lack of entry, the Department would view a BOC's interLATA entry as contrary to the public interest.

Actual evidence of competition is much more persuasive and informative than theoretical claims that markets are open to entry, for there have been erroneous predictions of the imminence of local competition ever since the AT&T divestiture. Important legal issues affecting how competition will develop remain unsettled, while local exchange and switched access competition today remains in a nascent stage. On a nationwide basis, most customers still lack any alternative to the incumbent LEC for local exchange or switched access services. Most potential new local entrants are still in the process of preparing to compete on a significant scale, rather than actually doing so, and many of the arbitrated agreements under Section 252 of the 1996 Act have not yet been implemented. This does not mean that it is necessary for BOC interLATA entry to wait until local competition has become fully effective.[53] As Dr. Schwartz explains in his affidavit, the economic balance of benefits and harms from BOC interLATA entry strongly favors withholding such entry until the BOC's local markets are "irreversibly opened to local competition," but not postponing BOC entry into interLATA markets until local competition has become fully effective. Schwartz Aff. ¶¶ 19, 149-169.

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[53] Although Congress required that local markets be open to competition before BOC long distance entry, some of the provisions of the 1996 Act indicate that Congress envisioned a transitional period after entry before local competition became fully effective. The protections of Section 272, which must be retained for at least three years after long distance entry, would have been unnecessary if Congress had wished to require fully competitive local markets as a precondition to long distance entry.

b. Competitive Entry Is Important to Setting Basic Performance Standards

Conversely, initial entry efforts may reveal that in spite of paper assurances, the BOC is unable or unwilling to provide the inputs needed by competitors in a timely and reliable manner, in the quantities needed to permit effective competition. In such a case, the Department would oppose a BOC's long distance entry. If entry were permitted under those circumstances, the BOC would have significantly diminished incentive thereafter to further improve or more fully implement access for competitors to their wholesale support processes, and indeed could have substantial incentives to discriminate, for example by delaying the full development and implementation of support system functions.[54] See Schwartz Aff. ¶¶ 149-197. In such a case, it would surely be difficult for the Commission, or state regulators, to compel adequate wholesale support processes to be developed on an efficient and nondiscriminatory basis through regulation alone.[55] Regulatory and judicial proceedings over claims of discrimination and failure to provide

[54] The Telecommunications Act requires incumbent LECs to provide facilities and services to their competitors at prices lower than the monopoly price of those facilities and services. Competitors can use these inputs to compete against the incumbent LECs in providing services (e.g., interLATA toll, intraLATA toll, and bundles of local and long distance service) that are much less stringently regulated than are these inputs. By discriminating in the quality of the inputs provided to competitors, e.g., by providing inferior operations support systems, the LECs can better protect supracompetitive pricing in the retail markets in which they face competition. See Schwartz Aff. ¶¶ 101-103, 115-117, 119-120.

[55] In this context, "non-discriminatory" provision of access will be dependent on the BOC's development and implementation of complex technology that differs in important respects from anything done before, and does not merely involve the provision of simple, well-established services that have been operating for some time. The BOCs have already experienced substantial problems making access to wholesale support systems available and have repeatedly had to delay their entry plans due to these difficulties. After a BOC enters the

access can be drawn out for years by BOCs unwilling to cooperate with competitive entry into their local markets. The difficulty of effectively regulating against discrimination in this context is well documented in practice,[56] and in economic literature.[57] In contrast, regulation has better

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interLATA market, however, the burden will shift in practice to the competitors and regulators, who will find it very problematic to prove whether a BOC's failure to develop and implement such technology is due to the inherent difficulty of the project or to a failure of the BOC legitimately to use its best efforts to do so. And if regulators conclude that the latter has occurred, their ability to provide effective remedies against such discrimination, i.e., effectively to require best efforts, will be limited if adequate benchmarks have not already been established before BOC interLATA entry.

[56] For example, BOCs and other LECs were able to delay significantly or prevent the option of 1+ dialing parity for intraLATA toll services in most states before the passage of the 1996 Act, thereby preserving a discriminatory advantage and a dominant market position for their own intraLATA toll services. See Schwartz Aff. ¶¶ 141-144.

The difficulty of opening networks to competition through the regulatory process alone is well illustrated by the Commission's efforts over several years to achieve network unbundling through "Open Network Architecture" (ONA) for enhanced services, which fell well short of the original objective. See Schwartz Aff. ¶¶ 145-148. Beginning in the mid-1980s, the Commission sought to require the BOCs to provide unbundled service 'building blocks' for competitors, including a wide range of capabilities. See Amendment of Sections 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry), Report and Order, 104 FCC 2d 958 (1986), on reconsideration, 2 FCC Rcd 3072 (1987), vacated, 905 F.2d 1217 (9th Cir. 1990). But the BOC's ONA plans, even after being amended, only offered part (60%, according to the Commission's estimate) of the interconnection arrangements and transmission facilities that competitors had requested, and the Commission accepted the BOCs' claims that it was not feasible to provide the requested unbundling and declined to require "fundamental unbundling" prior to eliminating structural separation, instead treating ONA as a "long-term" goal. Filing and Review of Open Network Architecture Plans, 4 FCC Rcd 1, at 42, 200 (1988); Filing and Review of Open Network Architecture Plans, 5 FCC Rcd 3103, at 3116, 3122 (1990), aff'd California v. FCC, 4 F.3d 1505 (9th Cir. 1993). Ten years after ONA was first ordered, it has still not been fully implemented, as made clear by the appellate decisions finding that the Commission's lifting of structural separation requirements to have been arbitrary and capricious due in part to the failure of the BOCs to unbundle their networks. See California v. FCC, 905 F. 2d 1217, 1232-38 (9th Cir. 1990) (FCC decision to abandon structural separation in favor of accounting safeguards was arbitrary and capricious); California v. FCC, 4 F.3d 1505, 1509-10 (9th Cir. 1993); California v. FCC, 39 F.3d 919, 929 (9th Cir. 1994).

