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September 29, 1998

FILED

SEP 29 1998

Missouri Public
Service Commission

Mr. Dale Hardy Roberts
Secretary/Chief Regulatory Law Judge
Missouri Public Service Commission
P. O. Box 360
Jefferson City, MO 65102

RE: Merger Proposal of SBC Communications, Inc. and Ameritech Corporation
Case No.: TM-99-76

Dear Mr. Roberts:

Enclosed for filing in the above-referenced case is the original and 14 copies of the Office of the Public Counsel's Suggestions in Support of Jurisdiction and Comments Regarding Ameritech/SBC Proposed Merger. Please "file" stamp the extra-enclosed copy and return it to this office. I have also on this date mailed, faxed and/or hand-delivered the appropriate number of copies to all counsel of record.

Thank you for your attention to this matter.

Very truly yours,

Michael F. Dandino
Senior Public Counsel

MFD:rjr

cc: Counsel of Record

Enclosure

**BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI**

In the Matter of the Merger of SBC
Communications, Inc. and Ameritech
Corporation.

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Case No. TM-99-76

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**OFFICE OF THE PUBLIC COUNSEL'S SUGGESTIONS
IN SUPPORT OF JURISDICTION AND COMMENTS
REGARDING AMERITECH/SBC PROPOSED MERGER**

Missouri Public
Service Commission

COMES NOW the Office of the Public Counsel and respectfully suggests the following to the Public Service Commission ("Commission") of Missouri in support of the Commission taking jurisdiction, opening a docket and holding evidentiary hearings regarding the proposed Ameritech/SBC merger. Public Counsel also offers its comments to the Commission to incorporate into the Commission's comments to the Federal Communications Commission ("FCC") in cc Docket No. 98-141.

INTRODUCTION AND OVERVIEW

The Commission has jurisdiction to review and consider the effect of the proposed Ameritech/SBC merger on Missouri telecommunications customers, the regulatory environment, the industry landscape and the public interest. The Commission has general supervisory regulatory authority over all telecommunications companies that do business and provide telecommunications service within the state. Foreign corporations or holding companies with headquarters in other states are not immune from the Commission's jurisdiction so long as the

company or its affiliate or subsidiary holds a certificate of authority under the Commission's auspices and has assets within the state used in providing telecommunications. Sections 386.250(2); 386.320 and 392.300, RSMo. 1994. (Cum. Supp. 1997.)

In addition to the general supervisory authority, the Commission also has specific authority under Section 392.300, RSMo. 1994 (Cum. Supp. 1997) to approve or reject the sale, assignment, lease, transfer or mortgage of any franchise, facilities or systems necessary or useful in the performance of its telecommunications duties. The Commission's jurisdiction extends to the merger or consolidation of a regulated telecommunications companies franchise, facilities or system.

Southwestern Bell Telephone Company ("SWBT") and Ameritech Communications, Inc. ("Ameritech") are regulated, certificated local exchange companies. Ameritech has authority to operate in SWBT's exchanges as a competitive local exchange company.

SBC Communications, Inc. ("SBC") and Ameritech Corporation are the parent companies of these certificated subsidiary companies. Under the proposed merger, SBC of Delaware, a corporation created for the sole purpose of transacting the merger, will acquire the stock of Ameritech and continue the telecommunications operations as a Tier Three subsidiary, the same as SWBT.

Neither Ameritech nor SBC has filed an application for this Commission's approval of the merger. Neither company has come before this Commission to provide any evidence that this transaction will not be detrimental to the health, safety, and general welfare of the public, that it will provide efficient telecommunications facilities, that it will not deprive patrons of the telecommunications companies of substantial justice, and that it will not otherwise be contrary to the public interest. Section 386.610, RSMo. 1994. To bring this vital issue before the

Commission, Public Counsel filed its Motion to Open a Docket and to Hold Hearings on the effect this merger may have on Missouri and to serve as a vehicle for the Commission's review and decision on the proposal. It is hard to imagine that the Commission will not follow the same path other state commissions have taken on mergers and give substantial consideration to this critically important matter. This merger proposal demands the same degree of regulatory scrutiny as posed by the gravity of the possible consequences of the merger.

