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April 23, 1997

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

Re: International Settlement Rates
IB Docket No. 96-261
Reply to Opposition to Petition for Clarification
SBC Communications Inc.
Pacific Bell Communications

Dear Mr. Caton:

Enclosed for filing, on behalf of SBC Communications Inc. and Pacific Bell Communications (hereinafter jointly referred to as "SBC"), is an original and eleven copies of SBC's Reply to the Opposition to SBC's Petition for Clarification in the above captioned proceeding. Please date-stamp and return the enclosed duplicate copy.

Should there be any questions about this matter, please contact the undersigned.

Sincerely,


Gina Harrison

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**FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY**

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

In the Matter of)
)
Regulation of International) Docket No. CC 90-337
Accounting Rates) Phase II

**REPLY TO OPPOSITION TO
PETITION FOR CLARIFICATION**

I. INTRODUCTION

SBC Communications Inc. and its subsidiary, Pacific Bell Communications (hereinafter jointly referred to as "SBC"),¹ herein reply to the opposition of AT&T to SBC's petition for clarification in the above captioned proceeding. SBC filed a petition for clarification for the sole purpose of requesting that the Commission clarify the scope of the regulatory safeguards adopted in the Flexibility Order.² Simply stated, SBC sought to confirm that alternative settlement arrangements affecting 25% or more of a route's traffic that include provisions that are exclusive in nature presumptively violate the Commission's prohibition on unreasonably discriminatory terms.

¹ PBCom became a subsidiary of SBC as a result of the April 1, 1997 merger of SBC and Pacific Telesis Group.

² SBC also submitted an opposition to a petition for reconsideration filed by AT&T in this proceeding. In its petition, AT&T sought significant alternations in the Order that would have the result of substantially reducing flexibility in negotiating alternative settlement arrangements and, as a result, would forestall the competitive opportunities created by the Flexibility Order, further entrenching AT&T's existing market share.

Since making this request, SBC has received support from every commenter (aside from AT&T) that has addressed this issue in subsequent pleadings.³ At the same time, while AT&T has erroneously characterized SBC's petition in several important respects, AT&T has made no attempt to articulate its view on the appropriate scope of the prohibition on unreasonably discriminatory terms, thus encouraging continued ambiguity. Thus, the Commission should disregard AT&T's opposition and acknowledge that exclusive terms presumptively violate the Commission's safeguard restriction on unreasonably discriminatory terms in alternative settlement agreements affecting 25% or more of the traffic on a route. As the Commission recognized in the Flexibility Order, maintenance of such a restriction is necessary in order to prevent the largest carriers from compelling foreign carriers to accept anticompetitive terms and conditions in settlement agreements.

³ See *Reply of the Telecommunications Resellers Association to Petitions for Reconsideration and Clarification*, CC Docket No. 90-337 Phase II, at 7 (April 10, 1997) ("TRA") (asserting that "requiring carriers to affirmatively demonstrate the reasonableness of their alternative arrangements in situations where similar arrangements are unavailable to other carriers will advance the development of an international services market toward a more truly competitive state"); *Response of LCI International Telecom Corp. to Petitions for Reconsideration and Clarification*, CC Docket No. 90-337 Phase II, at 6 (April 10, 1997) ("LCI") (stating that "the Commission should further clarify what would be deemed to constitute an 'unreasonably discriminatory' term or condition in an alternative arrangement"); *Petition for Clarification of NYNEX Long Distance Company*, CC Docket No. 90-337 Phase II, at 4 (March 10, 1997) ("NYNEX") (urging clarification that "exclusive alternative arrangements are prohibited unless the carrier can show that they are not unreasonably discriminatory"); see also *Comments of BT North America Inc. on Petitions for Reconsideration and Clarification of the Fourth Report and Order*, CC Docket No. 90-337 Phase II, at 3 n.6 (April 10, 1997) ("BT") (taking the position that the clarification sought by NYNEX and SBC "are already incorporated in the safeguards adopted in the Flexibility Order"); *Opposition of Sprint*, CC Docket No. 90-337 Phase II, at 6 (April 10, 1997) ("LCI") (supporting SBC's request for clarification in some circumstances).

II. SBC SEEKS ONLY TO CONFIRM WHAT WAS INDICATED IN THE FLEXIBILITY ORDER, THAT EXCLUSIVE PROVISIONS IN CERTAIN ALTERNATIVE SETTLEMENT AGREEMENTS PRESUMPTIVELY VIOLATE THE PROHIBITION ON UNREASONABLY DISCRIMINATORY TERMS.

In its petition for clarification, SBC sought to verify what is already apparent in the Flexibility Order, that alternative settlement arrangements affecting 25% or more of a route's traffic that include exclusive provisions are presumptively in violation of the Commission's prohibition on unreasonably discriminatory terms. In the Order, the Commission stated that one of its goals in prohibiting unreasonably discriminatory terms in large alternative settlement arrangements was to guard against the possibility that "a U.S. carrier with a significant share of the market may be in a position to extract anticompetitive *special concessions* from foreign carriers to the detriment of other U.S. carriers."⁴ SBC is simply seeking to clarify this language. Thus, AT&T is incorrect in claiming that SBC is attempting to "expand the requirements" of the Flexibility Order.⁵

AT&T is also incorrect in claiming, without any support in the record, that SBC wants the Commission to equate unreasonably discriminatory with "unequivocal, unconditional uniformity."⁶ At no point has SBC suggested that the Commission's prohibition on unreasonably discriminatory terms should act as a bar to any or all differences in prices and terms. In fact, SBC's petition for clarification clearly indicates that, in treating exclusive arrangements as presumptively unreasonably discriminatory, the Commission should rely on 47

⁴ Flexibility Order, ¶ 44 (emphasis added).

