STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

In the matter, on the Commission's own motion, to consider Ameritech Michigan's compliance with the competitive checklist in Section 271 of the federal Telecommunications Act of 1996.	)))))	Case No. U-12320

SBC AMERITECH MICHIGAN'S REPLY COMMENTS ON
<u>OCTOBER 21, 2002 SUBMISSION OF PERFORMANCE RESULTS</u>

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I. INTRODUCTION

The question on the table is whether SBC Ameritech Michigan, ("SBC") complies with the 14-point competitive checklist of Section 271(c)(2)(B) of the Telecommunications Act of 1996 ("1996 Act"). As the FCC has repeatedly held, the answer is in the end a judgment, in which the Commission and ultimately the FCC apply their expertise to the totality of the circumstances. *New York 271 Order*, ¶ 46. The Commission now has before it extensive evidence on which to base that judgment, including: (i) BearingPoint's comprehensive testing of SBC's operations support systems ("OSS"), which is discussed in a parallel round of comments; (ii) Staff's Mid-year Update Report on Competitive Market Conditions, which shows that even by the CLECs' own admission competing carriers have achieved remarkable growth, increasing their share of the local market from 15 percent to 20 percent in the first six months of 2002; and (iii) SBC's October 21, 2002 filing of its commercial performance results for June-August 2002, which are the focus of the present comment cycle (along with the related Audit Reports of Ernst & Young LLP ("E&Y")).

As SBC demonstrated in that filing, its commercial performance results show compliance with the checklist. SBC presented three consecutive months of results for 150 performance measures (divided into thousands of categories, such as product or service type), in all their exhaustive detail. In most cases (particularly for those measurements related to key, customer-impacting measures like missed due dates, and high-volume products like the UNE Platform), SBC met or exceeded the applicable Commission-approved performance standard. For the remaining measurements, SBC demonstrated that the differences between actual performance and the relevant standard do not affect the overall evidence of compliance, because they were slight, or isolated, or had been addressed by corrective action – exactly the sort of analysis the

FCC employs in assessing checklist compliance. In light of the fact that BearingPoint's testing of performance results is still ongoing (as opposed to its testing of direct wholesale services, which is substantially complete), SBC then supplemented the record by presenting the results of an independent audit of its performance reports, conducted by E&Y.

As the CLECs' comments in response to that filing make clear, the last things the CLECs want are for the Commission to consider the totality of the circumstances, exercise judgment, or follow the FCC's lead. Instead, they openly advocate that the Commission *ignore* evidence (or even delay its assessment entirely); that it forego judgment and consider any shortfall in performance (however isolated, immaterial, or obsolete) to dictate a finding of non-compliance; and that it give credence to CLEC arguments that the FCC has repeatedly rejected. The CLECs' real goal is not substantive analysis but unwarranted delay – an indefinite extension of today's limbo, in which SBC complies with the checklist (thereby enabling CLECs to take its customers with aggressive local and long-distance calling plans) and has presented extensive evidence of compliance, but is still prevented from offering long-distance packages of its own. That limbo is not fair to Michigan consumers or to SBC: consumers do not receive the benefits of full, unabridged competition, while SBC is, literally, forced to compete with one hand behind its back. As demonstrated below, the Commission should reject that course.

I. The CLECs' first pitch is that the Commission should ignore the totality of the circumstances showing checklist compliance, and ignore the vibrant competition going on in the real world, because BearingPoint's own test of performance measurements is not complete. The FCC, however, has squarely held that there is no procedural requirement that all audits be completed at the time a section 271 application is filed, and it has repeatedly rejected CLEC contentions, like those raised here, that all performance data are unreliable. Instead, the FCC

considers and gives weight to the applicant's data so long as there are sufficient other assurances of reliability, such as third-party audits and the availability of reconciliations between the BOC's data and the CLECs' own records. As SBC showed in its November 15, 2002 comments on BearingPoint's OSS Report and confirms below, there are more than sufficient assurances of reliability here – not only (i) the E&Y audit (which is addressed in Section II B *infra*) but also (ii) BearingPoint's independent testing of SBC's procedures and performance of test transactions, (iii) the indisputable real-world evidence of market entry, and (iv) the CLECs themselves (who, notwithstanding their protestations that SBC's reports are unreliable, have yet to request a data reconciliation or personalized "mini-audit", and have yet to present contrary performance data of their own).

II. With respect to the E&Y audit, the CLECs attempt an awkward, and ultimately unsuccessful, dance. Their position is that where E&Y's audit shows compliance, the Commission should ignore E&Y as biased or lax, but where E&Y found an exception and "qualified" its opinion in any respect, the Commission should automatically conclude that all SBC's data are unreliable. SBC, by contrast, takes *all* of E&Y's findings seriously. As SBC showed in its initial comments, E&Y has independently and thoroughly tested performance results for compliance with the Commission-approved business rules, and the vast majority of its tests were successful. Where E&Y found an exception, SBC either (i) has taken corrective action already, or (ii) will take corrective action shortly, but for present purposes demonstrates that the issue is not material to checklist compliance. E&Y will maintain its vigil, validating that all findings have been addressed and that all corrective actions have been carried out – and in many cases, that validation has already occurred. BearingPoint's testing will continue as well, and will thus provide further assurance for the Commission's supervision of SBC going forward.

III. With respect to the performance results themselves, the CLECs try a similar exercise in self-contradiction. Here, too, their approach is that where SBC's performance results show a standard has been met, the Commission should ignore those results as unreliable, but where the performance results show a "miss" of any amount for any measure in any month, the Commission should automatically declare non-compliance without considering the totality of the circumstances or exercising judgment. Both halves of the CLEC theory, however, have been rejected by the FCC. *First*, as shown in Sections II A and B, the FCC has rebuffed CLECs' blanket challenges to performance results, and this Commission likewise has more than reasonable assurance that SBC's results are reliable. *Second*, as shown in Section II C, the FCC has expressly held that checklist compliance is not just a quantitative toting up of "makes" and "misses" against specific numeric standards, but a qualitative judgment as to whether shortfalls are slight, isolated, or addressed by corrective action. SBC has performed that qualitative analysis of performance, and the CLECs have not presented any qualitative response.