prospects of providing effective constraints on competitive misconduct and backsliding by the incumbent LEC where stable arrangements with competitors are already in place and performance measures have been established based on competitive experience. See Schwartz Aff. ¶¶ 77, 127-136, 175.

The establishment of such performance measures will ensure the continued availability of functional and operable wholesale support processes and signal to competitors and regulators that the market has been irreversibly opened to competition. With clear performance benchmarks in place, both competitors and regulators will be better able to detect and remedy any shortcomings in the BOC's delivery of wholesale support services to its competitors. Although checklist compliance only requires a demonstration that a BOC's wholesale support processes provide adequate functionality and operability,[58] a record of performance benchmarks measured in an objective fashion -- and, if possible, commitments to maintain such standards -- is key to preventing the BOC from backsliding relative to its pre-entry performance. Without such benchmarks in place, competitors and regulators will have considerable difficulty in detecting

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In addition, the Department understands from prior investigations and interviews that cellular telephone companies experienced years of problems obtaining satisfactory interconnection with the BOCs. These problems were only resolved by the early 1990s.

[57] See, e.g., Jean Jacques Laffont and Jean Tirole, A Theory of Incentives in Procurement and Regulation (The MIT Press 1993).

[58] Even if the Commission were to interpret the checklist as requiring a showing less than the "meaningfully available" inquiry set forth in Part III, *supra*, we believe that, for the same reasons outlined above with respect to the establishment of basic performance standards, such an inquiry would still be a necessary part of a competitive assessment and public interest determination.

deterioration of wholesale support processes after the incentive of long distance entry is removed.[59] As Dr. Schwartz explains in his affidavit, it is difficult for competitors and regulators to detect BOC discrimination against competitors in *developing* new processes, such as automated wholesale support processes, because the development of the necessary processes is entirely within the BOCs' control and there is little precedent to indicate what is appropriate. Schwartz Aff. ¶¶ 134-136, 155-156, 180-182. In contrast, competitors and regulators are better able to detect active BOC discrimination against competitors in the *operation* of such processes by reference to established performance benchmarks. Thus, the Department will pay close attention to the adequacy of a BOC's established performance measures.[60]

c. The Department's Inquiry In the Absence of Significant Competitive Entry

Where a BOC seeks to provide interLATA service despite the absence of successful entry, it will be necessary to take a much harder look at the record to determine whether it has cooperated fully and done everything needed to make entry possible, or whether any barriers to entry still exist. Section 271 does not foreclose the possibility of BOC interLATA entry, even if the BOC faces no significant local competition in a state. That possibility, however, is properly limited to situations in which the lack of entry is not attributable in any significant part to the

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[59] See generally Affidavit of Michael J. Friduss ("Friduss Aff."), Exhibit D to this Evaluation.

[60] Another factor that is relevant to this showing is whether the BOC has entered into, or is subject to, clear penalties for failing to meet basic performance benchmarks, e.g., a time interval for provisioning unbundled loops.

BOC's failures to provision needed facilities, services and capabilities as the 1996 Act requires, or to other legal or artificial economic barriers. From the Department's observations, the enactment of the 1996 Act has spurred efforts by a large number of firms to enter a large number and wide variety of local markets. In light of those efforts, the absence of successful entry in a state reasonably gives rise to the inference that the state's local markets are not yet open to competition, just as successful entry of all types would give rise to the inference that the markets have been successfully opened.

In many situations, there may be some local entry occurring in a state at the time the BOC applies for interLATA entry authority, but not enough actual entry to suggest that the markets are fully open to competition. Although the Department looks for evidence that significant commercial entry has occurred, we do not mean to suggest that such competition must be ubiquitous, involve any particular number or type of entrants or result in any particular market share. Rather, we ask only that such competition have some real value in demonstrating that the "pipeline can carry gas," without, of course, experiencing significant leakage. Under some circumstances, even entry on a small scale may be sufficient to demonstrate that entrants will be able to obtain the cooperation needed from the BOC in order to compete successfully.

A key component of the demonstration that markets are open, particularly where actual competition is still limited, will be proof that the complex systems needed to support the provisioning and maintenance of resale services and unbundled elements are sufficiently functional and operable, as those concepts are described in Section III and Appendix A of this

evaluation, and that appropriate performance measures have been established. If so (depending on the facts in a given case, of course), the Department may well conclude that these systems will permit competitors to expand their operations in response to foreseeable demand levels, and that there are sufficient benchmarks to enable regulators and competitors to protect against "backsliding" by the BOC after long distance entry is obtained, when the BOC's incentives to cooperate with local competitors will be diminished.

