§ 271(c)(2)(B)(ii), as its nonrecurring rates do not meet the standard established by these provisions.

II. SWBT DOES NOT QUALIFY FOR TRACK A CONSIDERATION IN KANSAS

As discussed above, there is virtually no facilities-based residential competition in either Kansas or Oklahoma. Indeed, CLECs' opening comments reveal that, contrary to SWBT's claims, the degree of facilities-based entry is so minimal in Kansas that SWBT has not even satisfied the requirements of Track A.[4/] Its claims for compliance with Track A rest on three erroneous assertions: that the KCC finding of Track A compliance is adequate; that Global Crossing and Sprint provide more than de minimis, facilities-based service to residential customers; and that Birch Telecom and other carriers provide service predominantly over their own facilities in conjunction with resold service. Yet on closer inspection none of SWBT's assertions demonstrates that a competing provider in Kansas is providing the "actual commercial alternative" for facilities-based residential service that is required by Track A.[5/]

Notably, DOJ in its evaluation took SWBT's numbers at face value and nevertheless concluded that "[e]ssentially all CLEC residential service in Kansas is the resale of SBC service." DOJ OK/KS Eval. at 8. DOJ drew the further conclusion from these numbers, plus the limited extent of UNE-P competition, that there should be no presumption that the Kansas and Oklahoma markets are open to competition for all customers. See id. at 10. Given the clear

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4/ SWBT does not argue that it meets the test for Track B in Kansas.

5/ WorldCom does not challenge SWBT's application for section 271 authority in Oklahoma on the basis of Track A. There, SWBT claims that CLECs serve tens of thousands of customers via their own facilities, including thousands of residential customers. See Smith & Johnson Aff., att. E, p. 1.

problems with SWBT's local competition data that WorldCom discusses below, the Commission should conclude that SWBT does not meet the requirements of Track A in Kansas and that it has failed to open its markets to facilities-based residential competition.

A. Track A Standard

Track A requires that at least one "competing provider" offer service to residential and business customers "either exclusively over their own telephone exchange service facilities or predominantly over their own telephone exchange service facilities in combination with the resale of the telecommunications services of another carrier." 47 U.S.C. § 271(c)(1)(A). The Commission has interpreted this language to require the existence of "an actual commercial alternative to the BOC." OK Order ¶ 14, aff'd, SBC Communications, Inc. v. FCC, 138 F.3d 410, 416 (D.C. Cir. 1998) (upholding this standard).

The Commission has fleshed out this standard by noting that a "competing provider" must "actually be in the market and operational (i.e., accepting requests for service and providing such service for a fee)." MI Order ¶ 75. A competing provider need not have achieved any particular level of geographic penetration in a state, nor any particular market share. See id. ¶¶ 76-77. The Commission has recognized, however, that "there may be situations where a new entrant may have a commercial presence that is so small that the new entrant cannot be said to be an actual commercial alternative to the BOC, and therefore, not a 'competing provider.'" Id. ¶ 77.

While the Commission has never expressly reached the issue of whether a CLEC serving a de minimis number of residential access lines over its own facilities qualifies as a "competing

provider" under Track A, see id. ¶ 78, Congress clearly demonstrated its intent to foster facilities-based residential competition in the 1996 Act. See, e.g., H.R. Conf. Rep. No. 104-458, at 148 (1996) (discussing facilities-based competition under Track A; "Some of the initial forays of cable companies into the field of local telephony therefore hold the promise of providing the sort of local residential competition that has consistently been contemplated."); H.R. Rep. No. 104-204, at 77 (1995) ("It is also the Committee's intent that the competitor offer a true 'dialtone' alternative within the State, and not merely offer service in one business location that has an incidental, insignificant residential presence." (emphasis added)); see also LA II Order ¶ 46 (noting that Congress "expected such facilities-based competitive services to be offered to residential subscribers").

Moreover, the Commission itself has acknowledged the importance of the development of facilities-based competition to serve local exchange markets. While expressing its commitment to competition via all modes of entry, including resale, the Commission commented that facilities-based competition provides critical consumer benefits that do not flow from competition involving resold service:

> [W]e believe that, in the long term, the most substantial benefits to consumers will be achieved through facilities-based competition, because only facilities-based competitors can break down the incumbent LECs' bottleneck control over local networks and provide services without having to rely on their rivals for critical components of their offerings. Moreover, only facilities-based competition can fully unleash competing providers' abilities and incentives to innovate, both technologically and in service development, packaging, and pricing.[6/]

6/ Promotion of Competitive Networks Order, ¶ 4.

Given the importance of, and degree of congressional interest in, the development of facilities-based residential competition, the Commission should require a BOC to show that CLECs have done more than bill a handful of test customers before permitting the BOC to proceed along Track A. Especially considering the financial difficulties that many CLECs are currently experiencing in the course of attempting to open local markets,[7/] it would be premature to conclude that a CLEC with a tiny number of customers constitutes a viable commercial alternative to a BOC's local monopoly. The fact that CLECs will face added difficulty in recruiting and retaining local customers once the BOC enters the long distance market makes it even more critical that BOC entry not be granted before Track A has been fully satisfied.

