

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Application by SBC Communications Inc.,)	
Michigan Bell Telephone Company, and)	WC Docket No. 03-16
Southwestern Bell Communications Services,)	
Inc., for Authorization Under Section 271)	
Of the Communications Act to Provide)	
In-Region, InterLATA Service in)	
The State of Michigan)	

COMMENTS OF TDS METROCOM, LLC

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Dated: February 6, 2003

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SUMMARY

As an overriding and threshold matter, SBC's application should be denied because it is premature. SBC has failed to remedy the host of deficiencies and shortcomings that led the Commission to reject the Section 271 filing of its affiliate Ameritech Michigan in 1997. As TDS Metrocom's comments demonstrate, little has changed since 1997 that would justify a different conclusion from that which the Commission reached when it rejected Ameritech Michigan's request and found that Section 271 authority was not appropriate. SBC's operations support systems and performance metrics are incomplete, unproven, and insufficient; it has not otherwise met the requirements of the Section 271 competitive checklist; and the concerns that compelled the Commission to reject the 1997 filing likewise preclude any favorable consideration of SBC's Application today. In particular, SBC has yet to pass one of the most basic of the Performance Metric Reviews, PMR 4, regarding data integrity. Rather than adhere to the Master Test Plan, SBC had another auditor, Ernst & Young, examine the integrity of SBC's data. The Commission should disregard the Ernst & Young audit reports. Because the testing of SBC's OSS and performance metrics is not complete, no finding of checklist compliance may be made at this juncture.

Furthermore, SBC's application should be denied because SBC has failed to demonstrate that its markets are irreversibly open to competitors in the State of Michigan. Significantly, SBC continues to discriminate against CLECs with regard to its deficient operations support systems and performance metrics, including its infirm data integrity processes that prevent the Commission from verifying the accuracy of the data underlying SBC's performance measurement results. The ongoing and pervasive problems experienced by TDS Metrocom when it utilizes SBC's wholesale order processing, change management process, maintenance and

repair, and billing systems demonstrates that SBC has not met the applicable checklist requirements. With regard to billing, SBC's practices are replete with errors in the areas of backbilling, incorrect rates, double billing, miscoding and incorrect customer trouble reports. The evidence presented by TDS Metrocom establishes that no award of Section 271 to authority is warranted.

In addition, SBC fails to provide nondiscriminatory access to local loops by imposing a recent policy of refusing to remove bridged taps on loops that are under 2,500 feet in length unless TDS Metrocom agrees to pay special construction charges. This practice violates SBC's obligations with regard to the provisioning of DSL-capable loops, and results in improper and unjustified additional costs and provisioning delays, as well as in the unwarranted removal of such loops from applicable performance measurements.

Finally, the Application must be rejected because permitting SBC to provide in-region, interLATA service in Michigan would not be in the public interest. The pattern of unreasonable and unacceptable delay that characterizes almost every aspect of TDS Metrocom's interaction with SBC plainly establishes that granting the Application would be contrary to the public interest. In light of SBC's failure to meet the requirements of the competitive checklist and due to the critical failings identified in TDS Metrocom's comments, it cannot seriously be disputed that the award of Section 271 authority would be grossly premature. The Commission should decline to alter the conclusion it reached in 1997, and should summarily reject SBC's Application.

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The State of Michigan)

COMMENTS OF TDS METROCOM, LLC

TDS Metrocom, LLC (“TDS Metrocom”) submits these comments concerning the Application by SBC Communications Inc., Michigan Bell Telephone Company, and Southwestern Bell Communications Services, Inc. (collectively referred to as “SBC”), for Authorization Under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in the State of Michigan (“Application”).¹ For the reasons stated in these comments, the Commission should deny the Application.

I. SBC’S APPLICATION IS PREMATURE AND MUST BE DENIED

A. SBC Has Not Cured the Defects Identified by the Commission When It Rejected The Application in 1997

In this case the Commission is presented with an unusual situation compared to other Section 271 proceedings.² The Commission issued a forceful and resounding rejection of the

¹ *Comments Requested on the Application by SBC Communications, Inc. for Authorization Under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in the State of Michigan*, Public Notice, WC Docket No. 03-16, DA 03-156, released Jan. 16, 2003.

² The Commission has previously rejected and then granted Section 271 applications for the States of Louisiana, Oklahoma, and South Carolina. *See In the Matter of Joint Application by BellSouth Corporation, BellSouth Telecommunications Inc., and BellSouth Long Distance, Inc. for Provision of In-Region, InterLATA*

Section 271 Application filed by SBC's affiliate Ameritech Michigan ("Ameritech") in 1997,³ and has now been asked to approve the instant Application for Section 271 authority in the same state. As will be fully demonstrated herein, no such approval should be given because SBC has not cured the defects that plagued Ameritech's filing nearly six years ago.

In the *Michigan Order*, the Commission held that no Section 271 authority could be awarded to Ameritech because it had failed to implement the requirements of the Section 271 competitive checklist.⁴ The Commission repeatedly emphasized its determination that no finding of checklist compliance was warranted, noting that "our decision here recognizes the complexity of opening historically monopolized local markets to competition, and the clear mandate of Congress that such markets must be open to competition before the Bell Operating Companies ('BOCs') are to be permitted to provide in-region, interLATA services."⁵

The Commission found particular fault with the readiness of Ameritech's operations support systems ("OSS") to enable competitive local exchange carriers ("CLECs") to use network elements and resale services in competition with Ameritech, emphasizing that "new entrants must have access to the functions performed by the systems, databases and personnel, commonly referred to as operations support systems, that are used by the incumbent LEC to

Services in Georgia and Louisiana, Memorandum Opinion and Order, CC Docket No. 02-35, FCC 02-147 (May 15, 2002) ("*Georgia/Louisiana Order*") at ¶¶ 1, 3; *In the Matter of Joint Application by SBC 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 Kansas and Oklahoma*, Memorandum Opinion and Order, CC Docket No. 00-217, FCC 01-29 (Jan. 22, 2001) at ¶ 1; *In the Matter of Joint Application by BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc. for Provision of In-Region, InterLATA Services in Alabama, Kentucky, Mississippi, North Carolina and South Carolina*, Memorandum Opinion and Order, CC Docket No. 02-150, FCC 02-260 (Sept. 18, 2002) at ¶ 1. As fully explained herein, however, the Commission must find that SBC has still not met the applicable requirements for Section 271 authority in Michigan, and its Application must again be denied.

³ *Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, To Provide In-Region, InterLATA Services in Michigan*, CC Docket No. 97-137, FCC 97-298 (Aug. 19, 1997) ("*Michigan Order*").

⁴ *Michigan Order* at ¶¶ 5. See 47 U.S.C. § 271 (c)(2)(B).

support telecommunications services and unbundled elements.”⁶ It stated that nondiscriminatory access to such systems is “critically important to the development of effective, sustained competition in the local exchange market.”⁷

In explaining the central importance of OSS to its analysis of Ameritech’s Application, the Commission stated that “the duty to provide nondiscriminatory access to OSS functions is embodied in other terms of the competitive checklist as well.”⁸ It found that in order for a BOC to be able to demonstrate that it is properly furnishing all of the items enumerated in the competitive checklist, the BOC must show that it is providing nondiscriminatory access to the systems, information and personnel that support those elements or services.⁹ The Commission stated that without “equivalent access” to the BOC’s OSS, many items required by the competitive checklist would not be “practically available.”¹⁰

In rejecting the Application, the Commission found that Ameritech had failed to meet its burden of demonstrating that it provided nondiscriminatory access to all OSS functions as required by Sections 271 and 251 of the Telecommunications Act.¹¹ The Commission also ruled that Ameritech had failed to provide the Commission with the empirical data necessary for it to analyze whether Ameritech was furnishing nondiscriminatory access to all OSS functions.¹² It found that before any future Section 271 request could be granted:

⁵ *Michigan Order* at ¶ 4. *Id.* at ¶¶ 5, 6, 1-5, 106 (reiterating finding that checklist requirements had not been met).

⁶ *Michigan Order* at ¶ 129.

⁷ *Michigan Order* at ¶¶ 3, 130.

⁸ *Michigan Order* at ¶ 132.

⁹ *Michigan Order* at ¶ 132.

¹⁰ *Michigan Order* at ¶ 132.

¹¹ *Michigan Order* at ¶ 158.

¹² *Michigan Order* at ¶ 128.

We would expect Ameritech to demonstrate, at a minimum, that both individual and combinations of unbundled network elements can be ordered, provisioned, and billed in an efficient, accurate and timely manner, and that its operations support systems supporting such functions are designed to accommodate both current demand and projected demand of competing carriers.¹³

SBC now again asks the Commission to approve its Section 271 Application. No such approval is warranted or appropriate, however, because SBC has not remedied the host of problems that compelled rejection of its Application when the Commission first evaluated it. Despite SBC's claims that it has complied with each of the checklist requirements,¹⁴ has "put in place state-of-the-art, independently tested" OSS that successfully process CLEC orders,¹⁵ and has met or surpassed all relevant performance standards for 90 percent of all performance measurements in at least two of the last three months for which data are available,¹⁶ the record provides no basis for the Commission to change the conclusion it reached when considering the Application in 1997. TDS Metrocom submits that due to the absence of record support for SBC's Application and in light of the established legal precedent holding that "It is axiomatic that an agency choosing to alter its regulatory course 'must supply a reasoned analysis indicating that its prior policies and standards are being deliberately changed, not casually ignored,'"¹⁷ the Application must again be rejected.

