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BEFORE THE

Federal Communications Commission

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In re Applications of	)	
AMERITECH CORP., Transferor,	)	
and	)	
SBC COMMUNICATIONS, INC., Transferee	)	CC Docket No. 98-141
for Consent to Transfer Control	)	

COMMENTS OF SPRINT COMMUNICATIONS COMPANY L.P. ON PROPOSED CONDITIONS

WILLKIE FARR & GALLAGHER
Three Lafayette Centre
1155 21st Street, N.W.
Washington, D.C. 20036
(202) 328-8000

Attorneys for Sprint Communications Company L.P.

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ON PROPOSED CONDITIONS

Sprint Communications Company L.P. ("Sprint"), by its attorneys, hereby files its comments on the conditions proposed by SBC Communications, Inc. ("SBC") and Ameritech Corporation ("Ameritech") (collectively "SBC/Ameritech") for the pending application. Sprint objects to the Applicants' proposals as anticompetitive and contrary to the public interest.

As the record makes clear, the merger will enlarge the parties' ability to discriminate and impair regulators' ability to regulate, most especially in the area of new services that require new forms of cooperation. This threat comes at a particularly critical time, given the recognized evolution to data-oriented technologies, the growth of the Internet, and the congressional goal of widespread

deployment of advanced broadband services. In order to minimize the predictable, adverse consequences of the merger in this area, more definite obligations are needed to promote the competitive goals of the 1996 Act, especially the development of a multi-supplier environment for the deployment of advanced broadband services. As Sprint has consistently noted in this proceeding, the Commission should unconditionally deny the proposed SBC/Ameritech merger because no conditions will ameliorate the competitive harm that this merger will cause. Alternatively, if the Commission conditionally approves the merger, it should reject the SBC proposal in toto and move to craft a procompetitive set of conditions as detailed below. To the extent possible, these should be made pre-conditions to closing the merger. As demonstrated by the Bell Atlantic/NYNEX merger, post-merger conditions are largely ineffective once the merger is completed.

I. INTRODUCTION

It is important to set forth the precise procedural posture of SBC's proposed conditions. On June 29, after weeks of deliberations with the Applicants, the staff announced through a press conference that it was prepared to recommend Commission approval of the application subject to a set of conditions. A summary of the staff's understanding of those conditions was publicly released the same day. On July 1, 1999, the Applicants submitted their own proposal. Although the Applicants' submittal letter stated that "the

Commission Staff has specifically indicated that the package of conditions would satisfy their public interest concerns and lead them to support the proposed transfer of control," the FCC Public Notice simply sets forth the document as the Applicants' submission alone. Indeed, there is no indication that the staff ever saw the specific language proposed in any form until June 29, the same day the staff released its summary.[1] Given the ambiguous posture of the record, and the remarkably broad disparities between the staff summary and the Applicants' package, Sprint believes it is fair to assume that the two distinct documents are in fact distinct. The SBC "package" is merely a private submission, reflecting private interests and does not (and should not) enjoy any agreement or endorsement from the Commission staff.[2]

While the staff undoubtedly expended many weeks of hard work, the SBC proposal disserves the public interest. In many respects, the SBC proposal merely reiterates advocacy positions taken by SBC and Ameritech in various regulatory proceedings and commercial settings -- positions that have

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[1] See Ex Parte Letter from Paul K. Mancini, General Attorney and Assistant General Counsel, SBC, to Magalie Roman Salas, Secretary, FCC, June 30, 1999 (reflecting June 29 meetings with FCC staff and attaching document entitled "Potential Conditions Discussed").

[2] Given the failure of the Applicants to comply with the FCC's ex parte rules, there would of course be insurmountable Administrative Procedure Act deficiencies if this were not the case.

been the subject of widespread complaint (and substantiation) proving them to be anticompetitive. In negotiating conditions, the staff sought to avoid the pitfalls of the Bell Atlantic/NYNEX merger conditions process, that is, to require details in lieu of ambiguous rules that could later be interpreted in meaningless ways by the merger parties. The problem with the package lies in the fact that it is SBC alone that has to date provided the details. These details make plain the unhappy understanding of how futile the condition language as proposed will be. Side exits and trap doors abound, allowing SBC to evade and sabotage the procompetitive intent of the staff's efforts. The results of the SBC proposal would be to leave competitive entrants and the public in an affirmatively worse posture than they are today.

