

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 ) CC Docket No. 00-217  
Services, Inc. d/b/a Southwestern Bell Long )  
Distance for Provision of In-Region, )  
InterLATA Services in Kansas and Oklahoma )  
 )

**MEMORANDUM OPINION AND ORDER**

**Adopted: January 19, 2001**

**Released: January 22, 2001\***

By The Commission: Chairman Kennard issuing a statement; Commissioner Ness concurring and issuing a statement; Commissioner Furchtgott-Roth concurring in part, dissenting in part, and issuing a statement; Commissioner Powell approving in part, dissenting in part, and issuing a statement.

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## I. INTRODUCTION

1. On October 26, 2000, SBC Communications Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance (collectively SWBT) filed this application for authority under section 271 of the Communications Act, as amended, to provide in-region, interLATA services in the states of Kansas and Oklahoma.<sup>1</sup> We grant the application in this Order based on our conclusion that SWBT has taken the statutorily required steps to open its local exchange markets to competition in each of these states. As required by section 271, we find that SWBT has made a separate and independent showing of compliance for both states.

2. This Order represents the first time that we have approved a section 271 application for a more rural state, and the first time we have ruled on a section 271 application for a second state within a single BOC region. The general approach used by both the Kansas Corporation Commission (Kansas Commission) and the Oklahoma Corporation Commission (Oklahoma Commission) may serve as a model for the development of successful section 271 applications in other similarly situated states. In particular, we commend both states for using the successful work of the Texas Public Utility Commission (Texas Commission) as a starting point for the development of their own section 271 reviews. This approach demonstrates that more rural states can conduct successful section 271 reviews without overwhelming their regulatory resources by building on the work of other states in their region. In this regard, we also note that rural states may wish to cooperate and pool their resources in addressing section 271 compliance issues when uniform region-wide systems and procedures are used by the BOC.<sup>2</sup>

3. Both states have taken a number of important steps to facilitate the development of successful section 271 applications by SWBT. Both states conducted proceedings concerning SWBT's section 271 compliance with opportunities for participation by interested third parties.<sup>3</sup> Both states adopted a broad range of clearly defined performance measures and standards, and a Performance Assurance Plan designed to create a financial incentive for post-entry compliance with section 271. Although neither state provided for third party testing of SWBT's operations support systems (OSS) offerings, SWBT did arrange for an independent evaluation to determine whether certain automated OSS systems, which were found to satisfy the requirements of section 271 in Texas, were the same as those in Kansas and Oklahoma.<sup>4</sup>

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<sup>1</sup> A list of parties that submitted comments or replies is contained in Attachment A.

<sup>2</sup> The BOC must make an independent showing of section 271 compliance for each individual state, however.

<sup>3</sup> At the same time, we note that several parties criticize the state consideration of pricing issues. *See, e.g.,* Z-Tel Supp. Comments at 2-3; IP Communications Supp. Comments at 2-3 and 7-8.

<sup>4</sup> *See infra*, Section IV.B.2.

4. Despite the fact that Kansas and Oklahoma are more rural than other states where this Commission has granted section 271 authorization, competition is developing in response to the market opening measures taken by SWBT and the state commissions in these states. For example, SWBT states that competitors serve between 9.0 percent and 12.6 percent of the total access lines in its service area in Kansas.<sup>5</sup> SWBT adds that competitive local exchange carriers (LECs) serve between 85,000 and 145,000 business lines and more than 46,000 residential lines in its service territory in Kansas.<sup>6</sup> While many of these lines are served through resale, SWBT states that there are at least 26 competitive LECs providing facilities-based local exchange service in Kansas.<sup>7</sup> SWBT adds that between 37,000 and 98,000 lines in Kansas were served by competitors over their own facilities as of August 2000.<sup>8</sup> SWBT also cites a number of factors as evidence that competition is growing rapidly in Kansas.<sup>9</sup>

5. SWBT also states that in Oklahoma competitive LECs serve between 5.5 percent and 9.0 percent of the total access lines in SWBT service territory.<sup>10</sup> This corresponds to between 115,000 and 170,000 lines.<sup>11</sup> SWBT adds that its competitors serve more than 66,000 business lines and at least 49,000 residential lines in Oklahoma.<sup>12</sup> SWBT also states that between 61,000 and 114,000 lines are served by competitors over their own facilities.<sup>13</sup> In addition, SWBT states that competition is growing rapidly in Oklahoma, citing a number of factors in support of this assertion.<sup>14</sup>

6. Our analysis in this Order is affected by that fact that this joint application follows on the heels of authorization in another of SWBT's in-region states, Texas. In many ways, SWBT'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 followed in Kansas and Oklahoma.

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<sup>5</sup> SWBT Smith/Johnson Aff. at 7; *see also*, SWBT Brief at 14. Since SWBT does not have access to exact information on the number of lines in Kansas and Oklahoma served by competitive LECs, it has used several methods to estimate the number of lines served by its competitors. Each of these methods produces a somewhat different result, and the ranges cited reflect these differences. *Id.* at 14, n.25; SWBT Smith/Johnson Aff. at 11.

<sup>6</sup> SWBT Application at 14.

<sup>7</sup> Smith/Johnson Aff. at 8; SWBT Application at ii-iii.

<sup>8</sup> *Id.* at 14.

<sup>9</sup> SWBT Smith/Johnson Aff. at 5.

<sup>10</sup> *Id.* at 7, Table 3.

<sup>11</sup> SWBT Application at 17.

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

<sup>13</sup> *Id.*

<sup>14</sup> SWBT Smith/Johnson Aff. at 5.

Rather than reiterate background matters and jurisprudence set forth in the *SWBT Texas Order*,<sup>15</sup> and re-visit issues that were briefed, reviewed and resolved in that proceeding, we focus our analysis in this Order on a handful of issues that were contested by commenting parties, or that have not been addressed by the Commission in prior section 271 orders. Chief among these issues is pricing. We also consider SWBT's assertion that the systems and processes used to provision wholesale services to competing carriers in Kansas and Oklahoma should pass the checklist requirements because they are the same systems and processes found to be satisfactory in the Texas proceeding. As required by the statute, we have considered separately for each state covered by SWBT's application here whether SWBT has made all of the showings required by section 271. In conclusion, we find that SWBT has met its burden in demonstrating, for Kansas and Oklahoma respectively, that it complies with all applicable statutory requirements.

## II. BACKGROUND

### A. Statutory Framework

7. In the 1996 Act, Congress conditioned BOC provision of in-region, interLATA service on compliance with certain provisions of section 271. Pursuant to section 271, BOCs must apply to this Commission for authorization to provide interLATA services originating in any in-region state.<sup>16</sup> Congress has directed the Commission to issue a written determination on each application no later than 90 days after the application is filed.<sup>17</sup>

8. To obtain authorization to provide in-region, interLATA services under section 271, the BOC must show, with respect to each state for which it seeks authorization, that: (1) it satisfies the requirements of either section 271(c)(1)(A), known as "Track A" or 271(c)(1)(B), known as "Track B"; (2) it has "fully implemented the competitive checklist" or that the statements approved by the state under section 252 satisfy the competitive checklist contained in section 271(c)(2)(B);<sup>18</sup> (3) the requested authorization will be carried out in accordance with the requirements of section 272;<sup>19</sup> and (4) the BOC's entry into in-region, interLATA market is

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<sup>15</sup> See *Application by SBC Communications Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance Pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-Region, InterLATA Services in Texas*, Memorandum Opinion and Order, 15 FCC Rcd 18354, 18361, para. 13 (*SWBT Texas Order*).

<sup>16</sup> See 47 U.S.C. § 271.

<sup>17</sup> *Id.* § 271(d)(3).

<sup>18</sup> *Id.* § 271(d)(3)(A). The critical, market-opening provisions of section 251 are incorporated into the competitive checklist found in section 271. See *id.* § 251; see also *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, 11 FCC Rcd 15499 (1996) (*Local Competition First Report and Order*), *aff'd* in part and vacated in part sub nom, *Competitive Telecommunications Ass'n v. FCC*, 117 F.3d 1068 (8th Cir. 1997) and *Iowa Utils. Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1997), *aff'd in part and remanded*, *AT&T v. Iowa Utils. Bd.*, 525 U.S. 366 (1999).

<sup>19</sup> 47 U.S.C. § 271(d)(3)(B).

“consistent with the public interest, convenience, and necessity.”<sup>20</sup> The statute specifies that, unless the Commission finds that these four criteria have been satisfied, the Commission “shall not approve” the requested authorization.<sup>21</sup>

9. Section 271(d)(2)(A) requires the Commission to consult with the United States 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.”<sup>22</sup>

10. 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 or general statement satisfy the “competitive checklist.”<sup>23</sup> Because the Act does not prescribe any standard for Commission consideration of a state commission’s verification under section 271(d)(2)(B), the Commission has discretion in each section 271 proceeding to determine the amount of weight to accord the state commission’s verification.<sup>24</sup> 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 Commission’s role to determine whether the factual record supports the conclusion that particular requirements of section 271 have been met.<sup>25</sup>

## **B. History of this Application**

11. Both the Kansas Corporation Commission (Kansas Commission) and the Oklahoma Corporation Commission (Oklahoma Commission), after more than two years of reviewing SWBT’s compliance with the requirements of section 271, have endorsed Southwestern Bell’s application to provide in-region, interLATA services in their respective states.

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<sup>20</sup> *Id.* § 271(d)(3)(C).

<sup>21</sup> *Id.* § 271(d)(3); *see SBC Communications, Inc. v. FCC*, 138 F.3d 410, 413, 416 (D.C. Cir. 1998).

<sup>22</sup> 47 U.S.C. § 271(d)(2)(A).

<sup>23</sup> *Id.* § 271(d)(2)(B).

<sup>24</sup> *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*, Memorandum Opinion and Order, 15 FCC Rcd 3953, 3962, para. 20 (*Bell Atlantic New York Order*); *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*); *see also SBC Communications v. FCC*, 138 F.3d at 416 (“although the Commission must consult with the State commissions, the statute does not require the FCC to give State commissions’ views any particular weight”).

<sup>25</sup> *Ameritech Michigan Order*, 12 FCC Rcd at 20560; *SBC Communications v. FCC*, 138 F.3d at 416-17.

## 1. The Kansas Commission's Evaluation

12. On January 21, 1997, the Kansas Commission initiated a proceeding to examine SWBT's compliance with requirements of section 271.<sup>26</sup> This proceeding was open to participation by all interested parties and numerous CLECs participated.<sup>27</sup> SWBT filed a draft section 271 application with the Kansas Commission on February 17, 1998.<sup>28</sup> On March 16, 2000, SWBT filed a revised draft of its section 271 application that included a model interconnection agreement ("Kansas Section 271 Interconnection Agreement" or "K2A").<sup>29</sup> The K2A is based on a model interconnection agreement developed by the Texas Public Utilities Commission ("The Texas Commission");<sup>30</sup> but also includes arbitration decisions of the Kansas Commission and Kansas-specific terms. The K2A also includes a performance remedy plan, modeled after the plan adopted by the Texas Commission.<sup>31</sup>

13. In May 2000, the Kansas Commission invited interested parties to file comments on SWBT's application in two phases.<sup>32</sup> The initial phase focused on the K2A interconnection agreement, performance measures, and the performance remedy plan. The second phase focused on remaining portions of the draft application. On August 21, 2000, the Kansas Commission issued a report ("Kansas Commission Staff Report") in which it reviewed SWBT's compliance with section 271(c) (1)(A), the 14 checklist items in section 271(c)(2)(B), and the separate affiliate requirements of section 272.<sup>33</sup> The Staff Report also reviewed the public interest requirements under section 271(d)(3)(C) and the performance measures and performance remedy plan proposed by SWBT. Although recognizing areas of concern, Commission staff concluded

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<sup>26</sup> Kansas Commission Comments at 3.

<sup>27</sup> See SWBT Cleek Aff. at para. 25.

<sup>28</sup> Kansas Commission Comments at 3.

<sup>29</sup> Kansas Commission Comments at 4; SWBT Application at 5.

<sup>30</sup> See *Application by SBC Communications Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance Pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-Region, InterLATA Services in Texas*, Memorandum Opinion and Order, 15 FCC Rcd 18354, 18361, para. 13 (*SWBT Texas Order*). In the Texas 271 proceeding, a model interconnection agreement was developed and adopted which was referred to as the "Texas 271 Agreement" or "T2A." The Texas Commission, SWBT, and competing carriers worked collaboratively to identify and resolve a number of key issues related to SWBT's compliance with 271, including the operational readiness of SWBT's OSS, and the development of a performance monitoring and enforcement mechanism.

<sup>31</sup> SWBT Application at 5.

<sup>32</sup> Kansas Commission Comments at 4; SWBT Cleek Aff. at para. 38 ; SWBT Application at 5.

<sup>33</sup> Kansas Commission Comments at 4.

that SWBT had met its obligations under section 271.<sup>34</sup> In September and October, the Kansas Commission held several administrative meetings considering revisions and modifications to the K2A. On October 4, 2000, the Kansas Commission concluded that SWBT had satisfied the requirements of section 271, and that it would support SWBT's section 271 application. On October 9, 2000, pursuant to the Kansas Commission's direction, SWBT filed a revised final K2A.<sup>35</sup>

14. On November 17, 2000, the Kansas Commission filed comments in this proceeding. The Kansas Commission concluded that SWBT has complied with the checklist of section 271, that SWBT has complied with the requirements of section 272, and that it would be in the public interest to approve SWBT's application.<sup>36</sup> On December 11, 2000, the Kansas Commission filed its reply comments. We commend the Kansas Commission for its analysis.

## 2. The Oklahoma Commission's Evaluation

15. In 1997, this Commission rejected SWBT's initial application to provide in-region, interLATA services in Oklahoma, finding that SWBT did not face sufficient competition in Oklahoma to satisfy the requirements of "Track A" (section 271(c)(1)(A)).<sup>37</sup> In February 1998, SWBT filed a second draft application with the Oklahoma Commission.<sup>38</sup> The Oklahoma Commission reviewed SWBT's application and heard testimony from participating parties. On June 9, 2000, SWBT submitted a revised draft of its proposed application to the Oklahoma Commission, which included a model interconnection agreement (the "Oklahoma Section 271 Agreement or the O2A").<sup>39</sup> This model agreement, like the K2A, was based on the Texas 271 Agreement, and incorporated arbitration decisions of the Oklahoma Commission and Oklahoma-specific terms. After hearings and review, the Oklahoma Commission approved the O2A on

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<sup>34</sup> *Id.* See also SWBT Cleek Aff., Attach. A at 134-138 (*In the Matter of Southwestern Bell Telephone Company-Kansas' Compliance with Section 271 of the Federal Telecommunications Act of 1996*, Docket No. 97-SWBT-411-GIT, Staff's Recommendation)(August 21, 2000)("Kansas Commission Staff Report"). The Kansas staff stated that there were several concerns regarding the proposed performance remedy plan. Some concerns expressed were the derivation of the "K" Table values, the verification and validation of source data, the frequency of small samples, the use of Z- testing as part of SWBT's benchmark testing and Type I and Type II errors. We agree with the Kansas Commission that none of these issues, based on evidence in this proceeding, warrant denial of the application.

<sup>35</sup> SWBT Application at 8.

<sup>36</sup> Kansas Commission Comments at 44.

<sup>37</sup> See *In the Matter of 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, 12 FCC Rcd 8685 (1997), *aff'd*, *SBC Communications Inc. v. FCC*, 138 F.3d 410 (D.C. Cir. 1998).

<sup>38</sup> SWBT Application at 10.

<sup>39</sup> SWBT Application at 10-11.

September 28, 2000, subject to several modifications.<sup>40</sup> The Oklahoma Commission also set low interim rates for several unbundled network elements. To provide incentive to SWBT to establish permanent rates, the Oklahoma Commission held such rates would be subject to “true up” only until March 28, 2001.<sup>41</sup> On October 24, 2000, SWBT filed a revised, final O2A pursuant to the Oklahoma Commission’s request.<sup>42</sup>

16. The Oklahoma Commission filed initial comments in this proceeding on November 17, 2000. The Oklahoma Commission recommended approval of the application on grounds that all statutory requirements have been satisfied, and also arguing that the entry of SWBT into the long distance market will benefit not only long distance markets within Oklahoma, but will encourage competition in the local exchange market in Oklahoma.<sup>43</sup> On December 11, 2000, the Oklahoma Commission filed reply comments responding to specific issues raised by commenters in this proceeding. The Oklahoma Commission also urged that we give deference to its determination that competition exists in Oklahoma and that the requirements of section 271 have been met.<sup>44</sup> We commend the Oklahoma Commission for its analysis.

### 3. Department of Justice Evaluation

17. The Department of Justice filed its evaluation of SWBT’s application on December 4, 2000. In its evaluation, the Department of Justice first focuses on the prices at which SWBT provides interconnection and unbundled network elements (UNEs) in Kansas and Oklahoma.<sup>45</sup> The Department of Justice recommends that the Commission undertake an independent scrutiny of recurring and nonrecurring UNE rates in Oklahoma, and nonrecurring UNE rates in Kansas.<sup>46</sup> The Department of Justice also expresses concern over the interim nature of the rates for collocation and a number of UNEs.<sup>47</sup> The Department of Justice next questions the sufficiency of SWBT’s evidence in support of its OSS in Kansas and Oklahoma. SWBT relies heavily in its application on assertions that it provides wholesale services in Kansas and Oklahoma through the same OSS as in Texas, and argues that it has previously demonstrated that these systems satisfy

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<sup>40</sup> See SWBT Application at 11; *Application of the Attorney General of the State of Oklahoma, et al., To Explore Southwestern Bell Telephone Co.’s Compliance with Section 271(c) of the Telecommunications Act of 1996*, Cause No. PUD 970000560, Order No. 445180 (Oklahoma Commission, Sept. 28, 2000) (“Oklahoma Commission Sec. 271 Order”).

<sup>41</sup> SWBT Application at 11.

<sup>42</sup> Oklahoma Commission Comments at 2.

<sup>43</sup> *Id.*

<sup>44</sup> Oklahoma Commission Reply Comments at 27.

<sup>45</sup> Department of Justice Evaluation at 2.

<sup>46</sup> *Id.* at 13-20, 25-27.

<sup>47</sup> *Id.* at 24-25, 27-28.

section 271 requirements.<sup>48</sup> The Department of Justice finds that the evidence offered by SWBT to demonstrate that its OSS is, indeed, the same as in Texas, is “ambiguous and incomplete” in several respects. The Department of Justice also urges the Commission to establish the kind of evidentiary showing that will be expected of future applicants who seek to rely, as SWBT does, on findings from prior section 271 proceedings.<sup>49</sup>

### III. PROCEDURAL AND ANALYTICAL FRAMEWORK

18. The terms of the competitive checklist generally incorporate by reference the core local competition obligations that sections 251 and 252 impose on all incumbent LECs. In a variety of proceedings since 1996, the Commission has discharged its statutory authority to issue comprehensive rules and orders giving specific content to those obligations. In determining whether a BOC applicant has met the local competition prerequisites for entry into the long-distance market, therefore, we evaluate its compliance with our rules and orders in effect at the time the application was filed. We emphasize that a BOC must comply with all of the Commission’s rules implementing the requirements of section 251 and 252 beginning on the dates specified by those rules.<sup>50</sup>

19. As the Commission stated in the *SWBT Texas Order*, despite the comprehensiveness of our local competition rules, there will inevitably be, in any section 271 proceeding, new and unresolved interpretive disputes about 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 self-executing requirements of the Act. The section 271 process simply could not function as Congress intended if we were generally required to resolve all such disputes as a precondition to granting a section 271 application.<sup>51</sup> Congress designed section 271 proceedings as highly specialized, 90-day proceedings for examining the performance of a particular carrier in a particular State at a particular time. Such fast-track, narrowly focused adjudications are often inappropriate forums for the considered resolution of industry-wide local competition questions of general applicability.<sup>52</sup> Second, such a requirement would undermine the congressional intent of section 271 to give the BOCs an incentive to open their local markets to competition. That incentive would largely vanish if a BOC’s opponents could effectively doom any section 271 application by raising a host of novel interpretive disputes in their comments and demanding that authorization be denied unless each one of those disputes is resolved in the BOC’s

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<sup>48</sup> *Id.* at 28-36.

<sup>49</sup> *Id.* at 29-30.

<sup>50</sup> *SWBT Texas Order*, 15 FCC Rcd at 18368, para. 29.

<sup>51</sup> *See American Tel. and Tel. Co. v. FCC*, 220 F.3d 607, 631 (D.C. Cir. 2000).

<sup>52</sup> As the D.C. Circuit has held, “[A]llowing collateral challenges could change the nature of section 271 proceedings from an expedited process focused on an individual applicant’s performance into a wide-ranging, industry-wide examination of telecommunications law and policy.” *American Tel. and Tel. Co. v. FCC*, 220 F.3d at 631.

favor. Finally, simply as a matter of statutory construction, few of the substantive obligations contained in the local competition provisions of sections 251 and 252 are altogether self-executing; they rely for their content on the Commission's rules.<sup>53</sup>

#### A. Procedural Framework

20. In the context of section 271's adjudicatory framework, the Commission has established certain procedural rules governing BOC section 271 applications.<sup>54</sup> Among other things, these rules provide an opportunity for parties other than the Department of Justice and the relevant state commission to comment on section 271 applications.

21. These procedural rules have served the Commission well by deterring incomplete section 271 filings by the BOCs. In particular, they are designed to prevent applicants from presenting part of their initial *prima facie* showing for the first time in reply comments.<sup>55</sup> We do not expect that a BOC, in its initial application, will anticipate and address every argument its opponents might make in their comments. Based on the state proceedings, however, the BOCs should be able to identify most of the significant arguments and allegations that parties are likely to make in their filings before the Commission.<sup>56</sup> Thus, the rules provide that when an applicant files new information after the comment date, the Commission reserves the right to start the 90-day review period again or to accord such information no weight in determining section 271 compliance.<sup>57</sup> An exception to this approach exists for new information that is directly responsive to allegations raised in the comments. The Commission has also strictly limited the consideration of developments that occur after the date for filing comments.<sup>58</sup>

22. In this proceeding, we waive these procedural requirements on our own motion pursuant to section 1.3 of the Commission's rules,<sup>59</sup> to the extent necessary to consider rate

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<sup>53</sup> *SWBT Texas Order*, 15 FCC Rcd at 18367, para. 27.

<sup>54</sup> *See, e.g., Procedures for Bell Operating Company Applications Under New Section 271 of the Communications Act*, Public Notice, 11 FCC Rcd 19708 (Dec. 6, 1996) (Dec. 6, 1996 Public Notice); *Revised Comment Schedule for Ameritech Michigan Application, as amended, for Authorization under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in the State of Michigan*, Public Notice, DA 97-127 (Jan. 17, 1997) (Jan. 17, 1997 Public Notice); *Revised Procedures for Bell Operating Company Applications Under Section 271 of the Communications Act*, Public Notice, 13 FCC Rcd 17457 (Sept. 19, 1997) (Sept. 19, 1997 Public Notice); *Updated Filing Requirements for Bell Operating Company Applications Under Section 271 of the Communications Act*, Public Notice, DA-99-1994 (Sept. 28, 1999) (Sept. 28, 1999 Public Notice).

<sup>55</sup> *Ameritech Michigan Order*, 12 FCC Rcd at 20573, para. 54.

<sup>56</sup> *Bell Atlantic New York Order*, 15 FCC Rcd at 3969, para. 36; *Ameritech Michigan Order*, 12 FCC Rcd at 20575, para. .

<sup>57</sup> Sept. 28, 1999 Public Notice at 3.

<sup>58</sup> *Bell Atlantic New York Order*, 15 FCC Rcd at 3969, para. 36.

<sup>59</sup> 47 CFR § 1.3.

reductions filed by SWBT on day 63 of the 90-day period for Commission review of the Kansas and Oklahoma section 271 applications. “[A] waiver is appropriate only if special circumstances warrant a deviation from the general rule and such deviation will serve the public interest.”<sup>60</sup> We conclude that the special circumstances before us in this case warrant a deviation from the general rules for consideration of late-filed information or new developments that take place late in the application review process. In the particular circumstances presented by this application, we conclude that considering these late-filed rate reductions will serve the public interest. At the same time, we emphasize that in the absence of such special circumstances, we will continue to adhere to our general rules designed to ensure a fair and orderly process for the consideration of section 271 applications within the 90-day statutory deadline.

23. There are a number of special circumstances that support grant of this waiver to permit consideration of these rate reductions in determining section 271 compliance, and thus satisfy the first element of the test for grant of a waiver described above. First, the rate changes at issue are quite limited in nature. Basically, SWBT has made uniform percentage rate reductions, subject to specified rate floors, in certain categories of rates in Oklahoma and Kansas.<sup>61</sup> SWBT has not modified the rate structure developed in the state proceedings or modified the rates developed by the states with a combination of rate decreases and increases. As a result, addressing the effect of these rate revisions in terms of compliance with section 271 places a limited additional analytical burden on the Commission staff and commenting parties.<sup>62</sup> This differs significantly from the consideration of more complex rate revisions. It also differs from consideration of promises of future action, which may or may not actually take place.<sup>63</sup> It is also different from implementation of measures designed to achieve nondiscriminatory performance in

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<sup>60</sup> *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164 at 1166 (D.C. Cir. 1990); *WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969).

<sup>61</sup> 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. 00-217 (filed Dec. 28, 2000) (SWBT Dec. 28 *Ex Parte* Letter). SWBT’s December 28, 2000 *ex parte* filing is an amended version of an *ex parte* filing it made on December 27, 2000.

<sup>62</sup> In light of this and the nature and extent of the comments filed concerning these rate reductions, we cannot accept claims that interested parties did not have a reasonable opportunity to comment.

<sup>63</sup> Contrary to the arguments of certain commenting parties, there is no uncertainty concerning the availability of these rates to competing LECs. The Kansas Commission has approved these rate reductions with the reductions to become effective immediately. Letter from Eva Powers, Assistant General Counsel, Kansas Corporation Commission, to Magalie Roman Salas, Secretary, Federal Communications Commission, CC Docket No. 00-217 at 2 (filed Jan. 5, 2001) (Kansas Commission Jan. 5 *Ex Parte* Letter) and Attach. 1 (Order Approving Revisions to the K2A, Docket No. 97-SWBT-411-GIT at 1-3 (Jan. 4, 2001)) (Kansas Commission Jan. 4 Order). The Oklahoma Commission adopted the modified rates on January 10, 2001. *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. 00-217 (filed Jan. 12, 2001) (SWBT Jan. 12 *Ex Parte* Letter) at Attach. C (Final Order Approving Adoption of Amendment to Interconnection Agreement, Cause No. PUD 20010006 (Jan. 10, 2001))

the applicant's provision of service to competitive LECs, since it is often impossible to determine the actual effect of such changes on performance in advance. Second, because of the very limited nature of these rate changes, interested parties have had a reasonable opportunity to evaluate them and comment in a meaningful manner.<sup>64</sup> The nature of these rate changes has also permitted the Commission staff to evaluate these rate changes reasonably, within the 90-day review period.

24. Third, this is an instance in which an applicant has responded to criticism in the record by taking positive action that will clearly foster the development of competition. This is very different from the typical situation in which late-filed material provided by the applicant consists of additional arguments or information concerning whether its current performance or pricing satisfies the requirements of section 271. Fourth, these are otherwise generally persuasive applications, which demonstrate a commitment to opening local markets to competition as required by the 1996 Telecommunications Act.

25. We also conclude that, subject to certain limiting conditions described below, grant of this waiver will serve the public interest and thus satisfy the second element of the waiver standard described above. In particular, grant of this waiver permits the Commission to act on these section 271 applications quickly and efficiently without the procedural delays inherent in restarting the 90-day clock. Grant of this waiver also provides positive reinforcement to SWBT for responding to criticism in the record concerning its rate levels by making pro-competitive rate reductions. Given that interested parties have had a meaningful opportunity to comment on these rate reductions, we do not believe that the public interest would be served in this instance by strict adherence to our procedural rules. At the same time, as discussed below, we emphasize that we do not intend to allow a pattern of late-filed changes to threaten the Commission's ability to maintain a fair and orderly process for consideration of section 271 applications.

26. Although we conclude that grant of this waiver to permit consideration of these rate reductions at this time is superior to requiring that SWBT refile its application or restart the 90-day clock in order to obtain consideration of these rate reductions, we reiterate that we continue to expect applicants to make every effort to ensure that section 271 applications are complete when filed. Indeed, we believe it would be rare for other parties to satisfy the high bar set here in future applications. We expect the parties to file a complete application, including any prices on which they want the Commission to rely in its decision, on day one. Nonetheless, although we do not decide here whether we would ever accept amendments to prices within the first twenty days of the filing, for purposes of this application, we condition the grant of this waiver on delaying the effective date for 43 days after release. This represents one day for each day between day 20 and day 63, when SWBT filed these rate revisions. We believe that delaying the effective date in the instant application ensures that SWBT does not receive the full benefits of late-filed changes.

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<sup>64</sup> See *Comments Requested in Connection with Southwestern Bell's Section 271 Application for Kansas and Oklahoma*, CC Docket No. 00-217, Public Notice, DA No. 00-2912 (rel. Dec. 27, 2001) (Dec. 27 Public Notice); *Comment Schedule Set in December 27th Public Notice Remains the Same*, Public Notice, CC Docket No. 00-217, DA-00-2917 (December 28, 2000).

27. Under the special circumstances present in these applications, we cannot agree with the commenting parties that urge us to decline to consider these rate revisions or to treat these revisions as a new filing that starts the 90-day review period.<sup>65</sup> We cannot agree that consideration of these late-filed rate reductions permits SWBT to benefit by delaying the opening of its local markets in these states to competition. If these rate reductions had become effective the day before SWBT filed these applications, there would be no question concerning the propriety of considering the new rates under our procedural rules. Moreover, the statute does not require that a BOC demonstrate that it has been in compliance with section 271 for some period of time before it files a section 271 application. While we strongly encourage applicants to resolve issues concerning rate levels fully before they file section 271 applications, we do not believe that the limited delay in reducing these rates in Oklahoma and Kansas is sufficient to warrant excluding them from consideration. At the same time, we share, to some extent, the concerns expressed by a number of parties that applicants might attempt to use grant of this waiver to “game” the section 271 process with repeated last minute rate reductions.<sup>66</sup> We have already made clear that we do not expect applicants to do this repeatedly and we will look with disfavor on any situation in which a single applicant attempts to make such rate reductions late in the application review period on multiple occasions. This concern about the potential for future abuse does not persuade us, however, that it would be better to refuse to consider the rate reductions in this case or treat them as the filing of a new application and restart the 90-day review period since we can address such problems if and when they actually occur.

## B. Analytical Framework

28. As part of our determination that a BOC has satisfied the requirements of section 271, we consider whether the BOC has fully implemented the competitive checklist in subsection (c)(2)(B).<sup>67</sup> In demonstrating compliance with each item on the competitive checklist, a BOC must demonstrate 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 item in quantities that competitors may reasonably demand and at an acceptable level of quality.<sup>68</sup> In particular, the BOC must demonstrate that it is offering interconnection and access to network elements on a nondiscriminatory basis.<sup>69</sup> Previous

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<sup>65</sup> See, e.g., ALTS Supp. Comments at 3-5; AT&T Supp. Comments at 2; Allegiance Supp. Comments at 3-5; ConnectSouth Supp. Comments at 3-4; Cox Supp. Comments at 1-4; IP Supp. Comments at 7-13; McLeodUSA Supp. Comments at 2; Sprint Supp. Comments at 2-4; WorldCom Supp. Comments at 1-3.

<sup>66</sup> See, e.g., AT&T Supp. Comments at 1-3; IP Supp. Comments at 2-3 & 7-8; Z-Tel Supp. Comments at 2-3.

<sup>67</sup> See 47 U.S.C. § 271(d)(3). As set forth below, we conclude that SWBT has satisfied the requirements of subsection (c)(1)(A) (“Track A”) and thus its application merits analysis under section 271(d)(3)(A)(i) of our rules.

<sup>68</sup> *Bell Atlantic New York Order*, 15 FCC Rcd at 3973-74, para. 52.

<sup>69</sup> 47 U.S.C. § 271(c)(1)(B)(i), (ii).

Commission orders addressing section 271 applications have elaborated on this statutory standard. 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.<sup>70</sup> 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.<sup>71</sup> 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.”<sup>72</sup>

29. We note that a determination of whether the statutory standard is met is ultimately a judgment we must make based on our expertise in promoting competition in local markets and in telecommunications regulation generally.<sup>73</sup> We have not established, nor do we believe it appropriate to establish, specific objective criteria for what constitutes “substantially the same time and manner” or a “meaningful opportunity to compete.”<sup>74</sup> Whether this legal standard is met can only be decided based on an analysis of specific facts and circumstances. Therefore, we look at each application on a case-by-case basis and consider the totality of the circumstances, including the origin and quality of the information before us, to determine whether the nondiscrimination requirements of the Act are met. We reemphasize that the BOC applicant retains at all times the ultimate burden of proof that its application satisfies all of the requirements of section 271, even if no party files comments challenging its compliance with a particular requirement.<sup>75</sup>

### **1. Analysis of Performance Data**

30. SWBT reports performance data pursuant to over 120 detailed metrics established by the Texas Commission, and adopted by the Kansas and Oklahoma Commissions. These performance measurements cover the pre-ordering, ordering, provisioning, maintenance and repair, and billing functions it performs in the course of providing wholesale services to competing LECs. For most of these performance measurements, SWBT’s performance with respect to competitors is compared against either an analogous retail function or a benchmark performance

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<sup>70</sup> *SWBT Texas Order*, 15 FCC Rcd at 18373, para. 44; *Bell Atlantic New York Order*, 15 FCC Rcd at 3971, para. 44.

<sup>71</sup> *Bell Atlantic New York Order*, 15 FCC Rcd at 3971, para. 44; *Ameritech Michigan Order*, 12 FCC Rcd at 20618-19.

<sup>72</sup> *Id.*

<sup>73</sup> *SWBT Texas Order*, 15 FCC Rcd at 18374, para. 46; *Bell Atlantic New York Order*, 15 FCC Rcd at 3972, para. 46.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

level. Each of these categories of performance data is commercially important, and each has an effect on the ability of competitive LECs to attract, service and maintain customers. For example, a competing LEC must rely on timely responses to pre-ordering queries so that it can interact on a real-time basis with a prospective customer. Ordering and provisioning performance by the BOC will affect a competitor's ability to provide service to its customers within a commercially reasonable time frame, and delays or other flaws in these processes may (among other things) cause end users to cancel orders. In addition, end users may well decide to return to the incumbent if the BOC provides poor maintenance and repair service for unbundled local loops used by competitors.

31. As established in prior section 271 orders, and consistent with our analysis in this order, we have found that performance measurements provide valuable evidence regarding SWBT's compliance or noncompliance with individual checklist items. We emphasize, however, that we do not view each particular metric as wholly dispositive of checklist compliance. Nor do we suggest that the parity and benchmark standards established by state commissions 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. Ultimately, the determination of whether a BOC's performance is consistent with the statutory requirements is a contextual decision based on the totality of the circumstances. To the extent there is no statistically significant difference between SWBT's provision of service to competing carriers on one hand, and retail customers or a state's performance benchmark on the other, we generally need not look any further – particularly absent other evidence of discrimination by the BOC. Where a statistically significant difference exists, however, we will examine the evidence further to make our ultimate determination of whether the statutory nondiscrimination requirements are met.<sup>76</sup> Thus, we will examine explanations proffered by SWBT or other commenters about whether these differences provide an accurate depiction of the quality of SWBT's performance. We also will consider the degree and duration of the performance disparity, and whether the performance is part of an improving or deteriorating trend.<sup>77</sup>

32. Finally, in some instances, we may find statistically significant differences in certain performance measurements, but conclude that such differences do not warrant a finding of checklist noncompliance. In such cases, we may find that the performance differences are slight, or occur in isolated months, and thus suggest only an insignificant competitive impact. Furthermore, where there are multiple performance measures associated with a particular checklist item, we would consider the performance demonstrated by all the measurements as a

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<sup>76</sup> See *Bell Atlantic New York Order*, 15 FCC Rcd at 3976, para. 59.

<sup>77</sup> See, e.g., *SWBT Texas Order* at paras. 175, 188 and 293 (instances in which we found that an improvement in performance over time provided us with an indication that problems were being resolved).

whole. Accordingly, a disparity in performance for one measure, by itself, may not provide a basis for finding noncompliance with the checklist. We may also find that the reported performance data is impacted by factors beyond a BOC's control, a finding that would make us 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.

33. In sum, we do not use performance measurements as a substitute for the 14-point competitive checklist. Rather, we use performance measurements as valuable evidence with which to inform our judgment as to whether a BOC has complied with the checklist requirements. Although performance measurements add necessary objectivity and predictability to our review, they cannot wholly replace our own judgment as to whether a BOC has complied with the competitive checklist.

## 2. Relevance of Previous Section 271 Approvals

34. In the New York and Texas 271 proceedings, we were able to place significant reliance on two types of evidence in concluding that the BOC was providing interconnection, resold services, and access to unbundled network elements in accordance with the requirements of section 271. First, in both applications, the applicants offered sufficient and reliable evidence of nondiscriminatory performance, based on substantial volumes of transactions. Second, in both cases, a comprehensive test of the functions and capabilities of the BOC's operations support systems ("OSS") was conducted by an independent third party. In the instant application, the volumes of commercial orders – although they have increased in recent months – are significantly lower than they were in New York and Texas. In several instances, as discussed below, volumes are so low as to render the performance data inconsistent and inconclusive.<sup>78</sup> In addition, no comprehensive, independent third party test of SWBT's OSS was conducted in either Kansas or Oklahoma.

35. In support of this application, SWBT urges us to place significant reliance on the Commission's findings in the *SWBT Texas Order*, on grounds that many of its systems and processes used in Kansas and Oklahoma, as well as the legal obligations imposed by the Kansas and Oklahoma Commissions, are the same as those reviewed and approved in the Texas 271 proceeding.<sup>79</sup> We agree that findings in the *SWBT Texas Order* may be a relevant factor in our

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<sup>78</sup> We have 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)).

<sup>79</sup> See SWBT Brief at 19; SWBT Reply at 28-52.

analysis in this proceeding. Where SWBT provides evidence that a particular system reviewed and approved in Texas is also used in Kansas and Oklahoma, our review of the same system in this proceeding will be informed by our findings in the *SWBT Texas Order*. 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. Moreover, as noted by the Department of Justice, this approach can “avoid the delay and expense of redundant testing.”<sup>80</sup> We emphasize, however, that the statute requires us to make a separate determination of checklist compliance for each state and, accordingly, we do not consider any finding from the *SWBT Texas Order* to be dispositive of checklist compliance in this proceeding. While our review may be informed by our prior findings, we will consider all relevant evidence in the record, including state-specific factors identified by commenting parties, the states, the Department of Justice.

36. We also find, as discussed in further detail below, that SWBT’s actual performance in Texas may be relevant to our analysis of the commercial readiness of SWBT’s OSS in this proceeding, as well as to determinations with respect to other checklist items.<sup>81</sup> We find that 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, as SWBT itself recognizes, where performance data is based on a low number of observations, small variations in performance may produce wide swings in the reported performance data.<sup>82</sup> 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. We note, however, that we have 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.<sup>83</sup> Accordingly, even where an applicant seeks to rely on findings made in a prior, successful section 271 application (the “anchor” state), then, our analysis will always start with actual performance towards competitors in the applicant state. Indeed, 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.

37. Moreover, because our 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, we cannot simply rely on our findings relating to an applicant’s performance in an anchor state at the time we issued the determination for that state. The performance in that state could change due to a multitude of

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<sup>80</sup> See Department of Justice Evaluation at 28.

<sup>81</sup> See section IV.B.2, *infra*.

<sup>82</sup> See SWBT Dysart Decl. at para. 81 (noting that a small sample size could overstate disparities) and 88 (noting that, where order volumes are low, a single missed installation could preclude reaching a benchmark target).

<sup>83</sup> See *SWBT Texas Order*, 15 FCC Rcd at 18376, para. 53; *Bell Atlantic New York Order*, 15 FCC Rcd at 3974, para. 53.

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, we must examine how recent performance in that state compares to performance at the time we approved its section 271 application, in order to determine if the systems and processes continue to perform at acceptable levels.

38. We recognize, as does the Department of Justice, that this application presents us with the first opportunity to materially rely on this form of evidence in granting a section 271 application. We note, however, that the Commission has adopted the practice of reviewing evidence from other applications and states in previous section 271 proceedings. For instance, in the *First BellSouth Louisiana Order*, we used our evaluation of BellSouth's OSS in South Carolina as a "starting point" for our evaluation of its OSS in Louisiana, where the Commission had recently released the *BellSouth South Carolina Order*.<sup>84</sup> Furthermore, in the three BellSouth section 271 orders, we found performance measurements covering performance in BellSouth's entire region to be relevant to our consideration of the individual applications.<sup>85</sup> Such evidence was relevant, we explained, because BellSouth had adequately shown that it used essentially the same OSS system throughout its nine-state region.<sup>86</sup> 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 section 271 process, the delay and expense associated with redundant and unnecessary proceedings and submissions.

#### IV. PRIMARY ISSUES IN DISPUTE

39. In prior orders, we organized our discussion of the section 271 requirements sequentially, following the order of the statutory provision. In so doing, we have discussed in

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<sup>84</sup> See *Application by BellSouth Corporation, et al., Pursuant to Section 271 of the Communications Act of 1934, as Amended, to Provide In-Region, InterLATA Services in Louisiana*, CC Docket No. 97-231, Memorandum Opinion and Order, 13 FCC Rcd 6258, para. 21 (*BellSouth Louisiana Order*); see also *Application of BellSouth Corporation, et al., Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in South Carolina*, CC Docket No. 97-208, Memorandum Opinion and Order, 13 FCC Rcd 539 (*BellSouth South Carolina Order*).

<sup>85</sup> See *Application by BellSouth Corporation, et al., Pursuant to Section 271 of the Communications Act of 1934, as Amended, to Provide In-Region, InterLATA Services in Louisiana*, CC Docket No. 98-121, Memorandum Opinion and Order, 13 FCC Rcd 20599, 20655, para. 88 (*Second BellSouth Louisiana Order*); *BellSouth Louisiana Order*, 13 FCC Rcd at 6258, para. 21; *BellSouth South Carolina Order*, 13 FCC Rcd at 593-95, paras. 97 and 100.

<sup>86</sup> While we found region-wide evidence to be relevant in the BellSouth proceedings, we found in each instance that BellSouth, overall, had failed to carry its burden of demonstrating that it provided nondiscriminatory access to its OSS. See, e.g., *Second BellSouth Louisiana Order*, 13 FCC Rcd at 20657 *et seq.*, paras. 91 *et seq.* We thus did not determine whether region-wide performance data, absent any state-specific data, could suffice to demonstrate checklist compliance. Moreover, because the region-wide performance data or holdings from prior orders were not decisional in those instances, we did not examine BellSouth's assertion that its OSS was the same throughout all of its in-region states with the same scrutiny as here.

considerable detail the analytical framework and particular legal showing required to establish checklist compliance. Rather than simply recite prior jurisprudence, we focus instead in this order first on those issues and checklist items in controversy, based on the record developed in this proceeding. Accordingly, we begin by addressing whether SWBT has satisfied the requirements for Track A in both Kansas and Oklahoma. Next, we consider checklist item number two, which encompasses access to unbundled network elements, including issues related to OSS, combinations of network elements and Enhanced Extended Links (EELs). We then discuss checklist item number four, access to unbundled local loops, and checklist item number one, which covers interconnection and collocation. The remaining checklist requirements are then discussed briefly since they received little or no discussion from commenting parties, and our own review of the record leads us to conclude that SWBT has satisfied these requirements. Finally, we discuss issues concerning compliance with section 272 and the public interest requirement. It is our hope that this approach will serve to focus attention on the checklist items that tend to raise the most questions about compliance with section 271, while reducing the discussion of the checklist requirements that do not raise such questions.

#### **A. Compliance with Section 271(c)(1)(A)**

40. 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).<sup>87</sup> 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."<sup>88</sup> 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 exchange facilities in combination with the resale of the telecommunications services of another carrier."<sup>89</sup> 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.<sup>90</sup>

#### **1. Kansas**

41. We conclude, as the Kansas Commission did, that SWBT demonstrates that it satisfies the requirements of Track A based on the interconnection agreements it has implemented with competing carriers in Kansas. In support of its Track A showing, SWBT relies on interconnection agreements with Global Crossing, Sprint, Birch Telecom and Ionex

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<sup>87</sup> 47 U.S.C. § 271(d)(3)(A).

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> *Ameritech Michigan Order*, 12 FCC Rcd at 20589, para. 85; *see also BellSouth Louisiana Order*, 13 FCC Rcd 20633-35 at paras. 46-48.

Communications.<sup>91</sup> Specifically, the record demonstrates that both Ionex Communications and Birch Telecom provide service to residential subscribers exclusively over their own facilities using the UNE platform.<sup>92</sup> Sprint also provides local exchange service to business and residential subscribers.<sup>93</sup>

42. Although there has been considerable dispute in the record regarding the exact number of residential customers served by these carriers,<sup>94</sup> we conclude that a sufficient number of residential customers are being served by competing LECs through the use of their own facilities to demonstrate that there is an “actual commercial alternative” to SWBT in Kansas.<sup>95</sup> We note that commenters have complained that SWBT’s method of estimation overstates the number of customers.<sup>96</sup> We find, however, that SWBT’s response to these competitors in its reply comments, in conjunction with its *ex parte* submissions on this subject, support our conclusion that more than a *de minimis* number of residential customers are served via UNE-P in Kansas.<sup>97</sup>

43. On January 18, 2001, Sprint filed a motion to strike an *ex parte* letter submitted by SWBT on December 20, 2000, on grounds that SWBT had failed to follow the proper procedures

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<sup>91</sup> SWBT Application at 15-16.

<sup>92</sup> SWBT Reply at 73; SWBT Smith Reply Aff. at para. 12; Birch December 29 *Ex Parte* Letter at 1-2 (confidential version). We recognize that SWBT, and other carriers, have requested confidential treatment of estimated and actual customer counts, pursuant to the protective order in this proceeding. *See In the Matter of Application of SBC Communications, Inc. Pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-Region, InterLATA Services in Kansas and Oklahoma*, Protective Order, CC Docket No. 00-217, DA-00-2415 (October 26, 2000).

<sup>93</sup> SWBT Application at 16; SWBT Reply at 72; *See also* Sprint Comments at 9.

<sup>94</sup> AT&T Turner Decl. at paras. 2-3; Sprint Comments at 8-9 and 14 (arguing that its residential customers served on its facilities had been participating in pre-commercial testing and had only recently begun receiving bills, and that Birch appears to offer residential service only via resale); Cox Comments at 5; Global Crossing Comments at 1-3 (arguing that it has no facilities based residential customers in Kansas); ALTS Reply Comments at 4; WorldCom Reply Comments at 15, 20-22; *but see* Kansas Commission Comments at 6-7.

<sup>95</sup> *See SWBT Oklahoma Order*, 12 FCC Rcd at 8695, para. 14 (construing section 271(c)(1)(A) as requiring that “there must be an actual commercial alternative to the BOC in order to satisfy” Track A). The D.C. Circuit affirmed this reading of Track A. *See SBC Communications Inc. v. FCC*, 138 F.3d 410, 416-17 (D.C. Cir. 1998).

<sup>96</sup> AT&T Turner Decl. 6-8 (arguing that SWBT’s assumption of 2.75 access lines per interconnection trunk overestimates the number of facilities-based CLEC lines and disputing SWBT’s use of its E911 database to estimate facilities-based CLEC activity); Cox Comments at 4; Sprint Comments at 4-6; WorldCom Reply Comments at 19.

<sup>97</sup> *See* SWBT Reply at 71-73. SWBT stated that, at the time it filed its reply brief, it was in the process of investigating the number of UNE-P access lines used to provide service to residential customers in Kansas. *Id.* at 73, n.46. On December 20, 2000, SBC filed a written confidential *ex parte* letter presenting the results of its investigation, which indicate that Kansas competing carriers, including Birch Telecom, provide facilities-based service to a significant number of both residential and business customers via UNE-P. *See* SWBT Dec. 20 *Ex Parte* Letter; *see also* SWBT Smith Reply Aff. at para. 12.

for filing confidential material and that a redacted version of the letter had not been placed in the public record.<sup>98</sup> We deny this motion. The information contained in the letter related to the number of residential customers served via the UNE platform by six competitive carriers in Kansas other than Sprint. While Sprint suggests that “it is imperative that such data be vetted through the CLECs [named in the letter] themselves,”<sup>99</sup> we note that one of the competing carriers, Birch Telecom, did confirm the customer estimate provided by SWBT.<sup>100</sup> Consequently, all that Sprint (or any other commenter) could conceivably have argued, would have been to reiterate its opinion that only a *de minimis* number of residential customers are served by UNE-P in Kansas. As stated above, we reject that argument. Thus, we believe SWBT’s omission resulted in harmless error. Moreover, while we view the *ex parte* letter as providing additional support for SWBT’s assertion that it complies with “Track A,” it is not the only basis of our decision, as noted above.<sup>101</sup>

## 2. Oklahoma

44. We conclude, as the Oklahoma Commission did, that SWBT demonstrates that it satisfies the requirements of Track A based on the interconnection agreements it has implemented with competing carriers in Oklahoma.<sup>102</sup> Specifically, we find that Cox Communications (Cox) provides telephone exchange service either exclusively or predominantly over its own facilities to residential subscribers and to business subscribers.<sup>103</sup> While several competing carriers, including Cox, challenge the accuracy of SWBT’s estimates,<sup>104</sup> there is no dispute that Cox serves a

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<sup>98</sup> Motion to Strike of Sprint Communications Company (filed Jan. 18, 2000) (*Sprint Motion to Strike*).

<sup>99</sup> *Sprint Motion to Strike* at 3.

<sup>100</sup> See Letter from Gregory C. Lawhon, Birch Telecom, to Magalie Roman Salas, Secretary, Federal Communications Commission, December 29, 2000 (requesting confidential treatment) (Birch Dec. 29 *Ex Parte* Letter). Sprint notes that this letter also was improperly filed (as it was not also submitted in redacted form). *Id.*, n.2. We nonetheless find that it is appropriate to consider it because it contains the type of confidential carrier-specific information that would be unverifiable by other parties.

<sup>101</sup> Finally, as the Commission has explained in a prior section 271 proceeding, “if all other requirements of section 271 have been satisfied, it does not appear to be consistent with congressional intent to exclude a BOC from the in-region, interLATA market solely because the competitors’ service to residential customers is wholly through resale.” *Second BellSouth Louisiana Order*, 13 FCC Rcd at 20635, para. 48. Had we been unable to rely on SWBT’s December 20 *Ex Parte* Letter, or in its other methods of estimation put forth in its comments and replies, we would have been faced by this situation. Based on the totality of circumstances presented by this application, and based on our conclusions regarding checklist compliance, we likely would not have denied this application on “Track A” grounds, and would have relied on the existence of competitors’ service to residential customers through resale.

<sup>102</sup> Oklahoma Commission Comments at 2.

<sup>103</sup> SWBT Application at 18; SWBT Reply at 72; Cox Comments at 4.

<sup>104</sup> AT&T Turner Decl. at 6-8; Sprint Comments at 4-6; Cox Comments at 4; WorldCom Reply Comments at 19; *but see* SWBT Reply at 71-73; SWBT Smith Reply Aff. at 7-12.

significant number of residential customers using its own facilities and represents an “actual commercial alternative” to SWBT in Oklahoma.<sup>105</sup> Because Cox’s customers alone satisfy Track A, we need not determine whether SWBT’s estimates with respect to other competing carriers are correct.

## B. Checklist Item 2 – Unbundled Network Elements

45. We next determine whether SWBT has satisfied its obligation under checklist item 2 to provide nondiscriminatory access to unbundled network elements pursuant to section 251(c), at prices that meet the requirements of section 252(d). The Commission has identified a number of UNEs, including operations support systems (OSS), that incumbent LECs must make available under section 251(c)(3).<sup>106</sup> The nondiscriminatory provision of OSS and the ability of competing carriers to combine unbundled network elements are integral aspects of the BOC’s obligation to provide access to unbundled network elements. In this section, we address whether SWBT provides access to OSS and to combinations of UNEs in accordance with section 251(c)(3) and our rules.<sup>107</sup> Aside from OSS, the other UNEs that SWBT must make available under section 251(c)(3) are also listed as separate items on the competitive checklist, and are addressed below in separate sections for each checklist item.<sup>108</sup>

46. In this section, we focus on those aspects of SWBT’s compliance with this checklist item that were contested by commenting parties in this proceeding, and those issues and obligations that have not previously been considered by the Commission in a section 271 order. Accordingly, we start with an analysis of the prices charged for network elements in Kansas and Oklahoma. Next, under our analysis of whether SWBT provides nondiscriminatory access to OSS, we focus our analysis on two primary issues: the relevance of SWBT’s assertion that the OSS used in Kansas and Oklahoma are the same as those previously approved in the Texas 271 proceeding, and whether SWBT provides access to loop qualification information as required under the *UNE Remand Order*. Finally, we turn to other key aspects of OSS, as identified in prior section 271 applications, and to issues relating to combinations of network elements.

### 1. Pricing of Network Elements

47. 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.<sup>109</sup>

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<sup>105</sup> See *SWBT Oklahoma Order*, 12 FCC Rcd at 8695, para. 14.

<sup>106</sup> See *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, Third Report and Order, 15 FCC Rcd 3696, 3704, para. 15 (*UNE Remand Order*).

<sup>107</sup> 47 U.S.C. § 51.315(b).

<sup>108</sup> See 47 U.S.C. § 271(c)(2)(B) (for example, unbundled loops, transport and switching are listed separately as checklist items iv, v and vi).

<sup>109</sup> 47 U.S.C. § 271(B)(ii).

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.”<sup>110</sup> Section 252(d)(1) requires that a 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.<sup>111</sup> 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.<sup>112</sup> 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.<sup>113</sup>

48. Although the U.S. Court of Appeals for the Eighth Circuit stayed the Commission’s pricing rules in 1996,<sup>114</sup> 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.<sup>115</sup> 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.<sup>116</sup> The Eighth

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<sup>110</sup> 47 U.S.C. § 251(c)(3).

<sup>111</sup> 47 U.S.C. § 252(d)(1).

<sup>112</sup> *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 *In re 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).

<sup>113</sup> See 47 C.F.R. § 51.315(b).

