

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

In the Matter of

Application by SBC Communications Inc.,)	
Southwestern Bell Telephone Company, and)	
Southwestern Bell Communications Services,)	CC Docket No. 00-65
Inc. d/b/a Southwestern Bell Long Distance)	
for Provision of In-Region, InterLATA)	
Services in Texas)	

**REPLY COMMENTS OF THE ASSOCIATION FOR LOCAL
TELECOMMUNICATIONS SERVICE ("ALTS")**

**THE ASSOCIATION FOR LOCAL
TELECOMMUNICATIONS SERVICE**

Jonathan Askin
General Counsel
**THE ASSOCIATION FOR
LOCAL TELECOMMUNICATIONS
SERVICES**
888 17th Street, N.W.
Washington, D.C.
(202) 969-2587
(202) 969-2581 FAX
jaskin@alts.org

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By:
Robin A. Casey
Eric H. Drummond
Susan C. Gentz
Elizabeth Drews
CASEY, GENTZ & SIFUENTES, L.L.P.
919 Congress Avenue
Suite 1060
Austin, Texas 78701
(512) 480-9900
(512) 480-9200 FAX
edrummond@phonelaw.com

**Attorneys for the Association for Local
Telecommunications Service**

SUMMARY AND INTRODUCTION

On January 10, 2000, SBC Communications, Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Service, Inc. d/b/a Southwestern Bell Long Distance (collectively “SWBT”) filed an application with the Federal Communications Commission (“FCC” or “Commission”) seeking authority to provide in-region, interLATA services in Texas. To allay concerns regarding the inadequacies of its original application, on April 5, 2000, SWBT supplemented its application and asked that the 90-day clock for Commission review be restarted. Under the procedural schedule issued by the Commission, reply comments by interested third parties addressing SWBT’s supplemented application are due May 19, 2000.

The Commission’s mandate under the Federal Telecommunications Act of 1996 (“FTA”) is to affirmatively promote efficient competition in the local exchange and access markets by requiring incumbent local exchange carriers to open their networks to competition. By enacting section 271 of the FTA, Congress provided a single powerful incentive: if the Commission finds that a Bell Operating Company (“BOC”) has taken the necessary steps to irreversibly open its local exchange market to competition, the BOC can offer service in the lucrative long distance market.

Unfortunately, this BOC has not willingly embraced its responsibilities under section 271.¹ A two-year section 271 proceeding at the Public Utility Commission of Texas (“TPUC”)

¹ In the Covad/Rhythms arbitration proceeding involving “highly technical issues related to the provision of competitive advanced services under the FTA,” Texas arbitrators found that “SWBT abused the discovery process in this proceeding on three separate independent grounds.” The arbitrators noted the “Petitioners’ requests for economic harm arising from SWBT’s abuse of the discovery process and the resultant delay in entering Texas xDSL markets.” The arbitrators even encouraged “SWBT to take remedial action to improve its process for communicating ‘the whole truth’ to the Commission.” Order No. 20, *Petition of Rhythms Links, Inc. for Arbitration to Establish an Interconnection Agreement with Southwestern Bell Telephone Company* and *Petition of Dieca Communications, Inc., d/b/a Covad*

was necessary, involving constant, active oversight by the TPUC to avoid an ultimately negative recommendation by that agency. Even after extensive fine-tuning in the TPUC proceeding, SWBT, on its own, concluded that the application it filed with this Commission on January 10, 2000 required substantial supplementation, filing an additional brief and supplemental affidavits on April 5, 2000.² Moreover, as noted in its May 12, 2000 evaluation, even after significant supplementation of SWBT's Application, the United States Department of Justice ("DOJ") is yet to be satisfied that FTA compliance has been achieved.³

Both the state of the current record, and those facts that can be gleaned from SWBT's *ex parte* submissions, indicate that SWBT's application is premature and should not be approved at this time. Although the Commission has discretion whether to consider such additional information,⁴ SWBT's *ex parte* submission of literally thousands upon thousands of pages of supplemental material months after filing its application raises serious concern as to the adequacy and reliability of the information SWBT has provided. Because of the problems that arise when a BOC supplements the record with *ex parte* submissions, the Commission has warned that it expects a section 271 application, as originally filed, to include all of the factual

Continued . . .

Communications Company for Arbitration of Interconnection Rates, Terms, Conditions and Related Arrangements with Southwestern Bell Telephone Company, Docket Nos. 20226 and 20272, Public Utility Commission of Texas, (July 27, 1999) pp. 33-34. As noted in the Initial Joint Comments of ALTS and the CLEC Coalition, in an unsuccessful effort to offer long distance service without making the required Section 271 showing, SWBT's parent company, SBC Communications, Inc., filed a lawsuit attacking sections 271-275 of the FTA as an impermissible bill of attainder. *In the Matter of Application of Bell Atlantic New York for Authorization Under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in the State of New York*, Memorandum Opinion and Order, F.C.C. 99-404 (1999) ("BA/NY Order"), ¶ 4; *see also SBC Communications, Inc. v. FCC*, 154 F.3d 226 (5th Cir. 1998).

