

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	File No. EB-00-IH-0432
SBC Communications, Inc.)	
)	NAL/Acct. No. 200132080011
Apparent Liability for Forfeiture)	

NOTICE OF APPARENT LIABILITY FOR FORFEITURE

Adopted: December 19, 2000

Released: December 20, 2000

By the Chief, Enforcement Bureau:

I. INTRODUCTION

1. In this Notice of Apparent Liability for Forfeiture (NAL), we find that SBC Communications, Inc. (SBC) has apparently violated certain of the conditions that the Commission imposed pursuant to its approval of the merger application of Ameritech Corp. (Ameritech) and SBC.¹ In particular, it appears that, in seven of its in-region states and for a period of up to 13 months, SBC² failed to report certain performance data in accordance with the published Business Rules adopted in the Carrier-to-Carrier Performance Plan that SBC agreed to undertake as part of the merger conditions adopted in the *SBC/Ameritech Merger Order*.

2. The Carrier-to-Carrier Performance Plan is central to achieving the public interest goals enumerated in the *SBC/Ameritech Merger Order*, including that of ensuring open local markets by monitoring the quality of SBC's service to other telecommunications carriers.³ The Commission adopted the Performance Plan as a means to ensure 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..."⁴ Based upon our review of the facts and circumstances surrounding this matter, we find that SBC is apparently liable for a forfeiture in the amount of eighty eight thousand dollars (\$88,000.00).

¹ Applications of Ameritech Corp., Transferor, and SBC Communications, Inc., 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, CC Docket 98-141, *Memorandum Opinion and Order*, 14 FCC Rcd 14712, 14856 (1999) ("*SBC/Ameritech Merger Order*")

² SBC refers to SBC Communications, Inc. and all its affiliates, including its incumbent LECs.

³ *SBC/Ameritech Merger Order*, 14 FCC Rcd 14856, 14867.

⁴ *SBC/Ameritech Merger Order*, 14 FCC Rcd 14867.

II. BACKGROUND

3. SBC is an incumbent local exchange carrier (ILEC) that provides local telephone service in 13 states, including Arkansas, Kansas, Missouri, Oklahoma, Texas, California, Nevada, Illinois, Michigan, Indiana, Ohio, Wisconsin, and Connecticut. At the end of 1999, SBC served nearly 60 million local exchange access lines in its 13-state region, and served customers in 23 countries.⁵ SBC also provides in-region interLATA, wireless, Internet access, out-of-region interLATA, cable and wireless television, security monitoring, and directory publishing services.⁶ In 1999, SBC had total operating revenues of more than \$49 billion.⁷

4. In the *SBC/Ameritech Merger Order*, the Commission concluded that the merger of SBC and Ameritech posed significant public interest harms that were not mitigated by the proposed transaction's potential public interest benefits.⁸ The Commission, however, also found that the voluntary conditions submitted by the Applicants, and as modified by the Commission, would alter the public interest balance by mitigating substantially the potential public interest harms while providing additional public interest benefits.⁹ The Commission explained that these merger conditions were 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.¹⁰ These conditions would remain in effect for 36 months after release of the *SBC/Ameritech Merger Order*.¹¹

5. The Carrier-to-Carrier Performance Plan is part of the package of conditions designed to foster the public interest goal of opening local markets to competition by ensuring that SBC's service to competitors does not deteriorate as a result of the merger.¹² The Performance Plan requires SBC to file with the Commission and each of the relevant state commissions, on a monthly basis, performance data reflecting 20 different categories for each of SBC's 13 in-region states.¹³ The data in the 20 categories reflect SBC's performance in responding to requests for

⁵ SBC 1999 Annual Report at 6.

⁶ *SBC 1999 Annual Report* at 4.

⁷ *SBC 1999 Annual Report* at 76.

⁸ *SBC/Ameritech Merger Order*, 14 FCC Rcd 14854.

⁹ *SBC/Ameritech Merger Order*, 14 FCC Rcd 14855.

¹⁰ *SBC/Ameritech Merger Order*, 14 FCC Rcd 14856.

¹¹ *SBC/Ameritech Merger Order*, 14 FCC Rcd 14868.

¹² *SBC/Ameritech Merger Order*, 14 FCC Rcd 14867.

