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

In the Matter of Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from	)	
AMERITECH CORPORATION, Transferor	)	CC Docket No. 98-141
to	)	
SBC COMMUNICATIONS INC., Transferee	)	

JOINT REPLY OF SBC COMMUNICATIONS INC. AND AMERITECH CORPORATION TO COMMENTS REGARDING MERGER CONDITIONS

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TABLE OF CONTENTS

Page

INTRODUCTION AND SUMMARY 1

I. THE SBC/AMERITECH MERGER IS IN THE PUBLIC INTEREST 7

A. The Forces Driving the SBC/Ameritech Merger Have Only Intensified Since the Initial Filings 9

B. The Opponents' Claims of Anticompetitive Harm Lack Merit 14
1. The Merger Will Not Impede the Commission's Ability to Regulate. 14
2. The Merger Will Not Enable SBC/Ameritech to Discriminate 17
3. The Merger Will Not Remove a Significant Potential Competitor. 18

II. THE PROPOSED CONDITIONS ENSURE THAT THE MERGER'S PRO-COMPETITIVE BENEFITS WILL BE REALIZED 19

A. Ensuring Out-of-Region Competition/Benefits of the National/Local Strategy 25

B. Ensuring Open Local Markets 29
1. Carrier-to-Carrier Promotions 29
2. Performance Measures and Payments 39
3. Reporting Requirements 46
4. NRIC Participation 47
5. OSS: Enhancements and Additional Interfaces, Waiver of Charges, Assistance for Small CLECs 48
6. Collocation Compliance 56
7. Offering of UNEs 60
8. Compliance with the Commission's Pricing Rules 61
9. ADR 62
10. Most Favored Nation Provisions and Multistate Agreements 63
11. Shared Transport 67
12. Access to Cabling in MDUs and Multi-Tenant Business Premises 68

C. Promoting Advanced Services Deployment 71
1. Separate Affiliates for Advanced Services. 73
2. Loop Conditioning. 82
3. Line Sharing 84
4. Non-Discriminatory xDSL Rollout in SBC-Ameritech Region 88

D. Improving Residential Phone Service 88
1. InterLATA Pricing 89
2. Enhanced Lifeline Plans 89

E. Enforcing the Merger Order 91

F. The Effect of the Merger Conditions 93

III. REQUESTS FOR ADDITIONAL CONDITIONS ARE UNNECESSARY AND UNRELATED TO THE MERGER 95

CONCLUSION 100

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Introduction and Summary

We are now at the final stage of the most thorough and open merger review process ever conducted by the Commission. SBC and Ameritech filed their applications with the Commission over a year ago. Since that time, some of the most vocal critics of this merger have had their own mergers approved by the Commission, and those merged companies are competing in the market. Meanwhile, the Commission has solicited public comments and reply comments on this merger, sifted through boxes upon boxes of merger-related documents, held several public forums, and met countless times with SBC, Ameritech, and dozens of interexchange carriers (IXCs), competitive local exchange carriers (CLECs), and other commenters on the merger. In addition, several states have conducted hearings and reviewed the merger for compliance with state law. The Department of Justice, after carefully scrutinizing allegations of anticompetitive

harm, dismissed all of them and gave the merger a clean bill of health (subject only to compliance with the Commission's pre-existing rules on overlapping cellular properties).

Following the Commission's extensive review process, the Chairman instituted an additional procedure in which the Commission's Staff, the joint applicants, and interested parties attempted to address directly the various concerns raised about the merger. As part of this extraordinarily open process, the Commission's Staff met repeatedly with numerous parties to this proceeding to solicit their views.

The proposed Conditions submitted by SBC and Ameritech on July 1, 1999, are the product of these tens of thousands of hours of comment and feedback.[1] SBC and Ameritech believe this merger is in the public interest without any conditions attached. They are, however, willing to comply with the most extensive and unprecedented series of commitments ever made in a Commission merger proceeding in order to allay even the most remote, and entirely theoretical, possibility of potential anticompetitive harm and to guarantee tremendous public interest benefits from the merger.

