Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of	)	
	)	
AMERITECH CORP.,	)	
Transferor,	)	
	)	
AND	)	
	)	
SBC COMMUNICATIONS INC.,	)	CC Docket No. 98-141
Transferee,	)	
	)	
For Consent to Transfer Control of	)	
Corporations Holding Commission Licenses	)	
and Lines Pursuant to Sections 214	)	
and 310(d) of the Communications Act	)	
and Parts 5, 22, 24, 25, 63, 90, 95 and 101	)	
of the Commission's Rules	)	

MEMORANDUM OPINION AND ORDER

Adopted: October 6, 1999 **Released: October 8, 1999**

By the Commission: Commissioner Ness issuing a statement; Commissioners Furchtgott-Roth and Powell concurring in part, dissenting in part, and issuing separate statements; Commissioner Tristani issuing a statement.

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I. INTRODUCTION

In this Order, we consider the joint applications filed by SBC Communications Inc. (SBC) and Ameritech Corporation (Ameritech) pursuant to sections 214(a) and 310(d) of the Communications Act of 1934, as amended (Communications Act),[1] for approval to transfer control of licenses and lines from Ameritech to SBC in connection with their proposed merger.[2] Before we can grant their applications, SBC and Ameritech (collectively, Applicants) must demonstrate that their proposed transaction will serve the public interest, convenience, and necessity.[3] After lengthy discussions with Commission staff and consideration of public comments in this proceeding, SBC and Ameritech supplemented their initial application by attaching to it proposed conditions representing a set of voluntary commitments.

We conclude that approval of the applications to transfer control of Commission licenses and lines from Ameritech to SBC is in the public interest because such approval is subject to significant and enforceable conditions designed to mitigate the potential public interest harms of their merger, to open up the local markets of these Regional Bell Operating Companies (RBOCs), and to strengthen the merged firm's incentives to expand competition outside its regions. We believe that the proposed voluntary commitments by SBC and Ameritech substantially mitigate the potential public interest harms while providing public interest benefits that extend beyond those contained in the original applications.

Specifically, we conclude in this Order that the proposed merger of these RBOCs threatens to harm consumers of telecommunications services by: (a) denying them the benefits of future probable competition between the merging firms; (b) undermining the ability of regulators and competitors to implement the pro-competitive, deregulatory framework for local telecommunications that was adopted by Congress in the Telecommunications Act of 1996; and (c) increasing the merged entity's incentives and ability to raise entry barriers to, and otherwise discriminate against, entrants into the local markets of these RBOCs .[4] Furthermore, the asserted benefits of the proposed merger, absent conditions, do not outweigh these significant harms, as described herein.

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1 47 U.S.C. §§ 214(a), 310(d).

2 *See* Merger of SBC Communications Inc. and Ameritech Corporation, Description of the Transaction, Public Interest Showing and Related Demonstrations (filed July 24, 1998) (SBC/Ameritech July 24 Application).

3 *See* 47 U.S.C. §§ 214(a), 310(d). *See also Application of WorldCom, Inc. and MCI Communications Corporation for Transfer of Control of MCI Communications Corporation to WorldCom, Inc.*, CC Docket No. 97-211, Memorandum Opinion and Order, 13 FCC Rcd 18025, 18026-27, 18030-32 at paras. 1, 8-10 (1998) (*WorldCom/MCI Order*); *Applications of NYNEX Corporation Transferor, and Bell Atlantic Corporation Transferee, For Consent to Transfer Control of NYNEX Corporation and Its Subsidiaries*, File No. NSD-L-96-10, Memorandum Opinion and Order, 12 FCC Rcd 19985, 19987, 20000-04 at paras. 2, 29-32 (1997) (*Bell Atlantic/NYNEX Order*).

4 Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, *codified at* 47 U.S.C. §§ 151 *et seq.* (1996 Act).

The proposed conditions, however, change the public interest balance. We expect that with these conditions, competition in the provision of local exchange services, including advanced services, will increase both inside and outside the merged firm's region. Accordingly, assuming the Applicants' ongoing compliance with the conditions described in this Order, we find that the Applicants have demonstrated that the proposed transfer of licenses and lines from Ameritech to SBC serves the public interest, convenience, and necessity.

II. EXECUTIVE SUMMARY

To implement the dismantling of the Bell System, seven Regional Bell Operating Companies were created in 1984. After the mergers of SBC with Pacific Telesis and Bell Atlantic with NYNEX, five RBOCs remain. The instant proceeding concerns the proposed transfer of licenses and lines attendant upon a proposed merger of two RBOCs, SBC and Ameritech. We conclude that, with the conditions adopted by this Order, the Applicants have demonstrated that the proposed transfer of licenses and lines from Ameritech to SBC will serve the public interest, convenience, and necessity. We also make the following determinations in support of this conclusion:

- Harms – The proposed merger of these RBOCs threatens to harm consumers of telecommunications services in three distinct, but interrelated, ways.

    1) The merger will remove one of the most significant potential participants in local telecommunications mass markets both within and outside of each company's region.

    2) The merger will substantially reduce the Commission's ability to implement the market-opening requirements of the 1996 Act by comparative practice oversight methods.[5] Contrary to the deregulatory, competitive purpose of the 1996 Act, this will, in turn, increase the duration of the entrenched firms' market power and raise the costs of regulating them.

    3) The merger will increase the incentive and ability of the merged entity to discriminate against its rivals, particularly with respect to the provision of advanced telecommunications services. This is likely to frustrate the Commission's ability to foster advanced services as it is directed to do by the 1996 Act.

[5] This Commission, the states, and competing firms often compare the practices of one major incumbent local exchange carrier against the other incumbents to inform regulatory or competitive decisions.

- Benefits – The asserted benefits of the proposed merger do not outweigh the significant harms, detailed above. Specifically:

    1) The Applicants have failed to demonstrate that the merger is necessary in order to obtain the benefits to local competition of the National-Local Strategy, a plan in which the merged firm will enter 30 out-of-region markets as a competitive LEC.

    2) Only a small portion of the Applicants' claimed cost-saving efficiencies, including procurement savings, consolidation efficiencies, implementation of best practices, faster and broader roll-out of new products and services, and benefits to employees and communities, are merger-specific, likely and verifiable.

    3) The only merger-specific benefits to product markets other than local wireline telecommunications markets, such as wireless services, Internet services, long distance and international services, and global seamless services for large business customers, relate to a somewhat increased pace of expansion and modest reductions in unit costs. Any benefits in these regards are both speculative and small.

- Conditions – On July 1, 1999, the Applicants supplemented their application by proffering a set of voluntary commitments that they agreed to undertake as conditions of approval of their proposed transfer of licenses and lines. Following a period of public comment regarding their proposed conditions, the Applicants substantially revised their commitments on August 27, 1999, and continued to refine those commitments in filings with the Commission on September 7, September 17, and September 29, 1999. Assuming satisfactory compliance, implementation of the attached final set of conditions will further the following goals:

    1) promoting advanced services deployment;
    2) ensuring that in-region local markets are more open;
    3) fostering out-of-region competition;
    4) improving residential phone service; and
    5) enforcing the Merger Order.

  These commitments are sufficient to tip the scales, so that, on balance, the application to transfer licenses and lines should be approved.

- Wireless – SBC and Ameritech are required by the U.S. Department of Justice, and as a condition of this Order, to divest one of the cellular telephone licenses in seven Metropolitan Statistical Areas and seven Rural Service Areas where the two companies have overlapping cellular geographic service areas.

- International – The public interest will be served by transferring control of Ameritech's international section 214 authorizations to SBC, subject to the condition that SBC subsidiaries be classified as dominant international carriers in their provision of service on the U.S.-South Africa and U.S.-Denmark routes.

- Alarm Monitoring – Section 275 of the Communications Act does not require that the Ameritech BOCs lose their grandfathered right to be affiliated with an entity that is engaged in the provision of alarm monitoring services merely because the Ameritech BOCs will become affiliates of the SBC BOCs, which are not grandfathered. A forced divestiture of Ameritech's alarm monitoring subsidiary would be contrary to the intent of section 275.

- Cable – Section 652 of the Communications Act does not prohibit SBC from acquiring Ameritech's existing in-region cable overbuild operations.

- Service Quality – Any post-merger service quality concerns are adequately addressed by the Applicants' proffered commitments.

- Character/Requests for Hearing – Petitions to deny the applications do not raise a substantial or material question of fact that would warrant an evidentiary hearing regarding whether SBC or Ameritech possesses the requisite character to engage in a transfer of control of Commission licenses, or regarding any other matter related to this transaction.

III. BACKGROUND

A. The Applicants

Ameritech Corporation. Ameritech, one of the original seven RBOCs[6] formed as part of the divestiture of AT&T's local operations, is the primary incumbent local exchange carrier (LEC) serving Illinois, Indiana, Michigan, Ohio, and Wisconsin. Ameritech, through its operating companies,[7] serves more than 20 million local exchange access lines, and had 1998 operating revenues in excess of $17.1 billion.[8]

In addition to local exchange and exchange access services, Ameritech's operating companies provide a wide range of other services, including cellular, personal communications services (PCS), paging, security, cable television, Internet access, alarm monitoring and directory publishing services.[9] Ameritech provides cellular services to more than 3.5 million customers in 42 cellular markets throughout its five-state region and in other markets in Missouri, Hawaii and Kentucky, as well as PCS service in the Cleveland, Cincinnati, and Milwaukee metropolitan areas.[10] Ameritech also provides paging services to more than 1.5 million customers in its five-state region, and in two adjacent states, Missouri and Minnesota.[11] Through its Ameritech Interactive Media Services, Inc. subsidiary, Ameritech provides Internet services and products to over 66,000 customers,[12] while its cable television subsidiary, Ameritech New Media, Inc., provides competitive cable service to more than 200,000 consumers in over 75 communities in the Chicago, Cleveland, Columbus, and Detroit metropolitan areas.[13] Ameritech's SecurityLink by Ameritech, Inc. subsidiary is North America's second-largest security monitoring provider with more than one million residential and commercial accounts.[14] Finally, Ameritech has diverse overseas investments, which include direct or indirect financial interests in communications ventures in fifteen European countries, including Belgium, Denmark, Germany, Hungary, and Norway.[15]

Ameritech's subsidiaries hold numerous Commission licenses and operate lines used in interstate and international communications, including domestic and international lines authorized under section 214, and various Title III licenses necessary to operate cellular, paging, PCS, experimental radio, business radio, mobile radio, and microwave services, as well as earth

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6 In this Order, we use the term "BOC" to refer to a Bell operating company as defined in the Communications Act, 47 U.S.C. § 153(4), and the term "RBOC" to refer to the original seven regional holding companies created by the breakup of AT&T. *See United States v. American Tel. & Tel. Co.*, 552 F. Supp. 131 (D.D.C. 1982).

7 Ameritech's five local exchange operating companies are: Illinois Bell Telephone Company, Indiana Bell Telephone Company, Inc., Michigan Bell Telephone Company, The Ohio Bell Telephone Company, and Wisconsin Bell, Inc. *See* SBC/Ameritech July 24 Application, Description of the Applicants and Their Existing Business, at 2.

8 *See* Ameritech 1998 Annual Report (Selected Financial and Operating Data).

9 SBC/Ameritech July 24 Application, Description of the Applicants and Their Existing Business, at 2.

10 *Id*. at 3.

11 *Id*.

12 *Id*.

13 *See* http://www.ameritech.com/products/americast/whoweare.html.

14 SBC/Ameritech July 24 Application, Description of the Applicants and Their Existing Business, at 3.

15 *Id.*, Table 15 "Selected International Investments" (listing select Ameritech international investments).

station authorizations.[16] Through its subsidiaries, Ameritech is also authorized to operate international facilities-based and/or resale services originating outside the states in which Ameritech provides local exchange service.[17]

SBC Communications Inc. SBC, another of the original seven RBOCs, became the primary incumbent LEC serving Arkansas, Kansas, Missouri, Oklahoma, and Texas following the AT&T divestiture. In April 1997, SBC acquired Pacific Telesis Group, another RBOC, which was the primary incumbent LEC in California and Nevada.[18] In October 1998, SBC acquired Southern New England Telecommunications Corporation (SNET), which was the primary incumbent LEC for most of Connecticut.[19] Together, SBC's operating companies[20] serve more than 35.7 million local exchange access lines in its eight-state region. In 1998, SBC's operating revenues exceeded $28.7 billion.[21]

In addition to providing local exchange and exchange access services, SBC provides wireless, Internet access, out-of-region interLATA, cable television and directory publishing services.[22] SBC's principal wireless subsidiaries provide cellular, PCS, and paging services to more than 8.3 million subscribers throughout SBC's eight-state region and in several

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16 *Id*., Categories of Ameritech's FCC Authorizations.

17 *See id*., Application of Ameritech Corporation and SBC Communications Inc., for Authority, Pursuant to Section to Section 214 of the Communications Act of 1934, as Amended, to Transfer Control of Ameritech Corporation, a Company Controlling International Section 214 Authorizations (filed July 24, 1998)(SBC/Ameritech July 24 International Application).

18 *See Applications of Pacific Telesis Group, Transferor, and SBC Communications, Inc., Transferee, For Consent to Transfer Control of Pacific Telesis Group and its Subsidiaries*, Report No. LB-96-32, Memorandum Opinion and Order, 12 FCC Rcd 2624 (1997) (*SBC/PacTel Order*).

19 *See Applications for Consent to Transfer of Control of Licenses and Section 214 Authorizations from Southern New England Telecommunications Corporation, Transferor, to SBC Communications, Inc., Transferee*, CC Docket No. 98-25, Memorandum Opinion and Order, 13 FCC Rcd 21292, 21294 at para. 3 (1998) (*SBC/SNET Order*).

20 SBC's principal wireline subsidiaries are: Southwestern Bell Telephone Company (SWBT), Pacific Bell (PacBell), Nevada Bell, and The Southern New England Telephone Company (SNETel). *See* Application, Description of the Applicants and Their Existing Business, at 1.

21 SBC 1998 Annual Report at 6 (Management's Discussion and Analysis of Financial Condition and Results of Operations).

22 SBC/Ameritech July 24 Application, Description of the Applicants and Their Existing Business, at 1.

out-of-region markets.[23] SBC's Personal Vision subsidiary (d/b/a SNET Americast) provides cable television service in Connecticut.[24]

SBC also provides interexchange (long distance) service to more than 900,000 customers in Connecticut through its SNET subsidiary.[25] In February 1999, SBC entered into an alliance with Williams Communications, Inc., in which SBC will acquire $500 million, or approximately ten percent, of Williams' shares, giving SBC access to Williams' nationwide fiber-based broadband network.[26] Finally, SBC also holds international investments in communications ventures in France, Israel, Switzerland, the United Kingdom, Chile, Mexico, South Korea, Taiwan, and South Africa, as well as in two proposed trans-Pacific undersea cable systems linking China and Japan with the United States.[27]

1. A Changing Industry

In 1982, the United States District Court for the District of Columbia entered a consent decree in an antitrust suit entitled *United States v. AT&T Corp*.[28] The 1982 Consent Decree, also known as the "Modification of Final Judgment" (MFJ), when fully enforced in 1984, substantially dismantled what had formerly been an integrated end-to-end monopoly of U.S. telecommunications services, the Bell System. Before the MFJ, the Bell System provided local exchange telephone service to over 80 percent of all residential phone subscribers in the United States, and accounted for even higher shares of long distance service, phone plant equipment manufacture and customer premises equipment sales. For most Americans, the Bell System provided virtually all telecommunications needs. By fundamentally altering that

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[23] "SBC 2Q Earnings Per Share Increase 15.7 Percent: Company Sees Strong Growth in Wireless, Data Customers," www.sbc.com/News/Article.html?query_type=article&query=19990720-01 (July 10, 1999). SBC's wireless operations added 305,000 net wireless subscribers during the second quarter of 1999, including 167,000 PCS customers in California and Nevada. *Id.* SBC subsidiary Southwestern Bell Mobile Services (SBMS) operates cellular systems in the Chicago, Boston and Baltimore/Washington metropolitan areas, and in upstate New York. Southwestern Bell Wireless, Inc., a subsidiary of SBMS, operates cellular and PCS systems within Texas, Missouri, Oklahoma, Kansas and Arkansas. SBC subsidiary Pacific Bell Mobile Services operates PCS systems in California and Nevada. SBC subsidiary SNET Cellular, Inc. provides cellular service in Rhode Island and portions of Massachusetts, and Springwich Cellular Limited Partnership serves Connecticut and other parts of Massachusetts. *See* SBC/Ameritech July 24 Application, Description of the Applicants and Their Existing Business, at 1; Map 30 "SBC/Ameritech Wireless Holdings." Earlier this year, SBC acquired Comcast Cellular Holdings, Co. (Comcast Cellular), which provides cellular and PCS services to more than 850,000 subscribers throughout Pennsylvania, New Jersey, Delaware, and Maryland. *See Applications of Comcast Cellular Holdings, Co., Transferor, and SBC Communications, Inc., Transferee, For Consent to Transfer of Control of Licenses and Authorizations*, File Nos. 8-EX-TC-1999, *et al.*, Memorandum Opinion and Order, DA 99-1318 (July 2, 1999). Comcast Cellular also holds cellular licenses in the Joliet and Aurora/Elgin, Illinois metropolitan areas. *Id.*, at para. 9.

[24] *See SBC/SNET Order*, 13 FCC Rcd at 21294, para. 5.

[25] *See id.*, at para. 3.

[26] *See* SBC 1998 Annual Report at 3 (Letter from Edward E. Whitacre Jr., Chairman and CEO).

[27] SBC/Ameritech July 24 Application, Table 15 "Selected International Investments" (listing select SBC international investments).

[28] *See United States v. American Tel. & Tel. Co.*, 552 F. Supp. 131 (D.D.C. 1982).

environment, the MFJ, together with its underlying rationale, provides the central backdrop against which all telecommunications regulation takes place in this country, and, indeed, the measure against which we evaluate the merger before us.

The entry of the 1982 Consent Decree created SBC and Ameritech. The MFJ essentially divorced the Bell System's local exchange operations from its other lines of business by requiring the creation of seven regionally-based operating companies (*i.e.,* the RBOCs). These RBOCs were created as holding companies for the local operating companies that had been owned by AT&T and were forbidden from selling long distance services and information services, and from manufacturing or selling telecommunications equipment. Both SBC and Ameritech therefore are creations of the MFJ, not an outgrowth of natural market forces. Necessarily, then, the rationale behind the 1982 Consent Decree frames most of the issues raised by their proposed merger.

To put it simply, the Bell System was broken up because of two firmly held beliefs. One belief was that competition, rather than regulation, could best decide who would sell what telecommunications services at what prices to whom. The other belief was that the principal obstacles to realizing that competitive ideal were the incentive and ability of dominant local exchange carriers, who typically controlled virtually all local services within their regions, to wield exclusionary power against their rivals. The Department of Justice, the federal courts, and this Commission concluded that a firm controlling access to virtually all local phone customers in its region was very likely to exclude those who would directly compete with it and to discriminate against those, such as long distance service providers and equipment manufacturers, who might offer competitive ancillary services that the local exchange carrier also sought to offer. Further, decades of experimentation with various regulatory regimes had taught that regulators could not fully monitor and control such exclusionary and discriminatory behavior. Rather, structural solutions – in this case the divorce of AT&T from its local operating companies – were vitally necessary.

The other seminal event in post-World War II telecommunications regulation was the enactment of the 1996 Act. When Congress passed the 1996 Act, it codified the standards and principles established by the Bell System break-up and set forth a framework that governs us today. Two aspects of the 1996 Act in particular drive our analysis of this license transfer application and the companies' subsequent proposed conditions.

First, Congress not only firmly ratified the pro-competitive thrust of the MFJ and embraced its rationale, but it extended the goals of the decree. The MFJ principally sought to further competition in ancillary fields, such as long distance, equipment manufacturing, and information services. Based in part on successful state experiments with limited introduction of local competition, the 1996 Act determined that it would also be U.S. telecommunications policy to foster competition nationally in the provision of local exchange and exchange access services to all telephone subscribers, including residential units. From the date of the enactment of the

1996 Act, this Commission, in conjunction with state public utility commissions, has been statutorily charged with opening up local markets to competition, on the specific premise that without regulatory oversight, the incumbent LECs would be able to discriminate against and exclude local rivals.

Second, Congress directed this Commission and the state commissions to achieve these competitive ends by deregulatory means. The 1996 Act introduced into our telecommunications law a clearly-stated duty of dominant LECs to interconnect with their competitors – for example, to unbundle their networks and provide advance notice of changes in their network design, to permit rivals to resell incumbent LEC services at a discount, and to allow their competitors to collocate on their premises.[29] Incumbent LECs must accommodate their rivals, not predate against them, and the process of accommodation is to be through commercial negotiation – not regulatory fiat – where possible. Thus, Congress instructed this Commission and state regulators to effectuate the transition from monopoly markets to competitive markets in a deregulatory manner. This means that regulations enforcing interconnection on fair and equitable terms should not impose detailed regulatory oversight on incumbents. Our mandate is to achieve competition, not to devise a complex regulatory regime. We assess this transfer of control application, and its associated conditions, against this mandate.

2. State of Local Competition in SBC and Ameritech Regions

At the time of its merger application in July 1998, SBC served 33.4 million access lines.[30] SBC provided approximately 650,000 resold lines to competitors,[31] commonly referred to as competitive LECs. Most of these access lines were in California, Texas, and Kansas.[32] In addition, SBC provided 60,000 unbundled loops, most of which were in the former PacTel region[33] -- 52,000 in California and 3,600 in Nevada, compared with only 330 in Texas.[34] SBC also reported that it was providing approximately 353,000 interconnection trunks, greater than 90 percent of which were in California and Texas,[35] and 343 unbundled switch ports.[36]

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29 47 U.S.C. §251(c).

30 SBC/Ameritech July 24 Application, Description of the Applicants and Their Existing Businesses at 1. Since filing its merger application, SBC has added 2.3 million access lines as a result of its merger with SNET. *SBC/SNET Order*, 13 FCC Rcd at 21294, para. 3. In addition, access line growth in SBC's region has continued apace. SBC's wireline operations added 1.4 million access lines in the 12-month period ended March 31, 1999. "SBC First-Quarter Earnings Per Share Increase 14.3 Percent," www.sbc.com/News/Article.html?query_type=article&query=19990420-017 (visited Aug. 19, 1999). Residential lines grew 3.9 percent and business voice grade equivalent lines – which include both voice lines and data circuits – grew 15.9 percent in the first quarter of this year. *Id.* SBC reported a total of 37.7 million access lines as of April 20, 1999. *Id.*

31 SBC/Ameritech July 24 Application, Table 1 (Open Market Measures in SBC and Ameritech Regions).

32 *Id.* at Table 3 (SBC Local Landline Competitors by State and Method of Entry).

33 *Id.*, Description of the Transaction at 77 & Table 3.

34 *Id.* at Table 3.

35 *Id.* at Tables 1 & 3.

36 *Id.* at Table 1.

SBC stated that there were more than 50 active competitors in its region and that it had entered into 374 interconnection and resale agreements, 93 percent of which were adopted without state arbitration.[37] SBC noted 548 collocation arrangements (490 physical/58 virtual) in 173 wire centers, plus 443 pending arrangements.[38] SBC stated that competitors had installed 547 switches[39] (vs. approximately 2800 that SBC owns) and more than 6,500 route miles of fiber in its region.[40]

At the time of its application, Ameritech served more than 20 million access lines.[41] It provided approximately 635,000 resold lines to competitors, 92 percent of which were in three of its five states. Only six percent of these resold lines were in Wisconsin, and two percent were in Indiana.[42] Ameritech reported provisioning 94,600 unbundled loops.[43] Fifty-seven percent of these unbundled loops were in a single state, Michigan.[44] Only 900 such lines had been unbundled in Wisconsin and no lines had been unbundled in Indiana.[45] Ameritech also reported provisioning 180,000 interconnection trunks and "zero" unbundled switch ports.[46]

Ameritech stated that there were more than 50 active competitors in its region, and that it had entered into 175 interconnection and resale agreements with 39 carriers.[47] Ameritech reported 113 physical collocations and 166 virtual collocations in Ameritech wire centers, with 77 more scheduled for activation in the third quarter of 1998.[48] According to Ameritech, this represents 23 percent of Ameritech wire centers, which serve 63 percent of business lines and 50 percent of residential lines in Ameritech's service area.[49] Ameritech stated that competitors had installed 120 switches (vs. approximately 1500 that Ameritech owns) and more than 5,000 route miles of fiber in Ameritech's region.[50]

Although Ameritech had only 60 percent as many access lines as SBC, Ameritech and SBC had an equivalent number of resold lines, and Ameritech had approximately 50 percent more unbundled loops, as of July 1998. As noted, however, not a single unbundled loop was

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37 *Id.*, Description of the Transaction at 76-77 & Table 1.
38 *Id.*, Description of the Transaction at 77 & Table 1.
39 *Id.*, Description of the Transaction at 86-87.
40 *Id.*, Description of the Transaction at 87.
41 *Id.*, Description of the Applicants and Their Existing Businesses at 2.
42 *Id.* at Tables 1 & 4 (Ameritech Local Landline Competitors by State and Method of Entry).
43 *Id.*, Description of the Transaction at 77.
44 *Id.* at Table 4.
45 *Id.*
46 *Id.* at Table 1.
47 *Id.*, Description of the Transaction at 77 & Table 1.
48 *Id.*, Description of the Transaction at 77.
49 *Id.*
50 *Id.*, Description of the Transaction at 87.

reported in Indiana.[51] SBC provided proportionately more interconnection trunks, but nearly two-thirds of those trunks were in California,[52] and more than 90 percent were in Texas and California. Ameritech's provisioning of interconnection trunks was spread more evenly across its region.[53]

Ameritech's supply to competitors of 635,00 resold lines and 94,600 unbundled loops represents about 3.5 percent of its 20 million access lines,[54] whereas SBC's 650,000 resold lines and 60,000 unbundled loops represents approximately 2 percent of SBC's 33.4 million access lines.[55] SBC estimated that, as of December 1998, it had provided 800,000 lines through resale, and facilities-based competitive LECs had self-provisioned an additional 600,000 lines.[56] SBC counts the loss to facilities-based competitive LECs through a variety of means, including directory listings, 911/E911 databases, and telephone numbers ported to competitors.[57]

In their Joint Reply to comments regarding proposed merger conditions,[58] SBC and Ameritech assert that local communications markets have opened further, and competition

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[51] The Indiana Utility Regulatory Commission (IURC) states that *"there is virtually no competition for local telephone service in the state of Indiana."* IURC June 16 Comments at 6 (emphasis in original). The IURC found it "[p]articularly disturbing" that, as of December 31, 1998, Ameritech Indiana had lost less than 500 voice grade access lines as UNEs in a service area that included 2.2 million access lines. *Id.* at 3. Ameritech Indiana was providing 460 UNE loops and 16,980 resold lines (approximately 0.7 percent of total voice grade access lines). *Id.* at 7. The IURC cited, as other indications that facilities-based competition is non-existent, the fact that competing carriers had collocation arrangements in only 19 of Ameritech Indiana's 160 switching centers at the end of 1998, and that less than half (46 percent) of Ameritech Indiana's voice grade access lines were served by a switching center in which at least one competitor had a collocation arrangement. *Id.*

[52] *See* Consumer Coalition Comments, Affidavit of Susan M. Baldwin and Helen E. Golding (Baldwin & Golding Affidavit), at 9-10 (comparing estimated facilities-based competitive LEC penetration of 1.5 percent in PacTel region, which SBC acquired in April 1997, with estimated 0.6 percent facilities-based penetration in SWBT region).

[53] SBC/Ameritech July 24 Application, Table 4.

[54] Reducing these numbers to the level of an individual state, the Michigan PSC noted in its February 1998 Report on Local Telephone Interconnection that competitive LECs in Ameritech Michigan's service area operated 200,000 lines in Michigan: 20,000 with UNEs, and 180,000 through resale. *See* Report to the Michigan Governor and Legislature on Public Act of 1991 as amended section 353, Report on Local Telephone Interconnection (Feb. 1998), http://ermisweb.cis.state.mi.us/mpsc/comm/localcon.htm (visited Aug. 19, 1999). These 200,000 lines represented approximately 3.77 percent of Ameritech's total 5.3 million lines in Michigan, and were mainly concentrated in the Grand Rapids, Flint and Detroit areas. *Id. See also* IURC June 16 Comments at 9 (estimating that, at the end of 1998, approximately 3 percent of total voice grade access lines in Ameritech's service areas in Illinois and Michigan were served by a competitive LEC, either through total service resale or UNEs).

[55] These numbers are in line with industry estimates concerning competitive entry into SBC's markets. *See, e.g.,* "Competitors have swiped only 2.2% of SBC's phone lines, compared with a 3.4% loss at Bell Atlantic." "The Last Monopolist," *Business Week, 76, 77* (Apr. 12, 1999).

[56] Letter from Zeke Robertson, SBC, to Magalie Roman Salas, Secretary, FCC, CC Docket No. 98-141, Att. 2 at 4 (filed Mar. 30, 1999).

[57] SBC/Ameritech July 24 Application, Affidavit of Stephen M. Carter, Att. 1 at 3-5.

[58] Joint Reply of SBC Communications Inc. and Ameritech Corporation to Comments Regarding Merger Conditions, filed July 26, 1999 (SBC/Ameritech July 26 Reply Comments).

has intensified, in the year since they filed their initial merger application in July 1998.[59] Specifically, SBC and Ameritech state that they signed an additional 250 interconnection agreements during that year, and that competitors in Ameritech's region now serve 738,000 lines using their own facilities, 154,000 using unbundled network elements (an increase of 63 percent since the numbers reported in the merger application), and nearly one million lines through resale (an increase of 57 percent).[60] SBC and Ameritech note industry estimates that are much more conservative than the Applicants' original estimates concerning competitors' deployment of switches – *i.e.,* more than 175 in SBC's region (compared with 547 estimated by SBC in its application) and more than 75 in Ameritech's region (compared with 120 estimated by Ameritech in its application). However, those sources also indicate greater fiber deployment by competitive LECs in SBC's region as of 1999 (more than 10,000 route miles versus 6,500 estimated by SBC).[61]

It has been more than three and-a-half years since Congress passed the 1996 Act in an attempt to stimulate competition in local telephone markets. Competition has been slow to emerge, but there have been recent signs that momentum is building. For instance, the Commission's Local Competition Report notes that revenues of local service competitors increased from $2.2 billion at the end of 1997 to $3.6 billion at the end of 1998.[62] The report estimates that competitive LECs are gaining market share, but that incumbent LECs retain 96 percent of local service revenues.[63] Moreover, the Report indicates that competitive LECs have been most successful in the market for specialized services such as special access and local private line services, which are provided to business customers.[64] Aggregate competitive LEC use of resold incumbent LEC lines predominates over their use of unbundled loops by a factor of approximately 10 to 1 and according to data provided by ILECs, 40 percent of the resold lines

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59 *Id.* at 12.

60 *Id.* As of March 1999, SBC reported that it had provisioned more than 73,800 unbundled loops and more than 590,000 one- and two-way interconnection trunks to competitive LECs. Letter from Todd F. Silbergeld, SBC to Magalie Roman Salas, Secretary, FCC, CC Docket No. 97-121, Att. at 2-3 (filed Apr. 6, 1999). SBC estimated 830,000 resold lines. *Id.* These updated figures represent a 23 percent increase in provision of unbundled loops and a 28 percent increase in resale since the merger application.

61 SBC/Ameritech July 26 Reply Comments at 13.

62 *Local Competition*, Federal Communications Commission, Common Carrier Bureau, Industry Analysis Div., at Table 2.1 (Aug. 1999) (*"Local Competition Report"*).

63 *See id.* at 1, 12.

64 *Id.* at 1. *See* AT&T Oct. 15 Petition at 11 (citing a recent study by the Consumer Federation of America, *Stonewalling Local Competition: The Baby Bell Strategy to Subvert the Telecommunications Act of 1996* (1998) at 20, for the proposition that local competition affects little more than one percent of the local market and an even lower percentage of residential service). *See also* Letter from Antoinette Cook Bush, Ameritech, to Magalie Roman Salas, Secretary, FCC, CC Docket No. 98-141, at 11 (July 9, 1999) (stating that "there is a much higher level of competition in the business market than the residential market in Indiana" because Indiana has among the lowest retail residential local exchange rates in the country).

serve residential customers.[65] In addition, facilities-based competitive LECs appear to have concentrated in more urbanized areas.[66]

For its part, in response to the 1996 Act, SBC appears to have adopted an acquisition strategy. Within weeks of passage of the 1996 Act, SBC announced its agreement to merge with PacTel, one of the other six Baby Bells.[67] Last year, SBC merged with SNET, the primary incumbent LEC in Connecticut. The instant merger would add a third Baby Bell to the original SWBT and PacTel. Congress may or may not have contemplated such horizontal moves when it replaced the MFJ with the 1996 Act, but Congress did signal a clear intent that the desire of BOCs to enter the long distance markets within their existing regions would provide a powerful incentive to open their local markets to competition. This is embodied in the so-called "carrot-and-stick" approach taken in section 271 of the Act, which requires satisfaction of a 14-point checklist for determining whether local markets are open to competition before a BOC may be allowed to originate in-region interLATA services within a particular state.

SBC and Ameritech have separately engaged in failed attempts to convince regulators that their local markets are open to competition within the meaning of section 271.[68] This Commission denied SBC's application for in-region interLATA authority in Oklahoma in June 1997,[69] finding that SBC had not met the threshold requirement under section 271 that SBC be providing access and interconnection to a facilities-based competing provider of local exchange service to residential and business subscribers (the "Track A" requirement under section 271).[70] The Texas and California commissions issued orders in mid-1998 establishing

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65 *See Local Competition Report* at 2, 22-23. *See* Consumer Coalition Oct. 15 Comments at 6 (noting that even according to the applicants' own estimates in their application, less than one percent of access lines had been lost to competitors through unbundling); Telecommunications Resellers Association Oct. 15 Comments at 11-12 (referring to SBC's and Ameritech's unbundled loops as a "small fraction of a single percent of the network access lines SBC and Ameritech currently have in service").

66 *Id.* at 5-6; *see also Local Competition,* Federal Communications Commission, Common Carrier Bureau, Industry Analysis Div., at 2 (Dec. 1998) (noting that the Atlanta, Dallas, Los Angeles, and New York City LATAs each had more than 20 competitive LECs with the numbering resources necessary to provide mass market switched services over their own facilities, while 30 of the nation's more rural LATAs had no such competitive LECs). The IURC states that facilities-based competition is virtually non-existent in Indiana, and that competition has been much slower to develop in that state than in Ameritech states with larger MSAs such as Chicago, Detroit, Cleveland, and Milwaukee. IURC June 16 Comments at 8, 11. Indiana's largest MSA, Indianapolis, is only the 28th largest in the nation, and its second largest, Fort Wayne, ranks 81st, compared with Chicago (3rd), Detroit (8th), Cleveland (13th), and Milwaukee (26th). *Id.* at 11-12. Furthermore, five of the seven facilities-based competitors in Indiana have all of their switches located in Indianapolis and its surrounding cities. Letter from Antoinette Cook Bush, Ameritech, to Magalie Roman Salas, Secretary, FCC, CC Docket No. 98-141, Att. at 12 (July 9, 1999).

67 The PacTel merger was announced April 1, 1996 and consummated April 1, 1997. *See* Joint Opposition of SBC and Ameritech, Martin Kaplan Reply Aff. at 2.

68 *See* AT&T Oct. 15 Petition at 14, 18; Consumer Coalition Oct. 15 Comments at 8; Consumer Coalition Oct. 15 Comments, Baldwin & Golding Affidavit, at 12-16, 18; Sprint Petition at 52-54; Telecommunications Resellers Association Oct. 15 Comments at 11; Time Warner Telecom Corp. Oct. 15 Petition at 3-5.

69 *Application by SBC Communications, Inc., Pursuant to Section 271 of the Communications Act,* 12 FCC Rcd 8685 (1997) (*Oklahoma Order*).

70 *Id.* at para. 1. The Commission further concluded that SBC was foreclosed from obtaining interLATA authority under the alternative route, Track B (where no competing carrier has requested access and

collaborative processes among SBC, competitive LECs and commission staff to resolve outstanding issues regarding SBC's compliance with section 271 in those states. Those processes are ongoing and have resulted in significant progress with respect to operations support systems (OSS), performance measurements and penalties, collocation, and provision of unbundled network elements (UNEs). SBC states that it expects to receive section 271 approval for Texas and California first, and that approvals for its five remaining states would follow shortly thereafter.[71]

This Commission denied Ameritech's application for in-region interLATA authority in Michigan in August 1997, citing deficiencies with respect to access to OSS, interconnection, and access to 911 and E911 services.[72] Ameritech is not actively pursuing section 271 approvals in any of its states at this time as evidenced by the fact that Ameritech has not filed in any state section 271 proceedings since 1997.[73] On January 21, 1999, the Illinois Commerce Commission issued an order dismissing its section 271 proceeding because of the staleness of the record.[74]

All evidence suggests that competition has been slow to emerge in the territories of these Baby Bells and that not all geographic areas, and not all types of customers, are receiving the benefits of competition. Furthermore, this merger application comes at a critical juncture when competitive LECs may shortly be able to take advantage of more favorable market conditions resulting from: (1) recent court decisions;[75] (2) final prices for interconnection, UNEs and resale that have been determined in state cost proceedings;[76] and (3) extensive section 271 collaborative processes supervised by state commissions. A number of competitive LECs have

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interconnection), because SBC had already received several requests for access and interconnection from competing carriers. *See id.* Although the *Oklahoma Order* did not further examine SBC's compliance with the requirements of section 271, the Commission did note that the record in that proceeding was "replete with allegations from competitors such as Brooks [Fiber Properties, Inc.] and Cox [Communications, Inc.] that their efforts to enter the local exchange market [had] been frustrated by the actions of SBC." *Id.* at para. 64.

71 *See* Narrative Response of SBC Communications Inc. to the FCC's 1/5/99 Request for Supplemental Information filed Feb. 2, 1999 (CC Docket No. 98-141), at 32.

72 *See Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act,* 12 FCC Rcd 20543 (1997), para. 5. The U.S. Department of Justice and the Michigan Public Service Commission had both recommended denial of the application for similar reasons. *Id.* at paras. 32-33, 41-42.

73 Letter from Antoinette Cook Bush, Ameritech, to Magalie Roman Salas, Secretary, FCC, dated March 24, 1999. On November 2, 1998, Ameritech did file a comprehensive performance plan (including performance measurements, calculation methodologies, benchmarks and remedies for failure to perform as required) in a separate docket in Michigan. *Id.*

74 *Id.*

75 *See, e.g., AT&T Corp. v. Iowa Utils. Bd.,* 525 U.S. 366 (1999) (upholding Commission's rulemaking authority to carry out local competition provisions of the Telecommunications Act of 1996, upholding "pick and choose" rule, and remanding Commission's application of "necessary and impair" standard of the 1996 Act to network element unbundling rules).

76 *See, e.g.,* IURC June 16 Comments at 10-11 & n.25 (reporting that the IURC established a permanent wholesale discount for Ameritech Indiana (21.46 percent) on February 25, 1999, and that final unbundled network element rates had not yet been established for Ameritech in Indiana or Ohio).

noted in *ex parte* discussions with Commission staff that their original interconnection agreements with SBC and Ameritech expire this year, and that they are facing negotiation of "second-generation" interconnection agreements that will govern their relationships with these companies (or the combined company) over the next several years. With this background in mind, we turn in the following sections to discussion of the harms that are likely to result from this merger, which is proposed at a critical time in the evolution of local competition that Congress envisioned.

B. The Merger Transaction and Review Process

Proposed Transaction. Under the Agreement and Plan of Merger (Merger Agreement), dated May 10, 1998, Ameritech would become a first-tier, wholly-owned subsidiary of SBC in a stock-for-stock merger.[77] Following the merger, SBC would own all the stock of Ameritech, and SBC itself would be owned 57.5 percent by the pre-merger stockholders of SBC and 42.5 percent by the pre-merger stockholders of Ameritech.

Together, SBC and Ameritech would serve more than 55.5 million local exchange access lines, representing approximately one-third (31.9 percent) of the nation's total access lines.[78] SBC and Ameritech as a combined company would have more than 200,000 employees and annual revenues in excess of $45 billion, based on December 1998 statistics from both companies. In other words, SBC and Ameritech combined would be the second largest telecommunications company in the country behind only AT&T, as measured by revenues. Based on the extensive breadth of SBC's and Ameritech's operations, their proposed merger requires the approval of several government agencies, including the DOJ, state public utility commissions, the European Commission, and this Commission.

1. Department of Justice Review

The DOJ reviewed the proposed transaction as part of the pre-merger review process under the Hart-Scott-Rodino Antitrust Improvements Act of 1976.[79] On March 23, 1999,

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[77] The Merger Agreement specifies that Ameritech shareholders will receive newly-issued shares of SBC at a fixed exchange ratio of 1.316 shares of SBC common stock for each share of Ameritech common stock. Application, Description of Transaction, at 1. *See also* SBC/Ameritech July 24 Application, Agreement and Plan of Merger.

[78] *See* SBC 1998 Annual Report at 3 (Letter from Edward E. Whitacre Jr., Chairman and CEO).

[79] *See* 15 U.S.C. § 18a. DOJ specifically noted that its approval is only one step in the overall merger review process for the proposed transaction. *See* United States Department of Justice, "Justice Department Requires SBC to Divest Cellular Properties in Deal with Ameritech and Comcast," Press Release (Mar. 23, 1999) (DOJ Mar. 23 Press Release). DOJ outlined its role in the merger review process as follows:

"The Antitrust Division's suit was filed under Section 7 of the Clayton Act, which prohibits mergers that may substantially lessen competition, and reflects the Division's view about the antitrust issues raised by the proposed merger. Other government agencies, including the Federal Communications Commission and the public utility commissions of Illinois, Indiana, and Ohio, are also reviewing the SBC/Ameritech transaction under the laws which those agencies enforce."

DOJ, pursuant to a proposed consent decree, required the Applicants to divest cellular properties in overlapping geographic areas.[80] This condition was deemed necessary to prevent a substantial lessening of competition as a result of the merger in "markets for mobile wireless services in Illinois, Indiana, and Missouri."[81] Recognizing further that Ameritech planned to provide wireline service in St. Louis, and that "no one else is providing such service in St. Louis," DOJ required that Ameritech's, not SBC's, cellular assets be divested in St. Louis, and that the purchaser of these assets "has the capability of competing effectively in the provision of local exchange telecommunications services and long distance telecommunications services in the St. Louis area."[82] On April 5, 1999, Ameritech announced that it was selling twenty cellular holdings to a joint venture of GTE Consumer Services Inc. (GCSI), a subsidiary of GTE, and Georgetown Partners, which would eliminate all cellular overlaps.[83]

2. State and International Review

The proposed merger of SBC and Ameritech also requires the approval of, or notification to, a number of state governing bodies and the European Commission. The status of these proceedings is summarized below.[84]

Id.

80 *United States v. SBC Communications Inc. and Ameritech Corporation*, Case No. 99-0715, Stipulation and Final Judgment (D.D.C., filed Mar. 23, 1999) (Proposed Final Judgment).

81 Proposed Final Judgment at 2.

82 *Id*. In its Complaint, DOJ referenced a bundled product of local, long distance and cellular services that Ameritech had planned to provide to its residential cellular customers prior to the merger and indicated that "[t]here is no alternative source of such a bundled product in the St. Louis area at present." *United States v. SBC Communications Inc. and Ameritech Corporation*, Case No. 99-0715, Complaint, at para. 21 (D.D.C. filed Mar. 23, 1999) (DOJ Mar. 23 Complaint). Thus, DOJ acknowledged, "[t]he acquisition would prevent the realization of this new competition." *Id*.

83 *See* "Ameritech Sells Cellular Properties to GTE and Georgetown Partners for $3.27 Billion," Press Release (Apr. 5, 1999), http://www.ameritech.com/media/release/view/0,1038,2556|1_2,00.html. *See In re Applications of Ameritech Corporation, Transferor, and GTE Consumer Services, Inc., Transferee, for Consent to Transfer of Control of Licenses and Authorizations*, Memorandum Opinion and Order, DA 99-1677, 1999 WL 635,724 (WTB 1999).

84 In addition to the state proceedings outlined below, the Public Service Commission of Wisconsin examined the proposed merger for the purpose of filing comments with this Commission. *See* Comments of the Public Service Commission of Wisconsin, CC Docket No. 98-141 (filed May 19, 1999). In Indiana, the IURC on its own motion, on September 2, 1998, initiated an investigation into the proposed merger to determine whether the IURC had authority to approve the merger. *See Investigation of the Commission's Own Motion into all Matters Relating to the Merger of Ameritech Corporation and SBC Communications Inc.*, Cause No. 41255, Order (IURC Sept. 2, 1998). The IURC ruled on May 5, 1999, that the proposed merger required its approval. *See Investigation of the Commission's Own Motion into all Matters Relating to the Merger of Ameritech Corporation and SBC Communications Inc.*, Cause No. 41255, Order (IURC May 5, 1999). The Applicants appealed this ruling, and the Indiana Supreme Court held that the IURC lacks jurisdiction under state law over a transaction by a public utility's holding company, such as SBC's acquisition of Ameritech. *See Indiana Bell Telephone Co., Inc. v. Indiana Utility Regulatory Comm'n*, 715 N.E.2d 351 (Ind. 1999).

Ohio. Pursuant to the laws of Ohio, the Applicants filed for approval of their proposed transaction from the Public Utility Commission of Ohio (PUCO). On April 8, 1999, PUCO approved with conditions the proposed merger pursuant to a stipulated settlement agreement negotiated among several parties. The conditions imposed by PUCO, among other things, require that the Applicants: (1) freeze residential rates through January 2002; (2) compete for residential and business customers in four markets outside of Ameritech's current service territory; (3) improve service quality; (4) increase infrastructure investment; (5) maintain current employment levels for two years; and (6) offer a promotional rate for unbundled loops and resold service for a certain period of time linked to Ameritech's loss of residential access lines to competitors.[85] PUCO also required the combined entity to make available in Ohio the level of interconnection it obtains as a new entrant outside its service territory or which it provides in another state as an incumbent.[86] Finally, SBC and Ameritech agreed to meet certain competitive, operations support systems, and service quality benchmarks, or face monetary penalties.[87]

Illinois. On July 24, 1998, pursuant to Illinois law, the Applicants filed a joint application requesting approval of their proposed reorganization from the Illinois Commerce Commission (ICC). The ICC held numerous formal hearings on the application, and approved the merger on September 23, 1999, subject to several conditions.[88] The conditions imposed by the ICC address, among other things, performance measurements and associated penalties, enhanced operations support systems, shared transport, most-favored nation interconnection arrangements, residential xDSL service deployment, service outages and associated penalties, network infrastructure investment, 911 practices, and updated cost studies and cost allocation manuals. In addition, for three years, the combined company is required to allocate 50 percent of the net merger-related savings in Illinois to competitors and retail customers. The ICC also relied on a series of voluntarily commitments by the Applicants that, among other things, require the combined firm to retain Ameritech's brand identity and regional employment levels, make charitable and community contributions and establish community enrichment programs in the state (*e.g.*, a consumer education fund, a community technology fund, and community computer centers).

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[85] *See Joint Application of SBC Communications Inc., SBC Delaware Inc., Ameritech Corporation, and Ameritech Ohio for Consent and Approval of a Change of Control*, Public Utilities Comm'n of Ohio Case No. 98-1082-TP-AMT, Opinion and Order, at 18-19, 25-27, 30-31 (Apr. 8, 1999) (*Ohio PUC Merger Order*). The Applicants agreed to enter the local exchange markets in the Cincinnati, Hudson, Delaware, and Lebanon areas.

[86] *Id*. at 28.

[87] *Id*. at 10, 15-16, 22.

[88] *See SBC Communications Inc., SBC Delaware Inc., Ameritech Corporation, Illinois Bell Telephone Company d/b/a Ameritech Illinois, and Ameritech Illinois Metro, Inc.*, Docket No. 98-0555, Order (ICC Sept. 23, 1999) (*ICC Merger Order*).

Nevada. On July 29, 1999, the Public Utilities Commission of Nevada (Nevada PUC) ordered SBC to submit its proposed merger to the commission for review and approval.[89] SBC thereafter filed a special application with the Nevada PUC seeking either authorization to acquire Ameritech or a finding by the Nevada PUC that it lacks jurisdiction over the transaction.[90] The Applicants and the Nevada PUC staff subsequently agreed to a settlement agreement that was approved by the Nevada PUC on September 1, 1999. Pursuant to the stipulated agreement, no merger-related transaction costs will be passed on to Nevada ratepayers and, among other things, the merged firm must keep the Nevada PUC apprised of its implementation of any FCC merger conditions, retain the Nevada Bell brand identity, and buy locally where possible.[91]

European Commission. In a June 1998 letter to the Applicants, the European Commission's Merger Task Force confirmed that the proposed merger would not conflict with applicable antitrust guidelines.[92]

Others. In addition to these governing bodies, the Applicants sought approval of or made notification to: (i) certain state public utilities commissions in connection with Ameritech's authorizations to provide intrastate interexchange service in all 45 out-of-region states and local exchange service in eight out-of-region states; (ii) certain local franchising authorities in jurisdictions in which Ameritech has received franchises for competitive cable systems; and (iii) certain regulatory authorities in select European countries in which SBC or Ameritech holds investments.[93]

3. Commission Review

As noted above, SBC and Ameritech filed joint applications on July 24, 1998, pursuant to sections 214(a) and 310(d) of the Communications Act, requesting Commission approval of the transfer of control to SBC of licenses and lines owned or controlled by Ameritech or its affiliates or subsidiaries. Following the Commission's Public Notice of July 30,

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89 *See Petition of the Regulatory Operations Staff for an Order to Show Cause Why SBC Communications Inc. Should Not be Ordered to File an Application for Merger Approval in Compliance with NRS 704.329*, Docket No. 99-4031, Order (Nev. PUC rel. Aug. 2, 1999).

90 *See Special Application of SBC Communications Inc. for Authorization to Acquire Ameritech Corporation Pursuant to an Agreement and Plan of Merger or a Finding that the Commission Lacks Jurisdiction over the Acquisition*, Docket No. 99-8010, Notice of Application and Prehearing Conference (Nev. PUC Aug. 10, 1999).

91 *Special Application of SBC Communications Inc. for Authorization to Acquire Ameritech Corporation Pursuant to an Agreement and Plan of Merger or a Finding that the Commission Lacks Jurisdiction over the Acquisition*, Docket No. 99-8010, Order (Nev. PUC Sept. 1, 1999) (*Nevada PUC Merger Order*).

92 *See* "European Regulators Signal Clear Path for SBC-Ameritech Merger," SBC and Ameritech News Release (July 23, 1998) (SBC/AIT July 23 Press Release).

93 Application, Description of the Transaction, at 103-4. *See also* SBC/AIT July 23 Press Release (noting merger approval from the national regulatory authorities of Germany, Denmark and Belgium).

1998,[94] thirty-five parties filed timely comments supporting or opposing the application, or petitions to deny the application.[95] Nine parties, including the Applicants, filed reply comments. In addition, the Commission held a series of three public forums at which a number of parties, including (a) the Applicants, (b) states, consumer groups, community organizations, and industry participants, and (c) economists, could present their views on the proposed merger.[96]

On October 2, 1998, the Bureau adopted a protective order under which third parties would be allowed to review confidential or proprietary documents that SBC or Ameritech submitted.[97] Commission staff also requested, and obtained, the Applicants' consent to review the documents that SBC and Ameritech had submitted to DOJ as part of its Hart-Scott-Rodino review process.

In January, 1999, Commission staff requested additional documentation and information from the Applicants.[98] The supplemental request, among other things, sought documents and information on the following subjects: (1) Applicants' out-of-region entry activities; (2) Applicants' brand name awareness; (3) perceived demand for end-to-end telecommunications services; (4) Applicants' investment projects; (5) plans for implementing the Applicants' National-Local Strategy; (6) the profitability of serving out-of-region residential and small business customers; and (7) the relationship between the companies' National-Local Strategy and section 271 authorizations.[99] The Applicants filed certain of the Hart-Scott-Rodino documents, and other confidential documents, with the Commission under seal, with a redacted

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94 *SBC Communications, Inc. and Ameritech Corporation Seek FCC Consent for a Proposed Transfer of Control and Commission Seeks Comment on Proposed Protective Order Filed by SBC and Ameritech*, CC Docket No. 98-141, Public Notice, DA 98-1492 (July 30, 1998).

95 The parties that filed formal pleadings in this proceeding are listed in Appendix A. In addition to those formal pleadings, we received hundreds of informal comments through *ex parte* submissions.

96 *See* "Commission to Hold En Bancs Regarding Telecom Mergers," Public Notice, DA 98-2045 (Oct. 9, 1998); "Commission to Hold En Bancs Regarding Telecom Mergers," Public Notice, DA 98-2415 (Dec. 2, 1998); "Chief Economist Names Participants on Economic Round Table Regarding Telecom Mergers," Public Notice, DA 99-119 (Jan. 25, 1999).

97 *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from Ameritech Corporation, Transferor, to SBC Communications Inc., Transferee*, CC Docket No. 98-141, Order Adopting Protective Order, DA 98-1952 (Oct. 2, 1998).

98 *See* Letter from Carol E. Mattey, Chief, Policy and Program Planning Division, Common Carrier Bureau, to Dale (Zeke) Robertson, Senior Vice President, SBC Telecommunications Inc. (Jan. 5, 1999) (CCB Jan. 5 SBC Letter); Letter from Carol E. Mattey, Chief, Policy and Program Planning Division, Common Carrier Bureau, to Lynn Shapiro Starr, Executive Director, Federal Relations, Ameritech Corp. (Jan. 7, 1999) (CCB Jan. 7 Ameritech Letter).

99 *See* CCB Jan. 5 SBC Letter; CCB Jan. 7 Ameritech Letter. On May 10, 1999, Sprint alleged that the Applicants had withheld from the Commission certain documentation relevant to the Commission's document request letters. *See* Letter from Philip L. Verveer, Counsel for Sprint Communications Company, Willkie Farr & Gallagher, to William E. Kennard, Chairman, FCC (filed May 10, 1999). In response, the Commission requested that the Applicants submit certain of the identified documents, which Ameritech subsequently submitted. *See* Letter from Carol E. Mattey, Chief, Policy and Program Planning Division, Common Carrier Bureau, to Lynn Shapiro Starr, Executive Director, Federal Relations, Ameritech Corp. (May 19, 1999); Letter from Antoinette Cook Bush, Counsel to Ameritech Corporation, to Magalie Roman Salas, Secretary, FCC (filed May 20, 1999).

version placed in the public record. The portion of this Order that discusses confidential documents that were used in the Commission's decision-making process has been issued under seal as Appendix B.

On April 1, 1999, FCC Chairman William Kennard notified the Applicants that Commission staff had raised a number of significant issues with respect to potential public interest harms and questions about the claimed competitive and consumer benefits of their proposed transaction.[100] Accordingly, Chairman Kennard invited SBC and Ameritech and other interested parties to explore with Commission staff, on a cooperative and public basis, whether it would be possible to craft conditions that would address the public interest concerns raised by the Application.[101]

Accepting the Chairman's invitation,[102] representatives of SBC and Ameritech held a series of discussions with Commission staff to explore the possibility of the Applicants

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[100] *See* Letter from William E. Kennard, Chairman, FCC, to Richard C. Notebaert, Chairman and Chief Executive Officer, Ameritech Corporation and Edward E. Whitacre, Jr., Chairman and Chief Executive Officer, SBC Communications Inc., CC Docket No. 98-141 (Apr. 1, 1999). In that letter, the Chairman specified the following public interest concerns:

- How can the Commission be assured that the merger will not interfere with the companies' willingness and ability to fully open their local markets to competition in accordance with the Communications Act (Act)?
- How can the Commission be assured that the merger would promote the objective of the Telecommunications Act of 1996 to encourage competition in all telecommunications markets?
- How can the Commission be assured that the public will promptly receive the claimed benefits from the proposed "national/local strategy" in view of section 271 of the Act?
- How can the Commission be assured that the merger will not adversely affect the Commission's ability to fulfill its responsibilities under the Communications Act by reducing its ability to "benchmark" the performance and capabilities of telecommunications carriers?
- How can the Commission be assured that the proposed combination will serve the Communications Act's public interest mandate by improving overall consumer welfare?

Id. at 2.

[101] *See also* Letter from U.S. Senators Mike DeWine (R-OH), Herb Kohl (D-WI), Strom Thurmond (R-SC) and Patrick Leahy (D-VT) to William Kennard, FCC Chairman, dated Sept. 16, 1998 (expressing concern by leading members of U.S. Senate Antitrust Subcommittee about telecommunications industry mergers, and urging the Commission to "search for creative, but non-intrusive ways to limit the anticompetitive effects of these deals while emphasizing the procompetitive aspects."). The Senators stated that if a merger is justified on the basis of the prospect of increased competition by the merged parties, then the Commission "should consider how to guarantee that the competitive promises of the merging parties are kept – without unduly interfering in the legitimate business decisions of the respective companies." *Id*. at 1. The Senators suggested that in certain circumstances, this may be best accomplished "by clearly written, easily enforceable conditions for post-merger actions by the parties; in other cases, pre-merger conditions may provide more certainty." *Id*.

[102] *See* Letter from Edward E. Whitacre, Jr., SBC Communications Inc. and Richard C. Notebaert, Ameritech Corporation, to Honorable William E. Kennard, Chairman, FCC, CC Docket No. 98-141 (Apr. 7, 1999). *See also* Statement of FCC Chairman William Kennard on Ameritech and SBC Response to the Chairman's Request for a Dialogue (rel. Apr. 7, 1999).

strengthening their application by agreeing to certain voluntary public interest commitments.[103] During this time, Commission staff also met with other interested parties who expressed views on the severity of potential public interest harms and possible mitigating conditions.[104]

On May 6, 1999, the Common Carrier Bureau held a public forum where Commission staff and representatives of SBC and Ameritech reported on the progress of discussions and received further input on the need for, and composition of, any potential conditions.[105] Interested parties also expressed opinions on potential conditions through record submissions.

Based on the input received from Commission staff and third parties, SBC and Ameritech supplemented their initial Application by submitting on July 1, 1999 an "integrated package of conditions" which they claimed would satisfy potential public interest concerns and lead to Commission staff support of their Application.[106] More than 50 parties filed timely comments and 14 parties filed reply comments addressing the Applicants' proposed

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[103] *See, e.g.,* Letter from Todd F. Silbergeld, SBC Telecommunications, Inc., to Magalie Roman Salas, Secretary, FCC, CC Docket No. 98-141 (April 12, 1999) (indicating discussion of legal standard for merger review, pro-competitive aspects and certain concerns of proposed merger, and general purpose of any conditions); Letter from Todd F. Silbergeld, SBC Telecommunications, Inc., to Magalie Roman Salas, Secretary, FCC, CC Docket No. 98-141 (May 5, 1999) (indicating discussion of potential conditions concerning opening local markets to competition and advanced services, as well as the duration of potential conditions); Letter from Paul K. Mancini, SBC, to Magalie Roman Salas, Secretary, FCC, CC Docket No. 98-141 (June 17, 1999) (indicating discussion of potential conditions concerning OSS, collocation, and performance measures).

[104] *See, e.g.,* Letter from Karen J. Hardie, Ohio Consumers' Counsel, to Magalie Roman Salas, Secretary, FCC, CC Docket No. 98-141 (Apr. 23, 1999) (indicating discussion of residential competition); Letter from Patrick J. Donovan, Swidler Berlin Shereff Friedman on behalf of CoreComm Limited, to Magalie Roman Salas, Secretary, FCC, CC Docket No. 98-141 (Apr. 30, 1999) (indicating discussion of residential rates, burden of negotiating multiple interconnection agreements, collocation expense and delay, access to unbundled network elements, resale, OSS, and enforcement); Letter from A. Renee Callahan, Willkie Farr & Gallagher on behalf of Sprint Communications Company, to Magalie Roman Salas, Secretary, FCC, CC Docket No. 98-141 (Apr. 30, 1999) (indicating discussion of the need for specific incumbent LEC inputs to offer advanced services).

[105] *See, e.g.,* Commission Announces Public Forum on SBC Communications Inc. and Ameritech Corporation, Applications for Transfer of Control, CC Docket No. 98-141, Public Notice, DA 99-810 (rel. Apr. 28, 1999); SBC-Ameritech Public Forum Extended for Second Day, CC Docket No. 98-141, Public Notice, DA 99-837 (rel. May 4, 1999). *See also* Statement of FCC Chairman William E. Kennard on Conditions for SBC-Ameritech Merger (rel. May 6, 1999).

[106] *See* Letter of Richard Hetke, Senior Counsel, Ameritech Corporation, and Paul K. Mancini, General Attorney and Assistant General Counsel, SBC Communications Inc., to Magalie Roman Salas, Secretary, FCC, CC Docket No. 98-141 (filed July 1, 1999) (SBC/Ameritech July 1 *Ex Parte*). Specifically, in their reply comments in response to public comment on their proffered conditions, the Applicants state that they will comply with the commitments "to assuage concerns that the merger's benefits will not materialize and to address any remote, speculative possibility that competition in some markets may be threatened." SBC/Ameritech July 26 Reply Comments at 19.

commitments.[107] SBC and Ameritech subsequently clarified their commitments on August 27, 1999, and in further *ex parte* filings in September.[108]

II. PUBLIC INTEREST FRAMEWORK

Pursuant to sections 214(a) and 310(d) of the Communications Act, the Commission must determine whether the Applicants have demonstrated that the public interest would be served by transferring Ameritech's numerous licenses and lines used in interstate or foreign communications to SBC.[109] As discussed below, we must weigh the potential public interest harms of the proposed transaction against the potential public interest benefits to ensure that the Applicants have shown that, on balance, the merger serves the public interest, convenience and necessity.[110]

Section 214(a) of the Communications Act generally requires carriers to obtain from the Commission a certificate of public convenience and necessity before constructing, acquiring, operating or engaging in transmission over lines of communication, or before discontinuing, reducing or impairing service to a community.[111] In this case, section 214(a) requires the Commission to find that the "present or future public convenience and necessity require or will require" SBC to operate the acquired telecommunications lines, and that "neither the present nor future public convenience and necessity will be adversely affected" by the discontinuance of service from Ameritech.[112] Section 310(d) provides that no construction

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107 *See Pleading Cycle Established for Comments on Conditions Proposed by SBC Communications Inc. and Ameritech Corporation for their Pending Application to Transfer Control*, CC Docket No. 98-141, Public Notice (rel. July 1, 1999). The parties filing comments and reply comments are listed in Appendix A.

108 *See* Letter from Richard Hetke, Ameritech Corp. and Paul K. Mancini, SBC Communications Inc., to Magalie Roman Salas, Secretary, FCC, CC Docket No. 98-141 (filed Aug. 27, 1999) (SBC/Ameritech Aug. 27 *Ex Parte*); Letter from Richard Hetke, Ameritech Corp. and Paul K. Mancini, SBC Communications Inc., to Magalie Roman Salas, Secretary, FCC, CC Docket No. 98-141 (filed Sept. 7, 1999) (SBC/Ameritech Sept. 7 *Ex Parte*); Letter from Richard Hetke, Ameritech Corp. and Paul K. Mancini, SBC Communications Inc., to Magalie Roman Salas, Secretary, FCC, CC Docket No. 98-141 (filed Sept. 17, 1999) (SBC/Ameritech Sept. 17 *Ex Parte*).

109 47 U.S.C. §§ 214(a), 303(r), 310(d). *See WorldCom/MCI Order*, 13 FCC Rcd at 18030, para. 8; *Bell Atlantic/NYNEX Order*, 12 FCC Rcd at 20000, para. 29.

110 *See WorldCom/MCI Order*, 13 FCC Rcd at 18031-32, para. 10.

111 47 U.S.C. § 214(a).

112 47 U.S.C. § 214(a). *See Implementation of Section 402(b)(2)(A) of the Telecommunications Act of 1996; Petition for Forbearance of the Independent Telephone and Telecommunications Alliance*, CC Docket No. 97-11; AAD File No. 98-43, Report and Order in CC Docket No. 97-11 and Second Memorandum Opinion and Order in AAD File No. 98-43, FCC 99-104 (rel. June 30, 1999) (continuing to require Commission approval for transfers of control, even though blanket section 214 entry certification and streamlined section 214 exit certification have been granted for domestic carriers). In their joint application to transfer control of the domestic section 214 authority held by Ameritech Illinois Metro, Inc., the Applicants also "apply for any authorization the Commission may deem necessary under section 214 of the Communications Act for the transfer of control to SBC of domestic lines, now controlled by Ameritech and its subsidiaries, that are used for the provision of interstate services." Application, Part 63 Joint Application for Authority, Pursuant to section 214 of the Communications Act of 1934, as amended, to Transfer Control of Domestic Section 214 Authority, at 2 n.2.

permit or station license may be transferred, assigned, or disposed of in any manner except upon a finding by the Commission that the "public interest, convenience, and necessity will be served thereby."[113] The Commission therefore must determine that the proposed transfer of licenses from Ameritech to SBC "serves the public interest, convenience, and necessity" before it can approve the transaction.[114]

The public interest standard of sections 214(a) and 310(d) involves a balancing process that weighs the potential public interest harms of the proposed transaction against its potential public interest benefits.[115] The Applicants bear the burden of proving, by a preponderance of the evidence, that the proposed transaction, on balance, serves the public interest.[116] In applying this public interest test, the Commission considers four overriding questions: (1) whether the transaction would result in a violation of the Communications Act or any other applicable statutory provision;[117] (2) whether the transaction would result in a violation of Commission rules;[118] (3) whether the transaction would substantially frustrate or impair the Commission's implementation or enforcement of the Communications Act, or would interfere with the objectives of that and other statutes;[119] and (4) whether the merger promises to yield

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113 47 U.S.C. § 310(d).

114 47 U.S.C. § 310(d).

115 *See Bell Atlantic/NYNEX Order*, 12 FCC Rcd at 20063, para. 157.

116 *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from Tele-Communications, Inc., Transferor, to AT&T Corp., Transferee*, CS Docket No. 98-178, Memorandum Opinion and Order, 14 FCC Rcd at 3160, 3169-70, para. 15 (1999) (*AT&T/TCI Order*). *See also WorldCom/MCI Order*, 13 FCC Rcd at 18031, para. 10 n.33 (citing 47 U.S.C. § 309(e) (burdens of proceeding and proof rest with the applicant); *American Telephone and Telegraph Co. and MCI Communications Corporation Petitions for the Waiver of the International Settlements Policy*, File No. USP-89-(N)-086, Memorandum Opinion and Order, 5 FCC Rcd 4618, 4621, para. 19 (1990) (applicant seeking a waiver of an existing rate bears the burden of proof to establish that the public interest would be better served by the grant rather than the denial of the waiver request); *LeFlore Broadcasting Co., Inc.*, Docket No. 20026, Initial Decision, 66 FCC 2d 734, 736-37, paras. 2-3 (1975) (on the ultimate issue of whether the applicants have the requisite qualifications and whether a grant of the application would serve the public interest, as on all issues, the burden of proof is on the licensees).

117 *See, e.g.*, *AT&T/TCI Order*,14 FCC Rcd at 3221-24, paras. 130-136 (concluding that AT&T's acquisition of TCI, following its acquisition of Teleport, would not violate the buy-out restriction contained in section 652(a) of the Communications Act, which prohibits a local exchange carrier from acquiring more than a ten percent financial interest in an overlapping cable operator); *SBC/SNET Order*, 13 FCC Rcd 21292, 21309-10, para. 36 (stating that "in order to comply with section 271, SNET and its subsidiaries must cease originating long distance traffic in SBC's current seven-state region."). *See also infra* Section VIII.C. (Alarm Monitoring).

118 *See, e.g.*, *AT&T/TCI Order*, 14 FCC Rcd at 3207-08, paras. 98-99, n.287 (acknowledging that AT&T's acquisition of TCI would implicate the Commission's commercial mobile radio service (CMRS) spectrum cap, 47 C.F.R. § 20.6); 14 FCC Rcd at 3177-81, paras. 31-40 (affirming that a merged AT&T-TCI would still be subject to the Commission's rules protecting competitive access to cable programming, 47 C.F.R. §§ 76.1000-76.1004). *See also infra* discussion concerning spectrum cap in Section VIII.A. (Wireless Services).

119 *See, e.g.*, *AT&T/TCI Order*, 14 FCC Rcd at 3224-26, paras. 137-39 (examining the merger's effect on the preservation and advancement of the Commission's universal service goals and concluding that AT&T's planned deployment of cable telephony furthers the goal of providing equal and expanded access to advanced telecommunications technologies); at 3211-13, paras. 108-12 (imposing additional restrictions to ensure that AT&T-TCI not exert influence over the trustee of the Sprint PCS trading stock or receive economic benefit during the divestiture period to mitigate the possibility that AT&T would not compete fully with Sprint in CMRS markets

affirmative public interest benefits.[120] In summary, the Applicants must demonstrate that the transaction will not violate or interfere with the objectives of the Communications Act or Commission rules, and that the predominant effect of the transfer will be to advance the public interest.

The Commission's analysis of public interest benefits and harms includes, but is not limited to, an analysis of the potential competitive effects of the transaction, as informed by traditional antitrust principles.[121] While an antitrust analysis, such as that undertaken by the DOJ in this case, focuses solely on whether the effect of a proposed merger "may be substantially to lessen competition,"[122] the Communications Act requires the Commission to make an independent public interest determination, which includes evaluating public interest benefits or harms of the merger's likely effect on future competition.[123] In order to find that a merger is in the public interest, therefore, the Commission must "be convinced that it will enhance competition."[124]

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during such period, and also to ensure that Sprint's ability to raise capital to build out its network in this new service would not be adversely affected); *WorldCom/MCI Order*, 13 FCC Rcd at 18130-34, paras. 188-93 (addressing allegations that, as a direct result of the merger, the merged entity would cease providing long distance and local service to residential customers).

120 *See, e.g.*, *AT&T/TCI Order*, 14 FCC Rcd at 3229-30, para. 147 (finding consumer benefit through the company's intention and increased ability and incentive to provide facilities-based competition in local telecommunications markets); *Applications of Puerto Rico Telephone Authority, Transferor, and GTE Holdings (Puerto Rico) LLC, Transferee, For Consent to Transfer Control of Licenses and Authorizations Held by Puerto Rico Telephone Company and Celulares Telefónica, Inc.*, File Nos. 03373-03384-CL-TC-98, Memorandum Opinion and Order, 14 FCC Rcd 3122, 3149, at para. 58 (1999) (concluding that consumers would benefit from private ownership of the island's principal local exchange service provider by a well-financed and experienced company, along with the buyer's commitment to substantial infrastructure investment).

121 Although the Commission's analysis of competitive effects is informed by antitrust principles and judicial standards of evidence, it is not governed by them, which allows the Commission to arrive at a different assessment of likely competitive benefits or harms than antitrust agencies arrive at based on antitrust law. *See FCC v. RCA Communications*, 346 U.S. 86, 96-97 (1953) ("To restrict the Commission's action to cases in which tangible evidence appropriate for judicial determination is available would disregard a major reason for the creation of administrative agencies, better equipped as they are for weighing intangibles by specialization, by insight gained through experience, and by more flexible procedure."). *See also WorldCom/MCI Order*, 13 FCC Rcd at 18034, para. 13 (*citing RCA Communications*, 346 U.S. at 94; *United States v. FCC*, 652 F.2d 72, 81-82 (D.C. Cir. 1980) (*en banc*) (The Commission's "determination about the proper role of competitive forces in an industry must therefore be based, not exclusively on the letter of the antitrust laws, but also on the 'special considerations' of the particular industry."); *Teleprompter-Group W*, 87 FCC 2d 531 (1981), *aff'd on recon*., 89 FCC 2d 417 (1982) (Commission independently reviewed the competitive effects of a proposed merger); *Equipment Distributors' Coalition, Inc. v. FCC*, 824 F.2d 1197, 1201 (D.C. Cir. 1987); *Northeast Utilities Service Co. v. FERC*, 993 F.2d 937, 947-48 (1st Cir. 1993) (public interest standard does not require agencies "to analyze proposed mergers under the same standards that the Department of Justice . . . must apply.")).

122 15 U.S.C. § 18.

123 *See WorldCom/MCI Order*, 13 FCC Rcd at 18032-33, para. 12; *Bell Atlantic/NYNEX Order*, 12 FCC Rcd at 19987, para. 2.

124 *Bell Atlantic/NYNEX Order*, 12 FCC Rcd at 19987, para. 2.

In the *AT&T/TCI Order*, we explained that competition in the telecommunications industry is shaped not only by antitrust rules, but also by regulatory policies that govern interactions among industry participants.[125] For example, no industry can be effectively governed by antitrust rules unless some other rules specify the industry participants' property rights. In telecommunications markets the ground rules necessary to permit competition are frequently supplied by regulatory policy. Accordingly, our public interest evaluation necessarily encompasses the "broad aims of the Communications Act."[126] These broad aims include, among other things, the implementation of Congress's pro-competitive, deregulatory national policy framework designed to open all telecommunications markets to competition, the preservation and advancement of universal service, and the acceleration of private sector deployment of advanced services.[127] Our public interest analysis may also entail assessing whether the merger will affect the quality of telecommunications services or will result in the provision of new or additional services to consumers.[128] In making these assessments, the Commission considers the trends within, and needs of, the telecommunications industry, as well as the factors that influenced Congress to enact specific provisions of the Communications Act.[129]

Following passage of the 1996 Act, local telecommunications markets have been undergoing a transition to competitive markets, so a transaction may have predictable yet dramatic consequences for competition over time even if the immediate effect is more modest. Therefore, when a transaction is likely to affect local telecommunications markets, our statutory obligation requires us to assess future market conditions. In doing so, the Commission may rely upon its specialized judgment and expertise to render informed predictions about future market conditions and the likelihood of success of individual market participants.[130]

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125 *AT&T/TCI Order*, 14 FCC Rcd at 3169, para. 14

126 *See, e.g.*, *AT&T/TCI Order*, 14 FCC Rcd at 3168-69, para. 14; *WorldCom/MCI Order,* 13 FCC Rcd at 18030-31, para. 9.

127 *See WorldCom/MCI* Order, 13 FCC Rcd at 18030-31, para. 9. See *also*, *e.g.*, 47 U.S.C. §§ 254, 259, 332(c)(7), 706; Preamble to Pub. L. No. 104-104, 110 Stat. 56 (1996).

128 *See, e.g., WorldCom/MCI Order,* 13 FCC Rcd at 18030-31, para. 9*; Applications of Teleport Communications Group Inc., Transferor, and AT&T Corp., Transferee, For Consent to Transfer Control of Corporations Holding Point-to-Point Microwave Licenses and Authorizations to Provide International Facilities-Based and Resold Communications Services*, CC Docket No. 98-24, Memorandum Opinion and Order, 13 FCC Rcd 15236, 15242-43, para. 11 (1998) (*AT&T/Teleport Order*); *Bell Atlantic/NYNEX Order*, 12 FCC Rcd at 20063, para. 158.

129 *See, e.g., WorldCom/MCI Order*, 13 FCC Rcd at 18030-31, para. 9; *Bell Atlantic/NYNEX Order,* 12 FCC Rcd at 20003, para. 32 ("the Commission examines whether a proposed license transfer is consistent with the policies of the Communications Act, including, among other things, the transfer's effect on Commission policies encouraging competition and the benefits that would flow from the transfer.").

130 *See, e.g.*, *FCC v. RCA Communications, Inc*., 346 U.S. 86, 96-97 (1953); *FCC v. WNCN Listeners Guild*, 450 U.S. 582, 594-95 (1981); *Cellnet Communications, Inc. v. FCC*, No. 96-4022, 1998 WL 372319, at **10-12 (6th Cir. July 7, 1998). *See also WorldCom/MCI Order*, 13 FCC Rcd at 18033-34, 18038, paras. 13, 21; *AT&T/Teleport Order*, 13 FCC Rcd at 15246, para. 19, n.65; *Application by SBC Communications Inc., Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in Oklahoma*, CC Docket No. 97-121, Memorandum Opinion and Order, 12 FCC Rcd 8685, 8718-19, para. 57 (1997) (acknowledging that the Commission's use of its predictive judgment "is required by the terms of section 271 and consistent with the

Where necessary, the Commission can attach conditions to a transfer of lines and licenses in order to ensure that the public interest is served by the transaction.[131] Section 214(c) of the Communications Act authorizes the Commission to attach to the certificate "such terms and conditions as in its judgment the public convenience and necessity may require."[132] Similarly, section 303(r) of the Communications Act authorizes the Commission to prescribe restrictions or conditions, not inconsistent with law, that may be necessary to carry out the provisions of the Act.[133] Indeed, unlike the role of antitrust enforcement agencies, the Commission's public interest authority enables it to rely upon its extensive telecommunications regulatory and enforcement experience to impose and enforce certain types of conditions that tip the balance and result in a merger yielding overall positive public interest benefits.[134]

In addition to its public interest authority under the Communications Act, the Commission shares concurrent antitrust jurisdiction with DOJ under the Clayton Act to review mergers between common carriers.[135] In this case, because our public interest authority under the Communications Act is sufficient to address both the competitive issues raised by the proposed merger and its likely effect on the public interest, we decline to exercise our Clayton Act authority for the proposed transaction.[136]

As noted in the *AT&T-TCI Order*, many transfer applications on their face show that the merger would yield affirmative public interest benefit and would not violate the

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statutory scheme envisioned by Congress."), at 8719, para. 58 n.181 (collecting cases and noting the Supreme Court's recognition in various contexts that the Commission necessarily must make difficult predictive judgments in order to implement certain provisions of the Communications Act).

131 *See* 47 C.F.R. § 1.110. *See also WorldCom/MCI Order*, 13 FCC Rcd at 18031-32, para. 10; *Bell Atlantic/NYNEX Order*, 12 FCC Rcd at 20001-2, para. 30.

132 47 U.S.C. § 214(c). *See WorldCom/MCI Order*, 13 FCC Rcd at 18032, para. 10 n.35 (*citing MCI Communications Corp*, File No. I-S-P-93-013, Declaratory Ruling and Order, 9 FCC Rcd 3960, 3968, para. 39 (1994); *Sprint Corp.*, File No. I-S-P-95-002, Declaratory Ruling and Order, 11 FCC Rcd 1850, 1867-72, paras. 100-33 (1996); *GTE Corp.*, File No. W-P-C-2486, Memorandum Opinion and Order, 72 FCC 2d 111, 135, para. 76 (1979)); *Bell Atlantic/NYNEX Order*, 12 FCC Rcd at 20002, para. 30 n.59 (*citing Atlantic Tele-Network, Inc. v. FCC*, 59 F.3d 1384, 1389-90 (D.C. Cir. 1995); *GTE Service Corp. v. FCC*, 782 F.2d 263, 268 (D.C. Cir. 1986); *Western Union Tel. Co. v. FCC*, 541 F.2d 346, 355 (3rd Cir. 1976), *cert. denied*, 429 U.S. 1092 (1977)).

133 47 U.S.C. § 303(r). *See, e.g., WorldCom/MCI Order*, 13 FCC Rcd at 18032, para. 10 n.36 (*citing FCC v. Nat'l Citizens Comm. for Broadcasting*, 436 U.S. 775 (1978) (*Nat'l Citizens)* (broadcast-newspaper cross-ownership rules properly adopted pursuant to section 303(r)*); U.S. v. Southwestern Cable Co.*, 392 U.S. 157, 178 (1968) (section 303(r) powers permit Commission to order cable company not to carry broadcast signal beyond station's primary market); *United Video, Inc. v. FCC*, 890 F.2d 1173, 1182-83 (D.C. Cir. 1989) (syndicated exclusivity rules adopted pursuant to section 303(r) powers)).

134 *See WorldCom/MCI Order*, 13 FCC Rcd at 18034-35, para. 14.

135 *See* 15 U.S.C. §§ 18, 21(a) (granting the Commission jurisdiction under sections 7 and 11 of the Clayton Act to disapprove acquisitions of "common carriers engaged in wire or radio communications or radio transmissions of energy" where "in any line of commerce . . . the effect of such acquisition may be substantially to lessen competition, or tend to create a monopoly."). Both SBC and Ameritech are common carriers.

136 *See WorldCom/MCI Order*, 13 FCC Rcd at 18032, para. 12; *Bell Atlantic/NYNEX Order*, 12 FCC Rcd at 20005, para. 33. *See also United States v. FCC*, 652 F.2d 72, 88 (D.C. Cir. 1980) (en banc).

Communications Act or Commission rules, nor frustrate or undermine policies and enforcement of the Communications Act.[137] Such cases do not require extensive review and expenditure of considerable resources by the Commission and interested parties. This is not the case with respect to this proposed transaction. We analyze the potential public interest harms and benefits of this proposed merger, absent conditions, in the next sections.

III. ANALYSIS OF POTENTIAL PUBLIC INTEREST HARMS

A. Overview

We conclude that the proposed merger, considered without supplemental conditions, threatens our ability to fulfill our statutory mandate in the following three ways.

First, the proposed merger between SBC and Ameritech significantly decreases the potential for competition in local telecommunications markets by large incumbent LECs. The merger eliminates SBC and Ameritech as significant potential participants in the mass market for local exchange and exchange access services in the other's regions. Both firms have the capabilities and incentives to be considered most significant market participants in geographic areas adjacent to their own regions, and in out-of-region markets in which they have a cellular presence. This finding is based partly on our analysis of the plans of Ameritech to expand into St. Louis (in SBC's territory) which would have occurred but for the merger, and SBC's plans to expand into Chicago (in Ameritech's territory). As incumbent LECs, each firm is one of only a few potential entrants with the necessary systems, such as billing and operations support, required to provide local exchange services to residential and small business customers on a large scale. They also bring particular expertise to the process of negotiating and arbitrating interconnection agreements between incumbent and competitive LECs. In adjacent markets, each Applicant has an array of nearby switches that can be used to provide local exchange services in the other's traditional operating territories. Moreover, in out-of-region markets in which either Applicant has a cellular affiliate, it also has a base of customers to whom it can offer wireline local exchange services, potentially bundled with cellular and other offerings. Finally, in both adjacent and cellular out-of-region markets, SBC and Ameritech have brand recognition with mass market customers that would provide a strong and often unique advantage in providing competitive wireline services.

Second, the proposed merger frustrates the ability of the Commission (and state regulators) to implement the local market-opening provisions of the 1996 Act. The merger of SBC and Ameritech – two of the six remaining major incumbent LECs (the RBOCs and GTE) – would have an adverse impact on the ability of regulators and competitors to implement the competitive goals of the 1996 Act by deregulatory means. Comparing the practices of independent firms can assist federal and state regulators in defining incumbent LEC obligations

[137] *See AT&T/TCI Order*, 14 FCC Rcd at 3170, para. 16.

and in discovering new approaches and solutions to open markets to competition under sections 251 and 271 and state law. Such comparative practice analyses (or "benchmarking") depend upon having a sufficient number of independent sources of observation available for comparison. Indeed, the development of the local competition that exists today can be attributed largely to comparative practice analyses of experiments and developments in various states and among various incumbent LECs, as indicated by examples in the Comparative Practices Analysis section of this Order (*see infra* Section V.C.).

Significant differences between the major incumbent LECs and other carriers preclude the use of other carriers as alternative benchmarks. Large incumbent LECs differ greatly from smaller incumbent LECs, competitive LECs and foreign LECs in regulatory treatment, structure and operation. Furthermore, statistical parity comparisons cannot be used as a substitute for all forms of incumbent LEC benchmarking. The decreased ability to employ comparative practice analysis that would result from the proposed merger ultimately would force regulators and competitors to replace benchmarking with more intrusive and costly methods of regulation, frustrating the goals of the 1996 Act and this Commission of opening markets and easing regulation, to the detriment of the public interest. We and our state colleagues would be forced to adopt more regulations of greater complexity, while competitors would be prevented from gaining valuable information that could help them succeed in breaking down entry barriers.

Moreover, the merger's elimination of Ameritech as an independently-owned RBOC is likely to reduce significantly the amount of innovation that regulators and competitors could observe and analyze. Ameritech frequently has taken an approach at the holding-company level that is different from the other RBOCs, examples of which are detailed in the Comparative Practices Analysis section (*see infra* Section V.C.). These differences by Ameritech in one state have allowed regulators and competitors to induce market-opening behavior from other incumbent LECs in other states. Another harm of the merger is that the larger combined entity will have a greater incentive to unify the practices of its separate operating companies to affect the outcome of both best practices and average practices benchmarking by regulators and competitors, resulting in an overall loss of diversity at the operating-company level. The proposed merger of SBC and Ameritech would also directly increase the incentive and ability of remaining incumbent LECs to coordinate their behavior to resist market-opening measures. As the number of relevant independently-owned incumbent LECs shrinks to a small few, the probability of coordination significantly increases.

Third, while it would diminish regulatory efficacy, the proposed merger also would increase the incentives and ability of the larger merged entity to discriminate against rivals in retail markets where the new SBC will be the dominant incumbent LEC. The merger will lead the merged entity to raise entry barriers that will adversely affect the ability of rivals to compete in the provision of retail advanced services, interexchange services, local exchange and exchange access services, thereby reducing competition and increasing prices for consumers of those services. The increase in the number of local areas controlled by SBC as a result of the merger

will increase its incentive and ability to discriminate against carriers competing in retail markets that depend on access to SBC's inputs in order to provide services. For example, if SBC discriminates against a competitive LEC attempting to enter Houston, it will raise this rival's costs. This competitive LEC will have less capital to spend on common research, product development, and marketing costs, making the competitive LEC a less effective competitor in other areas such as Chicago because of its overall higher costs. Prior to the merger, SBC would not realize the benefits in Chicago from such conduct. After merging with Ameritech, which is the incumbent LEC in Chicago, SBC would realize such benefits. Because SBC after the merger would realize more of the gains from what are presently "external" effects, it would have a greater incentive to engage in discrimination than the combined incentives that the two individual companies would have had in their smaller regions.

Any likelihood of increased discrimination and heightened entry barriers causes particular concern in the retail market for advanced services, given the Commission's ongoing efforts to encourage innovation and investment in these emerging markets. Competitors' requests for the type of interconnection and access arrangements necessary to provide new types of advanced services are continually evolving and provide ample scope for incumbents to discriminate in satisfying these requests. The combined entity has an increased incentive to discriminate against a competitor such as Sprint ION that is seeking to enter markets on a national basis, because the merged firm will realize the benefits over the larger combined area in its control. Likewise, once an incumbent LEC has authority to provide interLATA services within its region, it has an incentive to discriminate against the termination of its competitors' calls that originate in that region in order to induce callers at the originating end to choose the incumbent LEC as their interexchange service provider. SBC after the proposed merger will have a much larger "in-region" area, and thus will terminate a greater number of calls from in-region customers. The larger merged firm would therefore have a greater incentive to engage in discrimination, which is likely to be particularly acute with respect to advanced or customized access services where such discrimination would be most difficult to detect.

In short, absent stringent conditions, we would be forced to conclude that this merger does not serve the public interest, convenience or necessity because it would inevitably retard progress in opening local telecommunications markets, thereby requiring us to engage in more regulation. Standing alone, without conditions, the initial application proposed a license transfer that would have been inconsistent with the approach to telecommunications regulation and telecommunications markets that the Congress established in the 1996 Act, ratifying the fundamental approaches enshrined in the MFJ. For that reason, we conclude that it would be inconsistent with the public interest, convenience and necessity to permit this license transfer in the absence of significant and enforceable conditions. The remainder of Part IV explains these conclusions in detail.

B. Analysis of Competitive Effects

1. Competition Between SBC and Ameritech

We begin our review of the proposed merger of SBC and Ameritech by examining the merger's likely effects on interactions between the merging firms, which represents one prong of our analysis of potential public interest harms. Until recently, carriers seeking to compete with incumbent LECs in local exchange and exchange access services markets had been prevented or deterred from entering due to legal, regulatory, economic and operational barriers. As such, these markets are currently undergoing a transition to competitive market conditions, as envisioned by the 1996 Act. Accordingly, as the 1996 Act is being implemented and local markets are opening to competition, it is necessary to use an analysis of competitive effects that accounts for the transitional nature of these local markets.[138] This "transitional market" analysis is relevant to the examination of a merger under the Communications Act because the Act requires this Commission actively to promote the development of competition in telecommunications markets, not merely to prevent the lessening of competition, which is the policy objective of antitrust laws.

As explained in the *WorldCom/MCI Order*, our framework for analyzing these transitional markets reflects the values of, and builds upon, but does not attempt to copy, the "actual potential competition" doctrine established in antitrust case law.[139] Under the actual potential competition doctrine, a merger between an existing market participant and a firm that is not currently a market participant, but that would have entered the market but for the merger, violates antitrust laws if the market is concentrated and entry by the nonparticipant would have resulted in deconcentration of the market or other pro-competitive effects.[140] As the case law indicates, one obstacle facing parties bringing an actual potential competition case is to demonstrate that the acquired firm would have entered the relevant market absent the merger. The transitional markets framework set forth in the *Bell Atlantic/NYNEX Order*, which is well-tailored to the Commission's unique role as an expert agency and its statutory obligation to promote competition and to open local markets, identifies as "most significant market participants" not only firms that already dominate transitional markets, but also those that are most likely to enter soon, effectively, and on a large scale once a more competitive environment is established. The Commission seeks to determine whether either or both of the merging parties are among a small number of these most significant market participants,[141] in

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138 *See WorldCom/MCI Order*, 13 FCC Rcd at 18036-37, para. 18 ("[T]he analytical framework set forth in the *Bell Atlantic/NYNEX Order* is a natural extension of the principles, contained in the merger guidelines and existing antitrust case law, to transitional markets.").

139 *See WorldCom/MCI Order*, 13 FCC Rcd at 18038, para. 20.

140 *See id.* (*citing United States v. Marine Bancorporation*, 418 U.S. 602 (1974); ABA Section of Antitrust Law, Antitrust Law Developments (4th ed. 1997) at 346-50 (Antitrust Law Developments)).

