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In the Matter of)
)
Application by SBC Communications, Inc.)
for Authorization to Provide In-Region,)
InterLATA Services in Kansas and Oklahoma)
_____)

CC Docket No. 00-217

**REPLY COMMENTS OF WORLDCOM, INC. ON THE APPLICATION BY SBC
COMMUNICATIONS, INC. FOR AUTHORIZATION TO PROVIDE IN-REGION,
INTERLATA SERVICES IN KANSAS AND OKLAHOMA**

Jerome L. Epstein
Nory Miller
Paul W. Cobb, Jr.
Marc A. Goldman
Elena N. Broder-Feldman
Jeffrey I. Ryan
JENNER & BLOCK
601 13th Street, N.W., Suite 1200
Washington, D.C. 20005
(202) 639-6000

Mary L. Brown
Keith L. Seat
WORLDCOM, INC.
1801 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 887-2993

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December 11, 2000

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<u>KCC Staff's Recommendation</u>	Staff's Recommendation on Southwestern Bell Telephone Co.'s Kansas 271 Application, <u>In re SWBT Kansas's Compliance with Section 271 of the Federal Telecommunications Act of 1996</u> , Docket No. 97-SWBT-411-GIT (Aug. 21, 2000) (SWBT App. C-Kansas, Tab 259).
<u>OCC Order No. 445180</u>	Order Regarding Recommendation on 271 Application Pursuant to Telecommunications Act of 1996, <u>In re Application of the Attorney General of the State of Oklahoma</u> , Cause No. PUD 97000560, Order No. 445340 (Sept. 28, 2000) (Attachment A to OK Eval.; SWBT App. C-Oklahoma, Tab 275).

<u>OCC Order No. 445340</u>	Order NUNC PRO TUNC Regarding Order No. 445180, <u>In re Application of the Attorney General of the State of Oklahoma</u> , Cause No. PUD 97000560, Order No. 445340 (Oct. 4, 2000) (Attachment B to OK Eval.; SWBT App. C-Oklahoma, Tab 276).
<u>OCC Pricing Order</u>	Order Adopting Amended Report and Recommendation of the Administrative Law Judge, <u>Application of Cox Oklahoma Telecom, Inc. for a Determination of the Costs of, and Permanent Rates for, the Unbundled Network Elements of Southwestern Bell Telephone Co.</u> , Cause Nos. PUD 970000213, PUD 970000442, Order No. 424864 (July 17, 1998) (SWBT App. G, Tab 17).
<u>OCC Alternative Reg. Order</u>	Order Approving Stipulation, <u>In re Application of Southwestern Bell Telephone Co. for Relief from Rate Base/Rate of Return Regulation and Seeking Approval of Its Transition Plan for Alternative Regulation</u> , Cause No. PUD 990000613, Order No. 437259 (OCC Dec. 10, 1999).
Declarations and Affidavits	
Baranowski/ Flappan Decl.	Joint Declaration of Baranowski/ Flappan on Behalf of AT&T Corp. (AT&T Corp. Comments, Tab 17).
Ham Aff.	Affidavit of Elizabeth A. Ham on Behalf of SBC Communications Inc. (SWBT App. A, Tab 15).
McMillon & Lichtenberg Decl.	Joint Declaration of Terri McMillon and Sherry Lichtenberg on Behalf of WorldCom Inc. (WorldCom, Inc. Comments, Tab A).
Noland/Smith Decl.	Joint Declaration of Brian D. Noland and David R. Smith on Behalf of SBC Communications Inc. (SWBT App. A, Tab 17).
Proferes/Nolan/ Bobeczko Decl.	Joint Declaration of Patricia Proferes, John Nolan and Paul Bobeczko on Behalf of WorldCom Inc. (Tab A hereto).
Smith/Johnson Aff.	Joint Affidavit of J. Gary Smith and Mark Johnson on Behalf of SBC Communications Inc. (SWBT App. A, Tab 1).
Other Record Materials	
KS Report	Report of the State Corporation Commission of the State of Kansas on Southwestern Bell Telephone Company's Compliance with Section 271, <u>In re Application of SBC Communications, Inc. for Authorization to Provide In-Region, InterLATA Services in Kansas and Oklahoma</u> , CC Docket No. 00-217 (Nov. 20, 2000).

