Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
Applications for Consent to the	)	
Transfer of Control of Licenses and	)	CC Docket No. 98-141
Section 214 Authorizations from	)	
Ameritech Corporation, Transferor,	)	
to SBC Communications Inc.,	)	
Transferee	)	

COMMENTS OF THE COMPETITIVE TELECOMMUNICATIONS ASSOCIATION ON THE PROPOSED CONDITIONS

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SUMMARY

CompTel endorses the goals of the Commission in its review of the SBC/Ameritech merger application, and appreciates the enormous efforts of the staff in attempting to negotiate conditions that could accomplish the goals of protecting consumers and promoting competition in the wake of a merger of two large incumbent local exchange carriers -- companies that will control, post-merger, about 38 percent of the nation's access lines.

Despite the Commission staff's best efforts, however, CompTel is compelled to conclude that the proposed conditions fall far short of those necessary to justify approval of this merger application. They do not offer competitors increased ability to penetrate local markets, and in many respects offer competitors less than the law currently provides. In many cases, the conditions simply require SBC/Ameritech to obey the law. Finally, those conditions that do move the ball ahead do not go far enough to have any significant impact on the consumer and competitive harms of the proposed merger.

Many of the conditions violate the nondiscrimination provisions that are at the heart of the 1996 Act's local competition requirements. These conditions -- which include a grossly restricted offering of network element combinations and severe limitations on the availability of reduced unbundled loop and resale rates -- would allow SBC/Ameritech to treat carriers differently and to impose use restrictions on network elements and resale that the Act and the FCC have specifically forbidden.

In addition, the proposed separate affiliate structure for advanced services is far too weak to provide any pro-competitive benefits. It permits joint marketing by the ILEC entity and the advanced services affiliate; allows SBC/Ameritech to provide operations, installation and maintenance services to the affiliate; and allows intermingling of equipment, customers, brand names, services, employees and resources between SBC/Ameritech and its affiliate. The conditions also could be read to confer non-incumbent local exchange carrier (ILEC) status on the advanced services affiliate (thereby exempting it from compliance with the market-opening provisions of Section 251(c) of the Act). Such a conclusion is incorrect as a matter of law and would prejudge other pending proceedings. It would permit ILECs to evade their local competition obligations simply by setting up a nominally separate affiliate for their local activities.

Any arguable benefits that might flow from the proposed separate affiliate structure -- in terms of improving competitor access to conditioned loops or collocation, for example -- are unlikely to be realized, moreover. This is so because SBC/Ameritech's affiliate will be able to employ resale of local exchange and advanced services provided by the SBC/Ameritech ILEC entity on a profitable basis, unlike unaffiliated CLECs, and thus will have no need to provide local exchange service or advanced services via unbundled network elements (UNEs) and collocation. In the case of advanced services, the SBC/Ameritech separate affiliate will also have the *exclusive* ability to engage in DSL line-sharing with the ILEC

entity, and for that reason would not be interfacing with the ILEC in the same way as unaffiliated CLECs, even if it were to employ a UNE strategy.

Several of the proposed conditions attempt to provide competitors with greater opportunities than are available today, but even these fall short of what is needed to have a meaningful impact on local competition. For example, SBC/Ameritech's promise to provide line-sharing opportunities for advanced services competitors is so hedged that competitors are unlikely to see that offering materialize soon, if ever -- and in the meantime, SBC/Ameritech's affiliate benefits from the discriminatory availability of an exclusive line-sharing offering from SBC/Ameritech. The discounted "surrogate line sharing" unbundled loop rate for competitors does little to mitigate this competitive harm, since that rate is only available if the affiliate uses line-sharing (which it may not, since it can profitably employ resale), and it still requires the end user customer to purchase two lines in order to obtain competitive DSL services from a CLEC (but not if it obtains them from SBC/Ameritech).

CompTel also supports the positive direction taken in the conditions with respect to OSS for small carriers, cabling in multi-unit properties, most favored nations provisions, and performance standards, but even these measures are too little. For example, the remedies for failure to meet the Tier 2 and 3 standards are not paid to the CLECs that are harmed by SBC/Ameritech's poor performance, which leaves those CLECs uncompensated for their harms and reduces SBC/Ameritech's incentive to comply.

In sum, the Commission should substantially strengthen the proposed conditions, so that they will, at a minimum, conform with what the 1996 Act and the FCC's rules already require. Specifically, the Commission should:

- Eliminate the restrictions on the availability of the combined network element offering (UNE-P) (including customer class, service, and time restrictions);
- Eliminate limitations on services provided pursuant to the discounted loop rates, both for voice grade and advanced services, and the customer class restrictions on service resale discounts;
- Strengthen the advanced services separate affiliate requirements so that the affiliate must truly deal with the SBC/Ameritech ILEC entity like any other CLEC;
- Prohibit any SBC/Ameritech "CLEC" affiliate from reselling the services (conventional or advanced) of the ILEC entity;
- Prohibit SBC/Ameritech from packaging its incumbent local exchange services with other competitive services, including out-of-region local services;
- Require SBC/Ameritech to wait to offer any DSL line-sharing option to its affiliate until such time as it is able to offer it on a commercial scale to unaffiliated CLECs;
- Eliminate the numerous restrictions on the most-favored-nation (MFN) commitments;
- Eliminate the restrictions on access to cabling in multi-unit properties;
- Require that all performance standards penalties be paid to CLECs, who are the harmed parties when performance standards are not met.

In addition, and regardless of what conditions the Commission eventually decides to impose, the Commission should make clear that the conditions are not relevant to, nor do they prejudge, action by the FCC in other rulemakings

(such as the network element remand, the DSL line-sharing proceeding, the advanced services separate affiliate proceeding, the CompTel Section 251(h) declaratory ruling petition, and any Section 271 proceedings). The Commission has important work to do in those proceedings, which will have industry-wide ramifications. It should not, even unintentionally, send the wrong signal through the condition it imposes here.

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COMMENTS OF
THE COMPETITIVE TELECOMMUNICATIONS ASSOCIATION
ON THE PROPOSED CONDITIONS

The Competitive Telecommunications Association ("CompTel") hereby submits its comments in the above-captioned proceeding on the conditions proposed by SBC Communications Inc. ("SBC") and Ameritech Corporation ("Ameritech") on their proposed merger. These comments are filed pursuant to the July 1, 1999, Public Notice inviting comment on the proposed conditions.

INTRODUCTION

CompTel is a national industry association representing 344 competitive telecommunications service providers and suppliers. CompTel's members include nationwide companies and smaller, regional carriers, providing local, long distance, and Internet services using a diverse mix of entry strategies. Since its inception in 1981, CompTel has advocated policies to promote the development of full and fair competition in the provision of communications services. CompTel's role on both the federal and state levels is to ensure that

companies of different sizes and with different entry strategies have a full and equal opportunity to compete in all communications service markets.

I. DESPITE THE COMMISSION STAFF'S BEST EFFORTS, THE PROPOSED CONDITIONS DO NOT ACCOMPLISH THE COMMISSION'S GOALS IN REVIEWING AN RBOC MERGER APPLICATION.

CompTel recognizes and greatly appreciates the enormous efforts of the staff in this proceeding to develop a set of conditions that might promote the development of local competition in the SBC/Ameritech region and mitigate the harmful effects of this mega-merger. While some of the conditions proposed by SBC and Ameritech in this proceeding constitute positive steps, they are not adequate in their current form to address the significant concerns expressed by Chairman William E. Kennard regarding the potential competitive and consumer harms of the proposed merger. 1/ Unless substantially strengthened, the proposed conditions will not give the Commission the necessary comfort to permit it to approve this merger.