141 As we stated in the *AT&T/TCG Order,* when analyzing a merger in a market that is rapidly changing, the best way to assess the likely effect of the merger is to isolate the effect of the merger from all other factors affecting the development of the relevant market over time. This is achieved by framing the analysis in a way that holds constant the effects of all changes in the market conditions other than those directly caused by the merger. To do this, we also identify as market participants those firms that have been effectively precluded from the market -- that

which case its absorption by the merger will, in most cases, if not offset by countervailing positive effects, harm the public interest in violation of the Communications Act.[142]

In this portion of the Order, we focus on the probable effects of SBC's acquisition of Ameritech on the provision of local exchange and exchange access services.[143] In analyzing the competitive effects of the instant merger, we take into account that SBC and Ameritech, until recently, have been effectively precluded from competing in each other's local markets. We therefore examine the ability and incentive of both SBC and Ameritech to enter each other's previously closed market. We conclude therefore that it is appropriate to utilize the "transitional markets" analytical framework of the *Bell Atlantic/NYNEX Order* to determine whether this merger would result in a potential harm to the public interest in the provision of local exchange and exchange access services in SBC's or Ameritech's regions.

2. Local Exchange and Exchange Access Services

a) Summary

We conclude that the merger causes a public interest harm by eliminating SBC and Ameritech as among the most significant potential participants in the mass market for local exchange and exchange access services in each other's regions. In the mass market for local exchange services, we conclude that both firms are most significant market participants in geographic areas adjacent to their own regions, and in out-of-region markets in which they have a cellular presence. We base this finding partly on our analysis of the plans of Ameritech to expand into St. Louis, and SBC's plans to expand into Chicago. In the larger business market for local exchange and exchange access services, SBC and Ameritech are only two of a larger number of actual and potential competitors in each other's regions. The merger would thus be less likely to have competitive effects leading to public interest harms in these markets. The exposition of our analysis of these competitive effects issues is necessarily truncated. Because much of the information concerning the parties' business plans has been submitted under a

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is, those firms that are most likely to enter (or are just beginning to enter) the market but have until recently been prevented or deterred from participating in the market by the barriers that the 1996 Act seeks to eradicate. We then identify the most significant participants based on an assessment of capabilities and incentives to compete effectively in the relevant market. *AT&T/TCG Order*, 13 FCC Rcd at 15245-46, para. 17.

142 Of course, a simple antitrust analysis of mergers could generally be characterized as attempting to identify the most significant participants in a market and to determine if the acquired firm is among them. The important distinction in transitional markets is that firms that have been precluded from entering the market may potentially be considered significant participants. Furthermore, based on an analysis of their abilities and incentives to expand out of region, firms may be included as significant competitors even though they may have yet to manifest a firm intention to enter or to invest substantially in preparation for entry. Of course, the case for including a firm as a significant potential competitor will generally be somewhat stronger to the extent that it can be established that the firm has made plans to enter or has already made investments in preparation for entry.

143 *See WorldCom/MCI Order*, 13 FCC Rcd at 18036-37, para. 18*; Bell Atlantic/NYNEX Order,* 12 FCC Rcd at 20008-10, paras. 37-38.

blanket of confidentiality, accordingly, a good deal of the information on which we rely here is explained only in Appendix B, to which access must be restricted.

b) Relevant Markets

As the Commission explained in the *BELL ATLANTIC-NYNEX Order*, we begin our analysis of the proposed merger by defining the relevant product and geographic markets.[144] We then consider whether the merger frustrates the Communications Act's goal of encouraging greater competition in relevant local markets.

Product Markets. We analyze the competitive effects of this merger on the provision of local exchange and exchange access services.[145] As we explained in the *WorldCom/MCI Order*, to define relevant product markets we can identify and aggregate consumers with similar demand patterns. For purposes of analyzing the competitive effects of this merger on these services we identify two distinct relevant product markets: (1) residential consumers and small business (mass market); and (2) medium-sized and large business customers (larger business market). We distinguish mass market consumers from larger business customers because the services offered to one group may not be adequate or feasible substitutes for services offered to the other group, and because firms need different assets and capabilities to target these two markets successfully.[146]

Geographic Markets. As we explained in the *WorldCom/MCI Order,* we aggregate into a relevant geographic market those customers facing similar choices regarding a particular relevant product or service in the same geographic area.[147] In the instant merger proceeding, we focus on competition within metropolitan areas because all out-of-region expansion plans contemplated or undertaken by either Applicant targeted customers in

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144 *See Bell Atlantic/NYNEX Order*, 12 FCC Rcd at 20016, para. 53; *see also WorldCom/MCI Order*, 13 FCC Rcd at 18119, para. 164.

145 In Sections VIII.A and VIII.B we address the proposed merger's impact on the wireless, international markets.

146 *See generally WorldCom/MCI,* 13 FCC Rcd at 18119*,* para. 164; *Bell Atlantic/NYNEX Order*, 12 FCC Rcd at 20016*,* para. 53. As recognized in these merger orders, mass market customers have a different decision-making process than do larger business customers. For example, residential and small businesses are served primarily through mass marketing techniques including regional advertising and telemarketing, while larger businesses tend to be served under individual contracts and marketed through direct sales contacts. *See also* Application, Description of Transaction at 64. Applicants' product market description also agrees with our established analysis.

147 *See WorldCom/MCI Order,* 13 FCC Rcd at 18119-20*,* para. 166; *See also Bell Atlantic/NYNEX Order*, 12 FCC Rcd at 20017*,* para. 54. The geographic market is more accurately defined as a series of point-to-point markets. We can consider, as a whole, groups of point-to-point markets where customers face the same competitive conditions. We therefore treat as a geographic market an area in which all customers in that area will likely face the same competitive alternatives for a product. *WorldCom/MCI Order*, 13 FCC Rcd at 18040, para. 25. As we noted in the *AT&T/TCG Order*, discrete local areas may constitute separate relevant markets, since customers may face different competitive alternatives in these markets. *See AT&T/TCG Order,* 13 FCC Rcd at 15248, para. 21.

metropolitan areas, as discussed in Appendix B. Indeed, at present and for the next few years, any local exchange and exchange access competition in both relevant product markets is likely to be confined to metropolitan areas. Any loss of potential competition by merger is therefore likely to affect primarily specific metropolitan areas. We focus on individual metropolitan areas because each may attract different levels of competition, and certain competitors, including the Applicants, may have particular strengths or unique assets in one metropolitan area compared with another. For instance, in St. Louis, Ameritech has advantages as a competitive LEC based on its cellular presence and as an incumbent LEC in an adjacent area. These considerations are relevant as we analyze the potential public interest harms below.

We reject arguments that we should modify or limit our geographic market definition. For example, the Applicants assert St. Louis and Chicago are the only geographic areas where they arguably would compete against each other.[148] Although we agree with Applicants that the geographic areas of St. Louis and Chicago raise competitive concerns for local exchange and exchange access services, as discussed below, other metropolitan areas warrant examination. Some commenters contend that the relevant geographic market is everywhere SBC and Ameritech could have competed had they pursued their competitive LEC business independently of each other.[149] Similarly, the Texas Office of Public Utility Counsel maintains the relevant market is the combined serving areas of SBC and Ameritech, rather than St. Louis and Chicago.[150] The Texas Office of Public Utility Counsel further argues that, if telecommunications customers have locations nationwide, marketing managers will eventually consider the relevant market as a national market.[151] We find that using our above stated approach, our analysis will include, but not be limited to, examination of these areas. We, therefore, find there is no need to modify our market definition, as the results of our analysis would be identical using any of these geographic market definitions.[152]

c) Market Participants

To analyze the probable effects of this merger on the relevant product and geographic markets, we first identify significant market participants. We note that incumbent LECs are still dominant within their regions, and therefore are included in the list of most significant market participants within their respective in-region markets. Next we consider, among other things, whether, but for the merger, either of the merging parties would be a significant potential competing provider of local exchange and exchange access services in the other's markets. We examine each of the merging firm's capabilities and incentives to provide

148 *See* SBC/Ameritech July 24 Application, Description of the Transaction at 64-65.

149 *See* e.spire Oct. 15 Comments at 8; *See also* South Austin Community Coalition Council Oct. 15 Comments at 2.

150 Texas Office of Public Utility Counsel Oct. 15 Comments at 6.

151 *Id.* at 6-7. We note that market definition is based on economic principles, as embodied in the 1992 Horizontal Merger Guidelines, and not popular conceptions or marketing strategies.

152 *See Bell Atlantic/NYNEX Order*, 12 FCC Rcd at 20016-17, para. 54; *WorldCom/MCI Order,* 13 FCC Rcd at 18042, para. 30.

local exchange and exchange access services outside the region in which it is an incumbent LEC, with particular emphasis on analyzing existing plans and any past attempts to do so. We then turn to an analysis of other firms that may be considered most significant market participants in the relevant markets to determine the competitive impact of the loss by merger of one of the Applicants as an independent entity.

As described in the *Bell Atlantic/NYNEX Order*, we identify the most significant market participants from the universe of actual and precluded competitors based on an analysis of the firms' capabilities and incentives to compete effectively in the relevant market. Of particular interest are those market participants that are likely to be at least as significant a competitive force as either of the merging parties.[153] In determining the most significant market participants from the universe of actual and precluded competitors, we identify the market participants that have, or are most likely to gain speedily, the greatest capabilities and incentives to compete most effectively and quickly in the relevant market.

In prior merger orders, the Commission set out the various capabilities it considers in identifying the most significant potential competitors in local exchange and exchange access markets.[154] Those capabilities include whether the firm: (1) has the operational ability to provide local telephone service (*i.e*., know how, and operational infrastructure, including sales, marketing, customer service, billing and network management); (2) could quickly acquire a critical mass of customers; (3) has brand name recognition, a reputation for providing high quality and reliable service, an existing customer base, or the financial resources to get these assets; and (4) possesses some significant unique advantages, such as a cellular presence in the relevant market.[155]

In order to determine the likelihood that a firm that is not currently serving a relevant market nevertheless will enter this market in the future, we consider industry trends that may lead a firm currently serving one product, customer, or geographic segment to expand to other relevant markets. For instance, in a number of recent merger applications before the Commission, prior applicants have pointed to consumers' demand for "one-stop-shopping," and/or end-to-end-service that is in part justifying these Applicants' merger plans.[156] In order to

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153 *See Bell Atlantic/NYNEX Order,* 12 FCC Rcd at 20019, para. 58. Actual participants are those firms currently offering the relevant products in the relevant geographic markets. Precluded competitors, as discussed above, are those firms most likely to have entered the market but for the barriers to entry the 1996 Act sought to lower. *Id.* at paras. 59-60. As the Commission recognized in the *Bell Atlantic/NYNEX Order*, in determining the most significant market participants from the universe of actual and precluded competitors, we identify the market participants that have, or are most likely to gain speedily, the greatest capabilities and incentives to compete most effectively and quickly in the relevant market. *Id.* at para. 62.

154 *Id*. at paras. 58-64; *WorldCom/MCI Order,* 13 FCC Rcd at 18047-48, 18051-56, 18122, paras. 36, 42-51, 171.

155 *See Bell Atlantic/NYNEX Order,* 12 FCC Rcd at 20020-21, para. 62.

156 *See WorldCom/MCI Order* 13 FCC Rcd at 18134-36, para. 194; *AT&T/TCI Order,* 14 FCC Rcd at 3228-29, para. 145. *See also AT&T/TCG Order*, 13 FCC Rcd at 15261, para. 47 n.148. In the *WorldCom/MCI Order*, Applicants argued that the merged company would be better able to provide bundled services and innovative product

meet these demands, firms providing one service may choose to expand their offering to provide a whole range of products or expand to other geographic regions.

We consider all available evidence demonstrating that precluded competitors would likely have entered relevant markets.[157] For instance, Applicants' plans or attempts to enter the relevant markets represent probative evidence of each Applicant's own perception that it possesses the capabilities and incentives necessary to be a significant participant in the market. We likewise look at unsuccessful plans to enter a relevant market in the past. Although a "failed" attempt might suggest that a firm is not a significant market participant, we would consider all relevant circumstances, including changes in market conditions that might facilitate successful subsequent entry and the strategic business consequences to a firm of failing to enter into a relevant market.[158] Finally, the lack of entry plans does not eliminate a firm from being considered a significant market participant; rather, we consider whether the firm has the capabilities, and is likely to have the incentive, to become a significant market participant soon.

Applying this analysis to the instant merger, we find that eliminating Ameritech and SBC as actual or potential participants in the mass market for local exchange and exchange access services in each other's regions results in a substantial public interest harm by frustrating the achievement of the Communications Act's objective of fostering greater competition in these markets. This harm must be outweighed by compensating benefits if the license transfer is to be approved.

(1) Mass Market

We find that, with respect to the mass market for local exchange and exchange access services, SBC and Ameritech have the capabilities and incentives to make each firm a most significant market participant in particular markets in each other's regions. First, as described in Appendix B, prior to the announcement of the proposed merger, SBC and

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combinations to consumers, and would also be able to offer multi-location customers door-to-door or end-to-end connectivity over their own fiber transport and intelligent network facilities. Similarly, in the *AT&T/TCI Order,* Applicants contended that the merger would increase the availability to consumers of a wide array of packaged services including local, long distance, wireless and high-speed Internet services. *See also* SBC/Ameritech July 24 Application, Description of Transaction, Kahan Aff. at 10,12.

157 *See Bell Atlantic/NYNEX Order*, 12 FCC Rcd at 20021-22, para. 64. We also noted in *Bell Atlantic/NYNEX*, that if a firm's internal documents demonstrate serious consideration of entry, they may create an inference of a capability to effect the market without a detailed examination of the competitor's capabilities and incentives.

158 Firms providing one service may choose to expand their offering to provide a whole range of products or expand to other geographic regions. For instance, as noted in Section V.B.2.c) (Market Participants), in a number of recent merger applications before the Commission, the merging parties have asserted that consumers are expressing demand for "one-stop shopping." *See WorldCom/MCI Order,* 13 FCC Rcd at 18037*,* para. 19; *Bell Atlantic/NYNEX Order,* 12 FCC Rcd at 20015, para. 52. According to the Applicants, this demand stimulated in part their merger plans. We also examine the activities of competitors providing similar services; if a competitor branches into new relevant markets, we may determine that a firm could or would respond to such a competitive challenge by serving these other relevant markets as well.

Ameritech had plans to enter other incumbent LECs' regions, including each other's. Second, as incumbent LECs, SBC and Ameritech have certain advantages when expanding out-of-region that other potential local service market entrants lack.

Ameritech's Out-of-Region Plans. We find that Ameritech is not only a most significant market participant in SBC's territory but also, as described in Appendix B, had both the incentives and capabilities to become a significant market participant in the St. Louis mass market for local exchange and exchange access service. The fact that Ameritech, prior to merger negotiations, had not begun offering commercial local wireline services out-of-region to the general public does not establish that Ameritech lacked the capabilities and incentives to expand. As described in greater detail in Appendix B, we find that, but for the merger, Ameritech would have implemented Project Gateway and entered the St. Louis residential market. In project Gateway, Ameritech's cellular company in St. Louis planned to offer local service as part of a bundle first to residential, and then to small business customers.[159] Applicants concede that uncertainties created by the planned merger were among the reasons for placing Project Gateway on hold.[160] In addition, in testimony before the Illinois Commerce Commission, Ameritech admitted that it would have proceeded with the launch of Project Gateway had it not been for the merger.[161] Specifically, Ameritech's internal documents show that the firm had already announced its intention to enter SBC's St. Louis market, and was actively implementing those entry plans at the time the merger was announced.[162] Once the proposed merger was announced, Ameritech suddenly abandoned these plans.[163]

Ameritech offers conceivable reasons for canceling Project Gateway besides the merger, but many or all of them had existed for a long time without causing it to be cancelled.[164] Also, whatever the merits of these reasons, none of them is described in contemporaneous documents as *the* reason, or even *a* reason, for the cancellation. Indeed, there is no stated reason for the cancellation and no statement of a simultaneous event provoking cancellation in the documents Ameritech has provided to us. What did, in fact, occur simultaneously with the cancellation of Project Gateway was the agreement of Ameritech and SBC to merge. We

159 *See* Appendix B (Summary of Confidential Information and Conclusions).

160 *See* SBC/Ameritech July 24 Application, Description of the Transaction at 71-72.

161 *See* Appendix B (Summary of Confidential Information and Conclusions).

162 *See id.*

163 *See* SBC/Ameritech July 24 Application, Description of the Transaction.

164 Among other reasons for canceling Project Gateway, Ameritech argues that projections indicated financial losses due in part to the increased competition in the St. Louis market for mobile services. This justification nevertheless is tied to the merger, as Ameritech states that the significance of these financial losses was to diminish the attractiveness of its cellular assets in St. Louis to potential buyers of those assets given the "substantial probability" that the assets would need to be divested to satisfy antitrust and regulatory authorities. Ameritech also points to implementation problems (billing, pricing, and order processing) and notes that fixing them would have taken significant resources. Finally, Ameritech notes that, contrary to predictions, its new mobile competitors did not enter with a bundled service offering. Ameritech argues that this removed the need for a defensive offering such as Project Gateway. *See* Appendix B (Summary of Confidential Information and Conclusions), *See also* SBC/Ameritech July 24 Application, Description of Transaction at 71-72.

conclude that Project Gateway was cancelled because SBC and Ameritech preferred to merge rather than compete in the mass market for local exchange and exchange access services in St. Louis and perhaps elsewhere.[165]

Although Ameritech minimizes the competitive significance of its own independent entry absent the merger, the preponderance of the evidence demonstrates that Ameritech's portrayal is self-serving.[166] Ameritech argues Project Gateway was resale-based, producing less competition than facilities-based entry. Next, Ameritech claims it lacked strong brand name recognition in St. Louis. Ameritech also argues it had problems implementing and launching the service in St. Louis because of difficulties interfacing with SBC's operations support systems (OSS). Lastly, Ameritech states it had difficulty pricing a bundle of services that would attract customers in St. Louis.[167]

We disagree with Ameritech that its entry into St. Louis would have had a limited impact on that market. We find that absent the merger, it is highly likely that Ameritech ultimately would have made Project Gateway facilities-based.[168] Although Ameritech initially relied on resale, this is typical of initial entry moves by competitive LECs. A competitive LEC's entry by resale may be a necessary first step to facilities-based competition. It is not *per se* a disavowal of it. In fact, Ameritech's documents indicate that it was considering facilities-based competition when it achieved sufficient scale to justify the related expenditure in capital,[169] and that it began several steps that, if completed, would have made it a facilities-based competitor in St. Louis.[170] Furthermore, we find that Ameritech's assertion that it lacks brand name recognition in St. Louis has no credibility. Ameritech had been aggressively promoting and providing its cellular service in St. Louis, under the Ameritech brand name, for many years. Ameritech's own documents show that it believed it had a strong brand name in St. Louis and that its brand name would enable it to compete effectively in the local service market there.[171] Finally, it is significant to our analysis that SBC considered Ameritech to be a potential facilities-based provider of local service to the Missouri consumer market[172] with strong brand name recognition.[173] Therefore, we conclude that Ameritech is a significant market participant in the mass market for local exchange and exchange access services in St. Louis.[174]

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165 *See* Appendix B (Summary of Confidential Information and Conclusions).

166 *See id.*

167 *See id.*

168 *See id.*

169 *See id.* Ameritech documents indicate that it considered facilities-based entry for several out-of-region endeavors.

170 *See* Appendix B (Summary of Confidential Information and Conclusions).

171 *See id. See also* Sprint Oct. 15 Petition at 16-17.

172 *See* Appendix B (Summary of Confidential Information and Conclusions).

173 *See id.*

174 *See id. See also* Sprint Oct. 15 Petition, Decl. of John B. Hayes at 28-31; Focal Oct. 15 Comments at 14; CPI Nov. 16 Reply Comment at 7; Consumer Federation of America/Consumers Union (CU/CFA) Nov. 16 Reply Comments at 3; Report of Gregory L. Rosston & Matthew G. Mercurio, An Economic Analysis of the

SBC's Out-of-Region Plans. The evidence indicates that SBC is a potential entrant for mass market local exchange and exchange access service in Ameritech's region.[175] The evidence in the record indicates that SBC had plans to enter the mass market in Chicago, building off its cellular base in that city, and could thus be viewed as a potential entrant into this market.[176] Support for this argument comes from SBC's own statements. For instance, in October 1996, SBC's James S. Kahan testified in the California SBC/PacTel merger proceeding that SBC had certain entry advantages in the Chicago market and therefore it "would make sense to enter the local exchange market in Chicago but not in Los Angeles." Kahan stated:

> In Chicago, we have an extensive wireless network consisting of 10 switches and over 600 cell sites. That network also includes extensive backbone network of microwave, leased facilities, and connections to a SONET ring. This network is supported by a sophisticated billing system, a responsive care unit, as well as sales and distribution marketing, accounting, finance, installation and maintenance and other personnel who reside in and understand the Chicago market. In addition, we have a well recognized brand name since we operate under the Cellular One name in Chicago. We also have a large existing customer base to which we send bills every month and to whom we could market services.[177]

We conclude that SBC was a significant potential entrant into Ameritech's region; SBC disagrees. SBC argues that Rochester, New York, was a first experiment in out-of-region competition in local services, and that the experiment failed, ending out-of-region planning. Nevertheless, we base our conclusion in part on our analysis of the ability of SBC to pursue out-of-region opportunities using, in this instance, its out-of-region cellular assets. In addition, although it had no existing plans to enter out-of-region territories at the time of the merger, SBC's internal documents indicate the company contemplated such entry when the competitive landscape became clear, as discussed in Appendix B.[178] Therefore, we conclude that SBC had

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SBC-Ameritech Merger at 15 (April 26, 1999), attach. to Attorneys General of Indiana, Michigan, Missouri, and Wisconsin *Ex Parte* (filed April 27, 1999)(State Attorneys General Apr. 27 *Ex Parte,* Rosston & Mercurio Report)

175 *See* Appendix B (Summary of Confidential Information and Conclusions).

176 Baldwin and Golding argue SBC's Rochester experience (discussed in para. 78, *infra*) is not a good predictor of success in Chicago. The Consumer Coalition Oct 15 Comments, Aff. of Susan M. Baldwin and Helen E. Golding at 38. Chicago, unlike Rochester, has many corporate headquarters whose telecommunications managers are familiar with SBC. Rosston & Mercurio argue that SBC is a potential entrant into Chicago since it has unique expertise, experience, operating systems, unique value, adjacency, brand name and facilities. *See* State Attorneys General Apr. 27 *Ex Parte,* Rosston & Mercurio Report at 19-20. *See also* CU/CFA Nov 16 Reply Comments.

177 Rebuttal Testimony of James S. Kahan (SBC), In the Matter of the Joint Application of Pacific Telesis Group and SBC Communications for SBC to Control Pacific Bell, Cal PUC Docket No. 96-05-038 (Cal. PUC Oct. 15
1996).

178 *See* Appendix B (Summary of Confidential Information and Conclusions).

the incentives to make it a significant potential market participant in the mass market for local services in out-of-region markets such as Chicago. Significantly, Ameritech also perceived SBC's potential entry into Chicago as a competitive threat to Ameritech.[179]

Capabilities and Incentives. The Applicants' own plans, as well as the Commission's independent analysis, indicate that SBC and Ameritech each have the operational capabilities necessary to enter out-of-region markets. In general, each has the requisite access to the necessary facilities, "know how," and operational infrastructure such as customer care, billing, and related systems that are essential to the provision of local exchange services to a broad base of residential and business customers.[180] These systems are required whether entry occurs through resale, use of UNEs, or some other form of facilities-based entry. SBC and Ameritech also possess special expertise as incumbent LECs that each could bring to the interconnection negotiation and arbitration process when entering out-of-region markets because of their intimate knowledge of local telephone operations and experience negotiating interconnection agreements with new entrants.[181]

Moreover, in a number of areas, Ameritech and SBC have the additional advantage of adjacency, or a cellular presence, or both.[182] Each company has an array of switches and switching locations that have capacity (or can be readily upgraded) to provide switching to contiguous territories. Thus, where they are contiguous, SBC or Ameritech can lease or build transport from their existing switches to a newly entered market more readily than other potential local service providers because of proximity to the newly entered market and their understanding of the requirements for local exchange services.[183] Finally, both Ameritech and

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179 *See* Appendix B (Summary of Confidential Information and Conclusions) citing State Attorney's General Apr. 27 *Ex Parte,* Rosston & Mercurio Report at 19.

180 *See Bell Atlantic/NYNEX Order*, 12 FCC Rcd 20020, 20040-41, paras. 62, 106-108; s*ee also* AT&T Oct. 15 Petition at 22; Focal Oct. 15 Comments at 15; Hyperion Oct. 15 Comments at 27; Level 3 Oct. 15 Comments at 8-10; Sprint Oct. 15 Petition at 8; Telecom Resellers Assn. Oct. 15 Comments at 8; State Attorney's General Apr. 27 *Ex Parte,* Rosston & Mercurio Report at 11-12; *see generally* CU/CFA Oct. 15 Comments at 3-7; Texas Public Utility Counsel Oct. 15 Comment at 6, *citing* Shepard Aff. at 25-48.

181 *Bell Atlantic/NYNEX Order*, 12 FCC Rcd 20040, para. 107; *see also* AT&T Oct. 15 Petition at 23; Sprint Oct. 15 Petition at 9; MCI WorldCom Oct. 15 Comments at 31.

182 *See* AT&T Oct. 15 Petition at 23; Sprint Oct. 15 Petition at 9. In the *Bell Atlantic/NYNEX Order* we concluded that Bell Atlantic was a most significant market participant in the adjacent LATA 132. This conclusion was based on the record which demonstrated Bell Atlantic had plans to enter the mass market for local exchange and exchange access service in the New York metropolitan area and had the capabilities necessary to do so. *Bell Atlantic/NYNEX Order***,** 12 FCC Rcd at 20025**,** para. 73.

183 As contiguous incumbent LECs, Ameritech and SBC also have the ability to use remote digital loop carriers to serve out-of-region end users. AT&T states such technology has a range of about 125 miles, which would permit it to be used in conjunction with the contiguous provider's switch in its nearby in-region territory**.** *See* AT&T Oct. 15 Petition at 23; Sprint Oct. 15 Petition at 9. Ameritech argues elsewhere that this distance is actually much greater, noting that switch manufacturers have designed their equipment to serve large geographic areas; for instance, "Lucent's 5ESS switch permits a CLEC to locate a remote switching module … up to 600 miles away from the host switch, allowing CLECs 'to expand networks and service offerings cost-effectively.'" Ameritech notes that AT&T is actually using switches to serve customers at up to 217 miles from the switch (a switch in Grand Rapids,

SBC have brand recognition in contiguous regions because of extensive advertising in media markets that cross these regions.[184] Ameritech's research, for example, shows its brand recognition in St. Louis is so high that it essentially proves Ameritech is one of the "top two" telecommunications brand names among consumers in the market.[185] The cellular assets that Ameritech and SBC possess in each other's regions also provide unique advantages for out-of-region entry. For instance, a cellular presence provides a ready customer base for expanding into wireline local telephony.

We therefore reject Applicants' claim that they should not be considered most significant market participants in out-of-region markets.[186] Given the depth and breadth of Ameritech's expansion plans, we find it likely that Ameritech would have expanded into other SBC markets, in addition to St. Louis, but for the merger. We find it significant that Ameritech viewed Project Gateway as a "testbed" in which it could learn about competing with incumbent LECs in local service and long distance service, customer demand for bundles, and how to implement local and other services in a new area.[187] Project Gateway, had it not been cancelled by Ameritech so that it could merge with SBC, would have given Ameritech insights and experience for later use about how best to enter additional out-of-region markets.[188] One potential means for entry for Ameritech was to build on its larger business expansion plans, as described below. We also find that SBC may have expanded into Ameritech markets, such as Chicago, using its cellular bases spread throughout Ameritech's region.[189]

As for other significant market participants, the dominance of each incumbent LEC in its own region makes it a most significant competitor in its own region. We also reaffirm our finding in prior decisions that the three largest interexchange carriers, AT&T, MCI (now MCI WorldCom), and Sprint are among the most significant participants in the mass market for local exchange and exchange access services.[190] We find that these firms each have the capabilities, incentives, and stated intentions to serve the mass market for local exchange

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MI is serving Perkins, MI). Ameritech Comments, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996,* CC Docket Nos. 96-98, 95-185 (filed May 26, 1999) at 78-80 (Ameritech May 26 Comments).

184 *See* AT&T Oct. 15 Petition at 23-24; Focal Oct. 15 Comments at 15; Hyperion Oct. 15 Comments at 27-28; Sprint Oct. 15 Petition at 9; Telecom Resellers Assn. Oct. 15 Comments at 8.

185 *See* AT&T Oct 15 Petition at 24, *citing* Wall St. J., at B4 (June 8, 1998) ("*Spirit of St. Louis Haunts SBC-Ameritech Merger*"). *See also infra* at para. 90.

186 *See* SBC/Ameritech Nov. 16 Reply Comments at 45-52, 67-72; *See also* Citizens for a Sound Economy Oct 15 Comments at 6-7.

187 *See* Appendix B (Summary of Confidential Information and Conclusions).

188 *See id.*

189 Besides Chicago, SBC has cellular properties in the following MSA's in Ameritech's region: Detroit-Ann Arbor (MI), Milwaukee (WI), Columbus (OH), Dayton (OH), Flint (MI), Madison (WI), Hamilton-Middletown (OH), Lima (OH), Racine (WI), and Springfield (OH), Decatur (IL), Sheboygan (WI), Kankakee (IL), Aurora-Elgin (IL) and Joliet (IL). *The Wireless Communications Industry*, 1998/1999 Winter Edition at 154. SBC also has PCS properties in Cleveland (OH) and Indianapolis (IN). *Id.* at 156.

190 *See Bell Atlantic/NYNEX Order*, 12 FCC Rcd at 20029, para. 82.

services. All three firms already have a substantial base of residential customers of their long distance services and established brand names resulting from their marketing of these services. Thus, these firms are among the best positioned to provide local services to residential customers. Further, their stated intentions to begin serving the mass market for local services underscores their position as being among the most significant competitors.[191] Nevertheless, in certain regions, such as adjacent territories or cellular markets, where incumbent LECs have brand name and/or customer base advantages similar to those enjoyed by the interexchange carriers with their customers, incumbent LECs have the additional advantage of their experience in providing local services to mass market customers as incumbent LECs.[192]

Other firms, currently serving or planning to serve the mass market for local exchange and exchange access services out-of-region, are not yet included in the list of most significant market participants. Competitive LECs have begun serving residential markets but do not yet have the existing customer base and brand name that enable AT&T, MCI, and Sprint, as well as certain incumbent LECs, to become most significant competitors.

(2) Larger Business Market

We find that the larger business local exchange market has a number of market participants with similar incentives and capabilities as an incumbent LEC expanding out-of-region. As the Commission found in earlier orders, incumbent LECs still dominate the market for local exchange and exchange access services sold to larger business customers in their regions and are therefore most significant market participants.[193] We recognize, as we observed in the *WorldCom/MCI Order*, that in contrast to the relative lack of competition incumbent LECs face in the market for local services sold to mass market customers, incumbent LECs face increasing competition from numerous new facilities-based carriers in serving the larger business

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[191] In the AT&T/TCI merger proceeding, the Commission found that the merging parties provided evidence supporting their intention to combine TCI's cable assets with AT&T's experience and brand name to begin providing residential local exchange service. *See AT&T/TCI Order*, 14 FCC Rcd at 3230-31, para. 148. Similarly, MCI and WorldCom assured the Commission during the MCI WorldCom proceeding that they would "augment their efforts in the residential local market," notably with respect to providing service to residents of multiple dwelling units (MDUs). *See WorldCom/MCI Order*, 13 FCC Rcd at 18132-33, paras. 191-92. Finally, Sprint has represented in the instant merger proceeding its intention to begin serving local mass market customers in numerous local markets with its ION offering. Sprint Oct. 15 Petition, Brauer Decl. at 5.

[192] GTE, as an incumbent LEC, has similar capabilities for expansion as an RBOC. For example, GTE has adjacency to many large markets in RBOCs regions and cellular assets. However, GTE has expressed to the Commission difficulties in expanding out-of-region, even in adjacent territories or using its cellular bases. *See Application for Consent to transfer Control of Licenses and Section 214 Authorizations from GTE to Bell Atlantic,* CC Docket No.98-184 at 7 (filed Oct. 24, 1998). Because GTE's statements are the subject of an open proceeding before the Commission, we make no conclusion on the merits of GTE's argument at this time. We do note, however, that GTE's argument does not apply here because our analysis shows that SBC and Ameritech would not experience difficulty in expanding out-of-region into each other's territory.

[193] *See WorldCom/MCI Order,* 13 FCC Rcd at 18123, para. 172; *AT&T/TCG Order,* 13 FCC Rcd at 15250, para. 26.

market.[194] We note that this competition lessens the potential public interest benefits of SBC or Ameritech expanding out-of-region in the larger business market for local exchange and exchange access services.[195]

As with the mass market, incumbent LECs have significant capabilities and incentives to expand into the market for larger business customers out-of-region. Prior to the merger Ameritech was offering out-of-region services to its larger business customers, and had already entered several metropolitan areas in SBC's territory as part of its Managed Local Access (MLA) Program.[196] In its MLA program, Ameritech offered local service in a number of out-of-region states to its largest business customers. Ameritech began to implement MLA in 1997. As of February 2, 1999, Ameritech had negotiated interconnection agreements and was certificated to provide local service as a reseller and/or facilities-based carrier in three SBC states – California, Missouri, and Texas.[197] Ameritech asserts that it cancelled the program in June 1998 because it was unable to win customers.[198] The Commission nevertheless agrees with the commenters that argue that Ameritech is a significant potential entrant in the larger business markets in California, Missouri, and Texas.[199] We base this conclusion on our analysis of the ability and incentive of Ameritech to expand out-of-region to serve larger business. The MLA program provides evidence of the incentives of Ameritech to expand out-of-region, if not the ability to do so.

Although both SBC and Ameritech are significant market participants in the larger business market for local exchange and exchange access services, unlike in the mass market for local exchange and exchange access services, a large number of other firms may have similar capabilities and incentives expanding out-of-region to serve larger business customers.[200] As we have noted, the larger business market for local exchange and exchange access services differs from the mass market.[201] Larger business customers in general tend to be more

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194 *WorldCom/MCI Order*, 13 FCC Rcd at 18123, para. 172.

195 *See* Section VI (Analysis of Potential Public Interest Benefits).

196 *See* Appendix B (Summary of Confidential Information and Conclusions).

197 *See id.*

198 This assertion seems to contradict Ameritech's own documents showing that Ameritech continued to market MLA and expend resources after the merger. *See* Appendix B (Summary of Confidential Information and Conclusions). We find it unnecessary here to reach a conclusion on the fate of the MLA program, as we do not base our conclusions on the success or failure of the MLA program alone.

199 *See* Appendix B (Summary of Confidential Information and Conclusions); *See also* Competition Policy Institute Nov. 16 Comments at 6; CFA Oct. 15 Comments at 20; MCI WorldCom Oct. 15 Comments at 3; Sprint Oct. 15 Petition at 8-9, Decl. of Stanley M. Besen, Padmanabhan Srinagesh & John R. Woodbury at 49-51; Telecommunications Resellers Ass'n Oct. 15 Comments at 83.

200 The list of market participants with the capabilities and incentives to provide local exchange services to larger business customers includes the largest interexchange carriers.

201 *See* Section V.B.2.b) (Relevant Markets). *See also WorldCom/MCI Order*, 13 FCC Rcd 18119, para. 164; *AT&T/TCG Order*, 13 FCC Rcd 15257, para. 38. AT&T/TCG, with its combination of AT&T's capital resources and existing base of business long distance customers along with TCG's local exchange facilities and existing base of business local exchange customers, is a significant competitor in the local market for larger business customers. In a similar vein, MCI/WorldCom, with its combination of MCI's business customer base and local facilities along

sophisticated and knowledgeable purchasers of telecommunications services than mass market customers. A significant difference between the mass market for local services and the larger business market for local services is that larger business customer purchases are not limited to a single local metropolitan geographic area; rather, they purchase simultaneously in numerous local markets. Ameritech's MLA program and the Applicants' National-Local Strategy are examples of how larger business customers' purchasing patterns are targeted by following larger business customers out-of-region. Finally, broad-based brand name recognition and mass advertising are less important in attracting larger business customers.[202] As a result, many more firms are entering the larger business market successfully than are entering the mass market for local exchange services, and the merger is therefore less likely to have adverse public interest effects in the larger business market for local services.[203]

d) Analysis of Merger's Effects

We seek to determine whether the merger of Ameritech and SBC is likely to cause a public interest harm by reducing the level of competition in any relevant local market. One of the major purposes of the Act, that we seek here to further, is to lower the entry barriers that gave incumbent LECs monopoly control over the local services offered to customers in their regions. The Act's goal was to introduce competition in these markets to the ultimate benefit of customers, both as entrants attempted to win consumers' business with lower prices and improved services, and as incumbents were forced in turn to respond to the entrants or lose customers. The realization of this goal is jeopardized if the incumbent and one of the most significant competitors in its region choose to merge instead of compete. This is true even if this competitor has not yet entered during the transitional period while entry barriers are being eliminated, as the merger will eliminate future entry and any corresponding competitive restraint this would place on the incumbent.

In the instant merger analysis, we conclude above that both SBC and Ameritech have the capabilities and incentives to expand into the mass market for local exchange and exchange access services in geographic markets adjacent to their own regions or ones in which they have a cellular presence. SBC and Ameritech are thus among the most significant potential competitors in these markets in each other's regions. Therefore, the merger of SBC and Ameritech would lessen competition in these markets, resulting in a potential public interest harm. In the larger business market for local exchange and exchange access services, we conclude above that SBC and Ameritech are among a significant number of actual and potential

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with WorldCom's competitive LEC assets (including Brooks Fiber and MFS), is also a significant competitor in the larger business local exchange market. Sprint has expressed an intention to serve this market with its ION offering, building off its own base of larger business customers. Other firms that are, or could soon become, significant market participants include NEXTLINK, e.spire, and WinStar.

202 *See AT&T/TCG Order*, 13 FCC Rcd at 15257, para. 39; *Bell Atlantic/NYNEX Order*, 12 FCC Rcd at 20016, para. 53

203 *See* SBC/Ameritech July 24 Application, Description of the Transaction at 66.

competitors in each other's regions. Therefore, the merger would be unlikely to lessen competition in these markets and we find little corresponding public interest harm.

(1) Competitive Effects on Mass Market Local Services

St. Louis. In our analysis of the ability and incentives of incumbent LECs to expand out-of-region, we focus on the advantages that incumbent LECs have when expanding into adjacent regions or regions in which they already have a cellular presence. In St. Louis, Ameritech enjoys both advantages. Indeed, as discussed above, Ameritech did have plans to enter the St. Louis market. We therefore focus our discussion first on the St. Louis market, before turning to other general regions.

We find that the merger will result in the elimination of Ameritech as a significant market participant in the mass market for local services in St. Louis. Consequently, the proposed merger will reduce the level of competition in this market, and thereby result in a significant public interest harm. As discussed above, we base this conclusion on the following. First, until the merger was negotiated, Ameritech was entering the mass market for local services in St. Louis. Second, we find that Ameritech was among the most significant competitors to SBC in St. Louis. We base this finding on our conclusion that Ameritech, as an incumbent LEC, has the operational experience to be able to offer local exchange services on a large-scale in out-of-region markets. In addition, Ameritech had a number of advantages for entering St. Louis, including its St. Louis wireless customer base and brand reputation, and its adjacency to St. Louis. The only other most significant potential market participants in the mass market for local services in St. Louis are the major interexchange carriers, with their ability to capitalize on their brand name and existing customer base.[204] We conclude, therefore, that the merger will eliminate Ameritech as one of a very limited number of most significant market participants in the mass market for local services in St. Louis, and thereby will result in a public interest harm.

We therefore concur with DOJ's conclusions that Ameritech planned to begin offering wireline local exchange services to mass market customers in St. Louis prior to the merger announcement, as well as the absence of other firms with similar intentions.[205] Nevertheless, we conclude that the divestiture of Ameritech's cellular assets required by DOJ, standing alone, does not mitigate the public interest harms outlined in this section.[206] As

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204 *See Bell Atlantic/NYNEX Order*, 12 FCC Rcd at 20024, para. 70.

205 *See* Appendix B (Summary of Confidential Information and Conclusions). The DOJ complaint states: "[A]meritech planned, prior to its announcement of its agreement to be acquired by SBC, to provide local exchange and long distance telephone services in SBC's local telephone service area, primarily by selling bundled packages of such services and its cellular mobile telephone service to existing Ameritech residential cellular customers. There is no alternative source of such a bundled product in the St. Louis area at present." DOJ Complaint at para. 21.

206 As noted by DOJ: "The antitrust Division's suit was filed under Section 7 of the Clayton Act, which prohibits mergers that may substantially lessen competition, and reflects the Division's view about the antitrust issues raised by the proposed merger. Other governments agencies, including the Federal Communications Commission and the public utility commissions of Illinois, Indiana, and Ohio, are also reviewing the SBC/Ameritech transactions under the laws which those agencies enforce." DOJ March 23 Press Release at 2.

discussed above, the public interest standard that governs the Commission's review is broader than the antitrust analysis undertaken by the DOJ. In particular, we find that the merger may delay the future development of competition or lessen its eventual impact, contrary to the intention of the 1996 Act. Specifically, we find that the merger will result in a significant public interest harm in the provision of local exchange services to the mass market in St. Louis and elsewhere, despite the divestiture of Ameritech's cellular assets.

We reach this conclusion based on our analysis of the capabilities, incentives, and intentions of Ameritech to expand into St. Louis, and our corresponding finding that GTE Consumer Services Incorporated (GCSI), the purchaser of Ameritech's St. Louis cellular assets[207] is not likely to be as significant a competitor to SBC's residential wireline services as was Ameritech. First, we note that GCSI meets the requirement specified in DOJ's Proposed Final Judgment, if it "has the capability of competing effectively in the provision of local exchange telecommunications services and long distance telecommunications service in the St Louis Area."[208] This specific language clearly indicates that DOJ only wishes to require that GCSI demonstrate the *capability* to use these assets to provide local services in St. Louis, but not the specific *intention* to so use them. We note that although GCSI has the capability of providing local services in the St Louis Area, based on the record before us, it lacks the adjacency, incentive and stated intention to provide wireline local exchange services in St. Louis that in combination with its brand name recognition gave Ameritech its advantages in entering the St. Louis market.[209] It is therefore unlikely that GCSI could demonstrate the same incentive, and intention to provide wireline local exchange services for mass market customers in St. Louis as Ameritech. We therefore conclude that the merger leads to a public interest harm in the St. Louis market despite the divestiture of Ameritech's cellular assets, although divestiture to a firm with the ability to extend the wireless business to a genuine wireline threat does mitigate the significance of the harm.

Other Regions. We further find that, as elaborated in Appendix B, the fact that SBC had no current plans to enter any mass market for local exchange and exchange access services out-of-region, and the fact that Ameritech's plans focused on St. Louis, do not preclude

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207 *See In re Applications of Ameritech Corporation, Transferor, and GTE Consumer Services, Inc., Transferee, for Consent to Transfer of Control of Licenses and Authorizations*, Memorandum Opinion and Order, DA 99-1677, 1999 W.L. 635,724 (WTB 1999).

208 *See* Proposed Final Judgment at 3.

209 We note that GCSI has not stated it has any specific plans to enter the mass market for local services in St. Louis. In a Press Release announcing the proposed acquisition of Ameritech's wireless properties, GTE Chairman and CEO Charles R. Lee stated that the purchase would "facilitate expansion into the local phone markets in key Midwest cities such as Chicago and St. Louis," however he mentioned no immediate specific plans to do so. *See* GTE Press Release at 2. In GCSI's application to the Commission for transfer of control of Ameritech's cellular licenses, there is similarly no mention of plans to use these wireless assets as a launching pad for offering wireline services; rather, there is simply a mention that wireless and wireline services will be made available through one-stop shopping "where an overlap exists between GTE's local exchange offerings and the Ameritech cellular properties." There is no such overlap in St. Louis. *See* Application of GTE Corporation for Transfer of Control of Radio Station Authorizations held by Ameritech, filed May 3, 1999 at 8-9.

a finding that each was a significant potential mass market participant in other regions. We base this finding on the transitional market analysis articulated in the *Bell Atlantic/NYNEX Order*, stating that in transitional markets such as the local markets examined here, the Commission may consider future entry in its analysis of the competitive effects of a merger.[210] As discussed in Appendix B, Ameritech was expanding elsewhere into SBC's region as part of its MLA program. Combining the MLA foothold in the larger business market in these regions with the benefits of Ameritech's experience as an incumbent LEC, along with additional experience that it would have accrued as a competitive LEC in St. Louis, we find that Ameritech had the capabilities and incentives to further expand into the mass market for local services in SBC's region. The divestiture of Ameritech's cellular assets in St. Louis does not provide any assurance that the purchaser will expand beyond St. Louis as Ameritech was likely to have done. Although SBC would not have adjacency benefits in most of Ameritech's region, combining its experience as an incumbent LEC with its cellular assets, notably in Chicago, but also elsewhere in Ameritech's region, we find that SBC had the capabilities and incentives to expand into the mass market for local services in Ameritech's region.

Therefore, we find that the merger of SBC and Ameritech results in the loss of a most significant potential competitor in the provision of mass market local exchange services in portions of each other's regions, resulting in a potential public interest harm. The harm is significant because both firms are among a very few that are poised on the edge of an entrenched monopolist, with genuine abilities to challenge that monopolist. These harms, although real and substantial, nevertheless may not be enough, in and of themselves, to justify prohibiting the merger. Neither firm was likely to enter most of the other's territory. Throughout both territories, at least three interexchange carriers are also significant actual or potential entrants. The divestiture of Ameritech's wireless St. Louis operation to GTE somewhat mitigates the merger's effects in that city. Were the loss of each firm's entry into the other's territory the only public interest harm produced by this merger, the overall balance would be much closer.

(2) Effects on Larger Business Market

With respect to the provision of local exchange access services to larger business customers, we find that, absent the merger, Ameritech is likely to have followed a number of its large business customers in a number of out-of-region states in SBC's territory, as documented by Ameritech's plans to offer local exchange services via its MLA program, and that SBC had the capabilities and incentives to expand out-of-region in a similar fashion, despite the absence of concrete plans.[211] We also find that there are a number of significant competitors equally competitive with SBC and Ameritech in these markets. Therefore, although SBC and Ameritech are significant market participants, we do not find that their elimination, as a result of the merger,

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[210] *See Bell Atlantic/NYNEX Order*, 12 FCC Rcd at 20020, para. 60; *WorldCom/MCI Order*, 13 FCC Rcd at 18037-38, paras. 19-20.

[211] *See* Appendix B (Summary of Confidential Information and Conclusions).

would substantially frustrate the goals of the Act and harm the public interest in the provision of local exchange and exchange access services sold to larger business customers.[212]

C. Comparative Practices Analysis

In this section, we analyze the effect of the proposed merger on the ability of regulators and competitors to use comparative analyses of the practices of similarly-situated independent incumbent LECs to implement the Communications Act in an effective, yet minimally intrusive manner. Such comparative practices analyses, referred to by some commenters as "benchmarking," provide valuable information regarding the incumbents' networks to regulators and competitors seeking, in particular, to promote and enforce the market-opening measures required by the 1996 Act and the rapid deployment of advanced services. Without the use of this tool, regulators would be forced, contrary to the 1996 Act and similar state laws, to engage in less efficient, more intrusive regulatory intervention in order to promote competition and secure quality service at reasonable rates for customers. We find that the proposed merger of SBC and Ameritech would pose a significant harm to the public interest by severely handicapping the ability of regulators and competitors to use comparative practices analysis as a critical, and minimally-intrusive, tool for achieving the Communications Act's objectives.

The Commission's public interest test considers, among other things, "whether the merger . . . would otherwise frustrate our implementation or enforcement of the Communications Act and federal communications policy."[213] In past incumbent LEC mergers, the Commission has recognized that the declining number of independently-owned major incumbent LECs limits the effectiveness of benchmarking for regulators in carrying out the goals of the Communications Act.[214] In the *Bell Atlantic/NYNEX Order* in particular, the Commission observed that, as the number of independent large incumbent LECs declines, regulators and competitors lose the ability to compare policies and performance among major incumbents that have made divergent management or strategic choices.[215] Consequently, in allowing the Bell Atlantic/NYNEX merger, the Commission expressly cautioned that "further reductions in the number of Bell

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212 *See WorldCom/MCI Order*, 13 FCC Rcd at 18074, para. 86; *Bell Atlantic/NYNEX Order*, 12 FCC Rcd at 20022, para. 65. We note, further, that this conclusion undermines the Applicants' argument that a potential public interest benefit would result post-merger from Applicants following their larger business customers out-of-region as a result of their National Local Strategy. A number of firms, including SBC and Ameritech, are already providing or could provide local exchange and exchange access services to these customers.

213 *AT&T/TCI Order*, 14 FCC Rcd at 3169, para. 14.

214 *See Bell Atlantic/NYNEX Order*, 12 FCC Rcd at 19994, para. 16; *SBC/SNET Order*, 13 FCC Rcd at 21292, para. 21 ("We remain concerned about the consolidation among large LECs as a general matter."). *See also SBC/PacTel Order*, 12 FCC Rcd at 2624, para. 32.

215 *Bell Atlantic/NYNEX Order*, 12 FCC Rcd at 19994, para. 16. The Commission specifically found that "[m]ergers between incumbent LECs will likely reduce experimentation and diversity of viewpoints in the process of opening markets to competition." *Id.* at 20060, para. 152.

Companies or comparable incumbent LECs would present serious public interest concerns."[216] The Commission went on to warn that "future applicants bear an additional burden in establishing that a proposed merger will, on balance, be pro-competitive and therefore serve the public interest, convenience and necessity."[217] The Applicants have not overcome that burden.

Following the concerns expressed in the *Bell Atlantic/NYNEX Order,* and SBC's prior acquisitions of Pacific Telesis and SNET, we must consider the effect that a further reduction in the number of large incumbent LECs would have on the ability of regulators and competitors to use comparative practices analyses as a deregulatory means to advance the pro-competitive goals of the Communications Act. We find, as the Commission concluded in the *Bell Atlantic/NYNEX Order*,[218] that the major incumbent LECs (RBOCs and GTE), because they are of similar size and face similar statutory obligations and market conditions, remain uniquely valuable benchmarks for assessing each other's performance. It follows that a reduction in the few remaining major incumbent LECs would restrict the flow of information to regulators and competitors that otherwise could be used to promote innovative market-opening solutions or to identify and curtail unreasonable and discriminatory behavior.

As discussed in greater detail below, we find that the proposed merger's elimination of Ameritech as an independent major incumbent LEC will significantly impede the ability of this Commission, state regulators and competitors to use comparative practices analyses to discover beneficial, pro-competitive approaches to open telecommunications markets to competition and to promote rapid deployment of advanced services. More specifically, the loss of Ameritech as an independent source of strategic decisions and experimentation, and the increased incentive for the merged entity to reduce autonomy at the local operating company level as a result of the merger, would severely restrict the diversity that regulators and competitors otherwise could observe and, where pro-competitive, endorse. By further reducing the number of major incumbent LECs, the merger also increases the risk that the remaining firms will collude, either explicitly or tacitly, to conceal information and thereby hinder regulators' and competitors' benchmarking efforts. We therefore conclude that the proposed merger of SBC and Ameritech would impede the ability of regulators and competitors to make effective benchmark comparisons, which would force more intrusive, more costly, and less effective regulatory measures contrary to the 1996 Act's deregulatory aims and the interests of both the regulated firms and taxpayers. The loss of this more efficient method of oversight can only serve to further entrench the large incumbent LEC's substantial market power.

Our analysis of the effect on comparative practices analysis of SBC's acquisition of Ameritech discusses: (1) the need for comparative practices analyses to offset the

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216 *Id.* at 20062-63, para. 156. The Commission stressed that further reductions in the number of RBOCs "become more and more problematic as the potential for coordinated behavior increases and the impact of individual company actions on our aggregate measures of the industry's performance grows." *Id.*

217 *Id.* at 19994, 20061, paras. 16, 153.

218 *Id.* at 19994, para. 16.

informational disadvantage of regulators and competitors; (2) the impact of a reduction in the number of comparable firms on benchmarking's effectiveness; (3) examples of the use of comparative practices analysis by regulators and competitors to evaluate practices of the large incumbent LECs both prior to and following the 1996 Act; (4) the adverse impact of the proposed SBC/Ameritech merger on the effectiveness of comparative practices analyses; and (5) the present inadequacy of other alternatives to large incumbent LEC benchmarks.

1. Need for Comparative Practices Analyses

For regulators and competitors, comparative analyses of the practices and approaches of a variety of similarly situated incumbent LECs can render valuable information regarding network features, capabilities and costs. The 1996 Act requires regulators to oversee the opening of local telecommunications markets to competition and to promote rapid deployment of advanced services under circumstances in which regulators possess far less accurate and less complete information than incumbent LECs about the capabilities and constraints of existing networks.[219] Without such information, regulators and competitors may not be able to make informed decisions regarding the feasibility and costs of certain interconnection or access arrangements, particularly when disputes arise over the introduction of new, unproven technologies or services.[220] The incumbent LEC's superior knowledge also gives it a decided advantage over competitors in negotiating prices, terms and conditions for interconnection or network access.[221]

In addition, incumbent LECs, which are both competitors and suppliers to new entrants, have strong economic incentive to preserve their traditional monopolies over local telephone service and to resist the introduction of competition that is required by the 1996 Act.[222] More specifically, an incumbent LEC has an incentive to: (1) delay interconnection negotiations and resolution of interconnection disputes; (2) limit both the methods and points of

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219 *See, e.g., Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, First Report and Order, 11 FCC Rcd. 15499, 15606, at para. 205 (1996) (*Local Competition Order*) (requiring incumbent LECs to prove to the appropriate state commission that interconnection or access at a particular point is not technically feasible, given that "[i]ncumbent LECs possess the information necessary to assess technical feasibility of interconnecting to particular LEC facilities."). *See also* Sprint Oct. 15 Petition, Farrell and Mitchell Decl., Att. C at 2-3, 7 (observing that a firm will be better informed about its economic costs, its ability to improve service quality or reduce delivery intervals, and other "softer" qualitative indicators such as access to unbundled network elements, provisioning and ordering practices, quality characteristics and opportunities for innovation).

220 *See* Sprint Oct. 15 Petition at 26-27 (discussing how innovative technologies, such as Sprint ION, may require access to new and additional capabilities in the local exchange network, which translates into a need for competitors to acquire incumbent LEC inputs in nontraditional forms or in new price configurations).

221 *See Local Competition Order*, 11 FCC Rcd at 15510, para. 15 (discussing Congress's recognition of the superior bargaining power of incumbent LECs in negotiations with new entrants).

222 *See, e.g., Local Competition Order*, at 15508-09, paras. 10-11 (recognizing that an incumbent LEC, with its economies of density, connectivity and scale, has "little economic incentive to assist new entrants in their efforts to secure a greater share of that market.").

interconnection and the facilities and services to which entrants are provided access; (3) raise entrants' costs by charging high prices for interconnection, network elements and services, and by delaying the provisioning of, and degrading the quality of, the interconnection, services, and elements it provides.[223] An incumbent LEC has similar, and probably greater, incentive to deny special accommodations required by competitive LECs seeking to offer innovative advanced services that the incumbent may not even offer.[224] As noted at the outset, this view of the incumbent LECs' incentives and abilities is the fundamental postulate of the basic cornerstones of modern telecommunications law – the MFJ and the 1996 Act.

Given these incentives to resist competitive entry, independent incumbent LECs, absent collusion, are likely to adopt different defensive strategies to forestall competitive entry, and each particular strategy will reveal information to regulators and competitors. One incumbent LEC may claim, for example, that a particular form of interconnection is infeasible, while a second may resist the unbundling of a particular network element, and a third may oppose the collocation of specific types of equipment within its central offices. In such situations, the behavior of other major incumbent LECs can be used as benchmarks to evaluate the outlying incumbent's claims. Competitors, in negotiating and implementing access and interconnection arrangements, could point to the conduct of one incumbent to rebut another incumbent's assertion that a particular service is not feasible or must be structured or priced in a particular manner. Comparative practices analysis does not require this Commission to assume the more expensive and intrusive posture of imposing arduous reporting requirements and dictating how networks should be organized and operated. Comparing the practices of a large number of similarly-situated incumbents provides a minimally-intrusive means for regulators and competitors to counterbalance the incumbents' superior knowledge of the possible technical arrangements for collocation, unbundled access, and interconnection, as well as the costs associated with such arrangements.

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223 *See, e.g.*, *id*.; *Implementation of the Telecommunications Act of 1996: Accounting Safeguards Under the Telecommunications Act of 1996*, CC Docket No. 96-150, Report and Order, 11 FCC Rcd 17539, 17542-43, 17546, paras. 3-4, 13-14 (1996) (*Accounting Safeguards Order*); *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended*, CC Docket No. 96-149, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 21905, 21910, 21912-13, 21914, 22002-04, paras. 6, 11-13, 16, 206-08 (1996) (*Non-Accounting Safeguards Order*) (discussing a BOC's incentive to degrade services and facilities furnished to rivals of its affiliates and seeking ways to ensure that a BOC cannot use its control over local exchange bottlenecks to undermine competition in new markets that it enters); *Deployment of Wireline Services Offering Advanced Telecommunications Capability, et al.*, CC Docket No. 98-147, *et al*., Memorandum Opinion and Order, and Notice of Proposed Rulemaking, 13 FCC Rcd 24012, 24023, 24035, paras. 21, 47-48 (1998) (*Advanced Services Order and NPRM*) (noting Congress's intent to open local markets to competition by reducing inherent economic and operational advantages possessed by incumbents, particularly with respect to interconnection, access to unbundled network elements and collocation).

224 *See, e.g.*, *Non-Accounting Safeguards Order*, 11 FCC Rcd at 22004, para. 211 (noting that a BOC's purposeful delay in implementing a competitor's request pertaining to an innovative new service would violate sections 201(a) and 272(c)(1) of the Communications Act). *See also* Section V.D.2.a) (Advanced Services) (discussing the Applicants' increased incentives and capabilities for blocking competition, particularly with respect to new services).

The ability to analyze a wide variety of approaches among the major incumbent LECs is especially crucial for regulators and competitors in implementing the provisions of the 1996 Act that mandate competitive access to facilities and services. As regulators seek to open local telecommunications markets and promote advanced services deployment using deregulatory means, they benefit greatly from observing diverse strategic decisions and experimentation among the incumbents.[225] The Applicants themselves acknowledge that the introduction of local competition has "both accelerated and been accompanied by rapid technological developments."[226] Comparative practices analyses are perhaps the regulators' and competitors' best means of staying abreast of such rapid technological advances, particularly in assessing the technical feasibility of novel access and interconnection configurations vital for the provision of new services and technologies.

In analyzing comparative practices, regulators and competitors generally use two broad methods of comparison – "best-practices" and "average-practices" benchmarking. It is not unusual, however, for comparative practices analyses to involve a combination of these approaches.

Best-Practices. Under "best-practices" benchmarking, a regulator compares behavior across a group of similarly situated, independent firms in order to identify the best practice employed by a firm, or subset of firms.[227] When individual incumbent LECs adopt a variety of techniques or technologies to provide a particular service, regulators and competitors can compare the costs and benefits of each technique to arrive at a "best practice," which presumptively could be promoted or required of all incumbents. If one or two incumbent LECs, for example, offered requesting carriers cageless collocation, this would call into question the claims of other incumbent LECs that cageless collocation threatened the reliability of the network.[228] Alternatively, if several similarly-situated incumbent LECs provide widely varying estimates of the cost of providing a certain service, then the low cost estimate would call into question the accuracy of the higher cost estimates.

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[225] Accordingly, we reject the Applicants' contention that benchmarking will cease to play a role during the post-1996 Act transition to full competition. *See* Letter from Todd F. Silbergeld, SBC Telecommunications, Inc., to Magalie Roman Salas, FCC, CC Docket No. 98-141 (filed March 26, 1999), Att. "Supplemental Memorandum Regarding Regulatory Benchmarking Issues," March 25, 1999 (SBC/Ameritech Mar. 25 Supplemental Memo) at 19. *See Bell Atlantic/NYNEX Order*, 12 FCC Rcd at 19994, para. 16 ("During the transition to competition it is critical that the Commission be able effectively to establish and enforce its pro-competitive rules and policies."). Even the Applicants seem to agree that benchmarking has been particularly useful in implementing section 251. *See* SBC/Ameritech Nov. 16 Reply Comments at 62 (commenting that "the vast majority of the benchmarks being developed under section 251 are best practices or parity benchmarks, not industry averages.").

[226] SBC/Ameritech Mar. 25 Supplemental Memo at 20.

[227] Similarly, evaluating the practices of several firms may lead to the identification of a "worst practice" if one firm's practice stands in poor contrast to that of other firms.

[228] *See, e.g., Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, First Report and Order and Further Notice of Proposed Rulemaking, 14 FCC Rcd 4761, 4784-85, at para. 42, n.100, n. 102 (1999) (*Advanced Services Further Notice*) (noting U.S. WEST's provision of cageless collocation in contrast to the security concerns expressed by Bell Atlantic, SBC and GTE).

Average-Practices. Under "average-practices" benchmarking, a regulator gathers data from a number of firms in order to identify the prevailing standard or to calculate the average, which then could be used as a benchmark against which to evaluate an individual LEC's performance. Substantial deviation from the benchmark average can assist regulators and competitors in detecting substandard, and potentially unreasonable, behavior, such as poor service quality or unreasonable costs.[229] Variations of this form of comparative practices analysis also can be used to monitor service quality or to detect unreasonable or discriminatory costs or practices. The Commission's calculation of the X-factor based on industry-wide increases in productivity, which was then applied to all "Price Cap LECs," is another use of average-practices benchmarking.[230] To be effective, however, average-practices benchmarking requires data from a large number of independent, similarly situated incumbent LECs, none of which is large enough to dominate, or skew, the aggregate data. In such a situation, an individual LEC's action would have little impact on the average benchmark, and an incumbent LEC would have no incentive to deviate from its individually optimal behavior in order to affect that average benchmark.

Absent the ability to benchmark among major independent incumbent LECs, this Commission and state regulators would have no choice but to engage in highly intrusive regulatory practices, such as investigating the challenged conduct directly and at substantial cost to make an assessment regarding its feasibility or reasonableness.[231] The increased need for such direct regulation would not only be more costly, but it would clash with the deregulatory goals of the 1996 Act.[232] Furthermore, these more intrusive and costly regulatory alternatives are unlikely to be as effective as comparative practices analysis in implementing the pro-competitive mandates of the 1996 Act, given the rapid evolution of technology, the incumbent LECs' informational advantage and their incentive to conceal such information.

2. Effect of Reduction in Number of Benchmarks

In order to render a variety of policies and practices for regulators and competitors to observe and analyze, comparative practices analysis requires a large number of comparable independent sources of observation. For this reason, mergers between benchmark firms significantly weaken the effectiveness of this tool. Removing a benchmark firm through a

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229 *See* Peter Huber, *The Geodesic Network: 1987 Report on Competition in the Telephone Industry*, at 3.24, 3.54-3.55 ("Benchmarking one LEC's performance against another in the post-divestiture marketplace has proved an effective regulatory tool. Laggard or eccentric LEC performance stands out when eight large holding companies line up for periodic regulatory inspection.").

230 *See Bell Atlantic/NYNEX Order*, 12 FCC Rcd at 20060, para. 150 (discussing the use of benchmarking in setting the X-factor, or the estimated annual rate of productivity gain used to adjust the price index of firms subject to price cap regulation).

231 As Sprint points out, without benchmarking, the Commission would have to employ far more intrusive measures, including document and *in personae* subpoenas, more after-the-fact complaint adjudication, or on-the record hearings. Sprint Oct. 15 Petition at 39.

232 *See id.* at 40.

merger reduces the independence of the sources of observation at three levels: (a) the holding company level, as policies of the acquired firm that conflict with those of the acquiring firm are eliminated; (b) the local operating company level, as the holding company's incentive to impose uniform practices throughout its expanded region increases; and (c) the industry level, as the incentives and capabilities of the few remaining major incumbent LECs to coordinate their behavior increase. In addition, the loss of an independent incumbent LEC will have a greater impact on reducing benchmarking's effectiveness the larger the region of the combined entity and the smaller the number of similarly-situated firms remaining following the merger.

a) Effect at Holding Company Level

A merger of two large incumbent LECs obviously eliminates an independent source of observation at the holding company level. The combined entity is unlikely to continue with two sets of policies and practices where the dual policies conflict with one another. Instead, it is likely to eliminate any divergent approaches in favor of a standard policy (which may represent a choice between the two firms' positions or a compromise). The acquiring firm has a particularly strong incentive to eliminate conflicting policies of the acquired firm that would jeopardize its chosen strategy to resist competitive entry.[233] Consequently, as the Commission explained in the *Bell Atlantic/NYNEX Order*, the result of the merger may be a reduction in the level of experimentation and variety of approaches observable to regulators and competitors.[234]

When only a few similarly-situated benchmark firms remain, the harms to benchmarking increase more than proportionately with each successive loss of a firm as an independent source of observation.[235] As the number of independent sources of observation declines, there is less likelihood that a significant "maverick" will emerge to undertake a strategic or management decision that departs from the other incumbents, and that may establish a best practice in the industry. Moreover, the best observed practice is likely to become worse simply because there are fewer observations. Finally, as the number of independent sources of observation decreases, deviations from average practices can be identified less confidently as unreasonable and punishable.

Having a significant number of independent points of observation is especially crucial for regulators and competitors in decisions regarding new services and innovative technologies. Such decisions are likely to entail forecasting the expected benefits, costs, timing, and problems associated with the provision and maintenance of such services and innovations. Although it is impossible to make such predictions with certainty, the existence of numerous major incumbent LECs increases the information available to regulators in evaluating whether or

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233 *See* State Attorneys General Apr. 27 *Ex Parte* at 20 ("A merger enables the surviving RBOC to reduce the possibility that the independent decisions of the other RBOCs would undercut the strategy it has adopted to respond to its market-opening obligations.").

234 *Bell Atlantic/NYNEX Order*, 12 FCC Rcd at 20060-62, paras. 152-54.

235 *See id.* at 20062-63, para. 156.

when to require the new service or innovation, and in setting rates. Conversely, having few major incumbent LECs to serve as independent points of observation can undermine the credibility of such determinations.

b) Effect at Operating Company Level

A merger of two holding companies also is likely to reduce the relative autonomy of their local operating companies and hence the overall level of experimentation and diversity for decisions that were made at the operating company level. Holding companies typically impose certain constraints on their operating companies. Accordingly, when two holding companies with distinct policies merge and adopt one common set of policies, the decisions made by the operating companies of the acquired holding company will become more closely correlated with the decisions made by the operating companies of the acquiring holding company. Furthermore, the expansion in the combined entity's service region results in a greater incentive to shift more decisions from the operating company level to the holding company level.

As a holding company's size increases, the cost it incurs when one of its operating companies' practices is used as a benchmark against the rest of the company also increases. For example, if each of the merging firms previously had five local operating companies, then each of these holding companies would have been concerned only with the cost of adopting a benchmark practice for its four other operating companies. Following the merger, however, the holding company would have to consider the cost of adopting this benchmark practice for a total of nine other operating companies. Accordingly, as a holding company acquires more operating companies and its service region expands, it has an increased incentive to ensure that its operating companies' policies are consistent with those of the holding company.

Where a merger creates an incumbent LEC of sufficient size to dominate the setting of industry averages and standard practices, which are based on data from operating companies, the merged firm acquires an incentive to impose uniform practices in order to influence or set the *de facto* average benchmark. An incumbent LEC with few operating companies, for example, may allow its local operating companies to set the non-recurring charge (NRC) associated with cutting over a loop, because the data from its operating companies will have negligible impact on the industry average. If, however, as a result of a merger, the holding company controlled a large percentage of the nation's local loops, then it would have a strong incentive to establish a uniform NRC in order to influence the industry average.[236] Alternatively, a holding company that knew that a maverick operating company outside its territory was developing a new billing and collection arrangement that would likely become a best-practice

[236] *See e.g.*, Letter from Lisa R. Youngers, MCI WorldCom, to Robert Atkinson and Thomas Krattenmaker, FCC, May 13, 1999 (MCI WorldCom May 13 *Ex Parte*), at 3 (observing that, as part of the Bell Atlantic/NYNEX merger conditions, Bell Atlantic submitted optional payment plans for non-recurring charges in all of its states with a uniform assumed anticipated bad debt figure of 2 percent, despite figures that MCI WorldCom calculated using ARMIS data and the Hatfield Model that ranged from .31 to .89 percent depending upon the individual operating company).

benchmark would have limited incentive to prevent its own operating companies from employing a variety of billing and collection arrangements, for the differing arrangements would have little effect on the ultimate benchmark. If, however, a merger brought the maverick operating company under the holding company's control, the holding company would be able to influence the benchmark by requiring all its operating companies (including the maverick) to adopt the billing and collection arrangement that it deemed most advantageous. The result, again, would be a loss of independent sources of observation for regulators and competitors seeking to use comparative practices analyses to promote competition and rapid deployment of advanced services.

c) Effect at Industry Level

A reduction in the number of independently-owned major incumbent LECs as a result of a merger increases the likelihood of coordination, either tacit or explicit, among the remaining firms in the industry for the purposes of reducing the effectiveness of comparative practices analyses. As general antitrust principles indicate, collusion is more likely to occur where only a few participants comprise a market and entry is relatively difficult.[237] This is due in part to the fact that, with fewer firms, less potentially divergent interests must be accommodated by the coordinated behavior. On the other hand, with a large number of competitors and low barriers to entry, coordinated behavior is less likely.[238]

The Horizontal Merger Guidelines indicate concern that firms may be able to coordinate with respect to price or other product attributes when six equally sized firms compete in an industry.[239] Nonetheless, the ability of firms to coordinate on price is partially mitigated by the fact that, by its very nature, an agreement to maintain price above the competitive level creates an incentive for each of the firms to cheat on the agreement and lower price. By undercutting the agreed-upon price, a firm could earn a higher profit than it would earn if it (along with the others) maintained the agreement. We note that, as the major incumbent LECs do not directly compete on price in the same geographic markets (and, as noted above, would be less likely to do so after the merger), they do not have this incentive to lower price.

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[237] *See* F. M. Scherer and D. Ross, *Industrial Market Structure and Economic Performance* 277-315 (3rd Ed., 1990); A. Jacquemin and M. Slade, "Cartels, Collusion, and Horizontal Merger," published in R.Schmalensee and R.D. Willig, *Handbook of Industrial Organization*, Vol. 1 (1989).

[238] Applying these principles, the Commission has recognized that the markets for local exchange and exchange access services, traditional monopolies collectively dominated by major regional holding companies, are conducive to coordinated interaction. *See Bell Atlantic/NYNEX Order*, 12 FCC Rcd at 20047, para. 122 (concluding "that the risk of coordinated interaction is particularly high in the markets in which Bell Atlantic and NYNEX compete.").

[239] This is implied by the fact that when a market's HHI is 1800, the guidelines consider the market to be highly concentrated and mergers between companies with more than 7% market share raise concerns of coordinated and unilateral anti-competitive effects.

In the context of comparative practices analysis, we expect that, with respect to coordinating divergent incentives, having fewer benchmark firms would also result in the remaining firms being better able to coordinate their behavior. In this situation, the coordination of behavior could be designed not to raise price, but, rather, to conceal information from regulators and thereby impede regulatory functioning. Unlike competing firms, each of which has a unilateral incentive to cheat on the agreement in order to raise its profits, no such incentive to cheat exists with respect to an agreement, tacit or explicit, to behave in a uniform way to conceal information from a regulator.

By reducing the number of benchmark firms, and thereby simplifying coordination of agreements, a merger between major incumbent LECs facilitates agreement among the remaining firms to conceal information to thwart the effectiveness of benchmarking.[240] The remaining firms will find it easier to coordinate the withholding of certain types of information and the elimination of divergent practices that regulators and competitors could use in comparative practices analyses. Tacit coordination among fewer major incumbent LECs makes it easier for the remaining firms to agree not to provide a certain type of interconnection or access arrangement in order to prevent regulators and competitors from concluding that such arrangement is feasible because another major incumbent is providing it. Likewise, the remaining firms could agree not to charge a non-recurring charge less than a certain price so as to avoid a regulator's use of a lower threshold to assess reasonableness. In this way, further consolidation among the major incumbent LECs would severely curtail regulators' abilities to constrain any tacit or explicit coordination by these incumbents to impede comparative practices analyses, especially as regulators seek to open the incumbents' markets to competition.

3. The Value of Comparative Practices Analyses

As illustrated by the examples that follow, courts, federal and state regulators, and competitors have consistently recognized comparative practices analysis as a crucial tool, and have employed such analyses, to set industry standards and policy, detect discriminatory behavior, and promote competition. In the *Bell Atlantic/NYNEX Order*, the Commission noted that federal and state regulators have long recognized benchmarking as a relatively non-intrusive

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[240] Because each successive reduction in the number of benchmarks will reduce the utility of comparative practices analyses, there will be some point at which further reduction in benchmark firms renders such comparisons ineffective. As noted above, in the *Horizontal Merger Guidelines*, DOJ set a threshold of market concentration according to an 1800 HHI, or the equivalent of six equally-sized firms. *See Horizontal Merger Guidelines*, at 16 ("Where the post-merger HHI exceeds 1800, it will be presumed that mergers producing an increase in the HHI of more than 100 points are likely to create or enhance market power or facilitate its exercise."). In such a market, a merger that reduces the number of competing firms from six to five is therefore likely to be challenged as raising serious concern regarding unilateral and coordinated effects. Analogously, using a market which consists not of competing firms but of benchmark firms, reducing the number of benchmark firms from six to five is likely to raise concern with respect to coordinated efforts to defeat benchmarking, which, as noted above, are more likely to succeed here than in competitive markets where each firm faces potential gain from unilateral deviation.

means of implementing pro-competitive policies and rules and of evaluating incumbents' compliance with such requirements.[241]

a) Comparative Practices Analyses under the Modified Final Judgment

Prior to their recent merger efforts, the RBOCs had been among the most fervent proponents of the use of benchmarking to supplant other more-intrusive forms of regulation.[242] For example, when the RBOCs petitioned for removal of the MFJ's line-of-business restrictions in 1987, each of the then-seven RBOCs argued that lifting the line-of-business restrictions was justified because the performance of one RBOC could be measured against that of the six others.[243] Ameritech, for example, asserted that the "division of the local exchange networks among seven independent companies has greatly enhanced the detectability of any monopoly abuse and the effectiveness of regulation."[244] In a subsequent filing, Ameritech, citing "overwhelming evidence that divestiture-created benchmarks are being used effectively by regulators, the DOJ and the industry as safeguards against any potential anticompetitive conduct or regulation abuse," asserted that "[n]o amount of sophistry can suppress the importance of benchmarks."[245] Similarly, SBC contended that, with the creation of seven regional companies

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241 *Bell Atlantic/NYNEX Order*, 12 FCC Rcd at 20058-58a, para. 148 (*citing United States v. Western Elec. Co., Inc.*, 47 Fed. Reg. 7170, 7174-75 (Feb. 17, 1982) (United States Department of Justice, Competitive Impact Statement); *United States v. Western Elec. Co.*, 993 F.2d 1572, 1580 (D.C. Cir.), *cert. denied*, 510 U.S. 984 (1993)).

242 *See Bell Atlantic/NYNEX Order*, 12 FCC Rcd at 20058a, para. 149 (*citing*, among other RBOC support, Ameritech Response to Comments on the Report and Recommendations of the United States Concerning the Line of Commerce Restriction, Civil Action No. 82-0192, at 23 (D.D.C Apr. 24, 1987); Ameritech Comments on the Report and Recommendations of the United States Concerning the Line of Business Restrictions, Civil Action No. 82-0192, at 10 (D.D.C. Mar. 13, 1987); SBC Comments on the Report and Recommendations of the United States Concerning the Line of Business Restriction, Civil Action No. 82-0192, at i (D.D. C. Mar. 13, 1987)).

243 *See United States v. Western Elec. Co.*, 673 F. Supp. 525, 547-48 (D.D.C. 1987), *aff'd in part, rev'd in part* 900 F.2d 283, *cert. denied,* 498 U.S. 911 (1990), *modified on remand* 767 F.Supp. 308 (D.D.C. 1991), *aff'd* 993 F.2d 1572, *cert. denied*, 510 U.S. 984 (1993).

244 Sprint Oct. 15 Petition, Farrell and Mitchell Decl., "The Benefits of Benchmarking as Recognized in MFJ Proceedings," at 8 (*quoting United States v. Western Elec. Co*., Civil Action No. 82-0192, Ameritech Comments on the Report and Recommendations of the United States Concerning the Line-of-Business Restrictions, at 10-11 (filed Mar. 13, 1987)). Ameritech included with its March 13, 1987 comments an attachment cataloguing "the widespread and effective use of benchmark comparisons since 1982" by the Commission, DOJ, the courts, and the private sector, which is attached as an Exhibit to the Farrell and Mitchell Declaration. In response to Ameritech's and SBC's prior support of benchmarking, SBC and Ameritech claim in their joint reply comments in this proceeding that they "advocated the use of benchmarks when it was economically rational to rely on such data." SBC/Ameritech Nov. 16 Reply Comments at 61 n.196.

245 Sprint Oct. 15 Petition, Farrell and Mitchell Decl., "The Benefits of Benchmarking as Recognized in MFJ Proceedings," at 8-9 (*quoting United States v. Western Elec. Co*., Civil Action No. 82-0192, Ameritech's Response to Comments on the Report and Recommendations of the United States Concerning the Line-of-Business Restrictions, at 23 (filed April 24, 1987)). *See also United States v. Western Elec. Co*., Civil Action No. 82-0192, Ameritech Comments on the Report and Recommendations of the United States Concerning the Line-of-Business Restrictions, Att. A at 10-11 (filed Mar. 13, 1987) (stating that the use of benchmark comparisons, on large items

as a result of the divestiture, "[t]he FCC can now monitor the rates, performances, and business practices of the seven [RBOCs] to detect potential anticompetitive activities."[246] SBC further asserted that the seven RBOC benchmarks provide "an effective deterrent against even subtle attempts to abuse any advantages that might arise from the ownership of local exchange telecommunications facilities."[247]

Federal courts, agreeing with the RBOCs' affirmations of the importance of benchmarking, have also recognized the value of comparative practices analyses among the major incumbent LECs. For example, in considering the information services line-of-business restriction, the D.C. Circuit explained:

> [T]he existence of seven [R]BOCs increases the number of benchmarks that can be used by regulators to detect discriminatory pricing. Indeed, federal and state regulators have in fact used such benchmarks in evaluating compliance with equal access requirements . . . and in comparing installation and maintenance practices for customer premises equipment.[248]

In another case, the court relied in part on benchmarking in rejecting a DOJ proposal to restrict RBOC marketing of customer premises equipment (CPE) to residential and single-line business customers. Specifically, the court noted that, "with seven different [RBOCs] involved in installation and maintenance, claims of one Operating Company that it had particular difficulties or problems with the equipment of manufacturers it did not sell could be readily undermined by a comparison with the practices of the other six companies."[249]

In addition to recognizing the value of benchmarking, federal courts regularly employed benchmarking by comparing practices among the RBOCs. For example, in ordering Pacific Bell to provide access lines for AT&T's coinless public telephones, the district court

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and small items, "has become a standard practice of the regional companies' customers and competitors, as well as the FCC and the Department of Justice.").

246 Sprint Oct. 15 Petition, Farrell and Mitchell Decl., "The Benefits of Benchmarking as Recognized in MFJ Proceedings," at 9 (*quoting United States v. Western Elec. Co*., Civil Action No. 82-0192, Comments of Southwestern Bell Corporation on the Report and Recommendations of the United States Concerning the Line-of-Business Restrictions, at i, 9-10 (filed Mar. 13, 1987)).

247 *Id.* (*quoting United States v. Western Elec. Co*., Civil Action No. 82-0192, Comments of Southwestern Bell Corporation on the Report and Recommendations of the United States Concerning the Line-of-Business Restrictions, at ii (filed Mar. 13, 1987). *See also Bell Atlantic/NYNEX Order*, 12 FCC Rcd at 20058a-59, para. 149 (citing other RBOCs' support of the use of benchmarking by the Commission, DOJ and the courts).

248 *United States v. Western Elec. Co.*, 993 F.2d 1572, 1580 (D.C. Cir.), *cert. denied*, 510 U.S. 984 (1993) (citation omitted).

249 *United States v. AT&T*, 1982-2 Trade Cas. (CCH) ¶ 64,980, 1982 WL 1893 at *2 n.8 (D.D.C. Aug. 23, 1982).

twice noted that Pacific Bell appeared to be the only RBOC not providing the required access.[250] Ruling on a separate motion, the court noted that no other RBOC had attempted, as Bell Atlantic had, to sell embedded CPE to the General Services Administration prior to the divestiture-related assignment of CPE accounts, assets and employees to AT&T.[251]

b) The Commission's Use of Comparative Practices Analyses

The Commission has long used various forms of comparative practices analyses in carrying out the objectives of the Communications Act. Broadly speaking, comparing the practices of several major incumbent LECs has enabled the Commission to determine whether an individual incumbent's claim concerning technical feasibility is warranted, or to monitor service quality with minimal regulatory intervention. Below are a sample of the examples of the Commission's use of such comparisons to implement the Communications Act and, most notably, the pro-competitive mandates of the 1996 Act.

The Commission employed "best-practices" benchmarking in implementing the local competition provisions of the 1996 Act. In interpreting the requirement that incumbent LECs provide interconnection and access to UNEs at any "technically feasible point,"[252] for example, the Commission concluded that successful interconnection or access to a UNE at a particular point in one incumbent LEC's network is substantial evidence that interconnection or access is technically feasible at that point in other networks employing substantially similar facilities.[253] Similarly, the Commission found that successful interconnection at a particular level of quality in one LEC's network is substantial evidence of the feasibility of interconnection at the same level of quality in another LEC's network.[254]

This Commission also adopted a "best-practices" approach in addressing collocation issues in its recent *Advanced Services Further Notice*. Specifically, we concluded that any collocation method used by one incumbent LEC is presumptively technically feasible for all other incumbents.[255] We stated that "[t]he incumbent LEC refusing to provide such a collocation arrangement, or an equally cost-effective arrangement, may only do so if it rebuts the presumption before the state commission that the particular premises in question cannot support

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250 *United States v. Western Elec. Co.*, 583 F. Supp. 1257, 1258 n.4, 1259 n.11 (D.D.C. 1984), *aff'd* 846 F.2d 1422, *cert. denied*, 488 U.S. 924 (1988).

251 *United States v. Western Elec. Co.*, 578 F. Supp. 680, 684 n.13 (D.D.C. 1983). Specifically, the court queried that "[i]f Bell Atlantic had that right with respect to CPE, why would not every other Operating Company have that same right with respect to all the other assets (*e.g.*, switches, land, buildings, transmission facilities) that under the decree and the plan are to go to AT&T on January 1, 1984?" *Id*.

252 47 U.S.C. § 251(c)(2), (c)(3).

253 *Local Competition Order*, 11 FCC Rcd. at 15606, para. 204. The Commission stated that the "substantial similarity of networks" may be evidenced by adherence to the same interface or protocol standards.

254 *Id*.

255 *Advanced Services Further Notice*, 14 FCC Rcd at 4786-87, para. 45.

the arrangement because of either technical reasons or lack of space."[256] We emphasized that "[w]e believe this 'best practices' approach will promote competition."[257] The Commission therefore considered the use of comparative practices analyses to be an efficient, pro-competitive method of evaluating the parameters of incumbents' interconnection or access arrangements.

The *Advanced Services* proceeding also illustrates that an incumbent LEC's unique approach can set the industry standard. In that proceeding, we addressed the issue of how to allocate the "up-front" costs incurred in preparing collocation space. Relying on an approach developed by Bell Atlantic in its New York section 271-pre-filing statement, under which each competitor was responsible only for its pro-rata share of the cost of conditioning the collocation space, we adopted Bell Atlantic's approach as a national standard and required incumbent LECs to allocate space preparation and other collocation charges on a pro-rated basis.[258] The Commission's explicit reliance on benchmarking in our recent orders implementing the advanced services provisions of the 1996 Act highlights the continued vitality of benchmarking as a market-opening tool for the future.

Just as best-practices benchmarking forms the foundation for the Commission's analysis of technical feasibility and collocation issues, average-practices benchmarking is the Commission's primary tool for monitoring service quality and detecting unreasonable or discriminatory costs or practices. In creating the Automated Reporting Management Information System (ARMIS) to monitor the effect of price cap regulation on large incumbent LECs' service quality and infrastructure development, the Commission directed the Common Carrier Bureau to promote uniformity in reporting factors so that the data collected would "be similar enough to permit ready benchmarking."[259] In response to a request by various incumbent LECs asking the Commission to reverse a Bureau decision to use ARMIS reports as the benchmark for comparing service quality among incumbent LECs, the Commission, affirming the Bureau's decision, stated

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256 *Id.* After noting that U S West already had provided cageless collocation to competitors, the Commission rejected the counter-arguments of Bell Atlantic, SBC and GTE regarding alleged risks to their equipment from such arrangements and required all incumbent LECs to provide a cageless collocation option for competitors. *Id.* at 4784-85, 4786-87, paras. 42, 45.

257 *Id*. at 4786-87, para. 45.

258 *Id.* at 4789-90, paras. 50-51. The Commission's adoption of Bell Atlantic's pro-rata approach for allocating space preparation costs is reminiscent of the Commission's adoption of Northwestern Bell's (NWB) pro-rata allocation plan in the *Default Traffic Plan* proceeding. *See Investigation of Access and Divestiture Related Tariffs*, CC Docket No. 83-1145, Memorandum Opinion and Order, 101 FCC2d 911, 924 (1985), at para. 32 (*Default Traffic Plan Order*). In that proceeding, most of the RBOCs had adopted the plan approved by the MFJ Court for routing of all default inter-exchange traffic to AT&T. NWB's experience with its pro-rata allocation plan led the DOJ and the Commission to reverse their support of the original default plan. DOJ noted, *inter alia*, that "NWB's experience has proved that a viable and reasonable alternative to default exists." *Id.* at 914, para. 8. The Commission, which ultimately adopted a uniform pro-rata allocation plan modeled after NWB's approach, explained that "prior concerns that an allocation plan would cause undue customer burden and confusion have been dispelled by NWB's experience," and "[t]he implementation of the NWB Plan has provided sufficient evidence that a viable alternative to default exists." *Id.* at 918, 920-21, paras. 18, 23.

259 *Policy and Rules Concerning Rates for Dominant Carriers*, CC Docket No. 87-313, Second Report and Order, 5 FCC Rcd. 6786, 6828, para. 341, n.455 (1990) (*LEC Price Cap Order*).

that uniform ARMIS reporting allows for "useful comparisons on incumbent LEC performance."[260] Reaffirming the importance of benchmarking in identifying instances where an incumbent LEC has allowed its service quality to degrade in order to extract greater profits from its capped rates, the Commission emphasized that "[f]rom the inception of the monitoring program, benchmarking has been a primary goal."[261]

As a final example highlighting the Commission's continued use of comparative practices analyses in the post-1996 Act era, the Commission has employed average-practice benchmarking in reviewing the cost support filed by incumbent LECs in connection with new services. For example, in investigating physical collocation tariffs, the Commission, recognizing that most incumbent LECs had little or no relevant operating experience or historical data, concluded that it was reasonable to pool all incumbent LECs' direct cost estimates in order to calculate an industry-wide average.[262] Then, if any individual incumbent LEC's cost estimate substantially deviated from the benchmark average, the Commission could set that LEC's tariff for further investigation into reasonableness. The Commission has used a similar average-practice methodology in other tariff review proceedings, including evaluating

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[260] *See Service Quality Standards Order,* 12 FCC Rcd. at 8140, 8141, paras. 59, 61. *See also Service Quality Modifications Order*, 8 FCC Rcd at 7475-76, at paras. 7-8 ("While we acknowledge that there are differences among the LECs, we also affirm that benchmarking is not only desirable but indispensable. . . . We believe that benchmarking will enable us to evaluate the impact of price cap regulation on the quality of service provided by the LECs and on the rate of development of technological improvements that are reflected in the LEC infrastructure reports.").

[261] *Service Quality Standards Order*, 12 FCC Rcd at 8139-40, para. 57. As Sprint noted, SBC implicitly conceded the importance of this type of service quality monitoring when it submitted a document in this proceeding defending the post-merger performance of Pacific Bell by making comparisons with other incumbents. *See* Sprint Apr. 2 *Ex Parte* Att., John B. Hayes et. al., "Empirical Analysis of the Footprint Effects of Mergers Between Large incumbent LECs," at 9 (*citing Pacific Bell: Post-Merger Performance*, submitted as attachment to Letter from Zeke Robertson, SBC, to Magalie Roman Salas, FCC, CC Docket No. 98-141 (filed Feb. 23, 1999)).

