

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

In the Matter of)
)
Joint Application by SBC Communications Inc.,)
Illinois Bell Telephone Company, Indiana Bell)
Telephone Company, the Ohio Bell Telephone) WC Docket No. 03-167
Company, Wisconsin Bell, Inc., and Southwestern)
Bell Communications Services, Inc. for)
Provision of In-Region, InterLATA Services)
in Illinois, Indiana, Ohio, and Wisconsin)

EVALUATION OF THE
UNITED STATES DEPARTMENT OF JUSTICE

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Table of Contents

Table of Contents	ii
Index of Full Citations	iii
Introduction and Summary	1
I. State Commission Proceedings	3
A. Illinois	3
B. Indiana	3
C. Ohio	4
D. Wisconsin	5
II. Entry into the Local Telecommunications Markets	6
III. Operations Support Systems	8
A. Billing	8
B. Manual Handling	15
C. Line-Splitting	16
IV. Pricing Issues	17
V. Reliability of Reported Performance Data	18
VI. Conclusion	20

INDEX OF FULL CITATIONS	
Short Citation	Full Citation
DOJ Evaluations and Related Materials	
DOJ Georgia/Louisiana I Evaluation	Evaluation of the U.S. Department of Justice, <i>In re: Joint Application by BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc. for Provision of In-Region InterLATA Services in Georgia and Louisiana</i> , FCC CC Docket No. 01-277 (Nov. 6, 2001), available at < http://www.usdoj.gov/atr/public/comments/sec271/sec271.htm >.
DOJ Massachusetts II Evaluation	Evaluation of the U.S. Department of Justice, <i>In re: Application by Verizon New England, 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</i> , FCC CC Docket No. 01-9 (Feb. 21, 2001), available at < http://www.usdoj.gov/atr/public/comments/sec271/sec271.htm >.
DOJ Michigan II Evaluation	Evaluation of the U.S. Department of Justice, <i>In re: Application of SBC Communications Inc., Michigan Bell Telephone Company, and Southwestern Bell Communications Services, Inc. for Provision of In-Region, InterLATA Services in Michigan</i> , FCC CC Docket No. 03-16 (Feb. 26, 2003), available at < http://www.usdoj.gov/atr/public/comments/sec271/sec271.htm >.
DOJ Michigan III Evaluation	Evaluation of the U.S. Department of Justice, <i>In re: Application by SBC Communications Inc., Michigan Bell Telephone Company, and Southwestern Bell Communications Services, Inc. for Provision of In-Region, InterLATA Services in Michigan</i> , FCC CC Docket No. 03-138 (July 16, 2003), available at < http://www.usdoj.gov/atr/public/comments/sec271/sec271.htm >.
DOJ Missouri I Evaluation	Evaluation of the U.S. Department of Justice, <i>In re: Application of 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 Missouri</i> , FCC CC Docket No. 01-88 (May 9, 2001), available at < http://www.usdoj.gov/atr/public/comments/sec271/sec271.htm >.
DOJ Oklahoma I Evaluation	Evaluation of the U.S. Department of Justice, <i>In re: Application of SBC Communications Inc. et al Pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-Region, InterLATA Services in the State of Oklahoma</i> , FCC CC Docket No. 97-121 (May 16, 1997), available at < http://www.usdoj.gov/atr/public/comments/sec271/sec271.htm >.
DOJ Pennsylvania Evaluation	Evaluation of the U.S. Department of Justice, <i>In re: Application by 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</i> , FCC CC Docket No. 01-138 (July 26, 2001), available at < http://www.usdoj.gov/atr/public/comments/sec271/sec271.htm >.
DOJ Performance Measures Reply Comments	Reply Comments of the U.S. Department of Justice, <i>In re: Performance Measurements and Standards for Unbundled Network Elements and Interconnection</i> , FCC CC Docket No. 01-318 (Feb. 12, 2002).

INDEX OF FULL CITATIONS	
Short Citation	Full Citation
DOJ Texas I Evaluation	Evaluation of the U.S. Department of Justice, <i>In re: Application of 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 Texas</i> , FCC CC Docket No. 00-4 (Feb. 14, 2000), available at < http://www.usdoj.gov/atr/public/comments/sec271/sec271.htm >.
FCC Orders, Reports, and Related Materials	
FCC Chairman Powell Michigan Withdrawal Statement	Statement of FCC Chairman Michael Powell on Withdrawal of SBC's 271 Application for Michigan (Apr. 16, 2003), available at < http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-233291A1.pdf >.
<i>FCC Maryland/Washington, D.C./West Virginia Order</i>	Memorandum Opinion and Order, <i>In re: Application by Verizon Maryland Inc., Verizon Washington, D.C. Inc., Verizon West Virginia 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 Maryland, Washington, D.C., and West Virginia</i> , 18 FCC Rcd 5212 (Mar. 19, 2003), available at < http://www.fcc.gov/Bureaus/Common_Carrier/in-region_applications >.
<i>FCC Michigan Order</i>	Memorandum Opinion and Order, <i>In re: Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in Michigan</i> , 12 FCC Rcd 20,543 (Aug. 19, 1997), available at < http://www.fcc.gov/Bureaus/Common_Carrier/in-region_applications >.
<i>FCC Minnesota Order</i>	Memorandum Opinion and Order, <i>In re: Application by Qwest Communications International Inc., for Authorization To Provide In-Region, InterLATA Services in Minnesota</i> , FCC WC Docket No. 03-142 (June 26, 2003), available at 2003 WL 21474544 and < http://www.fcc.gov/Bureaus/Common_Carrier/in-region_applications >.
<i>FCC Pennsylvania Order</i>	Memorandum Opinion and Order, <i>In re: 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</i> , 16 FCC Rcd 17,419 (Sept. 19, 2001), available at < http://www.fcc.gov/Bureaus/Common_Carrier/in-region_applications >.
<i>FCC Qwest Multistate I Order</i>	Memorandum Opinion and Order, <i>In re: 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</i> , 17 FCC Rcd 26,303 (Dec. 23, 2002), available at < http://www.fcc.gov/Bureaus/Common_Carrier/in-region_applications >.
State Commission Orders and Related Materials	
Illinois CC Consultative Report	Consultative Report to the Federal Communications Commission from the Illinois Commerce Commission, <i>In re: Investigation Concerning Illinois Bell Telephone Company's Compliance with Section 271 of the Telecommunications Act of 1996</i> , FCC WC Docket No. 03-167 (Aug. 6, 2003).

INDEX OF FULL CITATIONS	
Short Citation	Full Citation
Illinois CC Final Order	Order on Investigation, <i>In re: Investigation Concerning Illinois Bell Telephone Company's Compliance with Section 271 of the Telecommunications Act of 1996</i> , Illinois CC Docket No. 01-0662 (May 13, 2003), attached to SBC Br. App. C-IL as Tab 135.
Illinois CC Notice of Action	Notice of Commission Action, <i>In re: Illinois Bell Telephone Company Filing to Increase Unbundled Loop and Nonrecurring Rates</i> , Illinois CC Docket No. 02-0864 (May 22, 2003), available at http://eweb.icc.state.il.us/e-docket/ .
Indiana URC Comments	Comments of the Indiana Utility Regulatory Commission, <i>In re: Application of SBC, Pursuant to Section 271 of the Telecommunications Act of 1996 for Authorization to Provide In-Region, InterLATA Services in Illinois, Indiana, Ohio, and Wisconsin</i> , FCC WC Docket No. 03-167 (Aug. 6, 2003).
Indiana URC Compliance Order	Compliance Order, <i>In re: Petition of Indiana Bell Telephone Company, Incorporated, d/b/a Ameritech Indiana or SBC Indiana Pursuant to I.C. 8-1-2-61 for a Three-Phase Process for Commission Review of Various Submissions of SBC Indiana to Show Compliance with Section 271(c) of the Telecommunications Act of 1996</i> , Indiana URC Docket No. 41657 (July 2, 2003), attached to SBC Br. App. C-IN as Tab 71.
Indiana URC Report and Recommendation	Section 271 Report and Recommendation of the Indiana Utility Regulatory Commission to the Federal Communications Commission, <i>In re: Petition of Indiana Bell Telephone Company, Incorporated, d/b/a SBC Indiana Pursuant I.C. 8-1-2-61 for a Three-Phase Process for Commission Review of Various Submissions of SBC Indiana to Show Compliance with Section 271(c) of the Telecommunications Act of 1996</i> , Indiana URC Docket No. 41657, FCC WC Docket No. 03-167 (Aug. 6, 2003).
Michigan PSC Report	Report of the Michigan Public Service Commission, <i>In re: 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</i> , Michigan PSC Docket No. U-12320 (Jan. 13, 2003), available at http://www.cis.state.mi.us/mpsc/comm/271/Checklist.pdf .
Ohio PUC Comments	Comments of the Public Utilities Commission of Ohio, <i>In re: Application by SBC Communications, Inc. for Authorization to Provide In-Region, InterLATA Services in the States of Illinois, Indiana, Ohio, and Wisconsin</i> , FCC WC Docket No. 03-167 (Aug. 6, 2003).
Ohio PUC Compliance Order	Order, <i>In re: Investigation into SBC Ohio's Entry into In-Region InterLATA Service Under Section 271 of the Telecommunications Act of 1996</i> , Ohio PUC Docket No. 00-942-TP-COI (June 26, 2003), attached to SBC Br. App. C-OH as Tab 128.
Ohio PUC Report and Evaluation	Report and Evaluation, <i>In re: Investigation into SBC Ohio's (formerly Ameritech Ohio) Entry into In-Region, InterLATA Service Under Section 271 of the Telecommunications Act of 1996</i> , Ohio PUC Docket No. 00-942-TP-COI (June 26, 2003), FCC WC Docket 03-167 (Aug. 6, 2003).
Wisconsin PSC Final Determination II	Determination, <i>In re: Petition of Wisconsin Bell, Inc., for a Section 271 Checklist Proceeding</i> , Wisconsin PSC Docket No. 6720-TI-170 (July 7, 2003), attached to SBC Br. App. C-WI as Tab 67.

