PUBLIC NOTICE

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RECEIVED

August 20, 2001

COMMENTS REQUESTED ON THE APPLICATION BY SBC COMMUNICATIONS INC. FOR AUTHORIZATION UNDER SECTION 271 OF THE COMMUNICATIONS ACT TO PROVIDE IN-REGION, INTERLATA SERVICE IN THE STATES OF ARKANSAS AND MISSOURI (CC DOCKET NO. 01-194)

On August 20, 2001, SBC Communications Inc. and its subsidiaries, Southwestern Bell Telephone Company and Southwestern Bell Communications Services, Inc., d/b/a Southwestern Bell Long Distance (collectively, SWBT) filed a joint application for authorization to provide in-region, interLATA service in the States of Arkansas and Missouri, pursuant to section 271 of the Communications Act of 1934, as amended (the Act), 47 U.S.C. § 271. Pursuant to section 271 of the Communications Act of 1934, as amended, an applicant must demonstrate compliance with section 271 on a state-by-state basis. Where an applicant files a joint or multi-state application, as here, the Commission will determine for each state whether the application complies with each item of the section 271 competitive checklist and other requirements of the statute.

This Public Notice establishes certain procedural requirements relating to consideration of SWBT's joint application. The Commission in a prior Public Notice adopted general procedural requirements that apply to the processing of this and all other applications for authorization under section 271 of the Act.[1] A copy of this earlier Public Notice is attached hereto. Also attached is a protective order adopted today, *Application of SBC Communications Inc. Pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-Region, InterLATA Services in Arkansas and Missouri*, Protective Order, DA 01-1953 (CCB rel. Aug. 20, 2001), that establishes the conditions under which access will be made available to confidential documents submitted in this proceeding by SWBT or any other party.

Record of Prior Proceeding. SWBT filed a section 271 application for Missouri on April 4, 2001 (CC Docket No. 01-88), which it subsequently withdrew.[2] SWBT has requested that we permit it to incorporate Appendices B-G of its application in CC Docket 01-88

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[1] *See Updated Filing Requirements for Bell Operating Company Applications Under Section 271 of the Communications Act*, Public Notice, DA 01-734 (CCB rel. Mar. 23, 2001) (March 23, 2001 Public Notice).

[2] *See Application by SBC Communications Inc., et al*, Order, DA 01-1402, CC Docket No. 01-88 (CCB rel. June 8, 2001) (Order terminating docket).

into the joint application filed today. We grant this request. Commenting parties that seek to have any portion of their prior filings from CC Docket 01-88 incorporated into the record of this new docket should affirmatively so state in their comments.

Comments By Interested Third Parties. Comments by interested third parties in support of or in opposition to SWBT's application must be filed on or before **September 10, 2001**, and must be filed in conformance with the procedures set forth in the attached March 23, 2001 Public Notice. As in prior section 271 application proceedings, comments may not exceed 100 pages. Recognizing that this application covers two states, however, the Commission retains discretion to extend the page limit, upon request, if a commenter requires additional pages to address circumstances specific to Arkansas or Missouri.[3]

An original and two copies of all comments must be filed with the Commission Secretary, Magalie Roman Salas, 445 12th Street, S.W., CY-B402, Washington D.C. 20554. In addition, 12 copies of each comment must be delivered to Janice Myles, Common Carrier Bureau, 445 12th Street S.W., Room 5-B145, Washington, D.C., 20554 and one copy to Qualex International (Qualexint), Portals II, 445 12th Street S.W., Room CY-B402, Washington D.C., 20554. In addition to filing paper comments, parties may also file comments using the Commission's Electronic Comment Filing System (ECFS). *See* Electronic Filing of Document in Rulemaking Proceedings, 63 Fed Reg. 24, 121 (1998). Comments filed through the ECFS can be sent as an electronic file via the Internet to http://www.fcc.gov/e-file/ecfs.html. Generally, only one copy of an electronic submission must be filed. In completing the transmittal screen, commenters should include their full name, postal mailing address, and the applicable docket or rulemaking number. Parties may also submit an electronic comment by the Internet e-mail to ecfs@fcc.gov, and should include the following words in the body of the message, "get form <your e-mail address>." A sample form and directions will be sent in reply.

State Commission and Department of Justice Written Consultations. The Arkansas Public Service Commission and the Missouri Public Service Commission must file any written consultation on or before **September 10, 2001**.[4] Any written consultation by the U.S. Department of Justice, which by the Act's express terms must become part of the Commission's record, must be filed on or before **September 24, 2001**. Because the Arkansas and Missouri Commissions and the Department of Justice are given roles by statute in a section 271 proceeding, copies of all pleadings, including comments, should be filed with those parties.[5]

Replies. All participants in the proceeding -- the applicant, interested third parties, the Arkansas and Missouri Commissions, and the Department of Justice -- may file a reply to any comments filed by any other participant on or before **October 4, 2001**. Reply comments may not exceed 50

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[3] Parties anticipating that they may require additional pages for comments or reply comments are asked to contact Gary Remondino, FCC/Policy Division at 202/418-2298 or Scott Bergmann at 418-7102 as soon as possible, but in no event later than September 3, 2001 for comments and no later than September 28, 2001 for reply comments.

[4] We have asked state commissions to file written consultations on the same day as interested parties file comments.

[5] Please forward copies to the attention of: (1) Dan Joyce, General Counsel, Missouri Public Service Commission, P.O. Box 360, Jefferson City, Missouri 65102. (2) Art Stuenkel, Arkansas Public Service Commission, 1000 Center Street, P.O. Box 400, Little Rock, Arkansas, 72203 (3) Layla Seirafi, U.S. Department of Justice, Antitrust Division, Telecommunications Task Force, 1401 H St., NW, Suite 8000, Washington, D.C. 20005.

pages, unless parties request additional pages to address state-specific circumstances, as described above in footnote 3. An original and two copies of all reply comments must be filed with the Commission Secretary, Magalie Roman Salas, 445 12th Street, S.W., CY-B402, Washington D.C., 20554. In addition, 12 copies of each reply must be delivered to Janice Myles, Common Carrier Bureau, 445 12th Street S.W., Room 5-B145, Washington, D.C., 20554, and one copy to Qualex International, Portals II, 445 12th Street S.W., Room CY-B402, Washington D.C., 20554. Effective August 28, 2001, Qualex International will begin working with the Consumer Information Bureau's Reference Information Center (RIC) as the official duplicating contractor.