<sup>114</sup> *Iowa Utils. Bd. v. FCC*, 120 F.3d 753, 800, 804, 805-06 (8<sup>th</sup> Cir. 1997).

<sup>115</sup> *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.*

<sup>116</sup> *Iowa Utils. Bd. v. FCC*, 219 F.3d 744 (8<sup>th</sup> 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).

Circuit has stayed the issuance of its mandate pending review by the Supreme Court.<sup>117</sup> Accordingly, the Commission's rules remain in effect for purposes of this application.

**a. Pricing of Kansas Unbundled Network Elements**

**(i) Background**

49. In 1996, Sprint filed a petition with the Kansas Commission to open a generic cost proceeding.<sup>118</sup> AT&T joined the request, and presented the competitive LECs' version of TELRIC-based cost studies.<sup>119</sup> Over a four-year period, the Kansas Commission conducted extensive workshops, hearings, and other types of discovery as part of its cost docket.<sup>120</sup> In 1997, the Kansas Commission adopted SWBT's cost model as the basis of determining forward-looking costs for unbundled network elements.<sup>121</sup> The cost model was identical to the model utilized by the Texas Commission in its cost docket.<sup>122</sup> In 1998, the Kansas Commission directed SWBT to rerun its recurring cost studies using certain prescribed inputs and cost assumptions.<sup>123</sup> AT&T also reran its inputs through SWBT's cost model.<sup>124</sup> The Kansas Commission reviewed all submitted cost data and set recurring rates for unbundled network elements in February 1999.<sup>125</sup> In September 1999, the Kansas Commission issued an order on reconsideration adopting permanent recurring rates.<sup>126</sup> In that order, the Kansas Commission directed parties to rerun

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<sup>117</sup> *Iowa Utils. Bd. v. FCC*, No. 96-3321 *et al.* (8<sup>th</sup> Cir. Sept. 25, 2000).

<sup>118</sup> SWBT Cleek Reply Aff. at para. 5.

<sup>119</sup> *Id.*

<sup>120</sup> Kansas Commission Comments at 21; SWBT Cleek Reply Aff. at para. 5.

<sup>121</sup> SWBT Reply at 12; SWBT Cleek Reply Aff. at para. 7.

<sup>122</sup> SWBT Reply at 12; SWBT Ries/Smith Reply Aff. at paras. 7-8.

<sup>123</sup> SWBT Cleek Reply Aff. at para. 8.

<sup>124</sup> Kansas Commission Comments at 21; SWBT Cleek Reply Aff. at para. 8.

<sup>124</sup> SWBT Cleek Reply Aff. at para. 8.

<sup>125</sup> SWBT Application App. G, Vol. 2, Tab 22 (Final Order Establishing SWBT's Prices for Interconnection and UNEs, Docket No. 97-SCCC-149-GIT (February 19, 1999)) (Kansas Commission Feb. 19 Final Order), *see also* Kansas Commission Comments Attach. 12 (Order Regarding Non-Recurring Charges for UNEs, Docket No. 97-SCCC-149-GIT at 1 (Nov. 3, 2000)) (Kansas Commission Nov. 3 NRC Order); SWBT Cleek Reply Aff. at para. 8.

<sup>125</sup> SWBT Cleek Reply Aff. at para. 8.

<sup>126</sup> SWBT Application App. G, Vol. 2, Tab 25 (Kansas Commission Order on Reconsideration, Docket No. 97-SCCC-149-GIT (Sept. 17, 1999)) (Kansas Commission Sept. 17 Reconsideration Order).

inputs into their nonrecurring cost studies based on certain underlying TELRIC assumptions and determinations.<sup>127</sup>

50. Ten months later, on November 3, 2000, the Kansas Commission set permanent rates for nonrecurring charges.<sup>128</sup> The Kansas Commission found that neither SWBT's nor AT&T's submitted nonrecurring cost studies complied with the directives of its reconsideration order, and determined it could not accept either set of proposed rates.<sup>129</sup> Based on its concern about the length of time that the nonrecurring rate docket had been open, and its agreement to support SWBT's 271 application, the Kansas Commission determined that it should utilize "information previously received in this matter" as well as "its best judgment" to set nonrecurring charges on reconsideration.<sup>130</sup> The Kansas Commission found that the permanent rates it set on reconsideration fell "inside the range of prices that a reasonable application of TELRIC principles would produce."<sup>131</sup> SWBT asserts that the recurring and nonrecurring rates ultimately adopted by the Kansas Commission were based on its TELRIC models and conform to the Commission's pricing rules.<sup>132</sup>

51. On December 21, 2000, the Kansas Commission issued an order on reconsideration of its November 3, 2000 order.<sup>133</sup> It affirmed most of its earlier conclusions

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<sup>127</sup> Kansas Commission Sept. 17 Reconsideration Order at 26.

<sup>128</sup> Kansas Commission Comments at 21; Kansas Commission Nov. 3 NRC Order, *passim*; SWBT Cleek Reply Aff. at para. 9.

<sup>129</sup> Kansas Commission Nov. 3 NRC Order at 4. The Kansas Commission noted the following compliance problems with SWBT's inputs: (1) In virtually every cost study, the Kansas Commission found that SWBT's reconsideration inputs were "substantially higher" than its original inputs, with inadequate explanations for the increases; (2) SWBT failed to remove certain labor costs, despite the Kansas Commission's directive to do so; (3) SWBT submitted a cost study based on fully manual service processes, despite the Kansas Commission's directive to submit electronic order charges along with a "modest surcharge" for manual processing; (4) SWBT applied incorrect fall-out factors to its network provisioning and switch features; (5) SWBT failed to remove costs associated with a certain database (TIRKS); (6) SWBT used incorrect Dedicated Outside Plant and Dedicated Inside Plant assumptions; (7) SWBT's cost studies were "disjointed" and required "inordinate amounts of labor to review and analyze;" (8) SWBT's electronically filed studies did not always match the corresponding paper copies; and (9) SWBT failed to comply with the Kansas Commission's requirement that all cost studies be submitted in a PC-based format. *Id.* at 13-23. The Kansas Commission also found a number of problems with AT&T's inputs. *Id.*

<sup>130</sup> Kansas Commission Nov. 3 NRC Order at 4.

<sup>131</sup> *Id.* at 41.

<sup>132</sup> SWBT Reply at 12.

<sup>133</sup> Letter from Edwardo Rodriguez, Director-Federal Regulatory, SBC, to Magalie Roman Salas, Secretary, Federal Communications Commission, CC Docket No. 00-217 (filed Jan. 3, 2001) at Attach. 1 (Order on Petitions for Reconsideration and Clarification, Docket No. 97-SCCC-149-GIT (Dec. 21, 2000)) (Kansas Commission Dec. 21 NRC Order).

regarding permanent nonrecurring charges, but it modified and clarified certain issues, including the following: (1) unless individually negotiated agreements between competitive LECs and SWBT include provisions for true-ups, no true-ups of the permanent nonrecurring charges exist; (2) the issue of whether SWBT is required to perform new combinations of UNEs is being decided in other outstanding dockets; and (3) individual nonrecurring charges, as well as a new service order charge, apply when a new customer moves into a location previously served by SWBT.<sup>134</sup> Additionally, based on AT&T's assertions about SWBT's cost study inputs, the Kansas Commission reduced rates for 2-wire and 4-wire analog loops, 4-wire digital loops, 4-wire digital PRI loops, and electronic (mechanized) service orders.<sup>135</sup>

52. On December 28, 2000, SWBT filed a letter with the Commission which outlined "voluntary reduction of some of the TELRIC-based nonrecurring rates in Kansas," as well as reductions to certain recurring and nonrecurring rates in Oklahoma.<sup>136</sup> SWBT asserts that it takes these reductions as a "compromise" to mitigate commenters' concerns about prices in Kansas and Oklahoma.<sup>137</sup> The Kansas Commission approved and adopted these rate modifications on January 5, 2001, stating that it set permanent rates for recurring and nonrecurring charges "in accord with the TELRIC methodology," but that it "supports SWBT's efforts to address the concerns raised . . . that some of the Kansas rates are too high."<sup>138</sup>

## (ii) Discussion

53. Based on the evidence in the record, we find that SWBT's recurring and nonrecurring charges for UNEs made available in Kansas to other telecommunications carriers are just, reasonable, and nondiscriminatory in compliance with checklist item 2. SWBT states that it provides UNEs at TELRIC-based rates.<sup>139</sup> The Kansas Commission concludes that SWBT has satisfied the requirements of this checklist item.<sup>140</sup>

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<sup>134</sup> Kansas Commission Dec. 21 NRC Order at 4, 5, 10.

<sup>135</sup> *Id.* at 8-10.

<sup>136</sup> SWBT Dec. 28 *Ex Parte* Letter. *See also* Dec. 27 Public Notice. *See* section IV(B)(1) *infra* for a discussion of SWBT's price reductions in Oklahoma.

<sup>137</sup> SWBT Dec. 28 *Ex Parte* Letter at 2.

<sup>138</sup> Kansas Commission Jan. 5 *Ex Parte* Letter and Attach. 1, Kansas Commission Jan. 4 Order; *see also* SWBT Jan. 12 *Ex Parte* Letter and Attach. C, Final Order Approving Adoption of Amendment to Interconnection Agreement.

<sup>139</sup> SWBT Reply at 11-12.

<sup>140</sup> Kansas Commission Comments at 21.

**(a) Recurring Charges**

54. The Kansas Commission's February 1999 order,<sup>141</sup> as revised by the Kansas Commission's September 1999 order on reconsideration,<sup>142</sup> set permanent recurring rates and concluded that these rates were consistent with TELRIC principles. SWBT submits that the "Kansas Commission determined recurring UNE prices based on a TELRIC methodology, i.e., a determination of forward-looking economic costs plus a uniform allocation of joint and common costs."<sup>143</sup> The Department of Justice urged us to review these rates independently, but did not set forth any specific objections for these rates.<sup>144</sup> No commenter presents explicit objections to these rates.<sup>145</sup>

55. We conclude that Kansas' recurring UNE rates fall within the reasonable range of TELRIC prices. Furthermore, the Kansas Commission's orders show a consistent application of TELRIC principles in the setting of recurring prices.<sup>146</sup> Because no commenter presents evidence of clear errors in substantial factual matters, and the Kansas Commission followed TELRIC principles, we conclude that these prices comply with our rules.

**(b) Nonrecurring Charges**

56. Pursuant to its voluntary rate reduction outlined in its December 28 *ex parte* letter, SWBT applied a 25 percent discount to all permanent nonrecurring charges in Kansas, subject to the following two conditions: (1) If the 25 percent reduction would lead to a rate below the corresponding rate in Texas, SWBT lowers the rate only to the level of the corresponding Texas rates.<sup>147</sup> (2) SWBT compares the nonrecurring charge prescribed by the Kansas Commission in its December 21 reconsideration order to the rate that would be obtained by applying the 25 percent discount to the permanent rate adopted in November 3, 2000 order, and offers whichever rate is lower.<sup>148</sup>

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<sup>141</sup> Kansas Commission Feb. 19 Final Order.

<sup>142</sup> Kansas Commission Sept. 17 Reconsideration Order.

<sup>143</sup> SWBT Brief at 43 (citing SWBT Sparks Aff. at para. 163).

<sup>144</sup> Department of Justice Evaluation at 13, 28.

<sup>145</sup> For instance, WorldCom objects to Kansas nonrecurring rates, Oklahoma recurring rates and Oklahoma nonrecurring rates, but is silent on Kansas recurring rates. WorldCom Reply at 2, 5-14. IP Communications does not cite any Kansas recurring rates as examples of violations of TELRIC pricing principles by Kansas regulators. IP Communications Comments at 6. AT&T explicitly objects only to Kansas nonrecurring rates, not recurring rates. AT&T Comments at 18.

<sup>146</sup> See, e.g., Kansas Commission Sept. 17 Reconsideration Order at 15-18.

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

57. SWBT assesses a \$2.35 nonrecurring service order charge for each electronically-processed UNE service order or a \$12.35 nonrecurring service order charge for each manually processed service order.<sup>149</sup> When a customer changes or “migrates” his or her telephone service provider from SWBT to a competitive LEC that provides service by leasing the unbundled network element “platform” (UNE-P),<sup>150</sup> SWBT charges the competitive LEC a \$2.35 electronic service order charge,<sup>151</sup> but does not assess any other nonrecurring charges.<sup>152</sup> As discussed above, on December 28, 2000, SWBT voluntarily reduced certain nonrecurring charges in Kansas, and as part of these reductions, the \$12.35 manual service order charge was reduced to \$11.25.<sup>153</sup>

58. For each new service order (as opposed to a UNE migration), SWBT charges a competitive LEC a nonrecurring charge for each unbundled network element ordered, in addition to the service order charge.<sup>154</sup> To provide new service through the use of the UNE-P, the competitive LEC would pay: (1) the nonrecurring service order charge, (2) a \$28.45 nonrecurring charge for a two-wire analog loop,<sup>155</sup> (3) a \$26.70 nonrecurring charge for an analog loop-to-switch port cross connect,<sup>156</sup> and (4) an additional \$16.35 nonrecurring central office access charge (COAC),<sup>157</sup> for a total of \$73.85 for electronically-processed orders or \$83.85 for

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<sup>149</sup> These rates were reduced from \$5.00 and \$15.00, respectively, in the Kansas Commission’s Dec. 21 NRC Order. Kansas Commission Dec. 21 NRC Order at 10.

<sup>150</sup> SWBT’s UNE-P, or unbundled network element platform, consists of a 2-wire analog loop, an analog switch port, and an analog loop-to-switch port cross-connect. See SWBT Dec. 14 *Ex Parte* Letter, Attach. 3 at 1.

<sup>151</sup> Letter from Edwardo Rodriguez, Director-Federal Regulatory, SBC, to Magalie Roman Salas, Secretary, Federal Communications Commission, CC Docket No. 00-217 at Attach. 1, p. 1 (SWBT Nov. 28 Price Matrix *Ex Parte* Letter; SWBT App. B-KS, Tab 1, K2A at Attach. UNE-KS, p. 53, § 14.2.

<sup>152</sup> Letter from Edwardo Rodriguez, Director-Federal Regulatory, SBC, to Magalie Roman Salas, Secretary, Federal Communications Commission, CC Docket No. 00-217 (filed Dec. 13, 2000) (SWBT Dec. 13 COAC *Ex Parte* Letter); SWBT App. B-KS, Tab 1, K2A at Attach. UNE-KS, p. 53, § 14.2; see also AT&T Flappan Reply Decl. at para. 8.

<sup>153</sup> SWBT Dec. 28 *Ex Parte* Letter at Attach. A, p. 14.

<sup>154</sup> We note that the Kansas Commission recently determined that SWBT may assess individual nonrecurring charges associated with each UNE, as well as a service order change, when a new tenant moves into an existing home and orders service from the competitive LEC. Kansas Commission Dec. 21 NRC Order at 10. Additionally, pursuant to the K2A, SWBT may assess a Central Office Access Charge (COAC) on all such new orders. SWBT App. B-KS, Tab 1, K2A at Attach. UNE-KS, p. 53, § 14.2; see also SWBT Dec. 13 *Ex Parte* Letter at 2.

<sup>155</sup> Kansas Commission Dec. 21 NRC Order at Attach. B., p. 1. The Kansas Commission reduced this charge from the \$30.75 rate it set on November 3, 2000. Kansas Commission Nov. 3 NRC Order at Attach. B, p. 1.

<sup>156</sup> Kansas Commission Nov. 3 NRC Order at Attach. B, p. 3.

<sup>157</sup> SWBT Dec. 13 COAC *Ex Parte* Letter at 2; SWBT Nov. 28 Price Matrix *Ex Parte* Letter at Attach. 1, p. 15. This Commission found in the *SWBT Texas Order* that, because the Supreme Court’s determination in *AT&T v. Iowa Utils. Bd.* did not specifically find that incumbent LECs must combine separate UNEs, SWBT is not required (continued....)

manually-processed orders. As discussed above, SWBT voluntarily reduced these nonrecurring charges, which results in new totals of \$59.05 for electronically processed orders and \$67.95 for manually-processed orders.<sup>158</sup>

59. SWBT's showing withstands the arguments of its opponents regarding this checklist item. We have previously held that we 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[.]"<sup>159</sup> States also "retain the flexibility to consider 'local technological, environmental, regulatory, and economic conditions.'"<sup>160</sup> As discussed below, we find that SWBT's rates for nonrecurring charges are within a reasonable range of what TELRIC might produce.

60. Here, we find that basic TELRIC principles were followed, and we find no clear errors in substantial factual matters. We agree with the Kansas Commission that "it has appropriately exercised its flexibility to set prices within a range of TELRIC-based rates."<sup>161</sup> Additionally, the Kansas Commission has demonstrated a commitment to setting rates pursuant to a TELRIC-based methodology.<sup>162</sup> We note that the Kansas Commission modified various aspects of SWBT's cost model inputs once in 1999 and twice in 2000, and carefully considered and at times utilized alternative inputs from AT&T.<sup>163</sup> We commend the Kansas Commission for its  
(Continued from previous page)

to provide new UNE combinations and therefore may set market-based rates for such a service. *AT&T v. Iowa Utils. Bd.*, 525 U.S. 366; *SWBT Texas Order*, 15 FCC Rcd at 18474-75, paras. 234-35. Since then, the 8<sup>th</sup> Circuit specifically reiterated its conclusion that incumbent LECs are not required to make new UNE combinations. *Iowa Utils. Bd. v. FCC*, 219 F.3d 744, 758-59 (8<sup>th</sup> Cir. 2000), *petition for cert. filed sub nom. Verizon Communications, Inc. v. FCC*, 69 U.S.L.W. 3269 (U.S. Oct. 4, 2000) (No. 00-511). The 8<sup>th</sup> Circuit, however, has stayed the issuance of its mandate pending the outcome of a petition for writ of certiorari filed with the Supreme Court. *Iowa Utils. Bd. v. FCC*, No. 96-3321 et al. (8<sup>th</sup> Cir., Sept. 25, 2000). We note that SWBT's interconnection agreements include a method, other than the COAC, of combining elements that are not previously combined in SWBT's network. See SWBT Application App. B-Kansas, Tab 1 at Attach. UNE-KS (K2A), p. 1, § 2.2; SWBT Application App. B-Oklahoma, Tab 1 at Attach. UNE-OK (O2A), p. 1, § 2.2; see also SWBT Dec. 13 COAC *Ex Parte* Letter at 1. Because of the court's determination, and because competitive LECs have a method of avoiding the COAC, we did not examine whether SWBT's COAC charges in Texas were cost-based, and we decline to do so here for similar reasons.

<sup>158</sup> SWBT Dec. 28 *Ex Parte* Letter at Attach. A, pp. 1, 14; SWBT Nov. 28 Price Matrix *Ex Parte* Letter at Attach. 1, p. 15.

<sup>159</sup> *Bell Atlantic New York Order*, 15 FCC Rcd at 4084, para. 244.

<sup>160</sup> *Id.*, citing *Local Competition First Report and Order*, 11 FCC Rcd at 15559.

<sup>161</sup> *Bell Atlantic New York Order*, 15 FCC Rcd at 4085, para. 245.

<sup>162</sup> See Kansas Commission Comments at 21; Kansas Commission Reply Comments at 2-3; Kansas Commission Jan. 4 Order at 2-3. We find that Z-Tel produces no evidence to support its claim to the contrary. Z-Tel Supp. Comments at 12-13.

<sup>163</sup> Kansas Commission Comments at 21; Kansas Commission Nov. 3 NRC Order at 4, 23-25.

commitment to forward-looking pricing and the careful analyses it undertook in its ratemaking dockets. We note, however, that its efforts were hampered by carriers' failure to follow its directions in running their respective cost studies.<sup>164</sup> Additionally, we agree with commenters that numerous nonrecurring charges are significantly higher than corresponding rates in Texas, which we previously determined were within a reasonable TELRIC range.<sup>165</sup> We need not reach a conclusion as to whether the carriers' failure to follow the Kansas Commission's directions resulted in the permanent nonrecurring rates set by the Kansas Commission being out of compliance with our rules, because SWBT voluntarily reduced these rates in its December 28, 2000 *ex parte* letter.<sup>166</sup> We find that these additional voluntary reductions eliminate any remaining concerns about whether Kansas' nonrecurring rates are within the range of what a reasonable application of TELRIC principles would produce.

61. SWBT imposes only a \$2.35 service order charge to migrate a customer from SWBT's retail service to a competitive LEC's UNE-P.<sup>167</sup> UNE-P migrations account for the majority of new orders in Kansas.<sup>168</sup> Additionally, we note that nonrecurring charges for loops in Texas do not include certain installation and maintenance activity nonrecurring charges, which SWBT wanted to recover in Texas through its "trip charge" but which the Texas Commission disallowed.<sup>169</sup> The fact that SWBT recovers the "trip charge" in Kansas, but not Texas, accounts for most of the disparity in nonrecurring 2-wire analog loop and loop cross-connect charges between the two states.<sup>170</sup> We find nothing in the record to refute SWBT's claim that the trip charge is a legitimate expense, and we do not conduct a *de novo* review of the Kansas Commission's decision to allow such a charge.<sup>171</sup>

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<sup>164</sup> See Kansas Commission Nov. 3 NRC Order at 4, 24.

<sup>165</sup> *SWBT Texas Order*, 15 FCC Rcd at 18475, para. 236.

<sup>166</sup> See SWBT Dec. 28 *Ex Parte* Letter.

<sup>167</sup> KCC Dec. 22 *Ex Parte* Letter at 10; see also SWBT Nov. 13 COAC *Ex Parte* Letter at 1.

<sup>168</sup> See SWBT Dec. 14 *Ex Parte* Letter at 2; AT&T Flappan/Brown Supp. Decl. at para. 8 ("[A] substantial percentage of the customers that purchase CLEC local services are 'new service' customers . . .").

<sup>169</sup> SWBT Nov. 13 COAC *Ex Parte* Letter at 2.

<sup>170</sup> As to Allegiance's assertion that SWBT is not allowed to recover the COAC in Texas but recovers both the trip charge and COAC in Kansas and Oklahoma, which may indicate double-recovery of these costs in Kansas and Oklahoma, we note that the Texas, Kansas, and Oklahoma commissions each approved the COAC charge, and recovery for the charge is included in the K2A, O2A, and T2A. Allegiance Supp. Comments at 7 n.10. See SWBT Application App. B-Kansas, Tab 1, App. Pricing-UNE (K2A) at 13; SWBT Application App. B-Oklahoma, Tab 1, App. Pricing UNE (O2A) at 16; *SWBT Texas Order*, 15 FCC Rcd at 18474-75, paras. 234-37; SWBT Nov. 13 COAC *Ex Parte* Letter at 1-2; SWBT Supplement Reply Comments Attach. D, Affidavit of Thomas G. Ries and Barbara A. Smith at paras. 25-26.

<sup>171</sup> See also SWBT Cleek Reply Aff. at paras 19-21 (SWBT assertion that if Kansas and Texas permanent (non-discounted) nonrecurring charges were amortized over the period of time that a competitive LEC would likely have (continued...))

62. We conclude that no commenters have raised specific allegations regarding “clear errors in factual findings on matters so substantial” that the end result falls outside the reasonable range of what TELRIC might produce. We disagree with commenters who assert that the Kansas Commission merely acted out of self-imposed pressure to quickly set permanent nonrecurring charges on reconsideration after it had approved SWBT’s 271 application.<sup>172</sup> The record indicates that the Kansas Commission labored for several years in setting cost-based nonrecurring charges.<sup>173</sup> The Kansas Commission made a diligent effort to set permanent rates in a timely fashion despite the fact that its efforts were hampered by the noncompliance of parties to the cost docket.

63. We also disagree with AT&T’s assertion that the Kansas nonrecurring charges violate TELRIC because they include inputs from SWBT that do not conform to TELRIC principles.<sup>174</sup> The Kansas Commission explicitly rejected SWBT’s incorrect inputs and instead utilized inputs, in some instances those proposed by AT&T, that it found were more reasonable in both its November 3 and December 21 orders setting nonrecurring charges.<sup>175</sup> In its December 21 nonrecurring charges reconsideration order, the Kansas Commission carefully considered AT&T’s most recent assertions,<sup>176</sup> and in response modified SWBT’s rates for 2- and 4-wire analog loop, 4-wire digital loop, and 4-wire PRI loop rates, and rates for service order charges.<sup>177</sup> It declined to adopt AT&T’s proposed adjustments to fallout factor, directory white pages, manual processing, and Dedicated Outside Plant assumptions, and denied AT&T’s request that in the case of a new service order, only the service order charge should be applied.<sup>178</sup> We find that the Kansas Commission considered and reasonably responded to each of these assertions, and AT&T presents no evidence that the Kansas Commission made clear errors or failed to follow basic TELRIC principles in either order.

64. We are not persuaded by commenters’ assertion that the Kansas Commission’s settlement-type approach for some nonrecurring charges, in which it adopted a weighted average

(Continued from previous page) \_\_\_\_\_

a continuing business relationship with an end user, the total monthly costs for the UNE-P are less than for a competitive LEC operating in a comparable-sized exchange in Texas).

<sup>172</sup> AT&T Baranowski/Flappan Decl. at para. 78; WorldCom Reply Comments at 11-12; WorldCom Supp. Comments at 4-5, 7.

<sup>173</sup> Kansas Commission Nov. 3 NRC Order at 1-3.

<sup>174</sup> AT&T Comments at 20; AT&T Baranowski/Flappan Decl. at para. 74; Letter from David L. Lawson, Sidley & Austin, to Magalie Roman Salas, Secretary, Federal Communications Commission, CC Docket No. 00-217 at 9-10 (filed Dec. 22, 2000) (AT&T Dec. 22 *Ex Parte* Letter).

<sup>175</sup> Kansas Commission Nov. 3 NRC Order at 4, 23-26, 34-37; Kansas Commission Dec. 21 NRC Order at 8-10.

<sup>176</sup> Kansas Commission Dec. 21 NRC Order at 4-11.

<sup>177</sup> *Id.* at 8-10.

<sup>178</sup> *Id.* at 6-7, 10.

of inputs submitted by SWBT and AT&T, causes SWBT to fail this checklist item.<sup>179</sup> As discussed above, states have flexibility to set prices within a reasonable TELRIC range and to take state-specific factors into account.<sup>180</sup> Utilization of a weighted average of two sets of cost inputs is not a violation of basic TELRIC principles. To the extent there is any doubt about whether SWBT's nonrecurring charges in Kansas fall within the reasonable range of what TELRIC would produce, such doubt is eliminated by SWBT's recent implementation of 25 percent voluntary discounts from the November 3 rates.

65. We do not analyze the merits of WorldCom's assertion that nonrecurring charges for new UNE installations are so high that they preclude profitable entry into the Kansas market.<sup>181</sup> As discussed below,<sup>182</sup> incumbent LECs are not required, pursuant to the requirements of section 271, to guarantee competitors a certain profit margin. In order to comply with checklist item 2 of section 271, incumbent LECs must provide UNEs at rates and terms that are just, reasonable, and nondiscriminatory, and that allow the incumbent LEC to recover a reasonable profit.<sup>183</sup> We have analyzed SWBT's application under this standard.

66. We disagree with AT&T's assertion that allowing a 25 percent voluntary rate reduction is arbitrary and capricious.<sup>184</sup> While we acknowledge that this type of discount 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. As discussed above, the Kansas Commission found that SWBT's permanent recurring rates were within a reasonable TELRIC range, and SWBT's voluntary reductions of those permanent recurring rates assuage the concerns of commenters that some of the rates were higher than corresponding rates in Texas.<sup>185</sup> These discounts remove any doubt as to whether they fall within a reasonable range of what TELRIC might produce. If we were to disallow such a cost reduction, we would be depriving competitors of a significant benefit. Such a distinction would promote form over substance, which, given the necessarily imprecise nature of setting TELRIC-based pricing, is unnecessary.

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<sup>179</sup> AT&T Baranowski/Flappan Decl. at para. 77, AT&T Reply Comments at 19-20; *see also* Department of Justice Evaluation at 26 (expressing concern about such method but not recommending denial based on it).

<sup>180</sup> *Bell Atlantic New York Order*, 15 FCC Rcd at 4084, para. 244.

<sup>181</sup> WorldCom Reply at 13; *see also* AT&T Supp. Comments at 11.

<sup>182</sup> *See* section IV(B)(1)(b) (profit margin analysis).

<sup>183</sup> 47 U.S.C. § 271(2)(B)(ii), *citing* 47 U.S.C. §§ 251(c)(3) and 252(d)(1).

<sup>184</sup> AT&T Supp. Comments at 10-11; *see also* section III(A), *supra*. Although discounts from the December 21 rates would have been even deeper, we reject AT&T's assertion that it was capricious for SWBT to have applied its voluntary discounts to the November 3 rates instead. AT&T Supp. Comments at 10-11.

<sup>185</sup> *See, e.g.*, Department of Justice Evaluation at 9-10, 12-13; AT&T Comments at 7, 23-24.

67. We disagree with the assertion of IP and Sprint that we should deny SWBT's application because SWBT will attempt to raise rates as soon as its four-year contract with competitive LECs has expired.<sup>186</sup> In order to gain in-region, interLATA entry, a BOC must support its application with actual evidence demonstrating its present compliance with the statutory conditions for entry, instead of prospective evidence that is contingent on future behavior.<sup>187</sup> Should we receive evidence of non-cost-based pricing in the future, we may take appropriate enforcement action under section 271(d)(6).<sup>188</sup>

68. We also disagree with ALTS's assertion that if we accept SWBT's voluntary reductions, we will be improperly relying on promises of SWBT's future performance because the reductions have not yet gone into effect.<sup>189</sup> As noted above, both the Kansas Commission and the Oklahoma Commission have adopted these amended rates,<sup>190</sup> thereby mooting ALTS's argument. We find that IP's allegation that a voluntary 25 percent rate reduction could put rates below cost is without merit.<sup>191</sup> Although below-cost rates would not comply with the statute and would create incentives for inefficient entry, it would be perverse to deny a 271 application because an incumbent LEC's rates offered to competitors are too low. Further, IP submits no evidence to support a finding that SWBT's rates are below cost.

#### **b. Pricing of Oklahoma Unbundled Network Elements**

69. *Permanent Rates.* Oklahoma's prices for recurring and nonrecurring UNEs were set by an Administrative Law Judge (ALJ) on June 30, 1998,<sup>192</sup> and adopted by the Oklahoma Commission without modification on July 17, 1998.<sup>193</sup> The prices were established in the context of an arbitration between SWBT and Cox Oklahoma, a cable facilities-based competitor.<sup>194</sup> The

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<sup>186</sup> IP Supp. Comments at 3-4; Sprint Supp. Comments at 3.

<sup>187</sup> *SWBT Texas Order*, 15 FCC Rcd at 18371-72, para. 38; *Bell Atlantic New York Order*, 15 FCC Rcd at 3969, para. 37.

<sup>188</sup> See 47 U.S.C. § 271(d)(6).

<sup>189</sup> ALTS Supp. Comments at 5-6.

<sup>190</sup> Kansas Commission Jan. 4 Order at 1-3; SWBT Jan. 12 *Ex Parte* Letter at Attach. C.

<sup>191</sup> IP Supp. Comments at 3.

<sup>192</sup> Letter from Geoffrey M. Klineberg, Kellogg, Huber, Hansen, Todd & Evans, to Magalie Roman Salas, Secretary, Federal Communications Commission, CC Docket No. 00-217, Attach. (filed Nov. 29, 2000), Amended Report and Recommendation of the Administrative Law Judge, Cause No. 970000213 (June 30, 1998) (Oklahoma ALJ Recommendation).

<sup>193</sup> SWBT Application App. G, Vol. 2, Tab 17 (Final Order, Cause No. PUD 970000213 (July 17, 1998)) (Oklahoma Commission Pricing Order).

<sup>194</sup> Oklahoma ALJ Recommendation at 2.

arbitration was then opened to other parties, including AT&T, as part of an ongoing generic cost docket.<sup>195</sup> After reviewing the pre-filed testimony and cross-examination, the ALJ recommended that the Oklahoma Commission adopt the rates in the Cox stipulation.<sup>196</sup> The ALJ noted that the stipulated rates: (1) fell within the reasonable range of cost-based rates proposed by AT&T and SWBT in the generic cost docket; (2) would allow SWBT a reasonable opportunity for recovery of capital; and (3) would allow competitive LECs in Oklahoma to effectively compete with SWBT.<sup>197</sup> In adopting the stipulated rates, the Oklahoma Commission noted that the long run incremental cost (LRIC) studies performed by SWBT to calculate its rates were the functional equivalent of TELRIC.<sup>198</sup>

70. *Promotional Rates.* On December 10, 1999, the Oklahoma Commission unanimously approved a stipulation between SWBT, Oklahoma Commission staff, and various competitive LECs regarding SWBT's transition to alternative regulation.<sup>199</sup> Among other things, the stipulation provided promotional discount rates for certain UNEs.<sup>200</sup> Recurring charges were discounted up to 25 percent, and nonrecurring charges were discounted up to 35 percent.<sup>201</sup>

71. The promotional rates commenced on June 15, 2000, at which time SWBT notified competitive LECs in Oklahoma.<sup>202</sup> Once the aggregate number of competitive LEC lines provided at the promotional rates in any exchange equals or exceeds 25 percent of the total access lines for a class of customers, the "competitive cap" is met, and rates for additional UNEs in that exchange revert to the permanent UNE rates for service to that class of customer.<sup>203</sup> Otherwise, the rates for additional UNEs will automatically revert to permanent UNE rates on June 15, 2005 -- five years after the commencement date.<sup>204</sup> The Oklahoma Commission may initiate a new cost

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<sup>195</sup> *Id.* at 2-3.

<sup>196</sup> *Id.* at 167

<sup>197</sup> *Id.* at 158-159, 167.

<sup>198</sup> Oklahoma Commission Pricing Order at 3.

<sup>199</sup> SWBT Application App. G, Vol. 3, Tab 29 (Order Approving Stipulation, PUD Cause No. 990000613 (Dec. 10, 1999)) (Oklahoma Commission Stipulation Order). Among the competitive LECs that agreed not to oppose the stipulation were AT&T, Cox, Sprint, and WorldCom. By signing, these competitive LECs did not, however, agree that the promotional discount rates were or were not cost based. Oklahoma Commission Stipulation Order Attach. A at 4, 7.

<sup>200</sup> Oklahoma Commission Stipulation Order at 10.

<sup>201</sup> *Id.*, Attach. A of Attach. A. Rates not subject to the promotional discounts remain at the level established by the Oklahoma Commission Pricing Order. Oklahoma Commission Reply at 21-22.

<sup>202</sup> *Id.* at 4.

<sup>203</sup> Oklahoma Commission Stipulation Order Attach. A at 2-3.

<sup>204</sup> *Id.*, Attach. A at 3-4.

proceeding to reexamine the rates no earlier than June 15, 2002.<sup>205</sup> The Oklahoma Commission, however, may not implement any modification to the promotional rates in a particular zone until the earlier of June 15, 2005, or until the competitive cap has been met in the majority of SWBT exchanges within that zone.<sup>206</sup>

72. On December 28, 2000, SWBT filed a letter with the Commission outlining additional reductions it would undertake voluntarily.<sup>207</sup> Specifically, SWBT stated that it would extend the promotional reductions to include the recurring charges for all loops, including xDSL-capable loops.<sup>208</sup> Also, SWBT agreed to reduce its nonrecurring charges significantly, as follows: (1) the promotional discounts will be extended to all cross-connect nonrecurring charges; (2) Oklahoma nonrecurring charges that are already subject to the promotional discounts and that are higher than the corresponding nonrecurring charge set by the Kansas Commission in its November 3 nonrecurring charges order will receive a percentage discount equal to the percentage discount the corresponding Kansas nonrecurring charge receives; (3) Oklahoma nonrecurring charges that are not subject to the promotional discounts will receive a 25 percent discount.<sup>209</sup> Where any of the nonrecurring charge reductions led to a rate below the corresponding rate in Texas, SWBT agreed to lower the charge only to the Texas rate.<sup>210</sup> SWBT has also agreed to remove the competitive cap, so that the rate changes they have adopted would remain in effect for the term of the O2A.<sup>211</sup> On January 5, 2001, SWBT issued an Accessible Letter making the offer of the discounted rates available to all competitive LECs.<sup>212</sup> On January 10, 2001, the Oklahoma Commission approved the rates set forth in the December 28 *Ex Parte* Letter.<sup>213</sup>

#### (i) Recurring Charges

73. We conclude that the recurring charges for UNEs in Oklahoma comply with section 252(d)(1) of the Act. For the reasons discussed below, we have serious doubts as to whether the permanent rates set forth in the O2A are at TELRIC-based levels. Nevertheless, we

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<sup>205</sup> Oklahoma Commission Reply at 22; Oklahoma Commission Stipulation Order Attach. A at 4.

<sup>206</sup> Oklahoma Commission Reply at 22; Oklahoma Commission Stipulation Order Attach. A at 4.

<sup>207</sup> SWBT Dec. 28 *Ex Parte* Letter.

<sup>208</sup> *See id.* at 3, Attach. C at 1.

<sup>209</sup> *Id.* at 2-3, Attach. B.

<sup>210</sup> *Id.* at 3.

<sup>211</sup> *Id.*

<sup>212</sup> Oklahoma Commission Supp. Reply at 2; SWBT Supp. Reply at Attach. B.

<sup>213</sup> The Oklahoma Commission approved the discounts that were incorporated into an amendment to the interconnection agreement between Southwestern Bell and Logix filed with the Oklahoma Commission on January 5, 2001. Oklahoma Commission Supp. Reply at 1-2; SWBT Supp. Reply at Attach. C.

conclude that the presence of the promotional rates for many of the UNE-P recurring charges, together with the additional reductions to loop charges outlined in the SWBT December 28 *Ex Parte* Letter, provide competitive LECs with rates that are within the range that a reasonable application of TELRIC principles would produce.

74. As we note above,<sup>214</sup> we will reject a section 271 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.”<sup>215</sup> Thus, even though we conduct an independent review of SWBT’s Oklahoma rates,<sup>216</sup> we do not conduct a *de novo* review of the state commission’s ratemaking decisions.

75. The Oklahoma Commission approved a finding by the ALJ that the UNE rates are cost-based. The parties participating in the Oklahoma cost proceeding, including AT&T, agreed to use SWBT’s cost model.<sup>217</sup> The ALJ conducted his review by applying the state long run incremental cost (LRIC) standard.<sup>218</sup> The ALJ’s analysis of what is required under LRIC indicates that the standard he applied is similar to our TELRIC standard.<sup>219</sup> We therefore conclude that the cost model itself was TELRIC-based, and so “basic TELRIC principles” were followed. AT&T contends, however, that the ALJ made a number of errors in considering inputs. Specifically, AT&T challenges the fill factor used in calculating loop costs and transport,<sup>220</sup> the assessment of depreciation rates,<sup>221</sup> and the size of switch discounts.<sup>222</sup> In the *Local Competition First Report and Order*, the Commission anticipated that states would evaluate these and other inputs, and that they would vary among states.<sup>223</sup> We presume that the value for one of these inputs is reasonable

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<sup>214</sup> See section IV.B.1.a.ii, *supra*.

<sup>215</sup> *Bell Atlantic New York Order*, 15 FCC at 4084, para. 244.

<sup>216</sup> Department of Justice Evaluation at 13.

<sup>217</sup> Oklahoma ALJ Recommendation at 156.

<sup>218</sup> *Id.* at 158.

<sup>219</sup> See *id.* at 158-59. For example, the ALJ noted approvingly that AT&T had acknowledged that the cost of capital satisfied “the costing standards set forth in section 252 . . . and is a forward-looking cost of capital.” *Id.* at 159.

<sup>220</sup> AT&T Comments at 14-15.

<sup>221</sup> *Id.* at 15-16.

<sup>222</sup> AT&T Baranowski/Flappan Aff. at paras. 59-63.

<sup>223</sup> See, e.g., *Local Competition First Report and Order*, 11 FCC Rcd at 15847, 15849, 15856, paras. 682, 686, 702.

unless it is clearly outside the levels that could be obtained through application of the TELRIC methodology, or the state did not apply TELRIC in setting the input value.<sup>224</sup>

76. We reject AT&T's challenge to the depreciation rates.<sup>225</sup> SWBT proposed setting depreciation rates based on the equipment lives that it uses for financial accounting purposes,<sup>226</sup> and the ALJ made no explicit adjustments.<sup>227</sup> The ALJ, however, did acknowledge that depreciation lives are relevant, and stated that they were "amply addressed within the stipulation results which reduce recurring costs."<sup>228</sup> We accept the ALJ's conclusion on this matter. Our rules state that the depreciation rates must be economic.<sup>229</sup> While it would be reasonable for a state to follow the depreciation rates the Commission has set for regulation of SWBT's interstate services, as Kansas and other states have done,<sup>230</sup> other approaches are not necessarily unreasonable. We have never stated that states should be precluded from setting depreciation rates that differ from the Commission's,<sup>231</sup> and do not do so here. A state may find that a depreciation schedule such as the one proposed by SWBT is appropriate, and AT&T has failed to indicate why it would not be so here.

77. We also reject AT&T's contention that SWBT's switch inputs failed to include significant switch discounts it received or would receive in the future from switch manufacturers.<sup>232</sup> The ALJ concluded that he would be unable to assume whether switch discounts would increase or decrease in the future. He noted that the only variables of which he could be certain were the size of the discount in the current contracts and current list prices. He therefore set the size of the discount using the discount in the then-current prices.<sup>233</sup> We believe his decision was reasonable, and find that on this matter, AT&T fails to demonstrate clear error.<sup>234</sup>

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<sup>224</sup> See *American Tel. & Tel. Co. v. FCC*, 220 F.3d at 615; *Bell Atlantic New York Order*, 15 FCC at 4084, para. 244.

<sup>225</sup> AT&T Comments at 15-16.

<sup>226</sup> *Id.* at 15.

<sup>227</sup> Oklahoma ALJ Recommendation at 167.

<sup>228</sup> *Id.*

<sup>229</sup> 47 C.F.R. § 51.505(b)(3).

<sup>230</sup> See AT&T Baranowski/Flappan Aff. at 26, n.16.

<sup>231</sup> See *Local Competition First Report and Order*, 11 FCC Rcd at 15849, para. 686.

<sup>232</sup> AT&T Baranowski/Flappan Aff. at paras. 59-60; see also Department of Justice Evaluation at 18-19.

<sup>233</sup> Oklahoma ALJ Recommendation at 162-63.

<sup>234</sup> The ALJ's decision contrasts with the New York Commission's decision to assume a lower switch discount for future purchases than the one Bell Atlantic had been receiving, although the New York Commission is now taking another look at the issue. See *Bell Atlantic New York Order*, 15 FCC Rcd at 4085-86, paras. 246-47.

78. We do, however, agree with AT&T that the fill factors for transport and distribution cable that the ALJ used were not TELRIC-based.<sup>235</sup> A fill factor is the estimate of the proportion of a facility that will be used. In other words, the per-unit cost associated with a particular element should take into account the total cost associated with the element divided by a reasonable projection of the actual total usage of the element. Network engineers include a certain amount of spare capacity to accommodate administrative functions, such as testing and repair, and some expected amount of growth. If a fill factor is set too high, the particular element will have insufficient capacity to accommodate anticipated increases in demand or service outages. If a fill factor is set too low, the network could have considerable excess capacity, which results in increases to the per-unit cost higher than an efficient firm's cost.

79. Although the fill factors for transport used by the ALJ do not adhere to TELRIC principles, we believe that the ALJ acted reasonably on this matter. The fill factors for terminal equipment and for fiber affect interoffice transport rate elements and dedicated entrance facility rate elements. The ALJ concluded that the use of actual fill for these elements was appropriate, because objective fill is speculative and might not be achieved.<sup>236</sup> The ALJ failed to consider whether the actual fill factors were those of an efficient provider. Nevertheless, the ALJ noted that the transport rates were reduced 30 percent from SWBT's original proposal, and we believe the ALJ was reasonable in concluding that this adjustment adequately accounts for the low transport fill factor.<sup>237</sup> Even if this adjustment were inadequate, however, the resulting difference in rates is minimal for shared transport,<sup>238</sup> and any error is not of great enough magnitude to require denial of the application.

80. We cannot make the same conclusion with respect to the fill factor for distribution cable, which affects the rates for loops, and sub-loops for distribution. The ALJ used a loop fill factor of 30 percent, and rejected the 50 percent figure proposed by AT&T.<sup>239</sup> Under TELRIC, we determine what the LRIC would be for an efficient provider. We find that a fill factor that assumes that more than two-thirds of capacity is idle for an indefinite time is unreasonably low. By way of comparison, the Commission adopted fill factors ranging from 50 to 75 percent for the Universal Service Fund (USF) cost model, the Kansas Commission adopted a 53 percent fill

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<sup>235</sup> AT&T Baranowski/Flappan Aff. at paras. 43-44; *see also* Department of Justice Evaluation at 18-19 ("original rates submitted by SBC were calculated at least in part with an eye to historical cost recovery . . . . Serious questions have been raised about SBC's selection of . . . low fill factors . . . [and] improper calculation of joint and common costs. . .").

<sup>236</sup> Oklahoma ALJ Recommendation at 165.

<sup>237</sup> *Id.*

<sup>238</sup> For example, blended transport in zone 3 in Oklahoma is \$0.000607 per minute (a further promotional discount reduces this amount to \$0.000546), while the zone 3 blended transport rate in Texas is \$0.000399, a difference of roughly \$0.0002 per minute, or about \$0.20 per month assuming 1000 minutes of interswitch calling. *See* SWBT Nov. 28 Price Matrix *Ex Parte* Letter, Attach. at 6.

<sup>239</sup> Oklahoma ALJ Recommendation at 161.

factor for distribution cable, and the New York Public Service Commission adopted a 50 percent fill factor.<sup>240</sup> The ALJ's decision violates TELRIC because it used current fill, and refused to consider the forward-looking fill or assume that the fill factor would increase over time.<sup>241</sup>

81. Because states have considerable flexibility in setting UNE rates, certain flaws in a cost study, by themselves, may not result in rates that are outside the reasonable range that a correct application of our TELRIC rules would produce. Given our finding concerning the fill factor for the distribution cable, we must determine whether the ALJ's error is substantial, i.e., whether its presence results in rates "outside the range that the reasonable application of TELRIC principles would produce."

82. In making such a determination, we agree with the Department of Justice that we may, in appropriate circumstances, consider rates that we have found to be based on TELRIC principles.<sup>242</sup> We therefore compare SWBT's rates in Oklahoma to SWBT's rates in Texas. We do so because they are adjoining states; because the two states have a similar, if not identical, rate structure for comparison purposes; and because we have already found the rates in Texas reasonable. AT&T has compared the rates in Oklahoma to those in Kansas rather than those in Texas.<sup>243</sup> Given that the Commission has already found the rates in Texas to be TELRIC-based, however, a comparison that reasonably accounts for the differences in the rates between these two states would lead us to conclude that the rates in Oklahoma are also reasonable, regardless of how they compare with the Kansas rates. We note that for the same reasons, and given the fact that Oklahoma has higher teledensity than Texas, we clearly could have approved SWBT's Oklahoma rates if it had offered UNEs in Oklahoma at the same rates as it does in Texas.<sup>244</sup>

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<sup>240</sup> *Federal-State Joint Board on Universal Service*, CC Docket Nos. 96-45 and 97-160, Tenth Report and Order, 14 FCC Rcd 20156, 20369 (1999) (*USF Tenth Report and Order*); AT&T Baranowski/Flappan Aff. at para. 42; Bell Atlantic New York Application App. G, Vol. 1, Opinion No. 97-2, Order Setting Rates for First Group of Network Elements (Phase 1) at 65.

<sup>241</sup> Oklahoma ALJ Recommendation at 161 ("A reflection of fill well beyond what is currently available and used by SWBT to provide retail services essentially asks SWBT to provide superior quality facilities to AT&T"), 165; 47 C.F.R. § 51.505(b)(1).

<sup>242</sup> Department of Justice Evaluation at 12.

<sup>243</sup> E.g., AT&T Dec. 22 Pricing *Ex Parte* Letter at 3-4; AT&T Supp. Comments at 3, 7-9.

<sup>244</sup> We recognize that many states lack the extensive resources that were dedicated to this process by New York and Texas, as detailed in our orders in those states. *Bell Atlantic New York Order*, 15 FCC Rcd at 3957-59, paras. 6-12; *SWBT Texas Order* at 18357-58, paras. 3-4. We encourage states with limited resources to take advantage of the efforts devoted by New York and Texas in establishing TELRIC-compliant prices, by relying where appropriate on the existing work product of those states. Indeed, in the appropriate circumstances, such as those described above, a state would be entitled to a presumption of compliance with TELRIC if it adopted New York or Texas rates in whole and could demonstrate that its costs were at or above the costs in that state whose rates it adopted.

83. In taking a weighted average of loop rates in Oklahoma and Texas, we find that Oklahoma's rates are roughly one-third higher than those in Texas.<sup>245</sup> This difference is substantial, but by itself does not indicate that Oklahoma's rates are not at TELRIC-based levels. We disagree with commenters who argue otherwise,<sup>246</sup> because as the Department of Justice notes, "[s]uch differences may arise either from differences in costs between states, or from different judgments – both of which are reasonable – on rate making issues that are not susceptible to precise determination."<sup>247</sup>

84. As we note above, however, we cannot rely on the judgment of the ALJ with respect to loop costs. Consequently, we must either conclude that the rate differential is based on cost, or that Oklahoma's recurring rates are not TELRIC-based. Our USF cost model provides a reasonable basis for comparing cost differences between states. We have previously noted that while the USF cost model should not be relied upon to set rates for UNEs, it accurately reflects the relative cost differences among states.<sup>248</sup> Using a weighted average of wire-center loop costs, the USF cost model indicates that loop costs in SWBT's Oklahoma study area are roughly 23 percent higher than loop costs in its Texas study area.<sup>249</sup> We therefore attribute this portion of the differential, roughly two-thirds of it, to differences in cost.

85. The remainder of the differential, however, is not *de minimis*, and we cannot ignore its presence. SWBT fails to provide a reasonable explanation for its presence. SWBT

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<sup>245</sup> The weighted average rates for a 2-wire analog loop in Texas and Oklahoma are \$14.10 and \$18.87, respectively. See Letter from Eduardo Rodriguez, Director – Federal Regulatory, SBC, to Magalie Roman Salas, Secretary, Federal Communications Commission, CC Docket No. 00-217 at Attach. (Confidential) (filed Jan. 5, 2001) (SWBT Jan. 5 *Ex Parte* Letter); SWBT Nov. 28 Price Matrix *Ex Parte* Letter at Attach.; Letter from Eduardo Rodriguez, Director – Federal Regulatory, SBC, to Magalie Roman Salas, Secretary, Federal Communications Commission, CC Docket No. 00-217 at 2-3 (filed Jan. 9, 2001) (SWBT Jan. 9 *Ex Parte* Letter). Our analysis focuses on loop rates because loops are focused on by the parties, and are the elements most affected by the fill factors.

<sup>246</sup> See, e.g., ConnectSouth Comments at 3-4, IP Comments at 5-7, Sprint Comments at 41-42; Z-Tel Reply at 9-10.

<sup>247</sup> Department of Justice Evaluation at 12.

<sup>248</sup> *Federal-State Joint Board on 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). This comparison is distinguishable from our rejection of AT&T's challenge of Bell Atlantic's New York application, where we approved prices based on the assumption that the "feeder" portion of the loop would always use optical fiber, while our USF cost model uses copper for short distances. *AT&T v. FCC*, 220 F.3d at 619-20. There, AT&T challenged the state commission's decision to make a different assumption about a particular network design input than the cost model made, whereas here, we compare the relative differences in costs, produced by the cost model, between Oklahoma and Texas. The differential produced by the cost model reflects variations in forward-looking costs based on objective criteria, such as density zones and geological conditions. See *USF Tenth Report and Order*, 14 FCC Rcd at 20170, para. 30.

<sup>249</sup> See <http://www.fcc.gov/ccb/apd/hcpm>.

contends that any comparison between the rates in Texas and Oklahoma should take into account the fact that Oklahoma's exchanges are generally smaller than exchanges in Texas, and that the largest exchanges in Oklahoma would only be in the suburban zone in Texas.<sup>250</sup> These facts are significant, and consistent with the differences between the two states captured by the USF cost model.<sup>251</sup> Ultimately, however, we need not decide whether these loop rates exceed levels that would be obtained using TELRIC, however, because of the presence of the promotional loop rates and the rates set forth in the SWBT December 28 *Ex Parte* Letter. We believe it is appropriate to evaluate these rates because they are available to everyone. Consideration of rates that are higher than what competitors need actually pay is unreasonable under the circumstances.

86. Despite some doubts as to whether SWBT's permanent loop rates are within the range that TELRIC would produce, we conclude that SWBT's promotional loop rates for Oklahoma, which now contain discounts that SWBT applies to all loop rates, including xDSL-capable loops, are within the range of rates that could be obtained through application of TELRIC.<sup>252</sup> The weighted average of the Oklahoma discounted loop rates is roughly 11 percent higher than the weighted average of the loop rates in Texas.<sup>253</sup> This differential between Oklahoma promotional and Texas rates is well within the 23 percent differential suggested by the USF cost model, and so we conclude that the discounted rates meet the requirements of the Act.

87. While the loop rates were not derived in total compliance with our TELRIC rules, this flaw is not fatal to SWBT's application. The discounts now available in Oklahoma compensate for the ALJ's use of a fill factor that was not compliant with TELRIC. By comparing the Oklahoma loop rates to those in Texas, and taking the different characteristics of the two states as reflected in the USF cost model, we find that the discounted rates currently available are within a range that could be obtained by using TELRIC. This fact makes the rates equivalent to cost-based rates, and we do not believe it 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.

88. We note that the extension of this discount to all loops addresses concerns that the discounts are discriminatory against certain types of providers.<sup>254</sup> SWBT's decision to remove the

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<sup>250</sup> See SWBT Jones Reply Aff. at paras. 35-36; SWBT Dec. 14 *Ex Parte* Letter at 2-3.

<sup>251</sup> *USF Tenth Report and Order*, 14 FCC Rcd at 20171, para. 30 (the model reflects differences in structure costs by, e.g., using different values for the density zone). See also AT&T Clarke Supp. Decl. at 9, Attach. 2 (contending that line density, not exchange size, is the relevant factor).

<sup>252</sup> See section III.A, *supra*, for a discussion on why we consider SWBT's promotional rates for this application.

