

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

In the Matter of)
)
Joint Application by SBC Communications)
Inc., Southwestern Bell Telephone Company,)
and Southwestern Bell Communications) CC Docket No. 00-217
Services, Inc. d/b/a Southwestern Bell Long)
Distance for Provision of In-Region,)
InterLATA Services in Kansas and Oklahoma)

EVALUATION OF THE
UNITED STATES DEPARTMENT OF JUSTICE

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Introduction and Summary

SBC's joint application to offer long distance services in the states of Kansas and Oklahoma is based in substantial part on the template developed in Texas.¹ Many of the terms and conditions governing the availability of interconnection and unbundled network elements (UNEs) in Kansas and Oklahoma -- the ground rules for local competition -- match those that were evaluated favorably by the Department of Justice (DOJ) and approved by the Commission in SBC's earlier Texas application. And, both the Kansas Corporation Commission (KCC) and the Oklahoma Corporation Commission (OCC) have predicated their support for SBC's application to some degree on the success of the Texas template² in addition to evaluating state-specific performance results.

¹ See, e.g., SBC Brief at i-ii, 2, 19, 73-4.

² See, e.g., SBC Brief at 2; OCC Final 271 Order at 3, 150; KCC Staff 271 Report at 8, 10, 18, 27.

The Department's evaluation of this joint application focuses on two issues: the prices at which SBC provides interconnection and UNEs in Kansas and Oklahoma, and the sufficiency of SBC's evidence that its provision of nondiscriminatory access to operational support systems (OSS) in Texas supports a finding of nondiscriminatory access in Kansas and Oklahoma.

Both the recurring and nonrecurring charges for the use of UNEs in Oklahoma, and the nonrecurring charges for the use of UNEs in Kansas, are substantially greater than the comparable charges in Texas, which the Commission has found to be appropriately cost based. There is no obvious difference in costs between and among the states that would account for the difference in prices, and there are some indications in the record that the prices in Kansas and Oklahoma were not determined in accordance with the Commission's methodological requirements. Moreover, competitive local exchange carriers (CLECs) have chosen to use UNEs to a very limited extent in Kansas and Oklahoma, a fact that could suggest that the prices of those UNEs are not appropriately based on cost. In these circumstances, we believe the Commission should undertake an independent determination whether these prices conform to the requirements of the 1996 Act and the Commission's rules, rather than relying on the decisions of the KCC and OCC to approve those prices.

SBC's contention that it provides nondiscriminatory access to OSS in Kansas and Oklahoma is supported largely by evidence that its wholesale services in those states are provided with the same OSS that the Commission examined and approved in SBC's Texas application. The evidence contained in SBC's application, however, is ambiguous and incomplete in important

respects. Because of these shortcomings, the evidence does not establish clearly that acceptable wholesale performance in Texas will necessarily be duplicated in Kansas and Oklahoma. The Commission should require more evidence and clarification in these areas.

I. Entry in the Local Telecommunications Markets in Kansas and Oklahoma

To determine whether SBC has fully and irreversibly opened the local telecommunications market to competition for both business and residential customers, the Department examines the three modes of entry contemplated by the Telecommunications Act of 1996³: facilities-based entry, the use of unbundled elements of the incumbent's network and resale of the incumbent's services.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.⁵ The degree to which such existing competition is broad based determines the weight the Department places on it as evidence.⁶

For those entry modes where competitively significant entry is reasonably foreseeable but broad-based commercial entry is absent, the Department examines whether new technical and operational arrangements are available and working to support the entry mode, and whether

³ Pub. L. No. 104-104, 110 Stat. 56 (1996) (codified as amended in various sections of 47 U.S.C.).

⁴ See DOJ Schwartz Aff. ¶¶ 149-192; DOJ Schwartz Supplemental Aff. ¶¶ 26-60; DOJ Oklahoma I Evaluation at vi-vii, 36-51.

⁵ See, e.g., DOJ Oklahoma I Evaluation at vi-vii, 41-42.

⁶ See, e.g., DOJ Schwartz Aff. ¶ 176.

performance benchmarks have been established to detect backsliding by the incumbent after long distance entry.⁷ Small market shares held by competitors or even the absence of entry, standing alone, are neither conclusive evidence that a market remains closed to competition nor a basis for denying an application under section 271.⁸

A. Competitive Entry in Oklahoma

CLECs using all modes of entry serve approximately 115,000 lines, or 6.3 percent of the lines, in SBC's service area in Oklahoma.⁹ This level of CLEC retail penetration, in the aggregate, is approximately 70-80 percent of the levels in New York and Texas at the time applications were filed in those states.¹⁰ CLEC business lines in Oklahoma outnumber residential lines by a 57:43 proportion.¹¹ In contrast, 70 percent of the access lines in Oklahoma serve

⁷ DOJ Oklahoma I Evaluation at 48-51.

⁸ *See, e.g., id.* at 29-30; DOJ Louisiana II Evaluation at 26-27.

⁹ *See* SBC Brief at iii; SBC Smith/Johnson Aff. ¶ 12, tbl. 3. Counting CLEC lines as the sum of E911 + UNE-P + Resale, there are approximately 1.8 million access lines in SBC's Oklahoma service area.

¹⁰ In New York, CLECs served approximately 8.9% of total access lines. DOJ New York Evaluation at 9. In Texas, SBC estimated that CLECs served 12.8% of total access lines, but the Department concluded that CLECs actually served closer to 8.0% of the market. DOJ Texas I Evaluation at 8-9.

¹¹ *See* SBC Smith/Johnson Aff. ¶ 11, tbl. 2; ¶ 40, tbl. 9. Counting CLEC lines as the sum of E911 + UNE-P + Resale, there are 49,000 CLEC residential lines and 66,000 CLEC business lines in SBC's Oklahoma service area.

residential customers.¹² Long-distance carriers appear to provide local service to approximately 30,000 lines in the state, or one and one-half percent of the total lines in the state. Residential lines account for fewer than 100 of the total lines.¹³

Facilities-based CLEC lines comprise three percent, or 55,000, of Oklahoma lines.¹⁴ This percentage of facilities-based lines compares with three and one-half percent in Texas and five and one-half percent in New York at the times of their 271 applications.¹⁵ Approximately 80 percent of these lines serve business, but 12,000 serve residential customers.¹⁶ A single cable provider serves virtually all the facilities-based residential lines in Oklahoma.¹⁷

Resale of SBC service also makes up three percent of the lines in SBC's Oklahoma service area and is the primary means of residential entry. Thirty-seven thousand residential lines are

¹² See *FCC Common Carrier Statistics* at 22 tbl. 2-4. Department calculations based on the FCC data indicate that approximately 70% of all Oklahoma access lines are residential.

¹³ See *SBC Smith/Johnson Aff. Attach. F* ¶¶ 4, 26, 28 (data tables). The long distance carriers, as a group, have 160,000 telephone numbers assigned in Oklahoma, presumably to allow them to provide local telephone service in Oklahoma when they chose to do so or when circumstances permit.

¹⁴ See *SBC Smith/Johnson Aff.* ¶ 22 tbl. 5 (55,000 of 115,000 CLEC lines are facilities-based, as measured by E911 listings.). The number of facilities-based lines includes lines served by stand-alone loops and thus is not comprised of "pure" facilities-based lines.

¹⁵ See *DOJ Texas I Evaluation* at 8, 9 (Facilities-based CLEC lines were estimated to comprise 350,000-400,000 of the lines in SBC's Texas service area); *FCC New York Order* ¶14 (showing 651,793 facilities-based lines in New York at the time of application).

¹⁶ See *SBC Smith/Johnson Aff.* ¶ 22 tbl. 5 (12,000 or 22 % of CLEC facilities-based lines are residential lines.).

