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SUMMARY

SBC Communications Inc. ("SBC") seeks reconsideration of the Commission's Order released September 27, 1995, insofar as the Commission has failed to address whether streamlined tariff filing rules should be adopted for all carriers.

The Order rests on a determination that significant competition has developed in both interexchange and local exchange markets. Where competition exists, the Commission has found, current tariff filing requirements raise administrative costs, discourage price cuts, and retard the introduction of new services. These concerns apply no less to dominant carriers than to their nondominant competitors. Imposing asymmetrical tariff filing rules on these two categories of carriers defeats rather than promotes the Commission's procompetitive goals by depriving consumers of the benefits of real competition.

The Commission has artificially limited its inquiry to nondominant carriers. The rigid distinction between dominant and nondominant carriers is not viable here, however, in light of the Commission's conclusion that dominant carriers are subject to substantial competitive pressure for some services. Moreover, the Commission's decision to issue its Order without developing a record on this issue rests on misapprehensions concerning both the issues that were before the court in *Southwestern Bell Corp. v. FCC*, 43 F.3d 1515 (D.C. Cir. 1995), and the scope of the court's mandate in that case.

The Commission should reconsider its September 27 Order and extend the same tariff filing rules to carriers currently classified as dominant. At a minimum, the Commission should invite public comment on whether these tariff filing reforms should be extended to such carriers.

BACKGROUND

In February 1993, the Commission initiated a rulemaking to consider concerns that “existing tariff regulation of nondominant carriers inhibits price competition, service innovation, entry into the market, and the ability of firms to respond quickly to market trends.” Notice of Proposed Rulemaking, *Tariff Filing Requirements for Nondominant Common Carriers*, 8 FCC Rcd 1395, 1397 (1993) (“NPRM”). The Commission proposed to streamline tariff requirements for nondominant carriers in a number of respects, including provisions allowing them to designate a range of rates, rather than a single specified rate for the service at issue. *Id.* at 1398.

In response, SBC and other commenters noted that the anticompetitive consequences of existing tariff filing rules did not affect nondominant carriers alone. Carriers classified as dominant are affected by the tariff filing rules in just the same way as their nondominant competitors, with the same result of diminished competition and innovation. *See Nondominant Filing Order*, 8 FCC Rcd at 6753 (discussing comments). These commenters accordingly urged the Commission to reassess its dichotomy between dominant and nondominant carriers -- or at least to include dominant carriers within the scope of this proceeding. *Id.*

The Commission provided no substantive response. While acknowledging that “conditions in the telecommunications marketplace have not remained static since the Commission first established the dominant/nondominant classification” in 1980, the Commission stated summarily that “the original scope of this proceeding did not include, and

we do not expand the scope to include, the modification of the dominant/nondominant regulatory dichotomy.” *Id.* at 6754.

The D.C. Circuit, after finding the *Nondominant Filing Order* unlawful on other grounds, determined that it was unnecessary to consider SBC’s challenge to this aspect of the Commission’s decision. 43 F.3d at 1525 n.7. In vacating the *Nondominant Filing Order*, however, the court made clear that the Commission may not continue to sidestep the issue: “Any subsequent agency rules that attempt to apply [the] dominant/nondominant distinction may give rise to Southwestern’s claim and may provide a more appropriate context in which to consider it.” *Id.*

Despite this statement, the Commission has made no effort to address SBC’s concerns in the wake of the court’s decision. Without supplementing the record developed in 1993 (Order ¶ 8), the Commission simply removed the range-of-rates provision from the unlawful order and reissued it in substantially identical form.

ARGUMENT

The Order perpetuates a key error that infected the *Nondominant Filing Order*. The Commission still has not explained how the public interest can be served by applying to one group of competitors burdensome tariff filing rules deemed anticompetitive when applied to another group of competitors in the same markets. Nor has the Commission confronted the obvious inconsistency between the 15-year-old assumptions that underlie its dominant/nondominant dichotomy and the animating premise of this proceeding -- that competition has developed in both interexchange and local exchange markets. *See* NPRM, 8

FCC Rcd at 1396-97. Finally, it was error for the Commission to issue its Order without creating a record that would be sufficient to resolve these issues.