The law gives the Commission authority and the duty to act to protect consumers and to ensure that the public interest is served. The economic effects of the merger and its implications on Missouri's telecommunications environment demands as a matter of public policy a thorough review of the facts which can best be provided through an evidentiary hearing and discovery. Otherwise, the facts behind this transaction, the intention, plans and motivations of Ameritech and SBC will remain shrouded in secrecy and unknown to the agency charged with reviewing this transaction and protecting the public.

The Commission's Staff advised the Commission that it has the legal authority over this merger. However, the Staff suggested that the Commission fulfill its duty through comments in the FCC's proceeding. Public Counsel believes that is inadequate and is an abdication of the Commission's duty and responsibility. The Commission should not relegate itself solely to the role of a commentator. The Commission is a key decision and policy maker in this process with substantial power to approve, approve with conditions or reject the merger. If it takes the limited advisory role of a commentator, it fails to perform the duties entrusted to it by law. Also, the Commission then will not have the advantage of a full evidentiary proceeding with the opportunity for discovery given the truncated nature of the FCC proceeding.

In addition to its legal authority, the Commission has public policy responsibilities to investigate the merger. Under its jurisdiction to oversee the telecommunications industry in Missouri, the Commission has the authority and responsibility to execute the statutory directives and legislative intent of both Congress and the General Assembly. The Telecommunications Act of 1996 and Senate Bill No. 507, as well as Chapters 386 and 392, RSMo. establish goals and purposes for the Commission to carry out. Promotion of competition in the local exchange and in other telecommunications markets are the well recognized goal of the federal legislation. Under that broad purpose are directives to remove barriers to entry, to provide competitive access by wholesaling incumbent network elements and reselling the service, to provide for parity of service and rates for rural and urban areas, and to promote universal service at just, reasonable, and affordable rates.

Senate Bill No. 507 sets out the purposes of the state telecommunications law in Section 392.185, RSMo. and provides for local implementation of the federal law. To execute this policy and to provide policy guidelines consistent with the legislative goals, the Commission must investigate significant activities in the Missouri telecommunications market to evaluate the impact on the federal and state legislative goals, to protect the consumer and to ensure consistency with the public interest. The Commission cannot perform that duty if it stands on the sidelines or just kitbutzs from the stands. It needs to be an active player on the field. It cannot rely on distant federal agencies to carry the ball for the structure and vitality of Missouri telecommunications regulatory environment and the protection of the Missouri consumers. The Commission's unique role requires it to take an affirmative and active role in reviewing and approving or rejecting the proposal or approving it with conditions. The Commission's

comments to the FCC are important and necessary to help the FCC perform its function. But these comments alone do not fulfill the Commission's duty and public policy responsibilities.

Public Counsel identifies questions and issues that the Commission should explore to review the merger.

Finally, Public Counsel presents its comments and recommendation to the Commission to incorporate into the comments to the FCC. At this time, Public Counsel believes the merger is premature given the very limited status of local exchange competition in Missouri and nationally. This merger of two neighboring RBOC monopoly incumbents will reduce opportunity for competition by its sheer size and market power. Public Counsel has serious doubts that this merger will directly benefit Missouri customers, especially residential customers. Public Counsel believes that before any merger on this grand scale can be approved, SWBT should be required to meet the requirements of Section 271 of the Telecommunications Act of 1996. Under that condition, this Commission can have reasonable assurance that SWBT exchanges are truly open for effective competition. The Commission must also investigate the alleged benefits to ratepayers as compared to benefits to shareholders. It must ensure that cost savings and the anticipated efficiencies of a merger translates directly into rate reductions for Missouri customers.

