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Before the
Federal Communications Commission
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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

CC Docket No. 01-194

**REPLY COMMENTS OF AT&T CORP.
IN OPPOSITION TO SBC COMMUNICATIONS, INC.'S
SECTION 271 APPLICATION FOR ARKANSAS AND MISSOURI**

Mark C. Rosenblum
Dina Mack
AT&T CORP.
295 North Maple Avenue
Basking Ridge, NJ 07920
(908) 221-4343

David W. Carpenter
Mark E. Haddad
R. Merinda Wilson
Ronald S. Flagg
David L. Lawson
Richard E. Young
Christopher T. Shenk
SIDLEY AUSTIN BROWN & WOOD
1501 K Street, NW
Washington, D.C. 20005
(202) 736-8000

Attorneys for AT&T Corp.

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<i>KS/OK 271 Order</i>	Memorandum Opinion and Order, <i>Joint Application of SBC Communications, Inc., et al, for Provision of In-Region InterLATA Services in Kansas and Oklahoma</i> , CC Dkt. No. 00-217 (rel. Jan. 22, 2001)
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<i>Oklahoma I</i>	Memorandum Opinion and Order, <i>Application by SBC Communications, Inc., Pursuant to Sections 271 of the Communications Act of 1934, as Amended. to Provide In-Region InterLATA Services in Oklahoma</i> , 12 FCC Rcd. 8685 (1997)
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<i>Second Advanced Services Order</i>	Second Report and Order, <i>Deployment of Wireline Services Offering Advanced Telecommunications Capability</i> , 14 FCC Rcd. 19237 (1999)

<i>South Carolina 271 Order</i>	Memorandum Opinion and Order, <i>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</i> , 13 FCC Rcd. 539 (1997)
<i>Texas 271 Order</i>	Memorandum Opinion and Order, <i>Application by SBC Communications Inc., et al Pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-Region, InterLATA Services in Texas</i> , 15 FCC Rcd. 18354 (2000)
<i>UNE Remand Order</i>	Third Report and Order, <i>Implementation of the Local Competition Provisions of the Telecommunications Act of 1996</i> , 15 FCC Rcd. 3696 (1999)

MISCELLANEOUS PLEADINGS CITED

<i>DOJ Eval.</i>	Evaluation of the United States Department of Justice, <i>Joint Application by SBC Communications Inc., et al., for Provision of In-Region InterLATA Services in Arkansas and Missouri</i> , CC Dkt. No. 01-194 (September 24, 2001)
<i>DOJ Missouri I Eval.</i>	Evaluation of the United States Department of Justice, <i>Application by SBC Communications, Inc., et al., for Provision of In-Region InterLATA Services in Missouri</i> , CC Dkt. No. 01-88 (May 9, 2001)
<i>DOJ KS/OK Eval.</i>	Evaluation of the United States Department of Justice, <i>Joint Application of SBC Communications, Inc., et al, for Provision of In-Region InterLATA Services in Kansas and Oklahoma</i> , CC Dkt. No. 00-217 (Dec. 4, 2000)

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IN OPPOSITION TO SBC COMMUNICATIONS, INC.'S
SECTION 271 APPLICATION FOR ARKANSAS AND MISSOURI**

Pursuant to the Commission's Public Notice, AT&T Corp. ("AT&T") respectfully submits these reply comments in opposition to the application of SBC Communications, Inc., *et al.* ("SWBT") for authorization to provide in-region, interLATA services in Arkansas and Missouri.

INTRODUCTION AND SUMMARY OF ARGUMENT

The comments confirm that SWBT's Section 271 application for Arkansas and Missouri should not be granted. There is no meaningful local competition for residential customers in either Arkansas or Missouri. As the Evaluation of the Department of Justice ("DOJ") notes, competitive entry in Missouri has increased by only approximately 1 percent since SWBT filed its first application for Missouri last April – and that even this minor increase "is attributable primarily to CLEC growth in the business segment." DOJ Eval. at 4. DOJ makes clear that it has not altered its position in the first Missouri 271 proceeding, where it noted the lack of any meaningful local residential competition in the State and summarized some of the

evidence demonstrating that the absence of such competition is due to SWBT's failure to meet its statutory obligations. *Id.*; DOJ *Missouri I* Eval. at 3-8.

