

- Problem has gone on for over a year: Ameritech hasn't fixed it, and can't say when or if it will be fixed. Do they care?

The list can go on and on. New problems with Ameritech Michigan continue to abound. In LDMI's filing on November 5, 2002, LDMI pointed out that over half of the UNE-P billing items billed to LDMI by Ameritech Michigan, currently and back from the beginning of the year – are billed wrong (not surprisingly, they are billed at a higher rate than the correct rate). Neither Ernst & Young nor KPMG/BearingPoint seemed to be aware of the issue.

Now, beginning with a bill dated September 18, 2002, Ameritech Michigan has begun billing LDMI for UNE-P lines located in Wisconsin. It is improper for a Michigan UNE-P bill to contain billing for Wisconsin. It is even more improper for Ameritech to be billing this to LDMI, since LDMI has no UNE-P lines in the state of Wisconsin.

Nor is LDMI the only company facing service quality issues. For example, an analysis of data compiled by the Federal Communications Commission shows that the service quality to customers by Ameritech is the worst in the country, according to FCC data. The comparison is Ameritech Michigan, contrasted with the other major Bell companies, BellSouth, Qwest, Southwestern Bell, and Verizon. The Commission should not approve Ameritech Michigan getting into the long distance market until the problems have been fixed.

According to almost any statistic to be checked, the service quality of Ameritech Michigan is far below that of the other regional Bell companies in the nation. Approval of long distance entry is the reward SBC is to get for demonstrating it has fixed its problems. If SBC is given the reward before all these service problems have been resolved, Michigan will never get the service quality it deserves. As we all know, since SBC acquired Ameritech in 1999, SBC have cut investment, fired employees, and things have only gone from bad to worse.

Each year, the Federal Communications Commission compiles service data for Ameritech Michigan and all the other Bell companies in the U.S. The most recent data is for the calendar year 2001. The data is available at the FCC's website, www.fcc.gov. One key measure is the length of time to fix a repair problem, the "Initial Out-Of-Service Repair Interval". The FCC's results for 2001 show Ameritech Michigan at an average of 36.1 hours, as compared to 22.7 hours for all of Ameritech, 19.2 hours for BellSouth, 14.1 for Qwest, 23.6 hours for SBC's Southwestern Bell, and 21.2 hours for Verizon.

Often, problems don't seem to get fixed the first time around. So the FCC also measures "Repeat Out-Of-Service Report Intervals". For 2001, Ameritech Michigan was at 37.1 hours, versus 23.5 hours for all of Ameritech, 20.8 BellSouth, 15.8 Qwest, 24.3 Southwestern Bell, and 23.2 hours average at Verizon.

The length of time for a Bell company to complete phone installations is also very important. The FCC data for the most recent year, 2001, show Ameritech Michigan at 2.0 days average, compared to 1.2 days for BellSouth, 0.8 days for Qwest, 1.0 days for SBC's Southwestern Bell, and 1.2 days average for Verizon.

The FCC also measures State Complaints against Bell companies by customers. To make the results comparative, they measure State Complaints per 1 million lines. For the most recent year, 2001, Ameritech Michigan had 425 complaints per million lines, as contrasted with 232 for BellSouth, 228 for Qwest, 181 for all of SBC, and 185 for Verizon. Ameritech Michigan had over twice the complaint average as for the Bell companies overall: the overall Bell number was 195 complaints per 1 million lines.

The FCC also conducts an annual Customer Satisfaction Survey, measuring customer satisfaction regarding installation, repair, and customer interactions with the telephone

company's business office personnel. This survey is done for each of residence, small business, and large business customers. For the most recent study year, 2001, the FCC's Customer Satisfaction Survey, of Residence customers regarding installation performance, showed 14.35% of Ameritech Michigan customers dissatisfied, as compared to 11.15% at BellSouth, 6.4% at Qwest, 7.99% at Southwestern Bell, and 4.81% at Verizon.

