R. These average times are calculated using the same data as is used for PM 10.1, and therefore show correspondingly significant declines in performance as volume has increased. Furthermore, SORD-related rejects represent a large (and apparently increasing) percentage of the total number of rejects sent by SWBT. The percentages for July through November were 27%, 36%, 30%, 36%, and 37%.[9]

Untimely return of rejection notices is, by itself, serious "because new entrants cannot correct errors and resubmit orders until they are notified of their rejection."[10] But where the rejection is caused by a problem that cannot be fixed by a CLEC attempting to submit electronic orders (i.e., SORD errors), the problem cannot be tolerated in the significant and increasing volumes that exist here.

The data also reveals some problems SWBT has had in returning manual firm order confirmations ("FOCs") for certain types of unbundled elements in a timely fashion. Of particular concern is SWBT's inability to provide timely FOCs for unbundled loop orders of one to 50 loops. For example, from August through

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[9] Sprint determined these percentages by comparing the total volume of rejections in each month (the sum of mechanized rejects tracked in PM 10-01 and 10-02 and the rejects listed in PM 10.1-01) with the number of rejects listed in PM 10.1-01.

[10] Application of BellSouth Corp. to Provide In-Region, InterLATA Services in South Carolina, 13 FCC Rcd. 539, ¶ 117 (1997) ("South Carolina Order").

October (SWBT did not provide data for November), SWBT returned manual FOCs for such orders on average within 27.7, 25.8 and 37.2 hours, respectively. See id., Attachment B at 24. SWBT's performance appears to be rising further and further above the 24 hour return standard that the Commission found was reasonable in New York. See New York Order ¶ 164. It should also be noted that, while unbundled switches comprise a small percentage of orders, SWBT's average return of FOCs has been extremely high for these UNEs: between 44 and 148.9 hours during the period July through October. See Dysart Aff., Attachment B at 24.

C. SWBT Fails To Provide Nondiscriminatory Access To Its Ordering Systems For Updating LIDB.

When a customer signs up for SWBT service, the SWBT service representative enters LIDB information into a service order, and that information is then electronically entered into the SWBT LIDB.[11] When a CLEC places an order with SWBT to serve a customer using unbundled switching, including the UNE-P, the CLEC must ensure that the relevant information associated with the new customer is stored in the SWBT LIDB database. But under an

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[11] See Statement Of AT&T In Support Of Commission Ruling In Order No. 50 Requiring Nondiscriminatory Access To Service Order Systems For Updating LIDB at 4 (PUCT Sept. 20, 1999) ("AT&T 9/20/99 Statement") (quoting SWBT subject matter expert as stating that "[w]hen we take a service order from the customer, then information from that service order flows down into LVAS which then creates a record in the format that LIDB can understand. There is something in between LVAS and that service order that will interpret the service order and give the information in [sic] LVAS and create the record or create the update").

interim arrangement apparently in place at the time the instant application was filed, requesting carriers must fax a request to SWBT's Data Base Administration Center where the change is entered manually on the CLEC's behalf. See Accessible Letter CLECSS99-164, Attachment 1 at 11 (Nov. 30, 1999). Denying electronic access to CLECs increases the likelihood that LIDB information, such as calling card information, screening information for collect calls and so on, for CLEC customers will be entered incorrectly and in an untimely fashion. Failure to record this information correctly would be harmful to new entrants. Problems could include, for example, incorrect billing for calling card calls and the failure to screen collect calls.

It is clear that no legal or technical barrier prevented SWBT from providing electronic access to its ordering systems for updating LIDB long before filing this application. In August 1999, the PUCT ordered SWBT "to populate the LIDB database for UNE-P orders with the information that CLECs provide on the LSR."[12] SWBT initially refused to comply with this requirement, arguing that it was only obligated to provide CLECs with unbundled access to LIDB so that CLECs could themselves add their own customer information.[13] In other words, SWBT asserted that

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[12] See Order No. 50 Approving Proposed Interconnection Agreement As Amended, PIA Matrix at Attachment 6 § 9.4 (PUCT Aug. 16, 1999).