In Arkansas too, the comments confirm “low levels of CLEC penetration . . . and, in particular, the lack of the use of the UNE-platform” in that State. DOJ Eval. at 5 (CLECs serve only slightly more than 5 percent of the Arkansas residential market and most of those customers are served by resale).

The lack of residential competition in Missouri and Arkansas reflects SWBT's continuing failure to comply with the competitive checklist. The DOJ and numerous commenters confirm that SWBT's massively inflated Missouri rates are still based on cost studies that, by their own terms, violate fundamental TELRIC principles. The only difference between SWBT's first failed application and its current Application is that SWBT has reduced a handful of its non-TELRIC rates by an arbitrary fixed percentage. But there is no evidence that the few rates that have been reduced are now at TELRIC levels. The rest of the UNE elements, of course, are the same as those in SWBT's original flawed application, and remain significantly inflated by the many TELRIC violations in SWBT's cost studies. In addition, SWBT's discounts do not apply to the myriad interim rates which also exceed TELRIC levels and have never been reviewed by the MPSC. The comments also confirm that SWBT's Arkansas nonrecurring charges (“NRCs”) are massively inflated. *See Part I, infra.*

The comments further establish that the performance monitoring and assurance plans on which SWBT relies are inadequate to ensure that SWBT will comply with its Section 271 obligations in the future. Notably, as DOJ describes in its Evaluation, the Arkansas PSC has conceded that it lacks the requisite authority to enforce SWBT's compliance with its performance remedy plan. DOJ thus correctly concludes that the lack of post-entry enforcement

in Arkansas renders it highly dubious that SWBT's performance measurement and assurance plan will continue to evolve to reflect changes in the marketplace. DOJ is likewise correct in finding that the Arkansas PSC's own grave reservations regarding its enforcement authority simply underscore the significant risk that SWBT's performance violations after Section 271 entry will not be resolved swiftly or satisfactorily.

Additionally, as AT&T explained in its initial comments, SWBT's reliance on its implementation of the Texas remedy plan as evidence of the expected effectiveness of its Arkansas and Missouri remedy plans is misplaced. Indeed, SWBT's most recent challenge to the authority of the TPUC to impose new performance measures and remedies threatens to destroy the Section 271 monitoring process in Texas. And, unfortunately, the Texas remedy plan has not spawned the purported automatic penalty payments that are supposed to be triggered by so-called self-executing mechanisms. Although SWBT has finally paid AT&T the liquidated damages payments that were long overdue, SWBT did so only *after* AT&T discussed SWBT's untenable conduct in its opening comments on SWBT's 271 application. And there is no assurance that SWBT would comply with its obligations under the Arkansas and Missouri remedy plans after Section 271 entry. Moreover, SWBT's most recent remedy report in which SWBT's application of a statistical methodology resulted in a curious reduction in penalty payments from over \$900,000 to the paltry sum of approximately \$1400 — coupled with Ernst & Young's most recent audit findings revealing the possibility of errors in SBC's remedy calculations — illustrates that SWBT's claims regarding the efficacy of the purported self-executing mechanisms of its performance remedy plans simply cannot be credited. *See Part II, infra.*

It is also clear that SWBT has violated its obligations under checklist item (xiv) and Section 251(c)(4) to resell DSL services at an appropriate avoided-cost discount. SWBT, by

its own admission, is still billing end-users directly for DSL as a stand-alone service. Moreover, SWBT's public statements (including its public reports and telephone communications to potential DSL purchasers) make clear that SWBT is holding itself out as a provider of DSL service to business and residential end-users. In these circumstances, SWBT's refusal to resell DSL to CLECs in accordance with the discount requirements of Section 251(c)(4) plainly violates the checklist.

The belated, post-application tariff filed by SWBT's advanced services affiliate, SBC Advanced Solutions, Inc. ("ASI"), is too little and too late to correct this checklist violation. Although the tariff purports to offer "wholesale DSL transport" to both Internet service providers ("ISPs") and CLECs, the tariff includes no wholesale discount for CLECs consistent with Section 251(c)(4). The tariff also contains a number of unreasonable and discriminatory restrictions on the sales of DSL transport that violate the statute, including a limitation of such sales to situations where SWBT is providing the voice service to the end-user – a limitation that the Commission found unlawful in both the *Connecticut 271 Order* and the *Pennsylvania 271 Order*.