II. DISCUSSION

A. Given The Other Assurances That SBC's Data Are Reliable, The Commission Need Not Delay Its Assessment Or Wait For The Conclusion Of BearingPoint's Performance Measurement Review.

The CLECs first contend that the Commission should not assess checklist compliance at all, based on the fact that BearingPoint's review of performance measurements is not complete and based on their non-specific assertions that SBC's performance data are unreliable. This is nowhere near the first time that the CLECs have employed such a tactic. In fact, the CLECs have made similar attempts to derail several section 271 applications, even in one state (New

Jersey) in which KPMG *did* complete a comprehensive audit and had no remaining exceptions. The CLECs' contentions have been uniformly unsuccessful, with the FCC finding sufficient assurances that the applicant's data were reliable and proceeding with its substantive assessment of the data even if an audit had been done but BearingPoint's audit was still underway (as is the case here, and was also the case in Georgia):

- "Several commenters challenge the validity of the data provided by BellSouth. . . . We recognize that BellSouth's data continues to be subjected to third-party audit, but we cannot as a general matter insist that all audits must be completed at the time a section 271 application is filed at the Commission." *Georgia & Louisiana 271 Order*, ¶¶ 17, 19;

- "AT&T and ITCDeltaCom also challenge the validity of the data provided by BellSouth. . . . As we did in the BellSouth Georgia/Louisiana Order, we find that, as a general matter, BellSouth's performance metric data are accurate, reliable, and useful." *BellSouth Five-State 271 Order*, ¶¶ 14, 16;

- "[W]e are unpersuaded by the arguments of AT&T, WorldCom and El Paso-PACWEST that the detailed performance data submitted by SWBT are inherently unreliable . . . . In particular, we conclude that SWBT need not undergo a comprehensive verification of its representations." *Arkansas & Missouri 271 Order*, ¶ 16;

- "We reject the arguments made by AT&T and other parties that challenge the reliability of Verizon's data on the basis of the sheer volume of the changes and corrections that Verizon made to its processes . . . . Rather, we believe that the metrics change control process, and Verizon's compliance with that process, provides improved transparency and openness into a data collection effort that is inherently complex and iterative." *New Jersey 271 Order*, ¶¶ 90-91.

SBC demonstrates that the Commission should reach the same conclusion here. We discuss the issue at two levels. The first is procedural: whether the ongoing nature of BearingPoint's review constitutes an absolute bar to going forward. The second question is substantive: whether the Commission has reasonable assurance that SBC's reported results are accurate, even in the absence of a completed review by BearingPoint.

1. BearingPoint's Ongoing Review Is Not A Procedural Bar To The Commission's Assessment.

The CLECs first try to elevate their arguments about data reliability into a procedural bar, suggesting that the completion of BearingPoint's review is an absolute prerequisite for assessing checklist compliance. That contention is refuted by this Commission's Order of September 16, 2002, and by FCC precedent.

BearingPoint's performance measurement review is incomplete, and SBC has made no secret of that fact. On July 30, 2002, SBC moved to supplement the record with an audit by E&Y, and on September 5, 2002 SBC asked the Commission to set a schedule that provided for CLEC discussion of the E&Y reports and begin the assessment of checklist compliance. The CLECs had full opportunity to object, and did, raising the same arguments they offer now. The Commission "recognize[d] that SBC has not successfully completed the KPMG OSS test as required by the test plan approved by the Commission," but nonetheless granted SBC's motion and "conclude[d] that it should commence the review process as SBC requests." Sept. 16, 2002 Order, at 2. The Commission reasoned that "[s]ince the Commission approved the test plan, there have been significant changes both in Michigan and nationally with respect to competitive entry." *Id.*[1]

The Commission's decision fully accords with FCC precedent. The FCC has never required that all performance audits be complete at the time of an application – or even that an audit be done at all. Instead, as shown above, it has not only considered but approved section

[1] AT&T's challenge to that determination is the subject of a separate request for rehearing, which is now fully briefed and before the Commission.

271 applications where an audit was incomplete (*Georgia & Louisiana 271 Order*, ¶¶ 17, 19)) so long as there were reasonable assurances that the reported results were reliable.

Thus, the issue is not procedural, as the CLECs suggest (because the imposition of procedural hurdles just for their own sake does not further the public interest in competition), but substantive: whether the results are sufficiently reliable to merit consideration, and whether they show checklist compliance. We address those substantive questions in the sections that follow, and show that the answer is yes.

2. The Commission Has More Than Reasonable Assurance That SBC's Reported Results Are Reliable.

As noted above, the FCC has on several occasions addressed generalized complaints about the reliability of an applicant's performance reports. In rejecting those allegations, the FCC has considered the following mechanisms that provide reasonable assurance that the applicant's reports are reliable: (i) "extensive third-party auditing," (ii) the "open and collaborative nature of metric workshops," (iii) supervision by the applicable state commission, (iv) the "availability of the raw performance data" to CLECs and the applicant's "readiness to engage in data reconciliations" between its own records and those of the CLECs, and (v) the applicant's internal and external data controls. *Georgia & Louisiana 271 Order*, ¶ 19.

Each of these assurances is present here. In Section II B, we discuss the extensive third-party audit by E&Y. The open and collaborative nature of metrics workshops, and this Commission's close supervision of performance reporting and of local competition generally, are beyond question. SBC discusses the availability of data reconciliations – and the CLECs' failure to request them – in Section II A (2)(a), and its own controls over performance measurement in Section II A (2)(b). Further, SBC discusses the corroborating evidence presented by

BearingPoint's transactions testing in Section II A (2)(c). Finally, SBC addresses the CLEC claims regarding correction or "restatement" of previously reported results at Section II A (2)(d).

a. The CLECs' Failure To Request A Data Reconciliation Or Mini-Audit, And Their Failure To Present Contrary Performance Data.