As stated by the Commission, "very fact-specific determinations" are required to decide whether a CLEC has more than a de minimis market presence. OK Order ¶ 14. For example, the Commission found in the previous section 271 proceeding for Oklahoma that a CLEC's provision of local service on a test basis to four employees did not meet the test of Track A. See id. ¶ 17. By contrast, in the Michigan Order, the Commission found that CLECs were "serving more than a de minimis number of end-users for a fee." MI Order ¶ 78. The Commission relied on the fact that CLECs were serving tens of thousands of business lines over their own facilities, and one CLEC was serving more than 6,000 residential customers over its own facilities. See id. ¶¶ 65-67. The extent of a commercial presence to satisfy Track A has not been conclusively resolved, but any reasonable application of this provision requires a presence approaching that in Michigan, where the CLECs' residential customer base numbered in the thousands and was

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7/ See, e.g., Verizon/OnePoint Merger Order, ¶¶ 7 n.19, 12.

therefore much more likely to be commercially sustainable.[8/] The current situation in Kansas is not materially different from the conditions the Commission found did not satisfy Track A in the initial Oklahoma proceeding. SWBT has not met the Track A test in Kansas.[9/]

B. KCC Determination

SWBT's reliance on the KCC determination that SWBT met the requirements of Track A is misplaced. See SWBT Br. 13-14. The KCC's finding was based on the existence of only five facilities-based residential customers in Kansas. See KCC, Staff's Recommendation, § 1, at 3. This mere handful of customers is clearly not sufficient to support a viable commercial operation such that a CLEC could be considered a "competing provider" under the Act.

C. Global Crossing and Sprint

SWBT also makes the erroneous claim that data it has derived from the Enhanced 911 database shows that two other carriers -- Global Crossing and Sprint -- provide facilities-based service to residential customers. See SWBT Br. 15-16.[10/] Yet the comments of Global Crossing demonstrate that it does not provide facilities-based service to any residential customers in

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8/ Among other issues, a CLEC with only a relatively small number of customers will not be able to spread its overhead costs over a large enough customer base to support the costs of implementing technology and marketing campaigns to compete with the incumbent.

9/ As a reference point, the Commission recently characterized as "de minimis" the market presence of a CLEC serving 11,000 customers through resale in Verizon's region. Verizon/OnePoint Merger Order, ¶ 7.

10/ In the Joint Affidavit of J. Gary Smith and Mark Johnson, SWBT incorrectly states that WorldCom provides facilities-based service to one residential customer. See Smith/Johnson Aff., att. E, p. 1. WorldCom is not, however, providing facilities-based service to any residential customers in Kansas. The single line SWBT is referring to is a business line among thousands of lines provided to a large business. Proferes/Nolan/Bobeczko Decl. ¶ 10 n.1.

Kansas. See Comments of Global Crossing North America, Inc., at 2-3. Moreover, the stark disparity between SWBT's claims based on the E911 database and Global Crossing's denial call into question all of SWBT's arguments that depend on the database.[11/]

Neither do Sprint's activities in Kansas constitute an actual commercial alternative to SWBT as of the date of SWBT's filing. Sprint had at most 184 local residential customers on that date, and all had signed up for service during Sprint's testing phase, when Sprint was not billing for the service. See Sprint Comments at 9.[12/] Moreover, sixty percent of the customers were still taking local service from SWBT, which means that Sprint's service was not replacing SWBT's service and thus should not be considered to be an alternative. Even if all of the Sprint customers are considered to constitute bona fide, facilities-based, residential customers, the grand total amounts to no more than 0.02 percent of the lines controlled by SWBT in Kansas. See Sprint Comments at 10 n.11.

Under Commission precedent and the facts of this case, CLECs are serving only a de minimis number of Kansas residential customers over their own facilities. Sprint's residential customer base of between 56 and 184 customers is clearly not sufficient to constitute a commercially viable, sustainable alternative to SWBT. No more than 56 customers were even

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11/ The discrepancy between SWBT's numbers and the facts bolsters the arguments made by Sprint and others that SWBT's methodology significantly exaggerates the extent of local competition. See Sprint Comments at 4-6.

12/ Again, there is a large discrepancy between the numbers of facilities-based residential customers claimed by SWBT based on the E911 database and the number of customers claimed by Sprint.

arguably paying a fee as of the date of SWBT's filing.[13/] Even if the entire 184 customers are credited to SWBT, this number is a far cry from the over 6,000 facilities-based residential customers that were deemed adequate evidence of competition to satisfy track A in the Michigan Order. SWBT controlled the timing of its application, and it should have waited until competitors achieved a sufficient footing in the local residential market before proceeding.

D. Birch Telecom

SWBT incorrectly argues that Birch Telecom's provision of facilities-based service to business customers, combined with its provision of resold service to residential customers, qualifies SWBT for Track A. See SWBT Br. at 16. Although the Commission has in dicta expressed reservations on the issue, see LA II Order ¶ 48, Congress expressed a clear intent to foster facilities-based residential competition in the Act, including Track A's requirement of a facilities-based competitor for both "residential and business subscribers." 47 U.S.C. § 271(c)(1)(A) (emphasis added). Any other interpretation of the Act could leave residential customers with no facilities-based alternatives, relegating them to services that are entirely dependent on the incumbent BOC's technology and pricing.[14/] Differences in pricing of

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13/ While Sprint sent its first bills to 56 of these customers just six days prior to the filing, it is safe to assume that few if any had paid for the service by the time of the filing.