At the commencement of the conditions process, several goals were set forth by Chairman Kennard. The SBC proposal would ignore, and in many instances, undermine these goals. A primary goal was to open local telephone markets to competition, as well as to foster a competitive environment for all telecommunications services, including advanced services. The SBC proposals would serve to actually step backwards in the process. A prime example of this can be found in Attachment C, the proposed loop conditioning charges. The rates reflected are not merely not cost-based, they are <u>multiples</u> of what reasonable charges should be. SBC's proposed line sharing arrangements (which contain

unvarnished, anticompetitive output restrictions) similarly reflect only SBC's advocacy position -- arguments that on-the-record proceedings have already proven to be without foundation and contrary to a competitive environment.

Another goal set forth in Chairman Kennard's letter was to make meaningful SBC's claimed public interest inducement: the National-Local Strategy ("NLS"). When forced to reduce this promise to a binding commitment, the promise simply evaporated. The claim of firm business planning of which we were once assured has now been fundamentally altered: SBC will not even commit to the same 30 cities that it once claimed were the subject of concrete business plans. Despite earlier protestations, Section 271 authority is now revealed as an express prerequisite for any extensive SBC out-of-region entry. But perhaps most insultingly, it turns out the claimed need to grow to a 62 billion dollar company was purportedly necessary in order to serve a sum total of 30 individual residential and business customers!

Further, the duration of the proposed conditions alone defeats the purposes of Chairman Kennard's letter. Many provisions either lapse with the highly limited duration of the conditions themselves -- generally three years -- or with a specified exception of even shorter duration. There are numerous proposed "pull-back" provisions, should SBC lose certain legal positions (such as the Section 251(c) obligations of its advanced services separate affiliate). Not only are these duration terms mismatched with the onset

of the obligations (in some areas, the obligation would not start until the completion of preconditions likely to occur well after the lapse of the obligation!), a three year period is simply insufficient time in which to allow competitive entry to establish itself. As SBC's purported NLS "business plans" themselves demonstrate, entrants prudently need to plan for a significantly longer period. Indeed, with respect to the "promotional" offerings alone, the point is not to give CLECs a handout, but to establish forward-looking cost-based rates and other terms of entry that will allow companies to assess whether entry is economically feasible. Short-lived discounts off underlying rates that do not fairly reflect TELRIC costs merely transfer wealth (and very little of it); they do not enable the Commission (and the entrants themselves) to determine whether competition is really feasible at cost-based rates.

Sprint's pleading addresses those proposals that present, in Sprint's view, the most anticompetitive threats to competition and to the public. Given the sharply abbreviated schedule, and the Commission's informal expression of its desire to move promptly on the merits of the application, Sprint has not provided a line-by-line explication of the SBC document. Sprint submits that it is unwise if not illegal to allow the SBC package to frame the debate. It must not be SBC's writings that will control the telecommunications markets; the Commission may not have the time or the ability to affirmatively write over each word

and phrase in which SBC's self-interests are hidden. One can readily foresee SBC "explaining" to decisionmakers in the coming years why it wrote what it wrote, what it had in mind, and how its words are to be interpreted. Obviously, given the vagaries of the process and the document actually produced by SBC, regulation by "negative option," as it were, cannot be prudent or permissible. Sprint therefore urges the Commission to reject the document in toto, and to replace it with an extended staff effort, which should include the specific provisions Sprint discusses here.[3] Only in this way can the "pitfalls" of the SBC proposal be avoided.

To the extent that further proceedings are required to craft meaningfully detailed conditions, SBC and Ameritech have only themselves to blame for the additional time it will require. Over the time period in which days and weeks of meetings occurred, the merger parties submitted for the record only the briefest and non-revealing summaries of these FCC meetings. Their ex parte letters merely recorded the fact of the meetings and the fact that they discussed conditions. The FCC's ex parte rules are designed to ensure a full airing of issues for public notice and comment, and would have provided precisely this necessary airing on a more timely basis had the parties respected them. In

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[3] Further details are readily available in the ex parte filings of Sprint, AT&T and other CLEC interests.

contrast, Sprint and other similarly situated companies met with FCC officials and thereafter recorded for the public record their proposed conditions. Had the merger parties adhered to the FCC's ex parte rules, as they were obligated to do, the problems now confronting the timing of the Commission's deliberations would not exist. It is a problem of the merger parties' own making, and the FCC must proceed to take whatever time is necessary to ensure an outcome consistent with the public interest.

