

**Before the
Federal Communications Commission
Washington, DC 20554**

In the Matter of)	
Applications for Consent to the)	
Transfer of Control of Licenses and)	
Section 214 Authorizations from)	
)	CC Docket No. 98-141
AMERITECH CORPORATION,)	
Transferor)	
to)	
SBC COMMUNICATIONS, INC.,)	
Transferee)	

**COMMENTS OF AT&T CORP. TO
SBC'S REQUEST TO ELIMINATE MERGER CONDITION 27**

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July 27, 2004

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Pursuant to Public Notice DA-04-2092 issued by the Commission on July 13, 2004, AT&T Corp. ("AT&T") submits its Comments to SBC's letters¹ requesting that the Commission eliminate Condition 27 of the *SBC/Ameritech Merger Order*² requiring it to engage an independent auditor to examine its compliance with the non-sunset merger conditions, and to publicly file a report with the Commission, for all periods beginning on or after January 1, 2004.³

¹ Letter from Jim Lamoureux, Senior Counsel, SBC Telecommunications, Inc., to William Davenport, Chief, Investigations and Hearings Division, FCC, June 9, 2004 ("SBC Audit Waiver Request Letter") and Letter from David G. Cartwright, Director – Federal Regulatory, SBC Telecommunications, Inc., to Diana Lee, Investigations and Hearings Division, FCC, July 7, 2004 ("SBC Supplemental Audit Waiver Request Letter").

² Memorandum Opinion and Order, *Applications Of Ameritech Corp., Transferor, And SBC Communications Inc., Transferee, For Consent To Transfer Control Of Corporations*, 14 FCC Rcd. 14712 (1999) ("*SBC/Ameritech Merger Order*"). Although the Conditions appended to the Merger Order use Roman numerals (e.g. Condition 27 is marked Condition XXVII), SBC and its auditors have referred to them by their Arabic numerals, and AT&T will do so here as well.

³ SBC filed the March 15, 2004 Annual Compliance Report, but there was no accompanying auditor's report as there have been with prior annual compliance reports. Granting SBC its requested relief would presumably relieve SBC of having the Auditor's substantive or control audits filed in September 2004.

A virtually identical filing was made by Verizon, seeking relief as of January 1, 2005.⁴ For the reasons set forth below, SBC's request should be denied.

INTRODUCTION AND SUMMARY

The Commission found that the proposed merger of SBC and Ameritech posed “significant potential public interest harms” by removing an actual potential entrant; eliminating a “benchmark;” and “increasing the incentive and ability of the merged entity to discriminate against rivals, particularly with respect to advanced services” – harms “not mitigated by the proposed transaction’s potential public interest benefits.”⁵ The Commission ultimately agreed to the merger, and found that the “proposed transaction, on balance ... serve[d] the public interest, convenience and necessity,” but only because of the applicants’ “ongoing compliance” with the conditions, including the audit condition, agreed to by SBC.⁶

SBC now asks the Enforcement Bureau to eliminate one of the merger conditions – the condition requiring an annual, independent audit assessing SBC’s compliance with the other conditions. SBC argues that it ought to be relieved of the audit condition because “there is no productive reason for the Commission or SBC to devote their resources to further audits since most of the merger conditions sunset prior to January 1, 2004,”⁷ that most of the remaining operative conditions are “self-policing” and that compliance will cost “at least one million dollars” before the condition sunsets.⁸

⁴ See Public Notice DA-04-2093 issued by the Commission on July 13, 2004, CC Docket No. 98-184.

⁵ *SBC/Ameritech Merger Order* ¶ 348.

⁶ *Id.*, ¶ 354 (emphasis added).

⁷ SBC Supplemental Audit Waiver Request Letter at 1.

⁸ SBC Audit Waiver Request Letter at 1-2.

To begin with, two of the essential premises of SBC's request are incorrect. The Enforcement Bureau has no power on delegated authority to eliminate any merger condition that the Commission has found to be a necessary prerequisite to the approval of a merger. Moreover, SBC's unsupported assertion that Condition 17 (requiring the provision of unbundled network elements ("UNEs")) has sunset is wrong. That condition does not sunset until the Commission has issued a final, non-appealable order establishing SBC's unbundling obligations – which has not yet occurred, because of the D.C. Circuit's two decisions vacating the Commission's rules and the fact that further proceedings are currently pending before the Commission on those issues on remand. The entire purpose of the condition was to provide market certainty and require SBC to offer UNEs during any period in which the Commission's unbundling rules were stayed or vacated; the court's successive decisions vacating those rules leave the merger condition in place. Indeed, SBC's request seems to be a backdoor attempt to obtain the Commission's blessing for its erroneous interpretation of this condition by burying it in a long list of allegedly "sunset" conditions.

