

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of

Application by SBC Communications Inc.,)
Southwestern Bell Telephone Company, and)
Southwestern Bell Communications Services,) CC Docket No. 00-04
Inc. d/b/a Southwestern Bell Long Distance)
for Provision of In-Region, InterLATA)
Services in Texas)

COMMENTS OF THE
ASSOCIATION FOR LOCAL
TELECOMMUNICATIONS SERVICES

THE ASSOCIATION FOR LOCAL
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SUMMARY

ALTS is the leading national trade association representing facilities-based competitive local exchange carriers (“CLECs”). ALTS does not represent any of the major interexchange carriers (“IXCs”), and therefore its interest in this proceeding is singularly focused on ensuring that the Texas local telephone market is open to competition. In these Comments, ALTS reviews the aspects of SBC Communications, Inc.’s (“SWBT”) application that fall short of compliance with the 271 checklist and sets forth its analysis in accordance with the language of section 271(d)(3) and the past precedent of the Department of Justice and the Commission in analyzing the six previous RBOC applications for section 271 authority.

While ALTS commends SWBT for making significant progress in opening the Texas local exchange market to facilities-based competitors and complying with the requirements of the competitive checklist, ALTS submits that SWBT’s performance of its obligations under several checklist items necessitates a determination by the Commission that SWBT is not in compliance with its obligations. Specifically, SWBT’s Application does not meet the following checklist items:

- Item (i) – Nondiscriminatory access to interconnection trunks and collocation;
- Item (ii) – Nondiscriminatory access to unbundled network elements;
- Item (iv) – Nondiscriminatory access to unbundled local loops, including DSL capable loops; and
- Item (viii) – Nondiscriminatory access to White Pages directory listings.

As these comments will show, ALTS demonstrates that SWBT fails to provide nondiscriminatory interconnection to its network as is required by the competitive checklist. Specifically, SWBT has unreasonably and consistently delayed provision of interconnection trunks to CLECs, consequently causing CLEC customers to experience blocking and to have their requested service from CLECs delayed. SWBT's refusal to provide trunking to meet CLEC needs has harmed competition by requiring CLECs to limit their marketing efforts and their acceptance of new customers. In addition, the provision in SWBT's current Texas Collocation Tariff allowing SWBT to charge CLECs ordering cageless collocation for the cost of constructing a "partition" around SWBT's own equipment is inconsistent with the national rules established by the Commission in its recent *Collocation Order*.¹ As a result of this violation, CLECs are hampered in their ability to gain timely, effective and nondiscriminatory access to SWBT central offices for the physical placement of equipment necessary to allow them to compete in the Texas local market. SWBT must address the unreasonable restrictions on access to, and use of, collocation space before the Commission can find that SWBT complies with its 271 interconnection obligations.

SWBT is not providing nondiscriminatory access to unbundled network elements, including OSS, as required by checklist item (ii). SWBT regularly fails to meet Firm Order Commitment dates, causing competitive harm to CLECs. SWBT has been unable to provide fully functional, automated OSS to CLECs that are in parity with the functionality SWBT is able to provide to its retail services. Many of SWBT's most critical preordering, ordering and provisioning systems rely on manual processing. SWBT's reliance on manual processes for its

¹ See, *In re Deployment of Wireline Services Offering Advanced Telecommunications Capability*, First Report and Order and Further Notice of Proposed Rulemaking, CC Docket No. 98-147, FCC

OSS often results in significant delays or disruptions due to missed due dates and manual processing errors. Typical CLEC orders that should be processed in an automated, electronic fashion fall out for manual processing and, instead, must be hand-typed and handled by different SWBT personnel, leading to service delays and other customer-affecting problems. In addition, SWBT's systems are entirely incapable of relating orders on an electronic basis and orders that should be related in an automated fashion either fall out for manual processing or one or more of the orders flow through while the remainder are rejected.

SWBT fails to provide nondiscriminatory access to unbundled local loops, and, in particular, DSL-capable loops, pursuant to checklist item (iv). When provisioning unbundled local loops, SWBT fails to follow proper loop provisioning procedures and, as a result, SWBT's performance is deficient to the detriment of CLEC customers.

SWBT's provisioning of DSL-capable loops does not comply with the requirement that it provide nondiscriminatory access to local loops. Unlike New York, in which CLECs reported numerous problems with loop conditioning and other requirements, Texas offers a very real potential for the elimination of competitive handicaps. The technology restrictions, inadequate and unequal ordering and provisioning, inadequate and unequal access to loop make-up information, costly loop conditioning charges and imposition of other unsupported rates and charges were addressed in the arbitration case between SWBT and Covad Communications/RhythmsLinks. Unfortunately, there is every expectation that the PUC's arbitration order will be challenged by SWBT, thus creating pricing uncertainty for CLECs and slowing the progress that otherwise could be made to resolve systemic problems with SWBT's loop provisioning. Moreover, performance measures for DSL provisioning have only just been

98-48 (rel. Mar. 31, 1999) ("*Collocation Order*").

developed and the required minimum of three months of demonstrated parity performance is therefore not available. Under these circumstances it is premature to declare that SWBT has satisfied the checklist with respect to DSL loops.

Failure to Meet the Public Interest Requirements

SWBT fails the public interest analysis of the 271 review process. The SWBT Performance Remedy Plan falls short of providing true assurances that SWBT will *maintain* a competitive local market, once that point is truly reached. The “self-executing remedies” set out in the Plan are far too inconsequential to SWBT to serve as effective penalties for anti-competitive behavior, especially in view of the Texas Commission’s limited authority over SWBT’s and its CLEC affiliate’s behavior in the marketplace. Without stringent “anti-backsliding” measures complete with a “rocket docket” type enforcement mechanism to ensure timely resolution of claims regarding anti-competitive behavior, the public interest cannot properly be protected. This mechanism does not exist.

Tiered Penalties and Fresh Look Opportunities

ALTS recommends that the Commission employ anti-backsliding measures, in a manner similar to those proposed by Allegiance Telecom in its Petition for Expedited Rulemaking. Although the Commission recently dismissed Allegiance’s Petition, ALTS re-urges the adoption of a three-tiered penalty approach: **Tier 1:** the first failure by SWBT to comply with a performance measure will result in mandated rate reductions; **Tier 2:** failure of Tier 1 rate reductions to curb anti-competitive behavior will result in suspension of 271 authority; and **Tier 3:** failure of Tiers 1 and 2 will result in the imposition of material fines on SWBT.

Further, ALTS recommends that the Commission make available “fresh look” opportunities coincident with any grant of 271 authority. The Commission has implemented such

policies in the past to allow customers and competitors an opportunity to take advantage of significantly changed circumstances in a telecommunications market. Here, a fresh look policy will prevent certain long-term contracts with excessive termination penalties from foreclosing the development of competition in the Texas local exchange market.

Despite the efforts of all parties and the Texas Commission, there remain checklist items that SWBT fails to meet. Because full compliance is required before interLATA entry can be permitted, SWBT's Application should be denied. As soon as SWBT has remedied the deficiencies identified here, SWBT should refile its Application and once the Commission implements the necessary pro-competitive anti-backsliding measures ALTS and others advocate herein, the federal Telecommunications Act's goal of widespread facilities-based competition will be close to realization.

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In the Matter of

**Application by SBC Communications Inc.,)
Southwestern Bell Telephone Company, and)
Southwestern Bell Communications Services,) CC Docket No. 00-4
Inc. d/b/a Southwestern Bell Long Distance)
for Provision of In-Region, InterLATA)
Services in Texas)**

**COMMENTS OF THE
ASSOCIATION FOR LOCAL
TELECOMMUNICATIONS SERVICES**

The Association for Local Telecommunications Service (“ALTS”), by its attorneys, and pursuant to the Commission’s January 10, 2000, Public Notice in the above-captioned proceeding, hereby submits these comments on the Application by SBC Communications, Inc. (“SWBT”) for Authorization under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in the State of Texas (the “Application”).¹

ALTS is the leading national trade association representing facilities-based competitive local exchange carriers (“CLECs”). ALTS does not represent any of the major interexchange carriers (“IXCs”) and, therefore, its sole interest in this proceeding is to ensure that Texas’ local market is open to competitors. As an initial matter, ALTS wishes to commend and thank the

¹ *Application by SBC Communications, Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance for Authorization To Provide In-Region, InterLATA Services in Texas, CC Docket No. 00-4, Public Notice DA 00-37 (rel. Jan. 10, 2000).*

Commissioners and Staff of the Public Utility Commission of Texas (“Texas Commission” or “PUC”) for their tireless efforts in examining SWBT’s compliance with section 271 of the Telecommunications Act of 1996 (the “Act” or “FTA”). In many respects, SWBT’s Application comes closer to satisfying the requirements of section 271 of the Act than any such application filed to date. The progress made by SWBT in attempting to open the Texas local exchange market to competition since it filed its “draft” 271 application with the Texas Commission in March 1998 is indeed significant. Nonetheless, SWBT still has not demonstrated that it has fully implemented certain requirements, integral to opening the Texas market to competitors, and prerequisites to a grant of 271 relief by the Federal Communications Commission (“FCC” or “Commission”).

I. THE TEXAS COMMISSION’S EXAMINATION OF SWBT’S SECTION 271 COMPLIANCE

The Texas Commission’s examination of SWBT’s compliance with section 271 has produced a record that provides the Commission with a reasonably accurate picture of the status of local competition in the State of Texas, and should be referenced by this Commission as it conducts its own examination of SWBT’s Application. Nonetheless, the Commission must conduct an independent analysis of SWBT’s compliance.

Under section 271(d)(2)(B), the Commission “shall consult with the State commission of any State that is the subject of the application in order to verify the compliance of the Bell operating company with the requirements of subsection (c).”² In requiring the Commission to consult with the states, Congress afforded the states an opportunity to present their views regarding the opening of the Bell Operating Company’s (“BOC’s”) local networks to competition.

² 47 U.S.C. § 271(d)(2)(B).

The Commission has stated that “it is the Commission’s role to determine whether the factual record supports the conclusion that particular requirements of section 271 have been met.”³ In evaluating the weight to accord the record of the state proceeding, the Commission “will consider carefully state determinations of fact that are supported by a detailed and extensive record.”⁴

A. Overview of the Texas Commission’s 19-Month Examination of SWBT’s 271 Compliance

On March 2, 1998, SWBT filed its application for entry into the Texas interLATA telecommunications market pursuant to section 271; this application was examined in Project No. 16251. The PUC conducted a hearing on the merits regarding SWBT’s application in April 1998. On June 1, 1998, the PUC issued an order adopting the PUC Staff’s recommendations, which included 129 Staff recommendations to address deficiencies in the SWBT Application.⁵ As directed in the PUC’s Order, collaborative process work sessions were held from July through October to address the outstanding issues and deficiencies.⁶ The time allowed to address each subject area was strictly limited by the PUC and in many instances the collaborative sessions lasted 10-12 hours. These limitations often meant that CLECs could only address the most obvious problems and issues in the time allotted. Also frustrating to the CLECs was the fact that the work sessions were not recorded by a court reporter; only an oral summary at the conclusion of each session was transcribed.

³ *Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, To Provide In-Region, InterLATA Services In Michigan*, Memorandum Opinion and Order, 12 FCC Rcd 20543, ¶ 30 (1997) (“*Ameritech Michigan Order*”).

⁴ *Id.*

⁵ PUC Project No. 16251, *Order No. 25, Adopting Staff Recommendations, Directing Staff to Establish Collaborative Process (June 1, 1998)*.

⁶ In addition to the issues identified in the PUC’s Order, issues related to physical and virtual collocation were also included in the collaborative process. Issues related to Operation Support

The PUC Staff issued a series of status reports, from September through October, detailing the results of the collaborative process on specific issues.⁷ The Final Staff Status Report identified a number of issues left unresolved from the collaborative process, including collocation, provision of unbundled network elements, enhanced extended link (“EEL”), reciprocal compensation, DSL, and MFN.⁸

Beginning in late January 1999, Chairman Wood and the PUC Staff engaged in a series of private negotiations to address the unresolved issues.⁹ At the conclusion of these negotiations in April 1999, SWBT submitted a Memorandum of Understanding (the “MOU”) to the PUC containing commitments by SWBT that purported to address the outstanding issues in a manner consistent with Commission recommendations, and also including a commitment by SWBT to dismiss outstanding court appeals with prejudice.¹⁰ SWBT filed the MOU on April 26, 1999, without meaningful input or comment from the CLECs. Two weeks later, on May 13, 1999, SWBT filed a revised Proposed Interconnection Agreement (the “PIA”) that, according to claims by SWBT, complied with the terms of the MOU and incorporated commitments made by SWBT during the 1998 collaborative process. SWBT also filed a statement of its MFN policy in

Systems (“OSS”) testing and Performance Measures were separated out and addressed in PUC Project No. 20000.

⁷ Staff Status Reports were filed in Project No. 16251 on September 14 and September 28, 1998, and on October 27 and November 18, 1999.

⁸ *See, November 18, 1998 Final Staff Report on Collaborative Process.*

⁹ While these private negotiations resulted in the “resolution” of all outstanding issues except reciprocal compensation, it precluded the creation of a complete public record and resulted in some compromises the CLECs found highly objectionable, *e.g.*, CLECs paying for the partition around SWBT’s equipment for cageless collocation, no EEL for 4-wire digital loops carrying data traffic, a more restrictive MFN policy than required by the Supreme Court, and the premature closing of numerous operational issues.

¹⁰ *See, Memorandum of Understanding* filed in Project No. 16251 on April 26, 1999.

conjunction with the PIA.¹¹ According to the process established by the Texas Commission, the CLECs who were parties to the proceeding were allowed to comment on the revised PIA only to the extent the PIA was not consistent with the MOU.¹²

Additional collaborative work sessions conducted in June resolved some, but not all, of the identified issues related to the PIA and the MFN Policy. By Order dated August 16, 1999, the Texas Commission made determinations on the identified issues and ordered SWBT to revise the PIA and file the revised proposed agreement as “Texas 271 Agreement” (the “T2A”).¹³ That Order also adopted an MFN policy specific to the T2A and required SWBT to include the policy within the terms of the T2A.¹⁴ On August 30, 1999, SWBT filed a T2A that did not conform with the Commission’s August 16 Order, and, instead, proposed a series of modifications not approved by the Commission, including a separate attachment addressing provisioning of DSL. The Texas Commission addressed SWBT’s changes in its Order dated September 22, 1999, rejecting SWBT’s proposed DSL attachment, substituting the Staff’s DSL recommendation, and ordering SWBT to file conforming revisions to the T2A.¹⁵ Subsequently, SWBT has filed a series of amendments to the T2A, the latest of which was filed on January 7, 2000.