[13] See Letter from Fannin, Vice President & General Counsel, External Affairs - Texas, SWBT, to PUCT of 8/30/99, at 3-4.

it need only allow CLECs access to unbundled signaling and associated databases, to which CLECs would be required to build separate electronic interfaces. SWBT disavowed any obligation to grant CLECs access to the ordering functionality that allowed SWBT customer representatives to deliver order requests electronically to LIDB. This is incorrect as a legal matter, since requiring CLECs to build separate interfaces to connect to individual piece parts of the SWBT ordering functionalities when SWBT itself accesses those through an integrated system is patently discriminatory and a violation of SWBT's obligation to provide nondiscriminatory access to its OSS.

It is also apparently technically feasible to establish nondiscriminatory electronic access to SWBT's LIDB ordering functions. Both Pacific Bell and Bell Atlantic seem to have implemented such access long before SWBT.[14] Moreover, after SWBT finally agreed to comply with the PUCT's ruling, it quickly established the relevant technical specifications. Unfortunately, the transition to providing electronic access is just beginning. In the meantime, CLECs have suffered the consequences of discriminatory access to a vital input.[15]

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[14] See AT&T 9/20/99 Statement at 15; 9/14/99 Open Mtg. Tr. at 34.

[15] See, e.g., Informal Complaint of Birch Telecom at 6 (PUCT Sept. 7, 1999).

D. Other Problems With SWBT's Ordering Systems

Sprint is also concerned about two other aspects of SWBT's ordering systems that appear to deny requesting carriers nondiscriminatory access to the BOC's ordering systems.

First, SWBT has been unable to relate separate service orders. Apparently this has occurred where, for example, a requesting carrier submits an order for a loop with LNP or alternatively where the CLEC submits an order for one loop with LNP and separate new loop (for which no LNP is required) for the same customer. See Accessible Letter No. CLECSS99-147 (Nov. 3, 1999). In these cases, SWBT apparently splits the requesting carrier's orders into multiple service orders within its systems and does not automatically use an RPON to keep them associated within its systems. See Telcordia Final Report at 23 (SWBT's OSS does not relate LSRs via RPONS).[16] As a result, SWBT would provision a loop one day and the LNP days later.

SWBT has established an interim procedure for addressing this problem, but it requires CLECs to submit LSRs manually. See Accessible Letter No. CLECSS99-147 (Nov. 3, 1999). Thus, the RPON problem has introduced yet another case where SWBT will need to rely on manual processing of orders. It is not clear how many total CLEC orders require manually submitted LSRs with requested

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[16] Although Telcordia recognized this problem, as with so many aspects of the Telcordia testing process, SWBT was allowed to complete the tests without fixing the RPON problem.

RPONs. But the number of affected orders would appear to be significant, given that LNP is commonly requested along with unbundled loops and with separate non-LNP loops. Obviously, where the number of such orders increases, there is a growing risk of untimely and inaccurate processing by SWBT.[17]

Second, an apparently separate set of problems arises from the inefficient and complex three step process SWBT has adopted for converting retail/resale end users to the UNE-P. Pursuant to this process, SWBT's OSS creates the following three service orders when a requesting carrier requests conversion to the UNE-P ("Conversion as Specified" in SWBT's parlance): (1) a "D" order is issued to disconnect the existing SWBT retail billing arrangement, (2) a "C" order is issued to provision the element as the CLEC has requested and to establish appropriate UNE billing (e.g., to capture access usage), and (3) an "N" order is issued to ensure that directory listings and E911 listings remain accurate. See Ham Aff. ¶ 192.

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[17] In addition, the manual RPON solution will apparently remain in place until at least April 2000, when SWBT hopes to implement "an electronic notice to the Local Service Center (LSC) on Mechanized Order Generator (MOG) eligible Local Service Requests (LSRs), when the RPON field on the LSR Form is populated." Accessible Letter No. CLECSS99-173 (Dec. 23, 1999). Even under this solution, however, the LSC representative will be required to assist in processing the service order. See id. Thus, manual processing will apparently be required for the foreseeable future for LSRs requiring RPONs.

AT&T has complained about disconnects caused by the absence of an edit to detect a mismatch between the customer address as listed in the retail billing system (CRIS) and the customer address listed in the CLEC LSR. See AT&T Comments on Telcordia's Final Report at 8 (PUCT Oct. 13, 1999). AT&T has indicated that the addresses listed on its LSRs have in fact been obtained from SWBT during the pre-order process. This raises serious concerns regarding the UNE-P wholesale processes, especially since the address mismatch has apparently caused AT&T UNE-P customers to become disconnected. See id. at 9.

