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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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In the Matter of)
)
Application by SBC Communications Inc.,)
Southwestern Bell Telephone Company, And)
Southwestern Bell Communications Services,)
Inc., d/b/a Southwestern Bell Long Distance)
For Provision of In-Region InterLATA)
Services in Texas)
_____)

CC Docket No. 00-4

COMMENTS OF COVAD COMMUNICATIONS COMPANY

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SUMMARY

In 1996, Congress enacted sweeping changes to the nation's telecommunications laws, opening the local Bell monopolies to competition for the first time in nearly a century. Recognizing that undoing such an entrenched monopoly would be a Herculean effort, and that monopolies do not generally welcome the advent of competition, Congress presented Bell Operating Companies with the most appealing of incentives. In the MFJ, the late Judge Greene had barred BOCs from originating interLATA traffic in their monopoly regions, thus protecting consumers against BOCs leveraging their monopoly into the interLATA market. In the 1996 Act, in order to encourage BOCs to loosen their stranglehold on competition, Congress offered the BOCs the golden opportunity to enter the interLATA market if, and only if, they had taken the steps necessary to open their local markets to competition.

What steps are necessary? There are fourteen of them, Congress concluded, and each and every one of those steps must be taken fully *before* a BOC can enter the interLATA market. Why is the Act so clear that interLATA entry is only possible after the local bottleneck is broken? Because unless and until the BOC has taken all the steps necessary to open its local monopoly to competition, premature interLATA entry is dangerous, as it takes away the only real incentive Congress gave the BOCs to comply with the market-opening provisions of the Act.

In Texas, SBC has not some of these fourteen requirements. In particular, Covad demonstrates in these comments that SBC is has not met Checklist Items (ii) and (iv), with particular regard to advanced services. In Texas, SBC—

- has not implemented nondiscriminatory OSS for advanced services, such as providing CLECs real-time access to loop makeup information that

SBC's retail personnel enjoy. These systems are required by both Texas Commission and FCC mandates;

- does not have final TELRIC rates for xDSL-capable loops, for both installation, monthly and conditioning charges;
- has submitted incomplete performance data to try and prove comppliance with Checklist Item (iv) that omits enormous number of CLEC orders;
- has implemented a discriminatory xDSL-capable loop provisioning process that causes the vast majority of Covad's orders to be late, by any meaningful definition;
- submitted an "independent third-party" test of its OSS that made no meaningful examination of its advanced services OSS (indeed, the report examined a grand total of four xDSL-capable loops and drew no conclusions as to the timeliness of delivery of those loops); and
- stalled and stonewalled Covad's entry into Texas by unlawful conduct—conduct for which the Texas Commission ultimately sanctioned SBC late last year.

The FCC should not engage in the practice of "social promotion" of SBC's long-distance request. SBC has not taken the steps it is required by law to take in order to give competitors a full and functional opportunity to offer service in Texas. By approving this application, the FCC would assist SBC's in blocking competition by validating those anticompetitive actions and ensuring that SBC has no further incentive to open its market. The FCC cannot allow that to happen.

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COMMENTS OF COVAD COMMUNICATIONS COMPANY

The Section 271 process is essential to ensure that Bell Operating Companies (“BOCs”), such as Southwestern Bell Telephone Company (“SWBT”), fully open their markets to competition in the manner envisioned by the 1996 Act and Commission implementing rules. Covad Communications Company, the nation’s largest competitive DSL service provider and a provider of interLATA data services, does not fear competition from RBOCs like SBC in these areas. What does concern Covad, however, is ensuring that SBC and its kin provide nondiscriminatory access to its network to competitive providers like Covad. As the Commission has observed in the *Advanced Wireline Services* proceeding several times,¹ nondiscriminatory access to xDSL loops, collocation and OSS are essential to fostering a competitive environment for broadband services. Indeed, only last month, the Commission reiterated the importance of

¹ *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, Memorandum Opinion and Order and Notice of Proposed Rulemaking, 13 FCC Rcd 24012 (1998); First Report and Order and Further Notice of Proposed Rulemaking, 14 FCC Rcd. 4761 (1999) (*First Advanced Wireline Services Order*); Second Report and Order, FCC 99-330 (rel. Nov. 9, 1999); Third Report and Order, FCC 99-355 (rel. Dec. 9, 1999) (*Third Advanced Wireline Services Order*).

nondiscriminatory access to unbundled xDSL-capable loops in the *Bell Atlantic New York Order*.²

Covad has more experience with regard to the ordering and installation of DSL loops from incumbent local exchange carriers (“ILECs”) than any other CLEC, having placed over 57,000 unbundled DSL loops into service nationwide.³ In particular, Covad has extensive knowledge of and operational experience with SBC’s ability to provide xDSL-capable loops and its processes.