I. DOES THE PUBLIC SERVICE COMMISSION HAVE THE AUTHORITY AND DUTY TO REVIEW THE AMERITECH/SBC MERGER?

The Commission has the general and specific statutory authority and responsibility to review the merger to determine its effect on prices, service quality, range of services available and the level of competition in Missouri. Under the law, the Commission has a vital role in the merger approval process. The Missouri Public Service Commission is an

integral link in the public agency triad that must review and pass judgment on the transaction. The Commission's focus is on the local effect, the protection of consumers and the preservation of the public interest. To carry out its role, the Commission should open a docket and hold an evidentiary hearing with the opportunity for discovery, cross-examination and rebuttal evidence to review the transaction and determine the relevant facts. In that way, the Commission can properly weigh the effects on Missouri.

A. The Companies

SBC is a Delaware corporation providing local telecommunications services to over 2.5 million access lines in Missouri through its wholly owned subsidiary SWBT. Southwestern Bell Telephone Company is subject to this Commission's jurisdiction and SBC, to the extent it owns, controls, and operates SWBT, is subject to the Commission's jurisdiction. Ameritech is a Delaware corporation which provides telecommunications services throughout its subsidiary companies. Ameritech companies are the dominant incumbent local exchange companies in Illinois, Indiana, Ohio, Michigan, and Wisconsin. The subsidiary Ameritech Communications International, Inc. ("ACI") is a competitive local exchange company certified by the Missouri Public Service Commission (Case Nos. TA-96-389 and TA-96-415). It is authorized to provide competitive local exchange services in the SWBT exchanges designated in its tariff. Ameritech has an approved interconnection agreement with SWBT. ACI has met all three elements to provide local service. As a competitive local exchange company, Ameritech is subject to this Commission's jurisdiction.

B. Statutory Jurisdiction

Section 386.250, RSMo. provides, in part, that "...the jurisdiction, supervision, powers and duties of the Public Service Commission shall extend under this Chapter to: (2) To all telecommunications facilities, telecommunications services and to all telecommunications companies" so far as such telecommunications facilities and services are intrastate. This jurisdiction further extends to "(7) To such other and further extent, and to all such other and additional matters and things, and in such further respects as may herein appear, either expressly or implied."

Section 386.320.1, RSMo. 1994, gives the Commission "general supervision" of all telephone corporations and telephone lines with the power to examine and keep informed about their general condition, capitalization, franchises, and "the manner in which their lines and property are owned, leased, controlled or operated, not only with respect to the adequacy, security and accommodation offered by their services, but also with respect to their compliance with all the provisions of law, orders and decisions of the Commission and charter and franchise requirements." Section 386.610, RSMo. provides in pertinent part: "The provisions of this Chapter [386] shall be liberally construed with a view to the public welfare, efficient facilities and substantial justice between patrons and public utilities." This section declares that the purpose of the laws regulating public utilities is to protect the public. State ex rel. City of St. Louis v. PSC, 73 S.W.2d. 393 (Mo. 1937). Because these are remedial statutes in the exercise of the state's police power, the Commission's jurisdiction should be liberally construed to protect the public. State ex rel. Laundry, Inc. v. PSC, 34 S.W.2d. 37 (Mo. 1931); State ex rel. PSC v. Blair, 145 S.W.2d 865 (Mo banc. 1940).

Chapter 392, RSMo. provides the specific telecommunications regulatory jurisdiction and authority. Section 392.185, RSMo. provides the framework to construe the provisions of Chapter 392. These nine legislative purposes guide the Commission's consideration of all relevant facts. Public Counsel does not see any reasonable construction of Chapters 386 and 392 to deny the Commission's jurisdiction.

C. Consequences to Missouri Control Rather than Corporate Form

Upon completion of the merger, it appears that Ameritech's local exchange facilities, franchise, systems, or customer base will indirectly become SBC's facility, franchise, systems, and customers as Ameritech is absorbed into SBC as a third tier subsidiary on par with SWBT. Notwithstanding how the transaction is structured and executed for corporate and federal income taxation reasons, the end result produces circumstances significantly and substantially different in terms of real ownership, corporate strategy, competition, regulatory oversight and consumer protection.