² *Ex Parte* Submission from SBC Communications Inc. to Magalie Roman Salas, Secretary, Federal Communications Commission, CC Docket No. 00-4, (April 5, 2000). "Accordingly, as indicated in SWBT's *ex parte* letter of March 31, 2000, we are submitting the new affidavits with a request that the Commission restart the clock 'and reopen the comment period'." SBC Brief, p. 2.

³ Evaluation of the United States Department of Justice, May 12, 2000, p. 3.

⁴ BA/NY Order, ¶ 35.

evidence on which the applicant would have the Commission rely in making its findings.⁵ The practical implications of this rule enables the Commission to avoid disruption in the processing of the application and ensures that commenters are not faced with a “moving target.”⁶ Furthermore, due to many of the same concerns raised in this 271 application process, SWBT should note that the Commission has strongly encouraged parties to set forth their views comprehensively in their formal 271 filings, rather than in *ex parte* submissions.⁷

Section 271 approval requires that the BOC provide service to competitors at parity with its retail offerings or, where there is no comparable retail activity, that the BOC’s performance permit an efficient competitor a meaningful opportunity to compete.⁸ Failure to comply with even a single checklist item constitutes independent grounds for denying a section 271 application.⁹ SWBT must provide the Commission “actual evidence demonstrating its present compliance with the statutory conditions for entry, instead of prospective evidence that is contingent on future behavior.”¹⁰ “A BOC’s promises of *future* performance . . . have no probative value in demonstrating its *present* compliance with the requirements of section 271.”¹¹

⁵ *Id.*, ¶ 34. The FCC has unequivocally stated that “An applicant may not at any time during the pendency of its application, supplement its application by submitting new factual evidence that is not directly responsive to arguments raised by parties commenting on its application. **This includes the submission, or reply, of factual evidence gathered after the initial filing.**” (*Id.*, emphasis added.)

⁶ *Id.*, ¶ 35.

⁷ *Id.*, ¶ 7. “Under the procedural rules governing section 271 applications, we strongly encourage parties to set forth their views comprehensively in their formal submissions . . . and not to rely on subsequent *ex parte* presentations.” *Id.*

⁸ *Id.*, ¶ 5.

⁹ FTA § 271(d)(3)(A); Memorandum Opinion and Order, *Application of BellSouth Corp., et al. For Provision of In-Region, InterLATA Services in Louisiana*, 13 FCC Rcd. 20599 (1998) (“*Second BellSouth Louisiana Order*”), ¶ 74.

¹⁰ *BA/NY Order*, ¶ 37 (citing Memorandum Opinion and Order, *Application of Ameritech Michigan Pursuant to Section 271 to Provide In-Region, InterLATA Services in Michigan*, 12 FCC Rcd. 20543 (1997) (“*Ameritech Michigan Order*”) at 20573-7).

¹¹ *BA/NY Order*, ¶ 37 (emphasis added); *see also Second BellSouth Louisiana Order*, ¶ 56, n. 48; *Ameritech Michigan Order*, ¶¶ 55, 179; Memorandum Opinion and Order, *Application of BellSouth Corp., et al., Pursuant to Section 271 to Provide In-Region, InterLATA Services in South Carolina*, 13 FCC Rcd. 539 (1997) ¶ 38.

The Commission “must be able to make a determination based on the evidence in the record that a BOC has actually demonstrated compliance with the requirements of section 271.”¹²

SWBT has not yet met the required showing. On the issues identified by Chairman Kennard, in response to which SWBT sought to “refresh” its application, crucial work remains to be done. SWBT has failed to meet the requisite performance standards, unreasonably restricting access to its loops in the form of “hot cuts,” by performing coordinated cuts at an unacceptable level of quality, causing numerous outages. SWBT has engaged in prohibited, ultimately penalized conduct to impede CLEC efforts to deploy xDSL. Until SWBT provides these functions and unbundled network elements (“UNEs”) as required by the FTA, on a nondiscriminatory basis, and as delineated by this Commission, approval must be withheld.

Essentially the TPUC has asked that this Commission not apply its *BA/NY* standards outright to SWBT’s application, stating that: “States will be reluctant to develop performance measures if those measures are replaced by fiat with constantly evolving standards set by other tribunals.”¹³ But the FCC is not simply another tribunal. The FTA demonstrates Congress’ intent that *this Commission* determine whether section 271 compliance, in fact, has been achieved by each BOC.¹⁴ Consistent application by this Commission of its decisions would in no way diminish the undeniable talent and dedication of the TPUC, whose efforts have yielded a vital and lasting contribution to the review of section 271 applications in general and SWBT’s Texas application in particular. And, more importantly, the record shows that SWBT is not even meeting the requisite Texas performance measurements standards.

¹² *BA/NY* Order, ¶ 37.

¹³ The Evaluation of the Public Utility Commission of Texas, at 3, filed at the FCC in this docket on April 26, 2000.

