

III. THE COMMENTS CONFIRM THAT SWBT HAS FAILED TO PROVIDE NONDISCRIMINATORY ACCESS TO MAINTENANCE AND REPAIR FUNCTIONS.

DOJ agrees that the Commission should give “careful attention” to AT&T’s evidence that SWBT has not provided CLECs with nondiscriminatory access to its maintenance and repair systems, because SWBT’s database (“LMOS”) for tracking CLEC customers has not been accurately updated. DOJ Eval. at 7 n.22. As a result of that deficiency, CLECs have been required to report troubles manually for customers whose service was established prior to a SWBT upgrade in late March – meaning that a CLEC customer’s service will take significantly longer to fix than a comparable problem of a SWBT retail customer. Moreover, the failure of SWBT to update LMOS has distorted the reported data for a number of SWBT’s performance measurements by failing to capture all CLEC trouble reports – thereby causing an understatement of trouble reports for CLECs, and possibly an overstatement of SWBT’s retail trouble report rates.³⁰

Although DOJ concurs that the LMOS updating problem “may affect SBC’s ability to provide CLECs with parity performance and may call into question the reliability of some of SBC’s reported performance measures,” it states that the scope or competitive impact of the problem is not yet clear. *Id.* Since the filing of SWBT’s application, however, it has become apparent that the LMOS updating problem has *not* been corrected, even on a going-forward basis.

supra; Michigan 271 Order ¶ 51 (stating that “in no event” may the evidence in a BOC’s reply comments “post-date[] the filing of ... comments” on its application).

³⁰See DOJ Eval. at 7 n.22; AT&T at 6-7, 44-47 & Willard Decl. ¶¶ 9-29, 33.

Although SWBT implemented a software change in late March that was designed to eliminate LMOS updating errors on a purely *prospective* basis (and thus would not correct records that were erroneously updated prior to that time), SWBT had not completed testing on the change at the time it filed its application – or even at the time AT&T filed its opening comments. *See* AT&T at 46 & Willard Decl. ¶ 20 n.8. Actual commercial experience now shows that SWBT’s “fix” does *not* work, even on its limited, prospective basis. Recently, for example, AT&T reviewed a sample of 54 of its migration orders that were completed (*i.e.*, orders for which AT&T received a service order completion notice) between May 10 and May 14, 2001 – more than one month after implementation of SWBT’s software change. Only 32 of the 54 LMOS records for these orders correctly identified AT&T as the “owner” of the circuit. The remaining 22 LMOS records – 41 percent of the total – either identified the “owner” as SWBT or identified no “owner” at all. Willard Reply Decl. ¶ 4.

The failure of SWBT’s “fix” is confirmed by the results reported to the TPUC this month by Birch Telecom, which had also experienced difficulties in opening trouble reports electronically due to the LMOS updating problem. *See* Willard Decl. ¶ 19. Birch advised the TPUC that, when it sampled 50 access lines that were converted after SWBT implemented the software change, 24 of the lines – or 48 percent of the total – did not have an updated LMOS record to reflect Birch as the local service provider. Willard Reply Decl. ¶ 5 & Att. 1 thereto at 3.

The high error rates experienced by AT&T and Birch belie any notion that the LMOS updating problem has been solved with respect to orders provisioned after implementation of SWBT’s “fix.” In fact, these error rates suggest that the actual rate of LMOS

updating errors – both in the past and in the future – may be far higher than the 20 to 35 percent rate previously estimated. *See* AT&T at 45 & Willard Decl. ¶ 19; Willard Reply Decl. ¶ 6.

The failure of SWBT’s “fix” to prevent LMOS updating errors on a prospective basis simply exacerbates the competitive harm that CLECs already experience as a result of past updating errors. SWBT continues to offer only a case-by-case manual solution for correcting the “embedded base” of LMOS records – a process that could delay repair of a customer’s service by as much as 48 hours and that offers little assurance that the problem will ever be fully resolved. *See* Willard Decl. ¶¶ 21-22; Willard Reply Decl. ¶ 7 & Att. 1 thereto at 3-4. SWBT’s proposed manual solution to CLECs is particularly unjustifiable because SWBT had previously expressed a willingness to correct *all* of the records in the embedded base on a “proactive” basis – only to renege on that offer and substitute a “reactive” process that puts the burden on CLECs to report troubles by telephone or fax as LMOS updating errors are discovered. Willard Decl. ¶ 21 & Att. 4, p. 7; Willard Reply Decl. ¶ 21 & Att. 1 thereto at 3-4.