¹⁷ See *Cox Comments* at 5.

served through resale.¹⁸ Long distance carriers have made no significant use of resale in Oklahoma.¹⁹

The UNE-platform constitutes one-third of one percent (or approximately 6,000) of the lines in SBC's Oklahoma service area. Fourteen residential customers are served over the platform in the state.²⁰ The limited use of UNE-platform in Oklahoma contrasts sharply with the New York and Texas markets, where the use of UNE-platform has accounted for rapid CLEC expansion into the residential market.²¹ DSL entry in Oklahoma is minimal. There are 548 CLEC DSL lines in Oklahoma, which constitute 0.03 percent of total lines in Oklahoma.²²

B. Competitive Entry in Kansas

¹⁸ See SBC Smith/Johnson Aff. ¶ 40 tbl. 9 (55,000 CLEC lines in Oklahoma are provided by resale of SBC service.).

¹⁹ See SBC Smith/Johnson Aff. Attach. F ¶¶ 4, 26, 28.

²⁰ See SBC Smith/Johnson Aff. ¶ 11 tbl. 2; ¶ 22 tbl. 5. (Calculations from these tables indicate 6,288 UNE-Platform lines are in use in Oklahoma, and fourteen of these lines serve residential customers.).

²¹ At the time of the New York application, approximately 152,000 lines were served through the UNE-platform. *FCC New York Order* ¶ 14. By July 2000, CLECs served one million additional customers over the UNE-platform, almost 95% of them residential. DOJ Massachusetts Evaluation at 6, n.26; See also Verizon Taylor Decl. ¶ 21. At the time of the second Texas application, approximately 244,000 lines were served through the UNE-Platform. *FCC Texas Order* ¶ 5. By September 2000, CLECs in Texas served 569,000 customers over the UNE-Platform. The UNE-Platform accounted for approximately 8.5% and 5% of total state lines in New York and Texas, respectively, by the end of summer 2000.

²² See SBC October 2000 Kansas/Oklahoma Performance Data, Oklahoma PM 65-08 (Trouble Report Rate (%) for DSL) at 271- No. 65c (548 DSL lines in service as of Sept. 2000).

CLECs using all modes of entry serve approximately 130,000 lines, or 9 percent of the lines, in SBC's Kansas service area.²³ This level of CLEC retail penetration, in aggregate, is approximately the same as the levels in New York and Texas at the time applications were filed in those states.²⁴ CLEC business lines in Kansas outnumber residential lines by approximately a 2:1 margin.²⁵ By contrast, two-thirds of the access lines in Kansas serve residential customers.²⁶ Long distance carriers account for only several thousand lines in Kansas, with residential lines accounting for fewer than 1000 of these.²⁷ CLEC penetration in Kansas is smaller than either the 20 percent penetration currently achieved in New York, or in Texas where the UNE platform alone accounted for almost a five percentile gain in penetration during the first nine months of the

²³ See SBC Brief at ii and SBC Smith/Johnson Aff. ¶ 12 tbl. 3. Counting CLEC lines as the sum of E911 + UNE-P + Resale, there are approximately 1.46 million access lines in SBC's Kansas service area.

²⁴ In New York, CLECs served approximately 8.9% of total access lines. DOJ New York Evaluation at 9. In Texas, SBC estimated that CLECs served 12.8% of total access lines, but the Department concluded that CLECs actually served closer to 8.0% of the market. DOJ Texas I Evaluation at 8-9.

²⁵ See SBC Smith/Johnson Aff. ¶ 11 tbl. 2; ¶ 40 tbl. 9. Counting CLEC lines as the sum of E911 + UNE-P + Resale, there are approximately 47,000 CLEC residential lines and 86,000 CLEC business lines in SBC's Kansas service area.

²⁶ See *FCC Common Carrier Statistics* at 22 tbl. 2-4. Department calculations based on the FCC data indicate that approximately two-thirds of all Kansas access lines are residential.

²⁷ See SBC Smith/Johnson Aff. Attach. F ¶¶ 4, 26, 28. These same data show 11,000 - 12,000 interconnection trunks, possibly indicating additional facilities-based service in Kansas or in nearby states. Long distance carriers, as a group, have 280,000 telephone numbers assigned in Kansas, presumably to allow them to provide local telephone service in Kansas when they choose to do so or when circumstances permit.

year 2000.²⁸

The predominant mode of CLEC entry in Kansas is the resale of SBC service. Resale lines serve approximately six and one-half percent of the total lines in SBC's Kansas service area, or more than two-thirds of total CLEC lines.²⁹ Essentially all CLEC residential service in Kansas is the resale of SBC service.³⁰ Long distance carriers have made no significant use of resale in Kansas.³¹ Almost half of resale lines in Kansas are served by a single CLEC.³²

Facilities-based CLEC lines make up one and one-half percent of the lines in SBC's Kansas service area.³³ The percentage of facilities-based lines compares with three and one-half percent in Texas and five and one-half percent in New York at the times of their 271 applications.³⁴ Virtually all facilities-based CLEC lines serve business customers.³⁵ Only one long

²⁸ Verizon Taylor Decl. ¶ 21 (CLECs served approximately 2.5 million lines in New York as of July 31, 2000); *see* SBC October 2000 Texas Performance Data, Texas PM 37-03 (Trouble Report Rate - UNE Loop and Port Combinations) at 271-No. 37 (168,669 UNE-Platform lines as of January 2000 and 760,391 UNE-Platform lines as of October 2000).

²⁹ *See* SBC Smith/Johnson Aff. ¶ 40 tbl. 9 (showing 94,758 resold lines in SBC's Kansas territory, as of August, 2000).

³⁰ *See* SBC Smith/Johnson Aff. ¶ 11 tbl. 2 (showing UNE-P and facilities-based CLEC entry in Kansas accounting for a total of only 709 residential CLEC lines).

³¹ *See* SBC Smith/Johnson Aff. Attach. E at 4, 5.

³² *Id.*

³³ *See* SBC Smith/Johnson Aff. ¶ 22 tbl. 5 (21,000 CLEC lines in Kansas are facilities-based, as measured by E911 listings.). The number of facilities-based lines includes lines served by stand-alone loops and thus is not comprised of "pure" facilities-based lines.

³⁴ *See* DOJ Texas I Evaluation at 8 (Facilities-based CLEC lines were estimated to comprise 350,000-400,000 of the lines in SBC's Texas service area) and *FCC NY Order* ¶ 14

distance carrier is currently providing a significant number of facilities-based lines in Kansas.³⁶

The UNE-platform constitutes approximately one percent of lines in the state of Kansas. No residential customers are served over the platform in the state.³⁷ The limited use of the UNE-platform contrasts sharply with the New York and Texas markets, where the use of UNE-platform has accounted for rapid CLEC expansion into the residential market.³⁸ DSL entry is also minimal. There are 556 CLEC DSL lines in Kansas, which constitute 0.038 percent of total lines in Kansas.³⁹

C. Conclusion

The small number of UNE-P lines served by CLECs in both Oklahoma and Kansas, and the small number of facilities-based residential lines served by CLECs in both Oklahoma and Kansas, are insufficient, alone, to justify a presumption that the Oklahoma and Kansas markets are fully open to these modes of entry and are fully open to competition for business and residential

(showing 651,793 facilities-based lines at the time of application).

³⁵ See SBC Smith/Johnson Aff. ¶ 22 tbl. 5 (709 CLEC facilities-based lines serve residential customers.).

³⁶ See SBC Smith/Johnson Aff. Attach. E at 1.

³⁷ See SBC Smith/Johnson Aff. ¶ 11 tbl. 2; ¶ 22 tbl. 5 (Calculations from these tables indicate 17,045 UNE-platform lines are in use in Kansas, and none of these lines serve residential customers.).

³⁸ See *supra* note 21.

³⁹ See SBC October 2000 Kansas/Oklahoma Performance Data, Kansas PM 65-08 (Trouble Report Rate (%) for DSL) at 271-No. 65c (556 DSL lines as of Sept. 2000).

customers. These numbers compel a closer look at whether SBC has fully and irreversibly opened the Oklahoma and Kansas markets to all three modes of competition required by the Act for both business and residential customers, and, in particular in these states, whether: (1) interconnection, UNE and UNE-P rates and charges are properly cost-based; (2) interconnection, UNE, and UNE-P offerings by SBC meet reasonable levels of performance where requested or in use; and (3) SBC has shown that its interconnection and wholesale support systems and procedures are sufficiently close to those in Texas to ensure performance, and continuing performance, in conjunction with the established performance benchmarks and arrangements to prevent backsliding.