The Commission's *SBC/Ameritech Merger Order* also forecloses SBC's request for elimination of the auditing requirement. The Commission held that its "public interest" finding, on the basis of which the merger was approved, turned on the "assumption and expectation" that the conditions, including the audit provision, "will remain effective and enforceable" for the entire period.⁹ Maintaining the full time frame "is critical for the conditions to ameliorate the

⁹ *SBC/Ameritech Merger Order*, ¶ 359.

potential public interest harms of the merger.”¹⁰ The full array conditions, including the audit condition, were “intended to be a floor and not a ceiling.”¹¹

The Commission further held that the three compliance conditions, the self-reported compliance report, the independent audit and the voluntary payment obligations were inextricably intertwined. The Commission held that, “[o]nly a strong corporate compliance program, *in conjunction with* the independent audit and other enforcement mechanisms, will enable consumers to realize the full benefits of the conditions.”¹²

SBC’s claim that some of the conditions are “self-policing,” or that CLECs will complain to the Commission about violations, is belied by the experience with past audits where the auditor has identified interpretation issues that affect whether or not there has been a violation, as well as violations, of the ongoing Conditions that would not otherwise have come to the attention of the Commission.

Finally, SBC’s *ipse dixit* savings claim is not only unsubstantiated but also irrelevant. The Commission, in approving the Merger Conditions, determined that “[t]he independent audit requirement establishes an efficient and cost-effective mechanism for providing reasonable assurances of SBC/Ameritech’s compliance with its obligations under the conditions.”¹³ Accordingly, SBC’s request to eliminate the audit requirement should be denied.

¹⁰ *Id.*, ¶ 416.

¹¹ *Id.*, ¶ 417.

¹² *Id.*, ¶ 409.

¹³ *Id.*, ¶ 412.

ARGUMENT

I. TWO ESSENTIAL PREMISES OF SBC'S REQUEST – THAT THE ENFORCEMENT BUREAU HAS AUTHORITY TO REMOVE MERGER CONDITIONS AND THAT THE UNE CONDITION HAS SUNSET – ARE INCORRECT.

A. The Enforcement Bureau Has No Authority To Remove Merger Conditions That The Full Commission Has Found To Be Necessary To Approval Of The Merger.

SBC's Letter to the Bureau includes only the bald request that it "discontinue requiring SBC to conduct SBC/Ameritech post-merger audits for all periods beginning on or after January 1, 2004." SBC cites no authority under which the Enforcement Bureau could grant such a request, nor could it. The Enforcement Bureau has no power on delegated authority to repeal a merger condition that the full Commission has found to be necessary in the public interest as a precondition to the approval of a merger.

The Commission made clear in the *SBC/Ameritech Merger Order* that it would not grant early termination of any of the merger conditions. The Commission noted that it found the merger to be in the public interest *only* "on the assumption and expectation that *all* of the conditions we adopt today," including the audit condition, "will remain effective and enforceable" for "the period specified in the condition."¹⁴ Only by virtue of SBC's "ongoing compliance" with *all* of the Conditions, including condition requiring an independent audit, did the "proposed transaction, on balance ... serve the public interest, convenience and necessity."¹⁵ Elsewhere, the Commission indicated that full enforcement of the conditions for the full time frame "is critical for the conditions to ameliorate the potential public interest harms of the

¹⁴ *Id.*, ¶ 359 (emphasis added).

