

the vast majority of independent PSPs. APCC's members and customers are direct competitors of SBC in providing payphone services and will be directly impacted by the resulting anticompetitive market distortions identified in APCC's Petition to Deny should this Application for Consent to Transfer Control be approved.

DISCUSSION

As catalogued by Comptel/ALTS in its Petition to Deny, SBC has a well-documented history of violating the Commissions' rules, policies and orders. See Comptel/ALTS *Petition to Deny* at 61-68 (filed April 25, 2005). Given its current plan to merge with long-distance giant AT&T, the most troubling aspect of SBC's prior behavior is its apparent unwillingness to deal truthfully with the Commission and its numerous violations of the conditions set by the Commission in approving SBC's earlier merger with Ameritech, including willfully and repeatedly violating certain of the SBC/Ameritech merger conditions by failing to submit accurate performance data to the Commission and willfully and repeatedly violating the merger condition relating to shared transport. *Id.* at 63-64 and 66-68.

An additional example of the kind of conduct that SBC has engaged in is illustrative of what the Commission can expect if this merger is approved. In order to combat LEC incentives to charge PSPs excessive rates for network services, the

Commission's 1996 *Payphone Orders*¹ required LECs to bring the rates charged PSPs into compliance with the new services test, and made such compliance a condition of each LEC's eligibility to collect compensation for their own payphones under Section 276(b)(1)(A) of the Act. *First Payphone Order*, ¶ 146, *First Payphone Reconsideration Order*, ¶¶ 131, 162-63. Shortly before the April 15, 1997 deadline for compliance with this requirement, the Commission issued an order reiterating that compliance with the new services test was a precondition for a LEC's eligibility to collect payphone compensation. *Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Order, 12 FCC Rcd 20997, ¶¶ 30-33 (CCB 1997) ("*First Waiver Order*"). Claiming that they did not understand the Commission's prior orders, and recognizing that non-compliance jeopardized their eligibility for payphone compensation, a coalition of BOCs that included SBC² requested a temporary waiver of the new services test requirement to enable them to begin collecting dial-around compensation even though they had yet to bring their rates into compliance with the

¹ *Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, CC Dkt. No. 96-128, Report and Order, 11 FCC Rcd 20541 (1996) ("*First Payphone Order*"), recon. 11 FCC Rcd 21233, ¶ 131 (1996) ("*First Payphone Reconsideration Order*"), *aff'd in relevant part*, Ill. Pub. Telecomms. Ass'n v. FCC, 117 F.3d 555 (D.C. Cir. 1997), cert denied, Virginia State Corp. Comm'n v. FCC, 523 U.S. 1046 (1998).

² At the time, Ameritech had not yet been acquired by SBC. Both SBC and Ameritech were parties to the waiver request. *Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Order, 12 FCC Rcd 21370, 21371, n.7 (CCB 1997) ("*Second Waiver Order*"). By the time of the Illinois proceeding discussed below, SBC had acquired Ameritech.

new services test. See Letter from Michael K. Kellogg to Mary Beth Richards, April 10, 1997 (“*First Kellogg Letter*”) (Attachment 1 to *Comments of the American Public Communications Council on the Illinois Public Telecommunications Association’s Petition for Declaratory Ruling*, CC Dkt. No. 96-128). In return, the SBC/BOC coalition agreed that, “where new or revised tariffs are required” in order to comply with the new services test, they would refund any charges collected from PSPs after April 15, 1997, in excess of the level of charges found to comply with the test. See Letter from Michael K. Kellogg to Mary Beth Richards, April 11, 1997, at 1 (“*Second Kellogg Letter*”) (Attachment 2 to *Comments of the American Public Communications Council on the Illinois Public Telecommunications Association’s Petition for Declaratory Ruling*, CC Dkt. No. 96-128)).

In the *Second Waiver Order*, the Commission granted the waiver, subject to the express condition that a BOC would “reimburse or provide credit to its customers for those payphone services from April 15, 1997, if newly tariffed rates, when effective, are lower than the existing rates.” *Second Waiver Order at 21379-80. See also id.*, ¶¶ 2, 25.

Thus, the Commission, with SBC’s own consent, has determined that refunds were the appropriate remedy for non-compliance with the new services test and has legally subjected SBC to that remedy. To address the acknowledged non-compliance of SBC and the other BOCs, the Commission could have declared SBC and the others ineligible to collect dial-around compensation until their rates were found to be in compliance, a process that could have taken a substantial length of time even with the SBC and the other BOCs highly motivated to complete the proceedings. Rather than

postpone SBC's and the other BOCs' eligibility for dial-around compensation – a result that could have interfered with the transition to a competitive payphone market structure – the Commission and the SBC/BOC coalition agreed to an appropriate remedy. The Commission allowed SBC and the other BOCs to begin collecting dial-around compensation immediately by granting a blanket waiver of non-compliance with the new services test, subject to the condition that, in the event that SBC or the other BOCs were required to reduce rates in order to comply, the affected company must make whole the PSPs injured by such non-compliance by refunding the benefits gained by non-compliance – *i.e.*, the excess payphone line charges collected.

