

found that double billing, which results from failure to terminate promptly the BOC's existing billing relationship, is compelling evidence that a BOC's OSS for ordering and provisioning of wholesale services is not operationally ready.<sup>532</sup> SWBT has established procedures for automatically updating its billing systems – and manual processes to attend to orders that do not update properly.<sup>533</sup> The Texas Commission concluded that SWBT has adequate billing processes in place which minimize the likelihood of double billing.<sup>534</sup> While we do not discount the potential harm of double-billing on affected customers, there is insufficient evidence of double billing in this instance to indicate that SWBT's systems process for updating its billing records is discriminatory.

193. *Loss Notification Reports.* AT&T also reports that it recently has discovered instances in which SWBT fails to provide timely “loss notification reports,” which signal competing carriers that a customer has migrated to another LEC.<sup>535</sup> AT&T explains that this failure caused it improperly to continue billing 99 customers in April 2000 who apparently had switched to back to SWBT or to another LEC. We note that AT&T is entitled to receive these loss notification reports pursuant to its interconnection agreement with SWBT, which sets out in detail the procedure by which AT&T is able to request these reports.<sup>536</sup> While we recognize that failure to provide loss notification reports may impact customers and impede a competitive carriers' ability to compete, we also recognize that AT&T does not indicate whether it has registered to receive these reports as necessary under the interconnection agreement. There is thus no basis for finding that SWBT has failed to follow the loss notification procedures contained in its interconnection agreement, or is otherwise at fault for these missing loss notification reports. Also, because no other carrier suggests that SWBT fails to provide these notices, there is nothing to suggest that this is a systemic problem. We reject AT&T's claim, then, that these circumstances warrant a finding that SWBT has failed to provide nondiscriminatory access to its OSS.

#### g. Provisioning

194. In this section we conclude that, overall, SWBT provisions competing LEC customers' orders for resale and UNE-P services in substantially the same time and manner as it provisions orders for its own retail customers.<sup>537</sup> Consistent with our approach in prior section

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<sup>532</sup> *Ameritech Michigan Order*, 13 FCC Rcd at 20618, para. 203.

<sup>533</sup> See SWBT Texas I Locus Reply Aff. at paras. 10-13; SWBT Texas I Conway Aff. at para. 55 (describing the specialized “Error Response Team” which focuses solely on clearing errors on orders that have been completed but fail to post to billing. SWBT explains that this team prioritizes its work by age of the error and bill dates.).

<sup>534</sup> Texas Commission Texas I Comments at 43.

<sup>535</sup> See AT&T Texas II Chambers/DeYoung Reply Decl. at paras. 78-82.

<sup>536</sup> See SWBT Texas I Application, App. B, Tab 60 (SWBT/AT&T Interconnection Agreement) at Att. 5, sec. 7 (loss notification reports associated with resale services) and Att. 10, sec. 7 (loss notification reports associated with UNEs).

<sup>537</sup> We discuss loop provisioning below. See section V.D., *infra*.

271 orders, we examine SWBT's provisioning processes, as well as its performance with respect to provisioning timeliness (*i.e.*, missed due dates and average installation intervals) and provisioning quality (*i.e.*, service problems experienced at the provisioning stage).<sup>538</sup> We note, however, that SWBT's electronic processes for provisioning UNE-P orders may falter when handling orders that contain address-related discrepancies that are not resolved by SWBT's front-end edits. SWBT concedes that mismatched addresses can disrupt the normal order process flow, but indicates that its process for manually catching and correcting such errors are adequate to minimize the occurrence of service outage. We note that customer-affecting problems arising from these address discrepancies appear to be rare, and conclude that these process failures, standing alone, do not warrant a finding that SWBT fails to provide nondiscriminatory access to its provisioning functions.

195. *Provisioning Processes.* Based on the evidence in the record, we conclude that SWBT demonstrates that it provides nondiscriminatory access to its provisioning processes. Specifically, we find that SWBT provides competitive LECs and its retail operations with equivalent access to information on available service installation dates.<sup>539</sup> For orders that do not require a dispatch technician to complete, SWBT asserts that it makes available the same set of standard provisioning intervals for competing carriers and its retail representatives.<sup>540</sup> "Dispatch" orders, on the other hand, are routed to SWBT's provisioning systems and assigned a technician in the same manner as SWBT retail orders requiring a technician.<sup>541</sup> We also find that SWBT's processes provide requesting carriers with the same level of confidence as its own retail operations that the due date promised to customers will be the actual due date that the BOC assigns to the order when it is processed.<sup>542</sup>

196. We conclude that SWBT provisions orders for resale "POTS" and "specials" to competitors in substantially the same time and manner that it provisions equivalent orders to itself. Specifically, SWBT provides performance data showing that it provisions resale service at parity with its own retail operations. First, SWBT demonstrates that it misses fewer competitive LEC customer appointments for installing resale POTS and special services, and provisions such service within equivalent average intervals, compared to appointments and service for its own retail customers.<sup>543</sup> Second, SWBT demonstrates that the quality of installations provided to

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<sup>538</sup> See *Bell Atlantic New York*, 15 FCC Rcd at 4058, para. 196.

<sup>539</sup> See *SWBT Texas I Ham Aff.* at para. 187.

<sup>540</sup> See *id.*

<sup>541</sup> See *id.*

<sup>542</sup> See *id.* at para. 189 (noting that SWBT changed the "Customer Desired Due Date" field on the FOC on only 3.67% of orders in October 1999).

<sup>543</sup> For timely provisioning of "Resale POTS" orders, we consider the following measurements: SWBT Aggregated Performance Data, Measure Nos. 27-01 to 27-04 ("Mean Installation Interval") (POTS – Resale) at 271-No. 27a; *id.*, Measure Nos. 29-01 to 29-04 ("Percent SWBT Caused Missed Due Dates") (POTS – Resale) at 271-No. 29-a. For timely provisioning of "Resale Specials" orders, we considered primarily the following measurements: SWBT Aggregate Performance Data, Measure Nos. 43-01 to 43-08 ("Average Installation (continued....) )

competitors' customers is very close to parity, or above parity, compared to similar work performed for its own retail customers.<sup>544</sup> We further note that the Texas Commission concludes, based on this performance data, that SWBT provisions resale services in a nondiscriminatory manner.<sup>545</sup>

197. Based on a review of corresponding performance measurements for UNE-P service, we conclude that SWBT also provisions competing LEC orders for these network combinations in the same time and manner as it provisions equivalent retail services. Specifically, the record evidence demonstrates that SWBT is meeting the service installation dates for competitive LEC customers at higher rates than for its own retail customers, and completes these competing LECs' orders, on average, in less time than it completes analogous retail orders.<sup>546</sup> SWBT's performance data also indicates that it provisions UNE-P orders at generally the same level of quality (*i.e.*, with a comparably low level of troubles reported within the first ten days after installation) as it provisions analogous retail service.<sup>547</sup> Specifically, while SWBT reported slightly more installation-related troubles associated with UNE-P orders requiring no field work than for analogous retail orders in February 2000, it reported better than

(Continued from previous page)

Interval") (Specials – Resale) at 271-No. 43a-b; *id.*, Measure Nos. 45-01 to 45-08 ("Percent SWBT Caused Missed Due Dates") (Specials – Resale) at 271-No. 45a-b. These data indicate that SWBT satisfied the parity standards in the several sub-categories (residential and business orders, POTS and specials orders, orders requiring field work and those requiring no field work) for each of the past five months (December 1999 – April 2000), with only isolated exceptions. We thus conclude that SWBT provisions competing carriers' orders for resale services, overall, in substantially the same time as its provisions equivalent retail services.

<sup>544</sup> For provisioning quality of "Resale POTS" orders, we look to SWBT performance data reflecting the number of trouble tickets submitted within the first ten days after service is provisioned. See SWBT Aggregate Performance Data, Measure Nos. 35-01 to 35-08 ("Percent Trouble Reports on N and T Orders within 10 Days" and "Percent Trouble Reports on C Orders within 10 Days") (POTS – Resale) at 271-No. 35a-b. SWBT's performance on these measurements was generally better than parity. For provisioning quality of "Retail Specials" orders, we focus on the following performance measurements: SWBT Aggregate Performance Data, Measure Nos. 46-01 to 46-08 ("Percent Trouble Reports on N, T, C Orders within 30 Days") (Specials – Resale) at 271-No. 46a-b. SWBT's performance was above parity for each type of resale specials service, with only isolated exceptions.

<sup>545</sup> Texas Commission Texas I Comments at 93-94.

<sup>546</sup> SWBT's "Percent Missed Due Dates" performance metric demonstrates that, for the last five months, SWBT has consistently met a higher percentage of installation appointments for competing carriers' resale and UNE-P orders than it has for analogous retail orders. See SWBT Aggregate Performance Data, Measure Nos. 29-05 and 29-06 ("Percent SWBT Caused Missed Due Dates") at 271-No. 29b. SWBT's performance data also indicates that it provisions competing LECs' UNE-P orders, on average, in the same or shorter period of time than it does for its own analogous services. See SWBT Aggregate Performance Data, Measure Nos. 27-05 and 27-06 ("Mean Installation Interval") at 271-No. 27b. We recognize that these "average completed interval" metrics reflect only a portion of competing LEC orders, as they exclude orders for which competing carriers request longer-than-standard completion intervals. Combined with the missed due dates metric described above, however, this measurement provides an additional indication that SWBT is provisioning UNE-P and resale service in a timely manner, when compared to its retail operations.

<sup>547</sup> See SWBT Aggregated Performance Data, Measure Nos. 35-09 to 35-12 ("Percent Trouble Reports Within 10 Days") at 271-No. 35c.

parity performance for March and April 2000.<sup>548</sup> We also note that SWBT's performance with respect to UNE-P orders requiring field work reflects an installation-related trouble rate that is very slightly higher than the analogous retail rate.<sup>549</sup> We conclude that this level of disparity is minimal, however, and does not indicate that SWBT fails to provision competing LEC orders in the same time and manner as its own.

198. *Address Discrepancies and Service Outages.* Evidence submitted by SWBT and various commenters indicates that the normal order flow may be disrupted if a UNE-P order contains an address discrepancy that is not detected during the initial editing process.<sup>550</sup> Specifically, SWBT uses a "three order process" under which it splits a carrier's LSR into three separate sub-orders, each of which performs different tasks – such as provisioning and billing functions – in SWBT's back office systems. SWBT explains that it populates one of the orders with the address submitted by the competing LEC, and takes the address for the remaining two orders from one of its internal address databases. If these addresses are not exactly consistent (and SWBT has explained scenarios where they may not be consistent),<sup>551</sup> SWBT's process for automatically relating these three service orders fails and the three orders become "disassociated."<sup>552</sup> SWBT explains that one of these disassociated orders will act as a "disconnect" order and cut off the customer's dial tone unless SWBT promptly intervenes and manually reunites the three orders.<sup>553</sup> SWBT does not dispute that the potential exists for order disassociation leading to service outage, but explains that it has implemented a manual process to monitor for disassociated orders, which enables it to manually re-associate orders and prevent outages.<sup>554</sup>

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<sup>548</sup> See *id.* at 271-No. 35c.

<sup>549</sup> Specifically, for March and April 2000, 4.01 and 5.02 percent of UNE-P orders experienced a trouble report within 10 days of installation, compared to 3.13 and 3.68 percent for analogous retail orders. See *id.*

<sup>550</sup> See Appendix B ("OSS Appendix") for a more detailed description of SWBT's provisioning process.

<sup>551</sup> An address mismatch could occur for two reasons. First, there could be a problem with the address submitted by the competing LEC that was not picked up by SWBT's up-front edits. Second, a mismatch could result from an inconsistency between SWBT's two address databases. See Appendix B.

<sup>552</sup> See *id.*; SWBT Texas I Ham Reply Aff. at para. 73.

<sup>553</sup> See *id.* (if the C and D orders have different addresses, "the two service orders will flow through all provisioning systems as independent service orders . . . . The D order will flow on Due Date and disconnect the [customer's] service.").

<sup>554</sup> See *id.*; SWBT March 10 *Ex Parte* Letter at Att. 4 (explaining that orders that become disassociated due to an address mismatch are routed to the local service center (LSC) for resolution). SWBT's minutes from a December 21, 1999 "CLEC User's Forum" suggest that SWBT planned to implement a new process to address address mismatches on January 14, 2000, under which it would create a mechanized report listing UNE-P orders that had become disassociated and check the report three times daily. See AT&T Texas I Dalton/DeYoung Reply Aff., Att. 21 (SWBT Accessible Letter No. CLEC00-002) at 3. SWBT placed a copy of this mechanized report ("an internal report currently used by SWBT to detect orders that are at risk of an outage") on the record on March 13, 2000. SWBT March 13 *Ex Parte* Letter, Att. 1.

199. We conclude, based on evidence submitted by SWBT and commenting parties, that service outages attributable to problems with the “three order process” are very rare, and thus do not warrant a finding that SWBT fails to provision UNE-P orders in substantially the same time and manner as it provisions equivalent retail services. We recognize that the Texas Commission has reviewed allegations and evidence of UNE-P outages and concluded that the occurrence of such outages is “minimal.”<sup>555</sup> We agree with the Texas Commission in this matter: evidence submitted by carriers in this proceeding indicates that, at present, service outages associated with UNE-P conversions are relatively infrequent, and thus does not lead us to a different conclusion. We recognize that one commenter alleges that 5.6 percent of UNE-P orders experience a loss of service at installation, and another claims a 2.8 percent outage rate.<sup>556</sup> SWBT disputes these figures, however, and offers evidence indicating that, for these two carriers, the occurrence of outages resulting from errors in its OSS was actually less than one percent.<sup>557</sup> While it is difficult to resolve conclusively these disputed claims, we find that SWBT’s evidence, along with the prior determination of the Texas Commission, sufficiently refutes these claims. If, however, such outages rise to a level that impedes a carrier’s opportunity to compete, we will take appropriate enforcement action under section 271(d)(6).

200. In addition, we note that several commenters raise other complaints about problems which they attribute to the three-order process. The CLEC Coalition, for example, blames imperfections in SWBT’s three-order process for other service-affecting problems such as “loss of long distance service, loss of vertical features, loss of outbound calling, double billing and inability to call certain local numbers.”<sup>558</sup> While we do not discount the impact such problems would have on customers, we find that commenters did not document some of these problems, while others appear to be infrequent. We thus conclude that these problems do not warrant a finding that SWBT fails to provide nondiscriminatory access to its provisioning

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<sup>555</sup> Texas Commission Texas I Comments at 18; *see also* CLEC Coalition Texas I Tidwell/Kettler (Birch Telecom.) Aff. at 63-70 and Att. AA at 3 (explaining to the Texas Commission in November 1999 that the “volume of loss of dial tone is fairly small”).

<sup>556</sup> *See* CompTel May 11 *Ex Parte* Letter at 1-2 (reporting service disruptions for January to April, 2000); AT&T Texas I Dalton/DeYoung Reply Decl. at para. 41 (reporting lost dial tone for August to November 1999). Birch Telecommunications filed an informal complaint with the Texas Commission in September 1999, arguing that service outages during the UNE-P conversion process were adversely affecting its ability to compete – but did not quantify the frequency of these outages. *See* CLEC Coalition Texas I Comments at 27-28.

<sup>557</sup> SWBT claims that AT&T’s figure is too high, instead suggesting that fewer than one percent of AT&T’s UNE-P conversions in December 1999 and January 2000 resulted in lost dial tone. *See* SWBT Texas II Ham Aff. at para. 31; SWBT March 24 *ex parte* Letter. SWBT further claims that, based on its own review of trouble tickets submitted by Network Intelligence, that none of the service problems identified by Network Intelligence were attributable to the three-order process: SWBT either found no problem to exist, or determined that the problem was attributable to the customer’s wiring, or SWBT’s central office or cable facilities. *See* SWBT Texas II Noland/Dysart Reply Aff. at paras. 78-83.

<sup>558</sup> *See* CLEC Coalition Texas I Tidwell/Kettler (Birch) Aff. at paras. 81-90. Birch Telecom complained of other problems relating to the UNE-P three-order process which are addressed elsewhere in this Order. *See* CLEC Coalition Texas I Tidwell/Kettler (Birch) Aff. at paras. 76-91; *see* section V.B.1.d.1.f, *supra* (addressing delays in posting to billing, double-billing and LIDB update issues).

systems and processes. Finally, several commenters, including CompTel, argue that the “three order process” is inherently discriminatory, as it unlawfully splits already-combined elements apart and puts them back together.<sup>559</sup> We disagree with this characterization of SWBT’s three-order process – SWBT does not require carriers to order or pay for the network elements separately, nor does SWBT physically separate and reassemble the network elements. SWBT has explained that the three orders simply correspond to different functions that must be completed in its back office systems.

#### **h. Maintenance & Repair**

201. We conclude that SWBT demonstrates that it provides nondiscriminatory access to maintenance and repair OSS functions. First, we find that SWBT has deployed the necessary interfaces, systems, and personnel to enable requesting carriers to access the same maintenance and repair functions that SWBT provides to itself. We then conclude that SWBT’s systems allow carriers to access those functions in substantially the same time and manner as SWBT’s retail operations. We further find that SWBT restores service to customers of competing carriers in substantially the same time and manner as it restores service to its own customers. Finally, we conclude that SWBT performs maintenance and repair work for customers of competing carriers at substantially the same level of quality that it provides to its own customers.

#### **(i) Background**

202. As part of its obligation to provide nondiscriminatory access to OSS functions, SWBT must provide requesting carriers with nondiscriminatory access to its maintenance and repair systems.<sup>560</sup> A competing carrier that provides service through resale or unbundled network elements remains dependent upon the incumbent LEC for maintenance and repair. Because SWBT performs analogous maintenance and repair functions for its retail operations, it must provide competing carriers access that enables them to perform maintenance and repair functions “in substantially the same time and manner” as SWBT provides its retail customers.<sup>561</sup> Equivalent access ensures that competing carriers can assist customers experiencing service disruptions using the same network information and diagnostic tools that are available to SWBT personnel.<sup>562</sup> Without equivalent access, a competing carrier would be placed at a significant competitive disadvantage, as its customer would perceive a problem with SWBT’s network as a problem with the competing carrier’s own network.<sup>563</sup>

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<sup>559</sup> See CompTel Texas II Comments at 3-4; Global Crossing Texas II Reply Comments at 2.

<sup>560</sup> *Bell Atlantic New York Order*, 15 FCC Rcd at 4067, para. 212; *Second BellSouth Louisiana Order*, 13 FCC Rcd at 20692; *Ameritech Michigan Order*, 12 FCC Rcd at 20613, 20660-61.

<sup>561</sup> *Bell Atlantic New York Order* at 4067, para. 212; see also *Second BellSouth Louisiana Order*, 13 FCC Rcd at 20692-93.

<sup>562</sup> *Bell Atlantic New York Order*, 15 FCC Rcd at 4067, para. 212.

<sup>563</sup> See *id.*

**(ii) Discussion**

203. *Functionality.* We conclude that SWBT offers maintenance and repair interfaces and systems that enable a requesting carrier to access all the same functions that are available to SWBT's retail representatives. SWBT provides competing carriers with several options for requesting maintenance and reporting troubles. Competing carriers may electronically access SWBT's maintenance and repair functions for UNE-Loop, UNE-Platform, and resale through the Graphical User Interface Toolbar Trouble Administration interface (Toolbar) or the application-to-application Electronic Bonding Trouble Administration interface (EBTA).<sup>564</sup> Both the EBTA and Toolbar interfaces flow directly into SWBT's back-end OSS systems and enable competing carriers to perform the same functions, in the same manner, that SWBT's retail operations perform.<sup>565</sup> SWBT also offers requesting carriers non-electronic access to its maintenance and repair functions through the SWBT Local Operations Center (LOC).<sup>566</sup> The LOC handles all competing carrier repair and maintenance requests for UNEs, resale, and interconnection.<sup>567</sup>

204. WorldCom complains that it is precluded from accessing SWBT's EBTA interface for a new customer until that customer's order has posted to SWBT's wholesale billing systems.<sup>568</sup> Without this ability, WorldCom notes that it cannot use EBTA to submit trouble tickets or perform loop tests on the day service is provisioned, and possibly for several days thereafter. WorldCom has the option of using the Toolbar interface for these installation-related trouble situations, or may call SWBT's Local Operations Center ("LOC") to report troubles in

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<sup>564</sup> SWBT Texas I Ham Aff. at para. 217; *see* SWBT Texas I Conway Aff. at paras. 66-68.

<sup>565</sup> SWBT Texas I Ham Aff. at 218, 222 and 229. The Toolbar interface enables carriers to perform the the same functions that SWBT's retail operations perform, including: (1) issue trouble reports; (2) conduct a mechanized loop test; (3) determine that status of an opened trouble report; (4) check history; (5) view a list of open trouble reports; (6) view a list of trouble reports closed within the last 120 days. *Id.* at para. 219. Although the EBTA interface provides only functions 1 to 4, this does not reflect a deficiency in SWBT's OSS. The Commission previously has determined that a BOC is not required, for the purpose of satisfying checklist item 2, to implement an application-to-application interface for maintenance and repair functions – provided it demonstrates that it provides equivalent access to its maintenance and repair functions in another manner. *See Bell Atlantic New York Order*, 15 FCC Rcd at 4068, para. 215.

<sup>566</sup> SWBT Texas I Conway Aff. at para. 65; *see* SWBT Texas I Ham Aff. at 217. The LOC is staffed by 165 employees and is available through a hotline number 24 hours a day, seven days a week. SWBT Texas I Conway Aff. at para. 15, 28, 31.

<sup>567</sup> *See* SWBT Texas I Conway Aff. at para. 65-66. Since 1996, the LOC has processed over 195,600 POTS maintenance reports in Texas and an additional 66,900 reports in the remainder of SWBT's region. *Id.* at para. 65.

