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October 27, 2003

VIA ELECTRONIC FILING

Ms. Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 Twelfth Street, S. W. – Room TWB-204  
Washington, D. C. 20554

Re: *Ex parte*, CC Docket Nos. 96-149 and 98-141, SBC Petition for  
Forbearance from the Prohibition of Sharing Operating, Installation, and  
Maintenance Functions Under Section 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

Dear Ms. Dortch:

Attached please find AT&T's response to recent SBC submissions in the above-captioned proceedings that purport to provide evidence in support of its claim that compliance with the Section 272 operating, installation and maintenance safeguards imposes burdensome costs on the company.

Consistent with Section 1.1206 of the Commission's rules, I am filing one electronic copy of this notice and request that you place it in the record of the above-captioned proceeding.

Sincerely,

A handwritten signature in cursive script, appearing to read "F. Simone".

ATTACHMENT

cc: J. Carlisle  
M. Carey  
W. Dever  
P. Megna  
C. Shewman  
R. Tanner



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October 27, 2003

*Ex Parte*

VIA E-MAIL

Marlene Dortch  
Secretary  
Federal Communications Commission  
445 12<sup>th</sup> Street, S.W., TW-A-325  
Washington, DC 20554

Re: *Petition of SBC for Forbearance from the Prohibition of Sharing Operating, Installation, and Maintenance Functions Under Section 53.203(a)(2) and 52.203(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, 98-141*

Dear Ms. Dortch:

AT&T Corp. ("AT&T") hereby submits this response to SBC Communications Inc.'s cost submission<sup>1</sup> and other submissions since the filing of AT&T's

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<sup>1</sup> SBC filed a redacted version of this submission on October 21, 2003 (hereinafter "SBC's redacted cost submission") – all references herein to this analysis refer to the redacted version. The request for confidential treatment appended to SBC's redacted cost submission is patently frivolous – for example, the Dietz Declaration, appended to SBC's Petition for Forbearance and Modification, as to which there is no request for confidential treatment, *provides* the "Estimate % Savings" for "Ordering, Circuit Design and Facility Assignment," ¶ 13, but SBC *redacts* the same information from its cost submission as proprietary. SBC's redacted cost submission at 4. *Compare also*, Dietz Declaration ¶ 17 with SBC's redacted cost submission at 8 ("Local Fields Operation and Dispatch"). Moreover, Verizon had no problem providing this information in the redacted forms of its submissions. *See*, the redacted version of Verizon's June 4, 2003 *ex parte*, Attachment 3, *passim* including Tables 1-3. Finally,

Comments in this proceeding. SBC has failed to produce any credible evidence that the operating, installation, and maintenance (“OI&M”) safeguard, found by the Commission to be “necessary” to prevent “unjust[] and unreasonably discriminatory” practices by the BOCs,<sup>2</sup> has imposed any costs on SBC. There is simply no basis in the record for forbearing from the OI&M safeguard that will, in any event, expire as soon as Section 272 sunsets in each of SBC’s states.

**I. THE COMMISSION CANNOT FORBEAR FROM APPLYING THE OI&M RESTRICTION UNDER SECTION 10; MOREOVER GRANTING FORBEARANCE WOULD RAISE THE ISSUE OF SBC’S DOMINANCE.**

As demonstrated by AT&T in *ex parte* letters filed in the *Verizon Forbearance Proceeding*,<sup>3</sup> the Commission cannot forbear under Section 10(d) from applying section 272(b)(1)’s “operate independently” requirement including the OI&M safeguard. Briefly, section 10(d) of the Communications Act provides that “*the Commission may not forbear from applying the requirements of section 251(c) or 271 of this title under subsection (a) of this section until it determines that those requirements have been fully implemented.*” 47 U.S.C. § 160(d) (emphasis added). Section 271(d)(3), in turn, incorporates “the requirements of section 272” into section 271,<sup>4</sup> including the Commission’s implementing

