

ORIGINAL
EX PARTE OR LATE FILED

KELLOGG, HUBER, HANSEN, TODD & EVANS, P.L.L.C.

SUMNER SQUARE
1615 M STREET, N.W.
SUITE 400

WASHINGTON, D.C. 20036-3209

(202) 326-7900

FACSIMILE:
(202) 326-7999

MICHAEL K. KELLOGG
PETER W. HUBER
MARK C. HANSEN
K. CHRIS TODD
MARK L. EVANS
STEVEN F. BENZ

NEIL M. GORSUCH
GEOFFREY M. KLINEBERG
REID M. FIGEL
HENK BRANDS
SEAN A. LEV
COURTNEY SIMMONS ELWOOD
EVAN T. LEO

November 1, 2000

RECEIVED

NOV 1 2000

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Carol E. Matthey
Deputy Bureau Chief
Common Carrier Bureau
Federal Communications Commission
445 Twelfth Street, S.W., Room 5C-451
Washington, D.C. 20554

RE: *In the Matter of Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from Ameritech Corporation, Transferor, to SBC Communications Inc., Transferee, CC Dkt. No. 98-141*

Dear Ms. Matthey:

I would like to address two issues that you have raised regarding SBC's interpretation of the Merger Conditions adopted by the Commission in the *SBC/Ameritech Merger Order*.¹ Both issues concern the transition period set forth in Paragraph 3(c)(3), and repeated in Paragraph 4(n)(4), which allows the SBC ILECs to provide network planning, engineering, design, and assignment services to their advanced services affiliate(s) on an exclusive basis for 180 days after the Merger Closing Date. Your letter does not take into account an express exception to this 180-day deadline that allows the SBC ILECs to continue providing network planning, engineering, design, and assignment services for ADSL service in a given area until line sharing is provided to unaffiliated carriers in that area. At the same time, your letter suggests that the time permitted for other services is shortened to less than 180 days based on another provision that is entirely optional, even though this provision does not in any way override the permission granted in paragraph 3(c)(3). Both positions are incorrect.

¹ Memorandum Opinion and Order, *Applications of Ameritech Corp., Transferor, and SBC Communications, Inc., Transferee, For Consent to Transfer Control of Corporations Holding Commission Licenses and Lines Pursuant to Sections 214 and 310(d) of the Communications Act and Parts 5, 22, 24, 25, 63, 90, 95 and 101 of the Commission's Rules, 14 FCC Rcd 14712 (1999) ("SBC/Ameritech Merger Order")*.

No. of Copies rec'd 0114
List ABCDE

Carol E. Matthey
November 1, 2000
Page 2

Briefly, Paragraph 3(c)(3)'s limitation of the transitional period to 180 days for the SBC ILEC provision of network planning, engineering, design, or assignment functions is expressly qualified by its reference to paragraph 3(d). Paragraph 3(d), in turn, expressly provides that SBC's ILECs are permitted to provide "ADSL service" with Interim Line Sharing to their advanced services affiliate(s) on an exclusive basis in any geographic area until line sharing is provided to unaffiliated carriers within that same area. Because the provision of ADSL service necessarily involves network planning, engineering, design, or assignment functions, some of that network planning, engineering, design, and assignment will therefore be on an exclusive basis as well. SBC's reading of Paragraph 3(d) is the only interpretation that the language of that provision will allow.

Paragraph 6(g) is similarly unequivocal. Although your letter suggests that Paragraph 6(g) and the "functional equivalent provisions" within that paragraph are mandatory obligations, the language of Paragraph 6(g) makes clear that it is an *optional* provision. Paragraph 6(g) states at the outset that "SBC/Ameritech shall be *permitted to*" provision advanced services in the manner described in Paragraph 6(g). Thus, the language could not be clearer that Paragraph 6(g) does not *require* SBC to do anything but simply *permits* SBC to take advantage of those provisions. It does not, and cannot, override the express permission for a 180-day transition period granted in paragraph 3(c)(3) (which was added after paragraph 6(g) with the express intent of providing a more generous transitional mechanism).

As discussed in detail below, SBC's reading of these provisions is commanded not only by the plain language of the Merger Conditions, but also by the "legislative history" of, and the policies underlying, those conditions, as well as by SBC's and the FCC's clear understanding at the time the conditions were approved of how line sharing was being provided and would be provided in the future.