The OSS and Performance Measurement issues that were separated into PUC Project No. 20000 were the subject of a review conducted by a third-party independent consultant,

¹¹ See, *SWBT’s MFN Policy As Applied to the Proposed Interconnection Agreement* filed in Project No. 16251 on May 13, 1999.

¹² See, Project No. 16251, *Order No. 45, Filing of Comments on PIA, MFN Policy and Collocation Tariffs* (May 26, 1999).

¹³ See, Project No. 16251, *Order No. 50, Approving Proposed Interconnection Agreement as Amended* (August 16, 1999).

¹⁴ *Id.* at p. 3.

¹⁵ See, Project No. 16251, *Order No. 53, Approving Addition of DSL Attachment and Changes to the Texas 271 Agreement* (September 22, 1999).

Telcordia. On October 20–21, 1999, the Commission held a public hearing to review Telcordia’s final report (the “Telcordia Report”). The Telcordia Report identified deficiencies in SWBT performance in key areas, including: capacity and scalability, related purchase order numbers (RPONs), manual processing, DSL ordering and provisioning, and performance measures related to each of these items.¹⁶

After the PUC failed to approve the SWBT Application at the Texas Commission’s meeting on November 4, 1999, SWBT filed a series of affidavits containing additional promises and assurances regarding future changes to address concerns arising out of the Telcordia Report and the T2A.¹⁷ On December 16, 1999, the PUC approved SWBT’s application for interLATA service in Texas and SWBT thereafter filed its Application.

B. The Third-Party Testing Conducted in Texas Was Inferior to the Bell Atlantic KPMG Test

The Commission has consistently found that nondiscriminatory access to OSS is a prerequisite to the development of meaningful competition.¹⁸ The Commission therefore must examine a BOC’s OSS performance in order to evaluate its compliance with section 271(c)(2)(B)(ii) and (xiv).¹⁹ As the Commission has stated, “the most probative evidence that OSS functions are operationally ready is actual commercial usage.”²⁰ Absent commercial

¹⁶ The specific scope and results of the Telcordia Report are discussed in more detail in section I.C., *infra*.

¹⁷ Between December 13, 1999 and December 15, 1999, SWBT filed twelve affidavits and four corrections to those affidavits.

¹⁸ *Application of Bell Atlantic Corporation, et al. Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in New York*, CC Docket No. 99-295 Memorandum Opinion and Order, ¶ 83 (December 21, 1999) (“*Bell Atlantic New York Order*”); *Ameritech Michigan Order*, ¶ 134.

¹⁹ *Bell Atlantic New York Order*, ¶ 84.

²⁰ *Bell Atlantic New York Order*, ¶ 89; *Ameritech Michigan Order*, ¶ 138; see, *Application of Bell South Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc., for*

usage, the Commission has recognized that carrier-to-carrier testing, independent third-party testing, and internal testing also can provide probative evidence of the operational readiness of an applicant's OSS.²¹ Third-party testing has become the method of choice for state commissions evaluating RBOC compliance with OSS requirements, primarily as a result of the highly successful third-party testing undertaken by the New York Commission. Unfortunately, the Texas Commission did not employ a third-party test that was as broad and thorough as that conducted for Bell Atlantic in New York.

A chief criticism of the Telcordia Report is that in many cases Telcordia closed issues even though it did not, and was not able to, confirm whether the issue could recur. Indeed, Telcordia closed issues that arose during testing if they simply did not recur during retest, and did this even though the full range of the activity being tested did not end before the retest period had concluded.²² Under these circumstances, closing issues simply because they did not recur during the retest period is not enough to support the demands of section 271.

A further problem with the Telcordia Report is that Telcordia's analysis ended when even a part of SWBT's OSS process resulted in manual intervention. Given that the purpose of the test was to determine if SWBT's OSS systems could accommodate commercial volumes, not testing items requiring manual intervention is a serious flaw. Moreover, the scalability and capacity tests did not consider manual processes. Thus, while it is clear that in order to properly evaluate the

Provision of In-Region InterLATA Services in Louisiana, Memorandum Opinion and Order, 13 FCC Rcd 20599, ¶ 86 (1998) ("*Second BellSouth Louisiana Order*").

²¹ *Id.*

²² That is, in some instances, the Service Order Completion was returned after the retest period ended, thereby preventing Telcordia from evaluating the whole range of the activity. In such situations, Telcordia neither recommended that the retest period be extended nor informed the PUC staff that another retest period was necessary, either of which would have enabled Telcordia to include the full range of activity in its evaluation.

commercial readiness of SWBT's OSS, it was essential that Telcordia analyze and retest all of SWBT's OSS processes, Telcordia did not do so. This omission is a glaring error.

The value of the Telcordia Report is further impaired by the fact that Telcordia's test did not include a reliable evaluation of the types of service orders that facilities-based CLECs submit and did not include a test of LEX, the electronic interface almost all Texas facilities-based CLECs are using. Just as important, the parameters of the test were very narrow and did not evaluate back office systems.

While ALTS acknowledges the enormity of the task Telcordia undertook in approximately half the time allotted for the Bell Atlantic - KPMG test, these and other problems with Telcordia's work show that Telcordia did not accomplish the task set before it — evaluate SWBT's OSS (electronic and manual) to determine whether the systems were commercially ready. If the Commission concludes that the Telcordia test sufficiently tested the commercial readiness of SWBT's OSS, it will be significantly lowering the standards previously set by the Bell Atlantic – KPMG test. ALTS urges the Commission to hold firm in its requirement that a BOC's OSS test must truly assess commercial readiness and not “lower the bar” to the level set by the SWBT – Telcordia test. The Comments of the CLEC Coalition²³ address the problems associated with the Telcordia testing in further detail.

²³ The Comments of the CLEC Coalition include the affidavits of four ALTS members, Birch Telecom of Texas, Ltd., L.P., ICG Communications, Inc., NEXTLINK Texas, Inc. and Time Warner Telecom, L.P., which form the bases for the factual representations herein regarding interconnection trunks, collocation, access to UNEs, OSS and access to unbundled loops.

II. SWBT MUST DEMONSTRATE FULL COMPLIANCE WITH EACH REQUIREMENT UNDER SECTION 271

BOC entry into in-region, interLATA services is conditioned on compliance with section 271. BOCs first must apply to the Commission for authorization to provide interLATA services originating in any in-region state;²⁴ the Commission then must issue a written determination on each application no later than 90 days after it was received.²⁵ In acting on a BOC's application, the Commission must consult with the U.S. Attorney General and give substantial, but not outcome determinative, weight to the Attorney General's evaluation of the BOC's application.²⁶ In addition, the Commission must consult with the applicable state commission to verify that the BOC has in place one or more state-approved interconnection agreements with a facilities-based competitor²⁷ and that such arrangements comport with the section 271 competitive checklist.²⁸

The Commission may not authorize a BOC to provide in-region, interLATA service under section 271 unless it finds that the BOC has demonstrated that: (1) it satisfies the requirements for Track A or B entry;²⁹ (2) it has *fully* implemented and *is currently providing* all of the items

²⁴ See, 47 U.S.C. § 271(d)(1).

²⁵ See, *id.* § 271(d)(3).

²⁶ See, *id.* § 271(d)(2)(A).

²⁷ See, *id.* § 271(d)(2)(B). BOCs may enter an application based on one of two "tracks" established under section 271(c)(1). Track A requires the BOC to prove the presence of an unaffiliated facilities-based competitor that provides telephone exchange service to business and residential subscribers. See, *id.* § 271(c)(1)(A). Track B requires the BOC to prove that no unaffiliated facilities-based competitor that provides telephone exchange service to business and residential subscribers has requested access and interconnection to the BOC network within certain specified time parameters. See, *id.* § 271(c)(1)(A). SWBT is applying under Track A. See, Application at 4-9.

²⁸ The Competitive Checklist is a 14-point list of critical, market-opening provisions. See *infra*, Section II.

²⁹ See, 47 U.S.C. § 271(d)(3)(A).

set forth in the competitive checklist;³⁰ (3) the requested authorization will be carried out in accordance with section 272;³¹ and (4) the BOC's entry is consistent with the public interest, convenience and necessity.³² Pursuant to the legislation, the Commission "shall not approve" the application unless the Commission finds that the BOC meets these four criteria.³³

A. SWBT Must Satisfy the "Is Providing" Standard Under Section 271

The Commission has found that promises of *future* performance have no probative value in demonstrating *present* compliance.³⁴ To support its application, a BOC must submit actual evidence of present compliance, not prospective evidence that is contingent on future behavior.³⁵ In its evaluation of past section 271 applications, the Commission has mandated that a BOC demonstrate that it "is providing" each of the offerings enumerated in the 14-point competitive checklist codified in section 271(c)(2)(B).³⁶ The Commission has found that, in order to establish that a BOC "is providing" a checklist item, a BOC must demonstrate that it has a concrete and specific legal obligation to furnish the item upon request pursuant to a state-approved interconnection agreement or agreements that set forth prices and other terms and conditions for

³⁰ *Id.* (emphasis added).

³¹ *See*, 47 U.S.C. § 271(d)(3)(B).

³² *See*, 47 U.S.C. § 271(d)(3)(C).

³³ *Bell Atlantic New York Order* ¶ 18.

³⁴ *Bell Atlantic New York Order*, ¶ 37. States also have adopted this standard, *see, In re BellSouth Telecommunications, Inc.'s Entry into InterLATA Services Pursuant to Section 271 of the Telecommunications Act of 1996*, Docket No. 6863-U, (Ga. P.S.C. Oct. 15, 1998).

³⁵ *Id.*

³⁶ *Bell Atlantic New York Order*, ¶ 52 (citing *Ameritech Michigan Order*, ¶ 110). *See, Application of BellSouth Corporation, et al. Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in South Carolina*, Memorandum Opinion and Order, 13 FCC Rcd 539, ¶ 78 (1997) ("*BellSouth South Carolina Order*").

each checklist item, and that it is currently furnishing, or is ready to furnish, the checklist item in the quantities that competitors may reasonably demand and at an acceptable level of quality.³⁷

Moreover, the “is providing” standard requires that BOCs offer items described in the competitive checklist – in addition to any UNEs established by the Commission – at prices that are based on forward-looking, long-run incremental costs, or Total Element Long Run Incremental Cost (“TELRIC”) in order to obtain in-region interLATA relief.³⁸ As the Commission found in its *Ameritech Michigan Order*:

We conclude that Congress must have intended the Commission, in addressing section 271 applications, to construe the statute and apply a uniform approach to the phrase ‘based on cost’ when assessing BOC compliance with the competitive checklist.³⁹

Furthermore, the Supreme Court has upheld the Commission’s authority to require TELRIC pricing, holding that “the Commission has jurisdiction to design a pricing methodology.”⁴⁰ Thus, BOCs must provide competitive checklist items at TELRIC rates in order to obtain section 271 authority.

B. SWBT Must Satisfy the “Fully Implemented” Standard Under Section 271

To meet the required showing that it has “fully implemented” the competitive checklist under section 271, the BOC must demonstrate that it is offering interconnection and access to network elements on a nondiscriminatory basis.⁴¹ The Commission has determined that to comply with this standard, for those functions that are analogous to the functions a BOC provides to

³⁷ See, *Bell Atlantic New York Order*, ¶ 52 (citing *Ameritech Michigan Order*, 12 FCC Rcd at 20601-02).

³⁸ *Bell Atlantic New York Order*, ¶ 237.

³⁹ *Ameritech Michigan Order*, ¶ 288.

⁴⁰ *AT&T Corp. v. Iowa Util. Bd.*, 119 S. Ct. 721 (1999).

⁴¹ *Bell Atlantic New York Order*, ¶ 44.

itself, the BOC must provide access to competing carriers in “substantially the same time and manner” as it provides to itself.⁴² The Commission has further specified that this standard requires a BOC to provide access that is equal to (*i.e.*, substantially the same as) the level of access that the BOC provides itself, its customer, or its affiliates, in terms of quality, accuracy, and timeliness.⁴³ Further, for those functions that have no retail analogue, the BOC must demonstrate that it provides access, which offers competitors a “meaningful opportunity to compete.”⁴⁴

C. SWBT’s Application Does Not Meet the “Fully Implemented” Standard Under Section 271

SWBT appears, in ALTS’ estimation, to have complied with its obligation to demonstrate that it “is providing” the majority of the items on the competitive checklist. ALTS submits, however, that SWBT has failed to demonstrate that it “is providing” several items contained on the competitive checklist under the “fully implemented” standard, and SWBT must be in compliance with this standard for all fourteen checklist items in order satisfy section 271. Failure to satisfy even a single checklist item precludes a finding of compliance with section 271.⁴⁵

SWBT’s Application is deficient in several fundamental areas: (1) SWBT does not provide nondiscriminatory access to interconnection trunks; (2) SWBT has not demonstrated that it provides interconnection that complies with the requirements of section 251 as a result of SWBT’s failure to make its collocation tariffs compliant with the Commission’s *Collocation*

⁴² *Id.*

⁴³ *Id.* (citing *Ameritech Michigan Order*, 12 FCC Rcd at 20618-19).

⁴⁴ *Id.*

⁴⁵ *Second BellSouth Louisiana Order*, ¶ 74.

Order;⁴⁶ (3) SWBT does not provide nondiscriminatory access to unbundled network elements and Operational Support Systems, (4) SWBT does not provide nondiscriminatory access to unbundled loops, including DSL-capable loops and the provisioning of coordinated hot cuts and Operational Support Systems; and (5) SWBT does not provide nondiscriminatory access to White Page directory listings. Below, ALTS discusses the legal standards that the Commission has applied in its previous evaluations of RBOC applications for 271 relief, and provides a complete analysis of the deficiencies in SWBT's Application.

IV. DESPITE SUBSTANTIAL PROGRESS, SWBT HAS NOT FULLY IMPLEMENTED THE COMPETITIVE CHECKLIST

SWBT has made dramatic progress in eliminating barriers to competitive entry in the local exchange market in the State of Texas. As a result of the hard work of the Texas Commission and its Staff, along with the dedicated efforts of SWBT and ALTS members, substantial progress has been made in making a competitive market in Texas a reality. But despite the substantial progress achieved over the last two years, deficiencies remain in several areas that are of critical importance to promoting local competition.

The section 271 competitive checklist was designed to require BOCs to prove that their markets are irreversibly open to competition before they are authorized to provide long distance services. In enacting the competitive checklist, Congress recognized that unless a BOC has *fully* complied with the checklist, competition in the local market will not occur.⁴⁷ SWBT must provide the Commission with "actual evidence demonstrating its present compliance with the statutory conditions for entry, instead of prospective evidence that is contingent on future

⁴⁶ See, *In re Deployment of Wireline Services Offering Advanced Telecommunications Capability*, First Report and Order and Further Notice of Proposed Rulemaking, CC Docket No. 98-147, FCC 98-48 (rel. Mar. 31, 1999) ("*Collocation Order*").

behavior.”⁴⁸ The Commission has steadfastly held that applications under section 271 should be granted only when the local market in a state has been fully and irreversibly opened to competition.⁴⁹ Furthermore, each and every checklist item is significant. As the Commission has consistently indicated, failure to comply with even a *single* checklist item constitutes independent grounds for denying an application for 271 authority.⁵⁰ The Commission also has stated that the BOC must demonstrate that it has “fully implemented the competitive checklist in subsection (c)(2)(B).”⁵¹ Strict compliance with each requirement of section 271 is the only way that the Commission can ensure that sustainable competition will be realized in a local market.

