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

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In the Matter of )

Policy Rules Concerning the )  
Interstate, Interexchange Marketplace )

Implementation of Section 254(g) of the )  
Communications Act of 1934, as amended )

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CC Docket No. 96-61

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**COMMENTS OF SBC COMMUNICATIONS INC.**

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## SUMMARY

In this phase of the referenced Docket, the Commission has requested comments upon the use of the DOJ/FTC Horizontal Merger Guidelines<sup>1</sup> in connection with its definitions of geographic and product markets used in the evaluation of market power; its existing separation requirements for ILEC-affiliated interexchange carriers and its proposed separation for BOC affiliated out-of-region interexchange carriers; and its adoption of geographic rate averaging and rate integration rules in response to the Telecommunications Act.

First, the Horizontal Merger Guidelines were not intended to serve as the basis for determining whether or how to regulate a market or any portion of it or to establish asymmetrical regulation of markets or specific firms within a market. In addition, the Commission acknowledges that it does not yet have before it a specific application for the proposed new market definitions. In effect, therefore, the NPRM is advisory in nature and could ultimately prove counterproductive by reproducing the potential for uneven or anticompetitive regulation of interstate, interexchange services. Second, the Commission's suggested abandonment of or forbearance from the separate affiliate requirements of the Fifth Report and Order applicable to ILECs that provide interstate, interexchange services (and proposed to be extended to BOCs), is appropriate. The Commission's concern about potential anticompetitive conduct, expressed in the BOC Out-of-Region NPRM, is based upon the potential that ILECs or BOCs might improperly use their obligation to connect calls that are terminated in their own regions as they begin to provide out-of-region long-distance service. However, local exchange services are subject to

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<sup>1</sup>Abbreviated terms within this Summary have the same meaning as within the text of SBC's Comments.

equal access and non-discrimination safeguards as well as practical and business limitations that make such activities virtually impossible.

Accordingly, SBC urges the Commission (1) to avoid making an essentially non-binding policy statement upon market power issues it acknowledges are case specific, and (2) either to refuse to adopt BOC out-of-region separation requirements or to forbear from enforcing such requirements.

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**COMMENTS OF SBC COMMUNICATIONS INC.  
(NPRM SECTIONS IV, V, AND VI)**

SBC Communications Inc. ("SBC"), by its attorneys and on behalf of its subsidiaries, Southwestern Bell Communications Services, Inc. ("SBCS"), Southwestern Bell Telephone Company ("SWBT"), and Southwestern Bell Mobile Systems ("SBMS"), files these comments in response to Parts IV, V, and VI of the Notice of Proposed Rulemaking released by the Commission on March 25, 1996 (the "NPRM").

**I. INTRODUCTION**

The Commission has requested comments upon various proposals, including its definitions of geographic and product markets used in the evaluation of market power; its existing separation requirements for independent local exchange carrier ("ILEC") affiliated interexchange carriers and its proposed separation for BOC-affiliated out-of-region interexchange carriers; and its adoption of geographic rate averaging and rate integration principles. SBC urges the Commission: (1) to avoid making an essentially non-binding policy statement upon market power issues it acknowledges are case specific, and (2) either to decline to adopt BOC out-of-

region separation requirements or to forbear from enforcing such requirements.

## II. DISCUSSION

### A. RESPONSE TO NPRM SECTION IV; NO CHANGE IN GEOGRAPHIC OR PRODUCT MARKETS IS NECESSARY AT THIS TIME

The Commission uses its definitions of the relevant geographic and product markets in conjunction with its definitions of “dominant carrier” and “non-dominant carrier” to determine the regulatory regime under which a telecommunications carrier operates. In this analysis, the Commission reviews the “market power” of a telecommunications carrier in the relevant market, its “power to control prices,”<sup>1</sup> to determine whether the carrier will be subjected to the highly restrictive dominant carrier regulatory requirements or the comparatively light regulation that accompanies non-dominant carrier status. Currently, when the Commission reviews an interstate, interexchange carrier’s alleged market power, it assesses a single, nationwide geographic market and individual, non-substitutable product markets.<sup>2</sup>

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<sup>1</sup>47 C.F.R. §61(3).

