



U.S. Department of Justice

Antitrust Division

*City Center Building
1401 H Street, NW
Washington, DC 20530*

June 13, 2000

Ex Parte Submission

Magalie Roman Salas, Esq.
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: Application by SBC Communications Inc. et al. Pursuant to Section 271 of the Telecommunications Act of 1996 To Provide In-Region, InterLATA Services in Texas, CC Docket No. 00-65.

Dear Ms. Salas:

SBC has now provided additional performance data which indicate significant recent improvement in its provisioning of unbundled loops for voice services and for DSL services. In light of this evidence of improved performance, the Department of Justice recommends approval of SBC's application to provide long distance service in Texas, subject to the important qualifications noted below.¹

¹ The Commission docketed SBC's second Texas application on April 6, 2000. Order, *In re: Application by SBC Communications Inc., Southwestern Bell Telephone Company, and 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. 00-4, 15 FCC Rcd 6604 (2000). SBC has augmented that application with additional performance data multiple times: Ex Parte Submission from Austin C. Schlick to Magalie Roman Salas, Secretary, Federal Communications Commission, CC Docket No. 00-65, at 1 (Apr. 21, 2000); Ex Parte Submission from Austin C. Schlick to Magalie Roman Salas, Secretary, Federal Communications Commission, CC Docket No. 00-65 (Apr. 25, 2000) ("SBC 4/25/00 Hot Cut Ex Parte"); Texas Aggregated and Disaggregated Performance Measurement Tracking/Chart Results for May 1999 Through April 2000 ("SBC April Performance Data"), attached to Reply Brief in Support of Supplemental Application of Southwestern Bell, *In re: Application by SBC Communications Inc. et al. Pursuant to Section 271 of the Telecommunications Act of 1996 To Provide In-Region, InterLATA Services in Texas*, CC Docket No. 00-

I. SBC's Provisioning of DSL-Capable Loops

The Department advised the Commission to deny SBC's first Texas application in part because SBC had not shown that it was providing nondiscriminatory treatment to competitors offering services based on unbundled digital subscriber line (DSL)-capable loops. The Department also noted significant deficiencies in the process by which SBC measured and reported its performance in this area.² SBC has subsequently addressed both of these deficiencies.

Performance Measurements

SBC, working with the Texas PUC, has significantly improved the process by which it measures and reports its performance in providing unbundled loops for DSL services. SBC is now measuring and reporting its return of firm order commitments for DSL loops; it has corrected deficiencies in its measurement of the interval for returning preordering loop

65 (May 19, 2000) ("SBC Reply Brief") as App. B, Vol. 1-2; Ex Parte Submission from Austin C. Schlick to Magalie Roman Salas, Secretary, Federal Communications Commission, CC Docket No. 00-65 (May 30, 2000) ("SBC 5/30/00 OSS/Hot Cut Ex Parte"); Ex Parte Submission from Austin C. Schlick to Magalie Roman Salas, Secretary, Federal Communications Commission, CC Docket No. 00-65 (June 6, 2000) ("SBC Hot Cut Ex Parte Presentation"). The Department again notes the Commission's previous indication "that a section 271 application, as originally filed, will include all of the factual evidence on which the applicant would have the Commission rely in making its findings thereon." Memorandum Opinion and Order, *In re: Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, To Provide In-Region, InterLATA Services In Michigan*, 12 FCC Rcd 20543 ¶¶ 49-50 (1997).

² Evaluation of the United States Department of Justice, *In re: Application by SBC Communications Inc., Southwestern Bell Telephone Company, And Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance for Provision of In-Region, InterLATA Services in Texas*, CC Docket No. 00-4, at 2-3, 10-12, 27 (Feb. 14, 2000) ("DOJ Texas I Evaluation"), available at <<http://www.usdoj.gov/atr/public/comments/sec271/sbc/4160.htm>>; Ex Parte Submission from Donald J. Russell, Chief, Telecommunications Task Force, Antitrust Division, Department of Justice, to Magalie Roman Salas, Secretary, Federal Communications Commission, CC Docket No. 00-4, at 2, 8-9 (Mar. 20, 2000) ("DOJ Texas I Ex Parte"), available at <<http://www.usdoj.gov/atr/public/comments/sec271/sbc/4370.pdf>>.

qualification data; and it has corrected systems problems that had resulted in the exclusion of substantial numbers of DSL orders from the database from which average installation intervals were determined.³ These improvements are sufficient to address concerns about the measurement of SBC's DSL performance in connection with this application.

In reaching that conclusion, however, we emphasize that additional performance measures and ongoing refinement of performance measurement processes are likely to be needed as new services and technologies are implemented. The Texas PUC is already considering these issues, and SBC has committed in this application to promptly institute performance measures regarding the provisioning of line sharing.⁴

³ Evaluation of the Texas Public Utilities Commission, *In re: Application by SBC Communications Inc. et al. Pursuant to Section 271 of the Telecommunications Act of 1996 To Provide In-Region, InterLATA Services in Texas*, CC Docket No. 00-65, at 27-29 (Apr. 26, 2000) ("Texas PUC Evaluation"); Supplemental Reply Affidavit of William R. Dysart ¶¶ 25, 34-35 ("SBC Dysart Reply Aff."), attached to SBC Reply Brief as App. A-4, Vol. 1, Tab 2.

