

- 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.<sup>144</sup>

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<sup>144</sup> 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.<sup>145</sup> That option explicitly required a "fully operational" affiliate, however, something SWBT admits it does not have.<sup>146</sup> 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.<sup>147</sup> 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.<sup>148</sup>

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

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<sup>145</sup> *Bell Atlantic New York Order*, ¶ 330.

<sup>146</sup> Affidavit of Lincoln Brown for SWBT, ¶ 4.

<sup>147</sup> Affidavit of Lincoln Brown for SWBT, ¶ 4.

<sup>148</sup> *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.<sup>149</sup>

**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.<sup>150</sup> 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

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

<sup>150</sup> Award at p. 29.

unbundled access to subloops.<sup>151</sup> 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.<sup>152</sup>

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

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<sup>151</sup> *Id.*

<sup>152</sup> *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.<sup>153</sup>

SWBT contends that with regard to White Pages directory listings, “SWBT has consistently met all performance benchmarks for both timelines and accuracy.”<sup>154</sup> 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.<sup>155</sup> 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

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

<sup>154</sup> SWBT Brief Supporting Application, p. 11.

<sup>155</sup> *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.<sup>156</sup>

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.<sup>157</sup>

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.

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<sup>156</sup> 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.<sup>158</sup>

The public interest analysis is an independent element of the statutory checklist.<sup>159</sup> 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*.<sup>160</sup> Thus, the Commission could find that SWBT had satisfied each and every item on the fourteen point checklist and still not grant the Application.<sup>161</sup>

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

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

<sup>158</sup> *Ameritech Michigan Order*, ¶ 361.

<sup>159</sup> *Bell Atlantic New York Order*, ¶ 423.

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

<sup>161</sup> 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.”<sup>162</sup> 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,<sup>163</sup> 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;<sup>164</sup> (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;<sup>165</sup> (3) whether the BOC has agreed to performance monitoring which permits benchmarking and self-executing enforcement mechanisms;<sup>166</sup> (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;<sup>167</sup> (5) the existence of state or local laws that affect market entry including, but not limited to, laws that affect rights-of-way;<sup>168</sup> and (6) the existence of discriminatory or anti-competitive behavior or violation of any state or federal telecommunications law.<sup>169</sup>

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<sup>162</sup> *Ameritech Michigan Order*, ¶ 400.

<sup>163</sup> *See, First BellSouth Louisiana Order*, ¶ 361.

<sup>164</sup> *See, Ameritech Michigan Order*, ¶¶ 387, 391.

<sup>165</sup> *See, id.* ¶ 392.

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

<sup>167</sup> *See, Ameritech Michigan Order*, ¶ 395.

<sup>168</sup> *See, id.* ¶ 396.

<sup>169</sup> *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,<sup>170</sup> 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.<sup>171</sup> Only a few sentences are even given to the effect of SWBT's long distance entry on local competition.<sup>172</sup> 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.

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<sup>170</sup> *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.

<sup>171</sup> SWBT's Brief Supporting Application, pp. 47-62.

<sup>172</sup> *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 law<sup>173</sup> strips the PUC of almost all oversight of SWBT's relationship with its affiliates,<sup>174</sup> and overrides many of the competitive safeguards previously in the law.<sup>175</sup> 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;<sup>176</sup>
- 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

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<sup>173</sup> See, Tex. Utilities Code Ann. § 58.153.

<sup>174</sup> See, Tex. Utilities Code Ann. §§ 60.164, 60.165.

<sup>175</sup> See, Tex. Utilities Code Ann. §§ 58.063, 58.152.

<sup>176</sup> See, Tex. Utilities Code Ann. §§ 54.102, 60.164, 60.165.

deregulated and removed from PUC oversight at a critical time in the development of competition;<sup>177</sup>

- 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;<sup>178</sup>
- 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; and<sup>179</sup>
- 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.<sup>180</sup>
- Very basic competitive safeguards that existed in the statute were eliminated.<sup>181</sup>

Combined, all of the changes made to Texas law in the 76<sup>th</sup> 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

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<sup>177</sup> See, Tex. Utilities Code Ann. §§ 58.023, 58.051, 58.151, 58.101 - 58.104.

<sup>178</sup> See, Tex. Utilities Code Ann. §§ 58.003, 58.004, 58.063, 58.152.

<sup>179</sup> See, Tex. Utilities Code Ann. §§ 58.024, 58.063, 58.152, 58.153.

<sup>180</sup> See, Tex. Utilities Code Ann. §§ 58.152, 58.063.

<sup>181</sup> See, Tex. Utilities Code Ann. §§ 58.063, 58.152.

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.

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 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.<sup>182</sup>

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.<sup>183</sup> 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.<sup>184</sup> Beginning in July 1998, SWBT did everything it could to keep DSL issues out of its

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<sup>182</sup> Tex. Utilities Code Ann. § 60.165.

<sup>183</sup> Tex. Utilities Code Ann. § 60.165.

<sup>184</sup> See, generally Declaration of Christopher Goodpastor, supporting Comments of Covad Communications Company.

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 documents.<sup>185</sup> 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

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<sup>185</sup> *Id.*

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 affidavits accompanying the CLEC Coalition comments, the current performance measurements are not accurately capturing their companies' problems receiving sufficient and timely interconnection trunks.<sup>186</sup> 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.<sup>187</sup> 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

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

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

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**

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*,<sup>188</sup> 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.

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<sup>188</sup> *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.<sup>189</sup>

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<sup>189</sup> 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).<sup>190</sup>

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.<sup>191</sup> 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.

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<sup>190</sup> *Ameritech Michigan Order*, ¶ 401.

<sup>191</sup> *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.<sup>192</sup> Additionally, the Act mandates that section 271 complaints must be resolved within 90 days.<sup>193</sup> 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.<sup>194</sup>

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.<sup>195</sup> The purpose of the Commission’s rocket docket is to resolve interconnection and other local competition-related disputes expeditiously.<sup>196</sup> 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 that are flexible and do not involve lengthy and drawn out litigation.

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<sup>192</sup> 47 U.S.C. § 271(d)(6)(B).

<sup>193</sup> *Id.*

<sup>194</sup> *See, Allegiance Petition.*

<sup>195</sup> *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).

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

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<sup>196</sup> *Id.*

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.<sup>197</sup> As ALTS and KMC Telecom, Inc. have urged before,<sup>198</sup> 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

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<sup>197</sup> SWBT Brief Supporting Application, at 45-46.

<sup>198</sup> 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 .

could anticipate its competitors' entrance into the market, its representatives could aggressively market 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.<sup>199</sup> 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.”<sup>200</sup>

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.<sup>201</sup> 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.<sup>202</sup>

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<sup>199</sup> 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*”).

<sup>200</sup> *Id.*

<sup>201</sup> 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).

<sup>202</sup> 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.

Respectfully submitted,

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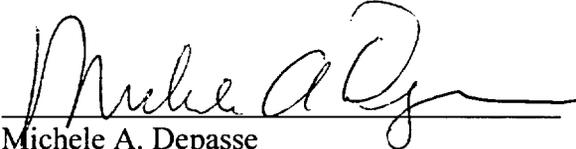
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