OK Eval.	Oklahoma Corporation Commission's Recommendation and Initial Comments, <u>In re Application of SBC Communications, Inc. for Authorization to Provide In-Region, InterLATA Services in Kansas and Oklahoma</u> , CC Docket No. 00-217 (Nov. 17, 2000).
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<u>DOJ Mass. Eval.</u>	Evaluation of the United States Dept. of Justice, <u>In re Application of Verizon New England Inc., NYNEX Long Distance Co., and Verizon Global Networks Inc. for Authorization to Provide In-Region, InterLATA Services in Massachusetts</u> , CC Docket No. 00-176 (filed Oct. 27, 2000).
<u>DOJ OK/KS Eval.</u>	Evaluation of the United States Dept. of Justice, <u>In re Application of SBC Communications, Inc. for Authorization to Provide In-Region, InterLATA Services in Kansas and Oklahoma</u> , CC Docket No. 00-217 (filed Dec. 11, 2000).
<u>DOJ SC Eval.</u>	Evaluation of the United States Dept. of Justice, <u>In re Application of BellSouth Corporation, et al. Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in South Carolina</u> , CC Docket No. 97-208 (Nov. 4, 1997).

INTRODUCTION AND EXECUTIVE SUMMARY

As the Commission examines why there is no residential competition in Kansas or Oklahoma, the answer will be clear: Southwestern Bell's ("SWBT") inflated prices preclude any possibility of local competition using elements of SWBT's network, and SWBT's Operations Support Systems ("OSS") are untested because residential entry using SWBT's unbundled elements has not been economically viable for any competitor. In stark contrast to New York and Texas, where competitors were serving tens of thousands of residential consumers using the UNE-Platform ("UNE-P") before Verizon and SWBT were granted section 271 authority, there are only fourteen UNE-P residential customers in Oklahoma and zero in Kansas.

As noted in WorldCom's opening comments – and as is clear from our actions in the marketplace – WorldCom enters local markets using UNE-P where it is profitable to do so. WorldCom has not entered the Kansas or Oklahoma residential markets because it is a money-losing proposition. WorldCom is not alone in reaching this conclusion. The Commission should be deeply troubled that, unlike in New York and Texas, competitors are not using SWBT's unbundled elements to provide residential service in Kansas or Oklahoma.

Indeed, the level of facilities-based residential competition in Kansas is so trivial that SWBT cannot even meet the requirements of Track A in that state. The opening comments of several competitive local exchange carriers ("CLECs") demonstrated that SWBT's claims of widespread facilities-based residential competition are inaccurate. The fact is that there is a de minimis amount of facilities-based residential competition in Kansas. No facilities-based

competitor provides an “actual commercial alternative” to SWBT’s residential service, as required by Track A.

It is critical that the Commission undertake a close, independent analysis of the excessive pricing that stands in the way of competitive entry in Kansas and Oklahoma. The Department of Justice properly found that the state commissions’ rate determinations should carry no weight in this case because the prices inexplicably and substantially exceed those in other SWBT states, and because the processes used by the state commissions were not aimed at setting cost-based rates. Independent analysis of pricing by the Commission is not only sound policy, as the Department of Justice found, but is required by the Telecommunications Act of 1996 (“1996 Act”) and is fully consistent with prior Commission precedent. The Commission should reject SWBT’s application because the prices for unbundled elements are not cost-based, as required by the competitive checklist.

In addition to the excessive prices for unbundled elements, the DOJ Evaluation and opening comments of competing carriers point to several other barriers to entry in Kansas and Oklahoma:

OSS. SWBT has not shown that its OSS in Kansas and Oklahoma is operationally ready. It has not presented commercial data sufficient to show readiness in these states, and it has not presented data from a third party test. SWBT has only minimal experience providing OSS in those states – and almost no experience providing UNE-P via EDI, the only method capable of providing ubiquitous residential service in the foreseeable future. Moreover, as the Department of Justice concluded, “the evidence does not establish clearly that acceptable wholesale performance in Texas will necessarily be duplicated in Kansas and Oklahoma.”