INDEX OF FULL CITATIONS	
Short Citation	Full Citation
Wisconsin PSC Phase I OSS Order	Final Decision (Phase I), <i>Investigation into Ameritech Wisconsin Operational Support Systems</i> , Wisconsin PSC Docket No. 6720-TI-160 (Sept. 25, 2001), <i>attached to</i> SBC Br. App. M as Tab 61.
Wisconsin PSC Wholesale Billing Practices Notice	Notice of Proceeding and Investigation and Assessment of Costs and Prehearing Conference, <i>In re: Investigation into the Wholesale Billing Practices of Wisconsin Bell, Inc., d/b/a SBC Wisconsin</i> , Wisconsin PSC Docket No. 6720-TI-183 (July 10, 2003), <i>available at</i> < http://psc.wi.gov/pdffiles/ord_notc/6164.PDF >.
SBC's Application and Related Filings	
SBC Billing Completion Notice <i>Ex Parte</i>	SBC Communications, Inc., Additional Information on SBC Billing Notice Completion, SBC <i>Ex Parte</i> Submission, FCC WC Docket No. 03-138 (Aug. 13, 2003).
SBC Br.	Brief in Support of Application by SBC for Provision of In-Region, InterLATA Services in Illinois, Indiana, Ohio, and Wisconsin, <i>In re: Application by SBC Communications Inc., Illinois Bell Telephone Company, Indiana Bell Telephone Company, the Ohio Bell Telephone Company, Wisconsin Bell, and Southwestern Bell Communications Services, Inc. for Provision of In-Region, InterLATA Services in Illinois, Indiana, Ohio, and Wisconsin</i> , FCC WC Docket No. 03-167 (July 17, 2003).
SBC Brown/Cottrell/Flynn Aff.	Affidavit of Justin W. Brown, Mark J. Cottrell and Michael E. Flynn, <i>attached to</i> SBC Br. App. A as Tab 6.
SBC Complex Orders <i>Ex Parte</i>	SBC Communications, Inc., Information in Response to DOJ Queries re Complex Orders, SBC <i>Ex Parte</i> Submission, FCC WC Docket No. 03-167 (Aug. 13, 2003).
SBC Ehr/Fioretti Aff.	Affidavit of James D. Ehr and Salvatore T. Fioretti, <i>attached to</i> SBC Br. App. A as Tab 22.
SBC Heritage Illinois Aff.	Affidavit of Deborah O. Heritage Regarding the Status of Local Exchange Competition in Illinois, <i>attached to</i> SBC Br. App. A as Tab 24.
SBC Heritage Indiana Aff.	Affidavit of Deborah O. Heritage Regarding the Status of Local Exchange Competition in Indiana, <i>attached to</i> SBC Br. App. A as Tab 25.
SBC Heritage Ohio Aff.	Affidavit of Deborah O. Heritage Regarding the Status of Local Exchange Competition in Ohio, <i>attached to</i> SBC Br. App. A as Tab 26.
SBC Heritage Wisconsin Aff.	Affidavit of Deborah O. Heritage Regarding the Status of Local Exchange Competition in Wisconsin, <i>attached to</i> SBC Br. App. A as Tab 27.
SBC Illinois Reply to KPMG Interim Report	SBC Ameritech Illinois Reply to KPMG Consulting's Detailed Interim Report to the Illinois Commerce Commission of June 18, 2002 on the SBC Ameritech OSS Evaluation, <i>In re: Investigation Concerning Illinois Bell Telephone Company's Compliance with Section 271 of the Telecommunications Act of 1996</i> , Illinois CC Docket No. 01-0662 (July 9, 2002), <i>attached to</i> SBC Br. App. C-IL as Tab 33.

INDEX OF FULL CITATIONS	
Short Citation	Full Citation
SBC Indiana Intent to File Supplementing Information	Notice of Intent to File Supplementing Information, SBC, <i>In re: Petition of Indiana Bell Telephone Company, Incorporated d/b/a Ameritech Indiana, Pursuant to I.C. 8-1-2-61, for a Three-Phase Process for Commission Review of Various Submissions of Ameritech Indiana to Show Compliance with Section 271(c) of the Telecommunications Act of 1996</i> , Indiana URC Docket No. 41657 (Jan. 17, 2003), <i>attached to</i> SBC Br. App. C-IN as Tab 45.
SBC Michigan Withdrawal <i>Ex Parte</i>	SBC Communications, Inc., Withdrawal of Section 271 Application for Michigan, SBC <i>Ex Parte</i> Submission, FCC WC Docket No. 03-16 (Apr. 16, 2003).
SBC Michigan III Billing <i>Ex Parte</i>	SBC Communications, Inc., Additional Information on SBC Billing Sample Review in Michigan, SBC <i>Ex Parte</i> Submission, FCC WC Docket No. 03-138 (July 28, 2003).
SBC Michigan III Brown/Cottrell/Flynn Supp. Reply Aff.	Supplemental Reply Affidavit of Justin W. Brown, Mark J. Cottrell and Michael E. Flynn, <i>attached to</i> SBC Michigan III Supp. Reply Comments.
SBC Michigan III Ehr/Fioretti Supp. Reply Aff.	Supplemental Reply Affidavit of James D. Ehr and Salvatore T. Fioretti, <i>attached to</i> SBC Michigan III Supp. Reply Comments.
SBC Michigan III Supp. Reply Comments	Supplemental Reply Comments in Support of Application by SBC for Provision of In-Region, InterLATA Services in Michigan, <i>In re: Application by SBC Communications Inc., Michigan Bell Telephone Company, and Southwestern Bell Communications Services, Inc. for Provision of In-Region, InterLATA Services in Michigan</i> , FCC WC Docket No. 03-138 (July 21, 2003).
SBC Ohio Intent to File Supplementing Information	SBC Ameritech Ohio's Notice of Intent to File in Phase III Performance Measure Audit Reports, SBC, <i>In re: Further Investigation into SBC Ameritech Ohio's Entry into In-Region InterLATA Service Under Section 271 of the Telecommunications Act of 1996</i> , Ohio PUC Docket No. 00-942-TP-COI (Nov. 12, 2002), <i>attached to</i> SBC Br. App. C-OH as Tab 96.
SBC VanderSanden Aff.	Affidavit of Scott T. VanderSanden, <i>attached to</i> SBC Br. App. A as Tab 40.
SBC Wardin Aff.	Affidavit of W. Karl Wardin on Behalf of Illinois Bell, <i>attached to</i> SBC Br. App. A as Tab 41.
Third-Party Comments and Affidavits/Declarations	
Access One Comments	Verified Comments of Access One, Inc., <i>In re: SBC's Application for Provision of In-Region, InterLATA Services in Illinois</i> , FCC WC Docket No. 03-167 (Aug. 6, 2003).
AT&T Comments	Comments of AT&T Corp., <i>In re: Application of SBC Communications Inc., Illinois Bell Telephone Company, Indiana Bell Telephone Company Incorporated, 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</i> , FCC WC Docket No. 03-167 (Aug. 6, 2003).
AT&T DeYoung/Tavares Decl.	Joint Declaration of Sarah DeYoung and Shannie Tavares on Behalf of AT&T Corp., <i>attached to</i> AT&T Comments as Tab B.

