

commenter has challenged SWBT's claim regarding the number of customers served by ALLTEL.<sup>379</sup>

119. Several commenters contend that SWBT's agreement with ALLTEL does not satisfy Track A because ALLTEL does not currently market its facilities-based service to new residential customers.<sup>380</sup> We disagree with these commenters that a competing provider must necessarily be accepting new customers in order to qualify for Track A, particularly given the large volume of customers served by ALLTEL. Moreover, we believe that this case is clearly distinct from the facts presented in the *First SBWT Oklahoma Order*, in which a competing carrier's refusal to accept new customers was relevant because it had not yet accepted any paying residential customers.<sup>381</sup> We believe that it would be unfair and inconsistent with the statute to foreclose a BOC's application under section 271 based on the marketing decision of a relatively established competitive provider. To accept commenters' argument that a carrier not accepting customers could never qualify as a "competing provider" under Track A would produce absurd results. Under this theory, a competitive LEC that already served a million residential subscribers via UNE-P would not qualify as a "competing provider" under Track A if it decided not to pursue any new customers. We believe that this cannot be what Congress intended for Track A.

120. We note that SWBT has also signed interconnection agreements with other competitive LECs that, according to SWBT, currently provide residential service in Arkansas.<sup>382</sup> Although those competitive LECs provide service to a very limited number of customers at this point and we do not rely on their presence for purposes of Track A,<sup>383</sup> their presence gives us further comfort that residential customers currently have alternatives to SWBT service. Also, the Arkansas Commission opined that the lower UNE prices SWBT recently implemented in Arkansas might encourage competitive LECs to become more active in the residential market.<sup>384</sup>

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<sup>379</sup> SWBT Application at 10; SWBT Reply App., Reply Appendix, Vol. 2, Tab 14, Affidavit of J. Gary Smith and David R. Tebeau at 3, para 5 (SWBT Smith/Tebeau Reply Aff.). WorldCom claims that "there is at most a *de minimis* level of facilities-based residential service" in Arkansas, but provides no evidence regarding the number of ALLTEL residential access lines. WorldCom Reply at 11.

<sup>380</sup> AT& T Comments at pp. 82-83; Sprint Comments at 3-5. According to the Arkansas Commission, ALLTEL discontinued offering residential service in Arkansas in November 2000 to new customers. The Arkansas Commission deferred a judgement as to whether SWBT satisfied Track A requirements. See Arkansas Commission Comments, Second Consultation Report at 6.

<sup>381</sup> *Application by SBC Communications Inc., Pursuant to Section 271 of the Communications Act of 1934, as amended, To Provide In-Region, InterLATA Services in Oklahoma*, CC Docket No. 97-121, Memorandum Opinion and Order, FCC 97-228, 12 FCC Rcd 8685, 8694-95, para. 14 (1997) (*First SBWT Oklahoma Order*).

<sup>382</sup> SWBT Application Arkansas App. A, Vol.6, Tab 21, Affidavit of J. Gary Smith, Attachment E, Part C, Tab 21, (*citing confidential portion*) at E-1, Table A (SWBT J.G. Smith Arkansas Aff.); SWBT Reply Brief at 9.

<sup>383</sup> SWBT J.G. Smith Arkansas Aff., Attachment E, Part C, Tab 21, (*citing confidential portion*) at E-1, Table A.

<sup>384</sup> Arkansas Commission Comments, Second Consultation Report at 6.

121. With respect to Missouri, we conclude that SWBT demonstrates that it satisfies the requirements of Track A based on the interconnection agreements it has implemented with AT&T and WorldCom.<sup>385</sup> The record demonstrates that AT&T provides facilities-based telephone exchange service to both residential and business subscribers through its own cable television facilities.<sup>386</sup> The record also shows that WorldCom provides service to residential and business customers almost exclusively over its own facilities.<sup>387</sup> No commenter has challenged SWBT's assertion that it qualifies for Track A in Missouri.<sup>388</sup>

