 (checklist item 5), 134-136 (checklist item 7), 137 (checklist item 8), 137-138 (checklist item 9), 138 (checklist item 10), 139 (checklist item 11) and 139-140 (checklist item 12); SWBT Caraway Arkansas Aff. at paras. 3-36, SWBT Caraway Missouri II Aff. at paras. 3-36 (checklist item 3); SWBT Deere Arkansas Aff. at paras. 126-146, SWBT Deere Missouri II Aff. at paras. 126-146, SWBT Sparks Arkansas Aff. at paras. 112-116, SWBT Sparks Missouri II Aff. at paras. 115-119 (checklist item 5); SWBT Deere Arkansas Aff. at paras. 189-210, SWBT Deere Missouri II Aff. at paras. 189-231, SWBT Dysart Arkansas Aff. at paras. 124-128, SWBT Dysart Missouri II Aff. at paras. 135-137, SWBT Rogers Arkansas Aff. at paras. 8-50, SWBT Rogers Missouri II Aff. at paras. 8-50, SWBT Yohe Missouri II Aff. at paras. 56-58 (checklist item 7); SWBT Rogers Arkansas Aff. at paras. 3-7, 51-69, SWBT Rogers Missouri II Aff. at paras. 3-7, 51-69 (checklist item 8); SWBT Mondon Arkansas Number Administration Aff. at paras. 3-20, SWBT Mondon Missouri II Number Administration Aff. at paras. 3-19 (checklist item 9); SWBT Deere Arkansas Aff. at paras. 211-265, SWBT Deere Missouri II Aff. at paras. 232-286 (checklist item 10); SWBT Dysart Arkansas Aff. at paras. 130-133, SWBT Dysart Missouri II Aff. at paras. 139-140, SWBT Mondon Arkansas Number Portability Aff. at paras. 3-29, SWBT Mondon Missouri II Number Portability Aff. at paras. 3-29 (checklist item 11); and SWBT Deere Arkansas Aff. at paras. 276-280, SWBT Deere Missouri II Aff. at paras. 297-301 (checklist item 12).

[373] *See* Arkansas Commission Comments, Second Consultation Report at 6 (checklist item 3), 6 (checklist item 5), 7 (checklist item7), 6 (checklist item 8), 6-7 (checklist item 9), 7 (checklist item 10), 7 (checklist item 11), and 7 (checklist item 12); *see also* Missouri Commission Comments at 14-15 (checklist item 3), 18-19 (checklist item 5), 20 (checklist item 7), 21 (checklist item 8), 21 (checklist item 9), 22 (checklist item 10), 22-23 (checklist item 11), and 23 (checklist item 12).

IV. COMPLIANCE WITH SECTION 271(C)(1)(A)

117. In order for the Commission to approve a BOC's application to provide in-region, interLATA services, a BOC must first demonstrate that it satisfies the requirements of either section 271(c)(1)(A) (Track A) or section 271(c)(1)(B) (Track B).[374] To qualify for Track A, a BOC must have interconnection agreements with one or more competing providers of "telephone exchange service … to residential and business subscribers."[375]

118. We conclude that SWBT demonstrates that it satisfies the requirements of Track A in Arkansas based on the interconnection agreement it has implemented with ALLTEL. In this proceeding, SWBT maintains that it satisfies Track A in Arkansas because ALLTEL provides facilities-based local phone service to a substantial number of residential and business subscribers in Arkansas.[376] Although commenters dispute the exact number of residential customers served by carriers in Arkansas,[377] we conclude that a sufficient number of residential customers are being served by ALLTEL through the use of their own facilities. SWBT has shown that ALLTEL serves more than a *de minimis* number of customers to qualify ALLTEL as a "competing provider"—several thousand according to the Arkansas Commission[378]—and no commenter has challenged SWBT's claim regarding the number of customers served by ALLTEL.[379]

119. Several commenters contend that SWBT's agreement with ALLTEL does not satisfy Track A because ALLTEL does not currently market its facilities-based service to new residential customers.[380] We disagree with these commenters that a competing provider must necessarily be accepting new customers in order to qualify for Track A, particularly given the large volume of customers served by ALLTEL. Moreover, we believe that this case is clearly

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374 47 U.S.C. § 271(d)(3)(A).

375 *Id.*

376 SWBT Application at 9-10.

377 Sprint Comments at 5; WorldCom Reply at 10. Sprint claims that using E911 and ported numbers overestimates the number of actual competitive LEC residential lines. Sprint Comments at 5-6, n.9. However, those comments are directed at SWBT's calculation of the number of residential customers served by WorldCom, Logix and McCleod, a total that is small.

378 Arkansas Commission Comments, Consultation Report at 5.

379 SWBT Application at 10; SWBT Reply App., Reply Appendix, Vol. 2, Tab 14, Affidavit of J. Gary Smith and David R. Tebeau at 3, para 5 (SWBT Smith/Tebeau Reply Aff.). WorldCom claims that "there is at most a *de minimis* level of facilities-based residential service" in Arkansas, but provides no evidence regarding the number of ALLTEL residential access lines. WorldCom Reply at 11.

380 AT& T Comments at pp. 82-83; Sprint Comments at 3-5. According to the Arkansas Commission, ALLTEL discontinued offering residential service in Arkansas in November 2000 to new customers. The Arkansas Commission deferred a judgement as to whether SWBT satisfied Track A requirements. *See* Arkansas Commission Comments, Second Consultation Report at 6.

distinct from the facts presented in the *First SBWT Oklahoma Order*, in which a competing carrier's refusal to accept new customers was relevant because it had not yet accepted any paying residential customers.[381] We believe that it would be unfair and inconsistent with the statute to foreclose a BOC's application under section 271 based on the marketing decision of a relatively established competitive provider. To accept commenters' argument that a carrier not accepting customers could never qualify as a "competing provider" under Track A would produce absurd results. Under this theory, a competitive LEC that already served a million residential subscribers via UNE-P would not qualify as a "competing provider" under Track A if it decided not to pursue any new customers. We believe that this cannot be what Congress intended for Track A.

120. We note that SWBT has also signed interconnection agreements with other competitive LECs that, according to SWBT, currently provide residential service in Arkansas.[382] Although those competitive LECs provide service to a very limited number of customers at this point and we do not rely on their presence for purposes of Track A,[383] their presence gives us further comfort that residential customers currently have alternatives to SWBT service. Also, the Arkansas Commission opined that the lower UNE prices SWBT recently implemented in Arkansas might encourage competitive LECs to become more active in the residential market.[384]

121. With respect to Missouri, we conclude that SWBT demonstrates that it satisfies the requirements of Track A based on the interconnection agreements it has implemented with AT&T and WorldCom.[385] The record demonstrates that AT&T provides facilities-based telephone exchange service to both residential and business subscribers through its own cable television facilities.[386] The record also shows that WorldCom provides service to residential and

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[381] *Application by SBC Communications Inc., Pursuant to Section 271 of the Communications Act of 1934, as amended, To Provide In-Region, InterLATA Services in Oklahoma*, CC Docket No. 97-121, Memorandum Opinion and Order, FCC 97-228, 12 FCC Rcd 8685, 8694-95, para. 14 (1997) (*First SWBT Oklahoma Order).*

[382] SWBT Application Arkansas App. A, Vol.6, Tab 21, Affidavit of J. Gary Smith, Attachment E, Part C, Tab 21, (*citing confidential portion)* at E-1, Table A (SWBT J.G. Smith Arkansas Aff.); SWBT Reply Brief at 9.

[383] SWBT J.G. Smith Arkansas Aff., Attachment E, Part C, Tab 21, (*citing confidential portion*) at E-1, Table A.

[384] Arkansas Commission Comments, Second Consultation Report at 6.

[385] SWBT Application at 14-15. SWBT also relies on Birch, Ionix Communications, and Global Crossing/Frontier to support its Track A showing. Given our reliance on SWBT's interconnection agreements with AT&T and WorldCom, we need not consider whether these other carriers qualify as competing providers under Track A.

[386] *Id.*

business customers almost exclusively over its own facilities.[387] No commenter has challenged SWBT's assertion that it qualifies for Track A in Missouri.[388]

V. SECTION 272 COMPLIANCE

122. Section 271(d)(3)(B) requires that the Commission shall not approve a BOC's application to provide interLATA services unless the BOC demonstrates that the "requested authorization will be carried out in accordance with the requirements of section 272."[389] The Commission set standards for compliance with section 272 in the *Accounting Safeguards Order* and the *Non-Accounting Safeguards Order*.[390] Together, these safeguards discourage, and facilitate the detection of, improper cost allocation and cross-subsidization between the BOC and its section 272 affiliate. In addition, these safeguards ensure that BOCs do not discriminate in favor of their section 272 affiliates.[391] As we stated in the *Ameritech Michigan Order*, compliance with section 272 is "of crucial importance" because the structural, transactional, and nondiscrimination safeguards of section 272 seek to ensure that BOCs compete on a level playing field.

123. Based on the record, we conclude that SWBT has demonstrated that it complies with the requirements of section 272. Significantly, SWBT provides evidence that it maintains the same structural separation and nondiscrimination safeguards in Arkansas and Missouri, as it does in Kansas, Oklahoma, and Texas.[392] We have previously found that SWBT met its burden of

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387 *Id.*

388 The Missouri Commission did an independent assessment of the number of competitive LEC access lines which was consistent with SWBT's estimates. *See* Missouri Commission Missouri I Comments, Attach. 1 at 19-20, citing William Voight's independent competitive level investigation.

389 47 U.S.C. § 271(d)(3)(B).

390 *See Implementation of the Accounting Safeguards Under the Telecommunications Act of 1996*, CC Docket No. 96-150, Report and Order, 11 FCC Rcd 17539 (1996) (*Accounting Safeguards Order*), Second Order On Reconsideration, FCC 00-9 (rel. Jan. 18, 2000); *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended*, CC Docket No. 96-149, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 21905 (1996) (*Non-Accounting Safeguards Order*); First Order on Reconsideration, 12 FCC Rcd 2297 (1997) (*First Order on Reconsideration*), Second Order on Reconsideration, 12 FCC Rcd 8653 (1997) (*Second Order on Reconsideration*), *aff'd sub nom. Bell Atlantic Telephone Companies v. FCC*, 131 F.3d 1044 (D.C. Cir. 1997), Third Order on Reconsideration, FCC 99-242 (rel. Oct. 4, 1999) (*Third Order on Reconsideration*).

391 *Non-Accounting Safeguards Order*, 11 FCC Rcd at 21914; *Accounting Safeguards Order*, 11 FCC Rcd at 17550; *Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended*, CC Docket No. 97-137, 12 FCC Rcd 20543, 20725 (1997) (*Ameritech Michigan Order*).

392 SWBT Application at 161-162.

proving compliance with section 272 in Kansas, Oklahoma, and Texas.[393] Moreover, no commenter has challenged SWBT's showing that it complies with section 272.

VI. PUBLIC INTEREST ANALYSIS

124. Apart from determining whether a BOC satisfies the competitive checklist and will comply with section 272, Congress directed the Commission to assess whether the requested authorization would be consistent with the public interest, convenience, and necessity.[394] At the same time, section 271(d)(4) of the Act states in full that "[t]he Commission may not, by rule or otherwise, limit or extend the terms used in the competitive checklist set forth in subsection (c)(2)(B)." Accordingly, although the Commission must make a separate determination that approval of a section 271 application is "consistent with the public interest, convenience, and necessity," it may neither limit or extend the terms of the competitive checklist of section 271(c)(2)(B). Thus, the Commission views the public interest requirement as an opportunity to review the circumstances presented by the application to ensure that no other relevant factors exist that would frustrate the congressional intent that markets be open, as required by the competitive checklist, and that entry will therefore serve the public interest as Congress expected. We find that compliance with the competitive checklist is, itself, a strong indicator that long distance entry is consistent with the public interest. While no one factor is dispositive in this analysis, the overriding goal is to ensure that nothing undermines the conclusion, based on the Commission's analysis of checklist compliance, that markets are open to competition. In this respect, we concur with those commenters that emphasize the appropriateness and value of public interest review.[395]

125. We conclude that approval of this joint application is consistent with the public interest. From our extensive review of the competitive checklist, which embodies the critical elements of market entry under the Act, we find that barriers to entry in the local exchange markets in Arkansas and Missouri have been removed and the local exchange markets in each state today are open to competition. We further find that the record confirms our view, as noted in prior section 271 orders, that BOC entry into the long distance market will benefit consumers and competition if the relevant local exchange market is open to competition consistent with the

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[393] *SWBT Kansas/Oklahoma* 16 FCC Rcd at 6370, para. 257; *SWBT Texas Order*, 15 FCC Rcd at 18549, para. 396.

[394] 47 U.S.C. § 271(d)(3)(C). We note that SWBT asserts that its entry into the interLATA market should be presumptively in the public interest and that the burden of proof should be on those who assert otherwise. SWBT Application at 145, n.101. It is clear that the Act requires a showing that entry of the BOC into the interLATA market is in the public interest, convenience and necessity, and the burden of proof that a BOC meets the 271 requirements lies with the applicant. *See* Appendix D at 5.

[395] AT&T Comments at 87; El Paso-PACWEST Comments at 2-14; McLeod Comments at 21-23; El Paso-PACWEST Reply at 1-3.

competitive checklist.[396] As discussed below, we conclude that approval of this joint application is consistent with the public interest.[397]

A. Competition in Local Exchange and Long Distance Markets

126. We find that the record confirms our view, as noted in prior section 271 orders, that BOC entry into the long distance market will benefit consumers and competition if the relevant local exchange market is open to competition consistent with the competitive checklist.[398] We disagree with those commenters who argue that the public interest would be disserved by granting SWBT's joint application for Arkansas and Missouri. In particular, several commenters contend that SWBT's application is premature and raise concerns about low levels of rural and residential competition.[399] Given an affirmative showing that a market is open and the competitive checklist has been satisfied, low customer volumes in and of themselves do not undermine that showing.[400] The Arkansas Commission is cognizant of the levels of residential competition in Arkansas and believes that recent reductions in UNE rates may result in additional residential services being offered through leased network elements.[401] We have repeatedly held that factors beyond a BOC's control, such as individual competitive carrier entry strategies, for instance, might explain a low residential customer base. We note that Congress specifically declined to adopt a market share or other similar test for BOC entry into long distance, and we do not establish one here.[402]

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396 *See SWBT Texas Order*, 15 FCC Rcd at 18558-59, para. 419.

397 We emphasize that grant of this application *does not* reflect any conclusion that SWBT's conduct in the individual instances cites by commenters is nondiscriminatory and complies with the company's obligations under the Communications Act.

398 *See SWBT Texas Order*, 15 FCC Rcd at 18558-59, para. 419.

399 Department of Justice Evaluation at 5; AT&T Missouri I Comments at 54-57; AT&T Comments at 91; City Utilities of Springfield Comments at 7; Navigator Comments at 2-3.

400 *SWBT Kansas/Oklahoma Order*, 16 FCC Rcd at 6375-9, para. 268. Other commenters contend that various barriers to entry in Arkansas and/or Missouri exist or that the market is not irreversibly open. Department of Justice Evaluation at 5; AT&T Missouri I Comments at 59-64; AT&T Comments at 97; City Utilities of Springfield Comments at 1; El Paso-PACWEST Comments at 15; McLeod Missouri I Comments at 58-63; McLeod Comments at 25-26; Missouri Office of Public Counsel Comments at 9. As discussed above, we find that SWBT has satisfied the competitive checklist and, thus, that barriers to local entry in the local exchange markets in Arkansas and Missouri have been removed.

401 Arkansas Commission Consultation Report at 25; El Paso-PACWEST Comments at 7; McLeod Comments at 23 with respect to Arkansas. Some commenters contend that the Arkansas and Missouri Commissions did not fully investigate the public interest standard. While we carefully consider the record developed by state commissions in their review of a BOC's application, it is ultimately the FCC's role to determine whether the factual record supports the conclusion that particular requirements of section 271 have been met.

402 *See Ameritech Michigan Order*, 12 FCC Rcd at 20585, para. 77.

B. Assurance of Future Compliance

127. As set forth below, we find that SWBT's performance remedy plans for Arkansas and Missouri provide additional assurance that the local market will remain open after SWBT receives section 271 authorization. The Commission previously has explained that one factor it may consider as part of its public interest analysis is whether a BOC would continue to satisfy the requirements of section 271 after entering the long distance market.[403] Accordingly, the Commission has strongly encouraged state commissions to conduct performance monitoring and post-entry enforcement.[404] Although it is not a requirement for section 271 authority that a BOC be subject to such performance mechanisms, the Commission has stated that the fact that a BOC will be subject to a satisfactory performance monitoring and enforcement mechanism would constitute probative evidence that the BOC will continue to meet its section 271 obligations and that its entry would be consistent with the public interest.[405]

1. Performance Remedy Plan

128. SWBT's Performance Remedy Plan is part of the A2A in Arkansas and M2A in Missouri and is available to competing LECs through those agreements.[406] Each plan is nearly identical to the Texas, Kansas and Oklahoma Performance Remedy Plans, which are essentially modified versions of the plan that we reviewed in the Texas section 271 proceedings.[407] That original plan has undergone review and modification through the ongoing Texas Commission and industry process under Texas Commission authority.[408] Under the plans, SWBT collects and reports data on a wide range of performance areas, according to set definitions and business rules. While we do not require that one state commission adopt or use another state's plan, we recognize the efficiency gained by all involved state commissions, SWBT and competing carriers from working together to develop and monitor common performance measures and similar remedy plans.

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403 *See Second BellSouth Louisiana Order*, 13 FCC Rcd at 20806; *Ameritech Michigan Order*, 12 FCC Rcd at 20747.

404 These mechanisms are generally administered by state commissions and derive from authority the states have under state law or under the federal Act. As such, these mechanisms can serve as critical complements to the Commission's authority to preserve checklist compliance pursuant to section 271(d)(6). Moreover, in this instance, we find that the collaborative process by which these mechanisms were developed in Texas and then adapted and modified in both Arkansas and Missouri for particular circumstances in each of these states, has itself helped to bring SWBT into checklist compliance.

405 *See Second BellSouth Louisiana Order*, 13 FCC Rcd at 20806.

406 The Missouri Commission approved the M2A on March 15, 2001 (*see* Dysart Missouri II Aff. at para. 6) and the Arkansas Commission approved the A2A on June 18, 2001 (*see* Arkansas Commission Consultation Report, Order No. 17).

407 *See SWBT Texas Order*, 15 FCC Rcd at 18563-64, para. 427.

408 Dysart Arkansas Aff., paras. 16-19; Dysart Missouri II Aff., paras. 16-20.

129. While the current Texas plan forms the basis for the Arkansas and Missouri plans, each plan is modified in certain aspects to address particular situations and conditions in Arkansas and Missouri. For example, as explained below, the Arkansas and Missouri plans differ from the current Texas plan in certain details in mathematical formulas for some calculations, the level of penalty caps and references to state-specific statutes and requirements.[409] We conclude that the state-specific modifications appear reasonable and do not detract from the overall effectiveness of the plans.

130. We have examined certain key aspects of these plans to determine whether the plans fall within a zone of reasonableness and are likely to provide incentives that are sufficient to foster post-entry checklist compliance. Plans may vary in their strengths and weaknesses, and there is no one way to demonstrate assurance.[410] In our *SWBT Texas Order*, for example, we predicted that the enforcement mechanisms developed in Texas would be effective in practice.[411] Since then, the Arkansas and Missouri Commissions adopted variants of the current Texas plan whose measures are designed to prevent backsliding in wholesale performance once SWBT is granted interLATA authority. We conclude that the Arkansas and Missouri Commissions adopted in the A2A and M2A, respectively, performance remedy plans that would discourage anti-competitive behavior by setting damages and penalties at a level above the simple "cost of doing business." As in prior section 271 orders, our conclusions are based on a review of several key elements in any performance remedy plan: total liability at risk in the plan; performance measurement and standards definitions; structure of the plan; self-executing nature of remedies in the plan; data validation and audit procedures in the plan; and accounting requirements.[412] We discuss only those elements about which commenters have raised substantial issues in the record before us.

131. We disagree with commenters that submit that the Arkansas Commission may have insufficient legal authority to effectively enforce the plan and ensure that SWBT will continue to provide nondiscriminatory service to competing carriers.[413] Based on the Arkansas Commission's precedent, we conclude that the Arkansas Commission has demonstrated sufficient authority to

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[409] SWBT Application at 159; SWBT Dysart Arkansas Aff., App. A, Tab 7, Subtab O; SWBT Dysart Missouri II Aff., App. A, Tab 6, Subtab O. The first-year penalty cap for each state represents the same percentage of carrier revenue derived from the state as approved in the *SWBT Texas Order* and again in the *SWBT Kansas/Oklahoma Order*. This amount for Arkansas is $48 million and for Missouri is $98 million.