E. SWBT Provides Discriminatory Access To Its Maintenance And Repair Systems.

SWBT's performance reports show a consistent failure to provide nondiscriminatory maintenance and repair services for CLECs relying on UNEs, an area largely omitted from the Telcordia tests. First, SWBT has not been able to meet its repair commitments for combinations of network elements. PM 38-05 is the most significant measure of SWBT's performance in this regard. PM 38-05 measures the percent of UNE trouble reports requiring the dispatch of repair personnel that are not met by the date established by SWBT when the trouble report is first received. See Dysart Aff., Attachment A at 66. The percentage of missed CLEC commitments is compared with the percentage of missed commitments for SWBT's own residential and business customers. See id. SWBT reports this data on a regionwide basis

only, dividing Texas into four regions. While the measurement covers only dispatch repairs, the vast majority (roughly 90%) of trouble reports for UNE combinations require dispatch. See id., Attachment B at 121-24.

SWBT's performance in this category has generally declined as the volume of trouble reports from CLECs has increased. For example, in November, the comparative percentages were (1) 8.8% missed for SWBT customers and 21.1% missed for CLEC customers in South Texas; (2) 6.9% missed for SWBT customers and 11.2% missed for CLEC customers in Central/West Texas; and (3) parity in Houston and Dallas/Ft. Worth. See id., Attachment R. SWBT has only recently begun to achieve parity in Dallas/Ft. Worth. In July, August and September, for example, SWBT missed trouble report commitments for CLEC UNE combination customers requiring dispatch approximately 5%, 7%, and 4.5% more often than for SWBT customers in Dallas/Ft. Worth. See id., Attachment B at 122. On the other hand, the November results were not an aberration for South Texas or Central/West Texas. See id., Attachment R. In both areas, SWBT has had problems providing nondiscriminatory repair service over the past several months. See id., Attachment B at 121, 124.

In addition, the quality of the repair and maintenance work SWBT provides CLEC customers using UNE combinations is inferior to the service SWBT provides its own customers. The performance data for PM 41-03 shows a general pattern of discrimination as

measured by the percentage of repeat trouble reports within 10 calendar days of a previous report for CLEC UNE-P customers as compared to SWBT customers (PM 41-03). See id., Attachment A at 70. From August through November, SWBT never achieved parity in South Texas and achieved parity only once in Houston (in October) and only once in Dallas/Ft. Worth (in November). See id., Attachment B at 141-144, Attachment R.

As Chairman Wood of the PUCT has observed, "[t]he combination of maintenance problems for UNE-P and UNE-L and for repeat trouble reports raises questions about the nondiscriminatory access to repairs and maintenance in the context of OSS." See 11/4/99 Open Mtg. Tr. at 23. Those questions must be resolved before SWBT is permitted to provide in-region interLATA service in Texas.

II. SWBT DOES NOT PROVIDE UNBUNDLED LOOPS ON A NONDISCRIMINATORY BASIS.

Section 271's checklist requires SWBT to provide competitors access to unbundled local loops on terms that are just, reasonable, and nondiscriminatory. 47 U.S.C. § 271(c)(2)(B)(ii), (iv). SWBT fails to meet this obligation on several fronts.

First, SWBT has failed to commit to the nondiscriminatory provisioning of clean copper loops, a crucial input to Sprint ION and other advanced services offerings. Second, SWBT has failed to demonstrate that it has fixed problems associated with hot cuts, which result in CLECs' customers experiencing unreasonable

rates of service outages. Third, SWBT's application does not demonstrate compliance with the Commission's Line Sharing Order, which becomes effective next week. SWBT cannot be found in compliance with Section 271 until these deficiencies have been corrected.

A. SWBT Does Not Provide Nondiscriminatory Access To Clean Copper Loops And Cannot Rely On The "Nascent Services" Exception Established In The New York Order.

