

ORIGINAL

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

In the Matter of)
Applications for Consent)
to the Transfer of Control of Licenses)
Section 214 Authorizations from)
AMERITECH CORPORATION,)
Transferor)
to)
SBC COMMUNICATIONS INC.,)
Transferee)

CC Docket 98-141

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COMMENTS OF
HYPERION TELECOMMUNICATIONS, INC.
IN OPPOSITION TO THE TRANSFER OF CONTROL

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**COMMENTS OF
HYPERION TELECOMMUNICATIONS, INC.
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Hyperion Telecommunications, Inc. ("Hyperion"), by undersigned counsel, hereby submits its Comments in opposition to the proposed merger of SBC Communications Inc. ("SBC") and Ameritech Corporation ("Ameritech"). Hyperion is a diversified telecommunications company whose affiliates provide facilities-based local exchange service. Hyperion operates twenty-two competitive local exchange networks in twelve states (Arkansas, Florida, Kansas, Kentucky, Louisiana, Mississippi, New Jersey, New York, Pennsylvania, Tennessee, Vermont, and Virginia). These networks currently serve forty-six cities with approximately 5,363 miles of fiber optic cable. Within SBC's and Ameritech's regions, Hyperion affiliates are certificated local exchange carriers and have approved interconnection agreements with SBC in Arkansas and Kansas. Hyperion's Arkansas affiliate is operational and competing with SBC in Little Rock. Hyperion affiliates have also recently initiated interconnection negotiations with SBC in Texas, and with Ameritech in Indiana and Ohio. Hyperion currently exchanges local traffic pursuant to an Indiana Commission -

approved traffic exchange agreement between its Kentucky affiliate in Louisville and Ameritech in the southern Indiana local calling area of Louisville, Kentucky.

Introduction and Summary

This merger, in combination with the proposed Bell Atlantic-GTE merger, is immensely significant. The two mergers will irrevocably alter the future of the local exchange market in this country, bringing a degree of concentration that has not been seen since the break-up of the old AT&T. SBC already controls over 33 million access lines.^{1/} After the merger, it would control some 54 million access lines, approximately one-third of the access lines in the country.^{2/} Bell Atlantic has nearly 40 million access lines.^{3/} After its merger with GTE, the combined company will have 63 million access lines, over one-third of the access lines in the country.^{4/} SBC-Ameritech and Bell Atlantic-GTE together will control some 117 million access lines, over 70% of the access lines in the country. Only the most compelling public benefits could justify such an extreme concentration of economic power. In fact, the applicants' case of public benefits is weak; and balanced against it are grave dangers to competition.

^{1/} SBC Communications, Inc., Form 10-K filed March 3, 1998, "Business Operations."

^{2/} Ameritech has 20.5 million access lines. Ameritech Corp., Form 10-K filed March 13, 1998, at 2. It has been reported that the combined SBC-Ameritech would control half the nation's business lines. *European Regulators Signal Clear Path for SBC-Ameritech Deal*, Dow Jones Online News (July 23, 1998).

^{3/} See Bell Atlantic Investor Information, <http://www.bell-atl.com/invest/profile/telecom.htm> (visited Oct. 7, 1998).

^{4/} "Bell Atlantic and GTE Agree to Merge," News Release, July 28, 1998, <http://www.ba.com/nr/1998/Jul/1998072800.1.html> (visited Oct. 7, 1998)

The asserted public benefit of the merger lies in the claim that the combined companies will bring serious competition for the first time to the local exchange market, by competing in each other's home region as well as in the home regions of the other incumbent RBOCs. It is asserted that SBC-Ameritech will enter the home region of Bell Atlantic-GTE, which will hypothetically retaliate by entering SBC-Ameritech's home region; that both will enter the home regions of the remaining RBOCs; and that in the resulting competition of these two giants, consumers will benefit.

This hypothetical scenario is rife with shaky assumptions and as such is highly dubious. When two firms dominate a market, they are not likely to attack each other's market share, out of fear that the other "superpower" will retaliate and in the ensuing battle neither side will gain sufficiently to offset the risk and expense of the fight. It may well be that SBC-Ameritech and Bell Atlantic-GTE will compete with each other for large business customers – because that is a segment of the local exchange market where other firms are beginning to provide significant competition. Indeed, SBC and Ameritech concede that the principal aim of their plan to compete out-of-region is to target such customers, precisely because, if they do not, other carriers will acquire that business. But that would only bring additional competition to a market segment where other carriers have already begun to compete. In market segments where there is yet no significant widespread competition from other carriers — i.e., in the market for residential customers and small businesses — it is most unlikely that the two merged giants will compete with each other, because to do so would trigger retaliation and an expensive fight that neither would win. In those market segments the most likely scenario is that the two giants will find it less risky and much more profitable to arrive at a tacit mutual non-aggression pact, both sitting on their own dominant market share and leaving the other undisturbed.

SBC and Ameritech already have sufficient financial and managerial resources to compete in the local markets out-of-region. Indeed, Ameritech has already made one serious competitive foray into the St. Louis market, where it has significant brand-name recognition and a large customer base. Both Ameritech and SBC have also planned other out-of-region competitive initiatives, including Ameritech in Texas. The merger would have the anticompetitive effect of removing each company as a potential competitor in the other's region.

In addition, the merger will have an anticompetitive effect by spreading SBC's "stonewall" corporate culture to the Ameritech region. SBC has a long history of anticompetitive practices. Pacific Bell's competitive record changed for the worse when SBC took over; and there is at least one documented instance in which SBC took an anticompetitive stance while Ameritech took a procompetitive stance on the same issue. There can be no doubt that SBC management will dominate the combined company, and will bring with it a hardened attitude toward competition in the region.

It has been suggested that the merger should be approved with conditions. This approach would be ineffective. Merger conditions have been either ineffectual to promote competition or ignored in the past, and once the merger is approved, effective enforcement of the conditions would be extraordinarily difficult. In the event, however, that the merger is approved, we set forth the conditions that are essential.

Finally, the Commission should inspect the applicants' Hart-Scott-Rodino documents, and hold a hearing. Particularly in a case where corporate intent and capabilities with respect to potential market entry are an issue, the Commission must conduct a factual inquiry. It is not bound by the

applicants' self-serving statements with respect to their pre-merger competitive plans, but must inspect internal documents and subject the applicants to discovery and cross-examination.

It has been observed that "[t]he local phone companies have figured out that it is better for their shareholders to combine with each other than to accept the risks and the expense of getting into price wars, building new facilities and providing lots of new services through their networks."^{5/} It is time for the Commission to make it clear that the merger route is no longer an acceptable means for the Bell giants to obtain new customers. If they are to expand significantly, it must be through competition, not acquisition. Otherwise, new entrants and consumers will be disadvantaged.

I. SBC'S CLAIM THAT THE MERGER WILL ENABLE IT TO PURSUE A NATIONAL STRATEGY OF LOCAL COMPETITION OUT-OF-REGION IS NOT CREDIBLE.

A. SBC-Ameritech is not likely to compete against other RBOCs except in market segments where competition already exists.

SBC's principal claim of public benefit is that the merger is necessary to enable it to pursue a national strategy of entering out-of-region local exchange markets. That claim is not credible, for several reasons.

The claim assumes that in order to be large enough to compete in out-of-region local markets, an RBOC must be so large that it controls, as SBC-Ameritech would do, one-third of all access lines in the country. If that premise is correct (and we show below that it is not), then the end game of SBC's argument is a telecommunications market dominated by two or three mega-RBOCs. Indeed, with the proposed merger of Bell Atlantic and GTE, that is exactly where this merger will take us.

^{5/} "Giant Telecom Deal Bets Against Free-For All Theory – SBC Strategy involves Grabbing As Many Local Users As Possible," The Arizona Republic, May 12, 1998 at A2, 1998 WL 7770971, quoting Ken McGee of the Gartner Group, Inc.

And if these mergers take place, it is hard to believe that the remaining RBOCs will remain independent for very long.