¹³ See *SBC/Ameritech Merger Order*, 14 FCC Rcd 14867, Appendix C at ¶ 24, and Attachment A at ¶ 13. The categories cover key aspects of pre-ordering, ordering, provisioning, maintenance and repair associated with UNEs, interconnection, and resold services. *Id.* SBC is required to file this report on the 20th of each month. The filing of performance data for the states in the original Southwestern Bell Telephone (SWBT) region (Texas,

facilities and services from its rivals, as well as its end-user customers.¹⁴ The Business Rules accompanying the Carrier-to-Carrier Performance Plan describe the specific data requirements and measurement standards for each performance measurement.¹⁵ This condition also requires that SBC make voluntary incentive payments to the U.S. Treasury in the event that it fails to meet designated performance thresholds.¹⁶ The merger conditions also require SBC to retain an independent auditor to provide a thorough and systematic review of SBC's compliance with the conditions and to determine the sufficiency of its internal controls.¹⁷ The Commission approved SBC's retention of Ernst and Young, LLC as its independent auditor.¹⁸

6. On August 31, 2000, Ernst and Young submitted its attestation report regarding SBC's compliance with the Commission's merger conditions from October 8, 1999 through December 31, 1999.¹⁹ The independent auditor's report is confined to the statements made by SBC in its assertion, in the accompanying Report of Management on Compliance with the Merger Conditions, that it had complied with the merger conditions set forth in the *SBC/Ameritech*

Oklahoma, Kansas, Missouri, and Arkansas) was required beginning on November 1, 1999, for the months of August and September, on November 20th for the month of October, and then on 20th of each month thereafter for the previous month's data. The performance data for the Pacific Bell (PacBell) and Nevada Bell states of California and Nevada had to be filed beginning on December 1, 1999, for the months of September and October, on December 20th for the month of November, and on the 20th of each subsequent month. The Commission required SBC to file similar data for the states in the Ameritech region (Illinois, Ohio, Wisconsin, Indiana and Michigan) in two phases with the filing of the first set commencing on January 6, 2000, and the second set starting on March 6, 2000. The filing of performance data in the Southern New England Telephone region of Connecticut began on October 8, 2000. The subsequent monthly reports for the Ameritech states and Connecticut are also due on the 20th of each month. *See SBC/Ameritech Merger Order*, Appendix C at ¶ 24.

¹⁴ *SBC/Ameritech Merger Order*, 14 FCC Rcd 14867.

¹⁵ *See SBC/Ameritech Merger Order*, Appendix C, Attachments A-2a, "SBC/Ameritech Performance Measurements Business Rules (except California and Nevada)," and A-2b, "SBC/Ameritech Performance Measurements Business Rules (California and Nevada)." The applicable business rules for performance measures in all states except for California and Nevada are those developed in a Texas collaborative process involving SBC's application for in-region, interLATA authorization. The performance measures in California and Nevada are reported using rules that were developed in a collaborative process in California. *SBC/Ameritech Merger Order* at ¶ 379.

¹⁶ *See SBC/Ameritech Merger Order*, Appendix C, Attachment A-3, "Calculation of Parity and Benchmark Performance and Voluntary Payments," and Attachment A-4, "Voluntary Payments for Performance Measurements." The amount of the payments varies according to the level and significance of discrimination detected. *SBC/Ameritech Merger Order*, 14 FCC Rcd 14867. SBC is required to make its first payments to the U.S. Treasury for failing to meet the performance thresholds during the months of August, September, and October of 2000 no later than December 20, 2000. The reported data form the basis for calculating the payments.

¹⁷ *SBC/Ameritech Merger Order*, Appendix C at ¶ 67.

¹⁸ *See Aug. 24, 1999 Letter from Robert C. Atkinson, Deputy Chief, Common Carrier Bureau, to Charles Foster, Group President, SBC.*

¹⁹ *See Aug. 31, 2000 Report of Independent Auditors, Ernst & Young, LLP (Auditor's Report on Compliance).* This report only covered SBC's conduct in Texas, Oklahoma, Kansas, Missouri, and Arkansas, California and Nevada.

Merger Order, except as noted therein, and had corrected the noted deficiencies.²⁰ The auditor's report, along with the underlying data in SBC's monthly filings, revealed numerous instances of SBC's failure to comply with the requirements of the Carrier-to-Carrier Performance Plan through the submission of inaccurate performance data.²¹ In particular, the record shows that, in submitting data for 13 of the performance measurements for Texas, Oklahoma, Kansas, Missouri, Arkansas, California, and Nevada, SBC continuously used incorrect benchmarks and disaggregation levels, and also excluded key data for a period of up to 13 months.²²

7. The performance measurements at issue in this NAL concern: Percent Firm Order Confirmations (FOCs) Returned Within "X" Hours (PM 1); Average Response Time for OSS Pre-Order Interfaces (PM 2); Order Process Percent Flow Through (PM 3); Percent SWBT Caused Missed Due Dates (PM 4); Average Delay Days for SWBT Caused Missed Due Dates (PM 7); Average Response Time for Loop Qualification Information (PM 9); Mean Time to Restore (PM 12); Trouble Report Date (PM 13); Average Trunk Restoration Interval (PM 14); Percent Trunk Blockage (PM 15); Percent Missed Collocation Due Dates (PM 17); Billing Timeliness (PM 18); and OSS Interface Availability (PM 19).