II. PROBLEMS ABOUND WITH THE SPECIFIC PROVISION PROPOSALS OF SBC/AMERITECH.

A. Loop Information for Advanced Services

The staff summary correctly recognized the need to ensure the reasonable, non-discriminatory availability of loop information in order to make possible a competitive environment for the delivery of advanced services. The loop prequalification and qualification information offered in the SBC proposal, and the timing and manner in which it would be offered, would only ensure BOC dominance, however.

First and foremost, information regarding the presence of DLCs, or Digital Loop Carriers, is missing from the list of necessary loop data. As the Commission well knows, loops that are behind DLCs require different arrangements to be made DSL capable.[4] Sprint estimates that more than half of

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[4] See Deployment of Wireline Services Offering Advanced Telecommunications Capability, Memorandum Opinion and Order and Further Notice of Proposed Rulemaking, 13 FCC Rcd. 24011, ¶¶ 165-72 (1998).

all residential access lines nationwide will ultimately be served by DLCs,[5] and thus no commercially viable provider of xDSL services can reasonably plan or market its business without prior access to such information on a marketwide basis.

Meaningful OSS for advanced services requires prompt and complete database access to all of the required information. The SBC proposal contains timeframes in excess of one to two years, thereby unnecessarily extending the monopoly-based market jump the RBOC (and any affiliate) enjoys. Moreover, the type of interfaces and competitor access to the data over the Internet actually being proposed would appear to be deliberately vague (Proposal ¶ 22): does the proposal mean competitors can search the database only on an address-by-address basis, without ever gaining access to the full set of data on a marketwide basis? Further, the proposal relates back to the type of access SBC has chosen to give its affiliate, leaving the CLECs with an unsatisfactory "lowest common denominator" approach to access entitlement. And while paragraph 23 of the proposal

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[5] The increase in DLC-served lines has been significant over the past five years: 50-70% of new lines (growth) are served by DLC and DLC is being used to rehabilitate loop plant. It is Sprint's understanding that more than 50% of suburban/urban customers and 80% of rural customers will ultimately be served by DLCs. This estimate is based upon the assumption that locations greater than 9,000 feet beyond the central office will trigger DLC deployment. Today approximately 50% of suburban/urban loops and 80% of rural loops are longer than 9,000 feet.

appears to obligate SBC more generally to providing access regarding loop data, it provides no time frame and vaguely references SBC's provision of access "whether such access is by electronic or non-electronic means." Moreover, it is simply unclear how these provisions are intended to relate to those contained in paragraph 16.[6] Again, we are at a critical window in xDSL deployment; if the FCC allows RBOCs to leverage their monopoly advantages into the new markets for advanced services, the efficiency and innovation of competitive supply will be sacrificed.

As a condition to the merger, the FCC must affirmatively require each SBC operating company to inventory its loops for DSL-capabilities, including DLC data. The entire potential market -- not just SBC -- will in this way have access to comprehensive information allowing their deployment and marketing plans to be made upon more accurate data. This will make unbundled loops more readily available to CLECs in order to bring advanced services to customers more quickly and more efficiently.

Sprint's Proposed Language:

"Each ILEC (defined as the operating companies of the merging companies) shall make available to requesting carriers electronic access on a daily basis to a Loop Inventory Database as provided herein. The Loop Inventory

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[6] Problems specific to paragraph 16 are discussed in Section II.G., infra.

Database shall be the exclusive repository of such information within the ILEC (or any affiliate of the ILEC) and any affiliate or division of the ILEC desiring to have access to such information shall access such information exclusively through the database, on the same terms and conditions as requesting CLECs. Two weeks prior to closing, each ILEC shall demonstrate to the Commission that it has established the Loop Inventory Database, and that it contains all relevant data (as set forth below) in the ILEC's possession (including in the possession of any affiliate of the ILEC), provided that the data contained in the Database shall reflect the inventory of loops connected to central offices serving not less than 50% of that ILEC's exchange access lines. No later than six months after the closing, the database shall reflect an inventory of loops connected to all of the remaining central offices. The database shall permit the real-time retrieval of both location specific loop capability information and aggregate market information. Location specific loop capability shall include: actual loop length (as measured from customer premise to serving central office); the presence of load coils, bridged taps, and repeaters (and how many of each); the presence of any other known interferers; whether the location currently is served by facilities that transit through a digital loop carrier (DLC); the availability of alternate facilities that could circumvent the DLC, i.e., end-to-end copper loop; and any known binder group