In view of these facts, the Commission cannot find that SWBT has provided nondiscriminatory access to maintenance and repair functions. The LMOS updating problem plainly denies CLECs parity of access, because it forces them to utilize a manual process for submission of maintenance and repair reports that puts them at a competitive disadvantage with SWBT’s retail operations. Furthermore, as a result of the distortion that it causes in SWBT’s performance data, the problem precludes any reliance on SWBT’s reported data as evidence that SWBT has met its OSS obligations. *See* AT&T at 44-48.

IV. SWBT'S APPLICATION IS NOT IN THE PUBLIC INTEREST.

There is a final, independent reason why the Commission should deny SWBT's application. Even if the Commission could rationally find that SWBT had fully implemented its obligations under the competitive checklist, including its duty to set cost-based rates within the range that a reasonable application of TELRIC would produce, the record here, particularly as summarized in the DOJ Evaluation, precludes any finding that granting SWBT's application is "consistent with the public interest, convenience and necessity." 47 U.S.C. § 271(d)(3)(C).

The reason is straightforward. At the heart of the public interest inquiry, as Congress conceived it and as this Commission has explained, is a determination whether, notwithstanding checklist compliance, the local market is in fact fully open to competition. The first step is to assess the actual state of local competition. Here, the record shows that residential competition is "almost nonexistent." DOJ Eval. at 2. The second step thus requires a determination whether the lack of competition is attributable to the BOC's misconduct or persisting barriers to entry, or instead reflects neutral business considerations uniquely within the control of new entrants (such as a regional business plan that does not include entry into a particular state for business reasons apart from whether the market is open to competition). *Michigan 271 Order* ¶¶ 385-391.

This analysis of whether local markets in fact are open not only is mandated by the terms of the Act and the Commission's prior orders, but is eminently practical and provides reasonable certainty to all parties as to the relevant factors likely to determine the outcome of the public interest inquiry. Because the relevant factors here decisively demonstrate that the local residential markets in Missouri remain closed to competitors, approval of this application is not in the public interest.

This conclusion is squarely supported by the recent findings of the Texas Public Utility Commission (“TPUC”), which underscores the adverse consequences that would result from premature interLATA authorization in Missouri. Report to the 77th Texas Legislature, “Scope of Competition in Telecommunications Markets in Texas” (Jan. 2001) (“TPUC Report”). The TPUC Report makes clear that even today, almost a year after obtaining 271 authorization in Texas, SWBT retains monopoly control of the residential local market in Texas and has raised prices for local service. AT&T at 66-70. CLEC competition for residential customers in Texas, while initially active, has faded, as experience has demonstrated that entry into local residential markets is not profitable. This lack of competition in Texas has permitted SWBT to extend its monopoly into the provision of bundled combinations of local and long distance services and, having established its market power, to *raise* its price for long distance service. If SWBT were now to receive interLATA authorization in Missouri, where UNE- and facilities-based residential competition has yet to develop at all, the anticompetitive results for consumers of both local and long distance service would materialize much faster and be far worse.

A. InterLATA Authorization Is Not In The Public Interest Unless The BOC’s Local Markets Are Irreversibly Open To Competition.

The key question to be resolved in the public interest inquiry is whether the BOC’s local markets truly “are open to local competition” from new entrants. *See, e.g., Kansas/Oklahoma 271 Order* ¶ 267. The fundamental objective of section 271 is to prohibit local carriers from offering long distance service until they have fully opened their local markets to competition. *Michigan 271 Order* ¶¶ 386, 388. To be sure, the competitive checklist sets forth the minimum criteria that make it possible for local markets to be open to competition. But meeting the checklist requirements alone is not sufficient to demonstrate that local markets are open. Rather, section 271(d)(3) requires an additional and independent finding that entry is in

the public interest. *E.g., id. at* ¶ 389. The public interest test reflects Congress’s realization that, at least in some states, mere satisfaction of the checklist would not be sufficient to allow local competition to develop, and that if the BOCs in those states nevertheless received long distance authority they would leverage their local monopoly into the long distance market – precisely the harm that the ban on interLATA service in section 271(a) is designed to prevent.