Many of the conditions also violate the nondiscrimination provisions that are at the heart of the 1996 Act's local competition requirements. These conditions -- which include a grossly restricted offering of network element combinations and severe limitations on the availability of reduced unbundled loop

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1/ See Letter from William E. Kennard, Chairman, Federal Communications Commission, to Richard C. Notebaert, Chairman and Chief Executive Officer, Ameritech Corporation, and Edward E. Whitacre, Jr. Chairman and Chief Executive Officer, SBC Communications, Inc., CC Docket No. 98-141 (dated April 1, 1999); see also Public Notice, CC Docket No. 98-141 (rel. July 1, 1999), at 1.

and resale rates -- would allow SBC/Ameritech to treat carriers differently and to impose use restrictions on network elements and resale that the Act and the FCC have specifically forbidden. 2/ The Commission simply cannot sanction conditions that violate the Commission's own rules, which embody statutory nondiscrimination standards. Cloaking such discrimination in the language of "promotions" does nothing to avoid the statutory problem or the competitive consequences of such discrimination. 3/

The problems with the proposed conditions fall generally into three categories. First, several of the proposed conditions contain restrictions that are unlawful and that would permit SBC/Ameritech to provide competitors with *less* than what the Telecommunications Act of 1996 ("1996 Act") requires. Second, many of the proposed conditions constitute nothing more than agreements by SBC and Ameritech to simply comply with their *existing* statutory, regulatory, and contractual obligations -- and thus are not meaningful as merger conditions. Third, while some of the proposed conditions move in the right direction, they do not go far enough to have any real impact on the likely competitive and consumer harms of the proposed merger, and thus do not accomplish the Commission's intended goal.

2/ Local Competition Order, CC Docket No. 96-98, at ¶¶ 859-862.

3/ Commission precedent permitting the use of promotional rates under limited circumstances, even if otherwise applicable (which it is not), is irrelevant here because it was adopted under different statutory provisions. See 47 U.S.C. § 202(a).

CompTel focuses in these comments on the major deficiencies 4/ in the proposed conditions, which are the following:

- Unlawful and anticompetitive limitations on access to combinations of network elements (UNE-platform).
- Discriminatory restrictions limiting the availability of discounted loop price.
- Weak separate affiliate structure for xDSL services, which permits substantial joint activity, sharing, and cross-subsidization.
- No defined structure or clear relationships between SBC/Ameritech's ILEC affiliates and its national CLEC subsidiary, the National Local Company (NatLoCo).
- Unlawful and inappropriate limitations on DSL line-sharing.
- Failure of performance standards penalty payments to go to the harmed parties: the competitive local exchange carriers competing with SBC/Ameritech.

In addition to these deficiencies, the conditions contain provisions that would actually create new anticompetitive incentives. In particular, by imposing penalties on SBC/Ameritech for failing to reach benchmarks in achieving the company's national/local strategy, the Commission would unwittingly be creating strong incentives for SBC/Ameritech to use the leverage it will obtain from its vast combined regional footprint to compete outside its region. The national/local strategy that the combined SBC/Ameritech expects to pursue will actually harm competition unless SBC/Ameritech is prevented from exploiting its in-region local

4/ CompTel assumes that other parties will identify and address additional shortcomings in the proposed conditions.

exchange market power -- and none of the proposed conditions address this problem. 5/

The proposed conditions also could have dangerous (though presumably unintended) ramifications for other proceedings, such as the Rule 51.319 UNE Remand Proceeding, 6/ future Section 271 proceedings, 7/ the "Section 706" advanced services separate affiliate proceeding, 8/ the DSL line-sharing rulemaking, 9/ and the CompTel Section 251(h) declaratory ruling petition. 10/ The

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5/ In its ex parte presentations to the Commission and at the Commission's May 6, 1999, forum, CompTel urged the Commission to adopt two conditions that were specifically intended to address the ills presented by a merger of this size of two incumbent local exchange carriers who have an avowed strategy of pursuing national/local customers. See, e.g., Ex Parte Notice of CompTel, June 7, 1999, in CC Docket No. 98-141. These conditions were (1) a prohibition on the resale of local exchange service by any in-region "CLEC" affiliates of SBC/Ameritech and (2) a prohibition on the packaging of in-region local service (over which SBC/Ameritech has market power over a huge geographic area) with competitive, out-of-region service. Id. In proposing only these conditions, CompTel focused on the most pernicious aspects of the merger, while recognizing that the Commission would soon be dealing with other important local competition issues on an industry-wide basis -- in the UNE remand proceeding, for example.

6/ Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Second Further Notice of Proposed Rulemaking, FCC 99-70, CC Docket No. 96-98, (rel. April 16, 1999).

7/ 47 U.S.C. § 271.

8/ Deployment of Wireline Services Offering Advanced Telecommunications Capability, Notice of Proposed Rulemaking, CC Docket No. 98-147, FCC 98-188, rel. August 7, 1998.

9/ Deployment of Wireline Services Offering Advanced Telecommunications Capability, Further Notice of Proposed Rulemaking, CC Docket No. 98-147, FCC 99-48, rel. March 31, 1999.

10/ Competitive Telecommunications Association, Florida Competitive Carriers Association, and Southeastern Competitive Carriers Association, Petition on

conditions also could have adverse implications for local competition and Section 271 proceedings in the states -- because state commissions may look to these conditions as a "high water mark" for local competition requirements. SBC and Ameritech should not be able -- through self-serving conditions that they themselves have negotiated and drafted -- to both obtain merger approval *and* attempt to pre-decide the outcomes of other proceedings that are critically important to the future of competition and the welfare of consumers.

If permitted, this merger -- and the proposed merger of Bell Atlantic and GTE -- will drastically change the dynamics of the telecommunications market in this country, placing almost 80 percent of the nation's access lines in the hands of two mega-RBOCs. To counter the potential competitive and consumer harms of such consolidation, the Commission must first ensure that it has established effective, competition-promoting safeguards that go beyond promises merely to comply with the Act.

The Commission should substantially strengthen the proposed conditions, so that they will, at a minimum, conform with what the 1996 Act and the FCC's rules already require. The Commission should also make clear that these conditions are not relevant to, nor do they prejudge, action by the FCC in other rulemakings (such as the network element remand, DSL line-sharing, advanced services separate affiliate, and Section 271 proceedings) -- rulemakings that will generate additional requirements that also will bind SBC/Ameritech when adopted.

Defining Certain Incumbent LEC Affiliates as Successors, Assigns, or Comparable

II. THE UNE-RELATED CONDITIONS, IN THEIR CURRENT FORM, WILL NOT ACCOMPLISH THE COMMISSION'S GOAL OF PROMOTING LOCAL COMPETITION, AND ARE UNLAWFUL.

The unbundled network element ("UNE") related conditions in the SBC /Ameritech proposal are both inadequate to promote local competition and unlawful in their design. They contain restrictions that make them so limited as to be effectively meaningless in promoting residential competition; they ignore the need to promote competition for business customers; and they give SBC/Ameritech far too much control over the merger conditions and the options that those conditions are supposed to make available to competitors. The conditions also are unlawful, violating the Act, the Supreme Court's decision, and the FCC's own rules. For the most part, moreover, to the extent that the conditions do not *violate* a rule or statutory provision, they simply constitute an agreement by SBC and Ameritech to comply with existing statutory and regulatory requirements -- and therefore have no place as conditions to a merger.

A. The Proposed UNE Platform Condition Would Hinder the Development of Broad Based Competition for Both Residential and Business Customers.

Broad-based competition for all classes of customers by all types of carriers cannot develop if SBC and Ameritech are allowed to limit competitors' access to combined network elements (the UNE platform) by making those combinations available only to serve residential customers and even then only subject to other restrictions. Remarkably, the proposed conditions nowhere

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Carriers under Section 251(h) of the Communications Act, CC Docket No. 98-39.

acknowledge that SBC and Ameritech do not have the right to deny competitors the ability to purchase network elements in their combined state, as the Supreme Court made clear in its January decision. 11/ Rather, the implicit (and incorrect) assumption that underlies the conditions is that competitors are not entitled to purchase combinations of elements -- as though pre-Supreme Court law were still in place. Whatever the legal validity of the conditions (which we discuss in the following sections), it is clear that they do not accomplish the Commission's policy goals in reviewing and conditioning this merger to address its competitive problems.

