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In the Matter of)
Application by SBC Communications Inc.,)
Michigan Bell Telephone Company, and) WC Docket No. 03-138
Southwestern Bell Communications Services,)
Inc. for Authorization To Provide In-Region,)
InterLATA Services in Michigan)

MEMORANDUM OPINION AND ORDER

Adopted: September 17, 2003

Released: September 17, 2003

By the Commission: Commissioners Copps and Adelstein issuing separate statements.

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I. INTRODUCTION

1. On June 19, 2003, SBC Communications Inc., and its subsidiaries, Michigan Bell Telephone Company, and Southwestern Bell Communications Services, Inc. (collectively, Michigan Bell) filed this application pursuant to section 271 of the Communications Act of 1934, as amended,¹ for authority to provide in-region, interLATA services originating in the State of Michigan.² This is the fourth application Michigan Bell has filed for in-region, interLATA authority.³ In this Order, we grant Michigan Bell’s application based on our conclusion that

¹ We refer to the Communications Act of 1934, as amended by the Telecommunications Act of 1996 and other statutes, as the Communications Act or the Act. See 47 U.S.C. §§ 151 *et seq.* We refer to the Telecommunications Act of 1996 as the 1996 Act. See Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996).

² See *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. 03-138 (filed June 19, 2003) (Michigan Bell Supplemental Application).

³ See *Application by Ameritech Michigan to Provide In-Region, InterLATA Services in Michigan*, CC Docket No. 97-1, Order, 12 FCC Rcd 2088 (1997) (*Ameritech Withdrawal Order*); *Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as Amended, To Provide In-Region, InterLATA Services in* (continued....)

Michigan Bell has taken the statutorily required steps to open its local exchange markets in Michigan to competition.

2. We wish to acknowledge the considerable effort and exemplary dedication of the Michigan Public Service Commission (Michigan Commission). The Michigan Commission reviewed Michigan Bell's section 271 compliance in open proceedings with ample opportunities for participation by interested third parties.⁴ Michigan Bell has implemented – and the Michigan Commission has approved – comprehensive performance measures and standards, as well as a comprehensive Performance Remedy Plan designed to create a financial incentive for post-entry compliance with section 271.⁵ In addition, the Michigan Commission required extensive third-party testing of Michigan Bell's operations support systems (OSS) offerings, and required comprehensive performance monitoring mechanisms to evaluate the quality of service Michigan Bell provides to its competitive local exchange carrier (LEC) customers.⁶ As the Commission has recognized, state proceedings demonstrating a commitment to advancing the pro-competitive purpose of the Act serve a vitally important role in the section 271 process.⁷ The Michigan Commission has certainly demonstrated that commitment and we applaud them for it.

3. We also commend Michigan Bell for the significant progress it has made in opening its local exchange market to competition in Michigan. The Michigan Commission states that competitive LECs provide service to 21.7 percent of total lines,⁸ including 519,809 business lines and 927,367 residential lines, as of December 2002.⁹ Additionally, of the estimated 1,447,176 competitive LEC lines in Michigan, there were 58,617 resold lines, 932,667 lines served via UNE-platform, 264,600 lines served via unbundled network facilities, and an

(Continued from previous page)

Michigan, CC Docket No. 97-137, Memorandum Opinion and Order, 12 FCC Rcd 20543 (1997) (*Ameritech Michigan Order*); *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. 03-16, Memorandum Opinion and Order, FCC DA 03-1168 (Apr. 16, 2003) (*Michigan Bell Withdrawal Order*).

⁴ See Michigan Commission Comments at 1; see also Michigan Commission Supplemental Comments at 3.

⁵ See Michigan Bell Application at 4-5; Michigan Bell Application, App. A, Vol. 3a, Tab 9, Affidavit of James D. Ehr (Michigan Bell Ehr Aff.) at para. 277.

⁶ Michigan Bell Application at 3-4.

⁷ See, e.g., *Application of Verizon New York Inc., Verizon Enterprise Solutions, Verizon Global Networks Inc., and Verizon Select Services, Inc., for Authorization to Provide In-Region, InterLATA Services in Connecticut*, CC Docket No. 01-100, FCC 01-208, Memorandum Opinion and Order, 16 FCC Rcd 14147, 14149, para. 3 (2001) (*Verizon Connecticut Order*); *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*, CC Docket No. 01-9, FCC 01-130, Memorandum Opinion and Order, 16 FCC Rcd 8988, 8990, para. 2 (2001) (*Verizon Massachusetts Order*).

⁸ Michigan Commission Supplemental Comments, Attach. A at 3. These numbers reflect competitive LEC participation in Michigan as of December 31, 2002.

⁹ *Id.* at 4.

estimated 148,691 lines served over the competitive LECs' own self-provided facilities.¹⁰ We believe that these results reflect the extensive efforts that Michigan Bell has made to open its local exchange markets to competition.

II. BACKGROUND

4. In the 1996 amendments to the Communications Act, Congress required that the Bell Operating Companies (BOCs) demonstrate compliance with certain market-opening requirements contained in section 271 of the Act before providing in-region, interLATA long distance service.¹¹ Congress provided for Commission review of BOC applications to provide such service in consultation with the relevant states and the U.S. Attorney General.¹²

5. On January 13, 2003, the Michigan Commission determined that Michigan Bell complied with section 271(c),¹³ and recommended that Michigan Bell be authorized to provide interLATA communications services in Michigan.¹⁴ On January 16, 2003, Michigan Bell filed its third section 271 application. On February 26, 2003, the Department of Justice filed its evaluation finding that while Michigan Bell, under the guidance of the Michigan Commission, had made significant strides in opening its markets to competitive LECs, the Department of Justice remained concerned that those markets were not "irreversibly" open to competition.¹⁵ Michigan Bell withdrew its application on April 16, 2003, stating that it would file a revised

¹⁰ *Id.*

¹¹ See 47 U.S.C. § 271.

¹² 47 U.S.C. § 271(d)(2)(A), (B). The Commission has summarized the relevant statutory framework in prior orders. See, e.g., *Joint Application by SBC Communications Inc., Southwestern Bell Tel. Co., 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, 16 FCC Rcd 6237, 6241-42, paras. 7-10 (2001) (*SWBT Kansas/Oklahoma Order*), *aff'd in part, remanded in part sub nom. Sprint Communications Co. v. FCC*, 274 F.3d 549 (D.C. Cir. 2001) (*Sprint v. FCC*); *Application by SBC Communications Inc., Southwestern Bell Tel. Co. 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, Memorandum Opinion and Order, 15 FCC Rcd 18354, 18359-61, paras. 8-11 (2000) (*SWBT Texas Order*).

¹³ Michigan Bell Application at 4; Michigan Commission Comments at 3; see also *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, Opinion and Order, (Michigan Commission Jan. 13, 2003) (*Michigan Commission Order*).

¹⁴ See Letter from Michigan Public Service Commissioners to the Federal Communications Commissioners (dated Jan. 13, 2003).

¹⁵ Department of Justice Evaluation at 3.

application that resolves the remaining issues of concern.¹⁶

6. On June 19, 2003, Michigan Bell filed the instant application.¹⁷ Comments were filed with the Commission on July 2, 2003 and reply comments were filed on July 21, 2003.¹⁸ The Michigan Commission filed a supplemental report on July 2, 2003 reaffirming its recommendation that Michigan Bell be authorized to provide interLATA services in Michigan.¹⁹ The Department of Justice filed an evaluation on July 16, 2003, expressing concerns about Michigan Bell's wholesale billing, line splitting, and data reliability.²⁰ The Department of Justice stated that wholesale billing errors continue to persist, which suggests there may still be underlying problems that Michigan Bell needs to do more to identify and correct.²¹ The Department of Justice also questioned whether Michigan Bell's current processes provide non-discriminatory access to line splitting and UNE-platform services.²² Finally, the Department of Justice noted that the Commission should consider the totality of the evidence in determining whether "the current performance metrics are reliable, and that a stable and reliable reporting system will be in place to help ensure that the Michigan market remains open after [Michigan Bell's] application is ultimately granted."²³ The Department of Justice ultimately stated that, "because of serious outstanding questions concerning the accuracy of [Michigan Bell's] wholesale billing," the Department of Justice "is not in a position to support this application based on the current record," but recognized that the Commission may "be able to satisfy itself regarding these [billing issues] prior to the conclusion of its review."²⁴

¹⁶ See Letter from James C. Smith, Senior Vice President, SBC, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 03-16 (filed Apr. 16, 2003); see also *Michigan Bell Withdrawal Order*.