The legislative history of Section 271 confirms that Congress intended the public interest determination to reflect an analysis of the actual competitive effects of granting the application. In describing the statutory role of DOJ, the Conference Report made clear that the Department could make its analysis under any competitive standard it chose, including Section VIII(c) of the MFJ as well as statutory antitrust standards. S. Conf. Rep. No. 104-230, at 149 (1996). *See Michigan 271 Order* ¶ 383 (exploring relevance of DOJ Evaluation to considerations of public interest). Thus, as the Commission has previously stated, section 271 “embodies a congressional determination that . . . local telecommunications markets must *first* be open to competition so that a BOC cannot use its control over bottleneck local exchange facilities to undermine competition in the long distance market.” *Michigan 271 Order* ¶ 388 (emphasis added).

Thus, to determine whether the BOC’s local telecommunications markets are in fact open to competition, the Commission first reviews the extent to which new entrants “are actually offering” local service to both business and residential customers through each of the three means offered by the Act. *Michigan 271 Order* ¶ 392; *see DOJ Evaluation* 3-7 (surveying the status of local competition). Second, where local competition is not securely established, the Commission determines whether this reflects the continuing presence of entry barriers and BOC misconduct, or is attributable instead solely to the business decisions of potential new entrants.

B. CLECs Have Not Succeeded In Entering The Local Residential Market.

In its *Michigan 271 Order*, the Commission recognized both that the “Act contemplates three paths of entry into the local market – the construction of new networks, the use of unbundled elements of the incumbent’s network, and resale,” (*id.* ¶ 96), and that Congress “sought to ensure that all procompetitive entry strategies are available.” *Id.* ¶ 388. The Commission concluded that “[o]ur public interest analysis of a section 271 application, consequently, *must* include an assessment of whether all procompetitive entry strategies are available to new entrants.” *Id.* (emphasis added). The Commission then explained that “the most probative evidence that all entry strategies are available would be that new entrants *are actually offering* competitive local telecommunications services to different classes of customers (residential and business) through a variety of arrangements (that is, through resale, unbundled elements, interconnection with the incumbent’s network, or some combination thereof) in different geographic regions (urban, suburban, and rural) in the relevant state, and at different scales of operation (small and large).” *Id.* at ¶ 392 (emphasis added). In subsequent applications, the Commission has repeatedly considered the degree to which competitors have actually succeeded in offering local telecommunications services using the different entry strategies prescribed by the Act. *See, e.g., New York Order* ¶¶ 13-14; *Texas Order* ¶¶ 5-6.

Here, the DOJ’s Evaluation confirms that competitors have not been able successfully to enter the local residential market. DOJ states that “competitive entry using UNEs to reach residential customers is almost nonexistent, suggesting that entry may have been impeded by above-cost rates.” DOJ Eval. at 2. In particular, DOJ’s Evaluation shows that SWBT maintains a virtual monopoly over residential service in its Missouri service territories,

with facilities-based CLECs providing only about 1 percent of residential lines³¹ and UNE-based CLECs serving less than one-tenth of 1 percent of residential lines.³² In short, the evidence of the extent to which CLECs “are actually offering” local service indicates that there is as yet no significant local residential competition in Missouri.

C. The Relevant Factors Demonstrate That SWBT’s Local Residential Markets Remain Closed To UNE- and Facilities-Based Competition.

The absence of meaningful local competition does not end the public interest inquiry. As the Commission has repeatedly made clear, it will “not construe the 1996 Act to require that a BOC lose a specific percentage of its market share.” *Michigan 271 Order* ¶ 391; *see, e.g., Kansas/Oklahoma 271 Order* ¶ 415. Thus, although the level of market penetration that CLECs have attained is relevant to whether the BOC’s historic monopoly has been broken, it is not dispositive. Rather, where data indicate that a BOC is not facing local competition, the Commission’s “inquiry then would necessarily focus on whether the lack of competitive entry is due to the BOC’s failure to cooperate in opening its network to competitors, the existence of barriers to entry, the business decisions of potential entrants, or some other reason.” *Michigan 271 Order* ¶ 391. To make this determination, the Commission should consider all “relevant factors” that might “frustrate congressional intent that local markets be open [to competition].” *Kansas/Oklahoma 271 Order* at ¶ 267.

DOJ’s Evaluation and the comments of other parties make clear that entry barriers and SWBT’s own actions have perpetuated SWBT’s monopoly over residential service in Missouri. They confirm the presence of at least four important barriers to entry into the local

³¹ DOJ Eval. at 4-5; *see also* AT&T at 56 & Table 1.

