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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

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OFFICE OF THE SECRETARY

In the Matter of )  
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Joint Application by SBC Communications, Inc., )  
Southwestern Bell Telephone Company, and )  
Southwestern Bell Communications Services, Inc. )  
d/b/a Southwestern Bell Long Distance for )  
Provision of In-Region, InterLATA Services in )  
Kansas and Oklahoma )

CC Docket No. 00-217

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## SUMMARY

SBC presents its application for Section 271 authority for Oklahoma and Kansas as essentially a routine filing susceptible to a “cookie cutter” evaluation and decision in light of the Commission’s approval of its application for Texas. It presents its application as calling for no more than an evaluation of its performance under the myriad metrics that at this point track almost every aspect of an RBOC’s performance relevant to the fourteen point Competitive Checklist, from collocation intervals to billing issues. The current OSS analysis alone focuses on 804 elements. As discussed below, SBC’s own data shows a pattern of consistent discrimination against CLECs with respect to key metrics that precludes grant of the present application.

More importantly, however, far from being a routine, the present application is an aggressive and far reaching initiative to obtain a long-standing SBC goal – immunization of “next generation” networks from any unbundling obligations under the Act. As discussed herein, SBC’s application is premised on its view that the “next generation” network technologies that ILECs are deploying, such as SBC’s Project Pronto, are exempt from unbundling obligations of the Act. In effect, by asking the Commission to determine that SBC has complied with the “competitive checklist” even while it contends in this application that Project Pronto technology is not subject to unbundling, SBC seeks to foreclose meaningful competitive access by CLECs to the networks of the future. The present application is an effort by SBC to set the stage for limiting CLEC unbundled access to separate, outmoded legacy networks and arrogating to ILECs all the benefits of advanced network technology while also gaining interLATA entry in Oklahoma and Kansas.

The present application is also remarkable in that SBC seeks to demonstrate compliance with the competitive checklist on the basis of very little performance data. For example, SBC states that there is insufficient statistically significant data to assess its performance in providing unbundled loops. While SBC presumes that the lack of statistically significant data is a justification for being less than punctilious in evaluating its application, the opposite is the case. The Commission should accept nothing less than completely acceptable performance in all performance measures where there is little competitive presence in a state. In those circumstances there is no justification for encountering even modest degrees of discrimination against CLECs in provision of checklist items.

The Commission should deny this application.

If the Commission nonetheless grants the application, additional special competitive safeguards must be established. Given that there is little data on which to find that SBC in Oklahoma and Kansas has irreversibly opened markets to competition, the Commission should establish stronger anti-backsliding measures. The measures established for Bell-Atlantic New York, and upon which the performance remedies proposed in this application are based, failed to prevent backsliding by that carrier in that state. This backsliding caused immediate and permanent harm to CLECs. The Commission should also require SBC to provide customers in Oklahoma and Texas a “fresh look” opportunity to terminate long term service contracts without penalty and switch to CLECs.

The Commission should also require that future Section 271 applicants post all relevant documents on their websites in a user friendly format, and prohibit applications for multiple states in one application.

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Provision of In-Region, InterLATA Services in	)	
Kansas and Oklahoma	)	

**COMMENTS OF  
ALLEGIANCE TELECOM, INC.**

Allegiance Telecom, Inc., (“Allegiance”) submits these comments concerning the above-captioned Joint application by SBC Communications, Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc.d/b/a Southwestern Bell Long Distance (“SBC”) for Provision of In-Region, InterLATA Services in Kansas and Oklahoma filed October 26, 2000 (“Application”).<sup>1</sup>

Allegiance is a facilities-based competitive local exchange carrier (“CLEC”) currently providing service in 26 markets in 19 states and the District of Columbia. Allegiance is rapidly expanding to offer various competitive services, including Internet access, and high speed data services to markets throughout the country.

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<sup>1</sup> Comments Requested on the Application By SBC Communications, Inc. for Authorization Under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in the States of Kansas and Oklahoma, Public Notice, CC Docket No. 00-217, DA 00-2414, released October 26, 2000.

**I. GRANT OF THE APPLICATION WOULD BE CONTRARY TO THE PUBLIC INTEREST BECAUSE SBC SEEKS TO IMMUNIZE “NEXT GENERATION” NETWORKS FROM INTERCONNECTION AND UNBUNDLING OBLIGATIONS**

An overreaching regulatory goal for ILECs over the last few years, guiding nearly all their efforts before regulators, is the immunization of advanced networks of the future from the interconnection and unbundling obligations of Section 251(c) of the Act. In 1998, most RBOCs filed petitions with the Commission requesting a determination that advanced services are not within the scope of ILEC obligations under Section 251(c). These requests were denied.<sup>2</sup> ILECs have also engaged in various collateral attacks against application of Section 251(c) obligations to advanced services by claiming, for example, that some advanced services are “information access” service rather than telecommunications and thus not subject to Section 251(c) obligations, which view the Commission also rejected.<sup>3</sup> ILECs have also lobbied Congress extensively for legislation that would amend the Communications Act to relieve them from application of unbundling and interconnection obligations to advanced networks.<sup>4</sup> BOCs, including SBC, also have opposed use of separate advanced services affiliates as a mechanism for relieving them of these obligations preferring instead deregulation of the parent companies’

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<sup>2</sup> *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Memorandum Opinion and Order and Notice of Proposed Rulemaking, CC Docket Nos. 98-147, 98-11, 98-26, 98-32, 98-15, 98-78, 98-91, 13 FCC Rcd. 24012 (1998).

