

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

In the Matter of

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

**REPLY COMMENTS OF THE
ASSOCIATION FOR LOCAL
TELECOMMUNICATIONS SERVICES**

THE ASSOCIATION FOR LOCAL
TELECOMMUNICATIONS SERVICES

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December 11, 2000

SUMMARY

ALTS is the leading national trade association representing facilities-based competitive local exchange carriers (“CLECs”). ALTS does not represent any of the major interexchange carriers (“IXCs”), and therefore its interest in this proceeding is singularly focused on ensuring that the Kansas and Oklahoma local telephone markets are open to competition. In these Reply Comments, ALTS explains why this Commission’s approval of the SWBT-TX Section 271 Application does not afford a basis for granting SWBT Section 271 approval in Kansas and Oklahoma. ALTS urges the Commission to reject SWBT’s Joint Application because there is insufficient competition in Kansas and Oklahoma and SWBT has failed to satisfy the competitive checklist.

SWBT’s Joint Application can be boiled down to the following refrain: “*Since SWBT was granted interLATA entry in Texas, it should also be granted interLATA entry in Kansas and Oklahoma.*” Contrary to SWBT’s assertions, and as the record in this proceeding demonstrates, SWBT cannot bootstrap the Commission’s grant of Section 271 authority in Texas into a similar approval for Kansas and Oklahoma. As this Commission has emphasized, each application made by a BOC must be examined independently and on its own merits. Specifically, the issue of whether an BOC has satisfied its Section 271 obligations must be determined on a case-by-case basis after review of a totality of the circumstances and based on an analysis of the specific facts and circumstances of that particular application.¹

¹ *Application of Bell Atlantic Corporation, et al. Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region InterLATA Services in New York*, CC Docket No. 99-295 Memorandum Opinion and Order, (December 21, 1999) (“hereinafter, “*Verizon-New York Order*”, ¶ 46, and *In the Matter of Application by SBC Communications, Inc., /Southwestern Bell Communications Services, Inc., d/b/a Southwestern Bell Long Distance Pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-Region InterLATA Services in Texas*, CC Docket No. 00-65, Memorandum Opinion and Order, FCC 00-238 (rel. Jun. 30, 2000)

Under this standard, SWBT's Joint Application must fail. The Joint Application is deficient in a number of fundamental areas: (1) SWBT has not demonstrated that the local markets in Kansas and Oklahoma are irreversibly open to all modes of competition; (2) SWBT does not provide nondiscriminatory access to all UNEs, including its OSS, as required by checklist item (ii); and (3) SWBT's rates for unbundled network elements are not forward-looking and cost-based. Furthermore, commenters in this proceeding have raised various concerns with SWBT's performance and policies that must be resolved before SWBT obtains Section 271 authority.

(hereinafter, "*SWBT-Texas Order*"), ¶ 46.

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The Association for Local Telecommunications Service (“ALTS”), pursuant to the Commission’s Public Notice in the above-captioned proceeding, hereby submits these reply comments on the Joint Application by SBC Communications, Inc. (“SWBT”) for Authorization under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in the States of Kansas and Oklahoma (the “Joint Application”).¹

ALTS is the leading national trade association representing facilities-based competitive local exchange carriers (“CLECs”). ALTS does not represent any of the major interexchange carriers (“IXCs”) and, therefore, its sole interest in this proceeding is to ensure that the Kansas and Oklahoma local markets are open to competitors. The Comments filed in this proceeding show there are very real concerns with the level of competition in Kansas and Oklahoma and

¹ *Application by SBC Communications, Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance for Authorization To Provide In-Region, InterLATA Services in Kansas and Oklahoma*, CC Docket No. 00-217, Public Notice DA 00-2414 (rel. Oct. 26, 2000).

with SWBT's performance in those states. Until these issues are resolved, SWBT must not be granted Section 271 authority to provide in-region interLATA services.

