



Ohio Consumers' Counsel

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October 14, 1998

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
1919 M Street, N.W.
Suite 222
Washington, D.C. 20544

Re: Docket No. 98-141

Dear Mr. Caton:

Enclosed for filing please find the original and twelve (12) copies of the Comments of the Consumer Coalition and the attached Affidavit of Susan M. Baldwin and Helen E. Golding, concerning the above-referenced proceeding.

Please date-stamp and return the additional copy in the pre-addressed, postage prepaid envelope to acknowledge receipt.

If you should have any questions or concerns regarding the enclosed, please do not hesitate to contact me at your convenience.

Sincerely,

Thomas J. O'Brien
Assistant Consumers' Counsel

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Enclosure

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**Before the
Federal Communications Commission
Washington, D.C. 20554**

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OCT 15 1998

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In re Applications of)
)
AMERITECH CORP.,)
Transferor,)
)
AND)
)
SBC COMMUNICATIONS, INC.,)
Transferee,)
)
For Consent to Transfer Control of)
Corporations Holdings Commission Licenses and)
Authorizations Pursuant to Sections 214 and)
310(d) of the Communications Act and Parts)
5, 22, 24, 25, 63, 90, 95 and 101)
of the Commission's Rules.)

CC Docket No. 98-141

**COMMENTS OF
THE CONSUMER COALITION**

Indiana Office of Utility Consumer Counselor

Michigan Attorney General

Missouri Office of the Public Counsel

Ohio Consumers' Counsel

Texas Office of the Public Utility Counsel

The Utility Reform Network

October 14, 1998

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EXECUTIVE SUMMARY

The proposed merger between SBC, Inc., and Ameritech Corporation announced May 11, 1998 will create the largest local exchange monopoly in the United States. The Commission must determine whether this merger transaction will serve the public interest, convenience and necessity. The Commission has previously found that this standard encompasses the pro-competitive, deregulatory aims of the Communications Act, designed to open all telecommunications markets to competition (including residential markets), while preserving and advancing universal service and accelerating the deployment of advanced telecommunications and information technologies and services. In the course of its determination, the Commission must consider the impact of this merger on the price, service quality, and range of telecommunications services available to residential consumers

This proposed merger poses significant threats to the development of competition as envisioned under the Telecommunications Act of 1996 with few, if any redeeming benefits. The concentration of 57 million access lines into a single firm is contrary to the spirit and intent of the Act. The threats posed by this merger are magnified because this is the *second* RBOC to be acquired by SBC, and the merged entity will constitute an amalgam of *three* RBOCs. It is highly probable that approval of this merger will perpetuate the current monopoly stranglehold that the remaining RBOCs have on the local exchange market and perhaps lead to a national telecommunications duopoly. Such a market structure will not further the aims of the national telecommunications policy.

As stated by the companies, the overriding goal of the merger is to position the merged company as a major power in the global telecommunications marketplace. In its

pursuit of “synergies” from this merger, the “New SBC” will have strong incentives to wrest as many dollars as possible from non-competitive services through disinvestment, by redoubling efforts to preserve its monopoly position, and by increasing its marketing pressure for optional services. Because residential consumers have the fewest alternatives in the telecommunications marketplace, they pose the most likely target for reductions in service quality, as recent history demonstrates.

Hard evidence exists that Ameritech was positioning itself to become a major competitor of SBC. That possibility will be forever eliminated by this merger. SBC, on the other hand, has established a firm record of avoiding competition and instead prefers to buy its way into a dominant market position.

Another concern caused by the sheer size of the merged company is the possibility of an enhanced ability to engage in strategic behavior towards its rivals. Ample anecdotal evidence exists that both of these companies are capable of engaging in anti-competitive behavior. The merged company, in its drive for global market position, will have an even greater motivation to thwart the fragile competitive scheme created by the '96 Act.

This merger also raises universal service concerns to the extent that an additional incentive to disinvest in universal service programs is created by this merger. Both Ameritech and SBC have questionable records with respect to promoting universal service. The Commission must ensure that the neediest affected consumers are not disadvantaged further through this merger.

The benefits claimed by the companies are totally speculative. For example, the companies have indicated no intention to pass any of the savings achieved through this

merger to their captive customers. This is a bare acknowledgement of the monopoly power that the companies, as incumbent local exchange companies, possess. Coupled with the consistently excessive returns earned by these companies, the companies' intentions strongly signal a continuing lack of marketplace discipline for local exchange services. Cost savings and synergies benefit only the shareholders of the merged company in the absence of a specific means of passing those benefits through to customers.

The companies claim that two substantive benefits will accrue to the public interest as a result of this merger, both stemming from the "National-Local" strategy. One benefit is the claim that the "new SBC" will simultaneously enter 30 new markets as a CLEC. The other substantive benefit to the public interest claimed by the companies is the possibility of retaliatory competition in response to the "new SBC's" competitive forays. The benefits of the "National-Local" strategy are based on a large, very speculative "chain of ifs." The benefit of new competitive entry in response to the "National-Local" strategy will only come to pass if each of a number of contingencies are first realized. The possibility of either SBC's execution of the "National-Local" strategy or retaliatory competition as a result of the New SBC's foray into new markets is far too speculative to count towards the promotion of the public interest.

On balance, the negative impacts of this merger are far less speculative than the benefits alleged by the companies. Too much time has elapsed since the passage of the '96 Act to believe that the imposition of conditions on this merger can overcome its negative aspects. Accordingly, the Commission should deny the approval of this merger.

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CC Docket No. 98-141

**COMMENTS OF
THE CONSUMER COALITION**

I. INTRODUCTION

On May 11, 1998 the acquisition of Ameritech, Inc., by SBC Communications, Inc., was announced. This merger, if consummated, would create the largest local exchange company in the United States. Indeed, when all United States telecommunications providers are considered, only AT&T would be larger on a revenue basis. The combined companies (what SBC terms the "new SBC") would control over 56 million access lines in 13 states, or over one-third of the nation's total. By customer class, this means that one-third of the residential and one-half of the business lines in the United States would be controlled by one incumbent monopoly telephone company.

On July 24, SBC filed its Application for Declaration of Common Ownership and Authorization for Common Officers and Directors, and SBC and Ameritech filed their Application for Authority, Pursuant to Part 24 of the Commission's Rules, to Transfer Control of a License Controlled by Ameritech Corporation, (the Application) with the Federal Communications Commission (FCC or Commission) herein. On this same date, SBC and Ameritech (the companies) also filed various applications seeking approval of their merger with the Illinois Commerce Commission (ICC) and the Public Utilities Commission of Ohio (PUCO).¹ The companies had previously filed an application for transfer of mobile and wireless licenses and approval to have common officers and directors with the Federal Trade Commission and the United States Department of Justice. In addition, the Indiana Utility Regulatory Commission (IURC) opened an investigation of the merger on September 30, 1998.²

On July 30, 1998, the Commission issued a notice requesting comments regarding merger-related issues. The Consumer Coalition, consisting of the Indiana Office of Utility Consumer Counselor,³

¹ *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 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, ICC Case No. 98-0555; In the Matter of the Joint Application of SBC Communications, Inc., SBC Delaware, Inc., Ameritech Corporation, and Ameritech Ohio for Consent and Approval of a Change of Control, PUCO Case No. 98-1082-TP-AMT.*

² *In the Matter of the Investigation on the Commission's Own Motion Into All Matters Relating to the Merger of Ameritech Corporation and SBC Communications, Inc., IURC Cause No. 41255, September 30, 1998.*

³ The Indiana Office of Utility Consumer Counselor (OUCC) is an agency of the State of Indiana duly authorized to represent Indiana ratepayers in state and federal proceedings, including proceedings before the FCC. Indiana Code Sec. 8-1-1.1-9.1. Because Ameritech Indiana is the largest telephone company in terms of access lines in the state, Indiana's ratepayers, and therefore the OUCC, have an important interest in this proceeding.

the Michigan Attorney General,⁴ the Missouri Public Counsel,⁵ the Ohio Consumers' Counsel,⁶ the Texas Office of the Public Utility Counsel,⁷ and The Utility Reform Network,⁸ respectfully submits its comments concerning this merger.⁹

Included with these comments is the Affidavit of Susan M. Baldwin and Helen E. Golding, of the consulting firm of Economics and Technology, Inc. (ETI) (hereinafter, the Affidavit). Ms. Baldwin and Ms. Golding are Senior Vice President and Vice

⁴ The Michigan Attorney General's appearance and intervention are authorized by MCL 14.28, MCL 14.101; MSA 3.211, and by his common law powers. This power to intervene can be exercised whenever he determines that the public interest so requires it. MCL 14.28; MSA 3.181. Numerous residents of the State of Michigan are customers and ratepayers of Ameritech. The interest of these customers and ratepayers is a public one, common among virtually every such customer and ratepayer in the State of Michigan.

⁵ The Missouri Public Counsel is a state agency established pursuant to § 386.700 RSMo 1994, whose function is to represent consumers of telecommunications services. Because SBC is the primary provider of local exchange service in Missouri and Ameritech is a recently certified competitive local exchange company in SBC's Missouri service area, the Missouri Public Counsel has an interest in this proceeding.

⁶ The Ohio Consumers' Counsel (OCC) is the statutory representative of Ohio's residential consumers in matters involving Ohio's public utilities. See O.R.C. Chapter 4911. Because Ameritech Ohio is the largest telephone company in the state, Ohio's residential consumers, and therefore the OCC, have an important interest in this proceeding.

⁷ The Texas Office of the Public Utility Counsel (OPC) is a governmental agency of the State of Texas which has been designated by law to represent residential and small commercial utility consumers of the state. OPC is responsible for representing those interests before Texas and federal regulatory agencies, as well as the courts. Because SBC, through its Southwestern Bell Telephone Company subsidiary, is the primary provider of local exchange service in Texas, the OPC has an interest in this proceeding. The Texas OPC is also separately submitting a Petition to Deny or in the Alternative Petition to Impose Conditions, along with the Affidavits of Dr. August H. Ankum, Dr. Carol A. Szerszen and Dr. William G Shepherd, as further support for its position in this matter.

⁸ The Utility Reform Network (TURN) is a non-profit consumer advocacy organization which represents the interests of California's residential and small business customers of telecommunications utilities. Because SBC, through its Pacific Bell subsidiary, is the primary provider of local exchange service in California, TURN has an interest in this proceeding.

⁹ The Consumer Coalition has not had the benefit of discovery during its preparation of these comments. However, discovery is expected to commence in the near future in the investigation pending before the Public Utilities Commission of Ohio (Case No. 98-1082-TP-AMT). The Consumer Coalition respectfully reserves its right to supplement its comments herein on the basis of information gained through the discovery process. Additionally, the Consumer Coalition appreciates the Commission's decision to hold *en Bancs* on the subject of industry consolidation. It is also apparent that due to the complexity of the issues arising from this case, evidentiary hearings may be appropriate.

President, respectively, at ETI. Statements of Qualification are included with their affidavit. These comments and the Affidavit are stand-alone demonstrations that this merger should not be approved.

II. LEGAL STANDARDS

The Commission has determined that § 214(a) and § 310(d) of the Communications Act of 1934 (the Act) govern the scope of its authority in merger cases. *In the Matter of Application of WorldCom, Inc. and MCI Communications Corporation for Transfer of Control of MCI Communications Corporation to WorldCom, Inc.*, CC Docket No. 97-211, Memorandum Opinion and Order (September 14, 1998) (*WorldCom*), ¶1; *In the Application of NYNEX Corporation, Transferor, and Bell Atlantic Corporation, Transferee, For Consent To Transfer Control of NYNEX Corporation and Its Subsidiaries*, File No. NSD-L-96-10, Memorandum Opinion and Order (August 14, 1997), ¶ 2 (*NYNEX*); 47 U.S.C. §§ 214(a), 310(d). Under these provisions of the Act, the merger transaction must be shown to serve the public interest, convenience, and necessity. *Id.* The Commission has previously set an appropriately high threshold for the companies to overcome in order to meet their burden of proof with respect to this standard. The Commission has found that §§ 214(a) and 310(d) encompass the “broad aims of the Communications Act[,]” specifically, the “pro-competitive, de-regulatory national policy framework designed to . . . open [] all telecommunications markets to competition,” “preserving and advancing” universal service, and “accelerat[ing] rapidly private sector deployment of advanced telecommunications and information technologies and services.” *WorldCom* at ¶ 9. This

standard also requires a substantial advance in the development of competition for residential local exchange services, thus bringing the benefits of competition (lower prices, better service quality and new, innovative services) to residential consumers.

The proposed SBC/Ameritech merger now before the Commission presents a number of very troublesome issues with respect to this public interest standard. The gravity of the issues presented by this merger are of a new order of magnitude because this is the *third* of the original RBOCs to be folded into an already massive local exchange provider, and the *second* RBOC to be acquired by SBC. The size of this proposed transaction, both geographically and financially, is unprecedented. If the Commission accepts as legitimate the justifications for this merger proffered by the companies, then the Commission will also be accepting SBC's vision of a global telecommunications oligopoly ["SBC Communications to Acquire Ameritech in a \$55 Billion Deal," *Wall St. J.* (May 11, 1998), p. A10 (SBC CEO Ed Whitacre's five global "telecom titans")], and, in all probability, will allow the creation of a national telecommunications duopoly.¹⁰ Such a market structure will not further the aims of the national policy articulated above. The Consumer Coalition shares the concerns recently expressed by Chairman Kennard and Commissioner Ness that this proposed megamerger will result in the loss of potential competition; consequently, the applicants must bear a heavy burden of proving that the merger will produce a net increase in competition. *See* "FCC May be a Roadblock for Ameritech," *Chi. Tribune*, September 28, 1998, <http://chicagotribune.com/business/businessnews/article/0,1051,ART-15719,00.html>,

¹⁰ The spectre of a national duopoly looms even larger when the Bell Atlantic/GTE proposal is considered.

accessed September 29, 1998; Remarks of Commissioner Susan Ness before the Consumer Federation of America Utility Conference, October 1, 1998. Accordingly, as demonstrated herein, the Commission must stop the relentless drive towards greater local exchange monopoly entrenchment -- here and now -- and deny the Application. *See also* Affidavit at ¶¶ 98-100.

III. THE CURRENT STATUS OF LOCAL EXCHANGE MARKETS

The local exchange marketplace remains a monopoly for all but the largest telecommunications consumers. Affidavit at ¶¶ 13-15. The information contained in the Application bears this out for SBC and Ameritech. Of the 36 million access lines on the SBC system, 1,017,883, or 2.8% are claimed to have been lost to competitors. Carter Affidavit, Attachment 1, p. 1. However, of that 1,017,883, only 367,921 (or 1%) have been lost through facilities-based competition (including 60,500 SBC unbundled network elements (UNE) loops). *Id.* at pp. 1&3. The balance, 649,962, have been "lost" to resellers. *Id.*; *see also* Affidavit at ¶ 15. The numbers are similar for Ameritech. Out of nearly 21 million access lines, 635,000, or 3.1% are claimed to have been lost to competitors. Appenzeller Affidavit ¶ 15. Of this number, 94,600 (or 0.46%) have been lost as unbundled network elements. *Id.* at ¶ 48. Some 540,000 access lines are in the hands of Ameritech's resellers. *Id.* Thus, in the combined service territory, only 0.81% of access lines have been lost on a UNE basis.

Because the wholesale discount to resellers is based on avoided cost, the loss of customers to resellers is effectively transparent to the incumbent LEC. In addition, the incumbent LEC retains control over all of the essential attributes of the services being

resold. UNE-based competition at least attempts to send the correct price signals to new entrants and provides a certain degree of autonomy with respect to the deployment of those elements.

Regardless of the significance of resold service, control of over 97% of the single most essential facility in the provision of local exchange services, by any standard, qualifies as a monopoly. It would be no exaggeration to say that virtually all of the access lines "lost" to competition belong to customers who would have received the benefits of local exchange competition with or without the changes made by the '96 Act. The prospects for competitive choice for the overwhelming majority of local exchange consumers -- in particular residential consumers -- remain as bleak as ever. In addition, it is noteworthy that Ameritech's market share loss, small though it may be, is still significantly larger than SBC's. Whether this difference is a reflection of the respective corporate cultures is a matter of relevant speculation, given that this merger represents a takeover of Ameritech by SBC.

Another key feature of the current local exchange marketplace is the return currently enjoyed by incumbent local exchange providers. SBC's 1997 return on equity was 34%, as reported by Value Line. Ameritech Corporation had a 1997 return on equity of 26%, again, as reported by Value Line. This situation also exists at the state level. . Ameritech Illinois' 1997 return on average equity was 40%. Illinois Bell Telephone Co. 1997 Form 10-K. Ameritech Indiana's 1997 return on average equity was 38%. Indiana Bell Telephone Co. 1997 Form 10-K. Ameritech Michigan's 1997 return on average equity was 43%. Michigan Bell Telephone Co. 1997 Form 10-K. Ameritech Ohio's 1997 return on average equity was 31% (this return is 33.76% as reported to the PUCO).

Ohio Bell Telephone Co. 1997 Form 10-K. Ameritech Wisconsin's 1997 return on average equity was 35%. Wisconsin Bell Inc., 1997 Form 10-K. These returns are not anomalies. After removing extraordinary one-time charges, the average return for Ameritech Ohio over the 1991-1997 timeframe was 24.32%. Ameritech Ohio 1991-1997 Annual Reports to the PUCO.

SBC and Ameritech are companies that derive the bulk of their income from regulated monopoly services. These returns are consistently produced despite the "costs and obligations of large-scale ILECs." Description of Transaction, Public Interest Showing and Related Demonstrations (filed July 24, 1998) (hereinafter, the Description) at 2. It is nonsensical to believe that these returns are not reflective of monopoly rents earned from tariffed, as opposed to negotiated, rates and services.

Another reality of the current local exchange marketplace is the fact that, notwithstanding the claims to the contrary by the companies (Description at 3), substantial barriers to entry still exist despite the rapid pace of technological change, as the statistics cited above demonstrate. Affidavit at ¶¶ 9&22. It can hardly be a coincidence that after two and a half years since its enactment, no RBOC has been able to demonstrate compliance with Section 271 of the Act. Affidavit at ¶ 19. These statistics should be kept firmly at the fore of the Commission's consideration of the consequences of this merger for the public interest and for this nation's telecommunications policy.

IV. REASONS FOR THE MERGER

The companies assert that globalization is the driving force behind this merger.

They seek to be able to follow the customer, especially large and medium sized customers as those customers expand across the globe:

This combination is absolutely necessary to achieve the scale and scope efficiencies that the merger will produce, and that will enable us simultaneously to: (a) continue to bring to each of our in-region states the innovative products and services our customers expect, the high quality jobs our employees desire, and our participation in the economic development of the communities we serve; (b) continue and complete the opening of our local markets to competition; and (c) effectively compete with the myriad highly-visible, technically proficient and well-financed competitors who are in our markets today.

Description at 4-5. According to the companies, this merger will result in significant synergies, in the form of revenue enhancements and cost savings and provide the volume of revenue necessary both to address the needs of the combined companies' in-region customers and to launch the out-of region and global elements of this new strategy.

Description at 6-7. The *alleged* "unprecedented" pro-competitive benefits of all of this will be to jump-start competition in the regions that this merger will allow the combined companies to enter. Thereafter, IXCs and other ILEC and CLECs will be forced to compete vigorously in their own regions and the "new SBC's" regions to protect their own customer bases. Description at 7-8. This is, in the companies' view, "[u]nquestionably" a distinct, merger-specific benefit. *Id.* at 7.

V. FACT VS. SPECULATION

When analyzing both the benefits and detriments of this merger, it is critically important to bear in mind those aspects that are facts versus those aspects that are speculative in nature. For instance, the companies accurately point out that this mergers' negative impact on potential competition is conjectural. Description at 10. But so too is any claim that this merger will enhance competition. *See, e.g., id.*

However, certain aspects of the current status of these companies and the local exchange marketplace are *not* conjectural. The statistics concerning the percentage of loops controlled by these incumbent monopolists are not conjecture. The returns earned from the monopoly services of these companies are not conjecture. As these returns show, their ability to extract monopoly rents is not conjecture. Also not conjecture is the plain fact that Ameritech and SBC were actual and potential competitors of each other, such that this merger *in fact* eliminates potential competition. This merger will, *in fact*, create the largest local exchange monopolist in the nation with revenues far in excess of any other RBOC. Affidavit at ¶ 44.

In its determination of whether the companies have met their burden of proof in this proceeding, the Commission should ascribe substantially more weight to these facts than to the speculative promises of the companies.

VI. THE MERGER POSES SIGNIFICANT RISKS TO THE PUBLIC INTEREST

In order to benefit consumer welfare, this merger would have to plausibly promote lower prices, increase innovation, and improve service. Apart from the companies' speculative claims about the National-Local Strategy and the chain of events

that will otherwise be set in motion by this merger, however, the companies claim virtually no concrete benefits for consumers. Rather, the justifications offered for this merger present some serious potential inconsistencies between promise and practice.

A. The National-Local Strategy poses significant risks to the incumbent local exchange operations of both companies.

The Companies claim that the rapidly changing global marketplace, which includes the telecommunications market, is driving the need for this merger and that the companies “could either stand pat and run the risk of losing our large and mid-size customers . . . or we could expand and compete for the opportunity to follow and serve our customers wherever they might be.” Description at 3-4. Retaining large and mid-sized customers is important in order to “sustain our revenues and to secure the resources needed to maintain, enhance and expand our networks for all our customers.” *Id.* at 4.

The financial resources to accomplish these goals must come from the “numerous synergies” that will result from this merger. *See id.* at 4. The experience in California with SBC’s acquisition of Pacific Telesis indicates that there are consequences to the pursuit of economies of scope and scale. A May 12, 1998 article in the *Cleveland Plain Dealer* contained the following quote of Brian Adamik, a Senior Vice President with the Yankee Group: “They cleaned house in California, and I think that many people think the same thing will happen here . . . Ameritech as we know it will be run out of Texas.”

A recent article in the *San Francisco Business Times* stated that Pac Tel’s business focus has changed to reflect SBC’s priorities. Of its 35 corporate officers, just 13 remain. Many back office operations have been moved wholesale from the Bay Area to San Antonio. Also, all or most of a range of PacTel administrative departments have

been transferred to San Antonio or outsourced. *San Francisco Business Times* (March 23, 1998), pp. 1 & 40.

Of course, this is completely consistent with the general motivation behind most corporate mergers, to consolidate and centralize as many functions as possible in order to produce the much sought-after “synergies.” In the logical context of the companies’ rationale for the merger, the initial stock transaction is just the first step. Thereafter, the “New SBC” will attempt to find each and every avenue to consolidate and centralize operations in an effort to slash costs and achieve efficiencies in order to fund the National-Local strategy. In most merger situations, the risk of alienating the existing customer base is a natural and effective check on over-zealous cost cutting. However, in the case of a major local exchange monopoly, the only material constraint is regulation. Incentive regulation has proven woefully inadequate in protecting against the impacts of over-zealous cost-cutting. For example, see “Ameritech to Cut Costs By \$3 Billion Over Five Years,” *Wall St. J.* (Mar. 25, 1998); “Ameritech to Cut 5000 Jobs,” *Akron Beacon J.* (Apr. 15, 1998).

Of course, reconciling the companies’ claims as to the driving forces behind the merger and the claims as to the merger’s effect on captive local exchange customers does not determine what results may occur. The nature of the change if the merger occurs is the “bet” all parties (including the applicants) make when moving forward with the deal. What must be addressed are the likely effects that the merger will have on competition and regulation. For those answers, history, law, and economics must be the guide.

B. “The Pac-Man Syndrome”

One clear economic issue presented in this case is the resulting size of the merged company. The sheer size of this merger is impressive. As a recent editorial put it, SBC Communications is the “veritable PAC-man in the [telecommunications] industry today.” *The Toledo Blade* (May 17, 1998) at B4. Looking at how SBC spends its investment dollar, SBC has established a clear strategy in its drive to “bulk-up” to be a global player: simply buy large incumbent local exchange companies.