Line Sharing. In your recent Letter,² you disagree that Paragraph 3(d) of the Merger Conditions allows SBC's ILECs to provide the Advanced Services affiliate(s) with the network planning, engineering, design, and assignment functions that are necessary to provide ADSL service until line sharing is provided to unaffiliated providers. Letter at 2 & n.5. Specifically, you contend that SBC's reading of Paragraph 3(d) would nullify Paragraph 3(c)(3).

² Letter from Carol E. Matthey, FCC, to Cassandra Carr, SBC Communications Inc., DA 00-2340 (rel. Oct. 16, 2000) ("Letter") (responding to Letter from Michael K. Kellogg to Carol E. Matthey (Feb. 15, 2000)).

Carol E. Matthey
November 1, 2000
Page 3

In fact, SBC's reading of the Merger Conditions is supported by the express terms of both Paragraphs 3(c)(3) and 3(d), as well as the structure and purpose of the Merger Conditions generally. Paragraph 3(c)(3) provides that:

[F]or a period of not more than 180 days after the Merger Closing Date, the incumbent LEC may provide, under a written agreement, network planning, engineering, design, and assignment services for Advanced Services Equipment *as defined in Subparagraph 3(d)*. . . .

Merger Conditions ¶ 3(c)(3) (emphasis added). Thus, Paragraph 3(c)(3) makes clear that its scope is subject to the terms of Paragraph 3(d).

Paragraph 3(d), in turn, is similarly unequivocal. It states that:

[T]he incumbent LECs may provide the ADSL service derived from the integrated combination of an unbundled loop, a DSLAM, and spectrum splitters at each end of the unbundled loop where the unbundled loop is also used to provide voice grade service ("Interim Line Sharing"), including OI&M functions associated with Interim Line Sharing, to the separate Advanced Services affiliate(s) on an exclusive basis within any geographic area until line sharing is provided to unaffiliated providers of Advanced Services within the same geographic area

Id. ¶ 3(d). Paragraph 3(d) therefore unambiguously provides that incumbents are permitted to provide the *service* derived from the integrated combination of an unbundled loop, a DSLAM, and spectrum splitters on an exclusive basis to the advanced services affiliates during a different transition period than the 180-day period. The period during which this service may be provided lasts until line sharing is provided to unaffiliated providers.

The provision of the "ADSL service derived from the integrated combination" of equipment described in Paragraph 3(d) *necessarily* involves network planning, engineering, design, or assignment functions. And because the ILECs are permitted to provide that ADSL service on an exclusive basis until line sharing is provided to unaffiliated providers, some of that network planning, engineering, design, and assignment will therefore be on an exclusive basis as well.

Carol E. Matthey
November 1, 2000
Page 4

This is the only interpretation of Paragraph 3(d) that the language will support. Although your Letter states that Paragraph 3(d) should be “construed narrowly,” Letter at 2, there is no reading of Paragraph 3(d) that makes sense other than to permit the incumbent LECs to provision ADSL service to separate affiliates on an exclusive basis -- and that necessarily includes whatever network planning, engineering, design, or assignment functions are required to provide that service -- until line sharing is made available within the same geographic area. Paragraph 3(d) does not state that the incumbent LEC may provide the Advanced Services affiliate(s) various piece parts of the network -- *i.e.*, the DSLAM, the loop, and the splitter -- so that the affiliate could then create its own integrated combination. Nor does Paragraph 3(d) state that the separate Advanced Services affiliate(s) must provide the ADSL service derived from the integrated combination. Rather, it unequivocally gives the incumbent LECs the right to “provide the ADSL *service* derived from the integrated combination.” And that right necessarily includes the right to perform network planning, engineering, design, and assignment because otherwise, the service could not be provided. Thus, to exclude network planning, engineering, design, and assignment would render the line sharing provision in Paragraph 3(d) a nullity, which, as you point out in your Letter, is inconsistent with canons of textual construction.

