

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of)

Petition for Forbearance from the)
Prohibition of Sharing Operating,)
Installation, and Maintenance Functions)
Under Section 53.203(a) of the)
Commission's Rules and Modification of)
Operating, Installation and Maintenance)
Conditions Contained in the)
SBC/Ameritech Merger Order)

CC Docket No. 96-149

CC Docket No. 98-141

**SPRINT CORPORATION'S
OPPOSITION TO PETITION FOR FORBEARANCE
AND MODIFICATION**

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July 1, 2003

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I. Introduction and Summary

SBC Communications, Inc. ("SBC") has filed a petition¹ asking that the Commission forbear from enforcing its rule that prevents it, as a group of Bell operating companies ("BOC"), from sharing operating, installation, and maintenance services ("OI&M") with its section 272 long distance affiliates. See 47 C.F.R. § 53.203(a)(2)-(3). SBC also asks the Commission to exempt it from related market-protecting conditions

¹ Petition for Forbearance and Modification (filed June 5, 2003) (Petition).

extended to its advanced services affiliates in the SBC/Ameritech Merger Order.² SBC further asks for modification of the ASI Tariffing Forbearance Order, which granted tariffing relief “to the extent SBC operates in accordance with the separate affiliate structure established” in the SBC/Ameritech Merger Order.³ In response to the Commission’s public notice dated June 10, 2003 (DA 03-1920), Sprint Corporation – on behalf of its incumbent local exchange, competitive local exchange (“CLEC”)/long distance, and wireless divisions – opposes SBC’s petition.

SBC’s petition echoes the nearly identical petition filed by Verizon on August 5, 2002,⁴ which it submitted during the comment cycle connected with the Commission’s Notice of Proposed Rulemaking on section 272(f)(1) issues and the BOCs’ separate affiliate requirements.⁵ In both proceedings, all non-BOC parties – including all participating state commissions and state utility consumer advocates – agreed that the BOCs, including SBC, remain virtually as dominant today in the local exchange and special access markets as they were when the Non-Accounting Safeguards Order was

² Applications of Ameritech Corp., Transferor, and SBC Communications Inc., Transferee, for Consent to Transfer Control, *Memorandum Opinion and Order*, 14 FCC Rcd. 14712 (1999) (“SBC/Ameritech Merger Order”).

³ Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services, *Memorandum Opinion and Order*, 17 FCC Rcd. 27000 at ¶ 13 (2002) (“ASI Tariffing Forbearance Order”).

⁴ Petition for Forbearance (filed Aug. 5, 2002) (“Verizon 272 proceeding”). Comments and reply comments were filed September 9 and 18, 2002.

⁵ Section 272(f)(1) Sunset of the BOC Separate Affiliate and Related Requirements, WC Docket No. 02-112 (“BOC 272 proceeding”). Comments and reply comments were submitted September 9 and 18, 2002, respectively.

adopted.⁶ If anything, SBC's acquisition of the Pacific Telesis Group, SNET, and Ameritech companies – creating a company with over a third of the nation's access lines and recording \$43 billion in annual revenue⁷ – has served to consolidate SBC's market dominance and help make rapid market share gains in long distance and advanced services.

SBC's petition is curiously quiet about AT&T's pending petition calling for extension of section 272 safeguards of SBC's affiliate in Texas, Southwestern Bell Telephone Company ("SWBT").⁸ In that proceeding too, the Public Utility Commission of Texas, the Texas Attorney General, and all non-BOC commenters emphasized the

⁶ Sprint joined the wide array of non-BOC parties calling for the Commission to exercise its authority to extend the separate affiliate requirements beyond the sunset date. Sprint contends that the Commission should retain current separate affiliate and nondiscrimination requirements and their implementing regulations for any BOC until at least the following competitive milestones have been met: (1) the Commission adopts special access and UNE performance measurements and enforcement measures; (2) 3 years have passed since the BOC received section 271 authority in the last of its states; and (3) the Commission has concluded, after reviewing results of two biennial audits for each state in which section 271 authority has been granted, that the BOC is in compliance with its section 272 obligations. Sprint also recommended that the Commission establish a broad framework for determining whether to extend section 272 requirements or to allow them to sunset, and that that framework be applied to each BOC as a whole rather than on a state-specific basis. See Sprint BOC 272 Comments at 1.

⁷ SBC/Ameritech Merger Order at ¶ 31.

⁸ Petition of AT&T Corp., Extension of Section 272 Obligations of Southwestern Bell Telephone Co. in the State of Texas, WC Docket No. 02-112 (filed April 10, 2003) ("SWBT 272 proceeding"). Comments were filed May 12 and 19, 2003, respectively. The Texas PUC submitted a further letter supporting the petition on May 22, 2003.

importance of maintaining and extending section 272 safeguards on SBC, including the OI&M safeguard.⁹

Regardless of how the Commission ultimately approaches the BOC 272 proceeding and AT&T's petition, SBC's petition – like Verizon's – must be denied. The OI&M restriction is mandated by the Act's requirement that section 272 affiliates "operate independently" from their BOC parents. SBC's "efficiency" and cost claims are unverified and not credible. They are also, frankly, irrelevant. The OI&M restriction remains necessary to prevent BOC misconduct and to protect consumers and the competitive marketplace.

II. The Act's "Operating Independently" Requirement Makes the OI&M Restriction Mandatory.

SBC acknowledges that section 272(b)(1) of the Communications Act expressly requires that the Commission ensure that a BOC and its section 272 affiliate "operate independently." Petition at 5. Yet SBC does not explain how the Commission can disregard this express statutory direction. The Commission found that this restriction is compelled by the Act's express requirement in section 271(b)(1) that BOC affiliates "*shall* operate independently from the Bell Operating Company."¹⁰

The Commission recognized from the outset "that the 'operate independently' requirement ... imposes requirements beyond those listed in sections 272(b)(2)-(5)."