³² DOJ Eval. at 6 7 n. 18; *see also* AT&T at 57 & Table 2.

residential market in Missouri. Individually and together, these four factors demonstrate that the non-existence of UNE- or facilities-based competition for residential customers reflects not the individual business decisions of CLECs but the fact that the Missouri residential market remains closed to local competition.

1. First, as the DOJ observes, “competitive entry using UNEs to reach residential customers is almost nonexistent, suggesting that entry may have been impeded by above-cost rates.”³³ DOJ’s concern that high UNE rates may be impeding local UNE-based residential entry is confirmed by AT&T’s analysis of the profit margins available to UNE-based competitors. That analysis shows that, at current prices, residential UNE-based competition is not viable in Missouri. Specifically, in three of the four Missouri UNE rate zones, a new competitor would lose money on each residential line it serves, even if its internal costs of running its business are excluded – *i.e.* new competitors’ gross margins in those zones are *negative*. Moreover, statewide average gross margins for UNE-based competitors in Missouri are *negative*. In other words, the evidence shows that a new entrant attempting to serve customers on a statewide basis in Missouri would earn no money to offset its internal costs of running its local services business. Competitors’ inability to enter profitably is a strong indication that UNE prices exceed costs and thus violate the Act and the Commission’s pricing rules, and certainly compel both an independent and rigorous investigation into the prices set by the state commission and strict application of the Commission’s TELRIC rules. AT&T at 61 n. 62. Moreover, even if the Commission were to find that Missouri’s rates were set within the range that a reasonable application of TELRIC would produce, the inability of new entrants to

³³ DOJ Eval. at 2. *See also* WorldCom Comments at 14-15 (“[C]urrent UNE prices are not TELRIC and therefore prohibit widespread economic entry via UNE-P”).

offer service profitably using those rates nevertheless looms as an insurmountable barrier to local entry. *See* AT&T at 60; Lieberman Decl. at 18-19.

The Commission has previously recognized that the practical real-world economics of local entry is relevant to the public interest analysis. In the *Michigan 271 Order*, the Commission observed that because “efficient competitive entry into the local market is vitally dependent upon appropriate pricing of the checklist items” (*id.* ¶ 281), competitive pricing is obviously “a relevant concern in [the FCC’s] public interest inquiry under section 271(d)(3)(C).” *Id.* ¶ 288. In particular, the Commission noted that the “public interest” prong of § 271 requires the FCC to determine whether UNE rates are “reasonable [and] procompetitive” and will lead to “efficient local entry.” *Id.* ¶¶ 287-88, 290-91. Indeed, because the fundamental purpose of § 271 is to prevent a BOC from providing long distance service when it alone is in an economic position to provide packages of local and long distance services, the profitability of entry is necessarily relevant to the public interest.

Where UNE rates satisfy TELRIC, but are still too high to permit profitable entry, the Commission has two basic options. Neither requires it to intrude into state prerogatives.

First, it may be possible for the Commission to address the problem by requiring a reduction in the level of UNE-rates to the low end of the reasonable TELRIC range³⁴ as a condition of BOC long-distance authorization in that state. In this manner, the Commission could give meaning to the Act’s public interest requirement and advance the principal objective

³⁴ Of course, it is AT&T’s view that proper application of TELRIC does not lead to the extremely wide range of “reasonable” prices that SWBT supports.

of Section 271 to prevent premature BOC entry by requiring that the BOC set its UNE rates at the low end of the TELRIC range, rather than at the upper end, when that is necessary to make local entry profitable.

Second, although the Commission lacks jurisdiction to alter retail rates, that does not mean that the Commission cannot make an assessment whether the local markets will allow competition. Section 271 does not mandate that the FCC “find a way” to approve every BOC application for long-distance authority and to grant them when the effect would be to guarantee that BOCs would, once again, ineluctably leverage local monopolies into the competitive long distance market. If entry would be uneconomic even with UNE rates at the low end of the TELRIC range of reasonableness, denial of the application would advance the object of § 271. It would also provide options to any state that wanted its BOC in the long distance market. It would then fall to the state commission to consider an array of steps that would allow local competition to develop and the BOC to receive long distance authority. These could range from raising retail rates, to establishing mechanisms to allow CLECs to participate in the intrastate subsidies that allow retail rates to be maintained at artificially low levels, to lowering UNE prices when used to serve residential customers.

