

their own end-user customers or customers of other CLECs. SS7 signaling can be provided between the CLEC's switches, between the CLEC's switches and Southwestern Bell switches, or between the CLEC's switches and the networks of other carriers connected to Southwestern Bell's SS7 network. Id. ¶ 133. SS7 interconnection facilities may be obtained from Southwestern Bell or furnished by the CLEC itself. Id. ¶ 135. Currently, three CLECs in Oklahoma have connected their switches to Southwestern Bell's SS7 network. Id. ¶ 133.

SWBT's STC and OCC-approved agreements offer CLECs the ability to obtain nondiscriminatory access to a variety of call-related databases. This access enables the CLEC to provide the types of sophisticated calling capabilities customers have come to expect from Southwestern Bell, without having to duplicate Southwestern Bell's investment in these technologies. See id. ¶¶ 136-155. Specifically, access to Southwestern Bell's Line Information Database ("LIDB") enables CLECs to store CLEC line and billing records in the LIDB on the same basis as Southwestern Bell. Id. ¶¶ 137-140. Nondiscriminatory access to Southwestern Bell's Calling Name Delivery Database ("CNAM") allows CLECs to offer their customers caller ID services. Id. ¶¶ 141-144. For completion of toll free calls, the STC and OCC-approved agreements afford CLECs unbundled access to Southwestern Bell's Toll Free Calling (800 and 888) Database, plus optional translation, call validation, and call routing features. Id. ¶¶ 145-150. Advanced Intelligent Network ("AIN") services allow CLECs to create their own AIN applications on Southwestern Bell's Integrated Service Control Point and then place them on Southwestern Bell's network. Id. ¶ 151.

Interested CLECs are provided the information they need to format and/or enter inputs into these databases. Id. ¶ 152. All data in the databases is maintained by Southwestern Bell in accordance with the confidentiality requirements of 47 U.S.C. § 222. Deere Aff. ¶ 153; see also Watts Aff. (discussing Southwestern Bell's steps to ensure compliance with CPNI rules). Three CLECs in Oklahoma are accessing Southwestern Bell's databases. Deere Aff. ¶ 136.

6. UNE Combinations

Southwestern Bell has taken seriously the FCC's desire to ensure that CLECs have the ability to combine UNEs for their own use. See South Carolina Order ¶¶ 197-209. To address this concern, Southwestern Bell has developed offerings that enable CLECs to combine UNEs purchased from Southwestern Bell and has spelled out those offerings in detail. See Deere Aff. ¶ 44; Auinbauh Aff. ¶ 51.

Appendix UNE to Southwestern Bell's STC lays out five alternative methods that CLECs may use to access and combine UNEs ordered from Southwestern Bell. STC App. UNE § 2.9.1; see Deere Aff. ¶¶ 84-113. Southwestern Bell will extend UNEs: (1) to a CLEC's physical collocation point of termination (POT) frame; (2) to a CLEC UNE frame located in a collocation common area; (3) to a CLEC's UNE frame located in a common area room space (rather than a collocation common area) within the central office building; (4) to an external point of presence, such as a cabinet located outside the central office building, provided by Southwestern Bell on Southwestern Bell property; or (5) to a building controlled by a party other than Southwestern Bell via cabling provided by the CLEC. STC App. UNE §§ 2.9.1.1-2.9.1.5; Deere Aff. ¶¶ 86-90. While the first two methods are available only to physically collocated

CLECs, the latter three are available to CLECs without regard to whether they have completed a collocation arrangement with Southwestern Bell. Deere Aff. ¶¶ 92-93.²⁰ These five methods are further described in Southwestern Bell's CLEC's Technical Publication for Access to Unbundled Network Elements, which has been provided with this application. Deere Aff. Sched. 1.

All five methods entail Southwestern Bell's provision of cross-connects — the wires, fibers, or equipment that connect one piece of equipment to another. Mr. Deere's affidavit discusses the types of cross-connects that are used with different unbundled offerings. Id. ¶¶ 94-113. In all cases, connections are established for CLECs using the same tested materials and procedures, and the same technicians that Southwestern Bell uses in serving its own customers. Id. ¶¶ 105, 113.

The STC sets forth cost-based rates for all five methods of accessing and combining UNEs. See STC App. UNE, Attachment: Access to Unbundled Network Elements. These rates, were determined in accordance with the same forward-looking methodology as the rates for UNEs themselves. Cleek Aff. ¶ 30; Moore Aff. ¶¶ 7-41.

No CLEC has expressed a specific desire to combine unbundled elements provided by Southwestern Bell. Nevertheless, the practical workability of each of the methods offered in the

²⁰. As already noted, CLECs that choose to pursue physical collocation — whether for interconnection or for purposes of combining UNEs (or both) — receive standardized terms that are set out in, among other documents, Southwestern Bell's Interconnectors' Technical Publication for Physical Collocation, a model collocation agreement that addresses such details as equipment standards, insurance requirements, billing, and liability issues. See supra Part II.C.1.

STC is confirmed through Southwestern Bell's own operational experience. See Deere Aff.

