the collocation compliance plan. Conditions ¶ 64. Moreover, if SBC/Ameritech's failure to comply with the collocation compliance plan had the effect of denying a person or entity access to a facility or service, or the intended benefit required to be provided under another of these Conditions, the Commission could extend the period for the other Condition as well.

7. Offering of UNEs.

SBC and Ameritech will be required to continue to provide UNEs in their respective states in accordance with the commitments made by the companies in their letters to Lawrence Strickling, Chief of the Common Carrier Bureau. Conditions ¶ 43. Some of the commenters complain that this condition offers no benefit that would not be available in its absence. See, e.g., AT&T at 8-9; MCI WorldCom at 48. They are mistaken. This claim ignores the fact that ILECs are under no current obligation to provide UNEs in light of the Supreme Court's Iowa Utilities Bd. decision vacating Rule 319. Moreover, inclusion of this commitment in the Conditions subjects it to the general enforcement provisions of the Conditions.

Other comments criticize SBC and Ameritech for not committing to provide UNEs regardless of the outcome in the UNE remand proceeding. AT&T App. A at 75-78; MCI WorldCom at 48-49; Sprint at 31-33; Level 3, at 14; CoreComm at 17.[84] Such a position would

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[84] Joint comments filed by certain cellular carriers complain that the proposed condition regarding the voluntary commitment to continue to provide UNEs fails to recognize explicitly Extended Local Calling Area (ECLA) arrangements – also known as reverse billing arrangements. This issue is currently pending before the Commission in the UNE Remand Proceeding and before the Michigan Public Service Commission arbitration proceeding regarding the interconnection agreement with Thumb Cellular and CenturyTel Wireless. See Second Further Notice of Proposed Rulemaking, Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, FCC 99-70 (rel. Apr. 26, 1999); Petition of CenturyTel Wireless Inc. and Thumb Cellular for Arbitration To Establish an Interconnection Agreement, Petition for Arbitration Pursuant to Section 252(b) of the Telecommunications Act of 1996, No. U-11989 (Mich. PSC filed May 25, 1999). Ameritech maintains that the current billing arrangements between Ameritech and the Joint Cellular Carriers are simply billing services, not "shared transport" as previously defined by the Commission. Moreover, none of the interconnection agreements in effect between Ameritech and any of the Joint Cellular Carriers covers shared transport.

be inconsistent with the Act. Congress passed the 1996 Act to promote competition and to encourage innovation. See Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, at Preamble, codified at 47 U.S.C. §§ 151 et seq. Section 251(d)(2), then, must be interpreted to advance those goals. An excessive unbundling requirement will chill all carriers' incentives to invest and innovate – a result that squarely conflicts with the goals of the Act. In the UNE remand proceeding, the Commission will determine what elements should be unbundled under 251(d)(2), consistent with the goals of the Act. If SBC and Ameritech were to provide network elements beyond those the Commission identifies, which is what these commenters request, it would thwart Congress's intent by retarding facilities-based local competition and impeding investment.

8. Compliance with the Commission's Pricing Rules.

The Conditions provide that SBC and Ameritech will assist the Commission in enforcing its pricing rules. Conditions ¶ 44. If the Chief of the Common Carrier Bureau provides SBC/Ameritech a written notice of concerns regarding SBC/Ameritech's compliance with the Commission's pricing rules, SBC and Ameritech will provide the Bureau Chief, within 30 days, documentation addressing the concerns. If the Bureau Chief provides SBC/Ameritech written notice that the previous concerns have still not been resolved, SBC/Ameritech will present the Bureau's concerns to the appropriate state commission and shall take all necessary steps to comply with the Commission's pricing rules in effect at that time. This procedure facilitates coordination between the FCC and state commissions, but in no way transfers pricing authority from one to the other.

Some commenters complain that this Condition merely requires SBC and Ameritech to comply with obligations that they already have under the Act. See, e.g., AT&T App. A at 79;

MCI WorldCom at 49-51. These commenters ignore that the Condition will assist the Commission in determining whether obligations are satisfied. It will also speed the resolution of any dispute because SBC/Ameritech must respond in 30 days to the Bureau Chief's request and must take any remaining concerns immediately to the appropriate state commission.[85] It is ironic that these commenters overlook the beneficial effect on enforcement the Condition will have, when these same commenters claim that enforcement should be a critical concern of the Commission. AT&T at 4, MCI WorldCom at 61-63.

9. ADR.

SBC and Ameritech will implement – subject to the appropriate state commission's approval and participation – an alternative dispute resolution process utilizing mediation to resolve carrier-to-carrier disputes. The process is available to CLECs, at their request, to resolve interconnection agreement disputes. This Condition will streamline and expedite resolution of carrier-to-carrier disputes. As some commenters recognize, see, e.g., Telecommunications Resellers Association at 36, the availability of this ADR process will cut the costs and time associated with resolving disputes through arbitration or litigation.

AT&T and others claim, however, that this Condition will be ineffectual. AT&T App. A at 92; MCI WorldCom at 54. In particular, AT&T claims that, because the provision is limited to "mediation," which means both parties must voluntarily accept the resolution, this Condition requires merely SBC and Ameritech to "talk" to CLECs. AT&T App. A at 92. This ignores the important role of the state commission staff in the ADR process established by Attachment E, which may itself help to resolve matters without the need for formal arbitrations. Moreover,

[85] This Condition in no way preempts or impedes a state's authority to establish UNE prices.

AT&T's view of mediation is, to say the least, cynical. Mediation is widely acclaimed as a beneficial means of dispute resolution, which frequently allows parties to bypass costly and protracted proceedings in court or before an arbitrator.[86]

AT&T further argues that the ADR provision is, in practice, of little use to parties because they may not invoke it prior to completing the dispute resolution processes created by their agreement. AT&T App. A at 92-93. Where CLECs have negotiated dispute resolution mechanisms with SBC or Ameritech, those mechanisms remain in place and are supplemented by the ADR process – thus giving carriers another alternative to formal complaint proceedings. Where carriers have not negotiated another process, the ADR mechanism is available immediately. And, in the future, any carrier negotiating an agreement can incorporate the ADR mechanism of the merger conditions into its agreement, if it prefers this to another negotiated approach. Thus, the ADR process is available consistent with each CLEC's individual contractual commitments and preferences.

10. Most Favored Nation Provisions and Multistate Agreements.

Under the proposed Conditions, SBC/Ameritech would be required, where technically feasible and lawful, to offer competitors operating within its territory the same arbitrated terms and conditions for facilities and services that SBC/Ameritech requests and secures as a CLEC outside of its region, with prices to be determined on a state-specific basis. SBC/Ameritech further would allow competitors in any SBC/Ameritech state to pick and choose terms that were voluntarily negotiated by SBC as an ILEC (or any other entity that was at all times during the

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[86] See Deborah Masucci, Securities Arbitration – A Success Story: What Does The Future Hold?, 31 Wake Forest L. Rev. 183, 200 (1996) ("The parties to a mediation benefit by reduced costs associated with early settlement and a more satisfying resolution of the dispute since the parties control the outcome.").

negotiations a subsidiary of SBC), in other SBC/Ameritech states. SBC/Ameritech also would be required to allow competitors to negotiate a single interconnection and/or UNE agreement that covers some or all of the SBC/Ameritech states, subject to state-specific pricing.

