

which Brooks Fiber has access. See Brooks Fiber Agreement, § III; see also USLD Agreement, § III; ICG Agreement, §§ 5.3.2, 5.3.3; Sprint Agreement, Attach. 12 § 3.0 (reciprocal compensation). SWBT and Brooks Fiber currently exchange traffic under a reciprocal compensation arrangement. Kaeshoefer Aff. ¶ 146.

*Checklist Item (14): Resale*

Section 271(c)(2)(B)(xiv) requires SWBT to make its telecommunication services available for resale in accordance with the provisions of sections 251(c)(4) and 252(d)(3) of the Communications Act. These provisions, in turn, require SWBT to provide its services at wholesale rates, with no unreasonable or discriminatory conditions or limitations. "Wholesale rates" are statutorily defined as the retail rates charged for a service, excluding the portion thereof "attributable to any marketing, billing, collection, and other costs that will be avoided by the local exchange carrier." § 252(d)(3).

1. SWBT's Statement offers LSP wholesale rates for any services that SWBT offers to its retail customers, with the exception of those excluded from resale requirements under Commission regulations. See Statement App. Resale § 1; Kaeshoefer Aff. ¶ 65. Consistent with 47 C.F.R. § 51.603(b), the services SWBT makes available for resale are "equal in quality, subject to the same conditions, and provided with the same provisioning time intervals" as the services SWBT provides to other customers, including end users. Kaeshoefer Aff. ¶ 64. These services are identical to the services SWBT furnishes its own retail customers, and CLECs are able to sell these services to the same customers as SWBT in the same manner. SWBT is offering services for resale with no unreasonable or discriminatory conditions or limitations.

SWBT is offering these services at wholesale rates that are equal to the retail rates less the portion thereof attributable to any marketing, billing, collection, or other costs that will be avoided by SWBT. Following the issuance of the Commission's Local Interconnection Order, SWBT performed an avoided cost study that complied with Commission's rules, including those later stayed by the Eighth Circuit. Moore Aff. ¶ 25. In the AT&T arbitration, the OCC adopted a 19.8 percent discount based upon this cost study and AT&T's own avoided cost study. See Cause No. PUD 960000218, Order No. 407704, at 4, adopting the November 13, 1996 Report and Recommendations of the Arbitrator, at 18-19. Kaeshoefer Aff. ¶ 65; Moore Aff. ¶ 25. SWBT's Statement incorporates the OCC's 19.8 percent discount rate for resellers. Moore Aff. ¶ 25.

2. The Brooks Fiber Agreement permits Brooks Fiber to resell SWBT's telephone exchange services. See Brooks Fiber Agreement, § X, and Appendix RESALE. By virtue of its MFN clause, Brooks Fiber also has access to resale at the 19.8 percent discount established by the OCC and included in various OCC-approved agreements. See Kaeshoefer Aff. ¶ 10. SWBT is currently furnishing resale services to Brooks Fiber. Kaeshoefer Aff. ¶ 66; Brooks Fiber OCC Comments at 2 (ISDN service).

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In sum, SWBT has fully implemented the competitive checklist through its Statement and also is making available all checklist items under the Brooks Fiber agreement and the other OCC-approved agreements that it incorporates. SWBT thus has opened its local markets in Oklahoma to competition to the full extent required by Congress in section 271.

**III. SOUTHWESTERN BELL SATISFIES THE REQUIREMENTS OF SECTION 272**

Section 271(d)(3)(B) requires the Commission to find that "the requested authorization will be carried out in accordance with the requirements of section 272 [of the Act]." Section 272 in turn establishes specific separate affiliate requirements and non-discrimination safeguards to ensure that a Bell operating company does not improperly advantage an affiliate's entry into the interLATA business.

**A. SBC Has Established a Separate, Section 272 Affiliate to Provide In-Region InterLATA Services**

To meet the requirements of section 272, SBC has established an affiliate, SBLD, that is separate from SWBT, Pacific Bell, and Nevada Bell (SBC's affiliated local exchange companies and BOCs).<sup>28</sup> As described below and established through the affidavits of Karol Sweitzer, Kathleen Larkin, and Elizabeth A. Ham (272), SBLD will provide in-region, interLATA services originating in Oklahoma in conformity with section 272 and with the Commission's Non-Accounting Safeguards Order and Accounting Safeguards Order.<sup>29</sup> SBLD is a duly formed and

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<sup>28</sup> SBC recently completed its merger with Pacific Telesis Group, and accordingly became affiliated with two additional BOCs, Pacific Bell and Nevada Bell. Affidavits of appropriate Pacific Bell and Nevada Bell witnesses (John Gueldner and James Riley, respectively), together with an affidavit of a Pacific Bell Communications, Inc. ("PBCOM") witness (Betsy Bernard) have been incorporated into this Application. As is demonstrated in these affidavits, SBLD (and to the extent required, PBCOM) will comply with the requirements of section 272 and the Commission's rules fully with respect to Pacific Bell and Nevada Bell.

<sup>29</sup> Report and Order, Implementation of the Telecommunications Act of 1996: Accounting Safeguards Under the Telecommunications Act of 1996, CC Dkt. No. 96-150 (rel. Dec. 24, 1996). To the extent that the Commission promulgates additional rules relating to the classification of Bell company in-region, interLATA providers as nondominant or dominant carriers, Southwestern Bell will, consistent with its right of appeal, comply with those rules.

existing corporation organized under the laws of the State of Delaware and is a wholly-owned subsidiary of SBC. SWBT is a duly formed and existing corporation organized under the laws of the State of Missouri and is a wholly-owned subsidiary of SBC. SWBT, Pacific Bell, and Nevada Bell own no stock of SBLD; correspondingly, SBLD owns no stock of SWBT, Pacific Bell, or Nevada Bell. SBLD is a separate corporate entity from SWBT, Pacific Bell, and Nevada Bell. Sweitzer Aff. ¶ C(2)(a).