<sup>253</sup> The weighted average rate for a 2-wire analog loop in Texas is \$14.10, while the weighted average for Oklahoma discounted 2-wire analog loops is \$15.70. See SWBT Jan. 5 *Ex Parte* Letter at Attach. (Confidential); SWBT Dec. 28 *Ex Parte* Letter; SWBT Jan. 9 *Ex Parte* Letter at 2-3.

<sup>254</sup> IP Reply at 4; AT&T Reply at 13-14; Department of Justice Evaluation at 23-24.

competitive cap also addresses the concern that the discounts were discriminatory, and designed to encourage only a limited amount of competition.<sup>255</sup> We are not troubled by the fact that competitive LECs may, on a service order basis, receive either the promotional discounts or the SBC/Ameritech merger discount, but may not receive both at the same time,<sup>256</sup> because the rates resulting from the promotional discounts are within the range that could be obtained by applying TELRIC. We evaluated UNE rates in Texas exclusive of the merger discount,<sup>257</sup> so here we consider how the promotional rates in Oklahoma compare with the permanent Texas rates.

89. The fact that these rates are termed promotional rather than permanent is irrelevant because the rates in fact remain in effect during the term of the O2A.<sup>258</sup> We also reject objections to SWBT's decision not to offer a promotional discount for all recurring charges.<sup>259</sup> Because we have concluded that the recurring rates for elements other than loops were set consistent with TELRIC, SWBT is under no obligation to reduce these rates.<sup>260</sup>

90. With respect to rates for UNEs other than loops, we reject the assertions that the ALJ's decision to split the difference between the rates proposed by SBC and AT&T cannot result in rates that are based on TELRIC,<sup>261</sup> and that the ALJ could not pick a rate between the two proposals unless he found that both proposals were appropriately cost based.<sup>262</sup> The ALJ did not simply "split the difference" between the two proposals. Rather, the ALJ carefully considered the merits of each potential input within the cost model. The ALJ's Recommendation included a 150-page distillation of the evidence provided by the parties, and the ALJ's findings and conclusions relied on that evidence. The ALJ relied on testimony indicating that had SWBT's cost studies been adjusted for reasons suggested by AT&T, including for the fill factor and depreciation, the rates proposed by SWBT would have been close to the rates ultimately set.<sup>263</sup>

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<sup>255</sup> AT&T Reply at 14-17; Department of Justice Evaluation at 24.

<sup>256</sup> IP Reply at 4; Letter from Howard J. Siegel, Vice President of Regulatory Policy, IP, to Magalie Roman Salas, Secretary, Federal Communications Commission, CC Docket No. 00-217 at 1-2 (filed Jan. 17, 2001); SWBT Jan. 9 *Ex Parte* Letter at 1-2.

<sup>257</sup> *SWBT Texas Order*, 15 FCC Rcd at 18471-77, paras. 231-41.

<sup>258</sup> See ALTS Supp. Comments at 5; Sprint Supp. Comments at 3.

<sup>259</sup> AT&T Supp. Comments at 9; IP Supp. Comments at 4.

<sup>260</sup> For the same reason, we reject AT&T's objection to the fact that reciprocal compensation rates did not receive the promotional rates, even though there are promotional rates for UNEs for local switching, common transport, and dedicated transport. AT&T Flappan/Browne Supp. Decl. at paras. 12-13. Furthermore, parties have not objected to the rates for reciprocal compensation. See section V.C., *infra*.

<sup>261</sup> AT&T Comments at 11-13.

<sup>262</sup> Department of Justice Evaluation at 18.

<sup>263</sup> Oklahoma ALJ Recommendation at 158.

While the conclusions that the ALJ drew may not be the ones that AT&T wanted, or even the ones we would have reached, other than as noted above, we cannot conclude that there is error.

91. We also reject AT&T's argument that because the cost models SWBT provided for Kansas and Oklahoma were nearly identical, the fact that the resulting rates are significantly different suggests that "the Kansas and Oklahoma recurring UNE rates cannot *both* be consistent with TELRIC."<sup>264</sup> The Act requires that UNE rates be just and reasonable,<sup>265</sup> and in other contexts, we have determined that standard to mean that any of a number of inputs or results from within a certain range could be appropriate.<sup>266</sup> Thus, TELRIC-based pricing can result in a range of rates, which is wide enough to encompass the UNE rates in both Kansas and Oklahoma. Commenters' failure to identify errors by the Oklahoma Commission outside of how it established loop rates demonstrates this. AT&T would leave the states to serve as mere functionaries in the section 251 and 252 pricing process, whereby their limited role would be to make sure that the pre-defined entries into the cost model are performed properly. The Act and our rules clearly provide states with a more significant role, by explicitly giving them the authority to set UNE rates.<sup>267</sup> As the Supreme Court has observed, "[i]t is the States that will apply [the Commission's] standards and implement [its] methodology, determining the concrete result in particular circumstances."<sup>268</sup>

92. Parties also assert that the Oklahoma promotional UNE rates are so high that no competitive LEC could afford to use the UNE platform to offer local residential service on a statewide basis.<sup>269</sup> Such an argument is irrelevant. The Act requires that we review whether the rates are cost-based, not whether a competitor can make a profit by entering the market. Were we to focus on profitability, we would have to consider the level of a state's retail rates, something which is within the state's jurisdictional authority, not the Commission's.<sup>270</sup>

93. Cox contends the promotional rates are discriminatory because the rates are not available to carriers with current agreements in place and those who are negotiating unique

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<sup>264</sup> AT&T Comments at 7-8 (emphasis in original). See also WorldCom Reply at 5-7, Z-Tel Reply at 2.

<sup>265</sup> 47 U.S.C. § 251(c)(3).

<sup>266</sup> See, e.g., *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order, 12 FCC Rcd 8776, 8931, para. 284 (1997) (defining a range of reasonableness for the amount of corporate operations expense per line supported through universal service mechanisms).

<sup>267</sup> See 47 U.S.C. § 252(d)(1); 47 C.F.R. §§ 51.501 *et seq.*

<sup>268</sup> *AT&T v. Iowa Utils. Bd.*, 525 U.S. at 384.

<sup>269</sup> See AT&T Supp. Comments at 2-3; WorldCom Supp. Comments at 10-12.

<sup>270</sup> 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).

agreements.<sup>271</sup> While carriers with current agreements may not be able to opt in to the new rates, this problem is not unique – carriers face the identical problem in any state whenever the incumbent changes its rates. Carriers negotiating unique agreements have the ability to “pick-and-choose” rates contained within the revised agreement.<sup>272</sup>

94. AT&T also argues that the promotional rates are discriminatory in violation of section 251(c)(3) of the Act because the discounts in zones 1 and 2 are greater than those in zone 3.<sup>273</sup> We disagree that the differing discounts are discriminatory. Each competitive LEC is eligible for the same discount for the same element in the same zone, regardless of the type of service the competitive LEC is offering. Section 251(c)(3) requires us only to compare rates that two classes of customers pay for the same rate elements, not for different ones.<sup>274</sup>

95. For these reasons, we conclude that SWBT has met the requirements of checklist item 2 with respect to its recurring UNE rates in Oklahoma.

### (ii) Nonrecurring Charges

96. SWBT assesses a number of nonrecurring charges on UNE orders in Oklahoma. SWBT assesses a \$3.33 nonrecurring service order charge for each electronically-processed UNE service order or a \$47.95 nonrecurring service order charge for each manually processed service order.<sup>275</sup> When a customer changes or “migrates” his or her telephone service provider from SWBT to a competitive LEC that provides service by leasing the unbundled network element “platform” (UNE-P),<sup>276</sup> SWBT charges the competitive LEC only the \$3.33 electronic service order charge, on an interim basis, subject to true-up and pending resolution by the Oklahoma Commission.<sup>277</sup> As discussed above, SWBT voluntarily reduced certain nonrecurring charges in Oklahoma. SWBT’s alternative regulation plan, along with SWBT’s further voluntary reduction,

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<sup>271</sup> Cox Supp. Comments at 3-4.

<sup>272</sup> 47 U.S.C. § 252(i). See Oklahoma Commission Supp. Reply at 2; SWBT Supp. Reply at 2.

<sup>273</sup> AT&T Reply at 11-14.

<sup>274</sup> See *Local Competition First Report and Order*, 11 FCC Rcd at 15928-29, para. 860-61 (“We find that it would be unlawfully discriminatory, in violation of sections 251 and 252, if an incumbent LEC were to charge one class of interconnecting carriers, such as CMRS providers, higher rates for interconnection than it charges other carriers. . .”).

<sup>275</sup> SWBT Nov. 28 Price Matrix *Ex Parte* Letter, Attach. at 10-11.

<sup>276</sup> SWBT’s UNE-P, or unbundled network element platform, consists of a 2-wire analog loop, an analog switch port, and an analog loop-to-switch port cross-connect. See SWBT Dec. 14 *Ex Parte* Letter at 2-3.

<sup>277</sup> SWBT Dec. 13 COAC *Ex Parte* Letter at 1; SWBT App. B-Oklahoma, Vol. 1, Tab 1 (Interconnection Agreement-Oklahoma between Southwestern Bell Telephone Company and CLEC), Attach. 6 at 52, § 14.2 (Sept. 28, 2000) (O2A); see also AT&T Flappan Reply Aff. at para. 8.

will reduce the nonrecurring service order charge for each manually processed service order to \$23.38.<sup>278</sup>

97. As opposed to migrations, SWBT charges a competitive LEC a nonrecurring charge for each unbundled network element ordered, in addition to the service order charge. To provide new service through the use of the UNE-P, the competitive LEC would pay: (1) the nonrecurring service order charge, (2) a \$37.50 nonrecurring charge for a two-wire analog loop, (3) a \$1.20 nonrecurring charge for an analog line port, (4) a \$70.71 nonrecurring charge for an analog loop-to-switch port cross connect, and (5) an additional \$16.35 nonrecurring COAC, for a total of \$129.09 for electronically-processed orders or \$173.71 for manually-processed orders.<sup>279</sup> SWBT's alternative regulation plan reduces the nonrecurring charge for a two-wire analog loop to \$24.38,<sup>280</sup> and the COAC to \$5.00.<sup>281</sup> In addition, SWBT's promotional rates result in the nonrecurring charge for an analog loop-to-switch port cross connect to \$30.25.<sup>282</sup> Thus, SWBT's voluntary reduction of nonrecurring charges will lead to new totals of \$64.16 for electronically-processed orders and \$84.21 for manually-processed orders.

98. We conclude that the nonrecurring rates for UNEs in Oklahoma comply with section 252(d)(1) of the Act. The record demonstrates that the ALJ carefully analyzed the various cost studies submitted for nonrecurring charges, and was committed to TELRIC principles in making his evaluations.<sup>283</sup>

99. AT&T and the Department of Justice argue that it was unreasonable for the ALJ to assume all manual processing in calculating both the service order component of nonrecurring rates, and the nonrecurring charges for the provisioning of UNEs.<sup>284</sup> The ALJ assumed manual processing for all service order charges. This assumption does not result in unreasonable rates for the service order component of nonrecurring rates, however, because subsequent to adoption of the ALJ's Recommendation, SWBT implemented a \$3.33 charge for electronic service orders.<sup>285</sup> The rates that resulted from the ALJ's cost proceeding are used only for manual placement of

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<sup>278</sup> SWBT Dec. 28 *Ex Parte* Letter, Attach. B at 13.

<sup>279</sup> SWBT Nov. 28 Price Matrix *Ex Parte* Letter, Attach. at 1-3, and 15.

<sup>280</sup> SWBT Dec. 28 *Ex Parte* Letter, Attach. B at 1.

<sup>281</sup> Oklahoma Commission Stipulation Order, Attach. A at 4.

<sup>282</sup> SWBT Dec. 28 *Ex Parte* Letter, Attach. B at 2.

<sup>283</sup> See Oklahoma ALJ Recommendation at 165 (discussing the cost studies in evidence for nonrecurring charges); Oklahoma Commission Pricing Order at 3 (noting that the LRIC studies utilized in the ALJ's proceedings were the functional equivalent of TELRIC).

<sup>284</sup> Department of Justice Evaluation at 19; AT&T Comments at 16-17.

<sup>285</sup> See SWBT Ries/Smith Reply Aff. at paras. 55-58.

service orders. Assumption of manual processing in determining a charge that applies only to manually processed orders is not unreasonable.

100. With respect to the nonrecurring charges for the provisioning of UNEs, the ALJ considered the competing claims of SWBT and AT&T, and rejected the contention of an AT&T witness who claimed that almost all processing could be done electronically.<sup>286</sup> In so doing, the ALJ relied on studies provided by SWBT, and noted that AT&T's contention did not reflect the amount of activity required to unbundle the network upon a competitive LEC's request.<sup>287</sup> The ALJ also noted that the nonrecurring charges that he recommended were 33 percent below those proposed by SWBT.<sup>288</sup> We also recognize that SWBT has voluntarily reduced these amounts by an additional 25 percent. To the extent there was any doubt about the reasonableness of the Oklahoma nonrecurring charges, we find that the voluntary reductions have eliminated that doubt and brought these rates within the reasonable range that the application of TELRIC would produce. For these reasons, we reject AT&T's assertions.

101. The arguments of the Department of Justice and Sprint that the nonrecurring UNE rates are higher in Oklahoma than in Texas<sup>289</sup> do not persuade us that Oklahoma rates are unreasonable, particularly when taking into account SWBT's recent voluntary 25 percent discount. As we note in our discussion of Oklahoma recurring charges, differences in rates alone do not constitute sufficient grounds to conclude that the higher rates are not TELRIC-based. In addition to reasonable differences in judgment, legitimate factors can cause differences in nonrecurring UNE rates between two states, including differences in costs and the services to which the charges apply. For example, the nonrecurring loop rates in Texas do not include installation and maintenance activities, which SWBT intended to recover from the trip charge and that the Texas Commission refused to accept.<sup>290</sup> In Oklahoma, on the other hand, the nonrecurring loop rates include this charge.<sup>291</sup> Furthermore, although both the Oklahoma and Texas Commissions use the TELRIC standard, they differ in terms of inputs to that model and how much they anticipate future cost reductions.<sup>292</sup> We also note that the nonrecurring UNE rates in Oklahoma are comparable to those in Kansas,<sup>293</sup> which we find to be reasonable. Thus we

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<sup>286</sup> Oklahoma ALJ Recommendation at 166. We note that the Kansas Commission reached the same determination. *See* Kansas Commission Nov. 3 NRC Order at 25.

<sup>287</sup> Oklahoma ALJ Recommendation at 166.

<sup>288</sup> *Id.*

<sup>289</sup> Department of Justice Evaluation at 15-16; Sprint Comments at 30-31.

<sup>290</sup> SWBT Reply at 10; SWBT Dec. 13 COAC *Ex Parte* Letter at 2. *See* section IV.B.1.a, *supra*, for a further discussion of the trip charge.

<sup>291</sup> SWBT Reply at 10.

<sup>292</sup> *Id.*

<sup>293</sup> *See generally* SWBT Dec. 28 *Ex Parte* Letter at Attach. A, B; AT&T Clarke Supp. Decl. at 10.

find, as we did in Kansas, that the fact that Oklahoma nonrecurring rates are higher than those in Texas does not make them unreasonable, nor does it cause SWBT to fail this checklist item.<sup>294</sup>

102. Parties' concerns that the nonrecurring UNE rates in Oklahoma are higher than in Texas should be mitigated by the reductions that SWBT has made with its alternative regulation plan, and its voluntary additional reductions.<sup>295</sup> These lower rates should better support the growth of a competitive local exchange environment in the Oklahoma market. We therefore conclude that SWBT has met the requirements of checklist item 2 with respect to its nonrecurring UNE rates in Oklahoma.

## 2. Access to Operations Support Systems

### a. Background

103. Our discussion of SWBT's OSS begins by outlining our general approach to analyzing the adequacy of an applicant's OSS. Next, we describe the analytical roadmap we use in reviewing a BOC's contention that its OSS in the applicant state(s), in this case Kansas and Oklahoma, is the same as its OSS in a state where we have previously approved the BOC's section 271 application, *i.e.*, Texas. We then individually analyze SWBT's performance in providing access to the five critical OSS functions: pre-ordering (which includes access to loop qualification information), ordering, provisioning, maintenance and repair, and billing. Finally, we address SWBT's change management process and the technical assistance that SWBT offers to competing carriers seeking to use its OSS.

104. The Commission has defined OSS as the various systems, databases, and personnel used by incumbent LECs to provide service to their customers,<sup>296</sup> and consistently has found that nondiscriminatory access to OSS is a prerequisite to the development of meaningful local competition.<sup>297</sup> Competing carriers 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 for their customers, to maintain and repair network facilities, and to bill customers. 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

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<sup>294</sup> We note that IP alleges in its supplemental comments that SWBT charges \$1.37 to activate each feature even when a migrating customer already has the features. IP Supp. Comments at 5. Even if this unsupported allegation is true, we find that the amount in question is *de minimis*.

<sup>295</sup> Commenters' concerns about our consideration of the discounted rates are addressed in section III.B, *supra*. Commenters' concerns over the discounted rates themselves are addressed in the Oklahoma recurring cost discussion, *supra*.

<sup>296</sup> See *Bell Atlantic New York Order*, 15 FCC Rcd at 3989-90, para. 83; *BellSouth South Carolina Order*, 13 FCC Rcd at 585; *SWBT Texas Order* 15 FCC Rcd at 18396-97, para. 92.

<sup>297</sup> See *Bell Atlantic New York Order*, 15 FCC Rcd at 3990, para. 83; *Second BellSouth Louisiana Order*, 13 FCC Rcd at 20653; *BellSouth South Carolina Order*, 13 FCC Rcd at 547-48, 585.

competing” in the local exchange market.<sup>298</sup> 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 permits competing carriers to perform these functions in “substantially the same time and manner” as the BOC.<sup>299</sup> For OSS functions that have no retail analogue, the BOC must offer access “sufficient to allow an efficient competitor a meaningful opportunity to compete.”<sup>300</sup>

105. We analyze whether SWBT has met the nondiscrimination standard for each OSS function using the two-step approach outlined in prior orders. 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.<sup>301</sup> Under the second inquiry, we examine 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.<sup>302</sup> The most probative evidence that OSS functions are operationally ready is actual commercial usage in the state for which the BOC seeks 271 authorization. Absent sufficient and reliable data on commercial usage in that state, 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. Finally, where, as here, the BOC proves that many of the OSS functions in the state for which it seeks 271 authorization are the same as in a state for which we have already granted such authorization, we will also look to performance in the latter state as additional evidence with which to make our determination.

#### **b. Relevance of the *SWBT Texas Order***

106. For the reasons discussed more fully below, we conclude that SWBT has demonstrated that it provides nondiscriminatory access to its OSS. We find that the evidence presented in this record shows that, under the first inquiry of our OSS analysis described above, SWBT provides nondiscriminatory access to OSS functions for pre-ordering, ordering,

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<sup>298</sup> See *Bell Atlantic New York Order*, 15 FCC Rcd at 3990, para. 83.

<sup>299</sup> *Id.*, 15 FCC Rcd at 3991, para. 85.

<sup>300</sup> *Id.* at 3991, para. 86.

<sup>301</sup> *Bell Atlantic New York Order*, 15 FCC Rcd at 3992, para. 87; *Ameritech Michigan Order*, 12 FCC Rcd at 20616, para. 136 (we determine “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.*

<sup>302</sup> We assess “whether the OSS functions that the BOC has deployed are operationally ready, as a practical matter.” See *Bell Atlantic New York Order*, 15 FCC Rcd at 3992, para. 88.

provisioning, maintenance and repair, and billing. In reaching this conclusion, we rely on detailed evidence provided by SWBT in this proceeding and, in certain instances, on our findings from the *SWBT Texas Order*. Under our second inquiry, we find that SWBT's OSS in both Kansas and Oklahoma are operationally ready to handle current demand and reasonably foreseeable future volumes. We base this determination on SWBT's actual performance in Kansas and Oklahoma and, in certain instances, on its performance in Texas.

107. SWBT relies heavily in this application on its argument that findings from the *SWBT Texas Order*, and the performance of its OSS in Texas, are relevant in this proceeding because it has deployed a region-wide OSS. Specifically, SWBT asserts that it provides wholesale services to competing carriers in Kansas, Oklahoma and Texas through one OSS, using common interfaces, systems, procedures and, to a large extent, common personnel. To support its claim, SWBT submits an attestation letter and a supplemental report from a third party consultant, Ernst & Young.<sup>303</sup> Ernst & Young reviewed five OSS interfaces that provide competing LECs access to pre-ordering and ordering functions, and two OSS systems that are central to the ordering process.<sup>304</sup> Ernst & Young concluded, on the basis of interviews, observing test orders, and examining programming code, that the several OSS interfaces and systems it reviewed are the same throughout SWBT's five-state operating region (including Kansas, Oklahoma and Texas).<sup>305</sup> In addition to the Ernst & Young report, which addresses only a portion of SWBT's OSS, SWBT also provides substantial additional evidence, in affidavits filed with its application and its reply comments, that the interfaces, systems and processes it has in place in Kansas and Oklahoma are the same as those used in Texas.<sup>306</sup> We also recognize that both the Kansas and Oklahoma Commissions concluded that SWBT uses a common OSS in Kansas, Oklahoma and Texas.<sup>307</sup>

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<sup>303</sup> See SWBT Application, Appendix G, Tab 44 (Ernst & Young Report); 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. 00-217 (filed December 1, 2000), Attachment A ("Ernst & Young Supplemental Report"). The Department of Justice was unable to judge whether Ernst & Young conducted a review adequate to support its conclusion, finding that the attestation did not describe the specific methods, tests, and analyses upon which the conclusion was based. See Department of Justice Evaluation at 32, n.97. Ernst & Young's subsequently-filed Supplemental Report provides critical details about the scope and methodology of the review. Without this support, we could have placed little reliance on the reviewer's conclusions.

<sup>304</sup> See Ernst & Young Supplemental Report at 3-4 (explaining that the following SWBT interfaces and systems were reviewed: EASE, LEX, EDI, DataGate, VeriGate, LASR, and SORD).

<sup>305</sup> Specifically, Ernst & Young concluded that, in all five SWBT states, the interfaces and systems it reviewed: process the same transactions; use the same programming code; provide the same functionality; and have the same supporting documentation. Ernst & Young Supplemental Report at 4.

<sup>306</sup> See SWBT Ham Aff. paras. 13-18; SWBT Ham Reply Aff. paras. 7, 8, 16, 19 and 29; SWBT Mah Reply Aff. paras. 5, 10, 11, 14, 20. See also SWBT Reply at 28.

<sup>307</sup> See SWBT Application, Appendix C-KS, Tab 259, at 18-19 (Kansas Commission Conclusion); SWBT Application, Appendix C-OK, Tab 275, at 172, 174 (Oklahoma Commission Conclusion).

108. We conclude that SWBT, through the Ernst & Young report and other aspects of its application, provides reliable evidence that the OSS systems in Texas are relevant and should be considered in our evaluation of SWBT's OSS in Kansas and Oklahoma. This showing thus enables us to rely, in certain instances, on findings relating to SWBT's OSS from the *SWBT Texas Order* in our analysis of SWBT's OSS in Kansas and Oklahoma. In addition, where low volumes render SWBT's performance data in Kansas and Oklahoma inconsistent and inconclusive, we find that data reflecting SWBT's performance in Texas can provide a particularly valuable indication of the commercial readiness of SWBT's OSS.

109. Under our first inquiry (the analysis of OSS functionality), our earlier conclusions about SWBT's OSS in Texas are relevant in this proceeding to the extent that SWBT uses the same systems, offering the same functionality, in Kansas and Oklahoma. For example, if we find (as we do below) that the interfaces used for pre-ordering are the same in Kansas, Oklahoma and Texas, then we may consider our findings in the *SWBT Texas Order* that these interfaces provide the full range of necessary functionality. With respect to our second inquiry (the analysis of commercial readiness), evidence that its OSS is the same across these three states allows us to broaden the scope of our review and look to evidence of SWBT's performance in Texas. While our analysis always starts with SWBT's performance in Kansas and Oklahoma, we find that SWBT's performance in Texas is relevant to the extent that SWBT demonstrates that it uses common systems and processes in all three states.

110. We agree with the Department of Justice that, because this is the first opportunity for the Commission to evaluate an application relying on this form of proof, we should establish the kind of evidentiary showing that will be expected of applicants in the future. By explaining clearly what types of evidence we have found to be persuasive in this instance, we are establishing a roadmap that can be followed by applicants in the future that seek to rely in part, as SWBT has, on evidence presented in another application. Moreover, we address in detail the Department of Justice's concerns about shortcomings in the evidence provided by SWBT in its initial application, and describe the additional evidence submitted by SWBT in response. As explained below, we find that SWBT has provided additional evidence in its reply comments and *ex parte* filings directly responsive to the Department of Justice's concerns, and find that this information adequately addresses these concerns.<sup>308</sup> A future applicant seeking, as SWBT does, to establish the relevance of another state's OSS, should supply this type of evidence with its *initial application*.

111. The Department of Justice found the evidence provided by SWBT in its initial application to show that its OSS is the same in Texas, Kansas and Oklahoma, to be "ambiguous and incomplete" in two general respects. First, the Department of Justice found that SWBT had not been clear as to precisely what it means for OSS to be "the same" – that is, whether this

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<sup>308</sup> We note that this additional evidence, provided by SWBT with its Reply Comments, is directly responsive to arguments raised by a party commenting on the application (here, the Department of Justice) and, consistent with the manner in which we have treated such responsive evidence in prior proceedings, may be considered without a waiver of our "freeze frame" rule. See *SWBT Texas Order*, 15 FCC Rcd at 18370, para. 35.

means the shared use of a single OSS, or the use of systems that are identical, but separate.<sup>309</sup> We find that SWBT has provided a sufficiently detailed description of its OSS, which distinguishes between these two concepts of sameness. In most respects, SWBT demonstrates that competing carriers in Kansas, Oklahoma and Texas share the use of a single OSS, not two or three separate OSS: a common set of processes, business rules, interfaces, systems and, in many instances, even personnel. Where SWBT has discernibly separate OSS, SWBT demonstrates that its OSS reasonably can be expected to behave the same way in all three states. As described below, for example, the use by SWBT of two different order processing systems (a SORD processor in Dallas for retail and wholesale orders in Texas, and a SORD processor in St. Louis for retail and wholesale orders in SWBT's other four in-region states) use the same programming code and, moreover, are designed to operate in an indistinguishable manner.

112. The Department of Justice further expressed concern that SWBT's application largely focused on certain mechanized aspects of its OSS, providing little evidence relating to the rest of the systems, processes and personnel that make up its OSS.<sup>310</sup> We agree that, unless an applicant seeks to establish only that certain discrete components of its OSS are the same, a general assertion of OSS sameness should be supported by evidence relating to *all* aspects of its OSS – including those OSS functions performed by BOC personnel.<sup>311</sup> We also agree with the Department of Justice that SWBT's initial application, and its heavy reliance on the incomplete Ernst & Young report, did not provide a full picture of SWBT's Kansas, Oklahoma and Texas OSS. SWBT supplemented the record in this proceeding with a substantial amount of additional evidence, to support its assertions regarding its OSS. Specifically, in response to the Department of Justice's suggestions, SWBT provided additional information or clarification relating to its showing of sameness in four specific areas: functions performed by SWBT's personnel; the EDI ordering interface; the SORD processors in Dallas and St. Louis; and the scalability of its manual processing functions. While we address each of these four areas below, and encourage future applicants to provide this type of evidence in their initial applications, we do not suggest that these four items establish an exact script for future applicants to follow.<sup>312</sup>

113. Of the issues identified by the Department of Justice as requiring additional evidence in this proceeding, the most complicated relates to the manual, or personnel,

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<sup>309</sup> Department of Justice Evaluation at 29.

<sup>310</sup> *Id.* at 30.

<sup>311</sup> As we have held previously, a BOC's OSS includes both mechanized systems and manual processes, and thus the OSS functions performed by BOC personnel have been part of our OSS functionality and commercial readiness reviews.

<sup>312</sup> Indeed, one issue not raised by the Department of Justice involves the OSS role played by SWBT's "back office" or "legacy" systems. These systems and databases are used in the processing of retail and wholesale orders, such as databases containing customer records and addresses, or those containing loop make-up information. SWBT notes that it is the only "Baby Bell" to survive intact as a regional BOC and, as such, has maintained a single region-wide set of OSS, including its back office systems, for its own retail use long before divestiture in 1984. *See* SWBT Ham Reply Aff. at para. 5.

components of SWBT's OSS. Specifically, the Department of Justice indicated that SWBT should be required to show that the personnel involved in actual provisioning and maintenance/repair of CLEC orders in Kansas and Oklahoma will do their jobs in the same manner as those in Texas, and identified a range of evidence necessary to make such a predictive judgment. In response to the Department of Justice's evaluation, SWBT provided additional information regarding the aspects of its OSS that involve manual work. Factors we found particularly relevant to our analysis include the following. First, SWBT provided additional information about the range of functions relating to different states that are performed by the same workforce out of common, five-state centers. For example, SWBT uses a common ordering center to perform manual work on orders for all five states, and uses the same pool of employees to perform certain provisioning, maintenance/repair and billing functions across all five states as well. SWBT also provided additional details supporting its assertion that its personnel would do their jobs in the same manner in all three states, for work that necessarily is performed at the state level rather than at these regional centers. Specifically, SWBT explained that common centers coordinate field work activities in all five states; field personnel access the same systems and use the same procedures in all five states; personnel receive common training across all five states; and there is a common organizational structure across all five states. In the end, we find that it is reasonable to conclude that the existence of these similarities will result in similar performance.

114. We also find that SWBT has provided additional evidence sufficient to answer the Department of Justice's concerns about carriers' ability to develop and use SWBT's EDI ordering interface in Kansas and Oklahoma. Evidence that the key interfaces used by competing carriers are the same certainly is necessary for any showing that a BOC provides common OSS in different states. SWBT explains, in affidavits submitted with its Reply Comments, that carriers may construct and use one EDI interface to submit orders in all five states, without any state-specific modifications.<sup>313</sup> SWBT also explains that precisely the same business rules for pre-ordering and ordering apply on a region-wide basis. Ernst & Young's report provides support for both of these points, indicating that the EDI interface uses the same computer code in each state, and that the business rules and user guides are the same.<sup>314</sup> Also, the evidence in the record does not indicate that state-specific inputs, such as different product codes, require carriers to modify their interfaces or even their procedure for submitting orders.<sup>315</sup> To the contrary, as SWBT explains,

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<sup>313</sup> See SWBT Ham Reply Aff. at paras. 7-10. In addition to having a single region-wide EDI ordering interface, SWBT also explains that its other interfaces are the same region-wide, and do not vary from state to state (specifically, the interfaces to its Verigate, DataGate, EDI (preordering), CORBA, LEX, Order Status, Provisioning Order Status, and Trouble Administration systems). *Id.* at para. 7.

<sup>314</sup> See SWBT Ham Reply Aff. at paras. 8 and 19; Ernst & Young Supplemental Report at 8 and 11-12.

<sup>315</sup> While WorldCom argues that the use of different product codes in each state *may* affect the performance of SWBT's OSS, it offers no evidence to suggest that it actually does so. See WorldCom Comments at 4-5; WorldCom Lichtenberg & Sivori Decl. at 18-20; Letter from Keith L. Seat, Senior Counsel, Federal Law and Public Policy, WorldCom, to Magalie Roman Salas, Secretary, Federal Communications Commission dated January 3, 2001, at 4-7 (WorldCom January 3 *Ex Parte* Letter). WorldCom January 3 *Ex Parte* Letter at 4-7. If SWBT's systems fail properly to recognize these state-specific codes – whether in Texas, Kansas or Oklahoma – (continued....)

competing carriers input the product codes (most of which do not vary from state to state) into the same order fields on the order form.<sup>316</sup> Finally, and perhaps most significantly, we find that SWBT's assertion that carriers in Kansas and Oklahoma have access to the same OSS interface as in Texas is not refuted by any carrier active in Kansas and Oklahoma. Indeed, SWBT notes that several carriers use EDI in all three states,<sup>317</sup> and none have placed any evidence in the record to refute SWBT's assertion that EDI can be used region-wide.

115. Third, SWBT provided additional evidence, as urged by the Department of Justice, regarding the use of one order processor (its "SORD" processor) in St. Louis to handle resale and wholesale orders in Kansas and Oklahoma, and another in Dallas to handle resale and wholesale orders in Texas. SWBT explains that its two SORD processors are the same type of hardware running identical software. Ernst & Young's conclusion that these processors are the same, based on a review of the computer code used by these systems, supports this assertion. WorldCom correctly points out that SWBT would have to perform software updates and other changes that affect SORD simultaneously, or risk disrupting order processing for carriers operating both in Texas and in SWBT's other in-region states.<sup>318</sup> We do not find that this creates a current problem, however, and note that a system change that results in discriminatory treatment of competing carriers would subject SWBT to the possibility of fines and an enforcement action.<sup>319</sup>

116. Finally, we find that SWBT has adequately addressed the Department of Justice's concerns relating to the scalability of its manual processes. SWBT provided additional evidence in its reply affidavits describing its process for anticipating competing carriers' demands, and for hiring and training additional employees necessary to process increased volumes of transactions. Moreover, if SWBT is unable to keep pace with increased competing carrier demand in the future, and performance deteriorates, the company would open itself to the possibility of substantial liability under the state performance plans, and also to enforcement action by the Commission.

117. Several commenters also argue that SWBT provides only a partial showing that it uses a common OSS in Kansas, Oklahoma and Texas and, thus, that it cannot rely on its Texas OSS in this proceeding. We find that this argument does not warrant a finding of checklist noncompliance for the same reasons, discussed above, that we found SWBT to have answered the Department of Justice's similar concerns. Specifically, we find no support in the record that OSS differences identified by WorldCom – the use of different product codes and the existence of two (Continued from previous page) \_\_\_\_\_  
and the timely processing of carriers' orders is affected, SWBT would be subject to a possible enforcement action under section 271(d)(6).

<sup>316</sup> See SWBT Ham Reply Aff. at para. 14.

<sup>317</sup> See SWBT Ham Reply Aff. at para. 9 and Attach. B.

<sup>318</sup> See WorldCom McMillon & Lichtenberg Decl. at para. 21.

<sup>319</sup> Indeed, if SWBT modifies SORD, SORD software, or any other OSS system, in a manner that impacts competing carriers, it must provide adequate advance notice so that such carriers may make necessary changes to their systems and procedures.

SORD processors – leads to different OSS performance from state to state or inhibits a carrier’s opportunity to compete. We also find unpersuasive WorldCom’s general speculation that other OSS differences are “likely” to exist.<sup>320</sup>

118. We also disagree with WorldCom’s contention that SWBT’s application should fail because a third party did not examine SWBT’s OSS in Kansas and Oklahoma. In prior section 271 orders, we have held that third party tests can provide critical information about the functionality and performance of a BOC’s OSS. We have not, however, stated that checklist compliance cannot be proven without a third party test of an applicant’s OSS. Indeed, we emphasize that our analysis of an applicant’s OSS rests on a wide range of evidence, of which evidence from third party tests is but one part. The need to rely on a third party test is reduced in this instance because SWBT has established the relevance of its Texas OSS. We agree with the Department of Justice that, in this respect, SWBT’s is a “sensible and efficient approach that can avoid the delay and expense of redundant testing.”<sup>321</sup>

### c. Pre-Ordering

119. Based on the evidence in the record, we conclude that SWBT demonstrates that it provides nondiscriminatory access to its OSS pre-ordering functions. Specifically, we find that SWBT demonstrates that: (i) SWBT 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; 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.

120. 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.<sup>322</sup> Most of the pre-ordering activities 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

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<sup>320</sup> See WorldCom McMillon & Lichtenberg Decl. at para. 22. While competing carriers, such as WorldCom, are not well-positioned to identify differences in SWBT’s proprietary back-office systems, we find that SWBT has provided sufficient evidence, particularly in its Reply Comments and Affidavits, to demonstrate that key aspects of its OSS are common in Texas, Kansas and Oklahoma. Moreover, as WorldCom itself recognizes, however, “it is quite likely that the OSS [in Kansas, Oklahoma and Texas] is more similar between these three states than between other states in the country” because “a single legacy company – SWBT – historically provided local telephone service for all three states.” WorldCom Comments at 6-7.

<sup>321</sup> Department of Justice Evaluation at 28.

<sup>322</sup> See *SWBT Texas Order*, 15 FCC Rcd at 18426, para. 148; *Bell Atlantic New York Order*, 15 FCC Rcd at 4014, para. 129. 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 *id.*, 15 FCC Rcd at 4015, para. 132.

customers. For example, in this proceeding and in accordance with the *UNE Remand Order*, we require SWBT to provide competing carriers with access at the pre-ordering stage to the same detailed information SWBT makes available to itself concerning loop make-up information so that competitors may make fully informed judgments about whether to provision xDSL service to end users.<sup>323</sup> In prior orders, we have 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.<sup>324</sup>

**(i) Access to Loop Qualification Information**

121. In this proceeding, we require a BOC to demonstrate for the first time that it provides access to loop qualification information in a manner consistent with the requirements of the *UNE Remand Order*.<sup>325</sup> In particular, we require SWBT to provide access to loop qualification information as part of the pre-ordering functionality of OSS. In the *UNE Remand Order*, we required incumbent carriers to provide competitors with access to all of the same detailed information about the loop that is available to themselves, and in the same time frame, so that a requesting carrier could make an independent judgment at the pre-ordering stage about whether a requested end user loop is capable of supporting the advanced services equipment the requesting carrier intends to install. At a minimum, SWBT must provide carriers with the same underlying information that it has in any of its own databases or internal records.<sup>326</sup> We explained that the relevant inquiry is not whether SWBT's retail arm has access to such underlying information but whether such information exists anywhere in SWBT's back office and can be accessed by any of SWBT's personnel. Moreover, SWBT may not "filter or digest" the underlying information and may not provide only information that is useful in the provision of a particular type of xDSL that SWBT offers. SWBT must provide loop qualification information based, for example, on an individual address or zip code of the end users in a particular wire

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<sup>323</sup> As we have explained in the 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 make-up 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.

<sup>324</sup> *SWBT Texas Order*, 15 FCC Rcd at 18426, para. 148; *Bell Atlantic New York Order* at 4014, para. 130; *Second BellSouth Louisiana Order*, 13 FCC Rcd at 20661-67, para. 105.

<sup>325</sup> *See UNE Remand Order*, 15 FCC Rcd 3696, 3885, paras. 427-431. This aspect of the *UNE Remand Order* had not taken effect at the time SWBT filed its second section 271 application for the State of Texas, and thus was not part of our review in that proceeding. *See SWBT Texas Order*, 15 FCC Rcd at 18367-68, para. 28.

<sup>326</sup> *See id.* For example, SWBT 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. *See id.*

center, NXX code or on any other basis that SWBT provides such information to itself. Moreover, SWBT must also provide access for competing carriers to the loop qualifying information that SWBT can itself access manually or electronically. Finally, SWBT must provide access to loop qualification information to competitors within the same time intervals it is provided to SWBT's retail operations or its advanced services affiliate, Advanced Solutions, Inc. (ASI).<sup>327</sup> As we stated 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."<sup>328</sup>

122. SWBT demonstrates that it offers nondiscriminatory access to OSS pre-ordering functions associated with determining whether a loop is capable of supporting xDSL advanced technologies. SWBT provides three ways for competing carriers to obtain loop make-up information. As we discuss in more detail below, competitors can request access to actual loop make-up information, theoretical, or design, loop make-up information,<sup>329</sup> or can request that SWBT perform a manual search of its paper records to determine actual loop information. SWBT provides competitors access to actual loop make-up information contained in SWBT's back-end system Loop Facilities Assignment and Control System (LFACS) through the pre-ordering interfaces Verigate, Datagate and EDI/CORBA. Because LFACS was designed as a provisioning system, LFACS will provide the requesting carrier with actual information on the loop that SWBT or ASI, would use if it were going to provision the service requested.<sup>330</sup> If, however, actual loop make-up information is not available in LFACS, SWBT will automatically provide theoretical, or design, loop makeup information. Specifically, SWBT will cause a query to be made into its LoopQual database for loop information based on a standard loop design for

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<sup>327</sup> The Commission required SBC to create a separate advanced services affiliate as a condition of the company's merger with Ameritech. See *Ameritech Corp., Transferor, and SBC Communications Inc., Transferee, For Consent to Transfer Control of Corporations Holding Commission Licenses and Lines Pursuant to Sections 214 and 310(d) of the Communications Act and Parts 5, 22, 24, 25, 63, 90, 95 and 101 of the Commission's Rules*, CC Docket No. 98-141, 14 FCC Rcd 14712 (1999)(*SBC/Ameritech Merger Order*). We note that the Court of Appeals for the District of Columbia recently issued a decision overturning the Commission's determination, in conjunction with the SBC-Ameritech merger, that the merged company could avoid the resale obligation of section 251(c)(4) for the sale of advanced services if it provided those services through a separate affiliate. *Association of Communications Enterprises v. Federal Communications Commission*, 2001 WL 20519 (D.C. Cir. Jan. 9, 2001). Although this decision addresses the separate affiliate requirements of the *SBC/Ameritech Merger Order*, it does not impact our ability to rely on SWBT's performance towards its separate affiliate in evaluating this application.

<sup>328</sup> *UNE Remand Order*, 15 FCC Rcd at 3885-3887, paras. 427-431.

<sup>329</sup> Design loop information is the theoretical make-up of a loop based on the standard loop design for the longest loop in the end user's distribution area. See *SWBT Ham Aff.* at para. 136. SWBT also provides a "green/yellow/red" graphic summary of the design loop information that allows requesting carriers to make a determination if a loop could support xDSL capabilities. "Green/yellow/red" is available to both competitors and SWBT. See *SWBT Chapman Aff.* at paras. 21-28; *SWBT Chapman Reply Aff.* at para. 4.

<sup>330</sup> *SWBT Cullen Reply Aff.* at paras. 3 and 4.

the longest loop in that end user's distribution area.<sup>331</sup> The requesting carrier can then use this theoretical loop information to determine if it would be willing to provide xDSL service to that end-user. Additionally, a carrier may also request loop design information without having to first request an actual loop make-up query. Finally, carriers may also request that SWBT perform a manual search of SWBT's engineering records. Such a request may be submitted via Verigate or DataGate directly to SWBT's engineering operations personnel. Once SWBT engineers complete the manual search, they will update the information in LFACS and the competing carrier can either receive the results via email or review the results in LFACS.<sup>332</sup>

123. We find that SWBT provides these mechanized and manual processes to competing carriers in a nondiscriminatory fashion and allows access to loop qualification functionality as a pre-ordering function in substantially the same manner as it does for itself. Where loop make-up information resides in an electronic format within SWBT's systems, SWBT enables competing carriers access to this information. SWBT uses the LFACS database to determine actual loop makeup information for its retail operations in exactly the same fashion that it is made available to competing carriers.<sup>333</sup> LFACS will automatically return information on an available, non-loaded copper loop as if it were provisioning the requested service to the specific address.<sup>334</sup> SWBT uses this same mechanized information for its own internal provisioning<sup>335</sup> and ASI receives the exact same information via the exact same interfaces.<sup>336</sup> In addition, when performing the manual lookup, SWBT performs the same process and returns the same type of information to the requestor regardless of whether it is for a competing carrier, or ASI, or itself.<sup>337</sup>

124. Furthermore, SWBT allows competing carriers access to the same detailed information about the loop that is available in its records or databases. Specifically, in accordance with the requirements detailed in the *UNE Remand Order*,<sup>338</sup> SWBT provides competing carriers

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<sup>331</sup> SWBT Ham Aff. at para. 136; SWBT Cullen Reply Aff. at para. 3, n.3.

<sup>332</sup> SWBT Chapman Aff. at paras. 30-31.

<sup>333</sup> SWBT Cullen Reply Aff. at para. 3.

<sup>334</sup> *Id.* at para. 4; SWBT Chapman Reply Aff. at para. 5. SWBT will automatically perform a line and station transfer to ensure that competing carriers can provide DSL capable services on any spare loop available to a specific end-user's address in the event that the existing loop is incapable of supporting DSL service, such as a digital loop carrier, or if only one loop existed. In these circumstances, SWBT might connect portions of another loop to create an additional loop over which it could provide the DSL service. *See* SWBT Welch Reply Aff. at para. 5.

<sup>335</sup> SWBT Chapman Reply Aff. at para. 6.

<sup>336</sup> SWBT Cullen Reply Aff. at para. 3. The interfaces are the GUI Verigate, application-to-application Datagate and the industry standard EDI/CORBA.

<sup>337</sup> *See* SWBT Chapman Aff. at para. 21.

<sup>338</sup> *See* *UNE Remand Order*, 15 FCC Rcd at 3885, para. 427.

access to information about: (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.<sup>339</sup>

125. SWBT's performance data reflect that it provides responses to competing carrier requests for loop information in substantially the same time and manner as for itself.<sup>340</sup> Significantly, commenters have not asserted in this proceeding that SWBT returns loop make-up information in an untimely manner.

126. Commenters, however, have raised a number of claims alleging that SWBT's provision of loop make-up information is discriminatory and violates the requirements of the *UNE Remand Order*. For the reasons discussed below, we reject these claims. IP Communications claims that SWBT's actual loop makeup information database is inaccurate and thus harms competing carriers when they place orders for loops based on inaccurate information.<sup>341</sup> As we noted above, when searching for loop qualification information, both competing carriers and SWBT utilize the LFACS system.<sup>342</sup> Thus, any inaccuracies in SWBT's database, because they affect SWBT in the same fashion as competing carriers, are not discriminatory.

127. We also reject Allegiance's and McLeodUSA's assertion that SWBT's use of the green/yellow/red loop information and the theoretical loop design information violates the *UNE Remand Order*.<sup>343</sup> These commenters contend that SWBT's use of this information denies competing carriers access to more detailed loop information and does not allow carriers to identify the physical attributes of the loop to make a more informed judgment about the possibility of offering service. We reject this contention because we find that this information is provided to competitors in addition to the actual loop makeup information. As noted above, the design loop information provided by SWBT is information on a theoretical loop based on a standard loop design for the longest loop in that end user's distribution area.<sup>344</sup> SWBT's green/yellow/red

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<sup>339</sup> See SWBT Chapman Aff. at para. 18.

<sup>340</sup> See SWBT Aggregated Performance Data, Measurement No. 1, SWBT Region-wide, at 271-No 1c; SWBT Aggregated Performance Data, Measurement No. 1.1-01, SWBT Region-wide, at 271-No 1.1. We note that SWBT reports pre-ordering response time and availability on a region-wide basis. Since the record in this proceeding demonstrates that SWBT's pre-ordering systems and processes are the same throughout the five-state region, we need not review state specific performance data.

<sup>341</sup> IP Comments at 15-17.

<sup>342</sup> SWBT Cullen Reply Aff. at para. 3.

<sup>343</sup> Allegiance Comments at 33; McLeodUSA Comments at 34.

<sup>344</sup> SWBT Ham Aff. at para. 136; SWBT Cullen Reply Aff. at para. 3, n.3.

designation is a graphical summary of the design loop information and an alternative way to provide the competitor with help in determining if the theoretical loop is adequate for providing advanced services.<sup>345</sup> In addition to design loop information and green/yellow/red information, competing carriers can also access SWBT's actual loop makeup information, to the extent it is available and, upon request, SWBT will manually search its paper records to determine the actual makeup of the loop.<sup>346</sup> We therefore find that SWBT's green/yellow/red designation merely supplements the other formats of loop makeup information SWBT provides.<sup>347</sup> In accordance with the *UNE Remand Order*, we find that SWBT provides competing carriers access to the same "detailed information" about a loop that is available in its own databases or other internal records.<sup>348</sup>

128. We also disagree with IP Communications' assertion that SWBT violates the *UNE Remand Order* by allowing competing carriers access only to "filtered" loop make-up information.<sup>349</sup> According to IP, when SWBT returns actual and manual loop make-up information to the competing carrier, it provides information on only the "best" loop for the competing carrier, screening out information on other possibly available loops.<sup>350</sup> IP asserts that there are numerous situations where a competing carrier may not want the loop SWBT provides and therefore needs to view loop information on all available loops.<sup>351</sup> IP suggests that by failing to return information on all possible loops at an address, SWBT impermissibly "filters" the loop make-up information. SWBT acknowledges that it returns information on only one loop, but contends that the *UNE Remand Order* does not require more.<sup>352</sup> We find that it is not self-evident from the *UNE Remand Order* that a BOC must provide loop make-up information on all loops that serve a particular address and thus we do not find SWBT to be in violation of that order. Furthermore, it would be inappropriate to resolve this issue within the context of a section 271 proceeding. This issue is best resolved by a rulemaking proceeding in which all interested parties

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<sup>345</sup> See SWBT Chapman Aff. at paras. 22-28.

<sup>346</sup> SWBT Chapman Aff. at para. 22-32; SWBT Chapman Reply Aff. at para. 4.

<sup>347</sup> *Id.*

<sup>348</sup> *UNE Remand Order*, 15 FCC Rcd at 3885, para. 427.

<sup>349</sup> IP Comments at 13.

<sup>350</sup> *Id.*; see also Letter from Howard J. Siegel, Vice President of Regulatory Policy, IP Communications Corp. to Magalie Roman Salas, Secretary, Federal Communications Commission, CC Docket No. 00-217, at 2 (filed November 30, 2000) (IP November 30, 2000 *Ex Parte* Letter).

<sup>351</sup> IP Comments at 13-14.

<sup>352</sup> See SWBT Reply at 69-70. SWBT explains that, when a pre-order request for actual loop make-up information is made and actual information is available, LFACS will transmit to the requestor information on the loop that LFACS would use if LFACS were provisioning the service requested.

are able to comment. Therefore, we invite IP, or any other interested party, to file a petition for declaratory ruling or a petition for a rulemaking on this issue.<sup>353</sup>

129. Finally, we reject IP's contention that SWBT does not comply with the *UNE Remand Order* because SWBT fails to return information on copper loops when end users are served by fiber (e.g., where SWBT has deployed fiber to remote terminals under its "Project Pronto"). In such instances, IP states, SWBT returns information on characteristics of the loop served by the digital loop carrier that may be the "best" loop to a given end user but which is incompatible with the competing carrier's service.<sup>354</sup> We agree that this practice, if true, would appear to violate the *UNE Remand Order*. In its reply comments, however, SWBT satisfactorily answers IP's assertion. SWBT explains that, in such an instance, its systems would automatically return loop make-up information on a copper loop running to the end user, if one exists or if a spare loop can be assigned, rather than make-up information on the fiber loop.<sup>355</sup> Furthermore, SWBT clarifies that it instructs its engineers who perform manual look-ups to return information on an all-copper loop in those situations where the end user is served by both a digital loop carrier and the copper loop.<sup>356</sup> We find that this satisfies the requirements of the *UNE Remand Order* and this checklist item.

#### (ii) Pre-Ordering Functionality and Integration

130. We also find that SWBT provides carriers in Kansas and Oklahoma nondiscriminatory access to all pre-ordering functions and enables these carriers to integrate pre-ordering and ordering functions. SWBT offers requesting carriers in Kansas and Oklahoma access to the same application-to-application interface, DataGate, that it makes available to carriers in Texas.<sup>357</sup> As in the Texas order, we find that the DataGate interface allows competing carriers to access the same pre-ordering functions that SWBT provides to itself.<sup>358</sup> The DataGate interface allows competing carriers to perform a wide range of pre-ordering functions for both resale services and UNEs. Specifically, carriers are able to use DataGate to: (1) validate addresses; (2) retrieve customer service records; (3) select and reserve telephone numbers; (4)

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<sup>353</sup> We note that, even in the event that the *UNE Remand Order* requirements are read to mean only the "best" loop, state commissions would nevertheless have the authority to impose additional obligations consistent with the Act.

<sup>354</sup> IP November 30, 2000 *Ex Parte* Letter.

<sup>355</sup> SWBT Welch Reply Aff. at paras. 5-6; SWBT Chapman Reply Aff. at para. 8.

<sup>356</sup> SWBT Chapman Reply Aff. at para. 11.

<sup>357</sup> The Ernst & Young Report found that SWBT's DataGate interface was the same throughout SWBT's five-state region. See SWBT Br. at 20, n. 32; Ernst & Young Supplemental Report, Kelly Aff., Attach. A at 4.

<sup>358</sup> *SWBT Texas Order*, 15 FCC Rcd at 18427, para. 149. The DataGate interface is based on SWBT's proprietary pre-ordering functionality, and allows competing carriers to acquire pre-ordering information using their own software programs or applications. See SWBT Ham Aff. at para. 123.

determine services and features available to a customer; (5) obtain due date availability; (6) access loop qualification information; (7) access DSL loop pre-qualification information; (8) determine theoretical DSL loop length; (9) view a customer's directory listing; (10) determine dispatch requirements; (11) retrieve local primary intraLATA carrier (LPIC) and primary interexchange carrier (PIC) list; (12) access the Common Language Location Identifier (CLLI) for the serving central office; and (13) verify channel facility assignment.<sup>359</sup> We note that no commenter alleges that SWBT fails or refuses to offer any of these specific pre-ordering functions.

131. SWBT also offers access to these same pre-ordering functions through EDI and CORBA interfaces. EDI and CORBA, which operate according to industry standards, overlay SWBT's DataGate system and allow competing carriers to use industry standard interfaces to access DataGate's functionality.<sup>360</sup> As we noted in the *SWBT Texas Order*, the availability of these interfaces is beneficial to competing carriers and we commend SWBT for continuing to develop and promote them.<sup>361</sup> However, we do not consider the measurements associated with the timeliness and availability of EDI/CORBA in finding that SWBT meets the nondiscrimination requirements for OSS pre-ordering functions.<sup>362</sup> Specifically, we rely only upon SWBT's performance measurements tracking the timeliness and availability of the DataGate and VeriGate pre-ordering interfaces.<sup>363</sup>

132. SWBT demonstrates that competing carriers successfully have built their systems to connect with SWBT's region-wide DataGate interface. SWBT states that five region-wide carriers are utilizing DataGate for pre-ordering, two of which are certified to do business in Kansas or Oklahoma.<sup>364</sup> Furthermore, a review of performance data submitted by SWBT confirms that carriers currently are using DataGate to perform many of the pre-ordering

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<sup>359</sup> See *id.* at 118.

<sup>360</sup> See *id.* at para. 120.

<sup>361</sup> *SWBT Texas Order*, 15 FCC Rcd at 18427-28, para. 150.

