ORIGINAL

EX PARTE OR LATE FILED

ATG Advanced TelCom Group, Inc.

200 South Virginia Street
Suite 103
Reno, NV 89501
Tel: 775-284-4000
Fax: 775-284-4044
www.callatg.com

RECEIVED
JAN - 2 2001
FCC MAIL ROOM

December 29, 2000

Magalie R. Salas, Secretary
Office of the Secretary
Federal Communications Commission
445 12th Street, NW, TW-A325
Washington, DC 20554

Re: *SBC/Ameritech Merger Conditions, CC Docket No. 98-141*

Dear Secretary Salas:

On behalf of Advanced TelCom Group, Inc., please find attached a letter memorializing a meeting between Advanced TelCom Group, Inc. and staff of the Enforcement Bureau of the Commission regarding SBC's violations of the Merger Conditions. The individuals listed below were served with copies of this letter

Regards,

Kathleen M. Marshall
Executive Director
Regulatory & Public Policy

Enclosures

Cc: Ms. Dorothy Attwood
Mr. David Solomon
Ms. Carol Mattey
Ms. Radhika Karmarkar
Mr. Anthony Dale
Mr. Mark Stone
Mr. William Dever

No. of Copies rec'd 0+1
List ABCDE

ATG Advanced TelCom Group, Inc.

200 South Virginia Street
Suite 103
Reno, NV 89501
Tel: 775-284-4000
Fax: 775-284-4044
www.callatg.com

RECEIVED
JAN - 2 2001
FCC MAIL ROOM

December 29, 2000

Radhika Karmarkar, Esq.
Deputy Division Chief
Enforcement Bureau
Federal Communications Commission
The Portals
445 Twelfth Street, SW
Washington, DC 20554

Re: SBC Violations of the Merger Conditions

Dear Ms. Karmarkar:

As we discussed in our November 21, 2000 meeting, Advanced TelCom, Inc. d/b/a Advanced TelCom Group ("ATG"), is concerned that SBC's outright and repeated violations of the Merger Conditions have caused and will continue to cause grave harm to the development of competition in the local exchange market. SBC's violations of the Merger Conditions, and their harmful effects to the industry, are highlighted below. ATG respectfully requests that the Enforcement Bureau take immediate action to ensure that any public interest benefits that would have resulted from the SBC/Ameritech Order, which the public has been deprived of thus far, are addressed and are not completely eliminated.

Collocation.

For the period between October 8, 1999 and June 8, 2000, SBC failed to file collocation applications for one of its Advanced Services Affiliates, Advanced Solutions, Inc. ("ASI"),[1] in violation of the Merger Conditions.[2] From April 5, 2000 forward, SBC incumbent LECs were no longer permitted to provide any network planning and engineering services to ASI on an exclusive basis.[3] Thus, under the FCC's own interpretation of the Merger Conditions, SBC incumbent LECs violated the merger conditions by provisioning collocation for ASI without treating ASI at

[1] Advanced Solutions, Inc. is the Advanced Services Affiliate that SBC created to provide advanced services in the SWBT, Pacific Bell, SNET and Nevada Bell territories, pursuant to subparagraph I(1) of the *Merger Conditions.*

[2] Ernst & Young LLP, *Report of Independent Accountants*, August 8, 2000, at 2 ("*Collocation Audit Report*"); *Report of Management on Compliance with the FCC's Collocation Rules* at ¶ 1.

[3] Letter from Carol Mattey to SBC, released October 16, 2000 at 2

arms length and by not requiring ASI to file collocation applications similar to those applications filed by non affiliated competitive exchange carriers.

From February 5, 2000 forward, SBC incumbent LECs were required to provide advanced services to ASI in a manner that was the "functional equivalent" of provisioning through a separate affiliate.[4] In order to treat ASI in such a manner, SBC incumbent LECs would have had and will have to treat ASI at arms length. Thus, ASI would need to file collocation applications to process their collocation requests, substantially similar to the process used by any other of SBC's separate affiliates who operate at arms length, and, most importantly, of non affiliated competitive carriers.

