

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20552

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of

The Development of a National Framework
to Detect and Deter Backsliding to Ensure
Continued Bell Operating Company
Compliance with Section 271 of the
Communications Act Once In-region
InterLATA Relief is Obtained

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RM 9474

**SBC COMMUNICATIONS INC.'S INITIAL COMMENTS IN RESPONSE TO
ALLEGIANCE TELCOM, INC.'S
PETITION FOR EXPEDITED RULEMAKING**

SBC Communications Inc. ("SBC") respectfully files these comments in response to the Allegiance Telecom, Inc.'s "Petition for Expedited Rulemaking," filed on February 1, 1999. These comments are submitted on behalf of SBC and its local-exchange-carrier subsidiaries Nevada Bell ("NB"), Pacific Bell ("PB"), The Southern New England Telephone Company ("SNET"), and Southwestern Bell Telephone Company ("SWBT"), collectively referred to as "SBC-LECs."

SUMMARY STATEMENT

In a word, Allegiance's Petition is unnecessary. What's more it is unwise. With respect to Allegiance's request for performance measurements, Allegiance chooses to ignore the significant amount of work done in this arena on the state level. As development of these measurements is best left to negotiations at the state level, SBC submits that rulemaking is inappropriate. With respect to Allegiance's request for new complaint procedures to handle § 271 non-compliance complaints, Allegiance ignores the work of the Commission over the last two years in developing new rules that are equally applicable to those kinds of complaints. With respect to Allegiance's request for additional § 271 non-compliance penalties, Allegiance chooses to ignore the express intent of Congress. Congress bestowed specific options on the Commission to handle § 271 non-compliance. To add to these options — as Allegiance seeks to do — is to run counter to the express intent of the statute. The Commission has sufficient

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authority and power to correct non-compliance and is not served in trying to divine in advance of the facts how and under what circumstances those powers might be exercised.

RESPONSE

In its Petition for Expedited Rulemaking ("Petition"), Allegiance Telecom, Inc. ("Allegiance") seeks to have the Commission convene a rulemaking proceeding for the purpose of establishing national standards for § 271 compliance, creation of a § 271 complaint procedure, and approval of a three-tier regime of remedies for non-compliance. Convocation of such a proceeding would be an utter waste of the Commission's time and energies. Quite simply, a rulemaking proceeding is not needed.

A. In light of the activity at the state level, as well as the work of the Department of Justice, national performance standards are unnecessary and create an impediment to negotiated contracts, which incorporate local conditions and concerns.

Performance standards or measurements have been negotiated between ILECs and CLECs as part of the § 251 interconnection agreement process. For example, SWBT has negotiated 57 interconnection agreements in Texas. All but four of those agreements provide for liquidated damages for SWBT's failure to meet certain specified criteria aimed at assessing parity with SWBT's retail operations. What's more, all 57 agreements provide for dispute resolution, allowing the opportunity for quick and inexpensive resolution of disputes. For its part, PB has negotiated 49 interconnection agreements, only ten of which don't have liquidated damages provisions. All 49 of those agreements have alternative dispute resolution provisions, specifically binding commercial arbitration.

Under the auspices of state commissions, both SWBT and PB have participated in developing performance measurements through negotiations. In Texas, SWBT has implemented a set of more than 100 performance measurements with more than 1,500 sub-measurements. SWBT has submitted this set of performance measurements to the Public Utility Commission of Texas for approval and will submit it to the Arkansas, Kansas, Missouri, and Oklahoma commissions, as well.

Similar results have been achieved in California and Nevada. As a result of an ILEC-CLEC collaborative process, PB has agreed to a set of 42 performance measurements with more than 1,400 sub-measurements. Approval of this collaborative plan is pending with the California Public Utilities Commission. In Nevada, hearings were held on the same measurement plan submitted to the California commission. Many of the CLECs that participated in the California collaborative process also participated in the Nevada hearings. As a result of those hearings, the Nevada state commission and the participating CLECs agreed to the California performance measurements.

In the case of the SBC-LECs, SBC has also negotiated a set of 66 performance measurements with the Department of Justice (DOJ). In short, there are plenty of agreed-to performance measurements that will assess the SBC-LECs' post-271-approval performance.

The drafters of the Federal Telecommunications Act of 1996 envisioned state-by-state approval of interconnection agreements. Interconnection is essentially an intrastate matter subject to the jurisdiction of the state commissions. While interstate issues are implicated by virtue of the benefits given to BOCs for meeting the § 271 checklist, development of these performance measurements is best left at the state level. State commissions are uniquely situated to evaluate local conditions. Putting aside the issue of the Commission's authority to promulgate national standards, the Commission's intrusion into this arena would be unwise. Among other things, such intrusion would derail efforts to reach voluntary agreement at the local level.

In spite of the progress made through negotiations, Allegiance states that, "[w]ithout continued monitoring by the Commission," BOC compliance with § 271 will deteriorate into "'helter skelter [sic]' processes."¹ There is no basis for this assertion. If the DOJ and the individual state commissions were not enough, the Commission can count on each and every CLEC to monitor BOC compliance. In part as a result of the monetary incentive created by the liquidated-damages provisions of their interconnection agreements, CLECs are already

¹ Petition, p. iii.

monitoring compliance. Indeed, as SWBT and PB will publish their post-271-approval performance measurements on an Internet website, monitoring will be made even easier for the DOJ, the state commissions, and the CLECs.