¹⁷ Because Michigan Bell incorporated its filings from the prior Michigan section 271 docket (WC Docket No. 03-16) into this proceeding, we refer to all filings made in this docket (WC Docket No. 03-138) as "supplemental" filings.

¹⁸ AT&T, CLECA and TDS Metrocom incorporated their filings from WC Docket No. 03-16 into this proceeding. See AT&T Supplemental Comments at 2; CLECA Supplemental Comments at 24; TDS Metrocom Supplemental Comments at 1.

¹⁹ See Michigan Commission Supplemental Comments at 12.

²⁰ Department of Justice Supplemental Evaluation at 2 (July 16, 2003).

²¹ *Id.* at 6-9.

²² *Id.* at 11-12.

²³ *Id.* at 14-15.

²⁴ *Id.* at 15. We note that the Department of Justice reiterated its concerns about Michigan Bell's billing systems in its Evaluation of Michigan Bell's OSS in the other states in the SBC Midwest region. *In the Matter of Joint Application by SBC Communications, Inc., Illinois Bell Telephone Company, Indiana Bell Telephone Company, the Ohio Bell Telephone Company, Wisconsin Bell, Inc., and Southwestern Bell Communications Services, Inc. for Provision of In-Region, InterLATA Services in Illinois, Indiana, Ohio, and Wisconsin*, WC Docket No. 03-167, Department of Justice Evaluation at 8-15 (filed Aug. 26, 2003) (Department of Justice 4-State Evaluation).

A. Compliance With Unbundling Rules

7. One part of the required showing, as explained in more detail below, is that the applicant satisfies the Commission's rules governing unbundled network elements (UNEs).²⁵ In the *UNE Remand Order* and the *Line Sharing Order*, the Commission established a list of UNEs which incumbent LECs were obliged to provide: (1) local loops and subloops; (2) network interface devices; (3) switching capability; (4) interoffice transmission facilities; (5) signaling networks and call-related databases; (6) OSS; and (7) the high frequency portion of the loop.²⁶ However, the D.C. Circuit vacated these orders and instructed the Commission to reevaluate the network elements subject to the unbundling requirement.²⁷ The court's mandate was stayed first until January 3, 2003 and then until February 20, 2003. On February 20, 2003, we adopted new unbundling rules as part of our *Triennial Review* proceeding, and we released the order on August 21, 2003.²⁸ Consistent with our prior orders, however, we do not require Michigan Bell to demonstrate compliance with rules that were not in effect at the time its application was filed.²⁹

8. Although the former unbundling rules were not in force at the time Michigan Bell filed its application in this proceeding, Michigan Bell states that it continues to provide nondiscriminatory access to these network elements.³⁰ As the Commission found in the *Bell Atlantic New York Order*, we believe that using the network elements identified in the former unbundling rules as a standard in evaluating Michigan Bell's application, filed during the interim

²⁵ In order to comply with the requirements or checklist item 2, a BOC must show that it is offering "[n]ondiscriminatory access to network elements in accordance with the requirements of section 251(c)(3). 47 U.S.C. § 271(c)(2)(B)(ii).

²⁶ See 47 C.F.R. § 51.319; *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, 15 FCC Rcd 3696 (1999) (*UNE Remand Order*); *Deployment of Wireline Services Offering Advanced Telecommunications Capability; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket Nos. 98-147, 96-98, Third Report and Order and Fourth Report and Order, 14 FCC Rcd 20912 (1999) (*Line Sharing Order*).

²⁷ See *United States Telecom Ass'n v. FCC*, 290 F.3d 415 (D.C. Cir. 2002) (*USTA*), cert. denied sub nom. *WorldCom, Inc. v. United States Telecom Ass'n*, 123 S.Ct 1571 (2003 Mem.)

²⁸ See *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers* (CC Docket No. 01-338), *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996* (CC Docket No. 96-98), and *Deployment of Wireline Services Offering Advanced Telecommunications Capability* (CC Docket No. 98-147), Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, FCC 03-36 (rel. Aug. 21, 2003) (*Triennial Review Order*); see also *FCC Adopts New Rules For Network Unbundling Obligations Of Incumbent Local Phone Carriers*, News Release, (rel. Feb. 20, 2003) (announcing adoption of an Order on Remand and Further Notice of Proposed Rulemaking in CC Docket No. 01-338, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*) (*Triennial Review News Release*).

²⁹ See *Bell Atlantic New York Order* at 3967, para. 31. The new rules adopted in the *Triennial Review* proceeding will take effect on October 2, 2003.

³⁰ See Michigan Bell Application at 26, 29, 65, 66.

period between the time the rules were vacated by the D.C. Circuit and the effective date of the new rules, is a reasonable way to ensure that the application complies with the checklist requirements.³¹ We find it significant that no commenter disputes that Michigan Bell should be required to demonstrate that it provides these network elements in a nondiscriminatory way. Accordingly, for the purposes of this application, we will evaluate whether Michigan Bell provides nondiscriminatory access to the network elements identified under the former unbundling rules. We emphasize that, on an ongoing basis, Michigan Bell must comply with all of the Commission's rules implementing the requirements of sections 251 and 252 upon the dates specified by those rules.³²

III. COMPLIANCE WITH SECTION 271(c)(1)(A)

9. In order for the Commission to approve a BOC's application to provide in-region, interLATA services, a BOC must first demonstrate that it satisfies the requirements of either section 271(c)(1)(A) (Track A) or 271(c)(1)(B) (Track B).³³ To meet the requirements of Track A, a BOC must have interconnection agreements with one or more competing providers of "telephone exchange service . . . to residential and business subscribers."³⁴ The Act states that "such telephone service may be offered . . . either exclusively over [the competitor's] own telephone exchange service facilities or predominantly over [the competitor's] own telephone exchange facilities in combination with the resale of the telecommunications services of another carrier."³⁵ The Commission has further held that a BOC must show that at least one "competing

³¹ See *Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in the State of New York*, CC Docket No. 99-295, Memorandum Opinion and Order, 15 FCC Rcd 3953, 3966-67, para. 30 (1999) (*Bell Atlantic New York Order*), *aff'd*, *AT&T Corp v. FCC*, 220 F.3d 607 (D.C. Cir. 2000). A similar procedural situation was presented in the *Bell Atlantic New York* proceeding. Bell Atlantic filed its application for section 271 authorization in New York after the unbundling rules had been vacated but before the *UNE Remand Order* had taken effect and, thus, at a time when no binding unbundling rules were in effect. Bell Atlantic suggested, and the Commission agreed, that it would be reasonable for the Commission to use the original seven network elements identified in the former unbundling rules in evaluating compliance with checklist item 2 for the application. See *id.* at 3966-67, paras. 29-31.

³² See *SWBT Texas Order*, 15 FCC Rcd at 18368, para. 29; *Bell Atlantic New York Order*, 15 FCC Rcd at 3967, para. 3.

³³ 47 U.S.C. § 271(d)(3)(A).

³⁴ 47 U.S.C. § 271(c)(1)(A).