By contrast, giving effect to the plain language of Paragraph 3(d) does not render Paragraph 3(c)(3) a nullity, because Paragraph 3(d) is but a limited exception to Paragraph 3(c)(3)’s terms. Paragraph 3(c)(3) applies with full force to the network planning, engineering, design, or assignment functions associated with *all other services* aside from the “ADSL service derived from the integrated combination of an unbundled loop, a DSLAM, and spectrum splitters . . . where the unbundled loop is also used to provide voice grade service.” Merger Conditions ¶ 3(d). The incumbents are therefore still subject to the 180-day transitional period in Paragraph 3(c)(3) for the network planning, engineering, design, and assignment associated with all other forms of Advanced Services, including ADSL service when the loop is not used to provide voice grade service. Moreover, Paragraph 3(c)(3) also applies to ADSL service if line sharing is provided to unaffiliated providers within the same geographic area. Thus, the line sharing provision in Paragraph 3(d) is an extremely limited carve-out from the general terms of Paragraph 3(c)(3). Paragraph 3(c)(3), far from being a nullity, will apply in most circumstances.

In addition to comports with the plain language of the Merger Conditions, SBC’s reading is supported by the purpose of the line sharing provision in Paragraph 3(d). The purpose of that provision was not to allow the Advanced Services affiliate(s) to order the high frequency portion of the loop (“HFPL”) for a period of time before other carriers could do so. Rather, its purpose was to allow the telcos to continue provisioning ADSL service over the HFPL, as they had *already* been doing, until such time that the telcos could develop processes and procedures so that providers outside the telcos (whether affiliated or unaffiliated) could order the HFPL. At

Carol E. Matthey
November 1, 2000
Page 5

the time the merger closed, the telcos were provisioning the vast majority of ADSL service to their customers over the HFPL. In order not to disrupt the provisioning of ADSL service to customers, the Merger Conditions therefore allowed the SBC ILECs to continue providing ADSL to SBC customers over the HFPL, using the internal SBC ILEC processes and procedures already in place, until such time that carriers other than the SBC ILECs could order the HFPL. Because the FCC had never required the ILECs to provide the HFPL as a UNE, the telcos did not have the processes and procedures in place that would allow other entities to order the HFPL. Accordingly, the transitional period was necessary.³ The Commission described this purpose in the *SBC/Ameritech Merger Order*. The Commission noted that “because SBC/Ameritech had previously been performing such activities on an integrated basis, it will take some time, both logistically and technically, to remove these functions from the incumbent.” 14 FCC Rcd at 14908, ¶ 475. The Commission was “therefore persuaded that the incumbent’s provision of these activities on an interim basis to the affiliate is a reasonable measure to effectuate the creation of the advanced services affiliate and its orderly transition.” *Id.* The Commission “decline[d] to require that SBC/Ameritech delay offering line sharing to its separate advanced services affiliate through its ‘interim line-sharing’ proposal until it offers line sharing on a commercial scale to competitors” because it did “not find that permitting interim line sharing between an SBC/Ameritech incumbent and its affiliate will unfairly advantage the affiliate vis-a-vis competitors because through the surrogate line sharing discount, unaffiliated carriers will be on comparable economic footing with the SBC/Ameritech advanced services affiliate.” *Id.* at 14909, ¶ 478.

The “legislative history” of the Merger Conditions further supports what the plain terms of Paragraph 3(d) and the *SBC/Ameritech Merger Order* make clear. The precursor to Paragraph 3(d) explained that the “interim line sharing” provision was designed to allow the telco to continue to provide “the DSLAM functional[ity] of interim line sharing to the separate Advanced Services affiliate(s) on an exclusive basis until it becomes both technically and commercially feasible to provide such capability to all providers.” Ex Parte Letter from Paul K. Mancini, SBC Counsel, and Richard Hetke, Ameritech Corporation Counsel, to Magalie Roman Salas, FCC, Attachment at 16, ¶ 27(c) (FCC filed July 1, 1999) (“SBC/Ameritech July 1, 1999 Ex Parte”). What this history demonstrates is that the interim line sharing provision was designed to allow

³ At the same time, “in order to ensure that competitors receive a benefit comparable to this ‘interim line sharing’ between an SBC/Ameritech incumbent LEC and its affiliate,” *SBC Ameritech Merger Order*, 14 FCC Rcd at 14862, ¶ 369, the Merger Conditions require SBC/Ameritech to offer competing carriers the economic equivalent of line sharing until line sharing becomes available to unaffiliated carriers.

Carol E. Matthey
November 1, 2000
Page 6

the SBC telcos to provide this service until it became technically feasible for carriers other than the telcos -- including the Separate Affiliate(s) -- to order the HFPL.