SBLD, either directly or through its subsidiaries,<sup>30</sup> currently provides direct-dialed interstate and intrastate, intraLATA and interLATA message telecommunications services, calling-card, and operator services originating in some states other than Arkansas, California, Kansas, Missouri, Nevada, Oklahoma, or Texas. See Sweitzer Aff. ¶ C(2)(b). These services are marketed primarily to customers of SBLD's wireless services affiliates under the "Cellular One" brand. SBLD provides no "in-region" telecommunications services of any kind as of the date of this application.

SBC may from time to time reorganize, merge, or otherwise change the form of SBLD or PBCOM, or create or acquire additional interexchange subsidiaries. At the time they offer interLATA services, any resulting subsidiaries or affiliates that provide interLATA services will be separate from SWBT, Pacific Bell, and Nevada Bell and will meet the requirements of section 272 of the 1996 Act, as well as applicable state and federal regulations. See Sweitzer Aff.; Ham

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<sup>30</sup> These subsidiaries are Southwestern Bell Communications Services—Illinois, Inc, Southwestern Bell Communications Services—Indiana, Inc., Southwestern Bell Communications Services—New York, Inc., Southwestern Bell Communications Services—Maryland, Inc., and Southwestern Bell Communications Services—Massachusetts, Inc.

(272) Aff. Any affiliate of SBC that SBC may later create or acquire to provide interLATA services similarly will be separate from SWBT, Pacific Bell, and Nevada Bell, and in all respects will comply with section 272.

**B. SWBT and SBLD Will Comply with the Structural and Transactional Requirements of Section 272(b)**

Section 272(b) establishes five structural and transactional requirements for any separate affiliate established to conduct: manufacturing activities authorized under 47 U.S.C. § 273(a); origination of interLATA telecommunications services (other than incidental interLATA services described in paragraphs (1), (2), (3), (5), and (6) of section 271(g), out-of-region services described in section 271(b)(2), or previously authorized activities described in section 271(f) and interLATA information services, other than electronic publishing (as defined in section 274(h)) and alarm monitoring services (as defined in section 275(e)). SWBT and SBLD will comply with all of these requirements, as follows.

1. Section 272(b)(1) provides that the required separate affiliate "shall operate independently from the Bell operating company." In the Non-Accounting Safeguards Order, the Commission concluded that section 272(b)(1) "imposes requirements beyond those listed in sections 272(b)(2)-(5)." Non-Accounting Safeguards Order ¶ 156. The Commission further concluded that operational independence requires that:

- (a) the BOC and its section 272 affiliate be precluded from jointly owning switching or transmission facilities or the land or buildings where those facilities are located;
- (b) "a section 272 affiliate [be precluded] from performing operating, installation, and maintenance functions associated with the BOC's facilities"; and

- (c) "a BOC or any BOC affiliate, other than the section 272 affiliate itself, [be precluded] from performing operating, installation, or maintenance functions associated with the facilities that the section 272 affiliate owns or leases from a provider other than the BOC with which it is affiliated."

Id. ¶ 158. SWBT and SBLD will operate independently under this standard.

As set forth in the Sweitzer Affidavit, SBLD anticipates that it will be a reseller as well as facilities-based provider of interLATA long-distance services and products. SBLD already has installed four Northern Telecom DMS250 long-distance switches and one Northern Telecom DMS 300 switch. SBLD will operate and maintain these switches. Any other SBLD switching or transmission equipment or facilities will be operated, installed, and maintained by SBLD personnel or by non-SBC-affiliated entities. SBLD will be responsible for and will directly coordinate the development of its network. In addition, SBLD will perform its own network design and network engineering functions. SBLD also will perform its own interoffice facility/circuit provisioning activities, including the operation of a center for facility assignment and design, message trunk design, and data network design. SBLD will perform its own trunking and routing functions, including trunk group design and routing/disaster planning. Sweitzer Aff. ¶ D(2)(c)(i).

SBLD will provide many of its own operations support systems. It will not obtain any such systems from SWBT or a non-section 272 affiliate of SWBT if such systems would constitute operating, installation, or maintenance functions prohibited under the Non-Accounting Safeguards Order. Further, SBLD will provide its own network operations functions and perform its own customer service design functions. Sweitzer Aff. ¶ (D)(2)(c)(i).

SBLD will develop and tariff its own products and services at the state and federal levels and prepare its own regulatory filings. Sweitzer Aff. ¶ (D)(2)(d). SBLD will also coordinate the marketing of those products and services, although it will use both SBLD and non-SBLD marketing and sales channels to accomplish the distribution of its products and services. Id. SBLD will perform its own accounting and finance functions. Id. Among the accounting and finance functions that SBLD will perform will be its maintenance of separate books of account, its establishment and maintenance of asset tracking and project accounting, development and administration of cost accounting and pricing models, establishment of financial requirements for the billing system, and accounting for international settlements. Id.

In the Non-Accounting Safeguards Order, the Commission prohibited, as an aspect of operational independence, joint ownership of switching or transmission facilities or the land or buildings where those facilities are located. Non-Accounting Safeguards Order ¶ 162. SWBT and SBLD do not jointly own property of any kind, and any property these companies own together in the future will be owned in accordance with Commission rules. Sweitzer Aff. § D; Ham (272) Aff. ¶ 2(a)(i). At the same time, SBLD may "negotiate with [SWBT] on an arm's length and nondiscriminatory basis to obtain transmission and switching facilities, to arrange for collocation of facilities, and to provide or to obtain services other than [operating, installation, and maintenance]."<sup>31</sup>

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<sup>31</sup>. Non-Accounting Safeguards Order ¶ 158. As set forth above, SBLD presently has four interexchange switches sited on premises leased from SWBT. Sweitzer Aff. ¶ D(2)(i). These switches are not currently interconnected with SWBT exchange access facilities. In September of 1996, prior to the promulgation of the Commission's rules, SWBT offered the same siting arrangements to SBLD's future competitors. See Ham (272) Aff. ¶ 2(a)(ix).