The aggregation of 57 million access lines is the key feature of this merger. Access lines and their supporting networks make up the vast bulk of the assets being acquired by SBC to achieve the allegedly necessary scale to be a global competitor. Left unanswered is the question of why roughly 57 million access lines are necessary to achieve the required scale? How many access lines does it take to compete globally? Could SBC achieve the scale it desires without acquiring incumbent local exchange companies?

This aggregation, moreover, has serious implications for competitive outcomes. If the companies consider the aggregation of incumbent local exchange monopolies as the key feature of this merger, this says something about the likelihood of retaliatory entry into the “new SBC’s” markets and the development of local exchange competition generally. For instance, how many access lines will a competitor of the combined company require? Under the logic of this merger, it will require something in *excess* of 57 million access lines. *See* Affidavit at ¶ 31.

C. Local Exchange Competition – Including the Residential Market

By itself, the goal of acquiring as many monopoly loops as possible -- as practiced by SBC -- carries ominous implications for the development of local exchange competition generally. This concentration of ownership of the local loop is certainly contrary to the spirit of the public interest standard heretofore articulated by the Commission, as well as the '96 Act: To the extent that the Act and the Commission's rules promulgated thereunder were designed to promote competition, the merger of two huge monopolies does not accomplish this goal.

As noted above, an essential feature of promoting the public interest is the affirmative promotion of consumer well-being through the promotion of competition and its benefits of lower prices, better service quality, and new and innovative services. After the merger, there will be one less major competitor. Given Ameritech's competitive strides in SBC territories, this loss is significant.

For example, the two companies were competing head-to-head in the cellular market. Affidavit at ¶ 46. Unfortunately, the proposed merger will eliminate that competition. Indeed, as stated in the companies' filings at the FCC, their "overlapping" cellular interests will be transferred to a third party. Description at 58.

Perhaps the most telling indication of the local exchange competition that Ameritech was prepared to offer in SBC's territory is the fact that of the eight out-of-region local exchange certificates held by Ameritech, seven are in SBC's current service territory. Securities and Exchange Commission Form S-4 (the Joint Proxy Statement) (June 5, 1998) at 45-46; *see also*, Affidavit at ¶¶ 53-59. An Ameritech spokesperson has stated that the Ameritech initiatives in various states are in different stages but all are part

of a “follow our customer” strategy the company is pursuing. “Pacific Bell Pact is Latest in Ameritech’s CLEC Drive,” *Telecomm. Rep.* (Jan. 12, 1998) at 39.

Ameritech was poised to begin providing competitive local services in Texas and California, having obtained local exchange certificates and achieving interconnection agreements with SBC. Ameritech had also made the greatest strides of any of the RBOCs in entering SBC’s St. Louis market, going so far as to begin trial marketing and taking out a listing as a CLEC in SWBT’s March 1998 Greater St. Louis white pages directory. As recently as January 1998, Ameritech stated that it was testing its billing and customer service systems in preparation for rolling out a commercial trial in St. Louis “early in 1998.” *Id.* A November 1997 article announced that Ameritech was targeting SBC’s residential market in St. Louis. “Ameritech Targets SW Bell’s Residential Market in St. Louis,” *Telecomm. Rep.* (Nov. 10, 1997) at 7. A June 8, 1998 *Wall Street Journal* article further described the market research conducted by Ameritech in preparation for entering the St. Louis area as follows:

But Chicago-based Ameritech’s executives said the Bell conducted months of research as it prepared to take on SBC before finally getting a green light from Chairman Notebaert. Ameritech aimed to be a major competitor for residential customers. Ameritech’s research showed that it might have been the only effective rival of SBC in the residential market.

Wall St. J. (June 8, 1998) at B4. The promise and hope of Ameritech and SBC entering each other’s telephone markets evaporates under the proposed merger. Affidavit at 53.

There is one other important market in which Ameritech itself has made significant competitive inroads. Ameritech’s cable venture, Ameritech New Media, has obtained 80 franchises to provide service throughout Ameritech’s service territory and

currently is providing service in 60 markets. “Ameritech New Media Wins 80th Cable TV Franchise,” Ameritech News Release, Sept. 9, 1998. At the very least, this effort appears to be threatened. SBC has made no commitment to continue providing cable service. Indeed the best spin that Ameritech can put on this lack of commitment is found in a statement from Ameritech’s vice president of federal relations wherein he indicated that SBC had not decided whether it wants to continue Ameritech New Media foray into cable TV. “Ameritech’s Cable TV Future Hangs on SBC Merger Decision,” *Telecomm. Rep.* (July 6, 1998) at 20. Perhaps more telling is the observation of *Crain’s Cleveland Business* which stated that “SBC Communications Inc. isn’t known to be a big fan of cable TV.” *Crain’s Cleveland Business* (May 25, 1998) at 1 & 49. See also, *Business First* (May 15, 1998) at 10-11.

SBC’s history with competitive ventures of the monopoly telephone companies that it purchases heightens concern. For example, when SBC purchased Pac Bell in 1997, one of its first actions was to halt the investment that Pac Bell was making in providing cable service. Similarly, SBC’s 1997 Annual Report to Stockholders (at 37) stated that it had halted construction on the Advanced Communications Network (ACN) in California. The Report stated that as part of an agreement with the ACN vendor, SBC paid the liabilities of the ACN trust that owned and financed ACN construction, incurred costs to shut down all construction previously conducted under the trust, and received certain consideration from the vendor. SBC also discontinued its broadband network video trials in Richardson, Texas and San Jose, California.

Further, SBC’s 1997 Annual Report to Stockholders referenced its withdrawal from the Americast cable venture. 1997 Annual Report at 37. The response from the

other Americast partners (including Ameritech) was to commence legal action against SBC. *Id.*

There is also potential harm to the long distance market. Based on current calling usage and patterns, it is expected that 45% of the current toll traffic originating in the merged SBC territory will terminate in the merged territory. Presentation of John Hoffman on behalf of Sprint Corporation before the PUCO (Aug. 26, 1998), transcript at 8-9. The merged entity will have an enormous competitive advantage as this traffic will not be subject to any “real” access charges and this, in turn, translates in to major rate design advantages to the applicants.

As can be seen, the hazard posed by this merger to emerging competition is substantial. This alone presents a very formidable obstacle for the companies to overcome in meeting their burden of demonstrating that this merger is in the public interest. However, as detailed below, other aspects of the merger pose additional threats to consumer welfare.

D. Strategic Behavior

Slashing costs (with the attendant effects on service quality discussed below) may be one prong of the “New SBC’s” strategy for creating “synergies” from this merger. *See, e.g.,* Kaplan Affidavit at ¶ 17. The companies have indicated that “revenue enhancement” will be another prong. Description at 6.

Unfortunately, part and parcel of revenue enhancement is *market preservation*. Thus, SBC’s drive to be a global player through the scope and scale provided by this

merger will bring with it an increased motivation to protect its monopoly markets from encroachment, contrary to the intent of the '96 Telecom Act.

Although it is natural for a firm to protect and enhance its market share, the status of monopoly market shares in the local exchange business has changed under state and federal laws. Through the '96 Act, Congress removed the protection from the antitrust laws that merging telephone companies such as SBC and Ameritech had long enjoyed by repealing 47 U.S.C. § 221(a). Under the new architecture of the Act, incumbent local exchange providers are *supposed* to lose market share. Of course, the '96 Act included a *quid pro quo* for this loss for the Regional Bell Operating Companies (RBOCs), namely entry into heretofore restricted markets, *i.e.*, interLATA interexchange markets inside their current service territory.

Experience is showing that incumbent RBOCs may prefer to protect market share by engaging in strategic behavior with respect to the provision of unbundled network elements rather than losing market share while gaining a Section 271 exemption. *See supra* at 6-7. Of course, it is entirely plausible that a profit-maximizing monopolist would attempt to minimally comply with the Section 271 checklist while continuing to engage in strategic behavior with respect to its competitor-customers, thus gaining the best of both worlds under the '96 Act -- monopoly market share for local exchange services *and* the provision of interLATA, interexchange services within its own region. *See Affidavit* at ¶¶ 19-20.

The Commission will no doubt hear first hand from the CLECs filing comments in this proceeding about the reluctance of both SBC and Ameritech to cooperate with respect to interconnection and the provision of UNEs. Competitors in SBC's current

service territory describe interactions with SBC as attempting to “kick a dead whale down a beach.” <http://chicagotribune.com/textversion/article/0,1492,SAV-9808030009,00.html>, accessed August 3, 1998. A speaker at the Illinois Commerce Commission’s (ICC) July 14, 1998 forum stated that “when we put together our business plan...we essentially tried to avoid SBC in all of the marketplace.” Transcript of Telecommunications Policy Open Meeting before the ICC (July 14, 1998), at 69. The same speaker remarked that this “avoid SBC” strategy is commonplace within the CLEC community. *Id.* As the numbers on market penetration cited above indicate, of SBC and Ameritech, Ameritech may be the more willing company to cooperate with competitors. *See* Affidavit at ¶ 18. Because the “new SBC” will be managed from San Antonio, this merger does not bode well for further competitive inroads in Ameritech’s service territory. *Id.* at ¶¶ 15-17.

E. Service quality

The companies’ intention to use the savings and efficiencies (“synergies”) achieved through this merger to leverage entry into new markets poses more immediate concerns to residential consumers. One of the hardest lessons learned from the national experience with alternative regulation in the form of price caps or rate freezes, is that monopoly service providers have a substantial incentive to increase return at the expense of service quality. This phenomenon tends to affect residential customers the most severely. *See* Affidavit at ¶¶ 79-81.

For example, Ameritech Ohio’s service quality problems have been the subject of intensive and protracted proceedings and investigations over the past years. A recent

case before the Public Utilities Commission of Ohio involved an investigation of Ameritech Ohio's quality of service in the areas of clearing of out-of-service reports, keeping new service installation appointments, meeting the business-office-center answer time requirements, meeting the repair-service-center answer time requirements, provision of directory listings, handling of "trouble reports" and adequacy of training and oversight of business office representatives.¹¹ This proceeding resulted in Ameritech Ohio paying a \$300,000 civil forfeiture, an adjustment of the price cap service quality factor which added a negative adjustment of 0.1 percent or a reduction of not less than \$450,000 and provisions for an audit to be conducted by the PUCO Staff.¹² PUCO Case No. 95-711-TP-COI, Finding and Order (June 26, 1997). The stipulation, as adopted by the PUCO, called for, among other items, another adjustment to the price cap service quality factor of \$150,000, an Ameritech Ohio internal audit of its billing adjustment system and a commitment by Ameritech to improve its performance regarding the amount of repeat troubles, facility delays, delayed installation orders, and out-of-service trouble report coding. *Id.*¹³

SBC's regulatory history on service quality raises similar problems. For example, the *San Francisco Business Times* stated that service quality complaints against Pacific

¹¹ *In the Matter of the Commission's Investigation Into Ameritech Ohio's Compliance With Several Subsections of Chapter 4901:1-5, Ohio Administrative Code, Concerning the Minimum Local Exchange Company Telephone Service Standards*, PUCO Case No. 95-711-TP-COI.

¹² The Staff audit was issued in *In the Matter of the Commission's Investigation of Ameritech Ohio Relative to Its Compliance with Certain Portions of the Minimum Telephone Service Standards Contained in Chapter 4901:1-5 of the Ohio Administrative Code*, PUCO Case No. 98-191-TP-COI.

¹³ Ameritech's customers have also taken it to court. A class action suit involving the company's inside wire maintenance program is the subject of *Todt, et al. v. Ameritech Corporation, et al.*, Case No. 97-L-102D, Circuit Court of Madison County, Illinois, Hon. Randall Bono presiding.

Bell have at least doubled since the company was acquired by SBC Communications in April 1997. *San Francisco Business Times* (March 2, 1998), at 49. More problematic is the suggestion that SBC business practices may further injure consumers through old-fashioned “hard-sells.” These issues are highlighted by the fact that anti-consumer behavior and abusive marketing practices have been evident since SBC’s purchase of Pac Bell in May 1997. *San Jose Mercury News* (June 5, 1998) at 1A.

The California Public Utilities Commission’s (CPUC) Office of Ratepayer Advocates (ORA)¹⁴ filed a petition with the CPUC to investigate harmful or misleading Pac Bell practices and to issue an order to cease all improper practices at the company’s residential order centers. The ORA requested investigation of the following Pac Bell practices: 1) misleading selling techniques for custom calling packages (packages add between \$9-\$20 to a customer’s telephone bill) and 2) failure to disclose Caller ID blocking services. The ORA stressed to the CPUC that “Pacific’s practices compromise the safety, privacy, financial integrity and basic consumer protections.” ORA letter to CPUC, June 4, 1998 and *San Francisco Chronicle* (June 5, 1998).

Similarly, TURN filed a request for a CPUC investigation in January 1998 regarding Pac Bell’s improper marketing practices of Caller ID service. TURN contends that Pac Bell is violating the customer notification and education program which is funded by ratepayers at the rate of \$20 million. This program is designed to provide unbiased information about the privacy implications of Caller ID. TURN letter to CPUC, Jan. 30, 1998.

¹⁴ The ORA is the public consumer advocate division of the CPUC. There are two other advocate groups in California: TURN and Utility Consumers’ Action Network (UCAN).

The Telecommunications International Union (TIU), representing Pac Bell telephone service representatives, filed a formal complaint with the CPUC on April 7, 1998. This complaint charges Pac Bell with misguided, irresponsible, and fraudulent sales policies. According to TIU, this sales policy “emphasizes sales over service.” TIU claims that representatives are instructed to offer the most expensive packages up-front, instead of first assessing the customers’ needs. Pac Bell representatives claim they face unrealistic and unethical sales quotas and are expected to follow the company’s unofficial motto, “Offer high and watch them buy. Offer low, no place to go.” TIU Press Release April 6, 1998 and *San Diego Union Tribune* (June 26, 1998).

TIU’s complaint provides examples of unethical sales practices including offering and selling Caller ID to a sight-impaired person, renaming customer calling packages that include non-basic features as “The Essentials,” and making telemarketing calls to customers with unlisted phone numbers. California advocacy groups such as Privacy Rights Clearinghouse were especially shocked by Pac Bell’s plan (disclosed in May 1998) to market enhanced service products to customers with unlisted telephone numbers. Pac Bell attempted to defend its action, by noting that its “customers with unlisted numbers would be pleased to hear a phone company sales pitch about services such as Caller ID, call waiting and three-way calling.” *Contra Costa Times* (May 5, 1998).

A *Los Angeles Times* article stated that “Pacific Bell has embarked on an aggressive sales campaign that tracks revenue by the hour, directs service employees to push sales on every call and encourages them to deny customers certain Call ID blocking

options.” It was noted that SBC routinely used such practices in their traditional Texas markets. *Los Angeles Times* (Feb. 26, 1998).

News articles state that service managers face the loss of 15% of their salary if they do not meet performance targets, which include sales goals while service representatives have been told that if they do not offer products to every single contact they can face suspensions. *San Francisco Chronicle* (Feb. 27, 1998) and *Los Angeles Times* (Feb. 25, 1998).

To the extent that the “new SBC” intends to make the huge capital outlays necessary to pursue its “National-Local Strategy,” it is only reasonable to believe that a portion of the “synergies” that will be used to fund expansion will come from the exercise of market power over its captive customers, as the foregoing evidence suggests. *See Affidavit at ¶73.*

F. Earnings and Synergies

If the estimates of the dollar value of the savings and efficiencies to be gained through this merger are realized, then the current level of earnings of each of SBC’s local exchange operating companies will be substantially increased. According to the affidavit of Marvin A. Kaplan filed in this proceeding, it is estimated that the proposed merger will create opportunities for revenue growth and costs savings of approximately \$2.5 billion a year by 2003. *Kaplan Affidavit at ¶ 2.*

One of the benefits of true competition is that gains in productivity and reductions in operating costs are flowed through to customers. A competitive firm is not completely free to use cost reductions to leverage entry into new markets. The companies, on the

other hand, have indicated that they have no intention of flowing cost reductions through to captive customers, residential customers least of all. Affidavit at ¶¶ 66-72.

J. D. Ellis, senior vice president and general counsel of SBC, has stated that he would be “surprised if [consumers] had a choice between a reduction in local rates or new services, that [they would opt for the rate reduction].” *The Akron Beacon Journal* (July 15, 1998) at C12. Unfortunately, the lack of competition in the SBC/Ameritech service territory means that consumers *have* no choice. Mr. Ellis’ statement is a very blunt acknowledgement of their monopoly position in their core markets.¹⁵ The companies’ intention to use the cost savings and other gains in efficiencies from this merger to leverage entry into new markets is another very clear exercise of market power that this merger promises to exacerbate.

G. Universal Service Commitment

Another part of the public interest standard articulated by the Commission is the advancement of universal service. Ameritech and SBC both have questionable records on promoting universal service. Ameritech Ohio’s Universal Service Assistance program (USA) is a result of a commitment made as part of the stipulation in Ameritech Ohio’s alternative regulation case. The purpose of the USA program is to increase telephone subscribership to low-income customers in Ameritech Ohio’s service territory.

¹⁵The Commission must not be lured into believing the companies’ statements that residential services cannot be reduced further because they are already priced below cost, as is so often repeated by company representatives. The fact is that residential services represent a huge portion of both companies’ business. Thus, if Ameritech residence services did not amply cover their costs, Ameritech Ohio could not have achieved a 1997 return on equity of 33.76%, and Ameritech Michigan could not have achieved a 1997 return on equity of 42%.

Consumer advocacy groups claim Ameritech Ohio has failed in the promotion of universal service goals including enrollment and promotion of the USA program. The Commission has required Ameritech to show its compliance with the USA agreement made in the alternative regulation case. PUCO Case No. 93-487-TP-ALT, Entry (July 6, 1998).

In California, the ORA filed a petition with the CPUC (Case No. I.90-092-047) on June 4, 1998. The petition requests the CPUC to investigate and order Pac Bell to cease current marketing practices. One harmful or misleading marketing practice as identified by ORA is the failure of Pac Bell to adequately screen potential Universal Lifeline Telephone Service (ULTS) customers for qualification into this program. According to ORA, "Pacific's service ordering procedures inappropriately lead customers through the qualification for ULTS. Further, the ULTS program is mis-represented as a 'low-cost' service alternative rather than as a 'low-income subsidy' for basic telephone service."

As with service quality, there is a strong incentive on the part of the "new SBC" to sacrifice universal service commitments on the altar of "synergies."

VII. CLAIMED BENEFITS FROM THE MERGER

A. The "National-Local" Strategy

The companies are justifying this merger on the basis of the claimed competitive benefits of the "National-Local" strategy. They claim that simultaneous entry into 30 new markets will force a retaliatory response in the SBC/Ameritech territory by the incumbent provider in those markets. This is a classic "trust-me" argument.

To begin with, the companies are claiming that the merger will provide the “new SBC” with the scope, scale, and “critical mass” of resources to permit it to pursue and implement successfully its “National-Local” strategy. Description at 11-12. This merger, according to the companies, is the only way to achieve this necessary “critical mass.” *Id.* But why is it necessary, or even prudent, to launch this plan on a 30 market basis, as opposed to the top five or ten markets not already in the “new SBC” territory? *See* Affidavit at ¶ 11. The companies initially plan on placing local exchange facilities to serve only “anchor customers,” in the same manner as CLECs do who are only a fraction of their respective sizes. Description at 5.

Yet these questions only deal with the SBC side of the “retaliatory competition” scenario contained within the National-Local strategy plan. On the other side of the ledger are questions dealing with the type of competitive response, if any, that would actually be prompted by the “New SBC’s” proposed initiatives. Foremost among these questions is how many access lines will the retaliating firm require to successfully enter the “New SBC’s” territory, given the fact that the “New SBC” required fifty-seven million access lines in order to launch its foray into new territory? It certainly will not be any of the RBOCs as presently constituted; they are not large enough. Consequently, further consolidation and merger activity will be required.

Beyond this, there are a number of very substantial contingencies, each of which must occur *before* the companies' retaliatory competition scenario would occur as envisioned. These contingencies constitute a long "Chain of Ifs." But this chain has several weak links, as detailed below.

First, the benefits of retaliatory entry will occur... if SBC actually pursues its National/Local strategy as advertised, and...

It must be accepted as an article of faith that the National-Local strategy would even occur as claimed. It is one thing for the companies to say they will invest billions to compete, it is quite another to actually spend the billions. *See* Affidavit at ¶ 41. Looking at how SBC has heretofore spent its capital for expansion, SBC's strategy is not to compete, but to acquire: first Pacific Telesis (Pac Bell), then Southern New England Telephone (SNET), and now Ameritech. Does SBC intend to enter these new markets by purchasing the incumbent provider? This is a highly relevant question because the proposed National-Local strategy is a significant departure from SBC's recent past practices. What will the entry pursuant to the National-Local strategy look like? Will it be along the lines of the "anchor" customer strategy?

Second, the benefits of retaliatory entry will occur... if SBC's entry is successful enough to provoke any response from the incumbent in terms of retaliatory competition, and...

If SBC does enter as a CLEC rather than by acquiring the incumbent monopolist, the effect of SBC's entry into these new markets must be substantial and severe enough to provoke the necessary competitive retaliation.¹⁶ However, any effect is largely dependent on the scope and scale of SBC's entry plans and timeframe. The companies have indicated that the process of acquiring the necessary certificates will take three years. Joint Proxy Statement at 22. How many years thereafter will the deployment of facilities require? After such facilities are deployed, what is the timeframe for

¹⁶ This assumes that retaliation would be the response at all. Another possibility is that the combination of SBC and Ameritech could dissuade would-be competitors from entering the SBC/Ameritech service territory. *See* Affidavit at ¶¶ 41&42.

retaliation? Who will actually retaliate? Indeed, the companies appear to be unsure of the answer to this question.

In addition, the FCC filing states that out-of-region ILECs have generally been discounted as likely potential entrants because they have no existing customer base from which to expand, no facilities to share with existing services, and little brand equity out-of-region. This statement is then followed by the claim that the ILECs will be motivated to retaliate by competing for large business customers in SBC-Ameritech territory. Schmalensee and Taylor Affidavit at 7-8. It is difficult to understand how the National-Local strategy will overcome the ILECs' barriers to entry cited by the companies. The Commission must use the "time-discounted" value of this *prospect* of retaliatory competition in determining whether this merger promotes the public convenience. Competitive entry *ten years* from now benefits the public interest less than competitive entry *six months* from now.

Third, the benefits of retaliatory entry will occur... if that entry is irreversibly targeted at locations that do not already have competitive alternatives, and...

In balancing the benefits of this merger against its harms, the Commission must remain cognizant of the *marginal* benefit or harm. Retaliatory entry may indeed occur, but if that entry occurs in a location where a functioning competitive marketplace already exists (*e.g.*, Chicago's Loop), then the *marginal* benefit from the competitive response to the National-Local Strategy will be slight when balanced with the competitive harms occasioned by this merger.

Fourth, the benefits of retaliatory entry will occur... if that entry is irreversibly targeted at customers that do not already have competitive alternatives...

Likewise, the *marginal* benefit of retaliatory entry will be slight if retaliatory entry is targeted towards customers that already enjoy benefits of competition -- large business customers in major cities -- rather than to residential and small commercial consumers.

The fact of the matter is that large national and global telecommunications customers already enjoy the benefits of local exchange competition. The retaliatory entry of new competitors as a result of the “New SBC’s” National-Local strategy will mean little in terms of the public interest if that entry is targeted only at the customer base that is, according to the companies, driving the National-Local strategy in the first place. There has been no plausible showing that the proposed merger will bring the benefits of competition to the vast majority of the companies’ customers. *See* Affidavit at ¶ 12. It is equally unlikely that the “retaliations” touted by the companies will spread the benefits of competition either.

Only after each of these contingencies has occurred, will the retaliatory competition suggested by the companies actually produce merger-related competitive benefits from retaliatory entry.

In light of the very speculative nature of the slight marginal benefits to competition this merger may cause, the public interest will suffer if competition is harmed in virtually any manner by its consummation.

Furthermore, the fundamental illogic of the National-Local Strategy -- that it contradicts past experience -- was summarized by the AT&T spokesperson at the Illinois forum:

Ameritech's ventures into the local exchange markets in Missouri, Texas and California should have prompted SBC to enter into the local exchange markets in Illinois and possibly several other Ameritech territories.