INDEX OF FULL CITATIONS	
Short Citation	Full Citation
AT&T DeYoung/Willard Decl.	Joint Declaration of Sarah DeYoung and Walter W. Willard on Behalf of AT&T Corp., <i>attached to AT&T Comments as Tab C.</i>
AT&T Moore/Connolly Decl.	Declaration of Karen W. Moore and Timothy M. Connolly on Behalf of AT&T Corp., <i>attached to AT&T Comments as Tab D.</i>
CIMCO Comments	Verified Comments of Bill Dvorak on Behalf of CIMCO Communications, Inc., <i>In re: SBC's Application for Provision of In-Region, InterLATA Services in Illinois</i> , FCC WC Docket No. 03-167 (Aug. 6, 2003).
Forte Comments	Verified Comments of Forte Communications, Inc., <i>In re: SBC's Application for Provision of In-Region, InterLATA Services in Illinois</i> , FCC WC Docket No. 03-167 (Aug. 6, 2003).
Globalcom Comments	Comments of Globalcom, Inc., <i>In re: Joint Application by SBC Communications Inc., Illinois Bell Telephone Company, Indiana Bell Telephone Company Incorporated, 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</i> , FCC WC Docket No. 03-167 (Aug. 6, 2003).
Indiana OUCC Comments	Indiana Office of Utility Consumer Counselor's Initial Comments on Petitioners' Request for InterLATA Authority in the State of Indiana, <i>In re: Joint Application by SBC Communications Inc., Illinois Bell Telephone Company, Indiana Bell Telephone Company Incorporated, 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</i> , FCC WC Docket No. 03-167 (Aug. 6, 2003).
Joint CLEC Comments	Comments of ACN Communications Services, Inc., BullsEye Telecom, Inc., Choice One Communications Inc., CIMCO Communications, Inc., Indiana Fiber Works, LLC., Mpower Communications Corp., and PowerNet Global Communications, Inc., <i>In re: Joint Application by SBC Communications Inc., Illinois Bell Telephone Company, Indiana Bell Telephone Company Incorporated, the Ohio Bell Telephone Company, Wisconsin Bell, Inc., and Southwestern Bell Communications Services, Inc., for Authorization Under Section 271 Of the Communications Act to Provide In-Region, InterLATA Service in Illinois, Indiana, Ohio, and Wisconsin</i> , FCC WC Docket No. 03-167 (Aug. 6, 2003).
MCI Comments	Comments of MCI, <i>In re: Joint Application by SBC Communications Inc., for Provision of In-Region, InterLATA Services in Illinois, Indiana, Ohio and Wisconsin</i> , FCC WC Docket No. 03-167 (Aug. 6, 2003).
NTD Comments	Comments of Northern Telephone and Data Corporation, <i>In re: Application by SBC Communications Inc., for Provision of In-Region, InterLATA Services in the States of Illinois, Indiana, Ohio and Wisconsin</i> , FCC WC Docket No. 03-167 (Aug. 6, 2003).
Ohio CC Comments	Comments of Ohio Consumers' Counsel, <i>In re: Application by SBC Communications, Inc. for Authorization to Provide In-Region InterLATA Services in the States of Illinois, Indiana, Ohio, and Wisconsin</i> , FCC WC Docket No. 03-167 (Aug. 6, 2003).

INDEX OF FULL CITATIONS	
Short Citation	Full Citation
TDS Metrocom Comments	Comments of TDS Metrocom, LLC, <i>In re: Joint Application by SBC Communications Inc., Illinois Bell Telephone Company, Indiana Bell Telephone Company Incorporated, the Ohio Bell Telephone Company, Wisconsin Bell, Inc., and Southwestern Bell Communications Services, Inc., for Authorization Under Section 271 Of the Communications Act to Provide In-Region, InterLATA Services in Illinois, Indiana, Ohio, and Wisconsin</i> , FCC WC Docket No. 03-167 (Aug. 6, 2003).
Z-Tel Comments	Opposition of Z-Tel Communications, Inc., <i>In re: Application by SBC Communications Inc. for Authorization to Provide In-Region, InterLATA Services in the States of Illinois, Indiana, Ohio, and Wisconsin</i> , FCC WC Docket No. 03-167 (Aug. 6, 2003).

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Telephone Company, the Ohio Bell Telephone) WC Docket No. 03-167
Company, Wisconsin Bell, Inc., and Southwestern)
Bell Communications Services, Inc. for)
Provision of In-Region, InterLATA Services)
in Illinois, Indiana, Ohio, and Wisconsin)

EVALUATION OF THE
UNITED STATES DEPARTMENT OF JUSTICE

Introduction and Summary

The United States Department of Justice (“the Department”), pursuant to Section 271(d)(2)(A) of the Telecommunications Act of 1996¹ (“the 1996 Act”), submits this Evaluation of the application filed on July 17, 2003, 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. (collectively, “SBC”) to provide in-region, interLATA services in Illinois, Indiana, Ohio, and Wisconsin.

This application to the Federal Communications Commission (“FCC” or “Commission”) is SBC’s first for these states and follows closely on the heels of its fourth application for long distance authority in Michigan, which is pending.² The Department’s evaluation of that

¹ Pub. L. No. 104-104, 110 Stat. 56 (1996) (codified as amended in scattered sections of 47 U.S.C.).

² See generally DOJ Michigan III Evaluation (filed July 16, 2003). SBC withdrew the third such application, filed on January 16, 2003. SBC Michigan Withdrawal *Ex Parte* at 1. On February 26, 2003, the Department submitted its Evaluation of that earlier application, focusing on issues pertaining to the adequacy of SBC’s operations support systems (“OSS”) and change management processes, and the reliability of its performance data. DOJ Michigan II Evaluation at 6-16. Based on these concerns, the Department concluded that it could not

application (“Michigan III Evaluation”) focused on issues pertaining to accuracy of wholesale billing, provisioning of line-splitting, and reliability of performance data.³ The Department found that, although SBC had made progress in addressing many of these concerns, it could not support the application based on the then current record as to billing problems.⁴ The Department did not, however, foreclose the possibility that the Commission could determine that the concerns were adequately addressed prior to the conclusion of its review.⁵

As the Department has explained, in-region, interLATA entry by a regional Bell Operating Company (“BOC”) should be permitted only when the local markets in a state have been “fully and irreversibly” opened to competition.⁶ Although SBC has made progress in addressing some of the issues raised in the Michigan II and Michigan III evaluations, the Department finds that issues remain concerning the billing processes that are common to Michigan and the four states that are the subject of the current application, and these issues preclude the Department from supporting this application based on the current record. The Department does not, however, foreclose the possibility that the Commission may be able to determine that these concerns have been adequately addressed prior to the conclusion of its review. In addition, the Department notes several other issues that deserve the Commission’s careful attention, including manual handling, line-splitting, pricing, and data reliability.

“support[] this application based on the current record.” *Id.* at 16. Following SBC’s withdrawal of its application, the Chairman of the Commission stated that “the outstanding issues that prevented approval were very narrow, but nonetheless important.” FCC Chairman Powell Michigan Withdrawal Statement at 1. The Chairman noted that “perhaps the most troubling of these issues relates to billing. Despite extensive examination of the record . . . questions remain regarding whether SBC is currently providing wholesale billing functions for competitive LECs in a manner that meets the requirements of our existing precedent.” *Id.*

This Evaluation incorporates by reference the entire DOJ Michigan II and Michigan III evaluations.

³ DOJ Michigan III Evaluation at 3-15.

⁴ *Id.* at 8-9, 15.

⁵ *Id.* at 15.

⁶ *See* DOJ Oklahoma I Evaluation at vi-vii, 36-51.

I. State Commission Proceedings

A. Illinois

The Illinois Commerce Commission (“Illinois CC”) facilitated the development of competition in local telecommunications markets by adopting carrier-to-carrier wholesale performance measurements and selecting BearingPoint to administer a third-party test of SBC’s OSS,⁷ conducting pricing proceedings to establish wholesale rates for unbundled network elements (“UNEs”),⁸ and approving a remedy plan (the “Compromise Plan”) established in conjunction with several CLECs.⁹ The Illinois CC found SBC to be compliant with the standards of Section 271¹⁰ and endorsed SBC’s application to the FCC.¹¹

B. Indiana

The Indiana Utility Regulatory Commission (“Indiana URC”) facilitated the development of competition in local telecommunications markets by adopting carrier-to-carrier wholesale performance measurements and selecting BearingPoint to administer a third-party test of SBC’s OSS,¹² conducting a pricing proceeding to establish UNE rates,¹³ and approving an “SBC Indiana

⁷ Illinois CC Consultative Report at 5.