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all the “data” as to which proprietary protection is sought is aggregated data of the type the Commission has previously held is not entitled to confidential treatment. *See, In the Matter of Accounting Safeguards Under the Telecommunications Act of 1996: Section 272(d) Biennial Audit Procedures*, Memorandum Opinion and Order, CC Docket No. 96-150 17 FCC Rcd. 17012 (rel. Sept. 5, 2002) (“*SBC Section 272 Audit Disclosure Order*”) ¶ 19 (“Aggregated information uncovered during audits, as the Commission has held previously, mitigates the likelihood of causing substantial competitive harm. Aggregated information of this nature does not allow competitors to gain insight into marketing plans, etc.” citing to *Examination of Current Policy Concerning the Treatment of Confidential Information Submitted to the Commission*, Report and Order, 13 FCC Rcd 24816 at ¶ 55 (1998) (*Confidential Treatment Policy*), *Order on Reconsideration*, 14 FCC Rcd 20128 (1999)); see also ¶ 26 (“data at issue is summary information aggregated between the categories “BOC and Affiliates” and “Non-Affiliates” and the request for proprietary treatment was therefore denied).

<sup>2</sup> *See Non-Accounting Safeguards Order* ¶ 163 (“[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 Second Order On Reconsideration* ¶ 12; *Non-Accounting Safeguards Third Order On Reconsideration* ¶ 20.

<sup>3</sup> Letter from David Lawson, on behalf of AT&T, to Marlene Dortch, Secretary, Federal Communications Commission, July 9, 2003, filed in *Verizon Petition for Forbearance from the Prohibition of Sharing Operating, Installation, and Maintenance Functions Under Section 53.203(a)(2) of the Commission’s Rules*, (“*Verizon Forbearance Proceeding*”) CC Docket No. 96-149; Letter from C. Frederick Beckner, Counsel to AT&T, to Marlene Dortch, FCC, Oct. 21, 2003, CC Docket No. 96-149.

<sup>4</sup> Section 271(d)(3), provides that the Commission “*shall not approve* the [long distance] authorization requested . . . unless it finds that . . . (B) the requested

rules under section 272,<sup>5</sup> thus clearly encompassing the OI&M safeguard. Accordingly, before forbearance can occur (whether expressly granted by Commission action or “deemed” granted by section 10(c)), the Commission must make express findings (*i.e.*, “determine[.]”) that those sections have in fact been fully implemented. SBC does not and cannot make that showing.

Moreover, SBC has independently committed, in each of the Section 271 proceedings, to comply with the “operate independently” requirement of Section 272 *as it was interpreted at the time they obtained Section 271 approval, that is, including the OI&M safeguard, until Section 272 sunsets*. Thus, in the Texas 271 proceeding, SWBT committed to the Commission “that its section 272 affiliate *will comply* with section 272(b)(1), which requires ... (3) no provision by the BOC (or other non- section 272 affiliate) of operation, installation, and maintenance services (OI&M) with respect to the section 272 affiliate's facilities; and (4) no provision of OI&M by the section 272 affiliate with respect to the BOC's facilities.”<sup>6</sup> This Texas commitment was explicitly referenced in each subsequent 271 proceeding.<sup>7</sup> The Commission has made clear that it understood these commitments as extending through the Section 272 sunset.<sup>8</sup>

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authorization will be carried out *in accordance with the requirements of section 272 of this section.*” 47 U.S.C. § 271(d)(3) (emphasis added).

<sup>5</sup> The FCC in its 1998 *NOI*, treated the term “requirement” in section 10(d) as applying to “statutory provisions” and to “implementing regulations.” 13 FCC Rcd. 21879, ¶ 31 (1998). Other sections of the Communications Act also make clear that Congress used the term “requirement” to include both the “provisions” of the Act *and* the FCC’s implementing “regulations.” *See, e.g.*, 47 U.S.C. § 252(e)(2)(B) (forbidding a state commission from approving an interconnection agreement “if it finds that the agreement does not meet the requirements of section 251, *including the regulations prescribed by the Commission pursuant to section 251*, or the standards set forth in subsection (d) of this section.”) (emphasis supplied). Moreover, SBC did not caption its Petition with a reference to 47 U.S.C. § 160(c), as required under Commission Rule 1.53, 47 C.F.R. § 1.53; thus, the 12 to 15 month statutory deadline imposed by 47 U.S.C. § 160(c) does not apply here.

<sup>6</sup> Memorandum Opinion and Order, *Application by SBC Communications, Inc., Southwestern Bell Tel. Co., and Southwestern Bell Communications Services, 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 Texas*, CC Docket No. 00-65, 15 FCC Rcd 18372, 18550, ¶ 399 (2000) (emphasis added).