SWBT has not yet attained compliance with each item on the competitive checklist and, therefore, the Commission must deny SWBT’s application until such time as each of the criteria is satisfied. SWBT’s Application is deficient in a number of fundamental areas: (1) SWBT does not provide interconnection that complies with checklist item (i), including the duty to provide nondiscriminatory access to interconnection trunks and collocation; (2) SWBT does not provide nondiscriminatory access to all UNEs, including its OSS, as required by checklist item (ii); (3) SWBT does not provide nondiscriminatory access to unbundled local loops, including DSL-capable loops as required under checklist item (iv); and (4) SWBT has not demonstrated that it provides non-discriminatory access to White Pages directory listings as required by checklist item (viii).

A. Checklist Item (i) - SWBT Does Not Provide Nondiscriminatory Access to Interconnection

⁴⁷ *Ameritech Michigan Order*, ¶ 18.

⁴⁸ *Bell Atlantic New York Order*, ¶ 37 (citing *Ameritech Michigan Order* at 20573-7).

⁴⁹ *See infra*, Section IX, n.204.

⁵⁰ *See, e.g., Second BellSouth Louisiana Order*, ¶ 74.

⁵¹ *Bell Atlantic New York Order*, ¶ 44.

Section 251 requires a BOC to allow requesting carriers to link their networks to the BOC's network for the mutual exchange of traffic. To fulfill the nondiscrimination obligation under this checklist item, a BOC must show that it provides interconnection at a level of quality that is indistinguishable from that which the BOC provides itself, a subsidiary, or any other party.

Section 271(c)(2)(B)(i) of the Act requires a section 271 applicant to provide or offer to provide “[i]nterconnection in accordance with the requirements of sections 251(c)(2) and 252(d)(1).” Section 251(c)(2) imposes upon incumbent LECs “the duty to provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the local exchange carrier’s network . . . for the transmission and routing of telephone exchange service and exchange access.” Pursuant to section 251(c)(2), interconnection must be: (1) provided at any technically feasible point within the carrier’s network; (2) at least equal in quality to that provided by the local exchange carrier to itself or . . . [to] any other party to which the carrier provides interconnection; and (3) provided on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, in accordance with the terms and conditions of the agreement and the requirements of [section 251] . . . and section 252.

Section 252(d)(1) of the Act states that “[d]eterminations by a State commission of the just and reasonable rate for the interconnection of facilities and equipment for purposes of [section 251(c)(2)] . . . (A) shall be (i) based on the cost . . . of providing the interconnection . . . and (ii) nondiscriminatory, and (B) may include a reasonable profit.” Competing carriers have the right to deliver traffic terminating on an incumbent LEC’s network at any technically feasible point on that network.⁵²

⁵² See, 47 C.F.R. § 51.321; *Local Competition First Report and Order*, ¶ 209.

Technically feasible methods of interconnection include, but are not limited to: physical collocation and virtual collocation at the premises of an incumbent LEC and meet point interconnection arrangements.⁵³ The incumbent LEC must submit to the state commission detailed floor plans or diagrams of any premises for which the incumbent LEC claims that physical collocation is not practical because of space limitations.⁵⁴ A BOC must have processes and procedures actually in place to ensure that physical and virtual collocation arrangements are available on terms and conditions that are “just, reasonable, and nondiscriminatory” in accordance with section 251(c)(6) and the FCC’s implementing rules.⁵⁵ In evaluating whether a 271 applicant has complied with its obligations, the Commission examines information regarding the quality of the BOC’s procedures to process applications for collocation, the timeliness of provision, and the efficiency of provisioning collocation space.⁵⁶ Further, the BOC must provide interconnection that is “equal in quality . . . and indistinguishable from that which the incumbent provides itself, a subsidiary, an affiliate or any other party.”⁵⁷

⁵³ See, 47 C.F.R. § 51.321; *Local Competition First Report and Order*, ¶ 553. *Bell Atlantic New York Order*, ¶ 66.

⁵⁴ See, 47 C.F.R. § 51.321(f); *Local Competition First Report and Order*, ¶ 602.

⁵⁵ *Bell Atlantic New York Order*, ¶ 66.

⁵⁶ See, *Bell Atlantic New York Order*, ¶ 66 (citing *Second BellSouth Louisiana Order*), 13 FCC Rcd at 20640-41.

⁵⁷ *Local Competition First Report and Order*, ¶ 224.

1. SWBT does not provide nondiscriminatory access to interconnection trunks

An incumbent LEC must design its “interconnection facilities to meet the same technical criteria and service standards,” that are used for the interoffice trunks within its own network.⁵⁸ The equal in quality obligation is not limited to service quality perceived by end users, and includes, but is not limited to, service quality as perceived by the requesting telecommunications carrier.⁵⁹ Information relevant to determining compliance with this checklist item is the number or percentage of trunks that are provided on a timely basis and the extent to which CLEC customers experience blocking as a result of SWBT’s failure to timely or accurately provision trunks.

By providing interconnection to a competitor in a manner less efficient than the incumbent LEC provides itself, the incumbent LEC violates the duty to provide “just” and “reasonable” interconnection under section 251(c)(2)(D).⁶⁰ An incumbent LEC must accommodate a competitor’s request for two-way trunking where technically feasible.⁶¹ Specifically, a BOC must engineer, repair, and maintain its interconnection trunks to the competing carrier in the same manner that the BOC performs these functions on its own interoffice transmission facilities. In order to demonstrate compliance with this checklist item, BOCs should show they have established standardized procedures for ordering and provisioning interconnection trunks.

Further, a BOC can demonstrate that it is meeting its statutory obligations with respect to interconnection by submitting performance measurements regarding its provision of

⁵⁸ See, 47 C.F.R. § 51.305(a)(3); *Local Competition First Report and Order*, ¶ 224; *Bell Atlantic New York Order*, ¶ 67.

⁵⁹ See, 47 C.F.R. § 51.305(a)(3); *Local Competition First Report and Order*, ¶ 224.

⁶⁰ See, *Local Competition First Report and Order*, ¶ 218.

⁶¹ See, 47 C.F.R. § 51.305(f); *Local Competition First Report and Order*, ¶ 219.

interconnection trunks (installation of new trunks and augmentations to existing trunk groups) and collocation arrangements (physical and virtual).

SWBT claims that, while there have been performance issues for which it has implemented “improvements,” it has met all of the Act’s requirements for interconnection.⁶² As proof, SWBT claims to have “bettered” the parity levels and benchmarks for “most” of the months for which results are available.⁶³

As shown by the Affidavits of ALTS member Time Warner Telecom, L.P. (“TWTC”) accompanying the CLEC Coalition Comments, SWBT has failed to provide nondiscriminatory interconnection to its network as required by the competitive checklist, because SWBT has consistently and unreasonably delayed provisioning interconnection trunks to TWTC and refused to accept TWTC trunking forecasts more frequently than every six months. SWBT's trunking policies allow it to manage and limit the growth of competition by failing to provide the quantity and types of interconnection trunks requested by CLECs in a timely manner. In addition, SWBT fails to satisfy this Checklist Item because its current Texas Collocation Tariff allows SWBT to charge CLECs ordering cageless collocation for a “partition” around SWBT’s own equipment which is inconsistent with the Texas Commission’s *Collocation Order*.

⁶² See, SWBT Brief Supporting Application, p. 79.

⁶³ *Id.*

2. Provision of Interconnection Trunks

The Comments of the CLEC Coalition⁶⁴ describe SWBT's refusal to timely provision tandem trunks and imposition of a cap on the numbers of trunks a CLEC can order per day, thereby causing CLEC customers to experience blocking and delays in obtaining service from CLECs.

Although SWBT has now rephrased its daily trunk limit claiming that it is only a "guideline," for all of 1999, its personnel clearly conveyed to the CLECs that they could not count on obtaining more than eight (8) trunks per day per region. This limitation caused CLECs to slow or stop their marketing efforts and, in some instances, resulted in a CLEC being unable to provide service to a new customer or ensured that the CLEC would not be able to prevent an existing customer from experiencing blocking of their calls. The competitive harm a CLEC suffers from not being able to expand its network to meet customer demand or prevent blocking is considerable.

ALTS member Time Warner Telecom, L.P. ("TWTC") is a facilities-based CLEC that operates extensive fiber optic networks in the cities of Austin, San Antonio and Houston and recently turned up its network in Dallas.⁶⁵ As a facilities-based company that offers services primarily over its own network, the primary services obtained from SWBT are interconnection facilities, or trunks, used to connect the TWTC and SWBT networks.

Because TWTC, like SWBT, must make capital investments and budgeting decisions in order to "grow" its network and accommodate the needs of new and existing customers, it expends considerable effort to ensure that its forecasts for facilities are accurate and will enable

TWTC to meet its current and future needs. TWTC provides SWBT trunking forecasts to SWBT twice a year but has proposed to begin providing quarterly forecasts. Early in their relationship, SWBT was reluctant to believe that TWTC could meet the numbers it forecasted. Over time, SWBT learned that TWTC's forecasts are reliable and have communicated this not only to TWTC, but in public hearings before PUC Commissioners and staff.⁶⁶ Nonetheless, as shown by the affidavit of Nick Summitt, TWTC was repeatedly limited by SWBT in its ability to order sufficient numbers of trunks in Houston during 1999 and experienced significant levels of blocking in Houston throughout the year.

Since the beginning of Project 16251 in early 1998, TWTC has expressed its difficulties in obtaining interconnection trunks from SWBT on a timely basis, particularly in Houston.⁶⁷ Because SWBT limited TWTC's ability to order trunks in Houston, TWTC turned away potential customers and limited its marketing efforts for fear of not being able to deliver timely, quality and consistent service to its customers.⁶⁸ Beginning in early 1999, TWTC tried to augment its network with additional tandem trunks but was repeatedly told by SWBT that it could not order tandem trunks. SWBT insisted on creating and augmenting direct end office trunking. SWBT also limited the number of trunks TWTC could order per day. By limiting the number of trunks SWBT would provision to 8 T1s per day, TWTC could not order trunks in the quantity necessary to meet its forecasted demand. Although on a number of occasions SWBT would allow TWTC to order tandem trunks and agreed to provision TWTC more than eight trunks, it generally only

⁶⁵ See Affidavit of Kelsi Reeves for TWTC, pp. 8-11, appended to Comments of CLEC Coalition.

⁶⁶ *Id.*

⁶⁷ See TWTC Reeves Affidavit, ¶¶ 17-18 appended to Comments of CLEC Coalition.

⁶⁸ See TWTC Reeves Affidavit, ¶ 14, appended to Comments of CLEC Coalition.

did so when blocking was occurring or about to occur.⁶⁹ TWTC was hopeful that SWBT's decision to add another tandem switch in Houston would alleviate SWBT's lack of tandem capacity, but this was not the case. Throughout 1999, TWTC continued to experience difficulties in obtaining sufficient number of trunks from SWBT on a timely basis and lost business as a result.⁷⁰

In its application and supporting affidavits, SWBT acknowledges that there have been problems with its trunking performance in Houston.⁷¹ However, SWBT claims that its out of parity performance in October resulted from 1) the failure of a single CLEC to "closely monitor" its two-way trunks and add trunks when necessary and 2) the fact that trunks that were ordered were direct finals rather than high usage (end office trunks that will "overflow" to the tandem).⁷² One of the CLECs referred to by SWBT in its brief and affidavits is TWTC, which strongly rejects SWBT's assignment of blame for SWBT's poor trunking performance.⁷³ TWTC monitors the network closely, but it must rely on SWBT for certain information. Specifically, if tandem trunks are blocked because of traffic that SWBT is sending to TWTC, TWTC's monitoring practices will show that the trunks are blocking traffic that originated in a specific SWBT end office, but it cannot see the quantity of calls being blocked. Mr. Dysart's affidavit states that the blocking occurred because TWTC "did not take appropriate action to add trunks when necessary." As shown in the affidavits of Mr. Summitt and Ms. Reeves, TWTC had been trying to order more trunks than SWBT was willing to provision for most of the year. In September

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ SWBT Brief in Support of Application, p. 79; Dysart Affidavit, pp. 138-139.

⁷² *Id.*

⁷³ *Id.*

1999, SWBT told TWTC that one of its Houston tandems was “capped” and that no new orders would be accepted indefinitely.⁷⁴

As a result of SWBT’s out-of-parity performance in Houston and SWBT's effort to have TWTC data removed, the PUC staff facilitated an all day meeting with TWTC and SWBT on November 29, 1999.⁷⁵ During the meeting, the parties discussed the reasons each believed was the cause of the problem but were unable to reach agreement on the cause. They did, however, reach agreement on some items they believed would lessen the likelihood of future problems. One such item was TWTC’s request to submit quarterly, instead of bi-annual, forecasts.⁷⁶ Despite its commitment to accept quarterly forecasts, SWBT recently told TWTC that it had decided that it would not do so.⁷⁷

Only as a result of increased pressure from the PUC and SWBT’s desire to gain the PUC’s 271 recommendation did SWBT agree that the guideline of 8 T1s per day would be increased to 12 T1s per day.

In an attempt to satisfy the PUC’s concerns about the trunking problems in Houston, SWBT also agreed to a new interim performance measurement PM 73.1, which measures the percent of held interconnection trunk orders greater than 90 calendar days.⁷⁸ In addition, this measurement will not be subject to the K exemption,⁷⁹ up until the six-month review process. TWTC believes, however, that this measurement still fails to accurately reflect the number of due

⁷⁴ TWTC is not the CLEC that purportedly ordered “direct final” trunks rather than “high usage” trunks, which caused blocking to occur.

⁷⁵ TWTC Reeves Affidavit, ¶ 27, appended to Comments of CLEC Coalition.

⁷⁶ TWTC Reeves Affidavit , ¶ 17, appended to Comments of CLEC Coalition.

