

August 8, 2000

Via Hand Delivery

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

*Re: SBC's Request for Interpretation, Modification, or Waiver, CC Docket
No. 98-141, ASD File No. 99-49*

Dear Ms. Salas:

On July 13, 2000, SBC Communications, Inc. ("SBC") filed a written *ex parte* letter in the above-captioned proceeding. In its July 13 *ex parte* communication, SBC offered to comply with several "Voluntary Commitments", in exchange for the Commission's granting SBC's request for a waiver or modification of the provision of the SBC/Ameritech Merger Conditions¹ requiring it to own all new advanced services equipment through a separate advanced services affiliate. On August 2, SBC modified, and clarified, these proposed commitments.

The Competitive Telecommunications Association ("CompTel"), submits this *ex parte* letter in response to SBC's proposed commitments. CompTel, in reliance on the foregoing legal analysis, believes the Commission should accept SBC's proposed conditions, subject to certain modifications still necessary to bring these conditions into compliance with the law.

CompTel also reiterates its position that, before the Commission can reject, accept, or modify SBC's Proposed Conditions, the effect of these conditions on the existing Merger Conditions, including the SBC ILECs' pre-existing, independent legal

¹ Letter dated Feb. 15, 2000, from Paul K. Mancini, SBC, to Lawrence E. Strickling, Chief, Common Carrier Bureau ("SBC request"); see *In Re Applications of Ameritech Corp. and SBC Communications For Consent to Transfer Control of Corporations Holding Commission Licenses and Lines*, Memorandum Opinion and Order, CC Docket No. 98-141, (rel. Oct. 8, 1999) Appendix C ("Merger Conditions").

obligations, must be fully understood.² Similarly, CompTel requests that the Commission provide some guidance to competitors, and state regulators, explaining how the Commission expects its modification, or waiver, of the Merger Conditions to affect how the SBC ILECs will, from a legal perspective, be dealing with the SBC advanced services affiliate and unaffiliated carriers on a forward-looking basis. Finally, upon consideration of the legal framework that will remain after a waiver is granted the Commission must conclude that it cannot, legally, accept all of SBC's proposed conditions in their present language.

I. SBC's ILECs Must Own the Advanced Services Equipment If the FCC Grants a Waiver/ Modification of the Merger Conditions

In exchange for its "Voluntary Commitments", SBC asks the Commission to find that "the SBC/Ameritech incumbent LECs *may* own, lease, deploy, install, maintain and/or operate . . . [the equipment that is the subject of this proceeding]." ³ SBC concludes the paragraph with the proviso that the aforementioned modification will not "authorize the SBC/Ameritech incumbent LECs to provide retail end users with Advanced Services" ⁴

In this paragraph, SBC asks the Commission to decide the issue of equipment ownership equipment in the manner most likely to create confusion for those who will inevitably be required to interpret the revised conditions for purposes of determining the SBC incumbent LECs' subsequent legal obligations. Moreover, the Commission, under existing precedent governing the other parts of the merger conditions (from which no waiver is sought), legally cannot make this requested finding.

Because SBC seeks no relief from the remainder of the merger conditions, it continues to be bound by the requirement that it provide all Advanced Services through "one or more affiliates that are structurally separate from the SBC/Ameritech incumbent LECs in accordance with the provisions and schedule set forth below." ⁵ One of these "provisions" governing the mandated structural separation of the advanced services affiliate(s) requires that the affiliate(s) "shall operate in accordance with the structural, transactional, and non-discrimination requirements that would apply to a separate affiliate's relationships with a Bell Operating Company under 47 U.S.C. § 272 (b), (c), (e), and (g), [in effect and as interpreted by the Commission as of August 27, 1999]." ⁶

The Commission has previously interpreted Section 272(b)(1)'s "operate independently" requirement to forbid the joint ownership, by a BOC and its affiliate, of

² See Letter from Jonathan D. Lee, CompTel to Magalie Roman Salas, FCC (April 26, 2000).

³ SBC August 2, 2000 Voluntary Commitments, ¶ 1 (emphasis added).

