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FEDERAL COMMUNICATIONS COMMISSION
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EX PARTE PRESENTATION

Magalie Roman Salas, Esq.
Secretary
Federal Communications Commission
The Portals
445 Twelfth Street, S.W.
Washington, D.C. 20554

Re: *In the Matter of Applications for Transfer of Control to SBC Communications Inc. of Licenses and Authorizations Held by Ameritech Corporation, CC Docket No. 98-141*

Dear Ms. Salas:

Attached for filing in the above-referenced docketed proceeding is the joint response of SBC Communications Inc. and Ameritech Corporation to comments recently submitted to the Commission by the attorneys general of Illinois (submitted separately), Indiana, Michigan, Missouri and Wisconsin. The comments of the five AGs raise no new issues and merely repeat arguments made by merger opponents that SBC and Ameritech have already addressed and refuted. Moreover, the recommendation of four of the attorneys general that the merger approval be conditioned on prior section 271 approval is unsupported by their analysis, is unnecessary, and, furthermore, would be contrary to law.

In accordance with the Commission's rules concerning ex parte presentations, two copies of this notice is provided herewith. Please call me if you have any questions.

Respectfully submitted,

Todd F. Silbergeld

Attachment

cc: Thomas Krattenmaker
Robert C. Atkinson
Carol E. Mattey
Michelle Carey
Michael H. Pryor
William Dever

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RESPONSE OF SBC AND AMERITECH TO COMMENTS OF FIVE STATE ATTORNEYS GENERAL

I. INTRODUCTION

On April 27, 1999, the attorneys general of four states – Indiana, Michigan, Missouri and Wisconsin – filed comments on the proposed SBC/Ameritech merger. The four AGs raise no issues new to this proceeding, but merely review points previously made by AT&T, Sprint, and other merger opponents on four subjects: potential competition, benchmarking, discrimination, and the National-Local Strategy. Although these four AGs suggest that the merger be conditioned on receipt of Section 271 authority, their underlying analysis falls far short of supporting that or any other relief. Separately on April 27, the Illinois AG filed comments adopting the "substance" of the other AGs' analysis, but rejecting the call for Section 271 conditions.

In fact, these five AGs appear to have chosen their words carefully, and they use characterizations that confirm what SBC and Ameritech have demonstrated in this record: The arguments against the merger are nebulous, tenuous, and speculative.

- As to ***potential competition***, the AGs say that Ameritech "would **most likely**" be competing in St. Louis, and SBC "**might well**" be entering local exchange in Chicago, both through their cellular subsidiaries. (It is worth noting that nowhere do the AGs or their economists even attempt to explain why the divestiture of Ameritech's Chicago and St. Louis cellular properties to GTE will not replace any potential competition from this cellular platform.)

- As to ***benchmarking***, the AGs comment that, while it "**seems**" that this merger "**might**" be intended to help avoid effective regulation, because each "regulated RBOC **may well**" restrain the ability of others to resist market-opening initiatives, it is "**not clear** how significant benchmark regulation" will be. (The five AGs rely entirely on Sprint's now-discredited benchmarking examples, and offer not a single new instance to support even their tentative conclusion.)

- As to ***discrimination***, the AGs' headline says it all: "The Katz/Salop 'Big Footprint' theory is analytically sound but appears **insufficiently quantifiable** for this instance **to justify blocking the merger.**" (Although they abandon this discrimination theory, it is important to note that the five AGs do not even attempt to respond on the merits to the Carlton/Sider empirical analysis demonstrating that there is no basis to support this theory.)

- As to the ***National-Local Strategy***, while the AGs recognize that the NLS "does count as a potential competitive benefit," they assert -- notwithstanding the firm and repeated commitments by SBC and Ameritech and their officials -- that it is "no sure thing" because it "**may well be**" that SBC/Ameritech would change its plans. (Here the five AGs are internally inconsistent, as they first argue that potential competition from SBC and Ameritech in **two cities** (Chicago and St. Louis) "could spark the development of effective local competition" and then contend that the FCC should ignore SBC/Ameritech's plan to enter **thirty cities** across the country.)

This foundation is obviously too shaky to support any relief, let alone the unprecedented suggestion – not joined by the Illinois AG – that the Commission precondition the merger on receipt of Section 271 authority in a majority of the SBC/Ameritech states. As their wording indicates, the AGs' comments are entirely speculative. They do not offer any new evidence or analysis on which to base sound policy decisions.

