

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

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

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EVALUATION OF THE  
UNITED STATES DEPARTMENT OF JUSTICE

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SBC Cottrell/Lawson Supp. Aff.	Supplemental Joint Affidavit of Mark J. Cottrell and Beth Lawson, <i>attached to</i> SBC Supp. Br. App. A as Tab 3.
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SBC Supp. Br.	Supplemental Brief 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 (June 19, 2003).

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MCI Comments	Comments of MCI, <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 2, 2003).
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TDS Metrocom Comments	Comments of TDS Metrocom, LLC, <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 2, 2003).
TDS Metrocom Cox Aff.	Affidavit of Rod Cox, <i>attached to</i> TDS Metrocom Comments as Tab A.

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EVALUATION OF THE  
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**Introduction and Summary**

The United States Department of Justice (“the Department”), pursuant to Section 271(d)(2)(A) of the Telecommunications Act of 1996<sup>1</sup> (“the 1996 Act”), submits this Evaluation of the application filed on June 19, 2003, by SBC Communications, Inc., Michigan Bell Telephone Company, and Southwestern Bell Communications Services, Inc. to provide in-region, interLATA services in Michigan.

This application to the Federal Communications Commission (“FCC” or “Commission”) is the fourth for long distance authority in Michigan, and follows SBC’s withdrawal of the third such application,<sup>2</sup> which it had filed on January 16, 2003. On February 26, 2003, the Department submitted its Evaluation of that earlier application (“Michigan II Evaluation”), 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.<sup>3</sup> Based on concerns

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

<sup>2</sup> SBC Michigan Withdrawal *Ex Parte* at 1.

<sup>3</sup> DOJ Michigan II Evaluation at 6-16. This Evaluation incorporates by reference the entire DOJ Michigan II Evaluation.

raised in these areas, the Department concluded that it could not “support[] this application based on the current record.”<sup>4</sup> 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.”<sup>5</sup> 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.”<sup>6</sup>

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.<sup>7</sup> Although SBC has made significant progress in addressing many of the issues raised in the DOJ Michigan II Evaluation and substantial entry has occurred in Michigan,<sup>8</sup> serious questions continue to be raised concerning the accuracy of SBC’s wholesale billing. The record does not permit the Department to conclude that these concerns are insignificant or that they have been adequately addressed. Thus, the Department is not in a position to support this 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 questions prior to the conclusion of its review. In addition, the Department believes that issues have been raised about the provision of line-splitting service and data reliability that merit the Commission’s careful attention.

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<sup>4</sup> *Id.* at 16.

<sup>5</sup> FCC Chairman Powell Michigan Withdrawal Statement at 1.

<sup>6</sup> *Id.*

<sup>7</sup> *See* DOJ Oklahoma I Evaluation at vi-vii, 36-51.

<sup>8</sup> For most modes of entry in Michigan, the levels of competitive entry have not changed significantly since the Department’s Michigan II Evaluation. *Compare* SBC Heritage Supp. Aff. at 4 tbl.1 n.4 & Attach. C at 1, 2, 6, *with* DOJ Michigan II Evaluation at 5-6. CLEC provision of residential service via the UNE-platform has risen from 23 to 28 percent of all residential lines. *See* DOJ Michigan II Evaluation at 5; Heritage Supp. Aff. at 4 tbl.1 n.4 & Attach. C at 2. As the Department observed in its previous evaluation, “SBC has made significant strides in opening its Michigan markets, as demonstrated by the levels of entry achieved to date.” DOJ Michigan II Evaluation at 2.



## I. State Commission Proceedings

Proceedings before the Michigan Public Service Commission (“Michigan PSC”) concerning SBC’s application were described by the Department in its prior Evaluation.<sup>9</sup> Since that time, SBC has worked with the competitive local exchange carriers (“CLECs”) and the Michigan PSC to develop compliance and improvement plans intended to ensure SBC’s improved performance in certain important areas.<sup>10</sup> The Michigan PSC has reviewed and approved these plans, with certain specified modifications,<sup>11</sup> and has noted that it remains able to “impose fines for noncompliance with its orders, including th[e] order approving the compliance and improvement plans.”<sup>12</sup> The Michigan PSC has, moreover, reiterated its support for SBC’s application.<sup>13</sup>

## II. Operations Support Systems

Several issues have been raised in this proceeding concerning OSS. The Department addresses two sets of OSS issues below, those concerning billing accuracy and provisioning of line-splitting service. In its Michigan II Evaluation, the Department raised two other concerns about OSS – SBC’s line loss notifications (“LLNs”) performance<sup>14</sup> and working service in

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<sup>9</sup> See DOJ Michigan II Evaluation at 2-4.