⁴ SBC Dysart Reply Aff. ¶¶ 44-45. Line sharing as ordered by the Commission will permit CLECs to provide DSL service to SBC's voice customers by accessing the high frequency portion of their loop. See Third Report and Order, *In re: Deployment of Wireline Services Offering Advanced Telecommunications Capability*, and Fourth Report and Order, *In re: Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 14 FCC Rcd 20912 (1999), *recon. pending*, *United States Telecom Ass'n v. Federal Communications Comm'n*, No. 00-1012 (D.C. Cir. filed Jan. 18, 2000) ("*Line Sharing Order*"). SBC began providing line sharing on May 29, 2000. See SBC Reply Brief at 19.

Provisioning of Unbundled DSL-Capable Loops

The Department recommended denial of SBC's initial application in part because SBC had not shown nondiscriminatory performance in providing DSL-capable loops.⁵ The March and April 2000 performance data submitted by SBC indicate that SBC is now providing parity under virtually all measures relating to the provisioning of DSL loops. Further improvements in the preordering and ordering processes should result from the recent implementation of improved access to databases with loop qualification data and from Texas PUC-directed changes in the ordering process.⁶

⁵ See DOJ Texas I Evaluation at 17-23; DOJ Texas I Ex Parte at 2-3. Advanced services competitors in Texas currently use two types of unbundled loops: DSL loops (which are all copper) are preferred because they can be used to provide all forms of xDSL service; BRI loops (which may traverse repeaters or digital loop carrier ("DLC")) systems are sometimes used by CLECs to provide a slower speed IDSL service where DSL loops are not available. Declaration of David Rosenstein ¶ 30, attached to Supplemental Comments of Covad Communications Company, *In re: Application by SBC Communications Inc. et al. Pursuant to Section 271 of the Telecommunications Act of 1996 To Provide In-Region, InterLATA Services in Texas*, CC Docket No. 00-65 (Apr. 26, 2000) as Confidential Ex. 9. In April 2000, SBC installed 1445 DSL loops and 923 BRI loops. SBC April Performance Data, Measurement 58-09 ("Percent SWBT Caused Missed Due Dates") (DSL) at 271-No. 58c; *id.*, Measurement 58-04 ("Percent SWBT Caused Missed Due Dates") (BRI) at 271-No. 58b.

⁶ Texas PUC Evaluation at 26. One of the principal areas of concern to the Department was the high frequency of missed appointments for DSL loops as measured by Performance Measure 58. The percent of missed due dates for DSL loops fell from 15.5% in January 2000 to 7.7% in March 2000, and to 2.5% for April 2000. SBC April Performance Data, Measurement 58-09 ("Percent SWBT Caused Missed Due Dates") (DSL) at 271-No. 58-c. Similarly, the number of trouble reports within 30 days fell from 9% for DSL in January 2000 to 6.8% in March 2000, and to 4.5 % in April 2000, and the overall trouble report rate decreased for DSL from 6.3% in January 2000 to 3.3% in March 2000, and to 2.4% in April 2000. SBC April Performance Data, Measurement 59-08 ("Percent Trouble Reports on N,T,C Orders within 30 Days") (DSL) at 271-No. 59c; *id.*, Measurement 65-08 ("Trouble Report Rate-%") (DSL) at 271-No. 65c.

SBC's performance providing BRI loops has unfortunately lagged behind its much improved performance for DSL loops.⁷ SBC has made impressive progress in complying with the three day installation interval prescribed for BRI loops.⁸ Significant performance issues remain, however, regarding the number of troubles on BRI loops and the timeliness of repairing such troubles.⁹ These measures indicate that SBC's performance in providing BRI loops is not at parity when compared to SBC's retail ISDN service.

SBC explains these results for BRI loops by saying that the CLECs are using the BRI loop (which SBC uses for ISDN service) in order to provide IDSL service which makes the provisioning work more difficult to perform.¹⁰ SBC maintains that this and other technical difficulties associated with supporting IDSL, combined with the three day interval for installation, are responsible for the higher trouble report rate and the longer repair times than SBC experiences

⁷ Texas PUC Evaluation at 34.

⁸ SBC's average installation interval for BRI loops in April 2000 was 2.8 days, and 90.2% of BRI loops were installed within 3 days. This shows a substantial improvement from January 2000 when the average was 6.7 days. SBC April Performance Data, Measurement 55-03 ("Average Installation Interval-Days") (BRI) at 271-No. 55a; *id.*, Measurement 56-03 ("Percent Installed Within 'X' Days") at 271-No. 56a.

⁹ SBC Dysart Reply Aff. ¶ 59; SBC April Performance Data, Measurement 65-03 ("Trouble Report Rate-%") (BRI) at 271-No. 65b; *id.*, Measurement 67-03 ("Mean Time to Restore-Dispatch") (BRI) at 271-No. 67b; *id.*, Measurement 59-03 ("Percent Trouble Reports on N,T,C Orders within 30 Days") (BRI) at 271-No. 59b.