To the extent that any facilities based, resale, or unbundled element competition is lacking in a state, the Department will attempt in its evaluation to determine why such entry is not occurring. We will seek to determine if the BOC's wholesale support processes are sufficiently functional and operable, and measurable in performance, to support competitive entry. We will also seek to determine whether the prices for relevant facilities and services that entrants must obtain from the BOC have been established and will remain available at appropriate cost-based levels, so as to provide the opportunity for economically efficient entry. And we will ask whether other entry barriers have been created by anticompetitive BOC behavior or by state laws or regulatory policies that may be inconsistent with the 1996 Act's requirements. On the other hand, if the absence or limited nature of local entry appears to result from potential competitors' choices not to enter -- either for strategic reasons relating to the Section 271 process, or simply because of decisions to invest elsewhere that do not arise from the BOC's compliance failures or barriers to entry in the state -- this should not defeat long distance entry by a BOC which has done its part to open the market.

This Department's approach to evaluating Section 271 applications has been reviewed by Dr. Schwartz, who has concluded that "[b]y far the best test of whether the local market has been opened to competition is whether meaningful local competition emerges," and that where such competitive evidence is lacking, "insist[ing] on offsetting evidence that the market indeed has been irreversibly opened" would be necessary and greater caution would be called for in approving any BOC entry. Dr. Schwartz also has concluded based on his economic analysis that the Department's standard "strikes a good balance between properly addressing the competitive concerns raised by BOC entry, and realizing the benefits from such entry as rapidly as can be justified in light of those concerns," and "serves the public interest in competition." Schwartz Aff. ¶¶ 20, 24, 192.

C. SBC Has a De Facto Monopoly in Local Exchange Telecommunications in Oklahoma and Dominates Exchange Access and IntraLATA Toll

Although the Oklahoma Corporation Commission took steps to establish a legal framework for local competition in Oklahoma in March 1996, shortly after the passage of the 1996 Act,[61] SBC still faces no real competition in local exchange services in Oklahoma today,

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[61] OCC, Telephone Rules, Okla. Admin. Code Section 165:55-17 (1996). Oklahoma's rules dealing with interconnection, unbundled elements and resale, OAC 165:55-17-5, substantially parallel Section 251 of the 1996 Act. All incumbent local telecommunications carriers in Oklahoma, including SWBT, still have their retail rates set by rate of return regulation, but this could change as a result of a pending Oklahoma Corporation Commission rulemaking proceeding on alternative price cap, regulation. Pending legislation, Okla. H.B. 1815, could eliminate the regulation of prices for SWBT and other LECs for all products (except basic local, which is capped for 2 years), in any exchange where a competitive local exchange carrier is

more than a year later. Its local exchange market share in Oklahoma is so near 100% as to be practically indistinguishable from a complete monopoly. Indeed, SBC's revenues are continuing to increase and have not been significantly affected by competition in any of its major regulated service categories in Oklahoma, including exchange access and intraLATA toll.[62] SWBT is the

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certificated, regardless of whether any actual competition exists. Id. at Section 7D. This could give SBC relative freedom in pricing intrastate access to interexchange carrier competitors. For possible competitive consequences, see Schwartz Aff. ¶ 100, 103, 123.

[62] SBC's total revenues in Oklahoma were $852,387,000 in 1995 and $1,074,510,000 in 1996, about 10% of SBC's total revenues in its region. FCC Report 43-01, ARMIS Annual Report for Southwestern Bell Telephone Co., 1995 and 1996. SWBT's basic local revenues in Oklahoma were $447,604,000 in 1995 and $480,375,000 in 1996. Id. This continued growth, according to SBC's 1996 annual report, comes from a combination of increases in access lines and sales of vertical services.

SWBT's Oklahoma access revenues were $254,528,000 in 1995 and $264,573,000 in 1996, 8% of the total for the SBC region. Id. Oklahoma is the third most significant SWBT state in interLATA traffic, after Texas and Missouri (and not counting SBC's recently acquired PacTel states). In 1995 5,356,983,000 interLATA long distance access minutes originated and terminated in Oklahoma, .97% of such minutes in the U.S. and 8.7% of such minutes in the SWBT region. FCC 1996 Common Carriers Statistics at Table 2.6. SBC's average interstate access charge per minute (originating or terminating) was 2.6 cents in 1995 (around the national average), declining to 2.5 cents in 1996 under price caps. In Oklahoma, SBC's intrastate interLATA charges mirror the federal ones, for a total of 5 cents per minute (originating and terminating). This contrasts with the situation in all of SWBT's other states, where SWBT's intrastate interLATA access charges are higher than the interstate ones, and indeed SBC has the highest average intrastate interLATA access charges of any of the BOCs other than US West. Id. SWBT's intraLATA access charge in Oklahoma is higher than the interLATA one, at 7 cents per minute (combining both ends). See Statement of Steven E. Turner on Behalf of AT&T Communications of the Southwest, OCC Cause No. PUD 97-64, at ¶ 16 (Mar. 6, 1997).

