

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

In the Matter of)
)
Application by SBC Communications,)
Inc., Pacific Bell Telephone Company,) WC Docket No. 02-306
and Southwestern Bell Communications)
Services, Inc. for Provision of)
In-Region, InterLATA Services in)
the State of California)

EVALUATION OF THE
UNITED STATES DEPARTMENT OF JUSTICE

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<i>FCC Georgia/Louisiana Order</i>	Memorandum Opinion and Order, <i>In re: Joint Application by BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc. for Provision of In-Region, InterLATA Services in Georgia and Louisiana</i> , 17 FCC Rcd 9018 (May 15, 2002), available at < http://www.fcc.gov/Bureaus/Common_Carrier/in-region_applications >.
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California PUC PIP Modification	Modification Clarifying Implementation Details of the Performance Incentives Plan for Pacific Bell Telephone Company, <i>In re: Order Instituting Rulemaking on the Commission's Own Motion into Monitoring Performance of Operations Support Systems</i> , California PUC Docket No. 97-10-016, <i>et al.</i> (June 6, 2002), <i>attached to</i> SBC Br. App. C as Tab 78.
California PUC PIP Order	Opinion on the Performance Incentives Plan for Pacific Bell Telephone Company, <i>In re: Order Instituting Rulemaking on the Commission's Own Motion into Monitoring Performance of Operations Support Systems</i> , California PUC Docket No. 97-10-016, <i>et al.</i> (Mar. 6, 2002), <i>attached to</i> SBC Br. App. C as Tab 76.

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California PUC Revised JPSA Order	Decision, <i>In re: Order Instituting Rulemaking on the Commission's Own Motion into Monitoring Performance of Operations Support Systems</i> , California PUC Docket No. 97-10-016, <i>et al.</i> (May 24, 2001), attached to SBC Br. App. C as Tab 71.

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<i>Cap Gemini OSS Test Final Report</i>	Cap Gemini Ernst & Young, <i>Final Report of the Pacific Bell Operations Support Systems</i> (Version 1.0) (Dec. 15, 2000), attached to SBC Br. App. D as Tab 207.
<i>Cap Gemini OSS Test Recommendation Verification Report</i>	Cap Gemini Ernst & Young, <i>Pacific Bell OSS Test Recommendation Verification Report</i> (Version 1.0) (June 22, 2001), attached to SBC Br. App. D as Tab 227.
<i>Cap Gemini OSS Test Revised Final Report</i>	Cap Gemini Ernst & Young, <i>Final Report of the Pacific Bell Operations Support Systems</i> (Version 1.2) (Feb. 12, 2001), attached to SBC Br. App. D as Tab 212.
<i>GXS Final Report</i>	GE Global eXchange Services, <i>Final Report Presented to California Public Utilities Commission for Test Generation Services in Relation to Pacific Bell's Operations Support System</i> (Feb. 12, 2001), attached to SBC Br. App. D as Tab 213.
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SBC Makarewicz Aff.	Affidavit of Thomas J. Makarewicz, <i>attached to</i> SBC Br. App. A as Tab 14.
SBC Motta Aff.	Affidavit of Richard J. Motta, <i>attached to</i> SBC Br. App. A as Tab 15.
SBC Sept. 2002 PMs <i>Ex Parte</i>	SBC Communications, Inc., SBC September 2002 Performance Reports, SBC <i>Ex Parte</i> Submission, FCC WC Docket No. 02-306 (Oct. 28, 2002).
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EVALUATION OF THE
UNITED STATES DEPARTMENT OF JUSTICE

Introduction and Summary

The United States Department of Justice (“the Department”), pursuant to Section 271(d)(2)(A) of the Telecommunications Act of 1996¹ (“the 1996 Act”), submits this Evaluation of the Application filed by SBC Communications Inc., Pacific Bell Telephone Company, and Southwestern Bell Communications Services, Inc. (collectively “SBC”) on September 20, 2002, to provide in-region, interLATA services in California. SBC’s Application to the Federal Communications Commission (“FCC” or “Commission”) is its first for long distance authority in California and follows its successful Section 271 applications pertaining to Texas, Kansas, Oklahoma, Missouri, and Arkansas.²

As the Department has explained, in-region, interLATA entry by a regional Bell Operating Company (“BOC”) should be permitted only when the local markets in a state have been “fully and irreversibly” opened to competition.³ This standard seeks to measure whether

¹ Pub. L. No. 104-104, 110 Stat. 56 (1996) (codified as amended in scattered sections of 47 U.S.C.).