¹⁴ See FTA §§ 271(b)(1), (d)(2).

Furthermore, in furtherance of Congress' goals, a state may set higher pro-competition requirements than what is necessary to meet the statutory nondiscrimination standard contained in the FTA.¹⁵ Although the Commission "will consider carefully state determinations of fact that are supported by a detailed and extensive record, it is the Commission's role to determine whether the factual record supports the conclusion that particular requirements of section 271 have been met."¹⁶ While Congress required that the Commission consult with *both* the state regulatory commission and the DOJ,¹⁷ these agencies disagree on whether SWBT's application is ready for approval. More importantly, however, the Commission is only required to "consult with the State Commission" under section 271(d)(2)(B), while it is required to "give substantial weight to the Attorney General's evaluation" under section 271(d)(2)(A). In the final analysis, this Commission is the regulatory agency ultimately responsible for interpreting the federal statute and the Commission's own implementing regulations and decisions.

Regulatory leadership and exhaustive labor by all involved have resulted in SWBT taking some steps that are essential for meaningful local exchange competition to exist in Texas. There is some measurable progress. But improvement from an *unacceptable* baseline, although welcome and clearly necessary, obviously does not equate to success.¹⁸ Nor should data indicating recent significant deterioration in performance be dismissed as an aberration; at the very least such data suggests that "the bugs are still being worked out" and that the application is

¹⁵ See, e.g., *BA/NY Order*, ¶55, n. 107.

¹⁶ *Id.*, ¶ 20.

¹⁷ FTA § 271(d)(2).

¹⁸ Where the data show *deterioration* in quality, SWBT has taken the position that two months of data does not demonstrate a trend. See "*SBC hit by state penalties; Fines could affect long-distance plans*," San Antonio Express News (April 19, 2000) (attached to Initial Joint Comments of ALTS and the CLEC Coalition, filed April 26, 2000 ("ALTS/CLEC Initial Joint Comments" Attachment 4)).

not yet ready to be approved. More importantly, SWBT's data alone suggest that SWBT is not even making minimally acceptable progress in certain critical areas.¹⁹

In its April 26 comments, the TPUC noted the failure of some CLECs to have reconciled SWBT's data. But, in many instances, SWBT has delayed providing CLECs access to their own data.²⁰ Moreover, it is crucial for all concerned to understand that SWBT retains at all times the ultimate burden of proof,²¹ and its own data show that SWBT has not achieved FTA section 271 compliance. For instance, Conway and Dysart agree that the benchmark for PM 114 is "*less than 2% premature disconnects within 10 minutes of the scheduled start time,*" but admit that for coordinated hot cuts in January, the level of premature cutovers was almost *double* the acceptable rate, and for February it was more than double for FDT, and five times higher for coordinated hot cuts.²²

Furthermore, current flaws in the TPUC performance measures and penalty mechanisms, in some important instances, render them inadequate to induce SWBT to avoid performance problems, which problems pose a continuing threat to competition in the local market. Indeed, the combination of the TPUC performance measures and penalties, regulatory procedures available at this Commission and at the TPUC, and the threat of denial of SWBT's section 271 application, together have proven *inadequate* to induce SWBT to avoid such problems. We certainly cannot expect the TPUC performance measures and penalties, and regulatory procedures, alone to do the job if SWBT's section 271 application is approved.

¹⁹ See Evaluation of the TPUC, filed April 26, 2000, pp. 15-20.

²⁰ See ALTS/CLEC Initial Joint Comments at 4-5 and Krabill affidavit attached thereto.

²¹ BA/NY Order, ¶ 47. "At the outset, we reemphasize that the BOC applicant retains at all times the ultimate burden of proof that its application satisfies all of the requirements of section 271, even if no party files comments challenging its compliance with a particular requirement."

²² See SWBT Conway/Dysart Supplemental Affidavit, ¶¶ 8-9.

SWBT's performance does not merely fall short of perfection; it falls short of the minimum performance standards of both the TPUC and this Commission's *BA/NY* order. Although SWBT has implied otherwise, regulators are not responsible for delays in section 271 approval caused by SWBT's operational failures and reluctance to comply with section 271 requirements. In addition, legitimate concerns over backsliding, heightened by the Texas statute, are not misplaced in Texas in light of Senate Bill 560 ("SB 560"), which provides the TPUC much weaker authority over SWBT than that enjoyed by the New York commission. That Herculean efforts by regulators in Texas were needed to induce SWBT's performance improvements observed so far, that significant problems remain, and that new problems are emerging, shows that permanent harm to local exchange competition in Texas will result if SWBT's application is approved before FTA section 271 compliance is fully and irreversibly achieved.