¹⁵ *Id.*, ¶ 354.

merger.”¹⁶ The Commission also determined that the minimum time frames were reasonable in the context of the telecommunications industry.¹⁷

The Enforcement Bureau has no power on delegated authority to revisit these Commission public interest determinations.¹⁸ While the Bureau certainly may enforce and interpret the scope of a merger order, “it is axiomatic that a delegated authority decision cannot conflict or otherwise reverse the decision of the full Commission.” *E.g., Mintz, Levin, Cohn, Ferris, Glovsky & Pope, P.C.*, 17 FCC Rcd. 16100, ¶ 6 (2002); 47 C.F.R. § 1.115(b). There is no dispute that the audit condition remains operative under the plain terms of the *SBC/Ameritech Merger Order*; therefore, any bureau decision that eliminates that condition would “reverse the decision of the full Commission.” *See also* Public Notice at 1 (recognizing that SBC’s request “effectively asks the Commission to eliminate Condition XXVII for future periods”). The Commission found independent, annual audits to be a necessary condition to approving the merger, and only the full Commission can reverse that policy, and only under the stringent standards necessary for a waiver. SBC has not even attempted such a showing, and its request should be denied for that reason alone.

¹⁶ *Id.*, ¶ 416.

¹⁷ *Id.*, ¶ 438 (“[i]n the fast-changing world of telecommunications industries, these commitments, in our judgment, will last for a sufficient period to have real impact, but not so long as to threaten imposing obsolete responses to future issues”); *see also id.* ¶ 510 (same).

¹⁸ *See Delegation of Additional Authority to the Enforcement Bureau*, 17 FCC Rcd. 4795, ¶¶ 2-3 (2002) (delegation of merger-related audit functions to Enforcement Bureau “in no way affects the substantive merger obligations” and the amendments to the merger orders “are non-substantive and pertain to agency organization, procedure, and practice”).

B. Condition 17, Offering UNEs, Has Not Sunset.

SBC also simply asserts that Condition 17, requiring the provision of unbundled network elements, has sunset.¹⁹ That is flatly incorrect. By its plain terms, that condition remains operative, and independent audits remain necessary to ensure SBC's compliance with that condition.

Condition 17 was one of the most important conditions to the merger, because there was a great need to protect local competition in light of the uncertainty surrounding the Commission's unbundling rules. To address this, SBC agreed "to reduce uncertainty to competing carriers from litigation that may arise in response to the Commission's order in its UNE Remand proceeding," and agreed that "from now until the date on which the Commission's order in that proceeding, and any subsequent proceedings, becomes final and non-appealable" it "will continue to make available to telecommunications carriers each UNE that was available under SBC's and Ameritech's interconnection agreements as of January 24, 1999, even after the expiration of existing interconnection agreements."²⁰

¹⁹ SBC Audit Waiver Request Letter at 1.

²⁰ *SBC/Ameritech Merger Order* ¶ 394. The merger condition itself (Merger Condition XVII) states that SBC/Ameritech will continue to provide UNEs

under the same terms and conditions that such UNEs or combinations of UNEs that were made available on January 24, 1999, . . . until the earlier of (i) the date the Commission issues a final order in its UNE remand proceeding in CC Docket No. 96-98 finding that the UNE or combination of UNEs *is not required to be provided* by SBC/Ameritech in the relevant geographic area, or (ii) the date of a final, non-appealable judicial decision providing that the UNE or combination of UNEs *is not required to be provided* by SBC/Ameritech in the relevant geographic area. This Paragraph shall become null and void and impose no further obligation on SBC/Ameritech after the effective date of a final and non-appealable Commission order in the UNE remand proceeding.

SBC/Ameritech Merger Order, App. C, ¶ 53 (emphases added, footnote omitted).

The conditions for terminating these conditions have not yet been satisfied. As an initial matter, these conditions were effectively drafted by SBC, and any ambiguity must be construed against it. *See United States v. Seckinger*, 397 U.S. 203, 210 (1970) (“[A] contract should be construed most strongly against the drafter”). In any event, by any reading of these contractual provisions, SBC remains obligated to provide existing UNEs; there is no conceivable counterargument.

First, the merger condition is clearly not subject to a three-year sunset. It is true that many merger conditions expire after three years, but that default sunset provision does not apply to conditions that have their own specific termination language. *See Memorandum Opinion and Order, Applications of Ameritech Corp., Transferor, & SBC Communications, Inc., Transferee*, 17 FCC Rcd. 19,595, ¶ 3 (2002) (“Some of the [merger] conditions . . . are not subject to that expiration date because the condition itself specifically establishes its own period of applicability.”). The Enforcement Bureau has already expressly recognized that the UNE condition is a condition that is *not* subject to the three-year sunset period. *See id.* ¶ 3 n.7.