I. The Commission Must Review SWBT's Joint Application On its Own Merits

SWBT's Joint Application relies almost exclusively on its assertion that because it was granted Section 271 authority in Texas, it should be granted such authority in Kansas and Oklahoma as well. Contrary to SWBT's assertions, simply because SWBT was permitted into the in-region long distance market in Texas does not mean that it has also earned that privilege in Kansas and Oklahoma. The Commission should, at a minimum, determine whether SWBT has fulfilled the minimum requirements established by the Commission in its *Verizon-New York Order* and its *SWBT-Texas Order*; however, as this Commission has emphasized, each application must be examined independently and on its own merits. Specifically, the issue of whether an BOC has satisfied its Section 271 obligations must be determined on a case-by-case basis after review of a totality of the circumstances and based on an analysis of the specific facts and circumstances of that particular application.² In other words, simply because the Commission may have found that SWBT has met the Section 271 requirements in Texas does not necessarily mean that it has met these requirements in Kansas and Oklahoma.

As discussed further below, SWBT does not face the same level of competition in Kansas and Oklahoma as it did in Texas when it applied for interLATA authority. Unlike Texas, there is little or no DSL entry or residential facilities-based competition in either Kansas or Oklahoma. Furthermore, contrary to SWBT's claims, its OSS used to process orders in Texas is not identical to the OSS used to process Kansas and Oklahoma orders; therefore, Texas OSS data is irrelevant to this proceeding.

II. SWBT Has Not Demonstrated That it has Satisfied the Requirements Of Section 271

The Commission may not authorize a BOC to provide in-region, interLATA service under Section 271 unless it finds that the BOC has demonstrated that: (1) it satisfies the requirements for Track A or B entry;³ (2) it has *fully* implemented and *is currently providing* all of the items set forth in the competitive checklist;⁴ (3) the requested authorization will be carried out in accordance with Section 272;⁵ and (4) the BOC's entry is consistent with the public interest, convenience and necessity.⁶ Pursuant to the Act, the Commission must deny SWBT's Joint Application because it does not meet these four criteria.⁷ The Joint Application is deficient in a number of fundamental areas: (1) SWBT has not demonstrated that the local markets in Kansas and Oklahoma are irreversibly open to all modes of competition; (2) SWBT does not provide nondiscriminatory access to all UNEs, including its OSS, as required by checklist item (ii); and (3) SWBT's rates for unbundled network elements are not forward-looking and cost-based. Furthermore, commenters in this proceeding have raised various concerns with SWBT's performance and policies that must be resolved before SWBT obtains Section 271 authority.

A. The Local Markets In Kansas And Oklahoma Are Not Irreversibly Open To Competition

ALTS submits that SWBT does not face sufficient competition in Kansas and Oklahoma to satisfy the requirements of Section 271. The Department of Justice's ("DOJ's") comments clearly express doubt as to whether SWBT's markets are irreversibly open to all modes of competitive entry. The level of CLEC retail penetration in Oklahoma is only 70-80 percent of the levels in New York and Texas when those applications were filed, virtually all of the

² *Verizon-New York Order* ¶ 46, *SWBT-Texas Order* ¶ 46.

³ *See* 47 U.S.C. § 271(d)(3)(A).

⁴ *See id.*

⁵ *See id.* § 271(d)(3)(B).

⁶ *See id.* § 271(d)(3)(C).

facilities-based residential competition is from one cable provider, and only minimal DSL service is provided by CLECs.⁸ Even the Kansas Corporation Commission (“KCC”) expressed reservation about SWBT satisfying the requirements of Track A due to the minute amount of facilities-based competition in the Kansas residential market.⁹ As the DOJ notes, “[e]ssentially all CLEC residential service in Kansas is the resale of SBC service.”¹⁰ The KCC found that only five residential lines are served by facilities-based competitors and correctly characterizes this as a “de minimis” amount of facilities-based residential competition.¹¹ Surprisingly, the KCC found this sufficient for SWBT to satisfy the requirements of Track A. However, ALTS agrees with the DOJ that SWBT’s showing is insufficient to “justify a presumption that the Oklahoma and Kansas markets are fully open to ... competition for business and residential customers.”¹²