[410] *See Ameritech Michigan* Order, 12 FCC Rcd at 20741-51, para. 393.

[411] *See SWBT Texas Order*, 15 FCC Rcd at 18560, para. 421; *also see Bell Atlantic New York Order*, 15 FCC Rcd at 4166-67, para. 433.

[412] *See, e.g., Verizon Massachusetts Order*, 16 FCC Rcd at 9121-25, paras. 240-247; *SWBT Kansas/Oklahoma Order*, 16 FCC Rcd at 6377-81, paras. 273-278.

[413] Department of Justice Evaluation at 12-13; Sprint Comments at 12-15; AT&T Reply at 12-14. These commenters note that the Arkansas Commission encouraged this Commission to adopt anti-backsliding provisions to ensure future performance. Arkansas Commission Second Report at 11-12.

implement and enforce the plan in Arkansas, assuring that local markets will remain open after SWBT receives section 271 authorization.[414] We note that the Arkansas Commission has repeatedly held that it has jurisdiction to adjudicate complaints against SWBT for alleged violations of interconnection agreements.[415] Furthermore, we note that if the Arkansas Commission were to decline to exercise jurisdiction, this Commission may have the authority to act in its place pursuant to section 252(e). The Commission has previously held that failure of a state commission to carry out its responsibilities, including the resolution of disputes arising from the interpretation and enforcement of interconnection agreements, may result in this Commission's preemption of state commission jurisdiction under section 252(e)(5).[416] We also make clear that the performance remedy plan is not the only means of ensuring that SWBT continues to provide nondiscriminatory service to competing carriers. For example, this Commission may address any future failure to comply with the conditions of section 271, pursuant to section 271(d)(6).[417]

132. We also reject proposals from McLeod and Z-TEL to modify specific points in the Texas metrics and performance remedy plan calculations which they contend would improve the plan and thus the Arkansas and Missouri plans derived from it.[418] We believe that revisions of the business rules and calculation methodologies are appropriately handled by the individual state commissions and may be proposed by any participant, including McLeod and Z-TEL at the state's regular six-month review. This process of periodic state review has given us confidence in the effectiveness of performance remedy plans in the past.

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[414] SWBT Application at 160-161. The Arkansas Commission adopted the performance remedy plan when it approved the A2A on June 18, 2001.

[415] *See Connect Communications Corp. v. Southwestern Bell Tel. Co.,* Docket No. 98-167 (where the Arkansas Commission found that it had jurisdiction over Connect's complaint regarding the terms of the Interconnection Agreement approved by the State Commission) (Dec. 31, 1998); *American Communications Servs. of Little Rock, Inc. v. Southwestern Bell Tel. Co.*, Docket No. 00-071-C (where the Arkansas Commission asserted jurisdiction under state law to adjudicate complaint alleging violation of an interconnection agreement) (June 12, 2000).

[416] *See Starpower Communications, LLC Petition for Preemption of Jurisdiction of the Virginia State Corporation Commission Pursuant to Section 252(e)(5) of the Telecommunications Act of 1996,* 15 FCC Rcd 11277, 11279, para. 6 (June 14, 2000). The order addressed a dispute concerning the interpretation and enforcement of an interconnection agreement between Starpower Communications and Bell Atlantic. The Commission held that a state commission's failure to carry out its responsibilities under section 252 can in some circumstances include the failure to interpret and enforce existing interconnection agreements.

[417] 47 U.S.C. § 271(d)(6).

[418] McLeod Missouri I Comments at 32-64; Z-TEL Comments at 2-9. Neither McLeod nor Z-TEL contends the calculations were inconsistent with the methodology approved by the Texas Commission. The most recent revisions of the metrics business rules resulting from the second six-month review open to SWBT, competitive LECs and commission staffs from Texas, Oklahoma, Kansas, Missouri and Arkansas has addressed some of Z-TEL's criticism. *See* SWBT Reply at 53-54.

133. We disagree with AT&T's assertion that the Arkansas and Missouri performance remedy plans are insufficiently self-executing.[419] AT&T filed an informal complaint with the Texas Commission alleging SWBT improperly withheld penalty payments inconsistent with the performance remedy procedures. The complaint is pending before the Texas Commission and we have confidence that the Texas Commission will effectively resolve the complaint. In addition, SWBT states that it has since made the disputed payments.[420] It appears that the plan dispute mechanism has been successfully tested in Texas, which gives us confidence that should a similar situation arise in Arkansas or Missouri, the appropriate Commissions could similarly resolve future disputes arising from the performance remedy plans in their states.

134. Finally, we reject AT&T's suggestion that the public interest is not met because SWBT has challenged the procedures for modifying the Texas performance remedy plan. AT&T alleges that SWBT factually misrepresents its historic willingness to review and modify the Texas Plan.[421] AT&T accurately observes that SWBT has failed to implement some changes ordered by the Texas Commission in its most recent six-month review, including: 1) a sampling methodology for one metric, 2) payment for a past measure the Texas Commission found had been calculated in error and elevation of the metric from a "low" to a "high" payment class, and 3) the inclusion of special access provisioning that is being provided pursuant to a SWBT tariff.[422] SWBT admits to failing to implement and appealing certain parts of the most recent six-month review order issued by the Texas Commission.[423] We note that the Texas Commission has been asked to address questions regarding modification and implementation of the Texas performance remedy plan in a complaint filed by AT&T.[424] Given that these issues are under review by the Texas Commission, we do not conclude that the Arkansas and Missouri plans are insufficient. If, in the future, market opening conditions have not been maintained, we maintain our ability to address backsliding under section 271(d)(6).

C. Other Issues

135. Commenters raise several other concerns which they contend support a finding that grant of this application is not in the public interest. In the initial Missouri proceedings, the

[419] AT&T Comments at 50; AT&T Reply at 14-17.

[420] SWBT Reply at 51-52.

[421] AT&T Comments at 56-57. Specifically, SWBT asserts that it "has demonstrated the 'continuing ability of the[se] measurements to evolve' by implementing all changes that were ordered by the Texas Commission in its six-month review process." SWBT Application at 156.

[422] AT&T Comments at 56-60.

[423] SWBT Reply at 52-53. SWBT contends that it intended to refer to changes ordered by the Texas Commission leading to version 1.7 of the metrics, not that it had complied with more recent Texas Commission orders regarding version 2.0 of the metrics. SWBT Reply at 52, n.64.

[424] SWBT Reply at 52-53.

Missouri Office of Public Counsel argued that the then recently-adopted M2A should be in effect and actual performance seen prior to SWBT filing an application for section 271 authority with this Commission.[425] El Paso-PACWEST contends that the current pricing for unbundled elements in Arkansas and Missouri is not in the public interest. As discussed above, we find that SWBT's prices in Arkansas and Missouri satisfy the pricing requirements applicable under section 271. While the Missouri Public Counsel and McLeod identify several historic situations that they allege demonstrate uncooperative and anti-competitive behavior by SWBT, we conclude that the specific issues raised had been resolved prior to SWBT filing this current application and we have no evidence of ongoing anti-competitive behavior.[426] In addition, we find that McLeod's representations that the Missouri municipalities franchise requirements are "onerous" and that SWBT as the incumbent receives preferential treatment are unsubstantiated and are insufficient reason to determine this application is not in the public interest.[427]

136. We do not find persuasive the assertion by the City Utilities of Springfield that Missouri state law restricting municipalities' entry into the telecommunications market is a barrier to entry that must be considered in the section 271 application.[428] We disagree with the City's arguments that SWBT's adherence to existing Missouri law, which forbids municipalities from providing telecommunications services or facilities, violates the public interest standard in promoting competition in the telecommunications industry in Missouri.[429] In the *Missouri Preemption Order*, the Commission found that the existing Missouri law that prohibited state political subdivisions from becoming certified to provide telecommunications services or facilities did not violate Section 253(a)'s prohibition on state barriers to entry; accordingly, the Commission concluded that it lacked authority to preempt Missouri's law.[430] Therefore, SWBT's compliance with existing Missouri law cannot be grounds for finding that it is violating the public interest.[431] Although we have acknowledged the benefits of competitive entry by municipalities

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[425] Missouri Public Counsel Missouri I Comments at 1-3. As the M2A was adopted on March 15, 2001 and has been in effect prior to the current application, we believe that this issue does not constitute sufficient grounds to find that the current application fails to be in the public interest.

[426] SWBT Dysart Reply Aff. at para. 89-102; McLeod Missouri I Comments at 58-59; McLeod Comments at 25-26; Missouri Office of Public Counsel Comments at 7-8; McLeod Reply at 4.

[427] McLeod Missouri I Comments at 60. While we do not believe that section 271 review is the appropriate forum for these issues, should it desire, McLeod may petition this Commission for preemption under section 253(c) of the Act.

[428] City Utilities of Springfield Comments at 1-2.

[429] *See The Missouri Municipal League; The Missouri Association of Municipal Utilities; City Utilities of Springfield; City of Columbia Water & Light; City of Sikeston Board of Utilities Petition for Preemption of Section 392.410(7) of the Revised Statutes of Missouri*, CC Docket No. 98-122, Memorandum Opinion and Order, 16 FCC Rcd 1157,1164-69, paras. 12-18 (2001) (*Missouri Preemption Order*) (discussing the current Missouri law in regard to its prohibition on state political subdivisions' involvement in the telecommunications industry).

[430] *Id.* at 1158-59, 1164, and 1170, paras. 2,4, 13, and 23.

[431] *See also, Bell Atlantic New York Order*, 15 FCC Rcd at 4080, para. 236 (holding that it would be "inequitable (continued….)

into the telecommunications industry, we find that SWBT has taken sufficient steps to facilitate competitive entry by non-governmental providers, so that grant of the application would serve the public interest in Missouri.[432]

VII. SECTION 271(d)(6) ENFORCEMENT AUTHORITY

137. Section 271(d)(6) of the Act requires SWBT to continue to satisfy the "conditions required for . . . approval" of its section 271 application after the Commission approves its application.[433] Thus, the Commission has a responsibility not only to ensure that SWBT is in compliance with section 271 today, but also that it remains in compliance in the future. As the Commission has already described the post-approval enforcement framework and its section 271(d)(6) enforcement powers in detail in prior orders, it is unnecessary to do so again here.[434]

138. Working in concert with the Arkansas and Missouri Commissions, we intend to closely monitor SWBT's post-approval compliance for Arkansas and Missouri to ensure that SWBT does not "cease [] to meet any of the conditions required for [section 271] approval."[435] We stand ready to exercise our various statutory enforcement powers quickly and decisively in appropriate circumstances to ensure that the local market remains open in Arkansas and Missouri. We are prepared to use our authority under section 271(d)(6) if evidence shows market opening conditions have not been maintained.

139. We require SWBT to report to the Commission all Arkansas and Missouri carrier-to-carrier performance metrics results and Performance Assurance Plan monthly reports beginning with the first full month after the effective date of this Order, and for each month thereafter for one year unless extended by the Commission. These results and reports will allow us to review, on an ongoing basis, SWBT's performance to ensure continued compliance with the statutory requirements. We are confident that cooperative state and federal oversight and enforcement can address any backsliding that may arise with respect to SWBT's entry into the Arkansas and Missouri long distance markets.[436]

(Continued from previous page)
to penalize Bell Atlantic for complying with the rules established by the New York Commission").

[432] *See Missouri Preemption Order*, 16 FCC Rcd at 1162-63, paras. 10-11.

[433] 47 U.S.C. § 271(d)(6).

[434] *SWBT Kansas/Oklahoma Order*, 16 FCC Rcd at 6382-84, paras. 283-85; *SWBT Texas Order*, 15 FCC Rcd at 18567-68, paras. 434-36; *Bell Atlantic New York Order*, 15 FCC Rcd at 4174, paras. 446-53. *See* Appendix D.

[435] 47 U.S.C. § 271(d)(6)(A).

[436] *See, e.g., Bell Atlantic-New York, Authorization Under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in the State of New York*, File No. EB-00-IH-0085, Order, 15 FCC Rcd 5413 (2000) (adopting consent decree between the Commission and Bell Atlantic that included provisions for Bell Atlantic to make a voluntary payment of $3,000,000 to the United States Treasury, with additional payments if Bell Atlantic failed to meet specified performance standards and weekly reporting requirements to gauge Bell Atlantic's (continued….)

VIII. CONCLUSION

140. For the reasons discussed above, we grant SWBT's applications for authorization under section 271 of the Act to provide in-region, interLATA services in the states of Arkansas and Missouri.

IX. ORDERING CLAUSES

141. Accordingly, IT IS ORDERED that, pursuant to sections 4(i), 4(j), and 271 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j) and 271, Southwestern Bell's applications to provide in-region, interLATA service in the states of Arkansas and Missouri, filed on August 20, 2001, ARE GRANTED.

(Continued from previous page)
performance in correcting the problems associated with its electronic ordering systems).

142. IT IS FURTHER ORDERED that this Order SHALL BECOME EFFECTIVE November 26, 2001.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary

Appendix A
Commenters in CC Docket 01-194

Comments	Abbreviation
Alliance for Public Technology	APT
Arkansas Public Service Commission	Arkansas Commission
Association of Communications Enterprises	ASCENT
AT&T	AT&T
Campaign for Telecommunications Access	CTA
City Utilities of Springfield, Missouri	City Utilities of Springfield
Communications Worker of America	CWA
Department of Justice	Department of Justice
E.Spire Communications, Inc	e.Spire
El Paso Network, L.L.C & PACWEST Telecom, Inc. *	El Paso-PACWEST
McLeodUSA Telecommunications Service Inc. *	McLeod
Missouri Office of the Public Counsel *	Missouri Public Counsel
Missouri Public Service Commission	Missouri Commission
Navigator Telecommunications L.L.C.	Navigator
Nuvox Inc	Nuvox
SAGE Telecom Inc	Sage
Sprint Communications Company	Sprint
WorldCom	WorldCom
Z-TEL Communications Inc	Z-TEL

Replies	
Association for Communication Enterprises *	ASCENT
Associations for Local Televisions Services *	ALTS
AT&T	AT&T
El Paso Networks, L.L.C. & PACWEST Telecom, Inc.	El Paso-PACWEST
McLeodUSA Telecommunications Service Inc.	McLeod
Missouri Public Service Commission	Missouri Commission

SAGE Telecom Inc.	SAGE
SBC Communications	Southwestern Bell or SWBT
WorldCom	WorldCom

Prior Comments Incorporated By Reference From CC Docket No. 01-88

AT&T	AT&T
El Paso Network, L.L.C & PACWEST Telecom, Inc.	El Paso-PACWEST
McLeodUSA Telecommunications Service Inc.	McLeod
Nuvox Inc.	Nuvox
Missouri Office of the Public Counsel	Missouri Public Counsel

Letter Commenters and Reply Commenters in CC Docket No. 01-194

Area Agency of Southeast Arkansas
Arkansas Art Center
Arkansas Business and Education Alliance
Arkansas Economic Developers
Arkansas Repertory Theatre
Arkansas Wildlife Federation
Arvest Bank
Baldar Motor and Drives
Bass Pro Shop, Sportman's Park Center
Belton Corporation for Economic Development
Benton Chamber of Commerce
Birchler Mengwasser Martin Lall P.C
BJC Health Systems
Bradley County
Bryant Chamber of Commerce
Buckley & Mitchell Attorneys at Law
Cape Giradeau Chamber of Commerce
Cape Kil Pest Control Company
Cape Polymers, Inc
Century 21 Chuck Fawcett Reality
City of Fayetteville Arkansas
City of Forrest City
City of Fort Smith Arkansas
City of Hillsboro
City of Jonesboro
City of Lanoke

City of St Peters
City of St. Ann
City of West Helena
City of Wilson
Clark County Industrial Council
Cline, Deforrest E.
Coil Construction, Inc
Conway Area Chamber of Commerce
Corporate Bank Transit, Inc
Creve Coeur-Olivette Chamber of Commerce
Custom Signworks, Inc
Dale Carnegie Training
Dale Knoll
Dillon Company
Drury University
Eagle Vision, Inc.
Eichhorst, Richard
Elvis Moody
ERS Foundation Recovery Systems
Estella A. Barron
Farmington Area Chamber of Commerce
Farmington Chamber of Commerce
Fenny's Inc
First Services, L.P.
Fleishman-Hillard International Communications
Florissant Valley Chamber of Commerce
Fort Smith Chamber of Commerce
Fort Smith Wholesale
Foundation Recovery Systems GMF, Inc
Gallery Central
Girandier Building & Realty Company
Global Marketing Solutions, Inc
Grandview Area Chamber of Commerce
Greater Hot Springs, Chamber of Commerce
Greater Poplar Bluff Area Chamber of Commerce
I F World Inc
Jefferson College
Kennet Missouri Chamber of Commerce
Kirkland Area Chamber of Commerce
Klabzuba Oil aand Gas
KUGT AM Radio
K.W. Keltner
Laurie Schneider Interior Designs, Inc
Lee's Summit Economic Development Council

Light and Power Company, Inc
Lonoke County Task Force, Open Arms Shelter
Magnolia Columbia County, Chamber of Commerce
Marco Contractors
Marianna Arkansas, Mayor
Maulein's Incorporated
McKenna, William
Metropolitan Community Colleges
Mid-East Area Chamber of Commerce
Mike Sells
Missouri Association of the Deaf
Missouri Council of the Blind
Missouri Merchants and Manufacturers Association
Moberly Area Chamber of Commerce
Moberly Regional Medical Center
Nixa Area Chamber of Commerce
North County, Inc.
Overhead Door
PARAQUAD Inc
Pat Dillon Company
Patti York, Mayor, St Charles
Purple Cow Restaurants
Richard Eichorst
Roger Lowell Area Chamber of Commerce
Saint Charles Chamber of Commerce
Salene County, Arkansas
Sedalia Area Chamber of Commerce
Sedia-Petis County Development Corporation
Senior Arkansas Sports Organization, Inc.
Shepard Group
SIGMA Chemical Company
Southeast Missouri State University
SouthGate Properties
Springdale Chamber of Commerce
Springfield Area Chamber of Commerce
St. Charles County Office of the County Executive
St. Joseph Area Chamber of Commerce
St. Joseph Downtown Partnership , Inc
St. John's Mercy Health Care
St. Genevieve County of Economic Development
The Children's Museum of Arkansas
Tom Brown, Mayor, St Peters
United Way Garland County
University of Central Arkansas

Van Buren, Chamber of Commerce
Waldron Food Center, Inc.
West Memphis City Counsel
Women Counsel on African American Affairs
Worldwide Global Corporation

Appendix B
Arkansas Performance Metrics

Appendix C
Missouri Performance Metrics

Appendix D
Statutory Requirements

I. STATUTORY FRAMEWORK

1. The 1996 Act conditions BOC entry into the provision of in-region interLATA services on compliance with certain provisions of section 271.[1] BOCs must apply to the Federal Communications Commission (Commission or FCC) for authorization to provide interLATA services originating in any in-region state.[2] The Commission must issue a written determination on each application no later than 90 days after receiving such application.[3] Section 271(d)(2)(A) requires the Commission to consult with the Attorney General before making any determination approving or denying a section 271 application. The Attorney General is entitled to evaluate the application "using any standard the Attorney General considers appropriate," and the Commission is required to "give substantial weight to the Attorney General's evaluation."[4]

2. In addition, the Commission must consult with the relevant state commission to verify that the BOC has one or more state-approved interconnection agreements with a facilities-based competitor, or a Statement of Generally Available Terms and Conditions (SGAT), and that either the agreement(s) or general statement satisfy the "competitive checklist."[5] Because the Act does not prescribe any standard for the consideration of a state commission's verification under section 271(d)(2)(B), the Commission has discretion in each section 271 proceeding to determine

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[1] For purposes of 271 proceedings, the Commission uses the definition of the term "Bell Operating Company" contained in 47 U.S.C. § 153(4).

[2] 47 U.S.C. § 271(d)(1). For purposes of 271 proceedings, the Commission utilizes the definition of the term "in-region state" that is contained in 47 U.S.C. § 271(i)(1). Section 271(j) provides that a BOC's in-region services include 800 service, private line service, or their equivalents that terminate in an in-region state of that BOC and that allow the called party to determine the interLATA carrier, even if such services originate out-of-region. *Id.* § 271(j). The 1996 Act defines "interLATA services" as "telecommunications between a point located in a local access and transport area and a point located outside such area." *Id.* § 153(21). Under the 1996 Act, a "local access and transport area" (LATA) is "a contiguous geographic area (A) established before the date of enactment of the [1996 Act] by a [BOC] such that no exchange area includes points within more than 1 metropolitan statistical area, consolidated metropolitan statistical area, or State, except as expressly permitted under the AT&T Consent Decree; or (B) established or modified by a [BOC] after such date of enactment and approved by the Commission." *Id.* § 153(25). LATAs were created as part of the Modification of Final Judgment's (MFJ) "plan of reorganization." *United States v. Western Elec. Co.*, 569 F. Supp. 1057 (D.D.C. 1983), *aff'd sub nom. California v. United States*, 464 U.S. 1013 (1983). Pursuant to the MFJ, "all [BOC] territory in the continental United States [was] divided into LATAs, generally centering upon a city or other identifiable community of interest." *United States v. Western Elec. Co.*, 569 F. Supp. 990, 993-94 (D.D.C. 1983).

