ALTS
ASSOCIATION FOR LOCAL TELECOMMUNICATIONS SERVICES

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Jonathan Askin
General Counsel

August 17, 2000

Magalie Roman Salas
Secretary
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 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

Dear Secretary Salas,

Pursuant to Section 1.1206(a) of the Commission's Rules, 47 C.F.R. 1.1206(a), this letter is to provide notice of *ex parte* meetings by Jonathan Askin on behalf of the Association for Local Telecommunications Services and Tom Koutsky on behalf of Covad Communications in the above-referenced proceeding on Wednesday, August 16, 2000. The parties met with Anna Gomez, Senior Legal Advisor to Chairman Kennard.

During the meeting, the parties discussed SBC's "Voluntary Commitments." In exchange for waiver of certain conditions imposed in the Order approving the merger of SBC and Ameritech, SBC has proposed to make available certain broadband service offerings, collocation options, and special construction arrangements that purport to ensure that competitive LECs will retain their ability to access unbundled network elements, interconnect with SBC's network, and offer innovative broadband services to consumers served through remote terminals.

The parties contended that SBC's commitments are unacceptably vague and ambiguous, and proposed that the Commission take certain steps to ensure that the commitments made by SBC are actually available in a timely and nondiscriminatory manner to competitive LECs. The parties proposed that SBC's commitment must be an obligation, not a "voluntary" offering and that SBC's commitments must be subject to the market-opening provisions of the Act. The parties expressed concern that SBC's proposal, insulated from regulatory scrutiny, will leave SBC with too much control over competitor access to its network. As a result, consumers risk losing the benefits that widespread competition has already brought to the broadband marketplace. Thus, it is essential that the Commission affirm and require that SBC, its network and proposed network modifications, and its "voluntary" commitments are subject to the

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requirements of sections 251 and 252 and that the Commission ensure that SBC's commitments are legally binding and enforceable and of sufficient duration to ensure continued deployment of competitive technologies and services. The substance of the discussion is set forth in the attached *ex parte* letter already on file in the above-referenced docket.

Should you have any questions about this matter, please call me at 969-2597. An original and one copy of this letter is being submitted to you for inclusion in the public record.

Sincerely,

Jonathan Askin

cc: Anna Gomez, Senior Legal Advisor to Chairman Kennard

July 21, 2000

The Honorable William E. Kennard
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 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

Dear Chairman Kennard:

On July 13, 2000, SBC Communications, Inc. (SBC) filed a written *ex parte* communication in the above-referenced proceeding. That submission delineates several "Voluntary Commitments" SBC pledges to undertake should the Commission grant its request for waiver of certain conditions imposed in the Order approving the merger of SBC and Ameritech.[1] Specifically, SBC proposes certain broadband service offerings, collocation options, and special construction arrangements that purport to ensure that competitive LECs will retain their ability to access unbundled network elements, interconnect with SBC's network, and offer innovative broadband services to consumers served through remote terminals.

Several ALTS members have been active participants in the Commission's consideration of SBC's waiver request. ALTS members have provided Commission staff with a great deal of technical information regarding SBC's proposal, in an effort to ensure that any Commission approval of SBC's request is based on a concrete commitment by SBC to foster, rather than hinder, competition. Project Pronto, which promises to bring high-speed broadband services to consumers who might otherwise be out of reach, can benefit consumers in SBC's territory only if it preserves the ability of all telecommunications carriers to provide innovative services. While we agree with those parties who contend that SBC's commitments are unacceptably vague and ambiguous,[2] in this letter, ALTS emphasizes and proposes two simple yet vital steps the Commission must take to ensure that the

[1] *See* In re Applications of Ameritech Corp., Transferor, and SBC Communications, Inc., Transferee, For Consent to Transfer Control of Corporations Holding Commission Licenses and Lines Pursuant to Section 214 and 310(d) of the Communications Act and Parts 5, 22, 24, 25, 63, 90, 95 and 101 of the Commission's Rules, Memorandum Opinion and Order, CC Docket No. 98-141 (released October 8, 1999) ("SBC-Ameritech Merger Conditions").
[2] *See, e.g.*, Letter from Michael Olsen and William Bailey, NorthPoint Communications, to Lawrence Strickling, Chief, FCC Common Carrier Bureau, in CC Docket No. 98-141, dated July 18, 2000.

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commitments made by SBC are actually available in a timely and nondiscriminatory manner to competitive LECs.

(1) SBC's commitment must be an obligation, not a "voluntary" offering.

SBC has made clear that it views its Pronto commitments as voluntary.[3] In addition, SBC states that all provisions in its commitment will terminate when its obligation to provide advanced services through a separate affiliate ends.[4] This sunset provision permits SBC to effectively terminate all competitive LEC service offerings on a date certain, leaving competitors unable to offer service to current and future customers through SBC remote terminals or preserved copper facilities. This includes certain commitments SBC has made that arguably represent implementation of obligations imposed on SBC by the Act and existing Commission rules.

The Commission should require SBC to provide the offerings outlined in its commitment beyond the sunset date of its affiliate. Indeed, there is no reason for SBC to tie the termination of its commitments to the sunset of its separate affiliate. The Commission has taken numerous procompetitive steps to ensure competitive LECs have access to incumbent remote terminals, and the sunset of SBC's separate affiliate obligation does not alter those requirements. Indeed, the loss of the separate affiliate – and the enforceable protection against discrimination it affords – provides even greater justification for the continuation of the commitments SBC has made.