Covad commends the hard work of the Texas Public Utilities Commission (the “Texas Commission”) in fostering an environment in Texas where broadband, DSL competition may eventually flourish. In the last year, the Texas Commission has reengineered its entire regulatory framework and interconnection policies with regard to DSL entry.

But SWBT has been dragged kicking and screaming through this process. In the last year, SWBT has been sanctioned and fined by the Texas Commission for its conduct in an interconnection arbitration with Covad and Rhythms/ACI, another national DSL service provider. SWBT continues to fight the substantive results of that arbitration at every turn. In short, SWBT cannot with a straight face rely upon the Texas Commission’s efforts to open Texas up to DSL entry while it still seeks to undermine those efforts through legal challenges and appeals.

² *Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act To Provide In-Region, InterLATA Service in the State of New York*, CC Docket No. 99-295, Memorandum Opinion and Order, FCC 99-404 (rel. Dec. 22, 1999) (*Bell Atlantic New York Order*).

³ “Covad Communications Announces Fourth Quarter and 1999 Results,” http://216/34/13.188/pr/pr_2000/012500_press.cfm.

Covad's comments in these proceedings will focus entirely upon two checklist items—Checklist Item (ii) (nondiscriminatory access to OSS, and pricing of unbundled network elements) and Checklist Item (iv) (nondiscriminatory access to unbundled loops). For both of these items, SWBT's application is premature. After a thorough examination of the record, it is clear that SWBT has chosen to "file first and promise to perform later." Granting this application—so soon after giving Bell Atlantic a "get out of jail free" card because of "unique circumstances" surrounding its DSL loop delivery—would transform the Section 271 process into a regime of "social promotion."

I. CHECKLIST ITEM (ii): SWBT'S CURRENT DSL-RELATED OSS IS DISCRIMINATORY, AND FINAL TELRIC PRICES OF DSL LOOPS IN TEXAS HAVE NOT BEEN ESTABLISHED

In considering Checklist Item (ii),⁴ the Commission has in the past focused upon two areas of critical importance to the development of competition: nondiscriminatory access to operations support systems ("OSS") and the pricing of unbundled network elements.

With regard to OSS, this application is "not ready for prime time."⁵ Because of SWBT's delaying tactics, implementation of the results of the OSS changes recently ordered by the Texas Commission in the Covad/Rhythms Arbitration has only begun and is not scheduled to be completed for a few months. As described more fully in Section

⁴ 47 U.S.C. § 271(c)(2)(B)(ii) (a BOC must provide "nondiscriminatory access to network elements in accordance with sections 251(c)(3) and 252(d)(1)" of the 1996 Act).

⁵ Covad's OSS comments are principally directed at the need to access loop makeup information on a pre-order basis (referred to by SWBT as "pre-qualification") and the DSL loop ordering process (referred to by SWBT as "loop qualification"). There are other aspects of SWBT's OSS—such as maintenance and repair systems—that are, of course, critical to the provision of advanced services. Other CLECs are apt to discuss other issues or problems with other SWBT systems. As a result, Covad's focused comments here should not be construed as a concession that SWBT's other methods, procedures and systems are nondiscriminatory.

II.B.2 below, Covad believes that the current discriminatory OSS may be skewing SWBT's performance measurements by excluding most of Covad's loop orders from examination. Therefore, not only is SWBT's DSL loop OSS discriminatory, the systems also seem to make a complete evaluation of SWBT's Application regarding Checklist Item (iv) essentially impossible.

With regard to pricing of unbundled network elements ("UNEs"), in Texas, SWBT only provides xDSL-capable loops in Texas pursuant to interim prices—SWBT has not even filed a TELRIC cost study for these unbundled network elements (UNEs) yet. Although SWBT relies upon interim prices for conditioning established in the Covad/Rhythms Arbitration Award, at the time SWBT filed its application, the interim prices established in that Award were not effective and available to CLECs.⁶

The Texas Commission has established processes to resolve both of these issues in the next several months. But rather than finish the process, SWBT decided to push this application through now, based upon its promises to satisfy these obligations eventually. Checklist compliance has always been about actual performance—not paper promises.

A. SWBT's Current DSL-Related OSS is Discriminatory

Nondiscriminatory access to OSS is a core prerequisite in the development of meaningful competition—particularly with regard to advanced services.⁷ In particular,

⁶ Arbitration Award, Petition of Rhythms Links, Inc. for Arbitration to Establish an Interconnection Agreement with Southwestern Bell Telephone Company, Docket No. 20226, Petition of DIECA Communications, Inc., d/b/a Covad Communications Company for Arbitration of Interconnection Rates, Terms, and Conditions and Related Arrangements with Southwestern Bell Telephone Company, Docket No. 20272 (Tex. P.U.C. Arb. Panel Nov. 30, 1999) ("Covad/Rhythms Arbitration Award"). A copy of the Award is attached to the Declaration of Christopher V. Goodpastor ("Goodpastor Decl.") as Exhibit CG-5.