First, there are known differences between SWBT's OSS in Kansas, Oklahoma and Texas. Products and regulations vary among these states and result in differences in SWBT's OSS including, for example, differences in universal service ordering codes and feature identifiers. Provisioning and maintenance and repair are performed by different personnel in each of these states. And orders in Kansas and Oklahoma are generally routed to a different SWBT processor than orders in Texas. Each of these differences could preclude OSS that works in Texas from working in Kansas and Oklahoma.

Second, in addition to the known differences among SWBT's OSS in Kansas, Oklahoma and Texas, there are likely other important differences as well. Even accepting at face value SWBT's claim that its OSS is the same in all three states, the scope of that claim – how broadly SWBT defines OSS and “sameness” – is not at all clear. There may well be important differences that fall outside the scope of SWBT's vague claim, as discussed by DOJ. In addition, there has been no thorough, independent examination of SWBT's claim. This Commission has always demanded proof that a BOC's OSS is ready, not just an assertion to that effect by the applicant. In other regions, BOC claims of identical OSS – along with claims of OSS readiness – have proven significantly exaggerated once closely evaluated.

Third, even if SWBT's OSS in Kansas and Oklahoma were identical to its OSS in Texas, SWBT's Texas performance does not prove readiness of that OSS. SWBT's OSS in Texas is performing inadequately in a number of important respects and that performance is likely to deteriorate if CLECs begin placing commercial volumes of orders in Kansas and Oklahoma. Primarily as a result of SWBT's high level of manual processing and decision to create three service orders from every UNE-P order, SWBT's performance in Texas is inadequate as it relates

to jeopardies, rejects, service order completion notices, and return of information CLECs need to determine the status of their orders. Several of these problems are not apparent from SWBT's performance data because SWBT's performance measures do not specifically measure these problems.

Line Splitting. The opening comments of IP Communications, a DSL provider, reinforce WorldCom's concerns that SWBT has erected a substantial barrier to competition by failing to offer reasonable and nondiscriminatory access to network elements required to allow line splitting between competitors such as WorldCom who use UNE-P, and DSL providers such as IP. WorldCom and other competitors who use UNE-P must have the same opportunity as SWBT to team with data carriers to provide a package of voice and high speed data services over the same line.

Interconnection Policies. More than two years ago MCI entered into an agreement with SWBT in Texas allowing MCI to establish a single point of interconnection ("POI") per LATA, pursuant to the requirements of the 1996 Act and the Commission's implementing regulations. The agreement avoided excessive costs SWBT was attempting to impose by forcing MCI to establish multiple POIs per LATA. SWBT now claims that it has adopted these pro-competitive terms in its generic Oklahoma interconnection agreement available to all CLECs. In recent testimony in Oklahoma, however, SWBT stated that it plans to shift to the CLEC the transport costs between SWBT's own end offices and a CLEC's single POI. SWBT thus purports to require CLECs in Oklahoma to bear substantial costs that were avoided by the "single POI" arrangement. SWBT is thus attempting an end run around a CLEC's right to a single POI by

imposing on the CLEC costs as if multiple POIs had been established. This unreasonable and discriminatory practice violates the interconnection requirements of the competitive checklist.

SWBT's application should be denied because it has not eliminated substantial barriers to local entry in Kansas and Oklahoma – barriers that have prevented residential customers in both states from having any choice of local service providers.

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Southwestern Bell's ("SWBT") application is premature because it has refused to remove several substantial barriers to local entry in Kansas and Oklahoma. SWBT and other Bell Operating Companies ("BOCs") demanded from this Commission a "roadmap" for section 271 approval, and the Commission could not have been more clear that cost-based prices and commercially ready Operations Support Systems ("OSS") are fundamental prerequisites to checklist compliance and section 271 approval. Nevertheless, SWBT forged ahead with this application despite grossly excessive, above-cost prices for unbundled network elements ("UNEs"), and OSS that has neither been proven to work in practice nor verified through an open and comprehensive third party test. To further solidify its stranglehold on the market, SWBT has adhered to discriminatory policies that thwart competition for advanced services and that substantially raise competitors' costs of interconnecting with SWBT's network. The result has been predictable – there is no residential competition using SWBT's UNEs in either Kansas or

Oklahoma. SWBT's application should be denied because it has not met the competitive checklist and has not opened the Oklahoma and Kansas local markets to competition.