<sup>10</sup> See generally Michigan PSC Improvement Plans Order. The compliance and performance plans included: Customer Service Inquiry Accuracy Plan, Directory Listings and Directory Assistance Database Update Accuracy Plan, Pre-Order Processing Timeliness Plan, Change Management Communications Plan, Special and UNE Circuit Repair Coding Accuracy Plan, Line Loss Communications Plan, and Bill Auditability and Dispute Resolution Plan. *Id.* at 15.

<sup>11</sup> *Id.* at 13.

<sup>12</sup> *Id.* at 14.

<sup>13</sup> Michigan PSC Supp. Report at 12.

<sup>14</sup> CLECs had raised a number of problems regarding LLNs that “warrant[ed the] Commission’s serious attention.” See DOJ Michigan II Evaluation at 8-10. Since then, SBC’s LLN improvement plan has been revised twice, after CLEC input and as ordered by the Michigan PSC. See Michigan PSC Improvement Plans Order at 1-2, 8-10, 15; SBC Compliance and Improvement Plans *Ex Parte* Attach. B (revised LLN communications plan). Among CLECs only MCI raises any LLN issues in this proceeding, and although it complains that SBC mistakenly issued LLNs on 364 lines, it raises this issue only as part of its broader challenge to SBC’s billing, and it does not challenge SBC’s LLN performance generally. See MCI Comments at 2-3; MCI Lichtenberg Decl. ¶ 22 (acknowledging SBC’s “improved line loss performance”). Thus, the LLN issues discussed in the Department’s Michigan II Evaluation appear to have been substantially resolved.

conflict notice procedures<sup>15</sup> – which appear to have been resolved by SBC. In addition, the Department raised a concern in its prior Evaluation about SBC’s change management procedures. SBC also appears to have satisfied that concern.<sup>16</sup>

**A. Billing**

The Department observed in its Michigan II Evaluation that SBC “has had trouble generating accurate bills.”<sup>17</sup> SBC had conducted a reconciliation after the consolidation of its UNE-platform billing into a single billing system, and as a result it had discovered a “significant number of prior errors.”<sup>18</sup> The Department noted, however, that the Michigan PSC had required SBC to submit an improvement plan addressing “issues related to [CLEC] inability to audit bills received from SBC and to utilize its billing dispute resolution process once issues arise.”<sup>19</sup> Based partly on those measures, the Department suggested that the Commission might be able to assure itself that SBC’s remaining billing problems were resolved.<sup>20</sup>

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<sup>15</sup> CLECs had complained that SBC was sending “working service in conflict” (“WSIC”) notices by fax, rather than electronically. *See generally* DOJ Michigan II Evaluation at 12-13. As the Department noted, electronic notification would become available when SBC adopted LSOG 6, which at the time was expected to be September 2003. *Id.* In fact, SBC implemented LSOG 6 on June 14, 2003. SBC Supp. Br. at 12. No CLEC has raised WSIC issues in this proceeding, and thus this issue appears to have been resolved.

<sup>16</sup> The Michigan PSC required SBC to submit a compliance and/or improvement plan to address change management issues. *See* DOJ Michigan II Evaluation at 6 (citing Michigan PSC Further Improvements Order at 10). The Department supported the Michigan PSC’s action, and suggested that the Commission examine SBC’s final plan with care. *See id.* at 7. SBC formulated a Change Management Communications Plan in collaboration with the CLECs. The Plan was adopted by the Michigan PSC on March 26, 2003. Michigan PSC Improvement Plans Order at 4-5, 15. It contains measures aimed at improving the notification process between SBC and the CLECs and calls for increased training of SBC personnel. SBC Supp. Br. at 14 (citing SBC Cottrell/Lawson Supp. Aff. ¶ 22). SBC states that since the new plan has been implemented there have been no new complaints by the CLECs that interface changes have resulted in rejected LSRs or failed pre-order transactions. *Id.* at 14 (citing SBC Cottrell/Lawson Supp. Aff. ¶ 38). No CLEC has complained in this proceeding about SBC’s notification process. Indeed, the record contains several examples of SBC’s utilization of its notification process by issuance of Accessible Letters. *E.g., id.* at 14 (citing SBC Cottrell/Lawson Supp. Aff. ¶ 22 (noting use of Exception Request Accessible Letters)), 25 (citing SBC Cottrell/Lawson Supp. Aff. ¶ 48 (discussing issuance of Accessible Letter to CLECs in Midwest region)).