¶¶ 94, 105, 113; see also South Carolina Order ¶ 205.

Southwestern Bell has not stopped at the limits of its legal obligation to assist CLECs enter the Oklahoma market. To the contrary, while the Eighth Circuit made clear "that requesting carriers [must] combine the unbundled elements themselves" under the 1996 Act, Iowa Utils. Bd., 120 F.3d at 813, Southwestern Bell voluntarily offers to do this work for CLECs. See Auinbauh Aff. ¶ 50.

In some instances CLECs can receive UNEs on a precombined basis without any additional charge. Where a CLEC orders a local loop as an unbundled network element, for example, Southwestern Bell will provide the NID and will connect the drop wire between the distribution plant facilities and the NID at no additional charge to the CLEC. Deere Aff. ¶ 54.

In other instances, Southwestern Bell will combine UNEs for a CLEC at a standard price. Southwestern Bell's STC makes available "Network Component Service (NCS) . . . a discretionary full-service offering, which SWBT is willing to provide above and beyond its obligations under the Act." STC App. NCS § 1.0. When placing a Network Component Service order, a CLEC identifies the network components it desires, the associated ordering codes, and the sequence in which those elements are to be combined. Id. § 2.1. Southwestern Bell then provides the requested elements on a combined basis. Nonrecurring charges associated with this Network Component Service are added to the recurring and nonrecurring charges for the underlying network elements. Id. §§ 2.2, 3. The charges for Network Component Service, which are not subject to section 252(d) and thus outside the OCC's pricing proceedings, are set

forth in Appendix NCS to Southwestern Bell's STC. Id. § 3.4; see Cleek Aff. ¶ 30. CLECs may order the Network Component Service (including the loop and port and loop and INP combinations specified by the Ordering and Billing Forum) through either EDI or LEX, as well as through manual processes. Ham Aff. ¶¶ 51, 77; see also Lowrance Aff. ¶ 16.

A CLEC considering whether to compete by purchasing UNEs on an unbundled basis, by ordering Southwestern Bell's Network Component Service, or by purchasing services for resale, will find that the most cost-effective strategy depends upon its particular business plan. This is inherent in the underlying statutory scheme: the FCC itself has stressed that resale and UNE entry strategies involve different risks and rewards.²¹ The affidavit of Michael Auinbauh gives illustrative costs for a hypothetical business line using these different entry modes. See Auinbauh Aff. Sched. 12. A CLEC would compare these costs to its anticipated revenue streams under each of the different approaches (taking account, for example, of its ability to recover access charges when using UNEs). A CLEC's decision also would depend upon its own costs of combining UNEs, as compared to the charge for Southwestern Bell's Network Component Service. Here again, Southwestern Bell affords CLECs a full range of options that collectively permit local entry in all of the ways intended by Congress.

²¹ See Iowa Utils. Bd., 120 F.3d at 815 ("A carrier providing services through unbundled access . . . must make an up-front investment that is large enough to pay for the cost of acquiring access to all of the unbundled elements of an incumbent LEC's network that are necessary to provide local telecommunications services without knowing whether consumer demand will be sufficient to cover such expenditures"); Local Interconnection Order, 11 FCC Rcd at 15668, ¶ 334 (same); see also S. Conf. Rep. No. 104-230, at 148 (noting "significant" "investment" associated with facilities-based entry).

E. Performance Measurements

Although the 1996 Act nowhere contains any requirement that a Bell company establish performance measurements to satisfy its obligations of providing nondiscriminatory network interconnection and access, Southwestern Bell has taken very seriously the Commission's request for "[c]lear and precise" measurements. Michigan Order ¶ 209. Indeed, working with the Department of Justice as well as CLECs such as AT&T, Southwestern Bell has developed a comprehensive set of measurements covering pre-ordering, ordering, provisioning, maintenance and repair, and billing of interconnection, UNEs, and resold services, among other functions.

Wherever possible, these measurements compare Southwestern Bell's level of service on behalf of CLECs to Southwestern Bell's level of service in its own retail operations. "Parity" of service exists where the difference in performance is no greater than one standard deviation in either direction — a test negotiated with AT&T for Oklahoma and other states. Dysart Aff. ¶ 8. Where no comparable retail functions exist, the level of service provided to CLECs is tested against standard intervals that were established through negotiations with AT&T and MCI. Id. ¶ 4. If a performance breach occurs, Southwestern Bell automatically will incur a penalty that reflects the magnitude of the breach. Conversely, Southwestern Bell will accrue credits against future penalties by giving CLECs superior performance. Id. ¶¶ 8-10. In this way, Southwestern Bell has committed to "appropriate, self-executing enforcement mechanisms" in accordance with the Commission's expressed desire. Michigan Order ¶ 394.

Southwestern Bell's performance measurement commitments have been included in Southwestern Bell's STC and thus are legally binding upon Southwestern Bell in its dealings

with CLECs in Oklahoma. See Dysart Aff. ¶ 5; STC App. PERFORMANCE

MEASUREMENTS.