I. THE COMMISSION HAS GIVEN NO RATIONAL EXPLANATION FOR EXCLUDING DOMINANT CARRIERS FROM THE SCOPE OF ITS RULEMAKING

In the NPRM and *Nondominant Filing Order*, the Commission noted that both AT&T and local exchange carriers face “significant competition” in their respective markets; it determined that streamlined tariff filing requirements would foster this competition. *Nondominant Filing Order*, 8 FCC Rcd at 6756; NPRM, 8 FCC Rcd at 1396-97. Yet the Commission has failed to recognize that this logic supports assessing streamlined filing requirements for *all* carriers.

The Commission has acknowledged that there is “growing evidence that an increasing variety of local telecommunication services are available on a competitive basis” and that market forces should be allowed to operate where competition exists. Second Further Notice of Proposed Rulemaking in CC Docket No. 94-1, *Price Cap Performance Review for Local Exchange Carriers*, FCC 95-393, at ¶ 5 (released Sept. 20, 1995) (“*Price Cap Notice*”). “Even where competition has not arrived,” the Commission has stated, regulatory reform that facilitates rate reduction “will benefit consumers both directly through lower prices and indirectly by encouraging only efficient competitive entry.” *Id.* ¶ 6. Consistent with these findings, the Commission has sought comment, in a different proceeding, on reducing regulatory burdens to reflect the growth of local exchange competition. *Id.* ¶¶ 127-58.

In this proceeding, however, the Commission has ignored the necessary implications of its market analysis. For example, the Commission determined that requiring nondominant

carriers to file tariffs with a substantial advance notice period “imposes direct and indirect costs on consumers by delaying the availability of new services and price reductions and by distorting the competitive marketplace in general,” particularly insofar as competitors are guaranteed a window of opportunity to counter their rivals’ initiatives. *Nondominant Filing Order*, 8 FCC Rcd at 6756 (footnote omitted). But all these points remain valid whether a carrier is dominant or nondominant: consumers benefit when any carrier lowers its rates or introduces a new service. The Commission’s conclusion that competitive pressures made it appropriate to reassess the volume of information required in tariff filings and the form of tariff submissions likewise cannot be limited only to nondominant carriers. *See NPRM*, 8 FCC Rcd at 1398-99. At least where nondominant carriers directly compete with dominant carriers, the same rules should apply to all competitors.

Indeed, just a few weeks after adopting its Order in this proceeding, the Commission found that applying dominant carrier filing requirements to AT&T caused significant harm. The filing rules “inhibit[ed] AT&T from quickly introducing new services and from quickly responding to new offerings by its rivals,” reduced AT&T’s incentive to lower its prices, and raised compliance and administrative costs. *Order, Motion of AT&T Corp. to be Reclassified as a Non-Dominant Carrier*, FCC 95-427, at ¶ 27 (released Oct. 23, 1995) (“*AT&T Reclassification Order*”); *see id.* at ¶ 32 (“As a result of the longer tariff notice requirements imposed on AT&T, AT&T would have less incentive and ability to initiate pro-competitive strategies.”). These factors, the Commission found, warranted relieving AT&T of notice requirements even for those services in which it retains the ability to control prices. *Id.* at ¶¶ 32-33.

The Commission has never explained its seemingly arbitrary refusal to extend this proceeding to all carriers, without regard to the dominant/nondominant distinction. The NPRM may have been triggered by judicial invalidation of the Commission's forbearance policy for nondominant carriers, 8 FCC Rcd at 1395, but that does not mean that the scope of the proceeding should be confined to nondominant carriers. Nor did the Commission address this defect in the *Nondominant Filing Order*, where it merely observed that "the original scope of this proceeding did not include . . . the modification of the dominant/nondominant regulatory dichotomy." 8 FCC Rcd at 6754.

We recognize that the Commission need not address in one proceeding all of the *different* issues that relate to a particular regulatory problem. See *Mobil Oil Exploration & Producing S.E., Inc. v. United Distribution Cos.*, 498 U.S. 211, 230 (1991); *Associated Gas Distribs. v. FERC*, 824 F.2d 981, 1038-39 (D.C. Cir. 1987). Here, however, the Commission has excluded some carriers from the scope of its rulemaking while including other carriers that are affected by the *same* issue in a similar way. Likewise, the Commission never considered whether, and to what extent, competition will suffer if the existing regulatory asymmetry between dominant and nondominant carriers becomes even more pronounced.