² See generally *FCC Arkansas/Missouri Order*; *FCC Kansas/Oklahoma Order*; *FCC Texas Order*.

³ See DOJ Oklahoma I Evaluation at vi-vii, 36-51.

the barriers to competition that Congress sought to eliminate with the 1996 Act have in fact been fully eliminated and whether there are objective criteria to ensure that competitive local exchange carriers (“CLECs”) will continue to have nondiscriminatory access to the facilities and services they will need from the BOC in order to enter and compete in the local exchange market. In applying its standard, the Department considers whether all three entry paths contemplated by the 1996 Act -- facilities-based entry involving the construction of new networks, the use of the unbundled elements of the BOC’s network (“UNEs”), and resale of the BOC’s services -- are fully and irreversibly open to competitive entry to serve both business and residential customers.

SBC’s application demonstrates that it has succeeded in opening its local markets in California to competition in many respects. Based on this record, and subject to the Commission’s assuring itself that the concerns expressed in this Evaluation have been resolved, the Department recommends that the FCC approve SBC’s application.

I. California Public Utilities Commission Proceedings

The California PUC has worked tirelessly to create an environment conducive to the development of local telecommunications competition in California. In particular, the California PUC has established and implemented wholesale performance measures⁴; conducted extensive pricing proceedings to establish wholesale rates for UNEs⁵; and adopted a Performance

⁴ California PUC Revised JPSA Order at 18-19 (adopting comprehensive OSS performance measurements and standards); California PUC PMs/PIP Modification I at 7, Apps. A & B; California PUC PMs/PIP Modification II at 8, App. A; *see also PwC PMs Report I* (attesting to substantial compliance with SBC’s assertions regarding performance measurement reporting systems and processes and identifying items for corrective action); *PwC PMs Report II* (examining corrective actions taken pursuant to the first performance measures report and identifying additional items for action); *PwC PMs Report III* (examining corrective actions taken pursuant to the second performance measures report and closing all items without exception).

⁵ California PUC Pricing Order I at 269-73, Apps. A-D (adopting UNE rates and establishing periodic price review processes); California PUC UNE Loop Rates Order at 14, App. A (establishing geographically deaveraged UNE loop rates); California PUC Pricing Order II at 71-73, Apps. A & B (ordering interim loop and switching UNE rates significantly lower than the original rates but subject to true-up pending further proceedings); *see also* California PUC UNE Rate Review Order at 21-22 (establishing scope and schedule for UNE rate review to conclude in 2003).

Incentives Plan (“PIP”) intended to ensure that an appropriate level of wholesale performance is maintained once SBC’s Section 271 application is approved.⁶

The California PUC’s review of SBC’s Section 271 filing included an independent third-party test by Cap Gemini Ernst & Young (“Cap Gemini”) designed to determine whether SBC provides CLECs nondiscriminatory access to its operations support systems (“OSS”).⁷ Cap Gemini’s OSS test report, issued in December 2000, was generally positive but made 43 recommendations for improvement and concluded that the California PUC should require SBC to address most of them prior to approving SBC’s OSS.⁸ In June 2001, Cap Gemini reported that SBC had adequately addressed the 19 recommendations that California PUC staff had deemed most significant.⁹ The California PUC subsequently found that SBC had “successfully passed the independent third-party test of its [OSS].”¹⁰

⁶ California PUC PIP Order at 98-99 & App. J (Performance Incentives Plan); California PUC PIP Modification at 6-7, App.; California PUC PMs/PIP Modification I at 7-8, Apps. A & B; California PUC PMs/PIP Modification II at 8, App. A. Incentive payments pursuant to the PIP commenced in April 2002. *See* California PUC PIP Order at 99.