[262] *In the Matter of Local Exchange Carriers' Rates, Terms, and Conditions for Expanded Interconnection Through Physical Collocation for Special Access and Switched Transport,* CC Docket No. 93-162, Second Report and Order, 12 FCC Rcd. 18730, 18793-96 at paras. 142-46 (1997).

non-primary residential line counts for presubscribed interexchange carrier charges[263] and number portability cost components.[264]

c) State Regulators' Use of Comparative Practices Analyses

State regulators likewise have relied on various forms of comparative practices analysis in carrying out their roles in monitoring carrier activity in their state and opening local markets to competition.[265] State regulators periodically compare the practices of incumbent LECs operating within their state. For example, an Illinois Commerce Commission (ICC) arbitration decision between AT&T and GTE included numerous examples in which the ICC directed GTE to adopt terms for AT&T that Ameritech had agreed to with other parties.[266] Likewise, when Ameritech recently objected to the Ohio Public Utilities Commission's requirement that it allow customers with past-due toll balances to switch to a new interexchange carrier, the commission observed that "every LEC except Ameritech has implemented our existing toll blocking policy," and thus found no basis to exempt Ameritech "from the requirements which every one of the other LECs is following."[267]

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[263] *See In the Matter of Access Charge Reform*, CC Docket No. 96-262, First Report and Order, 12 FCC Rcd. 15982 (1997) (*Access Charge Reform Order*). When evaluating tariff filings of the price cap LECs implementing the Presubscribed Interexchange Carrier Charge (PICC) required by the Commission's 1997 *Access Reform Order*, the Commission set a benchmark by calculating the percentage of non-primary residential lines to total residential lines reported by price cap LECs and then comparing those percentages to data collected by the Bureau, independent studies, and price cap LECs' public statements. *In the Matter of Tariffs Implementing Access Charge Reform*, CC Docket No. 97-251, Memorandum Opinion and Order, 13 FCC Rcd 14683 (1998), at paras. 29-31 (*Access Charge Reform Tariffs Investigation Order*). Because SNET's penetration ratios were significantly lower than the benchmark, the Bureau ordered SNET to detail the procedures and data used to estimate non-primary residential lines and to present evidence to justify its low penetration ratio. *1998 Annual Access Tariff Filings, SNET Revisions to Tariff FCC No. 73I*, CC Docket No. 98-104, Memorandum Opinion and Order, Order Designating Issues for Investigation and Order on Reconsideration, 13 FCC Rcd. 13977, 13983-84 at paras. 15-19 (1998). Thus, as with best-practices benchmarking, the use of average-practice benchmarking may be less intrusive than alternative measures to assess improper or discriminatory behavior, such as initially requiring full detail from every incumbent.

[264] In designating for investigation Bell Atlantic's imposition of a "transport component," the Commission noted that "no other carrier includes such a component or establishes different rates for Tandem and End Office queries." *See Number Portability Query Services*, CC Docket No. 98-14, Order Designating Issues for Investigation, 13 FCC Rcd 12063, 12068-69 at para. 9 (1998). The Commission also designated for investigation Pacific Bell's and Southwestern Bell's imposition of "non-recurring" charges that were nevertheless imposed on a monthly basis, noting "that no other carrier has proposed similar charges." *Id*. In that same paragraph, the Commission employed comparative practices analyses in noting "that charges for some query services vary widely among carriers. For example, Ameritech's proposed tandem query charge is 3.6 times that of Southwestern Bell." *Id.*

[265] *See* Comments of the Public Service Commission of Wisconsin, CC Docket No. 98-141 (filed July 15, 1999), at 7 ("Benchmarking can be used to evaluate a company's quality of service, cost characteristics, rate levels, innovation efforts, competitive efforts, and technical and economic feasibility issues.").

[266] *AT&T Communications of Illinois, Inc. Respondents: GTE North Inc; GTE South Inc,* Illinois Commerce Commission, Arbitration Decision, 96-AB-005 at 2, 4, 11, 17, 28, 30 (ICC Dec. 3, 1996).

[267] *Amendment of Chapter 4901:1-5 of the Ohio Administrative Code*, PUCO Case No. 96-1175-TP-ORD, Finding and Order at para. 16 (Ohio PUC Apr. 8, 1999), (directing Ameritech to bring itself into full compliance with Ohio PUC's selective toll blocking policy).

State regulators at times also compare the practices of the major incumbent LECs operating in other regions to the conduct of incumbents in their state.[268] For example, as AT&T points out, in rejecting the claims of Ameritech that it could not provide competitors using unbundled local switching with the billing information necessary to bill for terminating access or for originating toll free access, the ICC found "it quite instructive that many other RBOCs have voluntarily agreed to or have been ordered by state commissions to provide such information."[269] Likewise, in the New York section 271 collaborative hearings, after Covad indicated that no security problems arose in its cageless collocation arrangements with U S WEST in Washington state, Bell Atlantic retreated from its claims that security concerns and network risks prevented it from providing cageless collocation.[270] Similarly, in reviewing Ameritech Indiana's central office floor space charge, the Indiana Utility Regulatory Commission found "no reason to believe that Ameritech's central offices are constructed at a level of quality different than any other RBOC's central offices."[271]

As an example of a state regulators' use of RBOC average-practice benchmarking, the Public Utility Commission of Texas (Texas PUC), in arbitrating Southwestern Bell Telephone Company's interconnection agreements with five competitive LECs, found insufficient record evidence for collocation costs and therefore deemed "it reasonable to base interim rates on the average rates set in collocation agreements entered into by a sample of other RBOCs."[272] Similarly, the Texas PUC adopted an aggregate methodology for assessing avoided cost discounts when it found, *inter alia*, that SWBT's service-specific avoided cost estimates, "on their face, are so inconsistent with the experiences of the FCC and other states."[273]

As a final form of state regulators' use of comparative practices analyses, occasionally states compare divergent approaches among different local operating companies owned by the same holding company. For example, the Michigan PUC's requirement that Ameritech implement number portability in Michigan uses Ameritech's progress in Illinois as a

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[268] *See* SBC/Ameritech Nov. 16 Reply Comments, Schmalansee and Taylor Reply Aff. at 28 (observing that "state regulators frequently compare local interconnection and retail service prices across states as a guide to the reasonableness of the prices proposed in their state.").

[269] *See* AT&T Apr. 7 *Ex Parte* at 14 n. 7 (*citing* Investigation into Forward Looking Cost Studies and Rates of Ameritech Illinois for Interconnection, Network Elements, Transport and Termination of Traffic, *et al.*, Illinois Commerce Commission, Docket Nos. 96-0486/96-0569, Second Interim Order at 115 (ICC Feb. 17, 1998)).

[270] *See* AT&T Apr. 7 *Ex Parte* at 16 n.9 (*citing* Proceeding on Motion of the Commission to Examine Methods by Which Competitive Local Exchange Carriers Can Obtain and Combine Unbundled Network Elements, Docket No. 98-C-0690, Opinion No. 98-18, at 20-23 (N.Y. PSC Nov. 23, 1998)). Bell Atlantic ultimately offered a compromise form of cageless collocation.

[271] *Investigation and Generic Proceeding on Ameritech Indiana's Rates for Interconnection, Service, Unbundled Elements, and Transport and Termination Under the Telecommunications Act of 1996 and Related Indiana Statutes*, Indiana Utility Regulatory Commission, Cause No. 40611 at 40 (Jun 30, 1998), (finding no basis to accept Ameritech's selection of the highest cost percentile in applying the Building Construction Cost Data Guide).

[272] *Petition of AT&T Communications of the Southwest, Inc. for Compulsory Arbitration to Establish an Interconnection Agreement Between AT&T and Southwestern Bell Telephone Company*, Docket No. 16226, Arbitration Award at 43 (Tex PUC Nov. 7, 1996).

[273] *Id*. at 18.

benchmark.[274] Because such comparisons would be impossible if the local operating companies initially were to act in lock-step fashion (*i.e.*, before a best practice is identified), this form of comparison depends upon the local operating companies retaining independence to adopt innovative practices, notwithstanding their common ownership by one regional holding company.[275] As this sample of benchmarking examples illustrates, the ability to make benchmark comparisons, across independent, or at least semi-autonomous, operating companies constitutes an effective, and minimally intrusive, tool for state regulators.

d) Competitors' Use of Comparative Practices Analyses

Comparative practices analyses are also crucial for the incumbents' competitors which must rely on incumbent LECs for interconnection, access and unbundled elements. This explicit need to rely on the incumbents' facilities and services distinguishes the section 251 negotiation process from commercial negotiations in other competitive markets.[276] Consistent with the analysis above, competitive LECs commenting in this proceeding assert that in their interconnection negotiations with incumbent LECs, and in various state or federal proceedings implementing the Communications Act, they compare the incumbent LEC's price structure, provisioning, or claims about the feasibility of a particular service against their experiences with other incumbents.[277]

Both MCI WorldCom and AT&T, as well as other competitive LECs, provide examples of their use of benchmarking among the major incumbent LECs. When Bell Atlantic faced problems with premature switch translations and re-use of customer facilities, for example, MCI WorldCom urged Bell Atlantic to use BellSouth's process for local number portability cutovers (*i.e.*, deploying a direct interface from the Number Portability Administration Center to its provisioning systems).[278] Similarly, after NYNEX developed a special "VETS" testing vehicle for ensuring that competitors' NXXs are opened and dated correctly, MCI WorldCom suggested to other incumbents, such as Pacific Bell, that they adopt this improved internal NXX activation and testing process.[279] MCI WorldCom also objected to certain proposed collocation

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274 *See Ohio, Colorado, Michigan Adopt Local Competition Rules*, State Telephone Regulation Report, Vol. 14, No. 13 (June 27, 1996).

275 As discussed below, SBC indicates that it intends to apply largely uniform policies for all its operating companies in dealings with competitive LECs following merger with Ameritech. *See infra* at Section V.C.4.b)(Loss of Independence of Operating Companies).

276 *See Local Competition Order*, 11 FCC Rcd at 15611, para. 216.

277 MCI WorldCom Oct. 15 Comments, Joint Decl. of Michael A. Beach and Therese K. Fauerbach, at para. 18-19. As discussed above, competitive LECs generally must study and compare the practices employed by various incumbents in order to offset the informational advantage held by the incumbents in interconnection negotiation and arbitration.

278 MCI WorldCom May 13 *Ex Parte* at 2 (citing *Petition of New York Telephone Company for Approval of Its Statement of Generally Available Terms and Conditions Pursuant to Section 252 of The Telecommunications Act of 1996 and Draft Filing of Petition of InterLATA Entry Pursuant to Section 271 of the Telecommunications Act of 1996*, Case 97-C-0271, MCI WorldCom Affidavit at para. 59 (filed Oct. 24, 1998))).

279 MCI WorldCom May 13 *Ex Parte* at 4.

requirements of one RBOC (BellSouth) by pointing out that other RBOCs did not require those practices.[280] Finally, in appealing an interconnection agreement, MCI WorldCom argued against Bell Atlantic-Massachusetts's assumption that feeder facilities constructed of fiber-optic cable, rather than copper, were most cost-efficient for all loops, regardless of length, by showing that no other incumbent LEC had cost-justified the use of fiber-optic cable in loops with lengths less than 9,000 feet.[281] As these examples illustrate, MCI WorldCom's ability to compare the practices of a large number of independent major incumbent LECs has enabled it to refer certain incumbent LECs to proven alternate, and more pro-competitive, practices.

AT&T also cites several instances in which it used the practice of one RBOC as leverage to defeat claims by another RBOC regarding technical feasibility. AT&T's examples include the following:

- *Selective Routing of Operator and Directory Assistance Services*. When SBC claimed that selective routing of a competitive LEC's operator and directory assistance traffic to the competitive LEC's own operator centers was not technically feasible, AT&T introduced evidence that Bell Atlantic had agreed to perform such selective routing in Pennsylvania. SBC subsequently committed to develop the capability to perform the same function.[282]

- *Mechanized Loop Testing*. AT&T, challenging SBC's contention in state arbitrations that it was technically infeasible to provide mechanized loop testing (MLT) to competitive LECs using unbundled local switching,[283] pointed out that Bell Atlantic and BellSouth, which use the same switch technology as SBC, were able to provide competitive LECs with such MLT capability. As a result, at least two states, Texas and Missouri, have required SBC to provide MLT.[284]

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280 Specifically, MCI WorldCom's expert testified in a Tennessee proceeding that BellSouth's proposal that competitive LECs use drywall enclosures with a security mesh above the 8'6" level appeared unnecessary, as Bell Atlantic and other incumbent LECs that did not have analogous requirements were operating without any apparent safety or transmission problems. MCI WorldCom May 13 *Ex Parte* at 3-4 (*citing Permanent Cost Proceeding for UNEs in Tennessee*, Tennessee Regulatory Authority, Docket No. 97-01262, Rebuttal Testimony of Gerald B. Crockett on Behalf of MCI Telecommunications Corp and AT&T Communications of the South Central States, Inc. at 6-8 (filed Oct. 17, 1997)).

281 MCI WorldCom May 13 *Ex Parte* at 2 (*citing MCI Telecommunications Corp., et al. v. New England Telephone & Telegraph Co.*, Civil Action No. 98-CV-12375 (RCL), Opening Brief of MCI, at 17 (filed Apr. 30, 1999), (stating that Southwestern Bell uses copper feeder lengths for loops less than 12,000 feet, as do BellSouth and Ameritech for loops less than 9,000 feet)).

282 *See* AT&T Apr. 7 *Ex Parte* at 17 (*citing* Petition of AT&T Communications of the Southwest, Inc. for Compulsory Arbitration to Establish an Interconnection Agreement Between AT&T and Southwestern Bell Telephone Company, Docket No. 16226, Arbitration Award at 5, Att. Stipulation at 1 (Tex. PUC Nov. 7, 1996)).

283 *See* AT&T Apr. 7 *Ex Parte* at 15.

284 *See id.* (*citing* Petition of AT&T Communications of the Southwest, Inc., for Compulsory Arbitration to Establish an Interconnection Agreement Between AT&T and Southwestern Bell Telephone Company, Docket No. 16226, Order at App. B, 10-11 (Tex. PUC Sept. 30, 1997); Order Approving implementation Schedule at Att. A, 13,

- *Collocation of Remote Switching Module*. When Bell Atlantic claimed that collocation of remote switching modules (RSMs) was not feasible because it would exhaust central office space and require extensive central office modifications for its unique grounding requirements,[285] AT&T demonstrated that SBC had stipulated in its Texas arbitration that it would allow competitive LECs to collocate RSMs for access to unbundled elements without any restrictions on equipment.[286] Ultimately, AT&T won the right to conduct RSM collocation in every Bell Atlantic state except Virginia.

- *Interim Number Portability*. When Bell Atlantic resisted AT&T's requests that it provide two particular methods of implementing interim number portability, namely Route Indexing-Portability Hub (RIPH) and Directory Number Route Indexing (DNRI), AT&T pointed out that other RBOCs had agreed or been ordered to provide the methods and arranged for a representative from BellSouth to provide Bell Atlantic technical guidance on performing the translations required by RIPH or DNRI. After speaking with the BellSouth representative, Bell Atlantic agreed to provide DNRI, subject to joint technical and operational testing.[287]

- *Advanced Intelligent Network (AIN) Triggers*. In an arbitration with New York Telephone, AT&T responded to New York Telephone's concerns that AT&T's requested AIN access would raise security and network reliability issues by stating that the technology had been satisfactorily tested in a trial conducted by AT&T and BellSouth.[288]

The Applicants themselves confirm the existence of this type of benchmarking. For example, John Starkey, Vice President of Sales for SBC, explains that competitive LECs often bring to SBC's attention the practice of one SBC operating company, or of another RBOC. He further acknowledges that SBC has been compelled to adopt such practices throughout SBC's

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15 (Tex. PUC Mar, 17, 1998); AT&T Communications of the Southwest, Inc.'s Petition for Second Compulsory Arbitration Pursuant to section 252(b) of the Telecommunications Act of 1996 to Establish an Interconnection Agreement with Southwestern Bell Telephone Company, Case No. TO-98-115, Report and Order at 21-22 (Mo. PSC Jan. 2, 1998)).

285 *See* AT&T Apr. 7 *Ex Parte* at 16.

286 *See* AT&T Apr. 7 *Ex Parte* at 16-17 (*citing Petition of AT&T Communications of the Southwest, Inc. for Compulsory Arbitration to Establish an Interconnection Agreement Between AT&T and Southwestern Bell Telephone Company*, Docket No. 16226, Arbitration Award (Tex. PUC Nov. 7, 1996), at para. 5; Att. Stipulation at 1).

287 *See* AT&T Apr. 7 *Ex Parte* at 17-18 (*citing* Affidavit of Penn Pfautz on Behalf of AT&T Communications of Maryland, Inc., Maryland 271 Investigation, Case No. 8751 (Maryland PSC, filed Apr. 11, 1997)).

288 *Petition of AT&T Communications of New York, Inc. for Arbitration of an Interconnection Agreement with New York Telephone Company*, Case Nos. 96-C-0723, 96-C-0724, Opinion and Order Resolving Arbitration Issues (Nov. 29, 1996), at 28 (granting AT&T the ability to interconnect with New York Telephone's AIN system subject to testing and certification).

region to ensure a good flow-through rate.[289] One of Ameritech's affiants, Wharton B. Rivers, also cites an example where AT&T successfully argued for a modification in Ameritech's policy regarding the purchase of high capacity transport (services with DS1 or greater capacity) by comparing the methods used by all the major carriers and requesting that Ameritech implement SBC's procedures.[290] "Because of AT&T's request," Mr. Rivers explains, "many of [SBC's] procedures that were superior to those we were previously using have become standard with [Ameritech]."[291] Thus, the examples provided by competitors of SBC and Ameritech, as well as the Applicants themselves, confirm the importance of benchmarking to competitors seeking to offset incumbent LECs' informational and bargaining advantages.

4. Adverse Effects of SBC/Ameritech Merger

We now examine the potential effect of the proposed merger on the effectiveness of comparative practices analyses as a minimally-intrusive market-opening tool. More specifically, we consider in turn the merger's likely impact upon the diversity of approaches among major incumbent LECs to comply with the Communications Act and adopt market-opening measures (a) at the holding company level, (b) at the local operating company level, and (c) at the industry level. We conclude that the merger of SBC and Ameritech would have a significant adverse impact on the ability of regulators and competitors to employ comparative practices analyses, which ultimately would force regulators to substitute more intrusive, more costly, and less effective methods of regulation to the detriment of the public interest.

a) Loss of Ameritech as Independent Holding Company

We find that, with only six major incumbent LECs remaining today (the RBOCs and GTE), the elimination of Ameritech as an independent source of observation would seriously impair the ability of regulators and competitors to use comparative practices analyses to facilitate implementation of the Communications Act, particularly sections 251 and 271, the core provisions for promoting and assuring competition in local telephony. Moreover, by reducing the number of major incumbent LECs, the merger makes it less likely that deviations from the average benchmark will be identified confidently as unreasonable and punishable. Finally, if prior experience is any indication, the loss of Ameritech would severely affect the likelihood that a maverick would emerge to present a different approach or, at a minimum, to assist regulators and competitors in evaluating the claims of other incumbents.

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289 SBC Mar. 29, 1999, *Ex Parte* Meeting. Memo from To-Quyen Truong, Common Carrier Bureau, to File (filed Aug. 18, 1999) (Truong Memo).

290 SBC/Ameritech July 24 Application, Rivers Aff. at 8-9, para. 21. Mr. Rivers describes himself as a "firm believer in the use of best practices analysis," who regularly measures and compares operating performance "both internally across operation centers and externally with other companies." *Id*. at 7, para. 18.

291 *Id*., at 9, para. 21.

As with the Bell Atlantic/NYNEX merger, which the Commission concluded would reduce experimentation and diversity of viewpoints in the process of opening markets,[292] the proposed merger removes another independent source of experimentation and diversity. By admitting that each company, pre-merger, has different practices, the Applicants essentially acknowledge that there is diversity in the manner in which these companies market and provision services, deploy new technologies and respond to competitors. As a result of the merger, regulators and competitors will lose the problem-solving opportunities that flow from this diversity of approaches.

The record from prior RBOC mergers shows that, after both mergers, the acquiring firm quickly eliminated certain policies of the acquired company that were in conflict with those of the acquiring company.[293] For example, following their respective mergers, NYNEX and PacTel each altered their prior support of a three-category approach for delineating the scope of services for which carriers can use customer proprietary network information to conform with the favored approach of their merger partner.[294] As KMC notes, following its merger with SBC, Pacific Bell rescinded its pre-merger market trial of a "Calling Party Pays" billing and collection arrangement with a cellular provider.[295] Similarly, Sprint points out that Bell Atlantic, following its acquisition of NYNEX, reversed NYNEX's pre-merger practice of allowing assignment of existing customer contracts to resellers without treating the assignments as contract terminations triggering termination penalties.[296]

In particular, the proposed merger's elimination of Ameritech as an RBOC benchmark would acutely affect regulators and competitors seeking to ensure compliance with section 271. Retaining a significant number of independent RBOCs is particularly important as regulators consider whether, under section 271, an RBOC has opened its local market

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[292] *Bell Atlantic/NYNEX Order*, 12 FCC Rcd at 20060-61, paras. 152-53.

[293] *See also* State Attorneys General Apr. 27 *Ex Parte* at 20 ("RBOC mergers tend to facilitate the presentation of a united RBOC front and coherent strategy to the CLECs and regulators that are trying to their markets open.").

[294] *See Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information*, CC Docket No. 96-115, Second Report and Order and Further Notice of Proposed Rulemaking, 13 FCC Rcd 8061 (1998), at para. 28 n.105 ("We note that NYNEX and PacTel also deemed the three category approach acceptable in their initial pleadings in this docket. . . . Since their respective mergers, which occurred after their comments were received in this proceeding, however, Bell Atlantic/NYNEX and SBC/PacTel now support the 'single category approach.'").

[295] KMC Oct. 15 Comments at 18. *See also* Sprint Apr. 1 *Ex Parte* Att. 2 "Post-merger Examples of the Spread of Degraded Practices in the Acquired BOC's Territory and Worsening Conditions in the Acquiring BOC's Territory," at . According to KMC, SBC later told the carrier that it could not use Pacific Bell's tariffed billing and collection services to provide CPP. Sprint notes that the same cellular provider currently has billing and collection agreements with Ameritech that allow for the provision of CPP, which could be placed in jeopardy by SBC's acquisition of Ameritech.

[296] Sprint Apr. 1 *Ex Parte* Att. 2, at 2 (citing *Joint Application for Approval of the Reorganization of Illinois Bell Telephone Co. d/b/a Ameritech Illinois, and the Reorganization of Ameritech Illinois Metro, Inc.*, Dkt. 98-0555, Direct Test. Of Charlotte F. Terkeurst on behalf of the Government and Consumer Intervenors, GCI Ex. 2.0 at 50 (ICC Oct. 28, 1998)).

sufficiently to qualify to provide in-region, interLATA services in a given state.[297] Indeed, benchmarking among the RBOCs may become even more important after they have received section 271 authorization, as regulators and competitors seek to prevent possible backsliding by the RBOCs.

The loss of Ameritech's independence would be especially severe because Ameritech frequently has taken an approach that differs from the position taken collectively by the other RBOCs. The Commission has emphasized that, by proposing a framework to eliminate legal, economic and technical barriers to local competition, Ameritech's Customers First Plan, announced in 1993, constituted a major advance in telecommunications policy.[298] Ameritech also exhibited a willingness to adopt a flexible approach to competition by entering into a cooperative venture with Northpoint Communications, Inc., a data competitive LEC. This venture led to Ameritech's general support of the Commission's proposal for a separate subsidiary approach to advanced services, in contrast to the strong opposition from the other RBOCs.[299]

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[297] Although DOJ and the Commission evaluate each BOC's section 271 application for each state on an individual basis, reference to the best practices and average practices within the industry, and among BOCs in particular, sheds light on the evaluation of whether the BOC has complied with the 14-point competitive checklist in that state. For instance, the Applicants provide an example of DOJ's comparison of the performance of Ameritech in Michigan with BellSouth in Louisiana in terms of the number of unbundled loops that had been provisioned at the time the BOC filed its section 271 application. *See* SBC/Ameritech May 25 Supplemental Memo at 14, n.49. They also point out DOJ's consideration of the OSS testing methodology for Bell Atlantic in New York as superior to BellSouth's Louisiana consultant's methodology. *Id.* In addition to DOJ, this Commission has found comparisons among BOC practices, as reflected in their section 271 applications, to be useful in determining whether a BOC has met the section 271 statutory requirements. *See also Application of BellSouth Corporation, et al. Pursuant to Section 271 of the Communications Act of 1934, as amended, To Provide In-Region, interLATA Services In South Carolina*, CC Docket No. 97-208, Memorandum Opinion and Order, FCC 97-418, 13 FCC Rcd 539, 599-600 (1997), at para. 108 (stating, in contrast to BellSouth's failure to provide substantiation of its conclusion that the causes of high order errors in its South Carolina section 271 application were due to competing carriers' mistakes, that Ameritech did provide such information in its Michigan application); *id*., 13 FCC Rcd at 606, para. 121 (doubting that any technical obstacle would prevent BellSouth from providing electronic error notification and noting that "at least one other BOC, Ameritech, does provide electronic notification of error messages through an EDI interface.") (*citing Ameritech Michigan Order*, 12 FCC Rcd at 20642, para. 186)).

[298] *See Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, To Provide In-Region, InterLATA Services in Michigan*, CC Docket No. 97-137, Memorandum Opinion and Order, 12 FCC Rcd 20543 (1997), at para. 2.

[299] *Compare* Deployment of Wireline Services Offering Advanced Telecommunications Capability, Comments of Ameritech (filed Sept. 25, 1998), at 3 ("Ameritech agrees with the Commission's proposal as a component in a framework for interLATA relief."); Reply Comments of Ameritech (filed Oct. 16, 1998), at 1 ("The collaborative effort between Ameritech and Northpoint stands in sharp contrast to the usual adversarial posturing offered by most other commenters."); at 6 ("Beyond some minor modifications . . . no further changes to the separation requirements are warranted.") *with* Comments of SBC Communications Inc. (filed Sept. 25, 1998), at 2 ("Unfortunately, as currently proposed, the '272-like' structure for an advanced services affiliate . . . would appear to have too many inefficiencies, restrictions, and unknowns to provide an expected return commensurate with the risks of deploying the significant investment associated with advanced services."). *See also* Comm. Daily, Vol. 18, Iss. 152, Aug. 7, 1998 (Following Commission's release of *Advanced Services Order and NPRM*, "SBC, U S West and other incumbent phone companies immediately issued statements decrying requirement that they form separate

Ameritech also departed from the position taken by the other RBOCs and GTE in the *Number Portability* proceeding where the other major incumbents urged the Commission to allow incumbents to use the Query on Release (QOR) method rather than the Location Routing Number (LRN) method.[300] In concluding, contrary to the other RBOCs' assertions, that QOR offered no long-term cost savings relative to LRN, the Commission specifically noted Ameritech's support of LRN by emphasizing that "at least one incumbent LEC, Ameritech, has already decided that it is beneficial to deploy LRN from the outset."[301] Accordingly, the proposed acquisition of Ameritech by SBC would eliminate an important source of innovation and a major independent voice that has assisted regulators and competitors in implementing the 1996 Act's market-opening provisions.

b) Loss of Independence of Operating Companies

We find that, although the actual number of operating companies may not diminish following the merger of SBC and Ameritech, the combined entity will have greater incentive to unify the practices of these companies, resulting in an overall loss of independence at the operating-company level. Although we agree with the Applicants that, by requiring data to be provided on an operating-company or study-area level, this Commission and state authorities could retain the same number of data points and limit the Applicants' abilities to aggregate data following the merger,[302] we find that collection of operating-company specific or study-area specific data would be useless for benchmarking purposes if all the local companies follow a uniform policy set by the holding company. In that case, the result would be a reduction in the number of independent approaches, this time at the operating company level.

The operating companies involved in the instant merger are aligned with two distinct holding companies, each having a distinct top-level management philosophy. Each holding company also has adopted, or required of its operating companies, different policies and practices, particularly in negotiating interconnection agreements, which represent a certain level of autonomy.[303] Accordingly, in order to accept the Applicants' argument that the merger would not reduce the number of independent points of observation, we also would have to assume that

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subsidiaries in order to get deregulation."); Communications Today, Dec. 8, 1998, 1998 WL 23367826 (discussing petition by several incumbent LECs, including SBC, BellSouth, Bell Atlantic, GTE and U S WEST, for Commission to reduce requirements on incumbents' provision of DSL, and commenting that "[n]otable by its absence was Ameritech, which is the only Bell operating company (BOC) that thinks it will be possible to offer DSL service under the conditions currently under consideration by the FCC.").

300 *See Telephone Number Portability*, CC Docket No. 95-116, First Memorandum Opinion and Order on Reconsideration, 12 FCC Rcd 7236 (1997)(*Number Portability Order*).

301 *Id*. at 7257-58, para. 38.

302 SBC/Ameritech Nov. 16 Reply Comments at 56-57 (stating that "[a]fter the merger, each of the nine SBC and Ameritech operating companies will report all the same information to the same regulators as they do now.").

303 For example, we alluded earlier to Ameritech's acceptance of a separate subsidiary proposal for advanced services, which conflicted with the position taken by SBC. *See* Section V.C.4.a) (Loss of Ameritech as Independent Holding Company).

the merger would have no effect on the likelihood that the local operating companies would adopt independent approaches that differ from one another. Logic and evidence both point to the contrary. Post-merger, because of its larger size, the merged firm would be affected more than either company standing alone if regulators and/or competitors use best-practices benchmarking to force the firm to adopt throughout its region a market-opening measure adopted independently by one of its operating companies. Accordingly, following its acquisition of Ameritech's five operating companies, SBC will have a greater incentive to ensure that all thirteen of its local operating companies' policies are consistent.

The merged firm also will have a greater incentive to coordinate decisions made at the local operating company level in order to affect the outcome of average-practices benchmarking. The merger of SBC and Ameritech would create the largest incumbent LEC controlling approximately one-third of access lines nationwide. Because the merged firm would be disproportionately large compared to other incumbent LECs, the aggregate data reported by it would have a direct impact on the industry's average benchmarks. The merged firm thus would have both the capability and incentive to skew its decisions in order to affect the average benchmark strategically. Moreover, the merged firm's size could cause it to dominate the standards-setting process and establish *de facto* standards that advantage itself and disadvantage potential competitors or consumers. The proposed merger thus seriously would undermine the value of average-practices benchmarking among incumbent LECs.

SBC effectively admits that it will impose greater uniformity in policies toward competitive LECs following consummation of its merger with Ameritech. For example, Sandy Kinney, President of SBC's wholesale operations and John Starkey, Vice President of Sales for SBC, stated that SBC's policy is to adopt its "best practices" company-wide.[304] Ms. Kinney and Mr. Starkey also confirmed that, although SBC must file separate interconnection contracts in each state, SBC generally negotiates with competitive LECs on a region-wide basis, unless competitive LECs request state-by-state negotiation, and then modifies the standard agreement for specific states only as necessary to comply with any differing state rules.[305] SBC's representatives also stated that the performance measures that it will adhere to as a result of the section 271 collaborative process in California are a subset of those to which it is bound in the Texas section 271 process.[306] The Applicants' statements that the merger will eliminate overlapping functions and spread the adoption of best practices throughout the holding company, detailed below in our analysis of the merger's claimed public benefits, provide further evidence

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304 Remarks of Sandy Kinney, SBC President of Industry Markets, and John Starkey, SBC Vice-President of Sales, Truong Memo.

305 *Id.* The SBC employees assigned to deal with the provision of wholesale services to competitive LECs and interexchange carriers are not assigned to state-specific operating companies, but rather to specific SBC regions or SBC headquarters.

306 *Id.* SBC's representatives explained that, because the same parties generally are involved, there is a high level of cross-referencing between the various state proceedings that results in similar performance measures being adopted in different states within SBC's region, with some variation due to state public utility commissions' preferences.

that the various operating units' policies and operations will become more uniform post-merger.[307]

Even if the merged firm were to continue reporting data at the operating company level, therefore, indications from SBC, as well as logic and experience, suggest that a merger of SBC and Ameritech would likely lead to more uniform policies being adopted at the operating company level throughout the combined entity's region, again resulting in fewer independent points of observation for regulators and competitors.

c) Increased Risk of Coordination Among Remaining Major Incumbent LECs

The proposed merger, by reducing to five the number of major incumbent LECs, also would increase the incentive and ability of the remaining incumbents to coordinate their behavior, either explicitly or implicitly, to impede benchmarking and resist market-opening measures. As an initial matter, by merging Ameritech into SBC, the merger reduces by one the number of independent holding companies whose behavior must be coordinated, which simplifies the process of coordination. Coordination requires that the incentives of all parties are aligned, and reducing the number of companies reduces the number of incentives that must be aligned.

Reducing the number of firms also increases each firm's incentive to coordinate its behavior to undermine regulatory processes. As we have mentioned, SBC will grow larger as a result of the merger, and therefore stands to sustain a larger loss as the result of any comparative practices analysis that constrains its behavior. This gives the merged firm greater incentive to enter into tacit agreement with the remaining firms to convey minimal information to regulators and/or competitors and to eliminate outlying policies and practices that could become industry benchmarks. Moreover, the merger will create a demonstrably large incumbent LEC that can act as an industry leader for collusive purposes.

As a result of Ameritech's merger with SBC, the other major incumbent LECs also will have more incentive to cooperate in attempts to impede comparative practices analysis. Cooperative ventures, either explicit or implicit, involve the risk that one or more parties will deviate from the cooperative behavior, thereby spoiling the venture. With the cooperation of fewer firms necessary, the merger reduces the risk that a venture will fail, which translates into a lower risk for each firm from participating in the venture. This reduction in risk increases a firm's incentive to cooperate. By reducing the number of major incumbent LEC benchmark firms to five, with each firm facing more incentive to cooperate and little unilateral incentive to

[307] *See* Section VI (Analysis of Potential Public Interest Benefits).

break an agreement to impede benchmarking,[308] the proposed merger will facilitate any attempts, especially implicit attempts, to coordinate behavior to conceal forms of competitive deterrence from regulators and competitors. The merger of SBC and Ameritech therefore increases the incentive and abilities of the merged firm and other incumbent LECs to cooperate in becoming less effective benchmarks for regulators and competitors seeking to promote competitive entry and rapid deployment of advanced services.

5. Continued Need for Major Incumbent LEC Benchmarks

We reject the Applicants' arguments that smaller incumbent LECs and competitive LECs provide adequate benchmark alternatives to the major incumbent LECs,[309] and that parity requirements make the incumbent LEC's dealings with itself the only relevant benchmarks in a post-1996 Act era.[310] As discussed below, we find, to the contrary, that benchmarking among the large incumbent LECs will continue to be a crucial market-opening tool as regulators and competitors carry out the objectives of the 1996 Act.

Comparative practices analyses are effective only when the firms under observation are similarly situated, including the size of the firms relative to the size of the market. With comparable firms – *e.g.*, in their customer base, access to capital, network configuration, and the volume and type of demands from competitors – regulators and competitors can establish more effectively that approaches and rates adopted by one incumbent would be equally feasible for other incumbents. Significant variation between the major incumbent LECs and the other carriers cited by the Applicants preclude the use of the latter categories as alternative benchmarks in evaluating the major incumbent's LECs' compliance with their statutory obligations.

We agree with the broad principle that the methods of comparison may evolve over the course of the transition to full competition in local markets.[311] For instance, it may turn out, as Applicants assert, that the importance of benchmarking access charge rates will decline as interexchange carriers reach customers through more competitive LECs rather than incumbent LECs. [312] Nonetheless, as explained above, we find an acute present need for benchmarking to, among other tasks, facilitate implementation of the market-opening measures of the 1996 Act and promote the rapid deployment of advanced services. For these types of comparisons, we

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308 *See supra* at Section V.C.2.c)(Effect at Industry Level) (contrasting a firm's unilateral incentive to cheat on a pricing agreement with less incentive for it to break an agreement to conceal information to impede regulators' and competitors' benchmarking efforts).

309 *See* SBC/Ameritech Nov. 16 Reply Comments at 53-54, 60. *See also id*., Schmalansee and Taylor Reply Aff. at 27-29.

310 *See* SBC/Ameritech Nov. 16 Reply Comments at 57, 62. *See also id*., Schmalansee and Taylor Reply Aff. at 31; SBC/Ameritech Mar. 25 Supplemental Memo at 2.

311 *See* SBC/Ameritech Nov. 16 Reply Comments at 62 (stating that "the vast majority of the benchmarks being developed under section 251 are best practices or parity benchmarks, not industry averages.").

312 *See* SBC/Ameritech Nov. 16 Reply Comments at 62; SBC/Ameritech Mar. 25 Supplemental Memo at 20.

predict that the high percentage of access lines nationwide controlled by the RBOCs and GTE will keep them at the forefront in establishing benchmark rates, terms and conditions for an extended future period.

a) Inadequacy of Other Firms As Benchmarks Against Major Incumbent LECs

We reject the Applicants' contention that other types of firms serve as adequate benchmarks to the major incumbent LECs.[313] We are not persuaded that the presence of small incumbent LECs and/or competitive LECs eliminate the need for regulators and competitors to make direct comparisons among the RBOCs and GTE.[314] The Applicants' arguments ignore vital differences in the 1996 Act's treatment of large incumbent LECs, the RBOCs in particular, as compared with other incumbents and competitive carriers. Equally important, structural and operational differences between these carriers and the major incumbent LECs also make direct comparisons between them inappropriate.

(1) Differences in Regulatory Treatment

We conclude that the distinct obligations imposed on major incumbent LECs, as compared with other LECs, under the 1996 Act undermines the abilities of regulators and competitors to draw useful comparisons between the conduct of the major incumbent LECs and these other carriers. In short, small incumbent LECs and competitive LECs cannot qualify as adequate alternatives to the RBOCs and GTE as benchmarks for implementation of sections 251(c) and 271, the core market-opening provisions of the 1996 Act.

The Applicants fail to explain how smaller incumbent LECs or competitive LECs could substitute for other RBOCs in assessing compliance with certain prominent provisions of the 1996 Act that apply solely to the RBOCs. The ability to compare the RBOCs' policies and practices in areas such as OSS performance, unbundling, and interconnection arrangements, for example, is a practical tool for regulators, competitors and DOJ in determining a BOC's

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313 The Applicants repeatedly assert the notion that there is "a growing body of ILEC and CLEC market experience that will be available for FCC reference if necessary." SBC/Ameritech Mar. 25 Supplemental Memo at 18. *See also* SBC/Ameritech Nov. 16 Reply Comments, Schmalansee and Taylor Aff. at 30. Specifically, the Applicants claim that adequate alternative benchmarks can be found in small incumbent LECs (such as Sprint's operating subsidiaries, ALLTEL, Frontier and Cincinnati Bell) and multi-state competitive LECs (such as Focal, Hyperion, ITC, MGC, and RCN). *See* SBC/Ameritech Nov. 16 Reply Comments at 58.

314 We also are not prepared to take the novel step in this proceeding of treating foreign carriers as adequate benchmarks for the large incumbent LECs operating in the United States. To establish such a showing, we would have to find, at minimum, that a country's regulatory regime is comparable to our system, notably the 1996 Act's unbundling requirements and pro-competitive framework, and that the regime, as well as the relevant LEC's practices and agreements, is sufficiently transparent to yield adequate benchmarking information for use by this Commission, state commissions and competitors in implementing the Communications Act. Any such showing would be undermined if the foreign LEC faced different operational demands and employed different network architectures from the RBOCs and GTE.

compliance with section 271, or in monitoring to prevent potential backsliding.[315] Similarly, analyzing the structure of other LECs not subject to a statutory separate affiliate requirement for manufacturing activities, or for the provision of in-region interLATA telecommunications services and interLATA information services, will not aid regulators or competitors in assessing an RBOC's compliance with section 272. At a minimum, therefore, both regulators and competitors have a strong continuing need for separate comparative practices analyses among several RBOCs in order to ensure compliance with RBOC-specific provisions of the 1996 Act.

Equally important, we find a pivotal distinction between the section 251 obligations imposed on the major incumbent LECs versus those of rural incumbents or competitive LECs. In contrast to the major incumbent LECs that are subject to section 251(c)'s market-opening requirements,[316] many of the alternate carriers cited by the Applicants are not subject to full section 251(c) obligations. First, by definition, competitive LECs do not fall within the 1996 Act's definition of an "incumbent local exchange carrier" for the given service area, nor do such carriers own the operative facilities for which interconnection and access is sought.[317] Instead, competitive LECs are subject to the lesser requirements of section 251(b) that are applicable to all LECs.[318]

Second, many of the smaller incumbent LECs fall within section 251(f)'s exemption from certain section 251(c) obligations for rural carriers.[319] In the *SBC/SNET Order*, for instance, we concluded that the proposed merger was not likely to affect the public interest adversely in part because SBC and SNET were not comparable in size. The Commission noted that "SNET is substantially smaller than the 'first tier' LECs -- the BOCs and GTE -- and has long been subject to different regulatory treatment."[320] Here, both SBC and Ameritech are among the largest incumbent LECs, and those that formerly comprised the Bell System, and thus are subject to the statutory obligations suitable to those entities. We therefore find that regulators and competitors are restricted largely to the class of large incumbent LECs, principally the RBOCs and GTE, in making benchmark comparisons under section 251(c).[321]

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315 *See supra* n. 297.

316 *See* 47 U.S.C. § 251(c) (requiring incumbent LECs to negotiate in good faith and provide, *e.g.*, interconnection, unbundled access to network elements, resale, and collocation).

317 *See* 47 U.S.C. § 251(h).

318 47 U.S.C. § 251(b) (requiring all LECs to allow resale, number portability, dialing parity, access to rights of way, and reciprocal compensation).

319 Under section 251(f), rural incumbent LECs are exempt from the requirements of section 251(c) until (i) it has received a "bona fide request for interconnection, services, or network elements," and (ii) the state commission determines that "such request is not unduly economically burdensome, is technically feasible, and is consistent with section 254" universal service provisions. 47 U.S.C. § 251(f). *See* State Attorney Generals Apr. 27 *Ex Parte*, Rosston and Mercurio Rept. at 26.

320 *SBC/SNET Order*, 13 FCC Rcd at 21302, para. 21 (*citing Policy and Rules Concerning Rates for Dominant Carriers*, CC Docket No. 87-313, Second Report and Order, 5 FCC Rcd 6786, 6818-20 (1990); 47 U.S.C. § 251(f)(2)).

321 Not surprisingly, therefore, certain reporting requirements apply solely to the large incumbent LECs. *See* State Attorney Generals Apr. 27 *Ex Parte*, Rosston and Mercurio Rept. at 26 (noting that ARMIS reporting

(2) Differences in Structure and Operation

We also find that crucial distinctions in structure and operation undermine the value of using smaller incumbents and competitors as benchmarks for the RBOCs and GTE.

Small Incumbent LECs. We find that, because their service areas include fewer large metropolitan areas and thus tend to be subject to less competitive entry and less demand for budding advanced services, smaller incumbent LECs are not likely to provide useful benchmarks for measuring the market-opening performance of major incumbent LECs. In contrast to the smaller incumbents, the major incumbents tend to operate in markets characterized by high population density or a large number of business lines, which generally are more attractive to new entrants. The level of competitive activity in a given area can implicate the network architecture or capability required of certain incumbent facilities such as OSS and physical collocation. A small incumbent facing little demand for interconnection, collocation or facilities for advanced services is less likely to have traffic levels or performance measurements that would render meaningful comparisons with a large incumbent who must employ more sophisticated management systems to meet greater demand. Moreover, different market structures may result in different network configurations that limit the usefulness of comparisons. For example, the loop costs of an RBOC may not be comparable to those of a small rural incumbent LEC with longer average loops or less densely concentrated customers.

Furthermore, by arguing that large size enables an incumbent LEC to achieve economies of scale, upgrade its network and provide more advanced services than smaller incumbent LECs,[322] the Applicants imply that the less developed networks and higher costs of smaller incumbent LECs would make them inappropriate benchmarks for the large incumbent LECs. As detailed in Section V.D. (Increased Discrimination) below, the large footprints of the major incumbent LECs may offer these carriers greater opportunities to engage in anticompetitive behavior that would be difficult to detect using comparisons to smaller incumbents. Finally, in average-practices benchmarking, no small incumbent LEC could provide an adequate counterpoint to the combined entity's control of one-third of the nation's access lines.

Competitive LECs. We are not persuaded that competitive LECs presently stand as adequate firms with which to compare the market-opening performance of incumbents. The Applicants' suggestion that competitive LECs, whether or not facilities-based, can be used as

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requirements differentiate between Tier I and Tier II incumbent LECs, and that the X-factor is determined based on large incumbent LECs' data). The current difference in treatment between the large and the small incumbent LECs reflects a policy determination regarding the greater importance of the major incumbent LECs as benchmarks. We believe it inappropriate to impose additional reporting burdens on small incumbents in order to facilitate a large incumbent LEC's consolidation to even greater size.

322 *See* SBC/Ameritech July 24 Application, Description of the Transaction, at 1-2, 4-8, 11-12, 38-46, 52-55; Section VI (Analysis of Potential Public Interest Benefits).

suitable benchmarks for the large incumbent LECs[323] defies the logic and structure of the 1996 Act. As discussed above, a primary motivation behind benchmarking is to increase the level of information regarding the incumbents' networks for competitors seeking access to those facilities, as well as for regulators. Moreover, competitive LECs are pursuing numerous strategies using a variety of wireline and wireless technologies, and their limited facilities are far from comparable to the millions of local lines controlled by the RBOCs and GTE.[324]

Despite arguing that competitive LECs can serve as interconnection benchmarks by providing wholesale service to other competitive LECs,[325] the Applicants provide no evidence demonstrating that competitive LECs actually are serving as wholesale suppliers in such a way as to generate useful comparisons for incumbent performance. Moreover, even if some competitive LECs decide to act as wholesalers, their incentives are likely to differ considerably from those of the incumbents. These new entrants' strategies are directed at expanding their reach and filling their vacant capacity, whereas incumbent LECs are likely to focus first on protecting their customer base from erosion by competitors. Competitive LECs which are voluntarily and eagerly opening their networks to other carriers cannot provide useful benchmarking information for the detection of incumbents' subtle forms of resistance to market-opening measures.

We also reject the Applicants' assertion that sections 251 and 252 of the 1996 Act increase the information flow to competitors sufficiently to eliminate the need for comparative practices analyses.[326] By asserting that the publication of interconnection agreements supplants the need for benchmarking,[327] the Applicants brush past the complementary nature of the publication requirement and comparative practices analyses. The publication of interconnection agreements assists competitive LECs in making benchmark comparisons, not only as between what one particular incumbent LEC offers to different competitors but also as among the general practices of several different incumbents. By increasing the flow of information to competitors and regulators, sections 252(h) and 252(i) facilitate the ability of competitors and regulators to engage in active benchmarking among the incumbents. Thus, the entire section 251 process

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323 *See* SBC/Ameritech Mar. 25 Supplemental Memo at 13.

324 *See* SBC/Ameritech Nov. 16 Reply Comments, Schmalansee and Taylor Reply Aff. at 29 (observing that new entrants in local markets "are frequently very different from ILECs; they use different technologies and different back-office systems, provide different mixes of services, etc.").

325 *See* SBC/Ameritech Nov. 16 Reply Comments at 60.

326 SBC/Ameritech Nov. 16 Reply Comments at 54-55, 58-59. *See also id*., Schmalensee and Taylor Decl. at 30-32. The Applicants argue that section 252(h)'s requirement that interconnection agreements be signed by state regulators and made available for public inspection adds to the information available to competitive LECs and regulators, and that section 252(i)'s most-favored nation provision assures that competitive LECs can make use of their increased information by requiring incumbent LECs to make "available any interconnection service or network element supplied in any agreement approved under section 252 to any other telecommunications carrier under the same terms and conditions." *See* 47 U.S.C. § 252(h), (i).

327 *See* SBC/Ameritech Nov. 16 Reply Comments at 54-55; SBC/Ameritech Mar. 25 Supplemental Memo at 13, 18-19.

benefits from having more rather than fewer large incumbent LECs to provide a diversity of approaches in negotiating interconnection agreements.

All of the foregoing factors suggest that comparisons between a major incumbent LEC and a small incumbent or a competitive LEC are less likely to yield the kind of benefits that would flow from comparisons among the RBOCs and GTE. In this regard, we note that the Applicants fail to provide examples where a regulator or competitor has relied on the performance of these claimed benchmark alternatives as adequate benchmarks against an RBOC or GTE. We therefore reiterate our conclusion that the large incumbent LECs, because they are of similar size and face relatively similar market conditions, remain the principal sources of benchmarks for their own behavior.

b) Inadequacy of Parity Requirements

We are also unpersuaded by the Applicants' argument that maintaining a large number of major incumbent LECs as benchmarks is no longer necessary because, as they assert, rather than comparisons among major incumbent LECs, the relevant benchmarks during the transition to competitive local markets are parity comparisons focusing on how an incumbent LEC treats competitive LECs vis-à-vis itself.[328] According to the Applicants, "performance measures designed to compare the access and interconnection the Bell Operating Companies provide to CLECs on a state-by-state basis with that provided to their own retail operations have become the new 'benchmarks.'"[329]

We certainly agree with the notion that an incumbent LEC's treatment of its retail operations or its affiliates as compared with its treatment of competitors can provide useful benchmarks for regulators and competitors. In certain contexts, such as detecting discriminatory behavior in interconnection, provisioning, and maintenance, parity comparisons provide a useful, and minimally-intrusive, way to obtain information regarding an incumbent's performance.[330] As Sprint observes, however, implementation of a parity rule itself may require traditional benchmarking between major incumbent LECs[331] -- *e.g.,* in setting mutually acceptable performance standards to determine if an incumbent LEC has complied sufficiently with the parity requirement.

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328 SBC/Ameritech Mar. 25 Supplemental Memo at 2, 13. *See also* SBC/Ameritech Nov. 16 Reply Comments at 57 (contending that in many instances "the only necessary benchmark is supplied by the incumbent LEC itself: the dispositive regulatory issue is whether an incumbent LEC is treating competitors differently from itself.").

329 SBC/Ameritech Mar. 25 Supplemental Memo at 13.

330 *See, e.g.*, *Local Competition Order*, 11 FCC Rcd at 15614, para. 224 (Section 251(c)(2)(C) requires an incumbent LEC to provide interconnection between its network and that of a requesting carrier at a level of quality that is at least indistinguishable from that which the incumbent provides itself or any other party). *See Performance Measurements and Reporting Requirements for Operations Support Systems, Interconnection, and Operator Services and Directory Assistance*, Notice of Proposed Rulemaking, 13 FCC Rcd. 12817 (1998), at para. 14.

331 Sprint Apr. 12 *Ex Parte*, Farrell and Mitchell, *Response to Some Criticisms of Benchmarking Analysis*, at 3.

While we agree that parity rules are valuable, we nonetheless find that parity considerations cannot substitute for all forms of benchmarking. Parity rules will not serve the public and protect competition if, for example, an incumbent LEC deems it profitable to provide lackluster service or charge excessive rates to both its own retail affiliates and its competitors. For example, without discriminating, the incumbent LEC may profit from imposing high loop charges, or access charges, on both its affiliates and its competitors, because the charges to its affiliates constitute only an internal transfer. While parity requirements attempt to level the playing field, therefore, traditional comparative practices analyses remain necessary to ensure that this level does not sink below an acceptable standard.

For innovative entrants, in particular, parity rules will not always suffice. As Sprint notes, if the innovation requires a new form of interconnection or access, "[t]he incumbent can slow-roll the innovator, declining to provide the new kind of input, until the incumbent has a similar or leapfrogging innovation available."[332] As discussed further in Section V.D.2.a) (Advanced Services) below, if a competitive LEC seeks the provision of properly conditioned loops in order to provide xDSL service, an incumbent LEC which is not ready to provide xDSL service itself would have the incentive to deny this competitor the properly conditioned loops. In this circumstance, parity rules would provide no remedy for the competitive LEC, for the incumbent LEC would not be providing to its retail arm anything that it was denying its competitor. Exclusive reliance on parity rules, therefore, could slow the provision of innovative services to the public.

For the foregoing reasons, we conclude that parity rules complement, but do not supplant, the use of traditional comparative practices analyses by regulators and competitors. Indeed, if parity alone mattered, as the Applicants' analysis suggests, then all the remaining RBOCs would be permitted to merge into one entity, leaving regulators and competitors unable to compare distinct practices of several independently-owned firms.

c) Sufficiency of Remaining RBOC Benchmarks

Finally, we reject the Applicants' argument that because benchmarking requires only one firm to "break ranks" with others, the proposed merger will not impair benchmarking by eliminating the only remaining benchmark.[333] In other words, the Applicants have stated that the "benchmarking issue thus has been narrowed . . . to the question of whether the 'loss' of Ameritech as an independently owned RBOC would so affect the Commissions ability to determine whether a proposed practice is technically feasible as to outweigh the benefits presented by the merger."[334] They go on to argue that there are no examples of this Commission

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332 *Id.*

333 *See* SBC/Ameritech Mar. 25 Supplemental Memo at 24 (finding no evidence "that preserving the current number of independently owned RBOCs is material to the regulatory process, particularly on issues raised by the transition to competition.").

334 SBC/Ameritech Mar. 25 Supplemental Memo at 4.

using only a single RBOC-to-RBOC comparison as a benchmark.[335] Thus, according to the Applicants, the loss of one RBOC would not have changed the outcome of any benchmarking analysis because other firms, or the BOCs, could still be used as benchmarks for assessing technical feasibility. We disagree and find, to the contrary, that the merger would result in dangerously few RBOC and major incumbent LEC benchmarks.

The Applicants' assertion that the Commission's analysis has never turned solely on RBOC-to-RBOC comparisons, or on an RBOC outlier, disregards not only the examples of the Commission's use of comparative practices analysis cited above, but also SBC's and Ameritech's prior recognition and support of Commission benchmarking among the RBOCs.[336] More importantly, we reject the Applicants' implied presumption that reducing the number of independently-owned RBOCs could be harmful only if the Commission in its decision relies solely on an RBOC-to-RBOC comparison. Analyzing the practices of the large incumbent LECs, the RBOCs included, may reveal trends within the industry or other qualitative factors that, although not determinative, may heavily influence the Commission's reasoning. The Commission's regulatory processes are cumulative, and rarely rely solely upon any one rationale for action.

With technical feasibility concerns, in particular, the loss of one source of observation could in fact eliminate the single observation that would have proven a particular arrangement feasible.[337] This is especially true in making assessments regarding advanced services, where the major incumbent LEC benchmark firms have taken different strategies, or are in different stages, in terms of their own deployment or cooperation with others. Furthermore, as shown above, there are examples in which a single firm used as a benchmark.[338] Thus, reducing the number of potential benchmark firms increases the chance that regulators and competitors will lose the ability to observe the decisive benchmark.

More importantly, we disagree with the Applicants' assertion that the issue has been narrowed to the question of whether a proposed practice is technically feasible.[339] As we

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335 *Id.* at 9-12, App. 1.

336 *See supra* at Section V.C.3.a)(Comparative Practices Analysis under the Modified Final Judgement). We note that in 1987, Ameritech submitted to the MFJ Court a compilation of benchmark comparisons containing twelve pages of examples of the "Use of Benchmark Comparisons by the Federal Communications Commission." *See United States v. Western Elec. Co*., Civil Action No. 82-0192, Ameritech Comments on the Report and Recommendations of the United States Concerning the Line-of-Business Restrictions, Att. A at 16-27 (filed Mar. 13, 1987). To take but one example, Ameritech states that the Commission in its *Third Computer Inquiry* proceeding considered Ameritech's proposal to introduce a new network architecture, Feature Node/Service Interface, "as an indication that an architecture with highly efficient interconnection can be designed." *Id*. (*citing Amendment of Section 64.702 of the Commission's Rules and Regulations*, 104 FCC 2d 958, 1063-64 (1986), at para. 212). It is not clear what action the Commission might have taken, such as requiring more detailed information from incumbents, or when it might have reached a similar conclusion, had it not examined Ameritech's proposal.

337 *See* State Attorneys General Apr. 27 *Ex Parte* Rosston and Mercurio Rept. at 22.

338 *See infra* at Section V.C.3.b) (The Commission's Use of Comparative Practices Analyses).

339 SBC/Ameritech Mar. 25 Supplemental Memo at 4.

have stated above, aside from determining the simple feasibility of a proposed activity, benchmarking can be used to help determine the cost of a specific service, estimate the future cost of providing new services, or decide which out of a number of services is the most cost effective. In each of these cases, more independent observations will yield more useful information and improve the decisions of the regulator. To the extent that the mergers reduces the level of observation, this process is impaired. For example, finding that several major incumbent LECs can provide a service at a particular cost and level of quality will be more valuable than finding that only one major incumbent LEC can do so. With new services and technologies, reaching appropriate decisions will likely involve making predictive judgments regarding the costs and future demand for the innovative service or technology. Although it is impossible for regulators to predict the value of these variables with certainty, having more rather than fewer independent estimates of such values will yield more useful information.[340]

Although we do not view the instant merger's reduction of the number of major incumbent LECs (the RBOCs and GTE) from six to five to be an automatic trigger of benchmarking harms, we cautioned in the *Bell Atlantic/NYNEX Order* that these harms increase disproportionately with each additional decline in the number of major incumbent LECs.[341] As explained above, along with further restricting diversity, each successive reduction in benchmark firms materially increases the risk that the remaining firms could successfully coordinate behavior, implicitly or explicitly, to reduce the effectiveness of comparative practices analyses. With only five remaining benchmark firms, this risk is far greater than with six.[342]

6. Conclusion

We conclude that, by further reducing the number of separately-owned large incumbent LECs, the proposed merger of SBC and Ameritech would significantly harm the ability of regulators and competitors to rely on comparative practices analyses to carry out their obligations under the Communications Act. In particular, the proposed merger of SBC and Ameritech poses a significant potential harm to the public interest by: (1) removing a source of potential diversity from independent major incumbent LECs during the transition to competition; (2) creating an incentive for the combined firm to coordinate behavior at the operating company level, thereby reducing other potential sources of innovation; and (3) increasing the incentive and opportunity for collusion and concealment of information among the few remaining major incumbent LECs. All of these occurrences lead to an overall reduction in diverse policies, practices and approaches that otherwise could have been used to implement the Communications Act most effectively, particularly in overseeing the transition to competitive local markets. As a result, the Commission would have to substitute more intrusive regulation to enforce the

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340 For example, in choosing whether to require LRN or allow the interim use of QOR, the Commission estimated the speed at which numbers would be ported and the relative costs of rolling out the two different technologies, along with estimates of the benefit and technical shortcomings of each. *Number Portability Order*, 12 FCC Rcd at 7257-58, para. 38.

341 *Bell Atlantic/NYNEX Order*, 12 FCC Rcd at 20062-63, para. 156.

342 *See infra* at n. 240.

Communications Act, representing a less effective and more costly solution for both the regulated firms and the public. Only firms comfortable with a monopolistic environment would welcome such results.

As noted above, in allowing the Bell Atlantic/NYNEX merger, we expressly cautioned that further consolidation among the RBOCs or comparable incumbent LECs would present serious public interest concerns.[343] Because the harm to regulators' and competitors' ability to use benchmarking to implement and enforce the Communications Act is greater as the number of independent large incumbent LECs decreases, the Applicants must prove countervailing public interest benefits of this merger significantly exceeding those from previous incumbent LEC mergers in order to demonstrate that this merger, on balance, serves the public interest. Alternatively, we need to fashion very substantial market-opening, benchmarking conditions to alleviate the grave harms this merger poses to the regulatory processes and the operation of the 1996 Act's interconnection requirements.

D. Increased Discrimination

1. Overview

In the preceding section, we explained why this merger, as initially proposed, would seriously weaken oversight of the Applicants' behavior toward competitors. In this section, we explain why we also believe that this merger will increase predation while weakening our ability to combat it. We conclude that incumbent LECs, such as SBC and Ameritech, have the incentive and ability to discriminate against competitors in the provision of advanced services,[344] interexchange services, and circuit-switched local exchange services,[345] and that such incentive and ability will increase as a result of the merger. This increased incentive to discriminate will result in a public interest harm, because it will adversely affect national competitors' provision of services in the new, combined region, and, as a further result, will harm consumers who ultimately will be forced to pay more for retail services, with reduced quality and choice.

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343 *Bell Atlantic/NYNEX Order*, 12 FCC Rcd at 20062-63, para. 156.

344 For purposes of this order, we define the term "advanced services" as we did in the *Advanced Services Further Notice*, to mean "high speed, switched, broadband, wireline telecommunications capability that enables users to originate and receive highquality voice, data, graphics or video telecommunications using any technology." *Advanced Services Further Notice*, 14 FCC Rcd at 4762, n.2. The Commission there stated: "[t]he term 'broadband' is generally used to convey sufficient capacity -- or 'bandwidth' -- to transport large amounts of information. As technology evolves, the concept of 'broadband' will evolve with it: we may consider today's 'broadband' services to be 'narrowband' services when tomorrow's technologies appear." *Id*. For a further description of xDSL technology, *see id*. at paras. 9-12.

345 Throughout this section, "local exchange service," refers to circuit-switched local exchange service, otherwise known as Plain Old Telephone Service (POTS), rather than services, such as advanced services, based on digital subscriber line technology or packet-switched technology that may have a local component.

We believe the merger is likely to have particularly harmful, discriminatory effects on competition in the provision of new types of advanced services. Telecommunications markets today exhibit a continuing shift from a circuit-switched to a packet-switched environment capable of allowing the provision of a variety of new, advanced services.[346] Any discrimination against non-incumbent competitors who use these advanced packet-switched technologies likely will cause a significant setback to current and future efforts to encourage competition and innovation in the provision of new types of advanced services. For example, Sprint is particularly concerned that, post-merger, the larger, combined entity will have both greater incentive and ability to stifle Sprint's ION rollout.[347] Advanced services markets are still emerging and developing, so we must continue to ensure competition in the provision of advanced services by multiple providers. Therefore, we scrutinize carefully the possibility of an increase in incentive and ability to discriminate against competitive providers of such services. Protecting against an increased incentive and ability for incumbents to discriminate against competing advanced services providers not only furthers the Commission's ongoing efforts to encourage innovation and investment in advanced services,[348] but also comports with the Commission's obligations under section 706 to "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans."[349]

We also are concerned with the effects of discrimination on competition in the provision of interexchange services and local exchange services. Specifically, we conclude that the combined entity likely will discriminate to a greater extent against termination of interexchange calls by competing providers in the combined region, as well as against competitive LECs seeking to provide local exchange services in the combined region. With respect to local exchange competition, we believe that the likelihood of increased harmful discrimination is particularly acute with respect to competitive providers of local exchange services to mass market customers (smaller businesses and residential customers).

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346 A packet-switched network is one that transmits information by breaking it into small packets that are independently routed through the network from source to destination according to a destination address that is included in each packet. Packet switching differs from the circuit switching used in Plain Old Telephone Service (POTS): in a circuit-switched network, a dedicated circuit between the parties is established and reserved for the exclusive use of those parties. *See* Harry Newton, *Newton's Telecom Dictionary* (Flatiron Publishing, 14th ed. 1998) at 527.

347 Sprint touts ION as "an innovative new service that promises to bring an integrated package of advanced telecommunications services to millions of subscribers." *See* Sprint Oct. 15 Petition, Katz and Salop Decl. at 12. Sprint plans to offer ION in metropolitan areas containing over 65 percent of the population of the United States. *See* Sprint Oct. 15 Petition, Brauer Aff. at 4. For a detailed description of rollout plans for Sprint ION, *see id.* at 2-6. Sprint describes this service as a combined service that "integrates traditional voice traffic, Internet traffic, frame relay traffic, and other data traffic on one customer access facility and carries the traffic in the Asynchronous Transfer Mode data format through the Sprint network." Sprint Oct. 15 Petition, Katz and Salop Decl. at 12.

348 *See* Sprint Oct. 15 Petition, Besen, Srinagesh and Woodbury Decl. at 27-29 (asserting that an increase in incentive for the incumbent to forestall entry will retard innovation by the incumbent).

349 *See* Pub.L. 104104, Title VII, § 706, Feb. 8, 1996, 110 Stat. 153, reproduced in the notes under 47 U.S.C. § 157.

In explaining our conclusions about the harms to competition in the provision of advanced services, interexchange services, and local exchange services, we describe why the increase in the number of local areas controlled by the combined entity will increase its incentive and ability to discriminate against its rivals seeking to provide retail services within the combined region. As discussed in detail below, this increased incentive and ability to discriminate will, at times, harm a competitor's activities not only within the combined region but also in other regions.[350] According to Sprint, as a result of the merger, the combined entity, in order to preserve or gain business for its own retail services, will have increased incentives to discriminate against competing carriers that depend on access to the incumbent LECs' monopoly inputs to provide retail services (specifically, local exchange services, interexchange services, and bundled/new technology services). Examples of such necessary inputs are: (1) for local exchange services – interconnection and UNEs; (2) for interexchange services -- originating and terminating exchange access services (or UNEs used to obtain them); and (3) for new/bundled services, all of the above.[351]

Incumbent LECs in general have both the incentive and ability to discriminate against competitors in incumbent LECs' retail markets. This observation is the fundamental postulate underlying modern U.S. telecommunications law. The divestiture of AT&T rested principally on this observation. Two key sections of the 1996 Act -- sections 251 and 271 -- rest entirely on this point. Incumbent LECs have an incentive to discriminate against rivals to gain the business that these rivals lose as a result of such discrimination. This incentive exists in all retail markets in which they participate. Incumbent LECs' ability to discriminate against retail rivals stems from their monopoly control over key inputs that rivals need in order to offer retail services. Depending on the particular retail service, an incumbent LEC may exercise its ability to discriminate using different means, as described below. For instance, an incumbent LEC may discriminate against an interexchange carrier by delaying access to the trunk capacity needed to terminate calls.

In spite of the existing incentive to discriminate against rivals providing retail services, both theoretical and empirical evidence suggests that incumbent LECs may not be discriminating to the full extent of their ability. For example, the benefits of increased levels of discrimination may not justify the increased financial costs and corresponding risks of detection and punishment. The fact that competing firms are able to enter retail markets is amply represented in the record before us, and confirms that any current discrimination is not at a level that would totally preclude competition. As discussed below, the merger, by increasing the

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350 *See* Sprint Oct. 15 Petition at 20-32, Katz and Salop Decl. at 37-51; Letter from Michael Jones, Willkie Farr & Gallagher, Counsel for Sprint, to Magalie Roman Salas, Secretary, Federal Communications Commission, CC Docket No. 98-141 (filed Apr. 2, 1999) (Sprint Apr. 2 *Ex Parte*), Attach., John B. Hayes, Jith Jayaratne, and Michael L. Katz, "An Empirical Analysis of the Footprint Effects of Mergers Between Large ILECs" (Hayes, Jayaratne, and Katz Report).

351 A vertically integrated firm provides its own inputs to produce final products or services. For instance, an incumbent LEC controls the local loops and switching that it uses to provide retail local exchange services. *See* Jean Tirole, *The Theory of Industrial Organization* (MIT Press, 1988) at 15-16.

incentive to discriminate, probably will result in the merged entity further exploiting its ability to discriminate against retail rivals.

In many cases, discriminatory conduct by an incumbent LEC in its region affects a competitor in areas both inside and outside the incumbent's region. Effects outside the region (externalities or "spillover" effects)[352] can directly or indirectly harm customers, whose business the incumbent LEC is seeking to gain. Spillover effects directly harm customers when the incumbent LEC's discrimination in one region negatively affects a customer's communications between that region and another region. For instance, if SBC discriminates against the termination of long distance calls by an interexchange carrier in one city such as Houston, customers of this interexchange carrier in Chicago are directly affected, and may switch long distance providers as a result. Spillover effects indirectly affect customers when an incumbent LEC's discrimination in one region increases a national rival's general costs, thereby indirectly impairing the ability of this rival to provide service to customers in other regions. For instance, a competitive LEC's entry into various areas usually entails fixed costs such as research, product development, and marketing costs that must be covered by the sum of the competitive LEC's area-specific profits. If SBC raises this competitive LEC's costs in Houston, less money is available to cover those fixed costs, and it is likely to become a less effective competitor in other areas such as Chicago, or it may forego entry into the Chicago market altogether.[353] Regardless of the nature of the spillover effects, the intended result of discrimination is to reduce the ability of competitors to acquire and/or keep customers, that is, to increase the barriers to entry that competitors of incumbent LECs face.

Because after the merger the larger combined entity would realize more of the gains from such external effects, the marginal benefit and corresponding incentive to discriminate in each area would increase. As a result, the level of discrimination engaged in by the combined entity in each region within the combined territory would be greater than the sum of the level of discrimination engaged in by the two individual companies in their own, separate regions, absent the merger. Building on the example in the preceding paragraph, before the merger, we must assume that SBC discriminates against retail rivals in Houston based on the benefits reaped in its region and that Ameritech does likewise in Chicago. After the merger, SBC will have more incentive to discriminate in Houston because the benefits of this discrimination to SBC would extend further, all the way to Chicago. SBC will increase the level of discrimination in Houston in spite of the fact that Ameritech was already discriminating in Chicago; the level of discrimination in Chicago was set by Ameritech based only on the smaller benefits of keeping competitors out of Ameritech's region. Taking this theory to the extreme, to demonstrate its effect on competition, we consider a situation where all incumbents have merged, leaving only one incumbent LEC. Under such a scenario, the remaining incumbent LEC's

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352 Externalities, or spillovers, arise when an action by one party imposes costs or benefits on another party or parties. *See* Robert S. Pindyck & Daniel L. Rubinfeld, *Microeconomics* (Prentice Hall, 4th ed. 1998) at 648. A classic example of a negative externality is air pollution.

353 *See* Sprint Oct. 15 Petition at 22-23.

incentive to discriminate against rivals would be increased to the maximum, because the incumbent LEC could reap the benefit of discrimination in an extremely large area. The level of discrimination can be increased partly because, as discussed below, the combined entity will have an increased ability to discriminate.

In addition to increasing the incentives to discriminate, we find that the merger will enhance the ability of the combined entity to engage in an increased level of discrimination. The combined entity will be better able to discriminate against competitors by coordinating its formerly separate local exchange operations and controlling both ends of a higher percentage of calls (which is relevant to the provision of interexchange services). As described above, regulators will have greater difficulty monitoring and detecting this misconduct because of the reduction in the number of benchmarks. Therefore, the combined company not only will have more incentive to discriminate against rivals, but also will have a heightened ability to inhibit competitors' provision of services within the combined region compared with the ability of each company currently to discriminate within its region.

2. Analysis

In the paragraphs that follow, we analyze the incentive and ability to discriminate, both before and after the merger, with respect to competitors providing advanced services, interexchange services, and local exchange services in the SBC and Ameritech regions. Although we do not separately analyze the incentive and ability to discriminate against competitors providing bundled interexchange and local exchange services in these regions, we note that our analyses in sections b) and c) below apply equally to them as well.[354]

We find that the combined entity is likely to increase the level of discrimination that rivals must overcome to provide retail advanced services, interexchange services, and local exchange services. In the retail market for advanced services, incumbent LECs can engage in discriminatory conduct with respect to competitors' provision of services such as xDSL[355] by refusing to cooperate with competitors' requests for the evolving type of interconnection and access arrangements necessary to provide new types of advanced services. The combined entity, controlling a larger area, will engage in more such discrimination against a competitor such as NorthPoint Communications that is seeking to enter on a national basis, as it will realize more of the benefits. In the retail market for interexchange services, incumbent LECs with section 271 authority to offer interexchange services to in-region customers will have an incentive to discriminate against the termination of calls in its region by independent IXCs in order to induce callers at the originating end to choose the incumbent LEC as the interexchange provider. The combined entity, controlling a larger area, terminates calls from a greater number of in-region

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354 We note that Sprint combines its concerns about advanced services and "combinations of services." *See id.* at 26-28.

355 Broadband services based on digital subscriber line technology are commonly referred to as xDSL. *See supra* note 344.

customers and therefore has more incentive to engage in such discrimination. This discrimination is likely to be particularly acute with regards to advanced or customized access services for which detection of discrimination is most difficult. Finally, in the retail market for local exchange services, the merger gives the combined entity an increased incentive to engage in discrimination against competitive LECs engaging in a national entry strategy, as it will realize the benefits over a larger area. This discrimination is likely to be particularly acute with respect to the provision of local exchange services to mass market customers, for which there are few benchmarks of incumbent LECs' best practices that could be used to detect such discrimination. For the provision of all three types of services, the merger is likely to cause public interest harms by reducing the amount of competition faced by the merged entity.

a) Advanced Services

We find that the combined entity will have an increased incentive and ability to discriminate against competitors providing retail services that rely on new technology, particularly advanced services like Sprint ION.[356] The record reflects that competitive service providers frequently run into difficulty the first time they seek to provide a new service such as xDSL that is dependent on incumbent LEC inputs, thus giving the incumbent LECs the ability to control the pace of innovation. Examples of the types of things to which providers of xDSL services have needed access include, but are not limited to: (1) detailed loop information (such as information on loop qualification); (2) conditioned loops; (3) remote terminals; (4) the incumbent LEC's central office to collocate new technology; or (5) portions of interconnection agreements that are tailored to the needs of xDSL.[357] These difficulties motivated the Commission's continuing efforts to promote and ensure competitive provision of advanced services in the *Advanced Services* rulemaking proceeding.[358] Incumbent LEC discrimination

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356 Sprint Oct. 15 Petition at 26-28.

357 *See, e.g.*, MCI WorldCom Oct. 15 Comments at 42 (asserting that the "uncooperative and obstructionist attitude of [incumbent LECs] like SBC and Ameritech has made provision of access to central offices and remote terminals on reasonable and nondiscriminatory terms a [ ] difficult problem."), 40-42 (asserting that competitors have problems deploying xDSL services because neither SBC nor Ameritech has enabled competitors to obtain xDSL capable or otherwise conditioned loops on the same terms and conditions as the incumbent LEC or permitted competitors to place equipment in incumbent LEC offices on a nondiscriminatory basis or in remote terminals, which would allow them to provide service to customers served by Integrated Digital Loop Carrier systems (IDLC)). Remote concentration devices, such as digital loop carrier (DLC) systems, are an efficient means of aggregating subscriber traffic on to common transmission facilities, usually fiber, for transmission from a remote terminal to the central office, rather than dedicating a separate transmission facility (*e.g.*, a copper loop) for each subscriber's traffic all the way from the customer's premises to the central office. The use of DLCs varies by telephone company and typically ranges from almost zero to as much as 30 percent of the local loops within a given LEC's local network. IDLC is integrated with the switch and provides a direct, digital interface to a digital central office switch. With customers served by IDLC systems, it is difficult for competitors to unbundle the loop to enable them to provide DSL services. *See Advanced Services Order and NPRM*, 13 FCC Rcd at 24085, para. 165 and n.313.

358 For example, in the *Advanced Services Further Notice*, the Commission: (1) strengthened our collocation rules to reduce the costs and delays faced by competitors that seek to collocate equipment in an incumbent LEC's central office; (2) adopted certain spectrum compatibility rules and adopted a further rulemaking to explore issues related to developing long-term standards and practice for spectrum compatibility and management; and (3) sought

against competitive providers of xDSL services has delayed competitive provision of these services and necessitated regulatory intervention. As newer services come along, competitors will continually need novel and unforeseeable forms of access from the incumbent LEC. We conclude that the merger of SBC and Ameritech will increase the incentive and ability of the merged entity to discriminate in the provision of these forms of access to competitors.

A number of telecommunications providers, ranging in size from new entrants to the largest firms in the industry, are beginning to offer nationwide services based on advanced services. For instance, Sprint's describes its ION offering as "an innovative new service that promises to bring an integrated package of advanced telecommunications services to millions of subscribers."[359] Sprint asserts that it has plans to offer ION in metropolitan areas containing over 65 percent of the population of the United States.[360] Sprint describes this service as a combined service that "integrates traditional voice traffic, Internet traffic, frame relay traffic, and other data traffic on one customer access facility and carries the traffic in the Asynchronous Transfer Mode data format through the Sprint network."[361] Another carrier offering a competitive advanced service is Covad. Covad recently announced a nationwide, high-speed access service, called TeleSpeed Remote, that enables remote branch offices and workers to be connected to the main corporate network. Covad has plans to make this service available in a total of 58 cities by the end of 1999.[362] In this section, we show that SBC and Ameritech's incentive to discriminate will increase as a result of the merger, because, for example, discriminating against Covad's TeleSpeed Remote service in one city such as Los Angeles can affect the provision of TeleSpeed Remote in Chicago.

We disagree with Applicants that the economies of scale in developing, negotiating, and implementing the interfaces, protocols, and other access services Sprint asserts it needs to launch its services on a nationwide basis would, instead, benefit from dealing with fewer, larger, local exchange companies.[363] Although administratively it might be easier to deal with one incumbent LEC instead of two, the harms resulting from the merger of the two incumbents would be greater than the benefits of fewer negotiations. Indeed, the existence of multiple incumbents enables competitors to bring to the bargaining table with one incumbent lessons it has learned from negotiations with another incumbent. This is particularly true for advanced services for which some experimentation and innovation are required from the incumbent LEC.

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comment on whether we should require incumbent LECs to allow competitors to offer advanced services to end users over the same line on which the LEC is offering voice services. *See Advanced Services Further Notice*, 14 FCC Rcd at 4764, para. 6.

359 Sprint Oct. 15 Petition, Katz and Salop Decl. at 12.

360 Sprint Oct. 15 Petition, Brauer Aff. at 4. For a detailed description of rollout plans for Sprint ION, *see id.* at 2-6.

361 Sprint Oct. 15 Petition, Katz and Salop Decl. at 12.

362 Covad Press Release, "Covad Communications Delivers First Nationwide DSL Network Via Backbone Agreements with AT&T and Qwest," (Mar. 29, 1999).

363 *See* SBC/Ameritech Nov. 16 Reply Comments, Schmalensee and Taylor Reply Aff. at 24-25.

(1) Background

One of the fundamental goals of the 1996 Act is to promote innovation and investment by all participants in the telecommunications marketplace, in order to stimulate competition for all services, including advanced services.[364] Today, both incumbent LECs and new entrants are at the early stages of developing and deploying innovative new technologies to meet the ever-increasing demand for high-speed, high-capacity advanced services. For the advanced services market to develop in a robust fashion, it is critical that the marketplace for these services be conducive to investment, innovation, and meeting the needs of consumers.[365]

Given the importance to the public interest of continuing to ensure competition in the provision of advanced services,[366] we are required by section 706 to be particularly vigilant that a merger between two incumbent LECs such as SBC and Ameritech will not harm the development of competition for such advanced services. In a recent report to Congress, the Commission found that advanced telecommunications capability apparently are being deployed in a reasonable and timely fashion. Nevertheless, this report captures the advanced services market in its infancy, and the Commission must continue to facilitate the development of advanced services competition by reducing barriers to infrastructure investment so that companies in all segments of the communications industry have the incentive to innovate and invest in broadband technologies and facilities, bringing the benefits of this competition to consumers.[367] We find that incumbent LECs such as SBC and Ameritech already have ample ability and incentive to discriminate against advanced services providers; absent conditions, the increase in the incentive and ability to discriminate caused by the instant merger may frustrate substantially the realization of the 1996 Act's and the Commission's goals with respect to advanced services.

(2) Incentive and Ability to Discriminate

Because incumbent LECs either currently do, or in the future will, compete with other providers of advanced services, they have an incentive to discriminate against companies that depend on them for evolving types of interconnection and access arrangements necessary to provide new services to consumers. They also have the incentive to limit or control the

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364 *See Advanced Services Further Notice*, 14 FCC Rcd at 4762, para. 1 and n.2 (citing Joint Statement of Managers, S. Conf. Rep. No. 104-230, 104th Cong. 2d Sess. 1 (1996) (*Joint Explanatory Statement*)).

365 *See Advanced Services Further Notice*, 14 FCC Rcd at 4762, para. 2.

366 *See id.* at para. 53 (concluding that entry by many competitors is the best paradigm by which to bring broadband capabilities to all Americans).

367 *See Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, Report to Congress*, CC Docket No. 98-146, FCC 99-5 at para. 8 (rel. Feb. 2, 1999) (*Section 706 Report*). We also stated that, given the importance of advanced telecommunications capability, the Commission will continue to closely monitor the deployment of broadband capability to all Americans and to issue an annual report on this topic. *See id.* at para. 7.

development of new services to the extent new services compete with their current offerings. In addition, competitors often are totally dependent on incumbent LECs for last mile wireline access to end users.[368] We show below that the incentive to discriminate against advanced service providers is increased substantially by this merger.

We conclude that there is sufficient record evidence, described below, to demonstrate that evolving types of interconnection and access arrangements with incumbent LECs may be, or are likely to be, necessary for competitors to provide new, innovative services to consumers.[369] We agree with Sprint that BOCs' "near monopoly in access to local customers is the key to their continuing ability to impact local competition by failing to provide quality access to those monopoly facilities to companies such as Sprint."[370] According to Sprint, in order to offer its advanced Sprint ION service, it will need modifications to standard access and interconnection arrangements.[371] For larger customers, Sprint asserts that its ION service will use dedicated access lines purchased from the incumbent LEC, and for smaller customers, the services will use an xDSL capable loop and collocation space rented from the incumbent LEC, or resold incumbent LEC xDSL service.[372] Sprint asserts that, in the case of xDSL collocation, the RBOC also controls the central office space where xDSL equipment must be located to connect with the copper loops of the RBOC in order to function.[373]

Applicants respond that Sprint is "unable to point to a single 'innovative' access or interconnection arrangement that it has requested in connection with a new service offering that SBC or Ameritech has said is not available."[374] Moreover, Applicants refer to a June 1998 Sprint press release in which Sprint announced that it had reached "'key network access arrangements'" with Southwestern Bell and Ameritech enabling it to launch its ION service in SBC and Ameritech states.[375] This announcement does not preclude future difficulties for Sprint and other providers of advanced services, because these access arrangements only enable the provision of ION service to larger business customers using infrastructure already being used by Sprint; these access arrangements will not enable Sprint to provide ION service to smaller customers, or customers that do not have access to this infrastructure.[376] In addition, Sprint

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368 *See* Sprint Oct. 15 Petition, Brauer Aff. at 8.

369 *See* Sprint Oct. 15 Petition at 26.

370 *See* Sprint Oct. 15 Petition, Brauer Aff. at 7-8.

371 *See* Sprint Oct. 15 Petition at 27.

372 *See* Sprint Oct. 15 Petition, Katz and Salop Decl. at 20-22, Brauer Aff. at 4-5, 8-9.

373 *See* Sprint Oct. 15 Petition, Brauer Aff. at 9.

374 SBC/Ameritech Nov. 16 Reply Comments at 69.

375 *See* SBC/Ameritech Nov. 16 Reply Comments at 69-70 and n.234 (quoting Sprint Press Release, "Sprint Announces Network Agreements with Local Phone Companies for Initial Rollout of Revolutionary New Services," (June 17, 1998), available at <http://www.sprint.com/Stemp/press/releases/9806/9806170591.html> (Sprint June 17 Press Release)).

376 The press release cited by Applicants announces the large business rollout of Sprint ION, beginning with Chicago, Atlanta, Dallas, Houston, and Kansas City; at that time, agreements in New York and Denver were being finalized. The press release argues that these cities have several key elements in place for the initial deployment of Sprint ION, including broadband metropolitan area networks (BMANs) and "a strong, established business customer

contends that three sorts of problems have arisen in its effort to obtain innovative access arrangements from incumbent LECs: (1) Operations Support Systems (OSS)-related problems; (2) problems with access to incumbent LEC central offices and other facilities to enable collocation of equipment; and (3) the availability of suitably conditioned incumbent LEC facilities provided on an unbundled basis.[377] Sprint is concerned not only by incumbent LECs' ability to discriminate against competitors or potential competitors by denying access to necessary inputs, but also by slow-rolling competitors in negotiations for such inputs.[378]

We also note that the incumbent's control over the loop gives it the ability to tailor the loop to any collocated or attached electronics, thereby forcing competitors to provide service identical to the incumbent's. Specifically, by choosing electronics that meet the incumbent's market need, without regard to that of its competitors, the incumbent may stifle competitors' ability to innovate. Discrimination against competitors wishing to innovate and deploy technology different than that deployed by the incumbent LEC often is not easily detected by regulators. For example, for a competitor already providing advanced services using the incumbent's loop, the incumbent LEC has the ability to degrade the quality of the competitor's service by beginning to deploy technologies that would interfere with competitors' technologies. We also note that incumbent LECs will have the capability of offering new services on an end-to-end basis, but because the incumbent LEC controls end-to-end signaling, the incumbent LEC may make it difficult for others to offer similar new services.

Although the Commission issues rules to prevent discrimination, and will continue to do so, it is impossible for the Commission to foresee every possible type of discrimination, especially with evolving technologies. In this regard, we note that Applicants' reliance on existing regulatory safeguards is misplaced. They contend that in other contexts, carriers competing with incumbents in retail markets have been dependent on the incumbent LECs for interconnection or other network service, and have not faced discrimination and have been successful despite this dependency.[379] As examples, Applicants refer to cellular service, personal communications service (PCS), paging service, voice messaging service, provision of

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base that can immediately benefit from Sprint ION." BMANs are high-bandwidth fiber optic rings encircling cities, that "already enable Sprint to provide a variety of advanced services and are now being enhanced to enable new Sprint ION services…." For smaller customers that may not have access to BMANs, "emerging broadband access services, such as Digital Subscriber Line (DSL)" are being supported by Sprint. *See id.*

377 *See* Sprint Oct. 15 Petition, Katz and Salop Decl. at 13-16. Sprint notes that the conditioning of loops and placement of digital signals within a binder group of loops provide two mechanisms through which an incumbent LEC can degrade the quality of access services provided to competitors. *Id*. at 15-16.

378 *See* Sprint Oct. 15 Petition at 26-27. We recognize that recent measures adopted by the Commission in the *Advanced Services First Report and Order and FNPRM* should lessen an incumbent's ability to discriminate against competitive providers of advanced services seeking to collocate equipment in an incumbent's central office. *See Advanced Services First Report and Order and FNPRM* at paras. 6, 19-60. Our adoption of these measures, however, does not address our concerns about an incumbent LEC's ability to discriminate against such rivals by refusing to cooperate in other ways with competitors' requests for new types of interconnection and access arrangements necessary to provide innovative new services.

379 *See* SBC/Ameritech Nov. 16 Reply Comments at 70 and n.236; Schmalensee and Taylor Reply Aff. at 21.

customer premises equipment, and intraLATA toll service.[380] With respect to the intraLATA toll market, Applicants argue that, despite SBC and Ameritech each having terminated "virtually every call they have originated for the past decade," competition has grown.[381] According to Applicants, the success of intraLATA toll competition "is strong evidence that the theoretical problems of discriminatory treatment of BOC affiliates and their competitors are adequately addressed by existing regulatory safeguards."[382] Sprint responds, however, that incumbent LECs instead sought to delay intraLATA competition, "us[ing] the courts and regulatory processes to delay competitive entry into intraLATA markets."[383] Even if Applicants are correct in their assertion that discrimination is not a problem with respect to the intraLATA toll market, it does not necessary follow that they do not have the incentive and ability to discriminate against competitors providing advanced services, nor does it follow that the merger will not increase this incentive or ability. Indeed, the record here is replete with assertions of discrimination against competing xDSL providers, and, as noted above, discrimination against such providers has led to the Commission's actions in the *Advanced Services Rulemaking Proceeding*.

(3) Post-Merger Incentive and Ability to Discriminate

The merger increases, from pre-existing substantial levels, the ability and incentive of the merged entity to discriminate against the providers of advanced services. We agree with Sprint that there are spillover effects to discrimination against national providers of advanced services, and that, post-merger, the combined entity would internalize external effects to some extent, thus increasing its incentive to act in one area in a manner that produces these effects in another. Economies of scale and scope, and network effects, imply that when incumbent LECs weaken a competitive service in one region, this weakens it in other regions as well.[384] We also are concerned that the harm to competitive advanced services providers resulting from an increased incentive to discriminate will be particularly acute for those services that exhibit network effects. For services such as Covad's TeleSpeed Remote and Sprint's ION with "multi-market dependence," discrimination in one market "will ripple throughout other markets."[385] In addition, advanced services such as Sprint ION may rely on third-party suppliers to provide equipment and applications that make the service more attractive to customers.[386] The supply of such third-party applications is dependent on the number of consumers of the underlying service such as Sprint ION; again, discriminatory conduct reducing the number of subscribers in one area reduces the value of the service in other regions, as there will be fewer

380 *See* SBC/Ameritech Nov. 16 Reply Comments, Schmalensee and Taylor Reply Aff. at 21 and n.40.
381 *Id.* at 21.
382 *Id.* at 22.
383 *See* Sprint Apr. 2 *Ex Parte,* Hayes, Jayaratne, and Katz Report at 19.
384 *Id.* at 11-13. *See supra* Section V.D.1 (Overview). According to Sprint, ION exhibits both direct and indirect network effects. *See* Sprint Apr. 2 *Ex Parte,* Hayes, Jayaratne, and Katz Report at 12-13.
385 Sprint Oct. 15 Petition at 27, Katz and Salop Decl. at 44-45.
386 *See* Sprint Apr. 2 *Ex Parte,* Hayes, Jayaratne, and Katz Report at 12.

applications available.[387] We conclude that the merger's big footprint will create more incentives for the merged entity to discriminate against competitors whose networks become more attractive with more "on-net" customers.

After the merger, the combined company will be able internalize these external effects of discriminatory conduct in one area in the combined region on another area in that region. By capitalizing on its monopoly control over loops, for instance, the combined entity can discriminate against an advanced services provider entering an area in the combined region. This will reduce the customer base and revenues of the advanced services provider, thereby reducing its ability to enter another region. Because of the possibility of internalizing such spillover effects, the incentive for the combined entity to discriminate against competitors providing retail advanced services in particular areas within the combined region will be greater than the sum of the incentives for the companies operating alone. For example, pre-merger, discrimination against Sprint's ION service in Los Angeles will only benefit SBC outside Los Angeles to the extent that it impedes the ability of Sprint to provide service in the rest of SBC's region. The effect of such discrimination on the provision of ION in Ameritech's region does not benefit SBC, and is, therefore, ignored by SBC in deciding whether, and how much, to discriminate against Sprint. Post-merger, however, the marginal benefit of discrimination in Los Angeles increases as the combined entity receives the benefits of such discrimination in Chicago. Similarly, the combined entity receives more benefits from discriminating against Sprint in Chicago. As a result, the combined entity will increase the level of discrimination against Sprint in both Los Angeles and Chicago, which will reduce the competitiveness of Sprint ION.

The increased ability of the combined entity to discriminate, at least in the absence of stringent conditions, will result from: (1) the reduction in the number of benchmarks, making it more difficult for regulators to monitor and detect misconduct;[388] (2) the ability of the combined entity to coordinate and rationalize the discriminatory conduct of the two companies (sharing "worst practices"), making detection and proof of discrimination more difficult;[389] and 3) the efficiencies (economies of scope) that result from being able to share strategies and arguments while fighting similar regulatory battles in multiple state forums.[390] For example,

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387 For products that can use complementary third-party applications, there is a feedback relationship between the number of customers of the product and the availability of third-party applications; as more customers purchase the product, it is more profitable to provide complementary applications, and these additional applications make the product even more attractive to consumers. This feedback relationship holds true for many consumer electronics systems composed of hardware and software, such as compact disk players and compact disks, and personal computers and compatible software. For a theoretical description of this phenomenon, *see* Oz Shy, *Industrial Organization: Theory and Applications* (MIT Press, 1995) at 263-268.