Just like any good business, competing LECs maintain their own internal records of their business operations, and the FCC has recognized that a BOC's readiness "to engage in data reconciliations with any requesting carrier" provides valuable assurance as to the reliability of the BOC's data. *Georgia & Louisiana 271 Order*, ¶ 18. Further, when "the [state] Commission has established a process for competitive LECs to bring concerns about data integrity to them," and "no competitive LEC has done so," the FCC finds the absence of CLEC action to constitute probative evidence that the applicant's data are reliable. *Id.*

These principles are nothing new to this Commission: Since the Commission first established comprehensive performance measurements in 1999, it has recognized the valuable assurance and control provided by the data reconciliation process. Thus, the Commission's May 27, 1999 Order in Case No. U-11830 expressly "finds that raw data should be retained in sufficient detail so that a CLEC can reasonably reconcile the data captured by the ILEC (for the CLEC) with its own records." Further, the remedy plan ordered by the Commission expressly gives CLECs the right to require a targeted "mini-audit" to address any specific concerns that the parties might not resolve in the reconciliation process. Ehr Reply Aff. ¶ 12. On top of these controls, the parties have participated in performance measurement collaboratives for the past two and a half years, and the Commission has established an expedited procedure for resolution of any disputes arising out of the collaboratives.

Since the Commission's 1999 Order, SBC has provided each participating CLEC with monthly reports of wholesale performance, showing results for that CLEC and for CLECs in the aggregate along with the appropriate retail analogs and benchmarks. Ehr Reply Aff. ¶ 13. Further, SBC has made the underlying raw data available upon request, and several CLECs have requested and received such data.[2] Yet to date – notwithstanding their present assertions that SBC's performance is horrible and that its performance reports are unreliable – not one CLEC has requested a data reconciliation or mini-audit in any one of the Ameritech states. *Id.* ¶ 12. Further, not one CLEC has presented any performance data of its own to rebut the results reported by SBC.[3] *Id.* ¶ 12.

The CLECs' silence is not due to any naivete or lack of information. CLECs unquestionably maintain business records, at least of the customer-impacting functions they deem important (for example, when an order was placed, when installation was promised, when installation occurred, whether the customer reported a problem). Indeed, AT&T's own affiant, Ms. Moore, specifically states that her job responsibilities are, among other things, to "compare and analyze AT&T results with SBC's self-reported results," and that AT&T maintains a "team"

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2 AT&T contends that SBC has not provided data in the same format that SWBT provides such data. AT&T may be hoping that this allegation leads the Commission to think that SBC is not providing raw data at all. In reality, SBC has been providing raw data to AT&T for several months. All AT&T is saying is that the format is not the same as it receives in the SWBT states. AT&T does not show why the current format makes any real difference.

3 TDS, in its November 15 comments submitted an affidavit from Rod Cox, alleging unsatisfactory performance relating to a single measure for pre-ordering loop qualification. TDS's allegations, however, do not bear on the accuracy of reported performance -- the metric TDS addressed does not, in fact, purport to measure the issue of concern to TDS – but on the quality of the underlying loop qualification function that SBC provides. Significantly, TDS has mentioned this issue only in its comments responding to BearingPoint's report, but has not raised this issue in the context of the data reconciliation procedures in the MPSC approved Remedy Plan.

that consults with SBC on performance issues. AT&T Moore Aff. ¶ 3. And for its part, SBC offers CLECs ample detail to support its reports and assist in their review.

Nor is there any dearth of forums for the CLECs to speak their piece. To the contrary, the Commission has for some time given CLECs several alternative mechanisms, formal and informal, to pursue performance measurement issues, and there has been no allegation that any of these mechanisms is insufficient.

Given the CLECs' oft-repeated view that performance measurements are critical to their competitive position, their professed concern with the reliability of SBC's reports, and the FCC's repeated rulings that wholesale challenges to performance data require real evidentiary support, not just rhetoric, one would expect that at least one CLEC would have invoked its rights to reconciliation or mini-audit, or taken the opportunity to present at least some contrary performance data of their own here. The absence of any such proof demonstrates that the CLECs' own records do not support their assertions, and instead support SBC's reports.

b. SBC's Internal Controls.

The present comment cycle, and the parallel round of comments on BearingPoint's testing, have focused on the audit process as an external check over the accuracy of SBC's reports. In the preceding section, we addressed an additional external check: the process of data reconciliation and mini-audits between carriers. While these processes provide valuable information, and while SBC takes them seriously, the Commission should not overlook SBC's own commitment to reliable reporting and its own controls over the accuracy of its results.

Internal and external controls often go hand in hand. As a result of feedback received during the BearingPoint test, SBC has implemented improvements to its internal controls and to its already extensive documentation of performance measurement procedures. Ehr Reply Aff. ¶

21. Some of the more significant control steps include (a) copying and storing both the input and output files for performance data; (b) using numerical control records in the header and trailer of the input and output files to ensure that all records are processed; and (c) processing data more than one time, and cross-checking the results for accuracy. *Id.* ¶ 21. By the same token, many of the exceptions noted in E&Y's audit reflect issues that SBC had already identified and targeted for correction, either by restatement of previously reported results or by prospective changes in procedure.

c. BearingPoint's Independent Testing Of SBC's Processes.

While BearingPoint's review of performance *measurement* is not complete, its Report shows that testing of actual wholesale processes and transactions is substantially complete. BearingPoint's analysis corroborates SBC's performance results in two important respects. First, the successful results of its process reviews and transactions tests confirms the overall conclusion that SBC is providing access to CLECs in a nondiscriminatory fashion. Second, the detailed results of BearingPoint's transactions tests include BearingPoint's own, independent measurements of performance. In other words, BearingPoint was not just an independent referee who watched SBC play by the rules, but a timekeeper with its own stopwatch. As SBC showed in detail in its November 15, 2002 response to BearingPoint's Report, BearingPoint's recorded times match up favorably with those reported by SBC, and provide further assurance as to the reliability of SBC's results.

d. Restatements Of Previously Reported Results.

