Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re Applications of Matter of	)	
	)	
AMERITECH CORP.,	)	
Transferor,	)	
	)	
AND	)	CC Docket No. 98-141
	)	
SBC COMMUNICATIONS INC.,	)	
Transferee	)	
	)	
For Consent to Transfer Control of	)	
Corporations Holding Commission Licenses	)	
And Line 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	)	

PETITION TO INVESTIGATE THE PUBIC INTEREST BENEFITS OF THE TRANSFER AND TO TOLL THE EXPIRATION OF CERTAIN SBC/AMERITECH MERGER CONDITIONS PENDING INVESTIGATION

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DATED: September 3, 2002

SUMMARY

Z-Tel Communications, Inc. ("Z-Tel"), hereby petitions the Commission to re-examine the public interest benefits of the transfer and to toll the sunset of the Merger Conditions imposed by the SBC/Ameritech *Merger Order* pending that review. Nearly three years have passed since the Merger Conditions were promulgated, and it is clear that the public interest benefits of those Conditions – in particular, the pro-entry Conditions and the out-of-region entry Conditions – have failed to materialize. Indeed, SBC/Ameritech has violated the pro-entry Conditions repeatedly. At the same time, SBC has failed to engage in out-of-region competitive entry in any significant sense. As a result, the public interest benefits of the Conditions have failed to materialize, and the Commission should act to advance the public interest before it allows any of the Conditions to expire.

In the Merger Order, the Commission stated that it would continue to ensure that the SBC/Ameritech merger advances the public interest. It is time to put that policy to the test. The Commission cannot allow any Merger Conditions to expire on October 8, 2002, in light of SBC's noncompliance. SBC/Ameritech's recalcitrance has violated the letter and spirit of the in-region pro-entry Conditions and no public interest benefits have materialized from SBC's out-of-region entry.

For these reasons, the Commission should grant Z-Tel's petition and toll the expiration of all SBC/Ameritech Merger Conditions pending Commission review of whether and to what extent: (1) public interest benefits have resulted from the merger of SBC and Ameritech and (2) the merger remains consistent with the public interest given SBC's well documented failure to comply with the letter and the spirit of the Merger Conditions.

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Z-Tel Communications, Inc. ("Z-Tel"), through its undersigned counsel, hereby petitions the Commission to re-examine the public interest benefits of the transfer and to toll the sunset of the Merger Conditions imposed by the SBC/Ameritech *Merger Order*[1] pending that review. Nearly three years have passed since the Merger Conditions were promulgated, and it is clear that the public interest benefits of those Conditions – in particular, the pro-entry Conditions and the out-of-region entry Conditions – have failed to materialize. Indeed, SBC/Ameritech has

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1 *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, CC Docket 98-141*, Memorandum Opinion and Order, 14 FCC Rcd 14712 (1999) ("*Merger Order*").

violated the pro-entry Conditions repeatedly, as demonstrated by the periodic audit reports, FCC enforcement, and complaints by CLECs (including Z-Tel[2]). At the same time, SBC has failed to engage in out-of-region competitive entry in any significant sense. As a result, the public interest benefits of the Conditions have failed to materialize and the Commission should act pursuant to paragraph 360 of the *Merger Order* to advance the public interest before it allows any of the conditions to expire.

I. BACKGROUND

The Commission is required by law and its policies (articulated in paragraph 360 of the Merger Order) to re-examine the public interest benefits of the SBC/Ameritech Merger Conditions because those benefits have failed to materialize. The Commission should not and, indeed, cannot simply let the Conditions expire without ensuring that the public interest has been served.

In the *Merger Order*, the Commission concluded that the merger of SBC and Ameritech "threaten[ed] to harm consumers of telecommunications services in three distinct, but interrelated, ways."[3] Specifically the merger, as originally proposed, would:

- remove one of the most significant potential participants in local telecommunications mass markets both within and outside of the company's region;[4]

- substantially reduce the Commission's ability to implement the market-opening requirement of the 1996 Act by comparative practice oversight methods...., increase[ing] the duration of the entrenched firms' market power and rais[ing] the costs of

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2 *See, CoreComm Communications, Inc. and Z-Tel Communications, Inc. v. SBC et al.* EB-MD-0017 (filed Aug. 28, 2002).

3 *Merger Order* at 14717, ¶5.

4 The Commission defined the "mass market" to include "residential and small business" consumers. *See Merger Order* at 14746, ¶68; *see also* 14757, ¶93.

regulating them; and

- increase the incentive and ability of the merged entity to discriminate against its rivals, particularly with respect to advanced telecommunications services [, and thus] ... frustrate the Commission's ability to foster advanced services as it is directed to do so by the 1996 Act.[5]

After weighing these harms to consumers against the purported benefits asserted by SBC and Ameritech, the Commission concluded in no uncertain terms that "the asserted benefits of the proposed merger do not outweigh the significant harms."[6]

To "change the public interest balance"[7] and overcome the identified "significant harms," the Commission imposed "significant and enforceable conditions designed to mitigate the ... harms of the[] merger, to open up the local markets of these ... RBOCs, and to strengthen the merged firm's incentive to expand competition outside its regions."[8] The Conditions addressed what the Commission viewed to be the public interest harms of the merger, and fell into three general categories:

- In-Region Pro-Entry Conditions (Conditions 2-57). The Commission found that the merged firm would be better able to thwart CLECs from entering the local market in the SBC/Ameritech region. As a result, the Commission required SBC/Ameritech to provide the shared transport UNE,

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[5] *Id. See also* 14817, ¶236 (The Commission noted that "[w]e believe that this increased discrimination particularly will be aimed at, and harmful to, competitive providers of local exchange services to mass market customers (smaller businesses and residential customers).").

[6] *Id.* at 14716, ¶3.

[7] *Id.* at 14717, ¶4.

[8] *Id.* at 14716, ¶2. *See also* 14743, ¶62 ("absent stringent conditions, we would be forced to conclude that this merger does not serve the public interest, convenience or necessity because it would inevitably retard progress in opening local telecommunications markets, thereby requiring us to engage in more regulation. Standing alone, without conditions, the initial application proposed a license transfer that would have been inconsistent with the approach to telecommunications regulation and telecommunications markets that the Congress established in the 1996 Act.").

implement a wholesale performance plan, create a separate affiliated for advanced services, and other conditions.

- Out-of-Region Competition Conditions (Conditions 59-61). As discussed above, the merger lessened actual and potential competition between SBC/Ameritech. SBC and Ameritech argued before the Commission that they needed to be "bigger" to finance aggressive entry in the other RBOC regions. The Commission remedied this public interest harm and attempted to lock-in these supposed out-of-region public interest benefits by requiring SBC/Ameritech to enter 30 markets as a CLEC in the following three years.

- Pro-Consumer Conditions (Conditions 62-65). The Commission found that the merger would interfere with the ability of state commissions and the Commission to benchmark quality of service. As a result, the Commission implemented several quality of service standards.

"Assuming satisfactory compliance," the Commission determined the Merger Conditions would be "sufficient to tip the scales, so that, on balance, the application to transfer the lines should be approved."[9]

In approving the merger, the Commission noted its continued obligation to advance the public interest. The Commission granted the merger "on the assumption and expectation that all conditions ... [would] remain effective and enforceable for 36 months, or the period specified in the condition if different."[10] The Commission went on to note that it expected "SBC/Ameritech [to] implement each of the[] conditions in full, in good faith and in a reasonable manner to ensure that all telecommunications carriers and the public are able to obtain the full benefits of the[] conditions."[11] Cautioning SBC to the necessity of absolute compliance with the Merger Conditions, the Commission warned:

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9 *Id.* at 14718, ¶5.

10 *Id.* at 14858, ¶359.

11 *Id.* at 14858, ¶360.

> We expect that ... **all telecommunications carriers and the public are able to obtain the full benefits of these conditions**. If SBC/Ameritech does not fulfill its obligation to perform each of these conditions, pursuant to our public interest mandate under the Communications Act we must ensure that the merger remains beneficial to the public. **We intend to utilize every available enforcement mechanism, including, if necessary, revocation of the merged firm's section 214 authority, to ensure compliance with these conditions.** To this end, should the merged entity systematically fail to meet its obligations, we can and will revoke relevant licenses, or require the divestiture of SBC/Ameritech into the current SBC and Ameritech companies. Although such action would clearly be a last resort, it is one that would have to be taken if there is no other means for ensuring that the merger, on balance, benefits the public.[12]

After noting its eminent enforcement authority, the Commission went on to state that "the conditions contain **clear and specific language** defining SBC/Ameritech's obligations," and as such, the Commission would be able to "ensure that the Applicants have not proposed mere paper promises."[13]

Nearly three years have passed, and it has become abundantly clear that SBC views its merger obligations as "mere paper promises" through its "systematic" flouting of its "clear and specific" obligations. Indeed, neither "telecommunications carriers" nor "the public" have been "able to obtain the full benefits of these conditions."[14] The Commission is under an obligation under the Communications Act to "ensure that the merger remains beneficial to the public," and must reexamine the public interest at this point, before the expiration date.

For example, in Z-Tel's experience – and as confirmed by this Commission and the state commissions – SBC has paid merely lip service to its shared transport obligation and its

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12 *Id.* (emphasis added).

13 *Id.* at 14921, ¶508 (emphasis added).

14 *Id.* at 14858, ¶360.

operations support systems' ("OSS") obligations.[15] As a result, competitors are not enjoying the full benefits of the in-region pro-entry Conditions that the Commission required to offset the damage to competitors that the merger engendered.

At the same time, consumers are clearly not benefiting from the aggressive, out-of-region competition SBC/Ameritech promised. SBC's National/Local "strategy" – designed to "ensure that residential consumers and business customers outside of SBC/Ameritech's territory benefit from facilities-based competitive service by a major incumbent LEC – is an absolute non-event from a consumer perspective. Three years after the merger, the Commission expected that SBC Telecom would be a vibrant local competitor in thirty markets. SBC Telecom is instead a shell or, at best, a placeholder entity that is not competing aggressively at all.[16] When the *Merger Order* was written, the Commission was counting on far more public interest benefits from SBC Telecom's out-of-region entry strategy. If SBC Telecom's non-existent entry strategy is what the Commission expects local competition to look like, then there are absolutely no public interest benefits to be had from these out-of-region entry conditions. Because those public interest benefits are lacking, the Commission *must* conduct a new public interest analysis to ensure that the merger "remains beneficial to the public" and in the course of doing so, the

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15 Z-Tel notes that other carriers and consumers are likely the best source of information regarding SBC's compliance with conditions beyond those that Z-Tel avails itself of as a carrier that utilizes the UNE Platform, and the Commission should seek public comment on SBC's compliance with all of the various merger conditions for that reason. In addition, state public utility commissions and consumer groups would likely be the best source of information regarding public interest benefits to consumers, if any, that have resulted from the merger.

16 For example, on August 21, 2002, SBC stated that it "offers" residential local service in Washington, DC MSA. However, SBC sells only one residential voice product in Northern Virginia – a $28/month local service (no long-distance), with no vertical features like voice mail or CallerID. Verizon sells a comparable residential package for $9.33/month.

Commission should either implement stronger pro-competitive conditions or act to revoke authority and divest the two companies.

In the meantime, as elaborated below, the Commission, under no circumstance, should permit the expiration of any Merger Condition, pending the Commission's review and investigation of the current public interest benefits of the merger. The Commission's public interest review must seek comment from interested parties, such as consumers, state public utility commissions, and telecommunications carriers on: (1) public interest benefits have resulted from the merger of SBC and Ameritech, and (2) whether the merger remains consistent with the public interest given SBC's well documented failure to comply with the letter and the spirit of the Merger Conditions. If, based on that review, the Commission determines that the merger has not produced the relied upon public interest benefits, then the Commission should either: (1) "require the divestiture of SBC/Ameritech into the current SBC and Ameritech companies" (as promised in 1999), (2) "revo[ke] ... the merged firm's section 214 authority," or, at a minimum, (3) extend and supplement the pro-competitive merger conditions to ensure that the expected public interest benefits are achieved.

II. EVIDENCE OF SBC'S NONCOMPLIANCE WITH THE IN-REGION MARKET-OPENING MERGER CONDITIONS IS LEGION

As stated by the Commission in the *Merger Order*, the SBC/Ameritech merger posed "significant potential public interest harms" by, among other reasons, increasing the combined company's ability to discriminate against competitors.[17] The Merger Conditions were designed to mitigate the public interest harms; however, SBC has failed to comply with the

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[17] *Merger Order* at 14854, ¶348. *See also* 14819, ¶240 ("Discrimination against competitive providers of local exchange services is more likely to occur with respect to provision of such services to mass market customers than to larger business customers.").

Merger Conditions, sustaining forfeitures from the Commission, as well as complaints from state commissions.

The pattern of SBC's non-compliance with the in-region market-opening Merger Conditions is a trail of tears for CLECs that operate in the territory. While CLECs have been denied the pro-competitive benefits of benchmarking terms and conditions between the former SBC and Ameritech regions, the merged SBC/Ameritech has been able to stall and delay competitive entry in a region that accounts for over approximately 40% of the nation's telephone access lines. In particular, SBC/Ameritech has repeatedly violated the commitments it made to the Commission.

These and other violations have resulted in substantial penalty payments and forfeitures. Indeed, since the approval of the merger, SBC has been subject to nearly $1,000,000,000 – yes, one billion dollars – in fines.[18] Between August 2000 and May 2002, SBC has paid approximately $66,000,000 as a result of Merger Condition violations.[19] SBC has also been fined for its willful and deceitful treatment of its data filing obligations with the Commission, and state commissions have issued orders addressing SBC's manifest non-compliance. This Commission bears direct responsibility for creating this Frankenstein's monster of company, and the Commission must act to reign in this unrepentant corporate rulebreaker.

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18 *See* "RBOC Fines and Penalties – SBC, Pacific Bell, Ameritech," Voice For Choices, http://www.voicesforchoices.com/1091/wrapper.jsp?PID=1091-42 (attached hereto as Exhibit A).

19 *See Notice of SBC Voluntary Payments Pursuant to Merger Conditions*, CC Docket No. 98-141 rel. Aug. 1, 2002. Payment figures are for August 2000 through February 2002. Since its payment in April 2002, SBC has made an additional three million ($3,000,000) in payments as a result of violations of the merger conditions in January 2002 through May 2002.

In addition, as several periodic audits have shown, SBC has failed to comply with several other areas of the Conditions. The Commission has to date not publicly enforced CLEC requests to investigate and prosecute those violations. Indeed, the Chairman has stated that a lack of sufficient authority has made it difficult for the Commission to enforce those Conditions.[20] As a result, the public interest benefits that those Conditions were supposed to advance have not been realized. As a result, the Commission faces no choice but to reassess the public interest balance of the SBC/Ameritech merger at this time.

A. SBC's "Willful And Repeated" Failure To Satisfy The Shared Transport Condition 56

SBC has not complied with Condition 56 of the Merger Conditions for the entire three years it has been in effect. As a result, SBC has intentionally stalled competitive entry in its territories via UNE-P during this entire time. That delay has damaged CLECs to the tune of millions of dollars and has resulted in substantial consumer welfare loss in that time.

SBC/Ameritech's agreement to Condition 56 was a critical part of the Market-Opening Conditions in 1999. At that time, Ameritech was the *only* Bell operating company that was simply refusing to provide the shared transport UNE in its territory. This refusal had stalled competitive entry in the Ameritech region. Ameritech's refusal led to several state investigations, orders and arbitration awards, but Ameritech remained recalcitrant. The FCC issued a reconsideration in CC Docket No. 96-98 specifically rejecting Ameritech's position.[21]

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20 In testimony to the Senate Commerce Committee on July 30, 2002, Chairman Powell stated, "In our call for stronger enforcement to punish wrongdoing of incumbent local exchange carriers that violate merger conditions...we are calling for regulatory power to aid in enforcement efforts....[We] want more of that authority to do so effectively." Hearing of the Senate Commerce, Science and Transportation Committee, *Financial Turmoil in the Telecom Marketplace*, July 30, 2002, Panel I, tr. at 33 (Chairman Powell).

21 *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection between Local Exchange Carriers and Commercial Mobile Radio*

Indeed, Ameritech's refusal to comply with the law caused the Commission to reject Ameritech's Section 271 application for the state of Michigan in August 19, 1997.[22] Within a year, SBC and Ameritech sought Commission approval for their mega-merger.[23]

Due in large part to Ameritech's historical refusal to provide UNE shared transport in accordance with the Commission's rules, the Commission decided to require the merged company to end Ameritech's restiff policy. To do so, the Commission required SBC to "import" into the Ameritech region, the most favorable version of UNE shared transport that SBC was required to offer in Texas as of August 27, 1999:

> SBC/Ameritech shall offer shared transport in the SBC/Ameritech Service Area within the Ameritech States under terms and conditions, other than rate structure and price, that are substantially similar to (more favorable than) the *most favorable terms* SBC/Ameritech offers to telecommunications carriers in Texas as of August 27, 1999.[24]

SBC recently discussed the purpose of this condition:

> Prior to the SBC/Ameritech merger, *Ameritech – virtually alone among incumbent LECs* – had *steadfastly refused* to permit CLECs to use shared transport for local exchange services and exchange access. The SBC/Ameritech Merger Conditions provided the Commission with an opportunity to resolve that issue, and *bring Ameritech in line with the industry.*
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> * * *
>
> Accordingly, the Commission recognized that Ameritech was committed to fighting shared transport and that, even if the

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Service Providers, Third Order on Reconsideration and Further Notice of Proposed Rulemaking, 12 FCC Rcd 12460 (1997).