<sup>7</sup> *See, e.g.*, Memorandum Opinion and Order, *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*, WC Docket No. 02-306, 17 FCC Rcd 25650, 25730, ¶ 145 (2002) (“Pacific Bell provides evidence that it maintains *the same structural separation* and nondiscrimination safeguards in California *as it does in Texas*, Missouri, Arkansas, Kansas, and Oklahoma where SBC has already received section 271 authority. Pacific Bell also states, among other things, that it *will operate* independently of its section 272 affiliate....”) (emphasis added).

<sup>8</sup> Memorandum Opinion & Order, *Section 272(f)(1) Sunset of the BOC Separate Affiliate and Related Requirements*, 17 FCC Rcd. 26869 (2002) at ¶14 (“Under a state-

Granting forbearance would also render the Commission's prior determination that SBC is non-dominant no longer valid. The Commission, in finding the BOCs non-dominant in the *LEC Classification Order*,<sup>9</sup> did so because the BOCs' affiliates were required by section 272 to be "structurally separate" from the BOCs and to "operate independently" from the BOCs.<sup>10</sup> At the time the *LEC Classification Order* was issued, the "operate independently" requirement had been construed by the Commission to include the OI&M restriction. Forbearance would undermine that non-dominance determination.

## II. SBC'S "COST" SUBMISSION FAILS TO SUBSTANTIATE ANY OF THE CLAIMED COSTS.

As a threshold matter, SBC's cost evidence is legally irrelevant. No matter how costly compliance with the OI&M safeguards is claimed to be, so long as there is a "strong connection" between those safeguards and the protection of long distance competition, they are "necessary" within the meaning of Section 10 and forbearance may not be granted.<sup>11</sup>

In all events, SBC's "cost submission" provides no support for SBC's claims of cost savings if the OI&M safeguard is eliminated:

*First, the ipse dixit cost savings numbers provided by SBC are not verifiable. The cost submission is a mere regurgitation of the savings claims in the Dietz Declaration,<sup>12</sup> restated as an allocation into generic categories of ASI or SBCLD expenses and/or as the product of an ipse dixit "Annualized Expense" multiplied by an ipse dixit "Estimate % Savings." There is no disclosure of how this "Percentage" or "Annualized Expense" was calculated. There is no way to test any of SBC's assumptions, such as, for example, labor rates, capital costs, depreciation lives, and, most critically, whether the costs in question are actually "driven" by section 272 and the prohibition on OI&M sharing in particular.*

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by-state sunset, the separate affiliate and related safeguards of section 272 *will apply* in each state for three years after grant of a section 271 application. A requirement that each section 271 application show that in-region, interLATA entry *will comply* with the separate affiliate and related requirements of section 272 is entirely consistent with this.") (emphasis added).

<sup>9</sup> Second Report and Order, *Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area*, 12 FCC Rcd. 15756, ¶¶ 83, 158-61 (1997) ("*LEC Classification Order*"), unrelated provisions modified, Order on Reconsideration, *Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area*, 12 FCC Rcd. 8730 (1997).

<sup>10</sup> *Id.* ¶¶ 91, 112-18.

<sup>11</sup> *Cellular Telecommunications & Internet Assoc. v. FCC*, No. 02-1264, slip op. at 17 (D.C. Cir. June 6, 2003), *see more generally*, Letter from C. Frederick Beckner, on behalf of AT&T, to Marlene Dortch, Secretary, Federal Communications Commission, July 9, 2003, responding to Verizon's June 4, June 17, and June 24, 2003 *ex parte* filings ("AT&T's July 9, 2003 substantive *ex parte*"), which AT&T incorporates herein by reference, at 3.

<sup>12</sup> Dietz Declaration, Appended to SBC's Petition for Forbearance and Modification, ¶¶ 13-21.