<sup>568</sup> *See* WorldCom Texas II McMillon/Sivori/Lichtenberg Reply Decl. at paras. 53-56. We note that carriers raised a similar concern in the *Texas I* proceeding, explaining that SWBT's Toolbar system had the same limitation. *See, e.g., AT&T Texas I Dalton/DeYoung Decl.* at para. 200; WorldCom Texas I McMillon/Sivori Decl. at paras. 191-92. SWBT implemented a change on March 18, 2000, however, which removed this restriction on the use of Toolbar and enabled carriers to use the interface's normal functions for telephone number formatted resale and UNE-P services on or after the provisioning due date. SWBT Texas I Ham Reply Aff. at para. 111 & Attach. K (SWBT Feb. 18, 2000 Accessible Letter, No. CLECSS00-018).

such circumstances.<sup>569</sup> While reliance on these alternative means of accessing SWBT's maintenance and repair OSS undermines the efficiency and convenience of using EBTA, we conclude that these alternative processes are adequate and enable carriers that rely on EBTA to access SWBT's OSS in substantially the same time and manner as SWBT retail.<sup>570</sup> In addition, SWBT reports that, as of June 20, 2000, it has lifted this restriction on access to EBTA, thereby enabling WorldCom to submit trouble tickets on the completion date prior to posting of the order.<sup>571</sup> We expect that SWBT will implement this change for other carriers using EBTA as well.

205. *Interface Response Times.* We further conclude that SWBT's maintenance and repair interfaces and systems process trouble inquiries from competing carriers in substantially the same time and manner as SWBT processes inquiries concerning its own retail customers.<sup>572</sup> To compete effectively in the local exchange market, competing carriers must be able to diagnose and process customer trouble complaints with substantially the same speed and accuracy that SWBT diagnoses and processes complaints from its retail customers. A slower process can lead to customer perception that the competing carrier is a less efficient service provider than the BOC. SWBT has provided evidence of the transaction times for its Toolbar interfaces that indicates it responds to competing carrier requests for maintenance and repair inquiries in substantially the same time as it does for itself.<sup>573</sup> Moreover, we note that no commenter has asserted otherwise.

206. *Time to Restore.* We conclude that SWBT repairs reported troubles competing carriers in substantially the same time and manner that it repairs troubles reported by its own customers. The Commission has stressed that a BOC is obligated to repair troubles for a customer of a requesting carrier in substantially the same time that it takes to repair problems experienced by its own customers.<sup>574</sup> For example, because a reliable telephone line may be crucial for a business customer to conduct its business, the Commission has emphasized the importance of timely resolution of trouble reports from a competing carrier's business customers.<sup>575</sup>

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<sup>569</sup> *Id.* at para. 224-226; SWBT Texas I Ham Reply Aff. at para. 112.

<sup>570</sup> Indeed, SWBT's performance data indicates that carriers have been confronted with a very low number of trouble reports within ten days of provisioning, and we would expect the number of troubles occurring before an order posts to billing and triggers EBTA availability (which certainly should occur in under ten days) to be even lower. *See, e.g.*, SWBT Aggregated Performance Data, Measurement No. 35 ("Percent Trouble Reports on C Orders Within 10 Days") (UNE-P) at 271-No.35b (indicating that competing LECs received "installation related" trouble reports on less than one percent of UNE-P orders in March and April 2000).

<sup>571</sup> *See* SWBT June 23 *Ex Parte* Letter at 9.

<sup>572</sup> *See* SWBT January 21 *Ex Parte* Letter (maintenance & repair interface response times), Tab 1.

<sup>573</sup> *See id.*

<sup>574</sup> *Second BellSouth Louisiana Order*, 13 FCC Rcd at 20693, para. 147.

<sup>575</sup> *Id.*

207. We base our finding of nondiscriminatory restoration time on SWBT's performance data. SWBT's performance data for December 1999 through April 2000 indicates that, for both resale and unbundled network elements, SWBT repaired troubles reported by customers of competing carriers, on average, in substantially the same time that it repaired troubles reported by its own retail customers.<sup>576</sup> In addition to SWBT's performance with respect to average restoration intervals, we note that SWBT is able to meet a comparable number of repair commitments for competing carriers (in the "resale POTS" and "UNE-P" service categories) as for its own customers.<sup>577</sup> This level of performance is substantial evidence that SWBT responds to trouble reports and restores service in substantially the same time and manner for competing carriers as for itself. Accordingly, we find that the performance measurements provide compelling evidence that SWBT responds to competitors' trouble complaints in substantially the same time and manner that it responds to its own customers' complaints.

208. The one service category for which SWBT has not consistently performed repair functions for competing LECs and its retail operations in substantially the same time and manner is resale specials – particularly SWBT's resold Voice Grade Private Line service and ISDN products.<sup>578</sup> SWBT's performance data indicates that, for these two services, SWBT generally has taken two or three hours longer to perform repairs for competing LEC customers than for its own customers.<sup>579</sup> In this instance, however, we conclude that this difference in repair time is not

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<sup>576</sup> For resale POTS, SWBT took less time to repair end user troubles reported by its competitors than those involving its own retail customers for virtually all disaggregated sub-categories—for business and residential customers, for "dispatch" and "nondispatch" repair jobs, and for troubles "affecting service" and those taking a customer "out of service." SWBT Aggregated Performance Data, Measurement No. 39 ("Receipt to Clear Duration") at 271-No. 39a-39b. The only exceptions were SWBT's performance in February and April, in which it reported slightly longer-than-parity intervals to resolve business customers' "affecting service" troubles that did not require dispatch. *Id.* at 271-No. 39a. We conclude that these exceptions, particularly when viewed in the context of the related metrics that reflect parity performance, do not reflect a systemic problem with SWBT's OSS. Similarly, for UNE-P, SWBT reports shorter repair intervals for its competitors' customers than for its own retail customers in every sub-category during this same time period. *See* SWBT Aggregated Performance Data, Measurement No. 39 ("Receipt to Clear Duration") at 271-No. 39c.

<sup>577</sup> For the months of December 1999 through April 2000, SWBT met substantially the same percentage of repair commitments for troubles on competing LECs' resold and UNE-P lines as it did for comparable retail repair commitments. *See* SWBT Aggregated Performance Data, Measurement No. 38 ("% Missed Repair Commitments") at 271-No. 38a-b. The only exceptions occurred in April 2000, with respect to business POTS troubles (no dispatch) and UNE-P troubles (no dispatch). Because SWBT has reported satisfactory performance for the preceding four months in these two areas, however, we do not conclude that this April performance represents a systemic problem.

<sup>578</sup> SWBT has achieved parity with respect to VGPL troubles for only one of the last five months and reported that, in March 2000, it took an average of 12 hours longer to repair or restore competing LECs' VGPL troubles than for its own customers. SWBT Aggregated Performance Data, Measurement No. 52 ("Mean Time to Restore") at 271-No. 52a. Similarly, SWBT achieved parity with respect to ISDN (BRI) troubles for only one of the last five months and reported that, in March 2000, it took an average of almost 14 hours longer to repair or restore competing LECs' ISDN troubles than for its own customers. *Id.* at 271-No. 52b.

<sup>579</sup> Calculations using SWBT's reported performance data indicates that, for the last five months other than March 2000, the parity gap averaged 2.5 hours for Measurement 52-01, and 3.0 hours for Measurement 52-06.

competitively significant because it is so slight. In addition, we view these two performance measurements in the context of SWBT's strong overall maintenance and repair performance for resale services (described above). We thus conclude that SWBT's performance with respect to these two service offerings does not indicate that SWBT fails to repair troubles in substantially the same time and manner for retail and wholesale customers.

209. *Quality of Work Performed.* We also find that SWBT demonstrates that it performs maintenance and repair work for customers of competing carriers at the same level of quality as it performs for its retail customers. A competing carrier's customer may become dissatisfied if the customer experiences frequent service problems, especially repeated troubles. In determining the quality of maintenance and repair work performed by SWBT for competing carriers, we examine the rate of trouble reported by customers of competing carriers as compared with SWBT's own retail customers, as well as the rate of repeat reports of trouble. SWBT's performance data reveals that competing carriers' customers generally reported the same or lower rate of troubles, for both resold services and UNE-P, as SWBT's retail customers.<sup>580</sup> Similarly, performance data on the rate of *repeat* trouble reports submitted by competing carriers are generally lower than for SWBT's retail customers.<sup>581</sup> Based on the foregoing, we conclude that SWBT provides nondiscriminatory access to its maintenance and repair functions.

#### i. Billing

210. We conclude that SWBT provides nondiscriminatory access to its billing functions, based on an assessment of its billing processes and its Texas performance data. Competing carriers need access to billing information to provide accurate and timely bills to their customers.<sup>582</sup> SWBT is obligated to provide competing carriers with complete and accurate reports on the service usage of competing carriers' customers in substantially the same time and manner that SWBT provides such information to itself. To do so, SWBT provides competing carriers with billing information through the Usage Extract process and carrier bills.<sup>583</sup> The

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<sup>580</sup> See SWBT Aggregated Performance Data, Measurement No. 37 ("Trouble Report Rate") (Resale POTS and UNE-P) at 271-No.37, and Measurement No. 54 ("Failure Frequency") (Resale Specials) at 271-No. 54a-b. In only a handful on instances did SWBT report a higher trouble rate for competitors than for its retail operations: Residence POTS (February 2000), UNE-P (December 1999), resold DSL (December 1999) and UNE-P ISDN (April 2000). *Id.* We do not find these scattered discrepancies to be competitively significant for this metric in this instance.

<sup>581</sup> See SWBT Aggregated Performance Data, Measurement No. 41 ("Percent Repeat Reports") (Resale POTS and UNE-P) at 271-No. 41, and Measurement No. 53 ("Repeat Reports") (Resale Specials) at 271-No. 53a-b. These performance data reveal a statistically-significant disparity in only two instances: a higher number of repeat reports for competitive LECs than for its retail operations for UNE-P in December 1999, and for resold DS1 service in January 2000. We do not find that these results, particularly when viewed against the above-parity performance for the other months, indicate a competitively-significant disparity.

<sup>582</sup> *Bell Atlantic New York Order*, 15 FCC Rcd at 4075, para. 226; *Second BellSouth Louisiana Order*, 13 FCC Rcd at 20698, paras. 158-160.

<sup>583</sup> See SWBT Texas I Locus Aff. at paras. 10-11.

Usage Extract itemizes usage records for competing carrier customers, while carrier bills serve as a monthly invoice that incorporates charges for all of the products and services provided to a competing carrier by SWBT. Similar mechanisms are used to provide billing information to SWBT's retail operations.<sup>584</sup>

211. We find that the performance standards and measurements established by the Texas Commission and developed in conjunction with SWBT and competing carriers are appropriate measures of SWBT's ability to provide competing carriers with usage data in substantially the same time and manner that SWBT provides such information to itself.<sup>585</sup> SWBT's performance data indicate that, during the period from December 1999 to April 2000, SWBT's actual commercial performance consistently satisfied these standards for usage data timeliness and accuracy.<sup>586</sup> The one exception occurred in February 2000, when SWBT returned only 91.3 percent of daily usage feed records within six days, falling short of the 95 percent standard.<sup>587</sup> SWBT explains that its performance in this month was affected by the one-time recovery and return of "missing records" from September, October and November 1999.<sup>588</sup> We recognize that lost records, and even late records, can cause direct financial harm to competing carriers. In this instance, however, we note that SWBT claims to have fixed the underlying problem,<sup>589</sup> and further note that carriers do not dispute that the problem has been fixed. Based on these factors, and because SWBT's performance was satisfactory for the two preceding and two subsequent months, we conclude that SWBT does not discriminate in the provision of usage feeds to competing carriers.

212. Although several commenters complain that SWBT's performance with respect to wholesale bills is inadequate, the record does not indicate that SWBT's performance in this area deprives carriers a reasonable opportunity to compete. As noted by the National ALEC Association and other commenters, we recognize that SWBT has failed to satisfy the standard for timeliness of wholesale bills sent to resellers for three of the last five months.<sup>590</sup> SWBT offers a

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<sup>584</sup> See *id.* at paras. 6 and 9.

<sup>585</sup> Specifically, the standard adopted by the Texas Commission requires that SWBT transmit 95 percent of its Daily Usage Feeds for resale and UNEs to competing carriers within six business days after creation, and 95 percent of its wholesale bills within six work days of the bill date. SWBT Texas I Dysart Decl. at para. 510 and Att. A at A-30 and A-31. The Texas Commission also established standards regarding the percent of usage records transmitted correctly (95% correct).

<sup>586</sup> See SWBT Aggregated Performance Data, Measurement No. 14 ("Billing Accuracy"), Measurement No. 16 ("Percent of Usage Records Transmitted Correctly") and Measurement No. 19 ("Daily Usage Feed Timeliness") at 271-No. 14, 271-No. 15/16/17, and 271-No. 18/19/20.

<sup>587</sup> See *id.*, Measurement No. 19 at 271-No. 18/19/20; see also AT&T Texas II Chambers/DeYoung Aff. at para. 133.

<sup>588</sup> See SWBT Texas II McLaughlin Reply Aff. at paras. 5-7.

<sup>589</sup> See *id.*

<sup>590</sup> See National ALEC Association / Prepaid Communications Association Texas I Comments at 6; AT&T Texas II Chambers/DeYoung Reply Decl. at paras. 134-135. For the months of December 1999 to April 2000, SWBT (continued....)

separate explanations for each failure, suggesting that unique one-time occurrences caused the disparate results, and that the incident in March also delayed SWBT's own retail bills.<sup>591</sup> Commenters have not disputed SWBT's explanations, and we recognize that SWBT reported 100 percent on-time performance for February and April 2000. AT&T further complains that SWBT does not report whether it provides timely "wholesale bills" for its UNE-P orders.<sup>592</sup> Neither AT&T, nor any other competing LEC (other than the resellers discussed above) suggests that it actually receives such bills late or has been harmed by late bills. While we do not minimize the importance to carriers of receiving wholesale bills in a timely manner, the record does not reflect that carriers, overall, are not receiving wholesale bills in a timely manner. We thus conclude that SWBT does not discriminate against competing carriers in the provision of wholesale bills.

## 2. UNE Combinations and Other Issues

213. In this section, we conclude that SWBT provides nondiscriminatory access to combinations of unbundled network elements. We also reject allegations that SWBT imposes unreasonable and discriminatory restrictions on certain types of combinations. Finally, we reject allegations that SWBT places restrictions on intellectual property associated with UNEs that contravene its obligations under the Act.

### a. Background

214. In order to comply with the requirements of checklist item 2, a BOC must show that it is offering "[n]ondiscriminatory access to network elements in accordance with the requirements of section 251(c)(3) . . . ."<sup>593</sup> Section 251(c)(3) requires an incumbent LEC to "provide, to any requesting telecommunications carrier . . . nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms and conditions that are just, reasonable, and nondiscriminatory . . . ."<sup>594</sup> Section 251(c)(3) of the Act also

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returned 76.3, 92.2, 100, 65.7 and 100 percent of mechanized carrier bills (resale carriers only) within six days of the end of the bill cycle. SWBT Aggregated Performance Data, Measurement No. 18 ("Billing Timeliness") at 271-No. 15/18.

<sup>591</sup> See SWBT March 15 *Ex Parte* Letter (explaining December 1999 and January 2000 performance); SWBT Texas II McLaughlin Reply Aff. at para. 9.

<sup>592</sup> SWBT's Measure 18 – "Billing Timeliness (Wholesale Bill)" – covers only resale carriers receiving bills electronically (*i.e.*, it covers only those wholesale bills processed through the CRIS system and supplied to competing carriers via EDI). SWBT Application, App. C, Tab 1815 at 59. Although this document suggests that "[a] separate measure is produced" for carriers ordering UNEs and UNE-P, *see id.*, the record does not reflect that such a measure exists. The Texas Commission did not address the issue of whether carriers are receiving timely wholesale bills in its Comments in this proceeding. See Texas Commission Texas I Comments at 42-45 (discussing other aspects of SWBT's billing functions and performance). We note that Telcordia's conclusion that the "majority" of paper and mechanized bills were timely is too vague to merit any weight. Telcordia Final Report at 8; *see also id.* at 112 ("mechanized and paper bills were generally sent/transmitted in a timely manner").

<sup>593</sup> 47 U.S.C. § 271(c)(2)(B)(ii).

<sup>594</sup> 47 U.S.C. § 251(c)(3).

requires incumbent LECs to provide unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide a telecommunications service.<sup>595</sup>

215. In the *Ameritech Michigan Order*, the Commission emphasized that the ability of requesting carriers to use unbundled network elements, as well as combinations of unbundled network elements, is integral to achieving Congress' objective of promoting competition in local telecommunications markets.<sup>596</sup> Using combinations of unbundled network elements provides a competitor with the incentive and ability to package and market services in ways that differ from the BOCs' existing service offerings in order to compete in the local telecommunications market.<sup>597</sup> Moreover, combining the incumbent's unbundled network elements with their own facilities encourages facilities-based competition and allows competing providers to provide a wide array of competitive choices.<sup>598</sup> Because the use of combinations of unbundled network elements is an important strategy for entry into the local telecommunications market, as well as an obligation under the requirements of section 271, we examine section 271 applications to determine whether competitive carriers are able to combine network elements as required by the Act and the Commission's regulations.<sup>599</sup>

**b. Discussion**

**(i) Combinations of Unbundled Network Elements**

216. Based on the evidence in the record, SWBT demonstrates that it provides requesting telecommunications carriers with nondiscriminatory access to unbundled network elements (UNEs) at any technically feasible point. We also conclude that SWBT provides access to UNEs in a manner that allows requesting carriers to combine those elements, and that SWBT provides access to preexisting combinations of network elements. We base our conclusion on evidence of actual commercial usage, and also on SWBT's legal obligation to provide such access as established in the T2A.

217. The record indicates that SWBT, as required by the Texas Commission, provides a variety of methods that allow competitive carriers to combine unbundled network elements. For example, in addition to the standard physical and virtual collocation arrangements, SWBT provides alternative collocation arrangements such as shared collocation cages, common cage, and cageless collocation arrangements.<sup>600</sup> Where space for physical collocation is not available,

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<sup>595</sup> *Id.*

<sup>596</sup> *Ameritech Michigan Order*, 12 FCC Rcd at 20718-19; *BellSouth South Carolina Order*, 13 FCC Rcd at 646.

<sup>597</sup> *BellSouth South Carolina Order*, 13 FCC Rcd at 646. See also *Local Competition First Report and Order*, 11 FCC Rcd at 15666-68.

<sup>598</sup> *Bell Atlantic New York Order* at para. 230.

<sup>599</sup> *Id.*

<sup>600</sup> SWBT Texas I Application at 38; SWBT Texas I Deere Aff. at para. 164; SBC Texas I Application App. A-3, Vol. 1, Tab I, Affidavit of Michael C. Auinbauh at paras. 40, 95-97 (SWBT Texas I Auinbauh Aff.); Texas 271 (continued....)

SWBT also permits competing LECs to collocate their equipment in adjacent controlled environmental vaults or huts. Moreover, competitive LECs may request other technically feasible methods of combining UNEs that are consistent with the provisions of the 1996 Act and other governing statutes and decisions.<sup>601</sup> For example, SWBT will provide interested competitive LECs access to a secured frame room (or cabinet, where space constraints require) that is set aside for accomplishing the necessary connections.<sup>602</sup>

218. The record also indicates that SWBT provides access to combinations of network elements in compliance with our UNE rules.<sup>603</sup> SWBT has a legal obligation, under certain existing interconnection agreements and the T2A to provide access to preassembled combinations of network elements, including the loop-switch port platform combination (known as the UNE platform or UNE-P) and the Enhanced Extended Loop (EEL), a combination of loop and transport facilities.<sup>604</sup>

219. We disagree with arguments of several competing carriers that SWBT's ordering process for UNE-P is *per se* discriminatory and violates rule 315(b)'s prohibition against

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Agreement Attach. 6. The terms and conditions for access to unbundled network elements through physical collocation arrangements are set forth in the T2A, which was approved by the Texas Commission. SWBT Texas I Application at 39; SWBT Texas I Deere Aff. at paras. 151-163. SWBT has provided 655 physical and 40 virtual collocation arrangements to requesting carriers. It has 683 physical and 158 virtual arrangements still pending. SWBT Texas I Deere Aff. Attach. E. Texas 271 Agreement Attach. 6, § 2.4. Competing carriers can obtain tariffed collocation pursuant to FCC Tariff No. 73, through SWBT's Texas Collocation Tariffs, or by negotiating the terms and conditions for collocation in their interconnection agreements. SWBT Texas I Auinbau Aff. at paras. 40-79; 95-97 and Attachments C, D, E.

<sup>601</sup> SWBT Texas I Application at 39; SWBT Texas I Deere Aff. at 80-84; SWBT Texas I Auinbau Aff. at para. 66; Texas 271 Agreement Attach. 6, § 2.22.

<sup>602</sup> SWBT Texas I Auinbau Aff. at paras. 40, 64, 95-97. Collocation is not required in order to use this option for combining network elements. Texas Commission Texas I Evaluation at 24. Furthermore, when competitors order UNEs for combining at the secured frame or cabinet, SWBT is required to cross-connect those elements to the frame or cabinet at no additional charge. *Id.* at 24-25.

<sup>603</sup> See SWBT Texas I Auinbau Aff. at para. 86.