While the Commission has previously declined to rule on the issue of whether facilities-based competition must exist for both residential and business customers in order for a BOC to satisfy Track A, ALTS agrees with Sprint that such is the proper reading of the statute.¹³ The statute requires that competing services be provided either exclusively or predominantly over the competing carrier’s facilities and does not differentiate between residential and business services. Furthermore, there is no policy reason to ensure facilities-based competition for business customers but deny the benefits of such competition to residential customers. Thus, the Commission should determine that satisfaction of Track A requires more than a de minimis amount of facilities-based residential competition. While the Commission may choose not to apply a strict market share analysis in reviewing Section 271 applications, it should reject

⁷ *Verizon-New York Order* ¶ 18.

⁸ DOJ Evaluation at 4-6.

⁹ KCC Comments at 7; DOJ Evaluation at 7-10.

¹⁰ DOJ Evaluation at 8.

¹¹ KCC Comments at 6.

SWBT's Joint Application because the record in this proceeding shows insufficient competition exists in both Kansas and Oklahoma.

B. SWBT Has Not “Fully Implemented” the Competitive Checklist And Does Not Provide Nondiscriminatory Access To OSS Under Checklist Item (ii)

To show that it has “fully implemented” the competitive checklist under Section 271, the BOC must demonstrate that it is offering interconnection and access to network elements on a nondiscriminatory basis.¹⁴ The Commission has determined that to comply with this standard, for those functions that are analogous to the functions a BOC provides itself, the BOC must provide access to competing carriers in, “substantially the same manner” as it provides itself.¹⁵ The Commission has further specified that this standard requires a BOC to provide access that is equal to (*i.e.* substantially the same as) the level of access that the BOC provides itself, its customer or its affiliates, in terms of quality, accuracy, and timeliness.¹⁶ Further, for those functions that have no retail counterpart, the BOC must demonstrate that it provides access, which offers competitors a “meaningful opportunity to compete.”¹⁷

The Commission has found that promises of *future* performance have no probative value in demonstrating *present* compliance.¹⁸ To support its application, a BOC must submit actual evidence of present compliance, not prospective evidence that is contingent on future behavior.¹⁹ In its evaluation of past Section 271 applications, the Commission has mandated that a BOC demonstrate that it “is providing” each of the offerings enumerated in the 14-point competitive

¹² DOJ Evaluation at 10.

¹³ Sprint Comments at 12.

¹⁴ *Verizon-New York Order*, ¶ 44.

¹⁵ *Id.*

¹⁶ *Verizon-New York Order* (citing *Ameritech Michigan Section 271 Order*, 12 FCC Rcd at 20618-19).

¹⁷ *Id.*

¹⁸ *Verizon-New York Order* ¶ 37.

checklist codified in Section 271(c)(2)(B).²⁰ The Commission has found that in order to establish that a BOC “is providing” a checklist item, a BOC must demonstrate that it has a concrete and specific legal obligation to furnish the item upon request pursuant to a state-approved interconnection agreement or agreements that set forth prices and other terms and conditions for each checklist item, and that it is currently furnishing, or is ready to furnish, the checklist item in the quantities that competitors may reasonably demand and at an acceptable level of quality.²¹

To evaluate whether a BOC’s OSS functions are operationally ready, the Commission will review either data regarding commercial usage or provided by a third party that has conducted independent OSS testing. In this case, SWBT has not provided sufficient data from either source. In many areas, there have not been sufficient commercial volumes to measure SWBT’s performance under commercial conditions, and SWBT is the first BOC to file a 271 application without including independent third party data regarding its OSS testing. Although SWBT is following in Verizon’s footsteps in attempting to bootstrap its application by pointing to performance in another state, Verizon at least attempted to independently verify its OSS operations in its Massachusetts application. Here, SWBT merely asserts that its OSS are the same regionwide; therefore, its performance in Texas and the Commission’s review of its Texas application should dictate the outcome of this proceeding. SWBT claims the Telcordia independent test should suffice to demonstrate that its OSS in Kansas and Oklahoma satisfy Section 271. Even if SWBT’s OSS was identical regionwide, which is not the case as discussed

¹⁹ *Id.*

²⁰ See Application of BellSouth Corporation, et al. Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in South Carolina, Memorandum Opinion and Order, 13 FCC Rcd 539, ¶ 78 (1997) (citing Ameritech Michigan Section 271 Order ¶ 110).

