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VIA ELECTRONIC FILING

Ms. Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 Twelfth Street, S. W. – Room TWB-204  
Washington, D. C. 20554

Re: *Ex parte*, WC Docket No. 02-112, Extension of Section 272 Obligations of Southwestern Bell Telephone Co. in the State of Texas

Section 272 of the Telecommunications Act of 1996 was designed to limit the ability of a Bell Operating Company (“BOC”) to abuse post-271 local market power to harm competition. Because it was impossible to predict in 1996 how long local market power would endure after section 271 authorization, Congress tasked the Commission with the responsibility to determine, based upon state-specific market conditions, the point at which local markets in each state become sufficiently competitive that market forces provide an effective substitute for the vital state and federal oversight enabled by the accounting, auditing, and other section 272 safeguards. That is a weighty responsibility – as the Commission has repeatedly recognized. And as the state commissions have uniformly stressed in their comments in this proceeding, the section 272 accounting, audit and separation requirements remain *essential* tools for the detection and deterrence of discrimination until local market power dissipates.

Although the Commission initiated a comprehensive “sunset” rulemaking proceeding, it issued an order that did not even address the standards that should be used to evaluate whether section 272 safeguards should be allowed to sunset. Worse yet, the Commission simply let Verizon’s section 272 safeguards lapse in New York without providing any explanation whatsoever for its action.

Absent swift Commission action, the “crucial[ly] importan[t],” *Texas 271 Order*, 15 FCC Rcd. 18354, ¶ 395 (2000), section 272 obligations for SBC in Texas will also soon sunset. In light of the record established in this proceeding, allowing that to happen would be patently arbitrary and capricious. The Texas Public Utilities Commission (“Texas PUC”) and other commenters have proffered detailed and expert

testimony that demonstrate that SBC continues to enjoy substantial market power in Texas today, and will for the foreseeable future. Indeed, whether measured by market share, revenues or number of alternative carriers, the evidence shows that local competition has *decreased* in Texas over the most recent period for which hard data are available. Further, AT&T, the Texas PUC and other commenters have demonstrated that SBC has abused its local market by actively discriminating against rival long distance carriers that are dependent upon access to SBC's network and by cross-subsidizing SBC's long distance affiliate. Finally, AT&T, the Texas PUC, and other commenters have shown that SBC's ability to undertake such anticompetitive conduct would only increase if the core section 272 obligations are gutted.

It is equally clear that the Commission cannot lawfully avoid its section 272 responsibilities, the marketplace realities and the record in this proceeding by simply announcing in a "public notice" devoid of any reasoning that SBC's section 272 obligations have terminated. "The requirement that agency action not be arbitrary or capricious includes a requirement that the agency adequately explain its result and respond to relevant and significant public comments." *See, e.g., Public Citizen, Inc. v. FAA*, 988 F.2d 186, 197 (D.C. Cir. 1993). Under the most basic precepts of administrative law, "the agency must examine the relevant data and articulate a satisfactory explanation for its action including a rationale connection between the facts and the choice made." *Motor Vehicles Mfrs. Ass'n v. State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29, 43 (1983) (internal quotation marks omitted). "At the least, such a statement should indicate the major issues of policy that were raised in the proceedings and explain why the agency decided to respond to these issues as it did, particularly in light of the statutory objectives that the rule must serve." *Independent U.S. Tanker Owners Committee v. Dole*, 809 F.2d 847, 852 (D.C. Cir. 1987).

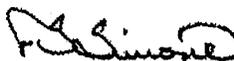
Even where an agency enjoys discretion as to whether to extend a rule or initiate a regulatory action, "an agency's failure to cogently explain why it has exercised its discretion in a given manner renders its decision arbitrary and capricious." *International Ladies' Garment Workers Union v. Donovan*, 722 F.2d 795, 815 n.35 (D.C. Cir. 1983). In particular, the D.C. Circuit has determined that where an agency issues a public notice requesting comments on an issue, but then later terminates that docket and decides not to act at all, the agency remains "oblige[d] . . . to consider the comments it received, and to articulate a reasoned explanation" and a "satisfactory explanation for its termination of [the] docket." *Williams Natural Gas Co. v. FERC*, 872 F.2d 438, 450 (D.C. Cir. 1989); *see also id.* at 446 ("[T]he agency, having expressed [] tentative views and having solicited comments on the issue, was not free to terminate the rulemaking for no reason whatsoever.").

The Commission has recognized these responsibilities in similar contexts. In 2000, for example, when the section 272 safeguards regarding the BOC's provision of interLATA information services were due to expire, the Commission issued a public notice in response to a petition filed by an interested party, solicited comment, and after consideration of those comments, issued an order determining that (and explaining why) those section 272 safeguards should expire. *BOC Information Services Safeguards Order*, 15 FCC Rcd. 3267 (2000).

In short, the Commission is obligated to conclude this proceeding (and future 272 sunset proceedings) with a written order that addresses the "relevant data" proffered by AT&T and "articulate[s] a reasoned explanation" that is consistent with "the statutory objectives" of section 272. And in light of the conclusive evidence that SBC enjoys considerable local market power in Texas, the only reasoned resolution of AT&T's petition is to extend SBC's section 272 safeguards for the next several years.

One electronic copy of this Notice is being submitted to the Secretary of the FCC in accordance with Section 1.1206 of the Commission's rules.

Sincerely,



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