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

In the Matter of)
)
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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AND CAPROCK COMMUNICATIONS, CORP.

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November 15, 2000

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TABLE OF CONTENTS

SUMMARY i

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 .. 2

II. THE APPLICATION DOES NOT DEMONSTRATE COMPLIANCE WITH THE “COMPETITIVE CHECKLIST” 6

 A. Legal Standard 6

 B. SBC Discriminates in Provision of Loops 7

 2. General Assessment 7

 3. Provisioning, Maintenance and Repair of Unbundled Loops 9

 a. Oklahoma 9

 b. Kansas 12

 4. Unbundled DSL Loops 16

 a. Missed Installation Appointments 16

 i. Oklahoma 16

 ii. Kansas 19

 a. Installation Quality of DSL Loops 19

 b. Timeliness of Access to DSL Loop Pre-Ordering and Ordering Information 20

 5. BRI Loops 21

 C. Hot Cuts 22

 D. White Pages Directory Listings — Checklist Item 8 24

 E. SBC Discriminates in Provision of OSS 25

 1. Legal Standard 25

 2. SBC’s OSS Performance Data Shows Discrimination Against CLECs... 26

 3. CapRock’s Experience In Texas Shows That SBC’s OSS Is Deficient. .. 29

III. SBC HAS NOT IMPLEMENTED ACCESS TO LOOP PREQUALIFICATION INFORMATION 33

IV. SBC’s APPLICATION MUST BE DENIED BECAUSE SBC REFUSES TO MAKE AVAILABLE AS A UNE PACKET SWITCHING CAPABILITY CONTAINED IN THE PROJECT PRONTO NETWORK ARCHITECTURE 36

 A. SBC's Network Contains Packet Switching Functionality Subject to Unbundling 36

 B. SBC Attempts to Interpret Away the Circumstances Under Which It Must Make Packet Switching Available as A UNE 38

IV. IF THE COMMISSION GRANTS THE APPLICATION, SUPPLEMENTAL COMPETITIVE SAFEGUARDS MUST BE ESTABLISHED 40

 A. Strengthened Backsliding Measures 40

1.	The Proposed Plans for Oklahoma and Kansas Are not Necessarily Self-Executing and the Potential Liability is not Meaningful under the Circumstances	43
2.	Experience has Shown that the New York Backsliding Measures Did not Prevent Significant Backsliding.....	46
3.	Proposed Additional Backsliding Measures	48
B.	The Commission Should Establish A Fresh Look Opportunity	49
V.	SBC HAS NOT PROVIDED ADEQUATE NOTICE OF SECTION 271 ISSUES IN OKLAHOMA AND KANSAS.....	51
VI.	THE COMMISSION SHOULD REQUIRE THAT THE APPLICATION AND ALL SUPPORTING DOCUMENTS TO BE POSTED ON THE APPLICANT’S WEBSITE	53
VII.	CONCLUSION.....	1

SUMMARY

The fourteen point competitive checklist that tracks the access and interconnection to network facilities that a Regional Bell Operating Company (“RBOC”) provides has evolved into a myriad of performance metrics. These metrics track almost every aspect of a RBOC’s performance from its collocation intervals to billing issues. The current OSS analysis alone focuses on 804 elements. While this analysis provides detailed insight into an RBOC’s performance, it would be easy for one to drown in this sea of numbers and statistics and miss the numerous flaws in SBC’s steps to open local services telecommunications markets in Oklahoma and Kansas to competition.

In this connection, the present SBC application is not suitable for a “cookie cutter” evaluation in which the Commission can presume that this and subsequent SBC or other BOC applications have met the competitive checklist. 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 the interconnection and 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. Far from being routine, the present application is a far reaching and aggressive effort by SBC to set the stage for limiting its unbundling obligations 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. If a BOC's performance is not good when there is little competitive pressure it is likely to deteriorate when the pressure is increased. In the present circumstances, there is no justification for encountering even modest degrees of discrimination against CLECs in provision of checklist items.

Unfortunately, the performance data that has been submitted shows that SBC discriminates against CLECs in provision of checklist items in important respects. Far from proposing any remedy that could ameliorate this discrimination, SBC in this application seeks to institutionalize, and make permanently acceptable to the Commission, its failure to meet important OSS and other performance standards.