<sup>17</sup> DOJ Michigan II Evaluation at 10.

<sup>18</sup> *Id.* at 10-11 & nn.46 & 47 (citations omitted).

<sup>19</sup> *Id.* at 11-12 (quoting Michigan PSC Further Improvements Order at 9).

<sup>20</sup> *Id.* at 12.

In the weeks after the Department's Evaluation, substantial additional information, chiefly in the form of *ex parte* filings and supplemental comments, was put before the Commission regarding billing.<sup>21</sup> At the same time, the Michigan PSC continued to conduct its compliance and improvement proceeding concerning, *inter alia*, aspects of SBC's billing.<sup>22</sup> Because of these proceedings, a great deal more information regarding SBC's billing performance is available now than was available at the time of the Department's prior Evaluation. SBC has provided, in the Commission's prior proceeding, in the Michigan PSC proceeding, and in its pending supplemental application, extensive descriptions of its efforts and progress in resolving issues arising from its billing platform reconciliation. CLECs have had the opportunity before the Commission to set forth their complaints regarding SBC's billing with greater specificity. The CLECs and SBC have also had the benefit of five more months of actual bills. This commercial experience provides more reliable evidence of SBC's overall billing performance than third-party testing.<sup>23</sup>

The Department recognizes that SBC has made significant efforts to improve its billing performance. SBC also has increased the level of communication to CLECs on billing matters generally, increased the auditability of its bills, and improved its billing dispute resolution procedures. BearingPoint's tests and Ernst & Young's ("E&Y's") verifications show that SBC's

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<sup>21</sup> See, e.g., FCC Billing Comments Public Notice (seeking supplemental comments on SBC UNE-Platform CABS Conversion *Ex Parte* regarding SBC's 2001-02 conversion of its UNE-platform billing accounts from the Resale Billing System to the Carrier Access Billing System ("CABS") database, and its reconciliation of the CABS database with the Ameritech Customer Information System ("ACIS") in January 2003).

<sup>22</sup> In January 2003, the Michigan PSC required SBC to submit a compliance or improvement plan on billing auditability and dispute resolution. See Michigan PSC Further Improvements Order at 9. After the early March collaborative discussions, SBC filed a "modified improvement plan," CLECs filed comments on the revised plan, and the Michigan PSC required additional revisions to the plan. See Michigan PSC Improvement Plans Order at 2, 11-13, 15. SBC filed its further revised Bill Auditability and Dispute Resolution Plan in April. See SBC Compliance and Improvement Plans *Ex Parte*.

<sup>23</sup> See *FCC Pennsylvania Order* ¶ 24 (noting Commission has "consistently held that commercial performance data is the most persuasive form of evidence"), ¶ 33 ("[A] third-party test alone cannot outweigh reliable commercial data[.]").

bills accurately reflect the rates shown on SBC's relevant billing tables.<sup>24</sup> E&Y reviewed the accuracy of elements of SBC's ACIS-CABS reconciliation, and its review generated several corrections which SBC has implemented.<sup>25</sup> SBC also appears to have made a genuine effort to address at least some of the specific billing problems raised by the CLECs.<sup>26</sup> As one of the CLECs concedes, "SBC has made progress in solving specific billing related errors as they arise."<sup>27</sup> Many of the CLECs' specific billing complaints, moreover, individually may not rise to a level of concern that would warrant denial of SBC's application, or may encompass disputes more appropriately resolved elsewhere.<sup>28</sup> As the Commission recognizes, "high-volume, carrier-to-carrier commercial billing cannot always be perfectly accurate."<sup>29</sup>

Nevertheless, persistent questions remain concerning billing accuracy. The Commission has held that BOCs must provide CLECs with "two essential billing functions: (i) complete, accurate and timely reports on the service usage of [their] customers and (ii) complete, accurate and timely wholesale bills."<sup>30</sup> Both the Department and the FCC have recognized that proper billing is essential to competition.<sup>31</sup> Inaccurate billing, the Commission has noted, 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

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<sup>24</sup> See SBC Brown/Cottrell/Flynn Supp. Aff. ¶¶ 71, 77-86.

<sup>25</sup> See *id.* ¶¶ 53-58 (certain errors in dates for debits and credits), ¶¶ 59-62 (complex circuit records).