<sup>2</sup>See In the Matter of AT&T Corp. To Be Reclassified as a Non-Dominant Carrier, FCC 95-427, Order (October 23, 1995)(the “AT&T Order”). In the NPRM, the Commission states that “consideration of substitutability of demand supports the use of narrower relevant product markets than the all services, product market defined in the Competitive Carrier proceeding. . . . Based on this analysis, we believe that we should define as a relevant product market an interstate, interexchange service for which there are no close substitutes or a group of services that are close substitutes for each other, but for which there are no other close substitutes.” NPRM at ¶46 (emphasis added). Based upon the AT&T Order however, the Commission has already abandoned the “all-services” approach--the Commission determined that AT&T was non-dominant in the provision of interstate, interexchange services even though it remained classified as dominant in related services. AT&T Order at ¶¶ 1-13;26;31. However, regardless of whether the all-services approach was abandoned (implicitly or by waiver through the AT&T Order or is abandoned explicitly through this rulemaking), the tentative conclusion that the Commission “should address the question of whether a specific interstate, interexchange service (or group of services) constitutes a separate product market only if there is credible evidence suggesting that there is or could be a lack of competitive performance with respect to that service (or group of services)” is correct. NPRM at ¶47. The Commission should not in any respect “pre-judge” through an advisory rulemaking or policy statement an issue as complex as market power.

In Section IV of the NPRM, the Commission cites with approval, for the first time, the United States Department of Justice/Federal Trade Commission Horizontal Merger Guidelines (the “Horizontal Merger Guidelines”) in connection with the development of new geographic and product market definitions for the purpose of determining the existence or non-existence of market power.<sup>3</sup> The Commission tentatively concludes under the NPRM’s discussion of potential new geographic and product market definitions that it need not change its approach except where “credible evidence” is adduced that there is, or could be, a lack of competitive performance in a service or group of services or within a particular, less-than-nationwide market and there is a showing that geographic rate averaging will not sufficiently mitigate any exercise of market power.<sup>4</sup>

The Horizontal Merger Guidelines were promulgated to provide businesses and consumers with the analytical framework and specific standards which would be utilized by the Department of Justice (the “DOJ”) and the Federal Trade Commission (the “FTC”) in evaluating proposed horizontal mergers and acquisitions. The Horizontal Merger Guidelines serve as a flexible basis for determining whether the enforcement agencies will approve or challenge a proposed transaction under Section 7 of the Clayton Act.

However, neither the Horizontal Merger Guidelines nor the provisions of the Horizontal Merger Guidelines dealing with Market Definition, Measurement and Concentration, were intended to serve as the basis for determining whether or how to regulate a market or any portion of it. Nor were the Horizontal Merger Guidelines intended to establish a mechanism or

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<sup>3</sup>1992 U.S. Department of Justice/Federal Trade Commission Horizontal Merger Guidelines, 4 Trade Reg. Rep. (CCH) ¶13,104, at 20,569.

<sup>4</sup>See NPRM ¶¶ 41,42. Given the Commission’s approach to Section IV of the NPRM, it is much more akin to a policy statement than a proposed rule.

justification for asymmetrical regulation of markets or specific firms within a market.<sup>5</sup>

The primary purpose of the Horizontal Merger Guidelines is to assist in the determination of whether the effect of a specific transaction--a merger which increases concentration in an industry--may be substantially to lessen competition or to tend to create a monopoly. The Horizontal Merger Guidelines were never intended to bar the entry of new firms into a market, to limit the competitive vigor of new entrants, or to justify regulation that would not be equally applied to all participants in the market.

The Commission's tentative conclusion that "we need not address the issue of delineating the boundaries of a specific product market, except where there is credible evidence

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<sup>5</sup>The Horizontal Merger Guidelines themselves state that once an enforcement agency decides to challenge a merger, the Horizontal Merger Guidelines will not even serve to describe how the agency will conduct the litigation that results:

The Guidelines are designed primarily to articulate the analytical framework the Agency applies in determining whether a merger is likely substantially to lessen competition, not to describe how the Agency will conduct the litigation of cases that it decides to bring. Although relevant in the latter context, the factors contemplated in the Guidelines neither dictate nor exhaust the range of evidence that the Agency must or may introduce in litigation. Consistent with their objective, the Guidelines do not attempt to assign the burden of proof, or the burden of coming forward with evidence, on any particular issue. Nor do the Guidelines attempt to adjust or reapportion burdens of proof or burdens of coming forward as those standards have been established by the Courts. Instead, the Guidelines set forth a methodology for analyzing issues once the necessary facts are available. . . .

The unifying theme is that mergers should not be permitted to create or enhance market power or to facilitate its exercise. . . .

While challenging competitively harmful mergers, the Agency seeks to avoid unnecessary interference with the larger universe of mergers that are either competitively beneficial or neutral. In implementing this objective, however, the Guidelines reflect the congressional intent that merger enforcement should interdict competitive problems in their incipiency.