2. Second, the *uncertainty* concerning the permanent level of UNE rates creates an additional barrier to entry. For a potential entrant to determine whether entry in a local market is worth the substantial up-front investment, it must have some degree of certainty as to the cost of its crucial inputs. As the declaration of Richard Clarke demonstrates, even small differences in UNE prices make an enormous difference to the profitability of entry. Where UNE-rates – which are the largest single input to the cost of local entry – are uncertain, the

ability of a CLEC to plan and execute a business plan is severely compromised. The comments confirm that competitive entry in Missouri has been plagued by precisely this sort of uncertainty.

For example, as DOJ stated, “[t]he interim rates set in Docket No. 98-115 are troublingly high and have been left as interim for years, despite concerns having been raised that the rates were not forward-looking. . . . While the current level of [other] rates (having been borrowed from Texas for the interim) does not appear problematic, the continued uncertainty of so many rates remaining interim, coupled with doubts about pricing . . . gives rise to doubts that the market is open to competition by firms that seek to use these elements.”³⁵

Uncertainty over pricing has also delayed facilities-based entry. For example, SWBT has insisted on the use of individual case based (“ICB”) requests for the pricing, terms and conditions under which SWBT would collocate with CLEC. In fact, SWBT did not even publish a Missouri collocation tariff until October 2000. To compound the uncertainty, the prices for collocation remain unsettled today.³⁶

Finally, as Sprint points out, the uncertainty about pricing is aggravated by the fact that SWBT challenged many of the key UNE rates and ultimately obtained an order from the United States Court of Appeals for the Eighth Circuit declaring them to be unlawful, because they were based on the Commission’s TELRIC pricing rules.³⁷ Although that order has now been stayed, pending review by the United States Supreme Court, SWBT’s refusal to accept its basic obligation under the Act to provide access to UNEs at cost-based rates has created

³⁵ DOJ Eval. At 19; *see also* Sprint Comments at 3-10.

³⁶ McLeodUSA Comments at 19-22, 28-29.

³⁷ *Southwestern Bell Tel. Co. v. Missouri Pub. Serv. Comm’n*, 236 F.3d 922 (8th Cir. 2001), *stay granted* No. 99-3833 (8th Cir. Feb. 7, 2001). *See* Sprint Comments at 5-8.

tremendous uncertainty over the future price of UNE inputs which are crucial to any plan for broad-based residential entry.

3. A third significant entry barrier is the absence both of accurate performance reporting and of an effective enforcement plan. The Commission has consistently held that a critical public-interest consideration is whether the BOC has established reliable performance measures and effective enforcement mechanisms to ensure that local markets *remain* open to competition after section 271 relief is granted. *E.g., Michigan 271 Order* ¶¶ 393-94. Such measures are crucial to the ability and willingness of new entrants to incur the substantial investment required to enter a BOC's local market, as well as to the continuing viability of competition once entry has occurred. UNE-based competitors, in particular, are crucially dependent on the cooperation of the BOC for their success. A reliable and enforceable set of performance standards is therefore a critical indicator of whether new entrants will be able "to obtain necessary inputs from the incumbent" to which they are legally entitled "without resort to lengthy regulatory or judicial intervention" or "protracted and contentious legal proceedings" (*id.* ¶ 394) – all of which serve to increase costs and uncertainty and therefore to deter and defeat competitive entry.

The comments demonstrate that SWBT's existing performance measures and enforcement plan are so inadequate that SWBT now views the prospect of paying fines for non-compliance with performance measure obligations as a mere cost of doing business.³⁸ The record shows, for example, that the Texas PUC Staff recently indicated that it would recommend a five-state audit of SWBT's reported flow-through data to address inaccuracies in SWBT's

³⁸ AT&T at 47-52; McLeodUSA Comments at 31-32, 39-54.

performance measure reporting. AT&T at 49. Indeed, SWBT's most recent submission of flow-through data (*i.e.*, pursuant to PM 13) demonstrates that SWBT in fact is discriminating against CLECs on this crucial measure of access to electronic order-processing.³⁹

