

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of

Petition of SBC for Forbearance From
the Prohibition of Sharing Operating,
Installation and Maintenance Functions
Under Sections 53.203(a)(2) and
53.203(a)(3) 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

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REPLY COMMENTS IN SUPPORT OF
PETITION FOR FORBEARANCE AND MODIFICATION

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On June 5, 2003, SBC Communications Inc., on behalf of itself and its subsidiaries (collectively referred to as "SBC"), filed a petition (the "SBC Petition") with the Federal Communications Commission (the "Commission") to forbear from enforcing sections 53.203(a)(2) and 53.203(a)(3) of the Commission's Rules,¹ which prohibit sharing of operating, installation and maintenance ("OI&M") functions by section 272 affiliates and Bell operating companies ("BOCs") and by section 272 affiliates and other affiliates of the BOCs. SBC also asked the Commission to modify the provisions of the *SBC/Ameritech Merger Order*² that restrict the sharing of OI&M services.³ The SBC

¹ 47 C.F.R. §53.203(a)(2)-(3).

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 In addition, as was discussed in Part IV of the SBC Petition, the Commission was asked to make clear that the elimination of the OI&M restrictions would not affect the relief from tariffing it granted in *Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services*, Memorandum Opinion and Order, 17 FCC Rcd. 27,000 (2002) ("*ASI Tariffing Forbearance Order*").

Petition was accompanied by an affidavit from Richard Dietz, the President and CEO of SBC Data Services, Inc. (the “Dietz Affidavit”). On June 16, 2003, SBC made an *ex parte* submission that further detailed the costs of the OI&M restrictions (the “Costs Submission” and, together with the SBC Petition and the Dietz Affidavit, the “SBC Filings”).

Comments in opposition to the SBC Petition were filed by AT&T Corp. (“AT&T”), WorldCom, Inc. d/b/a MCI (“WorldCom”) and Sprint Corporation (“Sprint”). Comments in support of the SBC Petition were submitted by the Verizon telephone companies (“Verizon”). SBC files these reply comments pursuant to the Public Notice released by the Commission on June 10, 2003.

I. INTRODUCTION AND SUMMARY

The SBC Filings show how the OI&M restrictions hurt consumers by impairing SBC’s ability to provide timely, cost-effective and reliable service to its customers. SBC’s customers face degraded service quality, lower reliability and higher costs through needlessly prolonged outages and slowed installations of new services. The SBC Filings also show how the OI&M regulations are not necessary to prevent cross-subsidization or discrimination, which were their stated purposes. On this basis, SBC has sought forbearance from the OI&M regulations and modification of the provisions of the *SBC/Ameritech Merger Order* that restrict the sharing of OI&M functions.

Not surprisingly, AT&T, WorldCom and Sprint oppose the lifting of the OI&M restrictions. Eager to saddle SBC with regulatory burdens that impair SBC’s ability to compete effectively in the marketplace, particularly for larger business customers, these

carriers largely ignore, and would have the Commission ignore, the harm to consumers that flows from the OI&M restrictions. But while AT&T, WorldCom and Sprint may dismiss SBC's concerns about the difficulty of providing reliable, high-quality services to SBC's customers, the Commission should not, and not only because of the harm that SBC's customers experience. To the extent that AT&T, WorldCom and Sprint can foster and prolong regulatory restraints that impair the services that SBC can provide, AT&T, WorldCom and Sprint face less competitive pressure to improve the quality, reliability and pricing of their own service. Thus, it is not just SBC's customers, but all customers, that are harmed when SBC is precluded from providing service in an efficient manner. As noted by former FCC Chief Economist Joseph Farrell: "When firms are hamstrung, even in order to equalize them with other firms, consumers are liable to lose out."⁴

Not only do AT&T, WorldCom and Sprint ignore the costs of the OI&M restrictions to SBC and its customers, they exaggerate the supposed benefits. They claim, in particular, that SBC maintains bottleneck control over critical network facilities and that the OI&M restrictions are necessary to ensure that SBC does not discriminate in its provision of these facilities. This is an argument that SBC's competitors use to try to justify every possible restriction on SBC. In each case, they begin by grossly understating the extent of local competition. They then trot out their litany of claimed anticompetitive acts, which, they argue, proves the need for whatever regulatory requirement is at issue.

⁴ Joseph Farrell, *Creating Local Competition*, Speech at the Federal Communications Commission (May 15, 1996), *in* 49 Fed. Comm. L.J. 201, 212 (1996).

The Commission should give no credence to these retread arguments. SBC's competitors fail completely to explain how their allegations – even if true, which they are not – relate to the OI&M restrictions. They do not explain, for example, how their claims of discrimination in collocation tariffs or their assertions of a price squeeze relate in any way, shape or form to the OI&M requirements. They simply proceed from the theory that their unproved allegations of discrimination require that the Commission tie SBC's hands in every way possible.

The time has come for the Commission to recognize the OI&M restrictions for what they are today – an artificial and unnecessary handicap on SBC's ability to serve customers, which diminishes service quality and raises prices for SBC's customers, while restraining SBC's ability to compete fully and thereby drive up quality and drive down prices for all customers. The OI&M restrictions do nothing in return to advance the public interest, only the private interests of AT&T, WorldCom and Sprint.

II. AT&T, WORLDCOM AND SPRINT IGNORE THE HARM THE OI&M RESTRICTIONS CAUSE CONSUMERS

AT&T, WorldCom and Sprint largely ignore the harm to consumers from the OI&M restrictions, saying little about the degraded service quality, lower reliability, delay, inconvenience, higher cost and reduced competition that result. Instead, AT&T, WorldCom and Sprint focus on how elimination of the OI&M restrictions might harm AT&T, WorldCom and Sprint.

Their attempt to shift the Commission's focus is understandable. The OI&M restrictions unquestionably do harm consumers, and once this conclusion is reached, a large part of the showing required for forbearance has been made. Demonstrating that

forbearance from the OI&M restrictions might hurt AT&T, WorldCom and Sprint by forcing them to compete on a more level playing field, however, does not counterbalance the fact that the OI&M restrictions hurt consumers. The Communications Act aims to protect consumers, not carriers who would rather seek artificially to handicap their competitors than compete with them.