⁹ Comments and reply comments were filed May 12 and 19, 2003, respectively. The Public Utility Commission of Texas submitted a further letter supporting AT&T's petition on May 22, 2003.

¹⁰ Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as Amended, 11 FCC Rcd. 21905 at ¶ 166 (1996) ("Non-Accounting Safeguards Order") (emphasis added).

Order at ¶ 156. The Commission noted that "[t]his conclusion is based on the principle of statutory construction that the statute should be construed so as to give effect to each of its provisions" (Order at ¶ 156), rather than on section 272(b)(3)'s requirement "that a BOC and its section 272 affiliate have 'separate officers, directors, and employees.'"

Order at ¶ 166. The Commission explained that this requirement is necessary "to prevent a BOC from integrating its local exchange and exchange access operations with its section 272 affiliate's activities to such an extent that the affiliate could not reasonably be found to be operating independently, as required by the statute." Id. at ¶ 158.

SBC claims the OI&M safeguards "are statutory regulations and not statutory requirements," and volunteers that the Commission can simply forbear anything it chooses in section 272. Petition at 24. But as the Commission recognized, "allowing the same personnel to perform the operating, installation, and maintenance services associated with a BOC's network and the facilities that a section 272 affiliate owns or leases from a provider other than the BOC would create the *opportunity for such substantial integration of operating functions* as to preclude independent operation, in violation of section 272(b)(1)." Non-Accounting Safeguards Order at ¶ 163. The Commission rightly recognized that these functions are the very core of any communications business. Therefore, "operational independence precludes a Section 272 affiliate from performing operation, installation, and maintenance functions associated with the BOC's facilities." Id. at ¶ 158.

SBC argues that even if the "Commission were to conclude that it did not have the authority to forbear from applying the terms of section 272 itself, that would still not mean it would not forbear from applying regulations adopted in striking a cost/benefit

balance in implementing that provision.” Petition at 25. Congress, however, already conducted its own “balancing” of cost and benefit, and determined that independent operation is essential, notwithstanding the inefficiencies that would ensue. Sprint agrees that the costs of competitive safeguards are reasonable, even necessary, to provide the key market protections that Congress intended. Contrary to SBC’s suggestion, however, the Commission would not be free to disregard this statutory instruction even if SBC’s self-serving assumptions were taken at face value. Genuine operational independence is among the conditions Congress set for the Bell monopolies to enter the interLATA long distance markets, and in light of the market-opening purposes of the Act, Commission discretion is limited. Recognizing that need to ensure a “level playing field,” the Commission had compelling reasons to include the OI&M safeguard as the number one condition for the SBC/Ameritech merger. SBC/Ameritech Merger Order at ¶ 363.

The OI&M safeguard remains an essential requirement to ensure both that the section 272 affiliate does "operate independently" from the BOC and that the BOC does not abuse its dominant position to discriminate in favor of its section 272 affiliate and against its competitors. 47 U.S.C. §§ 272(b)(1), 272(c)(1); Non-Accounting Safeguards Order at ¶ 163.

III. The OI&M Restriction Remains Necessary to Protect the Public and the Competitive Marketplace.

(A) SBC Remains Overwhelmingly Dominant in the Local Exchange and Exchange Access Markets.

Today, SBC and the other BOCs remain overwhelmingly dominant in the local exchange and exchange access markets in which they are the ILEC, and they retain the incentive and the ability to adversely affect long distance competition.¹¹

In the local exchange market, CLECs hold a mere 10.2% of the residential and small business market, and just 13.2% of the total end-user switched access lines.¹² Moreover, only a quarter of these CLECs provide service solely through their own facilities. Id. at Table 3. CLECs remain heavily dependent on BOCs for the facilities necessary to serve the majority of their customers. As Sprint noted in the BOC 272 proceeding, "Six and a half years after passage of the Telecommunications Act of 1996, a 10.2% market share for all competitors combined is hardly a testament to robust competition or a lack of ILEC dominance." Sprint BOC 272 Comments at 7. The Commission must also realize that competitive carriers will have difficulty holding onto what little portion of the market they have gained. The CLEC industry is in a seriously

¹¹ However, the same is *not* true of non-BOC ILECs, which because of their much smaller scale and geographically dispersed (and largely rural) local operations are not in the same position as the BOCs to adversely affect interexchange competition. (Indeed, insofar as Sprint is aware, the Commission has never found that a non-BOC ILEC has discriminated in favor of its affiliate at the expense of other unaffiliated carriers.) The fact that section 272 applies only to the Bell Operating Companies reflects Congress' recognition that the BOCs must be subject to more stringent safeguards than are required for other ILECs.

¹² Local Competition: Status as of Dec. 31, 2002, Industry Analysis Div., Common Carrier Bureau (June 2003) at Tables 1, 2.

troubled, fragile state. Dozens of CLECs have gone bankrupt, and the competitive IXCs are facing sharp revenue declines. Capital for competitive carriers is scarce.

In the exchange access market, competitive gains have also been very limited. Competitive IXCs remain dependent on ILECs for special access. Sprint explained in the Special Access Performance Measurement docket that its long distance division relies on ILECs for approximately 93% of its total special access requirements, despite aggressive efforts to self-supply and to utilize non-ILEC suppliers.¹³ AT&T explained in the ILEC Broadband proceeding that it is similarly dependent on BOC facilities for special access,¹⁴ and WorldCom's comments in the BOC 272 proceeding noted its heavy reliance on ILEC special access.¹⁵ The Texas Attorney General remarked on the BOCs' "market dominance" and "market power abuse," and noted that in Texas it is "easily observable" that "almost all competitors are still dependent upon SWBT for the provision of facilities." Texas AG SWBT 272 Comments at 5. The BOCs "continue[] to possess substantial market power." Consequently, SBC's "continued dominance over local exchange and exchange access services still hinders the development of a fully competitive market, especially given the current status of the financial markets, competitive local exchange carriers' (CLECs) access to capital, and the bankruptcy of many competitive carriers." Texas PUC SWBT 272 Comments at 2; Texas PUC BOC 272 Comments at 2-3 (citations omitted).