14/ The House bill originally excluded resale from Track A altogether. See H.R. Rep. No. 104-204, at 77 (1995). In the final legislation, a competing provider could offer services either "exclusively" over its own facilities or "predominantly" over its own facilities in conjunction with resale. See 47 U.S.C. § 271(c)(1)(A). The option for a CLEC to offer predominantly facilities-based service together with resale merely avoids the requirement that a CLEC offer services "exclusively" over its own facilities. Especially given Congress' attention to the needs of residential customers, the provision should not be read as permitting a Track A application where business customers can receive the advantages of competitive, facilities-based service but where residential customers cannot.

residential and business service, and in the demands placed on OSS for residential and business service, mean that residential customers in a state may not have an actual commercial alternative even if business customers do. Given Congress' strong interest in fostering residential competition on a facilities basis, such an outcome is not consistent with congressional intent.

Furthermore, even under an interpretation of Track A that counts facilities-based services provided to business customers and resold services provided to residential customers, Birch Telecom cannot be said to be providing local exchange services "predominantly" over its own facilities. According to the information provided by SWBT, Birch Telecom services over eight times more business lines by resale than over its own facilities, and it services 15 times more lines (business and residential) by resale than over its own facilities. See Smith/Johnson Aff., att. F, pp. 4-5.[15/]

In summary, none of the information provided by SWBT supports its claim that it meets the requirements for Track A in Kansas. The only carrier that appears to provide any type of facilities-based residential service is Sprint, and Sprint was serving a de minimis number of lines -- most of which were not for paying customers -- at the time of SWBT's filing. Moreover, carriers such as Birch Telecom that provide facilities-based business service and resold residential service do not meet Track A's requirement that competing providers supply

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15/ According to SWBT's data, another carrier -- KMC Telecom -- provides both facilities-based service to businesses and a minuscule number of resold lines to residential customers. See Smith/Johnson Aff., att. F, p. 12. KMC Telecom states that it offers only business service, however, demonstrating yet another problem with SWBT's data. See Comments of KMC Telecom, at 2.

predominantly facilities-based service to "residential and business subscribers." SWBT's application for Kansas should be denied because it does not qualify for Track A consideration.

III. SWBT HAS NOT SHOWN THAT ITS OSS IS OPERATIONALLY READY IN KANSAS AND OKLAHOMA

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 Kansas and Oklahoma, and it has not presented data from a third party test in those states. Nonetheless, the commissions in Kansas and Oklahoma conclude that SWBT's OSS is ready based primarily on SWBT's experience in providing OSS in Texas. That conclusion is wrong. As the Department of Justice explained, "the evidence does not establish clearly that acceptable wholesale performance in Texas will necessarily be duplicated in Kansas and Oklahoma." DOJ OK/KS Eval. at 3.

A. There Is No Track Record of Successful Commercial Usage Of SWBT's OSS in Kansas or Oklahoma

It is important to emphasize at the outset that the Kansas and Oklahoma commissions do not, for the most part, rely on SWBT's experience with OSS in Kansas and Oklahoma to conclude that SWBT's OSS is ready. Indeed, they could not. 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 near term. According to DOJ, only 14 residential customers are served via UNE-P in Oklahoma and none are served via UNE-P in Kansas. DOJ OK/KS Eval. at 6, 9. It is likely that not a single one of these 14 UNE-P orders was placed via EDI, but 14 orders would not, in any event, show readiness. In August, SWBT processed only 61 total orders over EDI in Kansas and only 256 in Oklahoma.

Ham Aff. ¶ 29. As DOJ concludes, "the limited commercial volumes of orders for UNEs in Kansas and Oklahoma make it difficult to assess SBC's claims on the basis of actual experience in those states." DOJ OK/KS Eval. at 28.

Moreover, SWBT's limited experience in Kansas and Oklahoma has not been a success. In Kansas, SWBT met only 82% of the version 1.7 performance measures in October – a decline from 84% in September and 87% in August. SWBT Nov. 28, 2000 ex parte. In Oklahoma, SWBT met only 85% of the version 1.7 performance measures in October. Id.[16/] Many of those failures involved critical measures, as shown below. SWBT's high failure rate on a very limited volume of orders provides no basis for concluding that SWBT's OSS is ready.

B. The Experience with SWBT's OSS in Texas Does Not Show that SWBT's OSS in Kansas or Oklahoma is Commercially Ready

The Kansas and Oklahoma commissions rely on SWBT's experience in Texas to conclude that SWBT's OSS is ready. But, as DOJ determined, that reliance is misplaced. 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 ("USOCs") and feature identifiers ("FIDs"). DOJ OK/KS Eval. at 33-34; McMillon & Lichtenberg Decl. ¶¶ 18-20. Provisioning and maintenance and repair are performed by different personnel in each of these states. DOJ OK/KS Eval. at 32. And orders in Kansas and Oklahoma are generally routed to a different

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16/ The version 1.7 performance measures are the newest measures resulting from the collaborative six month review of the performance remedy plan in Texas. As for the version 1.6 measures, SWBT met only 87% of those measures in Kansas in October and only 88% in Oklahoma. SWBT ex parte letter Nov. 28, 2000.