⁷ See, e.g., *Application of BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc., for Provision of In-Region, InterLATA Services in Louisiana*, CC Docket No. 98-121, Memorandum Opinion and Order, 13 FCC Red. 20599, 20653 (1998) (*Second BellSouth Louisiana Order*); *Application by BellSouth et al. Pursuant to Section 271 of the Communications Act of*

advanced service providers like Covad require full and nondiscriminatory access to loop makeup information, in order to determine what type of DSL service that particular end-user may receive.⁸ In addition, advanced services providers require efficient flow-through and installation of their xDSL-capable loop orders in order to meet customer expectations. SWBT has not proven that it can meet these needs.⁹

SWBT's current OSS fails to provide nondiscriminatory access to advanced service providers. In particular, the Texas Commission recently found in the Covad/Rhythms Arbitration that SWBT's retail ADSL personnel have superior access to SWBT's loop makeup information. As a result, SWBT has been ordered to implement significant and substantial changes to its OSS by in the next few months to come into compliance.

Yet, in this Application, SWBT seeks the Commission's blessing for several facets of the very advanced services OSS the Texas Commission found to be discriminatory. If the Commission accepts SWBT's arguments, it would fall into a trap

1934, as amended, to Provide InterLATA Services in South Carolina, CC Docket No. 97-208, Memorandum Opinion and Order, 13 FCC Rcd 539, 547-48 (*BellSouth South Carolina Order*); *Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, To Provide In-Region, InterLATA Services in Michigan*, CC Docket No. 97-137, Memorandum Opinion and Order, 12 FCC Rcd 20543, 20613-14 (1997) (*Ameritech Michigan Order*). The Commission has traditionally discussed nondiscriminatory access to OSS as a part of Checklist Item (ii) and (xiv), even though it is also instrumental to compliance with other checklist items as well. See *Bell Atlantic New York Order* ¶ 84.

⁸ In the *First Advanced Wireline Services Order and NPRM*, the Commission stated that "[i]f new entrants are to have a meaningful opportunity to compete, they must be able to determine during the pre-ordering process as quickly and efficiently as can the incumbent, whether or not a loop is capable of supporting xDSL-based services." *First Advanced Wireline Services Order and NPRM*, 13 FCC Rcd at 24038.

⁹ SWBT relies heavily upon the Telcordia Report in its Application for this checklist item. See, e.g., Ham Affidavit. Covad discusses the insufficiency of Telcordia's review of SWBT's provisioning systems for to xDSL-capable loops in Section II.B below, in the Covad's discussion of SWBT's meager xDSL loop showing pursuant to Checklist Item (iv).

that would undermine the Texas Commission's efforts in the Covad/Rhythms Arbitration to establish a foundation for open and competitive DSL entry in the state.

1. *SWBT has not fully implemented necessary changes to its OSS to support the provision of advanced services*

The Covad/Rhythms Arbitration Award¹⁰ firmly establishes that SWBT's current methods and procedures for offering DSL-capable loops in Texas are discriminatory and orders substantial changes to those methods and procedures. The Covad/Rhythms Arbitration Award sets forth comprehensive and rigorous timetable for SWBT implementation of the necessary OSS changes that the Texas Commission feels are necessary to bring SWBT's unbundled DSL loop offerings into compliance with the Telecommunications Act of 1996.¹¹

As discussed in the attached Goodpastor Declaration, the Texas Commission's recommendation regarding SWBT's Section 271 compliance relies substantially upon the result of the Covad/Rhythms Arbitration. In particular, the Memorandum of Understanding between SWBT and the Texas Commission (the "MOU"), reached on December 16, 1999, explicitly states that SWBT will follow the results of that Arbitration (although SWBT characteristically reserved its right to appeal).¹² Covad believes that the FCC should make sure that SWBT make good on those promises and requirements *before* granting interLATA authority.

¹⁰ Attached to the Goodpastor Decl. as Exhibit CG-5.

¹¹ Covad/Rhythms Arbitration Award (Exhibit CG-5) at 110-11.

¹² Goodpastor Decl. ¶¶ 30-32. The Memorandum of Understanding is attached to the Goodpastor Decl. as Exhibit CG-8.

Despite this legal mandate and the MOU,¹³ SWBT's instant applications spends an extraordinary amount of effort extolling the virtues of its "red-yellow-green" and "theoretical loop length" DSL loop pre-qualification information that is tailored to SWBT's retail ADSL services but not CLEC flavors of DSL.¹⁴ This effort is made in spite the fact that the Texas Commission and the FCC both ruled in 1999 that these pre-qualification systems were discriminatory and insufficient to comply with the 1996 Act.