Treatment of Confidential Information. To the extent a submission by any party (including the applicant, the Department of Justice, the relevant state commissions or any commenter) includes confidential information or comments on confidential information that another participant has submitted, the party must file with the Office of the Secretary: (a) one copy of only the portion(s) of the submission that contain confidential information or comment on confidential information that another participant has submitted, exclusive of the remainder of the submission; and (b) one original and two copies of the entire confidential submission in redacted form. Each of the submissions described in items (a) and (b) must be accompanied by a cover letter. The submission described in item (a) and accompanying cover letter should be stamped "Confidential—Not for Public Inspection." The original and two copies of the redacted submission described in item (b) and their accompanying cover letters should be stamped "Redacted—For Public Inspection." The cover letters accompanying both sets of submissions set forth in items (a) and (b) above should state that the party is filing a confidential portion of the submission and a redacted version of the entire submission. Other than bearing different stamps (i.e., "Confidential—Not for Public Inspection" or "Redacted—For Public Inspection"), the (a) and (b) cover letters should be identical. The submissions should be delivered in person to Magalie Roman Salas, Secretary, 445 12th Street, S.W., Room TW-B-204, Washington, D.C., 20554; or, in her absence, to William F. Caton, Deputy Secretary, at the same address. Each redacted filing must also be submitted on a read-only CD-ROM[6] formatted in Word 97 or Excel 97 format, as applicable. One set of the confidential and redacted submissions should also be delivered to Gary Remondino, Policy and Program Planning Division, Common Carrier Bureau, 445 12th Street, S.W., Room 5-C140, Washington, D.C., 20554.

All questions relating to access to confidential information submitted by SWBT should be directed to Jonathan Rabkin, 202-326-7900, at Kellogg, Huber, Hansen, Todd & Evans, 1615 M Street, N.W., Suite 400, Washington, D.C., 20036-3209).

Availability of Information. A wide range of information relating to SWBT's section 271 application for Kansas and Oklahoma may be retrieved from the Commission's World Wide Web site at http://www.fcc.gov.[7] Specific information, such as comments and *ex parte* submissions, may be obtained from the Electronic Comment Filing System (ECFS), which is accessible through the Commission's website. Moreover, SWBT has voluntarily agreed to post

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[6] If filing on CD-ROM is not possible, applicants may file on a 3.5 inch computer diskette.

[7] The rules relating to public information and the inspection of records are set forth at sections 0.441 through 0.470 of the Commission's Rules. 47 C.F.R. §§ 0.441-0.470.

several documents, including its application and supporting affidavits and substantive *ex parte* submissions, on the World Wide Web at http://sbc.com/PublicAffairs/LDByState/0,2951,37,00.html.

The application will be available for public inspection during regular business hours in the Reference Information Center of the Federal Communications Commission, Room CY-A-257, 445 12th Street, S.W., Washington, D.C., 20554. Paper copies of the application, and the record generated in response thereto, may be obtained from the Commission's copy contractor.

Ex Parte Rules - Permit-but-Disclose Proceeding. Because of the broad policy issues involved, section 271 application proceedings initially are classified as permit-but-disclose proceedings.[8] Accordingly, *ex parte* presentations will be permitted, provided they are disclosed in conformance with the Commission's *ex parte* rules.[9] Because of the 90-day statutory timeframe for decision, the Commission strongly encourages parties to set forth their views comprehensively in the formal filings specified above (e.g., written consultations, oppositions, supporting comments, etc.) and not to rely on subsequent *ex parte* presentations. In any event, parties may file no more than a total of 20 pages of written *ex parte* submissions. This 20-page limit does not include: (1) written *ex parte* submissions made solely to disclose an oral *ex parte* contact; (2) written material submitted at the time of an oral presentation to Commission staff that provides a brief outline of the presentation; (3) written material filed in response to direct requests from Commission staff; or (4) written factual exhibits. *Ex parte* submissions in excess of the 20-page limit will not be considered part of the record of this proceeding. In light of the statutory deadline for decision, parties are hereby requested to provide Gary Remondino, 445 12th Street, S.W. Room 5-C140, Washington D.C. 20554 with courtesy copies of any *ex parte* presentations made to any member of the Commission.

For purposes of this proceeding, any oral *ex parte* presentations from the Department of Justice, and the Arkansas or Missouri Commissions are deemed to be exempt *ex parte* presentations.[10] To the extent that the Commission obtains through such oral *ex parte* presentations new factual information on which the Commission may rely in its decision-making process, the party submitting the information – either the Department of Justice, the Arkansas Commission or the Missouri Commission – shall prepare a summary for inclusion in the record in accordance with Commission rules, unless such a summary is being prepared by Commission staff.[11] We also

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[8] See 47 C.F.R. § 1.1206(a)(13) (added by 64 FR 68946, 68946 (1999) (effective Jan. 10, 2000)); e.g., Comments Requested on Application by Bell Atlantic for Authorization under Section 271 of the Communications Act to Provide In-region, InterLATA Service in the State of New York (CC Docket No. 99-295), Public Notice, DA 99-2014, 1999 WL 770903 (CCB rel. Sept. 29, 1999).

[9] *See* 47 C.F.R. §§ 1.1202, 1.1206(b). Interested parties are to file with the Secretary of the Commission and serve Gary Remondino, Policy and Programming Planning Division, Common Carrier Bureau, Federal Communications Commission, Rm. 5-C140, 445 Twelfth St., S.W., Washington, DC 20554, and Qualex International (Qualexint) Portal II, Inc., 445 12th St., S.W., Room CY-B402 Washington, DC 20554, with copies of written *ex parte* presentations in these proceedings in accordance with the Commission's *ex parte* rules.

[10] *See id.* § 1.1200(a) ("Where the public interest so requires in a particular proceeding, the Commission and its staff retain the discretion to modify the applicable *ex parte* rules by order, letter, or public notice."); *id.* § 1204(a)(6), as amended by 64 FR 68946, 68946 (1999) (effective Jan. 10, 2000).