8. Because the Commission's ability to detect potential discriminatory conduct depends upon SBC's strict compliance with the approved terms and conditions of the Carrier-to-Carrier Performance Plan, failure to report the performance data in accordance with the published Business Rules could compromise the effectiveness of the merger conditions in ensuring open local markets.²³ The Carrier-to-Carrier Performance Plan is, therefore, a key aspect of the Commission's oversight of SBC's behavior towards its competitors.

III. DISCUSSION

A. Violations

9. Based on the facts set forth below, we find that SBC is apparently liable for a forfeiture for willful and repeated violation of the merger conditions adopted in the

²⁰ See Aug. 31, 2000 Report of Management on Compliance with the Merger Conditions (*Management's Assertion on Compliance*). In its statement, SBC stated that it had corrected some of the deficiencies by the time of the release of the auditor's report and had scheduled correction of other deficiencies prospectively. Although the independent auditor has not provided us with confirmation of the implementation of any corrections to date, the Common Carrier Bureau has been able to confirm corrections of deficiencies in the use of incorrect benchmarks and disaggregation levels from SBC's monthly filings. The monthly filings, however, do not inform us whether the deficiencies involving the exclusion of data have been corrected. We are relying on SBC's representations in its statement regarding the date of correction of the deficiencies involving the exclusion of data.

²¹ *Auditor's Report on Compliance* at 2. See also SBC's Initial, Monthly, and Interim Performance Data Submissions, Nov. 1, 1999, through Nov. 20, 2000.

²² See *Management's Assertion on Compliance*, Attachment A. Although the Auditor's Report only covered SBC's performance in 1999, the attached Management's Assertion on Compliance covers SBC's correction of the deficiencies through August, 2000.

²³ *SBC/Ameritech Merger Order*, 14 FCC Rcd 14867, 14868.

SBC/Ameritech Merger Order. For a period of up to 13 months from November, 1999 through November, 2000, SBC apparently violated its obligation to report accurately the data sought by the performance measurements in the Carrier-to-Carrier Performance Plan for Texas, Oklahoma, Kansas, Missouri, Arkansas, California, and Nevada. We find that SBC's failure to report this information accurately is willful and repeated. The term "willful" means that the violator knew it was taking the action in question, irrespective of any intent to violate the Commission's rules, and repeated means more than once.²⁴ Furthermore, a continuing violation is "repeated" if it lasts more than one day.²⁵

10. SBC, in its Assertion on Compliance, does not dispute that it gathered and reported the data sought by the specific performance measurements discussed below in a manner contrary to the Business Rules for those measurements.²⁶ Although we are aware that a few of the violations occurred as a result of SBC's application of different standards, which were required by the Texas and California business rules, SBC was, nevertheless, obligated to seek the Commission's advice and approval before modifying the Commission's Business Rules.²⁷ The merger conditions require that no changes be implemented until the Common Carrier Bureau is notified and directs SBC to implement such changes.²⁸ Given the importance of maintaining the integrity of the Carrier-to-Carrier Performance Plan, we cannot excuse SBC's failure to diligently follow the Business Rules set forth in the *SBC/Ameritech Merger Order*.

11. Consistent with the Commission's determination in the *SBC/Ameritech Merger Order* that our monitoring of SBC's performance through these measurements is a key tool in offsetting or preventing some of the potential harmful effects of that merger,²⁹ we find SBC's lack of diligence in following the Business Rules to be significant. One of the goals behind establishing detailed Business Rules at the outset was to have the Carrier-to-Carrier Performance Plan work in a self-executing manner in order to ensure timely disclosure of accurate performance data and submission of any required payments. This would enable Commission staff to focus its resources on analyzing the results of the data, rather than monitoring the gathering of the data. SBC's failure to follow the Business Rules could lead to inaccurate and unreliable results which would compromise the Commission's ability to monitor effectively

²⁴ See *Southern California Broadcasting Co.*, 6 FCC Rcd 4387, 4388 (1991); see also *Hale Broadcasting Corp.*, 79 FCC 2d 169, 171 (1980).

²⁵ *Southern California Broadcasting Co.*, 6 FCC Rcd 4388.

²⁶ *Management's Assertion on Compliance* at 1, 3, and Attachment A.

