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May 31, 2000

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

Carol Matthey  
Deputy Chief, Common Carrier Bureau  
Federal Communications Commission  
445 Twelfth Street, SW  
Washington DC 20554

Re: CC Docket No. 98-141 / Response to SBC's Requests for Interpretation, Waiver  
or Suspension of Merger Conditions Affecting the Ownership of Plugs/Cards and  
OCDs

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Dear Ms. Matthey:

Further to our meeting of Thursday, May 25, 2000, regarding the request for waiver of SBC Communications in the above-captioned proceeding, NorthPoint Communications, Covad Communications and Rhythms NetConnections wish to expand upon a number of issues that we discussed but did not fully resolve. More specifically, this letter establishes three points:

- (1) Granting the relief requested by SBC, without more,<sup>1</sup> will harm competition by reducing consumer choice and impairing the ability of DSL CLECs to deliver service;
- (2) In the absence of a waiver from the Commission, SBC may not circumvent the requirements of the Act and the Commission by merely funding its affiliate's attempt to "build around" these requirements;
- (3) SBC's own filing before this Commission demonstrates that the conditions proposed by the DSL CLECs are not onerous and are necessary to preserve the competitive environment anticipated in the merger conditions.

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<sup>1</sup> That is, excluding consideration of the conditions *endorsed by SBC* to rehabilitate the damage to the public interest that would otherwise result from the breach of the merger conditions.

The Commission's grant of a waiver *subject to* the conditions proposed by NorthPoint, Covad and Rhythms will ensure that its action, notwithstanding the diminution of the pro-competitive benefits of the affiliate, does not impair the public interest.

Granting SBC's Requested Waiver, Without More, Will Substantially Diminish the Market Opening and Pro-Competitive Benefits of the Merger Conditions as Adopted

SBC's request for waiver will, by transferring control of key assets to the incumbent and eliminating key benefits of the affiliate structure, diminish the benefits that would have accrued to the competitive market with full compliance. By proposing to permit the incumbent to own and control DSL equipment in the RT, SBC proposes to reverse the requirement that has the affiliate assess, apply for, secure, and exploit collocation on the same terms and conditions as other CLECs. (The affiliate must secure collocation "on the same terms and conditions that apply to [the ILECs'] own DSLAM." UNE Remand at ¶¶ 313, 221.) This requirement was adopted for two reasons: first, it ensures that the affiliate does not secure space ahead of, or secure better terms, more favorable interconnection, or "tailored" collocation rights over competitive LECs. Second, it pressures the incumbent to provision collocation for RTs in a manner that maximizes space (to avoid situations where the affiliate, if last in line, fails to get in) and that minimizes delay and cost of securing RT collocation (to ensure that the affiliate can get to market quickly).

SBC's proposed request for waiver would allow SBC to take space immediately (instead of through the affiliate) and effectively get "ahead of the line" of other CLECs. Because SBC has already announced that in most existing remote sites additional space will not be available, this substantially reduces the benefits that would have resulted from full compliance with the separate affiliate and will jeopardize the ability of unaffiliated CLECs (and only the unaffiliated CLECs) to serve new subscribers over RT based facilities. Further, any incentive on the incumbent's part to improve RT collocation practices either will be eliminated or, more likely, reversed, because in the absence of this requirement, the affiliate will never apply for or use RT collocation and the incumbent will have no incentive to ensure that RT collocation policies and practices permit timely and efficient network buildout.

SBC May Not "Build Around" the Unbundling and Collocation Requirements of Act in the Absence of a Waiver

SBC apparently has contended that, in the absence of a waiver, it could fund its affiliate such that the affiliate, itself, could construct new remote terminals and install DSLAM equipment *without* subjecting the affiliate or the incumbent to the conditions proposed by the DSL CLECs or even the unbundling requirements of the Act. Because DSL CLECs would be considerably worse off in such a scenario, it therefore seems to be SBC's position that the imposition of any conditions upon the grant of the waiver is gratuitous and inappropriate.

SBC's contention is based on a false premise: namely, that by "using" the affiliate SBC could defeat a competitive marketplace by "building around" the Act's and the Commission's requirements. This contention, and the premise, is wrong.

First, using the affiliate does not, without more, permit SBC to escape the unbundling rules. Any attempt by SBC to “build” around the law by constructing new bottleneck facilities – e.g., facilities previously declared to be, or that in the future may be declared, unbundled elements by the Commission – would be frustrated by the terms of the Merger Conditions themselves. SBC agreed to, and the Commission adopted, a rule that ensures that the unbundling rules apply to *elements*, regardless of ownership, specifically in order to prevent SBC from flouting the Act’s or Commission’s rules merely by transferring bottleneck facilities to the affiliate. “If SBC/Ameritech transfers to its separate affiliate a facility that is deemed to be a UNE under 47 U.S.C. § 251(c)(3), the Commission’s unbundling requirements will attach with respect to that UNE as described in section 53.207 of the Commission’s rules, 47 CFR § 53.207.” (Merger Conditions, ¶ 3(e).) Thus, for example, if the affiliate collocates or installs new RT-based DSL packet switching equipment that, pursuant to the UNE Remand, *must* be unbundled where no collocation space *in* that RT is available,<sup>2</sup> the unbundling requirement would attach to the RT-based DSLAM owned by the affiliate by operation of the conditions. Similarly, if the affiliate acquires or builds any portion of the copper subloop (including the feeder subloop), it would be subject to the subloop unbundling requirement<sup>3</sup> pursuant to paragraph 3(e). Accordingly, SBC *could not* circumvent specific unbundling rules by causing the affiliate to “build” those bottlenecks because, according to the conditions themselves, the unbundling requirements would still apply.