<sup>362</sup> In the Texas proceeding, because SWBT did not report measurements concerning its EDI/CORBA interfaces, we relied solely on its measurements tracking the timeliness and availability of DataGate and VeriGate. However, in this proceeding, SWBT reports measurements reporting both the availability and timeliness of EDI/CORBA. See SWBT Aggregated Performance Data, Measurement Nos. 1-12 through 1-15, SWBT Region-wide, at 271-No. 1d and SWBT Aggregated Performance Data, Measurement Nos. 4-01.6 through 4-01.11, SWBT Region-wide, at 271-No. 4b. Although no commenter complained about the availability or timeliness of these interfaces, we do not rely upon them in making our finding. SWBT itself does not explain or rely on these new measurements in support of its pre-ordering showing.

<sup>363</sup> See SWBT Aggregated Performance Data, Measurement Nos. 1 and 2, SWBT Region-wide, at 271-No. 1a and SWBT Aggregated Performance Data, Measurement No. 4, SWBT Region-wide, at 271-No. 4a. The Verigate interface is a graphical user interface that operates with Windows for competing carriers that want to utilize LEX or EDI ordering functions but do not want to incur the programming and expenses required for EDI, CORBA and DataGate. See SWBT Ham Aff. at para. 126.

<sup>364</sup> SWBT Application at 26; SWBT Ham Aff. at para. 124.

transactions listed above. Specifically, the data show that competing carriers are using DataGate to retrieve customer service records, validate addresses, select and reserve telephone numbers, determine services and features available to a customer, obtain due date availability, and retrieve local primary intraLATA carrier (LPIC) and primary interexchange carrier (PIC) list.<sup>365</sup>

133. We find that SWBT has shown that it allows competing carriers to integrate successfully pre-ordering information obtained from the DataGate interface with SWBT's EDI ordering functions.<sup>366</sup> We examined this issue closely in the Texas proceeding and found that the evidence in the record—including statements from competing carriers and the conclusions of a third party tester—demonstrated that these functions could be successfully integrated.<sup>367</sup> We reach the same conclusion in this proceeding, based on SWBT's demonstration that competing carriers in Kansas and Oklahoma are utilizing the same interfaces. We also note that the Oklahoma Commission found that DataGate could be integrated with SWBT's EDI ordering function.<sup>368</sup> Furthermore, commenters have not argued that competing carriers are unable to integrate DataGate with EDI ordering functions. Moreover, one of the competing carriers that integrated pre-ordering and ordering in Texas is also operating in Kansas and Oklahoma and has not complained of difficulties in placing orders in these states.<sup>369</sup>

### (iii) Interface Response Times and Availability

134. We find that SWBT demonstrates that it provides requesting carriers access to pre-ordering functionality in a manner that allows an efficient competitor a meaningful opportunity to compete. We have 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 SWBT serves its own customers.<sup>370</sup> SWBT's performance data demonstrate that SWBT's Datagate interface has met or exceeded the relevant benchmarks, with only a few scattered disparities, for interface response time and availability in each of the last four months during the same period of time that competing carrier pre-order transactions have increased.<sup>371</sup> We conclude that these performance

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<sup>365</sup> See SWBT Aggregated Performance Data, Measurement No. 1, SWBT Region-wide, at 271-1a.

<sup>366</sup> SWBT Ham Aff. at para. 123.

<sup>367</sup> *SWBT Texas Order*, 15 FCC Rcd at 18432, para. 158. In reaching this conclusion, we rely, in part, on the Telcordia integration test performed as part of the Texas proceeding and we conclude that this test provides us with additional assurance that competing carriers are able to achieve integration while utilizing SWBT's OSS.

<sup>368</sup> SWBT Application, Appendix C-OK, Volume 25a-c, Tab 275, at 178.

<sup>369</sup> SWBT Ham Aff. at para. 133.

<sup>370</sup> See *Bell Atlantic New York Order*, 15 FCC Rcd at 4025 and 4029, paras. 145 and 154.

<sup>371</sup> See SWBT Aggregated Performance Data, Measurements No. 1 and 2, SWBT Region-wide, at 271-No 1a. The sole exception was Average Response Time within "x" seconds-PIC Data, which SWBT missed in August. In that month, SWBT missed the 95% benchmark for response within 41 seconds by 5%, but was successful in (continued....)

disparities had a negligible competitive impact given that SWBT missed the relevant benchmarks by small margins. Significantly, commenters have not argued that SWBT fails to provide timely responses to pre-ordering inquiries or that its DataGate interface is unreliable.<sup>372</sup> We therefore conclude that SWBT's interfaces are available in a stable and consistent manner and afford an efficient competitor a meaningful opportunity to compete.

#### d. Ordering

135. In this section, we address SWBT's ability to provide competing carriers with access to the OSS functions necessary for placing wholesale orders. We find that SWBT demonstrates, with performance data and other evidence, that it provides competing carriers with access to OSS ordering functions, on a timely and consistent basis, and in a manner that allows these carriers a meaningful opportunity to compete.<sup>373</sup> As in prior section 271 orders, we look primarily at the applicant's ability to return order confirmation notices, order reject notices, order completion notices and jeopardies, and its order flow-through rate.<sup>374</sup> Significantly, SWBT has demonstrated that the interfaces, systems, processes and personnel that make up its ordering OSS in Kansas and Oklahoma are essentially the same as those used to process wholesale orders in Texas.<sup>375</sup> Our findings from the *SWBT Texas Order* with respect to the functionality of SWBT's ordering OSS, for those aspects that are common to Texas, Kansas and Oklahoma, thus are relevant to our review here. Furthermore, as explained above, data reflecting the performance of SWBT's ordering OSS in Texas also is relevant to our analysis here.

136. We emphasize that we generally look at the totality of the circumstances in analyzing the OSS ordering functions. Performance disparity in one measurement or sub-measurement is unlikely to result in a finding of checklist noncompliance, unless the disparity is dramatic, or absent additional evidence of competitive impact. We review each individual

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making the 90% benchmark for response within 27 seconds. However, SWBT surpassed the benchmark for this measurement for every other month in the past year. Moreover, SWBT has satisfied the benchmark of 99.5% availability for six of the last seven months. See SWBT Aggregated Performance Data, Measurement No. 4, SWBT Region-wide, at 271-No. 4a (April: 99.7%; May: 100%; June: 100%, July: 100%; August: 100%; September 99.4%; October: 99.7%).

<sup>372</sup> SWBT Ham Aff. at para. 24.

<sup>373</sup> Because most of these ordering functions lack a direct retail analogue, our standard of review is to determine whether SWBT's systems and performance allow an efficient carrier a meaningful opportunity to compete. For those functions of the ordering systems for which there is a retail analogue, we shall assess whether SWBT provides competing carriers with access to its OSS systems in substantially the same time and manner as it provides to its retail operations.

<sup>374</sup> 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.

<sup>375</sup> See SWBT Ham Aff. at paras. 13-18; SWBT Ham Reply Aff. at paras. 7, 8, 16, 19 and 29; SWBT Mah Reply Aff. at paras. 5, 10, 11, 14, 20; Ernst & Young Report; Ernst & Young Supplemental Report.

measurement as one part of a larger picture that informs our determination of checklist compliance or non-compliance.

**(i) Order Confirmation Notices**

137. In prior section 271 orders, we have held that order confirmation notices are important elements of the ordering process, and data demonstrating that they are provided in a timely manner is a key consideration for assessing whether competitors are allowed a meaningful opportunity to compete.<sup>376</sup> In this proceeding, we use the same analysis and look to the same performance measurements as in the Texas proceeding where we found that SWBT provides competing carriers timely order confirmation notices. Based on this review, we find that SWBT provides order confirmation notices to competitors in a way that allows them a meaningful opportunity to compete. In making this determination, we look to the data that indicate that SWBT provides competing carriers access to confirmation notices for orders for resale, UNE-P, unbundled loop, xDSL, and number port.

138. SWBT's data indicate that it returns timely order confirmation notices to competing carriers in Kansas and Oklahoma that use mechanized interfaces (EDI and LEX) to submit orders or that submit orders for "manual" processing (i.e. via fax). The data demonstrate that SWBT met the relevant performance benchmark for each service type in both states from July to October 2000 with scattered exceptions.<sup>377</sup> With respect to these few exceptions, we emphasize that we look at the totality of the circumstances and generally do not view individual performance disparities, particularly if they are isolated and slight, as they are here, as wholly dispositive as to whether SWBT has satisfied its checklist obligations. The performance disparities relate to SWBT's performance in returning manual order confirmation notices for xDSL capable loop orders and, in Kansas, in returning these manual notices for "number port"

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<sup>376</sup> See *SWBT Texas Order*, 15 FCC Rcd at 18438-40, paras. 163-164 (discussing order confirmation notices). In this instance, as in the *Bell Atlantic New York Order* and the *SWBT Texas Order*, we are not presented with a retail analogue for order confirmation notices, and thus assess whether the process and performance offered by the applicant enables an efficient competitor a meaningful opportunity to compete.

<sup>377</sup> See SWBT Aggregated Performance Data, Measurement No. 5, Kansas and Oklahoma, at 271-No. 5a-5f; SWBT Aggregate Performance Data, Measurement No. 5.1, Kansas and Oklahoma, at 271-No. 5.1a, 5.1b; SWBT Aggregated Performance Data, Measurement No. 94, Kansas and Oklahoma, at 271-No. 94a, 94c and 94e. We recognize that a third party review of SWBT's performance data uncovered irregularities in the way SWBT recorded the time that faxed manual orders were received. See *In the Matter of SBC Communications, Inc., Apparent Liability for Forfeiture*, File No. EB-00-IH-0432, Notice of Apparent Liability for Forfeiture, DA 00-2858 (Dec. 20, 2000) (*SBC Merger Audit NAL*). While this irregularity apparently was not corrected until August 2000, it does not appear that it had a significant impact on SWBT's reported performance data reviewed here, as SWBT's performance was not noticeably different in September and October. In any case, were we to rely exclusively on SWBT's September and October data for these "manual" order confirmation measurements, our conclusions would have been the same.

orders.<sup>378</sup> Each of these disparities was minimal.<sup>379</sup> Absent evidence of discrimination or competitive harm, we find that SWBT's performance appears to have little competitive impact.

139. We also recognize that performance data for both mechanical and manual order confirmation notices may be inconsistent because order volumes in Kansas and Oklahoma are low. As we stated above, where low volumes render SWBT's performance data in Kansas and Oklahoma inconsistent and inconclusive, data reflecting SWBT's performance in Texas can provide a valuable indication of the commercial readiness of SWBT's OSS. As a result, we look to SWBT's performance in Texas, where SWBT uses the same systems and processes as in Kansas and Oklahoma, to augment our review.<sup>380</sup> In sum, SWBT generally satisfied the relevant benchmark in Texas for each sub-category of service and for each ordering interface.<sup>381</sup> Where SWBT did not satisfy the relevant benchmark in each month, any disparity appears to be competitively insignificant.<sup>382</sup> We therefore reject McLeodUSA's contention that SWBT's OSS denies competitors a meaningful opportunity to compete because its order confirmation performance in Texas has deteriorated.<sup>383</sup> We find that SWBT's performance in returning timely order confirmation notices provides efficient competitors with a meaningful opportunity to compete.

140. Based on SWBT's Texas performance, and the factors discussed in the preceding paragraph, we also are not persuaded by Allegiance's contention that SWBT's xDSL disparity

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<sup>378</sup> See SWBT Aggregated Performance Data, Measurement No. 5.1-05, Kansas and Oklahoma, at 271-No. 5.1b; SWBT Aggregated Performance Data, Measurement No. 94-15, Kansas, at 271-No. 94e.

<sup>379</sup> In Oklahoma, SWBT satisfied the benchmark for xDSL order confirmations in October and missed by only one late notice in July and August and five late notices in September. See *id.* In Kansas, SWBT satisfied the benchmark in August but missed the benchmark by only one late notice in July and October and by two late notices in September. With respect to the number port only orders, SWBT missed the benchmark from by 0.9 percent in September and by 0.7 percent in October.

<sup>380</sup> See SWBT Ham Aff. at paras. 13-18; SWBT Ham Reply Aff. at paras. 7, 8, 16, 19 and 29; SWBT Mah Reply Aff. at paras. 5, 10, 11, 14, 20.

<sup>381</sup> See SWBT Aggregated Performance Data, Measurement No. 5, Texas, at 271-No. 5a-5f; SWBT Aggregated Performance Data, Measurement No. 94, Texas, at 271-No. 94a, 94c and 94e; SWBT Aggregate Performance Data, Measurement No. 5.1, Texas, at 271-No. 5.1a, 5.1b.

<sup>382</sup> See SWBT Aggregated Performance Data, Measurement No. 5-07, Texas, ("Percent FOCs Related to xDSL Capable Loops Returned within 'x' Hours – EDI"), at 271-No. 5c (missed the benchmark in August by 3.1 percent and in September by 2.9 percent); SWBT Aggregated Performance Data, Measurement No. 94-15, Texas, ("Percent FOCs Received Within 'X' Hours – Manual"), at 271-No. 94e (missing two of the last four benchmarks by 0.8 percent in August and 4.7 percent in September); and SWBT Aggregated Performance Data, Measurement No. 94-16, Texas, ("Percent FOCs Received Within 'X' Hours – Manual"), at 271-No. 94e (returning 100 percent of notices on-time in three of the last six months).

<sup>383</sup> McLeodUSA Comments at 30.

denies competitors a meaningful opportunity to compete.<sup>384</sup> Furthermore, we reject Allegiance's contention that SWBT is not meeting performance standards for loop ordering and provisioning because it did not satisfy a benchmark in "at least one month" in four measurements involving order confirmation returns for LEX and manual orders.<sup>385</sup> As we stated above, we do not view each particular measurement as wholly dispositive of checklist compliance, but will look to the totality of the circumstances in making a determination. Here, these performance discrepancies occur in isolated months and suggest only an insignificant competitive impact. We therefore decline to find checklist noncompliance.

## (ii) Order Rejection Notices

141. We conclude that SWBT provides competing carriers with timely order rejection notices in a manner that allows them a meaningful opportunity to compete. SWBT uses the same systems and procedures in Kansas and Oklahoma as it does in Texas to provide mechanically generated rejection notices (returned over the same interface competing carriers use to submit the order) and manually generated rejection notices (returned over a separate graphical user interface).<sup>386</sup> Here, SWBT's performance data demonstrate that it returns order rejection notices in a timely manner over both EDI and LEX.<sup>387</sup>

142. SWBT's performance data also demonstrate that it returns manually generated rejection notices in a timely fashion. Although SWBT has not satisfied the six-hour benchmark in two of the last four months in both states, SWBT has returned manual rejection notices, on average, between three and nine hours in Kansas and between three and ten hours in Oklahoma over the last four months.<sup>388</sup> In the *SWBT Texas Order*, we found that similar performance

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<sup>384</sup> Allegiance Comments at 25.

<sup>385</sup> *Id.* at 15.

<sup>386</sup> See SWBT Ham Aff. at paras. 13-18; SWBT Ham Reply Aff. at paras. 7, 8, 16, 19 and 29. Errors detected by mechanized edits automatically result in rejects that are returned electronically via LEX or EDI, while errors detected during manual processing result in manually generated rejection notices returned electronically via the "LASR GUI" interface. SWBT Ham Aff. at paras. 193, 201.

<sup>387</sup> SWBT has satisfied the standard for timely returns of mechanically generated reject notices by returning more than 97 percent of reject notices within one hour for the past 12 months over LEX and for 11 of the last 12 months over EDI. See SWBT Aggregated Performance Data, Measurement Nos. 10 and 11, Kansas and Oklahoma, at 271-No. 10-11. WorldCom complains that SWBT improperly rejects competitors' UNE-P orders. WorldCom Comments at 13. SWBT, however, working with competing carriers, has taken steps to remedy this problem by (1) implementing an exception report listing for UNE-P conversions that require three different service orders but for which each of the three orders has not yet issued and (2) created a report that shows the UNE-P conversion orders that require three service orders and for which the dates on each of the three orders do not match. See SWBT Noland Reply Aff. at para. 42.

<sup>388</sup> See SWBT Aggregated Performance Data, Measurement No. 11.1, Kansas and Oklahoma, 271-No.10.1, 11.1. Specifically, from July through October 2000 in Kansas, SWBT returned manually generated rejection notices in an average of 3.69, 8.32, 8.69 and 3.22 hours respectively. In Oklahoma, SWBT returned manually generated rejection notices in an average of 3.05, 6.76, 10.72, and 3.61 hours over the same time period.

satisfied the Commission's nondiscrimination standard.<sup>389</sup> Absent any clear evidence of discrimination or competitive harm, we find that this performance also demonstrates compliance with our requirements. We also note that here, as it was in the *SWBT Texas Order*, SWBT's performance is improving.<sup>390</sup> We disagree with commenters who claim that SWBT's performance in handling manual rejections demonstrates that SWBT fails to provide nondiscriminatory access to its OSS.<sup>391</sup> Additionally, because SWBT's ordering system is the same throughout the five-state region and because of the low order volumes in both Oklahoma and Kansas, we look to SWBT's current performance in Texas and note that it satisfies the requisite benchmark.<sup>392</sup>

143. In addition, we find unpersuasive Sprint's claim that SWBT rejects too many competing carrier orders.<sup>393</sup> This Commission has not, to date, engaged in a parity or direct benchmark analysis of a carrier's overall reject rate. We have, however, indicated that we will not hold a BOC accountable for rejects that occur for reasons within a competing carrier's control.<sup>394</sup>

As in the Texas and New York proceedings, order rejections in this instance vary widely by individual carrier, from 12.5 percent to 57.1 percent sent over EDI during September in Kansas alone.<sup>395</sup> We find that such a wide variation in the individual reject rates suggests that the disparate reject rate may be a function of a competing carrier's experience using the system, rather than the system itself. In light of this variation, we conclude that the overall reject rates faced by competing carriers in this instance do not appear to indicate flaws in SWBT's OSS systems or processes. Furthermore, no commenter offers any explanation as to why they may be experiencing higher reject rates in Kansas or Oklahoma than in Texas. We thus conclude that SWBT provides competing carriers with timely order rejection notices in a manner that allows them a meaningful opportunity to compete.<sup>396</sup>

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<sup>389</sup> See *SWBT Texas Order*, 15 FCC Rcd at 18441-42, para. 175.

<sup>390</sup> See SWBT Aggregated Performance Data, Measurement No. 10.1-01, Kansas and Oklahoma, at 271 No. 10.1-01, 11.1. SWBT has returned 79.8, 86.1, and 96.5 percent of manual rejection notices within 6 hours in August, September and October, respectively, in Kansas and 82.5, 86.4, and 96.2 percent of manual rejection notices within 6 hours in Oklahoma.

<sup>391</sup> Allegiance Comments at 28; McLeodUSA Comments at 27; Sprint Comments at 48; WorldCom Comments at 14.

<sup>392</sup> See SWBT Aggregated Performance Data, Measurements No. 10 and 11, Texas, at 271-No. 10-11; SWBT Aggregated Performance Data, Measurement No. 10.1-01, Texas, at 271-No.10.1, 11.1; and SWBT Aggregated Performance Data, Measurement No. 11.1, Texas, at 271-No.10.1, 11.1.

<sup>393</sup> Sprint Comments at 47.

<sup>394</sup> See *SWBT Texas Order*, 15 FCC Rcd at 18442, para. 176; *Bell Atlantic New York Order*, 15 FCC Rcd at 4044, para. 175; *Second BellSouth Louisiana Order*, 13 FCC Rcd at 20673-74, paras. 111-112.

<sup>395</sup> SWBT Ham Reply Aff. at para. 47.

<sup>396</sup> In the *SWBT Texas Order*, we recognized that SWBT planned to implement a change to its ordering system that would eliminate the need for carriers to list an end user's address on orders involving the migration of an end (continued....)

**(iii) Order Flow-Through Rate**

144. 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.<sup>397</sup> In so finding, we employ the same review and look to the same performance measurements as we did in the Texas proceeding. Based on this review, we conclude that SWBT demonstrates that its systems are capable of achieving high overall levels of order flow-through.<sup>398</sup>

145. Despite some disparities in SWBT's performance, we are able to conclude that SWBT flows-through competing carriers' orders in substantially the same time and manner as its own orders. We reject Sprint's assertion that SWBT's EDI flow through performance in Kansas denies nondiscriminatory access to its OSS.<sup>399</sup> While the EDI flow-through rate in Kansas has been as low as 61.1 percent in August, it has also been as high as 96.8 percent in July. This inconsistency may be attributable to the low number of orders submitted over EDI, which was as low as 33 in August, as well as the carriers' inexperience using the EDI interface. Evidence submitted by SWBT demonstrates that the two largest competing carriers in Kansas (in terms of the volume of orders submitted via EDI) achieved high flow-through rates.<sup>400</sup> Additionally, since the Ernst & Young report found that SWBT's pre-ordering and ordering interfaces were the same

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user from retail or resale to UNE-P service. *See SWBT Texas Order*, 15 FCC Rcd at 18443, para. 178. We discussed how SWBT's electronic processes for provisioning UNE-P faltered when it handled orders containing address-related discrepancies that were not resolved by SWBT's front-end edits. *Id.*, 15 FCC Rcd at 18452-53, para. 194. On May 27, 2000, SWBT released EDI/LSR software that eliminated the requirement to populate the end-user's address on UNE-P conversion service requests. Under SWBT's new process, no address errors would be returned to the competing carrier, and the service address would be provided by SWBT from the CRIS database, even if the street number and name information provided by the CLEC is incorrect. Importantly, no commenter complained about this problem in this proceeding. SWBT's application demonstrates that this change was implemented on May 27, 2000 and allowed SWBT's system to process competitor's orders even when an order had an incorrect end user address. *See SWBT Ham Aff.* at paras. 58-60.

<sup>397</sup> 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. *See SWBT Ham Aff.* at para. 205; *Bell Atlantic New York Order*, 15 FCC Rcd at 4033, n. 488. However, we have not considered flow-through rates as the sole indicium of parity and thus have not limited our analysis of a BOC's ordering processes to a review of its flow-through performance data. Instead, we have held that factors that are linked to order flow-through but are more directly indicative of a BOC's OSS performance, such as a BOC's overall ability to return timely order confirmation and rejection notices, accurately process manually handled orders, and scale its systems, are relevant and probative for analyzing a BOC's ability to provide access to its ordering functions in a nondiscriminatory manner.

<sup>398</sup> *See SWBT Aggregated Performance Data, Measurement No. 13, Kansas and Oklahoma*, at 271-No. 13a.

<sup>399</sup> Sprint Comments at 47. *See also* Department of Justice Evaluation at 34.

<sup>400</sup> The first carrier flowed through 100 percent of a total of 133 orders during the most recent four-month period. The second carrier achieved flow-through rates of 91 to 100 percent during the same time period (with the exception of one month in which SWBT failed to flow through 2 of 8 orders). *SWBT Ham Reply Aff.* at para. 52.

region-wide, we look to Texas to address the inconsistent performance results. SWBT's Texas performance indicates that competitors' orders flowed through between 91.8 and 94.4 percent of EDI orders in the last four months and, moreover, achieved better than parity results in each month.<sup>401</sup>

146. We also reject commenters' assertion that SWBT discriminates against competing carriers because its LEX flow-through rate in Oklahoma is lower than its analogous retail flow-through rate.<sup>402</sup> The record in this proceeding does not reflect that SWBT's LEX flow-through fails to provide competitors with nondiscriminatory access to its OSS.<sup>403</sup> SWBT points out that competing carriers' individual flow through rates vary, and that competing carriers that place a larger number of orders in Oklahoma attain better flow-through rates.<sup>404</sup> We have consistently stated that a BOC is not accountable for orders that are rejected or fail to flow through due to competing carriers' mistakes.<sup>405</sup> 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.<sup>406</sup> We conclude that the LEX flow-through rate in Oklahoma indicates that competing carriers' orders are handled in a nondiscriminatory manner and, absent evidence of significant competitive impact, this satisfies our inquiry on this matter.

#### (iv) Jeopardy Notices

147. We find that SWBT provides "jeopardy" notices to competing carriers in a nondiscriminatory manner. In analyzing SWBT's performance in returning timely jeopardy notices, we review the same systems and procedures as in the Texas proceeding.<sup>407</sup> SWBT provides mechanized jeopardy notifications to competing carriers via LEX or EDI if it determines,

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<sup>401</sup> See SWBT Aggregated Performance Data, Measurement No. 13, Texas, at 271-No. 13a.

<sup>402</sup> See Allegiance Comments at 29; McLeodUSA Comments at 28; Sprint Comments at 48.

<sup>403</sup> We have, in past section 271 applications, used flow-through as a potential indicator of a wide range of problems with a BOC's OSS. See *SWBT Texas Order*, 15 FCC Rcd at 18444, para. 179. We do not find that the flow-through rate in Oklahoma (between 70 and 80 percent in recent months), in itself, warrants a finding of checklist non-compliance, nor does the record in this proceeding indicate that this level of flow-through is indicative of the types of problems identified in prior orders. We thus disagree with Sprint's assertion that the LEX flow-through rate, by itself, shows that SWBT's OSS is neither scaleable nor reliable and McLeodUSA's and Allegiance's assertion that SWBT has not shown that it flows through competitors orders in a nondiscriminatory fashion. See Sprint Comments at 48; McLeodUSA Comments at 28; Allegiance Comments at 29.

<sup>404</sup> See SWBT Ham Reply Aff. at para. 56.

<sup>405</sup> See *Bell Atlantic New York Order*, 15 FCC Rcd at 4044, para. 175.

<sup>406</sup> See *SWBT Texas Order*, 15 FCC Rcd at 18444, para. 180, n.489.

<sup>407</sup> See SWBT Noland/Smith Aff. at para. 70.

after a service appointment is scheduled, that the necessary facilities are unavailable.<sup>408</sup> We conclude that SWBT provides “no facilities” jeopardy notices to competing carriers and to its own operations in substantially the same time and manner. SWBT provides these jeopardy notices to competitors and to itself in the same manner using the same databases.<sup>409</sup>

148. SWBT also provides a second type of electronic jeopardy notification over a web-based GUI. SWBT explains that these GUI jeopardies include, for example, instances where a dispatch technician is unable to access an end user’s property or discovers that additional driving instructions are needed.<sup>410</sup> We also conclude that SWBT’s process for returning these “other” jeopardy notifications provides efficient carriers with a meaningful opportunity to compete. SWBT began reporting in October the percentage of orders that receive SWBT caused jeopardy notices and the average amount of time SWBT takes to return them.<sup>411</sup> We note that, based on the October data, SWBT’s performance appears to indicate that it is returning jeopardy notifications quickly and on a small percentage of orders.<sup>412</sup>

149. WorldCom argues again, as it did in the Texas 271 that flaws in SWBT’s jeopardy process in Texas – specifically, that too many orders receive jeopardies and that jeopardies are sent too late in the process – deny carriers a meaningful opportunity to compete.<sup>413</sup> We conclude again that the record in this proceeding does not support its claim that an unreasonably high number of jeopardy notifications are returned to competing carriers. SWBT provides data indicating that less than four percent of all competing carriers’ orders are placed into jeopardy status.<sup>414</sup> While WorldCom claims that a slightly higher percentage of its order receive jeopardy notifications, we note that this number has declined recently.<sup>415</sup> Furthermore, as we noted in the *SWBT Texas Order*, SWBT is held accountable through its performance measurements for instances where SWBT-caused jeopardy situations result in missed due dates. As discussed below, SWBT misses fewer due dates for competing LECs than it does for its own retail

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<sup>408</sup> This “no facilities available” jeopardy notice is the only type of jeopardy notification SWBT provides within its retail operations. See SWBT Noland/Smith Aff. at para. 66.

<sup>409</sup> *Id.* at para. 70.

<sup>410</sup> *Id.* at paras. 66, 67, and 72.

<sup>411</sup> See SWBT Aggregated Performance Data, Measurement Nos. 10.2 and 11.2, Kansas and Oklahoma, at 271-No. 10.2, 11.2.

<sup>412</sup> We can place only limited weight on this performance data as it represents only one month of performance and because SWBT does not provide an explanation for this new measurement.

<sup>413</sup> See WorldCom Comments at 13; WorldCom Reply Comments at 31; WorldCom January 3, 2001 *Ex Parte* Letter at 8-10.

<sup>414</sup> See SWBT Noland/Smith Aff. at para. 69.

<sup>415</sup> WorldCom claims that SWBT put into jeopardy status 8.7 percent of WorldCom’s orders in August, 6.8 percent in September and 6.0 percent in October.

operations, across almost all categories of service. Accordingly, the record in this proceeding indicates that SWBT's performance with respect to jeopardy notices, in the context of SWBT's overall acceptable performance for ordering and provisioning, does not warrant a finding of checklist noncompliance.

(v) **Order Completion Notices**

150. SWBT returns service order completion notices (SOCs) to competing carriers in Kansas and Oklahoma in the same manner and following the same procedures as it does in Texas and we thus analyze the same systems that we found to be nondiscriminatory in the Texas proceeding.<sup>416</sup> We conclude that SWBT provides order completion notices to competing carriers in a nondiscriminatory manner. Since there is no equivalent retail process, SWBT's performance is measured against a benchmark.<sup>417</sup> Here, we base our finding that SWBT provides sufficient order completion notices on SWBT's timeliness in providing service order completion notices to competing carriers. The data indicate that SWBT generally meets the benchmark for orders submitted via the electronic interfaces (LEX and EDI).<sup>418</sup> While SWBT's performance on notices returned via EDI in Kansas has been inconsistent in recent months, we believe this performance is attributable to the low volumes of orders, and therefore we look to Texas performance. In Texas, over the past four months, SWBT consistently satisfied the benchmark for both EDI and LEX.<sup>419</sup> We therefore find that SWBT provides competing carriers with a meaningful opportunity to compete by returning timely order completion notices.

151. We reject WorldCom's complaint that SWBT discriminates against competitors by returning late service order confirmation notices for orders placed in Texas. WorldCom asserts that orders drop out of SWBT's OSS, which require manual interventions by SWBT's personnel. As a result, the return of SOCs is significantly slowed and competitors cannot begin billing end users. WorldCom admits, however, that SWBT has, in recent months, significantly reduced the number of late SOCs returned to competitors and, when WorldCom transmits a list of missing

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<sup>416</sup> See SWBT Ham Aff. at paras. 13-18; SWBT Ham Reply Aff. at para. 7. An order completion notice informs a competing carrier that SWBT has completed the installation of the service requested by the particular order.

<sup>417</sup> See *SWBT Texas Order*, 15 FCC Rcd at 18448-49, para. 187.

<sup>418</sup> Specifically, SWBT has returned 97 percent of these notices within a day of work completion over LEX in Kansas for the past eight months and in Oklahoma for the past two of the last four months. In two months where SWBT's Oklahoma LEX performance fell below the 97 percent benchmark, it did so by less than two percentage points, an amount that we find has little significant competitive impact. See SWBT Aggregated Performance Data, Measurement No. 7.1, Oklahoma, at 271-No. 7.1, 9. Over EDI, SWBT satisfied the benchmark four of the last six months in Oklahoma and one of the last four months in Kansas. For EDI orders submitted in Kansas, SWBT's performance varied from 100.0 percent in July to 78.7 percent in September. SWBT returned 100.0, 92.6, 78.7 and 88.6 percent of order completion notices within a day of completion over EDI in Kansas. Considering the totality of the evidence, we find that SWBT's EDI performance is sufficient in light of the fact that SWBT satisfied the benchmark in Kansas seven of the last 11 months.

<sup>419</sup> See SWBT Aggregated Performance Data, Measurement No. 7.1, Texas, at 271-No. 7.1, 9.

SOCs to SWBT, the SOC's are returned to WorldCom quickly.<sup>420</sup> We also find unpersuasive WorldCom's speculative complaint that SWBT's solution to this problem of assigning additional manual resources jeopardizes SOC return in the future when those manual resources are not present.<sup>421</sup> We note that SWBT's performance in returning timely SOC's for EDI orders is adequate.<sup>422</sup> If we find that WorldCom is correct and SWBT's solution to this former problem is a staffing solution, we expect SWBT to continue to assign resources in a fashion that provides competitors with a meaningful opportunity to compete.

(vi) **Other Issues**

152. We also find that SWBT makes available sufficiently detailed interface design specifications for EDI that enable competing carriers to modify or design their systems in a manner that will allow them to communicate with SWBT's systems and interfaces. In fact, several competing carriers have constructed and are using EDI interfaces throughout SWBT's region.<sup>423</sup> In the *SWBT Texas Order*, we found that sixteen carriers were in production using SWBT's EDI interface gateway, and additional carriers were testing the EDI requirements.<sup>424</sup> Now, SWBT has twenty-nine carriers utilizing its EDI interface, each of which could place an order on the same EDI gateway to submit a local service request in Kansas, Oklahoma or Texas.<sup>425</sup> We thus conclude that SWBT makes available access to its EDI ordering systems and procedures to allow a competing carrier a meaningful opportunity to compete.

153. *Three-Order Process.* Finally, WorldCom asserts that SWBT's so called "three-order process," whereby SWBT breaks UNE-P conversion orders into three separate orders for processing purposes, inhibits WorldCom's ability to provide service. WorldCom first maintains that SWBT provides incorrect "C" orders (i.e., orders designed to provision the UNE and establish the billing format) to WorldCom when returning order confirmation and order completion notices.<sup>426</sup> Although SWBT admits that this results in an end user being disconnected from the competing LEC, the parties determined that the problem arose in only three instances when an end user attempted to switch service from one competing LEC to another.<sup>427</sup> While we agree that this issue has the potential to impact numerous competitors' end users, we note that

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<sup>420</sup> WorldCom Comments at 10-11.

<sup>421</sup> *Id.*; see also WorldCom January 3, 2001 *Ex Parte* Letter at 10.

<sup>422</sup> See SWBT Noland Reply Aff. at para. 35.

<sup>423</sup> SWBT Ham Aff. at para. 49.

<sup>424</sup> *SWBT Texas Order*, 15 FCC Rcd at 18411-12, para. 120.

<sup>425</sup> SWBT Ham Aff. at para. 50.

<sup>426</sup> WorldCom Comments at 12-13.

<sup>427</sup> SWBT Reply at 45.

SWBT has deployed an interim solution, is working through the change management process to resolve the issue permanently and, since the problem affected so few end users, we thus find it does not warrant a finding of checklist noncompliance.<sup>428</sup> We note that, while we are encouraged by SWBT's effort, we expect its performance to continue at its current level. We also reject WorldCom's and McLeodUSA's complaint that the three-order process results in a loss of dial tone for their end users.<sup>429</sup> Working with both WorldCom and McLeodUSA, SWBT determined that both they were mistaken in their belief that the problem arose from the three-order process.<sup>430</sup> For example, WorldCom confirms that, after consulting with SWBT on this issue, 85 percent of the trouble tickets were problematic for reasons unrelated to the three-order process.<sup>431</sup> Additionally, SWBT asserts that McLeodUSA's problem order was not attributable to the three-order process but rather a clerical error.<sup>432</sup>

#### e. Provisioning

154. Consistent with our approach in prior section 271 orders, we examine the procedures SWBT follows when provisioning competitors' orders, its performance with respect to provisioning timeliness and its provisioning quality.<sup>433</sup> Based on the evidence in the record, we conclude that SWBT provisions 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.<sup>434</sup>

155. We find that SWBT demonstrates that it provides nondiscriminatory access to its provisioning processes. In the *SWBT Texas Order*, we found that SWBT's pre-ordering and ordering systems provided competing carriers with equivalent access to information on available service installation dates.<sup>435</sup> SWBT assigns due dates for service orders at the LSC and transmits the orders for provisioning to the LOC in a nondiscriminatory fashion.<sup>436</sup> SWBT's LSC uses the

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<sup>428</sup> See SWBT Ham Reply Aff. at paras. 62-63. We are also not persuaded by WorldCom's contention that we should reject SWBT's application due to SWBT's failure to propose a permanent solution to this issue. See WorldCom January 3, 2001 *Ex Parte* Letter at 11.

<sup>429</sup> See McLeodUSA Comments at 31-33; WorldCom Comments at 15-17.

<sup>430</sup> See SWBT Noland Aff. at paras. 39-40.

<sup>431</sup> See WorldCom January 3, 2001 *Ex Parte* Letter at 12.

<sup>432</sup> See SWBT Noland Reply Aff. at para. 41.

<sup>433</sup> See *Bell Atlantic New York*, 15 FCC Rcd at 4058, para. 196. For provisioning timeliness, we look to missed due dates and average installation intervals and for provisioning quality, we look to service problems experienced at the provisioning stage.

<sup>434</sup> We discuss loop provisioning below. See section V.D., *infra*.

<sup>435</sup> See *SWBT Texas Order*, 15 FCC Rcd at 18453, para. 195.

<sup>436</sup> See SWBT Noland/Smith Aff. at para. 96.

same due date selection and provisioning flows for competitor's orders as SWBT's retail service representatives use for provisioning service to SWBT's retail customers. For example, due dates for residential and simple business orders are determined by accessing SWBT's proprietary pre-ordering and ordering interface EASE, and due dates are assigned by the LSC depending on work load demand on installation forces.<sup>437</sup> In the event that an order requires fieldwork, the next available date will be assigned using the same procedures regardless of whether SWBT's retail or wholesale office requests the date.<sup>438</sup> Moreover, no competitor contends in this proceeding that SWBT does not allow nondiscriminatory access to its provisioning due date systems or even challenges its provisioning procedures.

**(i) Resale Orders**

156. We conclude that SWBT provisions orders for resale "POTS" and "specials" to competitors in substantially the same time that it provisions equivalent orders to itself.<sup>439</sup> As in our previous section 271 orders, we review SWBT's performance data to determine whether it provisions resale service at parity with its analogous retail services.<sup>440</sup> SWBT demonstrates that it misses fewer competitors' customer appointments for installing resale POTS and special services, and provisions such services within equivalent average intervals, as compared to appointments and service for its own retail customers.<sup>441</sup> Specifically, the data indicate that SWBT generally satisfied the parity standards for resale residential and most business POTS orders from July through October 2000 in both Kansas and Oklahoma, narrowly missing the parity mark for one sub-measurement.<sup>442</sup> Moreover, the Texas performance data show that SWBT has generally satisfied the parity standard for these measurements as well.<sup>443</sup> Considering that the disparities

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<sup>437</sup> EASE is the pre-ordering and ordering interface service order negotiation system used by SWBT and available to competing carriers for resold residence and simple business orders. *See* SWBT Ham Aff. at para. 129.

<sup>438</sup> *See* SWBT Noland/Smith Aff. at para. 33.

<sup>439</sup> SWBT's resale "specials" include orders for DDS, DS1, DS3, voice grade private line, ISDN-BRI, ISDN-PRI, DSL and any other available resold services. *See* SWBT Dysart Aff. at Attachment F, at 77.

<sup>440</sup> *See* SWBT Texas Order, 15 FCC Rcd at 18452, para. 194.

<sup>441</sup> *See* SWBT Aggregated Performance Data, Measurement Nos. 27-01 to 27-04, 29-01 to 29-04, 43-01 to 43-08, and 45-01 to 45-08, Kansas and Oklahoma, at 271-No. 27a, 271-No. 29-a, 271-No. 43a-b and 271-No. 45a-b.

<sup>442</sup> *See* SWBT Aggregated Performance Data, Measurement No. 29-04, Kansas and Oklahoma, ("Percent SWBT Caused Missed Due Dates-No Field Work-Business-POTS – Resale"), at 271-No. 29-a. In Oklahoma, the disparity was 0.01 percent in July, 0.65 percent in August, 0.43 percent in September and 1.20 percent in October. In Kansas, the disparity was 0.09 percent in July, 1.17 percent in August, 0.78 percent in September and 3.32 percent in October.

<sup>443</sup> *See* SWBT Aggregated Performance Data, Measurement Nos. 27-01 to 27-04, 29-01 to 29-04, 43-01 to 43-08, and 45-01 to 45-08, Texas, at 271-No. 27a, 271-No. 29-a, 271-No. 43a-b and 271-No. 45a-b. SWBT's only disparities were in Measurement No. 29-02 (disparity of 0.80 percent in August and 0.42 percent in September), Measurement No. 29-03 (disparity of 0.11 percent in October) and Measurement No. 29-04 (disparity of 0.21 percent in September).

were minimal and that no commenter complained about SWBT's performance, we conclude that this does not warrant a finding of checklist noncompliance.

157. SWBT also demonstrates that the quality of resale installations provided to competitors' customers was the same as, or better than, similar work performed for its own retail customers. The data demonstrate that SWBT's performance generally satisfied the parity standard for each type of resale POTS and specials service in both Kansas and Oklahoma from July through October.<sup>444</sup> We find, however, that the disparities do not appear to be competitively significant in that the numbers of orders provisioned were small or that the actual disparities were slight.<sup>445</sup> Additionally, SWBT's performance in Texas demonstrates that it generally satisfies the parity standard.<sup>446</sup> Considering the foregoing and that no commenter complained about these issues, we find that SWBT's performance supports a finding of checklist compliance.

## (ii) UNE-P Orders

158. Based on a review of corresponding performance measurements for UNE-P service, we conclude that SWBT also provisions competing carrier orders for these network combinations in the same time as it provisions equivalent retail services and at the same level of quality (*i.e.*, with a comparably low level of troubles reported within the first ten days after installation). SWBT's performance data demonstrate that, for the last four months in both states, SWBT provisioned UNE-P orders in substantially the same time that it provisioned similar orders for itself.<sup>447</sup> SWBT's data also indicate that, over the last four months, it provisioned UNE-P orders in substantially the same manner (*i.e.* quality) as it provisioned comparable retail orders for

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<sup>444</sup> See SWBT Aggregate Performance Data, Measurement Nos. 35-01 to 35-08 and 46-01 to 46-08, Kansas and Oklahoma, at 271-No. 35a-b and 271-No. 46a-b.

<sup>445</sup> While some of the dozens of sub-measurements in this area reflected disparities, none suggest a level of poor performance that warrants a finding of checklist noncompliance. For example, several performance measurements simply do not provide a meaningful indication of SWBT's performance because the volumes of orders are so low, such as SWBT Aggregate Performance Data, Measurement Nos. 35-05 and 35-06, Kansas and Oklahoma, at 271-No. 35b (in four months, competitors placed a total of 4 orders in Kansas for Measurement 35-05, and a total of 9 orders in Kansas and 4 in Oklahoma for Measurement 35-06). Other measurements have minimal disparities, such as SWBT Aggregate Performance Data, Measurement 35-08, Kansas, at 271-No. 35b (in the last three months, the disparity was 1.37 percent in August, 1.01 percent in September and 1.85 percent in October). Finally, other disparities were scattered and indicated no pattern of disparate performance, such as SWBT Aggregate Performance Data, Measurement 35-01, Kansas, at 271-No. 35a (disparity of 0.83 percent in July and 1.03 percent in October but better than parity in the other months).

<sup>446</sup> See SWBT Aggregate Performance Data, Measurement Nos. 35-01 to 35-08 and 46-01 to 46-08, Texas, at 271-No. 35a-b and 271-No. 46a-b. SWBT did not satisfy the parity standard in Texas the last four months for Measurement 35-05, which tracks one type of installation-related trouble report (*i.e.* for trouble requiring dispatch for residential orders). SWBT's performance was satisfactory for all other related measurements (*i.e.* installation related non-dispatch residential troubles and all troubles on business orders).

<sup>447</sup> See SWBT Aggregate Performance Data, Measurement Nos. 27 and 29, Kansas and Oklahoma, at 271-No. 27b and 271-No. 27b.

itself in Kansas and Oklahoma.<sup>448</sup> While there are disparities with respect to the sub-measurements relating to UNE-P provisioning, these disparities are minimal.<sup>449</sup> Taken as a whole, we find this performance to be acceptable. In addition, performance data from Texas demonstrate that SWBT satisfied the parity measurement.<sup>450</sup> Since the disparity in these sub-measurements is slight and no commenter complained about this issue, we find that SWBT's performance supports a finding of checklist compliance, particularly in light of SWBT's performance in Texas.

### (iii) Other Issues

159. *Number Portability and Loop Cutover Coordination.* We reject allegations made by carriers that SWBT has problems coordinating number portability with loop cutovers.<sup>451</sup> KMC, for example, maintains that, in Kansas, SWBT is either incapable or unwilling to coordinate loop cutovers in a manner that provides accurate provisioning dates and prevents end users from losing service.<sup>452</sup> Similarly, Sprint contends that SWBT fails to process timely LNP cancellation notices for xDSL loops, resulting in service outages for Sprint's customers.<sup>453</sup> Based upon our review of the record, we do not find that these allegations reflect a systemic failure that would warrant checklist noncompliance.<sup>454</sup>

160. We also reject Sprint's contention that, in Kansas, SWBT has not demonstrated that it is providing nondiscriminatory access to ported loops.<sup>455</sup> While Sprint maintains that SWBT has not met the benchmark with regard to premature disconnects for local number portability orders in June,<sup>456</sup> performance information during the period pertinent to this application indicate that these problems have been addressed and no longer appear to be an

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<sup>448</sup> See SWBT Aggregated Performance Data, Measurement No. 35c, at 271-No. 35c.

<sup>449</sup> For timeliness, see SWBT Aggregate Performance Data, Measurement No. 27-05, Kansas and Oklahoma, at 271-No. 27b (disparity of 1.05 days in July and 0.12 day in August in Kansas and disparity of 0.51 day in Oklahoma in August); Measurement No. 29-06, Oklahoma, at 271-No. 29b (disparity of 4.54 percent in July, 0.6 percent in September and 0.63 percent in October.) For quality, see Measurement No. 35-12, Oklahoma, at 271-No. 35c (disparity of 0.73 percent in July and August; 1.1 percent in September, and 0.2 percent in October).

<sup>450</sup> See SWBT Aggregate Performance Data, Measure Nos. 27, 29, and 35, Texas, at 271-No. 27b, 271-No. 29b, and 271-No. 35c.

<sup>451</sup> KMC Comments at 4; Sprint Comments at 64.

<sup>452</sup> KMC Comments at 4; *see also* Department of Justice Evaluation at 33.

<sup>453</sup> Sprint Comments at 64.

<sup>454</sup> See *supra* section IV.C.2.b.i (for further discussion regarding SWBT's hot cut provisioning); *see also* SWBT Reply at 94.

<sup>455</sup> Sprint Comments at 64-65.

<sup>456</sup> *Id.* at 64.

issue.<sup>457</sup> SWBT has also generally met the benchmark for the time it applies the ten-digit trigger prior to the local number portability due date. In July, the ten-digit trigger was implemented on only 73.91% of the orders.<sup>458</sup> SWBT has, however, met the benchmark in August, September and October.<sup>459</sup> In light of its improving performance in Kansas, we find that SWBT's performance indicates that it is providing nondiscriminatory access to ported loops. We are further encouraged that SWBT's performance in Kansas and Oklahoma on these measurements is in conformance with its performance in Texas.

#### f. Maintenance and Repair

161. *Functionality.* We conclude that SWBT offers maintenance and repair interfaces and systems that enable a requesting carrier to access all the same functions that are available to SWBT's retail representatives. SWBT provides competing carriers with several options for requesting maintenance and reporting troubles. Competing carriers may electronically access SWBT's maintenance and repair functions for UNE-Loop, UNE-P, and resale through the GUI Toolbar Trouble Administration interface (Toolbar) or the application-to-application Electronic Bonding Trouble Administration interface (EBTA).<sup>460</sup> Both the EBTA and Toolbar interfaces flow directly into SWBT's back-end OSS systems and enable competing carriers to perform the same functions, in the same manner, as SWBT's retail operations.<sup>461</sup> We note that SWBT supports the same maintenance and repair functions in Kansas and Oklahoma as it provides carriers in Texas and that we found these functions to be satisfactory in the *SWBT Texas Order*.<sup>462</sup> Based on this showing, and because no carrier disputes SWBT's case in this respect, we find once again that SWBT provides carriers with access to necessary maintenance and repair functions.

162. *Interface Response Times, Time to Restore and Quality of Work Performed.* We conclude that SWBT's maintenance and repair systems and processes are operationally ready and

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<sup>457</sup> SWBT Reply at 94; SWBT Dysart Reply Aff. at para. 108.

<sup>458</sup> Sprint Comments at 65.

<sup>459</sup> SWBT Reply at 94; SWBT Dysart Aff. at para. 162.

<sup>460</sup> SWBT Ham Aff. at para. 256; SWBT Noland/Smith Aff. at paras. 99-100.

<sup>461</sup> SWBT Ham Aff. at paras. 261, 266. The Toolbar interface enables carriers to perform the same functions as SWBT's retail operations, including: (1) issue trouble reports; (2) request and receive a mechanized loop test; (3) determine that status of an opened trouble report; (4) check history; (5) view a list of open trouble reports; and (6) view a list of trouble reports closed within the last 120 days. *Id.* at para. 258. SWBT also offers requesting carriers non-electronic access to its maintenance and repair functions through the SWBT Local Operations Center (LOC), which handles all competing carrier repair and maintenance requests for UNEs, resale, and interconnection. *See* SWBT Noland/Smith Aff. at paras. 18, 99; SWBT Ham Aff. at para. 76, 256. The LOC is staffed by nearly 400 employees and is available through a hotline number 24 hours a day, seven days a week. SWBT Noland/Smith Aff. at paras. 18, 20.

<sup>462</sup> *SWBT Texas Order*, 15 FCC Rcd at 18457, para. 201.

treat competing carriers in a nondiscriminatory manner. In previous section 271 applications, we reviewed performance data reflecting the timeliness of the BOC's interfaces used for maintenance and repair functions, the timeliness of its repair work, and the quality of the repair work. SWBT's performance data indicates satisfactory performance in each of these areas. First, because SWBT has shown that carriers in Kansas and Oklahoma have access to the same Toolbar Trouble Administration interface as carriers in Texas, we find, as we did in the *SWBT Texas Order*, that SWBT is able to respond to competing carrier requests for maintenance and repair inquiries in substantially the same time as for itself.<sup>463</sup> Second, the performance data show that SWBT repairs trouble reports for competing LECs' customers in substantially the same time as it repairs its own retail customers' troubles,<sup>464</sup> and meets substantially the same percentage of repair commitments for troubles on competing carriers' lines as it does for comparable retail repair commitments.<sup>465</sup> Third, the data reveal that competing carriers' customers that receive service via resale or UNE-P generally reported the same or a lower rate of trouble reports,<sup>466</sup> and the same rate of repeat trouble reports,<sup>467</sup> as SWBT's retail customers. Performance data in Texas confirm our findings

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<sup>463</sup> See *SWBT Ham Aff.* at paras. 4, 13; *SWBT Mah Reply Aff.* at para. 5; see also *SWBT Texas Order*, 15 FCC Rcd at 18459, para. 205. We note that no carrier claimed that SWBT's Toolbar interface acts differently in Kansas or Oklahoma than in Texas, or otherwise complained that this interface fails to provide timely responses.

<sup>464</sup> See *SWBT Aggregated Performance Data*, Measurement Nos. 39 and 52, Kansas and Oklahoma, at 271-No. 39a-39c and 271-No. 52a (average time to repair reported troubles). SWBT took longer to repair one type of trouble for competing LECs' customers than for its own customers – service-affecting troubles (as opposed to service outages) that do not require dispatch (as opposed to those that require a technician's visit). See *SWBT Aggregated Performance Data*, Measurement No. 39-03, Oklahoma, at 271-No. 39a. We note that performance on related measurements has been generally satisfactory in Oklahoma. Moreover, because the volume of observations is so low (between 10 and 20 troubles reported per month), we look to SWBT's performance in Texas where, under higher volumes, SWBT has consistently satisfied the parity standard. See *SWBT Aggregated Performance Data*, Measurement No. 39, Texas, at 271-No. 39a-39c.

<sup>465</sup> See *SWBT Aggregated Performance Data*, Measurement No. 38, Kansas and Oklahoma, at 271-No. 38a-b. SWBT missed repair commitments for competing carriers for the last four months for one sub-measurement, missing 14.06 percent in July (as opposed to 8.52 percent for itself), 11.69 percent in August (6.73 percent for itself), 12.68 percent in September (5.44 percent for itself), and 7.87 percent in October (7.52 percent for itself). See *SWBT Aggregated Performance Data*, Measurement No. 38-05, Kansas, at 271-No. 38b. This performance, in and of itself, does not appear to be a basis for a finding of checklist noncompliance in light of the fact that SWBT's performance, as a whole, is acceptable and when no commenter has identified this as an issue. We also are encouraged by SWBT's improved performance.

<sup>466</sup> See *SWBT Aggregated Performance Data*, Measurement Nos. 37 and 54, Kansas and Oklahoma, at 271-No. 37 and 271-No. 54 (trouble report rate). SWBT's data indicate that its competitors experienced a slightly higher trouble rate for resold business service than SWBT's business customers experienced in September and October, 2000. See *SWBT Aggregated Performance Data*, Measurement No. 37-02, Kansas, at 271-No. 37. Because the discrepancy between these two rates was slight (0.14 percent in September and 0.21 percent in October) and because no commenter complained about this performance, this performance differential does not appear to be competitively significant.

<sup>467</sup> See *SWBT Aggregated Performance Data*, Measurement No. 41, Kansas and Oklahoma, at 271-No. 41. While SWBT's performance is satisfactory in the residential and business resale categories, the percentage of repeat trouble reports experienced by its competitors' UNE-P customers has climbed recently and has been out-of-(continued...)

that SWBT is providing adequate access to functions associated with SWBT's repair and maintenance systems in Kansas and Oklahoma.<sup>468</sup> Finally, we note that no commenter has provided evidence to suggest that SWBT's systems and processes are inadequate in this area.

**g. Billing**

163. We conclude that SWBT provides nondiscriminatory access to its billing functions, which is necessary to enable competing carriers to provide accurate and timely bills to their customers.<sup>469</sup> We base our conclusion on an assessment of SWBT's billing processes and systems, and its performance data. As we have required in prior section 271 orders, SWBT 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 SWBT provides such information to itself, and wholesale bills in a manner that gives competing carriers a meaningful opportunity to compete.<sup>470</sup> SWBT explains that it 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.<sup>471</sup> The Usage Extract itemizes usage for records for competing carrier customers, while carrier bills serve as a monthly invoice that incorporates charges for all of the products and services provided to a competing carrier by SWBT. Similar mechanisms are used to provide billing information to SWBT's retail operations. As we concluded in the *SWBT Texas Order*, then, SWBT provides competing carriers nondiscriminatory access to the functionality of its billing systems.