SORD processor than orders in Texas. Id. at 33; McMillon & Lichtenberg Decl. ¶ 21. Each of these differences could preclude OSS that works in Texas from also working in Kansas and Oklahoma. DOJ OK/KS Eval. at 29-36; McMillon & Lichtenberg Decl. ¶¶ 18-25.

The product and regulatory differences require significant programming changes in a CLEC's interface. When WorldCom constructs its interfaces, it builds edits into those interfaces to ensure its orders are not rejected. It checks to ensure that a feature has been ordered using the correct USOC, and checks for "dependencies" of features ordered. For example, in some areas the feature "anonymous call rejection," which is often used to block calls from telemarketers, can only be ordered by customers who have also ordered "caller ID with name." WorldCom's edits check to ensure that an order for anonymous call blocking is not transmitted in these areas unless the customer has also ordered caller ID with name. Without these kinds of edits, the reject rate would be very high. This is particularly so because the dependencies are generally far more intricate and go well beyond the simple example of anonymous call rejection.

The USOCs, FIDs, and dependencies all vary from state to state as a result of product and regulatory differences. As a result, WorldCom and other CLECs must program different edits in different states. This is a relatively arduous process. When WorldCom constructed interfaces in Pennsylvania, it discovered that not only were USOCs and dependencies often different than those in New York where WorldCom's interfaces were already operational, but the differences were often not identified in Verizon's documentation. Indeed, in many instances Verizon was not even aware of these differences. As WorldCom worked with Verizon to obtain accurate information, it became clear that many such differences existed even within the states in the former Bell Atlantic-South region. The same is almost certainly true in the SWBT region.

Because SWBT's list of USOCs and FIDs is many hundreds of pages long, adjusting edits by state will take substantial effort. Until a CLEC or third party has successfully undertaken this effort, there is no way to know that SWBT's list is accurate and inclusive.[17/]

In relying on SWBT's OSS in Texas to conclude that SWBT's OSS is ready in Kansas and Oklahoma, the Kansas and Oklahoma commissions largely ignore these differences. They do not discuss the product and regulatory differences among the states. They do not discuss the personnel differences for provisioning and maintenance and repair. And the KCC does not discuss the use of different SORD processors. The OCC does reference its September 28, 2000 report that concludes the two SORD processors are identical, but the commission reached that conclusion without examining the processors or hiring anyone to do so. OCC Order No. 445180, at 171.

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 meaning of that claim is not at all clear. There may well be important differences that fall outside the scope of that claim. DOJ OK/KS Eval. at 29-30. Moreover, there has been no thorough independent examination of SWBT's claim.

17/ Of course no CLEC has undertaken this effort for EDI because SWBT's pricing prevents CLECs from entering the SWBT markets. Where CLECs are not using a particular interface – especially due to BOC-imposed barriers to entry – it all the more important that the OSS undergo rigorous third party testing. SWBT should not be held to a lesser standard for OSS by virtue of having prevented commercial usage of its OSS.

Ernst & Young did not conduct such an examination, as WorldCom explained in its initial comments. WorldCom Comments at 5-6. An evaluation conducted according to the attestation standards of a financial audit is not the same as an end-to-end test of a BOC's OSS which is open to CLEC participation. SWBT attempts to bolster the credibility of the Ernst & Young examination by submitting a supplemental report from Ernst & Young further explaining its methodology. SWBT December 1, 2000 ex parte letter Att. A. However, the supplemental report does not correct the defects of the original. Indeed, it underscores that the scope of the Ernst & Young evaluation was quite limited. As is apparent from the report, for example, Ernst & Young only evaluated systems, not personnel. And Ernst & Young did not even examine all of the relevant systems. The report does not discuss SWBT's mechanized order generator ("MOG"), any of SWBT's billing systems, or any of SWBT's maintenance and repair systems or interfaces.

Moreover, the report actually confirms that SWBT is running different "instances" of systems in different states. Thus, SWBT is running one instance of SORD for Kansas, one for Oklahoma and three for Texas. Id. at 12. It is also running five different instances of EASE. Id. The report does not explain how Ernst & Young tested these instances to determine they were identical.

In fact, the report provides only minimal details of Ernst & Young's methodology in general. It states, for example, that Ernst & Young "tested a sample of orders . . . to determine the format, content, and processing of the orders were the same across the states," but it does not say what kinds of orders were included in the sample, how many orders were included, whether

the orders were transmitted via EDI, or even what SWBT means in stating the format, content and processing were the same. Id. at 8.