¹³ Comments of Sprint Corp., Performance Measures and Standards for Interstate Special Access, CC Docket No. 01-321, at 4 (Jan. 22, 2002).

¹⁴ Comments of AT&T Corp., Review of Regulatory Requirements for Incumbent LEC Broadband Networks, CC Docket No. 01-337, at 28 (Mar. 1, 2002).

¹⁵ WorldCom BOC 272 Comments at 4.

Because SBC so dominates these markets, it naturally has the power to frustrate competition in advanced services. It was for this reason that the Commission imposed as its very first condition on the SBC/Ameritech merger a “separate affiliate for advanced services” as necessary to “promot[e] equitable and efficient advanced services deployment.” 14 FCC Rcd. 14712 at 14969. The Commission recognized that “[e]stablishing an advanced services separate affiliate will provide a structural mechanism to ensure that competing providers of advanced services receive effective, nondiscriminatory access to the facilities and services of the merged firm’s incumbent LECs that are necessary to provide advanced services” and “should ensure a level playing field between SBC/Ameritech and its advanced services competitors.” *Id.* at ¶ 363.

The likelihood of OI&M misconduct by BOCs has only increased since the Non-Accounting Safeguards and the SBC/Ameritech Merger Orders issued. As SBC and the other BOCs have received section 271 authority in all but a handful of states, they have a rapidly growing stake in the long distance market – SBC is now among the nation’s largest long distance carriers, with 7.6 million customers¹⁶ – and their “incentives to act in an anti-competitive manner against competitors in both the local and long distance markets have increased.” Texas PUC SWBT 272 Letter at 2.

SBC obviously has the incentive and the ability to abuse its dominant market position by misallocating OI&M costs and discriminating in favor of its affiliates and against its competitors. SBC's claim that these risks are “speculative and remote” (Petition at 4) is plainly false. The OI&M restriction is now more important than it has ever been.

¹⁶ Investor Briefing, SBC Investor Relations (Apr. 24, 2003) at 7.

(B) The OI&M Restriction Remains Necessary to Prevent Cost Misallocation.

SBC's claims that conventional, arms' length dealing requirements would be sufficient to prevent cost misallocation are without merit. Petition at 9. It is one thing to have a rule prohibiting cross-subsidization, and quite another to be able to detect and then enforce it. In the GTE Consent Decree proceeding, for example, the court noted how difficult it can be to monitor and prevent cross-subsidization, given Verizon's ability to shroud misconduct in accounting.¹⁷ As the court explained, it is "the more indirect, subtle vehicles for cross-subsidization that are ordinarily the most difficult to detect." 603 F. Supp. at 738. OI&M costs involve more opportunity for abuse than administrative costs. Similarly, in the Non-Accounting Safeguards Order (at ¶ 163), the Commission recognized that relying solely on accounting safeguards is unrealistic:

We conclude, as we did in the BOC Separations Order, that allowing the sharing of such services would require 'excessive costly and burdensome regulatory involvement in the operation, plans and day-to-day activities of the carrier ... to audit and monitor the accounting plans necessary for such sharing to take place.' Accordingly, we read section 272(b)(1) to bar a section 272 affiliate from contracting with a BOC or another entity affiliated with the BOC to obtain operating, installation, and maintenance functions associated with the section 272 affiliate's facilities.

The Texas Attorney General also recognized that "the non-accounting safeguards provided by section 272 of the Telecommunications Act," including the OI&M safeguards, "are the only effective means of monitoring ... [a BOC's] fulfillment of its open access obligations." Texas AG BOC 272 Comments at 2.

¹⁷ United States v. GTE Corp., 603 F. Supp. 730 (D.D.C. 1984) (subsequent history omitted).

SBC argues that it “has no reason to engage in any cross-subsidization,” because its rates are no longer cost-based. Petition at 11. Even under a price-cap regime, however, SBC obviously can exploit its dominance in the local exchange and exchange access markets to subsidize its entry into the long distance and advanced services markets, consolidate its dominant position, frustrate competition, and ultimately harm consumers.

The Texas PUC emphasized that because SBC is the “dominant provider[] of local-exchange and exchange-access services” it has “incentive to allocate improperly to its regulated core business costs that would be properly attributable to its competitive ventures such as its Section 272 Affiliates.”¹⁸ The Texas authorities have also noted troubling “alleg[ations] that SBC Texas, since receiving 271 approval in Texas, has engaged in intra-corporate, cross-subsidization practices with its long distance affiliate that have enabled it to engage in price squeezes for interLATA and intraLATA telecommunications services that are anti-competitive, predatory, unreasonably preferential, and discriminatory.”¹⁹ The suggestion that cost misallocation is no longer a concern is clearly mistaken.

SBC is also mistaken in claiming that “the Commission’s detailed cost-accounting rules and auditing procedures” prevent cross-subsidization. Petition at 11. No BOC has

¹⁸ Comments of the Public Utility Commission of Texas, Accounting Safeguards Under the Telecommunications Act of 1996: Section 272(d) Biennial Audit Procedures, CC Docket No. 96-150 (filed Jan. 30, 2003) at 7 (“Texas PUC Audit Comments”). The commenters, including state commissions, agreed SBC’s audit was unreliable.