While the five AGs seek to elevate their comments by noting that they conducted an "11-month joint investigation" of the proposed merger, they do not mention other very important facts:

- The "joint investigation" was conducted by attorneys general in **all thirteen** states SBC and Ameritech serve, yet **only five** signed on to the comments, and only four support the Section 271 condition.
- While SBC and Ameritech cooperated fully with the state attorneys general throughout their inquiry by making information and documents available, the parties were **not** given a meaningful opportunity to address the concerns prior to the filing of the comments, as is standard procedure in DOJ or state investigations. (In fact, Ameritech first learned of the filing from the Wisconsin Attorney General one business day before the comments were filed, and that office refused to give us even a few days to meet and address their issues.)

The AGs' comments do not add any new perspective to the merger opponents' positions, which are fully analyzed and rebutted in the record in this proceeding. Moreover, the four AGs who advocate the 271 condition do not even begin to tackle the serious legal problems that would be raised by grafting one regulatory scheme -- long distance entry -- onto the incompatible host of the entirely separate merger review process. There is no analysis whatsoever of why the Section 251 standards adopted by Congress to ensure open markets -- especially when combined with the truly Herculean efforts SBC already has expended to open its markets and that SBC's ILECs have expended to establish meaningful performance measures -- do not fully satisfy any perceived risk. In fact, the four AGs' suggestion of conditioning the merger on receipt of Section 271 authority would impermissibly extend Section

271 in a manner not contemplated by Congress and would, as the federal courts have made clear, be beyond the power of the Commission.

II. THE FIVE ATTORNEYS GENERAL'S COMMENTS ALREADY HAVE BEEN REBUTTED IN PRIOR FILINGS.

A. Potential Competition

The AGs' own characterization of the potential competition issue make clear how tenuous, infirm, and completely speculative their analysis is. Having had independent access to all documents submitted in the federal and state proceedings, and having been invited to participate in all of those proceedings, they can only muster the conviction to say that, absent the merger, "Ameritech **would most likely** be competing in St. Louis," and "SBC **might well** be implementing plans" to enter Chicago. AG Comments at 1 (emphasis added). Other key comments are couched in similarly speculative terms: "It **may well be** that each company would be a uniquely advantaged competitor in the other's territory," "[i]t is **certainly possible to question** whether SBC would terminate all of its plans . . . based on . . . Rochester," "elimination of an RBOC potential entrant **may well** cause competitive harm that is not mitigated by the presence of other types of potential entrants," and "it is **certainly possible** that Ameritech's entry into St. Louis or a competitive foray by SBC into Chicago **could** spark the development of effective local competition." *Id.* at 1, 4-5, 12-13, 16 (emphasis added). Then, in the summary, the AGs themselves question whether any of this even matters: "It may be that the status of SBC and Ameritech as potential competitors in each other's territory, standing alone, **does not significantly restrain** either from the exercise of market power." *Id.* at 22 (emphasis added). Such inconclusive conclusions, while honest assessments, cannot legally support relief here.

Still more remarkable is the failure of the AGs (and their economists) to recognize that even their speculative concern about potential competition will be remedied by the sale of Ameritech cellular properties to GTE, pursuant to the DOJ decree and the FCC rules. Not only does GTE step into the shoes of Ameritech Cellular (in both St. Louis and Chicago), but GTE possesses all the attributes the attorneys general find so appealing in SBC and Ameritech, including ILEC experience and a recognized brand name. In fact, GTE has publicly stated that it plans to provide local service as well as cellular service: "[T]hese properties will . . . facilitate expansion into the local phone markets in key Midwest cities such as Chicago and St. Louis." GTE News Release, *GTE to Acquire Ameritech Wireless Assets in Midwest* (Apr. 5, 1999), *available at* <http://www.gte.com/AboutGTE/ NewsCenter/News/Releases/ AmeritechWireless.html> (visited May 2, 1999).

Beyond these examples of how speculative the five AGs' potential competition argument is and how their concerns have already been met, it bears emphasis that the potential competition issue has been thoroughly and dispositively resolved not only by the Justice Department -- which concluded its investigation by imposing a cellular divestiture requirement -- but also in SBC/Ameritech's prior submissions in this docket. *See* Public Interest Statement of SBC Communications Inc. and Ameritech Corp., CC Dkt. No. 98-141, at 58-59, 65-73 (filed July 24, 1998); Joint

Opposition of SBC Communications Inc. and Ameritech Corp. to Petitions to Deny and Reply to Comments, CC Dkt. No. 98-141, at 44-53 (Nov. 16, 1998) ("SBC/Ameritech Reply"); Sigman Aff.; Osland Aff., Weller Aff. ¶¶ 31-36; Carlton Reply Aff. ¶¶ 20-26, 33. In short, that the merger will not adversely affect competition – potential, actual, or otherwise – in any relevant market is confirmed by the U.S. Department of Justice's recent approval of the merger without any local exchange market-opening conditions like those now urged by four of the state AGs. *United States v. SBC Communications Inc.*, No. 1:99CV00715, proposed Final Judgment (D.D.C. Mar. 23, 1999).