The ability to employ network elements in their combined form is absolutely essential to the development of broad-based competition in *both* the business and residential markets. The use of the UNE platform is the only entry strategy that allows competitors economically to serve a broad base of customers -- both residential and business -- while offering price and service packages that differ from those offered by an ILEC. To compete on a broad basis, CLECs also must have the ability to obtain and use combined UNEs efficiently, quickly, in adequate quantities, and with minimal service disruptions. Consumers (whether business or residential) must be able to shift between carriers -- and thus explore competitive

11/ AT&T Corp. v. Iowa Utilities Board, ___ U.S. ____, 119 S.Ct. 721 (1999) ("AT&T Corp.").

alternatives -- rapidly, simply, and inexpensively. 12/ The UNE platform is the *only* method of access to UNE combinations that satisfies these conditions today.

The service and customer class restrictions, as well as the time limitations on the SBC/Ameritech platform offering, would make this option unavailable in too many instances for any competitor to rely on it as a means of competing successfully even in the residential market. Rather, to compete broadly (even for residential customers), competitors will be forced to construct duplicative facilities (whether economic or not), or rely on costly, time-consuming, and service-disrupting collocation methods as their only means of obtaining UNE combinations. Broad-based mass-market business and residential competition cannot develop in such an environment.

Moreover, for some smaller companies (including many CompTel members), lack of access to the UNE platform for all services and all customers could prevent them from entering the local market at all, even if their eventual

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12/ As the New York Public Service Commission has stated, a "fully competitive local exchange market; to wit, multiple carriers providing a full range of services throughout New York State" "cannot develop unless customers are able to switch easily to the local exchange provider offering the service, price and quality options that best meets [sic] their needs." Proceeding on Motion of the Commission to Examine Methods by which Competitive Local Exchange Carriers can Obtain and Combine Unbundled Network Elements, Joint Complaint of AT&T Communications of New York, Inc., MCI Telecommunications Corporation, WorldCom, Inc. d/b/a/ LDDS WorldCom and the Empire Association of Long Distance Telephone Companies, Inc. Against New York Telephone Company Concerning Wholesale Provisioning of Local Exchange Service by New York Telephone Company and Sections of New York Telephone's Tariff No. 900, Case Nos. 98-C-0690, 95-C-0657, at 35.

plan is to construct competing local facilities. 13/ Even CLECs that have some of their own network facilities cannot justify installing facilities in every location where they choose to serve customers. In some cases, a mix of CLEC facilities and the UNE platform will be appropriate to serve a customer's needs. This is true, for example, with both residential and business customers that have needs for both high-capacity and low-capacity services. A customer in a single location might require both a DS1 connection to the CLEC switch and several analog voice-grade lines for other purposes (e.g. fax machines). Unrestricted access to the UNE platform also is necessary in order to promote robust competition for multi-location business customers -- such as the very customers SBC/Ameritech is planning to pursue through its national/local strategy. 14/

13/ This condition also prejudges the types of facilities construction that make sense. CompTel members need to spend capital wisely. Sometimes this means investing in local network. But it also may mean investing in xDSL technology, in ATM facilities, or even in software-management systems. The Act and the FCC's local competition rules foster this open process; these conditions do not.

14/ Even if a business customer is located in an area where investment in competing facilities can be justified, that business customer often will have multiple locations, both within a state and in other states. The proposed restrictions on access to the UNE platform could prevent even a "facilities-based" CLEC from successfully competing for that customer's business. Even if the CLEC has facilities to serve the business customer's main location, it may not have facilities to serve its other locations. The UNE platform would enable that CLEC to match the ILEC's multi-location service offer. Without the UNE platform, the CLEC would have to construct facilities, obtain collocation, and so on, in every branch location, just to be able to compete for the company's business. For example, a CLEC with facilities in Illinois but not Michigan might not be able to compete for the business of a customer with offices in Illinois and Michigan if the UNE platform is not available in Michigan.

In contrast, SBC/Ameritech would have far less need for that because it would have the advantage of being the incumbent throughout a wide part of the

B. The Proposed Restrictions on the Right to Employ UNE Combinations are Unlawful.

The proposed UNE platform condition flatly ignores the FCC rules expressly reinstated by the United States Supreme Court in AT&T Corp. v. Iowa Utilities Board. 15/ The Supreme Court affirmed the FCC's rule prohibiting incumbent local exchange carriers ("ILECs") from providing access to network elements that the ILEC currently combines. 16/ Nothing in the Supreme Court's decision permits the imposition of restrictions on the ability of CLECs to purchase network elements in both their discrete and combined form. The Supreme court has expressly rejected the fundamental premise that different law applies to UNEs in discrete than in combined form:

> It [Section 252(c)(3)] forbids incumbents to sabotage network elements that *are* provided in discrete pieces, and thus assuredly contemplates that elements *may* be requested and provide in this form (which the Commission's rules do not prohibit). But it does not say, or even remotely imply, that elements *must* be provided only in this fashion and never in combined form. 17/

Yet the proposed conditions do precisely this, by limiting the availability of UNEs in combined form -- i.e., by limiting the UNE-P to service to

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country. The advantage of incumbency also would extend even beyond the SBC/Ameritech region if, as discussed below, SBC/Ameritech's CLEC affiliates are allowed to bundled its in-region local offerings with their out-of-region competitive offerings.

15/ AT&T Corp. 119 S.Ct. 721.

16/ AT&T Corp., 119 S.Ct. at 736-38, upholding 47 C.F.R. § 315(b).

17/ Iowa Utilities Board at p. 737 (italics in original, underlining added).

residential customers, and by otherwise limiting its availability even to those customers. 18/

SBC and Ameritech entirely miss the point of the Supreme Court's decision. By limiting the ability of competitors to purchase the UNE platform, SBC and Ameritech are essentially stating that for certain services, certain customers, and that after a certain period of time, SBC and Ameritech will provide network elements only after first separating them from other network elements. In other words, the Joint Applicants propose completely different regimes applicable to discrete UNEs that UNEs in combined form, even though the Supreme Court concluded that the Act does not say, or even remotely imply, that distinction should make a difference. Furthermore, the Supreme Court made clear that ILECs such as SBC and Ameritech may *not*, under any circumstance but one, separate

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18/ Specifically, SBC and Ameritech state that they would provide the UNE platform: (1) *only* for the provision of service to residential customers, (2) *only* for POTS and Basic Rate Interface ("BRI") ISDN service, (3) *only* in conjunction with unbundled loops that are *not* "discounted" as provided for under the proposed "discounted" loop condition, and (4) *only* during an "Offering Window" that will consist of the shorter of either (a) a period of three years beginning 30 days after the Merger Closing Date, or (b) a period lasting from 30 days after the Merger Closing Date until the month following the date when the sum of resold lines in service under the resale "discount" condition plus the quantity of UNE platforms in service reaches a maximum *chosen by SBC and Ameritech* for each in-region state. Proposed Conditions for FCC Order Approving SBC/Ameritech Merger, Appendix A (filed July 1, 1999) ("Proposed Conditions"), at 26-27. SBC and Ameritech also state that a carrier would only be permitted to use a UNE platform that it has purchased for the shorter of either (1) three years or (2) for so long as a particular UNE platform remains in service at the same location for the same carrier. Id. at 26.

requested network elements that the incumbent currently combines. 19/ The *only* situation in which an ILEC may separate combinations of network elements is upon request by the requesting carrier. 20/ Thus, SBC's and Ameritech's attempt to insist on separating network elements for certain services and customers, and after a certain period of time, is flatly impermissible under the FCC's rules and the Supreme Court's decision.