Nor is there any way to ascertain whether SBC correctly and properly performed the mathematics it claimed to have undertaken. The Commission has made clear that such unverified *ipse dixit* does not establish “any record basis” to support agency action.<sup>13</sup>

*Second, the cost analysis excludes any additional costs that SBC as an entity will incur.* SBC, as an entity, will incur additional expenses as a result of having SBC Data Services consolidate ASI’s and SBCLD’s systems and workforces.<sup>14</sup> These costs will include: (a) the increased costs to SBC Data Services in performing the tasks that ASI and SBCLD personnel previously performed; and (b) the increased cost incurred in any reduction in headcount or consolidation of work forces.<sup>15</sup>

*Third, the OI&M savings claimed by SBC could be achieved without eliminating the OI&M safeguards.* This could be accomplished in at least three ways. First, as noted in AT&T’s Comments in this proceeding,<sup>16</sup> SBC is under *no* affirmative obligation to maintain a separate advanced services affiliate; that obligation was subject to sunset triggers that have now been met. Thus, SBC is free *at any time* fully to reintegrate its advanced services operations with its incumbent LEC operations, although if it were to do so, SBC’s advanced services would then be subject to dominant carrier tariffing and related requirements.<sup>17</sup> Second, SBC has *voluntarily* created seven different section 272 affiliates, each with its own OI&M resources.<sup>18</sup> If SBC’s theories were correct, significant cost savings could be achieved by integrating the seven separate 272 entities into one single unit. Third and finally, SBC could have contracted with any number of third parties to perform the functions that it claims were made necessary specifically because of the OI&M separation requirement. However, as discussed below in further detail, such a contract would have been a true arm’s length transaction, and would therefore almost certainly represent an out of pocket cost to SBC higher than the cost SBC intends to charge itself.

That the OI&M safeguard in no way hinders SBC is reflected by the realities of the marketplace. Despite the alleged “costs” of the Section 272 safeguards, SBC gained a 21 percent share in Texas within nine months and now claims to have market shares of “43

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<sup>13</sup> *E.g., AT&T Corp. v. Business Telecom, Inc.*, 16 FCC Rcd. 12312, ¶ 49 (2001).

<sup>14</sup> Dietz Declaration, ¶¶ 13-21.

<sup>15</sup> The increased costs incurred here in any reduction in headcount, *see*, SBC’s redacted cost submission at 6, 7, 9 and 10-12, are similar to those incurred in a merger. *See, e.g.,* Bear Stearns & Co. Inc., Equity Research, *SBC: Gearing Up for Earnings Growth*, July 21, 2000 (“For several reasons, including issues related to the merger with Ameritech, SBC had flattish EPS this period, and similar results are expected in the third quarter”; measuring merger integration costs as \$0.045/share for the second quarter).

<sup>16</sup> Comments of AT&T Corp, CC Docket Nos. 96-149, 98-141 (July 1, 2003) at 16.

<sup>17</sup> Including ASI costs also inflates the size of the claimed cost savings. SBC also inflates its cost savings by not taking into account the Section 272 sunsets in-region in 2004 and 2005. *See*, note 2 *supra*.

<sup>18</sup> Letter from Jacquelyne Flemming, Executive Director–Federal Regulatory, SBC to Marlene H. Dortch, Secretary, Federal Communications Commission, July 16, 2003 at 2-3.

percent overall and about 50 percent for consumer lines” in the six states where it provides long distance.<sup>19</sup>

**III. AT&T HAS DEMONSTRATED THAT THE OI&M SAFEGUARD IS “NECESSARY” TO PREVENT COST MISALLOCATION AND THAT PRICE CAP REGULATION DOES NOT DISINCENT SUCH CONDUCT.**

SBC asserts that “[n]o one offers any explanation of how SBC, whose LECs operate under pure price caps, can engage in cross-subsidization, much less how retention of OI&M restrictions would address this ostensible concern.”<sup>20</sup> Of course, SBC is flatly mistaken, for the Commission itself fully explained in 1996 (years *after* it instituted price cap regulation for large ILECs) that sharing of OI&M would “create substantial opportunities for cost misallocation.”<sup>21</sup> As the party seeking to challenge that conclusion (which is based on 20 years of FCC precedent), it is SBC that has utterly failed to respond to the Commission’s precedent and to introduce this evidence in the record. In particular, and as noted in AT&T’s Comments in this proceeding, AT&T, through the Declarations of its expert witness, Dr. Lee Selwyn, has fully explained why SBC and other ILECs could and would engage in improper cost misallocation if the longstanding OI&M prohibition were removed.<sup>22</sup>