⁷⁷ *Id.*

⁷⁸ SWBT Dysart Affidavit, p. 141.

dates missed due to a lack of SWBT facilities. Instead, it allows SWBT to hold orders for approximately four months and still be “in parity.” The business rules for this measurement provide that the clock “starts” on either the customer’s due date or 21 business days after SWBT receives the trunk order, whichever is greater.⁸⁰ If SWBT cannot meet a due date because of a lack of facilities and the CLEC ordering the facilities has forecasted its demand, then the customer’s due date or the 21st day after SWBT receives the trunk order should be a missed due date, not a starting point. PM 73 is the original measurement created to monitor missed due dates. CLECs have learned that if an order they place cannot be provisioned because of a lack of facilities, it goes into “held order” status. Once SWBT has the necessary facilities, it resets the due date. Orders that were not provisioned because of a lack of facilities were not counted as a missed due date. PM 74 is designed to measure the average delay days of missed due dates. The problem is not with PM 73 and 74, but the way that SWBT is implementing the measurements. The measurements do not allow SWBT to exclude orders that cannot be met because SWBT does not have facilities. It only allows “customer caused misses” to be excluded. Unless the lack of facilities is “caused” by the CLEC, this exclusion should not include held orders. The new measurement will show how long it takes to fill an order that is placed in held status, but no penalty applies unless the order is not filed in within 90 days after the original missed due date. This does not address the problem.

3. SWBT’s Collocation Tariff is inconsistent with the Commission’s Collocation Order

⁷⁹ The K exemption is a mathematical formula that adjusts the number of allowed misses under the performance measures.

⁸⁰ See Reeves Affidavit, ¶ 32 and SWBT’s January 7, 2000 filing in Project No. 16251.

To satisfy checklist item (i), SWBT must also demonstrate that it is providing timely and seamless access to its network. ALTS understands that the PUC ordered SWBT to incorporate numerous changes to its Collocation Tariff in order to comply with the FCC's *Collocation Order*. Although ALTS believes the Tariff's installation intervals still are too long, its main objection concerns SWBT's "security" measure of walling in its own equipment and making the CLEC pay for this construction as a "reasonable security measure" associated with cageless collocation. Specifically, Section 19.4(D) of the Tariff requires a CLEC to pay the lesser of the costs of SWBT partitioning in its own equipment or installation of a security camera.

SWBT affiant Michael Auinbaugh contends that this requirement comports with the FCC order released March 31, 1999 in CC docket No. 98-147(FCC-99-48, ¶¶ 46-49) which confirmed the ability of ILECs to take, and recover the costs of, reasonable security measures.⁸¹ ALTS agrees with the comments of the CLEC Coalition that the FCC's order does not contemplate that a reasonable security measure for cageless collocation would be an ILEC building a partition around all its central office equipment and letting the CLEC collocate in the space that is left.⁸² The PUC was successful in limiting the CLECs' cost for this reasonable security measure to that of a security camera and also eliminated SWBT's ability to rely on its interior security partition around its own equipment as the basis for a claim of space exhaustion. However, ALTS believes that allowing SWBT to provide cageless collocation to CLECs by putting a wall around its own equipment is most definitely not what the Commission had in mind as a reasonable security measure or that CLECs should have to either pay for the cost of such a partition or fight with SWBT about whether the partition was more expensive. This provision will be a burden to

⁸¹ See SWBT Auinbaugh Affidavit, p. 34.

⁸² See, ICG Rowling Affidavit, p. 17-18, appended to Comments of CLEC Coalition.

CLECs who desire to use cageless collocation because (1) the walling off of SWBT's equipment will inevitably make it more difficult for the CLECs' technicians to access SWBT's MDF for installing cross connects and (2) CLECs will have to battle the issue of cost comparisons of security cameras vs. walls on a central office by central office basis.

B. Checklist Item (ii) - SWBT does not provide nondiscriminatory access to all UNEs

1. SWBT routinely misses Firm Order Commitment (FOC) dates

In evaluating whether SWBT's OSS complies with the section 271 competitive checklist, the Commission must examine whether SWBT provides competitors with nondiscriminatory access to due dates, often referred to as a firm order commitment ("FOC") date but referred to as firm order "confirmation" date by SWBT. FOCs and jeopardy notices allow CLECs to monitor the status of their orders and to track their orders for their own and their customers' records.

As the Commission has recognized, owing to their use as barometers of performance, FOC and jeopardy/rejection notices play a critical role in a CLEC's ability to keep its customer apprised of installation dates (or changes thereto) and to modify a customer's order prior to installation. Further, the Commission also has recognized that the inability to provide CLECs with timely FOCs is a significant indication of whether a BOC's OSS is capable of providing competitors with parity performance.

The assertions in SWBT's Application belie its actual performance; SWBT's ability to provide CLECs with FOC and jeopardy notice information in a manner that complies with the Act is unproven. For example, SWBT continues to report to CLECs that there are no facilities available to provide service on a significant number of orders. Also, there is no deadline on the length of time SWBT has to make these facilities available and, as a result, SWBT often will

return a jeopardy notice with no new due date, forcing the customer to be without service. Even when SWBT submits jeopardy notices, they are often late. More importantly, Telcordia confirmed that a large number of provisioning problems for “no facilities” were due to SWBT manual error.⁸³

2. SWBT unduly relies on Manual Processes for OSS

SWBT essentially relies on manual processes as a means of permitting CLECs access to SWBT’s OSS. Manual processes increase the chances of service-affecting errors. SWBT’s Application omits discussion of the number of points at which manual intervention by SWBT must occur, and that manual intervention underlies a significant portion of the problems CLECs are experiencing.

For example, consider the number of CLEC orders that are held in some undetermined status prior to completion. SWBT reported that, in at least one instance, the failure to completely process the orders was due to the failure of the appropriate SWBT Local Service Center (“LSC”) personnel to type the orders to completion.⁸⁴ Telcordia confirmed that the orders were held in the undetermined status and not provisioned due to “manual SWBT error.”⁸⁵

⁸³ Telcordia Report, p. 22.4.1.3.1.

⁸⁴ Affidavit of Michael Draper for NEXTLINK, ¶ 23, appended to Comments of CLEC Coalition.

⁸⁵ Telcordia Final Report p. 69, 4.3.3.2.7.

a.) Orders that fall out for manual handling

In its Application, SWBT gives the FCC every impression that most CLEC orders can and should be mechanized, automated orders.⁸⁶ Many CLECs have found precisely the opposite to be true. It is NEXTLINK's experience that a majority of its orders fall out for manual handling, either because they are "MOG eligible"⁸⁷ by SWBT standards but do not MOG, or because they are complex orders and cannot MOG under the conditions SWBT currently has set for its OSS ordering and provisioning systems.⁸⁸ In spite of the positive spin SWBT has placed on its ordering and provisioning systems, these systems are configured such that when NEXTLINK simply orders stand-alone loops, which should MOG, these orders generally do not MOG and must be manually processed. More importantly, typical orders passed to SWBT by CLECs, such as T1s, BRIs⁸⁹ and DID⁹⁰ orders, are rated "complex" and in most cases cannot be handled in an efficient, automated manner.

SWBT's inability to coordinate manually processed orders is particularly evident with RPONs,⁹¹ which often fall into the Folders system. A facilities-based CLEC will often request SWBT to complete an order that may require SWBT to process several PONs⁹² or LSRs⁹³ for a single order (*e.g.*, customer orders a T1, PRI, DID and basic lines). The generation of multiple orders by SWBT's back-end office systems also occurs when a CLEC, such as NEXTLINK,

⁸⁶ See SWBT Brief in Support of Application, p. 88.

⁸⁷ Mechanized Order Generated (MOG)-eligible orders are those that can be processed electronically.

⁸⁸ See, NEXTLINK Draper Affidavit, ¶ 25, p. 10

⁸⁹ Basic Rate Interfaces ("BRI").

⁹⁰ Direct Inward Dial ("DID").

⁹¹ Related Purchase Order Number ("RPON").

⁹² Purchase Order Number ("PON").

⁹³ Local Service Request ("LSR").

orders a stand-alone UNE-loop, and C and D orders are created. An order of this nature may generate four to five different PONs in the SWBT system. All of the related orders must be worked together in order to prevent the CLEC's customer from losing service.

In looking at this issue, it is important to understand that SWBT's system is configured so that the migration of a SWBT retail line to a CLEC's unbundled switch/port and loop combination, generates three orders — Change-C, New-W, and Disconnect-D. For this same function, BA-NY generates only one order. The unfortunate consequence for many CLECs, such as Birch, is that when SWBT's mechanized processes are used, the Disconnect order is the only one that flows through much of the time and the customer's service is disconnected without new service by the CLEC being provided. Birch has not been able to convince SWBT to perform a root cause analysis that will permit SWBT to relate the orders or to not process the Disconnect order if the Change and New orders fall out.⁹⁴ It is difficult to believe that such a process is in parity with what SWBT provides itself. Until SWBT has performs a root cause analysis of this problem, it should be included in the list of reasons why SWBT does not meet checklist item (ii).

b.) Additional service-affecting issues

The deficiencies in SWBT's OSS create many other service-affecting problems. While CLECs made every attempt to bring additional issues to the attention of SWBT, and continue to do so today, these issues have not been resolved and damage CLECs' ability to render reliable service to their customers. These issues include, but are not limited to, the following: problems associated with supplemental orders, manual processes that show time stamps and performance measures, problems arising from multiple due dates, problems related to late arriving SOCs, inadequate LSC staffing, poorly communicated policy changes, inability of CLECs to access raw

data in order to validate performance measurement results, lack of User Identification Codes, OSS-related maintenance and repair and loss of dial tone upon conversion. Details regarding these problems are discussed in the Comments of the CLEC Coalition.

C. Checklist Item (iv) - SWBT Does Not Provide Nondiscriminatory Access to Unbundled Local Loops

Section 271(c)(2)(B)(iv) of the Act requires the BOC to provide, or offer to provide, access to “[l]ocal loop transmission from the central office to the customer’s premises, unbundled from local switching or other services.” To satisfy the nondiscrimination requirement under checklist item (iv), a BOC must demonstrate that it can efficiently furnish unbundled loops to competing carriers in substantially the same time and manner as to its own retail customers.⁹⁵ Nondiscriminatory access to unbundled local loops ensures that new entrants can provide quality telephone service promptly to new customers without constructing new loops to each customer’s home or business.

Pursuant to section 251(c)(3), BOCs have a duty to provide CLECs access to network elements on an unbundled basis.⁹⁶ Section 251 requires BOCs to provide unbundled access to a network element where lack of access impairs the ability of the requesting carrier to provide the services that it seeks to offer.⁹⁷ Consistent with this requirement, the Commission has determined that local loops are included in the minimum list of unbundled network elements that a BOC must provide, *e.g.*, 2-wire voice-grade analog loops, 4-wire voice-grade analog loops, and 2-wire and

⁹⁴ 11/2/99 Transcript, pp. 114: 8 – 115: 11.

⁹⁵ *Bell Atlantic New York Order*, ¶ 279.

⁹⁶ *See*, 47 U.S.C. § 271(c)(2)(B)(ii) and (iv); *Order on Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Dockets No. 98-147 and 96-98, FCC 99-355 (January 10, 2000) (“*UNE Remand Order*”); and *Bell Atlantic New York Order*, ¶ 269.

⁹⁷ *UNE Remand Order*, ¶ 11.

4-wire digital loops.⁹⁸ Pursuant to the most recent Commission order, BOCs must offer the high frequency portion of the local loop as a separate unbundled network element.⁹⁹ As the Commission has found, spectrum unbundling is crucial for the deployment of broadband services to the mass consumer market.¹⁰⁰ SWBT must satisfy these minimum requirements for provision of unbundled local loops to satisfy the standards of checklist item (iv).

To satisfy the requirements of nondiscriminatory offering of unbundled network elements, BOCs must deliver the unbundled loop to the competing carrier within a reasonable timeframe and with a minimum of service disruption, and must deliver a loop of the same quality as the loop that the BOC uses to provide service to its own customer.¹⁰¹ A BOC must also provide access to any functionality of the loop requested by a competing carrier unless it is not technically feasible to condition the loop facility to support the particular functionality requested.¹⁰² BOCs must allow requesting CLECs access to all functionalities of a loop, and the CLEC is entitled, at its option, to exclusive use of the entire loop facility.¹⁰³ To refuse a CLEC request for a particular loop or conditioning, the BOC must show that conditioning the loop in question will significantly degrade the BOC's voiceband services, and the BOC must show that there is not adjacent or

⁹⁸ See, *Implementation of the Local Telecommunications Provisions in the 1996 Act*, CC Docket No. 96-98, *First Report and Order*, 11 FCC Rcd 15499, ¶ 3 (1996), ¶ 380 (“*Local Competition First Report and Order*”); *UNE Remand Order*, ¶ 3.

⁹⁹ *Id.* at 3. The Commission defines the high frequency spectrum network element as “the frequency range above the voiceband on a copper loop facility used to carry analog circuit-switched voiceband transmissions.” *Id.* at ¶ 7.

¹⁰⁰ *Id.* at 6.

¹⁰¹ See, 47 C.F.R. § 51.313(b); 47 C.F.R. § 51.311(b); *Local Competition First Report and Order*, ¶¶ 312-16.

¹⁰² *Bell Atlantic New York Order*, ¶ 271 (citing *Second BellSouth Louisiana Order*, 13 FCC Rcd at 20713 and *Local Competition First Report and Order*, 11 FCC Rcd at 15692).

¹⁰³ *UNE Remand Order*, ¶ 5.

alternative loop that can be conditioned or to which the customer's service can be moved to enable meeting the CLEC request.¹⁰⁴

In addition Competing carriers must have nondiscriminatory access to the various functions of the BOC's operations support systems in order to obtain unbundled loops in a timely and efficient manner.¹⁰⁵ To meet this standard, it should take no longer to obtain and install equipment to condition a loop in response to a CLEC's request than it would take SWBT to procure and install the same equipment for itself.¹⁰⁶ Last, a BOC must provide cross-connect facilities, for example, between an unbundled loop and a requesting carrier's collocated equipment at prices consistent with section 252(d)(1) and on terms and conditions that are reasonable and nondiscriminatory under section 251(c)(3).¹⁰⁷

As a threshold requirement for checklist item (iv), SWBT must be in compliance with the FCC's *UNE Remand Order* as soon as it becomes effective on February 9, 2000. In its application, SWBT claims to have already complied with the Order's requirements by developing revised definitions of the loop, network interface device, and interoffice transport and "making them available in the form of an amendment to the T2A."¹⁰⁸ SWBT further claims that it "stands ready" to immediately enter into this amendment with any CLEC that requests it.¹⁰⁹ As shown by ICG Communications' affidavit of Gwen Rowling, these statements are completely false. Only days before the filing of these Comments, ICG and other ALTS members requested the UNE

¹⁰⁴ *Id.* at ¶ 36.

¹⁰⁵ *Bell Atlantic New York Order*, ¶ 270.

¹⁰⁶ *UNE Remand Order*, ¶ 32.

¹⁰⁷ *Bell Atlantic New York Order*, ¶ 272 (citing *Second BellSouth Louisiana Order*, 13 FCC Rcd at 20713).