22 *Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in Michigan*, Memorandum Opinion and Order, 12 FCC Rcd 20543 (1997).

23 Merger of SBC Communications Inc. and Ameritech Corporation, Description of the Transaction, Public Interest Showing and Related Demonstrations, CC Docket 98-141 (filed July 24, 1998).

24 *SBC Ameritech Merger Order*, Appendix C, ¶56 (1999) (emphasis added).

> Commission promulgated a shared-transport obligation in the near-term, Ameritech might take *months or even years* to implement it.[25]

Despite SBC's clear obligation to make such UNE shared transport available, SBC has failed to live up to its federal merger condition.

On January 18, 2002, the Commission released a Notice of Apparent Liability ("NAL") for Forfeiture against SBC for violating the Merger Condition 56 by not offering shared transport in each of the five former Ameritech states under terms offered in Texas.[26] The Commission concluded that SBC should be fined $6 million dollars for its violation. The Commission held that, "subsequent to the effective date of the merger conditions, SBC apparently attempted to restrict or prohibit the use of shared transport for routing intraLATA toll calls in the Ameritech states."[27] The NAL found it "**particularly egregious** that SBC refused to make shared transport available on the same terms available in Texas"[28] even after the Texas Commission made it "abundantly clear what SBC's obligations under its interconnection agreement were."[29]

Several lessons can be drawn from Ameritech's refusal to offer shared transport. The first lesson is that the regulatory process can be persistently ignored by an incumbent preferring profit to compliance. Indeed, the shared transport debate continues to this very day, and the FCC has not completed its investigation under the NAL.

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25 Response of SBC Communications, Inc. to Notice of Apparent Liability for Forfeiture, Federal Communications Commission File No. EB-01-IH- 0030, March 5, 2002 ("SBC NAL Response"), 1-2 (emphasis added).

26 *SBC Communications, Inc. Apparent Liability for Forfeiture*, Notice of Apparent Liability for Forfeiture, File No. EB-01-1H-0020, NAL/Acct. No. 200232080004 (Jan. 18, 2002) ("*Shared Transport NAL*").

27 *Id.* at ¶7.

28 *Id.* at ¶22 (emphasis added).

29 *Id.* Z-Tel and CoreComm have filed a § 208 Complaint to recover damages from SBC's violation.

It is clear that SBC always intended Merger Condition 56 to be a "paper promise." In a recent meeting with no less than Chairman Powell, SBC has argued there was no "meeting of the minds" between SBC and Commission staff on the meaning of the shared transport obligation.[30] Such bald assertions, standing alone, directly (1) contradict the Commission's unambiguous finding that "the conditions contain clear and specific language defining SBC/Ameritech's obligations" and (2) undercut the Commission's ability to "ensure that the Applicants have not proposed mere paper promises."[31]

Indeed, SBC's assertions are "particularly egregious" when one recognizes that SBC continues to be reprimanded for shared transport violations by the state public utility commissions and the courts. The Illinois Commerce Commission had this to say about SBC's shared transport compliance in an October 2001 Order:

> **We find Ameritech's argument** [that the ICC should not investigate its lapsed shared transport tariff offering] **wholly disingenuous** and designed to stave off the inevitable conclusion that Ameritech's [shared transport] offering fails to comply with our prior orders. **The real question is not whether it complies with our prior orders, but how many of our prior orders it defies.**
>
> ...
>
> Our Merger Order expressly required Ameritech to import to Illinois the rates agreed to in Texas for interim shared transport. We gave Ameritech the option of filing Illinois-specific rates *provided the rates are reasonably comparable to the importation of Texas rates*. **Instead, Ameritech filed a tariff with rates that are more than 16 times higher than Texas rates.**
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> ...
>
> ... **Ameritech's noncompliance is more egregious than just violating the Merger Order**. The rates filed by Ameritech for [shared transport] were also inconsistent with the shared transport cost study originally filed with us by Ameritech in compliance with our TELRIC Order. This shared transport cost study

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30 Letter from Michael B. Hazzard, Counsel to Z-Tel, to Lisa Griffin and Lia B. Royle, File Nos. EB-01-MD-017 and EB-01-1H-0030, July 12, 2002 (attached hereto as Exhibit B).

31 *Merger Order* at 14921, ¶508.

> demonstrated that the Texas rates we required Ameritech to import were not only accurate, but almost identical to the shared transport rate originally calculated by Ameritech.
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> ...
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> Thus, we conclude that Ameritech's [shared transport] offering failed to comply with our Wholesale Order, our TELRIC Order, our Merger Order, Ameritech's own shared transport cost study, and Ameritech's own prior sworn statements[.][32]

SBC's "compliance" with its *voluntary* commitments runs from coerced at best to nonexistent at worst.

The Illinois Commission's decision echoes decisions throughout the former Ameritech states. As one example, the Michigan Public Service Commission has ordered SBC/Ameritech to provide shared transport under both federal law, state law and the Merger Conditions, and Ameritech has resisted all of those attempts.[33] Ameritech recently sued the Michigan Commission to overturn that decision (despite its clear Merger Condition obligation to comply.) Those efforts failed on August, 12, 2002, when the federal district court for the Eastern District of Michigan upheld that Michigan Public Service Commission's order requiring SBC's Ameritech Michigan operating company to permit CLECs to use the shared transport UNE to provide intraLATA toll service to end users.[34] In that case, the court concluded that the Michigan Commission "correctly interpreted the [FCC's] Merger Approval Order, the [FCC's]

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32 *Illinois Commerce Commission On Its Own Motion: Investigation into the compliance of Illinois Bell Telephone Company with the order in Docket 96-0486/0569 Consolidated regarding the filing of tariffs and the accompanying cost studies for interconnection, unbundled network elements and local transport and termination and regarding end to end bundling issues*, ICC Docket No. 98-0396, 65-67 (Oct 16, 2001).

33 *Application of Ameritech Michigan for Approval of a Shared Transport Cost Study and Resolution of Disputed Issues Related to Shared Transport*, Case No. U-12622, Order (March 19, 2001)

34 *Michigan Bell Telephone Company, d/b/a Ameritech Michigan v. Laura Chappelle et al.*, Case No.: 01-CV-71517, Slip Op. 2 (EDMI Aug. 12, 2002).

UNE Remand Order, and the Texas Birch Decision [requiring] shared transport for intraLATA calls."[35] The Court cited extensively the Commission's NAL on this issue.

SBC's "particularly egregious" defiance of the shared transport merger condition – without more – demands that the Commission toll the expiration of this Market-Opening Merger Condition pending a plenary investigation of whether public interest benefits of the merger have been realized. The fact is that SBC/Ameritech has openly and notoriously failed to comply with this condition during the past three years.[36] To let the condition expire quietly – unenforced by a Commission that claims publicly to be committed to enforcement – would make a mockery of the Commission's public interest analysis and be a slap in the face to state commissions and new entrants in the SBC/Ameritech territory.

B. SBC's General OSS Shortcomings And Failure to Report Accurate Performance Data

Like the shared transport Merger Condition 56, one of the purposes of the OSS Conditions was to bring Ameritech's OSS up to snuff. In 1997, the FCC rejected Ameritech Michigan's 271 application on the basis of inadequate OSS.[37] Ameritech never tried to show 271 compliance again and instead agreed to merge with SBC. While that merger was pending,

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35 *Id.*, 18.

36 Indeed, not only has SBC flouted its shared transport obligation in the Ameritech states, it has affirmatively attempted to export Ameritech's restriction on shared transport to other states, including Arkansas, California, Kansas, Missouri, and Oklahoma. Z-Tel was successful in thwarting SBC's efforts in Arkansas, Kansas, Missouri, and Oklahoma through the federal 271 process, however, outstanding issues remain in California.

37 *Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in Michigan*, Memorandum Opinion and Order, 12 FCC Rcd 20543, ¶128 (1997) ("We conclude that Ameritech has not demonstrated that the access to OSS functions that it provides to competing carriers for the ordering and provisioning of resale services is equivalent to the access it provides to itself.").

SBC received approval for its 271 application in Texas – in which the Commission decided that SBC's OSS, in Texas, was adequate.

Three years later, the Ameritech OSS is still found wanting. For example, on June 17, 2002, KPMG (SBC-Ameritech's OSS auditer) noted in a report to the ICC that "413 specific [OSS] defect report have been provided to the ICC and SBC Ameritech."[38] In that report, KPMG enumerated some of the "most important remaining problems" that include:

- SBC Ameritech does not accurately update Customer Service records;
- SBC Ameritech's systems did not provide timely or accurate responses during pre-order/order volume testing;
- SBC Ameritech has not provided proper Line Loss Notifications;
- SBC Ameritech has made incorrect directory assistance updates;
- SBC Ameritech's end-to-end maintenance and repair process does not ensure trouble reports are handled consistently, accurately and completely;
- Orders have not flowed through SBC Ameritech EDI systems as expected; and
- SBC Ameritech EDI systems have not provided service order completions on confirmed due dates.[39]

In short, SBC Ameritech's OSS is still broken, and three years of the OSS Merger Conditions have not provided the incentive for SBC to fix problems that have long existed in the Ameritech states.

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38 KPMG Consulting, SBC Ameritech OSS Evaluation Interim Report (June 17, 2002), attached hereto as Exhibit C. KPMG is the testing agent throughout the five-state region that comprises the former Ameritech region, and the enumerate OSS failures apply with equal force across all former Ameritech states.

39 *Id.*

Indeed, the Ameritech OSS is so sub-standard that the only BOC region without a pending 271 application for any state is the Ameritech region. Since the Commission approved the SBC/Ameritech merger, in October 1999, SBC has sought 271 authority for six states, all of which are in the original SWBT territory.[40] SBC's failure to seek 271 authority for even a single state in the Ameritech region can only be due to the plain fact that SBC believes that neither state public utility commissions nor the Commission can now conclude it will pass the checklist for any state. To the contrary, SBC's/Ameritech's local competition implementation and checklist compliance has been deplorable as demonstrated by the number of orders issued by this Commission and various state public utility commission addressing SBC's failure to comply with the *Merger Conditions*, among other statutory and regulatory requirements that require SBC to open its network on a nondiscriminatory basis.

The OSS problems and Condition violations are not limited to the Ameritech region. As early as December 2000, just over a year after the SBC/Ameritech merger was approved, SBC was fined (a paltry) $88,000 for failing to accurately report performance data.[41] There, the Commission found that for thirteen months, SBC failed to report performance measurement data for Texas, Oklahoma, Kansas, Missouri, Arkansas, California and Nevada.[42] SBC had failed to report accurate performance data for important measurements such as Firm Order Confirmations, Response Time for OSS Pre-Order Interfaces, Order Process Flow

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40 The Commission approved SBC's Texas 271 application on June 30, 2000. The Commission approved SBC's Kansas and Oklahoma 271 application on January 22, 2002. The Commission approved SBC's Arkansas and Missouri 271 application on November 16, 2001 (citations omitted).

41 *SBC Communications, Inc. Apparent Liability for Forfeiture*, Notice of Apparent Liability for Forfeiture, File No. EB-00-IH-0432, NAL/Acct. No. 200132080011 (Dec. 20, 2000). *See also, SBC Communications, Inc. Apparent Liability for Forfeiture*, Forfeiture Order, (Mar. 15, 2001).

42 *Id.* at ¶9.

Through, and Missed Due Dates, among other things.[43] These categories of performance measurements are essential to CLECs' success in the local market, yet SBC without question at best paid lip service to these obligations.

C. Audit Reports of SBC's Compliance Have Uncovered Multiple Violations of the Conditions that the Commission has Failed to Publicly Enforce

Each of the successive audit reports provided under the Merger Conditions have reinforced the plain fact that SBC simply has not lived up to its promises to the Commission. As a result, neither consumers nor competitors have obtained the benefits that the Commission relied upon finding that the merger was in the public interest. Indeed, periodic audit reports have uncovered repeated violations. The attached table, compiled by CompTel, documents these issues.[44]

The evidence points to significant documentation. In its December 29, 2000 audit, numerous Merger Condition violations were identified related to SBC's advanced services affiliate. For example, SBC failed to treat its advanced services affiliate on an arm's length basis (shared office space, shared executives, etc.). SBC filed collocation applications on its affiliate's behalf. SBC failed to comply with Rule 51.321(h) of the Commission's collocation rules concerning timely reporting of exhausted collocation space. SBC developed an ordering system on behalf of its advanced services affiliate. This audit report resulted in the issuance of a Notice of Apparent Liability for the collocation issues, yet issues related to improperly aiding its advanced service affiliate remain outstanding.[45]

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43 *Id.* at ¶12.

44 FCC Complaints Concerning RBOC Merger Violations Chart Prepared by CompTel (attached hereto as Exhibit D).

45 In the Matter of SBC Communications, Inc. Apparent Liability for Forfeiture, File No. EB-00-IH-0326a (rel. May 24, 2001).

The Commission has taken public action on some, but not all of these violations. In October 2001, the Commission fined SBC $2,520,000, the statutory maximum, for, among other things, failing to notify the Commission within 30 days that information in affidavits included in its 271 applications was inaccurate, as well as making material misrepresentations.[46] One month later, in November 2001, the Commission issued a Notice of Apparent Liability for Forfeiture against SBC for failing to file a sworn statement in response to an Enforcement Bureau investigation.[47] In that investigation, SBC had, in response to a letter of inquiry from the Commission, informed the Commission it was unable to identify ISP customers from its other DSL customers. Nevertheless, in the Computer III Further Remand proceedings, SBC attached data it generated distinguishing between SBC's ISP and other DSL customers.[48] Consequently, the Commission asked for a sworn statement from SBC explaining the discrepancy in SBC's positions, which SBC failed to provide and thus was fined (an obviously inadequate) $100,000.[49]

Myriad other issues remain open, including many related to SBC's Year Two Merger Audit, completed September 4, 2001. For example, on January 24, 2002, CompTel filed materials with the Commission demonstrating SBC's failure to: (1) comply with the provisions of the Carrier-to-Carrier Performance Plan; (2) provide required promotion discounts to non-affiliated carriers, including CompTel member ATG; and (3) comply with the FCC's collocation rules and overcharged ATG for collocation space. All of these issues remain open except for one

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46 *SBC Communications, Inc. Apparent Liability for Forfeiture*, Notice of Apparent Liability for Forfeiture and Order, File No. EB-01-1H-0339, NAL/Acct. No. 200132080059 (Oct. 16, 2001).

47 *SBC Communications, Inc. Apparent Liability for Forfeiture*, Notice of Apparent Liability for Forfeiture, File No. EB-01-iH-0642, NAL/Acct. No. 200232080001 (Nov. 1, 2001). *See also SBC Communications, Inc. Apparent Liability for Forfeiture,* Forfeiture Order (Apr. 15, 2002).

48 *Id.* at ¶¶2-6.

49 *Id.* at ¶1.

(the 100 percent cap on the percentage by which SBC misses a performance benchmark under the Carrier-to-Carrier Performance Plan), which the Common Carrier Bureau declined to enforce earlier this year in a February 6, 2002 letter to SBC.[50]

As noted by the Commission, "inaccurate reporting of performance data may compromise the effectiveness of the merger conditions in promoting open local markets."[51] SBC's noncompliance with these and a number of other reporting requirements contained in the SBC/Ameritech *Merger Order* demonstrates systematic noncompliance of the type that warrants use by the Commission of "every available enforcement mechanism."[52]

* * *

In summary, SBC/Ameritech has failed to live up to the end of the bargain it struck with the Commission in October 1999. In the face of a Commission determination that the merger was not in the public interest because it would harm competition, SBC and Ameritech agreed to many Conditions that were designed to facilitate further entry by CLECs in the SBC/Ameritech region. Those Conditions were particularly geared to improving wholesale offerings (like shared transport) and performance in the Ameritech states. As discussed above, SBC/Ameritech has not provided those pro-competitive public interest benefits. But while SBC/Ameritech has enjoyed the fruits of this anticompetitive merger for the last three years, entrants and consumers have not enjoyed the pro-competitive benefits of the Merger Conditions.

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50 Letter from Carol E. Mattey, Deputy Chief, Common Carrier Bureau to Caryn D. Moir, SBC, ASD File No. 99-49, Feb 6, 2002 (attached hereto as Exhibit E).