SWBT's intraLATA toll revenues in Oklahoma were $77,021,000 in 1995 and $173,641,000 in 1996. FCC Report 43-01, ARMIS Annual Report for Southwestern Bell Telephone Co., 1995 and 1996. This large increase was mainly attributable to a one-time adjustment, but unlike several of the other BOCs, SBC's regionwide intraLATA toll revenues actually grew between 1995 and 1996, by 7.4% according to its 1996 annual report. SBC states that intraLATA revenues regionwide would have "decreased slightly" between 1995 and 1996 due to intraLATA competition were it not for special revenue adjustments in Oklahoma and

principal provider of local exchange and access services in Oklahoma, serving approximately 92% of the access lines in the state, 1,421,357 million (389,005 business, 1,032,353 residential) out of the total of 1,543,696 switched access lines as of 1995, and 1,470,000 as of 1996.[63] The remaining customers are served by independent LECs in separate geographic areas, such as GTE.

Only one local exchange competitor, Brooks Fiber, is operational in Oklahoma. Brooks is serving a very small number of business customers over its facilities, 20 as of the most recent information available when SBC filed this application. All of these customers are located in the two metropolitan areas in Oklahoma, Tulsa and Oklahoma City. While SBC claims that Brooks also serves residential customers, those "customers" are merely four employees of Brooks using resold SBC local service on a trial basis. No CLEC is actively competing for local residential customers in Oklahoma today, using either facilities or resale. SBC has so far provided no unbundled loops to any entrant, in sharp contrast with most of the other BOCs including Ameritech, PacTel, NYNEX, BellSouth and Bell Atlantic. SBC had 253 local switches installed throughout the state in 1996,[64] while local competitors in total have only three local switches based on the most current information. Brooks has one switch each in Oklahoma City and Tulsa, and Cox has one switch in Oklahoma City that is not yet operational. See Appendix B.

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elsewhere. 1996 10-K Annual Report for Southwestern Bell Telephone Company. Oklahoma does not yet have intraLATA toll dialing parity and could not require it before SBC provides interLATA services due to the Telecommunications Act's restriction in Section 271(e)(2).

[63] FCC 1996 Common Carriers Statistics at Table 2.4; ARMIS 4305, Annual Service Quality Report, Southwestern Bell Telephone Company, 1995 and 1996.

[64] ARMIS 4305, Annual Service Quality Report, Southwestern Bell Telephone Co., 1996.

In sum, none of the three entry paths specified by the 1996 Act are receiving any significant use for local competitive entry in Oklahoma today. Important categories of customers -- residential subscribers statewide, and all users outside the two major metropolitan areas -- have no real competitive choices. These circumstances give rise to the inference that the local markets served by SBC are not yet fully open to competition in Oklahoma.

D. The Absence of Local Competition in Oklahoma Can in Large Part Be Attributed to SBC's Failure to Provide What Competitors Need to Enter the Market

1. Potential Competitors Are Seeking to Enter Local Markets in Oklahoma But Have Not Yet Been Able to Do So

SWBT states in its application that it has approved, negotiated interconnection agreements with Brooks Fiber, Dobson Wireless, IntelCom Group (ICG), Sprint, U.S. Long Distance, and Western Oklahoma Long Distance. In addition, 10 other agreements have been signed but are not yet approved. In total, so far SBC has 17 agreements, including its most recent one with Cox (which was reached after SBC prepared this application), of which 6 are interconnection and 11 are purely resale agreements. Zamora Aff. ¶24 ; Phillip Decl. ¶ 3. The experiences and business decisions of these potential competitors illuminate the prospects for local competition in Oklahoma. In summary, of its 16 agreements as of the time SBC prepared its filing, SBC has 4 OCC approved interconnection agreements, and 2 OCC approved "resale" agreements. SBC Brief at 4; Zamora Aff. ¶24. SBC has filed three other interconnection agreements, with ACSI, Intermedia Communications and Cox Communications, that are

awaiting approval from the OCC. Other carriers have made requests but have not yet been able to reach interconnection agreements with SWBT, which states that requests for negotiations to date in Oklahoma have the potential to produce 44 agreements. Zamora Aff. ¶ 22. Of all the providers who have sought or received agreements, only one, Brooks Fiber, is operational and serving any local customers. AT&T is the only provider that has completed an arbitration, but this has not yet led to a signed agreement, so it is unclear when AT&T will be in a position to compete with SWBT. The five providers apart from Brooks who have approved interconnection agreements with SWBT in Oklahoma are either not ready to begin operations in the state and so do not know whether SWBT can actually provision services and elements, or are involved in disputes with SWBT on the application of certain charges and provisions of their agreements. See Appendix B.