Indeed, the Commission expressly declined to address the "complex" operational, pricing, and other practical issues associated with line sharing in the *SBC/Ameritech Merger Order*. 14 FCC Rcd at 14909, ¶ 477. This further shows that the Commission did not intend to require the separate affiliate simply to order the HFPL from the incumbent. On the contrary, as the Commission recognized in the *Line Sharing Order*,⁴ it would take time to develop the processes and procedures necessary for carriers, including the separate affiliates, to order the HFPL. Indeed, that is why the Commission gave ILECs 180 days from the release of the *Line Sharing Order* to provide the HFPL. As the *Line Sharing Order* held, the date it became feasible was June 5, 2000, not April 5, 2000.

If Paragraph 3(d) is construed, contrary to the plain language and as you suggest in your Letter, to mean only that the Advanced Services affiliate(s) may order the HFPL, the SBC telcos' deadline for having processes and procedures in place to order the HFPL was, in effect, midnight April 5, 2000 (and perhaps as early as February 5, 2000 for new activations).⁵ This reading of

⁴ Third Report and Order in CC Docket No. 98-147, Fourth Report and Order in CC Docket No. 96-98, *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 14 FCC Rcd 20912 (1999) ("*Line Sharing Order*").

⁵ Your Letter seems to suggest that the Separate Affiliates were required to operate in the "steady-state" for new activations that are jurisdictionally interstate no later than February 5, 2000. Letter at 2 n.6. But nothing in the paragraphs cited in the Letter overrides the Separate Affiliates' right under the Merger Conditions to take advantage of the transitional mechanisms in Paragraph 3(c)(3). Paragraphs 6(b) and 6(d) of the Merger Conditions require new activations of Advanced Services to be provided through a separate Advanced Services affiliate 30 days after certain regulatory approvals were obtained. Paragraph 5(a) sets a 90-day limit on when those regulatory approvals are deemed obtained for jurisdictionally interstate services. None of these provisions, however, require the Separate Affiliate to operate in the "steady-state" prior to the deadlines in the other transitional mechanisms. Indeed, Paragraph 4(n) makes clear that there are "several" transitional mechanisms and that they are not mutually exclusive. Thus, even though the Separate Affiliates became the providers of record under Paragraphs 5 and 6 on February 5, 2000, nothing in those paragraphs address when an incumbent LEC is authorized to provide network planning, engineering, design, and assignment functions to those separate Advanced Services affiliate(s). That question is addressed in Paragraph 3(c)(3), and nothing in Paragraphs 5 or 6 overrides the specific terms of Paragraph 3(c)(3). Thus, the full 180-day period in

Carol E. Matthey
November 1, 2000
Page 7

Paragraph 3(d) conflicts with the *Line Sharing Order*, the *SBC/Ameritech Merger Order*, and, as noted, with the plain terms of the Merger Conditions themselves. See Merger Conditions ¶ 3(d) (telcos may provide Interim Line Sharing “until line sharing is provided to unaffiliated providers of Advanced Services within the same geographic area”); *id.* ¶ 8(a) (“The SBC/Ameritech incumbent LEC may provide Interim Line Sharing capability to the separate Advanced Services affiliate within a certain geographic area for the provision of Advanced Services activated prior to the time that line sharing is provided to unaffiliated providers of Advanced Services within the same geographic area.”).

The “Functional Equivalent” Provision. The second concern you raise in your Letter relates to Paragraph 6(g) of the Merger Conditions. In particular, you note that the “functional equivalent provisions” in Paragraph 6(g) cannot be read as “optional” because such an interpretation “would significantly delay realization of the benefits of the separate affiliate condition.” Letter at 3. You further appear to suggest that the “functional equivalent” language in Paragraph 6(g) somehow overrides the express permission granted in Paragraph 3(c)(3) and repeated in Paragraph 4(n)(4), under which “the incumbent LEC may, on an exclusive basis, provide network planning, engineering, design and assignment services for Advanced Services Equipment . . . to the separate Advanced Services affiliate for a period of no more than 180 days after the Merger Closing Date.” Merger Conditions ¶ 4(n)(4). That cannot be correct.

As an initial matter, the express terms of Paragraph 6(g) make clear that it *is* optional. Paragraph 6(g) states at the outset that, during the transitional period set forth in that provision, “SBC/Ameritech *shall be permitted to*” provision advanced services in the manner described in Paragraph 6(g). Merger Conditions ¶ 6(g) (emphasis added). The use of the language “be permitted” makes clear that SBC/Ameritech is not “required” to do anything under Paragraph 6(g). SBC/Ameritech is merely permitted to take advantage of those provisions.