<sup>604</sup> SWBT Texas I Auinbau Aff. at paras. 87-93; Texas 271 Agreement Attach. 6, §§ 14.2 - 14.4, 14.7. In addition, under the terms of the Texas 271 Agreement, SWBT will unbundle local loops with unbundled local switch ports for competitive LECs to provide service to business customers until at least October 13, 2001 using elements that are not currently combined. SWBT Texas I Application at 35 ("Texas 271 Agreement obligates SWBT to assemble previously uncombined network elements for [competitive LECs] . . ."); SWBT Texas I Auinbau Aff. at paras. 88, 91-94; Texas 271 Agreement Attach. 6, §§ 2.4, 14.7; SWBT/AT&T Agreement Attach. 6, § 2.4. After October 13, 2001, in those SWBT central offices where there are four or more competitive LECs collocated and where SWBT has provided unbundled network elements, SWBT may elect not to combine unbundled network elements for a competitive LEC's business customers when the same UNEs are not already combined in that central office. If SWBT makes such an election, it will provide the requesting carrier with access to a secured frame where the competitive LEC can perform its own combining of those elements. SWBT will provide new combinations of unbundled local loop and switching not currently interconnected and functional in SWBT's network for the competitive LEC to provide service to residential customers through the full term of the Texas 271 Agreement.

separating individual network elements that are already combined.<sup>605</sup> These parties assert that rather than migrating pre-existing combinations of elements “as is,” SWBT’s ordering process functionally disconnects the existing service configuration in the switch and replaces it with a new configuration established by the competitive LEC’s local service request. According to these parties, SWBT’s “three-order” process results in service outages and disruptions for their customers, negatively impacting the competitive carriers’ ability to compete in the local market.<sup>606</sup>

220. Rule 315(b) forbids an incumbent LEC from separating network elements that are already combined to provide a service.<sup>607</sup> SWBT is not separating network elements in this context. Instead, SWBT engages in a billing software change in order to establish service on behalf of a competitive LEC. In particular, for SWBT to migrate a customer to a requesting carrier using the UNE platform, it must enter a software change that instructs its systems that the customer no longer belongs to SWBT, identifies the new provider for that customer, and changes billing instructions accordingly. We find that SWBT’s ordering process that converts its retail customer to a requesting carrier’s UNE platform customer through a software change does not involve separation of combined network elements, and therefore is not prohibited by rule 315(b).

221. For the same reason, we find that SWBT’s ordering process is not *per se* discriminatory. The record shows that SWBT’s ordering system is designed to link orders to flow through its systems together. Thus, if SWBT’s ordering process operates as SWBT claims it is intended to operate, the three orders would be processed simultaneously and the change would be imperceptible to the end-user customer. As described in the OSS section *supra*, SWBT is providing nondiscriminatory access to OSS ordering functions as evidenced by its performance data. Therefore, we conclude that SWBT is meeting its statutory obligation of providing nondiscriminatory access regardless of the specific type of ordering process it has chosen to implement.

222. Finally, we note that the Department of Justice expressed concern about two recent “disturbing allegations” by competing LECs regarding limitations on the availability of

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<sup>605</sup> See, e.g., CompTel Texas I Comments at 5-6; CompTel Texas I Comments, Exhibit A, Affidavit of Burk (CompTel Texas I Burk Aff.) at paras. 1-24; CompTel Texas I Comments, Exhibit B, Affidavit of Thompson (CompTel Texas I Thompson Aff.) at para. 26; AT&T Texas I Comments at 57-58; AT&T Texas I Comments, App. Vol. IIIA, Tab D, Declaration of DeYoung (AT&T DeYoung Decl.) at paras. 301-302. See also CLEC Coalition Texas I Comments at 26-27.

<sup>606</sup> See discussion *supra* in OSS section. SWBT’s ordering system separates the requesting carrier’s local service request into three separate orders: (1) a disconnect or “D” order instructs SWBT’s systems to disconnect the service presently installed at the customer location; (2) a new or “N” order is created that instructs SWBT’s systems to install new service at the customer location; and (3) a change or “C” order is created, instructing SWBT’s system to modify billing for the line.

<sup>607</sup> Rule 51.315(b) reads: “Except upon request, an incumbent LEC shall not separate requested network elements that the incumbent LEC currently combines.” 47 C.F.R. § 51.315. This rule was challenged but upheld by the Supreme Court. *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999).

UNE-P.<sup>608</sup> Based on our review of these allegations and evidence in the record, we conclude that SWBT satisfies its statutory obligation to provide access to UNE-P on a nondiscriminatory basis. First, AT&T alleges that SWBT refuses to provide “fiber-to-the-curb” lines originating from a central office in Richardson, Texas to competitive LECs on a UNE-P basis, making them available only on a resale basis.<sup>609</sup> While SWBT concedes that some orders for UNE-P over “fiber-to-the-curb” architecture were improperly rejected, it states that it completed other orders and that the improper rejections have not recurred since February 2000.<sup>610</sup> Moreover, SWBT explains that these rejections resulted from mistakes made by individual personnel and do not reflect its official policy. SWBT also submitted copies of internal procedures for completing such orders.<sup>611</sup>

223. Second, Global Crossing alleges that SWBT has “stonewalled” Global Crossing’s request to convert its resale customers in Texas to UNE-P service.<sup>612</sup> We have previously stated that we will not withhold section 271 authorization on the basis of isolated instances of alleged unfair dealing or discrimination under the Act.<sup>613</sup> In this instance, we do not find that the incident cited by Global Crossing constitutes a pattern of discriminatory conduct or undermines our overall conclusion that SWBT provides nondiscriminatory access to combinations of network elements.<sup>614</sup> Moreover, we note that SWBT now acknowledges that “resale-to-UNE-P conversions” are covered by Global Crossing/Frontier’s current interconnection agreement in Texas, and SWBT suggests that it is willing to resolve this issue promptly.<sup>615</sup>

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<sup>608</sup> See Department of Justice June 13 *Ex Parte* Letter at n.54.

<sup>609</sup> See AT&T Texas II Chambers/DeYoung Reply Decl. at paras. 55-62.

<sup>610</sup> See SWBT July 23 *Ex Parte* Letter at 4.

<sup>611</sup> See SWBT June 23 *Ex Parte* Letter at 4 and Att. 13 (confidential). Although we recognize that earlier remarks made by SWBT personnel in a workshop convened by the Texas Commission appear inconsistent with this policy, (see AT&T Texas 2 Chambers/DeYoung Reply Aff. at para. 59 and Att. 9), we rely on SWBT’s clarification provided in its June 23 *ex parte* letter.

<sup>612</sup> See Global Crossing Texas II Reply Comments at 2-3 (accusing SWBT of refusing to allow Global Crossing to provide UNE-P service in Texas even though “existing agreements expressly provide for the availability of unbundled network elements”).

<sup>613</sup> See *Bell Atlantic New York Order* at para. 444; *Ameritech Michigan Order*, 12 FCC Rcd at 20749.

<sup>614</sup> SWBT concedes that one of its account representatives caused this delay by initially insisting that Global Crossing/Frontier could not convert its Texas resale customers to UNE-P. See SWBT June 23 *Ex Parte* Letter at 4. We further note that Global Crossing may choose to address disputes, such as this one, arising out of its interconnection agreement with the Texas Commission. See Texas Commission June 19 *Ex Parte* Letter at 4 (“welcom[ing] the opportunity to work with [Global Crossing] to resolve any potential issues”).

<sup>615</sup> See SWBT June 23 *Ex Parte* Letter at 4.

(ii) Access to the Enhanced Extended Link

224. Section 251(c)(3) of the Act imposes on incumbent LECs such as SWBT the obligation to provide nondiscriminatory access to unbundled network elements.<sup>616</sup> AT&T and other commenters assert that SWBT places unreasonable and discriminatory restrictions on a combination of the loop and transport network elements (also known as an enhanced extended link or “EEL”) in violation of this statutory requirement.<sup>617</sup> We disagree.

225. In a further notice of proposed rulemaking that accompanied the *UNE Remand Order*, we requested comment on the legal and policy implications of allowing interexchange carriers to gain access to the EEL solely for the purpose of providing special access to their customers at UNE-based rates, thereby avoiding an incumbent LEC’s tariffed special access service.<sup>618</sup> We were specifically concerned that such access would imperil the universal service subsidies implicit in the access services provided by incumbent LECs.<sup>619</sup> In our *Supplemental Order* in the same proceeding, we exercised our authority to protect universal service during periods of regulatory transition by issuing a substantive rule temporarily conditioning an interexchange carrier’s access to the EEL on the interexchange carrier’s provision of a significant amount of local exchange service, in addition to exchange access service, to given customers.<sup>620</sup>

226. On June 2, 2000, we clarified and extended that interim measure in a *Supplemental Order Clarification*, establishing safe harbor guidelines for what constitutes a

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<sup>616</sup> 47 U.S.C. § 251(c)(3).

<sup>617</sup> AT&T Texas II Comments at 59-60; Level 3 Texas II Comments at 7-8; WorldCom Texas II Comments at 37.

<sup>618</sup> *UNE Remand Order*, 15 RCC Rcd at 3914-15, paras. 494-496. Special access service typically consists of: (1) “entrance facilities,” which are dedicated transport links from an interexchange carrier’s point of presence to an incumbent LEC’s switch or serving wire center (SWC); (2) a dedicated transport link from the serving wire center to an end office (i.e., interoffice transport); and (3) a channel termination facility from the end office to the end user (i.e., the local loop). *Id.* at 3912-13, paras. 485, 489.

<sup>619</sup> *Id.* at 3912-13, 3915, paras. 485-489, 496; *see also id.* at 3915, para. 496 (seeking comment on the policy implications for our universal service program of a significant reduction in special access revenues).

<sup>620</sup> *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, Supplemental Order, FCC 99-370 at paras. 4-5 (rel. Nov. 24, 1999) (*Supplemental Order*); *see Competitive Telecommunications Association v. FCC*, 117 F.3d 1068, 1073-75 (8<sup>th</sup> Cir. 1997) and *MCI Telecommunications Corp. v. FCC*, 750 F.2d 135, 140 (D.C. Cir. 1984)). The *Supplemental Order* extended the terms of the temporary constraint imposed in the *UNE Remand Order* beyond merely the “entrance facility” portion of special access because we had originally underestimated the extent of the policy implications associated with temporarily constraining interexchange carriers only from substituting entrance facilities for incumbent LECs’ special access service. *Supplemental Order* at para. 4 & n.5 (extending temporary constraint to include combinations of unbundled loops and dedicated interoffice transport network elements). *See* WorldCom Texas II Comments at 38 (noting that our provisional use restriction on UNEs as a substitute for access services was “carefully tailored” in an effort to preserve requesting carriers’ rights to use UNE combinations for all other telecommunications purposes).

“significant amount of local exchange service.”<sup>621</sup> In that order, we explained that, in addition to the universal service concerns underlying the *Supplemental Order* itself, we had not conducted an “impairment” analysis under section 251(d)(2) specifically addressing a carrier’s access to the EEL for purposes of competing in the exchange access market.<sup>622</sup> The need for such an analysis, we observed, was particularly important in light of the Supreme Court’s recent invalidation of our previous implementation of the “impairment” standard as insufficiently rigorous.<sup>623</sup> We found that we needed additional time to complete that empirical inquiry, and we explained that incumbent LECs have no statutory obligation to provide the EEL solely or primarily for use in the exchange access market unless and until we exercise our legislative rulemaking authority under section 251(d)(2) to impose that obligation.<sup>624</sup> We specifically rejected, on the basis of our long-standing experience in this area, the contention that this temporary constraint on access to the EEL would enable incumbent LECs to engage in “price squeezes” or other anticompetitive conduct once they enter the long-distance market.<sup>625</sup>

227. We disagree with WorldCom’s claim that SWBT has imposed discriminatory and unreasonable restrictions on access to EELs.<sup>626</sup> WorldCom points to three requirements that SWBT places on access to EELs: (1) collocation; (2) refusal to permit “commingled” traffic; and (3) certification by the competitive LEC that the leased UNEs will carry only certain patterns of traffic.<sup>627</sup> First, as we indicated in the *UNE Remand Order* and in the *Supplemental Order Clarification*, collocation is a reasonable requirement for access to EELs.<sup>628</sup> Secondly, under the three safe harbor circumstances described in the *Supplemental Order Clarification*, incumbent LECs are allowed to prohibit commingling. As we stated in that order, we are not persuaded that removing the prohibition in those local usage options would not lead to the use of unbundled network elements by interexchange carriers solely or primarily to bypass special access services.<sup>629</sup> Finally, certification is not an unreasonable requirement for implementing the *Supplemental Order*, where we expressly stated that competing carriers using EELs must provide

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<sup>621</sup> *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, Supplemental Order Clarification, FCC 00-183 at paras. 1, 21-23 (rel. June 2, 2000) (*Supplemental Order Clarification*).

<sup>622</sup> See *Supplemental Order Clarification* at paras. 13-17.

<sup>623</sup> *Id.*

<sup>624</sup> *Id.* at paras. 15-16 & n.50.

<sup>625</sup> *Id.* at paras. 19-20. The Eighth Circuit upheld a similar determination by this Commission in *Southwestern Bell Tel. Co. v. FCC*, 153 F.3d 523, 548 (8<sup>th</sup> Cir. 1998).

<sup>626</sup> WorldCom Texas II Comments at 37.

<sup>627</sup> *Id.* at 39-41.

<sup>628</sup> See *UNE Remand Order* at para. 486; *Supplemental Order Clarification* at paras. 22-24.

<sup>629</sup> See *Supplemental Order Clarification* at para. 28.

a significant amount of local exchange service.<sup>630</sup> In fact, all three of the safe harbor circumstances described in the *Supplemental Order Clarification* for determining whether a requesting carrier is providing a “significant” amount of local exchange service call for certification by the requesting carrier.<sup>631</sup>

228. There is no indication in the record that SWBT has imposed any restriction on access to EELs that conflicts with our specific guidance in the *Supplemental Order*. Because the substantive interim rules we have adopted in our orders on this subject define the nature of SWBT’s statutory obligations, SWBT’s adherence to them cannot constitute a basis for finding noncompliance with the checklist. It would be quite unfair to a BOC applicant to deny it approval to compete in the long-distance market on the basis of conduct that, in other proceedings, we have explicitly authorized. For the section 271 process to work, potential BOC applicants must have a reasonable degree of certainty about what they need to do to bring themselves in compliance with the statutory requirements, and they therefore need to be able to rely on our rules for appropriate guidance.

### (iii) Intellectual Property Rights for UNEs

229. We reject AT&T’s assertion that SWBT places restrictions on intellectual property associated with UNEs in violation of sections 251(c)(3) and 252(d)(1) of the Act.<sup>632</sup> Furthermore, AT&T appears to believe that SWBT has an obligation to protect competitive LECs that lease network elements from intellectual property liability.<sup>633</sup> AT&T notes that SWBT could “eliminate the problem” by agreeing to indemnify competitive LECs using UNEs in a manner equivalent to SWBT against any intellectual property liabilities that competitive LECs may incur from that use.<sup>634</sup>

230. We recently addressed the intellectual property rights surrounding UNEs in our *Intellectual Property Order* released April 27, 2000.<sup>635</sup> In that order, we declared that section 251(c)(3) requires an incumbent LEC such as SWBT to use its best efforts to obtain coextensive intellectual property rights associated with UNEs from a vendor on terms and conditions that are equal in quality to the terms and conditions under which the incumbent LEC has obtained its

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<sup>630</sup> *Supplemental Order* at para. 5 & n.9 (noting that allowing requesting carriers to “self-certify” that they are providing a significant amount of local exchange service would not delay their ability to convert facilities to unbundled network element pricing).

<sup>631</sup> *Id.* at paras. 22-23.

<sup>632</sup> AT&T Texas II Comments at 57.

<sup>633</sup> *See id.*; Letter from Mark E. Haddad, Counsel for AT&T Corp., to Magalie Roman Salas, Secretary, Federal Communications Commission, CC Docket No. 00-65 at 1-2 (filed June 27, 2000).

<sup>634</sup> AT&T Texas II Comments at 58.

<sup>635</sup> *Petition of MCI for Declaratory Ruling that New Entrants Need Not Obtain Separate License or Right-to-use Agreements Before Purchasing Unbundled Elements*, CCBPol. 97-4 & CC Docket No. 96-98, Memorandum Opinion and Order, FCC 00-139 (rel. Apr. 27, 2000) (*Intellectual Property Order*).

rights.<sup>636</sup> SWBT has stated that it will fully comply with the *Intellectual Property Order*'s requirement to use best efforts to obtain coextensive third-party intellectual property rights for competitive LECs using UNEs.<sup>637</sup> Additionally, the T2A provides that the terms of the *Intellectual Property Order* control over language in the T2A that AT&T asserts is discriminatory.<sup>638</sup> We therefore find that SWBT does not insist on language in its interconnection agreements that violates its obligation to provide nondiscriminatory access to UNEs under section 251(c)(3) or 252(d)(1) of the Act, as AT&T argues. Moreover, the *Intellectual Property Order* did not require that incumbent LECs indemnify competitive LECs for any intellectual property liability associated with their use of UNEs, and we do not find that unwillingness to provide such indemnification would necessarily constitute a violation of the Act. All that the nondiscrimination principle requires in this context is that the incumbent LEC utilize its best efforts to obtain coextensive third party intellectual property rights for competitive LECs in the use of unbundled network elements.

### 3. Pricing of Network Elements

#### a. Background

231. Checklist item 2 of section 271 states that a BOC must provide "nondiscriminatory access to network elements in accordance with sections 251(c)(3) and 252(d)(1)" of the Act.<sup>639</sup> Section 251(c)(3) requires local incumbent LECs to provide "nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory."<sup>640</sup> Section 252(d)(1) requires that a state commission's determination of the just and reasonable rates for network elements shall be based on the cost of providing the network elements, shall be nondiscriminatory, and may include a reasonable profit.<sup>641</sup> Pursuant to this statutory mandate, the Commission has determined that prices for UNEs must be based on the total element long run

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<sup>636</sup> *Id.* at para. 2. The Commission reasoned that the "nondiscriminatory access" obligation in section 251(c)(3) requires incumbent LECs to use their best efforts to provide all features and functionalities of each unbundled network element they provide, which includes any associated intellectual property rights that are necessary for the requesting carrier to use the network element in the same manner as the incumbent LEC. *Id.* at para. 9.

<sup>637</sup> SWBT Texas II Reply at 64.

<sup>638</sup> *Id.*; AT&T Texas I Comments, Vol. 4, Tab F, Declaration of Mark Witcher and Daniel P. Rhinehart at para. 16 (objecting to sections 7.3.2 through 7.3.4 of the T2A). Section 7.3.5 of the T2A provides that the provisions of the *Intellectual Property Order* "shall control over" the terms of sections 7.3.2 through 7.3.4. *Id.* Furthermore, any disputes between SWBT and the other party to the T2A regarding implementation of the *Intellectual Property Order* are subject to expedited dispute resolution procedures before the Texas Commission. *Id.*

<sup>639</sup> 47 U.S.C. § 271(B)(ii).

<sup>640</sup> 47 U.S.C. § 251(c)(3).

<sup>641</sup> 47 U.S.C. § 252(d)(1).

incremental cost of providing those elements.<sup>642</sup> The Commission also promulgated rule 51.315(b), which prohibits incumbent LECs from separating already combined elements before providing them to competing carriers, except on request.<sup>643</sup> Starting in September 1996, the U.S. Court of Appeals for the Eighth Circuit stayed and then vacated the Commission's pricing rules, and in 1997 it vacated Rule 51.315(b)<sup>644</sup> The Supreme Court restored these rules, however, on January 25, 1999.<sup>645</sup>

232. SWBT's initial application noted that it assessed a number of nonrecurring charges on UNE orders. SWBT assesses a \$2.56 nonrecurring service order charge for each UNE order.<sup>646</sup> SWBT also assesses a separate, nonrecurring charge for each stand-alone element ordered.<sup>647</sup> When a requesting carrier orders UNEs that are already combined in SWBT's network, SWBT assesses the sum of the nonrecurring charges for the applicable UNEs. Thus, in an order for a pre-combined residential platform containing a two-wire analog loop, the applicable charges were: 1) a \$2.56 nonrecurring service order charge, 2) a \$15.03 nonrecurring two-wire analog loop charge, 3) a \$1.27 nonrecurring port charge, and 4) a \$4.17 nonrecurring cross-connect charge, for a total of \$23.03 in nonrecurring charges.<sup>648</sup> In an order for a

<sup>642</sup> *Local Competition Order*, 11 FCC Rcd at 15844-46; 47 C.F.R. §§ 51.501. See also *Line Sharing Order* (Commission concluded that states should set the prices for line sharing, as a new network element, in the same manner as the state sets prices for other UNEs).

<sup>643</sup> See 47 C.F.R. § 51.315(b).

<sup>644</sup> *Iowa Utilities Board v. FCC*, 96 F.3d 1116 (8th Cir. 1996) (per curiam) (temporarily staying the *Local Competition Order* until the filing of the court's order resolving the petitioners' motion for stay); *Iowa Utilities Board v. FCC*, 109 F.3d 418 (8th Cir.) (dissolving temporary stay and granting petitioners' motion for stay, pending a final decision on the merits of the appeal), *motion to vacate stay denied*, 117 S. Ct. 429 (1996); *Iowa Utilities Board v. FCC*, 120 F.3d 753 (8th Cir. 1997) (vacating the Commission's pricing and combination rules).

<sup>645</sup> *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999).

<sup>646</sup> SWBT Auinbauh Texas I Aff. Pricing UNE, Schedule of Prices.

<sup>647</sup> SWBT Auinbauh Texas I Aff. at para. 140; SWBT Auinbauh Texas I Reply Aff. at para. 141.

