Before the
PUBLIC UTILITY COMMISSION OF TEXAS

Investigation of Southwestern Bell Telephone Company's Entry into the InterLATA Telecommunications Market	)))	Project No. 16251

COMMENTS OF THE COMPETITIVE TELECOMMUNICATIONS ASSOCIATION

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The Competitive Telecommunications Association ("CompTel") hereby comments on the April 26, 1999, Memorandum of Understanding ("MOU") submitted to the Commission by Southwestern Bell Telephone Company (""SWBT") in the referenced proceeding, pursuant to the Commission's April 26 procedural order in this case.

CompTel first wishes to acknowledge the enormous efforts this Commission has made over the last three years to create the conditions necessary for local competition to develop. The Commission's efforts have led to what CompTel recognizes is significant progress by SWBT in the direction of compliance with the local competition provisions of the 1996 Telecommunications Act. The MOU reflects some of that progress, and many of its provisions are an improvement over what SWBT had been willing to do previously.

That being said, however, SWBT's performance still falls far short of what the 1996 Act requires, and thus this Commission is not in a position to approve SWBT's bid for interLATA entry under Section 271, 47 U.S.C. § 271. The Memorandum of Understanding still is but a list of promises from SWBT. Until SWBT fulfills those promises, it is premature for SWBT to seek the Commission's approval.

More fundamentally, given the significant amount of time and effort this Commission and the various parties have invested in trying to make it possible

for local competition to develop and flourish in Texas, it would be unfortunate for the Commission to rush to judgment as to whether the MOU provides even the *framework* for a later Section 271 application. None of the parties to this proceeding have had a realistic chance to analyze and comment on the proposed MOU. CompTel received a copy of the MOU by e-mail from SWBT mid-day on Monday April 26, and received the notice by facsimile from the Commission of the opportunity to comment at about the same time. With comments due to be filed mid-day on April 28, this left CompTel (and other parties) less than two days to review and comment on a lengthy and complex MOU. This is clearly far too little time to analyze the document, much less to prepare constructive comments on it.

Because of the shortness of time allowed, CompTel does not attempt to identify all the substantive and procedural defects in the MOU. Instead, we list the following problems as *examples* of serious issues in the MOU which require further comment and analysis before the Commission expresses a view on their sufficiency. This is by no means a complete list of such issue areas.

Network Elements: The MOU is filled with restrictions on the availability of particular types of network elements, of network elements provided in combination, and on network elements necessary to provide advanced services in competition with SWBT. The MOU is rife with discrimination -- on the basis of technology, customer class, and service, for example. The MOU also permits SWBT to deny to competitors the ability to obtain network elements combined with other elements after a certain time and subject to numerous arbitrary restrictions.

These conditions and restrictions are anticompetitive and contrary to the public interest. They also may conflict with the FCC's rules on combinations of elements. Because SWBT has chosen to prematurely submit its application, it does not have the benefit of knowing what those FCC rules will be.

SWBT completely overlooks the issue of nondiscriminatory access to network elements. For example, SWBT appears to expect that CLECs will use collocation to combine elements themselves in those cases where the MOU no longer requires SWBT to do the combining for CLECs. Even if it were lawful for SWBT to force CLECs, rather than SWBT, to do the combining, SWBT is to satisfy the Act's nondiscrimination requirements, it must make available to CLECs a nondiscriminatory method for combining network elements, such as the recent change process. 1/

None of these important issues have been explored, and they must be before Section 271 approval is possible. This Commission should insist that SWBT provide unrestricted access to network elements (whether combined in SWBT's network or not), subject to cost-based charges where it is necessary for SWBT to do work to combine them. Anything less would be to permit SWBT deliberately to thwart its competitors' ability to employ network elements in any combinations or configuration to provide any competing service. Restrictions such as those imposed in the MOU may fall particularly hard on smaller entrants, such as many CompTel members, who have less ability to substitute their own facilities for those of the

1/ See, e.g., Letter from Westel, CompTel, and Texaltel to Hon. Katherine D.

ILEC.

Collocation: SWBT promises to comply with the FCC's recent order on collocation, but many of the key details are left out or are confused. Prices are not established for true cageless collocation. In addition, SWBT has not identified the amount of security costs it claims are associated with providing cageless collocation. Further, this Commission has yet to determine how those costs will be recovered from CLECs "in a reasonable manner." 2/ Many of the other implementing details for collocation would be set forth in a tariff; yet neither the Commission nor the parties have that tariff language before it. Without that tariff, there is no way to judge the adequacy of SWBT's compliance with the Act and with the FCC's collocation order. It is clearly premature for the Commission to address SWBT's compliance with this checklist item.

Interconnection Agreement Conditions. SWBT's MOU undertakings are to be set forth in a "proposed interconnection agreement" that SWBT says would be available to all CLECs. The precise language of such an agreement is critical to any judgment that the interconnection agreement meets all of the competitive checklist requirements of Section 271. As SWBT makes clear in its MOU, it believes the agreement also would form the basis for a grant of a Section 271

Farroba, October 27, 1998, in Project No. 16251.

2/ In the Matter of Deployment of Wireline Services Offering Advanced Telecommunications Capability, First Report and Order and Further Notice of Proposed Rulemaking, CC Docket No. 98-147, FCC 99-48 (rel. March 31, 1999) ("FCC Collocation Order"), at para. 48.

application. Yet that agreement does not yet exist. 3/ The details of such an agreement are critical and must be subject to public comment and Commission review before any even preliminary positive statements can be made about SWBT's Section 271 showing.