These Conditions will give competitors a wide range of options and packages for offering local service, beyond those required under the 1996 Act, that will assist them in competing against SBC/Ameritech. That CLECs will receive a real benefit from these Conditions is evident even now. Ameritech is already receiving requests from CLECs for terms offered by SBC in its states. Indeed, even some of the CLECs who now claim that these provisions have no benefit, see AT&T App. A at 96-97, MCI WorldCom at 55, have also approached Ameritech seeking multi-state or region-wide agreements, or seeking particular provisions from out-of-region agreements.

Despite these clear benefits, many commenters claim that these Conditions are too limited. AT&T App. A at 93; CoreComm at 21-23; Sprint at 37-41. Some claim that there is no reason to limit the MFN provision for out-of-region arrangements only to agreements obtained through arbitration initiated by SBC/Ameritech as a CLEC. They see no reason why all arbitrated agreements are not included. Commenters also argue that the MFN provision for out-of-region arrangements should extend to arrangements that the ILEC – against which SBC/Ameritech is competing – previously had made available to another CLEC. See, e.g., Sprint at 38-39; ALTS at 24; CompTel at 36-38.

SBC/Ameritech will do for in-region CLECs anything it asks out-of-region ILECs to do. This is essentially a parity condition. (One, incidentally, that is not matched by Sprint, which demands conditions of SBC/Ameritech that it has shown no intention of adopting where Sprint is an ILEC). The point is not that SBC/Ameritech must do anything in-region that is done by any

ILEC where the SBC/Ameritech CLEC does business. Such a requirement would require SBC/Ameritech to alter its own systems to match the systems of multiple out-of-region ILECs. This would be prohibitively inefficient and prevent implementation of uniform systems and procedures within SBC/Ameritech's region. Limiting the MFN provision to SBC/Ameritech-initiated terms eliminates that risk because SBC/Ameritech will, as an out-of-region CLEC, only ask for things that it would be willing to offer in-region. Thus, SBC/Ameritech can make sure that it does not request something that, if applied in-region, would undermine its goal of making its regional network uniform and efficient.

The Commission should also reject challenges to the MFN provision for in-region arrangements. Some commenters claim that this provision is unjustifiably limited because it applies only to terms that are voluntarily negotiated by SBC or by an entity that at all times during the negotiations was a subsidiary of SBC. See, e.g., Sprint at 39; Time Warner at 14-15. These commenters contend that arbitrated agreements should be included and that Ameritech's pre-merger agreements should also apply. See, e.g., Sprint at 39-40; Time Warner at 16.

The Conditions do not include arbitrated arrangements because that would effectively allow the state commission in one SBC/Ameritech state to interpret and apply sections 251 and 252 for all other SBC/Ameritech states, contrary to basic principles of federalism and the structure of the 1996 Act. Congress may enact uniform national policies in many areas, but it may not allow one state, directly or indirectly, to "impose its own policy choice on neighboring States."[87] This is a matter not only of federalism and states' rights, but also of individual rights. Because "[a] state's sovereign authority over persons, property, and activities extends only to its

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[87] BMW of N. Am., Inc. v. Gore, 116 S. Ct. 1589, 1596-97 (1996).

territorial limits," companies and individuals have a guaranteed right under the Due Process Clause of the Fourteenth Amendment to be free from the impact of a state's regulatory decisions when they are within the territory of another state.[88]

The MFN provision for in-region arrangements does not extend beyond SBC or an entity that was at all times a subsidiary of SBC because, once again, to do so would undermine SBC/Ameritech's ability to establish uniform systems and procedures within its 13-state region. If Ameritech's pre-merger agreements were extended region-wide under the MFN provision, SBC/Ameritech would have to adopt Ameritech's pre-merger approaches in the SBC states, even as it is moving toward a standard approach. In effect, SBC/Ameritech would have to maintain two (or more) parallel sets of systems and policies in all 13 states. The relationship between SNET and SBC illustrates the point. Now that SNET is an SBC subsidiary, any terms SNET negotiates in Connecticut would be available to CLECs anywhere in the 13-state region after the merger. But no one could reasonably claim that agreements negotiated by SNET prior to its merger with SBC should also be made available to CLECs in SBC/Ameritech states outside Connecticut. The key is that, after the merger, the subsidiary will not volunteer terms inconsistent with the merged company's policies, whereas before the merger, the separate company had no such concerns.

MCI WorldCom complains – with no support whatsoever – that, in practice, SBC/Ameritech will resist MFN arrangements and claim they are not feasible. MCI WorldCom at 55. The feasibility requirement of Paragraphs 51 and 52 of the Proposed Conditions is hardly a loophole – it merely recognizes that some terms may not be possible in light of state law and

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[88] See Stover v. O'Connell Assocs., Inc., 84 F.3d 132, 136 (4th Cir.), cert. denied, 519 U.S. 983 (1996).

the technical capability of SBC/Ameritech's systems within a particular state. Where an arrangement can feasibly be provided, it will be. And, if SBC/Ameritech violates this Condition, CLECs can seek recourse under the Conditions' enforcement provisions.

11. Shared Transport.

Contrary to the suggestions of some commenting parties,[89] the Supreme Court's June 1, 1999 decision confirmed that Ameritech currently has no federal legal obligation to provide shared transport.[90] Accordingly, the issue of whether shared transport is legally required under the 1996 Act and if required where and when it must be provided, will be decided in the first instance by the Commission in its pending UNE Remand Proceeding.[91]

Nevertheless, subject to the outcome of the UNE Remand Proceeding, SBC/Ameritech has committed to file tariffs and propose offerings to make available the function of shared transport no later than the merger closing date in the Ameritech states. Pricing will be consistent with the Commission's pricing rules. In addition, within one year of the merger closing date, SBC/Ameritech will implement and offer in Ameritech states the same version of shared transport (involving use of Advanced Intelligent Network ("AIN") facilities to perform a 10 digit number look-up) as SBC has implemented in Texas. Thus, if and to the extent that shared transport might ultimately be required as the result of the UNE Remand Proceeding, the merger will accelerate its deployment during this period of legal uncertainty.

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[89]See, e.g., AT&T App. A at 73-74; CompTel at 18-20; MCI WorldCom at 46-48.

[90]See Ameritech Corp. v. FCC, 119 S. Ct. 2016 (1999) (order granting certiorari and vacating the Eighth Circuit's affirmance of the Third Order on Reconsideration).

[91]See generally Second Further Notice of Proposed Rulemaking, Implementation of the Local Competition Provisions of the Telecommunications Act, CC Docket No. 96-98, FCC 99-70 (rel. Apr. 16, 1999) ("UNE Remand Proceeding").

12. Access to Cabling in MDUs and Multi-Tenant Business Premises.

The proposed Conditions also provide special assistance to CLECs in serving both Multi-Dwelling Unit Premises ("MDUs") and Multi-Tenant Business Premises housing small businesses ("MTUs") where SBC/Ameritech controls the cabling.[92] CLECs have expressed concern over their ability to gain access to customers in such multi-unit buildings. The proposed Conditions will enhance their access by helping to give CLECs a single point of interface to cabling in MDUs and MTUs.