**I. SWBT'S INFLATED CHARGES FOR UNBUNDLED ELEMENTS
VIOLATE THE CHECKLIST'S PRICING REQUIREMENTS**

SWBT has not even made out a prima facie case that it charges competitors forward-looking, cost-based rates for UNEs in either Kansas or Oklahoma, as required for approval under section 271(c)(2)(B)(ii) of the 1996 Act. Further, the evidence submitted by AT&T and others decisively rebuts SWBT's unsubstantiated conclusion that its rates are cost-based. SWBT's failure to justify its UNE rates in both states is alone a sufficient basis to deny SWBT's application. See NY Order ¶ 44; MI Order ¶¶ 105, 106; LA II Order ¶ 50.^{1/} The overwhelming evidence demonstrates that SWBT's recurring and non-recurring rates in Oklahoma, and SWBT's non-recurring rates in Kansas, are not reasonably based on TELRIC-compliant cost studies as required under the Act and this Commission's regulations, were not determined through processes that merit any deference, and present would-be competitors with a virtually insurmountable barrier to entry, especially in the residential market. In addition, it is disturbing that, over four years after the 1996 Act was enacted, Oklahoma and Kansas have still not attempted to set permanent rates for such basic elements as collocation.

Here, significantly, the Department of Justice ("DOJ" or "Department") – whose views must be given "substantial weight" (47 U.S.C. § 271(d)(2)(A)) – has reported grave doubts that SWBT's UNE rates meet the applicable standard. DOJ OK/KS Eval. at 2, 14-28. Further, the

^{1/} A table of citation abbreviations and corresponding full citations is provided on page iv above.

Department has reviewed the processes undertaken in Oklahoma with respect to all rates, and in Kansas with respect to non-recurring rates, and has recommended unequivocally that this Commission should not rely “on the decisions of the OCC and KCC approving these prices.” Id. at 37.

SWBT, remarkably, provides no support for its UNE rates in its application, but merely recites that state proceedings have occurred or will occur (with respect to interim rates) and makes a bare assertion that the state agencies “have made reasonable efforts to set interim rates in accordance with the Act and the FCC’s rules.” SWBT Br. at 86-87 (quotation and citation omitted). In its comments, the Oklahoma Corporation Commission (“OCC”) also does not provide any defense of the UNE rates it approved. It has simply submitted copies of its pricing orders, explained that it has at last established a procedural schedule for setting collocation rates, and stated that it intends – but has not established a procedural schedule – to set permanent rates for line splitting and line sharing. OCC Comments at 2-3. Similarly, the Kansas Corporation Commission (“KCC”) has offered nothing to rebut the evidence and arguments that the nonrecurring rates it approved hastily after SWBT’s application was filed do not comply with the Act’s requirement that they be cost-based. The KCC’s sole discussion is as follows: “The Commission issued an order setting nonrecurring rates on November 3, 2000.” KCC Comments at 21. This recital may be all that the KCC, which undertook a more careful and reasoned determination than the OCC in setting recurring rates, can say in defense of its recent order.