<sup>648</sup> SWBT Auinbauh Texas I Aff., App. Pricing UNE, Schedule of Prices. We note that SWBT's nonrecurring charges are substantially higher than those charged by incumbent LECs in other states, as the following table indicates:

STATE	RESIDENTIAL LOOP-TO-PORT COMBINATION RATES
Florida	\$1.46
New York	\$3.73
Connecticut	\$1.78
Texas	\$23.03

combination of elements not already assembled in SWBT's network, SWBT assessed an additional \$16.35 nonrecurring central office access charge (COAC).<sup>649</sup>

233. While the Eighth Circuit decision invalidating our rule 315(b) was in effect, the Texas Commission approved these charges.<sup>650</sup> AT&T and WorldCom appealed to a federal district court in Texas the state commission's decision on the nonrecurring charges, including the COAC, contending that they constituted non-cost based "glue charges."<sup>651</sup> The district court affirmed the Texas Commission's decision, also while the Eighth Circuit's decision was in effect.<sup>652</sup> AT&T and WorldCom then appealed to the Fifth Circuit.<sup>653</sup> On February 24, 2000, the U.S. Court of Appeals for the Fifth Circuit remanded AT&T and WorldCom's appeal to the Texas Commission for further proceedings in light of the Supreme Court's decision in *Iowa Utilities Board*.<sup>654</sup> The Eighth Circuit and the Texas Commission are currently considering whether the Supreme Court's decision in *Iowa Utilities Board* and our rules obligate SWBT to combine UNEs in new combinations as ordered by competitors.<sup>655</sup> The Texas Commission is also considering whether SWBT is entitled to impose the nonrecurring charges on competitive LEC orders for existing UNE combinations and whether SWBT's current nonrecurring charges are adequately supported by cost documentation as required by the Telecommunications Act and our rules.<sup>656</sup>

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<sup>649</sup> SWBT Auinbauh Texas I Aff., App. Pricing UNE, Schedule of Prices.

<sup>650</sup> Texas Commission Texas I Comments at 26; SWBT Auinbauh Texas I Aff. at para. 142. Rule 315(b) provides that an incumbent LEC shall not separate network elements that the incumbent LEC currently combines except upon request. 47 C.F.R. § 51.315(b). Although the Supreme Court's review of the Commission's rules in *Iowa Utilities Board* revived rule 315(b), the Court did not review the Eighth Circuit's decision regarding rules 315(c) through (f). See *Iowa Utilities Board*, 525 U.S. 366.

<sup>651</sup> Texas Commission Texas I Comments at 26; SWBT Auinbauh Texas I Aff. at para. 142; AT&T Rhinehart Texas I Aff. at para. 11; WorldCom Price Texas I Aff. at para. 4. Glue charges are charges competitors pay to compensate the incumbent LEC for combining network elements. We have expressed skepticism regarding the lawfulness of such charges in certain circumstances. See, e.g., *Bell Atlantic New York Order*, 15 FCC Rcd at 4092, para. 262.

<sup>652</sup> AT&T Rhinehart Texas I Reply Aff. at para. 29; SWBT Auinbauh Texas I Aff. at para. 142.

<sup>653</sup> SWBT Auinbauh Texas I Aff. at para. 142.

<sup>654</sup> *Southwestern Bell Telephone Co. v. AT&T Communications*, No. 99-50073, (5<sup>th</sup> Cir. Feb. 24, 2000).

<sup>655</sup> See *Iowa Utilities Board*, 525 U.S. 366; Texas Commission, Docket No. 21622, Order No. 1 and Docket No. 22290, Order No. 5, Consolidating Two Dockets Setting Forth the List of Issues and Schedule for Phase I of the Proceeding (April 4, 2000).

<sup>656</sup> See Texas Commission, Docket No. 21622, Order No. 1 and Docket No. 22290, Order No. 5, Consolidating Two Dockets Setting Forth the List of Issues and Schedule for Phase I of the Proceeding (April 4, 2000).

**b. Discussion**

234. *COAC*. SWBT states that the COAC is assessed on UNE combinations and enhanced extended loops (EELs) that do not already exist in combined form in SWBT's network, and thus require work by SWBT.<sup>657</sup> SWBT argues that the COAC is not subject to sections 251 and 252 of the Act,<sup>658</sup> and opposed the remand to the Texas Commission on this issue.<sup>659</sup> According to SWBT, the COAC is not subject to the Commission's forward-looking methodology because the Supreme Court held only that incumbent LECs cannot separate already combined elements before providing them, not that they must combine separate UNEs.<sup>660</sup> AT&T and WorldCom challenge the COAC as a non-cost-based glue charge.<sup>661</sup> They state that the COAC is not based on the cost of combining UNEs, but has its basis in a retail tariff that SWBT charges to cover central office activity to its retail customers.<sup>662</sup> AT&T and WorldCom contend that the COAC double-recovers costs recouped through the nonrecurring charges assessed on the individual elements,<sup>663</sup> as well as the retail fees for central office.<sup>664</sup>

235. In its 1997 ruling, the Eighth Circuit invalidated rules 315(c) through (f), which required incumbent LECs to provide network elements in new combinations requested by a competing carrier. The Supreme Court did not specifically review that aspect of the Eighth Circuit's holding, which is, therefore, binding on us unless and until it is vacated. We are also precluded by the Eighth Circuit's holding from denying this application on the ground that SWBT has somehow violated the Act by setting particular pricing conditions on the provision of UNE combinations that, under the Eighth Circuit's decision, it need not provide at all. For this reason, we have not examined the prices associated with the UNE combinations that SWBT is not required to provide. The Eighth Circuit is currently considering whether to revive rules 315(c) through (f) on remand from *Iowa Utilities Board*, and the Texas Commission has been asked to consider the underlying "new combinations" issue on remand from the Fifth Circuit.

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<sup>657</sup> SWBT Texas I Comments at 37-38; SWBT Auinbauh Texas I Aff. at para. 141; SWBT Texas I Reply at 56-57; Texas Commission Texas I Comments at 25; SWBT Auinbauh Texas I Reply Aff. at para. 43.

<sup>658</sup> SWBT Auinbauh Texas I Aff. at para. 142; SWBT Auinbauh Texas I Reply Aff. at para. 43.

<sup>659</sup> SWBT Smith Texas I Reply Aff. at para. 9; SWBT Auinbauh Texas I Aff. at para. 142.

<sup>660</sup> SWBT Texas I Comments, App. A-3, Tab 1; SWBT Auinbauh Texas I Aff. at para. 142; SWBT Texas I Reply at 56-57. *See also* AT&T Rhinehart Texas I Reply Aff. at para. 27.

<sup>661</sup> WorldCom Texas II Comments at 35.

<sup>662</sup> AT&T Rhinehart Texas I Aff. at paras. 57-58, 60; AT&T Rhinehart Texas I Reply Aff., Att. 2 at paras. 25, 27; WorldCom Price Texas I Aff. at para. 16.

<sup>663</sup> AT&T Rhinehart Texas I Aff. at para. 60; WorldCom Price Texas I Aff. at paras. 17-18; WorldCom Texas II Comments at 35.

<sup>664</sup> AT&T Rhinehart Texas I Reply Aff. at para. 25.

Given the current state of the law, those proceedings are the appropriate forums for resolving disputes such as the one at issue here.<sup>665</sup>

236. *Nonrecurring charges other than the COAC.* As previously discussed, we are reluctant to deny a section 271 application because a BOC is engaged in an unresolved rate dispute with its competitors and the relevant state commission, which has primary jurisdiction over the matter, is currently considering the matter.<sup>666</sup> Instead, as we have explained, interim rate solutions are a sufficient basis for granting a 271 application when an interim solution to a particular rate dispute is reasonable under the circumstances, the state commission has demonstrated its commitment to our pricing rules, and provision is made for refunds or true-ups once permanent rates are set. SWBT's 271 application easily meets that standard.

237. The dispute over the nonrecurring charges other than the COAC has evolved significantly since SWBT filed its initial application.<sup>667</sup> The practice that AT&T now challenges is a policy under which SWBT withholds collection of the relevant charges, effectively imposing an interim charge of zero on the nonrecurring items that form the basis of AT&T's complaints, if the competing carrier agrees to be bound by any true-up the Texas Commission might order on remand from the Fifth Circuit.<sup>668</sup> That interim solution, which AT&T chose to reject, is reasonable given the legal uncertainty that has surrounded these charges since the Supreme Court's 1999 decision in *Iowa Utilities Board*. SWBT has agreed to an interim solution that gives its competitors the current benefit of the doubt on these rates, subject only to the possibility that the Texas Commission, and ultimately the federal courts, might someday find that a charge greater than zero is required by the Act or our rules. AT&T is poorly positioned to complain about that solution. Because the Texas Commission and the federal courts must be presumed to apply the law correctly, those carriers face uncertainty about the imposition of a true-up only to the extent that they reasonably believe that they may in fact have a legal obligation to pay something greater than a charge of zero. No carrier is immune from the effect of future

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<sup>665</sup> WorldCom contends that competitive LECs do not have access to SWBT's network to combine elements and it is apparently on that premise that WorldCom infers a requirement that the COAC must be cost-based. That premise is belied by the provision in SWBT's T2A that allows competitive LECs to combine individually ordered network elements. WorldCom Texas II Comments at 35-36; see SWBT Auinbauh Texas I Aff., Att. A, Attachment UNE-TX at 2. Because SWBT's interconnection agreement includes such a provision, competitors have a method, other than the COAC, of combining elements that are not previously combined in SWBT's network.

<sup>666</sup> See also part V.A.2 *infra*, Pricing of Interconnection.

<sup>667</sup> AT&T Texas II Comments at 39-42; WorldCom Texas II Comments at 33-34. AT&T and WorldCom have challenged the nonrecurring charges that apply to the pre-existing two-wire analog, loop-to-switch port combination. The application of nonrecurring charges to other combinations of UNEs was not raised by the parties as an issue in this proceeding.

<sup>668</sup> AT&T Texas II Reply Comments at 37; AT&T June 14, 2000 *Ex Parte* Letter to Magalie Roman Salas, FCC Secretary, from Mark E. Haddad, Counsel for AT&T. See SWBT June 27, 2000 *Ex Parte* Letter to Magalie Roman Salas, FCC Secretary, from Edwardo Rodriguez, Jr., SBC Federal Regulatory Executive Director; SWBT Auinbauh Texas II Reply Aff. at paras. 41-42.

resolutions of disputed issues, and, under the circumstances, the objection of AT&T on this point is entirely insufficient to warrant a denial of SWBT's application.

238. In light of the Fifth Circuit remand and SWBT's offer to impose an effective interim rate of zero for the nonrecurring charges in dispute, therefore, we need not preempt the Texas Commission's ongoing inquiry into whether those charges comply with section 251 of the Act or our pricing rules. The Texas Commission has established a schedule to set permanent rates for all nonrecurring charges, and has indicated to the parties that the interim rates are subject to a true-up. The Texas Commission is currently reviewing whether SWBT is entitled to impose nonrecurring charges for existing UNE combinations and whether there is adequate cost support for SWBT's proposed nonrecurring charges as required by the Telecommunications Act of 1996 and our rules.<sup>670</sup> Interested parties will have an opportunity to challenge the cost-based nature of the rates proposed by SWBT in the proceeding before the Texas Commission.<sup>671</sup>

239. The situation we confront here is similar to the situation we confronted in the *Bell Atlantic New York Order* on the issue of interim rates.<sup>672</sup> As in that proceeding, the rate dispute here is fairly new, the relevant state commission has demonstrated a commitment to TELRIC, and provision will be made for retrospective rate adjustments once permanent rates are set. Moreover, SWBT has agreed to set an effective interim rate of zero, subject to true-up, pending resolution of this dispute. Because we are confident that the Texas Commission will reach an appropriate result consistent with our rules, we conclude that SWBT has met its obligations under this checklist item. We also observe that in any context in which prices are not set in accordance with our rules and the Act, we retain the ability to take a variety of enforcement actions and will not hesitate to do so.<sup>673</sup>

240. *xDSL Rates.* Covad argues that SWBT has not met the requirements of checklist item (ii) because it does not have final, TELRIC-based rates for charges relating to the installation and conditioning of xDSL-capable loops.<sup>674</sup> The Texas Commission, in the Mega-Arbitration, set permanent charges for xDSL-capable loops.<sup>675</sup> After reviewing the permanent rates set in the Mega-Arbitration, the arbitrator for the Covad/Rhythms' arbitration agreement set

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<sup>669</sup> See SWBT Texas I Reply at 50; SWBT Auinbauh Texas I Reply Aff. at paras. 27-29.

<sup>670</sup> See Texas Commission, Docket No. 21622, Order No. 1 and Docket No. 22290, Order No. 5, Consolidating Two Dockets Setting Forth the List of Issues and Schedule for Phase I of the Proceeding (April 4, 2000).

<sup>671</sup> AT&T Texas II Comments, Exh. G, at 3 (SWBT's April 5, 2000 brief before the Texas Commission).

<sup>672</sup> *Bell Atlantic New York Order* 15 FCC Rcd at 4091, para. 259; see also Section V.A.2, Pricing of Interconnection.

<sup>673</sup> See 47 U.S.C. § 271(d)(6).

<sup>674</sup> Covad Texas I Comments at 15.

<sup>675</sup> SWBT Texas I Application at 96; SWBT Auinbauh Aff. at para. 144.

interim charges, subject to true-up, that are the exact xDSL rates that Covad proposed.<sup>676</sup> The Texas Commission is now conducting a proceeding to set permanent xDSL rates based on cost studies that SWBT submitted at the direction of the Texas Commission arbitrator.<sup>677</sup>

241. As discussed previously, interim rate solutions are a sufficient basis for granting a section 271 application when an interim solution to a particular rate dispute is reasonable under the circumstances, where the state commission has demonstrated its commitment to our pricing rules, and provision is made for refunds or true-ups once permanent rates are set. It is evident from a review of the Covad/Rhythms arbitration proceeding that the interim xDSL rates are a reasonable interim solution to this fairly recent dispute, the Texas Commission has established a track record of setting interim xDSL rates that are cost-based, and the rates are subject to a retroactive rate adjustment.<sup>678</sup> We are confident that the Texas Commission will ultimately set permanent, cost-based xDSL rates that comply with our rules. Under these circumstances, we find that SWBT has met the requirements of checklist item 2 with respect to its xDSL rates.

242. *Promotional Discounts.* AT&T also asserts that promotional discounts on unbundled loop and platform orders for telecommunications carriers serving residential customers that SWBT offers are discriminatory and in violation of the Act.<sup>679</sup> These promotions arise out of SBC's merger with Ameritech.<sup>680</sup> We found in the *SBC/Ameritech Merger Order* that these promotions will bring more competitive offerings to residential customers.<sup>681</sup> We also found that these promotional offerings are offered to all telecommunications carriers on a nondiscriminatory basis.<sup>682</sup> Our findings in that order answer AT&T's concerns here, and in any event, it would be quite unfair to penalize SWBT in this proceeding for acting in accordance with those findings.<sup>683</sup>

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<sup>676</sup> Covad Texas I Comments, Tab 5, Final Arbitration Award, Docket Nos. 20226, 20272, at 87-88. See SWBT Auinbauh Aff. at para. 144; SWBT April 5 *Ex Parte* Letter at 14.

<sup>677</sup> Covad Texas I Comments, Tab 5, Final Arbitration Award, Docket Nos. 20226, 20272 at 86-87. The xDSL cost study for loop conditioning was due on March 31, 2000 and for loop make-up information was due on May 30, 2000.

<sup>678</sup> Covad Texas I Comments, Tab 5, Final Arbitration Award, Docket Nos. 20226, 20272, at 86-88.

<sup>679</sup> AT&T Texas II Comments at 64, n. 62.

<sup>680</sup> *Applications of Ameritech Corp. and SBC Communications Inc. for Consent to Transfer Control of Corporations Holding Commission Licenses and Lines Pursuant to Sections 214 and 310(d) of the Communications Act*, CC Docket No. 98-141, Memorandum Opinion and Order, 14 FCC Rcd 14712, 14874 at paras. 390-391 (1999) (*SBC/Ameritech Merger Order*).

<sup>681</sup> *Id.* at 14915-15, para. 494.

<sup>682</sup> *Id.* at 14916 at para. 497.

<sup>683</sup> At the time SWBT filed its application, SWBT offered competing carriers a second voice grade loop for the provision of advanced services at 50 percent of its lowest rate for a voice grade loop. Because the Commission found that this was a reasonable approach until the line sharing requirements took effect, we reject AT&T's (continued....)

## C. Checklist Item 3 – Poles, Ducts, Conduits and Rights of Way

### 1. Background

243. Section 271(c)(2)(B)(iii) requires BOCs to provide “[n]ondiscriminatory access to the poles, ducts, conduits, and rights-of-way owned or controlled by the [BOC] at just and reasonable rates in accordance with the requirements of section 224.”<sup>684</sup> In the *Local Competition First Report and Order*, the Commission interpreted section 251(b)(4) as requiring nondiscriminatory access to LEC poles, ducts, conduits, and rights-of-way for competing providers of telecommunications services in accordance with the requirements of section 224.<sup>685</sup> In addition, we interpreted the revised requirements of section 224 governing rates, terms, and conditions for telecommunications carriers’ attachments to utility poles in the *Pole Attachment Telecommunications Rate Order*.<sup>686</sup> Section 224(f)(1) states that “[a] utility shall provide a cable television system or any telecommunications carrier with nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by it.”<sup>687</sup> Notwithstanding this requirement, section 224(f)(2) permits a utility providing electric service to deny access to its poles, ducts, conduits, and rights-of-way, on a nondiscriminatory basis, “where there is insufficient capacity and for reasons of safety, reliability and generally applicable engineering purposes.”<sup>688</sup>

(Continued from previous page)

arguments otherwise. *SBC/Ameritech Merger Order*, 14 FCC Rcd at 14987-92, App. C., paras. 8, 14; *SWBT Texas II Auinbauh Aff.* at para. 5; *AT&T Texas II Comments* at 21; *AT&T Texas II Pfau/Chambers Decl.* at para. 13.

<sup>684</sup> 47 U.S.C. § 271(c)(2)(B)(iii). As originally enacted, section 224 was intended to address obstacles that cable operators encountered in obtaining access to poles, ducts, conduits, or rights-of-way owned or controlled by utilities. The 1996 Act amended section 224 in several important respects to ensure that telecommunications carriers as well as cable operators have access to poles, ducts, conduits, or rights-of-way owned or controlled by utility companies, including LECs. *Second BellSouth Louisiana Order*, 13 FCC Rcd at 20706, n.574.

<sup>685</sup> *Local Competition First Report and Order*, 11 FCC Rcd at 16073, para. 1156.

<sup>686</sup> *Implementation of Section 703(e) of the Telecommunications Act of 1996. Amendment of the Commission’s Rules and Policies Governing Pole Attachments*, CS Docket No. 97-151, 13 FCC Rcd 6777 (1998) (*Pole Attachment Telecommunications Rate Order*), vacated in part, *Gulf Power Company v. FCC*, 208 F.3d 1263 (11th Cir. 2000).

<sup>687</sup> 47 U.S.C. § 224(f)(1). Section 224(a)(1) defines “utility” to include any entity, including a LEC, that controls “poles, ducts, conduits, or rights-of-way used, in whole or in part, for any wire communications.” 47 U.S.C. § 224(a)(1).

<sup>688</sup> 47 U.S.C. § 224(f)(2). In the *Local Competition First Report and Order*, the Commission concluded that, although the statutory exception enunciated in section 224(f)(2) appears to be limited to utilities providing electrical service, LECs should also be permitted to deny access to their poles, ducts, conduits, and rights-of-way because of insufficient capacity and for reasons of safety, reliability and generally applicable engineering purposes, provided the assessment of such factors is done in a nondiscriminatory manner. *Local Competition First Report and Order*, 11 FCC Rcd at 16080-81, paras. 1175-77.

244. Section 224 also contains two separate provisions governing the maximum rates that a utility may charge for “pole attachments.”<sup>689</sup> Section 224(b)(1) states that the Commission shall regulate the rates, terms, and conditions governing pole attachments to ensure that they are “just and reasonable.”<sup>690</sup> Notwithstanding this general grant of authority, section 224(c)(1) states that “[n]othing in [section 224] shall be construed to apply to, or to give the Commission jurisdiction with respect to the rates, terms, and conditions, or access to poles, ducts, conduits and rights-of-way as provided in [section 224(f)], for pole attachments in any case where such matters are regulated by a State.”<sup>691</sup> As of 1992, nineteen states had certified to the Commission that they regulated the rates, terms, and conditions for pole attachments.<sup>692</sup> However, none of the five states in which SWBT is a LEC, including Texas, has elected to regulate poles, ducts, conduits, and rights-of-way.<sup>693</sup>

## 2. Discussion

245. Based on the evidence in the record, we conclude that SWBT provides nondiscriminatory access to the poles, ducts, conduits, and rights-of-way at just and reasonable rates in compliance with section 271(c)(2)(B)(iii), and thus satisfies the requirements of checklist item 3.<sup>694</sup> The Texas Commission concludes that SWBT provides nondiscriminatory access to

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<sup>689</sup> Section 224(a)(4) defines “pole attachment” as “any attachment by a cable television system or provider of telecommunications service to a pole, duct, conduit, or right-of-way owned or controlled by a utility.” 47 U.S.C. § 224(a)(4).

<sup>690</sup> 47 U.S.C. § 224(b)(1).

<sup>691</sup> 47 U.S.C. § 224(c)(1). Texas does not regulate the rates, terms, and conditions for pole attachments. *See In re Marcus Cable Associates, L.P. v. Texas Utilities Electric Company*, P.A. No. 96-002, 12 FCC Rcd 10362, 10365, para. 10 (1997); *see also States That Have Certified That They Regulate Pole Attachments*, Public Notice, 7 FCC Rcd 1498 (1992). The 1996 Act extended the Commission’s authority to include not just rates, terms, and conditions, but also the authority to regulate nondiscriminatory access to poles, ducts, conduits, and rights-of-way. *Local Competition First Report and Order*, 11 FCC Rcd at 16104, para. 1232; 47 U.S.C. § 224(f). Absent state regulation of terms and conditions of nondiscriminatory attachment access, the Commission retains jurisdiction. *Local Competition First Report and Order*, 11 FCC Rcd at 16104, para. 1232; 47 U.S.C. § 224(c)(1); *see also Bell Atlantic New York Order*, 15 FCC Rcd at 4093, para. 264.