2. Reasons Why Significant Entry Has Not Taken Place in Oklahoma

The present lack of competition in Oklahoma does not mean that the demographics of the state make efficient facilities-based local competition implausible. The places most likely to attract facilities based entry in Oklahoma are the state's two metropolitan areas, Tulsa and Oklahoma City, both of which are in SWBT's service area, and each of which is the core of one of the two separate LATAs SBC serves.[65] 67.7% of Oklahoma's population of 3.2 million lives in metropolitan areas, based on U.S. census data. SWBT has said that 55% of its Oklahoma local

[65] The third LATA in Oklahoma, in the panhandle, overlaps the state border and is mostly in Texas. SWBT has no local service territories in the Oklahoma part of this LATA.

exchange service revenues come from Oklahoma City and Tulsa.[66] Since about 68% of the access lines in SWBT's service area in Oklahoma are in the metropolitan areas, some two-thirds of customers in the SWBT service area could potentially be served by facilities-based local telephone competitors even if facilities-based competition were only to prove feasible in metropolitan areas.[67]

There appear to be two reasons that local competition has not yet developed in Oklahoma. One is the time needed to secure an agreement with SBC, and then to fully implement it and become an operational provider. Notwithstanding SBC's suggestions that the competitors have only themselves to blame, the Oklahoma Corporation Commission has not found, and SBC has not even tried to prove, that any particular competitor has negotiated in bad faith or unreasonably delayed in implementing its agreement. The other reason is that, as the Department's analysis in Part III and Appendix A of this evaluation and the comments of other parties demonstrate, SWBT has failed to provide adequate, nondiscriminatory access to essential checklist items that potential competitors have requested. If competitors cannot even get over the first hurdles with SBC, it is not surprising that they are not ordering the remaining services and facilities that they

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[66] Wheeler Aff. ¶ 6.

[67] SBC had 1,047,000 residential and 423,000 business access lines in Oklahoma as of 1996, of which 699,000 residential lines and 303,000 business lines were in metropolitan areas (MSAs), a total of 1,002,000 metropolitan access lines. ARMIS 4305, Annual Service Quality Report, Southwestern Bell Telephone Co., 1996. In 1995, there were 407,000 residence and 154,000 business lines in Oklahoma City, and 284,000 residence and 126,000 business lines in Tulsa, giving these two cities in combination 971,000 access lines. "Southwestern Bell Territory Local Competition Review," AT&T Presentation to the Department of Justice (Aug. 13, 1996) (based on ARMIS data).

would need to compete effectively.

SBC evidently agrees that facilities-based competition could happen in Oklahoma, and its own evidence refutes any claim that if it were not allowed in now, its interLATA entry would be deferred indefinitely for want of facilities-based competition. SBC affiant Michael L. Montgomery asserts that large numbers of SWBT business and residential customers are at risk to competitive providers, based on his estimates of the numbers of customers within 500 and 1000 feet of "competitive" providers' facilities in Oklahoma City and Tulsa. Using just information on Brooks, Montgomery asserts that 40% of SWBT's business lines are within 500 feet of Brooks' fiber facilities and that 56% of SWBT's Tulsa business lines are within 1000 feet of Brooks' facilities in Tulsa. Similar analysis was done for residential customers in Tulsa and both business and residential customers in Oklahoma City.[68] SBC also notes the large amount of resources that Brooks has already invested and plans to invest in Oklahoma as a facilities based local provider.[69] Yet it is uncontroverted that Brooks has only a handful of local exchange customers, raising the obvious question of why local competition has not yet begun to develop.

Brooks' very limited entry into business markets to date, and its lack of entry into

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[68] Affidavit of Michael L. Montgomery on Behalf of Southwestern Bell Telephone Company ("Montgomery Aff.") ¶¶4-5, 8, attached to SBC Brief. Two of the "competitive" providers Montgomery cites as having facilities near current SWBT customers (Cox and ACSI) do not currently have approved interconnection agreements.

[69] Wheeler Aff. ¶ 7, citing The Sunday Oklahoman (3/20/95), notes that Brooks plans to spend an additional $20 million over the next 10 years to upgrade its Oklahoma network from 50 fiber optic route miles to 88. This is in addition to the unknown amount already invested in a 200 fiber optic route mile network in Tulsa. Wheeler ¶14, citing Tulsa World (8/29/96).

residential markets, can be attributed to SBC's lack of full implementation of its interconnection agreement with Brooks. Brooks' witness Ed Cadieux cogently explained at the OCC's Section 271 hearing why, in spite of having facilities in such close proximity to substantial numbers of residential customers, Brooks is serving no residential customers on a facilities basis:

> . . . Brooks has never intended to be in the resale business on any pervasive, broad sense. As a result of that, our primary methods of accessing customers are either connecting customers directly to our fiber or connecting customers through the use of unbundled loops. We are not serving customers currently through use of unbundled loops for reasons that I described in my testimony because we have not completed the collocations as yet.