¹³ *Michigan Order* at ¶ 161.

¹⁴ *Brief in Support of Application by SBC for Provision of In-Region, InterLATA Services in Michigan*, In the Matter of Application by SBC Communications Inc., Michigan Bell Telephone Company, and Southwestern Bell Communications Services, Inc. for Provision of In-Region, InterLATA Services in Michigan, WC Docket No. Docket No. 03-16, DA 03-156 (Jan. 16, 2003) ("*SBC Brief*"), Executive Summary at 1.

¹⁵ *SBC Brief*, Executive Summary at 1.

¹⁶ *SBC Brief*, Executive Summary at 1.

¹⁷ *Action for Children's Television, et. al. v. Federal Communications Commission*, 821 F.2d 741, 745 (DC Cir. 1987), citing *Greater Boston Television Corp. v. Federal Communications Commission*, 444 F.2d 841, 852 (DC Cir. 1970), cert. den'd, 403 U.S. 923, 91 S.Ct. 2233, 29 L.Ed.2d 701 (1971) ("An agency's view of what is in the public interest may change, with or without a change in circumstances. But an agency changing its course must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored, and if an agency glosses over or swerves from prior precedents without discussion it may cross the line from the tolerably terse to the intolerably mute.")

SBC barely acknowledges the existence of the prior rejected Section 271 filing, failing to directly address the host of problems cited by the Commission when it rejected the 1997 Application. Instead, SBC merely notes that the current Application “represents the culmination” of efforts by it, the Michigan PSC, and CLECs to ensure the development of effective local competition and to address concerns identified in previous Michigan Section 271 proceedings.¹⁸

TDS Metrocom strongly disagrees with this characterization, and demonstrates that the continual and significant problems it experiences in its interactions with SBC plainly establish that there is no basis for the Commission to supersede its prior ruling and award Section 271 authority to SBC. The attached Affidavit of Rod Cox provides numerous examples of the significant problems TDS Metrocom has encountered with SBC. The Application must be rejected and no serious consideration should be given to any future SBC Section 271 request for the State of Michigan until SBC rectifies the discriminatory and anticompetitive behavior addressed by the Commission in the *Michigan Order* and detailed herein.

B. The Application Cannot Be Considered Until Testing of SBC’s Performance Metrics and Operations Support Systems Is Complete

As addressed above, this case presents unusual circumstances due to the Commission’s previous rejection of SBC’s Section 271 request for Michigan. In addition to the fact that the fatal deficiencies associated with the unsuccessful 1997 filing persist today and preclude Commission approval of the Application, the Commission must deny SBC’s request for the independent reason that testing of SBC’s performance metrics and OSS is far from complete. Given the ongoing state of such testing in Michigan, it is readily apparent that SBC has still not met the burden of demonstrating that it provides nondiscriminatory access to all of its OSS functions, a requirement cited by the Commission as one of the primary reasons for denying the

¹⁸ *SBC Brief at 2.*

1997 Application.¹⁹ SBC therefore cannot be deemed to be in compliance with the competitive checklist, and the award of Section 271 authority would be inappropriately premature.

Although the Michigan PSC found that SBC complied with the requirements of the competitive checklist, its report contained an astonishing number of qualifications and reservations about a wide array of aspects of SBC's performance.²⁰ In this regard, the facts are simply contrary to SBC's representation that the *Michigan PSC Report* consisted of it "unequivocally endorsing" SBC's Section 271 aspirations.²¹ Significantly, the *Michigan PSC Report* held that "work needs to be done to assure that all aspects of SBC's performance measure reporting system will operate smoothly, accurately, with stability and as expected to assure reliability and timeliness of reported results."²² The Michigan PSC likewise found that BearingPoint's performance metrics tests and Ernst & Young's ("E & Y's") performance audit were incomplete and should be finished.²³

The Michigan PSC's reservations about the propriety of SBC's Section 271 request were so substantial that it felt compelled to issue a simultaneous companion ruling that charted an

¹⁹ See *Michigan Order* at ¶¶ 5, 128, 158, 403. The Commission has repeatedly emphasized that nondiscriminatory access to OSS is a component of checklist compliance in other Section 271 cases. See *In the Matter of Application by BellSouth Corporation, BellSouth Telecommunications, Inc. and BellSouth Long Distance, Inc., for Authorization to Provide In-Region, InterLATA Services in Florida and Tennessee*, Memorandum Opinion and Order, WC Docket No. 02-307, FCC 02-331 (Dec. 19, 2002) at ¶ 68; *In the Matter of Application by Verizon Virginia Inc., Verizon Long Distance Virginia, Inc., Verizon Enterprise Solutions, Inc., Verizon Global Networks, Inc. and Verizon Select Services of Virginia, Inc., for Authorization to Provide In-Region, InterLATA Services in Virginia*, Memorandum Opinion and Order, WC Docket No. 02-214, FCC 02-297 (Oct. 30, 2002) at ¶ 22.

²⁰ See *Report of the Michigan Public Service Commission, In the Matter, on the Commission's Own Motion, to Consider SBC's, f/k/a Ameritech Michigan, Compliance with the Competitive Checklist in Section 271 of the Federal Telecommunications Act of 1996, Case No. U-12320 ("Michigan PSC Report")* (Mi. PSC Jan. 13, 2003) at 3.

²¹ *SBC Brief* at 4.

²² *Michigan PSC Report* at 14.

²³ *Michigan PSC Report* at 22.

elaborate course of future corrective actions that SBC must embark upon.²⁴ The *Michigan PSC Report Companion Order* directs SBC to satisfactorily complete the BearingPoint and E&Y tests, and to submit detailed compliance and/or improvement plans for each of the deficiencies identified by the Commission.²⁵ The substandard areas identified by the Michigan PSC include shortcomings related to pre-order timeliness through the EDI interface,²⁶ interruption of line loss notification issuance,²⁷ customer service records,²⁸ directory listing accuracy,²⁹ trouble report closure coding,³⁰ change management,³¹ line sharing/line splitting,³² and billing auditability.³³ With respect to the latter deficiency, the Michigan PSC noted that although several CLECs “have raised issues related to their inability to audit bills received from SBC and to utilize its billing dispute resolution process once issues arise...SBC has not responded to these issues.”³⁴

Despite its findings that testing of SBC’s performance metrics and OSS was incomplete, and that a host of deficiencies require correction by SBC, the Michigan PSC concluded that “for purposes of checklist support...the Commission believes that Section 271 consideration may proceed.”³⁵ TDS Metrocom submits that the Michigan PSC erred in making this finding, which

²⁴ *Opinion and Order*, In the Matter, on the Commission’s Own Motion, to Consider SBC’s, f/k/a Ameritech Michigan, Compliance with the Competitive Checklist in Section 271 of the Federal Telecommunications Act of 1996, Case No. U-12320 (“*Michigan PSC Report Companion Order*”) (Mi. PSC Jan. 13, 2003) at 3 (The Commission is also issuing a companion order specifying certain further actions and monitoring that the Commission has determined to be necessary”).

²⁵ *Michigan PSC Report Companion Order* at 4.

²⁶ *Michigan PSC Report Companion Order* at 8-9.

²⁷ *Michigan PSC Report Companion Order* at 6.

²⁸ *Michigan PSC Report Companion Order* at 8.

²⁹ *Michigan PSC Report Companion Order* at 8.

³⁰ *Michigan PSC Report Companion Order* at 8-9.

³¹ *Michigan PSC Report Companion Order* at 10.

³² *Michigan PSC Report Companion Order* at 11.

³³ *Michigan PSC Report Companion Order* at 9.

³⁴ *Michigan PSC Report Companion Order* at 9.

³⁵ *Michigan PSC Report* at 22.

is contrary both to the Commission's 1997 Order and to the established principles, discussed herein, that require compliance with the competitive checklist *before* Section 271 authority may be awarded.

In rejecting Ameritech's 1997 Application, the Commission made several findings that are particularly relevant to the instant case. The Commission ruled that "There is... a fundamental difference between making improvements to the OSS access that, at the time of the application, meets the nondiscriminatory requirement, and taking post-filing remedial measures to try to bring the OSS access into compliance during the pendency of the application."³⁶ In other Section 271 cases, the Commission has similarly stated that the competitive checklist must be "fully implemented" before Section 271 authority is given, rather than at some indeterminate date after the BOC has received such an award.³⁷

Furthermore, in the *Michigan Order* the Commission stated that "it is not enough that the BOC prove it is in compliance at the time of filing a section 271 application; it is essential that the BOC must also demonstrate that it can be relied upon to remain in compliance."³⁸ It added that "we will look to see if there are appropriate mechanisms, such as reporting requirements or performance standards, to measure compliance, or to detect noncompliance, by the BOC with their obligations."³⁹ Because testing of SBC's OSS and performance standards for the State of Michigan is not yet complete, the Application must be rejected.