164. We find that the performance standards and measurements established by the Texas Commission, and adopted by the Kansas and Oklahoma Commissions, provide a valuable measure of SWBT's ability to provide competing carriers with usage data in substantially the same time and manner that SWBT provides such information to itself. We note that SWBT reports performance data relating to the timeliness and accuracy of its usage data on a company-wide basis, rather than a state-specific basis. Because SWBT has shown that its systems and

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parity for the last two months. See SWBT Aggregated Performance Data, Measurement No. 41-03, Oklahoma, at 271-No. 41. We would be concerned were this trend to continue, but do not find that the two out-of-parity months, in light of the satisfactory performance on related measures and the absence of specific complaints from competitors, warrants a finding of checklist noncompliance.

<sup>468</sup> See SWBT Aggregated Performance Data, Measurement Nos. 37, 41 and 54, Texas, at 271-No. 37, 271-No. 41 and 271-No. 54.

<sup>469</sup> See *SWBT Texas Order* at 15 FCC Rcd at 18461, para. 210.

<sup>470</sup> See *id.*

<sup>471</sup> See SWBT McLaughlin Aff. at para. 4; SWBT McLaughlin Reply Aff. at paras. 3-12. SWBT explains that bills for Kansas, Oklahoma and Texas are processed in the same service centers, using the same systems and overseen by the same personnel. While the systems may use different tables, containing state-specific product codes and state-specific prices, there is nothing in the record that the use of these tables would change the functionality or performance of these billing systems.

processes used for providing billing information to competing carriers are essentially the same on a company-wide basis, and because no carrier has challenged SWBT's assertion or shown that it receives different treatment in Oklahoma or Kansas than in other SWBT states, we find that this region-wide data is relevant in this proceeding.<sup>472</sup> These performance data indicate that, during the period from July 2000 to October 2000, SWBT's actual commercial performance consistently satisfied the standards for usage data timeliness and accuracy.<sup>473</sup>

165. We also find, as we did in the *SWBT Texas Order*, that SWBT's systems provide competing carriers with wholesale bills in a manner that enables them a meaningful opportunity to compete. SWBT's performance data provide evidence regarding the timeliness of only a small fraction of carriers' bills (*i.e.*, for those carriers who choose to receive their bills via EDI).<sup>474</sup> SWBT explains, however, that its systems are designed to provide carrier bills in a prompt manner, whether delivered electronically or by paper.<sup>475</sup> Because no carrier has offered evidence undermining this showing, we conclude that SWBT has carried its burden of demonstrating that it does not discriminate against competing carriers in the provision of wholesale bills.

#### **h. Change Management Process**

166. As explained in our prior orders, competing carriers need information about, and specifications for, an incumbent's systems and interfaces in order to develop and modify their systems and procedures to access the incumbent's OSS functions.<sup>476</sup> 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

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<sup>472</sup> *Id.* We note that Ernst & Young, in its review to determine whether certain SWBT systems are the same region-wide, did not consider SWBT's billing systems. See Ernst & Young Supplemental Report. While SWBT's showing that its billing functions are the same region-wide was sufficient to allow us to consider region-wide data in this instance, we note a similar showing may not always allow us to do so in future applications. An independent reviewer's report could prove to be critical in supporting the relevance another state's OSS, for example, if there were evidence in the record that appeared to undermine this type of assertion (such as evidence suggesting that the billing systems function differently in different states, or competing carriers' assertions that they receive different treatment in different states).

<sup>473</sup> See SWBT Aggregated Performance Data, Measurement Nos. 14, 16 and 19, Kansas and Oklahoma, at 271-No. 14 and 271-No. 16/17/19.

<sup>474</sup> SWBT Aggregated Performance Data, Measurement No. 18, Kansas and Oklahoma, at 271-No. 15, 18 (demonstrating that, for the period of July to October, 2000, SWBT has returned 100% of bills returned via EDI on-time, in both Kansas and Oklahoma).

<sup>475</sup> See SWBT McLaughlin Aff. at para. 30 (explaining that bills are mailed or transmitted by the sixth workday associated with the bill date).

<sup>476</sup> See *e.g.*, *SWBT Texas Order*, 15 FCC Rcd at 18403, para. 106; *Bell Atlantic New York Order*, 15 FCC Rcd. at 3999, para. 102.

understand how to implement and use all of the OSS functions available to them.”<sup>477</sup> As part of this demonstration, the Commission has given substantial consideration to the existence of an adequate change management process and evidence that the BOC has adhered to this process over time.<sup>478</sup> We conclude that SWBT demonstrates it provides the documentation and support necessary to provide competing carriers nondiscriminatory access to its OSS by showing that it has an adequate change management process in its five-state region, which includes Kansas and Oklahoma. The record also reflects that SWBT has adhered to its change management process over time. Indeed, no commenter in this proceeding has complained about SWBT’s change management process. All of this contributes to our finding that SWBT provides access to its OSS in a manner that allows an efficient competitor a meaningful opportunity to compete.

167. *Adequacy of SWBT’s Change Management Plan.* SWBT employs a region-wide change management plan that is identical in each of its five in-region states. Accordingly, the change management process used in Kansas and Oklahoma has the same characteristics and benefits as the process used by SWBT in Texas. We are thus able to conclude, for the same reasons that we did in the *SWBT Texas Order*, that SWBT’s change management plan is adequate to achieve the ends described above.<sup>479</sup> Moreover, the SWBT change management plan now includes an improvement that was not available during the Texas 271 proceeding. Specifically, in the *SWBT Texas Order* we noted that, although it was not currently deploying such functionality, we were encouraged by SWBT’s plan to implement a process known as “versioning.”<sup>480</sup> Under versioning, SWBT continues to support an existing version of software for EDI/CORBA pre-ordering and EDI ordering interfaces even after releasing a subsequent version of the software.<sup>481</sup> We approve of SWBT’s subsequent implementation and find that versioning enhances SWBT’s change management plan by providing significant additional assurance that changes will not disrupt competing carriers’ use of SWBT’s OSS.

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<sup>477</sup> *SWBT Texas Order*, 15 FCC Rcd at 18403, para. 106; *Bell Atlantic New York Order*, 15 FCC Rcd. at 3999, para. 102.

<sup>478</sup> *SWBT Texas Order*, 15 FCC Rcd at 18403, para. 106; *Bell Atlantic New York Order*, 15 FCC Rcd. at 4000, para. 102. A 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. See *SWBT Texas Order*, 15 FCC Rcd at 18403-04, para. 107; *Bell Atlantic New York Order*, 15 FCC Rcd. at 4000, para. 103.

<sup>479</sup> See *SWBT Texas Order* in which we concluded that SWBT’s change management plan was adequate based on, *inter alia*, the “go/no go” vote process (15 FCC Rcd at 18409, para. 116), adequate documentation (15 FCC Rcd at 18411, para. 119), compliance with documented procedures (15 FCC Rcd at 18415-16, para. 127), and the testing environment (15 FCC Rcd at 18420, para. 134).

<sup>480</sup> See *SWBT Texas Order*, 15 FCC Rcd at 18406-07, para. 112.

<sup>481</sup> *SWBT Ham Aff.* at paras. 72-73; see also, *SWBT Ham Aff.*, Attach. G. at 8, § 3.4, (Change Agreement) (providing that the most recent prior release will be maintained in service after a new release).

168. We also conclude, as we did in the *SWBT Texas Order*, that SWBT provides competing carriers access to a stable testing environment that allows carriers to certify that their OSS will interact effectively with SWBT's OSS. The record demonstrates, with even more persuasive evidence than we relied on in the Texas order, that SWBT's testing environment available to competing LECs in Kansas and Oklahoma is stable, adequately mirrors the production environment, affords competing carriers an opportunity to test representative pre-ordering and ordering transactions, and offers the extended testing periods that competing carriers need for EDI implementation and new release testing. Since the time that SWBT filed its Texas application, thirteen additional carriers have utilized SWBT's testing environment to achieve production status on SWBT's EDI ordering gateway, with eight additional competing carriers currently in the process of testing and implementing EDI. Moreover, SWBT has released three different EDI/LSR releases and two LEX releases, and nine competing carriers were able to use the testing environment to sample these releases.<sup>482</sup>

169. *Compliance With Its Change Management Process.* SWBT has demonstrated a pattern of compliance with its documented change management processes and procedures, providing competing carriers with change management notification and documentation in a manner sufficiently timely to allow an efficient competitor a meaningful opportunity to compete. No party disputes this contention. Indeed, there is nothing in the record to suggest that parties are dissatisfied with SWBT's performance relating to three region-wide EDI/LSR releases. SWBT has recently implemented a performance measure to track the number of "late" or supplemental notices it sends out after the deadline for release specifications. Although the measurement indicates that over half of the change announcements SWBT has sent to competing carriers have been "late," we find that these results do not suggest that SWBT is failing to follow the change process, because SWBT explains that nearly all of the instances recorded in these measurements are merely supplemental information to notices that were provided in a timely manner. Therefore, we find this disparity to be competitively insignificant.<sup>483</sup>

170. *Training, Technical Assistance and Help Desk Support.* As we did in the *SWBT Texas Order*, we conclude that SWBT demonstrates that it provides the technical assistance and help desk support necessary to give competing carriers nondiscriminatory access to its OSS.<sup>484</sup>

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<sup>482</sup> SWBT Ham Aff. at para. 65.

<sup>483</sup> As SWBT explains, many of these "late" notices were letters sent to correct or update existing final requirements for new releases. See Letter from Jan Price, Associate Director-Federal Regulatory, SBC Corp., to Magalie Roman Salas, Secretary, Federal Communications Commission (Dec. 19, 2000) at 2 (SWBT Dec. 19, 2000 *Ex Parte* Letter). In October, SWBT sent four letters that were not "on time." Of the four, two were exception requests about which no competing carrier complained. We find this disparity is not competitively significant. No competing carrier claimed to have been harmed by the "late" notices (see SWBT Dec. 19, 2000 *Ex Parte* Letter at 3) and competing carriers are further protected under SWBT's change management process by their ability to version SWBT software. SWBT Dysart Aff., Attach. F at 179-180. Moreover, the fact that SWBT is sending these notifications and reporting them in its performance reports also is an indication that it is following its agreed-upon procedures.

<sup>484</sup> *SWBT Texas Order*, 15 FCC Rcd. at 18424, para. 144.

The same organizations that we found performed these functions in the Texas proceeding also perform these functions for competing carriers operating in Kansas and Oklahoma.<sup>485</sup> SWBT demonstrates that it provides efficient competitors a meaningful opportunity to compete by enabling them to understand how to implement and use all of the OSS functions available to them. Because these support organizations' personnel are the same as those used by competing carriers in Texas, and because the record does not indicate that SWBT support organizations provide inadequate or discriminatory treatment to competing carriers, we find that we can rely on these findings again in our disposition of this joint application.

### 3. UNE Combinations

171. In this section, we conclude that SWBT provides nondiscriminatory access to combinations of unbundled network elements.<sup>486</sup> Based on the evidence in the record, SWBT demonstrates that it provides access to UNEs in a manner that allows requesting carriers to combine those elements, and that SWBT provides access to preexisting combinations of network elements.<sup>487</sup> We reject allegations that SWBT imposes unreasonable and discriminatory restrictions on certain types of combinations. We base our conclusion on evidence of actual commercial usage, and also on SWBT's legal obligation to provide such access as established in the K2A and O2A.

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<sup>485</sup> SWBT Noland/Smith Aff. at para. 11. SWBT has a Local Service Center staffed with approximately 1,338 employees that provides competing LECs with a single point of contact for issues regarding ordering, billing, and collections related to interconnection facilities, resold services and UNEs. *See* SWBT Ham Aff. at para. 76. SWBT's LSC employees and facilities serve all five states in the SWBT region, including Texas, Kansas and Oklahoma. SWBT Noland/Smith Aff. at paras. 14-17. In addition, SWBT's Local Operations Center, with 391 employees, supports the provisioning of UNEs, interconnection with SWBT's local network, and resold services as well as any maintenance and repair functions requested by competing carriers. The LOC serves as the single point of contact for maintenance and repair and is available to competing carriers in the entire five-state SWBT region 24 hours a day, 7 days a week. SWBT Noland/Smith Aff. at para. 18, 20; SWBT Ham Aff. at para. 76.

<sup>486</sup> 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 requirements of section 251(c)(3) . . ." 47 U.S.C. § 271(c)(2)(B)(ii). 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 . . ." 47 U.S.C. § 251(c)(3). 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.

<sup>487</sup> In previous section 271 orders, the Commission has 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. *SWBT Texas Order*, 15 FCC Rcd at 18463-64, paras. 213-215; *Ameritech Michigan Order*, 12 FCC Rcd at 20718-19. 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. *SWBT Texas Order*, 15 FCC Rcd 18464, at para. 215.

172. The record indicates that SWBT provides access to combinations of network elements in compliance with our UNE rules.<sup>488</sup> The K2A and O2A provisions regarding combinations of unbundled network elements are identical to those in the T2A, which we found in the *SWBT Texas Order* to comply with our UNE rules.<sup>489</sup> SWBT has a legal obligation, under the K2A and O2A, as well as certain other existing interconnection agreements and our rules, to provide access to preassembled combinations of network elements, including the loop-switch port platform combination (known as the UNE platform or UNE-P) and the Enhanced Extended Link (EEL), a combination of loop and transport facilities.<sup>490</sup> The Kansas and Oklahoma Commissions likewise determined that SWBT provides access to combinations of network elements in compliance with our UNE rules.<sup>491</sup>

173. The record further indicates that SWBT provides access to network elements in a manner that allows competitive carriers to combine such network elements for themselves.<sup>492</sup> SWBT provides a variety of methods that allow competitive carriers to combine unbundled network elements. For example, in addition to the standard physical and virtual collocation arrangements, SWBT provides alternative collocation arrangements such as shared collocation cages, common cage, and cageless collocation arrangements, all of which may be used by competing LECs to combine network elements.<sup>493</sup> Where space for physical collocation is not available, SWBT also permits competing LECs to collocate their equipment in adjacent controlled

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<sup>488</sup> See SWBT Application at 45; Kansas Commission Comments at 19-20; Oklahoma Commission Sec. 271 Order at 167-68.

<sup>489</sup> See SWBT Sparks Aff. at para. 109.

<sup>490</sup> SWBT Application at 45; SWBT Sparks Aff. at paras. 108-120; Kansas 271 Agreement, Attach. 6, §§14.2 - 14.4, 14.7; Oklahoma 271 Agreement, Attach. 6, §§14.2 - 14.4, 14.7. In addition, under the terms of the Kansas and Oklahoma 271 Agreements, SWBT will combine unbundled local loops with unbundled local switch ports for competitive LECs to provide service to business customers until at least October 2002. SWBT Sparks Aff. at para. 115; Kansas 271 Agreement, Attach. 6, §§ 2.4, 14.3, 14.7; Oklahoma 271 Agreement, Attach. 6, §§ 2.4, 14.3, 14.7. After that date, in those SWBT central offices where there are four or more competitive LECs collocated and where SWBT has provided unbundled network elements, SWBT may elect not to combine unbundled network elements for a competitive LEC's business customers when the same UNEs are not already combined in that central office. See SWBT Sparks Aff. at para. 115. If SWBT makes such an election, it will provide the requesting carrier with access to a secured frame where the competitive LEC can perform its own combining of those elements. *Id.* SWBT will provide new combinations of unbundled local loop and switching not currently interconnected and functional in SWBT's network for the competitive LEC to provide service to residential customers through the full term of the K2A and O2A. *Id.* at para. 116.

<sup>491</sup> See Kansas Commission Comments at 19-20; Oklahoma Commission Sec. 271 Order at 167-69.

<sup>492</sup> SWBT Application at 46.

<sup>493</sup> SWBT Application at 46; SWBT Deere Aff. at paras. 173-87; SWBT Sparks Aff. at para. 111; Kansas 271 Agreement, Attach. 6; Oklahoma 271 Agreement, Attach. 6; see also section IV.D.2, *infra*, (discussing the terms and conditions for access to unbundled network elements through physical and virtual collocation arrangements).

environmental vaults or huts.<sup>494</sup> As required by our rules, competitive LECs may also request technically feasible methods of combining UNEs, other than collocation, that are consistent with the provisions of the 1996 Act and other governing statutes and decisions so that such carrier may combine network elements for themselves.<sup>495</sup> For example, SWBT will provide interested competitive LECs access to a secured frame room (or cabinet, where space constraints require) that is set aside for accomplishing the necessary connections.<sup>496</sup>

174. We reject Z-Tel's allegation that SWBT unlawfully restricts UNE-P carriers' use of UNEs to provide intraLATA toll service in Kansas and Oklahoma.<sup>497</sup> In its reply comments, Z-Tel argues, that SWBT recently determined to preclude competitors, including Z-Tel, from utilizing UNEs to provide intraLATA toll service to end users.<sup>498</sup> SWBT responds that Z-Tel's claim is incorrect, and that the relevant sections of the K2A and O2A are "exactly the same" as those sections in the T2A, which have been interpreted by the Texas Commission to preclude the use restriction of which Z-Tel complains.<sup>499</sup> Indeed, SWBT commits to "interpret those sections of the O2A and K2A in exactly the same fashion that it was ordered to in [Texas]."<sup>500</sup> Because we find that the O2A and K2A, by its terms, do not restrict the use of UNE-P to provide intraLATA toll service in Kansas and Oklahoma, and because we rely on SWBT's commitment to allow competing carriers to use UNE-P to provide interLATA toll service in Oklahoma and Kansas, we reject Z-Tel's claim. Should our reliance on SWBT's representations in this record prove to be misplaced, we will take the appropriate enforcement action at that time.

175. We also disagree with e.spire and other commenters that assert that SWBT's two-step EEL provisioning process intrinsically places unreasonable and discriminatory restrictions on

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<sup>494</sup> SWBT Application at 47; SWBT Sparks Aff. at para. 58.

<sup>495</sup> SWBT Application at 47; SWBT Sparks Aff. at para. 111; Kansas 271 Agreement Attach. 6, § 2.22; Oklahoma 271 Agreement Attach. 6, § 2.22.

<sup>496</sup> SWBT Sparks Aff. at paras. 121-23. Collocation is not required in order to use this option for combining network elements. *Id.* Furthermore, when competitors order UNEs for combining at the secured frame or cabinet, SWBT is required to cross-connect those elements to the frame or cabinet at no additional charge. *See* Kansas Commission Comments at 20; Oklahoma Commission Sec. 271 Order at 169.

<sup>497</sup> *See* Z-Tel Reply at 13-14.

<sup>498</sup> *See id.*, Attachment B. We note that Z-Tel raises this argument for the first time in its reply comments.

<sup>499</sup> *See* Letter from Eduardo Rodriguez, Director-Federal Regulatory, to Magalie Salas, Secretary, Federal Communications Commission, CC Docket No. 00-217 (filed December 22, 2000) (SWBT December 22 *Ex Parte* Letter); *see also* Z-Tel Reply at 14, n. 32. Because Z-Tel raised this issue for the first time in its reply comments, we find it appropriate to consider SWBT's *ex parte* response to Z-Tel's allegation.

<sup>500</sup> *See* SWBT December 22 *Ex Parte* Letter.

combinations of loop and transport network elements in violation of our *UNE Remand Orders*.<sup>501</sup> In our *UNE Remand Supplemental Order*, we temporarily conditioned a carrier's use of the EEL to provide exchange access services by requiring such use to include a significant amount of local exchange service, in addition to exchange access service, to given customers.<sup>502</sup> On June 2, 2000, we clarified and extended that interim measure in a *UNE Remand Supplemental Order Clarification*, establishing safe harbor guidelines for what constitutes a "significant amount of local exchange service."<sup>503</sup> In that order, we also established the procedures by which a requesting carrier may convert special access circuits to unbundled loop-transport combinations. To initiate the process, a requesting carrier must certify to the incumbent LEC that it is providing a significant amount of local exchange service over circuits currently purchased through the incumbent LEC's access tariffs, and specify the local usage option under which the requesting carrier seeks to qualify.<sup>504</sup> Once a requesting carrier properly certifies that it is providing a significant amount of local exchange service, we required that the process by which special access circuits are converted to unbundled loop-transport combinations should be "simple and accomplished without delay."<sup>505</sup> We specifically noted that the Access Service Request (ASR) process would likely suffice.<sup>506</sup> In particular, we emphasized the utility of the ASR process for conversions because it does not require a special access circuit to be disconnected and re-connected simply to accomplish the billing changes necessary to implement UNE pricing.

176. E.spire argues that SWBT's two-step process for converting access circuits to UNE pricing, which requires a requesting carrier to complete both an ASR and LSR, violates the rules set forth in the *Supplemental Order Clarification* governing EEL provisioning.<sup>507</sup> We

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<sup>501</sup> E.spire Comments at 3; Focal Comments at 2; *see also SWBT Texas Order*, 15 FCC Rcd 18468-70, paras. 224-228 (discussing the Commission's reasoning for restricting the use of EELs to provide exchange access services).

<sup>502</sup> *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, Supplemental Order, FCC 99-370 at paras. 4-5 (rel. Nov. 24, 1999) (*UNE Remand Supplemental Order*); *see Competitive Telecommunications Association v. FCC*, 117 F.3d 1068, 1073-75 (8<sup>th</sup> Cir. 1997) and *MCI Telecommunications Corp. v. FCC*, 750 F.2d 135, 140 (D.C. Cir. 1984)). The *Supplemental Order* extended the terms of the temporary constraint imposed in the *UNE Remand Order* beyond merely the "entrance facility" portion of special access because we had originally underestimated the extent of the policy implications associated with temporarily constraining interexchange carriers only from substituting entrance facilities for incumbent LECs' special access service. *Supplemental Order* at para. 4 & n.5 (extending temporary constraint to include combinations of unbundled loops and dedicated interoffice transport network elements).

<sup>503</sup> *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, Supplemental Order Clarification, FCC 00-183 at paras. 1, 21-23 (rel. June 2, 2000) (*Supplemental Order Clarification*).

<sup>504</sup> *Id.* at paras. 29-30.

<sup>505</sup> *Id.* at para. 30.

<sup>506</sup> *Id.*

<sup>507</sup> *See* e.spire Comments at 6; *see also* Focal Comments *passim*; ALTS Reply at 10.

disagree. In our *Supplemental Order Clarification*, we established a general rule to govern the EEL provisioning process in recognition that incumbent LECs may adopt different procedures to ensure that access circuits are converted to unbundled loop-transport combinations simply and without delay. We find that our rules do not expressly prohibit the two-step process performed by SWBT. Accordingly, based on the record in this proceeding, we can not conclude that SWBT's EEL provisioning process runs afoul of the rules set forth in our *Supplemental Order Clarification* without further evidence that such process cannot be accomplished simply, quickly and without an increased risk of disconnection. We note, however, that e.spire states in its comments that it has initiated a possible enforcement action by requesting, pursuant to Commission Rule 1.730(b),<sup>508</sup> to begin pre-filing settlement negotiations with SWBT, claiming that SWBT has violated the Commission's rules on EELs provisioning.<sup>509</sup> If it is determined on a more developed record that SWBT has indeed violated our UNE rules, we will, in that instance, take the appropriate enforcement action.<sup>510</sup>

### C. Checklist Item 4 – Unbundled Local Loops

#### 1. Background

177. 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.”<sup>511</sup> 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.<sup>512</sup>

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<sup>508</sup> 47 C.F.R. § 1.730(b).

<sup>509</sup> See e.spire comments at 7, n. 15 (citing Letter from Steven Augustino, Counsel to e.spire, to Frank Lamancusa, Deputy Division Chief, Market Disputes Resolution Division, Federal Communications Commission (filed Nov. 3, 2000)).

<sup>510</sup> As we have found in past section 271 proceedings, the section 271 process simply could not function if we were required to resolve every interpretive dispute about the precise content of an incumbent LEC's obligations to its competitors, including fact-intensive interpretive disputes. See *SWBT Texas Order*, 15 FCC Rcd at 18366-67, paras. 22-27.

<sup>511</sup> 47 U.S.C. § 271(c)(2)(B)(iv).

<sup>512</sup> *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).

178. 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.<sup>513</sup> 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.

## 2. Discussion

179. We conclude that SWBT demonstrates that it provides unbundled local loops in both Kansas and Oklahoma in accordance with the requirements of section 271. Specifically, we find that SWBT demonstrates that it provides new stand-alone loops, including xDSL-capable loops, in substantially the same time and manner as it does for SWBT’s own retail service.<sup>514</sup> We also conclude that SWBT demonstrates that it provides voice grade unbundled loops through “hot cut” conversions in a manner that affords competing carriers a meaningful opportunity to compete. In evaluating SWBT’s overall performance in providing unbundled local loops, we examine SWBT’s performance in the aggregate (i.e., by all loop types) as well as its performance for specific loop types (i.e., by voice grade, xDSL-capable, BRI, and DS-1 types). In doing so, we are looking for patterns of systematic performance disparities that have resulted in competitive harm or otherwise denied competing carriers a meaningful opportunity to compete.

180. As we have noted in previous section 271 Orders, we examine the data for all the various loop performance measurements, as well as the factors surrounding the development of these measures. Isolated instances of performance disparity, especially when the margin of disparity or the number of measurements impacted is small, will generally not result in findings of checklist noncompliance. We also look to SWBT’s performance in Texas (where SWBT has been handling commercial volumes to a greater degree and for a longer period of time) as evidence relevant to this checklist item because volumes in Kansas and Oklahoma are low and SWBT’s OSS is the same as in Texas. Finally, we evaluate the information SWBT provided

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<sup>513</sup> *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.

<sup>514</sup> Where no retail analogue exists to compare SWBT’s performance towards competing carriers to SWBT’s performance to its retail operations, we evaluate SWBT’s showing to ascertain whether SWBT affords competing carriers a meaningful opportunity to compete. As a result, we sometimes rely on performance measurements that use a benchmark instead of a parity standard.

describing its processes for installing and maintaining loops, the capabilities of its workforce, and employee training to show that it provisions and maintains unbundled loops using the same methods and procedures throughout its five-state region.<sup>515</sup>

181. As explained below, we evaluate SWBT's compliance with this checklist item by evaluating several performance measurements as they apply to five different types of unbundled local loops.<sup>516</sup> For most measurements, SWBT shows that it performs at an acceptable level, generally meeting or exceeding the established benchmark or parity standards in the months leading up to its application. We find that SWBT's overall performance meets the checklist requirements, even though some performance measurements indicate isolated problems for some types of unbundled loops. As explained below, we believe that the marginal disparities in some measurements are not competitively significant and do not show signs of systemic discrimination. Instead of faulting a BOC's showing for checklist item 4, we believe such performance issues are better addressed through a Performance Assurance Plan, targeted enforcement action, or carrier-initiated complaints under the Act or an interconnection agreement.

#### **a. xDSL-Capable Loops**

182. We find that SWBT demonstrates that it is providing xDSL-capable loops in accordance with the requirements of checklist item 4. In analyzing SWBT's showing, we rely primarily on the performance data noted above and described in prior section 271 Orders. We note, however, that we do not rely on SWBT's separate affiliate to reach our conclusions because SWBT carried its burden of demonstrating checklist compliance with an evidentiary showing of performance to its wholesale xDSL customers.<sup>517</sup>

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<sup>515</sup> Letter from Jared Craighead, Associate Director-Federal Regulatory, SBC Telecommunications, Inc., to Magalie Roman Salas, Secretary, Federal Communications Commission, CC Docket no 00-217 (Nov. 29, 2000) (SWBT November 29 EX Parte Letter); Letter from Eduardo Rodriguez, Executive Director-Federal Regulatory, SBC Telecommunications Inc., to Magalie Roman Salas, Secretary, Federal Communications Commission, CC Docket No. 00-217 (Nov. 7, 2000); SWBT Chapman Aff. at paras. 17-51, 71-101; SWBT Noland/Smith Aff. at paras. 14-26, 29, 96-148; SWBT Mah Reply Aff. at paras. 23-37; SWBT Noland Reply Aff. at paras. 3-19.

<sup>516</sup> Specifically, we examine percent FOCs returned within "x" hours, average installation interval, missed installation due dates, percentage of trouble reports within 30 days of installation, mean time to restore, trouble report rate, and repeat trouble report rate. We examine SWBT's performance for 8.0 dB loops, 5.0 dB loops, DS-1 loops, BRI loops, and DSL loops. Both BRI loops and DSL loops are "xDSL-capable loops."

<sup>517</sup> In addition, we note that SWBT's separate affiliate has not been purchasing the same inputs used to provide advanced services as unaffiliated competing carriers. SWBT's separate affiliate purchases either line sharing to provide ADSL service or intrastate special access, while competing carriers in Kansas and Oklahoma are purchasing stand-alone DSL loops, BRI loops, and DS-1 loops to provide advanced services. As a result, SWBT's advanced services separate affiliate is not useful in making a presumption of nondiscriminatory performance. Pursuant to the *Bell Atlantic New York Order* and the *SWBT Texas Order*, a BOC may submit evidence of a fully operational separate affiliate to demonstrate compliance with this checklist item, but only if its affiliate is purchasing the same inputs and using the same processes as unaffiliated carriers. See *Bell Atlantic New York Order*, 15 FCC Rcd at 4122-4123, paras. 331-32.

183. SWBT demonstrates that it has a legal obligation to provide unbundled xDSL-capable loops to competing carriers.<sup>518</sup> SWBT makes available unbundled xDSL-capable loops (including all technically feasible features, functions, and capabilities) in Kansas through the K2A and in Oklahoma through the O2A.<sup>519</sup> Since June 2000, the volume of xDSL-capable loop orders in Kansas and Oklahoma has tripled.<sup>520</sup> In recent months, SWBT has been providing a greater proportion of unbundled xDSL-capable loops to competing carriers. For the period July through October 2000, 50 percent of the unbundled loops provided in Kansas were either DSL or BRI loops; likewise, 72 percent of the unbundled loops provided in Oklahoma were either DSL or BRI loops.<sup>521</sup>

**(i) Order Processing Timeliness**

184. *Firm Order Confirmation (FOC) Timeliness.* We conclude that SWBT demonstrates that it provides order processing for xDSL-capable loops in a timely manner that provides an efficient competitor a meaningful opportunity to compete. In previous section 271 applications, we have relied primarily on performance measurements that track a BOC's ability to provide firm order confirmations (FOCs) in a timely manner.<sup>522</sup> In Kansas and Oklahoma, as in Texas, SWBT's FOC timeliness is measured against a benchmark of 24 hours. Since June 2000, SWBT has performed better than the established standard by providing at least 96 percent of the FOCs to competing carriers in Kansas and Oklahoma within the required time frame.<sup>523</sup> This performance is mirrored in Texas, where SWBT uses the same OSS for processing orders at significantly higher volumes.<sup>524</sup> Although several commenters have alleged that SWBT is not

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<sup>518</sup> SWBT provides two types of xDSL-capable loops: (1) DSL loops, which are further disaggregated in SWBT's performance measurements to show line shared loops and stand-alone DSL loops; and (2) BRI loops, which are often used to provide IDSL service. *See, e.g.,* SWBT Deere Aff. at para. 110.

<sup>519</sup> *Id.* at paras. 90-127; SWBT Jones Aff., Attach. A at 180. Kansas 271 Agreement, Attach. 25; Oklahoma 271 Agreement, Attach. 25.

<sup>520</sup> Since June 2000, SWBT has been provisioning at least 70 DSL loop orders per month in Kansas and at least 115 such orders per month in Oklahoma. In October 2000, the volume of orders exceeded 220 in Kansas and 300 in Oklahoma. *See* SWBT Aggregated Performance Data (Kansas and Oklahoma), Measure No. 58-09 ("Percent SWBT Caused Missed Due Dates – DSL – No Line Sharing"), at 271-No. 58c.

<sup>521</sup> *See* SWBT Aggregated Performance Data (Kansas and Oklahoma), Measure No. 58-09 ("Percent SWBT Caused Missed Due Dates – DSL – No Line Sharing"), at 271-No. 58c.

<sup>522</sup> We also evaluate a BOC's provisioning of loop qualification capability to competing carriers. For the instant application, we evaluate SWBT's performance for loop pre-qualification and loop qualification under checklist item 2, access to unbundled network elements.

<sup>523</sup> *See* SWBT Aggregated Performance Data (Kansas and Oklahoma), Measure No. 5.1-01 ("Percent Firm Order Confirmations (FOCs) Relating to xDSL-capable Loops Returned within x Hours"), at 271-No. 5.1a.

<sup>524</sup> Since June 2000, SWBT has returned at least 98 percent of FOCs within 24 hours. Except for July 2000, SWBT has processed at least 3,900 FOCs per month in Texas; in July 2000, SWBT processed 2,990 FOCs in Texas. By contrast, SWBT processed an average of 125 FOCs per month in Kansas and 184 FOCs per month in (continued....)

providing FOCs for unbundled loops in a timely manner, these parties generally point to problems that occurred before July 1, 2000.<sup>525</sup> Current and more recent performance indicate that these problems have been addressed and no longer appear to be an issue.

(ii) **Provisioning Timeliness**

185. We find that SWBT demonstrates that it provisions xDSL-capable loops for competing carriers in substantially the same time and manner that it installs xDSL-capable loops for its own retail operations. In analyzing SWBT's provisioning performance for checklist compliance, we continue to rely primarily upon the performance measurements identified in the Bell Atlantic New York and SWBT Texas Orders, i.e., missed installation due dates and average installation intervals. We also evaluate SWBT's provisioning processes. Because it uses the same processes throughout its region and we previously evaluated those processes in our review of SWBT's section 271 application for Texas, we also rely on SWBT's performance in Texas.

186. *Provisioning Processes.* We agree with the Kansas Commission and Oklahoma Commission that SWBT uses the same provisioning processes in those states as it does in Texas.<sup>526</sup> To order unbundled loops in any state in the SWBT region, competing carriers submit Local Service Requests (LSRs) to SWBT's Local Service Center in Dallas, Texas.<sup>527</sup> SWBT accepts LSRs for unbundled loops through an application-to-application interface, a graphical user interface (GUI), and through manual processes.<sup>528</sup> Orders for unbundled loops are forwarded from SWBT's Local Service Center to its Local Operations Center for supervision and management of the installation process.<sup>529</sup> With its staff in the Local Service Center and Local Operations Center, SWBT maintains centralized supervision and oversight of the provisioning process for unbundled loops purchased by competing carriers. After receiving an order for an unbundled loop, SWBT's Local Operations Center forwards the order to one of four Mechanized Loop Assignment Centers (MLACs), which are responsible for assigning facilities to the order

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Oklahoma between July and October 2000. *See* SWBT Aggregated Performance Data (Texas, Kansas, Oklahoma), Measure No. 5.1-01 ("Percent Firm Order Confirmations (FOCs) Relating to xDSL-capable Loops Returned within x Hours"), at 271-No. 5.1a.

<sup>525</sup> Adelphia Lippold Decl. at para. 4 (alleging an average 5.27 day delay in FOCs provided to Adelphia between March 3, 1999 and July 1, 2000); McLeodUSA Comments at 10.

<sup>526</sup> SWBT Cleek Aff., Attach. A at 75-78 (presenting Kansas Commission staff recommendations); SWBT Jones Aff., Attach. A at 180 (presenting Oklahoma Commission conclusion that SWBT meets checklist item 4), 181 (presenting Oklahoma Commission conclusion regarding SWBT's provisioning processes for xDSL loops); Kansas Commission Comments at 17, 25, 26; Oklahoma Commission Comments at 1, Attach. A; *but see* IP Comments, Attach. 4 at 16 (noting local and regional differences in provisioning performance); IP Reply at 7-9.

<sup>527</sup> SWBT Application at 50; SWBT Chapman Aff. at 3; SWBT Noland/Smith Aff. at para. 29. *See* SWBT November 29, 2000 *ex parte* at 2-5.

<sup>528</sup> SWBT Chapman Aff. at para. 37.

<sup>529</sup> SWBT Noland/Smith Aff. at paras. 18-22, 96-98; SWBT Chapman Aff. at paras. 35-45.

and maintaining an overall inventory of SWBT's facilities.<sup>530</sup> After completing its work, the MLAC forwards the order to one of two Circuit Provisioning Centers (CPCs), which are responsible for additional design and assignment work related to special services.<sup>531</sup> The CPCs forward the order to SWBT's provisioning forces. For unbundled loop installations that do not require a dispatch, SWBT's Central Office Operations employees perform the necessary work. SWBT's Installation and Maintenance forces perform all installation work that requires a dispatch outside the central office. Provisioning a stand-alone unbundled loop (including xDSL loops) usually requires SWBT to dispatch a technician.

187. *Average Installation Intervals.* As evidenced by SWBT's performance data, SWBT installs xDSL loops in a nondiscriminatory manner.<sup>532</sup> In Kansas, from August through October 2000, SWBT installed DSL loops in 6.7 days on average.<sup>533</sup> In Oklahoma during the same period, SWBT installed DSL loops in 6.1 days on average.<sup>534</sup> Although we recognize that these averages exceed the 5-day benchmark established by the state commissions, we note that SWBT's performance has improved during the same period in both Kansas and Oklahoma as volumes have increased.<sup>535</sup> This improving trend persuades us that SWBT's technicians are

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<sup>530</sup> See SWBT November 29, 2000 *Ex Parte*; SWBT Mah Reply Aff. at para. 24. SWBT has a total of four MLACs located in Kansas City, Kansas; St. Louis, Missouri; Dallas, Texas, and Houston, Texas. More precisely, the provisioning process starts when SOAC, the system used to route orders, receives an order from the service order system, SORD. See SWBT Ham Aff. at paras. 163-66; SWBT Mah Reply Aff. at para. 24. SWBT employees in the MLAC assign the facilities required to provision the service with LFACs. The MLAC employees use LFACs to manage outside plant facilities and SWITCH to manage and assign central office facilities. SWBT Mah Reply Aff. at para. 24. SWITCH is an operations system designed to inventory and assign central office equipment and related facilities. See *id.* at para. 20.

<sup>531</sup> SWBT Mah Reply Aff. at para. 25. SWBT's has a total of four CPCs located in Topeka, Kansas; St. Louis, Missouri; Dallas, Texas; and Houston, Texas. Employees in the CPC use TIRKS to perform their work functions. SWBT's downstream work units, i.e., Central Office Operations and Installation & Maintenance forces, use the work document created in TIRKS by the CPC employees to install the service. See *id.*

<sup>532</sup> SWBT's advanced services retail operations are currently organized into a separate affiliate, ASI. Because SWBT's affiliate does not purchase stand-alone unbundled xDSL loops, there is no direct retail analogue for comparing xDSL performance. We therefore evaluate SWBT's performance to ensure SWBT affords competing carriers a meaningful opportunity to compete.

<sup>533</sup> In Kansas, SWBT installed DSL loops (no line sharing and no conditioning required) in 7.44 days in August, 6.87 days in September, and 6.02 days in October. See SWBT Aggregated Performance Data (Kansas), Measure No. 55.1-01 ("Average Installation Interval – DSL – No Line Sharing – Requires No Conditioning"), at 271-No. 55.1.

<sup>534</sup> In Oklahoma, SWBT installed DSL loops (no line sharing and no conditioning required) in 6.46 days in August, 7.24 days in September, and 6.09 days in October. See SWBT Aggregated Performance Data (Oklahoma), Measure No. 55.1-01 ("Average Installation Interval – DSL – No Line Sharing – Requires No Conditioning"), at 271-No. 55.1.

<sup>535</sup> Volumes of orders for DSL loops nearly tripled in both states between August and October 2000. In Kansas, SWBT received 72 orders for DSL loops in August and 224 orders in October 2000. In Oklahoma, SWBT received 134 orders for DSL loops in August and 305 such orders in October 2000.

gaining sufficient expertise and are quickly adjusting to the growth of competition in these states. Moreover, SWBT's performance in Texas, where SWBT has installed unbundled DSL loops in 6.15 days on average for the period July through October 2000 while taking substantially greater volumes of orders, indicates that SWBT is capable of accommodating substantially greater volumes of orders for unbundled DSL loops without negatively impacting performance.<sup>536</sup> We therefore find that these performance disparities do not warrant a finding of checklist noncompliance.

188. *Percent Missed Installation Due Dates.* Although SWBT's performance data indicate that it has continuing difficulties satisfying the state-approved benchmarks for missed installation due dates, this performance alone does not undermine our determination that SWBT installs xDSL-capable loops in a manner that satisfies the checklist. Although past performance indicates that there has been statistically significant facial disparity between SWBT's actual performance and the five percent benchmark established by the Kansas and Oklahoma Commissions in their Performance Assurance Plans, the trend in Kansas and Oklahoma has been improving significantly, however, and, in the last two months, SWBT's performance has closed to within a few percentage points of the benchmark level.<sup>537</sup> Moreover, this improved performance brings SWBT's performance in line with Texas, in which SWBT has missed an average of 7.9 percent of installation due dates for xDSL-capable loops in the last four months.<sup>538</sup> Although we find this inability to satisfy the state-approved benchmarks to be troubling, we do not find that this constitutes per se discrimination requiring a finding of checklist noncompliance. Indeed, these performance disparities have been narrowed to a small margin, and SWBT's performance on other measurements related to xDSL-capable loops shows acceptable performance. Finally, as explained below, we find that the record in this proceeding does not reflect that performance at this level denies efficient competitors a meaningful opportunity to compete.

189. We are not persuaded that the issues raised by some parties defeat SWBT's showing that it provides nondiscriminatory access to unbundled xDSL-capable loops.<sup>539</sup> These

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<sup>536</sup> See SWBT Aggregated Performance Data (Texas), Measure No. 55.1-01 ("Average Installation Interval – DSL – No Line Sharing – Requires No Conditioning"), at 271-No. 55.1. In the *SWBT Texas Order*, we accepted installation intervals for stand-alone xDSL loops ranging from 4.98 days to 6.65 days. See *SWBT Texas Order* at 15 FCC Rcd at 18502, n.817, para. 292.

<sup>537</sup> See SWBT Aggregated Performance Data (Kansas and Oklahoma), Measure No. 58-09 ("Percent SWBT Caused Missed Due Dates – DSL – No Line Sharing"), at 271-No. 58c. In Kansas, SWBT missed 20.8 percent of the installation due dates for DSL loops in August and 9.4 percent in October. Volumes increased from 72 orders in August to 224 orders in October. In Oklahoma, SWBT missed 17.2 percent of the installation due dates for DSL loops in August and 9.8 percent in October. Volumes likewise increased in Oklahoma, from 134 orders in August to 305 orders in October. *Id.*

<sup>538</sup> See SWBT Aggregated Performance Data (Texas), Measure No. 58-09 ("Percent SWBT Caused Missed Due Dates – DSL – No Line Sharing"), at 271-No. 58c.

<sup>539</sup> See Adelpia Comments at 2, 4; Allegiance Comments at 11-31; KMC Comments at 4-9; McLeodUSA Comments at 7-22; Sprint Comments at 57-64.

parties generally point to disparities in SWBT's performance data without providing additional evidence of competitive harm. Allegiance and McLeodUSA argue, for example, that SWBT's data for missed installation due dates demonstrates a failure to meet the requirements of checklist item 4.<sup>540</sup> These parties have not indicated or otherwise submitted evidence that SWBT's performance has resulted in lost business, such as dissatisfied customers switching back to SWBT because of mistakes in the provisioning process or increased operating costs.<sup>541</sup> Nor have these parties shown evidence of disputes arising under interconnection agreements, documentation of complaints provided to SWBT and subsequent efforts to resolve the performance problems, or formal or informal complaints filed with regulatory agencies. As we have stated in the past, isolated instances of performance disparity, along with evidence of generally acceptable performance in other areas, are generally not sufficient on their own to show that a BOC has failed to demonstrate compliance with the checklist.<sup>542</sup>

190. As a final matter, we recognize that SWBT's data indicate that it continues to have some troubles with on-time provisioning of BRI loops, which are often used to provide xDSL services.<sup>543</sup> These performance problems have affected both SWBT and competing carriers alike. In particular, we note that, in Kansas, SWBT missed an average of 23.7 percent of the installation due dates for BRI loops during the period July through October 2000 in Kansas<sup>544</sup> and missed an average of 15.85 percent during the same period in Oklahoma.<sup>545</sup> In Texas, SWBT's performance has been similar in this area.<sup>546</sup> We are persuaded that SWBT's performance has not put competing carriers at a disadvantage because SWBT's data show that it has consistently performed worse when installing BRI loops for its own uses, so that competing carriers have generally enjoyed better installation service for BRI loops than SWBT's retail operations. As noted earlier in this Order, we evaluate SWBT's checklist showing based on the totality of the

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<sup>540</sup> Allegiance Comments at 20-23; McLeodUSA Comments at 9-12; Sprint Comments at 58, 60-61.

<sup>541</sup> See Adelpia Comments at 4. Adelpia explains that missed installation due dates irritate customers and often affect Adelpia's internal operations. We have not reviewed any evidence indicating specific instances in which customers cancelled installation service or otherwise changed service providers because of missed installation due dates.

<sup>542</sup> See *Second BellSouth Louisiana Order*, 13 FCC Rcd at 20718, para. 200.

<sup>543</sup> See Allegiance Comments at 25.

<sup>544</sup> See SWBT Aggregated Performance Data (Kansas), Measure No. 58-09 ("Percent SWBT Caused Missed Due Dates – BRI Loop"), at 271-No. 58a.

<sup>545</sup> See SWBT Aggregated Performance Data (Oklahoma), Measure No. 58-09 ("Percent SWBT Caused Missed Due Dates – BRI Loop"), at 271-No. 58a.

<sup>546</sup> In Texas, SWBT missed 15.5 percent, 17.8 percent, and 17.3 percent of the due dates for BRI loops in August, September, and October respectively. By contrast, SWBT missed 30 percent, 24.8 percent, and 27 percent of the due dates for BRI loops installed for its own retail operations. See SWBT Aggregated Performance Data (Texas), Measure No. 58-09 ("Percent SWBT Caused Missed Due Dates – BRI Loop"), at 271-No. 58a.

circumstances, and do not necessarily rely on its performance in a single measurement.<sup>547</sup> We will continue to monitor SWBT's performance in this area so that, if SWBT's performance deteriorates further, or if we find evidence that suggests discriminatory or unequal treatment, we will take appropriate enforcement action.

### (iii) Provisioning Quality

191. We find that SWBT demonstrates that it provides competing carriers an installation quality sufficient to afford them a meaningful opportunity to compete. As noted in previous section 271 Orders, trouble reports within 30 days after an installation indicate the quality of installation services provided to competing carriers.<sup>548</sup> In Kansas, SWBT has generally met the benchmark of 6 percent for trouble reports within 30 days of an installation for the period May through September 2000, and only missed the established standard by 0.7 percent in October 2000.<sup>549</sup> SWBT appeared to experience performance difficulties in only one month during the period pertinent to its application. Specifically, in July 2000, SWBT reported a rate of 18.3 percent trouble reports within 30 days of an installation. In light of the generally steady performance in Kansas, and because the sample size is so small, we conclude that SWBT's poor performance in July appears to constitute an aberration from the installation quality provided to competing carriers. We likewise find that SWBT's installation quality in Oklahoma affords competing carriers a meaningful opportunity to compete. For the period July through October 2000, troubles were reported on average on 6.6 percent of xDSL-capable loops within 30 days of installation, which was only 0.6 percent higher than the established benchmark.<sup>550</sup> Finally, we note that SWBT's performance in Texas has generally met the established benchmark.<sup>551</sup> Because volumes of DSL loop orders are substantially higher in Texas than in either Kansas or Oklahoma,<sup>552</sup> and because the provisioning processes are identical, we conclude that SWBT's

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<sup>547</sup> See *supra* paras. 30-33.

<sup>548</sup> *SWBT Texas Order*, 15 FCC Rcd at 18504-05, para. 299; *Bell Atlantic New York Order*, 15 FCC Rcd at 4073-74, para. 222, n.711.

<sup>549</sup> See SWBT Aggregated Performance Data, Measure No. 59-08 ("Percent Trouble Reports on N, T, C Orders within 30 days – DSL – No Line Sharing"), at 271-No. 59c.

<sup>550</sup> See SWBT Aggregated Performance Data (Oklahoma), Measure No. 59-08 ("Percent Trouble Reports on N, T, C Orders within 30 days – DSL – No Line Sharing"), at 271-No. 59c.

<sup>551</sup> See SWBT Aggregated Performance Data (Texas), Measure No. 59-08 ("Percent Trouble Reports on N, T, C Orders within 30 days – DSL – No Line Sharing"), at 271-No. 59c.

<sup>552</sup> In Texas, SWBT processed 2,646 circuits in July, 3,343 circuits in August, 3,720 circuits in September, and 3,592 circuits in October 2000. See SWBT Aggregated Performance Data (Texas), Measure No. 59-08 ("Percent Trouble Reports on N, T, C Orders within 30 days – DSL – No Line Sharing"), at 271-No. 59c. By contrast, SWBT processed orders for between 70 and 305 circuits in Kansas and Oklahoma during the same period. See SWBT Aggregated Performance Data (Kansas and Oklahoma), Measure No. 59-08 ("Percent Trouble Reports on N, T, C Orders within 30 days – DSL – No Line Sharing"), at 271-No. 59c.

Texas performance demonstrates that SWBT's provisioning systems and processes are capable of consistently providing quality installation service to competing carriers.

192. Although SWBT's data reveal some performance issues with BRI loops, we conclude that these issues are not fatal to SWBT's showing.<sup>553</sup> As noted earlier, we evaluate SWBT's showing based on the totality of the circumstances, so that SWBT's performance in a single measurement or for a single category of loops is not necessarily dispositive for SWBT's showing of checklist compliance.<sup>554</sup> In Kansas, competing carriers experienced an average of 12.3 percent trouble reports within 30 days after installation of a BRI loop compared to an average of 3.3 percent for SWBT's retail operations from August through October.<sup>555</sup> In Oklahoma, competing carriers experienced an average of 11.03 percent during the same period compared to a 3.5 percent average for SWBT's retail operations during the same period.<sup>556</sup> We have not found evidence that these types of troubles on BRI loops have denied competing carriers a meaningful opportunity to compete. Moreover, SWBT's performance in Texas shows an improving trend in this area.<sup>557</sup> Finally, SWBT's ability to provide trouble-free loops in Kansas and Oklahoma is generally good. Based on the totality of SWBT's performance in provisioning xDSL-loops, we conclude that SWBT's performance has not denied efficient competitors a meaningful opportunity to compete.

#### (iv) Maintenance & Repair

193. We conclude that SWBT demonstrates that it provides maintenance and repair of unbundled xDSL-capable loops in a manner that affords efficient competitors a meaningful opportunity to compete. In analyzing SWBT's showing for its maintenance and repair service, we continue to rely primarily upon the performance measurements identified in the Bell Atlantic New York and SWBT Texas Orders, i.e., the mean time to repair, the repeat trouble report rate, and the overall trouble report rate. We also evaluate SWBT's maintenance and repair processes and, because it uses the same processes throughout its region, SWBT's performance in Texas.

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<sup>553</sup> See Allegiance Comments at 25 (asserting that performance issues exist with BRI loops).

<sup>554</sup> See *supra* paras. 30-33.

<sup>555</sup> See SWBT Aggregated Performance Data (Kansas), Measure No. 59-03 ("Percent Trouble Reports on N,T, C Orders within 30 days – BRI Loop"), at 271-No. 59a.

<sup>556</sup> See SWBT Aggregated Performance Data (Oklahoma), Measure No. 59-03 ("Percent Trouble Reports on N,T, C Orders within 30 days – BRI Loop"), at 271-No. 59a.

<sup>557</sup> In Texas, competing carriers experienced a 25 percent trouble report rate within 30 days after installing BRI loops in January 2000; by September 2000, SWBT's performance improved so that competing carriers experienced 10.4 percent trouble report rate within 30 days of installing a BRI loop. See SWBT Aggregated Performance Data (Texas), Measure No. 59-03 ("Percent Trouble Reports on N,T, C Orders within 30 days – BRI Loop"), at 271-No. 59a.

194. *Maintenance and Repair Processes.* We agree with the Kansas Commission and the Oklahoma Commission that SWBT's maintenance and repair processes are the same in these states as in Texas. The maintenance process starts when a competing carrier contacts SWBT's Local Operations Center via telephone or uses a graphical user interface (GUI) or application-to-application interface to initiate a trouble report.<sup>558</sup> Employees in the Local Operations Center perform testing and then route the trouble report to SWBT's work units downstream in the process. SWBT's Central Office Operations perform any repair work needed in a central office; SWBT's Installation and Maintenance employees repair problems with SWBT's outside plant. SWBT's employees use standardized methods and procedures to perform their maintenance and repair work.<sup>559</sup> The Local Operations Center monitors the status of the repair work throughout the maintenance and repair process.<sup>560</sup> SWBT has shown that this process is the same as the one used in Texas.<sup>561</sup>

195. *Mean Time to Repair.* SWBT's performance data show a proven track record of providing quality repair service to competing carriers operating in Kansas and Oklahoma. In both states, SWBT has generally restored service for DSL loops in less than 5 hours, which is significantly better than the established 9-hour standard.<sup>562</sup> Although SWBT's October performance in Kansas missed the benchmark, we note that SWBT's performance generally has been acceptable. We believe that the disparity in SWBT's data for a single month may be attributable to the wide swings possible with low sample sizes. SWBT's performance in Texas appears to support this observation. In that state, SWBT has consistently restored service in an average of less than 4 hours since June 2000.<sup>563</sup> We find that, particularly in light of the substantially greater volume of work required of SWBT's workforce in Texas, SWBT's performance in Kansas and Oklahoma, indicates that its repair service affords competitors a meaningful opportunity to compete.

196. *Repeat Trouble Report Rate.* SWBT's repeat trouble report data show that competing carriers were rarely afflicted with continuing problems after a repair visit for a trouble on DSL loops. In Kansas, competing carriers have not experienced any repeat trouble reports

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<sup>558</sup> Competitive carriers submit trouble reports through Toolbar Trouble Administration (TBTA) or the application-to-application Electronic Bonding Trouble Administration interface. SWBT Noland/Smith Aff. at para. 99-105; SWBT Mah Reply Aff. at para. 28.

<sup>559</sup> *Id.* at para. 28 and Attach. A (providing training course examples).

<sup>560</sup> *Id.* at para. 29.

<sup>561</sup> See SWBT November 6, 2000 *Ex Parte*; SWBT November 29, 2000 *Ex Parte*; SWBT May Reply Aff. at paras. 28-30; SWBT Noland/Smith Aff. at paras. 99-105.

<sup>562</sup> See SWBT Aggregated Performance Data (Kansas and Oklahoma), Measure No. 67-08 ("Mean Time to Restore (Hours) – Dispatch – DSL – No Line Sharing"), at 271-No. 67c.