These Conditions include groundbreaking commitments by SBC and Ameritech to provide further incentives for competitive local entry within SBC's and Ameritech's regions and to compete vigorously for both business and residential customers outside those regions. SBC and Ameritech will take specific concrete steps to expand competition and improve service for residential customers. This includes consumers in low-income urban and rural communities,

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[1] Proposed Conditions for FCC Order Approving SBC/Ameritech Merger, Attachment A to Ex Parte Letter From Richard Hetke, Senior Counsel, Ameritech Corp., and Paul K. Mancini, General Attorney and Assistant General Counsel, SBC Communications Inc., to Magalie Roman Salas, Secretary, FCC (filed July 1, 1999) ("Conditions").

who will benefit from expanded universal service programs and SBC/Ameritech's nondiscriminatory deployment of advanced services. The proposed Conditions will also spur additional growth throughout the already-competitive advanced services market. These Conditions are backed not only by the Commission's general powers of enforcement, but also by tough reporting and compliance requirements that will allow the Commission and other interested parties to scrutinize SBC/Ameritech's progress in meeting the Conditions and by substantial financial commitments that will keep SBC/Ameritech steadfastly on its promised course. All of these additional commitments will be added to the existing array of substantial state and federal regulatory safeguards.

Some state regulators suggest in comments on the Conditions that the Conditions may preempt state authority in such areas as performance monitoring, performance standards, OSS, and pricing. Nothing could be further from the truth. Throughout the Conditions, state authority is preserved. See, e.g., Conditions ¶ 24 (loop conditioning pricing); id. ¶ 29 (advanced services approvals); id. ¶ 44 (pricing); id. ¶ 60 (Lifeline plans); id. ¶ 69 (duplication of state conditions); id. Attach. A ¶ 2 (performance monitoring). The Conditions are intended to support and supplement actions taken by state commissions. The Conditions do not and could not affect the jurisdictional balance between the states and this Commission.

Despite the unparalleled breadth and scope of these commitments and the extensive system of performance measurements and remedies that supports them, some commenters dismiss the Conditions as mere "paper promises" that the Commission will not be able to enforce. AT&T App. A at 62; MCI WorldCom at 61-63; Sprint at 66-69. The same arguments were made in connection with the SBC/Pacific Telesis merger, but all the pledges made in

connection with that merger were fulfilled, as they will be here.[2] It should also be noted that the very commenters leading the charge against this merger received approval of their own mergers with nothing remotely comparable to the Conditions proposed here. The Commission, for instance, approved AT&T's acquisition of TCI even though AT&T had made no concrete commitment to enter any specific local exchange and exchange access markets, one of the alleged benefits of the merger.[3] AT&T's application touted such a plan,[4] but the application was riddled with cautionary statements that AT&T's plans to provide local exchange and exchange access services were "limited,"[5] would "not occur overnight"[6] and would "take time to complete."[7] Notably, AT&T did not subject itself to anything like the extensive remedial scheme proposed in these Conditions.[8] All this, moreover, took place against the background of AT&T's still

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[2] In 1996, SBC and Pacific Telesis promised they would create 1,000 new jobs in California. See Memorandum and Order, Applications of Pacific Telesis Group, Transferor, and SBC Communications Inc., Transferee, For Consent To Transfer Control of Pacific Telesis Group and its Subsidiaries, 12 FCC Rcd 2624, 2658, ¶ 73 (1997) ("SBC/PacTel"). More than 4,000 jobs have been added since the merger. SBC and Pacific Telesis also guaranteed they would lower overall prices for California customers by keeping prices for basic services the same. Id. at 2658, ¶ 73. Since the merger, consumer prices for basic services have remained unchanged, while prices overall have been reduced. SBC and Pacific Telesis promised that after the merger, they would be able to provide new services to California customers utilizing their combined strengths. Id. SBC has delivered on that promise by offering new services like ADSL, Caller ID with name delivery and enhanced Internet service with lower ISDN fees.

[3] Memorandum Opinion and Order, Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from Tele-Communications, Inc., Transferor, To AT&T Corp., Transferee, CS Docket No. 98-178 (Feb. 18, 1999).

