

ORIGINAL

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

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In the Matter of)
)
1998 Biennial Regulatory Review)
Petition for Section 11 Biennial Review)
filed by SBC Communications, Inc.,) CC Docket No. 98-177
Southwestern Bell Telephone Company,)
Pacific Bell, and Nevada Bell)

Comments of KMC Telecom, Inc.

KMC Telecom, Inc. ("KMC"), respectfully submits the following comments in response to the Commission's November 24, 1998 Notice of Proposed Rulemaking ("NPRM") requesting comments in the above-captioned proceeding. KMC is authorized to provide, through its subsidiaries, competitive local and long distance services in over 17 states, and Puerto Rico. KMC has installed state-of-the-art networks various cities within its operating territory, including Huntsville, Alabama, Melbourne, Florida, Savannah and Augusta, Georgia, Baton Rouge and Shreveport, Louisiana, Greensboro and Winston-Salem, North Carolina, Corpus Christi, Texas, Roanoke, Virginia, and Madison, Wisconsin, and will soon build similar networks in several other cities in the Southeast and Midwest.

On May 8, 1998 SBC Communications, Inc. ("SBC") filed a Petition for Section 11 Biennial Review ("Petition") requesting an "exhaustive review" of various regulatory requirements currently applicable to SBC. As the Commission explicitly recognized in its NPRM, the majority of regulations SBC proposed for review already are or soon will be the subject of Commission proceedings. Indeed, as many of SBC's concerns are currently under consideration in the

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Commission's Access Charge Reform proceeding, the Commission properly declined to institute a parallel proceeding on those issues.

KMC respectfully submits that SBC's central argument, that competition and market entry by CLECs has made many of the Commission regulations obsolete and unnecessary, is simply inaccurate. Competition in the local exchange market remains in its infancy with incumbent local exchange carriers ("LECs") retaining approximately 95% of the local exchange market. SBC remains the dominant carrier throughout its "in-region" areas, holding a virtual monopoly position in those local exchange markets. The Commission specifically found insufficient competition to warrant SBC's entry into the Oklahoma long distance market in June 1997. Indeed, in that proceeding, SBC had difficulty identifying even a single significant competitor. The deregulation SBC proposes is untimely, unsupported by relevant evidence and would serve only: (i) to reduce transparency in the local exchange market place, (ii) to increase the ability of SBC to cross-subsidize the provision of services in which it competes, and (iii) to increase the incentive for SBC to discriminate against new entrants.

I. SBC's request for detariffing is contrary to the public interest and unsupported by available evidence.

SBC's request to detariff special access, direct trunked transport, operator services, directory services and interexchange services (together the "Services") is contrary to the public interest and should be denied. SBC provides virtually no evidence to support its requests. Even if SBC could establish that it faces competition in its own urban markets, SBC's request is overbroad, in that the relief sought could eliminate regulations applying to all incumbent LECs. Certainly further proceedings are necessary to determine whether detariffing is appropriate in rural markets where

competition has yet to develop, and in instances where the incumbent LEC may be actively discouraging new entry. SBC simply presents no broadly applicable evidence to support such proposals. Thus, unlike in the Detariffing proceeding, a well developed record demonstrating a clearly competitive environment is not before the Commission.

KMC also submits that SBC's reliance on the Commission's Detariffing Order for the proposition that tariffs are no longer necessary for dominant carriers is entirely misplaced. In its Detariffing Order, the Commission explicitly based its decision to remove tariff requirements for non-dominant carriers on the finding that "it is highly unlikely that interexchange carriers that lack market power could successfully charge rates, or impose terms and conditions for interstate, domestic, interexchange services that violate Sections 201 or 202 of the Communications Act."¹ SBC has not demonstrated and cannot seriously contend that it lacks market power in its in-region service area.

SBC, based only upon a report apparently funded and commissioned by SBC, argues that it has lost market share of over "40 percent" in the special access markets in Dallas and Los Angeles, and that similar losses are occurring in "most major markets."² Notably, SBC's report was not included with its Petition, and therefore is not available for inspection. However, the Commission's own independent Local Competition Report published in December 1998, states that "[in 1997, CLECs reported about 14% of the special access and local private line services provided to other

¹ *Policy and Rules Concerning the Interstate Interexchange Marketplace*, 11 FCC Rcd. 20730 (1996) (*Detariffing Order*).

² Petition at 22.

carriers and about 6% of such services to end users."³ Thus, SBC's study even if it could be independently verified as a reliable study, flies directly in the face of the impartial industry statistics compiled by the Commission itself. These obvious discrepancies create factual questions about methodology and assumptions employed by the SBC study.