Certainly, not all of the USOCs and FIDs are the same in all three states even if the business rule documents are "regional in nature." Id. The regional nature of the business rule documents does not mean there are not variations within those documents based on products and regulations in different states. Moreover, the fact that business rules appear the same also does not show that those rules work the same in practice. For example, in Verizon's June 2000 release of business rule documentation, the business rule describing whether Verizon would populate the "state" field when it returned pre-order information was identical for New York and Pennsylvania. Yet when WorldCom tested the OSS, Verizon failed to populate the state field in Pennsylvania when it returned pre-order information, but did populate this field in New York. WorldCom had built its interface with the expectation that Verizon would populate the state field because Verizon had always done so in New York. As a result, WorldCom had to recode its interface in Pennsylvania.

Finally, Ernst & Young conducted its evaluation without any input from CLECs or any visibility to CLECs. CLECs had no chance to suggest types of orders that should be tested, specific systems or personnel that should be evaluated, or problems that had arisen in Texas that should be evaluated in other SWBT states. Particularly given Ernst & Young's long-standing relationship with SWBT, the lack of CLEC input or oversight casts doubt on the credibility of Ernst & Young's conclusions, and clearly shows that the examination does not satisfy the "openness" requirement for an adequate third party test.

The Kansas and Oklahoma commissions do not even depend on the Ernst & Young report in reaching their determination that SWBT's OSS is the same in Kansas, Oklahoma and Texas. Instead, they simply accept SWBT's assertion that its OSS is identical. But the FCC has always demanded proof that a BOC's OSS is ready, not just an assertion to that effect by the BOC. In other regions, BOC claims of identical OSS have proven significantly exaggerated once closely evaluated. McMillon & Lichtenberg Decl. ¶¶ 23-24. In the absence of significant commercial experience in Kansas and Oklahoma, a close evaluation by an independent party is required here as well.

Such an evaluation, unlike the Ernst & Young evaluation, must include CLEC participation in the design of the test, CLEC visibility into the test process, and a detailed explanation of by the tester of its methodology and conclusions. WorldCom does not contend that the test must be as comprehensive as would be required if SWBT had no experience providing OSS in Texas. Because the OSS in Kansas and Oklahoma is the product of the same legacy company as the OSS in Texas, it almost certainly has important similarities. But the evaluation must examine general claims of "sameness" to determine their accuracy and include a careful analysis of those areas in which there are clear differences in OSS between Kansas, Oklahoma and Texas, such as those caused by product and regulatory differences and the different personnel used for provisioning and maintenance and repair. Thus, in order to assess whether business rules really are identical, the third-party tester must carefully select a sample of order types, with the participation of CLECs, and submit them across the interface to determine whether they are treated identically.

Third, even if SWBT's OSS in Kansas and Oklahoma were identical to its OSS in Texas, SWBT's Texas performance would 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 a commercial volume 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: (1) returns too many jeopardies, returns jeopardies for inappropriate reasons, and returns jeopardies far too late; (2) returns service order completions ("SOCs") too late; (3) returns incorrect information regarding one of the three services orders – the C order – that prevents CLECs from accessing order status information; (4) returns erroneous rejects to CLECs; (5) takes too long to transmit manually processed rejects; and (6) causes loss of dial tone on some UNE-P migration orders. See generally McMillon & Lichtenberg Decl. Some of these problems – SWBT's failure to return accurate C order numbers, erroneous return of rejects, and disconnection of lines causing lost dial tone – are not apparent from SWBT's own performance data because SWBT's performance measures do not specifically measure these problems.

Some of the other problems WorldCom has experienced are confirmed by SWBT's performance data throughout the region. In October, SWBT failed to meet the measure for return of SOCs via EDI within 1 day (PM 7.1-02) in either Kansas or Oklahoma.[18/] SWBT failed to meet the benchmark for return of manually processed rejects in either state (PM 10.1-01). SWBT again failed to meet the measure for billing completeness (PM 17-01) which measures the

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18/ All of the references to particular performance measures are to the data provided in SWBT's November 27, 2000 ex parte letter.

percentage of orders that post to billing prior to the carrier's billing period and thus reveals the existence of orders likely to be placed in jeopardy status or likely to result in delayed SOCs. Noland/Smith Aff. ¶ 93. The high number of jeopardies is also somewhat apparent from data on "SWBT caused missed due dates." In October in both Kansas and Oklahoma, SWBT failed the performance measures for "SWBT caused missed due dates" with respect to (1) no field work residential orders (PM 29-03); (2) no field work business orders (PM 29-04); (3) no field work UNE orders (PM 29-06); (4) VGPL orders (PM 45-01); (5) DSL no line sharing orders (PM 58-09); and (6) loop orders (5.0 dB loop no field work in Kansas (PM 58-03) and 8.0 dB loop no field work in Oklahoma (PM-02)).[19/] Moreover, SWBT missed these due dates by many days. In both Kansas and Oklahoma in October, the average delay days for SWBT caused missed due dates (PM 74-01) and the percentage of missed due dates that lasted more than 30 days (PM 75-01) were both far too high.[20/]

19/ In Kansas, SWBT also missed related measures for "percent installed within customer requested due date -- no field work – business," and "no field work UNEs." (PM 28-04, 28-06). In Oklahoma, SWBT also missed related measures for "average delay days for SWBT caused missed due dates – business – field work" (PM 32-02) and "average delay days for SWBT missed due dates – DSL – no line sharing." (PM 62-09).