But economic theory teaches that two or three giant companies, each with approximately 1/3 of the market, are likely to find ways to collude. Even without explicit collusion, the parties may settle on a tacit mutual non-aggression pact, as each realizes that attempting to steal customers from the other will lead to retaliation, which will in turn precipitate an expensive competitive fight causing losses to both sides.^{6/}

In short, local exchange competition between mega-RBOCs is likely to occur only in the larger business segment of the market in lesser metropolitan areas, where significant other competition is beginning to emerge. The best the Commission can hope for from the mega-RBOCs is "me-too" competition. The mega-RBOCs are unlikely to be "ice-breakers," bringing competition

^{6/} This phenomenon has been lucidly described by Professor Dennis Carlton, SBC's economic expert. Prof. Carlton posits a small town with two gas stations directly across the street from each other, with no other competition and no possibility of further entry, selling the same gas with the same capacity and quality of product. He concludes that the stations will not compete:

Each realizes that it cannot steal customers from its competitor before its competitor can respond. And the competitor will respond because it is more profitable to match the price cut and share the market at a lower price than to permit the price-cutting station to steal market share. Each station should rationally anticipate immediate matching and, therefore, not cut price in the first instance. Cooperative pricing is thus a logical outcome of the "game" without any secret meetings or additional communication.

Carlton, Gertner and Rosenfield, "Communication Among Competitors: Game Theory and Antitrust," 5 Geo. Mason L. Rev. 423, 428 (1997).

Of course, in the case of two or three mega-RBOCs, tacit non-aggression would take the form of a geographical division of markets rather than maintenance of a uniform price. But the same phenomenon of tacit non-aggression would occur.

to markets that would not otherwise become competitive. In these circumstances, the promised benefits of the SBC-Ameritech merger are at best remote.

Indeed, the merger may diminish, rather than enhance, the chances that the RBOCs will ever compete against each other in markets where significant competition has not otherwise developed. The merger of SBC and Ameritech, in combination with the merger of Bell Atlantic and GTE, will reduce the number of significant RBOCs from six to four, and may well lead to further mergers. That, in turn, will increase the likelihood that other tacit agreements not to compete will come to fruition in each other's region. "[A]s the number of firms increases, collusive agreements are more difficult to police, and the frequency of cheating and noncooperative behavior increases." Samuelson and Nordhaus, Economics (16th ed.) at 176. By countenancing a progressive reduction in the number of RBOCs, the Commission is simply increasing the chances that each will be content, in those segments of the market where non-RBOC competition has not been successful, simply to sit on their own dominant market shares and refrain from expensive and risky retaliatory fights with the other RBOCs.

SBC's own description of its plan for out-of-region local competition confirms what economic analysis suggests – that the mega-RBOCs will not be likely to compete with each other in markets that are not already competitive. SBC admits that the primary focus of its strategy is "the thousand largest companies in the United States," particularly those with principal offices within SBC's region which are already taking service from SBC. Kahan Aff't ¶ 30.^{2/} "The core of the National-Local Strategy is the conclusion that SBC must develop the capability to compete for the

^{2/} We note that at other parts of its presentation, SBC analyzes its strategy in terms of targeting the Fortune 500 companies. Carlton Aff't ¶¶ 25-29 and Table 1.

business of large national and global customers both in-region and out-of-region." Kahan Aff't ¶ 13. But the market for larger business customers, while still dominated by incumbent LECs, is the part of the local exchange market that is the least in need of additional competitors. As the Commission has found, "there are a large number of firms that actually compete or have the potential to compete in this market." *Application of WorldCom, Inc. and MCI Communications Corporation for Transfer of Control of MCI Communications Corporation to WorldCom, Inc.*, CC Dkt. No. 97-211, Memorandum Opinion and Order (rel. Sep. 14, 1998), ¶ 173. While additional competitors are free to enter this market, the procompetitive benefit of an additional competitor in this market is not such as to justify the anticompetitive effects of this merger in other markets.

To be sure, SBC claims that the "second section" of its strategy focuses on smaller businesses and residential customers. Kahan Aff't ¶ 31. However, there is no basis for believing that SBC will approach this part of its strategy with any particular urgency, or that it will succeed. The primary function of its strategy is to defend the large business customers it is already serving within its own region from encroachment by competitors. Competition for out-of-region small business and residential customers would not serve this function.

B. SBC has not shown that it needs to merge in order to obtain the resources to compete out-of-region.

SBC is already a huge company. It has approximately 33 million access lines. It serves the nation's two most populous states, California and Texas, as well as 7 of the country's 10 largest metropolitan areas and 16 of the country's largest metropolitan areas.^{8/} Its 1997 revenues were \$24.8 billion (\$26.8 billion if SNET's 1997 revenues are added), and its 1997 operating income was over

^{8/} SBC Communications, Inc., Form 10-K filed March 3, 1998, "Business Operations."

\$3 billion.^{9/} Its revenues and net income are already comparable to the companies it claims it must compete with: MCI WorldCom ((\$27 billion/\$500 million; Sprint (\$15 billion/\$1 billion); Bell Atlantic \$30 billion/\$2.5 billion; BellSouth (\$21 billion/\$3.3 billion); GTE (\$23 billion/\$2.8 billion); and France Telecom (\$27 billion/\$2.5 billion). SBC Brief at 53 n.67.

SBC points out that, without the merger, its revenues and income will lag behind AT&T/TCG ((\$51 billion/\$4.6 billion), and its revenues (but not its income) will lag behind Nippon Telephone (\$77 billion/\$2.4 billion) and Deutsche Telekom (\$39 billion/\$2 billion). *Id.* But the latter two companies lack the name recognition in the local market, as well as the managerial and technical experience in local telephone operations, both of which the Commission has recognized as essential for a company to be a significant competitor in the local exchange market. *Bell Atlantic-NYNEX*, ¶¶ 106, 107. And while AT&T has a recognized brand name and exceeds SBC in terms of revenues and income, SBC has not shown that AT&T has made significant inroads in entering local exchange markets.

SBC says that its first realization of the need to become larger was the announcement of the MCI/WorldCom merger; at that point, SBC says, it realized that it had to compete with companies of that size for the business of its large corporate customers, both within and without its region. *Kahan Aff.* ¶ 10. But SBC has already achieved the size of MCIWorldCom; its revenues are at about the same level as MCIWorldCom's, and its net income is higher. Moreover, it has far more managerial and technical experience in local exchange markets and enjoys dominant market power in local markets which MCI WorldCom does not command in either the local or interexchange

^{9/} SBC Communications, Inc., 1997 Annual Report at 31.

markets. In terms of financial and managerial resources, there is no reason why SBC cannot start competing with MCIWorldCom (and other companies of similar size) without any further mergers.

SBC says its out-of-region local exchange strategy will require more than \$2 billion in capital expenditure, plus operating expenses over the next ten years in excess of \$23.5 billion. Kahan Aff't ¶¶ 57, 58. But SBC's shareholders are paying a merger premium of approximately \$13 billion. Kahan Aff't ¶ 83. That sum alone would go a long way towards meeting what SBC says are the financial requirements for effective out-of-region local competition. The public interest would be better served if that sum were spent on such competition directly, rather than paid out as a premium for a merger.

Moreover, SBC presents a powerful argument for why it will have to compete for local business outside its region even without the merger. SBC argues that in today's more competitive environment, if it and Ameritech do not follow their current large business customers to out-of-region locations, other competitors will take their in-region business from these customers. Kahan Aff. ¶ 10. These customers represent the "profitable core" of SBC's business. Brief at 49. With competitive carriers such as MCI WorldCom attacking its high-end corporate business, SBC says it concluded that a strategy confined to its own region was "no longer viable for SBC." Kahan Aff. ¶ 22. As SBC explains, "[w]e cannot remain idle while our competitors capture the huge traffic volumes generated by a relatively small number of larger customers." Kahan Aff't ¶ 13. Rather than lose its large business customers to "financially strong, technically capable, fully integrated national and global competitors," SBC states that it has decided to become one of those competitors. Kahan Aff. ¶ 23.

But since SBC alone is already comparable in size to the competitors it says are threatening its core business, it will have to counterattack by competing out-of-region regardless of whether it merges.

II. SBC'S ACQUISITION OF AMERITECH WILL EXPAND THE REACH OF A CORPORATE CULTURE THAT IS TOTALLY RESISTANT TO COMPETITION.

Following SBC's acquisition of Pacific Telesis, all but 13 of PacTel's 35 top executives exercised their golden parachutes and left the company.^{10/} According to press reports, Ameritech's top five executives also have golden parachutes that would allow them to leave the company post-merger with very attractive financial packages.^{11/} Thus, if the merger is approved, it is more than likely that it will be SBC's current management that will control approximately 35% of the nation's local access lines and will oversee the provision of local telephone service in 13 states. In determining whether approval of the merger will serve the public interest, the Commission must take into account the demonstrated propensity of SBC's current management to fight and delay the entry of competitors into its existing monopoly markets. To the extent that SBC is able to expand the number of markets it controls through the acquisition of Ameritech, it will be able to expand the reach of its "stonewall" corporate culture to suppress the development of competition in a manner that completely frustrates the intent of Congress in passing the Telecommunications Act of 1996.