388 *See* Sprint Oct. 15 Petition at 28, Katz and Salop Decl. at 40.

389 *See* Sprint Oct. 15 Petition, Katz and Salop Decl. at 40 and n.55 (asserting that, by controlling both ends of access, the integrated company may better be able to evade regulatory oversight of the quality of access it provides).

390 *See* Sprint Oct. 15 Petition, Katz and Salop Decl. at 41. In addition, Sprint asserts that "to the extent that state proceedings do not take place simultaneously, SBC can gain a reputation among entrants as a firm that excludes rivals, and thereby may deter the entrants from attempting to enter to begin with, or it may slow down their entry plans." *See id.* at 41 n.56. As the Texas Office of Public Utility Counsel points out, "[a]ny joinder of firms

with fewer benchmarks, there are fewer remaining incumbent LECs likely to "break rank" at industry standards setting meetings if the combined entity is seeking to delay discussion about new technologies competitors are seeking to deploy using the local loop.

We reiterate that, given the formative stage of the advanced services market and the importance of ensuring the development of competition in the provision of advanced services by multiple providers, we scrutinize carefully the possibility of an increase in incentive and ability to discriminate against competitive providers of such services. We acknowledge that, in some circumstances, the increase in incentive and ability might be de miminis, such that there would be no resulting public interest harm. In this situation, however, the increased incentive and ability for incumbents to discriminate against competing advanced services providers is such that a finding that there is no significant harm to competitors and consumers not only would undercut the Commission's ongoing efforts to encourage innovation and investment in advanced services, but runs afoul of the Commission's obligations under section 706 to "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans." We also reiterate that, with a continuing shift from a circuit-switched to a packet-switched environment, combined with non-incumbent competitors, such as Covad, using advanced services technologies to provide innovative new services, any discrimination against these competitors likely will cause a significant setback to current and future efforts to encourage competition and innovation. Finally, we note that, with an increased incentive and ability to discriminate come increased costs of enforcement, which ultimately are borne by competitors and taxpayers.

Absent carefully tailored conditions, this risk of increased discrimination against competitive LECs offering advanced services might well be sufficient, standing alone, to force us to conclude that this merger is impermissible. This is a key reason why SBC has proposed – and we will accept – several conditions protecting the advanced services market. SBC's offer to establish a separate subsidiary for advanced services is directly responsive to our concerns that we reduce the risk of discrimination while not engaging in detailed regulatory oversight.

b) Long Distance Services

In this section we examine potential effects of the merger on the provision of interexchange services. Commenters allege that discrimination may take two forms: price and non-price. We examine these cases separately and conclude that the merged firm's increased incentive and ability to engage in non-price discrimination will harm competition in the provision of interexchange services, and, therefore, consumers of such services. With respect to price discrimination, specifically discrimination through a price squeeze, we conclude that there

holding full monopoly or dominance, including the … SBC/Ameritech merger[], tends to strengthen the ability to deter or block entry … [and] further shrinks the small group of possible significant entrants." *See* Texas Counsel Oct. 14 Petition, Shepherd Aff. at 6.

are adequate safeguards in place to guard against such conduct, both with and without the merger.

(1) Non-Price Discrimination

On this issue, we are reminded initially of the complaints against AT&T's discrimination towards nascent competitive long distance carriers that led to the breakup of the Bell System. The old vertically integrated Bell system, with its large footprint, made it difficult for interexchange rivals to obtain access to necessary inputs, thus prompting its ultimate breakup.[391] As described by Judge Greene, the government's case "alleged that AT&T used its control over its local monopoly to preclude competition in the intercity market."[392] Judge Greene explained: "[w]ith the divestiture of the Operating Companies AT&T will not be able to discriminate against intercity competitors, either by subsidizing it own intercity services with revenues from the monopoly local exchange services, or by obstructing its competitors' access to the local exchange network. The local operating companies will not be providing interexchange services, and they will therefore have no incentive to discriminate."[393] The success of the divestiture can be seen in the strength of competition in the interexchange market, leading to lower rates for all consumers.

Once SBC and Ameritech have met the requirements of section 271, they will be permitted to enter the long distance market. They will view interexchange carriers as retail competitors, not only as access customers. This will give these firms incentives, like those AT&T used to possess, to deny, delay, or degrade access service to interexchange carrier competitors. Because the merger of SBC and Ameritech will reconstitute about one-third of the Bell system's local network, we must examine carefully the claim that the merged firm will gain an increased ability to harm its interexchange rivals.

We find that the merged entity will have an increased incentive to discriminate against interexchange carriers after the merger. To illustrate with an example, an interexchange carrier may have a customer wishing to have a dedicated long distance connection between its headquarters in Cleveland and a subsidiary in Los Angeles. Before the merger, SBC has no incentive to discriminate in the provision of access at the Los Angeles end, because such discrimination may simply create business for Ameritech if the company in Cleveland decides to switch carriers. After the merger, however, discrimination by the combined entity in Los Angeles may result in more business for the combined entity in Cleveland. Of course, SBC may not know that the customer originating the call is in Cleveland. Nevertheless, as its region grows the chance of the originating customer being in its region correspondingly grows, increasing the incentive to discriminate at the terminating end of such calls.[394]

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391 Sprint Apr. 2 *Ex Parte,* Hayes, Jayaratne, and Katz Report at 17.

392 *United States v. American Tel. and Tel. Co.*, 552 F. Supp. at 161

393 *See id*. at 165.

394 Of course, if it could identify the location of the originating customer, then discrimination at the terminating end would be more efficient as it could be targeted accordingly. The merger would still increase the

(a) Incentive and Ability to Discriminate

For the reasons discussed below, we conclude that, once BOCs such as SBC and Ameritech receive authority to provide in-region, interexchange services, they will have the incentive and ability to discriminate against competing interexchange carriers that depend on the BOCs' exchange access services to provide interexchange services to consumers. A BOC, by eliminating efficient interconnection, may gain market share in the interexchange market using discriminatory tactics.[395] We find that, regardless of the merger, after receiving section 271 authority, there will be an incentive for a BOC to discriminate against *origination* of interexchange calls. This is true because, for calls originating in-region, a BOC will be able to benefit from discrimination by securing more customers on the originating side. A BOC has the incentive to discriminate against *termination* of a particular call only to the extent that the call originated in the same incumbent's region. If an incumbent LEC providing terminating access to an interexchange carrier denies or degrades that access, then the incumbent LEC competing with the interexchange carrier at the originating end also may benefit.[396] We focus on terminating access discrimination here because we find that SBC and Ameritech's incentive for this type of discrimination will increase significantly as a result of the merger.

The record reflects that incumbent LECs, such as SBC and Ameritech, given their monopoly control over exchange access services, currently have the ability to discriminate against rivals providing interexchange services, in favor of their own interexchange operations, by denying, degrading, or delaying access on the originating and terminating ends, just as in the pre-divestiture situation.[397] The pre-divestiture situation described above demonstrates not only an incentive to discriminate against interexchange carriers once they become competitors, but also the ability to do so.[398]

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incentive to engage in such termination, as more customers would originate and terminate calls in the combined region.

395 *See* Sprint Oct. 15 Petition, Katz and Salop Decl. at 41-42. As an example of alleged discrimination by a non-BOC incumbent LEC currently providing in-region long distance services, we note that Pilgrim Telephone, Inc. (Pilgrim), an interstate interexchange carrier providing casual calling services has alleged discrimination in the context of the Bell Atlantic/GTE merger proceeding. Specifically, Pilgrim asserts that GTE, a major incumbent LEC that already is competing in in-region interexchange services, in July 1998, ceased providing billing and collection services to Pilgrim, after repeated requests by Pilgrim not to do so. *See* Pilgrim Telephone Request for Conditions on Bell Atlantic/GTE Merger, CC Docket No. 98-184, filed Nov. 23, 1998 at 2 (Pilgrim Nov. 23 Comments in Bell Atlantic/GTE Proceeding). Pilgrim asserts that, as a result, it: (1) no longer serves collect callers wanting to reach friends or family who obtain local telephone service from GTE; (2) no longer provides any communications services that would need to be billed to GTE's local phone customers through GTE, including any casual calling services, any calls billed to line-based calling cards, and any 1+ calls. *Id*.

396 *See* Sprint Oct. 15 Petition, Katz and Salop Decl. at 41-42.

397 *See, e.g.*, Sprint Oct. 15 Petition at 24-26.

398 We note that with respect to intraLATA toll competition, Sprint asserts that incumbents continue to seek to delay competitive entry into that market. *See* Sprint Apr. 2 *Ex Parte,* Hayes, Jayaratne, and Katz Report at 19-20.

Moreover, we agree with Sprint and MCI that recent developments in local networks have enhanced incumbents' ability to engage in technical discrimination in favor of their long distance affiliates, in particular with respect to larger business customers.[399] The interexchange competitors we must consider here are not those "of the early days of interexchange competition . . . [that] were largely satisfied if they could obtain the basic forms of interconnection required to achieve equal access and to offer 'plain vanilla' long distance services."[400] Rather, we must take into account that long distance carriers, due to "changing customer requirements . . . by necessity, have increased their use of network-based intelligence . . . [to offer] differentiated, software-based services [which] depend[] upon the cooperation of the local exchange carrier."[401]

The specific developments in the local network that have enhanced incumbents' ability to technically discriminate against rival interexchange providers that need different and generally more complex forms of network interconnection are: (1) the deployment of common channel signaling systems;[402] (2) the development of advanced intelligent networks (AIN), or software driven networks; and (3) further developments in multi-media applications (such as applications involving combinations of voice, data, image, and video traffic).[403] BOCs will be able to "fine tune" their networks to favor their own interexchange operations and their own end user customers, by, for example, discriminating in negotiating and agreeing to make necessary changes in local switches.[404] BOCs also may discriminate by, among other things, (1) refusing to provide interconnection at critical points in their intelligent network based on alleged harm to the network or refusing to convey certain types of control messages across the AIN; or (2) "slow rolling" their competitors who make requests for interconnection or technical information.[405]

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399 *See* Sprint Oct. 15 Petition at 24-25 (citing Aff. of Dale N. Hatfield, Exhibit H to Comments of MCI Telecommunications Corp., filed in CC Docket No. 97-137, Application of Ameritech Michigan Pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-Region, InterLATA Services in Michigan (Hatfield Aff.)).

400 Hatfield Aff. at 22.

401 *Id*.

402 These systems are referred to as "out of band" signaling networks, and they simultaneously carry signaling messages for multiple calls. In general, most LECs' signaling networks adhere to a Bellcore standard Signaling System 7 (SS7) protocol. SS7 networks use signaling links to transmit routing messages between switches, and between switches and call-related databases (such as the Line Information Database, Toll Free Calling Database, and Advanced Intelligent Network databases). These links enable a switch to send queries via the SS7 network to call-related databases, which return customer information or instructions for call routing to the switch. A typical SS7 network includes a signaling link that transmits signaling information in packets, from a local switch to a signaling transfer point (STP), which is a high-capacity packet switch. The STP switches packets onto other links according to the address information contained in the packet. These additional links extend to other switches, databases, and STPs in the incumbent LECs' networks. A switch routing a call to another switch will initiate a series of signaling messages via signaling links through a STP to establish a call path on the voice network between the switches. *See Local Competition First Report and Order*, 11 FCC Rcd at 15738-41, paras 479-83.

403 Hatfield Aff. at 14.

404 *See id*. at 15. *See also id*. at 18-19 (stating the need for competitors to access AIN triggers, and, therefore, to access the local service provider's switch which is equipped with the appropriate trigger detection software).

405 *See id*. at 19-21.

We conclude, therefore, that the ability for SBC and Ameritech to discriminate, once they receive authority to provide in-region, interexchange services, will be greatest for customized or advanced interexchange access services for which detection of discrimination is most difficult. With the increased network complexity, and the possibility for new types of discrimination, comes also an increased difficulty in detecting discrimination. In such a situation, past experience with the interconnection of plain vanilla, or POTS service, becomes increasingly less useful as a regulatory tool for preventing, detecting, and remedying discrimination.[406]

We finally note that typically, such new advanced features are developed initially for business consumers, and later offered to residential consumers. Therefore, discrimination that adversely affects the competitive availability of advanced services to businesses also affects the timing, cost, and even availability of such services for residential consumers.

Applicants respond that "the increasing deployment of modern signaling systems (Signaling System 7 [SS7]), AIN capabilities and ATM network components permitting multimedia telecommunications does not increase the risk of discrimination."[407] Applicants assert that there is nothing inherent in technological advances that facilitates discrimination,[408] and that RBOCs do not have a monopoly on new technologies.[409] We disagree. We find that the technical advances described by Sprint and MCI do facilitate discrimination by making detection more difficult. To the extent that an interexchange competitor asks for an access arrangement that is customized or innovative, it may be difficult to show that the incumbent LEC is discriminating in the provision of a similar access service being provided to its own affiliate, if the affiliate is not actually requesting a similar service.

In addition, Applicants assert that selective call degradation is often not possible[410] and that efforts to degrade competitors' calls likely would degrade calls of the incumbent's customers as well,[411] particularly when the incumbent is reselling a competitor's interexchange service.[412] Any attempt at degradation, according to Applicants, also would be readily noticeable both to competitors and regulators.[413] Applicants miss the point. Selective

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406 *See id*. at 34.

407 SBC/Ameritech Nov. 16 Reply Comments at 67, Deere Reply Aff. at 3.

408 *See* SBC/Ameritech Nov. 16 Reply Comments at 67, Deere Reply Aff. at 3-4.

409 *See* SBC/Ameritech Nov. 16 Reply Comments at 67-68. In this regard, Applicants assert that the major interexchange carriers all have their own SS7, AIN and ATM capabilities, and that SBC and Ameritech offer these facilities or capabilities as part of their interconnection offerings. *See id.* at 68.

410 SBC/Ameritech Nov. 16 Reply Comments, Schmalensee and Taylor Reply Aff. at 19.

411 *See* SBC/Ameritech Nov. 16 Reply Comments, Deere Reply Aff. at 4. Applicants note that the same switches, signal transfer points, signaling links, signaling protocols and routing tables that SBC uses for itself are used to provide signaling for competitive LECs. *Id*.

412 *See* SBC/Ameritech Nov. 16 Reply Comments, Schmalensee and Taylor Reply Aff. at 20. *See also id*. at 23 (asserting that the only incumbents that would benefit from the spillover effects of selective degradation would be those not reselling the competitor's service).

413 *See* SBC/Ameritech Nov. 16 Reply Comments at 67-68, Deere Reply Aff. at 3-4.

call degradation (the question of how SBC and Ameritech could know which calls to degrade) is not the issue. Rather, we focus on the ability of a BOC such as SBC or Ameritech to discriminate against competitors' on the terminating end by denying competitors access to inputs necessary to terminate interexchange calls in the incumbent's region, or by delaying access to such inputs. For example, the BOC may fail to provision enough equipment for a competing interexchange carrier so that a higher percentage of the competitor's calls are blocked from terminating in the incumbent's region. When a competitor orders trunks in the incumbent's end office, the incumbent may fail to make available the number of trunks requested by the competitor, or it may delay installing the trunks in the end office. This type of discrimination is more subtle and less detectable than blatant selective call degradation. Also the discrimination need not involve call degradation of an existing service, rather it may involve slow rolling the provisioning or upgrading of that service.

Applicants also contend that incumbents may not find it in their interest to discriminate, because by doing so the incumbent easily could alienate large customers such as AT&T who may turn to competitive access providers.[414] Although it is true that competitive access providers offer an alternative to incumbent LECs for some such customers, it is not true for all such customers.[415] Therefore, incumbent LECs have an incentive to engage in discrimination against termination of interexchange calls where such alternatives are less available.

(b) Post-Merger Incentive and Ability to Discriminate

But for the merger, SBC would have no incentive to discriminate against termination of interexchange calls originating in Ameritech's region. This is true because SBC would not benefit at the originating end (by gaining more customers) from such discrimination on the terminating end.[416] After the merger, however, calls that had originated in Ameritech's region will now originate in the combined region, and the combined entity could therefore realize the benefits of discrimination on the terminating end, making it more likely that a customer on the originating end would choose the combined entity for interexchange service. The same is true for Ameritech with respect to calls originating in SBC's region. Therefore, we agree with Sprint that, as a result of the merger, the combined entity will have an incentive to

414 *See* SBC/Ameritech Nov. 16 Reply Comments, Schmalensee and Taylor Reply Aff. at 18. Applicants assert that the "wide availability of competitive access alternatives . . . dooms any discriminatory scheme to certain failure." SBC/Ameritech Nov. 16 Reply Comments at 66-67 (citing Schmalensee and Taylor Reply Aff. at 18).

415 For instance, not all cities are served by competitive LECs, and competitive LEC presence also is lacking in lesser-populated outskirts of other cities.

416 SBC and Ameritech would have an incentive to discriminate against termination of interexchange calls originating in each other's regions today to the extent that each one provided out-of-region long distance services and could benefit from such discrimination by gaining new customers at the originating end in each other's present territories. However, as both firms are providing out-of-region long distance services to only "a small degree" at this time, the impact of the merger would be to increase the incentive to discriminate as described above. *See* SBC/Ameritech Application, Description of the Transaction at 61.

discriminate against termination of certain calls that neither individual company would have absent the merger.[417] The issue here is that end users will be less likely to choose a competing carrier at the originating end whose service does not appear as good as the incumbent's service that is free from terminating problems. The issue is not, as Applicants assert, the effect on choice of interexchange carrier by the terminating customer.[418]

We agree with parties arguing that, with respect to interexchange calls, the merged firm (after receiving section 271 authority) will have an increased incentive to discriminate in terminating the calls of competing interexchange carriers, stemming from the fact that benefits will flow from controlling both ends of a higher percentage of interexchange calls.[419] According to Sprint, the combined entity would terminate 45 percent of minutes that the combined entity controls on the originating end, a 50 percent increase from the 30 percent of minutes for which Ameritech currently controls both the originating and terminating ends.[420] Applicants respond that the merger will increase the percentage of interLATA traffic originating and terminating in-region by only 2.8 percentage points for SBC (41.3 percent to 44.1 percent) and 6.9 percentage points for the combined company (37.2 percent to 44.1 percent).[421] Applicants assert that this increase "is no greater an increase than in the SBC/[Pacific] Telesis merger, where the Commission found that an increase of 'only six to seven percentage points' did not pose any anticompetitive risk."[422] We disagree with the Commission's conclusion in the *SBC/Pacific Telesis Order,* that there was no anticompetitive risk from the increase in the percentage of minutes for which the combined entity would control both the originating and terminating end, and we therefore reverse that conclusion.[423] Here, the harm would be significant because of the substantial number of customers that will be affected by the discrimination made possible by the increase in the percentage of interLATA traffic originating and terminating in the combined SBC/Pacific Telesis/Ameritech region.[424] We therefore agree with MCI WorldCom that, because

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417 *See* Sprint Oct. 15 Petition at 25-26.

418 *See* SBC/Ameritech Nov. 16 Reply Comments, Schmalensee and Taylor Reply Aff. at 20.

419 *See, e.g.*, AT&T Oct. 15 Petition at 31-32; Competitive Telecommunications Association (CompTel) Nov. 16 Reply Comments at 6-7; MCI WorldCom Oct. 15 Comments at 24-25. An incentive to discriminate on the originating end is not an issue in a merger proceeding because, regardless of the merger, there always will be an incentive for an incumbent offering interexchange services to discriminate against traffic originating in its region. *See supra* Section V.D.2.b)(1)(a) (Incentive and Ability to Discriminate).

420 *See* Sprint Oct. 15 Petition at 25.

421 *See* SBC/Ameritech Nov. 16 Reply Comments at 63-64, Schmalensee and Taylor Reply Aff. at 9-11.

422 *See* SBC/Ameritech Nov. 16 Reply Comments at 64 (quoting *SBC/PacTel Order,* 12 FCC Rcd at 2647, para. 50), Schmalensee and Taylor Reply Aff. at 10-11.

423 The result in the *SBC/PacTel Order* was correct, however, because in that merger, any resulting harm from that increase in percentage points would not, in and of itself, have been fatal to the merger. As explained below, the scale of the harm in that merger was much less than the harm presented here.

424 In contrast, the anticompetitive harm in SBC/Pacific Telesis was much less profound. Substantially fewer customers were affected by the discrimination made possible in SBC/Pacific Telesis, given that the combined entity controlled a substantially smaller number of access lines than will be controlled by the merged SBC and Ameritech entity. As discussed below, we also note that the number of access lines at issue here is greater than the number of access lines at issue in the Bell Atlantic/NYNEX proceeding. *See* CompTel Nov. 16 Reply Comments at 6-7; MCI WorldCom Oct. 15 Comments at 25.

interexchange carriers would be more dependent on a single entity for exchange access than they would absent the merger, hard-to-detect methods of non-price discrimination would be even more crippling to competing long distance companies.[425]

We agree with MCI WorldCom that the ability to engage in less detectable and more significant non-price discrimination would be greatly enhanced by the merger. For the same reasons discussed above with respect to advanced services, we conclude that, as a result of the merger, the ability to discriminate against rivals in the origination and termination of interexchange calls will be enhanced. The reduction in the number of benchmarks, the ability to coordinate and rationalize the discriminatory conduct of the two companies, and the economies of scope in fighting regulatory battles in multiple state fora, all should enable the combined entity to utilize its increased incentive to discriminate, thus reaping the benefits of such conduct in the combined region.[426] At the very least these factors will make it more difficult to safeguard against discrimination.

We recognize that the Commission concluded in the *Bell Atlantic/NYNEX Order* that given existing safeguards, the merger between Bell Atlantic and NYNEX would not result in an increased incentive and ability to engage in non-price discrimination against long distance competitors. We find that the larger scale of the instant merger, however, increases the risks to long distance competition. Non-price discrimination is a violation of several provisions of the Communications Act, as well as a number of rules adopted by the Commission.[427] Although we believe that these safeguards should help reduce a BOC's ability to discriminate,[428] we conclude

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425 *See* MCI WorldCom Oct. 15 Comments at 25 (asserting that common ownership facilitates SBC's and Ameritech's ability to focus their non-price discrimination efforts across the two regions.)

426 *See supra* Section V.D.2.a)(3) (Post-Merger Incentive and Ability to Discriminate).

427 Section 272(c) of the Communications Act states that a BOC, in dealing with its long distance affiliate: (1) may not discriminate between that company or affiliate and any other entity in the provision or procurement of goods, services, facilities, and information, or in the establishment of standards; and (2) shall account for all transactions with an affiliate described in subsection (a) of this section in accordance with accounting principles designated or approved by the Commission. 47 U.S.C. § 272(c). We have adopted a number of rules implementing these provisions and otherwise designed to prevent non-price discrimination. *See* 47 C.F.R. §§ 53.200, et seq. *See also Implementation of the Telecommunications Act of 1996: Accounting Safeguards Under the Telecommunications Act of 1996, Report and Order,* 11 FCC Rcd 17539 (1996) (*Accounting Safeguards Order*); *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended, First Report and Order and Further Notice of Proposed Rulemaking*, 11 FCC Rcd 21905 (1996) (*Non-Accounting Safeguards Order*); *Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area and Policy and Rules Concerning the Interstate, Interexchange Marketplace, Second Report and Order in CC Docket No. 96-149 and Third Report and Order in CC Docket No. 96-61*, 12 FCC Rcd 15756 (1997) (*LEC In-Region, Interexchange Order*).

428 *See* SBC/Ameritech Nov. 16 Reply Comments at 66, citing 47 U.S.C. § 272(c), (e). Section 272(e) states that a BOC: (1) shall fulfill any requests from an unaffiliated entity for telephone exchange service and exchange access within a period no longer than the period in which it provides such telephone exchange service and exchange access to itself or to its affiliates; (2) shall not provide any facilities, services, or information concerning its provision of exchange access to the affiliate described in subsection (a) of this section unless such facilities, services, or information are made available to other providers of interLATA services in that market on the same terms and conditions; (3) shall charge the affiliate described in subsection (a) of this section, or impute to itself (if

nevertheless that in this case, the incentive and ability to engage in such discrimination will increase as a result of the merger between SBC and Ameritech. As is often the case with mergers, the increase in harm ultimately becomes big enough as the number of firms drops. Thus, the relative lack of harm that the Commission found in the *Bell Atlantic/NYNEX Order* does not persist through all succeeding mergers. In addition, the scale of the merged firm resulting here will far exceed the scale of the Bell Atlantic/NYNEX combined entity. We also note that in the *Bell Atlantic/NYNEX Order*, the Commission did not specifically address the issue of discrimination on the terminating end of long distance calls, an issue that we consider to be significant here.

This merger would partially reverse the breakup of the Bell System prompted by complaints against AT&T's discrimination towards nascent competitive long distance carriers. As noted above, the old Bell system, with its large footprint, made it difficult for rivals to obtain access to necessary inputs, thus prompting its ultimate breakup. This merger would result in a large footprint that would take a big step toward recreating the Bell System whose discrimination against interexchange carriers led to divestiture in the first place. We find this inconsistent with our mandate under the Act to reduce regulatory involvement in telecommunications markets.

We find that several of the conditions SBC proposes likely will stimulate competition, and thus are consistent with our desire to avoid both increased discrimination and increased regulation. The market-opening conditions that we agree to today will provide the one sure remedy for the incumbent LEC's threat of discrimination: the competitive LEC's promise of an alternative access provider. When local markets are open, discrimination in access cannot succeed because others will compete to provide fair access. Thus, these conditions are consistent with our pro-competitive, deregulatory mandate, by substituting competition for regulation as the means to constrain the market power of the incumbent LECs, including the merged entity.

(2) Price Discrimination (Price Squeeze)

In addition to non-price discrimination, opponents of the proposed merger have raised arguments about a particular form of strategic pricing involving the Applicants' leveraging monopoly control over bottleneck local loop facilities to inhibit competition from long distance rivals. AT&T, MCI, and CompTel argue that once the combined entity begins selling in-region long distance service through an interexchange affiliate, it will take advantage of the "high" prices for interstate exchange access services (above cost prices), over which it has monopoly power (albeit constrained by regulation), by offering "low" prices for retail long distance services

using the access for its provision of its own services), an amount for access to its telephone exchange service and exchange access that is no less than the amount charged to any unaffiliated interexchange carriers for such service; and (4) may provide any interLATA or intraLATA facilities or services to its interLATA affiliate if such services or facilities are made available to all carriers at the same rates and on the same terms and conditions, and so long as the costs are appropriately allocated. 47 U.S.C. § 272(e).

in competition with the other long distance carriers, thereby setting up a price squeeze.[429] Because interstate exchange access services are a necessary input for long distance services, opponents argue that the relationship between the combined entity's "high" exchange access prices and its affiliate's "low" prices for long distance services forces competing long distance carriers either to lose money or to lose customers even if they are more efficient than the combined entity's long distance affiliate at providing long distance services.[430] For the reasons discussed below, we conclude that price squeeze tactics are likely to fail under the circumstances presented here as a predatory tactic aimed at eliminating competition among interexchange competitors.

As discussed above with respect to non-price discrimination, we conclude that because incumbent LECs, such as SBC and Ameritech, either currently, or, in the future will, compete with interexchange carriers such as MCI and AT&T for the provision of interexchange services, they have the incentive to discriminate through a price squeeze against such companies that depend on the incumbents' exchange access services to provide interexchange services to consumers. Likewise, as with respect to their increased incentive to engage in non-price discrimination as a result of the merger, we conclude that SBC and Ameritech will have an increased incentive to discriminate against the termination of calls through a price squeeze that neither individual company would have absent the merger.

We find, however, that, given the existing regulatory safeguards, they do not have a significant ability to act on this incentive. In the *Bell Atlantic/NYNEX Order,* the Commission considered the combined entity's ability to engage in a price squeeze against competitors providing retail interexchange services, and found that, "in light of the conditions we impose today, together with the reasons set forth in the *Access Charge Reform Order*, we believe that price squeeze tactics are likely to fail under the circumstances presented here as a predatory tactic aimed at eliminating competition among interexchange competitors."[431] Although the Commission did not focus on specific discrimination on the terminating end in the *Bell Atlantic/NYNEX Order*, we reach the same ultimate conclusion here -- that adequate safeguards are in place to prevent price squeezes. [432]

Although, as noted elsewhere, we do not wish to rely on regulatory safeguards to prevent public interest harms, we note here that one important safeguard mitigates harms in this

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429 *See* AT&T Oct. 15 Petition at 31-32; CompTel Nov. 16 Reply Comments at 6-7; MCI WorldCom Oct. 15 Comments at 24-25, Baseman and Kelly Decl. at 23-27. *See also* Sprint Oct. 15 Petition, Katz and Salop Decl. at 19-20. A price squeeze, as opponents use the term, refers to a particular, well-defined strategy of predation that would involve the combined entity setting high prices for access services while charging relatively low prices for retail services. It is this relationship between the input prices and the affiliate's prices, and not the absolute levels of those prices, that defines a price squeeze. *See Bell Atlantic/NYNEX Order,* 12 FCC Rcd at 20044, para. 116.

430 We note that access charges already are above cost. Therefore, in order to implement a price squeeze, an incumbent need only offer low prices for its long distance services.

431 *Id*. at 20045, para. 117.

432 *See* SBC/Ameritech Nov. 16 Reply Comments at 64-65.

case. In the *Access Charge Reform Order*, the Commission addressed the contention that an incumbent's interexchange affiliate could implement a price squeeze once the incumbent began offering in-region, interexchange toll services, and concluded that, although an incumbent LEC's control of exchange and exchange access facilities may give it the incentive and ability to engage in a price squeeze, the Commission has in place adequate safeguards against such conduct.[433] The Commission determined in the *Access Charge Reform Order* that the existence of price caps reduces the ability to raise prices on access.[434] In addition, we note that, as a result of the *Access Charge Reform Order* and *Price Cap 4th Report and Order*, access charges are being reduced.[435] We also note that, because it is relatively easy to compare a BOC's access charges with its own retail prices, price discrimination is relatively easy for the Commission and others to detect, and therefore, is unlikely to occur.[436] In addition, several important non-regulatory safeguards exist. As the Commission noted in the *AT&T/TCI Order*, the presence of extensive sunk facilities in both the local and interexchange markets suggests that the merged firm would be unable successfully to raise prices if any competitors were driven out of the market by the price squeeze.[437] The Commission stated in the *Access Charge Reform Order*: "[w]e take comfort in the fact that such remedies exist should an anticompetitive price squeeze occur in spite of the safeguards we have adopted."[438]

Existing regulatory and non-regulatory safeguards greatly reduce the ability of incumbent LECs, such as SBC and Ameritech, to engage in a price squeeze. Therefore, we conclude that there is no substantial probable public interest harm resulting from the increased

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433 *Access Charge Reform Order,* 12 FCC Rcd at 16100-04, paras. 275-282. For example, the Commission noted that the prohibition on joint ownership of switching and transmission facilities reduces the risk of improper allocations of the costs of common facilities between the incumbent and its interexchange affiliate, and helps deter any discrimination in access to the incumbent's transmission and switching facilities by requiring the affiliates to follow the same procedures as competing carriers to obtain access to those facilities. *See id.* at 16102, para. 279 (citing *Non-Accounting Safeguards Order*, 11 FCC Rcd at 21982-84, paras. 159-162). The Commission also noted that the requirement that an incumbent LEC offer services at tariffed rates, or on the same basis as requesting carriers that have negotiated interconnection agreements pursuant to section 251, reduces the risk of a price squeeze to the extent that an affiliate's long distance prices would have to exceed its costs for tariffed services. *See Access Charge Reform Order*, 12 FCC Rcd at 16102, para. 279.

434 *Id.* at 15993-94, para. 26 (stating that "price caps act as a transitional regulatory scheme until the advent of actual competition makes price cap regulation unnecessary.") Price caps fundamentally alter the process by which incumbent LECs determine the revenues they are permitted to obtain from interstate access charges for access services.

435 *See Price Cap Performance Review for Local Exchange Carriers, Access Charge Reform, Fourth Report and Order in CC Docket No. 94-1 and Second Report and Order in CC Docket No. 96-262*, 12 FCC Rcd 16642 (1997) (*Price Cap 4th Report and Order*), *aff'd in part, rev'd in part, USTA v FCC,* No. 97-1469, 1999 WL 317035 (D.C. Cir. May 21, 1999).

436 *See* SBC/Ameritech Nov. 16 Reply Comments at 64 (citing *SBC/PacTel Order*, 12 FCC Rcd at 2648-49, para. 53).

437 *See AT&T/TCI Order*, 14 FCC Rcd at 3215-16, para. 118.

438 *Access Charge Reform Order*, 12 FCC Rcd at 16103-04, para. 282. The Commission, in the *AT&T/TCI Order* noted that, in addition to federal antitrust laws prohibiting predatory conduct, numerous states have enacted parallel statutes to prohibit predatory pricing. *See AT&T/TCI Order*, 14 FCC Rcd at 3215-16, para. 118 and n.328.

incentive that SBC and Ameritech may have to discriminate against the termination of calls through a price squeeze as a result of the merger.

c) Circuit-Switched Local Exchange Services

For the reasons discussed below, we conclude that the merger will increase the combined entity's incentive and ability to discriminate against competitive LECs seeking to provide local exchange services in the combined region. We believe that this increased discrimination particularly will be aimed at, and harmful to, competitive providers of local exchange services to mass market customers (smaller businesses and residential customers).[439] Competitive LECs providing local services to larger business customers have more experience negotiating with incumbents from which they can benefit. Discrimination against competitive providers of local exchange services to larger business customers is still possible, however, because competitive local exchange carriers need access to termination from the incumbent even for such larger customers.

We also note that the local exchange market is just that, a local market. For the most part, companies competing with the incumbent LEC in the provision of retail local exchange service compete on a local basis, focusing on a particular area or region. For such carriers, discrimination in one region should not affect their success in other regions. For other competitive LECs, however, competing for local exchange service transcends local areas and takes a more national scope.[440] For such national competitive LECs, reputation, scale and scope, and technology are significant for their national strategy; a company's reputation in one region may affect its reputation in another region, and experience it gains with a new technology in one region may help it in another region. As an example, e.spire is a facilities based competitive LEC with 32 fiber networks in 20 states over which it provides local exchange and exchange access services.[441] Efforts by SBC to discriminate against e.spire in any of the five SBC states in which e.spire currently operates, or to prevent its entry into new markets, by raising e.spire's costs or harming its reputation, may limit e.spire's entry attempts into other regions, including Ameritech's.[442] E.spire asserts that both SBC and Ameritech have engaged in discriminatory conduct.[443] It is this group of competitors, with a national scope, with which we are concerned.

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439 *See* Sprint Oct. 15 Petition at 21-24.

440 *See infra* Section VI.A.1. (Benefits are not Merger-Specific).

441 *See* e.spire Oct. 15 Comments at 1.

442 *See id.* at 13-14.

443 *See id.* at 14-16. e.spire lists conduct that it alleged SBC engaged in as part of a Texas Public Utility Commission proceeding established to investigate whether SBC's Texas operating subsidiary, Southwestern Bell Telephone Company (SWBT) should be certified for entry into the interLATA telecommunications market. *See id.* at 14. e.spire also asserts that, when it sought to adopt another carrier's existing agreement with Ameritech in its entirety under section 252(i), Ameritech notified e.spire that adoption would be possible only if e.spire agreed either to accept Ameritech's position on reciprocal compensation for ISP traffic or agreed to place all amounts in escrow. *See id.* at 15.

(1) Incentive and Ability to Discriminate

Because incumbent LECs compete with competitive LECs for the provision of retail local exchange services, incumbent LECs have the incentive to discriminate against competitive LECs that depend on the incumbents' inputs (such as interconnection and UNEs) to compete. We find that a discriminatory interconnection policy will be profitable for an incumbent LEC insofar as its revenue gains in the provision of retail local exchange services exceed whatever revenues it forgoes from wholesale interconnection with rivals.[444]

The record reflects that incumbent LECs' control over access to interconnection and other essential inputs gives them the ability to discriminate against rivals providing local exchange services.[445] According to Sprint, incumbent LECs can discriminate against rival local carriers either by raising the price of interconnection charged to rivals (price discrimination) or by impairing their access to interconnection and other essential inputs.[446] We agree with Sprint that, because interconnection prices are subject to regulatory oversight, an incumbent's ability successfully to engage in price discrimination against competitive LECs seeking to enter its region is significantly weaker than its ability successfully to engage in non-price discrimination by, for example, discriminating in interconnection or refusing to negotiate with the competitor.[447] As evidence of incumbents' ability to engage in non-price discrimination against rival competitive LECs, Sprint asserts, for example, that incumbents have: (1) engaged in unreasonable collocation practices;[448] (2) provided poor access to their last mile and collocation space facilities;[449] (3) failed to provide sound and capable OSS for competitive LEC uses; and (4) failed to provide parity service regarding installation and maintenance of facilities.[450] In addition, as noted above, e.spire has alleged discriminatory conduct by both SBC and Ameritech.[451]

Discrimination against competitive providers of local exchange services is more likely to occur with respect to provision of such services to mass market customers than to larger business customers. This is true because there are more competitors serving larger business customers, with more experience dealing with incumbents for provision of such services. In addition, section 252(i), which allows a competitive LEC to opt into the interconnection agreements of other competitive LECs, and pick and choose portions of the agreements the competitive LEC finds attractive, is likely to be more helpful for providers of local exchange

444 *See* Sprint Oct. 15 Petition at 21.
445 *See, e.g., id.*
446 *See id.*
447 *See id.* at 20-21.
448 *See* Sprint Oct. 15 Petition, Brauer Aff. at 15-17 (giving examples of not making space available, refusing to accommodate equipment, insisting on overly stringent certification requirements, imposing excessive charges for collocation, and engaging in delivery delays).
449 *See id*. at 1-2.
450 *See id*. at 11-14.
451 *See* e.spire Oct. 15 Comments at 14-16.

service to larger business customers, as the agreements were more likely to have been negotiated by providers also using them for serving larger business customers.[452] Finally, because competitive LECs have little experience in successful provision of local exchange services to mass market customers, there exist few examples of incumbent LECs' best practices in provisioning inputs for competitive LECs to use for serving mass market customers that could be used as benchmarks to detect discriminatory and unreasonable behavior.

It is important to recognize, however, that to serve mass-market customers and larger businesses alike, competing local exchange carriers need access to inputs necessary to terminate local calls in the incumbent's network. Just as we determined that incumbents may deny or delay access to such inputs for competitors' provision of interexchange services, they also may do so for competitors' provision of local exchange services to all types of customers. The incumbent LEC, for example, may fail to provision enough equipment for a competing LEC so that a higher percentage of the competitor's calls are blocked from terminating in the incumbent's region. When a competitor orders trunks in the incumbent's end office, the incumbent may fail to make available the number of trunks requested by competitor, or it may delay installing the trunks in the end office. This type of discrimination is more subtle and less detectable than blatant selective call degradation.

We believe, however, that, on a going forward basis, as SBC and Ameritech receive section 271 authority, their ability to discriminate successfully against rival local service providers should diminish.[453] We note that, in an En Banc hearing, Steven Carter, SBC Operations, Inc. President-Strategic Markets, asserted that completion of the merger and launch of the National-Local Strategy "gives [SBC] an added incentive, perhaps, to work just a little harder to make sure that we do comply and fulfill 271 appropriately."[454] As a result, Applicants argue that competitive LECs will have "further assurance of non-discriminatory local access, the ability to purchase UNEs and the ability to resell services."[455] This would seem to imply, as argued by Sprint, that in the meantime, competitive LECs will not have such further assurance of nondiscriminatory local access.[456] Even after receiving section 271 authority, the threat of

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452 *See* 47 U.S.C. § 252(i).

453 We note that our concerns about discrimination against competitive providers of interexchange services, including interexchange advanced services, arise only once the combined entity has received section 271 authority. It is at the point of receiving section 271 authority that the combined entity's incentive to discriminate begins, because it is at that point that the combined entity becomes a competitor in the provision of retail interexchange services.

454 *See ILEC Merger En Banc Hearing*, Transcript, Dec. 14, 1998 at 91-92. *See also*, *Round Table on the Economics of Mergers Between Large ILECs Held on February 5, 1999*, Live Videotape Providing to Heritage Reporting Corporation on February 8, 1999 at 131 (Dennis Carlton asserting that because the National-Local Plan requires SBC to provide in-region long distance service, "it means it will have to satisfy the 271 checklist.")

455 *See* Letter from Wayne Watts, General Attorney and Assistant General Counsel, SBC Communications, to Magalie Roman Salas, Secretary, Federal Communications Commission, CC Docket No. 98-141, at 2 (filed Oct. 15, 1998) (SBC/Ameritech Oct. 15 *Ex Parte*), Attach. B at 8.

456 *See* Sprint Apr. 2 *Ex Parte,* Hayes, Jayaratne, and Katz Report at 8.

discrimination remains in force, however, particularly for the relatively few competitors seeking to provide local exchange services to the mass market.

(2) Post-Merger Incentive and Ability to Discriminate

As we found in the context of retail advanced services and interexchange services, we agree with Sprint's general theory that there are external effects to discrimination against the provision of retail local exchange services on a multi-region basis, and that, post-merger, the combined entity, in control of a larger local region, would realize more of the gains from such external effects, thus increasing its incentive to act in a manner in one area that produces these effects in another.[457] For national competitive LECs, such as large interexchange carriers, that plan to offer local service on a large scale in numerous major regions, entry into various areas likely will entail common research, product development, and marketing costs that must be covered by the sum of the competitive LEC's area-specific profits. For such national carriers, the discrimination practiced in one region may impair the competitor's national or multi-regional plans.[458] Therefore, actions that decrease the profitability of the competitive LEC in one area may make it forgo entry into another area, or make it a less effective competitor in another area.[459] Applicants counter that "there is simply no evidence that any [competitive LEC] has been deterred from entering one [incumbent LEC's] territory because of another [incumbent LEC's] behaviour . . . [competitive LECs] select the markets in which they will compete and go where they see the best opportunities."[460]

Applicants also contend that "[e]qually plausible external effects lead to the opposite policy conclusion – that by internalizing the externality, the merger will lead to less discrimination rather than more."[461] As an example, Applicants offer an incumbent LEC that discriminates against a competitive LEC in St. Louis, thereby preventing or raising its cost of entry. Applicants assert that, in such a situation, "[i]t is just as likely that such discriminatory behavior will lower the probability of successful [competitive LEC] entry in St. Louis and raise the probability that the [competitive LEC] will enter in Chicago. . . . In this case, the externality from discrimination would be positive, and internalizing that incentive through the merger would reduce the incentive to discriminate rather than increase it."[462] Nonetheless, especially given the

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457 *See* Sprint Oct. 15 Petition at 23.

458 *See* Sprint Oct. 15 Petition at 22-24 and n.36 (agreeing with Applicants that scale entry is important for viable entry), Katz and Salop Decl. at 42-45.

459 *See generally* Sprint Oct. 15 Petition at 22-28, Katz and Salop Decl. at 37-51.

460 *See* SBC/Ameritech Nov. 16 Reply Comments at 68 and n.227 (asserting that Focal was quoted after the merger announcement as saying it refuses to compete in SBC's territory, while it does in Ameritech's region, and noting that, in actuality, Focal recently began offering switched local service in San Francisco, where SBC is the incumbent LEC); *See also* SBC/Ameritech Nov. 16 Reply Comments, Schmalensee and Taylor Reply Aff. at 22-25.

461 SBC/Ameritech Nov. 16 Reply Comments, Schmalensee and Taylor Reply Aff. at 23.

462 *Id.* Applicants explain that "[i]ndividual [competitive LECs] do not serve every major market in the U.S., and they certainly do not enter all of the cities they intend to serve simultaneously. If all else is equal and the cost of entry in St. Louis were higher than that in an otherwise identical Chicago, it is certainly plausible that a substitution

increase in competitive LECs with national entry strategies, we conclude that, as discussed above with respect to services such as Sprint ION, weakening a carrier's chance of providing competitive local exchange service in one region weakens its chances of doing so in other areas as well, due to economies of scale and scope.[463] Post-merger, the combined company will be able internalize the external effects of discriminatory conduct in one area in the combined region on another area in that region. Because of the possibility of internalizing such spillover effects, the incentive for the combined entity to discriminate against competitors providing retail local exchange services in particular areas within the combined region will be greater than the incentive for each company, as a single entity.

For the same reasons discussed above with respect to advanced services and interexchange services, we conclude that, as a result of the merger, the ability to discriminate will be enhanced through, for example, the reduction in the number of benchmarks.

(3) Public Interest Harms

The increased incentive and ability for the combined entity to discriminate against rival providers of retail local exchange services in the combined region will result in varying degrees of harm. Generally, we note that the harms of such discrimination are, as with the risk of discrimination against interexchange competitors as discussed in detail above, caused in part by recent developments in local networks which have increased the risk of technical discrimination against rival local exchange providers, and the corresponding difficulty in detecting new types of discrimination.[464] Competitive providers of local exchange services to mass market customers currently have relatively little market success. The harm to these carriers, and, therefore, to consumers, is greater than the harm to competitive providers of such service to larger business customers, given that carriers serving larger business have more experience to date in dealing with incumbents. Although the harms of incumbent LEC discrimination against competitors providing local exchange services to larger businesses continues to diminish, it is still significant with respect to discrimination against these competitors' termination of local calls in the incumbent's region (as it is also for competitors serving mass market customers), as discussed above.

Many of the conditions proposed by SBC and adopted today directly address these concerns. For example, the conditions regarding performance measures, OSS reform, and collocation should constrain substantially the merged entity's ability to engage in discrimination against rival local exchange providers.

d) Other Issues

effect would raise the probability of entry into Chicago by more than the overall income effect would reduce the probability of entry everywhere." *Id*.

463 Sprint Apr. 2 *Ex Parte,* Hayes, Jayaratne, and Katz Report at 11-13.

464 *See* Hatfield Aff. at n.16 (asserting that the same techniques that can be used to discriminate against rival interexchange carriers can also be used against competing local exchange carriers).

(1) Internet Backbone Services

MCI WorldCom and CompTel argue that the combined entity will be able to exploit its monopoly power over essential Internet inputs to harm competition in the provision of Internet backbone services.[465] MCI WorldCom further argues that this threat is especially significant given (1) the emergence of advanced services as an important means of accessing the Internet, and the incumbent LECs' leveraging of their monopoly over such services to obtain more Internet business, and (2) the incumbent LEC's efforts to impose "excessive access charges" to Internet traffic.[466]

We disagree with MCI WorldCom that, as a result of the merger, the combined entity will leverage monopoly control over local inputs into the provision of Internet services.[467] As discussed above, we do conclude that, as a result of the merger, the combined entity will have an increased incentive and ability to discriminate against rivals providing advanced services, such as xDSL services, and that a significant public interest harm will result from this increased incentive and ability. We find the link from potential control over xDSL services to any market power over Internet services somewhat attenuated, and, therefore, disagree with MCI WorldCom.

In order to gain market power over Internet backbone services, the combined entity would need to obtain a critical mass of customers as an Internet service provider. As noted by SBC and Ameritech, the ISP industry is extremely competitive;[468] we find no compelling evidence that SBC and Ameritech could gain significant market share for their ISP, even by bundling Internet access services with residential xDSL service.[469] We further agree with Applicants that incumbent LECs cannot apply access charges unilaterally to ISP calls;[470] as the merger does not increase the combined entity's ability to impose such access charges, we find MCI WorldCom's concerns inapplicable at this time.[471] Therefore, we disagree with MCI WorldCom and CompTel that the merger is likely to cause public interest harm in the provision of Internet services.

(2) Empirical Evidence

Background. In a submission of the Applicants, Dennis Carlton and Hal Sider present empirical evidence they claim contradicts Sprint's assertions that the SBC-Ameritech

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465 *See* CompTel Nov. 16 Reply Comments at 7; MCI WorldCom Oct. 15 Comments at 35-48.

466 MCI WorldCom Oct. 15 Comments at 35-36.

467 *See* MCI WorldCom Oct. 15 Comments at vii and 46-47; MCI WorldCom Nov. 16 Reply Comments at 13.

468 Applicants note that, as of November 1998, there were over 5,000 ISPs nationwide. *See* SBC/Ameritech Nov. 16 Reply Comments at 81.

469 *See* MCI WorldCom Oct. 15 Comments at 42-44.

470 SBC/Ameritech Nov. 16 Reply Comments, Gilbert and Harris Reply Aff. at 37-38.

471 *See* MCI WorldCom Oct. 15 Comments at 46-47.

merger will give the merged firm greater incentive to discriminate against downstream rivals.[472] Carlton and Sider argue that if the Sprint hypothesis were correct, evidence of such behavior would have appeared in the aftermath of the two recent RBOC mergers, SBC/PacTel and Bell Atlantic/NYNEX. They claim instead that competitive LEC activity in LATAs within the merged RBOCs' regions, as measured by the number of firms that have been assigned numbering codes, is not lower either than competitive LEC activity in other RBOCs' regions, or lower than it would have been but for the relevant mergers, controlling for differences in population size, population growth, and area.[473]

Discussion. We find these results unpersuasive on a number of grounds. In terms of methodology, we find their chosen variables inadequate to validate their claims. Using the number of firms that have been assigned numbering codes in each LATA is an inadequate measure of competitive LEC activity for a number of reasons. First, as they themselves recognize, "assignment of a numbering code in a particular area does not indicate that the carrier assigned the code is providing service in the area."[474] Second, to the extent that such a carrier is providing service, the possession of numbering codes provides no indication of the number of customers that each competitive LEC is serving. Therefore, this variable does not adequately reflect the degree to which competitive LEC activity in one region may or may not be affected by incumbent LEC discrimination. Further, we question Carlton and Sider's use of the variables population size, population growth, and area to adequately control for "economic and demographic characteristics."[475] Population size and growth, for instance, may have no correlation to the variables that make a particular LATA attractive to the competitive LECs serving larger business customers. Therefore, in their comparisons of LEC activity in different BOCs' regions, they are unable to control accurately for many characteristics that may attract competitive LECs. In sum, we find that using Carlton and Sider's data, it is difficult to reach a conclusion regarding the level of competitive LEC activity, and ultimately the corresponding amount of discrimination, in the regions of the merged RBOCs.

We find further that, in spite of the foregoing, lack of conclusive evidence that the past RBOC mergers resulted in increased discrimination does not preclude any such effects resulting from the instant merger. First, we find that the potential public interest harms resulting from the instant merger are greatest for advanced services and interexchange services, services that RBOCs had little or no incentive to discriminate against at the time of the prior RBOC mergers. Therefore any evidence regarding previous mergers' effects on discrimination against

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472 Letter from Paul K. Mancini, General Attorney and Assistant General Counsel, SBC Communications, to Magalie Roman Salas, Secretary, Federal Communications Commission, CC Docket No. 98-141 (filed Apr. 13, 1999) (SBC/Ameritech Apr. 13 *Ex Parte*), Attach. 1, Dennis Carlton and Hal Sider, "Report to the FCC on Supplemental Analysis of the Katz/Salop Hypothesis" (Carlton and Sider Report). Dr. Carlton is Professor of Business Economics at the Graduate School of Business at the University of Chicago and President of Lexecon Inc. Dr. Sider is a Vice-President of Lexecon Inc.

473 *Id.* at 18.

474 *Id.* at 13 n.13 (citing *Local Competition Report* at 41).

475 *See* Carlton and Sider Report at 19.

competitive LEC entry may not be relevant. Second, with respect to the degree of competitive LEC activity, Carlton and Sider themselves cite to BOC incentives to accommodate competitive LECs in order to enter the long distance market. These incentives may counteract any incentives to discriminate against competitive LECs and thereby explain the lack of evidence of discrimination found by these authors.[476] Finally, we agree with Hayes et. al. that the size of the merged entity at question in the instant proceeding may exceed a threshold level with respect to the incentives to discriminate.[477] The combined SBC-Ameritech, with the ability to deny, degrade, or delay competitive LEC access to almost one-third of the nation's access lines may have a much greater unilateral effect on a potential rival's national entry strategy, and therefore such discrimination may become more attractive.[478]

e) Conclusion

For the reasons discussed above, we conclude that, as a result of the merger, SBC and Ameritech, as a combined entity, will have an increased ability and incentive to discriminate against rival providers of advanced services, and particularly new types of advanced services, in the combined region. We also conclude that the combined entity will have an increased incentive and ability to discriminate against rival providers of interexchange services, local services, and bundled local and long distance services. Although the Commission issues rules to prevent discrimination, and will continue to do so, it is impossible for the Commission to foresee every possible type of discrimination, especially with evolving technologies; therefore, we cannot rely on a regulatory solution to address unforeseeable competitive harms that might arise as a result of the merger. In our order, we adopt a number of conditions, initially proposed by SBC, that both guard specifically against the discrimination harms identified above and do so in a deregulatory manner, without imposing cumbersome, detailed regulatory oversight.

IV. ANALYSIS OF POTENTIAL PUBLIC INTEREST BENEFITS

In addition to assessing the probable public interest harms of this merger, we also must consider whether the merger is likely to generate redeeming public interest benefits.[479] For example, we ask whether the merged entity is likely to pursue business strategies resulting in demonstrable and verifiable benefits to consumers that could not be pursued but for the merger. Public interest benefits also include any cost saving efficiencies arising from the merger if such

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476 *Id.* at 6. ("… it is important not to ignore that the 1996 Act incorporates very strong incentives for [incumbent LECs] not to discriminate against [competitive LECs] through the promise of entry into long distance.")

477 *See* Sprint Apr. 2 *Ex Parte,* Hayes, Jayaratne, and Katz Report at 23. Dr. Hayes is Senior Economist at the Tilden Group. Dr. Katz is a cofounder of the Tilden Group, and Professor of Business Administration and Economics, and Director of the Center for Telecommunications and Digital Convergence, at the Univeristy of California at Berkeley.

478 *Id*.

479 *AT&T/TCI Order,* 14 FCC Rcd at 3168, para 13; *MCI/WorldCom Order,* 13 FCC Rcd at 18134-35, para. 194.

efficiencies are achievable only as a result of the merger, are sufficiently likely and verifiable, and are not deemed the result of anti-competitive reductions in output or increases in price.[480] Finally, merger specific benefits may also include beneficial conditions either proffered by the Applicants, by other parties, or imposed by the Commission. We address the Applicants' commitment to implement the National Local Strategy below.[481]

In this Order, we have concluded that the proposed merger of SBC and Ameritech is likely to result in substantial harms to the public interest. In considering whether the overall effect of the merger nevertheless is to advance the public interest, we employ a balancing process that weighs probable public interest harms against probable public interest benefits. Applicants, therefore, can carry their burden of demonstrating that the proposed transaction is in the public interest under the Communications Act only if the transaction on balance will enhance and promote, rather than eliminate or retard, the public interest. As the harms to the public interest become greater and more certain, the degree and certainty of the public interest benefits must also increase commensurately in order for us to find that the transaction on balance serves the public interest.[482] This sliding scale approach requires that where, as here, potential harms are indeed both substantial and likely, the Applicants' demonstration of claimed benefits also must reveal a higher degree of magnitude and likelihood than we would otherwise demand.

In their initial application, the Applicants enumerated a series of potential public interest benefits that they claim offset any anticipated public interest harms. We find that, of these claimed public interest benefits, few are in fact merger-specific, likely and credible. We conclude that the harms to the public interest likely to result from the merger outweigh the likely benefits.

The initial application claims three primary public interest benefits of the merger. First, Applicants assert that the merger will enable them to implement their out-of-region National-Local Strategy (in which the merged firm will enter 30 out-of-region cities as a competitive LEC), which they assert, in turn, will spark local exchange competition around the country and in certain foreign markets. Second, the Applicants claim that the merger will generate efficiencies in the forms of procurement savings, consolidation efficiencies, implementation of best practices, faster and broader roll-out of new products and services, and benefits to employees and communities. Third, they maintain that the merger will produce public interest benefits in other product markets, including wireless services, Internet services, long distance and international services and global seamless services for large business customers.[483] We discuss each of these in turn, and conclude that the Applicants have provided insufficient evidence to support any of their claims and that they have not demonstrated that, on balance, the merger is in the public interest, convenience and necessity.

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480 *1992 Horizontal Merger Guidelines* at 30.

481 *See* Section VII.B.3. (Fostering Out-of-Territory Competition).

482 *Bell Atlantic/NYNEX Order,* 12 FCC Rcd at 20063, para. 157.

483 SBC/Ameritech July 24 Application at 92-102.

A. National-Local Strategy

Background.[484] According to the Applicants, the National-Local Strategy is "the essentially simultaneous, facilities-based entry of the combined company into each of the Top 30 major U.S. markets outside of the area in which the combined company would be the incumbent carrier."[485] As originally formulated, the Strategy commits the merged entity to entering these 30 out-of-region metropolitan markets within three years following consummation of the merger.[486] Additionally, it calls for extending the Applicants' facilities-based geographic reach to 14 major foreign markets within five years of the close of the proposed merger.[487]

The Applicants maintain that the National-Local Strategy contemplates a "smart build" strategy in constructing facilities that are most needed and combining them with leased transport where available and with UNEs where necessary.[488] More specifically, the Applicants plan to install initially over 60 switches for the large and mid-size business segment in the 30 new markets. Subsequently, they plan to install over 80 additional switches for the small business and residential customer segment,[489] and to construct an intra-city fiber network of between 75 and 125 fiber miles in each of the 30 targeted markets,[490] (along with leasing inter-city trunks

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484 We discuss and evaluate here the proposal set forth in the Applicants' initial application. The Applicants have incorporated the National-Local Strategy, modified from the initial application, as a proposed condition to our approval of the merger. *See* Section VII.B.3. (Fostering Out-of-Territory Competition).

485 SBC/Ameritech July 24 Application at 5.

486 Narrative Response of SBC Communications Inc. to the FCC's Jan. 5, 1999 Request for Supplemental Information, Feb. 2, 1999 at 12-13. (SBC Feb. 2 Narrative Response) These markets include (ranked by size): New York, Philadelphia, Boston, Washington, Miami-Ft. Lauderdale, Atlanta, Minneapolis-St. Paul, Phoenix, Baltimore, Seattle-Everett, Denver - Boulder, Pittsburgh, Tampa - St. Petersburg, Portland, Cincinnati, Salt Lake City - Ogden, Orlando, Buffalo, New Orleans, Nashville - Davidson, Memphis, Las Vegas, Norfolk - Virginia Beach, Rochester, Greensboro - Winston-Salem, Louisville, Birmingham, Honolulu, Providence-Warwick, Albany-Schenectady-Troy. SBC/Ameritech July 24 Application at 12, Kahan Aff. at para. 34, and Attach. A, *New Markets for the New SBC.* Domestically, the Applicants initially plan to roll out voice and data services to large and medium-sized businesses in three markets, Boston, Miami and Seattle, in the second quarter of the year 2000. The Applicants then plan to enter 12 more markets in early 2001, within 18 months following the consummation of the merger, and the remaining 15 markets before the end of the third year following consummation of the merger. SBC Feb. 2 Narrative Response at 13-14. The Applicants also commit that, within 24 months of entering each new market, they will begin offering facilities-based services to all residential and business customers. SBC/Ameritech July 24 Application, Kahan Aff. at para. 63. On April 16, 1999, SBC filed applications with the utility commissions of Florida, Massachusetts and Washington and said it plans to be a facilities-based provider in each market, and plans to begin offering service in each of these markets within 12 months after the merger closes. *See* SBC Press Release, *SBC Files to Provide Local Exchange Services in Florida, Massachusetts and Washington* (April 16, 1999). On May 13, 1999, SBC added three new cities - New York, Washington DC, and Phoenix – to the list of initial markets the company will enter following the completion of the merger. *See* SBC Press Release, *SBC Adds New York, Washington, Phoenix to List of First New Markets Following Merger* (May 13, 1999).

487 SBC/Ameritech July 24 Application at 17, Kahan Aff. at para. 67.

488 SBC/Ameritech July 24 Application at 15, Kahan Aff. at para. 39.

489 SBC/Ameritech July 24 Application at 15, Kahan Aff. at para. 37.

490 SBC/Ameritech July 24 Application at 5, Kahan Aff. at para. 38. This amounts to 2,900 fiber miles overall.

from third parties.)[491] Applicants acknowledge that the architecture of the network and the facilities used will vary from market to market, and that they will build facilities, buy capacity, partner with another competitive LEC, and/or use some combination of these approaches.[492] Although it is not clear from the record whether the Applicants will buy or lease switches, nor whether they will lease or construct their own fiber, it does appear that they intend to construct some facilities.

In international markets, the Applicants plan to target large multinational customers in certain European, South American and Asian markets.[493] In these markets, Applicants contemplate initially installing one switch per city by 2001, and subsequently installing an additional 13 switches for a total of 27 by the end of their business plan.[494] According to the Applicants, they plan to lay fiber in these cities, with 1,400 kilometers of fiber installed within two years of the merger's close and more than 2,000 kilometers installed by the end of the plan.[495]

Many large firms headquartered in current Ameritech or SBC territory have additional business locations out of Ameritech's and SBC's regions. The Applicants' rationale behind the National-Local Strategy is to follow large and mid-size in-region multi-location business customers of the combined firm out-of-region into markets around the country and globe where those businesses have satellite offices or plant facilities.[496] The Applicants' strategy appears to be to offer these customers a full range of local, vertical, long distance, data and other services.[497] In this fashion, the Applicants hope to become an end-to-end provider of a full range of telecommunications services to large business customers with multiple locations. These customers would function as "anchor tenants," justifying the Applicants' entry into markets and facilitating the eventual deployment of voice and data services to small businesses and residential customers within those markets.[498]

Rationale for the Merger. SBC claims that the merger with Ameritech, standing alone, "is certainly not a compelling business opportunity for SBC." Rather, SBC regards the merger as "the means" and the National-Local Strategy "as the objective."[499] The Applicants further state that SBC's Board of Directors did not approve the merger "as an end in itself," but rather "as necessary for the company's pursuit of its National-Local Strategy."[500] According to

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491 SBC/Ameritech July 24 Application, Kahan Aff. at para. 39.

492 *Id*. at para. 55.

493 *Id.* at para. 67. The actual foreign cities appear to be in question. The Applicants do say that their plans include "European markets such as Berlin, Hamburg, Frankfurt, and London; South American markets such as Rio de Janeiro and Sao Paulo; and Asian markets including Tokyo, Hong Kong and Singapore."

494 *Id*. at para. 67. The National Local Strategy is based on a 10-year plan, from 1999 to 2008.

495 *Id.*

496 SBC/Ameritech July 24 Application at 5.

497 The Applicants are currently unable to provide this complete range of services to customers in-region.

498 SBC/Ameritech July 24 Application at 5.

499 SBC/Ameritech July 24 Application, Kahan Aff. at paras. 83-85.

500 SBC/Ameritech Nov. 16 Reply Comments at 20.

the Applicants, the real value creation for SBC shareholders "lies entirely" in the Applicants' successful execution of, and resulting benefits from, the National-Local Strategy.[501]

The Applicants contend that neither SBC nor Ameritech individually could pursue the National-Local Strategy as currently envisioned. In support of this claim, Applicants first submit that "[n]either SBC nor Ameritech currently has the scale, scope, resources, management and technical ability to implement the proposed national and global strategy on its own." [502] The Applicants further maintain that "neither [company] alone could suffer the earnings dilution that would accompany implementation of this plan."[503]

Thus, the Applicants assert that the merger is necessary to achieve the National-Local Strategy. Specifically, the Applicants believe that only through a merger will the combined company have: (1) the customer base (economies of scale); (2) the financial resources and reduced earnings dilution; (3) the geographic reach (economies of scope); and (4) the managerial and employee talent necessary to implement successfully the National-Local Strategy. We examine these claims more fully below**.**

Claimed Benefits. Applicants assert that the combined company's implementation of the National-Local Strategy will facilitate enhanced out-of-region local exchange competition, which, in turn, will escalate in-region local exchange competition.[504] Specifically, the Applicants maintain that their joint entry into 30 new out-of-region markets will "jump start competition for business and residential customers throughout the country."[505] The Applicants claim that a key benefit is that "[n]o other major competitive LEC currently provides service in each of the 30 markets that the new SBC plans to enter."[506] This salvo of new nationwide local exchange competition, the Applicants suggest, will pressure interexchange carriers, competitive LECs and the other incumbent LECs to compete not only in their own markets, but also in SBC's and Ameritech's home markets as well.[507] In addition, the Applicants submit that implementation of the National-Local Strategy will inject local exchange competition into 14 major foreign markets[508] and will create a new, major U.S. participant in the global telecommunications marketplace.[509] Finally, the Applicants maintain that a key public interest benefit from the

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501 *Id.*; SBC/Ameritech July 24 Application, Kahan Aff. at para. 83.

502 SBC/Ameritech July 24 Application at 51. In this regard, the Applicants stress the speed with which such a strategy must be undertaken in today's increasingly competitive market. Applicants also emphasize the requirement in the multilocation business customer market of providing "near national" coverage (equating to 70-80% of customers' telecom needs). SBC/Ameritech Nov. 16 Reply Comments at 21.

503 SBC/Ameritech July 24 Application at 51.

504 SBC/Ameritech July 24 Application, Kahan Aff. at paras. 86-89.

505 SBC/Ameritech July 24 Application at 21.

506 *Id.* at 22.

507 *Id.* at 7-8.

508 *Id.* at 26-27.

509 *Id.* at 85.

National-Local Strategy's implementation is the creation of thousands of new jobs, both domestically and internationally.[510]

Discussion. Elsewhere in this Order, we have concluded that the merger proposed by the Applicants portends probable and substantial harm to the public interest, as defined by the goals, values, and purposes of the Communications Act. The National-Local Strategy, Applicants assert, will provide public interest benefits that outweigh these harms. To make their case, the Applicants must also demonstrate that their merger is a reasonably necessary means to enable them to achieve these benefits, i.e. that the benefits are specific to the merger. Should the Applicants be able to pursue the Strategy – or its equivalent – without merging, consumers could achieve the benefits of the National-Local Strategy without suffering the harms of the merger. A mere recitation by the Applicants that they will provide some benefit if and only if their license transfer is approved cannot suffice to show that such a benefit is merger specific. Rather, we need sufficient evidence from the Applicants that the benefit is dependent on the merger if the benefit is to be included in an overall assessment of the effects of the license transfer.

In the following subsections, we conclude that the merger is not plausibly necessary to obtain the benefits of this Strategy. That is, we are not persuaded that the National-Local Strategy is a merger-specific benefit. First, we reject the argument that the merger increases the incentive of the two Applicants to pursue an out-of-region strategy. Second, the evidence does not support the Applicants' claim that, absent the merger, they would not have the ability to pursue an out-of-region strategy. Finally, we conclude that even though the National-Local Strategy is not a merger-specific benefit, successful implementation of the National-Local Strategy will bring some benefits to the local exchange marketplace, though not to the extent claimed by the Applicants. The single merger-specific benefit appears to be the increased speed with which the Applicants can expand into the country's top 50 markets. Even this benefit is tempered, however, because SBC effectively is merging with the incumbent in seven of those markets, which generates the substantial harm of eliminating a significant potential competitor in those markets.

Our evaluation of the National-Local Strategy centers around two inquiries: (1) Are the benefits promised by the Strategy merger-specific, in that they can be obtained only as a result of the merger? (2) Are the probable benefits consumers will receive from the Strategy large enough so that these benefits might be weighed, if necessary against the merger's probable harms?

1. The Benefits are Not Merger-Specific

We conclude that, whatever benefits might arise from the Applicants' proposed National-Local Strategy, these benefits cannot be used to justify the merger because the merger is not a sufficiently necessary condition -- either of the parties could implement this strategy on

[510] SBC/Ameritech July 24 Application at 27; SBC/Ameritech Nov. 16 Reply Comments at 13.

their own. The Applicants do not need to merge to become successful out-of-region competitive LECs, nor does their merger increase the likelihood that either or both will seek to implement a National-Local Strategy. We find only one claimed benefit to be merger-specific, and that is the speed with which the Applicants can reach their 50 market goal contemplated in the National-Local Strategy. We conclude that no other benefits of the National-Local Strategy, as it is proposed in the initial application, are merger-specific.

a) The National-Local Strategy is Not Unique

The Applicants maintain that the National-Local Strategy is in some way unique because it is a "significant" out-of-region local exchange strategy. [511] The Applicants in fact submit that it is the very uniqueness of the Strategy that necessitates this merger.[512]

We note that in a previous section entitled "Analysis of Competitive Effects in Local Exchange and Exchange Access Services," we concluded that the merger causes a public interest harm by eliminating SBC and Ameritech as among the most significant potential participants in the mass market for local exchange and exchange access services in each other's regions. Additionally, we concluded in the mass market for local exchange services that not only are both firms most significant market participants in geographic areas adjacent to their own regions, but also in out-of-region markets in which they have a cellular presence.[513]

As out-of-region competitors, therefore, we consider SBC and Ameritech to be unusually qualified. In this section, however, we address the strategy itself that these unusually qualified competitors plan to implement. We conclude that while the Applicants themselves may be particularly strong competitors relative to other new entrants, that their facilities-based strategy for going out-of-region is far from unique.

We note that smaller companies are pursuing similar facilities-based strategies offering similar product packages. For example, NEXTLINK claims that its goal is to provide integrated, end-to-end solutions for all of its customers' communications needs over its own network, which currently operates 23 local networks in 38 U.S. cities.[514] Allegiance Telecom,

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511 SBC/Ameritech Nov. 16 Reply Comments, Carlton Aff. at paras. 24, 26.

512 The Applicants state that the alternative, attempting to go national on a more incremental basis, entering fewer markets more slowly, would not permit them to respond promptly to requests for proposals from multi-location customers. The Applicants therefore claim that any alternative strategy would at best delay or even preclude the onset of significant new competition by the Applicants for business and residential customers in major and second tier markets. *See* SBC/Ameritech July 24 Application at 51-52, Kahan Aff. at para. 51, Carlton Aff. at paras. 43-44.

513 *See* Section V.B. (Analysis of Competitive Effects). By contrast, we concluded that in the larger business market for local exchange and exchange access services, SBC and Ameritech are only two of a larger number of actual and potential competitors in each other's regions. The merger would thus be less likely to have competitive effects leading to public interest harms.

514 NEXTLINK Communications, Inc., May 5, 1999 Prospectus Offering of Class A Common Stock 24 (1999).

Inc. seeks to be a premier provider of telecommunications services to business, government and other institutional users in major metropolitan areas. Allegiance offers an integrated set of voice and data products to customers in thirteen U.S. cities, with plans to enter eleven more cities for a total of 24 by the end of 2000.[515] Other carriers pursuing multi-market local exchange strategies include: Frontier, which offers facilities-based bundled voice and data services in 23 major markets today;[516] Focal, which offers facilities-based local switched voice services in 29 metropolitan statistical areas;[517] WinStar, which offers facilities-based bundled voice and data services in 30 markets today;[518] and AT&T and MCI WorldCom, which claim to offer facilities-based bundled voice and data services in 90-100 cities reaching 70-90% of all business subscriber lines.[519]

We also note that many of these companies have plans to expand into more markets in timeframes comparable to those contemplated by the Applicants. For example, WinStar, a competitive LEC with a market capitalization of only $2.3 billion, has announced plans to enter, on a facilities-basis, 30 additional major domestic markets in two years and an additional 50 major international markets within five years.[520]

The Applicants claim that they are the only major competitive LEC planning to serve the specific 30 out-of-region markets contemplated by their National-Local Strategy. We note, in the aggregate, however, that numerous competitive LECs *already* are providing bundled services in those markets while the Applicants' Strategy is still in the planning stages and will not see commercial roll-out until next year. In fact, Applicants' own research shows that there are numerous competitive LECs in their target out-of-region markets.[521] To put the Applicants' Strategy into perspective, below we provide a matrix[522] of the number of competitive LECs operating as of the end of 1998 in each of the 30 out-of-region markets identified by the Applicants.[523]

Market Name	Competitive LECs
Albany, NY	7

515 Allegiance Telecom, Inc., April 14, 1999 Prospectus Offering of Common Stock 1, 42 (1999).

516 *See* SBC Feb. 2 Narrative Response, Exhibit 7 at 1-3.

517 *See* SBC Feb. 2 Narrative Response, Exhibit 8 at 1.

518 *See* SBC Feb.2 Narrative Response, Exhibit 10 at 2.

519 *See* SBC/Ameritech Nov. 16 Reply Comments at 5, Grubman Aff. at para. 3.

520 *See* SBC Feb. 2 Narrative Response, Exhibit 10 at 1; Harry E Blount and Timothy Horan, *WinStar Communications, Inc.,* CIBC Oppenheimer, April 14, 1999, at 1, 4-5. The market capitalization is based on a closing stock price of $52.125 as of April 13, 1999.

521 *See* Appendix B (Summary of Confidential Information and Conclusions).

522 New Paradigm Resources Group, Inc., 1999 CLEC Report, Chapter 8, pages 28-120 (1999) (New Paradigm 1999 CLEC Report).

523 SBC will not be the first new entrant in the 30 out-of-region markets it plans to target with the National-Local Strategy, and in many markets, it will not even be in the top ten entrants. According to the New Paradigm Resources Group, Inc. 1999 CLEC Report, there were between 3 and 30 facilities-based competitive LECs already operating in these 30 cities as of end 1998.

Atlanta, GA	20
Baltimore, MD	11
Birmingham, AL	5
Boston, MA	21
Buffalo, NY	5
Cincinnati, OH	5
Denver, CO	15
Greensboro, NC	7
Honolulu, HI	3
Las Vegas, NV	8
Louisville, KY	6
Memphis, TN	7
Miami, FL	12
Minneapolis, MN	7
Nashville, TN	8
New Orleans, LA	10
New York, NY	30
Norfolk, VA	3
Orlando, FL	11
Philadelphia, PA	16
Phoenix, AZ	14
Pittsburgh, PA	4
Portland, ME	3
Providence, RI	3
Rochester, NY	7
Salt Lake City, UT	9
Seattle, WA	13
Tampa/St.Petersburg, FL	13
Washington, DC	22

That no single competitive LEC currently offers competitive services in each of the 30 markets misses the point; many of these competitive LECs offer coverage in markets not targeted by the Applicants, which the Applicants choose to overlook. Additionally, the Applicants' claim that establishing a presence in these top 30 out-of-region markets enhances their ability to compete for the business of large multi-location business customers similarly misses the point. The vast majority of these markets have multiple competitors all vying for the same business customers targeted by the Applicants. We conclude, therefore, that the Applicants' National-Local Strategy is neither unique in scope nor in its primary target customers.

b) Effect of the Merger on Applicants' Ability to Provide

Out-Of-Region Services

The Applicants contend that their ability to carry out the National-Local Strategy is vastly reduced absent the merger.[524] Having concluded *supra* that the Applicants are significant potential competitors in each other's regions as well as in their out-of-region cellular territories,[525] we find to the contrary that each of the Applicants is fully capable of undertaking a strategy of the size and scope of the National-Local Strategy. Dozens of competitive LECs, without the size, resources or assets of either SBC or Ameritech are presently pursuing significant entry plans in multiple markets. Moreover, the record reveals that, of the competitive LECs and several investment analysts interviewed by the Commission,[526] not one believes that a company the size of the proposed merged entity is necessary to succeed as a competitive LEC. We note that the Applicants appear to acknowledge that size is not necessarily commensurate with a carrier's ability to enter or to compete. For example, according to the Applicants, once they begin providing services in the territories of other incumbent LECs, these incumbents will retaliate by competing in the Applicants' territory.[527] Notably, the Applicants do not contend that these incumbent LECs must first merge in order to do so, despite the fact that those other incumbent LECs will be notably smaller than the combined SBC/Ameritech. To assert that these multi-billion dollar Applicants need to merge in order to pursue the National-Local Strategy therefore is contrary to both experience and common sense.

Nevertheless, Applicants offer four reasons why this merger is necessary to enhance their ability to implement their Strategy: 1) an insufficient customer base; 2) insufficient geographic reach; 3) likelihood of excessive earnings dilution if pursued on a standalone basis; and 4) insufficient managerial and employee talent.

We find that geographic reach, while an important consideration in a national or international expansion strategy for a regional or local player, plays at best a modest role in terms of this merger. After all, this merger gives SBC only seven of the 37 additional markets SBC intends to enter to achieve its coverage of the top 50 domestic markets. Had geographic

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524 SBC/Ameritech Nov. 16 Reply Comments, Carlton Aff. at para. 23

525 *See supra* Section V.B.2. (Local Exchange and Exchange Access Services).

526 *See e.g.* Letter from John J. Heitman, e.spire Communications, to Magalie Roman Salas, Secretary, FCC (filed Jan. 11, 1999) (e.spire Jan. 11 *Ex Parte*); Letter from Richard J. Metzger, Focal Communications, to Magalie Roman Salas, Secretary, FCC (filed Jan. 13, 1999) (Focal Jan. 13 *Ex Parte*); Letter from Joseph M. Sandri, Jr, WinStar Communications, Inc., to Magalie Roman Salas, Secretary, FCC (filed March 4, 1999) (Winstar Mar. 4 *Ex Parte*); Letter from Gunnar D. Halley, Teligent, to Magalie Roman Salas, to Magalie Roman Salas, Secretary, FCC, (filed March 5, 1999) (Teligent Mar. 5 *Ex Parte*); Letter from Daniel Gonzalez, NEXTLINK, to Magalie Roman Salas, Secretary, FCC (filed March 9, 1999) (NEXTLINK Mar. 9 *Ex Parte*); Letter from William L. Fishman, RCN Telecom Services, to Magalie Roman Salas, Secretary, FCC (filed March 17, 1999) (RCN Mar. 17 *Ex Parte*); Letter from Ross A. Buntrock, Intermedia, to Magalie Roman Salas, Secretary, FCC (filed March 24, 1999) (Intermedia Mar. 24 *Ex Parte*), Letter from Anna Maria Kovacs, Janney Montgomery Scott), to Magalie Roman Salas, Secretary, FCC (filed Dec. 14, 1999) (Janney Montgomery Scott Dec. 14 *Ex Parte*).

527 *See* SBC/Ameritech July 24 Application at 34; SBC Oct. 15 *Ex Parte*, at 2, 13-16.

coverage been the principal driver of SBC's expansion plans, SBC could have purchased a competitive LEC such as WinStar, which has facilities already built in 30 of the top markets. Such an acquisition certainly would bring SBC substantially closer to its goal of reaching the top 50 markets than does the Ameritech acquisition.

Similarly, we find that insufficient managerial and employee talent, while an important consideration, does not play an important role in this merger. Although SBC picks up over 40,000 employees with this merger,[528] many of whom are experienced managers, if the lack of personnel were the number one issue constraining SBC's ability to deploy a competitive LEC strategy in numerous new markets today, it would not buy an incumbent LEC whose personnel are least likely to have deployed competitive LEC operations in new markets, and who face the prospect of having to move locations to those new markets. Rather, it is more probable it would purchase a competitive LEC with experienced personnel and operations in those markets SBC plans to enter if the need for personnel to run such operations were the major consideration.

We therefore focus our discussion on the two reasons that appear to be the key drivers of this merger: an insufficient customer base and the threat of excessive dilution.

(1) Insufficient Customer Base

The Applicants contend that the merger is necessary to create a sufficient in-region customer base to follow into out-of-region markets. [529] We conclude, on the basis of substantial marketplace evidence, that the Applicants have failed to demonstrate that they must have almost 50 percent of the nation's Fortune 500 companies headquartered in its regions in order to launch successfully an out-of-region strategy.[530]

Specifically, Applicants claim that they need a larger customer base because their out-of-region plan involves a facilities-based entry strategy for which a "sufficiently broad base of customer relationships" is needed to support the large capital investments necessary to deploy new switches and networks.[531] Although we recognize that spreading fixed capital costs across a broader number of customers effectively reduces the cost per customer of geographic expansion, we question the Applicants' assertion that neither company individually has a sufficiently broad

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528 Ameritech's 1998 ARMIS 43-02 USOA Report, Table 1-1, Row 830. SBC will pick up an additional 40,912 employees from the Ameritech operating companies, but holding company employees are excluded from this number.

529 SBC/Ameritech Nov. 16 Reply Comments at 25, Carlton Aff. at para 42. *See also* SBC/Ameritech July 24 Application, Kahan Aff. at paras. 40-41.

530 Letter from Todd F. Silbergeld, SBC Communications, to Magalie Roman Salas, Secretary, FCC, Attach. D at 3 (filed Feb. 19, 1999) (SBC Feb. 19 *Ex Parte*). *See also* Letter from Wayne Watts, SBC, to Magalie Roman Salas, Secretary, FCC, at 3 (filed Oct. 5, 1998) (SBC Oct. 5 *Ex Parte*). Two hundred twenty-four (224) of the Fortune 500 companies (45%) would be headquartered in the combined companies' regions.

531 *See* SBC/Ameritech Nov. 16 Reply Comments at 24. *See also* SBC/Ameritech July 24 Application, Kahan Aff. at paras. 5, 14.

and large customer base to venture out-of-region.[532] We note that the Applicants have identified numerous other companies that provide a range of services for business customers on a national or regional basis, including AT&T, e.spire, Focal Communications, Frontier, Intermedia Communications, Level 3, MCI WorldCom, McLeodUSA, NEXTLINK, Qwest, RCN, Sprint, Teligent and Winstar.[533] Although the competitors on this list vary in size, each of these companies operates in multiple markets around the country. Although some may pursue only niche strategies in terms of products offered and customers targeted,[534] we find that most of these companies are pursuing expansionist strategies without business customer bases even approaching the levels of either SBC or Ameritech alone. We also note that the Applicants themselves admit the feasibility of SBC's entering the 15 largest MSAs out of SBC's region on its own, presumably with the customer base it has today.[535] Finally, Applicants also claim that their out-of-region ventures will lead other incumbent LECs to invade Applicants' regions. They do not assert, however, that these incumbent LECs will need to acquire enhanced customer bases before they retaliate, which implies that SBC and Ameritech currently are large enough on a standalone basis to pursue out-of-region strategies.

When specific examples are considered, we find that the Applicants' assertion that going out-of-region requires a large customer base far larger than either currently possesses distorts market reality. The Applicants identify Phoenix, Arizona as an "excellent example" of how the follow-the-customer strategy would work. [536] The Applicants identify over 2,100 Phoenix locations owned or operated by businesses headquartered in the Ameritech and SBC regions. Of these locations, 60% or over 1,250 belong to businesses headquartered in the Ameritech region. The remaining 40% or close to 850 locations belong to businesses headquartered in the SBC region. The Applicants conclude that absent the merger, neither SBC nor Ameritech "would have a sufficiently large customer base to follow into Phoenix."[537]

We find it incredible that neither SBC nor Ameritech has a sufficiently large customer base to enter the Phoenix market on its own. Competitors of far smaller size and resources are entering markets of the size of Phoenix on a facilities-basis and with substantially smaller customer bases. For example, as of the end of 1998, 14 facilities-based competitors were already in the Phoenix market.[538] Indeed we doubt that, absent the merger, the Applicants would ignore the competitive threat to their customer bases in-region by not going out-of-region to

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532 SBC/Ameritech July 24 Application at 7 ("Neither company, standing alone, has the breadth of experienced management and skilled technical personnel that such an undertaking requires, and it is simply not possible or feasible for either company alone to rapidly secure such personnel."). The Applicants state that Ameritech on its own has 91 Fortune 500 firms headquartered in its region, while SBC has 129 such firms headquartered in its region. The merged entity would have 220 Fortune 500 firms headquartered in its region.

533 SBC Feb. 2 Narrative Response at 7-8.

534 SBC/Ameritech July 24 Application at 23-24.

535 SBC/Ameritech July 24 Application, Kahan Aff. at para. 50.

536 *Id.* at 52-53.

537 *Id.*

538 New Paradigm 1999 CLEC Report at 30. These include small competitors, such as GST, ICG and WinStar, as well as large ones, such as AT&T and MCI WorldCom.

those markets such as Phoenix where each Applicant would find densely located outposts of many of its in-region customers.

(2) Excessive Earnings Dilution[539]

Applicants maintain that established companies such as SBC and Ameritech are valued by financial markets based on their earnings performance and not on another metric such as cash flow which is typically used to value younger companies with little or no earnings.[540] The Applicants argue that the cost of implementing the Strategy would be too dilutive to earnings for their more conservative-minded shareholders to tolerate. [541] Furthermore, the companies argue that this merger will mitigate the dilutive impact by increasing the shareholder base over which costs can be spread, by increasing the revenue base to absorb the out-of-region costs, and by reducing the number of new markets that the company would have to enter de novo to serve the top 50 markets.[542]

First, we question the Applicants' claims regarding the extent of dilution resulting from implementation of the Strategy. We note the Applicants intend to utilize a "smart build" strategy for entering the 30 out-of-region markets. By "smart build," the Applicants contemplate placing multiple switches in each market, and then utilizing available inter-city and local transport capabilities to most efficiently manage their capital. Only where such transport is not available will the Applicants construct their own fiber networks.[543]

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539 Earnings dilution is a financial concept describing a condition in which a diminution occurs in the proportion of income to which each share is entitled. *See* Brealey and Myers, *Principles of Corporate Finance*, 4th Edition at G3. Earnings dilution typically occurs when income falls relative to projected performance due to higher-than-expected costs or lower-than-expected revenues from a project, or when more shares are issued as in a stock offering or stock-for-stock merger. The higher the earnings dilution, the more costly for the company and its shareholders alike to bear.

540 SBC/Ameritech July 24 Application at 51.

541 *Id*.

542 SBC Feb. 2 Narrative Response at 16.

543 *See* SBC/Ameritech July 24 Application at 5, Kahan Aff. at paras. 37-39. We note that the Applicants claim that the Strategy contemplates constructing more than 2,900 fiber miles, or between 75 and 125 miles in each of the 30 out-of-region markets (though the Applicants contradict themselves in the SBC/Ameritech July 24 Application at 15 by once referring to route miles). Although new intra-city fiber would be a welcome contribution to the competitive environment in these markets, we must point out the difference between fiber miles and *route* miles. Fiber miles are the number of miles of fiber strand used in all routes including both lit and unlit fiber. Route miles are the total number of miles of fiber routes. *See* FCC Fiber Deployment Report for 1997 at 46. In general, multiple fiber strands are placed in a cable, so fiber miles typically exceed route miles of cable laid. Typical competitive LEC intra-city fiber configurations involve cables containing 20 to 200 fiber strands. For year end 1997, reporting competitive LECs on average had deployed 69 fiber strands per route mile of cable. *See* FCC Fiber Deployment Report for 1997 at 41. Using this conversion ratio as a proxy, we calculate that of the 2,900 fiber miles which the Applicants are contemplating deploying out-of-region, these equate to approximately 42 *route* miles over 30 markets, or an average of 1.5 miles per market. Compare this deployment to the average competitive LEC deployment of 721 route miles of fiber in the first quarter of 1999 alone. *See* David W. Barden, *Competitive Telecom Services Review*, JP Morgan Equity Research, June 2, 1999, at 10. On a per market basis, this recent fiber deployment far exceeds that proposed by the Applicants. We find that the Applicants' competitive LEC plans,

We find that this "smart build" strategy, which emphasizes installation of one's own switches, but delays construction of one's own fiber capacity until sufficient numbers of customers are won and the economics of demand dictate that such construction makes economic sense, is not unique. [544] To the contrary, numerous other competitive LECs are pursuing such a strategy. [545] This strategy contrasts with either investing up front in fiber in anticipation of recouping the investment in the future, or with pursuing a lease-only strategy whereby entrants lease the fiber as a long-term strategy. The attraction to competitive LECs of the "smart build" strategy over other strategies is the short-term prospect of fast market entry, quick revenue generation, deferral of substantial capital costs and the mitigation of dilution, and the long-term prospect of ramping up one's own fiber deployment, which facilitates realization of economies of scale, lower variable costs and improved margins. This view is consistent with that of the Applicants as they look to go out-of-region.[546] Even Applicants' note that their "smart build" approach is analogous to the strategy utilized by competitive access providers when they first entered the local exchange market.[547]

We also note that the Applicants predicate their National-Local Strategy on following existing in-region multi-location business customers into out-of-region markets. The existence of a large customer base, which most other competitive LECs lack, reduces the Applicants' customer acquisition costs relative to what other competitive LECs incur. Furthermore, the Applicants are not forced at the outset to invest in an all-out local market strategy in all 30 markets which most other competitive LECs would be forced to do if they sought to offer services comparable to those in the National Local Strategy. The cost and attendant dilution of the National-Local Strategy, therefore, are much less than they are for most competitive LECs.[548] If it typically takes two to three years for a "smart build" competitive LEC to achieve break even on a cash flow basis in a given market,[549] we would expect that time period to be compressed for the Applicants. On a market-by-market basis, we find that expected dilution for the Applicants is not only *not* excessive, it is a substantial improvement upon the earnings dilution likely experienced by competitive LECs.

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relative to the plans of other competitive LECs, are very conservative in terms of fiber deployment. Therefore, the Applicants' market entry costs with regards to fiber should similarly be low, which further supports our finding that the Applicants' out-of-region plans are not excessively dilutive.

544 David W. Barden, *Competitive Telecom Services Review*, JP Morgan Equity Research (June 2, 1999) at 10.

545 Examples include: Allegiance Telecom, ALLTEL's competitive LEC business, Commonwealth Telephone Enterprises' competitive LEC business, Hyperion Telecommunications, MGC Communications and US LEC.

546 *See* Appendix B; SBC/Ameritech July 24 Application, Kahan Aff. at para. 39.

547 SBC/Ameritech July 24 Application, Kahan Aff. at para. 42

548 Frank Governali and Kathryn Littlefield, *SBC Communications*, Credit Suisse First Boston Equity Research, May 14, 1998, at 7 (Credit Suisse First Boston Equity May 14 Report).

549 Daniel Reingold, *Merrill Lynch Global Securities Research*, ALLTEL CORP., May 19, 1999, at 3. For example, ALLTEL "is targeting a 2-3 year EBITDA breakeven goal for its competitive LEC markets, in line with our expectations for other 'smart build' competitive LECs."