Transcript of Proceedings, OCC Cause No. PUC 97-64 ("OCC Transcripts, Apr. 14, 1997"), at 66 (Apr. 14, 1997). For both Tulsa and Oklahoma City, Brooks facilities do appear to pass near a large number of customers, but that does not mean that Brooks could actually serve all of those customers directly without key unbundled elements from SWBT, such as local loops to connect the fiber rings to customer premises. It is not the desire of CLECs to refuse to use their own facilities that has lead to SBC's current inability to demonstrate checklist compliance on many items.[70]

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[70] During the Oklahoma 271 hearings, SWBT attorney Roger Toppin questioned Cadieux as to why Brooks was not offering local service to residential retail customers, in spite of the tariff Brooks had filed. Cadieux explained, "We have indicated all along that we do not intend to provide service on a resale basis to any significant extent. If we were to try to get into residential service on any broad scale immediately, we would have to do it on a resale basis because we don't have the availability of what is our preferred method of operation, the unbundled loop availability." OCC Transcript, Apr. 14, 1997, at 69. The affidavit of Liz Ham, SBC's OSS affiant, makes no mention made of Brooks' use of any SBC OSS interface. This is not surprising, given the unavailability of Brooks' preferred entry vehicle--unbundled loops.

The suggestion, arising from the absence of local competition, that SBC's local markets are not fully open to competition in Oklahoma, is confirmed by the experiences of the potential local competitors in dealing with SBC. SBC has failed to overcome the substantial evidence, introduced in comments in the Oklahoma Section 271 proceeding and before the Commission, that its own failure to provide adequate physical collocation, interim number portability, and wholesale support systems are, in large part, responsible for the current lack of local competition in Oklahoma. Moreover, there is significant evidence in the record to suggest that SBC has actively thwarted competitor attempts to develop and test interfaces to SBC's OSSs. SBC has refused to allow MCI to submit test orders to SBC interfaces until MCI both signed interconnection agreements and was certified in SBC states.[71] MCI, AT&T, and Sprint, the last being the one carrier with whom SBC is currently testing an application-to-application interface (DataGate), have complained of significant delays in SBC's provision of information needed to begin development of CLEC interfaces to SBC.[72] Sprint contends that SBC has failed to provide adequate documentation on operational interfaces and service availability in each of SBC's local switches, information Sprint will need to build an interface to SBC and market to consumers.[73]

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[71] Affidavit of Samuel L. King ("King Aff."), ¶35, attached to Comments of MCI Telecommunications Corporation, CC Docket No. 97-121 ("MCI FCC Comments") (May 1, 1997).

[72] Id. at ¶36; Dalton Aff. ¶8; Affidavit of Cynthia Meyer ("Meyer Aff."), ¶32, attached to Sprint Communications Company Petition to Deny, CC Docket No. 97-121 (May 1, 1997).

[73] Meyer Aff. ¶32.

Further, according to AT&T, with whom SBC is scheduled to begin testing of its EDI interface, SBC "is still in the process of clarifying and supplementing its own interface specifications."[74] Finally, one small carrier has stated that it was not even apprised of the availability of SBC's systems despite repeated requests over the course of a five month negotiation.[75]

Related to SBC's resistance to conducting carrier-to-carrier testing is its resistance to adopting a set of performance measures to ensure the continued, reliable performance of its wholesale support processes. Because none of SBC's automated wholesale support processes are operational -- commercially or otherwise -- SBC cannot make a demonstration of reliable performance and establish performance measures to ensure reliable support services post-entry behavior. More importantly, even if SBC's processes were operating at some level, SBC has not established a sufficiently comprehensive set of performance standards, nor supplied its own retail performance information, to permit such a comparison.

As discussed more fully in Michael Friduss' affidavit, SBC has not agreed to report its performance in several areas critical to CLEC competitive entry. Mr. Friduss finds, for example, that SBC has not included critical performance standards with which to compare SBC's retail and wholesale installation intervals, repair frequency and intervals, and the percentage of orders flowing through SBC OSSs without human intervention. Mr. Friduss' affidavit reveals serious deficiencies in SBC's proposed standards that would substantially undermine competitors' and

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[74] Dalton Aff. ¶8.

[75] Letter from Valu-Line of Kansas President Rick Tidwell to the Department of Justice of 5/8/97 at 1, Attachment G to this Evaluation.

regulators' ability to determine performance parity and adequacy either before or after interLATA entry.

Even if the issue related to SBC's support processes were adequately addressed, there could still be other obstacles to competitive entry in Oklahoma, which competitors would have to confront if they are ever able to cross the initial thresholds. For example, SBC has failed to show that its rates for unbundled elements, as established in the AT&T arbitration and used in its SGAT, are consistent with its underlying costs.[76] The Oklahoma Corporation Commission has never found SBC's SGAT rates for unbundled elements and interconnection, or the interim arbitrated rates from which they were derived, to be cost-based. The OCC arbitrator's decision on the AT&T application did not recommend "any particular methodology or cost study be adopted at this time," and the OCC did not even review cost studies in the arbitration to determine the interim rates. Rather, the arbitrator simply decided to "adopt SWBT's proposed rates on the basis that if a true-up is needed in the future it would be easier to explain to customers rather than trying to explain a lower price being trued-up to a higher price."[77] The

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[76] If SBC relies on the rates for unbundled elements in its agreement with Brooks, which are lower than those in the AT&T arbitration or the SGAT, as its basis for showing checklist compliance, it must demonstrate that those rates are available on a nondiscriminatory basis to satisfy Section 271(d)(2)(B)(ii). It is hard to see how SBC could do so, having put forward the SGAT rates as its generally available terms. Other providers that have entered into agreements since the AT&T arbitration, such as Sprint, have had to take the higher arbitrated interim rates rather than the Brooks prices.