As to how residential customers for 2001 felt about telephone company repair performance, 19.22% of Ameritech Michigan customers were dissatisfied, contrasted with 17.59% dissatisfied at BellSouth, 10.00% at Qwest, 11.67% at Southwestern Bell, and 13.44% at Verizon. Concerning residence customers and the business office, 15.65% of Ameritech Michigan customers were dissatisfied, versus BellSouth at 13.2%, Qwest at 3.2%, Southwestern Bell at 8.4%, and Verizon at 6.71%.

What about small business customers? As to installations, 14.68% of Ameritech Michigan users were unhappy, versus 9.36% BellSouth, 14.7% Qwest, 10.38% Southwestern Bell, and 9.8% Verizon. On repairs, 15.72% of Ameritech Michigan were dissatisfied, versus 9.91% BellSouth, 9.8% Qwest, 8.42% Southwestern Bell, and 11.38% Verizon. Business office: 15.72% Ameritech Michigan, 12.95% BellSouth, 6.7% Qwest, 9.38% Southwestern Bell, and 9.74% Verizon.

For large business customers and 2001, the FCC shows a similar pattern. Installations, 17.86% Ameritech Michigan dissatisfied, contrasted with 7.99% BellSouth, 10.5% Qwest, 6.75% Southwestern Bell, and 5.62% Verizon. Repairs: 18.31% Ameritech Michigan, 6.97% BellSouth, 9.9% Qwest, 6.21% Southwestern Bell, and 6.41% Verizon.

Michigan customers know well that they continue to get lousy service from Ameritech Michigan, and now we have the numbers that prove it. Yet Ameritech Michigan has the highest

profits in the country. A carrot and stick approach is needed, not just a carrot. The Commission needs to hold Ameritech's feet to the fire. Ameritech shouldn't get the 'carrot' of long distance entry until it has given to all of us the decent service we deserve.

V. SBC'S APPLICATION CANNOT BE ENDORSED BY THE COMMISSION UNTIL IT COMPLIES INITIALLY, AND UNTIL A FINAL PERFORMANCE COMPLIANCE PLAN THAT CREATES PROPER AND MEANINGFUL INCENTIVES FOR SBC TO MEET ITS POST-INTERLATA MARKET ENTRY PERFORMANCE OBLIGATIONS IS ADOPTED.

SBC will never have more incentive to comply with requirements than it does now. If SBC obtains 271 authority, whatever incentive exists today will be gone, and the likelihood of backsliding will be great absent clear and powerful replacement incentives. The Commission recognized this when, in its September 16, 2002 order, it allowed SBC to file a compliance plan. SBC proceeded to file a compliance plan on October 30, 2002, but it might as well have no plan as to implement the proposed one. Any favorable recommendation for the incumbent's interLATA market entry in the absence of a meaningful, Commission-adopted compliance plan that has been developed with the benefit of industry evaluation and comment, sets the stage for SBC to "backslide" on its obligations to competitors. Nothing could guarantee backsliding more than would adoption of SBC's proposal.

Ample evidence of SBC's propensity to backslide on its obligations already exists. Information compiled by Voices for Choices (www.voicesforchoices.com) shows that SBC has amassed non-performance penalties in excess of \$1 Billion since 1996 region wide.¹⁸ More than \$2 Million of those penalties have been assessed by this Commission since July 2002 alone.

¹⁸ <http://www.voicesforchoices.com/1091/wrapper.jsp?PID=1091-152>.

Moreover, the experience with the limited performance measures remedy plan adopted in Case No. U-11830 indicates that SBC is content to pay the penalties rather than improve performance.

The level of SBC's non-performance penalties is of such significance, and their recurrence so frequent, that SBC's on-going compliance is rendered suspect. The absence of an established compliance plan that accurately tests SBC's performance claims and imposes meaningful enforcement remedies for substantial performance with respect to the incumbent's wholesale subscribers remains an integral component to any 271 endorsement. In the absence of an adopted plan, endorsement of SBC's interLATA market entry leaves a gaping hole in SBC's compliance record and brings into question the very foundation of any Commission endorsement.