[3] 47 U.S.C. § 271(d)(3).

[4] *Id.* § 271(d)(2)(A).

[5] *Id.* § 271(d)(2)(B).

the amount of weight to accord the state commission's verification.[6] The Commission has held that, although it will consider carefully state determinations of fact that are supported by a detailed and extensive record, it is the FCC's role to determine whether the factual record supports the conclusion that particular requirements of section 271 have been met.[7]

3. Section 271 requires the Commission to make various findings before approving BOC entry. In order for the Commission to approve a BOC's application to provide in-region, interLATA services, a BOC must first demonstrate, with respect to each state for which it seeks authorization, that it satisfies the requirements of either section 271(c)(1)(A) (Track A) or 271(c)(1)(B) (Track B).[8] In order to obtain authorization under section 271, the BOC must also show that: (1) it has "fully implemented the competitive checklist" contained in section 271(c)(2)(B);[9] (2) the requested authorization will be carried out in accordance with the requirements of section 272;[10] and (3) the BOC's entry into the in-region interLATA market is "consistent with the public interest, convenience, and necessity."[11] The statute specifies that, unless the Commission finds that these criteria have been satisfied, the Commission "shall not approve" the requested authorization.[12]

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6 *Bell Atlantic New York Order*, 15 FCC Rcd at 3962, para. 20; *Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended*, CC Docket No. 97-137, 12 FCC Rcd 20543, 20559-60 (1997) (*Ameritech Michigan Order*). As the D.C. Circuit has held, "[A]lthough the Commission must consult with the state commissions, the statute does not require the Commission to give State Commissions' views any particular weight." *SBC Communications v. FCC*, 138 F.3d at 416.

7 *Ameritech Michigan Order*, 12 FCC Rcd at 20560; *SBC Communications v. FCC*, 138 F.3d at 416-17.

8 47 U.S.C. § 271(d)(3)(A). *See* Section III, *infra*, for a complete discussion of Track A and Track B requirements.

9 *Id.* §§ 271(c)(2)(B), 271(d)(3)(A)(i).

10 *Id.* § 272. *See Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended*, CC Docket No. 96-149, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 21905 (1996) (*Non-Accounting Safeguards Order*), *recon.*, Order on Reconsideration, 12 FCC Rcd 2297 (1997), *review pending sub nom., SBC Communications v. FCC*, No. 97-1118 (D.C. Cir., filed Mar. 6, 1997) (held in abeyance pursuant to court order filed May 7, 1997), *remanded in part sub nom., Bell Atlantic Telephone Companies v. FCC*, No. 97-1067 (D.C. Cir., filed Mar. 31, 1997), *on remand*, Second Order on Reconsideration, FCC 97-222 (rel. June 24, 1997), *petition for review pending sub nom. Bell Atlantic Telephone Companies v. FCC*, No. 97-1423 (D.C. Cir. filed July 11, 1997); *Implementation of the Telecommunications Act of 1996; Accounting Safeguards Under the Telecommunications Act of 1996*, Report and Order, 11 FCC Rcd 17539 (1996).

11 47 U.S.C. § 271(d)(3)(C).

12 *Id.* § 271(d)(3); *see SBC Communications, Inc. v. FCC*, 138 F.3d 410, 413, 416 (D.C. Cir. 1998).

II. PROCEDURAL AND ANALYTICAL FRAMEWORK

4. To determine whether a BOC applicant has met the prerequisites for entry into the long distance market, the Commission evaluates its compliance with the competitive checklist, as developed in the FCC's local competition rules and orders in effect at the time the application was filed. Despite the comprehensiveness of these rules, there will inevitably be, in any section 271 proceeding, disputes over an incumbent LEC's precise obligations to its competitors that FCC rules have not addressed and that do not involve *per se* violations of self-executing requirements of the Act. As explained in prior orders, the section 271 process simply could not function as Congress intended if the Commission were required to resolve all such disputes as a precondition to granting a section 271 application.[13] In the context of section 271's adjudicatory framework, the Commission has established certain procedural rules governing BOC section 271 applications.[14] The Commission has explained in prior orders the procedural rules it has developed to facilitate the review process.[15] Here we describe how the Commission considers the evidence of compliance that the BOC presents in its application.

5. As part of the determination that a BOC has satisfied the requirements of section 271, the Commission considers whether the BOC has fully implemented the competitive checklist in subsection (c)(2)(B). The BOC at all times bears the burden of proof of compliance with section 271, even if no party challenges its compliance with a particular requirement.[16] In demonstrating its compliance, a BOC must show that it has a concrete and specific legal obligation to furnish the item upon request pursuant to state-approved interconnection agreements that set forth prices and other terms and conditions for each checklist item, and that it is currently furnishing, or is ready to furnish, the checklist items in quantities that competitors may reasonably demand and at an acceptable level of quality.[17] In particular, the BOC must

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[13] *See SWBT Kansas/Oklahoma Order*, 16 FCC Rcd at 6246, para. 19; *see also AT&T Co. v. FCC*, 220 F.3d 607, 631 (D.C. Cir. 2000).

[14] *See Procedures for Bell Operating Company Applications Under New Section 271 of the Communications Act*, Public Notice, 11 FCC Rcd 19708, 19711 (Dec. 6, 1996); *Revised Comment Schedule For Ameritech Michigan Application, as amended, for Authorization Under Section 271 of the Communications Act to Provide In-Region, InterLATA Services in the State of Michigan*, Public Notice DA 97-127 (Jan. 17, 1997); *Revised Procedures for Bell Operating Company Applications Under Section 271 of the Communications Act*, Public Notice, 13 FCC Rcd 17457 (Sept. 19, 1997); *Updated Filing Requirements for Bell Operating Company Applications Under Section 271 of the Communications Act*, Public Notice, DA-99-1994 (Sept. 28, 1999); *Updated Filing Requirements for Bell Operating Company Applications Under Section 271 of the Communications Act*, Public Notice, DA 01-734 (CCB rel. Mar. 23, 2001) (collectively "271 Procedural Public Notices").

[15] *See, e.g.*, *SWBT Kansas/Oklahoma Order* 16 FCC Rcd at 6247-50, paras. 21-27; *SWBT Texas Order*, 15 FCC Rcd at 18370-73, paras. 34-42; *Bell Atlantic New York Order*, 15 FCC Rcd at 3968-71, paras. 32-42.

[16] *See SWBT Texas Order*, 15 FCC Rcd at 18374, para. 46; *Bell Atlantic New York Order*, 15 FCC Rcd at 3972, para. 46.

[17] *See Bell Atlantic New York Order*, 15 FCC Rcd at 3973-74, para. 52.

demonstrate that it is offering interconnection and access to network elements on a nondiscriminatory basis.[18] Previous Commission orders addressing section 271 applications have elaborated on this statutory standard.[19] First, for those functions the BOC provides to competing carriers that are analogous to the functions a BOC provides to itself in connection with its own retail service offerings, the BOC must provide access to competing carriers in "substantially the same time and manner" as it provides to itself.[20] Thus, where a retail analogue exists, a BOC must provide access that is equal to (*i.e.*, substantially the same as) the level of access that the BOC provides itself, its customers, or its affiliates, in terms of quality, accuracy, and timeliness.[21] For those functions that have no retail analogue, the BOC must demonstrate that the access it provides to competing carriers would offer an efficient carrier a "meaningful opportunity to compete."[22]

6. The determination of whether the statutory standard is met is ultimately a judgment the Commission must make based on its expertise in promoting competition in local markets and in telecommunications regulation generally.[23] The Commission has not established, nor does it believe it appropriate to establish, specific objective criteria for what constitutes "substantially the same time and manner" or a "meaningful opportunity to compete."[24] Whether this legal standard is met can only be decided based on an analysis of specific facts and circumstances. Therefore, the Commission looks at each application on a case-by-case basis and considers the totality of the circumstances, including the origin and quality of the information in the record, to determine whether the nondiscrimination requirements of the Act are met.

A. Performance Data

7. As established in prior section 271 orders, the Commission has found that performance measurements provide valuable evidence regarding a BOC's compliance or noncompliance with individual checklist items. The Commission expects that, in its *prima facie* case in the initial application, a BOC relying on performance data will:

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[18] *See* 47 U.S.C. § 271(c)(2)(B)(i), (ii).

[19] *See SWBT Kansas/Oklahoma Order*, 16 FCC Rcd at 6250-51, paras. 28-29; *Bell Atlantic New York Order*, 15 FCC Rcd at 3971-72, paras. 44-46.

[20] *SWBT Texas Order*, 15 FCC Rcd at 18373, para. 44; *Bell Atlantic New York Order*, 15 FCC Rcd at 3971, para. 44.

[21] *Bell Atlantic New York Order*, 15 FCC Rcd at 3971, para. 44; *Ameritech Michigan Order*, 12 FCC Rcd at 20618-19.

[22] *Id.*

[23] *SWBT Texas Order*, 15 FCC Rcd at 18374, para. 46; *Bell Atlantic New York Order*, 15 FCC Rcd at 3972, para. 46.

[24] *Id.*

a) provide sufficient performance data to support its contention that the statutory requirements are satisfied;

b) identify the facial disparities between the applicant's performance for itself and its performance for competitors;

c) explain why those facial disparities are anomalous, caused by forces beyond the applicant's control (*e.g.*, competing carrier-caused errors), or have no meaningful adverse impact on a competing carrier's ability to obtain and serve customers; and

d) provide the underlying data, analysis, and methodologies necessary to enable the Commission and commenters meaningfully to evaluate and contest the validity of the applicant's explanations for performance disparities, including, for example, carrier specific carrier-to-carrier performance data.

8. The Commission has explained in prior orders that parity and benchmark standards established by state commissions do not represent absolute maximum or minimum levels of performance necessary to satisfy the competitive checklist. Rather, where these standards are developed through open proceedings with input from both the incumbent and competing carriers, these standards can represent informed and reliable attempts to objectively approximate whether competing carriers are being served by the incumbent in substantially the same time and manner, or in a way that provides them a meaningful opportunity to compete.[25] Thus, to the extent there is no statistically significant difference between a BOC's provision of service to competing carriers and its own retail customers, the Commission generally need not look any further. Likewise, if a BOC's provision of service to competing carriers satisfies the performance benchmark, the analysis is usually done. Otherwise, the Commission will examine the evidence further to make a determination whether the statutory nondiscrimination requirements are met.[26] Thus, the Commission will examine the explanations that a BOC and others provide about whether these data accurately depict the quality of the BOC's performance. The Commission also may examine how many months a variation in performance has existed and what the recent trend has been. The Commission may find that statistically significant differences exist, but conclude that such differences have little or no competitive significance in the marketplace. In such cases, the Commission may conclude that the differences are not meaningful in terms of statutory compliance. Ultimately, the determination of whether a BOC's performance meets the statutory requirements necessarily is a contextual decision based on the totality of the circumstances and information before the Commission.

9. Where there are multiple performance measures associated with a particular checklist item, the Commission would consider the performance demonstrated by all the

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[25] *See SWBT Kansas/Oklahoma Order*, 16 FCC Rcd at 6252, para. 31; *SWBT Texas Order*, 15 FCC Rcd at 18377, para. 55andn.102.

[26] *See Bell Atlantic New York Order*, 15 FCC Rcd at 3970, para. 59.

measurements as a whole. Accordingly, a disparity in performance for one measure, by itself, may not provide a basis for finding noncompliance with the checklist. The Commission may also find that the reported performance data is affected by factors beyond a BOC's control, a finding that would make it less likely to hold the BOC wholly accountable for the disparity. This is not to say, however, that performance discrepancies on a single performance metric are unimportant. Indeed, under certain circumstances, disparity with respect to one performance measurement may support a finding of statutory noncompliance, particularly if the disparity is substantial or has endured for a long time, or if it is accompanied by other evidence of discriminatory conduct or evidence that competing carriers have been denied a meaningful opportunity to compete.

10. In sum, the Commission does not use performance measurements as a substitute for the 14-point competitive checklist. Rather, it uses performance measurements as valuable evidence with which to inform the judgment as to whether a BOC has complied with the checklist requirements. Although performance measurements add necessary objectivity and predictability to the review, they cannot wholly replace the Commission's own judgment as to whether a BOC has complied with the competitive checklist.

B. Relevance of Previous Section 271 Approvals

11. In some section 271 applications, the volumes of the BOC's commercial orders may be significantly lower than they were in prior proceedings. In certain instances, volumes may be so low as to render the performance data inconsistent and inconclusive.[27] Performance data based on low volumes of orders or other transactions is not as reliable an indicator of checklist compliance as performance based on larger numbers of observations. Indeed, where performance data is based on a low number of observations, small variations in performance may produce wide swings in the reported performance data. It is thus not possible to place the same evidentiary weight upon – and to draw the same types of conclusions from – performance data where volumes are low, as for data based on more robust activity.

12. In such cases, findings in prior, related section 271 proceedings may be a relevant factor in the Commission's analysis. Where a BOC provides evidence that a particular system reviewed and approved in a prior section 271 proceeding is also used in the proceeding at hand, the Commission's review of the same system in the current proceeding will be informed by the findings in the prior one. Indeed, to the extent that issues have already been briefed, reviewed and resolved in a prior section 271 proceeding, and absent new evidence or changed circumstances, an application for a related state should not be a forum for re-litigating and reconsidering those issues. Appropriately employed, such a practice can give us a fuller picture of the BOC's compliance with the section 271 requirements while avoiding, for all parties involved in the

[27] The Commission has never required, however, an applicant to demonstrate that it processes and provisions a substantial commercial volume of orders, or has achieved a specific market share in its service area, as a prerequisite for satisfying the competitive checklist. *See Ameritech Michigan Order*, 12 FCC Rcd at 20585, para. 77 (explaining that Congress had considered and rejected language that would have imposed a "market share" requirement in section 271(c)(1)(A)).

section 271 process, the delay and expense associated with redundant and unnecessary proceedings and submissions.

13. However, the statute requires the Commission to make a separate determination of checklist compliance for each state and, accordingly, we do not consider any finding from previous section 271 orders to be dispositive of checklist compliance in current proceedings. While the Commission's review may be informed by prior findings, the Commission will consider all relevant evidence in the record, including state-specific factors identified by commenting parties, the states, the Department of Justice. However, the Commission has always held that an applicant's performance towards competing carriers in an actual commercial environment is the best evidence of nondiscriminatory access to OSS and other network elements.[28] Thus, the BOC's actual performance in the applicant state may be relevant to the analysis and determinations with respect to the 14 checklist items. Evidence of satisfactory performance in another state cannot trump convincing evidence that an applicant fails to provide nondiscriminatory access to a network element in the applicant state.

14. Moreover, because the Commission's review of a section 271 application must be based on a snapshot of a BOC's recent performance at the time an application is filed, the Commission cannot simply rely on findings relating to an applicant's performance in an anchor state at the time it issued the determination for that state. The performance in that state could change due to a multitude of factors, such as increased order volumes or shifts in the mix of the types of services or UNEs requested by competing carriers. Thus, even when the applicant makes a convincing showing of the relevance of anchor state data, the Commission must examine how recent performance in that state compares to performance at the time it approved that state's section 271 application, in order to determine if the systems and processes continue to perform at acceptable levels.

III. COMPLIANCE WITH ENTRY REQUIREMENTS -- SECTIONS 271(C)(1)(A) & 271(C)(1)(B)

15. As noted above, in order for the Commission to approve a BOC's application to provide in-region, interLATA services, a BOC must first demonstrate that it satisfies the requirements of either section 271(c)(1)(A) (Track A) or 271(c)(1)(B) (Track B).[29] To qualify for Track A, a BOC must have interconnection agreements with one or more competing providers of "telephone exchange service . . . to residential and business subscribers."[30] The Act states that "such telephone service may be offered . . . either exclusively over [the competitor's] own telephone exchange service facilities or predominantly over [the competitor's] own telephone

[28] *See SWBT Texas Order*, 15 FCC Rcd at 18376, para. 53; *Bell Atlantic New York Order*, 15 FCC Rcd at 3974, para. 53.

[29] *See* 47 U.S.C. § 271(d)(3)(A).

[30] *Id*.

exchange facilities in combination with the resale of the telecommunications services of another carrier."[31] The Commission concluded in the *Ameritech Michigan Order* that section 271(c)(1)(A) is satisfied if one or more competing providers collectively serve residential and business subscribers.[32]

16. As an alternative to Track A, Section 271(c)(1)(B) permits BOCs to obtain authority to provide in-region, interLATA services if, after 10 months from the date of enactment, no facilities-based provider, as described in subparagraph (A), has requested the access and interconnection arrangements described therein (referencing one or more binding agreements approved under Section 252), but the State has approved an SGAT that satisfies the competitive checklist of subsection (c)(2)(B). Under section 271(d)(3)(A)(ii), the Commission shall not approve such a request for in-region, interLATA service unless the BOC demonstrates that, "with respect to access and interconnection generally offered pursuant to [an SGAT], such statement offers all of the items included in the competitive checklist...."[33] Track B, however, is not available to a BOC if it has already received a request for access and interconnection from a prospective competing provider of telephone exchange service.[34]

IV. COMPLIANCE WITH THE COMPETITIVE CHECKLIST – SECTION 271(C)(2)(B)

A. Checklist Item 1– Interconnection

17. Section 271(c)(2)(B)(i) of the Act requires a section 271 applicant to provide "[i]nterconnection in accordance with the requirements of sections 251(c)(2) and 252(d)(1)."[35] Section 251(c)(2) imposes a duty on incumbent LECs "to provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the local exchange carrier's network . . . for the transmission and routing of telephone exchange service and exchange access."[36] In the *Local Competition First Report and Order*, the Commission concluded that interconnection referred "only to the physical linking of two networks for the mutual exchange of

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[31] *Id*.

[32] *See Ameritech Michigan Order*, 12 FCC Rcd at 20589, para. 85; *see also Second BellSouth Louisiana Order*, 13 FCC Rcd at 20633-35, paras. 46-48.

[33] *See* 47 U.S.C. § 271(d)(3)(A)(ii).

[34] *See Ameritech Michigan Order*, 12 FCC Rcd at 20561-2, para. 34. Nevertheless, the above-mentioned foreclosure of Track B as an option is subject to limited exceptions. *See* 47 U.S.C. § 271(c)(1)(B); *see also Ameritech Michigan Order*, 12 FCC Rcd at 20563-64, paras. 37-38.

[35] 47 U.S.C. § 271(c)(2)(B)(i); *see Bell Atlantic New York Order*, 15 FCC Rcd at 3977-78, para. 63; *Second BellSouth Louisiana Order*, 13 FCC Rcd at 20640, para. 61; *Ameritech Michigan Order*, 12 FCC Rcd at 20662, para. 222.

[36] 47 U.S.C. § 251(c)(2)(A).

traffic."[37] Section 251 contains three requirements for the provision of interconnection. First, an incumbent LEC must provide interconnection "at any technically feasible point within the carrier's network."[38] Second, an incumbent LEC must provide interconnection that is "at least equal in quality to that provided by the local exchange carrier to itself."[39] Finally, the incumbent LEC must provide interconnection "on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, in accordance with the terms of the agreement and the requirements of [section 251] and section 252."[40]

18. To implement the equal-in-quality requirement in section 251, the Commission's rules require an incumbent LEC to design and operate its interconnection facilities to meet "the same technical criteria and service standards" that are used for the interoffice trunks within the incumbent LEC's network.[41] In the *Local Competition First Report and Order*, the Commission identified trunk group blockage and transmission standards as indicators of an incumbent LEC's technical criteria and service standards.[42] In prior section 271 applications, the Commission concluded that disparities in trunk group blockage indicated a failure to provide interconnection to competing carriers equal-in-quality to the interconnection the BOC provided to its own retail operations.[43]

19. In the *Local Competition First Report and Order*, the Commission concluded that the requirement to provide interconnection on terms and conditions that are "just, reasonable, and nondiscriminatory" means that an incumbent LEC must provide interconnection to a competitor in a manner no less efficient than the way in which the incumbent LEC provides the comparable function to its own retail operations.[44] The Commission's rules interpret this obligation to

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[37] *Local Competition First Report and Order*, 11 FCC Rcd at 15590, para. 176. Transport and termination of traffic are therefore excluded from the Commission's definition of interconnection. *See id.*

[38] 47 U.S.C. § 251(c)(2)(B). In the *Local Competition First Report and Order*, the Commission identified a minimum set of technically feasible points of interconnection. *See Local Competition First Report and Order*, 11 FCC Rcd at 15607-09, paras. 204-211.