Second, in the event that SBC undertakes to defeat the purpose of the merger conditions – e.g., uses the affiliate to “remonopolize” the facilities necessary for providing advanced services – the Commission retains the discretion to declare the affiliate a successor or assign of the monopoly and imposing all of those requirements appropriate to ensure compliance with the requirements of sections 251, 252, 271 and 272 of the Act. While SBC is entitled to a *presumption* that the affiliate is neither a successor nor assign of the incumbent so long as it adheres to the requirements in the Merger Conditions, such a presumption would be overcome if SBC either (1) failed to abide to the strict requirements of the merger conditions; or (2) undertook any other program that effectively transferred bottleneck control to the affiliate in contravention of our national competition policy. Any attempt to capitalize the affiliate with billions of dollars, transfer ratepayer assets, undertake bulk transfers of telephone customers, and monopolize the advanced services platform would be sufficient basis for the Commission to review whether such “successor or assign” liability should appropriately attach to the affiliate.

SBC’s Own Statements Regarding the Need to Preserve Copper, Ensure RT Collocation, and Exploit the Full Functionality of Any RT-Based DSL Platform Demonstrate that the Proposed Conditions Are Necessary and Not Onerous

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<sup>2</sup> UNE Remand Order at ¶ 313 (“We agree that, if a requesting carrier is unable to install its DSLAM at the remote terminal or obtain spare copper loops necessary to offer the same level of quality for advanced services, the incumbent LEC can effectively deny competitors entry into the packet switching market. We find that in this limited situation, requesting carriers are impaired without access to unbundled packet switching.”)

<sup>3</sup> By definition, the subloop includes any portion of the loop that *can* be accessed at the remote terminal. § 51.319(a)(2).

SBC's request for waiver should be granted only with the conditions proposed by the DSL CLECs, including those detailed conditions set forth by Rhythms, Covad and NorthPoint on May 19 (designed to address specific attempts by the incumbents to frustrate competitors' ability to offer Advanced Services over or around remote terminal devices), to compensate for the diminution in the public interest benefits that will result from grant of the waiver. Specifically, the Commission must require that SBC: (1) maintain and support copper loop infrastructure until such time as the removal of such infrastructure will not "impair" competitors' ability to provide the services that they wish to provide (*see* § 51.317(b); *see also* *Jato ex parte*, May 29, 2000 (regarding maintenance of home-run copper plant)); (2) unbundle the full features, functions, and capabilities of remote terminal equipment and permit collocation of any technically feasible equipment and/or interconnection at any technically feasible point in the remote terminal; and (3) undertake to create compliant collocation space for 3-5 competitive LECs in each new remote terminal (hut, vault, or CEV) installed after May 1, 2000. (*See* *NorthPoint ex parte*, May 11, 2000) These three fundamental principles ensure that competitive DSL LECs retain alternative avenues to serve subscribers (copper and collocated DSL equipment in the RT) in order to maintain market pressures on the incumbent to enhance and unbundle its RT DSL platform to the fullest possible extent and as required by the conditions.

In recent filings, SBC has supported these requirements and underscored the need to impose conditions to ensure that competition can flourish in the context of a Pronto buildout. For example, in the attached supplemental affidavit, SBC reiterates the need for, and extends an assurance to provide, RT collocation options for CLECs ("RT sites for Project Pronto will be sized larger than they otherwise would be, in order to create additional collocation space for CLECs in these RT sites," ¶ 30, 34). Similarly, despite reservations in filings before the Commission in other contexts, SBC notes that maintaining copper loops is essential to preserve competitive options, especially in light of flourishing technological advances in delivering copper-based DSL services on home-run copper ("These all-copper loops may become even more useful for provisioning DSL-based services because new forms of DSL with longer reach on all copper loops may evolve," ¶ 31). Finally, though it fails to make specific commitments, SBC recognizes that it would be inappropriate for SBC unilaterally to "hobble" available technology in the RT platform based on the limited services that SBC's affiliate chooses to offer; instead, SBC should deploy additional technological functionality based on products from its own or other vendors on the RT-based DSL platform as they become available (¶ 27.)

SBC's endorsement of the principles set forth in the DSL CLECs' conditions demonstrates that they are not onerous. SBC's failure to set forth in sufficient and material detail *how* it will comply with those principles, however, demonstrates the *need* for precision in the drafting and adoption of those conditions. Accordingly, we urge you to adopt conditions as set forth by the DSL CLECs in our prior filing to ensure that SBC actually is committed to take steps necessary to ensure that it (1) maintains and supports copper plant, (2) unbundles the full functionality of the RT and related facilities and permits all technically feasible means of collocation and interconnection, and (3) ensures that all new RT huts, vaults and CEVs be "collocation compliant" after May 1, 2000. By adopting the conditions outlined by the DSL

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CLECs in our prior filing, the Commission can ensure that the next generation network will continue to provide consumers with the choice, value, and advanced technology that have already been demonstrated as the results of facilities-based competition since the Commission's adoption of the rules implementing the 1996 Act.

Very truly yours,

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