<sup>692</sup> *See States That Have Certified That They Regulate Pole Attachments*, Public Notice, 7 FCC Rcd 1498 (1992); 47 U.S.C. § 224(f).

<sup>693</sup> SWBT Hearst Texas I Aff. at para. 32.

<sup>694</sup> SWBT states that, pursuant to section 224 of the Act, it has negotiated agreements with cable providers for access to poles, ducts, conduits, and rights-of-way. SWBT Texas I Application at 92. The product of these negotiations is contained in SWBT’s Master Agreement, which has been incorporated in interconnection agreements approved by the Texas Commission. *Id.* at 92. SWBT states that the Master Agreement is available to any competitive LEC, and that it will negotiate modifications to the Master Agreement upon request. *Id.* at 92-93. SWBT states that its Master Agreement and its state-approved interconnection agreements incorporate rates that were negotiated with cable operators and comply with the methodology set out in section 224(d)(1) of the Act, as well as the cost formula and methodology specified by the Commission. *Id.* at 93; *see also* SWBT Hearst Texas I (continued....)

poles, ducts, conduits, and rights-of-way at just and reasonable rates that comply with the Act and Commission rules.<sup>695</sup> No commenter raised allegations challenging SWBT's compliance with this checklist item.

#### D. Checklist Item 4 – Unbundled Local Loops

##### 1. Background

246. Section 271(c)(2)(B)(iv) of the Act, item 4 of the competitive checklist, requires that a BOC provide “[l]ocal loop transmission from the central office to the customer’s premises, unbundled from local switching or other services.”<sup>696</sup> The Commission has defined the loop as a transmission facility between a distribution frame, or its equivalent, in an incumbent LEC central office, and the demarcation point at the customer premises.<sup>697</sup> This definition includes different types of loops, including “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 service such as ISDN, ADSL, HDSL, and DS1-level signals.”<sup>698</sup>

247. In order to establish that it is “providing” unbundled local loops in compliance with section 271(c)(2)(B)(iv), a BOC must demonstrate that it has a concrete and specific legal obligation to furnish loops and that it is currently doing so in the quantities that competitors demand and at an acceptable level of quality.<sup>699</sup>

248. A BOC must also demonstrate that it provides nondiscriminatory access to unbundled loops.<sup>700</sup> Specifically, the BOC must provide access to any functionality of the loop requested by a competing carrier unless it is not technically feasible to condition the loop facility

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Aff. at para. 32; SWBT Texas I Application App. C, Tab 1233 at 57 (Final Staff Status Report on Collaborative Process, Investigation of Southwestern Bell Telephone Company’s Entry into the Texas InterLATA Telecommunications Market, TX PUC Nov. 18, 1998).

<sup>695</sup> Texas Commission Texas I Comments at 48-50.

<sup>696</sup> 47 U.S.C. § 271(c)(2)(B)(iv).

<sup>697</sup> *Local Competition First Report and Order*, 11 FCC Rcd at 15691, para. 380; *UNE Remand Order*, 15 FCC Rcd at 3772-73, paras. 166-167, n.301 (retaining definition of the local loop from the *Local Competition First Report and Order*, but replacing the phrase “network interconnection device” with “demarcation point,” and making explicit that dark fiber and loop conditioning are among the features, functions and capabilities of the loop).

<sup>698</sup> *Local Competition First Report and Order*, 11 FCC Rcd at 15691, para. 380; *UNE Remand Order*, 15 FCC Rcd at 3772-73, paras. 166-167.

<sup>699</sup> *Bell Atlantic New York Order*, 15 FCC Rcd at 4095, para. 269; *Second BellSouth Louisiana Order*, 13 FCC Rcd at 20637, para. 54.

<sup>700</sup> *Bell Atlantic New York Order*, 15 FCC Rcd at 4095, para. 269; *Second BellSouth Louisiana Order*, 13 FCC Rcd at 20712-13, para. 185.

to support the particular functionality requested.<sup>701</sup> In order to provide the requested loop functionality, such as the ability to deliver ISDN or xDSL services, the BOC may be required to take affirmative steps to condition existing loop facilities to enable competing carriers to provide services not currently provided over the facilities, with the competing carrier bearing the cost of such conditioning.<sup>702</sup> The BOC must provide competitors with access to unbundled loops regardless of whether the BOC uses integrated digital loop carrier (IDLC) technology<sup>703</sup> or similar remote concentration devices for the particular loops sought by the competitor. Again, the costs associated with providing access to such facilities may be recovered from competing carriers.<sup>704</sup>

249. SWBT states that through February 2000, it provisioned to competing carriers more than 54,000 loops on a stand-alone basis and over 203,000 loops as part of pre-assembled loop/port combinations.<sup>705</sup> In order to demonstrate that it provides nondiscriminatory access to these loops, SWBT submitted performance data relating to its loop provisioning and maintenance and repair functions for competing carriers. These data are disaggregated by loop type into several categories for both voice grade loops and loops capable of transmitting the digital signals necessary to support high-speed data services. In light of the variety of SWBT performance data, our analysis of checklist item 4 does not focus on any single performance measurement or any single type of loop. Instead, we examine the data for all the various loop performance measurements, as well as the factors surrounding the development of these performance measurements, in order to evaluate in the aggregate whether SWBT provides local loops in accordance with the requirements of checklist item 4.

250. The focus of our analysis in this section is on the provisioning and maintenance and repair of stand-alone loops. In particular, we address voice grade loops provisioned both as hot cut loops and as new stand-alone loops. We also address xDSL-capable loops and high capacity loops (e.g., DS1 loops). Because provisioning and maintenance and repair functions for pre-assembled loop/port combinations are more similar to processes used to provide resale than

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<sup>701</sup> *Bell Atlantic New York Order*, 15 FCC Rcd at 4095-96, para. 271; *Second BellSouth Louisiana Order*, 13 FCC Rcd at 20713, para. 187.

<sup>702</sup> *Bell Atlantic New York Order*, 15 FCC Rcd at 4095-96, para. 271.

<sup>703</sup> IDLC technology permits a carrier to multiplex and demultiplex loop traffic at a remote concentration point and to deliver that combined traffic directly to the switch without first separating the individual loops. *Local Competition First Report and Order*, 11 FCC Rcd at 15692, para. 383; *UNE Remand Order*, 15 FCC Rcd at 3793, para. 217.

<sup>704</sup> *Local Competition First Report and Order*, 11 FCC Rcd at 15692-93, para. 384.

<sup>705</sup> See *SWBT Texas II Habeeb Aff.* at para. 5, Attach. A; *but see* Department of Justice Texas I Evaluation at 8-9 (alleging that SWBT overstates its facilities-based estimates); *Allegiance Texas I Comments* at 2; *Allegiance Texas I Howland Decl.* at paras. 1-2 (alleging SWBT overstates competing carrier volumes); *SWBT Texas I Habeeb Reply* at paras. 3-10 (refuting Department of Justice and competing carrier allegations regarding SWBT's estimations of the volume of competition in Texas).

those used to provide unbundled loops, we address loop/port combination issues in our discussion of checklist item 2.

## 2. Discussion

251. Like the Department of Justice and Texas Commission,<sup>706</sup> we conclude that SWBT demonstrates that it provides unbundled local loops in accordance with the requirements of section 271.<sup>707</sup> Specifically, we find that SWBT demonstrates that it provides voice grade unbundled loops through “hot cut” conversions<sup>708</sup> in a manner that offers an efficient competitor a meaningful opportunity to compete. Similarly, we find that SWBT provides competing carriers with voice grade unbundled loops through new stand-alone loops in substantially the same time and manner as it does for its own retail service. We also conclude that SWBT demonstrates that it provides xDSL-capable loops and high capacity loops to competing carriers in a nondiscriminatory manner.

252. To reach these conclusions, we evaluate a variety of SWBT performance measurement data disaggregated by loop type. From these data,<sup>709</sup> we calculate that in February,

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<sup>706</sup> Department of Justice Texas II Evaluation at 1; Texas Commission Texas II Comments at 11-36.

<sup>707</sup> As a preliminary matter, we note that SWBT also demonstrates that it has a concrete and specific legal obligation to provide unbundled local loops to competing carriers. Through various interconnection agreements, SWBT provisions a full range of unbundled loops, including 2-wire analog loops with 8.0 dB or 5.0 dB loss, 4-wire analog loops, 2-wire ISDN digital-grade lines, 4-wire DS1 digital grade lines, and various 2- and 4-wire loops capable of offering xDSL services. In addition, competing carriers may request loops capable of carrying DS3 signals. SWBT provides access to stand-alone loops through cross-connects that run from the SWBT distribution frame to competing carriers' collocation space. See SWBT Texas I Deere Aff. at paras. 86-88, 151-165; see also Interim Award, petitions of IP Communications Corp. to Establish Expedited Public Utility Commission of Texas Oversight Concerning Line Sharing Issues, and Covad Communications Co., and Rhythms Links, Inc. against SWBT and GTE for Post-Interconnection Dispute Resolution and Arbitration Under the Telecommunications Act of 1996 Regarding Rates, Terms, Conditions, and Related Arrangements for Line Sharing, Docket Nos. 22168, 22469 (Texas PUC June 6, 2000) (setting forth interim interconnection terms and conditions for the high frequency portion of the loop).

<sup>708</sup> A hot cut entails manually disconnecting the customer's loop in the SWBT central office and reconnecting the same loop at the competing carrier's collocation space. It also involves coordinated switch software changes at both SWBT's switch and the competing carrier's switch and the implementation of local number portability. The customer is taken out of service while the hot cut is in progress, thereby making the cut “hot.” although if the cut is successful, the service disruption will last no more than a few minutes. Thus, ensuring that a hot cut is provisioned correctly with coordination between SWBT and the competing carrier is critical because problems with the cutover could result in extended service disruption for the customer. *Bell Atlantic New York Order*, 15 FCC Rcd at 4104-05, para. 291 n.925.

<sup>709</sup> See SWBT Aggregated Performance Data, Measurement No. 59 (“Percent Trouble Reports on N, T, C Orders within 30 days”) (8.0 dB Loop, 5.0 dB Loop, BRI Loop, DS1 Loop, DSL) at 271-No. 59a-c (calculated from total volumes listed on a per loop basis, combining 8.0 dB and 5.0 dB loop performance data to calculate mass market voice grade loops which may be provisioned by hot cuts or through new stand-alone loops, and BRI and DSL loop performance data to calculate xDSL-capable loops); Letter from Frank S. Simone, Government Affairs Director, AT&T, to Magalie Roman Salas, Secretary, Federal Communications Commission, CC Docket No. 00-04 (filed (continued....))

March, and April 2000, mass market voice grade loops, which may be provisioned by hot cuts or through new stand-alone loops.<sup>710</sup> were 77, 74, and 71 percent of all unbundled stand-alone loops ordered by competing carriers. During the same period, xDSL-capable loops increased from 19 percent of all unbundled stand-alone loops ordered by competing carriers in February 2000 to 23 and 27 percent of all unbundled stand-alone loops ordered by competing carriers in March and April 2000. At the same time, DS1 high capacity loops have remained between 1 and 4 percent of all unbundled loops ordered by competing carriers in Texas. Although we examine unbundled loops in this disaggregated way, we base our conclusion on SWBT's unbundled stand-alone loop provisioning overall. Thus, even if SWBT's performance appears lacking in a particular area, we examine the circumstances surrounding any shortfall, as well as SWBT's performance in aggregate, to reach our conclusion that checklist item 4 is met.

253. As described above, the Texas Commission developed SWBT's performance measurements and standards in a collaborative state proceeding with substantial input from competing carriers.<sup>711</sup> When possible, the Texas Commission elected to compare SWBT's service to competing carriers using unbundled loops directly to the level of service provided to SWBT's retail operations.<sup>712</sup> Thus, where the Texas Commission determined that a retail analogue is appropriate and uses this analogue in its evaluation, we examine SWBT's performance by determining whether it provides unbundled local loops to competing carriers in substantially the same time and manner as it does to its retail customers.<sup>713</sup> Where, however, the Texas Commission determined that no comparable retail function exists, the level of SWBT service provided to competing carriers is tested against benchmarks developed in the collaborative state proceeding.<sup>714</sup> In these instances, we examine SWBT's service to competing carriers in terms of whether its performance affords efficient competitors a meaningful opportunity to compete.<sup>715</sup>

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Mar. 27, 2000) (AT&T Mar. 27 *Ex Parte* Letter) (indicating that Performance Measurement No. 59 is reported on a per loop basis for all loop types, including 8.0 dB loops).

<sup>710</sup> Well over 50 percent of the stand-alone loops competing carriers purchase from SWBT are hot cut loops. Department of Justice Texas II Evaluation at 9. *Compare* volumes in SWBT Aggregated Performance Data, Measurement No. 59 ("Percent Trouble Reports on N. T. C Orders within 30 Days") (8.0 dB Loop, 5.0 dB Loop (combined)) at 271-No. 59a-c with Measurement No. 114.1 ("Loop Disconnect/Cross Connect Interval") (Local Number Portability with Loop-CHC, Local Number Portability with Loop-FDT) at 271-No. 114.1a-b.

<sup>711</sup> See *supra* Part III.D.2; see also Texas Commission Texas I Comments at 1-2.

<sup>712</sup> SWBT Texas I Application at 15.

<sup>713</sup> *Second BellSouth Louisiana Order*, 13 FCC Rcd at 20655, para. 87; see also *Bell Atlantic New York Order*, 15 FCC Rcd at 4098, para. 279.

<sup>714</sup> SWBT Texas I Application at 15. See generally *Bell Atlantic New York Order*, 15 FCC Rcd at 4098, para. 279.

<sup>715</sup> See *Bell Atlantic New York Order*, 15 FCC Rcd at 4095, para. 269; *Ameritech Michigan Order*, 12 FCC Rcd at 20619, para. 141.

254. In determining that SWBT satisfies checklist item 4, we rely, among other factors, on performance data collected and submitted by SWBT. Several commenters challenge the validity of SWBT's performance data generally, and loop performance data in particular.<sup>716</sup> As described above,<sup>717</sup> we reject this general contention because the data submitted by SWBT in this proceeding have been subject to substantial scrutiny and review by interested parties. Where commenters dispute specific data, we discuss these challenges in our analysis. In such instances, we look to the availability of data reconciled under the auspices of the Texas Commission, specific evidence presented by commenters, and the record as a whole, in order to determine the appropriate weight to accord the challenged data.

**a. Voice Grade Stand-Alone Loops**

255. SWBT provisions unbundled voice grade local loops to competing carriers in three distinct forms. First, SWBT provisions stand-alone loops to competing carriers through conversions of active loops to the carriers' collocation space. These loop cutovers, or hot cuts, make it possible to transfer an active SWBT customer's service to a competing carrier. Second, if SWBT does not presently service the customer on the lines in question, a competing carrier may obtain a "new" loop from SWBT. In this case, the customer receives service on a second loop from a competitive carrier and not from SWBT, while it may choose to retain SWBT on the original line. For both new loops and conversions of existing customers, when loops are provisioned on a stand-alone basis, the competing carrier obtains only the transmission facility between SWBT's central office and the customer's premises. Third, SWBT provisions loops as part of a platform of network elements. What follows below is a discussion of the provisioning and maintenance and repair of hot cut loops and new stand-alone loops. Because provisioning and maintenance and repair functions for loops provisioned as part of a platform are more similar to processes used to provide resale than those used to provide unbundled loops, we address them in checklist item 2.

**(i) Hot Cut Loop Provisioning**

256. Like the Department of Justice, we find that SWBT demonstrates that it provides unbundled hot cut loops through the conversion of active customers from SWBT to competing carriers, in accordance with the requirements of checklist item 4.<sup>718</sup> The ability of a BOC to provision working, trouble-free loops through hot cuts is critically important in light of the substantial risk that a defective hot cut will result in competing carrier customers experiencing service outages for more than a brief period.<sup>719</sup> Moreover, the failure to provision hot cut loops

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<sup>716</sup> AT&T Texas II Comments at 37-39; AT&T Texas II Reply at 15, 23-36; AT&T Texas I Pfau/De Young Decl. at paras. 15, 25, 56-58; WorldCom Texas I Comments at 34.

<sup>717</sup> See *supra* III.D.2.

<sup>718</sup> Department of Justice Texas II Evaluation at 1, 11.

<sup>719</sup> *Bell Atlantic New York Order*, 15 FCC Rcd at 4109, para. 299.

effectively has a particularly significant adverse impact on mass market competition because they are a critical component of competing carriers' efforts to provide service to the small- and medium-sized business markets.<sup>720</sup>

257. At the outset, we reject the argument made by some commenters that SWBT fails to meet the "standards" we developed in the *Bell Atlantic New York Order*.<sup>721</sup> With each application we are presented with a different set of circumstances: new and differently defined performance measurements, state proceedings with different histories, new processes by which BOCs perform necessary functions for competing carriers, and new competing carrier concerns. Although the hot cut timeliness and quality issues we assess remain consistent, the evidence presented will vary from one application to the next. For instance, unlike Bell Atlantic, SWBT's hot cut processes are divided into two methods, and these two methods are reflected in separate performance measurements. As described in more detail below, some of SWBT's performance measurements are reported on a per loop basis, rather than the per order basis used by Bell Atlantic with some of its performance measurements. In many cases, such differences are the product of state proceedings where provisioning processes and performance measurements were developed and refined with input from both the BOC and competing carriers. These differences can make direct comparison with the performance discussed in prior orders difficult, if not impossible. As a result, although our hot cut inquiry here examines the same criteria as our inquiry in the *Bell Atlantic New York Order*, we necessarily base our conclusion on the evidence presented in this application. In particular, we evaluate SWBT's hot cut process, and the timeliness and quality of the hot cuts it provides to competing carriers.

258. The Texas Commission reasonably determined that there is no retail equivalent to a hot cut, and no commenter contends otherwise. Thus, as in the *Bell Atlantic New York Order*, the appropriate standard is whether the BOC provides unbundled loops through hot cuts in a manner that offers an efficient competitor a meaningful opportunity to compete.<sup>722</sup> In a footnote in one of its comments, AT&T proposes an ostensibly different standard, under which a BOC would be required to demonstrate that it has provided "the fewest number of outages and best on-time performance that it is technically feasible and commercially reasonable for the BOC to achieve."<sup>723</sup> Because AT&T does not explain how such a test would operate in practice or how, if at all, it would differ from our traditional standard for BOC activities that lack a retail analogue,

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<sup>720</sup> Department of Justice Texas II Evaluation at 9; Connect! Texas II Comments at 6; AT&T Texas II Depkiewicz Reply Decl. at paras. 16-21, Attach. 1-3; Department of Justice Texas I Evaluation at 27; Allegiance Texas I Comments at 5; AT&T Texas I DeYoung Decl. Vol. IIIA at paras. 11, 99-102, Attach. 14-16; Letter from Mark E. Haddad, Counsel, AT&T, to Magalie Roman Salas, Secretary, Federal Communications Commission, CC Docket No. 00-65 at 10 (filed June 8, 2000) (AT&T June 8 *Ex Parte* Letter).

<sup>721</sup> @Link Texas II Comments at 3-4, 6; AT&T Texas II Comments at 26-27, 29; Connect! Texas II Comments at 4-5; RCN Texas II Comments at 5, 7; AT&T Texas II DeYoung/Van de Water Decl. at paras. 13-25; 51; ALTS Texas II Reply at 10-11; AT&T Texas II Reply at 19, 33, 35; AT&T Texas II DeYoung/Van de Water Reply Decl. at para. 9; Department of Justice Texas I Evaluation at 33.

<sup>722</sup> See *Bell Atlantic New York Order*, 15 FCC Rcd 4104, para. 291.

<sup>723</sup> AT&T Texas II Comments at 28 n.34.

we conclude that AT&T's passing reference to this issue provides no basis for departing from our traditional approach.<sup>724</sup>

259. *Hot Cut Process.* SWBT makes available two hot cut processes: the fully coordinated hot cut (CHC) process and the frame due time (FDT) hot cut process. CHC orders are manually handled in SWBT's order processing center and require intensive coordination and communication between SWBT and the competing carrier during the actual cutover from SWBT to the competing carrier.<sup>725</sup> FDT hot cuts require both SWBT and the competing carrier to perform necessary work at pre-arranged times, with no communication required at the time of the hot cut.<sup>726</sup> Unlike CHC orders, FDT orders are capable of flowing through SWBT's order processing center without manual work by SWBT's representatives.<sup>727</sup> Although in the past SWBT has represented that the CHC process is too resource-intensive to support commercial levels of demand for lower volume loop orders,<sup>728</sup> SWBT now states that it has sufficient resources to process competing carriers' orders in a timely and efficient manner, regardless of which method they choose.<sup>729</sup> Thus, competing carriers "have their choice of two alternative processes in every case, allowing them to pick the process that best fits their resources and priorities."<sup>730</sup> At present, slightly more than half of all hot cuts are performed with the FDT process; the remainder are performed with the CHC process.<sup>731</sup>

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<sup>724</sup> Indeed, AT&T appears to overlook the significance of the lack of a retail analogue in this context. It appears to rely, for example, on the language of section 51.311(b) of the Commission's rules, which requires an incumbent LEC, "to the extent technically feasible," to afford new entrants with a "quality of access" to network elements that is "at least equal in quality to that which the incumbent LEC provides to itself." 47 C.F.R. § 51.311(b). But the "equality" standard of this rule, which varies in application from incumbent to incumbent, applies in contexts where (unlike here) there is some retail analogue. The rule does not impose a general standard of performance.