[39] 47 U.S.C. § 251(c)(2)(C).

[40] *Id.* § 251(c)(2)(D).

[41] *Local Competition First Report and Order*, 11 FCC Rcd at 15613-15, paras. 221-225; *see Bell Atlantic New York Order*, 15 FCC Rcd at 3978, para. 64; *Second BellSouth Louisiana Order*, 13 FCC Rcd at 20641-42, paras. 63-64.

[42] *Local Competition First Report and Order*, 11 FCC Rcd at 15614-15, paras. 224-25.

[43] *See Bell Atlantic New York Order*, 15 FCC Rcd at 3978, para. 64; *Second BellSouth Louisiana Order*, 13 FCC Rcd at 20648-50, paras. 74-77; *Ameritech Michigan Order*, 12 FCC Rcd at 20671-74, paras. 240-45. The Commission has relied on trunk blockage data to evaluate a BOC's interconnection performance. Trunk group blockage indicates that end users are experiencing difficulty completing or receiving calls, which may have a direct impact on the customer's perception of a competitive LEC's service quality.

[44] *Local Competition First Report and Order*, 11 FCC Rcd at 15612, para. 218; *see also Bell Atlantic New York* (continued….)

include, among other things, the incumbent LEC's installation time for interconnection service[45] and its provisioning of two-way trunking arrangements.[46] Similarly, repair time for troubles affecting interconnection trunks is useful for determining whether a BOC provides interconnection service under "terms and conditions that are no less favorable than the terms and conditions" the BOC provides to its own retail operations.[47]

20. Competing carriers may choose any method of technically feasible interconnection at a particular point on the incumbent LEC's network.[48] Incumbent LEC provision of interconnection trunking is one common means of interconnection. Technically feasible methods also include, but are not limited to, physical and virtual collocation and meet point arrangements.[49] The provision of collocation is an essential prerequisite to demonstrating compliance with item 1 of the competitive checklist.[50] In the *Advanced Services First Report and Order*, the Commission revised its collocation rules to require incumbent LECs to include shared cage and cageless collocation arrangements as part of their physical collocation offerings.[51] To show compliance with its collocation obligations, a BOC must have processes and procedures in place to ensure that all applicable collocation arrangements are available on terms and conditions that are "just, reasonable, and nondiscriminatory" in accordance with section 251(c)(6) and the FCC's implementing rules.[52] Data showing the quality of procedures for processing applications for collocation space, as well as the timeliness and efficiency of provisioning collocation space, helps the Commission evaluate a BOC's compliance with its collocation obligations.[53]

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Order, 15 FCC Rcd at 3978, para. 65*; Second BellSouth Louisiana Order*, 13 FCC Rcd at 20642, para. 65.

[45] 47 C.F.R. § 51.305(a)(5).

[46] The Commission's rules require an incumbent LEC to provide two-way trunking upon request, wherever two-way trunking arrangements are technically feasible. 47 C.F.R. § 51.305(f); *see also Bell Atlantic New York* Order, 15 FCC Rcd at 3978-79, para. 65*; Second BellSouth Louisiana Order*, 13 FCC Rcd at 20642, para. 65; *Local Competition First Report and Order*, 11 FCC Rcd 15612-13, paras. 219-220.

[47] 47 C.F.R. § 51.305(a)(5).

[48] *Local Competition First Report and Order*, 11 FCC Rcd at 15779, paras. 549-50*; see Bell Atlantic New York Order*, 15 FCC Rcd at 3979, para. 66*; Second BellSouth Louisiana Order*, 13 FCC Rcd at 20640-41, para. 61.

[49] 47 C.F.R. § 51.321(b); *Local Competition First Report and Order*, 11 FCC Rcd at 15779-82, paras. 549-50; *see also Bell Atlantic New York Order*, 15 FCC Rcd at 3979, para. 66*; Second BellSouth Louisiana Order*, 13 FCC Rcd at 20640-41, para. 62.

[50] 47 U.S.C. § 251(c)(6) (requiring incumbent LECs to provide physical collocation); *Bell Atlantic New York Order*, 15 FCC Rcd at 3979, para. 66; *Second BellSouth Louisiana Order*, 13 FCC Rcd at 20640-41, paras. 61-62.

[51] *Advanced Services First Report and Order*, 14 FCC Rcd at 4784-86, paras. 41-43.

[52] *Bell Atlantic New York Order*, 15 FCC Rcd at 3979, para. 66; *Second BellSouth Louisiana Order*, 13 FCC Rcd at 20643, para. 66; *BellSouth Carolina Order*, 13 FCC Rcd at 649-51, para. 62.

[53] *Bell Atlantic New York Order*, *id*.; *Second BellSouth Louisiana Order*, *id*. at 20640-41, paras. 61-62.

21. As stated above, checklist item 1 requires a BOC to provide "interconnection in accordance with the requirements of sections 251(c)(2) and 252(d)(1)."[54] Section 252(d)(1) requires state determinations regarding the rates, terms, and conditions of interconnection to be based on cost and to be nondiscriminatory, and allows the rates to include a reasonable profit.[55] The Commission's pricing rules require, among other things, that in order to comply with its collocation obligations, an incumbent LEC provide collocation based on TELRIC.[56]

22. To the extent pricing disputes arise, the Commission will not duplicate the work of the state commissions. As noted in the *SWBT Texas Order*, the Act authorizes the state commissions to resolve specific carrier-to-carrier disputes arising under the local competition provisions, and it authorizes the federal district courts to ensure that the results of the state arbitration process are consistent with federal law.[57] Although the Commission has an independent statutory obligation to ensure compliance with the checklist, section 271 does not compel us to preempt the orderly disposition of intercarrier disputes by the state commissions, particularly now that the Supreme Court has restored the Commission's pricing jurisdiction and has thereby directed the state commissions to follow FCC pricing rules in their disposition of those disputes.[58]

23. Consistent with the Commission's precedent, the mere presence of interim rates will not generally threaten a section 271 application so long as: (1) an interim solution to a particular rate dispute is reasonable under the circumstances; (2) the state commission has demonstrated its commitment to the Commission's pricing rules; and (3) provision is made for refunds or true-ups once permanent rates are set.[59] In addition, the Commission has determined that rates contained within an approved section 271 application, including those that are interim, are reasonable starting points for interim rates for the same carrier in an adjoining state.[60]

24. Although the Commission has been willing to grant a section 271 application with a limited number of interim rates where the above-mentioned three-part test is met, it is clearly preferable to analyze a section 271 application on the basis of rates derived from a permanent rate

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[54] 47 U.S.C. § 271(c)(2)(B)(i) (emphasis added).

[55] *Id*. § 252(d)(1).

[56] *See* 47 C.F.R. §§ 51.501-07, 51.509(g); *Local Competition First Report and Order*, 11 FCC Rcd at 15812-16, 15844-61, 15874-76, 15912, paras. 618-29, 674-712, 743-51, 826.

[57] *See SWBT Texas Order*, 15 FCC Rcd at 18394, para. 88; *see also* 47 U.S.C. §§ 252(c), (e)(6); *AT&T Corp. v. Iowa Utils. Bd.,* 525 U.S. 366 (1999) (*AT&T v. Iowa Utils. Bd.*).

[58] *SWBT Texas Order*, *id.*; *AT&T v. Iowa Utils. Bd.*, 525 U.S. at ___ .

[59] *SWBT Texas Order*, *id.*; *see also Bell Atlantic New York Order*, 15 FCC Rcd at 4091, para. 258 (explaining the Commission's case-by-case review of interim prices).

[60] *SWBT Kansas/Oklahoma Order*, 16 FCC Rcd at 6359-60, para 239.

proceeding.[61] At some point, states will have had sufficient time to complete these proceedings. The Commission will, therefore, become more reluctant to continue approving section 271 applications containing interim rates. It would not be sound policy for interim rates to become a substitute for completing these significant proceedings.

B. Checklist Item 2 – Unbundled Network Elements.

1. Access to Operations Support Systems

25. Incumbent LECs use a variety of systems, databases, and personnel (collectively referred to as OSS) to provide service to their customers.[62] The Commission consistently has found that nondiscriminatory access to OSS is a prerequisite to the development of meaningful local competition.[63] For example, new entrants must have access to the functions performed by the incumbent's OSS in order to formulate and place orders for network elements or resale services, to install service to their customers, to maintain and repair network facilities, and to bill customers.[64] The Commission has determined that without nondiscriminatory access to the BOC's OSS, a competing carrier "will be severely disadvantaged, if not precluded altogether, from fairly competing" in the local exchange market.[65]

26. Section 271 requires the Commission to determine whether a BOC offers nondiscriminatory access to OSS functions. Section 271(c)(2)(B)(ii) requires a BOC to provide "nondiscriminatory access to network elements in accordance with the requirements of sections 251(c)(3) and 252(d)(1)."[66] The Commission has determined that access to OSS functions falls squarely within an incumbent LEC's duty under section 251(c)(3) to provide unbundled network elements under terms and conditions that are nondiscriminatory and just and reasonable, and its duty under section 251(c)(4) to offer resale services without imposing any limitations or conditions that are discriminatory or unreasonable.[67] The Commission must therefore examine a BOC's OSS performance to evaluate compliance with section 271(c)(2)(B)(ii) and (xiv).[68] In addition, the Commission has also concluded that the duty to provide nondiscriminatory access to

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61 *See Bell Atlantic New York Order*, 15 FCC Rcd at 4091, para. 260.

62 *Id*. at 3989-90, para. 83; *BellSouth South Carolina Order*, 13 FCC Rcd at 585.

63 *See Bell Atlantic New York Order*, *id*. at 3990, para. 83; *BellSouth South Carolina Order*, *id*. at 547-48, 585; *Second BellSouth Louisiana Order*, 13 FCC Rcd at 20653.

64 *See Bell Atlantic New York Order*, *id*. at 3990, para. 83.

65 *Id.*

66 47 U.S.C. § 271(c)(2)(B)(ii).

67 *Bell Atlantic New York Order*, 15 FCC Rcd at 3990, para. 84.

68 *Id.*

OSS functions is embodied in other terms of the competitive checklist as well.[69] Consistent with prior orders, the Commission examines a BOC's OSS performance directly under checklist items 2 and 14, as well as other checklist terms.[70]

27. As part of its statutory obligation to provide nondiscriminatory access to OSS functions, a BOC must provide access that sufficiently supports each of the three modes of competitive entry envisioned by the 1996 Act – competitor-owned facilities, unbundled network elements, and resale.[71] For OSS functions that are analogous to those that a BOC provides to itself, its customers or its affiliates, the nondiscrimination standard requires the BOC to offer requesting carriers access that is equivalent in terms of quality, accuracy, and timeliness.[72] The BOC must provide access that permits competing carriers to perform these functions in "substantially the same time and manner" as the BOC.[73] The Commission has recognized in prior orders that there may be situations in which a BOC contends that, although equivalent access has not been achieved for an analogous function, the access that it provides is nonetheless nondiscriminatory within the meaning of the statute.[74]

28. For OSS functions that have no retail analogue, the BOC must offer access "sufficient to allow an efficient competitor a meaningful opportunity to compete."[75] In assessing whether the quality of access affords an efficient competitor a meaningful opportunity to compete, the Commission will examine, in the first instance, whether specific performance standards exist for those functions.[76] In particular, the Commission will consider whether appropriate standards for measuring OSS performance have been adopted by the relevant state commission or agreed upon by the BOC in an interconnection agreement or during the implementation of such an agreement.[77] If such performance standards exist, the Commission will evaluate whether the

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[69] *Id.* As part of a BOC's demonstration that it is "providing" a checklist item (*e.g.*, unbundled loops, unbundled local switching, resale services), it must demonstrate that it is providing nondiscriminatory access to the systems, information, and personnel that support that element or service. An examination of a BOC's OSS performance is therefore integral to the determination of whether a BOC is offering all of the items contained in the competitive checklist. *Id*.

[70] *Id.* at 3990-91, para. 84.

[71] *Id.* at 3991, para. 85.

[72] *Id.*

[73] *Id.* For example, the Commission would not deem an incumbent LEC to be providing nondiscriminatory access to OSS if limitations on the processing of information between the interface and the back office systems prevented a competitor from performing a specific function in substantially the same time and manner as the incumbent performs that function for itself.

[74] *See id.*

[75] *Id.* at 3991, para. 86.

[76] *Id.*

BOC's performance is sufficient to allow an efficient competitor a meaningful opportunity to compete.[78]

29. The Commission analyzes whether a BOC has met the nondiscrimination standard for each OSS function using a two-step approach. First, the Commission determines "whether the BOC has deployed the necessary systems and personnel to provide sufficient access to each of the necessary OSS functions and whether the BOC is adequately assisting competing carriers to understand how to implement and use all of the OSS functions available to them."[79] The Commission next assesses "whether the OSS functions that the BOC has deployed are operationally ready, as a practical matter."[80]

30. Under the first inquiry, a BOC must demonstrate that it has developed sufficient electronic (for functions that the BOC accesses electronically) and manual interfaces to allow competing carriers equivalent access to all of the necessary OSS functions.[81] For example, a BOC must provide competing carriers with the specifications necessary for carriers to design or modify their systems in a manner that will enable them to communicate with the BOC's systems and any relevant interfaces.[82] In addition, a BOC must disclose to competing carriers any internal business rules[83] and other formatting information necessary to ensure that a carrier's requests and

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[77] *Id.* As a general proposition, specific performance standards adopted by a state commission in an arbitration decision would be more persuasive evidence of commercial reasonableness than a standard unilaterally adopted by the BOC outside of its interconnection agreement. *Id*. at 20619-20.

[78] *See id.* at 3991-92, para. 86.

[79] *Id.* at 3992, para. 87; *Ameritech Michigan Order*, 12 FCC Rcd at 20616; s*ee also Second BellSouth Louisiana Order*, 13 FCC Rcd at 20654; *BellSouth South Carolina Order*, 13 FCC Rcd at 592-93. In making this determination, the Commission "consider[s] all of the automated and manual processes a BOC has undertaken to provide access to OSS functions," including the interface (or gateway) that connects the competing carrier's own operations support systems to the BOC; any electronic or manual processing link between that interface and the BOC's OSS (including all necessary back office systems and personnel); and all of the OSS that a BOC uses in providing network elements and resale services to a competing carrier. *Ameritech Michigan Order*, 12 FCC Rcd at 20615; s*ee also Second BellSouth Louisiana Order*, 13 FCC Rcd at 20654 n.241.

[80] *See Bell Atlantic New York Order*, 15 FCC Rcd at 3992, para. 88.

[81] *Id*. at 3992, para. 87; *see also Ameritech Michigan Order*, 12 FCC Rcd at 20616, para. 136 (the Commission determines "whether the BOC has deployed the necessary systems and personnel to provide sufficient access to each of the necessary OSS functions and whether the BOC is adequately assisting competing carriers to understand how to implement and use all of the OSS functions available to them."). For example, a BOC must provide competing carriers the specifications necessary to design their systems interfaces and business rules necessary to format orders, and demonstrate that systems are scalable to handle current and projected demand. *Id.*

[82] *Id.*

[83] Business rules refer to the protocols that a BOC uses to ensure uniformity in the format of orders and include information concerning ordering codes such as universal service ordering codes (USOCs) and field identifiers (FIDs). *Id.; see also Ameritech Michigan Order*, 12 FCC Rcd at 20617 n. 335.

orders are processed efficiently.[84] Finally, a BOC must demonstrate that its OSS is designed to accommodate both current demand and projected demand for competing carriers' access to OSS functions.[85] Although not a prerequisite, the Commission continues to encourage the use of industry standards as an appropriate means of meeting the needs of a competitive local exchange market.[86]

31. Under the second inquiry, the Commission examines performance measurements and other evidence of commercial readiness to ascertain whether the BOC's OSS is handling current demand and will be able to handle reasonably foreseeable future volumes.[87] The most probative evidence that OSS functions are operationally ready is actual commercial usage.[88] Absent sufficient and reliable data on commercial usage, the Commission will consider the results of carrier-to-carrier testing, independent third-party testing, and internal testing in assessing the commercial readiness of a BOC's OSS.[89] Although the Commission does not require OSS testing, a persuasive test will provide us with an objective means by which to evaluate a BOC's OSS readiness where there is little to no evidence of commercial usage, or may otherwise strengthen an application where the BOC's evidence of actual commercial usage is weak or is otherwise challenged by competitors, The persuasiveness of a third-party review, however, is dependent upon the qualifications, experience and independence of the third party and the conditions and scope of the review itself.[90] If the review is limited in scope or depth or is not independent and blind, the Commission will give it minimal weight. As noted above, to the extent the Commission reviews performance data, it looks at the totality of the circumstances and generally does not view individual performance disparities, particularly if they are isolated and slight, as dispositive of whether a BOC has satisfied its checklist obligations.[91] Individual performance disparities may, nevertheless, result in a finding of checklist noncompliance, particularly if the disparity is substantial or has endured for a long time, or if it is accompanied by other evidence of discriminatory conduct or evidence that competing carriers have been denied a meaningful opportunity to compete.

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84 *Bell Atlantic New York Order*, 15 FCC Rcd at 3992, para. 88.

85 *Id.*

86 *See id.*

87 *Id.* at 3993, para. 89.

88 *Id.*

89 *Id.*

90 *See id.; Ameritech Michigan Order*, 12 FCC Rcd at 20659 (emphasizing that a third-party review should encompass the entire obligation of the incumbent LEC to provide nondiscriminatory access, and, where applicable, should consider the ability of actual competing carriers in the market to operate using the incumbent's OSS access).

91 *See SWBT Kansas/Oklahoma Order*, 16 FCC Rcd at 6301-02, para 138.

a. Relevance of a BOC's Prior Section 271 Orders

32. The *SWBT Kansas/Oklahoma Order* specifically outlined a non-exhaustive evidentiary showing that must be made in the initial application when a BOC seeks to rely on evidence presented in another application.[92] First, a BOC's application must explain the extent to which the OSS are "the same" – that is, whether it employs the shared use of a single OSS, or the use of systems that are identical, but separate.[93] To satisfy this inquiry, the Commission looks to whether the relevant states utilize a common set of processes, business rules, interfaces, systems and, in many instances, even personnel.[94] The Commission will also carefully examine third party reports that demonstrate that the BOC's OSS are the same in each of the relevant states.[95] Finally, where a BOC has discernibly separate OSS, it must demonstrate that its OSS reasonably can be expected to behave in the same manner.[96] Second, unless an applicant seeks to establish only that certain discrete components of its OSS are the same, an applicant must submit evidence relating to *all* aspects of its OSS, including those OSS functions performed by BOC personnel.

b. Pre-Ordering

33. A BOC must demonstrate that: (i) it offers nondiscriminatory access to OSS pre-ordering functions associated with determining whether a loop is capable of supporting xDSL advanced technologies; (ii) competing carriers successfully have built and are using application-to-application interfaces to perform pre-ordering functions and are able to integrate pre-ordering and ordering interfaces;[97] and (iii) its pre-ordering systems provide reasonably prompt response times and are consistently available in a manner that affords competitors a meaningful opportunity to compete.[98]

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92 *See id*. at 6286-91, paras. 107-118

93 *See id*. at 6288, para. 111.

94 The Commission has consistently held that a BOC's OSS includes both mechanized systems and manual processes, and thus the OSS functions performed by BOC personnel have been part of the FCC's OSS functionality and commercial readiness reviews.

95 *See SWBT Kansas/Oklahoma Order*, *id*. at 6287, para. 108.

96 *See id*. at 6288, para. 111.

97 In prior orders, the Commission has emphasized that providing pre-ordering functionality through an application-to-application interface is essential in enabling carriers to conduct real-time processing and to integrate pre-ordering and ordering functions in the same manner as the BOC. *SWBT Texas Order*, 15 FCC Rcd at 18426, para. 148.

98 The Commission has held previously that an interface that provides responses in a prompt timeframe and is stable and reliable, is necessary for competing carriers to market their services and serve their customers as efficiently and at the same level of quality as a BOC serves its own customers. *See Bell Atlantic New York Order*, 15 FCC Rcd at 4025 and 4029, paras. 145 and 154.