The Covad/Rhythms Arbitration Award ordered CLEC access to "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."¹⁵ In doing so, the Award firmly concluded that "competitive parity *can only be reached* with respect to loops used to provide xDSL services if CLECs are provided with *real-time access to actual loop makeup information . . .*"¹⁶ The Award also stated that SWBT's current pre-qualification and loop qualifications systems are "*not a reasonable substitute for the provision of actual loop makeup information*"¹⁷ and ordered SWBT to revise those systems. In the *UNE Remand Order*, the FCC specifically pointed to SBC's

¹³ The likelihood of SWBT's eventual requirements with these legal mandates and promises must be viewed in light of SWBT past conduct. On July 27, 1999, the Texas Arbitration Panel sanctioned SWBT for its conduct in this proceeding, including SWBT's abuse of the discovery process. The full Texas Commission later affirmed these sanctions and ordered SWBT to pay Covad and Rhythms approximately \$850,000 for these abuses. See Goodpastor Decl. ¶¶ 15-19. The Sanctions Order is attached to the Goodpastor Decl. as Exhibit CG-4.

¹⁴ See, e.g., Chapman Aff.

¹⁵ Covad/Rhythms Arbitration Award (Exhibit CG-5) at 60. See also *id.* at 65 ("SWBT must provide actual, real-time loop makeup information to CLECs rather than a pre-qualification or loop qualification process because SWBT's back office personnel have the ability to access relevant actual loop makeup information in real time through the back office databases.").

¹⁶ Covad/Rhythms Arbitration Award (Exhibit CG-5) at 74 (emphasis added).

¹⁷ Covad/Rhythms Arbitration Award (Exhibit CG-5) at 74.

“red-yellow-green” pre-qualification system and said that such a system would permit an ILEC “to discriminate against other xDSL technologies in favor of their own xDSL technology.”¹⁸ To date, SWBT has not fully implemented the changes to its OSS ordered by the Texas Commission and the FCC. As a result, the current method of offering loop makeup information by SWBT is still discriminatory.

The Covad/Rhythms Arbitration Award also ordered “that SWBT stop using its proposed spectrum management process, SFS.”¹⁹ The Award found that the SFS process “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.”²⁰ And once again, the FCC came to the same conclusion on December 9, 1999, where, in the *Third Advanced Wireline Services Order*,²¹ the FCC ordered SBC to “dismantle” its SFS process within sixty days of release of that Order.

Despite those two legal mandates, it does not appear that SWBT has dismantled its discriminatory SFS process. While the process is not being used to prevent Covad loops from being installed, it is still operating to delay provisioning of a substantial

¹⁸ *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, CC Docket No. 96-98, FCC 99-238 (rel. Nov. 5, 1999) (*UNE Remand Order*) at ¶ 428 (“Under our nondiscrimination requirement, an incumbent LEC cannot limit access to loop qualification information to such a ‘green, yellow, or red’ indicator. Instead, the incumbent LEC *must provide access to the underlying loop qualification information* contained in its engineering records, plant records, and other back office systems so that requesting carriers can make their own judgments about whether those loops are suitable for the services the requesting carriers seek to offer.”).

¹⁹ Covad/Rhythms Arbitration Award (Exhibit CG-5) at 47. *See* Goodpastor Decl. Exhibit CG-10 (Affidavit of Anjali Joshi) for a complete description of SWBT’s discriminatory binder group and spectrum management policies; *see also* Goodpastor Decl. ¶¶ 33-35; Attached Declaration of Michael Smith (“Michael Smith Decl.”) at ¶¶ 21-22; and Covad/Rhythms Arbitration Award (Exhibit CG-5) at 47.

²⁰ Covad/Rhythms Arbitration Award (Exhibit CG-5) at 47.

²¹ *Third Advanced Wireline Services Order* at ¶ 216.

number of Covad DSL loop orders in the same manner it has delayed provisioning since Covad's Texas launch in August 1999.²²

Finally, one of the specific topics of the Texas Arbitration was whether SWBT would be permitted to use its own internal (ADSL) Technical Publication guidelines to accept or reject CLEC DSL loop orders. The Texas Commission forbid SWBT from "impos[ing] its own standards for provisioning xDSL services via its own Technical Publications."²³ Yet, in this Application, SWBT Affiant Deere explicitly states that the method in which SWBT analyzes unbundled loop orders for DSL is based upon SWBT Technical Publication 76860.²⁴ SWBT's continuing reliance upon Technical Publication 76860 clearly violates the Covad/Rhythms Arbitration Award.

In summary, SWBT has not fully implemented the OSS changes explicitly ordered by the Texas Commission and the FCC to remedy significant discrimination issues regarding several critical OSS functions. The Covad/Rhythms Arbitration Award orders that SWBT change its spectrum management policies immediately and implement real-time pre-order access to loop makeup information by May 30, 2000.²⁵ Yet, instead of implementing those changes, SWBT decided to appeal the Award and file this Application while that appeal was pending. The Commission should insist that SWBT implement these necessary changes be made before considering SWBT's application any further.