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A. Checklist Item IV – Unbundled Local Loops

To establish that SWBT is providing unbundled local loops in compliance with section 271(c)(2)(B)(iv), SWBT “must demonstrate that it has a concrete and specific legal obligation to furnish loops and that it is currently doing so in the quantities that competitors reasonably demand and at an acceptable level of quality.”²³ In order to reach the conclusion that SWBT provides unbundled local loops in accordance with the requirements of section 271, this Commission has stated that it must assess “the totality of the evidence.”²⁴ That is, the Commission will examine the performance data for all of the various loop metrics, as well as the factors surrounding those metrics, in order to obtain “a comprehensive picture” of whether SWBT is providing unbundled local loops in accordance with the requirements of checklist item (iv).²⁵

1. Hot Cuts

Under this Commission’s analyses, SWBT must present sufficient evidence to “demonstrate” that it provides hot cuts in sufficient quantities, at an acceptable level of quality and with a minimum of service disruption, “thereby offering competitors a meaningful opportunity to compete in the local exchange market.”²⁶ Based upon the evidence submitted by SWBT in this docket, it has not made the requisite “minimally acceptable” showing of performance. As discussed above, SWBT’s own data show that it is *not* meeting the relatively

²³ *BA/NY Order* at ¶ 269.

²⁴ *Id.* at ¶ 274.

²⁵ *Id.* at ¶ 278. For instance, where the record in the *BA/NY* case contained evidence that, on average, competing carriers experienced longer average loop installation intervals than BA retail customers, the Commission determined that the disparity between wholesale and retail average installation intervals could be the result of discriminatory conduct. The FCC determined under the specific facts of that docket, however, that it was not “the result of discriminatory conduct, but rather the result of factors outside of [BA’s] control.” *Id.*, at ¶ 285.

²⁶ *Id.* at ¶ 291.

straightforward and simplistic benchmark for premature disconnects under PM 114. Moreover, SWBT further admits that in analyzing the significant number of SWBT-caused outages occurring in January 2000, “(1) more than half of the outages attributable to SWBT were a result of a ‘Cut outside of the Window’;” and (2) “half of the remaining outages were attributed to SWBT as a result of ordering errors at the LSC.”²⁷

ALTS asserts that SWBT has not complied with the “minimally acceptable” standards set forth in the *BA/NY* Order because the fundamental defects addressed jointly by ALTS and the CLEC Coalition in CC Docket No. 00-04, as well as the defects addressed by numerous other parties, have not been cured. For instance, CLECs continue to experience premature disconnects during hot cut conversions at rates that exceed the TPUC’s benchmark of 2% or less for PM 114.²⁸

AT&T contends that not only has SWBT failed to cure any of the important defects evidenced in its January 10, 2000 Application, but in several critical areas SWBT’s performance, in fact, has worsened.²⁹ AT&T’s reconciled data show that SWBT-caused outages occurred on 16.7% of AT&T’s hot cut orders during the December 1999 to February 2000 timeframe on which SWBT’s “refreshed” application relies.³⁰ SWBT’s outage rate of 16.7% is more than double the 8.2% outage rate for the August to October 1999 period relied upon in SWBT’s first

²⁷ SWBT Conway/Dysart Affidavit, ¶¶ 27-29. SWBT’s extremely poor performance for SWBT-caused, unscheduled outages during provisioning were determined based on jointly reconciled outage data and SWBT re-analyzed total number of lines. *Id.*

²⁸ “PM 114 measures the percentage of unbundled loop conversions where SWBT prematurely disconnects the customer prior to the scheduled conversion. The Texas Commission’s benchmark for this measure is less than 2% premature disconnects within 10 minutes of the scheduled start time.” Evaluation of the TPUC, p. 13.

²⁹ AT&T Supplemental Comments, p. 4: “SBC’s hot cut provisioning has become even worse than before.”

³⁰ *Id.*, at pp. 4-5.

application.³¹ Indeed, an outage rate of 16.7% is more than *three times* greater than the “fewer than five percent” minimally acceptable standard set forth in the *BA/NY* Order.³²

In terms of the data SWBT continues to rely upon to support its request for interLATA 271 authority, SWBT appears to be unable to accurately collect and report the data. Sprint Communications, for example, asserted in its initial comments that CLEC reconciled data differs so dramatically from the data provided by SWBT “that the credibility of SWBT’s self-reported data cannot be accepted at face value.”³³ Several CLECs that have reconciled PM 114 data with SWBT for the months of December 1999 to February 2000, have concluded that SWBT failed to capture a significant number of outages.³⁴ After concluding its reconciliation, AT&T complained that SWBT’s processes for collecting and reporting data were “rife with errors.”³⁵ The only way to effectively verify whether SWBT is *correctly* reporting the data it collects is to engage in laborious and time intensive data reconciliation, with key personnel manually verifying the data, order by order, month by month.³⁶ Because this process is so labor intensive and time consuming, few CLECs have the requisite resources to engage in the process.

What is clear from both reconciled *and* unreconciled data is that SWBT certainly has *not* complied with the TPUC’s benchmark standard that addresses the duration of hot cuts. Performance Measure 114.1 measures the coordinated cutover interval for orders of 1-24 loops. Under the TPUC’s interim benchmark, 100% of these cutovers are to be completed within two

³¹ *Id.*

³² *Id.* Indeed, AT&T’s disaggregated outage rates data for December 1999 to February 2000 is even more revealing. These outage rates for SWBT-caused outages are truly abysmal: 11.1% for CHC and 20.8% for FDT. *Id.* at p. 30.