SWBT is engaging in a concerted, anticompetitive effort to evade its obligation to allow competitors to resell DSL by taking steps to stop providing DSL at retail. SWBT's attempt to portray itself as a pure wholesaler of DSL in bulk to unaffiliated ISPs, and its ISP affiliate as a mere provider of "information services," is simply contrary to reality. SWBT not only provides its ISP affiliate with DSL transport (which the affiliate markets to the public in a combined package of DSL and Internet access service), but also performs a variety of services for its affiliate – including billing, customer care, marketing, and ordering – that it will not perform for unaffiliated ISPs. SWBT's discrimination in favor of its ISP affiliate, if successful,

would enable SWBT to leverage its monopoly into the advanced services market. Such a result would be flatly contrary to the pro-competitive objectives that the Commission sought to achieve in finding that “bulk sales” of DSL to unaffiliated ISPs, and information services, are not subject to the requirements of Section 251(c)(4). And SWBT will have even more incentive to extend its monopoly if its pending tender offer for the outstanding shares of Prodigy Communications is accepted. *See* Part III, *infra*.

Finally, as shown in Part IV, the comments demonstrate that SWBT continues to deny CLECs parity of access to maintenance and repair systems. DOJ, most notably, has urged the Commission to give “careful attention” to this issue, because SWBT’s application fails to demonstrate that it has adequately resolved the problems in the updating of LMOS records that have prevented CLECs from submitting trouble tickets electronically for a significant percentage of customers. Indeed, as DOJ describes in its Evaluation, SWBT’s own data indicate that the rate of new LMOS errors has continued to *increase* on a regionwide basis since SWBT implemented “fixes” in its systems designed to correct the LMOS updating problem. The comments of the CLECs provide further confirmation that LMOS records are still not updated accurately and promptly, thus forcing CLECs to resort to manual processes at a time when customer troubles are most likely to arise. This is plainly discriminatory, in view of the ability of SWBT’s retail operations to report all customer troubles on a fully electronic basis.

I. THE COMMENTS CONFIRM THAT SWBT’S UNE RATES ARE NOT COST-BASED AND DO NOT SATISFY CHECKLIST ITEM TWO.

A. MISSOURI.

The record clearly demonstrates that SWBT’s massively inflated Missouri rates are based on cost studies that, by their own terms, violate fundamental TELRIC principles, including, *inter alia*, reliance on an impermissible reproduction cost approach, extremely short

depreciation lives, an excessive common cost factor, and numerous clear methodological errors in the calculation of costs for the loop and switching elements. *See* WorldCom at 20-28; Association of Communication Enterprises at 22-28 (“ASCENT”); AT&T at 16-36; DOJ Eval. at 6 n.21. Those defects rendered the rates in SWBT’s first application far “outside the range that the reasonable application of TELRIC principles would produce,” DOJ *Missouri I* Eval. at 2, and precluded state-wide UNE-based entry in Missouri. *See, e.g.*, AT&T at 42-43 & Lieberman Decl. ¶¶ 18-20; *see also* DOJ Eval. at 2-3. The only difference between SWBT’s first failed application and its current Application is that SWBT has reduced a handful of its non-TELRIC rates by an arbitrary fixed percentage. *See, e.g.*, DOJ Eval. at 6-7; ASCENT at 22-28; El Paso at 15; McLeodUSA at 6-15; AT&T at 10-11. Those arbitrary discounts have not been shown to produce TELRIC-compliant rates and the rates for the rest of the UNE elements are the same as those in SWBT’s original flawed application. *See, e.g.*, DOJ Eval. at 7; El Paso at 15-16; McLeodUSA at 12; NUVOX at 10. Based on this record, it is obvious and undeniable that SWBT has failed to satisfy its Checklist Item Two burden. It is therefore not surprising that the DOJ is still “preclude[d] . . . from supporting [SWBT’s current] . . . application.” DOJ Eval. at 15.

For the handful of permanent rates that SWBT has reduced, there is no basis to conclude that those arbitrary rate discounts are sufficient to offset the massive inflation caused by the serious TELRIC violations that have been identified by the DOJ and other parties. *See* El Paso at 15-16; McLeodUSA at 11-12; WorldCom at 20-28; AT&T at 20-21; DOJ *Missouri I* Eval. at 14-20. Because SWBT has denied the Commission and commenters electronic access to its cost studies, neither the Commission nor the commenters can possibly determine the amount that SWBT’s Missouri rates are inflated over cost-based rates. *See, e.g.*, WorldCom at 20;