As noted above, the CLECs do not present any evidence from their own records to support their challenges to SBC's results. Rather, they borrow issues noted by E&Y (which are addressed in Section II.B.3 below) or BearingPoint (which are addressed in SBC's November 15 comments on BearingPoint's report, at section VI.) In addition, they contend that the Commission should presume SBC's data unreliable based solely on the existence and number of corrections or "restatements" SBC has made to past reports. This is a tactic the CLECs have repeatedly tried (without success) in other states. *See, e.g., New Jersey 271 Order*, ¶ 90 ("We reject the arguments made by AT&T and other parties that challenge the reliability of Verizon's data on the basis of the sheer volume of the changes and corrections that Verizon made to its processes for including the relevant data."); *Georgia & Louisiana 271 Order*, ¶ 17 (rejecting CLEC claims that "the pattern of restatements of the data by BellSouth and BellSouth's acknowledgements of problems with certain metrics mean that the data is not stable enough to be relied upon").

But the CLECs are missing the point. As the FCC has held, the existence of restatements means only that performance reporting is an "inherently complex and iterative" process, and the existence of "regular corrective activity does not demonstrate systemic infirmities as an end in itself." *New Jersey 271 Order*, ¶ 91. And as SBC explained in its November 15 comments (at 75-77), the number of restatements means that SBC has taken a conservative approach, restating results even for immaterial corrections.

The issue, then, is not a quantitative scorecard but a qualitative analysis: whether restatements are material enough to affect the Commission's analysis of overall checklist

compliance. The answer is no. For the year to date, the rate of restatements that actually changed a particular result from “pass” to “fail” was less than one percent of reported results. Ehr Reply Aff. ¶ 26. Moreover, despite the time and effort they devote to number-crunching, no CLEC has presented any evidence that results for any prior month have been restated in a way that affects overall checklist compliance or competition (for example, by comparing the overall results as restated for any month to those originally reported).

B. The Commission Should Give Weight To Ernst & Young’s Audit, Which Provides Reasonable Assurance As To The Accuracy Of SBC’s Reported Results.

1. Ernst & Young’s Qualifications and Objectivity.

The Commission should reject out of hand the CLECs’ attempts to impugn Ernst & Young’s qualifications. E&Y, like BearingPoint, is an established independent firm of international scope and top-drawer reputation. E&Y, like BearingPoint, has worked with performance measurements before, having conducted tests of compliance with the FCC's conditions for approval of the SBC/Ameritech merger, including performance measurement and reporting obligations, and having conducted a review of performance measurement processes and controls in connection with Southwestern Bell’s section 271 applications for Arkansas and Missouri. E&Y also knows operations support systems, having attested to the consistency of OSS for Kansas and Oklahoma with those used in Texas.

As with BearingPoint, the FCC has relied on E&Y’s work and rejected CLECs’ challenges to E&Y’s findings in approving section 271 applications. *See Arkansas & Missouri 271 Order*, ¶ 17 (“As part of SWBT's application, Ernst & Young evaluated and validated SWBT's data collection processes for performance measures. . . . After reviewing AT&T's

allegations, we find nothing sufficient to place in doubt either the correctness of the methodologies employed, or the conclusions reached in Ernst & Young's reports."); *Kansas & Oklahoma 271 Order*, ¶ 108 ("We conclude that SWBT, through the Ernst & Young report and other aspects of its application, provides reliable evidence that the OSS systems in Texas are relevant and should be considered in our evaluation of SWBT's OSS in Kansas and Oklahoma."). The FCC has also entrusted E&Y with auditing compliance with the SBC/Ameritech merger conditions. Ehr Reply Aff. ¶ 7; 10/21/02 Ehr Aff. ¶ 176.[4]

The CLECs' charges that E&Y is not objective or impartial are equally unfounded – and WorldCom of all parties is in no position to cast such stones. Yes, E&Y has also audited SBC's financial statements, but if anything that experience makes it more qualified, not less, to audit performance results, and E&Y's status as SBC's financial auditor has not dissuaded the FCC from relying on E&Y to audit SBC's compliance. It is also true that the CLECs did not pick E&Y or write its audit program (E&Y designed its own procedures, based on accepted attestation principles), but they have had ample opportunity to review E&Y's procedures, ask questions of E&Y personnel, and pore over E&Y's working papers.[5] Further, the CLECs

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[4] WorldCom attaches the results of E&Y's September 2001 and September 2002 FCC compliance audits, and constructed a chart showing that E&Y found more exceptions in 2002 than in 2001, and more exceptions in its present audit than in its FCC audit. WorldCom concludes that E&Y is to blame for "miss[ing] a large number of issues" in its earlier audit. The increase in exceptions, however, is not due to any laxity by E&Y but to an increase in the scope of its review. In 2001, the applicable FCC condition required implementation of 20 performance measures; the 2002 FCC audit involved more detailed auditing of the results of those measures; the audit here concerns a detailed test of over 150 performance measures. The important thing for present purposes is that SBC addressed E&Y's findings in the FCC proceedings and that SBC has addressed E&Y's findings here.

[5] The CLECs suggest that they did not receive full access to E&Y's working papers. An auditor's workpapers are, of course, confidential, and they are typically not attached to an audit report or released by the auditor. However, in this docket, interested parties were (cont'd)

themselves have had no problem relying on the parts of E&Y's report they like. After all, E&Y identified exceptions, and its inclusion of those exceptions in its report conclusively shows that E&Y is a watch dog and not a lap dog.[6] The Commission should disregard the CLECs' theatrics and proceed to the real issues: whether E&Y's procedures were adequate, and whether E&Y's findings (along with the other corroborating evidence in the record) give the Commission reasonable assurance that SBC's results can be relied upon in its evaluation. We address these issues in the sections that follow.