³³ Sprint Comments, p. 27 filed on April 26, 2000.

³⁴ Indeed, AT&T determined that in February, SWBT identified fewer than one-tenth of the outages that AT&T requested be reconciled. AT&T Supplemental Comments, p. 38.

³⁵ AT&T Supplemental Comments, p. 5.

³⁶ *Id.*

hours of the scheduled start time. The interim benchmark is rational in view of the fact that under the *BA/NY* standard, 90% of cuts are to be completed within one hour. According to information provided by the TPUC, for the three combined months of December 1999 to February 2000, SWBT missed the TPUC's benchmark *all three months*.³⁷ In fact, according to the TPUC's reconciled data for CHC orders containing 1-24 lines, SWBT's performance worsened from January to February 2000.³⁸ Indeed, whether reviewing reconciled or unreconciled data, although SWBT came close in February, it *never once* met the TPUC's benchmark.³⁹

The importance of SWBT meeting these benchmarks cannot be overstated. As a practical matter, CLECs cannot compete with SWBT in the local exchange marketplace if significant numbers of their prospective customers experience loss of service during the conversion process, or if other serious problems occur, such as SWBT continuing to bill the customer it lost to a CLEC for months after service has been switched over to that CLEC.⁴⁰ When TPUC staff reviewed SWBT's Tier-2 measurements for June, July and August 1999, they stated that SWBT had not met "the standards set in some key performance measurements" and that "[b]ecause staff believes that compliance on these key measures is critical, the staff recommends that SWBT should show improvement in performance for these key measurements prior to its application

³⁷ Evaluation of TPUC, p. 15. This is true for "Reconciled CLEC" Data Results for Orders Containing 1-24 Lines and "All CLEC" Data: Reconciled Plus Reported Results for Orders Containing 1-24 Lines.

³⁸ *Id.* SWBT misstates the parameters of the TPUC's benchmark by claiming that "Even when CLEC-caused misses are included, SWBT still met the benchmark for 93% of coordinated loop conversions and 95 percent of FDT loop cutovers." (Conway/Dysart Supplemental Affidavit, ¶ 12.) The fact that the benchmark is 100% completed conversions in two hours does not seem to deter SWBT from claiming that it has met another TPUC PM. "The fact that seven percent are performed in excess of two hours is a gross failure to meet the benchmark requirements established by the Texas PUC." Comments of Allegiance Telecom of Texas, Inc. in Opposition to Southwestern Bell's Supplemental Section 271 Application for Texas, p. 8.

³⁹ *Id.* According to the TPUC's analyses, the same holds true for FDT data, both reconciled and unreconciled. *Id.* at p. 20.

⁴⁰ See Comments of @Link, BlueStar, DSLnet, Mpower, and Pontio, p. 3.

with the FCC.”⁴¹ Indeed, even in November 1999 for hot cuts, staff was particularly concerned “about extended outages during provisioning of loops and loops with LNP as a part of the coordinated cutover process.”⁴² SWBT must be required to provide unbundled loops consistent with the minimum threshold requirements established by this Commission and the TPUC.

2. xDSL-Capable Loops

The initial comments filed by the data CLECs, particularly Covad and Rhythms, make clear that SWBT’s performance regarding the provision of DSL-capable loops still is insufficient. The TPUC’s comments also acknowledge SWBT’s failure to achieve parity or the benchmarks set by the TPUC for several performance measures.⁴³ While the TPUC concludes that competitors have a meaningful opportunity to compete in this key market, that conclusion assumes either that SWBT will diligently pursue improvements to its OSS and its provisioning and maintenance operations, or that CLECs will continue to force these issues to resolution at the TPUC. Neither assumption justifies approving this revised application.

Simply put, SWBT’s record regarding DSL offers no comfort that it will do the right thing once 271 relief is granted.⁴⁴ After all, neither regulatory scrutiny nor potential entry into a coveted market were sufficient inducement to prevent the conduct that lead to sanctions in the

⁴¹ TPUC Project No. 16251, Evaluation of SWBT Performance Measure Data by Staff of the Public Utility Commission of Texas, November 2, 1999, at p. 1.

⁴² In fact, staff was so concerned about SWBT’s performance at the end of last year that staff also recommended “that any future incidence of SWBT-caused failures during provisioning extending beyond one hour should be subject to per occurrence damages/assessments in the High category for Tier-1 and Tier-2, *with no measurement cap.*” *Id.*, at p. 3 (emphasis added.)

⁴³ Evaluation of the Public Utility Commission of Texas, pp. 28-35.

⁴⁴ Indeed, according to the *San Francisco Examiner* and the *Express-News*, on May 15, 2000 the American Arbitration Association ordered San Antonio-based SBC Communications Inc. to pay \$27.2 million to Covad Communications Company for not delivering in a timely manner requested xDSL equipment and collocation space Covad needs to provide high speed xDSL service to its customers. The \$27.2 million fine was awarded to Covad based on the conduct of SBC affiliate Pacific Bell. *See* attachment A.