Transcript of Telecommunications Policy Open Meeting before the ICC (July 14, 1998), at 41. Clearly, SBC's response has been to attempt to buy Ameritech, not to seek competition with Ameritech.

While the Commission has approved previous RBOC mergers, it has clearly noted that future mergers of RBOCs would be held to a higher burden of proof. In the Bell Atlantic-NYNEX merger, the Commission explicitly stated, "Because we approve this merger with conditions, thereby reducing the number of independently controlled large incumbent LECs, future applicants bear an additional burden in establishing that a proposed merger will, on balance, be pro-competitive and therefore serve the public interest, convenience and necessity." *In the Application of NYNEX Corporation and Bell Atlantic Corporation For Consent to Transfer Control of NYNEX Corporation and Its Subsidiaries*, FCC 97-286, Memorandum Opinion and Order (August 14, 1997) at 10. In the same Order, the Commission additionally stated that "further reductions in the number of Bell companies or comparable incumbent LECs would present serious public interest concerns." Order at 77.

Following the Bell Atlantic merger, there have been continuing complaints that the Company has not lived up to the promises it made about opening up its local market to competition.

http://www.nando.net/newsroom/ntn/biz/110597/biz7_12736_noframes.html. In California, SBC garnered the support of a wide range of community groups with a promise, seconded by the California Commission, to fund a wide variety of high-tech community activities with a \$50 million fund.

http://www.ucan.org/ucan/news/ameritech_merger_article.html, accessed Aug. 20, 1998. Unfortunately, it appears that -- approximately a year and a half after the merger -- none of the dollars promised to the fund have actually been distributed. *Id.* Alas, this is a familiar tale: Once the omelet is made, one can no longer unscramble the eggs if the conditions are not lived up to.

Unfortunately, Ameritech is also no stranger to unfulfilled commitments. The issue of Ameritech Ohio's failure to properly implement the Universal Service Assistance program adopted in the 1993 alternative regulation settlement is currently being litigated before the PUCO. PUCO Case No. 93-487-TP-ALT, Entry (July 6, 1998). The PUCO has also found that Ameritech Ohio's proposal for an all-service late payment charge violated the agreement in the alternative regulation settlement "to insulate residential consumers from any conceivable change in service that would ultimately make it more expensive for them to purchase service." *In the Matter of the Application of Ameritech Ohio to Revise its Exchange and Network Services Tariff, P.U.C.O. No. 20, to Add Late*

Payment Charges for Residential Customers, PUCO Case No. 97-597-TP-UNC, Finding and Order (December 23, 1997) at 8.¹⁷

VIII. AN ALTERNATIVE ANALYSIS

In its most recent decisions concerning mergers of major importance, the Commission used the analytic framework of the Department of Justice's merger guidelines to identify and evaluate the competitive harms posed by this merger. *WorldCom* at ¶ 11. The use of the merger guidelines is reasonable for a number of reasons, not the least of which is the fact that the Commission has concurrent Clayton Act jurisdiction with the DOJ. *Id.* Based on the Commission's determinations in similar (but smaller) merger cases,¹⁸ it is difficult to conceive how the Commission could find that this merger will not harm the development of telecommunications competition. The companies' attempts to downplay the extent of existent and potential SBC/Ameritech head-to-head competition only calls attention to the fact that very real steps towards head to head competition were underway. Affidavit at ¶¶ 53-59.

The question then remains as to whether there are any conditions that the Commission could impose on this merger to counterbalance its harmful effects, and still *promote* the public policy embodied in the '96 Act. The Consumer Coalition does not believe that the Commission can impose any realistic conditions on this merger that will effectively prevent the harms that the merger poses for residential consumers. Too much

¹⁷ The issue of whether a late payment charge for non-basic services represent a rate increase for those services where the settlement prohibits Ameritech Ohio from applying for rate increases is also currently before the Commission. *Id.*, Entry (July 15, 1998).

¹⁸ *WorldCom*, CC Docket No. 97-211, Memorandum Opinion and Order (September 14, 1998); *NYNEX*, File No NSD-L-96-10, Memorandum Opinion and Order (August 14, 1997).

time has passed since the passage of the '96 Act to believe that another attempt to jump-start its competitive architecture -- through approval of this merger with conditions -- will bring competitive benefits that could outweigh the harms posed by the merger.

Instead, the Commission should draw upon another, more useful analytical tool at its disposal. The Commission should add a Sherman Act analysis to its repertoire of analytical tools. Indeed, the Commission has previously found that the Sherman Act is relevant to the consideration of mergers such as this. NYNEX at ¶ 2.

In *MCI Communications Corp. v. American Tel. & Tel. Co.*, 708 F. 2d 1081 (1983), the U.S. Court of Appeals for the Seventh Circuit recognized the broad outline of the offense of monopolization. The offense of monopoly under §2 of the Sherman Act has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historical accident. *Id.* at 1132-33.

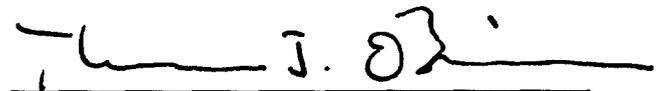
The benefit of a Sherman Act analysis in this case is its focus on the *intent* of the merging parties, rather than just market impact. This is particularly useful for RBOC mergers because it is almost a foregone conclusion that a combination of RBOCs will harm an already highly concentrated marketplace. Under a Sherman Act analysis, the Commission would examine the intent of the merging parties to determine if the merger is motivated by a desire to extract the combined fruits of market power available from their respective monopoly networks (the “synergies” of monopoly). It is quite clear that this is the overriding motivation for the merger now before the Commission. The remedy under this analysis is quite straightforward – deny the Application. The same holds true

under the Communications Act analysis (47 U.S.C. §§214(a), 310(d)): This merger is not in the public interest, and must not be approved.

IX. CONCLUSION

For all of the forgoing reasons, the Consumer Coalition respectfully requests that the Commission deny the relief requested by the companies.

Respectfully submitted,



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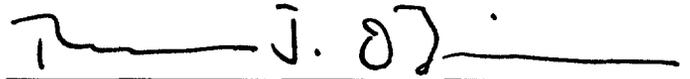
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CERTIFICATE OF SERVICE

I hereby certify that the Comments of the Consumer Coalition and the attached Affidavit of Susan M. Baldwin and Helen E. Golding, have been served by first-class mail, postage prepaid, to the parties identified below, on this 14th day of October, 1998.

A handwritten signature in black ink, appearing to read "T. J. O'Brien", written over a horizontal line.

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

In re Applications of)
)
AMERITECH CORP.,) CC Docket No. 98-141
Transferor,)
)
AND)
)
SBC COMMUNICATIONS, INC.,)
Transferee)
)
For Consent to Transfer Control of)
Corporations Holdings Commission Licenses and)
Authorizations Pursuant to Sections 214 and)
310(d) of the Communications Act and Parts)
5, 22, 24, 25, 63, 90, 95, and 101 of the)
Commission's Rules)

AFFIDAVIT OF

SUSAN M. BALDWIN

AND

HELEN E. GOLDING

on behalf of the

Indiana Office of Utility Consumer Counselor
Michigan Attorney General
Missouri Public Counsel
Ohio Consumers' Counsel
Texas Office of the Public Utility Counsel
The Utility Reform Network

October 13, 1998

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I. INTRODUCTION

1. Our names are Susan M. Baldwin and Helen E. Golding and we are, respectively, Senior Vice President and Vice President at Economics and Technology, Inc. (ETI), One Washington Mall, Boston, Massachusetts 02108. ETI is a research and consulting organization specializing in telecommunications economics, regulation and public policy. Our Statements of Qualifications are provided as Attachment 1 and Attachment 2.

2. We served as project managers for and were major contributors to the comprehensive analyses that ETI has conducted of three separate mergers of Tier I incumbent local exchange carriers (ILEC)¹ that have occurred since the enactment of the *Telecommunications Act of 1996* (*Act* or *1996 Act*). We analyzed the merger of SBC Communications Inc. (SBC) and Pacific Telesis Group (Pacific Telesis or PacTel) on behalf of the California Public Utilities Commission's Office of Ratepayer Advocates, the merger of Bell Atlantic Corporation (Bell Atlantic) and NYNEX Corporation (NYNEX) on behalf of the Maine Office of Public Advocate, and SBC's acquisition of the Southern New England Telecommunications Corporation (SNET) on behalf of the Connecticut Office of Consumer Counsel.

3. We are presently serving as project managers to ETI's in-depth analysis of the proposed merger between SBC and Ameritech Corporation (Ameritech) on behalf of the Ohio Consumers' Counsel, and are contributing to ETI's analysis of the proposed SBC/Ameritech merger on behalf of government and consumer intervenors in Illinois.

1. Tier 1 LECs are those local exchange carriers with \$100-million or more in "total company annual regulated revenues." *Commission Requirements for Cost Support Material to be Filed with 1990 Annual Access Tariffs*, 5 FCC Rcd 1364, 1364 (Common Carrier Bureau, 1990).

4. This affidavit has been prepared at the request of the Indiana Office of Utility Consumer Counselor, the Michigan Attorney General, the Missouri Public Counsel, the Ohio Consumers' Counsel, the Texas Office of the Public Utility Counsel, and The Utility Reform Network (TURN).

5. The purpose of this affidavit is to provide a critical assessment of the filing made on July 24, 1998 by SBC and Ameritech (collectively, the Applicants) with the Federal Communications Commission (FCC or Commission), seeking approval to transfer control of FCC authorizations held by subsidiaries of Ameritech to SBC. We demonstrate that, on balance, the proposed merger is not in the public interest and would diminish competition in the thirteen states² in which the post-merger SBC would remain the dominant incumbent local exchange carrier. Furthermore, because there is not any conceivable set of conditions that could remedy the characteristics of the merger that cause it to be anticompetitive and adverse to the public interest generally, we recommend that the FCC deny the proposed transfer of control from Ameritech to SBC.

6. This is the fourth of five occasions since the passage of the *1996 Act* less than three years ago that Tier I incumbent local exchange carriers have announced and pursued plans to merge. If permitted, it would represent SBC's third acquisition of another ILEC. The FCC approved the SBC/Pacific Telesis merger on January 31, 1997,³ the Bell Atlantic/NYNEX merger on August

2. These consist of Texas, Oklahoma, Kansas, Missouri, Arkansas, California, Nevada, Illinois, Wisconsin, Indiana, Ohio, Michigan and, assuming that the proposed takeover by SBC of SNET is permitted to go forward, Connecticut.

3. *In re Application of Pacific Telesis Group Transferor, and SBC Communications, Inc.*

(continued...)

14, 1997,⁴ and has yet to issue an order regarding SBC's proposed acquisition of SNET.

Although Bell Atlantic Corp. and GTE Corp. have announced plans to merge,⁵ they have not yet submitted an application to the FCC.

7. The Applicants contend that the proposed merger is a "logical and necessary next step in the rapidly evolving telecommunications market,"⁶ will further the goals of the *Act*, benefit consumers and shareholders, and is essential in order for the new SBC to become a "super carrier" with "true national/global status." As our affidavit demonstrates, there is no compelling destiny that requires this latest ILEC merger. In fact, when the speculative benefits projected by the Applicants are weighed against the likely harms of the merger, the Commission cannot reasonably find this proposed union to be in the public interest.

8. The Application and supporting affidavits filed with the Commission by SBC and Ameritech fail to establish that their merger is in the public interest. It is obvious that the Applicants have carefully studied the Commission's Order approving (with conditions) the Bell Atlantic/NYNEX merger and have attempted to distinguish their merger from aspects of the most

3. (...continued)
Transferee, For Consent to Transfer Control of Pacific Telesis Group and its Subsidiaries, Memorandum Opinion and Order, 12 FCC Rcd (1997).

4. *In the Applications of NYNEX Corporation, Transferor, and Bell Atlantic Corporation, Transferee, For Consent to Transfer Control of NYNEX Corporation and Its Subsidiaries*, File No. NSD-L-96-10, Memorandum Opinion and Order, released August 14, 1997 (*BA/NYNEX Merger Order*).

5. "Bell Atlantic and GTE Agree to Merge," www.ba.com/nr/1998/Jul/19980728001.html.

6. Description of Transaction, Public Interest Showing and Related Demonstrations ("Description"), at 1.

recent BOC merger that the Commission found to present troubling public interest concerns. However, in their attempts to explain away the potential harms that their merger presents to competition and to elevate the potential benefits of their combination, the Applicants make assertions and predictions that are both internally inconsistent and at odds with their past behaviors and with the prevailing conditions in the industry.

9. The Applicants claim that since the elimination of legal barriers to entry, competition has taken off and competitors are actually threatening the long-term viability of these large ILECs' businesses. At the same time, however, both SBC and Ameritech — with greater experience in the local exchange business than any of the competitive local exchange carriers (CLEC) and with equivalent if not greater financial strength than most potential rivals — go to great lengths to demonstrate that they had to abandon their feeble out-of-region entry efforts because they could not successfully break into their target markets. If the entry and growth of competition is as automatic and “inevitable” as SBC and Ameritech portray it to be, then their claim to have no intentions to compete in each other's territories seems implausible on its face. On the other hand, if their excuses for not having launched a successful out-of-region entry are plausible, it reinforces the conclusion that, indeed, entry barriers throughout the local exchange market are still significant, even for CLECs with strong financial positions and significant industry presence and experience.

10. The Applicants seem to suggest that only very large providers can remain viable in the telecommunications future as they envision it. At the same time, their claims about robust competition rely upon the mere existence or certification of many providers that are nowhere near as large as either of these two holding companies individually. Furthermore, the Applicants

suggest that only the very largest companies can hope to survive, but attempt to minimize potential public interest concerns about the possibility that their merger will lead to further consolidation of the ILECs.

11. The Applicants fail to explain how their projected entry into 30 major out-of-region markets will overcome the specific types of out-of-region entry problems that they themselves had experienced in Rochester, New York and St. Louis, Missouri, and that large interexchange carriers (IXC) with national brand-name recognition have also experienced in their attempts to break into ILEC markets for local exchange service.⁷ Although the Applicants attempt to distinguish the capabilities provided by their proposed merger, they fundamentally fail to show why their proposed merger will give them a unique capability to successfully execute out-of-region entry on a large scale that is somehow absent were the two firms each to attempt it alone, or why, in view of their own confessed inability to successfully compete as CLECs with each other or with other ILECs on a stand-alone basis, there is any reason for the Commission to expect that rivals with far less experience and resources in the local exchange service business would be successful in challenging SBC or Ameritech on the Applicants' home turf.

12. The Applicants also attempt to win points by claiming that they plan to serve residential and small business customers, yet their descriptions of the residential local exchange market portray it as unprofitable (because of allegedly below-cost prices) or unattractive, stating that “[m]arket prices for residential local exchange service are not attractive for the ILECs, relative to

7. Schmalensee and Taylor also note that “[o]ut-of-region ILECs have generally been discounted as likely potential entrants because they have no existing customer base from which to expand (unlike IXCs, CAPs, and cable companies), no facilities to share with existing services and little brand equity out-of-region.” Schmalensee/Taylor, at fn. 6.

other margins in other telecommunications markets, notably long distance.”⁸ The Applicants also state that “[n]o other national provider has yet announced a comparable strategy to serve residential customers nationwide.”⁹ However, the Applicants provide no satisfactory explanation of why they should be attracted to the residential market under these conditions or why they should be uniquely able to overcome the economic entry barriers that have hindered other CLECs from making serious headway in the residential and small business markets; moreover, as we discuss further below, all the fanfare aside, SBC’s ultimate residential/small business market share objectives — 4% — hardly meshes with the serious competitive challenge in the residential market that they promise to mount.

II. APPLICANTS’ DISTORTED VIEW OF PRE-MERGER COMPETITIVE CONDITIONS

Quantitative measures of competition show little progress toward breaking ILEC dominance of the local exchange market

13. The claims in the SBC/Ameritech application and their affidavits rely upon repetitious, insupportable assertions that local competition pursuant to the mandates of the *1996 Act* is somehow a self-fulfilling prophecy and, in fact, that it is already thriving. The Applicants characterize the policies in the 1996 legislation as “assuming” that “competition is not only

8. Schmalensee/Taylor, at ¶ 47. This (at best) half-truth contention that ILECs lose money on residential customers is belied by SBC’s other claim (Kaplan, at ¶ 9) that it has achieved a 50% penetration rate in the residential Caller ID market within the SWBT 5-state region, and that it is on the way toward achieving a similar result in the former Pacific Telesis jurisdictions. SWBT’s monthly rates for the virtually costless Caller ID service range between \$4.00 and \$7.00, a source of almost pure profit whose contribution toward overall profitability in the residential market has been conveniently overlooked, for present purposes, by the Applicants.

9. Description, at 22.

possible but inevitable.”¹⁰ In the same vein, the Description proclaims that “[t]he merger will not impede progress in implementing the 1996 Act. That process is ongoing and irreversible.”¹¹ SBC’s Mr. Kahan refers to “[t]he advent of full competition” which he claims “has brought forth a plethora of new entrants into the telecommunications industry.”¹² This sort of extreme puffery has been served up by major ILECs for years, starting well before passage of the *1996 Act*. But as the Commission has recognized (with some significant frustration), in the nearly three years since federal legislation began the process of removing the legal roadblocks to entry, local competition has shown itself to be neither easy to attain nor inevitable.

14. The reality of the situation as it exists today — not in some speculative future environment — is that local competition has gotten off to a very disappointing start, due in no small respect to the tactics of major ILECs, such as SBC and Ameritech. The results of the Common Carrier Bureau’s Local Competition Survey¹³ provide strong evidence that competitive inroads have been small and hardly ubiquitous in nature. In the aggregate, at the time of the survey, within the major ILECs’ serving areas, only about 1% of lines were being resold on a “bundled” (*total service resale* or *TSR*) basis, less than *one tenth* of one percent of local service lines were being provided over UNE loops purchased by CLECs, and about 0.14% of local numbers had been “ported” by ILECs to competing local service providers via interim local

10. *Id.*, at 56.

11. *Id.*, at 78.

12. Kahan, at ¶ 23.

13. Common Carrier Bureau Survey of Local Competition, FCC CC Public Notice regarding responses to the Common Carrier Bureau Survey on the State of Local Competition, March 27, 1998, www.fcc.gov/ccb/local_competition/survey/responses.

number portability (see Figure 1).¹⁴ Out of a total of some 11,000 serving wire centers identified by the major ILECs, only 390 (4%) had a physical collocation arrangement with at least one CLEC utilizing UNE loops.

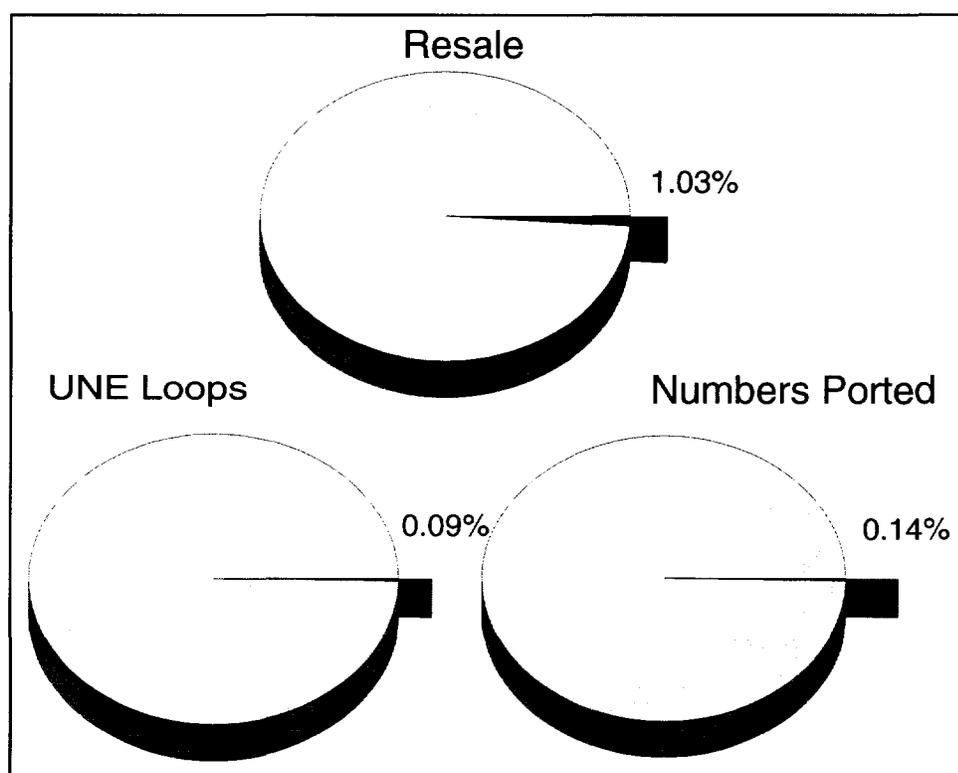


Figure 1. Competitive Entry into the Local Market, Nationwide.

14. Local numbers must be “ported” when an ILEC’s existing local service customers take service from a CLEC that is providing its own switching and desire to keep their local phone number. The total quantity of such numbers provides a reasonable proxy for the total number of CLEC lines provided over CLEC, as opposed to ILEC, facilities. While the number does not include CLEC-provided local service lines where the customer did not desire to keep the same phone number (e.g., new service installations, out-going only trunks, computer and fax lines), it does include some percentage of lines that are also included in the UNE loop counts (situations where the CLEC combines an ILEC UNE loop with its own switching).

15. Nor has SBC distinguished itself in the area of local competition. Attachment 1 to the Carter affidavit identifies a total of 1,017,883 “CLEC lines” across the seven-state SBC operating territory.¹⁵ However, of this amount, only 367,921 lines, or slightly over 1%, of the 32-million-plus access lines in the SBC region, are claimed to be *facilities-based* CLEC services.¹⁶ The remaining 649,962 “CLEC lines” are identified as “resold” SBC services. Only a monopolist would characterize its own services furnished via alternative retail distribution channels to constitute “competitive losses.” In most other industries, producers nurture and cultivate their retail distribution channels, without which their products might well languish on the loading dock.¹⁷ In fact, SBC continues to furnish these 649,962 “CLEC lines,” and they cannot be excluded from the near-99% market share that SBC continues to control.

16. SBC’s effectiveness in limiting competitive losses in the markets in which it operates can also be demonstrated by comparing the rates of facilities-based penetration in the five SWBT states to that in the two Pacific Telesis states, which SBC did not take over until April 1997. Mr. Carter’s data identifies a total of 274,099 facilities-based CLEC lines in California and Nevada,¹⁸

15. Carter, Attachment 1, at 1.

16. *Id.*, Attachment 1, at 1. However, the origin of this statistic is itself unclear. The supporting charts at pages 6-7 of Attachment 1 to Mr. Carter’s affidavit identify 367,921 “facilities based CLEC end user E-911 listings.” Separately, Mr. Carter shows 60,535 unbundled loops for the entire SBC region. These 60,535 UNE loops are presumably a subset of the 367,921 lines that SBC has identified as being “facilities-based.” Like customers served via resale, customers served over UNE loops also continue to generate revenue for SBC.

17. For example, SBC’s Mr. Sigman notes that in the wireless business it is common for facilities-based carriers to employ independent sales channels, such as “car audio equipment dealers,” to sell these services at retail. Sigman, at ¶ 12.