restrictions that would hinder the placement of a particular xDSL technology. Aggregate market information shall include: average loop length of all loops connected to a specific central office; the percentage of loops that are less than 6,000, 12,000 and 18,000 feet; the percentage of loops currently residing behind a DLC; and the percentage of loops that contain interferers such as load coils, bridged taps, and repeaters."

B. Loop Conditioning Charges

SBC further "commits" to provide uniform interim rates for conditioning xDSL loops. Proposal ¶ 24.[7] As shown below and in the attached sworn declaration of Carl H. Laemmli, the rates proposed -- up to $1,940 per segment of loop -- are without record basis and are fatally flawed. See generally Sworn Declaration of Carl H. Laemmli ("Laemmli Decl.") (attached as Appendix 1). First and foremost, Sprint believes that SBC's rates are inconsistent with the TELRIC methodology, and that their approval would send a message to state commissions that an ILEC may recover embedded, historical costs in loop conditioning charges under the FCC's pricing rules. Load coils, bridged taps, and repeaters are not elements of a forward-looking network. See Laemmli Decl. ¶¶ 12-17, 58-64. Thus, charging for removal of these items is not consistent with the TELRIC

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[7] The proposal provides that these rates shall be in effect until state specific cost-based rates are set. Id.

cost of providing xDSL capable loops. See id. Even if some embedded costs were allowable, SBC's rates are excessive and unsupported. To demonstrate how anticompetitive the proposed rates are, Sprint provides the following record support for appropriate loop conditioning rates. Third, to the extent that the Commission decides it lacks a basis for selecting between Sprint's and the Applicants' proposed rates, Sprint submits that, rather than adopt the exorbitant rates proposed by SBC, the Commission would do less harm if it deleted all language regarding interim rates for loop conditioning.

The following chart summarizes Sprint's and SBC's proposed charges for loop conditioning. The first column, entitled, "SBC Proposal," sets forth SBC's proposed charges in this proceeding. For comparison, the second column, entitled "Missouri Proposal," sets forth the rates proposed by SBC in its position statement before the Missouri commission in the state rate proceeding. The final column, entitled "Sprint Proposal," sets forth the alternate rates, which Sprint calculated after reviewing and correcting the assumptions underlying SBC's Missouri cost estimates, that Sprint proposes the Commission adopt here.[8]

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[8] Sprint Corporation's ILEC arm, Sprint-LTD, does not charge to condition loops less than 18,000 feet.

Type Of Conditioning	SBC Proposal[9]	Missouri Proposal	Sprint Proposal
Removal of repeaters	$360	$358.30	$68.33
Removal of bridged taps	$600	$599.25	$11.42
Removal of load coils	$980	$987.35	$15.33[10]

The above chart highlights two important facts. The first is that SBC's proposed rates here are virtually identical to those it proposed in Missouri. Accordingly, Mr. Laemmli's sworn declaration, which addresses the flaws in SBC's rates in that on-the-record proceeding, is equally relevant here. Second, Sprint's proposed rates are a fraction of SBC's proposed rates. This underscores the great disservice that will occur if the Commission approves SBC's proposed rates -- even on an interim basis -- in light of the lack of a factual record to support those rates and the vast disparities between proposals.

Moreover, as demonstrated by Mr. Laemmli's sworn declaration, the Applicants' proposed charges do not

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[9] This chart does not reflect the fact that SBC proposed separate (identical and cumulative) charges for removal of repeaters, bridged taps, and load coils in each of three defined loop segment lengths. For example, under the Applicants' proposed rates, a 38,000 feet loop with repeaters, bridged taps, and load coils in each of three segments would cost $5,820 to condition.