Southwestern Bell reports its performance monthly, at a state-wide level, using appropriate service and facility categories. Dysart Aff. ¶¶ 6-7. Currently, performance data are provided to CLECs manually; by the end of 1998, however, data will be available to CLECs electronically, via an Internet Web site developed by Southwestern Bell for that purpose. Id. ¶ 14.

To confirm that CLECs have nondiscriminatory access to pre-ordering functions, Southwestern Bell provides data establishing performance comparisons in the categories of average response time (by function) and OSS availability. See Dysart Aff. ¶¶ 20-25.

For ordering, the performance categories measured by Southwestern Bell are:

- Percentage of Firm Order Confirmations (FOCs) received within 24 hours
- Average time to return FOC
- Percentage of mechanized completions returned within 1 hour
- Average time to return mechanized completions
- Percentage of rejects
- Percentage of mechanized rejects returned within 1 hour
- Mean time to return mechanized rejects
- Service order accuracy
- Provisioning accuracy
- Order process percent flow through

- OSS interface availability
- LSC speed of answer

Id. ¶¶ 29-40.

Measurements assessing Southwestern Bell's performance in provisioning UNEs and resold services are the following:

- Mean installation interval
- Percentage of installations completed within the applicable provisioning interval
- Percentage of Southwestern Bell-caused missed due dates
- Percentage of trouble reports within 10 days of installation
- Percentage of trouble reports within 30 days of installation
- Percentage of missed due dates due to lack of facilities
- Delay days for missed dates due to lack of facilities

Id. ¶¶ 41-67.

Maintenance performance measurements are as follows:

- Receipt to clear duration
- Mean time to restore
- Trouble report rate
- Failure frequency
- Percentage of missed repair commitments
- Percentage out of service for less than 24 hours
- Percentage of repeat reports

- LOC average speed of answer

Id. ¶¶ 68-91.

Data for billing measurements are gathered through an internal Southwestern Bell auditing process. The measurements being developed are the percentage of accurate and complete formatted mechanized bills, percentage of billing records transmitted correctly, billing completeness, and billing timeliness. Id. ¶¶ 92-102.

For DA and operator services, the following measurements have been established: directory assistance grade of service; directory assistance average speed of answer; operator services grade of service; and operator services average speed of answer. Id. ¶¶ 107-111.

General network performance is measured through trouble reports and by providing CLECs with reports on all major network events. Id. ¶¶ 112-114. For interconnection trunks, however, special measurements have been established to compare the service received by CLECs to that received by Southwestern Bell with respect to trunk blockage, missed due dates, and trunk restoration intervals. See id. ¶¶ 120-124.

Finally, Southwestern Bell's provisioning of INP is measured in the categories of percentage of installations completed within three, seven, and ten business days (depending on the number of loops ordered), average INP installation interval, percentage of INP I-reports within 30 days, and percentage of missed due dates. See id. ¶¶ 125-130.

Although extensive, the above list is not exhaustive. Southwestern Bell recognizes that the need for performance measurements may evolve as networks and local competition evolve.

Accordingly, Southwestern Bell stands ready to continue to work with CLECs and regulators to develop additional or different measurements as necessary. Id. ¶¶ 41, 68, 98, 107, 120, 125.

III. SOUTHWESTERN BELL WILL PROVIDE INTERLATA SERVICES IN COMPLIANCE WITH THE REQUIREMENTS OF SECTION 272

Southwestern Bell is submitting with its application extensive evidence demonstrating that it will comply with the requirements of section 272 when it receives interLATA authorization for Oklahoma and, indeed, is operating in accordance with section 272's terms today.²² More broadly, Southwestern Bell has established structural separation and nondiscrimination safeguards that will ensure that its long distance affiliate does not have any unfair advantage over its competitors when it sells in-region, interLATA services.²³

Separate Affiliate Requirement of Section 272(a). SBC has established SBLD as a separate affiliate to provide in-region, interLATA services in compliance with the structural

²² Section 271(d)(3)(B) employs the future tense, requiring the Commission to ensure that “the requested authorization will be carried out in accordance with the requirements of section 272” (emphasis added). While “past and present behavior” under applicable rules may be relevant to ensuring future compliance with section 272, Michigan Order ¶ 366, the Act does not empower the Commission to require full section 272 compliance before the BOC applicant receives interLATA authorization.

²³ For purposes of this application, the relevant Bell operating company is Southwestern Bell Telephone Company (“SWBT”), and the relevant section 272 affiliate is Southwestern Bell Long Distance (“SBLD”). As a result of its merger with Pacific Telesis, SBC owns two additional Bell operating companies, Pacific Bell and Nevada Bell. While not covered by this application, these Bell operating companies and Pacific Bell Communications — the section 272 affiliate that was formed to provide long distance in their regions — are also currently operating in conformity with section 272 and will comply with this section when SBC is authorized to offer long distance services in California and Nevada.

separation and operational requirements of section 272. Sweitzer Aff. ¶ C.1; Rehmer Aff. ¶ C.1.

SBLD is a wholly separate entity from SWBT. Sweitzer Aff. ¶ C.2.