First, the Conditions will require SBC/Ameritech to wire, or seek permission to wire, MDUs to allow a single point of access for new cabling. For three years after the merger closes, in all new or retrofitted MTUs and single-building MDUs where SBC/Ameritech owns or controls the cables, SBC/Ameritech will install and provide new cables in a manner that will give CLECs a single point of interface. Similarly, when SBC/Ameritech is hired during that period to install cables in new or retrofitted MTUs and single-building MDUs, it must notify the landlord that, unless the property owner objects, it will install the new cables in a manner designed to provide such a single point of interface. These commitments will greatly facilitate the ability of CLECs to serve customers in such multi-unit buildings.

In addition to providing access to new cabling, SBC/Ameritech will work with CLECs to help provide them with access to existing cabling controlled by SBC/Ameritech in MDUs and MTUs. Specifically, it will offer to conduct trials in five large cities with interested (and unaffiliated) CLECs to identify the costs and procedures necessary to provide access to such cabling. These trials, which are to start within six months of the closing and to be completed

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[92] See Conditions ¶¶ 57-58.

within a year, are subject to a number of parameters designed to ensure their utility.[93] Following those trials, SBC/Ameritech must negotiate in good faith with CLECs regarding access to the buildings used in the trials and, more broadly, must negotiate to develop tariffs and/or interconnection agreements to facilitate single points of interconnection to cabling in MDUs and MTUs on a going-forward basis. These Conditions should more than ensure that CLECs can fairly compete for business in this segment of the market.

Commenters opposing this Condition – or seeking to modify it – raise four general issues. First, several commenters claim that there is no need for a trial. See, e.g., GST at 12; OpTel at 2, 5; WinStar at 10; MCI WorldCom at 57. These carriers claim that SBC/Ameritech should be required to provide all carriers access to MDUs and MTUs immediately. They completely ignore the uncertainties which may affect shared use of these cable facilities. A trial will reveal the problems which may arise and permit the parties to work through any technical operations difficulties. It will also test the economic feasibility of offering these arrangements, which is especially important given the potentially high costs to carriers and the costs and inconvenience to customers in existing properties.

Further, the Commission is currently considering whether to require access for all service providers to MDUs (in WT Docket 99-217, released July 7, 1999), and that proceeding is the appropriate place where the Commission should address changing its MDU policies. The record

[93] In each city, the trial will include at least 1000 residential units, at least one campus of garden apartments and at least one MTU; the trial will provide CLECs with a single point of interface with the cabling; and pricing will be at cost.

in this proceeding is insufficiently developed for such a determination, and the Commission has in the past prudently declined to impose conditions under these circumstances.[94]

Second, some commenters claim that CLECs should not be required to pay the entire cost of the network and/or cabling reconfiguration that is involved in providing MDU/MTU access. See OpTel at 4; MCI WorldCom at 57. OpTel, for example, offers instead a "fair share" division of costs, and MCI WorldCom suggests TELRIC. These requests must be rejected. The access these carriers request requires new facilities and, often, new cabling arrangements. The full amount of these reconfiguration costs – which are incremental and caused solely by the new entrant seeking access – should properly be borne by the requesting carrier.

Third, some of the commenters also ask the Commission to change the references in Paragraphs 57-58 from the "single point of interface" (and "single point of interconnection") to the "minimum point of entry" ("MPOE").[95] WinStar at 13; ALTS at 27. A fundamental problem with this proposal is that, depending upon the decision of the landlord, an MPOE may not exist on the property. In addition, the term "SPOI" gives carriers additional flexibility to negotiate the most effective and efficient arrangements. That is, in some instances, it may be in the CLEC's economic interests to have a SPOI at a different location than the MPOE. The Conditions provide this flexibility.

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[94] See BA/NYNEX, 12 FCC Rcd at 20087-88, ¶ 221 (refusing to rule on MCI's petition for rulemaking for PIC freeze in the context of the merger because "[w]e lack here a sufficient record to conclude whether such a requirement would be in the public interest" and noting that those concerns should be addressed in the rulemaking proceeding).

[95] The minimum point of entry is defined as either the closest practicable point to where the wiring crosses a property line or the closest practicable point to where the wiring enters a multiple dwelling unit building. 47 C.F.R. § 68.3. The telephone company's reasonable and nondiscriminatory standard operating practice determines which of these two standards applies. Id. Notice of Proposed Rulemaking, Telecommunications Services Inside Wiring; Customer Premises Equip., 11 FCC Rcd 2747, 2752, ¶ 8 n.17 (1996).

Finally, OpTel complains that the agreement to retrofit access facilities on properties that are newly constructed or retrofitted should not be limited to "single building" MDUs. OpTel at 2, 6-7. OpTel ignores the enormous expense associated with rewiring any individual building.[96] This expense would be a critical consideration even if it were certain that the single point of access would be utilized by CLECs. But there is no guarantee of such usage, even after SBC/Ameritech invests enormous sums to upgrade the facilities. This makes it all the more inefficient and impractical to extend Paragraph 58's requirement to multiple building MDUs – at least until demand and pricing have been established for a single building.

C. Promoting Advanced Services Deployment.

Today, competition in the advanced services market is thriving. The Commission has observed that the advanced services market has no dominant incumbent provider.[97] Instead, the market is brimming with a multitude of competitors employing several different categories of broadband technologies, including xDSL, cable modems, utility fiber to the home, satellite and terrestrial radio.[98] "Numerous 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

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[96] Paragraph 57.b of the Proposed Conditions already requires a trial of single point of access to an MDU campus, which will help quantify the precise costs involved.

[97] See, e.g., Report, Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, CC Docket No. 98-146, FCC 99-5, ¶ 48 & n.103 (rel. Feb. 2, 1999) ("Advanced Services Report") ("the preconditions for monopoly appear absent" in the "last mile" of the advanced services market); id. ("[N]o competitor has a large embedded base of paying residential consumers" and there is no "indicat[ion] that the consumer market is inherently a natural monopoly.").

[98] Advanced Services Report ¶ 48.

market."[99] Providers have already invested tens of billions of dollars in broadband facilities,[100] including enormous investment in the deployment of facilities that serve the "last mile" to the home.[101]

In this vibrant environment, ILECs have no advantage. In fact, the Commission has already concluded that the traditional telephone plant is "not ideally suited for broadband"[102] and that existing copper loops are "not broad or fast enough to be called 'advanced.'"[103] The provision of high-speed services requires virtually all new equipment because none of it is required for ordinary voice, cable, or radio services. The FCC's Office of Plans and Policy expressed the opinion that the analog modem bandwidth available over ILEC voice loops "is largely insufficient" to support real-time video transmissions over the Internet. In contrast, the high-speed connections available from cable and other providers already support these services.[104] High speeds enable content providers to deliver streaming video and audio, video e-mail, interactive advertising, video conferencing, and traditional (enhanced) video programming

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[99] Id. ¶ 12.

[100] See id. ¶ 35 ("[P]ublicly available data show that many companies in virtually all segments of the communications industry have made tens of billions of dollars of investment in broadband facilities.").

[101] See id. ¶ 34.

[102] Id. ¶ 46.

[103] Notice of Inquiry, Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, 13 FCC Rcd 15280, 15281, ¶ 3 (1998).

[104] K. Werbach, Office of Plans and Policy, FCC, Digital Tornado: The Internet and Telecommunications Policy, OPP Working Paper No. 29 at 53 (Mar. 1997).

