

## TELECOMMUNICATIONS LAW UPDATES

### COMMON CARRIER BUREAU TENTATIVELY AGREES ON CONDITIONS FOR SBC-AMERITECH MERGER

The FCC's Common Carrier Bureau has tentatively recommended approval of the proposed SBC-Ameritech merger, subject to an unprecedented list of conditions to be satisfied by the merged company. The 26 conditions require the company to open its in-region local markets to competition and to enter local markets outside its 13-state region. Of course, the conditions still are subject to approval by the Commission itself. But the Common Carrier Bureau's recommendation makes it likely that the merger ultimately will be approved with conditions similar to those announced.

When SBC and Ameritech announced their plan to merge in May 1998, many public officials and telecommunications carriers questioned whether such a merger might hinder local exchange competition. The merger would, for example, further reduce the number of Baby Bells from the original seven to four. Such consolidation, it was feared, might lessen the chances that the Bells would enter each other's markets to offer competitive local service. Indeed, prior to the merger announcement, Ameritech had planned to enter SBC's region by offering local service in St. Louis. Some also feared that reducing the number of Baby Bells would impair the FCC's ability to "benchmark" the capabilities of local exchange carriers by comparing one carrier's regulatory compliance against another's.

In April 1999, FCC Chairman William Kennard sent a letter to SBC and Ameritech,

asking the companies to begin negotiations with the FCC staff to develop a list of conditions to address these and other concerns. The Bureau's announcement last week is the culmination of those discussions.

Under the proposed conditions, SBC-Ameritech would have to go beyond what the FCC and the states previously have required in the way of market-opening measures. For example, competitors that want to resell SBC-Ameritech residential service would receive a 32 percent discount from retail rates for a specified period in any of the combined company's 13 states. For three years, SBC-Ameritech would have to reduce the price of leasing its local residential loops — the "last mile" into the home — to reflect an average 25 percent discount. SBC-Ameritech also would have to offer the controversial "UNE platform" for residential service for a specified period of time — in effect, to provide services at the deep discount of TELRIC.

The agreement requires SBC-Ameritech to offer "most favored nation arrangements" in its territory, forcing the company to give its competitors the same terms and conditions that it requests as a competitive LEC outside its region. SBC-Ameritech also would have to collaborate with its competitors in the deployment of uniform operations support systems ("OSS") in all 13 states and provide access to SBC-Ameritech's electronic OSS without charge.

In addition to these telephony obligations, SBC-Ameritech also would have to create a new separate affiliate to provide advanced services (such as DSL and frame relay) in the SBC-Ameritech region. The separate affiliate would operate independently from the telephone company, except that both the affiliate and the telephone company could market each other's services, and the affiliate could use the telephone company's brand name on an exclusive basis.

To promote competition *outside* the SBC-Ameritech region, the merged company would have to begin competing for residential and business customers in 30 new out-of-region markets within 30 months of the merger's approval. The agreement leaves little room for backsliding on this commitment. The proposed conditions include five verifiable steps that SBC-Ameritech would have to take as part of its entry into each of these markets. If it fails to take any of these steps within the time period specified, SBC-Ameritech would have to pay \$40 million per market (up to \$1.2 billion total). SBC-Ameritech would be strictly liable for any such violations: A showing of a willful violation would not be required.

The conditions that the FCC is imposing make clear just how dissatisfied the agency is with the progress of local competition under the Telecommunications Act of 1996. The FCC is extracting many obligations — such as mandatory out-of-region entry — that it would not have power to

impose outside of the merger context. And the FCC is demanding other conditions — such as the UNE platform and uniform OSS — that it has not previously imposed on incumbent LECs, whether or not it has power to do so. FCC Commissioner Harold Furchtgott-Roth has recently questioned whether the agency should use its merger approval authority in this manner, arguing that the Commission should not impose conditions on merging parties that it cannot, or does not, impose on an industrywide basis. Indeed, his criticisms of the FCC merger approval process have gathered considerable attention and spurred legislative activity on Capitol Hill. Some in Congress will no doubt argue that the proposed conditions for the SBC-Ameritech merger are just another abuse of the FCC's merger authority.

Interested parties may comment on the proposed conditions no later than July 13, and responses to these comments must be filed by July 20.

This letter is for general informational purposes only and does not represent our legal advice as to any particular set of facts, nor does this letter represent any undertaking to keep recipients advised as to all relevant legal developments. For further information on these or other telecommunications matters, please contact one of the lawyers listed below:

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