<sup>3</sup> *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Order on Remand., FCC 99-413, 1999 FCC Lexis 5491 (Dec. 23, 1999).

<sup>4</sup> See e.g., S.B. 2902, 106<sup>th</sup> Cong., 2d Sess. (2000); H.R. 2420 106<sup>th</sup> Cong., 1<sup>st</sup> Sess (1999).

provision of advanced services,<sup>5</sup> although SBC and Verizon have accepted use of separate affiliates for three years as the price of approval of their respective recent mergers.<sup>6</sup>

SBC in the present Application continues to seek this regulatory goal by stating that its Project Pronto network initiative is not subject to those obligations. Instead, in SBC's view, this major initiative that will provide the basis for provision of advanced services to [80 percent] of subscribers in its eleven state regions for years to come is at most subject to no more than three year "voluntary commitments" to make some limited aspects of Project Pronto network improvements available to CLECs.

Buried in the attachments to its Application, SBC declares, for example, that its "Project Pronto and Broadband Service offering are not part of any checklist item ..."<sup>7</sup> Similarly, in an effort to make the exclusion of Project Pronto from unbundling obligations seem acceptable, SBC states that "[b]ecause Project Pronto is an overlay network investment, rather than a replacement of the embedded network, none of the existing unbundling obligations available to CLECs today are altered in any way."<sup>8</sup> SBC also attempts to explain why Project Pronto loop

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<sup>5</sup> Ameritech Comments, CC Docket 98-147 at 49, filed September, 25, 1998; GTE Comments, CC Docket 98-147 at 25, filed September 25, 1998.

<sup>6</sup> See Application of Ameritech and SBC Communications, Inc. for Consent to Transfer of Control, CC Dkt 98-141, 14 FCC Red 14712 (1999); Application of GTE Corp. and Bell Atlantic Corp. for Transfer of Control, CC Dkt. 98-184, FCC 00-221 (rel. June 16, 2000).

<sup>7</sup> Affidavit of Carol A. Chapman ("Chapman Affidavit") at 50. The Broadband Service offering is a "service" that SBC agreed to make available to CLECs for three years as part of "voluntary commitments" in connection with its requested waiver of the SBC/Ameritech merger conditions to permit SBC, rather than its affiliate to own certain equipment and functions associated with Project Pronto.

<sup>8</sup> *Id.* at 52.

architecture is not really part of a loop subject to unbundling.<sup>9</sup> In short, SBC in the Application presents the sweeping view that its advanced services network facilities are not subject to Section 251(c) obligations.

As discussed, the Commission has already determined that advanced services networks deployed by ILECs are fully subject to Section 251(c) obligations. Therefore, the Application on its face falls short of the statutory standard under Section 271 for interLATA approval, *i.e.*, compliance with Section 251(c).

Moreover, it is hard to imagine a more daring assault on competition in provision of advanced telecommunications services than the position presented by SBC in its Application. Its observation that CLECs can obtain unbundled network elements for existing networks, but not for new, advanced networks is a declaration that SBC intends to relegate CLECs to unbundled use of outmoded and obsolete networks. This is a particularly appalling prospect given that the Project Pronto-type network architecture is also being installed by both SBC and Verizon and will likely be the model for fiber-based loops for the foreseeable future. At best, assuming that SBC continues to use an advanced services affiliate that uses Project Pronto network architecture pursuant to nondiscriminatory terms and conditions also available to CLECs, SBC's view of its obligations under the Act would mean that SBC can control the scope and pace of advanced services competition. In contrast, through access to unbundled next generation network elements, CLECs could provide a host of new services, unconstrained by SBC's current business plans. Therefore, even if SBC's Application was not unlawful on its

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<sup>9</sup> Id. at.55-58.

face because of SBC's statement that its advanced networks are not subject to Section 251(c), the Commission should deny the Application as contrary to the public interest under Section 271(d)(3)(c). Grant of the Application would also be contrary to the public interest in light of the other deficiencies of the Application as discussed elsewhere in these comments.