The FCC has frequently reflected on the importance of a state-adopted performance plan as a cornerstone for regional Bell operating company interLATA market entry approval. Of SBC's Texas interLATA market entry proceeding, the FCC noted

As part of its section 271 review, the Texas Commission also developed clearly defined performance measurements and standards, *and adopted a performance remedy plan* to discourage backsliding. In a continuing effort to refine and monitor performance measurements, the Texas Commission has a six month review process in place [emphasis supplied].¹⁹

Of SBC's Kansas and Oklahoma 271 applications, the FCC again stated,

Both states adopted a broad range of clearly defined performance measures and standards, and a Performance Assurance Plan designed to create a financial incentive for post-entry compliance with section 271.²⁰

¹⁹ *In the Matter of Application by SBC Communications Inc., Southwestern Bell Telephone Company, And Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance Pursuant to Section 271 of the Telecommunications Act of 1996 To Provide In-Region, InterLATA Services In Texas*, CC Docket No. 00-65, Memorandum Opinion and Order (rel. June 30, 2000) at para 3.

²⁰ *In the Matter of Joint Application by SBC Communications Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern*

This is a sentiment reflected in the FCC's Arkansas and Missouri 271 orders

The Arkansas and Missouri Commissions conducted extensive proceedings concerning Southwestern Bell's section 271 compliance ...the Commissions each *adopted* a broad range of performance measures and standards as well as Performance Remedy Plans designed to create a financial incentive for post-entry compliance with section 271 [emphasis supplied]."²¹

SBC's proposed plan is far from being an effective incentive for SBC to meet long-term performance obligations. It is certainly not in a form that is ready for Commission adoption. First, the plan itself is premature. As the BearingPoint report makes clear, SBC has not completed the test. It is inconceivable that an effective continuing compliance plan can be designed when SBC has not demonstrated current compliance. Moreover, the proposed compliance plan is admittedly incomplete. As Ameritech indicates it provides absolutely no compliance plans for the exceptions filed by BearingPoint in the OSS testing or for performance measures. The Commission cannot even consider an incomplete plan. It is more appropriate to concentrate on bringing SBC into present compliance by letting the BearingPoint testing play out until SBC passes the test, as SBC itself agreed to when it agreed to the Master Test Plan.

Second, SBC has again decided to change umpires. Just as SBC has attempted to sidestep the process with the E&Y report, SBC now seeks to shift the compliance auditing to HP. There is a pattern here. SBC is unsatisfied with BearingPoint because BearingPoint tests accurately. SBC does not want to do what it takes to pass the tests; it wants 271 authorization

Bell Long Distance for Provision of In-Region, InterLATA Services in Kansas and Oklahoma, CC Docket No. 00-217, Memorandum Opinion and Order (rel. January 21, 2001) at para 3.

²¹ *In the Matter of Joint Application by SBC Communications, Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc., d/b/a Southwestern Bell Long Distance Pursuant to Section 271 of the Telecommunications Act of 1996 To Provide In-Region, InterLATA Services in Arkansas and Missouri CC Docket No. 01-94, Memorandum Opinion and Order, (rel. November 16, 2001), para. 4.*

now and wants to find a more pliable auditor so it can continue to thwart competition at its own will.

Third, SBC attempts to freeze the CLECs like LDMI out of the process. One reason BearingPoint has enforced stringent testing on SBC is that the CLECs have been involved to assure that BearingPoint knows of the OSS deficiencies. By keeping CLECs out of the process of developing and implementing the compliance plan, SBC again hopes to have an easier time with compliance.

Finally, it must be noted that this Commission itself has recognized that SBC cannot be trusted. In its order in this docket of November 7, 2002, the Commission recognized that SBC could not be allowed to withdraw services or to withdraw tariffs unilaterally. The Commission instead installed a process for 30-day notice to all CLECs, with a provision for CLECs to file objections, and with the Commission able to commence a case if it deems it proper.²² Now, SBC proposes a compliance plan with no CLEC input. Consistency alone requires rejection of the proposed compliance plan.

SBC's proposed compliance plan is rife with exceptions and limitations which, in combination, dilute its intended effectiveness and offer little assurance of SBC's long-term performance. SBC's proposed compliance plan undermines the Commission's ability to obtain a clear and complete picture of the incumbent's current level of performance and conclude that that the proposed anti-backsliding mechanism will provide a set of incentives that are correctly targeted – and of sufficient magnitude – to provide a reasonable level of confidence that SBC will provide nondiscriminatory access on a going forward basis.