– none of which can be delivered effectively over low-speed lines.[105] Currently, there are about 900,000 U.S. residential users of high-speed Internet services, about 80 percent of which are served by cable.[106] Thus, if there is any dominance in the advanced services market, it is by cable operators. In fact, the Commission has concluded that non-phone company providers, including cable companies, electric utilities, and wireless cable companies, are further along in last-mile deployment of broadband to residential customers than ILECs.[107]

Under these circumstances, the SBC/Ameritech merger certainly poses no competitive threat to the advanced services market. Neither SBC nor Ameritech has a dominant position in this market. Rather, both companies face enormous competition from other advanced services providers in all of the markets in their region.

Nevertheless, SBC and Ameritech have agreed to a number of Conditions that foster competition in the market for data, insofar as advanced services providers choose to use SBC/Ameritech's wireline networks.

1. Separate Affiliates for Advanced Services.

Before the merger closing date, SBC and Ameritech will create one or more separate affiliates in the SBC/Ameritech region to provide advanced services such as ADSL. The separate affiliate will operate independently from SBC/Ameritech's in-region telephone company, largely in accordance with the structural, transactional, and nondiscrimination

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[105] Andrew W. Davis, Cable Modems: A High-Bandwidth Solution to Internet Access, Networked Multimedia for Business, Jan./Feb. 1998 (visited on July 26, 1999) <http://www.bcr.com/dvcmag/janfeb/dvc7p6.htm>.

[106] The Battle for the Last Mile, Economist, May 1, 1999, at 59; Broadband Daily, AOL's Fear of Dwindling Market Share Backed by MSO Estimates, Road Runner Research, Apr. 27, 1999 (visited on July 25, 1999) <http://www.broadband-daily.com/index.htm?issue_rec=2&&article_rec=6&&f_email=>.

[107] Advanced Services Report ¶¶ 53-58.

requirements of 47 U.S.C. §§ 272 (b),(c),(e), and (g). A key exception is that operation, installation, and maintenance functions may be performed by the telephone company on a nondiscriminatory basis. The separate affiliate will, among other things, maintain separate books, records, and accounts from the telephone company; it will have separate officers, directors and employees from the telephone company; and it will conduct arm's length transactions with the telephone company. The telephone company will not discriminate between the affiliates and any other entity in the provision or procurement of goods, services, facilities, and information, or the establishment of standards. Both the affiliate and the telephone company, however, may market the other's services; and the affiliate may use the telephone company's brand name on an exclusive basis.

The SBC/Ameritech phone companies may transfer advanced services equipment to the separate affiliate on an exclusive basis, but only during a limited grace period. The phone companies may not transfer any facilities or equipment deemed to be an unbundled network element under 47 C.F.R. § 51.319 (as in effect January 24, 1999). For purposes of applying 47 U.S.C. § 153(4)(B),[108] the separate affiliate shall not be deemed a "successor" or "assign" of a BOC as a result of the transfer.

The purpose of the Separate Affiliate Condition is to spur competition in the advanced services market even further and insure the maintenance of a level playing field. As NorthPoint observes, the creation of a separate subsidiary will "speed the deployment of [digital subscriber

[108] SBC and Ameritech mistakenly referred to 47 U.S.C. § 153(4)(A) in Paragraph 28 of Attachment A. It should be corrected to read 47 U.S.C. § 153(4)(B).

line] services by promoting competition." Statement of Michael Malaga, NorthPoint Chairman and CEO, released June 30, 1999. The Condition, NorthPoint notes,

> establishes the simple but critical rule that the incumbent LEC's advanced services subsidiary deal at arm's length with the incumbent for the purchase of collocation and loops. This would require the incumbent LEC affiliates, for the first time, to pay the same prices as competitive LECs for loops and collocation, eliminating the DSL price squeeze. The non-discriminatory treatment of all competitive LECs, including the separate affiliate, also would require that the affiliate wait in line for collocation, petition to open "closed" offices, and otherwise deal with the same collocation and operations support systems ("OSS") implementation problems experienced by competitive LECs. . . . NorthPoint is confident that the incumbent LECs will find the incentive and ability to fix these problems for all competitive carriers.

NorthPoint at 4-5 (emphasis added).

NorthPoint's endorsement of this Condition is significant because, as its comments point out, NorthPoint is a national facilities-based data CLEC that uses DSL technology. NorthPoint at 3. Data CLECs such as NorthPoint realize the value of this Condition for promoting competition in the advanced services market.

The commenters who challenge this condition do so to protect their individual interests, even when it means harming competition generally. For example, AT&T, which seeks to block the development of telephone-based advanced services that would compete with its dominant position as a cable-based advanced services provider, attacks the Structural Separation Condition on several grounds. AT&T App. A at 53-73.

a. The Definition of "Advanced Services." AT&T claims that the Conditions define "advanced services" too broadly because "even ordinary dial-up Internet access" comes within its terms. Id. at 54. AT&T is incorrect that this definition includes ordinary dial-up access because

that access is not packetized. Moreover, this definition expressly excludes ISDN from the definition.

b. Compliance with Section 251(c). Some commenters, including AT&T, claim that the separate affiliate condition would give SBC/Ameritech a "pretext" to refuse to comply with section 251(c). See, e.g., id. at 56; MCI WorldCom at 41; Sprint at 21. These commenters misconstrue the limited purpose of the separate affiliate and its relationship to SBC/Ameritech's ILECs. SBC/Ameritech's ILECs would, of course, remain subject to section 251(c) of the Act. Thus, they would be subject to the unbundling requirements that the Commission adopts in its UNE remand proceeding. The separate advanced services affiliate, however, would not be subject to section 251(c) because it would be neither a BOC nor a "successor or assign" of the BOC. See 47 U.S.C. § 153(4).

As AT&T itself admits, "successor or assign" is not capable of a single definition. AT&T App. A at 58. "[A] determination of its meaning 'must be based on the facts of each case and the particular legal obligation which is at issue.'" Id. at 58-59 (quoting Memorandum Opinion and Order, Deployment of Wireline Services Offering Advanced Telecommunications Capability, 13 FCC Rcd 24011, 24060, ¶ 104 n.202 (1998) (internal quotation omitted)). The terms are not defined in the 1996 Act, so the Commission must make a de novo interpretation of the successor/assign language, in light of the purposes of the Act, in determining how to treat an advanced services affiliate.

The "particular legal obligation which is at issue" here is section 251(c), which is the obligation of the 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. Far from being impeded by an advanced services subsidiary, that purpose is promoted by ensuring

that advanced services offered by an ILEC affiliate are placed on the same footing, with respect to access to the local exchange network, as those offered by a CLEC. That is why data CLECs such as NorthPoint support the condition. Further, the ILEC network facilities, personnel, systems and wholesale operations to support the provision of the core local exchange services remain with the ILEC, not with the Advanced Services subsidiary. There is no "successor or assign" created because the ILEC is still performing these functions, as it does today.

c. Relationship to Section 272. AT&T and others claim that complying with requirements largely based on section 272 is insufficient to give the advanced services affiliate "separate" affiliate status. See, e.g., AT&T App. A at 57-58; CompTel at 22. As SBC explained in detail in its letter to Christopher Wright, this argument is meritless. See Letter from Michael K. Kellogg to Christopher J. Wright, General Counsel, FCC (June 25, 1999). It is clear Congress thought those requirements were sufficient to assure independence. Thus, although advanced services affiliates need not comply with section 272, borrowing the main requirements of that section assures a level of independence that satisfies the goals of the Act. And SBC/Ameritech's advanced services affiliate will be separate in almost all of the same respects as a section 272 affiliate.