¹⁰ IDSL modems combine the three ISDN circuits into a single 144 kbs data stream, and in order to support this use of BRI loops, SBC's central office technicians must avoid using some incompatible slots with certain digital loop carriers. See Amended Supplemental Reply Affidavit of Carol Chapman ¶ 31 ("SBC Amended Chapman Reply Aff."), attached to Ex Parte Submission from Austin C. Schlick to Magalie Roman Salas, Secretary, Federal Communications Commission, CC Docket No. 00-65 (May 25, 2000) ("SBC Amended Reply Brief").

with its own ISDN service.¹¹ SBC, however, has committed to implementing solutions that should improve BRI performance. For example, as suggested by Rhythms Netconnections Inc., SBC is testing a new card for its digital loop carriers that will support IDSL.¹²

Because of the differences between the way BRI loops are provisioned for IDSL and the way those loops are provisioned for ISDN, differences in reported performance do not necessarily indicate discrimination. Although the BRI “trouble report” and “time to repair” performance data indicate poorer performance for CLECs’ IDSL loops than for SBC’s retail ISDN loops, SBC is installing BRI loops for CLECs more quickly than it installs either its own ISDN or DSL service.¹³ SBC maintains that it is inappropriate to compare loop quality measures when the prescribed installation intervals are substantially different.¹⁴ Moreover, it is difficult to determine whether the CLECs are denied a meaningful opportunity to compete if, as the performance reports indicate, a higher trouble rate is coupled with a shorter installation interval.¹⁵ Thus, as of today, the Department has concluded that SBC has achieved satisfactory overall performance providing loops for DSL competitors.

¹¹ SBC Dysart Reply Aff. ¶ 59.

¹² SBC Amended Chapman Reply Aff. ¶¶ 31, 33.

¹³ SBC Dysart Reply Aff. ¶ 51; Supplemental Joint Affidavit of Carol A. Chapman and William R. Dysart ¶¶ 43-49, attached to Ex Parte Submission from SBC Communications Inc. to Magalie Roman Salas, Secretary, Federal Communications Commission, CC Docket No. 00-4, at 2 (Apr. 5, 2000) (“SBC Texas II Application”) as Supp. App. Vol. D, Tab 1.

¹⁴ SBC Dysart Reply Aff. ¶ 59.

¹⁵ The Texas PUC, in its ongoing review of SBC’s DSL performance, will consider whether a somewhat longer interval is appropriate, and whether additional procedures such as joint testing would lead to improved performance for trouble reports and repair intervals. Texas PUC Evaluation at 34-35.

We emphasize, however, that future applications may require more than SBC has demonstrated in this application because of continuing developments in the market for advanced services. For example, the Texas PUC is currently conducting proceedings to implement line sharing.¹⁶ The Commission should, of course, carefully monitor SBC's compliance with the line sharing order given its great importance to the future development of competition for advanced services.¹⁷

Some CLECs object to the application based on concerns that SBC, through Project Pronto,¹⁸ is deploying digital loop carrier systems in remote terminals fed by fiber optic cables and

¹⁶ *Id.* at 35-36.

¹⁷ The Department does not agree with the suggestion that SBC's application here should be denied on the grounds that some issues relating to its implementation of the line sharing order have not been finally resolved. *See* Supplemental Comments of NorthPoint Communications, Inc., *In re: Application by SBC Communications Inc. et al. Pursuant to Section 271 of the Telecommunications Act of 1996 To Provide In-Region, InterLATA Services in Texas*, CC Docket No. 00-65, at 7-9 (Apr. 26, 2000); Supplemental Reply Comments of Covad Communications Company, *In re: Application by SBC Communications Inc. et al. Pursuant to Section 271 of the Telecommunications Act of 1996 To Provide In-Region, InterLATA Services in Texas*, CC Docket No. 00-65, at 3-6 (May 19, 2000); Supplemental Comments of Rhythms Netconnections Inc., *In re: Application by SBC Communications Inc. et al. Pursuant to Section 271 of the Telecommunications Act of 1996 To Provide In-Region, InterLATA Services in Texas*, CC Docket No. 00-65, at 3-7, 9 (Apr. 26, 2000) ("Rhythms Comments"). AT&T asserts a related concern that its ability to compete with SBC using UNE-P will be impaired if SBC is not required to permit DSL providers to access UNE-P loops for providing DSL service in conjunction with AT&T's voice service in the same manner that SBC's voice loops may be accessed for line sharing. Supplemental Reply Comments of AT&T Corp., *In re: Application by SBC Communications Inc. et al. Pursuant to Section 271 of the Telecommunications Act of 1996 To Provide In-Region, InterLATA Services in Texas*, CC Docket No. 00-65, at 8-9 (May 19, 2000) ("AT&T Reply Comments"). A prompt resolution of the issues surrounding AT&T's complaint is needed to prevent UNE-platform carriers from being at a competitive disadvantage to SBC.

