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May 23, 2000

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

VIA HAND DELIVERY

Ms. Magalie R. Salas
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: Ex Parte Presentation in CC Docket No. 98-141 /
SBC's Request for Interpretation, Waiver, or Modification
Of the SBC/Ameritech Merger Conditions

Dear Ms. Salas:

In response to a request from Bureau staff at a recent meeting, Jato Communications Corp. ("Jato"), by its undersigned counsel, submits this *ex parte* letter to describe its concerns with SBC's letter requesting interpretation, waiver or modification of the SBC/Ameritech Merger Conditions.¹

Jato is a competitive provider of DSL-based services in tier 2 and tier 3 markets in the United States. Jato offers symmetrical digital subscriber line ("SDSL") services to small and medium sized businesses in 24 cities in 12 markets. Jato began offering SDSL service in 1999 and recently expanded its service areas to include subscribers in California, Kansas, Missouri,

¹ Letter from Paul K. Mancini, SBC, to Lawrence E. Strickling, Chief, Common Carrier Bureau, FCC (Feb. 15, 2000) (*SBC Request*); see *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from Ameritech Corporation, Transferor, to SBC Communications, Inc., Transferee*, Memorandum Opinion and Order, FCC 99-279, CC Docket No. 98-141, Appendix C (rel. Oct. 8, 1999) (*Merger Conditions*).

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Oklahoma, Texas and other SBC/Ameritech states. SDSL service offers subscribers symmetrical downstream and upstream transmission speeds of up to 1.544 Mbps. Like other xDSL services, SDSL requires access to copper facilities, and functions best if the loop is free of impediments such as bridge taps and load coils. However, although distance and loop impediments may decrease the transmission speeds available, SDSL service is more robust than other xDSL services and generally can be provided over copper loops of up to 30,000 feet in length. Thus, Jato's service can be provided to customers located beyond the distance parameters of the ADSL service commonly deployed by SBC and other ILECs.

A. **Regardless of the Resolution of SBC's Request, the Commission Must Take Steps to Ensure that Copper Loops Continue to Be Available to Competitors**

Project Pronto threatens Jato's ability to provide SDSL service and, more broadly, to compete in the DSL marketplace. SBC's deployment of remote terminals ("RTs") is designed solely to assist SBC's ADSL product by reducing loop lengths to 12,000 feet or less. Jato is particularly concerned that SBC's deployment will *diminish* Jato's ability to access all-copper loops to provide its service. As a condition to any decision on the ownership question raised in the request, the Commission must take steps to ensure that competitive carriers such as Jato continue to have an opportunity to provide xDSL services using the existing copper infrastructure.

Deployment of fiber-fed RTs can increase competition only if they supplement, but do not replace, the existing infrastructure used to reach consumers. Jato currently has collocated in over 150 ILEC central offices, and soon will have collocations in approximately 800 central offices. These collocations provide Jato with the ability to access copper loops to reach customers located (depending upon loop quality and other factors) up to 30,000 feet from the central office. Jato has expended scores of millions of dollars to obtain these collocations and to install equipment used to provide advanced services to customers. Continued utility of this investment is dependent upon access to suitable copper facilities to reach its customers.

Under the Project Pronto architecture, however, many of the locations Jato serves from its central office collocation arrangements will be served by RTs with a combination fiber/copper loop.² The RT will not appreciably expand Jato's addressable market; SDSL already is able to reach customers more distant than ADSL service permits. Nor does the RT decrease Jato's costs of providing service, since assessing the copper at the RT (assuming SBC makes adequate collocation space available) would require collocation in each RT, rather than in a single central office. Instead, the RT is an impediment, much like a bridge tap, that Jato must

² Although SBC sometimes implies that these RTs will serve only "outlying" areas, it is likely that the RTs will also be deployed in many other areas as well. Indeed, Jato understands that some RTs could be located as close as 2,000 feet from existing central offices.