AT&T and other commenters argue, however, that, if the Conditions borrow from section 272, they must adopt it completely. See, e.g., AT&T App. A at 61; ALTS at 19; Sprint at 24-25. Again, SBC discussed this issue in depth in its letter to Christopher Wright and will not repeat the arguments here. The important point is that section 272 by its terms does not apply to advanced services affiliates, and there is no reason that all of its requirements should apply to them. Rather, to determine the separation requirements for an advanced services affiliate, the Commission must look to the purposes of the Act

d. OI&M. AT&T challenges the fact that the proposed Conditions allows the ILEC personnel to provide operations, installation, and maintenance services on a non-discriminatory basis to both the affiliate and other CLECs. AT&T App. A at 63. 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 subsidiary is a successor or assign. If anything, providing OI&M to the affiliate will benefit CLECs because the telephone company will have to provide the same quality service to them as it does to the affiliate, and a CLEC can readily compare its service with that of the separate affiliate to make sure it is being treated fairly. Moreover, if the separate subsidiary could not share the OI&M of the ILEC, roll-out of advanced services by the separate subsidiary would be greatly delayed and the costs of that delay would be significantly increased without any corresponding procompetitive effects. In effect, the separate subsidiary would have to be formed from the ground up; it would have to obtain the necessary trucks and maintenance equipment, train its personnel, etc. This unnecessary postponement would greatly hinder Congress's – and the Commission's goal – of rapid advanced services deployment.[109]

e. Disclosure Obligations. AT&T and others also challenge the disclosure obligation in the Conditions. See, e.g., AT&T App. A at 64; NorthPoint at 12. They claim that the Conditions fall short of section 272's requirements, which mandate disclosure of "transactions"

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[109] In a similar argument, AT&T claims that the transfer of assets violates the non-discrimination requirement of section 272(c)(1). AT&T App. A at 68. Again, reliance on section 272 is misplaced. Moreover, as SBC explained in its letter to Christopher Wright, the transfer of advanced services assets, as distinct from assets used for the provision of telephone exchange service, does not render the advanced services affiliate a "successor" or "assign." SBC will not repeat those arguments here, except to point out that, for purposes of defining a "successor" or "assign," the Commission should be able to distinguish between those elements used to provide telephone exchange service and those used solely to provide advanced services.

between the ILEC and the advanced services affiliate, whereas the Conditions require disclosure only of the interconnection agreement. AT&T App. at 64. AT&T oversimplifies the Condition. SBC and Ameritech will follow the disclosure requirements of section 272 with one exception: the public filing of an interconnection agreement would suffice for the otherwise applicable disclosure rules with respect to the transactions covered by that agreement. All transactions that are not covered by an interconnection agreement will be disclosed consistent with the FCC's 272 rules. This limited exception is certainly permissible. Again, although modeled on the FCC's rules implementing section 272, the structural separation requirement for advanced services does not track those rules in all respects. Rather, it addresses the concerns of CLECs – including sufficient disclosure of affiliate transactions to allow CLECs to confirm their receipt of nondiscriminatory treatment – while recognizing SBC/Ameritech's and the public's interest in avoiding requirements that are unnecessarily burdensome or difficult to administer in this context. Requiring disclosure of the interconnection agreements is a relatively easy-to-administer approach that is consistent with the statutory language of section 272(b); satisfies all legitimate needs of CLECs and regulators in the advanced services context; is easy to administer; and does not unnecessarily compromise the confidentiality of proprietary SBC/Ameritech business plans and business information relating to the competitive advanced services market.

NorthPoint asks the Commission to include a condition that provides for an independent audit of separate affiliate transactions, as is provided in section 272(d). NorthPoint at 12. This suggested condition would be redundant of Paragraph 62.d. of the Proposed Conditions, which already imposes a comprehensive auditing requirement.

f. Joint Marketing and Use of Brand Names. Many commenters attack the provisions that allow joint marketing and exclusive use by the affiliates of SBC/Ameritech's brand names.

See, e.g., AT&T App. A at 65-66; MCI WorldCom at 43; CompTel at 23-24; ICG at 18. But both of these activities are allowed for a section 272 affiliate – which, as explained in the letter to Christopher Wright, certainly could not be treated as a "successor" or "assign" of a BOC. Some commenters claim these provisions should only apply after a BOC has satisfied the market opening requirements of section 271. See, e.g., Sprint at 20. But the 271 threshold does not apply to an ILEC's provision of advanced services. SBC and Ameritech, like other ILECs, are free under federal law to provide advanced services with no separation at all.[110] Thus, joint marketing and exclusive use of the brand name – as well as OI&M – can and are being done right now in the ILEC with no separation at all. Section 271's checklist need not be met before an ILEC may do this – nor must any other checklist be satisfied. An ILEC should not lose these rights merely because it shifts the operations to a separate subsidiary in order to benefit competition.

NorthPoint contends that the joint marketing requirement should be clarified to state that SBC/Ameritech may not engage in joint pricing promotions on an exclusive basis. NorthPoint at 8. SBC/Ameritech will, of course, offer ILEC telecommunications services to CLECs and the advanced services subsidiary on nondiscriminatory terms and conditions, including price. Thus, the CLECs can offer the same promotional prices on bundled telecommunications services as SBC/Ameritech, if they so choose. But, just as is currently the case, SBC/Ameritech's marketing and promotions that include advanced services are a facet of competition and need not be made available to other providers. This benefits consumers, who are best served by competition, not homogenization, in pricing and marketing.

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[110] Ameritech has elected to provide most of its advanced services through a separate subsidiary.

g. State Certification. NorthPoint criticizes Paragraph 30.d, which provides that "SBC/Ameritech may provide Advanced Services through an SBC/Ameritech incumbent LEC in any state until SBC/Ameritech has obtained all necessary State approvals to provide Advanced Services through the separate Advanced Services affiliate in that State." NorthPoint argues that the Conditions should be revised to prohibit SBC/Ameritech ILECs from providing advanced services to new customers six months after the closing date of the merger. NorthPoint at 11; see also MCI WorldCom at 42. NorthPoint claims this is necessary "[t]o strengthen SBC/Ameritech's incentive to begin providing advanced services through a separate affiliate." NorthPoint at 11. This argument entirely ignores the fact that, under the Conditions, SBC/Ameritech is required to seek necessary state certification prior to the Merger Closing Date. Conditions ¶ 29.b. Thus, the Conditions already require SBC/Ameritech to act as quickly as possible. The Commission cannot decree, and SBC/Ameritech cannot ensure, a deadline for state commission action. The provision criticized by NorthPoint is necessary to ensure that SBC/Ameritech's ability to provide advanced services is not jeopardized by delays in state commission approval of certification applications or interconnection agreements, delays that could be engendered by competitors for their own purposes.

h. Sunset. Sprint finds fault with the Advanced Services Termination Condition because it fails to specify how SBC would provide advanced services once the Condition sunsets. Sprint at 30. Because the separate affiliate is not a successor or assign of the BOC, SBC/Ameritech has a choice after the Condition sunsets (provided that the FCC does not impose a separation requirement that applies to ILECs generally). SBC/Ameritech could either keep the advanced service affiliate, or it could provide advanced services through its ILECs.

i. On-going Rulemaking on Advanced Services. Finally, some commenters have expressed concern that the proposed Separate Subsidiary Condition interferes with the Commission's NRPM in CC Docket No. 98-147, which directly addresses advanced services affiliates. See, e.g., Wisconsin PSC at 8; Focal at 12. These proposed Conditions in no way interfere with the Commission's decisionmaking process in that docket. Rather, SBC and Ameritech will comply with these Conditions so that the Commission will have no doubt that the merger's pro-competitive benefits outweigh any alleged harm; the Commission can establish whatever industry rules it likes, within the boundaries of the law.