Since 1996, BOCs have been required to provide competitors local loops on an unbundled basis, including "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."[18] In the Second Louisiana Order, the Commission explained that, absent technical infeasibility, a BOC must provide xDSL-capable loops, even if the BOC must first condition those loops to enable CLECs to provide services that the incumbent does not currently provide over those loops. Second Louisiana Order ¶ 187. These minimum obligations were again

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[18] Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, 11 FCC Rcd. 15499, ¶ 380 (1996) ("Local Competition Order"); see also Deployment of Wireline Services Offering Advanced Telecommunications Capability, 13 FCC Rcd. 24011, ¶ 11 (1998) ("all incumbent LECs must provide requesting telecommunications carriers with unbundled loops capable of transporting high-speed digital signals").

reiterated in the Commission's recent UNE Remand Order and Line Sharing Order.[19]

SWBT argues that it has demonstrated it is providing nondiscriminatory access to xDSL loops in a number of ways, including: (1) Telcordia's testing of SWBT's capabilities; (2) SWBT's successful provisioning of xDSL loops in a commercial setting; (3) the PUCT's findings regarding xDSL; (4) SWBT's offer of heightened performance guarantees for xDSL; (5) its establishment of a separate advanced services affiliate pursuant to the SBC/Ameritech Order;[20] and (6) its special discounts on xDSL loops, again, pursuant to the SBC/Ameritech Order. Brief in Support of Application by SWBT for Provision of In-Region, InterLATA Services in Texas at 39-40 ("Br."). As a result of these cumulative efforts, SWBT contends that it "is meeting and will meet the CLECs' new demand for xDSL-capable loops." Id.

At the same time, if these arguments fail, SWBT appears to be positioning itself to fit its record on xDSL into the "nascent services" exception outlined by the Commission in the New York

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19 See Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Dkt. No. 96-98, Third Report & Order & Fourth Further Notice of Proposed Rulemaking ¶¶ 172-73 (rel. Nov. 5, 1999) (FCC 99-2238) ("UNE Remand Order"); Line Sharing Order ¶¶ 82-87.

20 Applications of Ameritech Corp. and SBC Communications Inc. for Consent to Transfer Control, CC Dkt. No. 98-141, 1999 FCC LEXIS 5069 (FCC 99-279) (rel. Oct. 8, 1999) ("SBC/Ameritech Order").

Order. See New York Order ¶¶ 320-27. For example, while claiming a record of compliance, SWBT attempts to characterize xDSL as a new offering, noting that "CLECs did not request [xDSL]-capable loops in any significant quantity until September 1999." Br. at 39. In addition, SWBT points out that it has provisioned about 1000 xDSL loops in Texas, which is "about the same number of xDSL-specific loops in [Bell Atlantic's] New York application." Id.

SWBT's arguments should be rejected. First, it is currently not in compliance with this checklist item. Second, given its conduct during the state proceedings below, SWBT is not entitled to take advantage of the "nascent services" exception articulated in the New York Order.

1. SWBT Does Not Provide Nondiscriminatory Access To xDSL-Capable Loops.

SWBT avers that its "systems and procedures for processing xDSL-capable loop inquiries and orders . . . passed every [Telcordia] test." Id. at 40. A closer examination of Telcordia's report, which is dated September 1999 -- the same time at which SWBT claims CLECs began to order xDSL loops -- is less convincing. In fact, as with so much of that report, the underlying data collected during the carrier-to-carrier tests shows that Telcordia's general conclusions as to SWBT's performance are unreliable.

For example, Telcordia's findings relate only to ADSL and SDSL. It is not surprising that SWBT's loop qualification procedure for ADSL, the so-called "red," "yellow," "green" process, might be functionally able to process CLECs' ADSL orders, since that is the procedure that SWBT developed for its retail ADSL service. See Telcordia Final Report at 9. Even so, of the nine LSRs that were tested, only two were provisioned successfully. See id. at 77.

As for SDSL, Telcordia reports that "SWBT does not offer SDSL services; therefore, no ordering guidelines exist for this particular type of service." Id. at 79. As a result, Telcordia's test of SDSL actually consisted of a test of SWBT's ISDN ordering procedures. Id. Nor were the results of that test favorable. According to Telcordia, "[o]f the 7 orders placed that required provisioning, 2 were actually provisioned. One did not meet specifications during loop qualification. Two were rejected for incorrect CLLI code and address. The remaining two orders were not complete as of 7/15/99." Id.

No mention is made of other types of xDSL services that CLECs might want to provide. Moreover, Telcordia expressly qualified the results of its limited testing: "since only a small number of data points were [sic] made available for review, Telcordia recommend[ed] that the [PUCT] confirm this [result], either in the course of commercial operations or using additional controlled tests." Id. at 9. Commissioner Walsh subsequently

made clear that the PUCT did not view the testing as sufficient to demonstrate SWBT's compliance with Section 271: "As Telcordia noted, there is insufficient commercial volume and xDSL to measure compliance, and the test also did not measure the ability to support preordering, loop qualification, provisioning of DSL capable loops at parity with Southwestern Bell retail." 11/4/99 Open Mtg. Tr. at 26.