## V. SECTION 272 COMPLIANCE

122. Section 271(d)(3)(B) requires that the Commission shall not approve a BOC's application to provide interLATA services unless the BOC demonstrates that the "requested authorization will be carried out in accordance with the requirements of section 272."<sup>389</sup> The Commission set standards for compliance with section 272 in the *Accounting Safeguards Order* and the *Non-Accounting Safeguards Order*.<sup>390</sup> Together, these safeguards discourage, and facilitate the detection of, improper cost allocation and cross-subsidization between the BOC and its section 272 affiliate. In addition, these safeguards ensure that BOCs do not discriminate in favor of their section 272 affiliates.<sup>391</sup> As we stated in the *Ameritech Michigan Order*, compliance with section 272 is "of crucial importance" because the structural, transactional, and

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<sup>385</sup> SWBT Application at 14-15. SWBT also relies on Birch, Ionix Communications, and Global Crossing/Frontier to support its Track A showing. Given our reliance on SWBT's interconnection agreements with AT&T and WorldCom, we need not consider whether these other carriers qualify as competing providers under Track A.

<sup>386</sup> *Id.*

<sup>387</sup> *Id.*

<sup>388</sup> The Missouri Commission did an independent assessment of the number of competitive LEC access lines which was consistent with SWBT's estimates. See Missouri Commission Missouri I Comments, Attach. 1 at 19-20, citing William Voight's independent competitive level investigation.

<sup>389</sup> 47 U.S.C. § 271(d)(3)(B).

<sup>390</sup> See *Implementation of the Accounting Safeguards Under the Telecommunications Act of 1996*, CC Docket No. 96-150, Report and Order, 11 FCC Rcd 17539 (1996) (*Accounting Safeguards Order*), Second Order on Reconsideration, FCC 00-9 (rel. Jan. 18, 2000); *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended*, CC Docket No. 96-149, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 21905 (1996) (*Non-Accounting Safeguards Order*); First Order on Reconsideration, 12 FCC Rcd 2297 (1997) (*First Order on Reconsideration*), Second Order on Reconsideration, 12 FCC Rcd 8653 (1997) (*Second Order on Reconsideration*), *aff'd sub nom. Bell Atlantic Telephone Companies v. FCC*, 131 F.3d 1044 (D.C. Cir. 1997), Third Order on Reconsideration, FCC 99-242 (rel. Oct. 4, 1999) (*Third Order on Reconsideration*).

<sup>391</sup> *Non-Accounting Safeguards Order*, 11 FCC Rcd at 21914; *Accounting Safeguards Order*, 11 FCC Rcd at 17550; *Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended*, CC Docket No. 97-137, 12 FCC Rcd 20543, 20725 (1997) (*Ameritech Michigan Order*).

nondiscrimination safeguards of section 272 seek to ensure that BOCs compete on a level playing field.

123. Based on the record, we conclude that SWBT has demonstrated that it complies with the requirements of section 272. Significantly, SWBT provides evidence that it maintains the same structural separation and nondiscrimination safeguards in Arkansas and Missouri, as it does in Kansas, Oklahoma, and Texas.<sup>392</sup> We have previously found that SWBT met its burden of proving compliance with section 272 in Kansas, Oklahoma, and Texas.<sup>393</sup> Moreover, no commenter has challenged SWBT's showing that it complies with section 272.

## VI. PUBLIC INTEREST ANALYSIS

124. Apart from determining whether a BOC satisfies the competitive checklist and will comply with section 272, Congress directed the Commission to assess whether the requested authorization would be consistent with the public interest, convenience, and necessity.<sup>394</sup> At the same time, section 271(d)(4) of the Act states in full that "[t]he Commission may not, by rule or otherwise, limit or extend the terms used in the competitive checklist set forth in subsection (c)(2)(B)." Accordingly, although the Commission must make a separate determination that approval of a section 271 application is "consistent with the public interest, convenience, and necessity," it may neither limit or extend the terms of the competitive checklist of section 271(c)(2)(B). Thus, the Commission views the public interest requirement as an opportunity to review the circumstances presented by the application to ensure that no other relevant factors exist that would frustrate the congressional intent that markets be open, as required by the competitive checklist, and that entry will therefore serve the public interest as Congress expected. We find that compliance with the competitive checklist is, itself, a strong indicator that long distance entry is consistent with the public interest. While no one factor is dispositive in this analysis, the overriding goal is to ensure that nothing undermines the conclusion, based on the Commission's analysis of checklist compliance, that markets are open to competition. In this respect, we concur with those commenters that emphasize the appropriateness and value of public interest review.<sup>395</sup>