A. AT&T, WorldCom and Sprint Try To Minimize the Harm that the OI&M Restrictions Cause Consumers By Degrading Service Quality

AT&T, WorldCom and Sprint largely ignore the harm that OI&M restrictions cause for consumers through degraded service quality, lower reliability, delay and inconvenience. AT&T ignores the issue altogether. WorldCom attempts to minimize the harm that consumers suffer from the OI&M restrictions, saying that the “additional costs and operational complexity” that results from the OI&M restrictions are “modest.”⁵ Similarly, Sprint maintains that “[r]etail consumers remain well-served by the industry, even with the OI&M safeguards in place.”⁶ Customers waiting for three different parts of the same company to perform needlessly duplicative steps for a product installation or to dispatch multiple repair crews to fix an outage might well differ with WorldCom’s characterization of their inconvenience and lack of service as “modest” or Sprint’s claim that they are “well-served.”

SBC explained in detail in the SBC Filings how the OI&M restrictions impair SBC’s ability to provide the highest quality of service to its customers. One example of how the OI&M restrictions delay maintenance concerned a customer taking a bundle of

⁵ WorldCom Comments at 7.

⁶ Sprint Comments at 27.

advanced, long distance and local services. If this customer were to report a problem to, say, the advanced services affiliate, then the advanced services affiliate would not even be permitted to test the customer's logical and physical circuit on an end-to-end basis, but only the affiliate's own facilities. If no problem were found in the advanced services affiliate's own facilities, then the trouble ticket would be referred to another affiliate, based on a guess of where the problem might be. If the guess were wrong, and it might well be because the circuit has not been tested on an end-to-end basis, then another hand off would be required. If potential problems were identified affecting multiple networks, then multiple repair crews must be dispatched. All the while, the customer waits without the service functioning properly.⁷

Similarly, an example of how the OI&M restrictions hamper installation and operations concerned a customer's proposed frame relay network. For SBC, two project managers were required to manage installation of the network – one from the advanced services affiliate for the provision of local fast packet service and one from the long distance affiliate for the long distance data components. Each project manager dealt with his or her affiliate's own work centers to initiate the turning up of service for the different portions of the frame relay network, hoping that from a timing and operational perspective the puzzle parts that could not be overseen by either one of them came together. Once the frame relay network was functioning, separate monitoring systems were required: one from the advanced services affiliate, and one from the long distance affiliate.⁸ These sorts of needless delays, inconvenience and inefficiency for medium-

⁷ Dietz Affidavit ¶ 3.

⁸ *Id.* ¶ 6.

sized and large business customers with sophisticated communications needs is hardly “modest,” as WorldCom claims, and such customers are hardly “well served,” as Sprint claims.⁹

B. AT&T, WorldCom and Sprint Trivialize the Harm that the OI&M Restrictions Cause Customers By Raising Costs

AT&T, WorldCom and Sprint also summarily dismiss the evidence SBC has presented of the operational costs of complying with the OI&M restrictions – costs that inevitably must be reflected in SBC’s retail rates and which thereby affect the competitive pressures SBC is able to bring to the market prices.¹⁰ AT&T, which like WorldCom and Sprint *had not reviewed the Costs Submission* before submitting its comments, nonetheless was able to leap to the conclusion that there is no “hard evidence” and “nothing of substance” behind SBC’s showing that it costs \$77 million each year simply for its long distance and advanced services subsidiaries to comply with the OI&M restrictions, and that further costs are associated with its BOCs’ compliance.¹¹ WorldCom, without any explanation, says that, at most, “SBC may face modest additional costs . . . as a result of the ban on OI&M sharing.”¹² Sprint, for its part, attacks SBC’s analysis as presenting only “estimated savings”¹³ – even though presenting an “actual savings” figure is, of course, impossible until the OI&M restrictions are lifted and savings are realized.

⁹ WorldCom Comments at 7; Sprint Comments at 27.

¹⁰ AT&T Comments at 16-20; WorldCom Comments at 7; Sprint Comments at 18-19.

¹¹ AT&T Comments at 18, 16.

¹² WorldCom Comments at 7.

¹³ Sprint Comments at 19.

In fact, in the past, this Commission has accepted “ballpark” figures to support findings of future efficiencies and economies of scope.¹⁴ Of course, it does not matter whether SBC’s actual operational savings would be \$77 million annually, as SBC estimates, \$100 million, \$75 million, or even \$50 million for that matter. The point is that there would be substantial savings to SBC and, by extension, to consumers, and neither AT&T nor WorldCom nor Sprint shows otherwise.

C. SBC’s Market Share for Residential Customers Does Not Show that the
OI&M Restrictions Cause No Harm

In a further attempt to distract attention from the harm to customers that results from the OI&M restrictions, AT&T¹⁵ and Sprint¹⁶ argue that SBC could not have won the number of long distance customers that it has after obtaining section 271 relief if the OI&M restrictions hobble SBC as the SBC Filings claim. SBC has been relatively successful in attracting residential customers largely because it has aggressively marketed pricing plans that are attractive to the scores of low-volume residential users who, before SBC entered the market, were forced to pay the “rack rates” of the incumbent long-distance carriers.

SBC has been less successful, however, in competing for larger business customers who demand the kind of seamless end-to-end service that the OI&M restrictions prevent. These customers demand specialized services from carriers with

¹⁴ Brief for the Respondent at 82, *California v. FCC*, 905 F. 2d 1217 (9th Cir. 1990) (No. 87-7230).

¹⁵ AT&T Comments at 19.

¹⁶ Sprint Comments at 21-23.

dedicated account teams, custom-engineered solutions, a single point of contact, and seamless end-to-end service and provisioning. These are the highest revenue and margin customers. SBC's share of the market for telecommunications services for medium-sized and large business customers is small, and AT&T, WorldCom and Sprint dominate this market. For example, in 2001, AT&T, WorldCom and Sprint together had a 72.5% share of the Frame Relay and ATM market, and SBC had a 4.3% share.¹⁷ As WorldCom's Chief Marketing Officer has noted, "Bell companies don't present a major threat to WorldCom, Inc.'s business service group. . . . [t]hey don't have the products, systems or sales forces to attack the middle and high-end segments of the business-service market."¹⁸ Thus, SBC has been far less successful with respect to the critical, high-revenue customers most affected by the OI&M restrictions.