34. The pre-ordering phase of OSS generally includes those activities that a carrier undertakes to gather and verify the information necessary to place an order.[99] Given that pre-ordering represents the first exposure that a prospective customer has to a competing carrier, it is critical that a competing carrier is able to accomplish pre-ordering activities in a manner no less efficient and responsive than the incumbent.[100] Most of the pre-ordering activities that must be undertaken by a competing carrier to order resale services and UNEs from the incumbent are analogous to the activities a BOC must accomplish to furnish service to its own customers. For these pre-ordering functions, a BOC must demonstrate that it provides requesting carriers access that enables them to perform pre-ordering functions in substantially the same time and manner as its retail operations.[101] For those pre-ordering functions that lack a retail analogue, a BOC must provide access that affords an efficient competitor a meaningful opportunity to compete.[102] In prior orders, the Commission has emphasized that providing pre-ordering functionality through an application-to-application interface is essential in enabling carriers to conduct real-time processing and to integrate pre-ordering and ordering functions in the same manner as the BOC.[103]

(i) Access to Loop Qualification Information

35. In accordance with the *UNE Remand Order*,[104] the Commission requires incumbent carriers to provide competitors with access to all of the same detailed information about the loop that is available to the incumbents,[105] and in the same time frame, so that a

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[99] *See Bell Atlantic New York Order*, 15 FCC Rcd at 4014, para. 129; *see also Second BellSouth Louisiana Order*, 13 FCC Rcd. at 20660, para. 94 (referring to "pre-ordering and ordering" collectively as "the exchange of information between telecommunications carriers about current or proposed customer products and services or unbundled network elements or some combination thereof"). In prior orders, the Commission has identified the following five pre-order functions: (1) customer service record (CSR) information; (2) address validation; (3) telephone number information; (4) due date information; (5) services and feature information. *See Bell Atlantic New York Order*, 15 FCC Rcd at 4015, para. 132; Second *BellSouth Louisiana Order*, 13 FCC Rcd. at 20660, para. 94; *BellSouth South Carolina Order*, 13 FCC Rcd. at 619, para. 147.

[100] *Bell Atlantic New York Order*, *id*. at 4014, para. 129.

[101] *Id.; see also BellSouth South Carolina Order*, 13 FCC Rcd. at 623-29 (concluding that failure to deploy an application-to-application interface denies competing carriers equivalent access to pre-ordering OSS functions).

[102] *Bell Atlantic New York Order*, *id*.

[103] *See id.* at 4014, para. 130; *Second BellSouth Louisiana Order*, 13 FCC Rcd at 20661-67, para. 105.

[104] *UNE Remand Order*, 15 FCC Rcd 3696, 3885, para. 426 (determining "that the pre-ordering function includes access to loop qualification information.").

[105] *See id.* At a minimum, a BOC must provide (1) the composition of the loop material, including both fiber and copper; (2) the existence, location and type of any electronic or other equipment on the loop, including but not limited to, digital loop carrier or other remote concentration devices, feeder/distribution interfaces, bridge taps, load coils, pair-gain devices, disturbers in the same or adjacent binder groups; (3) the loop length, including the length and location of each type of transmission media; (4) the wire gauge(s) of the loop; and (5) the electrical parameters of the loop, which may determine the suitability of the loop for various technologies. *Id.*

competing carrier can make an independent judgment at the pre-ordering stage about whether an end user loop is capable of supporting the advanced services equipment the competing carrier intends to install.[106] Under the *UNE Remand Order*, the relevant inquiry is not whether a BOC's retail arm accesses such underlying information but whether such information exists anywhere in a BOC's back office and can be accessed by any of a BOC's personnel.[107] Moreover, a BOC may not "filter or digest" the underlying information and may not provide only information that is useful in provisioning of a particular type of xDSL that a BOC offers.[108] A BOC must also provide loop qualification information based, for example, on an individual address or zip code of the end users in a particular wire center, NXX code or on any other basis that the BOC provides such information to itself. Moreover, a BOC must also provide access for competing carriers to the loop qualifying information that the BOC can itself access manually or electronically. Finally, a BOC must provide access to loop qualification information to competitors within the same time intervals it is provided to the BOC's retail operations or its advanced services affiliate.[109] As the Commission determined in the *UNE Remand Order*, however, "to the extent such information is not normally provided to the incumbent's retail personnel, but can be obtained by contacting back office personnel, it must be provided to requesting carriers within the same time frame that any incumbent personnel are able to obtain such information."[110]

c. Ordering

36. Consistent with Section 271(c)(2)(B)(ii), a BOC must demonstrate its ability to provide competing carriers with access to the OSS functions necessary for placing wholesale orders. For those functions of the ordering systems for which there is a retail analogue, a BOC must demonstrate, with performance data and other evidence, that it provides competing carriers with access to its OSS systems in substantially the same time and manner as it provides to its retail operations. For those ordering functions that lack a direct retail analogue, a BOC must demonstrate that its systems and performance allow an efficient carrier a meaningful opportunity to compete. As in prior section 271 orders, the Commission looks primarily at the applicant's

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[106] As the Commission has explained in prior proceedings, because characteristics of a loop, such as its length and the presence of various impediments to digital transmission, can hinder certain advanced services technologies, carriers often seek to "pre-qualify" a loop by accessing basic loop makeup information that will assist carriers in ascertaining whether the loop, either with or without the removal of the impediments, can support a particular advanced service. *See id.*, 15 FCC Rcd at 4021, para. 140.

[107] *UNE Remand Order*, 15 FCC Rcd at 3885-3887, paras. 427-431 (noting that "to the extent such information is not normally provided to the incumbent's retail personnel, but can be obtained by contacting back office personnel, it must be provided to requesting carriers within the same time frame that any incumbent personnel are able to obtain such information.").

[108] *See SWBT Kansas/Oklahoma Order*, para. 121.

[109] *Id.*

[110] *UNE Remand Order*, 15 FCC Rcd at 3885-3887, paras. 427-431.

ability to return order confirmation notices, order reject notices, order completion notices and jeopardies, and at its order flow-through rate.[111]

d. Provisioning

37. A BOC must provision competing carriers' orders for resale and UNE-P services in substantially the same time and manner as it provisions orders for its own retail customers.[112] Consistent with the approach in prior section 271 orders, the Commission examines a BOC's provisioning processes, as well as its performance with respect to provisioning timeliness (*i.e.*, missed due dates and average installation intervals) and provisioning quality (*i.e.*, service problems experienced at the provisioning stage).[113]

e. Maintenance and Repair

38. A competing carrier that provides service through resale or unbundled network elements remains dependent upon the incumbent LEC for maintenance and repair. Thus, as part of its obligation to provide nondiscriminatory access to OSS functions, a BOC must provide requesting carriers with nondiscriminatory access to its maintenance and repair systems.[114] To the extent a BOC performs analogous maintenance and repair functions for its retail operations, it must provide competing carriers access that enables them to perform maintenance and repair functions "in substantially the same time and manner" as a BOC provides its retail customers.[115] Equivalent access ensures that competing carriers can assist customers experiencing service disruptions using the same network information and diagnostic tools that are available to BOC personnel.[116] Without equivalent access, a competing carrier would be placed at a significant competitive disadvantage, as its customer would perceive a problem with a BOC's network as a problem with the competing carrier's own network.[117]

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[111] *See SWBT Texas Order*, 15 FCC Rcd at 18438, para. 170; *Bell Atlantic New York Order*, 15 FCC Rcd at 4035-4039, paras. 163-166. The Commission examines (i) order flow-through rates, (ii) jeopardy notices and (iii) order completion notices using the "same time and manner" standard. The Commission examines order confirmation notices and order rejection notices using the "meaningful opportunity to compete" standard.

[112] *See Bell Atlantic New York*, *id*. at 4058, para. 196. For provisioning timeliness, the Commission looks to missed due dates and average installation intervals; for provisioning quality, the Commission looks to service problems experienced at the provisioning stage.

[113] *Id.*

[114] *Id*. at 4067, para. 212; *Second BellSouth Louisiana Order*, 13 FCC Rcd at 20692; *Ameritech Michigan Order*, 12 FCC Rcd at 20613, 20660-61.

[115] *Bell Atlantic New York Order*, *id*.; *see also Second BellSouth Louisiana Order*, *id*. at 20692-93.

[116] *Bell Atlantic New York Order*, *id*.

[117] *Id*.

f. Billing

39. A BOC must provide nondiscriminatory access to its billing functions, which is necessary to enable competing carriers to provide accurate and timely bills to their customers.[118] In making this determination, the Commission assesses a BOC's billing processes and systems, and its performance data. Consistent with prior section 271 orders, a BOC must demonstrate that it provides competing carriers with complete and accurate reports on the service usage of competing carriers' customers in substantially the same time and manner that a BOC provides such information to itself, and with wholesale bills in a manner that gives competing carriers a meaningful opportunity to compete.[119]

g. Change Management Process

40. Competing carriers need information about, and specifications for, an incumbent's systems and interfaces to develop and modify their systems and procedures to access the incumbent's OSS functions.[120] Thus, in order to demonstrate that it is providing nondiscriminatory access to its OSS, a BOC must first demonstrate that it "has deployed the necessary systems and personnel to provide sufficient access to each of the necessary OSS functions and . . . is adequately assisting competing carriers to understand how to implement and use all of the OSS functions available to them."[121] By showing that it adequately assists competing carriers to use available OSS functions, a BOC provides evidence that it offers an efficient competitor a meaningful opportunity to compete.[122] As part of this demonstration, the Commission will give substantial consideration to the existence of an adequate change management process and evidence that the BOC has adhered to this process over time.[123]

41. The change management process refers to the methods and procedures that the BOC employs to communicate with competing carriers regarding the performance of, and changes in, the BOC's OSS system.[124] Such changes may include updates to existing functions that impact competing carrier interface(s) upon a BOC's release of new interface software; technology changes that require competing carriers to meet new technical requirements upon a

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118 *See SWBT Texas Order*, 15 FCC Rcd at 18461, para. 210.

119 *See id.*; *SWBT Kansas/Oklahoma Order*, 16 FCC Rcd at 6316-17, at para 163.

120 *Bell Atlantic New York Order*, 15 FCC Rcd at 3999-4000, para. 102; *First BellSouth Louisiana Order*, 13 FCC Rcd. at 6279 n. 197; *BellSouth South Carolina Order*, 13 FCC Rcd. at 625 n. 467; *Ameritech Michigan Order*, 12 FCC Rcd. at 20617 n. 334; *Local Competition Second Report and Order*, 11 FCC Rcd. at 19742.

121 *Bell Atlantic New York Order*, *id*. at 3999, para. 102.

122 *Id.* at 3999-4000, para. 102

123 *Id.* at 4000, para. 102.

124 *Id.* at 4000, para. 103.

BOC's software release date; additional functionality changes that may be used at the competing carrier's option, on or after a BOC's release date for new interface software; and changes that may be mandated by regulatory authorities.[125] Without a change management process in place, a BOC can impose substantial costs on competing carriers simply by making changes to its systems and interfaces without providing adequate testing opportunities and accurate and timely notice and documentation of the changes.[126] Change management problems can impair a competing carrier's ability to obtain nondiscriminatory access to UNEs, and hence a BOC's compliance with section 271(2)(B)(ii).[127]

42. In evaluating whether a BOC's change management plan affords an efficient competitor a meaningful opportunity to compete, the Commission first assesses whether the plan is adequate. In making this determination, it assesses whether the evidence demonstrates: (1) that information relating to the change management process is clearly organized and readily accessible to competing carriers;[128] (2) that competing carriers had substantial input in the design and continued operation of the change management process;[129] (3) that the change management plan defines a procedure for the timely resolution of change management disputes;[130] (4) the availability of a stable testing environment that mirrors production;[131] and (5) the efficacy of the documentation the BOC makes available for the purpose of building an electronic gateway.[132] After determining whether the BOC's change management plan is adequate, the Commission evaluates whether the BOC has demonstrated a pattern of compliance with this plan.[133]

2. UNE Combinations.

43. In order to comply with the requirements of checklist item 2, a BOC must show that it is offering "[n]ondiscriminatory access to network elements in accordance with the

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[125] *Id.*

[126] *Id.* at 4000, para. 103.

[127] *Id.*

[128] *Id.* at 4002, para. 107.

[129] *Id.* at 4000, para. 104.

[130] *Id.* at 4002, para. 108.

[131] *Id.* at 4002-03, paras. 109-10.

[132] *Id.* at 4003-04, para. 110. In the *Bell Atlantic New York Order*, the Commission used these factors in determining whether Bell Atlantic had an adequate change management process in place. *See id.* at 4004, para. 111. The Commission left open the possibility, however, that a change management plan different from the one implemented by Bell Atlantic may be sufficient to demonstrate compliance with the requirements of section 271. *Id.*

[133] *Id.* at 3999, para. 101, 4004-05, para. 112.

requirements of section 251(c)(3) . . . ."[134] Section 251(c)(3) requires an incumbent LEC to "provide, to any requesting telecommunications carrier . . . nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms and conditions that are just, reasonable, and nondiscriminatory . . . ."[135] Section 251(c)(3) of the Act also requires incumbent LECs to provide unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide a telecommunications service.[136]

44. In the *Ameritech Michigan Order*, the Commission emphasized that the ability of requesting carriers to use unbundled network elements, as well as combinations of unbundled network elements, is integral to achieving Congress' objective of promoting competition in local telecommunications markets.[137] Using combinations of unbundled network elements provides a competitor with the incentive and ability to package and market services in ways that differ from the BOCs' existing service offerings in order to compete in the local telecommunications market.[138] Moreover, combining the incumbent's unbundled network elements with their own facilities encourages facilities-based competition and allows competing providers to provide a wide array of competitive choices.[139] Because the use of combinations of unbundled network elements is an important strategy for entry into the local telecommunications market, as well as an obligation under the requirements of section 271, the Commission examines section 271 applications to determine whether competitive carriers are able to combine network elements as required by the Act and the Commission's regulations.[140]

3. Pricing of Network Elements

45. Checklist item 2 of section 271 states that a BOC must provide "nondiscriminatory access to network elements in accordance with sections 251(c)(3) and 252(d)(1)" of the Act.[141] Section 251(c)(3) requires local incumbent LECs to provide "nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory."[142] Section 252(d)(1) requires that a

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134 47 U.S.C. § 271(c)(2)(B)(ii).

135 *Id.* § 251(c)(3).

136 *Id.*

137 *Ameritech Michigan Order*, 12 FCC Rcd at 20718-19; *BellSouth South Carolina Order*, 13 FCC Rcd at 646.

138 *BellSouth South Carolina Order*, *id*. *See also Local Competition First Report and Order*, 11 FCC Rcd at 15666-68.

139 *Bell Atlantic New York Order* at para. 230.

140 *Id.*

141 47 U.S.C. § 271(B)(ii).

142 *Id.* § 251(c)(3).

state commission's determination of the just and reasonable rates for network elements shall be based on the cost of providing the network elements, shall be nondiscriminatory, and may include a reasonable profit.[143] Pursuant to this statutory mandate, the Commission has determined that prices for unbundled network elements (UNEs) must be based on the total element long run incremental cost (TELRIC) of providing those elements.[144] The Commission also promulgated rule 51.315(b), which prohibits incumbent LECs from separating already combined elements before providing them to competing carriers, except on request.[145] The Commission has previously held that it will not conduct a *de novo* review of a state's pricing determinations and will reject an application only if "basic TELRIC principles are violated or the state commission makes clear errors in factual findings on matters so substantial that the end result falls outside the range that the reasonable application of TELRIC principles would produce."[146]

46. Although the U.S. Court of Appeals for the Eighth Circuit stayed the Commission's pricing rules in 1996,[147] the Supreme Court restored the Commission's pricing authority on January 25, 1999, and remanded to the Eighth Circuit for consideration of the merits of the challenged rules.[148] On remand from the Supreme Court, the Eighth Circuit concluded that while TELRIC is an acceptable method for determining costs, certain specific requirements contained within the Commission's pricing rules were contrary to Congressional intent.[149] The

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143 47 U.S.C. § 252(d)(1).

144 *Local Competition First Report and Order*, 11 FCC Rcd at 15844-46, paras. 674-679; 47 C.F.R. §§ 51.501 *et seq*. *See also Deployment of Wireline Services Offering Advanced Telecommunications Capability, CC Docket No. 98-147, and Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98*, Third Report and Order and Fourth Report and Order, 14 FCC Rcd 20912, 20974, para. 135 *(Line Sharing Order)* (concluding that states should set the prices for line sharing as a new network element in the same manner as the state sets prices for other UNEs).

145 *See* 47 C.F.R. § 51.315(b).

146 *Bell Atlantic New York Order*, 15 FCC Rcd at 4084, para. 244; *SWBT Kansas/Oklahoma Order*, 16 FCC Rcd at 6266, para. 59.

147 *Iowa Utils. Bd. v. FCC*, 120 F.3d 753, 800, 804, 805-06 (8th Cir. 1997).

148 *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999). In reaching its decision, the Court acknowledged that section 201(b) "explicitly grants the FCC jurisdiction to make rules governing matters to which the 1996 Act applies." *Id.* at 380. Furthermore, the Court determined that section 251(d) also provides evidence of an express jurisdictional grant by requiring that "the Commission [shall] complete all actions necessary to establish regulations to implement the requirements of this section." *Id.* at 382. The Court also held that the pricing provisions implemented under the Commission's rulemaking authority do not inhibit the establishment of rates by the states. The Court concluded that the Commission has jurisdiction to design a pricing methodology to facilitate local competition under the 1996 Act, including pricing for interconnection and unbundled access, as "it is the States that will apply those standards and implement that methodology, determining the concrete result." *Id.*

149 *Iowa Utils. Bd. v. FCC*, 219 F.3d 744 (8th Cir. 2000), *petition for cert. filed sub nom. Verizon Communications v. FCC*, 69 U.S.L.W. 3269 (U.S. Oct. 4, 2000) (No. 00-511).

Eighth Circuit has stayed the issuance of its mandate pending review by the Supreme Court.[150] Accordingly, the Commission's pricing rules remain in effect.

C. Checklist Item 3 – Poles, Ducts, Conduits and Rights of Way.

47. Section 271(c)(2)(B)(iii) requires BOCs to provide "[n]ondiscriminatory access to the poles, ducts, conduits, and rights-of-way owned or controlled by the [BOC] at just and reasonable rates in accordance with the requirements of section 224."[151] Section 224(f)(1) states that "[a] utility shall provide a cable television system or any telecommunications carrier with nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by it."[152] Notwithstanding this requirement, section 224(f)(2) permits a utility providing electric service to deny access to its poles, ducts, conduits, and rights-of-way, on a nondiscriminatory basis, "where there is insufficient capacity and for reasons of safety, reliability and generally applicable engineering purposes."[153] Section 224 also contains two separate provisions governing the maximum rates that a utility may charge for "pole attachments."[154] Section 224(b)(1) states that the Commission shall regulate the rates, terms, and conditions governing pole attachments to ensure that they are "just and reasonable."[155] Notwithstanding this general grant of authority, section 224(c)(1) states that "[n]othing in [section 224] shall be construed to apply to, or to give the Commission jurisdiction with respect to the rates, terms, and conditions, or access to poles, ducts, conduits and rights-of-way as provided in [section 224(f)], for pole attachments in any case where such matters are regulated by a State."[156] As of 1992, nineteen states, including

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[150] *Iowa Utils. Bd. v. FCC*, No. 96-3321 *et al.* (8th Cir. Sept. 25, 2000).

[151] 47 U.S.C. § 271(c)(2)(B)(iii). As originally enacted, section 224 was intended to address obstacles that cable operators encountered in obtaining access to poles, ducts, conduits, or rights-of-way owned or controlled by utilities. The 1996 Act amended section 224 in several important respects to ensure that telecommunications carriers as well as cable operators have access to poles, ducts, conduits, or rights-of-way owned or controlled by utility companies, including LECs. *Second BellSouth Louisiana Order*, 13 FCC Rcd at 20706, n.574.

[152] 47 U.S.C. § 224(f)(1). Section 224(a)(1) defines "utility" to include any entity, including a LEC, that controls "poles, ducts, conduits, or rights-of-way used, in whole or in part, for any wire communications." 47 U.S.C. § 224(a)(1).

[153] 47 U.S.C. § 224(f)(2). In the *Local Competition First Report and Order*, the Commission concluded that, although the statutory exception enunciated in section 224(f)(2) appears to be limited to utilities providing electrical service, LECs should also be permitted to deny access to their poles, ducts, conduits, and rights-of-way because of insufficient capacity and for reasons of safety, reliability and generally applicable engineering purposes, provided the assessment of such factors is done in a nondiscriminatory manner. *Local Competition First Report and Order*, 11 FCC Rcd at 16080-81, paras. 1175-77.

[154] Section 224(a)(4) defines "pole attachment" as "any attachment by a cable television system or provider of telecommunications service to a pole, duct, conduit, or right-of-way owned or controlled by a utility." 47 U.S.C. § 224(a)(4).

[155] 47 U.S.C. § 224(b)(1).

[156] *Id.* § 224(c)(1). The 1996 Act extended the Commission's authority to include not just rates, terms, and (continued….)