SWBT also imposes several unreasonable and unlawful conditions on the proposed interconnection agreement. For example, the agreement lasts only one year (unless SWBT receives interLATA authority by January 2000). No competitor can build a business based on the terms of an interconnection agreement that could expire that quickly. This condition also places CLECs in an untenable position: if they oppose a SWBT Section 271 application, and are successful in doing so, they lose their interconnection agreement. If they do not oppose the application, they face premature SWBT Section 271 approval and interLATA entry without all the checklist conditions satisfied. The Commission should not allow SWBT to distort the Section 271 review process (and the local market) in this way. 4/

As another example, the proposed agreement would not be subject to Section 252(i) pick and choose rights. This is a blatantly unlawful restriction, which violates the Supreme Court's recent decision, which reinstated the FCC's interpretation of Section 252(i) as requiring ILECs to allow competitors to pick-and-choose from any interconnection agreements. 5/ As a practical matter, moreover,

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3/ SWBT states that the AT&T agreement forms the basis for the proposed interconnection agreement, but subject to numerous modifications that make it impossible to know what the proposed agreement would actually look like.

4/ AT&T Corp. v. Iowa Utilities Board, ___ U.S. ____; 119 S.Ct. 721 (1999).

5/ Id.

the absence of pick-and-choose rights has serious anticompetitive consequences: any CLEC that needs or desires to negotiate even one small provision that differs from the proposed agreement loses all the protections that supposedly were available to all competitors. Put differently, the agreement cannot be used to satisfy the checklist if it is not subject to pick and choose rights. 6/

SWBT also does not explain why the agreement should have a termination date 4 years hence, with the only promise made at that point being the willingness to renegotiate the agreement. The statutory rights under the checklist do not evaporate after four years. The MOU does not promise compliance beyond that point.

Operations Support Systems (OSS). There obviously is not adequate time to analyze the complex issue of OSS compliance by April 28, but a cursory review of the MOU shows that much has been left undone in this area. SWBT obviously has not yet done the real-world work it must do to show that its OSS satisfies the statutory requirements. Even SWBT acknowledges that it must still demonstrate "satisfactory completion of OSS testing." 7/

More importantly, there is still not sufficient market experience to show that SWBT can handle commercial-scale volumes of orders for unbundled loops, xDSL loops, extended link, or the network element platform (as just some examples). Moreover, even if the MOU were adequate to lay out a framework for

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6/ See 47 U.S.C. § 271(c)(2)(A) (requiring an RBOC to demonstrate that one or more interconnection agreements satisfy the specific checklist requirements).

7/ April 26, 1999, letter from Melanie S. Fannin, SWBT, to Hon. Katherine D.

OSS (which it is not), approving the MOU on this issue would be an empty gesture, since so much remains to be proven before actual Section 271 approval by this Commission is possible.

Performance Measures. This Commission has made substantial progress in coming up with performance standards and measures, as well as beginning the process of devising penalties for inadequate performance. A critical element of satisfying the Section 271 test, including the Department of Justice "irreversibly open to competition" test, is the adoption of a sound system of penalties that will change the RBOC's incentives post-interLATA entry enough to ensure that the RBOC will not "backslide" in its performance of its statutory obligations to CLECs.

The penalties contemplated by the MOU are not sufficiently serious to change SWBT's incentives to undermine its competitor's ability to provide good quality service after interLATA entry takes place. They also have been substantially weakened in the MOU. For example, inexplicably, SWBT does not plan to provide performance data on any measures adopted after January 1, 1999. As another example, SWBT will not pay penalties associated with failure to meet performance standards for CLECs that have not signed the proposed interconnection agreement.

The Commission should not adopt SWBT's proposal for guarding against backsliding.

Farroba (transmittal letter for MOU).

SBC Affiliate Issues. There is the possibility that SWBT (or a merged SBC/Ameritech) would attempt to establish an unregulated CLEC in order to avoid its market-opening obligations and to undermine competition. This issue should be more fully explored. For example, the Commission should consider whether to specify that any CLEC affiliate of SWBT will be considered subject to the same obligations as SWBT under the MOU and the proposed interconnection agreement. The SWBT CLEC affiliate is likely to function as SWBT's alter-ego, and thus should be subject to the obligations of SWBT under the agreement.

CONCLUSION

CompTel recognizes that SWBT has made significant progress toward satisfying the requirements of Section 271, thanks in part to the Commission's hard work to encourage that progress. However, the MOU consists largely of promises to comply with the Act and the competitive checklist requirements, rather than actual showing of proven compliance. The MOU also has obvious defects. More fundamentally, the parties have not been given an adequate opportunity to comment on the MOU. Thus, the Commission is not in a position to approve the MOU even as a framework for Section 271 compliance.

The Commission should afford the parties an extended opportunity to comment on the MOU, and should require SWBT to demonstrate actual satisfaction of the checklist items, not just to promise such compliance in the abstract, before indicating its approval of any Section 271 bid.

Respectfully submitted,

Carol Ann Bischoff
Executive Vice President
and General Counsel
Terry Monroe
Vice President, State Affairs
The Competitive Telecommunications
Association (CompTel)
1900 M Street, N.W., Suite 800
Washington, D.C. 20036
Phone: (202) 296-6650
Fax: (202) 296-7585
e-mail: tmonroe@comptel.org

Linda L. Oliver
Jennifer A. Purvis
Hogan & Hartson L.L.P.
555 Thirteenth Street, N.W.
Washington, D.C. 20004
Phone: (202) 637-5600
Fax: (202) 637-5910
e-mail: LLOLIVER@HHLAW.com
JPURVIS@HHLAW.com

Counsel for CompTel

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