D. The Benefits to AT&T, WorldCom and Sprint from Continuing To Subject SBC to the OI&M Restrictions Do Not Counterbalance the Harm to Consumers

Sprint gets to the heart of its real reason for arguing in favor of maintaining the OI&M restrictions when it bemoans its current financial condition, saying that "[t]he competitive industry clearly is in a troubled, fragile state" and "face[s] extraordinarily difficult times."¹⁹ Sprint contrasts its financial health with SBC's, saying that "SBC surely needs no protection from competitive 'disadvantage.'"²⁰ In other words, the

¹⁷ SBC Communications Inc., Notice of Ex Parte Communication in CC Dkt. No. 01-337, at 13 (dated May 29, 2003) (available at http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6514149513).

¹⁸ *WorldCom Exec Says Bells Don't Pose Major Threat in Business-Service Arena*, T.R. Daily, May 7, 2002.

¹⁹ Sprint Comments at 22, 8.

²⁰ *Id.* at 21.

Commission should assist Sprint, AT&T and WorldCom by artificially handicapping a better performing competitor.

What goes unmentioned is that the “troubled, fragile” state in which Sprint and AT&T find themselves in is, in large part, the result of their own doing. Both companies have undertaken failed large-scale ventures into other lines of business and technologies and have been forced to replace their management. As for WorldCom, in the words of the Report of Investigation by the Special Investigative Committee of the Board of Directors, it perpetrated “one of the largest public company accounting frauds in history” as “more than \$9 billion in false or unsupported accounting entries were made in WorldCom’s financial systems.”²¹ As put even more to the point in the Second Interim Report of Dick Thornburgh, Bankruptcy Court Examiner:

The WorldCom story is not limited to the massive accounting fraud that has been publicly reported. Aside from these issues, the Examiner's continued investigation into other matters has uncovered additional deceit, deficiencies and a disregard for the most basic principles of corporate governance.

The Examiner has identified significant problems with respect to virtually every area reviewed....There are many persons and entities that share responsibility for WorldCom’s downfall and the losses suffered by the Company’s shareholders and creditors. While the degree of responsibility varies greatly, WorldCom could not have failed as a result of the actions of a limited number of individuals. Rather, there was a broad breakdown of the system of internal controls, corporate governance and individual responsibility....²²

How should WorldCom, AT&T and Sprint be rewarded for this? By insulating them from competition by forcing a competitor needlessly to duplicate efforts, provide

²¹ Denis R. Beresford et al., Report of Investigation by the Special Investigative Committee of the Board of Directors of WorldCom, Inc. at 1 (March 31, 2003) (*available at* <http://www.sec.gov/Archives/Edgar/data/723527/000093176303001862/des991.htm>).

²² *In re WorldCom, Inc.*, No. 02-15533 (AJG), slip op., at 7-12 (Bankr. S.D.N.Y. June 9, 2003) (Second Interim Report of Dick Thornburgh, Bankruptcy Court Examiner).

less efficient and less reliable service, and incur unwarranted costs? And what is the answer of WorldCom, AT&T and Sprint to the customers frustrated by the inability of their carrier of choice to provide timely, efficient, reliable service? The needs of consumers should not be considered because they are, in Sprint's view at least, "well served," despite the fact that the OI&M restrictions cause "some burdens and some inefficiencies."²³

This brazen argument is, of course, inconsistent with the forbearance standards in section 10 of the Act, which require the Commission to consider whether enforcement of the OI&M restrictions is necessary for the protection of consumers, not whether it might be helpful to "troubled, fragile" AT&T, WorldCom and Sprint to impair the quality, reliability and efficiency of SBC's service offerings.

III. ELIMINATION OF THE OI&M RESTRICTIONS WILL NOT RESULT IN CROSS-SUBSIDIZATION OR DISCRIMINATION

While AT&T, WorldCom and Sprint largely ignore the harm that the OI&M restrictions cause consumers, they do loudly argue that the OI&M restrictions have two public interest benefits – preventing cross-subsidization and discrimination. Yet, despite their stock arguments, repeated in every proceeding and every forum, they can show no basis for maintaining the OI&M restrictions.

Moreover, even if there were some basis for their contention that the OI&M restrictions are necessary to prevent cross-subsidization and discrimination, these arguments would apply only to the sharing of OI&M services between, on the one hand,

²³ Sprint Comments at 27, 19.

the BOCs, and on the other, the advanced services affiliates and long distance affiliates. No challenge is even made to the sharing of OI&M among the non-BOC affiliates. Such sharing alone would save SBC \$77 million each year, as the Dietz Affidavit demonstrates, with additional savings to be realized if sharing with the BOC were also allowed.²⁴

A. The OI&M Restrictions Are Not Necessary To Prevent Cross-Subsidization

AT&T,²⁵ WorldCom²⁶ and Sprint²⁷ – and the commenters in other proceedings that they cite repeatedly²⁸ – assert that SBC has the incentive and ability to engage in cross-subsidization. No one offers any explanation of how SBC, whose LECs operate

²⁴ Section 272(b) of the Act provides that the separate long distance affiliate shall operate independently from the BOC. Yet section 53.203(a)(3) of the Commission’s Rules says that neither “a BOC or BOC affiliate” may perform OI&M functions for the long distance affiliate. Naturally, the Commission wanted to prevent the possibility of sham arrangements where use of an affiliate might be designed to evade the required independent operation between the BOC and the long distance affiliate. Yet there was no basis to otherwise limit the long distance affiliate from receiving OI&M from other BOC affiliates. The Commission should clarify that this was its intent.

²⁵ AT&T Comments at 11.

²⁶ WorldCom Comments at 5.

²⁷ Sprint Comments at 9.