The service and customer class restrictions on SBC/Ameritech's UNE platform proposal also violate (1) a requesting carriers' right under Section 251(c)(3) 21/ to use network elements to provide any telecommunications service and (2) the nondiscrimination requirements of Section 251(c)(3). 22/ In the many instances when the restrictions on the offering will make the platform unavailable, a competitor's only alternative will be to obtain UNE combinations through collocation-based combination methods. This discriminates against competitors in violation of Section 251(c)(3) by imposing on them delays, costs, difficulties, service interruptions, and limitations not incurred or experienced by SBC/Ameritech. The

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19/ AT&T Corp., 119 S.Ct. at 736-38; 47 U.S.C. § 51.315(b); Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, First Report and Order, 11 FCC Rcd 15499, 15647, para. 293 ("Local Competition Order"), vacated in part sub nom. Iowa Utilities Board v. FCC, 120 F.3d 753 (8th Cir. 1997), rev'd in part and remanded in part sub nom. AT&T Corp, 119 S.Ct. 721.

20/ Id.

21/ 47 U.S.C. § 251(c)(3).

22/ 47 U.S.C. § 251(c)(3).

restrictions on SBC/Ameritech's UNE platform offering violates Section 251(c)(3) in other ways as well:

Service Restrictions: SBC and Ameritech unlawfully restrict the services that can be provided over the network element platform to POTS and BRI ISDN. A network element is intended as a *generic* capability that can be used by a CLEC to offer *any* service of its choosing. 23/ Section 51.309(a) of the Commission's rules states that:

> [a]n incumbent LEC shall not impose limitations, restrictions, or requirements on requests for, or the use of, unbundled network elements that would impair the ability of a requesting telecommunications carrier to offer a telecommunications service in the manner the requesting telecommunications carrier intends. 24/

Placing restrictions on the services that can be offered using UNEs in their combined form denies competitors the right to obtain and use the undifferentiated functionalities of network elements. Indeed, the imposition of such restrictions effectively dictates the services a CLEC will be "allowed" to offer over the network elements it purchases. As made clear by the Act and the Commission' rules, however, the types of services offered by an entrant over the network elements it purchases are *solely* the decision of the entrant. SBC and Ameritech cannot decide what services they will compete against and what services they will not.

Customer Class Restrictions: Restrictions on a CLEC's use of network elements in their combined form based on customer class -- in this instance,

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23/ 47 U.S.C. 251(c)(3).

24/ 47 C.F.R. § 51.309(a).

permitting the use of the platform only for residential customers -- also violate the nondiscrimination requirements of Section 251(c)(3). SBC and Ameritech are subject to no restrictions whatsoever on their use of network elements to provide services to their customers. Competitive carriers, therefore, must also be free of restrictions on their use of network elements to provide communications services.

C. Restrictions That Limit The "Discounted" Residential Loop and Residential Wholesale Price Conditions are Unlawful.

Cost-based rates for the local loop and other network elements are essential for the development of local exchange competition. As a general matter, therefore, CompTel supports reductions in loop rates that will bring loop rates more in line with costs. SBC/Ameritech's proposed "discounted" residential loop offer, however, is restricted in a manner that is unlawful and that would impede the ability of competitors to provide broad-based local exchange services.

In order to bring the "discounted" loop offering into compliance with the 1996 Act and the FCC's own pricing rules, to make it an effective means of addressing the competitive harms of the merger, and to promote broad based competition, SBC and Ameritech must remove the service and customer class restrictions on its availability. CompTel fully supports the importance of residential competition, and a number of CompTel's members are competing for customers in that market. 25/ In addition, there is no question that lower, more

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25/ See Report on the State of Local Competition, Submitted by CompTel to the Honorable Tom Bliley, Jr., Chairman, U.S. House of Representatives, Committee on Commerce, Dec. 9, 1998 (indicating that 71 percent of CompTel member survey respondents are providing service to residential customers in at least one state).

cost-based loops rates are important. Nevertheless, SBC/Ameritech's "discounted" loop offering cannot lawfully be adopted as a merger condition until the restrictions on its availability are removed.

Specifically, loops purchased at the "discounted" price could not be purchased or used in combination with SBC/Ameritech local switching or the functions or features associated with that switching. 26/ In addition, the proposed "discounted" loop offer would be available (1) *only* for residential customers, (2) *only* for non-advanced services; (3) *only* for a certain number of loops, and (4) *only* for two years or less beginning 30 days after the Merger Closing Date. 27/ Once purchased, moreover, a carrier would be able to lease the offered loops at the discounted price for only three years or until the carrier stopped using a given loop, whichever is shorter. 28/

Making the "discounted" loop offering available only to serve residential customers and only to provide non-advanced services violates the nondiscrimination requirements of Section 251(c)(3) 29/ for the same reasons as those discussed above with respect to network elements in their combined form. First, these restrictions discriminate against carriers that choose to exercise their statutory rights to serve other types of customers over a loop and to provide other

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26/ Proposed Conditions at 24-25.

27/ Proposed Conditions at 24-25.

28/ Id. at 24.

29/ 47 U.S.C. § 251(c)(3).

types of services over a loop. Second, these restrictions discriminate against all CLECs vis-à-vis SBC and Ameritech because, contrary to their competitors, SBC and Ameritech can obtain access to loops at cost based rates no matter what services they choose to provide over those loops and no matter what customers they choose to serve over those loops. Third, by making lower cost loops available only to serve a certain class of customers, SBC and Ameritech would be discriminating based on the identity of the end user served by a CLEC -- another violation of Section 251(c)(3).

The discounts on loop rates also violate the cost-based pricing provisions of Section 252(d)(1). If the discounted loop rates are "cost-based," then by definition the regular loop rates are above cost. SBC/Ameritech cannot offer two different rates for loops and contend that both rates are "cost-based."

Furthermore, SBC's and Ameritech's promise to make residential loops available to competitors at an average 25 percent discount determined across all geographic regions in the SBC/Ameritech states 30/ is, as a practical matter, meaningless. This is so because promising an "average" 25 percent discount based on all geographic regions in the entire SBC/Ameritech footprint gives SBC/Ameritech the latitude to offer very limited discounts in the most accessible or most desirable central offices while offering higher discounts only in the less accessible or less desirable central offices.

30/ Proposed Conditions at 24.

For all of these same reasons, the SBC/Ameritech discounts on resale of residential services are unlawful and violative of the Section 251(d) pricing principles. Neither the discounted loop rates, nor the resale discounts, are lawful or effective conditions.

D. The Proposed "Compliance with the FCC's Pricing Rules" Condition Is No More Than an Agreement to Comply with Existing Requirements.

SBC and Ameritech state in the proposed "Compliance with FCC UNE Pricing Rules" that they will comply with the Commission's UNE pricing rules and resolve any concerns the Commission might have regarding such compliance. 31/ What SBC and Ameritech do not appear to understand, however, is that they must comply with the Commission's pricing rules regardless of whether they *agree* to do so or not. The Supreme Court made this clear in AT&T Corp. v. Iowa Utilities Board. 32/ Unless SBC and Ameritech somehow view such compliance with these binding FCC rules as optional, it is not clear why a condition requiring compliance with the Commission's UNE pricing rules is necessary.

E. The Proposed "Shared Transport" Commitments Offer Nothing More Than Compliance With FCC Regulations.

SBC's and Ameritech's proposal to offer shared transport in Ameritech region states similarly offers nothing more than compliance with the Commission's regulations. First, SBC and Ameritech indicate that they will *not* abide by this

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31/ Id. at 23.

32/ AT&T Corp., 119 S.Ct. at 729, 730, 733.

condition if the Commission issues even a geographically-limited "final and non-appealable order" under Section 251(d)(2) that either local switching or transport is not a UNE that must be made available to competitors. 33/

Second, if the Commission does decide that SBC and Ameritech must provide competitors with switching and shared transport -- as is likely since both switching and shared transport readily satisfy any reasonable reading of the "necessary" and "impair" standards in Section 251(d)(2) -- SBC and Ameritech would be agreeing in this condition to do no more than what they would already be required to do.

Third, SBC's and Ameritech's agreement to provide competitors with shared transport in Ameritech states does little in itself to help competitors. This is so because the OSS in Ameritech states is inadequate to permit the use of network elements by competitors at costs and speeds, and with a level of quality comparable to that of SBC and Ameritech. In addition, the OSS available in Ameritech states does not permit the provision of telecommunications services at commercial volumes using shared transport or other UNEs.