For the period from October 8, 1999 through February 5, 2000, under the Merger Conditions, SBC incumbent LECs were able to perform network planning and engineering services for ASI on an exclusive basis. Such services included arranging for and negotiating collocation space with SBC incumbent LECs. It is difficult to perceive, however, how SBC incumbent LECs could perform such services for ASI without direction from ASI in the form of collocation applications. If, as appears to be the case, SBC incumbent LECs not only performed such services on behalf of ASI, but also unilaterally decided for ASI where and, under what terms and conditions such collocation would be provisioned, then for all intents and purposes, ASI did not exist as a separate affiliate. Rather, SBC incumbent LECs were structuring a potential network for ASI in a manner consistent with SBC's or its incumbent LECs' own internal determinations.

SBC's failure to file collocation applications is harmful to competitors like ATG. SBC incumbent LECs consistently fail to meet the set intervals for complying with collocation applications. For example, in Nevada, in performance measure workshops related to its Section 271 application for state commission approval, Nevada Bell has agreed to comply with a 90-day interval for completion of physical collocation requests. From May through June 2000, Nevada Bell received a total of 12 requests for physical collocation and failed to provision any of the twelve within the 90-day interval they had previously agreed to. However, during the same period, Nevada Bell was able to enter central offices and tag equipment for ASI without even receiving a collocation application from ASI.

SBC's behavior with respect to collocation applications places its affiliates at a competitive advantage as compared to non-affiliated carriers because the SBC affiliates have a much shorter "time to market." For competitive carriers, "time to market" is critical in gaining a first mover advantage—the sooner a competitor is able to market to customers served out of a given wire center, the sooner the carrier may begin recouping its costs. Equally so, the sooner a carrier is able to increase the size of its footprint by serving a greater quantity of wire centers, the greater the opportunity for the carrier to recoup its costs. Thus, SBC's discriminatory behavior places ATG and other non-affiliated competitors at a disadvantage.

---

[4] *Id.*

Second, during the period October 8, 1999 through June 8, 2000, in certain circumstances, SBC failed to update its Internet sites with regard to exhausted collocation space within 10 days, in violation of the Merger Conditions.[5] Furthermore, according to SBC, the company only makes a determination regarding space availability as a result of a request for collocation, a request for a space availability report or as a result of an equipment addition by the SBC incumbent LEC.[6] During this time, while provisioning collocation for ASI, SBC should have had to assess the space available in those offices for collocation and updated the Internet site if ASI were being treated the same as a non-affiliated carrier for collocation requests. Instead, SBC incumbent LECs require a CLEC to expend significant resources by either requesting a space availability report ($112 in Nevada) or submitting an application for collocation space ($850 in Nevada) and then wait for SBC to make a determination that the central office premises has no space available. ASI never had to wait for such an assessment and was able to deprive non-affiliated carriers from obtaining availability information by the inaction of its affiliate LEC.

Rule 53.321(h) requires Incumbent LECs to update their Internet sites "within ten days from the date at which a premises runs out of physical collocation space."[7] The Commission's promulgated rule also allows competitors to request a report that provides more detailed information regarding the space available in an incumbent LEC central office. According to Rule 53.321(h), such a report must specify the amount of collocation space available at each requested premises, the number of collocators, and any modifications in the use of the space since the last report. In addition, the report must include any measures that the incumbent LEC is taking to make additional space available for collocation. Such a report is not meant to be used, as SBC incumbent LECs have done, as a trigger mechanism for the incumbent LEC to determine whether a particular central office space is exhausted. Rather, the space availability report is meant to augment the website information available to competitors regarding central office space availability with more detailed information that will allow competitors to plan their networks accordingly. Thus, for example, the incumbent LEC Internet website might indicate that space is available in a central office (e.g. by not listing that office as one where space is exhausted). The competitor may then request a report with respect to that central office to determine whether the size and specifications of the space available will suit the competitors' needs.

Not only has SBC, as noted by the auditors and confirmed by SBC's Management, failed to timely report exhausted physical collocation space,[8] but it has interpreted Rule 53.321(h) in such a way as to defeat its very purpose of allowing "competitors to avoid expending significant resources in applying for collocation space in an incumbent LEC's premises where no such space

---

[5] *See Collocation Audit Report* at 2, Merger Conditions at XI. The Audit Report fails to elaborate beyond the above description of the violation

[6] SBC Communications, *Report of Management on Compliance with the FCC's Collocation* Rules, at ¶7 (August 7, 2000).