Moreover, one of the central tenants of the Telecommunications Act of 1996 was to introduce competition into telecommunications markets for the public benefit SBC's previous monopoly status allowed it to enjoy a virtual 100% market share. New competition, by definition, means SBC market share should decline from 100 percent.

II. SBC's proposals would undermine the Commission's dominant/non-dominant carrier regime.

The Commission found incumbent LEC-affiliated interexchange carriers to be non-dominant in 1997, under the rationale that such action could promote the entry of incumbent LEC affiliated entities into the long distance market. Despite this decision, the Commission explicitly recognized that "as long as the BOCs retain control of local bottleneck facilities, they could potentially engage in improper cost allocation, discrimination, and other anti-competitive conduct." To prevent such conduct, the Commission cited the structural separation requirements imposed by Section 272 of the Telecommunications Act of 1996, and the FCC's affiliate transaction rules and continues to rely heavily on both structural and accounting safeguards to prevent monopolistic practices such as unlawful cross-subsidiaries. Accordingly, the Telecommunications Act and the FCC's rules remain

³ *Local Competition*, Industry Analysis Division, Common Carrier Bureau, Federal Communications Division, available at: www.fcc.gov/ccb/local_competition/survey/responses/, (December 1998).

crucial to help prevent the BOCs from engaging in “price squeezes” or other anticompetitive behavior.⁴

In its Petition, SBC now proposes to partially dismantle these safeguards. SBC’s detariffing and cost allocation manual (“CAM”) proposals substantially undermine the Commission’s ability to detect and prevent anti-competitive abuses by incumbent LECs because these proposals remove important disclosure requirements. If the Commission grants SBC’s request, it will substantially reduce its own ability to police anti-competitive acts by incumbent LECs. KMC respectfully submits that the Commission should not eliminate essential safeguards which are designed to permit the Commission to detect and prevent incumbent LECs from cross-subsidizing the provision of services in which such LECs faces new entrant competition until meaningful competition actually exists. Indeed, while KMC agrees with the Commission’s conclusion that SBC’s proposed “mega-proceeding” would be unwieldy, significant changes to the safeguards should not be considered independently, as SBC here proposes. Instead, efforts to review and revise the Commission’s rules should be undertaken in a more holistic proceeding, such as the Access Charge Reform or Structural Separation proceeding, in which the impact of SBC’s proposed changes can be examined in the broader context of other matters currently under consideration before the Commission.

Finally, SBC’s proposals constitute an attempt by SBC to eviscerate the Commission’s structural safeguards. In its Detariffing Order the Commission explicitly found no basis to exclude BOC-interexchange affiliates from its detariffing provisions so long as those entities are classified

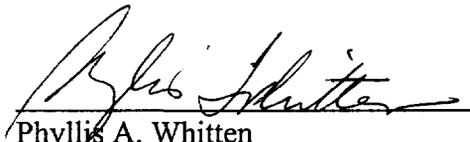
⁴ *In the Matter of Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC’s Local Exchange Area*, 12 FCC Rcd 15756 (1997)

as non-dominant carriers.⁵ Thus, to the extent that an entity, even one affiliated with an incumbent LEC, can demonstrate that it is without market power and qualify for non-dominant status, it is already eligible for detariffing (at least to the extent that detariffing is permitted). Seen in this light, SBC's proposal constitutes little more than an indirect attempt to circumvent the Commission's structural safeguards imposed on dominant carriers. KMC therefore respectfully submits that SBC's proposals, if granted would essentially remove structural safeguards previously found warranted by the Commission and therefore significantly impinge on competition in the local exchange market place.

III. Conclusion

In light of the foregoing, KMC respectfully submits that the Commission should not grant SBC's detariffing and CAM proposals at this time. KMC urges the Commission to retain its tariffing and CAM rules as currently effective until SBC faces competition sufficient to alleviate the need for these rules.

Respectfully Submitted,



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⁵ *Detariffing Order*, 11 FCC Rcd at 20730.

CERTIFICATE OF SERVICE

I, Ivonne J. Diaz, hereby certify that on this 11th day of January 1999, copies of Comments of KMC Telecom, Inc. were hand delivered to the following:

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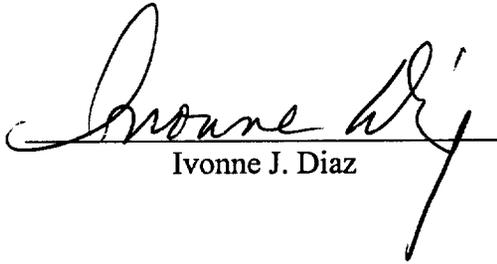
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