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. Manifestly, 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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**COMMENTS OF
MCLEODUSA, INC.
AND CAPROCK COMMUNICATIONS, CORP.**

McLeodUSA Telecommunications Services Inc. (“McLeodUSA”) and CapRock Communications, Corp. (“CapRock”) submit 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”).¹

McLeodUSA is a competitive provider of integrated telecommunications services to business and residential customers in the Midwestern and Rocky Mountain states, including Kansas. McLeodUSA is authorized to provide competitive local exchange service in 20 states

and interexchange service throughout the continental U.S. McLeodUSA is also authorized to provide interstate interexchange and international telecommunications service. McLeodUSA offers local and long distance telecommunications services, telecommunications network maintenance services, telecommunications equipment sales, service and installation, the sale of advertising space in telephone directories, and telemarketing services. McLeodUSA does not provide service in Oklahoma.

CapRock is a competitive local exchange service provider offering service in the southwestern region of the United States, primarily Texas. CapRock has initiated provision of service in Oklahoma. CapRock does not provide service in Kansas. CapRock has recently agreed to be acquired by McLeodUSA.

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

A regulatory goal that has been virtually a North Star to 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

¹ *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.

requests were denied.² 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.³ 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.⁴ BOCs, including SBC, also have opposed use of fully separate advanced services affiliates as a mechanism for relieving them of these obligations preferring instead deregulation of the parent companies’ provision of advanced services,⁵ although SBC and Verizon have accepted use of separate affiliates for three years as the price of approval of their respective recent mergers.⁶

SBC in the present Application continues to seek this regulatory goal by stating that is in compliance with the Act’s unbundling obligations while simultaneously declaring 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

² *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).

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

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

⁵ Comments of Ameritech in CC Dkt. 98-147 (filed Sept. 25, 1998).

⁶ 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).

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 . . .”⁷ 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.”⁸ SBC also attempts to explain why Project Pronto loop architecture is not really part of a loop subject to unbundling.⁹ In short, SBC in the Application presents the 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.

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

⁷ 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.

⁸ *Id.* at 52.

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 in all the SBC and Verizon regions 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, the 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 face because of SBC's statement of its unbundling obligations with respect to advanced networks, 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.

McLeodUSA and CapRock emphasize that 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*.¹⁰ 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

⁹ *Id.* at 55-58.

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

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. 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.¹¹ 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 "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.*"¹² To have "fully implemented" the Checklist, moreover, the BOC 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.¹³

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. CapRock's experience shows that SBC is not able to

¹¹ 47 U.S.C. §§ 271(c)(2)(A), (c)(2)(B), (d)(3)(A)(i).

¹² 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").

¹³ *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").

scale its OSS "to provide quantities that competitors may reasonably demand...." Further, SBC continues to seek to thwart competition in provision of advanced services by contending that packet switching capability utilized in connection with Project Pronto is not subject to unbundling.¹⁴ Its 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

2. 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.¹⁵ 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."¹⁶ In order to establish that it is providing unbundled local loops in compliance with section 271(c)(2)(B)(iv), SBC must demonstrate that it currently is meeting its obligation to furnish loops in the quantities that competitors reasonably demand and at an

¹⁴ Chapman Affidavit at 49, n. 34.

¹⁵ 47 U.S.C. § 271(d)(3)(A).

¹⁶ See also 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").

acceptable level of quality.¹⁷ SBC must also demonstrate that it provides nondiscriminatory access to unbundled loops.¹⁸

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.¹⁹ 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, to obtain that 88% success rate, SBC need only meet performance standards 2/3 of the time. Therefore, SBC's 88% success rate is grossly overstated.²⁰ 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 only those performance measures in which SBC met the

¹⁷ New York Order, ¶ 269.

¹⁸ Texas Order at para 248; New York Order, ¶ 269.

¹⁹ See Dysert Affidavit Attachment P.

²⁰ See Dysert Affidavit, Attachment P.

benchmark in each of the last three months, the success rate is only 77%. This shows substantial discrimination against CLECs.²¹

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 46.²² SBC claims that it attained performance requirements 87% of the time--again, for those 46 limited measurements yielding sufficient data.²³ 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%.²⁴

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.

3. 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.²⁵ As shown below, SBC's performance results belie those claims.

²¹ See Dysart Affidavit, Attachment P.

²² See Dysert Affidavit, Attachment Q.

