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June 28, 1999

**Ex Parte Filing**

Magalie Salas, Secretary  
Federal Communications Commission  
445 Twelfth Street, S.W.  
12<sup>th</sup> Street Lobby, Room TW-A325  
Washington, D.C. 20554

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JUN 28 1999  
FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

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

Dear Ms. Salas:

Enclosed for filing in this docket are the original and one copy of a letter I sent to Christopher Wright on behalf of SBC Communications Inc. I would ask that you include the letter in the record of this proceeding in compliance with 47 C.F.R. § 1.1206(a)(2).

If you have any questions concerning this matter, please contact me at (202) 326-7902.

Sincerely,

*Michael Kellogg*

Michael K. Kellogg

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June 25, 1999

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JUN 28 1999

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

Christopher J. Wright, Esquire  
General Counsel  
Federal Communications Commission  
445 Twelfth Street, S.W.  
Room 8C-723  
Washington, DC 20554

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

Dear Chris:

In our meeting yesterday, we discussed whether an ILEC's separate advanced services affiliate might, under certain circumstances, be considered a "successor" or "assign" of the ILEC, within the meaning of section 251(h)(1)(B)(ii). Specifically, we discussed an advanced services affiliate that, while it has separate officers and directors and separate books of account, would be permitted (1) to engage in joint marketing with the ILEC; (2) to use the ILEC's brand name without obligating the ILEC to make its brand name generally available; (3) to obtain operation, installation and maintenance ("OI&M") from the ILEC on a non-discriminatory basis; and (4) to transfer from the ILEC facilities and equipment (e.g., DSLAMs and packet switches, but not conditioned loops) used to provide advanced services.

In our view, none of these four factors, viewed singly or in combination, would render the advanced services affiliate a "successor" or "assign" of the ILEC. The first two (joint marketing and exclusive use of the brand name) are permitted by section 272, which sets out the requirements for a separate in-region interLATA affiliate. Since the 1996 Act clearly

contemplates that a 272 affiliate is not a “successor” or “assign” of the BOC,<sup>1</sup> joint marketing and use of the brand name, which are permitted by section 272, plainly cannot render an advanced services affiliate a successor or assign. As for the third factor, although the Commission has interpreted the “operate independently” language of section 272 to preclude any provision of OI&M to a 272 affiliate, no similar language is found in 251(h), and there would be no apparent reason that non-discriminatory provision of OI&M, available to all CLECs on the same terms and conditions, would have any bearing on the question of whether an advanced services affiliate is a successor or assign. This is simply the provision of a service by one entity to another.

That leaves the transfer of assets to the separate affiliate. Under 47 C.F.R. § 53.207, if a BOC transfers to an affiliated entity ownership of network elements that must be provided on an unbundled basis pursuant to section 251(c)(3), that entity will be deemed an “assign” of the BOC for purposes of the definition of “Bell Operating Company” in section 3(4). It would arguably follow that such an entity would also be an assign of the ILEC for purposes of section 251(h)(1)(B)(ii). It would not follow, however, that the transfer of advanced services assets would turn an affiliate into an assign of the ILEC.

As an initial matter, the Commission has not determined that advanced services facilities are network elements which must be unbundled. Under current rules, therefore, the transfer of advanced services facilities does not trigger the “assign” language of the Act. Even if the Commission were to define advanced services facilities as UNEs, moreover, the Commission has recognized that such facilities are fundamentally different from the core network elements used to provide traditional telephone service. Thus, in its *Advanced Services Order* (§ 108), the Commission drew a sharp distinction between “transfers of facilities used specifically to provide advanced services, such as DLAMs, packet switches, and transport facilities,” and transfers of “other network elements, such as loops,” which would automatically render a separate affiliate a successor of the ILEC.

Such a distinction finds support in the statute. Section 251(h) defines an ILEC as a carrier that “on February 8, 1996, provided *telephone exchange service*” and refers to “successor[s]” and “assign[s]” of such a carrier. 47 U.S.C. § 251(h) (emphasis added). Unlike the elements originally unbundled pursuant to Rule 319, the electronics and equipment used to provide advanced services are not core network elements used to provide telephone exchange service. Indeed, elements used to provide advanced services (except the conditioned loop) are entirely new facilities as opposed to the facilities that ILECs have long used to provide telephone

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<sup>1</sup>Otherwise, since section 272 forbids a BOC from providing in-region, interLATA services except through a separate affiliate, and section 3(4) defines “BOC” to include a “successor” or “assign,” if the separate affiliate permitted by section 272 were itself a successor of the BOC, Section 272 would contain an internal contradiction.

exchange service. The ILECs have no monopoly in network elements used solely to provide advanced services. And, of course, the nature of the equipment used in the provision of advanced services does not change based on whether the Commission orders that equipment to be unbundled. For purposes of defining a “successor” or “assign,” then, the Commission could continue to distinguish between those elements used to provide telephone exchange service and those used solely to provide advanced services, even if the Commission ultimately orders the latter to be unbundled.