⁵ See *Opposition to Petitions of Pacific Bell and NYNEX*, Docket No. CC 90-337 Phase II, at 2 (April 10, 1997) ("AT&T Opposition").

⁶ AT&T Opposition at 3.

C.F.R. § 63.01(r)(3)(i), which defines a special concession as any arrangement that is offered exclusively to a particular U.S. international carrier and not also to *similarly situated* U.S. international carriers authorized to serve a particular route.⁷

The Commission should also disregard AT&T's irrelevant assertion that it should be free from the Commission's regulatory safeguards (regardless of how they are defined) because of its non-dominant regulatory status. The Commission's regulatory safeguards apply to all carriers that enter into large settlement agreements,⁸ and should not be misconstrued as attempting to "hobble" AT&T.⁹ Furthermore, the Commission's goal in establishing safeguards was not to respond to market dominance, but to guard against the possibility that large carriers may be able to negotiate alternative arrangements that could distort markets and impair growth in competition. In accomplishing this goal, the safeguards are reasonable and well-balanced measures that are amply supported by the record in this proceeding.

⁷ See 47 C.F.R. § 63.01(r)(3)(i) (emphasis added). SBC also noted in its petition that it is not attempting to prohibit the use of growth-based accounting rate agreements. See *Petition for Clarification of PBCom*, Docket No. CC 90-337 Phase II, at 3 n.7 (March 10, 1997); see also *Competitive Telecommunications Assoc. v. FCC*, 998 F.2d 1058, 1061 (D.C. Cir. 1993) (establishing a three-step inquiry to determine whether a price difference is unreasonably discriminatory, focusing on: (1) whether competing services are "like" or "functionally equivalent," (2) whether there is a price difference between the services, and (3) whether that difference is reasonable).

⁸ For example, the regulatory safeguard on agreements covering 25% or more of the traffic on a route is likely to apply immediately to some of MCI's existing routes, See *Sprint* at 4 n.6, along with MCI's provision of services on the U.S./Britain route once its merger with British Telecom is complete.

⁹ AT&T Opposition at 2.

III. THE COMMISSION SHOULD ALSO CONFIRM ITS AUTHORITY TO REEXAMINE WHETHER FACIALLY COMPLIANT ALTERNATIVE SETTLEMENT ARRANGEMENTS ARE UNREASONABLY DISCRIMINATORY IN THEIR APPLICATION.

In seeking clarification of the Commission's regulatory safeguards for agreements affecting 25% or more of the traffic on a route, SBC also requested that the Commission confirm that large carriers are obligated to remain in compliance with the Commission's rules. Thus, if new facts arise indicating that a large carrier's previously approved alternative settlement agreement does not comply with the safeguard restrictions, the Commission can instruct the carrier to demonstrate that the arrangement is not unreasonably discriminatory.

The Commission's authority to reexamine previously approved alternative settlement arrangements is critically important in order to ensure that such arrangements do not become unreasonably discriminatory in their application. For example, a large carrier could implement an alternative agreement containing terms that it believes to be available to competing carriers. If, at a later date, however, a competing carrier is unable to obtain the same terms, the Commission should be in a position to compel the carrier that negotiated the arrangement to demonstrate that it is not unreasonably discriminatory.

AT&T cannot credibly claim that the Commission's exercise of such authority would be arbitrary and capricious.¹⁰ Carriers are routinely required to remain in compliance with statutory and regulatory requirements, such as the prohibition on charging unreasonably discriminatory rates under Section 202(a) of the Communications Act. Thus, the Commission is well within its

¹⁰ AT&T Opposition at 6.

authority in reserving the right to require carriers to demonstrate that alternative settlement arrangements that were previously approved as facially compliant are not unreasonably discriminatory in their application.

IV. CONCLUSION

In SBC's petition for clarification, SBC urged the Commission to reaffirm its stated purpose in incorporating regulatory safeguards in the Flexibility Order. As the Commission observed, once deviations from the ISP are permitted, "a U.S. carrier with a significant share of the market may be in a position to extract anticompetitive *special concessions* from foreign carriers to the detriment of other U.S. carriers."¹¹ SBC urges the Commission to reaffirm this competitive harm by clarifying that alternative settlement arrangements affecting 25% or more of a route's traffic that include exclusive provisions presumptively violate the prohibition on unreasonably discriminatory terms. Additionally, SBC requests that the Commission acknowledge that it retains the authority to compel large carriers to demonstrate that alternative settlement arrangements previously approved as facially compliant do not result in unreasonably discriminatory outcomes when implemented in the marketplace. Such measures are necessary in

¹¹ Flexibility Order, ¶ 44 (emphasis added).

order to prevent the Commission's flexible regulatory regime from being misused by large carriers to distort and possibly lock up individual markets for international interexchange services.

Respectfully submitted,
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April 23, 1997

CERTIFICATE OF SERVICE

I hereby certify that on this 23th day of April, 1997, I caused copies of the foregoing "Reply to Petition for Clarification" to be mailed via first-class postage prepaid mail to the following:

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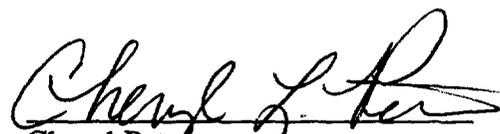
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