<sup>26</sup> See, e.g., *id.* ¶¶ 101-05.

<sup>27</sup> TDS Metrocom Comments at 8.

<sup>28</sup> See MCI Lichtenberg Decl. ¶ 36 (dispute over proper loop rate), ¶ 44 (MCI complaint about SBC's LNP charges for all local customers); TDS Metrocom Cox Aff. ¶ 22 (charges TDS says are improper under its interconnection agreement with SBC).

<sup>29</sup> *FCC Pennsylvania Order* ¶ 26 n.93.

<sup>30</sup> *Id.* ¶ 13. The Commission approved Verizon's Pennsylvania Section 271 application after finding, even though "as an evidentiary matter [it] is a close call," that "Verizon now provides a wholesale bill that gives [CLECs] a meaningful opportunity to compete." *Id.* ¶ 15; see also *id.* ¶ 22 (asserting "the BOC must demonstrate that it can produce a readable, auditable and accurate wholesale bill").

<sup>31</sup> The Department noted in its Pennsylvania Evaluation, for example, that "[a]ccurate and auditable electronic bills are an important factor in making local telecommunications markets fully and irreversibly open to competition." DOJ Pennsylvania Evaluation at 11.

adjust prices and expenses in response to competition, and deprives CLECs of revenue because they are unable to back-bill previously undercharged end users.<sup>32</sup>

Here, the CLECs make credible allegations that they are continuing to receive wholesale bills from SBC that contain substantial inaccuracies. Both AT&T and MCI have partly completed laborious efforts to compare SBC's bills with their own line usage records.<sup>33</sup> These comparisons reveal that the CLECs are receiving erroneous bills for hundreds, and perhaps thousands, of lines over which they do not in fact provide service.<sup>34</sup> TDS Metrocom catalogues a series of smaller, but still significant inaccuracies.<sup>35</sup>

The CLECs assert that they must devote substantial resources to reviewing and challenging SBC's bills.<sup>36</sup> TDS Metrocom asserts that this burden is growing.<sup>37</sup> SBC does not offer any objective measure to demonstrate that its actual billing performance is improving.<sup>38</sup> SBC has provided data in an attempt to establish that its performance in Michigan is equivalent to its current performance in other states where it had earlier obtained Section 271 authority; however, questions remain about the utility of this information.<sup>39</sup> In these circumstances, TDS

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<sup>32</sup> *FCC Pennsylvania Order* ¶ 23.

<sup>33</sup> MCI Lichtenberg Decl. ¶ 18; AT&T DeYoung/Tavares Decl. ¶¶ 7, 11.

<sup>34</sup> MCI Lichtenberg Decl. ¶¶ 19-24; AT&T DeYoung/Tavares Decl. ¶¶ 8-12.

<sup>35</sup> TDS Metrocom Cox Aff. *passim*.

<sup>36</sup> *See id.* ¶ 10 (TDS has a dedicated billing team of “five employees who spend an estimated [30 percent] of their time reviewing SBC bills and disputing billing inaccuracies and improper charges,” plus another person who spends at least 75 percent of his time on billing issues.); AT&T DeYoung/Tavares Decl. ¶ 11 (number of hours and cost of two-month review provided in confidential portion of filing); MCI Comments at 8-9 (“CLECs cannot be expected routinely to raise such [billing] issues on an ongoing basis, because the audits to find these errors are very time consuming.”); *cf. FCC Pennsylvania Order* ¶ 23 n.76 (noting CLEC costs of auditing Verizon bills).

<sup>37</sup> TDS Metrocom Cox Aff. ¶ 10.

<sup>38</sup> In Pennsylvania, in contrast, the total amounts involved in billing disputes declined from 26.59 percent of total charges in February 2001 to 2.21 percent in June. *See FCC Pennsylvania Order* ¶ 26 (March figure was 13.08 percent, April's was 9.47 percent, May's was 2.36 percent). Thus, Verizon was able to show that “the overall amounts involved in [its] manual adjustment process [were] nominal and [were] consistently decreasing over time.” *See id.* ¶ 39.