<sup>563</sup> See SWBT Aggregated Performance Data (Texas), Measure No. 67-08 ("Mean Time to Restore (Hours) – Dispatch – DSL – No Line Sharing"), at 271-No. 67c.

since March 2000.<sup>564</sup> Although SWBT has not performed as well in Oklahoma, SWBT's data are affected by the small number of repeat troubles. For example, only seven competing carriers reported trouble reports on DSL loops in September 2000, and only one of those carriers experienced a repeat trouble.<sup>565</sup> Finally, SWBT's performance in Texas, where it uses the same maintenance and repair processes as are made available in Kansas and Oklahoma, shows that competing carriers enjoy a repeat trouble report rate that is well below the established benchmark.<sup>566</sup>

197. *Trouble Report Rate.* SWBT's trouble report rates for DSL loops in Kansas and Oklahoma further supports our conclusion that SWBT provides competing carriers with maintenance and repair service in substantially the same time and manner as SWBT's own retail operations. Competing carriers in Kansas experienced a trouble report rate of only 2.75 percent on average for the months of July through October 2000, which is on average below the 3 percent benchmark.<sup>567</sup> Similarly, competing carriers in Oklahoma experienced an average of only 2.32 percent during the same period.<sup>568</sup> Furthermore, SWBT's performance in Texas demonstrates

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<sup>564</sup> See SWBT Aggregated Performance Data (Kansas), Measure No. 69-08 ("Repeat Reports – DSL – No Line Sharing"), at 271-No. 69c. SWBT's performance for repeat trouble reports on BRI loops shows comparable performance provided to competing carriers and to SWBT's retail operations. Since May 2000, SWBT has generally met the statistical parity standard for repeat troubles in Kansas. Although SWBT missed the parity standard in August 2000, we note that this month involved a low volume of only four repeat trouble reports. See SWBT Aggregated Performance Data (Kansas and Oklahoma), Measure No. 69-03 ("Repeat Reports – BRI Loop"), at 271-No. 69a.

<sup>565</sup> SWBT's Oklahoma performance is reported as 14.3 percent, which is just above the 12 percent benchmark. See SWBT Aggregated Performance Data (Kansas), Measure No. 69-08 ("Repeat Reports – DSL – No Line Sharing"), at 271-No. 69c.

<sup>566</sup> See SWBT Aggregated Performance Data (Texas), Measure No. 69-08 ("Repeat Reports – DSL – No Line Sharing"), at 271-No. 69c. In the area of BRI loop repair performance, SWBT provides competing carriers comparable repair service for BRI loops in Texas. For example, competing carriers experienced 17.5 percent, 11.5 percent, and 13.5 percent repeat trouble report rates in Texas for the months of August, September, and October respectively. By comparison, SWBT's retail operations experienced repeat trouble report rates of 15.3 percent, 15.9 percent, and 17 percent for the same period. SWBT's Oklahoma performance is reported as 14.3 percent, which is just above the 12 percent benchmark. See SWBT Aggregated Performance Data (Kansas), Measure No. 69-03 ("Repeat Reports – BRI Loop"), at 271-No. 69a.

<sup>567</sup> SWBT's trouble report rates for DSL loops provided to competing carriers were 4.2 percent, 1.7 percent, 2.0 percent, and 3.1 percent for the months of July, August, September, and October 2000 respectively. See SWBT Aggregated Performance Data (Kansas), Measure No. 65-08 ("Trouble Report Rate – DSL – No Line Sharing"), at 271-No. 65c; see also SWBT Reply at 64.

<sup>568</sup> See SWBT Aggregated Performance Data (Oklahoma), Measure No. 65-08 ("Trouble Report Rate – DSL – No Line Sharing"), at 271-No. 65c.

that it is capable of continuing to provide quality maintenance and repair service to competing carriers as volumes increase.<sup>569</sup>

**b. Voice-Grade Stand-Alone Loops**

198. We conclude that SWBT demonstrates that it provides voice grade unbundled loops in a nondiscriminatory manner. At the outset, we note that SWBT does not provide as many voice-grade loops in Kansas and Oklahoma as it does xDSL-capable loops in those states, making the difficulty of analyzing data based on low volumes even more acute. We therefore look towards SWBT's performance in Texas to assist our analysis of SWBT's showing that it provides unbundled voice grade loops in accordance with the checklist requirements. Finally, we note that SWBT's provisioning processes are the same for voice grade unbundled loops as for xDSL-capable loops.<sup>570</sup>

**(i) Hot Cut Loop Provisioning**

199. We find that SWBT demonstrates that it provides unbundled loops through the use of coordinated conversions of active customers from SWBT to competing carriers, a process known as "hot cuts," in accordance with the requirements of checklist item 4. Because there is no retail equivalent to a hot cut, SWBT must demonstrate that it provides unbundled loops through hot cuts "in a manner that offers an efficient competitor a meaningful opportunity to compete."<sup>571</sup>

200. *Hot Cut Process.* SWBT makes available the same two hot cut processes that it makes available in Texas: the fully coordinated hot cut (CHC) process and the frame due time (FDT) hot cut process. CHC orders are manually handled in SWBT's order processing center and require intensive coordination and communication between SWBT and the competing carrier during the actual cutover from SWBT to the competing carrier.<sup>572</sup> FDT hot cuts require both SWBT and the competing carrier to perform necessary work at pre-arranged times, with no communication required at the time of the hot cut.<sup>573</sup> Unlike CHC orders, FDT orders are capable of flowing through SWBT's order processing center without manual work by SWBT's representatives.<sup>574</sup> Competing carriers may freely choose between CHCs and FDT conversions,

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<sup>569</sup> In Texas, SWBT has consistently maintained a trouble report rate for DSL loops below the 3 percent benchmark since April 2000. Since July, SWBT's Texas average has been 2.4 percent for DSL loops without line sharing. See SWBT Aggregated Performance Data (Texas), Measure No. 65-08 ("Trouble Report Rate – DSL – No Line Sharing"), at 271-No. 65c.

<sup>570</sup> SWBT Chapman Aff. at 3; SWBT Mah Reply Aff. at 23-27; SWBT November 29, 2000 *Ex Parte* at 2-3.

<sup>571</sup> See *Bell Atlantic New York Order*, 15 FCC Rcd 4104, para. 291.

<sup>572</sup> SWBT Noland/Smith Aff. at para. 114.

<sup>573</sup> *Id.*; see also *SWBT Texas Order*, 15 FCC Rcd 18492-93, paras. 271-72.

<sup>574</sup> SWBT Noland/Smith Aff. at para. 114 n.14.

selecting the cutover methods that best fits their resources and priorities.<sup>575</sup> We note, however, that very few competitive LECs have used the FDT provisioning process during the months leading up to the filing of this application.<sup>576</sup>

201. We find that SWBT demonstrates that it provides hot cuts in Oklahoma and Kansas in accordance with checklist item 4 because competing carriers can choose freely between the CHC and FDT hot cut processes, and because it provides CHCs in a timely manner, at an acceptable level of quality, with minimal service disruption, and with a minimum number of troubles following installation. In our *SWBT Texas Order*, we concluded that SWBT provisioned hot cut loops through the CHC process in compliance with the criteria established in our earlier 271 orders,<sup>577</sup> but that SWBT could not establish checklist compliance based on FDT conversions because of problems with service disruptions.<sup>578</sup> Nevertheless, we concluded that SWBT provided hot cuts in Texas in accordance with checklist item 4 because competing carriers could choose freely between the CHC and FDT hot cut processes, and because the CHC process was in compliance with our hot cut processing criteria. Similarly, in this Order, we do not rely on the FDT hot cut process because carriers have not yet relied on this process sufficiently for us to conclude that SWBT demonstrates compliance with checklist item 4 based on FDT conversions. We thus conclude that SWBT demonstrates that it provides hot cuts in Oklahoma and Kansas in accordance with checklist item 4 because competing carriers can choose freely between the CHC and FDT hot cut processes, and because it provides CHCs in compliance with the criteria established in our earlier 271 proceedings.

202. *Hot Cut Timeliness.* We find that SWBT demonstrates that it can complete a substantial percentage of CHCs it provisions within a reasonable time interval.<sup>579</sup> Under the performance measurements developed by the Texas Commission, and adopted by the Kansas and Oklahoma Commissions, SWBT's hot cut performance is measured according to the percentage of hot cut loops in orders of less than 10 lines that SWBT completes within one hour.<sup>580</sup> In

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<sup>575</sup> SWBT Application at 96; SWBT Noland/Smith Aff. at para. 114

<sup>576</sup> SWBT Noland/Smith Aff. at para. 119 (stating that during July through September, "SWBT has received orders to provision only 2 loops via the FDT process in Oklahoma, and 8 loops in Kansas").

<sup>577</sup> See *SWBT Texas Order*, 15 FCC Rcd at 18487, paras. 260-61.

<sup>578</sup> See *id.*

<sup>579</sup> See, e.g., *Bell Atlantic New York Order*, 15 FCC Rcd at 4114-15, para. 309 (finding that Bell Atlantic was able to complete at least 90 percent of competing carrier hot cut orders of fewer than 10 lines within a one-hour interval).

<sup>580</sup> SWBT Noland/Smith Aff. at para. 118. We relied on similar data in our Texas 271 proceeding. We recognize, however, that PM 114.1 has been revised to track conversions with loop on a one-hour completion basis for orders of less than 10 lines, rather than orders of less than 11 lines. This change does not affect our analysis. See SWBT Aggregated Performance Data, Kansas and Oklahoma, Measurement No. 114.1 ("CHC/FDT LNP with Loop Provisioning Interval") ("Coordinated Hot Cut, Frame Due Time") at 271-No. 114.1-01- 114.01-05.

Kansas, the aggregated data from July 2000 through October 2000 indicate that SWBT completed an average 96.5 percent of all CHC loops from orders with less than 10 lines within 1 hour.<sup>581</sup> In Oklahoma, the aggregated data from July 2000 through October 2000 indicate that SWBT completed an average 94.2 percent of all CHC loops from orders with less than 10 lines within 1 hour.<sup>582</sup> We are further encouraged that SWBT's performance in Kansas and Oklahoma on hot cut timeliness appears consistent with its current performance in Texas, where SWBT, using the same CHC process, has completed an average of 97 percent of all CHC loops from orders with less than 10 lines within 1 hour from August 2000 through October 2000.<sup>583</sup> Thus, we find that the aggregated data demonstrate that SWBT can provision a substantial percentage of competing carrier CHC loops within a 1 hour interval, and that this evidence is sufficient to overcome the claims of a few carriers discussed below that argue SWBT's hot cut provisioning is not performed in a timely manner.

203. *Hot Cut Quality.* We further conclude that SWBT demonstrates that it provisions CHCs at a level of quality that offers efficient competitors a meaningful opportunity to compete. Upon review of the evidence in the record regarding hot cut installation quality, and specifically the outage rate associated with failed SWBT CHCs, and the trouble rate following CHC installation, we find that SWBT demonstrates that it provisions CHCs to competitors in a manner that meets the requirements of the checklist.

204. Because outages that occur on the day of a CHC were not reported by a SWBT performance measurement at the time of its application,<sup>584</sup> we rely, when possible, on outage data

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<sup>581</sup> See SWBT Noland/Smith Aff., Attachment C (providing July data for CHC loops for orders with less than 11 lines); SWBT Aggregated Performance Data, Kansas, Measurement No. 114.1-01 at 271-No. 114.1-01 (providing August through October data for CHC loops from orders with less than 10 lines). We also note that from July through October, SWBT completed 100 percent of FDT hot cut loops from orders with less than 10 lines within 1 hour. See SWBT Noland/Smith Aff., Attachment C (providing July data for FDT loops completed within 1 hour); SWBT Aggregated Performance Data, Kansas, Measurement No. 114.1-03 at 271-No. 114.1-03 (providing August through October data for FDT loops from orders with less than 10 lines).

<sup>582</sup> See SWBT Noland/Smith Aff., Attachment C (providing July data for CHC loops for orders with less than 11 lines); SWBT Aggregated Performance Data, Oklahoma, Measurement No. 114.1-01 at 271-No. 114.1-01 (providing August through October data for CHC loops from orders with less than 10 lines). We also note that from July through October, SWBT completed 100 percent of FDT hot cut loops from orders with less than 10 lines within 1 hour. See SWBT Noland/Smith Aff., Attachment C (providing July data for FDT loops completed within 1 hour); SWBT Aggregated Performance Data, Oklahoma, Measurement No. 114.1-03 at 271-No. 114.1-03 (providing August through October data for FDT loops from orders with less than 10 lines).

<sup>583</sup> SWBT Aggregated Performance Data, Texas, Measurement No. 114.1-01 at 271-No. 114.1-01 (providing August through October data for CHC loops from orders with less than 10 lines).

<sup>584</sup> As part of the Texas six-month performance measurement review, the Texas Commission adopted new PM 115.1 to measure the percent of CHC/FDT circuits for which the CLECs submits a trouble report on the day of the conversion, or before noon the next business day. See SWBT Noland/Smith Aff. at para. 131. SWBT's October data for PM 115.1 show no trouble reports in either Kansas or Oklahoma. See SWBT Aggregated Performance Data, Kansas and Oklahoma, Measurement No. 115.1 at 271-No.-115.1 (providing August through October data).

that has been reconciled by the state commission. Under the auspices of the Texas Commission, SWBT and AT&T established the Performance Process Improvement Group (PPIG) to reconcile SWBT and competing carrier data relating to unexpected hot cut outage data, including such data in Kansas.<sup>585</sup> In Kansas, the PPIG has focused its efforts on reconciling data for the Kansas City, Kansas and Kansas City, Missouri serving area.<sup>586</sup> During the period from June through August, reconciled data for the Kansas City market area demonstrate that SWBT completed at least 97.24 percent of CHCs without a service outage.<sup>587</sup> Because the PPIG data reveal that during the period from June through August 2000, an average of less than 3% of all CHC loops that SWBT provisioned resulted in end-user service outages caused by SWBT provisioning failures, we conclude that SWBT makes available a hot cut process that provides efficient competitors a meaningful opportunity to compete.<sup>588</sup>

205. In Oklahoma, neither AT&T nor any other competitive LEC has requested data reconciliation.<sup>589</sup> As such, to assess the outage rate in Oklahoma, SWBT shows, based on its own internal records, that it completed 100% of CHCs without a service outage from April 2000 to August 2000.<sup>590</sup> SWBT further states that the only competitive LEC to complain about hot cut performance before the Oklahoma Commission was AT&T and that AT&T chose not to pursue data reconciliation in Oklahoma.<sup>591</sup> We also note that no competitive LEC has complained of loop conversion-related outages in Oklahoma in this proceeding.<sup>592</sup> We thus conclude that the record demonstrates that the CHC process SWBT makes available to competing carriers in Oklahoma minimizes service disruptions that may deny an efficient competitor with a meaningful opportunity to compete.

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<sup>585</sup> See SWBT Noland/Smith Aff. at paras. 120-28 (discussing the PPIG reconciliation process); see also SWBT Texas Order, 15 FCC Rcd at 18488-92, paras. 263, 269-71 (describing the PPIG process in Texas). No Oklahoma CLEC requested reconciliation of outage data. See SWBT Noland Smith/Aff. at para. 120.

<sup>586</sup> Because Kansas City, Kansas and Kansas City, Missouri are in the same LATA, and are served off a single AT&T switch, the results for both cities have been combined pursuant to AT&T's request. *Id.* at para. 122.

<sup>587</sup> SWBT Application at 97.

<sup>588</sup> See SWBT Noland/Smith Aff. at paras. 124-25.

<sup>589</sup> *Id.* at para. 129.

<sup>590</sup> See SWBT Application at 99.

<sup>591</sup> See *id.* at para. 129.

<sup>592</sup> Several commenters assert that SWBT has failed to meet the Commission's minimum standards for hot cut performance based on a one-month anomaly in June 2000 in the Oklahoma data for PM 114-01 concerning premature disconnects involving the provisioning of local number portability *without* the loop. See Allegiance Comments at 30-32; McLeodUSA Comments at 22-23. We reject this assertion because these commenters rely on a measurement that does not capture premature disconnects involving loop conversions. PM 114-01 measures premature disconnects for LNP conversions without loops. See SWBT Smith Reply Aff. at para. 10.

206. We conclude that SWBT demonstrates that competing carrier end users experience only very low rates of installation troubles on lines provisioned by CHCs. From June through August 2000, competing carriers experienced troubles within 7 days after installation on an average of 1.45 percent of CHCs in Kansas and 2.34 percent of CHCs in Oklahoma.<sup>593</sup> Although the Oklahoma trouble report data are slightly higher than that which we found to comply with checklist item 4 in Texas,<sup>594</sup> there were only three reported instances of trouble in Oklahoma, and no commenter has complained about SWBT's Oklahoma CHC performance from July 2000 through October 2000.<sup>595</sup> Thus, we find that SWBT installs hot cuts in Oklahoma of sufficient quality to provide an efficient competitor with a meaningful opportunity to compete.<sup>596</sup>

207. We reject commenters' argument that, in Kansas, SWBT's true performance provisioning hot cuts is not captured in the performance data.<sup>597</sup> For example, commenters argue that the CHC process is fundamentally flawed leading to customer outages,<sup>598</sup> and that the hot cut performance data does not capture all of the SWBT-caused outages.<sup>599</sup> In addition, KMC argues that, based on the performance data, it seems obvious that SWBT uses a different CHC process in Kansas and Oklahoma than the CHC process that it uses in Texas.<sup>600</sup> Based on the record in this proceeding, we find commenters' anecdotal evidence insufficient to overcome SWBT's demonstrated compliance in Kansas with the timeliness and quality performance metrics discussed above.<sup>601</sup> We also reject Sprint's argument that its troubles with the FDT process in Kansas warrant a finding of checklist non-compliance.<sup>602</sup> As discussed above, because we do not rely on the FDT process to find that SWBT demonstrates compliance with checklist item 4, Sprint's alleged problems using the FDT process are not fatal to this application. We expect, however,

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<sup>593</sup> See SWBT Noland/Smith Aff., Attachment G. SWBT includes trouble reports received on the day of conversion in this data. *Id.* at para. 133.

<sup>594</sup> *SWBT Texas Order*, 15 FCC Rcd. at 18493, para. 274 (finding that a 1.5 percent trouble rate for CHC in Texas complied with checklist item 4).

<sup>595</sup> See SWBT Noland/Smith Aff. at para. 134.

<sup>596</sup> See generally *SWBT Texas Order*, 15 FCC Rcd. at 18493, para. 274.

<sup>597</sup> See Adelphia Lippold Decl. para. 7; KMC Comments at 4; Sprint Comments at 62-63.

<sup>598</sup> KMC Comments at 5-6.

<sup>599</sup> See Adelphia Lippold Decl. para. 7; Sprint Comments at 62-63.

<sup>600</sup> See Letter from Andrew Klein, Counsel to KMC, to Magalie Salas, Secretary of the Federal Communications Commission, CC Docket No. 00-217 (Dec. 7, 2000).

<sup>601</sup> See SWBT Noland/Smith Aff. at para. 116 (stating that the CHC and FDT processes and procedures in Kansas and Oklahoma are the same that SWBT uses in Texas).

<sup>602</sup> Sprint Comments 62-64; Sprint Supp. Comments 5-7.

that SWBT will address these issues with Sprint, and will continue to improve the FDT process as more competing carriers choose to avail themselves of this option.

**(ii) New Stand-Alone Loop Provisioning**

208. We find that SWBT demonstrates that it provisions new unbundled stand-alone voice grade loops in accordance with the requirements of checklist item 4. When SWBT does not presently service the customer on the line in question, a hot cut loop is not required. In such instances, a competing carrier obtains a new stand-alone loop from SWBT, which dispatches a technician to the customer's premises to complete the installation. We find that SWBT demonstrates that it provisions xDSL-capable loops for competing carriers in substantially the same time and manner that it installs xDSL-capable loops for its own retail operations. In analyzing SWBT's provisioning for new stand-alone loops, we continue to rely primarily upon the performance measurements identified in the Bell Atlantic New York and SWBT Texas Orders, i.e., missed installation due dates and average installation intervals. We note that SWBT's provisioning processes for new stand-alone loops mirrors its processes for provisioning xDSL-capable loops, which we find is identical in Kansas, Oklahoma, and Texas.

209. *Average Installation Interval.* Based on the record, we find that SWBT provisions new unbundled stand-alone loops to competing carriers in substantially the same time and manner as it does for its own retail service. Since July 2000, SWBT has generally met its 3-day target average installation interval for both 8.0 dB and 5.0 dB loops provided to competing carriers in both Kansas and Oklahoma.<sup>603</sup> SWBT's performance in Texas, where it has been handling greater volumes for a longer period of time, shows that SWBT has consistently met the established benchmarks for unbundled voice grade loops provided on a stand-alone basis.<sup>604</sup>

210. *Missed Installation Due Dates.* During the same period, SWBT missed either a lower percentage of installation due dates for competing carriers than for itself or a comparable percentage, depending on whether field work was required.<sup>605</sup> For installations of 8.0 dB loops

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<sup>603</sup> See SWBT Aggregated Performance Data (Kansas and Oklahoma), Measure No. 55-01 ("Average Installation Interval – 8.0 dB Loop"), at 271-No. 55a (indicating that SWBT met the 3-day benchmark between July and October 2000); SWBT Aggregated Performance Data (Kansas and Oklahoma), Measure No. 55-01 ("Average Installation Interval – 5.0 dB Loop"), at 271-No. 55a; SWBT Aggregated Performance Data (Kansas and Oklahoma), Measure No. 56-01 ("Percent Installed Within X Days – 8.0 dB Loop"), at 271-No. 56a (showing that SWBT generally installed 100 percent of the loops in the requested 3-day interval). We recognize that, in Oklahoma, SWBT installed only 83.3 percent of 8.0 dB loops in the 3-day interval for the month of October 2000. We conclude, however, that SWBT's performance is masked in large part due to the low volume of orders for that month. See *id.* (indicating that SWBT received only 6 orders for 8.0 dB loops during October 2000).

<sup>604</sup> See SWBT Aggregated Performance Data (Texas), Measure No. 55-01 ("Average Installation Interval – 8.0 dB Loop"), at 271-No. 55a (indicating that SWBT met the benchmarks for loop orders of all quantities between July and October 2000); SWBT Aggregated Performance Data (Texas), Measure No. 55-01 ("Average Installation Interval – 5.0 dB Loop"), at 271-No. 55a.

<sup>605</sup> See SWBT Aggregated Performance Data (Kansas), Measure No. 65-08 ("Percent SWBT Caused Missed Due Dates – 8.0 dB Loop – Field Work"), at 271-No. 58a. Although SWBT missed 33.3 percent of its installation due (continued...)

that did not require field work, SWBT did not meet the parity standard in Oklahoma for several months leading up to its application. SWBT persuades us, however, that the disparity in its data most likely stems from differences in the mix of work performed.<sup>606</sup> Furthermore, SWBT's Texas performance data show that, for substantially greater volumes, SWBT usually misses less than 1 percent of the installation due dates for 8.0 dB loops that do not require field work.<sup>607</sup>

211. Because these disparities in performance appear to be isolated and minimal, and because SWBT has demonstrated an ability to meet most of its other relevant benchmark and parity standards for other loop-related measurements, we are not persuaded by the arguments of KMC and others that certain isolated failures to meet due dates on SWBT's part shows that SWBT fails to provide voice grade loops in a nondiscriminatory manner.<sup>608</sup> Again, no party has submitted evidence to show that SWBT's performance has resulted in actual competitive harm.

### (iii) Maintenance and Repair of Voice Grade Loops

212. We conclude that SWBT demonstrates that it provides maintenance and repair functions for unbundled voice grade local loops to competing carriers in substantially the same time and manner as it does for its own retail customers.<sup>609</sup> SWBT misses its own repair commitments for voice grade loops more frequently than it misses repair commitments for

(Continued from previous page) \_\_\_\_\_

dates for competing carriers in September, there were only three orders in that month and SWBT missed only one of them. In light of the extremely low volume in Kansas for September, we conclude that SWBT's performance measurement does not reflect its true capabilities and provisioning quality. Furthermore, we note that most 8.0 dB loops do not require field work, and that SWBT's performance towards competing carriers has surpassed SWBT's performance for its retail operations in such instances in Kansas. *See* SWBT Aggregated Performance Data (Kansas), Measure No. 58-02 ("Percent SWBT Caused Missed Due Dates – 8.0 dB Loop – No Field Work"), at 271-No. 58a.

<sup>606</sup> SWBT Reply at 59; SWBT Dysart Aff. at paras. 79-81; SWBT Dysart Reply Aff. at para. 48. SWBT explains that it often assigns changes to a customer's service features (e.g., adding voice mail, call waiting, or caller identification) to the performance measurement "8.0 dB loop without field work." Because changing a customer's service features is not labor-intensive work, SWBT rarely fails to meet an assigned due date. By contrast, installing an 8.0 dB loop for a competing carrier requires more labor-intensive work and frequently takes longer than SWBT Application at 95; SWBT Reply at 59-60. After accounting for the discrepancies, SWBT met the parity standard for six months in the period January through August 2000. SWBT Reply at 59-60.

<sup>607</sup> In Texas, SWBT has provisioned at least 2,200 unbundled 8.0 dB loops per month since February 2000 and generally misses less than two dozen due dates per month. SWBT has generally missed a comparable percentage of due dates for its own retail operations during the same time period. *See* SWBT Aggregated Performance Data (Texas), Measure No. 58-02 ("Percent SWBT Caused Missed Due Dates – 8.0 dB Loop – No Field Work"), at 271-No. 58a.

<sup>608</sup> Allegiance Comments at 20-23; KMC Comments at 7-8; McLeodUSA Comments at 9-15.

<sup>609</sup> SWBT's maintenance and repair process for voice grade loops is identical to the process described for xDSL-capable loops.

competing carriers.<sup>610</sup> Competing carriers enjoy a lower rate of repeat trouble reports than SWBT's retail operations.<sup>611</sup> In both Kansas and Oklahoma, competing carriers experience a comparable percentage of trouble reports as SWBT's retail operations.<sup>612</sup> Likewise, SWBT demonstrates that it restores service for voice grade loops faster for competing carriers than for its own retail operations.<sup>613</sup> When measured against the applicable parity standards, SWBT's performance measurements show that it often provides substantially better repair service to competing carriers than to itself.<sup>614</sup>

### c. High Capacity Loop Performance

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<sup>610</sup> See SWBT Aggregated Performance Data, Measure No. 66-01 ("Missed Repair Commitments – 2 Wire Analog 8.0 dB Loop"), at 271-No. 65d-66a.

<sup>611</sup> Since June 2000, competing carriers have experienced a far lower repeat trouble report rate than SWBT's retail operations for 8.0 dB loops. In Kansas, competing carriers experienced repeat trouble report rates of 5.9 percent, 0 percent, and 5.9 percent for the months of August, September, and October respectively; by comparison, SWBT's retail operations experienced 12.5 percent, 11.8 percent, and 10.2 percent repeat troubles for the same months. In Oklahoma, competing carriers experienced 0 percent, 2.9 percent, and 5.6 percent for the months of August, September, and October respectively; by comparison, SWBT's retail operations experienced repeat trouble report rates of 13.4 percent, 11.8 percent, and 11.2 percent for the same months. See SWBT Aggregated Performance Data (Kansas and Oklahoma), Measure No. 69-01 ("Repeat Reports – 8.0 dB Loop with Test Access"), at 271-No. 69a. SWBT's performance for 5.0 dB loops has been comparable. See SWBT Aggregated Performance Data (Kansas and Oklahoma), Measure No. 69-02 ("Repeat Reports – 5.0 dB Loop with Test Access"), at 271-No. 69a. Finally, SWBT's performance in Texas, where SWBT has generally met its established parity standards while handling larger volumes, shows that competing carriers generally receive fewer repeat troubles than SWBT's retail operations. See SWBT Aggregated Performance Data (Texas), Measure No. 69-01 ("Repeat Reports – 8.0 dB Loop with Test Access"), at 271-No. 69a.

<sup>612</sup> SWBT Reply at 60, 63.

<sup>613</sup> See SWBT Aggregated Performance Data (Kansas and Oklahoma), Measure No. 67-01 ("Mean Time to Restore (Hours) – Dispatch – 8.0 dB Loop with Test Access"), at 271-No. 67c.

<sup>614</sup> See *id.* In Kansas, SWBT restored 8.0 dB loops for competing carriers in 4.34 hours in July, 13.77 hours in August, 1.97 hours in September, and 3.62 hours in October. By comparison, SWBT restored its own 8.0 dB loops in 20.67 hours in July, 17.88 hours in August, 17.43 hours in September, and 9.42 hours in October. SWBT's Kansas data for July and September show statistically significant results in favor of competing carriers. In Oklahoma, SWBT restored 8.0 dB loops for competing carriers in 3.37 hours in July, 3.14 hours in August, 3.59 hours in September, and 1.66 hours in October. By comparison, SWBT restored its own 8.0 dB loops in 29.95 hours in July, 18.24 hours in August, 17.24 hours in September, and 13.08 hours in October. SWBT's Oklahoma data for July through October show statistically significant results in favor of competing carriers.

213. We recognize that SWBT's performance with respect to provisioning high capacity loops on time has been poor in Kansas and Oklahoma.<sup>615</sup> Given the low volumes of orders for high capacity loops in these states,<sup>616</sup> we cannot find that SWBT's performance for high capacity loops results in a finding of noncompliance for all loop types. As noted above, SWBT performs at an acceptable level for most types of unbundled local loops. We note that SWBT uses the same processes for provisioning, maintaining, and repairing unbundled high capacity loops as it uses for other types of unbundled local loops.<sup>617</sup> In addition, we note that SWBT installed high capacity loops for carriers in Kansas in 2.7 days on average, and in 5.8 days on average in Oklahoma, for the period August through October 2000.<sup>618</sup> In both states, SWBT has improved its performance in October 2000. SWBT's average installation intervals indicate that it provisions DS-1 loops to competing carriers in a timely manner, and that SWBT quickly overcomes the challenges presented by a lack of facilities. We disagree with IP, KMC, Allegiance, and McLeodUSA that SWBT's failure to meet its installation dates for DS-1 loops in some cases requires a finding of checklist noncompliance.<sup>619</sup> Again, we look to the totality of the circumstances in evaluating SWBT's performance in providing loops in accordance with the checklist requirements. Although we recognize specific performance problems for high capacity loops, we do not find that this disparity in and of itself is enough to render a finding of checklist noncompliance. We stress, however, that we will be actively monitoring SWBT's performance in this area and we will take swift and appropriate enforcement action in the event SWBT's provisioning performance for high capacity loops fails to improve.

#### d. Line Sharing

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<sup>615</sup> See SWBT Reply at 62. SWBT missed on average 47.8 percent of its installation commitments in Oklahoma between July and October 2000, and 33.1 percent on average in Kansas during the same period. See SWBT Aggregated Performance Data (Kansas and Oklahoma), Measure No. 58-06 ("Percent SWBT Caused Missed Due Dates – DS1 Loop"), at 271-No. 58b; see Adelphia Comments at 4 (asserting that SWBT failed to meet due dates for installing DS-1 loops); *but see* SWBT D. Smith Reply Aff. at paras. 40-48. SWBT's performance in Texas has been equally poor. See SWBT Aggregated Performance Data (Texas), Measure No. 58-06 ("Percent SWBT Caused Missed Due Dates – DS1 Loop"), at 271-No. 58b.

<sup>616</sup> High-capacity loops comprise only 9.6 percent of the recent loop volume in Oklahoma and 15.7 percent of the recent loop volume in Kansas. From July through October, SWBT received 123 orders for DS-1 loops in Kansas (out of 1270 total for all loop types) and 210 orders (out of 1334 total) in Oklahoma. By contrast, SWBT received 1003 orders for DS-1 loops in Texas during the same period. See SWBT Aggregated Performance Data, Measure No. 58-06 ("Percent SWBT Caused Missed Due Dates – DS1 Loop"), at 271-No. 58b.

<sup>617</sup> See SWBT November 29, 2000 *Ex Parte* at 2,4.

<sup>618</sup> See SWBT Aggregated Performance Data (Kansas and Oklahoma), Measure No. 58-06 ("Percent SWBT Caused Missed Due Dates – DS1 Loop"), at 271-No. 58b.

<sup>619</sup> Adelphia Comments at 4; Allegiance Comments at 15, 17, 18; IP Comments at 4-5; KMC Comments at 8; McLeodUSA Comments at 11, 13.

(i) **Background**

214. 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.<sup>620</sup> In the *Line Sharing Order*, we acknowledged that it could take as long as 180 days from the release of our order for BOCs and other incumbent LECs to develop and deploy the technical and operational modifications necessary to implement the new rules. This 180-day period concluded on June 6, 2000, approximately four months before SWBT filed the instant application. Accordingly, SWBT must demonstrate that it has a legal obligation to provide nondiscriminatory access to line sharing, i.e., the unbundled high-frequency portion of the local loop.

(ii) **Discussion**

215. We find that SWBT demonstrates that, as of June 1, 2000, it has been making line sharing available in both Kansas and Oklahoma. SWBT makes line sharing available to competing carriers in an optional amendment to the K2A and the O2A.<sup>621</sup> Until recently, however, no competing carriers submitted orders for the high-frequency portion of the loop.<sup>622</sup> We conclude that we should not fault SWBT for the failure of competing carriers to deploy DSL service through line shared loops. We therefore focus our analysis of SWBT's line sharing performance for checklist compliance on SWBT's processes for provisioning line shared loops. To the extent there is any activity, we would expect to rely primarily upon the 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. Finally, to the extent that a BOC applicant relies upon commercial data from another state to establish that it is providing nondiscriminatory access to line shared loops in a state where it requests section 271 authority, it should provide evidence that the OSS and provisioning processes are identical. To the extent its

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<sup>620</sup> See Deployment of Wireline Services Offering Advanced Telecommunications Capabilities and Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Third Report and Order, CC Docket No. 98-147, Fourth Report and Order, CC Docket No. 96-98, 14 FCC Rcd 20912 (1999) (*Line Sharing Order*), *recon. pending*.

<sup>621</sup> SWBT Sparks Aff. at para. 104, Attach. C-KS and C-OK.

<sup>622</sup> SWBT Deere Aff. at paras. 121-25; SWBT Chapman Aff. at paras. 57-101; SWBT Sparks Aff. at paras. 104-07. In October 2000, SWBT provisioned a single line shared loop to competing carriers in Oklahoma and none to carriers in Kansas. See SWBT Aggregated Performance Data (Kansas and Oklahoma), Measure No. 58-10 ("Percent SWBT Caused Missed Due Dates – DSL –Line Sharing"), at 271-No. 58c.

OSS provisioning processes are not identical, a BOC applicant bears the burden of showing that whatever differences are present are not material. In the instant application, because SWBT is not processing orders for line sharing from competing carriers in commercial volumes in either Kansas or Oklahoma, we look to SWBT's performance in Texas to assist our evaluation. In addition, we rely on SWBT's performance towards its separate affiliate, Advanced Solutions, Inc. (ASI), to assist our evaluation because SWBT has provided substantial volumes of line shared loops to its separate affiliate.<sup>623</sup>

216. *Ordering, Provisioning, and Maintenance Processes.* We conclude that SWBT demonstrates that it has implemented the necessary processes for provisioning and maintaining the high-frequency portion of the loop in both Kansas and Oklahoma. The ordering, provisioning, and maintenance processes are nearly identical to those used to provision stand-alone xDSL-capable loops.<sup>624</sup> To order the unbundled high-frequency portion of the loop in any state in the SWBT region, competing carriers submit LSRs (through an application-to-application interface, a graphical user interface (GUI), or manually) to SWBT's Local Service Center in Dallas, Texas.<sup>625</sup> The LSR used by competing carriers is generally the same as the LSR used for stand-alone xDSL-capable loops, but some additional information (e.g., power spectral density information) is required to order the high-frequency portion of the loop.<sup>626</sup>

217. *Line Sharing Performance Data.* Only recently have competing carriers started purchasing the unbundled high-frequency portion of the loop from SWBT, and even then, only one competing carrier ordered a single line shared loop.<sup>627</sup> SWBT has been providing line sharing to competing carriers in Texas, however, and has been using the same provisioning and maintenance processes in Texas as it uses in Kansas and Oklahoma. In addition, because SWBT has been providing line sharing to its separate affiliate in Kansas, Oklahoma, and Texas, we can rely on SWBT's performance towards its separate affiliate to evaluate its operations in these states. We therefore look to SWBT's performance towards its affiliate and towards competing carriers in Texas to evaluate SWBT's ability to accommodate requests for line sharing in Kansas and Oklahoma once competing carriers start to order the product.

218. SWBT demonstrates that, in Texas, it provisions the unbundled high-frequency portion of the local loop to competing carriers in substantially the same time and manner as SWBT does for its own advanced services separate affiliate. In particular, SWBT provisioned

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<sup>623</sup> See n. 327, *supra* (discussing recent court decision relating to this affiliate).

<sup>624</sup> SWBT Chapman Aff. at paras. 3, 57-58, 71-97; SWBT Cullen Aff. at para. 8; SWBT November 29, 2000 *Ex Parte* at 3, 5.

<sup>625</sup> SWBT Chapman Aff. at para. 80; SWBT Noland/Smith Aff. at paras. 15 and 29.

<sup>626</sup> SWBT Chapman Aff. at paras. 81-84.

<sup>627</sup> One competing carrier ordered one line shared loop in October 2000. See SWBT Aggregated Performance Data (Kansas and Oklahoma), Measure No. 58-10 ("Percent SWBT Caused Missed Due Dates – DSL –Line Sharing"), at 271-No. 58c.

line shared loops to competing carriers 3.44 and 3.55 days in September and October 2000 respectively.<sup>628</sup> By contrast, SWBT took about one day longer to provision the same type of line shared loops to its separate affiliate. Moreover, SWBT missed only 2.1 and 1.8 percent of the installation due dates for line shared loops provided to competing carriers during the same months. We also find that SWBT installs the high frequency portion of the loop at an acceptable level of quality.<sup>629</sup> Although SWBT has not performed as well in the maintenance and repair of line shared loops as it has for stand-alone DSL loops, SWBT demonstrates that competing carriers experience a comparable percentage of trouble reports on line shared loops as SWBT's separate affiliate.<sup>630</sup> Similarly, competing carriers have experienced comparable repair times for line shared loops as SWBT's separate affiliate, even though SWBT's repair times were slow in September and October 2000.<sup>631</sup> SWBT's performance in Texas provides reasonable assurances that competing carriers will experience comparable service in Kansas and Oklahoma once they start ordering line shared loops.

219. We find that SWBT's performance towards its separate affiliate in Kansas and Oklahoma supports our analysis. In both states, SWBT has provisioned line shared loops to its separate affiliate in less than 5 days, since June 2000, while coping with substantial volumes.<sup>632</sup> Similarly, SWBT missed less than 1.5 percent of the installation due dates for line shared loops provided its affiliate in September and October 2000.<sup>633</sup> In light of SWBT's showing that orders

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<sup>628</sup> See SWBT Aggregated Performance Data (Texas), Measure No. 55.1-03 ("Average Installation Interval – DSL – Line Sharing – Requires No Conditioning"), at 271-No. 55.1. Although SWBT made available line sharing within its region as of June 1, 2000, SWBT did not have line sharing performance data available until September 2000. As a result, we only have two months of performance data to examine for this application.

<sup>629</sup> SWBT Aggregated Performance Data, Measure No. 59-09 ("Percent Trouble on N, T, C Orders within 30 Day – DSL – Line Sharing"), at 271-No. 59c.

<sup>630</sup> In Texas, competing carriers experienced a trouble report rate for line shared loops of 18.4 percent and 11 percent in September and October respectively. During the same time period, SWBT's separate affiliate experienced a trouble report rate of 22.2 percent and 8 percent. See SWBT Aggregated Performance Data (Texas), Measure No. 58-10 ("Percent SWBT Caused Missed Due Dates – DSL – Line Sharing"), at 271-No. 58c.

<sup>631</sup> SWBT restored service for competing carriers in 0.12 hours in September and in 37.88 hours in October. By comparison, SWBT restored service for its separate affiliate in 31.19 hours in September and 42.98 hours in October. See SWBT Aggregated Performance Data (Texas), Measure No. 67-23 ("Mean Time to Restore – No Dispatch – DSL – Line Sharing"), at 271-No. 67g.

<sup>632</sup> See SWBT Aggregated Performance Data, Measure No. 55.1-03 ("Average Installation Interval – DSL – Line Sharing – Requires No Conditioning"), at 271-No. 55.1. In September 2000, SWBT provisioned over 1,700 line shared loops to its separate affiliate in Kansas and over 2,000 line shared loops to its separate affiliate in Oklahoma. See SWBT Chapman Reply Aff. at para. 18.

<sup>633</sup> In Oklahoma, SWBT missed 0.5 percent and 0.3 percent of its installation due dates for line shared DSL loops provided to its affiliate in the months of September and October 2000 respectively. During the same period in Kansas, SWBT missed 0.2 percent and 1.2 percent of its installation due dates. See SWBT Aggregated Performance Data, Measure No. 58-09 ("Percent SWBT Caused Missed Due Dates – DSL – Line Sharing"), at 271-No. 58c.

for line sharing from competing carriers are treated by SWBT precisely as orders from its separate affiliate, we believe that competing carriers will experience comparable performance as they order line sharing. Although SWBT has an incentive to provide preferential provisioning and maintenance service to its separate affiliate, SWBT also has a duty to provide competing carriers with nondiscriminatory performance. We will therefore closely monitor SWBT's performance in this area to ensure that SWBT meets its nondiscrimination obligations in this area.<sup>634</sup>

**e. Line Splitting**

220. SWBT demonstrates that it makes it possible for competing carriers to provide voice and data service over a single loop – *i.e.*, to engage in “line splitting.”<sup>635</sup> Specifically, SWBT demonstrates 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.<sup>636</sup> A competing carrier, either alone or in conjunction with another carrier, thus 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.

221. WorldCom asserts in its Comments that, notwithstanding SWBT's assertions on the record in this proceeding, its K2A interconnection agreement in Kansas contains language that is plainly inconsistent with the line splitting obligation discussed above.<sup>637</sup> Specifically, this language states that competing LECs “shall not utilize any SWBT splitters, equipment, cross-connects or OSS systems to facilitate [line splitting].”<sup>638</sup> We agree with WorldCom that, on its face, this language appears to create a restriction that would make it virtually impossible for a

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<sup>634</sup> We note that SWBT's performance towards its separate affiliate is subject to an annual independent audit pursuant to the *SBC/Ameritech Merger Order*. See Applications of Ameritech Corp., Transferor, and SBC Communications, Inc., Transferee, For Consent to Transfer Control of Corporations Holding Commission Licenses and Lines Pursuant to Sections 214 and 310(d) of the Communications Act and Parts 5, 22, 24, 25, 63, 90, 95, and 101 of the Commission's Rules, CC Docket 98-141, *Memorandum Opinion and Order*, 14 FCC Rcd 14,712 at Appendix C, para. 66 (1999) (*SBC/Ameritech Merger Order*).

<sup>635</sup> 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.”).

<sup>636</sup> See SWBT Chapman Reply Aff. at paras. 29-40. In its reply, SWBT states that it will modify the language of its interconnection agreements to eliminate any ambiguity regarding the ability of a competing carrier to purchase line splitting. Specifically, SWBT offers an amendment that states that a competing carrier “may provide voice and data services over the same loop by engaging in ‘line splitting’ . . . .” SWBT Chapman Reply Aff. at para. 40 (addressing Section 4.7.5 of the K2A Optional Line Sharing Appendix).

<sup>637</sup> See WorldCom Comments at 19-20.

<sup>638</sup> See, *id.* (citing to SWBT Sparks Decl. Attach. C-KS, at 8 (K2A Optional Line Sharing Amendment § 4.7.5)).

carrier to provide voice and data service over a single loop in the manner envisioned in the *SWBT Texas Order*. SWBT, however, contends that it never intended this language to undermine its policy of permitting line splitting and, moreover, has never taken the position that this language precludes line splitting, as defined in the *SWBT Texas Order*.<sup>639</sup> We need not reach the question of interpreting this language, however, because SWBT has stricken this language and has replaced it with language that appears to be consistent with the *SWBT Texas Order*.<sup>640</sup> We thus conclude that, based on evidence in the record, SWBT has demonstrated that it currently satisfies its line splitting obligation in Kansas.

#### f. Pricing

222. Sprint and the Department of Justice take issue with certain rates in Kansas and Oklahoma, including those for loop conditioning, line sharing, and line splitting, because they are interim.<sup>641</sup> We address these concerns with respect to collocation,<sup>642</sup> and believe our conclusions are equally applicable here. Sprint further argues that the rates for loop conditioning proposed by SWBT are much higher than the interim rates, raising the possibility of enormous true-ups once the cost proceedings are completed.<sup>643</sup> The Kansas and Oklahoma Commissions have indicated that they intend to conclude the proceedings for loop conditioning in the immediate future,<sup>644</sup> so we are not worried about the true-up extending indefinitely. We also are not moved by the size of the differential. Based on the permanent rates that the Kansas and Oklahoma Commissions have already adopted for unbundled network elements,<sup>645</sup> and the expectation that in setting permanent rates, the Kansas and Oklahoma Commissions will take into account concerns we raise in our decision today, we have confidence that the Kansas and Oklahoma Commissions will set permanent rates that are in compliance with the Act and our rules. Thus, as we stated in the *SWBT Texas Order*, Sprint and other CLECs “face uncertainty about the imposition of a true-up only to the extent that they reasonably believe that they may in fact have a legal obligation to pay something greater than” the rates that the state commissions now impose.<sup>646</sup> We observed in the *SWBT Texas Order* that carriers should expect to be affected by future resolutions of disputed

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<sup>639</sup> See SWBT Chapman Reply Aff. at paras. 31-39.

<sup>640</sup> See, *id.* We rely on SWBT’s commitment to eliminate the restrictive language quoted above. Moreover, we accept SWBT’s explanation that the commitments outlined in its Chapman Reply Affidavit, rather than the language in the K2A quoted above, represents its position on line splitting.

<sup>641</sup> Sprint Comments at 27-37; Department of Justice Evaluation at 24-25, 27-28.

<sup>642</sup> See Section IV.D.4, *infra*.

<sup>643</sup> Sprint Comments at 32-33.

<sup>644</sup> Kansas Commission Reply at 4; Oklahoma Commission Reply at 17.

<sup>645</sup> See Section IV.B.1, *supra*.

<sup>646</sup> *SWBT Texas Order*, 15 FCC Rcd at 18475, para. 237.

issues, and that such concern is insufficient to warrant denial of a section 271 application.<sup>647</sup> For these reasons, we therefore conclude that each state's loop conditioning, line sharing, and line splitting rates are reasonable under the three-pronged interim rate test enunciated in the *Bell Atlantic New York Order*.<sup>648</sup>

#### **D. Checklist Item 1 – Interconnection**

223. We conclude, as described below, that SWBT demonstrates that it provides equal-in-quality interconnection on terms and conditions that are just, reasonable, and nondiscriminatory in accordance with the requirements of sections 251(c)(2) and as specified in section 271 and applied in our prior orders.<sup>649</sup> We further find that SWBT proves that it designs its interconnection facilities to meet “the same technical criteria and service standards” that are used for the interoffice trunks within its own network.<sup>650</sup> We also find that SWBT makes interconnection available at any technically feasible point, including the option to interconnect at only one technically feasible point within a LATA,<sup>651</sup> and that it is providing collocation in Kansas and Oklahoma in accordance with the Commission's rules.<sup>652</sup> We note that both the Kansas and Oklahoma Commissions have found that SWBT has satisfied all aspects of this checklist item.<sup>653</sup>

##### **1. Interconnection Trunking**

224. Based on our review of the record, we are persuaded that SWBT provides competing carriers with interconnection trunking in both Kansas and Oklahoma that is equal-in-quality to the interconnection SWBT provides to its own retail operations, and on terms and conditions that are just, reasonable, and nondiscriminatory.<sup>654</sup> SWBT makes interconnection

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<sup>647</sup> *Id.* at 14875-76, para. 237.

<sup>648</sup> *Bell Atlantic New York Order*, 15 FCC Rcd at 4091, para. 258.

<sup>649</sup> *See SWBT Texas Order*, 15 FCC Rcd at 18379-81, paras. 61-64; *Second BellSouth Louisiana Order*, 13 FCC Rcd at 20640.

<sup>650</sup> *See SWBT Texas Order*, 15 FCC Rcd at 18380, paras. 62-63; *Second BellSouth Louisiana Order*, 13 FCC Rcd at 20648-50, paras. 65, 74-77.

<sup>651</sup> *See SWBT Texas Order*, 15 FCC Rcd at 18390, para. 79.

<sup>652</sup> *See Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Order on Reconsideration and Second Further Notice of Proposed Rulemaking, CC Docket No. 98-147, FCC 00-297 (rel. August 10, 2000), *recon. pending (Advanced Services Reconsideration Order)*.

<sup>653</sup> Kansas Commission Comments at 7-8; Oklahoma Commission Sec. 271 Order at 160.

<sup>654</sup> 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. *Local Competition First Report and Order*, 11 FCC Rcd at 15614-15, paras. 224-25. In prior section 271 applications, the Commission concluded that disparities in trunk group blockage may indicate a failure to provide interconnection to competing carriers equal-in-quality to the interconnection the BOC provided to its own retail (continued....)

available in Kansas and Oklahoma through interconnection agreements, including its state-approved K2A and O2A agreements.<sup>655</sup> SWBT receives orders for interconnection trunks through the Access Service Request (ASR) process, and accepts ASRs through an electronic application-to-application interface, through a proprietary OSS system, and through manual orders.<sup>656</sup> SWBT provides performance data to measure the quality of interconnection service provided to competing carriers.<sup>657</sup> We note that no commenter in this proceeding raised concerns about trunk blockage or on-time provisioning of interconnection trunks.

225. *Interconnection Quality.* In prior section 271 applications, we relied on trunk blockage data to evaluate a BOC's interconnection quality.<sup>658</sup> SWBT's performance data demonstrate that it provides interconnection that is equal-in-quality to the interconnection it provides in its own network. Specifically, SWBT's statewide performance data measuring the percentage of calls blocked on outgoing traffic (trunk blockage from SWBT end office and tandem to competitive LEC end office) demonstrate that in the three months immediately preceding its application, SWBT was in compliance with the relevant benchmarks established in Kansas and Oklahoma (*i.e.*, blockage not to exceed one percent on these trunks).<sup>659</sup> Although the

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operations. *See SWBT Texas Order*, 15 FCC Rcd at 18380, para. 62. As discussed below, for certain interconnection performance metrics, the Oklahoma and Kansas Commissions relied on a benchmark standard for evaluating SWBT's performance (*e.g.*, percent of trunk blockage and average interconnection trunk installation intervals). For other interconnection measurements, such as percent missed due dates for installation, a parity standard is applied. *See SWBT Dysart Aff.* at paras. 10-11.

<sup>655</sup> SWBT Application App. B (providing interconnection agreements between SWBT and competing carriers in both Kansas and Oklahoma).

<sup>656</sup> SWBT Ham Aff. at para. 173.

<sup>657</sup> *See SWBT Dysart Aff.* at para. 50 and Attachs. A and B, Measurements 70-78 (Performance Measurement Business Rules) (Version 1.6). SWBT has implemented ten performance measures relating to interconnection, including measures that compare trunk blockage between SWBT and competitive LECs (PM 70), measures that capture missed due dates for trunk installations (PM 73), and measures that provide data on average installation intervals (PM 78). *Id.*

<sup>658</sup> 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. *SWBT Texas Order*, 15 FCC Rcd at 18382-83, paras. 66-68; *Second BellSouth Louisiana Order*, 13 FCC Rcd at 20649-50, para. 76; *Ameritech Michigan Order*, 12 FCC Rcd at 20669-74, paras. 236-245.

<sup>659</sup> In Kansas, for SWBT end office and SWBT tandem to competitive LEC end office, SWBT's data indicate 0% blockage for both measures from July through October. *See SWBT Aggregated Performance Data, Kansas*, No. 70-01 and 70-02 at 271-No. 70-71. In Oklahoma, for SWBT tandem to competitive LEC end office, SWBT's data indicate performance well below the benchmark, 0% blockage from July through September, and 0.1% blockage for October. *See SWBT Aggregated Performance Data, Oklahoma*, No. 70-01 and 70-02 at 271-No. 70-71.

number of trunks provisioned in Kansas and Oklahoma is relatively low, this pattern is consistent with the trend in Texas, where SWBT follows the same processes and procedures.<sup>660</sup>

226. *Interconnection Timeliness.* Other aspects of SWBT's performance data further indicate it is providing nondiscriminatory interconnection trunking in Kansas and Oklahoma.<sup>661</sup> In previous section 271 applications, the Commission has evaluated missed due dates and average installation intervals to gauge trunk provisioning timeliness. SWBT's performance in both of these areas demonstrates satisfactory performance in Kansas and Oklahoma. Because of low volumes, we also look to Texas performance to confirm our findings. SWBT's performance data concerning the percentage of missed due dates for provisioning of interconnection trunks show that, in recent months, SWBT's provisioning performance for competitors in Kansas was as good as (at parity) or better than that provided on its own network.<sup>662</sup> In Oklahoma, from July to October 2000 in the aggregate, SWBT-caused missed trunk installations averaged 22.9% for competitive LECs, and 28.6% for SWBT.<sup>663</sup> These figures indicate that, in general, SWBT

<sup>660</sup> See SWBT Aggregated Performance Data, Texas, No. 70-01 and 70-02 at 271-No. 70-71; SWBT Deere Aff. at para. 14.

<sup>661</sup> The Commission's rules interpret this obligation to include, among other things, the incumbent LEC's installation time for interconnection service, 47 C.F.R. § 51.305(a)(5), and its provisioning of two-way trunking arrangements. Our 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 *SWBT Texas Order*, 15 FCC Rcd at 18380-81, para. 63; *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.

<sup>662</sup> SWBT's percentage of missed due dates in Kansas:

PM 73: Missed Due Dates				
	July	Aug.	Sept.	Oct.
CLEC	0%	0%	0%	11.3%
SWBT	2.9%	18.5%	10.5%	99.6%

See SWBT Aggregated Performance Measurement Data, Kansas, PM 73 at 271-No.73-76 (showing performance measurement data for July 2000 through October 2000).