Here, SBC is not suggesting that the Commission is without authority to determine whether a BOC "has ceased to meet any of the conditions required for [271] approval."² Rather, SBC seeks to emphasize that there is a significant distinction between failing to meet a performance criterion or two with a particular CLEC — a dispute — and ceasing to meet the conditions for 271 approval — non-compliance. Even with the best of intentions, disputes will arise between ILECs and CLECs over performance. On their own, these individual disputes do not rise to the level of non-compliance. These disputes should be handled on the local level through the dispute resolution process and/or, if appropriate, through the state commissions. SBC anticipates that the dispute resolution process will obviate the need for a § 271(d)(6)(A) proceeding. In other words, resolution of these disputes, with their attendant liquidated damages and/or state-commission penalties, should adequately address the concerns raised by Allegiance.

In its Petition, Allegiance implies that, having been able to determine whether a BOC was in compliance with the § 271 checklist for purposes of approving interLATA relief, the Commission will suddenly be rendered unable to determine whether a BOC is still in compliance after granting interLATA relief. This is preposterous. A rulemaking proceeding and attendant guidelines are unnecessary because the Commission will be fully capable of determining whether a BOC is or is not in compliance. If this were not the case, how could it have granted relief in the first place?

This is equally true of the state commissions. Before interLATA relief is granted, the Commission is directed to consult with the relevant state commissions to verify compliance under § 271(c).³ Thus, before § 271 relief is granted, the state commission will have been able to determine compliance, as well. There is no reason to believe that, absent national guidelines,

² 47 U.S.C. § 271(d)(6)(A).

³ 47 U.S.C. § 271(d)(2)(B).

state commissions will be any less competent to assess compliance with § 271(c) after interLATA relief is granted than before.

In summary, the interconnection negotiations between ILECs and CLECs and negotiations under the auspices of the state commissions in the SBC-LECs' eight-state area have produced and are producing appropriate and sufficient performance measurements. These performance measurements are further enhanced by the agreements reached with the DOJ. By virtue of both liquidated-damages provisions and state penalties, these measurements are sufficient to address concerns about access to the local network and parity with the ILECs' retail operations. What's more, they obviate the need for national standards. Disputes concerning adherence to these measurements should be resolved at the local level. The Commission should not confuse disputes with non-compliance. SBC anticipates that resolution of these disputes should prevent questions of non-compliance with § 271.

B. With respect to any allegations of non-compliance with § 271, the Commission has sufficient procedures in place to address any complaints.

Allegiance petitions the Commission to establish a new § 271 complaint procedure with a "Rocket-Docket-like forum" available to CLECs and with a formal consultative role for the DOJ.⁴ Again, Allegiance's request is unnecessary. Recently, the Commission instigated new complaint rules to address the requirements of the Telecommunications Act of 1996.⁵ These new complaint rules are applicable to § 271 complaints.⁶ Moreover, the benefits of the Accelerated Docket are also available to CLECs or others with § 271 non-compliance allegations. The Accelerated Docket affords Allegiance and the other CLECs the "Rocket-Docket-like" forum requested in the Petition. While SBC would have preferred changes to the

⁴ Petition, p. 23.

⁵ *In the Matter of Implementation of the Telecommunications Act of 1996; Amendment of Rules Governing Procedures to be Followed When Formal Complaints are Filed Against Common Carriers, Report and Order*, CC Docket No. 96-238, FCC 97-396, 12 FCC Rcd 22497 (1997) (First Report & Order); *In the Matter of Implementation of the Telecommunications Act of 1996; Amendment of Rules Governing Procedures to be Followed When Formal Complaints are Filed Against Common Carriers, Second Report and Order*, CC Docket No. 96-238, FCC 98-154 (1998).

⁶ First Report & Order, ¶ 3.

new procedural rules, SBC does not believe that sufficient time has passed or that sufficient experience has been gained with these rules to suggest that they are inappropriate or inadequate for the purposes of addressing § 271(d) allegations. Allegiance has not made a case that these rules need further retooling for assessing non-compliance with § 271.

C. Section 271(d) already provides the Commission with specific options for responding to a determination of non-compliance and, therefore, additional options are unnecessary and in violation of the expressed intent of Congress.

In drafting § 271, the Congress set out three specific options for the Commission upon a determination that a BOC is no longer in compliance:

If at any time after the approval of an application under paragraph (3), the Commission determines that a Bell operating company has ceased to meet any of the conditions required for such approval, the Commission may, after notice and opportunity for a hearing —

- (i) issue an order to such company to correct the deficiency;
- (ii) impose a penalty on such company pursuant to title V; or
- (iii) suspend or revoke such approval.⁷

Congress determined that this array of options is sufficient to meet any determination of non-compliance. SBC submits that the question of whether and which of these options the Commission should employ is a matter of a case-by-case determination and cannot be set out in advance of the facts. Insofar as Allegiance or others seek to expand on the three options, its request would be contrary to the express intent of Congress. For example, Allegiance's suggestion that the Commission adopt the so-called New York approach and assess penalties in the form of reduced rates would go beyond the express authority granted to the Commission under the Communications Act.

It is unwise, as well as unnecessary, for the Commission to articulate in advance what the Commission might do in any particular case. The Commission has been granted specific authority and powers to correct non-compliance with § 271. How the Commission exercises that

⁷ 47 U.S.C. § 271(d)(6)(A).

authority should be decided on a case-by-case basis. SBC suspects that, absent extremely unusual circumstances, the Commission will be able to correct most determinations of non-compliance with nothing more than an order. Nothing can be gained by opening this issue to the rulemaking process.

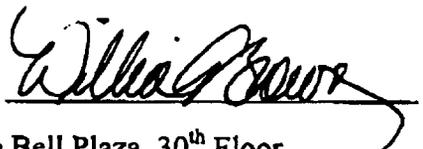
CONCLUSION

The simple and straightforward response to this Petition is that the requested rulemaking is unnecessary and unwise and that the Petition should be denied for the reasons stated above.

Respectfully submitted,

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