20/ In Kansas, the "average delay days for missed due dates" was 39.0 days in October; in Oklahoma, it was 94.5 days. In Kansas, the percentage of "SWBT missed due dates > 30 days" was 11.3% in October; in Oklahoma it was 49.9%. SWBT's misses of other measures are also particularly troublesome. In both Oklahoma and Kansas in October, SWBT badly missed the measure for "percentage premature disconnects for LNP orders" (PM 96-01). In Oklahoma, for example, SWBT disconnected 11.7% of CLEC customers in October as compared with 2.0% of SWBT customers. Id. In Kansas, SWBT also missed the measure for "percentage premature disconnects – frame due time – LNP" (PM 114-03) and for trouble reports UNE loop and port combinations (PM 37-03). In Oklahoma, SWBT failed to meet the performance standards for "percentage missed repair – business – no dispatch" (PM 38-04) and "percentage repeat reports – UNEs" (PM 41-03).

SWBT may attempt to rely on its specific performance data on jeopardies as evidence that its performance is now acceptable. In October, SWBT for the first time reported data on jeopardies specifically. SWBT provided region-wide data, not state specific numbers. SWBT reported that in October it returned "jeopardies previously called rejects" on 1.53% of CLEC orders, "facilities jeopardies" on 0.88% of CLEC orders, "other SWBT caused jeopardies" on 0.02% of orders and "CLEC/[end user] caused jeopardies" on 1.79% of orders. SWBT Nov. 27 ex parte (PM 112). These data appear to show a much lower percentage of jeopardies than SWBT acknowledged transmitting in prior months. Noland/Smith Aff. ¶ 68. They also appear to show far fewer jeopardies than WorldCom experienced on its orders. SWBT returned jeopardies to WorldCom on 8.7% of its August orders, 6.8% of September orders and 6.0% of October orders. McMillon & Lichtenberg Decl. ¶ 27.

Moreover, SWBT's data vastly under-report SWBT-caused jeopardies. SWBT categorizes all jeopardies for "customer not ready," "no access to end user," and "notification of new due date" as CLEC-caused jeopardies, for example. But SWBT is returning many such jeopardies on UNE-P migration orders. Since these jeopardy reasons should not apply to a UNE-P migration, SWBT is miscategorizing the jeopardies as CLEC-caused. On at least 2.9% of WorldCom's UNE-P migration orders, SWBT returned jeopardies that appear to be SWBT's fault. Id. ¶ 34. And SWBT took far too long to return these jeopardies. Id. ¶ 35. It may be that SWBT's performance was better for other CLECs than for WorldCom, but there is reason to be extremely skeptical, and SWBT does not claim this was the case. SWBT acknowledged prior mistakes in evaluating whether changes in due dates resulted from CLEC or SWBT causes and it is quite likely that SWBT is making the same sort of mistake in attributing jeopardies to SWBT

or CLEC causes. Noland/Smith Aff. ¶ 76. There has been no independent evaluation of SWBT's new data. In any event, one month of post-application data is not enough to show acceptable performance – especially since that data appears inconsistent with WorldCom's data. In November, WorldCom still received far too many jeopardies – a total of 3,975 jeopardies (more than in October) of which 994 were on UNE-P migration orders. SWBT returned these jeopardies in an average of 20 days past the due date.

SWBT's problem in returning jeopardies, as well as SWBT's other performance problems, are likely to worsen if CLECs enter the Oklahoma and Kansas markets in significant volumes. Many of SWBT's performance problems are caused in part by manual processes.[21/] For example, when CLEC orders fall into "error status," SWBT representatives must manually correct the orders before they post to billing. If the representatives do not correct the orders quickly enough, or make mistakes in doing so, SWBT may have to place the order in jeopardy status or may fail to return a SOC in a timely manner. Such problems increase with an increased volume of orders, particularly a rapid increase in volume. Thus, SWBT's problem returning SOCs to WorldCom became dramatic in July and August after WorldCom significantly increased its ordering volume. McMillon & Lichtenberg Decl. ¶¶ 45-47. The problem with jeopardies also

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21/ Most of SWBT's problems with manual processing occur after CLEC orders have reached SWBT's SORD processors. But SWBT's performance measures do not capture the level of manual processing at this stage. Even before orders reach SORD, however, SWBT engages in too much manual processing. On a region-wide basis, the percentage of orders flowing through to SORD appears to have steadily decreased since March or April of this year. (PM 13-02, 13-03). Indeed, since August, the percentage of UNE-P orders flowing through has declined significantly from 90.4% in August to 82.7% in October. (PM 13-02.3, 13-03.3). In October, SWBT missed the measures for percent flow through in Kansas for orders placed via both LEX and EDI. (PM 13-02, 13-03). It also missed the measure in Oklahoma for orders placed via LEX. (PM 13-02).

became more significant because SWBT did not have sufficient representatives to handle the increased volume of orders. Id. ¶¶ 27-28. WorldCom had to put a team in place to help to transmit lists of missing notifiers to SWBT and work with SWBT to ensure SWBT transmitted the notifiers. Id. ¶¶ 27, 45.