B. <u>Benchmarking</u>

The second "competitive concern" with the merger – inability to control market power because of the loss of an RBOC regulatory benchmark –not only is undermined by the Illinois AG's position, but is peppered with qualifications and admissions demonstrating the weakness of the argument. First, the AGs speculate about the intent of SBC and Ameritech: "[I]t seems as if RBOC mergers **might** be explained as intended to strengthen the merged firms' abilities to resist the dissipation of . . . market power" by eliminating a regulatory benchmark. AG Comments at 19 (emphasis added). This is apparently so, they suppose, because "**chances are** that Ameritech and SBC will have different approaches on many issues." *Id.* at 21 (emphasis added). But of greatest significance is the five AGs' recognition that the telecommunications marketplace is very dynamic and, whatever unspecified value another benchmark may conceivably have had in the past, they are irrelevant in a competitive marketplace. *Id.,* Attachment at 6.

The frailty of the five AGs' claims again is most evident in their refusal to join issue with facts in this record. Their filings ignore our prior submissions in this docket in which SBC/Ameritech rebutted and debunked the "examples" which the attorneys general recycled from previous filings of other merger opponents. *See Supplemental Memorandum Regarding Regulatory Benchmarking Issues*, attached to Letter from Todd F. Silbergeld, Director Federal Regulatory, SBC Telecommunications Inc., to Magalie Roman Salas, Office of the Secretary, Federal Communications Commission (March 26, 1999) (CC Dkt. No. 98-141 *ex parte* submission) ("Benchmarking Ex Parte"). *See also* SBC/Ameritech Reply at 53-63; Schmalensee/Taylor Reply Aff. ¶¶ 51-82; Rivera Reply Aff. The fact remains that no one, not the five AGs, nor the merger opponents, nor Commission Staff, has provided a valid example of the Commission's use of a single RBOC benchmark to determine the feasibility of a proposed practice. *See* Benchmarking Ex Parte at 5-12.

There could be no clearer evidence on this point than the Illinois AG's supplemental filing, which proposes reporting requirements so the Commission and the states can monitor not inter-RBOC performance, but service that SBC/Ameritech provide "to their affiliates and to other CLECs."

The AGs' benchmarking claims, in sum, like the same claims of other merger opponents, are purely speculative, ignore relevant facts, and do not provide a legally sufficient basis to disapprove or condition this merger.

C. Incentive And Ability To Discriminate

The five AGs admit that their third "competitive concern" – the internalization of anticompetitive spillover effects – is "insufficiently quantifiable in this instance to justify blocking the merger." AG Comments at 23. Indeed, the attorneys general are not even sure the theory would ever result in an anticompetitive effect sufficient to stop a merger: "[W]e are unaware of any way to quantify its predicted anticompetitive effect and determine for which mergers, **if any**, that effect is too significant to permit the merger to proceed. *Id.* at 25 (emphasis added). These admissions confirm the weakness of this theory, which Sprint's own economist characterizes as "informed conjecture."[1] There is absolutely no evidence to support the proposition that this merger would lead to an increase in discriminatory conduct.

Furthermore, SBC/Ameritech submitted a comprehensive, systematic econometric analysis demonstrating the faulty assumptions of the theory, the absence of evidentiary support for the spillover effects theory, and its inconsistency with the real-world business decisions of CLECs. Letter from Paul K. Mancini, General Attorney and Assistant General Counsel, SBC Communications Inc., to

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1 *See* Discrimination Ex Parte at 1.

Magalie Roman Salas, Office of the Secretary, Federal Communications Commission (April 13, 1999) (CC Dkt. No. 98-141 *ex parte* submission).[2] The AGs do not even attempt to address this empirical evidence. But the AGs' admission that the Sprint theory offers no basis to block the merger is most telling.

As the five AGs' own admission and SBC/Ameritech's submissions show, allegations of anticompetitive effects based on this unprecedented, unproven, and utterly speculative theory should not be taken seriously.