[4] Description of Transaction, Public Interest Showing, and Related Demonstrations, Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from Tele-Communications, Inc., Transferor To AT&T Corp., Transferee, CC Docket No. 98-178, at 16, 20, 24 (filed Sept. 14, 1998).

[5] Id. at 42 n.71.

[6] Id. at 38.

[7] Id. at 42 n.71.

[8] Similarly, MCI and WorldCom failed to make concrete commitments (backed by remedial measures) to advance the interests of residential customers. The Commission simply accepted the vague promises in their application that they planned to enter residential markets. Memorandum Opinion and Order, Application of

unfulfilled commitment to use for residential local service the TCG networks it had recently purchased in another merger.[9]

The pattern should be clear to the Commission. Over the last fourteen months, AT&T has completed mergers with TCG and TCI, and it has announced plans to merge with MediaOne and to enter a multi-billion dollar partnership with British Telecom. The MCI WorldCom conglomerate has been created out of MCI, WorldCom, MFS, Brooks Fiber, and UUNET. Through these acquisitions and other ventures, these companies have amassed the resources they deem necessary to compete in today's national and global telecommunications marketplace. Now they want to slam the door and prevent SBC and Ameritech from doing the same. These carriers' criticisms of the proposed Conditions have far less to do with the Conditions themselves than with their desire to avoid competition.

Sprint, too, pursues a double standard. Sprint asks for modifications and additions to the Conditions that it says are necessary to open local markets. Sprint at 2, 10-12, 36-37, 41-42, 49-50, 55. Yet in Las Vegas, Orlando, and other markets where Sprint is an ILEC, it has failed to implement any policies remotely close to the conditions it seeks to impose on SBC/Ameritech here.

The crowning irony is that these companies – which have been conspicuously absent in efforts to bring new competition to residential customers, notwithstanding promises to do so –

WorldCom, Inc. and MCI Communications Corp. for Transfer of Control of MCI Communications Corp. to WorldCom, Inc., 13 FCC Rcd 18025, 18131, ¶¶ 189-192 (1998) ("MCI WorldCom Merger Order").

[9] Memorandum Opinion and Order, Applications of Teleport Communications Group Inc., Transferor, and AT&T Corp., Transferee, 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 Docket No. 98-24, FCC 98-169, ¶¶ 47, 148 (July 23, 1998).

complain that the proposed Conditions do not go far enough to open markets and yet would strike down specific Conditions aimed at improving competition in the least competitive residential markets. See AT&T at 9-10 (arguing against carrier-to-carrier promotions while admitting that they would predominantly apply where competition is lacking); MCI WorldCom at 51-54 (rejecting notion of carrier-to-carrier promotions); Sprint at 33-36 (criticizing the availability of the UNE-P as being limited to residential lines).[10] Their interest is not in bringing competitive benefits to residential consumers, but in obtaining further discounts to aid them in the already competitive business markets. They seek, in other words, a transfer of wealth through regulatory fiat. The Commission should view such self-interested requests with particular skepticism.

There is in fact a decided disconnect between the purpose of this license transfer review proceeding and most of the comments filed on the proposed Conditions. The purpose of this proceeding is to determine whether the transfer of licenses necessitated by the merger is in the public interest. Yet most of the comments have nothing to do with the public interest merits of the merger or any genuine competitive concerns raised by the license transfers. They are just a platform for commenters seeking unjustified perks and anti-competitive protections for themselves – in the guise of additional terms or conditions – that bear no relationship to any harm allegedly caused by the merger.

Those commenters opposing the merger and the proposed Conditions have, at best, demonstrated that the SBC/Ameritech merger, with or without conditions, is not in the

[10] Indeed, these are the very companies that are currently imposing a fixed surcharge on low-volume, residential long distance customers – the very customers least able to bear such a charge. The IXCs plainly recognize that the open markets created by this merger will also be the catalyst for section 271 relief and a consequent end to their ability to soak residential consumers.

commenters' self-interest. They have done nothing to overcome SBC and Ameritech's powerful showing that the merger is in the public interest. Nor have proponents of various new conditions addressed this Commission's prior findings, in analogous contexts such as the Bell Atlantic/NYNEX and SBC/Pacific Telesis mergers, that similar conditions should not be adopted in the context of a transfer of control proceeding.[11] The groups that support this merger – including various consumer and labor groups, such as the Communications Workers of America and the Campaign for Telecommunications Access – recognize the enormous benefits it will bring to customers, employees and competition. Accordingly, the Commission should approve the merger – either without any Conditions[12] or with the Conditions agreed to by the Applicants.