2. Loop Conditioning.

Several CLECs find inadequate SBC/Ameritech's commitments to provide loop conditioning for advanced services. First, they assert that the only pre-qualification information SBC/Ameritech is required to provide is theoretical loop length, and not more detailed characteristics regarding individual loops.[111] In fact, Paragraphs 21-23 of the Proposed Conditions commit SBC/Ameritech to provide CLECs with access to all loop pre-qualification and qualification information that is available to SBC/Ameritech's own retail operations, including those of SBC/Ameritech's advanced services affiliate.[112] Thus, to the extent that SBC/Ameritech's retail personnel have access to information that a loop is served via DLC, or regarding characteristics of a loop other than theoretical loop length, SBC/Ameritech is required

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[111] See MCI WorldCom at 37; Sprint at 8-9; ALTS at 15-16; AT&T App. A at 52; Level 3, at 8; GST/KMC/LOGIX/RCN at 6; CoreComm at 11; Focal at 8-9; NorthPoint at 22-23; Rhythms NetConnections at 22-25.

[112] AT&T argues that SBC has databases that "are used primarily by SBC's engineers, not by its retail representatives" and that SBC's retail representatives can access this information, while competitors may not. AT&T App. A at 52 (emphasis in original). This is untrue. SBC in fact provides competitors with access to the databases used by SBC's engineers in the same manner that SBC's retail representatives access this data. This information is provided manually by SBC's engineering force, upon specific request.

to provide CLECs with this information. This eliminates any possibility that SBC/Ameritech would somehow have more complete loop qualification information than its competitors.

Second, some CLECs maintain that the commitments are vague about the manner in which loop qualification information will be provided electronically, and that the timeframes for providing this information are too long. See Sprint at 9-10; MCI WorldCom at 36-37; Rhythms NetConnections at 24-25.[113] These arguments also are without merit. Paragraph 16 of the proposed Conditions spells out in detail the kind of sophisticated computer programs and systems that SBC/Ameritech must develop to provide CLECs access to loop conditioning information, and contains strict implementation schedules – with steep penalties for failure to meet them. The time frames specified in this Paragraph, as well as those for access to pre-order information in Paragraphs 21 and 22, respectively, are already very compressed in light of the need to build complex, reliable and error-free systems that will serve the needs of both CLECs and their end user customers over the long-term. Moreover, Paragraph 23 ensures that CLECs will have the same information available to them as SBC/Ameritech's own retail operations, including its advanced services affiliate. Finally, the CLECs' supposed concerns about the timing of OSS upgrades already is addressed by Paragraph 35, which gives CLECs a 25 percent discount on loops used for advanced services until such time as SBC provides electronic access to loop qualification information.

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[113] Sprint's proposed language would require SBC/Ameritech to create within 6 months from the merger's closing a "Loop Inventory Database" with information about every single one of SBC/Ameritech's loops, as well as various "aggregate market information" about these loops. This requirement would require SBC/Ameritech to build, under an unreasonable deadline, a new database to Sprint's specifications, even though most, if not all, of the data that Sprint wants would be made available under the existing Conditions. The main exception is "aggregate market information," which is an unnecessary burden to impose on SBC since Sprint and other CLEC can themselves compile this information by reviewing and summarizing SBC's loop qualification information, to which they will have full access.

Finally, several CLECs criticize the proposed rates for conditioning loops for xDSL.[114] The proposed Conditions establish only interim rates until such time as state commissions – using cost studies that the proposed Conditions require SBC/Ameritech to file – set state-specific rates for loop conditioning. Indeed, many states have already begun, or plan soon to begin, such proceedings pursuant to sections 251 and 252. It would be unlawful and unnecessary for the Commission to seek to trump these proceedings by imposing Sprint's proposed rates on the states. See AT&T Corp., 119 S. Ct. at 732 ("It is the States that will apply [Section 252(d)'s pricing] standards and implement that methodology, determining the concrete result in particular circumstances.").

Nor are Sprint's pricing proposals substantively reasonable. Under section 252, as well as FCC precedent, competitors are required to pay for costs they cause the incumbent to incur for loop conditioning. See, e.g., Local Competition Order, 11 FCC Rcd at 15692, ¶ 382. Sprint's analogy to the rates charged by other carriers, who may have different costs, also fails. Even putting aside cost differences, SBC will impose no loop conditioning charges at all on loops less than 12,000 theoretical feet. See Conditions, Attach. 3. Moreover, any charges that SBC/Ameritech imposes on other carriers for conditioning loops of greater lengths will be imposed equally on SBC/Ameritech's advanced services affiliate, thus eliminating Sprint's claim that these charges impose a competitive disadvantage.

3. Line Sharing.

The merger commitments establish well-defined preconditions for SBC/Ameritech to implement line sharing for advanced services on a permanent basis. Until and unless such

[114] AT&T App. A at 53; Sprint at 12; ALTS at 14-15; GST/KMC/LOGIX/RCN at 6-7; Rhythms

preconditions are met, and line sharing becomes technically and commercially feasible, the commitments create the "Surrogate Line Sharing Charge," which offers CLECs all the economic benefits of line sharing. This charge enables CLECs to purchase, at a steep 50 percent discount, loops used exclusively to provide advanced services to customers to whom SBC/Ameritech simultaneously is providing voice services.

The CLEC opponents raise four principal arguments with regard to the interim line sharing commitments. First, they complain that unaffiliated providers may obtain loops at the 50 percent discounted Surrogate Line Sharing Charge only to provide data services. See Sprint at 26-27; Level 3, at 12. Revealingly, these CLECs do not – and indeed cannot – dispute that this provision will rapidly promote competition for advanced services, by significantly lowering the costs for carriers that provide such services. Indeed, the major CLECs focusing on providing facilities-based data services plan to eschew voice service altogether,[115] and will therefore benefit greatly from the cheaper loops they will be able to purchase. Moreover, the availability of cheaper loops for data will not in any way advantage SBC's provision of voice services, because carriers will still be free to obtain loops to provide both voice and data services pursuant to the Act's cost-based pricing provisions. (These loops, moreover, could be obtained under a 25 percent discount until SBC/Ameritech implements the OSS enhancement for pre-ordering and

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NetConnections at 7-9; Covad at 44-46.

[115] See ALTS at 21-22 ("Line sharing makes the most sense for CLECs and ILECs as a practical matter when the CLEC wants to provide high-speed data services but is not in the business of providing POTS."); NorthPoint at 18 (not objecting to restriction limiting line sharing to advanced services); Covad Communications, SEC Form 10-K (Dec. 31, 1998), at 7 ("Although we are authorized to provide both data and voice services, we are presently focusing on packet data services.").

ordering xDSL and other advanced services in accordance with Paragraph 16.c. of the Conditions).