²⁸ The commenters in other proceedings that AT&T, WorldCom and Sprint cite in support of their cost misallocation argument are at as much of a loss as they are to explain how a LEC operating under pure price caps could possibly benefit from misallocating OI&M costs. Sprint, for example, cites Texas PUC Comments for the proposition that SBC has the “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.” Sprint Comments at 11. To support this proposition, the Texas PUC, in turn, cites the 1996 *Non-Accounting Safeguards Order*, which dates from an era when rate-of-return regulation and limited price cap plans were still prevalent. See Comments of Public Utilities Commission of Texas, Accounting Safeguards Under the Telecommunications Act of 1996: Section 272(d) Biennial Procedures, CC Dkt. No. 96-150 at 7 (filed Jan. 30, 2003). Sprint also cites a letter from the Texas PUC reporting “troubling ‘alleg[ations]’ that SBC Texas. . . has engaged in cross-subsidization with its long distance affiliate.” Sprint Comments at 11 & n.19. The accuser, however, is none other than AT&T.

under pure price caps, can engage in cross-subsidization, much less how retention of OI&M restrictions would address that ostensible concern. The plain fact is that, under pure price caps, there is no longer any LEC rate base onto which OI&M costs can be loaded in order to increase the LEC's total return, and thus no incentive to misallocate OI&M costs, as there might have been under traditional rate-of-return regulation or, to a lesser extent, price caps with sharing.²⁹ Because SBC has no incentive to cross-subsidize through a misallocation of OI&M costs, prevention of cross-subsidization is not a potential benefit that flows from or can any longer justify maintaining structural separation safeguards such as the OI&M requirements.

AT&T mistakenly claims that cost misallocation is still potentially profitable under price caps. According to AT&T, under price caps, BOCs can overcharge for services that the BOCs provide to both affiliated and unaffiliated carriers, such as exchange access, while undercharging for services that BOCs provide only to affiliated carriers. The simultaneous overcharging and undercharging supposedly enables the BOC to net out the cost misallocations, which would have been impossible under rate-of-return regulation, because the BOC would have been forced to return the profits from the overcharging to the ratepayers.³⁰ The simple response to this assertion is that rates for

²⁹ WorldCom argues that, in the *Non-Accounting Safeguards Order*, the FCC “rejected SBC’s argument that the ban on OI&M sharing is not necessary to prevent cost misallocation.” WorldCom Comments at 5. As noted, the *Non-Accounting Safeguards Order* dates from 1996, when many of the BOCs were still subject to rate-of-return or limited price cap regulation, which provided different incentives. For its part, Sprint cites a 1984 case on the dangers of cross-subsidization, at a time when rate-of-return regulation was universal. Sprint Comments at 10. Sprint also says that “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 . . . ,” which is not at all obvious, in light of the price cap regulation to which SBC is subject. Sprint Comments at 11.

³⁰ AT&T Comments at 11.

exchange access and other services that BOCs provide to both affiliated and unaffiliated carriers are regulated to the extent regulation is deemed necessary by the Commission to prevent supracompetitive pricing, and thus the BOC's rates cannot be inflated as AT&T claims.

Moreover, AT&T's mistaken cost-misallocation theory does not fit the facts for OI&M services and so is irrelevant to the questions before the Commission in this proceeding. Cost misallocation supposedly could result in the BOC setting charges for OI&M services that are either higher or lower than they should be. If the charges are higher than they should be, competitors should not be harmed, because they will continue to provide OI&M services for themselves, as they do now. Only the SBC affiliates would pay too much. If the BOC's charges for the OI&M services that it provides are lower than they should be, then competitors can choose to purchase this subsidized OI&M service for themselves, because, under section 272(c), the BOC is required to make OI&M services available to competitors on a non-discriminatory basis. The other possibility is that OI&M services will be provided to the BOC by other affiliates. Surely, AT&T is not suggesting that these affiliates will be subsidizing the BOCs. Thus, in each of these cases, there is no incentive for mischarging for OI&M services, even under AT&T's strained theories of cross-subsidization, which means that prevention of cost misallocation is not a benefit that can flow from the OI&M restrictions.

B. The OI&M Restrictions Are Not Necessary To Prevent Discrimination

AT&T, WorldCom and Sprint repeat their tired arguments with respect to the ostensible risks of discrimination, yet they never come to grips with the inherent

implausibility of this asserted justification for the OI&M restrictions.³¹ They do not, for example, explain away the tension between secrecy and publicity required for a LEC to discriminate successfully. The LEC must keep its discrimination secret from regulators (who would punish the LEC) and from the LEC's competitors (who would report the LEC to regulators and bring their own actions against the LEC). At the same time, the LEC must in effect publicize the discrimination to its competitors' customers, who otherwise will not realize that they can improve their poor service by switching their service to the LEC. How discrimination can be both secret and notorious at the same time is a mystery that AT&T, WorldCom and Sprint never explain.³²

AT&T, WorldCom and Sprint also fail to explain why the numerous other safeguards against discrimination are not adequate and why the OI&M restrictions are needed on top of all these other safeguards. What discrimination would be caught as a result of the OI&M restrictions that would go undetected by the performance plans in place in the states where SBC has section 271 authority, by the section 202 prohibition on discrimination, by the network disclosure and equal access requirements imposed by sections 251(c)(5) and 251(g), by the network element provisioning requirements in section 251(c)(3), and by the section 272(e) requirement for parity in performance and access charges?

³¹ AT&T Comments at 6-11; WorldCom Comments at 5-7; Sprint Comments at 13.

³² In response to SBC's argument that it has no incentive to discriminate because, in this highly competitive long distance market, it is not likely that a disgruntled customer will choose SBC as its provider, AT&T argues that SBC does have an incentive because discrimination will tilt the playing field in SBC's favor. AT&T Comments at 10, 11. However, AT&T never explains why, in a market with more than 800 interexchange providers, a long distance customer would choose new entrant SBC instead of choosing, for example, another better known IXC as its long distance carrier.