^{10/} Poling, "SBC, Ameritech Are Contrasts In Style," *The Orange County Register*, May 12, 1998, C3, 1998 WL 2627981 ("PacTel chairman and chief executive Phil Quigley stayed with the company just nine months after his company merged into SBC before leaving with his \$10 million golden parachute.").

^{11/} *Id.*; Keller, "Growing Up: SBC Communications To Acquire Ameritech In a \$55 Billion Deal," *The Wall Street Journal*, May 11, 1998, A1, 1998 WL-WSJ 3493498.

A. SBC's Attempts To Thwart The Development of Competition in Texas

In his affidavit filed in support of the merger application, Stephen Carter states that "SBC is committed from the highest levels of the company to open its local networks to enable others to enter the local exchange telecommunications markets in which SBC operates." Carter Affidavit at 3. Unfortunately, SBC's purported corporate "commitment" does not translate into an open entry policy in the real world. This is evidenced by the substantial obstacles SBC has erected to constrain local competition in Texas. The following examples of SBC's recalcitrance in opening its markets demonstrate that very little, if any, weight should be accorded to Mr. Carter's statement.

The Texas Public Utility Commission ("PUC") consolidated for hearing the first five arbitration petitions that were filed against Southwestern Bell Telephone Company ("SWBT") pursuant to Section 252 of the Act. *Petition of MFS Communications Co., Inc. for Arbitration, et al.*, Texas PUC Docket Nos. 16189 *et al.* The PUC's Arbitration Award issued November 7, 1996, addressed numerous issues including SWBT's obligation to provide access to unbundled network elements, the terms and conditions for interconnection, resale, access to poles, ducts, conduits and rights of way, directory and operator services and telephone directory listings. The PUC also rejected SWBT's proposed rates for interconnection and unbundled elements and its proposal to negotiate and price physical collocation on an individual case basis. The PUC directed SWBT to tariff the rates, terms and conditions for physical collocation and to submit revised cost studies using a total element long run incremental cost methodology. The PUC also established interim rates which were to apply until the parties were able to negotiate permanent rates based on the revised cost studies. *Arbitration Award* in PUC Docket Nos. 16189, *et al.* (Tex. PUC November 7, 1996).

As soon the interconnection agreements incorporating the terms of the Arbitration Award were approved by the PUC, SWBT sued the PUC and each of the other parties to the arbitration in federal district court, alleging that the Arbitration Award and the resulting interconnection agreements violated Sections 251 and 252 of the Act. The court ruled in favor of the defendants on each and every one of SWBT's claims for relief. The court also offered the following comments on SWBT's litigation tactics, which far more accurately describe its attitude toward competition than Mr. Carter's self-serving statements:

The undersigned must note, however, that it was somewhat troubled by SWBT's tactics in this case. SWBT's penchant for rehashing issues that had already been fully briefed, raising arguments and claims that did not appear in even the most generous reading of the Amended Complaint, and most, importantly, taking positions in this litigation that it had expressly disavowed in the PUC administrative hearing, were, to say the least, distressing. The voluminous briefing in this case -- over seven hundred pages in total -- could probably have been cut in half had SWBT *not fought tooth and nail for every single obviously non-meritorious point*. Suffice it to say that every conceivable objection SWBT could have raised to the interconnection agreements was, in fact, raised, here and fully briefed by all parties to the lawsuit. The Court has considered these arguments and has concluded that the arbitrated terms of the interconnection agreements fully comply with the requirements of §§ 251 and 252 of the FTA and that the PUC's decisions regarding those arbitrated terms did not involve a misinterpretation or misapplication of federal law and were not arbitrary and capricious.

Southwestern Bell Tel. Co. v. AT&T Communications of the Southwest, Inc., et al., No. A 97-CA-132 SS, Order, at 31 (W.D. Tex., August 31, 1998) (emphasis added).

Simultaneously with its filing in federal court, SWBT filed a similar complaint in state court alleging that the Arbitration Award violated various provisions of state law. The case was removed to federal court. The court dismissed SWBT's state law claims on federal preemption grounds. *Southwestern Bell Tel. Co. v. Public Utility Commission of Texas, et al.*, No. A-97-108 SS, Order (W.D. Tex., August 10, 1998). SWBT has appealed that decision to the Fifth Circuit. Southwestern

Bell Telephone Company's Notice of Appeal in *Southwestern Bell Tel. Co. v. Public Utility Commission of Texas, et al.*, No. A-97-108 SS filed September 30, 1998.

In the meantime, SWBT filed its collocation tariff and revised cost studies and proposed permanent rates based on those studies. Although the PUC had stated in the Arbitration Award that "the adjustments in SWBT cost studies required by this Award will lower SWBT's proposed prices in all instances,"^{12/} SWBT's proposed permanent rates were higher in many instances than its original proposals. As a result, the parties were forced to file renewed arbitration petitions with the PUC. The PUC issued another Arbitration Award setting permanent rates and directing SWBT to revise its collocation tariff consistent with the terms of the Award. *Arbitration Award* in Docket Nos. 16189, *et al.* (Tex. PUC, December 7, 1997) Again, as soon as the amended interconnection agreements incorporating the terms of the Arbitration Award were approved by the PUC, SWBT filed suit in federal and state court against the PUC and the other parties to the arbitration seeking vacation of the Award and the orders approving the agreement. *Southwestern Bell Tel. Co. v. AT&T Communications of the Southwest, Inc.* Civil Action No. A 98-CA-197 SS (W.D. Tex.); *Southwestern Bell Tel. Co. v. AT&T Communications of the Southwest, Inc.*, Cause No. 98-04970 (98th Judicial District Court of Travis County). Those cases are still pending.

SWBT has also resisted complying with the terms of interconnection agreements that it voluntarily negotiated with its competitors. In mid-1997, SWBT unilaterally decided that it would not pay reciprocal compensation for local telephone calls to Internet service providers even though the interconnection agreements it had entered into with competing carriers contained no exclusion

^{12/} *Arbitration Award*, PUC Docket Nos. 16189, *et al.*, at ¶ 85 (Tex. PUC November 7, 1996).

for such traffic. After Time Warner filed a complaint with the PUC alleging that SWBT was in breach of its interconnection agreement, the PUC issued a decision directing SWBT to comply with the terms of the agreement and pay reciprocal compensation for the transport and termination of Internet service provider traffic. *Complaint and Request For Expedited Ruling of Time Warner Communications*, PUC Docket No. 18082 (Tex. PUC March 2, 1998). SWBT immediately filed a complaint in federal district court requesting a preliminary injunction and declaratory ruling seeking to vacate the PUC's decision. The court issued an order on June 22, 1998 affirming the PUC's decision and dismissing SWBT's complaint. *Southwestern Bell Tel. Co. v. Public Utility Commission of Texas, et al.*, MO-98-CA-43 (W.D. Tex. June 22, 1998).

SWBT has also refused to comply with the resale terms of its voluntarily negotiated interconnection agreement with KMC Telecom Inc. The Agreement provides that it "shall be construed in light of and consistent with the provisions of the" Telecommunications Act of 1996 and that "resale products are available subject to federal rules and regulations." In the *Local Competition Order*,^{13/} this Commission made clear that Section 251(c)(4) of the Act contained no language excluding contracts or other customer specific arrangements from the obligation to make retail telecommunications products available for resale at a wholesale discount. Nonetheless, SWBT refused to make customer contracts available for resale in Texas. As a result, in August 1997, KMC was forced to file a complaint with the PUC seeking an order directing SWBT to comply with its obligations under Section 251(c)(4) of the Act. Even after the Commission released its decisions in

^{13/} *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499 (1996), *aff'd. in part and vacated in part sub nom. Iowa Utilities Board v. FCC*, 120 F.3d 753 (8th Cir. 1997), *cert. granted*, Nos. 97-826, *et al.* (U.S. Jan. 26, 1998).

the BellSouth Section 271 cases confirming that Section 251(c)(4) requires incumbent LECs to make customer contracts available for resale at a wholesale discount,^{14/} SWBT continued in its adamant refusal to make such contracts available for resale. On March 19, 1998, PUC Arbitrators granted summary judgment in KMC's favor properly concluding that customer contracts had to be made available for resale and scheduled a subsequent hearing to determine the amount of the wholesale discount.^{15/} *Complaint of KMC Telecom Inc. Against Southwestern Bell Tel. Co. For Violations of Section 251(c)(4) of the Telecommunications Act of 1996*, PUC Docket No. 17759, Order No. 6 (Tex. PUC, March 19, 1998).