¹⁸ Project Pronto is an SBC network upgrade that will employ fiber optic cable and remote terminals to provide DSL services to customers that are out of reach to central office digital subscriber line access multiplexers ("DSLAMs"). In support of this application, SBC represents that it will offer competitors nondiscriminatory access to the DSL facilities being deployed in its remote terminals. SBC

will not permit CLECs to line share the loops served by those remote terminals.¹⁹ SBC asserts that, subject to the Commission's approval, it will offer CLECs the opportunity to provide DSL service to its subscribers served by Project Pronto.²⁰ SBC has stated further that it also intends to offer access to these facilities so that CLECs will be able to use them to provide both voice and DSL service over a single line.²¹ The Department recognizes that important issues with regard to the architecture of Project Pronto are currently before the Commission in other proceedings. Given the large percentage of SBC's lines that will potentially be served by the facilities being deployed in Project Pronto, it is essential that competitors be provided nondiscriminatory access to these facilities if the market for advanced services is to remain open to competition.

II. SBC's Provisioning of "Hot Cuts"

The most recent performance data demonstrate significant improvement in SBC's hot cut provisioning, particularly in hot cuts provisioned via its coordinated hot cut ("CHC") process. There has also been steady improvement in SBC's alternative hot cut process, Frame Due Time ("FDT"), though performance under that process still shows significant defects. However, in our

Reply Brief at 26-27; *see also* Supplemental Comments of the Competitive Telecommunications Association, *In re: Application by SBC Communications Inc. et al. Pursuant to Section 271 of the Telecommunications Act of 1996 To Provide In-Region, InterLATA Services in Texas*, CC Docket No. 00-65, at 5-8 (Apr. 26, 2000).

¹⁹ Rhythms Comments at 9.

²⁰ Joint Supplemental Reply Affidavit of Michael C. Auinbauh and John P. Lube ¶¶ 28-35, attached to SBC Reply Brief as App. A-1, Vol. 1, Tab 2.

²¹ *See* SBC Reply Brief at 21-22.

view those defects would not prevent meaningful competition, and thus should not preclude approval of this application, if the Commission is able to reach certain conclusions, as explained below.

The Competitive Significance of Hot Cut UNE Loops

The availability of unbundled network elements is a basic component of the Telecommunications Act of 1996.²² The use of unbundled loops has been and continues to be an important means by which CLECs provide service to small and medium-sized business customers.²³ Well over 50 percent of the stand-alone loops CLECs purchase from SBC are hot cut loops.²⁴ Consequently, these loops must be provided with a minimum of end-user disruption if CLECs are to have a meaningful opportunity to enter the local market and compete with the incumbent provider.

²² 47 U.S.C. § 271(c)(2)(B)(ii); *id.* § 251(c)(3); *id.* § 252(d)(1); First Report and Order, *In re: Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket Nos. 96-98 and 95-185, 11 FCC Rcd 15499 ¶ 378 (1996) (“*Local Competition Order*”), *aff’d in part and vacated in part sub nom. Competitive Telecommunications Ass’n v. Federal Communications Comm’n*, 117 F.3d 1068 (8th Cir. 1997) and *Iowa Utilities Bd. v. Federal Communications Comm’n*, 120 F.3d 753 (8th Cir. 1997), *aff’d in part and remanded sub nom. AT&T v. Iowa Utils. Bd.*, 119 S. Ct. 721 (1999).

²³ See DOJ Texas I Evaluation at 27; Memorandum Opinion and Order, *In re: Application by New York Telephone Company (d/b/a Bell Atlantic - New York), Bell Atlantic Communications, Inc., NYNEX Long Distance Company, and Bell Atlantic Global Networks, Inc., for Authorization to Provide In-Region, InterLATA Services in New York*, 15 FCC Rcd 3953 ¶ 308 (1999) (“*FCC New York Order*”).

²⁴ Compare SBC April Performance Data, Measurements 59-01 and 59-02 (Total UNE loops -- 8.0 dB and 5.0 dB combined) (April) with Measurements 114-02 and 114-06 (Hot Cut UNE loops -- CHC and FDT combined) (April); SBC Hot Cut Ex Parte Presentation, Ex. 17.

The Available Performance Data

There are several important dimensions of hot cut provisioning performance. Among other things, the cut should be accomplished at the time scheduled, should be completed within the time allotted, and should result in working telephone service for the customer. Although each of these dimensions of performance is different, their effects may overlap. For example, a cut that is performed prior to the scheduled time (i.e., a premature cut) reflects a lack of timeliness in provisioning and also results in service disruption or outage to the end user customer.²⁵

SBC regularly reports, and has partially reconciled, performance data for the Texas PUC-approved performance measures. While these data cover all CLECs using hot cuts, they do not capture all provisioning outages.²⁶ In order to assess the overall outage rate, the Department has relied on the AT&T/SBC hot cut reconciliation data, which provide the only overall provisioning outage data available in this record but which unfortunately cover only a small subset of all hot

²⁵ *FCC New York Order* ¶ 301 n.959.