³⁵ *Id.*

provider” constitutes “an actual commercial alternative to the BOC,”³⁶ which a BOC can do by demonstrating that the provider serves “more than a *de minimis* number” of subscribers.³⁷

10. We conclude, as did the Michigan Commission, that Michigan Bell satisfies the requirements of Track A in Michigan.³⁸ We base this decision on the interconnection agreements Michigan Bell has implemented with competing carriers in Michigan and the number of carriers that provide local telephone exchange service, either exclusively or predominantly over their own facilities, to residential and business customers.³⁹ No party challenges Michigan Bell’s compliance with section 271(c)(1)(A).⁴⁰ In support of its Track A showing, Michigan Bell relies on interconnection agreements with AT&T, McLeodUSA, Talk America, TDS Metrocom, and MCI.⁴¹ Specifically, the record demonstrates that AT&T, McLeod USA, Talk America, TDS Metrocom, and MCI each provide service to more than a *de minimis* number of residential and

³⁶ *Application by Qwest Communications International Inc., for Authorization To Provide In-Region, InterLATA Services in Minnesota*, Memorandum Opinion and Order, FCC 03-142, WC Docket No. 03-90 at para. 60 (rel. June 26, 2003) (*Qwest Minnesota Order*); *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, 12 FCC Rcd 8685, 8695, para. 14 (1997) (*SWBT Oklahoma Order*).

³⁷ *SWBT Kansas/Oklahoma Order*, 16 FCC Rcd at 6357, para. 42; *see also Ameritech Michigan Order*, 12 FCC Rcd at 20585, para. 78.

³⁸ Michigan Commission Comments at 29.

³⁹ Michigan Commission Comments at 28-29. As noted above, Michigan staff reports that as of Dec. 31, 2002, its survey of carriers found that 54 competitive LECs served approximately 1.45 million access lines in Michigan. Michigan Commission Supplemental Comments, Attach. at 4. Of those competitive LEC lines, there were 58,617 resold lines, 932,667 lines served via UNE-platform, 264,600 lines served via unbundled network facilities, and an estimated 148,691 lines served over the competitive LECs’ own self-provided facilities. *Id.*

⁴⁰ CLECA asserts that SBC’s estimate of competitive LEC market share for Michigan is inconsistent with Michigan SBC annual ARMIS filings. Letter from Roderick S. Cory, et.al., Counsel to CLECA, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 03-16 at 1-5 (filed Apr. 11, 2003) (CLECA Apr. 11 *Ex Parte* Letter). Sprint contends that SBC’s competitive carrier line count inaccurately attributes local service lines to Sprint operations in Michigan that are in actuality “one-way Dial IP” lines not used for local exchange service and, therefore, the SBC estimates for competitive LEC line counts for the state may be unreliable. Sprint Comments at 1-2. We note that the Michigan Commission conducts and reports, on a regular basis, surveys of all access lines in the state and we need not rely on SBC estimates for overall competitive presence in Michigan. Michigan Commission Supplemental Comments at 10 & Attach. A and B; *see also* Michigan Bell Heritage Supplemental Reply Aff. at 4-8.

⁴¹ Letter from Geoffrey M. Kleinberg, Counsel for Michigan Bell, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 03-16, Attach. A at 19 (filed Mar. 17, 2003) (Michigan Bell March 17 *Ex Parte* Letter); *see also* Michigan Bell Heritage Aff., Tab B at 1-2, Tab E, at 1-3 (citing confidential portion); Michigan Bell Heritage Supp. Aff., Attach. C at 1-2 (citing confidential portion).

business customers over their own facilities, or through the use of UNEs.⁴² Each of these carriers represents an actual “facilities-based competitor” to Michigan Bell in Michigan.⁴³

IV. PRIMARY ISSUES IN DISPUTE

11. As in recent section 271 orders, we will not repeat here the analytical framework and particular legal showing required to establish compliance with every checklist item. Rather, we rely upon the legal and analytical precedent established in prior section 271 orders,⁴⁴ and we attach comprehensive appendices containing performance data and the statutory framework for approving section 271 applications.⁴⁵ Our conclusions in this Order are based on performance data as reported in carrier-to-carrier reports reflecting service in the period from February 2003 through June 2003.

12. We focus here on the issues in controversy in the record. Accordingly, we begin by addressing issues concerning the accuracy and reliability of Michigan Bell’s performance data. We also extensively discuss checklist items 2, 4, and 7, which address access to unbundled network elements, access to local loops, access to 911 and E911 services, and access to directory assistance services and operator services. Next, we discuss checklist items 1, 2, 10 and 13, which address interconnection, unbundled network element combinations, signaling and reciprocal compensation, respectively. The remaining checklist requirements are discussed briefly, as they received little or no attention from commenting parties, and our own review of the record leads us to conclude that Michigan Bell has satisfied these requirements. Finally, we discuss issues concerning compliance with Track A, section 272 and the public interest requirement.

A. Evidentiary Case

1. Introduction

13. As a threshold matter, we reject challenges to the accuracy and reliability of the commercial performance data submitted by Michigan Bell. As explained fully below, we find that the commercial performance data submitted by Michigan Bell provide a reliable basis on which we may assess whether Michigan Bell has satisfied the demands of the checklist. Because we rely upon Michigan Bell’s commercial performance data in evaluating its compliance with several different checklist items, however, we address this issue before discussing whether Michigan Bell has satisfied the checklist requirements. In other section 271 proceedings, the Commission has relied on a variety of factors – including the findings of third-party auditors, the

⁴² Michigan Bell Heritage Supplemental Aff., Attach. C at 2-3 (citing confidential portion).

⁴³ 47 U.S.C. § 271(c)(1)(A).

⁴⁴ *Qwest Minnesota Order* at para. 10; *SWBT Kansas/Oklahoma Order*, 16 FCC Rcd at 6241-42, paras. 7-10; *SWBT Texas Order*, 15 FCC Rcd at 18359-61, paras. 8-11; *Bell Atlantic New York Order*, 15 FCC Rcd at 3961-63, paras. 17-20; see also App. C (Statutory Requirements).

⁴⁵ See generally App. B (Michigan Performance Data) and App. C.

availability of reconciliations and other raw data review by competitors, and the oversight of the relevant state commission – in assessing the reliability of an applicant’s commercial performance data. There is no single *sine qua non* of data reliability, but the Commission has consistently demanded evidence that the data accurately represent the applicant’s performance.⁴⁶

14. Like previous applicants, Michigan Bell has submitted performance metric data with its application as evidence that it meets its obligation to provide nondiscriminatory access to its network. These metrics were developed during an open, collaborative proceeding conducted by the Michigan Commission.⁴⁷ As described below, Michigan Bell has submitted into evidence the results of two separate third-party tests – an in-progress review conducted by BearingPoint, formerly known as KPMG Consulting, Inc., and a completed audit conducted by Ernst & Young, LLP (E&Y).

2. The Third-Party Tests

a. The BearingPoint Test

15. In February 2000, the Michigan Commission required Michigan Bell to sponsor a third-party test of its OSS.⁴⁸ Michigan Bell retained BearingPoint to conduct the third-party testing, under terms developed in collaborative sessions including BearingPoint, Michigan Commission staff, competitive LECs, Michigan Bell, and other interested parties.⁴⁹ These terms were set forth in a Master Test Plan, which was submitted to the Michigan Commission in August 2000.⁵⁰ The BearingPoint evaluation included three major test families. The first two – “transaction verification and validation” and “processes and procedures review” – assessed the performance of Michigan Bell’s OSS, and are described below.⁵¹ The third – the “performance

⁴⁶ See, e.g., *Joint Application by BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc., for Provision of In-Region, InterLATA Services in Georgia and Louisiana*, CC Docket No. 02-35, Memorandum Opinion and Order, 17 FCC Rcd 9018, 9027-32, paras. 16-20 (2002) (*BellSouth Georgia/Louisiana Order*) (holding the extensive third-party auditing, internal and external data controls, open and collaborative metric workshops, the availability of raw performance data and data reconciliations, and the oversight of state commissions ensured reliability of BellSouth data); *Bell Atlantic New York Order*, 15 FCC Rcd at 3959, para. 11 (explaining that the monthly review by the New York Commission of Bell Atlantic’s raw data, the collaborative proceedings conducted by the New York Commission concerning the performance metrics, and the review by KPMG and the New York Commission of Bell Atlantic’s internal controls surrounding the data collection process ensured that the performance data was accurate, consistent, and meaningful); *SWBT Texas Order*, 15 FCC Rcd at 18377-78, para. 57 (noting that SWBT’s data had been subject to scrutiny and review by interested parties, that its accuracy for the most part had not been contested, and that in those instances where it had been disputed, the Commission would look to the results of data reconciliations between SWBT and competing carriers).