SWBT claims that its recent provisioning record for xDSL demonstrates parity. Yet, SWBT's support for this claim is sparse. See Br. at 40-41. This fact is not surprising once one examines the measurements designed to track SWBT's performance in this area. PM 55.1 measures the average installation interval for xDSL, with and without conditioning. In October, SWBT's average installation for xDSL loops with conditioning in the Dallas/Ft. Worth area was 17.9 days for CLECs, compared to 8.3 days for SWBT retail. See Dysart Aff., Attachment B at 274. For November, of those categories reporting more than 10 data points, SWBT's average installation interval for xDSL without conditioning in Central/West Texas was 7.2 days for CLECs compared to 5.3 days for SWBT retail, and, in Houston, 11.0 days for CLECs versus 8.2 days for SWBT. See id., Attachment R.

PM 58 also tracks xDSL performance by measuring the percentage of SWBT caused missed due dates for xDSL loops. In September, the only area with greater than 10 data points, Central/West Texas, reported that 30% of the CLECs' missed due

dates were caused by SWBT, as compared to 2.6% of missed due dates for SWBT retail. See id., Attachment B at 297. The numbers for Central/West Texas improved in October, with 3.6% SWBT caused missed due dates for CLECs versus 1.3% for SWBT. See id. However, other areas where orders for xDSL loops were being ramped up fell far short of parity in October. In Dallas/Ft. Worth, the percentage of SWBT caused missed CLEC due dates was 14.0%, versus 5.4% for SWBT, and in Houston, 13.3% for CLECs versus 2.3% for SWBT. See id. at 298-99. While SWBT's performance in Houston improved in November (5.1% for CLECs versus 4.0% for SWBT), CLECs continued to receive unequal treatment in Central/West Texas (16.9% for CLECs versus 2.3% for SWBT) and Dallas/Ft. Worth (11.7% for CLECs versus 5.7% for SWBT). See id., Attachment R.

Another performance measurement (PM 57) that tracks SWBT's average response time for loop make-up information did appear with one exception to be at parity for September, October and November. The exception occurred in Central/West Texas in October, where CLECs received loop qualification information in 3.5 days versus 3.2 for SWBT retail, a "failure" under the Texas performance criteria. See id., Attachment B at 285. It is important, however, that of the four areas for which SWBT reports data, Central/West Texas experienced the largest demand for loop

qualifications in October.[21] Moreover, the efficacy of PM 57 was questioned during the Texas proceeding. See 11/4/99 Open Mtg. Tr. at 26. In particular, the PUCT was concerned that the measurement understated the average response time. See id. at 26-27. As a result, in December, the PUCT clarified that the interval for returning loop information would begin when SWBT personnel received the request, and would end when SWBT returned the information to the CLEC. See 12/16/99 Open Mtg. Tr. at 14-15.[22] None of the data currently reported incorporates this modification to the measurement.

As the above examination of SWBT's self-reported data makes clear, even with the low volumes experienced to date, SWBT is not provisioning xDSL-capable loops to CLECs at parity.

SWBT's reliance on its recent paper promises regarding xDSL provisioning is also unpersuasive. In the state proceeding below, SWBT committed to several last minute "fixes" on xDSL provisioning in order to secure the PUCT's approval of SWBT's application, including:

- eliminating its Selective Feeder Separation ("SFS") binder group management system;

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21 CLECs requested 134 loop qualifications in Central/West Texas; 112 in Dallas/Ft. Worth; 96 in Houston; and zero in South Texas. See Dysart Aff., Attachment B at 285-88.

22 Another last minute change to the loop prequalification process required SWBT to begin accepting loop qualification requests via email or fax. 12/16/99 Open Mtg. Tr. at 14-15.

- provisioning loops that have a theoretical loop length of 12,000 feet or less without requiring the manual loop qualification process, and, for these same loops, performing any necessary conditioning free of charge;

- permitting CLECs to purchase loops on an "as is" basis, whether or not the loop meets the parameters of any particular xDSL technology;

- accepting requests for loop makeup information by email and fax; and

- eliminating any requirement that CLECs submit a Power Spectrum Density ("PSD") mask with loop qualification requests.