125. We conclude that approval of this joint application is consistent with the public interest. From our extensive review of the competitive checklist, which embodies the critical

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<sup>392</sup> SWBT Application at 161-162.

<sup>393</sup> *SWBT Kansas/Oklahoma* 16 FCC Rcd at 6370, para. 257; *SWBT Texas Order*, 15 FCC Rcd at 18549, para. 396.

<sup>394</sup> 47 U.S.C. § 271(d)(3)(C). We note that SWBT asserts that its entry into the interLATA market should be presumptively in the public interest and that the burden of proof should be on those who assert otherwise. SWBT Application at 145, n.101. It is clear that the Act requires a showing that entry of the BOC into the interLATA market is in the public interest, convenience and necessity, and the burden of proof that a BOC meets the 271 requirements lies with the applicant. See Appendix D at 5.

<sup>395</sup> AT&T Comments at 87; El Paso-PACWEST Comments at 2-14; McLeod Comments at 21-23; El Paso-PACWEST Reply at 1-3.

elements of market entry under the Act, we find that barriers to entry in the local exchange markets in Arkansas and Missouri have been removed and the local exchange markets in each state today are open to competition. We further find that the record confirms our view, as noted in prior section 271 orders, that BOC entry into the long distance market will benefit consumers and competition if the relevant local exchange market is open to competition consistent with the competitive checklist.<sup>396</sup> As discussed below, we conclude that approval of this joint application is consistent with the public interest.<sup>397</sup>

#### A. Competition in Local Exchange and Long Distance Markets

126. We find that the record confirms our view, as noted in prior section 271 orders, that BOC entry into the long distance market will benefit consumers and competition if the relevant local exchange market is open to competition consistent with the competitive checklist.<sup>398</sup> We disagree with those commenters who argue that the public interest would be disserved by granting SWBT's joint application for Arkansas and Missouri. In particular, several commenters contend that SWBT's application is premature and raise concerns about low levels of rural and residential competition.<sup>399</sup> Given an affirmative showing that a market is open and the competitive checklist has been satisfied, low customer volumes in and of themselves do not undermine that showing.<sup>400</sup> The Arkansas Commission is cognizant of the levels of residential competition in Arkansas and believes that recent reductions in UNE rates may result in additional residential services being offered through leased network elements.<sup>401</sup> We have repeatedly held that factors beyond a BOC's control, such as individual competitive carrier entry strategies, for

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<sup>396</sup> See *SWBT Texas Order*, 15 FCC Rcd at 18558-59, para. 419.

<sup>397</sup> We emphasize that grant of this application *does not* reflect any conclusion that SWBT's conduct in the individual instances cited by commenters is nondiscriminatory and complies with the company's obligations under the Communications Act.

<sup>398</sup> See *SWBT Texas Order*, 15 FCC Rcd at 18558-59, para. 419.

<sup>399</sup> Department of Justice Evaluation at 5; AT&T Missouri I Comments at 54-57; AT&T Comments at 91; City Utilities of Springfield Comments at 7; Navigator Comments at 2-3.

<sup>400</sup> *SWBT Kansas/Oklahoma Order*, 16 FCC Rcd at 6375-9, para. 268. Other commenters contend that various barriers to entry in Arkansas and/or Missouri exist or that the market is not irreversibly open. Department of Justice Evaluation at 5; AT&T Missouri I Comments at 59-64; AT&T Comments at 97; City Utilities of Springfield Comments at 1; El Paso-PACWEST Comments at 15; McLeod Missouri I Comments at 58-63; McLeod Comments at 25-26; Missouri Office of Public Counsel Comments at 9. As discussed above, we find that SWBT has satisfied the competitive checklist and, thus, that barriers to local entry in the local exchange markets in Arkansas and Missouri have been removed.