⁴⁷ See Michigan Bell Ehr Aff. at paras. 12-20.

⁴⁸ See Michigan Commission Comments at 6.

⁴⁹ See *id.*

⁵⁰ See *id.*

⁵¹ See *infra* Part IV.B.2.

metrics review” (PMR) – evaluated the accuracy and reliability of Michigan Bell’s data.⁵² BearingPoint’s PMR testing addressed five categories: (1) PMR 1 – Data Collection and Storage Verification and Validation Review; (2) PMR 2 – Metrics Definitions and Standards Development and Documentation Verification and Validation Review; (3) PMR 3 – Metrics Change Management Verification and Validation Review; (4) PMR 4 – Metrics Data Integrity Verification and Validation Review; and (5) PMR 5 – Metrics Calculations and Reporting Verification and Validation Review.⁵³ BearingPoint’s testing was analogous to that which BearingPoint has performed to evaluate performance in various states served by Verizon and BellSouth.⁵⁴

16. Pursuant to a Michigan Commission request, BearingPoint prepared an interim report regarding its testing activities on September 23, 2002.⁵⁵ That report was updated on October 30, 2002, following further collaborative discussions, and has been updated regularly since then.⁵⁶ In its June 30, 2003 update, BearingPoint stated that more than half of the applicable PMR “test points” were “satisfied”; the remaining items were still subject to ongoing BearingPoint review.⁵⁷

b. The E&Y Test

17. On July 30, 2002, Michigan Bell notified the Michigan Commission that it

⁵² See Michigan Bell Application, App. A, Vol. 1, Tab 6, Affidavit of Mark Cottrell at para. 26 (Michigan Bell Cottrell Aff.).

⁵³ See Michigan Bell Ehr Aff. at para. 231.

⁵⁴ See, e.g., *Bell Atlantic New York Order*, 17 FCC Rcd at 9027, para. 16; *BellSouth Georgia/Louisiana Order*, 17 FCC Rcd. at 9029-32, paras. 18-20. The BearingPoint PMR evaluation involved review of both “live” industry data and data generated from test transactions performed by a pseudo competitive LEC established by BearingPoint. See Michigan Public Service Commission, Ameritech OSS Evaluation Project Master Test Plan, Version 3.0 (April 2, 2002) at 22 (available at http://www.osstesting.com/Documents/MI%20Docs/MPSC%20MTP%20Ver%203_0.pdf). The evaluation techniques employed for the PMR testing included the physical review of process activities and products, including site visits, walk-throughs, read-throughs, and work center observations; the compilation and review of books, manuals, and other publications related to the processes and systems under study; the review and analysis of historical data, reports, metrics, and other information in order to assess the effectiveness of a particular system or business function; and the recalculation of performance metrics. *Id.* at 18-19, 23, 25, 27, 28, 30.

⁵⁵ See *id.* at 7.

⁵⁶ See *id.* BearingPoint issued its most recent supplemental reports on June 30, 2003 and August 29, 2003. Our inquiry below focuses on the June 30, 2002 Report (available at http://www.osstesting.com/Documents/MI%20Docs/MI_OSS%20Evaluation_Metrics%20Report_063003.pdf) (June 30 BearingPoint Report) because that was the most recent report available at the time comments and replies were filed in this proceeding.

⁵⁷ A “test point” reflects a single evaluation criterion. For example, the first two criteria for PMR 1 are PMR 1-1-A, “Metrics data collection and storage processes have complete and up-to-date documentation for the Pre-Ordering Measure Group” and PMR 1-1-B, “Metrics data collection and storage processes have complete and up-to-date documentation for the Ordering Measure Group.” See, e.g., June 30 BearingPoint Report at 7.

planned to supplement the state section 271 record with an independent review of the Michigan performance measurements conducted by E&Y, and intended to rely on that data audit to support its application.⁵⁸ The E&Y data audit differed from the BearingPoint data review in several respects. For example, E&Y limited its review to the issues arising under the PMR 4 test family, the PMR 5 test family, and parts of the PMR 1 and PMR 3 test families.⁵⁹ E&Y also employed a different “materiality” threshold, excluding failures from its analysis where the difference between Michigan Bell’s results and its own findings was less than 5 percent and did not change a “passing” score for a particular performance metric into a “failing” score.⁶⁰ E&Y also utilized a more streamlined “retesting” methodology to assess Michigan Bell’s efforts to remediate problems identified during the audit.⁶¹ As further described below, E&Y’s testing was analogous to the testing it undertook to evaluate performance in Missouri, and similar to the tests on which we relied in approving section 271 applications for Texas and California.⁶²

18. E&Y issued a series of updates setting forth its findings, culminating in an April 16, 2003 Final Corrective Action Report. In that Report, E&Y concluded that all material problems identified either had been corrected or did not require corrective action.⁶³

⁵⁸ See Michigan Bell Ehr Aff. at para. 198.

⁵⁹ See Letter from Geoffrey M. Klineberg, Counsel for Michigan Bell, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 03-16, Attach. C at 6 (filed Mar. 14, 2003) (Michigan Bell March 14 *Ex Parte* Letter).

⁶⁰ See Michigan Bell Reply, Appendix, Second Affidavit of Daniel Dolan and Brian Horst at para. 18 (Michigan Bell Dolan/Horst Reply Aff.). This is the same materiality standard that E&Y uses when conducting merger compliance audits for the Commission. See Michigan Bell Dolan/Horst Reply Aff. at para. 18; Michigan Bell March 28 *Ex Parte* Letter, Attach. A at 9 n.29. BearingPoint employed a 1% materiality threshold. See Michigan Bell Supplemental Application, App. A, Vol. 2, Tab 5, Supplemental Affidavit of James D. Ehr and Salvatore T. Fioretti at para. 98 n.55 (Michigan Bell Ehr/Fioretti Supplemental Aff.).

⁶¹ See AT&T Supplemental Comments, Declaration of Karen W. Moore and Timothy M. Connolly at paras. 121-31 (AT&T Moore/Connolly Decl.). The E&Y test differed from the BearingPoint analysis in other less significant ways as well. For example, the E&Y audit evaluated data from fewer months than the BearingPoint review. See Michigan Bell Ehr Aff. at paras. 204, 264.

⁶² See, e.g., Michigan Bell March 14 *Ex Parte* Letter Attach. C at 7; see also *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*, WC Docket No. 02-306, Memorandum Opinion and Order, 17 FCC Rcd 25650, 25685-89, paras. 73-79 (*SBC California Order*); *Joint 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 Arkansas and Missouri*, CC Docket No. 01-194, Memorandum Opinion and Order, 16 FCC Rcd 20719, 20726, para. 17 (2001) (*SWBT Arkansas/Missouri Order*); *SWBT Texas Order*, 15 FCC Rcd at 18401-03, paras. 101-04; see also AT&T Supplemental Comments, Declaration of Karen W. Moore and Timothy M. Connolly at para. 39 (AT&T Moore/Connolly Supplemental Decl.).

⁶³ See Michigan Bell Ehr/Fioretti Supplemental Aff., Attach. A.