See Chapman Aff. ¶ 6. A review of the T2A's xDSL Attachment, however, does not reflect these latest commitments. First, at least one commitment is expressly contradicted by the xDSL Attachment's language: Section 8.1 states that SWBT may use "a selective feeder separation method to manage the spectrum." T2A, Attachment 25 § 8.1.[23] Second, Sprint has been unable to locate language in the xDSL Attachment implementing the following commitments: provisioning of loops with a theoretical length of 12,000 feet or less without a prequalification check;[24] ability of a CLEC to order a loop "as is"; elimination of the PSD

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[23] Section 8.5 does provide that SWBT will comply with "FCC and/or industry standards" pursuant to a "mutually agreeable transition plan and timeframe." T2A, Attachment 25 § 8.5. This language conflicts with Section 8.1 and in any event does not establish compliance with the Commission's absolute directive in the Line Sharing Order.

[24] Section 9.2 does prohibit SWBT from "seek[ing] retroactive true-up from CLEC for any conditioning performed under this Interim Agreement on loops under 15,000 feet." Id., § 9.2.

specification as part of the loop prequalification process;[25] or the ability of a CLEC to order loop make-up information via email or fax. See id., Attachment 25.

Moreover, the failure of the xDSL Attachment to reflect these commitments is all the more troubling since other attachments are in fact written at this level of detail. For example, the UNE Ordering and Provisioning Attachment permits CLECs to submit LSRs "via facsimile and/or telephone or other mutually agreed upon means." Id., Attachment 7 § 3.1. Yet, in spite of SWBT's promise to the PUCT, no mention of CLECs being able to submit loop qualification requests via email or facsimile appears in the xDSL Attachment. One might counter that the simple answer is for the CLEC to opt into the UNE Attachment. However, that solution is not quite as straightforward as it might appear. In order to opt into that language, a competitor has to agree to accept the UNE Attachment in its entirety -- all 68 pages, as well as four other "legitimately related" UNE attachments. See T2A, Attachment 6 § 14.8; id., Attachment 26.

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[25] Notably, there is ambiguous language in the xDSL Attachment that could be read to allow a CLEC to order a loop "as is" (to the extent that "as is" means without conditioning) or to allow a CLEC to wait until it places an order to designate a PSD mask. See id., §§ 6.2, 7.1.1, 8.2. However, the cited sections appeared in the xDSL Attachment as early as September. See Order No. 53 Approving Addition of DSL Attachment and Changes to the Texas 271 Agreement, Attachment (PUCT Sept. 22, 1999). The PUCT would not have sought additional promises from SWBT regarding these issues if the existing language were sufficient.

The xDSL Attachment is also deficient in other respects. For example, there is no mention of SWBT's legal obligation to provide loop make-up information regarding the presence of load coils, repeaters, bridged taps, and DLCs where manual processing is required.[26] Another parity issue arises because the only mechanized access to loop information that SWBT is required to provide today under the xDSL Attachment is access to its prequalification database. That database provides at most a theoretical loop length range, and is virtually useless for offerings other than ADSL.[27]

The Commission has previously held that Section 251(c)(3)'s "just" and "reasonable" requirement "encompasses more than the obligation to treat carriers equally." Local Competition Order

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[26] The attachment only requires SWBT to provide access to xDSL OSS that SWBT currently provides its retail unit (i.e., the so-called "red/yellow/green" database). See T2A, Attachment 25 § 5.1. Indeed, where manual processing is required, the only loop information that SWBT is required to provide CLECs is actual loop length. See id. § 5.3. SWBT's obligation to provide electronic access to mechanized and integrated OSS for xDSL is irrelevant to this proceeding because it takes effect at some indeterminate time in the future. Even when this obligation takes effect, SWBT does not appear to be required to provide access to information on the presence and length of bridged taps. See id. § 5.4.

[27] See Petition of Rhythms Links, Inc. for Arbitration to Establish an Interconnection Agreement with SWBT, Dkt. No. 20226, Arbitration Award at 74 (Arb. PUCT Nov. 1999) ("Rhythms Order") ("the [red/yellow/green] indicators obtained thus far from SWBT's pre-qualification and loop qualification programs are based on SWBT's ADSL service offering, and will be of only limited value to [competitors]").