AT&T at 20-22. Without having at least some idea of how much SWBT's non-TELRIC assumptions inflated the rates above lawful levels, there is no basis for any finding that SWBT's arbitrary fixed-percentage discounts to those inflated rates has reduced them to TELRIC levels. *See, e.g., MCI v. FCC*, 143 F.3d 606, 608-609 (D.C. Cir. 1998) (explaining that arbitrary discounts are useless without "some explanation of the logic of the derivation of the [discount]"); Memorandum Opinion and Order, *Access and Divestiture Related Tariffs*, 97 F.C.C.2d 1082, Appendix A (1984) (reducing NRCs by fixed percentage discounts cannot establish the lawfulness of those NRCs). In all events, even if (contrary to fact) it could be determined that the arbitrary discounts offered by SWBT could offset the rate inflation caused by its non-TELRIC-compliant cost studies (and its use of numerous non-TELRIC-compliant interim rates), that would only mean that SWBT's flawed cost studies combined with the rate discounts could produce TELRIC-compliant rates for the pre-1997 data on which its cost studies relied, but that fact would not show that those rates are cost-based today, as required by Section 271. It is not surprising, therefore, that the DOJ concluded that it is "unclear whether SBC has adequately responded to the concerns regarding pricing in Missouri." DOJ Eval. at 3.

There is, of course, no question that the myriad UNE rates that are not affected by SWBT's arbitrary rate discounts are still vastly overstated. Many of the serious TELRIC violations in SWBT's cost studies significantly inflated *all* of SWBT's UNE rates. Because SWBT's arbitrary rate reductions apply to only *some* UNE rates, those reductions could not (and do not) remedy the problems that required SWBT to withdraw its March application. *See, e.g., McLeodUSA* at 12; *NUVOX* at 10-11; Office of the Missouri Public Council at 4 ("OMPSC"); AT&T at 11, 20. Tellingly, SWBT has offered no discounts to its UNE loop rates in its urban zone – the zone where SWBT presumably expects the most competition. SWBT, as the

incumbent monopoly provider of local telephone services in Missouri should not be permitted to protect the areas where entry would most likely occur first by exercising its monopoly power to keep prices in those areas so high as to deter any competitive entry.

Furthermore, a “large number” of the rates to which SWBT’s discounts do not include its “troublingly high” interim rates. DOJ Eval. at 6. Many of these interim rates are SWBT’s “*proposed rates* that the Missouri PSC merely adopted on an interim basis without any on-the-merits TELRIC determination – as a matter of convenience – nearly four years ago.” NUVOX at 8 (emphasis in original); *see also* DOJ *Missouri I* Eval. at 18 (“there is no detailed Missouri PSC order discussing the cost models and inputs that produced those interim rates”).¹ And SWBT has provided no subsequent evidence that those rates are cost-based. Nor could it. As demonstrated by the commenters, SWBT’s interim rates are as much as *several hundred percent* higher than SWBT’s prices for the same UNEs in Arkansas, Kansas and Texas. *See, e.g.*, NUVOX at 4-5, 10; Sprint at 23-26.² Those rate differences are not remotely explained by differences in costs. *See, e.g.*, Sprint at 24-26 (based on several comparisons “[i]t does not appear that [cost differences] . . . explain the magnitude of the differences between SWBT’s rates in Missouri as compared to these other states”); *see also* AT&T at 36-39.

The Commission has never approved an application where, as here, the interim rates were so numerous and so significantly above TELRIC levels, and where the state commission has demonstrated an unwillingness to develop permanent cost-based rates for those

¹ Other interim rates, *e.g.*, most of SWBT’s DSL rates, were simply imported from Texas and have never been reviewed by the Missouri PSC. *See MPSC 271 Order* at 23. And, even assuming (contrary to fact) that the Texas rates are cost-based, neither SWBT nor the MPSC has attempted to demonstrate that the relevant costs for these particular UNEs are similar in Texas and Missouri. *See Arbitration Order, Application of AT&T Communications of Southwest, Inc., et al. for Compulsory Arbitration of Unresolved Issues With Southwestern Bell Telephone Company pursuant to Section 252(d) of the Telecommunications Act of 1996*, at 14 (Issued June 7 2001) (“*June 7 Arbitration Order*”) (noting that the Texas rates “are not supported by any evidence showing their relevance to Missouri”).