The Commission cannot correct these failures by pointing to the *Price Cap Performance Review* proceeding, where it is considering related matters as they pertain to local exchange carriers. That proceeding had not even been opened when the Commission issued its *Nondominant Tariff Order*. The Commission's decision to address "related, yet discrete, issues" (498 U.S. at 230) in a separate rulemaking is not an acceptable substitute for considering all of the major aspects of the issue that the Commission determined to address in

this docket. See *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (agency must consider all important aspects of the problem before it).

Nor does the Commission's dated distinction between dominant and nondominant carriers explain the limited scope of this proceeding. "Robust competition" (8 FCC Rcd at 6757) affects all carriers -- whether they are classified as dominant or nondominant. As noted above, moreover, the competitive harm and unnecessary burden that the Commission has associated with notice requirements and other tariff procedures is not limited to nondominant carriers. In fact, as the Supreme Court suggested in the forbearance case, relief may be *especially* warranted for dominant carriers: "[I]f one is concerned about the use of filed tariffs to communicate pricing information," the Court explained, it makes little sense "to require filing by the dominant carrier, the firm most likely to be a price leader." *MCI Telecommunications Corp. v. American Tel. & Tel. Co.*, 114 S. Ct. 2223, 2233 (1994).

Just as importantly, this proceeding calls into question whether blanket dominant carrier classifications retain any validity. The "economic underpinning" of the *Competitive Carrier Proceeding* was that carriers subject to competitive constraints "cannot rationally price their services in ways which . . . would contravene Sections 201(b) and 201(a)." First Report and Order, *Policy and Rules Concerning Rates for Competitive Common Carrier Servs.*, 85 F.C.C.2d 1, 31 (1980) ("*Competitive Carrier Order*"). While the Commission initially applied this principle by creating a new class of "nondominant" carriers, it committed itself to reviewing, on an ongoing basis, "evidence that circumstances have evolved in a manner which permits the easing of the regulatory requirements to which any carrier or class of carriers is subject." *Id.* at 11.

Competition has developed in the provision of some LEC services, notably interstate access. *See* NPRM, 8 FCC Rcd at 1396. Where a service is competitively provided, the benefits of strict tariff regulation are necessarily diminished, while the burdens of such regulation are particularly acute. *See, e.g., Nondominant Tariff Order*, 8 FCC Rcd at 6756-57 (discussing notice requirements). Thus, the logic of the *Competitive Carrier Order* itself requires reconsideration of the Commission's inflexible dominant/nondominant distinction.²

The Commission, in fact, is *obligated* to reassess its strict division between dominant and nondominant carriers. The Commission may not "adhere blindly to regulations that are cast in doubt by new developments or better understanding of the relevant facts." *ACLU v. FCC*, 823 F.2d 1554, 1565 (D.C. Cir. 1987). Where, as here, changed factual circumstances and the Commission's own decisions undermine the predicate for a particular regulatory approach, the Commission must either "reconsider [its] settled policy or explain its failure to do so." *Bechtel v. FCC*, 957 F.2d 873, 881 (D.C. Cir. 1992).

II. THE COMMISSION SHOULD SOLICIT COMMENT PURSUANT TO THE ADMINISTRATIVE PROCEDURE ACT

Because of the approach taken in the NPRM and the Commission's failure to solicit comment after the *Southwestern Bell* decision, the record in this proceeding concerns nondominant carriers exclusively. To address the issues put forward by SBC, therefore, the Commission will have to gather evidence that will support reassessment of the rigid, dichotomous regulatory approach taken in the *Competitive Carrier Proceeding*.

² The Commission has recognized the appropriateness of a more flexible, market-specific approach in the *Price Cap Performance Review* proceeding. *See Price Cap Notice*.

