

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.

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.

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

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.

trunks, it generally only 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 CLEC's 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").

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 SOC's,

⁹³ Local Service Request ("LSR").

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

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

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.

2-wire and 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

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.

there is not adjacent or 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

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.*

the UNE 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

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.

circumstances that do not unduly interrupt customer service. As discussed in the Comments of 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

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.

requirements are 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

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.

create 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

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.

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

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.

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

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 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.

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.