Allegiance emphasizes that it is not necessary for the Commission to bend over backwards to grant the Application, by for example, conditioning any such grant on compliance by SBC with any unbundling obligations identified in the *Next Generation Network Proceeding*.<sup>10</sup> While SBC will be subject to the outcome of that rulemaking in any event, the Commission should evaluate SBC's application as submitted. Given that the Application explicitly states that SBC's Project Pronto is not subject to unbundling, and that immunization of advanced networks from unbundling would not serve the pro-competitive goals of the Act, as the Commission has already determined, the Commission should deny the Application as submitted as contrary to the public interest.

## **II. SBC's APPLICATION MUST BE DENIED BECAUSE SBC REFUSES TO MAKE AVAILABLE AS A UNE PACKET SWITCHING CAPABILITY CONTAINED IN PROJECT PRONTO NETWORK ARCHITECTURE**

### **A. SBC's Network Contains Packet Switching Functionality Subject to Unbundling**

The Commission's *UNE Remand Order* requires SBC to provide packet switching as an unbundled network element in specific circumstances. The Commission stated that incumbent LECs must provide access to unbundled packet switching "if a requesting carrier is unable to

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<sup>10</sup> See Fifth Further Notice of Proposed Rulemaking in CC Dkt. No. 96-98, FCC 00-297 (released Aug. 10, 2000).

install its DSLAM at the remote terminal or obtain spare copper loops necessary to offer the same level of quality for advanced services[.]”<sup>11</sup> Under Section 271 of the Act, before SBC may obtain authority to provide in-region interLATA services, SBC must provide “nondiscriminatory access to network elements in accordance with the requirements of Sections 251(c)(3) and 252(d)(1).”<sup>12</sup> In order to show compliance with an item on the competitive checklist,

a BOC must demonstrate that it has a concrete and specific legal obligation to furnish the item upon request pursuant to state-approved interconnection agreements that set forth prices and other terms and conditions for each checklist item, and that it is currently furnishing, or is ready to furnish, the checklist item in quantities that competitors may reasonably demand and at an acceptable level of quality.<sup>13</sup>

Therefore, in order to qualify for Section 271 authority an RBOC must provide packet switching as a UNE in accordance with the Commission’s rules.

SBC contends, however, that it is unable to provide packet switching as a UNE because “[a]ll packet switches for advanced services owned by SBC that had the potential to be unbundled were transferred to its advanced services affiliate prior to the effective date of the *UNE Remand Order*. As a result, SBC states that it has no packet switching for advanced

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<sup>11</sup> *In re Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, 15 FCC Rcd 3696 (rel. Nov. 5, 1999) (“*UNE Remand Order*”) at para. 313.

<sup>12</sup> 47 U.S.C. § 271(c)(2)(B)(ii).

<sup>13</sup> *Application by SBC Communications Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance Pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-region, InterLATA Services in Texas*, Memorandum Opinion and Order, FCC 00-238, CC Dkt No. 00-65 (rel. Jun. 30, 2000) at para. 52.

services within its existing network to unbundle[.]”<sup>14</sup> However, SBC also acknowledges that its Broadband Service offering that it makes available to CLECs as a “voluntary commitment” in connection with Project Pronto contains packet switching functionality. In fact, SBC specifically requested and obtained authority from the Commission in connection with Project Pronto to retain ownership of the OCD in the central office and ADLU cards [in remote terminals] rather than transfer these to its affiliate, as otherwise required under the SBC/Ameritech merger conditions. In short, SBC’s statement that it does not have packet switching functionality that could be unbundled is incorrect, and contradicted by its own statements. SBC’s statements that it has no packet switching functionality that could be unbundled is little more than game playing and another manifestation of its overarching regulatory goal to retain, but immunize from unbundling obligations, next generation networks. The Commission should reject this effort. Simply stated, as long as SBC possesses a packet switching functionality it is subject to unbundling in accordance with the Act and the Commission’s rules.

Because SBC disclaims any responsibility to make packet switching available as a UNE, the Application presents a *prima facie* violation of the Commission’s UNE rules disqualifying SBC from Section 271 authority. The Application may, and should be, rejected for this reason alone.

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<sup>14</sup> Chapman Affidavit, p. 49.

**B. SBC Attempts to Interpret Away the Circumstances Under Which It Must Make Packet Switching Available as A UNE**

It is also worth noting that SBC pretends that the circumstances set forth in the Commission's rules that will trigger its obligation to provide packet switching as a UNE will never occur. The Commission certainly has qualified ILECs' obligation to provide the packet switching network element on an unbundled basis, but SBC interprets those circumstances so narrowly that they would essentially deny the packet switching network element.