⁴ *Id.*

⁵ Merger Conditions, ¶ 1.

⁶ *Id.*, ¶ 3.

“transmission and switching equipment and the property on which they are located. . . .”⁷ In the *Non-Accounting Safeguards Order*, the Commission went on to note that any use, by the affiliate, of BOC transmission and switching facilities must be obtained “pursuant to section 272(b)(5), which requires all transactions between a BOC and its section 272 affiliate to be on an arm’s length basis and reduced to writing.”⁸

Thus, because both pieces of equipment in question in the present proceeding have previously been determined to be part of the packet switching network element by the Commission,⁹ it is clear that this equipment *may not* be owned jointly by both the SBC ILEC and its Section 272 affiliate. Rather, they must always be owned by the ILEC if they are ever to be owned by any of SBC’s ILECs. Therefore, the Commission must *require* the equipment in question to be owned by SBC’s incumbent LECs.

II. The Commission Must Clarify and Explain, From a Legal Perspective, How SBC’s ILECs Will Interact With The SBC Affiliate In the Acquisition of ILEC Network Services

When the FCC imposed the separate affiliate requirement as part of the Merger Conditions, the Commission explicitly warned that it expected the conditions to be implemented “in full, in good faith and in a reasonable manner to ensure that *all telecommunications carriers* and the public are able to obtain the full benefits of these conditions.”¹⁰ By allowing SBC’s ILECs to own, essentially, all of the equipment necessary to provide advanced services, the Commission will be relinquishing a critical underpinning of the separate affiliate portion of the merger conditions.

However, the major anticipated benefit of the conditions, ensuring non-discriminatory access to basic ILEC network services, can still be realized if the Commission, in granting the requested waiver, provides a cogent, pro-competitive explanation of how the SBC affiliate will interact with the SBC ILECs. Therefore, the Commission must articulate determinations regarding the foregoing ILEC-Affiliate relationship, which will provide a basis for future interpretations of the Merger Conditions as well as ensure transparency and non-discrimination in the future interactions between the SBC ILECs and unaffiliated carriers.

⁷ *In the Matter of Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended*, First Report and Order and Further Notice of Proposed Rulemaking, CC Docket No. 96-149 (rel. Dec. 24, 1996)(“*Non-Accounting Safeguards Order*”), ¶¶ 159-160.

⁸ *Id.*, ¶ 160.

⁹ *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Third Report and Order and Fourth Notice of Proposed Rulemaking, CC Docket No. 96-98 (rel. Nov. 5, 1999) (“*UNE Remand Order*”), ¶ 304 (defining “packet switching” to include DSLAMs, routers, and ATM switches).

¹⁰ Merger Conditions, ¶ 360 (emphasis added).

a. The SBC Affiliate Will Be Providing Advanced Services Through ILEC-Combined UNEs, Not Through A Wholesale “Broadband Service”

Despite the fact that SBC refers to portions its Proposed Conditions as “Broadband Service Offerings”, any Commission grant of the requested waiver/modification of the merger conditions must clarify that the SBC ILECs are, in fact, providing UNEs to the SBC advanced services affiliate.¹¹ That SBC misleadingly characterizes the UNEs it will provide its affiliate as a “Service Offering” is simply an attempt to disguise that the SBC ILEC is choosing to combine these UNEs for its affiliate (and must, by extension, do so for unaffiliated carriers).¹²

If the advanced services equipment will be owned by SBC’s ILEC, then it is clear (because the affiliate must provide all new advanced services) that SBC’s advanced services affiliate will be leasing UNE combinations and not purchasing a “service” as that term is defined in the Act and used elsewhere in the Merger Conditions. The Commission is compelled to make this finding because, as SBC says itself in Paragraph 1 of its Proposed Conditions, the SBC ILECs will not be providing “retail end users with Advanced Services”¹³

This caveat, that the SBC ILECs will not be offering Advanced Services directly to retail end users, requires the FCC to find that the SBC advanced services affiliate is purchasing network elements, and not a “service”, as SBC has wrongly characterized this wholesale offering. Because the alleged “Broadband Service” will not be offered at retail, it explicitly does not meet the statutory definition of “Telecommunications Service” under 47 U.S.C. § 153(46) which is defined as “the offering of telecommunications for a fee directly to the public. . . .”