Reading Paragraph 6(g) according to its plain meaning does not render that provision meaningless. Letter at 3. It simply means that SBC/Ameritech may elect a different option under the Merger Conditions. As SBC previously explained, Paragraph 6(g) was originally the only

Paragraph 3(c)(3) was still applicable once those Separate Affiliates became the providers of record under Paragraphs 5 and 6.

Carol E. Matthey
November 1, 2000
Page 8

transitional authority granted to SBC/Ameritech.⁶ It became clear during the negotiation of the conditions, however, that the authority granted in Paragraph 6(g) might be too restrictive and would have seriously disrupted SBC/Ameritech's ability to deliver advanced services to consumers immediately after the merger. Therefore, in order "to minimize any disruption to the efficient and timely delivery of Advanced Services to customers," Merger Conditions ¶ 4(n), Paragraphs 3(c)(3) and 4(n)(4) were added. Paragraph 6(g) was not thereby removed, but it did not have to be, because it is a permissive, not a restrictive, provision. It remained up to SBC/Ameritech whether it would take advantage of that option or one of the other transitional mechanisms. As SBC has previously stated, having expressly agreed to these broader transitional mechanisms, the Commission cannot now in good faith suggest that Paragraph 6(g) is somehow a restriction that supersedes and renders them nugatory.

Finally, I would like to clarify that SBC does not take the position that the SBC incumbent LECs can provide advanced services as they did before the merger "during a transition period of unspecified duration." Letter at 3. The letter you cite for this proposition does not argue that the incumbents can provide advanced services as they did before the merger indefinitely. On the contrary, the passage you quote, Letter at 3 n.8, makes clear that it is SBC's position that the ILECs "may take the order, design the service, assign the equipment, and create and maintain all the necessary records, using its own systems and databases . . . *during the 180-day transitional period.*"⁷ And for this proposition, SBC relies on the express terms of Paragraph 3(c)(3). *See also SBC/Ameritech Merger Order*, 14 FCC Rcd at 14861, ¶ 366. SBC was merely re-stating what Paragraph 3(c)(3) expressly provides. Moreover, although your Letter also cites note 2 of SBC's Feb. 15, 2000 Letter, that note merely described the limited exception for Interim Line Sharing, as discussed above. There is, therefore, no danger that SBC's interpretation of the Merger Conditions will "delay realization of the benefits of the

⁶ The predecessor of Paragraph 6(g) was Paragraph 31(f) of the original July 1, 1999 draft of the proposed conditions. *See SBC/Ameritech July 1, 1999 Ex Parte* (attaching proposed conditions). That early version did not contain any counterpart to either Paragraph 3(c)(3) or Paragraph 4(n)(4) of the final Merger Conditions. Those two paragraphs, with their 180-day transitional mechanisms, were added later in the August 27, 1999 version of the conditions. *See Ex Parte Letter from Paul K. Mancini, SBC Counsel, and Richard Hetke, Ameritech Corporation Counsel, to Magalie Roman Salas, FCC* (FCC filed Aug. 27, 1999) (attaching revised proposed conditions). At the same time, the sunset for the advanced services affiliate was increased from three years to three-and-one-half years, to reflect the transitional period.

⁷ Letter from Michael K. Kellogg, Counsel for SBC, to Carol E. Matthey, FCC, at 7 (FCC filed Feb. 15, 2000) ("SBC's Feb. 15, 2000 Letter") (emphasis added).

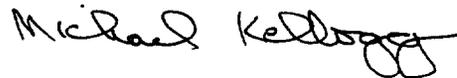
KELLOGG, HUBER, HANSEN, TODD & EVANS, P.L.L.C.

Carol E. Matthey
November 1, 2000
Page 9

separate affiliate condition.” Letter at 3. Rather, SBC’s interpretation gives full force to all the provision(s) of the Merger Conditions -- Merger Conditions that the Commission has held will, *as written*, “serve the public interest, convenience and necessity.” *SBC/Ameritech Merger Order*, 14 FCC Rcd at 14854-55, ¶ 349.

Please do not hesitate to call me if you would like further information or if you would like to meet to discuss these issues further.

Yours sincerely,

A handwritten signature in black ink that reads "Michael Kellogg". The signature is written in a cursive style with a long horizontal stroke at the end.

Michael K. Kellogg

cc: David Solomon
Christopher Wright