Connecticut, had certified to the Commission that they regulated the rates, terms, and conditions for pole attachments.[157]

D. Checklist Item 4 – Unbundled Local Loops.

48. Section 271(c)(2)(B)(iv) of the Act, item 4 of the competitive checklist, requires that a BOC provide "[l]ocal loop transmission from the central office to the customer's premises, unbundled from local switching or other services."[158] The Commission has defined the loop as a transmission facility between a distribution frame, or its equivalent, in an incumbent LEC central office, and the demarcation point at the customer premises. This definition includes different types of loops, including two-wire and four-wire analog voice-grade loops, and two-wire and four-wire loops that are conditioned to transmit the digital signals needed to provide service such as ISDN, ADSL, HDSL, and DS1-level signals.[159]

49. In order to establish that it is "providing" unbundled local loops in compliance with checklist item 4, a BOC must demonstrate that it has a concrete and specific legal obligation to furnish loops and that it is currently doing so in the quantities that competitors demand and at an acceptable level of quality. A BOC must also demonstrate that it provides nondiscriminatory access to unbundled loops.[160] Specifically, the BOC must provide access to any functionality of the loop requested by a competing carrier unless it is not technically feasible to condition the loop facility to support the particular functionality requested. In order to provide the requested loop functionality, such as the ability to deliver xDSL services, the BOC may be required to take affirmative steps to condition existing loop facilities to enable competing carriers to provide services not currently provided over the facilities. The BOC must provide competitors with access to unbundled loops regardless of whether the BOC uses digital loop carrier (DLC) technology or similar remote concentration devices for the particular loops sought by the competitor.

(Continued from previous page)
conditions, but also the authority to regulate nondiscriminatory access to poles, ducts, conduits, and rights-of-way. *Local Competition First Report and Order*, 11 FCC Rcd at 16104, para. 1232; 47 U.S.C. § 224(f). Absent state regulation of terms and conditions of nondiscriminatory attachment access, the Commission retains jurisdiction. *Local Competition First Report and Order*, 11 FCC Rcd at 16104, para. 1232; 47 U.S.C. § 224(c)(1); *see also Bell Atlantic New York Order*, 15 FCC Rcd at 4093, para. 264.

[157] *See States That Have Certified That They Regulate Pole Attachments*, Public Notice, 7 FCC Rcd 1498 (1992); 47 U.S.C. § 224(f).

[158] 47 U.S.C. § 271(c)(2)(B)(iv).

[159] *Local Competition First Report and Order*, 11 FCC Rcd at 15691, para. 380; *UNE Remand Order*, 15 FCC Rcd at 3772-73, paras. 166-167, n.301 (retaining definition of the local loop from the *Local Competition First Report and Order*, but replacing the phrase "network interconnection device" with "demarcation point," and making explicit that dark fiber and loop conditioning are among the features, functions and capabilities of the loop).

[160] *SWBT Texas Order*, 15 FCC Rcd at 18481-81, para. 248; *Bell Atlantic New York Order*, 15 FCC Rcd at 4095, para. 269; *Second BellSouth Louisiana Order*, 13 FCC Rcd at 20637, para. 185.

50. On December 9, 1999, the Commission released the *Line Sharing Order*, which introduced new rules requiring BOCs to offer requesting carriers unbundled access to the high-frequency portion of local loops (HFPL).[161] HFPL is defined as "the frequency above the voiceband on a copper loop facility that is being used to carry traditional POTS analog circuit-switched voiceband transmissions." This definition applies whether a BOC's voice customers are served by cooper or by digital loop carrier equipment. Competing carriers should have access to the HFPL at either a central office or at a remote terminal, however, the HFPL network element is *only* available on a copper loop facility.[162]

51. To determine whether a BOC makes line sharing available consistent with Commission rules set out in the *Line Sharing Order*, the Commission examines categories of performance measurements identified in the Bell Atlantic New York and SWBT Texas Orders. Specifically, a successful BOC applicant could provide evidence of BOC-caused missed installation due dates, average installation intervals, trouble reports within 30 days of installation, mean time to repair, trouble report rates, and repeat trouble report rates. In addition, a successful BOC applicant should provide evidence that its central offices are operationally ready to handle commercial volumes of line sharing and that it provides competing carriers with nondiscriminatory access to the pre-ordering and ordering OSS functions associated with the provision of line shared loops, including access to loop qualification information and databases.

52. Section 271(c)(2)(B)(iv) also requires that a BOC must demonstrate that it makes line splitting available to competing carriers so that competing carriers may provide voice and data service over a single loop"[163] In addition, a BOC must demonstrate that a competing carrier, either alone or in conjunction with another carrier, is able to replace an existing UNE-P configuration used to provide voice service with an arrangement that enables it to provide voice and data service to a customer. To make such a showing, a BOC must show that it has a legal obligation to provide line splitting through rates, terms, and conditions in interconnection agreements and that it offers competing carriers the ability to order an unbundled xDSL-capable loop terminated to a collocated splitter and DSLAM equipment, and combine it with unbundled switching and shared transport.[164]

E. Checklist Item 5 – Unbundled Local Transport.

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[161] *See Line Sharing Order*, 14 FCC Rcd at 20924-27, paras. 20-27.

[162] *Line Sharing Reconsideration Order*, para. 10.

[163] *See generally SWBT Texas Order*, 15 FCC Rcd at 18515-17, paras. 323-329 (describing line splitting); 47 C.F.R. §51.703(c) (requiring that incumbent LECs provide competing carriers with access to unbundled loops in a manner that allows competing carriers "to provide any telecommunications service that can be offered by means of that network element.").

[164] *See Kansas/Oklahoma Order*, 16 FCC Rcd at 6348, para. *220.*

53. Section 271(c)(2)(B)(v) of the competitive checklist requires a BOC to provide "[l]ocal transport from the trunk side of a wireline local exchange carrier switch unbundled from switching or other services."[165] The Commission has required that BOCs provide both dedicated and shared transport to requesting carriers.[166] Dedicated transport consists of BOC transmission facilities dedicated to a particular customer or carrier that provide telecommunications between wire centers owned by BOCs or requesting telecommunications carriers, or between switches owned by BOCs or requesting telecommunications carriers.[167] Shared transport consists of transmission facilities shared by more than one carrier, including the BOC, between end office switches, between end office switches and tandem switches, and between tandem switches, in the BOC's network.[168]

F. Checklist Item 6 – Unbundled Local Switching.

54. Section 271(c)(2)(B)(vi) of the 1996 Act requires a BOC to provide "[l]ocal switching unbundled from transport, local loop transmission, or other services."[169] In the *Second BellSouth Louisiana Order,* the Commission required BellSouth to provide unbundled local switching that included line-side and trunk-side facilities, plus the features, functions, and

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[165] 47 U.S.C. § 271(c)(2)(B)(v).

[166] *Second BellSouth Louisiana Order*, 13 FCC Rcd at 20719, para. 201.

[167] *Id.* A BOC has the following obligations with respect to dedicated transport: (a) provide unbundled access to dedicated transmission facilities between BOC central offices or between such offices and serving wire centers (SWCs); between SWCs and interexchange carriers points of presence (POPs); between tandem switches and SWCs, end offices or tandems of the BOC, and the wire centers of BOCs and requesting carriers; (b) provide all technically feasible transmission capabilities such as DS1, DS3, and Optical Carrier levels that the competing carrier could use to provide telecommunications; (c) not limit the facilities to which dedicated interoffice transport facilities are connected, provided such interconnections are technically feasible, or restrict the use of unbundled transport facilities; and (d) to the extent technically feasible, provide requesting carriers with access to digital cross-connect system functionality in the same manner that the BOC offers such capabilities to interexchange carriers that purchase transport services. *Id.* at 20719.

[168] *Id.* at 20719, n. 650. The Commission also found that a BOC has the following obligations with respect to shared transport: (a) provide shared transport in a way that enables the traffic of requesting carriers to be carried on the same transport facilities that a BOC uses for its own traffic; (b) provide shared transport transmission facilities between end office switches, between its end office and tandem switches, and between tandem switches in its network; (c) permit requesting carriers that purchase unbundled shared transport and unbundled switching to use the same routing table that is resident in the BOC's switch; and (d) permit requesting carriers to use shared (or dedicated) transport as an unbundled element to carry originating access traffic from, and terminating traffic to, customers to whom the requesting carrier is also providing local exchange service. *Id.* at 20720, n. 652.

[169] 47 U.S.C. § 271(c)(2)(B)(vi); *see also Second BellSouth Louisiana Order*, 13 FCC Rcd at 20722. A switch connects end user lines to other end user lines, and connects end user lines to trunks used for transporting a call to another central office or to a long-distance carrier. Switches can also provide end users with "vertical features" such as call waiting, call forwarding, and caller ID, and can direct a call to a specific trunk, such as to a competing carrier's operator services.

capabilities of the switch.[170] The features, functions, and capabilities of the switch include the basic switching function as well as the same basic capabilities that are available to the incumbent LEC's customers.[171] Additionally, local switching includes all vertical features that the switch is capable of providing, as well as any technically feasible customized routing functions.[172]

55. Moreover, in the *Second BellSouth Louisiana Order*, the Commission required BellSouth to permit competing carriers to purchase unbundled network elements, including unbundled switching, in a manner that permits a competing carrier to offer, and bill for, exchange access and the termination of local traffic.[173] The Commission also stated that measuring daily customer usage for billing purposes requires essentially the same OSS functions for both competing carriers and incumbent LECs, and that a BOC must demonstrate that it is providing equivalent access to billing information.[174] Therefore, the ability of a BOC to provide billing information necessary for a competitive LEC to bill for exchange access and termination of local traffic is an aspect of unbundled local switching.[175] Thus, there is an overlap between the provision of unbundled local switching and the provision of the OSS billing function.[176]

56. To comply with the requirements of unbundled local switching, a BOC must also make available trunk ports on a shared basis and routing tables resident in the BOC's switch, as necessary to provide access to shared transport functionality.[177] In addition, a BOC may not limit the ability of competitors to use unbundled local switching to provide exchange access by requiring competing carriers to purchase a dedicated trunk from an interexchange carrier's point of presence to a dedicated trunk port on the local switch.[178]

G. Checklist Item 7 – 911/E911 Access and Directory Assistance/Operator Services.

57. Section 271(c)(2)(B)(vii) of the Act requires a BOC to provide "[n]ondiscriminatory access to – (I) 911 and E911 services."[179] In the *Ameritech Michigan*

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[170] *Second BellSouth Louisiana Order*, 13 FCC Rcd at 20722, para. 207.

[171] *Id.*

[172] *Id.* at 20722-23, para. 207.

[173] *Id.* at 20723, para. 208.

[174] *Id.* at 20723, para. 208 (citing the *Ameritech Michigan Order*, 12 FCC Rcd at 20619, para. 140).

[175] *Id.*

[176] *Id.*

[177] *Id.* at 20723, para. 209 (citing the *Ameritech Michigan Order*, 12 FCC Rcd at 20705, para. 306).

[178] *Id.* (citing the *Ameritech Michigan Order*, 12 FCC Rcd at 20714-15, paras. 324-25).

[179] 47 U.S.C. § 271(c)(2)(B)(vii). 911 and E911 services transmit calls from end users to emergency personnel. (continued….)

Order, the Commission found that "section 271 requires a BOC to provide competitors access to its 911 and E911 services in the same manner that a BOC obtains such access, *i.e.*, at parity."[180] Specifically, the Commission found that a BOC "must maintain the 911 database entries for competing LECs with the same accuracy and reliability that it maintains the database entries for its own customers."[181] For facilities-based carriers, the BOC must provide "unbundled access to [its] 911 database and 911 interconnection, including the provision of dedicated trunks from the requesting carrier's switching facilities to the 911 control office at parity with what [the BOC] provides to itself."[182] Section 271(c)(2)(B)(vii)(II) and section 271(c)(2)(B)(vii)(III) require a BOC to provide nondiscriminatory access to "directory assistance services to allow the other carrier's customers to obtain telephone numbers" and "operator call completion services," respectively.[183] Section 251(b)(3) of the Act imposes on each LEC "the duty to permit all [competing providers of telephone exchange service and telephone toll service] to have nondiscriminatory access to . . . operator services, directory assistance, and directory listing, with no unreasonable dialing delays."[184] The Commission concluded in the *Second BellSouth Louisiana Order* that a BOC must be in compliance with the regulations implementing section 251(b)(3) to satisfy the requirements of sections 271(c)(2)(B)(vii)(II) and 271(c)(2)(B)(vii)(III).[185]

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It is critical that a BOC provide competing carriers with accurate and nondiscriminatory access to 911/E911 services so that these carriers' customers are able to reach emergency assistance. Customers use directory assistance and operator services to obtain customer listing information and other call completion services.

[180] *Ameritech Michigan Order*, 12 FCC Rcd at 20679, para. 256.

[181] *Id.*

[182] *Id.*

[183] 47 U.S.C. §§ 271(c)(2)(B)(vii)(II), (III).

[184] *Id.* § 251(b)(3). The Commission implemented section 251(b)(3) in the *Local Competition Second Report and Order*. 47 C.F.R. § 51.217; *In re Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Second Report and Order and Memorandum Opinion and Order, 11 FCC Rcd 19392 (1996) (*Local Competition Second Report and Order*) *vacated in part, People of the State of California v. FCC*, 124 F.3d 934 (8th Cir. 1997), *overruled in part, AT&T Corp. v. Iowa Utils. Bd.*, 119 S.Ct. 721 (1999)*; see also Implementation of the Telecommunications Act of 1996: Provision of Directory Listings Information under the Telecommunications Act of 1934*, Notice of Proposed Rulemaking, 14 FCC Rcd 15550 (1999) (*Directory Listings Information NPRM*).

[185] While both sections 251(b)(3) and 271(c)(2)(B)(vii)(II) refer to nondiscriminatory access to "directory assistance," section 251(b)(3) refers to nondiscriminatory access to "operator services," while section 271(c)(2)(B)(vii)(III) refers to nondiscriminatory access to "operator call completion services." 47 U.S.C. §§ 251(b)(3), 271(c)(2)(B)(vii)(III). The term "operator call completion services" is not defined in the Act, nor has the Commission previously defined the term. However, for section 251(b)(3) purposes, the term "operator services" was defined as meaning "any automatic or live assistance to a consumer to arrange for billing or completion, or both, of a telephone call." *Local Competition Second Report and Order*, 11 FCC Rcd at 19448, para. 110. In the same order the Commission concluded that busy line verification, emergency interrupt, and operator-assisted directory assistance are forms of "operator services," because they assist customers in arranging for the billing or completion (or both) of a telephone call. *Id.* at 19449, para. 111. All of these services may be needed or used to place a call. For example, if a customer tries to direct dial a telephone number and constantly (continued….)

In the *Local Competition Second Report and Order*, the Commission held that the phrase "nondiscriminatory access to directory assistance and directory listings" means that "the customers of all telecommunications service providers should be able to access each LEC's directory assistance service and obtain a directory listing on a nondiscriminatory basis, notwithstanding: (1) the identity of a requesting customer's local telephone service provider; or (2) the identity of the telephone service provider for a customer whose directory listing is requested."[186] The Commission concluded that nondiscriminatory access to the dialing patterns of 4-1-1 and 5-5-5-1-2-1-2 to access directory assistance were technically feasible, and would continue.[187] The Commission specifically held that the phrase "nondiscriminatory access to operator services" means that ". . . a telephone service customer, regardless of the identity of his or her local telephone service provider, must be able to connect to a local operator by dialing '0,' or '0 plus' the desired telephone number."[188]

58. Competing carriers may provide operator services and directory assistance by either reselling the BOC's services or by using their own personnel and facilities to provide these services. The Commission's rules require BOCs to permit competitive LECs wishing to resell the BOC's operator services and directory assistance to request the BOC to brand their calls.[189]

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receives a busy signal, the customer may contact the operator to attempt to complete the call. Since billing is a necessary part of call completion, and busy line verification, emergency interrupt, and operator-assisted directory assistance can all be used when an operator completes a call, the Commission concluded in the *Second BellSouth Louisiana Order* that for checklist compliance purposes, "operator call completion services" is a subset of or equivalent to "operator service." *Second BellSouth Louisiana Order*, 13 FCC Rcd at 20740, n.763. As a result, the Commission uses the nondiscriminatory standards established for operator services to determine whether nondiscriminatory access is provided.

[186] 47 C.F.R. § 51.217(c)(3); *Local Competition Second Report and Order*, 11 FCC Rcd at 19456-58, paras. 130-35. The *Local Competition Second Report and Order's* interpretation of section 251(b)(3) is limited "to access to each LEC's directory assistance service." *Id.* at 19456, para. 135. However, section 271(c)(2)(B)(vii) is not limited to the LEC's systems but requires "nondiscriminatory access to . . . directory assistance to allow the other carrier's customers to obtain telephone numbers." 47 U.S.C. § 271(c)(2)(B)(vii). Combined with the Commission's conclusion that "incumbent LECs must unbundle the facilities and functionalities providing operator services and directory assistance from resold services and other unbundled network elements to the extent technically feasible," *Local Competition First Report and Order*, 11 FCC Rcd at 15772-73, paras. 535-37, section 271(c)(2)(B)(vii)'s requirement should be understood to require the BOCs to provide nondiscriminatory access to the directory assistance service provider selected by the customer's local service provider, regardless of whether the competitor; provides such services itself; selects the BOC to provide such services; or chooses a third party to provide such services. *See Directory Listings Information NPRM.*

[187] *Local Competition Second Report and Order*, 11 FCC Rcd at 19464, para. 151.

[188] *Id.* at para. 112.

[189] 47 C.F.R. § 51.217(d); *Local Competition Second Report and Order*, 11 FCC Rcd at 19463, para. 148. For example, when customers call the operator or calls for directory assistance, they typically hear a message, such as "thank you for using XYZ Telephone Company." Competing carriers may use the BOC's brand, request the BOC to brand the call with the competitive carriers name or request that the BOC not brand the call at all. 47 C.F.R. § 51.217(d).

Competing carriers wishing to provide operator services or directory assistance using their own facilities and personnel must be able to obtain directory listings either by obtaining directory information on a "read only" or "per dip" basis from the BOC's directory assistance database, or by creating their own directory assistance database by obtaining the subscriber listing information in the BOC's database.[190] Although the Commission originally concluded that BOCs must provide directory assistance and operator services on an unbundled basis pursuant to sections 251 and 252, the Commission removed directory assistance and operator services from the list of required unbundled network elements in the *Local Competition Third Report and Order*.[191] Checklist item obligations that do not fall within a BOC's obligations to provide unbundled network elements are not subject to the requirements of sections 251 and 252, including the requirement that rates be based on forward-looking economic costs.[192] Checklist item obligations that do not fall within a BOC's UNE obligations, however, still must be provided in accordance with sections 201(b) and 202(a), which require that rates and conditions be just and reasonable, and not unreasonably discriminatory.[193]

H. Checklist Item 8 – White Pages Directory Listings

59. Section 271(c)(2)(B)(viii) of the 1996 Act requires a BOC to provide "[w]hite pages directory listings for customers of the other carrier's telephone exchange service."[194] Section 251(b)(3) of the 1996 Act obligates all LECs to permit competitive providers of telephone exchange service and telephone toll service to have nondiscriminatory access to directory listings.[195]

60. In the *Second BellSouth Louisiana Order*, the Commission concluded that, "consistent with the Commission's interpretation of 'directory listing' as used in section 251(b)(3), the term 'white pages' in section 271(c)(2)(B)(viii) refers to the local alphabetical directory that includes the residential and business listings of the customers of the local exchange provider."[196] The Commission further concluded, "the term 'directory listing,' as used in this section, includes, at a minimum, the subscriber's name, address, telephone number, or any

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[190] 47 C.F.R. § 51.217(C)(3)(ii); *Local Competition Second Report and Order*, 11 FCC Rcd at 19460-61, paras. 141-44.

[191] *UNE Remand Order*, 15 FCC Rcd at 3891-92, paras. 441-42.

[192] *Local Competition Third Report and Order* at para. 470. *See generally* 47 U.S.C. §§ 251-52; *see also* 47 U.S.C. § 252(d)(1)(A)(i) (requiring UNE rates to be "based on the cost (determined without reference to a rate-of-return or other rate-based proceeding) of providing the … network element").

[193] *Local Competition Third Report and Order* at paras. 470-73; *see also* 47 U.S.C. §§ 201(b), 202(a).

[194] 47 U.S.C. § 271(c)(2)(B)(viii).

[195] *Id.* § 251(b)(3).