²⁶ *See* Texas PUC Evaluation at 16. Hot cut performance is currently assessed by Performance Measure 114, which tracks premature cuts, Interim Performance Measure 114.1, which tracks cutover duration (measuring all loops against a two-hour interval, with the cutover marked as ended when the central office wiring work is done), and Performance Measure 115, which tracks those cuts that begin late. The Texas PUC is revising these measures. *See* Amended Joint Supplemental Reply Affidavit of Brian D. Noland and William R. Dysart ¶ 45 (“SBC Amended Noland/Dysart Reply Aff.”), attached to SBC Amended Reply Brief. Performance Measure 114 will continue to track premature cuts. A new Performance Measure 115 will capture provisioning outages not currently captured in any other measure. Performance Measure 114.1 will be disaggregated so that loops associated with orders of 1-10 lines will be tracked against a one-hour interval, and loops associated with larger orders will be tracked against a longer time; also, the end-time for CHC cuts will include the period of time between when SBC completes the cut in its central office and when SBC notifies the CLEC that the cut is complete. To date, SBC has not been required to report this interval, and thus, has not been necessarily attuned to managing it; this revision to Performance Measure 114.1 will close an important gap in SBC’s Performance Measure 114.1 calculations. *See* DOJ Texas I Evaluation at 31-32 n.84.

cuts.²⁷ The record includes recent reconciled outage data for January, February, and March 2000 as well as April 2000 outage data, which SBC presents as the results of its most recent reconciliation with AT&T, although no joint affidavit has yet been signed.²⁸ We presume, in the absence of any evidence to the contrary at this time, that these data are reliable, but we note that they have not been attested to by AT&T, nor has any other CLEC had the opportunity to review and respond to the data.

SBC's Hot Cut Performance

SBC's recent performance data on the CHC outage, timeliness and installation trouble report rates indicate sufficient improvement that CLECs using this process have a meaningful opportunity to compete, in accordance with the standard articulated in the Commission's *New York Order*. SBC has represented to the Department that critical process improvements were put

²⁷ In addition to the AT&T/SBC reconciliation of hot cut provisioning outages, the Texas PUC requested other CLECs to reconcile their own hot cut data with SBC for specific performance measures. These reconciliations were useful not only for providing the most reliable data describing SBC's performance, but also for illuminating certain gaps in SBC's data collection processes. As a result SBC has been able to plan and implement improvements to its performance data collection and reporting. SBC Amended Noland/Dysart Reply Aff. ¶¶ 31-40 & Joint Supplemental Reply Affidavit of Brian D. Noland and William R. Dysart, Attach. G, H ("SBC Noland/Dysart Reply Aff."), attached to SBC Reply Brief as App. A-2, Vol. 1, Tab 1. The availability of reliable performance data is critical not only for demonstrating whether the local exchange market is currently open but also as a tool for monitoring and ensuring that the local market remains open even after the BOC has entered the long distance business. Thus, it is necessary that SBC routinely make both the raw data and the necessary personnel available to both CLECs and regulators.

²⁸ SBC Hot Cut Ex Parte Presentation, Confidential Ex. 9 to Confidential Ex. 16.

in place in March 2000, at both its order center and central office operations, and that these process changes resulted in the reported performance improvements.²⁹

The CHC outage data produced by SBC, reflecting outages due both to premature as well as to defective cuts, evidence significant improvement from February to April 2000. For March and April 2000, the aggregate outage rate is within the “less than 5 percent” level described in the Commission’s *New York Order*.³⁰ The duration of these March-April outages appears to have improved significantly as well.³¹ SBC performed its CHC hot cuts from February through April 2000 in a relatively timely manner, provisioning 93.86 percent of CHC loops on small-sized

²⁹ See also Supplemental Joint Affidavit of Candy R. Conway and William R. Dysart ¶¶ 4-5, attached to SBC Texas II Application as Supp. App. Vol. C, Tab 1 (referring to increased resources added to SBC’s Local Service and Local Operations Centers since January 2000).

³⁰ See Joint Affidavit of Mark Van De Water and Robert Royer, Confidential Attach. (“Royer/Van De Water Aff.”), attached to SBC 4/25/00 Hot Cut Ex Parte (presenting reconciled hot cut outage data for February 2000); SBC Noland/Dysart Reply Aff., Confidential Attach. C (presenting reconciled hot cut outage data for March 2000); SBC Hot Cut Ex Parte Presentation, Confidential Ex. 9 to Confidential Ex. 11 (presenting hot cut outage data for February through April 2000).

³¹ SBC Hot Cut Ex Parte Presentation, Confidential Ex. 12. This average outage duration is in addition to the one hour “allowed” for provisioning small-size loop orders, and appears to be a significant improvement over the average duration for the December 1999 through February 2000 outages of about one business day (excluding outages resulting from SOAC). Supplemental Joint Declaration of Sarah DeYoung and Mark Van De Water, Confidential Attach. G (“AT&T DeYoung/Van De Water Decl.”), attached to Supplemental Comments of AT&T Corp., *In re: Application by SBC Communications Inc. et al. Pursuant to Section 271 of the Telecommunications Act of 1996 To Provide In-Region, InterLATA Services in Texas*, CC Docket No. 00-65 (Apr. 26, 2000) (“AT&T Comments”) as Exh. A.

orders within one hour.³² In addition, CLECs submit trouble reports on fewer than two percent of hot cut loops provisioned using the CHC process.³³