UNEs.³ As explained by the MPSC, many of SWBT’s Missouri interim “prices [are] . . . simply those proposed by SWBT, without modification” and were adopted nearly four years ago in the *December 23 Order*. See *June 7 Arbitration Order* at 10; see also *NUVOX* at 8. In that proceeding, SWBT proposed a series of new cross-connect, multiplexing and other charges. AT&T contended that each of the proposed charges reflected features or functionalities that were reflected in the already-established permanent UNE rates and that allowing any additional charge would result in double recovery. The Commission nonetheless authorized SWBT to impose many of the proposed charges, without adjustment, on an “interim” basis pending review of SWBT’s cost studies. Neither the MPSC, its staff, nor the Special Master even attempted to determine whether the SWBT proposals they endorsed were TELRIC-compliant. See *December 23 Order* at 32 (“the Special Master recommends that SWBT’s rates be adopted on an interim basis because the [Staff] believes that a rate *may* be appropriate . . . For the[se] reasons . . . the Commission finds that SWBT’s proposed interim rates and language should be adopted”) (emphasis added). Four years later the completely unreviewed and vastly overstated “interim” rates remain in place.

Based on the MPSC’s history and the fact that it has never even considered rates for these UNEs, there is no reason to believe that permanent rates will be established any time soon. An Arbitration Order released by the MPSC less than a month ago confirms that fact. In

² See also *DOJ Missouri I Eval.* at 12 (“[t]he [interim] rates set in Docket No. 98-115 exceed by a vast margin the rates for similar UNEs set in states in which SBC has already obtained section 271 approval”).

³ The Commission approved SWBT’s Texas 271 application which contained a limited number of interim rates for collocation. See *Texas 271 Order* ¶ 82-90. But those interim rates were based on cost studies that the Texas commission found to be TELRIC-compatible, and the Texas commission had demonstrated a willingness to develop permanent rates for those UNEs. See *id.*; *NUVOX* at 14. The Commission also approved Verizon’s New York 271 application which contained a limited number of interim rates for what were then relatively new UNE’s – xDSL loops – and in circumstances where the New York commission had a strong track record of pursuing permanent cost-based rates. See *New York 271 Order* ¶ 259; *NUVOX* at 14.

that proceeding, AT&T recommended that the MPSC set a procedure for setting permanent rates for all UNEs in Missouri. *See June 7 Order* at 13. SWBT proposed rates that are even higher than its existing rates. *See June 7 Arbitration Order* 13-14 (“SWBT has proposed rates greater than the rates contained in the M2A”). The MPSC correctly rejected SWBT’s proposals, finding that “there are problems with SWBT’s cost studies,” and that “[e]ven SWBT witnesses admitted the inadequacy of some of their cost studies.” *June 7 Arbitration Order* at 14. But the Commission chose not to develop new permanent rates for Missouri and, instead, simply re-adopted the M2A rates – including the many interim rates. *See June 7 Arbitration Order* at 14. There is simply no realistic expectation that permanent cost-based rates for these UNEs will be developed and implemented by the MPSC, and there is therefore no possible basis for a finding that SWBT is presently complying with Checklist Item 2.

Given SWBT’s massively inflated rates, it is not surprising that profitable statewide entry into Missouri’s local telephone markets is not possible. Even if there were no internal costs to entry – *e.g.*, marketing, customer service, billing, order processing, and other operating activities – the margins (revenues minus costs) available to new entrants would be *negative* in two of the four UNE zones in Missouri. *See AT&T at Lieberman, Exhibit 1.* And although positive margins are available in the remaining two zones, those margins are not remotely sufficient to offset a new entrant’s internal costs, which generally exceed ten dollars per month. *Id.* ¶ 19. Based on this record, there can be no non-arbitrary finding that SWBT has satisfied its burden of proving that its rates satisfy Checklist Item 2. In this regard, SWBT has ignored its burden of proof, relying instead on unsubstantiated assertions that arbitrary discounts to a few of its overstated UNE rates are sufficient. Such unsupported claims cannot be relied upon as a substitute for proof and, therefore, SWBT’s Missouri application must be denied.

B. ARKANSAS.

The comments also confirm that SWBT's non-recurring charges ("NRCs") in Arkansas are not cost-based and far exceed the NRCs of other section 271 approved states, including Texas. El Paso at 16-20; Navigator at 3-4; AT&T at 45-50. The Arkansas Public Service Commission ("APSC") adopted SWBT's Kansas NRCs without undertaking any review of the basis for those charges, believing itself prohibited by state law from undertaking such a review. In so doing, the APSC adopted NRCs that are based on cost studies that the Kansas Commission itself has criticized as contrary to fundamental TELRIC principles. See AT&T at 45-50.

