ORIGINAL

EX PARTE OR LATE FILED

DAVIS WEBER & EDWARDS P.C.

SIDNEY DAVIS
JAY E. GERBER
STEVEN M. EDWARDS
THOMAS J. SWEENEY, III
HOWARD WEBER
GEORGE F. HRITZ
JAMES G. SZYMANSKI
MORRIS WAISBROT
JOHN A. REDMON
DAVID DUNN
CYNTHIA A. FEIGIN
DENNIS H. TRACEY, III
WILLIAM F. HAIGNEY
DAVID F. WERTHEIMER
GEORGE A. SALTER
LYNDON M. TRETTER
SUSAN C. COCKFIELD
JOHN HOUSTON POPE

100 PARK AVENUE
NEW YORK, N.Y. 10017
(212) 685-8000
TELECOPIER: (212) 916-7200

WRITER'S E-MAIL ADDRESS:
DWERTHEIMER@DWELAW.COM

BRISCOE R. SMITH
JAMES C. HANSEN
R. JOHN COOPER
DONALD B. DILLPORT
KATHRYN L. GOETZ
FRANK T. SPANO
NORMA B. LEVY

COUNSEL

ONE BISCAYNE TOWER, SUITE 15
TWO SOUTH BISCAYNE
BOULEVARD
MIAMI, FLORIDA 33131
(305) 375-8400
TELECOPIER (305) 372-8921

WRITER'S DIRECT DIAL:
(212) 916-7235

March 13, 2000

RECEIVED
MAR 13 2000
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Ex Parte Submission

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

Re: Application by SWBT for Authorization To Provide In-Region, InterLATA Services in Texas, CC Docket No. 00-4

Dear Ms. Salas:

On behalf of our client, AT&T, we are writing in response to the recent March 2, 2000 ex parte filing by Southwestern Bell Telephone Company ("SWBT") in which SWBT (a) acknowledged that its previously filed December and January hot cut performance data was materially inaccurate and (b) submitted restated December and January performance data under entirely new measures.[1] For the reasons discussed below, the Commission should reject SWBT's newly proffered performance data and conclude that SWBT has failed to demonstrate compliance with its statutory obligations.

A. SWBT's Continuous Submission of New Performance Data Under New Performance Measures is Improper

Notwithstanding the Commission's procedural rule 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," Bell Atlantic ¶ 34,[2]

[1] Because SWBT failed to post its March 2 ex parte submission on its website by the time AT&T was preparing its March 6 hot cut-related ex parte filing, AT&T was unable to address SWBT's new disclosures in its prior filing.

[2] In the Matter of Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in the State of

No. of Copies rec'd 0+2
List ABCDE

SWBT has submitted a dizzying array of ex partes in this proceeding, totaling many thousands of pages. SWBT's latest hot cut ex parte represents its third supplementation of the hot cut performance data on which it relies in seeking the Commission's approval of its Section 271 Application. In contrast to the ordered procedures called for by the Commission's existing rules and orders governing Section 271 applications, the "rolling evidentiary record" that exists in practice denies to interested parties a meaningful opportunity to comment and prevents the Commission from conducting a thorough and careful evaluation of the record, as explained below. See DOJ Eval. at 3 (new data submitted post-filing should not be considered "[b]ecause of the limitations of time and information, and because of the critical need to protect the fairness and efficacy of the Commission's process").

SWBT's initial Application relied on August to October CHC hot cut data, which it quickly brushed aside in favor of December data that was included in a January 21 ex parte. The January 21 ex parte represented *the first time* that SWBT reported any data on (among other things) its FDT hot cut process, the only hot cut process in Texas that will support commercial volumes (and, even then, failed to include FDT data under PMs 114 and 115). SWBT supplemented its hot cut data again in a February 25 ex parte, this time submitting January performance data, and including, *for the first time*, FDT data under PMs 114 and 115. After discovering (perhaps due to objections raised by AT&T) that its previously submitted December and January hot cut data was materially inaccurate -- and thus could not support its Application -- SWBT has now filed yet another set of hot cut data, which it claims corrects its previously submitted data; and provides, *for the first time*, December data on FDT hot cuts under PM 114 and 115, and a disaggregation of its loop cutover performance by order size.