SBC first contends that because its deployment of fiber facilities in connection with its Broadband Service is an overlay, rather than a replacement of copper facilities, it is not required to provide packet switching on an unbundled basis.<sup>15</sup> Neither the *UNE Remand Order*, nor the Commission's rules implementing the *UNE Remand Order* can be read to impose an exception to the packet switching unbundling requirement where SBC deploys fiber in addition to copper facilities.<sup>16</sup> The language in both clearly contemplates that copper facilities would exist alongside fiber facilities. If the packet switching unbundling requirement were limited to situations where the ILEC replaced copper facilities with fiber optic facilities, the requirement that there must be no spare copper loops would always occur, rendering it useless as a criteria. Further, as discussed, adopting SBC's position on this issue would place significant portions of SBC's network out of the reach of competitors. For example, deployment of facilities into new areas where no facilities presently exist would not be replacing copper facilities, but surely failure to

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<sup>15</sup> Chapman Affidavit at 56.

<sup>16</sup> See 47 C.F.R. § 51.319(c)(3)(B).

allow competitors access to those facilities would deny competitors entry into the packet switching market for customers served by those facilities.

SBC also misconstrues the circumstances in which it will be required to make the packet switching available as a UNE because of unavailability of copper loops.<sup>17</sup> SBC is wrong because the test is not only whether spare copper loops are available to CLECs, but also whether those copper loops provide CLECs with the ability to provide the same level of quality for advanced services that the incumbent provides over its packet switching facilities. Therefore, the mere presence of spare copper loops to provide an xDSL service is insufficient to satisfy the requirement if the incumbent provides an advanced service superior in quality to the service provided over those spare copper loops. Further, SBC is essentially seeking a blanket waiver of its unbundling requirement for packet switching by pledging to make copper loops available to CLECs. Nothing in the *UNE Remand Order* authorizes such a blanket waiver. Instead, under the criteria established in the *UNE Remand Order*, whether SBC must provide packet switching on an unbundled basis must be determined on a case-by-case basis. SBC's attempt to rewrite the terms of the *UNE Remand Order* indicates an unwillingness to meet its Section 271 unbundling obligations. In any event, SBC has not made an unqualified promise to make copper loops available. In Project Pronto, SBC only agreed to make loops available for three years, and reserved the right to remove loops in some circumstances.<sup>18</sup> Thus, there may be situations where

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<sup>17</sup> Chapman Affidavit at 56.

<sup>18</sup> *Project Pronto Order*, paras. 14, 18.

no loops are available and the criteria for SBC to avoid its packet switching unbundling requirement could not be satisfied.

Third, SBC suggests that the packet switching facilities potentially subject to an unbundling requirement must be used by SBC to provide voice service.<sup>19</sup> Again, nothing in the *UNE Remand Order* limits SBC's unbundling requirement in this way. Indeed, packet switching is used primarily to provide data services. Under SBC's view, the packet switching unbundling requirement would be rendered useless except in those narrow instances, if they existed at all, where packet switching was used to provide voice services. Again, SBC's cramped reading of its unbundling obligations fails to meet the requirements of Section 271.

### **III. THE APPLICATION DOES NOT DEMONSTRATE COMPLIANCE WITH THE "COMPETITIVE CHECKLIST"**

#### **A. Legal Standard**

Section 271 requires a demonstration that the applicant BOC "is providing" and has "fully implemented" "each" item of the Competitive Checklist.<sup>20</sup> To be "providing" a Checklist item, the BOC must show not only "a concrete and specific legal obligation" to furnish the item pursuant to an interconnection agreement, but also "must demonstrate that it is presently ready to furnish each Checklist item *in the quantities that competitors may reasonably demand and at an acceptable level of quality.*"<sup>21</sup> To have "fully implemented" the Checklist, moreover, the BOC

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<sup>19</sup> *Id.* at 57.

<sup>20</sup> 47 U.S.C. §§ 271(c)(2)(A), (c)(2)(B), (d)(3)(A)(i).

<sup>21</sup> Application of Ameritech Michigan Pursuant to Section 271 to Provide In-Region, InterLATA Services in Michigan, Memorandum Opinion and Order, 13 FCC Rcd. 20543, ¶ 110 (1997) ("Ameritech Michigan Order").

must demonstrate that it has satisfied each of its Checklist obligations at the time of its filing.

Mere “paper promises” of future compliance do not suffice.<sup>22</sup>

As shown below, SBC has not shown that it is complying with each item of the Competitive Checklist. Its own performance data presents a picture of systematic discrimination against CLECs in a number of respects. SBC has not shown that it is able to scale its OSS “to provide quantities that competitors may reasonably demand...”. As discussed above, SBC’s refusal to make packet switching available as a UNE directly violates the *UNE Remand Order* and disqualifies it from Section 271 approval.

## **B. SBC Discriminates in Provision of Loops**

### **1. General Assessment**

SBC’s performance results demonstrate that it has not complied with Section 271 requirements for providing nondiscriminatory access to unbundled local loops in either Kansas or Oklahoma.<sup>23</sup> Section 271(c)(2)(B)(iv) of the Act, item 4 of the competitive checklist, requires that SBC provide “[l]ocal loop transmission from the central office to the customer’s premises, unbundled from local switching or other services.”<sup>24</sup> In order to establish that it is providing unbundled local loops in compliance with section 271(c)(2)(B)(iv), SBC must

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<sup>22</sup> *Id.* ¶¶ 55, 179; *see also* 47 U.S.C. § 160(d) (“the Commission may not forbear from applying the requirements of Section 251(c) or 271 . . . until it determines that those requirements have been fully implemented”).