In its *Advanced Services Order*, (§ 109) the Commission proposed a six-month grace period to allow the transfer of advanced services facilities (other than conditioned loops) to a separate facility. And, although the Commission there drew a tentative distinction between a *de minimis* transfer of such facilities and “a wholesale transfer” (*id.* at § 106), it is not clear that such a distinction would have any bearing on a transfer of advanced service facilities made by an ILEC today. Given the incipient nature of ILEC advanced services, any transfer of advanced services facilities will in fact be *de minimis* compared to the traditional local exchange facilities retained by the ILEC. (That is the relevant measure, since the core question is whether the affiliate has stepped into the shoes of the ILEC.) More fundamentally, the nature of these facilities — which are freely available to ILECs and CLECs alike in the open market — is fundamentally different from traditional, “bottleneck” local exchange facilities.

Such transfers are consistent with the Commission’s policies as well. Under the current set of rules (where no separation is required), ILECs have begun purchasing advanced services facilities. If the Commission wishes to encourage ILECs to set up separate subsidiaries for advanced services (rather than incorporating such facilities into the public switched telephone network), it will be necessary to allow those facilities to be transferred, without carrying a crippling disability, to the new affiliate. CLECs will not be placed at any disadvantage, because such facilities are freely available for lease or purchase in the open market and the ILECs’ facilities are very limited at this time.

As the Commission itself has noted (*Advanced Services Order* § 104 & n.202), there is no fixed test for when one entity will be considered a “successor” or “assign” of another. The terms are not defined in the 1996 Act, and prior case law in other contexts (e.g. labor law, corporate law, torts) has very little relevance because the inquiry is dependent upon the particular context and the purpose of the rules in question. Determinations about successorship, for example, must be based on “the facts of each case and the particular legal obligation which is at issue”; “there is and can be no single definition of ‘successor’ which is applicable in every legal context.” *Howard Johnson Co. v. Detroit Local Joint Executive Board*, 417 U.S. 249, n.9 (1974).

Here, the “particular legal obligation which is at issue” is the obligation of an ILEC to open its network to new entrants so that they can compete with the ILEC in the provision of what have traditionally been monopoly local exchange services. The Commission believes that far from

being impeded by the ILECs' transfer of its advanced services operations to an advanced services affiliate, this congressional purpose is promoted by placing advanced services offered by an ILEC on the same footing, with respect to access to the local exchange network, as those offered by a CLEC. Indeed, as a result of separating the ILEC's advanced services, the CLEC will have the added advantage of obtaining OI&M from the ILEC on the same terms and conditions as the ILEC affiliate. The whole point of the Commission's discussion of separate subsidiaries in its *Advanced Services Order* was to make that an attractive option for ILECs so that they would be encouraged to do it, with consequent benefits for ILECs and CLECs alike.

Three questions raised at yesterday's meeting are worth addressing briefly. First, someone asked whether the "safe harbor" created by section 272 for joint marketing and exclusive use of the ILEC brand name should really apply in this context. Section 272, after all, only comes into play after a BOC has satisfied the market opening requirements of section 271. No such threshold requirement applies to ILEC provision of advanced services. But that point simply underscores the benefits of a separate affiliate in this context. An ILEC today can provide advanced services with no separation: obviously, then, joint marketing and exclusive use of the brand name, as well as provision of OI&M and use of ILEC assets, are all contemplated by the Commission for advanced services — all those things can be done right in the ILEC with no separation at all. There are no 271 or other checklist requirements that must be met before an ILEC can provide advanced services. By shifting these operations to a separate affiliate, the ILEC should not lose the benefits of joint marketing and use of the brand name (otherwise it would have no incentive to make such a switch); but a CLEC gains the benefit of having transactions between the ILEC and the separate affiliate be open and available, so that the CLEC can benefit from similar transactions on a non-discriminatory basis.

That is why the *Qwest* decisions — in which both the Commission and the Court held that certain sorts of joint marketing arrangements can constitute the "provision" of forbidden interLATA services — are inapplicable here. Those decisions focus exclusively on the issue of what interLATA-related services a BOC may provide today, prior to obtaining 271 relief. They have no bearing on the separate question — governed by the terms of section 272 — of how the BOC may provide permitted services once 271 relief is obtained. So too, here. There is no question that an ILEC can itself provide advanced services today. It is an entirely separate question whether the provision of such services through an advanced services affiliate implicates the "successor" and "assign" language in section 251(h). With respect to this latter question, the "safe harbor" in section 272 for joint marketing and use of the brand name is dispositive.