DSL arbitration.⁴⁵ And, redress at the TPUC, while welcome, is no substitute for non-discriminatory provision of DSL-capable loops. CLECs appreciate the TPUC's willingness to aggressively monitor SWBT's actions; however, the constant and apparently endless effort required to pursue regulatory relief drains resources that could be used more productively in the actual provision of service to customers.

SWBT states repeatedly here and in ongoing workshops at the TPUC that SWBT is responding to CLECs' needs and is revising and improving its ordering and loop qualification processes, OSS, and provisioning and testing of DSL-capable loops. But actual experience shows that

- SWBT has failed to deliver parity or benchmark levels of performance for the required three months for the following measures for DSL-capable loops: PM 5.1-- return of FOCs; PM 58-- SWBT caused missed due dates; PM 62-- average delay days for missed due dates; PM 59--trouble reports within 30 days; and PM 65--trouble report rate.
- SWBT has failed to deliver parity or benchmark levels of performance for the required three months for the following measures for BRI loops: PM 56-- installation interval; PM 58--SWBT caused missed due dates; PM 67--mean time to restore; and PM 69--repeat trouble reports.
- SWBT is failing to meet the FCC's deadline for providing line sharing, with rollout now proposed to occur through late summer.⁴⁶

⁴⁵ *Petition of Rhythms Links, Inc. for Arbitration to Establish an Interconnection Agreement with Southwestern Bell Telephone Company* and *Petition of Dieca Communications, Inc., d/b/a Covad Communications Company for Arbitration of Interconnection Rates, Terms, Conditions and Related Arrangements with Southwestern Bell Telephone Company*, Docket Nos. 20226 and 20272, Public Utility Commission of Texas, (July 27, 1999), p. 2.

⁴⁶ Supplemental Comments of Covad Communications Company, pp. 5-7.

- SWBT has ensured that its affiliate ASI enjoys advantages not available to CLECs, in particular eliminating both the financial cost of and installation delays associated with the artificial standard SWBT unilaterally imposed on all other CLECs of maintaining 100 pairs of cable ties per central office collocation for line sharing.⁴⁷
- SWBT has designed an extensive fiber network deployment that uses remote terminals so small that CLECs cannot collocate DSLAMs, nor otherwise (as of the date of these reply comments) be certain that they can provide any form of DSL different from ADSL.

The only effective deterrent against anti-competitive behavior in the advanced services market is not in place. Efforts have only begun to develop performance measures setting appropriate parity and benchmark standards. Clear business rules that ensure collection of appropriate and accurate data do not yet exist. Performance data thus far being collected are simply incapable of revealing the favorable treatment ASI already receives in terms of collocation and line sharing. Swift and effective penalties for this discriminatory treatment are nowhere in the offing.

What CLECs face now is a market in which their supplier of essential services has demonstrably failed to meet reasonable performance measures while also failing to have created an independent affiliate that faces the same problems, the same delays, the same constraints as SWBT imposes on its competitors. Under these circumstances, the requirements for meeting checklist item (iv) have not been satisfied.

⁴⁷ Rhythms Net Connections Inc. Comments in Opposition to SBC's Application for Section 271 Authority, pp. 4-5.

B. Public Interest Analysis

In addition to the section 271 competitive checklist and FTA section 272 compliance, section 271 approval requires SWBT to show that its entry into the in-region, interLATA market is consistent with the public interest, convenience, and necessity.⁴⁸ The public interest requirement is an opportunity for regulators to review the circumstances presented by the application to ensure that no other relevant factors exist that would frustrate the congressional intent that markets be open.⁴⁹

Contradicting the intent of Congress and the spirit of sections 271 and 272, SWBT sent letters to virtually every CLEC in Texas that has adopted the T2A (SWBT's "model interconnection agreement" approved by the TPUC), informing CLECs that it intends to exercise its right to terminate the T2A effective October 13, 2000, because this Commission failed to approve its section 271 application.⁵⁰ Both this Commission and the TPUC have recognized the importance of interconnection agreements on which regulators rely in approving a section 271 application. As discussed in ALTS/CLEC Initial Joint Comments at 14-16, if SWBT's section 271 application is not approved in July, the Commission should premise any continuing efforts

⁴⁸ FTA § 271(d)(3)(C); *BA/NY* order, ¶ 18.