I. THE SBC/AMERITECH MERGER IS IN THE PUBLIC INTEREST

In determining whether license transfers under Sections 214 and 310 of the Communications Act are in the public interest, the Commission applies a balancing test, weighing the benefits of the merger – including benefits to consumers and increases in competition and efficiencies from the transaction – against any proven anticompetitive harms,

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[11] See, e.g., SBC/Pactel, 12 FCC Rcd at 2644, ¶ 42 (rejecting unrelated 271 arguments); Memorandum Opinion and Order, Applications of NYNEX Corp. and Bell Atlantic Corp. for Consent To Transfer Control of NYNEX Corp., 12 FCC Rcd 19985, 20087, ¶ 220 (1997) ("BA/NYNEX") (rejecting long distance billing and collection services conditions because "[i]t is not clear . . . how the proposed Conditions would remedy the potential harms to competition that result from the merger"); see also MCI WorldCom Merger Order, 13 FCC Rcd at 18115, ¶ 155 (rejecting unrelated conditions for peering criteria); Memorandum Opinion and Order, Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from Tele-Communications, Inc., Transferor, to AT&T Corp., Transferee, 14 FCC Rcd 3160, 3180, ¶ 37 (1999) ("AT&T/TCI Merger Order") (refusing to impose restrictions that are "beyond the scope of the Commission's program access rules," and inviting commenters who disagree with the rules' scope to litigate them via the program access complaint process).

[12] AT&T contends, in a fit of posturing, that the Commission is better off approving the merger without the proposed Conditions than with them. AT&T at 3. SBC and Ameritech would happily acquiesce in any such determination.

such as a reduction in competition. If the pro-competitive benefits outweigh any harm to competition, the merger passes the public interest threshold. [13]

The balance in this case points unequivocally towards approving the merger. As SBC and Ameritech discussed at length in their initial comments and reply comments, this merger grew out of SBC's and Ameritech's shared belief that they needed the resources of the merged company – and the resultant economies of scale and scope – to better serve their customers, to expand out-of-region, and to be viable competitors in increasingly national and global telecommunications markets. In conducting its public interest inquiry, the Commission must consider "trends within and needs of the industry" as well as "the complexity and rapidity of change in the industry."[14] These trends and the rapidly accelerating changes in the industry are the driving forces behind this merger, which will create unparalleled efficiencies and benefits to consumers due to synergies in research and development and marketing, improvements to services, the introduction of new and improved services, purchasing discounts, and the elimination of duplication. The industry's shift toward open markets, globalization, and consolidation, as well as technological transformations, all demonstrate why SBC and Ameritech concluded that they had to combine to compete more effectively.

Business and residential consumers will both benefit directly from the procompetitive aspects of this merger and the competition that SBC/Ameritech will provide in 30 out-of-region

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[13] Memorandum Opinion and Order, Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from Southern New England Telecommunications Corp., Transferor, to SBC Communications, Inc., Transferee, 13 FCC Rcd 21292, 21298-99, ¶¶ 13 (1998); Memorandum Opinion and Order, Applications of Airtouch Communications, Inc., Transferor, and Vodafone Group, PLC, Transferee, for Consent To Transfer of Control of Licenses and Authorizations, DA 99-1200, ¶¶ 4, 11 (rel. June 22, 1999); AT&T/TCI Merger Order, 14 FCC Rcd at 3168-70, ¶¶ 13-16 (rel. Feb. 18, 1999).

[14] Id. ¶ 32.

markets. SBC/Ameritech's out-of-region entry will also increase competition in-region, as it will accelerate the trends leading towards national and global markets and force companies whose turf SBC/Ameritech will invade to respond in kind.[15] And the terms SBC/Ameritech seeks and obtains as a CLEC out-of-region will be available to CLECs within SBC/Ameritech's region, further encouraging competition in those markets.