[7] *See* 47 C.F.R. § 53.321(h).

[8] *See Collocation Audit Report* at 1 (the auditors noted SBC's "noncompliance regarding the requirement for timely reporting of exhausted physical collocation space").

exists.[9] SBC's outright violation of Rule 53.321(h) places competitors at a competitive disadvantage by requiring them to expend time and money to obtain information that should be readily available on SBC incumbent LECs' Internet sites.

It is unclear from the information provided in the *Collocation Audit Report* whether the auditors reviewed SBC's compliance as to timely reports of exhausted physical collocation space with respect to space availability at Remote Terminals. With respect to incumbent LECs Nevada Bell and Pacifica Bell, SBC states on its Internet website that information regarding space exhaust at Remote Terminals is "not applicable at this time." The last time the website was updated was August 23, 2000 and October 5, 2000, respectively. According to the Commission's *UNE Remand Order,* incumbent LECs are required to make collocation available "in either controlled environmental huts or vaults, as well as other remote terminals, in appropriate circumstances."[10] Given this ruling, SBC must also post information on its incumbent LEC internet websites regarding space exhaust at Remote Terminals. The need for information on collocation space availability at Remote Terminals and SBC incumbent LECs' failure to provide such information in violation of the Merger Conditions and this Commission's Order has become even more critical with this Commission's approval of Project Pronto and SBC's active deployment of an overlay architecture that moves access to crucial elements within its network from the central office to the Remote Terminal site.

Failure to treat ASI at arms length.

Third, several of SBC's Advanced Services Affiliate employee work locations were either not covered by a lease agreement or were not owned outright, in violation of the Merger Conditions. Subparagraph I(3) of the Merger Conditions and Sections 272(b)(1) and 272(b)(5) of the Act[11] require SBC to operate independently from its affiliates and require SBC's affiliates' to conduct all transactions with SBC on an arms length basis. The auditors reported six locations where employees of Advanced Services Affiliates worked in space owned or leased by nonregulated affiliates. As a result of this behavior, the SBC affiliates incur lower operating costs than competitors and are able to direct resources towards implementing their business plans and increasing the speed of service rollouts. ATG would much prefer to direct its real estate resources toward deploying its services faster, so that it too may enjoy a "time to market" advantage. However, neither ATG nor any other non-affiliated competitive carrier is able to provide employees workspace at no cost.

---

[9] First Report and Order, *In the Matters of Deployment of Wireline Services Offering Advanced Telecommunications Capability,* CC Docket No. 98-147, at ¶58 (released March 31,1999) ("Collocation and Advanced Services Order").

[10] Order on Reconsideration, *In the Matters of Deployment of Wireline Services Offering Advanced Telecommunications Capability and Implementation of the Local Competition Provisions of the Telecommunications Act of 1996,* CC Dockets No. 98-147 and 96-98, at ¶ 103 fn. 226 (released August 10, 2000) ("Collocation Reconsideration Order").

[11] See 47 U.S.C. § 272(b)(5).

Fourth, SBC and SWBT provided approximately $2200 in legal services to ASI for which no underlying affiliate agreement existed, in violation of the Merger Conditions. [12] This is outright discriminatory behavior. In fact, just prior to ASI's CPCN hearing in Nevada, the SBC attorney making appearances on behalf of ASI was replaced. This SBC employee reported that he was returning to SBC but would continue to be available because he was training the SBC attorney who had then been transferred to ASI. In addition to failing to remain at arms length, this is another example of SBC's redirection of resources so as to minimize the overhead costs incurred by its affiliates.

Moreover, in addition to the outright violations of the Merger Conditions described above, there have been substantial additional SBC behaviors that evidence the lack of arms length separation between SBC and its separate affiliates. For the period of October 8, 1999 through December 20, 1999, four individual names appeared on the Officer and Director lists of both an ILEC and ADSI.[13] Additionally, two individuals appeared in the minutes of both an ILEC and an Advanced Services Affiliate within the evaluation period[14]

The failure of SBC to maintain arms length separation from its affiliates can also be seen in the failure of SBC and ASI to provide ownership information to the auditors for almost 20% of its assets. As a result, the auditors were unable to determine whether the assets were owned by ASI, SBC, or an SBC incumbent LEC. Moreover, the auditors revealed that in 1999, $3.7 million of advanced services equipment was recorded on ILEC books instead of ASI books. It is not clear what compensation, if any, was provided from ASI to SBC for the transfer of these assets, which were likely to be relatively new (as they were for the provision of advanced services, a nascent offering) and not much depreciated. These are early and telling examples of the lack of arms length separation required by the Merger Conditions and the Act.[15] Without arms length separation between the SBC ILECs and their affiliates, competitors are disadvantaged.