At best, therefore, the SBC/Ameritech "shared transport" condition would simply obligate SBC and Ameritech to do what they would already be required to do -- and to do so with the same inadequate OSS that they offer today.

33/ 47 U.S.C. § 251(d)(2); Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Second Further Notice of Proposed Rulemaking, FCC 99-70, CC Docket No. 96-98, (rel. April 16, 1999).

III. THE PROPOSED CONDITIONS CONTEMPLATE A WEAK SEPARATE AFFILIATE STRUCTURE THAT WOULD PERMIT SUBSTANTIAL JOINT ACTIVITY, SHARING, AND CROSS-SUBSIDIZATION.

A. The Proposed Advanced Services Separate Affiliate Structure Provides Few Benefits.

SBC and Ameritech propose as a "condition" that they be permitted to provide advanced services through one or more separate subsidiaries structured according to the provisions of Section 272. 34/ In addition, their proposal would: (1) allow SBC/Ameritech and its advanced services affiliates to jointly market their services, (2) permit SBC/Ameritech to transfer to its affiliates customers identified through inbound or outbound marketing, (3) permit SBC/Ameritech to provide operations, installation, and maintenance services to its affiliates, (4) allow the affiliates to own their own facilities, (5) allow the affiliates to use SBC/Ameritech's brand name, trademarks, and service marks on an exclusive basis, (6) permit the employees of the affiliates to be located within the same buildings and on the same floors as SBC/Ameritech's employees, (7) permit SBC/Ameritech to transfer equipment to its affiliates on an exclusive basis, and (8) transfer its advanced services customers to the affiliate. 35/ Furthermore, this SBC/Ameritech proposal would permit the intermingling of equipment, customers, brand names, services, employees, and resources between SBC/Ameritech and its affiliates without causing

34/ 47 U.S.C. § 272; Proposed Conditions at 14-18.

35/ Id. at 15, 16, 17, 18.

its affiliates to be deemed successors or assigns of an RBOC under Section 153(4)(A) of the 1996 Act. 36/

SBC and Ameritech also propose as a "condition" on their merger that they be "required" to adopt a "National-Local Strategy" under which CLEC affiliates of SBC/Ameritech would effectively leverage the market power that SBC and Ameritech would gain from their merger in order to enter out-of-region local exchange markets. 37/ Although SBC and Ameritech do not appear to discuss the structural separation of these CLEC affiliates in their proposal, these affiliates presumably would be subject -- at most -- to the same permissive structural separation as that proposed for the advanced services affiliates.

The relationships permitted between SBC/Ameritech and its "separate" affiliate show that these two entities are virtually the same because of the wide range of permissible joint and shared activities just described. These affiliates are nothing more than alter egos of the ILEC. This structure, therefore, should not be incorporated in its present formulation as a condition on the merger.

CompTel has argued from the beginning of the Commission's Advanced Services Proceeding 38/ and in its Section 251(h) Petition, 39/ that

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36/ Id. at 16; 47 U.S.C. § 153(4)(A).

37/ Proposed Conditions at 31-33.

38/ Deployment of Wireline Services Offering Advanced Telecommunications Capability, Notice of Proposed Rulemaking, FCC 98-188, CC Docket No. 98-147 (rel. Aug. 7, 1998), Comments of the Competitive Telecommunications Association (filed Sep. 25, 1998) ("CompTel Advanced Services Comments").

Section 272-based structural separations like that proposed for SBC/Ameritech's proposed advanced services and CLEC affiliates are inadequate to address an ILEC's ability and incentive to discriminate in favor of such affiliates. 40/ An ILEC's inherent conflict of interest as both the owner of the local exchange network and as a competitor in the local exchange market requires the imposition of more stringent structural safeguards designed to mitigate this conflict of interest and thus minimize the ILEC's incentive and ability to discriminate. Section 272-based structural separations also are inadequate to prevent an ILEC from attempting to avoid its obligations under the 1996 Act by moving facilities or services into an affiliate.

B. The Proposed Conditions Risk Prejudgment of the Section 251(h) Issue.

The proposed conditions appear to have an ulterior motive from SBC/Ameritech's point of view: the conditions provide that the affiliate would not be deemed a "successor or assign" within the statutory definition of a Bell operating company. 41/ If the words "successor or assign" in Section 4(a) of the Act were read in the same manner as those words in Section 251(h) of the Act, this condition could

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39/ Petition for Declaratory Ruling or, in the Alternative, for Rulemaking on Defining Certain Incumbent LEC Affiliates as Successors, Assigns, or Comparable Carriers under Section 251(h) of the Communications Act submitted by the Competitive Telecommunications Association, Florida Competitive Carriers Association, and Southeastern Competitive Carriers Association, CC Docket No. 98-39 (filed March 23, 1998) ("CompTel 251(h) Petition").

40/ CompTel Advanced Services Comments at 9-14, 14-16, 19-35; CompTel Section 251(h) Petition.

41/ Proposed Conditions at ¶ 28.

be setting the stage for a conclusion that this weak separate affiliate would not be considered an incumbent local exchange carrier within the meaning of Section 251(c) of the Act, and that it would therefore be exempt from the unbundling, resale, and other market-opening provisions of the Act. Such a provision could be read, however unintended it might be on the part of the Commission, to prejudge issues that are squarely before the Commission in other proceedings -- namely the Advanced Services Separate Affiliate proceeding and the CompTel 251(h) declaratory ruling proceeding. 42/

To create a truly separate affiliate that would not constitute a "successor or assign" of SBC/Ameritech, SBC/Ameritech must adopt far more stringent separation requirements. To make the proposed advanced services and CLEC separate affiliates truly separate from, and independent of, SBC/Ameritech, and thus to both minimize SBC/Ameritech's ability and incentive to discriminate in their favor and prevent SBC/Ameritech from attempting to avoid its obligations under the Act by moving facilities or services into the affiliates, the Commission would need to require SBC/Ameritech to implement additional structural safeguards. As CompTel set forth in its comments in the Advanced Services Separate Affiliate Proceeding, these safeguards should include: (1) substantial

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42/ Under Section 251(h)(1), 47 U.S.C. § 251(h)(1), an affiliate that receives benefits from its ILEC parent, whether through a transfer of assets or other benefits, qualifies as a "successor or assign" of the ILEC. See CompTel Section 251(h) Petition at 8-13. Alternatively, such affiliates qualify, under Section 251(h)(2), 47 U.S.C. § 251(h)(2). as "comparable carriers" subject to ILEC regulation. Id. at 13-15. In either case, an ILEC, such as SBC/Ameritech, cannot be permitted to avoid its obligations under the 1996 Act by moving services or facilities into a separate affiliate. Id. at 3-7.

public ownership of the affiliates and the presence of independent directors on the boards of the affiliates; (2) a ban on joint marketing by SBC/Ameritech and its affiliates; (3) a ban on the joint ownership or sharing of network facilities, functions, services, or employees by SBC/Ameritech and its affiliates; and (4) a requirement that any transfer of assets, including customer accounts, equipment, employees, or brand names, should subject the affiliate to ILEC obligations. 43/

C. Additional Structural Safeguards Should Be Imposed On SBC/Ameritech.

In addition, it is critical that the conditions imposed by the Commission include (1) a ban on the bundling of the affiliates' services with SBC/Ameritech's services (if NatLoCo does not operate within the ILEC region), (2) a ban on the affiliates' resale of SBC/Ameritech's local exchange services (if NatLoCo does operate within the ILEC region), and (3) a requirement that the affiliates may buy from SBC/Ameritech *only* those services and facilities that are available to all other CLECs and priced at cost-based rates -- (no matter what). In its ex parte meetings with the Commission and in its presentation at the forum, prior to the filing of the proposed conditions, CompTel urged that these conditions be imposed on this merger. 44/

A ban on the bundling by the affiliates of their services with SBC/Ameritech's services is essential because, if the affiliates engaged in such

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43/ CompTel Advanced Services Comments at ii-iii, 22-35.