<sup>39</sup> SBC asserts that the percentage of bills that have been disputed by CLECs from January 2002 through April 2003 is 12.1 percent of billings, and that this percentage is comparable to the rates found over the same 16-month period in other states where SBC already has Section 271 authority. *See SBC Supp. Br.* at 22; *SBC Brown/Cottrell/Flynn Supp. Aff.* ¶¶ 112-13. Even setting aside the fact that SBC's Michigan figure is significantly

Metrocom's "great[] concern[]" that "additional, significant issues exist that have yet to be identified" appears sufficiently grounded to justify further review in this area.<sup>40</sup>

Although SBC continues to address specific billing errors as they arise, the number of those errors and the reasons they have occurred suggest that there may be an underlying problem. SBC attributes various billing problems to, for example: "some flaws in the Robotask routines"; "information being posted to the wrong position"; "existing errors in the embedded base"; "an error in the ordering system causes an incorrect class of service to be assigned"; "billed an incorrect loop rate for loops served in those wire centers"; and "misclassified certain residential 2-wire analog UNE loops as business loops."<sup>41</sup> CLECs assert, moreover, that billing errors continue to appear, even after SBC has identified a problem, agreed to fix it, and asserted that the problem was resolved.<sup>42</sup>

SBC's efforts to address specific billing problems as they arise are commendable. The evidence suggests, however, that SBC needs to do more to identify and correct the underlying causes of its billing errors. The BearingPoint and E&Y tests show that SBC's billing programs themselves work well: when provided accurate information, the computerized billing programs

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larger than Verizon's figures for the last two months available for the Commission's review in Pennsylvania, the Department questions whether SBC's figure has any probative value. SBC does not say how this figure was calculated or what categories of billing errors were included. As CLECs have noted, a figure based only on whether a CLEC formally disputed a charge may not capture admittedly erroneous billed amounts and thus may understate the full magnitude of SBC's overall billing errors. *See* MCI Lichtenberg Decl. ¶ 45 (stating SBC's data on disputes "do not include the problems revealed by the reconciliation"); TDS Metrocom Comments at 9 (questioning whether figure includes back-billed amounts). Moreover, SBC offers only one figure for the full 16-month period and does not offer any figures from which one could ascertain a meaningful trend in Michigan.

<sup>40</sup> TDS Metrocom Cox Aff. ¶ 31 (also noting that due to "numerous back bills" received from SBC and to "limited resources" it "has only been able to analyze a portion" of its SBC invoices); *see also* AT&T DeYoung/Tavares Decl. ¶ 4 (In addition to overbilling and underbilling problems already identified, AT&T has identified "tens of thousands of additional telephone numbers that showed evidence of discrepancy but with respect to which AT&T did not have the time and resources to investigate.").

<sup>41</sup> SBC Brown/Cottrell/Flynn Supp. Aff. ¶¶ 29, 29, 31, 81, 88, 101 (respectively).

<sup>42</sup> *See* TDS Metrocom Cox Aff. ¶ 20 (Joint SNET facilities charges); MCI Lichtenberg Decl. ¶¶ 25-26 (non-recurring charges arising from ACIS-CABS mis-matches and assessed in period before the reconciliation were not audited during reconciliation); AT&T DeYoung/Tavares Decl. ¶¶ 23-29 (credits and debits resulting from the reconciliation not correctly calculated due to faulty or incomplete information about connect and disconnect dates).

create accurate bills. The problems may lurk at a deeper level, perhaps in the underlying databases from which bills are calculated and in the processes by which data is entered into and extracted from those databases.<sup>43</sup> Michigan's performance metrics do not test for billing problems at this level.<sup>44</sup> Yet problems at this level clearly will yield inaccurate bills. By the same token, although CLECs have offered some evidence as to their asserted burdens resulting from SBC's billing problems,<sup>45</sup> this information is limited, and the CLECs have not put in the record information to substantiate fully whether and how SBC's billing problems have affected competition.<sup>46</sup>

Serious questions continue to be raised concerning the accuracy of SBC's wholesale billing. The record does not permit the Department to conclude that these 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.

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<sup>43</sup> As MCI notes, even after the database reconciliation that matched up CABS with ACIS, "if ACIS is incorrect, then CABS would be incorrect even if ACIS and CABS were perfectly reconciled." MCI Lichtenberg Decl. ¶ 22. The E&Y review did not address whether there were underlying problems in ACIS. See SBC/E&Y Report at 4 n.5 (noting "underlying accuracy of the UNE-platform circuit information within the ACIS database . . . was not within the scope of E&Y's engagement").