<sup>401</sup> Arkansas Commission Consultation Report at 25; El Paso-PACWEST Comments at 7; McLeod Comments at 23 with respect to Arkansas. Some commenters contend that the Arkansas and Missouri Commissions did not fully investigate the public interest standard. While we carefully consider the record developed by state commissions in their review of a BOC's application, it is ultimately the FCC's role to determine whether the factual record supports the conclusion that particular requirements of section 271 have been met.

instance, might explain a low residential customer base. We note that Congress specifically declined to adopt a market share or other similar test for BOC entry into long distance, and we do not establish one here.<sup>402</sup>

## **B. Assurance of Future Compliance**

127. As set forth below, we find that SWBT's performance remedy plans for Arkansas and Missouri provide additional assurance that the local market will remain open after SWBT receives section 271 authorization. The Commission previously has explained that one factor it may consider as part of its public interest analysis is whether a BOC would continue to satisfy the requirements of section 271 after entering the long distance market.<sup>403</sup> Accordingly, the Commission has strongly encouraged state commissions to conduct performance monitoring and post-entry enforcement.<sup>404</sup> Although it is not a requirement for section 271 authority that a BOC be subject to such performance mechanisms, the Commission has stated that the fact that a BOC will be subject to a satisfactory performance monitoring and enforcement mechanism would constitute probative evidence that the BOC will continue to meet its section 271 obligations and that its entry would be consistent with the public interest.<sup>405</sup>

### **1. Performance Remedy Plan**

128. SWBT's Performance Remedy Plan is part of the A2A in Arkansas and M2A in Missouri and is available to competing LECs through those agreements.<sup>406</sup> Each plan is nearly identical to the Texas, Kansas and Oklahoma Performance Remedy Plans, which are essentially modified versions of the plan that we reviewed in the Texas section 271 proceedings.<sup>407</sup> That original plan has undergone review and modification through the ongoing Texas Commission and industry process under Texas Commission authority.<sup>408</sup> Under the plans, SWBT collects and

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<sup>402</sup> See *Ameritech Michigan Order*, 12 FCC Rcd at 20585, para. 77.

<sup>403</sup> See *Second BellSouth Louisiana Order*, 13 FCC Rcd at 20806; *Ameritech Michigan Order*, 12 FCC Rcd at 20747.

<sup>404</sup> These mechanisms are generally administered by state commissions and derive from authority the states have under state law or under the federal Act. As such, these mechanisms can serve as critical complements to the Commission's authority to preserve checklist compliance pursuant to section 271(d)(6). Moreover, in this instance, we find that the collaborative process by which these mechanisms were developed in Texas and then adapted and modified in both Arkansas and Missouri for particular circumstances in each of these states, has itself helped to bring SWBT into checklist compliance.

<sup>405</sup> See *Second BellSouth Louisiana Order*, 13 FCC Rcd at 20806.

<sup>406</sup> The Missouri Commission approved the M2A on March 15, 2001 (see *Dysart Missouri II Aff.* at para. 6) and the Arkansas Commission approved the A2A on June 18, 2001 (see *Arkansas Commission Consultation Report*, Order No. 17).

<sup>407</sup> See *SWBT Texas Order*, 15 FCC Rcd at 18563-64, para. 427.

<sup>408</sup> *Dysart Arkansas Aff.*, paras. 16-19; *Dysart Missouri II Aff.*, paras. 16-20.

reports data on a wide range of performance areas, according to set definitions and business rules. While we do not require that one state commission adopt or use another state's plan, we recognize the efficiency gained by all involved state commissions, SWBT and competing carriers from working together to develop and monitor common performance measures and similar remedy plans.

129. While the current Texas plan forms the basis for the Arkansas and Missouri plans, each plan is modified in certain aspects to address particular situations and conditions in Arkansas and Missouri. For example, as explained below, the Arkansas and Missouri plans differ from the current Texas plan in certain details in mathematical formulas for some calculations, the level of penalty caps and references to state-specific statutes and requirements.<sup>409</sup> We conclude that the state-specific modifications appear reasonable and do not detract from the overall effectiveness of the plans.