<sup>23</sup> 47 U.S.C. § 271(d)(3)(A).

<sup>24</sup> 47 U.S.C. § 271(c)(2)(B)(iv); Application by New York Telephone Company (d/b/a Bell Atlantic-New York), Bell Atlantic Communications, Inc., NYNEX Long Distance Company and Bell Atlantic Global Networks, Inc., for authorization to Provide In-Region, InterLATA Services in New York, Memorandum Opinion and Order, FCC 99-404, released December 22, 1999, para. 18, 44, appeal pending sub. nom., AT&T v. FCC, Case No. 99-1538 (D.C. Cir.) (“New York Order”).

demonstrate that it currently is meeting its obligation to furnish loops in the quantities that competitors reasonably demand and at an acceptable level of quality.<sup>25</sup> SBC must also demonstrate that it provides nondiscriminatory access to unbundled loops.<sup>26</sup>

In Oklahoma, out of a possible 274 measurements pertaining to checklist item four, only 34 yielded sufficient data to assess SBC's performance against the applicable standard (i.e., parity or benchmark).<sup>27</sup> This lack of performance data is not a justification for accepting discrimination against CLECs or adopting a more lenient attitude toward the competitive checklist. Instead, the Commission should require a substantially stronger showing that the BOC has adequately and irreversibly opened its markets to competition. While SBC claims to have met the applicable performance standard 88% of the time (where there was sufficient data to obtain measurements), closer scrutiny reveals a much lower success rate. It bases this 88% estimate on performance measures in which there has been successful performance for at least 2 of the last three months. In other words, 88% of the time SBC meets performance standards 2/3 of the time. Therefore, SBC's 88% success rate is grossly overstated.<sup>28</sup> In fact, in eight of the 34 measurements in which there was data, SBC either failed outright or did not meet the applicable performance standard in at least one of the last three months. Including as successes

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<sup>25</sup> New York Order , ¶ 269.

<sup>26</sup> Texas Order at para 248; New York Order, ¶ 269.

<sup>27</sup> See Dysert Affidavit Attachment P.

<sup>28</sup> See Dysert Affidavit Attachment P.

only those performance measures in which SBC met the benchmark in each of the last three months, the success rate is only 77%. This shows substantial discrimination against CLECs.<sup>29</sup>

The picture is much the same in Kansas. Out of a possible 274 measurements comprising checklist item four, there was only sufficient data to obtain results for 46.<sup>30</sup> SBC claims that it attained performance requirements 87% of the time--again, for those 46 limited measurements yielding sufficient data.<sup>31</sup> However, SBC either failed outright or did not meet the applicable performance standard in at least one of the last three months in 13 of 46 measurements, resulting in an actual "success" rate of less than 72%.<sup>32</sup>

Thus, in both states, the performance results of loop provisioning, quality and maintenance comprising checklist item four suggest that CLECs are being deprived of a meaningful opportunity to compete.

## **2. Provisioning, Maintenance and Repair of Unbundled Loops**

### **a. Oklahoma**

Provisioning. SBC claims that the average installation intervals for Oklahoma CLECs are generally comparable or better than the intervals experienced by SBC's retail customers.<sup>33</sup> As shown below, SBC's performance results belie those claims.

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<sup>29</sup> See Dysart Affidavit Attachment P.

<sup>30</sup> See Dysert Affidavit Attachment Q.

<sup>31</sup> See Dysart Affidavit Attachment Q.

<sup>32</sup> See Dysart Affidavit Attachment P.

<sup>33</sup> Dysart Affidavit para. 76.

SBC's performance results for PM 58-02 (Percent SBC-Caused Missed Due Dates -- 8.0 dB Loop -- No Field Work) have fallen short of parity in seven of the last twelve months and are on average nearly ten times worse than that which it provides its own retail customers (2.7% versus 0.3%).<sup>34</sup> SBC attempts to paper over its deficiencies on this key metric. First, SBC suggests that because this represents only 10 out of 367 total orders, the result is insignificant.<sup>35</sup> Second, SBC adds that the performance measure does not capture the same activities for both CLECs and SBC retail operations, because SBC retail customers who decide to add or delete a feature or functions (such as call waiting, three-way calling, etc.) do not need field work, and would not have produced missed due dates; whereas customers of switch-based CLECs request such services from the CLEC, not SBC. Thus, according to SBC, activities involving the addition, deletion, and/or modification of features by existing retail customers must be removed from the calculation of SBC's PM 58-02 results, which produces comparable results.