²⁷ *Management's Assertion on Compliance*, Attachment A at 13, ¶ e; 14, ¶ a; 15, ¶ b; 16, ¶¶ g and h. See also June 5, 2000 Letter from Chris Jines, Executive Director, Federal Regulatory, SBC, to Carol Matthey, Deputy Chief, Common Carrier Bureau. The Commission subsequently incorporated some aspects of the Texas Business Rules on May 1, 2000. See May 30, 2000 Letter from Carol Matthey, Deputy Chief, Common Carrier Bureau, to Marian Dyer, Vice President-Federal Regulatory, SBC.

²⁸ See *SBC/Ameritech Merger Order*, Appendix C, Attachment A at ¶ 4. See also May 30, 2000 Letter from Carol Matthey, Deputy Chief, Common Carrier Bureau, to Marian Dyer, Vice President-Federal Regulatory, SBC.

²⁹ *SBC/Ameritech Merger Order*, 14 FCC Rcd 14868.

SBC's conduct towards other carriers. For example, the use of less rigorous standards than those required under the designated business rules could mask material deficiencies in SBC's performance and ultimately undermine the voluntary payment scheme established in the merger conditions. The omission of key data could also lead to a "muddying" of the reported results. In addition, inaccurate results will make it difficult for CLECs to determine independently whether there are discrimination problems. Therefore, we must insist on rigorous adherence to the Carrier-to-Carrier Performance Plan.

12. The record evidences the following specific apparent violations by SBC of the Carrier-to-Carrier Performance Plan:

Apparent violations of PM 1 (Percent Firm Order Confirmations (FOCs) Returned Within "X" Hours) by SBC:

- For ten months from November 1, 1999, until August 31, 2000, SBC apparently violated the Business Rules for Performance Measurement 1³⁰ in the SWBT region by failing to report correctly the percent of FOCs timely returned by using the incorrect date, and standard (*i.e.*, 2:00), instead of military (*i.e.*, 14:00), time.³¹ The use of standard time masked whether the return of FOCs occurred in the a.m. or p.m. and thereby potentially overstated the percent of FOCs timely returned.
- For three months from December 1, 1999, until February 20, 2000, SBC apparently violated the Business Rules for Performance Measurement 1³² in the PacBell and Nevada Bell regions by overstating the percent of FOCs timely returned by excluding from the measurement the interval of time from the receipt of a fax request to the time the information was entered into the order entry system.³³

Apparent violations of PM 2 (Average Response Time for OSS Pre-Order Interfaces)³⁴ by SBC:

³⁰ This performance measurement measures the percent of FOCs returned within a specific time frame from receipt of a complete and accurate service request to return of confirmation to CLEC. *SBC/Ameritech Merger Order*, Appendix C, Attachment A-2a at A-12.

³¹ *Management's Assertion on Compliance*, Attachment A at 15, ¶ d. See also SBC Initial Performance Data Submission, Nov. 1, 1999; Aug. 31, 2000 letter and attached Interim Performance Data Submission, Aug. 31, 2000, from Chris Jines, Executive Director, Federal Regulatory, SBC, to Mark Stone, FCC.

³² This performance measurement measures the average time from receipt of a service request to return of a FOC/Local Service Confirmation (LSC). *SBC/Ameritech Merger Order*, Appendix C, Attachment A-2b at A-52.

³³ *Management's Assertion on Compliance*, Attachment A at 16, ¶ f. See also SBC Initial Performance Data Submission, Dec. 1, 1999; SBC Monthly Performance Data Submission, Feb. 20, 2000.

³⁴ This performance measurement measures the average response time in seconds from the SWBT side of the Remote Access Facility (RAF) and return for pre-order interfaces (Verigate, DataGate and EDI where the pre-order functionality is integrated) by function. *SBC/Ameritech Merger Order*, Appendix C, Attachment A-2a at A-15.

- For six months from November 1, 1999, until April 17, 2000, SBC apparently violated the Business Rules for Performance Measurement 2 in the SWBT region by overstating its speed in assessing service availability by using a benchmark of 86,400 seconds, instead of 5.5 seconds.³⁵
- For six months from November 1, 1999, until April 17, 2000, SBC apparently violated the Business Rules for Performance Measurement 2 in the SWBT region by failing to report accurately the response time for requests for customer service records by collecting the data into a single category, instead of disaggregating the data into two categories of “CSR Summary 1-30 Lines” and “CSR 31 Lines or more,”³⁶ thereby masking differences between the categories.

Apparent violation of PM 3 (Order Process Percent Flow Through)³⁷ by SBC:

- For nine months from November 1, 1999, until July 20, 2000, SBC apparently violated the Business Rules for Performance Measurement 3 in the SWBT region by failing to report accurately the percent of Mechanized Order Generator (MOG) eligible orders that progress through SBC’s ordering system by disaggregating the data by OSS interface, rather than by service type,³⁸ thereby masking potential problems occurring within different types of services.