130. We have examined certain key aspects of these plans to determine whether the plans fall within a zone of reasonableness and are likely to provide incentives that are sufficient to foster post-entry checklist compliance. Plans may vary in their strengths and weaknesses, and there is no one way to demonstrate assurance.<sup>410</sup> In our *SWBT Texas Order*, for example, we predicted that the enforcement mechanisms developed in Texas would be effective in practice.<sup>411</sup> Since then, the Arkansas and Missouri Commissions adopted variants of the current Texas plan whose measures are designed to prevent backsliding in wholesale performance once SWBT is granted interLATA authority. We conclude that the Arkansas and Missouri Commissions adopted in the A2A and M2A, respectively, performance remedy plans that would discourage anti-competitive behavior by setting damages and penalties at a level above the simple "cost of doing business." As in prior section 271 orders, our conclusions are based on a review of several key elements in any performance remedy plan: total liability at risk in the plan; performance measurement and standards definitions; structure of the plan; self-executing nature of remedies in the plan; data validation and audit procedures in the plan; and accounting requirements.<sup>412</sup> We discuss only those elements about which commenters have raised substantial issues in the record before us.

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<sup>409</sup> SWBT Application at 159; SWBT Dysart Arkansas Aff., App. A, Tab 7, Subtab O; SWBT Dysart Missouri II Aff., App. A, Tab 6, Subtab O. The first-year penalty cap for each state represents the same percentage of carrier revenue derived from the state as approved in the *SWBT Texas Order* and again in the *SWBT Kansas/Oklahoma Order*. This amount for Arkansas is \$48 million and for Missouri is \$98 million.

<sup>410</sup> See *Ameritech Michigan Order*, 12 FCC Rcd at 20741-51, para. 393.

<sup>411</sup> See *SWBT Texas Order*, 15 FCC Rcd at 18560, para. 421; also see *Bell Atlantic New York Order*, 15 FCC Rcd at 4166-67, para. 433.

<sup>412</sup> See, e.g., *Verizon Massachusetts Order*, 16 FCC Rcd at 9121-25, paras. 240-247; *SWBT Kansas/Oklahoma Order*, 16 FCC Rcd at 6377-81, paras. 273-278.

131. We disagree with commenters that submit that the Arkansas Commission may have insufficient legal authority to effectively enforce the plan and ensure that SWBT will continue to provide nondiscriminatory service to competing carriers.<sup>413</sup> Based on the Arkansas Commission's precedent, we conclude that the Arkansas Commission has demonstrated sufficient authority to implement and enforce the plan in Arkansas, assuring that local markets will remain open after SWBT receives section 271 authorization.<sup>414</sup> We note that the Arkansas Commission has repeatedly held that it has jurisdiction to adjudicate complaints against SWBT for alleged violations of interconnection agreements.<sup>415</sup> Furthermore, we note that if the Arkansas Commission were to decline to exercise jurisdiction, this Commission may have the authority to act in its place pursuant to section 252(e). The Commission has previously held that failure of a state commission to carry out its responsibilities, including the resolution of disputes arising from the interpretation and enforcement of interconnection agreements, may result in this Commission's preemption of state commission jurisdiction under section 252(e)(5).<sup>416</sup> We also make clear that the performance remedy plan is not the only means of ensuring that SWBT continues to provide nondiscriminatory service to competing carriers. For example, this Commission may address any future failure to comply with the conditions of section 271, pursuant to section 271(d)(6).<sup>417</sup>

132. We also reject proposals from McLeod and Z-TEL to modify specific points in the Texas metrics and performance remedy plan calculations which they contend would improve the plan and thus the Arkansas and Missouri plans derived from it.<sup>418</sup> We believe that revisions of

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<sup>413</sup> Department of Justice Evaluation at 12-13; Sprint Comments at 12-15; AT&T Reply at 12-14. These commenters note that the Arkansas Commission encouraged this Commission to adopt anti-backsliding provisions to ensure future performance. Arkansas Commission Second Report at 11-12.