Structural and Transactional Requirements of Section 272(b). Section 272(b)(1)

provides that the required separate affiliate “shall operate independently from the Bell operating company.” For as long as SBLD is subject to section 272, it will operate in a manner that satisfies both this statutory requirement and the Commission’s implementing regulations.

Rehmer Aff. ¶ D.1. SBLD and SWBT do not jointly own telecommunications transmission or switching facilities, or the land and buildings on which such facilities are located, and will not jointly own such facilities when subject to this restriction under section 272. Sweitzer Aff. ¶ C.5, C.6. SBLD also will use only personnel of the separate affiliate to operate, install, and maintain facilities, for as long as required by section 272. *Id.*; Rehmer Aff. ¶¶ D.2, D.3. SBLD will maintain separate books, records, and accounts from SWBT, § 272(b)(2), Larkin Aff. ¶ C.6; SBLD will have separate officers, directors, and employees from SWBT, § 272(b)(3), Rehmer Aff. ¶ E.1; and SBLD will not have recourse to the assets of SWBT, § 272(b)(4), Sweitzer Aff. ¶ C.13. SBLD will conduct all transactions with the SWBT on an arm’s-length basis, and any such transactions will be reduced to writing. § 272(b)(5), Larkin Aff. ¶ C.7. These transactions will be accounted for in accordance with all applicable Commission requirements. Larkin Aff. ¶ C.7.

While SBLD employs some former employees of SWBT, this does not constitute discrimination or cross-subsidy. There is nothing in the Act to preclude such hiring; indeed, it would be difficult for SBLD to operate if it could not hire employees with experience in the

industry. Furthermore, all Southwestern Bell employees are given detailed instructions regarding their obligations under the Act. Rehmer Aff. ¶ I.2. For example, SBC's Code of Business Conduct instructs employees on permitted and forbidden uses of proprietary information. Watts Aff. ¶ C.5. Employees are instructed that they are prohibited from using "customer proprietary information or any other proprietary information without a valid business reason," and that these restrictions must be followed both during and after the employee's employment. *Id.* Employees are warned that violations of these policies "can result in disciplinary actions, including dismissal and criminal prosecution." *Id.*

Although the Act does not require Southwestern Bell to satisfy the disclosure requirements of section 272(b)(5) prior to receiving authorization, Southwestern Bell has nevertheless disclosed significant information about transactions between SWBT and SBLD. Larkin Aff. ¶ G, 15-18, 22-25. Included with this application are copies of the agreements for all transactions between SWBT and SBLD to date, as well as descriptions of some services that may be provided in the future. Sweitzer Aff. ¶ C.15. These documents are available for public inspection during regular business hours at SBC's Washington, D.C. office. Larkin Aff. ¶ C.8. These transactions have been carried out on an arm's-length basis in accordance with the Commission's applicable affiliate transaction and cost-accounting rules. *Id.* ¶ C.7.

Agreements between SWBT and SBLD have been disclosed on the Internet in accordance with the posting procedures that will be followed when SBLD operates as a section 272 affiliate. See Report and Order, Implementation of the Telecommunications Act of 1996: Accounting Safeguards Under the Telecommunications Act of 1996, 11 FCC Rcd 17539, 17593,

¶ 122 (1996) (“Accounting Safeguards Order”); Sweitzer Aff. ¶ C.15, Sched. KS-3.

Descriptions of transactions between SWBT and SBLD are and will continue to be available on the Internet through SBC’s homepage, located at <http://www.sbc.com>. Sweitzer Aff. ¶ C.15.

Nondiscrimination Safeguards of Section 272(c). Section 272(c)(1) prohibits SWBT from discriminating between SBLD and other entities. Subject to the joint marketing authority granted by section 272(g), SWBT does and will make available to unaffiliated entities any goods, services, facilities, and information that it provides or will provide to SBLD at the same rates, terms, and conditions. Rehmer Aff. ¶ F.1. These may include exchange access, interconnection, collocation, unbundled network elements, resold services, and administrative services. Id. To the extent that SWBT develops new services for or with SBLD, it will also cooperate with other entities on a nondiscriminatory basis to develop such services, so long as it is required to do so under section 272. Id.

SWBT does not and will not, for so long as the requirement applies, discriminate between SBLD and other entities with regard to dissemination of technical information and interconnection standards related to telephone exchange and exchange access services. Id. SWBT will provide telecommunications services and network elements to SBLD using the same service parameters, interfaces, intervals, standards, and practices used to service other carriers and retail customers. Id. SWBT will not discriminate between SBLD and other carriers in the processing of presubscribed interexchange carrier change orders. Id. Nor does SWBT discriminate between SBLD and unaffiliated carriers with regard to protection of confidential network or customer information. Id. SWBT will not disclose any unaffiliated carrier’s

proprietary information without the unaffiliated carrier's consent. Id.; see generally Watts Aff.

¶ B.4 (Southwestern Bell and its affiliates will comply with the requirements of section 222 and with any final rules of the Commission regarding restrictions on the use of customer proprietary network information).