[77] Report and Recommendations of the Arbitrator, Application of AT&T Communications of the Southwest, Inc. for a Compulsory Arbitration of Unresolved Issues with Southwestern Bell Telephone Company Pursuant to Section 252 of the Telecommunications Act of 1996, OCC Cause No. PUD 96-218 ("OCC Arbitration Decision"), at 19-20 (Nov. 13, 1996).

OCC's proceeding to examine SBC's costs and set final prices will not even commence until later this summer, and it is not clear when this proceeding will be completed. Since it is not yet known what the final Oklahoma prices will be or how they will be determined, the provision for a true-up is hardly sufficient assurance that competitors will in fact be charged cost-based prices now or later.

There are serious disputes between SBC and some potential competitors in Oklahoma, as in other states throughout the SBC region, as to what would constitute cost-based wholesale rates.[78] There is also some reason to suspect that SBC's SGAT prices in Oklahoma exceed its true costs, given the history of how loop prices were negotiated and the interim rates determined.[79] These interim rates also are higher than loop rates set so far in the few states that

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[78] See, e.g., Affidavits of Daniel P. Rhinehart and Steven E. Turner, attached to AT&T FCC Comments.

[79] Brooks states in its comments that it had reached closure with SBC on a loop price lower than the Commission's Oklahoma loop proxy of $17.63 before the Commission's decision was issued. Following the Commission's decision, SBC increased its price offer in the final Brooks agreement to the full proxy "ceiling" level, before executing the agreement. Brooks OCC Comments at 7 n.7. After reaching its agreement with Brooks, and after the pricing provisions of the Commission's August 8 Local Competition Order were stayed, SBC then pressed for still higher loop prices beyond the proxy "ceiling" in its arbitration with AT&T. These rates, which were uniformly higher than the geographically averaged recurring loop price in the Brooks agreement submitted for OCC approval, and were 17% above the averaged proxy level for even the cheapest deaveraged urban loop at $20.70, were set on an interim basis in the arbitration award, and used in SBC's SGAT.

have completed cost proceedings.[80] Though no state in the SBC region has yet completed its final pricing proceedings to determine cost-based rates, there is substantial variation between the interim rates adopted in Missouri and Texas for unbundled elements, which were more in line with what competitors proposed or were an average of SBC's and competitors' proposals, and those in the SGATs in Oklahoma and Kansas, which simply followed SBC's proposals.[81] SBC has not presented an adequate evidentiary record here from which the Commission could determine if the interim arbitrated and SGAT rates in Oklahoma are cost-based, even assuming that the Commission were willing to engage in that inquiry now rather than awaiting the results of the final Oklahoma pricing proceeding.[82]

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[80] For example, New York, which used two density zones for loop prices, has set the prices at $12.49 and $19.24.

[81] To illustrate, the three deaveraged zone rates for a two-wire analog loop in the Oklahoma SGAT are $20.70, $27.75, and $49.30. The lowest of these rates is above the FCC's averaged proxy price of $17.63. In SBC's Kansas SGAT, the three deaveraged zone rates for the same loop are $19.65, $26.55, and $70.30, putting the lowest of these rates slightly below the FCC's averaged proxy price of $19.85, while the others are above it. In contrast, in Missouri, the three deaveraged zone rates for the same loop set in arbitration by the state commission (and challenged by SBC on appeal) are $9.99, $16.41, and $27.12, putting two of the three zones below the FCC's averaged proxy rate of $18.32. In Texas, the deaveraged rates for the same loop in the ICG agreement are $15.50, $17.30, and $23.10, compared with the FCC averaged proxy of $15.49, about the same as the lowest zone. These rates only reflect recurring monthly charges, and not the additional interim nonrecurring charges that also apply in each SBC state, and vary substantially among the states as well.

[82] In the AT&T arbitration in Oklahoma, SBC presented supplemental testimony through one witness, Eugene Springfield, but SBC has not made the cost study underlying his testimony part of its filing in this proceeding. Some of SBC's proposed interim rates were not even claimed to be based on a cost study, but were derived from previous tariffs or contracts. OCC Arbitration Decision at 20. SBC has not presented any affidavit by Mr. Springfield in this

There are also serious concerns about SBC's limitations on the availability of unbundled elements in its SGAT, which requires parties interested in taking unbundled elements to provide indemnification for any infringement of intellectual property rights that may result from combining or using services or equipment provided by SWBT. SGAT, § XV, ¶ A. 7, at 19. In order to assure SWBT that it has no liability for intellectual property claims, users of unbundled elements will have to obtain licenses from approximately 40 equipment vendors, resulting in delay and additional expense. Id. ¶ A. 6, at 18. SWBT has told AT&T that it will not provide any unbundled element for which it believes a license is required, until AT&T obtains such a license or a certification that a license is not required from the third party owner. Affidavit of Thomas C. Pelto ("Pelto Aff.") ¶ 3, attached to AT&T FCC Comments. Additionally, if SBC's competitor is sued by a third party over the use of this intellectual property, the SGAT provides that "SWBT shall undertake and control the defense and settlement of any such claim or suit and LSP [Local Service Provider] shall cooperate fully with SWBT in connection herewith." SGAT, ¶ A. 7.