<sup>44</sup> As the Department has noted, the relevant Michigan performance metrics have limited utility in catching a wide range of potential billing errors; 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. See DOJ Michigan II Evaluation at 11 n.48. CLECs have observed the limitations of this metric. See MCI Lichtenberg Decl. ¶ 45 n.1 ("SBC still does not have a billing accuracy metric that will catch and sanction future errors like those MCI is experiencing"); TDS Metrocom Cox Aff. ¶ 9 (asserting metrics do not capture "information about backbilling, incorrect rates, double billing or miscoding"). SBC reports that it is proposing a new metric to assess how well CABS records continue to match ACIS. See SBC Brown/Cottrell/Flynn Supp. Aff. ¶ 67. MCI reports, however, that "the details of any new measurements (including remedies) are being debated," MCI Lichtenberg Decl. ¶ 45 n.1, and TDS contends that "even if the parties are able to agree on changes, it will be months before they are implemented and results can be analyzed." TDS Metrocom Cox Aff. ¶ 9.

<sup>45</sup> See *supra* notes 33-37 and accompanying text.

<sup>46</sup> The FCC's expedited briefing schedule for this matter gave the CLECs less time than usual to prepare their initial comments. Compare FCC SBC Michigan Refiling Public Notice at 2 (giving CLECs 13 days to file comments), with FCC SBC Michigan Filing Public Notice at 1-2 (21 days to file same). CLECs may decide to supplement the record on these asserted burdens pertaining to billing after the Department's Evaluation is filed. See, e.g., FCC SBC Michigan Refiling Public Notice at 4, 5-6 (providing for reply comments and *ex partes*).

## **B. Line-Splitting**

As the Department observed in its prior Evaluation, line-splitting service to CLECs could provide an important platform for future broadband competition.<sup>47</sup> Such a platform will be 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.

AT&T and MCI raise several issues concerning line-splitting in their comments.<sup>48</sup> AT&T also raised some of these issues in connection with SBC's previous application. At that time, the Department noted in its Evaluation that the Michigan PSC had directed the parties to begin collaborative discussions on line-splitting issues.<sup>49</sup> These discussions apparently have proven fruitful with respect to two issues. SBC's July 7, 2003 *ex parte* letter appears to show that issues concerning "versioning" and service interruption at initial provisioning are being satisfactorily

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<sup>47</sup> DOJ Michigan II Evaluation at 13. 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 that 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.

<sup>48</sup> AT&T Comments at 8-23; MCI Comments at 9-15.

<sup>49</sup> DOJ Michigan II Evaluation at 14 n.60 (citing Michigan PSC Further Improvements Order at 10-11).



addressed.<sup>50</sup> In addition, SBC appears to have addressed in another *ex parte* letter a concern raised by AT&T about 911/E911 database upkeep for customers who use line-splitting.<sup>51</sup>

AT&T and MCI raise one issue with regard to SBC's current application which, the Department believes, does merit the Commission's attention.<sup>52</sup> The issue concerns SBC's processes for reconverting a customer from line-splitting back to UNE-platform service.<sup>53</sup> SBC's processes, the CLECs maintain, may effectively require them to serve the same customer through a new loop, which in some cases may result in substantial service interruptions and other service quality problems.<sup>54</sup> SBC responds that if its own due date process is "manually overridden," it is "possible for Michigan Bell to [re]use such a loop" when the reversion is done.<sup>55</sup>

The Commission should, the Department believes, determine based on the record before it whether SBC's processes provide non-discriminatory access to line-splitting and UNE-platform services. SBC's current processes appear to place the CLECs at a competitive disadvantage as

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<sup>50</sup> SBC Line-Splitting *Ex Parte* at 1-4. SBC has developed, in collaboration with the CLECs, a measure that addresses the "versioning" problem by allowing a CLEC and its partner DSL provider to submit automated service orders that will be associated with each other by using the previously unused Local Service Provider Authorization field. SBC commits to implementing this measure, barring unforeseen events, in its quarterly release scheduled for March 2004. *Id.* at 1-2. SBC also apparently has resolved the problem MCI experienced when some of its customers lost dial tone for substantial periods when new line-splitting service was initiated. SBC has communicated with MCI about how MCI can ensure that its service orders correctly reflect the needed information, and has undertaken to verify that dial tone will not be lost because of incorrect information by testing both the designated port and loop carrier facility assignments to assure the presence of dial tone. *Id.* at 3.

<sup>51</sup> AT&T raised its concern in discussing a newly issued SBC Accessible Letter which seemed to state that SBC would no longer make 911/E911 database updates for those CLEC customers with a line-splitting arrangement. *See* AT&T Comments at 17-23. On July 15, 2003, SBC issued another Accessible Letter which satisfactorily clarified this issue, explaining that CLECs are responsible only for initiating 911/E911 database updates if they physically rearrange or disconnect the UNEs originally used for the line-splitting arrangement. *See* SBC 911/E911 Database Updates *Ex Parte* Attach. 1.