2. Ernst & Young's Procedures Were Adequate.

As with their attacks on E&Y, the CLEC allegations about E&Y's procedures are unfounded. The Commission can first quickly discard AT&T's assertion that E&Y's report should be disregarded because E&Y audited results for the three months (March-May) preceding

(… cont'd)

afforded every reasonable opportunity to access underlying information relevant to E&Y's audit. As discussed in Mr. Ehr's reply affidavit, E&Y participated in two comprehensive collaborative sessions to discuss all aspects of their work, both before and after it was completed, and responded to numerous written inquiries and several rounds of written follow-up questions. Pursuant to the Commission's September 16, 2002 Order (page 4), Mr. Lonergan, Director of the Telecommunication Division, resolved all discovery issues. In all instances, SBC and E&Y complied fully with Mr. Lonergan's resolutions. SBC and E&Y made numerous documents available to interested parties under the terms of an amended protective agreement, and made voluminous amounts of data available for inspection by any interested parties at E&Y's offices in both Chicago and Washington D.C. Moreover, when interested parties requested additional time for such reviews, these requests were facilitated.

[6] The CLECs' main beef is with wording: E&Y provided an opinion stating where it found compliance and where it found exceptions, rather than rendering some ultimate conclusion (namely, a "fail" conclusion that adopts the CLEC view on SBC's reports). But it was quite proper for E&Y to leave the ultimate decision to the decision-maker, the Commission. E&Y's duty as an auditor is to provide information for the Commission to use in making its decisions, and for SBC to use in taking corrective action, and it is fulfilling that duty.

those contained in SBC's submission of June-August data. Neither the Commission nor the FCC has ever required that the auditor must examine the exact same data submitted with a section 271 application. Such a requirement would be impossible to carry out, because it takes time to do an audit and competition does not simply stop while the auditor proceeds. In the months the auditor took to complete its work on the data submitted for review, competition would continue, new performance results would be published – and CLECs like AT&T would no doubt claim the audited data were obsolete, touching off an endless loop of submission/audit/new submission/new audit. E&Y's testing of data for the three months immediately preceding SBC's submission is sufficient: There were no changes to performance measurements in that period, other than those made to correct exceptions – and those changes only provide further assurance as to the reliability of the data submitted.

LDMI's complaint that the E&Y audit was not "military style" or "test until pass" is baffling. While E&Y's report did not expressly adopt the test-until-pass methodology, the actual procedure is effectively test until pass. SBC has already corrected many of E&Y's findings, and E&Y has validated those corrective actions. As shown below and in Mr. Ehr's reply affidavit, the remaining exceptions do not materially affect checklist compliance, but even so SBC will continue making corrections (and E&Y will continue validating them) until all of E&Y's findings are resolved.

Most of the remaining CLEC allegations boil down to their view that E&Y did not test as many transactions as they would have picked, or employ the exact same methodology as BearingPoint (*e.g.* E&Y used scientific sampling rather than a 100% replication). E&Y determined the scope of its review in its own professional judgment, based on professional attestation standards. It has answered questions from CLECs and the Staff regarding its

decisions, and it will appear before the Commission at the November 25 oral presentation. Accordingly, we defer these issues to E&Y in the first instance.

3. Ernst & Young's Exceptions Are Addressed.

When it comes to addressing E&Y's findings, the CLECs start with theatrics. They contend that E&Y's report was "qualified," a result they portray as extraordinary in the world of annual audits of financial reports. But E&Y did not perform an audit of financial reports here; it performed a detailed attestation examination of numerous individual performance measurements. "Qualified" means only that E&Y noted exceptions in its review, so that leads us back to the real question: whether those exceptions have been addressed, and whether they affect the bottom line.

E&Y classified the issues set forth in its report into three groups. We address each group in turn.[7]

a. Restatements To Performance Measurements.

E&Y first identified several issues that were reported incorrectly in the March-May audit period, but were corrected by restatements afterwards. E&Y Report Attachment A (attachment N to 10/21/02 Ehr. Aff), at 2-8. As SBC showed in its October 21 filing, those corrections are reflected in the June-August data presented to the Commission. 10/21/02 Ehr Aff. ¶ 184. At the time of its October 21 reports, E&Y had validated SBC's restatements for 12 of the 17 issues

[7] TDS claims that E&Y's working papers show additional exceptions that were not included in its report. The working papers TDS describes were interim issues lists denoting items where E&Y was still investigating or performing follow-up work. E&Y's report naturally did not include those issues that it ultimately resolved to its own professional satisfaction.

identified that impacted parity, and 22 of the 24 issues identified that did not impact parity. E&Y Report Attachment A; Since that time E&Y has virtually completed its validation work. All of the restatement issues that impacted parity have been validated by E&Y. Only one of the issues that did not impact parity (Issue 13. PM IN1, a diagnostic measure) remains to be validated.. E&Y November 18, 2002 Report. Ehr Reply Aff. ¶ 26.

b. Prospective Changes To Performance Measurements.

E&Y next identified eighteen issues that affected 31 March-May performance measurements, and were to be resolved by prospective changes to reporting procedures going forward (as opposed to the restatement of prior reported results). SBC addressed these issues in its opening comments (*see* 10/21/02 Ehr Aff. Attachment Q) and provides an updated analysis here. Ehr Reply Aff. ¶¶ 30 & Attachment Q. As of the October 21, 2002 filing of performance results each of these issues had been addressed and seven had been verified by E&Y. Nine additional have been verified as of this Filing, and two are currently within E&Y's verification process. Of the thirty-one PMs listed, only five require restatement of one or more of the months' results filed on October 21, 2002 to address the issue described. The PMs requiring restatement as of this filing are 10.4, 91, , 10.4, MI2, 91, MI13, and CLEC WI1. Even though these results have not yet been restated, as discussed below, these restatements are not expected to affect the overall analysis of SBC's service provided to CLECs in these areas.

i. E&Y Issue 5 (Performance Measures 10.4 and MI2: Order "Jeopardy" Notices).

SBC provides the requesting carrier a "jeopardy" notice if a situation arises that might cause it to miss the due date. Performance Measure 10.4 calculates the percentage of orders that receive

jeopardy notices generally, while Performance Measure MI 2 addresses the percentages of orders that receive a jeopardy notice within 24 hours. Where a due date is modified from the one previously scheduled, E&Y determined that SBC's systems were not counting jeopardies issued in advance of the original due date, only the revised date. SBC modified its measurement programs to capture that data, and the August 2002 results in SBC's filing reflect that enhancement (and show slight increases in the number of notices over prior months). SBC plans to correct prior months in January 2002; nevertheless, this issue does not affect checklist compliance. A jeopardy notice only provides advance notice that a due date *might* be missed. The FCC considers the rate of actual missed due dates to be more probative; indeed, it approved Verizon's section 271 application for New York even though Verizon did not even provide jeopardy notices. SBC's October 21 filing demonstrates that the rate of missed due dates (Performance Measures 29, 45 and 58) was low, and those measurements are not affected by this issue.

ii. E&Y Issue 10 (Performance Measure 91: Percentage of LNP-Only Due Dates Within Industry Guidelines).