Second, several CLECs take issue with the condition that CLECs must use their loops consistent with SBC's technical specifications for voice services in order to benefit from the surrogate line sharing arrangement or line share, and ask the Commission to require SBC/Ameritech to abide by specific standards for its local voice service. See Sprint at 28; MCI WorldCom at 37-38. SBC and Ameritech currently provide services over their own facilities in a manner that fully conforms with all existing federal and state requirements. CLEC adherence to SBC/Ameritech's technical specifications ensures full compatibility with SBC's existing services and network configuration, and this makes the surrogate line sharing arrangement viable. If there were no such limitation, data CLECs could avoid the conditions under which the 50 percent discount is being made available. The data CLECs could purchase loops at the Surrogate Line Sharing charge even if they could not, in fact, line share with SBC/Ameritech's voice services, thus putting them at a significant advantage over SBC/Ameritech's separate advance services affiliate, which must limit itself to these technical specifications.

Third, Sprint and MCI WorldCom criticize the enforcement mechanisms contained in the Conditions, which ensure that CLECs that obtain loops at the Surrogate Line Sharing Charge use those discounted loops in compliance with the proposed Conditions. See Sprint at 28-29; MCI WorldCom at 38. These provisions in no way put enforcement in SBC/Ameritech's hands. Only the FCC and state commissions may adjudge CLEC conduct, and only these regulators may order remedies if CLECs violate the Conditions. The fact that SBC/Ameritech may hire independent auditors is only positive, as it will help ensure impartial review and minimize

disputes, and will deter unscrupulous CLECs from purchasing loops at the Surrogate Line Charge discount to provide services that would not be eligible for line sharing.

Finally, several CLECs rail at the technical reality that SBC/Ameritech cannot presently provide line sharing to multiple CLECs. The result, they claim, is that SBC/Ameritech will provide line sharing only to its own advanced services affiliates. See CompTel at 32; Level 3, at 12; Rhythms NetConnections at 10-11.[116] These claims ignore that the Surrogate Line Sharing Charge puts unaffiliated carriers on an equal footing with SBC's own advanced services affiliates, which, in effect, treats these CLECs as though line sharing is being provided to multiple carriers. Both will be able to provide identical services, and both will incur identical costs in purchasing loop access to do so. The Surrogate Line Sharing Charge indeed offers to CLECs that provide advanced services benefits that they would not have absent the merger, and promises to accelerate competition for advanced services, by greatly reducing the costs of loops for data services until such time as the Conditions for implementing permanent line sharing are met.

With respect to the timing of permanent line sharing, see CompTel at 30-31; NorthPoint at 14-16, the Conditions leave SBC/Ameritech with no discretion. Instead, they leave this discretion to the Commission and equipment vendors, to determine when full and fair permanent line sharing is technically feasible. If, as NorthPoint claims, industry-standard equipment to provide multi-carrier line sharing is already available in commercial volumes, then all that is required to trigger the Condition that SBC/Ameritech provide permanent line sharing is a

[116] ALTS states that "until line sharing is [sic] has been ordered ubiquitously, the surrogate charge appears to be an adequate substitute." ALTS at 22.

Commission finding that line sharing is technically feasible and that equipment meeting national standards compatible with SBC's and Ameritech's network is available in commercial volumes.

4. Non-Discriminatory xDSL Rollout in SBC-Ameritech Region.

Unlike other parties who have sought or are seeking merger approval from the Commission, SBC and Ameritech have agreed to express Conditions targeted at rolling out advanced services to low-income groups in rural and urban areas. SBC and Ameritech have agreed that, after SBC/Ameritech deploys xDSL in at least 20 urban wire centers in a particular state, at least 10 percent of the urban wire centers will be wire centers that have the highest proportion of low-income subscribers in the state. SBC/Ameritech also agrees that it will ensure that at least 10 percent of the rural wire centers where it deploys xDSL will be low income rural wire centers.

Unsurprisingly, most commenters could not criticize SBC and Ameritech's commitment to reach out to the least competitive market segments within its states. This Condition is path-breaking: no other recent merger order contains anything like it. Although a few commenters ask for an even greater commitment, see, e.g., OMB at 1, Low Income Coalition at 9-11, these commenters fail to show that the Condition as written would not provide a real and tangible benefit to the public.

D. Improving Residential Phone Service.

As previously discussed, the Conditions will bring benefits to residential customers by accelerating competition for local service in- and out-of-region, increasing the availability of and broadening choices for advanced services, and promoting best practices. In addition, there are a number of other, specific benefits to consumers.

1. InterLATA Pricing.

The Conditions provide that SBC/Ameritech will not charge residential consumers a minimum monthly or minimum flat rate charge on landline interLATA long distance service that is not associated with voluntary, optional calling plans. Conditions ¶ 59. Commenters make no effort to challenge the public interest benefit of this Condition. In fact, OWL applauds this Condition specifically as one of the many that "will protect[] the consumer and insure[] telecommunication services to all segments of our society at competitive prices." OWL at 1. Trying to avoid the unpleasant topic of its own inflated long distance landline pricing for residential customers, MCI WorldCom seeks to tie SBC/Ameritech's pricing commitment to the issue of access charges. MCI WorldCom at 57. All MCI WorldCom succeeds in doing, however, is to suggest that SBC/Ameritech will undercut the Big Three's long-distance prices when it receives section 271 authority. Although that is an observation that is not relevant here, it is one that should be kept in mind as this Commission considers Bell company interLATA entry.

2. Enhanced Lifeline Plans.

The enhanced Lifeline plan represents a substantial benefit to low income residential customers by providing large discounts on basic local service for eligible customers in 13 states – approximately 30 percent of the United States. The plan is modeled after the enhanced Ohio plan, which community groups, SBC and Ameritech recently negotiated as part of the Ohio merger approval proceedings.

Commenters have raised several issues with respect to this Lifeline plan. Some commenters request that the Commission order states to adopt specific Lifeline programs with

particular terms or that the Commission establish a national policy that trumps state policies. See Stockyard Area Development Association at 1 (requesting assurance that, where the federal Lifeline standards exceed those in Ohio, the federal standards will prevail); Parkview Areawide Seniors at 7 (asking for a declaration that those who receive an earned income credit on their federal tax returns should receive a monthly Lifeline credit)[117]; Low Income Coalition at 4-5 (asking for an extensive list of Conditions including adoption of all the requirements of the Ohio plan).

All of these comments reflect a basic misunderstanding as to the role of the Commission. The Commission cannot and should not compel the adoption of specific Lifeline program terms by the states. The duration, parameters, and terms of such a program are for each state to determine for itself. The Conditions as drafted recognize the limitations of the Commission's jurisdiction and the authority of state commissions in this area. The Conditions allow each state commission the option of adopting the Ohio plan in toto or following its own plan. The choice, as the Kansas Corporation Commission argues should be the case, is entirely in the discretion of each state commission.[118] This point also addresses the Kansas Commission's other concern – that the Ohio Plan only be filed in those states where the current programs do not meet the Ohio standards. Any state commission can reject SBC/Ameritech's offer to amend its Lifeline tariff, and SBC/Ameritech will not file in that state.

The various community groups that request expansion of the plan to include items such as voice mail services for the homeless and community technology centers for all residential

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[117] SBC and Ameritech are willing to extend the plan in Ohio as requested by the OCC, but the OCC's concerns are properly addressed before the Ohio Commission, not the FCC.