These benefits will come without any competitive costs. The Department of Justice carefully considered all the arguments raised by various commenters that this merger will impede competition and rightly found no reason to take action on any of them. That critical fact should be kept in mind as the Commission considers the various comments and complaints raised about the proposed Conditions. There is nothing in this record to suggest that the Commission can reach a different conclusion than the DOJ with respect to the competitive effects of the merger.

As noted, SBC and Ameritech have developed these points at length in prior pleadings and will not repeat them here. But it is worth stressing briefly the extent to which changes in market conditions since this merger was announced have increased the need for this merger and its public interest benefits, and highlighted the insubstantiality of complaints about potential competitive harms.

A. The Forces Driving the SBC/Ameritech Merger Have Only Intensified Since the Initial Filings.

As SBC and Ameritech explained in their initial filings, this merger is a response to powerful market forces that are reshaping the telecommunications industry. Shifts in regulation

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[15] Indeed, both Bell Atlantic and GTE, and U S WEST and Qwest, have cited out-of-region entry as a goal of their mergers. See, e.g., Qwest/U S WEST Merger Presentation (July 19, 1999) (visited July 26, 1999) <http://www.qwest.net/press/qwest_uswest.pdf> (discussing plans to "aggressively build and operate a CLEC out of region in 20+ markets" which will offer "a suite of fiber-based CLEC, LD, and Internet services").

are opening markets and boosting competition; increasingly strong economies of scope and scale, and globalization of the economy, are fueling rapid consolidation; and technological advances have created a new data/Internet infrastructure that is supplanting traditional media and markets. No competitor seriously disputed these trends in the initial round of comments, and none has done so in this round. Indeed, since the initial filings, these trends have only accelerated.

1. United States telecommunications companies have continued to merge and form joint ventures with both domestic and foreign partners, in order to achieve economies of scope and scale and in response to globalization. Since the initial filings, AT&T – which at the time was already the largest United States telecommunications company and second largest in the world – has completed or announced four major mergers and several joint ventures.[16] Qwest and U S WEST have just agreed to merge, as have Global Crossing and Frontier. BellSouth bought a $3.5 billion (10 percent equity) stake in Qwest. Qwest formed a joint venture with Dutch national carrier Royal KPN to construct a pan-European fiber network, and invested over $250 million in fixed wireless provider ART.[17] ALLTEL has acquired Aliant Communications and Liberty Cellular.

The competitive pressure to consolidate and globalize has affected not only United States telecommunications firms, but also foreign carriers. Since the initial filings in this proceeding, for example, AT&T Canada agreed to merge with MetroNet Communications, creating Canada's

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[16] In addition to its FCC-approved acquisitions of TCG and TCI, in December 1998, AT&T agreed to acquired IBM's Global Data Network. In the first quarter of 1999, AT&T completed and received FCC approval for its acquisition of TCI and Vanguard Cellular. In the second quarter of 1999, AT&T signed a definitive merger agreement with MediaOne. AT&T also announced that it would acquire (with partner BT) a 30 percent stake in Japan Telecom. AT&T also announced that it intends to form joint local service ventures with Time Warner and Comcast.

[17] Qwest Communications and Investor Group Commit $251 Million to Advanced Radio Telecom to Expand Its High-Speed Local Wireless Network, Qwest Communications Press Release, June 1, 1999.

first "national super carrier."[18] Global TeleSystems (GTS) and Esprit Telecom Group completed a $5 billion merger. British Telecom acquired a 20 percent stake in ImpSat, a leading Latin American telecommunications company. Swisscom is acquiring a controlling share of German phone company Debitel.