¹⁹ Texas PUC SWBT 272 Letter at 2, citing Complaint of AT&T Communications of Texas, L.P. against Southwestern Bell Telephone Company and Southern Bell Communications Service, Inc. d/b/a/ Southwestern Bell Long Distance, Docket No. 23063 at 2-3 (Sept. 22, 2000) (pending).

yet completed an audit establishing even a single year's compliance with section 272 requirements. In Texas – the only state in which SBC has yet purported to conduct an audit as required under section 272(d) – the Texas PUC and the Federal/State Joint Oversight Team each concluded that the SWBT audit was “incomplete” and had “clear flaws,” omitted many “types of transactions that implicate the safeguards contained in Section 272 of the Act and related FCC rules,” “provided insufficient information,” and failed to investigate identified discrepancies “between rates charged to the Section 272 affiliate and rates charged to ... unaffiliated carriers.”²⁰ In light of the audit's repeated, and unacceptable, shortcuts and serious and fundamental deficiencies, the Texas PUC concluded that the audit failed to show “whether SBC has met all requirements regarding the interactions between itself and its section 272 affiliates.”²¹

Another concern the Texas PUC has is that, unfortunately, the first audit of SBC Texas's Section 272 affiliate did not provide the PUC with sufficient information to determine whether SBC Texas was complying with the requirements. The audit failed to adequately investigate whether SBC Texas is engaging in cross-subsidization. ... The audit had systemic problems such as insufficient information generally; failure to audit the corporate support organizations (where nearly all cross-subsidization can be hidden); lack of work papers for audit; and sampling methodology used, when samples are involved, failed to draw statistically valid samples.

Moreover, as the National Association of State Utility Consumer Advocates (“NASUCA”) pointed out in the BOC 272 proceeding, “Qwest's recent disclosure that it

²⁰ Texas PUC Audit Comments at 7.

²¹ Id. at 5.

had improperly accounted for \$1.1 billion dollars in revenue calls into question the adequacy of accounting safeguards alone in protecting the public interest."²²

In adopting the OI&M safeguard, the Commission recognized that accounting and auditing measures are not enough. The practical difficulties of detecting BOC cost misallocation and enforcing compliance remain just as compelling today.

(C) The OI&M Restriction Remains Necessary to Curb Discrimination.

SBC contends that the OI&M safeguard is "not necessary" to prevent BOC discrimination. Petition at 12. In the Non-Accounting Safeguards Order, however, the Commission realized that "[a]llowing a BOC to contract with the section 272 affiliate for operating, installation, and maintenance services would *inevitably* afford the affiliate access to the BOC's facilities that is superior to that granted to the affiliate's competitors." Non-Accounting Safeguards Order at ¶ 163. The Commission found that the OI&M restriction therefore was necessary to implement section 272(e)(4)'s requirement that a BOC "may provide any interLATA or intraLATA facilities or services to its interLATA affiliate [only] if such services or facilities are made available to all carriers at the same rates and on the same terms and conditions." *Id.* at ¶ 164.

Such discrimination is a real problem, which will only get worse as SBC increases its expansion into the long distance market in its home states. Indeed, the Public Utility Commission of Texas cautioned recently that as SBC "has entered the long distance

²² NASUCA BOC 272 Reply at 8. NASUCA added, "At a time when public confidence in accounting standards for the telecommunications industry is ebbing, it would be administratively efficient and prudent to keep the separate affiliate requirements in place as the Commission wrestles with how best to ensure that financial information being report in the recent past – including past compliance with section 272 by those now urging its elimination – has been accurate." *Id.*

market, its incentives to act in an anti-competitive manner against competitors in both the local and long distance markets have increased.” Texas PUC SWBT 272 Letter at 2. The Texas commission also recounted in the BOC 272 proceeding that, two years after receiving section 271 approval, SWBT continues to fail to meet performance measures, having committed more than 5,254 violations between November 2001 and April 2002 alone, including repeated instances of discrimination.²³ It concluded (id. at 7):

Until these matters [special access performance measures] are resolved, the separate affiliate requirements of section 272 [including the OI&M restriction] remain the most effective means of assessing the BOCs' compliance with the statutory obligation to not discriminate against other entities in favor of its affiliates.

This belies SBC's suggestion that performance measures and available “substantial financial penalties” are sufficient to prevent “any attempted discrimination by SBC.” Petition at 15-16.

The Commission must acknowledge that the situation for competitive carriers, including competitive IXCs, has been made worse by the BOCs' failure to comply fully with their obligations under the Act. As the Texas Attorney General noted, SBC and other BOCs "have all been fined for a list of abuses and violations of their statutory and regulatory obligations – all of which occurred during a period in which the RBOCs must have been particularly sensitive to the need for compliance."²⁴ To date, the BOCs have been assessed fines, penalties, commitments, or refunds of over \$2.1 billion for violations

²³ Texas PUC BOC 272 Comments at 7. The Texas commission added "that there does not appear to be a significant trend downward" in SWBT violations. Id.

²⁴ Texas AG BOC 272 Reply at 3 (noting also that SBC and other BOCs "have used every means to slow or prevent the development of robust competition").

of statutory obligations, merger conditions, and conditions of section 271 approvals.²⁵

SBC's record of noncompliance with market-opening requirements, accounting guidelines, and competition safeguards is the worst in the BOC industry. SBC has incurred more than \$1.1 *billion* in such fines, penalties, commitments, or ordered refunds for violations of statutory obligations, merger conditions, and conditions of section 271 approvals at both state and federal levels.²⁶ SBC has been repeatedly fined, in particular, for its continuing unwillingness to meet wholesale services standards that are essential to competition. Since adoption of the SBC/Ameritech Merger Order, SBC has failed to meet wholesale performance requirements every single month, paying an average monthly fine of nearly \$3 million.