CapRock's comments show that its experience parallels WorldCom's to a large extent. In July, many of the orders CapRock submitted in Texas did not post to billing in SWBT's systems and, because of the higher volume of CLEC orders in July than in prior months, SWBT was unable to correct the orders quickly enough to ensure timely return of SOCs. Like WorldCom, CapRock put a special team in place to oversee return of notifiers to CapRock. Comments of McLeodUSA and CapRock at 30-31.[22/] In addition, when SWBT finally hired additional representatives to respond to the increasing volume of orders, these new representatives made mistakes. As DOJ notes, "SBC has attributed delays in processing manual order rejections in part to the hiring of new LSC representatives and the implementation of associated quality control reviews. Similarly, LSC service representatives have failed to correctly assign missed appointment codes when SBC has caused due dates to be missed." DOJ OK/KS Eval. at 35.

Until SWBT significantly reduces the manual processing in which it engages, any rapid increase in CLEC order volumes, such as would occur if CLECs began placing a commercial volume of orders in Oklahoma or Kansas, will continue to cause significant problems. SWBT will not have sufficient personnel to handle the new order volumes and, if SWBT does hire many new representatives, the new representatives are likely to make mistakes. SWBT must reduce its

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22/ CapRock also describes several customers that lost dial tone as a result of SWBT's three service order process. Comments of McLeodUSA and CapRock at 32-33.

high level of manual processing and resolve its other OSS problems before gaining section 271 approval in additional states.

Moreover, as explained above, SWBT must also present better evidence of the readiness of its OSS in those states. SWBT has presented no evidence specific to Kansas and Oklahoma that it is capable of processing UNE-P orders over EDI.

IV. SWBT IS NOT OFFERING REASONABLE AND NONDISCRIMINATORY ACCESS TO UNBUNDLED ELEMENTS NECESSARY TO ALLOW CLECS USING UNE-P TO ENGAGE IN LINE SPLITTING

WorldCom established in its opening comments that SWBT's application must be denied because of SWBT's refusal to allow line splitting – to enable a CLEC using UNE-P to provide both voice and data services over a single line. WorldCom Comments at 17-22. IP Communications Corporation, a provider of DSL services, likewise emphasizes the crucial importance of line splitting to future competition in both advanced and voice services. IP Comments at 28. Line splitting is critical to promoting competition so that WorldCom and other CLECs can take advantage of the more economical bundling of their voice service with data provided by any of a variety of data carriers. See WorldCom Comments at 17-18; IP Comments at 28. Moreover, as IP emphasizes, for the growth of competitive data services, "it is critical that no customers are artificially walled-off, as a practical matter" from data LEC offerings, as would be the case if "integrated voice/data offerings are not allowed when SWBT is not providing the voice services to the customer." IP Comments at 29. Especially in light of the precarious financial condition of many DSL providers, the Commission cannot afford to delay elimination of this unlawful barrier to competition.

Given that line splitting is technically feasible, id. at 28, SWBT has no excuse for not enabling it. But while the OCC conditioned its recommendation of section 271 authority on SWBT porting the result of the Texas line splitting arbitration to Oklahoma, SWBT does not make even the promise of future line splitting compliance in Kansas. See IP Comments at 29; accord WorldCom Comments at 19-21. This failing is reason enough to deny the Kansas application. In Oklahoma too, line splitting is not yet concretely available, and thus the application is premature.

Nothing in the comments of the state commissions contradicts this conclusion. Like SWBT itself, the KCC does not address line splitting in its evaluation of SWBT's section 271 compliance in that state, and thus does nothing to demonstrate that SWBT is currently meeting its obligations in this area.[23/] Rather, the KCC has deferred resolution of critical DSL-affecting issues until a later docket. See KS Report at 8, 27. But a promise of future compliance, let alone one so vague as this, is not sufficient to demonstrate checklist compliance today. See, e.g., TX Order ¶ 52 (to satisfy checklist, items must be concretely available as a legal and practical matter); MI Order ¶ 107; SC Order ¶¶ 78, 81; DOJ SC Eval. at 13 ("paper promises" are not

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23/ Indeed, parts of the KCC's report support the conclusion that SWBT's failure to enable UNE-P line splitting violates the competitive checklist. The KCC notes that to comply with checklist item 6, unbundled local switching, "When transferring a customer's local service to a competing carrier only requires a change in software, SWBT must be able to make the transfer within the same time period it takes SWBT to transfer end users between interexchange carriers. 47 C.F.R. § 51.319(c)(1)(ii); *Local Competition Order*, ¶ 421." KS Report at 28. To transfer the voice portion of a line shared circuit using a collocated data carrier splitter to a CLEC, while maintaining DSL service from the same data carrier, requires only a software change, but SWBT has not committed to provide this simple conversion at all, let alone shown that it can do it in a timely fashion.

sufficient to demonstrate that checklist item is available as legal and practical matter, as the Act requires); DOJ LA I Eval. at 9, 14.