³⁶ *Michigan Order* at ¶ 153.

³⁷ See *In the Matter of Application of Verizon New England Inc., Bell Atlantic Communications, Inc. (d/b/a Verizon Long Distance), NYNEX Long Distance Company (d/b/a Verizon Enterprise Solutions) and Verizon Global Networks Inc., for Authorization to Provide In-Region, InterLATA Services in Massachusetts*, Memorandum Opinion and Order, CC Docket No. 01-9, FCC 01-130 (April 16, 2001) at ¶ 11.

³⁸ *Michigan Order* at ¶ 22.

³⁹ *Michigan Order* at ¶ 22.

Because it is clear that SBC has not yet met its burden of establishing compliance with the requirements of the competitive checklist, the granting of the Application at this juncture would be premature. The compliance and/or improvement plans required by the *Michigan PSC Report Companion Order* are not due until February 13, 2003, and collaborative sessions are scheduled for March 4 and March 5 to discuss the submissions.⁴⁰ SBC must file modified plans based on the collaborative sessions on March 13, 2003,⁴¹ and the Michigan PSC has not announced a resolution date for the issues raised in the submissions. All of the future action required by the Michigan PSC is plainly inconsistent with any finding that SBC is currently in compliance with the applicable checklist requirements, and the Commission would improperly be “putting the cart before the horse” to hold otherwise.

Concerns about premature Section 271 Applications have previously been expressed by several commissioners. In his recent dissenting statement in the proceeding involving Commission approval of SBC’s Section 271 California filing, Commissioner Kevin J. Martin stated, “I believe approval of this application at this point is premature.”⁴² Commissioner Martin explained that SBC had not complied with the entire competitive checklist, and added, “I am not convinced that granting this application at this time is in the public interest.”⁴³ In dissenting from the majority’s approval of Verizon Pennsylvania’s Section 271 Application, Commissioner Michael J. Copps similarly found both that “the record does not demonstrate that Verizon has satisfied the requirements of Section 271 in Pennsylvania,” and that “I deem approval of the

⁴⁰ *Michigan PSC Report Companion Order* at 4-5.

⁴¹ *Michigan PSC Report Companion Order* at 5.

⁴² *Application by SBC Communications, Inc., Pacific Bell Telephone Company, and Southwestern Bell Communications Services, Inc. for Authorization to Provide In-Region, InterLATA Services in California*, Docket No. 02-306, Memorandum Opinion and Order, FCC 02-330 (December 19, 2002) (“*California Order*”), Dissenting Statement of Commissioner Kevin J. Martin at 1.

⁴³ *California Order*, Dissenting Statement of Commissioner Kevin J. Martin at 1.

Application at this point to be premature.”⁴⁴ The Commission should heed the commissioners’ prior statements and prevent the premature award of Section 271 authority in the instant case. Because SBC clearly has not met its burden of demonstrating compliance with all applicable legal requirements, its Application must be rejected.

II. GARBAGE IN, GARBAGE OUT: SBC’S DATA INTEGRITY IS INSUFFICIENT AND CANNOT FURNISH THE BASIS FOR ADEQUATE PERFORMANCE METRICS THAT SUPPORT SECTION 271 ENTRY

A. SBC Has Failed to Pass the Master Test Plan Regarding the Integrity of its Data

The Michigan PSC has acknowledged that SBC has yet to satisfy the requirements for the Performance Measurement Review (“PMR”) regarding the integrity of SBC’s data that underlies its performance measurement results:

PMR 4 test relates to data integrity. BearingPoint’s test evaluates the accuracy and completeness of data transferred from the point of collection to the point of reporting and as it is converted from raw to processed form. *At the time of BearingPoint’s October 30, 2002 report, tests for 32 of the 43 applicable test criteria were incomplete and 11 were not satisfied.*⁴⁵

Of the 43 applicable test criteria for data integrity under PMR 4, SBC has satisfied *none*.⁴⁶ SBC has demonstrated 0% compliance with PMR 4, and has presented no confirmation that the integrity of any of its data is reliable.⁴⁷ Moreover, SBC gives short shrift to compliance

⁴⁴ *Application of Verizon Pennsylvania, Inc., Verizon Long Distance, Verizon Enterprise Solutions, Verizon Global Networks, Inc., and Verizon Select Services, Inc. for Authorization to Provide In-Region, InterLATA Services in Pennsylvania*, (“*Pennsylvania Order*”), Dissenting Opinion of Commissioner Michael J. Copps at 8 (September 19, 2001).

⁴⁵ *Michigan PSC Report* at 10 (emphasis added).

⁴⁶ *See also SBC Brief*, Ehr Affid. at ¶ 234.

⁴⁷ The *Michigan PSC Report* states that BearingPoint updated its information regarding PMR 4 as of December 2002. *Id.* at 17, n.41. That update, however, does not appear on BearingPoint’s www.osstesting.com website or on the Michigan PSC website. SBC explains that the update was related to the audit reports relating to Ohio and Illinois. Ehr Affidavit, ¶ 258. Even assuming the description of the update to be true, SBC has edged forward by satisfying only 2 of 40 applicable test criteria (three criteria were recharacterized as not applicable, according to the Michigan PSC). This marginal improvement hardly demonstrates that SBC’s data is sufficiently reliable to draw reasonable conclusions based on SBC data.

with PMR 4 in its supporting documentation.⁴⁸ It does not even expect to complete testing for PMR 4 before the end of May 2003.⁴⁹ This date is well beyond the April 16, 2003 deadline for the Commission to issue an order in this proceeding, so the Commission will not have the benefit of the results of that testing. Yet integrity of data is essential if any of the performance measurements have any validity whatsoever. The axiom “garbage in, garbage out” is fully applicable to all statements or assessments of SBC’s compliance with the checklist based upon the performance measurement criteria unless and until SBC passes PMR 4.

SBC contends that even though the BearingPoint test is ongoing, the FCC is not precluded from assessing checklist compliance.⁵⁰ In support, SBC asserts that “the FCC considers and gives substantial weight to the BOC’s data, notwithstanding the fact that it is still the subject of a general audit, so long as there are sufficient other assurances of reliability[.]”⁵¹ TDS Metrocom submits that there can be no assurances of reliability that would be sufficient to rely on SBC’s data when SBC has not yet passed a single test criterion from the Master Test Plan for data integrity. Clearly, even though SBC has had seven years to implement the local competition provisions of the Telecom Act, SBC’s application for 271 authority is premature. The Michigan PSC also concludes that “these tests must continue but at present provide little evidence on which reliance of June, July, and August 2002 metrics results may be based.”⁵²

B. The Ernst & Young Audit Report Should Not Be Considered

Instead of simply withholding its recommendation on SBC’s application as the Michigan PSC should have done, the Michigan PSC relied upon the audit performed by Ernst & Young to

⁴⁸ See *SBC Brief*, Ehr Affid. ¶¶ 257-259.

⁴⁹ *Id.* at ¶ 259.

⁵⁰ *SBC Brief* at 12-13.

⁵¹ *Michigan PSC Report* at 11.

⁵² *Michigan PSC Report* at 18.

validate the integrity of SBC's data. Reliance on the E & Y report would be completely misplaced. Granting SBC section 271 authority on the grounds that the E & Y audit report validated the integrity of SBC's data would be arbitrary and capricious.

The E & Y report was generated ostensibly because SBC was not satisfied with the pace of BearingPoint's review of PMR 4:

On July 30, 2002, Ameritech Michigan filed a Notice ("July 30, 2002 Notice") in this case advising that it did not believe that KPMG Consulting, now known as BearingPoint, would complete its on-going reviews for the PMR-4 (Metrics Data Integrity) and PMR-5 (Metrics Calculations and Reporting) portions of the Performance Metrics Review Test before Ameritech Michigan made this filing of commercial performance results. In anticipation of this situation, Ameritech Michigan engaged E&Y in June 2002 to conduct a separate, independent audit of Ameritech Michigan's implementation of the Michigan Commission's performance business rules and of the accuracy and reliability of Ameritech Michigan's performance measurement reporting systems and processes (the "E&Y audit") to supplement the record on this issue. As the July 30, 2002 Notice indicated, the E&Y audit is not intended to replace or modify the intent or scope of BearingPoint's test, consistent with the terms of the Master Test Plan, Version 3.0, dated April 2, 2002.⁵³

Although the E&Y report was prepared and submitted ostensibly because BearingPoint's review was not being completed on SBC's particular schedule, it is more likely that SBC knew it was failing and would continue to fail the BearingPoint testing for data integrity. Thus, if SBC had any hope of obtaining section 271 authority in Michigan, it needed some sort of stop-gap endorsement of its data collection and processing practices.

The likely candidate to give SBC the endorsement it needed, of course, would be the accounting firm that also happens to be the auditor for SBC's corporate finances.⁵⁴ The mere fact that SBC relies upon E & Y to provide an alternative audit report to support SBC's section

⁵³ *Ameritech Michigan's Submission of Three Consecutive Months of Actual Performance Results and Independent Performance Audit Reports Issued by Ernst & Young*, Mich. PSC Case No. U-12320 (Oct. 21, 2002) at 101-102 (*SBC Brief*, App. C, Tab 110).