SBC's attempt to redefine its way out of noncompliance is unconvincing and cold comfort to those customers waiting for service. CLECs cannot compete effectively if a significant percentage of their customers receive substandard service caused by SBC. Even after recalculating the performance measure in a the manner suggested by SBC, on average CLECs still suffer double the percentage of missed due dates caused by SBC than does SBC.<sup>36</sup> Moreover, SBC presumes, but does not demonstrate, that CLEC customers are receiving service from switch-based competitors. Gerrymandering attempts aside, the simple fact is that SBC did

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<sup>34</sup> Dysart Affidavit paras. 78, 80.

<sup>35</sup> Dysart Affidavit para. 78.

not meet the minimum standard for this measure. Moreover, for voice grade loops, in the only month with significant enough activity to warrant measurement, SBC missed due dates over 34% of the time.<sup>37</sup>

SBC also had trouble making the grade for timely receipt of “firm order confirmation” for various types of loops and orders. In June through August 2000, SBC failed to meet performance standards in at least one month for PM 5-01 (Percent Firm Order Confirmation Received Within 5 Hours — Residence and Simple Business — LEX); PM 5-6 (Percent Firm Order Confirmation Received Within 5 Hours — Switch Ports — LEX); PM 5-14 (Percent Firm Order Confirmation Received Within 24 Hours — Complex Business (1 - 200 Lines) -- Manual); PM 5- 16 (Percent Firm Order Confirmation Received Within 24 Hours — UNE Loop (1 - 49) — Manual).<sup>38</sup> Accordingly, the Commission must conclude that SBC is not meeting performance standards with respect to loop ordering and provisioning to satisfy grant of the instant application for interLATA services.

Maintenance/Repair. Trouble report data indicate that CLECs are receiving service inferior to that received by SBC retail customers. For instance, PM 65-05 (Trouble report rate -- Average Monthly per Loop -- DS1 Loop) shows that from September 1999 to August 2000, SBC customers had a lower trouble report rate than CLECs (3.5% for CLECs compared to 4.6 % for

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<sup>36</sup> See Dysart Affidavit para. 80, Table 1 (covering January–August 2000)

<sup>37</sup> See Dysart Affidavit, Attachment P (PM 45-01 (Percent SBC Caused Missed Due Dates -- VGPL) August 2000). The SBC caused missed due dates for DSL services are discussed in a separate section below.

<sup>38</sup> See Dysart Affidavit, Attachment P.

SBC).<sup>39</sup> For PM-65-01 (Trouble report rate -- Average Monthly per Loop -- 8.0 Loop), CLEC customers reported trouble three times more frequently per loop than did SBC customers over the same period (0.7% for SBC compared to 2.3% for CLECs).<sup>40</sup> Thus, in instances where there is even enough data to tabulate, it demonstrates that SBC is providing CLECs loops of lesser quality than it provides itself, hindering CLECs ability to compete in the local exchange market place.

**b. Kansas**

For voice grade loops, SBC caused missed due dates in two out of the last three months in which its performance was measured. SBC did not achieve parity for PM 45-01 (Percent SBC Caused Missed Due Dates -- VGPL)<sup>41</sup> or offer an explanation for its apparent discrimination against CLECs on this performance measure. Nor did SBC address how it intended to remedy the problems reflected in the data. Indeed, SBC's silence should trouble the Commission enough to require SBC to account for the performance failure before considering the application further.

SBC prematurely applauds itself for having met the benchmarks for PM 56-01 (Percent Installations Completed Within "X" Days -- 8.0 dB (1-10 loops)) and PM 55-01 (Average Installation Interval -- 8.0 dB (1-10 loops)).<sup>42</sup> A closer look at the data, however, reveal that for

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<sup>39</sup> See Dysart Affidavit at para. 83, Table 2.

<sup>40</sup> See Dysart Affidavit at para. 83, Table 2.

<sup>41</sup> See Dysart Affidavit, Attachment Q.

<sup>42</sup> See Dysart Affidavit at para 85.

two of the last three months, there is actually insufficient data on which to assess whether SBC met the relevant criteria on either of the two performance measures.<sup>43</sup>

With regard to 5.0 dB loops, SBC concedes that the data for PM 56-02 (Percent Installations Completed Within “X” days - 5.0 dB (1 - 10 loops)) demonstrates that SBC provisioned only 75.4% percent of CLEC loops within the 3-day target when the benchmark is 95%. Over the same period, SBC also missed PM 55-02 (Average Installation Interval – 5 dB Loops (1- 10 loops)), with an average installation interval of 3.7 days, exceeding the 3-day target. The cumulative effect of such instances of noncompliance must surely harm a CLEC’s ability to compete. The Commission should therefore take pains not to award SBC authority to provide interLATA services until it demonstrates full compliance with the performance standards of checklist item 4.