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bypass in order to provide SDSL service. Unless the Commission takes steps to ensure that Jato may continue to provide its service, regardless of whether SBC has deployed an RT, Project Pronto will harm competition and will slow the deployment of advanced services technology in contravention of Section 706 of the Telecommunications Act of 1996.³

The preferable solution to this problem is to require SBC to continue to maintain its existing copper loop infrastructure so that these loops may be provided as network elements to requesting telecommunications carriers. The Commission should prohibit SBC from removing currently in-service copper facilities when it deploys a Project Pronto RT. Instead, SBC should be required to maintain these copper loops as unbundled network elements for at least a transition period of 10 years.⁴ The existing copper loops will continue to be useful for DSL and other purposes for at least this time period, especially if bridge taps or load coils necessary only for POTS service are removed from the loops. No pro-competitive purpose would be served by removing these valuable facilities from the pool of available loops. By contrast, preservation of these loops for a transition period will ensure that carriers such as Jato have access to network elements necessary to provide non-ADSL based services, now and in the future.

This condition does not require the Commission to expand SBC's unbundling obligations. The copper loops presently deployed in SBC's network are "network elements" subject to Section 251(c)(3)'s obligations and will remain so after SBC deploys its proposed RTs. The Commission has already made clear that "dead count" loops and "vacant" copper in the network are within the definition of an unbundled loop.⁵ Once SBC migrates customers to fiber-fed RTs, the existing copper loop capacity becomes capacity that is "in place and easily called into service" as an unbundled local loop.⁶ Accordingly, even though SBC would not be using these loops to serve its own customers, they would continue to be available to competitors such as Jato as an unbundled local loop network element.

Moreover, the obligation to provide these copper loops on an unbundled basis applies with full force to loops provided through DLC arrangements such as is proposed by SBC. The Commission's rules require SBC (as an ILEC) to "provide competitors with access to unbundled loops regardless of whether [it] uses integrated digital loop carrier technology, or

³ Pub. L. 104-104, 110 Stat. 153, Title VII, § 706 (Feb 8, 1996), *codified at* 47 C.F.R. § 157, Note.

⁴ SBC should be permitted to replace, but not retire, these copper facilities in accordance with the same replacement standards it applies to active copper loops.

⁵ *See Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, FCC 99-238, ¶ 174 (rel. Nov. 5, 1999) (*UNE Remand Order*).

⁶ *Id.*

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similar remote concentration devices, for the particular loop sought by a competitor.⁷ One common way ILECs provide this access is through the use of a “spare” copper loop that bypasses the DLC. Deployment of Project Pronto RTs would cause all of SBC’s existing loops to affected customers to become “spare” loops, creating abundant alternative loops for carriers such as Jato to use. As a result, in each instance where SBC migrates a customer to the DLC environment proposed in Project Pronto, SBC has an obligation to provide unbundled loops to requesting carriers using the all-copper facilities.⁸ Explicit confirmation of this obligation should be included in any action on SBC’s waiver request.

B. SBC Would Require a Waiver of the Merger Conditions to Own Either the DSL Cards or the OCDs Because They are “Advanced Services Equipment”

Jato agrees with the many commenters who contend that by asking the Commission to opine only as to ownership of the plugs/cards and OCDs, SBC places the cart before the horse. Ownership of plugs/cards or OCDs is neither inherently good nor bad for one entity or the other. The key question – and the first issue the Commission must resolve – is how the architecture should be modified to ensure vibrant, facilities-based competition in DSL services. As shown above, modification to ensure continued access to copper facilities is a prerequisite to any action. Assuming that SBC continues to provide unbundled copper loops after deployment of Project Pronto, Jato has no objection to grant of a waiver as described below.

Section 3(d) of the Merger Conditions requires SBC’s Advanced Services affiliate to “own ... and operate all new Advanced Services Equipment ... used to provide Advanced Services” if the equipment is put into service more than 30 days after the Merger closing date. It is clear from SBC’s description of its proposed architecture that both the DSL cards and the OCDs are “Advanced Services Equipment” under the Merger Conditions.

Advanced Services Equipment includes “DSLAMs or functionally equivalent equipment.” Merger Conditions, § 3(d). The DSL cards SBC proposes to use easily fit this definition. Indeed, SBC admits in its Request that the DSL card “provides the same functionality

⁷ *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd 15499, ¶ 383 (1996) (*Local Competition First Report and Order*) (emphasis added); see *UNE Remand Order*, ¶ 218.