SBC's provisioning performance using the FDT process is not as good as its most recent CHC performance. Of particular concern is the continuing high outage rate of 12.1 percent for orders from February through April 2000.³⁴ Although SBC's current performance reflects substantial improvement from the 20 percent FDT order outage rate presented in SBC's first Texas application,³⁵ SBC's FDT outage rate continues to be greater than that described in the Commission's *New York Order*, and these outages, however calculated, appear to last for a significant portion of the business day.³⁶ SBC performed its FDT hot cuts from February through April 2000 in a relatively timely manner, provisioning 95.1 percent of its FDT loops on small-

³² SBC Amended Noland/Dysart Reply Aff. ¶ 14 & Attach. B (showing reported-plus-reconciled data for February 2000 plus reported-unreconciled data for March and April 2000). SBC disaggregated the duration data for hot cut loops associated with orders of 1-10 lines and loops associated with larger orders and reported the smaller-size orders against a one-hour cutover standard.

³³ For February through April 2000, SBC received trouble reports within seven days of installation on an average of 1.52% of CHC-installed loops. *See* SBC Noland/Dysart Reply Aff., Attach. I (February through March 2000 data); SBC 5/30/00 OSS/Hot Cut Ex Parte, Tab 2 (April 2000 data).

³⁴ The February-April FDT line outage rate was 10.23%. These rates exclude February outages caused by the SOAC software problem. *See* Royer/Van De Water Aff., Confidential Attach. (February 2000 data); SBC Noland/Dysart Reply Aff., Confidential Attach. C (March 2000 data); SBC Hot Cut Ex Parte Presentation, Confidential Ex. 9 (February through April 2000 data).

³⁵ DOJ Texas I Evaluation at 34 (stating the FDT November/December 1999 order outage rate).

³⁶ *Compare* AT&T DeYoung/Van De Water Decl., Confidential Attach. G (outage duration data) *with* SBC Hot Cut Ex Parte Presentation, Confidential Ex. 15, 16 (outage duration data). These outage durations are in addition to the half-hour the AT&T/SBC reconciliation "allowed" for FDT provisioning.

sized orders within one hour.³⁷ CLECs submitted trouble reports on about two percent of the hot cut loops provisioned using the FDT process during this time period.³⁸

Looking at the performance data as a whole, we have concluded that the Commission reasonably could find that SBC's provisioning of hot cuts is acceptable, if it makes two subsidiary findings. First, the Commission should be assured that SBC's reported CHC outage data for April accurately reflect its performance. The April outage data were produced very late in the application period and are not accompanied by the normal reconciliation process attestations. Should the Commission choose to rely on these data, it should take the steps necessary to confirm their accuracy.

Second, the Commission should confirm that CLECs may, in fact, freely choose between the CHC and FDT hot cut processes. This issue is important because of the continuing deficiencies in performance under the FDT process. If CLECs as a practical matter were compelled to rely on the FDT process, their ability to compete effectively would be jeopardized. However, if CLECs may readily use the CHC process, and if SBC's performance using that process provides a meaningful opportunity to compete, then the availability of an alternative process, which may offer certain advantages to CLECs notwithstanding continuing performance shortcomings, should not preclude approval of the application.

³⁷ SBC Amended Noland/Dysart Reply Aff., Attach. B (including reconciled-plus-reported data for February, and reported-unreconciled data for March and April, for loops associated with orders of 1-10 lines).

³⁸ For February through April, CLECs submitted trouble reports within seven days of installation on 2.07% of their FDT-installed loops. *See* SBC Noland/Dysart Reply Aff., Attach. I (February through March 2000 data); SBC 5/30/00 OSS/Hot Cut Ex Parte, Tab 2 (April 2000 data).

CLECs in Texas are currently relying on both of these processes to have their hot cut loop orders provisioned, with CLECs increasingly relying on the FDT process. Indeed, SBC provisioned as many as 60 percent of hot cut loops using the FDT process in April 2000.³⁹ SBC has indicated that it “has in the past encouraged the use of FDT for those orders of 19 or less UNE loops,”⁴⁰ but it has told the Department that this policy was changed before the April 5 refiling of its Texas application and that CLECs know they are free to use either process.⁴¹ This policy change is not, however, clearly reflected in the current record.⁴²

³⁹ SBC Hot Cut Ex Parte Presentation, Ex. 17; *but see* SBC April Performance Data, Measurement 114 (“Percent of Premature Disconnects”), Measurement 114.1 (“Loop Disconnect/Cross Connect Interval-% within 120 Minutes”), and Measurement 115 (“Percent SWBT Caused Delayed Coordinated Cutovers”).

⁴⁰ SBC Amended Noland/Dysart Reply Aff. ¶ 54.