²³ See Dysart Affidavit, Attachment Q.

²⁴ See Dysart Affidavit, Attachment P.

²⁵ 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%).²⁶ 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.²⁷ 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.²⁸ 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

²⁶ Dysart Affidavit paras. 78, 80.

²⁷ 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.²⁹

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).³⁰ 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 inferior quality service to that received by SBC retail customers. For instance, PM 65-05 (Trouble report rate -- Average Monthly per Loop -- DS1 Loop) shows that there from September 1999 to August 2000, SBC customers had a lower trouble report rate than CLECs (3.5% for CLECs

²⁸ See Dysart Affidavit para. 80, Table 1 (covering January–August 2000)

²⁹ 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.

³⁰ See Dysart Affidavit, Attachment P.

compared to 4.6 % for SBC).³¹ 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).³² Thus, in instances where there is 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 three of the last months in which its performance was measured. SBC did not achieve parity for PM 45-01 (Percent SBC Caused Missed Due Dates -- VGPL)³³ 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)).³⁴ A closer look at the data, however, reveal that for

³¹ See Dysart Affidavit at para. 83, Table 2.

³² See Dysart Affidavit at para. 83, Table 2.

³³ See Dysart Affidavit, Attachment Q.

³⁴ 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.³⁵

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 harms 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).³⁶ 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.³⁷ 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

³⁵ See Dysart Affidavit, Attachment Q (PM 56-01.1 and PM 55-01.1).

³⁶ Dysart Affidavit at para. 88, Attachment Q.

³⁷ See Dysart Affidavit at para. 88, Attachment Q, PM 55-04.01 (Average Installation Interval – DS-1 Loop (1 - 10 Loops)).

orders, it would have to consistently provide perfect performance each month to meet the benchmark.³⁸ 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.³⁹ SBC has not done so. And, the Commission must remember that if there are problems with timely installation of loops when there are few orders, the problems will only increase as CLEC orders increase.

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.”⁴⁰ 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 CLEC’s opportunities to compete in the Kansas local exchange market.⁴¹ But, the fact is that SBC caused missed due dates for CLECs a whopping 30.8% of the time in August 2000 (the last of the 12 months for which SBC touts its performance). The fact that it caused itself to miss deadlines even more often is irrelevant. In addition, it is SBC’s responsibility to satisfy the applicable standards (a task it has not accomplished), not merely brush the results of unfavorable metrics away as meaningless. SBC seems blithely unaware of the loss of goodwill it

³⁸ Dysart Affidavit at para. 88.

³⁹ New York Order , ¶ 269.

⁴⁰ Dysart Affidavit at para. 89.

⁴¹ Dysart Affidavit, para. 89.

causes CLEC customers for missed appointments. The Commission must consider whether parity is good enough where SBC's performance is so completely below par.⁴²

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 2000.⁴³ The disparity in the number of trouble reports demonstrates a significant difference in loop quality between SBC and CLECs.

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).⁴⁴ 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 erroneously demonstrates discrimination.⁴⁵ However, even after SBC removed the purported "noise," the performance data still does not reflect parity.⁴⁶

⁴² Dysart Affidavit, Attachment Q.

⁴³ See Dysart Affidavit, Table 3.

⁴⁴ See Dysart Affidavit at para. 93.

⁴⁵ Dysart Affidavit at para. 94.

⁴⁶ See Dysart Affidavit, Table 4.

4. 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 either Kansas or Oklahoma. 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, with respect to 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.⁴⁷

SBC explains its poor results by stating that it provisions loops for its advanced services affiliate, ASI, over working loops, while CLECs require loop provisioning between the CLEC collocation arrangement and the end user locations.⁴⁸ 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,

⁴⁷ See Dysart Affidavit, Attachment P.

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.⁴⁹ Promises of *future* compliance, however, have no probative value in demonstrating *present* compliance and are not sufficient to show checklist compliance.⁵⁰ To support its application, a BOC must submit actual evidence of present compliance, not prospective evidence that is contingent on future behavior.⁵¹ Moreover, the Department of Justice notes that PM 58 is one of "the most significant measures for DSL provisioning."⁵²

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 poor 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,

⁴⁸ Dysart Affidavit at para. 109.

⁴⁹ Dysart Affidavit at para. 109.

⁵⁰ *New York Order* at para. 37.

⁵¹ FCC New York 271 Order at para. 37.