[10] This figure is the cost per pair of unloading coils from 25 pairs at once in two locations. Because load coils are not needed for voice service for loops less than 18,000 feet, we assume that SBC will unload all pairs in a binder group, 25 at a time.

withstand even minimal scrutiny. While the specific flaws in the proposed interim rates are too numerous to address here, some of the most egregious deficiencies include: (1) improperly requiring Sprint to pay for deloading loops that are between 12,000 and 18,000 feet (Laemmli Decl. ¶¶ 31-32, 55)[11]; (2) assuming an embedded network, assessing excessive charges for deloading loops that are between 12,000 and 18,000 feet (id. ¶¶ 33-57), removal of bridged taps (id. ¶¶ 70-79), and removal of repeaters (id. ¶¶ 80-90); (3) failing to reflect the efficiencies that the Applicants will undoubtedly attain through implementation of SBC's plan to renew its network (id. ¶¶ 51-57, 91); and (4) improperly charging for removal of repeaters for loops less than 18,000 feet (id. ¶¶ 83, 87).[12]

Perhaps most inculpatory is the fact that the charges endorsed by the Applicants are more than twice the amount -- $900 -- that SBC charges its own end users in Missouri.[13]

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[11] For example, properly designed, copper pairs are loaded only when they exceed 18,000 feet in length. Thus, if the ILEC must de-load copper pairs because it has elected to design its plant in a manner that is inconsistent with generally accepted network design principles, the ILEC should not be allowed to shift those costs to the CLEC.

[12] Sprint urges the Commission to review Mr. Laemmli's detailed discussion in the attached sworn declaration.

[13] In Kansas City, SBC is offering residential customers ADSL Internet service for $59 a month plus $198 for equipment and $299 for installation. End users also need an Internet service provider, which costs $10 a month from SBC. If an end user executes a one year contract, the monthly charge decreases to $39 and installation charges are dropped. While SBC has indicated to end users that certain

Other BOCs also charge their end users far less for loop conditioning. Allowing an ILEC to assess a CLEC "special construction charges in connection with the provisioning of an unbundled loop when, under identical circumstances, [the ILEC] routinely foregoes the collection of such charges from its own customers to whom it is provisioning unbundled loops," constitutes a violation of that ILEC's non-discrimination obligations. See BRE Communications LLC v. Ameritech Mich., Case No. U-11735, Opinion and Order at 30 (Mich. Pub. Serv. Comm'n Feb. 9, 1999). Moreover, a comparison of other BOCs' line conditioning charges -- or lack thereof -- further illustrates how excessive the Applicants' proposed charges are. For example, Sprint's current interconnection agreement with Pacific Bell (negotiated prior to its merger with SBC) does not charge for loop conditioning.[14] Also, Bell Atlantic-Pennsylvania recently filed a state settlement proposal that commits Bell Atlantic not to charge for loop conditioning. Finally, none

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lines may require conditioning, which would cost $900, SBC has stated that such charges "crop up with only a small percentage of customers and that it is looking at ways to eliminate that charge." Ted Sickinger, Southwest Bell Takes Wraps Off DSL: High Speed Internet Service Arrives, But Not All Customers Can Connect To It, Kansas City Star, July 1, 1999, at C1.

[14] Sprint's contract with Pacific Bell expires February 7, 2000. SBC has made it clear to Sprint personnel in charge of negotiating the new contract that Pacific Bell will not voluntarily agree to provide xDSL without charging conditioning fees similar to those proposed here. Further, Pacific Bell has filed tariffs indicating that its charge to condition a line for an end user is $900, the same as SBC's.

of Sprint's ten interconnection contracts or two Statement of Generally Available Terms and Conditions (SGAT) agreements with Bell Atlantic, or Sprint's interconnection contract with SNET, includes any loop conditioning costs.

As demonstrated, the Applicants' proposed rates are unsupported, excessive, and anticompetitive. Accordingly, Sprint requests that the Commission adopt the Sprint rates outlined above in the chart and detailed in Exhibit E of Mr. Laemmli's sworn declaration. Alternately, to ensure that the Applicants do not discriminate against CLECs, the Commission should prohibit SBC and Ameritech from assessing any non-recurring line conditioning or other charge on CLECs in excess of that assessed by the ILEC on its own retail customers subject to an approved tariff. Such a requirement will ensure that the ILECs treat CLECs at parity, and will avoid the untenable situation in which CLECs pay line conditioning charges far in excess of those charged end users by the incumbent.[15]