Moreover, these performance violations have not been accurately or completely reported by SBC. Independent auditors, reviewing SBC's 2001 performance reporting under market-opening conditions of the merger order, reported on August 30, 2002 that SBC's monthly performance filings contained repeated errors, misclassification of data, and omissions which affected SBC's calculations. SBC subsequently acknowledged that its reporting for 2002 and early 2003 contained similar irregularities. On March 30, 2003, SBC was obliged to enter a consent decree to address the chronic reporting

²⁵ The competition advocacy group, Voices for Choices, maintains a running tally of these penalties. "Bell Fine Watch" at <http://www.voicesforchoices.com>.

²⁶ SBC companies have been fined, ordered to make refunds, or compelled to enter consent decrees more than 160 times since September 1996, affecting every BOC state in its territories. See id.

deficiencies noted by the independent auditors – and pay a \$250,000 penalty – as part of an Enforcement Bureau investigation of these accounting irregularities.²⁷

Other evidence of SBC misconduct in just the last year and a half includes investigations into inaccurate information submitted in affidavits in two separate section 271 applications to provide long distance service;²⁸ intentionally violating an Enforcement Bureau Order directing the company to provide sworn verification of the truth and accuracy of its answers to a Bureau letter of inquiry relating to SBC's provisioning and maintenance of digital subscriber line service;²⁹ fines for twenty-four violations of the Commission's collocation rules;³⁰ a fine for violating reporting requirements under the Merger Order;³¹ a fine of \$6 million (the statutory maximum for the five violations) for failure to comply with its obligation to offer the shared transport

²⁷ SBC Communications Inc., DA 03-825 (rel. Mar. 20, 2003) (consent degree imposing \$250,000 penalty and mandating a formal compliance plan to remedy systemic misreporting of wholesale performance measures required under market-opening conditions of the SBC/Ameritech Merger Order).

²⁸ SBC Communications, File Nos. EB-01-IH-0339 and EB-01-IH-0453, *Order*, rel. May 28, 2002 (FCC 02-153). The Commission was investigating whether SBC had violated Sections 251 and 271 of the Act, and the terms of the June 1999 SBC/SNET Consent Decree, by providing inaccurate information about (1) competing carriers' ability to access loop qualification information from SBC, and (2) a competing carrier's difficulties obtaining electronic access to SBC's LMOS system. SBC was fined \$3.6 million.

²⁹ SBC Communications, Inc., EB-01-IH-0642, *Forfeiture Order*, rel. Apr. 15, 2002 (FCC 02-112) at ¶ 3. SBC stated that it had "intentionally refused to provide the sworn statement and that it did not intend to comply with that aspect of the Bureau's Order." It was fined \$100,000.

³⁰ SBC Communications, Inc., EB-00-IH-0326a, *Order on Review*, rel. Feb. 25, 2002 (FCC 02-61).

³¹ SBC Communications, Inc., EB-00-IH-0432, *Order on Review*, rel. May 29, 2001 (FCC 01-184).

UNE in the former Ameritech states on terms at least as favorable as those offered to telecommunications carriers in Texas;³² and federal and state penalties every month for failing to meet wholesale performance standards.

SBC's misconduct has directly impacted its competitors. AT&T has catalogued a variety of "anticompetitive strategies to harm long distance competition," among them "discrimination in provisioning of access to their essential network facilities, abuse of the PIC change process, discriminatory growth tariffs, and engaging in improper inter-affiliate transfers," as well as "price squeezing" by marketing intrastate long distance services at rates below costs, in violation of section 272(e).³³ Birch Telecom has pointed to repeated discrimination that has forced it to bring a series of complaints against SBC. Nor are these empty allegations. As the Texas commission pointed out, in a recent arbitration proceeding brought by three CLECs,³⁴

[t]he arbitrators found that SBC Texas was refusing to allow CLEC customers to presubscribe to SBC Texas's intraLATA toll service. The arbitrators found such actions to be a clear violation of existing state law and the FTA's pro-competitive policies, and therefore ordered SBC Texas to provide toll service on a non-discriminatory basis."

³² SBC Communications, Inc., EB-01-IH-0030, *Notice of Apparent Liability for Forfeiture*, rel. Jan. 18, 2002 (FCC 02-7).

³³ See AT&T SWBT 272 Petition at 14; AT&T BOC 272 Comments at 21-44.

³⁴ Texas PUC SWBT 272 Letter at 2-3, citing Petition of MCIMetro Access Transmission Services, LLC, Sage Telecom, Inc., Texas UNE-Platform Coalition, McLeod USA Telecommunications Services, Inc. and AT&T Communications of Texas, L.P. for Arbitration with Southwestern Bell Telephone Company under the Telecommunications Act of 1996, Docket No. 24542, *Arbitration Award* (May 1, 2002) at 201-203 (emphasis added, footnote omitted).

SBC's suggestion that a BOC would not discriminate because it "cannot be assured of being the choice for a disgruntled customer" (Petition at 15) plainly ignores the BOC's dominance of both the long distance and advanced services markets.

Given this evidence – discrimination against wholesale competitors, accounting irregularities, and violations of performance measures and merger conditions – it is clear that the OI&M safeguards should remain in place.

(D) The OI&M Safeguard is Not Unreasonably "Inefficient" or Burdensome.

SBC's petition alleges that the OI&M safeguard "impos[es] on SBC a grossly inefficient business and cost structure" (Petition at 10), and that the Commission has overlooked the lack of any potential "countervailing benefits." SBC Petition at 2. In the Non-Accounting Safeguards proceeding, however, the Commission had a full and extensive record, including comments submitted by every BOC and more than fifty other parties. Cost and efficiency arguments featured prominently in the RBOCs' submissions. Ultimately, reviewing its extensive record, the Commission reached an "appropriate balance between allowing the BOCs to achieve efficiencies within their corporate structures and protecting ratepayers against improper cost allocation and competitors against discrimination." Non-Accounting Safeguards Order at ¶ 167. It imposed the OI&M restriction, but declined to find that "operating independently" would require prohibition of all shared services. *Id.* at ¶ 168.