¹⁰⁸ SWBT Auinbaugh Affidavit, p. 38.

¹⁰⁹ *Id.*

Remand amendment, only to be told by SWBT that it was “awaiting approval” and was not yet available even for review.¹¹⁰ Since the amendment is an attachment to Mr. Auinbaugh’s affidavit in SWBT’s Application, ALTS is at a loss to understand why SWBT refuses to even provide copies to CLECs that either have taken or are considering taking the T2A and have specifically requested the amendment.¹¹¹

More importantly, ALTS is very concerned that SWBT would misrepresent its compliance with the *UNE Remand Order* in a sworn affidavit to the Commission. ALTS understands that, as a result of CLECs’ demand for the UNE amendment, SWBT issued an Accessible Letter¹¹² on January 28, 2000 regarding the amendment and its errata filings. This does not alter the fact that Mr. Auinbaugh’s statement regarding the availability of the amendment was not correct.

The following list of operational problems demonstrates why SWBT has not satisfied Section 271(c)(2)(B)(iv) of the Act.

1. SWBT does not follow loop provisioning procedures

Based upon the experience of ALTS members,¹¹³ SWBT still has great difficulty provisioning new loops. Before the Commission can approve SWBT’s Application, there must exist a solid record of SWBT’s ability to furnish CLECs with unbundled loops at the same level of service quality that its own customers enjoy, within a reasonable time frame, and under circumstances that do not unduly interrupt customer service. As discussed in the Comments of

¹¹⁰ See, ICG Rowling Affidavit, p.19-20, appended to Comments of CLEC Coalition.

¹¹¹ *Id.*

¹¹² Accessible Letters are SWBT’s primary means for communicating changes to its policies, practices, and service offerings to the CLEC community.

¹¹³ ALTS’ factual statements are supported by the affidavits of its members NEXTLINK Texas, Inc.; Time Warner Telecom, L.P.; ICG Communications, Inc. and Birch Telecom of Texas Ltd., L.L.P., which are appended to the Comments of the CLEC Coalition.

the CLEC Coalition, some Texas CLECs found that the hot cuts performed by SWBT were lasting several hours.¹¹⁴ It was not unusual for an eight line customer to be without dial tone for eight hours.¹¹⁵ SWBT claims that from August 1999 to October 1999, SWBT consistently bettered the PUC's benchmark for this activity.¹¹⁶ In fact, SWBT's performance for most of 1999 was subpar, especially with regard to the duration of hot cuts, a factor not captured by SWBT's performance measures.

2. SWBT's provision of DSL-capable loops does not comply with the FTA requirement for nondiscriminatory access

The *Bell Atlantic New York Order* made it abundantly clear that, in reviewing subsequent BOC applications, the Commission would consider a BOC's provisioning of DSL-capable loops a critically important test of its compliance with checklist item (iv).¹¹⁷ The Department of Justice also looked specifically at DSL loop provisioning when reviewing Bell Atlantic's 271 application.¹¹⁸ SWBT itself asked the PUC to include DSL contract language in the T2A "to ensure that qualified carriers have a meaningful opportunity to compete in the provisioning of DSL-based services in Texas."¹¹⁹ In that same filing, SWBT stated that the order resulting from the arbitration of DSL issues between SWBT and Covad/Rhythms would govern numerous

¹¹⁴ Id. at Section C.

¹¹⁵ ICG Rowling Affidavit, p. 8.

¹¹⁶ SWBT Brief Supporting Application, p. 99.

¹¹⁷ *Bell Atlantic New York Order*, ¶ 330.

¹¹⁸ The Department found that the data in the record for *Bell Atlantic* were insufficient to demonstrate its compliance with the requirement that it provide DSL-capable loops on a nondiscriminatory basis. *Bell Atlantic New York Order*, ¶ 328.

¹¹⁹ Letter from Timothy Leahy to the PUC Commissioners in Project No. 16251, dated August 30, 1999, p.1.

sections of the proposed contract language.¹²⁰ Thus, not only was SWBT fully aware that its provisioning of DSL-capable loops would be scrutinized by the Commission in its review of SWBT's application, it had every opportunity through the arbitration proceeding and the collaborative sessions to understand and respond to competitors' needs in Texas.

Unfortunately, nothing in SWBT's conduct over the past year indicates that SWBT will allow competitors a meaningful opportunity to compete in the provisioning of DSL-based services. Certainly SWBT's actions during the Arbitration proceeding show that SWBT expended far more energy ensuring that its ADSL offering would get to market first, through almost any tactic, than in meeting its CLEC customers' needs.¹²¹ Now, SWBT has challenged and is expected to continue to challenge the provisions of the Award that eliminated the most discriminatory and anti-competitive terms and conditions for DSL services. As effective as the Award may ultimately prove to be, its impact on competition is unproven.

Performance measures for DSL were late in being developed and their effectiveness is largely untested. The scant data that do exist are utterly insufficient to demonstrate that SWBT's provisioning of DSL-capable loops to its competitors is at parity. If anything, these data overstate the performance actually being achieved by SWBT, because among other things the business rules for calculating provisioning intervals throw certain types of orders out of the calculations altogether. Finally, much of the Award's impact will not be felt until all of its requirements are

¹²⁰ *Id.* at p. 2. The arbitration referred to is the consolidated proceeding for Docket No. 20226, Petition of Rhythms Links, Inc. to Establish an Interconnection Agreement with Southwestern Bell Telephone Company and Docket No. 20272, Petition of Dieca Communications, Inc., d/b/a Covad Communications for Arbitration of Interconnection Rates, Terms, Conditions and Related Arrangements with Southwestern Bell Telephone Company. The award entered in that arbitration is referred to as the "Arbitration Award" or "Award."

¹²¹ *See, generally,* Declaration of Christopher Goodpastor Supporting Comments of Covad Communications Company.

implemented, a process that will not be complete for months. Under these circumstances, it is simply not possible to conclude that SWBT has fully implemented DSL-capable loop provisioning as required by checklist item (iv).

- a.) **SWBT's past and future challenges of precisely those provisions of the Arbitration Award essential to CLEC competition create uncertainty in the market for DSL services and render it impossible for the Commission to rely on the Award as evidence that SWBT is providing nondiscriminatory access to DSL-capable loops**

The Arbitration Award approved by the PUC on January 27, 2000, represents a significant step in affording non-discriminatory access to DSL-capable loops by CLECs. Were SWBT to abide by the Award, the pernicious problems CLECs identified with respect to Bell Atlantic's DSL-loop offering would be avoided. The Award largely eliminates the technology restrictions, inadequate and unequal ordering and provisioning, inadequate and unequal access to loop make-up information, and the costly loop conditioning and other unsupported rates and charges that SWBT originally proposed. Recognizing the importance of the Award, the PUC has repeatedly stated that the Award's provisions are to be inserted in the T2A; thus the results of the arbitration form part of the basis for the PUC's recommendation that SWBT be permitted to enter the interLATA market.¹²²

Undeterred, SWBT seems determined to overturn the Award. SWBT began with the unprecedented filing of "comments" objecting to the interconnection agreement between itself and Covad that SWBT admitted incorporated the terms of the Award. SWBT sought rehearing and reconsideration, contending among other things that the Award (1) would force SWBT to create

¹²² SWBT agreed that the results of the Arbitration Award would be followed in the MOU and again in the interim version of Attachment 25 currently part of the T2A. *See*, Declaration of Christopher Goodpastor supporting the Comments of Covad Communications Company.

Texas-specific OSS enhancements contrary to what will be developed for all CLECs in SBC's territory pursuant to this Commission's SBC/Ameritech Merger Order; (2) would impose pre-ordering deadlines for processing CLEC orders that it may not be able to meet; (3) would deny SWBT its right to recover all its costs while unjustly enriching CLECs; and (4) relies on a stale record, as evidenced by the fact that the Arbitrators themselves relied on the FCC's *UNE Remand Order* and *Merger Order* which were entered subsequent to the hearing in the arbitration.¹²³ This farfetched procedural maneuver, initiated immediately after the parties' interconnection agreements were filed, reveals a determination to take any and all actions possible to overturn the Award.¹²⁴

Although the PUC rejected SWBT's attempt to effectively nullify the Award through rehearing and further delay, more challenges are sure to follow because SWBT explicitly has reserved its right to appeal. SWBT insists that it will abide by the terms of the Award while its appeal(s) is pending. Such an assurance would be satisfactory were only rates and charges at issue; dollars paid are capable of true-up and refund after all. But such promises are hollow indeed when the Award requires SWBT to make significant changes to systems and procedures that it has just implemented for the precise purpose of facilitating its own entry and expansion into the DSL market. To believe that SWBT will willingly and quickly give up advantages deliberately created when SBC has announced a \$6 billion initiative (called Project Pronto) to make ADSL

¹²³ Comments of Southwestern Bell Telephone Company Concerning Arbitration Award and Proposed Interconnection Agreements, January 6, 2000, ("SWBT PUC Appeal") pp. 2-6, provided as Exhibit CG-6 to the Declaration of Christopher Goodpastor Supporting the Comments of Covad Communications Company.

¹²⁴ As Rhythm's response to SWBT noted, the comment process is intended to give non-parties to an agreement an opportunity to point out discrimination or other problems with an interconnection agreement; it was never intended to be used by a party to an arbitration proceeding who has conceded the agreement, as filed, complies with the Arbitration Award.

available to 80 percent of its customers in three years would require a level of faith and trust in SWBT no CLEC that operates in Texas can muster.¹²⁵ Given the practical impact on competition that a failure to implement the arbitrators' decisions will have, it can hardly be said that competitors' non-discriminatory access to DSL-capable loops as required by checklist item (ii) is assured.

To understand what is at stake for CLECs, consider that the Award accomplishes the following:

(1) **Removes SWBT-imposed technology restrictions**¹²⁶

The Award rejects SWBT's attempts to restrict and control CLEC provisioning of DSL services. SWBT had proposed establishing seven distinct loop types, including a category for "other non-standard xDSL technologies." SWBT contended that distinct loop types are necessary in order for it to manage its inventory and network. It became apparent during the collaborative process that among the effects this structure would have is that it would allow SWBT to delay provisioning of a loop for new technologies until it had established a unique ordering code for such a loop (consistent with its use of 1FR, 1B etc. codes for different types of local exchange service). The arbitrators concluded that SWBT had not demonstrated a compelling reason for its categorization of loops. The Award states that SWBT will not be allowed to limit the capabilities of xDSL services on an xDSL loop through unnecessarily complex definitions and restrictions; and directs SWBT to offer only two types of loops—a 2-wire and a 4-wire loop. The arbitrators also found that the xDSL loop cannot be "categorized" based on loop length and limitations cannot be placed on the length of xDSL loops available to CLECs.

(2) **Eliminates SWBT's discriminatory loop segregation practices**¹²⁷

The Award requires SWBT to dismantle the binder groupings it created to advantage the ADSL service that it (and its affiliate) have decided to market. SWBT's initial proposal was to segregate DSL services in different binder groups, including setting aside a binder group just for ADSL. As a result of CLEC objections, SWBT modified its proposal and renamed it Selective Feeder

¹²⁵ SBC News Release, November 3, 1999, on SBC's web site.

¹²⁶ Award at p. 10.

¹²⁷ Award at pp. 47-49.

Separation (“SFS”) which it said would manage the binder group in the feeder plant only and would be used only where doing so would reduce interference in the feeder plant. The arbitrators ordered SWBT to stop its use of SFS and to remove any restrictions SWBT has imposed on the use of pairs for non-ADSL services. The arbitrators further ordered SWBT to cease reserving loop complements for ADSL services exclusively, and to release binder groups that it already has marked as “ADSL only.”

The arbitrators’ language here is especially noteworthy:

The SFS process further has the effect of discriminating against deployment of xDSL services other than ADSL, especially in relation to the availability of clean copper loops for use by xDSL providers. . . . The Arbitrators find that SWBT shall not reserve loop complements for ADSL services exclusively. . . . The Arbitrators find that the reservation of cable complements for the specific technology being utilized by SWBT’s retail operations would give SWBT an unfair competitive advantage. Further, such a practice does not create availability of xDSL capable loops on a nondiscriminatory basis. . . . [T]he particular segregation practices used by SWBT and the manner in which they have been deployed do not manage the spectrum in a competitively neutral or efficient manner.¹²⁸

(3) **Orders SWBT to deploy OSS that provides real-time loop information on a nondiscriminatory basis**¹²⁹

The Award establishes a process by which CLECs can have access to the same loop information available to SWBT for the provision of its own DSL services. The arbitrators ruled that SWBT must provide non-discriminatory access to its OSS functions, including any operations support systems utilized by SWBT’s service representatives and/or SWBT’s internal engineers and/or by SWBT’s advanced services affiliate to provision its own retail xDSL service. This decision is consistent with the FCC’s *UNE Remand Order* and important to CLECs desiring to provide xDSL service, because the issue of access to loop qualification information contained in SWBT engineering databases, but not in a database designed for service ordering was hotly contested. *Evidence that at least some of SWBT’s retail employees had access the engineering database was very troubling to the Arbitrators.* The Award requires SWBT to develop and deploy enhancements to its existing Datagate and EDI interfaces that will allow real-time electronic access to loop makeup information as a pre-ordering function. These enhancements are to be deployed as soon as possible, but not later than 6 months

¹²⁸ Award at pp. 47-48.

¹²⁹ Award at pp. 60-63.

from the date of the Award.

(4) **Order SWBT to charge TELRIC-based rates**¹³⁰

The Award rejects SWBT's plan to require CLECs to bear an inflated cost for loop conditioning to remove load coils, bridged taps and repeaters, that also was being applied in a discriminatory manner that favored SWBT's own ADSL service. The arbitrators established interim rates, reducing SWBT's proposed charges to (1) cease counting the cost of re-installing bridged tap as a cost of conditioning; and (2) recognize that SWBT's internal practice is to condition multiple loops when it is necessary to dispatch a technician, not one loop at a time. For permanent rate-setting purposes, the arbitrators ruled that SWBT should be compensated for performing conditioning at the request of a CLEC for loops greater than 12,000 feet,¹³¹ but, that network design inconsistencies in SWBT's cost studies rendered them invalid as a basis on which to set rates. SWBT was ordered to file a new TELRIC-based cost study for conditioning analog and digital xDSL loops at or in excess of 18,000 feet, and ordered to file a new TELRIC-based cost study for the removal of bridged tap, load coils and repeaters on xDSL loops greater than 12,000 feet but less than 18,000 feet. Moreover, they ordered that the costs studies must incorporate the actual percentage of loops that require conditioning based on actual field experience, utilize efficient conditioning and include a future discount to recognize the likelihood of the decreasing need for conditioning in the future.