3. Discussion

19. In analyzing this issue, we are mindful of the Department of Justice's concern that the Commission "satisfy itself that . . . a stable and reliable performance measure system [is] in place to help ensure that the Michigan market remains open after [Michigan Bell's] application is . . . granted."⁶⁴ We agree with the Department of Justice that reliable performance data constitute a "key input in determining whether a BOC is providing nondiscriminatory access to network services and facilities,"⁶⁵ and that "[s]uch data plays an important role both before and after [s]ection 271 approval in ensuring that local markets are and remain open to competition, and that the BOCs do not discriminate against local competitors."⁶⁶ As explained below, we are satisfied that the data presented here are accurate and reliable, and conclude that they can be used in evaluating Michigan Bell's satisfaction of the competitive checklist.

20. We note at the outset that our task here is to assess whether, on the whole, Michigan Bell's performance data form a sufficiently reliable and accurate basis upon which to evaluate checklist compliance. Thus, for example, in approving BellSouth's section 271 applications for Georgia and Louisiana, the Commission found that BellSouth's performance data were, "*as a general matter . . . accurate, reliable, and useful.*"⁶⁷ While certain issues remained unresolved, the Commission concluded that "the problems identified have had, *for the most part*, only a small impact on the data presented to us."⁶⁸ Even where the evidence indicates an unremedied flaw in a discrete subset of Michigan Bell's performance metrics, that flaw will not necessarily doom Michigan Bell's application unless it is part of a larger pattern calling into question a substantial portion of the data. As described below, we find no such pattern here.

a. The Ernst & Young Audit

21. As noted above, E&Y's "Final Corrective Action Report" found that all identified instances of material noncompliance either have been corrected or do not require corrective

⁶⁴ Department of Justice Supplemental Evaluation at 14-15.

⁶⁵ Department of Justice Evaluation at 14.

⁶⁶ *Id.* at 15-16.

⁶⁷ *BellSouth Georgia/Louisiana Order*, 17 FCC Rcd at 9031, para. 19 (emphasis added).

⁶⁸ *Id.* (emphasis added); see also *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*, WC Docket No. 02-314, Memorandum Opinion and Order, 17 FCC Rcd 26303, 26553, para. 465 (*Qwest 9-State Order*) ("We find that, at least for purposes of this application, Qwest's performance data are generally reliable and reflective of Qwest's wholesale performance."); *Application by Verizon New Jersey Inc., Bell Atlantic Communications, Inc. (d/b/a Verizon Long Distance), NYNEX Long Distance Company (d/b/a Verizon Enterprise Solutions), Verizon Global Networks Inc., and Verizon Select Services Inc., for Authorization to Provide In-Region, InterLATA Services in New Jersey*, WC Docket No. 02-67, Memorandum Opinion and Order, 17 FCC Rcd at 12275, 12364-65, para. 181 (2002) (*Verizon New Jersey Order*) ("[W]e find that, at least for purposes of this application, Verizon's performance data are generally reliable and reflective of Verizon's wholesale performance.").

action.⁶⁹ This conclusion constitutes important *prima facie* evidence that the data submitted are accurate and reliable for purposes of determining checklist compliance. Although E&Y's methodology is more streamlined than BearingPoint's, the Commission relied on an almost identical E&Y review in approving SWBT's section 271 application for Missouri, and has relied on similar audits in approving the California and Texas section 271 applications.⁷⁰ As discussed below, we reject commenters' arguments that the E&Y results cannot be credited here, either because of weaknesses in the E&Y methodology or because the very fact that the BearingPoint evaluation remains in progress alone casts doubt on E&Y's findings.

22. First, given our past reliance on the E&Y audit and audits employing similar methodologies, we reject commenters' arguments that the E&Y audit here is insufficiently rigorous to ground a finding that Michigan Bell's performance data are accurate and reliable.⁷¹ Rather, we agree with the Department of Justice that "E&Y's work should not be disregarded simply because of its approach."⁷² Nor do we believe that E&Y is somehow biased in Michigan Bell's favor. AT&T and CLECA state that the Securities and Exchange Commission (SEC) is investigating E&Y's alleged failure to remain neutral in auditing the books of its client PeopleSoft, and is seeking temporarily to prevent E&Y from taking on new auditing clients.⁷³ No commenter, however, has cited evidence that E&Y has acted improperly with regard to its evaluation of Michigan Bell's data. Absent specific evidence relating to this matter, the SEC's pursuit of claims unrelated to Michigan Bell is not sufficient to show a systemic problem with the accuracy and reliability of Michigan Bell's data.

23. Second, the mere fact that BearingPoint has not yet completed its review does not undermine the validity of the E&Y audit. AT&T suggests that the ongoing BearingPoint review, which "flatly contradict[s]" Michigan Bell's assertion that its data are reliable, precludes reliance on the E&Y audit.⁷⁴ As we explained above, however, we have previously approved at least three section 271 applications relying solely on the E&Y audit or on audits employing similar methodologies. Further, we have never required that an applicant complete even one data

⁶⁹ See *supra* para. 18.

⁷⁰ See *supra* note 62.

⁷¹ For example, AT&T contends that "E&Y's testing procedures were limited and flawed." AT&T Moore/Connolly Supplemental Decl. at para. 19. Its complaints include E&Y's failure to (1) test a full seven months' worth of data, as BearingPoint did, *id.* at para. 26; (2) utilize a pseudo-competitive LEC, as BearingPoint did, *id.* at para. 28; (3) "track the 'chain of custody' of the raw data completely through [Michigan Bell's] systems," as BearingPoint did, *id.* at para. 29; and (4) "perform[] regression testing to assess whether the corrective action that [Michigan Bell] has taken to resolve data defects had other, unintended consequences," as BearingPoint did, *id.* at para. 30. These methodological characteristics, however, do not distinguish the Michigan review from the reviews relied on in Missouri, Texas, or California.

⁷² See Department of Justice Supplemental Evaluation at 14.

⁷³ See AT&T Moore/Connolly Supplemental Decl. at paras. 6-7 & Attach. A (describing SEC proceeding regarding E&Y's auditing activities for PeopleSoft); CLECA Supplemental Comments at 5 & Attach. 1 (same).

⁷⁴ AT&T Supplemental Comments at 45.

review, much less two such reviews.⁷⁵ Given that we have previously found the E&Y review sufficient, and have never required a second independent audit, we cannot here conclude that Michigan Bell's application must be rejected, or the E&Y audit disregarded, simply because the BearingPoint review remains in progress.⁷⁶ Where E&Y has validated a particular practice or procedure, the fact that BearingPoint simply has reached no conclusion with regard to the matter is not an indication that Michigan Bell's data are inaccurate or unreliable.⁷⁷

b. The BearingPoint Review

24. Although we conclude that BearingPoint's testing does not, simply by virtue of its incompleteness, undermine the evidentiary force of the completed E&Y review, we recognize that BearingPoint has identified particular issues that do not appear to have been addressed in the context of the E&Y audit. Both Michigan Bell and the competitive LECs have provided testimony and other evidence regarding the BearingPoint results,⁷⁸ and we cannot ignore that evidence.⁷⁹ Nor can we assume that an issue identified by BearingPoint is inconsequential simply because it was not identified by E&Y.⁸⁰ Rather, we believe that the most appropriate response to the two audits is to accept the E&Y findings as *prima facie* evidence that Michigan Bell's data are generally accurate and reliable, but to consider whether any BearingPoint findings rebut that evidence. Thus, in this section, we discuss the general principles guiding our evaluation of the problems identified by BearingPoint, and then address BearingPoint's specific findings in each of the five "PMR" groupings. As we explain below, we conclude that BearingPoint's findings do not undermine our finding that Michigan Bell performance data are accurate and reliable for

⁷⁵ See *BellSouth Georgia/Louisiana Order*, 17 FCC Rcd at 9028-29, para. 17 (citing commenters' criticisms regarding "the lack of a completed audit"); *id.* at 9031, para. 19 (concluding that "we cannot as a general matter insist that all audits must be completed at the time a section 271 application is filed at the Commission").