[196] *Second BellSouth Louisiana Order*, 13 FCC Rcd at 20748, para. 255.

combination thereof."[197] The Commission's *Second BellSouth Louisiana Order* also held that a BOC satisfies the requirements of checklist item 8 by demonstrating that it: (1) provided nondiscriminatory appearance and integration of white page directory listings to competitive LECs' customers; and (2) provided white page listings for competitors' customers with the same accuracy and reliability that it provides its own customers.[198]

I. Checklist Item 9 – Numbering Administration.

61. Section 271(c)(2)(B)(ix) of the 1996 Act requires a BOC to provide "nondiscriminatory access to telephone numbers for assignment to the other carrier's telephone exchange service customers," until "the date by which telecommunications numbering administration, guidelines, plan, or rules are established."[199] The checklist mandates compliance with "such guidelines, plan, or rules" after they have been established.[200] A BOC must demonstrate that it adheres to industry numbering administration guidelines and Commission rules.[201]

J. Checklist Item 10 – Databases and Associated Signaling.

62. Section 271(c)(2)(B)(x) of the 1996 Act requires a BOC to provide "nondiscriminatory access to databases and associated signaling necessary for call routing and completion."[202] In the *Second BellSouth Louisiana Order,* the Commission required BellSouth to demonstrate that it provided requesting carriers with nondiscriminatory access to: "(1) signaling networks, including signaling links and signaling transfer points; (2) certain call-related databases necessary for call routing and completion, or in the alternative, a means of physical access to the

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[197] *Id.* In the *Second BellSouth Louisiana Order,* the Commission stated that the definition of "directory listing" was synonymous with the definition of "subscriber list information." *Id.* at 20747 (citing the *Local Competition Second Report and Order,* 11 FCC Rcd at 19458-59). However, the Commission's decision in a recent proceeding obviates this comparison, and supports the definition of directory listing delineated above. *See Implementation of the Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information,* CC Docket No. 96-115, Third Report and Order; *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996,* CC Docket No. 96-98, Second Order on Reconsideration; *Provision of Directory Listing Information under the Telecommunications Act of 1934, As Amended,* CC Docket No. 99-273, FCC 99-227, Notice of Proposed Rulemaking, para. 160 (rel. Sept. 9, 1999).

[198] *Id.*

[199] 47 U.S.C. § 271(c)(2)(B)(ix).

[200] *Id.*

[201] *See Second Bell South Louisiana Order,* 13 FCC Rcd at 20752*; see also Numbering Resource Optimization,* Report and Order and Further Notice of Proposed Rulemaking, 15 FCC Rcd 7574 (2000); *Numbering Resource Optimization,* Second Report and Order, Order on Reconsideration in CC Docket No. 99-200 and Second Further Notice of Proposed Rulemaking in CC Docket No. 99-200, CC Docket Nos. 96-98; 99-200 (rel. Dec. 29, 2000).

[202] 47 U.S.C. § 271(c)(2)(B)(x).

signaling transfer point linked to the unbundled database; and (3) Service Management Systems (SMS)."[203] The Commission also required BellSouth to design, create, test, and deploy Advanced Intelligent Network (AIN) based services at the SMS through a Service Creation Environment (SCE).[204] In the *Local Competition First Report and Order*, the Commission defined call-related databases as databases, other than operations support systems, that are used in signaling networks for billing and collection or the transmission, routing, or other provision of telecommunications service.[205] At that time the Commission required incumbent LECs to provide unbundled access to their call-related databases, including but not limited to: the Line Information Database (LIDB), the Toll Free Calling database, the Local Number Portability database, and Advanced Intelligent Network databases.[206] In the *UNE Remand Order*, the Commission clarified that the definition of call-related databases "includes, but is not limited to, the calling name (CNAM) database, as well as the 911 and E911 databases."[207]

K. Checklist Item 11 – Number Portability.

63. Section 271(c)(2)(B) of the 1996 Act requires a BOC to comply with the number portability regulations adopted by the Commission pursuant to section 251.[208] Section 251(b)(2) requires all LECs "to provide, to the extent technically feasible, number portability in accordance with requirements prescribed by the Commission."[209] The 1996 Act defines number portability as "the ability of users of telecommunications services to retain, at the same location, existing telecommunications numbers without impairment of quality, reliability, or convenience when switching from one telecommunications carrier to another."[210] In order to prevent the cost of number portability from thwarting local competition, Congress enacted section 251(e)(2), which requires that "[t]he cost of establishing telecommunications numbering administration arrangements and number portability shall be borne by all telecommunications carriers on a competitively neutral basis as determined by the Commission."[211] Pursuant to these statutory

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[203] *Second BellSouth Louisiana Order*, 13 FCC Rcd at 20753, para. 267.

[204] *Id.* at 20755-56, para. 272.

[205] *Local Competition First Report and Order*, 11 FCC Rcd at 15741, n.1126; *UNE Remand Order*, 15 FCC Rcd at 3875, para. 403.

[206] *Id*. at 15741-42, para. 484.

[207] *UNE Remand Order*, 15 FCC Rcd at 3875, para. 403.

[208] 47 U.S.C. § 271(c)(2)(B)(xii).

[209] *Id.* at § 251(b)(2).

[210] *Id.* at § 153(30).

[211] *Id.* at § 251(e)(2); *see also Second BellSouth Louisiana Order*, 13 FCC Rcd at 20757, para. 274; *In the Matter of Telephone Number Portability*, Third Report and Order, 13 FCC Rcd 11701, 11702-04 (1998) (*Third Number Portability Order*); *In the Matter of Telephone Number Portability*, Fourth Memorandum Opinion and Order on Reconsideration, CC Docket No. 95-116, at paras. 1, 6-9 (Jun. 23, 1999) (*Fourth Number Portability Order*).

provisions, the Commission requires LECs to offer interim number portability "to the extent technically feasible."[212] The Commission also requires LECs to gradually replace interim number portability with permanent number portability.[213] The Commission has established guidelines for states to follow in mandating a competitively neutral cost-recovery mechanism for interim number portability,[214] and created a competitively neural cost-recovery mechanism for long-term number portability.[215]

L. Checklist Item 12 – Local Dialing Parity.

64. Section 271(c)(2)(B)(xii) requires a BOC to provide "[n]ondiscriminatory access to such services or information as are necessary to allow the requesting carrier to implement local dialing parity in accordance with the requirements of section 251(b)(3)."[216] Section 251(b)(3) imposes upon all LECs "[t]he duty to provide dialing parity to competing providers of telephone exchange service and telephone toll service with no unreasonable dialing delays."[217] Section 153(15) of the Act defines "dialing parity" as follows:

> . . . a person that is not an affiliate of a local exchange carrier is able to provide telecommunications services in such a manner that customers have the ability to route automatically, without the use of any access code, their telecommunications to the telecommunications services provider of the customer's designation . . .[218]

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[212] *Fourth Number Portability Order* at para. 10; *In re Telephone Number Portability*, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 8352, 8409-12, paras. 110-116 (1996) (*First Number Portability Order*); *see also* 47 U.S.C. § 251(b)(2).

[213] *See* 47 C.F.R. §§ 52.3(b)-(f); *Second BellSouth Louisiana Order*, 13 FCC Rcd at 20758, para. 275; *First Number Portability Order*, 11 FCC Rcd at 8355 and 8399-8404, paras. 3 and 91; *Third Number Portability Order*, 13 FCC Rcd at 11708-12, paras. 12-16.

[214] *See* 47 C.F.R. § 52.29; *Second BellSouth Louisiana Order*, 13 FCC Rcd at 20758, para. 275; *First Number Portability Order*, 11 FCC Rcd at 8417-24, paras. 127-140.

[215] *See* 47 C.F.R. §§ 52.32, 52.33; *Second BellSouth Louisiana Order*, 13 FCC Rcd at 20758, para. 275; *Third Number Portability Order*, 13 FCC Rcd at 11706-07, para. 8; *Fourth Number Portability Order* at para. 9.

[216] Based on the Commission's view that section 251(b)(3) does not limit the duty to provide dialing parity to any particular form of dialing parity (*i.e.*, international, interstate, intrastate, or local), the Commission adopted rules in August 1996 to implement broad guidelines and minimum nationwide standards for dialing parity. *Local Competition Second Report and Order*, 11 FCC Rcd at 19407; *Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, CC Docket No. 95-185, Further Order On Reconsideration, FCC 99-170 (rel. July 19, 1999).

[217] 47 U.S.C. § 251(b)(3).

[218] *Id.* at § 153(15).

65. The rules implementing section 251(b)(3) provide that customers of competing carriers must be able to dial the same number of digits the BOC's customers dial to complete a local telephone call.[219] Moreover, customers of competing carriers must not otherwise suffer inferior quality service, such as unreasonable dialing delays, compared to the BOC's customers.[220]

M. Checklist Item 13 – Reciprocal Compensation.

66. Section 271(c)(2)(B)(xiii) of the Act requires that a BOC enter into "[r]eciprocal compensation arrangements in accordance with the requirements of section 252(d)(2)."[221] In turn, pursuant to section 252(d)(2)(A), "a state commission shall not consider the terms and conditions for reciprocal compensation to be just and reasonable unless (i) such terms and conditions provide for the mutual and reciprocal recovery by each carrier of costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carrier; and (ii) such terms and conditions determine such costs on the basis of a reasonable approximation of the additional costs of terminating such calls."[222]

N. Checklist Item 14 – Resale

67. Section 271(c)(2)(B)(xiv) of the Act requires a BOC to make "telecommunications services . . . available for resale in accordance with the requirements of sections 251(c)(4) and 252(d)(3)."[223] Section 251(c)(4)(A) requires incumbent LECs "to offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers."[224] Section 252(d)(3) requires state commissions to "determine wholesale rates on the basis of retail rates charged to subscribers for the telecommunications service requested, excluding the portion thereof attributable to any marketing, billing, collection, and other costs that will be avoided by the local exchange carrier."[225] Section 251(c)(4)(B) prohibits "unreasonable or discriminatory conditions or limitations" on service resold under section 251(c)(4)(A).[226] Consequently, the Commission concluded in the *Local Competition First Report and Order* that resale restrictions are presumed to be unreasonable unless the LEC proves

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219 47 C.F.R §§ 51.205, 51.207.

220 *See* 47 C.F.R. § 51.207 (requiring same number of digits to be dialed); *Local Competition Second Report and Order*, 11 FCC Rcd at 19400, 19403.

221 47 U.S.C. § 271(c)(2)(B)(xiii).

222 *Id.* § 252(d)(2)(A).

223 *Id.* § 271(c)(2)(B)(xiv).

224 *Id.* § 251(c)(4)(A).

225 *Id.* § 252(d)(3).

226 *Id.* § 251(c)(4)(B).

to the state commission that the restriction is reasonable and non-discriminatory.[227] If an incumbent LEC makes a service available only to a specific category of retail subscribers, however, a state commission may prohibit a carrier that obtains the service pursuant to section 251(c)(4)(A) from offering the service to a different category of subscribers.[228] If a state creates such a limitation, it must do so consistent with requirements established by the Federal Communications Commission.[229] In accordance with sections 271(c)(2)(B)(ii) and 271(c)(2)(B)(xiv), a BOC must also demonstrate that it provides nondiscriminatory access to operations support systems for the resale of its retail telecommunications services.[230]

V. COMPLIANCE WITH SEPARATE AFFILIATE REQUIREMENTS – SECTION 272

68. Section 271(d)(3)(B) requires that the Commission shall not approve a BOC's application to provide interLATA services unless the BOC demonstrates that the "requested authorization will be carried out in accordance with the requirements of section 272."[231] The Commission set standards for compliance with section 272 in the *Accounting Safeguards Order* and the *Non-Accounting Safeguards Order*.[232] Together, these safeguards discourage and facilitate the detection of improper cost allocation and cross-subsidization between the BOC and

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[227] *Local Competition First Report and Order*, 11 FCC Rcd at 15966, para. 939; 47 C.F.R. § 51.613(b). The Eighth Circuit acknowledged the Commission's authority to promulgate such rules, and specifically upheld the sections of the Commission's rules concerning resale of promotions and discounts in *Iowa Utilities Board. Iowa Utils. Bd. v. FCC*, 120 F.3d at 818-19, *aff'd in part and remanded on other grounds, AT&T v. Iowa Utils. Bd.*, 525 U.S. 366 (1999). *See also* 47 C.F.R. §§ 51.613-51.617.

[228] 47 U.S.C. § 251(c)(4)(B).

[229] *Id.*

[230] *See, e.g., Bell Atlantic New York Order*, 15 FCC Rcd at 4046-48, paras. 178-81 (Bell Atlantic provides nondiscriminatory access to its OSS ordering functions for resale services and therefore provides efficient competitors a meaningful opportunity to compete).

[231] 47 U.S.C. § 271(d)(3)(B).

[232] *See Implementation of the Accounting Safeguards Under the Telecommunications Act of 1996*, CC Docket No. 96-150, Report and Order, 11 FCC Rcd 17539 (1996) (*Accounting Safeguards Order*), Second Order On Reconsideration, FCC 00-9 (rel. Jan. 18, 2000); *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended*, CC Docket No. 96-149, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 21905 (1996) (*Non-Accounting Safeguards Order*), petition for review pending sub nom. SBC Communications v. FCC, No. 97-1118 (filed D.C. Cir. Mar. 6, 1997) (held in abeyance May 7, 1997), First Order on Reconsideration, 12 FCC Rcd 2297 (1997) (*First Order on Reconsideration*), Second Order on Reconsideration, 12 FCC Rcd 8653 (1997) (*Second Order on Reconsideration*), *aff'd sub nom. Bell Atlantic Telephone Companies v. FCC*, 131 F.3d 1044 (D.C. Cir. 1997), Third Order on Reconsideration, FCC 99-242 (rel. Oct. 4, 1999) (*Third Order on Reconsideration*).

its section 272 affiliate.[233] In addition, these safeguards ensure that BOCs do not discriminate in favor of their section 272 affiliates.[234]

69. As the Commission stated in the *Ameritech Michigan Order*, compliance with section 272 is "of crucial importance" because the structural, transactional, and nondiscrimination safeguards of section 272 seek to ensure that BOCs compete on a level playing field.[235] The Commission's findings regarding section 272 compliance constitute independent grounds for denying an application.[236] Past and present behavior of the BOC applicant provides "the best indicator of whether [the applicant] will carry out the requested authorization in compliance with section 272."[237]

VI. COMPLIANCE WITH THE PUBLIC INTEREST – SECTION 271(D)(3)(C).

70. In addition to determining whether a BOC satisfies the competitive checklist and will comply with section 272, Congress directed the Commission to assess whether the requested authorization would be consistent with the public interest, convenience, and necessity.[238] Compliance with the competitive checklist is itself a strong indicator that long distance entry is consistent with the public interest. This approach reflects the Commission's many years of experience with the consumer benefits that flow from competition in telecommunications markets.

71. Nonetheless, the public interest analysis is an independent element of the statutory checklist and, under normal canons of statutory construction, requires an independent determination.[239] Thus, the Commission views the public interest requirement as an opportunity to review the circumstances presented by the application to ensure that no other relevant factors exist that would frustrate the congressional intent that markets be open, as required by the competitive checklist, and that entry will therefore serve the public interest as Congress expected. Among other things, the Commission may review the local and long distance markets to ensure that there are not unusual circumstances that would make entry contrary to the public interest

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[233] *Non-Accounting Safeguards Order*, 11 FCC Rcd at 21914; *Accounting Safeguards Order*, 11 FCC Rcd at 17550; *Ameritech Michigan Order*, 12 FCC Rcd at 20725.

[234] *Non-Accounting Safeguards Order*, *id*. at paras. 15-16; *Ameritech Michigan Order*, 12 FCC Rcd at 20725, para. 346.

[235] *Ameritech Michigan Order*, *id*.; *Bell Atlantic New York Order*, 15 FCC Rcd at 4153, para. 402.

[236] *Second BellSouth Louisiana Order*, 13 FCC Rcd at 20785-20786 at para. 322; *Bell Atlantic New York Order*, *id*.

[237] *Bell Atlantic New York Order*, *id*.

[238] 47 U.S.C. § 271(d)(3)(C).

[239] In addition, Congress specifically rejected an amendment that would have stipulated that full implementation of the checklist necessarily satisfies the public interest criterion. *See Ameritech Michigan Order*, 12 FCC Rcd at 20747 at para. 360-366; *see also* 141 Cong. Rec. S7971, S8043 (June. 8, 1995).

under the particular circumstances of the application at issue.[240] Another factor that could be relevant to the analysis is whether the Commission has sufficient assurance that markets will remain open after grant of the application. While no one factor is dispositive in this analysis, the overriding goal is to ensure that nothing undermines the conclusion, based on the Commission's analysis of checklist compliance, that markets are open to competition.

[240] *See Second BellSouth Louisiana Order*, 13 FCC Rcd at 20805-06, para. 360 (the public interest analysis may include consideration of "whether approval . . . will foster competition in all relevant telecommunications markets").

SEPARATE STATEMENT OF COMMISSIONER KATHLEEN Q. ABERNATHY

Re: *Joint 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 Arkansas and Missouri*, CC Docket No. 01-194

I fully support the Commission's order and write separately to comment on the difficult and complex questions regarding SBC's resale obligations in the context of its provision of DSL-related services. The Commission appropriately concludes in the foregoing order that, because we have never held that an incumbent LEC's DSL Internet access service — as opposed to a distinct end-user DSL transport service — is subject to section 251(c)(4), we cannot find that SBC is in violation of checklist item 14. Whether SBC's DSL Internet access service is subject to section 251(c)(4) turns on whether the provision of that service entails the provision of a "telecommunications service . . . at retail."[1] The Commission has prudently declined to reach a definitive conclusion on this issue in this adjudicatory proceeding, in light of the 90-day statutory deadline for decision and the fact that our ultimate resolution of this issue likely will have significant implications in other regulatory contexts. For example, our analysis of this question likely will affect our classification of advanced services provided by cable operators and other facilities-based Internet service providers; it also could affect our administration of the federal universal service mechanisms, since carriers contribute based on their end-user revenues from telecommunications services, but not information services. I look forward to addressing the appropriate regulatory treatment of incumbent LECs' DSL-based Internet access services in a separate rulemaking proceeding, in which we can thoroughly explore this complex issue based on comments from a broad range of parties.

I support the cautious approach we take today, but I write this statement to further explain my support for our conclusion that SBC is in compliance with checklist item 14. Based on the current record and existing precedent, it appears that SBC's end-user Internet access service does not entail provision of a telecommunications service at retail and, therefore, that SBC is not required to make that service available for resale under section 251(c)(4). I note that my analysis of this question is not free from doubt, and both I and the Commission may adopt a different approach in the future based on a more fully developed record. Yet I hope that, by framing the debate below, I will give parties a starting point in our future consideration of these issues.

SBC provides three separate categories of DSL-related services. First, through its affiliate Advanced Solutions, Inc. (ASI), SBC sells DSL transport services to business customers and to a small number of grandfathered residential customers.[2] Second, also through ASI, SBC sells DSL

[1] 47 U.S.C. § 251(c)(4).

[2] Before merging with Ameritech in 1999, SWBT sold a DSL transport service directly to residential customers at retail. SBC Application at 51. Following the merger, ASI decided to cease providing a DSL transport service directly to end users as a stand-alone service, and to focus instead on the wholesale provision of DSL transport to (continued….)

transport services to ISPs, which, in turn, combine these services with enhanced functionalities to offer end-user subscribers DSL-based Internet access services. Third, through its affiliated ISP, Southwestern Bell Internet Services, Inc. (SBIS), SBC sells high-speed DSL Internet access services to end-user subscribers.

SBC acknowledges that the first category of services consists of telecommunications services provided at retail; therefore, pursuant to section 251(c)(4), SBC states that it makes those services available to CLECs for resale at the appropriate wholesale discount in Arkansas and Missouri.[3] SBC contends, however, that the second and third categories of services respectively consist of *wholesale* telecommunications services and retail *information* services, and that, as a result, neither of these categories is subject to the resale requirement in section 251(c)(4). Based on my review of our existing precedent, I am inclined to agree that this is the most reasonable interpretation of the Act. Since there is no dispute about SBC's first category of services, I discuss below only the second and third categories.

DSL TRANSPORT SERVICES OFFERED BY ASI TO ISPS

SBC offers DSL transport to ISPs, which then bundle that transport with their own enhanced functionalities and customer care to offer Internet access services to end users.[4] Under the terms of the relevant SBC tariff, a customer of this DSL transport service is responsible for "providing all customer support to its End Users, and all marketing, billing, ordering, and repair for its End Users."[5] The tariff also includes a volume discount plan, under which the monthly charge for the DSL transport service depends on the volume commitment the ISP has made.[6]

In the *Bulk Services Order*,[7] the Commission determined that DSL transport services provided by incumbent LECs to ISPs generally will not be considered services provided "at retail." We observed that "bulk DSL services sold to Internet Service Providers are markedly different from the retail DSL services designed for individual end-user consumption."[8] Unlike such retail services, DSL transport services sold to Internet service providers are designed to be "an input component to the Internet Service Providers' retail high-speed Internet service."[9]

(Continued from previous page)
ISPs (including its affiliated ISP). *Id.* at 51-52.

[3] *Id.* at 52.

[4] *Id.* at 54-58.

[5] SBC Reply at 26 (quoting SBC Tariff F.C.C. No. 1, § 6.3.1).

[6] *Id.* at 27 (citing SBC Tariff F.C.C. No. 1, §§ 6.4, 6.6).