51 *Id.* at ¶15.

52 *Merger Order* at 14585, ¶360.

III. SBC'S NATIONAL LOCAL STRATEGY HAS NOT BROUGHT THE BENEFITS OF COMPETITION FROM A MAJOR INCUMBENT LEC "TO BUSINESS AND RESIDENTIAL CUSTOMERS"

On August 21, 2002, SBC filed a "compliance" letter claiming that SBC had fulfilled all of its "Out-of-Region Competitive Entry" requirements.[53] By its filing, SBC also asserts that its "Out-of-Region Competitive Entry" requirements now "sunset."[54] In other words, SBC asserts that its three page letter filing puts a definitive end to its out-of-region entry obligations. So far as Z-Tel is concerned, SBC has made nothing more than a paper effort to "offer" competitive services, with no attendant public interest benefits. The Commission now needs to examine whether consumers are enjoying the public interest benefits of SBC's "entry" that the Commission expected in 1999. If not, the entire public interest balance of the merger needs to be reexamined.

In stark contrast to the reality that has emerged, SBC and Ameritech claimed that its "National Local Strategy" was "the essentially simultaneous, facilities-based entry of the combined company into each of the Top 30 major U.S. markets outside of the area in which the combined company would be the incumbent carrier."[55] Describing the National/Local Strategy's public interest benefit, the FCC stated that its condition:

> will **ensure** that residential consumers and business customers outside of SBC/Ameritech's territory benefit from facilities-based competitive service by a major incumbent LEC. This condition effectively requires SBC and Ameritech to **redeem their promise** that their merger will form the basis for a new, powerful, truly nationwide multi-purpose competitive telecommunications carrier. We also anticipate that this condition will stimulate competitive

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53 Letter from Caryn D. Moir, SBC to Marlene H. Dortch, FCC, CC Docket 98-141 (Aug. 21, 2002).

54 *Id.*

55 *Merger Order* at 14826, ¶259; *see also* SBC/Ameritech Application at 5 (July 24, 1998).

> entry into the SBC/Ameritech region by the affected incumbent LECs.[56]

In spite of this clear expectation, the National/Local Strategy has done nothing to redeem SBC/Ameritech's promise that their merger would spark competition both in the combined region and outside of the combined region. In fact, SBC has only engaged in the National/Local Strategy to "fulfill [its] merger commitment" and its service offerings include only voice services. SBC states that it will only enter the large business "enterprise" market when it has Section 271 authority.[57] SBC provides no explanation as to how its failure to obtain Section 271 authority in California, Nevada and the Ameritech region hinders its ability to provide mass market local services to consumers in Washington, DC, where it has ostensibly deployed a circuit switch.

SBC's "implementation" of its National/Local Strategy at best has been on a lip service basis. SBC's National/Local "rollout" in Atlanta, Georgia best demonstrates SBC's commitment to out-of-region competition. On February 14, 2001, SBC launched local telecommunications service in Atlanta. In the press release announcing the new services available, SBC stated:

> Business and consumers throughout Atlanta can now choose **a telecommunications provider that isn't all talk**. As part of an aggressive national expansion plan, SBC Communications, one of the world's leading telecommunications companies and recently named America's most admired telecommunications company by Fortune, is now offering local service in Atlanta through SBC Telecom.[58]

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56 *Merger Order* at 14877, ¶398 (emphasis added); *see also* SBC/Ameritech Application at 17.

57 The Real Story on Bell Out-of-Region Competition, Xchange, September 2002 (attached hereto as Exhibit F).

58 SBC Launches Telecommunications Service in Atlanta, February 14, 2001 (attached hereto as Exhibit G).

In reality, SBC's commitment to the Atlanta market was "all talk." SBC did not issue a press release only 15 days later when, according to the Atlanta Journal Constitution, it "quietly fired its 40-person staff and gave up the fight."[59] SBC became smarter with its successive National/Local rollouts. Gone were the press releases and the large pronouncements. Indeed, SBC no longer makes anything at all of its National/Local rollout, as it apparently rolled out in 27 markets this year with nary a whimper of publicity or advertising.

At bottom, rather than "redeem its promise," SBC has offered nothing but lip service commitment to its much fan-fared National/Local Strategy. Indeed, far from bringing "residential consumers and business customers outside of SBC/Ameritech's territory benefit from facilities-based competitive service by a major incumbent LEC," SBC has merely made paper filings to satisfy what at best has become a "paper promise" of the type the Commission claimed it was avoiding in approving the merger.[60]

In fact, SBC's switch-based, out-of-region performance perhaps demonstrates, at best, that access to unbundled local switching is absolutely essential to deploying competitive mass-market service. SBC ostensibly has switched in 30 MSAs, but its mass-market offering is noncompetitive.[61] Either SBC has decided that it cannot succeed in offering switched-based mass-market services alone, or perhaps it has tactically colluded with other BOCs to not compete out-of-region for these customers. Only SBC (and perhaps its BOC brethren) knows the answer to this question. To advance the public interest, the Commission should find out the answer.

SBC promised the Commission that it would provide residential and business consumers with "the benefit [of] facilities-based competitive service by a major incumbent

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59 SBC Retreats from Atlanta, The Atlanta Journal-Constitution (Mar.3, 2001) (attached hereto as Exhibit H).

60 *Merger Order* at 14921, ¶508.

61 *See supra* note 15.

LEC."[62] This simply has not occurred, and although paper compliance may satisfy a paper promise, consumers have obtained no benefit. Thus, contrary to the Commission's expectation, "the public" has not been "able to obtain the full benefits of these conditions." The Commission simply must act to investigate – with public notice and comment – the public interest benefits, if any, that have resulted from SBC's "National Local" deployment. With little or no public benefit having occurred, the Commission must take action to ensure that the merger remains in the public interest.

IV. CONCLUSION

In paragraph 360 of the Merger Order, the Commission stated that it would continue to ensure that the SBC/Ameritech merger advances the public interest. It is time to put that policy to the test. The Commission cannot allow any Merger Conditions to expire on October 8, 2002, in light of SBC's noncompliance. As the Commission stated in the *Merger Order*, "[w]e expect that SBC/Ameritech will implement each of these conditions in full, in good faith, and in a reasonable manner to ensure that all telecommunications carriers and the public are able to obtain the full benefits of these conditions."[63] For a host of reasons, local competition has not benefited from the SBC/Ameritech merger. SBC/Ameritech's recalcitrance has violated the letter and spirit of the in-region pro-entry Conditions and no public interest benefits have materialized from SBC's out-of-region entry.

For the reasons stated above, the Commission should grant Z-Tel's petition and toll the expiration of all SBC/Ameritech Merger Conditions pending Commission review of whether and to what extent: (1) public interest benefits have resulted from the merger of SBC

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62 *Merger Order* at 14877, ¶398 (emphasis added); *see also* SBC/Ameritech Application at 17.

63 *Merger Order* at 14858, ¶360.

and Ameritech and (2) the merger remains consistent with the public interest given SBC's well documented failure to comply with the letter and the spirit of the Merger Conditions.

Respectfully submitted,

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DATED: September 3, 2002

EXHIBIT A

hot topics

RBOC FINES AND PENALTIES - SBC, Pacific Bell, Ameritech

Assessed	Carrier	How Much	Where	Why	Source	Date
Sep-96	Ameritech	$73,000	OH	12 months of fines for failing to restore service after weather-related problems	The Plain Dealer Cleveland, OH	9/20/1996
Feb-97	Ameritech	$840,000	OH	"Inadvertent failure to accurately report" its service results under the state's minimum phone standards from 6/95-6/96: $300,000 fine + forgo up to $540,000 in earnings as a penalty	The Plain Dealer Cleveland, OH; Columbus Dispatch	2/12/1997
1998	Ameritech	$615,000	WI	Lack of good service to approx. 43,000 customers in 1995	Wisconsin State Journal	4/17/1998
Aug-98	Pacific Bell	$1,500,000	CA	Allegedly misused confidential billing information (fine is response to 1996 lawsuit filed by MCI, AT&T and Sprint)	San Diego Business Journal	9/14/1998
Sep-98	Pacific Bell	$309,000	CA	Provided substandard ISDN service to customers and submitted false reports of customer satisfaction to state regulators.	San Jose Mercury News	9/18/1998
1999	Pacific Bell	$44,000,000	CA	Company had engaged in overly aggressive and deceptive marketing practices ($24M to customer education fund $20M in fines)	Los Angeles Times	12/23/1999
Sep-99	SBC	$845,000	TX	Anti-competitive treatment of Covad & Rhythms (withholding documents during arbitration)	San Antonio Express-News; Network World	9/11/1999
Jan-00	SBC	$472,600	TX	CLEC problems in TX	Associated Press	4/19/2000
Feb-00	SBC	$407,000	TX	CLEC problems in TX	Associated Press	4/19/2000
May-00	SBC	$27,000,000	CA	Failure to deliver equipment & space to Covad in a timely manner.	San Francisco Business Times	2/2/2001
Jul-00	SBC	$708,950	IL	Failure to meet wholesale service standards	ePrairie.com	8/21/2001
Jul-00	SBC	$8,750,000	OH	Fines / credits levied for poor service & violation of PUCO orders	Dayton Daily News	9/22/2001
Jul-00	SBC	$155,500	OH	Failure to meet wholesale service standards	Public Utilities Commission of Ohio	
Jul-00	SBC	$800,000	OH	Company violated state telephone standards 122,531 times between 8/98 and 7/99.	Akron Beacon Journal	1/18/2001

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Aug-00	SBC	$932,400	IL	Failure to meet wholesale service standards	ePrairie.com	8/21/2001
Aug-00	SBC	$295,000	OH	Failure to meet wholesale service standards	Public Utilities Commission of Ohio	
Sep-00	SBC	$1,410,370	IL	Failure to meet wholesale service standards	ePrairie.com	8/21/2001
Sep-00	SBC	$813,525	OH	Failure to meet wholesale service standards	Public Utilities Commission of Ohio	
Oct-00	SBC	$13,750,000	WI	Refund (credits) for poor service quality	Capital Times (Madison, WI)	2/15/2001
Oct-00	SBC	$1,757,890	IL	Failure to meet wholesale service standards	ePrairie.com	8/21/2001
Oct-00	SBC	$743,126	OH	Failure to meet wholesale service standards	Public Utilities Commission of Ohio	
Oct-00	SBC	$1,750,000	WI	Rate reduction penalty for failure to meet service quality standards	Capital Times (Madison, WI); WI PSC Docket 6720-TI-ITF	2/15/2001
Nov-00	SBC	$1,416,223	IL	Failure to meet wholesale service standards	ePrairie.com	8/21/2001
Nov-00	SBC	$722,800	OH	Failure to meet wholesale service standards	Public Utilities Commission of Ohio	
Dec-00	SBC	$19,000,000	MI	Settlement reached in Dec. for service quality problems ($13 M) plus voluntary credits ($5.4 M)	Crain's Detroit Business	4/9/2001
Dec-00	SBC	$1,498,707	IL	Failure to meet wholesale service standards	ePrairie.com	8/21/2001
Dec-00	SBC	$760,975	OH	Failure to meet wholesale service standards	Public Utilities Commission of Ohio	
Dec-00	SBC	$6,151,100	US	Failing to meet SBC/Ameritech merger conditions.	Communications Daily; FCC Docket 98-141	4/9/2001
Jan-01	SBC	$30,000,000	IL	Failure to restore phone service w/i 24 hrs to at least 95% of customers. Standard part of SBC/Ameritech merger agreement.	South Bend Tribune	1/24/2001
Jan-01	SBC	$2,891,525	IL	Failure to meet wholesale service standards	ePrairie.com	8/21/2001
Jan-01	SBC	$1,224,657	OH	Failure to meet wholesale service standards	Public Utilities Commission of Ohio	
Jan-01	SBC	$6,400,000	US	Failure to meet merger commitments.	Communications Daily	4/9/2001
Jan-01	SBC	$675,000	IN	Pending damages to a computer consultant for faulty phone service. Ameritech has already been found guilty in the case.	The Indianapolis Star	1/23/2001
Feb-01	SBC	$6,085,950	US	Failure to meet merger commitments	Communications Daily	4/9/2001
Feb-01	SBC	$500	WI	Failure to meet wholesale service standards	Wisconsin Public Service Commission	
Feb-01	SBC	$3,151,154	IL	Failure to meet wholesale service standards	ePrairie.com	8/21/2001
Feb-01	SBC	$33,512	MI	Failure to meet wholesale service standards	Michigan Public Service Commission	
Feb-01	SBC	$828,387	OH	Failure to meet wholesale service standards	Public Utilities Commission of Ohio	
Mar-01	SBC	$3,077,406	IL	Failure to meet wholesale service standards	ePrairie.com	8/21/2001

Mar-01	SBC	$1,079,363	OH	Failure to meet wholesale service standards	Public Utilities Commission of Ohio	
Mar-01	SBC	$4,585,580	US	Failure to meet merger commitments.	Communications Daily, FCC Docket 98-141	4/9/2001
Mar-01	SBC	$88,000	US	Failure to report performance data (detailed monthy reports reflecting its performance responding to requests for facilities and services from rivals and end-user customers)	FCC Press Release	5/29/2001
Mar-01	SBC	$77,500	MI	Failure to meet wholesale service standards	Michigan Public Service Commission	
Apr-01	SBC	$3,600,630	IL	Failure to meet wholesale service standards	ePrairie.com	8/21/2001
Apr-01	SBC	$1,171,875	OH	Failure to meet wholesale service standards	Public Utilities Commission of Ohio	
Apr-01	SBC	$79,000	MI	Failure to meet wholesale service standards	Michigan Public Service Commission	
Apr-01	SBC	$17,500	WI	Failure to meet wholesale service standards	Wisconsin Public Service Commission	
May-01	SBC	$3,764,719	IL	Failure to meet wholesale service standards	ePrairie.com	8/21/2001
May-01	SBC	$1,141,739	OH	Failure to meet wholesale service standards	Public Utilities Commission of Ohio	
May-01	SBC	$1,006	WI	Failure to meet wholesale service standards	Wisconsin Public Service Commission	
May-01	SBC	$90,087	MI	Failure to meet wholesale service standards	Michigan Public Service Commission	
May-01	SBC	$3,872,175	US	Failure to meet merger commitments	Reuters; FCC Docket 98-141	5/31/2001
May-01	SBC	$94,500	US	Failure to identify COs w/o collocation space.	FCC Press Release	5/24/2001
May-01	SBC	$120,000,000	IL	Refunds to business customer due to improperly classifying services as competitive NOTE: ICC case with no final order yet. Legislature "settled" case for $120 million	Illinois Commerce Commission	
Jun-01	SBC	$2,200,000	IL	Failure to meet wholesale service standards	ePrairie.com	8/21/2001
Jun-01	SBC	$5,250	IN	Failure to meet wholesale service standards	Indiana Utility Regulatory Commission	
Jun-01	SBC	$60,000	MI	Failure to meet wholesale service standards	Michigan Public Service Commission	
Jun-01	SBC	$921,000	OH	Failure to meet wholesale service standards	Public Utilities Commission of Ohio	
Jul-01	SBC	$1,488,556	IL	Failure to meet wholesale service standards	Illinois Commerce Commission	
Jul-01	SBC	$4,750	IN	Failure to meet wholesale service standards	Indiana Utility Regulatory Commission	
Jul-01	SBC	$37,000	MI	Failure to meet wholesale service standards	Michigan Public Service Commission	
Jul-01	SBC	$114,893	OH	Failure to meet wholesale service standards	Public Utilities Commission of Ohio	
Jul-01	SBC	$3,223,235	US	Failure to meet merger commitments	Reuters; FCC Docket 98-141	7/27/2001
Aug-01	SBC	$549,550	IL	Failure to meet wholesale	Illinois Commerce	