When SWBT filed its draft Section 271 application with the PUC, carriers attempting to enter Texas local exchange market presented substantial evidence of the difficulties they regularly encountered in working with SWBT to interconnect their networks, to purchase unbundled elements and to resell SWBT services. The testimony revealed SWBT's corporate policy of fighting CLECs "tooth and nail" on every conceivable issue, even issues that the PUC had previously decided in favor of other CLECs. This evidence prompted the following comments from the Commissioners:

^{14/} *Application of BellSouth Corporation, et al. Pursuant to section 271 of the Communications Act of 1934, as amended, to Provide In-Region InterLATA Service in South Carolina*, 13 FCC Rcd 539 (1997); *Application of BellSouth Corporation, et al. Pursuant to section 271 of the Communications Act of 1934, as amended, to Provide In-Region InterLATA Service in Louisiana*, 13 FCC Rcd 6245 (1998).

^{15/} During the hearing on the discount issue, SWBT introduced the arbitrated interconnection agreement with AT&T, which contains language stating that the wholesale discount shall apply only to the resale of new, rather than existing, customer-specific contracts as support for its position that it has no obligation to make existing contract available for resale. (Prefiled Testimony of Barbara Smith submitted in PUC Docket No. 17759.) Significantly, SWBT's interconnection agreement with Ameritech contains no such restrictive language. (KMC Ex. 7 submitted in PUC Docket No. 17759.)

Commissioner Walsh: The record is replete with examples of Southwestern Bell'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.

Commissioner Curran: Here we have a situation where potential competitors have spent enormous time and effort and probably enormous sums of 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 a choice in their local phone service, and this enormous effort has resulted in a movement of just 1 percent of phone customers to competitors. I don't believe the record supports the explanation that this is the result of a lack of interest, either on the part of consumers or on the part of potential competitors.

Currently, there are CLECs with de minimis customers, and even those de minimis customers have been secured only with tremendous efforts and with Bell resisting at every turn. Will these CLECs and other CLECs be able to retain even this level of customer base into the future, much less to provide a real competitive alternative to additional subscribers? Under current practice, it is highly doubtful.

Investigation of Southwestern Bell Tel. Co.'s Entry Into the Texas InterLATA Telecommunications Market, Project No. 16251, Tr. 187, 202, 203-204 (May 21, 1998).

SWBT's treatment of its competitors in the populous and economically significant state of Texas reflects SBC's propensity for resisting competition at every stage. For example, despite the fact that the PUC had ordered SWBT to tariff the rates, terms and conditions for physical collocation, SWBT had refused to allow CLECs who were not parties to the arbitration to purchase collocation out of the tariff. The only way such CLECs could take advantage of the tariffed terms and conditions was to opt-in to the interconnection agreement of one of the parties to the arbitration pursuant to Section 252(i) of the Act. When CLECs raised this issue during the hearings on SWBT's application for authority to enter the interLATA market, the PUC had to direct SWBT to make the collocation tariff available to any CLEC that wanted to physically collocate in SWBT's central offices. *Investigation of Southwestern Bell Tel. Co.'s Entry Into the Texas InterLATA*

Telecommunications Market, Project No. 16251, Commission Recommendation, at 3 (Tex. PUC, June 3, 1998).

Similarly, despite the fact that the PUC had concluded in the *Time Warner* case that SWBT must pay reciprocal compensation for the termination of local calls to internet service providers, SWBT took the position that it would not pay reciprocal compensation for such traffic to other CLECs unless they filed and prevailed in their own separate arbitration proceedings before the PUC. The PUC directed SWBT to abide by its ruling on compensation for internet service provider traffic with respect to other CLECs and rejected SWBT's contention that such CLECs should be required to seek arbitration to receive such compensation. *Id.* at 8.

In addition, despite the fact that the PUC had concluded in the *KMC* case that SWBT must make customer contracts available for resale at a wholesale discount consistent with Section 251(c)(4) of the Act, SWBT refused to make such contracts available for resale to other CLECs. The PUC had to direct SWBT to change its policy to reflect compliance with this Commission's interpretation of Section 251(c)(4). *Id.* at 9.

At the conclusion of the hearings on SWBT's draft 271 application, the PUC wisely observed that "SWBT needs to change its corporate attitude and view [its competitors] as wholesale customers. . . . 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. . . ." *Id.* at 2. The PUC's assessment of SWBT's corporate attitude toward competition, which was based on substantial evidence of SWBT's efforts to delay and restrain the entry of competitors into its monopoly local exchange market in Texas, cannot be reconciled with

SBC's hollow representations to this Commission of its open-armed embrace of competition and its purported efforts to enable competitive entry.

B. SBC's Takeover of PacTel Has Resulted in A Deterioration of Service For Both Competitors and Consumers.

In his affidavit in support of the merger, Mr. Carter states that "SBC's record in opening its networks in the Southwestern Bell, Pacific Bell and Nevada Bell areas demonstrates SBC's commitment to its obligations under the 1996 Act. That has been the case with our merger with Pacific Telesis and there is no reason to expect it will be any different with Ameritech." (Carter Affidavit at 15.) As demonstrated above, SBC's record in opening its network in Southwestern Bell's territory reflects anything but a commitment to comply with its obligations under the Act. Moreover, since SBC acquired Pacific Bell in April 1997, the infiltration of the SBC corporate culture has had a negative impact on competition and consumer service in California. If, as Mr. Carter states, there is no reason to expect that things will be any different with Ameritech, the Commission should not approve the merger.

1. Pacific Bell Has Adopted SBC's Policy Of Keeping the Competition at Bay

The same types of anticompetitive conduct that surfaced with respect to SWBT's operations in the Texas Section 271 proceeding have also been raised in connection with Pacific Bell's application to obtain interLATA authority in California. For example, in its recent report on Pacific Bell's notice of intent to file for Section 271 authority in California, the Public Utilities Commission staff cited Pacific Bell for the misuse of customer proprietary network information ("CPNI") to maintain or win back customers that had chosen to switch carriers. *California Public Utilities Commission Telecommunications Division, Initial Staff Report, Pacific Bell (U 1001C) and Pacific*

Bell Communications Notice of Intent To File Section 271 Application for InterLATA Authority in California, at 26 (July 10, 1998). Only one month earlier, the Texas PUC cited SWBT for the same infraction and had to direct SWBT not to use CPNI to win back customers lost to competitors. *Investigation of Southwestern Bell Tel. Co.'s Entry Into the Texas InterLATA Telecommunications Market*, Project No. 16251, Commission Recommendation, at 3. Clearly, SBC's improper use of CPNI to counteract its competitors' sales efforts does not evidence an intent to open its markets to competition.

In addition, the California staff noted a number of deficiencies in Pacific Bell's provision (or more accurately, failure to provision) collocation space to its competitors, including Pacific Bell's denial of access to collocation in key central offices due to an alleged lack of space; failure to deliver collocation space on schedule; and ambiguous rules for the implementation of physical and virtual collocation that were subject to change unilaterally by Pacific Bell. *California Public Utilities Commission Telecommunications Division, Initial Staff Report, Pacific Bell (U 1001C) and Pacific Bell Communications Notice of Intent To File Section 271 Application for InterLATA Authority in California*, at 37. To address concerns raised in the hearing with respect to SWBT's failure to deliver collocation on schedule, the Texas PUC directed SWBT to establish performance measures for the number of days required to complete physical collocation facilities. *Investigation of Southwestern Bell Tel. Co.'s Entry Into the Texas InterLATA Telecommunications Market*, Project No. 16251, Commission Recommendation, at 9. The other issues it hoped to avoid by requiring SWBT to make its collocation tariff available to all CLECs.