ASI's Ordering System and Processes

Finally, the lack of arms length separation between SBC and its affiliates is evidenced by SBC's creation and maintenance of ASI's systems.[16] In particular, ASI contracted with SBC's IT organization to develop ASI's ordering system, ASOS.[17] As stated in the Auditor's Report, "ASI requests services directly from the department that provides the service at certain ILECs."[18]

---

[12] *Id.* at ¶ 25.
[13] *Id.*, at ¶ 12.
[14] *Id.*
[15] *Id.*, at ¶ 57.
[16] *In the Matter of OSS xDSL Plan of Record*, Collaborative Session 3, Hearing Transcript at 882-884. (March 28, 2000, TX PUC) ("March 28, 2000 hearing transcript").
[17] *Id.*, at 882. (Mr: Sirles of SBC: "Any changes to ASOS, they [ASI] would coordinate directly with the SBC IT organization").
[18] Ernst & Young, *Report of Independent Accountants on Applying Agreed-Upon Procedures,* Appendix A, at ¶ 24.

Meanwhile, competitors must develop their own interfaces and operating systems and conform those applications to SBC legacy ordering systems into which they have no direct insight. Competitors must also follow lengthy application procedures and undergo lengthy and expensive training even to use those interfaces.[19] Thus, by directly interacting with the appropriate incumbent LEC internal department, ASI need not participate in the initial development and change management process that unaffiliated competitors must endure.

SBC's IT organization that developed ASI's ordering systems also handles enhancements to LEX and other CLEC gateways for access to SBC's legacy systems.[20] Because SBC's IT department maintains ASI's systems and handles enhancements to the OSS gateways with which ASI's ASOS and other CLEC-owned systems interface, the IT department can coordinate enhancements to SBC's gateways with corollary updates to ASI's ordering and backend systems. Such coordination is not available to non-affiliated CLECs, and unfairly insulates ASI from the delays and snafus inherent in the change management process available to unaffiliated competitors.[21]

ASI's ordering system could be upgraded and flow through to SBC's legacy systems coincident with changes being made to the SBC system. Additionally, there is the potential and the motivation for SBC's IT department to configure any enhancements to its OSS gateways in a way that will complement ASI's ordering system. In contrast, competitors are merely informed of the changes made to the OSS gateways and are on their own to understand those changes and their implications in order to develop fixes to their systems. Thereafter, competitors can begin to implement the changes in their back end systems assuming that the information provided to the competitors is of sufficient detail and without error. Hence, competitors may realize a significant delay, as compared to ASI, each time a change is made to the SBC ordering system, which provides ASI with a significant first mover advantage any time SBC's OSS gateways and/or legacy systems are upgraded.

SBC may argue that transition mechanisms may have permitted SBC to develop ASI's ordering system during the transition period. However, that period has expired and any continuation on the part of SBC to plan ASI's ordering system is in violation of the Merger Conditions. Moreover, it is arguable whether direct processing of changes to (and maintenance of) the ordering system for ASI by SBC's IT organization is justifiable even under the transition mechanisms. In any case, since the expiration of the transition period, direct processing of changes to ASI's ordering system by SBC's IT department is certainly a violation of the Merger Conditions, because it gives ASI preferential access to the OSS of SBC's incumbent LECs as a result of the lack of an arms length relationship between ASI and its affiliated incumbent LECs.