⁴⁹ *BA/NY* Order, ¶ 423. The public interest analysis requires consideration of all relevant factors (*See BellSouth Louisiana* Order at ¶ 361), including the following: (1) whether all pro-competitive entry strategies are available to new entrants, including a variety of arrangements (interconnection, UNEs and resale) available to different classes of customers (business and residential) in different geographic regions in different scales of operation (*See Ameritech Michigan* Order at ¶ 387 and ¶ 391); (2) whether a BOC is making these entry methods and strategies available, through contract or otherwise, to any other requesting carrier upon the same rates, terms and conditions (*Id.* at ¶ 392); (3) whether the BOC has agreed to performance monitoring that permits benchmarking and self-executing enforcement mechanisms (*Id.* at ¶¶ 393-94; *BellSouth Louisiana* Order at ¶¶ 363-64; *see also BA/NY* Order at ¶ 429 and ¶ 430); (4) whether the BOC has provided for optional payment plans for payment of non-recurring charges that would ease the financial burden of market entry (*See Ameritech Michigan* Order at 395); (5) the existence of state or local laws that affect market entry (*Id.* at ¶ 396); and (6) the existence of discriminatory or anti-competitive behavior or violation of any state or federal telecommunications law (*Id.* at ¶ 397). These factors have, to some extent, been previously addressed; others are addressed below.

⁵⁰ Comments of Allegiance Telecom of Texas, Inc. in Opposition to Southwestern Bell's Supplemental Section 271 Application for Texas, p. 3.

to work with SWBT to resolve outstanding issues on SWBT's agreement to continue the term of the Texas 271 Agreement for a full four years, until October 13, 2003.

1. SWBT's Performance Remedy Plan

The Commission must consider whether SWBT has agreed to performance assurance plans that will provide significant financial incentives for it to *maintain* an open market and to *prevent* backsliding.⁵¹ That is, where a BOC relies on performance monitoring and enforcement mechanisms to provide assurance that it will continue nondiscriminatory conduct, the FCC "will review the mechanisms involved to ensure that they are likely to perform as promised."⁵² "[A]n overall liability amount would be meaningless if there is no likelihood that payments would approach this amount, even in instances of widespread performance failure."⁵³ Performance remedy plans must be self-executing: "It is important that these plans are designed to function automatically without imposing additional administrative and regulatory burdens on competitors."⁵⁴

In addition to certain problems with the performance measures themselves, some of which are being addressed in ongoing workshops at the TPUC, the above standards are not met by the performance enforcement mechanisms to which SWBT has so far agreed. There are two major flaws. The first is that, relative to the value to SWBT of harming the reputation, customer base and revenues of its local service competitors, the dollar amount of SWBT's penalty exposure is too low. As shown by the TPUC staff report on the performance data at issue in SWBT's original application, if the specific measures for which SWBT was out of parity had not been subject to per-measurement caps during August 1999, as analyzed by the TPUC and

⁵¹ *Id.* at ¶¶ 393-94; *see also* BA/NY Order, ¶¶ 12, 429-430.

⁵² *Id.*

⁵³ BA/NY Order, ¶ 437.

⁵⁴ *Id.* at ¶ 12.

Telcordia, the penalties payable to CLECs would have been \$5,803,600 *instead of* merely \$389,033.⁵⁵ The caps on specific measures, particularly the crucial customer-affecting measures, protect SWBT from the consequences of its failures and prevent the penalties from deterring future sub-par performance in complete contradiction of the goal of the measures. An additional problem is that the compliance rate to avoid penalties has been set at only 90 percent rather than the 95 percent needed to show parity performance.⁵⁶

If the *self-executing* penalty enforcement mechanisms are not stringent enough to induce the BOC to meet the performance standards that have been set, regulatory reliance on those performance standards and enforcement mechanisms will produce an overly optimistic view of the prospect for competition in the local market. Enforcement mechanisms that depend on expenditure of significant resources *by CLECs* and federal or state regulators, with the delay that attends even expedited regulatory proceedings, are simply no substitute for penalty enforcement mechanisms that are both self-executing and adequate in amount to deter problematic conduct.⁵⁷ By the time a CLEC has filed a complaint, or the regulator has launched an investigation addressing an anti-competitive behavior or service, and the regulator has conducted an inquiry and issued a decision, the competitive harm has already occurred and the CLEC is likely irreversibly harmed.

⁵⁵ TPUC Project No. 16251, Evaluation of SWBT Performance Measure Data by Staff of the Public Utility Commission of Texas, November 2, 1999, at 10, fn. 4. “The actual calculated assessment amount prior to application of the measurement caps is \$5,803,600.”

⁵⁶ That despite this, SWBT’s performance has been penalized, indicates the significance of SWBT performance failures.

⁵⁷ For example, after section 271 approval, FTA section 271(d)(6) requires notice and hearing before the Commission may: issue an order requiring the BOC to correct a deficiency regarding any of the conditions required for section 271 approval; impose a penalty on the BOC; or suspend or revoke such approval.

The second flaw in the SWBT penalty mechanisms is that, due to their design, most of the penalty payments go to the Texas State Treasury, not to CLECS -- the very entities damaged by the problems that led to the penalties.⁵⁸ Avoiding the requirement to pay its competitors the requisite substantial sums commensurate with its poor performance would significantly heighten SWBT's incentive to meet the performance measures. Moreover, payments to the Texas State Treasury do nothing to ameliorate the damage to the CLEC's reputation, customer base, and revenues caused by poor performance by SWBT, or to induce the CLEC to continue making investments necessary to offer a meaningful local service alternative in Texas.