For WorldCom, which hopes to provide local service to residential customers throughout the United States, including in Oklahoma and Kansas, SWBT’s grossly inflated prices preclude entry in these states. Proferes/Nolan/Bobeczko Decl. passim. WorldCom’s entry into residential

markets has been through leasing basic UNEs as a platform, or UNE-P, which permits faster, more economical and more pervasive market entry than a pure facilities-based offering. Id. ¶ 7. When UNE prices are set at forward-looking cost-based rates, they generally allow WorldCom and other CLECs to compete profitably with the incumbent, if no other barriers to entry such as discriminatory OSS or marketing restrictions are imposed. Id. WorldCom has entered the market in Texas, as well as other states, with its UNE-P offering. Id. ¶ 8. However, WorldCom has not entered the local residential markets in Oklahoma or Kansas, and has no plans to do so, under current conditions. Id. ¶¶ 6, 23. According to SWBT's own figures, other CLECs appear to have been compelled to reach the same conclusions. Only 14 residential customers are served over UNE-P in the entire State of Oklahoma, and in Kansas there is not even one single residential UNE-P customer. DOJ OK/KS Eval. at 6, 9. By contrast, tens of thousands of residential UNE-P orders are processed in New York, Texas and Pennsylvania each month. Proferes/Nolan/Bobeczko Decl. ¶ 10.

This Commission has already determined that it is required under the Act to independently determine whether a BOC has in fact complied with the competitive checklist. MI Order ¶ 282. "In so doing, [it] must assess whether a BOC has priced interconnection, unbundled network elements, transport and termination, and resale in accordance with the pricing requirements set forth in section 252(d), and, therefore, whether the BOC has fully implemented the competitive checklist." Id. The FCC's independent evaluation of UNE rates is critical to its determination whether local markets are open to competition, because overpriced UNEs present an effective barrier to UNE-P entry, as well as to entry based on combinations of SWBT UNEs and CLECs' own facilities. Moreover, premature entry by a BOC into the in-region interLATA

market while the BOC is preventing competition for local service through overpriced UNEs could distort competition in the long distance market as well by giving that BOC an unfair advantage in attracting long distance customers with bundled services. Id. WorldCom urges the Commission to undertake an independent evaluation of the UNE rates in Oklahoma and the nonrecurring UNE rates in Kansas and to conclude that they do not meet the standard set by the Act and this Commission's regulations.

A. SWBT's Recurring and Non-Recurring UNE Rates in Oklahoma Are Excessive and Are Not Cost-Based

As the DOJ found, Oklahoma's UNE rates "do not appear to be cost-based" and "far exceed the comparable cost-based rates from Texas." DOJ OK/KS Eval. at 14. Oklahoma's recurring UNE rates also are much higher than those approved in Kansas, id., even though SWBT used the same cost model in both states and estimated similar costs in both states. AT&T Baranowski/Flappan Decl. ¶ 16. By any measure, the disparities are significant. Recurring charges are from 35 to 200 percent higher in Oklahoma than in Kansas. AT&T Comments at 7. Recurring charges for loops alone are up to 50 to 100 percent higher, and nonrecurring UNE charges for loops are more than 300 to 700 percent higher than the comparable rates this Commission has reviewed and accepted in Texas. DOJ OK/KS Eval. at 15-16 (noting that the non-recurring charges "would be expected to vary only minimally from state to state").

Nothing about the process through which the Oklahoma rates were set provides any basis to conclude that they fairly derive from reasonable application of TELRIC principles. The OCC has not "conducted an exhaustive and rigorous investigation into the BOC's compliance with the checklist," as this Commission requires. NY Order ¶ 51. It has not "engaged in extensive fact-

finding in its rate case.” Id. ¶ 246. Instead, it eschewed any responsibility to determine the relevant costs and appropriate rates as required under the Act and simply took a set of rates negotiated between SWBT and a cable CLEC (Cox) – mediated by OCC staff – and imposed those rates on all CLECs. DOJ OK/KS Eval. at 17; OCC Pricing Order at 4. There are no cost studies supporting these rates. There is no record of adjustments to any underlying cost study (let alone justification for any such adjustments) that would yield these rates. The rates were simply the result of a settlement process between Cox and SWBT, picked from the wide range between SWBT’s proposals and AT&T’s, with no attempt by the OCC to determine what rates fairly reflect relevant costs in light of the rules established by the Act and this Commission’s regulations. AT&T Baranowski/Flappan Decl. ¶¶ 35, 39. In other words, these rates are arbitrary, and are not reasoned determinations of the cost of providing unbundled network elements.