SBC claims that the OI&M restriction imposes a dazzling sum of "costs," which it claims are lost "efficiencies" caused by its compliance. Petition at 20 & Dietz Decl. at ¶ 11. The petition, however, offers no real or reliable evidence. Rather than provide

audited data, SBC cites only unverified "*estimated savings*" based on a theoretical analysis prepared solely for advocacy purposes. Dietz Decl. at ¶ 12. The basis of SBC's claimed cost estimates are described only in general terms, and its figures are not independently verified. As the Texas Attorney General explained in the BOC 272 proceeding, after reviewing similar declarations attached to Verizon's comments, "RBOCs' 'efficiency losses' arguments are suspect, since the rules permit RBOC and section 272 affiliates to share a broad range of services and facilities, including sales, marketing, and administrative services." Texas AG BOC 272 Reply at 3.

SBC's factual assertions are difficult to accept at face value. SBC claims that the cost of maintaining duplicate personnel in its section 272 affiliates is a substantial "burden" on the company and its ability to provide service. Yet the Commission may note that SBC is one of the largest companies in the country, employing nearly 200,000 people – most of them in SBC's BOC operations.³⁵ In comparison, SBC's long distance and advanced services affiliates have only a handful of employees already serving nearly 8 million customers.

Sprint will grant that the OI&M safeguard may cause SBC some burdens and some inefficiencies. But the limited burdens and inefficiencies of the OI&M safeguard are reasonable when weighed against cost misallocation and discrimination in a marketplace that is a long way from being fully competitive. Indeed, SBC claimed annual savings of \$1.43 billion by virtue of the SBC/Ameritech merger alone, and

³⁵ SBC/Ameritech Merger Order at ¶ 31.

apparently thinks nothing of incurring tens or even scores of millions annually in penalties and forfeitures. Regardless, SBC retains huge advantages of scale and scope – not to mention a captive customer base – that vastly outweigh any impact of the OI&M restriction on its costs and operations.

SBC also claims that the OI&M restriction discourages “the deployment of new technologies.” Petition at 19. SBC provides no substance to support its assertion, and the Commission already determined that the loss of potential efficiency was a necessary trade-off to and required by the Act’s pro-competitive mandate. Non-Accounting Safeguards Order at ¶ 167. If the Commission disregarded the “operating independently” requirement of the Act – and if it failed to maintain an environment that promotes competition – other carriers would be less willing to invest. In the long run, as the dominant service provider in its territories, SBC itself will have far less incentive to invest, and every incentive to compel consumers and carrier customers to pay more for its services.

SBC also claims that the OI&M restriction is “anachronistic” because “[t]he technological and marketplace lines between local, long distance and advanced services are increasingly blurred.” Petition at 19.³⁶ For the time-being, however, SBC’s competitors are bound to distinctions between these categories of service, and Section 272 calls for SBC’s affiliates to be in the same position.

³⁶ Ironically, in the UNE Triennial Review, SBC and the other BOCs opposed updating section 251 unbundling requirements to reflect DSL and packet-based technologies.

(E) The OI&M Restriction Does Not Place SBC at a Competitive Disadvantage.

SBC claims, incredibly, that it is at a "disadvantage vis-à-vis its competitors " because of the OI&M safeguard. Petition at 14. SBC surely needs no protection from competitive "disadvantage."

In a recent statement to investors, SBC touted: "We had our best-ever quarter for DSL and long-distance subscriber growth, and we expect continued strong results from innovative product bundles and an aggressive marketing campaign."³⁷ SBC explained that, as of April 21, SBC had gained – virtually overnight – a retail long distance share of 13 percent in California, and in Texas and those other states where SBC provides long distance "at the end of the first quarter, SBC's retail voice line penetration had reached 43 percent overall and about 50 percent for consumer lines."³⁸ SBC emphasized how its "access-line strategies" are based on leveraging its position as dominant local exchange carrier, and trumpeted its success in winning back customers from struggling competitors.³⁹

SBC's consumer winback rate improved 500 basis points versus the fourth quarter of 2002 to 40 percent. This marks SBC's third consecutive quarter with a strong sequential improvement in its consumer winback percentage.

SBC's business winback rate topped 50 percent, consistent with recent quarters.

³⁷ SBC Investor Briefing, No. 235, Apr. 24, 2003, at 1.

³⁸ Id. at 7. Moreover, SBC accomplished these market gains without any significant investment in its own long distance facilities, but simply by leveraging its overwhelming dominance in the local exchange services market.

³⁹ Id. at 6.

SBC's announcement also showed it lost fewer retail lines to CLEC competitors and gained net market share from its few local competitors, even while reporting a \$5 billion profit and dramatically expanding its long distance market share.⁴⁰

In contrast, the CLEC industry and competitive long distance carriers are struggling through an extraordinary downturn. The competitive industry clearly is in a troubled, fragile state. Scores of CLECs have been forced into bankruptcy, as have several competitive IXCs.⁴¹ Assessing SBC's market, where CLECs have actually lost net market share, the Texas PUC showed its deep concern in its Texas Competition Report.⁴² All non-RBOC carriers have seen drastic declines in their market capitalization.⁴³ All potential BOC competitors face extraordinarily difficult times,

Far from being handicapped in the marketplace, SBC enjoys significant cost *advantages* unavailable to other interLATA carriers. The sharing of sales and marketing services alone gives SBC a significant edge over competitors. As WorldCom noted in the BOC 272 proceeding, the president of Verizon's long distance company was quoted bragging that shared sales and marketing give it customer acquisition costs 20% to 30% lower than its non-BOC competitors.' WorldCom BOC 272 Reply at 6-7 (quoting an article in USA Today). And while SBC claims that the OI&M restriction disadvantages SBC versus competing carriers that "may serve their customers using a single set of

⁴⁰ See id. at 6, 12.