				service standards	Commission	
Aug-01	SBC	$3,800,000	US	Failure to meet wholesale service standards	Reuters	8/24/2001
Sep-01	SBC	$2,540,487	US	Failure to meet wholesale service standards	Reuters; FCC Docket 98-141	9/26/2001
Sep-01	SBC	$25,600,000	CA	Deceptive and overly aggressive marketing of phone services	San Jose Mercury News	9/21/2001
Sep-01	SBC	$501,491	IL	Failure to meet wholesale standards	ePrairie.com	12/20/2001
Oct-01	SBC	$2,976,873	US	Failure to meet wholesale service standards	Fort Worth Star-Telegram; FCC Docket 98-141	10/27/2001
Oct-01	SBC	$443,000	MI	Failure to meet wholesale service standards	TRs State NewsWire	12/26/2001
Oct-01	SBC	$3,200	IN	Failure to meet wholesale service standards	TRs State NewsWire	12/26/2001
Oct-01	SBC	$5,000,000	OH	Bill credits for poor service / high pressure marketing tactics	Dayton Daily News	10/12/2001
Oct-01	SBC	$2,500,000	WI	Wholesale/retail penalties; stayed by court pending determination of how penalty funds will be used - amount being held in escrow	CommDaily	12/28/2001
Oct-01	SBC	$75,000	OH	Failure to meet wholesale service standards	TRs State NewsWire	12/26/2001
Oct-01	SBC	$480,613	IL	Failure to meet wholesale service standards	Chicago Tribune	12/21/2001
Oct-01	SBC	$2,520,000	US	Submission of inaccurate Sec. 271 information in its Kansas and Oklahoma application (pending)	Reuters	10/16/2001
Nov-01	SBC	$3,510,421	US	Failure to meet requirements regarding the treatment of rivals using the company's network.	Bloomberg	11/28/2001
Nov-01	SBC	$100,000	US	Failure to provide sworn written response to the FCC Enforcement Bureau in its investigation of possible anti-competitive behavior (pending)	CommDaily	11/5/2001
Nov-01	SBC	$501,491	IL	Failure to meet wholesale service requirements for the July-September period.	ePrairie.com	12/20/2001
Nov-01	SBC	$374,556	IL	Failure to meet wholesale service standards	SBC.com	
Nov-01	SBC	$468	IN	Failure to meet wholesale service standards	SBC.com	
Nov-01	SBC	$339,279	MI	Failure to meet wholesale service standards	SBC.com	
Nov-01	SBC	$208,401	OH	Failure to meet wholesale service standards	SBC.com	
Nov-01	SBC	$15,552	WI	Failure to meet wholesale service standards	SBC.com	
Dec-01	SBC	$480,613	IL	Failure to meet wholesale performance requirements	ePrairie.com	12/20/2001
Dec-01	SBC	$1,946,024	US	Failure to meet wholesale performance measures	Reuters	12/26/2001
Dec-01	SBC	$25,335	WI	Failure to meet wholesale	SBC.com	

				performance requirements		
Dec-01	SBC	$236,023	OH	Failure to meet wholesale performance requirements	SBC.com	
Dec-01	SBC	$527,018	MI	Failure to meet wholesale performance requirements	SBC.com	
Dec-01	SBC	$31,560	IN	Failure to meet wholesale performance requirements	SBC.com	
Dec-01	SBC	$286,660	IL	Failure to meet wholesale performance requirements	ePrairie.com	12/20/2001
Jan-02	SBC	$6,000,000	US	Failure to provide access to shared transport facilities in Ameritech territory (pending FCC decision)	FCC Press Release	1/18/2002
Jan-02	SBC	$15,300	WI	Failure to meet wholesale service standards	TRInsight	3/26/2002
Jan-02	SBC	$15,700	IN	Failure to meet wholesale service standards	TRInsight	3/26/2002
Jan-02	SBC	$51,000	OH	Failure to meet wholesale service standards	TRInsight	3/26/2002
Jan-02	SBC	$323,800	MI	Failure to meet wholesale service standards	TRInsight	3/26/2002
Jan-02	SBC	$470,700	IL	Failure to meet wholesale service standards	TRInsight	3/26/2002
Jan-02	SBC	$224,000,000	IL	Credits of $50/residential phone line for "net merger savings" from SBC/Ameritech merger	Chicago Tribune	1/18/2002
Jan-02	SBC	$3,750,000	MI	Court of appeals upheld 1999 fine against SBC for failing to fulfill WorldCom's orders for unbundled local transport	TR Daily, State of Michigan Court of Appeals Decision No. 226242 and No. 229912	1/24/2002
Jan-02	SBC	$2,900,000	US	Failure to meet wholesale performance measures	Communications Daily	1/31/2002
Feb-02	SBC	$292,000	IL	"Remedy payments" to state and CLECs for failing to meet merger committmenets (shared transport)	TRInsight	2/20/2002
Feb-02	SBC	$350,000,000	CA	State PUC released results of an audit for the time period of 1997-1999 finding that Pac Bell should refund customers $350M (pending)	Associated Press	2/21/2002
Feb-02	SBC	$84,000	US	Failure to identify COs w/o collocation space. (Reduced from original fine of $94,500 imposed 5/01)	FCC Press Release	2/25/2002
Feb-02	SBC	$30,000	MI	Customer Service Violations	Detroit Free Press	2/26/2002
Feb-02	SBC	$3,400,000	US	Failure to meet wholesale service standards	St. Louis Post-Dispatch	2/27/2002
Feb-02	SBC	$15,127	WI	Failure to meet wholesale service standards	SBC.com	4/23/2002
Feb-02	SBC	$32,606	OH	Failure to meet wholesale service standards	SBC.com	4/23/2002
Feb-02	SBC	$174,055	MI	Failure to meet wholesale service standards	SBC.com	4/23/2002
Feb-02	SBC	$30,120	IN	Failure to meet wholesale service standards	SBC.com	4/23/2002
Feb-02	SBC	$264,356	IL	Failure to meet wholesale service standards	ePrarie.com	4/22/2002

Mar-02	SBC	$1,700,000	US	Failure to meet wholesale service standards	Chicago Sun-Times	4/4/2002
Apr-02	SBC	$100,000	US	Violated an Enforcement Bureau order directing the company to provide sworn verification of the truth and accurarcy of its answers to a Bureau letter of inquiry.	FCC Press Release	4/15/2002
Apr-02	SBC	$109,033	IL	Failure to meet wholesale service standards	ePrairie.com	6/24/2002
Apr-02	SBC	$1,950,000	US	Failure to meet wholesale service standards that were part of SBC/Ameritech merger requirements	ePrairie.com	5/6/2002
May-02	SBC	$1,010,000	US	Failure to meet wholesale services standards as part of SBC/Ameritech merger requirements	Bloomberg	5/28/2002
May-02	SBC	$3,600,000	US	Filed inaccurate information in 271 applications for four states	Wall Street Journal	5/29/2002
June-02	SBC	$1,160,000	US	Failure to meet wholesale service standards	Bloomberg	6/25/2002
June-02	SBC	$8,500,000	OH	SBC did not provide acceptable levels of customer service.	PUCO	6/25/2002
June-02	SBC	$965,355	IL	Failure to meet wholesale service standards	Comm Daily	8/26/2002
June-02	SBC	$75,036	IN	Failure to meet wholesale service standards	Comm Daily	8/26/2002
June-02	SBC	$699,239	MI	Failure to meet wholesale service standards	Comm Daily	8/26/2002
June-02	SBC	$3,700,000	MI	Failure to meet wholesale service standards	Comm Daily	8/26/2002
June-02	SBC	$113,640	OH	Failure to meet wholesale service standards	Comm Daily	8/26/2002
June-02	SBC	$11,300,000	OH	Failure to meet wholesale service standards	Comm Daily	8/26/2002
June-02	SBC	$4,200,000	WI	Failure to meet wholesale service standards	Comm Daily	8/26/2002
July-02	SBC	$27,000,000	CA	Pending fine for billing thousands of customers for high-speed internet service they never requested	Wall Street Journal	7/08/2002
July-02	SBC	$2,931,325	WI	Failure to meet wholesale service standards for 5/02 (stayed usder PSC plan)	ePrairie.com	7/23/2002
July-02	SBC	$234,357	OH	Failure to meet wholesale service standards for 5/02	ePrairie.com	7/23/2002
July-02	SBC	$492,066	MI	Failure to meet wholesale service standards for 5/02	ePrairie.com	7/23/2002
July-02	SBC	$5,500	IN	Failure to meet wholesale service standards for 5/02	ePrairie.com	7/23/2002
July-02	SBC	$316,097	IL	Failure to meet wholesale service standards for 5/02	ePrairie.com	7/23/2002
	Total	**$1,057,148,642**				

EXHIBIT B

KELLEY DRYE & WARREN LLP
A LIMITED LIABILITY PARTNERSHIP

NEW YORK, NY
WASHINGTON, DC
LOS ANGELES, CA
CHICAGO, IL
STAMFORD, CT
PARSIPPANY, NJ

BRUSSELS, BELGIUM
HONG KONG

AFFILIATE OFFICES
BANGKOK, THAILAND
JAKARTA, INDONESIA
MUMBAI, INDIA
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COPY

July 12, 2002

VIA E-MAIL AND US MAIL

Lisa Griffin
Lia B. Royle
Market Disputes Resolution Division
Enforcement Bureau
Federal Communications Commission
Washington, DC 20554

Re: File Nos. EB-01-MD-017 and EB-01-IH-0030

Dear Ms. Griffin and Ms. Royle:

CoreComm Communications, Inc. and Z-Tel Communications, Inc. ("Complainants"), by counsel and in accordance with Ms. Griffin's oral ruling of July 1, 2002, hereby file their response to SBC Communications, Inc.'s ("SBC's") June 20, 2002 letter ("*June 20 Letter*") and June 26, 2002 letter ("*June 26 Letter*") in the above reference proceedings.

I. INTRODUCTION AND SUMMARY

In a meeting between SBC and Chairman Powell on July 9, 2002, SBC argued that it should not be required to comply with a condition of the approval of its license transfers in the Ameritech/SBC merger because SBC had no "meeting of the minds" with Commission Staff. In the first instance, SBC's argument is irrelevant. A Commission order approving the transfer of control of licenses is not a contract; it is a binding order of the Commission. In this case in particular, SBC can hardly complain that it had lack of notice of how to conform its conduct to the rule, as it drafted and proposed to the Commission the provision that it now claims is ambiguous. In the event that the Commission were to recognize a lack of contract formation defense, however, SBC's assertion is even more curious, as possible remedies for failing to form a contract include declaring the contract -- in this case the FCC's order approving the transfer of control of licenses from Ameritech to SBC -- to be void and subject to rescission. Followed to

this SBC assertion to its logical conclusion, as was discussed in the meeting with Chairman Powell, the SBC/Ameritech merger would have to be unwound.

SBC, Ameritech, and the Commission clearly contemplated divestiture as a remedy for failure to comply with the voluntary merger conditions that SBC and Ameritech committed to in order to obtain Commission approval of the merger.[1] Even with that possible remedy available to the Commission, SBC's compliance with the merger conditions has been, to say the least, dismal. Indeed, in addition to the instant NAL (which includes the highest proposed forfeiture ever), ongoing merger-related investigations, and various non-merger forfeitures,[2] the Enforcement Bureau has been busy at work dealing with SBC's failure to comply with its merger commitments to this Commission:

- File No. EB-00-1H-0326a (Feb. 25, 2002) (failure to comply with section 51.312(h) of the FCC's rules, which requires timely notice of premises where collocation space has been exhausted, as identified by the collocation audit required by the SBC-Ameritech Merger Conditions) and

- File No. EB-00-IH-0432 (May 29, 2001) (failure to accurately report wholesale performance data under the Carrier-to-Carrier Performance Plan required by the SBC/Ameritech Merger Conditions. (reporting period 10/8/99 through 12/31/99 for TX, OK, KS, MO, AK, CA, and NV).

SBC's dismal record of compliance with the merger conditions compounded by its recent statements that SBC and the Commission had "no meeting of the minds" demonstrates a systemic failure by SBC to satisfy commitments made to the Commission of the type that may indeed warrant divestiture, as contemplated in the SBC/Ameritech Merger Order.

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1 *Applications of Ameritech Corp., Transferor, and SBC Communications, Inc., Transferree, 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*, 14 FCC Rcd 14712, 14858 (1999) ("SBC/Ameritech Merger Order") (stating that "should the merged entity systematically fail to meet its obligations, we can and will revoke relevant licenses, or require the divestiture of SBC/Ameritech into the current SBC and Ameritech companies).

2 *See, e.g., In the Matter of SBC Communications, Inc.*, File Nos. EB-01-IH-0339, EB-01-IH-0453, NAL/Acct. No.200132080059, FRN Nos. 0004-3051-24, 0004-3335-71, 0005-1937-01, Order (rel. May 28, 2002) (requiring SBC to make a $3.6 million payment to the United States Treasury for providing inaccurate information to the FCC in affidavits supporting two separate section 271 applications to provide long distance service in Missouri, Oklahoma, and Kansas).

Indeed, SBC's argument that there was no "meeting of the minds" regarding the shared transport merger condition is essentially an admission that its current policy conflicts with the Commission's intent in drafting the condition. As the SBC/Ameritech Merger Order makes clear, if SBC/Ameritech *did not* agree to those conditions, including shared transport, the Commission would have rejected the merger as inconsistent with the public interest. The fact that less than three years later SBC now admits that it has failed to implement the Commission's shared transport condition warrants immediate and firm invocation of the full powers of the Commission's enforcement authority.

This backdrop of systemic, on-going noncompliance colors – but should not complicate – resolution of Z-Tel's and CoreComm's complaint under section 208. SBC's violations of the Merger Condition and a myriad of FCC rules is readily apparent. Grasping at any potential straw, SBC has now trotted out two strained arguments to avoid liability. In its *June 20 Letter*, SBC wrongly asserts that the D.C. Circuit's decision in *United States Telephone Ass'n v. FCC*, 290 F.3d 415 (D.C. Cir. 2002) ("*USTA*") somehow absolves SBC of its existing unbundling obligations. In its *June 26 Letter*, SBC wrongly asserts that *Trinko v. Bell Atlantic Corp.*, 01-7746, 2002 U.S. App. LEXIS 12233 (2d Cir. June 30, 2002) stands for the proposition that a carrier waives all of its rights under the Act and the Commission's implementing rules the moment it executes an interconnection agreement. As demonstrated below, neither SBC assertion is correct. Rather, SBC is merely attempting to bootstrap *USTA* and *Trinko* as a means of recycling the unsupported and unsupportable arguments that SBC has proffered throughout this proceeding.

II. The *USTA* Decision Has No Impact On Either The Complaint Proceeding Or The NAL

Contrary to SBC's basic claim, *June 20 Letter* at 1, the *USTA* remand has absolutely nothing to do with SBC's existing obligations under the Act and the Commission's implementing rules. As SBC admits, *id.*, the *USTA* remand is just that – a remand. It is black letter administrative law that remanded agency rules remain in effect on remand, and modifications made to rules on remand apply prospectively.[3] In addition, under the Federal Rules of Appellate Procedure, the FCC's filing of a Motion for Rehearing *en banc* automatically stays the issuance of the *USTA* mandate. Thus, the existing Commission rules and orders are in effect and remain in effect for purposes of this proceeding.

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[3] *See, e.g.*, *National Lime Ass'n v. EPA*, 233 F.3d 625, 635 (D.C. Cir. 2000) (regulations that are remanded but not vacated are "le[ft]... in place during remand"); *Sierra Club v. EPA*, 167 F.3d 658, 664 (D.C. Cir. 1999) (same).

Effectively, SBC's *June 20 Letter* is nothing but SBC's most recent attempt to have the Enforcement Bureau promulgate a presently nonexistent use restriction on the shared transport UNE. That request is beyond the authority of the Enforcement Bureau, and any such *sua sponte* rule change would violate the Administrative Procedure Act. In its initial brief, the Complainants demonstrated unquestionably that the Act, the Commission's rules, and the Commission's orders require SBC to permit competitors to use the shared transport UNE to provide intraLATA toll service.[4] Indeed, Complaints demonstrated that:

- the plain language of section 251(c)(3) of the Act mandates UNE access for all telecommunications services, including intraLATA toll services[5];
- Section 51.309(a) of the Commission's rules, 47 C.F.R. § 51.309(a), prohibits ILECs from placing use restrictions on UNEs[6];
- Section 51.309(b) of the Commission's rules, 47 C.F.R. § 51.309(b), expressly allows competitors to use UNEs to provide interexchange services, such as intraLATA toll services[7];
- Section 51.313(b) of the Commission's rules, 47 C.F.R. § 51.313(b) requires ILECs to allow competitors access to UNEs on terms and conditions no less than those the ILEC provides to itself, which includes intraLATA toll over shared transport[8]; and
- At least five Commission orders demonstrate that ILECs may not preclude competitors from using the shared transport UNE to provide intraLATA toll service.[9]

SBC makes no effort in its brief or in its *June 20 Letter* to address in any substantive way this mountain of precedent. Indeed, SBC's brief includes absolutely no discussion of the Commission rules.

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4 *See generally*, Initial Brief of Complainants (Jan. 29, 2002).

5 *Id.*, 2.

6 *Id.*, 5.

7 *Id.*

8 *Id.*, 6.

9 *Id.*, 6-14.

At bottom, SBC's *June 20 Letter* is merely SBC's latest attempt to say what it believes the Commission's rules should be. But that is the task of rulemaking proceedings, not complaint proceedings. As the Commission has recognized, "policy arguments that, whatever their merits, are inconsistent with the actual language of the rule in effect at that time" are simply irrelevant in complaint proceedings.[10] SBC's *June 20 Letter* is similarly irrelevant. For the Commission to do as SBC requests, not only would it let an admitted rule-breaker off the hook, the Commission would have to re-write its current shared transport rule, in clear violation of the Administrative Procedure Act in order to do so.