If SWBT provides SBLD with administrative services, these services will be offered to other entities on nondiscriminatory terms and conditions, as administrative services are today furnished to SBLD. Rehmer Aff. ¶ D.6; see also Sweitzer Aff. ¶ C.16. Service requests by nonaffiliated carriers will be fulfilled in the same period of time that such requests by SBLD are completed. Rehmer Aff. ¶ G.1.

Audit Requirements of Section 272(d). Pursuant to section 272(d)(1), SWBT will obtain and pay for a biennial, independent federal/state audit, commencing after section 272's requirements become applicable. See Sweitzer Aff. ¶ C.18; Larkin Aff. ¶ D.9. This audit will be consistent with the Commission's rules. Larkin Aff. ¶ D.9. In accordance with section 272(d)(2), the independent auditor will provide this Commission and the state commission with access to working papers and supporting materials relating to the audit. Id. ¶ D.10. And, as required by section 272(d)(3), SBC and its affiliates, including SBLD and SWBT, will provide the independent auditor, the Commission, and the state commission with access to financial records and accounts necessary to verify compliance with section 272 and the regulations promulgated thereunder, including the separate accounting requirements under section 272(b). Id. ¶ D.11.

Fulfillment of Requests Pursuant to Section 272(e). Pursuant to section 272(e)(1),

SWBT will fulfill, on a nondiscriminatory basis, any requests from unaffiliated entities for installation and maintenance of telephone exchange and exchange access services. Such services will be provided to other carriers within the same intervals as these services are provided to SBLD. Rehmer Aff. ¶ G.1.

SWBT will comply with section 272(e)(2) by providing any facilities, services, or information concerning its provision of exchange access to SBLD only if such facilities, services, or information are made available to other providers of interLATA services in that market on the same terms and conditions. Rehmer Aff. ¶ G.3. In accordance with section 272(e)(3), SWBT will charge SBLD rates for telephone exchange service and exchange access that are no less than the amount SWBT would charge any unaffiliated interexchange carrier for such service. Id. ¶ G.3. To the extent that SWBT is permitted to provide interLATA or intraLATA facilities or services to SBLD, SWBT will make such services or facilities available to all carriers at the same rates and on the same terms and conditions, in accordance with section 272(e)(4).

Joint Marketing Provisions of Section 272(g). Pursuant to 272(g)(1), SBLD will not market or sell SWBT's telephone exchange service unless SWBT permits SBLD's competitors to do so as well. However, SWBT and SBLD may appropriately engage in joint marketing during both inbound and outbound calls. See 47 U.S.C. § 272(g).

In its South Carolina Order, the Commission clarified the relationship between a BOC's joint marketing rights pursuant to section 272(g)(2) and its equal access obligations under

section 251(g). The Commission concluded that a BOC may market its long distance affiliate's service during inbound calls as long as it also "offers to read, in random order, the names and, if requested, the telephone numbers of all available interexchange carriers." South Carolina Order ¶ 239. When SWBT is authorized to offer long distance service in Oklahoma, it intends to use a joint marketing approach that will be consistent with the Commission's South Carolina Order. Rehmer Aff. ¶ H.2.

Compliance. Southwestern Bell has developed a compliance plan to ensure satisfaction of its obligations under section 272. Id. ¶ I.1. SWBT and SBLD conduct extensive training sessions, in which employees are provided with a detailed analysis of section 272 and the Commission's rules on this section. Id. ¶ I.2. SBC has a centralized Affiliate Oversight Group that is responsible for ensuring compliance with the appropriate state and federal accounting safeguards. Larkin Aff. ¶ E.13. SWBT has in place for all of its departments detailed procedures in dealing with contracts for nontariffed activities and affiliate transactions. See id., Attach. 1A. The Affiliate Oversight Group reviews purchases among affiliates to make sure that they comply with the affiliate transactions guidelines. Id. ¶ P.27. SBC has also created a 272 Oversight Team that meets on a regular basis to review all affiliate transactions; prior to undertaking a transaction with an affiliate, all managers must contact the 272 Oversight Team for review and approval. Rehmer Aff. ¶ I.1.

IV. SOUTHWESTERN BELL'S ENTRY INTO THE INTERLATA SERVICES MARKET IN OKLAHOMA WILL PROMOTE COMPETITION AND FURTHER THE PUBLIC INTEREST

The final element of the Commission's section 271 analysis is a determination whether interLATA entry "is consistent with the public interest, convenience, and necessity." 47 U.S.C. § 271(d)(3)(C). The remainder of this brief demonstrates that Southwestern Bell's provision of interLATA services in Oklahoma easily meets this test.

Congress expected, in passing the 1996 Act, that "removing all court ordered barriers to competition — including the MFJ interLATA restriction — will benefit consumers by lowering prices and accelerating innovation." 142 Cong. Rec. S713 (daily ed. Feb. 1, 1996) (statement of Sen. Breaux). The OCC has already concluded that allowing Southwestern Bell to offer long distance service is in the public interest, because approval of Southwestern Bell's application "will open up the intraLATA toll market to full competition and will spur further local competition in this state."²⁴ The U.S. Department of Justice agrees that in-region, interLATA entry by BOCs would promote long distance competition.²⁵ The Department of Commerce recently concluded that "[e]ntry by the Bell local exchange carriers into [long distance] should reduce prices and reduce the 81 percent market share now enjoyed by the big three carriers:

²⁴ Reply Comments of the Oklahoma Corporation Commission at 3, Application by SBC Communications Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance for Provision of In-Region, InterLATA Services in Oklahoma, CC Docket No. 97-121 (FCC filed May 27, 1997) ("OCC 1997 Reply Comments").