The excessive nature of SWBT's Arkansas/Kansas NRCs is obvious when those NRCs are compared to SWBT's Texas NRCs. For example, SWBT's Arkansas/Kansas UNE-P NRC for analog to switch port cross-connect is more than five times higher than that in Texas. AT&T at 48 & Baranowski Decl. ¶ 82. Likewise, the Arkansas/Kansas UNE-P Loop NRC is 65 percent higher than that in Texas. See Baranowski, Exhibit 3 at 4. SWBT's Arkansas/Kansas individual UNE NRCs for DS1 trunk port, dedicated cross connect voice grade 2W, STP port, white page information Zone 3, and feature activation charges are from two-thirds to fifty times greater than those in Texas. See El Paso at 18-19; AT&T at 48 & Baranowski Decl. ¶ 82.

These NRC disparities are significant and telling. As correctly pointed out by the KCC, "NRCs should not be expected to vary significantly across SWBT's jurisdictions because the activities associated with the NRCs are expected to be very similar across these jurisdictions." *KCC Recon. Order* at 26. See also *KCC Final Order* at 32 ("variances between Kansas [NRC] prices and other states should be limited"). Thus, the fact that SWBT's Arkansas/Kansas NRCs significantly exceed those of Texas strongly suggests that those charges are well outside the bounds of TELRIC compatibility.

SWBT's inflated Arkansas NRCs will have an especially adverse impact on CLECs' ability to successfully compete for new customers. *See, e.g.*, Navigator at 3-4; El Paso at 16-20; AT&T at 49. As this Commission has recognized, "a substantial percentage of the customers that purchase CLEC local services are [classified as] 'new service' customers" (*Kansas/Oklahoma 271 Order* ¶ 61 n.168) for which SWBT's NRC rates are substantially higher. *See* AT&T at 49. As a result, SWBT's inflated NRCs ensure that its competitors incur average costs that are much higher than SWBT's own costs. That is precisely what Checklist Item 2 is designed to prevent. Thus, APSC's blind adoption of those NRCs results in equally non-TELRIC compatible and discriminatory rates for Arkansas.

II. THE COMMENTS SUPPORT AT&T'S CONTENTION THAT SWBT'S PERFORMANCE REMEDY PLANS ARE INADEQUATE TO PREVENT FUTURE BACKSLIDING.

The comments confirm that SBWT's Arkansas and Missouri enforcement plans cannot possibly serve as effective deterrents against future backsliding.⁴ Noting the Arkansas PSC's own admission that it has "limited legal authority to ensure [SWBT's] future performance,"⁵ DOJ correctly observes that the lack of "appropriate post-entry performance oversight and enforcement in Arkansas is cause for concern"⁶ for two reasons. First, DOJ states that the lack of the State's enforcement authority casts into doubt whether the Arkansas performance monitoring and enforcement plan will continue to evolve "in response to changes in the telecommunications industry and in the local market. *Id.* at 12. Second, citing AT&T's recent problems in collecting penalty payments to which it is entitled in Texas, DOJ observes that the apparent "inability or unwillingness" of the Arkansas PSC to enforce the penalty

⁴ *See* Sprint at 15-17; DOJ Eval. at 13-14; Z-Tel at 7-9; AT&T at 50-60.

⁵ Second Consultation Report of the Arkansas Public Service Commission to the Federal Communications Commission Pursuant to 47 USC Section 271(d)(2)(B) at 12.

provisions of the Arkansas performance remedy plan would compromise swift and effective resolution of performance issues arising after Section 271 entry. *Id.* at 13 (footnote omitted). *See also* Sprint at 15-17.

This Commission has recognized the vital role that state regulatory agencies play in monitoring and enforcing a BOC's compliance with its statutory obligations after Section 271 relief is granted.⁷ Indeed, this Commission has emphasized that “state performance monitoring and post-entry enforcement”⁸ mechanisms are “*critical* complements to the Commission’s authority to preserve checklist compliance pursuant to section 271(d)(6).”⁹ Thus, for example, in approving Bell Atlantic’s New York 271 application, the Commission emphasized that the New York PSC was “committed to supervising the implementation of [performance assurance] plans” that were designed to assure that the markets remained open in the wake of Section 271 relief. *New York 271 Order* ¶ 12. In that connection, the Commission applauded the New York PSC’s ongoing efforts to assure the continuing refinement of performance metrics through collaborative proceedings. *Id.* ¶438. The Commission also cited the authority of the New York PSC to reallocate penalty payments for performance failures, thereby “dramatically increasing [Bell Atlantic’s] incentives to maintain or improve service in particular areas.” *Id.* ¶ 437 (footnote omitted). Additionally, the Commission heralded the fact that the New York remedy plan was

⁶ DOJ Eval. at 3.