Apparent violations of PM 4 (Percent SWBT Caused Missed Due Dates) by SBC:

- For six months from November 1, 1999, until April 20, 2000, SBC apparently violated the Business Rules for Performance Measurement 4c³⁹ in the SWBT region by failing to report accurately the percent of missed due dates for installation of UNEs by disaggregating the data into two categories of field work and no field work, instead of a single UNE category.⁴⁰

³⁵ *Management’s Assertion on Compliance*, Attachment A at 13, ¶ b. *See also* SBC Initial Performance Data Submission, Nov. 1, 1999; SBC Interim Performance Data Submission, April 17, 2000.

³⁶ *Management’s Assertion on Compliance*, Attachment A at 13, ¶ c. *See also* SBC Initial Performance Data Submission, Nov. 1, 1999; SBC Interim Performance Data Submission, April 17, 2000.

³⁷ This performance measurement measures the percent of orders or LSRs from entry to distribution that progress through SWBT ordering systems. *SBC/Ameritech Merger Order*, Appendix C, Attachment A-2a at A-17.

³⁸ *Management’s Assertion on Compliance*, Attachment A at 13, ¶ d. *See also* SBC Initial Performance Data Submission, Nov. 1, 1999; June 20, 2000 letter and attached Interim Performance Data Submission, June 20, 2000, from Chris Jines, Executive Director, Federal Regulatory, SBC, to Anthony Dale, FCC.

³⁹ This performance measurement measures the percent of UNEs (8db loops are measured at an order level) where installations are not completed by the negotiated due date. *SBC/Ameritech Merger Order*, Appendix C, Attachment A-2a at A-20.

⁴⁰ *Management’s Assertion on Compliance*, Attachment A at 13, ¶ e. *See also* SBC Initial Performance Data Submission, Nov. 1, 1999; SBC Monthly Performance Data Submission, April 20, 2000.

- For eight months from November 1, 1999, until June 20, 2000, SBC apparently violated the Business Rules for Performance Measurement 4c in the SWBT region by failing to report accurately the percent of missed due dates for installation of UNEs by excluding the data from two categories.⁴¹

Apparent violation of PM 7 (Average Delay Days for SWBT Caused Missed Due Dates) by SBC:

- For nine months from November 1, 1999, until July 20, 2000, SBC apparently violated the Business Rules for Performance Measurement 7c⁴² in the SWBT region by failing to report accurately the average number of delay days on missed due dates for installation of UNEs by excluding the data from two categories.⁴³

Apparent violations of PM 9 (Average Response Time for Loop Qualification Information) by SBC:

- For five months from December 1, 1999, until April 20, 2000, SBC apparently violated the Business Rules for Performance Measurement 9⁴⁴ in the PacBell and Nevada Bell regions by understating the average response time for providing loop qualification information for ADSL by excluding the data reflecting the time interval between receipt of a request for loop information and the submission of the request to the Outside Plant Engineer handling this request.⁴⁵
- For four months from November 1, 1999, until February 20, 2000, SBC apparently violated the Business Rules for Performance Measurement 9⁴⁶ in the SWBT region by understating the average response time for providing loop qualification information for ADSL by excluding the data reflecting the time interval between receipt of a request for

⁴¹ *Management's Assertion on Compliance*, Attachment A at 15, ¶ c. See also SBC Initial Performance Data Submission, Nov. 1, 1999; SBC Monthly Performance Data Submission, July 20, 2000.

⁴² This performance measurement measures the average calendar days from due date to completion date on company missed UNEs (8db loops are measured at an order level). *SBC/Ameritech Merger Order*, Appendix C, Attachment A-2a at A-31.

⁴³ *Management's Assertion on Compliance*, Attachment A at 15, ¶ c. See also SBC Initial Performance Data Submission, Nov. 1, 1999; SBC Monthly Performance Data Submission, July 20, 2000.

⁴⁴ This performance measurement measures the average time required to provide loop qualification information to ADSL. *SBC/Ameritech Merger Order*, Appendix C, Attachment A-2b at A-84.

⁴⁵ *Management's Assertion on Compliance*, Attachment A at 16, ¶ g. See also SBC Initial Performance Data Submission, Dec. 1, 1999; SBC Monthly Performance Data Submission, April 20, 2000.