⁷⁶ In reaching our conclusion, we note that the Michigan Commission itself has determined that E&Y's audit serves as a suitable substitute for BearingPoint's, notwithstanding the fact that BearingPoint had not completed its testing. See Michigan Commission Supplemental Comments at 5-6. Moreover, the Michigan Commission has required that the BearingPoint review be completed, and has committed itself to ensuring that issues raised in the future will be addressed appropriately.

⁷⁷ As explained below, we do not overlook cases in which BearingPoint has identified material infirmities in Michigan Bell's commercial data not addressed in the course of the E&Y audit. We note that this approach is consistent with the Department of Justice's advice that in evaluating the integrity of Michigan Bell's data, we "consider the totality of the evidence in the record." Department of Justice Supplemental Evaluation at 15.

⁷⁸ See Michigan Bell Ehr Aff. at paras. 231-64; Michigan Bell Ehr Reply Aff. at paras. 22-95; AT&T Reply Comments, Joint Reply Declaration of Karen W. Moore, Timothy M. Connolly and Sharon E. Norris at paras. 17-47 (AT&T Moore/Connolly/Norris Reply Decl.); Michigan Bell Ehr/Fioretti Supplemental Aff. at paras. 40-164; AT&T Moore/Connolly Supplemental Decl. at paras. 21-58.

⁷⁹ See, e.g., *Illinois Public Telecom. Ass'n v. FCC*, 117 F.3d 555, 564 (D.C. Cir. 1997) ("The FCC's *ipse dixit* conclusion, coupled with its failure to respond to contrary arguments resting on solid data, epitomizes arbitrary and capricious decisionmaking.").

⁸⁰ Put differently, we will not "dismiss[], based solely on the findings of E&Y's review, problems identified by BearingPoint's findings." Department of Justice Supplemental Evaluation at 14.

purposes of evaluating checklist compliance.

25. Four overarching principles guide our review of the outstanding BearingPoint issues. First, the fact that a BearingPoint issue remains “open” is *not* determinative for purposes of this application if the impact of the BearingPoint finding fails to satisfy the 5 percent materiality threshold that is applied by E&Y. As noted above, the E&Y review here employed a “materiality” standard that cited problems only if the solution to the problem would either (a) alter an affected performance metric result by 5 percent or more; or (b) change a “passing” result to a “failing” result or a “failing” result to a “passing” result.⁸¹ As also noted above, this is the same materiality threshold E&Y uses when conducting merger review audits for this Commission.⁸² Given our conclusion that the E&Y audit, standing alone, would justify a finding that Michigan Bell’s data were accurate and reliable, we must limit our review here to new problems that would have been deemed material if identified in the course of that review.

26. Second, we do not believe that evidence of problems that were remedied before the data at issue for purposes of this application were collected and processed has probative value in this proceeding. Our aim is to ensure that the performance data submitted by Michigan Bell in support of this application are accurate and reliable.⁸³ Performance problems that affected only the data for earlier months simply are not relevant to this proceeding.

27. Third, though we apply no bright-line rule in this regard, we focus our analysis on BearingPoint’s “exceptions” – that is, those cases where testing revealed that a Michigan Bell practice, policy, or system was expected not to satisfy one or more of the evaluation criteria defined for the test – rather than on “observations” – that is, those cases where testing revealed that a Michigan Bell practice, policy, or system *might* result in a negative finding in BearingPoint’s final report.⁸⁴ In the case of BearingPoint’s replication tests, however, we recognize that any material mismatch between BearingPoint’s figures and Michigan Bell’s constitutes important (but not conclusive) evidence that the metric at issue might be unreliable, irrespective of whether BearingPoint has labeled the underlying problem an “exception.”⁸⁵ Again, however, our aim is to determine only whether the data presented are sufficiently accurate and reliable to form a basis for conclusions regarding Michigan Bell’s performance under the checklist. For this reason, we focus our analysis below on *critical* metrics – that is, those metrics upon which the Commission typically relies in evaluating checklist compliance – for which BearingPoint’s replicated data fails to come within 5 percent of Michigan Bell’s own data.

28. Fourth, we emphasize again that our task is to determine whether, “as a general

⁸¹ See Michigan Bell Dolan/Horst Reply Aff. at para. 18.

⁸² See *supra* note 60.

⁸³ As noted above, the months relevant to this application are February 2003 through June 2003.

⁸⁴ One or more observations or exceptions may be associated with each unsatisfied test point.

⁸⁵ During the “replication” tests, BearingPoint recalculates each measure using source data provided by Michigan Bell. See *infra* para. 35.

matter,” Michigan Bell’s data are sound.⁸⁶ To the extent that BearingPoint issues remain open today or are identified going forward, we expect that those issues will be addressed in the context of the Michigan Commission’s ongoing oversight of BearingPoint’s review. That commission has specified that irrespective of whether we grant Michigan Bell’s section 271 application, the BearingPoint review will “continue until satisfactory results are achieved as determined by BearingPoint or are closed as determined by the Commission and its Staff.”⁸⁷ Michigan Bell, moreover, has emphasized its own commitment “to completing the BearingPoint test according to the directives received from the [Michigan Commission].”⁸⁸

(i) **PMR 1 (Data Collection and Storage)**

29. PMR 1 assesses the policies and practices according to which Michigan Bell collects and stores data.⁸⁹ As of June 30, 2003, BearingPoint maintained three open exceptions relating to PMR 1: Exceptions 186, 187 and 188. As explained below, these exceptions do not call into question the accuracy or reliability of Michigan Bell’s data.

30. Exception 186 reflects BearingPoint’s finding that various Michigan Bell systems had not retained performance data for the time period required by state regulation.⁹⁰ The evidence in our record indicates that this problem did not relate to data for any of the months at issue here. Moreover, Michigan Bell attests that it has remedied its data retention problems, and that data will, on a going-forward basis, be maintained for the appropriate period of time.⁹¹ While we believe that adherence to data retention requirements is critical, and recognize that the Michigan Commission might choose to sanction Michigan Bell pursuant to any relevant state laws or regulations for failing to satisfy its data retention requirements, Exception 186 does not implicate the calculation or reporting of the actual performance metrics, and thus does not cast doubt on the accuracy or reliability of the performance measures at issue here.

31. Exceptions 187 and 188 reflect BearingPoint’s finding that certain Michigan Bell technical documentation did not adequately describe the manner in which data was processed in the course of calculating performance measures.⁹² Since these exceptions were issued, however,

⁸⁶ *BellSouth Georgia/Louisiana Order*, 17 FCC Rcd at 9031, para. 19.

⁸⁷ Michigan Commission Reply Comments at 10; *see also* Michigan Commission Supplemental Comments at 3-4.

⁸⁸ Michigan Bell Supplemental Reply, App., Tab 6. Supplemental Reply Affidavit of James D. Ehr and Salvatore T. Fioretti at para. 43 (Michigan Bell Ehr/Fioretti Supplemental Reply Aff.).

⁸⁹ Michigan Bell Ehr/Fioretti Supplemental Aff. at para. 70.

⁹⁰ *See id.* at paras. 88-91; Exception 186 v.3 (available at <http://www.osstesting.com/Documents/Exceptions/Exception%20186v3.pdf>).

⁹¹ *See* Michigan Bell Ehr/Fioretti Supplemental Aff. at paras. 90-91.

⁹² *See id.* at para. 76-83; Exception 187 v.5 (available at <http://www.osstesting.com/Documents/Exceptions/Exception%20187v5.pdf>); Exception 188 v.5 (available at <http://www.osstesting.com/Documents/Exceptions/Exception%20188v5.pdf>).