II. The Commission Should Independently Determine Whether Prices for Unbundled Elements in Oklahoma and Kansas Are Properly Cost-Based.

Local telecommunications markets cannot be fully and irreversibly open to competition unless the prices for the interconnection and UNEs are properly based on costs. The FCC has established the basic principles that must be followed in establishing these prices, requiring that the prices “must be based on an incumbent LEC’s forward-looking, long-run incremental costs for each network element.”⁴⁰ Prices which are not properly cost-based act as a barrier to entry; such prices may prevent entry entirely, or limit entry in type or scale.⁴¹

⁴⁰ *FCC New York Order* ¶ 237.

⁴¹ *See* ConnectSouth Comments at 4 (“On November 2, 2000, ConnectSouth notified the Arkansas Public Service Commission that it was withdrawing from the Arkansas market due to SWBT’s high collocation and UNE charges.”); *see also Oklahoma ALJ Pricing*

The FCC has reasonably concluded that in many circumstances it will rely heavily on pricing decisions made by state commissions, but this deference is not blind. If “basic TELRIC principles are violated or the state commission makes clear errors in factual findings on matters so substantial that the end result falls outside the range that the reasonable application of TELRIC principles would produce[,]” then the prices may be found to violate section 252 of the Telecom Act and to preclude the grant of a section 271 application.⁴² This analysis properly encompasses both the price-setting process and the level of the resulting prices. Ultimately, the FCC must make its own, independent, finding regarding the propriety of the prices.⁴³

Because of the Commission’s experience and expertise in rate-making issues -- particularly with respect to the proper interpretation and implementation of its prescribed TELRIC methodology -- the Department will not attempt to make its own independent determination whether prices are appropriately cost-based. But while we rely on the Commission for this ultimate determination, we urge the Commission to consider two factors in its threshold inquiry

Recommendation at 111 (testimony suggesting that Cox Oklahoma, a cable facilities-based competitor, may direct its local entry in reaction to Oklahoma UNE prices, “work[ing] around” certain higher rates by “deploying development and implementation strategies of its own.”).

⁴² *FCC New York Order* ¶ 244. This approach conforms to the principles articulated by the Department in a prior proceeding, in which the Department indicated that deference to a state commission’s pricing decisions would be justified if those decisions reflected “a reasoned application of an appropriate methodology.” DOJ South Carolina Evaluation at 35. *See also id.* at 39 (“[I]f a state commission has not explained its critical decisions, or has explained them in terms that are inconsistent with procompetitive pricing principles, the Department will require further evidence that prices are consistent with its open-market standard.”).

⁴³ *See* 47 U.S.C.A. §271(d)(3) (West Supp. 1999).

whether “the end result falls outside the range that the reasonable application of TELRIC principles would produce.”

First, the Commission should compare the prices established in a state with prices established in other states for the same unbundled element, especially with prices that have been previously examined by the Commission and found to be appropriately cost based. We recognize that differences in prices from one state to another do not necessarily indicate that the prices in either state are not appropriately cost based. Such differences may arise either from differences in costs between states, or from different judgments -- both of which are reasonable -- on rate making issues that are not susceptible to precise determination. Nonetheless, we believe comparisons with prices established in other states are a useful starting point in determining whether the Commission should undertake more careful scrutiny of the prices presented in a section 271 application. In the absence of persuasive evidence of differences in costs between states, substantial differences in prices should trigger more careful scrutiny by the Commission.

Second, the Commission should also consider the extent to which CLECs are purchasing unbundled elements at the established prices. If CLECs are purchasing and using an unbundled element in significant volumes, there will be less reason for concern that entry is being constrained by above-cost prices than would the case if there were little or no demand for the element at the established prices. As in the case of price comparisons between states, this factor does not necessarily indicate whether prices are or are not cost-based, because the level of demand may reflect factors other than price. Nonetheless, this factor may be a useful indicator of whether

closer scrutiny of prices by the Commission is appropriate.

The record in this application clearly indicates that an independent scrutiny of prices by the Commission is appropriate. The recurring and non-recurring charges for unbundled elements in Oklahoma and the non-recurring charges in Kansas substantially exceed the level of charges in Texas that were examined by the FCC and found to be appropriately cost based. Moreover, SBC has not presented any convincing evidence that the differences in prices reflect any underlying differences in costs. UNE competition in Oklahoma and Kansas appears to be sparse, suggesting that entry may have been impeded by these rates.⁴⁴ Finally, the record in both states suggests that there may have been significant departures from the prescribed TELRIC methodology for determining costs and prices.

In addition to these concerns, collocation and a number of UNEs continue to be priced only on an interim basis in both Oklahoma and Kansas.⁴⁵ While interim rates in themselves do not require denial of a 271 application,⁴⁶ where, as here, the permanent rates are of concern, it is

⁴⁴ See *supra* notes 21, 38 and accompanying text; see also DOJ Massachusetts Evaluation at 17 (“[T]here is substantial reason to believe that UNE-Platform entry has been impeded by Verizon’s failure, at least perhaps until quite recently, to make certain network elements available to competitors at cost-based prices.”).

⁴⁵ In addition, at the time SBC filed its 271 application with the FCC, the Kansas non-recurring charges (NRCs) were still interim. Two weeks later, on November 3, 2000, the KCC issued a final pricing order on NRCs. *KCC NRC Order*. Unfortunately, the timing of this order was such that few commenters were able to fully analyze it in their November 15, 2000 comments. Whereas AT&T addressed the KCC’s order, Sprint mentioned it only in a footnote, and ConnectSouth did not refer to it at all.

⁴⁶ See *FCC Texas Order* ¶ 88 (“[T]he mere presence of interim rates will not generally threaten a section 271 application so long as an interim solution to a particular rate

additionally troubling to rely on interim rates to establish that the market is fully and irreversibly open to competition.⁴⁷

A. Oklahoma

Oklahoma's permanent prices do not appear to be cost-based: they far exceed the comparable cost-based rates from Texas, and the Oklahoma record suggests that this difference may reflect a failure to adhere to the Commission's TELRIC methodology. Oklahoma's promotional and other interim rates are similarly inadequate bases to support a finding that the local market is irreversibly open to competition.

1. Oklahoma's "permanent" prices may not be cost-based.

a. The rates adopted in the OCC's July 17, 1998 order appear to be excessive.

The majority of monthly recurring and service-initiating non-recurring rates for UNEs were set in Oklahoma by the OCC's order of July 17, 1998, which adopted the Amended Report and Recommendation of an Administrative Law Judge.⁴⁸ Both the recurring and non-recurring rates listed are substantially greater than the rates which were the basis for SBC's Texas application. In addition, the recurring rates in Oklahoma are much higher than the recurring rates

dispute is reasonable under the circumstances, the state commission has demonstrated its commitment to our pricing rules, and provision is made for refunds or true-ups once permanent rates are set.”).

⁴⁷ See *FCC New York Order* ¶ 258; DOJ South Carolina Evaluation at 39.

⁴⁸ *OCC Pricing Order; Oklahoma ALJ Pricing Recommendation.*

in Kansas.⁴⁹

Examples of these disparities abound: the recurring rates for unbundled 2-wire analog loops in Oklahoma are seven to 84 percent higher than comparable loops in Texas and nine to 49 percent higher than comparable loops in Kansas;⁵⁰ the recurring rates for unbundled 4-wire analog loops in Oklahoma are twice as high as the comparable loops in Texas and 50 to 77 percent higher than the comparable loops in Kansas.⁵¹ The recurring rates for unbundled 2-wire digital loops in Oklahoma are 17 to 58 percent higher than the comparable loops in Texas and 25 to 79 percent higher than the comparable loops in Kansas;⁵² and the monthly recurring rates for 4-wire digital loops in Oklahoma are 76 to 100 percent higher than the comparable loops in Texas and 88 to 100 percent higher than the comparable loops in Kansas.⁵³

⁴⁹ See AT&T Baranowski/Flappan Decl. ¶ 16 (“SWBT used the same cost model in Oklahoma and Kansas, and, not surprisingly, given the two states’ very similar characteristics, estimated similar network element costs in Oklahoma and Kansas (with *higher* cost estimates for Kansas in a few instances).”).