This merger is not immune from public scrutiny in Missouri because of the companies' headquarters location, state of incorporation, corporate structure or structure of the transaction. These Delaware corporations were incorporated there for traditional corporate reasons. Location of its principle corporate offices outside of Missouri does not bar Commission action.

Corporate form also cannot be used to defeat Commission oversight. If it could, the transfer of functions, services or activities that were traditionally with the regulated local telephone service provider to the parent organization or subsidiaries works mischief. This very issue of the transfer of planning and decision-making functions to separate corporate

entities, such as SBC Services, Inc., and SBC Operations, Inc., concerned Texas regulators in the Investigation of SWBT Company's Entry into the InterLATA Telecommunications Market docket, Project No. 16251. Southwestern Bell Telephone Company brings support staff from SBC corporate entities to testify in proceedings before the Missouri Commission on behalf of SWBT. (See, 314 NPA Relief, Case No. TO-98-212; Second AT&T/Southwestern Bell Telephone Company arbitration, Case No. TO-98-115.) The Commission should look at the real ownership, control and operational management and see the true nature of the transaction to determine its impact on the Missouri regulatory environment, competitive market and consumers.

D. RBOC Merger Review in Other States

The Massachusetts Department of Public Utilities, in the merger case of the New England Telephone's parent Nynex Corporation with Bell Atlantic Corporation (96-78), took jurisdiction of the merger under its general supervisory authority over utilities. State law only provided for the merging companies to provide written notice of the merger within 30 days of the transaction. The Department opened an investigation into the public interest aspects of the proposed merger, ordered four public hearings and solicited written comments. The agency ruled it had jurisdiction under its supervisory oversight to review the impact on (1) the continuing ability to provide high quality services, including continued investment in and upgrade of facilities at reasonable rates; and, (2) continuing development of competition in the state. The agency stated that Nynex's status as a price cap regulated company did not insulate it from scrutiny on its investment decision, service quality and rates. The Department recognized that Nynex in the two years since the inception of price caps reduced rates by 68 million dollars.

Other states have held merger proceedings for the recent merger of Bell Atlantic/Nynex, SBC/Pacific Telesis and SBC/SNET. Seven out of the eight states with statutory authority to hold hearings on these mergers instituted hearings, including discovery. These states are Connecticut (No. 98-02-20), Maine (No. 96-338), Vermont (No. 5900), New York (No. 96-C-0603), New Hampshire (No. DR 96-220), Massachusetts (No. DPU 96-78), California (No. D. 97-03-067).

Missouri ratepayers deserve the opportunity to be heard and have a full investigation into the effects of this merger.

E. Federal Law Encourage State Commission Involvement

The Federal Telecommunications Act of 1996 does not bar this Commission from exercising its jurisdiction in this merger. Section 271 contemplates that the Missouri Commission evaluate the competitive landscape and SWBT's compliance with the checklist requirements and its compliance with the public interest standard as a key component of the review process. Section 271(d)(2)(B). Section 253 also contemplates that states eliminate barriers to competitive entry. The Act and the recent 8th Circuit Court of Appeals decision in Iowa Utilities Board v. FCC, 120, F3d 753 (8th Cir. 1997) recognized the dual nature of telecommunication oversight and the states' role in telephone regulation. Under the merger provisions, the FCC and the U.S. Department of Justice have roles to review the anti-competitive implications and the effect on competition. State agencies complete the triad with findings on the local and state impact.

II. PUBLIC POLICY QUESTIONS AND ISSUES FOR PUBLIC SERVICE COMMISSION INVESTIGATION AND CONSIDERATION

The Commission must determine the effect of the merger on Missouri. This task is best accomplished by an evidentiary hearing to fully develop a record upon which the Commission can make a proper, lawful and informed decision about the merger. Based on that record, the Commission can approve or reject the merger. The Commission can also use the record of the investigation and hearings to fashion appropriate conditions on the merger to protect the consumer, to ensure that direct benefits flow to customers, and to enhance competition in the local market.