In accordance with the Commission's regulations relating to operational independence and nondiscrimination, SWBT has undertaken to identify and discontinue the provision to SBLD of any services the Commission has determined to be impermissible or subject to a nondiscrimination requirement under the Act. Ham (272) Aff. ¶ 2(a)(ii).

Upon commencing in-region operations, SBLD intends to purchase exchange access from SWBT, among other providers. In conformity with the Non-Accounting Safeguards Order, SBLD also may obtain other telecommunications services or unbundled network elements from SWBT, and SWBT may obtain telecommunications services from SBLD. To the extent the Commission's rules permit, SBLD may obtain operating, installation, or maintenance services associated with SWBT's telecommunications services, facilities, or unbundled network elements. Non-Accounting Safeguards Order ¶¶ 158, 164. Sweitzer Aff. § D.

SBLD and SWBT may also share directly administrative and other services, including marketing services, that are not "operating, installation, or maintenance" of switching or transmission facilities. Non-Accounting Safeguards Order ¶¶ 164-69, 183. To the extent SWBT provides these services to SBLD, and to the extent that those shared services are non-marketing in nature, SWBT will make them available on a non-discriminatory basis. Ham (272) Aff. 2(a)(vii).

SBLD and SWBT may each obtain administrative or joint marketing services from a common "services affiliate." If obtained from a services affiliate, administrative services may be provided to SBLD and SWBT on an exclusive basis. Any joint marketing services may be obtained on an exclusive basis, regardless of whether they are obtained from a services affiliate

or from SWBT. All such services will be accounted for in accordance with all applicable affiliate transaction rules. See Non-Accounting Safeguards Order ¶¶ 180-83; see also Sweitzer Aff. ¶ D(2)(d); Larkin Aff. § C; Ham (272) Aff. ¶ 2(a)(vii).

2. Section 272(b)(2) provides that the separate affiliate must “maintain books, records, and accounts in the manner prescribed by the Commission which shall be separate from the books, records, and accounts maintained by the [BOC] of which it is an affiliate.” SBLD and SWBT comply with this requirement and will continue to comply in the future. SBLD’s books, records, and accounts have been established in accordance with Generally Accepted Accounting Principles. Both SBLD’s and SWBT’s books, records, and accounts have been and will be maintained in accordance with the Commission’s regulations. Sweitzer Aff. § E; Larkin Aff. § C; see 47 U.S.C. § 272(b)(2). To date, all transactions between SBLD and SWBT have been recorded in compliance with the Commission’s existing Part 32 and 64 requirements. When the rule changes adopted in the Accounting Safeguards Order become applicable, all transactions between SBLD and SWBT will comply with its accounting requirements. See Sweitzer Aff. § E; Larkin Aff. § C.

3. Section 272(b)(3) requires that the separate affiliate “have separate officers, directors, and employees from [an affiliated] Bell operating company.” SBLD complies with this obligation, and will continue to do so. Sweitzer Aff. § F.

4. Section 272(b)(4) prohibits the separate affiliate from obtaining “credit under any arrangement that would permit a creditor, upon default, to have recourse to the assets of the Bell operating company.” Id. SBLD fully complies with this requirement in that neither SBLD nor

any of its affiliates has co-signed any contract or made any other arrangement with, or on behalf of, SBLD that would allow a creditor to obtain recourse to SWBT's assets in the event of a default. Neither SBLD, nor any of its affiliates, will do so in the future. See Sweitzer Aff. § G.

5. Section 272(b)(5) requires that the separate affiliate "conduct all transactions with the Bell operating company of which it is an affiliate on an arm's length basis with any such transactions reduced to writing and available for public inspection." SBLD and SWBT have complied with the Commission's affiliate transaction rules and will comply with section 272(b)(5) and the Commission's rules in the future. See Sweitzer Aff. § H; Sweitzer Aff. § C.

**C. SWBT Will Comply with the Nondiscrimination Safeguards Set Forth in Section 272(c)(1)**

Section 272(c)(1) provides that "[i]n its dealings with its [required] affiliate . . . [SWBT] may not discriminate between that company or affiliate and any other entity in the provision or procurement of goods, services, facilities, and information, or in the establishment of standards."<sup>32</sup> In accordance with section 272(c), SWBT will provide to its section 272 affiliates the same goods, services, facilities, and information at the same rates, terms, and conditions as are available to unaffiliated entities.<sup>33</sup> Ham (272) Aff. ¶ E(1)(a)(i). SWBT will make and implement provisioning, procurement, and standard-setting decisions without regard to whether

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<sup>32</sup> The section 272(c) nondiscrimination requirements do not apply to joint marketing authorized by section 272(g). See § 272(g)(3).

<sup>33</sup> For example, SWBT now offers billing and collection services to unaffiliated entities. If SWBT offers these services in the future, SWBT will offer them to SBLD on the same rates, terms, and conditions that are offered to non-affiliates.

the other party is a section 272 affiliated entity. Ham (272) Aff. ¶ E(1)(a)(ii); see Non-Accounting Safeguards Order ¶ 212.

**D. SWBT and its Affiliates, Including SBLD, Will Comply with the Audit Requirements of Section 272(d)**

Section 272(d) requires that:

a company required to operate a separate affiliate under this section shall obtain and pay for a joint federal/State audit every 2 years conducted by an independent auditor to determine whether such company has complied with this section and the regulations promulgated under this section, and particularly whether such company has complied with the separate accounting requirements under subsection (b).

SWBT and its section 272 affiliates, including SBLD, will comply with this audit requirement and the rules adopted in the Accounting Safeguards Order. Sweitzer Aff. § J; Larkin Aff. § D.