<sup>52</sup> AT&T Comments at 12-15; MCI Comments at 10-12. SBC suggests that this issue should be addressed by the Commission in some context other than SBC's Michigan Section 271 application. SBC Supp. Br. at 29-30. The Department defers to the Commission's judgment as to the appropriate forum for resolution, but notes that the CLECs' complaint seems to present an issue implicating SBC's ability to provide non-discriminatory access both to line-splitting and UNE-platform service. *Cf. FCC BellSouth Multistate Order* ¶ 218.

<sup>53</sup> AT&T Comments at 12-15; MCI Comments at 10-12.

<sup>54</sup> AT&T DeYoung Decl. ¶ 13; MCI Lichtenberg Decl. ¶¶ 63-66.

<sup>55</sup> SBC Line-Splitting *Ex Parte* at 5-6 & n.13. SBC also outlines several scenarios in which the CLEC would not be entitled to reuse the loop, but these scenarios are not relevant to the issue raised by AT&T and MCI, which concerns instances in which they are entitled to reuse the loop.

against SBC when they seek to sell DSL service. Their customers could experience a significant interruption of voice service if they later choose to disconnect the DSL service. SBC customers apparently do not suffer the same potential disability. SBC has proposed a resolution of this problem.<sup>56</sup> The Commission may have further information concerning that effort at the time it makes its decision.

### III. Reliability of Reported Performance Data

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.<sup>57</sup> The reliability of SBC’s metrics continues to be strongly contested, especially in light of continuing delays with the BearingPoint audit.

The OSS test ordered by the Michigan PSC included a comprehensive performance measures audit being conducted by BearingPoint.<sup>58</sup> Last year, in the midst of several delays in the completion of this audit, SBC initiated its own metrics review.<sup>59</sup> It engaged E&Y, its financial auditor, to perform a faster review. While that E&Y review is now complete, the BearingPoint audit is ongoing and, in SBC’s words, “will continue for months to come.”<sup>60</sup>

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<sup>56</sup> See SBC Line-Splitting II *Ex Parte* at 2-3. SBC’s resolution would bypass the existing provisioning process, but would require certain concessions from CLECs. See *id.* at 3. In addition to these concessions, agreements must be reached on certain other factors identified in an earlier *ex parte*. See *id.* (referring to SBC Line-Splitting *Ex Parte*). Finally, it might also be necessary to seek approval from the relevant state commissions to change existing interconnection agreements and performance measurements. See *id.* at 3 n.5. The uncertainty of the timing and implementation of this proposed solution suggests that the Commission should review its status before the close of this proceeding.

<sup>57</sup> 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.

<sup>58</sup> See, e.g., Michigan PSC Report at 6-7; Michigan PSC Supp. Report at 3-4.

<sup>59</sup> See SBC Notice of Intent to Supplement Record at 1-2.

<sup>60</sup> SBC Supp. Br. at 9; Michigan PSC Supp. Report at 5 (stating that “several more months will be necessary to complete [BearingPoint’s] activities”). The Michigan PSC reports that nearly 50 percent of the metrics test criteria have been satisfied in the BearingPoint test. Michigan PSC Supp. Report at 5.

Disputes about performance data continue to revolve around two basic issues: the *status* of the Michigan PSC-initiated BearingPoint audit and the *scope* of the SBC-initiated E&Y review. CLECs argue that the incomplete nature of the BearingPoint audit is a fatal problem, deemphasizing E&Y's positive conclusions due to SBC's sponsorship and the narrower scope of review.<sup>61</sup> In contrast, SBC seeks to distance itself from the BearingPoint audit and relies primarily upon the E&Y review and its positive conclusions. SBC argues that because E&Y's approach follows that of reviews previously accepted by the FCC, the only remaining question is whether BearingPoint is finding material reporting or calculation problems that E&Y did not.<sup>62</sup> As in its prior Evaluation, the Department does not fully agree with either side.

A state-sponsored audit is an important source of information. As such, the BearingPoint metrics audit and its findings to date should not be ignored or minimized simply because the audit is not progressing as fast as SBC desires. SBC itself appears to be responsible for some of the delays in completion of BearingPoint's audit.<sup>63</sup> 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

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<sup>61</sup> See AT&T Comments at 6-7; CLECA Comments at 3-8; MCI Comments at 15-16; TDS Metrocom Comments at 3-6.