A second question concerned whether, even if each factor viewed separately would not render the affiliate a successor of the ILECs, the four taken together might do so. There is no reason to think that they would. As already noted, joint marketing and use of the brand name are both permitted under section 272 and cannot, therefore, render the affiliate a successor taken separately or together. The provision of OI&M should have no bearing whatsoever on the

question because OI&M must be provided on non-discriminatory terms to CLECs and subsidiaries alike. Since there is no difference in treatment, OI&M services do not suggest that the affiliate has the special status of a successor. Finally, the transfer of assets that are not part of the ILEC's traditional local exchange service should not make the affiliate a successor to obligations imposed on the ILEC when the ILEC continues to control the facilities used to provide traditional local exchange service.

Finally, you asked whether general case law dealing with the terms "successor" and "assign" has any bearing on this question. As already noted, the relevant inquiry is necessarily tied to the purposes of the particular legal obligation at issue. Accordingly cases drawn from other legal contexts have little relevance here and often diverge from one another in their approach. For example, in determining a "successor" for purposes of labor law, the Supreme Court focused on "whether the business of both employers is essentially the same, whether the employees of the new company are doing the same jobs in the same working conditions under the same supervisors; and whether the new entity has the same production process, produces the same products, and basically has the same body of customers." *Fall River Dyeing and Finishing Corp. v. NLRB*, 482 U.S. 27, 43 (1987) (quoting). The purpose of the inquiry, the Court stressed is to determine whether "those employees who have been retained will understandably view their job situations as essentially unaltered." *Id.* (quoting *Golden State Bottling Co. v. NLRB*, 414 U.S. 168, 184 (1973)). The goal is to "further the Act's policy of industrial peace" and "[i]f the employees find themselves in essentially the same jobs after the employer transition and if their legitimate expectations in continued representation by their union are thwarted, their dissatisfaction may lead to labor unrest." *Id.* at 43-44.

In corporate and tort law, courts have also confronted the issue of whether a company is a "successor" or "assign" in determining whether it should be liable for another entity. In this context, however, the "well-settled" general rule is that "where one company sells or transfers all of its assets to another, the second entity does not become liable for the debts and liabilities, including torts, of the transferor." *Conway v. White Trucks*, 885 F.2d 90, 93 (3rd Cir. 1989). Indeed, courts have rejected liability even where the original and purchasing company share the same or similar names and the same company president. *See, e.g., Pace Setter*, 931 F. Supp. at 110 (refusing to find exception to general rule of liability where company name changed from PaceSetter to PaceSetter Marketing and the company president remained the same). Courts have also rejected liability where the purchasing company carries on the same business, manufactures the same product line under the same trade name, and profits from the goodwill, advertising and established market of its predecessor. *See, e.g., Burr v. South Bend Lathe, Inc.*, 480 N.E.2d 105, 108-109 (Ohio 1984).

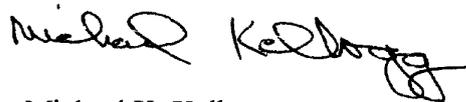
None of these cases, because of their different contexts, is dispositive, or even particularly informative, as to the meaning of "successor" and "assign" in section 251(h). The only case I am aware of that directly addresses the "successor" and "assign" language of 251(h) is *MCI*

*Telecommunications Corp. v. The Southern New England Telephone Company*, 27 F. Supp.2d 326, (D. Conn. 1998), in which a district court upheld the Connecticut PUC's approval of the transfer of SNET's retail operations and customers to SNET America, Inc. ("SAI"). Even here, however, the Court did not reach the question whether SAI should be considered a "successor" or "assign" of SNET. Instead, the Court determined that, regardless how that question was resolved, "being a 'successor or assign' of an ILEC, standing alone" is insufficient to subject a telecommunications carrier to resale obligations under sections 251 and 252. *Id.* at 336-337. The Court concluded that, because SAI — as opposed to SNET — did not provide telephone exchange service in the State of Connecticut on February 8, 1996, it failed to satisfy the condition set forth in § 251(h)(1)A), and therefore it could not be considered an ILEC. *Id.* at 337. Thus, according to the Court, it did not matter whether SAI is a "successor or assign" of SNET.

The Commission must make its own *de novo* interpretation of the successor/assign language in section 251(h), in light of the purposes of the Act. For the reasons given in this letter, we believe that the correct result is that an advanced services affiliate, as described above, would not be a successor or assign of an ILEC. Certainly, *Chevron* deference would be sufficient to sustain a Commission determination to that effect.

I would be happy to discuss these matters further if you have any questions. I can be reached at home over the weekend (202-364-1152) or in the office (202-326-7902).

Sincerely,



Michael K. Kellogg