⁵⁴ *SBC Brief*, Dolan/Horst Affidavit, Att. A at 2. SBC Communications, Inc. is number 27 on the Fortune 500 with annual revenues in excess of \$45 billion. See <http://www.fortune.com/fortune/fortune500>.

271 application raises sufficient suspicions of impropriety to warrant disregarding the E &Y audit report. The potential conflicts of interest should give the Commission pause.

Nevertheless, the Michigan PSC acceded to SBC's proposal to change its performance-review horses midstream. Yet the grounds for allowing SBC to supplement the record with an alternative audit report regarding data integrity had absolutely nothing to do with data integrity. In support of its view to permit the E &Y audit to proceed, the Michigan PSC stated, "Since the Commission approved the test plan, there have been significant changes both in Michigan and nationally with respect to competitive entry into telecommunications markets."⁵⁵ The Michigan PSC erred by agreeing to consider the E &Y report, and the Commission should not compound the error by considering the substance of the E &Y report here.

At the same time, as stated in the passage from the *Michigan PSC Report* quoted above, SBC acknowledges that the E &Y audit is necessarily subordinate to the BearingPoint audit. Therefore, regardless of whether SBC receives a favorable recommendation on data integrity from E &Y, SBC must also pass BearingPoint's audit of PMR 4 before SBC can be considered in compliance with the Master Test Plan. Until those results are reported, it shouldn't make a whit of difference whether E &Y considers SBC to be in compliance with PMR 4: relying on the E &Y audit raises the distinct possibility that SBC will be granted 271 authority, only to fail the official BearingPoint performance metrics review for the integrity of SBC's data. Unless the Commission is willing to revoke SBC's section 271 authority if SBC does not satisfy PMR 4 by a date certain, granting SBC section 271 authority pending completion of the BearingPoint testing is a recipe for failure. SBC certainly knows that the Commission has never revoked a BOC's 271 authority; granting it now gives SBC license to continue to fail the BearingPoint tests

⁵⁵ Mich. PSC Case No. U-12320, Opinion and Order, Sep. 16, 2002, at 2.

with little if any risk. For this reason, choosing a subordinate but favorable audit report even before the primary audit has been completed is arbitrary and capricious.

Moreover, there is good reason why BearingPoint's review of PMR 4 is taking as long as it has—SBC's OSS is woefully deficient. BearingPoint has made clear that the Master Test Plan for the SBC OSS system is substantially the same, or perhaps even weaker, than the third-party tests of the OSS systems of Verizon, Qwest, and BellSouth. There is no reason to allow SBC to be tested on more lenient grounds than the other BOCs just so that SBC may also obtain section 271 authority in Michigan.

C. Even if it Were Considered, the Ernst & Young Audit Report Does Not Validate the Integrity of SBC's Data

To the extent the Ernst & Young audit was intended to provide evidence of satisfaction of evaluation criteria, it fails to accomplish that. In performing its examination, E & Y did not apply the methodology that was initially contemplated by the master test plan. Instead, E & Y applied a less rigorous "sampling/audit" approach. Notwithstanding the inherent shortcomings and limitations with respect to the E & Y review, even its report does not show successful operation of SBC's OSS and does not show the performance measurements are being made in compliance with the Business Rules.

On its face, the E & Y report states that "our examination disclosed that certain processes used to generate performance measurements, primarily related to the manual collection and processing of data and computer program coding and modifications, did not include certain controls to ensure the accuracy of the reported performance measurements."⁵⁶ Similarly, the E & Y reports state that "our examination also disclosed certain instances of material noncompliance

⁵⁶ *SBC Brief*, Dolan/Horst Affid. Att.C at 1.

with the Business Rules.”⁵⁷ Despite the less rigorous approach applied by E & Y than initially contemplated by the Master Test Plan, the E & Y report demonstrates that SBC’s OSS and efforts to report its performance measurements in compliance with the Business Rules are seriously flawed.

These facts are clearly demonstrated by a review of Attachment A of the E & Y report. Under the heading “Other Identified Issues,” E & Y states that “the following performance measurements were reported in error during the Evaluation Period.”⁵⁸ This portion of the E & Y report describes thirty-two (32) separate errors impacting over seventy (70) different performance measures. The E & Y report then states that the results for all these performance measurements “have not been restated and have not been corrected by the Company as of the date of this report.” This portion of the E & Y report alone demonstrates that SBC is not properly complying with the Business Rules and that it is not even possible to restate the impact of SBC’s noncompliance on the accuracy of its performance measurement data. As a result, SBC cannot show successful operation of its OSS because it lacks control over the accuracy and completeness of its reported data and it is not in compliance with the Business Rules. Until these issues are properly addressed, any performance measurement data filed by SBC will be unreliable and meaningless.

It is also critical to note that in many instances where the E & Y report states a restatement has occurred, E & Y also states that it has not tested the accuracy of the restatement. For example, for Items 2(c), 2(d), and 2(h), the E & Y report states that “E & Y has not tested the accuracy of the restatements as of the date of this report.”⁵⁹ Yet, the alleged restatements impact

⁵⁷ *SBC Brief*, Dolan/Horst Affid. Att. B at 1.

⁵⁸ *SBC Brief*, Dolan/Horst Affid. Att. B at 11.

⁵⁹ *SBC Brief*, Dolan/Horst Affid. Att. B, Att. A at 3-4.

scores of performance measures. Items 2(c), 2(d), and 2(h) fell under category II(a) of the E & Y Report related to “Restatements That Impacted Parity or Benchmark Attainment or Failure.” Thus, with respect to many of the restatements that have been made, one cannot be certain that the restatements were properly performed.

The Supplemental Filings related to the E & Y report do not resolve these concerns. No mention of testing for accuracy related to items 2(c), 2(d), and 2(h) can be found in SBC’s responsive reports in December 2002,⁶⁰ or in January 2003.⁶¹ Moreover, in December 2002, E&Y disclaimed any independent review of implementation of system changes: “The Company’s Management is responsible for the assertion [of compliance with the required changes].”⁶² Likewise, in January 2003, “Management is responsible for the Company’s assertions regarding the status of the Company’s corrective action.”⁶³ Rather than actually performing an audit of the revised data, E&Y appears to have only discussed implementation of the proposed changes with SBC, and accepted SBC’s representations at face value without confirming what they were being told.

Also, E & Y lists a host of errors which have not resulted in restatements, but which the report claims have been corrected on a prospective basis. In Item III.4, for example, E & Y states that it “has not tested the accuracy of the restatement as of the date of this report.” Similarly, the report also states that the “correction of these issues has not been verified by E & Y as of the date of this report,” (Item III.5), or that E & Y “did not verify this change was

⁶⁰ *SBC Brief*, Dolan/Horst Affid. Att. F, App. A., Att. 2, 3-7.

⁶¹ *SBC Brief*, Dolan/Horst Affid. Att. H.

⁶² *SBC Brief*, Dolan/Horst Affid. Att. F at 1.

⁶³ *SBC Brief*, Dolan/Horst Affid. Att. H at 1.

implemented,” (Item III.8). Again, the Supplement Reports show no verification that the changes have been implemented effectively.⁶⁴

The E & Y report offers no reasonable support for a claim by SBC that it either has effective controls over the accuracy and completeness of its reported data or its reported performance measures are in compliance with the Business Rules. In fact, the E & Y report demonstrates that a more rigorous and detailed level of testing is both appropriate and necessary.

D. SBC’s Reliance on “Other Indicia of Reliability” Is Meritless

SBC attempts to bolster its application by referring to “other indicia or reliability” to assure the validity of its performance data.⁶⁵ Yet consideration of such additional factors would be unnecessary if SBC were able to satisfy PMR 4 under the BearingPoint test. Moreover, the purpose of an independent third-party test of SBC’s OSS was to be able to avoid having to rely on a subjective analysis of “other indicia of reliability” that might suggest reliability without actually proving it.

In addition, SBC is simply wrong that no CLEC has challenged the integrity of SBC’s data.⁶⁶ As the attached Affidavit of Rod Cox demonstrates, TDS brought to SBC’s attention a miscalculation of Performance Measurement 9 because SBC was missing a file that reflected a certain interface type. Cox Affid. at ¶ 9. SBC admitted the error. Whatever corrective actions SBC may have taken to resolve this particular problem, the fact that errors in SBC’s performance data exist and must be pointed out by wholesale customers of SBC proves that SBC’s data is not reliable.

⁶⁴ *SBC Brief*, Dolan/Horst Affid. Att. F., Exh. B., Att. 3 at 1; Appendix A, Att. 2 at 17-19.; Dolan/Horst Affid. Att. H, Att. A at 1-2.

⁶⁵ *SBC Brief* at 13, Ehr Affid. ¶¶ 265-276.