The California staff also found that as a condition of obtaining access to Pacific Bell's new OSS interfaces, CLECs were required to sign an OSS appendix that contained a number of

unfavorable and questionable provisions. Among the offensive provisions were that CLECs would not be provided access to customer service records ("CSRs") until after the customer had agreed to switch carriers. This restriction clearly hampers the CLECs' ability to make effective sales proposals to customers by denying them access to vital information. Pacific Bell also reserved the right to modify or discontinue use of any OSS interface upon 90 days' prior written notice, a reservation which obviously introduces tremendous financial and operational uncertainty for CLECs. Finally, the OSS appendix required the signatory to agree that Pacific Bell "provides nondiscriminatory access to its OSS interfaces." The California Staff appropriately expressed concern that Pacific Bell's insistence on these conditions constituted an abuse of market power. *California Public Utilities Commission Telecommunications Division, Initial Staff Report, Pacific Bell (U 1001C) and Pacific Bell Communications Notice of Intent To File Section 271 Application for InterLATA Authority in California*, at 29-30. In the Texas proceeding, the PUC directed SWBT to either improve the preordering interfaces available to CLECs to provide sufficient access to customer information or show that CLECs have access to customer records at parity with the access SWBT enjoys. *Investigation of Southwestern Bell Tel. Co.'s Entry Into the Texas InterLATA Telecommunications Market*, Project No. 16251, Commission Recommendation, at 13.

Issues relating to compliance with the requirements of Section 252(i) of the Act were also raised against SBC's affiliates both in California and Texas. The California staff expressed concerns about Pacific Bell's refusal to comply with its obligations under Section 252(i) of the Act by not making the terms and conditions of an interconnection agreement entered into with one paging company available to other paging companies and directed Pacific Bell to supply the reasons for its noncompliance. *California Public Utilities Commission Telecommunications Division, Initial Staff*

Report, Pacific Bell (U 1001C) and Pacific Bell Communications Notice of Intent To File Section 271 Application for InterLATA Authority in California, at 41. In the Texas Section 271 proceeding, the PUC directed SWBT to "establish that its interconnection agreements are binding and are available on a nondiscriminatory basis to all CLECs." *Investigation of Southwestern Bell Tel. Co.'s Entry Into the Texas InterLATA Telecommunications Market*, Project No. 16251, Commission Recommendation, at 2.

2. SBC Takes an Anti-Competitive Stance on the Introduction of Wireless "Calling Party Pays" While Ameritech Takes a Pro-Competitive Stance.

AirTouch Communications, a wireless provider, provided a striking example of SBC's efforts to nullify Pacific Bell's pro-competitive undertakings after it took control. According to Comments filed with the Public Utilities Commission of Ohio,^{16/} Pacific Bell had informed AirTouch that it could purchase the billing and collection services needed to implement its Calling Party Pays ("CPP") program out of the Pacific Bell tariff. CPP is a billing option AirTouch offers to its wireless customers, pursuant to which the calling party, rather than the wireless customer, is billed for calls placed to wireless customers. By allowing wireless customers to avoid the charges for incoming calls, CPP reduces the cost of wireless service and makes it more economical for customers to leave their phones on at all times to receive incoming calls. The availability of CPP goes a long way toward making wireless service an arguable substitute for, rather than merely a complement to, wireline service, thereby increasing the competitive choices accessible to consumers.

^{16/} *In the Matter of the Joint Application of SBC Communications, Inc., SBC Delaware, Inc. and Ameritech Ohio for Consent and Approval of a Transfer of Control*, Case No. 98-1082-TP-AMT, Comments of AirTouch Communications, filed September 4, 1998.

An essential element for the deployment of CPP, however, is a billing and collection agreement with the incumbent LEC.

Prior to SBC's acquisition of Pacific Bell, AirTouch had negotiated a market trial for CPP in California pursuant to which Pacific Bell had agreed to provide a number of services, including billing and collection, necessary for implementation of the trial. Within weeks of SBC's acquisition, Pacific Bell stopped working with AirTouch and eventually told AirTouch that it was no longer interested in pursuing the market trial. SBC later informed AirTouch that it could not use Pacific Bell's tariffed billing and collection services to provide CPP. As a result, AirTouch was forced to file a complaint with the California Public Utilities Commission to compel Pacific Bell to honor the terms of its tariff.^{17/}

In the BellSouth Louisiana 271 decision, the Commission noted that while wireless providers are positioning their service offerings to become competitive with wireline service, they are still in the process of transitioning from a complementary service to a competitive equivalent to wireline service.^{18/} SBC's refusal to allow Pacific Bell to provide AirTouch the billing and collection services necessary to implement CPP is clearly designed to impede the development of wireless services as a commercial and competitive alternative to Pacific Bell's wireline service.

According to AirTouch, it currently has billing and collection agreements with Ameritech that allow it to offer CPP. If SBC's acquisition of Ameritech is approved, AirTouch is rightfully

^{17/} AirTouch Comments at 7-8; *AirTouch Cellular v. Pacific Bell*, Case No. 97-12-044 (Cal. PUC, filed December 23, 1997).

^{18/} *Application of BellSouth Corporation, et al. Pursuant to section 271 of the Communications Act of 1934, as amended, to Provide In-Region InterLATA Service in Louisiana*, 13 FCC Rcd 6245, at ¶73 (1998).

fearful that its experience with Pacific Bell in blocking its ability to provide CPP will be repeated in the Ameritech states. SBC's blatant use of its monopoly power to squelch competition is in significant contrast to the position taken by Ameritech on this important competitive issue, and is an illustration of the competitive harm that would ensue if the SBC management attitude takes over Ameritech.

3. Consumer Dissatisfaction With Local Service Has Grown Under SBC's Management.

Since SBC's acquisition of Pacific Bell, numerous complaints have been filed relating to its business practices and customer service policies. In an Order Instituting Rulemaking released on June 18, 1998, the California Commission noted that formal and informal customer complaints about deteriorating telephone service had proliferated in the last year, prompting it to open an investigation on service quality standards. *Order Instituting Rulemaking on the Commission's Own Motion into the Service Quality Standards For All Telecommunications Carriers and Revisions to General Order 133-B*, R.98-06-029 (Cal. PUC, June 18, 1998). Coincidentally, SBC had assumed control of Pacific Bell just over a year before the release of the Commission's Order.

Pacific Bell's own employees recently filed a complaint with the California Commission alleging that SBC had implemented an aggressive, irresponsible and deceptive sales policy, emphasizing sales over service and customer satisfaction. *Telecommunications International Union, International Federation of Professional and Technical Engineers, AFL-CIO v. Pacific Bell and SBC*, filed June 18, 1998 with the California Public Utilities Commission.

The Utility Consumers Action Network ("UCAN"), a San Diego-based consumer watchdog group, has filed numerous complaints against Pacific Bell alleging that residential service has

deteriorated significantly under Southwestern Bell's stewardship. Examples of service deteriorations cited by UCAN include Pacific Bell's closure of public offices, which has a disproportionate impact on low income and elderly customers who use the offices to pay bills to reinstate service or interact on a face to face basis with Pacific Bell employees^{19/}; and Pacific Bell's allegedly deceptive and misleading marketing campaigns for Caller ID and related services.^{20/}

* * * * *

Unfortunately, SBC's "stonewall" corporate culture may achieve the desired effect of keeping some competitors away. Shortly after the merger was announced, the CEO of a Chicago-based CLEC explained that "[w]e're not in the SBC service area primarily because of the perception that they are one of the least ILECs open to competitive local service carriers."^{21/} It would be a clear detriment to competition to bring Ameritech's region under SBC's management philosophy. The Congressional goal of opening the telecommunications markets to competition and making available to consumers a choice of local telephone service providers would be realized more rapidly if new entrants could devote their resources to constructing networks, developing innovative products and marketing their services to customers rather than to litigating to obtain what they are entitled to under the Communications Act. The more local markets that SBC controls, the more money

^{19/} UCAN March 23, 1998 Protest of Pacific Bell Advice Letters 19291 and 19294 -Office Closures.

^{20/} *The Utility Consumers's Action Network v. Pacific Bell (U-1001-C)*, C. 98-04-004 (Cal. PUC, filed June 2, 1998).

^{21/} "A Baby Bell Tolls for Ameritech: Tough SBC Will Cut Costs, Staff, Units," Crain's Chicago Business May 18, 1998 at 1, quoting Robert Taylor, CEO of Focal Communications Co.

competitors will be forced to spend to pry open the door of competitive access to the incumbent's networks on reasonable and nondiscriminatory terms.