²¹ See *id.*

below, the Telcordia test would not be fully convertible here because SWBT's legal obligations have changed through the Commission's *UNE Remand* and *Line Sharing Orders* since the Telcordia test was conducted. Therefore, many aspects of SWBT's OSS have not undergone any independent testing, and there is inadequate commercial data to show SWBT's conformance with the Commission's rules in Kansas and Oklahoma.

Moreover, the DOJ aptly questioned SWBT's characterization of its systems as being the "same" as those in Texas, questioning whether any or all of the following are truly the "same": software, employees, procedures.²² Several commenters further show that SWBT's OSS are clearly not identical throughout its region. For example, Sprint notes that Texas orders are processed through a center in Dallas, TX whereas Kansas and Oklahoma orders are processed through a center in St. Louis, MO. Because the data provided for Texas does not demonstrate the capabilities of the systems and personnel in St. Louis, the Commission should discount that data as irrelevant to this proceeding. Furthermore, many of the orders processed for Kansas and Oklahoma require manual intervention.²³ This fact alone highlights the disparities in processing between orders in those states and Texas, and this manual intervention emphasizes the need to evaluate the procedures and personnel in the St. Louis center where orders from Kansas and Oklahoma are processed.

The KCC's comments are replete with notices that no data or insufficient data was available to measure SWBT's performance and that the staff had concerns about SWBT's subpar performance.²⁴ Nonetheless, the KCC concluded that SWBT had satisfied the checklist, hoping

²² DOJ Evaluation at 32-36.

²³ Sprint Comments at 52.

²⁴ See, e.g., KCC Comments at 8 (no data reported for many measurements re: interconnection), 16 (SWBT missed for flow-through benchmark rate in 3 of 4 most recent months; no data available for Kansas re: jeopardy notices), 17-18 ("Staff's evaluation [of DSL provisioning] was hampered by low activity in Kansas;" "Commission is

in many areas to continue monitoring SWBT's performance to ensure improvements in the future.²⁵ In fact, the KCC notes its Staff's belief that "SWBT's parity performance will more closely align with the other states when Kansas order volumes increase."²⁶ ALTS submits that if SWBT cannot perform adequately with the current low volume of orders, it cannot be expected to improve performance with greater volumes. Moreover, the time to ensure improvements in performance is *before* SWBT obtains Section 271 authority, not afterward, because once the incentives of 271 are removed, SWBT will have no compulsion to improve its wholesale performance. Moreover, the statute requires BOCs to prove that their markets are open to competition *before* they are authorized to provide long distance services. In enacting the competitive checklist, Congress recognized that unless a BOC has *fully* complied with the checklist, competition in the local market would not occur.²⁷ SWBT must provide the Commission with "actual evidence demonstrating its present compliance with the statutory conditions for entry, instead of prospective evidence that is contingent on future behavior."²⁸ The Commission should not rely on the KCC's belief that SWBT's performance will improve in the future. SWBT must show current, not future, compliance. While any one of the subpar items identified in the KCC comments may not necessitate rejection of SWBT's application, in totality, they certainly show that SWBT has not demonstrated compliance with Section 271. SWBT should be required to refile its Joint Application when it has compiled and presented adequate data to support its assertions that its performance meets the checklist requirements.

concerned with SWBT's performance in this area and will continue to monitor it closely"), 18 (SWBT was not in parity for PM17-01 (billing completeness) for months July-September).

²⁵ KCC Comments at 12.

²⁶ *Id.* at 26.

²⁷ *Ameritech Michigan Section 271 Order* ¶ 18.