18. Carter, Attachment 1, at 1. These data are as of June 30, 1998, whereas the access line
(continued...)

or about 1.5% of the roughly 17.7-million Pacific Bell and Nevada Bell access lines. In stark contrast, Mr. Carter identifies only 93,822 facilities-based CLEC lines in the five SWBT states, representing only 0.6% of the roughly 15.7-million SWBT access lines. While both the 1.5% California/Nevada and 0.6% Texas/Oklahoma/Kansas/Missouri/Arkansas CLEC market shares are barely above zero, one cannot help but observe that the extent of facilities-based CLEC penetration is two-and-one-half times as great in the two states that SBC did not control until last year than in the five states that the Company has dominated since the formation of SBC in 1984. Indeed, just comparing the results for the two most populous SBC states — California and Texas — underscores the extent of SBC's effectiveness in curtailing even the most modest levels of facilities-based entry. California's 261,051 facilities-based CLEC lines represent 1.5% of Pacific Bell's 17.4-million lines; whereas Texas' 59,082 facilities-based CLEC lines represent about 0.6% of the 9.3-million access lines that SWBT furnishes in that state.¹⁹ Considering the high rate of economic growth and reputation for entrepreneurial activity for which Texas is well known, the lack of significant CLEC penetration speaks volumes about the effectiveness of SBC's policy of keeping the competitive "welcome mat smaller than anyone else's."²⁰

18. (...continued)
count used to calculate the percentages identified in this paragraph are based on the Common Carrier Bureau Survey of Local Competition, with the result that the percentages of CLEC inroads are somewhat overstated.

19. The source for the data for facilities-based CLEC lines is Carter, Attachment 1, at 1. The source for data for total switched access lines is the Common Carrier Bureau Survey of Local Competition, March 1998.

20. "Pick of the Litter: Why SBC Is the Baby Bell to Beat," *Business Week*, March 6, 1995.

17. In the Public Utility Commission of Texas' recent investigation of SWBT's applications for Section 271 authority, one commissioner commented on the lack of inroads made by potential competitors in the local market:

Here we have a situation where potential competitors have spent enormous effort and time, and probably money, attempting to gain a foothold in the local telephone market. The regulatory agency has spent untold hours in an effort to establish mechanisms under which the phone customers of Texas will have choice in their local phone service. And this enormous effort has resulted in a movement of just 1% of phone customers to competitors. I don't believe the record supports the explanation that this is the result of a lack of interest on the part of consumers or on the part of potential competitors.²¹

18. It appears that SBC also trails Ameritech in its performance in the area of local competition. In the Local Competition Survey compiled by the Common Carrier Bureau earlier this year, Ameritech led SBC in both the number of lines provisioned as UNEs and in the quantity of numbers ported.²² Indeed, according to the survey results, Ameritech alone provisioned 52% of the total 130,304 UNE loops reported by the ILECs (compared with SBC's 11%). Despite his attempts to show the contrary, the data provided by Mr. Appenzeller confirm that, even more recently, Ameritech's dominance in its in-region local exchange markets has been barely affected by competition. Mr. Appenzeller provides "raw" numbers for lines provided on a resale basis and ported numbers, not choosing to disclose how these numbers

21. Opening Statement of Commissioner Patricia A. Curran, Public Utility Commission of Texas, Docket No. 16251, Investigation into Southwestern Bell Telephone Company's Entry into In-Region InterLATA Services Under Section 271 of the Telecommunications Act of 1996, May 21, 1998, at 3.

22. Ameritech: UNE Loops: 68,134; ported numbers: 70,069. SBC: UNE Loops: 13,940; ported numbers: 40,061. Common Carrier Bureau Survey of Local Competition, FCC CC Public Notice regarding responses to the Common Carrier Bureau Survey on the State of Local Competition, March 27, 1998, www.fcc.gov/ccb/local_competition/survey/responses.

compare to total access lines in the Ameritech region.²³ Besides, as we have pointed out in the discussion of SBC, lines provided to CLECs for resale are not, and cannot be included in any quantification of, “competitive losses.” However, while the Ameritech performance still leaves much to be desired, based upon the experience of the past several years, it certainly appears that it would be a detriment to transplant SBC’s practices with regard to implementing local competition into the Ameritech region.

ILEC implementation of the 1996 Act is still far from complete, and the progress toward achieving local competition reflects this fact

19. The fact that, after nearly three years, not a single BOC has been able to demonstrate compliance with the requirements of Section 271 of the Act is another compelling basis for the Commission to conclude that local competition is not thriving. In its only Section 271 filing with the Commission to date, SBC relied upon a competitor’s limited employee service trial as the basis for its claim that it faced facilities-based residential competition.²⁴ After floating this extremely weak trial balloon, SBC has not returned to the FCC to demonstrate its compliance with Section 271 in any of its seven states. In fact, as a fall-back to working toward meaningful compliance efforts, SBC has gone so far as to try, unsuccessfully thus far, to obtain the complete

23. Appenzeller cites a total of 810,000 resold lines in Ameritech territory as of May, 1998 (at ¶ 15), which is only 4% of the approximately 20.5-million lines Ameritech serves. His total of 110,700 lines served by interim and long-term number portability (¶ 20) represents a mere 0.5% of all Ameritech lines.

24. *Application of SBC Communications Inc. Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-region, InterLATA Services In Oklahoma*, CC Docket No. 97-121, *Memorandum Opinion and Order*, FCC 97-228, released June 26, 1997 (“*Oklahoma Order*”) at para. 17.

legal invalidation of Section 271 through creative constitutional theories that undercut the bedrock policy compromise upon which the 1996 legislation was fashioned.²⁵

20. The Public Utility Commission of Texas, in its investigation of SWBT's Section 271 application, determined, among other things, that "SWBT needs to show this Commission and participants during the collaborative process by its actions that its corporate attitude has changed and that it has begun to treat CLECs like its customers."²⁶ The PUC Chairman stated during an open hearing:

If I felt the lack of competition were from a lack of interest or commitment on the part of the new entrants, it would be easy to dismiss their concerns, but for most of the participants in this hearing, that is not the case. This is potentially the richest telecom market in the country. Legal and regulatory barriers to local market entry have been eliminated and we have approved countless applications for new authority and interconnection agreements. But a piece of paper doesn't mean much if the incumbent really isn't interested in making this work.²⁷

One of the Texas Commissioners raised as an issue "whether any of these providers is or can become a true competitive alternative to SWB, in light of SWB's lack of cooperation and efforts to frustrate the CLEC's efforts to enter the market." She further elaborated that "[t]he record is

25. SBC has attempted to prevent the Commission from enforcing Section 271 of the Act, characterizing it as an unconstitutional "bill of attainder." While a federal district court in Texas upheld SBC's claim (*SBC Communications, Inc. et al. v. FCC, et al.*, Civil Action No. 7:97-CV-163-X, U.S. District Court (N.D. TX), December 31, 1997) that decision was recently reversed on appeal by the U.S. Court of Appeals for the Fifth Circuit (No. 98-10140, September 4, 1998, revised September 23, 1998).

26. Public Utility Commission of Texas Project No. 16251, *Investigation of Southwestern Bell Telephone Company's Entry into the Texas InterLATA Telecommunications Market*, Order No. 25, June 1, 1998, Attachment 1 (Commission Recommendation), at 2.

27. Statement of Chairman Pat Wood, III, May 21, 1998.

replete with examples of SWB's failure to meaningfully negotiate, reluctance to implement the terms of the arbitrated agreements, lack of cooperation with customers, and evidence of behavior which obstructs competitive entry."²⁸ Another Commissioner, in addressing public interest concerns, stated:

... no matter what safeguards and protective measures we recommend, we cannot be assured that competition will become irreversible in Texas until SWB is committed to treating CLECs as customers rather than as competitors.²⁹

21. SBC has also failed to eliminate barriers to local competition in its newly acquired California territory. On October 5, 1998, the staff of the Telecommunications Division of the CPUC issued its Final Staff Report on the *Pacific Bell and Pacific Bell Communications Notice of Intent to File Section 271 Application For InterLATA Authority in California* ("*Final Staff Report*"),³⁰ in which it identified several substantive areas in which SBC has failed to comply with the competitive mandate embodied in the *1996 Act*. One conclusion in the *Final Staff Report* pertains to interconnection agreements. The staff determined that "interconnection agreements are not performing as intended by either the Commission or parties to the agreements

28. Statement of Commission Judy Walsh Regarding Southwestern Bell's § 271 Request to Enter Long Distance Market, May 21, 1998, at 1.

29. Opening Statement of Commissioner Patricia A. Curran, Public Utility Commission of Texas, Docket No. 16251, Investigation into Southwestern Bell Telephone Company's Entry into In-Region InterLATA Services Under Section 271 of the Telecommunications Act of 1996, May 21, 1998, at 5.

30. On March 31, 1998, SBC-Pacific Bell filed a draft application with the California Public Utilities Commission to become a long distance provider pursuant to Section 271 of the *Telecommunications Act of 1996*. The *Final Staff Report* represents the conclusions of the CPUC Telecommunications Division staff regarding SBC-Pacific's application.

in question,”³¹ and identified three types of problems hindering interconnection agreements from performing as envisioned:

[T]he provisions in interconnection agreements that allow CLECs to incorporate new network elements and services have not produced timely results. CLECs have found this process too slow for a competitive marketplace and lacking in tangible results. Second, the process for resolving contractual disputes is burdensome, time consuming and inconclusive. Third, when CLECs seek to amend interconnection agreements, it becomes apparent that they have unequal bargaining power and no recourse to a neutral third party that can authoritatively resolve disputes.³²

22. The CPUC Staff also concluded that “Pacific has not opened its market to an extent that allows CLECs a reasonable expectation of serving the mass market.”³³ In explaining how Pacific has failed to accommodate such mass market entry, the Staff observed that:

Many carriers plan to enter the mass market through the combining of network elements or use of unbundled loops. Unfortunately, Pacific has not demonstrated that it has in place a workable method for CLECs to order and provision combined elements. Unbundled loops require termination in a collocation cage; Pacific has not made adequate collocation options available for Unbundled Network Element (UNE) combinations or unbundled loops. Further, Pacific does not yet have an automated system for processing those orders. Many of these issues are described in the report as “gating” factors. Gating factors are those barriers to robust competition that Pacific has erected through the policies and procedures it has adopted.

Pacific proposes a process for combining network elements that is labor intensive at best and completely infeasible at worst. Pacific did not demonstrate the feasibility of its proposed method of combining network elements through actual data or a test. Other new entrants plan to use unbundled loops; this requires collocation at Pacific’s locations. However, collocation space is limited in many central offices, and Pacific has not explored certain

31. *Final Staff Report*, at 2

32. *Id.*

33. *Id.*

types of collocation (e.g. cageless collocation) which would alleviate space constraints and make it possible for more carriers to collocate.³⁴

The CPUC Staff also determined that “Pacific does not yet have Operations Support Systems (OSS) in place for network elements that afford CLECs a meaningful opportunity to compete.”³⁵

According to the *Final Staff Report*, “Pacific often chooses solutions based on Pacific’s determination of whether it complies with Section 271 requirements, not based on how effective they might be in promoting competition.” Furthermore, the Staff concluded that “it appears ... that Pacific designs solutions only to meet perceived legal requirements of Section 271. In staff’s judgment, while Section 271 does contain specific legal requirements, it also contains the larger requirement that Pacific open its market to meaningful competition.”³⁶

23. The Applicants have also attempted to distract the Commission with visions of technological revolution whose existence portends the imminent arrival of competition. Specifically, in their affidavit, Professors Gilbert and Harris go on at length about *prospective* competition driven by various forms of technological change, in various stages of development and application in the telecommunications industry.³⁷ The BOCs began proffering similar arguments in support of deregulation long before the *1996 Act* was even passed, but the slow

34. *Id.*, at 4.

35. *Id.*, at 5.

36. *Id.*, at 11.

37. Gilbert/Harris, at ¶¶ 11-21.

pace of development for local competition belies the claim that technology alone is *presently* a sufficient force to overcome the ILECs' dominance in the local exchange market.³⁸

24. Moreover, as the Commission explicitly recognized in the *BA/NYNEX Merger Order*,

Even upon hypothetical full implementation of the Telecommunications Act of 1996, significant barriers to entry into the local telecommunications marketplace will remain. Entrants must still be able to attract capital, as well as to amass and retain the technical, operational, financial and marketing skills necessary to operate as a telecommunications provider in the local market. For mass market services, entrants will have to invest in establishing the brand name recognition and, even more importantly, the mass market reputation for providing high quality telecommunications services. These consumer "goodwill" assets take significant amounts of time and resources to acquire. An unknown entrant's attempts to build "goodwill" by providing reliable, high quality service relies heavily on the cooperation of the incumbent LEC that provides interconnection, unbundled elements, resold services or transport and termination, and can be frustrated by the incumbent LEC if that carrier engages in discriminatory conduct affecting service quality, reliability or timeliness. For all these reasons, we cannot at this time simply assume that implementation of the Telecommunications Act of 1996 and the potential for development of competition will eliminate any concerns about potential competitive effects of mergers, particularly the effects on the pace of the development of competition.³⁹

The Commission's clear understanding of the challenges facing new entrants stands in stark contrast to the vision of rampant competition conjured up in the Applicants' affidavits.

25. The Applicants have also suggested that the FCC's concerns over the slow progress toward achieving local competition, expressed in the *BA/NYNEX Merger Order*, would no longer

38. It is conceivable that at some future point, new technologies will be deployed in a manner that allows CLECs to overcome all of the major entry barriers in the local market, but sound public policy should not rely on the possibility of a future condition whose actual impact and timing are completely unknown and unknowable.

39. *Bell Atlantic/NYNEX Merger Order*, at ¶ 42.

apply. The implication is that advances during the past year were *so substantial* as to obviate any such concerns. The Applicants provide no specific evidence to support this claim, however, and it is likely that none exists. Major dissatisfaction continues with the inadequacy of ILEC operations support systems.⁴⁰ ILECs continue to be unwilling and/or unable to provide combinations of UNEs without unwieldy and expensive physical collocation arrangements.⁴¹ CLECs are having a difficult time sustaining any significant level of entry in the residential and small business markets.⁴² Indeed, as we discuss below, in their own out-of-region entry initiatives, both SBC and Ameritech encountered precisely the same kinds of difficulties and roadblocks whose existence they seek to deny within their own combined service areas. Indeed, the Applicants have themselves contended that out-of-region entry can only occur when attempted “on a massive scale” as, for example, in the so-called “National/Local Strategy” which

40. The inadequacy of OSS continues to be a major stumbling block in ILECs’ attempts to satisfy the requirements of Section 271. See, *Application of BellSouth Corporation, et al., Pursuant to Section 271 of Communications Act of 1934, as amended, to Provide In-region, InterLATA Services in Louisiana*, CC Docket 97-231, *Memorandum Opinion and Order*, FCC 97-228, February 4, 1998, at ¶¶ 1, 20-58; *Application of BellSouth Corporation, et al., Pursuant to Section 271 of Communications Act of 1934, as amended, to Provide In-region, InterLATA Services in South Carolina*, CC Docket No. 97-208, *Memorandum Opinion and Order*, FCC 97-418, released December 24, 1997, at ¶¶ 101-81; *Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-region, InterLATA Services in Michigan*, CC Docket No. 97-137, *Memorandum Opinion and Order*, FCC 97-298, released August 19, 1997, at ¶¶ 128-221. Ironically, the Commission did not reach the issue of OSS compliance with regard to SBC’s one Section 271 filing, because of serious threshold deficiencies that made it unnecessary for the Commission to even analyze the specific elements of checklist compliance. See, *Application of SBC Communications Inc. Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-region, InterLATA Services In Oklahoma*, CC Docket No. 97-121, *Memorandum Opinion and Order*, FCC 97-228, released June 26, 1997, at ¶ 66.

41. The magnitude of this problem was evidenced at the full-day forum held by the Common Carrier Bureau on June 4, 1998.

42. “MCI has Stopped Pursuing Residential Customers,” *The New York Times*, April 15, 1998.

itself could not, the Applicants aver, be pursued by any entity smaller than the size of SBC and Ameritech combined.

26. In sum, there is a direct conflict between the merger philosophy reflected in the Applicants' statements and actions, on the one hand, and their claims that competition is flourishing (or, at a minimum, poised to take off and fulfill some inevitable and irreversible economic destiny). On the one hand, the Applicants contend that entry barriers for their actual and potential competitors — only one of which is even remotely as large as the proposed SBC/Ameritech combination — are not particularly high. Yet, at the very same time, the Applicants take the position that their combination is a necessary condition of their being able to launch broad-based out-of-region competitive entry.

Other industry mergers do not justify megaLEC consolidation or overcome its anticompetitive impacts

27. The Applicants also argue that their merger is simply another step in some global, telecommunications industry merger mania, in which they must become bigger in order to attract sufficient capital to survive. In their Description, SBC and Ameritech attempt to portray the entire field of domestic and foreign telecommunications providers as “comparable in size” to the SBC/PacTel/SNET/Ameritech megaLEC.⁴³ Leaving aside the fact that most of these other providers do not approach the size of the new SBC, the point that SBC seems to be trying to make is largely irrelevant. Size, in and of itself, is meaningless to the issue at hand, without considering the relative strengths of these providers in local exchange markets. In the several

43. Description, at 53 and fn. 67.

years since the *1996 Act*, neither size nor national presence have permitted the large IXCs or other large CLECs, such as cable companies the capability to unseat the ILECs as dominant providers of local exchange service, nor has it allowed the IXCs to establish a dominant position in the newly emerging market for bundled local and long distance services. Without consideration of the particular advantages that ILECs, such as SBC and Ameritech, possess as local exchange service providers, one might as well be discussing the annual revenues and net incomes of such financial giants as General Motors, Exxon, or Boeing. As the Applicants themselves concede, successful entry into other ILECs' strongholds depends in large part on the specific operational experience and managerial talent that ILECs themselves uniquely possess.

28. There are also important differences between the post-merger ILEC whose financial stability is derived from serving 35 percent of the country's access lines and an IXC that has comparable revenues derived largely from competitive enterprises. When AT&T and MCI/WorldCom attempt to raise capital to support new business ventures, they do not have recourse to a vast base of customers who do not, as yet, have any readily available competitive alternatives, or to overvalued embedded plant that, through depreciation accruals and vestiges of regulatory earnings requirements, can continue to provide a source of cash flow to which no non-ILEC telecommunications entity has access.⁴⁴

44. The recent USTA petition seeking FCC forbearance in setting depreciation rates, if granted, would afford SBC, Ameritech and all other ILECs an even larger cash stash than they presently enjoy. USTA Petition for Forbearance from Depreciation Regulation of Price Cap LECs, ASD 98-91, Public Notice, DA 98-64, released September 28, 1998. The ILECs' persistent ability to set prices that recover overvalued embedded plant could exist only under noncompetitive conditions; the very fact that such a request has been made (notwithstanding its ultimate disposition by the Commission) undercuts all of the Applicants' claims as to the presence of competitive market forces sufficient to constrain their own prices and anticompetitive conduct.

29. The Applicants' inclusion of large foreign companies in their "parade of giants" is even less relevant.⁴⁵ Not only is it unlikely that such foreign companies have a strong interest in entering US local exchange markets, their ability to surpass either SBC or Ameritech as potential successful competitors in such markets is doubtful.

The trend toward further ILEC consolidation poses a direct and possibly irreversible threat to competition and should be halted now

30. The proposed merger will further reduce the number of remaining BOCs (see Figures 2 through 5), a step which the Commission has already recognized has a detrimental impact on the public interest. In an attempt to ward off this concern, the Applicants have focused in on observations in prior Commission orders to the effect that there is no "magic number" of BOCs that must be maintained. However, the fact that the Commission has not been willing to predict where it will draw the line on ILEC mergers does not in any sense commit the Commission to a policy of never drawing that line. As the Commission observed in the *BA/NYNEX Merger Order*, "Further reductions ... become more and more problematic as the potential for coordinated behavior increases and the impact of individual company actions on our aggregate measures of the industry's performance grows. ... [thus] further reductions in the number of Bell Companies or comparable incumbent LECs would present serious public interest concerns."⁴⁶

45. Nonetheless, SBC has described itself as "one of the five largest telecommunications companies in the world," based on 1997 year-end market value of \$67.3-billion. Connecticut DPUC Docket 98-02-20, SBC Response to MCI-4, "SBC Communications Inc. Talking Points for Randall Stephenson," Draft, February 16, 1998, SBCSNET004664.

46. *BA/NYNEX Merger Order*, at ¶ 156.

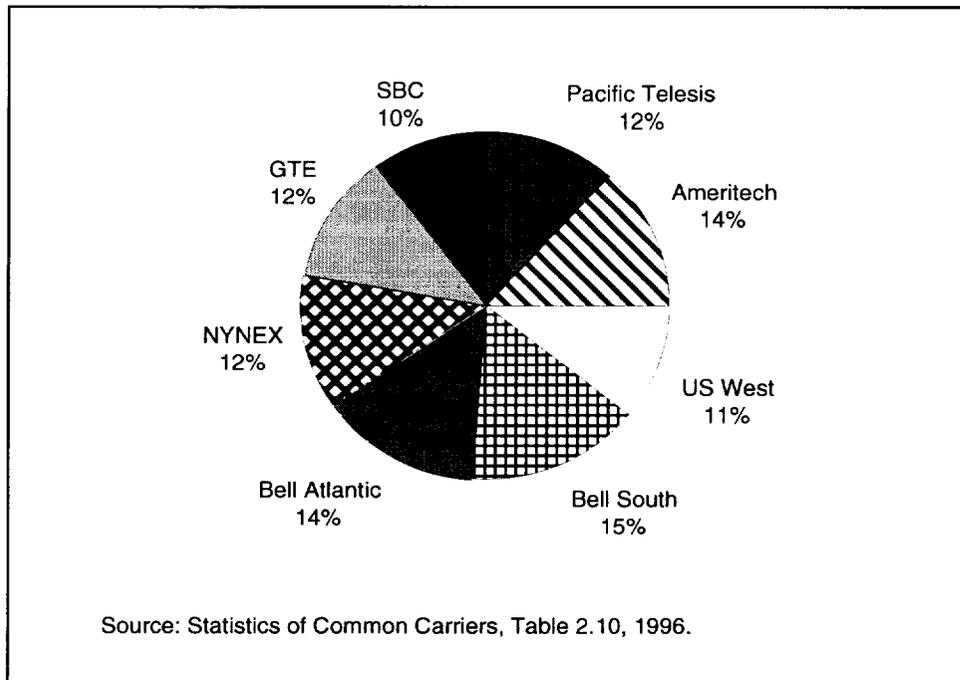


Figure 2. Pre-Mergers: Access Line Shares (1996).

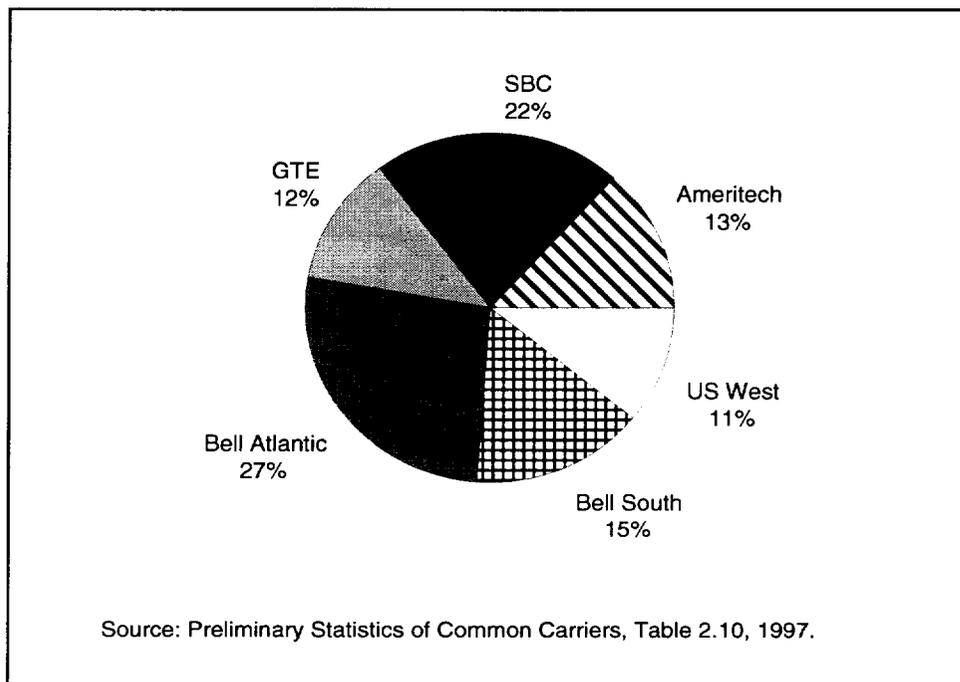


Figure 3. Post SBC/Pacific Telesis and Bell Atlantic/NYNEX Mergers: Access Line Shares (1997).