⁵² Evaluation of the United States Department of Justice, CC Docket No. 00-4, Feb. 14, 2000, Pg. 18-19.

must order separate unbundled loops.⁵³ SBC claims that it misses due dates for CLECs in many cases because CLECs 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.⁵⁴

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.

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 cannot be provided through line sharing

⁵³ Dysart Affidavit para 109.

⁵⁴ Dysart Affidavit para 109.

with analog voice services.⁵⁵ In reality, the “lack of facilities” argument is an 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.⁵⁶ On PM 58-09 (Percent SBC Caused Missed Due Dates – DSL), SBC has not been in parity in two out of three months.⁵⁷ 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.

a. 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 opportunity to compete.⁵⁸ In Kansas, SBC reports that under PM 59-08 (Percent Trouble Report Rate -- DSL) it failed to achieve parity in one of three months from June to August 2000, presumably because “CLECs choose to use non-standard xDSL technologies.”⁵⁹ It claims that CLECs are choosing to test the limits of technology and, therefore, experience a failure rate that

⁵⁵ DOJ March 20, 2000 letter, submitted in CC Docket 00-65, p. 4.

⁵⁶ See Dysart Affidavit paras. 112-16.

⁵⁷ Dysart Affidavit, Attachment Q.

⁵⁸ *New York Order*, para. 335.

⁵⁹ Dysart Affidavit, para. 118, and Attachment Q.

is generally higher than that experienced when operating within the recognized parameters established by the industry.⁶⁰

The Commission should reject this argument. CLECs are not errant players in the telecommunications industry subjecting ILEC facilities to radically new uses outside of normal industry parameters. CLECs do not have the luxury of attempting to build commercial success on the basis of untested technologies. The equipment and services they deploy have been fully tested in real world situations. SBC has provided no evidence supporting its claim that it is the technology that CLECs use that is causing trouble reports on CLEC lines. Accordingly, CLECs are not to blame for SBC's failure to meet parity in quality of loops provided to CLECs. Instead, the obvious interpretation of SBC's performance data is that it is systematically discriminating against CLECs in terms of the quality of loops that it provides to them. This is another reason why the Commission must deny SBC's application for section 271 approval in Kansas and Oklahoma.

b. Timeliness of Access to DSL Loop Pre-Ordering and Ordering Information

SBC did not attain benchmark standards for PM 5.1-01 (Percent Firm Order Confirmation ("FOCs" Relating to xDSL-Capable Loops Returned Within 24 Hours) for

⁶⁰ Dysart Affidavit, para. 118.

manually submitted orders for the last two consecutive months in Oklahoma.⁶¹ In Kansas, SBC failed to achieve parity in one of the last three months.⁶²

5. BRI Loops

With respect to BRI loops, where there was sufficient activity to obtain performance data, that data suggests that SBC has provided CLECs loops of lesser quality than it provides to itself. In Oklahoma, the data for PM 59-03 (Percent Trouble Reports Within 30 days — BRI Loops) reflect failure to achieve parity for both of the last two months SBC has results.⁶³ Also, SBC did not demonstrate parity for one of the last three months for PM 65-03 (Trouble Report Rate — BRI Loops with Test Access). Kansas CLECs were not provided parity in one of three months for PM 59-03 (Percent Trouble Reports Within 30 days — BRI Loops).⁶⁴ For the only month in which there was sufficient data to obtain performance measures, data also indicates that for PM 62-04 (Average Delay Days for SBC Missed Due Dates — BRI Loop) SBC did not achieve parity.⁶⁵ In fact, SBC caused an average delay for CLECs about a week longer than it did for itself for missed due dates in August.⁶⁶ Obviously, this means that CLECs will not be able to provide a comparable level of service to their customers as SBC is able to provide to its customers.

⁶¹ See Dysart Affidavit, para. 126.

⁶² See Dysart Affidavit, para. 126.

⁶³ See Dysart Affidavit, Attachment P.

⁶⁴ See Dysart Affidavit, Attachment Q.

⁶⁵ See Dysart Affidavit, Attachment Q.

⁶⁶ Id.