The investigation should focus on key questions and issues suggested by the merger. These include the following:

1. Given that the avowed purpose of the "new SBC" is to position the merged company to be a major competitor in the global telecommunications market, what impact does that strategy have on Missouri?
2. Will financial and management resources be shifted from local service and create a disinvestment in Missouri to fund and direct the new SBC's climb to a strong global competitive status?
3. Will SWBT and SBC redouble its efforts to protect its monopoly position and defend its current territory and market share? In this way, the favored markets and favored high usage business customers will be fortified to guard against incursions by competitors at the expense of less desirable markets and residential customers. The new SBC targets 30 out of regional markets for its competitive entry. The question left unanswered is the status of its in-

region competition. The merger has eliminated a potential RBOC competitor for the 20 large markets in the SBC/Ameritech areas. Any strong competitor would first shore up its "homeland" defenses before venturing into other regions to compete. The "retaliatory competition" from RBOCs responding to the new SBC's out of region strategy is mere speculation. The new SBC will still retain the advantages of the "home field advantage" in its region.

4. Will the revenues needed for global competition increase pressure to reduce service quality and customer service and market and install high profit optional services, such as caller ID, call return and other vertical features by hard sell tactics and deception market practices? After the SBC acquisition of PacBell, service quality complaints doubled. San Francisco Business Times (February 27, 1998). Complaints in California against SBC for anti-consumer behavior and abusive marketing practices have been filed. San Jose Mercury News (June 5, 1998) at 1A; San Francisco Chronicle (June 5, 1998); San Diego Union Tribune (June 26, 1998). These complaints include questionable sales practices for caller ID, custom-calling packages, and solicitation of unlisted customers.

5. The merger will result in a concentration of 57 million access lines in one company. How will this combination of neighboring RBOC monopolies into the largest American local telephone company promote competition in the local markets of St. Louis, Kansas City, Springfield, Cape Girardeau, St. Joseph, Blue Springs, Hannibal, Sikeston, and the other Missouri SWBT service areas? How will this giant improve competition for the Missouri residential customers? What criteria will the Commission use to evaluate measures of residential customer benefits alleged by the companies?

The Commission has no evidence before it to commence a benefit analysis. In other states and before the FCC and the Senate Committee, the companies have on been long on generalizations, but short on details to identify concrete customer benefits.

6. Will the global strategy and the "new SBC" national-local strategy aimed at the top 30 markets result in reduced efforts to bring advanced services and reduced service quality and customer service for rural areas or marginally profitable exchanges? What assurances can the Commission expect from the new SBC that Missouri service quality will not erode, that advanced services will be generally available throughout its Missouri territory and reasonable, affordable rates will prevail.

7. Does the merger of these two defacto local exchange monopolies promote the terms and spirit of the Federal Telecommunications Act and Senate Bill No. 507? Ameritech was heralded as a major competitor to SBC in Missouri. In January, 1998, it was anticipated that Ameritech would be the first company to offer an alternative to SWBT for local telephone service. A key factor in the St. Louis market was the option to move from resale to facilities based investment because it is adjacent to Ameritech's territory. St. Louis Business Journal, January 19, 1998. The Wall Street Journal reported that the merger discards Ameritech's market research justifying taking on SBC in the St. Louis market. "Ameritech armed to be a major competitor for residential customers. Ameritech's research showed that it might have been the only effective rival of SBC in the residential market." (Wall Street Journal, June 8, 1998 at B4.) See also, "Ameritech Targets SW Bell's Residential Market in St. Louis," Telecommunications Reports (November 10, 1997) at p.7.