TDS has specific examples of the unreliability of SBC data. The loop qualification information provided by SBC is often inaccurate. After TDS observed significant discrepancies between the data reported in the two loop pre-qualification tools provided by SBC, Verigate and DTI, TDS Metrocom tracked a sample of 125 DSL orders. Cox Affid. at ¶¶ 22-25. The results showed that in 36 cases (28.8%), the data from the two tools was significantly different. A summary of the data is attached to the Cox Affidavit. To give a few examples, Verigate reported a loop length of approximately 3,900 feet while DTI stated that the same loop was more than 18,000 feet long. In another case, Verigate reported a loop length of 8,000 feet while DTI said it was more than 20,000 feet. These errors have serious consequences. Based on Verigate data that stated that a particular loop was less than 6,000 feet long, TDS ordered DSL service on the loop, and the order was processed by SBC. The technician installing the order tested the line and found that it was 23,000 feet, beyond the limits of effectiveness for a DSL line. TDS had to explain to its customer that, in fact, it was unable to provide it DSL service. Even though SBC is solely to blame for this error, it gives the erroneous appearance that TDS is unable to provide service effectively.⁶⁷

Further, SBC's performance measurements fail to account for these errors. Even though TDS was experiencing an error rate of 28.8%, SBC was reporting that the loop make up information provided to TDS Metrocom was "100% accurate" under Performance Measurement 1.2. Cox Affid. ¶ 24. Attached to the Cox Affidavit is the report from SBC in Michigan erroneously indicating near- perfect compliance with its loop qualification information.

Also attached to the Cox Affidavit is a report obtained from SBC's CLEC wholesale website. It summarizes the number of restatements of data that SBC has posted for Michigan

⁶⁶ *SBC Brief* at 17.

⁶⁷ The sample of DSL orders included lines in Michigan, Wisconsin, and Illinois.

since November 2001. The high number of restatements indicates that SBC has very little control over its data at the time it calculates its performance measurements, indicating very little reliability in the data.

III. SBC CANNOT ESTABLISH COMPLIANCE WITH THE REQUIREMENTS OF CHECKLIST ITEM 2: NONDISCRIMINATORY ACCESS TO NETWORK ELEMENTS/OPERATIONS SUPPORT SYSTEMS

A. Legal Standard

Checklist Item 2 requires that a BOC provide non-discriminatory access to network elements.⁶⁸ OSS and the information they contain are critical to the ability of competing carriers to use network elements and resale services to compete with BOCs.⁶⁹ In analyzing whether a BOC provides non-discriminatory access to its OSS for Section 271 purposes, the Commission has adopted a two-step approach. First, the Commission determines “whether the BOC has deployed the necessary systems and personnel to provide sufficient access to each of the necessary OSS functions and whether the BOC is adequately assisting competing carriers to understand how to implement and use all of the OSS functions available to them.”⁷⁰ The Commission has traditionally focused on the functionality and capacity of the BOC’s OSS in its analysis of this step.

In the second step, the Commission determines “whether the OSS functions provided by the BOC to competing carriers are actually handling current demand and will be able to handle

⁶⁸ 47 U.S.C. § 271(c)(2)(B)(ii).

⁶⁹ *Michigan Order* at ¶ 130.

⁷⁰ *Michigan Order* at ¶ 136. See *Application by SBC Communications, Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance Pursuant to Section 271 of the Telecommunications Act of 1996 to provide In-Region, InterLATA Services in Texas*, CC Docket No. 00-65, FCC 00-238 at ¶ 96 (June 30, 2000) (“*Texas Order*”).

reasonably foreseeable demand volumes.”⁷¹ It looks at performance measures and other evidence of commercial readiness. The Commission evaluates performance in the five stages of OSS – pre-ordering, ordering, provisioning, maintenance/repair and billing. With respect to the instant Application, both the general functionality/capability of SBC’s OSS and its performance at the various stages of the OSS process demonstrate that SBC is not satisfying the requirements of the competitive checklist in regard to OSS.

B. The Functionality and Capability of the SBC OSS System is Woefully Deficient

As previously noted, the Commission requires a 271 applicant to demonstrate that its OSS is designed to accommodate both current demand and projected demand for competing carriers’ access to OSS functions.⁷² There are fundamental concerns about the functionality and capacity of SBC’s Michigan OSS systems. In the *Michigan PSC Report Companion Order*, substantial reservations about SBC’s OSS led the Michigan PSC to take the unusual step of requiring remedial action by SBC in several areas. Furthermore, TDS Metrocom is aware of serious questions as to the functionality and capacity of SBC’s OSS as demonstrated below. The fact that many of these issues are still festering suggest that the root cause of these problems has not been fixed.

As is demonstrated herein, SBC’s OSS systems contain numerous deficiencies in the various stages of OSS. It is likely that the continued testing required by the Michigan PSC will unearth even more problems, the cumulative effect of which will further demonstrate that SBC has not met the applicable checklist requirements. SBC should be required to demonstrate a period of sustained compliance with the applicable performance standards in regard to OSS prior to its Application being approved.

⁷¹ *Michigan Order* at ¶ 138; *See Texas Order* at ¶ 96.

⁷² *Id.* at ¶ 97.

1. SBC Inconsistently Decides What Qualifies as a “Project” Under the Performance Measurements

SBC’s documentation is incomplete and inconsistent with respect to orders that qualify as “Projects” under the performance measurements. “Projects” are service orders of sufficient quantity that they are subject to a separate ordering process and a negotiated due date. SBC Accessible Letter CLECAM02-406 says, “One or more PONs where quantities of lines/circuits/trunks etc. for the same location, same end user, and for the identical service configuration reach a prescribed threshold which will necessitate due date negotiations to secure a FOC are considered ‘Projects.’” The same Letter says, “Quantities that require TBD or negotiated due date dates are identified in the Ameritech Business Rules Performance Measurements.” The Business Rules are important because eight performance measurements measure Projects. The problem is that the Business Rules applicable to Projects are inconsistent. Several of the Business Rules define Projects as orders of more than 100 lines, yet others refer to SBC’s CLEC website for the definition. SBC’s CLEC website define Projects as orders of more than 20 lines. While it should be an easy fix to revise the Business Rules so that all of them define Projects as orders of more than 100 lines, this example demonstrates the difficulties CLECs have in navigating through SBC’s woeful OSS documentation.

2. SBC’s Transition to LSOG5 Was Poorly Conceived

TDS Metrocom also experienced significant problems when SBC switched its Local Service Ordering Guidelines (“LSOG”) from Version 4 to Version 5. Cox Affid. at ¶¶ 12-21. The problems experienced by TDS Metrocom demonstrate that the Change Management Process is either ineffective, or SBC is not using it properly. The Commission previously has stressed the importance of effective Change Management. In particular, the Commission has stated the

importance of “the availability of a stable testing environment that mirrors production.”⁷³

Although SBC had tested the transition from LSOG4 to LSOG5 before its official release, the test environment was not sufficiently rigorous to identify problems in the system that needed corrections to accomplish the transition seamlessly. Thus, TDS Metrocom was not able to prepare for the transition adequately, and numerous problems ensued. Attached to Mr. Cox’s Affidavit is a Table identifying the issues that arose after SBC had migrated to LSOG5 and TDS Metrocom’s systems remained on LSOG4. TDS Metrocom was able to document 951 orders that TDS Metrocom attempted to submit to SBC for processing and that were impaired by the transition. The Table indicates issues that are still unresolved. The underlying problem was never fixed, and TDS Metrocom is using a manual workaround to handle it. Cox Affid. ¶ 12-14. When SBC stops providing support for LSOG4 and TDS Metrocom is required to migrate to LSOG5, the manual workaround will no longer be effective but TDS Metrocom will have no assurances that the same problems will not arise under the new platform. SBC’s Change Management Process is severely flawed.

3. SBC Continues to Engage in On-the-Fly Revisions to Order Processing

As discussed above, TDS Metrocom experienced significant problems with SBC’s loop qualification data when it attempted to identify and order loops to provide DSL service. In response, SBC referred TDS Metrocom to its “YZP Process” for ordering DSL lines. When it was rolled out, the YZP Process was woefully deficient in terms of documentation of the process and the procedures. The YZP process was put in place by SBC without the benefit of the Change Management Process or CLEC Users Forum established by SBC. Cox Affid. at ¶ 26.

⁷³ *New York Order* at ¶ 103; *New Jersey Order*, Appendix C, ¶ 42.

4. TDS Metrocom Has Had Significant Problems with SBC Maintenance and Repair

TDS Metrocom has had significant problems with maintenance and repair provided by SBC. Although the majority of SBC technicians are honest, knowledgeable and hard working, a disturbing number of technicians are causing unnecessary service dispatches for TDS Metrocom, missing appointments with TDS Metrocom customers, miscoding tickets, extending out of service conditions for TDS Metrocom's end users, and more than likely charging TDS Metrocom invalid trouble isolation charges. Cox Affid. at ¶¶ 27-43.

There appears to be no way to adequately monitor whether SBC field technicians are accurately and properly coding service tickets. This is extremely important because many performance measures, and the corresponding remedy obligations, have exclusions for events that are coded as either "no trouble found" ("NTF") or "customer premise equipment related." Trouble Isolation Charges ("TICs") are the fees that SBC charges to investigate problems on lines to customers served by TDS Metrocom when the SBC technician determines that SBC's network is not the cause of the line problem.