¶ 315. Rather, it requires the incumbent to provide UNEs "under terms and conditions that would provide an efficient competitor with a meaningful opportunity to compete." Id. One of the principal reasons for offering service through UNEs (rather than resale) "is that carriers using solely unbundled elements . . . will have greater opportunities to offer services that are different from those offered by incumbents." Id. ¶ 332. As the Arbitrators found in the Rhythms Order, "SWBT's pre-qualification and loop qualification systems as currently described are not a reasonable substitute for pre-order access to actual loop makeup information." Rhythms Order at 62. SWBT's "red/yellow/green" prequalification database does not afford CLECs a meaningful opportunity to compete and thus does not satisfy Section 271(c)(2)(B)(ii)'s and Section 251(c)(3)'s "just" and "reasonable" requirement.[28]

Clearly, the xDSL Attachment, while containing some helpful terms for xDSL deployment, is incomplete at best, and, as of next week, will be inconsistent with federal law.[29] Section 271

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[28] See id. at 74; see also UNE Remand Order ¶ 428 ("Under our nondiscrimination requirement, an incumbent LEC can not limit access to loop qualification information to such a 'green, yellow, or red' indicator.").

[29] In addition to the fact that it gives SWBT the option of using SFS as a binder group management method, the xDSL Attachment also fails to require SWBT to provide nondiscriminatory access to the valuable loop qualification information stored in its LFACS and LEAD databases, which are available to SWBT's back office staff and must be made available to CLECs under the Act's nondiscrimination

requires that a BOC have an actual, enforceable commitment to provide xDSL at parity: "to establish that it is 'providing' a checklist item, a BOC must demonstrate that it has a concrete and specific legal obligation to furnish the item upon request pursuant to a state-approved interconnection agreement." Second Louisiana Order ¶ 54. In prior orders, the Commission has rejected BOCs' attempts to sidestep this requirement by promising to comply with a requirement in the future. For example, in Michigan, the Commission rejected just such an attempt, noting that "a BOC's promises of future performance to address particular concerns raised by commenters have no probative value in demonstrating its present compliance with the requirements of section 271." See Michigan Order ¶ 55. Indeed, the Commission has previously admonished BOCs that "[i]f, after the date of filing, the BOC concludes that additional information is necessary, or additional actions must be taken, in order to demonstrate compliance . . . then the BOC's application is premature and should be withdrawn." Id.

SWBT has failed to demonstrate that it has a "concrete and specific legal obligation," see Second Louisiana Order ¶ 54, to furnish xDSL pursuant to the terms and conditions that received the PUCT's approval during the December Open Meeting. Further, SWBT's current xDSL Attachment contains discriminatory terms and

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standard. See Rhythms Order at 60-62, 74 (citing UNE Remand Order ¶ 428).

conditions. Nor can SWBT rely upon its interim agreements with Covad and Rhythms, as these skeletal contracts do not comply with relevant state and federal law either. Accordingly, neither Ms. Chapman's promise here that carriers may adopt the xDSL Attachment, see Chapman Aff. ¶ 57, nor her promise during the proceeding below that a carrier may elect one of the interim agreements, see Chapman 11/19/99 Aff. ¶ 55,[30] is sufficient to demonstrate checklist compliance under this Commission's previously articulated standards.

As to SWBT's claims of "enhanced performance guarantees," these "guarantees" consist primarily of higher penalties for non-compliance and promises of future mechanized OSS pursuant to the SBC/Ameritech Order, which, as discussed below, cannot be used to demonstrate Section 271 compliance. As Commissioner Walsh so eloquently stated, "cash payments in lieu of parity compliance will not ensure that the markets are fully and irreversibly open

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[30] The ephemeral nature of such a commitment is illustrated by the fact that this offer is not repeated in Chapman's Affidavit accompanying this Application. Rather, Chapman states that, while SWBT has rewritten these interim agreements, it "has filed Comments seeking additional review by the Texas PUC." Chapman Aff. ¶ 58. It is Sprint's understanding that last Thursday the PUCT rejected SWBT's last minute procedural maneuvering and upheld the Rhythms Order.

Moreover, the interim agreements themselves expressly provide that "the rates, terms and conditions set forth in this Interim Agreement are not available for adoption by any other carrier (other than [Rhythms] or Covad) under Section 252(i) of the Act." Chapman 11/19/99 Aff., Exhibit G § 1.0, Exhibit H § 1.0.

. . . . The CLECs need parity, not penalties." 11/4/99 Open Mtg. Tr. at 20-21.