D. Benefits Of The Merger

Finally, the attorneys general do not question whether the merger and the National-Local Strategy ("NLS") will benefit consumers: "SBC's plans to offer local exchange service on a competitive basis in 30 out-of-region markets within the next four years **does count** as a potential competitive benefit of the merger." AG Comments at 29 (emphasis added). While the AGs question whether SBC/Ameritech could change those plans, *id.*, they do not explain why this Commission should ignore SBC/Ameritech's firm and repeated commitments that it will implement the NLS (and the concrete steps it has taken to do so) that are far stronger evidence than statements from parties to other mergers that the FCC accepted and relied on.[3]

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2 *See also* SBC/Ameritech Reply at 63-70; Schmalensee/Taylor Reply Aff. 20-50; Deere Reply Aff.

3 *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from Tele-Communications, Inc. To AT&T Corp.*, CS Dkt. No. 98-178, FCC 99-24 at ¶¶ 147-148 (Feb. 18, 1999); *Application of WorldCom, Inc. and MCI Communications Corp. for Transfer of Control of MCI Communications Corp. to*
(continued...)

Moreover, the AGs cannot have it both ways. If, as the AGs claim, "Ameritech's entry into St. Louis or a competitive foray by SBC into Chicago" is so significant because it "could spark the development of competitive local competition," AG Comments at 16, then SBC/Ameritech's entry into **thirty cities** across the country through the NLS should be an even greater "spark."

Finally, SBC/Ameritech has previously addressed this argument in numerous submissions to the Commission. *See, e.g.*, SBC/Ameritech Reply at 19-43; Kahan Aff.; Kahan Reply Aff.; Carlton Aff.; Carlton Reply Aff.; Grubman Reply Aff. Thus, for the reasons stated above, SBC/Ameritech's NLS and the resulting benefits cannot be ignored or discounted, as the attorneys general argue.

III. CONDITIONING THE MERGER ON SECTION 271 APPROVAL IS UNNECESSARY AND UNLAWFUL.

The four AGs provide no justification whatsoever for conditioning the merger on the prior grant of interLATA authority in seven states under Section 271 of the Act. They offer the conclusory assertion that such a condition would be "directly responsive to the competitive conditions that prompt reasonable reservations about merger approval," AG Comments at 33, but they do not explain how. Indeed,

(...continued)

WorldCom, Inc., CC Dkt. No. 97-211, FCC 98-225 at ¶¶ 191-192, 199 (Sept. 14, 1998); *Applications of Teleport Communications Group Inc. and AT&T Corp. For Consent to Transfer of Control of Corporations Holding Point-to-Point Microwave Licenses and Authorizations to Provide International Facilities-Based and Resold Communications Services*, CC Dkt. No. 98-24, FCC 98-169 at ¶¶ 47-48 (July 23, 1998). Indeed, the attorneys general essentially concede that blocking the merger would be **anti**competitive: "We cannot say that blocking the merger would have no adverse consequences on the development of local exchange competition." AG Comments at 31.

having concluded that the "big footprint" theory cannot be substantiated, the only merger-specific effects they identify (wrongly, at that) are the supposed loss of potential entry in St. Louis and Chicago and the supposed loss of a regulatory benchmark. Those issues have nothing to do with Section 271 conditions, nor do they provide any basis for converting this voluntary option into a mandatory requirement.

Indeed, the Commission itself has expressly and repeatedly rejected requests to impose such a condition in prior ILEC merger cases. It has ruled explicitly that "the determination of whether the proposed merger is in the public interest has no bearing on the question of whether the authorization of Bell Atlantic-NYNEX to provide in-region interLATA services would be consistent with the public interest, convenience, and necessity." *Applications of NYNEX Corp. and Bell Atlantic Corp. for Consent to Transfer Control of NYNEX Corp. and its Subsidiaries*, 12 FCC Rcd 19985, ¶ 203 (1997). *Accord, Applications of Pacific Telesis Group and SBC Communications Inc.*, 12 FCC Rcd 2624, 2661-63 (1997).

But even if there were a rationale to explain why a Section 271 requirement would remedy some actual merger-specific harm, the Commission could not lawfully impose such a condition. Since the Communications Act already specifies the direct consequences of failure to obtain Section 271 authority (*i.e.*, the continued prohibition against offering interLATA services), the FCC may not make compliance with the substantive provisions of that section, in the same or a different form, a condition of approving the merger. By seeking to do so, the

Commission would effectively add an enormous consequence -- denial of the merger -- to the consequence already specifically provided in the Act. The courts have made clear that modifying a specific statutory process by imposing such conditions exceeds an agency's authority.