²² Goodpastor Decl. ¶¶ 33-35; Michael Smith Decl. ¶ 22.

²³ Covad/Rhythms Arbitration Award (Exhibit CG-5) at 39.

²⁴ Deere Aff. ¶ 110, Attachment B.

²⁵ Covad/Rhythms Arbitration Award (Exhibit CG-5) at 110-11.

2. *The Texas Commission Found Evidence of Actual Discrimination by SWBT against Data CLECs.*

In the *Bell Atlantic New York Order*, the Commission explicitly stated that its evaluation of OSS under Checklist Item (ii) included an evaluation as to whether the BOC “provides requesting carriers *equivalent access* to the loop qualification functionality that it provides to itself.”²⁶ In the course of the Covad/Rhythms Texas Arbitration, the Panel found there to be several cases of **actual discrimination** in which SWBT retail ADSL personnel had superior access to loop makeup and other network information that CLECs did not possess.

SWBT Retail ADSL Personnel had Superior Access to Loop Makeup Information. The Texas Commission found evidence “that some SWBT employees involved with retail ADSL have access to databases containing useful loop makeup information that are not available to CLECs.”²⁷ In particular, the Arbitrators noted that SWBT’s outside plant engineers and loop assignment center personnel have access to LFACS and LEAD databases that contain loop makeup information.²⁸ To remedy this situation, the Arbitrators ordered that SWBT not assign employees to both wholesale and retail responsibilities, “nor should SWBT employees be allowed access to information that in any way may advantage its retail advanced services operations over those of its competitors.”²⁹

²⁶ *Bell Atlantic New York Order* at ¶ 140.

²⁷ Covad/Rhythms Arbitration Award (Exhibit CG-5) at 61.

²⁸ The Arbitrators noted that they were “troubled by the inconsistencies regarding the relationship between SWBT’s retail and wholesale operations, and find that the issue of nondiscriminatory access must be further addressed.” Covad/Rhythms Arbitration Award (Exhibit CG-5) at 61.

²⁹ *Id.* As discussed above, the Texas Commission also ordered SWBT to “provide actual, real-time loop makeup information to CLECs rather than a pre-qualification or loop qualification process because

Nevertheless, in the Application, SWBT made repeated claims that no such discriminatory access occurs. For instance—

SWBT Brief Supporting Application

- “SWBT provides CLECs access to the very same on-line database SBC’s retail operations use to obtain loop ‘pre-qualification’ information.” SWBT Brief Supporting Application at 42 (hereinafter “SWBT Brief”)
- “CLECs have access to the same information as SBC’s retail operations, in the same manner and within the same time frames.” SWBT Brief at 42.

Chapman Affidavit

- “CLECs and SBC Retail have the same degree of access to the pre-qualification resource” Chapman ¶ 9.
- “CLECs and SBC Retail have identical access to the pre-qualification tool.” Chapman ¶ 10.
- “The Loop qualification process for SBC Retail is substantively identical to that performed for CLECs.” Chapman ¶ 47.

Ham Affidavit

- “CLECs are able to obtain all the same information about the length of SWBT’s local DSL-capable loops that is available to SWBT’s own retail personnel through the pre-qualification process.” Ham ¶ 212.
- Enhancements to loop qualification information “is not a parity concern since SWBT is currently providing the same information for both retail and wholesale in the same manner.” Ham ¶ 213.

In the end, the FCC faces a choice: should it accept the observations of a neutral, fact-finding of the Texas Commission Arbitration Panel, which came to its conclusion after months of discovery and several days of live sworn testimony and cross-examination? Or should the FCC accept SWBT’s statements listed above, made in the context of this Application and not subject to cross-examination?

SWBT’s back office personnel have the ability to access relevant actual loop makeup information in real time through the back office databases.” *Id.* at 65.

Reserving Binder Cables for “ADSL only” Deployment. The Texas

Commission Panel also found that SWBT was reserving binder cable complements in its outside plant “for the specific technology being utilized by SWBT’s retail operations” (ADSL). Indeed, SWBT had reserved binders for ADSL in more than one hundred central offices in Texas.³⁰ The Texas Commission found that this practice “would give SWBT an unfair competitive advantage”, “does not create availability of xDSL capable loops on a nondiscriminatory basis”, and “do[es] not manage the spectrum in a competitively neutral or efficient manner.” As the result, the TPUC ordered SWBT “to release binder groups that have already been marked ‘ADSL only.’”³¹ SWBT has not shown in its Application that it has in fact released these binder groups to other forms of DSL.³²

Sharing CLEC Deployment Information with ADSL Retail Personnel. A proper and nondiscriminatory OSS would contain adequate “firewalls” that would prevent ILEC retail personnel from obtaining access to CLEC deployment information, such as collocation arrangements. SWBT does not appear to have had such firewalls in place.