Performance Measure 91 calculates the percentage of orders for local number portability ("LNP") for which the due date was within target timelines promulgated by industry bodies. This measure does not include orders in which the requesting carrier requests another product or service, such as an unbundled loop, in conjunction with LNP. E&Y's report stated that SBC incorrectly excluded certain orders ("projects," orders revised by the CLEC, and orders completed before the due date) from this measure. (Note that orders completed before the due date would count as successful orders in this measure, and the exclusion of such orders serves to understate performance.) SBC corrected its programs, and the August 2002 data in its filing

reflect the enhancement. Data for that month remained consistent with the previous months, showing a success rate of over 98.6 percent (as compared to 99.52 percent and 97.73 percent) for the category with the lion's share of the commercial volume. SBC plans to restate the June - July data in January 2003, but, as shown for the corrected August 2002 data, this issue does not affect overall checklist compliance.

iii. E&Y Issue 15 (Performance Measure MI-13)

For PM MI13, the restatement will address a timing issue where the volume of "line loss notices" sent was overstated (i.e. notices that were not sent until September were included in August 2002 results). The restated performance results is not expected to vary significantly, and the line loss notices that were erroneously included in the August results have already been reported properly in the September results made available to CLECs and the Commission on October 21, 2002. As noted in SBC's October 21, 2002 filing, there was a malfunction in August that delayed the actual issuance of line loss notices, which SBC has addressed. And as SBC pointed out in its November 15, 2002 comments on BearingPoint's OSS test (at 46), BearingPoint (which was aware of the August line loss notice issue) has closed its exceptions on line loss, and its Report states that the related test criteria have been satisfied.

iv. E&Y Issue 18 (Performance Measure C WI 1: Average Delay in Original FOCs Due Dates).

Performance Measure C WI 1 relates to orders that go through SBC's facilities modification process (where additional work may result in a delay in the expected installation date) and it calculates the average delay, in days, from the original due date to the date of

completion. E&Y found that the delay period was incorrectly calculated for orders in which the CLEC requested a revised due date: Instead of starting the clock on the later date requested by the CLEC, SBC started the clock at the original due date. Further, for all orders SBC stopped the clock on the expected installation date rather than the actual completion date. SBC implemented a revision to its programs, and the July and August 2002 results in its filing reflect that enhancement (and show improved performance). While SBC plans to correct June data in January 2002, only 67 orders were at issue in that month, and the improved performance results for July and August (which reflect the correct methodology) show that this issue does not affect the overall analysis of performance.

c. Other Identified Issues.

E&Y's report of October 21, 2002 listed thirty-two numbered items ("issues") where E&Y determined that an error had been made in the PM calculations and the error had not been addressed as of the date of their report. E&Y identified seventy-six PMs that were potentially affected but SBC's investigation of those issues and the affected PMs determined that the issues did not have a significant impact on June – August 2002 reported results for forty of the PMs listed. (As stated above, I consider a change significant where it affects volume by at least five percent, or whether it causes a measure to change from hit or miss or vice versa). The current status of each issue and affected PM is described below.. These issues are addressed at paragraphs 38 - 52 of Mr. Ehr's reply affidavit, which shows that these issues do not affect the overall analysis of performance results as a whole.

These issues are discussed by Mr. Ehr in three categories. First, he describes those issues, and affected performance measures, where implementation is complete, and restatements have either been completed or are scheduled. Sixteen of the thirty-two issues as of the filing of this

affidavit, which affect 41 performance measures, fall within this category. Of those 41, restatements, if needed, have been completed for the months of June, July and August for 25 of the affected PMs. The remaining 16 performance measures (5, 7, 8, 10.4, 55.1, 56, 58, 74, 75, 78, 91, 93, MI2, MI10, MI13and MI16) are scheduled for restatement affecting June, July and/or August results, to the extent applicable, on December 5th or January 6th.

The second category includes identified issues for which SBC has scheduled updates to PM implementations. Nine of the thirty-two issues, which affect 45 PMs identified by E&Y, fit into this group. These updates are scheduled primarily for November and December results. Of those 45 PMs, results submitted for June July and August are not impacted for 27. Of the remaining eighteen PMs, twelve (PMs 28, 43, 44, 55.1, 55.2, 55.3, 56, 56.1, 58, 91, 93, and ~~and~~MI12) are scheduled for restatement on either December 5th or January 6th. For the remaining six PMs (5, 6, 92, 95, 99, and MI9) restatement has not yet been scheduled. Again, based on current analysis, reported results for June, July and August are not expected to vary in a material manner.

The final seven issues, affecting 13 performance measures, are yet to be addressed and have not had an implementation update scheduled as of this filing. The performance measures affected are 7.1, 10.4, MI2, 65, 65.1, 66, 67, 68, 69, 91, 95, MI13 CLEC WI5.

d. Interpretations Of Business Rules.

Attachment B to E&Y's report listed several "interpretations made by management" in applying the business rules for performance measurement. SBC explained its basis for each interpretation in meticulous detail in its October 21, 2002 filing (10/21/02 Ehr Aff. ¶¶ 193-195 & Attachment R). The CLECs express outrage at SBC (alleging that SBC has unilaterally changed

the business rules),[8] and indignation at E&Y (for not expressing a negative opinion). Neither objection has merit.