Horizontal Merger Guidelines § 0.1, 57 Fed. Reg. 41552 (September 10, 1992) (emphasis added).

suggesting that there is or could be a lack of competitive performance with respect to a particular service or group of services” is, therefore, fundamentally correct.<sup>6</sup> Likewise, the Commission’s tentative conclusion that it will review its definition of geographic markets only “[i]f there is credible evidence suggesting that there is or could be a lack of competition in a particular point-to-point market (or group of markets) and there is a showing that geographic rate averaging will not sufficiently mitigate the exercise of market power (if it exists)” is fundamentally correct.<sup>7</sup> The Commission need not evaluate in advance the market power of a potential class of participants in the interstate, interexchange market.<sup>8</sup> Because the Commission does not yet have before it a specific application for new market definitions, an advisory rulemaking could ultimately produce uneven or anticompetitive regulation of interstate, interexchange services, the very evil Parts III and VII of the NPRM seek to diminish.

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<sup>6</sup>NPRM at ¶41.

<sup>7</sup>NPRM at ¶42.

<sup>8</sup>If and when specific issues arise in which the Commission is called upon to evaluate transactions or conduct which allegedly threatens competition, the Commission, after examining the facts relating to the conduct in question, can then determine the best method of analyzing them. If the complaint is that a LEC is engaging in conduct such as that described in footnote 120 of the NPRM (“raising its interexchange rivals’ costs by providing poorer interconnection to the LEC’s network facilities than the LEC provides to itself or its affiliate, or by delaying fulfillment of its rivals’ requests to connect to the LEC’s network”), the first step is to evaluate the challenged conduct--a step which may not even require the kinds of market definition exercises applicable to the evaluation of a proposed merger or resolution of a contested antitrust suit. If a particular BOC allegedly engages in conduct in violation of the stringent requirements of the Communications Act, as amended, then the Commission should be entitled to use whatever analytical tools may be most appropriate to analyze the conduct in question.

B. RESPONSE TO NPRM SECTION V

1. THE SEPARATION REQUIREMENTS ARE UNNECESSARY  
BECAUSE DISCRIMINATION IS LEGALLY AND PRACTICALLY  
IMPOSSIBLE

In the recent BOC Out-of-Region NPRM,<sup>9</sup> the Commission tentatively concluded that it would require dominant regulation of BOCs that provide interexchange services without a structurally separate affiliate.<sup>10</sup> The Commission also expressed concern that BOCs, like ILECs that also provide interexchange services, could shift costs or otherwise engage in anticompetitive conduct in connection with the interexchange services market. This concern was based on the alleged control of local exchange facilities.<sup>11</sup> Both of these positions, among others, were effectively rebutted by commenters.

The Commission's concern about anticompetitive conduct is based upon the potential that the BOCs might improperly use their obligation to connect calls that are terminated in their own regions as they begin to provide out-of-region long-distance service. However, BOCs' local exchange services are subject to the Commission's well established and carefully policed equal access and non-discrimination safeguards.<sup>12</sup> Any contention that BOCs could discriminate in light of these safeguards is both imaginative and highly speculative.

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<sup>9</sup>In the Matter of Bell Operating Company Provision of Out-of-Region Interstate, Interexchange Services, CC Docket No. 96-21. Notice of Proposed Rulemaking, FCC 96-59 (February 14, 1996) ("BOC Out-of-Region NPRM").

<sup>10</sup>BOC Out-of-Region NPRM at ¶11 (citing, *inter alia*, Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor, CC Docket No. 79-252, 98 F.C.C. 2d 1191 at fn 23 (August 8, 1984) ("Fifth Report and Order").

<sup>11</sup>Id. (citing Fifth Report and Order at ¶9).

<sup>12</sup> See, e.g., Fifth Report and Order, 98 F.C.C. 2d 1191, at text accompanying notes 11 and 12; 47 U.S.C. §§ 201, 202.

As a practical matter, there are several reasons why BOCs cannot discriminate. A BOC cannot easily or economically identify calls that originate with its interexchange competitors in markets in which the BOC operates as an interexchange carrier from calls originating in markets in which it does not. Moreover, it is highly improbable that the BOCs, facing access competition and additional local exchange competition, have any incentive to degrade the quality of access service offered to interexchange carriers or to incur the dissatisfaction of their own local exchange customers. In addition, BOCs cannot degrade access service without detection and are not likely to do so in the face of the penalties to which they could be subjected.

Even if the Commission could lawfully require a separate subsidiary in exchange for non-dominant treatment--which it arguably cannot under the Telecommunications Act<sup>13</sup>--it is unnecessary. First, in the context of in-region local exchange carrier facilities and out-of-region interexchange carrier operations, there is no significant opportunity for cross-subsidy or cost shifting. Second, even if such an opportunity existed, the Commission long ago adopted joint cost rules and now, since the adoption of the Fifth Report and Order, has obtained substantial experience in enforcing them. Finally, under price cap regulation of BOC local exchange carriers, there is little or no incentive to misallocate costs. The existing nonstructural accounting safeguards and price cap regulation combine more than adequately to protect a local exchange carrier's customers--whether a BOC or an ILEC. With the advent of the Commission's joint cost rules and price cap regulation, the Fifth Report and Order and its footnoted dictum no longer constitute a legitimate basis to require an ILEC or BOC's out-of-region interexchange services to be provided through a structurally separate company.