[11] *See id.* § 1.1206(a).

waive any page limits for written *ex parte* submissions by the Department of Justice or the Arkansas and Missouri Commissions.[12]

Notwithstanding the above, the Commission may, by subsequent public notice, prohibit all presentations to its decision-making personnel regarding the application during a seven-day period preceding the anticipated release date of the Commission's order regarding the application.[13]

Ex Parte Meeting Schedule. The Common Carrier Bureau will be available for meetings on September 5-6, 2001 and September 27-28, 2001, in case interested parties wish to discuss any issues that they intend to raise in comments or reply comments, as applicable, in support of or in opposition to SWBT's application. The purpose of these meetings is to give interested parties an opportunity to inform Bureau staff of such issues prior to filing their written comments or reply comments. The Bureau encourages interested parties to make joint presentations of common concerns to the extent feasible. Parties who wish to schedule meetings with the Bureau should call Gary Remondino, Policy and Program Planning Division, at (202) 418-2298 or Scott Bergmann at (202) 418-7102

Aside from the meetings listed above, *ex parte* meetings related to this proceeding will occur only at the request of Bureau staff.

Calendar

Ex Parte Meetings related to Comments: September 5-6, 2001

Comments Due: September 10, 2001

State Commission Comments Due: September 10, 2001

U.S. Department of Justice Evaluation: September 24, 2001

Ex Parte Meetings related to Reply Comments: September 27-28, 2001

Reply Comments Due: October 4, 2001

Statutory Deadline: November 18, 2001

By the Common Carrier Bureau.

News Media contact: Michael Balmoris -- (202) 418-1500
Common Carrier Bureau contact: Scott Bergmann (202) 418-7102

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[12] *See id.* § 1.1200(a).

[13] *See id.* §§ 1.1200; 1.1203.

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March 23, 2001

UPDATED FILING REQUIREMENTS FOR BELL OPERATING COMPANY APPLICATIONS UNDER SECTION 271 OF THE COMMUNICATIONS ACT

This Public Notice updates the general procedural requirements that apply to the Commission's processing of applications by Bell Operating Companies (BOCs) for authorization to provide in-region, interLATA service pursuant to section 271 of the Communications Act of 1934, as amended (the Act).[1] In prior Public Notices, the Commission has set forth procedural requirements and policies relating to the processing of such BOC applications.[2] This Public Notice makes further minor revisions to the procedural requirements set forth in those earlier Public Notices. In addition, in the interests of clarity and for the convenience of parties, this Public Notice restates the previously-adopted procedural requirements and policies, and thereby serves as a single, current reference for the procedural requirements and policies relating to the Commission's processing of section 271 applications.

A. Application Filing Requirements

Under section 271, the a Bell Operating Company may file an application with the Commission seeking authorization to provide interLATA services originating in any in-region state or states. By "application," the Commission means: (1) a stand-alone document entitled "Brief in Support of Application by [Bell company name] for Provision of In-Region, InterLATA Services in [name of state(s)]"; and (2) any supporting documentation. The content of both parts of the application is addressed later in this Public Notice.

Under the revised procedures described in this Public Notice, applicants must file each section 271 application with the Commission as follows:

(1) Applicants must file an original and one copy of each section 271 application with the Office of the Secretary at the Federal Communications Commission in

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[1] 47 U.S.C. § 271.

[2] *See Updated Filing Requirements for Bell Operating Company Applications Under Section 271 of the Communications Act*, DA 99-1994, Public Notice, 14 FCC Rcd 16128 (1999) (*September 28, 1999 Public Notice*). The *September 28, 1999 Public Notice* revised and superseded the procedures and policies for section 271 applications that were set forth in prior Public Notices. *See Revised Procedures for Bell Operating Company Applications Under Section 271 of the Communications Act*, FCC 97-330, Public Notice, 12 FCC Rcd 18590 (1997); *Procedures for Bell Operating Company Applications Under New Section 271 of the Communications Act*, FCC 96-469, Public Notice, 11 FCC Rcd 19708 (1996). *See also Bell Operating Companies Given Option of Filing Certain Documents on CD-ROM in Section 271 Applications*, DA 98-1354, Public Notice, 13 FCC Rcd 12791 (1998).

paper form. The applicant must also submit the application on a CD-ROM[3] in read-only format, as described in paragraph (3) below, to the Office of the Secretary. The original, the copy and the CD-ROM in read-only format should be sent to Magalie Roman Salas, Secretary, Office of the Secretary, Federal Communications Commission, 445 12th Street, S.W., Room TW-B204, Washington, D.C. 20554.

(2) An applicant must also submit twelve (12) copies of the section 271 application to Janice Myles, Policy and Program Planning Division, Common Carrier Bureau, Federal Communications Commission, 445 12th Street, S.W., Room 5-C327, Washington, D.C. 20554. Copies for the Common Carrier Bureau may be filed in part paper and part read-only CD-ROM format, as described in paragraph (3) below.

(3) Subject to the terms of paragraphs (1) and (2) above, an applicant is permitted to file the Common Carrier Bureau's copies exclusively on CD-ROM in read-only format except the following: (a) Applicant's Brief in Support; (b) any affidavits; (c) any exhibits referenced by and attached directly to such affidavits; (d) the statement of generally available terms (SGAT) of interconnection under section 252 and any amendments thereto; and (e) any performance data the applicant submits to demonstrate compliance with section 271. The documents referenced in items (a) through (e) must be filed in paper form. All other documents, including operations support systems (OSS) guides and manuals that a BOC provides to competitive local exchange carriers and records from state proceedings for which the BOC is filing its application that do not fall within items (a)-(e) above, may be filed on CD-ROM subject to the terms of paragraphs (1) and (2) above. An applicant nonetheless should be prepared to provide a paper copy of any document submitted in electronic form within approximately 24 hours of any request from the Common Carrier Bureau.

Any CD-ROM in read-only format submitted to the Commission should be formatted in Word 97, Excel 97, PowerPoint, PDF, or TIF format, or such other format as may be approved by the Common Carrier Bureau. For each set of CD-ROM(s) submitted, the applicant must also submit in paper form a detailed index identifying the title, date, location of, and subjects covered by each supporting document submitted in CD-ROM format. This index may be combined with the table of appendices submitted as part of an applicant's Brief in Support, and should specify the location of any documentation, whether submitted on CD-ROM or paper form.