First, as SBC demonstrated in its October 21 filing, some interpretation is inherent in applying a myriad of generic business rules to the practical nitty-gritty of complex computer programs and processes. SBC demonstrated that its interpretations were reasonable, and the CLECs have not put forth a substantive rebuttal to any of these explanations or showed how they affect the overall assessment of checklist compliance. To the contrary, when SBC recommended clarifications to the business rules in the collaborative six-month review, the CLECs did not object. Ehr Reply Aff. ¶¶ 54.[9]

E&Y's course was equally appropriate. Much as the CLECs might have liked a negative opinion, E&Y did not usurp the role of the Commission (as decision maker) or of the collaborative performance measurement review. Rather, E&Y provided information for the parties and the Commission to make an assessment. SBC presented its assessment, and it is unrebutted.

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8 Such allegations come standard-issue in the CLEC package of challenges to BOC performance data. *See BellSouth Five-State 271 Order*, ¶ 14 (finding performance data reliable and approving BOC application despite AT&T complaint that "BellSouth unilaterally changed the rules by which the metrics are calculated" after the state commission had approved them); *Georgia & Louisiana 271 Order*, ¶ 17 (same).

9 SBC is not suggesting that changes under consideration in the six-month review are to be "retroactively" applied, as the CLECs contend, but that the absence of substantive objections here or in the six-month review demonstrates that its interpretations are reasonable.

C. SBC's Performance Results Demonstrate Compliance With The Pertinent Section 271 Checklist Items.

In its October 21, 2002 filing, SBC presented a complete set of results for all 150 of its Commission-approved measurements, divided into all of the over 3,000 reporting categories and compared to all applicable "parity" or "benchmark" standards, for the months of June-August 2002. To provide an overview, SBC calculated the percentage of standards met in each month (consistently in the 86-88 percent range), and the percentage of standards that SBC met in at least 2 of the 3 months (approximately 88 percent). SBC focused its analysis on measures that were "missed" in at least 2 of the 3 months, and demonstrated that they did not affect overall checklist compliance. This approach was not novel, nor should it have come as a surprise: SBC's affiliates in the Southwestern Bell ("SWBT") region used the exact same format in their successful section 271 applications.

1. SBC's Filing Complies With The Commission's Procedural Requirements.

Following the CLEC theme of attempting to construct new procedural obstacles to delay the Commission's review, AT&T contends that SBC violated a Commission procedural requirement that SBC present three consecutive months of data showing compliance with the performance measures. That contention misreads the Commission's order, and improperly seeks to rewrite FCC precedent.

The Commission's Order of February 9, 2000 recognized that performance measurements were one means to the ultimate goal of demonstrating compliance with the Act's competitive checklist and its principle of nondiscrimination. The Commission stated (at ¶ 8) that "[a]s part of the approval process, SBC must demonstrate parity for all OSS" and "demonstrate

nondiscriminatory access to all interconnection services delineated in Section 271's checklist provision." It required SBC to implement and update performance measures and standards "to ensure continuing parity for all OSS" and "nondiscriminatory access to all interconnection services delineated in the checklist provisions." *Id.* ¶ 11.

Reading the February 9, 2000 Order as a whole, then, the requirement of three consecutive months of data that appears at paragraph 13 was intended to demonstrate compliance with the Act, and SBC has demonstrated just that. Compliance with the Act does not mean meeting every single performance standard in every one of the thousands of reporting categories in all three months, as AT&T suggests, because no BOC has ever accomplished such a feat and the Act does not require it. Quite the contrary: The FCC has repeatedly held that it "may find statistically significant differences in certain performance measurements, but conclude that such differences do not warrant a finding of checklist noncompliance" because, for example, "the performance differences are slight, *or occur in isolated months*, and thus suggest only an insignificant competitive impact." *Kansas & Oklahoma 271 Order*, ¶ 32 (emphasis added). Based on such qualitative analysis, the FCC has just as consistently held that shortfalls in a single month do not affect the BOC's showing of compliance with the Act. *New York 271 Order*, ¶¶ 160 & 164 n.504 (finding compliance even though applicant missed 95 percent benchmark for order confirmations in one of four months reported); *Texas 271 Order*, ¶ 172 n.465 (finding compliance even though applicant missed 95 percent benchmark for order confirmations in one out of five months reported); *Kansas & Oklahoma 271 Order*, ¶ 134 n.371 (BOC missed benchmark for pre-order response time in one month); *Georgia & Louisiana 271 Order*, ¶ 140 & n.494 (finding that one-month shortfall for timeliness of rejection notices was "an isolated miss and not indicative of a systemic problem").

Of course, AT&T and the CLECs were free to present qualitative analysis of their own to show that any of the shortfalls that appeared in only one month were really not isolated, or were so severe as to make a difference in the marketplace. All of them have had full access to SBC's monthly performance results as they are reported (and thus, even before SBC's filing) for the market as a whole and for themselves in particular. All of them have access to their own marketing and business records, and to their own customers. Yet the most they can muster is AT&T's attempt to reshuffle the numbers so as to make for "pass" rates that look lower. The fact that no CLEC has presented any qualitative analysis, be it informal or scientific, simply confirms that SBC's own assessment (which the CLECs dismiss as "spin") was actually dead-on correct.[10]

2. SBC's Filing Demonstrates Substantive Compliance With The Pertinent Checklist Items.

AT&T's attempt to stir controversy over "3 out of 3" or "2 out of 3" illustrates the more fundamental problem that pervades the CLEC comments: the lack of any qualitative analysis. In the CLECs' view, any "miss" of a performance standard impacts competition, and the Commission should mechanically find non-compliance based solely on the existence or number or percentage of shortfalls (or based solely on the CLECs' say-so that the measure is "critical"). That view, however, has been consistently rejected by the FCC, which has held that "[a]lthough

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[10] Even on the CLECs' own superficial, quantitative level, their analysis fails to affect the overall conclusion of checklist compliance. For example, AT&T contends that SBC's pass rate is lower when one includes only measures that were met in 3 out of 3 months, as opposed to the pass rate for each individual month or for 2 out of 3 months. That is true, but by AT&T's own count SBC passed approximately three-quarters of its numerous standards in all three months. The fact that the pass rate increases to approximately 88 percent met in 2 out of 3 months shows that most of the "misses" counted by AT&T only affected one month and thus do not reflect any systemic issue.