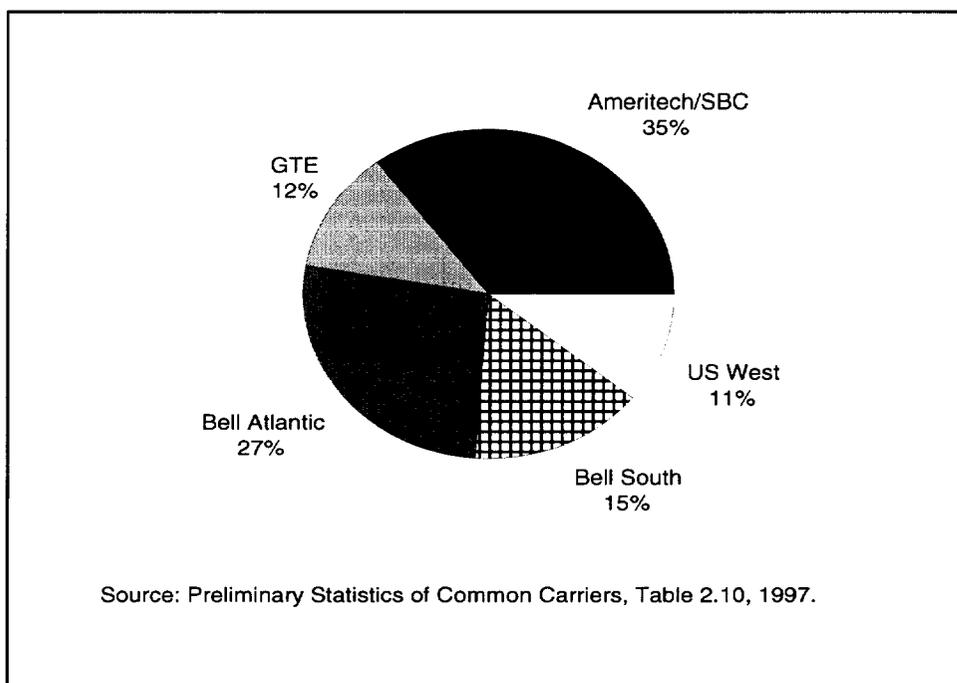


Figure 4. Post SBC/Ameritech Merger: Access Line Shares (1997).

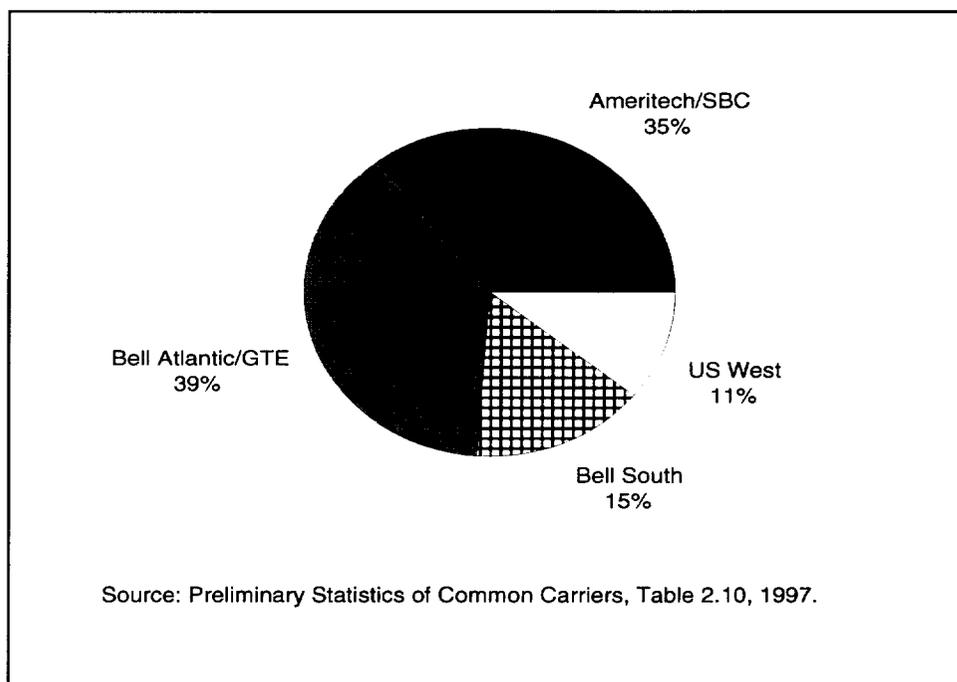


Figure 5. Post Bell Atlantic/GTE Merger: Access Line Shares (1997).

31. Not only would a larger SBC tend to precipitate interest in mergers by other large telecommunications companies, this latest of SBC's merger proposals is by no means assured to be the last. All of the rationale that SBC offers in support of its proposed merger with Ameritech would also support further aggrandizement of SBC through subsequent mergers. If merging with Ameritech provides the size that SBC claims is necessary for it to enter 30 out-of-region markets, would acquiring BellSouth supply the means for SBC to set up shop in 20 additional markets (while at the same time alleviating SBC from the bother of competing out-of-region in the BellSouth region)? Would SBC need another takeover target any time a telecommunications provider anywhere in the world got larger? Simply put, there is no obvious logical ending point to the SBC acquisition strategy.

32. Another plausible extension of the Applicants' claim that the proposed merger is critical for them to "compete,"⁴⁷ is that the remaining Tier 1 ILECs will similarly to be driven to merge.⁴⁸ The fact that the present merger threatens to be a driving force toward further ILEC consolidation is, in and of itself, a reason for the Commission to consider applying the brakes at this time.

33. In an effort to allay concerns over the effects of this consolidation, SBC/Ameritech affiants Richard Schmalensee and William Taylor argue that the proposed merger does not cross a particular numerical threshold recognized in the area of antitrust. They contend that "it is generally recognized in antitrust economics that if three or more firms possess the same or

47. See, e.g., Kahan, at ¶¶ 75-85.

48. In fact, it has been announced that Bell Atlantic will attempt to complete its second major merger since 1997, this time with GTE, the largest of the independent ILECs.

comparable advantages as possible entrants, the merger would be unlikely to have adverse competitive effects”⁴⁹ even if the companies involved are “actual competitors” or “actual potential competitors.”⁵⁰ A different viewpoint concerning the numerical threshold has been expressed by Dr. William Shepherd, who has observed:

Decades of extensive economic research into industrial organization — using theoretical analysis, large-scale econometrics, scores of case studies, and other methods — have clarified the conditions that are required for effective competition. They derive from writings ranging from George Stigler to Joe Bain. They include three elements, at a minimum:

- At least five reasonably-comparable competitors. This provides for unremitting mutual pressure for efficiency and innovation, as well as any avoidance of any sustained coordination and collusion among competitors.⁵¹

However, we are not here dealing with the type of stable competitive market typically addressed under the analytical framework set forth in the Merger Guidelines, and the critical issue is not

49. Schmalensee/Taylor at ¶ 42.

50. The FCC has also noted that, under traditional application of the DoJ *1984 Merger Guidelines*, “[t]he Department is unlikely to challenge a potential competition merger if the entry advantage ascribed to the acquiring firm (or another advantage of comparable importance) is also possessed by three or more firms.” *BA/NYNEX Merger Order*, at fn. 153, citing Department of Justice, *1984 Merger Guidelines*, 49 Fed. Reg. 26823, 26835, § 4.133.

51. William G. Shepherd, “Deregulation: From Monopoly Only to Dominance? Telecommunications, Railroads, and Electricity,” *NRRI Quarterly Bulletin*, Vol. 17, No. 2, at 152. The excerpt includes the following footnote: “The earlier literature used to require ten or more comparable firms, so as to make collusion really unlikely. Under Chicago-School pressure, the mainstream now has retreated to specifying only about five or more competitors, but that is an absolute minimum. A few ‘new-IO’ pure theorists and ‘contestability’ advocates are willing to take extreme positions favoring just two or three competitors, but their work has no basis in real-market research.” *Id.*, at fn. 11. The other two elements discussed in the article include the absence of single-firm dominance and reasonably free entry into and among all segments of the market.

whether a three or five-competitor threshold applies. As the FCC observed in the *BA/NYNEX Merger Order*,

In assessing just how many other significant market participants must remain for our competitive concern to diminish, we are guided by the underlying policy and economic analysis of the *1984 Merger Guidelines*. Our conclusion, however, departs from the standard articulated in those *Guidelines* for several reasons. First, telecommunications markets such as local exchange and exchange access services presently have only one supplier as a practical matter or, as in the case of mass market bundled local exchange and exchange access, and long distance services, no current actual suppliers. In contrast, in the typical potential competition case the relevant markets are oligopolies with four or more competitors.⁵²

The Commission also recognized that “the doctrine of actual potential competition as reflected in the *1984 Merger Guidelines* has usually been applied to stable markets that potential entrants have decided not to enter. In contrast, telecommunications markets are undergoing major change, with new entry anticipated as implementation of the 1996 Act progresses.”⁵³ For this reason, the Commission appropriately determined that it must “evaluate the number of most significant market participants and the competitive effects of mergers among them, even where three other potential competitors with equivalent competitive capabilities to the merging parties will remain.”⁵⁴

34. The snowballing effect of each successive merger has clear and important implications for the ability of the FCC and the states to regulate effectively during the transition to

52. *BA/NYNEX Merger Order*, at ¶ 66 (footnotes omitted).

53. *Id.*, at ¶ 67 (footnotes omitted).

54. *Id.*, at ¶ 68.

competition. In its *BA/NYNEX Merger Order*, the FCC carefully laid out why benchmarking of ILEC performance was an important regulatory tool that needed to be preserved, emphasizing in particular that “the ability to compare actions of a larger number of carriers improves [the Commission’s] ability to identify and constrain market power.”⁵⁵ The Commission pointed to specific examples of areas in which it depended upon comparing and contrasting the rates and practices of the major ILECs to determine the reasonableness of their actions. The Commission *BA/NYNEX* also noted that “in establishing the productivity adjustment factor for price cap ILECs, we rely on calculations of industry-wide productivity. The smaller the base on which this number is calculated, the more likely it is to include distortions and create unwanted incentives for cost misallocation by regulated companies that price caps were intended to mitigate.”⁵⁶ As the Commission also observed, the Department of Justice and the Court overseeing the Modified Final Judgment have also recognized the value of having multiple BOCs, as have the BOCs themselves.⁵⁷

35. The Applicants, not unexpectedly, minimize this concern. They claim that benchmarks should appropriately have a diminished importance in a *competitive* environment and cite the Commission’s own findings in support of this proposition.⁵⁸ The problem with the Applicants’ position, of course, is not with the ultimate conclusion but rather with the premise: If the local exchange market were competitive (which it is not), then regulatory oversight (including

55. *Id.*, at ¶ 147.

56. *Id.*

57. *Id.*, at ¶¶ 148-149.

58. Description, at 81.

regulatory benchmarking) would become less important. However, like many of the arguments advanced by the Applicants and in their supporting affidavits, this position rests upon a faulty assumption about the status of competition and its ability at present and for the foreseeable future to take the place of effective regulation as a means of disciplining rates and practices of incumbent LECs. As we have discussed earlier and as the Commission has recognized on numerous occasions, we are far from achieving a competitive environment for local exchange service.

36. Separate and apart from the concern over the effect of the rapidly diminishing number of ILECs on regulators' benchmarking capabilities, there is also a legitimate concern (identified by the Commission in the *BA/NYNEX Merger Order*) that a reduction in the number of ILECs may tend to "reduce experimentation and diversity of viewpoints in the process of opening markets to competition" and "increase the likelihood that cooperation" among this already tight-knit group.⁵⁹ The FCC stated that "[f]urther reductions, however, become more and more problematic as the potential for coordinated behavior increases and the impact of individual company actions on our aggregate measures of the industry's performance grows."⁶⁰ It is fair to conclude that these changes would be detrimental to the public interest, by making the already difficult process of implementing the pro-competitive mandates of the *1996 Act* even more difficult to achieve.

59. *BA/NYNEX Merger Order*, at ¶ 152.

60. *Id.*, at ¶ 156.

III. POTENTIAL PUBLIC INTEREST HARMS OF THE MERGER

Anticompetitive effects of the merger

37. The core question before the Commission is the overall effect of the merger on competition. The heart of the Applicants' argument is that their merger is necessary to introduce a new, aggressive, nationally focused player which will expand competition outside of its home region and draw from its competitors a more intense level competition in its own, home-region market. The key tenet of the Applicants' position is that their national, out-of-region entry strategy, the so-called "National/Local Strategy," could not be achieved by either of these large ILECs absent the merger. However, as we demonstrate below, this very proposition — that only a megaLEC of the proportions of the new SBC could compete on a national basis and overcome the impediments to regional and niche market entry that the Applicants have identified — is proof that the merger will overwhelm and eliminate from viability other entrants with potential for competition in the SBC and Ameritech markets (as well as other local exchange markets nationwide). It is also evident that the success of this dubious strategy depends wholly on the Applicants' ability to engage in various forms of direct and indirect cross-subsidization of their new competitive venture using the resources of their noncompetitive local exchange businesses.

38. The Applicants have carefully attempted to persuade the Commission that neither of them would be an "actual, potential competitor" in the other's home region, absent the merger, and have sought to show that their merger will have a positive, rather than a negative, impact upon competition in the local telecommunications market, both in- and out-of-region. Because a contrary conclusion would directly threaten their ability to obtain the Commission's approval of

the merger, it is hardly surprising that the Applicants have laid out their case in some detail. However, those “details” consist largely of unsupported conjecture, revisionist histories, and justifications that, when taken as a whole, simply do not lead to the conclusions that the Applicants would like for the Commission to draw. With any reasonable scrutiny, it is clear that the Applicants fail to meet their burden of proof that they are not actual potential out-of-region competitors.

39. Moreover, as the Commission has recognized, the judgment about the Applicants’ intentions and their potential to enter the other’s region as a formidable competitor cannot be made entirely based on the analysis of current and known conditions, since the market in question is in considerable flux.⁶¹ The FCC has recognized this critical contextual distinction between the analytical framework addressed in more typical applications of the *Horizontal Merger Guidelines* and the somewhat more fluid framework that must necessarily apply to the analysis of the competitive effects of ILEC mergers:

In some cases, however, the transaction will have a greater effect on future, rather than present, market performance. This is especially true if a merger may be a strategic response to declining entry barriers, in which an incumbent firm is seeking to avoid competition by eliminating a potentially significant future competition. *In the case of*

61. The FCC determined that “[i]t is, however, precisely because such competition is just beginning at this time and uncertainties exist that care in evaluating the potential impact of mergers in evolving markets is crucial to ensuring the development of a pro-competitive, deregulatory national telecommunications industry structure.” *BA/NYNEX Merger Order*, at ¶ 41.

*local telecommunications markets, competition is only now emerging and a merger between a current monopolist and one of the new competitors may have a substantial adverse impact on future market performance even though the new competitor currently has only a small number of customers.*⁶²

Although SBC might not make a *de novo* entry into Ameritech's region as quickly as it would an entry through acquisition, there is still (as discussed further below) a reasonable likelihood that it would make such an entry in the future in light of its well-known and readily-conceded plans to become a national/global player.⁶³ What is certain is that the completion of the proposed merger would unambiguously preclude such a possibility.

40. The Applicants stress that their National/Local Strategy is unique and entails a plan to enter more markets than those announced to date by other ILECs and CLECs.⁶⁴ While the Applicants portray their aggressive plans for expansion as a benefit to competition, the merger could have some distinctly adverse effects on the development of competition in the 30 markets targeted by the Applicants. Other CLECs may well have business plans (whether or not previously "announced") to serve the 30 markets that the Applicants plan to enter, even if at a

62. *BA/NYNEX Merger Order*, at ¶ 96 (emphasis added).

63. This theme surfaces, for example, in one significant antitrust case. Justice Douglas stated "[t]hus, although Falstaff might not have made a *de novo* entry if it has not been allowed to acquire Narragansett, we cannot say that it would be unwilling to make such an entry *in the future* when the New England market might be ripe for an infusion of new competition. At this point in time, it is the most likely new competitor." In the same case, Justice Marshall stated, "Even if it is true that management has no present intent of entering the market *de novo*, the possibility remains that it may change its mind as the objective factors favoring such entry are more clearly perceived." *United States v. Falstaff Brewing Corp.*, 410 U.S. 526, 559 (1973).

64. "No other ILEC or CLEC has announced an out-of-region local competition initiative of comparable scope, and, in the U.S., the only carriers currently competing on a national-local basis are the vertically-integrated IXCs (AT&T-TCG-TCI and MCI-WorldCom-MFS-UUNet-Brooks Fiber)." Schmalensee/Taylor, at ¶ 16.

more gradual pace. However, if SBC were allowed to acquire Ameritech and become a \$41-billion company, that very fact could well deter entry in the new SBC's 30 target markets by other potential competitors. As a result, less competition would occur in the out-of-region markets.

41. In fact, whether or not the new SBC actually completes its grandiose out-of-region entry undertaking, its intention to enter major markets nationwide is likely to have a chilling effect. Experience shows that, as it has with other out-of-region business strategies, SBC may well renege on its plan to enter the 30 markets. SBC's fiduciary responsibilities lie with its stockholders, not its customers, and if top management subsequently determines that out-of-region markets are not likely to become profitable within a reasonable period of time, SBC may well abort or scale back its National/Local Strategy (regardless of its original intentions or the promises made to regulators in the pre-merger time frame).⁶⁵ Even if SBC begins its National/Local Strategy and then discontinues this business plan, there would be negative ramifications for the development of local competition (in addition to squandering in-region monies and managerial talent). SBC's announced intent to enter the 30 markets would have discouraged and/or delayed entry by other carriers in these markets. Also, SBC's failure to complete its out-of-region entry strategy would further solidify the market power of the incumbent local exchange carriers serving those regions of the country. Rather than achieving

65. As the Applicants acknowledge, the financial and other resource demands required to accomplish the National/Local Strategy are huge. Mr. Kahan specifically states that the business plan for the National/Local Strategy contemplates a "cumulative negative cash flow for nearly ten years." ¶ 80 Thus, realistically, SBC can only speculate at this present time as to its ability to complete this project in the full scope described in the Applicants' current business plans.

the goals of the *Act*, the proposed merger would allow the incumbent to become yet more entrenched, thus quelling competitive entry by potential rivals.

42. Most significantly, however, the merger is certain to harm the development of local competition in the Applicants' two home regions. Whether their entry can be shown to have been imminent or whether it would have been somewhat more remote in time,⁶⁶ the fact remains that the threat of competitive entry by either of these major regional ILECs into the other's home region would be a major factor affecting the competitive performance of both the ILEC and other entrants. As discussed below, SBC is an actual potential competitor of serious consequence in the Ameritech region; Ameritech should also not be discounted as an actual potential competitor in the SBC region.⁶⁷ The sheer size of the SBC/Ameritech megaLEC, whose in-region market dominance will be fortified by even greater financial/managerial/technical/customer resources and scope of operations, is likely to deter some CLECs who had previously committed to entering one or more of the seven major markets in the Ameritech region being acquired by SBC through the merger. Moreover, as we discuss below, the new SBC will confront more intense financial pressure than ever before to protect its dominance in the consolidated home region, in order to protect the stream of noncompetitive service revenues that it admits are necessary to provide the financial stability underlying its new, risky out-of-region venture.

66. In its *BA/NYNEX Merger Order*, regarding its interpretation of the potential competition doctrine, the FCC stated that "there is case law holding that such entry must be certain" "[w]e choose, however, to follow the larger and, in our opinion, more reasonable line of cases holding that entry need only be reasonably likely." *BA/NYNEX Merger Order*, at footnote 260, cites omitted.

67. As the FCC recognized, case law distinguishes between actual potential competition and perceived potential competition. *BA/NYNEX Merger Order*, atfn. 148.

43. The Applicants' own build-up for the National/Local Strategy also confirms that the impact of their combination is not merely the "benign" "geographic market extension merger" of two monopolists discussed by Dr. Harris. Mr. Kahan's description of the motivation for his company's National/Local Strategy confirms that SBC views its regional market dominance as a stepping stone into becoming a national and international player. This view is at odds with Dr. Harris' "geographic market extension" theory and with his notion that the combination of the existing SBC/Pacific/SNET and Ameritech monopolies will not increase SBC's market power. In assessing whether the merger is likely to have a significant adverse effect on competition, the Commission must weigh the likelihood of actual *de novo* entry by SBC into the Ameritech region (or Ameritech into SBC's) against the likelihood of entry by other RBOCs into the combined SBC/Ameritech home region assuming that the merger occurs and the National/Local Strategy is pursued. As we will show, the probability of out-of-region entry by SBC in the Ameritech region, absent the merger, is much greater than the speculative possibility of another RBOC venturing to confront the new mega-SBC.

44. Absent the merger, Ameritech and SBC could compete not only in each other's territories, but also could compete with each other in the markets outside the Ameritech/SBC region. The merger diminishes the quantity of competitors in local markets throughout the country, reducing the number of large LECs — large companies with a proven track record in serving (and defending) the local market — from six (SBC-Pacific-SNET, Bell Atlantic-NYNEX; Ameritech; Bell South; US West; and GTE) to five.⁶⁸ Table 1, below, compares the relative revenues of these six potential competitors.

68. Approval of the Bell Atlantic-GTE merger would reduce this number to four, and would consolidate 74% of the nation's access lines in the two largest megaLECs..

Table 1			
Industry Concentration Resulting from the Proposed Merger Would Diminish Prospects for Local Competition			
Pre-Merger		Post-Merger	
Company	Revenue (billions)	Company	Revenue (billions)
Bell Atlantic	\$30.2	Ameritech/SBC	\$40.9
SBC	\$24.9	Bell Atlantic	\$30.2
GTE	\$23.3	GTE	\$23.3
Bell South	\$20.6	Bell South	\$20.6
Ameritech	\$16.0	US West	\$15.2
US West	\$15.2		

Source: Preliminary Statistics of Common Carriers, Table 1.1, 1997.

SBC's potential entry into the Ameritech region, absent the merger

45. SBC strongly disavows any intention to compete in the Ameritech region. SBC's current sentiments on this subject, as expressed through the Application and supporting affidavits, do not comport with either its past business strategies (as expressed by senior management) or its current expansionist plans, and they are hardly compelling evidence of its potential future role as an out-of-region competitor within Ameritech's existing region. Conveniently, SBC's out-of-region entry plans now comport with its current regulatory goals.

46. In fact, at the time of the PacTel merger, Chicago was specifically named as fitting the profile of the out-of-region market that SBC had the greatest interest in entering. On October 15, 1996, Mr. Kahan filed rebuttal testimony with the California Public Utilities Commission in which he stated, "[a]s noted in my direct testimony, SBC has not contemplated a de novo entry into the local exchange business outside of its five state area or locations where it has a cellular

presence.”⁶⁹ Mr. Kahan described three “critical assets” for its out-of-region entry: “existing brand name, infrastructure, and customer base.”⁷⁰ Mr. Kahan elaborated further:

Absent this merger, we have concluded that it would make sense to enter the local exchange market in Chicago but not in Los Angeles. In Chicago, we have an extensive wireless network consisting of 10 switches and over 600 cell sites. That network also includes an extensive backbone network of microwave, leased facilities, and connections to a SONET ring. This network is supported by a sophisticated billing system, a responsive care unit, as well as sales and distribution marketing, accounting, finance, installation maintenance and other personnel who reside in and understand the Chicago market. In addition, we have a well recognized brand name since we operate under the Cellular One name in Chicago. We also have a large existing customer base to which we send bills every month and to whom we could market services.⁷¹

47. Mr. Kahan said further in his California testimony that “[a]s a result, SBC has determined to expand where it has customers, facilities and brand name. Chicago fits that definition; Los Angeles does not.”⁷² Less than two years later, SBC finds itself in the awkward position of explaining away this previously announced business strategy, in attempting to persuade the FCC that there is no causal link between its proposed merger with Ameritech and the decision to discontinue the use of its wireless service as a platform for out-of-region entry.