(4) To the extent that the application, or a comment or reply submission by any party, includes confidential information or comments on confidential information that another participant has submitted, the party must submit the following versions of the relevant document (*i.e.*, the brief, affidavit or other attachment):[4]

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[3] If filing on CD-ROM is not possible, applicants may file on a 3.5 inch computer diskette.

[4] The procedures governing the filing of confidential material in an *ex parte* submission is covered in Section G, below.

(i) A redacted version, stamped "Redacted—For Public Inspection" on its cover page and on pages containing redacted material, and clearly indicating the redacted areas on the relevant pages. An original plus one copy of the redacted version must be submitted (along with the rest of the application, comment or reply) to the Office of the Secretary in paper form, and twelve (12) copies must be provided to Janice Myles, Policy and Program Planning Division, at the address listed above in paragraph (2). The redacted filing also must be submitted on CD-ROM (or 3.5 inch diskette) in read-only format. Copies of submissions containing redacted material must also be submitted to the Department of Justice and state commissions, consistent with the general procedures outlined in this Section A (governing applications) and in Section D (governing comments and replies).

(ii) A confidential version, stamped "Confidential—Subject to Protective Order," consisting only of the pages containing confidential information. The confidential version must be submitted with a cover letter that identifies clearly the page(s) or portion(s) of the submission that contain redacted material, and lists the name, address, and phone number of the person who will address inquiries regarding access to the confidential information by other participants in the proceeding (subject to the terms of any applicable protective order). One copy of the cover letter and confidential submission should be delivered in person to the Office of the Secretary, 445 12th Street, S.W., Room TW-B-204, to Magalie Roman Salas, Secretary; or, in her absence, to William F. Caton, Deputy Secretary. In addition, the party should deliver two copies of the cover letter and confidential material (or as many copies of the material as otherwise requested by the recipients) to the Common Carrier Bureau staff member and Department of Justice contact identified in the Initial Public Notice as the designated recipients of confidential material.

The applicant must also submit a completely paper copy of the application simultaneously to: (a) the Department of Justice c/o Donald J. Russell, Telecommunications Task Force, Antitrust Division, Suite 8000, 1401 H Street, N.W., Washington, D.C. 20530; (b) the relevant state regulatory commission(s); and (c) the Commission's copy contractor, International Transcription Service, Inc. (ITS), 445 Twelfth Street, S.W., CY-B402, Washington, D.C. 20554, tel. 202/857-3800.

Applications will be available for public inspection during regular business hours in the Reference Information Center of the Federal Communications Commission, Room CY-A257, 445 12th Street, S.W., Washington, D.C. 20554. We also require the applicant to post application materials and all of its subsequent submissions (*e.g.*, reply comments and *ex parte* filings), within 24 hours of submission, on its own Internet home page and to indicate the applicable URL where the materials are located in its Brief in Support. This URL will also be accessible through a link on the Commission's Internet home page at http://www.fcc.gov.

B. Preliminary Matters

The Commission expects 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. In order to meet its burden of proof, the applicant may submit new evidence after filing solely to rebut arguments made or facts submitted by other commenters. Such new evidence may cover only the period placed in dispute by commenters, and thus should not relate to performance after the filing of comments by third parties (*i.e.,*

generally the 20th day of the proceeding).[5] It generally will not be appropriate for an applicant to make any part of its initial *prima facie* showing for the first time in reply comments or in *ex parte* submissions, although there may be limited exceptions to this rule.[6] We emphasize that, as a general matter, it is highly disruptive to our processes to have a record that is constantly evolving.

All factual assertions made by an applicant, or any commenter, must be supported by credible evidence, or they may not be entitled to any weight. Such factual assertions, as well as expert testimony, submitted by any party must also be supported by an affidavit or verified statement of a person or persons with personal knowledge thereof.

Applicants and participants in section 271 proceedings also have an obligation to present their position in a clear and concise manner. In the section 271 proceedings conducted so far, the applications – as well as some of the subsequent responsive filings – have been voluminous. In addition, certain parties have included substantive arguments in affidavits or other supporting materials only, and not in their legal briefs. As a result, in some cases, we have found it burdensome and time-consuming to determine the positions of parties. Because of the shortness of the 90-day review period, we believe that it is necessary to make the section 271 review process as efficient as possible, consistent with the requirements of the statute. We therefore require applicants and commenting parties to make all substantive legal and policy arguments in a legal brief (*i.e.*, the Applicant's Brief in Support; comments in opposition or support; reply comments; *ex parte* filings). The Commission retains the authority to strike, or to decline to consider, substantive arguments that appear only in affidavits or other supporting documentation.[7] To facilitate the Commission's review, we urge applicants and participants to include within each submission a table of contents that identifies clearly each particular checklist item number, or other requirement identified in the statute, to which their filing pertains, as well as the page number where the discussion of that item, or requirement, begins.

We recognize that the question of whether an applicant has satisfied the requirements of section 271 raises numerous complex and fact-intensive issues. Nonetheless, given the limited period in which the agency has to review such applications, we have established page limits for the Applicant's Brief in Support and for third party comments and replies. Despite these page limits, we expect that applicants and other participants in section 271 proceedings will continue to provide expert testimony in support of the positions articulated in their briefs, to clarify detailed factual issues, and, through the use of affidavits and other supporting documentation, to support fully the factual and legal assertions made in their legal briefs.

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[5] *See 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 New York*, CC Docket No. 99-295, Memorandum Opinion and Order, 15 FCC Rcd 3953, 3968-69, paras. 34-37 (1999) (*Bell Atlantic New York Order*); *Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, To Provide In-Region, InterLATA Services in Michigan*, CC Docket No. 97-137, Memorandum Opinion and Order, 12 FCC Rcd 20543, at para. 51 (1997) (*Ameritech Michigan Order*).

[6] *See Bell Atlantic New York Order*, 15 FCC Rcd at 3968, para. 35; *Joint 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 Kansas and Oklahoma*, CC Docket No. 00-217, Memorandum Opinion and Order, FCC 01-29, at paras. 22-27 (rel. January 22, 2001) (restating these principles, but waiving their application in exceptional circumstances).