Specifically, Dr. Selwyn demonstrated how there could be a misallocation of costs to the monopoly ILEC ratepayers if, for example, the BOC were to undertake any upgrades, *e.g.*, to its existing operations support system (“OSS”), or if the BOC had no excess capacity to provide OI&M services.<sup>23</sup> Indeed, in the *Verizon OI&M Forbearance*

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<sup>19</sup> SBC Investor Briefing, 7, [http://www.sbc.com/Investor/Financial/Earning\\_Info/docs/1Q\\_03\\_IB\\_FINAL.pdf](http://www.sbc.com/Investor/Financial/Earning_Info/docs/1Q_03_IB_FINAL.pdf). See also, Statement of Edward Whitacre, CEO, SBC Communications, Transcript, April 24, 2003 Conference Call Addressing First Quarter 2003 Earnings (contending that SBC has achieved “near 50 percent” penetration of the consumer long distance market in its Southwestern territories). Although SBC claims that the OI&M safeguard has especially disadvantaged it in the business segment of the market, SBC Reply Comments at 9, third party analysts have reported that SBC has been very successful in this segment as well, See, *e.g.*, Probe Research, Inc., *FRBOC Entry into Long Distance*, May 2002 at 11 (“Business represent[ed] 20% of SBC’s long distance lines”).

<sup>20</sup> See, SBC’s Reply Comments in Support of Petition for Forbearance and Modification at 12-13.

<sup>21</sup> *Non-Accounting Safeguards Order* ¶ 163.

<sup>22</sup> See, Comments of AT&T Corp. July 1, 2003 at 11 and note 32, *citing to* the Ex Parte Declarations of Lee L. Selwyn, in CC Docket No. 96-149, November 15, 2002 and July 9, 2003. AT&T supplemented this response in the subsequent *Further Notice of Proposed Rulemaking proceeding in FCC WC Docket No. 02-112 and CC Docket No. 00-175*, FCC 03-111 (rel. May 19, 2003) (“*Non-Dominance FNPRM*”) proceeding, see, Declaration of Lee L. Selwyn appended to AT&T’s Comments (June 30, 2003); Reply Declaration of Lee L. Selwyn appended to AT&T’s Reply Comments (July 28, 2003), which AT&T incorporates herein by reference.

<sup>23</sup> See, Ex Parte Declaration of Lee L. Selwyn, in CC Docket No. 96-149, July 9, 2003 ¶¶ 17 (“since an allocation based solely upon relative usage is ‘blind’ to other cost

*Proceeding*, Verizon represented that its Section 272 affiliate would no longer upgrade its OSS for purposes of providing OI&M services,<sup>24</sup> relying on the BOC to do so.<sup>25</sup> Verizon also asserted that the BOC would have no excess capacity,<sup>26</sup> thus raising precisely the concern for cost misallocation raised by Dr. Selwyn to the extent that additional employees or other assets had to be added. SBC here similarly seeks to integrate systems and workforces if the OI&M safeguard is removed. As AT&T demonstrated in the *Verizon OI&M Forbearance Proceeding*, there is no effective way to determine whether the systems upgrades will be improperly allocated entirely or primarily to the BOC or whether, for a joint local and long distance installation or repair service call, the Section 272 affiliate be charged only for the “incremental” long distance portion of the work so that it would not be charged for its allocable portion of the joint cost of sending the field force and vehicles to the job site.<sup>27</sup>

Second, Dr. Selwyn demonstrated that even if *CALLS* were “pure price caps,” BOCs would still have a powerful incentive to shift costs *out* of its long distance affiliates so as to enhance their ability to compete with nonintegrated rivals.<sup>28</sup> In any event, Dr.

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causative factors, it can provide opportunities for cost shifting between regulated and non-regulated activities”), 18 (to the extent the OSS upgrade will be utilized on an integrated basis the BOC could treat both the upgrade and subsequent ongoing maintenance expenses as a “common cost,” and “*any non-zero allocation of these incremental system development and maintenance costs to POTS would have the effect of shifting costs away from the competitive long distance company and onto regulated monopoly local exchange service,*” emphasis in the original) and 19 (where the ILEC has no excess capacity, eliminating the OI&M safeguard would result in a net *increase* in costs being allocated to monopoly ILEC ratepayers “if, for example, the ILEC were required to construct or acquire a block of additional capacity to serve the affiliate (or even to accept a transfer of capacity from the affiliate) that would not be fully utilized with the three-year usage allocation time frame contemplated at 47 CFR § 64.901(b)(4)”).