It is far from clear that there are legitimate third party intellectual property rights that

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proceeding, and it offered no witnesses for cross-examination in the state Section 271 proceeding in Oklahoma. With this application, SBC has presented only a summary affidavit by J. Michael Moore, purporting to describe in general terms some parameters and assumptions of SBC's cost studies, but not actually disclosing the underlying studies themselves, and simply asserting the conclusion that "the costs provided by SWBT meet the requirements of the Act" and the Commission's regulation and "provide a suitable basis for rates." See Affidavit of J. Michael Moore, attached to SBC Brief. AT&T has an alternative cost study which concludes that SBC's prices significantly exceed costs.

would be affected by the sale of an unbundled network element functionality.[83] But whether there are such rights or not, SBC's use of the claim of such rights to place burdens on parties seeking access to unbundled elements has unreasonable consequences, potentially delaying and increasing the expense of entry. The Commission has already articulated procedures, in its Order implementing the infrastructure sharing obligations imposed by Section 259 of the Act,[84] by which an ILEC, CLEC, and third party vendor could work together, in the case of legitimate third-party claims of intellectual property rights, to assure that the vendor's rights are protected and that the CLEC gets the non-discriminatory access required under the Act. The Commission has stated, "[i]n the ordinary course . . . . we fully anticipate that such licensing will not be necessary," Infrastructure Sharing Order ¶69, but that in any event, the providing incumbent LEC

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[83]Pelto Aff. ¶¶ 30-34. AT&T presents arguments which support the view that, because most intellectual property rights are extinguished with the first sale of the product containing the intellectual property, and given that, in providing the unbundled elements the ILEC never relinquishes control of the element, it is unlikely that any real violations of a third party's intellectual property rights are at issue. AT&T and MCI have both challenged the legality of SBC's position requiring interconnectors to secure intellectual property licences from third party vendors under the Act. AT&T has challenged this requirement in federal district court in Texas. AT&T Communications of the Southwest, Inc. v. Southwestern Bell Telephone Co. and the Commissioners of the Public Utility Commission of Texas, Civ. Action No. A 97CA 029 (W.D. Tex. filed Jan. 10, 1997). MCI has filed a Petition for a Declaratory Ruling at the Commission. In the Matter of Petition of MCI for Declaratory Ruling, CCBPol 97-4, (filed Mar. 11, 1997). Various vendors have raised doubts about the applicability of third-party licensing rights to unbundled elements in most situations where the CLEC is not using the unbundled elements in a different manner than the ILEC . See, e.g., Comments of Northern Telecom Inc., In the Matter of Petition of MCI for Declaratory Ruling, CC Docket No. 96-98, CCBPol 97-4, at 5-6 (filed Apr. 15, 1997); Comments of Lucent Technologies Inc., CCB Pol 97-4, at 2 (Apr. 15, 1997).

[84] Report and Order, Implementation of Infrastructure Sharing Provisions in the Telecommunications Act of 1996, ("Infrastructure Sharing Order"), CC Docket 96-237 (rel. Feb. 7, 1997).

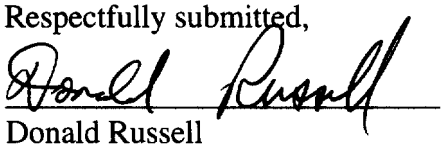
must not impose "inappropriate burdens on qualifying carriers," and if a license is required, "the providing incumbent LEC will be required to secure such licensing by negotiating with the relevant third party directly." Id. ¶ 70. SBC's handling of this issue, in contrast, puts the burdens and the risk on the CLEC seeking to use its unbundled elements. Pelto Aff., ¶¶ 8-12.

At this time, given the lack of competition in Oklahoma and the various obstacles SBC has placed in the path of competitive entry, SBC's in-region interLATA entry in Oklahoma would not be consistent with the public interest.

Conclusion

Based on the foregoing evaluation, the application of SBC Communications Inc. et al. to provide in-region interLATA service in the state of Oklahoma should be denied. This application fails to comply with the requirements of Section 271 of the Act. It does not satisfy either of the two entry tracks set forth in Section 271(c)(1)(A) or (B), fails to comply with the statutory competitive checklist, and would not be consistent with the public interest in competition.

Respectfully submitted,



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May 16, 1997

INDEX OF EXHIBITS AND ATTACHMENTS

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A	Appendix: SBC's Wholesale Support Processes
B	Appendix: Local Competitors and Potential Competitors in Oklahoma

Exhibits

	Title
C	Affidavit of Marius Schwartz
D	Affidavit of Michael J. Friduss

Attachments

	Title
E	SWBT's Response to Public Utility Commission of Texas' Request for Information
F	Letter from Metro Access Networks to Donald J. Russell, March 5, 1997
G	Letter from Valu-Line of Kansas to DoJ, May 8, 1997
H	SBC Presentation to DoJ, January 23, 1997
I	SBC Submission to DoJ, April 29, 1997
J	Letter from AT&T to DoJ Regarding OSS Testing, April 23, 1997