With regard to DS-1 loops, SBC claims to have satisfied PM 55-04 (Average Installation Interval – DS-1 Loop).<sup>44</sup> For each of the three months listed in the chart provided with its application, however, SBC did not once meet the 3-day target for installation and in one month took on average 14.7 days to install a DS-1 loop.<sup>45</sup> SBC does admit to not meeting the benchmark for PM 56-04 (Percent Installations Completed within “X” days – DS1 (1 -10 Loops)). SBC claims that *failure* is not tantamount to discrimination and points out that its performance is steadily improving. SBC also asserts that, given the small volume of CLEC DS1

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<sup>43</sup> See Dysart Affidavit, Attachment Q (PM 56-01.1 and PM 55-01.1).

<sup>44</sup> Dysart Affidavit at para. 88, Attachment Q.

orders, it would have to consistently provide perfect performance each month to meet the benchmark.<sup>46</sup> The standard, however, is full implementation of the competitive checklist. To meet that burden, SBC must demonstrate that it is able to furnish loops in the quantities that competitors reasonably demand and at an acceptable level of quality.<sup>47</sup> SBC has not done so.

Similarly, SBC papers over its failure to meet PM 58-06 (Percent SBC Caused Missed Due Dates – DS1 Loops) by claiming that it “has not a single out of parity condition in twelve months ending in August 2000.”<sup>48</sup> SBC then argues that because it has been in parity on missed due dates and only about 0.5 days above equivalent SBC installation intervals, it has not compromised CLECs' opportunities to compete in the Kansas local exchange market.<sup>49</sup> First, it is not up to SBC to determine whether CLEC opportunities to compete have been compromised. SBC's job is to satisfy the applicable standards (a task it has not accomplished), not merely brush the results of unfavorable metrics away as meaningless. Second, SBC seems blithely unaware of the goodwill CLECs lose with customers when appointments are missed. The Commission must consider whether parity is good enough where in August 2000 (the last of the 12 months for which SBC touts its performance), SBC caused missed due dates for CLECs a whopping 30.8%

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<sup>45</sup> See Dysart Affidavit at para. 88, Attachment Q, PM 55-04.01 (Average Installation Interval – DS-1 Loop (1 - 10 Loops)).

<sup>46</sup> Dysart Affidavit at para. 88.

<sup>47</sup> New York Order , ¶ 269.

<sup>48</sup> Dysart Affidavit at para. 89.

<sup>49</sup> Dysart Affidavit, para. 89.

of the time--but has the audacity to claim achievement of applicable standards because it caused itself to miss deadlines *100%* of the time.<sup>50</sup>

Maintenance. Data indicate SBC is causing CLEC customers to receive inferior quality service inasmuch as SBC was deficient under PM 65-02 (Trouble Report Rate – Average Monthly Reports per Loop – 5.0 dB Loop). In fact, CLECs experienced 6 times the number of trouble reports per loop than did SBC for 5 dB loops from September 1999 to August 2000.<sup>51</sup> The disparity in the number of trouble reports serves as an indicator of differences in loop quality between SBC and CLECs and suggests the reason why CLECs may have difficulty retaining local exchange customers in Kansas in some instances.

SBC's performance results for PM 59-01 (Percent Installation Reports (Trouble Reports) Within 30 days (I-30) of Installation – N, T, C Orders – 8.0 dB Loops) are short of parity in each of the past two months (July and August 2000).<sup>52</sup> SBC excuses its failure by positing, without proof, that any trouble may have occurred at the CLEC's or end user's premises and that due to the nature of the services ordered by SBC's retail customers, those orders do not generate trouble tickets. The result, according to SBC, is a downward bias on SBC's retail performance data that

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<sup>50</sup> Dysart Affidavit, Attachment Q.

<sup>51</sup> See Dysert Affidavit, Table 3.

<sup>52</sup> See Dysart Affidavit at para. 93.

erroneously demonstrates discrimination.<sup>53</sup> However, even after SBC removed the purported “noise,” the performance data still does not reflect parity.<sup>54</sup>

### **3. Unbundled DSL Loops**

Viewed as a whole, the existing performance data demonstrate that SBC has failed to provide non-discriminatory access to xDSL capable loops to competing carriers and has not, therefore, met checklist Item No. 4. In particular, the Commission should closely review the data concerning SBC’s missed installation appointments and the impact that can have on CLECs’ ability to compete in Oklahoma and Kansas.

#### **a. Missed Installation Appointments**

##### **(i) Oklahoma**

In Oklahoma, with regard to DSL provisioning, the data demonstrates that SBC is not ready for prime time. SBC frequently misses due dates for CLEC customers. For instance, about its performance on PM 58-09 (Percent SBC Caused Missed Due Dates – DSL), SBC simply proclaims that it has been in parity for two of the past four months. Dysart Affidavit at para. 109. A closer look at the data reveals that for the last two months for which results are available, SBC missed CLEC due dates, in July 2000, 13.6 % of the time compared to 1.8 % for itself, and in August it missed dates for CLECs 17.2% of the time compared to 5.8% for itself.<sup>55</sup>

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<sup>53</sup> Dysart Affidavit at para. 94.