[7] We note that the United States Court of Appeals for the District of Columbia Circuit has found that the Commission "need not sift pleadings and documents to identify" arguments that are not "stated with clarity." *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969(, *cert. denied*, 409 U.S. 1027 (1972). It is the petitioner who has the "burden of clarifying its position" before the agency. *Northside Sanitary Landfill, Inc., v. Thomas*, 849 F.2d 1516, 1519 (D.C. Cir. 1988), *cert. denied*, 489 U.S. 1078 (1989). This duty is even more crucial in the context of section 271 proceedings, because of the limited period in which the agency has to review section 271 applications.

Because the statute affords us only 90 days to review the application, we encourage the BOC, and interested third parties, to ensure that factual disputes are brought before and addressed by the relevant state commission prior to submitting its application with this Commission.

C. Content of Applications

Section 271 of the Act requires BOCs to demonstrate compliance with section 271 on a state-by-state basis. A BOC may, however, choose to file an application covering multiple states. If the BOC files a multi-state application, the Commission will determine for each state whether the application complies with each item of the section 271 competitive checklist and other requirements of the statute. Accordingly, the applicant must make state-specific evidentiary showings and separately identify each state's relevant performance data. The applicant may choose, however, to describe general processes applicable to multiple states together in one affidavit. For multi-state applications, the Commission retains discretion to extend the page limit on an applicant's Brief in Support, as well as responsive pleadings, to ensure that the applicant has sufficient space to present factual and legal assertions of satisfaction with the statutory requirements for each state.

We stress again that, as originally filed, a section 271 application should include all of the factual evidence on which the applicant asks the Commission to rely in making its findings thereon. Generally, an applicant shall not incorporate by reference entire documents or significant portions of documents that were filed in other proceedings, such as comments, reply comments, or supplemental materials filed or arguments made in a previous section 271 proceeding. A BOC that previously filed an application for a particular state that was rejected in a Commission order, however, may rely upon those portions of the Commission's decision finding compliance with Section 271 when reapplying for section 271 approval in that state. Under such circumstances, the BOC may incorporate by reference portions of the record in the previous proceeding.[8] Although an applicant is permitted to note arguments that were presented in earlier filings, the BOC must provide a complete recitation in its current filing of any argument that it wishes the Commission to consider. We have given BOCs substantial leeway with respect to the evidence they present to satisfy the checklist. Although our orders have provided guidance on which types of evidence we find more persuasive, we reiterate that we remain open to approving an application based on other types of evidence if a BOC can persuade us that such evidence demonstrates nondiscriminatory treatment and other aspects of the statutory requirements. In past orders, we have found that the most probative evidence of nondiscrimination is actual commercial usage, and "[p]erformance measures are an especially effective means of providing us with evidence of the quality and timeliness of the access provided by a BOC to requesting carriers."[9]

Simply put, we would find it most persuasive if, in its initial application, a section 271 applicant relying on performance data:

(1) provided sufficient performance data to supports its contention that the statutory requirements are satisfied;

(2) identified the facial disparities between the applicant's performance for itself and its performance for competitors;

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[8] *See, e.g., Application of BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc., for Provision of In-Region, InterLATA Services in Louisiana*, CC Docket No. 98-121, Memorandum Opinion and Order, 13 FCC Rcd 20599, 20604, at para. 8 (1998). Where the Commission has found compliance with particular aspects of the section 271 statutory requirements for a given state, the BOC may incorporate by reference its prior showing for those aspects, provided that it certifies in the subsequent application that its actions and performance at that time are consistent with the prior showing.

[9] *See, e.g., Bell Atlantic New York Order*, 15 FCC Rcd at 3969, para. 53.

(3) explained why those facial disparities are anomalous, caused by forces beyond the applicant's control (e.g., competitive LEC errors) or have no meaningful adverse impact on a competitive LEC's ability to obtain and serve customers; *and*
(4) provided the underlying data, analysis and methodologies necessary to enable the Commission and commenters to meaningfully evaluate and contest the validity of the applicant's explanations for performance disparities, including, for example, carrier specific carrrier-to-carrier performance data.

We believe these steps should be readily apparent from our previous orders, but we provide them in the interest of removing doubt about what we would find most persuasive to show that it is more likely than not that an applicant has satisfied the requirements of section 271.

All section 271 applications shall conform to the Commission's general rules relating to applications.[10] As noted above, applications shall have two parts: (1) a "Brief in Support of Application by [Bell company name] for Provision of In-Region, InterLATA Services in [name of state(s)]"; and (2) any supporting documentation, such as affidavits. The Applicant's Brief in Support may not exceed 125 pages. The Commission retains discretion to adjust this page limit for good cause shown, such as when the application addresses multiple states. The table of contents, summary of arguments, list of agreements, list of appendices, contact person for confidential submissions, Anti-Drug Abuse Act certification, and affidavits (items (a), (b), (c), (h), (i), (j) and (k) below) shall not be counted in determining the length of the Brief in Support. There is no page limit on supporting documentation, but, as discussed above, substantive legal or policy arguments not fully asserted in the Brief in Support may, at the Commission's discretion, be disregarded. In addition, the applicant must submit on paper a detailed table of appendices identifying the title, date, location of, and subjects covered by each supporting document submitted in CD-ROM format.

The Brief in Support should contain the following items:

(a) a table of contents;
(b) a concise summary of the substantive arguments presented in the Brief;[11]
(c) a statement identifying how the applicant meets the requirements of section 271(c)(1) for the applicable state(s), including a list of the specific interconnection agreements on which the applicant bases its application, and the status of any federal court challenges to these agreements pursuant to section 252(e)(6);
(d) a statement summarizing the status and findings of the relevant state proceedings (if any) examining the applicant's compliance with section 271 or portions thereof;
(e) all legal and factual arguments that the three requirements of section 271(d)(3) have been met, supported as necessary with selected excerpts from the supporting documentation (with appropriate citations);[12]
(f) a list of all appendices (including affidavits) and the location of and subjects covered by each of those appendices;
(g) the name, address, and phone number of the person who will address inquiries relating to access (subject to the terms of any applicable protective order) to any confidential information submitted by the applicant;
(h) an Anti-Drug Abuse Act certification as required by 47 C.F.R. § 1.2002; and
(i) an affidavit signed by an officer or duly authorized employee certifying that all information

[10] *See* 47 C.F.R. §§ 1.49, 1.741-1.749.