<sup>62</sup> See, e.g., SBC Supp. Br. at 2, 5; SBC Ehr/Fioretti Supp. Aff. ¶¶ 7, 41-42. SBC appears to confuse the burden of making a *prima facie* case with the ultimate burden of persuasion. One could find the E&Y review and conclusions sufficient to make a *prima facie* case that SBC's metrics are reliable and still conclude, considering the totality of evidence in the record, that certain metrics are not reliable.

<sup>63</sup> For example, the data integrity and metrics replication portions of the BearingPoint audit were significantly delayed by SBC's inadequate documentation of its performance measures and the associated business rules, without which one cannot determine the meaningfulness or accuracy of reported metrics. 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).

date.<sup>64</sup> As the Department pointed out in its Michigan II Evaluation, moreover, the simple fact that the audit is incomplete does not itself show that the reported metrics are unreliable.<sup>65</sup>

With respect to the E&Y verification, weight should be given to its conclusions commensurate with its more limited scope and methodology. Unlike the more traditional audit-style approach of BearingPoint's testing, which includes replication testing of several months of published reports, the E&Y review focuses on the processes by which those reports were prepared.<sup>66</sup> Correct processes are, of course, a prerequisite of reliable reporting. Thus this approach does have value, as demonstrated here by the large number of important issues that E&Y identified.<sup>67</sup> E&Y's work should not be disregarded simply because of its approach. The Commission should, however, use great care before dismissing, based solely on the findings of E&Y's review, problems identified by BearingPoint's findings or marketplace performance data.

SBC has made numerous improvements to its performance measurement and reporting in response to deficiencies identified by BearingPoint and E&Y.<sup>68</sup> What remains is for the Commission to satisfy itself that 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

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<sup>64</sup> For example, SBC argues that BearingPoint's "interim findings" deserve less weight than a final report, *see* SBC Ehr/Fioretti Supp. Aff. ¶¶ 42, 45-48, and that BearingPoint's "exceptions" are entitled to lesser weight than "E&Y findings," *see* SBC Supp. Br. at 5-6 (emphasis in original). However, BearingPoint clearly states that exceptions were "created if BearingPoint determined that a test indicated one of SBC Ameritech's practices, policies, or system characteristics *did not satisfy* one or more of the evaluation criteria defined for the test." BearingPoint OSS Evaluation Project Report at 10 (emphasis added); *cf. id.* (observation represents something that "might result in a negative finding"). Likewise, a "Not Satisfied" means that "[t]he norm, benchmark, standard, and/or guideline was not met." *Id.* Thus, the Department shares CLEC commenters' concerns that SBC is mischaracterizing BearingPoint's processes and its findings. *See, e.g.,* AT&T Comments at 46-47; AT&T Moore/Connolly Decl. ¶¶ 42-48, 50, 54-55, 70-71; CLECA Comments at 6-7. The Department recommends that the Commission, if it deems SBC's distinctions potentially significant, discuss these matters with BearingPoint directly and assure itself that it fully understands BearingPoint's processes, the meaning of its terms, and the nature of its findings.

<sup>65</sup> DOJ Michigan II Evaluation at 15.

<sup>66</sup> *E.g.,* E&Y Scope, Approach, and Methodology Statement at 3.

<sup>67</sup> *See generally* E&Y Final Corrective Action Report.

<sup>68</sup> *See, e.g.,* SBC Ehr/Fioretti Supp. Aff. ¶¶ 34-38, 74-84, 86-87.

open after SBC's application is ultimately granted. In judging these issues, the Commission should consider the totality of evidence in the record.<sup>69</sup>

#### IV. Conclusion

Because of serious outstanding questions concerning the accuracy of SBC's wholesale billing, the Department is not in a position to support this 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 questions prior to the conclusion of its review.

Respectfully submitted,

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<sup>69</sup> The Michigan PSC appropriately has ordered BearingPoint to continue the remaining portions of its audit and states that reports "will continue to completion." Michigan PSC Supp. Report at 3-4; *see also* Michigan PSC Report at 22 (PSC to "vigorously pursue completion of the remaining portions of the BearingPoint . . . testing in regard to SBC's metrics reporting so that a stable and dependable system will be in place in the very near future"). Further testing and refinement of the performance measures will permit effective monitoring of SBC's wholesale performance even after Section 271 authority is ultimately granted.

## Certificate of Service

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 July 16, 2003.

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