II. The *Trinko* Decision Has No Impact On Either The Complaint Proceeding Or The NAL

SBC asserts that the *Trinko* decision supports its position that competitors waive all of their rights under the Act and the Commission's rules the moment they execute an interconnection agreement.[11] *Trinko* contains no such holding. Rather, *Trinko* – at best – found that "[t]he particular interconnection agreement entered into by the defendant and AT&T requires the parties to resolve any disputes through procedures set forth in the agreement."[12] That decision was based upon a specific interpretation by the Second Circuit of a specific interconnection agreement – the AT&T and Bell Atlantic interconnection agreement in New York. In making its argument – in its June 26 letter and throughout its papers in the complaint proceeding – SBC has never once cited or referenced any provision of any interconnection agreements with the Complainants that supports SBC's contention that Complainants have waived their rights under the Act and the Commission's rules.

Although SBC claims that Complainants have waived – apparently implicitly – all remedial rights under the statute and the Commission's rules upon signing an interconnection agreement with SBC,[13] SBC has offered no evidence of any such waiver by the Complainants. Even after filing excerpt after excerpt from various interconnection agreements allegedly supporting its view, SBC never once has cited to any provision in any Z-Tel or CoreComm agreement that even remotely suggests that either party waived remedial statutory rights and/or rights under Commission rules and orders by entering into such agreements.

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[10] *Net2000 Communications, Inc. v. Verizon-Washington, D.C. et al.*, Memorandum Opinion and Order, File No. EB-00-018, ¶ 30 (rel. Jan. 9, 2002).

[11] *June 26 Letter*, 1.

[12] Trinko, *27.

[13] SBC Reply Brief, 2-4.

The reason for this gaping hole in SBC's argument is simple: the clear text of the Z-Tel and CoreComm agreements make clear that in executing these agreements, Z-Tel and CoreComm did not waive their respective rights to seek relief under the statute or under the FCC's rules and orders. Indeed, these agreements contain express and explicit clauses that expressly preserve each parties remedial rights.[14] Complainants note, however, that it is not their burden to demonstrate that they have not waived their statutory rights. That task is left to SBC as part of its affirmative defense. As noted, SBC has never once pointed to any provision of any interconnection agreement that even remotely suggests that Complainants waived any right under the Act, the Commision's rules, or otherwise. The explanation for this failure is simple: Complainants have done nothing to waive their rights under the Act, the Commission's rules, or otherwise.

The FCC is clearly an appropriate forum to enforce its own rules. Undisturbed Commission precedent demonstrates that the Commission can, and has, adjudicated formal complaints on matters arising from Section 251 of the Act and associated implementing rules. In the *Local Competition Order*, the Commission announced that it would adjudicate claims arising under Section 251 of the Act and associated rules through its Section 208 enforcement authority:

> An aggrieved party [*e.g.*, Complainants] could file a Section 208 complaint with the Commission alleging that the incumbent LEC or requesting carrier has failed to comply with the requirements of Sections 251 and 252, including Commission implementing rules thereunder, even if the carrier is in compliance with an agreement approved by the state commission.[15]

Although initially vacated by the Eighth Circuit, the Supreme Court reinstated the Commission's authority to adjudicate claims arising under Section 251 of the Act,[16] and that authority and this Commission ruling continue to exist to this day. Not even SBC has the nerve to contest this plain fact. Moreover, the Commission has adjudicated a number of Section 251-related formal complaints pursuant to the rule outlined above, including the following:

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[14] As an example, an excerpt of the Interconnection Agreement between Z-Tel Communications, Inc. and Ameritech Illinois is attached hereto at Tab 1. Section XXVI.6 clearly states that "no remedy set for this agreement is intended to be exclusive and each and every remedy shall be cumulative and in addition to any other rights or remedies now or hereafter existing under applicable or otherwise."

[15] *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, First Report and Order, CC Docket No. 96-98, 11 FCC Rcd 15499, ¶ 127 (1996) (subsequent history omitted) ("*Local Competition Order*").

[16] *AT&T v. Iowa Utils. Bd.*, 525 U.S. 366, 389 (1999).

- *Net2000 Communications, Inc. v. Verizon-Washington, D.C. et al.*;[17]
- *TSR Wireless v. U S WEST*;[18] and
- *Cellexis International, Inc. v. Bell Atlantic NYNEX Mobile Systems, et al.*[19]

SBC conveniently refuses to admit the existence of the Commission's existing rule and spot-on cases in its brief. Again, SBC demonstrates that it has no "meeting of the minds" with the Commission.

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[17] *Net2000 Communications, Inc. v. Verizon-Washington D.C. et al.*, Memorandum Opinion and Order, File No. EB-00-018 (rel. Jan. 9, 2002). In this case, the Commission addressed the merits of Net2000's claims that Verizon's special access-to-EEL conversion process violated Sections 201(b) and 251(c) of the Act and relevant Commission local competition orders. If the Commission lacked jurisdictional authority to address Section 251 claims (which it does not) and if the violation of Section 251 could not amount to a Section 201(b) violation (which similarly is incorrect), then the Commission presumably would have dismissed Net2000's claims for lack of jurisdiction. The Commission did not do so, however. Rather, the Commission addressed the merits of each of Net2000's claims.

[18] *TSR Wireless, LLC v. U S WEST Communications, Inc.*, 15 FCC Rcd 11166, *petition for review denied sub nom. Qwest Corporation v. FCC*, 252 F.3d 462 (D.C. Cir. 2001). In this case, the Commission noted:

> As an initial matter, we reject Defendants' arguments that the Commission lacks jurisdiction to resolve the issues raised in these formal complaints. Section 208 permits 'any person ... complaining of anything done or omitted to be done by any common carrier subject to this Act, in contravention of the provisions thereof' to file a complaint with the Commission. Defendants are common carriers. Complainants allege that Defendants have imposed certain charges on them in violation of Sections 201, and 251-252 of the Act and the Commission's rules implementing those Sections. The Commission stated in the *Local Competition Order* that 'an aggrieved party could file a Section 208 complaint with the Commission, alleging that the incumbent LEC or requesting carrier has failed to comply with the requirements of Section 251 and 252, including Commission rules thereunder....' Therefore, *our authority to decide these complaints arises from Sections 201, 208, 251 and 252 of the Act.*

Id., 13 (emphasis added) (citations omitted).

[19] *Cellexis International, Inc. v Bell Atlantic NYNEX Mobile Systems, et al.*, Memorandum Opinion and Order, File Nos. WB/ENF-F-97-001, WB/ENF-F-97-002, WB/ENF-F-97-003 (rel. Dec. 19, 2001). Here, the Commission confirmed that a carrier's practices may violate Sections 201(b), 202(a), and 251 of the Act. *Id.*, ¶¶ 8-10. The Commission again confirmed that "statutory ... obligations, whatever they may be, exist independent of the [interconnection] Agreement's terms." *Id.*, ¶ 9. Moreover, the Commission confirmed that a carrier does not waive its statutory rights merely by signing an interconnection agreement. *Id.*

Trinko does nothing to disrupt the existing Commission complaint rule or related rulings. Indeed, as noted, the *Trinko* court was extremely carefully to constrain itself to the interconnection agreement between AT&T and Bell Atlantic in New York. The *dicta* upon which SBC relies merely contains the *Trinko* court's view that it would be possible for a CLEC to waive voluntarily remedies in an interconnection agreement, based upon the particular language of that agreement.

> Congress chose to give the parties the ***option*** to negotiate particular agreements with the aid and ultimate approval of state regulatory bodies, which have specialized expertise in the area of telecommunications. This ***option*** offers telecommunications carriers the ***choice*** to use a regulatory process that ***might*** be more efficient than other alternatives. [20]
>
> * * *
>
> An ILEC ***can*** meet its obligations under subsections (b) and (c) by entering into an interconnection agreement with a requesting carrier through the procedures outlined in section 252. Such interconnection agreements ***do not necessarily*** reiterate the duties enumerated in section 251. Instead, the ILEC and requesting carrier have the ***option*** of contracting around the obligations or section 251.[21]

Z-Tel and CoreComm did not exercise any such "**option**" in the interconnection agreements at issue in this case, and more importantly, SBC has never asserted that Z-Tel and CoreComm exercised any such option. Rather, SBC's argument is that the mere existence of the agreement constitutes an automatic waiver of remedies available under the Act and the Commission's rules. *Trinko* says no such thing. At best, the *Trinko dicta* stands for the unremarkable proposition that parties have the "**option**" of waiving rights in executing an interconnection agreement.[22] Nowhere does *Trinko* remotely state that parties automatically waive all of there statutory rights merely by entering an interconnection agreement.

It is worth mentioning that under SBC's reading of *Trinko*, not only would the Commission lack authority to enforce its rules, but the Commission would similarly lack

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20 *Trinko*, *35 (emphasis added).

21 *Id.*, *31 (emphasis added).

22 *Id.*.

authority to enforce the SBC/Ameritech merger conditions.[23] Apparently, merely by uttering the word "*Trinko*," SBC can escape any enforcement of any Commission regulation merely through the existence of an interconnection agreement, regardless of whether parties sought to preserve – rather than waive – their rights. Once again SBC proves too much.

Finally, Complainants do note the occurrence of several ironies in SBC's reliance upon *Trinko*. The *Trinko* court re-established the availability of private antitrust remedies for unlawful behavior by Verizon and other incumbent LECs. In doing so, the *Trinko* court rejected the viewpoint of the Seventh Circuit Court of Appeals in *Goldwasser v. Ameritech*, which held that FCC authority over local interconnection policy superceded application of antitrust law to incumbent LECs like SBC. Since *Goldwasser* was issued, SBC has relied upon it in motions to dismiss private antitrust litigation brought by CoreComm, Covad, and another CLEC called CalTech International Telecom Corporation. In those motions to dismiss, SBC urged the federal courts to dismiss antitrust claims on the basis that the proper method of resolving local competition disputes lies with the FCC and state commissions, through the section 251 and 252 process. But now that SBC is faced with FCC enforcement, it conveniently ignores the position it consistently takes before federal courts.

It should not surprise the Commission that SBC would present different interpretations of the Commission's enforcement authority before federal antitrust courts than the FCC. SBC would prefer that it not answer to *any* legal authority – antitrust or regulatory – and it will do anything or say anything to achieve that result. These are the actions of a lawless company, and the Commission should exercise its full enforcement authority over SBC's actions.

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[23] *June 26 Letter*, n. 3 ("While the court in Trinko was referring to an ILEC's obligation under section 251, its analysis and reasoning apply equally to the Commission's rules and orders (including the SBC/Ameritech merger conditions).").

III. Conclusion

As demonstrated above, neither *USTA* nor *Trinko* have any bearing on the Commission's decision in the above-referenced proceedings. To the contrary, SBC's reliance on these demonstrate that its arguments are thus far meritless. Accordingly, the Commission should act as soon as possible to grant Complainants' complaint and issue a Forfeiture Order to resolve the NAL.

Respectfully submitted,

Michael B. Hazzard
COUNSEL TO COMPLAINANTS

cc: Chairman Powell*
Commissioner Abernathy*
Commissioner Martin*
Commissioner Copps*
Kyle Dixon*
Matthew Brill*
Daniel Gonzales*
Jordan Goldstein*
Maureen Del Duca*
David H. Solomon*
Marlene H. Dortch**
Christopher Heimann***

* By US Mail
** By Hand Delivery
*** By Email and US Mail

TAB A

INTERCONNECTION AGREEMENT UNDER SECTIONS 251 AND 252 OF THE TELECOMMUNICATIONS ACT OF 1996

Dated as of May 12, 2000

by and between

AMERITECH ILLINOIS

and

Z-TEL COMMUNICATIONS, INC.

take over such defense; provided that in such event the Indemnifying Party shall not be responsible for, nor shall it be obligated to indemnify the relevant Indemnified Party against, any cost or liability in excess of such refused compromise or settlement. With respect to any defense accepted by the Indemnifying Party, the relevant Indemnified Party shall be entitled to participate with the Indemnifying Party in such defense if the Claim requests equitable relief or other relief that could affect the rights of the Indemnified Party and also shall be entitled to employ separate counsel for such defense at such Indemnified Party's expense. If the Indemnifying Party does not accept the defense of any indemnified Claim as provided above, the relevant Indemnified Party shall have the right to employ counsel for such defense at the expense of the Indemnifying Party. Each Party agrees to cooperate and to cause its employees and agents to cooperate with the other Party in the defense of any such Claim and the relevant records of each Party shall be available to the other Party with respect to any such defense, subject to the restrictions and limitations set forth in **Article XX**.

ARTICLE XXVI
LIMITATION OF LIABILITY

XXVI.1 Limited Responsibility. Each Party shall be responsible only for service(s) and facility(ies) which are provided by that Party, its authorized agents, subcontractors, or others retained by such parties, and neither Party shall bear any responsibility for the services and facilities provided by the other Party, its Affiliates, agents, subcontractors, or other persons retained by such parties. No Party shall be liable for any act or omission of another Telecommunications Carrier (other than an Affiliate) providing a portion of a service.

XXVI.2 Apportionment of Fault. In the case of any Loss arising from the negligence or willful misconduct of both Parties, each Party shall bear, and its obligation shall be limited to, that portion of the resulting expense caused by its negligence or misconduct or the negligence or misconduct of such Party's Affiliates, agents, contractors or other persons acting in concert with it.

XXVI.3 Limitation of Damages. Except for indemnity obligations under **Article XXV**, Ameritech's liability to CLEC for any Loss resulting from any and all causes shall be as follows:

a) Except for Ameritech's willful misconduct, with respect to any Claim for any Loss associated with the installation, provision, termination, maintenance, repair, or restoration of an individual Network Element or Combination provided for a specific CLEC Customer, Ameritech's liability shall be limited to the greater of: (i) the total amount that is or would have been charged to CLEC for the service or function not performed or improperly performed and (ii) the amount Ameritech would have been liable to its Customer if the Resale Service was provided directly to its Customer; and

b) For all other Claims, including any Claims resulting from the failure of Ameritech to meet its parity obligations under this Agreement, CLEC shall be entitled to recover its proven damages, subject to the limitations of **Section 26.5**.

XXVI.4 Limitations in Tariffs. Each Party shall, to the maximum extent permitted by Applicable Law, provide in its tariffs and contracts with its Customers that relate to any Telecommunications Service or Network Element provided or contemplated under this Agreement, that in no case shall such Party or any of its agents, contractors or other persons retained by such parties be liable to any Customer for any Consequential Damages (as defined in Section 26.5 below). If a Party breaches its obligations under this Section 26.4, the breaching Party shall be liable to the nonbreaching Party for any and all Losses resulting from such breach, including the indemnification of and/or reimbursement for Losses arising from Claims by and from such breaching Party's Customers, to the extent such Losses would have been limited had the tariff or contract provisions referenced above in this Section been included.

XXVI.5 Consequential Damages. In no event shall either Party have any liability whatsoever to the other Party for any indirect, special, consequential, incidental or punitive damages, including loss of anticipated profits or revenue or other economic loss in connection with or arising from anything said, omitted or done hereunder (collectively, **Consequential Damages**), even if the other Party has been advised of the possibility of such damages; provided that the foregoing shall not limit (i) a Party's obligation under Section 25.1 to indemnify, defend and hold the other Party harmless against any amounts payable to a third person, including any losses, costs, fines, penalties, criminal or civil judgments or settlements, expenses (including attorneys' fees) and Consequential Damages of such third person or (ii) a Party's liability to the other for willful or intentional misconduct.

XXVI.6 Remedies. Except as expressly provided herein, no remedy set forth in this Agreement is intended to be exclusive and each and every remedy shall be cumulative and in addition to any other rights or remedies now or hereafter existing under applicable law or otherwise.

ARTICLE XXVII
BILLING

XXVII.1 Billing.

XXVII.1.1 Each Party will bill all applicable charges, at the rates set forth herein, in the Pricing Schedule and as set forth in applicable tariffs or contracts referenced herein, for the services provided by that Party to the other Party in accordance with this Article XXVII and the Implementation Plan.

XXVII.1.2 The Parties agree that in order to ensure the proper performance and integrity of the entire billing process, each Party will be responsible and accountable for transmitting to the other Party an accurate and current bill. Each Party agrees to implement control mechanisms and procedures to render a bill that accurately reflects the services ordered and used by the other Party.

EXHIBIT C

INTERIM REPORT

Introduction

KPMG Consulting was directed by Illinois Commerce Commission (ICC) staff to provide a brief interim status report about the third-party independent review of SBC Ameritech Illinois' OSS. KPMG Consulting understands that the Commission will use the information in this report to determine whether the OSS evaluation should continue as planned. ICC staff directed KPMG Consulting to provide this report so that it could be released to the public prior to a special open meeting of the Illinois Commerce Commission on Thursday, June 20, 2002.

This interim status report answers three questions:

- What was KPMG Consulting asked to do and what has been accomplished?
- What remains to be done?
- How should the test proceed?

Question Number 1: What was KPMG Consulting Asked to Do and What Has Been Accomplished?