⁸ *Id.* at 55. On May 9, 2003 the Illinois General Assembly passed Illinois Public Act 93-0005, which dictated how the Illinois CC would consider the fill factor and depreciation inputs in establishing TELRIC costs and rates for UNE loops. As a result, the Illinois CC established new UNE loop rates on June 9, 2003. SBC Wardin Aff. ¶¶ 25-26. The same day, a federal court enjoined the Illinois CC and SBC from implementing the new rates and subsequently issued permanent injunctive relief. *Id.* ¶ 27. SBC has appealed this order. *Id.* ¶ 27 n.44. Therefore, the UNE loop rates relied upon by SBC for the purposes of this application are not affected by the new legislation. *Id.* ¶ 27.

⁹ Illinois CC Final Order at 829, 916.

¹⁰ *Id.* at 926. The Commission’s Final Order dictated certain remedial actions to address deficiencies pertaining to compliance with checklist items 2 and 4, the majority of which SBC has taken. Illinois CC Consultative Report at 4-5.

¹¹ *Id.* at 4.

¹² Indiana URC Comments at 2.

¹³ Indiana URC Report and Recommendation at 57.

Section 271 Remedy Plan.”¹⁴ The Indiana URC found SBC to be “largely in compliance” with the standards of Section 271,¹⁵ but ultimately deferred to the FCC to “determine whether local markets have been fully and irreversibly open to competition, and that SBC has demonstrated sufficient accuracy of its systems data and wholesale billing reliability.”¹⁶

C. Ohio

The Public Utilities Commission of Ohio (“Ohio PUC”) facilitated the development of competition in local telecommunications markets by adopting carrier-to-carrier wholesale performance measurements and selecting BearingPoint to administer a third-party test of SBC’s OSS,¹⁷ conducting pricing proceedings to establish wholesale UNE rates,¹⁸ and affirming that the Ohio Remedy Plan was sufficient for the purposes of satisfying the requirements of Section

¹⁴ *Id.* at 200. Implementation of the Indiana URC’s initial remedy plan was enjoined by a federal court, which found that the state commission had no authority to impose a remedy plan in the context of its Section 271 proceeding. Subsequently, the Indiana URC decided that it would recommend approval of the SBC Indiana Section 271 Remedy Plan, which was based on certain modifications to the Compromise Plan as reflected in Time Warner’s interconnection agreement. *See id.* at 187-88.

¹⁵ Indiana URC Comments at 1.

¹⁶ *Id.* at 1-2. In a July 2, 2003 order, the Indiana Commission declined to make a finding regarding SBC’s Section 271 compliance until SBC filed certain compliance and improvement plans that had been filed before the Michigan PSC. Indiana URC Compliance Order at 12; *see also id.* Attach. 1 at 1-5. SBC filed these plans on July 11, 2003 and filed revised versions on August 1. Indiana URC Report and Recommendation at 192-93. These plans notwithstanding, the Indiana URC deferred a number of issues regarding billing, OSS, Change Management/ Joint Test Environment, and performance data to the FCC for resolution and asked that the FCC assure enforcement of the proposed remedy plan. *See id.* at 200.

¹⁷ Ohio PUC Report and Evaluation at 2-4.

¹⁸ *Id.* at 153.

271.¹⁹ The Ohio PUC found SBC to have satisfied the standards of Section 271²⁰ and recommended that the FCC approve SBC's application.²¹

D. Wisconsin

The Public Service Commission of Wisconsin ("Wisconsin PSC") facilitated the development of competition in local telecommunications markets by adopting carrier-to-carrier wholesale performance measurements,²² retaining BearingPoint to administer a third-party test of SBC's OSS,²³ and conducting a pricing proceeding to establish wholesale rates for UNES.²⁴ However, the Wisconsin PSC declined to comment on the adequacy of the Wisconsin Compromise Remedy Plan for the purposes of a Section 271 proceeding.²⁵ The Wisconsin PSC

¹⁹ *Id.* at 287. The Ohio PUC declined to alter the Ohio remedy plan in its Section 271 proceeding, but decided to open a new docket to consider revisions to the plan to ensure an appropriate level of wholesale performance after Section 271 authority is granted. *Id.* at 288. Further, the Ohio PUC noted that CLECs may choose to negotiate separate remedy plan terms in the context of an interconnection agreement. *Id.*

²⁰ Ohio PUC Comments at 1; Ohio PUC Report and Evaluation at 289. The Ohio PUC noted that there were several outstanding OSS functionality issues that, however, did not affect its final decision. In a separate order, the Ohio PUC required that SBC file a compliance plan to address these issues and reinforce the Ohio PUC's protections against backsliding. Ohio PUC Compliance Order at 6-7. SBC filed this plan on July 2, 2003. SBC Br. at 10.

²¹ Ohio PUC Comments at 5; Ohio PUC Report and Evaluation at 289.

²² Wisconsin PSC Phase I OSS Order at 30.

²³ *See id.*

²⁴ Wisconsin PSC Final Determination II App. B at 1.

²⁵ Wisconsin PSC Final Determination II at 30. SBC sought judicial review of the Wisconsin PSC's initial remedy plan, which was vacated by a state court in July 2002. SBC VanderSanden Aff. ¶ 37. The Wisconsin PSC continues to support this remedy plan, but acknowledges that the existence of the Compromise Plan in interconnection agreements, along with the provisions of the Consent Order, would be sufficient to ensure an appropriate level of wholesale performance after Section 271 authority is granted. Wisconsin PSC Final Determination II at 30.

found SBC to be compliant with the standards of Section 271²⁶ and recommended that the FCC approve SBC's application.²⁷

II. Entry into the Local Telecommunications Markets

In assessing whether the local markets in a state are fully and irreversibly open to competition, the Department looks first to the actual entry in a market.²⁸ The Department does not, however, broadly presume that all three entry tracks – facilities-based, UNEs, and resale – are open or closed on the basis of an aggregate level of entry alone.²⁹ The following table reports CLEC entry in Illinois, Indiana, Ohio, and Wisconsin in terms of shares of total residential and business lines served and shares of residential and business lines served by means of each mode of entry.

²⁶ See Wisconsin PSC Comments at 1. The Wisconsin PSC predicated this finding on the requirement that SBC stipulate to an enforceable Consent Order, which required SBC to file nine compliance and improvement plans that ensure the Wisconsin PSC's oversight of SBC's performance in the future. Wisconsin PSC Final Determination II at 22-25. In addition, although the Wisconsin PSC found SBC's billing systems to be checklist compliant, it opened a separate docket to address the continued concerns of the CLECs regarding billing disputes. SBC VanderSanden Aff. ¶ 22.

²⁷ Wisconsin PSC Comments at 1.

²⁸ See DOJ Pennsylvania Evaluation at 3-4 (“The Department first looks to actual competitive entry, because the experience of competitors seeking to enter a market can provide highly probative evidence about the presence or absence of artificial barriers to entry. Of course, entry barriers can differ by types of customers or geographic areas within a state, so the Department looks for evidence relevant to each market in a state.” (Footnote omitted.)).

²⁹ See, e.g., DOJ Georgia/Louisiana I Evaluation at 7; DOJ Missouri I Evaluation at 6-7.

CLEC Entry by State³⁰

	Illinois	Indiana	Ohio	Wisconsin	
Total Lines³¹	8,094,454	2,476,363	4,307,891	2,465,649	
Total Bus. Lines	3,845,787	996,649	1,644,064	1,088,291	
Total Res. Lines	4,248,667	1,479,714	2,663,827	1,377,358	
CLEC Shares	% Total Lines	29.0	15.9	20.6	25.7
	% Total Bus.	34.7	19.1	23.8	37.0
	% Total Res.	23.8	13.8	18.6	16.8
	% Bus. Fac-B	29.0	16.4	18.3	33.5
	% Bus. UNE-P	3.5	2.0	4.7	1.7
	% Bus. Resale	2.2	0.7	0.7	1.8
	% Res. Fac-B	8.3	3.5	0.6	6.9
	% Res. UNE-P	15.2	9.3	17.6	9.3
% Res. Resale	0.3	0.9	0.4	0.6	

Given the regional nature of SBC's OSS,³² the Department evaluates entry regionwide, taking note that pricing or other state-specific factors may significantly affect the degree to which CLECs use a specific mode in a specific state. In the states addressed in this application, the levels of entry and the absence of evidence that entry has been unduly hindered by problems with obtaining inputs from SBC lead the Department to conclude that opportunities are available to competitive facilities-based carriers serving business customers. Although residential entry

³⁰ See SBC Heritage Illinois Aff. at 6 n.9 & tbl.1, Attach. E at 1, 2, 6 (line counts as of May 2003); SBC Heritage Indiana Aff. at 6 n.7 & tbl.1, Attach. E at 1, 2, 6-7 (same); SBC Heritage Ohio Aff. at 6 n.9 & tbl.1, Attach. E at 1, 2, 6 (same); SBC Heritage Wisconsin Aff. at 6 n.8 & tbl.1, & Attach. E at 1, 2, 6 (same). The second three categories report CLEC lines as percentages of total lines, business lines, and residential lines, respectively; the last six categories report percentages of business and residential lines served by CLECs by means of each mode of entry, i.e., facilities-based (service via primarily a CLEC's own network that is either connected directly to the customer premises or connected through loops leased from the BOC), UNE-platform (a combination of loop, switch, and transport elements), and resale.