In the course of the Covad/Rhythms Arbitration, the Texas Commission found disturbing evidence that “shows that SWBT has already shared with its retail ADSL personnel a list of central offices in which CLECs have collocated or those in which

³⁰ In live oral testimony before the Texas Commission Arbitration Panel, SWBT Witness Deere stated that SWBT had reserved binder groups for ADSL in “a hundred plus” wire centers “in the major metropolitan areas” of Texas. See Covad/Rhythms Arbitration Award (Exhibit CG-5) n. 374 (quoting June 4, 1999 Arbitration Transcript).

³¹ *Id.* at 49-50.

³² See Goodpastor Decl. ¶¶ 33-35.

CLECs seek to deploy services.”³³ This is a classic case of discriminatory treatment—SWBT utilized its position as supplier of collocation to CLECs like Covad in order to advantage its own retail ADSL operations. The Commission must fully investigate this discrimination by SWBT and ensure that such communications does not occur in the future, utilizing any enforcement tool necessary.

Providing ADSL Retail Personnel Discriminatory and Competitively Significant Access to Network Assignment Databases. The Texas Commission Arbitration Panel also found evidence that SWBT’s retail ADSL personnel (the “ADSL Retail Core Team”) were granted access to “network assignment databases that could easily allow SWBT’s retail operations to gain significant advantage over their competitors.”³⁴ SWBT would be able to utilize this information to tailor and market its DSL service offerings in a manner no CLEC would be able to match. The Texas Commission Panel found this conduct to be so egregious that it ordered SWBT to file a “firewall” plan within 45 calendar days with the Commission for approval in order to restrict the flow of information between SWBT’s retail and wholesale operations.³⁵ As of this writing, SWBT has not yet to file this plan, let alone implement it.

³³ *Id.* at 68-69.

³⁴ *Id.* at 70 (citing exhibits and evidence).

³⁵ *Id.*

* * *

These examples of *actual* discrimination found by the Texas Commission should give the FCC pause in reviewing this application.³⁶ The evidence is clear: SWBT has provided superior access to network and loop information to its retail ADSL personnel; it has explicitly favored its chosen ADSL technology by essentially “pre-qualifying” (that is, pre-conditioning) binders in over a hundred Texas central offices for “ADSL only”; it has violated fundamental confidentiality principles by sharing commercially-sensitive CLEC deployment and network assignment databases with its ADSL retail personnel.

3. *Summary: SWBT Must Implement a Nondiscriminatory DSL Loop OSS before interLATA Authority is Granted*

In the end, SWBT’s submission with the OSS aspect to Checklist Item (ii) depends on whether SWBT has changed the pre-qualification and loop qualification process that both the Texas Commission and the FCC have found to be discriminatory. To date, SWBT has not made all required changes—even though its own retail personnel have access to this loop makeup information in real-time and even though the Texas Commission found other evidence of actual discrimination. Until SWBT has remedied this situation of *present* and *competitively significant* discrimination, SWBT does not provide nondiscriminatory access to its OSS, and Checklist Item (ii) is not satisfied.

³⁶ See Separate Statement of Commissioner Harold Furchgott-Roth, *Bell Atlantic New York Order* (indicating that parties opposing Section 271 applications should provide instances of actual, adjudicatory findings of discrimination). Covad submits that the record and findings of the Texas Commission Arbitration Panel in the Covad/Rhythms Arbitration easily passes this muster.

B. Final TELRIC Rates for DSL Loops have not been Established

The Commission has consistently ruled that Checklist Item (ii) requires a BOC to show that its prices for interconnection and unbundled network elements are based on forward-looking, long-run incremental costs.³⁷

For the most part, SWBT's Application relies upon the rates established for UNEs in the Texas "Mega-Arbitration" to establish compliance with this checklist requirement.³⁸ However, with regard to xDSL-capable loops, SWBT relies upon the result of the Covad/Rhythms Arbitration to support its argument that its prices for xDSL-capable loops in Texas is TELRIC-based.³⁹ In that Covad/Rhythms Arbitration Award, the Texas Commission explicitly *rejected* the rates for digital xDSL loops established in the Mega-Arbitration and ordered SWBT to file a new cost study.⁴⁰ To date, SWBT has not filed that cost study. As a result, interim rates established in the Covad/Rhythms Arbitration Award will now operate for *every* xDSL-capable loop Covad orders in Texas, subject to true-up.⁴¹

In the *Bell Atlantic New York Order*, the Commission granted Bell Atlantic's 271 application on the basis of interim xDSL-loop conditioning rates.⁴² In doing so, however, the Commission stated that "it is clearly preferable to analyze a section 271 application

³⁷ See, e.g., *Bell Atlantic New York Order* at ¶ 237.