Nor could SBC claim that the condition has expired because there is “a final and non-appealable Commission order in the UNE remand proceeding.” There is in fact no such order. This reading is compelled by the FCC’s explanation of this merger condition: that “from now until the date on which the Commission’s order in that proceeding, *and any subsequent proceedings*, becomes final and non-appealable,” SBC “will continue to make available to telecommunications carriers each UNE that was” previously available.²¹ In the wake of the D.C. Circuit’s decision in *USTA II*, there are still “subsequent proceedings” underway at the Commission, and the Commission has yet to issue a final, non-appealable order determining

²¹ *SBC/Ameritech Merger Order* ¶ 394.

whether SBC must make a number of important UNEs, including switching, available. Thus, the condition is still operative.

Any contrary argument would render the Commission's phrase "any subsequent proceedings" superfluous. The *UNE Remand Order* was reversed by *USTA I*, and the *Triennial Review Order* was the FCC's order on remand from that decision.²² Given that the *UNE Remand Order* was issued prior to the issuance of the *SBC/Ameritech Merger Order*, it would have been a simple matter for the FCC (or SBC) to write the condition to specify that the obligation to offer UNEs would exist until the pending judicial review of the *UNE Remand Order* was final. The FCC, however, did not adopt such language. Rather, as noted, the plain language of the merger condition provides that the condition to offer UNEs applies until there is a "*final and non-appealable Commission order[]*" in the *UNE Remand* proceeding."²³ Further, the FCC, in explaining this condition, expressly stated that the condition would apply "until the date on which the Commission's order in that proceeding [*UNE Remand*], and any subsequent proceedings, become final and non-appealable."²⁴ Under the reading that SBC is implicitly proposing, there would never be any "subsequent proceedings" because the obligation would terminate after the initial review of the *UNE Remand Order*.²⁵

²² The *TRO* is expressly captioned as an "Order on Remand" in both the *UNE Remand* docket (CC Docket No. 96-98) and the *Line Sharing* docket (CC Docket No. 98-147). And that is, of course, why the appeal of the *TRO* was transferred from the Eighth Circuit to the D.C. Circuit and assigned to the same panel that heard *USTA I* – at SBC's request.

²³ *SBC/Ameritech Merger Order*, App. C, ¶ 53 (emphasis added).

²⁴ *SBC/Ameritech Merger Order*, ¶ 394 (emphasis added).

²⁵ See also *Bell Atlantic/GTE Merger Order* ¶ 316 (UNE condition would have no "practical effect" unless the *UNE Remand Order* or *Line Sharing Order* were "stayed or vacated" (emphasis added)).

Nor is it the case that this condition terminates when *USTA II* becomes final. In *USTA II*, the court did not hold that ILECs “are not required” to provide UNEs within the meaning of the condition. Rather, the court vacated the unbundling rules a second time merely for lack of reasoned explanation, which has triggered another “subsequent proceeding” on remand which is still pending at the Commission. There is still no final, non-appealable order with respect to the aspects of the Commission’s unbundling rules that were vacated in *USTA II*. The very point of the condition was to preserve the *status quo* should a court stay or vacate the unbundling rules that the FCC adopted in the UNE proceeding – as the D.C. Circuit has done in *USTA II*.²⁶

Accordingly, any contention that the merger conditions have been satisfied, notwithstanding the current uncertainty regarding the scope of ILEC unbundling obligations, would be contrary to the entire purpose of these conditions. The FCC found both that these mergers would reduce local competition and that affirmative steps were necessary to facilitate UNE-based competition. In particular, the FCC recognized that local competition was unlikely if carriers did not have a clear entitlement to particular UNEs.²⁷ Thus, the intended purpose of the condition was to provide the necessary certainty to induce local entry.²⁸ And it does so by ensuring that the ILEC remains obligated to provide UNEs until litigation surrounding the *UNE Remand Order* is finally resolved, by either: (1) a final judicial decision upholding the unbundling rules the FCC issues in those proceedings; (2) a final, non-appealable FCC order eliminating unbundling of a particular UNE; or (3) a final judicial decision holding the FCC

²⁶ *SBC/Ameritech Merger Order* ¶ 394.

²⁷ *Id.*

²⁸ *Id.*

cannot require unbundling of a particular element. Because none of those conditions is satisfied, application of this condition is mandatory.