In May 2000, the Commission hired KPMG Consulting to perform several functions, including a "New York style" test of SBC Ameritech's Operational Support Systems (OSS). Here is a summary of what the Commission has required KPMG Consulting to do:

- Develop a Master Test Plan
- Build the electronic interfaces necessary for conducting the test
- Conduct a preliminary assessment of SBC Ameritech's performance measures
- Build a "test CLEC" in order to "live the CLEC experience" during testing
- Design and implement a process to manage the "test-until-pass" assessment
- Design a highly open testing process so that extensive information would be provided during the test to the ICC and to industry
- Execute the tests described in the Master Test Plan under the close supervision of ICC staff

Over the last 2 years KPMG Consulting has devoted over 100,000 person-hours to accomplish the ICC's objectives. Here is a summary of what KPMG Consulting has accomplished to date:

- KPMG Consulting worked with ICC staff, SBC Ameritech, and CLECs to design a Master Test Plan covering all key facets of SBC Ameritech's OSS, including:
  - Pre-ordering and ordering
  - Provisioning
  - Billing
  - Maintenance & repair
  - Interface support
  - Account management
  - CLEC training

- KPMG Consulting, working with Hewlett Packard, designed and implemented systems to test SBC Ameritech's electronic interfaces:
  - EDI and GUI (pre-order/order)
  - CORBA (pre-order)
  - EDI 811 (billing)
  - EBTA (maintenance & repair)

- KPMG Consulting conducted a study published in June 2001 on a sample of SBC Ameritech Illinois performance measures. This report raised questions about SBC Ameritech's data integrity and measurement reporting.

- KPMG Consulting executed the tests in the Illinois Master Test Plan by:
  - Conducting hundreds of interviews with SBC Ameritech employees
  - Reviewing more than 1,000 SBC Ameritech documents
  - Monitoring and assessing hundreds of provisioning and repair events
  - Submitting tens of thousands of electronic transactions

- KPMG Consulting and Hewlett Packard "lived the CLEC experience" by:
  - Making hundreds of contacts with SBC Ameritech account managers and help desks
  - Submitting thousands of pre-order inquiries and customer orders
  - Receiving hundreds of electronic and paper bills
  - Processing hundreds of trouble tickets

- KPMG Consulting's program management and communications have been timely and extremely detailed. KPMG Consulting has been:
  - Conducting daily meetings with Commission staff and SBC Ameritech about project issues and progress
  - Providing weekly briefings about important schedule jeopardies and test obstacles
  - Providing detailed monthly status reports
  - Making thousands of test documents (e.g., interview notes, data requests, etc.) accessible to ICC staff online through a secure website

- KPMG Consulting has updated the ICC project plan 12 times during the test. These project plan changes have been driven by testing requirements in the Master Test Plan and the test-until-pass approach. All project plan updates have been jointly reviewed each month by KPMG Consulting, SBC Ameritech, and ICC staff. Project plan updates have included:
  - Activity descriptions and schedules for over 1,000 activities
  - Line-by-line updates explaining changes to every scheduled activity each month

- KPMG Consulting has provided extensive information to interested parties by:
  - Conducting weekly meetings with CLECs monitoring the Illinois test
  - Maintaining a website (www.osstesting.com) with extensive information for the general public

KPMG Consulting continues to work under the close supervision of ICC staff to complete the remaining test activities.

Question Number 2: What Remains to Be Done?

If no significant defects had been discovered in SBC Ameritech's systems, processes, and documentation, it is estimated that the Illinois test could have been completed in March 2002. However, as of today, 413 specific defect reports have been provided to the ICC and SBC Ameritech. SBC Ameritech has acknowledged many of these defects and taken corrective action. Consistent with the Master Test Plan, KPMG Consulting has been performing retesting in areas where SBC Ameritech has taken corrective action.

Some of the most important remaining problems with SBC Ameritech OSS systems and processes that continue to be investigated are:

- SBC Ameritech does not accurately update Customer Service records.
- SBC Ameritech systems did not provide timely or accurate responses during pre-order/order volume testing.
- SBC Ameritech has not provided proper Line Loss Notifications.

- SBC Ameritech has made incorrect directory assistance updates.
- SBC Ameritech's end-to-end maintenance & repair process does not ensure trouble reports are handled consistently, accurately and completely.
- Orders have not flowed through SBC Ameritech EDI systems as expected.
- SBC Ameritech EDI systems have not provided service order completions on confirmed due dates.

In addition to the significant issues listed above, KPMG Consulting has noted numerous unresolved issues in SBC Ameritech's performance metrics systems and processes:

- SBC Ameritech's data retention policies regarding source data do not enable thorough and complete audits.
- The procedures and controls SBC Ameritech has in place for performance measurement calculation and reporting are inadequate.
- SBC Ameritech restated performance measurement results without notifying CLECs and regulators in a consistent manner.
- SBC Ameritech does not provide accurate notices of performance measure restatements on its Website News Page.

Until these and other issues are addressed, the Global Exit Criteria in the current Illinois Master Test Plan as designed will not be satisfied, and the test will not be considered complete:

Question Number 3: How Should the Test Proceed?

As stated above, KPMG Consulting understands that the Commission will use the information in this report to determine whether the OSS evaluation should continue as planned. We understand that the Commission may decide to change the test, end the test immediately, or proceed under the existing plans.

Since KPMG Consulting is required to act as a third-party evaluator independent of SBC Ameritech or any other Illinois-regulated telecommunications carrier, we believe it would be inappropriate to advocate in favor of or disfavor of proposals to change the test. However, at this point in the test, KPMG Consulting notes that there are only two ways to significantly change the schedule and resources required for testing:

1. **Change the test-until-pass requirement.** If the Commission intends for SBC Ameritech to cooperate with the test until all important defects are resolved, then the test-until-pass requirement should not be changed. However, if the ICC is willing to have the test completed with certain defects left unresolved, the ICC should modify the test-until-pass requirement. This could reduce the testing effort and streamline the schedule. However, by reducing or eliminating the test-until-pass requirement, ICC would need to deal with how negative or inconclusive results from the test would be addressed, especially if the test results were to be used in a Section 271 proceeding.

2. **Change the scope of the test.** If the Commission wanted to reduce the scope of the test, it could simply eliminate or reduce the testing requirements. For scope changes to have any significant impact, they would need to be focused in areas where significant testing work remains, such as in the performance metrics area. These scope changes would be noted by updating the Master Test Plan, consistent with the scope change procedures documented in the Plan. This process has been available throughout the test, and has been used to make several changes to the Illinois test already.

KPMG Consulting is prepared to work with the Commission to wrap up testing activities and provide a final report if so directed. If the Commission decides to continue with the test as planned, KPMG Consulting will continue to work under the close supervision of ICC staff to perform the test as specified.

EXHIBIT D

FCC Complaints Concerning RBOC Merger Violations

RBOC	MERGER AUDIT	COMPLAINTANT	DATE	ISSUE(S)	STATUS
Verizon	N/A	Covad	March 5, 2001	Verizon's unilateral elimination of an FCC-mandated discount for loops used to provide advanced services.	Open
Verizon	Collocation, Unbundled Network Element and Line-Sharing Audits (filed January 29, 2001)	WorldCom	March 20, 2001	1. Verizon failed to comply with several of the FCC's collocation requirements and discriminated to the advantage of its advanced services affiliate (i.e., Verizon did not charge the affiliate collocation fees or bill the affiliate for collocation space) 2. Verizon did not correctly bill wholesale customers for network facilities. 3. Verizon did not demonstrate to the relevant state commissions that it was necessary for Verizon to reserve dark fiber in its network. 4. Verizon provided its own employees with detailed loop information on an electronic basis, whereas Verizon only provided non-affiliated carriers with this information on a manual basis.	Open, except for collocation violations (September 14, 2001 Consent Decree)
Verizon	Genuity Audit (June 1, 2001)	AT&T	June 28, 2001 and August 8, 2001	1. Verizon is Genuity's sole supplier of debt capital, in violation of merger conditions that limit Verizon's holdings to no more than 25 percent of the total outstanding debt of Genuity. 2. Verizon is providing Genuity with preferential treatment due to its failure to (a) charge Genuity commercially reasonable rates; and (b) bill and collect outstanding debts from Genuity.	Issue 3 was closed by In the Matter of Verizon Communications Inc., File No. EB-01-IH-0519(rel. August 20, 2002); Issues 1, 2, and 4 are outstanding.

				3. Verizon withheld information from the auditor. 4. Verizon's management did not provide an assertion regarding Verizon's discrimination in favor of Genuity in the provision of high-speed access and regular special access services because Verizon unilaterally decided that this was not required.	
Verizon	Genuity Audit (filed June 1, 2001)	WorldCom	June 26, 2001	Same as issues 2-4 above.	See above.
Verizon	Advanced Services Affiliate & General Merger Conditions Audits (filed June 18, 2001 and June 1, 2001, respectively)	CompTel	August 6, 2001	1. Verizon provided its advanced services affiliate with free line-sharing for the period July 2000-April 2001. 2. Verizon provided its advanced services affiliate with access to operations support systems that were not available to other carriers. 3. Verizon misreported or failed to report carrier-to-carrier performance data. 4. Verizon failed to provide other carriers accurate and timely wholesale discounts mandated by the merger conditions.	Issue 3 was closed by In the Matter of Verizon Communications Inc., File No. EB-01-IH-0519(rel. August 20, 2002); Issues 1, 2, and 4 are outstanding.
Qwest	Qwest-US WEST Merger Audit (April 16, 2001)	AT&T	May 1, 2001	Qwest provided in-region, interLATA private line services to 266 customers, which violates both the US WEST-Qwest merger conditions and Section 271 of TA-96.	Open
Qwest	Qwest-US WEST Merger Audit (April 16, 2001)	WorldCom	May 14, 2001	Same as above	Open
Qwest	Qwest-US WEST Merger Audit (April 16, 2001)	CompTel	May 16, 2001	Same as above	Open

Qwest	Qwest-US WEST Merger Audit (April 16, 2001)	Touch America	October 29, 2001	Same as above. However, Touch America notified the FCC that Arthur Andersen did not contact Touch America concerning the audit and would not incorporate Touch America's concerns.	
Qwest	Qwest-US WEST Merger Audit (Year 2) (March 11, 2002)	AT&T	May 2, 2002	Same as the Year 1 Audit references above, though the scope of the violations increased in Year Two.	Open
Qwest	Formal complaint concerning Qwest's failure to comply with the provisions of its divestiture agreement, as required by the Qwest-US WEST merger conditions	Touch America (formal complaint); also, Touch America letter re: Merger Audit, October 29, 2001	File No. EB-02-MD-004 (Feb. 11, 2002) (revised and refiled March 1, 2002).	Same as above, plus other accusations, such as Qwest's failure to divest facilities, etc.	Open
Qwest	Qwest-US WEST Merger Audit (Year Two) (March 11, 2002)	Touch America	May 3, 2002	Touch America asks the FCC to issue an order directing Qwest to provide Touch America with all customer, circuit and CPNI associated with the customer accounts identified as Touch America customers in the Year Two Merger Audit.	Open
SBC	SBC-Ameritech Merger Audit (Year One)	Advanced Telcom Group (ATG)	December 29, 2000	1. SBC failed to treat its advanced services affiliate on an arm's length basis (shared office space, shared executives, etc.) 2. SBC filed collocation applications on its affiliate's behalf. 3. SBC failed to comply with Rule 51.321(h) of the FCC's collocation rules concerning timely reporting of exhausted collocation space.	In the Matter of SBC Communications, Inc. Apparent Liability for Forfeiture, File No. EB-00-IH-0326a, released May 24, 2001 (collocation violations); other merger violations remain unresolved.

				4. SBC developed an ordering system on behalf of its advanced services affiliate.	
SBC	Letter requesting revisions to the data reported through the Carrier-to-Carrier Performance Plan	CompTel	June 7, 2001	CompTel requested the following revisions to the publicly reported wholesale performance data: 1. The FCC should post voluntary payments with the wholesale performance data rather than burying it in ECFS. 2. Voluntary payments should be disaggregated by state and by measure. 3. SBC should be required to report gross monthly voluntary payments. 4. SBC should report state offsets to its payments under the FCC Merger Conditions.	Open
SBC	SBC-Ameritech Merger Audit (Year Two) (September 4, 2001)	CompTel	January 24, 2002	1. SBC failed to comply with the provisions of the Carrier-to-Carrier Performance Plan; 2. SBC failed to provide required promotion discounts to non-affiliated carriers, including CompTel member ATG; 3. SBC failed to comply with the FCC's collocation rules and overcharged ATG for collocation space.	Open, with the exception of the 100 percent cap on the percentage by which SBC misses a performance benchmark under the Carrier-to-Carrier Performance Plan, which was permitted by CCB's February 6, 2002 letter to SBC.
SBC	SBC-Ameritech Merger Audit (Year Two) (September 4, 2001)	ATG	February 4, 2002	ATG notified the FCC that SBC finally credited ATG for the promotional discount required on IDSL lines by the merger conditions, 19 months late and only after CompTel and ATG filed the January 24 letter.	Open

SBC	Section 272 Biennial Audit (Texas) December 17, 2001	AT&T	February 12, 2002	AT&T asked the FCC to require SBC to publicly file a non-redacted audit report, consistent with the Commission's order on the Verizon 272 Audit Report.	Open
SBC	SBC Request for an Extension of Its Deadline for Implementation of the Uniform and Enhanced OSS Interface	WorldCom	March 15, 2002	WorldCom asked the FCC to impose the "voluntary incentive payments" associated with Paragraph 382 of the Merger Order if SBC misses its 18 month implementation deadline.	Closed per CCB's March 22, 2002 letter; no sanctions.

FCC ENFORCEMENT ACTIONS

COMPANY	VIOLATIONS	DATE	SANCTIONS	CITE
SBC	Failure to comply with section 51.312(h) of the FCC's rules, which requires timely notice of premises where collocation space has been exhausted, as identified by the collocation audit required by the SBC-Ameritech Merger Conditions.	February 25, 2002	$84,000 (reduced from $94,500)	File No. EB-00-1H-0326a Order on Review
SBC	Failure to accurately report wholesale performance data under the Carrier-to-Carrier Performance Plan required by the SBC/Ameritech Merger Conditions. (reporting period 10/8/99 through 12/31/99 for TX, OK, KS, MO, AK, CA, and NV)	May 29, 2001	$88,000	File No. EB-00-IH-0432, Forfeiture Order
Verizon	Failure to comply with section 51.312(h) of the FCC's rules, which requires timely notice of premises where collocation space has been exhausted, as identified by the collocation audit required by the Bell Atlantic-GTE Merger Conditions. (reporting period 7/1/00 through 10/31/00)	September 14, 2001	$77,000 plus remedial actions to ensure compliance with the rule.	File No. EB-01-1H-0236 Consent Decree

SBC	Failure to provide shared transport in the Ameritech states as required by the SBC-Ameritech Merger Conditions.	January 18, 2002	$6,000,000	File No. EB-01-IH-0030 Notice of Apparent Liability
Verizon	Verizon must allow Global NAPs to adopt its Rhode Island interconnection agreement with Verizon in Massachusetts and Virginia under the multi-state MFN requirement in the Bell Atlantic-GTE Merger Conditions	February 28, 2002	No damages; Global NAPs must file the Rhode Island agreement with the Virginia and Massachusetts commissions.	File No. EB-01-MD-010 Memorandum Opinion and Order
Verizon	Verizon failed to provide the independent auditor with certain historical performance data for an audit of Verizon's compliance with the Bell Atlantic-GTE Merger Conditions (June 20, 2000 through December 31, 2000). Verizon also misreported performance data for the same period, which affected Verizon's voluntary payments for failing to meet performance targets. Verizon also failed to provide the independent auditor with several agreements between Genuity and Verizon.	August 20,2002	Consent decree with $260,000 payment to the U.S. Treasury. Verizon also must implement a remedial compliance program.	File No. EB-01-IH-0519 Order

EXHIBIT E

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FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554
February 6, 2002

Ms. Caryn D. Moir
Vice President – Federal Regulatory
SBC Telecommunications, Inc.
1401 I Street, NW, Suite 400
Washington, DC 20005

RE: *SBC/Ameritech Merger Order*, CC Docket No. 98-141, ASD File No. 99-49

Dear Ms. Moir:

This letter responds to SBC Communications, Inc.'s ("SBC") January 4, 2001 letter regarding performance measurements payments under the *SBC/Ameritech Merger Order*.[1] With this letter, I further explain the Common Carrier Bureau's ("Bureau") views on the method for calculating payments under the *Merger Order*.