³⁸ See, generally, SWBT Smith Affidavit.

³⁹ SWBT Brief at 42-43; Auinbaugh at ¶ 144.

⁴⁰ Covad/Rhythms Arbitration Award (Exhibit CG-5) at 86.

⁴¹ *Id.* at 87-88.

⁴² Covad disagreed with that position in the New York decision, and has filed an appeal on this and other points. That appeal is currently pending before the D.C. Circuit.

on the basis of rates derived from a permanent rate proceeding.” The Commission noted that “[i]t would not be sound policy for interim rates to become a substitute for completing these significant proceedings.”⁴³

The Commission recognized that while interim rates “create uncertainty,” that condition “will be minimized if the interim rates are for a few isolated ancillary items”⁴⁴ Unfortunately, the interim rates for DSL-related elements currently in place in Texas present far more uncertainty than the interim rates that were in place in the New York. In particular, the New York interim rates related solely to xDSL-loop conditioning and OSS charges—whereas the interim rates in place in Texas include loop conditioning, DSL OSS charges, *and* the monthly recurring loop rate for all xDSL-capable loops. In short, the *entire* price regime for xDSL-capable loops in Texas is predicated upon interim rates—not “a few isolated ancillary items.”

These differences are important. Since conditioning a loop to support DSL is only necessary for some loops, the presence of interim conditioning charges in New York did not affect many of Covad’s orders. In Texas, however, Covad does not know the “final” installation and monthly charge for *every single loop that it orders*. The monthly and nonrecurring charges for *every* xDSL-capable loop could change suddenly.

The Commission must recognize the significant risk that interim rates entail for new entrants. In New York, a CLEC may be able to somewhat minimize the uncertainty caused by the interim conditioning rates. While certainly not an optimal situation, a CLEC in New York is certainly more able to control its exposure to the risk of the

⁴³ *Bell Atlantic New York Order* at ¶ 260.

⁴⁴ *Id.* at ¶ 258.

interim conditioning rate than if interim rates applied for every monthly and nonrecurring charge for every loop.⁴⁵ The latter is present in this case—in Texas, the *only* way a CLEC can minimize the risk of the broad-based interim xDSL loop rates is not to order xDSL-capable loops. That result is wholly inconsistent with the public interest and the Commission’s mandate under Section 706 of the 1996 Act to promote the competitive deployment of advanced services like DSL.

The interim rates for all digital DSL loops in Texas have a competitive effect as well. Indeed, it appears that SWBT may actually be waiving conditioning charges for its retail ADSL customers in the state (contrary to its tariff), at the same time that the rates for conditioning of CLEC loops remains uncertain.⁴⁶ The Texas Commission noted that charging CLECs conditioning charges “while excusing retail customers” would appear to “constitute a barrier to CLECs’ offering of xDSL services.”⁴⁷

One final salient fact distinguishes this Application from the situation in New York. At the time of the New York application, Bell Atlantic had actually filed cost studies for xDSL-capable loop conditioning and DSL-related OSS. While Covad and other CLECs had (and still have) significant disputes with those studies, the Bell Atlantic cost studies at least provided a tableau on which to comment.⁴⁸ In Texas, pursuant to the

⁴⁵ The Commission explicitly stated that the “limited scope of Bell Atlantic’s interim rates” were a factor in finding compliance with Checklist Item (ii). *Bell Atlantic New York Order* at ¶ 261.

⁴⁶ See Covad/Rhythms Arbitration Award (Exhibit CG-5) at 98-99 (noting that “SWBT could not testify that it has charged any SWBT retail ADSL customers the \$900 conditioning charge listed in its federal tariff” and citing the relevant portion of the transcript).

⁴⁷ *Id.* at 99. Of course, SWBT’s compliance with its federal tariff is an issue for the FCC to resolve ultimately.

⁴⁸ In addition, having a cost study on record at least provides a form of a “ceiling” for these rates.

Covad/Rhythms Arbitration Award, SWBT's cost studies are not due for several months.⁴⁹

Covad has no doubt that the Texas Commission will examine SWBT's cost studies with rigor. But nothing can change the facts—all aspects of the xDSL-capable loop pricing regime in Texas are still open to question. Instead of applying to “a few isolated ancillary items,” a DSL CLEC cannot really be sure what it must pay for *every* loop it orders in Texas, both on a nonrecurring and monthly basis. To be consistent with Commission precedent and give full effect to the nondiscriminatory, TELRIC-pricing component of Checklist Item (ii), the Commission must reject this Application.