44/ See Comments of H. Russell Frisby, Jr., President, CompTel, at May 6 Forum; Ex Parte Notice of CompTel in CC Docket No. 98-141, June 7, 1999.

bundling throughout SBC/Ameritech's vast post-merger footprint, no other carriers would be able to match those offerings.

A ban on the resale of SBC/Ameritech's local exchange service by the advanced services and CLEC affiliates is necessary because service-resale is *inherently* discriminatory and would uniquely favor those affiliates. This is so because wholly-owned affiliates can offer services through resale without running into the financial and market constraints of resale that would otherwise affect a legitimate entrant. First, unlike a true CLEC, the SBC/Ameritech "CLEC" using service resale would continue to receive access revenues for each of the affiliate's customers, acting in effect as uncompensated marketing agent for SBC/Ameritech's access service. Second, the defining constraint of resale is that the CLEC-reseller can only offer services that are identical to those of the ILEC. An ILEC affiliate, however, could actually benefit from this service limitation, because it would actually *want* customers to perceive it as the ILEC.

A requirement that SBC/Ameritech's affiliates must buy or receive from SBC/Ameritech only those services and facilities that are (1) available to all other CLECs and (2) priced at cost-based rates is necessary because SBC/Ameritech and its affiliates would have the same shareholders, and because SBC and Ameritech have stated that they will ultimately view the economic return from both SBC/Ameritech and their separate affiliates on a consolidated basis.45 This means

45 SBC Communications Inc., SBC Delaware Inc., Ameritech Corporation, Illinois Bell Telephone Company d/b/a Ameritech Illinois, and Ameritech Illinois Metro, Inc., Joint Application for Approval of the Reorganization of Illinois Bell

that while an unaffiliated CLEC would experience real additional costs if it paid above-cost rates for services or facilities from SBC/Ameritech, the costs that an SBC/Ameritech affiliate would incur in paying such above-cost rates would simply become revenues for SBC/Ameritech. Because costs and revenues of both SBC/Ameritech and its affiliates will be consolidated to determine SBC/Ameritech's earnings, such transactions would "net out" with no effect on corporate profits. To prevent SBC/Ameritech from charging above-cost prices to harm competitors, therefore, the prices of any services or facilities that an affiliate obtains from SBC/Ameritech must be cost-based. In addition, to prevent other forms of discrimination, the services and facilities made available by SBC/Ameritech to its affiliates must be available on identical terms and conditions (including ordering and provisioning using the same OSS) to unaffiliated CLECs. 46/

Telephone Company d/b/a/ Ameritech Illinois, and the Reorganization of Ameritech Illinois Metro, Inc., in Accordance with Section 7-204 of the Public Utilities Act and for All Other Appropriate Relief, Illinois Commerce Commission, Docket No. 98-0555, SBC-Ameritech Exhibit 1.3, Direct Testimony on Re-Opening of James Kahan, at 20 (filed June 16, 1999) ("Kahan Illinois Testimony").

46/ There is no indication from the proposed conditions that SBC/Ameritech would treat its advanced services affiliate as if it were a CLEC as opposed to another part of the same company. Indeed, from Ameritech's testimony in the Illinois state proceeding examining the SBC/Ameritech merger, it appears that SBC/Ameritech would not treat an advanced services affiliate just like an unaffiliated CLEC, but rather would use such measures as the FCC's affiliate transaction rules to govern the prices paid for services rendered by the ILEC entity to the advanced services separate affiliate. In that proceeding, an Ameritech witness stated that ". . . all such dealings between Ameritech Illinois and the National Local Subsidiary will be controlled by federal and state affiliate transaction rules, and will be subject to review by the Commission." Illinois Kahan Testimony at 21.

Without these three safeguards, SBC/Ameritech could crowd out legitimate competitors and intensify its dominance of its local exchange markets.

D. Whatever Benefits Might Flow From The Proposed Separate Affiliate Structure Would be Lost Due The Availability Of Service Resale And The Exclusive Nature Of The DSL Line-Sharing Proposal.

Even a weak separate affiliate structure such as the one proposed here arguably could produce some benefits. For example, if the separate affiliate were required to use the same OSS as unaffiliated CLECs to order UNEs, were forced to employ the same collocation arrangements, and were required to "stand in the same line" for collocation space as unaffiliated CLECs, then the ILEC part of SBC/Ameritech might have stronger incentives to make OSS work, to make collocation viable, and to open its central office space to competitors. These benefits, however, are unlikely to be achieved under the currently proposed conditions.

As a practical matter, it is unlikely that the SBC/Ameritech advanced services separate affiliate (or any other "CLEC" affiliate) will need to deal with SBC/Ameritech in the same way that an unaffiliated CLEC must. First, SBC/Ameritech's advanced services affiliate does not need to provide advanced services such as xDSL in the same way as an unaffiliated CLEC. Either the advanced services affiliate can resell the ILEC entity's own advanced services, or it can engage in line-sharing with SBC/Ameritech's ILEC entity on an exclusive

basis. 47/ The SBC/Ameritech separate affiliate thus need not order loops in the same manner as competitors or install facilities in SBC/Ameritech central offices in the same manner that CLECs must do to provide competing advanced services such as xDSL.

Second, the SBC/Ameritech advanced services affiliate will likely be packaging its advanced services offerings with other services, including local exchange services, where it has the unique ability to engage in joint marketing or service resale relationships with the SBC/Ameritech local entity. As discussed above, only an SBC/Ameritech "CLEC" affiliate could find it profitable to engage in resale of local exchange services; and joint marketing arrangements are by the terms of the proposed conditions exempted from the nondiscrimination requirements. Thus, the SBC/Ameritech advanced services separate affiliate is unlikely to interface with SBC/Ameritech in any way that resembles the way that unaffiliated carriers will do, whether for advanced services and for packages of advanced and other local services -- even if advanced services line-sharing is eventually made available to competitors.

In sum, then, even the few benefits that arguably could occur in the context of the proposed separate affiliate structure -- in terms of creating better and

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47/ As discussed above, it is unclear from the proposed conditions exactly what the advanced services separate affiliate *is* supposed to do, as opposed to what the ILEC entity will be doing *for and with* the separate affiliate. At most, however, the conditions would appear to contemplate an advanced services affiliate that could (and likely would) provide advanced services via resale of the ILEC's services, via the exclusive DSL line sharing arrangement, or via some other arrangement likely

nondiscriminatory conditions for competitors -- are unlikely to materialize. The Commission should strengthen the separate affiliate requirements as discussed above as a condition of the merger in order to achieve these procompetitive benefits.

IV. OTHER PROPOSED CONDITIONS MOVE IN THE RIGHT DIRECTION BUT REMAIN INADEQUATE .

Other conditions proposed by SBC/Ameritech move in the right direction but are inadequate to have any real impact or balancing effect on the likely competitive and consumer harms of the proposed merger. These conditions would require modification before they could have any real significance.

A. The Proposed "Line Sharing" Condition Takes a Positive Step but is Too Restricted and Discriminatory to be Lawful or of any Value as a Merger Condition.

SBC and Ameritech take a theoretically positive step in proposing to offer line sharing as described in the Further Notice of Proposed Rulemaking in the Advanced Services Proceeding, CC Docket No. 98-147. 48/ SBC and Ameritech effectively eliminate the value of this proposal, however, by imposing broad limitations on its applicability and by creating a discriminatory exception to those limitations for the proposed SBC/Ameritech advanced services affiliates. SBC/Ameritech's promise to provide line-sharing opportunities for advanced services competitors is so hedged that competitors are unlikely to see that

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to differ substantially from the type of arrangement an unaffiliated CLEC would have with the SBC/Ameritech.

48/ Proposed Conditions at 19.

offering materialize soon, if ever -- and in the meantime, SBC/Ameritech's affiliate benefits from the discriminatory availability of an exclusive line-sharing offering from SBC/Ameritech.