³¹ Figures report total lines in SBC's service area in each state. There are incumbent local exchange carriers other than SBC serving parts of Illinois, Indiana, Ohio, and Wisconsin.

³² SBC asserts that its OSS is regional in nature. See, e.g., SBC Br. at 54-55.

through the UNE-platform, in particular, appears noteworthy, the concerns identified below preclude a conclusion based on the existing record that for other modes of entry the local markets in these states are and will remain open to competitive entry.

III. Operations Support Systems

SBC uses the same operations support systems (“OSS”) across all five states in the Ameritech region, including the four involved in the present application. Thus, issues concerning OSS are generally the same throughout the four states, although when individual CLECs operate only in one or two states, they may focus on problems in only those states. The Department addresses below issues raised by the CLECs concerning wholesale billing accuracy, manual handling of some orders, and line-splitting.³³

A. Billing

The billing systems employed in the four-state SBC/Ameritech region are the same as those employed in Michigan.³⁴ In its recent Evaluation of SBC’s re-filed Section 271 application for Michigan, the Department observed that while SBC had made “significant efforts to improve its billing performance, . . . persistent questions remain concerning billing accuracy.”³⁵ Because

³³ AT&T also raises an issue that concerns whether it is “effectively unable to send a subsequent change order on the customer’s account until it receives” a billing completion notice (“BCN”). AT&T Comments at 65. AT&T argues that the time for posting of the BCN can be lengthy, as long as 10 days. *Id.* at 66-67; AT&T DeYoung/Willard Decl. ¶ 61. AT&T’s inability to submit subsequent change orders, it asserts, can lead to rejected change requests, delayed change provisioning, and customer dissatisfaction. *Id.* at 65-67. Forte cites similar issues concerning BCNs. Forte Comments at 9-11. Forte states that while using previous Local Service Order Guidelines (“LSOG”) versions it was usually able to send subsequent orders within 24 hours of the initial order, whereas now it must wait 24 to 72 hours to send subsequent orders. *Id.* at 10.

SBC responds that in the case of UNE-platform migrations, a CLEC may submit subsequent change orders once the customer service information (“CSI”) has been updated to reflect the CLEC as the owner of the account. SBC Billing Completion Notice *Ex Parte* at 1. SBC further avers that, “[i]n most cases,” the CSI is updated in the ACIS database within 24 hours of a service order completion. *Id.* SBC also states that for full migrations, “SBC’s electronic systems and manual processes are designed to process” change orders even before the CSI is updated. *Id.* Similar functionality, SBC reports, will be implemented for partial migrations on August 27, 2003. *Id.* The Commission should assure itself that SBC has adequately addressed the CLECs’ concerns.

³⁴ See SBC Brown/Cottrell/Flynn Aff. ¶ 1 n.1.

³⁵ DOJ Michigan III Evaluation at 5-6.

the record did not contain evidence from which the Department could conclude that these concerns were insignificant or that they had been adequately addressed, the Department was not able to support SBC's application for long distance authority in Michigan. The Department has sought from SBC, both in the Michigan proceedings and in the present one, additional information that would allow the Department to draw a different conclusion. However, as discussed below, the limited information provided by SBC is insufficient to alleviate the concerns raised in the Michigan III Evaluation, which persist here.

The record before the Department in the Michigan proceeding included SBC's own billing affidavit, which showed that CLECs continued to experience billing accuracy problems of various types.³⁶ In addition, the CLECs alleged with some supporting information that they were currently receiving wholesale bills from SBC that contained substantial inaccuracies.³⁷ In this proceeding CLECs reiterate the billing accuracy issues they raised in Michigan.³⁸ The CLECs also raise new issues concerning ongoing billing problems with SBC. Substantial showings are made by several small CLECs that operate in one or more of the four states, such as CIMCO, Forte, and NTD.³⁹ Forte alleges that over the past two years, 25 to 35 percent of its

³⁶ *See id.* at 8.

³⁷ *See id.* at 7-8.

³⁸ AT&T DeYoung/Tavares Decl. ¶¶ 10-33; MCI Comments at 6-10; TDS Metrocom Comments at 12-14.

³⁹ CIMCO states that it has been assessed non-recurring charges ("NRCs") on lines that it has converted from resale to UNE-platform, experienced double-billing for the same item on different pages of the same invoice, been charged for taxes on non-taxable items, received overcharges for directory assistance (resulting in credits of \$15,000 on CIMCO's April bill), and received bills for lines that do not belong to it. CIMCO Comments at 6-7. CIMCO also asserts that SBC has billed the wrong rate for point-to-point circuits, erroneously billed for installation charges on three-year leased circuits, and failed to update CIMCO's customers' PICs in its switch, in one instance resulting in \$15,000 in overcharges to a CIMCO customer. *Id.* at 6-7. Forte complains that it has been assessed erroneous NRCs on lines converted from resale to UNE-platform, experienced double-billing for the same item on different pages of the same invoice, received overcharges for installation on converted lines, and experienced the application of incorrect rates. Forte Comments at 11-12.

NTD complains of "significant problems with SBC's wholesale billing[.]" NTD Comments at 3-4. Among the problems it cites are substantial back-billing for various products and services, billing for products or services

bills have contained overcharges.⁴⁰ A larger CLEC, TDS Metrocom, reports that since August 2002 it has opened disputes on approximately 20 percent of the total amount billed to it by SBC.⁴¹ TDS Metrocom asserts that 87 percent of these disputes have been resolved in its favor.⁴²

Some of the state commissions have also raised concerns about billing issues. The Indiana URC, for example, observed:

Because of the problems and concerns that numerous parties and entities have raised, we cannot dismiss these [billing] complaints out of hand. However, because we do not have any independent means of determining whether certain SBC databases do need to be synchronized or reconciled, and whether certain SBC processes do need to be updated or corrected, we cannot reach a conclusion at this time as to whether SBC has satisfied the billing requirements of Checklist Item No. 2.⁴³

The Indiana Commission specifically asks for the FCC's assistance in ensuring that "these potential problems," to the extent they are not being addressed, are "in fact corrected."⁴⁴ The Wisconsin Commission has recently opened a comprehensive investigation into SBC's

that are not provided, double-billing, application of incorrect rates, failure to implement price changes on a timely basis, improper application of payments, and failure to provide back-up data to support billing adjustments. NTD Comments at 3-4. Mpower alleges that SBC erroneously bills it for termination of local, Section 251(b)(5) traffic as well as improper trip charges for hot-cuts. Joint CLEC Comments at 5-6. Access One raises a litany of billing problems, including incorrect universal service order codes, inapplicable local number portability charges, call records for orders that may belong to another CLEC, and unauthorized calls. Access One Comments at 2-3.

AT&T also raises a new issue with respect to UNE-platform billing on non-fieldwork orders. According to AT&T, SBC has been improperly charging new installation NRCs on certain non-fieldwork UNE-platform orders. AT&T DeYoung/Tavares Decl. ¶ 26. In April and May 2003, AT&T reports that it was improperly assessed NRCs on non-field work UNE-platform orders, resulting in over-billing of almost \$235,000 in Illinois, Ohio, and Michigan. *Id.*

⁴⁰ Forte Comments at 11.

⁴¹ TDS Metrocom Comments at 12.

⁴² *Id.*

⁴³ Indiana URC Report and Recommendation at 160.

⁴⁴ *Id.*

wholesale billing.⁴⁵ To date, more than 65 billing issues have been raised by the CLECs in that proceeding.⁴⁶

The Commission and the Department have observed that inaccurate wholesale billing can impair competition in the local exchange market. It “diverts CLEC resources to bill reconciliation and correction, hampers CLEC ability to raise capital because improper overcharges are carried on the CLECs’ financial reports, diminishes CLEC capacity to adjust prices and expenses in response to competition, and deprives CLECs of revenue because they are unable to back-bill previously undercharged end users.”⁴⁷ CLECs have submitted data to establish that such effects are being felt in the SBC/Ameritech region.⁴⁸ In addition to the time and expense associated with reviewing and submitting claims, CLECs also complain about the length of time it takes SBC to investigate and resolve billing disputes.⁴⁹ Although SBC apparently has stepped up its effort to credit CLECs for over-billing, resolution of these claims

⁴⁵ Wisconsin PSC Wholesale Billing Practices Notice.