II. EVEN AS TO THE CONDITIONS THAT SBC CONCEDES ARE STILL OPERATIVE, THE COMMISSION HAS DETERMINED THAT AN INDEPENDENT AUDIT IS NECESSARY.

Even as to the conditions that SBC concedes are still operative, these conditions are important conditions to the merger and independent audits remain necessary to ensure that SBC complies with them.

One of the “five primary public interest goals” the conditions were “designed to accomplish included “ensuring compliance with and enforcement of the conditions.”²⁹ The Commission imposed three Compliance conditions: “(1) establishing a self-executing compliance mechanism; (2) requiring an independent audit of the Applicants’ compliance with the conditions; *and* (3) providing self-executing remedies for failure to perform an obligation.”³⁰ The first was embodied in Condition 26 and includes SBC’s obligation to file its annual merger compliance report.³¹ The second is embodied in Condition 27 which required an audit to evaluate both the effectiveness of SBC’s internal control over compliance with the specified merger conditions (and SBC’s assertions regarding those controls in its Annual Merger Compliance Report) and SBC’s compliance with the specified conditions and management’s assertions included in the Report of Management on Compliance.³² The last is embodied in Condition 28,

²⁹ *Id.*, ¶ 355.

³⁰ *Id.*, ¶ 406 (emphasis added).

³¹ *Id.*, ¶¶ 407-409.

³² *Id.*, ¶¶ 410-412.

pursuant to which SBC has made almost \$86.7 million of “voluntary” payments over a three-and-a-half year period.³³

In the *SBC/Ameritech Merger Order* the Commission held that “[o]nly a strong corporate compliance program, *in conjunction with* the independent audit and other enforcement mechanisms, will enable consumers to realize the full benefits of the conditions.”³⁴ Independent audits are essential because it is “the findings in the auditor’s report, or the review of the auditor’s working papers,” not the BOC’s compliance report, that could “form the basis of enforcement actions.”³⁵

Independent audits have found numerous problems relating to the conditions that SBC concedes are still operative; audits uncover questionable SBC interpretations of conditions that would not otherwise be uncovered; and audits compensate for the lack of other ILEC benchmarks, which is a consequence of the merger. For all of these reasons, the audits should be retained.

A. The Remaining Conditions Are Important And Not “Self-Policing.”

SBC argues that “there is no productive reason for the Commission or SBC to devote their resources to further audits since most of the merger conditions sunset prior to January 1, 2004.”³⁶ But the continuing conditions³⁷ are all essential to the “primary public interest goals”

³³ Notice of SBC Voluntary Payments Pursuant to Merger Conditions CC Docket No. 98-141 (June 3, 2004) for Performance Months August 2000 through March 2004.

³⁴ *SBC/Ameritech Merger Order*, ¶ 409.

³⁵ *Id.*, ¶ 410 and n. 766, *citing to*, Contel Telephone Operating Companies, *Notice of Apparent Liability for Forfeiture*, 6 FCC Rcd 1880 (1991) (initiating an enforcement action based on the review of an independent auditor’s working papers).

³⁶ SBC Audit Waiver Request Letter at 1.

the conditions were designed to achieve, and on the basis of which the merger was allowed to proceed.³⁸ (i) “promoting equitable and efficient advanced services deployment” – Condition 3 (“Advanced Services OSS”) and Condition 6 (“Non-Discriminatory Rollout of xDSL Services”); (ii) “ensuring open local markets” – Condition 8 (“Uniform and Enhanced OSS”), Conditions 14-16 (all relating to “Carrier-to-Carrier Promotions:” “Unbundled Loop Discount,” “Resale Discount” and “UNE Platform”) and Condition 19 (“Shared Transport in Ameritech States”); and (iii) “improving residential phone service” – Condition 23 (“Enhanced Lifeline Plans”).

SBC argues that two of the remaining conditions involve nothing more than the continued payment of discounts as to which harmed parties could file a complaint.³⁹ But violations of the discount conditions will only be identified by the auditors, as they have been in the past,⁴⁰ rather than as the result of the filing of a formal complaint, not only because of the auditor’s unique access to SBC’s papers in the first instance (reducing both the cost and time of discovering a violation), but because of the relatively small size of the discount relative to the high cost of pursuing a formal complaint. The futility of filing a complaint is demonstrated by

³⁷ SBC asserts that compliance with Conditions 17, “Carrier-to-Carrier Performance Plan” and 22, “InterLATA Services Pricing,” which extended to 2004, were included in the scope of the 2003 audit. SBC Supplemental Audit Waiver Request Letter, Table 1.