In the *SBC/Ameritech Merger Order*, the Commission adopted the Carrier-to-Carrier Performance Plan ("Performance Plan") that requires SBC to make payments to the United States Treasury should it fail to meet certain performance standards.[2] The Performance Plan prescribes the steps SBC must follow to calculate payments.[3] Before making its first payment, SBC orally asked the Bureau for direction on eleven payment issues arising from the Performance Plan. On December 11, 2000, the Bureau provided SBC a letter setting forth how the relevant payment provisions should be interpreted.[4] On January 4, 2001, SBC indicated it disagreed with the Bureau's interpretation on four issues.[5] As explained below, based on my further review, I conclude that SBC's position on three issues is reasonable and accordingly modify my prior guidance. On one issue, I decline to modify my prior interpretation, but note that the practical impact of the issue may be dwindling.

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[1] Letter from Sandra Wagner, Vice President, Federal Regulatory, SBC, to Carol E. Mattey, Deputy Bureau Chief, Common Carrier Bureau, FCC (Jan. 4, 2001) ("*SBC January 4th Letter*"); 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, CC Docket 98-141, *Memorandum Opinion and Order*, 14 FCC Rcd 14712 (1999) ("*Merger Order*").

[2] *Merger Order* at Appendix C, Attachment A.

[3] *See id.*

[4] *See* Letter from Carol Mattey, Deputy Chief, Common Carrier Bureau, to Sandra Wagner, Vice President, Federal Regulatory, SBC (Dec. 11, 2000) ("*Bureau Payment Calculation Letter*").

[5] *See SBC January 4th Letter.*

1. For measurements expressed as averages, should the "performance gap" – the extent to which SBC misses the performance standard – be capped at 100% if SBC misses the performance standard by a higher percent?[6]

The Performance Plan does not, on its face, cap the difference between the level of service SBC provides to CLECs and the relevant performance standard (i.e., the "performance gap"). Accordingly, the Bureau instructed SBC to follow the formula spelled out in the *Merger Order*.[7] SBC disagrees with this guidance for two reasons. First, SBC contends that an uncapped performance gap will require the company to pay on more than the actual volume of activity. Second, SBC states that the Texas Commission subsequently imposed such a cap on the state's performance plan, and therefore the Bureau should modify its interpretation of the relevant provisions in the merger conditions.[8] As explained below, I conclude there are public policy benefits in permitting SBC to make calculations under this provision in a uniform manner with the Texas plan, and therefore I authorize SBC to cap the performance gap at 100%.

The *Merger Order* establishes a four-step method for calculating payments for this type of measurement (i.e., a measurement expressed as an average):[9]

1) SBC calculates the "ideal value," which is the minimum level of service SBC could provide CLECs without owing payments;[10]

2) SBC calculates the percentage difference between the ideal value and the service it gave CLECs (i.e., the "performance gap").[11] For example, if SBC provisions circuits to CLECs in nine days and calculates an ideal value of three days, the performance gap would be 200% (the difference of six days divided by the ideal value of three days);[12]

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[6] *See* Issue Number 3 in the *Bureau Payment Calculation Letter* at 2-3.

[7] *See Bureau Payment Calculation Letter* at 2-3.

[8] *SBC January 4th Letter* at 3.

[9] In fact, there are three steps. Because the third step has two stages, I describe the process in four steps here. Stated simply, the formula is a function to the dollar value of the measurement multiplied by the number of data points multiplied by the average quality of SBC's performance.

[10] *See Merger Order* at Appendix C, Attachment A, A-116, at "Step 1" for measurements expressed as averages or means. The "ideal value" is SBC's term. SBC calculates the ideal value by translating the "critical-z" into the units being measured by the performance measurement (e.g., days, hours, and percentages). The ideal value is based partly on the service SBC provides its own retail customers (or a benchmark standard if SBC does not provide the service on a retail basis). *See Merger Order* at Appendix C, Attachment A, A-116. For simplicity, I use a one-month example; in fact, SBC's payments are based on chronic failures of either three consecutive months or six of twelve months in a calendar year. *See Merger Order* at Appendix C, Attachment A, ¶ 9.

[11] *See Merger Order* at Appendix C, Attachment A, A-116, "Step 2." This step requires SBC to "[c]alculate the percentage difference between the actual average and the [ideal value] . . ."

[12] Stated differently, in this example it took SBC three times longer to provision CLEC circuits than its retail circuits (nine days versus three).

3) SBC multiplies the performance gap by the number of data points.[13] Continuing with the example, SBC would multiply 200% by the number of times it provisioned circuits to CLECs, e.g., 150 provisioned circuits to yield 300;[14] then

4) SBC multiplies the product of Step 3 by a fixed-dollar amount based upon the measurement's designation in the Performance Plan as "High," "Medium," or "Low."[15] In the example, SBC would multiply 300 by the pre-set dollar amount, e.g., $900 for a "Medium" measurement. SBC's final payment amount for this measurement would thus be $270,000.

SBC first argues that the performance gap calculated in the second step should be limited to 100%. To do otherwise, SBC claims, would require the company to pay on more than the actual number of data points, i.e., applying a 200% performance gap to 150 data points would cause the company to pay on 300 data points.[16] Capping the performance gap at 100% would reduce the example payment to $135,000.[17]

I find this argument unpersuasive. Failing the performance standard by a wide margin, which is often within SBC's control, creates a large performance gap. A large performance gap does not mean SBC pays on more than the actual number of data points, as SBC argues. Rather, SBC would simply be paying for a larger disparity on the specified number of occurrences.[18]

SBC also suggests that the Bureau should accept its position because the Texas Commission subsequently modified the Texas plan to cap the performance gap at 100%.[19] As SBC notes, part of the Performance Plan was modeled on the Texas plan. While the Commission was explicit that it was not bound to any future state change,[20] the fact that the Texas Commission chose to modify this aspect of the state performance plan warrants a consideration of whether there are public policy benefits in applying the calculation in the same fashion for the federal plan. The Commission is committed to the goal of

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[13] Although SBC's *January 4th Letter* uses the term "occurrences," SBC stated orally to Bureau staff that it uses "occurrences" and "data points" synonymously. SBC and the Bureau thus agree that the "total number of data points" refers to the total volume of CLEC activity for the measurement, e.g., the number of circuits provisioned to CLECs.

[14] In other words, 150 provisioned circuits times 200% to yield the number 300.

[15] *See Merger Order* at Appendix C, Attachment A, A-116 at "Step 3."

[16] *SBC January 4th Letter* at 3.

[17] In other words, 100% performance gap times 150 data points times the $900 pre-set dollar amount.

[18] *See Merger Order*, 15 FCC Rcd at 14867, ¶ 377; *see also id.* at ¶ 378 (stating that SBC's payments will vary according to the "level and significance of the discrimination detected").

[19] *SBC January 4th Letter* at 3.

[20] *Merger Order* at Appendix C, Attachment A, ¶ 4 (stating that the Bureau will decide if state changes should be made to the Performance Plan).

working closely with the states in developing and applying national performance measurements as a general matter, and I believe that objective should guide our interpretation and application of the relevant merger conditions in this instance. I conclude that administrative efficiency would be served if SBC were permitted to apply this payment calculation in a fashion that mirrors the Texas performance plan. Accordingly, SBC may follow the 100% cap approach for measurements expressed as averages under the federal performance plan.

2. Should SBC report z-scores and calculate payments for performance measurements with 10 or fewer data points?[21]

The Performance Plan does not, on its face, exclude any performance measurements from either reporting or payment based on volume. Accordingly, I stated in the *Bureau Payment Calculation Letter* that SBC should report and pay on measurements with 10 or fewer data points.[22] SBC disagrees. Specifically, SBC argues that the Performance Plan's trebling of damages for volumes between 10 and 100 suggests by implication that volumes of 10 or fewer should be excluded.[23] SBC also has orally indicated its concern that it not be required to make payments for situations in which there are so few data points that a meaningful statistical conclusion cannot be made. Second, SBC suggests that the Texas Commission's exclusion of such low volume measurements in its state plan should guide the Bureau's decision.

At the outset, I note that the business rules expressly describe in detail the types of data SBC should exclude.[24] Nowhere among these exclusions are low-volume measurements. The fact that the Performance Plan trebles damages for volumes between 10 and 100 does not mean that the Commission wished to exclude volumes of 9 or fewer, given that the Commission was clear to exclude other data. To do so would be inconsistent with the Performance Plan's goal of completely capturing SBC's performance (except for limited, explicitly stated circumstances) and, where necessary, establishing payment obligations.[25] Second, the Performance Plan already addresses low-volume situations. The Commission adopted a specific statistical test for use with measurements with "29 or fewer" observations.[26] One-time low-volume situations will not, of themselves, lead to payment; instead, SBC would only make payments in low-volume situations when it misses the established standard three months in a row (or six months in a year). This aspect of the Performance Plan should protect SBC from having to make payments for random events.

SBC states that the Texas Commission clarified the Texas plan to exclude low-volume measurements for payments to the state.[27] As noted above, however, changes at the state level are not

[21] *See* Issue Number 9, *Bureau Payment Calculation Letter* at 4-5.

[22] *See Bureau Payment Calculation Letter* at 4-5.

[23] *See SBC January 4th Letter* at 5-6.

[24] *See Merger Order* at Appendix C, Attachment A, A-12 – A-111.

[25] *See Merger Order*, 15 FCC Rcd at 14867, ¶ 377 (stating that the goal of the Performance Plan is to ensure that quality of service to CLECs will not deteriorate as a result of the SBC/Ameritech merger).

[26] *See Merger Order* at Appendix C, Attachment A, A-112 – A-114.

[27] *SBC January 4th Letter* at 6.

automatically made to the federal Performance Plan. Moreover, as SBC concedes, the Texas Commission excluded low-volume measurements only for payments directly to the state, not for payments to CLECs.[28] This is an important distinction between the two plans. The Texas Commission is still assured that SBC has an incentive to improve performance even in low-volume situations under its plan. If we were to accept SBC's proposal to exclude low volume measurements here, there would be no such assurance under the federal plan. I therefore believe this is an instance where the benefits of applying divergent federal and state approaches could outweigh the potential administrative costs. For these reasons, I decline to modify my prior interpretation. I note, however, that the effect of this issue may, as a practical matter, be less significant in light of the increase in CLEC activity over the last year. As CLEC business increases, measurement volumes increase, and SBC should encounter fewer low-volume situations.

3. **If SBC is required to make a payment for failure to meet a standard (i.e., failing to meet the monthly ideal value for that standard for three consecutive months), how should the second component of the payment calculation – the extent to which the performance standard was missed – for parity measurements expressed as averages or means be calculated for purposes of determining SBC's payment obligation?**[29]

The Performance Plan states that SBC should compare the level of service SBC provides CLECs (the "actual CLEC service") for each of the three months analyzed to the ideal value for the most recent month (i.e., the third month).[30] The Bureau instructed SBC to use this methodology in the *Bureau Payment Calculation Letter*.[31] SBC nevertheless observes that the Performance Plan's approach could result in a negative performance gap and payment amount because the months are not comparable.[32]

SBC suggests that a more appropriate approach would be to compare each month's actual CLEC service to the ideal value for the same month.[33] Upon further review, I agree that SBC's suggested approach will avoid the unintended results SBC describes and is consistent with the Performance Plan's methodology for other types of measurements.[34] SBC therefore may use its proposed approach on this issue.

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[28] *Id.* Under the Texas plan, payments fall into two tiers, i.e., payments to the Texas Commission and payments to CLECs.

[29] *See* Issue Number 4, *Bureau Payment Calculation Letter* at 3.

[30] *Merger Order* at Appendix C, Attachment A, A-116 – A-117. As described above, the ideal value is the minimum service SBC could give CLECs without being liable for payments. In addition, the relevant period of analysis could be six of twelve months.

[31] *See Bureau Payment Calculation Letter* at 3.

[32] *SBC January 4th Letter* at 4. For example, assume the ideal value for September is three days. Assume further an actual CLEC service level of two days and one day for July and August, respectively. The performance gaps for July and August would be negative (two days minus three days and one day minus three days).

[33] *SBC January 4th Letter* at 3-4.

[34] *See Merger Order* at Appendix C, Attachment A, A-116 – A-117 (prescribing the month-to-month comparison for measurements expressed as percentages, ratios, and proportions).

4. In conducting parity tests, should SBC use the variance computed for ILEC-to-CLEC data in months when there are no SBC retail data?[35]

The Performance Plan is silent on this issue. In the *Bureau Payment Calculation Letter*, I stated that SBC should use the SBC retail variance of an adjacent month, preferably the next most recent month.[36] SBC disagrees, stating instead that it should instead calculate a pooled variance estimate using the SBC and CLEC results for the current month.[37] Because the Performance Plan does not directly address this issue and SBC's proposal is reasonable, I conclude SBC may use its proposed approach on this issue.

I appreciate the opportunity to work through these issues with you and your staff. If SBC disagrees with our interpretation of the *Merger Conditions*, it should file an application for review with the Commission pursuant to section 1.115 of the Commission's rules.[38]

Please do not hesitate to contact me if I can be of further assistance. You may also contact Mark Stone in the Common Carrier Bureau directly at (202) 418-0816 for further information on this matter.

Sincerely,

Carol E. Mattey

Carol E. Mattey
Deputy Chief, Common Carrier Bureau

CC: Al Syeles, SBC

[35] *See* Issue Number 7, *Bureau Payment Calculation Letter* at 4.

[36] *See Bureau Payment Calculation Letter* at 4.

[37] *SBC January 4th Letter* at 5.

[38] 47 C.F.R. § 1.115.

EXHIBIT F

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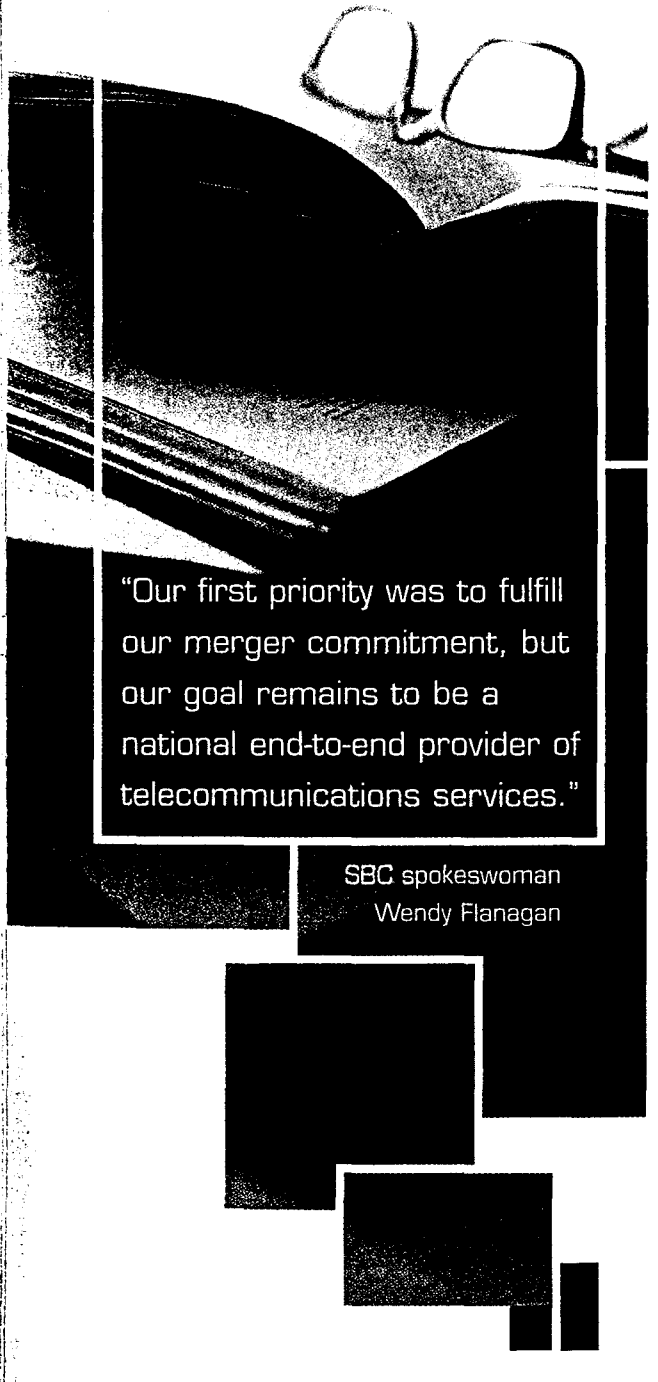

"Our first priority was to fulfill our merger commitment, but our goal remains to be a national end-to-end provider of telecommunications services."

SBC spokeswoman Wendy Flanagan

By Fred Dawson

With the gates opening to long-distance entry by the Bell companies in state after state, the beginnings of competition among the big telcos are evident in many places. Nevertheless, don't try to convince opponents of deregulation that this means anything.

The likelihood of the RBOCs ever really competing against each other has become so entwined with the debate over FCC policy assumptions that many opponents of those policies are ignoring or, in some cases, denying the reality of recent signs that such competition has begun. The argument goes: FCC rules fostering facilities-based over nonfacilities-based competition won't benefit the public because the Bells will never compete with each other. But this commitment to the belief that the Bells won't compete obscures the opportunity to make another argument, which is that, as long as the existing rules supporting access to unbundled network elements remain on the books, the Bells will be far more likely to compete with each other than if those rules are eliminated or radically modified.