⁴¹ There is some suggestion on the record that SBC previously saw no need for a policy change. *Id.* (SBC “has always been clear that CLECs may freely opt to have all of their orders for less than 19 loops provisioned via FDT, or via the coordinated process.”); Supplemental Reply Affidavit of Candy Conway ¶ 43 (“SWBT will continue to provide CHC to any CLEC requesting this type of conversion.”). Some statements in the record suggest otherwise. Affidavit of Candy R. Conway ¶ 79, attached to Brief in Support of Application by SBC Communications, Inc., *In re: Application by SBC Communications Inc., Southwestern Bell Telephone Company, and 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. 00-4 (Jan. 10, 2000) as App. A, Vol. A-4, Tab 3. (“The CHC process is normally necessary only for larger size business customers ... FDT should be used for small business and residence end users.”); AT&T DeYoung/Van De Water Decl., Attach. D, E (correspondence between SBC Telecommunications Inc. and AT&T Corp. in which SBC encourages the use of FDT); E-mail from Bob Bannecker, Southwestern Bell Telephone Company, to Sarah DeYoung, AT&T Corp., May 26, 2000, attached to Ex Parte Submission by AT&T Corp. to Magalie Roman Salas, Secretary, Federal Communications Commission, CC Docket No. 00-65 (June 8, 2000) as Confidential Attach. 8 (addressing SBC’s ability to handle CHC orders).

⁴² Of continuing concern in this regard is the basis and justification of the additional charges that SBC imposes for small size CHC cuts. The structure of these charges itself suggests that its purpose is to push the CLECs to use FDT. SBC asserts that these charges are Texas PUC-approved, and that it refrains from assessing them on FDT cuts because it is a special discounted process. SBC Amended

The availability of the FDT process appears to be a positive development in hot cut provisioning because the FDT process does not require at-cut coordination between SBC and the CLEC and thus should require fewer resources of *both* parties. While SBC's current FDT performance is not yet at the level necessary to sustain the long-term development and maintenance of an open local exchange market on its own, continuing performance improvements for FDT⁴³ may make it a process with great potential for the efficient provisioning of small-size loop orders.

Creating performance measures for the FDT process with appropriate standards is critical to achieving this laudable goal. SBC's managers, like many at incumbent telephone service providers, strive to meet the performance requirements set for them. Those requirements, therefore, must be set to preserve the long-term viability of FDT as a meaningful entry and competitive opportunity for CLECs. The Texas PUC is currently revising its hot cut performance measures.⁴⁴ These anticipated improvements, in conjunction with the continuing capable

Noland/Dysart Reply Aff. ¶¶ 48-53. AT&T asserts that these charges have never been approved by the Texas PUC. Supplemental Joint Reply Declaration of Sarah DeYoung and Mark Van De Water ¶ 27, attached to AT&T Reply Comments as App. I. The charges appear to be significant in amount, and the record does not contain any justification of them as appropriately cost-based.

⁴³ As measured in rolling three-month averages, SBC's FDT provisioning has steadily improved: the December 1999 through February 2000 order outage rate was 16.05%; the January through March 2000 order outage rate was 14.95%; the February through April 2000 order outage rate was 12.1%. *See Royer/Van De Water Aff.*, Confidential Attach.; *SBC Noland/Dysart Reply Aff.*, Confidential Attach. C; *SBC Hot Cut Ex Parte Presentation*, Confidential Ex. 9.

⁴⁴ New Performance Measure 115 is intended to track provisioning outages for CHC and FDT that are not currently captured by the Texas performance measures. *See SBC Amended Noland/Dysart Reply Aff.* ¶ 45. Until the Texas PUC has finalized and implemented the new performance measure, including associated benchmarks, these outages will not result in any payments under the Performance Remedy Plan. Thus, there is no current incentive for SBC to maintain an adequate level of

oversight of the Texas PUC, are key to the Department's conclusion that SBC's current hot cut performance overall appears to be adequate.

III. UNE-Platform Issues

In evaluating SBC's first Texas application, the Department was unable to determine whether certain complaints about performance problems relating to the UNE-platform would impose a serious constraint on competition. For that reason, the Department recommended that the Commission reserve judgment on those issues for a subsequent re-application, in the belief that additional commercial experience might provide evidence clarifying the competitive significance of these issues.⁴⁵

The most recent signs are encouraging. Entry by CLECs using the UNE-platform has increased steadily since the time of our initial evaluation in February 2000. The number of platform lines SBC provisioned each month in Texas rose from approximately 23,000 platform lines in January 2000 to over 40,000 platform lines in March 2000.⁴⁶ Moreover, several of the CLECs providing service using the UNE platform are increasing the number of platform lines they order from SBC.⁴⁷ Importantly, two CLECs with plans to mass market UNE-platform based

provisioning quality for hot cuts processed using either the CHC or FDT processes.

⁴⁵ DOJ Texas I Evaluation at 49-53.

⁴⁶ See Supplemental Affidavit of John S. Habeeb, Attach. A, attached to SBC Texas II Application as Supp. App. Vol. A, Tab 1A; Supplemental Reply Affidavit of John S. Habeeb, Attach. A, attached to SBC Reply Brief as App. A-4, Vol. 1, Tab 3A.

⁴⁷ See Supplemental Reply Affidavit of Elizabeth A. Ham, Confidential Attach. D ("SBC Ham Reply Aff."), attached to SBC Reply Brief.

service are currently present in the Texas market. AT&T entered the local market using the platform in the second half of 1999 and has been steadily increasing the volume of UNE-platform based services it provides. In April 2000, WorldCom began selling local UNE-platform based service in Texas, although its current volumes are still low. In sum, Texas appears to be poised on the brink of significant UNE-platform based competition. We expect that CLEC UNE-platform orders will increase dramatically over the next few months as AT&T, WorldCom, and other competitors step up their marketing efforts.