⁷ Thus, for example, in approving SWBT’s Kansas and Oklahoma 271 applications, the Commission acknowledged that both the Kansas and Oklahoma Commissions had the authority to review and modify the performance measurement plans and take swift action if SWBT failed to comply with its performance obligations. *Kansas/Oklahoma 271 Order* ¶ 275 n. 839.

⁸ *Texas 271 Order* ¶ 420.

⁹ *Texas 271 Order* ¶ 420, n.1219 (emphasis added); *New York 271 Order* ¶ 429, n. 1316; *Kansas/Oklahoma 271 Order* ¶ 269, n. 828; *Massachusetts 271 Order*, ¶ 236, n. 757.

“enforceable as a New York Commission order” that could subject Bell Atlantic to penalties of \$100,000 daily. *Id.* ¶ 441, n. 1353.

In stark contrast, the Arkansas PSC has conceded that it lacks the requisite authority to assure SWBT’s compliance with a performance enforcement plan. As the comments demonstrate, if SWBT is perfectly willing to pay penalties and fines for performance failures in States with clear authority to impose sanctions for unlawful conduct, it stands to reason that SWBT would feel it had *carte blanche* to discriminate against CLECs in Arkansas where the state regulatory agency has admitted that it cannot ensure SWBT’s compliance with performance standards and remedial measures. *See Sprint* at 17. Against this backdrop, SWBT cannot seriously contend that its promised future compliance with the Arkansas performance remedy plan provides sufficient assurance that it will satisfy its statutory obligations after Section 271 entry. Indeed, a performance remedy plan without the teeth of state post-entry enforcement cannot possibly be effective in producing compliance with performance measures and remedies. And, in all events, SWBT’s promises of future compliance have no probative value.¹⁰

There are other reasons why the Arkansas performance assurance plan, as well as the Missouri performance remedy plan, is wholly inadequate to ensure that SWBT will comply with its statutory obligations if Section 271 relief is granted. As AT&T demonstrated in its initial comments, the Arkansas and Missouri performance remedy plans are essentially carbon copies of the Texas performance enforcement plan. However, in proceedings before the TPUC, SWBT has stated unequivocally that: (1) it is not required to comply with any TPUC order emanating from the six-month review process; (2) the TPUC cannot impose any modifications to existing performance measures or remedies without SWBT’s concurrence; (3) the TPUC cannot

¹⁰ *Michigan 271 Order* ¶ 55 (stating that “[p]aper promises do not, and cannot, satisfy a BOC’s burden of proof”).

compel SWBT to pay liquidated damages without SWBT's consent; and (4) the TPUC cannot order SWBT to implement new performance measures without SWBT's consent.¹¹ SWBT's current stance challenging the authority of the TPUC to impose any new measures or remedies with which SWBT disagrees threatens to, *inter alia*, eviscerate the collaborative processes that are key components in the evolution of performance monitoring and remedy plans that reflect the dynamism in the marketplace and mire the CLECs in protracted litigation.

Furthermore, as AT&T demonstrated in its opening comments, the Texas performance remedy plan has been anything but self-executing. In this regard, AT&T explained that SWBT had improperly withheld penalty payments associated with its chronic failure to meet the parity standard under Performance Measure 27 from April through June. *Id.* at 54-55. Apparently realizing that its tactic of simply withholding long overdue penalty payments was untenable during the pendency of its Section 271 application, SWBT has now paid AT&T the liquidated damages to which it is entitled. It must be emphasized, however, that SWBT finally paid these liquidated damages only *after* AT&T was forced to commence dispute resolution proceedings before the TPUC and *after* AT&T assailed SWBT's conduct in its opening comments on SWBT's joint application. Thus, no solace can be taken that SWBT will fulfill its obligations to make appropriate and timely penalty payments post-Section 271 entry.