³⁸ *SBC/Ameritech Merger Order*, ¶ 355.

³⁹ SBC Audit Waiver Request Letter at 1. SBC does not identify the specific conditions but it is presumably referring to conditions 14 and 15.

⁴⁰ Ernst & Young, Report of Independent Accountants (August 29, 2003) (“E&Y 2003 Substantive Audit Report”), ¶ 6(a)(ii) and (iii) at 4-5 (CLECs did not receive discounts within 60 days of the initial billing for the service as required by the Merger Conditions). SBC identified violations of Conditions 14 and 15 in its March 15, 2004 Annual Compliance Report at 19 (“[t]he Company became aware that a system error occurring in April, 2002 caused orders for residential loops to be improperly entered as business loops in the SBC Midwest region. As

Attachment C of the most recent auditor's report, showing that CLEC complaints alleging non-compliance by SBC with the merger conditions remained unresolved two to three years after they were filed.⁴¹

SBC further argues that the xDSL rollout condition is "self-policing" requiring only the filing of quarterly reports.⁴² But the filing of unaudited quarterly reports is not a substitute for an auditor's review of SBC's performance.

The remaining six conditions are neither "self-policing" nor should the audit requirement be waived because of the ability of harmed parties to file a complaint. The ability to file a complaint did not obviate the need for an independent auditor when the conditions were imposed and nothing has changed since then to alter that conclusion.

B. Experience With The Past Audits Of The Remaining Operative Conditions Shows That Independent Audits Result In The Disclosure of Information That Would Not Have Otherwise Been Voluntarily Reported By SBC.

The Auditor has previously found that SBC did not have processes in place that would allow for accurate self-reporting of violations of the ongoing merger conditions in SBC's Annual Audit Compliance Report. Specifically, the most recent Audit Report concluded:

"a. The processes to provide discounts required by Condition 3, Advanced Services Operation Support Services," 14, "Carrier-to-Carrier Promotions: Unbundled Loop Discount," and 15, "Carrier-to-Carrier Promotions: Resale Discount," did not include certain controls to verify that all eligible and requested discounts by Competitive Local

such, CLECs did not receive the discount for eligible residential loops ordered subsequent to the error").

⁴¹ *Id.*, Attachment C (Supra Complaint filed in 2000, and the Heritage Technology Complaint filed in 2001, both before the Texas Public Utility Commission and both alleging violations of Condition 11, "Collocation Compliance").

⁴² Condition 6, "Non-Discriminatory Rollout of xDSL Services."

Exchange Carriers (“CLECs”) were provided within the established time frames as specified in the Merger Conditions ...

d. The processes used to ensure the annual compliance report filed in accordance with Condition 26 did not ensure that the Company reported noncompliance related to ... Condition 15 related to discounts not provided to eligible CLEC lines in SWBT, and in Condition 23 as it relates to the requirement to spend an annual amount no less than the annual promotional budget set for that state.”⁴³

Past SBC merger audits have also identified disputed interpretations affecting a determination of compliance with the Conditions that would not necessarily be identified or disclosed absent the audit. SBC’s Annual Compliance Report contains only its *ipse dixit* conclusions of compliance. There is no assurance that SBC would self-identify non-compliance where its interpretation differed from that of those harmed by its non-compliance. For example, in past SBC audits, the issue arose as to whether the Merger Conditions require the auditor to audit the accuracy and completeness of the performance data in Condition 24 as well as Condition 7; SBC argued that it was only the latter.⁴⁴ The Commission staff and SBC ultimately agreed that the auditor would test and report on the completeness of eight service quality measurements as selected by the FCC staff in order to evaluate SBC’s compliance with Condition 24. Similar issues of interpretation could arise in the future.

Moreover, the auditor has found material violations by SBC of the continuing merger conditions that were not reported in its Annual Compliance Report. Thus the most recent audit report found that “[t]he filed annual compliance report did not note the material noncompliance related to Condition 15, ‘Resale Discount,’ as discussed in paragraph 6.a.iii. as it relates to certain CLEC lines in SWBT not receiving the eligible discount, and Condition 23, ‘Enhanced

⁴³ Ernst & Young, Report of Independent Accountants (Sept. 2, 2003) (“E&Y 2003 Controls Audit Report”), ¶ 7 at 4-6.