⁵⁰ The recurring rate for a 2-wire analog loop ranges from \$12.14 to \$18.98 in Texas and from \$11.86 to \$23.34 in Kansas, but from \$13 to \$35 in Oklahoma. Two-wire analog loops may be subject to promotional discounts pursuant to Oklahoma’s Alternative Regulation Order. See SBC Pricing Chart *Ex Parte* at 1.

⁵¹ The recurring rate for a 4-wire analog loop ranges from \$15.86 to \$36.06 in Texas and from \$19.44 to \$41.76 in Kansas, but from \$30.39 to \$72.37 in Oklahoma. Four-wire analog loops are not included in the Oklahoma Alternative Regulation list of discounted UNEs. See *id.*

⁵² The recurring rate for a 2-wire digital loop ranges from \$34.91 to \$46.09 in Texas and from \$32.66 to \$40.69 in Kansas, but from \$41.14 to \$72.87 in Oklahoma. Two-wire digital loops are not included in the Oklahoma Alternative Regulation list of discounted UNEs. See *id.*

⁵³ The recurring rate for a 4-wire digital loop ranges from \$75.81 to \$76.96 in Texas and from \$64.78 to \$88.48 in Kansas, but from \$134.61 to \$166.57 in Oklahoma. Four-wire

The non-recurring charges (NRCs) in Oklahoma are even more disparate than the recurring rates. NRCs for analog loops in Oklahoma are two and a half times higher than their Texas comparables.⁵⁴ In Oklahoma, the NRCs for 2-wire digital loops are six and seven times higher than the Texas comparables,⁵⁵ while the NRCs for 4-wire digital loops are over three times higher than those in Texas.⁵⁶ The NRC for a cross-connect (analog loop to collocation) is thirteen times higher in Oklahoma than in Texas.⁵⁷ The existence of these disparities is particularly striking for non-recurring charges which would be expected to vary only minimally from state to state.⁵⁸

b. No justification for the level of these rates is presented in the record to the FCC; moreover, the record at the state level

digital loops may be subject to certain promotional discounts pursuant to Oklahoma's Alternative Regulation Order. *See id.*

⁵⁴ The Oklahoma NRC is \$37.50 for the first analog loop and \$15.65 for each additional loop, compared to the Texas NRC of \$15.03 for the first analog loop and \$6.22 for each additional loop. *See id.* at 1-2. The NRC for two-wire analog loops may be subject to promotional discounts pursuant to Oklahoma's Alternative Regulation Order. Four-wire analog loops, however, are not included in the Oklahoma Alternative Regulation list of discounted UNEs. *See id.*

⁵⁵ The NRC in Oklahoma is \$93.24 for the first loop and \$48.88 for each additional loop; in Texas it is \$15.03 for the first and \$6.22 for each additional loop. *See id.* at 1.

⁵⁶ The NRC in Oklahoma is \$220.25 for the first loop and \$86.81 for each additional loop; in Texas the NRC is \$73.25 for the first and \$26.68 for each additional loop. *See id.*

⁵⁷ The NRC in Oklahoma is \$62.04; in Texas the NRC is \$4.72. *See id.*

⁵⁸ *See KCC NRC Order at 2* ("Prices should be similar for similarly defined elements, especially for those cost elements that use common resources with [sic] the five SWBT states: Texas, Missouri, Arkansas, Oklahoma and Kansas.").

suggests that the rates may not reflect proper application of the TELRIC methodology.

SBC does not directly acknowledge or explain the disparity between the rates it offers in support of its Oklahoma 271 application and those which were the basis for its Texas 271 application. The record in the Oklahoma pricing docket, however, suggests that the rate disparity might not be cost-based.

Prices for unbundled elements in Oklahoma were established in the context of an arbitration between SBC and Cox Oklahoma, a cable facilities-based competitor, which was then opened to other parties, including AT&T, as a generic cost docket. At the beginning of the hearing to cross-examine on pre-filed testimony, OCC staff announced it had reached a non-unanimous stipulation with Cox regarding rates for UNEs, which SBC agreed to accept if adopted *in toto*.⁵⁹ After reviewing the pre-filed testimony and cross-examination, the ALJ recommended that the OCC adopt the stipulation:

“The stipulation[s] ... present certain rate levels that do not strictly equal any cost proposal of any party but which, in total, fall well within the ranges of the various proposals; at times below what SWBT might have proposed yet above what AT&T might have proposed. ... The Commission, similar to the responsibility of a jury in a civil case, has the discretion to adopt a position in the “middle” of that which is proposed by the parties.”⁶⁰

The OCC agreed with this assessment and approved the ALJ Report, adding that “the rates

⁵⁹ *Oklahoma ALJ Pricing Recommendation* at 3-4. The fact that a single CLEC agreed to the stipulated rates does not itself require the “conclu[sion] that such a rate is competitively appropriate on a permanent basis for all parties[;]” further justification is required. DOJ South Carolina Evaluation at 42.

⁶⁰ *Oklahoma ALJ Pricing Recommendation* at 158-59.

contained in the stipulation should be deemed temporary.”⁶¹ Commissioner Bob Anthony dissented in part on the grounds that, “Instead of rates based on cost, today’s order has adopted ‘settlement process’ rates.”⁶²

The fact that a price is set in some mid-point range between prices proposed by an ILEC and a CLEC does not indicate that the price is appropriately cost based, absent a separate determination that both the higher and lower proposed prices are appropriately cost based. We are not aware of any such determination in Oklahoma. Rather, it appears that the original rates submitted by SBC were calculated at least in part with an eye to historical cost recovery rather than the forward-looking cost analysis required by the Commission’s rules.⁶³ Serious questions

⁶¹ *OCC Pricing Order* at 4. The decision’s “temporary” status may have been a formality as no further cost proceedings on these particular rates appear to have been opened. The OCC did require SBC to submit by September 1, 1998 further cost information regarding mechanized (rather than manual) service orders. *See id.* at 5. However no further cost proceedings were undertaken. *See SBC Ries Oklahoma Aff.* ¶¶ 11, 14. Moreover, the November, 1999 stipulation transitioning SBC to Alternative Regulation precludes any further cost docket from being opened for two years after the plan is formally approved, and any cost changes from being implemented for five years from that date. *OCC Alt. Reg. Order* Attach. A ¶ 8.

⁶² *OCC Pricing Order* (Commissioner Anthony dissenting-in-part).

⁶³ *See, e.g.,* descriptions of SBC witness testimony in *Oklahoma ALJ Pricing Recommendation*; *id.* at 5: Witness Auinbauh on cost and pricing standards (“[T]he costs presented by the CLECs are inadequate to cover those costs associated with SWBT’s existing network. The CLECs claim that SWBT should be required to provide unbundled access at prices based on the cost of an unbuilt, ‘superior’ network. However, those prices would not allow SWBT the opportunity to recover its costs.”); *id.* at 12: Witness Deere (“described the network as it now exists. This is the relevant network to be considered in this docket because the present network and its related technologies will be used during the life of the contracts which are the subject of the cost studies in this docket”); *id.* at 14: Witness Deere (said Opponents’ “proposals generally ignore the costs of replacing existing facilities and overstate the purported efficiencies to

have been raised about SBC's selection of (among other things) low fill factors (that do not appear to represent efficient levels of utilization), improper calculation of joint and common costs, and improper switch prices (that do not appear to represent price levels which are reasonably likely to be obtained).⁶⁴ SBC seems also to have assumed 100 percent manual processing in calculating its non-recurring costs.⁶⁵ These factors appear to have substantially affected the level of the final set of rates included in the stipulation and adopted by the ALJ.