<sup>24</sup> June 4 *ex parte*, Attachment 3 at 5, note 4.

<sup>25</sup> That the BOC would have to furnish the upgrade is obvious in light of Verizon’s allegations regarding the purported need for OI&M forbearance in order to meet the needs of its most demanding large business customer, Declaration of Steven G. McCully appended to Verizon’s *Petition for Forbearance*, *passim*, and in light of Verizon’s assertion in its Forbearance petition that “the BOCs OSS could perform the same tasks with little modification.” Verizon’s *Petition for Forbearance* at 3.

<sup>26</sup> Howard Supplemental Declaration ¶ 5; *see also*, Verizon August 11, 2003 *ex parte* at 2.

<sup>27</sup> Letter from Aryeh Friedman, on behalf of AT&T, to Marlene Dortch, Secretary, Federal Communications Commission, October 1, 2003 (“*AT&T’s Verizon OI&M October 1 ex parte*”) at 6.

<sup>28</sup> *See*, Ex Parte Declaration of Lee L. Selwyn, in CC Docket No. 96-149, November 15, 2002 ¶¶ 44-45; Declaration of Lee L. Selwyn appended to AT&T’s Comments in the *Non-Dominance FNPRM* (June 30, 2003) ¶¶ 97-103; Reply Declaration of Lee L. Selwyn appended to AT&T’s Comments in the *Non-Dominance FNPRM* (July 28, 2003) ¶¶ 57-58. In the Reply Declaration of Dennis W. Carlton, Hal Sider and Allan Shampine in the *Non-Dominance FNPRM* proceeding, the LECs notably failed to

Selwyn demonstrated that *CALLS* is not "pure price caps," as SBC claims, because it is scheduled to expire in July 2005, and the Commission has expressly committed to reexamine ILEC price caps if, at the time that *CALLS* expires, the level of competition is still not sufficient to constrain rates effectively. Indeed, when the *CALLS* plan was adopted by the FCC, the Commission specifically expressed the *expectation* that by 2005:

"increased competition will serve to constrain access rates in the later years of the *CALLS* Proposal as X-factor reductions are phased out. We believe that market forces, instead of regulatory prescription, should be used to constrain prices whenever possible. As competitors utilizing a range of technologies, including cable, cellular, MMDS and LMDS, continue to enter the local exchange market, we expect that rates will continue to decrease.... Therefore, the significant up-front reductions coupled with increased competition ultimately should result in access charges that are comparable to those that would be achieved under our current price cap system over the five-year term of the *CALLS* Proposal. Furthermore, after the five year term we can re-examine the issue to determine whether competition has emerged to constrain rates effectively."<sup>29</sup>

That, of course, has not happened, and is unlikely to happen by 2005. This affects SBC's current incentives and conduct. If SBC is able to load costs onto its ILECs, those costs (if not detected and eliminated) could then be used to support a higher overall ILEC access charge rate level and a less onerous (from SBC's perspective) price adjustment mechanism under a reexamination of *CALLS* and possible reinitialization of access charges at the 11.25% ILEC authorized rate of return.

SBC's argument that 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 of Section 272(c)'s non-discrimination obligations<sup>30</sup> is disingenuous. BOCs like SBC have evaded this requirement by virtue of their ability to craft affiliate transactions in a manner that ensures BOC services made available to an affiliate are not realistically available to CLECs on the same terms and conditions. For example, SBC's Billing and Collection services provided to its affiliates include a "Volume Discount" involving a minimum commitment of the long distance carrier's traffic equal to 85% of the SBC in region subscribed customers. The only entity that would typically qualify for this discount is SBC Long Distance.<sup>31</sup>

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respond to Dr. Selwyn's discussion of the BOCs' incentive to shift costs *out* of their long distance affiliates so as to enhance their ability to compete with nonintegrated rivals even under a regime of pure price cap regulation

<sup>29</sup> *Access Charge Reform*, CC Docket No. 96-262, *Sixth Report and Order*, CC Docket Nos. 96-262 and 94-1, *Report and Order*, CC Docket No. 99-249, *Eleventh Report and Order*, CC Docket No. 96-45, 15 FCC Rcd 12962, 13031 (2000).