If effective competition in SWBT's territory is halted or delayed by the merger, SWBT's customers, especially residential customers will suffer the consequences

Residential customers in the absence of effective competition to generate price reductions, more service options and improved service will remain captive customers of SWBT. Since those customers will have few or no options, they become obvious targets of reduced service quality. How will the merger with its continued concentration of the ownership of the local loop into fewer and larger incumbent companies affect competition?

8. Will the sheer size and market power of the new SBC pose regulatory difficulties for the Commission and other state regulators? Will the new SBC be able to overpower the Commission's policies, rules and guidelines for consumer protection? Will it be necessary for state commissions to form a task force or other coordinating mechanism to oversee the new SBC stretching from Connecticut through the Midwest, Southwest, and California? What costs and obstacles will the new SBC produce for the state regulators?

9. Will SBC's past "hardball" approach to competition and market entry intensify with the new SBC as it grows in access lines and power? AT&T Communications of the Southwest and MCI have waged long and bitter fights with SWBT to produce an interconnection agreement which would allow entry into Missouri's market. This experience was common through all SWBT's territories. Even today, the Commission's final arbitration decision for AT&T and SWBT is pending in U.S. District Court in Kansas City.

SWBT has been unable to qualify for Section 271 entry into the interLATA market. SWBT's tough dealings with its interconnection and wholesale customers indicates an unwillingness to provide the *quid pro quo* of open access to its network in exchange for interLATA market entry.

10. How will the merger affect universal service? The answers are not readily available, but must be clearly identified prior to approval.

11. How will the merger affect SBC investments in the state and job retention.

12. How will the merger cost savings directly benefit the Missouri ratepayers?

The Commission must demand a firm and clear response from Ameritech and SBC. The shareholders alone should not benefit from any efficiencies and cost savings from the merger. Missouri ratepayers have funded this merger in part and should share in its fruits. Price cap regulation does not bar rate reductions conditioned for merger approval. This is not a rate proceeding, but a merger proceeding.

III. RECOMMENDATION

The Office of the Public Counsel believes that this proposed merger is not appropriate at this time and does not serve the legislative goal, the consumer or the public interest.

FCC Commissioner Susan Ness in testimony before the U.S. House Judiciary Committee on June 24, 1998, said that while there was a transition to competition for business and high volume users "the vast majority of residential and other low-income customers continue to have no choice in the provision of either local voice or video service." While noting that over 620 long distance providers make for a substantially competitive long distance market place, Ness observed that "we're far from there" in local competition.

Since Ameritech and the SBC subsidiaries have not been able to qualify for the Section 271 checklist, the local market is not open to competitive entry sufficient to allow the creation of this super company. The residential local customer does not seem to enjoy any real benefit, especially in Missouri. This merger poses many hazards to emerging competition, to service quality, and choices for residential customers, and price relief.

At this time, Public Counsel would recommend that the Commission disapprove the merger.

As an alternative, if the merger is considered acceptable to the Commission, then it must extract conditions and assurances from SBC and Ameritech to ensure that competition can develop, that these RBOC's local markets will be irreversibly open to competition, and that adequate safeguards are in place to prevent backsliding on this commitment. The incumbent companies must meet the checklist requirements of Section 271(c)(2)(B) of the Federal Telecommunications Act prior to merger approval.

In addition, the Commission must demand strict quality of service standards and measurements and effective remedies to correct deficiencies. The Commission should demand consumer protection standards that the company must adopt to prevent customer abuse and unethical marketing.

Finally, the Commission should insist that savings generated by the merger be directly shared in part with Missouri ratepayers through rate reductions.

IV. CONCLUSION

The Office of the Public Counsel prays the Public Service Commission to open a docket to investigate this merger and adopt a procedural schedule for an evidentiary hearing and discovery so that the facts about this merger and its effect on Missouri can be investigated and the Commission can make an informed decision.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I hereby certify that the foregoing document has been faxed, mailed, or hand-delivered to the following counsel of record on this 29th day of September, 1998:

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