²² Case No. U-12320, Order of November 7, 2002, p. 7.

SBC's 271 application cannot be endorsed unless the Commission first determines full compliance NOW and adopts a compliance that 1) accurately measures SBC's current and future performance in Michigan, 2) creates meaningful incentives for SBC's long-term compliance, 3) independently verifies SBC's true compliance with its market opening obligations, and 4) has the benefit of comment from SBC's wholesale subscribers, who will substantially be impacted by any final plan. Anything less is a prescription for backsliding.

VI. PERMANENT TELRIC-BASED UNBUNDLED NETWORK ELEMENT RATES MUST BE ESTABLISHED AND ADOPTED BY SBC, WITHOUT SUBSEQUENT CHALLENGE, BEFORE SBC CAN BE FOUND COMPLIANT WITH CHECKLIST ITEM 2.

Under the express statutory language of Sections 251 and 271 of the Act, the existence of final forward looking, cost-based UNE pricing is a critical component in any Section 271 compliance analysis.²³ While "permanent" UNE rates have been established in Michigan, SBC has lost no time in seeking significant increases in those rates, rates that SBC now proposes must be established at more than double its retail rates.²⁴ Although the incumbent's Application has been dismissed with prejudice,²⁵ SBC's challenges to current UNE pricing, and the potential result of such challenges, create an untenable position for competitors and further brings SBC's *present* and ongoing compliance with the Act into grave question.

²³ See *In the Matter of Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in the State New York, Memorandum Opinion and Order*, CC Docket No. 99-295, FCC 99-404 (Dec. 22, 1999) at para. 237.

²⁴ See, SBC Application filed August 30, 2002, in MPSC Case No. U-13518, and MPSC Orders, Case Nos. U-13518 and U-13531, September 16, 2002.

²⁵ *Id.*

SBC now claims, in a seeming revelation, that it is selling its local telephone lines to competitors on a below-cost basis.²⁶ This revelation comes on the heels of a lengthy proceeding in which SBC's own data were evaluated by the Commission when establishing UNE rates pursuant to FCC costing methodology. Interestingly, SBC and other incumbents previously unsuccessfully appealed the pricing methodology to the FCC and subsequently to the courts, claiming the FCC's pricing methodology resulted in below-cost pricing. In May 2002, the U.S. Supreme Court responded that the RBOC claims were nonsense. The Supreme Court said comparisons offered by the Bells were "spurious," that their numbers were "clearly wrong," and RBOC arguments were "patently misstated".²⁷ The Supreme Court stressed that if the Bell pricing plans were adopted, it would result in "higher retail prices consumers would have to pay", and "fixed-cost schemes that preserve home-field advantages for the [Bells]."

To ensure that meaningful competition indeed develops in Michigan, and for SBC to be found compliant with the Act's public interest standard, the Commission must find that, in addition to meeting its market opening obligations, SBC has adopted forward looking TELRIC-compliant rates. Such rates must be within a range that reasonably permits UNE-based competition, particularly in the residential market.²⁸ It is crucial that permanent UNE rates avoid the "price squeeze" concerns raised in the U.S. Court of Appeals for the District of Columbia Circuit ruling on the Kansas and Oklahoma Section 271 cases.²⁹

²⁶ See The Detroit News, Editorial, October 3, 2002.

²⁷ *Verizon et al v. FCC*, 122 S.Ct. 1646 (2002).

²⁸ See *Sprint Communications Co, L.P. v. FCC*, 274 F.3d 549, 555 (D.C. Cir. 2002).

²⁹ *Id.* at 554-55. Those concerns focused on state-approved UNE rates, relied upon by the FCC, that were so high that competitors faced a price squeeze, *i.e.*, competitors could not buy UNEs from SBC and compete in the residential market.