<sup>414</sup> SWBT Application at 160-161. The Arkansas Commission adopted the performance remedy plan when it approved the A2A on June 18, 2001.

<sup>415</sup> See *Connect Communications Corp. v. Southwestern Bell Tel. Co.*, Docket No. 98-167 (where the Arkansas Commission found that it had jurisdiction over Connect's complaint regarding the terms of the Interconnection Agreement approved by the State Commission) (Dec. 31, 1998); *American Communications Servs. of Little Rock, Inc. v. Southwestern Bell Tel. Co.*, Docket No. 00-071-C (where the Arkansas Commission asserted jurisdiction under state law to adjudicate complaint alleging violation of an interconnection agreement) (June 12, 2000).

<sup>416</sup> See *Starpower Communications, LLC Petition for Preemption of Jurisdiction of the Virginia State Corporation Commission Pursuant to Section 252(e)(5) of the Telecommunications Act of 1996*, 15 FCC Rcd 11277, 11279, para. 6 (June 14, 2000). The order addressed a dispute concerning the interpretation and enforcement of an interconnection agreement between Starpower Communications and Bell Atlantic. The Commission held that a state commission's failure to carry out its responsibilities under section 252 can in some circumstances include the failure to interpret and enforce existing interconnection agreements.

<sup>417</sup> 47 U.S.C. § 271(d)(6).

<sup>418</sup> McLeod Missouri I Comments at 32-64; Z-TEL Comments at 2-9. Neither McLeod nor Z-TEL contends the calculations were inconsistent with the methodology approved by the Texas Commission. The most recent revisions of the metrics business rules resulting from the second six-month review open to SWBT, competitive LECs and (continued....)

the business rules and calculation methodologies are appropriately handled by the individual state commissions and may be proposed by any participant, including McLeod and Z-TEL at the state's regular six-month review. This process of periodic state review has given us confidence in the effectiveness of performance remedy plans in the past.

133. We disagree with AT&T's assertion that the Arkansas and Missouri performance remedy plans are insufficiently self-executing.<sup>419</sup> AT&T filed an informal complaint with the Texas Commission alleging SWBT improperly withheld penalty payments inconsistent with the performance remedy procedures. The complaint is pending before the Texas Commission and we have confidence that the Texas Commission will effectively resolve the complaint. In addition, SWBT states that it has since made the disputed payments.<sup>420</sup> It appears that the plan dispute mechanism has been successfully tested in Texas, which gives us confidence that should a similar situation arise in Arkansas or Missouri, the appropriate Commissions could similarly resolve future disputes arising from the performance remedy plans in their states.

134. Finally, we reject AT&T's suggestion that the public interest is not met because SWBT has challenged the procedures for modifying the Texas performance remedy plan. AT&T alleges that SWBT factually misrepresents its historic willingness to review and modify the Texas Plan.<sup>421</sup> AT&T accurately observes that SWBT has failed to implement some changes ordered by the Texas Commission in its most recent six-month review, including: 1) a sampling methodology for one metric, 2) payment for a past measure the Texas Commission found had been calculated in error and elevation of the metric from a "low" to a "high" payment class, and 3) the inclusion of special access provisioning that is being provided pursuant to a SWBT tariff.<sup>422</sup> SWBT admits to failing to implement and appealing certain parts of the most recent six-month review order issued by the Texas Commission.<sup>423</sup> We note that the Texas Commission has been asked to address questions regarding modification and implementation of the Texas performance remedy plan in a complaint filed by AT&T.<sup>424</sup> Given that these issues are under review by the Texas Commission, we do not conclude that the Arkansas and Missouri plans are

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commission staffs from Texas, Oklahoma, Kansas, Missouri and Arkansas has addressed some of Z-TEL's criticism. See SWBT Reply at 53-54.

<sup>419</sup> AT&T Comments at 50; AT&T Reply at 14-17.

<sup>420</sup> SWBT Reply at 51-52.