**E. SWBT Will Provide Facilities and Services in Conformity with the Nondiscrimination Requirements Set Forth of Section 272(e)**

SWBT will comply with the requirements of section 272(e) for so long as those requirements are in effect. SWBT will fulfill requests from unaffiliated entities for installation and repair of telephone exchange and exchange access services within the same intervals in which it fulfills such requests from SBLD. SWBT will not provide services, facilities, or information relating to exchange access service to SBLD unless non-affiliated providers of interLATA services are provided such services, facilities, or information on the same terms and conditions given to SBLD. When SBLD obtains exchange access from SWBT, SWBT will charge SBLD an amount for access that is no less than the amount charged to any unaffiliated interexchange carriers for such service. SWBT will provide permitted interLATA or intraLATA facilities or services to SBLD only if such services or facilities are made available to all carriers

at the same rates and on the same terms and conditions; further, these facilities or services will be provided only under proper cost allocation methodologies. Ham (OSS) Aff. § F.

SWBT will use the same facilities, systems, and procedures to provide services to SBLD that it uses to provide comparable services to similarly situated unaffiliated carriers. Any operations support system or interface SWBT offers to SBLD for these functions will be offered to other providers of interLATA services in a given market on comparable rates, terms, and conditions. Id.<sup>34</sup>

**F. SBLD and SWBT Will Comply with the Joint Marketing Provisions of Section 272(g)**

Section 272 authorizes BOCs and their required affiliates to engage in joint marketing and sale of services and provides that such joint marketing and sales "shall not be considered to violate the nondiscrimination provisions of subsection (c)." § 272(g)(3). SBLD will not "market or sell [SWBT] telephone exchange services . . . unless [SWBT] permits other entities offering the same or similar service to market and sell its telephone exchange services." § 272 (g)(1). In addition, SWBT will not market and sell SBLD's interLATA service within any of its in-region states until SBLD "is authorized to provide interLATA services" in a particular state.

§ 272(g)(2); see Sweitzer Aff. § I; Ham (272) Aff. § G. SWBT also will comply with the Commission's requirements with respect to marketing on in-bound calls for new local exchange service. See Non-Accounting Safeguards Order ¶ 292. In addition, SBLD and SWBT will

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<sup>34</sup> Although SWBT reserves its rights with regard to the Commission's Further Notice of Proposed Rulemaking, CC Docket 96-149, ¶¶ 362 et seq., and any clarification, reconsideration, or appeal of any resulting order, SWBT will comply with any regulations ultimately resulting from that proceeding.

comply with the customer information privacy requirements of section 272 and any related rules or regulations issued by the Commission. Ham (272) Aff. ¶ E(1)(a)(xi), (xii).

**IV. SBLD'S INTERLATA ENTRY WILL PROMOTE COMPETITION, FURTHER THE PUBLIC INTEREST, AND SATISFY SUBSECTION 271(d)(3)(B)**

The final element of the Commission's section 271 analysis is a determination whether Southwestern Bell's interLATA entry in Oklahoma "is consistent with the public interest, convenience and necessity." § 271(d)(3)(C). The remainder of this Brief demonstrates that SBLD's provision of interLATA services in Oklahoma meets this public interest test. SBLD's entry will secure significant benefits for the public, in the form of lower prices and higher-quality telecommunications services. This is clear from: (1) the demonstrated ability of incumbent LECs to infuse interLATA and other telecommunications markets with competition in the instances in which they have been permitted to compete; (2) Southwestern Bell's ability to do the same in Oklahoma; and (3) the implausibility of any countervailing negative effect on competition.

**A. The Public Interest Inquiry**

The Commission's public interest review must be conducted within applicable statutory boundaries. As the Supreme Court has held, "the use of the words 'public interest' in a regulatory statute is not a broad license to promote the general public welfare. Rather, the words take meaning from the purposes of the regulatory legislation." NAACP v. FPC, 425 U.S. 662, 669 (1976). In particular, while the 1996 Act relies upon regulators to ensure that markets are open to new entrants, it does not authorize them to use the section 271 process as a vehicle for implementing their policy preferences regarding the shape of local competition. Instead,

Congress sought to promote rapid Bell company entry — a “principal goal” of the 1996 Act (Local Interconnection Order ¶ 3) — by instructing the Commission to conduct a public interest inquiry that is guided and constrained by years of precedent under section 214(a) of the 1934 Act.

1. *SBLD's Entry Is Presumptively Beneficial*

Congress intended to incorporate prior Commission precedent by using the phrase “public interest, convenience, and necessity” in section 271(d)(3). See McDermott Int'l., Inc. v. Wilander, 498 U.S. 337, 342 (1991) (absent “contrary indication” those interpreting statutory terms must assume that “Congress intended it to have its established meaning”). The Senate Commerce Committee, which first drafted the public interest provision of section 271, explained that “[t]he public interest, convenience, and necessity standard is the bedrock of the 1934 Act, and the Committee does not change that underlying premise through the amendments contained in this bill.”<sup>35</sup> Indeed, the public interest language of the Act is based upon “[a] test which has been a test utilized by [the] Commission ever since or almost ever since its creation.”<sup>36</sup>

Under the governing Commission precedent, the entry of an additional provider of interLATA services in Oklahoma presumptively will further the public interest. The

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<sup>35</sup> See, e.g., S. Rep. No. 23, 104<sup>th</sup> Cong., 1<sup>st</sup> Sess. 44 (1995); see also Conference Report at 149 (“the conference agreement adopts the basic structure of the Senate bill concerning authorization of BOC entry by the Commission”).

<sup>36</sup> 141 Cong. Rec. S8165 (daily ed. June 12, 1995) (statement of Senator Gorton); see also 141 Cong. Rec. S7895 (daily ed. June 7, 1995) (statement of Sen. Hollings) (“we have used the original Communications Act of 1934 as amended, for the simple reason that over the 60 plus years we now have a complex body of law, special rulings, interpretations of legal expressions and requirements”).

