

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

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FEDERAL COMMUNICATIONS COMMISSION  
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In the Matter of )  
)  
Tariff Filing Requirements for )  
Nondominant Common Carriers )  
)  
)

CC Docket No. 93-36

DOCKET FILE COPY ORIGINAL

OPPOSITION OF AD HOC TELECOMMUNICATIONS USERS COMMITTEE  
TO PETITION OF SBC COMMUNICATIONS INC. FOR RECONSIDERATION

INTRODUCTION

Southwestern Bell ("SBC") is trying for the third time to inject into this docket an issue beyond the scope of the proceeding. Both the Commission and the United States Court of Appeals for the District of Columbia Circuit have already rejected SBC's previous attempts to unilaterally expand this proceeding. The Commission should summarily reject SBC's latest attempt to end run the factual and procedural prerequisites for the regulatory treatment it desires.

DISCUSSION

For more than a decade, the Commission forbore from requiring nondominant carriers to file tariffs pursuant to the permissive detariffing rules adopted in the *Competitive Carrier Proceeding*.<sup>1</sup> The Commission consistently required dominant carriers like SBC to continue filing tariffs.

<sup>1</sup> Policy and Rules Concerning Rates for the Competitive Common Carrier Services and Facilities Authorizations Therefor (CC Docket No. 79-252) (Competitive Carrier), Notice of Inquiry and Proposed Rulemaking, 77 FCC 2d 308 (1979) (competitive Carrier Notice); First Report and Order, 85 FCC 2d 1 (1980) (First Report); Further Notice of Proposed Rulemaking, 84 FCC 2d 445 (1981) (Competitive Carrier Further Notice); Second Notice of Proposed Rulemaking, FCC No. 82-187, 47 Fed. Reg. 17,308 (1982); Second Report and Order, 91 FCC 2d 59 (1982) (Second Report), recon., 93 FCC 2d 53 (1983); Third Further Notice of Proposed Rulemaking, 48 Fed. Reg. 28,292 (1983); Third Report and Order, 48 Fed. Reg. 46,791 (1983);

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In 1992, the U.S. Court of Appeals for the D.C. Circuit rejected the Commission's permissive detariffing rules in its *Forbearance Decision*.<sup>2</sup> The court's decision and the FCC order under review therein did not revisit the dominant/non-dominant classification system created in *Competitive Carrier* nor any of the carrier classifications made by the Commission in the course of that proceeding. The issue under consideration was solely the lawfulness of the tariff filing rules that applied to nondominant carriers.

The instant rulemaking was established to create tariff filing rules for nondominant carriers in the wake of the *Forbearance Decision* and subsequent judicial decisions rejecting the Commission's "forbearance" approach.<sup>3</sup> The Commission's Notice of Proposed Rulemaking ("Notice" or "NPRM") in this docket stated that the proceeding was initiated only "to consider easing in the near term the existing tariff filing requirements for *nondominant* carriers."<sup>4</sup> The Notice emphasized that it was setting forth "a targeted proposal to streamline...our tariff filing rules for domestic nondominant common carriers."<sup>5</sup>

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Fourth Report and Order, 95 FCC 2d 554 (1983) en banc denied, January 21, 1993; Fourth Further Notice of Proposed Rulemaking, 96 FCC 2d 922 (1984); Fifth Report and Order, 98 FCC 2d 1191 (1984) (Fifth Report), recon., 59 Rad. Reg. 2d (P&F) 543 (1985); Sixth Report and Order, 99 FCC 2d 1020 (1985) (Sixth Report), rev'd MCI Telecommunications Corp. v. FCC, 765 F.2d 1186 (D.C. Cir. 1985) (MCI v. FCC).

<sup>2</sup> AT&T v. FCC, 978 F.2d 727 (D.C. Cir. 1992), *rehearing en banc denied*, Jan. 21, 1993 (" *Forbearance Decision*").