⁴⁶ This performance measurement measures the average time required to provide loop qualification for ADSL. *SBC/Ameritech Merger Order*, Appendix C, Attachment A-2a at A-33.

loop information and the submission of the request to the Outside Plant Engineer handling this request.⁴⁷

Apparent violations of PM 12 (Mean Time to Restore) by SBC:

- For eight months from November 1, 1999, until June 5, 2000, SBC apparently violated the Business Rules for Performance Measurement 12b⁴⁸ in the SWBT region by failing to report accurately the mean time to restore design service by disaggregating the data into categories of dispatch and no dispatch, instead of a single category for design service.⁴⁹
- For eight months from November 1, 1999, until June 5, 2000, SBC apparently violated the Business Rules for Performance Measurement 12c⁵⁰ in the SWBT region by failing to report accurately the mean time to restore UNE by disaggregating the data into categories of dispatch and no dispatch, instead of a single category for UNE service.⁵¹

Apparent violation of PM 13 (Trouble Report Date) by SBC:

- For nine months from December 1, 1999, until August 31, 2000, SBC apparently violated the Business Rules for Performance Measurement 13a⁵² in the Nevada Bell region by failing to report accurately the frequency of customer trouble reports by using an incorrect number of UNEs in the denominator of the calculation of the trouble report rate.⁵³

⁴⁷ *Management's Assertion on Compliance*, Attachment A at 14, ¶ a. See also SBC Initial Performance Data Submission, Nov. 1, 1999; SBC Monthly Performance Data Submission, Feb. 20, 2000.

⁴⁸ This performance measurement measures the average duration of network customer trouble reports for design service from the receipt of the customer trouble report to the time that the trouble report is cleared. *SBC/Ameritech Merger Order*, Appendix C, Attachment A-2a at A-40.

⁴⁹ *Management's Assertion on Compliance*, Attachment A at 13, ¶ e. See also SBC Initial Performance Data Submission, Nov. 1, 1999; June 5, 2000 letter and attached Interim Performance Data Submission, June 5, 2000, from Chris Jines, Executive Director, Federal Regulatory, SBC, to Carol E. Matthey, FCC.

⁵⁰ This performance measurement measures the average duration of network customer trouble reports for UNEs from the receipt of the customer trouble report to the time the trouble report is cleared excluding no access and delayed maintenance. *SBC/Ameritech Merger Order*, Appendix C, Attachment A-2a at A-41.

⁵¹ *Management's Assertion on Compliance*, Attachment A at 13, ¶ e. See also SBC Initial Performance Data Submission, Nov. 1, 1999; June 5, 2000 letter and attached Interim Performance Data Submission, June 5, 2000, from Chris Jines, Executive Director, Federal Regulatory, SBC, to Carol E. Matthey, FCC.

⁵² This performance measurement measures the total number of network customer trouble reports for POTS received within a calendar month per 100 access lines. *SBC/Ameritech Merger Order*, Appendix C, Attachment A-2b at A-99.

⁵³ *Management's Assertion on Compliance*, Attachment A at 14, ¶ i. See also SBC Initial Performance Data Submission, Dec. 1, 1999; Aug. 31, 2000 letter and attached Interim Performance Data Submission, Aug. 31, 2000, from Chris Jines, Executive Director, Federal Regulatory, SBC, to Mark Stone, FCC.

Apparent violation of PM 14 (Average Trunk Restoration Interval)⁵⁴ by SBC:

- For ten months, from December 1, 1999, until September 8, 2000, SBC apparently violated the Business Rules for Performance Measurement 14 in the PacBell region by failing to report accurately the average trunk restoration interval by disaggregating the data at a statewide level, rather than by market region,⁵⁵ thereby masking potential problems occurring at the market region level.

Apparent violation of PM 15 (Percent Trunk Blockage)⁵⁶ by SBC:

- For nine months from December 1, 1999, until August 31, 2000, SBC apparently violated the Business Rules for Performance Measurement 15 in the PacBell region by failing to report accurately the percent of trunk blockage by disaggregating the data at a statewide level, rather than by market region,⁵⁷ thereby masking potential problems occurring at the market region level.

Apparent violations of PM 17 (Percent Missed Collocation Due Dates)⁵⁸ by SBC:

- For eight months from November 1, 1999, until June 5, 2000, SBC apparently violated the Business Rules for Performance Measurement 17 in the SWBT region by failing to report accurately the percent of missed collocation due dates by disaggregating the data into additional categories of collocation (caged initial; caged augments; cageless initial; cageless augments; shared caged initial; shared caged augments; virtual initial; and virtual augments.), instead of limiting the disaggregation to the categories of physical, virtual, cageless, and additions.⁵⁹

⁵⁴ This performance measurement measures the average time to restore service affecting new trunk groups. *SBC/Ameritech Merger Order*, Appendix C, Attachment A-2b at A-104.