Indeed, the record must be reopened in any event. The Commission issued the Order on the assumption that, although the D.C. Circuit vacated the entire *Nondominant Filing Order*, its decision invalidated only the range-of-rates provision. Order ¶¶ 7, 9. The Commission’s entire assessment of the sufficiency of the record thus consists of the following:

In this Order, we consider the entire extensive record already assembled for the *Nondominant Filing NPRM* and *Nondominant Filing Order*. We find that the existing record supports our decision to reinstate those tariff filing rules which were not considered by the court, and find neither a policy reason nor a legal requirement to supplement the record before moving forward.

Order ¶ 8.

The D.C. Circuit has disapproved similar attempts to reissue “corrected” versions of vacated rules without reopening the record. For example, in *Mobil Oil Corp. v. EPA*, 35 F.3d 579 (D.C. Cir. 1994), the court rejected EPA’s argument that the comments received in response to an earlier notice of proposed rulemaking “remained fresh and relevant” and that EPA could simply repeat analysis that had not expressly been invalidated by the court. “[W]e vacated the original . . . rule,” the court emphasized; “to repromulgate the rule, the EPA must comply with the applicable provisions of the [Administrative Procedure Act].” *Id.* at 584.

The court went on to explain that the agency is not necessarily required to “‘start from scratch’ and initiate new notice and comment proceedings If the original record is still fresh, a new round of notice and comment might be unnecessary. Such a finding, however, must be made by the agency *and supported in the record*; it is not self-evident.” *Id.* (emphasis added). In particular, the agency may not rely on the old record without determining whether new information has come to light in the interim that might be relevant

to the agency's decision. *Id.* at 585; see *Action on Smoking & Health v. CAB*, 713 F.2d 795, 800 (D.C. Cir. 1983) (“*ASH*”) (“[A] new rule . . . must be promulgated in accordance with the rulemaking procedures demanded by section 4 of the Administrative Procedure Act, including its notice and comment requirements.”) (emphasis in original).

In *ASH*, the court clarified that when it vacates and remands the invalid portion of a rule to the agency, the agency may enter a new order that remedies the specific defects that were identified in the earlier action. But where the reviewing court has vacated the rule without remanding, there is nothing left of the original rule. 713 F.2d at 797. Any subsequent agency action on the matter constitutes a new rule, subject to the requirements of the APA. *Id.* at 798. The agency must solicit public comment unless it explains why notice and comment would be “impracticable, unnecessary, or contrary to the public interest” under 5 U.S.C. § 533(b)(B). These exceptions to the notice and comment requirement, moreover, “should be invoked only in emergency situations when delay would do real harm. Bald assertions that the agency does not believe comments would be useful cannot create good cause to forgo notice and comment procedures.” 713 F.2d at 800 (citations omitted).

The D.C. Circuit vacated the *Nondominant Filing Order*; it did not remand the order for a minor correction. 43 F.3d at 1526. Thus, when the Commission decided to issue a new order without the offending range-of-rates provision, it had an obligation either to reopen the record or to explain persuasively why further comment is not needed. The Commission did neither. Instead, it proceeded on the erroneous assumption that the range-of-rates provision was the only aspect of the *Nondominant Filing Order* challenged in the *Southwestern Bell* case. See Order ¶ 7. Having overlooked SBC's arguments in the *Southwestern Bell* case, the

Commission mistakenly assumed that it could simply eliminate the range-of-rates provision and reissue the *Nondominant Filing Order* without considering the regulatory and market developments since 1993 that would support additional substantive changes.

But the Commission may not simply refuse to consider factual evidence and legal argument supporting an outcome other than reissuance of the *Nondominant Filing Order*. The Commission should rectify that error by issuing a new Notice of Proposed Rulemaking inviting comment on the issues raised by SBC both before the D.C. Circuit and again in this petition.

CONCLUSION

The Commission should grant SBC's petition for reconsideration and extend to carriers currently regulated as dominant the same tariff filing rules that it has applied to carriers regulated as nondominant. At a minimum, the Commission should solicit comment on whether, and to what extent, the tariff reforms adopted in the Order should be applied to carriers currently classified as dominant.

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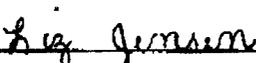
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CERTIFICATE OF SERVICE

I, Liz Jensen, hereby certify that the foregoing
Petition for Reconsideration of SBC Communications Inc. in
CC Docket No. 93-36, has been served this 13th day of
November, 1995 to the Parties of Record.



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