Nor do SBC's competitors convincingly explain how the lifting of OI&M restrictions would enable SBC to discriminate against them because they have opted to provide either their own OI&M services or receive them through automated processes. WorldCom tries to argue that it is irrelevant that competitors perform their own OI&M services; the only issue that is relevant is that SBC's control over OI&M for shared bottleneck facilities would allow it to use shared OI&M functions to discriminate against its rivals.³³ WorldCom is wrong. It is highly relevant that IXCs perform their own OI&M services because this shows first, that while SBC's competitors can and do provide end-to-end local and long distance services using the same workforce and systems, SBC cannot do so. Second, it shows that, while SBC's BOCs have been ready and willing to provide OI&M services to unaffiliated IXCs on a non-discriminatory basis, IXCs often have not wanted these services, preferring to perform the OI&M functions themselves. Therefore, IXCs concerns about the lifting of the OI&M restrictions are superfluous.

Second, WorldCom argues that the Commission has already rejected, in the *Non-Accounting Safeguards Order*,³⁴ SBC's argument that automated systems inherently preclude discrimination. In the *Non-Accounting Safeguards Order*, the Commission stated that the "BOCs use of . . . automated order processing systems is important for meeting [the Act's nondiscrimination requirements], but does not guarantee that requests placed via these systems are actually completed within the requisite period of time."³⁵

³³ WorldCom Comments at 6.

³⁴ *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act*, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd. 21905 (1996) ("*Non-Accounting Safeguards Order*").

³⁵ *Id.* ¶ 243.

WorldCom takes the Commission's quote out of context. Far from rejecting the contention that automated systems preclude discrimination, the Commission *agreed* that automated systems are important for meeting nondiscrimination requirements. It only disagreed with the BOCs about the need for performance measures despite the existence of automated systems. Given that the Commission recognized the value of automated systems in preventing discrimination, and given the other safeguards that SBC outlined above and in the SBC Petition, the issue now is whether the OI&M restrictions remain necessary any longer as an additional nondiscrimination safeguard. SBC submits that the answer is no.

Finally, WorldCom argues that SBC has nowhere indicated a commitment to use the same systems or to provide nondiscriminatory access to its systems for both affiliated and unaffiliated carriers. That is incorrect. SBC remains subject to sections 272(c) and (e), which require it to provide service to all carriers on the same rates, terms and conditions. SBC has also specifically noted in its Petition its current nondiscriminatory processes for performing trouble isolation and repair for all carriers and committed that it would "not engage in any unlawful discrimination in the event it were asked to repair its competitors' own facilities."³⁶

C. Competitors' Specific Claims About SBC's Alleged Anticompetitive Behavior Are Unsubstantiated and Irrelevant.

Unable to explain why the OI&M requirements are necessary to protect against discrimination and cross subsidization, AT&T, WorldCom and Sprint attempt to distract

³⁶ SBC Petition at 14. SBC did note, however, that although it has always been ready, willing and able to provide nondiscriminatory services to all IXCs, most of its competitors provide their own OI&M functions and prefer to operate their own networks instead of having others do it for them. SBC Petition at 12.

the Commission by offering up a litany of allegations of anticompetitive conduct by SBC. Sprint, in particular, points to Commission enforcement actions or settlements regarding performance data, collocation and shared transport services as evidence of a need for retaining the OI&M requirements.³⁷ Much of what is cited consists of unproven allegations.³⁸ More important, none of the issues raised relate to the sharing of OI&M services. For example, the two California proceedings referred to by AT&T pertain to retail marketing and billing issues and have no connection to issues about SBC's relationship with its competitors. Indeed, AT&T fails to mention that it had raised these same proceedings as evidence of anticompetitive conduct in SBC's section 271 proceeding, where the Commission did not accept AT&T's arguments.³⁹

Further, although commenters unsuccessfully tried to use SBC's payments in Texas as grounds for requesting extension of section 272 safeguards, this again does not demonstrate the need for retaining OI&M requirements. The only thing it demonstrates is that BOCs are subject to unprecedented and exhaustive regulation that includes hundreds of performance measures and oversight of all aspects of the BOCs' services. Indeed, far from suggesting a need for the OI&M requirements, the performance measures are

³⁷ Sprint Comments at 11, 12.

³⁸ For example, AT&T's complaint that SBC has engaged in a price squeeze or Sprint's reference to Birch Telecom's complaint on collocation tariffs and interconnection agreements are still pending matters and disputed by SBC.

³⁹ AT&T also fails to mention that the California PUC's statement that it was not confident about non-structural safeguards was made in the context of joint marketing arrangements under California statutes and this Commission did not accept the CPUC's position on that issue. *Application by SBC Communications Inc., Pacific Bell Telephone Company and Southwestern Bell Communications Services Inc. for Authorization To Provide In-Region InterLATA Services in California*, Memorandum Opinion and Order, 17 FCC Rcd. 25650, at ¶¶ 168-172 (2002).

evidence that such costly restrictions are superfluous because almost everything the BOC does is monitored, tracked and enforced.⁴⁰

Sprint's use of Commission settlements or enforcement actions to make a case of discrimination against SBC is equally misleading. The enforcement actions cited relate to disputed legal issues like SBC's obligation to provide shared transport services, the Commission's ability to require sworn affidavits, interpretation of the Commission's collocation rules, or to data discrepancy issues with respect to some of the data SBC provided to the Commission as a result of the *SBC/Ameritech Merger Order*. These are wholly irrelevant to the current issue and provide no basis for extension of OI&M requirements.⁴¹ Indeed, Sprint does not even purport to address how enforcement or settlement actions in other contexts affect the Commission's analysis under section 272 OI&M requirements. Thus, this Commission should reject the litany of allegations put forward again by SBC's competitors and see them for what they are: an attempt to prevent SBC from competing effectively in the market for local and long distance service.

⁴⁰ AT&T cites a Texas PUC report that SBC met the performance benchmarks set by the Texas PUC in only 6 out of the 31 months. AT&T Comments at 10. As SBC has already informed the Texas PUC and the FCC, that is incorrect. The Texas PUC required SBC to meet 90% of its measures in any 2 out of 3 months and SBC has met that standard every month since May 2000. *See SBC Communications Inc. Notice of Ex Parte Communications in WC Docket No. 02-112, June 10, 2003.*

⁴¹ Additionally, Sprint, like AT&T, attempts to mislead by stating that a settlement action is effectively an "admission" of discriminatory behavior by SBC.