[11] *See id.* at § 1.49.

[12] Item (e) is obviously the core portion of the Brief in Support, and may be quite lengthy. It may help to divide it, therefore, into three subsections, one corresponding to each of the three requirements set forth in section 271(d)(3).

supplied in the application is true and accurate to the best of his or her information and belief.[13]

The name of the applicant, the date the application is filed, and the state(s) to which it relates should appear in the upper right-hand corner of each page of the Brief in Support.

As for the supporting documentation, we require that it contain those portions of the public record of the relevant state proceedings *upon which the applicant is relying* for Commission approval or has cited in its Brief in Support. This would likely include, among other relevant materials, state commission orders, tariffs and interconnection agreements. The applicant should avoid, to the extent possible, filing non-relevant portions of the record from the state proceeding. The applicant nonetheless should be prepared to submit a copy of other portions of the public record of the relevant state proceedings within approximately 24 hours of any request from the Common Carrier Bureau, in either paper or electronic form as requested by the Bureau staff. In addition, supporting documentation (including any affidavits from subject matter experts) shall be provided in appendices, separated by tabs and divided into volumes as appropriate. Each volume shall contain a table of contents that lists the subject of each tabbed section of that volume.

D. Comments and Replies By Interested Third Parties

After an application has been filed, the Common Carrier Bureau will issue a public notice ("Initial Public Notice") establishing the specific due dates for comments and replies by interested third parties. Comments generally will be due approximately 20 days after the Initial Public Notice is issued, and replies generally will be due 45 days after the Initial Public Notice is issued. The Commission retains discretion to adjust the due dates for comments and replies on a case-by-case basis, depending upon the circumstances of a particular application, but in all instances will seek to ensure that interested third parties have sufficient time to review and comment on each application. The Commission strongly discourages, and will take appropriate steps to prevent, an applicant from attempting to limit the time for interested third parties to review an application (*e.g.*, by filing on a Friday or the day before a national holiday).

For both comments and reply submissions, the name of the party, the name of the applicant, and the state(s) to which the submission relates should appear in the upper right-hand corner of each page. These filings shall also include a table of contents, a concise summary of the arguments presented in the comments or replies, and a list of all appendices and the location of and subjects covered by each of those appendices. None of these portions of the comments shall be counted in determining the length of these submissions. As discussed above, the table of contents should identify clearly each particular checklist item, or other requirement identified in the statute, to which the filing pertains, as well as the page number where the discussion of that item or requirement begins. Comments may not exceed 100 pages, and replies may not exceed 50 pages. The Commission retains discretion to adjust these page limits for good cause shown, such as when comments address a multi-state application.

When filing comments or replies, parties (including commenters, the Department of Justice, and the relevant state commission(s)) should submit: (1) an original, four copies and a CD-ROM or 3.5 inch computer diskette containing the filing to Magalie Roman Salas, Secretary, Office of the Secretary, Federal Communications Commission, 445 12th Street, S.W., Room TW-B204, Washington, D.C. 20554; and (2) twelve (12) copies to Janice Myles, Policy and Program Planning Division, Common Carrier Bureau, Federal Communications Commission, Re: docket no. XXX, 445 12th Street, S.W., Room 5-C327, Washington, D.C. 20554. Because the relevant state commission(s) and the Department of Justice

[13] *See* 47 C.F.R. § 1.743.

are given roles by statute in a section 271 proceeding, copies of all filings, including comments, reply comments and *ex parte* submissions, should be filed with those parties. The name and address of the contact person at these agencies will be listed in the Initial Public Notice. To the extent that a comment or reply submission includes confidential information or comments on confidential information that another participant has submitted, the party must follow the procedures described in Part A.4 above, including providing copies of confidential material to both the Commission and the Department of Justice.

We encourage third parties to file well-documented factual submissions in support or, or in opposition to, a BOC's section 271 application. Anecdotal evidence or unsupported assertions in opposition to an application are not persuasive.[14] Accordingly, factual allegations supported by detailed affidavits will be most probative.

There is no page limit on supporting documentation. As discussed in section B of this Public Notice, however, parties must make all substantive legal and policy arguments in their comments or replies, rather than in supporting documentation. Supporting documentation, including any records of relevant state proceedings, interconnection agreements, affidavits, etc., shall be provided in appendices, separated by tabs and divided into volumes as appropriate. Each volume shall contain a table of contents that lists the subject of each tabbed section of that volume. Commenters shall not incorporate by reference, in their comments or replies, entire documents or significant portions of documents that were filed in other proceedings, such as comments or reply comments filed or arguments made in a previous section 271 proceeding. Although commenters are permitted to note arguments that were presented in earlier filings, they must provide a complete recitation in their current filing of any argument that they wish the Commission to consider.

All participants in the proceeding – the applicant, interested third parties, the relevant state commission(s), and the Department of Justice – may file a reply to any comment made by any other participant. The applicant's and third parties' replies may not raise new arguments or include new data that are not directly responsive to arguments other participants have raised, nor may the replies merely repeat arguments made by that party in the application or initial comments. As discussed above in Section B, an applicant may submit new factual evidence in its reply if the sole purpose of that evidence is to rebut arguments made, or facts submitted, by commenters, provided the evidence covers only the period placed in dispute by commenters and in no event post-dates the filing of the relevant comments.[15]

E. Written Consultations from State Commission(s) and Department of Justice

State commissions have a critical statutory role in the section 271 authorization process. We encourage state commissions to become actively involved in validating and reconciling data, overseeing third-party testing of operations support systems, developing clearly-defined performance measures and standards, and implementing performance assurance measures that strongly encourage post-entry compliance. Indeed, given our 90-day statutory deadline, this Commission looks to state commissions to resolve factual disputes wherever possible. As indicated in prior section 271 orders, this Commission will accord more weight to state commission evaluations where the state has conducted a rigorous investigation of the BOC's compliance with the statutory requirements through an open, collaborative state process that allows full participation by all interested parties, and has supported its evaluation with a detailed record.[16]

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[14] *See Bell Atlantic New York Order*, 15 FCC Rcd at 3973, para. 50.