On the other hand, the proposed “service” offering conforms perfectly to the statutory definition of “Network Element”, which the Commission has interpreted to include “all ‘facilit[ies] or equipment used in the provision of a telecommunications service,’ and all ‘features, functions, and capabilities that are provided by means of such

¹¹ In other words, in exchange for the waiver, the Commission must determine that SBC will provide access to its network, for both its affiliate and other CLECs, through ILEC-combined unbundled network elements. The FCC must also find that CLECs would be impaired if they did not have access to these unbundled network elements, that such impairment will not be presumed to end once the merger conditions expire, and that further unbundling may be required if CLECs can demonstrate the technical feasibility of such unbundling to this Commission or state commissions.

¹² Indeed, SBC’s original request for an interpretation, modification, or waiver of its merger conditions was accompanied by a proposed “Appendix DSL-DLE” which described many of the same network elements it refers to now as “service offerings” as “UNEs.” *SBC request*, Appendix DSL-DLE, Section 3.0, *et seq.*

¹³ August 2, 2000 Voluntary Commitments, ¶ 1.

facility or equipment. . . .”¹⁴ It is notable that, within its proposed commitments, SBC describes all of its various “service offerings” in terms of component facilities and functions, because none of these so-called services will be offered directly to end-users.¹⁵

This classification of what SBC will be providing its affiliate, and others, is also consistent with how the terms “service” and “network element” are used in describing the “design functions” required to be undertaken by the affiliate in the Merger Conditions. For example, Paragraph 4(c)(1)-(3) of the Merger Conditions requires the affiliate to identify, configure, and order the “Advanced Services network components, unbundled network elements and telecommunications services” necessary to provide advanced services. In describing examples of these items, the Commission lists “unbundled loops” and “DS1 special access services.” Because these items, respectively, meet the statutory definitions of “network element” and “telecommunications service”, it is clear that the Commission intended to continue to follow the statutory terminology of the Act in specifying the basic network inputs that must be purchased by the SBC affiliate. In Paragraph 4(f) of the Merger Conditions, requiring the affiliate to order from the ILEC all “interconnection facilities” and “telecommunications services” necessary to provide the customer’s advanced services, the Commission again distinguishes between loops (“facilities”) and DS1 special access service (“telecommunications services”).

Hence, consistent with the existing use of these terms in both the statute and the Merger Conditions, the FCC must find that SBC will be providing “network elements” to both its affiliate and other providers. The practical effect of this determination is that, in addition to those network elements specified in its proposed commitments, SBC’s ILEC will also be required to provide access consistent with Section 251 of the Act.¹⁶

Consequently, both the SBC affiliate and unaffiliated carriers will be able to seek “compulsory arbitration” when they are unable to reach agreement on additional UNEs, prices, terms, or conditions, pursuant to Section 252 of the Act. CompTel wishes to emphasize this point: notwithstanding Paragraph 8 of SBC’s Voluntary Commitments, the Commission cannot supplant a requesting carrier’s statutory right to seek compulsory arbitration with a non-binding, unbalanced, and unsupervised collaborative process.

¹⁴ *In the Matter of Implementation of Local Competition Provisions of the Telecommunications Act of 1996*, First Report and Order, (rel. Aug. 8, 1996), ¶ 262 (internal quotations from 47 U.S.C. § 153(29)) (“*Local Competition Order*”).

¹⁵ CompTel also points to the analysis of one of its members, Advanced Telcom Group (“ATG”) that many of the functionalities that SBC “commits” to provide are already required under the UNE Remand Order. See Letter from Kathleen M. Marshall, ATG, to Magalie R. Salas, FCC (July 31, 2000) pp. 3-5.