IV. THE REMAINING ARGUMENTS IN FAVOR OF THE OI&M RESTRICTIONS ARE ALSO UNPERSUASIVE

A. Circumstances Have Changed Dramatically Since the OI&M Restrictions Were First Implemented

AT&T and Sprint absurdly claim that there is “no evidence of changed circumstances that could justify repealing the OI&M services restriction.”⁴² In reality, circumstances have changed dramatically since the OI&M restrictions were first implemented in 1996.

One supposed benefit of the OI&M restrictions – the prevention of cross-subsidization through cost misallocation – has disappeared, as pure-price caps have replaced rate-of-return regulation and price caps with sharing, thereby destroying any incentive to misallocate costs.⁴³ The other supposed benefit of the OI&M restrictions – prevention of discrimination – has become superfluous as other mechanisms have come into place to prevent discrimination. These include section 271 market opening measures, like revamping of the BOCs’ OSS, extensive performance plans, which require SBC to furnish thousands of measures of performance each month, section 271 post-entry compliance reviews by this Commission, and the implementation of the section 272 biennial audits.⁴⁴

Even as the benefits of the OI&M restrictions have proven illusory, the costs have proven to be far more substantial than expected. The harm to customers from delayed installations, needlessly prolonged outages and less effective competition for their

⁴² AT&T Comments at 3; *see also* Sprint Comments at 28-29.

⁴³ *See infra* Part III.A.

⁴⁴ *See infra* Part III.B.

business has been detailed. Practical experience has shown just how expensive the OI&M restrictions are to comply with, and how they have crimped SBC's ability to compete for the business of medium-sized and large business customers. In addition, demand has exploded from medium-sized and large business customers for bundled services to serve multiple locations seamlessly on an end-to-end basis – the very services that are most sensitive to the OI&M restrictions – and thus the effect of the OI&M restrictions has become far more pronounced than might have been imagined. The passage of time has thus undermined the basis of the OI&M restrictions.

B. The OI&M Restrictions Are Not Necessary To Place SBC on a Level Playing Field with Its Competitors

AT&T, WorldCom and Sprint claim that the harms that the OI&M restrictions cause SBC customers are no different from the difficulties that they face providing their own service and coordinating their activities with the BOCs when they buy some of their services from the BOCs.⁴⁵ Fairness, they say, requires that SBC's customers suffer the same inconvenience as their own customers.

This argument is fallacious for two reasons. First, it ignores the fact that a goal of the Telecommunications Act is that every firm exploit its efficiencies so consumers get the full benefit of competition. The advantages that a particular firm may have – in terms of economies of scale or scope or other cost savings – can and does translate into consumer benefits. There is no reason to handicap one firm just because others do not have the same advantages. As FCC Chief Economist, Joseph Farrell has said:

Like most economists, I am uncomfortable with rules that forbid a firm from exploiting efficiencies just because its

⁴⁵ AT&T Comments at 18-19; WorldCom Comments at 7; Sprint Comments at 23.

rivals cannot do likewise. Such handicapping, or leveling without regard for up or down, may make for a good game, but the game is only a metaphor. When firms are hamstrung, even in order to equalize them with other firms, consumers are liable to lose out.⁴⁶

Second, this argument ignores that, since at least 1996, AT&T, WorldCom and Sprint have had the legal right to provide end-to-end service, and AT&T and WorldCom have done so for their large and medium-sized business customers through the extensive fiber networks they have acquired. As the Commission's own figures show, CLECs have deployed extensive networks of their own and are increasingly using their own last mile facilities to compete on a vertically integrated basis. Even by the Commission's extremely conservative estimates, CLECs are providing about 26% of their switched access lines over their own loop facilities. And the number of CLEC owned lines increased from around 2.8 million in 1999 to over 6 million in December 2002.⁴⁷ AT&T says that it has an "extensive local network serving business customers in 90 U.S. cities" that "reaches more than 6,300 buildings,"⁴⁸ and WorldCom has networks that provide such capabilities "[d]eployed in business centers throughout the United States" and

⁴⁶ Joseph Farrell, Creating Local Competition, Speech at the Federal Communications Commission (May 15, 1996), in 49 Fed. Comm. L.J. 201, 212 (1996).

⁴⁷ FCC Report: Local Telephone Competition: Status of December 31, 2002 (June 2003) Table 3 – Reporting Competitive Local Exchange Carriers. As the BOCs explained in the *UNE Fact Report*, the Commission's numbers are grossly understated because, *inter alia*, they rely on reporting CLECs who do not appear to comply with the Commission's instructions in reporting voice grade equivalents. *UNE Fact Report 2002*, at Appendix I, CC Docket No. 01-338, *et al.* (Apr. 2002) ("*Fact Report*") (Attach. A. to SBC Comments). The *UNE Fact Report* estimates that, as of December 2001, CLECs were providing between 12.5 to 20.5 million lines over their own last mile facilities. *Id.* at IV-2.

⁴⁸ AT&T Corporation, Securities and Exchange Commission Annual Report on Form 10-K for the Year Ended December 31, 2002, at 6 (*available at* <http://www.sec.gov/Archives/edgar/data/5907/000095012303003510/e84804e10vk.txt>).

79,383 buildings are connected to its networks.⁴⁹ As AT&T Senior Vice President Barbara Peda has said, “With our integrated networking solutions, businesses no longer have to patch together disparate services from multiple providers.”⁵⁰ Thus, for the critically important business customers whose needs make them the most sensitive to the harms caused by the OI&M restrictions, AT&T and WorldCom can and do provide end-to-end service through one organization, while the OI&M restrictions prohibit SBC from doing the same.