2. The rise of data and the Internet is transforming telecommunications. Data now comprises roughly half of all traffic that moves over telephone lines, and is growing much faster than voice. In recent testimony before Congress, MCI WorldCom stated that "demand for Internet bandwidth doubles every 3 or 4 months. . . . The Internet already accounts for 50 percent of the traffic on the world's communications networks. By some estimates, the Internet will soak up 90 percent of all bandwidth by 2003, and 99 percent by 2004. . . . For the past three years, MCI WorldCom has increased the capacity of its UUNET backbone by over 1,000 percent each year to handle peak traffic loads."[19]

The enormous rise of data traffic has created a new market for high-speed data and Internet access – and competition is developing most rapidly in this market. Earlier this year the Commission concluded that "[n]umerous companies in virtually all segments of the communications industry are starting to deploy, or plan to deploy in the near future, broadband to the consumer market."[20] Non-phone-company providers, including cable companies, electric utilities, and wireless cable companies are further along in last-mile deployment of broadband

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[18] AT&T Canada, CLEC MetroNet Agree to $4.58 Billion Merger, TR Daily, Mar. 4, 1999.

[19] Michael Salsbury, Executive Vice President and General Counsel, MCI Worldcom, Inc., Before the House Judiciary Committee, June 30, 1999.

[20] Advanced Services Report ¶ 12.

than ILECs.[21] As the Commission has acknowledged, CLECs also rank ahead of ILECs in current deployment of broadband to the last mile.[22] According to a recent study, at least four CLECs – Covad, NorthPoint, Rhythms NetConnection, and MCI WorldCom – have deployed DSL services in more central offices, passing more subscribers, than any single ILEC, and more than SBC and Ameritech combined.[23] Cable operators are offering commercial cable telephony, and that service is now "available to a large number of customers in many markets."[24]

3. Local telecommunications markets have opened even further, and competition has intensified. Competitors in SBC's and Ameritech's regions now serve nearly 3.2 million lines using their own facilities, 130,000 lines using unbundled network elements, and nearly 900,000 through resale. In Ameritech's region, competitors serve 738,000 lines using their own facilities, 154,000 using unbundled network elements, and one million lines through resale. SBC and Ameritech have signed almost 900 interconnection agreements with competitors, including over 250 such agreements, since SBC and Ameritech filed their application.

Although some competitors maintain that local markets still are not entirely open,[25] CLECs' enormous investments in competitive local facilities demonstrate that market conditions are ripe for competition. Since the 1996 Act, CLECs have spent millions of dollars to advertise

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[21] See id. ¶¶ 53-58.

[22] See id. ¶¶ 53, 56, 58.

[23] DSL Prime, Availability Midyear 1999 (visited July 26, 1999) <http://dslprime.com/news_articles/availability/availability.html>.

[24] Fifth Annual Report, Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming, CS Docket No. 98-102, FCC 98-335, ¶ 59 (rel. Dec. 23, 1998) ("Fifth Annual Video Programming Report").

[25] MCI WorldCom at 8; AT&T at 8.

their local service offerings and have obtained over $30 billion in financing to build out their networks.[26] According to one industry analyst, "capital spending by the 12 largest CLECs will grow by more than 25 percent in 1999 to over $5 billion."[27] In SBC's region, competitors have deployed over 175 switches and at least 10,000 miles of fiber;[28] in Ameritech's region, competitors have deployed over 75 switches and at least 5,200 miles of fiber.[29]

The acceleration of these trends since this merger was announced makes SBC's and Ameritech's merger even more imperative. As stated previously in SBC's and Ameritech's Public Interest Statement and Joint Opposition ("Joint Opposition"), the decision to merge was based on SBC's and Ameritech's determination that the forces reshaping the telecommunications industry would soon divide carriers into two camps – vertically-integrated national and global carriers, and a large number of regional and niche carriers. In order to be one of the major global carriers in the first camp, the companies needed to join forces. The merger allows the companies to achieve the scale and scope efficiencies that will enable them simultaneously to continue providing innovative, high-quality services in-region; to develop new and improved services; to continue opening local markets to competition; to expand aggressively out-of-region; and to compete effectively with their myriad local competitors.

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[26] The Council of Economic Advisors, National Telecommunications and Information Administration, Progress Report: Growth and Competition in U.S. Telecommunications 1993-1998, Feb. 8, 1999 (visited July 26, 1999) <http://www.ntia.doc.gov/ntiahome/press/ceafinalrpt.htm>.

[27] Telecom Equip.: Network Infrastructure Monthly-June 1999, U.S. Bancorp Pipe Jaffray, Inc., Leifur, C. at *5.