Second, although the merger is projected to be accretive to earnings after 2001, even the relative dilution in the early years suggests that the National-Local Strategy in and of itself is not excessively or intolerably dilutive for the Applicants and their shareholders. Although we note that the National-Local Strategy may seem dilutive *on an aggregate basis* for all 30 markets, the Applicants provided guidance to Wall Street at the time of the merger announcement that suggested that the Strategy would dilute earnings by no more than one percent per year for the next several years.[550] According to the Applicants, SBC would experience approximately twice the dilution if it implemented the National-Local Strategy without the merger,[551] implying earnings dilution of two percent per year over the next several years. This proposed merger between SBC and Ameritech, by contrast, is projected to dilute earnings by seven percent in 2000 and by three percent in 2001 due to the issuance of additional shares necessary to pay the approximately 27% premium.[552] Nevertheless, shareholders for both companies approved this proposed merger.

Third, we note that the Applicants each have pursued substantial and dilutive projects in the past. For example, SBC's purchase of Pacific Telesis in 1997 was valued at $17 billion and was earnings dilutive for two years to an extent comparable with the currently proposed merger.[553] In terms of internal projects, SBC and its Pacific Telesis subsidiary have spent almost $900 million in the last three years on capital expenditures for their PCS business. EBITDA[554] losses in that time period were approximately $360 million, with losses of $229 million in 1997 alone.[555] Similarly, Ameritech's cable overbuilds involve substantial capital expenditures and are expected on a franchise-by-franchise basis to be earnings dilutive for the first four years.[556] More specifically, analyst estimates of Ameritech's cable business project capital expenditures of $3.5 billion over the next 10 years and EBITDA losses for 1999 alone of $159 million.[557] By comparison, the National-Local Strategy calls for capital expenditures of more than $2 billion over ten years, or approximately $200 million per year.[558] We conclude that shareholders of both companies have weathered and tolerated comparable dilution from

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550 Credit Suisse First Boston May 14 Report at 7.

551 SBC/Ameritech Nov. 16 Reply Comments, Grubman Aff. at para. 8. We note that the Applicants refused to submit for the public record any documentation supporting Grubman's computation of the National-Local Strategy's dilutive impact absent the merger.

552 SBC/Ameritech Nov. 16 Reply Comments, Grubman Aff. at para. 8. The 27% premium to Ameritech's closing price of $43.875 was as of May 8, 1998. *See* SBC Investor Briefing No. 200, *SBC Communications and Ameritech to Merge*, May 11, 1998 at 8.

553 SBC Feb. 19 *Ex Parte*, Attach. A at 13, Attach. F at 7.

554 EBITDA is Earnings Before Interest Taxes Depreciation and Amortization. EBITDA is an income statement calculation that serves as a proxy for operating cash flow.

555 Stephanie Comfort and Stephen Flynn, *The Financial Models*, Morgan Stanley Dean Witter, Oct. 9, 1998 at 22-23.

556 Anna-Maria Kovacs, *Progress Report on Ameritech*, Janney Montgomery Scott, April 14, 1998, at 4.

557 Stephanie Comfort and Stephen Flynn, *The Financial Models*, Morgan Stanley Dean Witter, Jan. 21, 1999 at 6-8. Ameritech's cable capital expenditures translate into approximately $450 per home passed.

558 *See* SBC/Ameritech July 24 Application, Kahan Aff. at paras. 57-58; SBC/Ameritech Nov. 16 Reply Comments, Grubman Aff. at para. 8. The Applicants in fact intend to front-load the brunt of their capital spending related to the National-Local Strategy over the first seven years of the 10-year plan.

expensive projects in the past. We remain unconvinced that shareholders would not be so inclined in the context of the National-Local Strategy.

Finally, we reject the Applicants' argument that the merger mitigates the Strategy's dilutive impact by reducing the number of new markets that the company has to enter *de novo* to serve the top 50 markets. SBC's merger with Ameritech reduces from 37 to 30 the number of new markets that SBC needs to enter out-of-region to attain the top 50 markets goal. The associated capital expenditures required for market entry therefore would not apply to these seven markets. Most of the operating expenses, by contrast, would apply since they largely represent ongoing costs that would occur post-market entry. Although the reduction in overall capital expenditures from entering seven fewer markets is directly tied to the merger, the merger itself involves a substantial premium of almost $13 billion paid by SBC to Ameritech in the form of additional shares issued. So while the Applicants argue on the one hand that they need more shareholders to reduce earnings dilution (by spreading the costs of the National-Local Strategy over a larger base), they admit that the very method of gaining these shareholders, via this merger, will dilute earnings due to the issuance of more shares for the premium paid. We cannot fully separate the increased cost to shareholders of the premium paid from the decreased cost to shareholders due to the merger benefit of reducing the number of new markets the combined company will enter out-of-region. In short, we conclude that the reduction in cost is countered in part by the increase in cost from the premium paid. We also conclude that the reduction in cost from having to enter seven fewer markets comes at the great expense of losing a potential competitor in those markets.

c) The Merger Does Not Enhance Applicants' Incentive to Enter Out-of-Region Markets

Having concluded that the Applicants individually are able today to pursue substantial out-of-region strategies without this merger, we turn to whether the merger in some way enhances the Applicants' incentive to go out-of-region. Where ability in this context refers to whether each Applicant has the wherewithal to pursue a standalone competitive LEC strategy, incentive, by contrast, refers to whether the Applicants have an economic desire to do so.

The fundamental motivation for the National-Local Strategy, according to the Applicants, is the recognition that they must compete for the business of large national and global customers both in-region and out-of-region."[559] They maintain that they "cannot remain idle while [their] competitors capture the huge traffic volumes generated by a relatively small number of larger customers."[560] For Southwestern Bell Telephone Company, one of SBC's operating companies, the top one percent of its business customers represent eight percent of the

559 SBC/Ameritech July 24 Application, Kahan Aff. at para. 13.

560 *Id.*

company's total revenues.[561] For Ameritech, the top one percent represent eleven percent of the company's total revenues.[562] SBC asserts that it has lost a significant amount of existing business, as well as new business opportunities, to competitive LECs.[563] Ameritech maintains that, although it rarely loses 100% of an in-region large customer's entire telecommunications spending, it does lose out on potential revenue because it is prohibited from participating in the growth of new services or in bidding for the higher-margin services.[564]

The Applicants fail to provide sufficient evidence to persuade us of the extent of the competitive threat that they face. Although the Applicants provide aggregate data related to resold and unbundled loops,[565] they provide little data in the way of lost customers, number of lines lost per customer, line additions that might offset line losses.[566] With regard to the provision of end-to-end services to large business customers, SBC claims it does not have the data necessary to calculate the percentage of its or Ameritech's business customers, or business opportunities, that either company has lost to those carriers that currently offer and market end-to-end service to business customers.[567] Similarly, Ameritech argues that it has no information on SBC's competitive losses to those same carriers, and that it has not previously calculated such losses for itself, though it presumes that they are considerable.[568] We conclude that, although the Applicants may be suffering some lost lines to their competitors, these losses are not occurring at such a rate as to lead to disinvestment and/or rate increases, as the Applicants suggest.[569]

We further find misleading the presumption that Applicants must cover 70-80% of their large business customers' local and long distance expenditures in order to compete to retain those customers.[570] The Applicants claim that a local presence in the top 50 markets with local exchange offerings is critical to compete. Yet, there is evidence to suggest that local exchange service is less important relative to long distance services for these large business customers. For example, one noted Wall Street analyst reports that, of the $82 billion in switched telephony

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561 *Id.* Though Kahan was not explicit, it is our assumption, based on the SBC/Ameritech's Application filing date of July 24, 1998, that the figures represent 1997 results.

562 SBC/Ameritech July 24 Application, Weller Aff. at para. 21. Results are for 1997.

563 SBC Feb. 2 Narrative Response at 7.

564 Response of Ameritech Corporation to the FCC's Jan. 5, 1999 Request for Documentary Material, February 2, 1999, at 4 (Ameritech Feb. 2 Response).

565 *See* SBC/Ameritech July 24 Application at Tables 1-10.

566 The Applicants provide some data related to line additions but only at an aggregate level for *all* Regional Bell Operating Companies and for the universe of public competitive LECs. *See* SBC/Ameritech July 24 Application, Carlton Aff. at 9.

567 SBC Feb. 2 Narrative Response at 7.

568 Ameritech Feb. 2 Response at 48.

569 SBC/Ameritech July 24 Application at 42.

570 *See* SBC Feb. 2 Narrative Response at 11; SBC/Ameritech Nov. 16 Reply Comments, Kahan Aff. at para. 16; SBC/Ameritech July 24 Application, Kahan Aff. at para. 48, Carlton Aff. at para. 16.

revenues generated by large and medium businesses in 1998, approximately 75% were for long distance/international services and the remaining 25% were for local exchange services.[571]

None of this, however, is to deny that the Applicants clearly have the incentive to enter out-of-region markets and to gain section 271 approval absent the merger. Not only are the Applicants at a competitive disadvantage in the long distance voice market, they are at serious disadvantage to large and small competitive LECs alike in the data market where over 85% of large and medium business customer expenditures are for long-haul services.[572] We find, therefore, that the Applicants' suggestion that the merger and consequent pursuit of the National-Local Strategy gives them added incentive to meet the necessary market opening conditions in-region to achieve section 271 approval[573] is inconsistent with the market reality.

Finally, we note that evidence of prior out-of-region activity by both Applicants suggests that each already has exhibited the incentive to expand absent this merger.[574] We already concluded above that Ameritech's Managed Local Access Program gave Ameritech both the incentive and capability to become a significant potential entrant serving large businesses in certain markets in California, Missouri and Texas. Additionally, we concluded that Ameritech would have entered the St. Louis residential market with a wireline/wireless service offering but for the merger with SBC. We concluded that SBC had the incentive and capabilities to make it a significant potential market participant in the mass market for local services in Chicago.[575] We also note that SBC's acquisition of SNET led one noted Wall Street analyst to conclude that SNET would be the vehicle by which SBC would attack the Northeast integrated services markets, New York and Boston in particular.[576]

We find that the Applicants, irrespective of this merger, have demonstrated definitively that they have a critical need to respond to losses in the business market by expanding their geographic reach and providing a full suite of telecom services. We further find that the Applicants already have acted on this incentive, as demonstrated by their out-of-region plans mentioned above. We conclude, therefore, that the Applicants' incentive to expand out-of-region is demonstrable and substantial absent this merger, and that the merger can do little to enhance this incentive.

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571 Jack B. Grubman and Christine Gochuico, *Review of Our Position on RBOCs*, Salomon Smith Barney Equity Research, March 11, 1999 at 4-5 (Salomon Smith Barney March 11 Report).

572 Salomon Smith Barney March 11 Report at 4-5.

573 SBC Oct. 15 *Ex Parte* at 2, Attach. B at 7.

574 According to the SBC/Ameritech July 24 Application, Kahan Aff. at para. 69, Applicants admit that they have significant experience in competing out-of-region. SBC submits that it has been an effective competitor out-of-region in the wireless market since 1987. Ameritech, too, has competed out-of-region with its nationwide alarm monitoring business.

575 *See* Section V.B.2.c)(1) (Mass Market).

576 Frank Governali, *SBC Communications*, Credit Suisse First Boston Equity Research, Jan. 7, 1998 at 2 (Credit Suisse First Boston Equity Jan. 7 Report). Mr. Governali also postulated that with SNET vulnerable to competitive entry by neighboring Bell Atlantic, that "the best defense is an effective offense" and that he expected SBC "to launch in the New York and Boston markets soon after the SBC/SNET merger closing."

2. Magnitude of the Claimed Benefits

We have concluded that the Applicants' out-of-region strategy is neither dependent on the merger, nor unique. We also have concluded that the merger in and of itself does not materially enhance the Applicants' already substantial abilities and incentives to pursue out-of-region strategies on an individual basis. Thus, we find that the single primary benefit of the merger, in the context of the National-Local Strategy, is speed. The Applicants can achieve their goal of establishing a presence in the top 50 U.S. markets somewhat faster by acquiring Ameritech than by rolling out competitive services in Ameritech's present markets as well as the additional 30 markets outside of Ameritech's and SBC's territories. Applicants claim that faster implementation of the Strategy materially increases the likelihood that the Strategy will be successful.[577]

We next evaluate the magnitude of actual benefits resulting from an accelerated implementation of the Applicants' National-Local Strategy. The Applicants maintain that the benefits are substantial and accrue to business and residential customers alike both out-of-region, as well as in-region. In the following subsections, we evaluate the Applicants' arguments, focusing on a) the Strategy's dependency on interLATA authority, and b) the Applicants' claims of public interest benefits resulting from the National-Local Strategy.

a) The National-Local Strategy is Dependent on In-Region InterLATA Authority[578]

The Applicants assert that the National-Local Strategy "is predicated on SBC/Ameritech's ability to offer a package of interLATA voice and data services" both in-region and out-of-region.[579] Consequently, this Strategy requires them to obtain authority to provide in-region long distance.[580] Without section 271 approval to offer long distance voice and data services, the Applicants would suffer from the same product constraints that prevent them today from competing for all of the voice and data business of their customers. For example, Applicants are already disadvantaged in responding to requests for one-stop shopping capabilities due to, among other factors, interLATA limitations.[581] We conclude, therefore, that for the National-Local Strategy to be successfully implemented, the Applicants' own evidence

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577 SBC Feb. 2 Narrative Response at 16.

578 Section 271 says "neither a Bell operating company, nor any affiliate of a Bell operating company, may provide interLATA services except as provided by this section." A BOC may provide interLATA service only once it has met the requirements outlined in section 271, including complying with the competitive checklist. 47 U.S.C. § 271.

579 SBC Oct. 15 *Ex Parte* at 10.

580 SBC/Ameritech Nov. 16 Reply Comments, Carlton Aff. at para. 80.

581 *See* Letter from Marian Dyer to Magalie Roman Salas, March 4, 1999 at 4, Letter from Antoinette Cook Bush to Magalie Roman Salas, Feb. 1, 1999 at 5.

indicates that they must possess and offer a full suite of services, which in turn is dependent not on the merger, but on the Applicants gaining section 271 approval in-region.

Applicants state that the "relationship between the receipt of section 271 authority and the implementation of the Strategy is a question of timing." [582] We note that this, in turn, will affect the timing of the National-Local Strategy roll-out. In February 1999, SBC claimed that it expects to have section 271 authority in its largest states within the next 12-18 months, which is consistent with its current plans for the roll-out of the Strategy in the initial markets,[583] which brings us to February to August 2000. SBC also anticipates that, once section 271 authority is obtained in its largest states, it will secure the authority in the remaining states "in short order."[584] In contrast, Ameritech makes no claim about when it anticipates obtaining section 271 authority. Although SBC plans to begin the roll-out of the Strategy before it has received section 271 authority in all of the combined companies' states, it has not determined a "minimum" number of such states. [585]

Furthermore, according to the Applicants, the economics of the merger require that the merged company rapidly receive interLATA authority.[586] Through the National-Local Strategy, the Applicants aim to serve successfully the needs of multi-location customers for local, long distance, data, Internet and customized private network services. According to a recent report produced by a Wall Street bank, long distance accounts on average for approximately 80% of blended voice and data revenues generated by large business customers, with long distance representing 85-90% of data for these customers.[587] Data is outgrowing voice as a percentage of revenues 15 to 1, and, therefore, interLATA authority is critical in order to participate in this growing demand for data transmission.[588] According to one noted Wall Street analyst, those BOCs that get into long distance earlier will have a better chance of protecting their large business accounts and penetrating further their large business accounts. [589] Clearly, the inability to provide long distance services will create an enormous gap in the bundled product offering and thus missed revenue opportunities.

Although it is understandable that the Applicants' plans are not yet fully determined, the uncertainty regarding section 271 approvals makes it difficult for us to evaluate the extent of the claimed benefits and makes them speculative at best. Although we expect the Applicants to push aggressively to meet their roll-out schedule, it is impossible to predict obstacles they may encounter in obtaining their section 271 authority. Any delays to section 271 approvals impede the roll-out of the National-Local Strategy. Such delays to the Strategy,

582 SBC Feb. 2 Narrative Response at 34.
583 *Id.*
584 *Id.*
585 *Id.* at 35.
586 Carlton Oct. 15, 1999 Aff. at 2.
587 Salomon Smith Barney Equity Mar. 11 Report at 5
588 *Id.* at 4.
589 *Id.* at 6.

therefore, result in delayed benefits to consumers. We therefore conclude that the dependency of the National-Local Strategy on section 271 approvals is a substantial constraint to both the full implementation and success of the plan.

b) Analysis of Applicants' Claims Regarding the Effect of the National-Local Strategy on Competition

(1) Out-of-region Competition

The Applicants argue that their National-Local Strategy will benefit business and residential customers by offering them a significant, new, facilities-based competitive choice for a fully-integrated package of services."[590] Also, according to the Applicants, the addition of another entrant will force other incumbent LECs, whose markets the Applicants plan to enter, to respond by expediting their own efforts to provide in-region long distance.[591]

Large and Mid-Size Businesses. Applicants argue that the only carriers currently competing on a national-local basis for the 1,000 largest business customers in America are the vertically-integrated interexchange carriers. The Applicants, therefore, maintain that the addition of another entrant, the merged SBC/Ameritech, would bring more competition to these customers seeking end-to-end solutions locally, nationally and globally.[592]

The addition of another entrant to these new markets should benefit the competitive landscape in those markets. We question, however, the extent of the benefit. Even the Applicants admit that the large business and government customers enjoy the largest number of options for their local exchange and other telecommunications needs.[593] They state that "[t]hese are the customers most avidly pursued by the competitive LECs."[594] The Applicants further state that SBC's National-Local Strategy "is only one of several recent responses" to new competitive dynamics in the telecommunications industry.[595] As examples, the Applicants cite competitive LECs that are pursuing similar strategies and targeting customers in similar geographic markets: Allegiance Telecom, AT&T, Covad, e.spire, Electric Lightwave, Focal, GST Telecommunications, Hyperion, ICG Communications, Intermedia Communications, Sprint, Time Warner Telecom, WinStar, and MCI WorldCom.[596]

We find that the Applicants' National-Local Strategy has substantial company in competitors that have not only announced, but also deployed, facilities in the geographic markets and to serve the customer base contemplated by the Applicants. We conclude, therefore, that the

590 SBC/Ameritech Nov. 16 Reply Comments at 8.
591 SBC Oct. 15 *Ex Parte* at 15.
592 SBC/Ameritech July 24 Application, Schmalensee and Taylor Aff. at para. 16.
593 SBC/Ameritech July 24 Application at 61.
594 *Id.*
595 SBC/Ameritech July 24 Application, Carlton Aff. at para. 36.
596 *Id.*

benefits of an additional entrant targeting the large/medium business customer base in the top 50 markets are modest.[597]

Residential Customers and Small Businesses. Applicants contend that out-of-region small business and residential customers also will benefit from SBC/Ameritech's entry as an additional facilities-based entrant providing local, long distance and data services.[598]

Specifically, the Applicants plan to target "about 25 percent of the total residential and small business customers in out-of-region areas and expect to service 16.5 percent of this target group after 10 years."[599] This translates into an overall penetration rate of four percent of the residential customers in these 30 markets and closer to six percent of the small businesses in these markets. The residential customers that the Applicants will target are heavy users of telecommunications services that are most likely to want bundles of local exchange, long distance and other services.[600] The Applicants initially plan to serve these residential customers primarily with a mix of UNEs and later via unbundled loops, with a small portion being served by resale.[601] The Applicants contend that a significant percentage of residential and small business customers are within reach of the first out-of-region offices that the merged company plans to equip with switches and fiber.[602]

We find that the Applicants' provide little evidence to support these assertions. The Applicants claim that a significant percentage of residential and small business customers are near central offices first targeted by the Strategy; yet they provide no supporting evidence, with the exception of a few maps depicting two geographic markets, one of which is not even slated to be in the first phase of market roll-outs. We therefore have no basis to determine how many residential and small business customers are likely to benefit from the Applicants' National-Local Strategy, or when they will benefit.

We also find that the Strategy contemplates targeting only the top quartile of residential customers, based on telecommunications expenditures.[603] While we are encouraged by the promise of greater residential competition in these markets, this is not, as the Applicants suggest, the panacea for residential competition intended by the 1996 Act.[604]

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597 Because the out-of-region entry is not merger-specific, this modest benefit overstates the merger's value.

598 SBC/Ameritech July 24 Application, Schmalensee and Taylor Aff. at para. 6.

599 SBC/Ameritech Nov. 16 Reply Comments, Carlton Aff. at para. 84.

600 SBC/Ameritech Nov. 16 Reply Comments, Kahan Aff. at para. 29. The Applicants provide data suggesting that high users "are equally distributed across all income levels." *See* Letter from Wayne Watts, to Magalie Roman Salas, Secretary, FCC at 1 (filed Oct. 6, 1998) (SBC Oct. 6 *Ex Parte*.); SBC/Ameritech Nov. 16 Reply Comments, Kahan Aff. at paras. 29-30.

601 SBC Feb. 2 Narrative Response at 26.

602 SBC/Ameritech Nov. 16 Reply Comments at 9.

603 SBC/Ameritech Nov. 16 Reply Comments, Carlton Aff. at para. 84.

604 Rather, this Strategy represents to a great degree the strategies pursued by other competitive LECs targeting small and medium business customers that can and do sign up residential customers that are proximate to the

(2) In-region Competition

The Applicants' claims that their merger will stimulate increased in-region competition are not fully persuasive either. They state that their National-Local Strategy will put the company in direct competition with all major interexchange carriers, incumbent LECs and other competitive LECs outside its region.[605] Consequently, the Applicants believe that their out-of-region expansion will also generate competitive responses from these competitors who will attempt to follow their customers into SBC's territory.[606] More specifically, the Applicants based the National-Local Strategy on the assumption that "incumbent BOCs" in particular would have to respond to defend not only their business in their own region, but in the Applicants' regions, as well.[607] In support of this contention, the Applicants cite economic literature suggesting that actions by one firm might have a "demonstration effect" that validates the firm's strategy for other firms, thereby reducing the risk and uncertainty to those other firms of adopting similar strategies.[608] The Applicants expect, therefore, other BOCs to retaliate by competing initially for large business customers in SBC-Ameritech territory[609] in an attempt to follow select customers or by undertaking efforts to achieve similar economies of scale, scope and geographical diversity as the new SBC.[610]

Of course, the Applicants cannot have it both ways. On the one hand, they argue that the merger is the catalyst for their own out-of-region expansion. On the other, they maintain that their own expansion will trigger imitative retaliatory responses by other BOCs. For other BOCs to pursue a similar out-of-region strategy, the Applicants' own logic dictates that other BOCs, too, will need to merge to facilitate their expansion.

Furthermore, while we are encouraged by the promise of greater competition, we once again question the extent of such competition due to retaliation in in-region markets. First, we are skeptical that residential customers will benefit from retaliatory responses that likely will target large business customers, at least initially. Second, we reiterate that the Applicants themselves have said that the large business market already enjoys the largest number of competitive options. It seems to us that retaliatory responses, therefore, would not have a substantial impact. We note that even the Applicants share this view.[611]

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competitive LEC's facilities. Examples of such carriers include: Cox Communications, McLeodUSA, Teligent and WinStar. *See* SBC/Ameritech Nov. 16 Reply Comments, Carlton Aff. at para. 36.

605 SBC/Ameritech July 24 Application at 24-25.

606 *See* SBC/Ameritech July 24 Application at 34; SBC Oct. 15 *Ex Parte* at 2, 13-16.

607 SBC/Ameritech July 24 Application, Kahan Aff. at para. 88.

608 SBC Oct. 15 *Ex Parte* at 2.

609 SBC/Ameritech July 24 Application, Schmalensee and Taylor Aff. at para. 16.

610 SBC/Ameritech July 24 Application, Kahan Aff. at para. 88.

611 *See* Appendix B (Summary of Confidential Information and Conclusions)

B. Efficiencies

We concluded above that the Applicants' pursuit of the National-Local Strategy, and the associated benefits to local exchange markets resulting from this Strategy, are largely not merger-specific. In this section, we evaluate the second component of the Applicants' claimed benefits -- efficiencies resulting from the merger in the form of revenue enhancements and cost savings.

In the *Bell Atlantic-NYNEX Merger Order*, the Commission outlined the types of efficiencies that it would consider as the public interest benefits of a proposed merger.[612] The Commission generally recognized that efficiencies generated through a merger can mitigate public interest harms if such efficiencies enhance the merged firm's ability and incentive to compete and, therefore, result in lower prices, improved quality, enhanced service or new products. The Commission further noted, however, that beneficial efficiencies include only those efficiencies that are merger specific, *i.e.*, those that would not be achievable but for the proposed merger. Thus, the Commission held that efficiencies that can be achieved through means less harmful to the public interest than the proposed merger cannot be considered to be true merger benefits. The Commission further stated that efficiencies are particularly significant if they improve market performance in a relevant market and thereby reduce the harms otherwise presented by the proposed merger. The Commission recognized also, that in order to mitigate public interest harms, efficiencies cannot result from anti-competitive reductions in output or service.

The Commission also recognized in the *Bell Atlantic-NYNEX Merger Order* that efficiencies resulting in reductions to marginal costs, as opposed to fixed or overhead costs, were more likely to offset unilateral or coordinated effects by counteracting the merged firm's incentive to elevate price, or enhancing the incentive of a maverick firm to lower price or by creating a new maverick firm.[613] The Commission determined in that proceeding that only a small fraction of the Applicants' asserted costs savings qualified, in that they reduce marginal costs, rather than fixed or overhead costs.[614]

As the Commission has previously noted, the Applicants bear the burden of showing both that the merger-specific efficiencies will occur, and that these efficiencies and any other public interest benefits sufficiently offset any harms resulting from the merger such that the Commission can conclude that the transaction is in the public interest.[615] Thus, Applicants cannot carry their burden if their efficiency claims are vague or speculative, and cannot be

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612 *Bell Atlantic/NYNEX Order,* 12 FCC Rcd at 20063-64, para. 158.

613 *Id.* at 20066-67, para. 169; *1997 Horizontal Merger Guidelines Revisions*.

614 *Bell Atlantic/NYNEX Order*, 12 FCC Rcd at 20066-67, paras. 169-170. The Commission found that procurement savings reduce the cost of incremental inputs, thereby reducing marginal cost. Savings in the cost of providing long distance services, to the extent that they represent real productive efficiencies, also represent a reduction in marginal cost.

615 *Id*.

verified by reasonable means.[616] Therefore, the public interest benefits of a merger include any efficiencies arising from the transaction if such efficiencies are merger-specific, are sufficiently likely and verifiable, and are not the result of anti-competitive reductions in output or increases in price.[617]

The Applicants maintain that the merger will produce significant cost savings and additional revenues due to synergies in new product development and marketing, purchasing discounts, and the elimination of duplication.[618] According to the Applicants, the resulting increased cash flow will make the combined company a more effective competitor, enhance and expand services to existing customers, and help support the financial requirements for the merged company's in-region, out-of-region, and global plans.[619] The Applicants estimate that by the third year after the closing of this merger, the merger will enable the combined company to realize total efficiency gains on an annual basis of $2.5 billion, including almost $800 million in additional revenues and over $1.7 billion in cost savings.[620]

Although we conclude that this merger would expedite the achievement of many of the Applicants' claimed efficiencies, we find that only a portion of them are indeed merger-specific. We further find that, of those efficiencies that are merger-specific, fewer still are efficiencies that can be passed through to consumers in a verifiable fashion. Because we already have concluded in this Order that this merger, absent conditions, is likely to result in substantial harms to the public interest, we conclude here that the claimed efficiencies that are merger-specific are not sufficient to outweigh these public interest harms.

1. Cost Savings

The Applicants claim that the proposed merger will produce annual cost savings of $1.43 billion, which includes $1.17 billion in expense savings and $260 million in capital savings.[621] These cost savings will be realized in the areas of administrative overhead, support functions and telephone company operations.

The claimed efficiencies fall into several categories, including: 1) elimination of duplicative or redundant personnel or functions, 2) economies of scale, 3) economies of scope, and 4) adoption of best practices.[622] Specifically, the Applicants assert that the largest cost savings will come from support operations ($771 million), such as volume discounts on equipment purchases ($381 million) and consolidation of billing/ordering functions ($227

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616 *Id.*

617 *Id*.

618 SBC/Ameritech July 24 Application at 37.

619 SBC/Ameritech July 24 Application at 38, Kaplan Aff. at para. 32.

620 SBC/Ameritech July 24 Application at 38, Schmalensee and Taylor Aff. at para. 12, Kaplan Aff. at paras. 7, 17.

621 SBC/Ameritech July 24 Application, Kaplan Aff. at para. 17.

622 SBC/Ameritech July 24 Application, Schmalensee and Taylor Aff. at para. 11, Kaplan Aff. at para. 17.

million).[623] The Applicants also project cost savings of $313 million from combining the operations of the SBC and Ameritech telephone operating companies. According to the Applicants, such savings will be derived from provisioning and maintenance ($115 million), switching operations and network engineering ($45 million), and other miscellaneous sources ($153 million). [624] The Applicants also claim cost savings from combining administrative functions ($201 million)[625] and from combining the two companies' activities in businesses such as Yellow Pages, wireless service, and Internet service ($146 million).[626]

We find that certain types of cost savings are indeed merger-specific. For example, elimination of duplicative or redundant administrative functions, or the reduction in future equipment purchases,[627] are direct consequences of the merger. The same is true for some types of best practices, such as when superior methods of provisioning service and maintaining operations are transferred between companies, and economies of scale or scope that could not be achieved but for the merger.

Although such cost savings may be merger-specific, verifiable and even likely, some may be the result of decreases in output. For instance, in *Bell Atlantic-NYNEX*, we found that the elimination of parallel research and development efforts would eliminate a form of non-price competition in which firms attempt to differentiate products either in function or quality.[628] Both SBC and Ameritech, like Bell Atlantic and NYNEX, engage in research and development and the merger, by consolidating these functions, could reduce this competitive differentiation.

Additionally, although some cost savings may be merger-specific, verifiable and even likely, they may not necessarily be passed through to consumers in the form of lower prices or new or improved services.[629] For example, elimination of a redundant controller is merger-specific. It is verifiable and indeed quite likely. But such a reduction in fixed costs, however, may or may not be passed on to consumers. In the absence of explicit pass-throughs which are publicly committed to by the Applicants, we find it difficult to evaluate just how much of such cost savings actually would benefit the public interest.

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623 SBC/Ameritech July 24 Application, Kaplan Aff. para. 20.

624 *Id.* at paras. 21, 23.

625 *Id.* at para. 24.

626 *Id.* at para. 25.

627 An example of this is the claim by the Applicants that this merger would enable them to consolidate two different methods of acquiring and maintaining switches into one. Since Ameritech outsources its switch engineering functions while SBC performs these functions in-house, the merger would enable the combined company to take advantage of scale economies in performing these functions. *See* SBC/Ameritech July 24 Application, Gilbert and Harris Aff. at para. 43.

628 *Bell Atlantic/NYNEX Order*, 12 FCC Rcd at 20067, para. 171.

629 In fact, the Applicants even admit that "[o]f the merger cost savings, some will go to stockholders." *See* SBC/Ameritech July 24 Application, Schmalensee and Taylor Aff. at para. 17.

The redundant controller example highlights a general problem - although the Applicants have assigned dollar amounts to the various claimed cost savings, they provide little supporting evidence to persuade us that these savings will occur or, if so, in what magnitude. The Applicants maintain that their prior experience with the Pacific Telesis merger should serve as a useful indicator of their ability to fulfill their cost savings projections.[630] Although we recognize SBC's success with realizing synergies from the Pacific Telesis merger, prior experience is not a sufficient substitute for rigorous analysis of the facts or presentation of persuasive evidence. Without sufficient evidence to support their claimed cost savings, we find it difficult at best to evaluate their claims.

The Applicants also state that in excess of $1.45 billion of investment is necessary to achieve these savings.[631] The Applicants provide no further breakout detailing the nature, extent and impact of these investments, however, and they provide little information as to when these investments will be made and completed.[632]

Finally, the Applicants argue that these efficiencies will generate extra cash flows that then will be used to benefit the public interest. They maintain that realizing the claimed efficiencies will enable them to become a more effective competitor, enhance and expand services to existing customers, and help support the financial requirements for the new company's in-region, out-of-region, and global plans.[633] We do not disagree that increased cash could be used to accomplish these aims. But, as we reject the majority of claimed cost savings on the grounds that they are either not merger-specific or not easily verifiable, we also reject the attendant benefits as not being merger-specific.

We conclude, therefore, that while some portion of the cost savings do satisfy the established criteria, they do not contribute sufficiently to amend our overall conclusion that this merger is not in the public interest, absent the possibility of appropriate, substantial conditions.

2. Revenue Enhancements

The Applicants estimate additional revenues of $778 million on an annual basis by the third year after merger closing.[634] They claim that these are efficiency gains stemming from the adoption of best practices by both companies. For example, the Applicants contend that SBC's strength in research and development, along with its expertise in developing and marketing attractive service packages, will enable Ameritech to achieve significant new revenue

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630 SBC/Ameritech July 24 Application at 40, Gilbert and Harris Aff. at paras. 54-59.

631 SBC/Ameritech July 24 Application, Kaplan Aff. at para. 17.

632 *Id.* Kaplan states that "[n]et savings, i.e. savings after investment, begin the second year after closing." He also maintains that these investments must be made before the full savings can be realized. It is unclear, therefore, when these investments must be completed to achieve "full" savings on schedule.

633 SBC/Ameritech July 24 Application at 38, Kaplan Aff. at para. 32.

634 SBC/Ameritech July 24 Application, Kaplan Aff. at para. 7, Schmalensee and Taylor Aff. at para. 12.

opportunities in selling vertical services.[635] Similarly, the Applicants claim that Ameritech's strength in selling Centrex services will enable SBC to increase penetration and sales of Centrex in its own territory.[636]

The Applicants estimate annual revenue growth of $778 million from the implementation of best practices between the companies. [637] Specifically, the Applicants expect increased sales of vertical features ($230 million), additional lines ($134 million), directory publishing ($98 million), data services ($65 million), wireless services ($50 million), and all other products and services that the companies offer, such as Centrex ($120 million).[638]

In general, the Commission has not recognized claimed revenue synergies as merger-specific because additional revenues can also be generated through increases in price or increases in quantity. As the Applicants assure us that their projections assume no price increases, the thrust of our inquiry will focus on increases in output which will be generated, according to the Applicants, by the adoption of best practices by both companies. The Applicants claim that the result of these efforts will be an incremental $778 million in revenue on an annual basis.

First, we find that the Applicants fail to account for any increases in input costs due to the corresponding increases in output. For example, the claimed increases in vertical features penetration results from the transfer of best practices from SBC to Ameritech.[639] This transfer comes at a cost, whether it involves retraining Ameritech's sales force or recrafting vertical features packages, or by some other change. As the Justice Department's *Merger Guidelines* state, cognizable efficiencies are assessed "net of costs produced by the merger or incurred in achieving those efficiencies."[640] The net contribution to the merged company from the claimed revenue synergies, therefore, would be something substantially less than the $778 million claimed by the Applicants.

Second, although the Applicants have quantified the projected incremental revenue associated with transfers of best practices between the companies, they fail to provide supporting calculations demonstrating how they arrived at those quantifications. The Applicants point to SBC's merger with Pacific Telesis as evidence of prior experience in these matters.[641]

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635 SBC/Ameritech July 24 Application, Kaplan Aff. at para. 8.

636 *Id.* at para. 14.

637 SBC/Ameritech July 24 Application at 38, Schmalensee and Taylor Aff. at para. 12, Kaplan Aff. at para. 7.

638 SBC/Ameritech July 24 Application, Kaplan Aff. at paras. 7-9.

639 It should also be noted that while SBC may enjoy higher penetration levels of vertical services than Ameritech, that Ameritech's percentage growth in vertical services penetration and revenue has outpaced SBC's growth on average over the past five quarters. Average growth in vertical service for Ameritech over 5 quarters is 20.0% vs. 18.4% for SBC. *See* Daniel Reingold and Ehud Gelblum, *Telecom Services – Local*, Merrill Lynch, (Apr. 16, 1999), at 3.

640 *1992 Horizontal Merger Guidelines* at 30.

641 SBC/Ameritech July 24 Application, Kaplan Aff. at para. 15, Gilbert and Harris Aff. at para. 56.

Although we recognize that SBC may have gained valuable experience in this regard, we do not accept such experience as a sufficient substitute for providing the supporting calculations. Additionally, even the Applicants admit that regardless of past experience, "no one can predict with 100 percent certainty when or if all the estimated synergy benefits will occur."[642]

Third, best practices, even if fully implemented, can be difficult to verify. We conclude, therefore, that these claimed revenue synergies are speculative at best, are difficult to verify, and lack the supporting evidence to persuade us as to their likelihood and verifiability. In any event, neither party needs to merge with the other in order to learn about selling vertical services or Centrex services. Surely simply hiring experienced personnel or forming a limited joint venture should be sufficient.

3. Long Distance

The Applicants expect a net benefit of $300 million from additional revenues and reduced costs in the combined company's long distance operations after it receives in-region, interLATA authority.[643] They cite three main factors, including: 1) increased intra-region traffic over their own networks which reduces unit costs; 2) larger wholesale purchase discounts from increased long distance traffic; and 3) increased long distance revenues from the combination of large business customer bases and implementation of the National-Local Strategy.[644]

We recognized in the *Bell Atlantic-NYNEX Merger Order* that savings in the costs to provide long distance services counted as efficiencies.[645] However, any increases in intra-regional traffic and increased long-distance revenue claimed by the Applicants could simply be the result of shifting traffic from competitors' networks to their own. This is not a reduction in the cost of providing services and therefore does not constitute a merger specific efficiency. With respect to being able to obtain larger wholesale discounts, the Applicants have not shown that such discounts (if they can be verified) could not be achieved by alternate less harmful means.

C. Other Product Markets

The National-Local Strategy's emphasis on jump-starting local exchange competition around the country remains the Applicants' primary claimed public interest benefit of the proposed merger. [646] The Applicants, however, also maintain that the merger itself will generate synergies and pro-competitive benefits that will benefit ancillary product markets, including markets for Internet services, wireless services, long distance and international

642 SBC/Ameritech July 24 Application, Kaplan Aff. at 15.
643 SBC/Ameritech July 24 Application at 38, Kaplan Aff. at para. 26.
644 SBC/Ameritech July 24 Application, Kaplan Aff. at para. 26.
645 *Bell Atlantic/Nynex Order,* 12 FCC Rcd at 20067, para. 170.
646 SBC/Ameritech July 24 Application at 21.

services, global seamless services for large business customers, video services and alarm monitoring services. [647]

With respect to wireless services, the Applicants state that the merger expands their geographic reach, thereby enabling them to offer a more seamless and broader footprint to customers. Additionally, the Applicants submit that, as a merged entity, they can offer customers consistency of advanced features, which is dependent on an integrated, regional network to reduce unit costs and maximize efficiencies.[648]

The Applicants also maintain that the merger will stimulate greater competition in the national market for Internet services.[649] According to the Applicants, today they hold less than 2% of this national market on a combined basis.[650] Although they currently provide only dial-up access services, both SBC and Ameritech are deploying high-speed data networks and services. Moreover, SBC has an equity stake in Williams Communications, which owns one of the largest nationwide fiber networks. The Applicants conclude that the only effect of the merger in this market will be to help them to compete better against more dominant competitors.[651]

The Applicants contend that the merger will help reduce concentration and promote competition in the long distance and international services market. The Applicants use the following logic to support their contention: the merger makes possible the Applicants' pursuit of the National-Local Strategy; the National-Local Strategy, in turn, calls for offering a full bundle of data and voice services, including long distance and international services.[652] The full competitive benefit in the long distance and international services market, therefore, is dependent on the merger. By capturing a share of out-of-region long distance traffic, coupled with in-region traffic once section 271 authorizations are secured, the Applicants believe they can add to competitive choices in these markets that they claim is still dominated by AT&T, MCI WorldCom and Sprint.[653] They believe that internationally, U.S.-based business customers should benefit from the Applicants' expanded geographic reach into 14 major foreign markets by paying lower international termination rates and other such costs.[654] Applicants also maintain that as they follow their large customers out-of-region domestically, the realities of the marketplace will also require that they follow them to foreign markets.[655] We have discussed the international component of the National-Local strategy above.

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647 *Id.* at 92-102.
648 *Id.* at 94.
649 *Id.*
650 *Id.* at 96.
651 *Id.*
652 *Id.* at 97.
653 *Id.* at 96-97.
654 *Id.* at 98.
655 SBC/Ameritech July 24 Application, Kahan Aff. at para. 67

Finally, the Applicants claim that as they expand out-of-region and begin to provide bundled services, the long distance providers and competitive LECs will have to compete to preserve their existing long distance and full-service customers.[656] As the Applicants themselves have noted, they are currently able to provide long distance service out-of-region immediately,[657] though they have refrained from doing so. Further, as the Commission found in the Bell Atlantic/NYNEX merger order, the experience of other incumbent LECs in offering in-region interexchange service suggest that the Applicants can be quite effective competitors once they receive section 271 authority.[658] We, therefore, do not find their argument that the merger will generate more long distance competition persuasive.

In the global seamless services market for large business customers, the Applicants claim that the merger will create a strong new competitor with the reach, resources and scale to bring new competition to a market populated by only a handful of major competitors worldwide. This merger will benefit large business customers that not only have domestic telecommunications needs, but transnational requirements as well. According to the Applicants, their increased ability to compete globally through this transaction will spur competition not only in the large business market, but also in the small business and residential markets.[659]

We conclude that the merger brings few tangible merger-specific benefits to these other product markets. In general, we find that the only merger-specific benefits to these markets are those related to speed of expansion and reductions in unit costs, such as with consistency of advanced features in the wireless services market. Other than these benefits, we find that each company could expand geographically or offer the products on its own. Specifically, each company individually could expand its respective wireless footprints through other acquisitions or joint ventures that do not threaten equivalent public interest harms. Each company could offer out-of-region Internet services today, so expanding its customer base of dial-up customers could be achieved absent this merger. Each company could offer long distance services out-of-region and abroad today absent the merger. In-region, each company's ability to offer long distance services is subject to section 271 authorizations which are not dependent on this merger. Each company could secure large business customers today in the global seamless services market by leveraging its substantial international holdings and by introducing a full suite of local and long distance voice and data products. These activities, therefore, are not dependent on the merger and could be accomplished individually.

V. CONDITIONS

656 *Id.* at para. 90

657 *Id.*

658 *Bell Atlantic/NYNEX Order*, 12 FCC Rcd at 20067-68, para. 172.

659 SBC/Ameritech July 24 Application at 98-100.

We conclude above that the proposed merger of SBC and Ameritech poses significant potential public interest harms by: (a) removing one of the most significant potential participants in local telecommunications mass markets both within and outside of each company's region; (b) eliminating an independent source for effective, minimally-intrusive comparative practices analyses among the few remaining major incumbent LECs as the Commission implements and enforces the 1996 Act's market-opening requirements; and (c) increasing the incentive and ability of the merged entity to discriminate against rivals, particularly with respect to advanced services. We also conclude that these concerns are not mitigated by the proposed transaction's potential public interest benefits. Thus, if our analysis ended at this point, we would have to conclude that the Applicants have not demonstrated that the proposed transaction, on balance, will serve the public interest, convenience and necessity.

As noted above, on July 1, 1999, the Applicants supplemented their initial Application to include a package of voluntary commitments that they intended would alter the public interest balance in their favor.[660] After receiving extensive public comment on their proposed conditions, SBC and Ameritech clarified and modified their commitments on August 27, 1999, and in subsequent filings.[661] We believe that the Applicants' package of conditions, with the modifications by this Commission, alters the public interest balance of the proposed merger by mitigating substantially the potential public interest harms while providing additional public interest benefit. Accordingly, with the full panoply of conditions that we adopt in this Order, and assuming the Applicants' ongoing compliance with these conditions, we find that the Applicants have demonstrated that the proposed transfer of licenses and lines from Ameritech to SBC will serve the public interest, convenience and necessity.

A. Open Process

As a threshold matter, we affirm that considering conditions in license and line transfer proceedings is an appropriate and, in circumstances such as this merger, a necessary process in our application review. It is seductively simple, yet short-sighted, to believe that our role is limited to voting an application up or down, measuring an application solely against whether it violates a specific provision of the Act or a specific Commission rule. Such a view

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660 Letter from Paul K. Mancini, SBC Communications Inc., and Richard Hetke, Ameritech Corporation, to Magalie Roman Salas, FCC Secretary, CC Docket No. 98-141 (filed July 1, 1999) (SBC/Ameritech July 1 *Ex Parte*). *See also* "Pleading Cycle Established for Comments on Conditions Proposed by SBC Communications Inc. and Ameritech Corporation for their Pending Application to Transfer Control," CC Docket No. 98-141, Public Notice, DA 99-1305 (rel. July 1, 1999).

661 Letter from Richard Hetke, Ameritech Corporation and Paul K. Mancini, SBC Communications Inc., to Magalie Roman Salas, Secretary, FCC, CC Docket No. 98-141 (filed Aug. 27, 1999) (SBC/Ameritech August 27 *Ex Parte*); Letter from Richard Hetke, Ameritech Corporation and Paul K. Mancini, SBC Communications Inc., to Magalie Roman Salas, Secretary, FCC, CC Docket No. 98-141 (filed Sept. 7, 1999) (SBC/Ameritech Sept. 7 *Ex Parte*); Letter from Richard Hetke, Ameritech Corporation and Paul K. Mancini, SBC Communications Inc., to Magalie Roman Salas, Secretary, FCC, CC Docket No. 98-141 (filed Sept. 17, 1999) (SBC/Ameritech Sept. 17 *Ex Parte*); Letter from Marian Dyer, SBC Telecommunications, Inc., to Magalie Roman Salas, Secretary, FCC, CC Docket No. 98-141 (filed Sept. 29, 1999)(SBC/Ameritech Sept. 29 *Ex Parte*).

rests on the assumption that our market-opening rules will work equally well regardless of the number of major incumbent LECs or RBOCs and of who owns them. As we discussed at some length in Section IV of this Order, however, this would be an incorrect view of our rules, and the current realities of the telecommunications industry.

Accordingly, following the Applicants' acceptance of the process outlined in the Chairman's April 1st letter, Commission staff discussed with the Applicants a set of voluntary conditions that might both alleviate our public interest concerns and strengthen the merger's public interest benefits. It is, of course, up to the Commission – not the staff – to judge whether such conditions are sufficient. Throughout these discussions, Commission staff and the parties understood that, although productive dialogue required separate meetings among staff and various parties, this agency is a public agency and it conducts its business in public. Accordingly, our staff followed procedures that were designed to permit effective negotiations in the context of an open reporting process. To these ends, the staff first met with representatives of SBC and Ameritech, with each meeting memorialized by a letter included in the public file of this proceeding that summarized the topics discussed. Then, in order to learn the views of interested parties, our staff conducted a public forum on conditions on May 6, 1999[662] at which numerous citizens, representatives of citizen groups, and industry members spoke. The staff also met extensively, in individual sessions, with dozens of individuals, groups and firms, both before and after the Applicants placed on the public record, for full public commentary, an initial version of their supplemental proffered conditions.

The success of these "open negotiation" procedures is, we think, evident from the Applicants' supplemental proffer of conditions. A comparison between the Applicants' initial proposed conditions, filed on July 1, 1999, and the contents of the May 6th public forum and the reports of Commission staff's early *ex parte* meetings with consumer representatives and industry participants evidence how substantially the public input influenced those proposals. When compared with their July filing, the Applicants' subsequent proffers show on their face that public input substantially altered and shaped the Applicants' final proposal.

Having explained why the staff engaged in discussions over conditions and why the staff operated in an "open negotiation" process designed to permit constructive bargaining, we turn now to a description of the conditions voluntarily submitted by SBC and Ameritech in their final joint supplement to their initial Application. Subsequently, we explain why we have decided to accept these voluntary conditions, and to approve the proposed merger subject to those conditions.

B. Adopted Conditions

662 We note that in addition to this forum on conditions, the Commission held three earlier public forums addressing more generic policy matters associated with mergers. *See supra* at Section III.B.3 (Commission Review).

We adopt, with some modification, the proffered commitments of SBC and Ameritech as express conditions of our approval of the transfer of licenses and lines from Ameritech to SBC.[663] For the reasons set forth below, we conclude that, assuming the Applicants' ongoing compliance with these conditions, SBC and Ameritech have demonstrated that their proposed transaction, on balance, will serve the public interest, convenience and necessity. We summarize these conditions below.

As indicated below, these conditions are designed to accomplish five primary public interest goals: (a) promoting equitable and efficient advanced services deployment; (b) ensuring open local markets; (c) fostering out-of-territory competition; (d) improving residential phone service; and (e) ensuring compliance with and enforcement of the conditions. These goals flow from our statutory objectives to open all telecommunications markets to competition, to promote rapid deployment of advanced services, and to ensure that the public has access to efficient, high-quality telecommunications services. Achieving these goals will also serve to ameliorate the potential public interest harms of the transaction described above.

Even though some of the conditions may relate to other requirements that SBC and Ameritech are or will be subject to under the Act or our rules, the conditions that we adopt in this merger proceeding are not intended to prejudge, or override, Commission action in other proceedings. The Commission may, for example, adopt additional requirements in other more general proceedings that affect matters addressed by these conditions. In that case, because the conditions are intended to be a floor and not a ceiling, SBC and Ameritech would be subject to the general requirements as well as these conditions. We emphasize that the merged firm must comply with any applicable Commission orders or rules in addition to the requirements of these conditions.[664]

Nor are the conditions that we adopt today intended to be considered as an interpretation of sections of the Communications Act, especially sections 251, 252, 271 and 272, or the Commission's rules, or any other federal statute including the antitrust laws. The conditions are designed to address potential public interest harms specific to the merger of the Applicants, not the general obligations of incumbent LECs or the criteria for BOC entry into the interLATA services market. For example, the structure of the separate advanced services affiliate that is required under the conditions would not be adequate for SBC/Ameritech's provision of in-region, interLATA services following section 271 authorization.[665] Similarly, the

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663 The specific conditions that we adopt in this merger proceeding are set forth in Appendix C to this Order. In order to provide guidance to the industry on particular interpretive issues, as well as to facilitate implementation and enforcement of the conditions, in some instances we have annotated SBC/Ameritech's proffered conditions with explanatory footnotes that further reflect and clarify the intent of the particular condition.

664 If SBC/Ameritech is unable to comply simultaneously with both the requirements of any condition and the requirements of any Commission rule or order, it must so inform the Commission and seek guidance as to how it should proceed.

665 SBC/Ameritech must comply fully with all section 272 requirements to provide in-region, interLATA services following section 271 authorization.

Carrier-to-Carrier Performance Plan is not meant to substitute for any enforcement mechanisms that the Commission may adopt in the section 271 context (*i.e.*, anti-backsliding measures), nor substitute for state performance measure plans. All of the conditions that we adopt today are merger-specific and not determinative of the obligations imposed by the Act or our rules on SBC, Ameritech or any other telecommunications carrier. In particular, we note that our adoption of SBC/Ameritech's proposed conditions does not signify that, by complying with these conditions, SBC/Ameritech will satisfy its nondiscrimination obligations under the Act or Commission rules.

The conditions are also not intended to limit the authority of state commissions to impose or enforce requirements that go beyond those adopted in this Order. Because these conditions serve as a baseline, the Applicants must abide by any applicable state rules, even if those rules address matters that are included within these conditions, unless the merged entity would violate one of these conditions by following the state rule.[666] We do not preclude states from imposing additional rules, regulations, programs or policies that are not inconsistent with these conditions. As discussed below, however, to the extent that a requirement in these conditions duplicates a requirement imposed by a state pursuant to its review of the proposed merger, parties can elect to receive the benefit under either these conditions or the identical state conditions.

We approve this merger on the assumption and expectation that all of the conditions that we adopt today will remain effective and enforceable for 36 months, or the period specified in the condition if different. Accordingly, for conditions that take effect a certain period of time after the merger closing, SBC/Ameritech's obligations under those conditions would extend from their effective date for a full 36-month period of benefit, which would fall later than 36 months after the merger closing.

We expect that SBC/Ameritech will implement each of these conditions in full, in good faith and in a reasonable manner to ensure that all telecommunications carriers and the public are able to obtain the full benefits of these conditions. If SBC/Ameritech does not fulfill its obligation to perform each of the conditions, pursuant to our public interest mandate under the Communications Act we must ensure that the merger remains beneficial to the public. We intend to utilize every available enforcement mechanism, including, if necessary, revocation of the merged firm's section 214 authority,[667] to ensure compliance with these conditions. To this end, should the merged entity systematically fail to meet its obligations, we can and will revoke relevant licenses, or require the divestiture of SBC/Ameritech into the current SBC and

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666 *See* Michigan PSC July 26 Reply Comments at 2 (seeking clarification regarding state authority over matters discussed in the conditions).

667 *See CCN, Inc., et al.*, CC Docket No. 97-144, Order, 13 FCC Rcd 13599 (1998) (revoking the Fletcher Companies' section 214 operating authority for slamming and other violations of the Communications Act and Commission rules).

Ameritech companies.[668] Although such action would clearly be a last resort, it is one that would have to be taken if there is no other means for ensuring that the merger, on balance, benefits the public.

Our approval of this Application subject to conditions should not be considered as an indication that future applicants always will be able to rely on similar public interest commitments to offset potential public interest harms.[669] Each case will present different facts and circumstances. Some potential mergers may present serious public interest harms such that no package of commitments, each of which may benefit some aspect of the public interest, could offset the harms. In any case, however, the burden rests always with the applicants to demonstrate that any proposed transaction will, on balance, further the public interest, convenience and necessity.

We also reiterate our growing concern about the impact of the declining number of major incumbent LECs. As the Commission has stated, further consolidation among the major incumbent LECs could gravely impair our implementation of Congress's directive to open all telecommunications markets to competition. After the Bell Atlantic/NYNEX merger reduced the number of remaining RBOCs to five, this Commission expressly cautioned that future applicants seeking approval of a merger between major incumbent LECs "bear an additional burden in establishing that a proposed merger will, on balance, be pro-competitive and therefore serve the public interest, convenience and necessity."[670] The instant transaction, approved with a stringent set of conditions, removes yet another independent major incumbent LEC, thereby further escalating the burden on any future major incumbent LEC merger applicants.

1. Promoting Equitable and Efficient Advanced Services Deployment

Separate Affiliate for Advanced Services. Under this condition, SBC and Ameritech will create, prior to closing the merger, one or more separate affiliates to provide all

668 *Cf. Application of General Telephone and Electronics Corporation to Acquire Control of Telenet Corporation and its Wholly-Owned Subsidiary Telenet Communications Corporation*, File Nos. W-P-C-2486, *et al.*, Memorandum Opinion and Order, 72 FCC 2d 111, 169, para. 170 (1979) (granting section 214 application of GTE to acquire Telenet subject to conditions that included structural separation but stating that the Commission would "take any necessary steps including divestiture" should GTE violate the order's requirements).

669 *See Bell Atlantic/NYNEX Order*, 12 FCC Rcd at 19993, para. 15.

670 *Bell Atlantic/NYNEX Order*, 12 FCC Rcd at 19994, para. 16.

advanced services[671] in the combined SBC/Ameritech[672] region on a phased-in basis. At present, we note that SBC and Ameritech are only permitted to provide intraLATA advanced services.[673] Establishing an advanced services separate affiliate will provide a structural mechanism to ensure that competing providers of advanced services receive effective, nondiscriminatory access to the facilities and services of the merged firm's incumbent LECs that are necessary to provide advanced services. Because the merged firm's own separate advanced services affiliate will use the same processes as competitors, and pay an equivalent price for facilities and services, the condition should ensure a level playing field between SBC/Ameritech and its advanced services competitors.[674] Given this expectation, we anticipate that this condition will greatly accelerate competition in the advanced services market by lowering the costs and risks of entry and reducing uncertainty, while prodding all carriers, including the Applicants, to hasten deployment.[675]

The separate advanced services affiliate will be distinct from SBC/Ameritech's in-region telephone companies and operate largely in accordance with the structural, transactional, and nondiscrimination requirements of sections 272(b), (c), (e), and (g).[676] The

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671 For purposes of these conditions, the term "advanced services" means any interstate or intrastate wireline telecommunications services (such as ADSL, IDSL, xDSL, frame relay, and cell relay) that rely on packetized technology and have the capability of supporting transmission speeds of at least 56 kilobits per second (kbps) in both directions. Ordinary dial-up Internet access service, which is not packetized and does not consist of speeds exceeding 56 kbps in both directions, is not included within this definition. *See* SBC/Ameritech July 26 Reply Comments at 75-76 (responding to AT&T's claim that the definition could include ordinary dial-up Internet access).

672 We use the term "SBC/Ameritech" to represent the entity that will result from the merger, consisting of today's SBC Communications Inc., Ameritech Corporation, and each company's incumbent LEC telephone subsidiaries.

673 SBC/Ameritech must receive authorization under section 271 to provide in-region, interLATA services. At that time, SBC/Ameritech must provide in-region, interLATA advanced services through a separate affiliate that complies fully with the requirements of section 272.

674 Agreeing that this condition will promote competition in the advanced services market, NorthPoint, a facilities-based data competitor, observes that, by requiring the SBC/Ameritech incumbent LECs to provide nondiscriminatory treatment to all telecommunications carriers, the separate advanced services affiliates will "wait in line for collocation, petition to open 'closed' offices, and otherwise deal with the same collocation and [OSS] implementation problems experienced by competitive LECs." NorthPoint July 19 Comments at 4-5. NorthPoint also notes that the condition's "simple but critical rule that the incumbent LEC's advanced services subsidiary deal at arm's length with the incumbent for the purchase of collocation and loops," would require, for the first time, that an affiliate of the incumbent LEC "pay the same prices as competitive LECs for loops and collocation, eliminating the DSL price squeeze." *Id.* at 4-5. *See also* MCI WorldCom July 19 Comments at 40 (supporting separate advanced services affiliate condition because "separation can help enforcement of the unbundling, resale, and nondiscrimination requirements of section 251(c)."); Texas PUC Aug. 5 Comments at 5 (supporting separate advanced services affiliate).

675 *See* SBC/Ameritech July 26 Reply Comments at 74.

676 47 U.S.C. § 272(b), (c), (e), and (g). After the Applicants' July filing, several parties sought clarification as to the services that the separate advanced services affiliate or SBC/Ameritech's incumbent LEC could provide the other, as well as the methods used to provide them and the personnel and equipment that an SBC/Ameritech incumbent LEC can transfer to the separate affiliate. *See, e.g.*, Cable & Wireless July 19 Comments at 8. The Applicants' subsequent filings provided this detail. *See* SBC/Ameritech Aug. 27 *Ex Parte* at 4, Att. 1 at 2-12; SBC/Ameritech Sept. 7 *Ex Parte* at 1, Att. 1 at 2-12, Att. 2 at 1-20; SBC/Ameritech Sept. 17 *Ex Parte* at 1-4.

condition, however, specifies certain activities that will be permitted between the SBC/Ameritech incumbent LEC and the separate affiliate, some of which differ from section 272's requirements.

Specifically, the SBC/Ameritech incumbent LEC and its advanced services affiliate may jointly market the other's services and perform certain customer care services.[677] In addition, the incumbent may perform certain operation, installation, and maintenance (OI&M) functions,[678] pursuant to a tariff, written affiliate agreement,[679] or approved interconnection agreement, and provide billing and collection services,[680] pursuant to a written agreement, for its separate affiliate on a nondiscriminatory basis. The incumbent may engage in line sharing[681] with its affiliate on an exclusive, interim basis as long as it provides unaffiliated entities with the "surrogate line-sharing" discount described below for the use of a second loop to provide advanced services. The incumbent LEC may also transfer to the separate affiliate specified advanced services equipment[682] on an exclusive basis during a limited grace period. Starting 30

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677 The customer care services permitted under the condition on an exclusive basis are: (1) ongoing customer notification of service order progress; (2) response to a customer's inquiry regarding the status of an order; (3) changes to customer account information; and (4) receipt of customer complaints (other than receipt and isolation of trouble reports).

678 The OI&M functions subject to these conditions encompass the deployment and operation of a facilities-based telecommunications network. Many competitive carriers contract with third parties for some or all of these functions, and the conditions permit the SBC/Ameritech separate affiliate to contract with the SBC/Ameritech incumbent LEC for such functions, provided that the incumbent acts in a nondiscriminatory fashion. The OI&M activities performed by an incumbent LEC in the normal course of providing unbundled elements, services or interconnection are not subject to these conditions. Such normal OI&M activities will not be affected by the conditions and will be provided and priced in accordance with forward-looking rules applicable to the underlying service, unbundled element or interconnection.

679 We note that, in accordance with the Commission's accounting safeguards, any transactions or shared services performed pursuant to this written affiliate agreement must be valued in accordance with the affiliate transactions rules, reduced to writing and posted on the Internet, and made available to competitors on the same rates, terms and conditions. *See Non-Accounting Safeguards Order*, 11 FCC Rcd at 21992, para. 181.

680 The billing and collection services that the incumbent is permitted to provide on a nondiscriminatory basis include payment arrangements, account adjustment, responding to account balance inquiries, account closure, responses to legal action affecting or involving the customer, and receipt and resolution of customer billing and collection complaints. SBC/Ameritech may, for example, include the affiliate's and other carriers' bills on a separate page in the same envelope with its bill, or it may choose to place the affiliate's and other carriers' bills in a separate envelope. Either way, SBC/Ameritech must offer the same services that it provides to its affiliate to unaffiliated carriers at the same rates, terms and conditions, and on a disaggregated basis that permits the unaffiliated providers to select the particular services that they desire from the incumbent.

681 "Line sharing" allows two different service providers to offer services over the same line, with each provider utilizing different frequencies to transport voice or data over that line. *See Advanced Services Further Notice*, 14 FCC Rcd at 4805-06, para. 92.

682 For purposes of this condition, the equipment that may be transferred consists of: (1) DSLAMs or functionally equivalent equipment, (2) spectrum splitters that are solely used in the provision of advanced services, (3) packet switches and multiplexers such as ATMs and frame relay engines used to provide advanced services, (4) modems used in the provision of packetized data, and (5) DACS frames used only in the provision of advanced services. Spectrum splitters used to separate the voice-grade channel from the advanced services channel are not permitted to be transferred. Such asset transfers must take place in accordance with the Commission's accounting

days after the merger closing, all new advanced services equipment must be purchased and owned by the separate affiliate. The affiliate may also use the SBC/Ameritech incumbent LEC's name, trademarks or service marks on an exclusive basis, and employees of the separate affiliate may be located in the same buildings and on the same floors as the incumbent LEC's employees. Moreover, although SBC/Ameritech will comply with the Commission's section 272 accounting safeguards,[683] it will be permitted to deviate from these only to the extent that it will not have to comply with the Commission's transaction disclosure requirements under section 272(b)(5) with respect to transactions conducted pursuant to interconnection agreements between an SBC/Ameritech incumbent and its advanced services affiliate. To ensure that all transactions between the advanced services affiliate and the incumbent are conducted on an arms-length basis, SBC/Ameritech's compliance with this separate affiliate condition will be subject to a rigorous annual audit.[684]

After a transition period, the responsibility to provide advanced services in the SBC/Ameritech service area will rest with the separate affiliate, and the activities that it and the incumbent may undertake are specifically set forth in the conditions. Nevertheless, the conditions permit an SBC/Ameritech incumbent to perform certain activities on behalf of its affiliate on an exclusive basis for the period of time during which SBC/Ameritech transitions to this separate affiliate structure. Specifically, for a limited period, SBC/Ameritech may provide network planning, engineering, design or assignment services associated with advanced services to its affiliate, and receive and isolate troubles affecting an advanced services customer on behalf of the affiliate.

SBC/Ameritech's obligation to provide all advanced services through a separate affiliate will sunset after either: (a) the later of 42 months after the merger's closing, or 36 months after the incumbent ceases to process trouble reports for the affiliate on an exclusive basis; (b) the date on which Congress has enacted legislation that specifically prohibits the Commission from requiring an incumbent LEC to establish a separate advanced services affiliate and the Commission has modified its rules and regulations in a manner that would materially alter the structure or interaction between the incumbent and affiliate from that set forth in the conditions;[685] or (c) nine months after a final, non-appealable judicial decision determines that the separate advanced services affiliate is deemed a successor or assign of the incumbent, unless that decision is based substantially on conduct by or between an SBC/Ameritech incumbent and its affiliate that was not expressly permitted by these conditions.

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safeguards. Consistent with the Commission's rules, if SBC/Ameritech transfers to its separate advanced services affiliate a facility that is deemed to be an unbundled network element under 47 U.S.C. § 251(c)(3), the Commission's unbundling requirements will attach with respect to that element. *See* 47 C.F.R. § 53.207.

683 *See Accounting Safeguards Order*, 11 FCC Rcd at 17588-618, 17652-55, paras. 111-70, 251-58.

684 *See* ALTS July 19 Comments at 19-20 (suggesting audit of all sub-parent transactions and relationship).

685 Examples of such a material change would be if the Commission prohibits an incumbent LEC from providing joint marketing or operation, installation and maintenance services to an advanced services affiliate. *See* MCI WorldCom July 19 Comments at 46; Sprint July 19 Comments at 30 (requesting clarification as to the type of modifications that would produce a material change).

If, after one of these three sunset events occurs, SBC/Ameritech decides to no longer provide advanced services through a separate affiliate in a particular state, then SBC/Ameritech will continue certain other obligations until 48 months after the merger closing date. In that case, SBC/Ameritech must, for example, provide all advanced services through a separate office or division that will continue using the same OSS interfaces, processes and procedures that are made available to unaffiliated entities (including using the Electronic Data Interchange (EDI) interface for processing a substantial majority of pre-order inquiries and orders). In addition, SBC/Ameritech will continue the surrogate line-sharing and advanced services OSS discounts, and its incumbent LECs will continue to provide unaffiliated carriers with the same OI&M services that its retail operations use, as well as those OI&M services that previously were made available under the conditions.

Surrogate Line-Sharing Discount. By separating a line into a voice channel and an advanced services channel and carrying both voice and advanced services traffic simultaneously, line sharing potentially enables each service to be provided by a different carrier.[686] Although the Applicants have not proposed in this proceeding to allow other carriers to provide data services over the same loop on which SBC or Ameritech provides voice service, they have proposed to allow their separate advanced services affiliate to do so. The conditions permit SBC/Ameritech to provide line sharing to its advanced services affiliate on an exclusive basis until SBC/Ameritech provides line sharing to unaffiliated carriers in the same geographic area. Nevertheless, in order to ensure that competitors receive a benefit comparable to this "interim line sharing" between an SBC/Ameritech incumbent LEC and its affiliate, SBC/Ameritech will offer other carriers a second loop at a substantial discount. In this manner, the conditions require SBC/Ameritech to offer competing carriers the economic equivalent of line sharing until line sharing becomes available to unaffiliated carriers.[687] In addition, the performance measurements adopted as part of this Order will encourage the rapid installation of the surrogate line. For example, measures 6c and 8 ensure that loops will be installed in a nondiscriminatory and timely manner.

Specifically, where SBC/Ameritech and its separate advanced services affiliate engage in "interim line sharing," the merged firm will charge unaffiliated providers of advanced

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686 *Advanced Services Further Notice*, 14 FCC Rcd at 4806, para. 93.

687 The Applicants' July filing contained a proposed condition requiring SBC/Ameritech to implement line sharing on a permanent basis, subject to a 12-month implementation schedule, when it was technically and commercially feasible to do so according to industry standards. *See* SBC/Ameritech July 1 *Ex Parte*, Att. A at para. 33. Several commenters protested that the restrictions on when this obligation would take effect eviscerated any potential benefit from the condition. *See* CompTel July 19 Comments at 30-32; Level 3 July 19 Comments at 12, NorthPoint July 19 Comments at 14-16; Rhythms July 19 Comments at 10-11. The Applicants subsequently removed the proposed condition in their August filing. *See* ALTS July 19 Comments at 22 (observing that, until line sharing is ordered ubiquitously, the surrogate charge appears to be an adequate substitute). *See also Advanced Services Further Notice*, 14 FCC Rcd at 4805-12, paras. 92-107 (seeking further comment on operational, pricing and other practical issues associated with line sharing).

services surrogate charges for an additional unbundled loop, provided that the loop is used solely for the provision of advanced services (conforming to an industry-standard spectral mask)[688] to a customer that is receiving voice-grade service,[689] either on a retail or wholesale basis, from an SBC/Ameritech incumbent LEC.[690] The "surrogate line-sharing charges," which SBC/Ameritech also will charge to its separate advanced services affiliate for interim line sharing, represent a 50-percent discount from the monthly recurring charge and the nonrecurring line or service connection charge. This discount not only puts unaffiliated advanced services providers on comparable economic footing with the merged firm's separate advanced services affiliate, but, pending actual implementation of line sharing, it allows these carriers to obtain reduced loop costs that otherwise would not be available to them. We note that, in the event that SBC/Ameritech is required to line share with competitors, the Applicants will temporarily waive all nonrecurring charges associated with the installation of a new shared line in order to ease the transition for those competitors using a second loop under the surrogate line sharing discount. In addition, SBC/Ameritech will continue to provide this discount until the line is actually shared.[691] We find that this condition will spur deployment of advanced services by SBC/Ameritech, as well as other carriers, while ensuring that these other carriers receive treatment from an SBC/Ameritech incumbent LEC comparable to that provided to the SBC/Ameritech separate affiliate.

Advanced Services OSS. In addition to the general OSS conditions outlined below, SBC/Ameritech will develop and deploy common electronic OSS interfaces across all 13

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688 The Applicants' July filing was criticized for referencing a spectral mask contained in an SBC technical publication (*i.e.*, SBC TP 76730). *See, e.g.,* MCI WorldCom July 19 Comments at 37-38; Sprint July 19 Comments at 28. We believe that the Applicants' later use of an industry standard, which may evolve as technologies change, is a better way of delineating the scope of services that carriers receiving the surrogate line-sharing charges may provide over an additional loop.

689 Pursuant to NorthPoint's suggestion, the Applicants defined the term "voice grade service" in their August filing. *See* NorthPoint July 19 Comments at 18; SBC/Ameritech Aug. 27 *Ex Parte* at 4.

690 We are not troubled that the discount applies only to loops that are used solely for providing advanced services. *See* Level 3 July 19 Comments at 12; Sprint July 19 Comments at 26-27 (objecting to advanced services-only restriction). This condition is designed to promote rapid deployment of advanced services by removing any cost advantages that the separate advanced services affiliate, which receives interim line-sharing capability from an SBC/Ameritech incumbent LEC, would have over other advanced services providers that, because line sharing is not available to them in SBC/Ameritech territories, would have to provide such services over a stand-alone line. As ALTS points out, line sharing "makes the most sense . . . when the CLEC wants to provide high-speed data services but is not in the business of providing POTS." ALTS July 19 Comments at 21-22. We also note that the Applicants' proposed mechanisms to enforce this restriction, which include a carrier certification process that SBC/Ameritech may audit, were altered in the August filing in response to concern from commenters. *See* MCI WorldCom July 19 Comments at 38; Sprint July 19 Comments at 28-29. Under the conditions we adopt today, the appropriate state commission has discretion to deny a carrier the surrogate line-sharing charges on any loop for which it found the use restriction or audit provision violated, and to remove a carrier's entitlement to any future surrogate line-sharing charges only upon a finding of an intentional and repeated violation. This altered approach provides state commissions with more flexibility and results in a less extreme penalty for a carrier's unintentional violation than the automatic disqualification from future discounts called for under the Applicants' July filing.

691 *See* SBC/Ameritech Aug. 27 *Ex Parte* at 5.

SBC/Ameritech states to be used by any telecommunications carrier, including the merged firm's advanced services affiliates, for pre-ordering and ordering facilities used to provide advanced services. This condition will guard against discrimination by the merged entity toward its rivals while, at the same time, lower those rivals' costs of providing competing advanced services. The requirements of this condition track the phases involved in unifying SBC's and Ameritech's general OSS interfaces described below. Subject to certain implementation schedules, the merged firm will: (1) prepare a plan of record outlining the steps that will be taken in developing and deploying the electronic OSS advanced services interfaces (Phase I); (2) collaborate with participating telecommunications carriers to reach agreement on the interfaces, enhancements, and business requirements to be implemented (Phase II); and (3) develop and deploy the agreed-upon interfaces, enhancements, and business requirements within a specified period of time (Phase III). Phases I and III are associated with voluntary incentive payments to encourage rapid deployment. SBC and Ameritech therefore will either meet the planning (Phase I) and deployment (Phase III) commitments within the prescribed time period, or make voluntary incentive payments of $10,000 per business day per state, or up to $110,000 per day across all 13 states, for a missed target date. The total voluntary payments will not exceed $20 million across all states. Once deployed, the Applicants will maintain the enhancements and additional interfaces for not less than 36 months. The Chief of the Common Carrier Bureau may authorize an independent third party arbitrator to resolve disputes stemming from the collaborative process or SBC/Ameritech's implementation of the agreed-upon interfaces, enhancements and business requirements.

Until SBC/Ameritech has developed and deployed the advanced services OSS enhancements, interfaces, and business requirements described above, and the SBC/Ameritech separate advanced services affiliate uses the EDI interface for pre-ordering and ordering a substantial majority[692] of the facilities it uses to provide advanced services, SBC/Ameritech will offer telecommunications carriers a 25-percent discount from the recurring and nonrecurring charges for unbundled loops used in the provision of advanced services. This discount is intended to compensate other carriers for the unenhanced OSS and to provide SBC/Ameritech with an incentive to improve the systems and processes as quickly as possible.

Access to Advanced Services Loop Information. This condition should promote rapid deployment of advanced services by ensuring that carriers have access to the information they need to market and sell their advanced services offerings. Competing carriers have stated that they need, at the pre-ordering stage, a method of obtaining information about the local loop to make informed decisions about whether and how they can provide advanced services to a customer.[693] Thus, the condition reiterates SBC/Ameritech's general obligation under the

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[692] After commenters sought clarification of the term "substantial majority," the Applicants defined it as at least 75 percent of pre-order inquiries and 75 percent of orders. *See* Covad July 22 Comments at 57.

[693] *See, e.g.*, Covad July 22 Comments at 53; Focal/Adelphia/McLeod July 19 Comments at 8-13; Level 3 July 19 Comments at 8-10; MCI WorldCom July 19 Comments at 37-38; NorthPoint July 19 Comments at 23; Rhythms Net July 19 Comments at 22-25.

Communications Act to provide unaffiliated telecommunications carriers with nondiscriminatory access to the same loop information that is available to its own retail operations. The condition goes on, however, to require SBC/Ameritech to provide specific information regarding its loops to requesting telecommunications carriers without regard to the information that is available to SBC/Ameritech's retail operations.[694]

First, SBC/Ameritech will provide competitors electronic, pre-order access to address-specific loop pre-qualification information (*i.e.*, the theoretical loop length) before the merger's closing in most SBC states, and within 22 months of the closing in the Ameritech states.[695] Second, within one year of the merger's closing, SBC/Ameritech will provide in all SBC/Ameritech states pre-order Internet access to loop pre-qualification information based upon a zip code of end users within a wire center. This will assist telecommunications carriers in targeting geographic areas capable of receiving advanced services. Third, no later than 90 days after the merger closing, SBC/Ameritech will provide requesting telecommunications carriers, including its separate advanced services affiliate, with additional loop make-up information in response to an address-specific request. Depending on the request, SBC/Ameritech will provide, by manual means until it is available electronically, information contained on an individual loop record, which may include: the actual loop length; length by gauge; the presence of bridged taps, load coils, and repeaters, and their approximate location and number; the presence of pair-gain devices, digital loop carriers or digital added main lines; and the presence of disturbers in the same or adjacent binder groups.[696] SBC/Ameritech will price the provision of this loop makeup information in compliance with any applicable Commission pricing rules for UNEs. Although SBC/Ameritech is allowed under the condition to provide such loop information by manual means pending electronic delivery, the condition (like all others) does not prevent a state from imposing additional consistent requirements.[697]

Loop Conditioning Charges and Cost Studies. Numerous parties allege that the rates charged by incumbents for conditioning loops are unreasonably high and preclude competitors from offering advanced services to many potential customers, particularly residential and small business customers where the conditioning costs may exceed prospective net

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694 We note that, in response to concern that the nondiscriminatory obligation to provide loop information was ambiguous in the Applicants' July proposal, the Applicants subsequently revised their commitment to make the nondiscrimination requirement explicit and to clarify distinct ways in which competing carriers can obtain, on a timely basis, information relevant for assessing the feasibility of providing advanced services at a given location. *See* ALTS July 19 Comments at 15-16. *See also* SBC/Ameritech Aug. 27 *Ex Parte* at 3, 4.

695 This difference in timing is because SBC already has the necessary information in electronic form, while Ameritech does not. In light of SBC/Ameritech's incentive to speed electronic access to its separate advanced services affiliate, we decline to require in this proceeding that Ameritech provide electronic access to the theoretical loop length by the merger closing date. *See* CoreComm July 22 Comments at 12.

696 *See* Letter from Joan Marsh, AT&T, to Magalie Roman Salas, Secretary, FCC, CC Docket No. 98-141, at 17 (filed Aug. 9, 1999) (AT&T Aug. 9 *Ex Parte*) (proposing categories of loop makeup information); SBC/Ameritech Aug. 27 *Ex Parte* at 4.

697 *See* Texas PUC Aug. 5 Comments at 3 (commenting that the "Texas PUC and other states may wish to more strongly encourage SWBT or Ameritech to provide loop make-up data via electronic means.").

income.[698] This condition is designed to ensure that SBC/Ameritech will not erect a barrier to the competitive deployment of advanced services by charging excessive rates for loop conditioning. Within 180 days of the merger's closing, SBC/Ameritech will file with state commissions cost studies and proposed rates for conditioning loops used in the provision of advanced services, prepared in accordance with the methodology contained in the Commission's pricing rules for UNEs.[699] Pending approval of state-specific rates, SBC/Ameritech will immediately make available to carriers loop conditioning rates (provided that they are greater than zero) contained in any effective interconnection agreement to which an SBC/Ameritech incumbent LEC is a party, subject to true-up.[700] In addition, subject to true-up, SBC/Ameritech will impose no loop conditioning charges on loops less than 12,000 theoretical feet during this period. Moreover, advanced services providers will have a choice in the amount and extent of conditioning on any particular loop.

Nondiscriminatory Rollout of xDSL Services. As a means of ensuring that the merged firm's rollout of advanced services reaches some of the least competitive market segments and is more widely available to low-income consumers, SBC and Ameritech will target their deployment of xDSL services to include low-income groups in rural and urban areas.[701] Specifically, for each SBC/Ameritech in-region state, SBC/Ameritech will ensure that at least 10 percent of the rural wire centers where it, or its separate advanced services affiliate, deploys xDSL service will be low-income rural wire centers, meaning those wire centers with the greatest number of low-income households. Similarly, at least 10 percent of the urban wire centers where the merged firm or its separate advanced services affiliate deploys xDSL service in each in-region state will be low-income urban wire centers. These requirements will become enforceable for any given state 180 days after the merger closes and after SBC/Ameritech and/or its advanced services affiliate has deployed xDSL service in that state in at least 20 urban wire centers (to activate the urban requirement) or 20 rural wire centers (to activate the rural requirement). After the respective effective date, SBC/Ameritech will provide

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698 *See, e.g.*, NorthPoint Comments at 4-5; Rhythms Net July 19 Comments at 7-9.

699 *See* 47 C.F.R. § 51.501 *et seq.* (requiring the total element long-run incremental cost standard for the pricing of network elements).

700 Several commenters objected to the set of uniform interim rates set forth in the Applicants' July proposal that would have applied in each SBC/Ameritech state pending the establishment of state-specific rates for loop conditioning. *See, e.g.*, ALTS July 19 Comments at 14-15 (claiming proposed rates were significantly higher than those currently offered in some SBC states); AT&T July 19 Comments, App. A at 53; Covad July 22 Comments at 45-51 (claiming the Applicants' proposed charges were discriminatory, not cost-based, and higher than the current charges in several SBC and Ameritech states); GST/KMC/LOGIX/RCN July 19 Comments at 6-7; MCI WorldCom July 19 Comments at 38-40; Sprint July 19 Comments at 12-14 (proposing alternate conditioning rates); Texas PUC Aug. 5 Comments at 3 (indicating that the proposed rates "represent a significant departure from the approach taken by the Texas PUC in interim agreements."). The Applicants subsequently dropped these rates from the proposed conditions package, and agreed to allow carriers to elect, on an interim basis and subject to true-up, conditioning rates contained in any interconnection agreement in any SBC/Ameritech state. *See* SBC/Ameritech August 27 *Ex Parte* at Att. 1 at 27.

701 *See* Campaign for Telecommunications Access July 19 Comments at 15 (predicting that this condition would advance the roll out of xDSL and other advanced services to rural and inner city areas).

nondiscriminatory deployment of xDSL services for at least 36 months thereafter. SBC/Ameritech will consult with the appropriate state commission, within 90 days of the merger's closing, to classify all SBC/Ameritech wire centers in that state as urban or rural.[702] Furthermore, to assist in monitoring the merged firm's equitable deployment of xDSL, SBC/Ameritech will publicly file a quarterly report with the Commission describing the status of its xDSL deployment, including the identity and location of each urban and rural wire center where it has deployed xDSL.[703]

2. Ensuring Open Local Markets

Carrier-to-Carrier Performance Plan. As a means of ensuring that SBC/Ameritech's service to telecommunications carriers will not deteriorate as a result of the merger and the larger firm's increased incentive and ability to discriminate and to stimulate the merged entity to adopt "best practices" that clearly favor public rather than private interests, SBC/Ameritech will publicly file performance measurement data for each of the 13 SBC/Ameritech in-region states with this Commission and the relevant state commission on a monthly basis. The data will reflect SBC/Ameritech incumbent LECs' performance of their obligations toward telecommunications carriers in 20 different measurement categories. These categories cover key aspects of pre-ordering, ordering, provisioning, maintenance and repair associated with UNEs, interconnection, and resold services. Many of the twenty measurement categories are divided into numerous disaggregated sub-measurements, thereby tracking SBC/Ameritech's performance for different functions and different types of service.[704] Furthermore, the list of measurements reported by SBC/Ameritech under this condition is not static. This list is subject to addition or deletion, and the measurements themselves are subject to modification, by the Chief of the Common Carrier Bureau, through a joint semi-annual review with SBC/Ameritech.[705]

Under this condition, SBC/Ameritech will either achieve the stated performance goal for the agreed-upon measures in each state or, if SBC/Ameritech fails to provide service that meets the stated performance goal, make a voluntary incentive payment to the U.S. Treasury in an amount varying according to the level and significance of discrimination detected. These voluntary incentive payments are subject to monthly state-specific caps that total, across all states, as much as $250 million in the first year, $375 million in the second year, and $500 million in the third year (*i.e.,* a total of up to $1.125 billion over three years), with a credit for amounts paid to states and competitive LECs under state-imposed performance monitoring plans

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[702] *See* Edgemont July 19 Comments at 12 (criticizing that the Applicants had "sole control" over classifying wire centers in the initial July proposal).

[703] *See* SBC/Ameritech Sept. 29 *Ex Parte* at 1.

[704] Following the Texas PUC's observation that certain statistical calculations in the July Proposal differed from the Texas plan, the Applicants altered the statistical methodology to correspond more closely with the Texas plan. *See* Texas PUC Aug. 5 Comments at 4-5.

[705] Other elements of the plan are also subject to periodic review and modification by the Chief of the Common Carrier Bureau, including certain aspects of the payment calculation mechanism.

or under liquidated damages provisions of interconnection agreements.[706] As discussed below, SBC/Ameritech's potential liability may be reduced by up to $125 million in the third year if SBC/Ameritech completes and deploys OSS enhancements before their target date, depending upon the enhancement and how early it is completed.

The specific performance measures that SBC and Ameritech will implement are based primarily upon performance measures developed in a Texas collaborative process involving SBC's application for in-region, interLATA relief. The performance measures in California and Nevada will be reported using rules that were developed in a collaborative process in California. Rather than develop a new set of measures for this merger proceeding, we find that relying upon these performance measures and corresponding business rules, which may be modified over time, will achieve the goals of the Carrier-to-Carrier Performance Plan and conserve time and resources. We emphasize that use of such measures in this merger review proceeding is not meant to affect, supplant, or supersede any existing or future state performance plan. The adoption of these measures in the present merger context does not signify that these performance measures would be sufficient in the context of a section 271 application.

These limited performance measures are intended to offset or prevent some of the merger's potential harmful effects; they are not designed or intended as anti-backsliding measures for purposes of section 271. The present performance plan must be viewed in the context of the entire set of proposed safeguards that comprise the overall merger conditions package. As SBC and Ameritech explain, this merger-related Carrier-to-Carrier Performance Plan is designed to cover the "range of activities that have the most direct and immediate impact on [competitive LECs] and their customers," and is not intended "to cover each and every facet of local competition, to supplant state performance programs, nor to preempt state consideration of performance measures for section 271 purposes."[707] Indeed, we expect – and we encourage – each state to adopt rigorous and extensive performance monitoring programs in connection with

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[706] In addition to criticizing the complexity of the voluntary payment structure set forth in the Applicants' July proposal, several commenters objected that the payment caps were inadequate to discourage the merged firm from providing substandard service to competitors. *See, e.g.,* AT&T July 19 Comments, App. A at 41; ALTS July 19 Comments at 4; MCI WorldCom July 19 Comments at 20-24, 32; Sprint July 19 Comments at 59-60. Since their initial proposal, the Applicants increased the merged firm's total payment exposure to $1.125 billion from the initially-proposed level of $1 billion. In addition, the Applicants substantially simplified the voluntary payment structure by eliminating two of the three "tiers" of payments, and multiplying the per-occurrence or per-measure voluntary payment figure for the remaining tier by a factor of three. Finally, the Applicants provided that they will increase the payments for performance measurements where observations are particularly low, as well as for specific sub-measurements representing low-volume, nascent services. For these measurements and sub-measurements, the per-occurrence and per-measurement payments will again be tripled. *See* SBC/Ameritech Aug. 27 *Ex Parte* at 5-6. We find that this "low-volume" multiplier will help to ensure that the Applicants' proposed incentive mechanism will offer meaningful protections where service volumes are low. Particularly in light of these modifications, we find that the voluntary payment structure and cap are sufficient to address the limited purposes of the Carrier-to-Carrier Performance Plan – to neutralize the merged firm's increased incentive and ability to discriminate and to remedy other merger-specific potential harms such as the loss of a major incumbent LEC benchmark. *See infra*, Section V (Analysis of Potential Public Interest Harms).

[707] SBC/Ameritech July 26 Reply Comments at 40.

section 271 proceedings. Under these conditions, therefore, SBC/Ameritech's obligations under the plan in a given state will terminate upon the company's authorization to provide in-region, interLATA service in that state. The condition will expire otherwise 36 months after the payment obligation arises in the state.

Uniform Enhanced OSS. Effective, nondiscriminatory access to OSS is critical for achieving the 1996 Act's local competition objectives. This condition will guard against discriminatory treatment by the merged entity to its rivals, as well as reducing the costs and uncertainty of providing competing services. Under this condition, SBC and Ameritech will establish, in consultation with competitive LECs, uniform OSS interfaces and systems across their combined 13 in-region states that are based on the best practices (from their competitors' perspective) of the two companies.

Specifically, the companies will develop and deploy uniform application-to-application interfaces[708] (*e.g.*, EDI), uniform graphical user interfaces, uniform business rules or software solutions to ensure that local service requests submitted by other carriers are consistent with SBC/Ameritech's business rules, and a uniform change management process, which will be deployed in each SBC/Ameritech state unless rejected by that state. In general, for each obligation, the merged firm will: (1) prepare a plan of record outlining the steps that will be taken in unifying the OSS of each operating company (Phase I); (2) collaborate with participating competitive LECs to reach agreement on the interfaces, enhancements, business requirements, and change management process to be implemented (Phase II); and (3) develop and deploy the agreed-upon interfaces, enhancements, and business requirements within a specified period of time (Phase III). Phases I and III are associated with voluntary incentive payments to encourage rapid deployment. SBC and Ameritech will either meet the planning (Phase I) and deployment (Phase III) requirements within the prescribed time period, or make voluntary incentive payments to the U.S. Treasury of $10,000 per business day per state, or up to $110,000 per day across all 13 states, for a missed target date. The total voluntary payments will not exceed $20 million per obligation across all states. Once deployed, the Applicants will maintain the enhancements and additional interfaces for not less than 36 months.[709] The Applicants also will provide direct access to SBC's Service Order Retrieval and Distribution system and Ameritech's and SNET's equivalent service order processing systems, as well as enhancements to SBC's existing electronic bonding interface for maintenance and repair. Under

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[708] In response to comments regarding the need to define the term "uniform interfaces," the Applicants incorporated a definition that encompasses suggestions by commenters. *See*, *e.g.*, MCI WorldCom July 19 Comments at 31.

[709] *See* Covad July 22 Comments at 31 (noting that, under the Applicants' July proposal, SBC/Ameritech could spend two years designing an interface and then stop providing it one year later). *See also* SBC/Ameritech Aug. 27 *Ex Parte* at 6.

this condition, states may choose whether to accept SBC/Ameritech's plan for uniform change management.[710]

We share SBC/Ameritech's concern that disputes between SBC/Ameritech and its rivals might substantially delay the availability of these important OSS enhancements. Therefore, we agree that the Chief of the Common Carrier Bureau should be empowered to authorize an independent third party arbitrator to resolve disputes stemming from the collaborative process or SBC/Ameritech's proper implementation of the agreed-upon interfaces, enhancements and business requirements.[711] In addition, we note that SBC/Ameritech has incentive to complete the OSS enhancements as quickly as possible. Specifically, if SBC/Ameritech completes and deploys the OSS enhancements prior to the deployment target dates, the total amount of its potential liability for voluntary incentive payments under the Carrier-to-Carrier Performance Plan may be reduced by up to $125 million in the third year, depending upon the enhancement and how early it is completed.