Commission has explained that section 214 "must be construed" to contain a presumption that both competitive entry and "the provision of new technologies and services" serve the public interest.<sup>37</sup> Thus, the Commission has consistently maintained an open entry policy for interexchange markets on the ground that new entrants enhance competition and that "competitive entry" serves the public interest.<sup>38</sup> This presumption of public benefit has been applied to incumbent LECs seeking to provide interexchange service to their local customers.<sup>39</sup>

SBLD will be a new entrant into the interLATA market in Oklahoma and will offer new services, such as bundled packages of local and long distance. To defeat this Application on

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<sup>37</sup>. Second Report and Order, MTS-WATS Market Structure Inquiry, 92 F.C.C.2d 787, 790-91, 803-05, ¶¶ 7-8, 46-49 (1982); Time Warner Entertainment Co. and U S West Communications, 8 FCC Rcd 7106, 7107-08, ¶10 (1993) (applying statutory presumption of 47 U.S.C. § 157(a), which encourages the provision of new technologies and services to the public). As required by case law interpreting section 214, the Commission has found that competition in interLATA markets "would benefit the public interest." MTS-WATS Market Structure Inquiry, 92 F.C.C.2d at 807-09, ¶¶ 53-59; see generally FCC v. RCA Communications, Inc., 346 U.S. 86 (1953), and Hawaiian Tel. Co. v. FCC, 498 F.2d 771 (D.C. Cir. 1974).

<sup>38</sup>. MTS-WATS Market Structure Inquiry, 92 F.C.C.2d at 790-91, ¶¶ 7-8; see MTS-WATS Market Structure Inquiry, 81 F.C.C.2d 177, 201-02, ¶ 103 (1980) (Commission will "refrain from requiring new entrants to demonstrate beneficial effects of competition in the absence of a showing that competition will produce detrimental effects"); cf. Market Entry and Regulation of Foreign-Affiliated Entities, 11 FCC Rcd 3873, 3878, ¶ 10 (1995) ("competition directly advances the public interest"); Washington Utils. & Transp. Comm'n v. FCC, 513 F.2d 1142, 1155, 1168 (9<sup>th</sup> Cir.) (upholding FCC order that "general policy in favor of entry of new carriers in the specialized communications field would serve the public interest"), cert. denied sub nom. National Ass'n of Regulatory Comm'rs v. FCC, 423 U.S. 836 (1975).

<sup>39</sup>. Inquiry into Policies to be Followed in the Authorization of Common Carrier Facilities to Provide Telecommunications Service off the Island of Puerto Rico, 2 FCC Rcd 6600, 6604 ¶ 30 (1987) (citing MTS-WATS Market Structure Inquiry, 81 F.C.C.2d at 186); see Inquiry into Policies to be Followed in the Authorization of Common Carrier Facilities to Provide Telecommunications Serv. off of the Island of Puerto Rico, 8 FCC Rcd 63, 63, 66, ¶¶ 1, 15 (1992) (reaffirming earlier decision).

public interest grounds, therefore, opponents would have to demonstrate with clear and convincing evidence that SBLD's entry will harm consumers.<sup>40</sup> In fact, however, they will only be able to show that SBLD's provision of interLATA services in Oklahoma will increase competition and thereby benefit consumers.

2. *Congress Rejected Efforts to Make InterLATA Entry Contingent on Actual Local Competition.*

Congress not only instructed the Commission to apply existing public interest criteria to section 271 applications, but also declared other sorts of review to be off limits. Specifically, Congress prohibited the FCC from imposing a local competition requirement of the sort that Congress itself rejected.

This restriction is clear from Congress' explicit rejection of proposals such as the "actual and demonstrable competition" approach initially backed by Senator Hollings, Senator Kerrey's proposed "substantial number of customers" test, and the "10 percent of customers" standard suggested in the House.<sup>41</sup> It also is found in the language of section 271(c)(4), which provides that "the Commission may not, by rule or otherwise, limit or extend the terms used in the

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<sup>40</sup>. See Inquiry into Policies to be Followed in the Authorization of Common Carrier Facilities to Provide Telecommunications Service off the Island of Puerto Rico, 2 FCC Rcd at 6604 ¶ 30 (Commission has "placed a burden on any entity opposing entry by a new carrier into interstate, interexchange markets to demonstrate by clear and convincing evidence that [additional] competition would not benefit the public") (emphasis added); see also 47 U.S.C. § 157(a) (those opposing the proposed use of new technologies or services must "demonstrate that such proposal is inconsistent with the public interest").

<sup>41</sup>. See 141 Cong. Rec. S7972, S8009 (daily ed. June 8, 1995) (statement of Sen. Hollings); 141 Cong. Rec. S8310, S8319 (daily ed. June 14, 1995) (Kerrey amendment); 141 Cong. Rec. H8425, H8454 (daily ed. Aug. 4, 1995) (statement of Rep. Bunn) (10% test).

competitive checklist set forth in subsection (c)(2)(B)" (emphasis added). The checklist requirements are the mechanism by which Congress ensured that Bell companies will have opened their local markets to competitors by the time they provide in-region interLATA services; Congress viewed satisfaction of these requirements, and only these requirements, as the appropriate threshold test for full Bell company entry into long distance markets.<sup>42</sup>

Section 271(c)(1)(B) confirms that entry into the local exchange is not a prerequisite to Bell company entry into in-region interLATA markets. This section, the Conference Report explains, "is intended to ensure that a BOC is not effectively prevented from seeking entry into the interLATA services market" by the entry decisions of facilities-based CLECs. Conference Report at 148. The Commission therefore must reject any attempts by incumbent interexchange carriers or others to make this proceeding a referendum on the extent of local competition in Oklahoma. Southwestern Bell's opponents cannot properly oppose this application based on tests for open local markets that depart from the ones Congress established in section 271.<sup>43</sup>

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<sup>42</sup> See 142 Cong. Rec. S688 (daily ed. Feb. 1, 1996) (statement of Sen. Hollings) (Bell companies must "open their networks to competition prior to their entry into long distance") (emphasis added); 141 Cong. Rec. S8188, S8195 (daily ed. June 12, 1995) (statement of Sen. Pressler) (noting rejection of "actual competition" test in favor of checklist approach).