III. THE MERGER WILL ELIMINATE SIGNIFICANT POTENTIAL COMPETITION IN THE ST. LOUIS MARKET, AND RAISES MATERIAL FACTUAL ISSUES WITH RESPECT TO OTHER MARKETS REQUIRING INSPECTION OF HART-SCOTT-RODINO DOCUMENTS AND A HEARING.

A. St. Louis

SBC concedes that Ameritech had entered the St. Louis market as a CLEC, offering resold local service to its existing cellular customers. SBC claims that this was a "limited" and "defensive" effort by Ameritech, designed to protect its cellular business against erosion by wireless competitors offering bundled wireless and local exchange service. Brief at 70, Osland Aff't ¶ 4. On this basis, SBC argues that Ameritech was not a significant potential competitor in St. Louis. Brief at 70-72.

However, that was hardly the view shared by Ameritech when it initially entered the St. Louis market. In announcing its entry, the company stated that "St. Louis is one of the nation's great markets, and this expansion represents a tremendous opportunity for Ameritech to grow through competition." Ameritech stated that customers in St. Louis "will begin to have a choice of some of the most complete and innovative packages of communications services in the country." The company was optimistic about its prospects in St. Louis, explaining that "[t]he Ameritech brand is already strong there, as evidenced by our superior customer growth in cellular and paging."^{22/}

^{22/} "Ameritech to Expand in St. Louis," Ameritech Press Release (Nov. 6, 1997). [Http://www.ameritech.com/media/releases/release-1254.html](http://www.ameritech.com/media/releases/release-1254.html) (visited September 1, 1998). Ameritech also described its plans in its 10-K filed March 13, 1998: "*Now that we have approval from the Missouri public service commission, we plan to offer local and long distance pyhone service to residential customers in the St. Louis metropolitan area in early 1998. . . . Our offerings in the St. Louis market will include local pyhone, long distance, cellular, paging and wireless data* (continued...)"

In addition, a news report quotes an Ameritech official as stating that its "research in St. Louis shows a very high, unaided brand awareness of the name Ameritech."^{23/} The article goes on to report that Ameritech proved to be one of the "top two" telecommunications brand names in that market, along with AT&T. Ameritech had 250,000 to 300,000 wireless subscribers in the St. Louis metropolitan area, or about 10% of the overall population of 2.5 million. The article also quoted the President of Ameritech Cellular as predicting that "the majority of our base of customers will come over to this product."^{24/}

This material indicates that Ameritech was SBC's most significant potential competitor in the St. Louis area for residential customers. It had the brand name recognition – which the Commission has recognized as perhaps the single most important asset for an entrant to the local exchange market. Bell Atlantic-NYNEX, ¶ 106. It also had the technical and managerial capability to compete in the local exchange market -- another factor the Commission has recognized as significant in this market. Bell Atlantic-NYNEX, ¶ 107. And it had a significant and sizeable customer base of wireless subscribers to whom it could offer packages including wireline service. Of all the other potential competitors in the St. Louis region listed by SBC (Brief at 72), only AT&T offers both the recognized brand name and a large number of existing customers; and AT&T lacks

^{22/}(...continued)

services. Customers will have the option of a consolidated bill." Ameritech Corp., Form 10-K, Item 1 "Business," "Landline Communications Services."

^{23/} "Spirit of St. Louis Haunts SBC-Ameritech Merger Plan," 6/8/98 Wall Street Journal B4.

^{24/} Id.

Ameritech's extensive managerial and technical experience in the provision of residential local exchange service.

In an attempt to denigrate its St. Louis market entry, SBC argues that Ameritech Cellular was encountering initial problems in providing local service to its St. Louis cellular subscribers. Brief at 71-72. SBC lists these problems as: 1) a confusing billing format, 2) a pricing plan which provided value to some customers but not others, 3) increased competitive pressure on rates, and 4) order processing errors. *Osland Aff't* ¶ 8.

But getting the right billing format and devising the right pricing plan would appear to be typical and solvable start-up problems, as with the resolution of order processing errors. Increased competitive pressure on rates may have been a more serious problem, but without more information the Commission cannot conclude that this factor would have stopped Ameritech from going forward, had the merger not been proposed.

SBC argues that even if Ameritech is a significant potential competitor in St. Louis, if Ameritech Cellular is sold in connection with the merger, the purchaser will inherit its customer base and network and thus step into Ameritech's shoes as a significant competitor. Brief at 73. But the purchaser will not (unless it is AT&T) inherit a brand name widely recognized in St. Louis; nor will it inherit Ameritech's cadre of managerial and technical personnel with years of experience in providing local service. Thus the purchaser will not be in nearly as strong a position as Ameritech now is to compete in the St. Louis residential market.

The Commission has summarized the five elements of the "actual potential competition doctrine." *Bell Atlantic-NYNEX*, ¶ 138. Each of these five elements would be met by Ameritech's competitive entry into the local exchange market in St. Louis:

1. "[T]he market in question ('the target market') is highly concentrated." *Id.* SBC does not dispute the fact that the local exchange market in St. Louis, as elsewhere, is highly concentrated.

2. "[F]ew other potential entrants are 'equivalent' to the company that proposes to enter the target market by merger." *Id.* SBC argues that there are two other significant competitors in St. Louis: AT&T/TCG/TCI and WorldCom/MCI/MFS/Brooks/UUNet. Brief at 72. Even if that argument were correct, the potential competition doctrine would still be applicable. In *Bell Atlantic-NYNEX*, the Commission found that the merger would have anticompetitive effects because it would eliminate "one of just four new significant market participants." *Id.* at ¶ 108. To be sure, the Commission also stated that the eliminated competitor was "the 'second choice' alternative for a significant number of customers." *Id.* But that also appears to be the case for Ameritech in St. Louis, in view of the report that Ameritech had a large customer base and was one of the top two telecommunications brand names in the market, along with AT&T.^{25/}

Moreover, in *Bell Atlantic-NYNEX* the Commission found that Bell Atlantic "possesses unique advantages not possessed by other market participants" because "[u]nlike AT&T or MCI, Bell Atlantic has substantial experience serving mass market customers of local exchange and exchange access services." *Id.* at ¶ 107. Ameritech possesses the same advantage vis-a-vis AT&T and WorldCom/MCI.

3. "[T]he company entering the target market by merger was reasonably likely to have entered the market but for the proposed merger." *Id.* Here Ameritech not only was "reasonably

^{25/} See note 1 *supra*.

likely" to have entered the St. Louis market; it did enter the market. And while it now says that the entry was "limited," Ameritech's public announcement upon entering the market, as well as its high brand-name recognition and large base of existing customers, confirms otherwise.

4. The company seeking to enter the market through merger "had other feasible means of entry." Id. Ameritech obviously thought it had "other feasible means of entry," since it actually did enter the market through means other than merger. And while it now denigrates its prospects in that market, the Commission is not bound by "subjective statements of company officials" concerning their entry plans, particularly when those statements are contradicted by actions the company took before the merger was announced. *Bell Atlantic-NYNEX*, ¶ 75 and note 166, quoting *United States v. Falstaff Brewing Corp.*, 410 U.S. 526, 566 (1973) (Marshall, J., concurring).

5. "[S]uch alternative means of entry offer a substantial likelihood of ultimately producing de-concentration in the target market or other significant pro-competitive effects." *Bell Atlantic-NYNEX*, ¶ 138. Again, while Ameritech now minimizes its chances of success, it thought its prospects were good when it entered, based on its significant existing customer base and its high brand-name recognition. In addition, it possesses the managerial experience and technical expertise which the Commission has also deemed important in assessing the significance of potential competition in the local exchange market. *Id.*, ¶ 107.

B. Other Markets

While the details of Ameritech's efforts to provide competitive services in St. Louis are relatively well documented, the Commission should not overlook other areas in which the companies appear to have considered competitive entry into each other's markets. Ameritech's CLEC subsidiary, for example, is already certificated to provide service in California, and it has an

interconnection agreement with SBC's Pacific Bell subsidiary there. Similarly, Ameritech's CLEC unit is authorized to offer competitive local exchange service in Texas – where, again, it has an interconnection agreement in place with SBC's Southwestern Bell incumbent subsidiary. Although it appears that the Ameritech entities had not initiated service in those states as of the parties' announced merger agreement, it is not unheard of in the competitive telecommunications industry – with all of the implementation issues that need to be addressed – for carriers to hold certificates for a year or more before service actually begins.^{26/} Thus, the absence of any service offerings at this point should not necessarily be construed as representative of an internal corporate decision to halt competitive entry.