<sup>3</sup> See *Southwestern Bell Corp. v. FCC*, 43 F.3d 1515, 1518-1519 (D.C. Cir. 1995) (" *Range of Rates Decision*") and proceedings reviewed therein.

<sup>4</sup> *In the Matter of Tariff Filing Requirements for Non Dominant Common Carriers*, Notice of Proposed Rulemaking, CC Docket No. 93-36, 8 FCC Rcd. 1395; 73 Rad. Reg. 2d (P&F) 861, released February 19, 1993, at 1395 ("NPRM" or "Notice")(emphasis added).

<sup>5</sup> *Id.*

Thus, the NPRM could not have more clearly narrowed the focus of this proceeding to filing requirements only. The Notice contained no invitation to comment upon the dominant/nondominant distinction or the FCC's earlier classification of local exchange carriers as dominant.

Despite the narrow focus of the NPRM, SBC (like AT&T and other BOCs) filed comments urging the Commission to expand the issues under consideration to include reexamination of the dominant/nondominant classification.<sup>6</sup> Users (including Ad Hoc), CAPs and nondominant interexchange carriers opposed AT&T and the BOCs on the grounds that the issue was beyond the scope of the rulemaking, which was "to determine how best to implement tariffing requirements for nondominant carriers in light of the [*Forbearance Decision*], and not to uproot and discard the Commission's long-standing policy that designates carriers that lack market power as nondominant."<sup>7</sup>

The Commission agreed in its Report and Order in this docket ("*Report and Order*") and refused to expand the scope of the proceeding.<sup>8</sup>

The *Report and Order* also adopted a "range of rates" rule for nondominant tariff filings which was subsequently rejected by the D.C. Circuit in its *Range of Rates Decision*.<sup>9</sup> On appeal, SBC persisted in raising its unrelated

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<sup>6</sup> *Tariff Filing requirements for Nondominant Common Carriers* CC Docket 93-36, released August 18, 1993, 8 FCC Rcd 6752, 6753 [para. 6] ("*Report and Order*").

<sup>7</sup> *Id.* at para 7.

<sup>8</sup> *Id.* at para 8.

<sup>9</sup> *Range of Rates Decision*, note 3, *supra*.

dominant/nondominant issue, claiming that the Commission erred in refusing to reconsider the dominant/nondominant distinction. Like the Commission, the D.C. Circuit refused to expand the scope of the proceeding. In its decision reviewing the *Report and Order*, the court dismissed SBC's claim in a footnote, which states in typically non-committal fashion that the dominant/nondominant distinction "may" arise via subsequent agency action which then "may" provide an appropriate context for considering it.

In its *Remand Order* implementing the *Range of Rates Decision*, the Commission noted SBC's claims in the appeal and declined to address them further.<sup>10</sup>

SBC now seeks reconsideration of the *Remand Order*, arguing yet again that the Commission should ignore its long-standing regulatory scheme and either announce that nondominant filing requirements will apply to dominant carriers or that SBC is no longer a dominant carrier.

#### I. THE COMMISSION SHOULD DISMISS SBC'S PETITION

Persistence can be admirable but taken to the extreme as SBC has done, it becomes an waste of the Commission's resources and those of interested parties. The Commission and the circuit court have on four occasions made clear to SBC that it is raising an issue beyond the scope of this proceeding. In order to raise the issue once again, SBC's petition for reconsideration argues for

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<sup>10</sup> *Tariff Filing requirements for Nondominant Common Carriers* CC Docket No. 93-36, released September 27, 1995, FCC No. 95-399, 1995 FCC LEXIS 6378; 78 Rad. Reg. 2d (P&F) 1722 (" *Remand Order*").

a fundamental change in the way it is regulated on the strength of (1) a single footnote rejecting its argument in a decision reviewing an unrelated issue; and (2) broadly-worded dicta in other Commission proceedings.