DOJ correctly stated that “[t]he fact that a price is set in some mid-point range between prices proposed by an ILEC and a CLEC does not indicate that the price is appropriately cost based, absent a separate determination that both the higher and lower proposed prices are appropriately cost based.” DOJ OK/KS Eval. at 18. The OCC made no such determination and there is no basis to assume that SWBT’s proposals were cost based. AT&T has raised significant questions about the inclusion of embedded historic costs by SWBT and its assumptions of very low fill factors, completely manual ordering processes, depreciation based on the unrealistically short lives used in financial reporting, allocation of common costs based on the ratio of costs to expenses rather than to revenues, and the use of cost figures from existing switches rather than from new switch contracts. AT&T Baranowski/Flappan Decl. ¶¶ 37, 40, 46, 52, 56, 60.

Rates that are merely set between AT&T's TELRIC proposals at one end and SWBT's non-TELRIC proposals at the other cannot be considered cost-based without a showing that the rates properly reflect appropriate costs. SWBT has provided no such showing to this Commission. It has submitted nothing to support the legitimacy of these rates or to explain what differences in Oklahoma justify the recurring rates being so much higher than the rates in Kansas. The OCC's pricing decision, and the ALJ's recommendation it was based on, certainly provide no support from which to conclude that these rates properly reflect appropriate costs. See DOJ OK/KS Eval. at 20.

Oklahoma's inflated recurring rates, without even taking into consideration the inflated nonrecurring rates, create a debilitating price squeeze that wholly precludes WorldCom from currently considering UNE-P entry there. With CLEC internal costs of providing local service in excess of \$10.00/month/line, WorldCom cannot afford to market its local residential service in those states and parts of states where it would receive an inadequate gross margin. See WorldCom Mass. Reply Comments at 25. In Oklahoma, SWBT's recurring UNE-P rates exceed the total revenue WorldCom could expect to collect per customer in all but the densest zone, before any internal costs are considered. Proferes/Nolan/Bobeczko Decl. ¶¶ 12, 16. Even in the densest zone, the margin is well below a level that could support competition by WorldCom or any new entrant seeking to provide broad-based local residential competition through UNE-P. Id. In states WorldCom has entered because of adequate pricing in some zones, WorldCom still does not actively market its local UNE-P services in other zones where the gross margins are better than the gross margins anywhere in Oklahoma, because it cannot provide these services competitively and profitably. The evidence suggests that no other CLEC is able to provide

broad-based UNE-P service at these rates either. See DOJ OK/KS Eval. at 6 (UNE-P service is being provided to only one-third of one percent of the lines in SWBT's Oklahoma service area, and only 14 of those lines serve residential customers).

The promotional rates the OCC approved last December do not solve any of these fatal flaws. See OCC December 10, 1999 Order.^{2/} First, as a matter of law, these rates are not before the Commission in this proceeding because SWBT did not rely on them in its application. See DOJ OK/KS Eval. at 21. Second, the so-called promotional rates are not any more cost-based than the rates they temporarily replace. They do not fairly derive from reasonable application of TELRIC principles. They do not meet the standards established by the Act or by this Commission's regulations. There are no cost studies that, either directly or with considered adjustments, yield the promotional rates. The promotional rates, like the rates they temporarily replace, are just compromise rates – plucked from the wide range between proposed charges and apparently reflecting relative negotiating power rather than the cost of providing unbundled network elements. See DOJ OK/KS Eval. at 24 (noting that there is no evidence in the record that the promotional rates are cost-based). Moreover, as part of the compromise, the OCC agreed not even to attempt to set cost-based rates until two years after the promotional rates became effective. Thus, not only has the OCC not yet set cost-based rates, it has contracted not to do so for another two years. OCC December 10, 1999 Order, Stipulation ¶ 8.

^{2/} SWBT nominally elected to offer these discounts as of June 15, 2000, although there is some question about when or whether they have in fact been available. See DOJ OK/KS Eval. at 22, 23 n.75.