⁷ *Cap Gemini OSS Test Final Report* at 5. Cap Gemini served as the OSS test administrator, and General Electric Global eXchange Services (“GXS”) served as the “test generator” which set up the “pseudo CLECs” and executed the test cases. *Id.*; *GXS Final Report* at 5. A final version of the *Cap Gemini Final Report* was issued in February 2001, pursuant to workshops involving the consultants and interested parties. *See generally Cap Gemini OSS Test Revised Final Report.*

⁸ *See Cap Gemini OSS Test Final Report* at 7-11. GXS found that SBC’s OSS were “robust and reliable” and its OSS interfaces “generally functioned well,” but also made numerous recommendations for improvement. *GXS Final Report* at 13-16.

⁹ *Cap Gemini OSS Test Recommendation Verification Report* at 4-6.

¹⁰ California PUC Decision at 2. Despite this positive test finding, on the basis of 2001 commercial performance data the state commission questioned “whether the sum of [maintenance and repair] evidence adequately supports a finding that CLECs are being allowed a meaningful opportunity to compete.” *Id.* at 53. More recent data indicates that SBC’s maintenance and repair performance pertaining to the UNE-platform and UNE loops warrants further scrutiny by the FCC as additional data are reported during this application’s pendency. SBC claims that it has “met all but one [of the] UNE P maintenance submeasures in two of the last three months,” SBC G. Johnson Aff. ¶ 156 n.93 (citing May-July data), but as of September it had not done so for PM 19 (Customer Trouble Report Rate), PM 20 (Customer Troubles Not Resolved within Estimated Time), PM 21 (Average Time to Restore), and PM 23 (Frequency of Repeat Troubles in 30-Day Period). SBC Sept. 2002 PMs *Ex Parte* at 19-7, 20-9, 21-9, 23-6; *see also* AT&T Toomey/Walker/Kalb Decl. ¶ 70. In addition, SBC’s performance in maintaining and repairing UNE loops for CLECs has been uneven. *See, e.g.,* SBC Sept. 2002 PMs *Ex Parte* at 21-6, 23-3, 23-4; *see also* AT&T Toomey/Walker/Kalb Decl. ¶ 71 (certain DSL-capable loops); XO Comments at 17, 20-21 (high-capacity loops). SBC admits performance deficiencies with respect to these products. *See* SBC Motta Aff. ¶¶ 33-44, 50-51 (detailing efforts to improve performance). *But see FCC New York Order* ¶ 37 (“[T]he Commission has found that a BOC’s promises of *future* performance to address particular concerns raised by

On September 19, 2002, the California PUC granted SBC's motion for an order that it had substantially satisfied the requirements of the 14-point checklist for Section 271 authority, despite finding that it had failed to fully comply with the items pertaining to local number portability ("LNP") and resale.¹¹ In addition, the California PUC was unable to determine that SBC had satisfied the requirements of California Public Utilities Code Section 709.2(c), pertaining to whether its entry into intrastate interLATA service would be consistent with the public interest.¹²

The California PUC's determinations regarding the federal checklist items pertaining to LNP and resale of advanced services do not appear to preclude approval of SBC's application.¹³

commenters have no probative value in demonstrating its *present* compliance with the requirements of section 271.").

¹¹ California PUC Decision at 2-4, 198-200, 215-20 (finding SBC must provide a mechanized enhancement to local number portability administration and must offer certain DSL or "advanced services" products at resale to comply with Checklist Items 11 and 14, respectively).

¹² *Id.* at 3-4, 239-67; *see also* California PUC Ruling on Concluding Inquiry at 2 (acknowledging that on two of the four Section 709.2(c) requirements, "determinations could not be made on the existing record"). Three of five California PUC commissioners dissented. California PUC Decision (Lynch, Comm'n President, dissenting) at 4 ("Any decision endorsing SBC Pacific Bell's [Section] 271 application to enter the intrastate long distance market without making the affirmative findings required by state law [pursuant to Section 709.2] violates state law."); California PUC Decision (Peevey, Comm'r, concurring and dissenting) at 3 ("On a legal basis, [Section 709.2] is not applicable. On a policy basis, the outcome is contradictory to the clear intent of the section [and if] 709.2 was applicable, then Pacific Bell meets all four of the criteria contained within it."); California PUC Decision (Duque, Comm'r, dissenting in part) at 2-4 ("Section 709.2, as a matter of fact and procedure should have never been rejoined and revisited with Section 271 analysis" and the majority's application of Section 709.2 is substantively flawed.).