SWBT's never-ending restatement of its data threatens both the integrity and fairness of the Commission's 271 process. First, none of SWBT's new data has been subject to any discovery or data reconciliation process in which the accuracy of the data could be examined. With respect to all of the restated December and January data that SWBT relies on, SWBT has not revealed the carrier-specific data that underlies its aggregate CLEC data, much less provided the raw data that it has relied upon. Thus, there is no way to determine if SWBT's restated data is any more accurate than its prior, admittedly flawed data. The Commission could not possibly rely on SWBT's restated data to support any findings without making subsidiary findings that the data was accurate -- a conclusion that is simply impossible on the current record. Moreover, given the numerous errors that AT&T's prior data reconciliation efforts with SWBT uncovered as well as the issues raised with respect to the reliability of its latest submission (discussed below), it is likely that *none* of SWBT's August to January hot cut data is accurate.[3] Second, SWBT's continuous post-filing submissions deprive commenters of a

---

New York, CC Docket No. 99-295, Memorandum Opinion and Order, FCC 99-285 (rel. Dec. 22, 1999)(hereafter "Bell Atlantic").

[3] Notably, SWBT has shown a reluctance to proceed with the PPIG task force's reconciliation of SWBT-caused outages on AT&T's FDT and CHC hot cuts, claiming a variety of reasons (e.g., lack of available resources, personnel vacations, etc.). As a result, not only have the outage rates on AT&T's November and December CHC hot cuts not been reconciled, but no progress has been made to reconcile outages on AT&T's January and February FDT and CHC

fair opportunity to address SWBT's Application and thus raise substantial due process concerns. By continually changing the data and the measures it relies upon to support its Application, SWBT has effectively forced commenters to respond to a moving target -- a difficult prospect under any circumstances, but one which is especially troubling here, given the Commission's rigorous comment schedule, and the fact that two of SWBT's three supplemental hot cut data submissions were filed after reply comments were due.

B. SWBT's Restated December and January Performance Data Is Not Reliable

The only "evidentiary value" of SWBT's March 2 ex parte submission is SWBT's admissions that its previously filed December and January hot cut performance data is wrong. These admissions merely underscore that, as the Department of Justice and others have demonstrated, SWBT's data is wholly unreliable. Indeed, in the five months between August and December, SWBT has never correctly reported AT&T's hot cut performance data.[4] Moreover, even before SWBT disclosed its errors, AT&T showed in its Reply Comments that SWBT's reported December performance data was wrong.[5] What is remarkable, however, is that SWBT now asks the Commission to believe, based on conclusory assertions contained in an unsworn submission, that SWBT has corrected the flaws in its data collection process and that, while its January 21 and February 25 ex parte data submissions contained errors, its restated December and January performance data is accurate.

There is no reason to accept SWBT's latest claim of data integrity. Despite the sworn statements that accompanied the January 21 ex parte, SWBT now admits that its December (and January) hot cut performance data was "not accurately stated." That is an understatement. According to SWBT's restated December data, its prior reported December volume figures for CHC and FDT loop cuts were understated by 40% and 20%, respectively. Obviously, the magnitude of these errors raises serious questions concerning SWBT's commitment to ensuring the accuracy of the performance data on which it asks the Commission to rely.

Furthermore, SWBT's latest submission, on its face, raises substantial concern over the accuracy of its restated December and January data. These concerns include the following:

---

hot cuts.

[4] See Declaration of Sarah DeYoung, Exhibit D to the Comments of AT&T Corp. in Opposition to Southwestern Bell Telephone Company's Section 271 Application for Texas ("UNE-L Decl.") ¶¶ 209-42; Reply Declaration of Sarah DeYoung on behalf of AT&T Corporation, Exhibit P to the Reply Comments of AT&T Corp. in Opposition to Southwestern Bell Telephone Company's Section 271 Application for Texas ("UNE-L Reply Decl.") ¶¶ 68-73; AT&T March 6, 2000 ex parte submission.