<sup>663</sup> See Letter from Jared Craighead, Associate Director-Federal Regulatory, SBC Telecommunications, to Magalie Salas, Secretary, Federal Communications Commission, CC Docket No. 00-217 (filed Dec. 14, 2000). SWBT's percentage of missed due dates in Oklahoma:

PM 73: Missed Due Dates				
	July	Aug.	Sept.	Oct.
CLEC	20.7%	0%	15.8%	49.9%
SWBT	0%	78.4%	23.2%	16.2%

See SWBT Aggregated Performance Measurement Data, Oklahoma, PM 73 at 271-No.73-76 (showing performance measurement data for July 2000 through October 2000).

provided parity or better performance for competitors in Oklahoma for trunk installations.<sup>664</sup> As we discussed above, we also look to SWBT's current performance in Texas, where, using the same processes and procedures, SWBT has been processing commercial volumes to a greater degree and for a longer period of time, to further determine whether SWBT's performance in Kansas and Oklahoma appears acceptable.<sup>665</sup> The Texas data, which show that SWBT consistently misses fewer due dates for competing carriers than for itself, further suggests that SWBT's system of provisioning trunks is nondiscriminatory.<sup>666</sup>

227. *Average Installation Intervals.* SWBT's performance data measuring the average time for installation of interconnection trunks in Oklahoma and Kansas show marginal disparities in performance between actual performance and the 20-day benchmark established by the Oklahoma and Kansas Commissions. For example, SWBT's performance data for average time to install interconnection trunks meet the Kansas 20-day benchmark in six out of seven months for which there are data during the twelve-month period of time ending October 31, 2000. Similarly, in Oklahoma, SWBT's data show that it meets the 20-day benchmark in seven out of nine months for which there are data.<sup>667</sup> Once again, because of the low volume of orders in Kansas and Oklahoma, we find it instructive to look to Texas where SWBT follows the same procedures and has been handling larger commercial volumes of orders for a longer period of time. In Texas, SWBT's performance data show that it meets the 20-day benchmark nine out of the past twelve months.<sup>668</sup> Finally, we note that no commenter has raised interconnection trunk provisioning

<sup>664</sup> We also note that over the twelve-month period concluding October 31, 2000, SWBT has provided competitive LECs more timely interconnection trunk installations than SWBT has provided its own retail operations by a factor of almost three. *See* SWBT Dysart Reply Aff. at para. 111.

<sup>665</sup> SWBT percentage of missed due dates in Texas:

<b>PM 73: Missed Due Dates</b>				
	<b>July</b>	<b>Aug.</b>	<b>Sept.</b>	<b>Oct.</b>
CLEC	0%	2.5%	7.2%	8.7%
SWBT	25.1%	26.1%	28.8%	41.3%

*See* SWBT Aggregated Performance Measurement Data, Texas, PM 73 at 271-No.73-76 (showing performance measurement data for July 2000 through October 2000). We attribute these month-to-month fluctuations, at least in part, to the very low sample sizes involved, and thus find the 4-month aggregate number to be more probative of SWBT's performance in this instance.

<sup>666</sup> We also are encouraged by SWBT's commitment to continue to improve trunk provisioning performance in Oklahoma. *See* SWBT Mah Reply Aff. at para. 44.

<sup>667</sup> *See* SWBT Aggregated Performance Measurement Data, Kansas and Oklahoma, No. 78 at 271-No-78 (showing performance measurement data for average interconnection trunk installation interval).

<sup>668</sup> The average installation interval for the months in which SWBT missed the benchmark were 22.8 days for December 1999, 25.94 for January 2000, and 29.06 for October 2000. *See* SWBT Aggregated Performance Measurement Data, Texas, No. 78 at 271-No-78 (showing performance measurement data for average interconnection trunk installation interval).

timeliness as an issue. For all of these reasons, we find that SWBT's performance for installation of interconnection trunks provides competing carriers with a meaningful opportunity to compete and complies with checklist item 1.

## 2. Collocation

228. SWBT demonstrates that its collocation offerings in Kansas and Oklahoma satisfy the requirements of sections 251 and 271 of the Act. SWBT provides physical and virtual collocation through state-approved tariffs.<sup>669</sup> SWBT's Kansas and Oklahoma physical and virtual collocation tariffs are virtually identical to the Texas physical and virtual collocation tariffs, which we found to satisfy checklist item 1 in our *SWBT Texas Order*.<sup>670</sup> In its application, SWBT indicates that shared, cageless, and adjacent collocation options are available in Kansas and Oklahoma, and that it has taken other steps necessary to implement the collocation requirements contained in the *Advanced Services First Report and Order* and *Advanced Services Reconsideration Order*.<sup>671</sup>

229. SWBT's collocation performance data generally indicate that SWBT processed collocation requests and provisioned collocation arrangements within time frames established by the Kansas and Oklahoma Commissions.<sup>672</sup> SWBT states that it has provided 233 physical collocation arrangements in 38 different SWBT central offices in Kansas, and 366 physical collocation spaces in 66 different SWBT central offices in Oklahoma.<sup>673</sup> Except where a competitive LEC places a large number of collocation orders in the same 5-business day period, SWBT responds to each request within 10 calendar days.<sup>674</sup> SWBT provides three measurements (disaggregated into various submeasures) for collocation: Percentage of Missed Collocation Due Dates (PM 107), Average Delay Days for SWBT Missed Due Dates (PM 108), and Percent of

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<sup>669</sup> The Kansas Commission approved SWBT's physical collocation tariff on June 14, 2000. *SWBT Sparks Aff.* at para. 34. The Kansas Commission approved SWBT's virtual collocation tariff on April 12, 2000. *Id.* On May 9, 2000, the Oklahoma Commission adopted the terms and conditions of SWBT's Texas physical and virtual collocation tariffs on an interim basis, subject to true-up, while it reviews SWBT's Oklahoma physical and virtual collocation tariffs. *See id.*; Oklahoma Commission Sec. 271 Order at 20.

<sup>670</sup> SWBT Application at 80; *see also* Kansas Commission Staff Report at 8-10; Oklahoma Commission Sec. 271 Order at 160-61.

<sup>671</sup> SWBT Application at 79-85; *see also* Kansas Commission Staff Report at 10-11; Oklahoma Commission Sec. 271 Order at 161. On October 10, 2000, SWBT amended its collocation procedures to implement the rules adopted in the *Advanced Services Reconsideration Order*. SWBT Application App. E, Vol. 8, Revision to Notification of Compliance with FCC 00-297.

<sup>672</sup> Because the Kansas and Oklahoma Commissions have set their own application processing and provisioning standards for physical collocation, SWBT's operations in those states are not subject to the national standards. *See Advanced Services Reconsideration Order*, paras. 21-23; *see also* *SWBT Sparks Aff.* at para. 38.

<sup>673</sup> SWBT Application at 80; SWBT Smith/Johnson Aff., Attach. A.

<sup>674</sup> SWBT Sparks Aff. at para. 40; Kansas Commission Comments at 9.

Requests Processed within the Tariffed Timelines (PM 109). Where data points are available, SWBT's data indicate it meets the measures for the months of July through October with few exceptions.<sup>675</sup> Thus, based on the record in this proceeding, we are persuaded that SWBT is meeting its collocation obligations.<sup>676</sup>

230. We reject MFNS's argument that SWBT's application should be denied because SWBT refuses to permit collocation of a fiber distribution frame in Texas.<sup>677</sup> First, MFNS admits that this dispute does not arise out of a collocation dispute in either Kansas or Oklahoma. Second, SWBT must allow collocation of only that equipment which is "necessary for interconnection or access to [UNEs]." <sup>678</sup> In accordance with the D.C. Circuit's opinion in *GTE v. FCC*,<sup>679</sup> we currently are considering what equipment is "necessary" for these purposes.<sup>680</sup> Finally, we believe that MFNS's alleged difficulties negotiating collocation arrangements with SWBT are best resolved through the section 252 negotiation and arbitration process or through the section 208 complaint process. As we have found in past section 271 proceedings, the section 271 process simply could not function if we were required to resolve every interpretive dispute about the precise content of an incumbent LEC's obligations to its competitors, including fact-intensive interpretive disputes.<sup>681</sup>

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<sup>675</sup> See SWBT Aggregated Performance Measurement Data, Kansas and Oklahoma, PMs 107-109 at 271-No. 107a –109b. Although a few data points fall marginally short of the benchmarks, we do not believe that these misses rise to the level of non-compliance with this checklist item, absent evidence of more systemic failure or evidence from competitors demonstrating how this performance denied them a meaningful opportunity to compete.

<sup>676</sup> We are aware that the Enforcement Bureau recently has issued a *Notice of Apparent Liability for Forfeiture* for violations of the Commission's rule requiring incumbent local exchange carriers promptly to post notices of premises that have run out of collocation space. See *SBC Communications, Inc., Apparent Liability for Forfeiture*, File No. EB-00-IH-0326a, DA-01-128 (rel. Jan. 18, 2001). This issue first came to light on August 7, 2000 through an independent auditor's public report concerning SBC's compliance with the Commission's collocation rules. See August 7, 2000 Report of Independent Accountants, Ernst & Young LLP. SBC had agreed to such an audit as part of the Commission's approval of the merger application of Ameritech Corporation and SBC. Although we are concerned about SWBT's apparent violation of our collocation rules, we believe that this issue will be appropriately addressed in the Enforcement Bureau's review of the pending *Notice of Apparent Liability (NAL)*. Based on the information that we have to date, we are not persuaded that the evidence supporting the NAL warrants a finding of checklist non-compliance. Moreover, no commenter has raised SWBT's posting of collocation space exhaustion as an issue in this proceeding.

<sup>677</sup> See, e.g., MFNS Comments at 3.

<sup>678</sup> 47 U.S.C. § 251(c)(6).

<sup>679</sup> *GTE Services Corp. v. FCC*, 205 F.3d 416 (D.C. Cir. 2000) (*GTE v. FCC*).

<sup>680</sup> *Advanced Services Reconsideration Order*, paras. 71-92; see also MFNS Comments in CC Docket 98-147 at 10-15 (filed Oct. 12, 2000) (arguing that incumbent LECs must permit requesting carriers to collocate fiber distribution frames).

<sup>681</sup> See *SWBT Texas Order*, 15 FCC Rcd at 18366-67, paras. 22-27.

231. We also disagree with Sprint that its problems concerning collocation in remote terminals in Kansas and Oklahoma warrant denial of SWBT's application.<sup>682</sup> The state commissions determined that Sprint's issues concerning collocation in remote terminals were insufficient to overcome an overall finding of checklist compliance.<sup>683</sup> In addition, the Kansas Commission has said that if Sprint, or any other CLEC continues to experience difficulties concerning collocation in remote terminals, it will address these issues as part of its six-month review of SWBT's collocation tariff in Kansas.<sup>684</sup> Because this appears to be a fact-based interconnection dispute that is better resolved at the state-level, and because the state commissions have determined that Sprint's claims were insufficient to overcome an overall finding of checklist non-compliance, we are not persuaded that SWBT has failed to comply with its collocation obligations in Kansas and Oklahoma.<sup>685</sup>

### 3. Technically Feasible Points of Interconnection

232. We conclude that SWBT provides interconnection at all technically feasible points, including a single point of interconnection, and therefore demonstrates compliance with the checklist item. SWBT asserts that it makes each of its standard methods of interconnection available at the line side or trunk side of the local switch, the trunk connection points of a tandem switch, central office cross-connect points, out-of-band signaling transfer points, and points of access to UNEs.<sup>686</sup> SWBT demonstrates that it has state-approved interconnection agreements that spell out readily available points of interconnection, and provide a process for requesting interconnection at additional, technically feasible points.<sup>687</sup> 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.<sup>688</sup>

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<sup>682</sup> Sprint Comments at 65-66 (referring to concerns expressed before the Oklahoma and Kansas Commissions regarding collocation for advanced services).

<sup>683</sup> See Kansas Commission Comments at 8-9; Oklahoma Commission Sec. 271 Order at 165.

<sup>684</sup> Kansas Staff Recommendation at 9.

<sup>685</sup> We also note that SWBT indicates that it has reached agreement with Sprint on language to be added to a new Sprint interconnection agreement to resolve Sprint's issues concerning collocation in remote terminals. See SWBT Reply at 88 n. 57.

<sup>686</sup> SWBT Application at 76; SWBT Deere Aff. at paras. 15; 21-22. SWBT will provide other technically feasible alternatives using the Special Request Procedure set forth in the K2A and O2A. *Id.* at 15; 84-88.

<sup>687</sup> SWBT Application at 76. SWBT's state-approved K2A and O2A require SWBT to provide other collocation arrangements that have been demonstrated to be technically feasible and in compliance with the *Advanced Services Order*.

<sup>688</sup> In compliance with our *SWBT Texas Order*, SWBT modified the language of its K2A and O2A to allow a carrier to choose a single point of interconnection in a LATA. See *SWBT Texas Order*, 15 FCC Rcd 18390, para. 78; see also SWBT Application at 76; SWBT Deere Aff. at para. 5, 14, 66.

233. Some commenters argue that SWBT effectively denies a competing carrier the right to select a single point of interconnection by improperly shifting to competing carriers inflated transport and switching costs associated with such an arrangement.<sup>689</sup> For example, AT&T avers that, in a technical conference in Oklahoma after the adoption of the O2A, SWBT advanced several compensation arrangements relating to a competing carrier's choice of interconnection and collocation which require AT&T to pay inflated transport costs upon exercising its right to a single point of interconnection.<sup>690</sup> SWBT responds that AT&T largely misunderstands the positions it advanced at the technical conference, and that AT&T's claims are best addressed at the state level through the negotiation and arbitration process.<sup>691</sup> SWBT further argues that the Commission previously determined that carriers seeking a single point of interconnection should bear any additional cost associated with taking traffic to and from the point of interconnection in the other exchange.<sup>692</sup>

234. Because these commenters, including AT&T, take issue only with positions advanced by SWBT in a technical conference, we find that the issues raised are hypothetical ones, and therefore do not warrant a finding of non-compliance with checklist item 1. Although SWBT's interpretation of the state-approved interconnection agreement raises potential future compliance issues regarding the interplay between a single point of interconnection and reciprocal compensation, our review must be limited to present issues of compliance.<sup>693</sup> Indeed, we understand that AT&T has filed for arbitration of these issues in Oklahoma.<sup>694</sup> To the extent that the parties believe that this is a matter requiring more explicit rules, we invite them to file a petition for declaratory ruling or petition for rulemaking with the Commission.

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<sup>689</sup> AT&T Comments at 24; *see also* Cox Comments at 10; WorldCom Reply at 38.

<sup>690</sup> *See* AT&T Comments, Attachment 2 at 14-20.

<sup>691</sup> *See* SWBT Reply at 77-87.

<sup>692</sup> *Id.* at 86. SWBT relies on the following language from its Texas interconnection agreement with WorldCom: "MCI(WorldCom) and SWBT agree that MCI(WorldCom) may designate, at its option, a minimum of one point of interconnection within a single SWBT exchange where SWBT facilities are available, or multiple points of interconnection within the exchange, for the exchange of all traffic within that exchange. If WorldCom desires a single point for interconnection within a LATA, SWBT agrees to provide dedicated or common transport to any other exchange within a LATA requested by WorldCom, or WorldCom may self-provision, or use a third party's facilities." *See SWBT Texas Order*, 15 FCC Rcd 18390, para. 78 n. 174.

<sup>693</sup> *SWBT Texas Order*, 15 FCC Rcd 18367, para. 27.

<sup>694</sup> *See* Oklahoma Commission Reply at 16. We also note that in its Reply, SWBT makes certain concessions regarding future interpretation of certain language in the O2A and K2A that is at issue. For example, in response to AT&T's argument that SWBT requires a CLEC collocated in a SWBT end office to interconnect there by provisioning direct trunks, AT&T Comments at 28, SWBT concedes that the proper reading of the O2A and K2A is that direct trunking from the CLEC's collocation facility is an option, not a requirement. *See* SWBT Reply at 81.

235. Finally, we caution SWBT from taking what appears to be an expansive and out of context interpretation of findings we made in our *SWBT Texas Order* concerning its obligation to deliver traffic to a competitive LEC's point of interconnection.<sup>695</sup> In our *SWBT Texas Order*, we cited to SWBT's interconnection agreement with MCI-WorldCom to support the proposition that SWBT provided carriers the option of a single point of interconnection.<sup>696</sup> We did not, however, consider the issue of how that choice of interconnection would affect inter-carrier compensation arrangements. Nor did our decision to allow a single point of interconnection change an incumbent LEC's reciprocal compensation obligations under our current rules.<sup>697</sup> For example, these rules preclude an incumbent LEC from charging carriers for local traffic that originates on the incumbent LEC's network.<sup>698</sup> These rules also require that an incumbent LEC compensate the other carrier for transport<sup>699</sup> and termination<sup>700</sup> for local traffic that originates on the network facilities of such other carrier.<sup>701</sup>

#### 4. Pricing of Interconnection

##### a. Background

236. 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)."<sup>702</sup> Section 251(c)(2) 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."<sup>703</sup> 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.<sup>704</sup> The Commission's pricing rules require, among other

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<sup>695</sup> See SWBT Reply at 86-87.

<sup>696</sup> See *SWBT Texas Order*, 15 FCC Rcd 18390, para. 78 n. 174.

<sup>697</sup> See 47 C.F.R. §§ 51.701 *et seq.*

<sup>698</sup> 47 C.F.R. § 51.703(b); see also *TSR Wireless, LLC et al. v. U.S. West*, File Nos. E-98-13, E-98-15, E-98-16, E-98-17, E-98-18, FCC No. 00-194 (rel. June 21, 2000), *pet. for review docketed sub nom.*, *Qwest v. FCC*, No. 00-1376 (D.C. Cir. Aug. 17, 2000).

<sup>699</sup> 47 C.F.R. § 51.701(c).

<sup>700</sup> 47 C.F.R. § 51.701(d).

<sup>701</sup> 47 C.F.R. § 51.701(e).

<sup>702</sup> 47 U.S.C. § 271(c)(2)(B)(i).

<sup>703</sup> 47 U.S.C. § 251(c)(2).

<sup>704</sup> 47 U.S.C. § 252(d)(1).

things, that in order to comply with its collocation obligations, an incumbent LEC provide collocation based on TELRIC.<sup>705</sup>

**b. Discussion**

237. Based on the evidence in the record, we find that SWBT offers interconnection in Kansas and Oklahoma to other telecommunications carriers at just, reasonable, and nondiscriminatory rates, in compliance with checklist item 1. The Kansas and Oklahoma Commissions conclude that SWBT currently provides collocation under approved interconnection agreements and tariffs, consistent with FCC, Kansas Commission, and Oklahoma Commission orders.<sup>706</sup>

238. Sprint challenges SWBT's collocation rates in both states because the rates are interim. Sprint further asserts that the fact that SWBT has not yet set permanent rates in Kansas and Oklahoma is directly relevant to whether the Commission can discount the uncertainty and risk of non-cost-based interim rates.<sup>707</sup> The Department of Justice also expresses concern over the interim nature of both states' collocation rates.<sup>708</sup> We have previously set forth a three-pronged test to determine whether interim rates are acceptable: (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.<sup>709</sup> We conclude that each state's interim collocation rates meet this standard.

239. We find that the interim solutions adopted by the Kansas and Oklahoma Commissions are reasonable under the circumstances. ConnectSouth alleges that SWBT's physical collocation rates are barriers to entry in Kansas and Oklahoma because they are significantly higher than the cost-based rates charged in Texas.<sup>710</sup> We note that the Oklahoma rates cited by ConnectSouth<sup>711</sup> have been superseded by the interim rates adopted by the

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<sup>705</sup> 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.

<sup>706</sup> Kansas Commission Comments at 9; SWBT Application App. C-Oklahoma, Vol. 25a-c, Tab 275 (Order Regarding Recommendation On 271 Application Pursuant to Telecommunications Act of 1996, Cause No. PUD 970000560 (Sept. 28, 2000)) at 161-62 (Oklahoma Commission Final 271 Order).

<sup>707</sup> Sprint Comments at 34-36.

<sup>708</sup> Department of Justice Evaluation at 24-25, 27-28.

<sup>709</sup> *SWBT Texas Order*, 15 FCC Rcd at 18394, para. 88; see also *Bell Atlantic New York Order*, 15 FCC Rcd at 4091, para. 258.

<sup>710</sup> ConnectSouth Comments at 2-6.

<sup>711</sup> *Id.*

Oklahoma Commission, which in fact are the Texas collocation rates.<sup>712</sup> As the Commission noted in the *SWBT Texas Order*, the Texas Commission based its interim physical collocation rates on a TELRIC model developed by AT&T and MCI, with modifications.<sup>713</sup> We believe that the rates contained within the Texas 271 application, including those that are interim, are reasonable starting points for interim rates for the same carrier in an adjoining state. In Kansas, the interim rates were set at SWBT's proposed rates, except for those for Site Conditioning and Power, which the Kansas Commission set at one-half of the rates proposed by SWBT.<sup>714</sup> The Kansas Commission found that while the competitive LECs preferred Texas interim rates to those proposed by SWBT, they were more concerned with having a true-up in place, and acknowledged that SWBT's proposed rates were significant improvements over the Individual Case Basis (ICB) rates that were then in place.<sup>715</sup> We view the Kansas Commission's decision as a reasonable attempt by the state commission to set an interim TELRIC-based rate pending its final determination.

240. We take notice that each state has pending cost proceedings to set permanent rates for collocation,<sup>716</sup> and each has ordered that the interim rates be subject to true-up.<sup>717</sup> We also recognize that each state set its interim collocation rates so that competitive LECs could obtain collocation subject to true up rather than through ICB pricing that was much more expensive and not subject to true up.<sup>718</sup> Furthermore, each state has committed to complete its collocation cost docket in the near future.<sup>719</sup> We conclude that the uncertainty surrounding the interim rates has been minimized. Based on the permanent rates that the Kansas and Oklahoma Commissions have already adopted for unbundled network elements, and the expectation that in setting permanent collocation rates, the Kansas and Oklahoma Commissions will take into account concerns we raise in our decision today, we have confidence that the Kansas and Oklahoma Commissions will set permanent collocation rates that are in compliance with the Act and our rules.<sup>720</sup> We believe

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<sup>712</sup> SWBT Application App. G, Vol. 3, Tab 36 (Order Denying Appeals From The April 20, 2000, Oral Recommendation of the Administrative Law Judge, Cause No. PUD 200000169 (May 2, 2000)) at 10 (Oklahoma Commission Collocation Order).

<sup>713</sup> *SWBT Texas Order*, 15 FCC Rcd at 18395, para. 89.

<sup>714</sup> SWBT Application App. D-Kansas, Vol. 2, Tab 52 (Order Granting in Part, Denying in Part Motion to Integrate Texas Collocation Rates into the SWBT-Kansas Collocation Tariff, Pending a Kansas-Specific Cost Proceeding and Subject to True Up, Docket No. 00-SWBT-733-TAR (Apr. 21, 2000)) at 4, 6-7, Att. 2 (Kansas Commission Collocation Order).

<sup>715</sup> *Id.* at 3.

<sup>716</sup> Kansas Commission Reply at 4; Oklahoma Commission Final 271 Order at 162.

<sup>717</sup> Kansas Commission Collocation Order at 7; Oklahoma Commission Collocation Order at 10.

<sup>718</sup> Kansas Commission Collocation Order at 3-4; Oklahoma Commission Collocation Order at 9-10.

<sup>719</sup> *See* Kansas Commission Reply at 4; Oklahoma Commission Comments at 2.

<sup>720</sup> *See* section IV.B.1, *supra*.

that these steps adequately address the Department of Justice's concerns about the existence of interim rates in both states.<sup>721</sup> Consequently, we find that SWBT has met its obligations under this checklist item for rates in both Kansas and Oklahoma.

## V. OTHER CHECKLIST ITEMS

### A. Checklist Item 6 – Switching

#### 1. Background

241. 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.”<sup>722</sup> To satisfy its obligations under this subsection, an applicant must demonstrate compliance with the Commission rules effective as of the date of the application relating to unbundled local switching, most of which are set forth in detail in our prior 271 orders.<sup>723</sup> The Commission revised these rules in the *UNE Remand Order*, which was released on November 5, 1999. That order generally retained the unbundling obligations for local switching while narrowing the scope of the obligation for certain geographic areas.<sup>724</sup> In the *UNE Remand Order*, the Commission required that incumbent LECs need not provide access on an unbundled basis to packet switching except in certain limited circumstances.<sup>725</sup>

#### 2. Discussion

242. Based on the evidence in the record, we conclude that SWBT demonstrates that it complies with checklist item 6.<sup>726</sup> Specifically, SWBT demonstrates that it provides: (1) line-side and trunk side facilities;<sup>727</sup> (2) basic switching functions;<sup>728</sup> (3) vertical features;<sup>729</sup> (4) customized

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<sup>721</sup> See Department of Justice Comments at 24 (Oklahoma), 27-28 (Kansas).

<sup>722</sup> 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.

<sup>723</sup> See *SWBT Texas Order*, 15 FCC Rcd at 18520-22, paras. 336-38; *Second BellSouth Louisiana Order*, 13 FCC Rcd at 20722, para. 207.

<sup>724</sup> *UNE Remand Order*, 15 FCC Rcd at 3822-32, paras. 276-299 (limiting an incumbent LEC's general duty to unbundle circuit switching when a requesting telecommunications carrier serves end users in the top 50 MSAs, in Density Zone 1, with four or more voice grade lines, provided that such LEC provides access to EELs).

<sup>725</sup> *UNE Remand Order*, 15 FCC Rcd at 3838-3919.

<sup>726</sup> SWBT Application at 103 (SWBT furnishes more than 17,000 unbundled switch ports in Kansas, and more than 6,000 in Oklahoma, mostly in combination with unbundled local loops); SWBT Smith/Johnson Aff., Attachment A.

<sup>727</sup> Line-side facilities include, but are not limited to, the connection between a loop termination at a main distribution frame, and a switch line card. Trunk-side facilities include, but are not limited to, the connection (continued....)

routing;<sup>730</sup> (5) shared trunk ports;<sup>731</sup> (6) unbundled tandem switching;<sup>732</sup> (7) usage information for billing exchange access;<sup>733</sup> and (8) usage information for billing for reciprocal compensation.<sup>734</sup>

The Kansas and Oklahoma Commissions conclude that SWBT is in compliance with checklist item 6.<sup>735</sup> Furthermore, the terms and conditions for local switching in both the K2A and the O2A are similar to those in the T2A, which we considered in the Texas 271 proceeding and determined to satisfy the requirements of checklist item 6.<sup>736</sup> One significant modification to the T2A, (Continued from previous page) \_\_\_\_\_

between trunk termination at a trunk-side cross-connect panel and a switch trunk card. *Second BellSouth Louisiana Order*, 13 FCC Rcd at 20724 nn.679-680. *See* SWBT Deere Aff. at paras. 152-153.

<sup>728</sup> The basic switching function includes, but is not limited to: connecting lines to lines, lines to trunks, trunks to lines, trunks to trunks, as well as the same basic capabilities that are available to the BOC's customers, such as a telephone number, directory listing, dial tone, signaling, and access to 911, operator services, and directory assistance. *Second BellSouth Louisiana Order*, 13 FCC Rcd at 20726 n.690. *See also* SWBT Deere Aff. at para. 154.

<sup>729</sup> *Second BellSouth Louisiana Order* at 13 FCC Rcd at 20726. Vertical features provide end-users with various services such as custom calling, call waiting, call forwarding, caller ID and Centrex. *Id.*; *see also* SWBT Deere Aff. at paras. 154, 161.

<sup>730</sup> An incumbent LEC must provide customized routing as part of the local switching element, unless it can prove to the state commission that customized routing in a particular switch is not technically feasible. *Second BellSouth Louisiana Order* at 13 FCC Rcd at 20728 n.705. Customized routing permits requesting carriers to designate the particular outgoing trunks associated with unbundled switching provided by the incumbent, which will carry certain classes of traffic originating from requesting carriers' customers. *See Id.* at 20728-29, para. 221; SWBT Deere Aff. at paras. 134-137. Customized routing is also referred to as selective routing. *Second BellSouth Louisiana Order* at 20728 n.704.

<sup>731</sup> *Local Competition Third Reconsideration Order*, 12 FCC Rcd at 12475-79; *Ameritech Michigan Order*, 12 FCC Rcd at 20716-17; *see also Second BellSouth Louisiana Order*, 13 FCC Rcd at 20732, para. 228; SWBT Deere at para. 157.

<sup>732</sup> The requirement to provide unbundled tandem switching includes: (i) trunk-connect facilities, including but not limited to the connection between trunk termination at a cross-connect panel and a switch trunk card; (ii) the base switching function of connecting trunks to trunks; and, (iii) the functions that are centralized in tandem switches (as distinguished from separate end-office switches), including but not limited to call recording, the routing of calls to operator services, and signaling conversion features. *Second BellSouth Louisiana Order*, 13 FCC Rcd at 20733 n. 732. *See* SWBT Deere Aff. at paras. 165-169.

<sup>733</sup> *See Second BellSouth Louisiana Order*, 13 FCC Rcd at 20733-35, paras. 230-31; SWBT Sparks Aff. at para. 133.

<sup>734</sup> *See Second BellSouth Louisiana Order*, 13 FCC Rcd at 20735-37, paras. 232-34; SWBT Sparks Aff. at para. 134.

<sup>735</sup> Kansas Commission Comments at 28-29; Oklahoma Commission Sec. 271 Order at 184-85.

<sup>736</sup> As an amendment to its K2A and O2A, SWBT offers CLECs an optional amendment which implements the rules adopted in the Commission's *UNE Remand Order* that became effective on February 17, 2000. *See* SWBT Sparks Aff. at para. 90. These amendments include language which eliminates unbundled switching as a UNE in certain high density areas when EELs are available. *Id.*, Attachment B.

however, is the addition of a provision for unbundled packet switching which, as discussed below, we find satisfies the requirements of the *UNE Remand Order*.

243. With regard to the provision of unbundled packet switching, SWBT demonstrates that it has a legal obligation in Kansas and Oklahoma to provide packet switching according to the rules set forth in the *UNE Remand Order*.<sup>737</sup> Indeed, SWBT's K2A and O2A incorporate verbatim the criteria adopted in our *UNE Remand Order* to establish when packet switching will be made available as an unbundled network element.<sup>738</sup>

244. We disagree with commenters that argue that SWBT violates the Commission's rules because it asserts in an attached affidavit a predictive judgment that it will not have to make available its packet switching capability contained in its Project Pronto network architecture.<sup>739</sup> These commenters do not allege that SWBT has denied them access to unbundled packet switching in Kansas or Oklahoma in contravention of our rules. Rather, these commenters take issue with SWBT's interpretation, set forth in this application, of its packet switching unbundling obligations as applied in the context of SWBT's Project Pronto.<sup>740</sup> Specifically, they disagree with SWBT's assertion that packet switching capability deployed as part of its Project Pronto does not, and will not, qualify for unbundling because its Project Pronto architecture is designed in a way that prevents it from meeting the criteria established in the *UNE Remand Order* for such unbundling.

245. In assessing compliance with checklist item 6, we need not rule on SWBT's interpretation of the *UNE Remand Order* as it relates to packet switching that is part of Project Pronto because no party has yet requested packet switching in Kansas or Oklahoma, and neither the Kansas nor the Oklahoma Commission has expressly endorsed or affirmed this interpretation. Without a specific factual situation or further information, this is not an issue that is ripe for review in the context of a pending section 271 application. Although SWBT's interpretation raises potential future compliance issues with packet switching unbundling obligations,<sup>741</sup> our review must be limited to present and concrete issues of compliance. Therefore, we find that SWBT complies with checklist item 6 concerning unbundled packet switching because it has demonstrated that it has a present legal obligation under the K2A and O2A, as well as existing interconnection agreements, to provide access to unbundled packet switching in accordance with

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<sup>737</sup> SWBT Chapman Reply Aff. at paras. 70-71.

<sup>738</sup> See SWBT Deere Aff. at paras. 150, 188; SWBT Sparks Aff., Attach. B at KS-9, OK-8-9.

<sup>739</sup> Allegiance Comments at 5-6; IP Comments at 21-27; McLeodUSA Comments at 36-37.

<sup>740</sup> See SWBT Chapman Aff. at paras. 109, 127; see also SWBT Reply at 91-92.

<sup>741</sup> For example, SWBT argues that unbundling criteria established in the *UNE Remand Order* will never be met because its Project Pronto architecture involves a fiber overlay, and thus copper subloops will always be available to a requesting carrier. SWBT Chapman Reply Aff. at paras. 74-75. This conclusion ignores the requirement in our unbundling rules that a competitor be able to provide over the spare copper the same level of quality advanced services to its customer as the incumbent LEC. See *UNE Remand Order*, 15 FCC Rcd at 3838-39.

our rules. In doing so, we limit our finding to a review of the legal obligations contained in the K2A and O2A and expressly reserve judgment on SWBT's interpretation of its obligation with respect to unbundled packet switching until faced with more concrete factual circumstances. We emphasize that nothing in our *Pronto Modification Order* relieves SWBT of any obligations under sections 251, 252 or any other provision of the Communications Act.<sup>742</sup>

## B. Checklist Item 8 – White Pages Directory Listings

246. 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.”<sup>743</sup> 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.<sup>744</sup> In the *Second BellSouth Louisiana Order*, the Commission found 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.<sup>745</sup>

247. Based on the evidence in the record, we conclude that SWBT satisfies the requirements of checklist item 8.<sup>746</sup> The Kansas and Oklahoma Commissions also conclude that SWBT complies with this checklist item.<sup>747</sup> We reject McLeodUSA and KMC’s assertions that SWBT fails to provide white pages directory listings in a nondiscriminatory manner.<sup>748</sup> Although

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<sup>742</sup> *Ameritech Corp. Transferor, and SBC Communications Inc., Transferee, For Consent to Transfer Control*, CC Docket No. 98-141, *Second Memorandum Opinion and Order*, FCC 00-336 paras, 2, 9, 30 (rel. Sept. 8, 2000) (*Pronto Modification Order*).

<sup>743</sup> 47 U.S.C. § 271(c)(2)(B)(viii).

<sup>744</sup> 47 U.S.C. § 251(b)(3). 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.” *Second BellSouth Louisiana Order*, 13 FCC Rcd at 20748, para. 255. We further concluded, “the term ‘directory listing,’ as used in this section, includes, at a minimum, the subscriber’s name, address, telephone number, or any combination thereof.” *Id.*

<sup>745</sup> *Id.*

<sup>746</sup> SWBT Application at 108-09; SWBT Rogers Aff. at paras. 6, 51-65. SWBT demonstrates that it is providing white pages directory listings for customers of competitive LECs that are nondiscriminatory in appearance and integration, and have the same accuracy and reliability that SWBT provides for its own customers. SWBT Rogers Aff. at paras. 53, 62 (nondiscriminatory appearance, *e.g.*, same size, font, and typeface), and paras. 62-65 (comparable accuracy and reliability).

<sup>747</sup> Kansas Commission Comments at 30; Oklahoma Commission Sec. 271 Order at 187.

<sup>748</sup> McLeodUSA Comments at 24-25; KMC Comments at 12; KMC Moseley Aff. at para. 18.

McLeodUSA claims that Ameritech has not provided directory listing to its resale customers in Illinois and Wisconsin,<sup>749</sup> McLeodUSA provides no evidence of problems with SWBT's white pages directory listings in Kansas and Oklahoma. Thus, McLeodUSA's argument is not relevant to a determination of whether SWBT meets checklist item 8 in Kansas and Oklahoma.<sup>750</sup> KMC states that SWBT has failed to provide white pages directory listings for many KMC customers in Kansas.<sup>751</sup> We conclude that there is no evidence to support that the difficulties KMC has encountered with SWBT's white pages directory listing procedures reflect systemic problems with SWBT's provisioning of their listings.

### C. Checklist Item 13 – Reciprocal Compensation

248. 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).”<sup>752</sup> 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.”<sup>753</sup>

249. Based on the evidence in the record, we conclude that SWBT demonstrates that it has entered into reciprocal compensation arrangements in accordance with the requirements of section 252(d)(2), and thus satisfies the requirements of checklist item 13. SWBT demonstrates that it: (1) has in place reciprocal compensation arrangements in accordance with section 252(d)(2),<sup>754</sup> and (2) is making all required payments in a timely fashion.<sup>755</sup> SWBT states that reciprocal compensation interconnection arrangements are available under rates set forth in the K2A and O2A and that Kansas and Oklahoma interconnection agreements contain negotiated, or

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<sup>749</sup> McLeodUSA Comments at 24.

<sup>750</sup> See SWBT Texas Order, 15 FCC Rcd at 18528, para. 351; see also SWBT Reply at 93.

<sup>751</sup> KMC Comments at 12. Specifically, KMC asserts that during a recent directory printing, at least 15 of its customers did not have white pages directory listings in the telephone directory. *Id.* SWBT explains that it ensures that all listings remain intact when customers transfer their local telephone service and, thus far, KMC has failed to take advantage of SWBT's white pages directory listings verification reports. SWBT Reply at 93; SWBT Rogers Reply Aff. at paras. 5-6, 9. SWBT maintains that it will continue to work with KMC to resolve all outstanding issues it may have regarding dropped directory listings. SWBT Reply at 93.

<sup>752</sup> 47 U.S.C. § 271(c)(2)(B)(xiii).

<sup>753</sup> 47 U.S.C. § 252(d)(2)(A).

<sup>754</sup> SWBT provides reciprocal compensation to competing carriers for the termination of local calls from SWBT customers under approved interconnection agreements in both Kansas and Oklahoma. SWBT Application at 115.

<sup>755</sup> SWBT Application at 116.

arbitrated, reciprocal compensation rates.<sup>756</sup> Both the Kansas Commission and Oklahoma Commission have concluded that SWBT complies with the reciprocal compensation requirements in item 13.<sup>757</sup>

250. SWBT, however, has not paid reciprocal compensation for ISP-bound traffic in Kansas and Oklahoma, maintaining that such traffic is “non-local,” and, therefore outside the reciprocal compensation requirement.<sup>758</sup> Several commenters allege that SWBT’s refusal to pay constitutes a failure of the reciprocal compensation requirement.<sup>759</sup> E-spire further maintains that SWBT’s choice to withhold the disputed amount and its protracted litigation are designed to keep competitors out of the market.<sup>760</sup>

251. We find that the issues raised by the commenters do not evidence SWBT’s failure to satisfy checklist item 13. Under a prior Commission order, ISP-bound traffic is not subject to the reciprocal compensation provisions of section 251(b)(5) and 252(d)(2),<sup>761</sup> therefore, as we stated in our *Bell Atlantic New York Order*, whether a carrier pays such compensation is “irrelevant to checklist item 13.”<sup>762</sup> The D.C. Circuit vacated and remanded the Commission’s order, and the Commission is now reconsidering the matter.<sup>763</sup> Given that the Commission has not yet determined the status of ISP-bound traffic, refusing to pay reciprocal compensation for ISP-bound traffic does not violate checklist item 13’s requirements at this time. As we have stated, “[i]n the absence” of a Commission rule on reciprocal compensation, “parties may voluntarily include this traffic within the scope of their interconnection agreements . . . [and] they are bound by those agreements, as interpreted and enforced by the state commissions.”<sup>764</sup> At this time, therefore, provided that a carrier follows states’ interpretations and requirements promulgated

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<sup>756</sup> SWBT Application at 115.

<sup>757</sup> Kansas Commission Comments at 33; SWBT Application App. C—Oklahoma, Vol. 25a-c, Tab 275 (Oklahoma Commission’s Final Order No. 445180 with Attachment 02A) (Sept. 28, 2000) at 2.

<sup>758</sup> SWBT Application at 116.

<sup>759</sup> See AT&T Comments at 30; e.spire Comments at 10; WorldCom Comments at 22-25.

<sup>760</sup> E-spire Comments at 11-13. E-spire asks the Commission to require a BOC litigating ISP-bound traffic to pay the disputed amount or to refrain from filing section 271 applications while the BOC litigates. *Id.*

<sup>761</sup> *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996: Inter-Carrier Compensation for ISP-Bound Traffic; Declaratory Ruling and Notice of Proposed Rulemaking*, CC Docket Nos. 96-98, 99-68, 14 FCC Rcd 3689, 3706 at para. 27 (1999) (*Reciprocal Compensation Declaratory Ruling*).

<sup>762</sup> *Bell Atlantic New York Order*, 15 FCC Rcd at 4142, para. 377.

<sup>763</sup> See *Bell Atl. Tel. Companies v. FCC*, 206 F.3d 1 (D.C. Cir. 2000); *Comment Sought on Remand of the Commission’s Reciprocal Compensation Declaratory Ruling by the U.S. Court of Appeals for the D.C. Circuit*, CC Docket. Nos. 96-98, 99-68, Public Notice, 15 FCC Rcd 11311 (2000).

<sup>764</sup> *Reciprocal Compensation Declaratory Ruling*, 15 FCC Rcd at 3703, para. 22.

under their interpretations of interconnection agreements, including states' requirements concerning ISP-bound traffic, such carrier has satisfied checklist item 13. Kansas has no final determination on the payment of reciprocal compensation for ISP-bound traffic.<sup>765</sup> The United States Court of Appeals for the Tenth Circuit has recently affirmed the Oklahoma Commission's determination that reciprocal compensation must be paid for ISP-bound traffic.<sup>766</sup> We expect that SWBT will comply with the final judicial determination of the matter.

#### D. Checklist Item 14 – Resale

252. 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)."<sup>767</sup> Based on the evidence in the record, we conclude that SWBT demonstrates that it makes telecommunications services available in Kansas and Oklahoma for resale in accordance with sections 251(c)(4) and 252(d)(3), and thus satisfies the requirements of checklist item 14.<sup>768</sup> SWBT states that it allows resellers nondiscriminatory access to its systems in compliance with this checklist item,<sup>769</sup> and the Kansas and Oklahoma Commissions agree.<sup>770</sup> In Kansas, SWBT, AT&T and the KCC staff have agreed to a uniform avoided cost discount of 21.6 percent, which

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<sup>765</sup> SWBT Application at 117. On May 19, 2000, the Kansas Commission opened Docket No. 00-GIMT-1054-GIT to investigate whether reciprocal compensation should be paid for ISP-bound traffic. Kansas Commission Comments at 33.

<sup>766</sup> *Southwestern Bell Telephone Co. v. Brooks Fiber Commun. of Oklahoma*, No. 99-5222, 2000 WL 1827576 (10<sup>th</sup> Cir. Dec. 13, 2000).

<sup>767</sup> 47 U.S.C. § 271(c)(2)(B)(xiv).

<sup>768</sup> We note that the Court of Appeals for the District of Columbia has recently issued a decision overturning the Commission's determination, in conjunction with the Ameritech-SBC merger, that the merged company could avoid the resale obligation of section 251(c)(4) for the sale of advanced services if it provided those services through a subsidiary. *Association of Communications Enterprises v. Federal Communications Commission*, 2001 WL 20519 (D.C. Cir. Jan. 9, 2001). At the time SWBT filed this application, it was obligated to comply with the Commission's rules regarding the provision of advanced services through affiliates. In its review of the Commission's decision on the New York 271 application, the D.C. Circuit affirmed the Commission's view that "compliance with Commission orders cannot serve as a basis for rejecting an application." *AT&T Corp. v. FCC*, 220 F.3d at 630. We believe that, consistent with this ruling, SWBT should not be faulted for its efforts to comply with a Commission order in effect at the time of the application, even though the order was subsequently vacated. At the same time, we expect SWBT to act promptly to come into compliance with section 251(c)(4) in accordance with the terms of the court's decision. We anticipate issuing an order in the very near future to address this issue.

<sup>769</sup> SWBT Application at 117-120.

<sup>770</sup> Kansas Commission Comments at 34-35; Oklahoma Commission Comments Attach. A at 190-191.

is incorporated in the K2A.<sup>771</sup> In Oklahoma, the OCC has established a wholesale discount rate of 19.8%, which is incorporated into the O2A.<sup>772</sup>

253. We find unpersuasive commenters' claims that the Commission should allow customers in long-term contracts to switch to competing telecommunications carriers without termination penalties under a "fresh look" argument.<sup>773</sup> In the *Bell Atlantic New York Order* and the *SWBT Texas Order*, we determined that although termination liabilities could, in certain circumstances, be unreasonable or anticompetitive, they do not on their face cause a carrier to fail checklist item 14.<sup>774</sup> We also determined that if termination liabilities are not triggered by the assignment of a contract to a competitive LEC, such termination liabilities do not constitute a restriction on resale under checklist item 14.<sup>775</sup> In both Kansas and Oklahoma, the assignment of a Customer Specific Arrangement to a competitive LEC does not trigger termination liabilities.<sup>776</sup> Accordingly, these termination liabilities do not constitute a restriction on resale under checklist item 14. We note that KMC raised an identical "fresh look" argument in a Petition for Declaratory Ruling, which is currently pending.<sup>777</sup> We find, as we did in the *Bell Atlantic New York Order* and *SWBT Texas Order*, that this issue is best addressed in the context of that pending petition, and we decline to resolve the issue here.<sup>778</sup> In any event, our resolution of this issue would not cast doubt on SWBT's overall compliance with checklist item 14 because SWBT meets our existing resale requirements.

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<sup>771</sup> SWBT Application at 117.

<sup>772</sup> *Id.* at 117-118.

<sup>773</sup> Allegiance Comments at 43-45; McLeodUSA Comments at 49-51.

<sup>774</sup> *Bell Atlantic New York Order*, 15 FCC Rcd at 4147-48, para. 390; *SWBT Texas Order*, 15 FCC Rcd at 18547, para. 392.

<sup>775</sup> *Bell Atlantic New York Order*, 15 FCC Rcd at 4147-48, para. 390.

<sup>776</sup> SWBT Sparks Aff. at paras. 160-161.

<sup>777</sup> See *In re Establishment of Rules to Prohibit the Imposition of Unjust, Onerous Termination Penalties on Customers Choosing to Partake of the Benefits of Local Exchange Telecommunications Competition*, Petition for Declaratory Ruling, CC Docket No. 99-142 (filed Apr. 26, 1999) (requesting that the Commission declare unlawful termination penalties imposed by incumbent LECs, to prohibit enforcement of incumbent LEC termination penalties, and to require the removal of incumbent LEC termination penalties from state tariffs until more competition develops).

<sup>778</sup> *Bell Atlantic New York Order*, 15 FCC Rcd at 4148, para. 391; *SWBT Texas Order*, 15 FCC Rcd at 18547-48, para. 392.

254. Based on evidence in the record, we also find that SWBT satisfies the provisioning requirements of checklist item 14. As discussed above, SWBT is provisioning competitive LECs' orders for resale in substantially the same time and manner as for its retail customers.<sup>779</sup>

### **E. Remaining Checklist Items (3, 5, 7, 9-12)**

255. An applicant under section 271 must demonstrate that it complies with checklist item 3 (poles, ducts, conduits and rights of way),<sup>780</sup> item 5 (unbundled local transport),<sup>781</sup> item 7 (911/E911 access and directory assistance/operator services),<sup>782</sup> item 9 (numbering administration),<sup>783</sup> item 10 (databases and associated signaling),<sup>784</sup> item 11 (number portability),<sup>785</sup> and item 12 (local dialing parity).<sup>786</sup> Based on the evidence in the record, and in accordance with Commission rules and orders concerning compliance with section 271 of the Act, we conclude that SWBT demonstrates that it is in compliance with checklist items 3, 5, 7, 9, 10, 11 and 12 in both Kansas and Oklahoma.<sup>787</sup> The Kansas and Oklahoma Commissions also conclude that SWBT complies with the requirements of each of these checklist items.<sup>788</sup> No commenter raised allegations challenging SWBT's compliance with checklist items 3, 9 and 12. Insofar as

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<sup>779</sup> See section IV.B.2, *supra*.

<sup>780</sup> 47 U.S.C. § 271(c)(2)(B)(iii); *SWBT Texas Order*, 15 FCC Rcd at 18478-79, paras. 243-44. We discuss the statutory requirements of checklist item 3, 5, 7, 9, 10, 11 and 12 in more detail in Appendix B of this Order.

<sup>781</sup> 47 U.S.C. § 271(c)(2)(B)(v); *SWBT Texas Order*, 15 FCC Rcd at 18518-19, para. 331.

<sup>782</sup> 47 U.S.C. § 271(c)(2)(B)(vii); *SWBT Texas Order*, 15 FCC Rcd at 18524-27, paras. 343, 345-48.

<sup>783</sup> 47 U.S.C. § 271(c)(2)(B)(ix); *SWBT Texas Order*, 15 FCC Rcd at 18530-31, paras. 359-60.

<sup>784</sup> 47 U.S.C. § 271(c)(2)(B)(x); *SWBT Texas Order*, 15 FCC Rcd at 18531-32, paras. 362-63.

<sup>785</sup> 47 U.S.C. § 271(c)(2)(B)(xi); *SWBT Texas Order*, 15 FCC Rcd at 18534-35, paras. 369-70.

<sup>786</sup> 47 U.S.C. § 271(c)(2)(B)(xii); *SWBT Texas Order*, 15 FCC Rcd at 18536-37, paras. 373-74.

<sup>787</sup> SWBT Application at 88-91 (checklist item 3), 100-03 (checklist item 5), 104-08 (checklist item 7), 109-10 (checklist item 9), 110-11 (checklist item 10), 111-14 (checklist item 11), and 114-15 (checklist item 12); *see also* SWBT Adair Aff. (checklist item 9); SWBT Deere Aff. at paras. 128-48 (checklist item 5), paras. 189-209 (checklist item 7), paras. 210-50 (checklist item 10), paras. 251-260 (checklist item 11) and paras. 261-64 (checklist item 12); SWBT Dysart Aff. at para. 74 (checklist item 3), paras. 150-54 (checklist item 5), paras. 155-56 (checklist item 7), paras. 157-162 (checklist item 11); SWBT Hearst Aff. at para. 5 (checklist item 3); SWBT Orozco Aff. (checklist item 11); SWBT Rogers Aff. at paras. 70-86 (checklist item 10);

<sup>788</sup> Kansas Commission Comments at 22 (checklist item 3), 64 (checklist item 5), 29 (checklist item 7), 30 (checklist item 9), 31 (checklist items 10-11), and 32 (checklist item 12); Oklahoma Commission Sec. 271 Order at 179 (checklist item 3), 184 (checklist item 5), 185-86 (checklist item 7), 187 (checklist item 9), 188 (checklist item 10), 189 (checklist item 11), and 189 (checklist item 12).

commenters raised issues concerning checklist items 5, 7, 10 and 11, we address these issues elsewhere in this Order.<sup>789</sup>

## VI. SECTION 272 COMPLIANCE

256. 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."<sup>790</sup> The Commission set standards for compliance with section 272 in the *Accounting Safeguards Order* and the *Non-Accounting Safeguards Order*.<sup>791</sup> 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.<sup>792</sup> 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.<sup>793</sup>

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<sup>789</sup> Focal contends that SWBT fails to satisfy checklist item 5 because the ordering process that SWBT has implemented for the conversion of existing circuits to EELs is so burdensome as to violate SWBT's obligation to provide EELs to requesting carriers. Focal Comments at 5. We discuss the provisioning of EELs, and address Focal's comments, in section IV.B.3, *supra*. Additionally, several CLECs allege that SWBT does not make available loop make-up information in a manner consistent with the *UNE Remand Order*. Allegiance Comments at 34; McLeodUSA Comments at 35; IP Comments at 12, 14. We address these concerns in section IV.B.2.c.i, *supra*. KMC and Sprint allege that SWBT fails to satisfy checklist item 11 because it has problems coordinating number portability with loop cutovers. KMC Comments at 4; Sprint Comments at 64. We address these issues in section IV.B.2.e.iii, *supra*. MFNS states that SWBT's denial of its requests for collocation and access to UNEs demonstrates unquestionable bad faith on SWBT's part, in contravention of checklist item 5 and of the public interest, convenience, and necessity. MFNS Comments at 13. We address these issues in section VII, *infra* where we discuss the public interest standard that is part of section 271 of the 1996 Act.

<sup>790</sup> 47 U.S.C. § 271(d)(3)(B).

<sup>791</sup> 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*).

<sup>792</sup> *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.

<sup>793</sup> *Ameritech Michigan Order*, 12 FCC Rcd at 20725.

## A. Discussion

257. Based on the record, we conclude that SWBT has demonstrated that it complies with the requirements of section 272. No commenter has challenged SWBT's showing that it complies with Section 272. In addition, we have previously found that SWBT met its burden of proving compliance with section 272 in Texas.<sup>794</sup> Significantly, SWBT states that it maintains the same structural separation and nondiscrimination safeguards in Kansas and Oklahoma as it does in Texas.<sup>795</sup> We address each section 272 requirement below.

### 1. Structural, Transactional, and Accounting Requirements of Section 272

258. *Section 272(a) – Separate Affiliate.* Section 272(a) requires BOCs and their local exchange carrier affiliates that are subject to section 251(c) to provide certain competitive services through structurally separate affiliates.<sup>796</sup> For the reasons described in the subsequent section below, we conclude that SBC demonstrates that it will operate in accordance with section 272(a). No party challenges SWBT's showing that it complies with section 272(a).

259. The parent company, SBC Communications, Inc., has established one primary section 272 affiliate to provide in-region interLATA services in Kansas and Oklahoma upon gaining section 271 approval: Southwestern Bell Communications Services, Inc. ("SBCS"), which does business as Southwestern Bell Long Distance.<sup>797</sup> At this time, SBCS provides long distance service in Texas, and also conducts the company's calling card operations. Once earning section 271 approval, SBCS plans to provide in-region interLATA services in Kansas and Oklahoma by reselling wholesale network services of one or more unaffiliated providers.<sup>798</sup> In its application, SWBT demonstrates that it has implemented internal control mechanisms reasonably designed to prevent, as well as detect and correct, any noncompliance with section 272.

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<sup>794</sup> *SWBT Texas Order*, 15 FCC Rcd at 18549, para. 396.

<sup>795</sup> SWBT Application at 69.

<sup>796</sup> Section 272(a) states that a BOC may not provide certain services except through one or more affiliates that meet the requirements of section 272(b). *See* 47 U.S.C. § 272(a)(1)(B).

<sup>797</sup> For the purposes of its application to provide in-region interLATA services in Kansas and Oklahoma, we only address SWBT's section 272 showing with respect to one affiliate, SBCS. We note that SWBT has several other section 272 affiliates as a result of various mergers: Southern New England Telephone Enhanced Services, Inc. (SNET Enhanced Services); Ameritech Communications, Inc. (ACI); Ameritech Communications, Inc. of Illinois (ACoI); and Ameritech Communications, Inc. of Wisconsin (ACoW). On October 8, 1999, the merger of SBC and Ameritech was consummated. For a discussion of Ameritech's Section 272 affiliates, *see* SWBT Carrisalez Aff. at paras. 9-12. Our findings do not apply to Advanced Services, Inc. (ASI) because ASI is not a section 272 affiliate. These other affiliates do not provide service in Kansas or Oklahoma. *See* SWBT Ramsey Aff. at paras 3-4.