SBC and Ameritech severely limit the applicability of the proposed line sharing condition by stating that they will offer the proposed line sharing only when SBC and Ameritech decide (1) that line sharing has become technically feasible and (2) that the equipment necessary to provide line sharing has become available, based on industry standards, and at commercial volumes. 49/

The problems with these limitations are, first, that they appear to give SBC and Ameritech unilateral discretion in deciding when the prerequisites for the line sharing condition are met. Second, SBC and Ameritech appear to believe that line-sharing is not technically feasible. They have both argued in their comments opposing line sharing in CC Docket No. 98-147 that line sharing is not technically feasible and that the equipment necessary to provide line sharing is not available. 50/ Their comments in that docket indicate, moreover, that absent an order that ILECs must provide line sharing, neither SBC nor Ameritech will work

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49/ Id.

50/ In the Matter of Deployment of Wireline Services Offering Advanced Telecommunications Capability, Further Notice of Proposed Rulemaking, **FCC _____,** CC Docket No. 98-147 (rel. March 31, 1999), Comments of Ameritech (filed June 15, 1999) ("Ameritech Line Sharing Comments"), at 8-12, and Comments of SBC Communications Inc. (filed June 15, 1999) ("SBC Line Sharing Comments"), at 20-27.

to make line sharing technically feasible or to make the equipment necessary for line sharing available. 51/

In addition, Ameritech has stated that even if the Commission were to order the provision of line sharing, it would "take a minimum of two years for [Ameritech] to complete -- after industry standards and regulatory requirements were fully developed" -- the work required to implement line sharing. 52/ SBC has made similar statements. 53/ Thus, the statements of SBC and Ameritech in other proceedings reveal that these ILECs are not likely to actually offer line sharing under the proposed condition for two or more years to come, at best.

SBC and Ameritech also have the audacity to create an unlawful exception to the limitations on the line sharing condition for their advanced services affiliates but not for unaffiliated CLECs. Specifically, SBC and Ameritech state that even if they did not provide line sharing to unaffiliated CLECs under the proposed condition, they could provide line sharing to their own advanced services affiliates. 54/ They also state that they would do so at a 50 percent "discount" off the lowest monthly recurring charge for the loops used. 55/

51/ See Ameritech Line Sharing Comments at 8-12; SBC Line Sharing Comments at 20-27.

52/ Ameritech Line Sharing Comments at 8-9.

53/ SBC Line Sharing Comments at 21 (SBC estimates that the process of developing and implementing the upgrades necessary to implement line sharing "could take approximately one and a half to two years to complete.").

54/ Proposed Conditions at 19.

55/ Id.

The discounted "surrogate line sharing" unbundled loop rate for competitors does little to mitigate this competitive harm, since that rate is only available if the affiliate uses line-sharing (which it may not, since it can profitably employ resale), and it still requires the end user customer to purchase two lines in order to obtain competitive DSL services from a CLEC (but not if it obtains them from SBC/Ameritech). 56/

In sum, therefore, SBC's and Ameritech's line sharing proposal would have no value as a merger condition -- and could not lawfully be adopted as a merger condition -- unless the Commission requires SBC and Ameritech to remove the prerequisites to its applicability, remove the control that SBC/Ameritech could exercise over its applicability, and either remove the discriminatory exception that SBC and Ameritech make for their advanced services affiliates or offer the same unrestricted exception to unaffiliated CLECs.

B. The Uniform OSS Proposal and OSS Assistance for Small CLEC Proposal Take the Right Approach but Require Modifications.

SBC and Ameritech also propose to (1) develop and deploy uniform OSS throughout the SBC/Ameritech region -- except for Connecticut -- and (2) make teams of experts available to assist certain small CLECs that experience problems

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56/ SBC and Ameritech state that if they provided such line sharing to their affiliates, they would permit unaffiliated CLECs to purchase unbundled local loops at a similar 50 percent "discount" off the lowest recurring monthly charge, but only if (1) such unaffiliated CLECs did not use the loop to provide any voice grade service, (2) SBC and Ameritech provided the local exchange service to the end users on those loops, and (3) the unaffiliated CLECs' advanced services were compatible with SBC's and Ameritech's voice grade services. Id. at 19-20.

with SBC/Ameritech's OSS. While SBC and Ameritech have taken the right approach in proposing these commitments, modifications would be required in order to make them effective.

First, the Commission should require SBC/Ameritech not only to implement uniform OSS throughout the SBC/Ameritech region, but also to adopt as that uniform OSS, the OSS required in Texas. This requirement is essential because CLECs will have to deploy interfaces compatible with the OSS that is deployed by SBC/Ameritech. Since the OSS required in Texas will use the most recently developed interface standards, it would make no sense from an efficiency or quality of service standpoint to require CLECs to design their interfaces based on anything other than the standards required in Texas.

Second, in offering OSS assistance to small CLECs, SBC and Ameritech stated that the term "small CLEC" would mean any CLEC that, when combined with all of its parents, subsidiaries, and joint ventures providing telecommunications services, has less than $300,000 million in annual telecommunications revenues, excluding revenues from wireless services. 57/ This revenue cut-off amount, however, is so low that it would exclude many of CompTel's members who are small CLECs. To be of any real assistance to small CLECs, the cut-off revenue amount for the promised OSS assistance should be at least $500 million in annual telecommunications revenues. Many telecommunications companies that are small CLECs have substantial revenues from their other

57/ Proposed Conditions at 12.

telecommunications activities, revenues that may well exceed the proposed $200 million figure. Yet these companies are often still small in terms of their activity in providing local services, where they are a new entrant. The Commission should modify this condition to address the needs of the true range of small carriers by raising the annual telecommunications revenues figure to $500 million.

C. The Promise to Install CLEC-Accessible Cabling in Multi-Unit Properties is a Positive but Inadequate Step.

SBC and Ameritech take a potentially positive step in promising to install and provide cables that will give CLECs a single point of interface for newly constructed or retrofitted single building multi-dwelling units ("MDUs") and multi-tenant business premises where SBC/Ameritech is hired to install new cables or where SBC/Ameritech owns or controls the cables. 58/ As with its other proposed commitments, however, its offer is significantly limited. By restricting its commitment to *newly* constructed or retrofitted single building MDUs and multi-tenant business premises, SBC and Ameritech severely limit the potential benefits of this commitment. Newly constructed and retrofitted single building MDUs and multi-tenant business premises are only the tip of the iceberg. This condition would do nothing to address the inability of CLECs to access the substantial numbers of existing multi-unit residential and office buildings not slated for retrofitting. SBC/Ameritech's willingness to provide standard interfaces also

58/ Proposed Conditions at 30. We assume that this must mean something more than merely complying with existing requirements to establish a minimum point of entry ("MPOE"), although this is not clear from the proposed conditions.

expires, inexplicably, after three years. This makes the offering close to useless as a practical matter.

It is also a theoretically positive step that SBC and Ameritech have committed to conduct trials for offering access to cabling within MDUs and multi-tenant premises. The trials are extremely limited, however, in both scope (an unspecified number of buildings in only five cities) and coverage (only MDUs and buildings housing "small businesses"). A serious commitment to opening up access to these buildings would require a much more extensive trial than is reflected in the proposed condition. No commitments flow, moreover, from the outcome of those trials (other than a commitment to "negotiate").

In sum, this proposed condition offers too little to be meaningfully to the promotion of competition in multi-tenant buildings.

D. The "MFN Arrangements" Condition Reflects a Constructive Concept But Is Too Restricted to Have Any Impact.

Although simplifying the request/arbitration process and making additional interconnection arrangements and UNEs available to competitors is a constructive concept, neither the out-of-region nor the in-region portions of the proposed "MFN Arrangements" condition would have any meaningful benefit for competition or consumers.