SBC's actions in Michigan belie its reliance on the Commission's TELRIC-compliant rates to demonstrate compliance with checklist item 2. While SBC relies upon the Commission's establishment of final UNE rates, there is all assurance that SBC will aggressively pursue challenges to those rates in light of its recent actions. SBC now claims that its wholesale prices to competitors are below cost and causing it huge losses. "[SBC] blames these losses on the Michigan Public Service Commission (PSC) for forcing it to sell the use of its local telephone lines below cost to competitors"³⁰ SBC has proposed to raise the monthly wholesale price of a local UNE line nearly two and a half times from \$14.00 to \$34.00 per line.³¹ Yet, SBC sells retail local phone service to customers for approximately \$14-\$15/month. SBC's "cost" proposal would result in a *wholesale* price that would be more than twice the *retail* price. Through its UNE hike proposal, SBC is engaging in an illegal price squeeze, and price discrimination (higher prices to competitors than it charges to its own customers) which is a clearly anticompetitive and illegal act.³² Indeed, SBC's behavior on pricing is not just a "price squeeze," but an outright economic preclusion of competition – the antithesis of the Act's expressed pro-competitive intent.³³

³⁰ The Detroit News, Editorial, October 3, 2002.

³¹ Detroit Free Press, "SBC seeks to raise line fees", Jeff Bennett, 8/31/02.

³² See *United States v. AT&T*, 552 F. Supp. 131 (D.D.C. 1982), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983).

³³ Monthly rates for the most common type of loops, 2 wire analog, would increase by 187.7%, 215.7% and 128.5% in zones A, B, and C, respectively. Monthly rates for ULS-ST tandem switching, per minute of use, would go up by 1,043.5%, and for ULS-ST SS7 signaling transport, per message, by 1,413.1%. UNE-P migration charges for simple electronic orders would rise by 2,425.7%; for simple manual orders, by 12,685.7%, for complex electronic orders by 3,765.7%, and for complex manual orders by 18,168.6%. Loop nonrecurring charges for service order-initial would rise 811.7%, for loop connection, by 327.4%, and for service order disconnect, by 1,397.4%. See prefiled testimony of Michael Silver, Case No. U-13518.

In conjunction with the Commission's dismissal of SBC's August 30, 2002 UNE rate application, the Commission opened Case No. U-13531. This proceeding is intended to consider subsequent SBC's challenges to existing UNE cost structures, thus opening a door to significant changes in UNE rates that could ultimately, if adopted as proposed, economically preclude competitors from effectively utilizing UNEs to serve competitors, and drive companies such as LDMI out of the local market. That this proceeding has now been opened, the "permanence" of SBC's UNE rates remains in question, and SBC cannot be found in compliance with Checklist item 2.

Meanwhile, the threat that SBC Ameritech is holding over the head of the Commission, the Governor, the Attorney General, and others, is that if Michigan doesn't play it SBC's way, the punishment will be huge job cuts. SBC Chairman Whitacre told the Wall Street Journal that "job cuts will be the heaviest in the Midwest, where he said the wholesale prices that SBC must offer to competitors are the lowest".³⁴ The threat of punishment to Michigan could not be more clear, based on current UNE-P prices in our state. Commissioner Robert Nelson has also publicly acknowledged the anticompetitive actions of SBC Ameritech in a recent statement: They "only chose to commence their assault on UNE-P after it began to erode their monopolistic profit levels and only after the U.S. Supreme Court upheld the pricing model underlying UNE-P. They were willing to live with the 1996 Act until it produced the result they have sought to avoid since its passage – competition."³⁵

The incumbent's demonstrated intent to challenge Commission-established pricing methodologies and costs, particularly given that the Commission itself has now opened a new

³⁴ Wall Street Journal, Shawn Young, SBC to Lay Off 11,000 More Workers, September 27, 2002.

³⁵ The accompanying statement of Commissioner Robert Nelson, TR Daily, September 29, 2002.

pricing proceeding, means that there are no long term established UNE rates on which competitors may rely. At a minimum, no Commission endorsement of SBC's interLATA market entry should be considered until SBC's cost challenges have once and for all been concluded and not subsequently challenged. Otherwise, the Commission's decision in this proceeding will be based on competition that will no longer exist if SBC's cost changes are adopted.