¹⁶ In those instances where the Commission has required the unbundling of packet switching, or where states may require additional unbundling consistent with the Commission’s impair analysis, the SBC ILECs “must provide network elements along with *all of their features and functions*, so that new entrants may offer services that compete with those offered by incumbents *as well as new services*.” *Local Competition Order*, ¶ 260 (emphasis added).

b. The Commission Must Determine That SBC's ILECs Have Performed "Design Functions" For The SBC Affiliate

The FCC must determine that the SBC ILECs are configuring the ADSL product offering for the SBC affiliate, and in doing so are performing the type of "design functions" expressly required to be performed by the affiliate pursuant to Paragraph 4(c) of the Merger Conditions. It is now clear that all of the functions described under the paragraph heading "Design of the Customer's Advanced Service" have been performed by SBC's ILEC for its affiliate, despite the Commission's clear admonition that "these functions may not be performed by an incumbent LEC." Because these advanced services design functions, which should have been done by the SBC affiliate, using only those "network components, unbundled network elements, telecommunications services, and work activities" that are available to unaffiliated carriers, were instead clearly performed for the affiliate by the ILEC, the FCC must determine that the SBC ILECs have developed new services or facilities for their affiliate within the meaning of Section 272(c)(1) of the Act.

Therefore, the SBC ILECs must provide for what SBC admits are the "legitimate questions and concerns"¹⁷ of unaffiliated carriers in the same time and manner as it has done for its affiliate.¹⁸ Because SBC's ILECs have already largely performed this service for their affiliate(s), it would be difficult for the FCC to determine a non-discriminatory interval for SBC to be required to provide the acknowledged requests for integrated voice/data "service", variable bit rate PVCs, and a G.Lite offering, consistent with Section 272(c)(1). Thus, the only fair means of ensuring non-discrimination in the provision of these advanced services design functions is for the Commission to require that all providers dependent on the SBC ILECs' design functions take *delivery* at the same time. This will be accomplished only if the Commission prohibits SBC's affiliate from offering service to new customers through the Pronto network until unaffiliated providers can also use the Pronto network to offer the services they intend to offer.

This requirement will ensure that unaffiliated carriers will not be prejudiced by the discriminatory treatment with which SBC has already favored its affiliate. Similarly, SBC's ILECs will have an incentive to be especially expedient in performing these functions for competitors, because their affiliate will, thereby, become equally "dependent" on the SBC ILECs, consistent with the Commission's original purpose in imposing these conditions.¹⁹

¹⁷ SBC's July 13, 2000 Letter to Lawrence Strickling at 2.

¹⁸ "we find that the development of new services, including the development of new transmission offerings, is the provision of service under section 272(c)(1) that, once provided by the BOC to its section 272 affiliate, must be provided to unaffiliated entities in a nondiscriminatory manner." *Non-Accounting Safeguards Order* at ¶ 210.

¹⁹ Merger Conditions, ¶ 363.

1. The Commission Must Establish Terms Governing the Start Date of the Broadband UNE Offering

CompTel has learned, through its members' meetings with SBC, that SBC plans to make its "broadband service offering" available approximately 7 days from FCC approval. This assertion is made in spite of the fact that SBC has failed to complete its technical publications or even provide CLECs a draft of those publications. SBC, further, has not provided adequate training for CLECs to use the Project Pronto architecture. Any approval should explicitly state the start date and the steps SBC must follow to ensure parity access to the architecture. While the exact date can be debated, a ninety-day schedule should be sufficient. During the ninety-day window, SBC would be required to provide an adequate number of training sessions, provide CLECs access to technical publications, and be subject to expedited state proceedings to address detailed terms, conditions and rates.

c. The Commission Must Allow All Carriers to Interconnect With the Advanced Services Provider of Their Choice

The FCC must also find that the SBC ILECs, in being allowed to exclusively joint market with their advanced services affiliate, cannot prevent other carriers from providing end users with the same, or similar, combinations of service through joint marketing and interconnection. Thus, in accord with Section 272(e)(2), a facilities-based voice provider (including a provider leasing the SBC ILECs' UNE Platform) must be able to interconnect with the advanced services provider of their choice in order to provide voice and data services to the end-user. CompTel notes that the SBC affiliate, when providing voice and data services to end users, will also be using UNEP, as the affiliate will, presumably, not own voice switching equipment duplicative of the SBC ILECs.