“SWBT argued that these embedded rates represent the more likely actual cost that it will incur in providing service and UNEs in Oklahoma. Traditionally, the Commission's obligation has been to permit a utility the opportunity to achieve its revenue requirement and attract capital. In reviewing the stipulation rates *with the embedded costs*, together with the requirement in Section 252 of the Act that cost-based rates may include reasonable profit, the ALJ concludes that the stipulated rates meet these obligations; are cost-based and will enable SWBT a reasonable opportunity for recovery of capital in a competitive market at reasonable profit and more importantly, will allow Cox and other CLECs in Oklahoma to effectively compete against SWBT in the Oklahoma

be gained. ... If the Commission were to adopt these proposals, SWBT costs would be understated and rates would be established on the basis of a hypothetical, fantasy network that does not and can not exist.”); *id.* at 25: Witness Ham on OSS (“POTs-associated OSS simply is not capable or suitable to perform UNE ordering and provisioning.... Currently, all UNE orders received from the CLECs (whether by EDI, LEX, facsimile or mail) are manually input by SWBT service representatives.”); *id.* at 36: Witness Lehman on applicable economic principles (“Actual costs should be considered in connection with the estimates presented in this cause. AT&T's estimates differ from SWBT's by something on the order of 100%. If actual or historical costs are ignored, then these appear to be equally plausible cost estimates. However, they are not. AT&T's cost assumptions imply a radical departure from actual experience.”).

⁶⁴ See generally AT&T Baranowski/Flappan Decl.

⁶⁵ See *Oklahoma ALJ Pricing Recommendation* at 165; *OCC Pricing Order* at 5 (ordering SBC to submit an additional TELRIC study assuming electronic processing of orders). As noted, *supra*, note 61, nothing further was pursued on this matter.

marketplace.”⁶⁶

Because the OCC engaged in no “line by line and item by item determination of rates,”⁶⁷ it

⁶⁶ *Oklahoma ALJ Pricing Recommendation* at 167 (citations omitted; emphasis added). *See also id.* at 161 (“Again, the Act requires SWBT to unbundle its existing network, not some superior quality network.... A reflection of fill well beyond what is currently available and used by SWBT to provide retail services essentially asks SWBT to provide superior quality facilities to AT&T. For these reasons, the ALJ concludes that AT&T’s loop cost proposal is to be given little weight, but not dismissed entirely. It forms the very lowest boundary of cost.”); *id.* at 165 (“SWBT identified that manual activity would be needed for all UNE service orders submitted at the present time.... Based upon the current record, the ALJ concludes that manual UNE service order activity is the likely option.”).

The ALJ did give “some consideration to to the Affidavit of [SWBT witness] Charles H. Cleek, which showed that had SWBT’s cost studies been adjusted for reasons suggested by AT&T (e.g. [sic], relating to fill, depreciation, the cost of money, the common cost allocator, time adjustments, utilization, etc.), then the rates proposed by SWBT would have been reasonably close to the stipulated rates.” *Id.* at 158. Cleek agreed that “adjustments in depreciation could result in a cost different [sic] of between \$2.00 and \$2.25 per month, a fill factor adjustment could result in a cost difference of as much as \$3.00 per line per month, while an adjustment in the cost of money could result in a cost difference of as much as \$1.00 per line per month.” *Id.* at 105. SBC’s rerun cost studies based on OCC staff’s consultant’s proposals as listed in the *Oklahoma ALJ Pricing Recommendation* do not match AT&T’s rerun cost studies allegedly based on the same proposals. *Compare id.* at 105-106 with AT&T Baranowski/Flappan Decl. ¶ 68 tbl. 1. SBC did not present data on the effect of using a different common cost allocator, “the final significant cost driver.” *Oklahoma ALJ Pricing Recommendation* at 106. SBC had proposed an 18.64% markup; OCC staff’s consultant had proposed a 13.1% markup; AT&T had proposed a 10.46% markup. *Id.*; *see also* AT&T Baranowski/Flappan Decl. ¶ 58. Moreover, as discussed by the ALJ and the OCC, SBC continued to assume 100% manual processing. *See supra*, and note 65. *See also Oklahoma ALJ Pricing Recommendation* at 91-92 (SBC witness Moore “now admits that the completed 26 percent fill factor for the low side equipment that was used in the study is wrong and should be changed. SWBT now admits that the appropriate fill factor for this equipment is 92 percent. ... [But he] could not say whether or not the prices that are in that [stipulation] are above or below the rates that would be generated by rerunning the study to include the[se] changes.”).

⁶⁷ *OCC Pricing Order* (Commissioner Anthony dissenting-in-part).

is impossible to discern the precise assumptions upon which it may have relied. The assumptions suggested by this record, however, coupled with the high level of the resulting rates, strongly suggest that the rates may not be based on an appropriate measure of costs.

2. The promotional discounts available as part of Oklahoma's Alternative Regulation process do not cure defects in the prices adopted in 1998.⁶⁸

On December 10, 1999, the OCC approved a stipulation between SBC, OCC staff, and various CLECs regarding SBC's transition to alternative regulation.⁶⁹ In addition to certain commitments regarding SBC's upgrading of its infrastructure and support of an Oklahoma education information technology fund, the stipulation included "Promotional Discounts" for certain UNEs: UNE-platform, 2-wire analog loop, loop cross-connects, and interoffice transport, as well as certain NRCs, and UNE-platform recurring and non-recurring "glue charges." The discounts ranged from 5-25 percent for recurring charges, and 15-35 percent for non-recurring charges.

The term "Promotional Discount" itself implies that the resulting rate is not the "true"

⁶⁸ Recent *ex partes* filed at the FCC by SBC suggest that it may be attempting belatedly to base its application on these rates. See SBC Pricing Chart *Ex Parte* (explicitly listing Oklahoma Alt. Reg. rates); SBC UNE-Platform Rate Comparison *Ex Parte* (Oklahoma rates listed appear to be the alternative regulation rates rather than those adopted in the *OCC Pricing Order*).

⁶⁹ See *OCC Alt. Reg. Order*. SBC, OCC staff, the Oklahoma Attorney General, Logix Communications, Birch Communications and the Oklahoma Education Coalition signed in support of the stipulation; AT&T, Sprint, MCI/WorldCom, and Cox Oklahoma signed "agree[ing] to not oppose the stipulation." "Signing this Stipulation does not constitute an admission by any party that UNE rates are or are not cost-based[.]" *Id.* Attach. A ¶ 9.

cost-based rate but some shorter-lived special. Perhaps for this reason, SBC does not appear to base its 271 application on these promotional rates. The Oklahoma alternative regulation promotional discounts are not mentioned in SBC's brief,⁷⁰ or in the pricing affidavits to which the brief cites.⁷¹ They are not listed in the main UNE pricing attachment to the O2A, Attachment 6, but are referenced in an Optional Appendix which was belatedly attached to the O2A at the instruction of the OCC.⁷²

While it is possible that these promotional discounts might have permitted some local entry in Oklahoma which would not have been possible under the permanent rates discussed above,⁷³ these rates do not appear to have been available until after June 15, 2000, when SBC

⁷⁰ See, e.g., SBC Brief at 86 (referencing the O2A Attach. 6), at 93 (referencing the OCC Generic Cost Docket 97-213 as the TELRIC-based pricing).

⁷¹ See SBC Ries Oklahoma Aff. ¶ 11 (Oklahoma ALJ relied on 97-213 and 97-442 rates as the TELRIC grounds for 271 approval); SBC Sparks Aff. ¶ 182 (OCC approved cost-based rates in 97-213 and 97-42).

⁷² See SBC Jones Aff. ¶ 14 (OCC ordered SBC to amend the O2A, including modifications to the optional appendix, Oklahoma Alternative Regulation Transition Plan, Attachment H to the Jones Affidavit. Neither the Optional Appendix attached to the Jones affidavit nor the October 24, 2000 Optional Appendix filed at Appendix C - Oklahoma - Tab 288 list the promotional rates; both refer to the Alternative Regulation plan as Attachment A, but the attachment is not appended to either document. The September 28, 2000 version of the O2A, filed at Appendix B - Oklahoma - Tab 1, does not include the optional appendix.). The OCC based its 271 recommendation on the rates established in the cost dockets 97-213 and 97-442, but noted as well the availability of the Alternative Regulation Promotions as an additional opportunity for CLECs. *OCC Final 271 Order* at 151, 155, 167, 168.