⁴¹ See Public Utility Commission of Texas, Report to the 78th Texas Legislature: Scope of Competition in Telecommunications Markets in Texas (Jan. 2003) at 17 & App. G.

⁴² Id. at 19, 20 & App. H, Table 22.

⁴³ Id. at 7 & App. B.

[personnel] and systems” (Petition at 8), it is exceptionally rare that any other carrier can provide the seamless “end-to-end services” that SBC ascribes to them. Competitors can offer such end-to-end service only where they have their own fiber to the premises at each circuit end, and only a tiny percentage of buildings nationwide are reached by non-ILEC fiber. In addition, in the vast majority of cases (even with the largest business customers), competitive long distance carriers must routinely coordinate installation, repair, and maintenance actions with the BOC, just as its section 272 affiliate must do.

So while SBC claims that the OI&M requirements force it to “operate with added costs” and “complicate its efforts to provide the high level of service quality that customers expect” (Petition at 8-9), in fact it is merely in the same position as other long distance carriers. It is entirely appropriate that SBC's long distance and advanced services affiliates should follow the same procedures as these competitors – and face the same difficulties. That principle of equal treatment is embedded in section 272 and acknowledged in the Non-Accounting Safeguards and SBC/Ameritech Merger Orders.⁴⁴ Lifting the OI&M would in fact give SBC's section 272 affiliates an unfair advantage over competitors.

⁴⁴ See Non-Accounting Safeguards Order at ¶ 160; SBC/Ameritech Merger Order at ¶ 363.

IV. The Petition Fails to Meet the Requirements of Section 10 for Forbearance.

Section 10(a) of the Act provides that the Commission may forbear from applying requirements of the Act only if the petitioner proves three stringent criteria are met:⁴⁵

- (1) enforcement is not necessary to ensure that the charges and practices of the carrier are just and reasonable and are not unjustly or unreasonably discriminatory;
- (2) enforcement is not necessary to protect consumers; *and*
- (3) forbearance is consistent with the public interest.

47 U.S.C. § 160(a). Section 10(b) provides further that, in considering the public interest under section 10(a)(3), "the Commission *shall* consider whether forbearance from enforcing the provision or regulation will promote competitive market conditions, including the extent to which such forbearance will enhance competition..." 47 U.S.C. § 160(b).

(A) The OI&M Restriction Remains Necessary to Ensure that Charges and Practices Are Just and Reasonable and Not Discriminatory.

Sprint has already established that the OI&M restriction remains necessary to prevent discrimination in favor of SBC's long distance and advanced services affiliates. See Section III, supra. Supporting AT&T's call to extend section 272 safeguards for

⁴⁵ SBC implies that section 10 is not discretionary, and that if conditions are met the Commission "is required to forbear." Petition at 9. The courts have recognized, however, that the Commission has significant latitude to determine, in the reasonable exercise of its expert judgment, whether a petitioner has shown that such conditions are met. The courts' "deference is particularly great where ... the issues involve 'a high level of technical expertise in an area of rapidly changing technological and competitive circumstances.'" Verizon Tel. Cos. v. FCC, 292 F.3d 903, 909 (D.C. Cir. 2002), quoting from Sprint Comms. Co. v. FCC, 274 F.3d 549, 556 (D.C. Cir. 2001).

SWBT, including the OI&M restriction, the Texas authorities emphasized that “easily observable market conditions” lend “credence to allegations [of] market power abuse.”⁴⁶ In the BOC 272 proceeding, all of the state commissions and their consumer advocates commenting on these issues recognized the continuing need for these safeguards. As NASUCA explained, “Clearly, the BOCs still have market power and thus still have the ability to discriminate against competitors. ... By any reasonable definition, the BOCs are still monopolists,” and the situation is only “likely to worsen.” NASUCA BOC 272 Comments at 4. The Commission likewise has acknowledged, in successive section 271 orders involving SBC, that “compliance with section 272 is of ‘crucial importance’ because the structural, transactional, and nondiscrimination safeguards of section 272 seek to ensure that BOCs compete on a *level playing field*.”⁴⁷

(B) The OI&M Restriction Remains Necessary to Protect Consumers.

SBC claims that these market-opening restraints “hurt consumers by degrading [SBC’s] service quality,” “by increasing [SBC’s] prices,” and “by diminishing competition” by reducing SBC’s pricing and quality pressure on its competitors. Petition at 17, 20, 21. SBC’s self-absorbed view of the competitive market hints at an awareness of its own dominance of the marketplace.

⁴⁶ Texas AG SWBT 272 Comments at 1, 4.

⁴⁷ See Application by SBC Comms. Inc., Southwestern Bell Tel. Co., and Southwestern Bell Comms. Inc. d/b/a Southwestern Bell Long Distance, Pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-Region, InterLATA Services in Tex., 15 FCC Rcd. 18354 at ¶ 395 (2000), quoting Application of Ameritech Mich. Pursuant to Section 271 of the Comms. Act of 1934, as Amended, to Provide In-Region, InterLATA Services in Mich., 12 FCC Rcd. 20543, 20725 (1997). See also SBC/Ameritech Merger Order at ¶ 363 (structural separation between SBC and advanced services affiliates is necessary to ensure a “level playing field”).