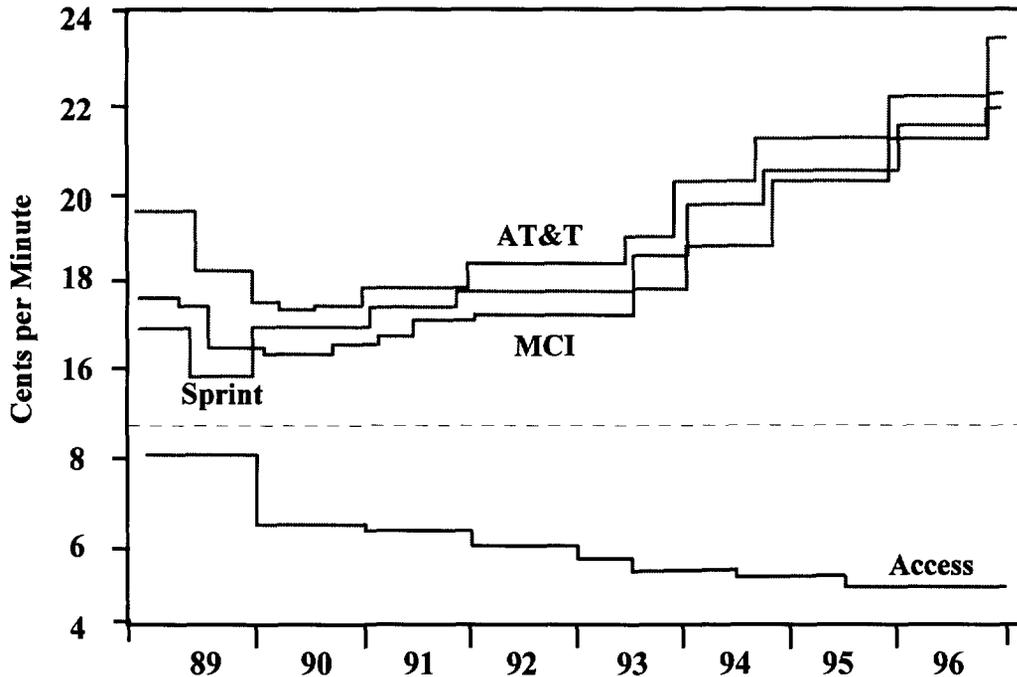
<sup>43</sup> The Department of Justice is not similarly constrained when consulting with the Commission pursuant to section 271(d)(2)(A). The Acting Assistant Attorney General for Antitrust in fact has indicated that he will use a test different from the one this Commission must apply. See Joel I. Klein, Preparing for Competition in a Deregulated Telecommunications Marketplace, Speech before the Glasser Legalworks Seminar (Mar. 11, 1997) (App. Vol. II, Tab 5). Specifically, it appears the Antitrust Division intends to set a standard of "open" local markets that departs from section 271(c)(1) and the checklist. *Id.* at 8-9. While that is the Department's prerogative, any departure from the test established by Congress will diminish the relevance of the Department's views in this proceeding.

**B. The Current State of Competition**

The entry of a new competitor able to realize scale and scope economies in providing long distance in Oklahoma would further the public interest regardless of the state of competition in the interexchange market. Even if the interexchange market were fully competitive, Southwestern Bell's entry into that market would be in the public interest. Southwestern Bell need not demonstrate the perfect or imperfect nature of competition in any market in order for the Commission to conclude that Southwestern Bell's entry into long distance in Oklahoma will benefit consumers.

The Commission, however, is aware that the interexchange market is not perfectly competitive. AT&T, MCI and Sprint have repeatedly raised their basic long distance rates in recent years. See generally AT&T Reclassification, 11 FCC Rcd at 3313 ¶ 81 (noting 16% increase since 1991, "with much of the increase occurring since January 1, 1994"). Again and again, they have announced virtually identical price increases, typically within days of one

**Recent Trends in Long Distance Rates  
and Exchange Access Charges\***



\*Source: The WEFA Group, The Economic Impact of Immediate Competition in Long Distance in Oklahoma.

another.<sup>44</sup> In February 1996, for example, AT&T raised rates by 4.3 percent; within a few weeks, MCI announced that it would raise its rates by 4.9 percent and Sprint announced a 5 percent hike.<sup>45</sup> Sprint then raised its long distance rates twice in November 1996 (by 3 percent and then 2 percent), prompting AT&T to increase its rates by 5.9 percent and MCI to raise its own by 4.9

<sup>44</sup> See Affidavit of Alfred E. Kahn and Timothy J. Tardiff ("Kahn Aff.") ¶ 20 (AT&T rate increases); see also AT&T Reclassification, 11 FCC Rcd at 3313 ¶ 81 ("[E]ach time AT&T has increased its basic rate, MCI and Sprint have quickly thereafter matched the increase.").

<sup>45</sup> See Paula Squires, Deregulation Fails to Stop Rising Long Distance Rates, Richmond Times Dispatch, Dec. 8, 1996, at E1 (App. Vol. II, Tab 8); Bloomberg Bus. News, MCI Raising Rates with Rivals, L.A. Times, Nov. 30, 1996, at D3 (App. Vol. II, Tab 9); AT&T Bumps Up Rates Before RBOC Long-Distance Entry, Report on AT&T, Feb. 26, 1996 (App. Vol. II, Tab 10).

percent, both effective December 1.<sup>46</sup> In all, AT&T's basic residential interstate rate has gone up by over 20 percent since 1994. Kahn Aff. ¶ 20.