⁴⁶ See MCI Comments at 9; NTD Comments Ex. 2.

⁴⁷ DOJ Michigan III Evaluation at 6-7 (citing *FCC Pennsylvania Order* ¶ 23). AT&T attests that because of SBC’s billing errors it “has no way of knowing, month to month, what its costs are, or whether it is operating profitably.” AT&T DeYoung/Tavares Decl. ¶ 32. It goes on to assert that it can “be an effective competitor in a service business with margins as narrow as those for local telephone service” only if it knows, “with precision, what its costs are. That information determines, among other things, the pricing that a competitor can offer its customers, the promotions and packages it can offer new customers, and the level of service and commitment it can make[.]” *Id.*

⁴⁸ NTD alleges that it “has been forced to hire an employee dedicated to reviewing SBC bills and disputing billing inaccuracies and improper charges.” NTD Comments at 8. TDS Metrocom reports that it employs a team of five individuals who spend 30 percent of their time reviewing SBC bills and disputing charges. TDS Metrocom Comments at 9. TDS Metrocom asserts that it has not experienced anywhere near the same magnitude of billing problems with Qwest as it has with SBC. *Id.* AT&T similarly reports that its two employees who review SBC bills spend approximately 70 percent of their time on Ameritech region bills, and 30 percent of their time on bills generated in SBC’s other two regions. AT&T DeYoung/Tavares Decl. ¶¶ 28-29.

⁴⁹ NTD alleges that it submitted over 200 claims last year, many of which have taken six (6) months to process and resolve. NTD Comments at 8; see also TDS Metrocom Comments at 15 (asserting that although SBC reportedly admitted to misclassifying lines between business and residential categories, the final resolution in the form of credits to TDS Metrocom’s bills has taken more than one year from the date SBC was first notified of the problem); Joint CLEC Comments at 7.

can take months and, as SBC readily admits, is “laborious and resource-intensive[.]”⁵⁰ Back-billing also appears to be a major source of problems for numerous CLECs.⁵¹

The Department cannot, of course, verify that every CLEC complaint about billing is correct. Moreover, the CLECs could have more fully demonstrated the extent to which these problems have adversely affected their ability to compete. The Department believes, however, that enough has been shown to raise a genuine issue.⁵² As the Commission recognizes, the BOC itself “must demonstrate that it can produce a readable, auditable, and accurate wholesale bill.”⁵³ That is true not only because the BOC is the proponent of its own application, but for a very practical reason. The records and information held by the BOC are critical to any determination of whether it is accurately billing the CLECs.

SBC has not provided information sufficient to show either (1) that its erroneous bills comprise only an insignificant proportion of its total billings or (2) that it has implemented a lasting solution to its billing accuracy problems. In its Michigan III Evaluation, the Department noted SBC’s acknowledged billing problems of the recent past, and observed that “SBC does not

⁵⁰ SBC Michigan III Supp. Reply Comments at 8; *see also* SBC Michigan III Brown/Cottrell/Flynn Supp. Reply Aff. ¶ 28 (stating SBC spent “hundreds of hours” reviewing an AT&T complaint).

⁵¹ *See* NTD Comments at 7; TDS Metrocom Comments at 19; AT&T DeYoung/Tavares Decl. ¶ 32; Joint CLEC Comments at 8. NTD asserts that “the receipt of an inaccurate bill from SBC followed many months later by a back-bill for additional charges means any opportunity to recover the wholesale charges from NTD’s retail customer is lost – either as a matter of customer relations in a competitive marketplace, or because some of the end users who were customers of NTD during the period in question are no longer its customers.” NTD Comments at 7. CLECs claim that this problem is compounded by SBC’s failure to provide source data to justify the back-bills. NTD Comments at 7; TDS Metrocom Comments at 19-20.

⁵² “The BOC at all times bears the burden of proof of compliance with Section 271, even if no party challenges its compliance with a particular requirement.” *FCC Minnesota Order* App. C ¶ 5; *see also FCC Maryland/Washington, DC/West Virginia Order* App. F ¶ 5. Compliance with Section 271 requires provision of “complete, accurate and timely wholesale bills.” *FCC Pennsylvania Order* ¶ 13.

⁵³ *FCC Pennsylvania Order* ¶ 22; *see also id.* ¶ 15.

offer any objective measure to demonstrate that its actual billing performance is improving.”⁵⁴

To date SBC has not offered any such objective measure. Nor has SBC shown that it has undertaken to comprehensively examine the databases and processes that now supply information inputs to its billing systems.⁵⁵

In its supplemental reply filing in Michigan, SBC discusses billing issues.⁵⁶ It describes steps it is taking to address those issues, including installation of a database to track settlements

⁵⁴ DOJ Michigan III Evaluation at 7. The Department also noted that the relevant Ameritech region performance metrics have limited utility in catching a wide range of potential billing errors. *Id.* at 9 n.44. The most relevant metric, MI 14, is designed to determine whether bills are correctly being calculated according to SBC’s billing tables, not whether the underlying information about the lines themselves is accurate. Yet bills that are in error because of incorrect information inputs are not less troublesome because that erroneous information was correctly processed. A new metric is being considered, but its content and date of implementation are still uncertain. *Id.* Some state commissions have also noted these problems. *See* Indiana URC Report and Recommendation at 158-60; Wisconsin PSC Final Determination II at 18-21.

Similarly, the BearingPoint tests do not provide a sufficient showing of accurate billing. SBC has in its own filings admitted a series of billing errors, including problems related to its ACIS-CABS conversion which alone resulted in nearly \$17 million in billing adjustments. *See infra* notes 58 & 59; *see also* DOJ Michigan III Evaluation at 8; DOJ Michigan II Evaluation at 10-11 & nn.46-47. BearingPoint apparently did not identify these errors, either because they resulted from causes not detected by the test transactions or because system changes were made after testing activity finished. For such reasons the Department and the Commission have consistently taken the position that data from actual commercial usage is more probative than that from third-party testing, and thus that a successful test is not determinative when commercial usage indicates that significant problems remain. *See, e.g., FCC Qwest Multistate I Order* ¶ 102; *FCC Pennsylvania Order* ¶¶ 24, 33; *FCC Michigan Order* ¶ 138; *see also* DOJ Michigan III Evaluation at 5.

⁵⁵ SBC again proffers in its four-state application a comparison of the percentage of wholesale billing disputes as against the percentage of such disputes in states in which SBC has already received Section 271 approval. SBC Brown/Cottrell/Flynn Aff. ¶¶ 130-31. This comparison is not probative as to the issue of billing errors, and the percentage figure is flawed. *See* DOJ Michigan III Evaluation at 7 n.39. SBC’s showing is insufficient, among other reasons, because it (1) apparently does not include billing disputes by AT&T, *see* SBC Michigan III Brown/Cottrell/Flynn Supp. Reply Aff. ¶ 58, perhaps the largest CLEC; (2) apparently captures only amounts that have been formally disputed, and not those caught by SBC or by the CLEC itself and resolved without a formal dispute, *see* DOJ Michigan III Evaluation at 7-8 n.39; (3) covers the whole of a 17-month period, SBC Brown/Cottrell/Flynn Aff. ¶ 130, and is not broken down by month so that any trend may be discerned, *cf. FCC Pennsylvania Order* ¶ 26 (examining dispute data month by month to discern a favorable trend); and (4) compares billing disputes in the four states at issue in this application with current billing disputes in other states in which SBC has already been granted Section 271 authority, SBC Brown/Cottrell/Flynn Aff. ¶ 132, rather than with disputes in those states, or other states, at the time their applications were pending.

⁵⁶ *See, e.g.,* SBC Michigan III Brown/Cottrell/Flynn Supp. Reply Aff. ¶¶ 25-28, 39-47, 83-101 (discussing contentions about billing made by AT&T, MCI, TDS Metrocom, and other parties). In addition, SBC contests AT&T’s assertion about the extent of billing errors it has encountered. *Id.* ¶ 26. Specifically, SBC alleges, based on a preliminary analysis, that roughly 75 percent of AT&T’s asserted errors are due to faulty AT&T record-keeping. *Id.* A confidential *ex parte* filed by SBC one week later, however, contains statements in which SBC itself appears to call into question the attribution of all of these errors to AT&T. *See* SBC Michigan III Billing *Ex Parte* & Attach. 1 (confidential); *see also* AT&T DeYoung/Tavares Decl. ¶¶ 13-16 (disputing much of SBC’s analysis).

and adjustments over \$50,000, which “provides a means to sort data by root cause to determine trends and potential areas in need of process improvements.”⁵⁷ At the same time, however, the reply filing raises additional concerns. SBC acknowledges there the validity of additional billing claims made by the CLECs,⁵⁸ as well as problems not yet discovered by the CLECs.⁵⁹ Whether the problem lies in SBC’s actual billing systems, inputs to its billing systems, or with some other aspect of its OSS, the CLECs continue to receive erroneous bills. SBC reports that it has implemented fixes for some of the problems.⁶⁰ Nevertheless, in the absence of a showing that billing errors are proportionately insignificant, the fact that new errors continue to arise suggests that SBC still has trouble generating accurate bills, and needs to implement a lasting and comprehensive solution.