A perfect example of this activity is a TDS Metrocom customer that was receiving incoming calls for a different telephone number than its own. TDS Metrocom isolated the trouble to SBC's network. SBC dispatched a technician to the customer's premises and closed out the trouble as "No Trouble Found," yet mysteriously, the trouble for the customer was resolved by the time the SBC technician left the premises. It is not technically possible for a customer to be able to correct this type of problem themselves. Nonetheless, TDS Metrocom was able to identify a \$71.00 TIC for this trouble ticket. Cox Affid. ¶ 35.

The miscoding of service tickets has several impacts on CLECs. First, it causes remedies to be understated since such reporting necessarily excludes these outages/service issues from the items for which compensation is due. Second, miscoding by field technicians calls into question the accuracy of the entire performance reporting system since there appears to be no adequate means for independent verification. Finally, miscoding subjects CLECs to TICs that the CLEC has little, if any, ability to avoid. Mr. Cox provides examples of poor performance with respect to maintenance and repair. Cox Affid. at ¶¶ 36-43.

IV. SBC FAILS TO SATISFY CHECKLIST ITEM 2 BECAUSE IT DOES NOT PROVIDE READABLE, AUDITABLE AND ACCURATE WHOLESALE BILLS

In the *Pennsylvania Order*, the Commission stated that Verizon “must demonstrate that it can produce a readable, auditable, and accurate wholesale bill in order to satisfy its nondiscrimination requirements under checklist item 2.”⁷⁴ CLECs need readable, auditable, and accurate wholesale bills for a number of reasons:

First, a competitive LEC must spend additional monetary and personnel resources reconciling bills and pursuing bill corrections. Second, a competitive LEC must show improper overcharges as current debts on its balance sheet until the charges are resolved, which can jeopardize its ability to attract investment capital. Third, competitive LECs must operate with a diminished capacity to monitor, predict and adjust expenses and prices in response to competition. Fourth, competitive LECs may lose revenue because they generally cannot, as a practical matter, back-bill end users in response to an untimely wholesale bill from an incumbent LEC. Accurate and timely wholesale bills in both retail and BOS BDT formats thus represent a crucial component of OSS.⁷⁵

SBC claims that “Michigan Bell’s billing performance data demonstrate that Michigan Bell provides timely, accurate, and complete usage data and bills.”⁷⁶ In fact,

⁷⁴ *Pennsylvania Order* at ¶ 22.

⁷⁵ *Id.* at ¶ 23 (citations omitted).

⁷⁶ *SBC Brief* at 53.

nothing could be further from the truth. Since TDS Metrocom began operations in 1998, it has *never* received an accurate bill from SBC. Cox Affid. ¶ 44. TDS Metrocom has a dedicated billing team comprised of five (5) employees who spend an estimated thirty percent (30%) of their time reviewing SBC bills and disputing billing inaccuracies and improper charges. Mr. Cox provides specific examples of SBC billing practices that have cost TDS Metrocom considerable expense and delay, thereby impairing its ability to compete by having to redirect limited resources into resolving billing disputes. Cox Affid. ¶¶ 46-68. One representative example is the instance in which SBC was billing TDS Metrocom for the same circuit on two separate collocation invoices for a period of five (5) months. After conducting research, TDS Metrocom discovered that SBC switched the billing for this circuit from one invoice to another and, in the midst of that unexplained “invoice change,” it proceeded to double bill TDS Metrocom for those five (5) months by billing for the same circuit on both invoices. Cox Affid. ¶ 53.

Despite these examples, SBC maintains that it is satisfying the performance measurements for billing.⁷⁷ A closer inspection, however, reveals that the performance measurements are not capturing information about backbilling, incorrect rates, double billing, or miscoding. Performance Measurement 14, Billing Accuracy, for example, measures whether CLEC and retail bills are consistent with billing tables. This is akin to measuring whether or not your printed receipt at the grocery store matches the data in the bar code scanner that produces the printed receipt. It does nothing to assess whether or not the price in the scanner is correct or that it matches the posted price for the product. (i.e. the tariffed rate for the UNE). The PM that comes closest to capturing the problems

⁷⁷ *SBC Brief* at 53-54.

encountered by TDS Metrocom, PM 17 Billing Completeness, actually reports that SBC is achieving a 90% rate of compliance. *See Cox Affid.* ¶ 46. It simply makes no sense that SBC can be achieving high 90% compliance under the billing performance measurements, while TDS Metrocom has never received an accurate bill from SBC and must dedicate more than 50 employee-hours every week to review, correct, and dispute SBC's invoices.

A key problem is that SBC is not proactively monitoring its own bills. SBC must be required to develop a validation process to ensure the accuracy of its bills. BearingPoint has noted this in its testing of SBC's OSS in Michigan. BearingPoint opened Exception 119 under the category "Billing Accuracy and Completeness." This exception says, "SBC does not follow a systematic process for verifying the accuracy and ensuring proper formatting of bills produced by the Carrier Access Billing System (CABS)." Until SBC satisfies this Exception, it cannot be considered in compliance with the competitive checklist. *Cox Affid.* ¶ 47.

TDS Metrocom has taken steps to attempt to remove the disparity between actual performance results and the results reported by SBC under the existing and inadequate PMs. TDS Metrocom, together with other CLECs, have proposed performance measurements that actually measure SBC's performance in the billing category. TDS Metrocom has proposed the following performance measurements to more accurately assess the problems with SBC's billing systems: (1) Percent of errors corrected and updated in Billing Tables within 30 Days; (2) Percent of required billing table updates not completed within 30 Days; (3) Percent of Billing Disputes Acknowledged within 2 Days; and (4) Percent of Billing Disputes Resolved within 30 Days.

As the Commission can see, SBC's wholesale billing operations are woefully inadequate. SBC's poor provisioning of wholesale bills to TDS Metrocom has impaired TDS Metrocom's ability to provide local exchange service by diverting personnel and financial resources in order to resolve these unnecessary disputes. The Commission should reject SBC's application for failing to satisfy checklist item 2.

V. SBC CANNOT ESTABLISH COMPLIANCE WITH THE REQUIREMENTS OF CHECKLIST ITEM 4: NON-DISCRIMINATORY ACCESS TO UNBUNDLED LOCAL LOOPS

SBC cannot meet Checklist Item 4 because of its recently adopted policy of requiring a separate process, outside of normal conditioning for the removal of so-called "non-excessive bridged taps (less than 2,500 feet)" in connection with the provisioning of DSL-capable loops.

TDS Metrocom has recently filed a complaint with the Public Service Commission of Wisconsin on SBC's refusal to remove what they have termed "non-excessive bridged taps," or bridged taps of less than 2,500 feet. Although the complaint was filed in Wisconsin, SBC's practices underlying the complaint are also occurring in Michigan and constitute a violation of FCC regulations. Under those regulations, "The incumbent LEC shall condition lines required to be unbundled under this section whenever a competitor requests."⁷⁸ Line conditioning is defined as "the removal from the loop of any devices that may diminish the capability of the loop to deliver high-speed switched wireline telecommunications capability, including xDSL service. Such devices include, but are not limited to, bridge taps, low pass filters, and range extenders."⁷⁹ SBC fails both of these requirements. Cox Affid. ¶¶ 69-82.

⁷⁸ 47 C.F.R. § 51.319(3).

⁷⁹ *Id.*

Over the last several years when TDS Metrocom requested conditioning of lines for DSL compatibility, all bridged taps were removed without incident. Beginning in February 2002 SBC changed its internal policies and not only stopped removing bridged taps of less than 2,500 feet on new orders, but actually took a number of current TDS Metrocom DSL customers out of service by apparently placing bridged taps on their lines. Cox Affid. ¶ 71.

For non-excessive bridged taps, the impact to TDS Metrocom was a requirement to use new ordering codes if TDS Metrocom wanted to get conditioning for both short and long bridged taps. This was a change in practice from what TDS Metrocom had been doing for a couple of years. Once again, SBC changed its policy without notice (even though such a change violated federal law), TDS Metrocom was forced to complain to SBC about problems with getting properly conditioned loops, and SBC subsequently announced the change in policy to the CLEC community.

VI. SBC'S APPLICATION IS NOT IN THE PUBLIC INTEREST

A. The Standard

Under Section 271(d)(3)(C) of the Act, the Commission may not grant Section 271 authorization unless it is consistent with the “public interest, convenience and necessity.”⁸⁰ The public interest standard was intended to mirror the broad public interest authority the Commission had been given in other areas.⁸¹ The legislative history of the 1996 Act evidences an unequivocal intent on the part of Congress that the Commission “in evaluating section 271 applications . . . perform its traditionally broad public interest analysis of whether a proposed

⁸⁰ 47 U.S.C. § 271(d)(3)(C).