Restructuring of OSS Charges. This condition is designed to assist smaller competitors and new entrants by requiring the merged firm to recover electronic OSS costs on a strict usage basis rather than through a flat monthly fee. Because SBC currently charges a flat monthly fee for access to electronic OSS, parties feared that SBC would spread this practice to Ameritech's region following the merger. Under the condition, therefore, for a period of at least 36 months, SBC/Ameritech will restructure OSS charges to eliminate any flat-rate, up-front charge for the right to use the company's standard electronic interfaces for accessing OSS (*i.e.*, flat-rate monthly charges for access to SBC's Remote Access facility and Information Services Call Center, amounting to approximately $3600 per month).[712] This condition is not meant to

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[710] Despite the benefits competing carriers derive from a uniform system of change management, the condition permits a state, if it so desires, to establish its own change management plan. *See* California PUC July 28 Reply Comments at 6-7. *See also* SBC/Ameritech Aug. 27 *Ex Parte* at 6.

[711] Several competitive carriers objected to the arbitration procedures set forth in the Applicants' initial proposal. *See* ALTS July 19 Comments at 14; AT&T July 19 Comments, App. A at 39-41; MCI WorldCom July 19 Comments at 34-35; Sprint July 19 Comments at 43, 50-52. Most of these concerns were addressed in the Applicants' August filing. *See* SBC/Ameritech Aug. 27 *Ex Parte* at 6. Several carriers, for example, are concerned that the arbitration process in OSS implementation phases II (collaborative) and III (deployment) could delay SBC/Ameritech's enhanced OSS deployment. *See, e.g.*, Allegiance July 19 Comments at 7 (fearing SBC/Ameritech delay throughout arbitrations). The Applicants subsequently clarified that the arbitration should last no longer than two months, unless the Chief of the Common Carrier Bureau extends that deadline. Other parties criticized that competitive LECs involved in OSS disputes "would be required to pay for 50 percent of the arbitration costs when they would have absolutely no say in the arbitrator or the procedures to be used." ALTS July 19 Comments at 14. The Applicants subsequently clarified that all parties to the dispute, including competitors, may present disputed issues to the Chief of the Common Carrier Bureau, and the Bureau Chief will approve the arbitrator. In addition, the Applicants clarified that each party will pay its own costs for the arbitration, and the costs of the arbitrator and experts will be borne half by SBC/Ameritech and half by participating competitive LECs. This arbitration process is designed to accommodate the need for rapid resolution in a neutral forum of disputes stemming from SBC/Ameritech's compliance with the conditions relating to OSS enhancements.

[712] *See* Texas PUC Aug. 5 Comments at 4 (supporting the waiver of charges for electronic access to specified OSS functions during the three-year period).

affect the merged firm's ability to recover any OSS-related costs associated with UNEs and resold services through its pricing of such elements and services in accordance with applicable federal and state requirements.[713] SBC/Ameritech is not required to eliminate extra charges for manual processing of service orders, provided that an electronic means of processing such orders is available to carriers. If, however, no electronic interface for processing orders of 30 lines or less is available to a carrier, SBC/Ameritech will eliminate any extra charge for manual processing and shall charge instead the rate for processing similar orders electronically.[714]

Training in the Use of OSS for Qualifying Carriers. As a means of reducing the barriers to new entry in its region, SBC/Ameritech will provide special OSS assistance to any "qualifying" competitive LEC (a competitive LEC having less than $300 million in total annual telecommunications revenues).[715] Specifically, the merged firm will designate and make available for 36 months at no additional cost a team of OSS experts to assist these qualifying carriers with OSS issues.[716] The condition also obligates SBC/Ameritech to identify and develop training and procedures beneficial to such qualifying carriers. Disputes regarding whether a carrier qualifies as competitive LEC under this condition will be resolved by the appropriate state commission.

Collocation Compliance. Competing carriers contend that collocation provisioning and costs have been a major impediment to competitive provisioning of local service.[717] To address this concern, SBC and Ameritech have agreed to implement a number of

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[713] This commitment in the Applicants' July filing referred to a "waiver" of OSS charges, which several commenters understood to mean that costs for developing and providing OSS should not be recoverable through any means. *See, e.g.,* ALTS July 19 Comments at 14; AT&T July 19 Comments, App. A at 45-49; Covad July 22 Comments at 35; Telecomm. Resellers Assoc. July 19 Comments at 34-35. The Applicants subsequently clarified that their original intent was to "restructure," rather than "waive," OSS charges. *See* SBC/Ameritech Aug. 27 *Ex Parte* at 6. Because this condition is designed to assist smaller competitors and new entrants by requiring the merged firm to recover electronic OSS costs on a strict usage basis rather than through the flat monthly fee that SBC currently charges, we find that the Applicants' clarification does not substantively alter their initial commitment.

[714] *See* Comptel July 19 Comments at 34; Covad July 22 Comments at 35-36; NorthPoint July 19 Comments at 20-22 (suggesting modification to eliminate manual charges where no electronic access is available). *See also* Kansas Commission July 19 Comments at 3 (noting that the need for manual access generally results from SWBT's OSS and not because a carrier prefers manual ordering). As reflected in SBC/Ameritech's reply comments, this OSS restructuring commitment "creat[es] an additional incentive for CLECs to use electronic interfaces that will, in the long term, both ease and expedite their local entry and reduce industry costs." SBC/Ameritech July 26 Reply Comments at 55. If we were to require the merged firm to eliminate all processing charges for manual orders, as some commenters request, this would remove the extra incentive for carriers to use electronic OSS access where available. *See* NALA July 19 Comments at 3-4; Level 3 July 19 Comments at 7; TRA July 19 Comments at 34. We decline to impose a requirement that would have such an effect.

[715] The revenue restriction includes revenue from any affiliates, parents, subsidiaries and telecommunications joint ventures of the competitive LEC.

[716] After commenters expressed concern that the free OSS training described in the Applicants' July filing lasted only one year, the Applicants extended their commitment to the full 36-month period. *See* CoreComm July 22 Comments at 11. *See also* SBC/Ameritech Aug. 27 *Ex Parte* at 6.

[717] *See, e.g.,* ALTS July 19 Comments at 10; Covad July 22 Comments at 14, 19-30 (criticizing Ameritech's collocation practices); Focal/Adelphia/McLeod July 19 Comments at 16-18 (requesting specific performance

measures to ensure that the companies provide collocation to telecommunications carriers in a lawful and timely manner.[718] Before the merger closing date, SBC and Ameritech will file a tariff or offer to amend interconnection agreements in each SBC/Ameritech state to demonstrate compliance with the Commission's collocation rules.[719] In addition, prior to the merger closing date, an independent auditor, approved by the Chief of the Common Carrier Bureau, will conduct a review and determine whether each company is offering collocation terms and conditions, and has in place methods and procedures, that comply with the Commission's rules.

After the merger closing, an independent auditor will develop and implement a comprehensive audit of the merged company's compliance with the Commission's collocation requirements for the first eight months after the closing. The independent auditor will present its final audit report to the Commission, and publicly file a copy with the Secretary, no later than ten months after the merger closing date. If the auditor's report reveals problems with SBC/Ameritech's collocation practices and policies, we fully expect that SBC/Ameritech will implement immediately any necessary corrective action. After reviewing the auditor's findings, the Commission may, of course, decide to take additional action as deemed necessary and appropriate. As an additional incentive for the merged firm to provide efficient collocation,[720] SBC/Ameritech will waive the nonrecurring charges for physical, virtual, adjacent and cageless collocation arrangements if the firm misses the collocation due date by more than 60 days.[721]

Most-Favored Nation Arrangements. This condition, designed to facilitate market entry throughout SBC/Ameritech's region as well as the spread of best practices (as that term is understood by SBC/Ameritech's competitors), has two components. First, where it is feasible given technical limitations, SBC/Ameritech will offer telecommunications carriers operating within its service area any interconnection arrangement or UNE that SBC/Ameritech, as a competitive LEC outside of its incumbent service area, secures from the incumbent LEC and that was not previously made available by the incumbent.[722] SBC/Ameritech will make the

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intervals, remedies and deadlines for collocation); GST/KMC/Logix/RCN July 19 Comments at 2-4 (noting that, due to incumbents' delays, collocation provisioning has become a critical issue).

718 Although several commenters characterize the Applicants' commitment as promising merely to fulfill a pre-existing duty, we note that, since their July filing, the Applicants proposed an additional obligation, waiver of nonrecurring collocation charges, if the merged firm is late in meeting a collocation due date. *See, e.g.*, AT&T July 19 Comments, App. A at 27; CoreComm July 19 Comments at 2-3; Focal July 19 Comments at 16-18; MCI WorldCom July 19 Comments at 8. In addition, by having an independent auditor verify the existence of standard collocation terms and conditions, as well as related methods and procedures, at each company prior to the merger, and then conduct a thorough review of the implementation of the collocation rules after sufficient time has passed for the merged firm to have generated useful data, we also find that this condition will make it easier for the Commission and others to detect non-compliance following the merger.

719 *See Advanced Services Further Notice*, 14 FCC Rcd at 4771-94, paras. 19-60.

720 *See* CoreComm July 22 Comments at 5 (noting that new entrants rely on the collocation provisioning intervals of the incumbent to execute their business plans).

721 *See* SBC/Ameritech Aug. 27 *Ex Parte* at 7.

722 To assist competitive LECs in exercising their options, all relevant interconnection agreements will be posted on the Internet by SBC/Ameritech or its out-of-territory affiliate.

interconnection arrangement or network element available on the same terms and conditions as the incumbent, with prices determined on a state-specific basis.[723] Second, where it is feasible given technical limitations, SBC/Ameritech will make available to any requesting telecommunications carrier in any of its 13 states any interconnection arrangement or UNE in any other of the same 13 states that was negotiated[724] by an affiliate of SBC, subject to state-specific pricing.[725] When a carrier selects an interconnection arrangement or network element for an in-region state in which no rate for a comparable arrangement or element has been established, SBC/Ameritech will make the arrangement or element available at the rates in the originating state on an interim basis until the requisite rates are developed.[726] Disputes regarding the availability of an interconnection arrangement or unbundled element will be resolved through negotiation between the parties or by the relevant state commission pursuant to section 252.

Multi-State Interconnection and/or Resale Agreements. Negotiating a separate interconnection agreement between the same parties in multiple states can impose substantial unnecessary costs and delays on competitors and provides incumbent LECs with an incentive to game the process.[727] Because this merger increases the number of states in which SBC operates from eight to 13, it will increase the merged firm's incentive and ability to impose unnecessary negotiation costs on its competitors. To neutralize this incentive, in addition to promoting market entry and assisting telecommunications carriers that want to operate in more than one SBC/Ameritech state, SBC/Ameritech will offer requesting telecommunications carriers an interconnection and/or resale agreement covering multiple SBC and/or Ameritech states,[728]

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[723] Several commenters opposed a restriction in the Applicants' July filing that limited out-of-territory arrangements only to agreements obtained through arbitration initiated by SBC/Ameritech. *See, e.g.*, Allegiance July 19 Comments at 8; AT&T July 19 Comments, App. A at 93; CoreComm July 19 Comments at 21-23; Sprint July 19 Comments at 37-43. SBC/Ameritech has since removed the arbitration restriction. *See* SBC/Ameritech Aug. 27 *Ex Parte* at 7.

[724] Provisions of interconnection agreements determined by arbitration by state commissions pursuant to section 252 are therefore not eligible for "most-favored nation" treatment. Where parties to the state arbitration proceeding stipulate that certain arrangements have been agreed to by negotiation, however, such arrangements would be eligible for "most-favored nation" treatment.

[725] After parties such as the Texas PUC questioned whether this condition would extend to the Proposed Interconnection Agreement (PIA) that was developed in SBC's Texas section 271 proceeding, the Applicants clarified that it would not apply to the PIA, apparently because SBC does not consider the PIA to be an entirely "voluntary" arrangement on SBC's part. *See* Texas PUC Aug. 5 Comments at 2. *See also* SBC/Ameritech Aug. 27 *Ex Parte* Att. 1 at 42.

[726] *See* Texas PUC Aug. 5 Comments at 3 (suggesting pricing portability pending rate development in the host state).

[727] *See* MCI WorldCom July 19 Comments at 55 (strongly supporting the principle of a regional interconnection agreement).

[728] Responding to commenters, the Applicants amended their commitment in August to make explicit that a multi-state agreement under this condition could extend to any in-region SBC/Ameritech state. *See* ALTS July 19 Comments at 26 (questioning whether a regional agreement would cover the whole region); Cablevision Lightpath July 26 Reply Comments at 4; CompTel July 19 Comments at 36-38.

subject to technical feasibility and state-specific pricing.[729] SBC/Ameritech will make a sample generic multi-state agreement available to any requesting carrier no later than 60 days after the merger closing. Carriers may elect that generic agreement for any number of SBC/Ameritech states, or may negotiate a different multi-state agreement with SBC/Ameritech. In conjunction with the in-region most-favored nation provision described above, carriers that negotiate an interconnection agreement with an SBC/Ameritech incumbent LEC in one state may require SBC/Ameritech to sign the same agreement (exclusive of price) throughout the SBC/Ameritech region.

Carrier-to-Carrier Promotions. To offset the loss of probable competition between SBC and Ameritech for residential services in their regions and to facilitate market entry, the Applicants propose three promotions designed specifically to encourage rapid development of local competition in residential and less dense areas. SBC/Ameritech will offer these promotions equally to all telecommunications carriers with which it has an existing interconnection and/or resale agreement in an SBC/Ameritech state. Within ten days of the merger closing, SBC/Ameritech will provide each such telecommunications carrier a written offer to amend the carrier's interconnection agreement in that state to incorporate the promotions. The offering window for each promotion will begin 30 days after the merger closing date and run through the later of: (a) 24 months; (b) the date on which SBC/Ameritech is authorized to provide in-region, interLATA services in the relevant state; or (c) the date on which SBC/Ameritech provides facilities-based service to at least one customer in 15 out-of-territory markets. Notwithstanding this offering window, the conditions specify the maximum number of lines per state for which SBC/Ameritech must provide the promotion.[730] As indicated below, SBC/Ameritech will make each promotion available equally to any telecommunications carrier that makes a timely request, and each promotion will last 36 months from the date that the promotional loop, resold service or platform is installed or operational.

Carrier-to-Carrier Promotions: *Unbundled Loop Discounts*. First, SBC/Ameritech will offer a promotional discount on the monthly recurring charges for unbundled local loops used in the provision of residential local service and not used in combination with SBC/Ameritech's local switching. The promotional discounted prices are set forth in the conditions and are, on average within each state,[731] 25 percent below the lowest

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[729] Even though SBC/Ameritech will offer to negotiate a multi-state interconnection agreement, the affected SBC/Ameritech incumbent LECs may separately sign the agreement, which shall constitute a separate contract for section 252 purposes.

[730] In order to provide competitive LECs with advance planning information, the conditions require SBC/Ameritech to provide written or Internet notice to competitive LECs when the promotions (*i.e.*, the promotional loop discount or, taken together, the resale and platform promotions) reach 50 percent and 80 percent of a state's maximum lines.

[731] In response to the July filing, commenters expressed concern that the 25-percent discount would be averaged across all states. *See* California PUC July 28 Reply Comments at 4 (recommending that 25-percent discount be averaged on a state-wide, rather than company-wide basis, and be subject to review by the appropriate state commission). *See also* CoreComm July 22 Comments at 18-20 (suggesting that the Applicants submit the

applicable monthly recurring price established by the state commission.[732] SBC/Ameritech will make the promotional loop discount available equally to all telecommunications carriers that request the discount prior to expiration of the offering window or satisfaction of the line threshold limitation, and the promotion will last 36 months for each loop requested in that period.

Carrier-to-Carrier Promotions: *Resale Discounts*. As another means of encouraging residential competition in less dense areas, SBC/Ameritech will offer a promotional resale discount on SBC/Ameritech's retail telecommunications services, where such services are resold to residential customers. The promotional resale discount shall be 32 percent from retail rates for an initial period of not less than 24 months, and, for the remaining period of the promotion, a rate equal to 1.1 times the standard wholesale discount rate established for that service by the state commission (*i.e.*, an additional discount of ten percent). SBC/Ameritech will make the promotional resale discount available equally to all telecommunications carriers that request the discount prior to expiration of the offering window or satisfaction of the line threshold limitation, and the promotion will last 36 months.

Carrier-to-Carrier Promotions: *UNE Platform*. Competitors have asserted that the availability of end-to-end combinations of UNEs is essential for residential competition. To spur residential competition, SBC/Ameritech will offer end-to-end combinations of all network elements required to be unbundled as of January 24, 1999 (including the UNE platform) to competitive LECs providing residential local service[733] regardless of the outcome of the Commission's UNE Remand proceeding. The price for the promotional UNE platform shall be negotiated or established by the appropriate state commission in accordance with federal and state pricing rules for UNEs.[734] SBC/Ameritech will make the promotional UNE platform available equally to all telecommunications carriers that request it prior to expiration of the offering window or satisfaction of the line threshold limitation,[735] and the promotion will last 36 months from the date the promotional UNE platform is provisioned.

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proposed promotional loop rates for every geographic area within their regions). In their August filing, the Applicants provided the exact loop discounts, averaged on a state basis. *See* SBC/Ameritech Aug. 27 *Ex Parte* at 7.

[732] Initially, the Applicants' July proposal provided that the discount would be taken off the monthly recurring rate set by the relevant state commission as of July 1, 1999. The Applicants extended this cutoff date in later filings to account for subsequent state commission action. *See* California PUC July 28 Reply Comments at 3-4 (requesting an extension in order for SBC/Ameritech's loop discounts to account for the California PUC's final rates for unbundled loops). *See also* SBC/Ameritech Aug. 27 *Ex Parte*, Att. C; SBC/Ameritech Sept. 7 *Ex Parte* at 3.

[733] In response to AT&T's suggestion, the Applicants clarified that the promotional UNE platform may be used to provide exchange access services in combination with residential POTS service and Basic Rate Interface ISDN service. *See* SBC/Ameritech Aug. 27 *Ex Parte* at 8.

[734] *See* 47 U.S.C. § 252(d)(1).

[735] Unbundled network elements made available pursuant to other means (*e.g.*, through state or federal regulation) will not be counted against the line limitation.

Offering of UNEs.[736] In order to reduce uncertainty to competing carriers from litigation that may arise in response to the Commission's order in its UNE Remand proceeding,[737] from now until the date on which the Commission's order in that proceeding, and any subsequent proceedings, becomes final and non-appealable, SBC and Ameritech 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, unless the Commission removes an element from the list in the UNE Remand proceeding or a final and non-appealable judicial decision determines that SBC/Ameritech is not required to provide that UNE in all or a portion of its operating territory.[738]

Alternative Dispute Resolution Through Mediation. As a means of streamlining and expediting resolution of carrier-to-carrier disputes, SBC/Ameritech will offer telecommunications carriers, subject to the appropriate state commission's approval and participation, an option of resolving interconnection agreement disputes through a state-supervised mediation dispute resolution process.[739] This mediation process supplements, rather than supersedes, any other options at the carrier's disposal for addressing interconnection disputes with SBC or Ameritech, including negotiated dispute resolution mechanisms. We note that no state or competitive LEC is required to adopt or participate in this process.[740]

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[736] After receiving public comment on the proposed conditions, the Applicants removed a condition that had been included in their July filing related to ensuring compliance with Commission pricing rules for unbundled network elements. *See, e.g.,* MCI WorldCom July 19 Comments at 49-51.

[737] *In Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, Second Further Notice of Proposed Rulemaking, CC Docket No. 96-98 (1999).

[738] We disagree with commenters that claim that this condition offers no real benefit because the Applicants made similar promises in prior letters to the Chief of the Common Carrier Bureau. *See* AT&T July 19 Comments at 8-9; MCI WorldCom July 19 Comments at 48; Sprint July 19 Comments at 32. By making this obligation a condition to our merger approval, the Applicants become subject to the Commission's full enforcement authority. Moreover, the condition obligates the Applicants to make the network elements available even after the expiration of an interconnection agreement.

[739] Through the voluntary participation of state commission staff, we anticipate that this condition will help resolve some disputes quickly without the need for prolonged arbitrations or litigations. *See* Telecommunications Resellers Assoc. July 19 Comments at 36 (predicting that the mediation process would cut the costs and time associated with resolving disputes through arbitration or litigation). We therefore reject AT&T's and MCI WorldCom's claims that the condition as proposed will prove ineffectual. *See* AT&T July 19 Comments, App. A at 92; MCI WorldCom July 19 Comments at 54.

[740] *See* SBC/Ameritech Aug. 27 *Ex Parte* at 8.

Shared Transport.[741] Under this condition, no later than the merger closing date, Ameritech will file tariffs to provide shared transport to telecommunications carriers using a surrogate billing method in each Ameritech state. Within one year of the merger closing date, SBC/Ameritech will provide shared transport utilizing an advanced intelligent network software solution in each Ameritech state. This condition also obligates Ameritech to provide shared transport until a final order of the Commission or a final and non-appealable judicial decision determines that SBC/Ameritech is not required to provide shared transport in all or a portion of its operating territory.[742]

Access to Cabling in Multi-Unit Properties. In order to provide information regarding possible options for additional competition in the provision of local service to multi-unit properties, SBC/Ameritech will conduct a trial in five cities that will provide telecommunications carriers with access at a single point of interconnection to cabling owned or controlled by SBC-Ameritech in multi-tenant residential and business properties.[743] As a separate commitment, SBC/Ameritech will design and install all new cabling owned or controlled by SBC/Ameritech in a manner so that it can be accessed by any telecommunications carrier at a single point of interconnection, located at the minimum point of entry.[744]

3. Fostering Out-of-Territory Competition

Out-of-Territory Competitive Entry (National-Local Strategy). As a condition of this merger, within 30 months of the merger closing date the combined firm will enter at least 30

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[741] Shared transport means transmission facilities shared by more than one carrier, including the incumbent LEC, between end office switches, between end office switches and tandem switches and between tandem switches in the incumbent LEC's network. *See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, Third Order on Reconsideration and Further Notice of Proposed Rulemaking, 12 FCC Rcd 12460, 12453, para. 27 (1997), *aff'd, Southwestern Bell Telephone Co. v. FCC*, 153 F.3d 597 (8th Cir. 1998), *vacated, Ameritech Corp. v. FCC*, 119 S.Ct. 2016 (Jun. 1, 1999); *In the Matter, on the Commission's Own Motion, to Consider the Total Service Long Run Incremental Costs and To Determine the Prices of Unbundled Network Elements, Interconnection Services, Resold Services, and Basic Local Exchange Services for Ameritech Michigan*, Case No. U-11280, 1998 Mich. PSC LEXIS 46, 183 P.U.R.4th 1 (Mich. Pub. Serv. Comm'n Jan. 28, 1998).

[742] Our adoption of this condition in the instant merger proceeding should not be construed as Commission approval of the lawfulness of Ameritech's current shared transport policy.

[743] After several commenters questioned whether the trial was likely to have any meaningful effect on competitive options for consumers in multiple dwelling units within the SBC/Ameritech region, the Applicants amended their commitments. *See, e.g.*, ALTS July 19 Comments at 26-28. The Chief of the Common Carrier Bureau will now resolve any disputes that may arise regarding the trial, such as disputes over the cities selected for the trial. For new installations, the Applicants also agreed to provide a single point of interconnection at the minimum point of entry, and to extend their commitment to include new cables installed or controlled by SBC/Ameritech in a campus of garden apartment dwelling units. *See* GST/KMC/Logix/RCN July 26 Reply Comments at 3-4; NextLink/ATG July 19 Comments at 35-36; Winstar July 19 Comments at 17 (urging minimum point of entry); Optel July 19 Comments at 7 (requesting inclusion of "campus style" properties). *See also* SBC/Ameritech Aug. 27 *Ex Parte* at 8.

[744] There may be multiple points of entry where a property owner requests diversity.

major markets outside SBC's and Ameritech's incumbent service area as a facilities-based provider of local telecommunications services to business and residential customers. This will ensure that residential consumers and business customers outside of SBC/Ameritech's territory benefit from facilities-based competitive service by a major incumbent LEC. This condition effectively requires SBC and Ameritech to redeem their promise that their merger will form the basis for a new, powerful, truly nationwide multi-purpose competitive telecommunications carrier. We also anticipate that this condition will stimulate competitive entry into the SBC/Ameritech region by the affected incumbent LECs.

Under this condition, SBC and Ameritech will select the 30 out-of-territory markets from the list of 50 major markets that they included in their proposal.[745] As part of the combined firm's entry into each of these new markets, SBC and Ameritech will either meet certain verifiable entry requirements in each market (*i.e.*, installing or obtaining switching capability; providing facilities-based service to each of three business or residential customers; collocating in each of ten wire centers; offering facilities-based service to all business and all residential customers served by each of those ten wire centers; and offering service, whether by resale, unbundled elements or facilities, to all business and all residential customers within the entire service area of the incumbent RBOC or Tier 1 incumbent LEC in the market[746]), or make voluntary incentive payments to a state-designated fund (or as governed by state law) in the amount of $110,000 per day for each missed entry requirement, for a total of $1.1 million per entry requirement per market. SBC/Ameritech would therefore be obligated to pay $39.6 million if it missed all 36 entry requirements in a market, or nearly $1.2 billion for missing the entry requirements in all 30 markets. The Applicants' implementation schedule requires the combined firm to enter Boston, Miami and Seattle within 12 months after the merger closing, an additional 12 markets within 18 months of closing, and all 30 markets by the later of 30 months after the merger closing date or 60 days following the company's authorization to provide in-region, interLATA services in states representing at least 60 percent of all access lines served by the combined firm's incumbent LECs.

4. Improving Residential Phone Service

Pricing of InterLATA Services. As a direct benefit to consumers, particularly low-income consumers and low-volume long distance callers, this condition provides that SBC/Ameritech will not charge residential customers a minimum monthly or minimum flat rate charge for long distance service for a period of not less than three years.[747] This requirement

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745 The list contains two markets – Cincinnati and Las Vegas – that are located within SBC's or Ameritech's in-region states but outside either company's traditional service area. *See* Consumer Coalition July 19 Comments at 3, Aff. at 26-27 (suggesting that SBC/Ameritech be required to enter in-region markets controlled by others).

746 For enforcement purposes, the conditions break down this obligation into, for both business and residential customers, six entry requirements which each represent service to a sixth of the remaining wire centers required to be served.

747 This requirement does not prohibit the merged firm from offering its customers an optional, voluntary pricing plan that may include a minimum monthly charge, minimum flat rate charge, or a prepaid calling card.

should not only benefit those customers that make few long distance calls, but also should help to ensure that long distance services continue to be available to all consumers at competitive prices.[748]

Enhanced Lifeline Plans. Designed specifically to ensure that the benefits of the merger extend to low-income residential customers throughout all of SBC's and Ameritech's regions, this condition requires the merged firm to offer each of its 13 in-region states a plan to provide discounts on basic local service for eligible customers.[749] SBC/Ameritech will offer a low-income Lifeline universal service plan modeled after the Ohio Universal Service Assistance (USA) Lifeline plan that Ameritech and Ohio community groups negotiated in 1994 and later revised to adjust to the 1996 Act. It will also incorporate elements from the December 1998 Ohio Commission Order addressing the Ohio USA plan. Specifically, SBC/Ameritech will offer to provide a discount equal to the price of basic residential measured rate service, excluding local usage, in each state, up to a maximum discount of $10.20 per month (including all federal, state and company contributions). Although the Applicants' initial commitment was limited to the subscriber eligibility, discounts and eligible services features of the Ohio USA Lifeline plan, after the public comment period, SBC and Ameritech extended the offer to include certain other commitments.[750]

Under the revised condition, SBC/Ameritech will permit a Lifeline customer with past-due bills for local service to restore local service after payment of no more than $25 and an agreement to repay the balance of local charges in six equal monthly payments. Lifeline customers also will not be required to pay a deposit for local service if they elect toll blocks. SBC/Ameritech will allow prospective Lifeline customers to verify their eligibility on a written form, and SBC/Ameritech will give those forms to state agencies that administer qualifying programs so that the agencies can distribute the forms to their clients.[751] SBC/Ameritech also will negotiate with state agencies administering qualifying programs to procure an on-line verification process. Easing the financial burden for prospective Lifeline customers, SBC/Ameritech will provide both a toll-free telephone number for prospective customers to inquire about or subscribe to the program and a toll-free fax line for customers to send program documentation, and new customers will not be required to pay a deposit to obtain local service. SBC/Ameritech will publicize the program in each state with an annual promotional budget that

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748 *See* OWL July 19 Comments at 1 (lauding condition as one that will protect consumers and ensure "telecommunication services to all segments of our society at competitive prices.").

749 State commissions are free to accept or reject the plan outlined in these conditions. *See* Kansas Commission July 19 Comments at 4 (observing that a program similar to Ohio's Lifeline USA plan would reduce lifeline benefits to Kansas customers).

750 *See, e.g.*, Low Income Coalition July 19 Comments at 4-5 (requesting expansion of the condition to cover all the requirements of the Ohio USA Lifeline plan); Edgemont July 19 Comments at 8 (noting that Ohio's successful USA plan is far more than the eligibility, discounts and eligible services negotiated in 1994). *See also* Consumer Coalition July 19 Comments at 4, Aff. at 28-30 (expressing confusion over what parts of the evolving Ohio plan were included within the Applicants' proposal).

751 We note that SBC/Ameritech will provide these forms in English and such other languages as are prevalent in the applicable service area.

is proportional to the annual promotional budget in Ohio.[752] In addition to including Lifeline information on customer service center voice response units where practical and appropriate, SBC/Ameritech also will automatically upgrade current Lifeline customers to the new program where it is evident that doing so will unambiguously improve the customer's situation. For each state that accepts SBC/Ameritech's offer, the company will maintain the plan for a period of not less than 36 months.

Additional Service Quality Reporting. As a safeguard against potential deterioration in SBC's or Ameritech's quality of service as a result of the merger, and to promote affirmative service quality improvements, this condition requires SBC/Ameritech to report additional benchmark and service-quality information. First, SBC/Ameritech will report, on a quarterly basis, the quality of service that it provides to customers. SBC/Ameritech will develop and file with this Commission and state commissions quarterly state-by-state service quality reports in accordance with the National Association of Regulatory Utility Commissioners (NARUC) Technology Policy Subgroup's November 1998 "Service Quality White Paper."[753] Through this reporting program, SBC/Ameritech will make publicly available in a timely manner key information about its service quality, including installation and repair performance, switch and transmission facility outages, consumer complaints, and answer time performance.[754] We anticipate that, by providing consumers and states with information about SBC/Ameritech's service quality, this condition will, at a minimum, deter any potential service quality degradation and motivate the merged firm to improve its service quality where possible.[755]

In addition, SBC/Ameritech will file reports showing the service quality provided to interexchange carriers, which will include data regarding the installation and maintenance of switched, high speed special, and special access services.[756] By receiving such information on a quarterly basis, the Commission and others can take appropriate action in the event such reports show service quality degradation. SBC/Ameritech also will continue reporting ARMIS data on an operating-company basis in order to preserve the number of observable points of operating-company behavior for benchmarking purposes.

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752 *See* Edgemont July 19 Comments at 6-8 (requesting specific promotional requirements).

753 In the Preamble to the Service Quality White Paper, NARUC states that a service quality reporting program will "allow interested parties to assess current service quality levels among the states, and identify increasing or decreasing trends over time." National Association of Regulatory Utility Commissioners, SERVICE QUALITY WHITE PAPER (Nov. 1998); *see also* National Regulatory Research Institute, TELECOMMUNICATIONS SERVICE QUALITY 127-60 (1996) (noting that information facilitates competition on quality).

754 *See* SBC/Ameritech July 26 Reply Comments at 46-47. *See also* CWA July 19 Comments at 2-3 (noting that the additional reporting will assist regulators and consumer groups in ensuring that the merged firm abides by its commitments to continue to invest in a high-quality network serving all market segments).

755 *See, e.g.,* American Association of Retired Persons, PROMISES AND REALITIES 46-49 (1999) (analyzing service quality performance of Pacific Bell after the merger with SBC).

756 *See* ARMIS 43-05 Service Quality Report, Table 1. In the ARMIS 43-05 Service Quality Report, price cap incumbent LECs report the installation and maintenance of switched access, high speed special access, and special access services provided to interexchange carriers. *See* MCI WorldCom July 19 Comments at 24 (requesting that SBC and Ameritech provide reporting on special access and switched access service quality).

NRIC Participation. Through this condition, we expect that SBC/Ameritech will demonstrate and further its commitment to maintain reliable, high-quality networks and services. The Applicants will continue their participation in the Network Reliability and Interoperability Council (NRIC), a committee organized to make recommendations to the Commission on how to ensure "optimal reliability, interoperability and interconnectivity of, and accessibility to, public telecommunications networks."[757] SBC/Ameritech's continued participation will provide assurance that the merged firm will review the causes of network outages in a timely manner and adopt industry best practices designed to promote reliable, high quality services.

5. Ensuring Compliance with and Enforcement of these Conditions

The Commission is firmly committed to enforcing the Communications Act and the public interest standard that forms its foundation. Attaching conditions to a merger without an efficient and judicious enforcement program would impair the Commission's ability to protect the public interest. The conditions therefore establish compliance and enforcement mechanisms that not only will provide SBC/Ameritech with a strong incentive to comply with each of its requirements, but also will facilitate the Commission's oversight of the Applicants' obligations under these conditions. As a general matter, the conditions place the responsibility of taking active steps to ensure compliance on SBC/Ameritech by: (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.

Compliance Program. For the benefits of the conditions to outweigh the potential public interest harms of the merger, SBC/Ameritech must take aggressive steps to implement every aspect of these conditions and to comply with both the letter and the spirit of its obligations. In our view, the benefits of these conditions depend entirely upon the Applicants' compliance. Because the conditions that we adopt today are spelled out in detail with their satisfaction measured by objective criteria, and because failing to comply with the conditions could expose SBC/Ameritech to a material loss of revenue, we believe that SBC/Ameritech has a strong incentive to implement an aggressive and effective compliance program.[758]

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[757] Network Reliability and Interoperability Council, Revised Charter for the Network Reliability and Interoperability Council (visited July 25, 1999). *See* Network Reliability and Interoperability Council, Charter (1998). The NRIC is the successor organization to the Network Reliability Council, a federal advisory committee chartered to study the reliability of the public telecommunications network. *See* Network Reliability & Interoperability Council, NETWORK INTEROPERABILITY: THE KEY TO COMPETITION (1997); Network Reliability Council, NETWORK RELIABILITY: THE PATH FORWARD (1996); Network Reliability Council, A REPORT TO THE NATION (1994); *see also* 47 C.F.R. § 63.100 (establishing network outage reporting requirements).

[758] A corporate compliance program is a well-established technique for ensuring that an organization takes active steps to comply with legal and regulatory requirements. The Commission has used compliance programs as a tool for addressing potential problem areas. *See* SBC Communications, *Order*, FCC 99-153 (rel. June 28, 1999);

As part of the conditions, SBC and Ameritech will establish a corporate compliance program to identify all applicable compliance requirements, establish and maintain the internal controls needed to ensure compliance, evaluate the merged firm's compliance on an on-going basis, and take any corrective actions necessary to ensure full and timely compliance.[759] SBC/Ameritech will appoint a "Compliance Officer" with sufficient rank and experience to supervise its corporate operations and to ensure that the business units carry out their responsibilities under the conditions.[760] This Compliance Officer will prepare and publicly file with the Commission an annual compliance report addressing the corporation's compliance with the conditions and the sufficiency of the corporation's internal controls for ensuring continued compliance.[761]

We expect that SBC and Ameritech will put into place a reasonably designed, implemented, and self-enforced compliance program that will detect potential noncompliance in time for SBC/Ameritech to notify the Commission and take corrective action before such noncompliance impairs the benefits of these conditions. To provide additional assurances to the public regarding SBC/Ameritech's compliance, however, the Commission plans to conduct

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Notice of Apparent Liability for Forfeiture of US West Communications, Inc., *Order*, FCC 99-90, Attachment A (rel. May 7, 1999); Long Distance Direct, Inc., Notice of Apparent Liability for Forfeiture, 14 FCC Rcd 314 (1998); *see also* Liability of KCIT Acquisition Company, *Memorandum Opinion and Order*, DA 99-1545 (Mass Med. Bur. 1999). In addition, compliance programs are routinely used to ensure compliance with antitrust laws. *See U.S. v. 21st Century Bidding Corp.*, No. 98-2752, 1999 WL 135165 (D.D.C. Feb. 25, 1999); *United States v. Seminole Fertilizer Corp.*, No. 97-1507-Civ-T-17E, 1997 WL 692953 (M.D.Fla. Sep. 19, 1997); *United States v. Universal Shipper's Ass'n*, Civil Action No. 96-1154-A, 1996 WL 760279 (E.D.Va. Nov. 6, 1996).

[759] Corporate compliance programs should both deter potential misconduct within the corporation, and provide a method for internal policing. Components of a corporate compliance program include, for example, corporate conduct codes, employee training, record-keeping, standard operating procedures followed by employees, individual work assignments, monitoring programs, and internal compliance audits. *See* Richard S. Gruner, *Designing Compliance Programs*, Practicing Law Institute: Corporate Law and Practice Course Handbook Series, 1100 PLI/Corp 151 (1999); Don Zarin, *Doing Business Under the Foreign Corrupt Practices Act: Compliance Programs*, Practicing Law Institute: Corporate Law and Practice Course Handbook Series, 943 PLI/Corp 525 (1996). *See also* Sprint July 19 Comments at 63-65 (recommending the appointment of a senior individual as a compliance officer).

[760] On July 13, 1999, SBC/Ameritech appointed a high-ranking corporate officer, Mr. Charles Foster, Group President-SBC Communications, as the officer responsible for overseeing implementation of and compliance with the proposed conditions. *See* Letter from Charles E. Foster, Group President, SBC Communications Inc., to Magalie Roman Salas, Secretary, FCC (July 29, 1999). We note that, as an additional safeguard, the Board of Directors of SBC/Ameritech will oversee the activities of the Compliance Officer. *See In re Caremark Internat'l Inc. Derivative Litigation*, 698 A.2d 959, 967-70 (Del. Ch. 1996) (establishing a duty for corporate directors to implement an effective compliance program); *see also* Blue Ribbon Committee on Improving the Effectiveness of Corporate Audit Committees, REPORT AND RECOMMENDATIONS (1999) (recommending actions by corporate boards to improve oversight and monitoring of corporate compliance).

[761] The Compliance Report also will include a statement of the cost-savings achieved during the course of the calendar year in order to assist the Commission and the public in assessing any efficiencies arising out of this merger. This report will constitute, as required by industry standards, SBC/Ameritech's written assertion regarding its compliance with the conditions contained herein and the effectiveness of SBC/Ameritech's internal control structure over compliance. *See* American Inst. of Certified Pub. Accountants, COMPLIANCE ATTESTATION, AT § 500.01.

targeted audits of various aspects of the Applicants' compliance programs.[762] Only a strong corporate compliance program, in conjunction with the independent audit and other enforcement mechanisms, will enable consumers to realize the full benefit of the conditions.

Independent Auditor. Because the public interest benefit of these conditions depends entirely upon SBC/Ameritech's compliance, the conditions also establish an independent oversight program. SBC and Ameritech will retain an independent auditor[763] to conduct an annual audit to provide a thorough and systematic evaluation of SBC/Ameritech's compliance with the conditions and the sufficiency of SBC/Ameritech's internal controls.[764] Acting pursuant to its delegated authority, the Common Carrier Bureau will approve the independent auditor and oversee the conduct of the independent audit, which will include reviewing the scope and quality of the auditor's work.[765] The independent auditor's final report, which will be publicly available, will contain sufficient detail for the Commission and the public to understand the extent of the auditor's testing and evaluation procedures. In addition, the findings in the auditor's report, or the review of the auditor's working papers, could form the basis of enforcement actions.[766] SBC/Ameritech and the independent auditor also will meet for a post-audit conference to assess the conduct of the audit and the need for any modifications to the audit program. Based on these requirements, we find that the conditions provide for effective

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762 *See e.g.,* Focal *et al.* July 26 Reply Comments at 6 (recommending that the Commission strengthen the proposed compliance and enforcement plan).

763 *See* Letter from Charles E. Foster, Group President, SBC Communications Inc. to Mr. Robert C. Atkinson, Deputy Chief, Common Carrier Bureau, FCC (Aug. 10, 1999); Letter from Charles E. Foster, Group President, SBC Communications Inc. to Mr. Robert C. Atkinson, Deputy Chief, Common Carrier Bureau, FCC (Aug. 18, 1999) (proposing independent auditor); Letter from Robert C. Atkinson, Deputy Chief, Common Carrier Bureau, FCC, to Charles E. Foster, Group President, SBC Communications Inc. (Aug. 24, 1999) (approving proposed choice of independent auditor).

764 By "internal control," we mean the process implemented by a company's board of directors, management, and other personnel designed to provide reasonable assurance regarding, in this instance, the company's compliance with the requirements established in this Order and all applicable laws and regulations. *See* American Inst. of Certified Pub. Accountants, CONSIDERATION OF INTERNAL CONTROL IN A FINANCIAL STATEMENT, AU § 319.06 (1998); COMPLIANCE ATTESTATION, AT § 500.01, n.1 (1999). The independent auditor will examine, for example, SBC/Ameritech's compliance with, as well as its ability to administer, the requirements of the Carrier-to-Carrier Performance Plan to report accurate and relevant performance data. *See, e.g.,* U.S. GAO, ASSESSING THE RELIABILITY OF COMPUTER-PROCESSED DATA, GAO/OP-8.1.3 (Apr. 1991) (providing guidance for auditing computer-processed data). Strong internal controls are necessary both to ensure that SBC/Ameritech takes affirmative steps to comply with the conditions and to counteract its incentive to delay local competition in its region. Managerial philosophy, commitment to employee competence, ethical values, oversight by the board of directors, assignment of authority, and human resources practices work together to provide the discipline and structure necessary for ensuring compliance with the conditions. *See* American Inst. of Certified Pub. Accountants, ATTESTATION ENGAGEMENTS, AT § 100.11-.12, .33-40; CONSIDERATION OF INTERNAL CONTROL IN A FINANCIAL STATEMENT, AU § 319.

765 *See* 47 C.F.R. § 0.91; *Amendment of Parts 0, 1 and 64 of the Commission's Rules with Respect to Delegation of Authority to the Chief, Common Carrier Bureau, and Technical Corrections and Deletions*, Report and Order, 5 FCC Rcd 4601 (1990). *See also* Letter from Robert C. Atkinson, Deputy Chief, Common Carrier Bureau, FCC, to Charles E. Foster, Group President, SBC Communications Inc. (Aug. 24, 1999).

766 *See* 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).

Commission oversight of the audit process and a mechanism for revising the audit programs and procedures based on our experience over time.[767]

The independent auditor will conduct its examination in accordance with the standards of the American Institute of Certified Public Accountants ("AICPA").[768] Specifically, the independent auditor will conduct a "compliance attestation,"[769] which requires issuing a report that "expresses a conclusion about the reliability of a written assertion that is the responsibility of another party."[770] For most conditions, the independent auditor will conduct this examination using the "examination engagement"[771] method to evaluate SBC/Ameritech's compliance, and to issue a "positive opinion" (with exceptions noted) in its final report. The conditions, however, require the more thorough "agreed-upon procedures" engagement[772] to evaluate SBC/Ameritech's compliance with the separate advanced services affiliate requirements. In this way, the conditions emulate the Federal-State joint audit required by section 272(d).[773]

The 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.[774] SBC/Ameritech is required to inform the auditor of its progress at meeting the specific deadlines and requirements set forth in the conditions, which will enable the independent auditor to detect potential noncompliance in a timely manner. Pursuant to its obligations as the designated auditor, the independent auditor will notify the

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767 *See* AT&T July 19 Comments at 14 ; GST/KMC/Logix/RCN July 19 Comments at 4.

768 The Commission's rules already require independent auditors to use generally accepted auditing standards ("GAAS") for conducting audits of an incumbent LEC's compliance with our accounting safeguards. 47 C.F.R. § 64.904(a); *see* Computer III Remand Proceedings: Bell Operating Company Safeguards and Tier 1 Local Exchange Company Safeguards, *Report and Order*, 6 FCC Rcd 7571, para. 24 (1991) ("*Computer III Remand Order*").

769 American Inst. of Certified Pub. Accountants, COMPLIANCE ATTESTATION, AT § 500.

770 American Inst. of Certified Pub. Accountants, ATTESTATION STANDARDS, AT § 100.01. For the purposes of these conditions, we consider SBC/Ameritech's annual Compliance Report to be its written assertion. Consistent with AICPA standards, the independent auditor's report "does not provide a legal determination of [SBC/Ameritech's] compliance" with the specified requirements; however, the auditor's findings may aid the Commission in making such a determination. American Inst. of Certified Pub. Accountants, COMPLIANCE ATTESTATION, AT § 500.03; *see also* American Inst. of Certified Pub. Accountants, ILLEGAL ACTS BY CLIENTS, AU § 317.03 ("Whether an act is, in fact, illegal is a determination that is normally beyond the auditor's competence."). *See also* Sprint July 19 Comments at 62 (citing *Joint Cost Order* at para. 253); AT&T July 19 Comments at 14.

771 *See* American Inst. of Certified Pub. Accountants, COMPLIANCE ATTESTATION, AT § 500.27; ATTESTATION ENGAGEMENTS, AT § 100.53 (noting that an examination engagement is used to reduce the attestation risk to a low level).

772 *See* American Inst. of Certified Pub. Accountants, COMPLIANCE ATTESTATION, AT § 500.15-20; AGREED-UPON PROCEDURES ENGAGEMENTS, AT § 600. An agreed-upon procedures engagement is more thorough than an examination engagement because the concept of materiality does not apply to any reported findings. *See* American Inst. of Certified Pub. Accountants, AGREED-UPON PROCEDURES ENGAGEMENTS, AT § 600.27.

773 *See* 47 U.S.C. § 272(d); *see also* 47 C.F.R. §§ 53.209-213; *Accounting Safeguards Order* at paras. 197-205.

774 ALTS July 19 Comments at 10.

Commission immediately of the problem areas and any corrective action undertaken.[775] By requiring SBC and Ameritech to pay for the audit, the conditions place the costs of compliance on the Applicants instead of their competitors or taxpayers. We note that, pursuant to our regulatory fee schedule, SBC/Ameritech will reimburse the U.S. Treasury for any review and audit work performed by the Commission staff.[776]

Voluntary Payment Obligations. For many of the conditions, the Applicants proposed a voluntary incentive payment structure, which could expose SBC/Ameritech to significant financial liability, if the merged firm fails to satisfy an obligation in a timely manner. For example, as described above, under its National-Local Strategy, SBC/Ameritech will make voluntary incentive payments, valued at a maximum of $39.6 million per market, for missing a market's entry requirements. In addition, SBC/Ameritech will incur similar voluntary payment obligations for failing to provide service to competitive LECs that meets the standards of the Carrier-to-Carrier Performance Plan (up to a total of $1.125 billion over three years, with an offset for early OSS deployment), and for failing to meet the deployment schedule for its OSS enhancements (up to a total of $20 million per obligation). We expect that the size and scope of these potential voluntary payments will provide a strong incentive for SBC/Ameritech to ensure that it fully complies with both the letter and the spirit of the conditions.[777] The conditions recognize that SBC/Ameritech is strictly liable for making any and all payments arising out of its nonperformance.[778] Moreover, failing either to satisfy the underlying obligation or to make timely voluntary payments will subject the Applicants to potential liability in the same way SBC/Ameritech would be liable for violating any other Commission order, rule, or regulation.

We expect that SBC/Ameritech will take all necessary measures, such as amending tariffs and interconnection agreements, to give the conditions their full legal effect in a timely manner. Although we note that the Commission may grant an extension of time for a requirement under the conditions, SBC/Ameritech bears a heavy burden of demonstrating good cause.[779] We expect that this heavy burden of persuasion, coupled with the compliance mechanisms and significant financial exposure, will ensure that the public enjoys the full benefits of these conditions in a timely manner. We also expect that the self-executing remedial measures, such as SBC/Ameritech's voluntary incentive payment obligations, will limit any delay arising from extensive litigation arising from potential violations.

Other Mechanisms. We emphasize that the enforcement and compliance

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[775] AICPA standards recognize occasions in which an independent auditor has a duty to notify others, including regulatory agencies, of problems uncovered during an audit. *See* American Inst. of Certified Pub. Accountants, ILLEGAL ACTS BY CLIENTS, AU § 317.23-.24.

[776] 47 C.F.R § 1.1105.

[777] *See* Allegiance July 19 Comments at 11-12 (recommending the calculation of payment obligations on a per-day basis).

[778] The Commission may, however, grant a waiver of SBC/Ameritech's voluntary payment obligation if SBC/Ameritech can demonstrate that the failure was due to an Act of God.

[779] *See* MCI WorldCom July 19 Comments at 61, 63.

programs established in these conditions in no way supersede or replace the Commission's enforcement and investigative powers, but merely supplement our usual processes. The Commission may, at its discretion and subject to its normal procedures, take additional enforcement action against SBC/Ameritech for failing to comply with any provision of this Order, including extending the sunset provisions, imposing fines and forfeitures,[780] issuing cease-and-desist orders, modifying the conditions,[781] awarding damages,[782] or requiring appropriate remedial action. In addition, members of the public may pursue a claim in accordance with either section 207 or section 208 of the Act.[783] We do not expect that any enforcement penalties or compliance mechanisms will become merely an acceptable cost of doing business, and we note that the conditions require all such costs to be excluded from SBC/Ameritech's rates. In this way, the enforcement plan rightly ensures that consumers will not be forced to bear the costs of SBC/Ameritech's mistakes.

Sunset. Unless otherwise specified, each obligation under these conditions will sunset after 36 months of benefit, which may be tolled or extended by the Commission for a period of time commensurate with any noncompliance by SBC/Ameritech. Maintaining a full three-year period of benefit is critical for the conditions to ameliorate the potential public interest harms of the merger. Thus, in the event that SBC/Ameritech fails to comply fully with its obligations, the Commission may, in its discretion, either on its own motion or in response to a petition, toll the effective sunset date of the relevant condition, and related conditions, to ensure that the public enjoys the full three-year term of the benefits.

Effect of The Conditions. As discussed above, these conditions are intended to be a floor and not a ceiling. The Applicants must abide by state rules, even though the rules may touch on identical subjects, unless the merged entity would violate one of these conditions by following the state rule. The conditions are also not intended to limit the authority or jurisdiction of state commissions to impose or enforce additional requirements stemming from a state's review of the proposed merger.[784] To the extent that a requirement in these conditions duplicates a requirement imposed by a state such that these conditions and state conditions grant parties similar rights against SBC/Ameritech, the affected parties must elect either to receive the benefit under either these conditions or state law. For example, SBC/Ameritech will not be required to provide two promotional loop discounts simultaneously for the same loop. If, on the other hand, SBC/Ameritech fails to meet a stated performance standard under the Carrier-to-Carrier Performance Plan for a measurement that is replicated in a state performance plan, SBC/Ameritech would face repercussion under both plans.

Although the merged firm will offer to amend interconnection agreements or

780 47 U.S.C. § 503.
781 47 U.S.C. §§ 316, 416(b).
782 47 U.S.C. § 209.
783 *See* MCI WorldCom July 19 Comments at 61-63.
784 *See Ohio PUC Merger Order*; *ICC Merger Order*; *Nevada PUC Merger Order* (establishing conditions for state approval of SBC's acquisition of Ameritech).

make certain other offers to state commissions in order to implement several of the conditions, nothing in the conditions obligates carriers or state commissions to accept any of SBC/Ameritech's offers. The conditions, therefore, do not alter any rights that a telecommunications carrier has under an existing negotiated or arbitrated interconnection agreement. Moreover, the Applicants also agree that they will not resist the efforts of state commissions to administer the conditions by arguing that the relevant state commission lacks the necessary authority or jurisdiction.[785]

C. Benefits of Conditions

We conclude that, with the conditions that we adopt in this Order, the merger of SBC and Ameritech is likely to be beneficial for consumers and spur competition in the local and advanced services markets. Given that the conditions will substantially mitigate the potential public interest harms of the proposed merger and will result in affirmative public benefit, we conclude that the Applicants have demonstrated that the proposed merger, on balance, will serve the public interest, convenience and necessity.

1. Mitigating Harm from Loss of Potential Competition

As noted above, the proposed merger will remove, in many local markets throughout SBC's and Ameritech's territories, a current significant competitive threat and a probable future entrant. Armed with the inside knowledge of how to overcome roadblocks to local competition, SBC and Ameritech are especially qualified to compete successfully against other incumbent LECs.

We find that, while not substituting fully for the loss of direct competition between SBC and Ameritech, the conditions we adopt will significantly mitigate any potential public interest harms. After the merger, these conditions require the merged firm to open its markets to others while at the same time entering markets outside of its region. Specifically, the conditions require the merged SBC/Ameritech to enter 30 out-of-region markets as a competitive LEC within 30 months of the merger's closing. Although we concluded above that the Applicants' initial pledge to implement the National-Local Strategy offered no merger-specific competitive benefit, as augmented by the conditions, the plan will motivate the combined company to enter markets more quickly than the companies, separately, would have entered absent the merger. For example, the Applicants shortened the timetable pledged in their initial Application by six months and have agreed to voluntary incentive payments that could amount to nearly $1.2 billion if SBC/Ameritech fails to implement the strategy in all thirty markets. Thus, the merged firm will face significant economic repercussion if it fails to achieve a certain level of entry in each market according to a specified implementation schedule. These benefits to some extent counterbalance the loss of direct competition between SBC and Ameritech, particularly if

[785] *See* APSC July 19 Comments at 1-3 (questioning whether Arkansas's Telecommunications Regulatory Reform Act limited the Arkansas Public Service Commission's ability to take certain measures to enforce these conditions).

the outcome of SBC/Ameritech's implementation of the condition is faster retaliation within its home region by the major incumbent LECs whose home territories the merged firm invades.[786]

Further, by reducing the risk and costs associated with entry into SBC and Ameritech territories, particularly with respect to residential and advanced services markets, other conditions stimulate entry into these markets, thereby offsetting the loss of probable competition between the Applicants resulting from the merger. Several conditions lower the entry barriers in the SBC and Ameritech regions, especially for residential competition. For example, we anticipate that the carrier-to-carrier promotions for residential service will spur other entities to enter these markets and establish a presence in residential markets that can be sustained after expiration of the promotional discounts. In addition, SBC/Ameritech's most-favored nation obligations, which covers certain arrangements that the company obtains as a competitive LEC outside its region as well as arrangements imported from other in-region states, and its agreement to enter into multi-state interconnection agreements should assist competitors in entering new markets within the SBC/Ameritech region. Similarly, the Carrier-to-Carrier Performance Plan will provide competing carriers with additional protections by strengthening SBC/Ameritech's incentive to provide quality of service at least equivalent to the merged firm's retail operations or a benchmark standard. Moreover, both the OSS and the collocation provisions will reduce the cost of entry into SBC/Ameritech territories. These conditions make competition in SBC/Ameritech's region more likely, thereby offsetting in part the competitive threat that each Applicant posed to the other.

2. Mitigating Harm from Loss of Benchmarks

As indicated above, by removing a major incumbent LEC, the merger of SBC and Ameritech would result in fewer sources of diversity and experimentation at the holding company, operating company, and industry level from which regulators and competitors could draw comparisons particularly useful in implementing the 1996 Act's pro-competitive mandates. We doubt that any set of conditions could substitute fully for the loss of one of the few remaining major incumbent LEC benchmarks. The harm from such comparative practices analyses, however, to some extent is mitigated by conditions that require the spread of best practices throughout the merged firm's service areas or the reporting of information regarding the incumbent's networks and performance that is useful to regulators and competitors.

We anticipate that several conditions will require the merged firm to spread best practices throughout its region. Significantly, "best practices," as we use the phrase here, will be identified in full or in part by the Applicants' customers and regulators, not by SBC and Ameritech. Both the out-of-region and in-region most-favored nation requirements are designed

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786 *See* SBC/Ameritech July 24 Application, Description of the Transaction, at 24-25 (suggesting that implementation of the National-Local Strategy will stimulate competitive responses by other carriers, including other incumbent LECs); SBC/Ameritech Nov. 16 Reply Comments at 14 (predicting that SBC/Ameritech's out-of-region expansion would result in retaliation by the affected incumbents).

explicitly to assure carriers some ability to obtain beneficial arrangements, whether specifically requested by SBC/Ameritech as an out-of-region competitor or simply offered by the firm in an in-region state, throughout the merged firm's 13-state area. With respect to OSS, SBC/Ameritech will establish uniform OSS interfaces and systems across its 13 in-region states that, in the Applicants' own words, "are based on the best practices of the two companies."[787] This commitment to implement OSS best practices offers assurance that the merged firm will take into account practices of certain operating companies that other carriers have found useful or beneficial in establishing uniform interfaces, enhancements and business requirements.

Another example of the spread of best practices concerns shared transport. Pursuant to the condition requiring the provision of shared transport in Ameritech territory, which Ameritech has vigorously resisted implementing in the past,[788] SBC/Ameritech has committed to implement and offer in the Ameritech states the same version of shared transport that SBC has implemented in Texas. Similarly, the merged firm will offer a Lifeline plan based on features of the Ameritech Ohio plan to each of the merged firm's in-region states. SBC/Ameritech's commitment to provide all advanced services through a separate affiliate, essentially adopting Ameritech's long-standing approach to advanced services, also represents a departure from SBC's former opposition to any such requirement.[789]

The conditions also require SBC/Ameritech to continue participation in the NRIC, which issues periodic reports concerning the reliability of public telecommunications network services, and regularly compiles detailed lists of industry best practices designed to reduce the number and scope of network outages. Through its continued participation in the NRIC, we fully expect SBC/Ameritech to study and, to every extent possible, implement the industry best practices for network reliability. In this way, we anticipate that SBC/Ameritech will be able to, at a minimum, maintain a high state of reliability after the merger and take aggressive steps to address network reliability in those areas where the company may need improvement.

Aside from the spread of existing best practices, several conditions will help to offset the potential loss of future diversity and experimentation resulting from the merger. For example, addressing an issue that drew comments from several parties, SBC and Ameritech have agreed to conduct a trial with interested competitive LECs in five large cities to identify the procedures and associated costs required to provide carriers with access to LEC owned or controlled cabling behind a single point of interconnection within multi-dwelling unit premises. Similarly, although Ameritech previously had established separate affiliates to provide advanced services, the merged firm is subject to specific obligations under the separate affiliate structure that will result in a flow of information to federal and state regulators, as well as competitors, concerning the Applicants' provision of advanced services.

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787 SBC/Ameritech July 26 Reply Comments at 48.

788 *See supra* n. 741. *See also* Ameritech May 26 Comments, CC Docket Nos. 96-98, 95-185.

789 *See supra* at Section V.C.4.a) (Loss of Ameritech as Independent Holding Company).

In addition to promoting experimentation and spreading best practices, the conditions also help ameliorate any potential loss of observable information to regulators and competitors. In particular, the Carrier-to-Carrier Performance Plan will generate valuable information for regulators and competitors for use in implementing and enforcing the Communications Act. The merged firm will also continue to report ARMIS data separately for each of its operating companies, and will now report such data on a quarterly basis. The requirement that the Applicants develop and file state-by-state service quality reports in accordance with the recommendations of the NARUC Technology Policy Subgroup will facilitate comparative practices analysis by providing additional data for this Commission and state commissions in carrying out their statutory responsibilities and in detecting potential violations of the Communications Act. The Applicants also are obligated under the conditions to provide quarterly state-specific service quality reports regarding the quality of services provided to interexchange carriers, and to file a statement of the cost savings associated with the merger.

3. Mitigating Harm from Potential Increased Discrimination

We find that several commitments will alleviate the concern that the merged firm will use its combined size and market power to discriminate more effectively against its rivals in its in-region markets for local services as well as advanced services. As stated by one commenter, an effective means of ensuring that the merged firm cannot engage in anticompetitive conduct against smaller entrants is to "make sure that the company is already permitting effective entry into the SBC and Ameritech regions."[790] The conditions that we adopt today are carefully targeted at the types of discrimination the merger was otherwise most likely to engender. Moreover, they substantially reduce entry barriers to the merged entity's region.

The combined entity's incentive to discriminate, stemming from its larger geographic footprint, is especially likely, if left unchecked, to translate into an ability to discriminate against the provision of advanced services.[791] The requirements that the merged firm provide such services through a separate affiliate, and comply with reporting and performance obligations, decreases the ability of SBC/Ameritech to discriminate successfully, and thereby neutralizes some of SBC/Ameritech's increased incentive to discriminate with respect to advanced services. Significantly, the merged entity will have to treat rival providers of advanced services the same way that it treats its own separate advanced services affiliate.

The Applicants' commitments to establish uniform advanced services and other OSS interfaces also should reduce somewhat the costs and other barriers that local or advanced services competitors face in entering multiple markets within the SBC and Ameritech regions. This uniformity should also reduce the merged firm's ability to impair a national, or regional, competitive LEC's strategy that is at the heart of the merged firm's increased incentive to

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790 CoreComm Comments at 17.

791 *See supra* at Section V.D.2.a) (Advanced Services).

discriminate.[792] We expect that other conditions, most notably the collocation compliance and surrogate line sharing discount, also will reduce the costs and uncertainty of providing advanced services in SBC/Ameritech's region, and thereby remedy to a certain extent any effects of increased discrimination for national competitive LEC entrants.

The Carrier-to-Carrier Performance Plan also partially alleviates the Applicants' increased incentive and ability to discriminate against rivals following the merger. By requiring the merged firm to report results of 20 performance measures, and achieve the agreed-upon standard or voluntarily make incentive payments, the plan provides heightened incentive for the company not to discriminate in ways that would be detected through the measures. Competing carriers operating in or contemplating entry into SBC/Ameritech territory will have an increased measure of confidence that the company will not engage in discrimination that would be detected through such measures. If the results reveal unequal treatment, the voluntary payment scheme, as NorthPoint notes, will "create a direct economic incentive for SBC/Ameritech to cure performance problems quickly."[793]

The Carrier-to-Carrier Performance Plan is specifically designed to permit monitoring for discriminatory conduct in SBC/Ameritech's provision of elements and services utilized by the incumbent or other carriers in providing advanced services. Certain measures, such as the average installation interval for DSL loops (performance measure # 8) and the average response time for loop makeup information (performance measure # 9), were designed specifically to address the needs of advanced services providers. For many of the other measures, data will be reported distinctly for DSL loops. The availability of this information will assist entities that are contemplating providing advanced services in the SBC/Ameritech 13-state region, as well as helping carriers already operating in the region to monitor and address any potential increased discrimination.

As explained above, with SBC's new access to customer accounts in Ameritech's region (*e.g.*, Dallas business customers with branch offices in Chicago), and vice-versa, the merged firm gains an advantage in servicing multi-location business customers. Allowing competitors to import most-favored nation arrangements across SBC-Ameritech's in-region states helps to safeguard against this increased potential for discrimination while reducing the merged firm's advantage of servicing multi-location customers.[794]

The enforcement mechanisms contained in these conditions also will aid in the detection of discriminatory behavior by SBC/Ameritech. In particular, the conditions require the more thorough type of audit, an agreed-upon procedures engagement, for the separate advanced services affiliate provisions. Like the section 272(d) audit, the independent auditor will conduct a systematic and thorough examination into SBC/Ameritech's compliance with the structural,

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792 *See supra* at Section V.D.2.a) (Circuit-Switched Local Exchange Services).

793 NorthPoint July 19 Comments at 5.

794 *See* Consumer Coalition July 19 Comments, Affidavit of Mark N. Cooper, at 14.

transactional, nondiscrimination and other requirements of the separate advanced services affiliate.

4. Additional Benefits from Conditions

While these conditions mitigate, in many important ways, the potential public interest harms of the proposed transaction, we also find that the conditions will result in affirmative public interest benefits that tip the public interest balance of the proposed transaction in the Applicants' favor. Collectively, these conditions will, we believe, create a powerful momentum for increasing competition and choice in telecommunications markets inside and outside SBC's and Ameritech's territories.

As an initial matter, nearly all of the obligations under the conditions apply throughout SBC's and Ameritech's 13 in-region states, and others even extend to markets outside of the companies' traditional service areas. Because our public interest analysis is not limited to potential public benefit within a select geographic area or market, but also considers potential public interest benefits of applying conditions such as those imposed in this Order to a wider area, the breadth of the conditions helps the Applicants in carrying their burden of demonstrating how the merger advances competition.

We also find it significant that the conditions in general will last for a 36-month period. As addressed in the conditions, the duration of each commitment is tied not to our approval or the merger closing date, but to the initiation of the benefit of the condition. In other words, the commitments are designed to provide 36 months of benefit once SBC/Ameritech's obligations take effect. In 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.

Fostering Out-of-Territory Competitive Entry. We described earlier the Applicants' post-merger National-Local Strategy and why we could not regard its undoubted benefits as merger-specific. These conditions do not alter the basic fact that the parties do not need to merge in order to form out-of-region competitive LECs. The conditions do, however, greatly increase both the likelihood and the magnitude of a post-merger out-of-region entry strategy. These certainly enhance the public interest.

Lower Entry Barriers for Residential Competition. In broad terms, we anticipate that the conditions will prove beneficial in jumpstarting residential competition by lowering entry barriers for residential competition. The carrier-to-carrier promotions are specifically designed to induce more entry into residential markets quickly. The Applicants' commitments regarding carrier-to-carrier promotions, collocation, OSS, and multi-state interconnection agreements will, in our judgment, greatly reduce the costs of entry over the long run. In addition, the commitment to reform the process of cabling new multi-tenant dwellings and

business properties will increase access to customers by competitors not otherwise relying on the incumbent's wireline network.

Accelerating Advanced Services Deployment. Several conditions are aimed at increasing the availability of and broadening choices for advanced services for all Americans. The extensive commitments regarding advanced services all help to attain a single overriding goal: to encourage entry into the provision of advanced services by numerous firms, as well as the Applicants, while protecting against the risk that SBC/Ameritech might cripple these services in their infancy by discriminating against rival advanced services providers. The provisions for equitable sharing of loop information, for a surrogate line-sharing discount, for a separate affiliate for the Applicants' provision of advanced services, and for a new, open and nondiscriminatory OSS system will reduce the costs, including the risks, of entering these markets.

Improving Service to Residential and Low-Income Consumers. Low-income consumers, in rural and urban areas alike, will realize direct benefits from the enhanced Lifeline plans offered to them and from the assurance that they will share in the benefits of new advanced services offerings. Moreover, through the Applicants' additional service quality reporting, the Commission, states, and consumers will have information needed to monitor the merged firm's service quality on a timely basis.

D. Other Requested Conditions or Modifications to Proffered Conditions

Several commenters suggest additional conditions or modifications to the Applicants' package of voluntary proposed conditions. To the extent that a party requested a condition that we do not impose today, or suggested a change in the Applicants' proposal that we did not incorporate, we explain our rationale for declining the request below. We begin by discussing the separate advanced services affiliate, and whether the structure set forth in the conditions would render it a "successor or assign" of the incumbent LEC.

1. Separate Affiliate for Advanced Services

Several commenters question whether the separate advanced services affiliate structure described in the Applicants' July filing contains adequate safeguards to ensure that the SBC/Ameritech advanced services affiliate will function separately from the incumbent like any other competitive LEC.[795] Although commenters are divided over the merits of the separate affiliate condition, we find that SBC/Ameritech's provision of advanced services through a separate affiliate will spur the deployment of advanced services by all entities. We conclude that

[795] *See, e.g.*, CompTel July 19 Comments at 4; CoreComm July 22 Comments at 15-16; MCI WorldCom July 19 Comments at 42-46 (suggesting, *inter alia*, that the Applicants provide advanced services through affiliates that meet all section 272 separation requirements before merger consummation, and that they specify the charges for services, elements and features that the affiliate can purchase from the incumbent).

the separate affiliate structure contained in the conditions that we adopt today, which has changed significantly since the July filing, will ensure that advanced services are deployed efficiently. At the same time, the structure will safeguard against SBC/Ameritech leveraging its control over certain bottleneck facilities into the nascent advanced services market.

As discussed below, on the basis of the conditions as written, we find that the affiliate structure creates a rebuttable presumption that an SBC/Ameritech advanced services affiliate will not be a "successor or assign" of an incumbent LEC under section 251(h)(1) or a BOC under section 3(4)(B) of the Act.[796] At the same time, however, we note that if an SBC/Ameritech incumbent LEC and its advanced services affiliate behave in a manner inconsistent with the intent of the conditions or engage in activities beyond those expressly permitted in the conditions, the company bears the risk that the affiliate will be deemed a successor or assign of the incumbent LEC and, therefore, subject to incumbent LEC regulation under section 251(c). Accordingly, if an SBC/Ameritech advanced services affiliate is found to be a successor or assign[797] based on activities that are expressly permitted in these conditions, then, nine months after such a finding becomes final and non-appealable, SBC/Ameritech will no longer be obligated under the conditions to provide all advanced services through a separate affiliate, although it may choose to do so, but will continue to bear certain obligations.[798] If, however, the separate advanced services affiliate is deemed to be a successor or assign based substantially on conduct by or between an SBC/Ameritech incumbent and its affiliate that was not expressly permitted by these conditions, then SBC/Ameritech shall continue providing advanced services through the affiliate, operating as a successor or assign, for the full duration of the condition.

a) Section 251(h)(1) Statutory Framework

In the *Advanced Services Order and NPRM*,[799] the Commission recognized that a determination as to whether a carrier is an incumbent LEC is based on the statutory definition set forth in section 251(h). As discussed below, section 251(h)(1) of the Act defines an incumbent local exchange carrier as a local exchange carrier[800] that was providing local exchange service as of the date of enactment of the 1996 Act and was a member of an exchange carrier association on

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796 *See* 47 U.S.C. § 251(h)(1); 47 U.S.C. § 153(4)(B).

797 We do not address in this proceeding the potential obligations or requirements with respect to third parties that may be imposed on SBC/Ameritech in the event that its advanced services affiliate is found to be a successor or assign.

798 We note that, after that time, if SBC/Ameritech decides to no longer provide advanced services through a separate affiliate in a particular state, it will provide them through a separate division that will comply with certain obligations until 48 months after the merger closing date.

799 *Advanced Services Order and NPRM*, 13 FCC Rcd at 24052, para. 89. *See also* Comments Requested in Connection with Court Remand of August 1998 Advanced Services Order, CC Docket Nos. 98-11 *et al.*, *Public Notice*, DA 99-1853 (rel. Sept. 9, 1999).

800 Section 3(26) of the Act defines a local exchange carrier as "[a]ny person that is engaged in the provision of telephone exchange service or exchange access . . . ." 47 U.S.C. § 153(26).

such date,[801] or that is a "successor or assign" of such a carrier.[802] Section 251(h)(2) provides that the Commission may deem, by rule, that a LEC is comparable to, and therefore should be treated as, an incumbent if the following three criteria are met: (1) the LEC occupies a position in the market for telephone exchange service comparable to an incumbent LEC; (2) the LEC has "substantially replaced" an incumbent; and (3) treating the LEC as an incumbent "is consistent with the public interest, convenience, and necessity and the purposes of [section 251]."[803] Furthermore, section 3(4)(B) of the Act defines a "Bell Operating Company" as including "any successor or assign of any such company that provides wireline telephone exchange service."[804] Thus, under the Act, a "successor or assign" of an incumbent LEC, or in this case a BOC, will be subject to the obligations imposed upon incumbent LECs in section 251(c).

We recognize that one interpretation of section 251(h)(1) is that, in order to fall within its definition, two conditions must be met: (1) the LEC must have provided service in the area as of February 8, 1996;[805] and (2) it must have been a member of NECA on that date[806] or became a successor or assign of a NECA member after that date.[807] Under this interpretation, an entity that was a successor or assign of a NECA member would not be deemed an incumbent LEC under 251(h)(1) unless that entity itself was also providing local exchange service in the NECA member's area on February 6, 1996.[808] In other words, an affiliate established after the date of enactment, regardless of whether it replaces or substantially continues the operations of the incumbent, would never meet the definition of an incumbent LEC under 251(h)(1) under this interpretation because it was not in existence, thus could not have been providing telephone

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801 Specifically, the Act refers to a LEC that was deemed to be a member of the exchange carrier association pursuant to section 69.601(b) of the Commission's regulations. *See* 47 U.S.C. §251(h)(1)(B)(i). The referenced association is the National Exchange Carrier Association (NECA), which prepares and files access charge tariffs on behalf of all telephone companies that do not file separate tariffs or concur in a joint access tariff of another telephone company for all access elements. *See* 47 C.F.R. § 69.601. Under the Commission's rules, NECA also is responsible for the collection and distribution of access charge revenues. *See* 47 C.F.R. § 69.603.

802 47 U.S.C. § 251(h)(1).

803 47 U.S.C. § 251(h)(2).

804 47 U.S.C. § 153(4)(B).

805 47 U.S.C. § 251(h)(1)(A).

806 47 U.S.C. § 251(h)(1)(B)(i).

807 47 U.S.C. § 251(h)(1)(B)(ii).

808 *See MCI Telecommunications Corp. v. The Southern New England Telephone Co.*, 27 F.Supp.2d 326, 336-37 (D.Conn. 1998) (*MCI Telecomm. Corp.*) (concluding that, even if a carrier is a successor or assign of an incumbent under section 251(h)(1)(B)(ii), the carrier cannot be deemed an incumbent because it did not provide service in the area on February 8, 1996, and therefore fails to satisfy section 251(h)(1)(A)).

exchange service, as of February 8, 1996.[809] We find that this formulation appears to distort the notion of "successor or assign" that is at the heart of the statutory provision.[810]

We find the more reasonable interpretation of section 251(h)(1) to mean that an entity may become an incumbent LEC by being a successor or assign of a LEC[811] that, as of February 8, 1996, was providing local exchange service in a particular area[812] and was a member of NECA,[813] even if that entity was not itself providing local exchange service in the area or a member of NECA as of that date.[814] This interpretation of "successor and assign" is not only more consistent with the goals of section 251, but conforms more closely to the traditional notion of "successor or assign."[815] We therefore decline to follow the approach set forth in *MCI Telecomm. Corp.*,[816] as we believe such interpretation produces a result plainly at variance with the policy of the legislation as a whole.[817]

In this proceeding, therefore, we must examine whether the SBC/Ameritech advanced services affiliate that will be created and operated in accordance with the conditions

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809 This interpretation also implies that an entity that purchases an incumbent LEC would be deemed an incumbent only if that entity had also been providing local exchange service in the incumbent's area as of the date of enactment – a situation that we believe would rarely be met because local exchange service in most areas was provided solely by the incumbent as of that date.

810 *See MCI Telecomm. Corp.*, 27 F.Supp.2d at 337 (recognizing that the literal interpretation of section 251(h)(1) "appears to be an unusual formulation for a statutory provision purporting to address successors or assigns," and "gives the appearance of allowing for a large loophole").

811 47 U.S.C. § 251(h)(1)(B)(ii).

812 47 U.S.C. § 251(h)(1)(A).

813 47 U.S.C. § 251(h)(1)(B)(i).

814 We also believe that this approach is consistent with section 251(h)(2).

815 We note that the Applicants have presumed this interpretation of section 251(h)(1) in the instant proceeding. *See* Letter from Michael K. Kellogg, Counsel for SBC, Kellogg, Huber, Hansen, Todd & Evans, to Christopher J. Wright, General Counsel, FCC, CC Docket No. 98-141, at 2 (filed June 25, 1999) (SBC June 25 *Ex Parte*) (stating that section 251(h) defines an incumbent LEC "as a carrier that 'on February 8, 1996, provided telephone exchange service' and refers to 'successor[s]' and 'assign[s]' of such a carrier.") (emphasis omitted)); Letter from Michael K. Kellogg, Counsel for SBC, Kellogg, Huber, Hansen, Todd & Evans, to Christopher J. Wright, General Counsel, FCC, CC Docket No. 98-141, at 5 (filed Sept. 9, 1999) (SBC June 25 *Ex Parte*) (same).

816 *See supra* n. 810.

817 *See, e.g., United States v. American Trucking Assocs.*, 310 U.S. 534, 543 (1967); *Public Citizen v. United States Dept. of Justice*, 491 U.S. 440, 454-455 (1989) ("Where the literal reading of a statutory term would compel an odd result, we must search for other evidence of congressional intent to lend the term its proper scope," including the circumstances of the enactment of a particular legislation); *United States v. Ron Pair Enterprises, Inc.*, 498 U.S. 235, 242 (1989) (where "the literal application of a statute will produce a result demonstrably at odds with the intention of its drafters . . . the intention of the drafters, rather than the strict language, controls."); *Environmental Defense Fund v. Environmental Protection Agency*, 82 F.3d 451, 468-69 (D.C. Cir.), *amended on other grounds*, 92 F.3d 1209 (D.C. Cir. 1996) ("Because this literal reading of the statute would actually frustrate the congressional intent supporting it, we look to the EPA for an interpretation of the statute more true to Congress's purpose"). *See also Guam Public Utilities Commission*, CCB Pol. 96-18, CC Docket No. 97-134, Declaratory Ruling and Notice of Proposed Rulemaking, 12 FCC Rcd 6925, 6942-43, at para. 29-30 (1997); *Treatment of the Guam Telephone Authority and Similarly Situated Carriers as Incumbent Local Exchange Carriers Under Section 251(h)(2) of the Communications Act*, CC Docket No. 97-134, Report and Order, FCC 98-163, 1998 WL 400007 (rel. Jul. 20, 1998).

would be deemed a successor or assign of the SBC/Ameritech incumbent LEC, which was providing service and was a member of NECA as of February 8, 1996. As discussed below, we reach a rebuttable presumption that the SBC/Ameritech advanced services affiliate should not be deemed a successor or assign of an incumbent LEC under section 251(h)(1).

b) Legal Analysis of "Successor or Assign"

As an initial matter, we note that the Commission has never determined the circumstances under which one entity will be considered a successor or assign of another under section 251(h)(1) or section 3(4) of the Act. This issue is, therefore, a matter of first impression for the Commission. In order to provide guidance to the Applicants regarding the interconnection obligations that will be required of the advanced services affiliate, we analyze section 251(h)(1) as it applies to the affiliate structure set forth in the conditions.

To determine whether an advanced services affiliate would be deemed an incumbent LEC pursuant to section 251(h)(1), or a BOC pursuant to section 3(4), we first look to the text of the statute to determine the circumstances under which an entity would become a successor or assign. Neither the Act nor its legislative history defines the terms "successor or assign" in either context. Employing our traditional tools of statutory construction, therefore, we look to the purposes of the Act, and section 251 in particular, to determine a reasonable meaning of the terms in their context.[818] We also examine case law for guidance on how federal courts have interpreted these terms.

One of the fundamental goals of the Act is to promote innovation and investment in the telecommunications marketplace by all participants, both incumbents and new entrants, and to stimulate competition for all services, including advanced services.[819] We therefore interpret the terms "successor or assign" as used in section 251 in a manner that promotes, rather than frustrates, the pro-competitive and innovation-enhancing purposes of that section and section 706(a) of the 1996 Act. The primary pro-competitive objective of section 251 is to open the local exchange market to competition in all services to ensure that consumers reap the benefits of broad-based and long-lasting competition. In particular, section 251 requires all incumbent LECs to provide nondiscriminatory access to their network facilities,[820] thereby allowing competing carriers to enter local markets by purchasing parts of the incumbent's

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818 *See Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 843 n.9 (1984); *Bell Atlantic Telephone Companies v. FCC*, 131 F.3d 1044, 1047 (D.C. Cir. 1997).

819 *See* Telecommunications Act of 1996, Pub.L. No. 104-104, Purpose Statement, 110 Stat. 56, 56 (1996) (stating that the broad purpose of the 1996 Act is "to promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies."). Section 706(a) of the 1996 Act directs the Commission to "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans." Pub.L. 104-104, Title VII, § 706, Feb. 8, 1996, 110 Stat. 153, reproduced in the notes under 47 U.S.C. § 157.

820 *See Local Competition Order*, 11 FCC Rcd at 15506, para. 4.

network, and to allow resale of their services at wholesale rates. Section 251 also facilitates investment and deployment of innovative technologies by encouraging new carriers to enter markets previously foreclosed to them with a wide array of diverse services.[821] Thus, we must interpret the terms "successor or assign" in a manner that furthers increased competition among various service providers, while encouraging investment in new services and deployment of innovative technologies.

Typically, a successor or assign legal analysis is triggered after an entity ceases to exist.[822] For example, when an existing entity creates another entity to replace it, it may be appropriate to consider whether the new entity has "stepped into the shoes" of the previously existing entity. In our context, however, we must assess circumstances under which an incumbent LEC may develop a new line of business in a new, less regulated entity, or transfer a nascent business to such an entity, while continuing other core lines of business in the incumbent LEC. Essentially, we must ensure that the existing entity has ceded sufficient control of the new entity so that we are able to recognize the new entity as its own operation.

We recognize, as the Supreme Court confirmed in *Howard Johnson Co. v. Detroit Local Joint Executive Bd.*, that a determination as to whether an affiliate is a successor or assign is ultimately fact-based, and the terms take their meaning from the particular legal context in which they are used.[823] In considering the particular facts and the legal context, however, courts generally have looked for "substantial continuity" between two companies such that one entity steps into the shoes of, or replaces, another entity.[824] In particular, in the labor law case of *Fall River Dyeing & Finishing Corp. v. NLRB*, the Supreme Court, in determining whether substantial continuity existed between two companies such that one company was the successor of another, focused on whether the company had "acquired substantial assets of its predecessor and continued, without interruption or substantial change, the predecessor's business operations."[825]

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821 *See also* Section 706(a) of the 1996 Act, codified at 47 U.S.C. § 157 note.

822 *See, e.g.*, *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27 (1987) (*Fall River Dyeing*).

823 *Howard Johnson Co. v. Detroit Local Joint Executive Bd.*, 417 U.S. 249, 264 n.9 (1974) (stating that determinations about successorship must be based on "the facts of each case and the particular legal obligation which is at issue" and that "there is and can be no single definition of 'successor' which is applicable in every legal context."). *See also* SBC June 25 *Ex Parte* at 3; SBC Sept. 9 *Ex Parte* at 6 (stating that determinations about successorship are fact-based).

824 *See, e.g.*, *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 551 (1964) (concluding that a successor corporation could be compelled to arbitrate under a collective-bargaining agreement if there was "substantial continuity of identity in the business enterprise"); *Golden State Bottling Co., Inc. v. NLRB*, 414 U.S. 168, 182 n.5 (1973) (referring to the general rule of corporate liability under which a successor corporation could be liable for the debts or liabilities of its predecessor if, among other tests, the successor corporation is "merely a continuation of the selling corporation"). *See also Atchison Casting Corp. v. Dofasco Inc.*, 889 F. Supp. 1445, 1448-49 (D. Kan. 1995) (*quoting Blacks Law Dictionary* 1431 (6th ed. 1990)) (addressing allegations of breach of contract and fraud for a contract that bound "successors or assigns" of the predecessor corporation, and stating that "the term [successor] ordinarily means 'another corporation which through amalgamation, consolidation, or other legal succession, becomes invested with rights and assumes burdens of the first corporation.'").

825 *Fall River Dyeing*, 482 U.S. at 43 (citation omitted). We also note that, in an analogous context involving regulated industries, courts have looked to whether the statutory purpose could be easily frustrated through the use

For the instant inquiry, we find it instructive to consider the affiliate structure that Congress established in another part of the Act to accomplish similar policy objectives. In particular, we are guided by the affiliate structure chosen by Congress in section 272. Section 272 requires BOCs to provide certain manufacturing activities and origination of certain interLATA telecommunications services and interLATA information services only through a separate affiliate.[826] Congress set forth certain structural and transactional safeguards, as well as nondiscrimination and audit requirements, to prevent a BOC from leveraging its market power in the local market into adjacent, more competitive markets in an anticompetitive manner.[827] A section 272 affiliate must, for example, operate independently from the BOC; maintain separate books, records, and accounts; have separate officers, directors, and employees; not obtain credit recourse to the BOC; and conduct all transactions on an arm's length basis, reduced to writing, and available for public inspection.[828] Although we are not bound by section 272 here, the underlying policy rationales of separation in that context, as discussed in prior Commission orders, are similar to those in the instant context.[829] Indeed, in this case, consideration of section 272's requirements will enable us to avoid re-inventing the wheel with respect to previous Commission consideration of separation criteria.

We find that a separate affiliate structure for advanced services should not be more stringent than necessary to effectuate the overriding statutory purpose of promoting local competition and the deployment of advanced services by all carriers. While section 272's intent, to prevent an incumbent from leveraging market power in an anticompetitive manner and thereby frustrating the purposes of the Act, has some bearing on our analysis of the degree of separation between the SBC/Ameritech incumbent and its advanced services affiliate, other considerations are also present in the context of advanced services.[830] In particular, the

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of separate corporate entities to determine whether it is appropriate to "pierce the corporate veil." *See, e.g., General Telephone Co. of the Southwest v. U.S.*, 449 F.2d 846, 855 (5th Cir. 1971) (stating that "where the statutory purpose could [] be easily frustrated through the use of separate corporate entities, the Commission is entitled to look through the corporate form and treat the separate affiliate as one and the same for purposes of regulation"); *Transcontinental Gas Pipe Line Corp. v. FERC*, 998 F.2d 1313, 1320 (5th Cir. 1993) (*Transcontinental Gas*) (same); *MCI Telecommunications Corp. v. O'Brien Marketing, Inc.*, 913 F. Supp. 1536, 1541 (S.D. Fla. 1995) (stating that courts will look closely at the purpose of the federal statute involved in applying the federal rule that a corporate entity may be disregarded in the interests of public convenience, fairness, and equity).

826 *See* 47 U.S.C. § 272(a).

827 *See Non-Accounting Safeguards Order*, 11 FCC Rcd at 21910, para. 6.

828 *See* 47 U.S.C. § 272(b).

829 For example, one purpose of section 272's structural and nondiscrimination safeguards is to ensure that competitors of the BOC's section 272 affiliate have access to essential inputs for the provision of local services on terms at least as favorable as those provided by the BOC to its affiliate. *See Non-Accounting Safeguards Order*, 11 FCC Rcd at 21913, para. 13. A similar rationale applies here with respect to access to those inputs by competitors of SBC/Ameritech's advanced services affiliate.

830 Using section 272 safeguards as guidance in this case may result in efficiencies for SBC/Ameritech. For example, SBC/Ameritech may, if it chooses, provide all advanced services through an already existing section 272 affiliate, or, in contemplation of receiving authority to provide in-region, interLATA services in a particular state,

Commission has an affirmative duty to encourage the rapid deployment of advanced services pursuant to section 706(a) of the 1996 Act.[831] The conditions therefore attempt to strike a balance that ensures that the separation requirements and safeguards are not outweighed by countervailing burdens that may tend to stifle the deployment of innovative technologies. While we are concerned that, to not be deemed an incumbent LEC, section 251's purposes require a degree of separation between an incumbent LEC and its advanced services affiliate, we also seek to preserve, if possible, innovative business structures and certain economies of scale and scope that will spur rapid deployment of advanced services by all carriers, as specifically envisioned by Congress.

Based on the case law and goals of the 1996 Act, and guided by the separation principles established by Congress in section 272, we conclude that, in determining whether an advanced services affiliate is a successor or assign of an incumbent LEC, we must consider whether, given the totality of the circumstances, "substantial continuity" exists between the incumbent LEC and the affiliate. In order to ensure that there is no substantial continuity between an incumbent and its advanced services affiliate, we look for the presence of certain indicia. Specifically, we evaluate whether: (1) there is identifiable physical separation between the entities; (2) the incumbent LEC has not transferred to its affiliate substantial assets or assets that are necessary for the continuation of the incumbent's traditional business operations;[832] (3) transactions between the incumbent and affiliate are conducted at arms-length and are transparent; and (4) the affiliate does not derive unfair advantage from the incumbent.[833] This approach is intended to ensure that an advanced services affiliate is not, in effect, standing in the shoes of an incumbent LEC and therefore rendered a "successor or assign" of the incumbent. If, for example, the affiliate's operations become too intertwined with the incumbent, thereby frustrating the pro-competitive purposes of section 251, the incumbent would be in a position to evade its obligations under section 251(c). We evaluate whether these indicia are present in the SBC/Ameritech advanced services affiliate structure below.

c) Successor or Assign Analysis Applied to SBC/Ameritech Advanced Services Affiliates

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transition an advanced services affiliate created under these conditions into a section 272 affiliate so that, upon such approval, it can provide both intraLATA and interLATA advanced services through that affiliate.

831 *See* Pub.L. 104-104, Title VII, § 706(a), Feb. 8, 1996, 110 Stat. 153, reproduced in the notes under 47 U.S.C. § 157.

832 *See Fall River Dyeing*, 482 U.S. at 43 (*quoting Golden State Bottling Co.*, 414 U.S. at 184) (finding that a determination as to whether a new company is the successor of the old requires an examination of whether the new company has "acquired substantial assets of its predecessor and continued without interruption or substantial change, the predecessor's business operations").

833 *See generally, Transcontinental Gas*, 998 F.2d at 1320 (finding that, because a regulated entity was using its subsidiary to engage in "undue" discrimination, thereby frustrating the statutory purpose, FERC correctly looked behind the corporate form and treated the subsidiary and the regulated entity as one and the same for purposes of regulation).

We expect that, on the basis of the conditions as written, there will be no substantial continuity between the SBC/Ameritech incumbent LEC and its advanced services affiliate. Accordingly, we find that a rebuttable presumption is established that SBC/Ameritech's advanced services affiliate will not be a "successor or assign" of an incumbent LEC[834] or a BOC,[835] and therefore not be subject to incumbent LEC regulation under section 251.[836] Our conclusion, however, is a rebuttable presumption based exclusively on our analysis of the permitted activities described in the conditions. As discussed above, a successor or assign analysis is ultimately fact-based,[837] and, at this time, SBC/Ameritech's advanced services affiliate has yet to engage in actual transactions with the incumbent or establish a course of conduct that will shed light on the degree of continuity. We do not yet know, for example, whether SBC/Ameritech will choose to lessen the risk that its advanced services affiliate will be deemed a successor or assign by adhering to a more stringent structural separation model than that outlined in the conditions.[838] We assume, however, for the purposes of the instant discussion, that SBC/Ameritech and its affiliates will conduct their operations by engaging in all of the activities permitted in the conditions.