The Department concludes that serious questions remain concerning the accuracy of SBC’s wholesale billing. The record does not permit the Department to conclude that these

⁵⁷ SBC Michigan III Brown/Cottrell/Flynn Supp. Reply Aff. ¶ 65.

⁵⁸ *See id.* ¶ 27 (“SBC Midwest has identified some errors that are attributable to SBC Midwest; generally speaking, however, these errors appear to be the result of manual service order errors . . . (e.g., exclusion of an accurate telephone number within a FOC/Service Order Completion (“SOC”) or an account being established with the incorrect CLEC for the telephone number through a manual error in the service order process).”), ¶ 85 (“MCI has also raised issues with charges related to migrations, disconnects and truck rolls. Based on SBC Midwest’s investigation, SBC Midwest has agreed to provide MCI credits related to these items. These issues are largely related to human errors[.]” (footnote omitted)), ¶ 95 (“TDS was mistakenly charged for some DS3 lines because the Trunk Inventory Record Keeping Systems (“TIRKS”) was not updated to reflect which circuits were joint circuits. It is important to note that this was an error in updating the TIRKS database, and does not raise issues with SBC Midwest’s billing OSS.”), ¶ 96 (In addressing TDS’s claimed overcharges for the design and construction of collocation facilities, SBC admits that it “mistakenly only adjusted the late payment charges, monthly recurring mileage charges and some non-recurring charges, omitting some of the non-recurring charge adjustments due TDS.”), ¶ 97 (“SBC Midwest recently identified that rate updates for Transit billing were not implemented for TDS in Illinois.”); *see also* SBC Brown/Cottrell/Flynn Aff. ¶¶ 105-10 (describing SBC loop rate zone errors), ¶¶ 119-23 (describing SBC misclassification of business and residential loops).

⁵⁹ *See* SBC Michigan III Brown/Cottrell/Flynn Supp. Reply Aff. ¶ 101 (“As the result of investigating a recent CLEC billing claim, SBC has determined that approximately 1400 UNE-P circuits across SBC’s five Midwest states have been billed incorrectly due to an ordering system error introduced with the March 2003 OSS release. . . . As a result of its finding, SBC will implement a correction on August 1, 2003, to resolve this problem prospectively.”).

⁶⁰ *Id.* ¶¶ 83, 85.

concerns are insignificant or that they have been adequately addressed. Thus, the Department is not in a position to support SBC's application based on the current record. The Department recognizes that the Commission may have additional evidence at the time it completes its review, and that the Commission may then be able to determine that SBC's billing performance is adequate.

B. Manual Handling

Some CLECs argue that they are often forced to rely on manual processes instead of SBC's normal mechanized interfaces. The largest category of these instances⁶¹ involves software problems in SBC's systems that cause orders to be rejected erroneously; consequently, until the problem is fixed, CLECs must bypass SBC's electronic interfaces and submit affected orders manually by fax.⁶² Each time this occurs, CLECs argue, they and their customers are adversely affected during the weeks until that problem is fixed.⁶³ The nature and number of the software problems alleged indicate that SBC's software testing may be inadequate. Due to time

⁶¹ An additional instance involves certain new service orders that had been fully automated but now have a significant manual element. Under LSOG 4, CLECs could electronically submit these orders with a "placeholder" for certain fields where SBC would provide the necessary information and then process the order without further CLEC intervention. SBC Complex Orders *Ex Parte* at 1-2. Because placeholders were eliminated beginning with LSOG 5, CLECs must first obtain the corresponding information through manual pre-ordering requests that require CLECs to fax lengthy forms to SBC. CIMCO Comments at 4-5 (noting doubling of days involved in the ordering process). It is disputed whether this change was agreed to during the Uniform and Enhanced Plan of Record discussions. Compare SBC Complex Orders *Ex Parte* at 2, with CIMCO Comments at 4 n.2. SBC has offered to simplify the fax process, SBC Complex Orders *Ex Parte* at 2; see also CIMCO Comments at 5, but it apparently has no plans to provide an alternative mechanized process that would eliminate the disadvantages of the current manual process.

⁶² See CIMCO Comments at 3, 8-12; Access One Comments at 5-6; see also Forte Comments at 7-9 (loss of LSOG 4 "unreject" capability increases need for manual faxing). Such problems are ultimately worked via Defect Reports or Change Requests. Given the importance of mechanized ordering, all such problems need to be resolved as expeditiously as possible, regardless of their classification.

⁶³ See Access One Comments at 7 (citing more than \$172,000 in lost revenues and personnel costs); CIMCO Comments at 3, 8 (asserting contract orders delayed "for weeks at a time"), 12 (citing lost revenue and personnel costs); Forte Comments at 8, 9 (noting customer could face installation delays of two weeks or more); Joint CLEC Comments at 24-29 (describing effects on CLECs). SBC suggests that CLEC deployment and use of fax servers can reduce the effort of faxing, see SBC Complex Orders *Ex Parte* at 2 n.1, but this poses a duplicative expense for CLECs that already have incurred the cost of deploying mechanized systems that interconnect with SBC's electronic interfaces.

limitations and the changing status of these issues, the Department has not been able to resolve all factual questions surrounding these issues. Given the importance of mechanized interfaces, the Department believes that the Commission should carefully consider the status of any such problems and, more generally, the adequacy of SBC's pre-release testing and defect resolution processes.

C. Line-Splitting

As the Department observed in its Michigan III Evaluation, line-splitting service to CLECs could provide an important platform for future broadband competition.⁶⁴ The Department, after reviewing SBC's line-splitting services, expressed concern about SBC's processes for reconvertng a customer from line-splitting back to UNE-platform service, concluding that the inability of SBC to allow CLECs to re-use loops may place CLECs at a competitive disadvantage as against SBC when they seek to sell DSL service.⁶⁵ SBC's policy is the same in each of the four states for which SBC has submitted the application pending before the Commission, and CLECs continue to raise these concerns.⁶⁶ Therefore, for the same reasons discussed in its Michigan III Evaluation, the Department believes that the Commission should determine whether SBC's processes provide non-discriminatory access to line-splitting and UNE-platform services.

⁶⁴ DOJ Michigan III Evaluation at 10. Line-splitting is a configuration of the loop in the central office that permits a CLEC to offer a DSL Internet access service over the same loop that it or another CLEC uses to provide a customer with voice service. This configuration provides an opportunity for CLECs to achieve the same efficiencies that the incumbents have when they offer their voice customers DSL service, avoiding the cost and inconvenience of provisioning a second loop. Such a platform will become more important if in the future incumbent local exchange providers are no longer required to share their voice customer loops with independent providers of DSL service. In such an environment, and absent line-splitting service, a given area might be served only by two broadband providers, the incumbent local exchange provider itself and any cable television system serving the same area.

⁶⁵ DOJ Michigan III Evaluation at 11-12.

⁶⁶ *See, e.g.*, AT&T Comments at 11-12.

IV. Pricing Issues

Prices for unbundled elements must lie within a range consistent with TELRIC principles. Commission rules leave the setting of prices within this range to the state commissions. Z-Tel asserts that SBC will not make available to it state commission-ordered rates in Indiana and Illinois unless Z-Tel agrees to amend its interconnection agreements with SBC.⁶⁷ SBC has demanded, Z-Tel alleges, the amendment or insertion of other, unrelated provisions of the interconnection agreement (e.g., a prohibition on retroactive application of cost-based rates) as a condition of amending the pricing provision.⁶⁸ Z-Tel apparently has refused to agree to these additional provisions. The Department defers to the Commission's determination whether SBC's conduct could violate Commission rules or provisions of the Telecommunications Act.⁶⁹

⁶⁷ Z-Tel Comments at 6. In Indiana, for example, Z-Tel reports that it is being charged the interconnection agreement rate of \$5.34, as opposed to the TELRIC rate of \$2.98, for analog switch ports. *Id.* at 5. Z-Tel alleges that for July 2003 "SBC assessed on Z-Tel more than \$47,000 in fees over SBC's TELRIC rates, which equates to approximately 24% of total billed charges to Z-Tel in Indiana." *Id.* at 10. In Illinois, Z-Tel alleges that SBC charged it more than \$157,000 above the TELRIC rates set by the Illinois Commission for July, amounting to over 20 percent of Z-Tel's total billed charges in Illinois. *Id.* at 9-10.