<sup>725</sup> SWBT Texas I Ham Aff. at para. 134; SWBT Texas I Conway Aff. at paras. 78-79.

<sup>726</sup> SWBT Texas I Conway at para. 76.

<sup>727</sup> Department of Justice Texas I Evaluation at 27.

<sup>728</sup> SWBT Texas I Conway Aff. at para. 79; AT&T Texas I DeYoung Decl. IIIA at paras. 44-47 (citing SWBT letters, e-mails, and statements presented to the Texas Commission and Nov. 2, 1999 Texas Commission Hearing Tr. at 267 (Gwen Rowling of ICG Communications testified before the Texas Commission that "Frame due time, we have been asked by Southwestern Bell to start using it. We didn't come to Bell to do it. They asked us to start doing it . . . .")). See also AT&T Texas II Reply at 23; @Link et al. Texas II Reply at 5; AT&T June 8 *Ex Parte* Letter at 6-7.

<sup>729</sup> SWBT Texas II Application at 10; SWBT Texas II Noland/Dysart Reply Aff. at para. 54; SWBT June 23 *Ex Parte* Letter at 3.

<sup>730</sup> SWBT Texas II Application at 8; SWBT Texas II Noland/Dysart Reply Aff. at para. 54.

<sup>731</sup> In February, March, and April 2000, SWBT performed 1890, 1998, and 1500 CHCs and 2296, 2119, and 1637 FDT hot cuts. SWBT Aggregated Performance Data, Measurement No. 114.1 ("Loop Disconnect/Cross Connect Interval") (Local Number Portability with Loop—CHC, Local Number Portability with Loop—FDT) at 271-No. 114.1a-b.

260. Upon review of SWBT's present representations regarding CHC availability and the lack of recent competing carrier evidence suggesting otherwise, we conclude that competing carriers may freely choose between the CHC and FDT hot cut processes.<sup>732</sup> Although some commenters maintain that SWBT cannot handle high volumes of CHC orders, they offer little or no current evidence to demonstrate that this continues to be true.<sup>733</sup> With respect to the more recent evidence that AT&T offers to support this conclusion, namely AT&T's experience with erroneous CHC order rejections for invalid due dates, we conclude that it is insufficient to warrant a determination that the CHC process is not capable of handling current demand. The only evidence AT&T provides is a statement by SWBT in an e-mail regarding CHC rejections that SWBT cannot provide a "limitless" number of CHC orders.<sup>734</sup> In light of its stated commitment in the same e-mail to "make[] every effort to accommodate all requested dates and times for CHC orders," this is not, by itself, substantial evidence that SWBT's process cannot manage competing carrier demand for CHCs.<sup>735</sup> Moreover, the e-mail indicates that SWBT actively is working with AT&T to resolve its CHC rejection problem. In any event, should future SWBT hot cut capacity constraints limit competing carrier access to unbundled voice grade loops, we shall take appropriate enforcement action at that time.

261. We emphasize that competing carriers can now choose freely between the CHC and FDT hot cut processes, because we conclude that the evidence in this proceeding indicates that it is only through the CHC process that SWBT is able to provision unbundled hot cut loops in accordance with the requirements of checklist item 4. In the discussion that follows, we find that SWBT demonstrates it provisions CHCs in a timely manner and at an acceptable level of quality, with a minimal service disruption and a minimum number of troubles following installation. We also find that SWBT demonstrates that it provisions FDT hot cuts in a timely manner and with a minimum number of troubles following installation. Problems, however, remain with respect to FDT hot cut service disruptions, and therefore we do not find that SWBT provisions hot cut loops through the FDT process in accordance with the requirements of checklist item 4. Yet, because the FDT process is still chosen by competing carriers in significant numbers, we discuss the FDT process in conjunction with the CHC process below.

262. *Hot Cut Timeliness.* We conclude that SWBT demonstrates that it can complete a substantial percentage of CHCs and FDT hot cuts it provisions within a reasonable time

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<sup>732</sup> We note that the Department of Justice requested that the Commission make this determination. See Department of Justice Texas II Evaluation at 14. See also Texas Commission June 19 *Ex Parte* Letter at 3 n.7; SWBT June 23 *Ex Parte* Letter at 3..

<sup>733</sup> @Link Texas II Comments at 5; Connect! Texas II Comments at 7; RCN Texas II Comments at 8; AT&T Texas II Reply Comments at 24; AT&T June 8 *Ex Parte* Letter at 6 (citing SWBT statements from September and November 1999 regarding the availability of the FDT hot cut process and/or the limits of the CHC process).

<sup>734</sup> See generally AT&T June 8 *Ex Parte* Letter at 7, Attach. 8 (e-mail from Bob Bannecker, SWBT, to Sarah DeYoung, AT&T (sent May 26, 2000)).

<sup>735</sup> AT&T June 8 *Ex Parte* Letter at Attach. 8 (e-mail from Bob Bannecker, SWBT, to Sarah DeYoung, AT&T (sent May 26, 2000)).

interval.<sup>736</sup> Under the performance measurement developed by the Texas Commission, and approved at its December 16, 1999 open meeting, SWBT hot cut performance is measured according to the percentage of hot cut loops in orders of less than 25 lines that SWBT completes within a specified time window.<sup>737</sup> The Texas Commission adopted an interim benchmark, under which 100 percent of these cutovers must be completed within 2 hours of the scheduled start time.<sup>738</sup> This standard applies to both CHC and FDT hot cuts.<sup>739</sup> The performance data SWBT submitted with its application indicate that SWBT completed between 98 and 99 percent of all CHCs within 2 hours from February through April 2000.<sup>740</sup> During the same time period, these data indicate that SWBT completed between 92 and 99 percent of FDT hot cuts within 2 hours.<sup>741</sup>

263. In response to criticism regarding the accuracy of SWBT's hot cut data, the Texas Commission issued orders requesting SWBT and competing carrier reconciliation of various SWBT self-reported hot cut performance measurement data.<sup>742</sup> Because we believe data reconciled under the auspices of a state commission, with the participation of both competing carriers and the BOC, to be reliable evidence of a BOC's performance, we accord these data substantial weight.<sup>743</sup> Moreover, the reconciled data include information on SWBT's ability to perform both CHCs and FDT hot cuts within a 1 hour interval.<sup>744</sup> In addition to these reconciled data, SWBT presented data from competing carriers that were reconciled, combined with SWBT

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<sup>736</sup> See, e.g., *Bell Atlantic New York Order*, 15 FCC Rcd at 4114-15, para. 309 (finding that Bell Atlantic was able to complete at least 90 percent of competing carrier hot cut orders of fewer than 10 lines within a one-hour interval).

<sup>737</sup> Texas Commission Texas II Comments at 13.

<sup>738</sup> Texas Commission Texas II Comments at 13.

<sup>739</sup> See, e.g., SWBT Aggregated Performance Data, Measurement No. 114.1 ("Loop Disconnect/Cross Connect Interval") (Local Number Portability with Loop-CHC, Local Number Portability with Loop-FDT) at 271-No. 114.1a-b.

<sup>740</sup> SWBT Aggregated Performance Data, Measurement No. 114.1 ("Loop Disconnect/Cross Connect Interval") (Local Number Portability with Loop-CHC) at 271-No. 114.1a.

<sup>741</sup> SWBT Aggregated Performance Data, Measurement No. 114.1 ("Loop Disconnect/Cross Connect Interval") (Local Number Portability with Loop-FDT) at 271-No. 114.1b.

<sup>742</sup> Order No. 4, *Section 271 Compliance Monitoring of Southwestern Bell Tel. Co. of Texas*, Project No. 20400 (Texas PUC Mar. 28, 2000) (Texas Commission Mar. 28 Order); Order No. 9, *Section 271 Compliance Monitoring of Southwestern Bell Tel. Co. of Texas*, Project No. 20400 (Texas PUC May 5, 2000) (Texas Commission May 5 Order).

<sup>743</sup> See *Bell Atlantic New York Order*, 15 FCC Rcd at 4106-07, paras. 294-95. See also SWBT Texas II Application at 31; SWBT Texas II Noland/Dysart Reply Aff. at para. 19. But see AT&T Texas II DeYoung/Van de Water Reply Decl. at para. 15; AT&T June 8 *Ex Parte* Letter at 15 (alleging that SWBT overstates the Texas Commission's involvement in fact finding).

<sup>744</sup> AT&T has criticized the 2 hour interval as overly generous. AT&T Texas II Comments at 35-36; AT&T Texas II DeYoung/Van de Water at paras. 60, 105-109. The Texas Commission is revising its hot cut interval measurement. Loops in orders with less than 11 lines will be assessed using a 1 hour interval and loops in larger orders will be tracked against a longer time. SWBT Texas II Noland/Dysart Reply Aff. at para. 45.

data from competing carriers that did not participate in the reconciliation. Because we find that this aggregated presentation is the most accurate overall picture of SWBT performance in Texas, we use it to evaluate SWBT's hot cut loop timeliness.

264. We find that the aggregated data demonstrate that SWBT can provision a substantial percentage of competing carrier CHC and FDT hot cut loops within a 1 hour interval. These aggregated data indicate that during December 1999, and January and February 2000, SWBT completed an average of 90 percent of all CHC loops from orders with less than 11 lines within 1 hour and an average of 94 percent of all FDT hot cut loops from orders with less than 11 lines within 1 hour.<sup>745</sup> Moreover, in its reply comments, SWBT developed similar data for March and April 2000, that demonstrate that during these two months, SWBT completed an average of 93 percent of all CHC loops from orders with less than 11 lines within 1 hour and an average of 96 percent of all FDT hot cut loops from orders with less than 11 lines within 1 hour.<sup>746</sup> We find this evidence sufficient to overcome the claims of competing carriers that SWBT's hot cut provisioning is not performed in a timely manner and therefore affects their ability to obtain and retain customers.<sup>747</sup>

265. We acknowledge that some commenters raise concerns with respect to the way SWBT measures the interval for its completion of hot cut loops. First, some competing carriers criticize SWBT and the Texas Commission for using a measurement based on individual loops, rather than orders.<sup>748</sup> Although these commenters insist that a loop-based measurement<sup>749</sup> is a more charitable representation of SWBT's performance than a measurement based on orders, we do not find their arguments persuasive. A measurement based on loops and not orders is not systematically more generous to the BOC, because it is possible for the percentage of loops completed within an interval to be lower than the percentage of orders completed within the same interval. As SWBT points out, whether one approach is stricter than the other depends upon the extent to which delays occur on multiple lines in the same order.<sup>750</sup> Moreover, we agree

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<sup>745</sup> SWBT Apr. 25 *Ex Parte* Letter at Attach. 2 ("PM 114.1 Reconciled/Reported Results Summary").

<sup>746</sup> These data were developed pursuant to a May 5, 2000 Texas Commission order requesting reconciliation of certain SWBT March and April 2000 hot cut data. We acknowledge, however, they do not reflect the final reconciliation. See SWBT Texas II Noland/Dysart Reply Aff. at para. 15, Attach. B ("PM 114.1 Reconciled/Reported Results Summary") (averaging together March and April 2000 data). See also Texas Commission May 5 Order; AT&T June 8 *Ex Parte* Letter at 1-2 (criticizing SWBT's unilateral presentation of hot cut timeliness data for March and April 2000).

<sup>747</sup> CLEC Coalition Texas I Comments at 41-42; RCN Texas II Comments at 11; ALTS Texas I Comments at 33; AT&T Texas I DeYoung Vol. IIIA Decl. at paras. 75-81, 128-130.

<sup>748</sup> AT&T Texas II Comments at 34; AT&T Texas II DeYoung/Van de Water Decl. at paras. 22, 31, 52; AT&T Texas II DeYoung/Van de Water Reply Decl. at paras. 72-81; Department of Justice Texas I Evaluation at 32 n.85; Allegiance Texas I Comments at 5-7; ALTS Texas I Comments at 33; AT&T Texas I DeYoung Vol. IIIA Decl. at paras. 14, 55, 131-159.

<sup>749</sup> By loop-based measurement, we mean data reported on an individual line basis.

<sup>750</sup> SWBT Texas II Reply at 34; SWBT Texas II Noland/Dysart Reply Aff. at para. 47 (demonstrating that changing from reporting a measurement in loops to reporting a measurement in orders has no consistent impact). (continued....)

with the Texas Commission that performance measurements are not necessarily "one size fits all," and conclude that it is the more prudent course for this Commission to recognize reasonable measurements adopted by state commissions as a part of a state proceeding that included both BOC and competing carrier input.<sup>751</sup>

266. Finally, some commenters criticize SWBT's interim hot cut timeliness performance measurement because the business rules indicate that the interval ends when the SWBT technician completes the hot cut, excluding the time it takes for the SWBT technician to call the competing carrier to indicate that SWBT completed work on the CHC cutover.<sup>752</sup> At the outset, we note that this criticism does not apply to FDT hot cuts, because no such call is required when this process is used. With respect to CHCs, we find that this concern is misplaced, because communication between SWBT and the competing carrier is already required at the time of the CHC.<sup>753</sup> Although beyond the scope of this order, we note that SWBT and competing carriers recently agreed to revise the business rules so that the conversion interval will end after the SWBT technician has notified the competing carrier that the cutover is complete.<sup>754</sup>

267. *Hot Cut Quality.* We further conclude that SWBT demonstrates that it provisions CHCs at a level of quality that offers efficient competitors a meaningful opportunity to compete. Upon review of the evidence in the record regarding hot cut installation quality, and specifically the outage rate associated with failed SWBT CHCs, and the trouble rate following CHC installation, we find that SWBT demonstrates that it provisions CHCs to competitors in a manner that meets the requirements of the checklist. Although we find that SWBT's performance with respect to troubles following FDT hot cut installation meets the requirements of the checklist, we find that the outage rate associated with failed SWBT FDT hot cuts does not.

268. *Outages.* We conclude that the record demonstrates that the CHC process SWBT makes available to competing carriers minimizes service disruptions that may significantly affect competing carriers' end-user customers. As a result, we conclude that SWBT demonstrates that the level of outages competing carriers may experience as a result of failed SWBT CHCs is sufficiently small to provide an efficient competitor with a meaningful opportunity to compete.

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Attach. K (comparing SWBT hot cut timeliness data for December 1999 through March 2000, finding that of the eight reported results (CHC and FDT for the four months), two showed no change when recalculated on a per order basis, three showed improvement, and three showed deterioration in SWBT performance).

<sup>751</sup> Texas Commission Texas II Comments at 3.

<sup>752</sup> AT&T Texas II Comments at 39; AT&T Texas II DeYoung/Van de Water Decl. at paras. 54, 102; AT&T Texas II DeYoung/Van de Water Reply Decl. at para. 92; Department of Justice Texas I Evaluation at 31-32 n.84; Department of Justice Mar. 9 *Ex Parte* Letter at 9; AT&T June 8 *Ex Parte* at 11-13.

<sup>753</sup> SWBT Texas I Conway Aff. at para. 84.

<sup>754</sup> SWBT Texas II Reply at 33; SWBT Texas II Noland/Dysart Reply Aff. at paras. 11-13; Department of Justice Texas II Evaluation at 10 n.26; Department of Justice Texas I Evaluation at 31-32 n.84. AT&T also contends that SWBT's interim performance measurement fails to capture certain delays in switch activation. AT&T, however, presents no data to indicate that this is a recurrent problem. AT&T June 8 *Ex Parte* Letter at 13.

269. A comprehensive reconciliation of AT&T's hot cut outage data conducted under the auspices of the Texas Commission demonstrates that SWBT's CHC process minimizes service disruptions experienced by competing carrier customers who are provisioned service via hot cut loops. Because no performance measurement exists to capture all SWBT-caused hot cut outages, the Texas Commission developed the Provisioning Process Improvement Group (PPIG) to reconcile SWBT and competing carrier data relating to unexpected hot cut service outages.<sup>755</sup> As a result of PPIG efforts, a joint affidavit was filed with the Texas Commission by SWBT and AT&T with reconciled outage data for December 1999, and January and February 2000.<sup>756</sup> In addition, SWBT filed an affidavit with the Texas Commission reflecting the PPIG reconciliation for March 2000 that is consistent with AT&T's representation of the March 2000 PPIG data in its reply comments.<sup>757</sup> Furthermore, the Texas Commission filed an *ex parte* letter with this Commission indicating the results of the April 2000 PPIG data reconciliation.<sup>758</sup> As with our discussion of SWBT's hot cut timeliness data, we review these reconciled data on a per loop basis.<sup>759</sup>

270. Because the PPIG data reveal that during the period from December 1999 through April 2000, an average of less than 5 percent of all CHC loops that SWBT provisioned to AT&T resulted in end-user service outages caused by SWBT provisioning failures, we conclude that SWBT makes available a hot cut process that provides efficient competitors with a meaningful opportunity to compete.<sup>760</sup> We find this outage rate low enough to reject competing carrier arguments that high CHC outage rates caused by SWBT provisioning failures make it difficult

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<sup>755</sup> Texas Commission Texas II Comments at 16; SWBT Texas II Conway/Dysart Aff. at para. 25; SWBT Apr. 25 *Ex Parte* Letter at Attach. 3 (Joint Affidavit of Mark Van de Water and Robert Royer, Investigation of Southwestern Bell Telephone Co.'s Entry Into the Texas InterLATA Telecommunications Market, Section 271 Compliance Monitoring of Southwestern Bell Telephone Co., Project Nos. 16251, 20400 at 2 (filed with Texas PUC Apr. 21, 2000) (PPIG Van de Water/Royer Aff.)).

<sup>756</sup> PPIG Van de Water/Royer Aff. at Attach. (CHC and FDT December 1999, and January and February 2000 outage data charts).

<sup>757</sup> Affidavit of Terry R. Hoeven, Section 271 Compliance Monitoring of Southwestern Bell Telephone Co., Project No. 20400 (filed with Texas PUC May 18, 2000) (PPIG Hoeven Aff.) (SWBT filing listing PPIG data from March 2000 reconciliation); SWBT Texas II Noland/Dysart Reply Aff. at Attach. C; AT&T Texas II De Young/Van de Water Reply Decl. at Attach. 1 (March 2000 PPIG data summary).

<sup>758</sup> We note that the Department of Justice requested that the Commission confirm the accuracy of the April 2000 CHC outage data. Department of Justice Texas II Evaluation at 14. We find the Texas Commission's endorsement of these data, as described in its June 9, 2000 *ex parte* letter, and as filed by SWBT with the Texas Commission in a June 15, 2000 affidavit, is substantial evidence of its accuracy. Texas Commission June 19 *Ex Parte* Letter at 3.

<sup>759</sup> As described above with respect to hot cut timeliness data, we reject the argument of commenters who contend that a measurement based on loops rather than orders is systematically more generous to the incumbent than a measurement based on orders. *See supra* para. 266.

<sup>760</sup> PPIG Van de Water/Royer Aff. at Attach. (CHC and FDT December 1999, and January and February 2000 PPIG outage charts); PPIG Hoeven Aff. (CHC and FDT March 2000 outage charts); AT&T Texas II DeYoung/Van de Water Reply Decl. at Attach. 1 (outages summary, March 2000 data); Texas Commission June 19 *Ex Parte* Letter at 3 (CHC outages from PPIG April 2000 data).

for them to obtain and retain customers.<sup>761</sup> We acknowledge, however, that this average excludes outages directly related to a one-time Telcordia software problem (SOAC) that affected outage rates in February 2000. Although some commenters criticize this exclusion,<sup>762</sup> we find that these outages were an unusual one-time problem based on a vendor's software defect.<sup>763</sup> The Texas Commission concludes that "this problem has been rectified and will not affect SWBT's future performance."<sup>764</sup> Furthermore, AT&T acknowledged the scope of the SOAC outage problem and its impact on the PPIG data in the joint affidavit.<sup>765</sup>

271. We acknowledge that the reconciled PPIG data demonstrate a higher outage rate associated with the FDT hot cut process than the CHC process.<sup>766</sup> Furthermore, we acknowledge that in the past SWBT has encouraged competing carriers to use the FDT process for all but large volume loop orders, or orders provisioned outside of normal business hours.<sup>767</sup> At present, however, SWBT makes both the CHC and FDT hot cut processes equally available to competing carriers.<sup>768</sup> Moreover, SWBT provides the FDT process to competing carriers free of charge, despite the fact that FDT conversions require most of the same SWBT labor as CHC conversions.<sup>769</sup> In addition, the mechanized nature of the FDT process makes it a less labor-intensive option for competing carriers than the CHC process.<sup>770</sup> If, despite these conveniences, any competing carrier finds FDT outage rates too high, they are free to use the alternative CHC process.

272. Because we find that the CHC process affords efficient competitors a meaningful opportunity to compete, and that this process is now widely available to all competing carriers, we do not find the fact that SWBT has developed an alternative, mechanized process with a higher incidence of competing carrier end-user customer outages to be fatal to this application.

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<sup>761</sup> See SWBT Texas II Conway/Dysart Aff. at paras. 10-11; AT&T Texas II DeYoung/Van de Water Decl. at paras. 23, 55-59 n.11. See generally *Bell Atlantic New York Order*, 15 FCC Rcd at 4110-11, paras. 302-03.

<sup>762</sup> See, e.g., AT&T Texas II Comments at 31 n.38; AT&T Texas II Reply at 28-29.

<sup>763</sup> SWBT Texas II Conway/Dysart at paras. 10-11 (SWBT performance results for February irreversibly affected by Telcordia software defect); SWBT Texas II Noland/Dysart Reply Aff. at paras. 23-24 (describing SWBT testing procedures to ensure this sort of software problem does not happen in the future).

<sup>764</sup> Texas Commission Texas II Comments at 18; SWBT Texas II Conway Aff. at para. 34.

<sup>765</sup> PPIG Van de Water/Royer Aff. at Attach. (CHC and FDT February 2000 outage charts).