¹³ The FCC has previously found SBC's advanced services offerings to be in compliance and, to the extent there remain ambiguities pertaining to the offering of DSL transport at retail, the FCC has initiated a separate proceeding to address the relevant factual and legal claims. *FCC Arkansas/Missouri Order* ¶¶ 78-84; *see also FCC Georgia/Louisiana Order* ¶¶ 273-77.

Regarding LNP, one CLEC claims that the lack of a mechanized check to LNP administration has had a negative impact on its ability to compete. AT&T Comments at 53; AT&T Willard Decl. ¶¶ 64, 76. However, the FCC has not previously required a mechanized process to be in place for checklist compliance. *Cf. FCC BellSouth Multistate Order* ¶ 263 (addressing CLEC complaint alleging premature line disconnects during LNP provisioning and suggesting mechanized process meets or exceeds checklist requirements). In any event, the California PUC conditioned its recommendation of approval on SBC's implementation of a mechanized enhancement to the Number Portability Administration Center check that will automatically delay a disconnect if a new service provider has not yet completed installation work. California PUC Decision at 3. SBC responded to the California PUC's directive by implementing a mechanized enhancement on September 30 and committing to provide data regarding the enhancement after 30 days of operation. *See* SBC California PUC LNP Compliance Notice at 1-2. The data may assist the FCC in verifying the effectiveness of SBC's LNP offering by the conclusion of these proceedings.

Regarding its initial findings pursuant to State Utilities Code Section 709.2(c), the California PUC recently solicited further comment to assist it in concluding its inquiry under Section 709.2(c) by the end of the year.¹⁴ The Department defers to the FCC regarding the impact of these continuing state proceedings on its deliberations pertaining to SBC's compliance with the federal public interest standard for Section 271 approval.¹⁵

II. Entry into the Local Telecommunications Markets

In assessing whether the local markets in a state are fully and irreversibly open to competition, the Department looks first to the actual entry in a market.¹⁶ But the Department does not broadly presume that all three entry tracks -- facilities-based, unbundled network elements ("UNEs"), and resale -- are open or closed on the basis of an aggregate level of entry alone.¹⁷

¹⁴ California PUC Ruling on Concluding Inquiry at 2-3 ("[I]t is now imperative to assess the record developed in this proceeding and determine whether or not there is a need to further augment it . . ."); *see also* California PUC Comments Letter at 2 (The state commission "expects to conclude these proceedings and issue a further order before the FCC disposes of Pacific's section 271 application."). The California PUC originally did not make final determinations on two of the four inquiries required by Section 709.2(c), those addressing anticompetitive behavior and improper cross-subsidization. California PUC Ruling on Concluding Inquiry at 1-2. The Department notes, however, that to the extent Section 709.2(c) and Section 271 concerns overlap, the California PUC found that SBC satisfied the first prong of the state public interest requirements by providing "all competitors [with] fair, nondiscriminatory, and mutually open access to [local] exchanges . . ." California PUC Decision at 242-44.

In the reopened Section 709.2 proceeding, several parties have raised issues not addressed by the California PUC in its initial decision. *See, e.g.*, AT&T California PUC Public Interest Filing.

¹⁵ *See* 47 U.S.C. § 271(d)(3)(C) (directing the Commission to assess whether the requested authorization would be "consistent with the public interest, convenience, and necessity"). The Telecommunications Act of 1996 requires the FCC to consult with state commissions on issues of checklist compliance but does not require it to give special weight to state commission views, although it may choose to do so. *See FCC Michigan Order* ¶¶ 30, 34 (citing 47 U.S.C. § 271(d)(2)(B)); *FCC South Carolina Order* ¶ 27.

¹⁶ *See* DOJ Pennsylvania Evaluation at 3-4 ("The Department first looks to actual competitive entry, because the experience of competitors seeking to enter a market can provide highly probative evidence about the presence or absence of artificial barriers to entry. Of course, entry barriers can differ by types of customers or geographic areas within a state, so the Department looks for evidence relevant to each market in a state." (Footnote omitted.)).