However, SBC asserts that in Illinois "any CLEC with an existing interconnection agreement may also take service under the terms, conditions, and rate applications contained in Illinois Bell's combination tariff." SBC Br. at 47.

⁶⁸ Z-Tel Comments at 6-9.

⁶⁹ See 47 C.F.R. § 51.501 et seq. (2002); 47 U.S.C. §§ 252(d)(1), 252(i), 271(c)(2)(B)(ii).

Another pricing issue is raised by Globalcom, which argues that it is being assessed non-recurring charges ("NRCs") in excess of TELRIC rates for enhanced extended links ("EELs") in Illinois, and that SBC's EELs rate for Wisconsin also fails to be TELRIC compliant. Globalcom Comments at 1-2, 4-9, 24-25. Globalcom states that the rates for Wisconsin have not been, and are not scheduled to be, reviewed by the Wisconsin PSC. *Id.* at 24-25. The Illinois NRCs for EELs are designated as interim ones. *Id.* at 9. SBC proposed permanent NRCs for EELs in Illinois which would be substantially lower than the interim ones, although Globalcom argues that these proposed rates were also in excess of TELRIC. *Id.* at 12-13. The Illinois CC's proceeding to consider the new rates was dismissed, pursuant to a Public Act which itself has been stayed pending ensuing federal litigation. Illinois CC Notice of Action; see also SBC Br. at 48-49; Globalcom Comments at 12. The Department notes that if rates, interim or otherwise, are subject to an established "true-up" provision dating back to a date certain, and where a state commission is committed to establishing appropriately cost-based prices for the elements in question, these issues may best be handled in state commission proceedings. The Department brings this issue to the Commission's attention, and defers to the Commission as to how this question should be resolved.

V. Reliability of Reported Performance Data

As the Department has repeatedly emphasized, performance metrics must be reliable – meaningful, accurate, and reproducible – if they are to fulfill their dual purposes of depicting an incumbent’s present level of performance and of establishing performance benchmarks that enable regulators to detect “back-sliding” and constrain anticompetitive behavior effectively.⁷⁰

In this proceeding, the reliability of SBC’s reported metrics is again being contested.⁷¹

The key issues here are the same as the key issues in the pending Michigan application: the status of the ongoing state commission-initiated BearingPoint audit,⁷² the scope of the SBC-initiated Ernst & Young (“E&Y”) review,⁷³ and the conclusions that should be drawn from each. After examining these issues in Michigan, and as explained more fully in its Michigan III Evaluation, the Department concluded that the BearingPoint metrics audit and its findings to date

⁷⁰ See, e.g., DOJ Oklahoma I Evaluation at 46-48; DOJ Texas I Evaluation at 5-6 (stating that “[i]n evaluating the actual commercial experience of [a Bell company’s] competitors . . . the reliability of the reported [performance] data is critical” and discussing the key attributes of reliable metrics); see also DOJ Massachusetts II Evaluation at 4-5; DOJ Performance Measures Reply Comments at 2-4.

⁷¹ CLECs argue that the incomplete nature of the BearingPoint audit, along with its findings to date, poses fatal problems, and they de-emphasize E&Y’s conclusions due to SBC’s sponsorship and the narrower scope of review. See Joint CLEC Comments at 12-14; AT&T Comments at 68-85; TDS Metrocom Comments at 4-8. The Indiana and Ohio consumers’ counsels take similar positions. See Indiana OUCC Comments at 7-14; Ohio CC Comments at 5-8, 12-13. In contrast, SBC seeks to distance itself from the BearingPoint audit and relies primarily upon the E&Y review and its conclusions. See, e.g., SBC Br. at 20-23; SBC Ehr/Fioretti Aff. ¶¶ 8, 33-34.

⁷² The OSS testing established in the four states includes comprehensive performance measures audits conducted by BearingPoint. See, e.g., Illinois CC Consultative Report at 5-6, 7; Indiana URC Report and Recommendation at 1; Ohio PUC Report and Evaluation at 3, 7-8; Wisconsin PSC Final Determination II at 13-14 & nn.22-24. Last year, in the midst of extensive delays in these audits, SBC took the unusual step of asking the Illinois CC to have the BearingPoint testing essentially halted. See SBC Illinois Reply to KPMG Interim Report at 4. SBC sought to halt BearingPoint’s testing, citing extensive delay, in the same time-frame that it was finishing its production to BearingPoint of documentation regarding definitions, business rules, and calculations for its metrics, documentation without which BearingPoint could not set up systems to replicate SBC’s metrics pursuant to PMR-5 of the test. See Michigan PSC Report at 16-17 & n.37 (discussing extended delay in SBC production of documentation and the resulting impact in terms of delay to the PMR-4 and PMR-5 portions of the testing).

⁷³ SBC initiated its own review, engaging E&Y, its financial auditor, to perform a faster metrics review. E.g., SBC Indiana Intent to File Supplementing Information at 1-3; SBC Ohio Intent to File Supplementing Information at 1-3. In these filings, SBC disclaimed any intent to substitute the E&Y review for the BearingPoint testing, SBC Indiana Intent to File Supplementing Information at 2; SBC Ohio Intent to File Supplementing Information at 2, but that is the practical effect, see SBC Ehr/Fioretti Aff. ¶ 8 (asserting the E&Y review is “the relevant third party evaluation upon which [the FCC] should rely”).

should not be ignored or minimized simply because the audit is not progressing as fast as SBC desires, and that weight should be given to the E&Y verification and its conclusions commensurate with its more limited scope and methodology.⁷⁴ The record here provides further support for those conclusions,⁷⁵ and these matters continue to warrant the Commission's attention.

Overall, the Commission should ensure that the current performance metrics are reliable and that a stable and reliable reporting system will be in place to help ensure that these local markets remain open after SBC's application is ultimately granted. In making these determinations, the Commission should carefully consider BearingPoint's ongoing audits, including its open exceptions, its interim status reports, and any other findings to date regarding the meaningfulness, accuracy, and reproducibility of SBC's reported metrics. The Commission should also consider E&Y's findings, though it should use great care before dismissing, based

⁷⁴ DOJ Michigan III Evaluation at 13-14. As to the BearingPoint audit, the Department explained that SBC itself appears to be responsible for some of the delays in completion of BearingPoint's audit, and it should not be permitted to bootstrap its position by citing the incomplete nature of the audit as grounds for downplaying the audit's findings to date. *Id.* at 13 & n.63; *see also* Indiana URC Report and Recommendation at 160 (agreeing with DOJ analysis).

⁷⁵ For example, like the Department, the Indiana URC and Ohio PUC explicitly recognize that the E&Y review has a more limited scope than the BearingPoint audit and that this limits the weight that should be accorded its conclusions. Ohio PUC Report and Evaluation App. A at 27-28 (determining that it would not rely on E&Y results). Further, the Illinois Commission found that "a 'Not Satisfied' finding indicates failure until such time as the third party can verify the Company has addressed the concerns or findings that resulted in the Not Satisfied finding." Illinois CC Final Order at 766. Thus, such BearingPoint findings have evidentiary value for as long as a criterion remains unsatisfied. *See* SBC Michigan III Ehr/Fioretti Supp. Reply Aff. Attach. B at 2-3 (BearingPoint e-mail). The Indiana URC found that BearingPoint "has uncovered significant questions about the reliability of SBC's performance measures results, the integrity of the underlying data, and the adequacy of SBC's various performance measure systems and the controls," and although some problems appear to have been corrected, "BearingPoint continues to report significant metrics-related problems." Indiana URC Report and Recommendation at 33, 34. At this point, approximately 25 percent of applicable metrics test criteria are "Not Satisfied." *See* AT&T Moore/Connolly Decl. at 36-38 tbls. 1-4 (reproducing test statistics from recent BearingPoint reports). Further, by AT&T's analysis, nearly 60 percent of SBC's measures are affected by documentation errors. AT&T Moore/Connolly Decl. ¶ 111. AT&T argues that the current percentage of criteria "passed" by SBC in these states is much lower than in states as to which the Commission has granted Section 271 applications. AT&T Comments at 73; AT&T Moore/Connolly Decl. ¶¶ 77-84.

solely on such findings, problems identified by BearingPoint or indicated by marketplace performance data.

VI. Conclusion

Because serious issues remain concerning SBC's ability to render accurate wholesale bills, the Department is not in a position to support SBC's application based on the current record. The Department does not, however, foreclose the possibility that the Commission may be able to satisfy itself regarding these issues prior to the conclusion of its review.

Respectfully submitted,

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I hereby certify that I have caused a true and accurate copy of the foregoing Evaluation of the United States Department of Justice to be served on the persons indicated on the attached service list by first class mail, overnight mail, hand delivery, or electronic mail on August 26, 2003.

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