C. The SBC/Ameritech Merger Conditions Should Be Modified

The Commission should modify the SBC/Ameritech Merger Conditions to eliminate its restrictions on OI&M sharing, notwithstanding AT&T’s arguments to the contrary. AT&T claims that, because the SBC/Ameritech Merger Conditions already permit the sharing of OI&M services between SBC’s ILECs and advanced service affiliates, SBC’s estimates of cost savings from elimination of the OI&M restrictions are wrong.⁵¹ AT&T’s argument is based on a fundamental misunderstanding of both the OI&M restrictions and SBC’s cost calculations.⁵²

Although the SBC/Ameritech Merger Conditions permit SBC’s ILECs to provide OI&M services to SBC’s advanced services affiliates, its advanced services affiliates

⁴⁹ WorldCom, Inc., Securities and Exchange Commission Annual Report on Form 10-K for the Year Ended December 31, 2001, at 12, 13 (*available at* <http://www.sec.gov/Archives/edgar/data/723527/000100547702001226/0001005477-02-001226-index.htm>).

⁵⁰ Press Release, AT&T Corporation, AT&T Introduces New Business Local Access Offer for Large Companies, Government Agencies (April 16, 2003) (*available at* <http://www.att.com/news/item/0,1847,11577,00.html>).

⁵¹ AT&T Comments at 5.

⁵² The fact that AT&T had not yet even reviewed the Costs Submission did not deter AT&T from asserting that the cost estimates were wrong.

cannot provide OI&M services to the SBC ILECs. And the other non-ILEC affiliates of SBC, like the Internet services affiliate, cannot provide OI&M services to its advanced services affiliate. Furthermore, SBC's advanced services and long distance affiliates cannot provide OI&M services to each other. And SBC's ILECs cannot provide OI&M services to SBC's long distance subsidiary. Thus, the limited OI&M exemption in the SBC/Ameritech Merger Conditions does little to alleviate the fundamental problem – SBC cannot centralize the provision of OI&M functions for advanced, long distance and local services. This problem directly affects the quality and reliability of the service SBC is able to offer its medium-sized and large business customers, who demand seamless end-to-end provision of sophisticated services. SBC's estimate, as submitted to the Commission, of the annual cost savings of \$77 million from elimination of the OI&M restrictions was based solely on the duplication of OI&M functions among its advanced services, long distance and other non-ILEC affiliates, and, contrary to AT&T's assertions, does not include any of the additional costs savings that could be achieved if the ILECs were also allowed to share OI&M functions.

AT&T also argues that the Commission should not forbear from the OI&M restrictions in the *SBC/Ameritech Merger Order* because SBC itself proposed the restrictions and they are central to the effectiveness of the separate advanced services affiliate scheme.⁵³ AT&T's arguments are fallacious for three reasons.

First, it is irrelevant how or why the OI&M restrictions were proposed; the relevant issue is whether today, given the extensive costs and the lack of corresponding

⁵³ AT&T Comments at 12, 13.

benefits, these conditions further the public interest and thus should be continued. For the reasons set forth in the SBC Petition, the answer to that question is no.

Second, it is misleading to suggest that SBC somehow believed these requirements were essential. As the *SBC/Ameritech Merger Order* makes clear, the separate affiliate requirements, including the OI&M requirements, were proposed by SBC and negotiated with the Commission to address concerns expressed by others regarding the “potential” effects of the merger. Although SBC believed that these concerns were overstated, it agreed to the conditions to alleviate such concerns.⁵⁴

Third, and most importantly, the OI&M restrictions from which SBC requests forbearance were not central to the separate affiliate structure. Indeed, given that the Commission specifically allowed the BOC to provide OI&M services to the advanced services affiliates, there could not possibly have been any public policy rationale for non-BOC affiliates being prohibited from sharing OI&M services with each other. Rather, this was the *inadvertent* result of applying section 272 regulations – regulations that state that no BOC affiliate shall provide OI&M services to the section 272 affiliate – to the advanced services affiliate, except to the extent modified by the *SBC/Ameritech Merger Order*.⁵⁵

⁵⁴ *SBC/Ameritech Merger Order* ¶¶ 42-45.

⁵⁵ AT&T also argues that the restrictions should not be modified because “not a thing” has changed since the time of the *SBC/Ameritech Merger Order*. Once again, AT&T’s argument is both irrelevant and incorrect. First, it is not relevant whether conditions have changed; the question is whether there is – and there is clearly not – any justification for the restrictions. Second, since the time of the *SBC/Ameritech Merger Order*, an increasing number of competitors are serving their customers on an end-to-end basis, thereby reducing their dependence on BOC facilities.

Finally, AT&T argues that SBC's request for forbearance should be denied because this would somehow give SBC the best of all worlds, allowing ASI to remain detariffed under the Commission's *ASI Tariffing Forbearance Order*, while at the same time eliminating the protections that the Commission "expressly relied" upon in its *ASI Tariffing Forbearance Order*.⁵⁶ That is simply wrong. The Commission never relied on the OI&M restrictions as a basis for its decision in the *ASI Tariffing Forbearance Order*. The Commission granted ASI forbearance from tariff requirements because it found, among other things, that this would be in the public interest and would spur competition. It also found that SBC's voluntary commitments, in combination with the separate affiliate structure and prospect of regulation via the section 208 complaint process, would help ensure that the rates, terms and conditions under which ASI offers advanced services would be just and reasonable. In granting forbearance from tariffing requirements, the Commission relied on the ability of ASI's competitors to obtain "telecommunications facilities and services" from SBC at the same rates, terms and conditions as available to ASI.⁵⁷ Elimination of OI&M restrictions, however, has nothing to do with SBC's

⁵⁶ AT&T Comments at 14, 15.