Moreover, the fact that SBC designed ASI's ordering system and currently facilitates upgrades to the same, when coupled with the fact that ASI's ordering system requires no ASI personnel, on

---

[19] *Id.* at ¶ 24.
[20] March 28 hearing transcript at 881-882.
[21] March 28 hearing transcript at 881-882.

its face creates an even more significant disadvantage to competitors. As explained in the Texas hearing transcript,[22] an SBC joint marketing representative interfaces with the customer to complete a customer form that is then electronically transferred into the ASOS. Once ASOS receives the customer information form it electronically creates a local service request ("LSR"), which is then transferred directly into SBC incumbent LEC's SORD legacy system for processing. ASI conceded at the hearing that SBC processes the entire order without any human intervention on behalf of ASI.[23]

The discriminatory nature of this arrangement can be seen in information provided by SBC regarding ASI's ordering process flow-throughs in Nevada and California. At a presentation by SBC to CLECs in Nevada on August 30, 2000, SBC expert Liz Ham presented a series of charts regarding use of SBC OSS processes by CLECs from January 2000 through July 2000.[24] Ms. Ham stated that the increase in the number of transactions on both Datagate and EDI in June and July were due to ASI's use of those systems for preorder and order transactions, respectively. Indeed, the increase in the number of transactions is significant. Using the numbers provided by SBC, Datagate transaction activity increased 1,805% from May to July, 2000. Correspondingly, for the five months previous, from January to May 2000, the entire CLEC community in both California and Nevada increased the number of transactions via Datagate by only 200%. Similarly, for EDI ordering transaction activity, there was a 216% increase in the number of transactions from May to July, 2000. In contrast, the number of CLEC EDI order transactions prior to the entrance of ASI decreased 19% from January to May 2000. Equally indicative is the small 26% increase (compared to the 216% increase in EDI transactions) in transaction activity for LEX, an SBC ordering system used by a majority of non affiliated CLECs, between the months of May and July, 2000. The entire CLEC community in California and Nevada cannot come close to submitting the number of orders that ASI has managed to ramp up to after just two months of existence. ATG believes that ASI could not manage such activity either without the discriminatory actions by SBC in ASI's favor.

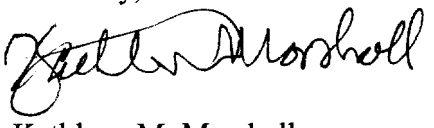
The Enforcement Bureau must address the violations noted above, as well as SBC's general failure to maintain an arms length relationship with its advanced service affiliates. Without such intervention, SBC will continue to engage in discriminatory conduct. This is evidenced by SBC's failure to comply with Carol Mattey's October 13, 2000 letter stating that SBC's interpretation of paragraph 3(d) of the *Separate Affiliate for Advanced Services* condition was incorrect. Despite direct orders form the Common Carrier Bureau, SBC continues to operate in violation of the conditions, and uses its continued correspondence to the Commission on the issue to avoid having to immediately comply.[25] As a result, the Bureau must take immediate

---

[22] *In the Matter of OSS xDSL Plan of Record*, Collaborative Session 4, Hearing Transcript at 1223 (March 29, 2000, TX PUC) ("March 29, 2000 hearing transcript")
[23] March 29 hearing transcript at 1228.
[24] *See* attached Exhibit A
[25] *See* Letter of Carol E. Mattey of the Common Carrier Bureau of the Federal Communications Commission to Cassandra Carr of SBC, in CC Docket 98-141 and ASD File No. 99-49 (released October 16, 2000) ("October 13 Letter") (determining that SBC was incorrect in its interpretation

affirmative steps to require SBC to comply with the Merger Conditions and to ensure that SBC's merger with Ameritech is in the public interest and that the actions of SBC, which currently deprive the public of the benefits which were to flow from that merger through the Conditions, end as quickly as possible.

Sincerely,



Kathleen M. Marshall
Executive Director
Regulatory & Public Policy
Advanced TelCom Group

Cc: Ms. Dorothy Attwood
Mr. David Solomon
Ms. Carol Mattey
Mr. Anthony Dale
Mr. William Dever
Mr. Mark Stone

---

that the transition period would be extended until line sharing is adopted); *see also ex parte* Letter of Kellogg, Huber, Hansen, Todd & Evans, P.L.L.C., on behalf of SBC, to Carol E. Mattey of the Common Carrier Bureau, filed February 15, 2000 in CC Docket No. 98-141 ("February 15 Letter") and Letter of Kellogg, Huber, Hansen, Todd & Evans, P.L.L.C., on behalf of SBC, to Carol E. Mattey of the Common Carrier Bureau, filed November 1, 2000 in CC Docket No. 98-141 ("November 1 Letter") (continuing to argue that SBC's planning activities were justified because line sharing had not been provided to unaffiliated carriers.)