⁵⁵ *Management's Assertion on Compliance*, Attachment A at 14, ¶ h. See also SBC Initial Performance Data Submission, Dec. 1, 1999; Sep. 8, 2000 letter and attached Interim Performance Data Submission, Sep. 8, 2000, from Chris Jines, Executive Director, Federal Regulatory, SBC, to Mark Stone, FCC.

⁵⁶ This performance measurement measures the percent of calls blocked on outgoing traffic from LEC end office to CLEC end office and from LEC tandem to CLEC end office. *SBC/Ameritech Merger Order*, Appendix C, Attachment A-2b at A-105.

⁵⁷ *Management's Assertion on Compliance*, Attachment A at 14, ¶ g. See also SBC Initial Performance Data Submission, Dec. 1, 1999; Aug. 31, 2000 letter and attached Interim Performance Data Submission, Aug. 31, 2000, from Chris Jines, Executive Director, Federal Regulatory, SBC, to Mark Stone, FCC.

⁵⁸ This performance measurement measures the percent of SWBT caused missed due dates for collocation projects. *SBC/Ameritech Merger Order*, Appendix C, Attachment A-2a at A-48.

⁵⁹ *Management's Assertion on Compliance*, Attachment A at 13, ¶ e. See also SBC Initial Performance Data Submission, Nov. 1, 1999; June 5, 2000 letter and attached Interim Performance Data Submission, June 5, 2000, from Chris Jines, Executive Director, Federal Regulatory, SBC, to Carol E. Matthey, FCC.

Apparent violation of PM 18 (Billing Timeliness)⁶⁰ by SBC:

- For 13 months from November 1, 1999, until at least November 20, 2000, SBC apparently violated the Business Rules for Performance Measurement 18 in the SWBT region by failing to report accurately billing timeliness by excluding the billing information for all provisioned UNES.⁶¹

Apparent violations of PM 19 (OSS Interface Availability)⁶² by SBC:

- For nine months from December 1, 1999, until August 30, 2000, SBC apparently violated the Business Rules for Performance Measurement 19 in the PacBell region by region by failing to report accurately on their web site the availability of OSS interface by failing to include the Z-scores for this measurement.⁶³
- For three months from December 1, 1999, until March 20, 2000, SBC apparently violated the Business Rules for Performance Measurement 19 in the PacBell and Nevada Bell regions by overstating OSS interface availability by excluding system outage data.⁶⁴

B. Forfeiture Amount

13. In light of SBC's apparent willful or repeated failure to comply with the merger conditions in the *SBC/Ameritech Merger Order*, we find that a forfeiture is warranted. Section 503(b)(1) of the Act states that any person that willfully or repeatedly fails to comply with any provision of the Act or any rule, regulation, or order issued by the Commission, shall be liable to the United States for a forfeiture penalty.⁶⁵ For the time period relevant to this proceeding, section 503(b)(2)(B) of the Act authorizes the Commission to assess a forfeiture of up to \$110,000 for each violation, or each day of a continuing violation, up to a statutory maximum of \$1,100,000 for a single act or failure to act.⁶⁶ In determining the appropriate forfeiture amount,

⁶⁰ This performance measurement measures the length of time from the billing date to the time a wholesale bill is sent or transmitted (made available) to the CLECs. *SBC/Ameritech Merger Order*, Appendix C, Attachment A-2a at A-49.

⁶¹ *Management's Assertion on Compliance*, Attachment A at 15, ¶ b. See also SBC Initial Performance Data Submission, Nov. 1, 1999.

⁶² This performance measurement measures the percent of time OSS interface is available compared to scheduled availability. *SBC/Ameritech Merger Order*, Appendix C, Attachment A-2b at A-110.

⁶³ *Management's Assertion on Compliance*, Attachment A at 14, ¶ m. See also SBC Initial Performance Data Submission, Dec. 1, 1999; SBC Monthly Performance Data Submission, August 30, 2000.

⁶⁴ *Management's Assertion on Compliance*, Attachment A at 16, ¶ e. See also SBC Initial Performance Data Submission, Dec. 1, 1999; SBC Monthly Performance Data Submission, March 20, 2000.

⁶⁵ 47 U.S.C. §503(b)(1)(B); see also 47 C.F.R. § 1.80(a)(2).