Michigan Bell has corrected inaccuracies, allowing BearingPoint to confirm that the documentation regarding numerous measures is now accurate.⁹³ Moreover, we disagree with AT&T's suggestion that these exceptions might signal improper calculation of the performance measures themselves,⁹⁴ because a BOC could maintain incorrect documentation (and thus fail to satisfy test criteria in PMR 1) but still calculate its metrics properly (and thus satisfy all test criteria in PMR 4 and PMR 5). For this reason, while we believe PMR 1 is important, it does not directly impugn the accuracy of any metrics, and thus we rely primarily on PMR 4 and PMR 5 – not PMR 1 – to evaluate the accuracy of the actual performance metrics.⁹⁵ Thus, exceptions 187 and 188 raise questions regarding Michigan Bell's documentation, but *not* about the validity of the underlying data.

(ii) PMR 2 (Metrics Definitions and Standards) and PMR 3 (Performance Measurement Change Management)

32. BearingPoint has completed testing for PMR 2, which addresses metrics definitions and standards, and PMR 3, which addresses performance measurement change management. BearingPoint has deemed all test points for PMR 2 and PMR 3 to be "satisfied."⁹⁶ No commenter alleges that issues relating to either PMR 2 or PMR 3 stand as a barrier to approval of Michigan Bell's application here.

(iii) PMR 4 (Metrics Data Integrity)

33. PMR 4 addresses policies and practices used by Michigan Bell for processing the data used in the production of its reported performance results.⁹⁷ As of its June 30, 2003 Report, BearingPoint maintained only one open exception relating to PMR 4: Exception 181. This exception identified discrepancies between Michigan Bell's source systems and its processed records for a single diagnostic performance measure, PM 104.1 ("The average time it takes to unlock the 911 record").⁹⁸ Michigan Bell states that beginning with July 2002 results, it and its vendors implemented several process changes, and that beginning with the January 2003 data, it implemented a series of computer code enhancements.⁹⁹ These efforts, Michigan Bell contends, have improved the accuracy of its PM 104.1 calculations. In any event, however, Michigan Bell states that the problem had no material impact on the reported measurements. No commenter has

⁹³ Michigan Bell Ehr/Fioretti Supplemental Aff. at paras. 76, 80.

⁹⁴ See AT&T Moore/Connolly Supplemental Decl. at para. 54.

⁹⁵ See, e.g., Ehr/Fioretti Supplemental Reply Aff. at para. 49. As discussed below, moreover, we do not believe that open issues in PMR 4 or PMR 5 do undermine the accuracy or reliability of Michigan Bell's data.

⁹⁶ See June 30 BearingPoint Report at 5.

⁹⁷ Michigan Bell July 10 *Ex Parte* Letter, Attach. at 3.

⁹⁸ See Michigan Bell Ehr/Fioretti Supplemental Aff. at paras. 115-16; Exception 181 (available at <http://www.osstesting.com/Documents/Exceptions/Exception%20181vf.pdf>).

⁹⁹ See Michigan Bell Ehr/Fioretti Supplemental Aff. at para. 115.

challenged these arguments here. In light of Michigan Bell's un rebutted evidence (1) that the only remaining PMR 4 issue affects just one measure, which is diagnostic in nature and thus involves no penalties for poor performance, (2) that it has worked to remedy the issue, and (3) that the issue did not materially affect any metric, we conclude that BearingPoint's PMR 4 results do not bar a finding that Michigan Bell's data are accurate and reliable.

(iv) **PMR 5 (Metrics Calculation and Reporting)**

34. PMR 5 assesses Michigan Bell's calculation of performance measurement results and its application of the business rules and exclusions. BearingPoint's PMR 5 test, which evaluates data from July, August, and September of 2002,¹⁰⁰ is still in progress. We address only the components of the PMR 5 review which have revealed problems.¹⁰¹

35. *PMR 5-2.* PMR 5-2 comprises the "replication" analysis of Michigan Bell's performance measures. During the course of its PMR 5-2 review, BearingPoint recalculates each measure using source data provided by Michigan Bell, attempting to match its findings to Michigan Bell's. As of June 30, 2003, Michigan Bell had failed to replicate successfully several of the critical performance metrics on which we generally rely in assessing a carrier's section 271 application. In only eight cases, however, did the mismatch meet the 5 percent E&Y materiality threshold.¹⁰² We discuss each below.

36. The material mismatches fell into three categories. First, fully half of the mismatches resulted from a one-time calculation error by Michigan Bell personnel, which affected the August 2002 performance results for four metrics.¹⁰³ The error did not affect data in

¹⁰⁰ See Michigan Bell Ehr Aff. at para. 264; Michigan Bell Ehr/Fioretti Supplemental Aff. at paras. 63, 135.

¹⁰¹ PMR 5-1 evaluates whether Michigan Bell reports all required performance measure disaggregations. There are no open BearingPoint issues relating to PMR 5-1, and no commenter has alleged that problems in this area preclude a finding that Michigan Bell's data are accurate and reliable. PMR 5-4 comprises BearingPoint's evaluation of whether Michigan Bell has implemented exclusions in accordance with the applicable business rules. As of BearingPoint's June 30, 2003 report, no BearingPoint exceptions related to PMR 5-4. June 30 BearingPoint Report at 183-94; Michigan Bell Ehr/Fioretti Supplemental Aff. at para. 130. No commenter has cited PMR 5-4 issues as a ground for denying Michigan Bell's application.

¹⁰² Although BearingPoint does not itself adopt this threshold, it has validated Michigan Bell's assertions that the remaining mismatches fell within a 5 percent standard of error. See Michigan Bell Ehr/Fioretti Supplemental Aff. at Attach. C, Attach. D. The metrics for which the disparity was greater than 5 percent included PM 1.2 (Accuracy of Actual LMU Info Provided for DSL Orders Manually), PM 37 (Trouble Report Rate), PM 37.1 (Trouble Report Rate Net of Install & Repeat Reports), PM 58 (% SBC/Ameritech Caused Missed Due Dates), PM 114 (% Premature Disconnects (Coordinated Cutovers)), PM 114.1 (CHC/FDT LNP w/ Loop Provisioning Interval), PM 115 (% of SBC/Ameritech Caused Delayed Coordinated Cutovers), and PM 115.1 (% Provisioning Trouble Reports).

¹⁰³ The affected metrics were PM 114 (% Premature Disconnects (Coordinated Cutovers)), PM 114.1 (CHC/FDT LNP w/ Loop Provisioning Interval), PM 115 (% of SBC/Ameritech Caused Delayed Coordinated Cutovers), and PM 115.1 (% Provisioning Trouble Reports).

July or September, the other two months evaluated.¹⁰⁴ To ensure accurate reporting of these measures going-forward, Michigan Bell reinforced its “measurement process training within the applicable service delivery organization.”¹⁰⁵ BearingPoint has closed the observation associated with these mismatches as “satisfied,” and there is no evidence suggesting that the problem has affected data for the months at issue here. Thus, these four items do not undermine the accuracy or reliability of the four affected measures, much less that of Michigan Bell’s data more generally.

37. Second, two of the material mismatches (relating to PM 1.2 (Accuracy of Actual LMU Info Provided for DSL Orders Manually) and PM 58 (% SBC/Ameritech Caused Missed Due Dates)) appear to have resulted from BearingPoint’s improper application of the relevant business rules. In both of these cases, Michigan Bell has worked with BearingPoint to resolve the misinterpretation, and BearingPoint is in the process of retesting Michigan Bell’s figures.¹⁰⁶ Under these circumstances, we cannot find that BearingPoint’s inability to replicate the two measures in question undermines the accuracy or reliability of the two affected measures, or that of Michigan Bell’s data more generally.¹⁰⁷

38. Finally, the remaining two mismatches (relating to PM 37 (Trouble Report Rate) and PM 37.1 (Trouble Report Rate Net of Install & Repeat Reports)) appear to have resulted from a combination of BearingPoint’s improper application of the relevant business rules and Michigan Bell’s use of incorrect records while calculating the measures. Michigan Bell corrected the errors beginning with the February 2003 data, meaning that they should not affect the data for the months at issue in this application.¹⁰⁸ BearingPoint is now retesting these measures. Given Michigan Bell’s efforts to remediate the problems identified, and the record evidence suggesting that those errors have not infected the data at issue here, we find that these mismatches do not undermine the accuracy or reliability of Michigan Bell’s data.