⁷³ OCC staff testified that the adoption of the promotional discounts would assist the development of local exchange competition. *OCC Alt. Reg. Order* at 6. Birch testified that "the promotional discounts are a step in the right direction" and although even the discounted rates "are not all at the level they would like to see, ... the promotional rates will bring Birch to

formally opted into the Alternative Regulation Plan.⁷⁴ It is not clear how many, if any, CLECs have actually obtained UNEs pursuant to the promotion.⁷⁵ Even the discounted rates are in many cases higher than their Texas and Kansas counterparts. Moreover, in addition to being limited in both scale and scope, the promotional discounts are also limited in the period of time during which they will be operative: when the number of residential lines “provisioned by competitive local exchange carriers (CLECs) in the aggregate in an exchange equals or exceeds twenty-five percent (25%) of the total residential access lines in that exchange” then the residential discounts for new UNEs no longer apply; a similar 25 percent limitation applies for competitive business lines.⁷⁶ In any case, the promotion expires after four years for business lines in the urban zone 3, and after five years for other business and residential lines, both new lines and those already in

Oklahoma ... [because] ... the timing of a CLEC reaching a customer to provide service is an important factor in obtaining the customer.” *Id.* at 7. *But see OCC 271 Order* at 155-6 (referencing otherwise undocumented Birch settlement with SBC, including additional reduction of UNE-Platform NRCs to zero, on an interim basis, subject to true-up in a subsequent cost docket).

⁷⁴ See *SBC Amended Notice of Election*.

⁷⁵ See ConnectSouth Comments at 3, 7 (listing “actual costs billed by SWBT and paid by ConnectSouth,” which do not reflect these discounts).

⁷⁶ *OCC Alt. Reg. Order* Attach. A ¶ 4(1). The 25 percent calculation is defined by lines for which “a CLEC utilizes these Promotional Discounts, or the promotional merger discounts specified in the Conditions to the Memorandum Opinion and Order of the Federal Communications Commission in connection with the merger of SBC Communications, Inc. and Ameritech Corporation, FCC 99-279....” *Id.* ¶ 4(3)(iii). It is not clear from the language of the Alternative Regulation Stipulation whether this cap would be limited to UNE lines or would also count any competitive lines provided via resale in the calculation of the aggregate.

service at the promotional discount.⁷⁷

Even if the promotions could somehow be found to be cost-based, for which there is no evidence in the record,⁷⁸ their lack of permanence and the fact that any one CLEC has no certainty regarding its ability to obtain the discounts (as their availability depends on the number of aggregate competitive lines) make these promotions a problematic basis on which to predicate long-term competitive entry. Moreover, SBC has a legal obligation to provide UNEs at cost-based rates regardless of CLEC market share, whether market share is calculated based on UNE lines, resale lines or their own facilities. For these reasons, the Alternative Regulation promotions are an insufficient basis on which to grant a 271 application.

3. Proper resolution of Oklahoma's interim rates appears uncertain.

The OCC has yet to finalize rates for collocation and for certain UNEs.⁷⁹ While the interim nature of these rates in itself is not necessarily a fatal flaw, the context suggests that the interim prices here are inadequate for purposes of 271 compliance. The amount of many of the

⁷⁷ *Id.* ¶ 5.

⁷⁸ The fact that the percentage Promotional Discount varies by zone undermines any claim that they are cost-based because any legitimate cost differences by zone should have been already dealt with in the original UNE pricing proceedings.

⁷⁹ The NRCs for UNE-Platform migrations also appear to be interim. *See OCC Final 271 Order* at 166. The OCC hopes to be able to finalize rates by March 28, 2000. *See id.* at 161-62, 166 (restricting true-up requirements to six months “in order to encourage Southwestern Bell to expeditiously seek a permanent rate” for collocation, loop conditioning and non-recurring charges for UNE-Platform migrations).

rates and the length of time the collocation rates, in particular, have remained interim,⁸⁰ give rise to substantial doubts that the market is open to competition by firms that seek to use these items.

B. Kansas

The KCC set permanent recurring rates in its order of February, 1999, which was revised in its order on rehearing from September, 1999. Non-recurring charges continued to be interim until after the date SBC filed its 271 application for Kansas. Since that time, the NRCs have been made final. As in the case of the recurring and nonrecurring prices in Oklahoma, the FCC should undertake an independent determination whether the Kansas nonrecurring charges are appropriately cost based. In addition, collocation and certain UNE rates remain interim in Kansas which, as with respect to Oklahoma, is cause for concern.

1. Kansas's nonrecurring rates may not reflect proper application of the TELRIC methodology.

SBC's 271 application for Kansas was based, in part, on interim NRCs for UNEs which

⁸⁰ Collocation was available on an individual case basis (ICB) in Oklahoma until May, 2000. The ICB rates exceeded the Texas rates by 50 to 100%. ConnectSouth Comments at 6, 7. ICB rates remained in place until SBC submitted an interim collocation tariff based on the Texas rates, which the OCC adopted on an interim basis, pending final resolution of a collocation cost docket, with true-up limited to six months after the OCC's September 28, 2000 order approving SBC's 271 application. *See OCC Final 271 Order* at 161-62. The OCC, thus, hopes to have final collocation rates in place in March, 2001. The OCC's recent reduction of the interim collocation rates (by borrowing the Texas rates) does not adequately ease the concern regarding the interim rates. *See DOJ South Carolina Evaluation* at 39 ("A market will not be 'irreversibly' open to competition if there is a substantial risk that the input prices on which competitors depend will be increased to inappropriate levels after a section 271 application has been granted.").

were as substantially in excess of the Texas NRCs as the Oklahoma prices discussed above.⁸¹ SBC's application does not explain the reasons for these differences. After SBC filed its 271 application for Kansas, the KCC entered a final order on non-recurring rates for UNEs.⁸² This final order followed the KCC's earlier decision to support SBC's application with the stated expectation that non-recurring rates would be promptly and properly decided.⁸³ The KCC approved these final non-recurring rates despite SBC's apparent disregard of the KCC's instructions on the proper re-running of cost studies.⁸⁴ In some instances, the KCC explicitly adopted a "settlement" type approach -- adopting a weighted average of the AT&T (2/3) and SBC (1/3) proposals.⁸⁵ The final order did reduce many of the non-recurring rates which SBC had been charging.⁸⁶ The permanent NRCs remain, however, two or more times higher than the comparable Texas rates, and no justification for these differences is presented. Instead, the KCC

⁸¹ See Sprint Comments at 29 (chart showing Kansas NRCs for the first UNE are three to nine times higher than the Texas comparables, and NRCs for each additional UNE are one-and-one-half to twelve times higher).

⁸² *KCC NRC Order*.

⁸³ *Id.* at 4 ("The Commission believes that the best way to execute this commitment is to complete this phase of the docket and issue an order setting prices for the non-recurring cost elements despite the failure of SWBT and AT&T to compile cost studies in accordance with the Commission directives."); *id.* at 24.

⁸⁴ See *id.* at 12-16 (KCC "Staff notes that in spite of direct language in Commission orders, SWBT submitted a cost study based on fully manual processes"); *id.* at 27.

⁸⁵ *Id.* Attach. B at 10 n.2.

⁸⁶ According to KCC staff, SBC's rerun cost studies proposed prices "substantially higher," even, than the interim prices which had been in effect. *KCC NRC Order* at 12-13.

explicitly recognized that non-recurring charges “should be similar for similarly defined elements, especially for those cost elements that use common resources within the five SWBT states: Texas, Missouri, Arkansas, Oklahoma and Kansas.”⁸⁷ Such does not appear to be the case in Kansas. Both the level of the final NRCs in Kansas and the acknowledged flaws in the information on which they were based⁸⁸ suggest that the rates may not be properly cost based.

2. Proper resolution of Kansas’s interim rates appears uncertain.

As in Oklahoma, Kansas has yet to finalize collocation and certain other UNE rates. Although the KCC has had a more convincing record of setting cost-based recurring rates,⁸⁹ concern remains that the resolution of these remaining rates may not be cost-based and cannot be relied upon to support a finding that the local telecommunications market in Kansas is irreversibly

⁸⁷ *KCC NRC Order* at 2, 24 (“The Commission recognizes that many telecommunication[s] services are provided on a regional basis. As such, it can be appropriate to rely upon the examination by other state commissions facing similar facts and circumstances.”).