Commenters urge us to require SBC/Ameritech to provide advanced services through a separate affiliate that complies fully with the structural and transactional requirements of section 272.[839] As an initial matter, we note that section 272, by its terms, applies only to manufacturing activities, in-region originating interLATA services, and interLATA information

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834 *See* 47 U.S.C. § 251(h)(1)(B)(ii) (successor or assign of incumbent LEC). *See also* 47 U.S.C. § 251(h)(2) (treating comparable carriers as incumbents). We note that because we presume that the SBC/Ameritech advanced services affiliate is not a successor or assign, it can also benefit from a presumption of nondominance, which provides the affiliate more flexibility to price its services in a competitive manner. The separation requirements and safeguards that prevent the advanced services affiliate from being a successor or assign of an incumbent also are likely to prevent an incumbent from leveraging its market power in the local market through an affiliate to gain market power in the advanced services market. The affiliate, therefore, can provide advanced services as a nondominant carrier, while the nascent market for advanced services can continue to grow in a competitive fashion, protected from anticompetitive behavior.

835 *See* 47 U.S.C. § 153(4)(B) (successor or assign of a BOC).

836 We disagree with those commenters that claim that, simply through the creation of the advanced services affiliate, SBC and Ameritech will evade section 251 obligations, namely the obligation of an incumbent LEC to open and unbundle its network. *See* AT&T July 19 Comments, App. A at 56; MCI WorldCom July 19 Comments at 41; Sprint July 19 Comments at 21. The condition does not alter the obligations of an SBC/Ameritech incumbent LEC under section 251 and Commission rules. Assuming that the separate advanced services affiliate adheres to the conditions and does not act in such a way as to be deemed a successor or assign of an incumbent LEC, it will not be subject to section 251(c) requirements. For this reason, we decline to require the separate advanced services affiliate to make its services available for resale under 47 U.S.C. § 251(c)(4). *See* CoreComm July 22 Comments at 13.

837 *See* SBC June 25 *Ex Parte* at 3; SBC Sept. 9 *Ex Parte* at 6 (stating that determinations about successorship are fact-based).

838 To the extent that SBC/Ameritech chooses to adhere more closely to section 272, which contains Congress' vision of a structurally separate BOC affiliate for the provision of certain specified services, SBC/Ameritech is assured more certainty that its affiliate would not be deemed to be a successor or assign.

839 *See, e.g.*, ALTS July 19 Comments at 18-20; AT&T July 19 Comments, App. A at 57-58, 61; ALTS July 19 Comments at 19; CompTel July 19 Comments at 22; MCI WorldCom July 19 Comments at 42; Sprint July 19 Comments at 24-25.

services.[840] Accordingly, the structure of an SBC/Ameritech affiliate that provides advanced services need not be dictated by section 272's framework.[841]

The Applicants' proposal nonetheless adheres to most of the structural and transactional requirements of sections 272(b), (c), (e), and (g), as interpreted by the Commission. Deviations from these requirements are expressly set forth in the description of activities permitted between the SBC/Ameritech incumbent LEC and its advanced services affiliate. Under the conditions, the separate advanced services affiliate will be permitted: (1) to engage in joint marketing with the SBC/Ameritech incumbent on an exclusive basis, which includes customer contacts up to and including the sale (*i.e.*, the incumbent may perform advanced services customer inquiries, sales, and order-taking); (2) to engage in certain customer care activities with the incumbent on an exclusive basis (*i.e.*, the incumbent may notify customers of service order progress, respond to customer inquiries regarding the status of an order, change customer account information, and receive customer complaints other than those regarding receipt and isolation of trouble); (3) to use the incumbent's brand name on an exclusive basis; (4) to obtain billing and collection services from the incumbent on a nondiscriminatory basis; (5) to obtain operation, installation and maintenance (OI&M) services from the incumbent on a nondiscriminatory basis; (6) to receive, within a limited grace period, from the incumbent an initial transfer of assets used to provide advanced services; and (7) to locate employees in the same buildings and on the same floors as employees of the incumbent, provided that the underlying building facilities are owned or leased by the affiliate. In addition, the conditions permit the SBC/Ameritech incumbent to perform certain activities on behalf of its affiliate on an exclusive basis for the period of time during which SBC/Ameritech transitions to this separate affiliate structure. Specifically, for a limited period, SBC/Ameritech may provide network planning, engineering, design or assignment services associated with advanced services to its affiliate, and receive and isolate troubles affecting an advanced services customer on behalf of the affiliate. Additionally, the SBC/Ameritech incumbent is permitted to line share with its advanced services affiliate on an exclusive basis until it provides line sharing to unaffiliated providers of advanced services.

Using the indicia outlined above, we find that, assuming the SBC/Ameritech advanced services affiliate strictly adheres to the structure set forth in the conditions, or to a more stringent separation structure, a rebuttable presumption is established that there will be no substantial continuity between the SBC/Ameritech incumbent and its advanced services affiliate and that the affiliate will thus not be a successor or assign of the incumbent LEC.[842] We believe that the affiliate structure set forth in the conditions will ensure that an SBC/Ameritech advanced

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[840] *See* 47 U.S.C. § 272(a)(2) (including information services other than electronic publishing and alarm monitoring services).

[841] We note, however, that once SBC/Ameritech receives authority to provide in-region, interLATA service in a particular state, it must provide all interLATA advanced services in that state through a section 272 affiliate. *See* 47 U.S.C. § 272(a).

[842] We note that the affiliate would remain subject to the general duties of telecommunications carriers in section 251(a) and the obligations of all local exchange carriers in section 251(b).

services affiliate occupies a position in the market comparable not to an incumbent, but rather to a non-incumbent advanced services competitors.

Identifiable Physical Separation. We find that SBC/Ameritech's compliance with the structural requirements of section 272(b)[843] ensures an identifiable level of physical separation between the incumbent and its affiliate. Under these rules, the incumbent and its affiliate will not jointly own transmission and switching facilities, nor the buildings and land where switching and transmission facilities are located.[844] The affiliate will also not obtain credit under any arrangement that would permit a creditor, upon default, to have recourse to the assets of the incumbent.[845] Additionally, the advanced services affiliate will maintain separate officers, directors, and employees from the incumbent.[846] Although the SBC/Ameritech advanced services affiliate is permitted to locate employees in the same buildings and on the same floor as the incumbent's employees, the conditions contain additional restrictions that mitigate the risk of abuse or malfeasance in this case. Despite the potential proximity, the affiliate must use only the same OSS systems, processes and procedures that are available to unaffiliated entities, and the incumbent's employees will conduct transactions with the affiliate in the same manner in which they conduct transactions with unaffiliated entities. For example, in communicating with the affiliate, the incumbent's employees must use the same mode of communication that they use with unaffiliated carriers (*e.g.*, phone calls or email). Furthermore, complying with the Commission's accounting safeguards protects ratepayers of SBC/Ameritech's regulated services from bearing the risks and costs associated with the affiliate.

Asset Transfers. We find that SBC/Ameritech will not be transferring substantial assets or assets that are necessary to continue the incumbent's traditional business operations.[847] The conditions permit the limited transfer of certain advanced services equipment to the affiliate, but require that such transfers comply with the Commission's affiliate transactions rules and accounting safeguards, including the obligation that the transfer of facilities used to provide

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843 We recognize that SBC/Ameritech is permitted to deviate from these requirements, and our implementing rules, with respect to certain operations, installation and maintenance functions. We discuss the permitted deviation under the unfair advantage prong below.

844 *See Non-Accounting Safeguards Order*, 11 FCC Rcd at 21982-84, para. 158-62 (discussing joint ownership of transmission and switching facilities, buildings and land). We note that, consistent with section 272(b)(5), a lease of office space between an incumbent and its advanced services affiliate must be valued in accordance with the Commission's affiliate transactions rules, reduced to writing and posted on the Internet, and made available to competitors on the same rates, terms and conditions. *See Non-Accounting Safeguards Order*, 11 FCC Rcd at 21992, para. 181.

845 *See* 47 U.S. C. § 272(b)(4). Consistent with the *Non-Accounting Safeguards Order*, the SBC/Ameritech incumbent, its parent, or any affiliate may not co-sign a contract or any other instrument with the advanced services affiliate that would allow the affiliate to obtain credit in a manner that grants the creditor recourse to the incumbent's assets in the event of a default by the advanced services affiliate. *See Non-Accounting Safeguards Order*, 11 FCC Rcd at 21995, para. 189.

846 *See Non-Accounting Safeguards Order*, 11 FCC Rcd at 21990-91, para. 178. We note that the conditions permit SBC/Ameritech to transfer employees as part of the creation of the advanced services affiliate.

847 Although this conclusion implies that the advanced services affiliate is not a successor or assign of the incumbent, our analysis has no effect on the application of other legal requirements that may apply to such transfers.

advanced services be made at the higher of net book cost or estimated fair market value.[848] This safeguard ensures that the actual value of the asset is reflected in the transfer, and will prevent SBC/Ameritech from discriminating in favor of its affiliate through below-cost transfers. In addition, although not explicitly discussed in the conditions, we recognize that, shortly after the affiliate is created, SBC/Ameritech will also be transferring other types of assets to its separate affiliate including customer accounts, initial capital contribution, and real estate, as well as employees.[849] This limited transfer of assets and employees necessary for the provision of advanced services will not result in the transferring of a substantial portion of the incumbent's assets[850] or the shifting of the incumbent's traditional business operations. The incumbent will continue to provide traditional voice-based circuit-switched local services, as well as other services, through the use of the assets and employees that remain with the incumbent. Moreover, to the extent that our transactional safeguards are applicable to these other asset transfers as well, such safeguards continue to pre-ensure arms-length dealings.[851] We therefore find that a limited one-time transfer of such assets and employees does not frustrate the statutory purpose of section 251, nor manifest substantial continuity between the incumbent and its advanced services affiliate. Rather, such transfers will further the pro-competitive goals of the Act, section 706(a) of the 1996 Act in particular, by facilitating a more efficient and competitive deployment of advanced services to consumers.

Although the SBC/Ameritech incumbent is permitted to transfer equipment to its affiliate, the permitted transfers only encompass equipment that is used to provide advanced services. SBC/Ameritech is explicitly not permitted to transfer UNEs or other equipment used primarily to provide basic local services.[852] All equipment transfers between the incumbent and affiliate also must be conducted within a limited grace period.[853] We note also that the equipment transfers are further limited by the requirement that any new advanced services equipment must be purchased by the affiliate after 30 days from the merger's closing. Allowing this limited

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848 *See* 47 C.F.R. § 32.27(b). *See also Accounting Safeguards Order*, 11 FCC Rcd at 17605-07, 17609-10, paras. 144-48, 153-54.

849 The Commission reserves the right to examine, on a case-by-case basis, the transfer of any additional assets necessary for the creation or functioning of the SBC/Ameritech separate advanced services affiliate.

850 We expect that the assets that SBC/Ameritech would transfer to the advanced services affiliate, including a reasonable amount of capital necessary to create the advanced services affiliate, would only comprise a small fraction of the incumbent's total assets. We note, however, that where the capital transferred from the incumbent LEC to the advanced services affiliate exceeds reasonable expectations, we would no longer consider such capital to be start-up capital and we would find such transfer to comprise a substantial portion of the incumbent's total assets.

851 As discussed above, the transfer of such assets must occur at the higher of net book cost or estimated fair market value. In addition, the affiliate must provide a detailed written description of the asset or service transferred and the terms and conditions of the transaction on the Internet within 10 days of the transaction. *See Accounting Safeguards Order*, 11 FCC Rcd at 17593, para. 122.

852 *See* 47 C.F.R. § 53.207 (stating that if a BOC transfers network elements to an affiliate, such entity will be deemed to be an assign of the BOC under section 3(4) with respect to the transferred element).

853 The conditions permit an SBC/Ameritech incumbent LEC to transfer advanced services equipment, including supporting facilities and personnel, to an advanced services affiliate only until 180 days after the Commission issues a final order, excluding any judicial appeals, in its UNE Remand proceeding, CC Docket No. 96-98.

transfer of advanced services equipment will facilitate the affiliate's creation and prevent the affiliate from having to duplicate investments that have already been made by the SBC/Ameritech incumbent. Moreover, the limited transfer will allow the affiliate to begin deploying advanced services to consumers more quickly.

Transactional Safeguards. We find that adequate protection against improper cost allocation exists in the affiliate structure contained in the conditions. Structural separation, by itself, greatly assists in deterring improper cost allocation.[854] Additional protection against improper cost allocation, however, is provided by SBC/Ameritech's adherence to the requirements of sections 272(b)(5) and (c)(2), and the Commission's implementing rules.[855] Complying with the affiliate transactions rules in this case therefore protects ratepayers of regulated services from bearing the risks and costs associated with competitive ventures while allowing for the provision of advanced services in a competitive manner by all providers.[856]

Specifically, consistent with section 272(b)(5), the conditions also provide that the SBC/Ameritech incumbent will conduct all transactions with its advanced services affiliate on an arm's length basis, with transactions reduced to writing and timely posted on the company's Internet website in accordance with the Commission's rules.[857] In this way, the relations between an SBC/Ameritech incumbent and its advanced services affiliate will be highly transparent, which will facilitate monitoring and enforcement of the condition's requirements.

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[854] Structural separation, when properly implemented, ensures that an affiliate's costs are separated from an incumbent, and therefore aids in the prevention and detection of cost misallocation. *See Non-Accounting Safeguards Order*, 11 FCC Rcd at 21914, para. 15.

[855] *See Accounting Safeguards Order*, 11 FCC Rcd at 17586-87, paras. 107-09; 47 C.F.R § 32.27. In particular, the affiliate transactions rules discourage cross-subsidization by requiring carriers, in recording asset transfers and services provided between regulated and nonregulated affiliates, to record the costs of such transactions according to certain valuation methodologies. Depending on the circumstances of the transaction, the rules may require an incumbent LEC to reflect the tariffed rate, the rate of publiclyfiled agreements, the prevailing price, the net book cost, the fully distributed cost, or the estimated fair market value applicable to individual assets or services. *See* 47 C.F.R. § 32.27(b), (c).

[856] In the *Accounting Safeguards Order*, the Commission concluded that the affiliate transactions rules, with certain modifications to the valuation methodologies, would satisfy the "arm's length" requirement of section 272(b)(5). *See Accounting Safeguards Order*, 11 FCC Rcd at 17588-616, 17652-55, paras. 111-66, 251-58. In the *Joint Cost* proceeding, the Commission adopted the affiliate transactions rules codified in Part 32 as part of a comprehensive effort to improve the safeguards against cross-subsidization. *See generally Separation of Costs of Regulated Telephone Service from Costs of Nonregulated Activities*, CC Docket No. 86-111, Report and Order, 2 FCC Rcd 1298 (1987) (*Joint Cost Order*), *Order on Reconsideration*, 2 FCC Rcd 6283 (1987) (*Joint Cost Reconsideration Order*), *Order on Further Reconsideration*, 3 FCC Rcd 6701 (1988) (*Joint Cost Further Reconsideration Order*), *aff'd sub nom. Southwestern Bell Corp. v. FCC*, 896 F.2d 1378 (D.C. Cir. 1990). In addition, the Commission relied on the affiliate transactions rules to protect ratepayers from bearing the costs of cross-subsidization in the *Computer III* proceeding. *See BOC Safeguards Order*, 6 FCC Rcd at 7592, para. 48.

[857] *See Accounting Safeguards Order*, 11 FCC Rcd at 17594, para. 123. We note that the Commission's rules require incumbent LECs, including SBC and Ameritech, to disclose on a regular basis financial and accounting information needed to assess the allocation of costs. *See* 47 C.F.R. §§ 43.21 (requiring disclosure of financial and accounting data), 64.903 (requiring submission of regular cost allocation manuals). *See also* Automated Reporting Management Information System, FCC Report 43-02 (USOA Report) and FCC Report 43-03 (Joint Cost Report).

The only respect in which the SBC/Ameritech incumbent and its affiliate are permitted to deviate from these requirements is with regard to the facilities and services that the affiliate will order out of its interconnection agreement with the incumbent. Although these transactions will not be made available consistent with the transaction disclosure requirements of section 272(b)(45), SBC/Ameritech will comply with all of the Commission's other transaction requirements. Moreover, the interconnection agreement itself will be made publicly available pursuant to the requirements of section 252, and SBC/Ameritech must provide all such services and facilities to unaffiliated parties on a nondiscriminatory basis. Moreover, the transactions will be audited by the independent auditor as part of the thorough advanced services affiliate audit. This audit, which will be conducted on an annual basis by an independent auditor in accordance with industry standards, as well as through any spot audits that may be conducted by Commission staff as part of the Commission's regulatory oversight, should readily detect any improper cost allocation.[858] Given that these safeguards will assist in detecting and deterring cross-subsidization and discrimination, we find that transactions between the incumbent and affiliate are not likely to manifest substantial continuity between the entities.

Unfair Advantage. For the most part, SBC/Ameritech will comply with the requirements of section 272(c)(1) and will not discriminate between its advanced services affiliate and any other entity in the provision or procurement of goods, services, facilities, or information, or in the establishment of standards.[859] These safeguards are intended to ensure that an affiliate will not derive unfair advantages from the incumbent. The SBC/Ameritech advanced services affiliate must, for example, obtain facilities necessary for the provision of advanced services, such as local loops and collocation space, at the same rates and using the same operations support systems interfaces and procedures that are available to other competitive LECs. This gives the SBC/Ameritech incumbent strong incentive to provide the necessary inputs in an efficient, cost-effective manner that will benefit all providers of advanced services and, ultimately, the public at large. Additionally, the incumbent's provision of inputs to its advanced services affiliate will serve as an important benchmark against which to measure its performance to unaffiliated carriers.

We find that an SBC/Ameritech advanced services affiliate will not derive unfair advantages from the activities between it and the incumbent that are permitted under the conditions. First, with respect to joint marketing, we note that section 272(g) expressly contemplates that a BOC and its section 272 affiliate can jointly market and sell the other's services, and, pursuant to section 272(g)(3), this joint marketing would not violate the nondiscrimination provisions of section 272(c). Presumably, the section 272 affiliate would not be a successor or assign of a BOC under section 251(h) and 3(4). We see no reason that the SBC/Ameritech advanced services affiliate should be treated more strictly than a section 272 affiliate. Moreover, permitting the SBC/Ameritech incumbent and its advanced services affiliate

858 We also note that this Commission and state commissions will have access to the independent auditor's working papers, which provides an additional safeguard. *See* SBC/Ameritech Aug. 27 *Ex Parte* at 7.

859 *See* 47 U.S.C. § 272(c)(1).

to engage in joint marketing activities will further the 1996 Act's objective of spurring rapid deployment of advanced services to consumers by facilitating the SBC/Ameritech affiliate's and incumbent's ability to tailor the services offered in a manner that best suits the consumer's needs.[860] Given the nascency of the advanced services market, joint marketing between an incumbent and its advanced services affiliate would not confer an unfair advantage on the affiliate, particularly as other entities are also able to engage in such marketing activities.

Although a closer question is presented by the exclusive provision of customer care services (defined in the conditions as notification of service order progress, response to customer inquiries regarding the status of an order, changes to customer account information, and receipt of certain customer complaints), we find that sharing these services will not unfairly advantage the affiliate. Specifically, we find that prohibiting such sharing of services would add unnecessary costs and burden the affiliate in such a manner that its ability to be an effective advanced services provider would be diminished. Moreover, we believe that it would lead to customer confusion if a customer were not permitted to track the progress of an order or modify account information by placing a single phone call to the incumbent.

We conclude that, if we were to prohibit the sharing of joint marketing and customer care services in this context, the ability of an incumbent LEC and its advanced services affiliate to achieve the economies of scale and scope inherent in offering an array of services would be diminished without conferring benefits to justify the prohibition.[861] Moreover, we do not believe that the competitive benefits of allowing an incumbent LEC and its advanced services affiliate to achieve such efficiencies are outweighed by an incumbent LEC's potential to engage in discrimination or improper cost allocation. As described above, an incumbent LEC must allocate the cost of such services between itself and its advanced services affiliate.[862] In addition, an agreement for an SBC/Ameritech incumbent to provide joint marketing and customer care services to its affiliate, or vice versa, constitutes a transaction between the incumbent and affiliate. Accordingly, such transactions must be conducted on an arm's length basis, reduced to writing, and made available for public inspection. Such transactions, of course, also will be inspected by the independent auditor, as noted above.

Allowing the SBC/Ameritech advanced services affiliate to use the incumbent's brand name in this situation is also consistent with and furthers the 1996 Act's objective to promote competition and innovation in the local market. As with joint marketing, we note that section 272 does not prohibit the use of the BOC's brand name by its affiliate. In this context, by permitting the advanced services affiliate to use a widely-recognized brand name, SBC/Ameritech will be in a position to bring new packages of services, lower prices, and

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860 *See Non-Accounting Safeguards Order*, 11 FCC Rcd at 22048, paras. 296.

861 *See Id.* at 21991, para. 179 (concluding the same regarding the sharing of joint marketing services between a BOC and its section 272 affiliate).

862 In this way, the incumbent LEC's ratepayers will not bear the costs associated with the marketing activities related to advanced services. *See* 47 C.F.R. § 64.901-904. *See also Accounting Safeguards Order*, 11 FCC Rcd at 17561, para. 50.

increased innovation to customers in a more expedient manner. Moreover, given the nascency of the advanced services market, we do not believe it is unfair to permit the affiliate to use the incumbent's brand name as other competitors may have an equally well-recognized brand name, or an equivalent opportunity to develop one. Accordingly, we find no basis for restricting the affiliate's use of the incumbent's brand name in this case.

We decline to limit the advanced services affiliate's ability to purchase UNEs from, or resell the retail services of, an SBC/Ameritech incumbent LEC.[863] The advanced services affiliate will not be not precluded from providing local exchange services, such as local, circuit-switched services,[864] as long as it provides such services bundled in conjunction with advanced services. The affiliate will also be allowed to provide incumbent LEC resold services in the same manner as any other competitive LEC. As long as the affiliate obtains services and facilities from the incumbent LEC pursuant to a tariff or valid interconnection agreement, the affiliate will stand in the same position as any competitive advanced services provider and should therefore have the same flexibility as competitors to provide "one-stop shopping" to its customers. We find that the increased flexibility resulting from the affiliate's ability to provide both advanced services along with traditional local exchange services serves the public interest, because such flexibility will encourage the advanced services affiliate to provide innovative new services.[865] Moreover, we note that the conditions contain safeguards which should deter the affiliate from pricing its retail services below the wholesale price it pays to the incumbent.[866]

Although the conditions permit SBC/Ameritech and its affiliate to share operation, installation, and maintenance (OI&M) services, we do not find that such sharing will confer upon the affiliate an unfair advantage in the provision of advanced services. We reach this conclusion for several reasons. First, although sharing of these services is permitted, the conditions also provide that such services will be made available to unaffiliated entities on a nondiscriminatory basis. As such, there should be no difference in price or quality between the OI&M services provided to the affiliate vis-a-vis unaffiliated entities. Second, although we recognize that in the section 272 context the Commission prohibited the sharing of these functions, we do not find such a prohibition to be required in the advanced services context. For example, because the loop is used to provide both telephone exchange services and advanced

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863 *See* CompTel July 19 Comments at 2-4.

864 *See Non-Accounting Safeguards Order*, 11 FCC Rcd at 22055-56, paras. 312-13 (stating that a section 272 affiliate cannot be precluded under section 251 from qualifying as a requesting carrier that is entitled to purchase unbundled elements or retail services at wholesale rates from the BOC and declining to distinguish between a section 272 affiliate's ability to provide local service by reselling BOC local exchange service and its ability to offer such service by purchasing unbundled elements from the BOC). We also note that the rules promulgated in the *Non-Accounting Safeguards Order* include a statement that: "[a] BOC affiliate shall not be deemed a 'successor or assign' of a BOC solely because it obtains network elements from the BOC pursuant to section 251(c)(3) of the Act." 47 C.F.R. § 53.205.

865 *See Non-Accounting Safeguards Order*, 11 FCC Rcd at 22057-58, para. 315 (addressing a section 272 affiliate's ability to provide local and long distance services).

866 For example, SBC/Ameritech and the affiliate may not jointly own switching and transmission facilities and must comply with our accounting safeguards rules.

services, greater network integration is required in the provision of advanced services than in the provision of long distance services. Given this, allowing the SBC/Ameritech incumbent to share these services with its affiliate, on the same basis that it shares them with unaffiliated entities, will permit greater economies of scope and enable the affiliate to be a more efficient competitor. Third, as described above, the merger conditions require a rigorous internal compliance program and annual audits. We believe that these mechanisms will adequately deter SBC/Ameritech from favoring its affiliate in the provision of OI&M services (as well as other services).

For similar reasons, we do not find that permitting the SBC/Ameritech incumbent to provide billing and collection services to its advanced services affiliate and other unaffiliated entities on a nondiscriminatory basis would unfairly advantage the affiliate. We note that the billing and collection services provided by the incumbent to the affiliate will be made available to other advanced services providers on a disaggregated basis that allows these unaffiliated carriers to select the particular services that they desire from the incumbent. Allowing this nondiscriminatory provision of billing and collection services by the incumbent not only enables the affiliate to receive greater economies of scope, but it may also enable unaffiliated providers to be more efficient competitors, thereby accelerating the deployment of advanced services by all carriers. Again, we find that the conditions' internal compliance program and annual audit requirements should deter and detect any preferential treatment.

We also find that the SBC/Ameritech advanced services affiliate will not derive unfair advantage from the incumbent through the activities that are permitted for a short, transitional period. We recognize that because SBC/Ameritech had previously been performing such activities on an integrated basis, it will take some time, both logistically and technically, to remove these functions from the incumbent. We are therefore persuaded that the incumbent's provision of these activities on an interim basis to the affiliate is a reasonable measure to effectuate the creation of the advanced services affiliate and its orderly transition. Moreover, we note that the separate affiliate requirement will not sunset until 36 months after the incumbent ceases to process trouble reports on behalf of the affiliate on an exclusive basis. As such, the conditions provide an incentive for the transitional period to be a very limited one.

Although the discriminatory provision of line sharing ordinarily would give us concern that the affiliate is deriving unfair advantage from the incumbent, our concern is tempered in this case for two reasons. First, exclusive line sharing is only an interim measure that will disappear when the SBC/Ameritech incumbent provides line sharing to unaffiliated entities. Second, during the period in which an SBC/Ameritech incumbent provides interim line sharing to an affiliate, competing providers will receive the economic equivalent of this "interim line sharing" through a 50 percent discount on the use of a second loop to provide advanced services. We are therefore persuaded that the incumbent's provision of line sharing exclusively to the affiliate does not confer an unfair advantage upon the affiliate in this case.

2. Requests Regarding Other Conditions

Surrogate Line-Sharing Discount. We reject the suggestion of several carriers that we require the merged firm to make line sharing available immediately to competitors.[867] The Commission recently issued a further notice of proposed rulemaking that sought comment on operational, pricing and other practical issues associated with line sharing.[868] We find it more suitable to address these complex issues in the context of the ongoing industry-wide rulemaking rather than this merger proceeding.

We also decline to require that SBC/Ameritech delay offering line sharing to its separate advanced services affiliate through its "interim line-sharing" proposal until it offers line sharing on a commercial scale to competitors.[869] We do not find that permitting interim line sharing between an SBC/Ameritech incumbent and its affiliate will unfairly advantage the affiliate vis-à-vis competitors because through the surrogate line sharing discount, unaffiliated carriers will be on comparable economic footing with the SBC/Ameritech advanced services affiliate.

Access to Advanced Services Loop Information. Some competing carriers object that SBC/Ameritech is allowed 22 months after the merger closing date to provide electronic access to advanced services loop information (*i.e.,* the theoretical loop length) in the Ameritech states.[870] As noted above, unlike SBC, Ameritech purportedly does not already have the necessary information in electronic form. Because, in the Ameritech region, the SBC/Ameritech separate advanced services affiliate will be disadvantaged in the same manner as competing advanced services providers without electronic access to loop pre-qualification information, we believe that SBC/Ameritech will have every incentive to expedite its fulfillment of this condition.

Nondiscriminatory Rollout of xDSL Services. Some parties suggest that this condition should affirmatively require SBC/Ameritech to adhere to a timetable for deploying xDSL technology to rural and low-income areas.[871] Other commenters question when the Applicants' obligation under this condition would become effective, and suggest that the Commission require at least one low-income rural and urban wire center among the first ten wire centers where the merged firm rolls out xDSL service.[872] Given the high market demand for

867 *See, e.g.*, Covad July 22 Comments at 41-43.

868 *See Advanced Services Further Notice*, 14 FCC Rcd at 4805-12, paras. 92-107.

869 *See* CompTel July 19 Comments at 4; CoreComm July 22 Comments at 16.

870 *See* CoreComm July 22 Comments at 12.

871 *See, e.g.,* APPA July 19 Comments at 5.

872 AARP and the Consumer Coalition, for example, link the nondiscriminatory deployment of xDSL services to the requirements of the National-Local Strategy, and suggest that at least one low-income rural and one low-income urban wire center should be included in the initial ten wire centers. *See* AARP July 19 Comments at 5; Consumer Coalition July 19 Comments at 4, Aff. at 30. The xDSL service rollout commitment, however, applies only to SBC/Ameritech in-region states. Because the National-Local Strategy is aimed at fostering competition in both POTS and advanced services, we decline to expand the nondiscriminatory xDSL rollout obligation to out-of-region markets.

advanced services, and that a number of other conditions are designed to spur deployment of advanced services and to benefit low-income consumers, we decline to subject SBC/Ameritech to a specific timetable for advanced services deployment, or to enforce the condition prior to deployment in twenty wire centers. We note, however, that SBC/Ameritech will report the status of its xDSL deployment, including deployment to low-income areas, to the Commission on a quarterly basis.

Carrier-to-Carrier Performance Plan. We reject the suggestion of a number of commenters that we impose the complete list of measurements adopted by the Texas PUC or other state commissions, such as California.[873] We also decline to adopt other specific performance measurements advocated by certain parties,[874] or to make specific changes in the proposal, such as altering the benchmarks or statistical methodology.[875] We reiterate that the Carrier-to-Carrier Performance Plan constitutes the Applicants' voluntary proposal for monitoring and remedying the specific potential public interest harms identified in the instant merger, including the potential for increased discrimination by the larger merged entity and the loss of another major incumbent LEC benchmark. In contrast, performance programs that are being developed by state commissions in the context of section 271 proceedings serve a different purpose and may be designed to cover more facets of local competition and to prevent a BOC from backsliding on section 271 obligations. The Carrier-to-Carrier Performance Plan that we adopt today serves a more limited purpose, and hence has a more limited scope. Moreover, we note that, to account for necessary revisions or updates, the plan includes a semi-annual review of the plan's measurements by the Chief of the Common Carrier Bureau and SBC/Ameritech. Significantly, the Carrier-to-Carrier Performance Plan is only one component of a broad package of voluntary merger safeguards proposed by the Applicants. Measures that are sufficient as part of a comprehensive package of safeguards in the present merger context may not be adequate in the section 271 context.

Similarly, we decline to require parity across measurements between different states, as suggested by the Indiana Utility Regulatory Commission.[876] We find that the plan is sufficient, for merger purposes, to reduce the larger entity's increased incentive for discrimination by giving its individual operating companies incentives to treat competitors as they would SBC's or Ameritech's own retail operations. Other merger commitments, such as the

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873 *See, e.g.,* ALTS July 19 Comments at 8-10; CoreComm July 22 Comments at 8; Covad July 22 Comments at 12-14; Focal/Adelphia/McLeod July 19 Comments at 22-23; GST/KMC/Logix/RCN July 19 Comments at 2; ICG July 20 Comments at 7-10; Level 3 July 19 Comments at 6-7; Sprint July 19 Comments at 56-58; Time Warner Telecom July 19 Comments at 3-4. *See also* California PUC July 28 Reply Comments at 5-6 (questioning whether this condition will derail or delay state efforts to establish performance measures).

874 *See, e.g.,* MCI WorldCom July 19 Comments at Att. 1 (containing an alternate performance measurement plan).

875 *See, e.g.,* MCI WorldCom July 19 Comments at 17-19.

876 *See* IURC July 19 Comments at 5 (claiming the Applicants' initial proposal was problematic because it was not designed to achieve performance parity between different states).

most-favored nation and OSS conditions, address uniformity and the spread of best practices across the merged firm's 13-state region.

Although some commenters also note that SBC/Ameritech's obligation to make voluntary incentive payments under the plan commences later in Connecticut than in the other SBC/Ameritech states,[877] SBC has indicated that in light of its recent acquisition of SNET, it needs additional time to implement the payment obligations in that state. Given this, and that the voluntary payment obligations for Connecticut will extend for the full 36 month period, we find it reasonable for SBC to allow additional time to conform its systems in Connecticut.

Uniform Enhanced Operations Support Systems. Although several parties contend that the OSS enhancement implementation timelines are too long and should be shortened,[878] we are persuaded by the Applicants' assertion that timelines contained in their commitments "reflect the bare minimum time needed for successful implementation of the required elements."[879] Given that unification of the OSS systems of SWBT, PacTel, SNET and Ameritech is a substantial undertaking, and recognizing that the benefit of the OSS enhancements will be realized for at least a full 36-month period, we deem the implementation timelines reasonable. We expect SBC/Ameritech to design and build reliable, error-free systems that will serve the needs of competitors and their customers as efficiently as possible.[880] Moreover, we note that SBC/Ameritech has an incentive to expedite deployment of these enhancements. For example, until SBC/Ameritech develops and deploys the advanced services OSS enhancements and interfaces, and until those systems are actually used by its separate advanced services for the bulk of its pre-ordering and ordering, competitors will receive a 25-percent discount on the recurring and nonrecurring charges for loops used in the provision of advanced services. In addition, the maximum amount of SBC/Ameritech's voluntary incentive payments in the third year of the Carrier-to-Carrier Performance Plan decreases proportionately as the firm implements the OSS enhancements, interfaces, and business requirements ahead of schedule.

Competitors also assert that the July proposal's remedy of $100,000 per business day, capped at $10 million, for failure to meet the OSS implementation schedules is not an adequate incentive for a company the size of a combined SBC and Ameritech. With subsequent filings, the OSS voluntary incentive payments are now $110,000 per business day, capped at $20 million, which we find adequate to incent the company to satisfy its obligations in a timely manner. In addition, unlike the initial proposal, with the August Clarification, the payments will

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877 *See* Covad July 22 Comments at 12-13; CTC July 19 Comments at 7-8.

878 *See* ALTS July 19 Comments at 12-13 (suggesting 3-4 month deadline for Phase II, 9-12 month deadline for Phase III); AT&T July 19 Comments, App. A at 35, 39; CoreComm July 19 Comments at 5-7; GST/KMC/Logix/RCN July 19 Comments at 4; ICG July 20 Comments at 5; MCI WorldCom July 19 Comments at 28-29; Northpoint July 19 Comments at 24-25; Sprint July 19 Comments at 43-45. Allegiance asserts that the OSS timelines are selective and should be more comprehensive. *See* Allegiance July 19 Comments at 3.

879 SBC/Ameritech July 26 Reply Comments at 50.

880 *See id.* at 83.

reach back to the initial failure date, should a failure occur, which removes incentive on SBC/Ameritech's part to delay arbitration.

Competitive carriers also seek to have the Commission require third-party testing of the OSS enhancements and interfaces to ensure that they are uniform, comply with applicable standards and guidelines, and are scalable and workable, meaning that they support seamless end-to-end interoperability for all five core OSS functions.[881] Although comprehensive third-party testing may be useful in other contexts, such as section 271 proceedings, we decline to require SBC/Ameritech to submit its OSS enhancements and interfaces to third-party testing as part of these conditions.[882] We find adequate enforcement mechanisms at our disposal should SBC/Ameritech not develop and deploy OSS enhancements and interfaces consistent with the requirements of the conditions. Moreover, SBC/Ameritech has committed to make significant voluntary incentive payments if it fails to deploy OSS upgrades and enhancements in substantial compliance with the collaborative agreement. This potential exposure should provide adequate incentive for the merged firm to develop and deploy efficiently OSS enhancements and interfaces that fully comply with the collaborative agreement and are scalable and workable.

We also reject the other more specific changes to the OSS conditions suggested by commenters. Several parties claim, for example, that the conditions should define SBC/Ameritech's precise obligations under each phase and for each obligation.[883] We find that these are details that will be addressed in the collaborative process. Ideally, the details of implementing the uniform OSS enhancements and interfaces will be worked out expeditiously in these workshop sessions. We find no reason to prevent the voluntary participants, with the assistance of a neutral arbitrator, if necessary, and oversight of the Common Carrier Bureau, from determining the best manner in which to implement the requirements of these conditions.[884]

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881 *See, e.g.,* ALTS July 19 Comments at 13-14; AT&T July 19 Comments at 41; MCI WorldCom July 19 Comments at 32-33; NextLink/ATG July 19 Comments at 26. The Consumer Coalition also suggests that, as part of the merger conditions, we require SBC and Ameritech to conduct an independent, commercial scale test of OSS prior to section 271 authorization. Consumer Coalition July 19 Comments at 2, Aff at 16. While we encourage the use of independent third-party testing as a means of ascertaining whether a BOC is meeting section 271's requirements, we decline to require such testing as part of this merger proceeding.

882 We note that the Illinois Commerce Commission's merger conditions require the combined firm to pay for an independent third-party to provide technical assistance to the ICC and to conduct a test of the merged firm's OSS enhancements. *See ICC Merger Order*, at 199.

883 *See, e.g.,* CompTel July 19 Comments at 33-34; CoreComm July 19 Comments at 6-7; Level 3 July 19 Comments at 6-7; MCI WorldCom July 19 Comments at 33-34 (specifying minimum requirements for change management process); Sprint July 19 Comments at 43; Time Warner July 19 Comments at 6.

884 The conditions we adopt today set the standard for the Applicants' obligations under the condition. Although the details of implementation may be worked out in a collaborative session, or under the auspices of an independent arbitrator, the Commission at all times maintains final enforcement authority over SBC/Ameritech's implementation of the OSS enhancements, interfaces and business requirements. *See* Sprint July 19 Comments at 52-54.

Training in the Use of OSS for Qualifying Carriers. CompTel suggests that the Commission should lower the threshold for a carrier to qualify for assistance under this condition,[885] while other carriers ask that this Commission, rather than state commissions, verify a competitive LEC's status as a qualifying carrier.[886] We decline to take either suggestion. We find that limiting eligibility to those competitive LECs that earn less than $300 million in annual revenues should adequately target those carriers in most need of assistance, and thereby stimulate competitive entry.[887] Further, we find that, given state commissions' roles in certifying competitive LECs and monitoring their activity within the state, they are best-suited for verifying the status of a particular competitive LEC.

Collocation Compliance. We decline to alter the nature and design of the collocation audits. Commenters suggest that the Commission should exert more control to ensure neutrality and completeness,[888] and that the audit period should be extended.[889] As indicated above, we find that the independent audit procedures set forth in the conditions, with participation by the Common Carrier Bureau, will ensure that SBC/Ameritech is in compliance with all collocation requirements.

Most-Favored Nation Arrangements. We also reject requests by commenters to change SBC/Ameritech's most-favored nation obligations. Parties claim, for example, that the limitation in the out-of-region provision that SBC/Ameritech must only provide an interconnection arrangement or network element that had not previously been available by that incumbent is unnecessarily restrictive.[890] Instead, they urge us to require SBC/Ameritech to offer, if requested, each interconnection arrangement or UNE that SBC/Ameritech avails itself of outside of its service territory, or every arrangement or UNE that is being offered by the host incumbent. The change requested by these carriers, therefore, could require SBC/Ameritech to provide in-region every interconnection arrangement or UNE that is being offered by each incumbent in all 30 out-of-territory markets. We are concerned that such a requirement would be inefficient and undermine the National-Local Strategy's goals. If such a requirement were imposed, SBC/Ameritech might select cities to enter by limiting the number of incumbent LECs whose territory it enters, or by only entering areas where the incumbent offers less diverse arrangements. Either strategy would undermine our expectation that the merged firm will enter diverse geographic markets and become a powerful competitive LEC as part of its National-Local Strategy. The condition as written balances these policy considerations by ensuring that SBC/Ameritech will not seek special arrangements outside its territory that it would not offer to competitors inside its territory.

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885 CompTel July 19 Comments at 34.

886 NorthPoint July 19 Comments at 21; Covad July 22 Comments at 36.

887 *See* SBC/Ameritech July 26 Reply Comments at 56 (intending OSS assistance "to help those CLECs that genuinely need it.").

888 *See, e.g.,* Allegiance July 19 Comments at 3-4; ALTS July 19 Comments at 11.

889 *See* ALTS July 19 Comments at 11 (suggesting an 18-month audit period).

890 *See, e.g.,* Allegiance July 19 Comments at 8; ALTS July 19 Comments at 24; CompTel July 19 Comments at 36-38; Consumer Coalition July 19 Comments at 2, Aff. at 13; Sprint July 19 Comments at 38-39.

Several competitive LECs also urge us to require SBC/Ameritech to make available in all 13 SBC/Ameritech states any interconnection arrangement or network element that is available in any SBC or Ameritech state, whether voluntarily negotiated or arbitrated.[891] We decline to expand the condition to arbitrated arrangements because doing so might interfere with the state arbitration process under sections 251 and 252 of the Communications Act. We note that where SBC/Ameritech has stipulated in arbitration proceedings that specific arrangements have been determined through negotiation, these voluntary arrangements will be available for "most-favored nation" treatment. If we required SBC/Ameritech to import arbitrated terms and conditions from one state into all others, then one state could effectively interpret the merged firm's obligations under sections 251 and 252 for all other states.[892] For similar reasons, we decline to extend the condition to reach the Proposed Interconnection Agreement (PIA) in Texas.[893]

We also decline the request by some commenters that the condition apply to interconnection agreements negotiated by Ameritech, Pacific Bell or SNET prior to each entity's acquisition by SBC.[894] We find it reasonable for this condition to be implemented on a going-forward basis, applying only to arrangements negotiated by an affiliate of SBC. In this way, SBC/Ameritech, bearing in mind its commitment to implement best practices, will be on notice as to which systems and procedures could become uniform across its region. Furthermore, we find that the technical feasibility exemption is not a loophole,[895] for the relevant state commission can ascertain what is possible in light of state law and the technical capability of SBC/Ameritech's systems within that state.

Carrier-to-Carrier Promotions. We also reject commenters' suggestions that we eliminate the restrictions on the availability of the carrier-to-carrier promotions. For example, commenters seek removal of the limitation that competitors receiving the promotional unbundled loop discount can only use these loops for voice services, as well as the residential restriction and line limitation contained in each of the three promotions.[896]

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891 *See, e.g.,* Allegiance July 19 Comments at 8; ALTS July 19 Comments at 25; Cablevision Lightpath July 26 Reply Comments at 5; Consumer Coalition July 19 Comments at 2, Aff. at 14-15; CoreComm July 22 Comments at 22; Covad July 22 Comments at 64; Metromedia Fiber July 19 Comments at 7-9; Sprint July 19 Comments at 39-40; Time Warner July 19 Comments at 16.

892 *See* SBC/Ameritech July 26 Reply Comments at 65.

893 *See* Texas PUC Aug. 5 Comments at 2-3 (suggesting that "the MFN provisions should extend to language that has been approved as part of state regulatory decisions concerning RBOC entry into long distance services under 47 U.S.C. § 271, since the RBOC would be voluntarily agreeing to such language as a condition of § 271 approval.").

894 *See* CoreComm July 22 Comments at 22; ICG July 20 Comments at 5.

895 *See, e.g.,* MCI WorldCom July 19 Comments at 55.

896 *See* ALTS July 19 Comments at 23-24; Cable & Wireless July 19 Comments at 6-7; CompTel July 19 Comments at 4; MCI WorldCom July 19 Comments at 51-54.

We find that, by targeting the promotions to the residential market, these conditions will bring more competitive offerings to residential customers that have less choice today than large or medium-sized business customers. Our desire to promote residential competition is consistent with Congress's intent, through enacting the 1996 Act, to spur facilities-based competition to serve residential customers.[897] Moreover, we find that the promotions' limited duration and line limitations will motivate competing carriers to enter the residential market faster to secure the benefit of the promotions, thereby accelerating the availability of competitive offerings to residential consumers.[898] Once a carrier secures the promotion, however, it is guaranteed the promotional terms for a full three-year period. Because our intent is for these promotions to ignite competition in the residential local exchange or exchange access markets in SBC's and Ameritech's regions, we decline to expand this particular condition to cover loops used in the provision of advanced services. Indeed, we note that competitors that choose to use an unbundled loop to provide advanced services receive greater discounts elsewhere in the conditions.[899]

We also reject arguments by certain competitive LECs that the carrier-to-carrier promotions are unlawful in that they contradict core premises of the Communications Act and Commission rules.[900] First, based on the manner in which SBC/Ameritech will execute its obligations, we do not find that the residential and voice service restrictions transgress the Act or corresponding Commission rules.[901] Specifically, SBC/Ameritech will implement the promotions by voluntarily offering to amend its interconnection agreements with telecommunications carriers to incorporate the promotional terms.[902] Moreover, SBC/Ameritech will make this offer in a nondiscriminatory manner to all telecommunications carriers with which it has an interconnection agreement in any SBC/Ameritech state.

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897 *See* S. Conf. Rep. No. 104-230, at 148 (contemplating that 1996 Act would promote facilities-based, "local residential competition").

898 We decline to increase the resale discount. *See*, *e.g.* MCI WorldCom July 19 Comments at 53-54. We find that the thirty-two percent discount, which we note is seven percent higher than the maximum default wholesale discount rate the Commission adopted in the *Local Competition Order*, should facilitate competitive entry in the residential market. *See Local Competition Order*, 11 FCC Rcd at 15955-56, 15963-64, paras. 910, 932-33.

899 The conditions already establish a discount of over 50 percent for loops used to provide advanced services. *See* Appendix C at Section II (surrogate line sharing discount); Section III (advanced services OSS discount).

900 *See, e.g.,* AT&T July 19 Comments at 16, App. A at 83-87; CompTel July 19 Comments at 14-18; Focal/Adelphia/McLeod July 26 Reply Comments at 9.

901 *See* 47 U.S.C. § 251(c)(3), (4)(b) (nondiscrimination requirements); 47 C.F.R. § 51.313(a) (requiring nondiscriminatory access to network elements); 47 C.F.R. § 51.603(a) (requiring nondiscriminatory resale); 47 C.F.R. § 51.503(c) (providing that an incumbent's rates shall not vary on the "basis of the class of customers served by the requesting carrier, or the type of services that the requesting carrier purchasing such elements uses them to provide.").

902 *See* 47 U.S.C. § 252(a)(1). With SBC/Ameritech voluntarily offering to amend interconnection agreements, states will not be in the position of putting the discount into arbitrated agreements. *See* California PUC July 28 Reply Comments at 3-5 (questioning whether the CPUC can put the discount into an interconnection agreement and remain legally consistent with section 252(d)(3) of the Communications Act). Of course, the amended agreements will still be subject to state commission approval of voluntarily negotiated agreements pursuant to 47 U.S.C. § 252(e).

The 1996 Act and corresponding Commission rules give incumbent LECs and their competitors certain latitude to enter into customized contractual arrangements, subject to section 252(i)'s requirement that any negotiated arrangement must be made available to all interested carriers. Section 252(a)(1) provides that "an incumbent local exchange carrier may negotiate and enter into a binding agreement with the requesting telecommunications carrier or carriers without regard to the standards set forth in sections (b) and (c) of section 251."[903] Likewise, although section 252(e)(2) requires a finding of compliance with section 251 when state commissions review arbitrated agreements, there is no corresponding requirement with respect to negotiated agreements.[904]

Some commenters[905] contend that the line limitation on the number of discounted loops, resale and platform offerings that will be made available to competitive LECs would violate the "pick and choose" rule of section 252(i), as well as the general nondiscrimination requirements of section 251(c)(3) and 251(c)(4)(B).[906] We note that, under the specific terms of the merger conditions, these promotions are being offered to competitors in a nondiscriminatory fashion. Specifically, in each of its states, SBC/Ameritech will offer the promotion simultaneously to all telecommunications carriers that have an existing interconnection and/or resale agreement with SBC or Ameritech, and, for carriers that accept the promotion at any time within 10 business days of the initial offer, SBC/Ameritech will simultaneously file the amendments with the relevant state commission for approval. These measures should ensure that all competitive LECs operating in SBC/Ameritech's region will be afforded an equal opportunity to participate in the promotions. Moreover, carriers that begin operating in SBC/Ameritech's region, or decide to participate in the promotions, after this initial offer period will have the opportunity to participate in the offerings, and SBC/Ameritech will respond to their inquiries within 10 days. To this end, SBC/Ameritech will notify all carriers operating in the state when 50 percent and 80 percent of the maximum lines in that state are reached.

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903 47 U.S.C. § 252(a)(1). *See Local Competition Order*, 11 FCC Rcd at 15528, paras. 54, 58 (stating that "parties that voluntarily negotiate agreements need not comply with the requirements we establish under sections 251(b) and (c), including any pricing rules we adopt.").

904 47 U.S.C. § 252(e)(2). The Supreme Court recognized this distinction in *AT&T Corp. v. Iowa Utilities Board*, stating: "When an entrant seeks access through [resale, leasing of unbundled network elements, or interconnection], the incumbent can negotiate an agreement without regard to the duties it would otherwise have under §251(b) or (c). But if private negotiation fails, either party can petition the state commission that regulates local phone service to arbitrate open issues, which arbitration is subject to §251 and the FCC regulations promulgated thereunder." *AT&T Corp. v. Iowa Utilities Bd.*, 119 S.Ct. at 727 (footnote and citation omitted).

905 *See, e.g.,* AT&T July 19 Comments at 15, App. A at 83-87; CompTel July 19 Comments at 14-18; Focal/Adelphia/McLeod July 26 Reply Comments at 9.

906 *See* 47 C.F.R. § 51.809(a) (implementing pick and choose rule of section 252(i). *See also* 47 C.F.R. § 51.313(a) (requiring nondiscriminatory access to network elements); 47 C.F.R. § 51.603(a) (requiring nondiscriminatory resale). As explained above, the nondiscrimination requirements of section 251(c) and corresponding Commission rules do not apply to voluntarily negotiated agreements.

Offering of UNEs. Several commenters criticize SBC and Ameritech for not committing to provide indefinitely the UNEs described in section 51.319 of the Commission's rules, regardless of the outcome of the UNE Remand proceeding.[907] Certain cellular carriers also ask that the condition explicitly recognize extended local calling area arrangements, commonly known as reverse billing arrangements, in order to prevent the merged firm from terminating Ameritech's existing extended local calling area arrangements.[908] We emphasize that this condition has practical effect only in the event that the Commission's rules in the UNE Remand proceeding are stayed or vacated. Until that time, SBC/Ameritech will comply with the unbundling rules mandated by the Commission in the UNE Remand proceeding.

Alternative Dispute Resolution Through Mediation. We reject Covad's request that we expand the ADR process to permit multi-state mediations of similar or common issues.[909] As noted above, a core component of the optional alternative dispute resolution process set forth in the conditions is the voluntary participation of state commission staff, which, we anticipate, will assist carriers in getting disputes resolved quickly. Multiple states, therefore, may choose to be involved but we do not require such participation in this Order.

Access to Cabling in Multi-Unit Properties. Parties generally support the conditions related to accessing cabling in multi-unit premises, but request that the Commission make the trial more comprehensive. ALTS, for example, comments that the proposed trial excludes buildings that contain only medium-sized and large commercial tenants.[910] We find that the cabling trials are sufficient to address their intended purpose, which is verifying the technical feasibility and costs of such offerings, and therefore decline to alter the features of the trials. Moreover, we believe that the Applicants' commitment to provide carriers with access to LEC owned or controlled cabling behind a single point of interconnection for multi-unit properties and campuses of garden apartment dwellings will significantly further competitors' access to cabling. We also note that, in addition to these conditions, SBC/Ameritech will comply with any rules resulting from the UNE Remand proceeding.

Out-of-Territory Competitive Entry (National-Local Strategy). Some commenters claim that the condition establishing milestones for the Applicants' National-Local Strategy does not go far enough in advancing residential competition, and therefore urge us to strengthen SBC/Ameritech's residential entry requirements.[911] The Consumer Coalition, for example,

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907 *See, e.g.,* AT&T July 19 Comments, App. A at 75-78; CoreComm July 22 Comments at 17. GST/KMC/Logix/RCN July 19 Comments at 9-10; Level 3 July 19 Comments at 14; MCI WorldCom July 19 Comments at 48-49; Sprint July 19 Comments at 31-33.

908 *See* Joint Cellular Carriers July 19 Comments at 2 (requesting that condition apply to extended local calling area arrangements currently provided by Ameritech in Michigan).

909 *See* Covad July 22 Comments at 61-63.

910 ALTS July 19 Comments at 26-28.

911 *See* Consumer Coalition July 19 Comments at 3, Aff. at 20-28 (advocating that SBC/Ameritech be required to achieve a certain level of residential penetration or demonstrate a good faith effort to attract residential customers); Time Warner July 19 Comments at 17-19.

suggests that, rather than simply buying up competitive LECs, the merged firm should have to meet at least half of its build-out commitments with new facilities.[912] Imposing these additional restrictions would severely limit the Applicants' ability to undertake innovative business strategies or ventures with other firms. We anticipate that the presence of SBC/Ameritech, a large, experienced incumbent LEC, as a facilities-based competitor in 30 markets will foster competition in those market. We find that the entry requirements included within the Applicants' proposed condition are sufficient to ensure that SBC/Ameritech provides meaningful, facilities-based service outside its territories.

Enhanced Lifeline Plans. We reject the requests of some commenters that we impose additional requirements on SBC/Ameritech's offer of enhanced Lifeline plans.[913] We also decline to obligate the merged firm to provide community voice mail services or community technology centers for residential customers in low-income areas.[914] Although these additional requirements would benefit low-income consumers, SBC and Ameritech point out that such matters are being addressed at the state level.[915] We find that the Applicants' commitment to offer states an enhanced Lifeline plan, which was significantly strengthened after the comment period, will provide substantial direct benefits to low-income residential consumers.

Independent Auditor. We disagree with arguments by commenters that we should not rely on independent audits because the auditor may not retain an appropriate degree of independence.[916] The Commission is not delegating its enforcement and investigative authority, or its responsibility to enforce the Act, to either the independent auditor or the Applicants.[917] Instead, we are adopting the Applicants' plan that involves using an independent audit as a cost-effective tool to supplement the Commission's normal processes and procedures. The Commission has the authority to use independent auditors to supplement our usual investigative the authority,[918] and we have extensive experience with this method for ensuring compliance with our rules.[919] Independent audits, combined with targeted on-site audits

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912 Consumer Coalition July 19 Comments at 3, Aff. at 24-25.

913 *See, e.g.*, AARP July 19 Comments at 4-5; Edgemont July 19 Comments at 6-8; ParkView Areawide Seniors July 19 Comments at 7-10.

914 *See* Low Income Coalition July 19 Comments at 9-14; Edgemont July 19 Comments at 9-11, 13.

915 *See* SBC/Ameritech July 26 Reply Comments at 91 (explaining that SBC and Ameritech have worked with state officials and community groups in Ohio and California to establish and ensure ongoing support for community technology centers). *See also ICC Merger Order*, at 232-36 (adopting SBC/Ameritech's commitment to establish a community technology fund in Illinois).

916 *See* Sprint July 19 Comments at 61; Level 3 July 19 Comments at 4-6; GST/KMC/Logix/RCN July 19 Comments at 4; MCI WorldCom July 19 Comments at 59-60.

917 *See* Sprint July 19 Comments at 61-62.

918 *See* 47 U.S.C. § 220(c) (providing that the "Commission may obtain the services of any person licensed to provide public accounting services under the law of any State to assist with, or conduct, audits").

919 *See Separation of Costs of Regulated Telephone Services from Costs of Nonregulated Activities*, CC Docket No. 86-111, *Report and Order*, 2 FCC Rcd 1298, paras. 243-73 (1987) ("*Joint Cost Order*"), *modified on recon.*, 2 FCC Rcd 6283 (1987) ("*Joint Cost Reconsideration Order*"), *further recon*., 3 FCC Rcd 6701 (1988*), aff'd sub nom.*, *Southwestern Bell Corp. v. FCC*, 896 F.2d 1378 (D.C. Cir. 1990). *See also* 47 U.S.C. § 220(c) (providing that the "Commission may obtain the services of any person licensed to provide public accounting services under the law

conducted by Commission staff and thorough reviews of the auditor's working papers, have proven largely successful in ensuring compliance with the Commission's accounting safeguards.[920] Furthermore, the independent audit requirement in the 1996 Act indicates that independent audits are useful tools for evaluating compliance with structural, transactional, and nondiscrimination requirements.[921] Likewise, we view the success that other federal agencies have had with independent audit programs as further evidence that the audit provisions will be an effective tool for ensuring compliance with the conditions.[922]

By relying on auditing industry standards, the condition ensures that SBC/Ameritech will engage a technically proficient licensed auditor, and that the auditor will exercise due care in performing the audit and obtain sufficient evidence needed to support its findings.[923] Because the auditor will evaluate the sufficiency of SBC/Ameritech's internal control structure, the conditions provide for an assessment of the merged firm's ability to comply on an ongoing basis, and thereby establish a heightened compliance standard. Furthermore, Commission oversight of the audit process and the public disclosure of the auditor's report further convince us that the independent auditor will perform the engagement to our satisfaction.[924] We anticipate that Commission review of the auditor's working papers, and the public disclosure of the auditor's detailed final report, will provide additional assurances

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of any State to assist with, or conduct, audits); *see also* 47 C.F.R. §§ 64.904 (requiring independent audits of cost allocation procedures), 69.621 (establishing an independent audit requirement regarding certain universal service rules). Besides the audits noted above, the Commission has additional experience with independent evaluations of structural, transactional, and nondiscrimination requirements pursuant to the provisions of section 274. *See* 47 U.S.C. § 274(b)(8); *Accounting Safeguards Order*, 11 FCC Rcd at 17640-43, paras. 220-26.

920 *See Computer III Remand Order* at para. 52; *see also* Pacific Bell, *Order to Show Cause*, 10 FCC Rcd 5503 (1995), *Consent Decree Order*, 11 FCC Rcd 14813 (1996); US West Communications, Inc., Order to Show Cause, 10 FCC Rcd 5523 (1995), *Consent Decree Order*, 11 FCC Rcd 14822 (1996); The Bell Atlantic Telephone Operating Companies, *Order to Show Cause*, 10 FCC Rcd 5099 (1995), *Consent Decree Order*, 11 FCC Rcd 14839 (1996).

921 47 U.S.C. § 272(d). *See also Accounting Safeguards Order*, 11 FCC Rcd at 17623-32, paras. 184-205; 47 C.F.R. § 53.209.

922 *See* 7 C.F.R. § 210.22 (requiring independent audits for participants in National School Lunch Program); 7 C.F.R. § 1209.39 (requiring independent audits of the Mushroom Promotion, Research, and Consumer Information Council); 7 C.F.R. § 1773.1 (requiring independent audits of electric and telephone borrowers from the Rural Utilities Service); 10 C.F.R. § 600.26 (requiring independent audits for Department of Energy grantees); 12 C.F.R. § 363.3 (requiring independent audits of the banking industry); 15 C.F.R. § 280.215 (requiring independent audits for accreditation of laboratories by National Institute of Standards and Technology); 24 C.F.R. § 85.26 (requiring independent audits of Housing and Urban Development grantees).

923 AICPA standards provide that independent auditors "should not only be independent in fact, but also should avoid situations that may impair the *appearance* of independence." American Inst. of Certified Pub. Accountants, ATTESTATION STANDARDS, AT § 100.26 (emphasis added); *see* American Inst. of Certified Pub. Accountants, INDEPENDENCE, AU § 220 ("Public confidence would be impaired by evidence that independence was actually lacking, and it might also be impaired by the existence of circumstances which reasonable people might believe likely to influence independence."); *see also* Alvin A. Arens and James K. Loebbeck, AUDITING: AN INTEGRATED APPROACH 82 (5th ed. 1991) ("If auditors are independent in fact, but users believe them to be advocates for the client, most of the value of the audit function will be lost.").

924 *See* Allegiance July 19 Comments at 3-4 (advocating Commission oversight).

regarding the thoroughness of the audit and the auditor's independence.[925] The Commission can take appropriate action, including terminating the independent auditor, in the event problems arise related to the conduct of the audit.

Although the independent audit will provide a systematic means of evaluating SBC/Ameritech's compliance, we are aware of inherent limitations in the audit process.[926] Most notably, an independent audit does not guarantee discovery of noncompliance or illegal acts.[927] Because detection of noncompliance is not guaranteed, an auditor's report that fails to note any exceptions does not preclude an individual from filing a complaint with the Commission or the courts and a subsequent finding of noncompliance.[928] Finally, we stress that the independent auditor's failure to uncover noncompliance does not free SBC/Ameritech from its responsibility to ensure compliance with the conditions.

We decline to adopt commenters' suggestions that we establish a formal mechanism for participation in the audit process by state commissions and others.[929] The audit provisions contained under these conditions, however, are not implemented pursuant to section 272(d). We recognize that the state commissions have valuable insight into on-going issues and problems in the telecommunications industry,[930] and we stress that the Commission will work closely with the state commissions on an informal basis regarding SBC/Ameritech's compliance with these conditions. Pursuant to long-standing delegated authority, the Common Carrier Bureau may cooperate with state commissions by coordinating compliance and enforcement activities and sharing information gathered in the course of audits.[931] Moreover, we note that,

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925 Level 3 July 19 Comments at 4-6 (supporting public disclosure of the audit report).

926 AT&T July 19 Comments at 14; Sprint July 19 Comments at 61-62; Level 3 July 19 Comments at 4-6; Time Warner July 19 Comments at 4-5; GST/KMC/Logix/RCN July 19 Comments at 4-5; MCI WorldCom July 19 Comments at 60.

927 *See* American Inst. of Certified Pub. Accountants, COMPLIANCE ATTESTATION, AT § 500.28; *see also* U.S. GAO, GOVERNMENT ACCOUNTING STANDARDS § 4.17 (1999) ("The Yellow Book").

928 In light of these limitations, the Commission may, in its discretion, conduct targeted field audits of certain aspects of the conditions. *See* MCI WorldCom July 19 Comments at 60 (recommending that the Commission establish a procedure for resolving issues when a party disputes the independent auditor's findings).

929 TX Office of Public Utility Counsel Aug. 5 Comments at 11-12; Wisconsin PSC July 19 Comments at 5-6; IURC July 16 Comments at 6; Kansas Corp. Comm'n July 19 Comments at 1-2; Mich. PSC July 26 Reply Comments at 2. *See also* Time Warner July 19 Comments at 4-5; Covad July 26 Reply Comments at 27-30.

930 *See* 47 U.S.C. § 410(b) (authorizing the Commission to confer with state commission regarding telecommunications policy matters and "to avail itself of such cooperation, services, records, and facilities as may be afforded by any State commission").

931 *See* 47 C.F.R. § 0.291(b). To improve operating and administrative efficiency, the Commission delegated authority to the Common Carrier Bureau to coordinate compliance and enforcement activities with state commissions when: (i) there is a shared policy interest, and (ii) the states have processes for protecting confidential information. Amendment of Parts 0, 1, and 64 of the Commission's Rules with Respect to Delegation of Authority to the Chief, Common Carrier Bureau, Report and Order, 5 FCC Rcd 4601 (1990); Delegation of Authority to the Chief, Common Carrier Bureau, *Memorandum Opinion and Order*, 50 Fed. Reg. 18487-03 (1985), on reconsideration, 104 FCC2d. 733 (1986).

under the conditions, SBC/Ameritech will ensure that the independent auditor provides access to its working papers to state commissions, thereby alleviating some concerns raised by the states.

Although the conditions establish clear deadlines for completing the audit planning and preparation work, and for submitting the independent auditor's report, some commenters raise concerns with the September 1 deadline, arguing generally that the submission deadline will provide a lengthy delay in learning about potential problem areas.[932] These concerns are addressed by the obligation to use AICPA standards, which require the independent auditor to perform procedures designed to identify additional information about SBC/Ameritech's compliance after the end of the relevant calendar year but before the submission of the final report.[933] In addition, we expect that the requirement for SBC/Ameritech to notify the independent auditor and the Commission of its on-going progress, as well as the other public disclosure requirements and the corporate compliance program, will ensure prompt and complete notification of potential problem areas. Furthermore, with respect to concerns regarding the timing of the independent audit of the advanced services affiliate provisions,[934] we note that under the conditions the implementation schedule is accelerated if the merger closing date occurs late in the calendar year.[935] Finally, the conditions establish a mechanism by which the Commission can evaluate the effectiveness of the audit program and determine the need for any modifications or improvements.

Enforcement. We have carefully evaluated the conditions to ensure that the Applicants have not proposed mere paper promises. We find that the corporate compliance program, independent audit, public disclosure requirements, and specificity of the conditions will ensure that these conditions produce meaningful and effective change. Despite some objection from commenters,[936] we find that that the conditions contain clear and specific language defining SBC/Ameritech's obligations, which will greatly facilitate compliance and enforcement efforts that may arise. The conditions also specify deadlines and implementation schedules for several of SBC/Ameritech's obligations. We recognize that our experience administering these conditions over time may reveal overlooked ambiguities. As with all of the Commission's regulations, we have the authority to interpret these conditions.[937] We plan to interpret any

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932 *See* MCI WorldCom July 19 Comments at 59-63. The conditions require the independent auditor to conduct its examination for each calendar year during which the conditions remain in effect.

933 American Inst. of Certified Pub. Accountants, COMPLIANCE ATTESTATION, AT § 500.49, 500.50, 500.51; *see also* American Inst. of Certified Pub. Accountants, SUBSEQUENT EVENTS, AU § 560.

934 *See* Northpoint Aug. 19 *Ex Parte* at 2-3.

935 By speeding up the implementation of the agreed-upon procedures audit, the conditions ensure that the Commission, state commissions, and the public will receive timely feedback concerning SBC/Ameritech's compliance with the advanced services affiliate provisions. Specifically, in the event that the merger closing date occurs after November 1, 1999, the independent auditor will conduct an agreed-upon procedures audit for the first six months after the merger closing date, and will submit a report no later than September 1, 2000.

936 *See, e.g.,* Sprint July 19 Comments at 62, 67.

937 *See Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504 (1994); *Udall v. Tallman*, 380 U.S. 1 (1965*); Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945).

ambiguity in manner consistent with the underlying intent of the conditions and in accordance with our normal processes and procedures.

Several commenters urge the Commission to require satisfaction of all or most of the conditions prior to consummation of the merger.[938] Claiming that the merger is a reaction to current industry trends, the Applicants respond that further delay would drain the companies' business operations and impede strategic and day-to-day decision-making.[939] We have balanced these considerations and find that the conditions contain specific, concrete requirements which will facilitate post-merger enforcement. The conditions also require completion of certain tasks prior to consummation of the merger, which include: (1) filing a collocation tariff and/or offering to amend interconnection agreements to reflect standard terms and conditions for collocation; (2) incorporating separate advanced services affiliates, seeking necessary state certifications and approvals and negotiating and filing interconnection agreements between SBC/Ameritech incumbent LECs and their advanced services affiliates; (3) filing an OSS Process Improvement Plan with the Commission; and (4) engaging an independent auditor for the ten-month collocation audit and the first annual compliance review. A number of the obligations imposed upon SBC and Ameritech also take effect within 10 or 30 days of the merger's closing date. We find that the pre-merger obligations are adequate to ensure that SBC and Ameritech will have set in motion, prior to the merger, processes and actions that are necessary to bring the conditions to fruition in a speedy manner. Given the comprehensive enforcement mechanisms contained in the conditions, we also decline to require the merged firm to post a bond to ensure compliance with these conditions.[940]

Sunset. Some parties object that the three-year expiration of the Applicants' proposed conditions is inadequate,[941] and suggest that the conditions should remain in place as long as necessary to serve their intended purpose.[942] We note that in August the Applicants clarified their commitments to provide, in general, at least 36 months of benefit for each

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938 *See, e.g.*, ALTS July 19 Comments at 3; Cable & Wireless July 19 Comments at 3-4; MCI WorldCom July 19 Comments at 3-7; Sprint July 19 Comments at 2; Time Warner Telecom July 19 Comments at 8.

939 *See* SBC/Ameritech July 26 Reply Comments at 22-24.

940 *See* Covad July 22 Comments at 67-68 (seeking to have the Applicants post a $1 billion bond to ensure compliance); MCI WorldCom July 19 Comments at 32 (suggesting posting of $500 million bond for potential voluntary payments associated with OSS enhancements).

941 *See, e.g.,* Texas PUC Aug. 5 Comments at 2 (suggesting that "the three-year expiration of these conditions may not be sufficient time to ameliorate the market concentration concerns," but that, for other conditions, the interval "may give the incumbent carrier too much protection."); CoreComm July 22 Comments at 24-25 (suggesting five years are needed to cancel out the anticompetitive effects of the merger); Level 3 July 26 Reply Comments at 4-5 (suggesting a minimum 10-year period).

942 *See* Consumer Coalition July 19 Comments, Aff. at 12; Focal/Adelphia/McLeod July 19 Comments at 24-25 (suggesting biennial review of continuing need for conditions after five years); MCI WorldCom July 19 Comments at 9-10, 63-64 (suggesting periodic review of continuing need for conditions).

condition. We find that this three-year period of benefit is sufficient for this merger proceeding, given the rapidly changing telecommunications industry.[943]

Effect of Conditions. A common concern expressed by state commissions, competitors and several other parties is that the Applicants' commitments will set the bar for other state and federal proceedings, particularly ongoing or anticipated proceedings to implement sections 251 and 271 of the Act.[944] This is certainly not our intention; nor should these conditions have that effect. As explained above, the conditions that we adopt today are in no way intended to define what is required under, for example, sections 251 or 271, and SBC/Ameritech's compliance with these conditions does not signify that it will satisfy its nondiscrimination obligations under the Act or Commission rules. We emphasize that the performance measures that are part of this merger-related conditions package should not be viewed by states, BOCs, or competitors as sufficient, let alone optimal,[945] measures to demonstrate a BOC's compliance with section 271 or to satisfy the public interest standard in that context. Rather, these measures constitute a package of voluntary commitments proposed by the Applicants to resolve issues and concerns that are peculiar to this merger.[946]

Some parties also object to the paragraph in the Applicants' proposal that states that the expiration of a condition will not be considered in the Commission's public interest analysis of a section 271 application.[947] We note that these conditions are stand-alone obligations adopted as conditions to our approval of SBC/Ameritech's application to transfer licenses and lines. Provided that SBC/Ameritech complies fully with the letter and spirit of the conditions, the expiration of any obligation in accordance with the conditions will not affect other proceedings.

Section 271 Approval Pre-Merger. Several commenters in this proceeding, including the attorneys general of Indiana, Michigan, Missouri and Wisconsin, have suggested

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943 Like the Bell Atlantic/NYNEX proceeding, we also adopt a sunset provision in this matter. Here, most of SBC/Ameritech's obligations sunset after 36 months of benefit. Moreover, the conditions can be extended for any period in which SBC/Ameritech fails to comply with its obligations.

944 *See, e.g.*, BellSouth July 19 Comments at 1-4; AT&T July 19 Comments at 18 (predicting that Commission adoption of the submitted proposal would undermine ongoing efforts to implement and enforce existing state and federal rules); *id*. at 18, n.17 (stating that the ability of state regulators to obtain pro-competitive requirements "would be jeopardized by any indication that this Commission believes that requiring less of incumbent LECs is appropriate or desirable – which, rightly or wrongly, is the implication that would be drawn from approval of these conditions."); Texas PUC Aug. 5 Comments at 2 (expressing concern "that the Applicants' Proposed Conditions may be interpreted to supplant, rather than enhance, terms and conditions that have been previously adopted in Texas or in other states in which SBC and Ameritech operate.").

945 *See* AT&T July 19 Comments at 19 (fearing treatment of the conditions as if they reflected the Commission's view of the optimal set of requirements and enforcement measures to obtain compliance with the Act).

946 *See, e.g.*, SBC/Ameritech July 1 *Ex Parte* at 1-2; SBC/Ameritech July 26 Reply Comments at 95 ("The proposed Conditions were crafted to deal expressly with concerns raised about the merger; they were not proposed to address, expand, or supplement section 271 issues or concerns.").

947 *See, e.g.*, CoreComm July 22 Comments at 26; Level 3 July 19 Comments at 18.

that we require SBC and Ameritech to obtain authorization to provide in-region, interLATA services in at least a majority of each company's in-region states prior to consummation of the merger.[948] According to these commenters, the section 271 approval process assures the Commission that SBC and Ameritech have sufficiently opened their local markets to competition. Requiring section 271 authorization pre-merger, these commenters claim, would have the benefit of being directly responsive to the competitive conditions that underlie the harms, while providing strong incentive for the companies to complete their market-opening obligations imposed under the 1996 Act, and avoiding enforcement problems created by prior post-merger conditions.[949] The commenters also note that the Applicants, themselves, consider section 271 approval as a necessary prerequisite for success of their National-Local Strategy.[950]

Although imposing such a condition may provide the Commission with assurance regarding the openness of the Applicants' markets, we do not consider pre-merger section 271 approval to be the only means at the Commission's disposal in this merger proceeding to achieve a level of confidence that the Applicants have opened their market sufficiently and that the proposed transaction will advance the public interest. In the instant proceeding, we find that the Applicants have voluntarily submitted a set of conditions that suffice to demonstrate that the merger, on balance, will serve the public interest. We therefore decline to impose a pre-merger section 271 approval condition in this proceeding. Similarly, we reject the suggestion of some parties that we require SBC and Ameritech to demonstrate pursuant to section 271 that effective competition exists throughout its entire region, rather than in the state for which the company applied for section 271 authorization.[951]

Level 3 Structural Split. We also reject Level 3's request that we condition the merger on "planning" for loop divestiture, or a structural solution that isolates the BOCs from control of the local loops.[952] We find that the conditions contain adequate safeguards, such as requiring a separate affiliate for the provision of advanced services, that mitigate SBC/Ameritech's increased incentive and ability to discriminate against rivals as a result of the merger.

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948 *See* CoreComm July 22 Comments at 17-18; MCI WorldCom July 19 Comments at 7; NextLink/ATG July 19 Comments at 9; State Attorneys General Apr. 27 *Ex Parte* at 2, 32-33 (requesting section 271 approval in a majority of SBC and Ameritech states as a merger pre-condition). *See also* Consumer Coalition July 19 Comments at 2, Aff. at 11 (seeking a condition preventing SBC/Ameritech from applying for section 271 approval until the merger performance measurement plan becomes operational).

949 *See* State Attorneys General Apr. 27 *Ex Parte* at 32-33.

950 *See* State Attorneys General Apr. 27 *Ex Parte* at 32-33.

951 Focal Oct. 15 Comments at 17; Hyperion Oct. 15 Comments at 36; KMC Oct. 15 Comments at 23; Level 3 Oct. 15 Comments at 38.

952 Level 3 Comments at 36-37 (citing Petition of LCI Telecom Corp. for Declaratory Rulings, CC Docket No. 98-5 (filed Mar. 23, 1998) (proposing solutions involving divestiture of local loops to an independent company, or, in the alternative, operation of the loops by an independent company)). *See also* Level 3 July 19 Comments at 18-19 (similar).

Divestiture of Alarm Services. We discuss in Section VIII.C below the Alarm Industry Communications Committee's (AICC's) claim that section 275 of the Communications Act requires Ameritech to divest ownership of its SecurityLink alarm services subsidiary to an independent, unaffiliated entity prior to the merger.[953]

Enhanced Extended Links. We decline to require SBC and Ameritech in this proceeding to offer enhanced extended links as an UNE.[954] We find that the legal, technical and policy implications of deeming enhanced extended links as UNEs are better addressed in the context of an industry-wide rulemaking.[955] Moreover, we note that some state commissions have required incumbent LECs to offer enhanced extended links.

Other Conditions. We also reject, as contrary to the 1996 Act, the request that we require the Applicants to resell voicemail services.[956] We also find it inappropriate to require the merged firm to affirmatively urge repeal of state legislative measures that prevent public power utilities from providing telecommunications services.[957] To the extent that other commenters suggest conditions aimed at curbing specific conduct on the part of SBC and/or Ameritech, such as winback, directory listings and paging practices or compliance with reciprocal compensation

953 *See* AICC July 19 Comments at 2-6.

954 *See, e.g.*, ALTS July 19 Comments at 22-23; Level3 July 19 Comments at 14; Consumer Coalition July 19 Comments at 2, Aff. at 19; CoreComm July 22 Comments at 20.

955 *See* "FCC Promotes Local Telecommunications Competition," CC Docket No. 96-98, Report No. CC 99-41, Press Release (rel. Sept. 15, 1999).

956 *See* Ntegrity July 19 Comments at 15; Nat'l ALEC Assoc. Comments at 5-6 (suggesting that that the Commission require the Applicants to resell voice mail services).

957 *See* APPA July 19 Comments at 6-7; TX Rural Municipal Utilities July 19 Comments at 14 (suggesting that we require SBC to lobby in writing and testimony before Congress and the Texas Legislature to remove the prohibition against municipal electric utilities from providing telecommunications services in Texas).

provisions,[958] we find that these concerns are best addressed in the context of enforcement proceedings.

VI. OTHER ISSUES

A. Wireless Services

1. Wireless Service Offerings

Various subsidiaries of SBC hold commercial mobile radio service (CMRS) licenses. PBMS provides in-region personal communications services (PCS) and SWBW operates both in-region cellular and PCS franchises. SBMS provides out-of-region cellular services in Chicago, Boston, Baltimore/Washington D.C., and upstate New York.[959] Through its recent acquisition of SNET, SBC provides cellular, PCS, and paging services in portions of New England.[960] SBC has also recently acquired Comcast Cellular Corp., which has cellular operations in the mid-Atlantic region and in the greater Chicago area.[961] Ameritech operates 42 cellular franchises, serving 3.5 million customers in markets totaling 20 million residents. In addition, Ameritech now offers PCS in the Cleveland and Indianapolis MTAs.[962] Ameritech also

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958 *See* ALTS July 19 Comments at 28-29 (suggesting that the Commission prohibit SBC and Ameritech from trying to win customers back, or prevent them from changing carriers, using information that a competitive carrier has requested that customer's service records); *id*. at 29 (seeking SBC's and Ameritech's compliance with outstanding state orders to pay competitive LECs any reciprocal compensation due); Nat'l ALEC Assoc. July 19 Comments at 6-7; Ntegrity July 19 Comments at 10 (suggesting reforms of the Applicants' billing practices); Focal/Adelphia/McLeod July 19 Comments at 19 (requesting that SBC and Ameritech provide directory listing at cost-based prices and submit disputes to arbitration); PageNet July 19 Comments at 5-8; PCIA July 19 Comments at 2-5 (asking that the Commission require SBC to cease billing, and refund money to, messaging carriers for facilities it uses to deliver SBC-originated local calling traffic and to honor its interconnection obligations to messaging carriers); Power-Finder West July 19 Comments at 1 (requesting that the Commission require Ameritech to revise tariffs to eliminate 500 NXX code end-office activation charges); Ntegrity July 19 Comments at 13 (requesting that record order change be made uniform and lowered); Pilgrim July 19 Comments at 3 (asking the Commission to eliminate any SBC or Ameritech policy that restricts lawful content provided by a customer of a casual calling company and to require nondiscriminatory provision of billing and collection services, especially casual calling services); Hyperion July 19 Comments at 37 (requesting that SBC/Ameritech conduct remote call forwarding cut-overs at specific scheduled times, including after business hours, to avoid customer disruption); Nat'l ALEC Assoc. Comments at 4-5 (requesting that the Applicants be required to resell directory assistance blocking and directory assistance call completion blocking services throughout their regions).

959 SBC/Ameritech July 24 Application, Description of Applicants and Their Existing Business, at 1.

960 *See infra* Section III.A. (The Applicants).

961 *See* In re Applications of Comcast Cellular Holdings, Co. and SBC Communications, Inc., *Memorandum Opinion and Order*, DA 99-1318, 1999 WL 446,562 (WTB 1999).

962 SBC/Ameritech July 24 Application, Description of Applicants and Their Existing Business, at 3; Cleveland launch news release: <http://www.ameritech.com/products/wireless/clearpath/mediakit/accpp010.htm>; Indianapolis launch news release: <http://www.ameritech.com/products/wireless/clearpath/mediakit/accpp032.htm>.

provides paging services to 1.5 million customers collectively within its five-state wireline territory, Minnesota and Missouri.[963]

2. Relevant Markets

Both parties provide mobile voice telephone service over cellular and PCS networks and two-way mobile data (CDPD) over cellular networks.[964] Ameritech currently provides cellular, paging, wireless data and security monitoring services in SBC's region.[965] Aside from its cellular operations, SBC's commercial offerings of wireless services in Ameritech's territory are limited to the resale of paging services. The Wireless Bureau has previously found that interconnected mobile voice telephone services, paging/messaging services, and two-way wireless data services constitute relevant product markets.[966] Hence, we examine the effects of the merger on the public interest in mobile voice telephone services, wireless data services, and paging services. We also address concerns raised with respect to commercial disputes involving wireless operations generally.

3. Mobile Voice Telephone Services

SBC and Ameritech both hold cellular telephone licenses in 14 cellular service areas in the greater St. Louis and Chicago metropolitan areas.[967] Thus, the proposed merger implicates the Commission's cellular cross-interest rule, which generally prohibits an entity from holding a direct or indirect ownership interest in licensees for channel blocks in overlapping cellular geographic service areas ("CGSA").[968] The proposed merger also raises issues under the CMRS spectrum cap, which generally prohibits a licensee from having an attributable interest in more than 45 MHz of CMRS licensed spectrum in the same geographic area.[969] SBC/Ameritech

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963 SBC/Ameritech July 24 Application, Description of Applicants and Their Existing Business, at 3.

964 SBC offers CDPD only in Connecticut and Rhode Island through SNET Cellular.

965 AT&T Oct. 15 Petition at 25.

966 *See* In re Applications of Vanguard Cellular Systems Inc. and Winston, Inc., *Memorandum Opinion and Order,* DA 99-481, 1999 WL 129,480 (WTB 1999); In re Applications of 360° Communications Company and ALLTEL Corporation, *Memorandum Opinion and Order*, 1998 WL 906,754 (WTB 1998); In re Applications of Pittencrieff Communications, Inc. and Nextel Communications, Inc., *Memorandum Opinion and Orde*r, 13 FCC Rcd 8935, 8940, para. 10 (1997); In re Application of Motorola, Inc. and American Mobile Satellite Corporation for Consent to Transfer of Control of Ardis Company, *Memorandum Opinion and Order*, 13 FCC Rcd 5182, 5187, para. 7 (WTB 1997).

967 Metropolitan Statistical Areas served by both SBC and Ameritech include: Chicago, IL, St. Louis, MO-IL, Gary-Hammond-East Chicago, IN, Springfield, IL, Champaign-Urbana-Rantoul, IL, Bloomington-Normal, IL, Decatur, IL. Rural Service Areas are: Illinois 2–Bureau, 3–Mason, 6–Montgomery; Missouri 8–Callaway, 12–Maries, 18–Perry, 19–Stoddard.

968 47 C.F.R. § 22.942. *See also* 47 C.F.R. § 20.6 (CMRS spectrum aggregation limit).

969 47 C.F.R. § 20.6.

have committed to divest one of the overlapping systems in each of these 14 Metropolitan Statistical Areas (MSAs) and Rural Service Areas (RSAs).[970]

On May 14, 1999, the Wireless Telecommunications Bureau, by delegated authority, announced that Ameritech had filed applications seeking Commission consent to transfer to GTE Consumer Services Inc. (GCSI) control of cellular properties that overlap with SBC and Comcast properties.[971] On August 20, 1999, the Bureau granted these applications.[972] Consummation of that transaction pursuant to this approval will remedy cellular cross-ownership and spectrum cap concerns raised by the SBC/Ameritech transaction. Therefore, we will grant this application subject to the condition that Ameritech closes its deal with GCSI before or simultaneous with the closing of the SBC/Ameritech transaction.

We note that Ameritech's divestiture of assets is also consistent with the DOJ Consent Decree entered into by Applicants in connection with this proposed merger. DOJ also reserved the right to approve the proposed buyer of the divested assets to ensure that the divestiture would not harm competition by substituting a less robust competitor.[973] This concern was also voiced by several parties who feared that Ameritech would attempt to impede competition by assigning its cellular licenses to one or more parties unable to compete effectively against the combined SBC/Ameritech.[974] DOJ has approved Ameritech's divestiture of the licenses to GCSI and we agree that competition would not likely be harmed in these wireless markets.[975] Thus, we find that the commenting parties' concerns have been addressed.

4. Two-way Wireless Data Services

We find no basis for concern that the proposed merger will harm competition in the markets for wireless data services. First, SBC does not presently offer CDPD in any region where its cellular network overlaps that of Ameritech, so the proposed merger would not harm existing competition. Second, any concerns regarding the loss of potential competition are

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970 SBC/Ameritech July 24 Application, Description of the Transaction at 58. Ameritech has been SBC's most formidable cellular competitor in St. Louis, with over 250,000 wireless subscribers, or about 10 percent of the total potential market of 2.5 million residents.

971 *See Public Notice*, Ameritech and GTE Seek FCC Consent to Transfer Control of Licenses from Ameritech to GTE, DA 99-920 (WTB May 14, 1999). We also note that Ameritech will be transferring control to GCSI of cellular properties that overlap with cellular properties that SBC recently acquired from Comcast. *See* In re Applications of Comcast Cellular Holdings, Co. and SBC Communications Inc., *Memorandum Opinion and Order*, DA 99-1318, 1999 WL 446,562 (WTB 1999).

972 *See In re Applications of Ameritech Corporation, Transferor, and GTE Consumer Services, Inc., Transferee, for Consent to Transfer of Control of Licenses and Authorizations*, Memorandum Opinion and Order, DA 99-1677, 1999 WL 635,724 (WTB 1999).

973 DOJ Final Judgment at 8.

974 *See e.g.,* AT&T Oct. 15 Petition at 25; CFA Nov. 16 Reply Comments at 3; Hyperion Oct. 15 Comments at 28.

975 In Section V.B.2.d)(1) (Competitive Effects on Mass Market Local Services) *supra,* we discuss the effects of these transactions in the broader market for telecommunications services generally in St. Louis.

addressed by the divestiture of cellular assets as described above. Finally, no concern was raised by any commenter.

5. Paging Services

Some parties contend that we should not grant this application because SBC has failed to abide by the Commission's interconnection rules.[976] The Paging and Messaging Alliance of the Personal Communications Industry Association (PMA) submits that SBC continues to charge paging providers for SBC-originated traffic and refuses to pay compensation to paging carriers for terminating SBC-originated calls.[977] PMA also states that when SBC assumed control of Pacific Bell, negotiations with Pacific Bell regarding the terms of interconnection came to an immediate halt.[978] SBC reports that the issue of interconnection is a "good faith" dispute that is currently pending before a federal court, before the FCC and before the California PUC.[979] SBC believes that the reciprocal compensation provisions of the Act were intended to apply only to two-way communication.[980] Except in California, therefore, where a California PUC Order specifically addresses this issue, SBC does not pay reciprocal compensation for one-way paging. This matter is the subject of a separate proceeding at the Commission and need not be resolved in the context of this license transfer review.[981]

6. Other Competitive Issues

Several parties claim that we should not grant these applications because of pending disputes with SBC. We find, however, that none of these commenters has raised concerns that would preclude our grant of this application. Several commenters allege that SBC's acquisition of Ameritech may jeopardize the ability of AirTouch to provide "calling party pays" service.[982] However, the California PUC recently denied a petition by AirTouch to compel Pacific Bell to provide billing and collection for a CPP trial based on Pacific Bell's tariff for billing and collection of wireless services.[983] The denial was based on language in a prior California PUC decision prohibiting a LEC from billing its wireline customers at wireless rates for calls placed to wireless phones.[984] As we previously

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976 *See e.g.*, JSM Tele-Page Oct. 15 Petition at 1-2, Paging and Messaging Alliance of the Personal Communications Industry Association (PMA) Oct. 15 Petition at 4-11.

977 *Id.* at 4-9.

978 *Id.* at 10-11.

979 SBC Nov. 16 Reply Comments, App. B at 2.

980 *Id.* at 14-15.

981 *See* In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, *Declaratory Ruling*; Inter-Carrier Compensation for ISP-Bound Traffic, CC Docket No. 99-68, *Notice of Proposed Rulemaking*, 14 FCC Rcd. 3689 (1999).

982 CoreComm Oct. 15 Comments at 7-9; Hyperion Oct. 15 Comments at 22-24; KMC Oct. 15 Comments at 18-20.

983 *AirTouch Cellular v. Pacific Bell*, Decision 98-12-086, Case 97-12-044, Cal. Pub. Util. Comm'n (Dec. 17, 1998).

984 *Id.* at 2.

discussed in our order approving the SBC/SNET merger,[985] however, we find that this is not an appropriate forum for resolving these disputes.

B. International Issues

Subsidiaries of both SBC and Ameritech are authorized under section 214 of the Act to provide U.S. international service on an out-of-region basis.[986] Both SBC and Ameritech also have ownership interests in carriers that operate on the foreign end of U.S. international routes. Some of these interests rise to the level of an "affiliation" within the meaning of section 63.09. This application raises the issue whether the public interest would be served by permitting the merged entity to provide U.S. international service on these affiliated routes and, if so, under what terms. We consider first the foreign carrier affiliations of SBC and the issues raised by those affiliations in this transfer proceeding. We then consider the affiliations of Ameritech and issues raised by those affiliations.

1. SBC Foreign Carrier Affiliations

As a result of the merger, Ameritech's international carrier subsidiaries would become newly-affiliated with all of SBC's foreign carrier affiliates.[987] SBC's foreign carrier affiliates operate in South Africa (Telkom South Africa Ltd.) and Switzerland (diAx).[988] Ameritech holds section 214 authorization to serve each of these foreign points, and the Applicants request that we authorize a transfer of control of all of Ameritech's international authorizations to SBC.[989] Our approval of the Application thus would permit SBC-controlled subsidiaries to serve these affiliated routes. This Application raises for our consideration the issue whether the public interest would be served by permitting SBC to provide U.S. international service between the United States and South Africa and Switzerland through its acquisition of control of Ameritech's international section 214 certificates. If we approve the proposed transfer of control of Ameritech's authorizations to SBC, we also must inquire whether

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985 *SBC/SNET Order,* 13 FCC Rcd at 21306, paras. 28-29.