Recent news stories highlight the widely held belief that inter-Bell competition has not begun. For example, an article appearing July 23 on *BusinessWeek* Online, cited SBC Communications Inc.'s alleged failure to meet its commitment to compete out of territory as a condition of its merger with Ameritech as evidence the "Bells seem to have kept competition at arm's length since their formation in 1984." The article notes SBC claims it has met the requirements, then quotes TeleTruth, which in March called on Congress to investigate claims SBC had reneged on its commitment. "No one in authority has held SBC accountable for ignoring their commitments and obligations," said TeleTruth founder and chairman Bruce Kushnick at that time.

The perception persists. "Nobody in their right mind could assert SBC has attempted to compete out of region," says Jonathan Askin, general counsel for the Association for Local Telecommunications Services.

In fact, SBC had met the terms of its commitment to launch facilities-based local voice services in 30 markets by the second quarter of this year, says John Winston, assistant bureau chief at the FCC's Enforcement Bureau. "They have complied," Winston says. "That's all I have to say on the matter."

Actually, the number of markets launched to date is 32, says SBC spokeswoman Wendy Flanagan. But she readily admits the marketing effort SBC has mounted so far is minimal compared to what it intends once the conditions are right for competing as a national carrier, which means getting final approval on long-distance service in its territories and a return to more solid ground in the general economy.

"Our first priority was to fulfill our merger commitment, but our goal remains to be a national end-to-end provider of telecommunications services," Flanagan says. "That requires that we have relief from restrictions on providing long-distance services."

In late 2000, SBC began its out-of-territory initiative by offering high-end voice and data services to the enterprise market and targeting the mass market with switched voice. The company changed course in early 2001, when it declared that it was scaling back marketing efforts out of territory and only would offer switched voice pending changes in the regulatory and economic climate. SBC sees the enterprise market as top priority once it's in a position to provide the full suite of long-distance, data and local voice services to customers no matter where they are, emphasizes Flanagan.

"We continue to offer the high-end enterprise services in markets where we were offering them at the outset, but, elsewhere, we've focused on offering just voice for now," Flanagan says. "But as we build out our facilities in these markets we're putting in the equipment that's needed to support the enterprise service requirements."

SBC won't say how many voice services customers it has in the 19 states plus Washington, D.C., it serves outside its operating territories. "There may be as many as several hundred thousand customers in any given market at this point," Flanagan says. SBC has installed its own switches in these markets and operates over its own metro infra-

structures, although it relies on use of incumbents' local loops for last-mile delivery. Flanagan says the marketing effort is limited to Yellow Pages advertising and promotion of services via the SBC Telecom Web site.

SBC's reluctance to serve the lucrative high-end market for ATM, frame relay and other advanced services until it wins clearance on long distance contrasts with the strategy in play at Verizon Communications Inc., which has launched facilities-based enterprise services in Dallas, Los Angeles and Seattle in direct competition with SBC and Qwest Communications International Inc. Here again a merger commitment is involved, although Verizon officials say this is not the motivation for a strategy that makes good business sense and fits in with the carrier's long-term growth plans. Verizon's move into these cities, which began a year ago with Dallas, was intrinsic to the GTE merger plan. GTE offered a foundation on which to build facilities extensions into the central urban areas because it had operations on the fringes of many big cities, says Kevin Ireland, Verizon's enterprise solutions group spokesman.

"This tends to be a lower cost approach to getting into these markets than would be the case if we were building from scratch," Ireland says. "We're currently assessing what additional cities to go into and hope to announce some more soon."

Not everyone is convinced Verizon is doing anything but meeting a merger commitment. There also is a perception the FCC again is allowing a carrier to skate by without really meeting the requirements. ALTS, for example, protests the commission's willingness to allow Verizon to count $90 million of a $150 million preliminary investment in bankrupt DSL CLEC NorthPoint Communications Inc. toward the Bell's commitment to spend $500 million on out-of-territory services within 36 months of the merger. Verizon made the investment as part of an intended acquisition but subsequently backed away from the buyout.

"There's no getting around the fact that Verizon's pullout from its plan to acquire NorthPoint brought NorthPoint down, which eliminated one of the major potential competitors to the RBOCs," Askin says. "Yet Verizon gets credited for investing in out-of-territory competition in that deal by the FCC." Verizon may have satisfied "some absurdist literal reading of its merger commitment," Askin says, however, the way the investment has been interpreted "has made a mockery of the FCC process and the bargain that Verizon struck."

One thing is clear: Verizon means business in the markets it has launched so far. Networks in all three markets use DWDM technology to support delivery of a broad portfolio of Internet access, managed data, ATM, frame relay and SONET-protected services that can be bundled with long distance, Ireland notes. "Local switched voice will be the last thing we offer," he says. "What we're doing is driven by market demand, and our goal right now is to grow our market reach by expanding our customer base, not just plop in a voice switch to meet a merger commitment."

Once the company is established in the high-end market, it will be in a position to leverage that presence into the smaller business and consumer markets, with voice services as part of the service mix, assuming the local regulatory conditions and market demand are in line with that strategy, Ireland says. "Also, down the road, given the pace of improvement in voice over IP technology, we may find there's no need to install circuit switches, which will allow us to move into voice by leveraging the data infrastructure we already have in place," he adds.

While the starting point for competing out of territory is markedly different from SBC, Verizon also sees long-distance entry as crucial to full-scale aggressive pursuit of a national service strategy. "Once we're approved for long distance in all our states, we'll go after the bigger companies who need national fame relay, national ATM and other types of connectivity," he says. "We already are approved in six states, and the rest are just around the corner."

Verizon has experimented with a variety of approaches to establishing its infrastructures out of territory. They began using a leased fiber from Metromedia Fiber Network Inc. in Dallas and moved to a mix of leased and owned facilities in Seattle and finally to strictly owned facilities in Los Angeles. "L.A. has proved to be our most successful model so far and is well ahead of the others from a sales standpoint," Ireland says. The company has installed high-capacity video switching and transport equipment to accommodate demand from media concerns, he adds.

With Qwest well established as a competitive carrier outside former US West territories, the only Bell company not competing in other Bell markets is BellSouth Corp. And, BellSouth spokesman Jeff Battcher says that's the way things will be for the foreseeable future. "We're concentrating on our markets in the nine states we presently serve," Battcher says. While the company now is locked into that strategy, "things in this industry change so fast, it's hard to say if that will always be the case," he adds.

Battcher says the possibility of competition from Verizon and SBC is of no great consequence in influencing BellSouth's agenda. "We're accustomed to competition and don't look on them as especially different," he says.

As for Qwest, BellSouth has a close relationship that emphasizes cooperation rather than competition, Battcher notes. BellSouth uses Qwest as its wholesale provider for long-haul transport and local access out of territory and has a "teaming" agreement with the carrier in markets where BellSouth hasn't yet entered the long-distance business. There, when Qwest comes in to offer long-distance services, BellSouth provides local connectivity services as part of the package. The deal works in reverse in Qwest's home territories.

Soon Qwest and BellSouth will be competing with each other for long-distance customers in BellSouth's territories, which means the close marketing affiliation likely will go away. What that will mean to BellSouth's willingness to go into local markets as a local service provider out of its current territories remains to be seen.

While three of the four Bell companies say expansion into other markets is key to their long-term strategies and point to current out-of-territory efforts as proof of those intensions, many observers claim the last thing these companies want is to open the door to all-out competition among themselves.

Instead, the detractors say, any small measure of inter-Bell competition is meant to persuade FCC regulators that policies undermining nonfacilities-based competition will clear the way for facilities-based competition among the giants left standing in the wake of the telecom meltdown.

"There's no hope for competition among the big players," flatly states Mark Cooper, director of research at the Consumer Federation of America. "The only thing they'll do is buy each other out."

Cooper cites FCC Chairman Michael Powell's comments when he first took over as FCC chairman, in which Powell said, "I fundamentally disagree with the idea that deregulation is something to be handed out only after competition is found to exist," as the driving philosophy behind a policy initiative that inevitably leads to "the remonopolization of the industry." Powell, who recently was quoted in *The Wall Street Journal* as saying the telecom industry was in a state of "utter crisis," bears some responsibility for contributing to that crisis, Cooper says. Powell proposed rules "that would enable the dominant firms in the cable and telephone industries to lock out competitors," Cooper asserts.

Regulatory issues aside, there's every reason to be skeptical about any flowering of competition among the Bells in light of their falling fortunes in the current downturn, says Allan Tumolillo, COO at Probe Research. Tumolillo says the recent hit the Bells took in the stock market has increased the odds significantly that the worst-case telecom scenario outlined in a recent Probe report would come to pass. The Bells lost almost $70 billion of their market capitalization (about 25 percent) between June 28 and July 22, when stocks in general were in freefall, Tumolillo notes. They have lost nearly 60 percent of their market value since reaching five-year highs in mid '99, he adds.

Tumolillo says the "catastrophic" scenario would occur if one of the four RBOCs is forced into bankruptcy and there's no other company strong enough to replace it. "I put the chance of that happening at 10 percent in the report, but now we're seeing signs of pain that might be raising the chances of this happening," Tumolillo says. "If, for example, one of these companies were even accused of accounting fraud, its stocks could drop precipitously." ▣

EXHIBIT G

SBC ranked #1
telecom company

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- **Press Release**

SBC Launches Telecommunications Service in Atlanta

America's Most Admired Telecom Company Offering Free Monthly Service; Atlanta Customers Now Have a Proven, Reliable Telecommunications Alternative Through SBC Telecom

Atlanta, Georgia, February 14, 2001

Businesses and consumers throughout Atlanta can now choose a telecommunications provider that isn't all talk. As part of an aggressive national expansion plan, SBC Communications, one of the world's leading telecommunications companies and recently named America's most admired telecommunications company by Fortune, is now offering local service in the Atlanta area through SBC Telecom.

Atlanta is among the first of 30 new markets outside of SBC's 13-state coverage area, where the company will compete for business and residential telephone customers. As a special way of saying hello to Atlanta, SBC Telecom is offering customers attractive incentives such as free monthly service and lifetime monthly discounts.

What SBC Telecom brings to Atlanta is more than 100 years of unmatched expertise and reliability in providing telecommunications services to millions of customers around the world. SBC Telecom's parent company, SBC Communications, is the second largest phone company in the U.S., and is the country's leading provider of DSL.

"Our customers will get the best of both worlds, personal attention from a new competitor, plus the experience and resources of a national and global leader," said Lisa Mosley, regional vice president, sales, SBC Telecom. "Customers in Atlanta have told us they want a new, better telecommunications choice, and with SBC Telecom, they will get the most compelling combination of value, service and reliability in the market."

The value of SBC Telecom lies in its attractive portfolio of competitively priced bundled services called SBC Simple Solutions that customers demand, all for a fraction of what they are paying now. Customers will be able to choose from among the following:

- SBC Phone Solution, which combines local phone service with popular calling features like Call Waiting, Caller ID, and Three-Way Calling.
- SBC Web Solution, which combines the features of SBC Phone Solution with dial-up Internet service or DSL service, including unlimited access, a customized browser, and a personal home

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- Access Advantage Plus, a high-capacity line which allows business customers to combine PBX trunks, basic phone lines, data services, Internet access, and long distance service over a single high-speed facility.

Residential customers who choose SBC Simple Solutions will get their first month of local phone service FREE, with no installation charges. Through SBC Long Distance, consumers can also add long-distance service for as low as 8-cents a minute, with no monthly fees or restrictions. SBC Telecom's main office is located at One Ravinia Drive in Atlanta. In addition to hosting a local staff of sales and technical professionals, Atlanta will serve as the southeast regional headquarters for SBC Telecom's network operations.

SBC, a true integrated communications provider, is simplifying the lives of its Atlanta customers by providing one contact and one phone number for both sales and service, (678-587-0517). It is the reliability, quality, and leading edge technology in its products and services that recently led Fortune Magazine to name SBC the "World's Most Admired Telecommunications Company" for the fourth consecutive year, and "America's Most Admired Telecommunications Company" for 2000.

In October 1999, SBC announced it would expand service into 30 new markets outside of its traditional service region - the first time a former Bell operating company will compete for local business and residential customers on a national scale. When the national expansion is completed, SBC will compete in 50 of the nation's top markets, reaching 180 million people - about two-thirds of the U.S. population.

Atlanta was chosen by SBC as an expansion market because it is home to many of America's leading businesses. "This city's skilled work force, high concentration of high-tech businesses, and quality of life make it a perfect fit for SBC," said Vic Bolton, regional vice president, external affairs, SBC Telecom. We are truly excited to be a part of this dynamic city and look forward to being a good corporate citizen of Atlanta."

SBC Communications Inc. (www.sbc.com) is a global communications leader. Through its subsidiaries' trusted brands - Southwestern Bell, Ameritech, Pacific Bell, SBC Telecom, Nevada Bell, SNET and Sterling Commerce - and world-class network, SBC and its affiliated companies provide a full range of voice, data, networking and e-business services, including local and long-distance voice, high-speed Internet access and data transport, voice and data network integration, software and process integration, Web site and application hosting, e-marketplace development, paging and messaging, as well as cable and satellite television, security services, and directory advertising and publishing. In the United States, the company currently has 61.3 million access lines and is undertaking a national expansion program that will bring SBC service to the nation's top 50 markets. SBC has a 60 percent equity interest in Cingular Wireless, its joint venture with BellSouth, which serves 19 million wireless customers. Internationally, SBC has telecommunications investments in more than 20 countries and has annual revenues that rank it among the largest Fortune 500 companies.

EXHIBIT H

SBC retreats from Atlanta
Texas regional telecom fires 40-person staff 15 days after announcing campaign to compete with BellSouth.
Michael E. Kanell - Staff
Saturday, March 3, 2001

Just 15 days after trumpeting a full-tilt campaign to corral a hefty share of the Atlanta market, SBC Telecom on Friday quietly fired its 40-person staff and gave up the fight.
SBC had just become the first of the remaining regional phone companies to jump into other markets, offering service to both residents and businesses. But now SBC has pulled back --- at least temporarily --- from a much ballyhooed promise to spend upward of $6 billion building networks to compete in 30 cities outside the Texas-based company's home region.
Spokeswoman Wendy Flanagan confirmed that SBC is "scaling down" efforts in those out-of-region cities, but company officials wouldn't release the number of job cuts nationally. The company won't seek new customers but will service those relatively few it already has, she said. "This is a slowdown, a scaling down in some offices, not a change in strategy," she said.
SBC has service in "eight or nine" of the 30 cities targeted outside its 13-state region, she said.
The company has permission to offer long-distance in just three of its home states. That means it cannot offer long-distance from most of its turf to Atlanta and other new markets, Flanagan said. "We have to revise the business model, not once a quarter, but continually. The rollout was built on some key assumptions that have not turned out."
On Feb. 15, a company executive vowed to fight for every business and residential customer in Atlanta.
Federal regulators had conditioned their approval of SBC buying Chicago-based Ameritech on the company's promise to compete outside its region. SBC said Friday it will still abide by that agreement, but its retreat risks provoking regulators who may feel the deal's spirit has been violated. SBC is already flirting with $40 million-a-city Federal Communications Commission fines for not complying with deadlines. But should SBC fail to meet all the conditions, it could be whacked up to $1.2 billion, said Michael Balmoris, spokesman for the FCC.
Earlier in the day, the $51 billion-a-year company warned analysts that its earnings this year will be shy of expectations. Analyst Patrick Comack of Guzman & Co. said that SBC's competitive phone business in places like Atlanta could not be profitable until 2004. "I think they are trying to squeeze as much cost out of the operation as they can." Company priorities are delivering high-speed lines and improving customer service in its own region, he said.
Atlanta-based analyst Jeffrey Kagan said the retreat is a response to a telecom downturn. "I don't look at this and say, 'they're trying to get away with something.' I have to believe that if it weren't for the changes in the market, they'd still be here. But this is going to frustrate consumers."
And it will no doubt infuriate advocates who say neither regional Bells nor regulators are serious about giving consumers more choice. "They justified the Ameritech merger as giving them the girth they needed to compete against other telcos," said Gene Kimmelman, co-director of Consumers Union. "But in reality, they were just building bigger monopolies. This demonstrates that the economy of local telephone competition does not exist."

SBC declined to provide specifics. But employees hired over the last few months were let go in Atlanta during an emotional afternoon session in which the bad news was delivered by Lisa Mosley, company vice president. Employees are apparently going to receive a severance package including eight weeks of pay and benefits. Workers at the meeting were told that Mosley will stay on for 90 days, then lose her own job. Another unnamed employee will stay on to run the office.
Two weeks ago, BellSouth praised SBC's entry as further proof that its local market was open to rivals as required. On Friday, BellSouth spokesman Jeff Battcher declined to comment on SBC's decision.

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