⁸¹ See 47 U.S.C. § 241(a); § 303; § 309(a); § 310(d).

action or authorization would further the purposes of the Communications Act.”⁸² As a Senate Report noted, the public interest standard is “the bedrock of the 1934 Act, and the Committee does not change that underlying premise through the amendments contained in the bill.”⁸³ The Report went on to add that “in order to prevent abuse of [the public interest standard], the Committee has required the application of greater scrutiny to the FCC’s decision to invoke that standard as a basis for approving or denying an application by a Bell operating company to provide interLATA services.”⁸⁴

The Commission recognized the huge import that Congress placed on the public interest standard by crafting a strong definition of the standard in the Section 271 context. It noted that under the standard it was given “broad discretion to identify and weigh all relevant factors in determining whether BOC entry into a particular in-region market is consistent with the public interest.”⁸⁵ The Commission determined that as part of this broad authority it should consider factors relevant to the achievement of the goals and objectives of the 1996 Act.⁸⁶ It explicitly recognized that “Congress did not repeal the MFJ in order to allow checklist compliance alone to be sufficient to obtain in-region, interLATA authority.”⁸⁷

Predictably, the BOCs initially attempted to dilute the public interest standard. For instance, BellSouth argued that the public interest requirement is met whenever a BOC has implemented the competitive checklist.⁸⁸ BellSouth also contended that the Commission’s

⁸² *Michigan Order* at ¶ 385.

⁸³ *Michigan Order* at ¶ 385, n. 992, *quoting*, S. Rep. Mo. 23, 104th Cong., 1st Sess. 44 (1995).

⁸⁴ *Michigan Order* at ¶ 385, n. 992, *quoting*, S. Rep. Mo. 23, 104th Cong., 1st Sess. 44 (1995).

⁸⁵ *Michigan Order* at ¶ 383.

⁸⁶ *Michigan Order* at ¶ 385.

⁸⁷ *Michigan Order* at ¶ 385.

⁸⁸ *In the Matter of the Application of BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc., for Provision of In-Region, InterLATA Services in Louisiana*, Memorandum Opinion and Order, CC Docket No. 98-121, FCC 98-271 (1998) (“1998 Louisiana Order”) at ¶ 361.

responsibility to evaluate public interest concerns is limited narrowly to assessing whether BOC entry would enhance competition in the long distance market.⁸⁹ The Commission rejected both of these claims and reaffirmed that it will consider “whether approval of a section 271 application will foster competition in all relevant telecommunications markets (including the relevant local exchange market), rather than just the in-region, interLATA market.”⁹⁰ The Commission stated that it would not be satisfied that the public interest standard has been met unless there is an adequate factual record that the “BOC has undertaken all actions necessary to assure that its local telecommunications market is, and will remain, open to competition.”⁹¹ As the Department of Justice noted, in-region interLATA entry by a BOC should be permitted only when the local markets in a state have been “fully and irreversibly” opened to competition.⁹²

Senators Burns, Hollings, Inouye, and Stevens reaffirmed the importance of the public interest standard in a letter to Chairman Powell.⁹³ In that letter the Senators stated that:

[t]he public interest requirements were added to Section 271 to ensure that long distance authority would not be granted to a Bell company unless the commission affirmatively finds it is in the public interest. Meaningful exercise of that authority is needed in light of the current precarious state of the competitive carriers which is largely due to their inability to obtain affordable, timely, and consistent access to the Bell networks.⁹⁴

⁸⁹ *1998 Louisiana Order* at ¶ 361.

⁹⁰ *1998 Louisiana Order* at ¶ 361. Congress rejected an amendment that would have stipulated that full implementation of the checklist satisfies the public interest criterion. *Michigan Order* at ¶ 389.

⁹¹ *Michigan Order* at ¶ 386.

⁹² *In the Matter of Application of Verizon Pennsylvania, Inc., et al., for Authorization to Provide In-Region, InterLATA Services in Pennsylvania*, CC Docket No. 01-138, Evaluation of the United States Department of Justice at 2 (July 26, 2001); *See also Michigan Order* at ¶ 382.

⁹³ Letter from Senators Conrad Burns, Ernest F. Hollings, Daniel K. Inouye, Ted Stevens to The Honorable Michael K. Powell, Chairman, Federal Communications Commission (April 17, 2001).

⁹⁴ *Id.* at 3.

The Commission has traditionally focused on both the current state of competition in a particular market and assurances of future compliance to ensure future competition in evaluating the public interest standard.⁹⁵

More recently, however, the Commission has weakened the public interest standard and has adopted positions consistent with the BOC attempts to subsume the public interest analysis under considerations of checklist compliance. In the *Georgia/Louisiana Order*, the Commission virtually tied approval to checklist compliance: “[A]lthough 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 nor extend the terms of the competitive checklist of section 271(c)(2)(B).”⁹⁶

Further, the Commission has given applicants substantial latitude in demonstrating such checklist compliance. The Commission has allowed applicants to incorporate interconnection terms and conditions,⁹⁷ rates,⁹⁸ and even performance data⁹⁹ from another state to demonstrate checklist compliance in a particular state. The Commission has also increasingly allowed applicants to rely on promises of future compliance,¹⁰⁰ and has waived the “complete as filed” requirement in further dilution of the vigor of the checklist.¹⁰¹ As a result, the checklist has

⁹⁵ *Joint Application by SBC 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 Kansas and Oklahoma*, CC Docket No. 00-217, Memorandum Opinion and Order, FCC 01-29, (Jan. 22, 2001) ¶¶ 266-281 (“*Kansas/Oklahoma Order*”).

⁹⁶ *Georgia/Louisiana Order* at ¶ 280.

⁹⁷ *Kansas/Oklahoma Order* at ¶ 35.

⁹⁸ *See Id.* at ¶ 82, n. 244.

⁹⁹ *See Id.* at ¶¶ 35-38.

¹⁰⁰ *See Pennsylvania Order*.

¹⁰¹ *See Application by Qwest Communications International, Inc., for Authorization to Provide In-Region, InterLATA Services in the States of Colorado, Idaho, Iowa, Montana, Nebraska, North Dakota, Utah, Washington, and Wyoming*, Docket No. 02-314, Memorandum Opinion and Order, FCC 02-333 (December 23, 2002) ¶¶ 176-180; *California Order* at ¶¶ 26-31.

increasingly become a formula where if the applicant can plug in the correct inputs it can obtain Section 271 authority.

The Commission has determined that this latitude is warranted. TDS Metrocom is not here to second-guess that determination, but to merely reiterate that this is all the more reason for a viable public interest standard. With the mounting number of metrics to consider, it is inevitable that the process will only continue to grow more mechanistic. As checklist compliance becomes more mechanistic, it is all the more important that a viable public interest standard be preserved.

The public interest standard enables the Commission to look beyond the numbers and look at the qualitative aspects of the application. The Commission is able to consider if the application, when looked at as a whole, truly promotes competition and is in the public interest.

Promoting CLEC market entry should be a paramount goal of the Commission. Competitive entry into local markets promotes increased choices for end users and promotes innovation and demand for services. For instance, CLECs have fueled the growth of advanced services and broadband deployment by deploying state-of-the-art networks. Prior to competitive entry, the BOCs were disinterested in advanced services and broadband deployment;¹⁰² now they fill airwaves advocating greater broadband deployment. The Act was intended to provide for a “pro-competitive, deregulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition.”¹⁰³ The goal of

¹⁰² In a White Paper released in September 2001, the Deputy General Counsel of Verizon explained how Verizon resists deploying state-of-the-art facilities in a competitive market before Verizon has recouped its investment in its more traditional facilities. John Thorne, “The 1996 Telecom Act: What Went Wrong and Protecting the Broadband Buildout” (Sep. 2001) at 13-14. Carriers entering the market for the first time would be much more likely to deploy facilities using the most recent technological advances throughout their network.

¹⁰³ P.L. 104-104, Telecommunications Act of 1996, S. Conf. Rep. 104-230 at 1 (1996).

promoting competition was to “secure lower prices and higher quality services for American telecommunications consumers.”¹⁰⁴ As the House Commerce Committee Report noted:

Technological advances would be more rapid and services would be more widely available and at lower prices if telecommunications markets were competitive rather than regulated monopolies.¹⁰⁵

Competitive entry into markets has helped make the goals a reality, and the Commission has played a significant role in effecting these goals. However, the Commission cannot ignore those goals now.

The Commission cannot deny that local competition is imperiled and that competitive exit from local markets is not in the public interest. For this reason, the Commission should reconsider this misguided statement from the *Georgia/Louisiana 271 Order*:

Given an affirmative showing that the competitive checklist has been satisfied, low customer volumes or the financial hardships of the competitive LEC community do not undermine that showing. We have consistently declined to use factors beyond the control of the BOC, such as the weak economy, or over-investment and poor business planning by competitive LECs to deny an application.¹⁰⁶

This statement indicates an almost complete abandonment of any public interest standard.

Checklist compliance is a requirement, but it is not the only requirement for section 271 approval. The Commission must consider BOC applications within the context of the current telecommunications industry. The CLECs that remain in business provide the only hope for intramodal competition in local markets as BOCs have been refusing to compete in each other’s regions. With the long distance industry in turmoil, and the increasing possibility that now two of the large three long distance carriers, particularly WorldCom and perhaps even AT&T, will be

¹⁰⁴ P.L. 104-104, H.R. Rep. 104-204(I) at 160 (1995).