As WorldCom indicated in its opening comments, the situation in Oklahoma is only marginally better. The OCC has required SWBT to provide terms for line splitting in its generic interconnection agreement, the O2A. OCC Order No. 445180, at 181. But as the OCC also noted, "Southwestern Bell has not conducted cost studies using Oklahoma specific costs, for the purpose of pricing line sharing and/or line splitting." Id. To solve this failing, the OCC ordered that "the decision, when adopted by the Texas Public Utility Commission, from the Texas line splitting docket (AT&T arbitration, Texas PUC Docket No. 22315) should be adopted as interim terms, conditions and rates for line splitting in Oklahoma." See OCC Order No. 445340, at 2 (emphasis added). Although the FCC has indicated that interim rates may be sufficient to sustain a section 271 application under certain conditions, NY Order ¶¶ 258-259, this is obviously not the case in Oklahoma with respect to line splitting. Because SWBT is appealing the Texas line splitting order, the Texas Commission has yet to adopt it, and consequently, at the moment there are in fact no rates and conditions for line splitting in place in Oklahoma, not even interim ones. The uncertainty engendered by these conditions is compounded because, as DOJ concluded, Oklahoma's overall record on the establishment of permanent rates is poor – both because Oklahoma has allowed interim rates to remain in place for excessive periods, and because permanent rates that Oklahoma has approved do not appear to be based on an appropriate

measure of costs. DOJ OK/KS Eval. at 20, 24-25. For these reasons, in Oklahoma too, SWBT cannot show that line splitting is currently available on concrete and nondiscriminatory terms.[24/]

The comments of several parties raise another significant concern relevant to line splitting, namely how SWBT will enable the provision of CLEC voice and another competing carrier's data over the same loop where customers are served by digital loop carrier ("DLC") systems. Whether the architecture is all copper or DLC, CLECs are entitled to nondiscriminatory "access to unbundled loops in a manner that allows the requesting carrier 'to provide any telecommunications service that can be offered by means of that network element.'" TX Order ¶ 325. Consequently, CLECs must have an opportunity equal to SWBT to provide voice service over the same loop (or subloop) that is used by a data carrier to provide data services. But while SWBT trumpets the greater number of consumers who will be able to receive DSL service

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24/ WorldCom echoes the deep concerns of commenters including IP Communications, McLeod, Allegiance and Sprint about SWBT's overall ability to provide adequate DSL service, and in particular to provide line sharing. SWBT has not proven such ability on this record, especially given SWBT's lack of commercial experience provisioning stand-alone and line shared DSL in Kansas and Oklahoma, the complete lack of testing of line sharing in Texas or in the states currently under consideration, and the very marginal, if not overtly discriminatory, results of its few reported performance measures. Indeed, although the OCC concluded that SWBT met the requirements for access to unbundled loops, including for advanced services, it did not explain how it squared this conclusion with its specific finding:

> [B]ecause line sharing is provisioned differently than xDSL loops, and because the FCC did not consider line sharing in its Texas Order, Southwestern Bell cannot reply upon findings from the Texas Order to support their compliance with the line sharing requirements set forth in the Third Report and Order in CC Docket No. 98-147 and the Fourth report and Order in CC Docket no. 96-98. Additionally, Southwestern Bell has not demonstrated that its OSSs can adequately support commercial volumes for line shared orders.

OCC Order No. 445180, at 181.

through DLC systems, see Project Pronto Order ¶ 4, it does not explain whether and how it will enable line splitting in a DLC environment.[25/] In addition, SWBT has taken a discriminatory and unreasonable stance against giving consumers the maximum choice of competitive carriers for both voice and data on the same loop. For these reasons, SWBT's application should be rejected.

V. SWBT'S INTERCONNECTION POLICIES DENY CLECS NONDISCRIMINATORY INTERCONNECTION AT ANY TECHNICALLY FEASIBLE POINT

In its opening comments, AT&T contends that in Oklahoma SWBT is attempting to nullify the benefits of an MCI-SWBT agreement concerning single points of interconnection by improperly shifting transport costs to CLECs. AT&T is correct. The purpose of the MCI-SWBT agreement in Texas establishing a single point of interconnection ("POI") per LATA was to prevent SWBT from improperly inflating MCI's costs.[26/] SWBT's claim that it has exported this agreement to Oklahoma is misleading, as it has stripped the agreement of its core purpose by purporting in Oklahoma to shift additional transport costs to CLECs that establish a single POI.

The 1996 Act permits CLECs to choose the most efficient points at which to exchange traffic with ILECs, for the purpose of, among other things, lowering CLECs' transport costs. Local Competition Order ¶ 172; see also id. ¶ 209; 47 U.S.C. § 251(c)(2)(B). Accordingly, MCI entered into an agreement with SWBT in Texas allowing MCI to establish a single POI per

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25/ Sprint reports problems obtaining the necessary collocation at the remote terminal required to provide access to the DLC subloop for providing advanced services. Sprint Comments at 65-66. Sprint's experience undermines SWBT's claimed compliance with checklist items (i), (ii) and (iv), and is particularly critical for line splitting.

26/ WorldCom refers to MCI in this section because the applicable agreement was between SWBT and MCImetro, now a WorldCom subsidiary.