Moreover, the very fact that Ameritech has obtained certification and entered into interconnection arrangements with SBC in two states brings it farther along the continuum of competitive entry than Bell Atlantic was in New York prior to the merger with NYNEX. Yet the Commission concluded in the *BA/NYNEX Merger Order* that Bell Atlantic was a "precluded competitor and among the most significant market participants" in the New York local exchange, exchange access, and long distance markets even though Bell Atlantic had not taken any public or regulatory steps to enter the New York market.^{27/} In fact, the Commission's conclusion was based primarily upon a review of internal Bell Atlantic documents that indicated that the company "was

^{26/} Indeed, according to a January 1998 press report announcing the California interconnection agreement, Ameritech "has been working since the enactment of the 1996 Telecommunications Act to offer service wherever its major in-region corporate customers have operations." *Pacific Bell is Latest in Ameritech's CLEC Drive*, TeleCompetition Report (Jan. 15, 1998).

^{27/} *BA/NYNEX Merger Order*, at ¶ 73.

actively seeking" to enter New York.^{28/} Since Ameritech's efforts in California and Texas demonstrate a much higher level of activity than Bell Atlantic's internal deliberations with respect to New York, the Commission should carefully consider the questions of material fact presented by Ameritech's activities and, as discussed below, engage in the same kind of review of internal corporate documents in order to understand how far along Ameritech was in "actively seeking" to enter SBC markets.^{29/}

SBC claims that it considered and rejected entry into the local exchange market in Chicago, based on its claimed unsuccessful foray into Rochester, New York. Brief at 67-70. However, as the Commission has noted, it is not "bound by subjective statements of company officials that they have no intention of making a de novo entry." *Bell Atlantic/NYNEX*, ¶ 75 n. 166, quoting *United States v. Falstaff Brewing Corp.*, 410 U.S. 526, 566 (1973) (Marshall, J., concurring). SBC has a recognized brand name ("Cellular One") in Chicago and a customer base through its cellular service. Through its long experience in providing local exchange service in its home region, it has the managerial and technical expertise to enter the local exchange market outside its home regions. And it clearly has significant financial resources, even without the merger. These are all the ingredients for successful entry into the local exchange market. See *Bell Atlantic/NYNEX* ¶¶ 106, 107. Rather

^{28/} *Id.*

^{29/} As part of this review of internal corporate documents, the Commission should also examine SBC's long-distance entry into Chicago and Central Illinois. A December 1996 SBC press release touted this offering as "another step closer to its 'one stop-shopping' strategy," which would combine long-distance services with wireless local service offered by SBC's Cellular One affiliate. This SBC statement indicates that the company hoped – and was taking active steps – to tap into the local exchange market and long-distance markets in Ameritech's home region. *SBC Communications Introduces its First Landline Long-Distance Service in Chicago, Boston, Washington, D.C., Baltimore, Upstate New York, Central Illinois*, Press Release (Dec. 2, 1996).

than accept SBC's say-so, the Commission should, at a minimum, inspect the Hart-Scott Rodino documents to determine the actual status of SBC's intentions prior to the merger regarding out-of-region competition.

The prospect of two large Bell Companies (one of whom is already the product of two dominant incumbent mergers) combining their substantial access lines and monopoly market shares is a serious matter that merits more attention than consideration through pleadings back and forth between interested parties. Such a hearing would be particularly helpful in developing a sound factual record and more closely analyzing the internal SBC and Ameritech strategies associated with their individual decisions to enter (and their apparent decisions to cancel competitive entry into) each other's markets.

As the Commission noted in the *BA/NYNEX Merger Order*, in considering whether two companies may have been actual potential competitors of one another. "[T]he decision whether the acquiring firm is an actual potential competitor is, in the last analysis, an independent one to be made by the trial court [or the FCC in this case] on the basis of all relevant evidence properly weighed according to its credibility."^{30/} Questions of corporate intentions and capabilities are at the core of the potential competition issues in this case, and these issues go beyond the issues of economic analysis that might be appropriate for consideration on the papers. Given the severe competitive concerns at issue in their proposal and the substantial questions of material fact they present, SBC and Ameritech should be required to provide a detailed explanation of their public interest

^{30/} *Id.*, at ¶ 75, n. 166 (quoting *United States v. Falstaff Brewing Corp.*, 410 U.S. 526, 566 (1973) (Marshall, J., concurring)).

arguments, with appropriate opportunity for presentation and examination of the witnesses who have submitted sworn statements in support of this proposed merger.

Moreover, as in the BA-NYNEX merger context, the Commission should review – and allow interested parties to review – the Hart-Scott-Rodino documents that SBC and Ameritech have filed with the Department of Justice.^{31/} Indeed, an analysis of such documents could prove essential in gaining a better understanding of the internal workings of the companies at the time they made the decisions to either compete or not compete in each other's markets.^{32/} It would be particularly helpful to know whether the prospect of a potential merger entered into the decision making process. In the end, only such a thorough process of hearings and internal company document review (pursuant, of course, to protective order) will allow the Commission to evaluate accurately whether SBC and Ameritech have carried the burden of demonstrating that this proposed mega-merger would be in the public interest and promote competition.

^{31/} See *BA/NYNEX Merger Order*, at ¶ 28 (referencing Nov. 22, 1996 letter from the Common Carrier Bureau requiring Bell Atlantic and NYNEX to make approximately 30,000 of the Hart-Scott-Rodino documents available for review pursuant to protective order).

^{32/} As the Commission noted in its *BA/NYNEX Merger Order*, the Fifth Circuit has previously found that it was within the Federal Reserve Board's discretion to afford little weight to "the self-serving statements proffered to demonstrate the merger applicant would not enter the relevant market independently." *BA/NYNEX Merger Order*, at ¶ 75, n. 166 (citing *Mercantile Texas Corp. v. Federal Reserve Board*, 638 F.2d 1255, 1268-70 (5th Cir. 1981)).

IV. CONDITIONS TO MERGER APPROVAL ARE NOT AN EFFECTIVE MEANS TO ALLEVIATE ANTI-COMPETITIVE EFFECTS. HOWEVER, IF THE COMMISSION ULTIMATELY DETERMINES TO APPROVE THE MERGER, APPROVAL SHOULD BE CONTINGENT UPON THE IMPOSITION AND IMPLEMENTATION OF STRINGENT, PRO-COMPETITIVE CONDITIONS AND SANCTIONS FOR FAILURE TO MEET THOSE CONDITIONS.

A. Conditions are not an effective means of resolving the anticompetitive concerns raised by this merger.

The severe competitive concerns raised by creating a company controlling a third of all the access lines in the country are unlikely to be resolved by approving it subject to conditions. For example, conditions cannot address the effect of the merger in stifling any incentive on the part of either company to compete in each other's region. And if the Bell Atlantic/GTE merger is also approved, there is no set of conditions that can remove the incentive the two giant companies would have not to compete with each other, out of fear of the consequences of retaliation by a more powerful mega-Bell company. And conditions cannot address the problem raised by spreading the reach of SBC's "stonewall" corporate culture into Ameritech's region.

Moreover, there is considerable question whether merger conditions would prove to be enforceable. For example, there are already charges that the BA-NYNEX merger conditions have not been complied with. As MCI explained earlier this year in a Complaint filed with this Commission, "Bell Atlantic previously failed to comply with the Merger Order, and continues to do so, through its failure to price unbundled network elements based on forward-looking economic costs. . . . Bell Atlantic has now compounded its complete disregard for the critical market-opening provisions in the Commission's Merger Order by refusing to negotiate in good faith to develop

adequate performance standards, remedies, and associated reporting."^{33/} If the merger is consummated, it would be impossible to undo as a practical matter. And given the enormous stake a combined company would have in preserving its within-region local exchange monopoly, it would be motivated to violate any merger conditions for as long as possible, even if compliance orders and fines result.

B. If the merger is approved, market-opening conditions should be attached, with effective sanctions for non-compliance.

If the Commission approves this merger, notwithstanding Hyperion's objections, it should consider the BA/NYNEX merger conditions as an initial starting point of a broader set of conditions to guard against the danger of harm to competitors seeking to gain market entry. The Commission should devise adequate conditions to ensure that the new SBC-Ameritech cannot use its combined size and market power to discriminate against smaller local exchange competitors.