SWBT's final two arguments rest on its future creation of a separate advanced services subsidiary in Texas (as of February 2, 2000) and its "surrogate" line sharing discounts. As with its promises of future mechanized OSS, each argument improperly relies on SWBT's fulfillment of the conditions imposed by the Commission as a prerequisite to its approval of the SBC/Ameritech merger. See Br. at 43-45.

Even if SWBT had offered "proof of a fully operational separate advanced services affiliate," see New York Order ¶ 330 -- which it has not -- such an affiliate would not absolve SWBT of its obligation to provide nondiscriminatory access to xDSL-capable loops. As noted, SWBT's separate affiliate proposal flows directly from the SBC/Ameritech Order. Yet, the Commission made clear in that docket that the agreed-upon conditions could not be used to bootstrap the new company's compliance with Section 271. See infra p. 70. SWBT cannot launder the SBC/Ameritech separate affiliate to make it applicable to Section 271 simply by citing to the Commission's New York Order. Indeed, failure to roundly reject SWBT's attempt would allow it to make an end run around the SBC/Ameritech Order and permit the anticompetitive effects of that merger to redound to the benefit of SWBT. Such a result is inimical to competition and cannot be

tolerated. For the same reasons, SWBT cannot rely on its surrogate line sharing discounts for compliance.[31]

2. SWBT Cannot Rely On The "Nascent Services" Exception Established In The New York Order.

In New York, the Commission identified "unique factual circumstances with regard to xDSL loops." New York Order ¶ 322. For example, the record reflected "sharp disparities . . . regarding the quality of Bell Atlantic's xDSL loop provisioning" coupled with a recent surge in demand. Id. ¶¶ 325, 327. As a result, the Commission deemed it within its discretion to examine Bell Atlantic's provisioning of loops as a whole, not just xDSL loops, to assess compliance. Id. ¶ 327. The Commission, however, was careful to clarify that it did "not expect the special circumstances that are present in [the New York] application to exist in future applications." Id. ¶ 336.

As demonstrated, SWBT has not established that it provides xDSL loops at parity. On reply, SWBT will no doubt attempt to argue that CLECs only recently began to order xDSL, and that, as a result, SWBT should receive the same dispensation in Texas with regard to these "nascent services" as Bell Atlantic did in New York. In this case, however, the reason that SWBT has only recently observed an increase in CLECs' orders for xDSL loops can be directly traced to SWBT's own delay tactics during the xDSL

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[31] The limitations of surrogate line sharing as a proxy for actual line sharing are discussed infra pp. 60-61.

arbitrations. Acceptance of such an argument would thus effectively reward SWBT for successfully slow rolling its competitors' introduction of xDSL services.

In July and June 1998, Covad Communications Co. and Rhythms Links, Inc., respectively, began to negotiate interconnection agreements with SWBT that focused on xDSL.[32] Despite the fact that both Covad and Rhythms filed petitions for arbitration in December 1998, as of this filing, neither company had a finally executed and approved interconnection agreement with SWBT.[33]

The primary cause of delay in the Covad/Rhythms docket -- and, by extension, in the development of the xDSL Attachment of the T2A, which expressly incorporates the final outcome of that

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[32] See 11/4/99 Open Mtg. Tr. at 235-36; Supplemental Aff. of Geis on Behalf of Rhythms Links, Inc. in Response to the Commission's November 5, 1999 Memorandum ¶ 27 (PUCT Nov. 22, 1999) ("Geis 11/22/99 Aff.").

[33] A November 1999 Arbitration Award resolved numerous issues and directed the parties to file conforming interconnection agreements by December 30, 1999. See Rhythms Order at 100. As noted earlier, Chapman's affidavit reveals that SWBT has filed further comments in that proceeding, despite an arbitration award ordering that a conforming contract be filed with the PUCT on December 30, 1999. See supra n.30. Given SWBT's behavior in the Texas 271 docket, in which it was similarly directed to incorporate the PUCT's changes to the T2A, but instead ignored those directions and filed a non-conforming agreement, it is not clear when a final agreement will be filed, let alone approved and available for adoption by other CLECs. See Letter from Fannin, Vice President & General Counsel, External Affairs - Texas, SWBT, to PUCT of 8/30/99, at 1-13.

In contrast, SWBT negotiated an interconnection agreement with its advanced services affiliate 30 days after the affiliate was incorporated. See Geis 11/22/99 Aff. ¶ 30.