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<sup>13</sup>See Section 272. The Telecommunications Act requires no separate subsidiary for BOC out-of-region interexchange services.

2. THE COMMISSION SHOULD NOT REGULATE BOCS AS DOMINANT WHEN IT ACKNOWLEDGES THAT THE FACTS SUGGEST OTHERWISE

Perhaps more fundamentally, the Commission has acknowledged that “[the available] facts suggest that, upon entry into the provision of out-of-region interstate, interexchange services, BOC affiliates would not be likely to possess market power.”<sup>14</sup> Under its existing rules, a “dominant carrier” is defined in the Commission’s rules as a carrier that possesses “market power (i.e., power to control prices),” and a “non-dominant carrier” is defined as “[a] carrier not found to be dominant [i.e., one that does not possess market power].”<sup>15</sup> The Commission assesses “market power” based upon an examination of:

- (a) the carrier’s market share;
- (b) the supply elasticity of the market;
- (c) the demand elasticity of the carrier’s customers (or in BOC’s case, potential customers); and
- (d) the carrier’s cost structure, size, and resources.<sup>16</sup>

Applying these factors to any existing “independent local exchange carrier” or new entrant BOC--with or without a separate affiliate--the Commission can quickly determine that the BOC has no market power in the provision of out-of-region, interstate, interexchange services. The ILEC or BOC is, by definition, “non-dominant.” No justification for applying a different definition of “dominant” to ILECs or BOCs exists, particularly “out-of-region.” ILECs and BOCs do not have market power in the interexchange market and, therefore, qualify as non-dominant carriers in the relevant market. The Commission has acknowledged that the available facts suggest this

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<sup>14</sup>BOC Out-of-Region NPRM at ¶8.

<sup>15</sup>47 C.F.R. §61.3(o),(u).

<sup>16</sup>AT&T Order at 23

conclusion. ILEC and BOC out-of-region interexchange services should be regulated as non-dominant without structural separation.

3. TO THE EXTENT THAT STRUCTURAL SEPARATION REQUIREMENTS ARE IMPOSED UNDER DOCKET CC-96-21, THEY SHOULD BE ELIMINATED OR THE COMMISSION SHOULD EXERCISE FORBEARANCE

Although in the first instance the separation requirements tentatively concluded under CC Docket 96-21 are unnecessary, the explicit language of The Telecommunications Act of 1996 reveals that Congress did not anticipate that the Commission would adopt dominant regulation for out-of-region, non-separate-affiliate BOC services specifically authorized to be undertaken without a separate affiliate. Congress' intent was to facilitate the entry of competitors to not only the local exchange market, but the interexchange market, as well. To the extent that the Commission's proposed dominant carrier regulations delay or impede a BOC's provision of out-of-region services beyond the date of enactment, they impinge upon Congressional intent that BOCs--and not just their subsidiaries or affiliates--may offer such services immediately upon enactment.<sup>17</sup> The Commission should not, therefore, regulate BOCs as dominant in their out-of-region provision of interstate, interexchange services; to the extent such regulations are adopted under the rationale of the Fifth Report and Order in CC Docket 96-21, the Commission should eliminate the restrictions, or exercise forbearance, through this proceeding.<sup>18</sup>

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<sup>17</sup>The 45-day tariff filing requirement for dominant carriers (47 C.F.R. §61.58), makes it impossible for a BOC subject to dominant carrier regulation to offer interexchange services "immediately."

<sup>18</sup>Similar treatment for ILECs is appropriate.

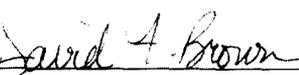
### III. CONCLUSION

In this phase of the referenced Docket, the Commission has requested comments upon the use of the Horizontal Merger Guidelines in connection with its definitions of geographic and product markets used in the evaluation of market power, its existing separation requirements for ILEC-affiliated interexchange carriers and its proposed separation for BOC affiliated out-of-region interexchange carriers, and its adoption of geographic rate averaging and rate integration principles in response to the Telecommunications Act. SBC urges the Commission (1) to avoid making an essentially non-binding policy statement upon market power issues it acknowledges are case specific, and (2) either to refuse to adopt BOC out-of-region separation requirements or to forbear from enforcing such requirements.

Respectfully submitted,

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