Third, these rates cannot irreversibly open the market for UNE-P entry because they are temporary. WorldCom, like other businesses, cannot base decisions about which markets to enter on prices that are, by definition, temporary and not expected to either be extended or improved. Proferes/Nolan/Bobeczko Decl. ¶ 17. And these promotional discounts will disappear – either quickly or in five years – whether they successfully induce competitive entry or not. If they are successful – *i.e.*, if they were actually sufficient to make UNE-P entry feasible – they would disappear quickly because they expire based on the number of lines leased to CLECs. The 25% threshold of CLEC penetration would be reached quickly in viable markets, freezing prospects for competition while SWBT retains a 75% market share. WorldCom’s long-time experience providing long distance service, and recent experience as a UNE-P provider in New York, Texas and Pennsylvania, demonstrate that when competitive conditions exist, a 25% rate of penetration by all competitors can develop quickly. In New York, CLECs already serve almost 17 percent of what had been Verizon’s residential customers through leased lines, and more than 25 percent in many areas. *Id.* Moreover, even if the discounts fail to induce competition, they still expire after either four or five years for customers in every exchange. OCC Alternative Reg. Order at 7 & Stipulation ¶¶ B.4, B.5. Furthermore, neither the OCC’s history in setting rates under the Act, nor its determination to safeguard SWBT’s monopoly by withdrawing the promotional rates in any exchange where SWBT’s market share drops to 75 percent, augur well for the possibility that these rates will be extended or improved after the expiration dates. Thus, CLECs cannot rationally make business plans based on these temporary rates. Proferes/Nolan/Bobeczko Decl. ¶¶ 17-18.

Finally, and critically, these promotional rates would not permit UNE-P entry even if they were permanent rates. Proferes/Nolan/Bobeczko Decl. ¶ 19. The discounts just take a little off the top; they do not bring rates down to a viable level. As discussed above, Oklahoma's recurring rates are 35 to 200 percent higher than those in Kansas. In the most urban zone, which might be expected to be most susceptible to competition initially, the promotional discounts are minimal, ranging from zero to only 10 percent. Even in the most rural zones, the promotional rates do not provide discounts of more than 25 percent. OCC Alternative Reg. Order, Att. A. Thus, whether these rates are temporary or permanent, they remain far too high to permit competition in the residential market. Proferes/Nolan/Bobeczko Decl. ¶ 19.

SWBT's application for section 271 authority in Oklahoma should be denied because SWBT has not met its burden of proof that it has provided "[n]ondiscriminatory access to network elements in accordance with the requirements of sections 251(c)(3) and 252(d)(1)," 47 U.S.C. § 271(c)(2)(B)(ii), because its rates do not meet the standard established by these provisions. SWBT's application for section 271 authority in Oklahoma should also be denied because SWBT's inflated rates preclude the primary mode of entry for bringing the benefits of competition to residential customers.

B. SWBT's Non-Recurring Rates in Kansas Are Excessive and Are Not Cost-Based

An evaluation of the nonrecurring charges ("NRCs") on which SWBT based its application for Kansas^{3/} shows that they are "substantially in excess of the Texas NRCs" with no explanation from SWBT as to the reasons for these differences. DOJ OK/KS Eval. at 26. As Sprint has pointed out, SWBT's Kansas NRC for the first two-wire loop, for example, is 3 times higher than the comparable rate in Texas. See Sprint Comments at 29. SWBT's Kansas NRC for the first two-wire digital loop is more than 9 times the comparable rate in Texas. Id. (also showing that SWBT's NRCs in Kansas for additional UNEs are 1½ to 12 times higher than in Texas). SWBT has plainly not met its burden of proof with respect to establishing that these rates meet its checklist obligation.