48. According to SBC, in 1996, SBC management asked SBC Wireless to examine the possibility of offering local exchange service through its wireless business in four out-of-region

69. California Public Utilities Commission, 96-05-038, *In the Matter of the Joint Application of Pacific Telesis Group (“Telesis”) and SBC Communications Inc. (“SBC”) for SBC to Control Pacific Bell*, Rebuttal Testimony of James S. Kahan (SBC), October 15, 1996, at 2.

70. *Id.*, at 3.

71. *Id.*, at 4.

72. *Id.*, at 6.

markets, Boston, Chicago, Rochester, and Washington/Baltimore. SBC chose Rochester as a test market, and began reselling Frontier's local exchange service in early 1997 but, according to SBC, "the results were not what we expected."⁷³ SBC indicates that although "we had expected it [local exchange entry] to become profitable within a few years," [o]ur actual experience, however, led us to believe that local exchange service in Rochester would not become profitable in the foreseeable future."⁷⁴

49. Based upon its experience in Rochester and other considerations that SBC describes,⁷⁵ SBC now contends that it decided in the summer of 1997 "not to pursue local exchange entry in the other out-of-region areas, including Chicago, through our wireless operations." According to SBC, "[a]ll efforts in Chicago and in the other out-of-region areas analyzing possible entry stopped at that time and have never been resumed."⁷⁶

50. SBC's apparently failed effort to succeed in the Rochester test market as quickly as it had hoped can be interpreted in several ways. Despite the hoopla that greeted the Rochester Telephone Corporation "Open Market Plan," which the New York Public Service Commission approved in late 1994, the Rochester market may not have been as conducive to local

73. Sigman, at ¶¶ 5-7.

74. *Id.*, at ¶ 9.

75. SBC apparently determined, among other things, that wireline and wireless networks are very different and that the "wireless backbone networks...did not have the excess capacity to handle the greater volume and call length of local exchange traffic"; that wireless and wireline sales distribution channels differ; and that SBC's wireless brand name "did not help in selling wireline service." Sigman, at ¶¶ 11-13.

76. Sigman, at ¶ 17.

competition as had been originally hoped. The wholesale discount that Rochester Telephone offered was an unrealistically low discount of 5% below its retail tariff prices.⁷⁷ Alternatively, it is not clear how hard SBC worked at succeeding and whether it may have given up prematurely when it realized that *de novo* entry was much harder than simply buying a company. Presumably SBC entered the Rochester market with the expectation of succeeding — if SBC tried but failed in Rochester, why should the FCC place much confidence in the ability of others to provide a serious competitive challenge to the new, highly fortified SBC in any of its in-region areas?

51. As a result of the Rochester experiment, SBC claims that it decided not to combine “in-region wireless and wireline operations in the same corporate chain.”⁷⁸ SBC also claims that it has decided against implementing the National/Local Strategy through the wireless platform, even where it has a wireless presence.⁷⁹ But whatever the lesson the Rochester trial may have taught about wireless as an entry platform, this limited effort does not reasonably explain away SBC’s likely interest in the Chicago market. SBC’s extensive cellular presence in the Chicago MSA, coupled with the large number of national and multinational corporations that are headquartered in the Chicago area and Chicago’s status as the nation’s “second city,” makes the failed Rochester trial an extremely implausible alibi for SBC’s alleged loss of interest in the Chicago market. Indeed, extrapolating from Mr. Kahan’s statement that SBC’s “current overall

77. New York Public Service Commission, *Petition of Rochester Telephone Corporation for Approval of Proposed Restructuring Plan*, Case 93-C-0103; *Petition of Rochester Telephone Corporation for Approval of a New Multi Year Rate Stability Agreement*, Case 93-C-0033; *Opinion and Order Approving Joint Stipulation and Agreement*, Opinion No. 94-25, Issued and Effective November 10, 1994.

78. Sigman, ¶ 16.

79. *Id.*, ¶ 19.

cellular penetration [is] 12.2 percent,”⁸⁰ it is likely that SBC Wireless has between 900,000 and one million current cellular subscribers in its Chicago-area system, thus providing a sizable existing customer base that certainly has sufficient mass to support a full-blown local wireline service market entry.⁸¹

52. SBC cannot at the same time claim that it will be unable to pursue a National/Local Strategy without the merger while also claiming that the National/Local Strategy will stimulate increased competition within the 13 states in which SBC/Pacific/SNET/Ameritech would be the dominant incumbent LEC. If the National/Local Strategy will be pursued only if the merger takes place, then the inescapable conclusion is that the merger will reduce, and certainly not expand, the potential for effective competition in local exchange service markets in the Ameritech and SBC regions. As such, the SBC/Ameritech merger would violate the *Horizontal Merger Guidelines* — because the proposed merger will “create, enhance or facilitate exercise of market power” and would have a significant adverse effect on the development of competition.

80. Kahan, at ¶ 73.

81. The actual number of SBC cellular customers in the Chicago area may well have been a good deal greater than this estimate, which is based upon companywide cellular penetration rates. As of January 1, 1998, SBC Cellular One had a total of 292 NXX codes, representing *nearly three million* individual telephone numbers, assigned to it in the five Chicago-area NPAs (312, 773, 708, 847 and 630). Bellcore, *Local Exchange Routing Guide*, January 1, 1998. See also Late Filed Exhibit 2.1 in Illinois Commerce Commission Dockets 97-0211/97-0192.

Ameritech's potential entry into the SBC region, absent the merger

53. According to the Application, “Ameritech has no plans to become an out-of-region CLEC, and, absent the merger, would not do so.”⁸² Yet very recently, Ameritech undertook several out-of-region ventures, which it goes to great length to explain away in its filing to the FCC. If the merger negotiations had not occurred, these preliminary ventures might well have become the proving ground for future out-of-region plans, rather than the burying ground for what Ameritech now characterizes as failed business pursuits. Even if Ameritech’s claims that “[t]he national/local strategy could not be achieved — and would not have been pursued — by Ameritech alone”⁸³ are taken at face value, Ameritech still might have pursued out-of-region ventures on a less grandiose basis. The “National/Local Strategy,” as defined by the Applicants, has a particular set of characteristics and, while Ameritech may well not have attempted to accomplish out-of-region entry in this precise manner, it might well have pursued a different but nonetheless effective out-of-region plan. Unless one accepts the Applicants’ contention that out-of-region entry on anything less than the “massive scale” contemplated in the National/Local Strategy is doomed to failure (in which event there is virtually no prospect of any serious competition in the local exchange market anywhere), then, as we demonstrate below, there are potentially numerous means by which SBC and Ameritech could be successful out-of-region CLEC competitors.

54. In the fourth quarter of 1997, Ameritech “unsuccessfully undertook a resold business service offering out-of-region to its large business customers, which it is now no longer actively

82. Weller, at ¶ 31.

83. *Id.*, at ¶ 13.

pursuing.”⁸⁴ Ameritech halted the roll-out as of June 25, 1998, because “it was not achieving the desired number of customers and because the gross margins on reselling local access to large customers (which often had already negotiated volume contracts with local carriers) were too small to continue the effort.”⁸⁵ June 25, 1998 was, of course, some six weeks *after* SBC and Ameritech announced their intention to merge.

55. It is certainly convenient for purposes of this filing for Ameritech to be able to characterize this plan, which entailed reselling local exchange service to one customer (398 lines in California, 86 in Texas and 118 in New York), as unsuccessful. One can easily imagine that had Ameritech not sought to merge with SBC, and had instead decided to attempt to pursue this fledgling business, it would have sought to portray a different view to Wall Street, perhaps describing the experience thus far as an inevitable part of a learning curve.

56. Also, like SBC, Ameritech recently sought to package out-of-region local exchange service with its cellular service. Project Gateway was “developed by Ameritech Cellular primarily as a defensive strategy in response to a perception in early 1997 that other wireless competitors in St. Louis ... were planning to offer local services to cellular subscribers as part of a bundling strategy”⁸⁶ As described by Ameritech, “[a]t its core, Project Gateway was a discrete and limited initiative designed to protect the value of Ameritech’s cellular business in St. Louis against erosion caused by the anticipated introduction of bundled services offerings by

84. *Id.*, at ¶ 32.

85. *Id.*

86. Osland, at ¶ 4.

wireless competitors in that market.”⁸⁷ Ameritech started a trial involving 390 employees and their families on January 26, 1998 and ended the trial by the end of March 1998.⁸⁸

57. Through the trial, Ameritech ostensibly identified problems with the new business: it encountered significant order processing errors; the bill format was confusing; the pricing plan provided value to some but not to others; and increased competition put “greater than anticipated” pricing pressure on cellular and long-distance rates — reducing the appeal of the package and undercutting business assumptions.⁸⁹ Project Gateway is now on hold,⁹⁰ and, according to Ameritech, “[t]he decision to put the trial on hold was solely and unilaterally reached by Ameritech.”⁹¹

58. It is not surprising that, in attempting to enter a new line of business, a company would encounter problems; indeed, given the legacy of problems that virtually everyone attempting to enter the local telephone business has confronted, it is difficult to imagine how or why Ameritech might have thought that things would somehow be different for its own out-of-region pursuits. The decision to cut-and-run cannot be held out as demonstrating that Ameritech would have abandoned its attempts at out-of-region entry absent the merger with SBC; none of the specific “problems” that Mr. Osland has identified would be a basis to abandon the kind of competitive

87. *Id.*

88. *Id.*, at ¶ 8.

89. *Id.*

90. *Id.*, at ¶ 10.

91. *Id.*, at ¶ 14.

efforts that the Applicants contend are being aimed at themselves, unless of course one accepts the ultimate futility of all efforts to introduce competition into the local exchange market. Thus, absent the merger, Ameritech could be expected to have attempted to troubleshoot and to overcome those problems. Other firms venturing into new areas that have encountered similar difficulties might seek to simplify a confusing bill format, to modify the pricing plan to suit customer needs, and to correct order processing errors. If every start-up CLEC gave up as quickly as Ameritech, local competition would not be a factor in the telecommunications landscape. Of course, if the merger occurs, the FCC will never know whether Ameritech would have tried harder and pursued its out-of-region offerings on its own.

59. The timing of Ameritech's decision to abandon its out-of-region efforts is also highly suspicious. Ameritech's business decisions to curtail its resold business local exchange service and Project Gateway occurred just as it was working out the final details of the proposed merger. SBC's and Ameritech's chief executive officers first met on February 24, 1998, and discussed the possibility of merging.⁹² In an affidavit dated July 21, 1998, Mr. Weller asserted that "Ameritech has no plans to become an out-of-region CLEC, and, absent the merger, would not do so."⁹³ Between February and July 1998, Ameritech discontinued its out-of-region ventures. At the end of March 1998, Ameritech ended its Project Gateway trial (the experiment in bundling landline and cellular service in out-of-region markets). On June 25, 1998, Ameritech halted its out-of-region resold local business service. Had the merger negotiations never occurred, Ameritech may well have attempted to modify its resold local business service strategy and its

92. Amended Proxy Statement/Prospectus, September 21, 1998, at 23-24.

93. Weller, at ¶ 31.

cellular-based strategy to overcome the specific problems it encountered when it first attempted to establish an out-of-region toehold.

Ameritech and SBC clearly do possess unique advantages as potential entrants in each other's regions

60. The Applicants claim that “[i]n general, Ameritech has no particular advantages over other potential competitors in St. Louis local exchange markets; similarly SBC has no unique advantage over other possible entrants in Chicago.”⁹⁴ This contention seeks to overlook the unparalleled experience that these companies, as ILECs, have acquired through their century-long monopoly as providers of local exchange and exchange access services, and flies in the face of SBC claims expressly linking the merger to the ability of the Applicants to pursue their National/Local Strategy. As the FCC found with respect to Bell Atlantic, Ameritech and SBC, as incumbent local exchange carriers, have “substantial experience serving mass market customers of local exchange and exchange access services.” Also, as the FCC recognized, “an incumbent LEC entering an out-of-region local market would bring particular expertise to the interconnection negotiation and arbitration process because of its intimate knowledge of local telephone operations.”⁹⁵

61. The RBOCs, as they presently exist, are uniquely positioned to bootstrap their monopoly local service relationship with national companies headquartered or otherwise maintaining telecom-intensive operations within the RBOC region into out-of-region markets.

94. Schmalensee/Taylor, at ¶ 42.

95. *BA/NYNEX Merger Order*, at ¶ 107.

No other provider — not “AT&T/Teleport/TCI, MCI/WorldCom/MFS/Brooks Fiber/UUNet, Sprint/France Telecom/Deutsche Telekom [or any] other global competitors” possess this special near-monopoly relationship with large national/multinational customers. Yet SBC apparently believes that, despite its present position as the second largest local exchange carrier in the United States and the fifth largest in the world, it “lacks a sufficiently broad customer base to allow SBC to be competitive”⁹⁶ with firms such as “AT&T/Teleport/TCI, MCI/WorldCom/MFS/Brooks Fiber/UUNet, Sprint/France Telecom/Deutsche Telekom and other global competitors” *none of whom presently provide any consequential quantity of local exchange service anywhere in the United States.*

62. It is also evident that the unique advantages that ILECs, such as SBC and Ameritech, derive from their incumbency are not abating any time soon. As demonstrated earlier, competition does not yet exist in the local market. Many factors contribute to the slow start: the absence of effective operations support systems, the need to complete widespread deployment of local number portability, the lack of cost-based network elements, customer inertia, etc. As the FCC has recognized, even after these barriers have been eliminated, and “[a]lthough the 1996 Act put in place a number of mechanisms that dramatically increase the opportunities for competitive entry, the business of telecommunications will still involve substantial barriers to rapid and costless entry and exit that are intrinsic to the economics of the industry.”⁹⁷

96. Kahan, at ¶ 76.

97. *BA/NYNEX Merger Order*, at ¶ 132.

63. Moreover, for competition not only to emerge but to last in the long-run, there must be “committed entry,”⁹⁸ whereby entrants are prepared to make a substantial up-front investment which they are at risk of not being able to recover. “Firms considering entry that requires significant such costs must evaluate the profitability of the entry on the basis of long term participation in the market, because the underlying assets will be committed to the market until they are economically depreciated.”⁹⁹ The ILECs themselves have ubiquitous investment, which is largely depreciated with reliance on a predictable (virtually guaranteed) revenue flow from noncompetitive services.

The new SBC’s economic incentive and ability to exercise market power in the combined home-region market

64. The Applicants repeatedly describe their vision of the benefits of the proposed merger (e.g., the Applicants’ ability to compete more effectively on a national and global level, the array of new products that purportedly would not otherwise be offered as quickly or as comprehensively were the merger not to occur, the anticipated “jump-starting” of local competition, expectations of improved service quality, etc.). SBC and Ameritech also predict that their National/Local Strategy will spur a copycat response in their home region by other ILECs that will thus lead to more active competition in the Ameritech/SBC combined in-region territory.

98. As stated in the 1992 Guidelines, committed entry “is defined as new competition that requires expenditure of significant sunk costs of entry and exit.” *1992 Horizontal Merger Guidelines*, 57 Fed. Reg. 41552, at § 3.0.

99. *Id.*

65. As we will demonstrate, the promised benefits to consumers in the home region and the out-of-region markets are general, highly speculative, and certainly unenforceable. In exchange for the possibility of these speculative benefits — some of which might well occur absent the merger and others of which might not occur at all — consumers of noncompetitive intrastate and interstate telecommunications services in the home region are being expected to subsidize SBC's out-of-region business strategy and to accept the diminution of local competition. A significant issue that the Applicants have glossed over is that by virtue of the proposed merger, the new SBC would possess a strong economic incentive and an unrestrained ability to exercise market power in its newly expanded 13-state home ground.

The new SBC is constrained neither by competition nor by existing price regulation schemes to flow any merger benefits through to customers of its noncompetitive services

66. The Applicants include a passing reference but make absolutely no commitment to lower intrastate and/or interstate prices as a consequence of their merger.¹⁰⁰ In their filing with the FCC, the discussion of price reductions is at best highly theoretical:

Of the merger cost savings, some will go to stockholders. The remainder will likely be passed through to consumers in the form of improved services, lower prices, more rapid introduction and dissemination of new services, and additional options and packages of services as competitive forces require. It would be unusual for a firm not to use some of

100. In their filing to the Illinois Commerce Commission, despite a statutory requirement to share merger cost savings with consumers, the Applicants attempt to sidestep this obligation. Illinois Commerce Commission Docket No. 98-0555, Joint Application of SBC/Ameritech, July 24, 1998, at ¶ 25. The Applicants have not yet submitted testimony in Indiana or in Ohio in support of their proposed merger. A recent article in the *The St. Louis Post Dispatch* quotes an SBC spokesperson as saying, "This isn't about rates...My understanding is that as far as rates go, those are set for us." "Phone merger will make St. Louis area a test market, deal would create nation's largest local phone firm, how rates will be affected is unclear," May 12, 1998.

its cost reductions to expand its markets, so that the sum of the benefits to stockholders and consumers will likely exceed the merging companies' own cost savings. The reason is that one firm's price reductions or quality improvements will tend to force competitors to lower their prices or improve their products as well.¹⁰¹

The premise of the conclusion that these benefits will actually reach consumers is the presence of competition, an eventuality that is in the distant future. Furthermore, the Applicants fail entirely to specify in even approximate terms how they will allocate the merger cost savings between stockholders and consumers, and they are equally silent as to the intended distribution of benefits between consumers in their new home region and consumers in the out-of-region markets.

67. As Table 2, below shows, the Applicants derive the vast majority of the value of their businesses from home region incumbent LEC and adjacent yellow pages operations,¹⁰² and derive the vast majority of their in-region telco revenues from the provision of noncompetitive services to customers in SBC and Ameritech regions. Indeed, the Applicants readily acknowledge that "[a] substantial base of current customers and revenues is necessary to maintain earnings growth and spread risk while following customers into out-of-region local markets."¹⁰³

101. Schmalensee/Taylor, at ¶ 17.

102. Amended Proxy Statement/Prospectus, September 21, 1998, at 29-33.

103. Schmalensee/Taylor, at ¶ 16.

Table 2				
Telco and Directory Segments Comprise the Vast Majority of the Applicants' Value (billions)				
Ameritech Business Segments	Low	High	Computed Average*	Computed Average Value Relative to Total Average Value
Telco	\$33.6	\$38.7	\$36.2	63%
Directory/Publishing	\$5.5	\$6.8	\$6.2	11%
Domestic Cellular	\$4.0	\$4.5	\$4.3	7%
Domestic PCS	\$0.3	\$0.4	\$0.3	1%
Other Assets	\$10.0	\$10.9	\$10.5	18%
Telco and Directory Combined			\$42.3	74%
Total	\$53.4	\$61.3	\$57.3	100%
SBC Business Segments				
Telco	\$52.1	\$60.1	\$56.1	60%
Directory/Publishing	\$8.4	\$10.6	\$9.5	10%
Domestic Cellular	\$10.4	\$11.5	\$11.0	12%
Domestic PCS	\$1.6	\$2.3	\$2.0	2%
Other Assets	\$14.2	\$15.5	\$14.9	16%
Telco and Directory Combined			\$65.6	70%
Total	\$86.7	\$100.0	\$93.4	100%
Source: Amended Proxy Statement/Prospectus, Opinion of Financial Advisors, September 21, 1998, pp. 29-33.				
Note: *The "Computed Average Value" is the simple average of the low and high values appearing in the table as reported by Salomon Smith Barney. Salomon Smith Barney did not opine as to the average value in each business segment.				

68. While either rate of return or price cap regulation governs the Applicants' provision of interstate and intrastate services in the thirteen-state region that the proposed merger

encompasses, neither mode of regulation will simulate competitive results in the post-merger marketplace without further regulatory intervention. Neither the X factor nor the “going-in” revenue requirement established in the price cap jurisdictions contemplated the unprecedented, unforeseen, and substantial synergies resulting from the merger. Similarly, any revenue requirement that state public utility commissions may have established under traditional rate of return regulation does not reflect the significantly lower operating expenses and vastly enhanced revenue stream that the merger will yield. Therefore, under the existing regulatory and marketplace conditions, the new SBC would have the ability to exercise its market power, i.e., to fail to pass through the substantial cost savings to consumers and thus to charge supracompetitive rates in its new home region.

69. The existing interstate price cap regime clearly does not account for the major unforeseen merger activity.¹⁰⁴ The FCC examined productivity-related data for the years up through 1995 in establishing the current X factor at 6.5% in its most recent price cap order, released on May 21, 1997.¹⁰⁵ Five mergers of Tier 1 ILECs have been proposed or completed

104. In its decision that recently approved SBC’s acquisition of SNET, the Connecticut Department of Public Utility Control (“Department”) explicitly recognized the Department’s authority, under the statute that governs SNET’s price cap regulation, to modify the price cap plan to account for the major unforeseen change resulting from SBC’s merger with SNET. Connecticut Docket No. 98-02-20, *Joint Application of SBC Communications Inc. And Southern New England Telecommunications Corporation for Approval of a Change of Control, Decision*, September 2, 1998 (“*Connecticut Merger Decision*”). The *Connecticut Merger Decision* states, “[i]n the opinion of the Department, the SNET/SBC Merger is for purposes of the Alt Reg Plan an unforeseen event. ... Clearly, the proposed restructuring of SNET into separate wholesale (Telco) and retail (SNET America) functions and the proposed Merger constitute unforeseen circumstances, which at the discretion of the Department may trigger a modification of the alternative regulation plan.” *Id.*, at 51-52.

105. *In the Matter of Price Cap Performance Review for Local Exchange Carriers, Access*
(continued...)

since the end point of the FCC's study period used for establishing the current X factor based upon combined ILEC intrastate and interstate operations.¹⁰⁶ Neither interstate nor intrastate X factors reflect the substantial merger synergies that are contemplated by the ILEC mergers that have been completed or that are currently pending.

70. The study period underlying the X factor that now governs the level of ILEC interstate rates necessarily excludes the impact of the unforeseen and substantial synergies resulting from the massive mergers that have been taking place or that are proposed to take place.¹⁰⁷ The predicted outcome of these mergers (predictions that SBC contends have been realized or exceeded in California)¹⁰⁸ would cause real input costs to decline more rapidly (relative to

105. (...continued)
Charge Reform, CC Docket No. 94-1, CC Docket No. 96-262, *Fourth Report and Order in CC Docket No. 94-1 and Second Report and Order in CC Docket No. 96-262*, 12 FCC Rcd 16642 (1997) ("Second Price Cap Performance Review").

106. Bell Atlantic submitted its application to the FCC in support of its proposed merger with NYNEX on July 2, 1996, which the FCC approved on August 14, 1997. SBC's announced its proposed acquisition of Pacific Telesis on April 1, 1996 and consummated the merger on April 1, 1997. SBC's proposed acquisition of SNET was announced on January 5, 1998, and received approval by the Connecticut Department of Public Utility Control on September 2, 1998 (the FCC's review is still pending). SBC's proposed acquisition of Ameritech was announced on May 11, 1998. The most recent proposed merger by large ILECs, that of Bell Atlantic and GTE, was announced on July 28, 1998, and has, as of this date, not been formally submitted to the Commission for its review.

107. The X factors that state public utility commissions have established similarly fail to reflect the significant impact that these mergers have on ILEC productivity.

108. The Applicants state that "[e]xperience shows that SBC's *ex ante* estimates of the benefits of its merger with Pacific Telesis were on target." Gilbert/Harris, at ¶ 4. When addressing the investment community, SBC's Executive Vice President, Marty Kaplan stated that "you can count on more savings will be committed to you for the Pacific merger and we will deliver *at least* the \$2.5-billion in total synergies for this new transaction." Connecticut Docket
(continued...)

economywide price levels) because the mergers reduce the costs of capital purchases and reduce operating expenses through elimination of duplication, scale, and the adoption of best practices, and would cause output to increase (due to the merged companies' adoption of a variety of revenue enhancement techniques). Lower input costs and increased output work to increase Total Factor Productivity (TFP) relative to the historic levels upon which the existing X factor has been based.