⁴⁴ E&Y 2003 Substantive Audit Report, ¶ 5 at 3.

Lifeline Plans,' as discussed in paragraph 6.d as it relates to the requirement to spend no less than the annual promotional budget to advertise enhanced Lifeline plans or other programs to benefit low-income consumers.”⁴⁵

C. The Annual Compliance Report Is Insufficient Because Of The Inability To Benchmark.

As noted above, one of the anticompetitive effects of the merger that the Conditions were designed to address was the loss of yet another BOC “benchmark.” The Commission found that “the major incumbent LECs ... remain uniquely valuable benchmarks for assessing each others performance.”⁴⁶ As the Commission noted, the further loss of benchmarks, which “provide valuable information regarding network features, costs and capabilities”⁴⁷ (the same goals that the remaining operative merger conditions seek to achieve) increases the risk that the remaining firms will, *inter alia* “conceal information.”⁴⁸ Thus, it would be difficult to evaluate the reliability of a self-reported Compliance Report on, *e.g.*, Condition 3, Advanced Services OSS, 6 (Non-Discriminatory Rollout of xDSL Services), Condition 8 (Uniform and Enhanced OSS and Advances Services OSS), Condition 16 (UNE Platform); Condition 17 (Offering UNEs) and Condition 19 (Shared Transferred in Ameritech States) because there would be few benchmarks with which to compare the results and to see whether any information was being concealed. The

⁴⁵ *Id.*, ¶ 6.e. at 6-7.

⁴⁶ *SBC/Ameritech Merger Order*, ¶ 103.

⁴⁷ *Id.*, ¶ 106.

⁴⁸ *Id.*, ¶ 104. *See also, id.* at ¶ 184.

audited reporting of condition related information to some extent mitigates this loss of benchmarks and to some extent cures this insufficiency.⁴⁹

III. THE COMMISSION HAS ALREADY DETERMINED THAT THE PUBLIC INTEREST PRECLUDES EARLY TERMINATION OF ANY OF THE CONDITIONS FOR ANY REASON, INCLUDING COST.

SBC asserts, as yet an additional ground for having the audit condition eliminated, that it “expects the merger condition audits for the year 2004 and beyond would cost at least one million dollars.”⁵⁰ First, that *ipse dixit* assertion (virtually identical to that made by Verizon in a parallel filing, even though the time frame and the number of continuing conditions are different) is unsubstantiated. SBC has submitted no declaration or evidence of ongoing audit costs (which have undoubtedly decreased as Conditions have sunset).

More importantly, the Commission held in the *SBC/Ameritech Merger Order* that the cost of the audit is a necessary cost for protecting the public interest and less costly than more intrusive regulation. There the Commission held that the independent audit requirement in Condition 27 was “an efficient and cost-effective mechanism for providing reasonable assurances of SBC/Ameritech’s compliance with its obligations under the conditions.”⁵¹ Indeed, it was SBC’s “plan” to use the independent auditor “as a cost-effective tool to supplement the Commission’s normal processes and procedures” for ensuring compliance with the conditions.⁵²

⁴⁹ *Id.*, ¶ 423 (“[t]he harm from such comparative practices analysis .. to some extent is mitigated by conditions that require ... the reporting of information regarding ... performance that is useful to regulators and competitors.”).

⁵⁰ Verizon Audit Waiver Request Letter at 2.

⁵¹ *SBC/Ameritech Merger Order*, ¶ 412.

⁵² *Id.*, ¶ 503.

CONCLUSION

For the reasons stated above, and in AT&T's Petition to Deny, the Commission should deny the Applicants' proposed merger as contrary to the public interest.

Respectfully submitted,

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July 27, 2004

CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of July, 2004, I caused true and correct copies of the forgoing Comments of AT&T Corp. to SBC's Request To Eliminate Merger Condition 27 to be served on all parties by mailing, postage prepaid to their addresses listed on the attached service list.

Dated: July 27, 2004
Bedminster, NJ

/s/ Karen Kotula

Karen Kotula

SERVICE LIST

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