²⁵ Evaluation of the United States Department of Justice, Application of SBC Communications Inc. For Provision of In-Region, InterLATA Services in Oklahoma, CC Docket No. 97-121, at 3-4 (FCC filed May 16, 1997) ("DOJ Evaluation").

AT&T, MCI, and Sprint.”²⁶ This Commission itself has affirmed that “BOC entry into the long distance market will further Congress’ objectives of promoting competition and deregulation of telecommunications markets.” Michigan Order ¶ 381.

The damage done by continuing to exclude BOCs from in-region, interLATA services is staggering. As the attached affidavits of Alfred Kahn and Timothy Tardiff, Richard Schmalensee, Kenneth Gordon, and Michael Raimondi of the WEFA Group demonstrate, Oklahoma residential consumers are being denied a real alternative to the major interexchange carriers’ high basic rates, and the State of Oklahoma is being robbed of thousands of jobs that would be created following Southwestern Bell’s interLATA entry. This public burden cannot be justified by a desire to promote local competition. The requirements of sections 251 and 252 and other provisions of the 1996 Act already open local markets, and further “[a]ttempts to micromanage the process of deregulation . . . are more likely to produce distortions than actually to encourage efficient competition.” Kahn & Tardiff Aff. ¶ 96; see also Michigan Order ¶¶ 387, 390 (suggesting higher standards). Indeed, Southwestern Bell’s interLATA entry would increase local competition in Oklahoma, as well as long distance competition, as the OCC has concluded. OCC 1997 Reply Comments at 3.

A. The Scope of the Public Interest Inquiry

While the public interest inquiry generally may provide the Commission with “broad discretion . . . to consider factors relevant to the achievement of the goals and objectives of”

²⁶ U.S. Dep’t of Commerce, U.S. Industry & Trade Outlook ‘98, at 30-8.

legislation, Michigan Order ¶ 385, it is limited by Congress's specific determinations.²⁷ In the 1996 Act, Congress decided that it would open local markets by enacting a competitive checklist that sets forth concrete obligations in plain terms. The "checklist" was Congress's test of "what . . . competition would encompass," 141 Cong. Rec. S7972, S8009 (daily ed. June 8, 1995) (statement of Sen. Hollings), and Congress forbade the Commission from second-guessing its legislative judgment or modifying the checklist "by rule or otherwise," 47 U.S.C. § 271(d)(4) (emphasis added); see also 141 Cong. Rec. S8188, S8195 (daily ed. June 12, 1995) (statement of Sen. Pressler) (noting adoption of checklist approach in place of "actual competition" test). As the Chairman of the Senate Commerce Committee reassured Senators, "[t]he FCC's public-interest review is constrained by the statute" because "the FCC is specifically prohibited from limiting or extending the terms used in the competitive checklist." Id. at S7967 (daily ed. June 8, 1995) (statement of Sen. Pressler). Accordingly, the Commission may not use the public interest inquiry to add local competition criteria beyond those that Congress included in the checklist.

The Michigan Order nevertheless suggested that public interest approval in every case might be conditioned on exceeding the checklist. The Commission there reasoned that because Congress (1) wanted BOCs to enter long distance only after local markets are open and (2)

²⁷ See NAACP v. FPC, 425 U.S. 662, 669 (1976) ("the use of the words 'public interest' in a regulatory statute . . . take meaning from the purposes of the regulatory legislation"); New York Central Sec. Corp. v. United States, 287 U.S. 12, 25 (1932) ("the term 'public interest' as thus used [in a statute] is not a concept without ascertainable criteria"); Business Roundtable v. SEC, 905 F.2d 406, 413 (D.C. Cir. 1990) ("broad 'public interest' mandates must be limited to 'the purposes Congress had in mind when it enacted [the] legislation'" (quoting NAACP v. FPC, 425 U.S. at 670)).

included both the competitive checklist and the public interest test in section 271, Congress must have viewed the competitive checklist as an inadequate mechanism to open local markets.

Michigan Order ¶¶ 386, 389. But, in fact, Congress wanted the Commission to examine an essential aspect of BOC interLATA entry not addressed by any other part of section 271: the competitive consequences of that entry, given the checklist and section 272's safeguards. The Commission's equation of the public interest inquiry with its own assessment of local competition is implausible on its face, for it assumes that Congress devoted countless hours to honing the smallest details of the checklist and forbade the Commission from altering them, see 47 U.S.C. § 271(d)(4), and yet wanted the Commission to use a different standard of open local markets as the dispositive test in considering BOC applications.²⁸

The Department of Justice has previously suggested that the possible benefits of faster development of local competition may outweigh the costs of delaying BOC interLATA entry, and therefore that the Commission should adopt a section 271 standard that is more stringent than the competitive checklist drafted by Congress.²⁹ In reaching this conclusion, DOJ has relied on an expert, Professor Marius Schwartz, who is simultaneously serving as a paid advocate of AT&T's interests.³⁰ Professor Schwartz acknowledges that he has not quantified the cost-benefit

²⁸ See, e.g., 141 Cong. Rec. S8188, S8195 (daily ed. June 12, 1995) (statement of Sen. Pressler) (describing extensive negotiations and work that went into developing the competitive checklist).