¹⁷ *See, e.g.*, DOJ Georgia/Louisiana I Evaluation at 7; DOJ Missouri I Evaluation at 6-7.

According to SBC's data, SBC and CLECs serve a total of approximately 20,112,000 lines in SBC's California service area as of July 2002.¹⁸ Of the total lines in SBC's service area in California, 43.5 percent, or approximately 8,745,000, serve businesses, and 56.5 percent, or approximately 11,367,000, serve residential customers.¹⁹ For business and residential customers combined, SBC estimates that CLECs using all modes of entry serve approximately 2,602,000 lines, or approximately 12.9 percent of all lines in SBC's service area in the state.²⁰

Competitors have made significant progress in penetrating the business market in California. CLECs serve approximately 20.8 percent of all business lines in SBC's California service area.²¹ CLECs serve approximately 18.8 percent of all business lines using primarily their own networks that are either connected directly to the customer premises or connected through loops leased from SBC.²² CLECs use the UNE-platform (a combination of loop, switch, and transport elements) to serve slightly more than 1 percent of all business lines.²³ CLECs resell SBC's services to serve less than one percent of such lines.²⁴

CLECs serve approximately 6.9 percent of all residential lines in SBC's California service area.²⁵ Facilities-based carriers serve approximately 5.1 percent of all residential lines using primarily their own networks that are either connected directly to the customer premises or

¹⁸ See SBC J.G. Smith Aff. ¶ 8 tbl.1 n.8 (SBC retail lines as of July 2002); *id.* ¶ 8 tbl.1 (CLEC lines as of July 2002). There are incumbent local exchange carriers other than SBC in California.

¹⁹ See SBC J.G. Smith Aff. ¶ 8 tbl.1 n.8; *id.* ¶ 10 tbl.2 (CLEC residential and business lines as of July 2002).

²⁰ See *id.*

²¹ See SBC J.G. Smith Aff. ¶ 8 tbl.1 n.8; *id.* ¶ 10 tbl.2 (CLECs serve approximately 1,816,000 business lines).

²² See SBC J.G. Smith Aff. Attach. E-1 (CLECs serve approximately 1,646,000 business lines using at least some of their own facilities); *id.* ¶ 8 tbl.1 n.8; *id.* ¶ 10 tbl.2.

²³ See SBC J.G. Smith Aff. Attach. E-2 (CLECs serve approximately 98,800 business lines through the UNE-platform); *id.* ¶ 8 tbl.1 n.8; *id.* ¶ 10 tbl.2.

²⁴ See SBC J.G. Smith Aff. Attach. E-5 to E-6 (CLECs serve approximately 71,200 business lines via resale); *id.* ¶ 8 tbl.1 n.8; *id.* ¶ 10 tbl.2.

²⁵ See SBC J.G. Smith Aff. ¶ 8 tbl.1 n.8; *id.* ¶ 10 tbl.2 (CLECs serve approximately 786,000 residential lines).

connected through loops leased from SBC.²⁶ Indeed, most CLEC service to residential customers in California is facilities-based, provided primarily over the cable television facilities of AT&T Broadband and Cox Communications.²⁷ CLECs serve approximately 1.1 percent of all residential lines through the UNE-platform and less than one percent of such lines by means of resale.²⁸

The amount of entry by facilities-based CLECs serving business customers in California, and the absence of evidence that entry by both business and residential facilities-based carriers has been unduly hindered by problems with obtaining inputs from SBC, leads the Department to conclude that opportunities to serve both types of customers via facilities are available there. The Department also concludes, due in part to the paucity of CLEC complaints regarding resale, that SBC has fulfilled its obligations to open the resale mode of entry to competition for both residential and business customers in California. Although there is significantly less competition to serve both business and residential customers through the UNE-platform, the lower levels of penetration may reflect the higher UNE pricing that was in effect for most of the period preceding this application as opposed to the UNE prices on which the application is based, as well as a degree of uncertainty as to the UNE rates currently under review by the California PUC.²⁹

III. TELRIC Pricing

The California PUC recently ordered interim loop and switching rates that are significantly lower than the original rates and that will be subject to “true-up” pending further

²⁶ See SBC J.G. Smith Aff. Attach. E-1 (CLECs serve approximately 582,900 residential lines using at least some of their own facilities); *id.* ¶ 8 tbl.1 n.8; *id.* ¶ 10 tbl.2.