<sup>30</sup> SBC's Reply Comments at 14.

<sup>31</sup> The relevant schedules can be found at [http://www.sbc.com/public\\_affairs/regulatory\\_documents/affiliate\\_agreements/0,,152,00.html](http://www.sbc.com/public_affairs/regulatory_documents/affiliate_agreements/0,,152,00.html)). SBC has there indicated that it uses "Tariff" prices for its Billing and Collections services although this is not a tariffed service; SBC appears to have made either a costing or a posting error.

#### IV. AT&T HAS DEMONSTRATED THAT THE OI&M SAFEGUARD IS "NECESSARY" TO PREVENT DISCRIMINATION

AT&T has also developed a full record through Dr. Selwyn's declarations substantiating the likelihood of discrimination if the OI&M safeguard is removed, particularly with respect to superior access to the BOC's systems.<sup>32</sup> SBC's response to AT&T's evidence is to minimize this risk because of "the tension between secrecy and publicity required for a LEC to discriminate successfully" and the availability of other safeguards.<sup>33</sup> But as the recent *SBC Consent Decree* demonstrates, SBC is quite capable of engaging in unlawful conduct undetected by the safeguards put in place to identify such conduct.<sup>34</sup> Specifically, audits, a key safeguard for detecting violations of the *SBC/Ameritech Merger Order* (which imposed conditions designed, *inter alia*, to prevent the concealment of section 271 violations and discrimination),<sup>35</sup> never detected SBC's provisioning of long distance services in pre-relief states.<sup>36</sup> Similarly, Section 272 audits, particularly as conducted to date,<sup>37</sup> clearly would not detect discriminatory practices by SBC resulting from OI&M forbearance, discrimination such as providing its Section 272 affiliate with superior access to its systems.

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<sup>32</sup> See, Ex Parte Declarations of Lee L. Selwyn, in CC Docket No. 96-149, July 9, 2003 ¶¶ 20-21; Letter from Frank Simone, on behalf of AT&T, to Marlene Dortch, Secretary, Federal Communications Commission, September 16, 2003 at 2 and *AT&T's Verizon OI&M October 1 ex parte* at 8-9.

<sup>33</sup> SBC's Reply Comments at 15.

<sup>34</sup> Order and Consent Decree, *In the Matter of SBC Communications*, EB-03-IH-0013 (rel. Oct. 1, 2003).

<sup>35</sup> Identifying Section 271 violations and discrimination were made more difficult by the merger of SBC and Ameritech because the merger eliminated yet another BOC to "benchmark" against, and increased the likelihood of undetected discrimination. *SBC/Ameritech Merger Order* ¶¶ 184 (noting that the removal of this benchmark increased the likelihood of concealment of information), 209 (undetected discrimination) and 348-349 (conditions imposed to respond to the benchmarking and discrimination concerns).

<sup>36</sup> Nor did the Commission come to learn of these violations until, at times, years after the violations occurred. For example, "between October 1999 and November 2002 [SBC claims it] inadvertently continued to provide the long distance service [to its former affiliates] free-of-charge." *Consent Decree* at 5, ¶ 5(a). That *Consent Decree* also clarifies that the Trunk Information Record Keeping System ("TIRKS") is not so mechanized that circuit design is not subject to employee intervention, *id* at 6-7, ¶¶ 8(b)(1) and (2), despite SBC's assurance that because TIRKS is mechanized "as a practical matter discrimination is impossible." SBC's *Petition for Forbearance and Modification*, June 5, 2003 at 13; see also, Letter from Jacquelyne Flemming, Executive Director-Federal Regulatory, SBC to Marlene H. Dortch, Secretary, Federal Communications Commission, August 28, 2003 at 2-3.

<sup>37</sup> See Comments of AT&T Corp, CC Docket No. 96-150 (filed Jan. 29, 2003).

Sincerely,

A handwritten signature in cursive script, appearing to read "Aryeh Friedman". The signature is written in dark ink on a white background.

Aryeh Friedman