Finally, rather than adopt the anticompetitive rates proposed by the Applicants, Sprint submits that the Commission would do less harm if it were to delete all proposed language regarding interim line conditioning charges. Undoubtedly, CLECs will be better off presenting

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[15] Further, there appears to be no imputation requirement for SBC's retail services, or those of its "non-dominant" affiliate, with respect to loop conditioning charges.

fully supported factual records in cost proceedings without having to combat what is certain to be portrayed by SBC as the FCC's tacit approval of the Applicants' exorbitant non-recurring charges. Indeed, in a transparent effort to bootstrap and legitimize its proposed rates before the Missouri commission, SBC has already attempted to characterize the instant proposal as rates that have been approved by the Commission staff.[16] At a minimum, the Commission should ensure that the proposed conditions do not

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[16] On July 9, 1999, SBC witness Deere testified regarding the loop conditioning rates contained in Attachment C (erroneously described as "Appendix C") of the proposal: "And so Appendix C. I believe it is in the agreement, has an interim rate for conditioning when it is required, and there's a rate for bridge tap, removal of repeaters and load coils. And because the FCC's interpretation of what that paragraph means in there is the same as ours. And so they recommend an interim rate for the conditioning." Petition of Sprint Communications Company L.P. for Arbitration of Unresolved Interconnection Issues regarding xDSL with Southwestern Bell Telephone, Case No. TO-99-461, Hearing Transcript, Vol. II at 118, lines 8-15 (Mo. Pub. Serv. Comm'n July 9, 1999) (relevant pages attached as Appendix 2). Moreover, counsel for SBC expressly noted that SBC is "simply pointing out a fact that, you know, this agreement [between SBC, Ameritech, FCC and FCC staff] has been reached, and it's information that would be useful to the [Missouri] Commission." Id. at 120, lines 1, 5-9.

Later on, when asked by whom the proposal was drafted, Mr. Deere responded: "It was a joint effort by the staff of the FCC and representatives from SBC and from Ameritech." Id. at 142-43, lines 24-1. While the witness conceded upon cross-examination that the Commission had not approved the rates, he stated that "the FCC staff has approved . . . the concept of charging for the conditioning." Id. at 145-46, lines 23-3. When pressed as to whether the actual rates had been approved, Mr. Deere responding by stating that the FCC staff had "applied these as interim rates." Id. at 146, lines 4-5.

exacerbate the anticompetitive effects of the merger, as these proposed rates would do.

C. Advanced Services Affiliate

SBC proposes to establish a separate affiliate structure for provisioning advanced services.[17] The affiliate would resemble a Section 272 affiliate (but with significant requirements omitted),[18] and would be regulated as a non-dominant carrier by the Commission. During a transition period, SBC would be permitted to share certain advanced services' "functionalities" and provision line sharing on an exclusive basis with its affiliate until it becomes "technically and commercially" feasible to provide such capability to competing advanced services' providers. The proposal also establishes a "grace period" during which SBC would be permitted to transfer advanced services' equipment[19] to the affiliate on an exclusive basis. The

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[17] SBC defines advanced services as "wireline telecommunications services, such as ADSL, IDSL, xDSL, Frame Relay, Cell Relay and Dial Access Service that rely on packetized technology and have the capability of supporting transmissions speeds of a[t] least 56 kilobits per second in at least one direction. This definition of Advanced Services does not include data services that are not based on packetized technology such as ISDN." Proposal ¶ 26.

[18] See generally Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd. 17539 (1996) ("Non-Accounting Order").

[19] SBC defines advanced services equipment as "(1) DSLAMs or functionally equivalent equipment, (2) splitters located at the customer premises that are used in the provision of Advanced Services, (3) packet switches and multiplexers such as ATMs, Frame Relay engines and Packet

separate affiliate requirements sunset three years after the merger closes (or four years with respect to certain provisions), but potentially much earlier.