The Commission should require any merged SBC-Ameritech to commit to providing lower cost-based prices for unbundled network elements, and higher wholesale discounts on resold services, that truly compete with the cost methodology set forth in the *Local Competition Order*.

In addition, the Commission should require the new SBC-Ameritech, if it applies for in-region interLATA authority following the merger, to demonstrate that effective competition (as that term may be embodied in the Act's Section 271 competitive checklist) exists *throughout its entire region*, rather than looking at any one state. Such a condition would at least ensure that some effective competition exists throughout the combined region before this powerful local monopoly

^{33/} Complaint of MCI Telecommunications Corporation and MCImetro Access Transmission Services, Inc., File No. E-98-32 (filed Mar. 17, 1998).

can forge ahead in new markets. This would guard against an abuse of market power by SBC, and furnish the additional incentives necessary to induce the combined company to take steps in opening all of its markets to competition.

The Commission should also require SBC-Ameritech to submit *monthly* performance reports, in lieu of the quarterly reports required in the context of the BA-NYNEX merger.^{34/} Since the new SBC-Ameritech would already be compiling data on a monthly basis under the basic BA-NYNEX conditions, it should be a relatively minor additional burden to publish those results on a more frequent, monthly basis. A span of even three months can make a substantial difference in deciding whether to enter a market or in attempting to withstand the continuing anticompetitive conduct of an incumbent — especially one as large as a combined SBC-Ameritech company with bottleneck control of essential facilities across such a large expanse of the United States.

More stringent reporting requirements, however, are only a means to an end. Reports allow carriers to measure performance, but they cannot prevent SBC-Ameritech from acting in a discriminatory and anticompetitive manner. The Commission should attach conditions compelling the combined SBC-Ameritech to adhere to certain levels of performance in providing competitors with access to unbundled network elements and resold services. For new customers acquired by a CLEC, SBC/Ameritech should consent to Remote Call Forwarding cut-overs at specific scheduled times, including after business hours, to avoid any customer business disruption that could be detrimental to successful market entry by competitors.^{35/} For each reporting category imposed, SBC-

^{34/} See *BA/NYNEX Merger Order*, at ¶ XX.

^{35/} Hyperion has experienced damaging instances of other RBOCs failing to meet scheduled
(continued...)

Ameritech should be required to meet a certain threshold of performance (whether it be a set interval or a specific success rate) so that carriers can determine with certainty when the mega-RBOC is performing in a substandard manner.

While we recognize that the Commission tentatively concluded in its Operations Support Systems rulemaking that it would be "premature" to develop performance standards,^{36/} it would only be through the adoption of such standards that the reporting requirements can truly provide competitors with certainty in analyzing the relative performance of SBC-Ameritech. Where the Commission feels that there is insufficient information to develop reasoned performance standards for a particular reporting category, the Commission should require the combined SBC-Ameritech to clearly identify the performance levels and intervals it would provide for itself, and adopt those as default performance standards.^{37/}

2. The Commission should also ensure that the combined SBC-Ameritech cannot evade compliance with these merger conditions, as Bell Atlantic-NYNEX has apparently done.

It may be practically impossible, of course, to undo such a merger once it is consummated. However, that might be the only effective sanction. Instead, the Commission should establish a

^{35/}(...continued)

time commitments for RCF cut-overs for loop installations with very harmful effects upon both Hyperion and its new customer(s).

^{36/} *Performance Measurements and Reporting Requirements for Operations Support Systems, Interconnection, and Operator Services and Directory Assistance*, CC Docket No. 98-56, RM-9101, Notice of Proposed Rulemaking (rel. Apr. 17, 1998), at ¶125.

^{37/} The Commission should also require periodic independent third-party verification of SBC-Ameritech's OSS to better ensure that performance will be satisfactory going forward.

system of reasonable yet strict financial sanctions for failure to adhere to the performance standards incorporated in the merger conditions.

For example, if SBC-Ameritech's performance vis-a-vis a CLEC in any category in which it is required to report falls below the level of performance it provides for its own operations for two consecutive months, the Commission should assess a fine of \$75,000 for each month thereafter that the substandard performance in that category continues. The proposed amount of this fine has a sound basis. In the Southwestern Bell-AT&T interconnection agreement in Texas, Southwestern Bell has already agreed to pay liquidated damages of between \$25,000 and \$75,000 in cases where Southwestern Bell's performance falls below a certain measurement level for two consecutive months. Adopting a performance penalty on the high end of that range in the present context would help ensure that there are adequate disincentives to deter the larger, more economically powerful combined SBC-Ameritech from engaging in anticompetitive conduct.

Moreover, the Commission should create an entirely separate system of penalties to be imposed should the combined SBC-Ameritech fail to meet other, non-performance related merger conditions. In instances in which the new SBC-Ameritech, for example, fails to make combinations of network elements available to competitors or refuses to provide reports on a monthly basis, the Commission should impose a penalty of \$500 per day for a continuing violation. As in the case of performance breaches, this amount also has a sound basis; 47 U.S.C. § 502 allows the Commission to impose such a fine for each and every day that a person willingly and knowingly violates any Commission rule, regulation, restriction, or condition. By imposing sanctions for these kinds of violations as well, the Commission can be better assured on a going forward basis that it will not

EXECUTIVE SUMMARY

Hyperion Telecommunications Services, Inc. ("Hyperion") opposes the proposed merger of SBC Communications, Inc. ("SBC") and Ameritech Corporation ("Ameritech"). This proposed merger of two massive, neighboring Regional Bell Operating Companies ("RBOCs"), each of whom already wields dominant market power in its home region, is likely to have a dramatic and adverse impact upon the development of competition in their combined region, while offering little, if any, competitive benefit to out-of-region consumers. Indeed, SBC has on its own shown its intent to fight and delay the development of competition throughout its continually growing region. Accordingly, there is no reason to expect that a larger SBC would somehow become a kinder, gentler RBOC. Thus, Hyperion respectfully submits that the Commission should, after appropriate review of the Hart-Scott-Rodino documents filed by SBC and Ameritech and an evidentiary hearing on the application, ultimately rule that this proposed merger is not in the public interest.

Should the Commission nevertheless decide that this merger can proceed, it should not allow SBC and Ameritech to become an even larger mega-RBOC without imposing strong pro-competitive conditions on the mega-RBOC's operations going forward. Specifically, Hyperion asserts that the only way in which the proposed union could possibly be found to serve the public interest is if SBC-Ameritech's commitment to the following conditions is made an essential part of merger approval:

1. Elimination of resale restrictions and provision of greater wholesale discounts on resold services and forward-looking, cost-based prices for unbundled network elements.
2. Elimination of operations restrictions on resale that have no technical basis.
3. Elimination of special construction charges when such charges would not be imposed upon the RBOC's own end user customers.
4. Implementation of intraLATA toll dialing parity in all states by February 8, 1999, if not otherwise required to implement dialing parity sooner.

5. Establishment of reasonable prices for directory listings and a mechanism for appealing disputes over such prices to this Commission.
6. Immediate development of Operational Support Systems that enable competitors to provide service to their end users in parity with the service that SBC-Ameritech provides to its own end users.
7. Submission of *monthly* performance reports.
8. Satisfaction of defined performance standards.
9. Payment of reasonable, yet strict, sanctions for failures to satisfy performance and non-performance related merger conditions.

Only by imposing and enforcing such conditions and effective sanctions can the Commission adequately ensure that a new SBC-Ameritech behemoth would not abuse its enormous market power to the detriment of competitors, such as Hyperion, throughout the combined mega-RBOC's region.

violations as well, the Commission can be better assured on a going forward basis that it will not encounter the same kind of compliance problems that have given rise to the MCI Complaint against Bell Atlantic.

CONCLUSION

The application for a transfer of control should be denied. Alternatively, the Commission should inspect the applicants' Hart-Scott-Rodino filings, and set the case for an evidentiary hearing.

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Dated: October 15, 1998

CERTIFICATE OF SERVICE

I do hereby certify that on this 15th day of October, 1998, a true copy of the foregoing Comments in FCC Docket No. 98-141 was served by first-class, U. S. Postal Service, postage prepaid or by hand as indicated, upon the following:

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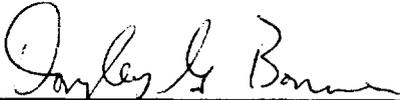
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