<sup>798</sup> SWBT Carrisalez Aff. at para. 24.

260. *Section 272(b)*. Based on the evidence in the record, and our prior determinations regarding SWBT's section 272 affiliate,<sup>799</sup> we find that SWBT has demonstrated that its section 272 affiliate complies with section 272(b) in the provision of services in Kansas and Oklahoma. Specifically, we find that SWBT has demonstrated that its separate affiliate "operates independently" as required under section 272(b)(1);<sup>800</sup> maintains separate books, records and accounts as required under section 272(b)(2);<sup>801</sup> maintains separate officers, directors and employees as required under section 272(b)(3);<sup>802</sup> fulfills the credit arrangements requirements of section 272(b)(4);<sup>803</sup> and complies with the arm's length and public disclosure requirements of section 272(b)(5).<sup>804</sup> Furthermore, we note, as we did in the *SWBT Texas 271 Order*, that neither the Commission's review of SWBT's accounting information nor the audits conducted by independent auditors have revealed discrepancies with SWBT's corporate accounting procedures for affiliate transactions in the past three years.<sup>805</sup> We also note that the section 272(d) joint Federal-State audit will provide an appropriate mechanism for detecting potential anticompetitive or otherwise improper conduct. Finally, no party challenges SWBT's showing that it complies with section 272(b).

261. *Section 272(c)(2) – Accounting Principles*. Based on the evidence in the record, SWBT demonstrates that it accounts for all transactions with its section 272 affiliates in accordance with the accounting principles designated or approved by the Commission.<sup>806</sup> In the *Accounting Safeguards Order*, the Commission concluded that complying with the Part 32 affiliate transactions rules satisfies the accounting requirements of section 272(c), which pertain to the BOC's "dealings" with its separate affiliate. We agree with SBC that its section 272 affiliates

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<sup>799</sup> *SWBT Texas Order*, 15 FCC Rcd at 18549-54, paras. 397-407.

<sup>800</sup> SWBT Application at 69 (citing SWBT Carrisalez Aff. at paras. 18-26; SWBT Yohe Aff. at paras. 11-17).

<sup>801</sup> SWBT Application at 69 (citing SWBT Carrisalez Aff. at paras. 27-36; SWBT Larkin Aff. at paras. 9-11, 36-42. In addition, SWBT describes the security measures and other internal controls to show restricted access to the books, records, and accounts of its section 272 affiliate. See SWBT Larkin Aff. at paras. 10-11.

<sup>802</sup> 47 U.S.C. § 272(b)(3); 47 C.F.R. § 53.203(c); *Ameritech Michigan Order*, 12 FCC Rcd at 20730-31, para. 360; *Second BellSouth Louisiana Order*, 13 FCC Rcd at 20789-90, paras. 329-30; SWBT Application at 69-70; SWBT Carrisalez at paras. 37-46, Attachs. D-K (submitting names of corporate officers and directors); Attach. L (submitting corporate policy prohibiting loans of employees); SWBT Yohe Aff. at paras. 18-19.

<sup>803</sup> 47 U.S.C. § 272(b)(4); 47 C.F.R. § 53.203(d); *Non-Accounting Safeguards Order*, 11 FCC Rcd at 21995, paras. 189-90; see SWBT Application at 70; SWBT Carrisalez Aff. at paras. 47-49; SWBT Yohe Aff. at paras. at 20-21.

<sup>804</sup> SWBT Application at 70; SWBT Larkin Aff. at paras. 13-36; SWBT Carrisalez Aff. at 50-78; *SWBT Texas Order*, 15 FCC Rcd at 18551-54, paras. 403-407.

<sup>805</sup> *SWBT Texas Order*, 15 FCC Rcd at 18553, para. 406.

<sup>806</sup> 47 U.S.C. § 272(c)(2); SWBT Larkin Aff. at para. 7.

may share services (except OI&M) provided to its affiliated BOCs by a “shared services affiliate,” but we emphasize that such services are subject to the appropriate non-structural safeguards.<sup>807</sup>

262. *Section 272(d) – Biennial Audit.* Based on the evidence in the record, we conclude that SWBT demonstrates that it will comply with section 272(d), which requires an independent audit of a BOC’s compliance with section 272 after receiving interLATA authorization.<sup>808</sup> The section 272(d) biennial audit involves a thorough and systematic evaluation of a BOC’s compliance with section 272 and its affiliate relationships performed by an independent auditor working under the direction of the Commission and state commissions.<sup>809</sup> As noted in the *Accounting Safeguards Order*, once a BOC obtains section 271 approval, the Chief of the Common Carrier Bureau will form a joint Federal/State audit team to review the conduct of the audit and oversee the activities of the independent auditor.<sup>810</sup> We view the active participation of the state commissions as critical to the success of the biennial audit at ensuring a BOC’s compliance with section 272. As noted in previous orders, the section 272(d) biennial audit entails an examination into a BOC’s affiliate relationships to ensure the company does not use its corporate affiliates as improper tools for circumventing statutory obligations.<sup>811</sup> We emphasize that a BOC cannot circumvent legal and regulatory requirements through its affiliate structure.

## 2. Nondiscrimination Safeguards of Section 272

263. *Section 272(c)(1) – Nondiscrimination Safeguards.* Based on the evidence in the record, we conclude that SWBT demonstrates that it will comply with section 272(c)(1), which prohibits a BOC from discriminating in favor of its section 272 affiliate in the “provision or procurement of goods, services, facilities, and information, or in the establishment of standards.”<sup>812</sup> The Commission’s nondiscrimination safeguards require a BOC to, among other

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<sup>807</sup> SWBT has a “shared services affiliate” that provides services to members of the corporate family. *See SWBT Texas Order*, 15 FCC Rcd at 18554, para. 408. The Commission’s accounting safeguards allow certain accounting treatment for services provided by a shared services affiliate to members of the corporate family, so long as the shared services affiliate only conducts business with members of the corporate family. *See Accounting Safeguards Order*, 11 FCC Rcd at 17607-608, para. 148.

<sup>808</sup> 47 U.S.C. § 272(d); 47 C.F.R. § 53.209-213; *see* SWBT Application at 70-71; SWBT Larkin Aff. at paras. 37-42; SWBT Carrisalez Aff. at paras. 79-81.

<sup>809</sup> 47 U.S.C. § 272(d)(1).

<sup>810</sup> *Accounting Safeguards Order*, 11 FCC Rcd at 17629, para. 198.

<sup>811</sup> *Accounting Safeguards Order*, 11 FCC Rcd at 17631, para. 203; *Second BellSouth Louisiana Order*, 13 FCC Rcd at 20794, para. 338; *Bell Atlantic New York Order*, 15 FCC Rcd at 4158-57, para. 416.

<sup>812</sup> 47 U.S.C. § 272(c)(1); *Non-Accounting Safeguards Order*, 11 FCC Rcd at 21997-17, para. 195; *Second BellSouth Louisiana Order*, 13 FCC Rcd 20796-800, paras. 341-50. The Commission found that the nondiscrimination safeguards extend to any good, service, facility, or information that a BOC provides to its section 272 affiliate, including administrative services and other non-telecommunications goods and services. *Non-Accounting Safeguards Order*, 11 FCC Rcd at 22003-04, para. 210. The Commission interprets the section (continued....)

things, “provide to unaffiliated entities the same goods, services, facilities, and information that it provides to its section 272 affiliate at the same rates, terms, and conditions.”<sup>813</sup> Our review of SWBT’s internal controls and standard operating procedures shows that SWBT requires its section 272 affiliate to adhere to the same procedures for obtaining collocation space required of unaffiliated third parties, and that SWBT has procedures to ensure that unaffiliated entities have access to information for, among other things, the development of company-internal standards and processes.<sup>814</sup> In addition, we note SWBT’s OSS showing demonstrates that it meets the requirements of section 272(c)(1) regarding nondiscriminatory provision of information.<sup>815</sup>

264. *Section 272(e) – Fulfillment of Certain Requests.* Based on the evidence in the record, SWBT demonstrates that it will comply with section 272(e), which requires SWBT to fulfill requests for, among other things, telephone exchange and exchange access services from unaffiliated entities within the same time period SWBT fulfills such requests for its own retail operations.<sup>816</sup> In addition, section 272(e) also provides that a BOC “shall not provide any facilities, services, or information concerning its provision of exchange access to the [section 272 affiliate] unless such facilities, services or information are made available to other providers of interLATA services in that market on the same terms and conditions.”<sup>817</sup> Finally, section 272(e) places certain accounting and nondiscrimination requirements on BOCs with respect to exchange access and facilities or services provided to their section 272 affiliates.<sup>818</sup> We note that no party challenges SWBT’s showing with respect to section 272(e).

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272(c) nondiscrimination safeguards broadly. *See id.* at 22003, 22007, 22012, 22015-016; SWBT Yohe Aff. at paras. 22-32.

<sup>813</sup> *Non-Accounting Safeguards Order*, 11 FCC Rcd at 22000-01, para. 202.

<sup>814</sup> SWBT Application at 81-83; SWBT Sparks Aff. at para. 79 (noting collocation space reservation policies applicable to SWBT affiliates).

<sup>815</sup> *See* discussion *supra* Section IV.B.2; *SWBT Texas Order*, 15 FCC Rcd at 18555-56, para. 410 ; *Second BellSouth Louisiana Order*, 13 FCC Rcd 20799, para. 346.

<sup>816</sup> 47 U.S.C. § 272(e)(1); *Non-Accounting Safeguards Order*, 11 FCC Rcd at 22018-22, paras. 239-45; *Second BellSouth Louisiana Order*, 13 FCC Rcd at 20800-01, paras. 348-50; *see* SWBT Application at 71-72. SWBT demonstrates that it will provide accurate data regarding actual service intervals so that unaffiliated parties can evaluate the performance SWBT provides itself and its affiliates and compare such performance to the service quality SWBT provides to competing carriers. SWBT Yohe Aff. at paras. 33-39, Attach. C (submitting report format for section 272(e)(1) reporting requirements).

<sup>817</sup> 47 U.S.C. § 272(e)(2).

<sup>818</sup> 47 U.S.C. § 272(e)(3), (e)(4); *Second BellSouth Louisiana Order*, 13 FCC Rcd at 20802-03, paras. 353-55; *see* SWBT Application at 71; SWBT Yohe Aff. at paras. 40-43.

### 3. Joint Marketing Provisions of Section 272

265. Based on the evidence in the record, we conclude that SWBT has demonstrated that it will comply with the joint marketing provisions of section 272(g)(1),<sup>819</sup> and the affiliate services requirements of section 272(g)(2).<sup>820</sup> We note that no party challenges SWBT's showing.

## VII. PUBLIC INTEREST ANALYSIS

266. Separate 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.<sup>821</sup> We conclude that approval of this joint application is consistent with the public interest. In reaching this determination, we find that 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 years of experience with the consumer benefits that flow from competition in telecommunications markets.

267. Nonetheless, the public interest requirement is independent of the statutory checklist and, under normal canons of statutory construction, requires an independent determination. Thus, we view the public interest requirement as an opportunity to review the circumstances presented by the applications 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, we 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 under the particular circumstances of these applications.<sup>822</sup> Another factor that could be relevant to our analysis is whether we have sufficient assurance that markets will remain open after grant of the application. While no one factor is dispositive in this analysis, our overriding goal is to ensure that nothing undermines our conclusion, based on our analysis of checklist compliance, that markets are open to competition. As discussed below, we conclude that the public interest would be met by granting the joint application for Kansas and Oklahoma.

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<sup>819</sup> 47 U.S.C. § 272(g)(1); *see* SWBT Application at 72; SWBT Carrisalez Aff. at paras. 82-90; SWBT Yohe Aff. at paras. 48-50.

<sup>820</sup> 47 U.S.C. § 272(g)(2); *Second BellSouth Louisiana Order*, 13 FCC Rcd at 20804, para. 357; *see* SWBT Application at 72; SWBT Yohe Aff. at para. 50; SWBT Carrisalez Aff. at para. 88.

<sup>821</sup> 47 U.S.C. § 271(d)(3)(C).

<sup>822</sup> *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").

### A. Competition in Local Exchange and Long Distance Markets

268. As set forth below, we conclude that approval of the joint application for Kansas and Oklahoma is consistent with promoting competition in the local and long distance telecommunications markets in each state. Consistent with our extensive review of the competitive checklist, which embodies the critical elements of market entry under the Act, we find that barriers to competitive entry in the local markets have been removed and the local exchange markets today are open to competition. We disagree with commenters' arguments that the public interest would be disserved by granting SWBT's application because the local market in Kansas and in Oklahoma have not yet truly been opened to competition.<sup>823</sup> Commenters cite an array of evidence which, they argue, demonstrates that the local telecommunications market is not open and that competition has not sufficiently taken hold in Kansas and Oklahoma. For example, one commenter suggests that the low percentage of total access lines served by competitive LECs in both Kansas and Oklahoma, and the minimal competition for residential services in Kansas, indicate that these markets are not yet truly open.<sup>824</sup> 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. Factors beyond a BOC's control, such as individual CLEC 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 have no intention of establishing one here.<sup>825</sup> 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 competitive checklist.<sup>826</sup>

### B. Assurance of Future Compliance

269. As set forth below, we find that SWBT's performance remedy plans for both Kansas and Oklahoma provide additional assurance that the local markets 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.<sup>827</sup> Although the Commission strongly encourages state performance monitoring and post-entry enforcement, we have never required BOC applicants to demonstrate that they are subject to such mechanisms as a

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<sup>823</sup> See, e.g., AT&T Comments at 21-24; Sprint Comments at 68.

<sup>824</sup> Sprint Comment at 68.

<sup>825</sup> See *Ameritech Michigan Order*, 12 FCC Rcd at 20585, para. 77.

<sup>826</sup> See *SWBT Texas Order*, 15 FCC Rcd at 18558-59, para. 419.

<sup>827</sup> See *Second BellSouth Louisiana Order*, 13 FCC Rcd at 20806; see *Ameritech Michigan Order*, 12 FCC Rcd at 20747.

condition of section 271 approval.<sup>828</sup> The Commission has stated that the fact that a BOC will be subject to performance monitoring and enforcement mechanisms 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.<sup>829</sup>

### 1. Performance Remedy Plan

270. SWBT's Performance Remedy Plans are part of the K2A and O2A standard interconnection contracts and are available to competing LECs through those agreements. The two Plans are nearly identical to the current Texas Performance Remedy Plan, itself a modified version of the plan we reviewed in the Texas 271 proceedings.<sup>830</sup> That original plan has undergone review and modification through the ongoing Texas Commission and industry process under Texas Commission authority.<sup>831</sup> 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.

271. Under the Plans, SWBT collects and reports data on a wide range of performance areas, according to set definitions and business rules. The Performance Remedy Plans provide for two classes or "tiers" of performance penalties. Tier-1 penalties apply generally to customer-affecting measurements. Penalties for failure to comply with standards corresponding to these performance measurements are paid to competitive LECs receiving the substandard performance and that have opted into this section of the K2A or O2A. Tier-2 penalties apply to competition-affecting measurements such as OSS availability, and are paid to the respective State Treasuries. Tier-1 damages are assessed if a performance measure is out of compliance for a single month, but Tier-2 fines apply only if a measurement is missed for three consecutive months. Alternately, if three consecutive months are not missed, but six of twelve months' measurements are missed, Tier-2 fines will also apply.<sup>832</sup>

272. While the current Texas Plan forms the basis for the two new plans, both the Kansas and Oklahoma commissions modified their plans in certain aspects to address particular

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<sup>828</sup> 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 Kansas and Oklahoma for particular circumstances in each of these states, has itself helped to bring SWBT into checklist compliance.

<sup>829</sup> See *Second BellSouth Louisiana Order*, 13 FCC Rcd at 20806.

<sup>830</sup> SWBT Dysart Aff. at para. 25-42.

<sup>831</sup> SWBT Application at 66.

<sup>832</sup> SWBT Dysart Reply Aff. at para. 146.

situations and conditions in those states. For example, as explained below, the Kansas and Oklahoma 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. While some commenters question the differences between the current Texas and the Kansas and Oklahoma Plans,<sup>833</sup> we conclude that the state-specific modifications appear reasonable and do not detract from the overall effectiveness of the Plans.

## 2. Key Elements of the Enforcement Plans

273. We have examined certain key aspects of these plans to determine whether they 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.<sup>834</sup> In our *SWBT Texas Order*, for example, we predicted that the enforcement mechanisms developed in Texas would be effective in practice.<sup>835</sup> Both the Kansas and Oklahoma Commissions adopted a variant of the current Texas Plan whose measures, coupled with a self-executing performance remedy plan, are designed to prevent backsliding. Both the Kansas and Oklahoma Commissions recognize the importance of implementing and monitoring a remedy plan that produces sufficient incentives for SWBT to maintain a high level of wholesale service and sufficient disincentives for SWBT to engage in anti-competitive behavior after section 271 relief is granted in their state.<sup>836</sup> As explained below, we conclude that both the Kansas and the Oklahoma Commissions established a performance remedy plan that would discourage anti-competitive behavior by setting the damages and penalties at a level above the simple cost of doing business.

274. *Total Liability At Risk.* We conclude that the total of \$45 million for Kansas and \$44 million for Oklahoma in potential penalties placed at risk, on an annual basis, under the performance plans represents a meaningful incentive for SWBT to maintain a high level of performance.<sup>837</sup> As a percentage of the applicant's in-state net return, these penalty plans place

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<sup>833</sup> Allegiance Comments at 39; McLeodUSA Comments at 45. It appears that many of the differences identified may result from the fact that the Texas plan has been recently modified and those modifications were incorporated in the Kansas and Oklahoma Plans.

<sup>834</sup> See *Ameritech Michigan Order*, 12 FCC Rcd at 20741-51, para. 393.

<sup>835</sup> 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. This prediction was based on five characteristics: (1) potential liability that provides a meaningful and significant incentive to comply with the designated performance standards; (2) clearly-articulated, pre-determined measures and standards, which encompass a comprehensive range of carrier-to-carrier performance; (3) a reasonable structure that is designed to detect and sanction poor performance when it occurs; (4) a self-executing mechanism that does not leave the door open unreasonably to litigation and appeal; and (5) reasonable assurances that the reported data is accurate.

<sup>836</sup> Oklahoma Commission Sec. 271 Order at 193; Kansas Commission Comments at 40-42.

<sup>837</sup> SWBT Dysart Aff. at para. 32. The cap is based on 36% of SWBT's net return, and will be recalculated annually, but will never exceed \$45 million or go below \$35 million for Kansas or exceed \$44 million or go below (continued....)

the same amount at stake as the plans adopted in Texas and New York. We thus disagree with commenters that suggest that this amount is insufficient and fails to provide adequate assurance of SWBT's compliance in the future.<sup>838</sup> The performance plans adopted by the Kansas and Oklahoma Commissions do not represent the only means of ensuring that SWBT continues to provide nondiscriminatory service to competing carriers.<sup>839</sup> In addition to the \$45 million in Kansas and \$44 million in Oklahoma at stake under the Plans, as noted above, SWBT faces other consequences if it fails to sustain a high level of service to competing carriers, including: federal enforcement action pursuant to section 271(d)(6); liquidated damages under interconnection agreements; and remedies associated with antitrust and other legal actions.

275. *Performance Measurements and Standards.* Performance measurements are intended to ensure that the reporting mechanism provides a “benchmark against which new entrants and regulators can measure performance over time to detect and correct any degradation of service rendered to new entrants.”<sup>840</sup> The Plans are not static, and we recognize that both the Kansas and Oklahoma Commissions are committed to periodic review and modification of the plans based on input from both SWBT and competitive LECs.<sup>841</sup> The Kansas and Oklahoma Plans include a semi-annual review process, similar to that adopted in the Texas Plan. This continuing ability of the measurements to evolve is an important feature because it allows the Plans to reflect changes in the telecommunications industry and the Kansas and Oklahoma markets.<sup>842</sup>

(Continued from previous page) \_\_\_\_\_

\$34.25 million for Oklahoma. The cap represents a comparable proportion of the applicant's “net return” as we deemed adequate for Bell Atlantic in New York (*see Bell Atlantic New York Order*, 15 FCC Rcd at 4168, para. 436 n.1332) and for SWBT in Texas (*see SWBT Texas Order*, 15 FCC Rcd at 18561-62, para. 424).

<sup>838</sup> Allegiance Comments at 37-38; McLeodUSA Comments at 43-45; Sprint Comments at 70-73. *See also Bell Atlantic New York Order*, 15 FCC Rcd at 4168-69, para. 437 (“[A]n overall liability amount would be meaningless if there is no likelihood that payments would approach this amount, even in instances of widespread performance failure.”).

<sup>839</sup> Kansas Commission Comments at 43. The Commission states its intention to remain diligent to complaints even if the test results show compliance and further states that “if SWBT's behavior is habitually noncompliant ... the Commission retains the authority to address the level of penalties.” *Also see* Oklahoma Commission Reply at 27 (“In the event of ‘backsliding’ ... the OCC will not hesitate to take such action as may be available to the OCC to correct the performance of SWBT”).

<sup>840</sup> *See SWBT Texas Order*, 15 FCC Rcd at 18562-63, para. 425; *see also Bell Atlantic New York Order*, 15 FCC Rcd at 4169, para. 438.

<sup>841</sup> SWBT Dysart Aff. at para. 25-26. The Kansas and Oklahoma Plans start with the Texas Plan after the modifications incorporated from the first six-month review. For instance, the Version 1.7 metrics are currently used in the Texas as well as the Kansas and Oklahoma Plans. We note that Version 1.7 of the performance metrics evolved from the previously approved Version 1.6 as a result of the expected periodic review as originally envisioned when the Texas Plan was approved.

<sup>842</sup> *See Bell Atlantic New York Order*, 15 FCC Rcd at 4169, para. 438.

276. *Structural Elements of the Plan.* The Kansas and Oklahoma Plans add to the current Texas Plan specific conditions for Z statistical calculations and the methodology for calculating the Fisher's Exact Test, among other changes.<sup>843</sup> As we found in the Texas proceedings, the structural elements of the Plan appear reasonably designed to detect and sanction poor performance when it occurs. Some commenters offer specific suggestions for strengthening the plan,<sup>844</sup> and Sprint contends that the Plans are flawed because they were not fully reviewed by the state commissions.<sup>845</sup> The two Plans are structurally similar to the Texas Plan and have been adopted by each state commission and are subject to their periodic review and revision; therefore, these criticisms do not undermine our overall conclusion that the Plans provide a meaningful incentive to provide nondiscriminatory performance in the future.

277. *Self-Executing Mechanism.* The performance monitoring and enforcement mechanisms appear to be reasonably self-executing, and are comparable to the mechanisms we found satisfactory in the *Bell Atlantic New York Order* and in the *SWBT Texas Order*.<sup>846</sup> Specifically, we note that SWBT is required to provide performance data by the 20th day of the month following the reporting month, and is required to make payments, if necessary, by the 30th day following the due date of the performance measurement report for the month in which the obligation arose.<sup>847</sup> Several commenters, however, suggest the Plans may not yet be in effect.<sup>848</sup> Both the Kansas and the Oklahoma Tier-1 and Tier-2 penalty provisions are currently in operation and, therefore, in effect.<sup>849</sup>

278. *Data Validation and Audit Procedures.* As we held in prior section 271 orders, the reliability of reported data is critical: the performance measures must generate results that are meaningful, accurate, and reproducible. In particular, the raw data underlying a performance measurement must be stored in a secure, stable, and auditable file if we are to accord a remedy plan significant weight.<sup>850</sup> The systems and processes used to generate SWBT's Kansas and

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<sup>843</sup> SWBT Dysart Reply at para. 137.

<sup>844</sup> Allegiance Comments at 42-43 (including penalties for performance failure for three out of five months, increased monthly caps, removal of "CLEC" caps and a "several tiered" approach to remedies). *Also see* McLeodUSA Comments at 40-43.

<sup>845</sup> Sprint Comments at 69-70 (suggesting neither state adequately considered the Plans).

<sup>846</sup> *See Bell Atlantic New York Order*, 15 FCC Rcd at 4171, para. 441; *also see SWBT Texas Order*, 15 FCC Rcd at 18563-64, para. 427.

<sup>847</sup> SWBT Dysart Reply at para. 153.

<sup>848</sup> Allegiance Comments at 39 (asserting that the Texas Plan "appears to be somewhat more self-executing or more likely to become effective" than the Kansas or Oklahoma Plans) *see also* McLeodUSA Comments at 43.

<sup>849</sup> SWBT Dysart Reply Aff. at paras. 164-165 (plans were first approved on October 23, 2000 for Kansas and December 7, 2000 for Oklahoma).

<sup>850</sup> SWBT Dysart Aff. at paras. 165-168.

Oklahoma data are the same as those used in the previous Texas 271 review.<sup>851</sup> While Sprint suggests that neither the Kansas nor Oklahoma Commissions rigorously reviewed and validated the accuracy of the data,<sup>852</sup> no competing LEC has demonstrated that SWBT's data are inaccurate. Further we note that SWBT provides competing carriers with access to their own specific data which acts as an additional check on the accuracy of the data.<sup>853</sup> We thus find that we will accord significant weight to the data as we did in the Texas 271 proceedings.

279. On December 20, 2000 the FCC issued a Notice of Apparent Liability to SWBT for issues pursuant to the SBC/Ameritech Merger Order regarding certain data reporting.<sup>854</sup> All of the identified issues have been corrected. Except as noted above, with respect to only one specific performance measurement, no data reviewed in the current evaluation of this joint application was affected. While one of these findings does relate to data for the time period under review, we find as noted above that the issue identified by the auditors does not affect our conclusions.<sup>855</sup>

280. *Accounting Requirements.* Consistent with our accounting rules, relating to antitrust damages and certain other penalties paid by carriers, SWBT should not reflect any portion of penalties paid out under these Plans as expenses in the revenue requirement for interstate services.<sup>856</sup> As stated in prior orders, such accounting treatment ensures that ratepayers do not bear, in the form of increased rates, the costs of penalties paid out under the Plans in the event that SWBT fails to provide adequate service quality to competitive LECs.<sup>857</sup>

### C. Other Issues

281. Commenters raise several other concerns which, they contend, support a finding that grant of this application is not in the public interest. AT&T's argument concerning

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<sup>851</sup> SWBT Dysart Reply at para. 124.

<sup>852</sup> Sprint Comments at 76.

<sup>853</sup> SWBT Dysart Aff. paras. 170-172.

<sup>854</sup> *SBC Merger Audit NAL*. See n. 377, *supra*.

<sup>855</sup> See discussion of order confirmation notices for faxed orders in section IV.B.2.d.i., *supra*.

<sup>856</sup> See *Accounting for Judgments and Other Costs Associated with Litigation*, 12 FCC Rcd 5112 (1997); 47 C.F.R. § 7370(d). As a general matter, a carrier's operating expenses recovered through its rates must be legitimate costs of providing adequate service to ratepayers. See, e.g., *West Ohio Gas Co. v. PUC*, 294 U.S. 63, 74 (1935); *Mountain States Tel. and Tel. Co. v. FCC*, 939 F.2d 1035, 1044 (D.C. Cir. 1991). In the *SBC/Ameritech Merger Order*, the Commission held that bill credits provided under the performance assurance plan arising from that order "shall not be reflected in the revenue requirement of an SBC/Ameritech incumbent LEC." *SBC/Ameritech Merger Order App. C* at para. 34.

<sup>857</sup> See *SWBT Texas Order*, 15 FCC Rcd at 18565, 430; *Bell Atlantic New York Order*, 15 FCC Rcd at 4172-73, para. 443.

insufficient economic margin with current unbundled network element prices is addressed above in the pricing section. MFNS contends certain interconnection issues cause a public interest concern. EMI's concerns about service outages in Oklahoma are isolated instances and do not constitute discrimination against competitive carriers, and we do not find that these service quality issues cited constitute a pattern of discriminatory conduct that undermines our confidence that SWBT's local market is open to competition. The Commission has previously found that although terminations liabilities could, in certain circumstances, be unreasonable or anticompetitive, they do not on their face cause a carrier to fail checklist item 14.<sup>858</sup> Allegiance and McLeodUSA and CAPROCK suggests that SWBT has not complied with the filing requirement of demonstrating the measures taken to narrow the issues in dispute and the results of those measures.<sup>859</sup> We believe the record adequately illuminates the measures SWBT, the state commissions and CLECs undertook to narrow and eliminate issues prior to the filing of this joint application. These arguments do not convince us that grant of this joint application would be inconsistent with the public interest.

282. Finally, several commenters contend that "Project Pronto," which refers to SWBT's plan to deploy equipment used to provide advanced services in fiber-fed remote terminals, might restrict competing carriers' ability to use the full features, functions, and capabilities of SWBT's local loops.<sup>860</sup> As SWBT notes, however, nothing about its plan to increase the amount of fiber and remote terminals in its networks changes its fundamental obligation to provide access to the full features, functions, and capabilities of the local loop.<sup>861</sup> Accordingly, we find no grounds to reject SWBT's application based upon these hypothetical concerns.

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<sup>858</sup> AT&T Lieberman Decl. (presenting analysis related to prices, addressed in the pricing section above); MFNS's Comments at 13 (regarding fiber distribution interconnection issues has been addressed above under collocation); EMI Comments at 1-3 (suggesting SWBT provides inadequate service quality in Oklahoma. It should be noted that EMI did not make this argument before the Oklahoma Commission 271 proceedings; however, EMI had previously filed a complaint with that Commission regarding an accidental cable cut (the basis of its service quality argument)). Finally, two commenters argue that a "fresh look" policy (to provide an opportunity for retail and wholesale customers to exit without penalty long term contracts that the carriers have voluntarily entered into with SWBT) should be implemented in Kansas and Oklahoma. *See* Allegiance Comments at 43-45; McLeodUSA Comments at 49-51. We find, as we have in prior orders, that this issue is best addressed in the context of a pending Petition for Declaratory Ruling regarding our "fresh look" policy, and we decline to resolve the issue here. *See SWBT Texas Order*, 15 FCC Rcd at 18566, para. 433.

<sup>859</sup> Allegiance Comments at 45-46; McLeodUSA Comments at 51-53.

<sup>860</sup> Allegiance Comments at 2-10; IP Comments at 18-27; McLeodUSA Comments at 2-6.

<sup>861</sup> SWBT Chapman Aff. at paras. 111-29.

### VIII. SECTION 271(D)(6) ENFORCEMENT AUTHORITY

283. Section 271(d)(6) of the Act requires SWBT to continue to satisfy the “conditions required for ... approval”<sup>862</sup> of its section 271 application after the Commission approves its application. To this end, Congress gave the Commission specific post-approval enforcement powers to address possible “backsliding” by SWBT and other BOCs.<sup>863</sup> This authority is critical to the statutory design that local markets are – and remain – open to competition, and evidences Congress’s recognition that a BOC’s incentives to cooperate with its local service competitors may diminish in a given state once the BOC obtains section 271 approval in that state.<sup>864</sup> Several times in this order, we expressed concern about possible backsliding by SWBT once it obtains section 271 approval and begins providing in-region interLATA service in Kansas and Oklahoma. We will exercise this authority in the event SWBT ceases to meet a condition of its approval. As we stated in the *Bell Atlantic New York Order*, “[s]wift and effective post-approval enforcement of section 271’s requirements ... is essential to achieve Congress’s goal of maintaining conditions conducive to achieving durable competition in local markets.”<sup>865</sup>

284. We described the post-approval enforcement framework, as well as our various section 271(d)(6) enforcement powers, in detail in the *Bell Atlantic New York Order*.<sup>866</sup> Section 271(d)(6)(B) provides for the Commission to receive and review complaints filed by persons concerning alleged failures by a BOC to meet conditions required for long distance approval.<sup>867</sup> Section 271(d)(6)(A) also specifies several enforcement actions that the Commission can take on its own motion, including ordering the BOC to correct a deficiency, assessing a forfeiture, and suspending or revoking the BOC’s authority to provide long distance service.<sup>868</sup> The Commission is required to provide a BOC with notice and an opportunity for a hearing if we exercise our authority pursuant to section 271(d)(6)(A). We will comply with this requirement and exercise

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<sup>862</sup> 47 U.S.C. § 271(d)(6).

<sup>863</sup> This substantial enforcement authority augments the agency’s pre-existing enforcement powers, including its authority under sections 206-209 of the Communications Act. *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, 22066 (1996) (*Non-Accounting Safeguards Order*).

<sup>864</sup> See generally *U S WEST Communications, Inc. v. FCC*, 177 F.3d 1057, 1060 (D.C. Cir. 1999) (noting that a central purpose of section 271 is to create incentives for BOCs to open local markets to competition), *cert. denied*, 120 S.Ct. 1240 (2000); *AT&T Corp v. FCC*, 220 F.3d at 612 (same).

<sup>865</sup> *Bell Atlantic New York Order*, 15 FCC Rcd at 4174, para. 446.

<sup>866</sup> *Id.*, 15 FCC Rcd at 4174-77, paras. 446-453.

<sup>867</sup> 47 U.S.C. § 271(d)(6)(B). These complaints may include requests for damages. See *Non-Accounting Safeguards Order*, 11 FCC Rcd at 22066.

<sup>868</sup> 47 U.S.C. § 271(d)(6)(A).

this enforcement power without holding time-consuming formal, trial-type evidentiary hearings. Instead, we will resolve the matter through an expeditious paper proceeding.<sup>869</sup>

285. We will monitor closely SWBT's post-approval compliance. In this regard, we require SWBT to provide the Commission with the monthly aggregated Performance Measures for Kansas, Oklahoma, Texas and SWBT's five-state region at least one year from the date of the release of this order, so that we can review its performance to ensure continued compliance with the statutory requirements. 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 both Kansas and Oklahoma. Furthermore, 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 Kansas and Oklahoma long distance markets.<sup>870</sup>

## IX. CONCLUSION

286. For the reasons discussed above, we grant SWBT's joint application for authorization under section 271 of the Act to provide in-region, interLATA services in the state of Kansas, and to provide in-region, interLATA services in the state of Oklahoma.

## X. ORDERING CLAUSES

287. 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, SWBT's application to provide in-region interLATA service in the State of Kansas, and in the State of Oklahoma, filed on October 26, 2000, IS GRANTED.

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<sup>869</sup> See *Bell Atlantic New York Order*, 15 FCC Rcd at 4176, para. 450. Furthermore, we envision exercising our section 271(d)(6)(A)(iii) suspension power, when appropriate, through a "standstill" order that could prohibit a non-compliant BOC from enrolling additional subscribers and from marketing and promoting interLATA service – in essence, freezing the BOC's subscriber base as of the date of the order. See 47 U.S.C. § 271(d)(6)(A)(iii); *Bell Atlantic New York Order*, 15 FCC Rcd at 4175-76, paras. 448-451.

<sup>870</sup> For example, the New York Public Service Commission and the Commission coordinated a two-pronged enforcement response when Bell Atlantic developed performance problems associated with lost or mishandled orders for unbundled network elements submitted electronically by its local service competitors. See *Order Directing Market Adjustments and Amending Performance Assurance*, Case OO-C-0008/9 and Case 99-C-0949 (New York PSC, Mar. 23, 2000); *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 Commission and Bell Atlantic that included provisions for Bell Atlantic to make a voluntary payment of \$3,000,000 to the United States Treasury, additional payments if Bell Atlantic failed to meet specified performance standards, and weekly reporting requirements to gauge Bell Atlantic's performance in correcting the problems associated with its electronic ordering systems); Letter from David H. Solomon, Chief, FCC Enforcement Bureau to Edward D. Young, III, Senior Vice President – Regulatory, Bell Atlantic, dated June 20, 2000 (advising Bell Atlantic that it appears to the Commission to have met the requisite performance standards and that, in the absence of new information indicating that Bell Atlantic's performance reports are materially inaccurate, Bell Atlantic's obligations under the Consent Decree have terminated).

288. IT IS FURTHER ORDERED that the motion to strike filed by Sprint Communications Company on January 18, 2001, IS DENIED.

289. IT IS FURTHER ORDERED that we waive our procedural rules regarding the consideration of late-filed evidence, but as a condition of this waiver, we delay the effective date of this Order by 43 days from the date of release. Therefore, this Order SHALL BECOME EFFECTIVE March 7, 2001.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas,  
Secretary

## Appendix A

**SBC Communications Inc, Southwestern Bell Telephone Company**  
**Southwestern Bell Communications Services**  
**271 Application to provide In-region, InterLATA services in Kansas and Oklahoma**  
**CC Docket 00-217**

## COMMENTS

Commenters	Abbreviation
Adelphia Business Solutions Investment	Adelphia
Allegiance Telecom, Inc	Allegiance
Alliance for Public Technology	APT
AT&T Corp	AT&T
Campaign for Telecommunication Access	CTA
Communications Workers of America	CWA
ConnectSouth Communications, Inc	ConnectSouth
Cox Communications, Inc	COX
Department of Justice	
E.Spire Communications, Inc *	E.spire
Environmental Management, Inc	EMI
Focal Communications Group*	Focal
Global Crossing	Global Crossing
Ionex Communications Inc	Ionex
IP Communications	IP Communications
Kansas Corporation Commission	Kansas Commission
KMC Telecom Inc	KMC
McLeodUSA Inc & CAPROCK Communications, Corp.	McLeodUSA
Metromedia Fiber Network Services, Inc *	MFNS
Oklahoma Corporation Commission	Oklahoma Commission
Sprint Communications Company	Sprint
WorldCom	WorldCom

\* The final version of this order was approved by the Commission on January 19, 2001.

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**REPLY COMMENTS**

Commenters	Abbreviation
Association for Local Telecommunications	ALTS
AT&T Corp	AT&T
Campaign for Telecommunications Access	CTA
Environmental Management, Inc	EMI
Ionex Communications Inc	Ionex
IP Communications	IP
Kansas Corporation Commission *	Kansas Commission
McLeodUSA Inc & CAPROCK Communications, Corp	McLeodUSA
Oklahoma Corporation Commission	Oklahoma Commission
Southwestern Bell Corporation	SBC
WorldCom	WorldCom
Z-Tel Corporation Inc	Z-Tel

\* Denotes electronic filing.

**SUPPLEMENTAL COMMENTS**  
**(filed January 8, 2001)**

Allegiance Telecom, Inc.  
Association for Local Telecommunications Services  
AT&T, Corp.  
ConnectSouth Communications  
Cox Communications, Inc.  
Kansas Corporation Commission  
McLeodUSA Telecommunications Services, Inc.  
Metromedia Fiber Network Services, Inc.  
Sprint Communications Company, L.P.  
WorldCom, Inc.  
Z-Tel Communications, Inc.

**SUPPLEMENTAL REPLY COMMENTS**  
**(filed January 12, 2001)**

AT&T Corp.  
Citizens' Utility Ratepayer Board  
Environmental Management, Inc.  
National Consumer League  
Oklahoma Corporation Commission  
Southwestern Bell

## Appendix B

## Statutory Requirements – Checklist Items 3, 5, 7, 9-12

1. *Checklist Item 3 – Poles, Ducts, Conduits and Rights of Way.* 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.”<sup>1</sup> 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.”<sup>2</sup> 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.”<sup>3</sup> Section 224 also contains two separate provisions governing the maximum rates that a utility may charge for “pole attachments.”<sup>4</sup> 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.”<sup>5</sup> 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.”<sup>6</sup> As of 1992, nineteen states had certified to the Commission that they

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<sup>1</sup> 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.

<sup>2</sup> 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).

<sup>3</sup> 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.

<sup>4</sup> 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).

<sup>5</sup> 47 U.S.C. § 224(b)(1).

<sup>6</sup> 47 U.S.C. § 224(c)(1). The 1996 Act extended the Commission’s authority to include not just rates, terms, and 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 (continued....)

regulated the rates, terms, and conditions for pole attachments.<sup>7</sup> However, none of the five states in which SWBT is a LEC, including Kansas and Oklahoma, have elected to regulate poles, ducts, conduits, and rights-of-way.<sup>8</sup>

2. **Checklist Item 5 – Unbundled Local Transport.** 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.”<sup>9</sup> The Commission has required that BOCs provide both dedicated and shared transport to requesting carriers.<sup>10</sup> 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.<sup>11</sup> 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.<sup>12</sup>

3. **Checklist Item 7 – 911/E911 Access and Directory Assistance/Operator Services.** Section 271(c)(2)(B)(vii) of the Act requires a BOC to provide “[n]ondiscriminatory

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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.

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

<sup>8</sup> SWBT Hearst Aff. at para. 36.

<sup>9</sup> 47 U.S.C. § 271(c)(2)(B)(v).

<sup>10</sup> *Second BellSouth Louisiana Order*, 13 FCC Rcd at 20719, para. 201.

<sup>11</sup> *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.

<sup>12</sup> *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.

access to – (I) 911 and E911 services.”<sup>13</sup> In the *Ameritech Michigan 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.”<sup>14</sup> 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.”<sup>15</sup> 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.”<sup>16</sup> 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.<sup>17</sup> 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.”<sup>18</sup> We 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).<sup>19</sup> In the *Local Competition Second*

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<sup>13</sup> 47 U.S.C. § 271(c)(2)(B)(vii).

<sup>14</sup> *Ameritech Michigan Order*, 12 FCC Rcd at 20679, para. 256.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> 47 U.S.C. §§ 271(c)(2)(B)(vii)(II), (III).

<sup>18</sup> 47 U.S.C. § 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*).

<sup>19</sup> 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 receives a busy signal, the customer may contact the operator to attempt to complete the call. Since billing is a (continued....)

*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.”<sup>20</sup> 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.<sup>21</sup> 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.”<sup>22</sup>

4. 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. Our 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.<sup>23</sup> 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

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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, we 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, we use the nondiscriminatory standards established for operator services to determine whether nondiscriminatory access is provided.

<sup>20</sup> 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*.

<sup>21</sup> *Local Competition Second Report and Order*, 11 FCC Rcd at 19464, para. 151.

<sup>22</sup> *Id.* at para. 112.

<sup>23</sup> 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).

own directory assistance database by obtaining the subscriber listing information in the BOC's database.<sup>24</sup> 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*.<sup>25</sup> 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.<sup>26</sup> 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.<sup>27</sup>

5. **Checklist Item 9 – Numbering Administration.** 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.”<sup>28</sup> The checklist mandates compliance with “such guidelines, plan, or rules” after they have been established.<sup>29</sup> A BOC must demonstrate that it adheres to industry numbering administration guidelines and Commission rules.<sup>30</sup>

6. **Checklist Item 10 – Databases and Associated Signaling.** 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.”<sup>31</sup> In the *Second BellSouth Louisiana Order*, we 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

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<sup>24</sup> 47 C.F.R. § 51.217(C)(3)(ii); *Local Competition Second Report and Order*, 11 FCC Rcd at 19460-61, paras. 141-44.

<sup>25</sup> *UNE Remand Order*, 15 FCC Rcd at 3891-92, paras. 441-42.

<sup>26</sup> *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”).

<sup>27</sup> *Local Competition Third Report and Order* at paras. 470-73; see also 47 U.S.C. §§ 201(b), 202(a).

<sup>28</sup> 47 U.S.C. § 271(c)(2)(B)(ix).

<sup>29</sup> *Id.*

<sup>30</sup> 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).

<sup>31</sup> 47 U.S.C. § 271(c)(2)(B)(x).

completion, or in the alternative, a means of physical access to the signaling transfer point linked to the unbundled database; and (3) Service Management Systems (SMS).”<sup>32</sup> We also required BellSouth to design, create, test, and deploy Advanced Intelligent Network (AIN) based services at the SMS through a Service Creation Environment (SCE).<sup>33</sup> 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.<sup>34</sup> 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.<sup>35</sup> In the *UNE Remand Order*, we 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.”<sup>36</sup>

7. **Checklist Item 11 – Number Portability.** 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.<sup>37</sup> Section 251(b)(2) requires all LECs “to provide, to the extent technically feasible, number portability in accordance with requirements prescribed by the Commission.”<sup>38</sup> 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.”<sup>39</sup> 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.”<sup>40</sup> Pursuant to these statutory provisions, the Commission requires LECs to

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<sup>32</sup> *Second BellSouth Louisiana Order*, 13 FCC Rcd at 20753, para. 267.

<sup>33</sup> *Id.* at 20755-56, para. 272.

<sup>34</sup> *Local Competition First Report and Order*, 11 FCC Rcd at 15741, n.1126; *UNE Remand Order*, 15 FCC Rcd at 3875, para. 403.

<sup>35</sup> *Local Competition First Report and Order*, 11 FCC Rcd at 15741-42, para. 484.

<sup>36</sup> *UNE Remand Order*, 15 FCC Rcd at 3875, para. 403.

<sup>37</sup> 47 U.S.C. § 271(c)(2)(B)(xii).

<sup>38</sup> *Id.* at § 251(b)(2).

<sup>39</sup> *Id.* at § 153(30).

<sup>40</sup> *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*).

offer interim number portability “to the extent technically feasible.”<sup>41</sup> The Commission also requires LECs to gradually replace interim number portability with permanent number portability.<sup>42</sup> The Commission has established guidelines for states to follow in mandating a competitively neutral cost-recovery mechanism for interim number portability,<sup>43</sup> and created a competitively neutral cost-recovery mechanism for long-term number portability.<sup>44</sup>

8. **Checklist Item 12 – Local Dialing Parity.** 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).”<sup>45</sup> 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.”<sup>46</sup> 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 . . .<sup>47</sup>

9. Our 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

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<sup>41</sup> *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).

<sup>42</sup> 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.

<sup>43</sup> 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.

<sup>44</sup> 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.

<sup>45</sup> 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).

<sup>46</sup> 47 U.S.C. § 251(b)(3).

<sup>47</sup> *Id.* at § 153(15).

local telephone call.<sup>48</sup> Moreover, customers of competing carriers must not otherwise suffer inferior quality service, such as unreasonable dialing delays, compared to the BOC's customers.<sup>49</sup>

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<sup>48</sup> 47 C.F.R §§ 51.205, 51.207.

<sup>49</sup> 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.

**SEPARATE STATEMENT OF CHAIRMAN WILLIAM E. KENNARD**

***Re: 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 Kansas and Oklahoma***

I am pleased to support the application of Southwestern Bell (SWBT) to offer long distance service in the States of Kansas and Oklahoma. We have found today that SWBT has taken the steps required by the Act to allow competitors into two rural markets.

Our action also is a testament to the work of the Kansas and the Oklahoma Commissions. Here, for the first time, we are approving section 271 applications for two smaller, less urbanized states that build on a previous, successful section 271 application for another state in the same Bell Operating Company (BOC) region. This process demonstrates that smaller, less urbanized states can successfully fulfill their vitally important role in the section 271 process without overwhelming their regulatory resources. I commend both Kansas and Oklahoma for their work with SWBT in bringing these applications to fruition, and see their general approach in building on the Texas application as a model that other states may wish to follow.

And I also must commend the Department of Justice for its thorough review of SWBT's application. The Department of Justice gave us some areas on which to focus, one of which was pricing. And it was right: some of SWBT's prices were not acceptable. I also agree that TELRIC pricing, like demonstrated success in provisioning, are critical for new entrants to meaningfully compete. Because SWBT voluntarily reduced its prices to be within the zone that application of TELRIC would produce, I am able to support its joint application. Importantly, by a vote of 4 to 1, this Order approves SWBT's pricing, not as originally filed, but as revised by SBWT on December 28th.

I support the Commission's decision to waive its procedural rules to permit consideration of these late-filed rate reductions by SWBT in the unique circumstances of this application. At the same time, I believe that the Commission must ensure that a pattern of last-minute rate reductions or other changes in section 271 applications does not develop in the future. Allowing such a pattern to develop could encourage the BOCs to attempt to short circuit the critically important, statutorily mandated state review process rather than engage in a good faith effort to resolve contested issues under state auspices before filing a section 271 application with this Commission. Such a pattern of late-filed changes could also undermine the Commission's long-term ability to ensure a fair and orderly process for action on section 271 applications consistent with the 90-day statutory time frame. The BOCs have sufficient experience and guidance now to understand that their prices must be TELRIC. The Commission has spoken loud and clear on this issue.

With this Order, the Commission has approved four section 271 applications – two for large states with substantial urban population centers and two for smaller, less urbanized states.

The roadmap for a successful section 271 is clear, and SWBT and Verizon have both shown that they can successfully navigate these requirements, and open their markets to competition. With this roadmap fully charted, I leave the Commission confident that the BOCs can readily implement the pro-competitive environment envisioned by Congress and reflected in the requirements of the 1996 Telecommunications Act. I remain steadfast in my belief that, over time, this pro-competitive environment will produce substantial benefits for the American public by increasing consumer choice, fostering innovation and lowering overall prices for telecommunications services.

**SEPARATE STATEMENT OF  
COMMISSIONER SUSAN NESS, 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 for Provision of In-Region InterLATA Services in Kansas and Oklahoma***

I commend SBC for its substantial efforts to open the local market to competition in Oklahoma and Kansas, and the Kansas and Oklahoma Commissions for working hard to jumpstart competition in their respective markets. The order is particularly significant because it demonstrates that citizens of rural states can reap the benefits of increased competition. Although I have concurred in the decision to grant SBC authority to provide long distance services originating in these states, I disagree with certain aspects of the reasoning of the order. In particular, this order grants a waiver of our rules and accepts new rates filed by SBC on December 28<sup>th</sup> – day 63 of the 90-day statutory period. I believe this is ill-advised.

Section 271 requires the Commission to assess whether the local market is open to competition as a pre-condition for authorizing a Bell company to provide long-distance services. Prior to the filing of any 271 applications, we established the rule that an application must be complete on the date it is filed. We have consistently reiterated the importance of this rule.<sup>1</sup> Resolving an adjudicatory proceeding involving a massive record and innumerable issues within 90 days is difficult, if not impossible, if parties are able to modify their prima facie case while the application is pending. Such waivers give parties an incentive to “game” the system by withholding evidence until late in the 90-day process. A moving target also prejudices the ability of the state commissions and the Department of Justice to advise us – an opportunity guaranteed by the statute. As a matter of fundamental fairness, parties ought to be able to rely on the Commission’s rules and I am troubled by this decision to change the Commission’s rules mid-stream.

I am equally troubled by the remedy which is to delay the effective date of the order for 43 days. Instead of the approach adopted in today’s decision, I would have restarted the clock on the day that SBC requested us to examine its new rates. If this route had been followed, the Commission in all likelihood would have been able to consider the new application in an expedited fashion and issue a clean decision that would have taken effect in the same timeframe as the date contemplated by this order. Indeed, by granting a waiver, but delaying the effective date, that is in essence what the order achieves.

In addition to the timing issue, I am uncomfortable with the manner in which prices for unbundled network elements were set. Appropriate pricing is at the heart of the statute. If prices are not based on costs, the enduring competition envisioned by Congress will be thwarted. I

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<sup>1</sup> See, e.g., *Ameritech Michigan Order*, 12 FCC Rcd 20543, 20570-76 (1997); *BellSouth South Carolina Order*, 13 FCC Rcd 539, 560-61 (1997); *Bell Atlantic New York Order*, 15 FCC Rcd 3953, 3968-69 (1999); *SBC Texas Order*, 15 FCC Rcd 18354, 18370-72 (2000).

support today's decision insofar as it recognizes the Commission's role in evaluating the rates a Bell company charges its competitors. As the order makes clear, the Commission has an obligation in each section 271 application to examine the methodology used to arrive at the rates and ensure that those rates are based on forward-looking costs.

Although the order concludes that the state commissions did not adhere to forward-looking pricing principles in all respects, the late-filed rates appear to be within a range of prices that would be consistent with such principles, while the original rates were not. We must recognize that a forward-looking cost methodology gives some latitude to state commissions in setting rates. I encourage state commissions to follow assiduously forward-looking cost methodologies so that the Commission may avoid the need to second-guess rates in future applications. I urge the Commission to engage in further dialogue with our state colleagues on all 271 issues -- and in particular to identify best practices on pricing -- *before* a Bell company files its application. I am confident that future 271 applications will reflect the benefits of these discussions, and I expect that future applicants will have in place rates based on forward-looking costs prior to filing an application.

**STATEMENT OF COMMISSIONER HAROLD FURCHTGOTT-ROTH,  
CONCURRING IN PART AND DISSENTING IN PART**

*Re: Memorandum Opinion and Order, 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 Kansas and Oklahoma (CC Docket No. 00-217).*

I concur in the decision to grant SBC Communication Inc.'s ("SBC") application to provide in-region, inter-LATA services in Kansas and in Oklahoma. I wish to make clear, however, that the basis for my concurrence differs from that of the majority. As I have made clear in previous statements, I believe that section 271 primarily requires the Commission to determine whether a Bell operating company has fulfilled its obligations under the specific interconnection agreements into which it has entered. A central question, in my view, is whether competing carriers have attempted to enforce their rights under the 1996 Act by filing complaints arising out of these agreements, either with the relevant state commission, or in federal district court. Where they have not pursued such complaints, as is the case here, I think there is little reason that the Commission should undertake, as an initial matter, a review of their claims that the Bell company has not complied with section 251's requirements.

I also wish to make clear that I do not base my approval of SBC's application on any of the pricing information that SBC submitted after it filed its application, including the information that it filed on the sixty-third day of the review process. Although there may be some circumstances in which it would be proper for the Commission to consider late-filed evidence, those circumstances are not present here. If the Commission would not have approved this application in the absence of this late-filed information, I believe that SBC should have been required to resubmit its application, thereby restarting the review process.

Finally, I join with Commissioner Powell in dissenting from that part of the order that delays by 43 days the date on which SBC's authorization to provide long-distance service in these states becomes effective. I do not believe that the Act permits us to invent procedural rules like this one. Of course, if the Commission had refused to consider the late-filed pricing information in the first place, it would not have found it necessary to bend the statute in this way.

**STATEMENT OF COMMISSIONER MICHAEL K. POWELL,  
APPROVING IN PART AND DISSENTING IN PART**

***Re: Memorandum Opinion and Order, 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 Kansas and Oklahoma (CC Docket No. 00-217)***

I am pleased to support this *Order*. In one small respect, however, I cannot support this action fully, namely the decision to delay by 43 days the effectiveness of SBC's authorization to provide long distance in these states. I am very supportive of the intention underlying this decision, as I agree that we must remain vigilant to protect the integrity of the section 271 process against unnecessary delays in the filing of relevant evidence, even pricing evidence. Moreover, I wish to join in the admonishment of future applicants that they risk rejection if they file evidence after the due date for initial comments. Nonetheless, I see no authority in the Act that permits us to conclude that the statutory requirements are satisfied, but refuse to allow the applicant to enter the long distance market for several more weeks. As such, I must reluctantly dissent to this minor, procedural aspect of the *Order*.