The proposal does not ensure that unaffiliated providers of advanced services are able to compete on a level basis in the SBC and Ameritech regions. As an initial matter, the Section 272 safeguards are designed to be implemented only after the extensive market-opening requirements of Section 271 have been met. See 47 U.S.C. § 272(a)(2). Sections 271 and 272 work hand in glove to reduce the possibility of anticompetitive behavior. That, of course, is not the case here as the Commission has yet to deem any BOC's telephone exchange markets open pursuant to Section 271. Thus, SBC may not simply import Section 272's requirements -- and in a watered-down form at that -- into the advanced services context at this time. This is especially true since the Commission is currently reviewing the provision of advanced services in the Section 706 context and elsewhere. Moreover, the proposal prejudges issues not yet decided by the Commission and may ultimately "lock-in" an outcome, such as non-dominant regulation for the affiliate, more favorable to SBC than that decided for other ILECs subject to any subsequent rulemaking or other

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Engines used to provide advanced services, (4) modems used in the provision of packetized data, and (5) DACS frames used in the provision of Advanced Services." Proposal ¶ 27.c.

decisions. Such a result would harm the evolving advanced services' market. SBC's proposal for establishing an advanced services affiliate is harmful, rather than helpful, to competition. It should therefore be scrapped in its entirety.

1. Regulatory Obligations

The manner of separation contrived by SBC here would allow the SBC ILECs to evade their regulatory obligations under Section 251(c). The proposal attempts to resuscitate an approach already proven erroneous in the ongoing Section 706 proceeding: the separation of advanced services will neither allow BOCs to escape their ILEC obligations (most especially 251 and 271), nor will it protect competition or consumers from BOC leveraging of their POTS monopoly into advanced services without the most stringent separation requirements.

Separate subsidiary structures have been deployed by the FCC as a means of delineating monopoly services and functions from competitive activities, allowing the Commission and the public to target regulatory efforts to the monopoly enterprise. Such regulatory efforts include mandating competitors' access to monopoly functions on non-discriminatory and reasonable terms. In this way, a BOC may enter competitive markets without substantial risk of leveraging its monopoly base into the competitive areas.

The problem with applying this construct to xDSL, and especially in the warped form presented by SBC, is that it

utterly fails to properly isolate -- to separate -- the monopoly inputs from competitive ones. As other Commission proceedings have shown, for example, the xDSL service itself may be a monopoly service in smaller central offices where demand will support only a single DSLAM. In other geographic markets, lack of collocation availability may trigger a need for xDSL UNE-platform access. As discussed below, the SBC proposal does not even begin to resolve these problems. Indeed, it seems to seek to foreclose such access entirely.

It should be plain that SBC is merely seeking to evade its 251(c) obligations by specifying that SBC's affiliate should be regulated as a non-dominant carrier. See Proposal ¶ 36. But as a matter of law, SBC's corporate decision to permit its affiliate, rather than the SBC ILEC, to provide advanced services renders the affiliate a "successor or assign" of the ILEC and therefore subject to dominant regulation and the non-discretionary obligations of Section 251(c).[20] The decision to transfer responsibility for advanced services should be viewed no differently, as a legal matter, than a transfer of facilities. Each results

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[20] The transfer of assets from the ILEC to the affiliate, of course, would render the affiliate a "successor or assign" as well. While SBC has sought to argue otherwise, its degree of confidence in its own legal arguments is revealed in paragraphs 28 and 39.c, both of which relieve SBC of the separation requirements in the event a court rejects its "successor or assign" position.

in the affiliate exclusively providing services that would otherwise be provided by the ILEC.

Enabling SBC to avoid direct regulation by establishing a separate subsidiary is also contrary to sound public policy. Today's advanced services, such as packet transmission technologies, may be tomorrow's method of provisioning all telecommunications services and information services. SBC must not be permitted to avoid a cornerstone of the 1996 Act -- Section 251 -- by providing such monopoly services through an unregulated affiliate.[21]

In order to ensure a competitive environment for xDSL offerings, the FCC must require access to essential inputs for advanced services. In markets where demand for such services will be thin, at least initially, access must include DSLAM sharing and a UNE-Platform for xDSL services. In lieu of promoting such access (either here or in the pending rulemaking), SBC's proposal would assure <u>against</u> any such access. This problem is exacerbated by the additional problems identified below.

2. Degree of Separation

Unlike the "true" separation contemplated by Section 272, the SBC proposal would permit significant sharing of

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[21] As the record in the 706 proceeding also proves, SBC does not need regulatory inducements to provide advanced services. Conclusive evidence of this fact is that SBC has already filed tariffs to offer xDSL services, notwithstanding the fact that SBC has argued that forbearance under Section 706 would be necessary for SBC to have adequate incentives to deploy such services.