Out-of-Region: Under the out-of-region portion of this condition, SBC and Ameritech promise to offer competitors in the SBC/Ameritech region any interconnection arrangement or UNE that has never before been made available to a competitor by the pertinent ILEC on the same terms and conditions (excluding

price) that an SBC/Ameritech CLEC affiliate obtains through arbitration outside the SBC/Ameritech region. 59/ This commitment, however, is unlikely to bring any benefits to competitors and have no impact on competition because it is restricted to (1) interconnection agreements and UNEs that an out-of-region ILEC has *never before* made available to *any other CLEC* and (2) interconnection arrangements and UNEs obtained through *arbitration*. The likelihood is that SBC/Ameritech will *negotiate* a favorable arrangement with another ILEC, not that it will be more successful in an arbitration than countless other CLECs have been -- and under the proposed conditions, such a term would not be available to in-region CLECs.

In-Region: Under the in-region portion of this condition, SBC and Ameritech agree to make available to competitors in any SBC/Ameritech state any interconnection arrangement or UNE on the same terms and conditions (excluding price) that SBC or any SBC affiliate voluntarily-negotiates in an agreement that is approved after the Merger Closing Date in any other SBC/Ameritech state. 60/ This commitment also would have no beneficial effect on competitors or consumers because it is restricted to interconnection arrangements and UNEs that are: (1) *voluntarily* negotiated (2) by SBC or an SBC subsidiary (which appears to mean the ILEC forms of SBC and its subsidiaries, not any of its CLEC affiliates), and (3) *after* the Merger Closing Date. These limitations make this condition meaningless as a practical matter.

59/ Id. at 28.

Both the out-of-region and in-region portions of this condition essentially leave CLECs in the same position as they started – relying on SBC's management (and its decisions as to whether its ILEC entities will agree to an item or whether its CLEC entities will arbitrate for an item) as the entity with the power to determine the opportunities available to CLECs. To obtain anything else under these proposals would require a CLEC to pursue arbitration, which negates the very point of a commitment that should be designed to expedite the importation of provisions favorable to competition.

In short, the "MFN Arrangements" condition, as currently proposed, would create no improvement in competitive conditions, no simplification of the request/arbitration process, and no real change in SBC/Ameritech's incentive to balance its out-of-region entry with an opening of its in-region local networks. For this condition to have any positive effect, SBC and Ameritech would have to remove the restrictions they have placed on its operation.

IV. THE PROPOSED PERFORMANCE INCENTIVE PLAN IS INADEQUATE AND WOULD NOT ENSURE COMPLIANCE WITH THE 1996 ACT.

As CompTel has made clear in recent filings before the Commission, 61/ CompTel supports the adoption of performance measures and

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60/ Id. SBC and Ameritech agree to make such interconnection arrangements and UNEs available under the rules that would apply to Section 252(i) requests. Id.

61/ Letter from Robert J. Aamoth and Edward A. Yorkgitis to Michael Pryor, Policy and Program Planning Division, Common Carrier Bureau, Federal Communications Commission (dated June 4, 1999), ex parte submission in CC Docket Nos. 96-98 and 98-121.

remedies for ILECs that will (1) create ILEC incentives to comply with their market-opening obligations under the 1996 Act and (2) provide adequate compensation to CLECs adversely affected by an ILEC's noncompliance. The "Federal Performance Parity Plan" ("Plan") proposed by SBC and Ameritech, 62/ ¶¶ however, does not create remedies sufficient to create such incentives or provide such compensation, and does not always require the payment of remedies to affected CLECs. 63/

As an initial matter, the SBC/Ameritech Plan suffers from one fundamental -- and fatal -- defect. The purpose of performance standards and remedies is to ensure that ILECs, like SBC and Ameritech, comply with their obligations under the 1996 Act. Specifically, performance standards and remedies are designed to ensure that ILECs are providing competitors with access to interconnection arrangements, UNEs, and services for resale that is equal in quality to the access the ILEC provides to itself and its affiliates. 64/ Remarkably, however, SBC and Ameritech state in their "Federal Performance *Parity* Plan," that

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62/ Proposed Conditions at 1-2 and Attachment A at 1-5.

63/ CompTel does not address in these comments the adequacy of the performance measures themselves, except to note that those measures must be strong in order to be meaningful. We expect that other parties will identify deficiencies in those measures in their comments. We also assume that the Commission will be addressing performance measures on an industry wide basis, in relevant rulemakings and in Section 271 proceedings.

64/ Local Competition Order, 11 FCC Rcd at 15614-15, 15658-59, ¶¶ 224-25, 313.

> [t]he measurements and benchmarks under the Plan *bear no relationship* to the standard of performance that satisfies SBC/Ameritech's legal obligations in a particular state." 65/

The SBC/Ameritech Plan is meaningless unless this basic defect is corrected. To be effective, the performance standards in the Plan must be designed to ensure SBC/Ameritech compliance with the market-opening requirements in the 1996 Act.

Assuming such modifications are made, CompTel generally supports a tiered approach to remedies like that set forth in the proposed Plan, 66/ the remedies addressed in any performance incentive plan must generate effective incentives to comply with applicable performance standards both before and after an RBOC like SBC/Ameritech obtains section 271 approval. The remedies also must be sufficient to deter noncompliance both with respect to large CLECs, like AT&T and MCI WorldCom, and small CLECs, such as many of CompTel's members.

The remedies also must compensate CLECs affected by ILEC non-compliance in a manner that goes beyond mere restitution. The full range of damage that noncompliance can cause a CLEC is much greater than the direct cost of the unbundled element involved or of the service not provided (or provided poorly) to the CLEC. An ILEC's non-compliance can cause a CLEC to lose customers, have dissatisfied customers, fail to win customers, lose revenues, and suffer injury to its reputation. Moreover, the effects can be long-term and

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65/ Proposed Conditions, Attachment A at 5 (emphasis added).

66/ Proposed Conditions, Attachment A at 2-4.

particularly catastrophic for small CLECs without the financial wherewithal to weather such harm for even short periods of time. The financial remedies proposed by SBC and Ameritech are not sufficient to either deter ILEC non-compliance with performance standards, or adequately compensate CLECs affected by such non-compliance.

The SBC Ameritech proposal that Tier 2 and Tier 3 remedies be paid into a government-created fund, 67/ moreover, severely reduces the deterrent and compensatory effectiveness of their Plan. These remedies would provide far greater incentives for compliance if they were paid directly to the CLECs that used the particular element, service, or function associated with the SBC/Ameritech noncompliance. The Tier 2 and Tier 3 remedies in SBC/Ameritech's Plan are designed to address widespread patterns of discriminatory behavior. As a result, such discriminatory behavior is virtually certain to affect *all CLECs* adversely, even if performance vis-à-vis some CLECs taken individually might not in itself trigger a Tier 1 remedy. Requiring the ILECs to pay Tier 2 and Tier 3 remedies to all CLECs that used an element, service, or function affected by SBC/Ameritech's non-compliance would ensure that such CLECs receive some compensation for the injury they suffer.

In approving an SBC/Ameritech performance incentive plan, the Commission also should consider requiring a sliding scale of additional non-monetary consequences that would apply following a grant of Section 271 authority,

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67/ Proposed Conditions, Attachment A at 3, 4.

and that would address more severe non-compliance with applicable performance standards. In addition, for extreme and deliberate discriminatory behavior, The Commission should consider requiring a structural separation of the network and retail operations of SBC/Ameritech, with safeguards similar to those discussed above with respect to the proposed advanced services affiliates and CLEC affiliates of SBC/Ameritech. In severe cases of noncompliance, structural separation may be the only remedy that will change an ILEC's, such as SBC/Ameritech's, fundamental incentives and behavior. 68/

Although SBC and Ameritech move in the right direction in proposing a performance incentive plan, SBC/Ameritech's Plan would require substantial modifications before it could be effective. Most importantly, the Plan would have to be revised to address and promote compliance with the 1996 Act -- not with some arbitrary level of performance as SBC and Ameritech appear to contemplate -- before it could have any significance.

68/ See discussion in Section III above.

CONCLUSION

For the foregoing reasons, the Commission must substantially improve the proposed conditions if it is to use them as a basis for approval of the SBC/Ameritech merger. The proposed conditions do little to promote competition, and in some cases provide for less than the law requires. They cannot, as drafted, form the basis for grant of the merger application.

Respectfully submitted,

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