ALTS therefore respectfully requests that the Commission require SBC, as a condition of approval of its waiver request, to provide all of the commitments made in its July 13, 2000 *ex parte* without any sunset date. In order to justify lifting the procompetitive merger conditions that SBC seeks to remove, the Commission must ensure that the same public interest benefits guaranteed by those conditions are replaced by SBC's commitment to facilitate competition. Concluding that the public interest would be served by implementation of SBC's commitments, the Commission cannot permit SBC to unilaterally revoke those commitments and leave competitive LECs – and consumers – in a broadband monopoly.

(2) SBC's commitments must be subject to the market-opening provisions of the Act

As noted, SBC calls its commitments "voluntary," the effect of which is to insulate its proposals from any obligations under the Act. For example, although SBC promises to provide its broadband service offering pursuant to the pricing requirements of the Act, SBC makes clear that its "broadband service offering" is not a UNE, and thus is not subject to any of the other procompetitive provisions of sections 251 and 252. Thus even though SBC commits to price its "service" pursuant to the Commission's pricing rules, competitive LECs are unable to challenge the prices SBC actually sets before the appropriate state commission, because SBC's "service" is not subject to the arbitration provisions of section 252 of the Act. In addition, SBC's commitment to provide its broadband service offering pursuant to reasonable and nondiscriminatory terms is subject only to SBC's unilateral interpretation of those terms – by insulating its "service offering" from the Act, SBC effectively precludes state or federal challenge to the terms and conditions of the offering. Instead, SBC offers a

[3] As recently as yesterday, at an SBC presentation of Project Pronto wholesale services in San Francisco attended by several ALTS members, SBC stated in its written materials that its broadband service "is subject to change, modification and/or withdrawal by the SBC ILEC(s), in its sole discretion, in whole or in part . . . ."
[4] SBC July 13, 2000 *ex parte* at 9.

collaborative process for resolution of such issues – a process that again leaves SBC as the final arbiter of the reasonableness of its own service offering.

Absent such a requirement, consumers will miss out on future innovation in the broadband marketplace, because all carriers will be forced to act as straight resellers of SBC's broadband service offering. For example, SBC does not commit to permit competitive LECs to deploy their own line cards in an SBC remote terminal. SBC limits competitive LECs to line cards that are already deployed by SBC in its remote terminals, and does not permit competitive LECs to install their own line cards. Rather, SBC commits only to "evaluate and discuss" requests for deployment of such cards, or other new arrangements or functionalities, in industry sessions.[5] At the same time, SBC makes clear that no industry collaborative discussions will take place during the pendency of any FCC proceeding considering "substantially the same issue" as raised in this matter.[6] Competitive LECs are thus left without a mechanism for appeal of SBC's unilateral determinations as to the technical feasibility of particular collocation arrangements, or a competitive LEC request to utilize specific features and functionalities of equipment.

ALTS must point out that the "voluntary" commitments proposed by SBC implicate network facilities that are legally subject to sections 251 and 252 of the Act.[7] In order to avoid any misunderstanding among the parties, ALTS thinks it is essential for the Commission to affirm that SBC's network and its modifications to that network are, and shall continue to be, subject to the strictures of sections 251 and 252, regardless of what SBC may unilaterally propose in its "voluntary" commitments.

Furthermore, because SBC frames its "broadband service offering" as "voluntary" and exempt from the procompetitive provisions of sections 251 and 252, ALTS asks the Commission to require SBC to subject the "voluntary" commitments to the provisions of sections 251 and 252 of the Act so that CLECs have a viable mechanism to ensure compliance with SBC's commitments. SBC expresses its willingness to provide its broadband service and collocation arrangements in a nondiscriminatory manner,[8] but at the same time seeks to insulate itself from any regulatory checks on its implementation of that commitment. SBC should not be permitted to establish prices, terms and conditions of its service offering in a vacuum – or to commit solely to providing competitive LECs only what it provides to its own affiliate. Rather, SBC should be subject to the same oversight from the Commission and state commissions as when it establishes rates, terms and conditions for any of its other wholesale offerings. If competitive LECs do not have the option of seeking the assistance of state commissions, pursuant to section 252 of the Act, to resolve pricing and other disputes related to SBC's broadband service offering, competitors are no better off than if SBC had never proposed the offering at all. In any event, the Commission should ensure that SBC's ASI affiliate is not permitted to offer any advanced services through Pronto-enabled remote terminals until such time as the functionalities and service offerings to which SBC has committed are actually available to competitors.

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[5] *Id.* at 3.
[6] *Id.* at 8.
[7] *See In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, FCC 99-238, at paras. 166-202, 205-229.
[8] *Id.* at 1.

In sum, ALTS welcomes SBC's investment in its network and the promise of widespread availability of broadband services. At the same time, ALTS members are concerned that SBC's proposal, insulated from regulatory scrutiny, will leave SBC with too much control over competitor access to its network. As a result, consumers risk losing the benefits that widespread competition has already brought to the broadband marketplace. Thus, it is essential that the Commission affirm and require that SBC, its network and proposed network modifications, and its "voluntary" commitments are subject to the requirements of sections 251 and 252 and that the Commission ensure that SBC's commitments are legally binding and enforceable and of sufficient duration to ensure continued deployment of competitive technologies and services.

Please do not hesitate to contact me if I can be of any further assistance.

Sincerely,

Jonathan Askin
General Counsel,
Association for Local
Telecommunications Services