The uncertainty whether potential entrants can trust SWBT accurately to measure and report its compliance with its statutory obligations is significantly compounded by SWBT's recent admission that it submitted false affidavits concerning loop qualification in support of its Kansas and Oklahoma 271 applications. As explained in SBC's letter to the Commission, dated April 13, 2001, SWBT repeatedly submitted materially false testimony to the Commission in order to rebut a competitor's charge that SWBT was in violation of Commission orders and the section 271 competitive checklist. The Commission explicitly relied upon SWBT's misrepresentations in finding that SWBT complied with the checklist and was entitled to section 271 authorization.⁴⁰ SWBT's conduct in connection with the Kansas/Oklahoma application

³⁹ See Letter from SWBT Senior Counsel Cynthia F. Malone to Donna Geiger and Nara Srinivasa, Texas PUC, dated May 15, 2001. SWBT's letter restates Performance Measurement data for PM 13 "Flow Through LEX/EDI." The restated data show that for recent months flow-through rates for CLECs in Missouri (and other states as well) are below SWBT retail and out of parity.

⁴⁰ The Arkansas Public Service Commission is currently conducting an investigation into SWBT's misrepresentations. See Order No. 16, Docket No. 00-211-U (May 7, 2001). This episode is not the first time SBC has been investigated for submitting false information. See *In re SBC Communications Inc.*, FCC 99-153 (rel. June 28, 1999) ("SBC/SNET Consent Decree"). In the SBC/SNET Consent Decree, the Commission found that statements allegedly made by SBC to the FCC were not accurate, and an SBC legal review team acknowledged violations of the Telecommunications Act, as well as "compliance problems and mistakes." *Id.* ¶¶ 5, 10. See also *Petition of Accelerated Connections, Inc., d/b/a/ACI Corp For Arbitration to Establish an Interconnection Agreement With SWBT*, TPUC Docket No. 20226, Order on Appeal of Order No. 20 (Oct. 13, 1999) (affirming over \$800,000 in sanctions against SWBT for failure to produce information and documents in discovery).

underscores its willingness to say anything – rather than open its local markets – in order to gain section 271 authorization.⁴¹

4. Fourth, the record confirms that SWBT has failed “to cooperate in opening its network to competitors” and has engaged in “discriminatory or other anticompetitive conduct.” *Michigan 271 Order* ¶¶ 391, 397. Such conduct plainly operates to deter and defeat competitive entry, and thus is directly relevant to any assessment of why competition has not taken root in a given market, as the Commission itself has held. *Id.* SWBT’s misconduct has been particularly harmful with respect to competitive facilities-based residential service which, like UNE-based service, remains de minimis in Missouri. DOJ Eval. at 4-5.

For example, until ordered to do so by the Missouri PSC, SWBT improperly refused to recognize CLECs as participants in Missouri’s Metropolitan Calling Area Plan (“MCA”) by programming its switches to screen the NXX codes of facilities-based CLEC MCA subscribers.⁴² As a result, CLEC customers had a smaller inbound calling scope than comparable SWBT customers. Thus, anyone calling those CLECs’ customers were required to dial extra digits and pay toll charges. This anticompetitive behavior was directly targeted at facilities-based providers -- CLECs that relied on resale were able to participate in the MCA plan. As AT&T showed in connection with a complaint in filed in Missouri on this issue, this

⁴¹ Indeed, SWBT, aware of false statements in materials provided to the Commission in February 2001, failed to report these false statements to the Commission until April 2001. *SWBT’s Response to the Commission’s Order of May 7, 2001*, Docket No. 00-211-U, at 10-11 (April 2001).

⁴² DOJ Eval. at 6 & n.21; McLeodUSA Comments at 3-13, 56-57; *see also* Direct Testimony of R. Matthew Kohly on Behalf of AT&T Communications of the Southwest, Inc., *Application of SWBT to Provide Notice of Intent to File an Application for Authorization to Provide In-Region InterLATA Services Originating In Missouri Pursuant to Section 271 of the Telecommunications*

significantly impaired the ability of it and other facilities-based carriers to attract and retain customers, one of whom testified that he felt his business was “punish[ed] for changing phone companies.”⁴³ SWBT was not required to alter its policy until after it filed its renewed 271 application, a year after AT&T’s complaint was filed.

In yet another example of misconduct, for a significant period of time last year, SWBT improperly used a “winback” unit – a unit whose mission was to retain customers for SWBT – to administer local PIC freezes placed on its customers’ accounts. Not surprisingly given this arrangement, in many instances, SWBT refused to remove the freeze after the customer contacted SWBT, and even refused to participate in third-party conferencing with the customer and AT&T representative to resolve the problem.⁴⁴ Obviously, the failure to remove the PIC freeze upon request increases the likelihood that the customer will not change providers, especially where it is SWBT’s winback unit that has the contact with, and therefore the opportunity to dissuade, the customer from switching providers.