Despite the current rate of growth in the market, there are some lingering doubts whether UNE-platform competition will be constrained in certain respects. First, the Department is concerned about the apparent difficulty CLECs have had integrating SBC's pre-order interfaces with SBC's ordering interface, difficulties that are exacerbated by the lack of a fully segmented, or parsed, customer service record. Integration of these interfaces is a necessary prerequisite for CLECs to process mass market volumes of UNE-platform orders.⁴⁸ SBC has recently taken some significant steps designed to alleviate the concerns related to pre-order and order integration.⁴⁹

⁴⁸ *FCC New York Order* ¶ 137.

⁴⁹ SBC's CLEC website now addresses pre-order and order integration issues. *See* SBC Ham Reply Aff., Attach. I-1. SBC has implemented Telcordia's recommended documentation changes relating to integration. Amended Supplemental Reply Affidavit of Elizabeth A. Ham ¶ 36 ("SBC Amended Ham Reply Aff."), attached to SBC Amended Reply Brief. SBC has said that it will provide CLECs with two weeks of consulting services from a third-party vendor. Supplemental Affidavit of Elizabeth A. Ham ¶ 15, attached to SBC Texas II Application as Supp. App. Vol. B, Tab 1. SBC is also planning to host an integration workshop on June 21, 2000. *Id.* ¶ 16. Most significantly, on May 27, 2000, SBC stopped requiring service addresses for orders to convert existing SBC local service to UNE-platform service. *Id.* ¶¶ 24-25 & Attach. I; SBC Amended Ham Reply Aff. ¶¶ 22-25.

Evidence of improvements from these changes should be closely evaluated by the Commission as such evidence is not available to the Department on the current record.

Second, the Department is concerned about the allegations regarding SBC's inability to provide nondiscriminatory access to updating the line information database ("LIDB")⁵⁰ in a timely and accurate manner.⁵¹ Although SBC has acknowledged the serious nature of this problem and states that it has been resolved,⁵² some evidence in the record suggests that this problem persists.⁵³ The Commission should assure itself that this problem has indeed been resolved.⁵⁴

⁵⁰ *FCC Local Competition Order* ¶ 484; Third Report and Order and Fourth Further Notice of Proposed Rulemaking, *In re: Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, 15 FCC Rcd 3696 ¶ 403 (1999), *recon. pending United Telecom Ass'n v. Federal Communications Comm'n*, No. 00-1015 (D.C. Cir. filed Jan. 19, 2000).

⁵¹ Joint Supplemental Reply Declaration of Terri McMillon, John Sivori & Sherry Lichtenberg ¶¶ 26-40 ("WorldCom McMillon, Sivori & Lichtenberg Reply Decl."), attached to Reply Comments of WorldCom, Inc., *In re: Application by SBC Communications Inc. et al. Pursuant to Section 271 of the Telecommunications Act of 1996 To Provide In-Region, InterLATA Services in Texas*, CC Docket No. 00-65 (May 19, 2000) (incorrect intraLATA and/or interLATA PIC on 15-70% of records sampled).

⁵² SBC Amended Noland/Dysart Reply Aff. ¶¶ 87-92.

⁵³ WorldCom McMillon, Sivori & Lichtenberg Reply Decl. ¶¶ 26-40. Ex Parte Submission from Keith L. Seat, Senior Counsel, WorldCom, Inc., to Magalie Roman Salas, Secretary, Federal Communications Commission, CC Docket No. 00-65, at 7 (June 9, 2000).

⁵⁴ The Department also notes two recent disturbing allegations regarding limitations on the availability of the UNE-platform to SBC's competitors, which cannot be resolved based on information currently in the record. First, "fiber-to-the-curb" lines originating from a central office in Richardson, Texas are allegedly not available as a UNE-platform, only as resale. Joint Supplemental Reply Declaration of Julie S. Chambers and Sarah DeYoung ¶¶ 55-62 & Attach. 9, attached to AT&T Reply Comments as Exh. J. Second, Global Crossings alleges that it cannot reach an agreement with SBC about converting resale customers in Texas to the UNE-platform. Reply Affidavit of Christopher E. Poynter ¶¶ 1-4, attached to Supplemental Reply Comments of Global Crossings, *In re: Application by SBC Communications Inc. et al. Pursuant to Section 271 of the Telecommunications Act of 1996 To Provide In-Region, InterLATA Services in Texas*, CC Docket No. 00-65 (May 19, 2000).

Conclusion

SBC has provided additional data indicating significantly improved performance in providing DSL loops and hot cuts. If the Commission concludes that the recent hot cut performance data accurately reflect SBC's performance and that CLECs may freely choose between the CHC hot cut process and the FDT hot cut process, it should approve this application. The Commission should also satisfy itself that adequate mechanisms exist to resolve emerging issues that will affect competition, such as DSL line sharing and Project Pronto. The Department requests that a copy of this correspondence be placed in the record of this proceeding.

Sincerely,

/s/

Donald J. Russell
Chief
Telecommunications Task Force
Antitrust Division