SBC's pleading should be summarily dismissed by the Commission as frivolous. SBC apparently believes that it can pressure the Commission to follow SBC's agenda by filing ill-conceived pleadings which divert resources from useful work. This proceeding does not raise SBC's dominant/nondominant issue and SBC has been told four times, by the court and the Commission, that the issue doesn't belong here. Perhaps the fifth time will be the charm.

## **II. SBC'S PETITION IS AN ATTEMPT TO AVOID AN EVIDENTIARY SHOWING**

In order to reclassify SBC as a nondominant carrier, the Commission must have a record from which it may make findings of fact regarding the state of competition in SBC's markets. SBC can choose from any number of appropriate procedural vehicles for establishing such a record. SBC could file a petition for declaratory ruling, a petition for rulemaking, or a petition for waiver. All of these pleadings require SBC to make the factual record that justifies a change in its regulatory classification.

If SBC believes that it can demonstrate sufficient marketplace competition to warrant reclassification as a nondominant carrier, it should present its evidence to the Commission in the appropriate procedural forum. Apparently, SBC is not prepared to do so, nor is the Ad Hoc Committee aware of any factual

evidence that would enable it to do so. The Ad Hoc Committee is composed of numerous large and sophisticated users of telecommunications, including many in SBC's service area who would likely be the first beneficiaries of the pricing flexibility that SBC seeks, through negotiated offerings *cum* AT&T's contract tariffs, through bulk discounts or via other de-averaged rate mechanisms. Thus, the Committee has every incentive to support de-regulatory initiatives as soon as they are justified by the state of competition in the marketplace. Given the state of competition in SBC's marketplace, the Committee cannot support SBC's attempt in its petition to create a procedural shortcut to the reclassification it seeks.

### **CONCLUSION**

The state of competition in local exchange service markets, and the regulatory changes such competition would justify, if any, are currently the subjects of raging debate in Congress, in several existing FCC proceedings (e.g., the Expanded Interconnection rulemakings,<sup>11</sup> the LEC price caps pricing flexibility proceeding,<sup>12</sup> and the universal service reform docket<sup>13</sup>) and in the eagerly-awaited comprehensive access reform docket. SBC's petition for

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<sup>11</sup> *Local Exchange Carriers' Rates, Terms, and Conditions for Expanded Interconnection Through Virtual Collocation for Special Access and Switched Transport*, CC Docket 94-97, Phase I, released (May 11, 1995).

<sup>12</sup> *Price Cap Performance Review for Local Exchange Carriers*, CC Docket No. 94-1

<sup>13</sup> *Amendment of Part 36 of the Commission's Rules and Establishment of a Joint Board*, Notice of Proposed Rulemaking and Notice of Inquiry, FCC 95-282, CC Docket No. 80-286 (released July 13, 1995).

reconsideration ignores these venues and insists that its regulatory world should be turned upside down because of a few off-hand remarks in unrelated FCC orders and an inoposite footnote in a D.C. Circuit decision.

Accordingly, the Commission should dismiss SBC's petition summarily as frivolous; construe it as a petition for declaratory ruling or motion for reclassification for which no evidentiary support is proffered and deny it; or target Commission resources on higher priority matters and allow this petition allow it to be overtaken by the variety of imminent regulatory events that will supersede it.

Respectfully submitted,

  
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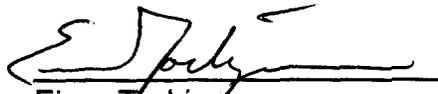
Dated: January 16, 1995

## Certificate of Service

I, Einar Torbjornsen, hereby certify that true and correct copies of the Opposition of the Ad Hoc Telecommunications Users Committee to the Petition of SBC Communications Inc. for Reconsideration, In the Matter of Tariff Filing Requirements for Non Dominant Common Carriers, CC Docket No. 93-36 were served this 16th day of January, 1996 via first class mail upon the parties on the attached service listand via hand delivery of the following:

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