<sup>421</sup> AT&T Comments at 56-57. Specifically, SWBT asserts that it "has demonstrated the 'continuing ability of the[se] measurements to evolve' by implementing all changes that were ordered by the Texas Commission in its six-month review process." SWBT Application at 156.

<sup>422</sup> AT&T Comments at 56-60.

<sup>423</sup> SWBT Reply at 52-53. SWBT contends that it intended to refer to changes ordered by the Texas Commission leading to version 1.7 of the metrics, not that it had complied with more recent Texas Commission orders regarding version 2.0 of the metrics. SWBT Reply at 52, n.64.

<sup>424</sup> SWBT Reply at 52-53.

insufficient. If, in the future, market opening conditions have not been maintained, we maintain our ability to address backsliding under section 271(d)(6).

### C. Other Issues

135. Commenters raise several other concerns which they contend support a finding that grant of this application is not in the public interest. In the initial Missouri proceedings, the Missouri Office of Public Counsel argued that the then recently-adopted M2A should be in effect and actual performance seen prior to SWBT filing an application for section 271 authority with this Commission.<sup>425</sup> El Paso-PACWEST contends that the current pricing for unbundled elements in Arkansas and Missouri is not in the public interest. As discussed above, we find that SWBT's prices in Arkansas and Missouri satisfy the pricing requirements applicable under section 271. While the Missouri Public Counsel and McLeod identify several historic situations that they allege demonstrate uncooperative and anti-competitive behavior by SWBT, we conclude that the specific issues raised had been resolved prior to SWBT filing this current application and we have no evidence of ongoing anti-competitive behavior.<sup>426</sup> In addition, we find that McLeod's representations that the Missouri municipalities franchise requirements are "onerous" and that SWBT as the incumbent receives preferential treatment are unsubstantiated and are insufficient reason to determine this application is not in the public interest.<sup>427</sup>

136. We do not find persuasive the assertion by the City Utilities of Springfield that Missouri state law restricting municipalities' entry into the telecommunications market is a barrier to entry that must be considered in the section 271 application.<sup>428</sup> We disagree with the City's arguments that SWBT's adherence to existing Missouri law, which forbids municipalities from providing telecommunications services or facilities, violates the public interest standard in promoting competition in the telecommunications industry in Missouri.<sup>429</sup> In the *Missouri Preemption Order*, the Commission found that the existing Missouri law that prohibited state

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<sup>425</sup> Missouri Public Counsel Missouri I Comments at 1-3. As the M2A was adopted on March 15, 2001 and has been in effect prior to the current application, we believe that this issue does not constitute sufficient grounds to find that the current application fails to be in the public interest.

<sup>426</sup> SWBT Dysart Reply Aff. at para. 89-102; McLeod Missouri I Comments at 58-59; McLeod Comments at 25-26; Missouri Office of Public Counsel Comments at 7-8; McLeod Reply at 4.

<sup>427</sup> McLeod Missouri I Comments at 60. While we do not believe that section 271 review is the appropriate forum for these issues, should it desire, McLeod may petition this Commission for preemption under section 253(c) of the Act.

<sup>428</sup> City Utilities of Springfield Comments at 1-2.

<sup>429</sup> See *The Missouri Municipal League; The Missouri Association of Municipal Utilities; City Utilities of Springfield; City of Columbia Water & Light; City of Sikeston Board of Utilities Petition for Preemption of Section 392.410(7) of the Revised Statutes of Missouri*, CC Docket No. 98-122, Memorandum Opinion and Order, 16 FCC Rcd 1157,1164-69, paras. 12-18 (2001) (*Missouri Preemption Order*) (discussing the current Missouri law in regard to its prohibition on state political subdivisions' involvement in the telecommunications industry).

political subdivisions from becoming certified to provide telecommunications services or facilities did not violate Section 253(a)'s prohibition on state barriers to entry; accordingly, the Commission concluded that it lacked authority to preempt Missouri's law.<sup>430</sup> Therefore, SWBT's compliance with existing Missouri law cannot be grounds for finding that it is violating the public interest.<sup>431</sup> Although we have acknowledged the benefits of competitive entry by municipalities into the telecommunications industry, we find that SWBT has taken sufficient steps to facilitate competitive entry by non-governmental providers, so that grant of the application would serve the public interest in Missouri.<sup>432</sup>