⁸⁸ *Id.* at 23-24 (“SWBT’s and AT&T’s cost studies do not comply with the Commission’s directives for the re-submission of the non-recurring cost studies. ... AT&T and SWBT have failed to provide the Commission an adequate basis to accept their prices proposed as alternative prices to the Commission’s prior determinations. ... The practical choices appear to be to continue the proceeding until all unbundled network elements needed by CLECs are available with prices supported by accurate and Commission-approved cost data or to assess the information the Commission received in this matter and its limitations, apply its best judgment, and determine the prices for the non-recurring unbundled network elements now.”).

⁸⁹ The Kansas recurring rates are, on the average, marginally higher than those set in Texas. No commenter has alleged that the Kansas recurring rates are not adequately cost-based. AT&T explicitly lists them as a cost-based comparable to the Oklahoma recurring rates. AT&T Baranowski/Flappan Decl. ¶¶ 16, 19.

open to competition.⁹⁰

III. SBC Has Not Submitted Sufficient Evidence to Prove Nondiscriminatory Access to the Operational Support Systems Relied On by CLECs in Kansas and Oklahoma.

SBC asserts that it provides nondiscriminatory access to its operational support systems (OSS) to CLECs operating in Kansas and Oklahoma. SBC has not undertaken an independent third party test to provide evidence on this point, and the limited commercial volumes of orders for UNEs in Kansas and Oklahoma make it difficult to assess SBC's claims on the basis of actual experience in those states. Therefore, SBC's application relies heavily on assertions that wholesale services to CLECs in Kansas and Oklahoma are provided through the same OSS used to provide those services to CLECs in Texas⁹¹ and that it has previously demonstrated that the Texas OSS are sufficient.⁹²

In principle, we believe this is a sensible and efficient approach that can avoid the delay and expense of redundant testing, and we expect that if this approach is successful in this application, it should be and will be followed in future applications in which wholesale operations of a BOC are operated on a multi-state basis. Since this application presents the Commission with its first opportunity to respond to this form of proof, we believe it is important for the

⁹⁰ The KCC hopes to be able to finalize the collocation rates after November 2000, and the rates at issue in the DSL docket by the end of Spring 2001. *KCC 271 Report* at 8, 27.

⁹¹ SBC Brief at 19-21.

⁹² *See FCC Texas Order* ¶ 99.

Commission to establish the kind of evidentiary showing that will be expected of applicants in these situations and, in particular, to indicate that the Commission expects clear and persuasive evidence in support of arguments that an application in one state should be approved because of a prior approval of allegedly identical systems in another state.

To support its assertion that the OSS for Kansas and Oklahoma are the same as those used and approved in Texas, SBC relies primarily on SBC affiants who provide information in four subject areas: SBC's electronic OSS generally; SBC's billing systems; SBC's order processing center (the LSC) and provisioning center (the LOC); and SBC's performance measurements for Oklahoma and Kansas.⁹³ While these affidavits provide useful evidence in support of SBC's application, they are ambiguous and incomplete in two important respects.

First, it is not always clear precisely what the affiants mean when they state that the Oklahoma and Kansas OSS are "the same" as the Texas OSS. To illustrate this ambiguity by analogy, a statement that two individuals drive the same automobile could have several possible meanings. The statement might mean, for example, that the two individuals share the use of a single vehicle, but it also might mean that they drive two separate vehicles that are the same make and model. Moreover, the statement could be true in the latter sense even if the performance of the two vehicles is quite different, either because they are equipped differently (*e.g.*, one with a manual transmission and one with an automatic transmission) or because one of the vehicles is badly in need of repairs.

⁹³ See SBC Ham Aff.; SBC McLaughlin Aff.; SBC Noland/Smith Aff.; and SBC Dysart Aff.

Second, the SBC affidavits largely focus on certain electronic interfaces and software.

But the systems and processes that are relevant in this context encompass more than merely these interfaces and software; they include all the systems and processes, both electronic and manual, necessary to provide complete end-to-end treatment of CLEC orders: those that CLECs in Kansas and Oklahoma use to gather pre-order information and submit orders; those SBC uses to process, provision, maintain and repair those orders; those SBC uses to bill its competitors for the wholesale services provided; and those necessary to manage the relationships between SBC and its wholesale customers, the CLECs.⁹⁴

Both of these deficiencies have an important bearing on the extent to which a claim of “sameness” is persuasive evidence on the question to which that claim is ultimately relevant, *i.e.*, can the Commission be sure that the quality of SBC’s wholesale performance in Texas can be and will be duplicated in Kansas and Oklahoma, because SBC has completed all of the work needed to achieve that level of quality in the latter states. It could be the case that even though the Kansas and Oklahoma OSS are the “same” as the Texas OSS in some senses of that word, there might still be significant differences in the wholesale performance that could be achieved using that OSS,

⁹⁴ The Commission uses the term “operations support systems” to refer to “the systems, databases and personnel . . . that are used by the incumbent LEC to support telecommunications services and network elements.” *FCC Michigan Order* ¶ 129. The Department has used a corresponding term, “wholesale support processes,” which we have defined as “those manual and electronic processes, including access to OSS functions, that provide competing carriers with meaningful access to resale services, unbundled elements, and other items required by Section 251 and the checklist of Section 271.” DOJ Michigan Evaluation at 21-22, A-1; DOJ Oklahoma I Evaluation at 26-30, App. A. The Commission finds these terms synonymous. *FCC Michigan Order* ¶ 129 n.315.

notwithstanding some undefined degree of similarity.

Neither of these shortcomings is cured by the Ernst and Young attestation which concludes that:

In our opinion, [SBC] management's assertion that as of June 30, 2000, SWBT utilized the same operational support systems throughout the SWBT five-state operating region (Arkansas, Kansas, Missouri, Oklahoma and Texas) to support CLEC activity is fairly stated, in all material respects.⁹⁵

While attesting to the accuracy of the SBC management assertion, Ernst and Young does nothing to add to⁹⁶ or clarify the meaning of that assertion. In particular, the Ernst and Young attestation does not clarify what is meant by the assertion that "the same" OSS are used; and does not explain whether its definition of materiality is based on an analysis of the quality of wholesale performance that would be achieved using the OSS.⁹⁷

⁹⁵ Ernst & Young Report at 1.

⁹⁶ The relevant Management Assertion was that "the same operational support systems were used throughout the SWBT five state operating region (Arkansas, Kansas, Missouri, Oklahoma and Texas) to support competing local exchange carrier (CLEC) activity. A description of each of these operation support systems is listed in Attachment A." Attachment A lists the following: pre-ordering and ordering interfaces Datagate, EASE, EDI, LEX and Verigate; LASR, an application that receives LSRs from CLECs; and SORD, SBC's electronic service order processing system). Ernst & Young Report at 2, Attach. A. We note that this list does not include the MOG (the system that generates service orders from CLEC local service requests on a mechanized basis, thus creating "flow through"); SBC's complete set of maintenance and billing systems; SBC's back-end "legacy systems"; and the manual centers, systems and process that touch CLEC orders such as the local service center (LSC) that processes orders and local order center (LOC) that provisions, maintains and repairs unbundled elements purchased by the CLECs. All of these unlisted systems, processes, and centers have key roles in providing services and network elements to CLECs on an adequate, nondiscriminatory basis.

⁹⁷ Moreover, we are unable to judge independently whether Ernst & Young conducted a review that is adequate to support its conclusion because the attestation and SBC's

In order to address this ultimate question, we believe SBC should provide additional information or clarification in at least the following areas.⁹⁸

First, SBC's application offers no evidence regarding the means by which it ensures that the personnel involved in performing the actual provisioning, maintenance and repair of CLEC orders in Kansas and Oklahoma -- work that is necessarily performed at the state level and not at a regional level -- will do their jobs in the same manner as those in Texas.⁹⁹ SBC has not shown whether the processes in Kansas and Oklahoma to provision, maintain and repair CLEC lines and unbundled elements are the same as those used in Texas or how the integrity of these processes is maintained across the states. It is also unclear from the record how management activities are coordinated and whether management of the state-specific personnel occurs directly from the

application provide no information describing the specific methods, tests, and analyses upon which the conclusion is based. To make an independent judgment one needs to clearly and completely understand the scope of the work, including "how and by whom it was defined; the qualifications of the organization and of the individual persons who designed, conducted, and analyzed the tests; and the tests performed that form the basis for the conclusions reached..." DOJ Louisiana II Evaluation at 36-37. There is even less information in this application than the minimal amount provided regarding the audit BellSouth submitted in its second Louisiana application, a level of information that the Department found "plainly inadequate." *Id.* at 36. SBC appears to be trying to remedy this deficiency. It filed an affidavit and supporting materials from Ernst and Young shortly before the FCC's 7:00 p.m. filing deadline on December 1, 2000, the Friday preceding the Department's Monday filing date, which timing precluded the Department from effectively reviewing the materials prior to filing this evaluation. SBC *Ex Parte* Submission to the FCC, CC Docket No. 00-217 (Dec. 1, 2000).