²⁷ SBC J.G. Smith Aff. ¶¶ 14-16.

²⁸ See SBC J.G. Smith Aff. Attachs. E-2 & E-5 to E-6 (CLECs serve approximately 123,900 residential lines through the UNE-platform and 79,800 such lines via resale); *id.* ¶ 8 tbl.1 n.8; *id.* ¶ 10 tbl.2.

²⁹ See *supra* note 5.

proceedings.³⁰ In order to ensure that pricing would not be an issue in these proceedings, SBC “voluntarily agreed to a ‘modified true-up’ process, if the permanent rates set by the [California PUC] in the 2002 Consolidated UNE Reexamination proceeding are higher than the currently effective interim rates.”³¹ One CLEC has expressed concerns about the true-up mechanism that SBC has proposed for use in California.³² SBC’s modification would limit any true-up to the difference between the interim rates and rates benchmarked to “the effective rates in Texas for the period of time in which the [California] interim rates were in place.”³³ The FCC has established that comparisons between states can be a useful way to set as well as analyze rates and that there is no reason to “make a distinction between cost-based rates and rates that equal cost-based rates.”³⁴ However, it is not clear which Texas rates will be reflected in SBC’s true-up calculations if the Texas PUC revises its rates pursuant to its pending cost proceeding during the period interim rates are in effect in California.³⁵ Conceivably, SBC’s proposal could have the effect of altering the Commission’s approach to cross-state comparisons of rates.³⁶ At the very least, the ambiguity of the proposal invites unnecessary future debate over such issues. The Department therefore urges the Commission to resolve this ambiguity before relying in any way

³⁰ See California PUC Pricing Order II at 71-73, Apps. A & B.

³¹ SBC Vandeloop Aff. ¶¶ 49-54.

³² AT&T Comments at 29-30.

³³ SBC Vandeloop Aff. ¶ 50.

³⁴ *FCC Kansas/Oklahoma Order* ¶ 87; see also *id.* ¶ 82 n.244.

³⁵ See SBC Makarewicz Aff. ¶ 12 (“[P]recisely what effect proposed cost changes will have on the Texas rates is the question currently before the Texas Commission and does not mitigate the appropriateness of applying current Texas rates in a benchmark analysis.”).

³⁶ Cf. *FCC Massachusetts Order* ¶ 30 (“[B]ecause Verizon would have us rely on switching rates from the New York proceeding, a decision by the New York Commission to modify these UNE rates may undermine Verizon’s reliance on those rates in [its] Massachusetts [application] and its compliance with the requirements of Section 271, depending on the New York Commission’s conclusions.”), *aff’d in part, remanded in part, WorldCom, Inc. v. FCC*, --- F.3d ---, 2002 WL 31360443, at *5 (D.C. Cir. Oct. 22, 2002) (approving of the Commission’s having “observed that Verizon’s § 271 compliance in Massachusetts would be undermined if its UNE rates fell out of line with TELRIC levels, as determined by the active rate review processes under way in New York and Massachusetts”).

on SBC's commitment. The Department, however, defers to the Commission's ultimate determination of whether the prices supporting this application are appropriately cost-based.³⁷

IV. Conclusion

SBC's application demonstrates that it has succeeded in opening its local markets in California to competition in many respects. Based on this record, and subject to the Commission's assuring itself that the concerns expressed in this Evaluation have been resolved, the Department recommends that the FCC approve SBC's application.

Respectfully submitted,

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³⁷ See DOJ Rhode Island Evaluation at 6; DOJ Missouri I Evaluation at 1-2; DOJ Kansas/Oklahoma Evaluation at 11.

Certificate of Service

I hereby certify that I have caused a true and accurate copy of the foregoing Evaluation of the United States Department of Justice to be served on the persons indicated on the attached service list by first class mail, overnight mail, hand delivery, or electronic mail on October 29, 2002.

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