Additionally, SWBT's Texas July performance remedy report for AT&T provides little comfort that the threat of penalty payments under its performance assurance plans will trigger SWBT's compliance with performance standards. In that connection, SWBT's most recent performance remedy report reveals that, before SWBT applied the K-Table, a statistical

¹¹ SWBT's position is that a state commission could take these actions, if at all, only after a separate arbitration, subject to rights of appeal. *See* AT&T Comments at 56-60.

methodology purportedly designed to account for random variation,¹² SWBT's penalty payments for failing Performance Measure 27 once again (as well as other measures) would have totaled \$957,400 in July. However, in applying the K Table, SWBT excused its performance failures under Performance Measure 27 and other measures entirely; and its penalty payment for July totaled the meager sum of \$1,457. Because of this dramatic and rather suspicious decline in liquidated damages, AT&T recently asked SWBT to clarify the basis for its penalty calculations.¹³

Indeed, Ernst & Young's recent audit report of SBC's compliance with this Commission's merger conditions illustrates that AT&T's concerns regarding the accuracy of SWBT's penalty payment calculations are well-founded. In this regard, Ernst & Young found that SBC's errors in its performance results "may have potentially impacted the Company's calculation of voluntary payments made to the United States Treasury."¹⁴ Critically, SBC reported that it could not correct and could not even assess the magnitude of these errors because

¹² Even if SWBT properly applied the K-Table, as Z-Tel explains, the K-Table is a flawed statistical methodology that inappropriately permits SWBT to excuse performance failures and avoid penalty payments. See Z-Tel Comments, Declaration of George S. Ford ¶¶ 44-55. In the case of AT&T's July performance remedy report SWBT applied the K Table to eliminate liability that was almost entirely the result of SWBT's fourth consecutive violation of Performance Measure 27. However, repeated performance violations for a single measurement are extraordinarily unlikely to be the product of random variation in the data and should not be excused by application of the K Table. That SWBT applied the K Table to such violations is one more illustration of the excessive forgiveness in SWBT's remedy plan. In any event, a penalty plan that operates to reduce penalty payments from over \$950,000 to the paltry sum of \$1,475 cannot reasonably serve to induce SWBT to meet its performance obligations now or in the future.

¹³ AT&T and SWBT had a conference call on October 2, 2001 to discuss the July performance remedy report. The call failed to resolve AT&T's concerns. Moreover, SWBT refused AT&T's request to provide it with: (1) an enhanced penalty report that provides information on the number of measures calculated to determine the allowable K Table exclusions, the K Table value calculated for each AT&T entity and the critical Z score calculated for each AT&T entity; and (2) revised monthly penalty reports containing this information for each month in which data are restated. In addition to citing lack of resources as one reason for declining AT&T's request, SWBT claimed that CLECs would likely become "confused" by such enhancements.

¹⁴ Letter from Sandra L. Wagner (SBC) to Ms. Magalie Salas dated September 4, 2001 attaching Ernst & Young Report (p. 4), *In the Matter of Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from Ameritech Corp. to SBC Communications, Inc.* (CC Docket No. 98-141).

of its inability ‘to retrieve the underlying data necessary to restate the performance measures.’”
Id.

In sum, SWBT’s record in Texas is one of massive resistance to its obligations under its performance incentive plans. SWBT’s unilateral withholding of payments owed under PM 27, its virtual elimination of almost \$1 million in liquidated damages, its erroneously reported performance results, and its refusal to accept the authority of the Texas PUC on performance measurement issues with which SWBT disagrees, all demonstrate SWBT’s refusal to allow its performance incentive plans to operate in a “self-executing” and effective manner. Rather, SWBT has refused to comply with its obligations, and dared CLECs to try to enforce them. SWBT’s conduct thus defeats the fundamental objective of a self-executing enforcement plan. A critical issue under the public interest test is whether “the BOC has agreed to private and self-executing enforcement mechanisms that are automatically triggered by noncompliance with the applicable performance standard without resort to lengthy regulatory or judicial intervention.” *Michigan 271 Order* ¶ 394. Such automatic compliance is crucial, because “forcing new entrants to engage in protracted and contentious legal proceedings to enforce their contractual and statutory rights” can “significantly delay the development of local competition” *Id.* Unless and until SWBT has demonstrated, by its actions, that it is complying with its performance obligations without forcing new entrants to engage in protracted and contentious enforcement procedures, this Commission should not approve any further SWBT 271 applications.