The Commission may rest assured that SBC – one of the world’s largest telecommunications companies – is quite capable of providing quality service, even while subject to these limited restrictions. Its rapid market share gains in interLATA long distance services, advanced services, and the enterprise market show not only that these safeguards do no handicap SBC in the market, but that SBC is able to capitalize on its monopoly legacy – including ubiquitous network, an established customer base, and a vast and predictable revenue stream.

Contrary to SBC’s claim, its competitors simply do not have the ability to provide “customers with seamless services” (Petition at 18-19), such as “end-to-end monitoring and repair.” It is an exceptionally rare customer when a competitor has this capability, as Sprint explained in Section III(E), supra. And SBC’s suggestion that SBC’s “help” ensures competitors enjoy a higher “level of service for its *own* operations on behalf of their own customers” (Petition at 19) is belied by the business-destroying troubles that SBC’s competitors have routinely experienced dealing with this incumbent.

SBC’s assertion of an “estimated” \$77 million in annual “savings” is not credible. See Section III(D), supra. Even assuming SBC realized any meaningful reduction in OI&M costs, however, SBC does not explain why these “savings” would actually be passed through to consumers in a long distance market that is already competitive or in a local exchange market that is not. The New Jersey Department of the Ratepayer Advocate (NJDRRA) addressed the impact of the OI&M safeguard on consumers in its BOC 272 Comments. It pointed out that the Commission has received no showing, and has no record to support a finding, that a BOC's long distance affiliate is *not* subsidized at the expense of consumers. NJDRRA BOC 272 Reply at 14-16. SBC has undeniable

market power in local exchange, exchange access, and advanced services, and will continue to have such power for the foreseeable future. As the NJDRA agreed, that market power is virtually certain to lead to cross-subsidies as BOCs buy market share in other services.

Retail consumers remain well-served by the industry, even with the OI&M safeguard in place. SBC's claims about "degrading service quality" ring hollow. Petition at 17. Consumers receive better, and cheaper, service because of competition enabled by competition safeguards, including the OI&M's protection against cross-subsidization and discrimination against competitors.

(C) Forbearing to Enforce the OI&M Restriction Would be Contrary to the Public Interest.

SBC claims that the OI&M requirement increases costs and impairs quality while "offer[ing] virtually no public benefit." Petition at 22. Sprint believes the record shows that removing the OI&M safeguard for SBC would harm the public interest by undermining competition. Lifting the long-standing OI&M restriction would inevitably lead to some measure of cost misallocation and discrimination.

SBC's suggestion that removing these marketplace protections would delay the "deployment of new technologies" or advanced services (Petition at 19, 26) is an empty claim. In setting this merger condition, the Commission found, by "ensur[ing] a level playing field between SBC/Ameritech and its advanced services competitors ... this condition will greatly accelerate competition in the advanced services market by lowering the costs and risks of entry and reducing uncertainty, while prodding all carriers, including the Applicants, to hasten deployment." SBC/Ameritech Merger Order at ¶ 363.

SBC contends that the *Computer III* decision shows that structural separation is costly and also unnecessary for advanced services.⁴⁸ Of course, that ruling predates the emergence of a competitive market under the 1996 Act. In implementing the Act, the Commission found in both the Non-Accounting Safeguards and the SBC/Ameritech Merger Orders that the competitive marketplace and the public interest *required* at least this degree of structural separation for both long distance and advanced services. SBC also mischaracterizes the *Comsat* ruling. The Commission lifted structural separation requirements from Comsat's World Systems Division only after finding that it was no longer dominant in its all but a small part of its Intelsat product markets.⁴⁹ Indeed, Comsat's request for forbearance of structural separation, streamlined tariffing, and rate of return provisions was denied for certain services and markets, and Comsat also remained subject to structural separation requirements for thin routes and other aspects of its business, despite having little of the market dominance obviously enjoyed by SBC. SBC's argument that these two orders invite forbearance here is misplaced. Petition at 22-23.

V. Conclusion

The Commission addressed the OI&M issue thoroughly in the Non-Accounting Safeguards proceeding. It found that the OI&M restriction was mandated by the Act, that it was necessary to reduce cost misallocation and discrimination, and that it was a

⁴⁸ Petition at 22, citing Amendment of Section 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry), *Report and Order*, 104 FCC 2d 958 (1986) (subsequent history omitted).

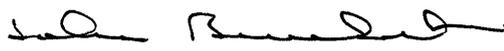
⁴⁹ COMSAT Corporation; Petition Pursuant to § 10(c) of the Communications Act for Forbearance from Dominant Carrier Regulation, *Order and Notice of Proposed Rulemaking*, 13 FCC Rcd.14083 at ¶ 180 (1998) (subsequent history omitted).

reasonable trade-off between BOC efficiency and market protection. The Commission reiterated the importance of the OI&M safeguard in the SBC/Ameritech Merger Order. In seeking forbearance, SBC has offered only unsubstantiated claims, and it fails to meet the demanding requirements of section 10.

Even with the OI&M restriction in place, the playing field is hardly level. SBC and the other BOCs clearly still have the ability and incentive to unfairly exploit their market dominance. In the BOC 272 proceeding and in the SWBT 272 proceeding, as well as the Verizon OI&M proceeding, and the SWBT Audit proceeding, virtually all other non-BOC commenters agreed that the section 272 safeguards, including the OI&M restriction, remain necessary. SBC's petition should be denied.

Respectfully submitted,

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July 1, 2003

Sprint Corp. Opposition to
Petition for Forbearance
CC Docket Nos. 96-149/98-141
July 1, 2003

CERTIFICATE OF SERVICE

I hereby certify that a copy of Sprint Corporation's Opposition to Petition for Forbearance and Modification in CC Docket Nos. 96-149 and 98-141 was delivered by electronic mail or First Class, postage prepaid, U.S. Mail on this 1st day of July 2003 to the parties listed below.


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