²⁹ Evaluation of the United States Department of Justice, Application of BellSouth Communications Inc. for Provision of In-Region, InterLATA Services in South Carolina, CC Docket No. 97-208, at 49 (FCC filed Nov. 4, 1997) ("DOJ South Carolina Evaluation").

³⁰ Marius Schwartz, DOJ's economist, recently appeared before Commission staff on behalf of AT&T, apparently arguing for restrictions on entry into AT&T's markets. Ex Parte Letter from

comparison upon which he bases his assertion; nor has Professor Schwartz attempted to quantify how much more open the local market could be made by applying some standard that adds requirements to the competitive checklist.³¹ Instead, sounding more like a philosopher than an economist, Professor Schwartz contends that “logic” dictates that his “open market” standard “will yield large benefits in advancing local competition at the expense of comparatively modest and short-lived costs in the long distance market.” Schwartz Supp. Aff. ¶ 11. But the “logic” of a single economist — especially one who has been retained by AT&T in other telecommunications proceedings — is an exceedingly slim basis upon which to ignore the clear intent of Congress.

The point of the public interest test is to allow the Commission to examine the effect on competition of BOC entry into the interLATA market. The principal focus of the inquiry must be the market where the effects of BOC entry would directly be felt: the interLATA market. It cannot be the local market, for issues related solely to local competition are conclusively determined by compliance with sections 251 and 252, and with the competitive checklist.

The Commission may as part of its public interest inquiry evaluate such matters as the current state of long distance competition and the degree to which the checklist, section 272, and other regulatory safeguards constrain anticompetitive conduct in the interLATA market. These

Kristen C. Thatcher, AT&T, to William F. Caton, Docket No. IB 97-142 (Oct. 27, 1997) (App. D, Tab ____). (DOJ’s technical consultant, Michael Friduss, counts “new local service providers” — i.e., CLECs — among his clients. Friduss Aff. ¶ 11 (DOJ South Carolina Evaluation Ex. 3)).

³¹. See Ex Parte Letter from Kristen C. Thatcher, AT&T, to William F. Caton, Docket No. IB 97-142 (Oct. 27, 1997) (App. D, Tab ____); Schwartz Supp. Aff. ¶ 9.

inquiries are familiar for the Commission. As long as a decade ago, for example, the Commission addressed the hotly contested issue of whether regulatory safeguards and market conditions were then sufficient to preclude BOCs from impeding competition in long distance. The Commission concluded that they were, and thus agreed with the Department of Justice that the line of business restrictions in the Modification of Final Judgment (“MFJ”) should be lifted, notwithstanding that in 1987 BOCs had no obligations to competitors comparable to the checklist.³²

The Commission also may consider individual circumstances that Congress could not have anticipated — such as the applicant’s history of compliance or non-compliance with Commission rules. See Michigan Order ¶ 397. The Commission may not, however, use the public interest inquiry to substitute its own local competition plan for that established by Congress,³³ or to rewrite express provisions of the Act.³⁴ In particular, the public interest test

³² Responsive Comments of the Federal Communications Commission As Amicus Curiae on the Report and Recommendations of the United States Concerning the Line of Business Restrictions Imposed on the Bell Companies by the Modification of Final Judgment at 58, United States v. Western Electric Co., No. 82-0192 (D.D.C. filed Apr. 27, 1987).

³³ See generally 47 U.S.C. § 271(d)(4); S. Conf. Rep. No. 104-230 at 1 (enacting a “de-regulatory national policy framework”); 141 Cong. Rec. S7895 (daily ed. June 7, 1995) (statement of Sen. Hollings) (“We should not attempt to micro-manage the marketplace”); id. at H8282 (daily ed. Aug. 2, 1995) (statement of Rep. Bliley) (Congress wanted to promote “competition, and not Government micro-management of markets”); accord Local Interconnection Order, 11 FCC Rcd at 15509, ¶ 12 (“look[ing] to the market, not to regulation,” to determine entry strategies).

³⁴ See NAACP v. FPC, 425 U.S. at 669; United Sav. Ass’n v. Timbers of Inwood Forest Assocs., Ltd., 484 U.S. 365, 371 (1988) (when “only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law,” statutory provision’s meaning is “clarified by the remainder of the statutory scheme”); National Broadcasting Co. v. United States, 319 U.S. 190, 216 (1943) (the public interest “is to be interpreted by its context”).

may not be used as a vehicle for circumventing the specific statutory restrictions of sections 251 and 252 regarding such matters as the pricing of UNEs and resold services. Because section 252 reserves pricing authority to the states, and the public interest provisions of section 271 do not purport to override that delegation of authority, the Commission may not usurp state jurisdiction over pricing through the section 271 process. Indeed, the United States Court of Appeals for the Eighth Circuit has expressly forbidden the FCC from imposing, relying upon, or considering federal pricing standards in section 271 proceedings. See Order on Motions for Enforcement of the Mandate, Iowa Utils. Bd. v. FCC, No. 96-3321 (Jan. 22, 1998).