VII. A GRANT OF SBC'S APPLICATION TODAY WOULD DISSERVE THE PUBLIC INTEREST

Section 271(d)(3)(C) of the Act directs that the FCC shall not give Section 271 authorization unless the requested authorization is consistent with the "public interest, convenience and necessity."³⁶ This public interest standard was intended to mirror the broad public interest authority the FCC had been given in other areas.³⁷ The legislative history of the 1996 Act reflects Congress' intent that the FCC "in evaluating section 271 applications ... perform its traditionally broad public interest analysis of whether a proposed action or authorization would further the purposes of the Communications Act."³⁸ Indeed, as a Senate Report noted during Congress' deliberations on the 1996 Act, the public interest standard is "the bedrock of the 1934 Act, and the Committee does not change that underlying premise through the amendments contained in the bill."³⁹

³⁶ 47 U.S.C. § 271(d)(3)(C).

³⁷ See 47 U.S.C. § 241(a); § 303; § 309(a); § 310(d).

³⁸ *In the Matter of the 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, FCC 97-298, ¶ 385 (1997) ("Ameritech Michigan 271 Order").

³⁹ *Id.*, n. 992, quoting, S. Rep. No. 23, 104th Cong., 1st Sess. 44 (1995).

This "public interest" requirement was taken from the Senate bill. Senator McCain offered an amendment to strip the public interest standard from the bill, portraying it as "an ill-defined, arbitrary standard which implies almost limitless policymaking authority to the FCC".⁴⁰ After spirited debate, however, the Senate defeated the McCain amendment by a vote of 68-31. Most members appeared to be persuaded by Senator Pressler and others that the public interest test was not a license for the Commission to commit mischief, but had been construed enough times by enough courts over the preceding six decades to give the phrase "public convenience, interest, and necessity" a specificity that the words themselves may not convey.⁴¹

Congress thus recognized that in order for the "carrot and stick" policy reflected in the 1996 Act to achieve Congress' goals, more than black-letter checklist compliance would be required from the RBOCs. As the FCC has since noted, in order for the local competition provisions of the Act to work, "local telecommunications markets must first be open to competition so that a BOC cannot use its control over bottleneck local exchange facilities to undermine competition in the long distance market."⁴²

Where a regulatory statute directs a regulatory agency to apply a "public interest" standard in its decisions, the term "public interest" takes its meaning from the specific purposes

⁴⁰ 141 Cong. Rec. S7960 (daily ed. June 8, 1995) (statement of Sen. McCain). See also *id.* at S7970 (daily ed. June 8, 1995) (statement of Sen. Packwood) (public interest test is "amorphous" and "is anything the [FCC] wants it to be"); *id.* at S7966 (daily ed. June 8, 1995) (statement of Sen. Burns) ("[p]ublic interest is kind of like art or beauty: It is in the eye of the beholder"); *id.* at S7964 (daily ed. June 8, 1995) (statement of Sen. Craig) (FCC has "open field to interpret the public interest any way it wishes").

⁴¹ See *id.* at S7970 (daily ed. June 8, 1995) (statement of Sen. Kerrey) (the Supreme Court understands the intent of the public interest standard "with a lot more clarity than meets the eye"); *id.* at S7966 (daily ed. June 8, 1995) (statement of Sen. Pressler) (the "Communications Act specifies in some detail the kinds of regulatory tasks authorized or required under the act").

⁴² *Ameritech Michigan 271 Order* at ¶ 388.

of the regulatory statute.⁴³ In this case, the overriding goal of the 1996 Act is to promote competition in all telecommunications markets.⁴⁴ Thus, the FCC's public interest analysis under Section 271 must focus on whether approval of the BOC's application will promote the public interest in competitive markets.⁴⁵

The FCC has declared that its intention is to "identify and weigh all relevant factors in determining whether BOC entry into a particular in-region market is consistent with the public interest."⁴⁶ Thus, the FCC has explained that it will consider "whether approval of a section 271 application will foster competition in all relevant telecommunications markets (including the relevant local exchange market), rather than just the in-region, interLATA market."⁴⁷ Indeed, the D.C. Circuit, on two occasions in the past year, has remanded FCC Section 271 approvals for the FCC's failure to consider the impact of challenged RBOC conduct on the development of local competition.⁴⁸

⁴³ *NAACP v. FPC*, 425 U.S. 662, 669 (1976).