The comments thus demonstrate that the lack of CLEC competition for residential service is due to SWBT’s “failure to cooperate in opening its network to competitors” and to the “existence of barriers to entry.” *Michigan 271 Order* ¶ 391. At the same time, the record also confirms that the lack of competitive entry in Missouri is *not* due to “the business decisions of potential entrants” that are independent of the entry barriers and BOC misconduct described above. Nothing in the record suggests that potential entrants have decided that the Missouri

Act of 1996, Missouri PSC TO-99-227 (Aug. 28, 2000) (“Kohly Testimony” appended hereto as Attachment 7), at 34-49.

⁴³ Kohly Testimony at 45.

⁴⁴ Kohly Testimony at 30-34.

market, though open, is simply not worth pursuing. To the contrary, the record shows that potential entrants have not entered the residential market in Missouri because (1) entry is unprofitable at prevailing UNE rates; (2) the Missouri PSC has not demonstrated a commitment to establish permanent cost-based rates, but has left interim rates in place for years with no effective true up; (3) SWBT is vigorously and successfully litigating over its very obligation to provide cost-based rates; (4) SWBT is willing to misrepresent the facts to support premature 271 authority, including inaccurately reporting to state and federal regulators that its performance is non-discriminatory when in reality it is not; (5) SWBT is content to pay millions of dollars in penalties each month for the privilege of continuing to block local entry rather than eliminating the deficient performance; and (6) SWBT continues to obstruct entry through discriminatory and non-cooperative conduct.

Thus, although low-to-nonexistent market shares are not necessarily inconsistent with a finding that markets are irreversibly open to local competition, that is true only if other factors are present that “demonstrate that competitive alternatives can flourish rapidly throughout a state.” *Michigan 271 Order* ¶ 392. Where, as here, the lack of entry reflects BOC misconduct and persistent entry barriers, then the Commission must conclude that the local markets are not open to competition and interLATA authorization is not in the public interest.

Finally, the comments confirm, and the Commission should acknowledge, that the barriers that today block entry into residential markets in Missouri hold the potential to harm competition in long distance markets as well if SWBT is granted premature 271 authority. To grant SWBT’s application at this point would perpetuate SWBT’s monopoly control over residential markets in Missouri and allow SWBT to extend that monopoly into the long distance market – precisely the anticompetitive effect Section 271 was designed to prevent.

The looming harm to consumers is not speculative. The TPUC Report states that, six months after this Commission approved SWBT's Texas 271 application, "monopoly power exists . . . in residential and rural markets in Texas." *Id.* at 83. The TPUC also found that SWBT's monopoly power is likely to persist because large and small CLECs alike have reduced or eliminated their residential service in Texas. *Id.* at 55-58, 80-81. The result, for residential consumers in Texas, is thus precisely the opposite of what the Act was intended to produce. SWBT is so insulated from competition for its statewide offer of bundled local and long distance services that it not only has attracted hundreds of thousands of new customers but has raised its rates for both local and long-distance services. *Id.* at 62-64, 79, 81. If SWBT were to receive interLATA authorization in Missouri, where UNE- and facilities-based residential competition has yet to develop at all, results for consumers of both local and long distance service would undoubtedly be far worse.

CONCLUSION

For the reasons stated above and in AT&T's opening comments, the Commission should not approve SWBT's Section 271 application for Missouri.

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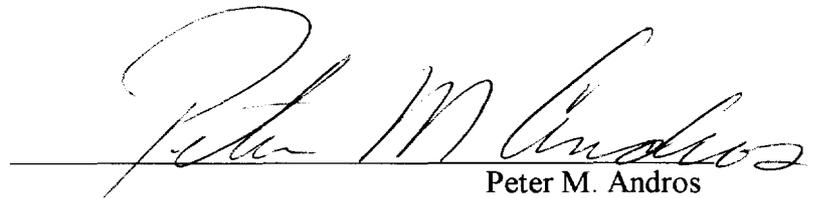
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May 16, 2001

CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of May, 2001, I caused true and correct copies of the forgoing Reply Comments of AT&T Corp. to be served on all parties by mailing, postage prepaid to their addresses listed on the attached service list.

Dated: May 16, 2001
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