B. The Current Long Distance Oligopoly Limits Competition

Turning to the core of the Commission's proper inquiry, it has long been settled that the benefits of new entry in long distance presumptively outweigh any risk of harm,³⁵ even where the long distance entrant is an incumbent local exchange carrier.³⁶ That presumption is especially apt when applied to this application.

³⁵ See Report and Order, Inquiry into Policies to be Followed in the Authorization of Common Carrier Facilities to Provide Telecomm. Serv. off of the Island of Puerto Rico, 2 FCC Rcd 6600, 6604, ¶ 30 (1987) (“plac[ing] 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); Report and Third Supplemental Notice of Inquiry and Proposed Rulemaking, MTS-WATS Market Structure, 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”).

³⁶ See Inquiry into Policies to be Followed in the Authorization of Common Carrier Facilities to Provide Telecomm. Serv. off of the Island of Puerto Rico, 2 FCC Rcd at 6604, ¶ 30 (Commission's “open entry policy” “clearly contemplate[s] competitive entry by independent local exchange companies”) (citing MTS-WATS Market Structure, 81 F.C.C.2d at 186).

The interexchange market is highly concentrated and systematically non-competitive. In the Michigan Order, the Commission repeated its “concern[s] . . . that not all segments of this market appear to be subject to vigorous competition,” and “about the relative lack of competition among carriers to serve low volume long distance customers.” Michigan Order ¶ 16. While access charges declined by 65 percent between 1984 and 1997, long distance carriers failed to pass along all of these cost savings to consumers. See Kahn & Tardiff Aff. ¶ 12; Schmalensee Aff. ¶ 10 (“If the long distance market were truly competitive, the incumbent interexchange carriers would have passed through to consumers the reductions in both access and nonaccess costs.”). In particular, recent decreases in access charges have not been matched by decreases in the rates paid by consumers. Kahn & Tardiff Aff. ¶ 12; Schmalensee Aff. ¶ 7. In fact, while access charges per conservation minute decreased approximately nine percent between April 1995 and July 1997, during this same period AT&T increased its basic rate for residential interstate calling by approximately five percent. Kahn & Tardiff Aff. ¶ 13. The monthly consumer price index for interstate toll calls rose steadily during 1995 and 1996, with only minor declines in early 1997. See The WEFA Group, The Economic Impact of Southwestern Bell’s Entry into the InterLATA Long Distance Markets in Oklahoma 10 & Fig. 3 (Apr. 1997) (“WEFA Report”) (attached to Raimondi Aff.).

Recent flat-rate promotions do not mark a substantial departure from the long-standing pattern of lock-step price increases by the major interexchange carriers. Schmalensee Aff. ¶¶ 13-15. For instance, AT&T’s flat rate of 15 cents per minute — higher than its standard weekend rate — does not benefit typical residential callers who place most calls during off-peak

hours. Id. ¶ 14. As Professor Schmalensee points out, “the primary reason that some consumers might find [AT&T’s] the One Rate plan attractive today is that AT&T has substantially raised its basic rates over the last several years. If instead AT&T had merely passed through its savings in access charges — even ignoring its other cost savings — then its 15-cents per minute One Rate plan would be unattractive in comparison.” Id. ¶ 15. Likewise, AT&T’s plan offering a flat rate of 10 cents per minute after paying a monthly fee of \$4.95 is unattractive for lower-volume customers for whom the fee amounts to a substantial percentage of total charges. MCI’s flat rate of 14.5 cents and Sprint’s two-tiered plan of a 25-cent peak rate and 10-cent off-peak rate also provide modest relief at best.³⁷

While the interexchange carrier economists depend upon flat-rate and discount plans as their basis for asserting that prices are falling, that reliance is unwarranted. First, these plans are not widely used. In 1995, 64 percent of AT&T’s Oklahoma residents faced full basic rates, either because their tolling volume was insufficient to generate a discount under a calling plan, or because they did not belong to a calling plan. Id. ¶ 11.³⁸ Moreover, the major carriers’ calling plans have themselves become vehicles for hidden price increases. AT&T’s price “simplification” plan, announced last month, is the latest example.³⁹ The Telecommunications Research and Action Center and Consumers Union have “complained that new rates would result

³⁷ See AT&T Calls MCI Flat Pricing More Than A Coincidence, Newsbytes, Sept. 30, 1996.

³⁸ See also Pradnya Joshi, The Big Savings Maze, Newsday, Jan. 11, 1998, at F8 (60-63 percent of long distance customers pay basic rates).

³⁹ See AT&T Abandons Distance Charges, Joins MCI and Sprint in Using Per-Min. Rates, Communications Daily, Nov. 5, 1997, at 3.