performance measurements add necessary objectivity and predictability to our review, they cannot wholly replace our own judgment as to whether a BOC has complied with the competitive checklist." *Kansas & Oklahoma 271 Order*, ¶ 33. Contrary to the CLECs' theory that any miss is significant, the FCC has clearly stated that "we do not view any particular metric as wholly dispositive of checklist compliance. Nor do established performance standards represent absolute maximum or minimum levels of performance necessary to satisfy the competitive checklist." *Id.* ¶ 31. Rather, "the ultimate determination of whether an applicant's performance is consistent with the statutory requirements is a contextual decision based on the totality of the circumstances." *Id.*

As a result, a proper analysis of performance begins with numbers, but it ends with judgment. In the FCC's words, "[t]o the extent there is no statistically significant difference between [the applicant's] provision of service to competing carriers on one hand, and retail customers or a state's performance benchmark on the other, we generally need not look any further - particularly absent other evidence of discrimination by the BOC." *Id.* Conversely, "[w]here a statistically significant difference exists," the FCC does not automatically deem the applicant to be out of compliance, but "will examine the evidence further to make our ultimate determination of whether the statutory nondiscrimination requirements are met." *Id.* That qualitative step includes consideration of (i) "whether these differences provide an accurate depiction of the quality of . . . performance," (ii) "the degree and duration of the performance disparity," (iii) "whether the performance is part of an improving or deteriorating trend" (iv) whether "the performance differences are slight, or occur in isolated months, and thus

suggest only an insignificant competitive impact," and (v) "the performance demonstrated by all [related] measurements as a whole." *Id.* ¶¶ 31-32.[11]

Those important steps are exactly the ones SBC took in its opening comments, using its own experience in the Michigan marketplace, in providing wholesale and retail service, and in measuring performance. SBC also presented the underlying data so that the Commission could apply its own expertise, test SBC's analysis, and reach its own conclusions as to checklist compliance. The CLECs had ample opportunity to present their own analysis or to provide a substantive rebuttal (as opposed to the creative use of numbers and their practiced use of anti-Ameritech rhetoric). They also have sufficient resources, starting with their own business experience in the Michigan marketplace: Any good business keeps track of its relationships with its customers and its suppliers, and SBC has full respect for the CLECs as businesspeople and competitors. Yet, despite their abundance of opportunity, resources, and motivation, not one CLEC has presented any evidence that any performance shortfall was really significant or made any real difference to competition.

The only CLEC that even made the attempt was Z-Tel, which complains about a delay in "line loss notices" that resulted from a system malfunction in August 2002, and also alleges that it receives complaints from customers about double-billing (which Z-Tel attributes to untimely line loss notices). SBC addressed the August 2002 delay in line loss notices in its October 21,

[11] Qualitative analysis does not mean that SBC is attempting to water down its Commission-approved performance standards as AT&T claims. Those standards serve the same function they always have: They provide "valuable evidence with which to inform our judgment as to whether a BOC has complied with the checklist requirements" (*Kansas & Oklahoma 271 Order*, ¶ 31) and under SBC's ongoing performance assurance plan performance shortfalls can serve as the trigger for automatic remedy payments to the applicable CLECs or to the state. But the FCC "do[es] not use performance (cont'd)

2002 filing, and explained that it had been corrected; more generally, SBC has addressed line loss notice issues in extensive supplemental filings. BearingPoint's Report confirms that the line loss notice process works, and SBC has included a procedure to address line loss issues on a going-forward basis in its Compliance Plan.[12]

The remaining CLEC comments are addressed in the reply affidavit of Mr. Ehr, but all of them can be summarized by a single fundamental defect. Michigan is simply the latest in a long line of states in which CLECs could only offer "anecdotal-based challenges" rather than making an effort to "compile and submit independent evidence and construct an affirmative case for its position." *New Jersey 271 Order*, ¶ 94 (collecting cases). The CLECs' substantive silence speaks louder than their colorful words.

3. The CLECs' Predictions Of "Backsliding" After Section 271 Approval Are Unfounded.

In an apparent concession that SBC's results do demonstrate checklist compliance, AT&T takes a fallback position – the prediction that if the Commission recommends (and the FCC grants) section 271 approval, SBC will "backslide" on performance. That is nonsense.

(… cont'd)

measurements as a substitute for the 14-point competitive checklist" or for its own judgment. *Id.* ¶ 33.

12 Z-Tel notes that it has disputed several charges on SBC's wholesale bills, and that it is working with SBC to resolve the issues. The carrier-specific issues that Z-Tel raises are the reason SBC has billing dispute procedures, and section 271 proceedings are not meant to replace those procedures. *See BellSouth Five-State Order*, ¶ 176 ("To the extent that billing disputes arise, carriers are able to address their disputes through the billing dispute resolution process outlined in their interconnection agreements - and the record indicates that they are actively doing so."); *Pennsylvania 271 Order*, ¶ 26 & n.93; *Massachusetts 271 Order*, ¶ 99 ("ASCENT argues that its members frequently complain about inaccuracy of billing data . . . . Absent support, however, these concerns do not overcome the showing Verizon has made through its performance data and the KPMG analysis.").

There are numerous mechanisms in place to prevent backsliding, including (i) SBC's own commitment to quality service; (ii) the ongoing audit work of E&Y and BearingPoint, (iii) SBC's Commission-approved performance remedy plan, (iv) the annual performance audits called for by that plan; and (v) the Commission's and the FCC's unquestioned commitment to local competition (backed by numerous enforcement mechanisms). Experience has demonstrated that these mechanisms work: SBC's affiliates have received approval to offer long-distance service in several states already, and all have maintained high levels of wholesale performance after approval. It is time for Michigan consumers to reap the same benefits.

III. CONCLUSION

For the reasons described above and in its opening comments, SBC respectfully requests that the Commission review the ample evidence (including SBC's submission of performance results, the E&Y reports, and BearingPoint's Report) in its totality, and enter a favorable recommendation that SBC has demonstrated compliance with the competitive checklist.

Respectfully submitted,

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