C. There is No Cost Justification For SWBT's Unreasonable UNE Rates in Kansas and Texas

The concerns raised by DOJ regarding SWBT's UNE prices in Kansas and Oklahoma are valid and must be resolved by the Commission in this proceeding. While the state commissions have the jurisdiction to establish rates for unbundled network elements, they must comply with the Act and the Commission's rules requiring those rates to be forward-looking and cost-based. As explained by the DOJ and other commenters in this proceeding, SWBT's rates were not developed using those principles. Furthermore, SWBT's rates in Kansas and Oklahoma are many times the rates for those same elements in Texas. While there may be cost justification for some variance in rates, such dramatic variances in SWBT's case are not likely to be cost justified.

The Commission must resolve the issues regarding SWBT's excessive recurring and non-recurring rates in this proceeding because rates that are not cost-based will continue to delay or impede competitive entry. This is very likely the case in Kansas and Oklahoma where facilities-based competition has not flourished, especially in the residential market. Since the KCC and OCC have approved these rates under questionable circumstances, the Commission is the last line of defense to ensuring that SWBT charges reasonable cost-based rates for UNEs. If the Commission grants the Joint Application under the current conditions, competition will continue to be thwarted.

D. The Record Demonstrates that SWBT's Performance is Deficient in Many Areas

The Commission must ensure the issues raised by CLECs in this proceeding are fully addressed by SWBT before it gains Section 271 authority in Kansas and Oklahoma. Once SWBT gains 271 authority, it will have no incentive to improve its performance on any of the measurements. If the Commission grants this Joint Application, it will dramatically lower the

bar for 271 relief and do a great disservice to consumers hoping to see the benefits of competition. SWBT has filed its Joint Application in two states that have very little competition. This is evidenced by the small number of customers served by facilities-based competitors as well as by the limited data SWBT is able to produce as evidence of its wholesale performance in those states. Because of this limitation, SWBT attempts to bootstrap its Joint Application by relying primarily on its performance in Texas and the Commission's review of its Texas application. The Commission should not accept SWBT's version of the facts and should give great weight to the issues described by the CLECs in this proceeding.

Both Focal and e.spire describe their frustrations in attempting to convert special access to EELs.²⁹ The Commission was clear that CLECs should be allowed to use the simple ASR process to avoid unnecessary cost and delay during the conversions, and by requiring the more cumbersome process, SWBT violates the Commission's *UNE Remand Order* and its *Supplemental Clarification Order*. The Commission recognized the importance of EELs in encouraging competition and they remain critical to CLECs using high-capacity facilities. ALTS urges the Commission to force SWBT to begin providing reasonable and nondiscriminatory access to EELs.

SWBT must provide CLECs with access to real-time accurate loop pre-qualification and loop qualification information. IP Communications comments describe SWBT's discriminatory practice of screening the amount of loop qualification data that will be provided to CLECs as well as the inaccuracy of data that is often provided.³⁰ The DOJ noted that there is very little DSL entry in Kansas and Oklahoma, and competition for those services will continue to be hampered if SWBT is not forced to provide accurate and complete information regarding loop make-up. By

²⁹ Focal Comments at 4-6 and e.spire Comments at 3-8.

providing inaccurate and partial information to CLECs, SWBT fails to provide nondiscriminatory access to CLECs in violation of Section 271.

The Commission must require BOCs to comply with their reciprocal compensation obligations in order to receive Section 271 authority. The OCC has found that ISP-bound traffic is subject to reciprocal compensation; however, SWBT continues to litigate the issue with each individual carrier and refuses to pay while the litigation is pending. ALTS agrees with e.spire that SWBT should be required to pay reciprocal compensation it owes for ISP-bound traffic, albeit under protest, before it may be granted Section 271 authority.³¹

III. CONCLUSION

For the foregoing reasons, ALTS urges the Commission to deny SWBT's Joint Application.

Respectfully submitted,

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³⁰ IP Communications Comments at 13.

³¹ e.spire Comments at 13.