⁵⁷ *ASI Tariffing Forbearance Order* ¶ 27.

provision of telecommunications facilities and services. Thus, AT&T's arguments should be summarily rejected.⁵⁸

D. The Commission Has Section 10 Authority To Forbear from Applying the OI&M Restrictions

Notwithstanding plain language to the contrary in section 10 of the Act, AT&T, WorldCom and Sprint rehash arguments rebutted elsewhere⁵⁹ that the Commission's forbearance authority does not extend to section 272 itself, or even to the OI&M rules, which were promulgated under section 272.⁶⁰ The simple fact is that section 10(d) of the Act limits the Commission's forbearance authority with respect only to "the requirements of section 251(c) or 271."⁶¹ Section 10(d) says *nothing* about limiting the Commission's authority to forbear from section 272. The mere fact that there is some interplay between sections 271 and 272, just as there is between many other sections of the Act, cannot serve as a basis for ignoring Congress's clear command to the Commission to exercise its

⁵⁸ AT&T also implies that, although ASI can reintegrate its operations with the BOC any time, it has chosen not to do so because the separate affiliate structure affords it freedom from dominant carrier regulation. AT&T Comments at 17. AT&T does not explain why ASI should subject itself to dominant carrier regulation. In the data market, where the OI&M restrictions are most relevant, SBC is just a small player trying to catch up with big players like AT&T, WorldCom and Sprint. It makes no sense for SBC to be regulated as a dominant carrier in that market. Moreover, SBC has made a business decision not to reintegrate those operations in large part because it is disruptive and inefficient to do so without the benefit of the sharing of OI&M services among all the SBC affiliates, as sought here. SBC still would not have the ability to meet fully its customers' needs. In any event, the only relevant issue is whether, given the existing structure, the OI&M restrictions should continue to exist. As stated above, the answer is clearly no.

⁵⁹ Verizon, Notice of Ex Parte Meeting, CC Dkt. Nos. 96-149, 98-151 (filed April 17, 2003).

⁶⁰ AT&T Comments at 3; WorldCom Comments at 1-3; Sprint Comments at 4-6.

⁶¹ 47 U.S.C. § 160(d).

forbearance authority with respect to all sections of the Act except sections 251(c) and 271.

Even if Congress had written section 10(d) differently than it did to limit the scope of the Commission's forbearance authority with respect to "the requirements of sections 251(c), 271 or 272," as AT&T, WorldCom and Sprint seem to imagine that Congress did, the Commission would still be required to grant the SBC Petition. The OI&M restrictions are not part of section 272, nor even a *requirement* of section 272. In fact, section 272 says nothing at all about the OI&M restrictions. Section 272 does say that long distance affiliates shall "operate independently" from the BOCs and gives a list of specific ways in which long distance affiliates *shall* operate independently. This list nowhere includes any OI&M restrictions, unlike section 274 of the Act, which does prohibit the sharing of OI&M services between BOCs and electronic publishing affiliates.

Section 272 also gives the Commission authority to specify additional ways in which to further operational independence, and the Commission used this authority to promulgate the OI&M restrictions, as well as the restrictions on joint ownership of switching and transmission facilities. In adopting the OI&M restrictions, the Commission compared them to other means that could be used to achieve the same end, thereby indicating that the OI&M restrictions were expedient measures and not statutory requirements. While the congressionally mandated indicia of operational independence are "requirements of section 272," the Commission-created OI&M restrictions are not.

Nothing in section 272 obligated the Commission to promulgate the OI&M restrictions. As AT&T acknowledges, the OI&M restrictions were a "balancing of costs

and benefits,”⁶² and in light of the circumstances that existed in 1996, the Commission struck a particular balance. This balance was not a “requirement of section 272” then, it is not a “requirement of section 272 now,” and the Commission could forbear from it now, even if the Commission’s forbearance authority were constrained with respect to section 272, which it is not.

Further proof of the Commission’s forbearance authority with respect to the OI&M restrictions is found in section 10(a) of the Act, where Congress states that the Commission’s forbearance authority extends to “any regulation.”⁶³ Because the OI&M restrictions are regulations, the Commission’s forbearance authority clearly extends to the OI&M restrictions.

Section 10(d) thus constrains the Commission’s forbearance authority only with respect to “the requirements of section 251(c) or 271,”⁶⁴ not to the requirements of section 272, much less to regulations promulgated under Section 272 as expedient measures and not statutory requirements. AT&T, WorldCom and Sprint cannot rewrite the Act to add new exclusions Congress did not incorporate in section 10(d).

V. CONCLUSION

Today, a customer who experiences an outage in a bundle of SBC services may have to wait for three different repair crews – one from the long distance affiliate, one from the data services affiliate, and one from the local telephone company – before the

⁶² AT&T Comments at 4.

⁶³ 47 U.S.C. § 160(a).

⁶⁴ 47 U.S.C. § 160(d).

problem can be fixed, even if the problem was simple and could have been fixed by the first repair crew, if it had not turned out to be on the opposite side of an imaginary line. And no single organization is able to monitor and maintain the customer's entire network to prevent the outage in the first place. Network reliability is diminished, the customer is needlessly without service, and the costs of this senseless duplication impact marketplace rates and competition.

New broadband services are going to be extended to an SBC customer's new facility in an area previously without such capabilities. But the customer must wait while separate project managers direct separate design and installation crews and hope the pieces fit together smoothly, with no one able to oversee the entire effort or eliminate the duplication of effort. Are the lack of service and higher costs in the public interest? Is it enough to tell the customer their inconvenience and frustrations are the result of OI&M restrictions imposed in Washington, D.C. – or will these sophisticated business customers with significant communications requirements take their business elsewhere? That is what AT&T, WorldCom and Sprint expect, and why they have filed their oppositions. But while that explains their motives, that does not provide a basis for the FCC not to forbear from application of the OI&M constraints.

AT&T, WorldCom and Sprint not surprisingly have leapt to the defense of the OI&M rules, with justifications that are understandably unpersuasive. They ignore the harm the OI&M rules cause for consumers, while trumpeting the benefits that the rules create for themselves as if that benefited the public interest. They relish the market opportunity that impairment of SBC's ability to provide timely, efficient, reliable service to major customers offers them, and the consequent lack of competitive pressure to

improve their own service offerings. They rehash stock arguments about their fears of cross-subsidization and discrimination, while ignoring the glaring flaws in these arguments. The Commission should recognize the claims of AT&T, WorldCom and Sprint for what they are – naked attempts to advance their private interests at the expense of the public interest – and remove the prohibitions on sharing OI&M functions to allow more timely, reliable and cost-effective provision of services.

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July 15, 2003

CERTIFICATE OF SERVICE

I hereby certify that a copy of SBC's Reply Comments in Support of Petition for Forbearance and Modification in CC Docket Nos. 96-149 and 98-141 were delivered by electronic mail or first class U.S. Mail, postage prepaid, on this 15th day of July, 2003, to the parties listed below.

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