71. In its most recent evaluation of the X factor, the FCC recognized but did not explicitly account for the fact that, because ILECs had relatively recently invested substantially in network improvement to enable the provision of new discretionary services, historical demand for these services did not likely capture future (and substantially greater) levels of demand. The FCC concluded that "physical measures of services should produce conservative measures of

108. (...continued)

No. 98-02-20, *SBC/SNET Merger*, SBC revised response to MCI-4, SBC-Ameritech Analyst Conference, Bates page 011969, (emphasis added). Also, although procurement savings in California had been anticipated to be 3%, within only a year after the SBC/Pacific Telesis merger was finalized, SBC reported actual procurement savings of 7%-10%, *more than twice the original projections*. Connecticut Docket No. 98-02-20, *SBC/SNET Merger*, SBC Response to OCC-12; California Public Utilities Commission, 96-05-038, *In the Matter of the Joint Application of Pacific Telesis Group ("Telesis") and SBC Communications Inc. ("SBC") for SBC to Control Pacific Bell*, Decision 97-03-067, March 31, 1997, at 30.

productivity and productivity growth.”¹⁰⁹ As Table 3 shows, the Applicants anticipate substantial growth in revenues from vertical and other optional services.¹¹⁰

Table 3		SBC Anticipates Annual Home-Region Merger Related Synergies of \$2.5-Billion	
Estimated Revenue Growth:	Estimated Synergies ¹ (millions)		
Vertical Features			
Call Waiting, Call Return and Voice Mail	\$230		
Caller ID	81		
Total Estimated Vertical Feature Growth		\$311	
Additional Lines		134	
Directory, Publishing		98	
Data Services		65	
Wireless		50	
Centrex and Other Services		120	
Total Estimated Revenue Growth			\$778
Estimated Cost Savings:			
Support Savings			
Purchasing	\$381		
Information Technology	227		
Marketing, Product Development	85		
Real Estate	54		
Other Support Savings (motor vehicle operations, etc.)	24		
Total Support Savings		\$771	
Telephone Company Operations			
Provisioning and maintenance	\$115		
Switched Operations and Network Engineering	45		
Other Savings			
Telemarketing	10		
Outside Sales	15		
Demand Sales	35		
Collections	10		
Network Administration	17		
Operator Services	22		
Public Payphone Operations	13		
Industry Markets	31		
Total Telephone Operations Savings		\$313	
Administration Consolidation		201	
Other Business Consolidation		146	
Long Distance		300	
Total Estimated Cost Savings			\$1,731
Total Estimated Synergies			\$2,509
Source: Affidavit of Martin A. Kaplan.			
Note:			
¹ These synergy estimates do not include the impact of the National Local Strategy, Affidavit of Martin A. Kaplan, at 17.			

109. The FCC also stated that “[w]e expect that the quantities of vertical services will increase faster than the inputs used to provide those services in the future, because the price cap LECs have only recently deployed the SS7 facilities necessary to provide vertical services widely in their networks.” *Second Price Cap Performance Review*, at ¶ 41.

110. *Description*, at 47.

72. The lower future rates to which the Applicants occasionally allude in their filing hinge critically upon the existence of competitive market forces both in SBC's new home region and in the out-of-region markets that SBC claims it plans to enter. However, as we demonstrated above, such competition does not exist now, nor is it likely to exist in the near future. In the clear absence of such market discipline, the Applicants need not and moreover have absolutely no economic incentive to flow through the cost savings to consumers of noncompetitive intrastate and interstate services in either their home region or in out-of-region markets. Indeed, the Applicants have provided ample evidence of their economic incentive to use the *annual* \$2.5-billion in merger synergies to subsidize their ambitious plans to enter 30 new domestic markets and 14 new international markets within three years because such an ambitious entry strategy within a short time period will require substantial financing. Furthermore, should SBC decide at a later date to discontinue its pursuit of the National/Local Strategy, its overriding economic incentive would be to flow through any remaining synergy benefits to its stockholders. Although a theoretical possibility exists that in the distant future competition could cause SBC to lower rates as a result of its reduced cost and enhanced revenue stream, the possibility is so remote as to be meaningless in the present context. The Applicants stress the importance of sharing risk by merging,¹¹¹ but fail to mention that the primary risk bearers of SBC's scheme to enter out-of-region markets would be consumers in the new enlarged SBC home region, *distinctly not SBC's shareholders*. By contrast, the primary beneficiaries of the new business venture — should it succeed — would be SBC's stockholders.

111. Kahan, at ¶ 81.

73. As we demonstrate in the following discussion, while the Applicants devote much of their filing to the purported benefits inuring as a result of its National/Local Strategy, they fail entirely to dispel the serious negative consequences of their ability and incentive to exercise market power in-region and thereby to cross-subsidize the pursuit of a national footprint and “true national/global status”¹¹² with monies extracted from their base of monopoly customers. This inevitable cross-subsidization of SBC’s National/Local Strategy with in-region monopoly revenues runs directly counter to both the letter and intent of Section 254(k) of the *1996 Act*, which explicitly prohibits ILECs from using “services that are not competitive to subsidize services that are subject to competition.” Moreover, the scope of the cross-subsidization contemplated by the Applicants is so pervasive that it is unlikely that existing cost allocation rules will be effective in preventing it.

Impact of the proposed merger on consumers

74. Home region customers would bear the brunt of the risks posed by the merger and would likely see negligible gain as a result of the merger. As described earlier, consumers in the new SBC’s home region will cross-subsidize SBC’s anticipated entry into out-of-region markets. Table 3 summarizes the components of the \$2.5-billion *annual* synergies that the Applicants predict will occur as a result of the merger, one of which is an additional \$778-million per year resulting from the more successful penetration of services in the Ameritech region.¹¹³ Most of

112. Weller, at ¶ 11.

113. In his description of the anticipated merger synergies, Mr. Kaplan does not provide information about his underlying assumptions about critical variables such as future prices for competitive and noncompetitive services and SBC’s market share expectations in its home region.

these revenues relate to services that can be offered at significant profit because — with revenues largely derived from their noncompetitive services — Ameritech has deployed digital switches, SS7, the excess loop capacity and the capabilities necessary to offer vertical services and additional lines. Because the incremental cost of providing vertical services is negligible, increasing the penetration of these services generates substantial profit, and such profits can be expected to persist precisely because of the lack of competition for the underlying residential/small business dial tone services.

75. Were the home market competitive, market force pressures would force SBC to pass through the substantial cost reductions to consumers and would prevent SBC from generating supracompetitive profits from “discretionary” vertical services that are linked inextricably to the underlying noncompetitive access line. In the absence of such marketplace discipline, SBC can readily divert these excess revenues from its noncompetitive services to cross-subsidize its entry into out-of-region markets. Extracting monies today from consumers in the home region in exchange for a promise to serve consumers in out-of-region markets in the distant future is not in the public interest.¹¹⁴

76. Residential and small business consumers will fund the new SBC’s grand visions, without reaping any significant benefits from the merger.¹¹⁵ The Applicants demonstrate their

114. The Applicants’ representations of the benefits to out-of-region consumers are hardly persuasive. In one instance, the Applicants discuss in entirely illustrative terms the impact of a theoretical rate reduction for an unspecified service(s) at an unspecified time, stating that “a one percent decline in local service rates in the 30 cities where SBC intends to deploy facilities and services would result in annual savings to consumers of roughly \$175-million.” Carlton, at ¶ 11.

115. In describing its vision, SBC claims that it intends to follow its big customers around the
(continued...)

compelling financial incentive to pursue their large business customers: the synergies flowing from the proposed merger would subsidize that pursuit. Providing service to the “mass market” comes across as an afterthought, a token gesture intended presumably to placate regulators. Given SBC’s less than convincing plans to serve residential customers, the ultimate consequence of the proposed merger likely would be to shift funds from consumers in the home region to large businesses in out-of-region markets. Even if SBC someday offers services to the “mass market” in these new regions, this likely will not occur until many years after it pursues the large business customers.

77. The manner in which the Applicants propose to accomplish the staffing of its National/Local Strategy also relies on a direct and impermissible cross-subsidy from noncompetitive services. Whereas SBC portrays its intent to “rely to a significant extent on managers from SBC and Ameritech to staff the 30-city venture”¹¹⁶ as a efficiency made possible by the merger, the real impact is to pirate highly trained personnel who, by the Applicants’ own admission, are difficult (or at least costly) to replicate.¹¹⁷ Moreover, the fact that the Applicants would contemplate diverting their most talented managers away from their in-region local

115. (...continued)
country and around the globe. Description, at 36. SBC’s National/Local Strategy is intended to expand its coverage of the “Fortune 500 Firms’ Telecommunications Expenditures,” (Carlton, Table 1) and to provide “near national” coverage (defined by SBC to mean that 70% of a firm’s estimated telecommunications expenditures are in the supplier’s footprint). Carlton, at ¶ 27.

116. Carlton, at ¶ 32, citing Kahan, at ¶ 78.

117. The fact that the Applicants perceive this raiding of corporate talent as potentially less disruptive with two companies’ managers to draw upon is irrelevant to the issue of cross-subsidization.

telephone businesses to their new, out-of-region venture also demonstrates that they feel little pressure to defend their home region against any serious competitive threat.

Impact of the merger premium on customer service in the new SBC's home region

78. SBC's payment of a \$13-billion premium to acquire Ameritech¹¹⁸ will create substantial pressure to reduce costs and increase revenues in both companies — and particularly in Ameritech's home region. The consolidation of operations, the “reciprocal adoption of best practices,”¹¹⁹ the purchasing power resulting in procurement savings are among the ways that the Applicants indicate that they will reduce costs. Another way to cut costs is to allow service quality to deteriorate. Although the Applicants contend that service quality will increase as a result of the merger¹²⁰ and that therefore the “real winners will be the customers — who will benefit from improved customer service levels,”¹²¹ the economic incentives facing the new SBC would suggest otherwise.

79. The consumers most at risk are those with the fewest (or no) competitive alternatives. All of the data that Ameritech provides relative to service quality in its five-state region are averaged across customer classes and across regions of the state and thus, as measurement tools, cannot reveal any problems with the provision of disparate service quality throughout the

118. Kahan, at ¶ 83.

119. Schmalensee/Taylor, at ¶ 13. SBC asserts that the applicants' skills are “highly complementary, not simply overlapping.” Weller, at ¶ 14.

120. Rivers, at ¶¶ 18-25.

121. *Id.*, at ¶ 25.

region.¹²² Even if SBC achieved acceptable service quality performance *on average*, SBC could still allow service quality to decline in certain regions of the thirteen states or to provide higher service quality to large customers than to small ones.¹²³ In the absence of widespread competition in the local exchange market, a carrier does not have an economic incentive to install residential lines in a timely manner, to address trouble reports for customers in rural areas, or to maintain service quality generally for customers without an opportunity to change suppliers.

80. The Applicants contend that the increased penetration of new and discretionary services will increase consumer surplus.¹²⁴ The increased utilization of existing products will undoubtedly increase consumer surplus, but if SBC acts excessively aggressive in its pursuit of new revenues and engages in inappropriate or deceptive sales practices, the harm to consumers will offset that consumer surplus. The economic incentive confronting SBC, particularly in a post-merger environment when it would seek to demonstrate to the investor community that it can make good on its predictions, is to maximize its sales of profitable services. The interest of consumers is to receive accurate, comprehensive and useful information about new products, and to have consumer information used properly.

122. *Id.*, at Attachment 1.

123. Bell Atlantic raised this concern stating, “[i]n fact, the averaging which is inherent in any system of statewide standards permits wide variation in service quality throughout the different parts of the state.” Connecticut Docket No. 97-06-02, *DPUC Review of the Quality of Service Provided by the New York Telephone Company*, Brief of Bell Atlantic-New York, April 24, 1998.

124. Gilbert/Harris, at ¶ 3.

81. The mere fact that consumer surplus will increase as a consequence of SBC's potential introduction of new services or more aggressive marketing of existing services cannot by itself be considered a "benefit" of the proposed transaction. Economic theory teaches that consumers will engage in purchase transactions when the incremental value they receive exceeds the price that they are required to pay; that difference represents consumer surplus. What is germane to this discussion is thus not the fact that consumer surplus will increase, but that, all other things being equal, it will increase by a lesser amount under monopoly conditions than it would under competitive conditions. As we have previously noted, SBC's ability to price vertical services such as Caller ID at huge multiples of their near-zero incremental cost stems directly from its market power in the underlying residential/small business access line market. These "discretionary" services cannot be purchased from a provider other than the one that supplies the basic dial tone line, and since there is no competition for dial tone, there is no competition for vertical services either. Were actual and effective competition present, vertical services would be priced in pennies, not dollars, and consumer surplus derived from such consumption would be significantly greater.

82. SBC's CEO Edward Whitacre expresses one view of SBC's success in marketing services in California:

We remain on target to achieve all of the synergies associated with the Pacific Telesis merger, particularly revenue growth at Pacific Bell which increased 6.3 percent, driven in large part by our ability to sell vertical services as we continue to share expertise from Southwestern Bell.¹²⁵

125. Gilbert/Harris, at fn. 43, quoting CEO Edward E. Whitacre.

However, increasing consumer surplus is in the public interest only if SBC does not engage in anticompetitive or improper marketing and sales practices.

83. Another view of SBC's success is that in its relentless pursuit of new revenues, SBC may engage in improper marketing practices. According to a report submitted to the commissioners of the CPUC by the CPUC's Office of Ratepayer Advocates ("ORA"), deceptive business practices at SBC/Pacific "are systematic and a great deal of pressure is brought to bear on their service representatives to adhere to the practices."¹²⁶ Among the ORA's allegations are the following:

Pacific employs misleading packages selling techniques in marketing its custom calling or other optional features and aggressively markets these products to *all* customers in *all* contact situations. Pacific names its bundled packages of optional calling features, "The Essentials"; "Basic Service Pack"; and "Basic Saver Plus". These packages add between \$9 and \$20 to a customer's bill but are named and marketed in a manner which may mislead customers into thinking they are part of basic service. This practice violates PU code Section 2896, which requires carriers to provide customers with sufficient information upon which to make "informed" choices among telecommunications services.¹²⁷

Pacific's failure to disclose to new customers that there are two blocking options available (Complete and Selective) to block Caller ID service is deceptive and similarly violates Code Section 2896.¹²⁸

Pacific's service representatives must attempt to change blocking status, try to sell the Basic Saver Pack, the most expensive inside wire repair plan, the local toll calling plans on *all* incoming order center calls. These time consuming sales techniques negatively impact Pacific's ability to timely answer business office calls, to adequately inform

126. Letter from Director Elena Schmid, Office of Ratepayer Advocates, to President Richard Bilas, and Commissioners Conlon, Knight Jr., Duque, and Nepper, dated June 4, 1998, at 2.

127. *Id.*, emphasis in original.

128. *Id.*

customers about service arrangements, service offerings and options, and aspects of emergency and basic telephone service. These practices collectively imperil Pacific's ability to comply with PU Code Section 2896, which also requires carriers to maintain reasonable statewide service quality standards regarding customer service.¹²⁹

84. In another example of anticompetitive and deceptive business practices, Pacific Bell was fined \$1.5-million by the United States District Court for the Northern California District as a punitive royalty payment for "misappropriation of plaintiff's [AT&T's] confidential, computerized long distance billing information."¹³⁰ This judgment, issued on August 26, 1998, found SBC/Pacific using a competitor's database, to which they had access because of its incumbent position in the local exchange market, to compile revenue information for over 350,000 customers with the express aim of attracting high-use customers to its own service.

IV. CLAIMED BENEFITS OF THE MERGER

85. The Applicants identify numerous and diverse benefits that they claim the merger would yield for the public. Among the benefits that the Applicants project are their ability to compete more effectively on a national and global level and to introduce a broader array of products more quickly than could be accomplished by either ILEC individually. They also promise a "jump-starting" of local competition, improved service quality, and a theoretical possibility of rate reductions.

129. *Id.*, emphasis in original.

130. *AT&T Communications, et. al. vs. Pacific Bell, et. al.*, United States District Court for the Northern California District, No. C 96-1691 CRB, *Order*, filed August 26, 1998, at 7.

86. In fact, as discussed above with regard to the risks and harms to the public interest likely to result from the merger, many of the changes predicted by the Applicants are “benefits” only to the Applicants themselves, to be accomplished at the expense both of consumers and competition in general. Some of the benefits for which the Applicants attempt to claim credit could occur without the proposed merger. In other areas, the Applicants fail to substantiate their claims with respect to merger benefits, such as their assertion that a wider variety of new products would be offered to consumers sooner than if the merger were not to occur. In fact, even if there are some arguable benefits to the new SBC’s accomplishment of its grandiose National/Local Strategy (which by no means offset the enormous anticompetitive risks that the National/Local Strategy would create), the Applicants have failed to demonstrate in a convincing manner that they will succeed in fully implementing this hugely ambitious project.

87. The Applicants’ claims with respect to the benefits for residential and small business market are particularly unpersuasive. In fact, the Applicants are openly disparaging of the residential and small business market. As demonstrated earlier, the Applicants’ motivation to expand their market position with large business customers is likely the driving incentive for the National/Local Strategy. There is also no reason to expect that the Applicants will safeguard the quality of their service to smaller, home-region consumers while they pursue large national customers. For example, while the Applicants claim that the mutual adoption of best practices will result in a higher level of service quality, the economic incentives facing the Applicants would simply serve to exacerbate the potential for the delivery of disparate service quality throughout the home region, where the level of quality provided would reflect SBC’s anticipated level of competition.

88. The Applicants' also claim as a benefit to competition their theory that the National/Local Strategy will motivate competitors to "retaliate" or engage in "reciprocal" entry into the combined SBC/Ameritech operating region.¹³¹ This theory is wholly speculative and unsupported. It also presumes that other ILECs will merge to form sufficiently large conglomerates to be able to finance the same kinds of massive scale out-of-region entry that SBC claims to be necessary (another step toward further diminishing the number of significant competitors in the local market).

89. The Applicants also tout the efficiencies from consolidation of research and development efforts. However, the merging of two multi-billion dollar companies will result in a loss of innovation precisely at the time when the telecommunications industry is undergoing substantial change and customers are seeking diverse services. As recognized by the FCC, research and development is a way that "firms engage in non-price competition."¹³² The Applicants' contention that the two firms do not compete through research and development efforts appears to rely upon the existence of Technology Resources, Inc. (TRI), which conducts research and development on SBC's behalf, whereas Ameritech apparently does not have access to the same type of research arm.¹³³ However, even if Ameritech does not have access to its own "mini-Bellcore," Ameritech presumably has some resources devoted to new product development. Ameritech and SBC are each rolling out a DSL service, which means that Ameritech must somehow have figured out how to test and develop engineering specifications

131. Carlton, at ¶ 10; Schmalensee/Taylor, at ¶¶ 7, 16.

132. *BA/NYNEX Merger Order*, at ¶ 171.

133. Schmalensee/Taylor, at ¶ 20.

for this new product.¹³⁴ It is inconceivable that Ameritech does not possess capabilities to develop new products.¹³⁵

90. Furthermore, access to TRI does not create an unmitigated benefit for consumers because its presence complicates regulators' responsibilities with regard to the allocation of TRI costs between noncompetitive and competitive services. The relationship between TRI and Ameritech is similar to the historical relationship between Bellcore and Bell operating companies. To the extent that Ameritech's and SBC's funding of TRI projects are assigned to regulated operations, there is a risk that customers of regulated services would be forced to cross-subsidize the development of unregulated and/or competitive services.

91. In sum, as we have shown, there is a distinctly negative side to many of the changes that the Applicants claim as benefits. Moreover, whatever synergies and cost savings the Applicants predict from their merger should be totally discounted, given that the Applicants fail to show how consumers would actually share in these savings.

134. Gilbert/Harris, at ¶ 38.

135. Indeed, if Ameritech's capabilities in this regard are as minimal as the Applicants now contend, that would be all the more reason to expect SBC to take a *de novo* run at its midwest neighbor's core market.

V. SUMMARY AND RECOMMENDATIONS

The proposed merger is not in the public interest

92. As we have demonstrated, the proposed merger would severely diminish prospects for local competition and would result in negligible benefits, if any, for the public. The merger would require customers of noncompetitive services in SBC's proposed new home region to subsidize SBC's entry into out-of-region markets, further solidify SBC's market power during a time of potential transition in the telecommunications industry, minimize opportunities for innovation in telecommunications services, and have a chilling effect on the interest of other potential entrants into the local market throughout the country. The reduction in the number of large LECs with an unparalleled, century-long track record in providing local exchange service would jeopardize the FCC's ability to regulate effectively because it would shrink the number of companies against which the FCC can benchmark performance and would lessen the possibility of one or more ILECs "breaking ranks" with the other ILECs.

93. SBC is a potential competitor in Ameritech's region and Ameritech is a potential competitor in SBC's region. SBC and Ameritech are also potential competitors in markets outside the SBC/Ameritech region. Presently, no new entrant has made consequential inroads into the ILEC market for local exchange and access services in any of these regions, and therefore, the loss of potential competitors can only serve to lessen the prospects for the development of a competitive local marketplace.

94. SBC's post-merger actions in California suggest that, in seeking to recover the premium associated with its acquisition of Pacific Telesis, SBC has engaged in deceptive sales practices. Also, the Public Utilities Commission of Texas and the Staff of the California Public Utilities Commission have commented on SBC's recalcitrance in opening up its local markets to competition. The proposed merger would detract from SBC's and Ameritech's progress toward facilitating local competition because it would shift managerial and financial resources from the home region to the new out-of-region markets and create additional economic incentive for SBC to protect its monopoly position in its home market.

The Commission cannot be confident that any conditions it might impose will be sufficient to elevate the public interest benefits of this merger to a level that offsets the risks and harms to the public interest

95. In balancing the concerns raised by the merger of Bell Atlantic and NYNEX with the potential efficiencies asserted by these two companies, the FCC determined that, absent the *ex parte* filings made by these two companies in July and August 1997, the Commission would have been compelled to conclude that these two applicants had failed to demonstrate that the transaction was in the public interest.¹³⁶ In their *ex parte* filings, Bell Atlantic and NYNEX identified specific commitments that they would undertake as conditions of the FCC's approval of their merger. Based upon its analysis of these conditions and their incorporation in the Commission's order, the FCC determined that the merger of Bell Atlantic and NYNEX could be found to be in the public interest.¹³⁷

136. *BA/NYNEX Merger Order*, at ¶¶ 177-178.

137. *Id.*, at ¶ 178.

96. The question the Commission might reasonably ask, in connection with its present merger review, is whether any similar conditions would be sufficient to overcome the serious concerns that have been identified with the SBC-Ameritech merger. Among the nine conditions established by the Commission (scheduled to sunset in August 2001)¹³⁸ include commitments by Bell Atlantic to:

- Submit regular Performance Monitoring Reports (PMR) detailing the company's performance in the ordering, provisioning, and maintenance of resold services, unbundled elements, and interconnection trunks;
- Accept specifications for the establishment and testing of uniform interfaces for carriers to gain access to BA/NYNEX operations support systems;
- Provide alternatives that would reduce competitors' up-front costs (by incorporating them into recurring charges or by allowing non-recurring charges to be paid over a number of months); and
- Ensure, when it proposes rates for interconnection, transport and termination, or unbundled network elements, that such rates are based on the forward-looking, economic cost to provide those items.¹³⁹

These conditions, which were integral to the FCC's approval of the merger between Bell Atlantic and NYNEX, were intended to eliminate entry barriers and encourage the robust development of competition in the merged Bell Atlantic-NYNEX region. Unfortunately, in the fourteen months since the merger, there has been virtually no indication that competition is any more robust or developed in Bell Atlantic/NYNEX states than it is anywhere else in the country. Indeed, both the Commission and potential competitors have expressed concern with the manner in which Bell Atlantic has complied with certain aspects of the conditions. The Commission has issued

138. *Id.*, at ¶ 193.