The long distance carriers' price increases have occurred despite declining costs. Long distance carriers' unit costs of supplying service are falling by about 6-7 percent per year due to improvements and cost reductions in fiber optic electronics and switches.<sup>47</sup> On top of these declines, AT&T, MCI and Sprint have benefitted from reductions in access charges, which are by far the largest cost component of interexchange carriers' costs. WEFA Report at 9. From 1994 to 1996 alone, access charges declined by about 10 percent. Kahn Aff. ¶ 14; see also WEFA Rep. at 11 (access charges falling by about 3% to 4% per year).

By raising prices despite these significant cost reductions, AT&T, MCI, and Sprint have increased significantly their already high price-cost margins, particularly for residential and small business service. See Paul W. MacAvoy, The Failure of Antitrust and Regulation to Establish Competition in Long-Distance Telephone Services 117-120 (1996) ("MacAvoy Study").

Professor MacAvoy calculates that for MTS/WATS telephone service, the long distance carriers' price-cost margins rose from under 55 percent in 1987 to near 70 percent in 1994. See MacAvoy Study at 117, 118 Fig. 5-1; see also Kahn Aff. ¶¶ 14-15 (discussing AT&T markups). MCI and Sprint are reducing the gap between their prices and AT&T's, so that the price-cost margins of the three major carriers have converged at the same time rates have increased. See MacAvoy

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<sup>46</sup> See Paula Squires, supra.

<sup>47</sup> WEFA Rep. at 11 ; see also Reply Affidavit of Professor Jerry Hausman at ¶ 14, United States v. Western Elec. Co., No. 82-1092 (DOJ filed June 30, 1995) ("Hausman MTV Reply Aff.") (estimating 6% decrease per year) (App. Vol. II, Tab 11).

Study at 102, 117-20. Consistent with this closing of ranks, MCI and Sprint no longer are taking market share from AT&T. See Schmalensee Aff. ¶ 9.

The long distance carriers traditionally have cited discount plans in response to such price data. Yet many high-volume callers do not use a discount plan and low-volume callers are not even eligible for them. In 1995, for example, over 80 percent of AT&T's residential long distance customers were required to pay full, undiscounted toll rates.<sup>48</sup> Moreover, AT&T and MCI recently have scaled back their discount plans even further, ensuring that fewer customers are eligible for lesser discounts.<sup>49</sup>

While the Commission staff has concluded that the rates offered through discount plans fell between 1991 and 1995 (while basic rates rose), Detariffing Order at ¶ 123, that does not take account of declining costs. Dean MacAvoy calculates that from 1989 to 1994 price-cost margins for major discount plans — AT&T's Reach Out America, MCI's Prime Time Day and Friends and Family I, and Sprint's Sprint Plus and Sprint Select plans — averaged 97 percent, 95 percent,

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<sup>48</sup> Schmalensee Aff. ¶ 18; see also MacAvoy Study at 125 (60% of AT&T residential customers ineligible for discounts); AT&T Reclassification, 11 FCC Rcd at 3312-13, ¶ 79 (discounted traffic as percentage of all Basket 1 traffic).

<sup>49</sup> In August 1995, AT&T revoked its 25-30 percent discounts for callers with monthly bills exceeding \$10 and replaced it with a plan that provides only a 10 percent discount to customers whose monthly bills are between \$10 and \$25. See "True Savings" Ends: AT&T Offers New Discount Plan, Drops "True Savings" as Competition Ebbs, Communications Daily, Aug. 22, 1995, at 3 (App. Vol. II I, Tab 12). AT&T's 30 percent discount is now available only for callers whose monthly bills exceed \$50. See Telecommunications Research and Action Center, Tele-Tips, Saving Money on Your Long Distance Bill, Sept. 1996, at 8 ("TRAC") (App. Vol. II, Tab 13). MCI has similarly trimmed the level of discounts in its Friends and Family plan. Telephony, Communications Daily, Sept. 5, 1995, at 4 (noting change in offerings) (App. Vol. II, Tab 14); TRAC at 8 (same offerings today as after change).

and 90 percent, respectively, of the carriers' price-cost margins for undiscounted service. Id. Discount plans thus do little to reduce profit margins — even when they are used.

Nor do large advertising expenditures and customer "churn" suggest a different pattern. When price/cost margins climb (and gaining a new customer becomes relatively more profitable), providers commonly increase their efforts to attract customers through advertising. Hausman MTV Reply Aff. ¶ 10 & n. 12. Although the major carriers' advertising may cause some customers to change networks, these consumers receive little advantage from the switch; they "are still paying an above competitive price, but from a new long distance carrier." Id. ¶ 10.

Recent flat-rate promotions also do not mark a departure from longstanding pricing patterns. In 1996, AT&T introduced a new flat rate of 15 cents per minute, which is higher than its standard evening rate; AT&T acknowledges that its plan does not cut prices for typical residential callers, who place most of their calls in the evenings and on weekends.<sup>50</sup> MCI has set its own flat rate within one-half cent of AT&T's; Sprint frames these plans with a two-tiered plan offering peak rates of 25 cents per minute and off-peak rates of 10 cents.<sup>51</sup> These plans have failed to reduce the cost of long distance calling for most customers. The consumer price index for interstate toll calls rose by almost 4 percent during 1996, with no decline in any month. Kahn Aff. ¶ 14; WEFA Rep. Figure 3.

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<sup>50</sup> See Roy Furchgott, Spending It: Dialing for Dollars, with Competing Flat-Rate Plans, N.Y. Times, Sept. 29, 1996, section 3 at 8 (App. Vol. II, Tab 15).