[5] UNE-L Reply Decl. ¶¶ 62-74. Significantly, SWBT's admission further supports AT&T's prior showing that the PPIG task force had not reconciled the November and December outage rate for AT&T's CHC hot cuts due to AT&T's concern that SWBT's loop and order volume counts were inaccurate. Id. ¶¶ 25 n.21, 71.

• SWBT now claims that a software programming error caused its systems to understate the total volume of FDT and CHC hot cuts because its systems only counted the first two lines on a UNE loop order. However, while the alleged programming error might explain differences in reported percentages (due to a change in volume), it does not explain why SWBT's restated data now reports, in some instances, a lower number of delayed loop cuts. For example, while reporting in its February 25 ex parte that there were 41 delayed FDT cut starts (under PM 115[6]) in January, SWBT now claims that there were really only 31 delayed cuts.[7] Surely a software error that results in an increase in the number of loops measured cannot explain a decrease in the number of reported delayed cut starts.

• SWBT's January 21 ex parte data on PM 114.1 reported exclusions for so-called "CLEC-Caused Misses" which, AT&T explained, were unwarranted.[8] SWBT's latest restated data now includes exclusions with a different title -- "Customer Caused Misses"-- which SWBT does not even attempt to define and is, in any event, no more justified under the business rules for PM 114.1 than the previously described CLEC-Caused Misses.

• Even assuming "CLEC-Caused Misses" are the same as "Customer Caused Misses", SWBT's restated December data substantially reduced the number of such misses previously reported, another fact that cannot be explained by the alleged software error that SWBT maintains only accounted for an understatement in the number of loops recorded.[9]

---

[6] In its latest submission, SWBT misleadingly describes PM 115 as "SWBT Caused Delayed" cuts, which suggests that PM 115 measures the length of the loop cutover. In fact, PM 115 captures only those loop cuts where SWBT delayed commencing the cut. It does not capture the length of time required to complete the cut, so it does not, in fact, capture "delayed cuts." UNE-L Decl. ¶¶ 131, 248; UNE-L Reply Decl. ¶ 57.

[7] The figures set forth above for delayed FDT cut starts for January were derived by comparing the percentage of delayed cuts starts (60 minutes) reported in SWBT's February 25 ex parte (i.e., 3.2% of 1,280 = 41 delayed cut starts) with the similar performance category reported in SWBT's March 2 ex parte, which was calculated by subtracting from the reported total number of FDT cuts completed, the number of FDT cuts timely started within 60 minutes (i.e., 1293 - 1262 = 31 delayed cut starts).

[8] See UNE-L Reply Decl. ¶ 37 n.26.

[9] For example, whereas SWBT's initial CHC December data reflected approximately 62 excluded "misses" for cutovers completed in 1 hour and 34 excluded "misses" for cutovers completed in 2 hours, its restated December data reflects no exclusion of "misses" for either interval. Although not explicitly stated in its January 21 ex parte submission, the conclusion that SWBT counted 62 excluded misses for cutovers completed in 1 hour in its initial December data is derived as follows: SWBT reported in its initial December data that it had completed 1055 CHC loop cuts within 1 hour, which SWBT claimed represented 86.3% of all CHC loop cuts after excluding CLEC-caused misses. Based on those figures, the total volume of CHC loop cuts was 1,222 (i.e., 1055/.863) and, by comparing that 1,222 figure to the total volume of CHC loop cuts SWBT reported before exclusions (i.e., 1284), it is apparent that SWBT excluded 62 CHC loop cuts as CLEC-caused misses.

- In its initial December data (submitted in its January 21 ex parte), SWBT reported 2523 loops converted "Without FDT or CHC" and 660 new loops. After Ms. DeYoung's Reply Declaration questioned the integrity of those figures because SWBT does not offer loop conversions without CHC or FDT,[10] SWBT dropped the claim that there were loop conversions without CHC or FDT, and instead now reports that there were 1,931 "new/moved loops" in December (which means that SWBT likely reclassified many of the previously identified 2523 converted loops as FDT and CHC hot cuts). Because SWBT's new "moved loops" category is similarly undefined and unaccounted for under any existing SWBT unbundled loop offering, Ms. DeYoung called SWBT's account representative for AT&T, Rhonda Huser, on March 8, 2000, and asked Ms. Huser to explain what a "moved loop" is. Ms. Huser replied that she did not know what it was and would have to check. The fact that SWBT continues to report provisioning some of the 1,931 loops in December (and 544 loops in January) under some undefined process raises the concern that SWBT has still not properly identified all of its December and January FDT and CHC loop cuts.