¹⁰⁵ *Id.*

¹⁰⁶ *Georgia/Louisiana Order* at ¶ 282.

purchased by a BOC, the vision for the 21st century is fast becoming a return to the pre-1980s America.

The 1996 Act was designed to provide end users with a number of competitive choices and services. As Commissioner Copps has stated:

The combination of competitive BOC entry into the interLATA market and competitive local exchange carrier (CLEC) entry into the BOC's once-dominant local market, Congress believed, would lead to significant consumer benefits in the form of lower prices, better service, and investment in new technologies. Continued BOC dominance of a state's local market, however, could undermine consumer benefits if the BOC could leverage this dominance upon entering the interLATA market.¹⁰⁷

If the Commission allows the Section 271 process to continue to be diluted, end users will be seeing a landscape dominated by the BOCs each seeking to maintain their monopolies in their regions. The Commission was given the ability to prevent such a scenario through use of the public interest standard. The Commission should employ this standard to ensure that local markets are irreversibly open to competition. The steady erosion of the separation between checklist compliance and satisfaction of the public interest standard must be reversed. Given the vulnerable state of the competitive telecommunications industry, and the BOC efforts to thwart the local competition provisions of the Telecommunications Act, granting SBC Section 271 authority in Michigan is clearly not in the public interest, and SBC's Application should be denied.

B. The Danger of Premature Entry

The Commission should also be vigilant to ensure against the danger of a premature grant of Section 271 authority. This consideration is particularly compelling in the instant case, where SBC/Ameritech's Application was already rejected by the Commission and the deficiencies that

¹⁰⁷ *Pennsylvania Order*, Dissenting Opinion of Commissioner Michael J. Copps at 1 .

prevented its approval nearly seven years ago have not been corrected. If a BOC is allowed into the long distance arena before a local market is irreversibly open, local competition will not develop, and long distance competition could be imperiled.¹⁰⁸ As Dr. Mark N. Cooper of the Consumer Federation of America noted:

[t]he risk that arises from a rush to approve the 271 is that the incumbent can exploit the anticompetitive conditions, or ‘competitive imbalance,’ in the critical early days of the bundled telecommunications market. It can then rapidly capture long distance customers by bundling local and long distance service, while competitors are unable to respond with a competitively priced bundle. Allowing premature entry will cause the CLEC industry to shrink, as RBOCs capture long distance market share. The incentive to open the local market will be eliminated.¹⁰⁹

As the Commission has also noted:

Section 271, however embodies a Congressional determination that, in order for this potential to become a reality, 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. Only then is the other congressional intention of creating an incentive or reward for opening the local exchange market met.¹¹⁰

While a BOC’s entry into the long distance market may have pro-competitive effects, those benefits are only sustainable if the local telecommunications market is open to competition after BOC entry.¹¹¹

¹⁰⁸ *Rulemaking on the Commission’s Own Motion to Govern Open Access to Bottleneck Services and Establish a Framework for Network Architecture Development of Dominant Carrier Networks, Investigation on the Commission’s Own Motion into Open Access and Network Architecture Development of Dominant Carrier Networks, Order Instituting Rulemaking on the Commission’s Own Motion into Competition for Local Exchange Services, Order Instituting Investigation on the Commission’s Own Motion Into Competition for Local Exchange Service*, California Public Utilities Commissions Docket Nos. R.93-04-003, I.93-04-002, R.95-04-043, I.95-04044, Comments of Dr. Mark N. Cooper for the Consumer Federation of America on Public Interest Issues at 16 (Aug. 23, 2001).

¹⁰⁹ *Id.*

¹¹⁰ *Michigan Order* at ¶ 388.

¹¹¹ *Michigan Order* at ¶ 390.

C. SBC's Anticompetitive Conduct Warrants a Finding that SBC's Application is not in the Public Interest

The Telecom Act requires SBC to cooperate with its competitors to ensure the development of local competition. Only then—after local competition has taken root, and not before—is SBC permitted to obtain section 271 authority. SBC not only has demonstrated a lack of cooperation with CLECs, but has engaged in overtly anticompetitive conduct to the detriment of TDS Metrocom. For example:

1. In TDS Metrocom's arbitration proceeding with SBC, the Michigan PSC ruled that SBC had negotiated in bad faith by refusing to agree to terms related to off-site collocation that SBC was required to provide under its own tariff. According to the Michigan PSC, "Ameritech Michigan's refusal to provide off-site adjacent collocation pursuant to the tariff it has on file is a neglect or refusal to fulfill some duty not prompted by an honest mistake, but by some interested motive."¹¹² That interested motive is the impairment of TDS Metrocom's ability to compete.

2. SBC's field technicians continue to engage in anticompetitive conduct when completing service requests. On one occasion, when an SBC technician responded to a TDS Metrocom customer's service appointment, the TDS Metrocom customer spoke at length with the technician, and showed him to the demarcation. Once the SBC technician completed the order, he asked the TDS Customer to call TDS Metrocom to report completion, which she did. The customer informed TDS Metrocom that the SBC technician had told her that she could have had the service quicker and cheaper through SBC and that he knew he shouldn't be telling her that, but he did anyway. Cox Affid. ¶ 41.

¹¹² *Petition for Arbitration to Establish an Interconnection Agreement Between TDS Metrocom, Inc. and Ameritech Michigan*, Case No. U-12952, Opinion and Order (Mich. PSC Sep. 7, 2001) at 9-10 (internal quotation marks omitted).

The following day, TDS Metrocom received information that the SBC technician had reported the appointment as “end user refused service.” When TDS Metrocom contacted the business office at SBC, TDS Metrocom was told that this information was not in the order. A few days later, the same customer called TDS Metrocom to say that another SBC technician had visited the night before, for no apparent reason because her service was working fine. Cox Affid. ¶ 31. Nevertheless, the SBC technician informed the TDS Metrocom customer that they are told by SBC to inform customers when they are doing DSL installs that if they are interested in changing back to SBC, SBC technicians can answer any questions they may have about doing so, but cannot say anything more than that. However backhanded the approach may have been, the SBC technician was soliciting the TDS Metrocom customer to switch back to SBC. Cox Affid ¶ 41.

3. SBC bases its estimates of the extent of competition in Michigan on large numbers of customers of CLECs using the Unbundled Network Element Platform (UNE-P).¹¹³ But for the presence of these UNE-P customers, competition in Michigan would actually be far less significant. At the same time, SBC is working its regulatory channels diligently to eliminate UNE-P.¹¹⁴ SBC invokes the presence of UNE-P in order to justify section 271 authority, but then would have UNE-P terminated once it obtains section 271 authority. This conduct should not be countenanced by the Commission. Moreover, to the extent that SBC has concentrated its efforts into improving its OSS for UNE-P orders (in order to create an appearance that it is providing OSS competently for its section 271 applications), the Commission must anticipate the OSS disaster that will result if SBC is successful in eliminating UNE-P. TDS Metrocom’s experience

¹¹³ *SBC Brief* at 7.

¹¹⁴ *See, e.g.*, Ex Parte Letter dated Oct. 10, 2002, to Marlene H. Dortch, Secretary, Federal Communications Commission, from Brian J. Benison, SBC Communications, Inc., FCC Dkt. No. 01-338.

is a good example because TDS Metrocom does not use UNE-P. When carriers such as WorldCom and AT&T are required to place orders for UNE loops instead of UNE-P, and interconnect SBC facilities with their own facilities, the glitches that TDS Metrocom experiences incessantly will no doubt mushroom into full-scale system failures.

4. SBC representatives continue to engage in a practice of corresponding with TDS Metrocom only by way of telephone rather than through written communications as TDS Metrocom repeatedly requests. Quite obviously, SBC attempts to avoid creating any sort of documentary evidence of its inadequate responses to questions from CLECs.

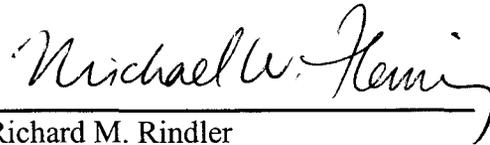
As the Commission can see, SBC continues to engage in practices that have no legitimate purpose other than to impede TDS Metrocom's ability to compete. SBC's conduct is inconsistent with the standard necessary to satisfy the public interest requirement of Section 271. SBC's discriminatory and anticompetitive conduct in the areas addressed in these Comments will only serve to preclude the development of viable competition in Michigan. SBC's brazen conduct plainly demonstrates that the Application is not in the public interest. SBC's anticompetitive conduct counsels against the granting of the Application, and the Commission should deny it.

VII. CONCLUSION

For the foregoing reasons, SBC's Application fails to satisfy the standards for obtaining section 271 authority. The Commission should be highly skeptical of the lukewarm endorsement given to SBC by the Michigan PSC, and should seriously consider all of the unresolved issues that SBC must address pursuant to the *Michigan PSC Report Companion Order*. The multiple deficiencies identified by the Michigan PSC and those described herein demonstrate that the award of Section 271 authority at this time would be premature. TDS

Metrocom, LLC, urges the Commission to deny SBC's Application for Provision of In-Region InterLATA Services in the State of Michigan.

Respectfully submitted,



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Dated: February 6, 2003