C. Hot Cuts

Another area where SBC must meet performance criteria is the provisioning of unbundled loops through “the use of coordinated conversions of active customers” -- so-called “hot cuts” -- from the BOC to the competing carriers.⁶⁷ This involves manually disconnecting the customer’s loop in the BOC’s central office and reconnecting the loop at the competing carrier’s collocation space.⁶⁸ Since the customer is taken out of service while the hot cut is in progress, it is critical that the hot cut be provisioned correctly and coordinated between the BOC and the competing carrier in order to prevent extended service disruptions for the customer.⁶⁹ The appropriate standard by which to examine performance is whether the BOC provides unbundled loops through hot cuts in a manner that offers a competitor a meaningful opportunity to compete.⁷⁰ For Texas, the Commission reviewed hot cut performance measured according to the percentage of hot cut loop orders completed within a specified time window. The Oklahoma performance measures require, for instance, fewer than 2% premature disconnects during a hot cut. SBC claims to have “effectively” met or surpassed this 2% benchmark performance level in each of the past 12 months for PM 114-01 (Percent of Premature Disconnects — Coordinated Hot Cuts — LNP).⁷¹ McLeod USA and CapRock are not sure what SBC’s definition of “effectively” is. The data, however, indicate that SBC clearly missed the 2%

⁶⁷ *New York Order*, ¶ 291.

⁶⁸ *New York Order*, ¶ 291, fn. 925.

⁶⁹ *Id.*

⁷⁰ *Texas Order*, para. 258; *New York Order*, para 291.

⁷¹ *Dysart Affidavit* at para. 143.

mark by a wide margin. In June 2000, the percentage of premature disconnects for CLEC hot cuts was a staggering 21%.⁷²

CLECs cannot, as a practical matter, compete effectively if prospective customers experience significant losses of service in the hot cut process, or if other coordination problems occur. In fact, the Commission recognized the central importance of hot cuts when it noted in the *New York Order* that:

We are especially concerned with hot cut performance because of the substantial risk that an untimely or defective cutover will result in an end-user customer's loss of service for more than a brief period, as well as the effect of such disruptions upon competitors. We also would be particularly concerned if there were any evidence that [a BOC] is competing in the market place in part by suggesting to consumers that there is a possibility of service disruptions when customers switch their service from [a BOC] to competing carriers.⁷³

With regard to SBC's Texas application, the Department of Justice concluded that "SBC's performance with regard to hot cuts is worse than Bell Atlantic's performance in New York, which the Commission concluded was 'minimally acceptable.'"⁷⁴ SBC has failed to show that its hot cut performance meets even this "minimally acceptable" standard.

⁷² See Dysart Affidavit, Attachment Q.

⁷³ Bell Atlantic New York Order, ¶ 309.

⁷⁴ United States Department of Justice Evaluation ("DOJ Evaluation"), in CC Docket 00-65, p. 27.

D. White Pages Directory Listings — Checklist Item 8

Section 271(c)(2)(B)(viii) of the 1996 Act requires SBC to provide “[w]hite pages directory listings for customers of the other carrier’s telephone exchange service.”⁷⁵ Section 251(b)(3) of the 1996 Act obligates all LECs to permit competitive providers of telephone exchange service and telephone toll service to have nondiscriminatory access to directory listings.⁷⁶ In the *Louisiana II Order*, the Commission found that a BOC satisfies the requirements of Checklist item 8 by demonstrating that it: (1) provided nondiscriminatory appearance and integration of white pages directory listings to competitive LEC’s customers; and (2) provided white page listing for competitors’ customers with the same accuracy and reliability that it provides its own customers.⁷⁷

McLeodUSA has experienced discriminatory treatment from SBC/Ameritech with regard to white pages listings in at least two states. In Illinois and Wisconsin, SBC has not provided directory listing to McLeodUSA’s resale customers in accordance with section 271, applicable tariffs, and various agreements and understandings between the parties.⁷⁸ While Illinois and Wisconsin are not the states for which SBC has filed the instant application, the difficulties McLeodUSA has experienced with SBC white page listings evidence systemic defects within SBC’s white pages directory listings procedures throughout its territory. McLeodUSA and CapRock urge the Commission to investigate these matters further before entertaining grant of

⁷⁵ 47 U.S.C. Sec. 271(c)(2)(B)(viii).

⁷⁶ 47 U.S.C. Sec. 251(b)(3).

⁷⁷ *Louisiana II Order*, 13 FCC Rcd at 20748.