<sup>766</sup> PPIG Van de Water/Royer Aff. at Attach. (FDT December 1999, and January and February 2000 outage charts).

<sup>767</sup> See SWBT Texas I Conway Aff. at paras. 79, 86. AT&T Texas II Reply at 23; @Link et al. Texas II Reply at 5; See also AT&T Texas I DeYoung Decl. Vol. IIIA at paras. 44-47; AT&T June 8 *Ex Parte* Letter at 6-7.

<sup>768</sup> SWBT Texas II Application at 8-10; SWBT June 23 *Ex Parte* Letter at 3.

<sup>769</sup> SWBT Texas II Reply at 36-37.

<sup>770</sup> SWBT Texas II Reply at 36-37.

The record reflects that SWBT is working to further refine the FDT process so that it becomes a viable option for more competing carriers in the near future.<sup>771</sup> We do not wish to discourage SWBT, or any other incumbent, from developing new processes to provision unbundled loops. As the Texas Commission points out, no one is benefited if this Commission discourages incumbents from developing potentially more efficient systems or processes, just before or during the pendency of their section 271 application.<sup>772</sup>

273. Finally, we commend the Texas Commission for developing a new "outages on conversion" performance measurement in its April 2000 work sessions with SWBT and competing carriers.<sup>773</sup> This measurement will capture the percentage of CHC and FDT circuits for which competing carriers submit a provisioning trouble report on the day of the conversion, or by noon on the following day.<sup>774</sup> The Texas Commission's action effectively provides an outage measure that AT&T and other competing carriers have indicated is important to them.<sup>775</sup> This addition to the Texas performance measurements also will render it unnecessary to perform the sort of manual, time-consuming review and assessments that have been performed under the auspices of the PPIG and are described above.<sup>776</sup> We believe this measurement will be a useful, standardized way for competing carriers to assess FDT and CHC outage rates in the future and will enable competing carriers to determine which method better suits their business plans.

274. Installation Troubles. We conclude that SWBT demonstrates that competing carrier end users experience only very low rates of installation troubles on lines provisioned by CHCs and FDT hot cuts. From December 1999 through March 2000, competing carriers experienced troubles within 7 days after installation on an average of only 1.5 percent of CHCs and 2.3 percent of FDT hot cuts.<sup>777</sup> When the CHC and FDT processes are combined, competing

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<sup>771</sup> SWBT Texas II Noland/Dysart Reply Aff. at para. 26 (describing "considerable effort" SWBT has devoted to improving its FDT hot cut performance).

<sup>772</sup> Texas Commission Texas II Comments at 14; AT&T June 8 *Ex Parte* Letter at 2 (acknowledging that FDT hot cuts require "less coordination" than CHCs, with "fewer steps and fewer time consuming hand-offs").

<sup>773</sup> SWBT Texas II Noland/Dysart Reply Aff. at para. 45, Attach. J.

<sup>774</sup> SWBT Texas II Noland/Dysart Reply Aff. at para. 45, Attach. J.

<sup>775</sup> See ALTS/CLEC Coalition Texas II Comments at 3-5; AT&T Texas II Comments at 32-33; AT&T Texas II DeYoung/Van de Water Decl. at para. 26; AT&T Texas II DeYoung/Van de Water Reply Decl. at paras. 86-90; see also AT&T June 8 *Ex Parte* Letter at 8-9 (expressing concern about the exclusion of outages captured as trouble reports following installation); AT&T Texas II Reply at 20; AT&T Texas II DeYoung/Van de Water Decl. at para. 96 (expressing concern that defective cuts are not captured in existing performance measurements).

<sup>776</sup> See AT&T Texas II DeYoung/Van de Water Decl. at para. 77 (characterizing the manual reconciliation process as "extraordinarily resource-intensive").

<sup>777</sup> We note that SWBT presents these data only for December 1999 through March 2000, and as in the *Bell Atlantic New York Order*, they are loop-based data (rather than order-based data). SWBT Texas II Noland/Dysart Reply Aff. at Attach. I. The Texas Commission established a performance measurement to assess the quality of a variety of loops provisioned by SWBT to competing carriers that captures the percentage of troubles within 30 days after installation. Because this is a much longer period than the 7 day period we used to evaluate hot cut quality in (continued....)

carriers experienced troubles within 7 days following installation on an average of only 1.9 percent of all hot cut loops.<sup>778</sup> As a result, we find that SWBT installs hot cuts of quality sufficient to provide an efficient competitor with a meaningful opportunity to compete.<sup>779</sup>

275. *Other Hot Cut Issues.* We reject AT&T's allegation that SWBT fails checklist 4 because of problems with the pricing of the CHC hot cut process.<sup>780</sup> The Department of Justice concludes that SWBT passes this checklist item.<sup>781</sup> It states, however, that it has "continuing concern" regarding SWBT's CHC charges because they are "significant in amount" and notes that "the record does not contain any justification of them as appropriately cost-based."<sup>782</sup> AT&T asserts that: (1) SWBT fails to identify relevant time and materials charges imposed during the CHC process; (2) fails to identify its cost studies to support these charges; (3) fails to prove that the Texas Commission considered or approved these charges; and (4) does not impose these charges for all hot cuts, which proves that the CHC charges are actually penalties.<sup>783</sup>

276. SWBT disputes each of AT&T's allegations. First, SWBT asserts that it has adequately identified its time and material charges imposed during the CHC process, and that the terms of these charges are contained in both the UNE price schedule of AT&T's interconnection contract and in the T2A agreement.<sup>784</sup> SWBT also responds that these rates are cost-based and were arbitrated by the Texas Commission as part of its Mega-Arbitration.<sup>785</sup> Additionally, SWBT asserts that as part of its rate case, the Texas Commission considered SWBT's cost studies relating to the CHC process.<sup>786</sup> SWBT also disputes AT&T's allegation that the CHC rates are imposed in a punitive manner. SWBT states that it has waived the Texas Commission-approved

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our *Bell Atlantic New York Order* and because the data for this performance measurement also includes new loops that are not provisioned by hot cuts, SWBT reviewed the underlying data for these measurements and submitted data specifically for hot cut loops within 10 days after installation. In response to AT&T criticism questioning SWBT's decision to use a 10 day measurement period, SWBT submitted trouble data for the 7 day period following installation identical to the standard discussed in the *Bell Atlantic New York Order*. See SWBT Texas II Noland/Dysart Reply Aff. at paras. 41-44, Attach. 1; AT&T Texas II Comments at 37; AT&T Texas II DeYoung/Van de Water Decl. at para. 70.

<sup>778</sup> SWBT Texas II Noland/Dysart Reply Aff. at Attach. 1.

<sup>779</sup> See generally *Bell Atlantic New York Order*, 15 FCC Rcd at 4109, para. 301.

<sup>780</sup> AT&T Texas II Reply Comments at 24-25; AT&T Texas II DeYoung/Van de Water Reply Aff. at paras. 27-28; AT&T June 8 *Ex Parte* Letter at 4-6.

<sup>781</sup> Department of Justice Texas II Evaluation at 14-15.

<sup>782</sup> Department of Justice Texas II Evaluation at 15 n.42.

<sup>783</sup> AT&T Texas II DeYoung/Van de Water Reply Aff. at paras. 27-28; AT&T June 8 *Ex Parte* Letter at 5.

<sup>784</sup> SWBT Texas II Noland/Dysart Reply Aff. at para. 50; SWBT June 23 *Ex Parte* Letter at 3.

<sup>785</sup> SWBT Texas II Noland/Dysart Reply Aff. at para. 50; SWBT June 23 *Ex Parte* Letter at 3.

<sup>786</sup> SWBT June 23 *Ex Parte* Letter at 3.

charges for its alternative hot cut method, FDT, in order to make that process "an attractive optional offering" for competitive LECs.<sup>787</sup> SWBT contends, however, that offering one hot cut method free does not make the alternative method punitive, as both options are equally available.<sup>788</sup>

277. Because of its demonstrated commitment to our pricing rules, the Texas Commission's determinations are entitled to a presumption of legitimacy.<sup>789</sup> AT&T provides no basis for disputing SWBT's observation that the CHC charges were arbitrated by the Texas Commission as part of its Mega-Arbitration proceeding. Thus, AT&T's challenge to the cost basis of these charges (and there could be no other legally relevant type of challenge) is in reality a challenge to the pricing determinations of the Texas Commission. AT&T has altogether failed to establish a record for challenging the Texas Commission's rulings on this point or to explain with particularity how it believes the Texas Commission may have erred. In short, AT&T has not laid a proper foundation that would justify this Commission in second-guessing the Texas Commission's exercise of its pricing jurisdiction.

#### (ii) New Stand-Alone Loop Provisioning

278. We find that SWBT demonstrates that it provisions new unbundled stand-alone voice grade loops in accordance with the requirements of checklist item 4. As described above, when SWBT does not presently service the customer on the line in question, a hot cut loop is not required. Instead, a competing carrier may obtain a new loop from SWBT, which requires that a technician be dispatched to the customer's premises in order to complete the installation.

279. First, we find that SWBT systems afford competing carriers access to appointment dates that is equivalent to the access provided to SWBT representatives serving retail customers. SWBT represents that SORD provides competing carriers with the same access to available due dates as that afforded to SWBT's retail operations.<sup>790</sup> SWBT also represents that the same due date database is used for both competing carrier and SWBT retail orders.<sup>791</sup> No commenters claim otherwise.

280. We also conclude that SWBT provisions new unbundled stand-alone loops to competing carriers in substantially the same time and manner as it does for its own retail service. From February through April 2000, SWBT missed a lower percentage of 8.0 dB loop installation due dates requiring field work for competing carriers than it did for its own retail service.<sup>792</sup> With

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<sup>787</sup> SWBT Texas II Noland/Dysart Reply Aff. at para. 50.

<sup>788</sup> SWBT Texas II Noland/Dysart Reply Aff. at para. 51; SWBT June 23 *Ex Parte* Letter at 3.

<sup>789</sup> See section V.A.2.

<sup>790</sup> SWBT Texas I Ham Aff. at para. 186.

<sup>791</sup> SWBT Texas I Ham Aff. at para. 187.

<sup>792</sup> In February, March, and April 2000, SWBT missed 3.4, 5.8, and 9.9 percent of competing carrier 8.0 dB loop installation due dates involving field work. During the same time period, SWBT missed 11.3, 11.4, and 12.0 of the (continued....)

respect to loop quality, during the same period of time, the 8.0 dB loops that SWBT installed for competing carriers experienced a comparable percentage of trouble reports as SWBT's own 8.0 dB loops.<sup>793</sup> Although these performance data do not exclusively address the provisioning of new stand-alone 8.0 dB loops, they do include the provisioning of such loops. Moreover, we note that no commenter has criticized this aspect of SWBT's performance. Therefore, we find that SWBT provisions new voice grade loops in accordance with the requirements of checklist item 4.

### (iii) Maintenance and Repair of Voice Grade Loops

281. Like the Department of Justice, we conclude that SWBT demonstrates that it provides maintenance and repair functions for unbundled local loops provisioned to competing carriers in substantially the same time and manner as it does for its own retail customers.<sup>794</sup> During the period from December 1999 through April 2000, SWBT met a greater percentage of unbundled loop repair due dates for customers of competing carriers than for its own retail customers.<sup>795</sup> In addition, during the same period, the average time to repair unbundled loops for competing carriers was consistently and significantly lower than the time that SWBT took to repair such loops for its own customers.<sup>796</sup> Furthermore, during the same period, competing

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\_\_\_\_\_ same installation due dates for its retail service. SWBT Aggregated Performance Data, Measurement No. 58 ("Percent SWBT Caused Missed Due Dates") (8.0 dB Loop-Field Work) at 271-No. 58a.

<sup>793</sup> In February, March, and April 2000, competing carriers experienced troubles within 30 days following installation on 5.6, 5.3, and 4.9 of their 8.0 dB loops. During the same period SWBT retail customers experienced troubles within 30 days following installation on 3.1, 3.3, and 3.5 percent of their 8.0 dB loops. We acknowledge that while the trouble rates are comparable, the competing carrier rate is marginally higher. In light of SWBT's unbundled voice grade loop provisioning overall, and the fact that no commenter criticizes this aspect of SWBT's performance, we do not find this small difference competitively significant. SWBT Aggregated Performance Data, Measurement No. 59 ("Percent Trouble Reports on N, T, C Orders within 30 Days") (8.0 dB Loop) at 271-No. 59a.

<sup>794</sup> In this section, we discuss maintenance and repair functions for unbundled hot cut and new stand-alone loops, but not xDSL-capable loops and high capacity loops, which are separately addressed in discussions specific to those loop types. *See infra* at paras. 303-06, 319-20.

<sup>795</sup> In December 1999 and January and February 2000, SWBT missed only 2.6, 0.8, and 1.7 percent of competing carrier repair due dates, but 8.3, 7.3, and 6.8 percent of such appointments for its own retail customers. Although in March 2000, SWBT missed 11.1 percent of repair due dates for competing carriers, and only 7.7 percent of such appointments for its own retail customers, this proved to be an aberration, because in April 2000, SWBT missed only 3.3 percent of competing carrier repair due dates and 7.1 percent of such due dates for its own retail customers. SWBT Aggregate Performance Data, Measurement No. 66 ("Missed Repair Commitments") (2 Wire Analog-8.0 dB Loop) at 271-No. 65d-66. SWBT does not measure missed repair due dates for 5.0 dB loops, which are used much less frequently than 8.0 dB loops. For instance, in April 2000, competing carriers were provisioned 5783 8.0 dB loops and only 228 5.0 dB loops. SWBT Aggregated Performance Data, Measurement No. 59 ("Percent Trouble Reports on N, T, C Orders within 30 Days") (8.0 dB Loop, 5.0 dB Loop) at 271-No. 59a (reporting total volumes on a per loop basis).

<sup>796</sup> In February, March, and April 2000, the average time to repair competing carrier unbundled 8.0 dB loops requiring dispatch was 5.95, 14.02, and 5.47 hours, respectively. During the same period, the average time to repair SWBT retail 8.0 dB loops requiring dispatch was 24.03, 27.26, and 30.48 hours, respectively. SWBT Aggregated Performance Data, Measurement No. 67 ("Mean Time to Restore (Hours)-Dispatch") (8.0 dB Loop with Test (continued...))

carriers and SWBT experienced a comparable percentage of repeat trouble reports for unbundled loops.<sup>797</sup> Thus, we find that SWBT provides nondiscriminatory maintenance and repair services for the unbundled loops that it provides to competing carriers.<sup>798</sup>

**b. xDSL-Capable Loops**

282. We conclude that SWBT demonstrates that it provides unbundled local loops for the provision of xDSL services in a nondiscriminatory manner. At the outset, we note that xDSL-capable loops are a substantial and growing portion of all unbundled loops provisioned by SWBT to competing carriers.<sup>799</sup> We also note that in our *Bell Atlantic New York Order*, we stated that we would “find it most persuasive if future applicants under section 271 . . . make a separate and comprehensive evidentiary showing with respect to the provision of xDSL-capable loops.”<sup>800</sup> In doing so, we set forth the evidence that an applicant may use to demonstrate that it provides xDSL-capable loops to competing carriers in a nondiscriminatory manner. First, the Commission stated that 271 applicants could demonstrate that they are providing nondiscriminatory access to xDSL-capable loops through comprehensive and accurate reports of performance measures.<sup>801</sup> As we noted in our *Bell Atlantic New York Order*:

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Access) at 271-No. 67a. During the same period, SWBT took a nearly comparable amount of time to repair the less frequently used 5.0 dB loops requiring dispatch for competing carriers as it did to repair 5.0 dB loops requiring dispatch for its own retail customers. For instance, in February, March, and April 2000, SWBT repaired competing carrier 5.0 dB loops in 5.72, 9.39, and 4.08 hours, respectively. During the same period, SWBT repaired its own retail 5.0 dB loops in 4.68, 5.34, and 6.14 hours, respectively. SWBT Aggregated Performance Data, Measurement No. 67 (“Mean Time to Restore (Hours)-Dispatch”) (5.0 dB loops with Test Access) at 271-No. 67a.

<sup>797</sup> In February, March, and April 2000, competing carriers experienced repeat troubles on 13.3, 10.3, and 7.9 percent of their 8.0 dB loops, while SWBT experienced repeat troubles during the same period on 12.0, 12.2, and 12.9 percent of its own retail 8.0 dB loops. SWBT Aggregated Performance Data, Measurement No. 69 (“Repeat Reports (%)”) (8.0 dB Loop with Test Access) at 271-No. 68-69a. In February, March, and April 2000, competing carriers experienced repeat troubles on 16.1, 9.3, and 5.9 percent of their 5.0 dB loops, while SWBT experienced repeat troubles during the same period on 13.2, 13.3, and 13.0 percent of their retail 5.0 dB loops. SWBT Aggregated Performance Data, Measurement No. 69 (“Repeat Reports (%)”) (5.0 dB Loops with Test Access) at 271-No. 68-69a. We note that for both 8.0 dB and 5.0 dB loops, in the last two months competing carriers have experienced fewer repeat troubles on their loops than SWBT has experienced on its own retail loops.

<sup>798</sup> See Texas Commission Texas I Comments at 50, 54 (reviewing missed repair appointments).

<sup>799</sup> In February 2000, xDSL-capable loops were only 19 percent of all unbundled stand-alone loops ordered by competing carriers. By April 2000, xDSL capable loops were 27 percent of all such loops. See SWBT Aggregated Performance Data, Measurement No. 59 (“Percent Trouble Reports on N, T, C Orders within 30 Days”) (8.0 dB Loop, 5.0 dB Loop, BRI Loop, DS1 Loop, DSL) at 27-No. 59a-c (calculated from total volumes listed on a per loop basis and combining BRI and DSL loop performance data to calculate xDSL-capable loops).

<sup>800</sup> *Bell Atlantic New York Order*, 15 FCC Rcd at 4122, para. 330. We did not require such a showing in New York because of the “unique circumstances” associated with the Bell Atlantic New York application, including the fact that the Commission’s previous section 271 orders did not address the ordering or provisioning of xDSL-capable loops. SWBT has not argued that such “unique circumstances” exist in Texas. See also Department of Justice Texas I Evaluation at 10 n.19.

<sup>801</sup> *Bell Atlantic New York Order*, 15 FCC Rcd at 4123-24, paras. 333-35.

we emphasize our strong preference for a record that contains data measuring a BOC's performance pursuant to state-adopted standards that were developed with input from the relevant carriers and that include clearly-defined guidelines and methodology . . . Accordingly, we encourage state commissions to adopt specific xDSL loop performance standards measuring, for instance, the average completion interval, the percent of installation due dates missed as a result of the BOC's provisioning error, the timeliness of order processing, the installation quality of xDSL loops provisioned, and the timeliness and quality of the BOC's xDSL maintenance and repair functions.<sup>802</sup>

Second, the Commission indicated that the establishment of a "fully operational" separate affiliate for advanced services "may provide significant evidence" of nondiscrimination.<sup>803</sup>

283. We commend the Texas Commission for its extensive consideration of xDSL-capable loop issues and development of specific xDSL-capable loop performance standards before SWBT filed its application. We also commend the Texas Commission for its efforts to include competing carriers in this process. As a result, we have for the first time in a section 271 application a complete record of a BOC's xDSL-capable loop performance from which to assess the provisioning of nondiscriminatory access to xDSL-capable loops.

#### (i) xDSL-Capable Loop Performance

284. Like the Department of Justice, we conclude that SWBT demonstrates that it provides nondiscriminatory access to xDSL-capable loops through its existing performance measurement data and other evidence it presents in its application.<sup>804</sup> Consistent with our statements in the *Bell Atlantic New York Order*, we analyze competing carrier access to SWBT xDSL-capable loops on the basis of performance measurements and standards adopted by the Texas Commission in a state proceeding. Specifically, we review SWBT's xDSL-capable loop order processing timeliness, the timeliness of SWBT's xDSL capable loop installation and percentage of SWBT-caused missed due dates, the quality of the xDSL-capable loops SWBT installs, and the timeliness and quality of the maintenance and repair functions SWBT provides to competing carrier xDSL-capable loops. In nearly all areas, recent performance data indicate that SWBT offers competing carrier nondiscriminatory access to xDSL-capable loops. Viewed as a whole, the recent performance data confirm that SWBT, although it has not yet achieved perfection, has met its general obligation to provide competing carriers with nondiscriminatory access to xDSL-capable loops and has satisfied the requirements of the checklist. If in the future, however, SWBT performance deteriorates and restricts competing carrier access to unbundled xDSL-capable loops in a discriminatory manner, we note that we may take appropriate enforcement action pursuant to section 271(d)(6).

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<sup>802</sup> *Bell Atlantic New York Order*, 15 FCC Rcd at 4123-24, para. 334.

<sup>803</sup> *Bell Atlantic New York Order*, 15 FCC Rcd at 4122, para. 331.

<sup>804</sup> Department of Justice Texas II Evaluation at 1.

285. As a preliminary matter, we note that competing carriers in Texas rely principally on two types of unbundled xDSL-capable loops: the xDSL loop and the BRI ISDN loop.<sup>805</sup> The Texas Commission developed separate loop-type performance measurement categories for xDSL loops (including, but not limited to, loops provisioned for ADSL, HDSL, and SDSL services) and BRI ISDN loops, which are used by competing carriers to provide IDSL services. For the discussion of SWBT performance that follows, we refer to xDSL loops and BRI ISDN loops collectively as xDSL-capable loops. When discussing the separate categories of performance measurements, we refer to xDSL loops and BRI loops.

286. *Order Processing Timeliness.* We conclude that SWBT demonstrates that it provides order processing for xDSL-capable loops in a timely manner that provides an efficient competitor with a meaningful opportunity to compete. We reach this conclusion on the basis of the nondiscriminatory access to loop qualification information that SWBT provides competing carriers, SWBT's ability to process competing carrier FOCs in a timely manner, and SWBT's substantial implementation of xDSL-capable loop processing changes required by the Texas Commission.