⁹⁸ Further scrutiny by the Commission may reveal other areas in which more information or clarification is needed.

⁹⁹ Additional relevant inquiry on this matter would include the level of staffing in the respective states, the uniformity of the methods and procedures by which these personnel are trained and guided through their work, and their relative level of experience.

LOC or whether there are intermediary management groups that are state-specific. Evidence on these points is needed, among other reasons, because of indications in the record suggesting that there may be provisioning problems in Kansas and Oklahoma that are related to inadequate management of service technicians or problematic coordination between the LOC and the state-specific technicians regarding the issuance of firm order commitments, facilities checks and premature transfers of local telephone numbers that cause missed due dates and service outages.¹⁰⁰ To the extent that SBC's performance in Kansas or Oklahoma differs from its performance in Texas, SBC should explain how that difference can be reconciled with the claim that the OSS are "the same."

Second, SBC should provide additional evidence concerning CLECs' ability to develop and use SBC's Electronic Data Interchange (EDI) ordering interface for operations in Kansas and Oklahoma. Product offerings often differ from state to state, both in the manner in which products are defined and the manner in which they are tariffed. Universal Service Ordering Codes associated with product offerings are not necessarily the same across states, and there may be other differences as well.¹⁰¹ Thus, it is not self-evident that the business rules that are applicable in Texas would all be used in Kansas and Oklahoma, or that products available in Kansas and/or

¹⁰⁰ KMC Comments at 4-11; KMC Mosely Aff. at 2-7; Adelpia Comments at 3-5; Adelpia Lippold Decl. ¶¶ 4-13. *See also, e.g.*, SBC October 2000 Kansas/Oklahoma Performance Data (Version 1.6) PM 58-06 (Percent SWBT Caused Missed Due Dates- DS1 Loop) at 271-No. 58b (Kansas), 271-No. 58b (Oklahoma); and PM 62-06 (Average Delay Days for SWBT Missed Due Dates DS1 Loop) at 271-No. 62b (Kansas), 271-No. 62b (Oklahoma).

¹⁰¹ *See* MCI McMillon/Lichtenberg Aff. ¶¶ 19-20.

Oklahoma would not require use of business rules that are unnecessary in Texas.¹⁰² Such differences could mean that the CLEC side of any application-to-application interface such as EDI would not be identical to those CLECs have developed in Texas and would require some further development work. We note that the reject rate for EDI orders is significantly higher in Kansas and Oklahoma than it is in Texas, that reject rates are rising, and that flow through rates are lower in Kansas,¹⁰³ facts which raise questions whether the extent of “sameness” is sufficient to ensure the same quality of wholesale performance across states.¹⁰⁴

Third, SBC should provide additional evidence concerning the implications, if any, of the fact that orders for Kansas and Oklahoma appear to be processed on a service order processor in

¹⁰² Such differences in business rules applied from one state to another would also affect orders submitted through terminal interfaces such as LEX.

¹⁰³ Compare SBC October 2000 Kansas/Oklahoma Performance Data, PM 9-02 (Percent Rejects (EDI)) at 271-No. 9 (Kansas), 271-No. 9 (Oklahoma) with SBC October 2000 Texas Performance Data, PM 9-02 (Percent Rejects (EDI)) at 271-No. 9 (Texas); compare SBC October 2000 Kansas/Oklahoma Performance Data, PM 13-03 (Order Process % Flow Through (EDI)) at 271-No. 13c (Kansas) with SBC October 2000 Texas Performance Data, PM 13-03 (Order Process % Flow Through (EDI)) at 271-No. 13 (Texas). See also *KCC Staff 271 Report* at 30 (flow through “should be reviewed when SWBT files its FCC application”); *KCC 271 Report* at 16 (listing flow through results).

¹⁰⁴ SBC states that CLECs operating in Kansas and Oklahoma receive the same EDI documentation and design specifications as CLECs operating in Texas. SBC Ham Aff. ¶ 45. Moreover, SBC asserts that it would be akin to flipping a switch for a CLEC using an EDI interface for Texas orders to “be able to use the same EDI gateway on its side to submit LSRs in Kansas and Oklahoma.” According to SBC, once a “Texas” CLEC is certified by the state to operate in Kansas or Oklahoma, the only change necessary on the LSR would be to use a Kansas or Oklahoma-specific operating company number in conjunction, of course, with a Kansas or Oklahoma-specific address. *Id.* ¶50 This evidence is important, but we believe it requires supplementation to address the specific issues noted herein.

St. Louis, Missouri that is physically distinct from the service order processor used for Texas orders which is located in Dallas.¹⁰⁵ Thus, it would appear that the service order processor in Dallas has been significantly utilized while the processor in St. Louis on which the Kansas and Oklahoma CLECs rely has not, which means that information is lacking about St. Louis service order processor's capacity constraints, software updates for that processor, and its interrelationship with the other elements of SBC's order processing systems.

Finally, SBC should provide additional evidence that CLEC orders from Kansas and Oklahoma which require manual intervention in the LSC will be adequately processed. SBC added 600 service representatives to its LSC and LOC between January and August 2000.¹⁰⁶ SBC has attributed delays in processing manual order rejections in part to the hiring of new LSC representatives and the implementation of associated quality control reviews.¹⁰⁷ Similarly, LSC service representatives have failed to correctly assign missed appointment codes when SBC has caused due dates to be missed. Correcting this problem required intensive (re)training of service representatives in September 2000.¹⁰⁸ SBC needs to demonstrate that CLEC orders from Kansas and Oklahoma will not suffer from the mistakes of poorly trained service representatives.

We emphasize that in pointing out the shortcomings of SBC's initial attempt to

¹⁰⁵ Compare SBC Ham Aff. ¶ 15 with Ham Testimony, Oklahoma Transcript at 74-5 and MCI McMillon/Lichtenberg Decl. Attach. 1.

¹⁰⁶ SBC Noland/Smith Aff. ¶ 64.

¹⁰⁷ See SBC Dysart/Noland/Smith Aff. Supp. A ¶¶15-16

¹⁰⁸ SBC Noland/Smith Aff. ¶¶ 75-79.

demonstrate its provision of nondiscriminatory access to OSS in Kansas and Oklahoma, we do not denigrate the general approach of relying on persuasive evidence of testing or commercial use in one state to support an application in another state. Rather, our point is that the Commission should require complete and precise evidence in support of such an approach, recognizing that “sameness” is not an all-or-nothing proposition. Evidence that *some* systems or processes are the same in multiple states is not sufficient to establish that *all* relevant systems and processes are the same, and evidence that a particular system is the same in many respects is not sufficient to establish that it is the same in all respects that may be relevant to a BOC’s wholesale performance. Only by requiring clear and detailed evidence on these matters can the Commission achieve the important goal of ensuring nondiscriminatory access, while permitting 271 applicants to prove their provision of nondiscriminatory access in an efficient and expeditious process.

IV. Conclusions and Recommendations

The Commission should undertake an independent determination whether UNE prices in Oklahoma and Kansas conform to the requirements of the 1996 Act and the Commission’s rules, rather than relying on the decisions of the OCC and KCC approving these prices. In addition, the Commission should require more evidence than SBC presented in its initial application to support its contention that it provides nondiscriminatory access to OSS in Oklahoma and Kansas.

Respectfully submitted,

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