[28] Bellcore, TR-EQP-000315, Local Exchange Routing Guide (Mar. 1, 1999) ("March 1999 LERG"); New Paradigm Resources Group, 1999 CLEC Report, ch. 10 (10th ed. 1999) ("1999 CLEC Report").

[29] March 1999 LERG; 1999 CLEC Report.

B. The Opponents' Claims of Anticompetitive Harm Lack Merit.

A number of commenters argue that the merger is intrinsically anticompetitve and should not be approved under any set of conditions. The Department of Justice and the Public Utilities Commission of Ohio, of course, have already considered and rejected these baseless claims. But that has not precluded the repetition of those claims here. Accordingly, before addressing comments on the Conditions themselves, we will once again demonstrate that the arguments that the merger is anticompetitive are without merit and that the merger should be approved even without the proposed Conditions.

1. The Merger Will Not Impede the Commission's Ability To Regulate.

A number of commenters claim that the merger should not be approved because it will deprive the Commission of a benchmark and thus hamper its ability to regulate.[30] This is the same mantra they have repeated throughout many rounds of comments opposing the merger, but it still misses the point. Benchmarking is a regulatory tool, not an end in itself. The Commission's objective is not to preserve a minimum number of "benchmark" companies, but to facilitate and encourage the development of competition and other telecommunications goals. This merger, which will enable SBC/Ameritech to implement the National-Local Strategy, accomplishes that objective directly. The proposed Conditions provide concrete steps for implementing, measuring, and enforcing that objective. The net effect is to enhance, not reduce, the Commission's ability to regulate in furtherance of local competition.

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[30] See, e.g., AT&T at 4; Sprint at 41-42.

The Applicants have addressed and refuted the merger opponents' benchmarking arguments in detail in previous submissions[31] and will not reproduce those submissions in detail here. As the Applicants have shown, the Commission has traditionally relied on data at the operating company level, not at the RBOC level, in reaching regulatory decisions. Since this merger will not result in the loss of any operating company data, it will not reduce the amount of data available to the Commission.[32]

In any event, the traditional use of benchmarks to compare practices of different companies is of limited and declining importance today. The key regulatory issue faced by the Commission now involves the interconnection of networks necessary to open markets to competition. Thus, the relevant question is how an ILEC treats itself versus how it treats others. This merger will not impair the Commission's ability to compare the treatment that SBC/Ameritech accords itself with SBC/Ameritech's treatment of CLECs. To the contrary, as the number of CLECs increases, and as SBC/Ameritech itself becomes a CLEC with the implementation of the National-Local Strategy, the number of benchmarks will increase, not decrease. Moreover, as discussed below, SBC has been developing performance measures with the DOJ, state commissions, and CLECs, creating detailed reports that are available to the public and state and federal regulators and can be used to identify and evaluate precisely how SBC/Ameritech is treating CLECs.

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[31] See Joint Opposition at 53-63; Schmalensee/Taylor Reply Aff. ¶¶ 51-82; Rivera Reply Aff.; Supplemental Memorandum Regarding Regulatory Benchmarking Issues (submitted via ex parte letter from Todd Silbergeld to Magalie Roman Salas dated March 26, 1999) ("Supp. Benchmarking Memo").

[32] See Supp. Benchmarking Memo at 2-12.

While SBC and Ameritech believe that there is no legitimate basis for concern that the merger will impair the Commission's ability to regulate, they have nonetheless proposed several significant Conditions to lay to rest any such concerns. The merged company will continue filing ARMIS reports separately for each of its operating companies.[33] In addition, SBC/Ameritech has agreed to file additional state-by-state reports recommended by NARUC, on a quarterly basis, detailing their local service quality.[34] Thus, there will be an increase, not a loss, of benchmarking-related data, and no decline in the number of operating company benchmarks.