Again, it is important to recognize that SWBT's existing practices were shown to be discriminatory. The arbitrators noted that SWBT has not charged any SWBT retail ADSL customer the \$900 conditioning charge listed in its tariff, and that the likelihood of charging any of its own customers is less because SWBT had segregated "clean loops" into an ADSL binder.¹³²

These essential aspects of the Award are now either the subject of SWBT's appeals or likely to be implemented at a snail's pace as the appellate process drags on. SWBT was ordered to develop OSS for mechanized loop qualification, ordering and provisioning of DSL capable

¹³⁰ Award at p. 86.

¹³¹ The Arbitrators found that the record showed such conditioning should not be necessary on loops less than 18,000 feet, but that the FCC's *UNE Remand Order* allows charges for conditioning on loops greater than 12,000 feet. Award at pp. 94-95.

¹³² SWBT had reserved binders for ADSL in more than 100 central offices in Texas. Award at n. 374.

loops.¹³³ SWBT now contends that it cannot be required to develop any OSS for Texas that differ from systems to be developed under the SBC/Ameritech Merger Conditions.¹³⁴ SWBT makes this argument despite the fact that the mechanized OSS SWBT is ordered to provide would simply match the systems and databases that SWBT now uses to determine actual loop make-up information and to provision its own ADSL.¹³⁵ The Award determined that SWBT cannot charge CLECs for loop qualification so long as the process is performed manually, because costs must be based on forward-looking technology.¹³⁶ SWBT ignores the requirement that its rates reflect forward-looking costs and instead contends that it is entitled to compensation for all costs under prior FCC orders, including its costs for manual loop qualification.¹³⁷

The Award rejected SWBT's binder group management and SFS plans and determined that SWBT cannot reserve binder groups to be used solely for its own (or its affiliate's) provision of ADSL.¹³⁸ SWBT's implementation of this part of the Award is critical to CLECs' ability to obtain loops. But, reversing its processes to segregate loops for its provisioning of ADSL is time-consuming and costly, and offers no benefit to SWBT's own business plans. It is only reasonable to expect this effort to be less than a high priority. Most importantly, as of the date these Comments are being written, SFS is still in place, continuing to advantage SWBT's ADSL

¹³³ *Id.* at pp. 62-63.

¹³⁴ SWBT PUC Appeal at pp. 2-3.

¹³⁵ *Id.* at p. 61.

¹³⁶ *Id.* at p. 76.

¹³⁷ SWBT PUC Appeal at pp. 10-11,

¹³⁸ *Id.* at p. 47.

offering while resulting in initial rejection and the need to re-submit more than half of CLEC DSL loop orders.¹³⁹

Finally, the Award orders SWBT to develop and submit TELRIC-based cost studies to support charges for 2-wire and 4-wire DSL-capable loops and for loop conditioning.¹⁴⁰ Those studies are not due to be completed until March 1, 2000.¹⁴¹ Negotiated rates based on those cost studies are not required to be filed until July 2000, and may themselves be the subject of yet another arbitration.¹⁴² As a result, no CLEC knows the price it will be paying for DSL-capable loops later this year; all it has available to it as it decides whether and how to market DSL services is “interim” rates and charges, subject to true-up. While the interim rates and charges resulting from the Arbitration Award are far more reasonable and closer to TELRIC costs than anything SWBT proposed, CLECs not only face marketplace uncertainty right now, but also the prospect of further arbitrations before SWBT’s rates and charges for provisioning DSL loops are finally set.¹⁴³

SWBT unquestionably has the legal right to appeal the Commission’s Order in the Arbitration. But, until those appeals have run their course, competitive uncertainty prevails and every incentive exists for SWBT to put forth less than its best efforts to implement those portions of the Award that require systemic changes while affording no advantage to SWBT’s own operations. In any event, there are no milestones or periodic reports required of SWBT to demonstrate that it is implementing the Award and no means for CLECs independently to

¹³⁹ See, Declaration of Michael Smith Supporting Comments of Covad Communications Company.

¹⁴⁰ Award at p. 86.

¹⁴¹ *Id.* at p. 111.

¹⁴² *Id.*

¹⁴³ See, Comments of Covad Communications Company for further discussion of pricing uncertainty.

determine whether SWBT is doing so. Worse yet, should a stay of the Award be entered, the T2A currently contains only interim provisions for DSL that do not meet the needs of CLECs.

b.) The scant performance data available do not demonstrate that SWBT is provisioning DSL-capable loops to its competitors at parity with provisioning to itself and its affiliates as required to meet checklist item (ii)

Although the Award orders SWBT to develop performance measures for the provisioning of DSL-capable loops, those measures have only just been created and the necessary three months of data demonstrating parity performance obviously do not exist. Absent experience with the performance measures' operation, it is impossible to be sure that the measures that now exist are sufficient and the business rules that underlie their calculation appropriate to track SWBT's actual provisioning of service to its competitors as compared to itself or its advanced services affiliate. As described in detail in the Comments of Covad Communications Company, grave doubts exist.

Covad's analysis shows that SWBT returns Firm Order Commitments for DSL-capable loops late, has missed due dates for these loops and has provided BRI loops (used for IDSL) that experience trouble reports all at levels that show a lack of parity. The PUC has not examined performance with respect to DSL loops and will not address needed changes in performance metrics until April 2000. The Telcordia Report is inconclusive on the issue of DSL-capable loops because no CLEC was ordering these loops in any number when the study was being performed.¹⁴⁴

¹⁴⁴ As Covad states in its Comments, data CLECs experiences were essentially untested by Telcordia because SWBT's actions prevented these CLECs from having interconnection agreements in place at that time. *See, generally*, Declaration of Christopher Goodpastor Supporting Comments of Covad Communications Corporation for a discussion of the tortuous process of Covad's effort to obtain an interconnection agreement and the Covad arbitration. As addressed in Covad's Comments, Telcordia looked at a total of only four DSL loop orders.

- c.) **SWBT's Application does not comply with checklist item (iv) through creation of a separate affiliate, because its interconnection arrangements with its advanced services affiliate are unclear and the potential for discriminatory treatment to occur unchecked clearly exists**

The Commission gave BOCs an option to comply with the requirements of checklist item (iv) through the creation of a separate advanced services affiliate.¹⁴⁵ That option explicitly required a “fully operational” affiliate, however, something SWBT admits it does not have.¹⁴⁶ Moreover, SWBT is required by the Commission's SBC/Ameritech merger conditions to have an interconnection agreement in place that meets certain conditions not satisfied here.

SWBT's advanced services affiliate has opted into the T2A, an agreement that does not address essential aspects of SWBT's relationship to that company. Notably, the T2A does not address line sharing arrangements, although SWBT acknowledges that line sharing with its advanced services affiliate is taking place.¹⁴⁷ Moreover, no interconnection or other agreement is on file with the PUC that addresses rates, terms and conditions for collocation, equipment transfers, or the terms of joint marketing and personnel utilization. This information is essential; allowing SWBT to have “secret agreements” with its affiliate on these vital matters will vitiate competition in advanced services.¹⁴⁸

The affiliate issue is of particular importance with respect to SWBT and local competition in Texas, because the PUC has only very limited jurisdiction over affiliates and affiliate transactions. Senate Bill 560, the legislation that made sweeping reductions in the Texas

¹⁴⁵ *Bell Atlantic New York Order*, ¶ 330.

¹⁴⁶ Affidavit of Lincoln Brown for SWBT, ¶ 4.

¹⁴⁷ Affidavit of Lincoln Brown for SWBT, ¶ 4.

¹⁴⁸ *See, generally, Declaration of Christopher Goodpastor Supporting Comments of Covad Communications Company and Exhibits thereto.*

Commission's regulatory authority over SWBT as of September 1999, prohibits the PUC from imposing any requirement on SWBT that is more burdensome than those imposed by the FCC. Because the FCC's role in examining affiliate relationships can be dispositive of affiliate controls and safeguards in Texas, ALTS urges the Commission to be cognizant of the dearth of information on the SWBT's relationship with its advanced services affiliate, and the concomitant potential for mischief, that exists with respect to DSL.¹⁴⁹

d.) An important aspect of the Award can be negated by the investment decisions SBC makes with respect to its advanced services affiliate's network

An important issue in the Arbitration concerned CLECs' need to collocate in SWBT's remote terminals where SWBT's network consists of fiber from the central office to the remote terminal, with copper running to business and residential customers thereafter. ADSL and SDSL services operate only on copper wires. Without access to the remote terminal, CLECs cannot offer these advanced services to customers.

The Arbitrators found that a CLEC's ability to provide xDSL service would be negated if SWBT has deployed (1) digital loop carrier systems and an uninterrupted copper loop is replaced with a fiber segment or shared copper in the distribution section of the loop, (2) DAML technology to derive 2 voice-grade POTS circuits from a single copper pair, or (3) entirely fiber optic facilities to the end user.¹⁵⁰ To prevent CLEC's from being unable to serve these customers, the arbitrators concluded that CLECs must have the option to request that SWBT make copper facilities available or to collocate a DSLAM in the remote terminal with SWBT providing

¹⁴⁹ As discussed *infra*, additional competitive issues arise as a result of SWBT's ability under Texas law to have an in-region CLEC affiliate.

¹⁵⁰ Award at p. 29.

unbundled access to subloops.¹⁵¹ They further ordered that, if neither of these options is workable and if SWBT has a DSLAM in the remote terminal, SWBT must unbundle and provide access to its DSLAM.¹⁵²

SWBT's press release for its Project Pronto states that SBC plans to invest billions of dollars in order to "[push] fiber and Digital Subscriber Line (DSL) equipment deeper into the neighborhoods it serves" and "[use] advanced fiber optics and neighborhood broadband gateways containing next-generation digital loop carriers to push DSL capabilities now housed in central offices closer to customers." To the extent these network improvements belong in the first instance to SWBT's affiliate and are not transferred assets from SWBT, the interconnection obligations of the FTA and the Arbitrators' Award do not apply and CLECs will lose the ability to serve customers that the Award seeks to protect.

Given the uncertainty that exists regarding SWBT's reported performance and its advanced services affiliate, it is imperative that the Commission be sure that SWBT is fulfilling its obligation to provide DSL-capable loops on a non-discriminatory basis. The Commission has stated before that mere promises and assurances of future actions are not enough to justify a finding that the competitive checklist has been fulfilled. Nowhere is this more clear than in reviewing SWBT's failure to comply with checklist items (ii) and (iv).

D. Checklist Item (viii) - SWBT Is Not Providing White Page Directory Listings on a Nondiscriminatory Basis

Section 271(c)(2)(B)(viii) states that access or interconnection provided or generally offered by a BOC must include: "White [P]ages directory listings for customers of the other

¹⁵¹ *Id.*

¹⁵² *Id.* at p. 30.

carrier's telephone exchange service.” This checklist item ensures that white pages listings for customers of different carriers are comparable, in terms of accuracy and reliability, notwithstanding the identity of the customer’s telephone service provider.¹⁵³

SWBT contends that with regard to White Pages directory listings, “SWBT has consistently met all performance benchmarks for both timelines and accuracy.”¹⁵⁴ It may be true that SWBT has met the benchmarks because there does not appear to be a performance measure that captures the problems CLECs are experiencing. As detailed in the Comments of the CLEC Coalition, CLECs in Texas are continuing to experience problems with SWBT’s processes for making changes to customer listings, having such changes incorporated into the White Pages, and customer listings “falling out” of directory assistance for no apparent reason. When CLEC customers encounter these problems, important/potential customers are unable to reach them and this results in lost business.¹⁵⁵ Ultimately, the CLEC is blamed for the error and may never be able to reestablish a business relationship with that customer.

V. ONCE THE PROBLEMS CITED HEREIN ARE REMEDIED, THE TEXAS LOCAL EXCHANGE MARKET MAY BE “FULLY AND IRREVERSIBLY OPENED” TO COMPETITION

The requirement that the local exchange market of a state for which the BOC has filed a section 271 Application must be “fully and irreversibly open to competition” has developed in the course of the Commission and Department of Justice (“DOJ”) proceedings reviewing these requests. As a threshold matter, section 271(d)(2)(A) requires the Commission to consult with

¹⁵³ *Bell Atlantic New York Order* at ¶ 359 (citing *Second BellSouth Louisiana Order*, 13 FCC Rcd at 20747-48).

¹⁵⁴ SWBT Brief Supporting Application, p. 11.

¹⁵⁵ *See*, ICG Rowling Affidavit, pp. 13-14 and NEXTLINK Draper Affidavit, pp. 7-8.

the U.S. Attorney General in the course of the Commission's own evaluation, and to give substantial but not outcome determinative weight to the DOJ evaluation.¹⁵⁶

In determining whether an RBOC meets the irreversibly open to competition standard, the DOJ takes into consideration whether all three entry paths contemplated by the Act (interconnection, UNEs and resale) are fully and irreversibly open to competition to serve both residential and business customers. The DOJ examines: (1) the extent of actual competition; (2) whether significant barriers continue to impede the growth of competition; and (3) whether benchmarks to prevent backsliding have been established.¹⁵⁷

SWBT's Application does not demonstrate that full and irreversible competition exists in the Texas local market. Significant barriers continue to impede the growth of facilities-based competition. CLECs still face a number of obstacles when attempting to order and timely provision interconnection trunks and unbundled loops. In addition, effective protections against SWBT's backsliding into anti-competitive behavior do not yet exist in Texas. Pursuant to its Performance Remedy Plan, SWBT has implemented numerous measures that could serve as benchmarks to help determine whether backsliding is occurring; however, some measures, e.g. trunking measurements, are not accurately capturing SWBT's below-par performance and the performance penalties approved by the PUC are insufficient to deter backsliding are inadequate. The self-executing remedies or financial penalties that follow poor performance are insignificant when compared to the revenue SWBT will realize by entering the long distance market. Further, these penalties do very little to remedy the monetary damages potentially incurred by CLECs due to SWBT's anti-competitive behavior.

¹⁵⁶ See, 47 U.S.C. § 271(d)(2)(A).

VI. SWBT’S APPLICATION FAILS TO DEMONSTRATE THAT ITS ENTRY INTO THE INTERLATA MARKET IN TEXAS IS IN THE PUBLIC INTEREST

Section 271(d)(3) of the Act provides that the Commission may not approve a section 271 application unless, among other things, the requested authorization is consistent with the public interest, convenience, and necessity. In the *Ameritech Michigan Order*, the Commission explicitly rejected the view that its responsibility to evaluate public interest concerns is limited merely to assessing whether a BOC entry would enhance competition in the long distance market.¹⁵⁸

The public interest analysis is an independent element of the statutory checklist.¹⁵⁹ The Commission’s inquiry requires considering whether factors exist that would frustrate the Congressional intent of an open market, including assessing whether conditions are such that the local market *will remain open*.¹⁶⁰ Thus, the Commission could find that SWBT had satisfied each and every item on the fourteen point checklist and still not grant the Application.¹⁶¹

Further, the Commission has concluded that “in the absence of adequate commitments from a BOC, we believe that we have the authority to impose such requirements as conditions on

¹⁵⁷ See, *Second BellSouth Louisiana Order*, ¶ 16-18; *BellSouth South Carolina Order*, ¶ 36; *Ameritech Michigan Order*, ¶ 42.