⁷⁸ McLeodUSA will provide these documents at the Commission’s request.

section 271 authority in Kansas or Oklahoma. In all likelihood, the Commission would discover problems with significant number of white page listings for customers of competing LECs, warranting a finding of noncompliance with checklist item number 8.

E. SBC Discriminates in Provision of OSS

1. Legal Standard

Under the Competitive Checklist, SBC must provide nondiscriminatory access to OSS.⁷⁹ The Commission has previously determined that nondiscriminatory access to the OSS functions and capabilities of pre-ordering, ordering, provisioning, repair and maintenance, and billing (“OSS”) are needed by competitive carriers to deliver local exchange and exchange access services at the level expected by customers.⁸⁰ Where there is a retail analogue between OSS functions that a BOC provides itself and a competitor, the BOC must show that the BOC is offering CLECs access to the functions that is “equivalent in terms of quality, accuracy, and timeliness” to what the BOC provides to itself with respect to its retail analog.⁸¹ In the absence of a retail analogue, nondiscriminatory access to OSS requires SBC to provide access “sufficient to allow a efficient competitor a meaningful opportunity to compete.”⁸² This is because absent nondiscriminatory access to OSS, competitive carriers do not have a meaningful opportunity to

⁷⁹ 47 U.S.C. Section 271(c)(2)(B)(ii).

⁸⁰ 15 FCC Rcd. at 3884.

⁸¹ *New York Order* at para. 88.

⁸² *Id.* at para 86.

compete.⁸³ Where performance measures exist, the Commission will evaluate whether the access granted is sufficient to afford competitive carriers a meaningful opportunity to compete.⁸⁴

The Commission has determined that competitive carriers need nondiscriminatory access to *all* OSS capabilities and functions.⁸⁵ Access to some OSS capabilities and functions, some of the time, does not amount to *full* implementation of the competitive checklist. Nor does access to most OSS capabilities and functions some of the time amount to *full* implementation of the competitive checklist. As explained below, SBC does not provide nondiscriminatory access to all OSS function and capabilities. Therefore, SBC has not fully implemented the competitive checklist in Kansas and Oklahoma, competitive carriers do not have a meaningful opportunity to compete in those states, and the Application must be denied.

2. SBC's OSS Performance Data Shows Discrimination Against CLECs

SBC submits performance data based on performance measures established by the Texas Public Utility Commission. However, the affidavits submitted in support of SBC's application reveal that SBC fails to meet a number of the important operative standards established by the Commission for nondiscriminatory access to OSS.⁸⁶ For the most part, like SBC's performance for other items in the competitive checklist, SBC acknowledges that it fails to meet critical performance standards but contends that they do not matter. It asks the Commission to find that

⁸³ *Id.* at para. 83; *see also* BellSouth South Carolina Order, 13 FCC Rcd. at 585.

⁸⁴ *Texas Order* at para 95.

⁸⁵ *New York Order* at para. 88.

⁸⁶ *See* Dysart Aff. para. 58-72.

it somehow provides nondiscriminatory access to OSS even though its own performance data shows that it does not.

For example, SBC acknowledges that for the 12 consecutive months immediately preceding its Application it failed to meet performance standard PM 10.1-01(Percent Manual Rejects Received Electronically and Returned Within 5 hours). SBC asserts that this performance “properly viewed” provides CLECs a meaningful opportunity to compete.⁸⁷ SBC also states that although it failed to meet this performance standard, the failed performance is better than the failed performance that the Commission approved in *Texas Order*.⁸⁸ Similarly, SBC failed to meet the parity standard in each of the immediately preceding three months for PM 17-01 (Billing Completeness). Here again, SBC essentially argues that although it didn’t meet the standard, it was close enough because the Commission found this performance acceptable in the *Texas Order*.⁸⁹

McLeod and CapRock submit that these explanations provide no basis for finding that SBC’s failure to provide parity to CLECs with respect to manual rejects and billing completeness is acceptable. In effect, what SBC is contending is that it is acceptable for it to fail in these measures on a permanent basis. Thus, SBC has provided no statement of how it intends to improve performance concerning these measures such as by submitting a detailed performance improvement plan.

⁸⁷ See Dysart Aff. para. 59.

⁸⁸ See Dysart Aff. para. 60

⁸⁹ See Dysart Aff. para. 65.