Although it would make a mockery of the Commission's *Second Waiver Order* if the Commission allows companies to succeed in attempts to have it both ways – to retain both the dial-around compensation they have collected pursuant to the *Second Waiver Order* and the excessive payphone line charges they have collected from PSPs for years in violation of the *Payphone Orders* – that is exactly what SBC is doing. SBC argued in Illinois that it did not file a “new rate” in reliance on the *Second Waiver Order*, but only filed a cost justification for its existing rates. *ICC Order* at 39³. SBC contends that it did not rely on the blanket waiver granted by the FCC and is not bound by the waiver conditions. This argument is fallacious. The key determinant of whether the

³ Illinois Commerce Commission, *Investigation into Certain Payphone Issues as Directed in Docket 97-0225*, ICC Docket No. 98-1095, Interim Order at 46 (November 12, 2003) (“*ICC Order*”).

Second Waiver Order applies is not whether the BOC voluntarily reduced its rates, but whether “new or revised tariffs are required.” *Second Kellogg Letter* at 1. By successfully delaying compliance with the new services test for up to seven years, SBC has reaped huge economic gains to which they were not entitled, and has unfairly deprived PSPs and their customers of the benefits of cost based rates, to which PSPs *were* and are entitled, thus conferring a competitive benefit upon itself.⁴

In our Petition to Deny⁵, we warned the Commission that the merged SBC/AT&T entity will have every incentive to manipulate the payphone compensation system in anticompetitive ways. Among the most potentially damaging consequences for independent PSPs would be the merged entity’s incentive and ability to:

- Fail to devote sufficient resources to ensuring accurate dial-around compensation payments;
- Delay compensation payments to their payphone competitors;

⁴ Nor does SBC’s merger partner, AT&T, have clean hands in its prior dealings with independent PSPs. For five years, APCC has been engaged in litigation with AT&T because AT&T has failed to pay PSPs all the dial around compensation to which PSPs are entitled. See *APCC Servs., Inc. v. AT&T Corp.*, 297 F. Supp. 2nd 101 (D.D.C. 2003), appeal docketed sub nom. *APCC Servs., Inc. v. Sprint Communications Co.*, No. 04-7034 (D.C. Cir. Jan. 2, 2004). More recently, the Commission also has been required to reject AT&T’s spurious claim that it did not have to pay into the universal service fund based on revenues derived from the sale of AT&T’s enhanced prepaid calling cards on the ground that the services provided using the cards were information services. See *AT&T Corp. Petition for Declaratory Ruling Regarding Enhanced Prepaid Calling Card Services/Regulation of Prepaid Calling Card Services, Order and Notice of Proposed Rulemaking*, WC Dkt. No. 03-133, No. 05-68, FCC 05-41 (released February 23, 2005).

- Engage in “takebacks” of alleged overpayments from their payphone competitors without allowing PSPs to dispute the overpayment;
- Withhold payments from high-volume payphones operated by their payphone competitors;
- Deny payments to their payphone competitors for dial-around carried by means of IP technology; and
- Make judgment calls to reduce payments to their payphone competitors.

As amply illustrated by the prior actions of SBC and AT&T, our concerns over the harmful effects of the proposed merger on independent PSPs are not speculative. The Commission should carefully weigh the prior history of both SBC and AT&T in failing to meet their obligations under FCC’s rules and complying with their commitments when considering our Petition opposing approval of the Application. As history is a strong predictor of future behavior, the Commission can only expect even more egregious conduct if this merger is approved.

CONCLUSION

For the foregoing reasons, the Commission should deny the Application for Consent to Transfer Control filed by SBC/AT&T.

(Footnote continued)

⁵ See *Petition to Deny of the American Public Communications Council* at 3-5.

DECLARATION OF WILLARD R. NICHOLS

I, Willard R. Nichols, on behalf of myself and the American Public Communications Council, Inc. ("APCC"), hereby declare upon my own personal knowledge that APCC is interested in the outcome of the Application for Consent to Transfer of Control filed by SBC Communications, Inc. and AT&T Corp. as APCC represents more than 1,140 independent payphone service providers who are direct competitors of SBC's payphone operations. I further declare that the matters stated in these Reply Comments and our Petition to Deny are accurate.



By: _____

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I hereby certify that on May 10, 2005, the foregoing petition was sent via electronic mail to the following:

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