The KCC's hastily manufactured permanent nonrecurring rates, issued November 3, 2000 (after SWBT filed this application), provide no stronger basis for SWBT to claim compliance with the pricing requirements of the checklist. The KCC did not make substantive findings, with

^{3/} The interim NRCs in Kansas on which SWBT based its application are the only Kansas NRCs properly before this Commission, under this Commission's "complete when filed" rule. MI Order ¶¶ 49-54. "[A]t any time during the pendency of its application, [an applicant may not] supplement its application by submitting new factual evidence that is not directly responsive to arguments raised by parties commenting on its application." TX Order ¶ 35; see also SC Order ¶ 38. If SWBT wants new rates to be evaluated in the Commission's consideration of whether SWBT has satisfied its checklist obligation, its only choice is to withdraw its application for section 271 authority in Kansas and to refile its application. This Commission has held SWBT to this standard before, requiring the basic respect for established rules that marks lawful agency proceedings. And this Commission's obligation to avoid arbitrary and capricious decisionmaking counsels holding SWBT, and other BOCs, to these same established procedures which provide for fair consideration of the important questions at issue in a section 271 proceeding. Because the choice of when to file is entirely within the discretion of the applicants, the "complete when filed" rule is unassailably fair to them.

a reasoned explanation, that support a conclusion that the rates are reasonably consistent with TELRIC principles. The KCC had earlier issued a Reconsideration Order, requesting both SWBT and AT&T to redo their cost studies to comply with the KCC's determinations as to certain underlying assumptions. In its November 3 order, the KCC acknowledged that "[n]either SWBT's nor AT&T's cost studies comply with the Commission's Reconsideration Order" and that "[a]s the record exists now, there is not an adequate basis for the Commission to accept alternative prices proposed by either AT&T or SWBT." KCC NRC Order at 4. The KCC also acknowledged that despite its direct orders, SWBT had not submitted cost studies in a PC-based format which could be used by its staff "to prepare independent cost study analysis and recommend prices for non-recurring charges in accordance [with] the pricing parameters determined by the Commission." *Id.* at 23. Furthermore, the KCC noted that the cost studies SWBT filed electronically did not match the paper copy it filed. *Id.*

The KCC considered continuing "the proceeding until all unbundled network elements needed by CLECs are available with prices supported by accurate and Commission-approved cost data," *id.* at 24 (emphasis added), but chose not to. Instead, the KCC decided its commitment to support SWBT's application before the FCC for section 271 authority had priority, and, purely in the interest of avoiding delay, decided to choose compromise rates from the range established by cost studies it had already determined did not reflect appropriate assumptions. *Id.* at 4, 24. Nothing in the KCC's decision, or decision-making process, provides any assurance that the rates that issued are cost-based.

Any such claim is further undermined by the fact that the rates are "two or more times higher than the comparable Texas rates, and no justification for these differences is presented."

DOJ OK/KS Eval. at 27; see also Sprint Comments at 28 n.38. As AT&T has noted, for example, the loop NRC in Texas is \$15; in Kansas, it is more than \$30. The basic analog loop to port cross-connect in Texas is \$4.72, but more than \$26 in Kansas. AT&T Comments at 21; AT&T Baranowski/Flappan Decl. ¶¶ 79-81.

For UNE-P entry, these significantly above-cost NRCs apply to new installs. Because the gross margin based solely on the recurring rates is already borderline for recovering CLEC internal costs even in the densest zone, the additional weight of these NRCs is significant. Moreover, internal CLEC costs in Kansas would be substantially higher than in other states because Kansas has a “single no” telemarketing ban that prevents CLECs from competing in the state without excessive marketing costs. Proferes/Nolan/Bobeczko Decl. ¶ 21.

WorldCom is not actively marketing its local UNE-P services in areas of the states it has entered where the margins are better than the margins anywhere in Kansas (after accounting for the telemarketing restriction) because it cannot provide service competitively and profitably. The evidence suggests that no other CLEC is able to provide residential UNE-P service at these rates either. See DOJ OK/KS Eval. at 9 (UNE-P service is being provided to only one percent of the lines in SWBT’s Kansas service area, and none of those lines serves a residential customer). Although the experience thus far reflects the nonrecurring rates in effect when SWBT filed its application, rather than the rates the KCC recently adopted, the recently-adopted rates remain so high that WorldCom believes they will not lead to a different result.

SWBT’s application for section 271 authority in Kansas should be denied because SWBT has not met its burden of proof that it has provided “[n]ondiscriminatory access to network elements in accordance with the requirements of sections 251(c)(3) and 252(d)(1),” 47 U.S.C.