139. *BA/NYNEX Merger Order*, at Appendix 3.

two letters regarding the Performance Monitoring Reports submitted by Bell Atlantic, expressing in the second one that it was “concerned ... about the error rates in the submissions Bell Atlantic has filed to date.”¹⁴⁰ MCI has also filed a complaint with the Commission, alleging “numerous instances over the past seven months where Bell Atlantic has completely disregarded the critical market-opening provisions” in the order.¹⁴¹

97. Furthermore, although we have not undertaken a detailed analysis of the data that Bell Atlantic has submitted in its PMRs, an initial evaluation raises concerns that the Commission’s conditions have not encouraged Bell Atlantic to open its local markets. These concerns focus on the pre-ordering and ordering functions that are especially critical for potential competitors. For example, in the first ten months for which data are available, Bell Atlantic has apparently failed to establish operations support systems needed to allow the automated flow-through of orders for POTS UNE loops.¹⁴² While the flow-through rate for resold loop orders is substantially higher in some Bell Atlantic states, it is by no means consistently so. Indeed, Bell Atlantic’s performance has been substantially better in the former NYNEX territory than in the former Bell Atlantic

140. Letters from Kenneth P. Moran, Chief, Accounting Safeguards Division, to Ms. Patricia E. Koch, Assistant Vice President, Government Relations - FCC, DA 98-1228 (rel. June 24, 1998); DA 98-711 (rel. April 13, 1998).

141. “Bell Atlantic Continues to Violate Conditions of its Merger Agreement; MCI Calls on FCC to Impose Sanctions,” MCI Press Release, March 23, 1998 (www.mci.com/aboutyou/interests/publicpol/press/980323.shtml).

142. With a single exception (in September of 1997, in Massachusetts), in every Bell Atlantic state for each month since it began reporting, BA has reported 0% flow-through for POTS UNEs, or else that it is unable to provide public data because two (or fewer) CLECs placed orders. *Bell Atlantic Performance Monitoring Report*, data file downloaded from FCC, www.fcc.gov/ccb/Mergers/Bell_Atantic_NYNEX/ (updated August 20, 1998), at 7.02.

territory.¹⁴³ Under a concerted effort to improve, one would expect a substantial convergence between the two halves, as “best practices” were adopted and operations support systems were optimized between the two areas. Such optimization has apparently not materialized in this case. Finally, there exists a substantial and consistent disparity between the time required to obtain a Customer Service Record for retail customers as compared with CLECs in Bell Atlantic-North.¹⁴⁴ There is no reason that the simplest of database queries should require any more time for competitors than for Bell Atlantic itself, and no reason that the time required should be *increasing* over time. Even if Bell Atlantic’s UNE and resale performance seems to show some improvement in other areas (provisioning and maintenance), these examples indicate that, despite the conditions, entry barriers remain in place precisely where they are most critical.

98. In the *BA/NYNEX Merger Order*, the FCC provided ample notice that imposing conditions would not necessarily remedy concerns for all mergers. The FCC warned future merging companies that:

It is quite plausible that there will be some mergers of actual or precluded competitors that will present such significant potential harms to competition that there will be no means to conclude that the transaction serves the public interest, convenience and necessity. The elimination of an even more significant market participant than Bell Atlantic would raise even greater competitive concerns.¹⁴⁵

143. In June, 1998 (the most recent month for which data is available), in BA-North states the flow-through rate for resale orders ranged between 14% and 60%, while in BA-South it ranged between 0% and 0.6%. *Id.*, at 7.01.

144. Over the ten months of data collected, the average response time for retail CSR requests has been 0.131 seconds, while for CLECs the same operation required 3.647 seconds. Comparable retail data is not available for Bell Atlantic-South states. *Id.*, at 1.01, 1.11.

145. *Bell Atlantic/NYNEX Merger Order*, at ¶ 179.

SBC today is a more formidable market participant than Bell Atlantic was before it merged with NYNEX. SBC's 1997 revenues were \$30-billion and it serves more than 33-million access lines.¹⁴⁶ By comparison, Bell Atlantic's 1996 (i.e., pre-merger) revenues were \$13.1-billion¹⁴⁷ and it served approximately 20.6-million access lines.¹⁴⁸

99. An equally if not more important factor (than the relative sizes of the pre-merger ILECs) that distinguishes SBC's proposed acquisition of Ameritech from Bell Atlantic's merger with NYNEX is that the harm to the public interest posed by the SBC/Ameritech merger is far greater than the Bell Atlantic/NYNEX merger. SBC does not disguise its intent to exploit its virtual monopoly control of its proposed enlarged home region to finance its pursuit of out-of-region markets. There are simply no conditions that can remedy the anticompetitive concerns raised by this blatant cross-subsidization, and by the other concerns discussed earlier. While the conditions that are integral to the FCC's approval of the Bell Atlantic/NYNEX merger are undeniably in the public interest (e.g., improvements to OSS interfaces, alternative payment schemes for nonrecurring charges, and carrier-to-carrier testing capabilities, etc.), and while these conditions may well help to lower the barriers to entry in the local market, they will not in and of themselves ensure that local competition develops. The harm to the public caused by the loss of a significant precluded competitor combined with the other risks discussed above outweigh the public interest benefits of imposing conditions on the proposed merger.

146. *Preliminary Statistics of Common Carriers*, Table 1.1 (1997).

147. *Statistics of Common Carriers*, 1996, Table 1.1.

148. *Preliminary Statistics of Common Carriers*, Table 1.1 (1997).

100. Furthermore, approval of the merger — an event with far-reaching consequences for the structure of the local telecommunications market — would be an irreversible decision. Even if the FCC were to condition its approval of the SBC/Ameritech merger upon certain commitments (presumably intended to offset the harm to the public interest), should SBC, after receiving the regulatory go-ahead to consummate the proposed transaction, fail to meet the commitments upon which the FCC conditioned its approval of the merger, there is little that the FCC can do to force compliance. SBC's track record shows a predilection for litigation and resistance and, thus, protracted regulatory efforts would likely be required to enforce compliance with any conditions made integral to an approval of the merger. This is an unacceptable result and one that would absolutely fail to protect the public interest.

101. For all of the foregoing reasons, the Commission should deny SBC's and Ameritech's request for approval to transfer control of FCC authorizations held by subsidiaries of Ameritech to SBC.

DECLARATION

The foregoing statements are true and correct to the best of our knowledge, information and belief.

Susan M. Baldwin

Susan M. Baldwin

Helen E. Golding

Helen E. Golding

Boston, Massachusetts, October 13, 1998

SWORN TO AND SUBSCRIBED

before me on this, the 13th day of
October, 1998.

Ellen B. Wasserman

NOTARY PUBLIC

My Commission expires:
My Commission Expires Apr. 1, 1999



Attachments

Attachment 1

Statement of Qualifications

SUSAN M. BALDWIN

Susan M. Baldwin, a Senior Vice President at ETI, has been actively involved in public policy for twenty years, fourteen of which have been in telecommunications policy and regulation. Ms. Baldwin received her Master of Public Policy from Harvard University's John F. Kennedy School of Government and her Bachelor of Arts degree in Mathematics and English from Wellesley College.

Ms. Baldwin has far-reaching experience in the public and consulting sectors in the economics and public policy of the telecommunications industry. Ms. Baldwin has testified before the Colorado Public Utilities Commission, Connecticut Department of Public Utility Control, Idaho Public Utilities Commission, Massachusetts Department of Telecommunications and Energy, Nevada Public Service Commission, New Jersey Board of Regulatory Commissioners, Public Utilities Commission of Ohio, Rhode Island Public Utilities Commission, Tennessee Public Service Commission, and Vermont Public Service Board. She has also participated extensively in projects in California, Delaware, the District of Columbia, Hawaii, Illinois, Indiana, New York, Pennsylvania, Washington, and Canada on behalf of consumer advocates, public utility commissions, and competitive local exchange carriers. Ms. Baldwin has authored numerous comments submitted to the Federal Communications Commission on topics including price cap regulation, colocation, and universal service. Among the various subject matters she has examined for state and federal regulatory proceedings are applications for mergers by regional Bell Holding Companies, Section 271 applications, cost studies (embedded and forward-looking), local competition, numbering issues, ISDN, network modernization, depreciation, universal service, rate design, access charges, and alternative regulation.

Among Ms. Baldwin's numerous projects have been the responsibility of advising the Vermont Public Service Board in matters relating to a comprehensive investigation of NYNEX's revenue requirement and proposed alternative regulation plan. She participated in all phases of the docket, encompassing review of testimony, issuance of discovery, cross-examination of witnesses, drafting of memoranda, drafting of decisions, and review of compliance filings. Another year-long project managed by Ms. Baldwin was the in-depth analysis and evaluation of the cost proxy models submitted in the FCC's universal service proceeding. On behalf of the staff of the Idaho Public Utilities Commission, Ms. Baldwin testified on the proper allocation of US West's costs between regulated and non-regulated services. Ms. Baldwin co-managed a project to assist the Office of Ratepayer Advocates (ORA) analyze the California Public Utilities Commission's investigation of the merger of Pacific Telesis Group and SBC Communications, and co-sponsored testimony on behalf of the Connecticut Office of Consumer Counsel on the impact of SBC's acquisition of SNET on consumers. On behalf of AT&T Communications of California, Inc. and MCI Telecommunications Corporation, Ms. Baldwin conducted a comprehensive analysis of the non-recurring cost studies submitted by incumbent local exchange carriers in California. On behalf of the Ad Hoc Telecommunications Users Committee, Ms. Baldwin participated in the Numbering Resource Optimization Group (NRO-WG), and in that capacity, served as a co-chair of the Analysis Task Force of the NRO-WG.

Previously, as the Director of ETI's Publications Group, Ms. Baldwin was responsible for the development and marketing of all regular and special publications. In addition to supervising the management of *Trends in Communications Policy*, the *Intercity Rates Handbook*, and the state *Telephone Rate Reports*, Ms. Baldwin oversaw and contributed to the compilation of ETI's many special reports and tracking services for individual clients.

Ms. Baldwin served four years as the Director of the Telecommunications Division for the Massachusetts Department of Public Utilities (the predecessor to the Massachusetts Department of Telecommunications and Energy), where she directed a staff of nine, and acted in a direct advisory capacity to the DPU Commissioners. (The Massachusetts DTE maintains a non-separated staff, which directly interacts with the Commission rather than taking an advocacy role of its own in proceedings.) Ms. Baldwin advised and drafted decisions for the Commission in numerous proceedings at the DPU including investigations of a comprehensive restructuring of New England Telephone Company's rates, an audit of NET's transactions with its NYNEX affiliates, colocation, ISDN, Caller ID, 900-type services, AT&T's requests for a change in regulatory treatment, pay-telephone and alternative operator services, increased accessibility to the network by disabled persons, conduit rates charged by NET to cable companies, and quality of service.

Under her supervision, staff analyzed all telecommunications matters relating to the regulation of the \$1.7-billion telecommunications industry in Massachusetts, including the review of all telecommunications tariff filings; petitions; cost, revenue and quality of service data; and certification applications. As a member of the Telecommunications Staff Committees of the New England Conference of Public Utility Commissioners (NECPUC) and National Association of Regulatory Utility Commissioners (NARUC), she contributed to the development of telecommunications on regional and national levels.

Ms. Baldwin has worked with local, state, and federal officials on energy, environmental, budget, welfare, and telecommunications issues. As a policy analyst for the New England Regional Commission (NERCOM), Massachusetts Department of Public Welfare (DPW), and Massachusetts Office of Energy Resources (MOER), she acquired extensive experience working with governors' offices, state legislatures, congressional offices, and industry and advocacy groups. As an energy analyst for NERCOM, Ms. Baldwin coordinated New England's first regional seminar on low level radioactive waste, analyzed federal and state energy policies, and wrote several reports on regional energy issues. As a budget analyst for the DPW, she forecast expenditures, developed low income policy, negotiated contracts, prepared and defended budget requests, and monitored expenditures of over \$100 million. While working with MOER, Ms. Baldwin conducted a statewide survey of the solar industry and analyzed federal solar legislation.

While attending the Kennedy School of Government, Ms. Baldwin served as a teaching assistant for a graduate course in microeconomics and as a research assistant for the school's Energy and Environmental Policy Center, and at Wellesley College was a Rhodes Scholar nominee. She has also studied in Ghent, Belgium.

Ms. Baldwin has published articles on telecommunications and energy policy in trade journals and has spoken at industry associations and conferences. These have included the following:

Reports:

“The Use of Cost Proxy Models to Make Implicit Support Explicit, Assessing the BCPM and the Hatfield Model 3.1” (with Dr. Lee L. Selwyn). Prepared for the National Cable Television Association, submitted in FCC CC Docket No. 96-45, March 1997.

“The Use of Forward-Looking Economic Cost Proxy Models” (with Dr. Lee L. Selwyn). Prepared for the National Cable Television Association, submitted in FCC Docket No. CCB/CPB 97-2, February 1997.

“Continuing Evaluation of Cost Proxy Models for Sizing the Universal Service Fund, Analysis of the Similarities and Differences between the Hatfield Model and the BCM2” (with Dr. Lee L. Selwyn). Prepared for the National Cable Television Association, submitted in FCC CC Docket No. 96-45, October 1996.

“Converging on a Cost Proxy Model for Primary Line Basic Residential Service, A Blueprint for Designing a Competitively Neutral Universal Service Fund” (with Dr. Lee L. Selwyn). Prepared for the National Cable Television Association, submitted in FCC CC Docket No. 96-45, August 1996.

“The BCM Debate, A Further Discussion” (with Dr. Lee L. Selwyn and Helen E. Golding). Prepared for the National Cable Television Association, submitted in FCC CC Docket No. 96-45, May 1996.

“The Cost of Universal Service, A Critical Assessment of the Benchmark Cost Model” (with Dr. Lee L. Selwyn). Prepared for the National Cable Television Association, submitted in FCC CC Docket No. 96-45, April 1996.

“Funding Universal Service: Maximizing Penetration and Efficiency in a Competitive Local Service Environment” (with Dr. Lee L. Selwyn). Prepared for Time Warner Communications, Inc., October 1995.

“A Balanced Telecommunications Infrastructure Plan for New York State” (with Dr. Lee L. Selwyn). Prepared for the New York User Parties, December 4, 1992.

“A Roadmap to the Information Age: Defining a Rational Telecommunications Plan for Connecticut” (with Dr. Lee L. Selwyn, Susan M. Gately, JoAnn S. Hanson, David N. Townsend, and Scott C. Lundquist). Prepared for the Connecticut Office of Consumer Counsel, October 30, 1992.

“Analysis of Local Exchange Carrier April 1988 Bypass Data Submissions” (with William P. Montgomery and Dr. Lee L. Selwyn). Prepared for the National Association of State Utility Consumer Advocates, August 1988.

“Strategic Planning for Corporate Telecommunications in the Post-Divestiture Era: A Five Year View” (with Dr. Lee L. Selwyn, William P. Montgomery, and David N. Townsend). Report to the International Communications Association, December 1986.

“Competitive Pricing Analysis of Interstate Private Line Services.” Prepared for the National Telecommunications Network, June 1986.

“Analysis of Diamond State Telephone Private Line Pricing Movements: 1980-1990.” Prepared for Network Strategies, Inc., April 1985.

“Analysis of New York Telephone Private Line Pricing Movements: 1980-1990.” Prepared for Network Strategies, Inc., February 1985.

Publications/Presentations:

“FCC En Banc Hearing — Universal Service Methodology,” June 8, 1998, panelist.

“Universal Service: Real World Applications,” 1997 NASUCA Mid-Year Meeting, June 9, 1997.

“Modeling operating and support expenses” and “Modeling capital expenses,” panelist for Federal-State Joint Board on Universal Service Staff Workshops on Proxy Cost Models, January 14-15, 1997, CC Docket 96-45.

“Interpreting the Telecommunications Act of 1996 Mandate for the Deployment of Advanced Telecommunications Services in a Fiscally Responsible and Fully Informed Manner” (with Helen E. Golding), *Proceedings of the Tenth NARUC Biennial Regulatory Information Conference*, Volume 3, September 11-13, 1996.

“Making Adjustments to the BCM2.” Presentation to the Staff of the Federal-State Joint Board on Universal Service, September 16, 1996.

“Converging on a Model: An Examination of Updated Benchmark Cost Models and their Use in Support of Universal Service Funding.” Presentation to the NARUC Summer Committee Meetings, July 22, 1996.

“The Phone Wars and How to Win Them” (with Helen E. Golding). *Planning*, July 1996 (Volume 62, Number 7).

“ETI’s Corrections to and Sensitivity Analyses of the Benchmark Cost Model.” Presentation to the Staff of the Federal-State Joint Board on Universal Service, May 30, 1996.

“Redefining Universal Service.” Presentation at the Telecommunications Reports conference on “Redefining Universal Service for a Future Competitive Environment,” January 18, 1996.

“New Frontiers in Regulation.” Presentation to the New England Women Economists Association, December 12, 1995.

“Local Cable and Telco Markets.” Presentation at the New England Conference of Public Utilities Commissioners 46th Annual Symposium, June 29, 1993.

“Relationship of Depreciation to State Infrastructure Modernization.” Presentation at the *Telecommunications Reports* conference on “Telecommunications Depreciation,” May 6, 1993.

“Crafting a Rational Path to the Information Age.” Presentation at the State of New Hampshire’s conference on the “Twenty-First Century Telecommunications Infrastructure,” April 1993.

“The Political Economics of ISDN,” presentation at the John F. Kennedy School of Government seminar on “Getting from Here to There: Building an Information Infrastructure in Massachusetts,” March 1993.

“ISDN Rate-Setting in Massachusetts.” *Business Communications Review*, June 1992 (Volume 22, No. 6).

“The New Competitive Landscape: Collocation in Massachusetts.” Presentation at TeleStrategies Conference on Local Exchange Competition, November 1991.

“Telecommunications Policy Developments in Massachusetts.” Presentations to the Boston Area Telecommunications Association, October 1989; March 1990; November 1990; June 1992. Presentation to the New England Telecommunications Association, March 1990.

“Tariff Data is Critical to Network Management.” *Telecommunications Products and Technology*, May 1988 (Volume 6, No. 5).

“How to Capitalize on the New Tariffs.” Presentation at Communications Managers Association conference, 1988.

“Auction Methods for the Strategic Petroleum Reserve” (With Steven Kelman and Richard Innes). Prepared for Harvard University Energy Security Program, July 1983.

“How Two New England Cities Got a \$100 Million Waste-to-Energy Project” (with Diane Schwartz). *Planning*, March 1983 (Volume 49, Number 3).

“Evaluation of Economic Development and Energy Program in Lawrence, Massachusetts.” (with Richard Innes). Prepared for U.S. Department of Energy, August, 1982.

“Energy Efficiency in New England’s Rental Housing.” New England Regional Commission, 1981.

“Low Level Radioactive Waste Management in New England.” New England Regional Commission, 1981.

“The Realtor’s Guide to Residential Energy Efficiency.” Prepared for the U.S. Department of Energy and the National Association of Realtors, 1980.

Attachment 2

Statement of Qualifications

HELEN E. GOLDING

Helen E. Golding, Vice President in the Regulatory Policy Group has worked for more than twenty years in the field of communications regulation and public policy. In the public sector, she has worked at both state and federal regulatory agencies; she also has extensive private sector experience in the areas of telecommunications law, strategic planning, and regulatory policy. In addition to her telecommunications industry expertise, Ms. Golding has considerable experience in the public policy and law of the energy industry.

Since the passage of the landmark *Telecommunications Act of 1996*, Ms. Golding has directed work at ETI to evaluate the progress of various Bell operating companies (BOCs) toward meeting the standards of Section 271 of the *Act* (which specifies the conditions for BOC re-entry into the in-region, interLATA services market), as well as ETI's study of the progress toward implementing local competition in the absence of the Section 271 incentive, in the case of The Southern New England Telephone Company. She also directed work analyzing the propriety of Ameritech's application for authorization by the Illinois and Michigan public utilities commissions to provide local exchange service through the same separate subsidiary that Ameritech would employ (subject to FCC approval) to provide interLATA long distance services. Along with Dr. Selwyn, Ms. Golding co-authored evidence in the Canadian Radio and Telecommunications Commission's investigation into forbearance from regulation of toll services provided by the Stentor companies, Canada's equivalent of the pre-divestiture Bell System.

Recently, Ms. Golding has done extensive work on behalf of the Connecticut Office of Consumer Counsel in the Department of Public Utility Control's investigation of SBC's proposed acquisition of SNET. She also co-directed the work done on behalf of the Office of Utility Consumer Counselor in the Indiana Utility Regulatory Commission's investigation of a new alternative regulation plan for Ameritech Indiana and on behalf of the Office of Consumer Counsel in the Colorado Public Utilities Commission's review of a price regulation scheme proposed by US West. Ms. Golding was project manager and a primary contributor in ETI's analysis and preparation of testimony on behalf of the Office of Public Advocate in the Maine Public Utilities Commission's investigation of the proposed NYNEX-Bell Atlantic merger. She also contributed significantly to numerous submissions to the Federal-State Joint Board and FCC in CC Docket 96-45 (Universal Service) and to the New Jersey Board of Public Utilities's docket on state universal service funding.

Prior to the passage of the *Telecommunications Act*, Ms. Golding managed projects on alternative regulation and competition in the states of Maine and Connecticut. She also had extensive involvement in preparing testimony and comments in the alternative regulation proceedings in Ohio and Massachusetts, in competition dockets in New York, New Jersey, Massachusetts and Hawaii, and in state proceedings focusing on universal service in Florida and Tennessee. Ms. Golding also participated in the preparation of detailed filings submitted in the FCC's LEC Price Cap Review proceeding.

Ms. Golding was Assistant General Counsel of the Massachusetts Department of Public Utilities from November 1988 to September 1992. Ms. Golding managed a staff of hearing officers, who conducted adjudicatory and rulemaking proceedings for all regulated utilities. Her position required case management and policy coordination with the Department's numerous technical divisions (organized by industry sector: telecommunications, electric, gas, water, and transportation). Ms. Golding also served as the Commission's chief legal advisor on matters that spanned the Department's broad utility jurisdiction. In addition to overseeing numerous rate cases for all utilities, these proceedings included the tariffing of new services, design of conservation and load management programs, incentive and competitive rates, licensing, financing, siting, and utility management practices.

Immediately prior to joining ETI, Ms. Golding was a member of the Regulatory Practice Group at Rubin and Rudman, a mid-sized Boston law firm, where she specialized in communications, energy, and municipal law, for clients that included communications and cable companies, municipal electric companies, independent power producers, and public authorities.

Prior to becoming Assistant General Counsel at the DPU, Ms. Golding was Regulatory Counsel and Manager of Telecommunications Public Policy for Honeywell Inc., providing legal and strategic planning advice concerning rate and regulatory developments affecting the company as a large user of telecommunications service and as a computer manufacturer. In that position, she also provided counsel on tariff and regulatory matters to the company's alarm and customer premises equipment businesses.

Ms. Golding also worked at the Federal Communications Commission, as a General Attorney in the Common Carrier Bureau, Tariff Division, where she was responsible for tariff review and rulemaking proceedings for domestic and international telecommunications services.

Ms. Golding is a graduate of Boston University School of Law (J.D., 1977) and Bryn Mawr College (A.B. *cum laude*, 1974).

Reports:

"The Connecticut Experience with Telecommunications Competition," (with Dr. Lee L. Selwyn, and Susan M. Gately), February 1998.

"Report on The Southern New England Telephone Company," (prepared with Cablevision Systems Corporation, Patricia D. Kravtin, *et al.*), July 1997.

"The BCM Debate, A Further Discussion" (with Dr. Lee L. Selwyn). Prepared for the National Cable Television Association, submitted in FCC CC Docket No. 96-45, May 1996.

Canadian Radio and Telecommunications Commission, Telecom Public Notice CRTC 96-26, Evidence on Behalf of AT&T Canada, Ltd. *et al.*, (with Dr. Lee L. Selwyn), November 22, 1996.

Publications and presentations:

Overview of current issues in telecommunications law, addressed to the Boston Bar Association, Annual Symposium on Information and Telecommunications Law, February 1998.

Proceedings of the Tenth NARUC Biennial Regulatory Information Conference, Vol. 3, Telecommunications, *Interpreting the Telecommunications Act of 1996 Mandate for the Deployment of Advanced Telecommunications Services in a Fiscally Responsible and Fully Informed Manner*, (with Susan M. Baldwin), September 1996.

"*The Phone Wars and How to Win Them*," (with Susan M. Baldwin), *Planning*, Vol. 62, No. 7 (July 1996).