[15] *See id.*, 15 FCC Rcd at 3968, para. 34; *Ameritech Michigan Order*, 12 FCC Rcd at 20543, para. 15.

[16] *See Bell Atlantic New York Order*, 15 FCC Rcd at 3973-74, paras. 51, 54; *see also id.*, 15 FCC Rcd at 3957-59, paras. 6-12 (describing efforts of the New York Public Service Commission); *Application by SBC Communications*

We expect that state commissions will make written factual findings and reach reasoned legal conclusions concerning the BOC's compliance with the requirements of section 271. Such written conclusions of fact and law should be submitted to the Commission to guide our review of a BOC's application, as contemplated in section 271(d)(2)(B) of the Act.[17] As in previous section 271 applications, we will set a deadline for filing a state commission's written evaluation of 20 days after issuance of the Initial Public Notice.[18] Based on our experience, however, we emphasize that it is extremely beneficial to the efficient processing of section 271 applications if a state commission's evaluation is available at the time the BOC files its application, or as soon thereafter as possible. Indeed, without the benefit of a state's analysis and conclusions until several weeks into a proceeding, resources may be wasted considering issues and concerns raised by parties that have already been thoroughly considered by state regulators. This is particularly true where a state has spent a great deal of time and effort on local competition issues, and on the BOC's section 271 application. Accordingly, we encourage state commissions to make available a written evaluation at the time a BOC files its application, but in no event later than 20 days after the application is filed. When submitting evaluations to the Commission, state commissions shall follow the filing procedures outlined in sections A and D of this Public Notice applicable to third party commenters. We encourage state commissions to include in their evaluations a discussion of any complaints that have been filed against the BOC, either at the state commission or in federal court, pursuant to sections 251 and 252 of the Act.

A written consultation by the Department of Justice (which, by the Act's express terms, must become part of the record) must be filed not later than approximately 35 days after the issuance of the Initial Public Notice. The specific due date for the Department's written consultation will be set forth in the Initial Public Notice, and may vary depending on the circumstances of the individual application. The Department of Justice shall also follow the applicable filing procedures outlined in sections A and D of this Public Notice.

The state commission(s) and the Department of Justice are also welcome to file reply comments pursuant to section D of this Public Notice, as well as written *ex parte* submissions in accordance with section G of this Public Notice.

F. Motions

Because of the shortness of the 90-day period to review section 271 applications, a dispositive motion filed with the Commission in a section 271 proceeding (*e.g.*, motion to dismiss) will be treated as an early-filed pleading and will not be subject to a separate pleading cycle, unless the Commission or Bureau determines otherwise in a public notice issued after the motion is filed. The Commission generally expects, however, that such a separate pleading cycle will not be necessary. Thus, in general, dispositive motions filed before the due date for third party comments will be treated as early-filed comments; dispositive motions filed after the due date for third party comments but before the due date for replies will be treated as early-filed replies; and dispositive motions filed after the due date for replies will be treated as *ex parte* submissions. Such motions will be counted toward the applicable page limit for the

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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. 00-65, Memorandum Opinion and Order, 15 FCC Rcd 18354, 18357-59, paras. 3-4 (describing efforts of the Texas Public Utility Commission).

[17] *See* 47 U.S.C. § 271(d)(2)(B) (requiring the Commission to consult with the relevant state commissions in order to verify the compliance of the BOC with the requirements of section 271).

[18] Like the due dates for comments and reply comments, the specific due dates of these written consultations will be set forth in the Initial Public Notice, and may vary depending on the circumstances of the individual application.

submitting party.

Non-dispositive motions (*e.g.*, motions to strike) will be subject to the default pleading cycle in section 1.45 of the Commission's rules,[19] unless the Commission or Bureau determines otherwise in a public notice. Because of the expedited nature of section 271 proceedings, section 1.4(h) of the Commission's rules will not apply to motions filed in section 271 proceedings.[20] Thus, parties will not be allowed an extra three days (beyond the time permitted in section 1.45) to respond to non-dispositive motions and oppositions thereto, regardless of whether the filing was served on the party by mail. In lieu of that rule, however, a party submitting a non-dispositive motion must, on the day of filing, serve that motion either by hand or by facsimile on any party whose filing is the subject of the motion. In addition, parties must submit non-dispositive motions and oppositions to such motions to the Commission on a read-only CD-ROM formatted in Word 97, Excel 97, PowerPoint, PDF, or TIF format, or such other format as may be approved by the Common Carrier Bureau, as applicable (as well as in hard copy form). Certain filings submitted on read-only CD-ROM may be posted on the Commission's Internet homepage for public inspection at http://www.fcc.gov. Such motions, oppositions, and replies will not be counted toward the submitting party's page limit.

G. Ex Parte Rules – Permit-But-Disclose Proceeding

Because of the broad policy issues involved, section 271 application proceedings initially will be considered permit-but-disclose proceedings.[21] Accordingly, *ex parte* presentations will be permitted, provided they are disclosed in conformance with Commission *ex parte* rules.[22] Because of the statutory timeframe, however, we strongly encourage parties to set forth their views comprehensively in the formal filings specified above (*e.g.*, the Applicant's Brief in Support; comments or replies with supporting materials) and not to rely on subsequent *ex parte* presentations. In any event, parties may not file more than a total of 20 pages of written *ex parte* submissions. This 20-page limit does not include: (1) written *ex parte* submissions made solely to disclose an oral *ex parte* contact; (2) written material submitted at the time of an oral presentation to Commission staff that provides a brief outline of the presentation; (3) written material filed in response to direct requests from Commission staff;[23] or (4) written factual exhibits. The Commission retains the right not to consider as part of the record *ex parte* submissions in excess of the 20-page limit. Parties should provide Bureau staff (along with the contact person for the Department of Justice and the relevant state commission(s), identified in the Initial Public Notice) with courtesy copies of any *ex parte* presentation, including those made to any member of the Commission. Parties should also file with the Commission any material concerning a section 271 application that is provided to the Department of Justice during the pendency of the proceeding, following the procedures outlined in this section (including, if applicable, the procedures governing the filing of confidential information). Finally, recognizing the burden placed on all parties by the 90-day statutory deadline, we strongly encourage each applicant to post a copy of its *ex parte* submissions on a publicly-accessible web site, and commenters to provide the applicant with a copy of their own *ex parte* submissions – both within 24 hours of filing the material with the Commission.[24]

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[19] 47 C.F.R. § 1.45.