[7] See Deployment of Wireline Services Offering Advanced Telecommunications Capability, Second Report and Order, 14 FCC Rcd 19237 (1999) (Bulk Services Order).

[8] *Id.* at 19244 ¶ 15.

[9] *Id.* at 19245 ¶ 17.

Moreover, "DSL services sold to Internet Service Providers are not targeted to end-user subscribers, but instead are targeted to Internet Service Providers that will combine a regulated telecommunications service with an enhancement, Internet service, and offer the resulting service, and unregulated information service, to the ultimate end-user."[10] The Internet service provider "take[s] on the consumer-oriented tasks of marketing, billing, and collections to the ultimate consumer and accepting repair requests directly from the end-user."[11] We incorporated this wholesale/retail distinction into our rules, which provide that "advanced telecommunications services sold to Internet Service Providers as an input component to the Internet Service Providers' retail Internet service offering shall not be considered to be telecommunications services offered on a retail basis that incumbent LECs must make available for resale at wholesale rates to requesting telecommunications carriers."[12] The D.C. Circuit upheld the *Bulk Services Order* in *ASCENT II*, holding that the Commission reasonably construed the statutory phrase "at retail."[13]

Under the *Bulk Services Order* and section 51.605(c) of our rules, it seems clear that SBC's tariffed DSL transport service for ISPs is a *wholesale* telecommunications service. This service accordingly is not subject to the resale obligation in section 251(c)(4), because that provision applies only to *retail* telecommunications services.[14] As noted above, under SBC's tariff, the ISPs themselves provide all customer-care functions as part of their own retail information services.[15] SBC states that the ISPs alone may accept orders for their DSL-based Internet access service, and SBC accepts orders for its DSL transport service only from the ISPs.[16] The ISPs are responsible for all installation costs, and they are obligated to accept repair requests directly from their end-user customers and to incur the costs of maintaining and operating help-desk functions.[17] ISPs also are solely responsible for billing and collecting from their end-user customers.[18] In sum, as with the Verizon tariff found to be a wholesale offering in the *Bulk Services Order*, SBC's tariff "specifically contemplate[s] that the Internet Service Provider will be the entity providing to the ultimate end-user many services typically associated with retail sales, thus reinforcing our conclusion that the bulk DSL services are not retail services

[10] Id.

[11] Id.

[12] 47 C.F.R. § 51.605(c).

[13] Association of Communications Enterprises v. FCC, 253 F.3d 29 (D.C. Cir. 2001) (ASCENT II).

[14] *See* 47 U.S.C. § 251(c)(4).

[15] SBC Application at 56-57; SBC Reply at 26-30; SBC Tariff F.C.C. No. 1, §§ 6.3.1, 6.4, 6.6.

[16] SBC Application at 56.

[17] Id.

[18] Id.

offered to the ultimate end-users."[19]

As the court noted in *ASCENT II*, "[i]f in the future an ILEC's offering designed for and sold to ISPs is shown actually to be taken by end users to a substantial degree, then the Commission might need to modify its regulation to bring its treatment of that offering into alignment with its interpretation of 'at retail,' *but that is a case for another day*."[20] Accordingly, if a CLEC could demonstrate that SBC's DSL transport service is in fact being consumed by end users — as opposed to noting the "mere possibility" that such retail consumption *might* occur[21] — that would require me to reassess my tentative conclusion that this offering is a wholesale service.[22]

DSL INTERNET ACCESS SERVICES OFFERED BY SBIS TO END-USER SUBSCRIBERS

SBC also provides a high-speed DSL Internet access service to end users through SBIS, its affiliated ISP. SBC states that SBIS is the only entity that has a contractual relationship with end users who subscribe to this Internet access service.[23] SBIS representatives handle customer care, repair, and maintenance inquiries.[24] SBIS and SWBT jointly market the DSL-based Internet access service to end users. Under the terms of their agreement, SBIS pays SWBT for soliciting and accepting orders for SBIS.[25] SBIS also pays SWBT for a separate page on the customer's bill, in the same manner that interexchange carriers often do, and that page bears the SBIS brand and the monthly customer charges for SBIS's high-speed Internet access service.[26]

The Commission discussed the appropriate regulatory classification of Internet access services at length in the *Report to Congress*. In that Report, we began by reaffirming our longstanding understanding that "the categories of 'telecommunications service' and 'information

[19] *Bulk Services Order*, 14 FCC Rcd at 19244; *see* SBC Reply at 27-29 (comparing SBC tariff with Verizon tariff).

[20] *ASCENT II*, 253 F.3d at 32 (emphasis added).

[21] Id.

[22] I agree with SBC that its previously offered "split-billing" option — under which SBC allowed customers of Internet service providers to pay SBC directly (rather than through the ISP) for SBC's DSL transport service — does not compromise the wholesale nature of this DSL transport service. This billing arrangement did not somehow make Internet service providers the "ultimate consumer[s]" of SBC's DSL transport service. *Bulk Services Order*, 14 FCC Rcd at 19245 ¶ 17. In any event, SBC's elimination of this billing option, together with its modification of its website to make clear that SBC does not offer DSL transport service to end users at retail, clarify the wholesale nature of SBC's tariffed DSL transport service. *See* SBC Application at 57-58.

[23] SBC Application at 59.

[24] Id.

[25] Id.

[26] *Id.* at 60.

service' in the 1996 Act are mutually exclusive."[27] Based on the statutory definitions of these terms, our *Computer Inquiry* precedents, and the legislative history of the 1996 Act, we rejected the argument that "a service qualifies as a 'telecommunications service' whenever the service provider transports information over transmission facilities, without regard to whether the service provider is using information-processing capabilities to manipulate that information or provide new information."[28] Rather, we stated that an entity is providing a telecommunications service "only when the entity provides a transparent transmission path, and does not 'change . . . the form and content' of the information."[29] We therefore adopted a "functional approach," under which the classification of a service depends on "the *nature* of the service being offered to customers."[30]

Applying this general framework to Internet access services, the Commission concluded that Internet access services are information services, not telecommunications services.[31] The mere fact that such services are offered "via telecommunications" cannot suffice to render such services "telecommunications services." By definition, information services "necessarily require a transmission component in order for users to access information."[32] Indeed, if we had found that any entity self-provisioning *telecommunications* were thereby providing a *telecommunications service* to end users, "it would be difficult to devise a sustainable rationale under which all, or essentially all, information services did not fall into the telecommunications service category."[33] Thus, even though an Internet access service offered to end users "involves data transport elements . . . the provision of Internet access service crucially involves information-processing elements as well; it offers end users information-service capabilities *inextricably intertwined* with data transport."[34] This intertwining of telecommunications and information-processing components signifies that an information service provider cannot be deemed to be offering separate services, each with a distinct legal status; rather, an ISP offers a single service — Internet access — which is best considered an information service.[35]

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[27] *Report to Congress*, 13 FCC Rcd at 11520 ¶ 39; *id.* at 11530 ¶ 59 (reiterating that the categories of "telecommunications service" and "information service" are "mutually exclusive"). *See also Implementation of the Non-Accounting Safeguards of Section 271 and 282 of the Communications Act of 1934, as Amended*, FCC 01-140, CC Docket No. 96-149, ¶¶ 34-39 (rel. Apr. 27, 2001) (same).

[28] *Report to Congress*, 13 FCC Rcd. at 11520-21 ¶ 40.

[29] *Id.* at 11521 ¶ 41 (quoting 47 U.S.C. § 153(43)).

[30] *Id.* at 11530 ¶ 59 (emphasis added).

[31] *Id.* at 11529-11540 ¶¶ 56-82.

[32] *Id.* at 11529 ¶ 57.

[33] Id.

[34] *Id.* at 11539-40 ¶ 80 (emphasis added).

[35] *Id.* at 11539-40 ¶¶ 79-80. *See also Bulk Services Order*, 13 FCC Rcd at 19247 ¶ 20 (reaffirming that Internet access providers are information service providers, rather than telecommunications providers).

Based on this analysis, it appears that SBC's end-user DSL Internet access service is best characterized as an information service. Thus, if we were forced to resolve the classification issue posed in this proceeding — and I am persuaded that our precedents permit us to defer such resolution — it would follow that this service is not covered by the resale requirement in section 251(c)(4).

As a threshold matter, I emphasize that this approach would not rely in any respect on the particularities of SBC's corporate structure. That is, I do not consider it relevant that an SBC affiliate, SBIS, is providing the Internet access service in question. In *ASCENT I*, the D.C. Circuit made clear that the resale obligation in section 251(c)(4) applies to an incumbent LEC's data affiliate, just as it does to the incumbent LEC itself.[36] Thus, as SBC recognizes, there is no question that SBIS is *subject to* section 251(c)(4), no less than SWBT is; the pertinent question is whether that statutory provision *applies by its terms* to the DSL-based Internet access service at issue.[37] SBC argues persuasively that *ASCENT I* essentially requires us to "draw[] a circle that includes SWBT, ASI, and SBIS" and ask, "what DSL-related service is provided [by the combined entity] at retail?"[38] It appears that the Commission was correct in the *Report to Congress* in concluding that the data transport and computer processing functionalities that make up an Internet access service are "inextricably intertwined" and that, therefore, Internet access should be characterized as a single, indivisible information service.[39]

I recognize that the *Report to Congress* primarily concerned the status of Internet access services offered by independent ISPs — *i.e.*, those not affiliated with incumbent LECs. Such ISPs, unlike ILEC-owned ISPs, "typically own no telecommunications facilities."[40] While I look forward to exploring in a separate rulemaking proceeding whether there is any relevant distinction between affiliated and unaffiliated ISPs, I currently look for guidance to the Commission's analysis in the *Report to Congress*, where we said:

> When the information service provider owns the underlying [transmission] facilities, it appears that it should itself be treated as providing the underlying telecommunications. *That conclusion, however, speaks only to the relationship between the facilities owner and the information service provider (in some cases,*

[36] *Association of Communications Enterprises v. FCC*, 235 F.3d 662, 668 (D.C. Cir. 2001) ("[T]he Commission may not permit an ILEC to avoid § 251(c) obligations as applied to advanced services by setting up a wholly owned affiliate to offer those services.").

[37] *See* SBC Reply at 24.

[38] SBC Application at 60.

[39] *Report to Congress*, 13 FCC Rcd at 11539-40 ¶ 80.

[40] *Id.* at 11540 ¶ 81.

> *the same entity); it does not affect the relationship between the information service provider and its subscribers.*[41]

Thus, the nature of the Internet access service provided to end-user subscribers does not appear to be affected by the relationship between the ISP (here, SBIS) and the facilities provider (here, SWBT). That end-user Internet access service is — at this point, based on our existing precedents — best considered an information service, irrespective of who provides it.

It does not appear that the Commission has ever held that an incumbent LEC's *information service* is subject to regulation under Title II of the Act, and there is much to be said for refraining from doing so on a going-forward basis. Looking beyond the legacy regulatory classification of the service provider, and focusing instead on the nature of the service being provided, would allow the Commission to develop a more consistent regulatory approach to advanced services and to reduce regulatory distortions that hamper intermodal competition. To be sure, the Commission's orders dealing with advanced services have muddied the waters in this regard. For example, the Commission has stated that "advanced services sold [by incumbent LECs] at retail . . . are subject to the discounted resale obligation."[42] But I believe that such assertions should be read in light of the statutory language, which imposes such an obligation only on advanced *telecommunications* services provided at retail — not on advanced *information* services. Thus, blanket statements that "advanced services" or "DSL services" are subject to section 251(c)(4) appear to be inherently overbroad. In making such statements in the past, the Commission apparently was referring only to advanced *telecommunications* services, or DSL-based *telecommunications* services.

If SBC is providing a retail information service, rather than a retail telecommunications service, the question arises: Should SBC be compelled to provide separately a retail DSL transport service to residential customers? That is a question that I hope to explore in our upcoming rulemaking. As a general matter, though, it appears that incumbent LECs are under no *existing* federal obligation to offer DSL transport services on a retail basis.[43] As SBC concedes, the Commission's *Computer III* unbundling obligations require the company to make its underlying telecommunications functionality available to unaffiliated information service providers,[44] but I am not aware of any requirement under our *Computer II*/*Computer III* regime to

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[41] *Id.* at 11534 ¶ 69 n.138 (emphasis added).

[42] *Bulk Services Order*, 13 FCC Rcd at 19238 ¶ 3; *see also id.* ¶¶ 8, 10.

[43] *See* SBC Reply at 31-32 (citing *Local Competition Order*, 11 FCC Rcd at 15976-78 ¶¶ 965-68; *MCI Telecomms. Corp. v. SNET*, 27 F. Supp. 2d 326, 335 (D. Conn. 1998)).

[44] SBC Application at 61-62. Even if the Commission had definitively ruled on this record that SBC is providing an information service, I do not think we could have determined whether SBC's offering to unaffiliated ISPs complies with the prohibitions against nondiscrimination under *Computer III*. ISPs that believe that SBC is engaging in discriminatory or otherwise unlawful conduct should file a complaint with the appropriate state (continued….)

offer this telecommunications functionality on a *retail* basis. Moreover, I am not persuaded by ASCENT's assertion that the *Bulk Services Order* implicitly held that "the incumbent LEC would still have to make available for Section 251(c)(4) resale xDSL-based advanced services provided to residential and business end-users."[45] While Verizon was offering both a retail DSL transport service for residential customers and a wholesale DSL transport service for ISPs, the Commission did not state or imply that it was necessary for a carrier to offer both kinds of telecommunications services.

Finally, it is important to recognize that, if the Commission ultimately concludes in a rulemaking proceeding that SBC's DSL-based information services are not subject to the resale requirement in section 251(c)(4), that would not deny competitors an opportunity to provide their own high-speed Internet access services. Most importantly, CLECs retain the ability to provide DSL-based Internet access service by purchasing unbundled loops and attaching their own DSLAM in the incumbent LEC's central office. CLECs also may resell CSAs to business customers and may obtain resale under section 251(b)(1).[46] Independent Internet service providers may purchase bulk DSL transport from SBC under its advanced services tariff. And, of course, facilities-based competitors such as cable operators can provide service without relying on

(Continued from previous page)
commission or with this Commission.

[45] ASCENT Comments at 10-11.

[46] 47 U.S.C. § 251(b)(1). Some commenters have suggested that SBC is imposing unreasonable restrictions on the resale of its DSL transport service in violation of section 251(b)(1). *See, e.g.*, Ex Parte Letter of Florida Digital Network, Inc., filed Nov. 7, 2001. As in the case of alleged violations of section 251(c)(4) or *Computer III*, I believe such allegations would be best resolved in a separate proceeding.

incumbent LECs' networks at all. I therefore do not believe that an interpretation along the lines I suggest would have anticompetitive consequences, particularly because, in my experience, competitive carriers do not typically rely on section 251(c)(4) as a means of providing DSL-related services. Indeed, by focusing carriers on facilities-based entry strategies, such an interpretation of the Act likely would have highly procompetitive effects over the long term.

SEPARATE STATEMENT OF
COMMISSIONER MICHAEL J. COPPS,
CONCURRING

Re: *Joint 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 Arkansas and Missouri*

Today's decision is the closest of calls. Questions raised in the closing hours of deliberation, arguably going beyond the section 271 process, compel further consideration which the Commission today agrees to undertake in a new and separate proceeding to be initiated by the end of the year and completed as soon as possible next year. This proceeding could conceivably lead to changes in the implementation of the majority decision to authorize SBC to provide long-distance services in Missouri and Arkansas. With assurances for the timely disposition of a Notice of Proposed Rulemaking and completion of an Order on the extant issues, I have agreed, with no small reluctance, to concur in this decision.

Let me begin by noting that SBC has made laudable progress to open its local markets to competition and I commend the company for its significant efforts. I also commend the Arkansas and Missouri Commissions which have worked very hard to promote competition in their markets.

My major concern in this application is whether SBC has complied with an important checklist requirement – the obligation to ensure that telecommunications services are made available for resale. More precisely, the issue concerns whether SBC has met its obligation to make its DSL services available for resale. The majority concludes that our precedent is not adequately clear. While I believe it would have been preferable to resolve these issues here, I believe that a separate proceeding with a full record can clarify the situation and provide relatively prompt redress if the facts indicate the need for remedy.

This is a tremendously important issue. Through the Telecommunications Act of 1996, Congress sought to promote competition in all telecommunications markets, including especially the replacement of monopoly with competition in the local telecommunications market. At the heart of the Congressional framework is the clear requirement that Bell companies may enter the long-distance market only after they have opened their local markets to competition.

The 1996 Act provides for three modes of entry for competitors in the local market – the construction of new networks, the use of unbundled elements of the incumbent's network, and resale of the incumbent's services. Congress incorporated these three paths into the competitive checklist of section 271. I am committed to preserving all of these statutory paths for competitive entry.

I am seriously troubled that, for small business and residential customers, SBC does not make available for resale pursuant to section 251(c)(4) any DSL service offerings. SBC currently offers two types of broadband DSL services. First, SBC sells directly to large businesses. These services **are** retail offerings, and SBC makes them available at a wholesale discount to competitors wishing to resell them. For small businesses and residential customers, however, SBC generally provides DSL services only to its own Internet provider and to unaffiliated Internet providers. Citing the *AOL Bulk Services Order*, SBC claims that it is not providing DSL at retail, thus triggering no obligations under section 251(c)(4). Yet, a strong argument can be made that the *AOL Bulk Services Order* was premised on the expectation that there would be a retail offering from which discounts would be calculated.

The need to resolve these issues soon in the separate proceeding is made even starker when one considers the harmful impact of the failure to provide such an offering. SBC and other incumbents could attempt to use a DSL loophole that need not exist to spread beyond the provision of DSL services. Although there is some confusion in the record, SBC appears to have the ability to limit the provision of broadband DSL for Internet providers, affiliated or independent, to those customers who purchase its **voice** services. Customers may not be able to obtain a separate line for DSL services without also purchasing SBC's voice services. Thus, by tying the provision of broadband to the purchase of voice services, SBC might effectively limit competition for voice services as well. Not only should this issue be addressed in the separate proceeding, but I would also urge the Commission to pursue aggressively enforcement options should violations of rules that are outside the competitive checklist come to light, or even the existence of conditions tolerating such violations.

I understand the majority's conclusion that these issues raise complex and far-reaching questions that should be addressed in a general rulemaking. Under the circumstances, I support conducting and concluding an expeditious rulemaking in the close near term to answer these questions once and for all. I would expect that we will complete this proceeding with a full record that will allow us to promulgate clear rules that advance the pro-competitive objectives of the Congress and preserve the three paths of competitive entry.

SEPARATE STATEMENT OF COMMISSIONER KEVIN MARTIN

Re: *Joint 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 Arkansas and Missouri,* CC Docket No. 01-194

I am pleased that the local exchange markets in Arkansas and Missouri are open to competition and that SBC will be permitted to compete for long distance service in those states. I am writing separately on the narrow issue of the high-speed Internet access service offered by SBIS. Some commenters argue that this service is available to end users "at retail," and that therefore SBC must make the underlying DSL transport component available to competitive LECs pursuant to section 251(c)(4). SBC argues that this service is not subject to section 251(c)(4) because (1) this is an information service, not a "telecommunications service;" and (2) DSL transport is merely a *component* of the overall information service, and is not separately offered "at retail." Accordingly, SBC argues that the obligations of section 251(c)(4), which are triggered only by services that are "telecommunications services" provided "at retail," simply cannot apply.

Section 251(c)(4) imposes on incumbent LECs the duty "to offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers." As today's order states, SBIS is offering a "high-speed Internet access service." The Commission has definitively concluded that "Internet access services are appropriately classed as information, rather than telecommunications, services."[1] Moreover, the Commission has concluded that "the categories of 'telecommunications service' and 'information service' in the 1996 Act are mutually exclusive."[2] While the Commission may ultimately address this issue in more detail, those who argue that this high-speed Internet access service provided to end users should be subject to section 251(c)(4) must show how, in light of the precedent described above, this is a "telecommunications service" being offered "at retail."

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[1] *Federal-State Joint Board on Universal Service*, Report to Congress, CC Docket No. 96-45, FCC 98-67 (rel Apr. 10, 1998) ("Report to Congress") at ¶ 73. A "telecommunications service" is defined in the Act as a transmission of information of the user's choosing "without change in the form or content of the information as sent and received." 47 U.S.C. § 153(43). The Commission explained that "Internet access providers do not offer a pure transmission path; they combine computer processing, information provision, and other computer-mediated offerings with data transport." Report to Congress at ¶ 73. The Commission summarized this distinction by explaining that "if the user can receive nothing more than pure transmission, the service is a telecommunications service," and "if the user can receive enhanced functionality, such as manipulation of information and interaction with stored data, the service is an information service." *Id*. at ¶ 59.

[2] Report to Congress at ¶ 12; see also *id.* at ¶ 59.