As set forth in detail below, moreover, SBC and Ameritech have committed to a detailed 13-state performance-measurement regime in which information on retail and wholesale performance will be provided to the Commission on a quarterly basis with respect to 20 measurement categories (which yield a total of 36 measurements).[35] In addition to providing benchmarks against which to measure the performance of SBC/Ameritech, including all five of the OSS functions (pre-ordering, ordering, processing, maintenance, and billing for resale and UNEs), the proposal also provides for substantial liquidated damages to CLECs and public interest payments for any non-compliance. This regime, together with the measures that have been agreed upon with the DOJ and with various states and CLECs, will provide an unprecedented basis for ensuring that SBC/Ameritech does not discriminate against CLECs. This wealth of information will be available to the Commission and the PUCs – and CLECs will

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[33] Proposed Conditions ¶ 56.

[34] Id. ¶ 54.

[35] See id. Attach. A.

have access to the 13-state aggregated information and their CLEC-specific information. This vast amount of information – coupled with the fact that the Commission has not historically relied on RBOC to RBOC comparisons at all – guarantees that there should not be any remaining concerns about benchmarks.

2. The Merger Will Not Enable SBC/Ameritech to Discriminate.

Sprint repeats its "big footprint" argument, which asserts that expanding the geographic scope of an ILEC's operations will increase its incentive to discriminate against CLECs operating in multi-state locations because it will be able to reap the benefits of such discrimination at both the originating and terminating end of a greater number of calls.[36] There is admittedly no factual basis for this theory – indeed, Sprint's own economist euphemistically called it "informed conjecture" – and, as we have demonstrated in prior filings, it is contradicted by actual experience.[37]

The Commission has rejected similar speculative theories in the past, for the obvious reason that an ILEC cannot degrade service to a CLEC in a way that is serious enough to cause end users not to take service from the CLEC and yet subtle enough to avoid detection by regulators and some of the most sophisticated companies in the world, armed with precise performance measurements. These two allegations cannot both be true, and, not surprisingly, neither Sprint nor any other commenter can cite any credible or empirical evidence that this has ever occurred. If meaningful but undetectable discrimination is not possible, then the existence of a "big footprint" is irrelevant.

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[36] See Sprint at 48.

[37] See Joint Opposition at 65-70; Schmalensee/Taylor Reply Aff., ¶¶ 32-50; Letter from Paul K. Mancini to Magalie Roman Salas dated April 13, 1999 (with attachments) ("April 13, 1999 ex parte").

Moreover, the undisputed facts do not support this theory. As shown in our April 13, 1999 ex parte, if Sprint's theory had any basis, CLEC activity should have declined following the SBC/Telesis and Bell Atlantic/NYNEX mergers. This, of course, did not happen. Nor is there any evidence that SBC or Ameritech have engaged in discrimination in similar circumstances, such as cellular interconnection and intraLATA toll interconnection, notwithstanding their alleged incentives and ability to discriminate in those markets. Absent any evidentiary support, this theory cannot be credited or used as the basis to reject or condition this merger.

As in the case of benchmarking, moreover, if the Commission does have some concerns about this theory, they have been addressed by the proposed Conditions. Both the numerous steps that the Applicants are taking to open their markets and the rigorous 13-state performance measures by which their actions will be tested leave no doubt that SBC/Ameritech will be unable to engage in any meaningful discrimination.

3. The Merger Will Not Remove a Significant Potential Competitor.

AT&T reasserts the argument it raised in its earlier filings before the Commission and Department of Justice that the merger "eliminate[s] the otherwise imminent prospect of competition between the merging parties." AT&T at 4. As SBC and Ameritech have demonstrated in multiple submissions in this proceeding, there was no such prospect, imminent or otherwise.[38] The DOJ fully examined the potential competition issues raised during the course

[38] See Response of SBC and Ameritech to Submissions of Sprint and AT&T (filed June 16, 1999); Response to Attorneys General of the States of Indiana, Michigan, Missouri and Wisconsin, filed by SBC and Ameritech on May 5, 1999; Merger Application, Description of the Transaction, Public Interest Showing and Related Demonstrations, CC Docket No. 98-141, at 63-73 (filed July 24, 1998); see also Ameritech Corporation Narrative Response to Request for Documentary Material at 8-17, 34-42 (filed Feb. 2, 1999). On the other hand, the fact that AT&T's mergers with TCG and TCI eliminated actual, existing competition did not serve as a bar to those mergers and did not give rise to anything like the Conditions proposed for this merger.