For example, in *City of Kansas City, Mo. v. HUD*, 861 F.2d 739 (D.C. Cir. 1988), HUD had conditioned release of the City's annual Community Development Block Grant ("CDBG") on curing its alleged noncompliance with certain provisions of the CDBG Act. (HUD did so by forcing the City to sign an agreement containing "special conditions" before it could receive the grant.) *Id.* at 741. The court found that the condition was unlawful, since it effectively imposed sanctions without following the procedures spelled out in the CDBG Act for remedying noncompliance. *Id.* at 742-43. The court rejected HUD's argument that it was authorized to impose such conditions by a different provision of the Act that allowed it to make "appropriate adjustments" in the amount of an annual grant. *Id.* at 743-44. Similarly here, the FCC may not attach a requirement that the parties obtain Section 271 authority as a pre-condition to approval of the merger. To do so would be to circumvent the specific procedures set up by Congress for achieving compliance with Section 271.[4]

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[4] *See AT&T v. FCC*, 487 F.2d 865 (2d Cir. 1973) (the Commission may not avoid the procedural protections provided in Section 205 of the Act by seeking to accomplish the same result through a tariff change moratorium order).

In *Natural Resources Defense Council v. Browner*, 57 F.3d 1122 (D.C. Cir. 1995), the D.C. Circuit held that an agency must follow the procedures established by Congress in accordance with their terms. The case involved amendments to the Clean Air Act that provided deadlines and multiple incentives for states to come into compliance with clean air standards. *See id.* at 1122-24. The NRDC challenged an EPA interpretation that gave states additional time to file implementation plans after they had cured deficiencies in their original plans, complaining that the interpretation allowed states to evade the deadlines and was inconsistent with the overall objective of the Clean Air Act amendments. *Id.* at 1125. The court held that the section was clear on its face, and must be followed by EPA. *Id.* at 1129. The court found that it was "only one of several mechanisms in the 1990 amendments that encourage state compliance," and held that each element of the "multi-faceted statutory scheme" must be given effect as written. *Id.* at 1127, 1128. By the same reasoning, the Commission here may not seek to increase the incentives for compliance with provisions of the '96 Act by superimposing the threatened denial of the merger on the incentive mechanisms already provided.

Moreover, the Supreme Court has held that an agency may not seek to convert a voluntary mechanism under a regulatory statute into a mandatory one by imposing it as a condition on grant of another statutory right. In *NLRB v. District 50, UMWA*, 355 U.S. 453 (1958), the National Labor Relations Board had issued an order requiring that the United Mine Workers of America not be recognized by the employer until it received NLRB certification under then-sections 9(f) through (h) of the National Labor Relations Act. *Id.* at 455-56. But as the Court noted, those sections:

> merely describe advantages that may be gained by compliance with their conditions. The very specificity of the advantages to be gained and the express provision for the loss of these advantages imply that no consequences other than those so listed shall result from noncompliance.

Id. at 462, *quoting United Mine Workers v. Arkansas Oak Flooring Co.*, 351 U.S. 62, 73 (1956). The UMWA had chosen not to comply with the requirements for certification, and was therefore effectively barred by the conditional order from representing the employees. *NLRB*, 355 U.S. at 456. Even under the admittedly broad powers granted to the NLRB to issue orders that promoted the policies of the statute, the Court could find no authority to mandate compliance with the prerequisites for voluntary certification. *Id.* at 458, 461-63. Because other means for achieving the purposes of the statute were available to the NLRB short of the certification condition, the Supreme Court held that its condition order was "not appropriate or adapted to the situation calling for redress and constitute[d] an abuse of the Board's discretionary power." *Id.* at 463.

Here, the proposed requirement that the parties must receive Section 271 authority in multiple states before the merger may be consummated is exactly the type of unlawful condition the Supreme Court has struck down. To require Section 271 authority as a condition of approval of this merger would not only have adverse practical consequences for the already complex Section 271 process, but would plainly be unlawful.

IV. CONCLUSION

The five AGs' comments raise no new issues; indeed, they underscore exactly how tenuous and speculative the arguments against this merger really are. SBC and Ameritech have demonstrated that there is no merit to any of these arguments. And it is significant that the relief proposed by four chief state law enforcement officers is not only not supported by any substantial evidence, but would violate federal law.