986 Upon consummation of the proposed merger, section 271 of the Act will prohibit any of SBC's or Ameritech's international carrier-subsidiaries from providing international services originating in any of their combined "in-region States," as that term is defined in section 271(i) of the Act, 47 U.S.C. § 271(i).

987 Section 63.09(e) provides, in relevant part, that: "Two entities are *affiliated* with each other if one of them, or an entity that controls one of them, directly or indirectly owns more than 25 percent of the capital stock of, or controls, the other one." 47 C.F.R. § 63.09(e).

988 *See* SBC/Ameritech July 24 International Application, at 9; Letter from Todd F. Silbergeld, Director, Federal Regulatory, SBC Communications Inc., to Magalie Roman Salas, Secretary, FCC (filed February 1, 1999) (SBC Feb. 1 *Ex Parte)*. *See also* Letter from Philip W. Horton, Arnold & Porter, counsel to SBC, to Magalie Roman Salas, Secretary, FCC (filed July 2, 1999) (SBC/Ameritech July 2 *Ex Parte)* (amending SBC/Ameritech July 24 International Application, to delete VTR Inversiones as an affiliated carrier in Chile); Letter from Philip Horton, Arnold & Porter, counsel to SBC, to Susan O'Connell, International Bureau, FCC, (filed July 21, 1999) (SBC July 21 *Ex Parte*) (updating information relating to DiAx).

989 *See* SBC/Ameritech July 24 International Application at 6-9 (listing the international section 214 authorizations held by Ameritech and SBC), 10-11.

SBC's affiliates in South Africa or Switzerland have sufficient market power to warrant classifying the combined entity's U.S. international carrier subsidiaries as "dominant" U.S. international carriers on either of these routes. We conclude that the public interest would be served by transferring control of Ameritech's international section 214 authorizations to SBC, subject to classification of SBC subsidiaries as dominant international carriers in their provision of service on the U.S.-South Africa route.

The rules and standards adopted in the Commission's *Foreign Participation Order* govern our decision whether, and on what terms, to authorize SBC to provide service on routes where SBC has affiliations with foreign carriers.[990] In that decision, the Commission adopted an open entry standard for applicants that request authority to serve a World Trade Organization (WTO) member country in which the applicants have a foreign carrier-affiliate. Previously, the Commission applied the "effective competitive opportunities (ECO)" test to certain applicants that sought to provide service on routes where an affiliated foreign carrier possessed market power.[991] In the *Foreign Participation Order*, the Commission eliminated the ECO test in favor of a rebuttable presumption that applications for international section 214 authority from applicants affiliated with foreign carriers in WTO member countries do not pose concerns that would justify denial of the application on competition grounds.[992] The Commission retained the ECO test for certain applicants that seek to serve non-WTO countries in which the applicant has an affiliation with a foreign carrier possessing market power.[993] The Commission also considers other public interest factors that may weigh in favor of, or against, granting an international section 214 application, including national security, law enforcement, foreign policy and trade concerns.[994]

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990 *Rules and Policies on Foreign Participation in the U.S. Telecommunications Market,* IB Docket Nos. 97-142 and 95-22, Report and Order and Order on Reconsideration, 12 FCC Rcd 23891 (1997), *recon. pending* (*Foreign Participation Order*).

991 The "effective competitive opportunities (ECO)" analysis was developed and discussed in the *Foreign Carrier Entry Order*. *See Market Entry and Regulation of Foreign-Affiliated Entities*, IB Docket No. 95-22, Report and Order, 11 FCC Rcd 3873 (1995).

992 *Foreign Participation Order,* 12 FCC Rcd at 23906-10, paras. 33-43; *see also id*. at 23913-17, paras. 50-58. The Commission addressed in the *Foreign Participation Order* a specific competition concern: that a foreign carrier with market power in an input market on the foreign end of a U.S. international route has the ability to exercise, or leverage, that market power into the U.S. market to the detriment of competition and consumers. The Commission found that, because of the implementation of the WTO agreement on basic telecommunications services, foreign carriers in WTO member countries would rarely be able to harm competition in the U.S. market by acting anticompetitively. The Commission further noted its ability to impose specific conditions on a grant of authority. *Id*. at 23913-14, para. 51.

993 *Id*. at 23944-46, paras. 124-129; *see also id*. at 23949-50, paras. 139-142. Section 63.18(j)-(k) of the rules applies the ECO test where the applicant is a foreign carrier in the non-WTO country; or controls a foreign carrier in that country; or where any entity that owns more than 25 percent of the applicant, or controls the applicant, controls a foreign carrier in that country; or, in specified circumstances, where two or more foreign carriers own, in the aggregate, more than 25 percent of the applicant. 47 C.F.R. § 63.18(j)-(k).

994 *See Foreign Participation Order,* 12 FCC Rcd at 23919-21, paras. 61-66.

Both South Africa and Switzerland are members of the WTO. Accordingly, we find that SBC is entitled to a presumption that its foreign carrier affiliations do not raise competition concerns that would warrant denial of its request to serve the U.S.-South Africa and U.S.-Switzerland routes through its acquisition of control of Ameritech's international section 214 certificates. We note that no party has filed comments that address specifically the international transfer application, and we find no public interest factors that would warrant denying SBC's request to acquire control of Ameritech's international section 214 authorizations.

We next examine whether it is necessary to impose our international dominant carrier safeguards on SBC's international carrier subsidiaries in their provision of service on these affiliated routes.[995] Under rules adopted in the *Foreign Participation Order*, we regulate U.S. international carriers as dominant on routes where an affiliated foreign carrier has sufficient market power on the foreign end to affect competition adversely in the U.S. market.[996] A U.S. carrier presumptively is classified as non-dominant on an affiliated route if the carrier demonstrates that the foreign affiliate lacks 50 percent market share in the international transport and local access markets on the foreign end of the route.[997] Section 63.18 of the rules requires SBC, as transferee in this proceeding, to demonstrate that it qualifies for non-dominant classification on any affiliated route for which it seeks to be regulated as a non-dominant international carrier. The Joint Application recognizes that SBC's affiliate in South Africa, Telkom South Africa Ltd., is the incumbent telecommunications carrier in South Africa, and unlike the case of its Switzerland affiliate, SBC does not assert that Telkom South Africa lacks market power. We therefore amend, effective upon consummation of the proposed merger with SBC, the international section 214 authorizations held by Ameritech Communications, Inc. (ACI), File Nos. ITC-96-441 and ITC-97-289, to apply dominant carrier regulation, as specified in section 63.10 of the rules, to its provision of the authorized services on the U.S.-South Africa route.[998]

We note that SBC and Ameritech subsidiaries currently have section 214 authority to resell the switched services of unaffiliated U.S. international carriers to South Africa and are classified as non-dominant in their provision of such service. We find that, upon consummation of the merger, each of SBC's subsidiaries will warrant continued regulation as non-dominant providers of switched services to South Africa for so long as each provides such services only

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995 Our international dominant carrier safeguards are set forth in section 63.10(c) of the rules (*as amended in International Settlement Rates*, IB Docket No. 96-261, Report and Order on Reconsideration and Order Lifting Stay, FCC 99-124 (rel. June 11, 1999)).

996 *Foreign Participation Order,* 12 FCC Rcd at 23951-52, para. 144; 47 C.F.R. § 63.10(a)(3).

997 *See* 47 C.F.R § 63.10(a)(3).

998 The authorization granted in File No. 96-441 permits ACI to resell interconnected and non-interconnected international private lines on all U.S. international routes, except to Hungary, subject to limitations generally applied to U.S. international resale carriers. *See* 47 C.F.R. § 63.23. The authorization granted in File No. 97-289 permits ACI to provide international facilities-based services on all U.S. international routes, except Hungary, subject to limitations generally applied to U.S. international facilities-based carriers. *See* 47 C.F.R. § 63.22.

through the resale of unaffiliated U.S.-authorized carriers' switched services.[999] SBC subsidiaries are and will be required, however, to file quarterly reports of their switched resale traffic on this route.[1000]

We find that SBC has provided sufficient information to demonstrate that its affiliate in Switzerland lacks market power and that it therefore warrants non-dominant carrier treatment on the U.S.-Switzerland route. SBC represents that its affiliate lacks 50 percent market share in the international transport and local access markets in Switzerland,[1001] and there is no evidence in the record that contradicts this statement or otherwise suggests that SBC's affiliate has market power.

2. Ameritech Foreign Carrier Affiliations

Ameritech has investment interests in several foreign carriers that rise to the level of an affiliation under section 63.09 of the rules.[1002] Ameritech identifies the following foreign carrier affiliates: MATAV Rt (Hungary), Tele Danmark A/S (Denmark), Talkline (Germany and the Netherlands), BEN Netherland B.V. (the Netherlands), and UAB Mobilios Telekomunikacijos or "Bite" (Lithuania).[1003] In the case of Tele Danmark, Talkline, and Bite, Ameritech's investment interests constitute controlling interests.[1004]

As a result of the proposed merger, SBC would acquire indirectly Ameritech's ownership interests in MATAV, Tele Danmark, Talkline, BEN Netherlands and Bite. The controlling interests that SBC would acquire in Tele Danmark, Talkline, and Bite trigger a pre-merger notification requirement under section 63.11(a) of the rules. This provision requires, in relevant part, that authorized carriers notify the Commission sixty days prior to acquiring, directly or indirectly, a controlling interest in a foreign carrier.[1005] As explained in the *Foreign Participation Order*, the prior notification requirement of section 63.11 gives the Commission the opportunity to evaluate new affiliations under the entry standards adopted in that order.[1006]

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999 Section 63.10(a)(4) of the rules, 47 C.F.R. § 63.10(a)(4), establishes a presumption of non-dominance for carriers that provide switched services on affiliated routes solely through the resale of an unaffiliated U.S. facilities-based carrier's international switched services.

1000 *See* 47 C.F.R. § 43.61(c) (requiring carriers engaged in the resale of international switched services on routes where a foreign-carrier affiliate has market power and collects settlement payments from U.S. carriers to file quarterly reports of their switched resale traffic and revenues on the affiliated route).

1001 *See* SBC/Ameritech July 24 International Application, at 12; SBC July 21 *Ex Parte*.

1002 *See* 47 C.F.R. § 63.09.

1003 *See* Ameritech Notification of Foreign Affiliation Pursuant to section 63.11 of the Commission's Rules (dated Feb. 26, 1999); Letter from Christopher M. Heimann, Director of Legal Affairs, Ameritech, to Magalie Roman Salas, Secretary, FCC (filed July 15, 1999) (Ameritech July 15 *Ex Parte*).

1004 Ameritech July 15 *Ex Parte*.

1005 47 C.F.R. § 63.11(a).

1006 The Commission stated that "[t]he notifications will give us the opportunity to impose any conditions that we might deem necessary in a particular case. We might, for example, find in a particular case that an affiliation raises anticompetitive concerns that must be addressed by imposing our benchmarks condition or the dominant

In this case, section 63.11(a) directs us to determine whether, upon consummation of the proposed merger, it would continue to serve the public interest to allow SBC's carrier-subsidiaries to serve Denmark, Germany, the Netherlands and Lithuania, where SBC proposes to acquire controlling interests in foreign carriers as a result of its merger with Ameritech. Applying the entry standard of the *Foreign Participation Order*, we conclude that the public interest would continue to be served by SBC's provision of service, through all its authorized subsidiaries, on U.S. international routes to Denmark, Germany and the Netherlands. Each of these countries is a member of the WTO,[1007] and we find no other public interest factors that would warrant a different conclusion. SBC does not assert, however, that Tele Danmark lacks sufficient market power in Denmark to affect competition adversely in the United States. We therefore amend, effective upon consummation of the proposed merger with Ameritech, the international section 214 authorizations held by certain of SBC's currently authorized subsidiaries to apply dominant carrier regulation, as specified in section 63.10 of the rules, to their provision of the service on the U.S.-Denmark route.[1008] We note that ACI already is classified as a dominant carrier in its provision of service on this route.

We find that, after the merger, SBC subsidiaries would be subject to continued regulation as non-dominant carriers to Germany and the Netherlands. The record indicates that Talkline currently provides mobile communications services in Germany and resold cellular service in the Netherlands.[1009] As we have previously found in our 1998 Biennial Regulatory Review of international common carrier regulations, foreign carriers that operate solely on a resale basis, or that have only mobile wireless (and no wireline) facilities, are unlikely to raise market power concerns.[1010]

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safeguards we adopt here." *Foreign Participation Order*, 12 FCC Rcd at 24036, para. 333. Section 63.11(b) of the rules requires, in relevant part, that authorized carriers which acquire a non-controlling interest in a foreign carrier that otherwise meets the definition of an affiliation notify the Commission *within 30 days* of the investment. *See* 47 C.F.R. § 63.11(b). Thus, after the merger, SBC will be required to notify us of its acquisition of a non-controlling affiliation with MATAV and BEN Netherland. The Commission or the International Bureau, on delegated authority, will at that time consider further whether any change in regulatory status is warranted for SBC subsidiaries in their provision of service to Hungary or the Netherlands.

1007 As we also find below, Talkline does not in any event have sufficient market power in Germany or the Netherlands to affect competition adversely in the United States.

1008 The authorizations that would be amended are as follows: Pacific Bell Communications, File No. ITC-96-689; SBC Global Communications, Inc., File Nos. ITC-96-692 & ITC-98-423-T/C; Southwestern Bell Communications Services, Inc., File No. ITC-97-770 (renumbered ITC-214-19971108-00689); SNET America, Inc., File No. 96-172; and SNET Diversified Group, Inc., File No. 96-538. After the merger, each of these SBC subsidiaries would warrant continued regulation as non-dominant providers of switched services to Denmark for so long as each provides such services only through the resale of unaffiliated U.S.-authorized carriers' switched services. *See* 47 C.F.R. § 63.10(a)(4). *See also* 47 C.F.R. § 43.61(c).

1009 *See* Ameritech July 15 *Ex Parte*.

1010 *See 1998 Biennial Regulatory Review -- Review of International Common Carrier Regulations,* IB Docket No. 98-118, Report and Order, 14 FCC Rcd 4909 (1999), *recon. pending*; *id*. at 4922, para. 29.

Although SBC proposes to acquire Ameritech's controlling interest in Bite in Lithuania, which is not a member of the WTO, we find that the public interest would continue to be served by SBC's authorization to provide service on this route. Bite is authorized in Lithuania to provide mobile wireless service only.[1011] On this basis, and in the absence of any other evidence of market power, we conclude that Bite lacks sufficient market power to affect competition adversely in the United States.[1012] Accordingly, we find that SBC's investment is consistent with the entry policies adopted in the *Foreign Participation Order* for carriers from non-WTO countries.[1013] We also find that, after the merger, SBC subsidiaries would be subject to continued regulation as non-dominant international carriers between the United States and Lithuania.

C. Alarm Monitoring

1. Overview

The Alarm Industry Communications Committee (AICC) argues that, if SBC is permitted to take control of Ameritech's alarm monitoring business, by means of acquiring Ameritech, and makes it a wholly-owned subsidiary, SBC will be engaging in the provision of alarm monitoring services in violation of section 275(a)(1) of the Communications Act.[1014] For the reasons discussed below, we conclude that it is unnecessary to require Ameritech to divest its alarm monitoring assets as a condition to our approval of its merger with SBC. This conclusion is based on our determination that, if SBC and Ameritech were to consummate their planned merger without Ameritech divesting its alarm monitoring assets and ceasing to provide alarm monitoring service, the combined entity would not violate the prohibition in section 275(a)(1) against BOCs, other than those permitted by section 275(a)(2), providing alarm monitoring services for five years after the date of enactment of the Telecommunications Act of 1996. We therefore reject AICC's request that we precondition our merger approval on, among other things discussed below, Ameritech divesting its alarm monitoring assets and ceasing to provide alarm monitoring services.

The 1996 Act provides for delayed entry by BOCs into the alarm monitoring business until five years after the date of enactment. Specifically, section 275(a)(1) states: "[n]o Bell operating company or affiliate thereof shall engage in the provision of alarm monitoring services before the date which is 5 years after the date of enactment of the Telecommunications Act of 1996."[1015] Section 275 provides a grandfathering clause, however, allowing BOCs that

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[1011] *See* Ameritech July 15 *Ex Parte*; Letter from Christopher M. Heimann, Director of Legal Affairs, Ameritech, to Magalie Roman Salas, Secretary, FCC (filed Sept. 21, 1999).

[1012] *See supra* n.1010 and accompanying text.

[1013] *See Foreign Participation Order* at 12 FCC Rcd at 23949, para. 139 (applying the ECO test only to certain applicants that seek to serve non-WTO countries in which the applicant's affiliated foreign carrier *possesses market power*).

[1014] *See* AICC Oct. 15 Comments at 2-4, citing 47 U.S.C. § 275(a)(1).

[1015] 47 U.S.C. § 275(a)(1).

were providing alarm monitoring service as of November 30, 1995, to continue doing so. Specifically, section 275(a)(2) states: "[p]aragraph (1) does not prohibit or limit the provision, directly or through an affiliate, of alarm monitoring services by a Bell operating company that was engaged in providing alarm monitoring services as of November 30, 1995, directly or through an affiliate."[1016] Section 275(a)(2) also states:

> [s]uch Bell operating company or affiliate may not acquire any equity interest in, or obtain financial control of, any unaffiliated alarm monitoring service entity after November 30, 1995, and until 5 years after the date of enactment of the Telecommunications Act of 1996, except that this sentence shall not prohibit an exchange of customers for the customers of an unaffiliated alarm monitoring service entity.[1017]

We note that the restriction in section 275(a)(1) applies to a BOC (such as the SBC BOCs or Ameritech BOCs) or BOC affiliate.[1018] The grandfathering exception in section 275(a)(2) also applies to a BOC or BOC affiliate. The alarm monitoring services at issue are provided by SecurityLink. SecurityLink currently is an affiliate of the five grandfathered Ameritech BOCs. After the merger, SecurityLink will also be an affiliate of the non-grandfathered SBC BOCs. For purposes of brevity, when we refer to "SBC" or "Ameritech" providing alarm monitoring services, or being grandfathered or exempt from the restriction against BOCs providing such services, we will in fact be referring to the SBC BOCs or Ameritech BOCs, or to SecurityLink as their affiliate.

1016 47 U.S.C. § 275(a)(2).

1017 *Id*.

1018 Section 153(4) defines a "Bell operating company": "The term 'Bell operating company' –

(A) means any of the following companies: Bell Telephone Company of Nevada, Illinois Bell Telephone Company, Indiana Bell Telephone Company, Incorporated, Michigan Bell Telephone Company, New England Telephone and Telegraph Company, New Jersey Bell Telephone Company, New York Telephone Company, U S WEST Communications Company, South Central Bell Telephone Company, Southern Bell Telephone and Telegraph Company, Southwestern Bell Telephone Company, The Bell Telephone Company of Pennsylvania, The Chesapeake and Potomac Telephone Company, The Chesapeake and Potomac Telephone Company of Maryland, The Chesapeake and Potomac Telephone Company of Virginia, The Chesapeake and Potomac Telephone Company of West Virginia, the Diamond State Telephone Company, the Ohio Bell Telephone Company, the Pacific Telephone and Telegraph Company, or Wisconsin Telephone Company; and

(B) includes any successor or assign of any such company that provides wireline telephone exchange service; but

(C) does not include an affiliate of any such company, other than an affiliate described in subparagraph (A) or (B)." 47 U.S.C. § 153(4)(A),(B)(C). Section 153(1) defines an "affiliate": "The term 'affiliate' means a person that (directly or indirectly) owns or controls, is owned or controlled by, or is under common ownership or control with, another person. For purposes of this paragraph, the term 'own' means to own an equity interest (or the equivalent thereof) of more than 10 percent. 47 U.S.C. § 153(1).

The Commission has concluded in its rulemaking proceeding implementing section 275 that the scope of section 275(a)(2) is best addressed on a case-by-case basis in which the Commission is able to consider all of the facts that may apply to a particular transaction.[1019] In that Order, the Commission found that, because Ameritech is the only BOC that was authorized to provide alarm monitoring service as of November 30, 1995, it is the only BOC that qualifies for "grandfathered" treatment under section 275(a)(2).[1020] Ameritech provides intraLATA alarm monitoring pursuant to an approved CEI plan[1021] and interLATA alarm monitoring services pursuant to a waiver of the Modification of Final Judgement.[1022] The Commission currently has pending before it several cases in which it has ordered Ameritech to show cause why it should not be required to divest Ameritech's purchases of unaffiliated providers of alarm monitoring service.[1023] On August 31, 1999, the Commission released an order denying Ameritech's request that the Commission forbear from applying section 275(a) of the Act to apply both to alarm monitoring service transactions already completed and to future transactions by Ameritech.[1024]

2. Analysis

a) "Engaged in the Provision" of Alarm Monitoring Services under Section 275(a)(1).

The first question we must consider is whether, by means of Ameritech being a wholly-owned subsidiary of SBC[1025] that provides alarm monitoring services through its affiliate, SecurityLink,[1026] SBC would be "engage[d] in the provision" of alarm monitoring services within the meaning of that term under section 275(a)(1). There is no dispute in the record that, if SBC acquires Ameritech, SecurityLink would remain a BOC affiliate (affiliated with the SBC BOCs, as well as the Ameritech BOCs) and would be "engage[d] in the provision of" alarm monitoring

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1019 *See Implementation of the Telecommunications Act of 1996: Telemessaging, Electronic Publishing, and Alarm Monitoring Services*, CC Docket No. 96-152, Second Report and Order, 12 FCC Rcd 3824, 3844, para. 44 (1997), *recons. pending* (*Alarm Monitoring Order*).

1020 *See Alarm Monitoring Order*, 12 FCC Rcd at 3839, para. 33.

1021 *See Bell Operating Companies Joint Petition for Waiver of Computer II Rules*, 10 FCC Rcd 13758, 13770 (Com. Car. Bur. 1995) (*CEI Plan Order*) (approving Ameritech's CEI plan for "SecurityLink" service).

1022 *See United States v. Western Electric Co*., 46 F.3d 1198 (D.D.C. 1995).

1023 *See Enforcement of Section 275(a)(2) of the Communications Act of 1934, as Amended by the Telecommunications Act of 1996, Against Ameritech Corporation, Motion for Orders to Show Cause and to Cease and Desist*, CCBPol 96-17, Memorandum Opinion and Order on Remand and Order to Show Cause, 13 FCC Rcd 19046, para. 1 (*Enforcement of Section 275(a)(2) Order on Remand)* and *Enforcement of Section 275(a)(2) of the Communications Act of 1934, as amended by the Telecommunications Act of 1996, Against Ameritech Corporation, Memorandum Opinion and Order to Show Cause*, FCC 98-148 (rel. July 8, 1998), para. 1 (*Ameritech First Show Cause Order*).

1024 *See Petition of Ameritech Corporation for Forbearance from Enforcement of Section 275(a) of the Communications Act of 1934, as Amended*, Order, CC Docket No. 98-65 (rel. Aug. 31, 1999).

1025 *See* SBC/Ameritech July 24 Application, Description of the Transaction at 1.

1026 *See Alarm Monitoring Order*, 12 FCC Rcd at 3839, para. 33.

services within the meaning of the term in section 275(a)(1). SecurityLink would be under common ownership and control with the SBC BOCs and the Ameritech BOCs.[1027]

b) "Grandfathering" under Section 275(a)(2).

Introduction. Given that the SBC BOCs would indeed be "engage[d] in the provision of" alarm monitoring services under section 275(a)(1) through SBC's newly acquired affiliate, SecurityLink, we now consider whether SBC, by means of acquiring Ameritech, along with the Ameritech BOCs and their alarm monitoring subsidiary, also acquires Ameritech's grandfathered status under section 275(a)(2) such that the SBC BOCs would not be unlawfully "engag[ing] in the provision of" alarm monitoring services under section 275(a)(1).

We note that the varying interpretations in the record, described below, of whether a grandfathered BOC loses its exemption under section 275(a)(2) if the exempt entity is acquired by a non-grandfathered BOC demonstrates the need for Commission statutory interpretation. For example, AICC asserts that if SBC acquires Ameritech along with its SecurityLink alarm monitoring subsidiary, Ameritech's exemption under section 275(a)(2) to provide services through SecurityLink does not pass to SBC.[1028] Rather, according to AICC, once control of Ameritech passes to SBC, Ameritech "effectively loses its grandfathered status."[1029] Applicants respond that the opposite is true because, under Applicants' reading of that statute, "'control' simply is not a statutory condition for qualifying under section 275(a)(2) – a Bell operating company or its affiliate was either providing alarm monitoring services in 1995 or not."[1030] Applicants argue that because section 275(a)(2) creates a "permanent" exception for a BOC, like the Ameritech BOCs, that provided alarm monitoring services as of November 30, 1995, and because after the merger Ameritech, its operating companies, and SecurityLink all will continue to exist, the exemption under section 275(a)(2) "will continue to apply by its plain language."[1031] Applicants further argue that because SBC, once it acquires Ameritech, will become a "successor or assign" to Ameritech under section 153(4), it will be "a successor to Ameritech's interests," including its grandfathering rights to own SecurityLink.[1032] There is no dispute that Ameritech is entitled to its exempt status. For the reasons discussed below, we conclude that Ameritech does not lose its grandfathered status merely because of its acquisition by a BOC to whom the grandfathering exemption in section 275(a)(2) does not apply.

1027 *See* 47 U.S.C. § 153(1).

1028 *See* Letter from Steven A. Augustino, Counsel to the AICC, to Thomas Krattenmaker and Robert Atkinson, FCC, at 3, (April 13, 1999 *Ex Parte*).

1029 *See* AICC Oct. 15 Comments at 5. We note that the Michigan Consumer Federation argues that, in addition to being contrary to the intent of section 275, reading section 275(a)(2) to allow a transfer of grandfathering rights would "turn . . . on its head . . . the tradition of statutory 'grandfathering.'" Michigan Consumer Federation Oct. 15 Comments at 10.

1030 *See* SBC/Ameritech Nov. 16 Reply Comments at 89-90; *see also* Letter from Antoinette Cook Bush, Counsel for Ameritech, to Magalie Roman Salas, Secretary, Federal Communications Commission, CC Docket No. 98-41, at 5 (filed April 28) (Ameritech April 28, 1999 *Ex Parte*).

1031 *See* Ameritech April 28, *Ex Parte* at 2-3.

1032 *See* SBC/Ameritech Nov. 16 Reply Comments at 90; Ameritech April 28, 1999 Ex Parte at 3-4.

Statutory Analysis. Section 275 is silent on the issue of whether, when an alarm monitoring entity that is affiliated with a grandfathered BOC also becomes affiliated with a non-grandfathered BOC, the exempt status of the grandfathered BOC transfers to the non-grandfathered BOC. The legislative history does not provide illumination on the matter. We must, therefore, examine the statutory purpose and structure of section 275 to give meaning to the scope of the restriction and exception thereto.[1033] Using the traditional tools of statutory construction, we look to the purpose of the Act, and section 275 in particular, to devise a reasonable interpretation of the applicability of the exemption in section 275(a)(2).[1034]

Although the legislative history does not speak to the applicability of grandfathering rights in section 275(a)(2) to the situation at hand, the legislative history does indeed shed some light on Congress' concern in deciding to impose a 5-year moratorium on BOC provision of alarm monitoring services, and on Congress' general purpose in grandfathering existing BOC provision of alarm monitoring services.

Congress, in enacting section 275, appeared concerned about ensuring a "level playing field" between the BOCs and the alarm monitoring industry.[1035] The Judiciary Committee Report on the Antitrust Consent Decree Reform Act of 1995 would have allowed a BOC to apply with the Department of Justice to provide alarm monitoring services 3 years after the date of enactment. It included an exception, however, "'grandfathering' any alarm monitoring services being provided by a Bell operating company on or before the date of enactment."[1036] In reasoning about the need for grandfathering, the Report stated: "[I]t is the intent of this Committee that any such company be permitted to manage and conduct their alarm monitoring services as would any other industry participant, without arbitrary restrictions on

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[1033] *See AT&T Corp., et al. v. Ameritech Corp.,* File Nos. E-98-41, E-98-42,E-98-43, Memorandum Opinion and Order, 13 FCC Rcd 21438, para. 35 (1998) (stating same in interpreting the meaning of the term "provide" in section 271(a)), *aff'd sub nom. US WEST Communications, Inc. v. FCC,* 177 F.3d 1057 (D.C. Cir. 1999).

[1034] *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 843 n.9 (1984); *Bell Atlantic Telephone Companies v. FCC*, 131 F.3d 1044, 1047 (D.C. Cir. 1997).

[1035] *Enforcement of Section 275(a)(2) Order on Remand*, 13 FCC Rcd 19046, para. 14 and n. 54, *citing* H.R. Rep. No. 104-204, 104th Cong., 1st Sess., 87 (1995) ("[t]he state-of-art services provided by the alarm and telemessaging industries are dependent on the local telephone wires . . . [t]hese industries have had problems with the local telephone companies. On several occasions, the Federal Government has stepped in to ensure a level playing field. Thus, the concerns raised by the industry are real and not theoretical.") An earlier Senate report expresses similar concerns:

> [t]he services provided by the alarm industry are dependent upon the local telephone exchange monopoly. There is no practical reliable alternative. Given this fact and because this thriving small business industry would be highly susceptible to anticompetitive activities, the Committee believes that alarm companies would be placed in great jeopardy if the Bell Operating Companies were permitted to provide alarm monitoring services today.

See S. Rep. No. 103-367, 103rd Cong., 2nd Sess. at para. 7 (1994).

[1036] *See* H.R. Rep. No. 104-203, 104th Cong., 1st Sess., 28 (1995).

customer acquisition or growth of the business."[1037] It appears that Congress created this exception ultimately adopted in section 275(a)(2) in order not to burden companies currently providing alarm monitoring services by requiring them to sell that business.

We must construe the exception in a way that does not void it of any meaning. Engaging in this construction, we conclude that section 275(a)(2) is most reasonably interpreted not to require BOCs, such as the Ameritech BOCs, that were providing alarm monitoring services as of November 30, 1995 (and that are, therefore, explicitly permitted to continue providing such services) to sell their alarm monitoring affiliate and cease providing these services merely because that alarm monitoring affiliate also has become affiliated with non-exempt BOCs, such as the SBC BOCs. As Applicants point out, after the merger, Ameritech, notwithstanding that it will be a subsidiary of SBC, will continue to exist and the relationship among Ameritech, its BOCs, and SecurityLink will not change.[1038]

For the grandfathering provision in section 275(a)(2) to have any significance, Congress must have intended for the exemption in section 275(a)(2) to be a "permanent" one, as Applicants assert it is.[1039] We note that the Michigan Consumer Federation supports a requirement that Ameritech divest its alarm monitoring assets prior to merging with SBC, arguing that the nature of the grandfather provision is like a "snapshot," *i.e.,* we should only consider whether SBC was providing alarm monitoring services as of November 30, 1995.[1040] We believe, however, that a decision not to require Ameritech to divest its exempt alarm monitoring assets would preserve the "snapshot" nature of the section 275(a)(2) exemption as far as Ameritech is concerned. Forcing Ameritech to divest its alarm monitoring affiliate would effectively terminate the exemption for Ameritech.

As noted above, it appears that Congress created the exception in section 275(a)(2) in order not to burden companies providing alarm monitoring services by requiring them to sell their business. A requirement that Ameritech divest its alarm monitoring assets now would do just this. There would be no less of a burden now than Congress envisioned there would have been at the time it enacted the 1996 Act. Indeed, the burden may even be greater now, given that, in all likelihood, selling the business now would mean the loss of more customers than it would have three years ago.

Such an understanding of Congressional intent is supported by principles of statutory construction. In the instant case there is a potential conflict between sections 275(a)(1) and (a)(2) which we must resolve. Currently, SecurityLink is providing alarm monitoring services as an affiliate of the grandfathered Ameritech BOCs. After the merger, Security Link will also be an affiliate of the non-grandfathered SBC BOCs. Therefore, after the merger,

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1037 *See* H.R. Rep. No. 104-203 at 28.

1038 *See* Ameritech April 28 *Ex Parte* at 2-3.

1039 *See id.* at 2.

1040 *See* Michigan Consumer Federation Oct. 15 Comments at 10.

SecurityLink will be providing alarm monitoring services both as an affiliate of BOCs subject to the section 275(a)(2) exemption from the general prohibition against BOCs or their affiliates providing alarm monitoring services and as an affiliate of BOCs subject to the general prohibition in section 275(a)(1). Because neither the statute nor the legislative history sheds light on how this apparent conflict might be resolved, we must resolve the conflict in a way that makes sense of the statute as a whole.[1041] For the reasons discussed below, we determine that, as a matter of statutory construction, the more specific exemption in section 275(a)(2) should prevail over the more general prohibition in section 275(a)(1). We believe this outcome is consistent with Congress' apparent intent not to burden BOCs currently engaged in the provision of alarm monitoring services by forcing them to sell their business.

The ultimate issue in assessing AICC's and Applicants' competing interpretations of section 275 is whether the rule in section 275(a)(1) or the exception in section 275(a)(2) is the more specific and, therefore, the controlling provision. As the Supreme Court stated in *Morales v. Transworld Airlines*, "it is a commonplace of statutory construction that the specific governs the general."[1042] In interpreting this canon, the Supreme Court more recently has stated: "[t] his Court has understood the present canon ('the specific governs the general') as a warning against applying a general provision when doing so would undermine limitations created by a more specific provision."[1043] We agree with Applicants that section 275(a)(2) is the more specific and hence controlling provision.[1044] An exception necessarily is more specific than the general rule to which it applies.[1045] Section 275(a)(2) is plainly an exception: it provides that "[p]aragraph (1) does not prohibit or limit the provision, directly or through an affiliate, of alarm monitoring services by a [grandfathered] Bell operating company."[1046] In addition, the proximity of sections 275(a)(1) and (a)(2) in the statute further support application of the rule that the more specific governs the general.[1047] We see no compelling reason to conclude that, in these circumstances, the general rule is more specific than the exception.

1041 *Cf. Bell Atlantic Telephone Companies,* 131 F.3d at 1045 (noting "potentially contradictory" provisions of section 272 of the 1996 Act and affirming the FCC's interpretation of section 272).

1042 *See Morales v. Trans World Airlines, Inc*., 504 U.S. 374, 384 (1992); *Busic v. United States*, 446 U.S. 398, 406 (1980).

1043 *Varity Corp. v. Charles Howe*, 516 U.S. 489, 511 (1996).

1044 *See* Ameritech April 28, 1999 *Ex Parte* at 3.

1045 *See Security Pac. Nat'l Bank v. Resolution Trust Corp*., 63 F.3d 900, 904 (9th Cir.), *cert. denied*, 517 US 1103 (1995) ("Generally a more specific provision of an enactment prevails, in the sense of making an exception to, a more general provision), *citing* 2A Norman J. Singer, Sutherland Statutory Construction § 47.17 (5th ed. 1992) ("If the general words are given their full and natural meaning, they would include objects designated by the specific words, making the latter superfluous.").

1046 47 U.S.C. § 275(a)(2).

1047 *See HCSC-Laundry v. United States*, 450 U.S. 1, 6 (1981) ("[I]t is a basic principle of statutory construction that a specific statute . . . controls over a general provision . . . particularly when the two are interrelated and closely positioned . . . ").

AICC argues that "acceptance of SBC and Ameritech's 'successor or assign' argument would significantly expand the grandfathering provision of Section 275(a)(2)."[1048] Applicants respond by pointing out that section 275 does not impose size limitations on alarm monitoring entities or on the geographic area in which a grandfathered BOC or BOC affiliate may provide alarm monitoring services.[1049] In this regard, nothing in section 275's language suggests that Congress was concerned about in-region discrimination by the BOC controlling the bottleneck over the last mile: the general prohibition in section (a)(1) prohibits ownership of alarm monitoring services out-of-region as well as in-region, and the exception in section (a)(2) applies to in-region as well as out-of-region. In addition, as evidenced by section 271, Congress knew how to draft language to prevent BOCs from providing new in-region services, such as long distance, but did not follow this pattern in drafting section 275. Congress may have chosen to exclude most BOCs from the provision of alarm monitoring out of more general competitive concerns. As noted above, Congress, in enacting section 275, appeared concerned about ensuring a "level playing field" between the BOCs and the alarm monitoring industry.[1050] Adopting Applicants' interpretation of section 275 would not seem to undermine this purpose or indeed to affect the competitive balance at all. No more of the alarm monitoring industry would be affiliated with the BOCs than before.

It is under the rubric of specific statutory language trumping general statutory language that we address AICC's comparison of the instant situation with that in the Bell Atlantic/GTE merger. AICC argues that one reason we must require Ameritech to divest its alarm monitoring assets if it merges with SBC is to be consistent with the in-region interLATA issue in the pending Bell Atlantic/GTE license transfer application.[1051] AICC argues that the issues are similar because in both there is a transfer of obligations when an acquiring entity becomes a successor or assign of the acquired entity. AICC points out that Bell Atlantic and GTE recognize that GTE's freedom from restrictions on providing interLATA services does not extend to Bell Atlantic merely because Bell Atlantic would be acquiring GTE.[1052] If Bell Atlantic acquires GTE, Bell Atlantic would not succeed to GTE's interLATA authority, and Bell Atlantic's statutory restriction on entering the in-region interLATA market would govern the resulting combination.[1053] In AICC's view, just as GTE's freedom from in-region interLATA restrictions would not transfer to Bell Atlantic, and, therefore prevail over the restriction in section 271, the Ameritech BOCs' section 275(a)(2) grandfathered rights should not transfer to the SBC BOCs, and prevail over the restriction in section 275(a)(1).[1054] We disagree with AICC. Unlike section 275(a)(2) for alarm monitoring services, there is no specific exception in section 271 that trumps the general prohibition against BOCs providing in-region interLATA services.

1048 *See* AICC April 13 *Ex Parte* at 3.

1049 *See* Ameritech *April 28 Ex Parte* at 5.

1050 *Enforcement of Section 275(a)(2) Order on Remand*, 13 FCC Rcd 19046, para. 14 and n. 54.

1051 *See* AICC April 13 *Ex Parte* at 3-4.

1052 *See id*.

1053 *See id.*; Ameritech April 28 *Ex Parte* at 5-6.

1054 *See* AICC April 13 *Ex Parte* at 3-4.

Therefore, the rule of statutory construction addressing specific and general language in a statute does not even come into play in the Bell Atlantic/GTE scenario.

We reject AICC's argument that, in effect, the Commission already has determined that the rule of section 275(a)(1) is the more specific provision that takes precedence over the exception in section 275(a)(2). In support of this contention, AICC cites the Commission's statement that "[s]ection 275(a)(2)… has no applicability to non-grandfathered BOCs."[1055] Read in context, however, this statement does not support AICC's contention. The cited sentence concludes a discussion of what constitutes being "engage[d] in the provision of" alarm monitoring services for purposes of section 275(a)(1). In this context, the cited sentence indicates that section 275(a)(2)'s limitation on the steps that a grandfathered BOC may take to expand its business "has no applicability" in determining what constitutes "engag[ing] in provision of" alarm monitoring services under section 275(a)(1)'s prohibition. This portion of the Order has no bearing on whether section 275(a)(2) may otherwise be considered in determining whether a BOC is subject to the general prohibition on engaging in alarm monitoring or falls within the exception in section 275(a)(2).

3. AICC Motion on Smith Alarm

We note that AICC also filed a motion requesting that the Commission require Ameritech and SBC to submit to the Commission, and to make available to others pursuant to the protective order in this proceeding,[1056] all documents relating to their relationship with Smith Alarm Systems, Inc. (Smith Alarm), an unaffiliated, privately-held alarm monitoring service provider based in Dallas, TX, that, according to AICC is the 15th largest provider of alarm monitoring services, with annual revenues exceeding $32 million.[1057] AICC asserts that it:

> is concerned by published reports and recent statements by Ameritech executives which confirm that: Ameritech has paid a reported $6 million for an option to purchase Smith Alarm in March 2001, at a price which already has been negotiated; and Ameritech has agreed to bankroll Smith Alarm in pursuing additional alarm monitoring acquisitions.[1058]

AICC also asserts that it "believes that Smith Alarm has an explicit or implicit agreement to purchase any assets that Ameritech is required to divest as a result of FCC orders – assets which,

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[1055] *See* AICC Oct. 15 Comments at 4-5, citing *Implementation of the Telecommunications Act of 1996: Telemessaging, Electronic Publishing, and Alarm Monitoring Services,* Second Report and Order, 12 FCC Rcd 3824, 3843 at para. 33 (1997).

[1056] *See Order Adopting Protective Order*, DA 98-1952.

[1057] *See* AICC Motion to Require Full Disclosure of Relationship with Smith Alarm, (filed Dec. 3, 1998) (AICC Dec. 3 Motion) at 1, 4.

[1058] AICC Dec. 3 Motion at 3-4, Exh. A, Oloroso, "Rivals Sound Ameritech Alarm: A Ploy to Get Around a Ban on Security Firm Deals?," Crains Chicago Business, November 23, 1998, at 1.

as a result of Ameritech's option to purchase Smith Alarm, would soon return to Ameritech."[1059] AICC is concerned that, given these arrangements, even if the Commission were to require Ameritech to divest its alarm monitoring assets as a precondition to approval of the SBC/Ameritech merger, any divestiture would be a sham.[1060] AICC also argues that, in addition, "Ameritech's option/lending arrangement [with Smith Alarm] is itself a violation of Section 275 . . . by giving Ameritech 'financial control' over an unaffiliated alarm monitoring service entity."[1061]

Applicants, in addition to responding that AICC's allegations are incorrect, also argue that Ameritech's business relationship with Smith Alarm is not relevant to this merger proceeding.[1062] First, Applicants assert that Ameritech has not entered into a loan agreement with Smith Alarm, and that the article to which AICC refers does not state as much.[1063] Applicants also deny that Smith has agreed to purchase any assets which Ameritech is ordered to divest.[1064] Ameritech further argues that, consistent with previous Commission determinations, a merger proceeding is not the proper forum to address issues such as these which are related to effective enforcement of section 275.[1065] In support of their proposition, Applicants cite to, among other things, the *MCI WorldCom* Order.[1066] Applicants assert that "even when an argument may 'raise []serious concerns,' the Commission has refused 'to delay consummation of [a] merger in order to resolve them.'"[1067]

We need not, and cannot on this record, reach a conclusion on the merits of AICC's concern about Ameritech's involvement with Smith Alarm. We agree with Applicants that issues such as these are not appropriate for resolution in the context of a merger proceeding. We note that, for purposes of this merger proceeding, the result is the same – issues such as those relating to Ameritech's ties to Smith Alarm, or any other alarm monitoring entity, are better addressed in a separate proceeding, with a full record developed on the relationship with a particular alarm monitoring entity. As a result, therefore, we will state the obvious – that we expect, once SBC and Ameritech merge, that the combined entity will abide by the Communications Act, including section 275, and all Commission rules.

D. Cable Overbuild Issues

1059 AICC Dec. 3 Motion at 5.

1060 *Id.* at 5-6.

1061 *Id.* at 6-8.

1062 *See* SBC/Ameritech Opposition to Motion to Require Full Disclosure of Relationship with Smith Alarm (filed Dec. 16, 1998) (SBC/Ameritech Dec. 16 Opposition to Motion) at 1-3.

1063 *See* SBC/Ameritech Dec. 16 Opposition to Motion at 2-3.

1064 *See id.* at 3.

1065 *See id.* at 3-4.

1066 *See MCI/WorldCom Order*, 13 FCC Rcd at 18117-118, para. 161.

1067 SBC/Ameritech Dec. 16 Opposition to Motion at 3, quoting *WorldCom/MCI Order*, 13 FCC Rcd at 18117-118, para. 161.

A few commenters express concern that SBC may discontinue Ameritech's cable overbuilds operated by Ameritech New Media (ANM), thereby reducing competition in the video services market after the merger.[1068] Sprint also asserts that the proposed transfer is unlawful under section 652 of the Communications Act.[1069] We address these issues below.

Cable Overbuilds. Sprint notes that SBC has not addressed its plans with respect to Ameritech's significant in-region cable overbuilds.[1070] Sprint and others cite SBC's discontinuance of cable operations in the past as cause for concern that SBC will cease ANM's cable overbuilds in the Midwest.[1071] SBC responds that the merger will merely change the ultimate corporate parent of ANM from Ameritech to SBC, and will not affect the obligations of ANM to manage and operate its cable systems. Further, SBC states that it has made no plans regarding changes to ANM or its operations, and that it intends to evaluate ANM's ongoing performance once detailed post-merger planning can occur.[1072]

We conclude that the possible discontinuance of ANM's cable overbuilds does not raise issues cognizable under the antitrust laws or the Commission's public interest standards under sections 214(a) and 310(d).[1073] Further, speculation about a possible future decision by SBC to exit the cable business is not triggered by the structure of any ownership changes that will occur because of the transfer. Rather, the issue arises solely based on historical evidence that SBC may have different business plans than Ameritech. We decline to extend our public interest analysis to dictate the merged entity's cable business strategy.

Section 652. Sprint contends that section 652 bars SBC from acquiring, as part of the merger, any cable systems operated by Ameritech because SBC's telephone service area

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[1068] *See* Consumer Coalition Oct. 15 Comments at 16; NATOA Oct. 15 Comments at 1-2; Sprint Oct. 15 Petition at 42, 44.

[1069] Section 652 prohibits local exchange carriers from acquiring more than a 10% financial interest in cable operators that provide cable service within the LEC's telephone service area. 47 U.S.C. § 572.

[1070] An "overbuild" occurs when two or more wireline cable television systems directly compete for subscribers in a local video programming delivery market. *See In the Matter of Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, CS Docket 98-102, 13 FCC Rcd 24284, 24293 at para.14, n11, FCC 98-335, released Dec. 23, 1998 *(5th Annual Competition Report)*. Ameritech describes itself as the largest cable overbuilder in the country. Ameritech has acquired 87 cable franchises within its service regions in Illinois, Michigan, Ohio, and Wisconsin, with 72 of these cable franchises operational as of December 1, 1998. Ameritech serves 200,000 subscribers through these systems, and has the potential to pass more than 1.5 million homes through its 87 cable franchises. Ameritech was recently ranked 35th among the top 50 Multiple System Operators (MSO) in the country. *See* 5th Annual Competition Report at paras. 110, 111, 113; *see also* NCTA*, Top 50 MSOs,* Cable Television Developments, Summer 1999.

[1071] SBC sold PacTel's competitive video distribution service after the SBC/PacTel merger despite pre-merger assurances that it would not do so. *See* Sprint Oct. 15 Petition at 42, n62. Commenters also refer to SBC's discontinuance of its cable operations in the Washington D.C. area and in Richardson, Texas. *See* Consumer Coalition Oct. 15 Comments at 16; NATOA Oct. 15 Comments at 2; Sprint Oct. 15 Petition at 42, 44.

[1072] *See* SBC/Ameritech Nov. 16 Reply Comments at 87.

[1073] 47 U.S.C. §§ 214(a), 310(d).

will include Ameritech's telephone service area after the merger.[1074] Section 652 of the Communications Act, entitled "Prohibition on Buy Outs,"[1075] was enacted as part of the 1996 Act.[1076] Section 652(a) states that no "local exchange carrier or any affiliate of such carrier owned by, operated by, controlled by, or under common control with such carrier may purchase or otherwise acquire directly or indirectly more than a 10 percent financial interest, or any management interest, in any cable operator providing cable service within the local exchange carrier's telephone service area."[1077] Section 652(b) places a corresponding prohibition on cable operators.[1078]

We conclude that section 652 is not applicable to the proposed transaction.[1079] Ameritech, as an incumbent LEC, has begun overbuilding incumbent cable operators in its telephone service region. SBC, as the acquiring incumbent LEC, would not be acquiring the local cable operator in these areas, but simply would stand in Ameritech's shoes as an incumbent LEC offering competing service.[1080] Congress was not opposed to the provision of cable service by a LEC, Congress simply did not want that provision of service to occur by the acquisition of the local cable operator.[1081] If a LEC chooses to provide video programming on its own, the LEC is not prohibited. Likewise, a LEC is not prohibited from choosing to construct a new system to provide programming or services, even with the local cable operator.[1082] Ameritech has built its own cable systems. The merged entity will continue to own those same cable systems. SBC

1074 *See* Sprint Oct. 15 Petition at 44-46.

1075 47 U.S.C. § 572.

1076 At the same time, the 1996 Act repealed former section 613(b) which had prohibited a common carrier from providing video programming directly to subscribers in its telephone service area. 1996 Act, § 302(b)(1).

1077 47 U.S.C. § 572(a). The definition of "affiliate" for the purposes of this section was considered in *Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996*, 14 FCC Rcd 5296, 5335-36, at para. 91, FCC 99-57, released March 29, 1999 (*Cable Reform Order*). In the *Cable Reform Order*, the Commission decided to refer the consideration of the definition of "affiliate" to the pending proceeding in CS Docket 98-82. *See Implementation of the Cable Television Consumer Protection and Competition Act of 1992: Review of the Commission's Cable Attribution Rules,* Notice of Proposed Rulemaking, 13 FCC Rcd 12990 (1998).

1078 Section 652(b) states that "[n]o cable operator or affiliate that is owned by, operated by, controlled by, or under common ownership with such cable operator may purchase or otherwise acquire, directly or indirectly, more than a 10 percent financial interest, or any management interest, in any local exchange carrier providing telephone exchange service within such cable operator's franchise area." 47 U.S.C. § 572(b). The legislative history of section 652 indicates that Congress was concerned with "limiting acquisitions and prohibiting joint ventures between local exchange companies and cable operators that operate in the same market to provide video programming to subscribers or to provide telecommunications services in such market." S. Rep. No. 104-230, at 379 (1996).

1079 Further, forced divestiture would not be in the public interest because cable overbuilds help to promote video competition.

1080 *See* SBC/Ameritech Nov. 16 Reply Comments at 85-87.

1081 Congress' main concern in enacting section 652, as indicated by the legislative history, was to avoid having a LEC purchase a local cable operator and thus control both wires to consumers. S. Rep. No. 104-230, at 379 (1996).

1082 In enacting section 652, Congress repealed its prior prohibition against the provision of video programming by a common carrier and it chose not to prohibit LECs from building facilities to provide video programming even as joint ventures with local cable companies. S. Rep. No. 104-230, at 379 (1996).

acquires Ameritech's cable overbuilds as part of the very same transaction in which SBC's telephone service area expands to include Ameritech's local exchange carrier operations. Accordingly, SBC is not making any purchase or acquisition of a cable operator that would constitute a prohibited buyout under section 652.

E. Service Quality Issues

A number of commenters raise concerns regarding potential service quality problems resulting from the merger. These parties generally argue that service quality data and anecdotal evidence regarding Pacific Bell's performance in California demonstrate that mergers among large incumbent LECs adversely affect the public interest by hampering the delivery of service to consumers.[1083] SBC objects to these arguments, and provides a variety of information to demonstrate that its earlier merger with PacTel resulted in improved service quality.[1084]

As a general matter, service quality information consists of data regarding the provisioning of telecommunications services, the maintenance and repair of telecommunications equipment and facilities, the frequency of various types of network trouble, trunk blockage, switch outages, and the performance of the local loop.[1085] The Commission has traditionally relied on monitoring the quality of telecommunications service to ensure that consumers enjoy high quality, rapid communications.[1086] Through the annual Automated Reporting Management Information System ("ARMIS") filing requirements, price cap incumbent LECs submit data depicting the quality of service provided to their customers.[1087] In addition to the ARMIS reporting requirements, carriers report to the Commission information about the frequency and scope of network outages.[1088] Commenters point to formal and informal complaint rates to support their

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[1083] *See* CoreComm Oct. 15 Comments at 9-10; Consumer Coalition Oct. 15 Comments at 20-21; Focal Oct. 15 Comments at 6-8; Hyperion Oct. 15 Comments at 24-25; KMC Oct. 15 Comments at 20-21; Level 3 Oct. 15 Comments at 22-23. *See also* The California Office of Ratepayer Advocates, Public Utilities Commission (ORA) December 16 *Ex Parte* at 2; Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from Ameritech Corporation, Transferor, to SBC Communications. Inc. Transferee, CC Docket No. 98-141, En Banc Hearing, Prepared Statement of Regina Costa on Behalf of The Utility Reform Newtork (TURN) (December 14, 1998), ("*Costa Prepared Statement"*) at 2.

[1084] *See* SBC/Ameritech July 24 Application, Kahan Aff. at paras. 96-98 & Attach.'s D,E, & F; SBC/Ameritech Reply Comments, App. B at 26*;* SBC Feb. 23 *Ex Parte;* SBC April 14 *Ex Parte*; SBC May 3 *Ex Parte.*

[1085] *See e.g.* Bellcore, SR-2275, Notes on the Networks §§ 5.4, 7.11, 8.1-8.11, 10.1-10.2 (1997); *see also* R.F. Rey (Tech Ed.), Engineering and Operations in the Bell System 571-602, 663-84 (2nd ed. 1984).

[1086] *See LEC Price Cap Order* at paras. 332-364.

[1087] *See* Policy and Rules Concerning Rates for Dominant Carriers, *Memorandum Opinion and Order*, 6 FCC Rcd 2974 (Com. Car. Bur. 1991) ("*Service Quality Order*"), *recon.*, 6 FCC Rcd 7482 (Com. Car. Bur. 1991).

[1088] *See* Amendment of Part 63 of the Commission's Rules to Provide for Notification by Common Carriers of Service Disruptions, *Report and Order*, 7 FCC Rcd 2010 (1992) ("*Network Outage Order*"),

claims that PacTel's service deteriorated after its merger with SBC.[1089] SBC and Pacific Bell's ARMIS data suggest that there were some service quality problems in the PacTel regions following the SBC/PacTel merger. For example, Pacific Bell reported an average repair time of 38.8 hours for 1997, which is below its premerger performance of 29.3 hours, and its 1998 ARMIS submissions showed continued problems with repair time.[1090] In February 1999, SBC submitted additional information on the record, some of which further corroborated the service quality concerns,[1091] and some of which showed improvement.[1092]

We reject claims that we should prohibit these license transfers because of speculation that service quality in the Ameritech region will deteriorate as a result of the merger. Evidence in the record reveals that SBC has increased its commitments to improving service quality by hiring more employees, investing in infrastructure, and adopting enhanced operating practices.[1093] We conclude that these commitments and the further commitments proffered by SBC and Ameritech in supplementing the instant application sufficiently mitigate the service quality concerns raised in the record. The commitments proffered by SBC and Ameritech include several measures designed to prevent potential service quality degradation after the merger. Moreover, we anticipate that the quarterly reporting requirements, which are based on recommendations from

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Second Report and Order, 9 FCC Rcd 3911 (1994) ("*Network Outage Second Report and Order*"), *modified on recon.*, *Order on Reconsideration*, 10 FCC Rcd 11764 (1995) ("*Network Outage Report Recon*"). All communications common carriers are required to report network outages affecting 30,000 customers for 30 minutes or longer. *See* 47 C.F.R. § 63.100.

1089 Several commenters maintain that the level of service quality deteriorated following the SBC/PacTel merger and that customer complaints related to service quality substantially increased. The most serious problems reported involved delays in service installations and missed appointments. *See* Costa Prepared Statement at 2; Consumer Coalition Oct. 15 Comments at 20-21; CoreComm Newco Oct. 15 Comments at 9-10; Focal Oct. 15 Comments at 6-8; Hyperion Oct. 15 Comments at 24-25; KMC Oct. 15 Comments at 20-21; Level 3 Oct. 15 Comments at 22-23.

1090 *See* ARMIS 43-05 Service Quality Report, Table II, Row 0145. PacTel's 1998 reported repair times stood at 34.7 hours. Applicants state that PacBell recognizes that the informal complaint rate has increased since 1996, and is making efforts to reduce the number of complaints. Applicants further note that variations in complaint rates are due in large part to variables outside of PacBell's control, such as slamming by third parties and weather conditions. *See* SBC/Ameritech Nov. 16 Reply Comments, App. B at 26.

1091 *See* SBC Feb. 23 *Ex Parte* at 2. SBC's revised data showed increased repair time averages: (1) its 1997 performance showed a 40.7 hour average repair time in California, and (2) its 1998 performance showed a 43.6 hour repair time, almost double the RBOC average repair time of 22.8 hours for 1997.

1092 SBC's 1998 pre-filing data showed some improvement in installation times in 1998 over its 1997 performance. SBC's additional information also indicated that its switch performance improved after the merger. In 1996 and 1997, Pacific reported that 134 and 138 switches experienced outages respectively. In its pre-filing ARMIS data, Pacific indicates that only 106 switches experienced downtime during 1998. *See* SBC Feb. 23 *Ex Parte* at 3.

1093 *See* SBC Feb. 23 *Ex Parte.*

the states, will provide the Commission, state public service commissions, and the public with key service quality data in a timely manner. In this way, we expect that these conditions will assist the states in promoting a high quality telecommunications service by providing uniform information.[1094] Further, providing the service quality data will assist the Commission in taking appropriate action in the event we find that service quality suffers after the merger.

F. Public Interest Issues Involving SBC's Acquisition of the Ameritech Licenses and Lines

Section 310(d) of the Communications Act provides that no station license may be transferred, assigned, or disposed of in any manner except upon a finding by the Commission that the "public interest, convenience and necessity will be served thereby."[1095] Among the factors that the Commission considers in its public interest inquiry is whether the applicant for a license has the requisite "citizenship, character, financial, technical, and other qualifications."[1096] The Commission has previously determined that, in deciding character issues, it will consider certain forms of adjudicated, non-FCC related misconduct that includes: (1) felony convictions; (2) fraudulent misrepresentations to governmental units; and (3) violations of antitrust or other laws protecting competition.[1097] With respect to FCC-related conduct, the Commission has stated that it would treat any violation of any provision of the Act, or of the Commission's rules or polices, as predictive of an applicant's future truthfulness and reliability and, thus, as having a bearing on an applicant's character qualifications.[1098] In prior incumbent LEC merger orders, the

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1094 In March 1998, the National Association of Regulatory and Utility Commissioners ("NARUC") recommended that the Commission work closely with the states to promote high quality service. To do this, NARUC recommended implementing a service quality monitoring program. Specifically, NARUC recommended that we update our service quality monitoring program to account for technological and regulatory developments in the telecommunications industry, to collect service quality information on a more frequent basis than the current annual requirement, and to make service quality information easily accessible on the Internet. *See* NARUC Resolution No. 2, Resolution Regarding a Federal Service Quality Reporting Program, Winter Meeting, March 1998.

1095 47 U.S.C. § 310(d).

1096 *See SBC/SNET Order* 13 FCC Rcd 21305, at para *26.*

1097 *See Bell Atlantic/NYNEX Order* 12 FCC Rcd 20092-93, at para. 236.

1098 *Policy Regarding Character Qualifications in Broadcast Licensing,* 102 FCC 2d 1179, 1209-10 at para. 57 (1986) ("*Character Qualifications*"), modified, 5 FCC Rcd. 3252 (1990) ("*Character Qualifications Modification*"), *recon. granted in part*, 6 FCC Rcd 3448 (1991), *modified in part*, 7 FCC Rcd 6564, (1992) ("*Further Character Qualification Modification*"); *MCI Telecommunications Corp*., 3 FCC Rcd 509 (1998) (stating that character qualifications standards adopted in the broadcast context can provide guidance in the common carrier context). The Commission has also determined that allegations that an applicant has engaged in unreasonable or anticompetitive conduct is relevant to the Commission public interest analysis *SBC/SNET Order* 13 FCC Rcd 21306-07, at paras. 28-30.

Commission has used the Commission's character policy in the broadcast area as guidance in resolving similar questions in transfer of licenses proceedings.[1099]

A number of commenters maintain that SBC has a history of vigorously resisting competition in its existing monopoly markets.[1100] These commenters assert that approval of the merger will enable SBC to expand the reach of this corporate culture to the five-state Ameritech region. Other commenters maintain that SBC has engaged in "endless litigation and frivolous appeals" designed to delay state regulatory commission decisions.[1101] The record is replete with specific examples cited by commenters alleging anti-competitive conduct by SBC.[1102] For example, 800 Resale Carriers maintains that, in violation of the Commission's *800 Readyline Orders*, and sections 69.105 and 69.205 of the Commission's rules,[1103] SBC has refused to rebate overcharges imposed upon hundreds of resellers of 800 service dating back to 1986 and amounting to hundreds of millions of dollars.[1104] Further, the Paging and Messaging Alliance of PCIA states that, in violation of specific provisions of the Act, and the Commission's rules, SBC continues to charge CMRS carriers who provide paging services for SBC-originated traffic, and refuses to pay compensation to paging carriers for terminating calls originated by SBC.[1105]

1099 *See SBC/SNET Order* 13 FCC Rcd 21305 at para. 26; *Bell Atlantic/NYNEX Order* 12 FCC Rcd 20092-93, at para 236.

1100 *See* CFA/CU Oct. 15 Comments at 10; CoreComm Oct. 15 Comments at 11; Hyperion Oct. 15 Comments at 11; KMC Oct. 15 Comments at 4, 11; McLeodUSA Oct. 15 Comments at 9. Several commenters cite findings by the California and Texas Commissions concerning Pacific Bell's and SWBT's compliance with section 271 as evidence of SBC's lack of progress in opening its local markets to competition. *See* AT&T Oct. 15 Petition at 21; Focal Oct. 15 Comments at 4-6; Hyperion Oct. 15 Comments at 19-21; KMC Telecom Oct. 15 Comments at 15-16; MCI WorldCom Oct. 15 Comments at 7-8.

1101 Commenters generally cite SBC's numerous appeals of the Texas Commission Arbitration Award requiring SBC to tariff the rates for collocation and its lawsuit challenging the constitutionality of section 271. *See* AT&T Oct. 15 Petition at 14; *see also* CFA/CU Oct. 15 Comments at 14-15; Hyperion at 17; KMC Telecom Oct. 15 Comments at 12; Texas Public Utility Counsel Oct. 15 Comments at 4. Some commenters maintain that SBC's acquisition of PacTel has had a negative impact on competition and consumer service in California. *See* AT&T Oct. 15 Petition at 21, Blitch Aff. paras. 20-22; CFA/CU Oct. 15 Comments at 18; CoreComm Oct. 15 Comments at 7-9; Focal Oct. 15 Comments at 4; Hyperion Oct. 15 Comments at 22-24; MCI WorldCom Oct. 15 Comments at 23, Beach/Fauerbach Decl. at para. 20; KMC Oct. 15 Comments at 18-20. AT&T states, for example, that SBC backtracked from agreements between Pacific Bell and AT&T after the merger with SBC. AT&T Oct. 15 Petition at 20-21, Blitch Aff. at paras. 18-20. Other commenters state that, after the merger, Pacific Bell adopted SBC's policy of refusing to provide the billing and collection services necessary to implement a Calling Party Pays (CPP) program.

1102 *See* AT&T Oct. 15 Petition at 15,16, 21, MCI WorldCom Oct. 15 Comments, Beach/Fauerbach Aff. at 16. S*ee also* CFA/CU Oct. 15 Comments at 11,12,15-17; CoreComm Oct. 15 Comments at 7-9; e.spire Oct. 15 Comments, Kallenbach Aff. at 7-9,13,16,18; Focal Oct. 15 Comments at 4-5,5-6; Level 3 Oct. 15 Comments at 22; Hyperion Oct. 15 Comments at 21-22; KMC Oct. 15 Comments at 17; McLeodUSA Oct. 15 Comments at 10.

1103 *See* 800 Resale Carriers Oct. 15 Petition at 6.

1104 800 Resale Carriers Oct. 15 Petition at 6.

1105 PMA Oct. 15 Petition at 4-9. Several commenters also maintain that Ameritech has engaged in anticompetitive practices to forestall local competition in its region. *See* CoreComm Oct. 15 Comments at 4-5; MCI WorldCom Oct. 15 Comments at 4. AT&T submits that, when Ameritech is confronted with a binding and effective regulation or court decision that it strongly dislikes, "it simply defies the law," thereby forcing further litigation of the issue. Commenters cite Ameritech's conduct including shared transport, intraLATA toll dialing parity, reciprocal

SBC responds that many of the allegations cited in the record concern matters that are already being addressed by this Commission, a state regulatory agency, and/or a federal court.[1106] For example, allegations that: (1) Pacific Bell refuses to make available to paging companies interconnection terms and conditions that it has offered to others;[1107] (2) SBC fails to pay reciprocal compensation to Internet service providers and paging providers;[1108] (3) SBC's performance measures are inadequate;[1109] (4) Pacific Bell refuses to provide the billing and collection services necessary to implement CPP;[1110] and (5) SBC has used intellectual property claims to deny new entrants access to network elements,[1111] concern subjects that are currently being considered in other proceedings.

We conclude that none of the foregoing allegations provides a basis for finding that applicants lack the fitness to acquire licenses and authorizations currently held by Ameritech. The Commission has previously stated that typically it will not consider in merger proceedings "matters that are the subject of other proceedings before the Commission because the public interest would be better served by addressing the matter in the broader proceeding of general applicability."[1112] Although it may be true that certain conduct by Applicants had the effect of delaying and minimizing the emergence of competition in their respective local markets, none of these acts were found to be a violation of any law. Thus, we decline to consider them as part of our analysis of SBC's fitness to acquire licenses and authorizations currently held by Ameritech. We emphasize that, in reaching this conclusion, we are in no way condoning actions by an incumbent LEC that have the potential to impede the 1996 Act's goal of facilitating competition in all telecommunications markets. Indeed, as noted below, without SBC's voluntary commitments aimed at opening its local markets to competition, the public interest benefits of the proposed merger would not outweigh the significant public interest harms. We believe that SBC and Ameritech's commitments on issues such as collocation, OSS

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compensation, and combinations of unbundled network elements as evidence of Ameritech's recalcitrance in opening its local markets to competition. *See* AT&T Oct 15 Petition at 18; MCI WorldCom Oct. 15 Comments at 4-5, Beach/Fauerbach Decl. at paras. 9-10; Time Warner Oct. 15 Comments at 7.

[1106] SBC/Ameritech Nov. 16 Reply Comments, App. B at 1 (noting that the claims relating to interconnection for paging companies, performance measures, reciprocal compensation, and unbundled network elements are currently being addressed by this Commission, state public utility commissions, and/or federal courts).

[1107] *See, e.g., In re Requests for Clarification of the Commission's Rules Regarding Interconnection Between LECs and Paging Carriers*, CCB/CPD 97-24 (filed Apr. 25, 1997).

[1108] *See* App. B at 14 (noting that reciprocal compensation is being considered in CC Docket Nos. 96-98, 95-185).

[1109] *In re Performance Measurements and Reporting Requirements for Operations Support Systems, Interconnection, and Operator Services and Directory Assistance*, Notice of Proposed Rulemaking, 13 FCC Rcd. 12817 (1998).

[1110] *AirTouch Cellular v. Pacific Bell*, No. C.97-12-044 (Cal. PUC filed Dec. 23, 1997).

[1111] *See, e.g., In re Implementation of Infrastructure Sharing Provisions in the Telecommunications Act of 1996*, Report and Order, 12 FCC Rcd. 5470 (1997); *In re Petition of MCI for Declaratory Ruling That New Entrants Need Not Obtain Separate Licenses or Right-to-Use Agreements Before Purchasing Unbundled Network Elements*, CC Docket No. 96-98, CCBPol Docket No. 97-4 (filed Mar. 11, 1997).

[1112] *SBC/SNET Order*, 13 FCC Rcd at 21306, at para. 29.

enhancements, shared transport, and offering of UNEs, and performance measurements, should facilitate the development of competition in the combined SBC/Ameritech region.[1113]

Moreover, we also note that many allegations concerning SBC's conduct have been specifically rebutted by evidence proffered by Applicants. For example, SBC points out that the district court granted summary judgment in favor of SBC on AT&T's claim that SBC improperly influenced Ernst & Young to withdraw from providing consulting services for AT&T.[1114]

On the basis of the foregoing, there is no basis for concluding SBC's or Ameritech's behavior to date precludes our finding that the proposed license and lines transfers serve the public interest.

G. Requests for Evidentiary Hearing

Several commenters in this proceeding request that the Commission designate the proposed merger, or specific issues raised by the merger, for a trial-type evidentiary hearing before an administrative law judge to determine whether approval of the transfer of control request resulting from the proposed merger would serve the public interest.[1115]

Under the Communications Act, the Commission is required to hold an evidentiary hearing on transfer of control applications in certain circumstances.[1116] Parties challenging an application to transfer control by means of a petition to deny under section 309(d) must satisfy a two-step test.[1117] First, the petition to deny must set forth 'specific allegations of fact sufficient to show that . . . a grant of the application would be prima facie inconsistent with

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[1113] *See* SBC/Ameritech July 1 *Ex Parte*, App. A at 2, 4, 22, and 23.

[1114] SBC/Ameritech Nov. 16 Reply Comments, App. B at 21 (citing *Southwestern Bell Telephone Co. v. AT&T Communications of the Southwest, Inc.*, No. 98-CA-4627 (W.D. Tex. Nov. 11, 1998).

[1115] *See* CoreComm Oct. 15 Comments at iv, 22; Focal Oct. 15 Comments at ii, 16; Hyperion Oct. 15 Comments at 4, 30, 33, 40; McLeodUSA Oct. Comments at iii, 8,17. Certain commenters, however, do not specifically request an evidentiary hearing, but rather, public hearings where they can present testimony to the Commission. *See* Michigan Consumer Federation Oct. 15 Comments at 3; Parkview Areawide Seniors Oct. 15 Comments, Recommendations for Action at 2; South Austin Oct. 15 Comments, Recommendations for Action at 18. *See also* Letter of John C. Gamboa, Executive Director, The Greenlining Institute, to William Kennard, Chairman, FCC, CC Docket No. 98-141 (dated Oct. 27, 1998) (requesting regional public hearings). As indicated above, the Commission did hold a series of public forums at which representatives from these commenting parties could present their views on the proposed merger. *See supra* Section III.B.3 (Commission Review). Although Parkview Areawide Seniors specifically requests that the Commission review the merger's impact on universal service, Lifeline support and tariff offerings targeted towards low income families and senior citizens, Parkview does not assert particular facts that would warrant an evidentiary hearing, and the issues upon which Parkview expresses general concern are encompassed within our public interest determination.

[1116] *See* 47 U.S.C. § 309.

[1117] 47 U.S.C. § 309(d).

[the public interest];'.[1118] Second, the petition must present a 'substantial and material question of fact.'[1119] If the Commission concludes that the protesting party has met both prongs of the test, or if it cannot, for any reason, find that grant of the application would be consistent with the public interest, the Commission must formally designate the application for a hearing in accordance with section 309(e).[1120]

To satisfy the first prong of the test, a petitioning party must set forth allegations, supported by affidavit, that constitute "specific evidentiary facts, not ultimate conclusionary facts or mere general allegations . . .."[1121] The Commission determines whether a petitioner has met this threshold inquiry in a manner similar to a trial judge's consideration of a motion for directed verdict: "if all the supporting facts alleged in the affidavits were true, could a reasonable fact finder conclude that the ultimate fact in dispute had been established."[1122]

If the Commission determines that a petitioner has satisfied the threshold standard of alleging a *prima facie* inconsistency with the public interest, it must then proceed to the second phase of the inquiry and determine whether, "on the basis of the application, the pleadings filed, or other matters which [the Commission] may officially notice," the petitioner has presented a "substantial and material question of fact."[1123] If the Commission concludes that the "totality of the evidence arouses a sufficient doubt" as to whether grant of the application would serve the public interest, the Commission must designate the application for hearing pursuant to section 309(e).[1124]

In evaluating whether a petitioner has satisfied the two-part test established in section 309(d),[1125] the D.C. Circuit has indicated that where petitioners assert only "legal and economic conclusions concerning market structure, competitive effect, and the public interest," such assertions "manifestly do not" require a live hearing.[1126] Moreover, in deferring to the Commission's determination not to hold an evidentiary hearing in *United States v. FCC*, the Court stated that "to allow others to force the Commission to conduct further evidentiary inquiry

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[1118] 47 U.S.C. § 309(d)(1); *Gencom Inc. v. FCC*, 832 F.2d 171, 181 (D.C. Cir. 1987); *see Astroline Communications Co. v. FCC*, 857 F.2d 1556, 1562 (D.C. Cir. 1988).

[1119] 47 U.S.C. § 309(d)(2); *Gencom*, 832 F.2d at 181; *see Astroline*, 857 F.2d at 1562.

[1120] 47 U.S.C. § 309(e). *See also WorldCom/MCI Order*, 13 FCC Rcd at 18139-40, para. 202.

[1121] *United States v. FCC,* 652 F.2d 72, 89 (D.C. Cir.1980) (en banc) (*quoting Columbus Broadcasting Coalition v. FCC,* 505 F.2d 320, 323-24 (D.C. Circuit 1974)).

[1122] *Gencom,* 832 F.2d at 181.

[1123] 47 U.S.C. § 309(d)(2). *See also Gencom,* 832 F.2d at 181.

[1124] *Serafyn v. FCC,* No. 95-1385, 149 F.3d 1213, 1216 (D.C. Cir. 1998) (quoting *Citizens for Jazz on WRVR Inc. v. FCC,* 775 F.2d 392, 395 (D.C. Cir. 1985)). A court may disturb the Commission's decision to deny an evidentiary hearing only if, upon examination of the Commission's statement of reasons for denial, the court determines the Commission's decision to be arbitrary and capricious. *Astroline,* 857 F.2d at 1562.

[1125] 47 U.S.C. § 309(d).

[1126] *SBC Communications, Inc. v. FCC*, 56 F.3d at 1496-97 (D.C. Cir. 1995)(quoting *United States v. FCC,* 652 F.2d at 89-90) (affirming the Commission's decision in the *AT&T/McCaw Order* not to hold a full evidentiary hearing before approving the merger). *See AT&T/McCaw Order*, 9 FCC Rcd 5836 at 5927-28, paras. 172-174.

would be to arm interested parties with a potent instrument for delay."[1127] In that case, the D.C. Circuit deferred to the Commission's conclusion that the potential benefits of such a hearing would be outweighed by the delay and its attendant costs.[1128]

As an initial matter, we note that some parties seeking an evidentiary hearing in this merger proceeding did not satisfy the procedural requirements of section 309(d)(1).[1129] First, several commenters included their requests for evidentiary hearings in general comments regarding the Application, not in a petition to deny, as section 309(d)(1) requires.[1130] We further note that although JSM Telepage, Inc., Paging & Messaging Alliance, and Time Warner Telecom Corporation have properly filed petitions to deny, these parties failed to support any allegations by affidavits. Finally, some parties have met the procedural requirements of § 309(d)(1) including 800 Resellers Carrier, AT&T, Sprint, and the Texas Office of Public Utility Counsel. We note, however, that a number of issues raised in the record do not reflect disputes over material facts, but rather focus on issues concerning competitive impact of the merger and the public interest. These types of issues "manifestly do not" require a live hearing.[1131]

We conclude that none of the requests for evidentiary hearing has raised a substantial and material question of fact that would require an evidentiary hearing.[1132] The parties dispute the overall competitive impact of the merger and the ultimate public interest determination which, according to the D.C. Circuit, are claims that "manifestly do not" require a hearing.[1133] Certain parties have requested evidentiary hearings to evaluate the Applicants' intra-corporate motives, particularly with respect to Ameritech's plans to enter the St. Louis market.[1134] CoreComm, for example, argues that the Commission "is not bound by the applicants' self-serving statements with respect to their pre-merger competitive plans, but must inspect internal documents and subject the applicants to discovery and cross-examination."[1135] Hyperion argues that "the decision whether the acquiring firm is an actual potential competitor is, in the last analysis, an independent one to be made by the trial court [or the FCC in this case]

1127 *United States v. FCC,* 652 F.2d at 88-99.

1128 The court deferred to the Commission's judgment not to hold a hearing when the Commission had "on two different occasions, invited interested parties to submit whatever written material they wanted the Commission to consider, and on one occasion heard oral argument en banc on the antitrust issues of the SBS venture." The court further noted that, "all of the business parties to this case, and others, participated in the argument, and submitted materials were voluminous." *Id.* 652 F.2d at 92. Similarly, in this proceeding we note the voluminous record before us, including the numerous comments and ex parte filings we have received and the public forums we have conducted.

1129 *See* 47 U.S.C. § 309(d)(1).

1130 *See* 47 U.S.C. § 309(d)(1).

1131 *See SBC Communications,* 56 F.3d at 1496-97.

1132 *See* 47 U.S.C.§ 309(d).

1133 *See SBC Communications,* 56 F.3d at 1496.

1134 *See* CoreComm Oct. 15 Comments at iv; Focal Oct. 15 Comments at 15, 16; Hyperion Oct. 15 Comments at ii, 4, 33-34.

1135 CoreComm Oct. 15 Comments at iv.

on the basis of all relevant evidence properly weighed according to its credibility."[1136] To the extent that these requests are grounded in inferences and conclusions to be drawn from Ameritech's plans to enter the St. Louis market, rather than in concrete facts regarding such entry, we note that this is the ultimate task that is before the Commission in making its public interest determination. The Commission extensively investigated the documentary evidence regarding Ameritech's plans to enter the St. Louis market, and made inferences therefrom, in making its determination on the merger's potential public interest harms.[1137] Mere assertions from the commenters of corporate motives, without specific factual allegations, cannot require the grant of a petitioner's request for an evidentiary hearing.

We conclude that, even where parties rely on conflicting allegations regarding Ameritech's planned entry into St. Louis, these matters concern the competitive impact of the merger and are not, as asserted, substantial and material questions of fact. Accordingly, we find that no party has satisfied the two-step test set forth in section 309(d),[1138] both procedurally and substantively. The voluminous record before us in this proceeding, including the numerous comments and ex parte filings we have received, and the public forums we have conducted, has provided sufficient evidence to conclude no substantial and material question of fact has been raised and that grant of the Applicants' request, as supplemented with the conditions imposed in this Order, serves the public interest, convenience and necessity.[1139]

1136 Hyperion Oct. 15 Comments at 33.

1137 *See supra* Section V.B.2C)(1) (Mass Market). *See also* Appendix B (Summary of Confidential Information and Conclusions).

1138 47 U.S.C. § 309(d).

1139 *WorldCom/MCI Order,* 13 FCC Rcd at 18141, para. 205.

VII. ORDERING CLAUSES

Accordingly, having reviewed the applications and the record in this matter, IT IS ORDERED, pursuant to Sections 4(i) and (j), 214(a), 214(c), 309, and 310(d) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 214(a), 214(c), 309, 310(d), that the applications filed by SBC Communications and Ameritech Corporation in the above-captioned proceeding are GRANTED subject to the conditions stated below.

IT IS FURTHER ORDERED pursuant to Sections 4(i) and (j), 214(a), 214(c), 309, and 310(d) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 214(a), 214(c), 309, 310(d), that the above grant shall include authority for SBC to acquire control of:

a) any authorization issued to Ameritech's subsidiaries and affiliates during the Commission's consideration of the transfer of control applications and the period required for consummation of the transaction following approval;

b) construction permits held by licensees involved in this transfer that mature into licenses after closing and that may have been omitted from the transfer of control applications; and

c) applications that will have been filed by such licensees and that are pending at the time of consummation of the proposed transfer of control.[1140]

IT IS FURTHER ORDERED that as a condition of this grant SBC and Ameritech shall comply with the conditions set forth in Appendix C of this Order.

IT IS FURTHER ORDERED that, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), grant of the SBC/Ameritech Application is subject to the condition that, before or on the same day as the closing of the SBC/Ameritech transaction, Ameritech assign to GTE Ameritech's interest in cellular licensees in those areas identified herein where SBC's and Ameritech's interests currently overlap and that are the subject of the Wireless Telecommunications Bureau's *Memorandum Opinion and Order*, DA 99-1677, granting consent to such assignment.

IT IS FURTHER ORDERED that the Section 214 authorizations granted to Ameritech Communications, Inc. (ACI), File Nos. ITC-96-441 and ITC-97-289, are amended, effective upon consummation of Ameritech's merger with SBC, to apply dominant carrier regulation, as specified in Section 63.10 of the rules, to ACI's provision of the authorized services on the U.S.-South Africa route.

1140 *See AT&T/McCaw Order*, 9 FCC Rcd at 5909 n.300; *WorldCom/MCI Order*, 13 FCC Rcd at 18153.

IT IS FURTHER ORDERED that the following Section 214 authorizations granted to subsidiaries of SBC are amended to apply dominant carrier regulation, as specified in Section 63.10 of the rules, to their provision of the authorized services on the U.S.-Denmark route effective upon consummation of Ameritech's merger with SBC: Pacific Bell Communications, File No. ITC-96-689; SBC Global Communications, Inc., File Nos. ITC-96-692 & ITC-98-423-T/C; Southwestern Bell Communications Services, Inc., File No. ITC-97-770 (renumbered ITC-214-19971108-00689); SNET America, Inc., File No. 96-172; SNET Diversified Group, Inc., File No. 96-538.

IT IS FURTHER ORDERED that pursuant to Section 212 of the Communications Act and Part 62 of the Commission's rules, 47 C.F.R. Part 62, all of SBC's post-merger carrier subsidiaries will be "commonly owned carriers" as that term is defined in the Commission's rules.

IT IS FURTHER ORDERED that all motions to accept late-filed comments filed in CC Docket No. 98-141 are GRANTED.

IT IS FURTHER ORDERED that all petitions to deny the applications of SBC and Ameritech for transfer of control, and all requests to hold an evidentiary hearing, are DENIED for the reasons stated herein.

IT IS FURTHER ORDERED that SBC and Ameritech's request for a blanket exemption from any applicable cut-off rules in cases where Ameritech's subsidiaries or affiliates file amendments to pending Part 22, Part 24, Part 25, Part 90 and Part 101 or other applications to reflect the consummation of the proposed transfer of control is GRANTED.

IT IS FURTHER ORDERED that pursuant to section 1.103 of the Commission's rules, 47 C.F.R. § 1.103, this Memorandum Opinion and Order is effective upon adoption.

APPENDIX A: Public Record Filings

A. List of Commenters and Filings

The Commission received 7 petitions to deny the SBC-Ameritech application, 28 comments, and 9 reply comments, filed by the parties listed below.

Petitions to Deny Filed by: (7)

1. AT&T
2. JSM Tele-Page, Inc.
3. Paging and Messaging Alliance of PCIA
4. Sprint
5. Texas Public Utility Counsel
6. Time Warner
7. 800 Resale Carriers

Comments Filed by: (28)

1. Alarm Industry Communications Committee (AICC)
2. Consumer Coalition (Indiana Office of Utility Consumer Counselor, Missouri Office of the Public Counsel, Ohio Consumers' Counsel, Texas Office of the Public Utility Counsel, and The Utility Reform Network)
3. Consumer Federation of America/Consumers Union
4. CoreComm
5. Citizens for a Sound Economy
6. Communications Workers of America
7. Edgemont Neighborhood
8. e.spire
9. Focal
10. Hyperion
11. Indiana URC
12. Kansas Corp. Commission
13. Keep America Connected
14. KMC
15. Level 3
16. MCI WorldCom, Inc.
17. McLeod
18. Michigan Consumer Federation
19. Missouri PSC
20. National Assoc. of Telecommunications Officers and Advisors (NATOA)
21. Ohio PUC
22. Parkview Seniors

23. Pilgrim Telephone, Inc.
24. Shell Oil
25. South Austin Community
26. Supra Telecomm.
27. Telecommunications Resellers Association
28. Texas PUC

Reply Comments Filed by: (9)

1. Competition Policy Institute
2. Competitive Telecommunications Association
3. Consumer Federation of America, Consumers Union, and AARP
4. CoreComm
5. Consumer Coalition (Indiana Office of Utility Consumer Counselor, Missouri Office of the Public Counsel, Ohio Consumers' Counsel, Texas Office of the Public Utility Counsel, and The Utility Reform Network)
6. Level 3
7. MCI WorldCom, Inc.
8. Missouri PSC
9. SBC Communications Inc. and Ameritech Corporation

The Commission received 51 comments on the proposed conditions, and 14 reply comments, filed by the parties listed below.

Comments Filed by: (51)

1. AARP
2. AT&T Corp.
3. Alarm Industry Communications Committee
4. Allegiance Telecom, Inc.
5. American Public Power Association
6. Arkansas Public Service Commission
7. Association for Local Telecommunications Services (ALTS)
8. BellSouth Corporation and BellSouth Telecommunications, Inc.
9. CTC Communications Corp.
10. Cable & Wireless USA, Inc.
11. Campaign for Telecommunications Access and 51 Participating Commenters
12. Centennial Cellular Corp., CenturyTel Wireless, Inc., Thumb Cellular Limited Partnership and Trillium Cellular Corp. ("Joint Cellular Carriers")
13. Citizen Action of Illinois *et al.*
14. Communications Workers of America
15. Competitive Telecommunications Association (CompTel)
16. CoreComm Ltd.
17. Covad Communications Co.
18. Edgemont Neighborhood Coalition, Benton Foundation, Appalachian People's Action Coalition and Community Technology Institute (the Low Income Coalition)
19. Focal Communications Corp, Adelphia Business Solutions, and McLeodUSA Telecommunications Services, Inc.
20. GST Telecom Inc., KMC Telecom Inc., Logix Communications Corp. and RCN Telecom Services, Inc.
21. ICG Communications, Inc.
22. Indiana Utility Regulatory Commission (IURC)
23. Kansas Corporation Commission
24. Level 3 Communications, Inc.
25. MCI WorldCom, Inc.
26. Metromedia Fiber Network Services, Inc.
27. Mexican American Legal Defense and Educational Fund
28. National ALEC Association
29. National Council of La Raza
30. NEXTLINK Communications, Inc. and Advanced TelCom Group, Inc.
31. NorthPoint Communications, Inc.
32. Ntegrity Telecontent Services
33. Ohio Consumers' Counsel

34. Optel, Inc.
35. Paging Network, Inc.
36. Parkview Areawide Seniors, Inc.
37. Personal Communications Industry Association (PCIA)
38. Pilgrim Telephone, Inc.
39. Power-Finder West Communications, LLC
40. Public Utilities Commission of Ohio (PUCO)
41. Rhythms NetConnections Inc.
42. Sprint Communications Company L.P.
43. TDS Metrocom
44. Telecommunications Resellers Associations (TRA)
45. Texas Office of Public Utility Counsel
46. Texas Public Utility Commission
47. Texas Rural Municipal Electric Utilities
48. Time Warner Telecom
49. Williams Communications, Inc.
50. Winstar Communications, Inc. and Teligent, Inc.
51. Wisconsin Public Service Commission

Reply Comments Filed by: (14)

1. Cablevision Lightpath, Inc.
2. California Public Utilities Commission
3. CTC Communications Corporation
4. Excel Telecommunications, Inc.
5. Focal Communications Corporation, Adelphia Business Solutions, & McLeod USA Telecommunications Services, Inc.
6. GST Telecom Inc., KMC Telecom Inc., Logix Communications Corporation & RCN Telecom Services Inc.
7. Level 3 Communications, Inc.
8. MCI WorldCom, Inc.
9. Michigan Public Service Commission (MPSC)
10. NEXTLINK Communications, Inc. and Advanced Telecom Group, Inc.
11. Rhythms Netconnections, Inc.
12. SBC Communications Inc. and Ameritech
13. Sprint Communications Company L.P.
14. Texas Rural Municipal Electric Utilities

B. List of Participants in Public Forum on Merger Conditions

1. George Herrera
   U.S. Hispanic Chamber of Commerce

2. Mark Rosenblum
   AT&T

3. Steve Augustino
   Alarm Industry Communications Committee

4. Leon M. Kestenbaum
   Sprint

5. Gerry Salemme
   NextLink

6. Jonathan Sallet
   MCI

7. David Newburger
   Campaign for Telecommunications Access

8. Max J. Starkloff

9. Mark Buechele
   Supra Telecom and Information Systems

10. H. Russell Frisby, Jr.
    CompTel

11. Brian R. Moir
    International Communications Association

12. Lynn Dangtu
    Vietnamese-American Chamber of Commerce
    of Southern California

13. Michael Metzler
    Santa Ana Chamber of Commerce

14. Wendy Yoo
    Korean American Federation of Orange County

15. Stan Oftelie
    Orange County Business Council

16. Dolores Davis Penn
    Missouri Center for Minority Health and Aging

17. Ralph Pugh
    Hispanic Chamber of Commerce of Orange County, California

18. Bea Bacon
    National Silver Haired Congress

19. Roy Neel
    USTA

20. Mark Cooper
    Consumer Federation of America

21. Judy McCollum

22. Ron Binz
    Competition Policy Institute

23. Eric Branfman
    CoreComm

24. Doug Lawrence

25. Robert McCauslan
    Allegiance Telecom

26. Dahlia Hayles
    Rainbow/PUSH Coalition

27. Jim Gray
    Oklahoma Indian Times

28. Lee Ruck
    NATOA

29. Barbara Easterling
    Communications Workers of America

30. Angela Ledford
    Keep America Connected

31. Jeff Smith

32. Patricia T. Heudel
    National Assocation of Commissions for Women

33. Mike C. Turpen

34. Dennis Thomas

35. Neil F. Hartigan

36. David Kumar Singh
    IWAYNet Communications

37. Dr. Robert G. Harris

38. Howard Bedlin
    National Council on Aging

39. Tom Koutsky
    Covad

40. Rev. Edward E. Fields

41. Robert Crandall
    Bell Atlantic

APPENDIX B: Summary of Confidential Information and Conclusions

[TEXT NOT AVAILABLE IN PUBLICLY RELEASED VERSION]

This Appendix summarizes documents produced by the Applicants and the conclusions we draw from those documents insofar as they relate to each Applicant's plans to compete outside its home region, and in particular within each other's region. We also discuss additional information regarding the Applicants' showing of public interest benefits.

A. Each Applicant's Plans to Compete Outside Its Home Region

1. Ameritech's Out-of-Region Plans

2. SBC's Out-of-Region Plans

3. Conclusion

B. Additional Information Pertaining to the Analysis of Potential Public Benefits

APPENDIX C: Conditions