<sup>54</sup> See Dysart Affidavit, Table 4.

<sup>55</sup> See Dysart Affidavit, Attachment P.

SBC explains its poor results by stating that it provisions its advanced services affiliate, ASI, over working loops, while CLECs require loop provisioning between the CLEC collocation arrangement and the end user locations.<sup>56</sup> This attempted explanation is no more than a request that SBC be permitted to permanently discriminate against CLECs. If this difference in provisioning is correct, the solution is not to accept discrimination against CLECs, but for SBC to improve its performance notwithstanding any provisioning differences. SBC's purported correction of the performance criteria, moreover, does not account for instances in which loops that were previously used for voice grade service require reconfiguration to connect to DSL equipment at the end office for its affiliate. SBC also promises that the incidence of missed due dates will improve as CLECs migrate to a line sharing environment.<sup>57</sup> Promises of *future* compliance, however, have no probative value in demonstrating *present* compliance.<sup>58</sup> To support its application, a BOC must submit actual evidence of present compliance, not prospective evidence that is contingent on future behavior.<sup>59</sup> Moreover, the Department of Justice notes that PM 58 is one of "the most significant measures for DSL provisioning."<sup>60</sup>

SBC also failed to achieve PM 60-08 (Percent Missed Due Dates to Lack of Facilities -- DSL) in two out of the last three months. Dysart Affidavit, Attachment P. SBC offers a number of excuses as to why the Commission should nonetheless conclude that this kind of poor

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<sup>56</sup> Dysart Affidavit at para. 109.

<sup>57</sup> Dysart Affidavit at para. 109.

<sup>58</sup> *New York Order* at para. 37.

<sup>59</sup> FCC New York 271 Order at para. 37.

performance does not disadvantage competing providers of DSL service. It claims that as a general matter these performance measures require an “apples to oranges” comparison because SBC provides DSL service through line sharing whereas competing providers, until they obtain line sharing, must order separate unbundled loops.<sup>61</sup> SBC claims that it misses due dates for CLECs in many cases because CLECs must obtain a separate loop to provide DSL service but that loops are sometimes unavailable immediately or need repair - which it refers to as “lack of facilities.” However, it says that this “lack of facilities” does not happen to SBC’s retail operations because SBC provides service through line sharing (which CLECs purportedly have not yet taken advantage of) that is provided over existing loops. SBC contends that this causes unfair performance results for SBC in terms of missed due dates.<sup>62</sup>

This argument perversely attempts to blame SBC’s own poor performance in terms of missed due dates on its own discrimination against CLECs in provision of line sharing. Further, if SBC is not able to present performance data that make sense until line sharing is commonly used by CLECs in Oklahoma, the Commission should reject the application on the basis of the present poor showing on missed due dates and direct SBC not to file again until it has performance results that show attainment of the applicable standards regardless of whether CLECs use line sharing.

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<sup>60</sup> Evaluation of the United States Department of Justice, CC Docket No. 00-4, Feb. 14, 2000, Pg. 18-19.

<sup>61</sup> Dysart Affidavit para 109.

<sup>62</sup> Dysart Affidavit para 109.

In addition, SBC's "lack of facilities" argument has already been found unpersuasive by the Department of Justice. The Department of Justice recommended that the Commission reject this argument because even after line sharing is implemented, CLECs will continue to need unbundled loops for DSL services, including SDSL, that are not able to be provided through line sharing with analog voice services.<sup>63</sup> In reality, the "lack of facilities" argument is an ineffectual attempt to justify its discrimination against CLECs. Accordingly, SBC's performance concerning missed due dates does not show that it is providing nondiscriminatory access to DSL capable loops.

**(ii) Kansas**

SBC's performance in Kansas is equally dismal.<sup>64</sup> On PM 58-09 (Percent SBC Caused Missed Due Dates – DSL), SBC has not been in parity in two out of three months.<sup>65</sup> On PM 60-08 (Percent Missed Due Dates to Lack of Facilities --DSL), SBC failed to achieve parity in three out of three months. SBC again blamed CLECs under its line sharing and "lack of facilities" arguments, which should be rejected for the reasons set out above.

**b. Installation Quality of DSL Loops**

In order to qualify for Section 271 approval, a BOC must show that the quality of loops provisioned to CLECs is substantially the same for the BOC's provision of its own retail advanced services or that the level of quality is sufficiently high to permit CLECs a meaningful

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<sup>63</sup> DOJ March 20, 2000 letter, submitted in CC Docket 00-65, p. 4.

<sup>64</sup> See Dysart Affidavit paras. 112-16.

<sup>65</sup> Dysart Affidavit, Attachment Q.