287. First, we find that SWBT demonstrates that it offers nondiscriminatory access to OSS pre-ordering functions associated with determining whether a loop is capable of supporting xDSL technologies.<sup>806</sup> As described in greater detail in our discussion of checklist item 2, we find that the mechanized and manual processes in place at the time SWBT filed its application enable requesting carriers to access loop qualification information in substantially the same time an manner as SWBT's retail operations. In fact, in the period from February through April 2000, the average time for SWBT to return competing carrier loop qualification requests was consistently lower than the average time for SWBT to return such requests to its own retail operations.<sup>807</sup>

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<sup>805</sup> An xDSL loop is a continuous copper line from the collocation site in SWBT's central office to the end user, which is not equipped with "repeaters," the equipment used to increase the transmitted signal. The ISDN BRI loop may include a section of fiber optic cable and should include ISDN repeaters for long loops. BRI loops are sometimes used by competing carriers to provide a slower speed IDSL service where xDSL loops are not available. Covad Texas II Rosenstein Decl. at para. 30. In April 2000, SWBT installed 1445 xDSL loops and 923 BRI loops. SWBT Aggregated Performance Data, Measurement No. 58 ("Percent SWBT Caused Missed Due Dates") (DSL, BRI Loop) at 271-No. 58b-c.

<sup>806</sup> Because characteristics of a loop, such as its length and the presence of various impediments to digital transmission can hinder certain advanced services technologies, carriers often seek to access basic loop make-up information that will assist carriers in ascertaining whether the loop, without the removal of impediments, can support a particular advanced service. See *Bell Atlantic New York Order*, 15 FCC Rcd at 4021, para. 140; *UNE Remand Order*, 15 FCC Rcd at 3884-85, paras. 426-27.

<sup>807</sup> In February, March, and April 2000, SWBT, on average, returned competing carrier loop make-up requests in 4.34, 2.63, and 1.72 days, while returning similar requests for its own retail operations in 3.99, 5.39, and 2.15 days. SWBT Aggregate Performance Data, Measurement No. 57 ("Average Time for Loop Make-Up Information") at 271-No. 57. We also note that in January 2000, the performance measurement was redefined in response to Department of Justice criticism, to include the entire time between SWBT's receipt from the competing (continued....)

288. Second, we find that performance data demonstrate that SWBT processes competing carrier LSRs for xDSL-capable loops in a timely manner that provides efficient competitors with a meaningful opportunity to compete. For instance, in both March and April 2000, SWBT returned 94 percent of competing carrier FOCs within 24 hours for xDSL-capable loops ordered via LEX and 96 percent of competing carrier FOCs within 24 hours for xDSL-capable loops ordered via EDI.<sup>808</sup>

289. In large part, our finding that SWBT processes competing carrier xDSL-capable loop orders in a timely fashion is the product of the Texas Commission's comprehensive review of SWBT's methods and procedures for offering xDSL-capable loops in the Covad/Rhythms arbitration.<sup>809</sup> The Covad/Rhythms arbitration award culminated a year-long effort to resolve interconnection disputes related to SWBT's xDSL-capable loop ordering practices for competing carriers, consolidated by the Texas Commission under section 252(g) of the Act.<sup>810</sup> In the course of this arbitration, the Texas Commission ordered SWBT to implement substantial changes to its xDSL-capable loop ordering process.<sup>811</sup> In addition, at the Texas Commission's December 16, 1999 open meeting, SWBT made a series of related commitments to implement xDSL-capable

(Continued from previous page)

carrier of a request for information relating to loop qualification and the time that such information is returned to the competing carrier. SWBT Texas II Application at 12; SWBT Texas II Chapman/Dysart Aff. at para. 28.

<sup>808</sup> SWBT Aggregate Performance Data, Measurement No. 5.1 ("Percent Firm Order Confirmations (FOCs) Relating to xDSL-capable Loops Returned within "X" Hours) (Mechanized LSRs-LEX (1-20 Loops), Mechanized LSRs-EDI (1-20 Loops) at 271-No. 5.1a. This performance measurement is relatively new, and not yet approved by the Texas Commission, so only March and April 2000 data are available. See SWBT Chapman/Dysart Texas II Aff. at Attach. A; Covad Goodpastor Texas II Decl. at para. 30. The Department of Justice characterizes SWBT's present measuring and reporting of competing carrier FOCs as a "significant improvement" over SWBT's first Texas application. Department of Justice Texas II Evaluation at 2.

<sup>809</sup> Arbitration Award, petitions of Rhythms Links, Inc. and Dieca Communications, Inc. d/b/a Covad Communications Company for Arbitration of Interconnection Rates, Terms, Conditions and Related Arrangements with Southwestern Bell Telephone Company, Docket Nos. 20226 and 20272 (Texas PUC Nov. 30, 1999) (Covad/Rhythms Arbitration Award); Texas Commission January 27, 2000 Open Meeting Transcript at 63-67 (Jan. 27 Open Meeting Tr.) (affirming November 30, 1999 decision of Texas Commission arbitrator).

<sup>810</sup> 47 U.S.C. § 252(g); Covad/Rhythms Arbitration Award at 1. The Texas Commission affirmed its decision on January 27, 2000 and on February 4, 2000, approved both Covad and Rhythms' interconnection agreements with SWBT based on the principles established in the arbitration. Order Approving Interconnection Agreements, petitions of Rhythms Links, Inc. and Dieca Communications, Inc. d/b/a Covad Communications Company for Arbitration of Interconnection Rates, Terms, Conditions and Related Arrangements with Southwestern Bell Telephone Company, Docket No. 20272 (Texas PUC Feb. 4, 2000); Jan. 27 Open Meeting Tr. at 63-67.

<sup>811</sup> Covad/Rhythms Arbitration Award 11-17, 34-36, 40, 42-52, 56-65, 78-80 (ordered changes include requiring SWBT to provide xDSL-capable loops on demand for xDSL services of the competing carrier's own choosing; drop arbitrary length and transmission speed restrictions on competing carriers' xDSL-capable loops; provide competing carriers equivalent access to the loop qualification information available to SWBT retail personnel; and eliminate its efforts to segregate and reserve the best loops for SWBT retail customers with its Selective Feeder System binder group management).

loop ordering process changes in order to secure the support of the Texas Commission for its section 271 application.<sup>812</sup>

290. We conclude that SWBT performance data demonstrate that in recent months, with the substantial implementation of these changes, competing carriers can order xDSL-capable loops in a timely manner.<sup>813</sup> Through numerous affidavits and supporting attachments, SWBT demonstrates step-by-step how it complied with the requirements of the arbitration and put in place the terms and conditions the Texas Commission found necessary to provide competing carriers with nondiscriminatory access to xDSL-capable loops.<sup>814</sup> Notably, SWBT describes how it has dismantled the binder group management system it had developed to mechanically segregate ADSL-based services from other data services.<sup>815</sup> Although some commenters contend that more work needs to be done by SWBT before the Commission can find that it has fully complied with its legal obligations, we find that these allegations are insufficient

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<sup>812</sup> Dec. 16 Open Meeting Tr. at 12-14, 16-17 (changes committed to include eliminating rejection of competing carrier xDSL-capable loop orders lacking information categorizing the request in one of seven SWBT Power Spectral Density masks; taking requests for loop qualification information via e-mail or fax; developing streamlined two-step ordering process for xDSL-capable loops; making available acceptance testing after provisioning; offering xDSL-capable loops "as is" to competing carriers who do not wish to have performed the conditioning SWBT recommends; offering loops of less than 12,000 feet without requiring competing carriers to go through the loop qualification process; and reaffirming commitment to eliminate the Selective Feeder System).

<sup>813</sup> We acknowledge that a recent Texas Commission order required a limited modification to the "firewall" plan developed to ensure competing carriers equivalent access to the loop qualification information available to SWBT retail personnel. Order No. 13, Order Granting Covad's Motion to Reconsider Order No. 10; requiring Further Modification to SWBT's Modified Plan to Ensure Competitive Neutrality; Requesting Comment; Requesting Additional Information Regarding TP 76869 Tx; and Notice of Workshop, Docket Nos. 20226, 20272 (Texas PUC June 21, 2000); Letter from Thomas M. Koutsky, Vice President—Regulatory Affairs, Covad, to Magalie Roman Salas, Secretary, Federal Communications Commission (filed June 23, 2000). Because these modifications involve further safeguards to ensure the competitive neutrality required by the Covad/Rhythms Arbitration Award, and do not reflect a determination by the Texas Commission that SWBT is presently discriminating against competing carriers by restricting access to loop qualification information, we conclude that the Texas Commission's recent action does not in any way undermine our conclusions in this section.

<sup>814</sup> See generally SWBT Meierhoff Texas II Aff. at paras. 8-30 (describing dismantling of selective feeder system binder group management designed to reserve binder groups for ADSL); SWBT Chapman/Dysart Texas II Aff. at paras. 71-91, SWBT Chapman Texas I Aff. at Attach. F (Jan. 4, 2000 Accessible Letter) (describing modifications to ordering process, including, no longer requiring manual loop qualification for xDSL-capable loops under 12,000 feet, allowing competing carriers to request loop make-up information prior to the submission of an LSR, allowing competing carriers to order a loop before the loop qualification process is complete, allowing competing carriers to provision xDSL services that do not comply with industry standards, removing xDSL transmission speed limitations for competing carriers, and removing requirement that competing carriers provide a PSD number when requesting loop qualification).

<sup>815</sup> SWBT Meierhoff Texas II Aff. at paras. 8-30.

to rebut the strong combination of performance data and affidavit evidence that SWBT presents to demonstrate its order processing timeliness.<sup>816</sup>

291. *Average Installation Interval.* We find that SWBT installation interval data demonstrate that it provisions xDSL loop orders in substantially the same time and manner as it does for its own retail service. We also find that SWBT installation interval data demonstrate that it provisions BRI loop orders in a sufficiently timely manner for an efficient competitor to have a meaningful opportunity to compete.

292. *xDSL Loops.* In February, March, and April 2000, SWBT generally provisioned competing carrier orders for xDSL loops in less time than it did for its own retail customers, regardless of whether or not loop conditioning was required.<sup>817</sup> Covad, however, questions the accuracy of these performance data, claiming that many of its loop orders are missing from this performance measurement.<sup>818</sup> Yet, Covad fails to acknowledge that the business rules associated with this measurement expressly permit the exclusion of competing carrier loop orders requesting an installation interval longer than the standard offered interval.<sup>819</sup> In addition, earlier problems with the accuracy of the data in this performance measurement were corrected after SWBT discovered a "minor processing error" resulting in accidental exclusions.<sup>820</sup> Finally, we find further confirmation of the timeliness of SWBT xDSL loop provisioning in other performance data demonstrating a low rate of missed installation due dates for competing carrier xDSL loops.<sup>821</sup>

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<sup>816</sup> Covad Texas II Comments at 3, 10-18; NorthPoint Texas II Comments at 6, 9-12; Rhythms Texas II Comments at 14; Sprint Texas II Comments at 23-25; Covad Texas II Goodpastor Decl. at paras. 21-63; Covad Texas II Reply Comments at 6-10.

<sup>817</sup> In February, March, and April 2000, SWBT provisioned competing carrier orders for xDSL loops that did not require conditioning in an average of 6.65, 6.02, and 4.98 days, respectively. During the same period, SWBT provisioned orders for xDSL loops that did not require conditioning for its own retail service in an average of 7.63, 7.78, and 11.36 days, respectively. In February, March, and April 2000, SWBT provisioned competing carrier orders for xDSL loops that required conditioning in an average of 16.34, 10.19, and 10.27 days. During the same period, SWBT provisioned orders for xDSL loops that required conditioning for its own retail service in an average of 14.40, 10.67, and 31.50 days. SWBT Aggregated Performance Data, Measurement No. 55.1 ("Average Installation Interval-DSL") (Requires No Conditioning, Requires Conditioning) at 271-No. 55.1.

<sup>818</sup> Covad Texas II Comments at 20.

<sup>819</sup> See SWBT Performance Measurement Business Rules, Measurement No. 55.1 ("Average Installation Interval-DSL"). See also SWBT Texas II Dysart Reply Aff. at paras. 25-26 (refuting Covad's claims of measurement inaccuracy); Covad Texas I Comments at 31 (alleging that SWBT systems force Covad to adjust installation dates on its xDSL-capable loop order to extend beyond the average interval in order to avoid automatic rejections on orders requiring supplements); SWBT Texas I Dysart Reply Aff. at paras. 24-25 (denying Covad allegations).

<sup>820</sup> SWBT Texas II Dysart Reply Aff. at 18, 22-35 (correction of exclusion of NorthPoint and Covad data); Department of Justice Texas II Evaluation at 3.

<sup>821</sup> See generally, SWBT Aggregated Performance Data, Measurement No. 58 ("SWBT Caused Missed Due Dates") (DSL) at 271-No. 58c.

293. BRI Loops. With respect to BRI loops, the Texas Commission did not establish a retail analogue, but instead established a 3 day target interval for order installation.<sup>822</sup> Accordingly, we assess SWBT's performance on the basis of whether or not it offers efficient competitors a meaningful opportunity to compete. As the Department of Justice notes, in recent months, SWBT has provisioned competing carrier BRI loop orders in progressively fewer and fewer days.<sup>823</sup> In fact, in April 2000, when volumes of BRI loop orders were more than twice as high than in any previous month, SWBT was able to provision such orders in an average of 2.8 days, within the 3 day target established by the Texas Commission.<sup>824</sup> This represents substantial improvement from January 2000, when the average was 6.7 days.<sup>825</sup> Furthermore, we note that the shortest installation interval offered to SWBT's retail for BRI loops is 5 days and may be as long as 10 days if loop conditioning is required.<sup>826</sup> This is substantially longer than the 3 day interval that applies for competing carriers. Thus, we conclude that recent performance indicates that efficient competitors have a meaningful opportunity to compete.

294. Covad, however, urges the Commission to recognize that it has a contractual right to a 3 day installation period and that historically SWBT has not met this interval.<sup>827</sup> Our inquiry, for purposes of this application, is whether SWBT provides competing carriers with a meaningful opportunity to compete. SWBT's failure to meet this 3 day interval with Covad does not preclude a finding of overall compliance with item 4 of the checklist, in light of SWBT's improving performance in this area and the longer installation interval SWBT provides for its own retail service.

295. *Percentage of Installation Due Dates Missed Due to BOC Provisioning Error*. We find that SWBT demonstrates with its missed due date performance data that it installs xDSL-capable loops for competing carriers in substantially the same time and manner that it installs xDSL-capable loops for its own retail service. This finding further buttresses our conclusion regarding SWBT installation intervals that is described above.

296. xDSL Loops. As a preliminary matter, although the Texas Commission originally established SWBT DS1 loops as the appropriate retail analogue for competing carrier xDSL

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<sup>822</sup> SWBT Chapman/Dysart Texas II Aff. at para. 44. *See generally* SWBT Aggregated Performance Data, Measurement No. 55 ("Average Installation Interval (Days)") (BRI Loop) at 271-No. 55a.

<sup>823</sup> *See generally* SWBT Aggregated Performance Data, Measurement No. 55 ("Average Installation Interval (Days)") (BRI Loop) at 271-No. 55a; Department of Justice Texas II Evaluation at 5-6 (characterizing recent SWBT BRI loop performance as demonstrating "impressive progress").

<sup>824</sup> SWBT Aggregated Performance Data, Measurement No. 55 ("Average Installation Interval (Days)") (BRI Loop) at 271-No. 55a.

<sup>825</sup> SWBT Aggregated Performance Data, Measurement No. 55 ("Average Installation Interval (Days)") (BRI Loop) at 271-No. 55a.

<sup>826</sup> SWBT Texas II Dysart Reply Aff. at para. 47.

<sup>827</sup> Covad Texas II Comments at 25.

loops in this performance measurement, neither the Texas Commission, nor any carriers participating in this proceeding encourage us to use the DS1 analogue.<sup>828</sup> Accordingly, we confine our review to the standard presented in SWBT's performance data: a straightforward comparison between xDSL loops provisioned to competing carriers and xDSL loops provisioned to SWBT's own retail service. We note that this is the comparison used in the Texas Commission's evaluation, and addressed by the commenters.

297. Although in the past SWBT had some difficulty meeting competing carrier xDSL loop due dates,<sup>829</sup> more recent data indicate that SWBT has since remedied this problem. In March 2000, SWBT missed a comparable percentage of xDSL loop due dates for competing carriers as it did for its own retail services, and in April 2000, SWBT missed less than 3 percent of competing carrier due dates, and 11 percent of the due dates for its own retail service.<sup>830</sup> Thus, we find that SWBT now meets installation due dates for competing carriers in a nondiscriminatory manner.

298. BRI Loops. Although in the past SWBT had some difficulty meeting competing carrier BRI loop due dates,<sup>831</sup> more recent data indicate that SWBT has since remedied this problem. In both March and April 2000, SWBT missed fewer competing carrier BRI loop due dates for competing carriers than for its own retail service.<sup>832</sup> Notably, in April 2000, SWBT missed 20 percent of its own retail service BRI loop due dates and only 9 percent of such due dates for competing carrier BRI loops.<sup>833</sup>

299. Loop Quality. We find that SWBT demonstrates that it provisions xDSL-capable loops to competing in a manner sufficient to meet the requirements of checklist item 4. As the Commission has noted in the past, trouble reports within 30 days are "indicative of the quality of network components supplied by the incumbent LEC."<sup>834</sup> Moreover, advanced services customers that experience substantial troubles in the period following installation of a xDSL-

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<sup>828</sup> We note also that in a recent workshop before the Texas Commission carriers agreed the DS1 analogue was not appropriate. Texas Commission Texas II Comments at 29; SWBT Performance Measurement Business Rules, Measurement No. 58 ("Percent SWBT Caused Missed Due Dates") (listing retail analogues).

<sup>829</sup> Covad Texas II Comments at 21 (describing problems with xDSL loop missed installation due dates).

<sup>830</sup> In March 2000, SWBT missed 7.7 percent of xDSL loop installation due dates for competing carriers and 6.5 percent of xDSL loop installation due dates for its own retail service. SWBT Aggregated Performance Data, Measurement No. 58 ("Percent SWBT Caused Missed Due Dates") (DSL) at 271-No. 58c.

<sup>831</sup> Covad Texas II Comments at 23 (describing problems with BRI loop missed installation due dates).

<sup>832</sup> In March 2000, SWBT missed 15.9 percent of competing carrier BRI loop installation due dates and 16.7 percent of BRI loop installation due dates for its own retail service. SWBT Aggregated Performance Data, Measurement No. 58 ("Percent SWBT Caused Missed Due Dates") (BRI Loop) at 271-No. 58b.

<sup>833</sup> SWBT Aggregated Performance Data, Measurement No. 58 ("Percent SWBT Caused Missed Due Dates") (BRI Loop) at 271-No. 58b.

<sup>834</sup> *Bell Atlantic New York Order*, 15 FCC Rcd at 4073-74, para. 222 n.711.

capable loop are unlikely to remain with a competing carrier.

300. xDSL Loops. For reasons described above with respect to missed installation due dates, we confine our review of xDSL loop quality to the standard presented in SWBT's performance data: a straightforward comparison between xDSL loops provisioned to competing carriers and xDSL loops provisioned to SWBT's own retail service.<sup>835</sup> Although in the past SWBT has had some difficulty provisioning xDSL loops without more troubles following installation than their own retail xDSL loops,<sup>836</sup> more recent data indicate that SWBT has since remedied this problem. In both March and April 2000, SWBT provisioned xDSL loops to competing carriers with comparable trouble rates in the 30 days following installation.<sup>837</sup> For instance, in April 2000, just over 4 percent of both SWBT and competing carrier xDSL loops experienced troubles in the 30 day period after installation.<sup>838</sup>

301. BRI Loops. Like the Department of Justice, we acknowledge that some performance issues remain with respect to troubles following the installation of competing carrier BRI loops.<sup>839</sup> We find that these issues arise from the fact that competing carriers use BRI loops for IDSL service,<sup>840</sup> which makes provisioning work more difficult than that required for the ISDN service that SWBT provisions using BRI loops.<sup>841</sup> SWBT maintains that these technical difficulties associated with supporting IDSL, combined with the short 3 day installation interval, are responsible for trouble rates greater than those SWBT experiences with its retail ISDN service.<sup>842</sup> We also find that SWBT is working with competing carriers and equipment vendors to

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<sup>835</sup> Texas Commission Texas II Comments at 29; SWBT Performance Measurement Business Rules, Measurement No. 59 ("Percent Troubles on N, T, C Orders within 30 Days") (citing to list of retail analogues in Measurement No. 58).

<sup>836</sup> Covad Texas II Comments at 21 (describing problems with xDSL loop troubles within 30 days after installation).

<sup>837</sup> SWBT Aggregated Performance Data, Measurement No. 59 ("Percent Troubles on N, T, C Orders within 30 Days") (DSL) at 271-No. 59c.

<sup>838</sup> SWBT Aggregated Performance Data, Measurement No. 59 ("Percent Troubles on N, T, C Orders within 30 Days") (DSL) at 271-No. 59c.

<sup>839</sup> See generally Department of Justice Texas II Evaluation at 4-6.

<sup>840</sup> IDSL modems combine the three ISDN circuits into a single 144 kbs data stream, and in order to support this use of BRI loops, SWBT central office technicians must avoid using some incompatible slots with certain digital loop carriers. SWBT Chapman Texas II Reply Aff. at para. 31.

<sup>841</sup> SWBT Dysart Texas II Reply Aff. at paras. 59-60.

<sup>842</sup> SWBT Dysart Texas II Reply Aff. at para. 59.