⁸ SBC is required by Section 251(c)(3) to keep these facilities in service as part of its duty to make modifications necessary to accommodate network elements. See *Local Competition First Report and Order*, ¶ 198 (Section 251(c)(3) obligation includes modifications of LEC facilities necessary to provide access to UNEs), *aff’d in relevant part, Iowa Utils. Bd. v. FCC*, 120 F.3d 753, 813 n.33 (8th Cir. 1997). Since SDSL service cannot be provided through the DLC arrangement SBC is proposing, access to the existing all-copper facilities is the only way to provide Jato with access to unbundled loops.

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as a DSLAM in that it splits the voice and data signal.” *SBC Request* at 3. Moreover, in SBC’s depiction of the network, the ADSL cards replace the DSLAM as the interface between the subscriber and the CLEC’s ATM switch. *Compare* Project Pronto March 1, 2000 Product Overview at 5 (Non-DLE Infrastructure) *with id.* at 8 (DLE Infrastructure). Thus, DSL cards are equipment that the Merger Conditions require the SBC’s Advanced Services affiliate to own and the SBC ILECs to allow unaffiliated CLECs to interconnect on a non-discriminatory basis.

Similarly, OCDs are ATM switches that SBC will use to aggregate and disaggregate DSL traffic arriving over a common fiber feeder circuit and route that traffic to the appropriate CLEC’s ATM cloud. As such, the OCD is a “packet switch[] ... used to provide Advanced Services” within the definition of “Advanced Services Equipment” under the Merger Conditions. Merger Conditions, § 3(d). Thus, if SBC’s ILECs are to own this equipment, it must obtain a waiver of the Merger Conditions.

Jato has no objection to grant of a limited waiver (assuming continued access to the copper facilities as described above), provided, (1) SBC permits carriers to utilize all of the features and capabilities available from the equipment, and (2) the waiver is limited in time. Jato agrees with Northpoint that SBC may not “hobble” competitors seeking to use the devices to provide ADSL service.⁹ For example, SBC may not limit the transmission speed of a competitor’s service and must allow competitors to specify any quality of service class supported by its OCD, including constant bit rate, real time and non-real time variable bit rate, “available bit rate” and unspecified bit rate PVCs. In addition, a competitor using SBC’s equipment as a network element must be able to perform remote loop testing and to provision all ADSL parameters such as ADSL fast path and ADSL interleave path. Strict adherence to this non-discrimination requirement is necessary to ensure that all ADSL providers have an opportunity to provide service responsive to their customers’ needs and to develop innovative services that distinguish themselves from competitors.

Second, any action should, by its nature, be limited. The Commission has only begun to examine the issues created by the deployment of RTs in the ILECs’ networks. As the Commission’s recent Public Forum demonstrated, the issues are complex and involve difficult questions of overcoming space and other practical obstacles to ensure the development of an open network conducive to multi-provider competition.¹⁰ Although it is not clear at this time how the Commission will be addressing these issues, some action is likely in the near future. Therefore, if the Commission authorizes SBC’s ILECs to own the equipment it requests, that

⁹ *Northpoint ex parte*, CC Docket No. 98-141 (May 11, 2000).

¹⁰ *See Public Notice*, Common Carrier Bureau and Office of Engineering and Technology Announce Public Forum on Competitive Access to Next-Generation Remote Terminals, DA 00-891 (rel. April 19, 2000).

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authorization either should sunset after one year or should be conditioned upon immediate modification to conform to any rules the Commission may adopt for RT interconnection.¹¹

Sincerely,



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Counsel for Jato Communications Corp.

SAA:pab

cc: Larry Strickling
Carol Matthey
Michelle Carey
Jake Jennings
Tony Dale
Johanna Mikes
Staci Pies
Mark Stone

¹¹ In addition, SBC must not act to harm the Commission's ability to address these issues. Therefore, pending any Commission action addressing RTs, SBC should be required to deploy its Project Pronto RTs so that it may continue to fulfill its interconnection obligations to competitive carriers. This means, for example, that SBC must "take into account projected demand for collocation of equipment" in renovating RTs or deploying new RTs. 47 C.F.R. § 51.323(f)(3). Jato suggests that, as a rule of thumb, SBC should size its RTs so that at least 25 percent of the usable equipment space is reserved for the collocation of competitive carriers' equipment.