[118] Kansas Corporation Commission at 4.

customers in low income areas, see, e.g., Low Income Coalition at 9-14, are best negotiated and resolved at the state level.[119] For example, SBC and Ameritech have worked with state officials and community groups in Ohio and California to establish and ensure ongoing support for such community technology centers.

In short, these commenters have failed to demonstrate that any expansion of the plan is necessary to approve the merger. The proposed Condition, in its present form, presents substantial public interest benefits – and to the portion of the population with the greatest need.

E. Enforcing the Merger Order.

To guarantee that all of the pro-competitive effects of the merger Conditions materialize, SBC/Ameritech's compliance will be subject to stringent verification and enforcement provisions, which are in addition to the existing enforcement mechanisms available to the Commission. SBC/Ameritech will establish a compliance program, including the appointment of a corporate officer to oversee compliance with the merger Conditions and periodic reports to the Commission. Conditions ¶ 62.a–62.c. SBC/Ameritech will also annually engage, at its own expense, an independent auditor to verify its compliance with the Conditions. The auditor must be acceptable to the Commission, and the Commission Staff will be involved in developing the auditor's methods and procedures. Id. ¶ 62.d. SBC/Ameritech is subject to payments under the Conditions that could exceed well in excess of $2 billion. Plus, SBC/Ameritech will be strictly liable for these payments under Paragraph 65 – no showing of a willful violation is necessary. Nor will SBC/Ameritech be able to delay making payments that are due. See id. ¶ 66. Moreover, Paragraph 64 provides that if the Commission determines that SBC/Ameritech has

[119] Id. at 13-14.

failed to comply with a Condition, the Commission may extend the effective period of that Condition. If the failure to comply with a Condition has the effect of denying a person or entity access to a facility or service or the intended benefit required to be provided under another Condition, the Commission may also extend the effective period of that other Condition. These Conditions ensure that the pro-competitive benefits of each Condition – and the merger – will be realized. While SBC and Ameritech stand ready to fulfill everyone of the promises they have made throughout this proceeding, the enforcement Conditions take this pledge even further.

Some commenters claim that the Conditions will be difficult to enforce. See, e.g., AT&T at 13-15; Sprint at 66-69; MCI WorldCom at 61-63; CoreComm at 2 & App. A; ALTS at 2-7; CompTel at 38-42. Ironically, many of these commenters have themselves told the Commission that a simple promise – backed with nothing more – is sufficient to approve a merger.[120] And the Commission listened; it approved recent mergers with nothing more than the promises of the parties that they would improve competition.[121] SBC and Ameritech, by contrast, have provided far more than "paper promises." Detailed reporting requirements and compliance audits will reveal any deficiency, and payments and other enforcement provisions subject SBC/Ameritech to real consequences if noncompliance is discovered.[122]

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[120] See, e.g., AT&T/TCI Application at 78 (arguing that "AT&T and TCI commit to having all their telephony services available on a stand-alone basis" but arguing against the imposition of a condition imposing such a requirement.).

[121] See AT&T/TCI Merger Order, 14 FCC Rcd 3160; MCI WorldCom Merger Order, 13 FCC Rcd 18025.

[122] The Arkansas Public Service Commission (APSC) raises a different enforcement issue. It is apparently concerned that the Arkansas Telecommunications Regulatory Reform Act of 1997, 47 Ark. Code Ann. § 23-17-401 et seq. ("Arkansas Act"), may prevent the APSC from implementing certain merger Conditions. APSC at 2. SWBT has repeatedly taken the position in proceedings before the APSC and the Commission that the APSC has ample authority to fulfill its federal obligations. See, e.g., Comments of Southwestern Bell Telephone Company, ACSI's Petition for Declaratory Ruling Regarding Preemption of the Arkansas Telecommunications Regulatory Reform Act of 1997, CC Docket No. 97-100, at 9 (filed May 5, 1997). The APSC's proposal to add an additional condition

F. The Effect of the Merger Conditions.

The Ohio PUC asks the Commission to clarify Paragraph 69 of the Conditions, which states that the Conditions "shall supplement, but shall not be cumulative of, substantially related conditions imposed under state law." Conditions ¶ 69. Where both the proposed merger Conditions and conditions imposed on the merger pursuant to state law grant parties similar rights against SBC/Ameritech, "affected parties shall not have a right to invoke the relevant terms of these Conditions in a given state if they invoked a substantially related condition imposed on the merger under state law." Id. The Ohio PUC contends that the terms "similar rights" and "substantially related conditions" are vague and that there is no reason the two related commitments should be an "either or" choice for the CLECs. Ohio PUC at 3-4. Instead, the Ohio PUC proposes that both sets of conditions should apply absent a direct conflict that makes compliance with both impossible. Id. at 4-5. The Ohio PUC would make an exception only for rate discounts.

It should be stressed that the proposed federal Conditions do not supplant the states' powers in any way.[123] If a particular state wants additional obligations, it may order them if they are otherwise consistent with federal and state law. For example, if a state wants Texas's 121 performance measures in addition to the FPPP's 20 measurement categories with 36

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specifically addressing Arkansas is thus unnecessary. And it is procedurally inappropriate, given that the underlying issues of concern to the APSC are already before the Commission in another docket.

[123] AT&T would have the Commission reject the Conditions because the overall effect of their adoption would be substantially to undermine ongoing efforts to implement and enforce existing state and federal rules. AT&T at 18. AT&T claims that the Conditions will be viewed by the States as the Commission's view of the optimal set of requirements and enforcement measures to obtain compliance with the Act. Id. at 18-19. This line of attack, of course, could be directed at all of the Commission's prior merger orders that imposed conditions. Yet AT&T offers no basis for distinguishing this Application from the others that the Commission approved with conditions.

measurements, it may issue an order implementing that choice. See Wisconsin PSC at 3-5. Paragraph 69 in fact explicitly respects the states' powers by providing that the federal Conditions will automatically be tailored to reflect overlapping state merger conditions. This ensures that the overall pro-competitive intent of the federal Conditions is fulfilled, while preserving the states' authority. Specifically with respect to the Conditions that SBC/Ameritech negotiated in Ohio and which were part of the Ohio Commission's approval of the merger ("the Ohio conditions"), SBC/Ameritech will comply in all respects with those conditions.

SBC/Ameritech agrees with the Ohio PUC, however, that both sets of conditions cannot apply to carrier-to-carrier promotions. Here, the effect of applying both sets of substantially related conditions will be a "best of breed" approach. For example, certain details associated with the offering of promotional resale discounts in the proposed Conditions filed with the Commission are not identical to similar provisions in the Ohio conditions (e.g., the maximum number of resold lines offered under the proposed FCC conditions is potentially larger than under the Ohio conditions). In this case, Ameritech would offer the resale promotion in Ohio under whatever were the most beneficial terms to CLECs. However, it would not be appropriate to cumulate the provisions of both sets of conditions so that, for example, the maximum number of lines available for the resale promotion would be the sum of the FCC cap and the state cap. To do so would hold SBC/Ameritech to an aggregated set of terms that neither the FCC nor any state has required as a condition of the merger. Paragraph 69, as it is currently written, reflects the principle that states that impose merger conditions should get the benefit of any provision in the FCC Conditions that, in the opinion of the state, is more favorable but that the Commission and the state conditions should not be duplicative.