III. The Commission Must Reject Those Aspects of SBC's Proposed Conditions That Are Contrary To The Law or Public Policy

As CompTel has noted above, the separate affiliate conditions were intended to benefit both telecommunications carriers and the public. Therefore, any modification of these conditions, must leave carriers and the public no worse off than under the original conditions .

The condition SBC seeks a modification, or waiver, of—Paragraph 3d—is an affirmative obligation. Additionally, a waiver/modification of this condition will also substantially weaken other conditions.²⁰ Because the original conditions created affirmative, enforceable legal obligations for the benefit of "all telecommunications carriers", any "substitute" conditions cannot minimize these existing legal rights. Similarly, any ancillary conditions must also be consistent with the purpose of the

²⁰ For example, those conditions requiring the affiliate to seek collocation, purchase advanced services equipment, and assume network planning and design responsibilities with respect to advanced services. Merger Conditions, ¶¶ 4(a), (c).

original conditions. With these precepts in mind, CompTel offers the foregoing observations in addition to those expressed above.

a. Pricing of Broadband UNEs, Remote Terminal Collocation, and Special Construction Arrangements Must Conform to TELRIC Methodology

Because the Pronto network overlay is a new, supposedly efficient, network, SBC will not be prejudiced at all by the use of the TELRIC methodology. Here, the TELRIC “hypothetical” premise transforms into the real, and present, basis for Project Pronto. The Commission should reject SBC’s attempt to interject delay and uncertainty by insisting on some as-yet-undefined, but clearly unnecessary, methodology.

b. The FCC Should Require a Performance Measure For the Migrations of Customers From Pronto to Mainframe Copper

These migrations must be performed with the same intervals and service quality that SBC’s affiliate receives when the SBC ILEC migrates customers from mainframe copper to Pronto. To ensure nondiscrimination, performance must be monitored and subject to Commission audit. The adoption of such a performance measure would be consistent with the recent FCC revisions to the SBC Carrier-to-Carrier Performance Plan, which favor using the SBC affiliate as the basis for determining parity whenever possible.²¹

c. Unaffiliated Carriers Must Be Provided the Same Access to the Subloop as the SBC Affiliate

The SBC affiliate is the only carrier under the provisions of ¶ 5 d. of the proposed commitments which will get access to the public switched telephone network link from the remote terminal to the SAI. The SBC affiliate, because of discriminatory SBC deployment decisions to interconnect the link between the SAI and the RT with an engineering controlled splice, versus a more open cross-connect panel, is the only DSL provider which will receive the benefit of sharing its costs with the SBC ILEC. The Commission has previously stated, “a BOC’s adoption of a network interface that favors its section 272 affiliate and disadvantages an unaffiliated entity will establish a prima facie case of discrimination under section 272(c)(1).”²²

Thus, only where duplicative construction of the link between the RT and the SAI is truly necessary from an engineering perspective should SBC be allowed to require competitors to purchase and deploy a duplicative portion of the PSTN. Moreover, in these cases the cost should be presumptively born by the SBC ILEC, which in contravention of the Act’s mandates, opted to deploy a closed network. If SBC could later demonstrate that its decision to interconnect to the RT through a splice point was the

²¹ Letter from Carol E. Matthey, Deputy Chief, Common Carrier Bureau, to Stanley Sigman, Group President—SBC National Operations, DA 00-1538, (rel. Aug. 1, 2000)

²² *Non-Accounting Safeguards Order*, ¶ 208.

most reasonable, then SBC should be allowed to recover some portion of this additional expense from competitors. Finally, SBC should be required, in the future, deploy its network consistent with the requirements of Section 251(a)(2) and Section 251(c)(2)(C) in order to facilitate competitive interconnection.