SBC also acknowledges that it failed to meet the parity standard in each of the immediately preceding three months for PM 13-02 (Order Process Percent Flow Through - LEX) in Oklahoma. It attempts to minimize this by comparing its own retail flow through rate with the flow through rate in its five-state region. However, this is not a valid comparison because the parity at issue is between CLECs and SBC's retail operations, not between SBC's Oklahoma and regional performance. Predictably, SBC describes the resulting difference as minor and "not likely to have hindered any Oklahoma CLEC's opportunity to compete."⁹⁰ Therefore, SBC has not provided an adequate explanation for its failure to meet parity under this measure.

SBC attempts to discount the discrimination against CLECs in provision of OSS by stating that overall it only "failed to meet the applicable standard for a handful of measures."⁹¹ SBC ignores the fact that the Act mandates nondiscriminatory access to OSS, not almost nondiscriminatory access to OSS. Further, as pointed out, the Commission has "previously determined that nondiscriminatory access to OSS is a prerequisite to the development of meaningful local competition."⁹² McLeod and CapRock stress that anything less than complete parity will harm CLECs ability to compete since customers of competitive carriers, if provided a lesser degree of service across a wide spectrum, will inevitably assign blame for the lesser degree of service to the competitive carrier. Less than complete parity materially impairs the ability of competitive carriers to provide the services they seek to offer in the local telecommunications market.

⁹⁰ Dysart Aff. para 62,

⁹¹ See Dysart Aff. para. 59.

McLeod and CapRock recognize that the Commission has stated in the Texas 271 proceeding that it would not withhold Section 271 authorization on the basis of isolated instances of allegedly unfair dealing or discrimination⁹³ While the Commission has made clear that it also does not expect “perfection” in all aspects of OSS, it is clear that at some point the number of problems, even if each one can be viewed as “relatively small” amount to an inability to provision OSS on a non-discriminatory basis pursuant to Section 271(c)(2)(B)(ii). The number of issues admitted to by SBC in the instant case clearly rise to that level. Therefore, the Commission should reject the application.

3. CapRock’s Experience In Texas Shows That SBC’s OSS Is Deficient.

In the Application, SBC contends that it provides OSS to CLECs in Oklahoma, Kansas, Texas and other states through the same OSS system. Therefore, it contends, the approval of its OSS in the *Texas Application* requires approval of the present Application. Insofar as information concerning SBC’s OSS in Texas is relevant, however, information showing poor performance is also relevant. In this connection, CapRock, which has extensive operational experience with SBC in Texas, offers the following information concerning SBC’s OSS in Texas. This shows that SBC’s performance is deteriorating, that its OSS is not scalable, and that SBC “back end” systems associated with its OSS are not operating properly. Since SBC uses the same OSS region wide, these data are also applicable to Oklahoma and Texas.

⁹² *Texas Order* para. 92.

⁹³ *Texas Order* at 431.

Firm Order Confirmations (“FOCs”) Are Trending Downward. Ability to receive FOCs timely is imperative to a CLEC when it is building a relationship with a new customer. If CapRock or any other CLEC cannot meet its commitments to provide customers with a date of when they will be converted, then customer begin losing confidence in the ability of a CLEC to meet its local telecommunication needs. As shown in Attachment A to these comments, receipt of FOCs from SBC has been trending downward in the last few months in Texas. (Attachment A). This is of great concern to CapRock not only in Texas but also in Oklahoma since apparently all orders are processed from the same SBC Local Service Center (LSC) for these states.

SBC Is Unable to Scale Its Workforce in Times of High CLEC Order Volumes. In July 2000, CapRock discovered that SBC was not correcting errors from its internal order exception report. CapRock found 4,407 orders that were still pending. Approximately 1437 of these orders were in error status, 1122 were in completion status, and 1848 were in originating status. Completion status means that a FOC has been returned to CapRock, but the [SOC] has not been returned and these orders have not been posted to SBC’s billing system. Error status means that the FOC has been returned to CapRock, but the order has an error and has not been completed. Originating status means that a FOC is pending.

SBC’s internal order exception report for CapRock continued to grow daily, CapRock could not afford to wait for SBC to correct the errors on its own. CapRock assigned a team of five people to monitor this report and to meet weekly with SBC on these pending orders. SBC advised CapRock that it would only be able to correct 100 orders a day because of the volumes of orders they were experiencing from all CLECs. The volumes of old orders were finally