NEVADA BELL

CLEC Panel Presentation Meeting

8/30/00

Nevada Bell Telephone Company

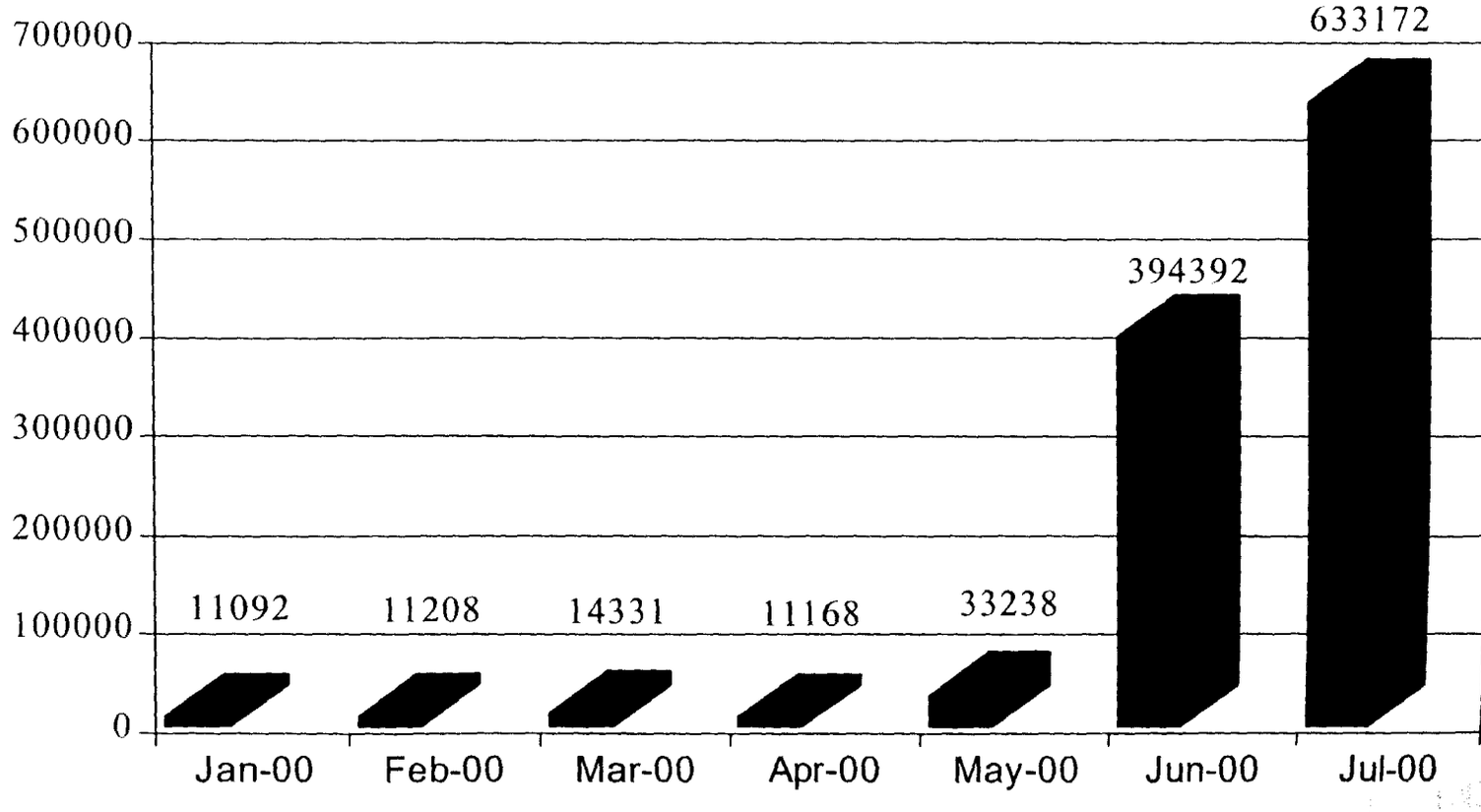
Exhibit A

Nevada/Pacific Bell's Operational Support Systems

Presented by:

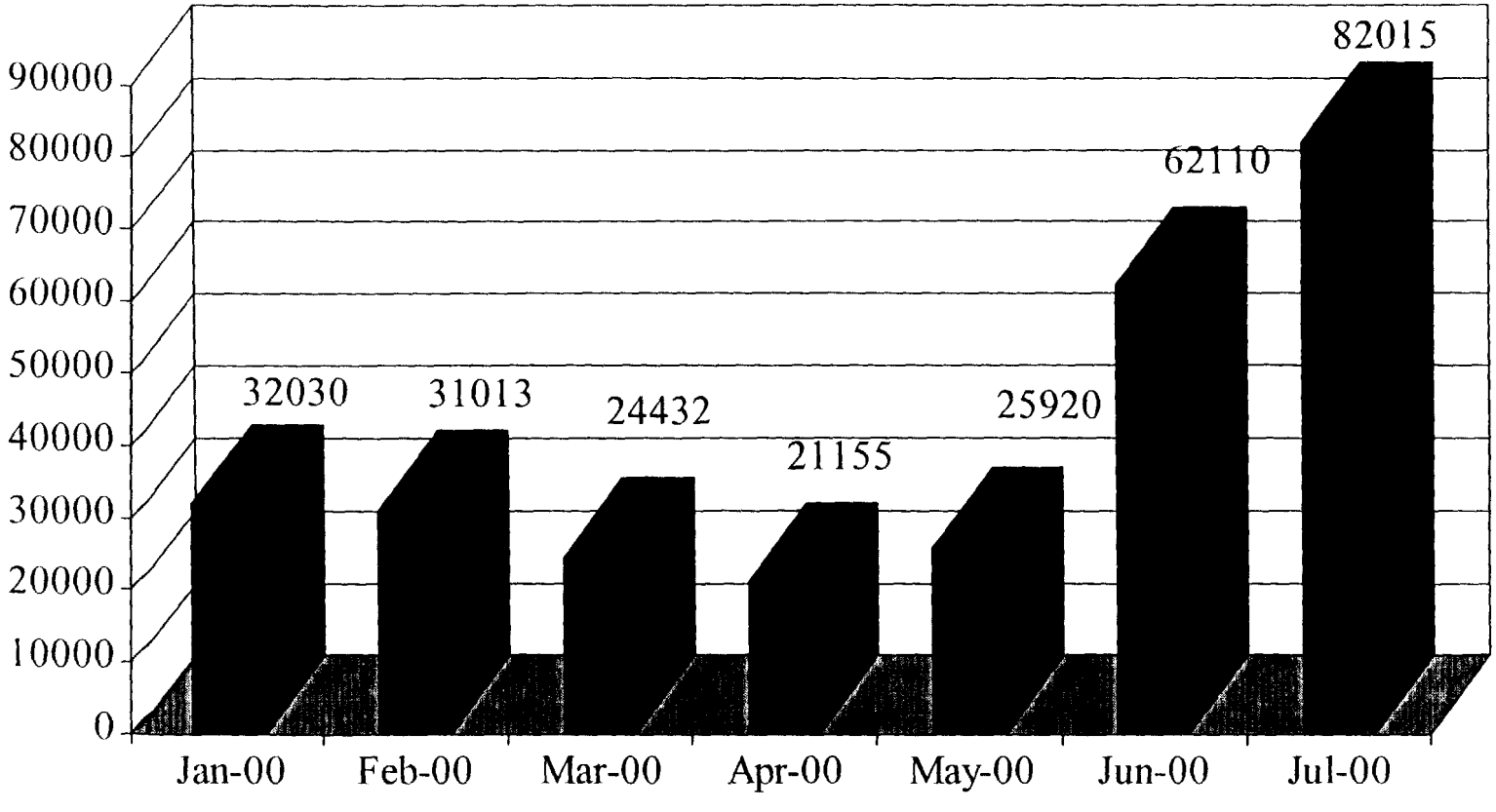
Liz Ham

DataGate Transaction Activity



Cumulative Jan '00 - Jul '00 **1,108,601** (as tracked for PM 1)

EDI Transaction Activity



Cumulative Jan '00 - Jul '00 278,675