C. SWBT's Restated December and January Performance Data Fails To Show SWBT's Compliance With The Commission's Standards

Not surprisingly, SWBT contends that its March 2 ex parte shows that its loop performance "is at least equivalent to Bell Atlantic's" and that its latest restatement of data shows that its "actual performance was slightly better than previously stated". SWBT's March 2 ex parte submission at 1. Even if SWBT's restated data was both timely and reliable -- which it is not -- its data does not, in fact, meet the "minimally acceptable" level of performance established in Bell Atlantic, as AT&T shows below.[11]

Service Outages

- Restated data still omits any performance data on outages due to defective loop cuts for either FDT or CHC hot cuts. At least 6.7% (December) and 7.6% (January) of all CLECs' FDT loops suffered service outages due to SWBT's failure to complete loop cutovers within 1 hour (see PM 114.1, Attach. A hereto) and SWBT's premature loop cuts (see PM 114).[12] As for CHC hot cuts, 4.1% (January) of CLECs' loops suffered

[10] See UNE-L Reply Decl. ¶ 74 n.41.

[11] In order to properly present this review, AT&T has revised (in Attachment A, hereto) SWBT's presentation of its restated data to include the hot cuts improperly excluded by SWBT from PM 114.1 as "customer caused misses." It is also important to note that, because SWBT has reported its restated data in terms of loop cuts -- rather than orders -- the outage rates and cutover performance statistics understate the extent of SWBT's poor provisioning on CLECs' customers, for all the reasons AT&T has previously discussed. See, e.g., AT&T's March 6, 2000 ex parte submission.

[12] Even these figures likely understate the extent of outages suffered by CLECs' customers because SWBT fails to disclose the number of FDT loop cutovers not completed in the agreed-upon 30 minute cutover interval, which results in customer outages. See UNE-L Reply Decl. ¶¶ 39-43.

outages due to SWBT's premature loop cuts (see PM 114), which is a sufficiently large figure to show non-compliance given SWBT's failure to report outages due to defective cuts.

Cutover Performance

- CHC hot cuts: The chart below (drawn from Attachment A) shows that SWBT's restated, disaggregated data does not meet the Commission's 90% 1 hour cutover benchmark for 10 or less loops. Nor does January data for more than 10 loops meet the Commission's 90% benchmark using a 2 hour cutover interval; and even if the Commission improperly determined that deference to the TPUC interval was warranted here, the TPUC's 100% benchmark was not met in either December or January.[13]

	10 or less loops (1 hr. interval)	more than 10 loops (2 hr. interval)	all loops (2 hr. interval per TPUC approved PM 114.1)
December	87.2%	91.2%	93.5%
January	87.5%	87.4%	93.0%
Average	87.3%	89.6%	93.3%

- FDT hot cuts: In its latest ex parte, SWBT does not even bother to report its performance for the agreed-upon 30 minute cutover interval for FDT hot cuts. In addition, as AT&T has shown, all FDT hot cuts not completed in 30 minutes suffer unexpected service outages (which are only a subset of the outages that are experienced in connection with such orders). As shown below, SWBT's restated data (as presented in Attachment A) reflects an unacceptable level of outages and even fails to satisfy the TPUC's 100% cutover benchmark using a 2 hour cutover interval (which, by definition, reflects a service outage of 1.5 hours).

	all loops (1/2 hr. interval)	all loops (1 hr. interval)	all loops (2 hr. interval per possible TPUC standard)
December	no data	94.0%	96.0%
January	no data	93.6%	95.3%
Average	no data	93.8%	95.7%

Trouble Report Rate

- SWBT's March 2 submission includes no performance data on trouble report rates for FDT and CHC hot cuts, and SWBT's previously reported December trouble report