[20] *See* 47 C.F.R. § 1.4(h).

[21] *See* 47 C.F.R. §§ 1.1200(a), 1.1206.

[22] *See* 47 C.F.R. §§ 1.1202, 1.1206(b).

[23] *See Bell Atlantic New York Order*, 15 FCC Rcd at 3970, paras. 41-42 (discussing *ex parte* submissions and the Commission's discretion to request additional information in order to further its deliberative process).

[24] We commend applicants in prior section 271 proceedings for making available *ex parte* letters on their web sites and, in return, have asked commenters to provide courtesy copies of their own *ex parte* submissions to the applicant. *See, e.g., Comments Requested on the Application by Verizon New England, Inc. for Authorization Under Section*

To the extent an *ex parte* submission includes confidential information or comments on confidential information that another participant has submitted, the party must file with the Office of the Secretary: (i) one original of only the portion(s) of the submission that contain confidential information or comments on confidential information that another participant has submitted; and (ii) one original and two copies of the entire confidential submission in redacted form, which clearly indicates the redacted areas on the relevant pages.[25] The submissions described in items (i) and (ii) must be accompanied by a cover letter that lists the name, address, and phone number of the person who will address inquiries regarding access to the confidential information by other participants in the proceeding (subject to the terms of any applicable protective order). Each page of the submission described in item (i) and the accompanying cover letter should be stamped "Confidential—Subject to Protective Order." Each page of the redacted submission described in item (ii) and the accompanying cover letter should be stamped "Redacted—For Public Inspection." Other than having different stamps, the cover letters should be the same for the confidential and redacted submissions. Both submissions should be delivered in person to the Office of the Secretary, 445 12th Street, S.W., Room TW-B-204, to Magalie Roman Salas, Secretary; or in her absence, to William F. Caton, Deputy Secretary. In addition, two copies of the redacted and confidential submissions, and the accompanying cover letters, should be delivered to the Common Carrier Bureau staff member and Department of Justice contact identified in the Initial Public Notice as the designated recipients of confidential material.

For purposes of these proceedings, and in light of the explicit role the Act gives to the Department of Justice and state commissions under section 271, any oral *ex parte* presentations from the Department of Justice and the relevant state commission(s) will be deemed to be exempt *ex parte* presentations. To the extent that the Commission obtains through such oral *ex parte* presentations new factual information on which the Commission subsequently relies in its decision-making process, the Commission will either request the Department of Justice or the relevant state commission(s) to prepare a summary, or itself will prepare a summary, of the new factual information for inclusion in the record in accordance with the Commission's rules.[26] There are no page limits on written *ex parte* submissions by the Department of Justice or the relevant state commission(s).

Notwithstanding the above, the Commission may, by subsequent public notice, prohibit all communication with Commission personnel regarding the application during a specified period preceding the anticipated release date of the Commission's order regarding the application.[27]

H. FCC Notice to Individuals Required by the Privacy Act and the Paperwork Reduction Act

Pursuant to section 271 of the Communications Act of 1934, as amended, the BOC must demonstrate compliance with section 271 on a state-by-state basis by filing an application to provide in-region, interLATA services covering one or more states. The relevant state regulatory commission(s) must file written consultations relating to the applications not later than approximately 20 days after the issuance of an Initial Public Notice establishing specific due dates for various filings. Interested third parties may file comments on the applications not later than approximately 20 days after the issuance of the Initial Public Notice. The Department of Justice must file a written consultation relating to the applications not later than approximately 35 days after the issuance of the Initial Public Notice. As noted above, the filing

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271 of the Communications Act to Provide In-Region, InterLATA Service in the State of Massachusetts, CC Docket No. 01-9, Public Notice, DA 01-106 (rel. January 16, 2001).

[25] The procedures for filing confidential materials as part of the initial application, comments or replies is covered above in Section A.4.

[26] *See* 47 C.F.R. § 1.1204(a)(6).

[27] *Cf.* 47 C.F.R. §§ 1.1200(a), 1.1203.

deadlines are set by the Commission in the Initial Public Notice and may vary depending on the circumstances of the individual application. All of the information submitted by the various parties would be used to ensure that the BOCs have complied with their obligations under the Communications Act of 1934, as amended, prior to receiving Commission authorization to provide in-region, interLATA services pursuant to section 271. Obligation to respond is not mandatory.

The Commission has estimated that each response to this collection of information will take, on average, 250 hours. This estimate includes the time to read the instructions, look through existing records, gather and maintain required data, and actually complete and review the form or response. If you have any comments on this estimate, or on how the Commission can improve the collection and reduce the burden it causes you, please write the Federal Communications Commission, AMD-PERM, Washington, D.C. 20554, Paperwork Reduction Project (3060-0756). Your comments also will be accepted via the Internet if you send them to jboley@fcc.gov. Please DO NOT SEND COMPLETED APPLICATION FORMS TO THIS ADDRESS.

Remember – You are not required to respond to a collection of information sponsored by the Federal government, and the government may not conduct or sponsor this collection unless it displays a currently valid OMB control number or if it fails to provide you with this notice. This collection has been assigned an OMB control number of 3060-0756.

This notice is required by the Privacy Act of 1974, Public Law 93-579, December 31, 1974, 5 U.S.C. § 552a(e)(3) and the Paperwork Reduction Act of 1995, Public Law 104-13, October 1, 1995, 44 U.S.C. § 3507.

*The action contained herein has been analyzed with respect to the Paperwork Reduction Act of 1995 and found to impose new or modified reporting and record-keeping requirements or burdens on the public. Implementation of these new or modified reporting and record-keeping requirements will be subject to approval by the Office of Management and Budget (OMB) as prescribed by the Act. This Public Notice will be re-released after OMB approval has been obtained.

By the Chief, Common Carrier Bureau.

News Media contact: Michael Balmoris 202/418-1500.
FCC Common Carrier Bureau contact: Janice Myles, Policy and Program Planning Division 202/418-1580.

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