¹⁵⁸ *Ameritech Michigan Order*, ¶ 361.

¹⁵⁹ *Bell Atlantic New York Order*, ¶ 423.

¹⁶⁰ *Bell Atlantic New York Order*, ¶ 423 (emphasis added), also see *Ameritech Michigan Order*, ¶ 361.

¹⁶¹ As the Commission stated in the *Ameritech Michigan Order*, ¶ 390: “Although the competitive checklist prescribes certain, minimum access and interconnection requirements necessary to open the local exchange to competition, we believe that compliance with the checklist will not necessarily assure that all barriers to entry to the local telecommunications market have been eliminated, or that a BOC will continue to cooperate with new entrants after receiving in-region, interLATA authority.”

our grant of in-region, interLATA authority.”¹⁶² Indeed, the Commission’s public interest analysis balances a number of factors in order to determine whether BOC entry will serve the public interest, convenience and necessity.

This analysis is not merely a rehashing of the competitive checklist items. Rather, all relevant factors,¹⁶³ including the following are to be considered: (1) whether all pro-competitive entry strategies are available to new entrants, including a variety of arrangements (interconnection, UNEs and resale) available to different classes of customers (business and residential) in different geographic regions in different scales of operation;¹⁶⁴ (2) whether a BOC is making these entry methods and strategies available, through contract or otherwise, to any other requesting carrier upon the same rates, terms and conditions;¹⁶⁵ (3) whether the BOC has agreed to performance monitoring which permits benchmarking and self-executing enforcement mechanisms;¹⁶⁶ (4) whether the BOC has provided for optional payment plans for the payment of non-recurring charges that would ease the financial burden of market entry;¹⁶⁷ (5) the existence of state or local laws that affect market entry including, but not limited to, laws that affect rights-of-way;¹⁶⁸ and (6) the existence of discriminatory or anti-competitive behavior or violation of any state or federal telecommunications law.¹⁶⁹

¹⁶² *Ameritech Michigan Order*, ¶ 400.

¹⁶³ *See, First BellSouth Louisiana Order*, ¶ 361.

¹⁶⁴ *See, Ameritech Michigan Order*, ¶¶ 387, 391.

¹⁶⁵ *See, id.* ¶ 392.

¹⁶⁶ *See, id.* ¶¶ 393-94; *First BellSouth Louisiana Order*, ¶¶ 363-64; *see also, Bell Atlantic New York Order*, ¶ 429 and ¶ 430.

¹⁶⁷ *See, Ameritech Michigan Order*, ¶ 395.

¹⁶⁸ *See, id.* ¶ 396.

¹⁶⁹ *See, id.* ¶ 397.

The hallmark of the Commission's public interest analysis is whether all barriers to entry into the local telecommunications market have been eliminated, and whether the market will *continue* to remain open once 271 authorization is granted. While SWBT's performance assurance measures are one tool that can be used to address discriminatory behavior on the part of SWBT, the Performance Remedy Plan does not provide sufficient incentives to deter SWBT from engaging in discrimination once 271 authority is received. Therefore, ALTS submits that the Commission should implement anti-backsliding prevention measures and enforcement procedures modeled after those originally proposed by Allegiance Telecom in its Petition for Expedited Rulemaking,¹⁷⁰ to address violations of 271 obligations in the event that SWBT's application is granted. Further, the Commission should make fresh look opportunities available if it grants SWBT's Application.

A. The Commission Cannot Rely on PUC Oversight or SWBT's Promises to Ensure That an Open Market Will be Maintained in Texas

SWBT's public interest analysis focuses almost exclusively on the consumer benefits SWBT will bring to the long distance market.¹⁷¹ Only a few sentences are even given to the effect of SWBT's long distance entry on local competition.¹⁷² ALTS believes, however, that Commission's public interest determination should consider certain unique aspects of the competitive marketplace in Texas, most notably, the extent of the PUC's ability to prevent anti-competitive behavior by SWBT and a recent example of such behavior.

¹⁷⁰ *In the Matter of the Development of a National Framework to Detect and Deter Backsliding to Ensure Continued Bell Operating Compliance with Section 271 of the Communications Act Once In-region InterLATA Relief Is Obtained*, RM 9474, (Feb. 1, 1999) ("Allegiance Petition"), dismissed January 19, 2000.

¹⁷¹ SWBT's Brief Supporting Application, pp. 47-62.

¹⁷² *Id.* at 62.

First, unlike the New York Commission, the Texas Commission now has very little authority over most of the business services SWBT provides. Senate Bill 560 (SB 560), which became effective September 1, 1999, grants SWBT considerable freedom from regulatory oversight by the Texas Commission. This new legislation – drafted by SWBT and pushed through the Legislature by its team of more than 100 lobbyists – allows SWBT to offer new services upon ten days notice to the PUC, and allows these service offerings to remain in effect despite complaints or clear evidence that the offerings violate the law¹⁷³ strips the PUC of almost all oversight of SWBT’s relationship with its affiliates,¹⁷⁴ and overrides many of the competitive safeguards previously in the law.¹⁷⁵ In contrast, the New York Commission retains considerable authority to review and evaluate Bell Atlantic’s rates and services and their impact on competition.

Many of the changes that were made to Texas law by SB 560 directly impact the PUC’s ability to successfully manage the transition to competition once SWBT obtains 271 relief. In very broad terms, some of the most significant changes made in relation to the public interest review are:

- SWBT was allowed to create unregulated “competitor” affiliates in existing monopoly service areas, giving it the ability to operate outside the regulations that apply to the Incumbent, and new limitations were placed on the PUC’s authority over affiliates;¹⁷⁶
- Services that would not have been reclassified as competitive based on a legitimate review of the level of competition which existed for that service were statutorily deregulated and removed from PUC oversight at a critical time in the development of competition;¹⁷⁷

¹⁷³ See, Tex. Utilities Code Ann. § 58.153.

¹⁷⁴ See, Tex. Utilities Code Ann. §§ 60.164, 60.165.

¹⁷⁵ See, Tex. Utilities Code Ann. §§ 58.063, 58.152.

¹⁷⁶ See, Tex. Utilities Code Ann. §§ 54.102, 60.164, 60.165.

¹⁷⁷ See, Tex. Utilities Code Ann. §§ 58.023, 58.051, 58.151, 58.101 - 58.104.

- Authority was granted that allows SWBT to utilize all forms of pricing flexibility immediately for most services and on a date certain for the remaining services, absent any showing that sufficient competition exists for those services;¹⁷⁸
- Strong limitations were put on PUC governance by reducing the PUC's ability to make an up-front review of the appropriateness or legality of pricing flexibility service offerings and on its ability to take corrective action if SWBT abuses its dominant market position; and¹⁷⁹
- Changes in the state law allow SWBT to price its retail services at rates lower than the corresponding wholesale rates for those same services. Because SWBT needs only to price its rates for services above LRIC and is also allowed to freeze rates at the rate in effect September 1, 1999, it therefore has the ability to create price squeezes by undercutting the services CLECs provide using TELRIC-based UNES.¹⁸⁰
- Very basic competitive safeguards that existed in the statute were eliminated.¹⁸¹

Combined, all of the changes made to Texas law in the 76th Legislative Session create a statutory backdrop that severely handicaps the PUC and staff in performing a meaningful review of service offerings and affiliate relationships and transactions so that illegal rates and offerings are not brought to market. Instead, the limited information that the PUC receives from SWBT in the informational filing is so cursory in nature and the review time frame so restricted that it is almost impossible for the PUC to ensure that illegal rates or service offerings will not become effective. Moreover, the rules implementing the new statutory provisions enacted in SB 560 have not yet been adopted by the PUC, so there is little certainty about the extent of the PUC's oversight of SWBT's behavior in an "open market." CLECs anticipate that SWBT's future legislative efforts will further reduce the authority and standing of the PUC.

¹⁷⁸ See, Tex. Utilities Code Ann. §§ 58.003, 58.004, 58.063, 58.152.

¹⁷⁹ See, Tex. Utilities Code Ann. §§ 58.024, 58.063, 58.152, 58.153.

¹⁸⁰ See, Tex. Utilities Code Ann. §§ 58.152, 58.063.

¹⁸¹ See, Tex. Utilities Code Ann. §§ 58.063, 58.152.

Absent meaningful oversight by the PUC, CLECs must now act as the “market police” in the regulatory forum and bring complaints against SWBT’s service offerings that appear to violate the few competitive safeguards that remain in the law. By the time a CLEC has filed a complaint about an anti-competitive act or service and the PUC has conducted an inquiry and issued a decision, the competitive harm has often already occurred. The new limitations on the PUC’s authority make it is all the more imperative that the Commission ensure that SWBT’s Application completely satisfies the public interest test and fourteen point checklist prior to granting SWBT 271 authority and rigorous, self-executing performance measures and enforcement mechanisms are in place.

An area particularly vulnerable to abuse is SWBT’s ability to create affiliates, with virtually no oversight by the PUC. Because the Texas law was recently changed to permit SWBT to have a CLEC affiliate within its incumbent service areas, the Commission must carefully scrutinize and guard against SWBT’s ability to harm competitors by entering into preferential arrangements with the affiliate or by transferring aspects of its network or services to the affiliate without the attendant statutory obligations that currently apply to SWBT. If the incumbent’s equipment, and thus its network elements, are transferred to an affiliate for its own use in providing services, the very real danger exists that competitors’ ability to resell services and to use unbundled elements will, at best, be significantly impaired. Obviously, the incentive to do this is greatest where the equipment is vital to providing an advanced service or a new service that SWBT can deploy and offer before its competitors could do so on their own. However, even if there is no transfer of assets, the ability of SWBT’s CLEC affiliate to resell SWBT’s services can also affect competitors. The CLEC affiliate could reduce retail prices without a commensurate reduction in the wholesale rates paid by independent CLECs, and SB 560 prevents any imputation

of the discount to SWBT.¹⁸²

SB 560 specifically forbids the PUC from adopting any affiliate rule or order that is more “burdensome” than the rules or orders of the Commission.¹⁸³ Consequently, only the Commission can protect against anti-competitive dealings and arrangements between SWBT and its CLEC affiliate(s), by conditioning any grant of 271 approval. If the SWBT affiliate is financed by the same parent company, uses the same branding, and has personnel transferred from SWBT, then SWBT has transferred or assigned to its CLEC affiliate significant attributes of SWBT, including corporate identity, financing, and human capital. Indeed, if an in-region affiliate provides the same services that SWBT itself provides on a near-monopoly basis, the affiliate entity will be largely indistinguishable from SWBT itself. The Commission should therefore treat the CLEC affiliate as a dominant carrier, or, at a minimum, as a condition of 271 approval, impose the same safeguards that it determines are necessary for SWBT’s advanced services affiliate.

In evaluating the public interest of SWBT’s 271 approval, the Commission should also carefully review and consider SWBT’s anti-competitive behavior in Texas with respect to its DSL competitors. As described in the comments filed by ALTS member Covad Communications, Inc., SWBT went to great lengths to delay the entry of DSL competition in Texas.¹⁸⁴ Beginning in July 1998, SWBT did everything it could to keep DSL issues out of its 271 case and delay resolution of interconnection issues essential to competing DSL providers, all so that its own ADSL service could be first to market in Texas. To accomplish this goal, SWBT went so far as to fail to produce highly relevant documents in discovery and ordering the destruction of relevant

¹⁸² Tex. Utilities Code Ann. § 60.165.

¹⁸³ Tex. Utilities Code Ann. § 60.165.

¹⁸⁴ *See*, generally Declaration of Christopher Goodpastor, supporting Comments of Covad Communications Company.

documents.¹⁸⁵ These tactics produced the desired result, delaying the resolution of disputed issues and delaying market entry. They also resulted in no DSL provider being able to test order flows in the Telcordia testing. SWBT succeeded in delaying its competitors' entry into the market and managed to deploy its DSL product in Texas a full nine months before Covad was able to begin offering its DSL services. But for the dedicated efforts of the PUC staff and commissioners in the DSL arbitration proceeding and the 271 collaborative process, there would be no choice of DSL providers in Texas even today. Unfortunately, there will not be a 271 case pending before the PUC next time a CLEC tries to provide an innovative new technology or service and SWBT wishes to offer a competing product. Without anti-backsliding mechanisms, including effective, accurate performance measurements and penalties, local competition in Texas will not remain open.

B. SWBT's Performance Remedy Plan Does Not Meet the Public Interest Test

The rationale behind the Commission's "self-executing remedy" requirement is to promote the swift development of local exchange competition by preventing competitors from being driven out of business by being forced to litigate operational issues with the BOC each time such issues arise. The PUC Staff, CLECs and SWBT devoted countless hours to developing and refining the performance measures and Performance Remedy Plan ("PRP") that are now embodied in SWBT's T2A. Recognizing the need for ongoing review of the performance measures and PRP, the PUC established a six-month review process that will examine whether certain measures need to be added or changed. The performance data analyzed by Telcordia and the PUC in September and October of 1999 revealed many discrepancies and inconsistencies between SWBT's reported data and CLECs' operational experiences. As shown by the Time Warner Telecom and NEXTLINK

¹⁸⁵ *Id.*

affidavits accompanying the CLEC Coalition comments, the current performance measurements are not accurately capturing their companies' problems receiving sufficient and timely interconnection trunks.¹⁸⁶ While SWBT subsequently implemented changes to the measurements and applicable penalties, they are not sufficient to ensure that the extent of the problems will be fully documented, nor do the associated self-executing penalties for noncompliance result in an adequate deterrence for the future.

Although ALTS was pleased to see that the annual cap on performance penalties was increased from \$125 million to a range of \$225 to \$289 million, it remains concerned that the limits on the penalties for individual measures will have the greatest impact on the CLECs that suffer the result of SWBT's nonparity performance. As shown by the PUC Staff report on SWBT's performance data, if the specific measures for which SWBT was out of parity had not been subject to per measurement caps during the three months analyzed by the PUC and Telcordia, the penalties payable to CLECs would have been \$5,803,600 instead of \$456,300.¹⁸⁷ The caps on specific measures, particularly the critical customer-affecting measures, serve to protect SWBT from the consequences of its failures and prevent the penalties from serving as a deterrent to future sub-par performance. For at least the first full year after SWBT obtains 271 authority, the individual measure penalty caps should be lifted for any performance measures that have detected non-parity performance during the twelve months immediately prior to the grant of 271 approval.

C. The Commission Must Adopt Stringent Anti-backsliding Measures

¹⁸⁶ See, Reeves Affidavit, pp. 14-15, and Affidavit of Lea Barron for NEXTLINK, pp. 2-5, appended to Comments of CLEC Coalition.