II. CHECKLIST ITEM (iv): SWBT HAS NOT SHOWN THAT IT IS PROVIDING DSL LOOPS IN A NONDISCRIMINATORY MANNER

A. The Legal Standard of the *Bell Atlantic New York Order*

Section 271(c)(2)(B)(iv) of the Act, item (iv) of the competitive checklist, requires Bell Operating Companies to provide “[l]ocal loop transmission from the central office to the customer’s premises, unbundled from local switching or other services.”⁵⁰ As the Commission concluded in its first extensive discussion of the loop checklist item, the *Second BellSouth Louisiana 271 Order* issued in October of 1998, the loop requirement of item (iv) “is an unbundled network element that must be provided on a nondiscriminatory basis pursuant to section 251(c)(3).”⁵¹ The Commission further

⁴⁹ Pursuant to the Covad/Rhythms Arbitration Award, SWBT is to file its cost study for DSL-capable loops on or before March 1, 2000. SWBT's cost study for conditioning loops is due on March 30, 2000, and SWBT's cost study for real-time access to loop makeup OSS is due on June 30, 2000. Covad/Rhythms Arbitration Award (Exhibit CG-5) at 110-111.

⁵⁰ 47 U.S.C. § 271(c)(2)(B)(iv).

⁵¹ *Second BellSouth Louisiana 271 Order* at ¶ 185.

concluded that a BOC's Checklist Item (iv) obligation, like its section 251(c)(3) obligation, extends to the nondiscriminatory provisioning of "two-wire and four-wire analog voice-grade loops, and two-wire and four-wire loops that are conditioned to transmit the digital signals needed to provide services such as ISDN, ADSL, HDSL and DS1-level signals."⁵² Thus, back in October 1998, the Commission provided a clear interpretation of Checklist Item (iv) as including DSL loops as well as voice grade loops.

In the *Bell Atlantic New York Order*, the Commission found "unique circumstances" that excused Bell Atlantic from its obligation to prove that it was providing nondiscriminatory access to loops ordered by DSL carriers in New York.⁵³ The Commission further concluded, however, that even though it would permit "overall" loop data to substitute for Bell Atlantic's failure to demonstrate nondiscriminatory xDSL-capable loop provisioning in New York, "we do not expect to rely solely on a BOC's overall loop performance in reaching a decision on this checklist item in future applications."⁵⁴ Thus Bell Atlantic received the only "get out of jail free" card for xDSL-capable loop provisioning that the Commission intends to give.

The Commission now requires section 271 applicants to "make a separate and comprehensive evidentiary showing with respect to the provision of xDSL-capable loops."⁵⁵ SWBT is permitted to make this showing in one of two ways. First, it can offer "proof of a fully operational separate advanced services affiliate," presumably one that

⁵² *Id.* at ¶ 184.

⁵³ *Bell Atlantic New York Order* at ¶ 330.

⁵⁴ *Id.*

⁵⁵ *Id.*

has been operational for a sufficiently long period of time to actually demonstrate its nondiscriminatory behavior.⁵⁶ In the alternative, SWBT can make its loop case by “establishing by a preponderance of the evidence that it provides xDSL-capable loops to competitors in a nondiscriminatory manner.”⁵⁷ Regardless of the method of proof selected, the Commission made clear that “we do not expect the special circumstances that are present in this [New York] application to exist in future applications.” This was true, the Commission found, because “in setting forth our views on the two avenues of proof that we would find persuasive in future applications, we have now provided direction to the BOCs regarding their obligation to provide xDSL-capable loops in accordance with the requirements of the competitive checklist.”⁵⁸

Based on Covad’s experience in Texas to date, SWBT’s application is deficient under either avenue of proof. With regard to SWBT’s attempt to prove nondiscriminatory access,⁵⁹ SWBT’s falls far short. For instance, the performance data SWBT submitted in this proceeding and provided individually to Covad are wrought with errors. For example, SWBT’s FOC performance data (PM 5-17) simply pretends that more than *half* of Covad’s orders do not exist.⁶⁰ Similarly, SWBT only tracks 51.14% of

⁵⁶ *Id.*

⁵⁷ *Id.* at ¶ 333. The Commission emphasized its “strong preference” for BOC data that utilizes “unambiguous performance standards and measures” so as to avoid future disputes, as in New York, over “what performance is being measured and whether it is properly captured by particular measures.” *Id.* at ¶ 334. Specifically, the Commission concluded that it “would expect a BOC to demonstrate, preferably through the use of state or third-party verified performance data, that it provides xDSL-capable loops to competitors either in substantially the same average interval in which it provides xDSL service to its retail customers or in an interval that offers competing carriers a meaningful opportunity to compete.” *Id.*

⁵⁸ *Id.* at ¶ 336.

⁵⁹ SWBT Brief at 39-45 and accompanying portions of the Chapman, Dysart, Hamm, Deere, Brown and Auinbau Affidavits, and the January 14, 2000 *ex parte* presentation.

⁶⁰ See Attached Declaration of Matthew Wall (“Wall Decl.”) at ¶ 15.