⁴⁴ The 1996 Act "provide[s] for a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans *by opening all telecommunications markets to competition.*" H.R. Conf. Rep. No. 104-458, 104th Cong., 2d Sess. 113 (1996), *reprinted in* 1996 U.S.C.C.A.N. 124 (emphasis added) (*Conference Report*). A conference report "is the most persuasive evidence of congressional intent besides the statute itself." *Resolution Trust Corp. v. Gallagher*, 10 F.3d 416, 421 (7th Cir. 1993). *Accord Estate of Wallace v. Commissioner*, 965 F.2d 1038, 1045 (11th Cir. 1992).

⁴⁵ *Sprint Communications Co. v. FCC*, 274 F.3d 549 (D.C. Cir. 2001).

⁴⁶ *Ameritech Michigan 271 Order* at ¶ 383.

⁴⁷ *In the Matter of the Application of BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc. for Provision of In-Region, InterLATA Services in Louisiana*, CC Docket No. 98-121, Memorandum Opinion and Order, FCC 98-271, ¶ 361 (1998).

⁴⁸ *See Worldcom, Inc. v. Verizon New England, Inc.*, ___ F.3d ___, No. 01-1198 (D.C. Cir. Oct. 22, 2002) (remanding the FCC's grant of Section 271 authority to Verizon in

In order for the public interest standard to be satisfied, the BOC must demonstrate that it “has undertaken all actions necessary to assure that its local telecommunications market is, and will remain, open to competition.”⁴⁹ As the Department of Justice notes, in-region, interLATA entry by a Bell Operating Company (“BOC”) should be permitted only when the local markets in a state have been “fully and irreversibly” opened to competition.⁵⁰ Thus, *any* conduct by the Bell company that is inconsistent with opening local markets to competition should be considered as part of the public interest analysis.

The importance of the public interest standard was recently reaffirmed by Senators Burns, Hollings, Inouye, and Stevens in a letter to Chairman Powell.⁵¹ In that letter the Senators stated:

[t]he public interest requirements were added to Section 271 to ensure that long distance authority would not be granted to a Bell company unless the commission affirmatively finds it is in the public interest. Meaningful exercise of that authority is needed in light of the current precarious state of the competitive carriers which is largely due to their inability to obtain affordable, timely, and consistent access to the Bell networks.⁵²

Massachusetts because the FCC failed to consider the public interest implications of price squeeze); *see also Sprint Communications Co. v. FCC*, 274 F.3d 549 (D.C. Cir. 2001) (same for Missouri and Oklahoma).

⁴⁹ *Ameritech Michigan 271 Order* at ¶ 386.

⁵⁰ *In the Matter of Application of Verizon Pennsylvania, Inc., et al., for Authorization to Provide In-Region, InterLATA Services in Pennsylvania*, CC Docket No. 01-138, Evaluation of the United States Department of Justice at 2 (July 26, 2001); *see also, Ameritech Michigan 271 Order* at ¶ 382.

⁵¹ Letter from Senators Conrad Burns, Ernest F. Hollings, Daniel K. Inouye, Ted Stevens to The Honorable Michael K. Powell, Chairman, Federal Communications Commission (April 17, 2001) (“*Senators’ Letter*”).

⁵² *Id.* at 3.

While a regional Bell operating company's entry into the long distance market may have pro-competitive effects, those benefits are only sustainable if the local telecommunications market remains open after its entry. Thus, focusing on the purported benefits of SBC's entry into the long-distance market is putting the cart before the horse. The local market has to be truly open to competition for those benefits to take root.