¹⁸⁷ PUC Project No. 16251, Evaluation of SWBT Performance Measure Data by Staff of Public Utility Commission of Texas, p. 10.

ALTS submits that prior to the grant of SWBT's Application, the Commission must adopt mechanisms to ensure that SWBT does not backslide on its obligations pursuant to section 271 of the Act. As Allegiance Telecom indicated in its *Petition for Expedited Rulemaking*,¹⁸⁸ a BOC's statutory obligation to provide each element of the competitive checklist continues even after a it has obtained in-region interLATA relief. However, as evidenced by the two year long process in Texas, compliance with key pro-competitive provisions of the Act has been slow in coming, and advances have largely resulted from pressure imposed by regulators and competitors. Therefore, although the Commissioner has dismissed the Allegiance Petition, ALTS urges that a backsliding framework be put in place prior to the grant of 271 authority to SWBT.

¹⁸⁸ *See, Allegiance Petition.* Although the Commission recently dismissed Allegiance's petition, stringent anti-backsliding measures are critical to Texas CLECs if SWBT's Application is approved.

1. The Commission has clear authority to impose anti-backsliding measures

The Commission undoubtedly has ample authority to impose safeguards to guard against backsliding. The Commission's authority is derived from several sources. First, section 271(c)(6) empowers the Commission to enforce BOC compliance with the competitive checklist and any additional commitments made by the BOCs in exchange for interLATA relief. In addition, the Act provides the Commission with additional authority to establish backsliding prevention measures pursuant to its authority over the terms and conditions of interconnection, contained in section 251. Further, as the Supreme Court affirmed, the Commission has independent rulemaking authority pursuant to sections 201(b), 303(r), and 4(i) of the Act to adopt rules and regulations to implement the Act.

The Commission's authority to implement backsliding prevention measures can be found in the Act itself. The Act specifically provides that once a BOC receives interLATA relief, the primary tool available to the Commission to ensure continued compliance with the requirements of section 271 is section 271(d)(6)(A). Section 271(d)(6)(A) provides that:

If at any time after the approval of [a section 271 application], the Commission determines that a Bell operating company has ceased to meet any of the conditions required for such approval, the Commission may, after notice and opportunity for a hearing

- (i) issue an order to such company to correct the deficiency;
- (ii) impose a penalty on such company pursuant to title V; or
- (iii) suspend or revoke such approval. . . .

The Commission shall establish procedures for the review of complaints of failures by Bell operating companies to meet conditions required for approval [of a section 271 application]. Unless the parties otherwise agree, the Commission shall act on such complaint within 90 days.¹⁸⁹

¹⁸⁹ 47 U.S.C. § 271(d)(6)(A).

The Commission has consistently recognized that, aside from its authority under section 271 of the Act, the Commission derives authority to enforce section 271 obligations from a number of statutory sources. For instance, the Commission recognized in the *Ameritech Michigan Order* that:

the Commission independently derives authority for the imposition of conditions in the section 271 context from 303(r) of the Communications Act...Because section 271 is part of the Communications Act, the Commission's authority under section 303(r) to prescribe conditions plainly extends to section 271. Moreover, as noted we do not read section 271 as containing any prohibitions on conditions but rather, find express support for conditioning approval of section 271 applications in the language of section 271(d)(6)(A).¹⁹⁰

In addition, the Commission has unambiguous statutory authority to implement anti-backsliding mechanisms and develop performance standards to gauge continued BOC compliance with section 271 pursuant to its authority under sections 201, 251, 303(r) and 4(i). The Supreme Court has specifically held, in fact, that section 201(b) of the Act provides the Commission with independent authority to implement the local competition provisions of the Act.¹⁹¹ Moreover, the Commission's broad authority to implement the interconnection provisions of the Act under sections 251(d) and 201(b) fully empowers the Commission to implement anti-backsliding standards. What's more, sections 303(r) and 4(i) of the Act empower the Commission to adopt rules and regulations to implement the Act. ALTS submits, therefore, that there can be little doubt about the existence of the Commission's statutory authority to implement anti-backsliding measures.

¹⁹⁰ *Ameritech Michigan Order*, ¶ 401.

¹⁹¹ *See, AT&T Corp. v. Iowa Util. Bd.* ("We think the grant in § 201(b) means what it says: The FCC has rulemaking authority to carry out the 'provisions of this Act,' which include §§ 251 and 252, added by the Telecommunications Act of 1996.").

2. As part of its anti-backsliding framework the Commission should establish a section 271 “rocket docket”

Section 271(d)(6)(B) directs the Commission to “establish complaint procedures for the review of complaints concerning failures by [BOCs]” to live up to section 271 obligations.¹⁹² Additionally, the Act mandates that section 271 complaints must be resolved within 90 days.¹⁹³ ALTS submits, therefore, that the Commission should promulgate rules establishing complaint procedures along with anti-backsliding measures, similar to those discussed in the Allegiance Petition.¹⁹⁴

A federal complaint procedure would be useful in determining whether a BOC compliance issue results from an isolated incident that occurred in a particular state, or is a region-wide problem, which would require intervention by this Commission for resolution. Such a federal complaint process would not in any way limit the ability of state commissions to conduct independent enforcement procedures. In developing a complaint procedure the Commission should establish a forum akin to its “rocket docket” expedited complaint process.¹⁹⁵ The purpose of the Commission’s rocket docket is to resolve interconnection and other local competition-related disputes expeditiously.¹⁹⁶ In the event the Commission approves SWBT’s application, section 271 backsliding will become a primary focus of local competition-related disputes. As the Commission has previously recognized, competitors need access to dispute resolution mechanisms

¹⁹² 47 U.S.C. § 271(d)(6)(B).

¹⁹³ *Id.*

¹⁹⁴ *See, Allegiance Petition.*

¹⁹⁵ *Implementation of the Telecommunications Act of 1996—Amendment of Rules Governing Procedures to be Followed When Formal Complaints are Filed Against Common Carriers*, Second Report and Order, 13 FCC Rcd 17018 (1998).

¹⁹⁶ *Id.*

that are flexible and do not involve lengthy and drawn out litigation. Therefore, a rocket docket-like forum should be made available to CLECs to air section 271-related complaints.

As part of the 271 complaint process, CLECs also should have the ability to petition the Commission for a declaratory ruling establishing fault in cases of service outages and similar network problems. Many CLECs are implementing an entry strategy that relies upon UNEs provided by the BOCs to provide service. Therefore, a BOC's failure to provision service correctly, or to meet circuit cutover deadlines often is attributed by the customer to the CLEC rather than to the BOC. Attribution to CLECs of fault for service outages can cripple a CLEC's reputation in a community in spite of the fact that the network outage may have been caused by the BOC. In the event the Commission makes a finding establishing that the fault for the problem lies with the ILEC, the incumbent would be required to send a letter, approved by the CLEC, to the CLEC's customer explaining the root cause of the problem and reporting the Commission's finding. A determination of fault by the Commission would go a long way toward protecting CLECs from acquiring a reputation that they do not deserve in cases where service outages are caused by other parties.

3. The Commission's Anti-backsliding Framework Should Utilize a Three-Tiered Penalty Approach

ALTS agrees with the three-tiered penalty approach suggested by the Allegiance Petition. Use of the three-tiered penalty approach would provide solid incentives to supplement the Performance Remedy Plan, which would result in BOCs' compliance with 271 obligations and commitments. The three-tiered penalty approach would work as follows.

In response to backsliding, the Commission would first mandate a reduction in rates that a BOC charges competitors for checklist items, such as resale, UNEs, and traffic termination. If price reductions fail to result in compliance within 60 days, the Commission would next suspend

section 271 authority, which would preclude a BOC from marketing or accepting new orders for in-region interLATA service. Such a “freeze” of authority would not affect existing BOC long distance customers. Finally, if neither of the aforementioned remedies results in compliance within an additional 60 days, the Commission would levy material fines on BOCs on a per-occurrence basis. By gradually increasing pressure on BOCs to comply with section 271 over a period not exceeding 120 days from the Commission’s original determination, ALTS believes that the impact of BOC noncompliance on consumers and on competition itself would be minimized.

D. The Commission Should Provide “Fresh Look” Opportunities for Consumers Immediately upon the Grant of 271 Authority to SWBT

SWBT states in its Application that it will impose termination penalties on customers, and contends that such penalties are in fact, pro-competitive.¹⁹⁷ As ALTS and KMC Telecom, Inc. have urged before,¹⁹⁸ the Commission must address the anti-competitive effect these penalties are having and eliminate this significant drag on the development of a competitive market. The Commission should exercise its authority to address this issue here and allow fresh look opportunities for both retail and wholesale customers as part of any approval of a section 271 application. As discussed above, the anti-competitive behavior in which SWBT has engaged by refusing to allow the assignment of resale contracts by itself warrants a fresh look period. There is no question that SWBT has made a concerted effort to tie up customers with long-term contracts for every service for which competition was on the horizon. SWBT not only could anticipate its competitors’ entrance into the market, its representatives could aggressively market

¹⁹⁷ SWBT Brief Supporting Application, at 45-46.

¹⁹⁸ *See, Joint Comments of the Association for Local Telecommunications Services, Net2000 Communications, Inc., and Teligent, Inc.*, filed on June 3, 1999 in CC Docket No. 99-142 (the “*Declaratory Ruling on Excessive Termination Penalties*”); *see also* KMC Telecom, Inc., *Petition for Declaratory Ruling*, filed on April 26, 1999, in CC Docket No. 99-142 .

discounts in return for long-term commitments, knowing that while CLECs were still negotiating interconnection agreements, they could not market what they could not deliver.

Retail customers are not alone in being caught in long-term contracts. Many CLECs are committed to special access facility arrangements that no longer meet their needs and could be more economically and effectively replaced by EELs, were it not for stiff penalties. Facilities-based carriers took these long-term contracts to obtain competitive rates; they could not base their business strategy on an expectation that other, superior interconnection arrangements would become available. Certainly no ILEC held out the promise of EELs as an alternative. So long as facilities-based carriers are locked in long-term commitments, ILECs' offering of EELs as a demonstration of its satisfaction of the Act's requirements is more rhetoric than substance.

SWBT is not exception. It is not required to rely on any other entities' network; it can move its traffic at will from one type of facility to another, incurring no financial penalty like early termination charges. Unless competitors are granted the same freedom, through a fresh look opportunity, CLECs' ability to reconfigure and optimize their networks will continue to be constrained by their biggest competitor. If the local market is to truly be open to competition, this constraint must be removed.

Clearly, the Commission possesses the legal authority to declare invalid contractual termination penalties, as well as to require their removal from existing state tariffs. Congress' primary purpose in passing the Act was to open all telecommunications markets and, particularly, local markets to robust competition. Indeed, the Commission consistently has stated that the Act directs the Commission to open local exchange and exchange access markets to competitive entry and promote increased competition in telecommunications markets already open to competition,

such as long distance.¹⁹⁹ To achieve these goals, “[t]he Act directs [the Commission] and . . . state [commissions] to remove not only statutory and regulatory impediments to competition, but economic and operation impediments as well.”²⁰⁰

In the past the Commission has utilized “fresh look” policies to allow customers to reexamine existing telecommunications service contracts where circumstances have dramatically changed, as when a monopoly marketplace opens to competition, or where a regulatory area is subject to significantly altered circumstances.²⁰¹ Certainly the advent of local competition for retail customers and the availability of new interconnection arrangements contribute significant change. ALTS submits that if the Commission were to grant SWBT’s Application, imposing a fresh look period on contracts would prevent excessive termination penalties from thwarting CLEC choice and allow customers to reap the benefits of local competition.²⁰²

¹⁹⁹ See, e.g., *Implementation of the Local Telecommunications Provisions in the 1996 Act*, CC Docket No. 96-98, *First Report and Order*, 11 FCC Rcd 15499, ¶ 3 (1996) (“*Local Competition First Report and Order*”).

²⁰⁰ *Id.*

²⁰¹ See, *Telecommunications Services Inside Wiring; Customer Premises Equipment; Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Cable Home Wiring*, 13 FCC Rcd 3659, ¶¶ 202, 264-5 (1997); *Expanded Interconnection with Local Telephone Company Facilities*, 7 FCC Rcd 7369, 7463-7465 (1992), recon., 8 FCC Rcd 7341, 7342-7359 (1993) (fresh look to enable customers to take advantage of new competitive opportunities under special access expanded interconnection), *vacated on other grounds and remanded for further proceedings sub nom. SWBT Tel. Cos. v. FCC*, 24 F.3d 1441 [75 RR 2d 487] (1994); *Competition in the Interstate Interexchange Marketplace*, CC Docket No. 90-132, Memorandum Opinion and Order on Reconsideration, 7 FCC Rcd 2677, 2681-82 (1992) (“fresh look” in context of 800 bundling with Interexchange offerings); *Amendment of the Commission’s Rules Relative to Allocation of the 849-851/894-896 MHz Bands*, 6 FCC Rcd 4582, 4583-84 (1991) (“fresh look” requirements imposed in context of air-ground radiotelephone service as condition of grant of Title III license).

²⁰² See, *Joint Comments of the Association for Local Telecommunications Services, Net2000 Communications, Inc., and Teligent, Inc.*, filed on June 3, 1999 in CC Docket No. 99-142 (the “*Declaratory Ruling on Excessive Termination Penalties*”); see also, *KMC Telecom, Inc., Petition for Declaratory Ruling*, filed on April 26, 1999, in CC Docket No. 99-142 .

The Commission should grant SWBT's retail and wholesale customers that have long-term contracts with stiff termination penalties the ability to opt out of those provisions, provided that the contracts were executed prior to the grant of interLATA authority for SWBT. Such a fresh look will give all customers a real opportunity to assess their available options and make decisions based on legitimate service and economic factors, rather than the cost of termination.

In sum, SWBT's entry into the in-region, interLATA market in Texas is not at this time in the public interest for several reasons. First, as previously discussed, SWBT has not met all of the competitive checklist items, as required by Section 271(c)(2)(B) of the Act. SWBT's inability to provide nondiscriminatory access to interconnection trunks, unbundled loops, and OSS compels a finding that SWBT fails to meet the public interest standards of section 271. In addition, the limited ability of the PUC to protect SWBT from anti-competitive behavior and SWBT's recent attempts to stall the entry of DSL competitors, warrant the implementation of stringent anti-backsliding mechanisms, including the improved performance measures and penalties and the elimination of termination penalties associated with long-term customer contracts.

VII. CONCLUSION

For the foregoing reasons, ALTS urges the Commission to deny SWBT's instant Application and implement the pro-competitive anti-backsliding measures advocated herein that will promote the 1996 Act's goal of widespread facilities-based competition.

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**THE ASSOCIATION FOR LOCAL
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