⁶⁶ 47 U.S.C. § 503(b)(2)(B); see also 47 C.F.R § 1.80(b)(2).

we consider the factors enumerated in section 503(b)(2)(D) of the Act, including “the nature, circumstances, extent and gravity of the violation, and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require.”⁶⁷

14. SBC has submitted 13 monthly reports embodying one or more of the apparent violations detailed above and thus has committed 13 separate apparent violations of the *SBC/Ameritech Merger Order*. While several of the apparent violations discussed in this NAL clearly had the effect of casting SBC’s performance in a more favorable light, all of the apparent violations we have discussed demonstrate that SBC repeatedly failed to implement the Business Rules as adopted by the Commission. Because section 503(b)(6) of the Act limits the Commission’s jurisdiction over this cause of action to one year from the time the action accrued, our forfeiture calculation does not include a penalty for any violations that occurred during November and December of 1999. Therefore, for forfeiture purposes, SBC has committed 11 apparent violations of the *SBC/Ameritech Merger Order*.

15. Under the Commission’s forfeiture guidelines, the base forfeiture amount for failure to file required forms or information is \$3000 per violation.⁶⁸ The Commission’s rules, however, explicitly provide that the Commission and its staff may issue a higher or lower forfeiture than provided in the guidelines, as permitted by statute. We believe that an upward adjustment in the forfeiture amount is warranted in this case. As explained above, inaccurate reporting of performance data may compromise the effectiveness of the merger conditions in promoting open local markets. Moreover, we are faced here with noncompliance with a number of the reporting requirements in the *SBC/Ameritech Merger Order* over an extended period of time. Therefore, we will apply a forfeiture amount of \$8000 to each of the 11 violations described herein, and find SBC apparently liable for a forfeiture amount in the amount of \$88,000. We note that our imposition of a proposed forfeiture in this proceeding is independent of SBC’s obligation to make voluntary payments for failure to perform according to the benchmarks and other parity guidelines set forth in Appendix C of the *SBC/Ameritech Merger Order*.⁶⁹

IV. ORDERING CLAUSES

16. ACCORDINGLY, IT IS ORDERED THAT, pursuant to section 503(b) of the Act,⁷⁰ and section 1.80 of the Commission’s Rules,⁷¹ SBC Communications is HEREBY NOTIFIED of

⁶⁷ 47 U.S.C. § 503(b)(2)(D); see also *The Commission’s Forfeiture Policy Statement and Amendment of Section 1.80 of the Commission’s Rules*, 12 FCC Rcd 17087, 17100 (1997) (“*Forfeiture Policy Statement*”); *recon. denied* 15 FCC Rcd 303 (1999); 47 C.F.R. § 1.80(b)(4).

⁶⁸ *Forfeiture Policy Statement*, 12 FCC Rcd 17114.

⁶⁹ See *SBC/Ameritech Merger Order*, Appendix C, Attachment A-3, “Calculation of Parity and Benchmark Performance and Voluntary Payments,” and Attachment A-4, “Voluntary Payments for Performance Measurements.”

⁷⁰ 47 U.S.C. § 503(b).

⁷¹ 47 C.F.R. § 1.80.

its APPARENT LIABILITY FOR FORFEITURE in the amount of eighty eight thousand dollars (\$88,000.00) for willfully or repeatedly violating the Commission's merger conditions in the *SBC/Ameritech Merger Order*.

17. IT IS FURTHER ORDERED THAT, pursuant to section 1.80 of the Commission's Rules, within thirty (30) days of the release date of this NOTICE OF APPARENT LIABILITY, SBC Communications SHALL PAY to the United States the full amount of the proposed forfeiture OR SHALL FILE a written statement showing why the proposed forfeiture should not be imposed or should be reduced.

18. Payment of the forfeiture amount may be made by mailing a check or similar instrument payable to the order of the Federal Communications Commission, to the Forfeiture Collection Section, Finance Branch, Federal Communications Commission, P.O. Box 73482, Chicago, Illinois 60673-7482. The payment should note the "NAL/ Acct. No." referenced above.

19. The response, if any, must be mailed to Charles W. Kelley, Chief, Investigations and Hearings Division, Enforcement Bureau, Federal Communications Commission, 445 12th Street S.W., Room 3-B443, Washington, D.C., 20554, and must include the "NAL/Acct. No." referenced above.

20. The Commission will not consider reducing or canceling a forfeiture in response to a claim of inability to pay unless the respondent submits: (1) federal tax returns for the most recent three-year period; (2) financial statements prepared according to generally accepted accounting practices ("GAAP"); or (3) some other reliable and objective documentation that accurately reflects the respondent's current financial status. Any claim of inability to pay must specifically identify the basis for the claim by reference to the financial documentation provided.

21. IT IS FURTHER ORDERED that a copy of this Notice of Apparent Liability shall be sent by Certified Mail/Return Receipt Requested to SBC Communications, c/o Sandra L. Wagner, Vice President-Federal Regulatory, 1401 I Street, N.W., Suite 1100, Washington, D.C. 20005.

FEDERAL COMMUNICATIONS COMMISSION

David H. Solomon
Chief, Enforcement Bureau