## VII. SECTION 271(d)(6) ENFORCEMENT AUTHORITY

137. Section 271(d)(6) of the Act requires SWBT to continue to satisfy the "conditions required for . . . approval" of its section 271 application after the Commission approves its application.<sup>433</sup> Thus, the Commission has a responsibility not only to ensure that SWBT is in compliance with section 271 today, but also that it remains in compliance in the future. As the Commission has already described the post-approval enforcement framework and its section 271(d)(6) enforcement powers in detail in prior orders, it is unnecessary to do so again here.<sup>434</sup>

138. Working in concert with the Arkansas and Missouri Commissions, we intend to closely monitor SWBT's post-approval compliance for Arkansas and Missouri to ensure that SWBT does not "cease [] to meet any of the conditions required for [section 271] approval."<sup>435</sup> We stand ready to exercise our various statutory enforcement powers quickly and decisively in appropriate circumstances to ensure that the local market remains open in Arkansas and Missouri. We are prepared to use our authority under section 271(d)(6) if evidence shows market opening conditions have not been maintained.

139. We require SWBT to report to the Commission all Arkansas and Missouri carrier-to-carrier performance metrics results and Performance Assurance Plan monthly reports beginning with the first full month after the effective date of this Order, and for each month thereafter for one year unless extended by the Commission. These results and reports will allow us to review, on an ongoing basis, SWBT's performance to ensure continued compliance with the statutory requirements. We are confident that cooperative state and federal oversight and

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<sup>430</sup> *Id.* at 1158-59, 1164, and 1170, paras. 2,4, 13, and 23.

<sup>431</sup> *See also, Bell Atlantic New York Order*, 15 FCC Rcd at 4080, para. 236 (holding that it would be "inequitable to penalize Bell Atlantic for complying with the rules established by the New York Commission").

<sup>432</sup> *See Missouri Preemption Order*, 16 FCC Rcd at 1162-63, paras. 10-11.

<sup>433</sup> 47 U.S.C. § 271(d)(6).

<sup>434</sup> *SWBT Kansas/Oklahoma Order*, 16 FCC Rcd at 6382-84, paras. 283-85; *SWBT Texas Order*, 15 FCC Rcd at 18567-68, paras. 434-36; *Bell Atlantic New York Order*, 15 FCC Rcd at 4174, paras. 446-53. *See Appendix D.*

<sup>435</sup> 47 U.S.C. § 271(d)(6)(A).

enforcement can address any backsliding that may arise with respect to SWBT's entry into the Arkansas and Missouri long distance markets.<sup>436</sup>

### VIII. CONCLUSION

140. For the reasons discussed above, we grant SWBT's applications for authorization under section 271 of the Act to provide in-region, interLATA services in the states of Arkansas and Missouri.

### IX. ORDERING CLAUSES

141. Accordingly, IT IS ORDERED that, pursuant to sections 4(i), 4(j), and 271 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j) and 271, Southwestern Bell's applications to provide in-region, interLATA service in the states of Arkansas and Missouri, filed on August 20, 2001, ARE GRANTED.

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<sup>436</sup> See, e.g., *Bell Atlantic-New York, Authorization Under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in the State of New York*, File No. EB-00-IH-0085, Order, 15 FCC Rcd 5413 (2000) (adopting consent decree between the Commission and Bell Atlantic that included provisions for Bell Atlantic to make a voluntary payment of \$3,000,000 to the United States Treasury, with additional payments if Bell Atlantic failed to meet specified performance standards and weekly reporting requirements to gauge Bell Atlantic's performance in correcting the problems associated with its electronic ordering systems).

142. IT IS FURTHER ORDERED that this Order SHALL BECOME EFFECTIVE November 26, 2001.

FEDERAL COMMUNICATIONS COMMISSION



Magalie Roman Salas  
Secretary