39. *PMR 5-3.* PMR 5-3 comprises BearingPoint’s analysis of whether Michigan Bell calculates performance results in accordance with the applicable business rules. As of BearingPoint’s June 30, 2003 report, only two BearingPoint exceptions related to PMR 5-3.¹⁰⁹ The first, Exception 111, cited improper treatment of certain order types in the calculation of performance measures 66 through 68, which address the timeliness of repairs to unbundled

¹⁰⁴ See Michigan Bell Ehr/Fioretti Supplemental Aff. at para. 141

¹⁰⁵ See Michigan Bell July 10 *Ex Parte* Letter, Attach. Ev2 at 7.

¹⁰⁶ See *id.* at 1-2.

¹⁰⁷ As explained below, moreover, we do not rely on PM 1.2 in approving this application. See *infra* Part IV.B.2.b.

¹⁰⁸ See Michigan Bell July 10 *Ex Parte* Letter, Attach. Ev2 at 3-4. Moreover, Michigan Bell has restated data for the months reviewed by BearingPoint. See *id.*

¹⁰⁹ June 30 BearingPoint Report at 174; Michigan Bell Ehr/Fioretti Supplemental Aff. at para. 129.

loops.¹¹⁰ Michigan Bell argues that it has responded to BearingPoint's finding by implementing process enhancements and clarifying its business rules.¹¹¹ No commenter disputes this claim. The second exception, Exception 113, involved a dispute between BearingPoint and Michigan Bell regarding interpretation of the rules governing PM 2, which calculates the speed of responses to pre-order inquiries.¹¹² Michigan Bell states that it has recently clarified the rule to reflect its interpretation, and that the Michigan Commission has approved the clarification.¹¹³ Again, no commenter has contested Michigan Bell's claims.

4. Conclusion

40. In sum, we conclude that the E&Y audit stands as *prima facie* evidence that Michigan Bell's data are, on the whole, accurate and reliable, and that BearingPoint's specific criticisms do not rebut this conclusion. In those cases where BearingPoint has identified specific concerns that it believes would likely affect performance measures critical to our evaluation, the problems cited generally either do not affect the data for the months at issue, have been remedied by Michigan Bell, or are not material under the standards this Commission has employed in prior proceedings. We therefore believe that the commercial performance data before us form an adequate evidentiary basis on which we can render judgments regarding Michigan Bell's satisfaction of the competitive checklist.

B. Checklist Item 2 – Unbundled Network Elements

1. Pricing of Unbundled Network Elements

41. Checklist item 2 of section 271 states that a BOC must provide “[n]ondiscriminatory access to network elements in accordance with the requirements of sections 251(c)(3) and 252(d)(1)” of the Act.¹¹⁴ Section 251(c)(3) requires incumbent LECs to provide “nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory.”¹¹⁵ Section 252(d)(1) provides that a state commission's determination of the just and reasonable rates for network elements must be nondiscriminatory, must be based on the cost of providing the network elements, and may include a reasonable profit.¹¹⁶ Pursuant to this statutory mandate, the

¹¹⁰ See Exception 111 v.2 (available at <http://www.osstesting.com/Documents/Exceptions/Exception%20111v2.pdf>).

¹¹¹ See Michigan Bell Ehr/Fioretti Supplemental Aff. at para. 129; Exception 111 v.2 Disposition (available at <http://www.osstesting.com/Documents/Exceptions/Exception%20111v2%20Disposition%202.pdf>).

¹¹² Michigan Bell Ehr/Fioretti Supplemental Aff. at para. 129; Exception 113 v.2 (available at <http://www.osstesting.com/Documents/Exceptions/Exception%20113v2.pdf>).

¹¹³ Michigan Bell Ehr/Fioretti Supplemental Aff. at para. 129 & n.74.

¹¹⁴ 47 U.S.C. § 271(c)(2)(B)(ii).

¹¹⁵ 47 U.S.C. § 251(c)(3).

¹¹⁶ 47 U.S.C. § 252(d)(1).

Commission has determined that prices for UNEs must be based on the total element long-run incremental cost (TELRIC) of providing those elements.¹¹⁷

42. In applying the Commission's TELRIC pricing principles in this application, we do not conduct a *de novo* review of a state's pricing determinations.¹¹⁸ We will, however, reject an application if "basic TELRIC principles are violated or the state commission makes clear errors in factual findings on matters so substantial that the end result falls outside the range that the reasonable application of TELRIC principles would produce."¹¹⁹ We note that different states may reach different results that are each within the range of what a reasonable application of TELRIC principles would produce. Accordingly, an input rejected elsewhere might be reasonable under the specific circumstances here.

43. The analytical framework we employ to review section 271 applications in these situations is well established. As the Commission's previous decisions make clear, a BOC may submit as part of its *prima facie* case a valid pricing determination from a state commission. In such cases, we will conclude that the BOC meets the TELRIC pricing requirements of section 271 unless we find that the determination violates basic TELRIC principles or contains clear errors of fact on matters so substantial that the end result falls outside the range that a reasonable application of TELRIC principles would produce.¹²⁰ Once the BOC makes a *prima facie* case of compliance, the objecting party must proffer evidence that persuasively rebuts the BOC's *prima facie* showing. The burden then shifts to the BOC to demonstrate the validity of its evidence or the state commission's approval of the disputed rate or charge.¹²¹ When a party raises a challenge related to a pricing issue for the first time in the Commission's section 271 proceedings without showing why it was not possible to raise it before the state commission, we may exercise our

¹¹⁷ *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, First Report and Order, 11 FCC Rcd 15499, 15844-47, paras. 674-79 (1996) (*Local Competition First Report and Order*) (subsequent history omitted); 47 C.F.R. §§ 51.501-51.515. Last year the Supreme Court upheld the Commission's forward-looking pricing methodology in determining the costs of UNEs. *Verizon Communications, Inc. v. FCC*, 535 U.S. 467, 523 (2002). The Commission recently has initiated a proceeding to review its TELRIC rules. *Review of the Commission's Rules Regarding the Pricing of Unbundled Network Elements and the Resale of Service by Incumbent Local Exchange Carriers*, WC Docket No. 03-173, FCC 03-224 (Sept. 15, 2003).

¹¹⁸ *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*, CC Docket No. 01-138, Memorandum Opinion and Order, 16 FCC Rcd 17419, 17453, para. 55 (citations omitted) (2001) (*Verizon Pennsylvania Order*) (subsequent history omitted); see also *Sprint Communs. Co. v. FCC*, 274 F.3d 549, 556 (D.C. Cir. 2001) ("When the Commission adjudicates § 271 applications, it does not – and cannot – conduct *de novo* review of state rate-setting determinations. Instead, it makes a general assessment of compliance with TELRIC principles.").

¹¹⁹ *Verizon Pennsylvania Order*, 16 FCC Rcd at 17453, para. 55 (citations omitted).

¹²⁰ See, e.g., *Verizon New Jersey Order*, 17 FCC Rcd at 12305, para. 68.

¹²¹ *Application by BellSouth Corporation, et al., Pursuant to Section 271 of the Communications Act of 1934, as Amended, to Provide In-Region, InterLATA Services in Louisiana*, CC Docket No. 98-121, Memorandum Opinion and Order, 13 FCC Rcd 20599, 20635-39, paras. 51-59 (1998) (*BellSouth Second Louisiana Order*).