Under this broad public interest standard, the instant situation in the record could not present a clearer case for denial of SBC's request for the Commission to endorse its Section 271 application.⁵³ The failure to meet the Competitive Checklist itself warrants a separate finding that grant of the Application would not serve the public interest. The Commission must consider the public interest ramifications of SBC interLATA market entry in terms of whether the public today has meaningful alternatives for LOCAL service, not whether the entry of one more long distance competitor will better serve the public interest. Until SBC's competitors can aver to their *present* ability to provide service to the public at parity with the incumbent, SBC's claims of future public interest benefits remain simply conjecture, not based on a solid foundation of fact. Despite SBC's self-serving opinions, and evidence of potential competition, premature entry by SBC into the long distance market, before the market has been irreversibly open to competition, will not facilitate the growth of local competition, but rather will stifle competition in both the local and long distance markets, and eliminate Verizon's incentives to open, and keep open, the local market. Viewed before a backdrop of SBC's establishment of barriers to

⁵³ Letter from Senators Conrad Burns, Ernest F. Hollings, Daniel K. Inouye, Ted Stevens to The Honorable Michael K. Powell, Chairman, Federal Communications Commission (April 17, 2001) ("*Senators' Letter*"). That letter stated that "[t]he public interest requirements were added to Section 271 to ensure that long distance authority would not be granted to a Bell company unless the commission affirmatively finds it is in the public interest. Meaningful exercise of that authority is needed in light of the current precarious state of the competitive carriers which is largely due to their inability to obtain affordable, timely, and consistent access to the Bell networks. *Id* at 3.

competition, as the addressed herein, shows that grant of the application would not serve the public interest. Accordingly, the Commission should deny the application for failure to meet the public interest standard of Section 271(d)(3)(C) of the Act.

VIII. CONCLUSION

SBC has not made its case for interLATA market entry. Independent tests of the incumbent's OSS similarly conclude numerous issues which must be resolved. These deficiencies are sufficient cause for rejecting SBC's application. Moreover, the Company's failure to meet the Act's "Competitive Checklist," most conspicuously through challenges to current UNE pricing coupled with its recalcitrant and anti-competitive behavior, clearly demonstrate that SBC has not met its obligations. Indeed, all SBC seems to do is attempt to institute a UNE price hike while blaming its supposed problems on regulators and competitors.⁵⁴ There is no reason why the Michigan Commission should grant a favorable 271 recommendation to a company that is slapping the Commission and CLECs upside the head for SBC's own problems. If the Commission *does* grant a 271 at this time to SBC despite the threats and the utter failure of its systems, what does that say about the state's commitment to the public interests of Michigan consumers and businesses? "The last refuge of a competitive coward is to lay off workers and blame it on regulation."⁵⁵

SBC's compliance failures are exacerbated by the absence of a Commission-adopted compliance plan, adopted after the CLECs have sat down with Ameritech and the Commission

⁵⁴ Illinois Commerce Commissioner Terry Harvill has this to say about SBC Ameritech: "How likely are we to do things for them we don't have to when they are slapping us upside the head for their problems? Maybe they should look inward. Maybe their problems are of their own making." Chicago Tribune, Jon Van, article reacting to SBC's announcement it is cutting 11,000 jobs and blaming it on regulators, September 28, 2002.

⁵⁵ Columbus Dispatch, September 27, 2002, quoting a pro-competitive spokesman.

Staff as with the performance measures, that can be relied upon by competitive local exchange carriers to create sufficient incentives for the incumbent to continue meeting its obligations after 271 authority is granted.

Finally, the Commission's recommendation for 271 approval should be withheld under the public interest test.

These significant failures do not warrant favorable Commission endorsement. The Commission declared in February 2000 what Ameritech needs to do, and Ameritech has failed miserably to meet the required standards. SBC has failed to pass the state's test of critical systems needed to allow local phone competition to develop in Michigan, and the Michigan Public Service Commission should immediately terminate the company's request to enter the long distance market as a result.

If anything, the record in this case is replete with evidence indicating that SBC should be prevented from obtaining any approval during a moratorium period of one year. At a minimum, SBC should be denied interLATA market entry until UNE rates that will not be challenged are established, until a performance assurance plan is adopted, and until SBC's compliance records is capable of carrying the weight of SBC's assertions.

In short, SBC Ameritech has flunked the Michigan 271 test, and Commission concurrence in its 271 request to get into the long distance business should be denied.

Respectfully submitted,

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