<sup>51</sup> See AT&T Calls MCI Flat Pricing More Than a Coincidence, Newsbytes, Sept. 30, 1996 (App. Vol. II, Tab 16).

The major carriers have in the past claimed that customers who spend less than \$3 per month are served below cost , but have not provided any record support for that claim.<sup>52</sup> Even if the claim were true, moreover, it would not explain why the large group of profitable customers with monthly bills of \$3-10 must pay full, undiscounted basic rates. See Kahn Aff. ¶¶ 22-23. And the incumbent's argument only highlights the need for competition to place pressure upon all carriers to lower operational and marketing costs.

There may be methodological controversies about the proper measures of price, cost, and profit in long distance. Yet there can be no genuine dispute that the interexchange market will be more competitive when the legal barrier to Southwestern Bell's entry is removed — in the same way that barriers to entering the local exchange have been removed.

**C. SBLD's Entry into the InterLATA Market Will Promote Competition**

The benefits of SBLD's entry in Oklahoma are plain when one considers both the demonstrated ability of other incumbent LECs to infuse long distance markets with competition, as well as the particular attributes of Southwestern Bell.

*1. Evidence of Competition Where LECs Have Been Allowed to Offer Long Distance.*

The concrete benefits that have resulted where incumbent LECs have been permitted to offer long distance services prove the likely benefits of SBLD's entry.

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<sup>52</sup> See, e.g., Statement of John W. Mayo on behalf of AT&T Communications of the Southwest ¶ 47; AT&T Reclassification, 11 FCC Rcd at 3311, ¶ 76; see also Detariffing Order ¶ 123 (noting that competition appears to be especially weak for the business of low-volume callers).

Long Distance Service in the New Jersey Corridors. The MFJ permitted NYNEX and Bell Atlantic to provide interstate interLATA services to in-region customers in two small geographic corridors running from New York City and Philadelphia into New Jersey. See United States v. Western Elec. Co., 569 F. Supp. 990, 1018-19, 1023 (D.D.C. 1983). In these corridors, NYNEX and Bell Atlantic have set their prices well below those of the major carriers. Kahn Aff. ¶ 52. According to AT&T's figures, for instance, Bell Atlantic's corridor rates are as much as one-third lower than AT&T's.<sup>53</sup>

AT&T petitioned the Commission for authority to reduce its long distance rates for New Jersey customers in these corridors precisely because it faces more intense competition there than elsewhere. See AT&T Waiver Petition at 1, 5. MCI followed suit, petitioning the Commission "so that [MCI] likewise will be in a position to benefit consumers by being able to compete effectively against Bell Atlantic and AT&T."<sup>54</sup> In their petitions, both AT&T and MCI frankly admitted that consumers in these corridors are better off than consumers who cannot obtain long distance service from the incumbent Bell company.<sup>55</sup>

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<sup>53</sup> AT&T Corp.'s Petition for Waiver and Request for Expedited Consideration, AT&T Petition for Waiver of Section 64.1701 of the Commission's Rules, CC Docket No. 96-26, Attachment A (filed Oct. 23, 1996) ("AT&T Waiver Petition") (App. Vol. II, Tab 17).

<sup>54</sup> MCI Comments at 1, AT&T Petition for Waiver of Section 64.1701 of the Commission's Rules, CC Docket No. 96-26 (filed Nov. 18, 1996) ("MCI Comments") (emphasis added) (App. Vol. II, Tab 18).

<sup>55</sup> See AT&T Waiver Petition at 5 (consumers in the corridors, unlike other areas, "benefit from the highest degree of competition possible"); MCI Comments at 3 ("fully support[ing]" AT&T's "arguments").

Competition in Connecticut. SNET's brief history as an interstate carrier in Connecticut serves as another dramatic example of the likely effects of Southwestern Bell's entry in Oklahoma. Since 1994, SNET has offered interstate long distance services to its local customers. The result has been lower rates for Connecticut consumers, on intrastate as well as interstate calls. On average, SNET has set its interstate rates 15-25 percent below AT&T's undiscounted rates. Kahn Aff. ¶ 53.

AT&T thus asked the Commission for authority to reduce its long distance rates in Connecticut even as it raises them in other states where Bell companies are barred from providing interLATA service.<sup>56</sup> Being unable to lower its interstate long distance rates in Connecticut without doing so elsewhere,<sup>57</sup> however, AT&T answered SNET's advances with intrastate toll promotions targeted at customers who use AT&T for interstate service as well.<sup>58</sup> SNET has countered in classic competitive fashion, with new intrastate and interstate promotions.<sup>59</sup> Throughout this competitive tussle, SNET has shown both a willingness and

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<sup>56.</sup> See AT&T Comments, Market Definition, Separations, Rate Averaging and Rate Integration, at 29, Policy and Rules Concerning the Interstate, Interexchange Marketplace & Implementation of Section 254(g), CC Dkt. No. 96-61 (FCC Apr. 19, 1996) ("AT&T Rate Averaging Comments") (App. Vol. II, Tab 19); AT&T Corp.'s Petition for Reconsideration, Policy and Rules Concerning the Interstate, Interexchange Marketplace, CC Dkt. No. 96-61, at 2-5 (Sept. 16, 1996) (App. Vol. II, Tab 20).

<sup>57.</sup> See AT&T Petition for Reconsideration at 4; AT&T Rate Averaging Comments at 29.

<sup>58.</sup> William Hathaway, AT&T Making New Rate Offer in Connecticut, The Hartford Courant, May 17, 1996, at F1 (App. Vol. II, Tab 21) (5 cents per minute flat rate on intrastate calls).

<sup>59.</sup> Susan Jackson, A Telecom Yankee Defends its Turf, Business Week, Oct. 28, 1996, at 167 (App. Vol. II, Tab 22) (one-second billing increments and free interstate calls).