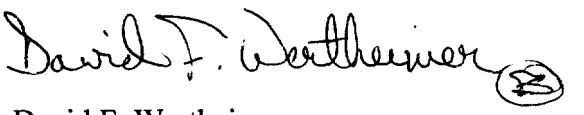
[13] The chart presents SWBT's performance categorized by the analogous disaggregated cutover intervals (e.g., 10 or less loops cutover in 1 hour) employed by Bell Atlantic and also by the TPUC's 2 hour cutover interval for all loops under PM 114.1. Attachment A sets forth SWBT's cutover data for all loops (on both a disaggregated and aggregated basis) under both 1 and 2 hour cutover intervals.

rate is wrong due to understated volume figures and failure to report trouble report rate on omitted FDT and CHC hot cuts.

Because SWBT admits that its previously reported December and January performance data is inaccurate and because SWBT's restated performance data is untimely, unreliable and, in any event, fails to show compliant performance, SWBT's hot cut performance data fails to demonstrate checklist compliance.

Finally, while SWBT's restated data fails to satisfy even the version of the "meaningful opportunity to compete" standard that the Commission applied in Bell Atlantic, that standard is legally erroneous. As AT&T has demonstrated in each prior Section 271 proceeding as well as in its appeal of the Bell Atlantic decision, there is no practical difference between the parity standard that applies where there is a retail analogue to the facility provided to a CLEC and the standard that applies where there is no such analogue. In the latter situation, the BOCs' checklist obligation is to provision the facility in as short a period of time as is technically and commercially feasible -- i.e., the best that can reasonably be done. It is then, and only then, that the Commission can find that there is a "meaningful opportunity to compete" and that the checklist is satisfied. It is indisputable that SWBT has not met this standard.

Very truly yours,



David F. Wertheimer
John A. Redmon

Copies to:

D. Attwood	W. Agee
K. Dixon	R. Atkinson
J. Goldstein	C. Blue
H. Walker	M. Carey
S. Whitesell	W. Dever
	J. Jennings
	J. Rosenworcel
	D. Shiman
	J. Stanley
	L. Strickling
	A. Wright

ATTACHMENT A

Recalculated **CHC** Loop Cutover Performance Data (PM 114.1)
(Including "Customer Caused Misses")*

	No. of lines	Cuts within 1 hour	% Within 1 hour	Cuts within 2 hours	% within 2 hours
December					
≤ 10 lines	1750	1526	87.2%	1645	94.0%
> 10 lines	377	246	65.3%	344	91.2%
Total lines	2127	1772	83.3%	1989	93.5%
January					
≤ 10 lines	1064	931	87.5%	1005	94.5%
> 10 lines	285	223	78.2%	249	87.4%
Total lines	1349	1154	85.5%	1254	93.0%
2 Month Average					
≤ 10 lines	2814	2457	87.3%	2650	94.2%
> 10 lines	662	469	70.8%	593	89.6%
Total lines	3476	2926	84.2%	3243	93.3%

Recalculated **FDT** Loop Cutover Performance Data (PM 114.1)
(Including "Customer Caused Misses")*

	No. of lines	Cuts within 1 hour	% Within 1 hour	Cuts within 2 hours	% within 2 hours
December					
≤ 10 lines	1905	1802	94.6%	1843	96.7%
> 10 lines	178	156	87.6%	156	87.6%
Total lines	2083	1958	94.0%	1999	96.0%
January					
≤ 10 lines	1244	1175	94.5%	1197	96.2%
> 10 lines	49	35	71.4%	35	71.4%
Total lines	1293	1210	93.6%	1232	95.3%
2 Month Average					
≤ 10 lines	3149	2977	94.5%	3040	96.5%
> 10 lines	227	191	84.1%	191	84.1%
Total lines	3376	3168	93.8%	3231	95.7%

*The data set forth above is based on SWBT's restated December and January PM 114.1 performance data submitted in its March 2, 2000 ex parte. AT&T has revised SWBT's presentation to include the "customer caused misses" that SWBT improperly excluded.