d. The Copper Facility Retirement Policy Should Be Modified

CompTel agrees with, and supports, the comments provided by CompTel member Jato Communications on this issue.²³ Additionally, CompTel suggests that the Commission should require SBC to demonstrate that CO-deployed SDSL technology can reach end users without interference from RT-deployed ADSL prior to removing any existing copper from an RT-served CO. Symmetric DSL service is a necessary precondition for carriers to offer VoDSL, which allows carriers to channelize, and create multiple voice-grade lines from, one copper loop. By facilitating and encouraging symmetric DSL deployment, from the CO, SBC will subsequently reduce the overall need for copper loops. CompTel also suggests that the Commission determine, in this proceeding, that any transfer of the retired copper facilities from SBC's ILECs to any SBC affiliate will be presumed to create "successor or assign" obligations under Section 251(h) of the Act.

e. SBC Should Be Required to Provide Modems to CLECs at SBC's Cost of Acquisition

CLECs ordinarily make their own arrangements with modem vendors. In doing so, they reach agreements with vendors who offer modems that are compatible with the CLECs DSLAMs. The CLEC can purchase modems in bulk because the CLEC will ordinarily have only one DSLAM vendor. Project Pronto creates special circumstances. Here, the CLEC must acquire modems that are compatible, not with the CLECs equipment, but instead with SBC's line cards. The CLEC is put in a position where it will have to acquire a different set of modems in order to use the Project Pronto architecture; thus impairing its ability to obtain its own modems at bulk discounts. This problem does not affect SBC's affiliate, because SBC, without obtaining CLEC vendor input, "coincidentally" chose the same vendor that that ASI uses for its central office equipment.

This problem for CLECs might be addressable by competitors being able to purchase off of any SBC ILEC agreement that was available to the SBC affiliate. However, it is not certain that SBC's ILECs are purchasing this modem equipment. Therefore, to solve this problem, the SBC ILECs, or whichever SBC affiliate is purchasing the modems, must be required to give unaffiliated carriers the ability to purchase modems on the same terms that are available to any SBC ILEC, or affiliate. All carriers would benefit from the greater bulk discounts. More importantly, SBC would take the proper role of assuring that the remote terminal equipment it chooses to deploy

²³ See, Letter from Steven A. Augustino, counsel to Jato Communications Corporation, to Magalie R. Salas, FCC, (July 25, 2000).

does not create a barrier to entry by adding undue complexity to impair competitors' ability to obtain customer premise equipment.

f. SBC Must Be Required to Manage Future Network Modifications In a Nondiscriminatory, Collaborative Manner

As CompTel has previously noted, the SBC ILECs are not retail providers of advanced services; rather, by operation of the Merger Conditions, they are wholesalers. In a competitive market, a wholesaler would consult with its wholesale customer regarding new equipment. The ultimate purchasing decision may rest with the SBC ILECs, but a failure to attempt to serve the needs of their customers calls into question SBC's intent to comply with the nondiscrimination requirements of the merger conditions.²⁴ To address these concerns, decisions relating to choice of future vendors and products should, at least, be the subject of discussion by all interested carriers. The Commission should also impose conditions to ensure that SBC's affiliate will only communicate with the SBC ILEC regarding future network modifications, in a manner that allows the FCC, and competitors, the ability to monitor compliance with the nondiscrimination requirements of the Merger Conditions.

* * *

In conclusion, CompTel asks the Commission to incorporate the above requested changes, and legal analyses, in any order granting SBC's requested modification or waiver of its Merger Conditions. If these modifications, and accompanying legal clarifications are adopted by the Commission, CompTel supports SBC's request for a modification/waiver of the Merger Conditions.

Sincerely,

Jonathan D. Lee
Vice President,
Regulatory Affairs

cc (via electronic mail): Ms. Dorothy Attwood
Ms. Carol Matthey
Mr. Anthony Dale
Ms. Rebecca Beynon
Mr. Kyle Dixon
Mr. Jordan Goldstein
Ms. Anna Gomez
Ms. Sarah Whitesell
Mr. Paul Mancini

²⁴ CompTel has previously explained the evidentiary basis in this proceeding to question SBC's good faith in implementing the terms of the Merger Conditions. *See* Letter from Jonathan D. Lee, CompTel to Magalie Roman Salas, FCC (May 19, 2000).