These two changes in the penalty mechanisms are essential to protect consumer interests in lasting, effective competition. The Commission has concluded that "in the absence of adequate commitments from a BOC, we believe that we have authority to impose such requirements as conditions on our grant of in-region, interLATA authority."⁵⁹ At a minimum, this Commission and the TPUC should correct the above two flaws in the remedy plan as a condition to approval of SWBT's section 271 application.

2. The Weakened Regulatory Structure

With respect to the existence of state or local laws that affect market entry, assessing the TPUC's ability to redress current or future problems with SWBT requires recognition that the TPUC, though talented, hardworking, and well-intentioned, is hamstrung by its weakened authority under the Texas statute. Unlike the New York Commission, the TPUC now has very little authority over most of the business services SWBT provides. Senate Bill 560, which took effect September 1, 1999 -- drafted by SWBT and pushed through the Legislature by SWBT's

⁵⁸ For example, in January and again in February, SWBT paid the Texas State Treasury over \$400,000 for a total of \$879,600 in penalties for three months of noncompliance with the most critical performance measures. In contrast, SWBT paid only a paltry amount to CLECs (*e.g.*, \$450 in December 1999).

⁵⁹ *Ameritech Michigan Order*, ¶ 400; *see also* ¶401.

team of more than 100 lobbyists, who collected more than \$1 million a month in lobbying fees – allows SWBT to offer new services upon ten days notice to the TPUC, and allows these service offerings to remain in effect despite complaints or clear evidence that the offerings violate the law.⁶⁰ Senate Bill 560 also strips the PUC of almost all oversight of SWBT’s relationship with its affiliates⁶¹ and overrides many competitive safeguards previously in the law.⁶² In contrast, the New York Commission retains considerable authority to review and evaluate Bell Atlantic’s rates and services and their impact on competition.

In very broad terms, some of the changes made by SB 560 that are most significant to the Commission’s public interest review are:

- SWBT can create unregulated “competitor” affiliates in its existing service, and new limitations have been placed on TPUC authority over affiliates;⁶³
- Services that would not have been reclassified as competitive based on a legitimate review of the level of competition for that service have been statutorily deregulated and removed from TPUC oversight;⁶⁴
- SWBT can utilize all forms of pricing flexibility immediately for most services, and on a date certain for the remaining services, absent any showing that sufficient competition exists for those services;⁶⁵

⁶⁰ See Tex. Util. Code Ann. § 58.153.

⁶¹ *Id.* §§ 60.164, .165.

⁶² *Id.* §§ 58.063, .152.

⁶³ *Id.* §§ 54.102, 60.164-.165.

⁶⁴ *Id.* §§ 58.023, .051, .151, .101 - .104.

⁶⁵ *Id.* §§ 58.003, .004, .063, .152.

- The TPUC's ability has been sharply limited to review in advance the appropriateness or legality of pricing flexibility service offerings and to take corrective action if SWBT abuses its dominant market position;⁶⁶
- SWBT can price its retail services at rates lower than the corresponding wholesale rates for those same services. Because SWBT needs only to price its rates for services above long-run incremental cost and can it also freeze rates at the rate in effect September 1, 1999, SWBT can create price squeezes by undercutting the prices it charges for the services CLECs provide using UNEs based on total element long run incremental cost ("TELRIC");⁶⁷ and
- Very basic competitive safeguards in the statute have been deleted.⁶⁸

Combined, the changes made to Texas law in the 76th Legislative Session severely handicap the TPUC's ability to perform meaningful review of service offerings and affiliate relationships and transactions. In actuality, the timeline related to SWBT's ability to make informational filings at the TPUC is so restricted, permitting only cursory reviews of SWBT's filings, that the TPUC cannot ensure that illegal rates or service offerings will not become effective.

CONCLUSION

For the reasons described above, ALTS requests that the Commission deny SWBT's section 271 application until the customer-affecting problems described herein are resolved and this Commission has implemented anti-backsliding measures consistent with the goals and requirements of the FTA and this Commission's implementing regulations and decisions. An application that requires thousands of pages of *ex parte* supplementation, yet still relies on data

⁶⁶ *Id.* §§ 58.024, .063, .152, .153.

⁶⁷ *Id.* §§ 58.152, .063.

⁶⁸ *Id.* §§ 58.063, .152.

that are suspect and incomplete, is not ready to be approved. An incumbent Bell Operating Company that precludes the timely, sufficient expansion of local service competitors' networks, and that subjects a competitor's customers to loss of dial tone, missed due dates, and other crucial ordering and provisioning problems, has not fully implemented or offered every item on the competitive checklist. Performance penalties that have failed to induce sustained acceptable performance or to prevent backsliding during the very pendency of the section 271 application cannot be relied on to induce acceptable performance, much less prevent backsliding. This is especially true where, as in this instance, self-executing penalty payments are too low and are not directed to the competitors that have been damaged. Approval of this application would be premature based on the requirements of section 271 and inconsistent with the public interest, convenience, and necessity.