

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

In the Matter of)
)
)
Petition of the SBC Companies for Forbearance from) **CC Docket No. 98-227**
Regulation as a Dominant Carrier for High Capacity)
Dedicated Transport Services in Specified MSAs)
)

**OPPOSITION OF THE
TELECOMMUNICATIONS RESELLERS ASSOCIATION**

The Telecommunications Resellers Association ("TRA"),¹ through undersigned counsel and pursuant to *Public Notice*, DA 98-2509 (released December 8, 1998), hereby opposes the A Petition of the SBC Companies for Forbearance² filed by SBC Communications Inc., on behalf of Southwestern Bell Telephone Company, Pacific Bell and Nevada Bell (collectively, the "Petitioners") in the captioned proceeding on December 7, 1998 (the "Petition"). As TRA will demonstrate below, Petitioners have failed to satisfy the statutory test for exercise by the Commission of its Section 10 forbearance authority. Accordingly, TRA urges the Commission to deny the Petition.

Petitioners urge the Commission to A forbear from regulating the SBC Companies as dominant carriers with respect to high capacity dedicated transport services in those portions of [14] specified Metropolitan Statistical Areas (AMSAs³) in which the SBC Companies operate as the

A national trade association, TRA represents nearly 800 entities engaged in, or providing products and service sort of, telecommunications resale. TRA was created, and carries a continuing mandate, to foster and promote telecommunications resale, to support the telecommunications resale industry and to protect and further the interests of entities engaged in the resale of telecommunications services. TRA is the largest association of competitive carriers in the United States, comprising among its members not only the large majority of providers of domestic interexchange and international services, but also a majority of competitive local exchange carriers.

incumbent local exchange carriers.² In other words, Petitioners seek relief from those Part 61 tariffing rules and the Part 69 access charge rules that apply to dominant providers of interstate access services. As defined by Petitioners, high capacity dedicated transport services include those special access services, switched access entrance facilities, and switched access direct trunked transport services that operate at DS1 and higher transmission speeds (*e.g.*, DS1, DS3, OCN).³ The 14 MSAs in which Petitioners seek relief include five California MSAs (*i.e.*, Los Angeles (including Orange County and Riverside), San Francisco, San Diego, Sacramento, and San Jose), and five Texas MSAs (*i.e.*, Dallas/Ft. Worth, Houston, San Antonio, Austin, and El Paso), as well as St. Louis, Missouri, Oklahoma City, Oklahoma, Little Rock, Arkansas, and Reno, Nevada.

Petition at 1.

Id. at 1, fn. 2.

In support of their Petition, Petitioners contend that A[t]he market for high capacity dedicated transport services has become highly competitive in at least [the 14 MSAs identified in the Petition]≡.⁴ Elaborating on this claim, Petitioners assert that they face Aintense facilities-based competition in each of the [14 MSAs] from numerous competitors≡ and that Atheir market shares have been reduced in these MSAs by a low of 25% to more than 50%.≡⁵ As a result, Petitioners argue, they Ado not have market power in the high capacity dedicated transport services market in any of the 14 MSAs.≡⁶ Accordingly, Petitioners conclude, the Commission should Aforbear from regulating them as if they were still dominant carriers.≡⁷

Id. at i.

Id.

Id.

Id.

Section 10 of the Communications Act of 1934, as amended (the Act), permits the Commission to "forbear from applying any regulation or any provision of [the Communications Act] to a telecommunications carrier" only if the Commission "determines that (1) enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier . . . are just and reasonable and are not unjustly or unreasonably discriminatory; (2) enforcement of such regulation or provision is not necessary for the protection of consumers; and (3) forbearance from applying such provision or regulation is consistent with the public interest."⁸ Moreover, the Act requires the Commission to determine "whether forbearance will promote competitive market conditions, including the extent to which forbearance will enhance competition among providers of telecommunications services."⁹

It belabors the obvious to suggest that the above standard as applied to requests for forbearance from dominant carrier regulation can only be met if the petitioning carrier is no longer dominant. A dominant carrier has long been defined as one "possesse[d] of market power."¹⁰ Because they are possessed of market power, the behavior of dominant carriers is not adequately disciplined by market forces. Accordingly, enhanced regulatory oversight is necessary both to ensure that dominant

47 U.S.C. § 160(a).

47 U.S.C. § 160(b).

Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor, 1 Report and Order, 85 FCC 2d 1 (1980), Further Notice of Proposed Rulemaking, 84 FCC 2d 445 (1981), Second Further Notice of Proposed Rulemaking, 47 Fed. Reg. 17, 308 (1982), Second Report and Order, 91 FCC 2d 59 (1982), Order on Reconsideration, 91 FCC 2d 54 (1983), Third Further Notice of Proposed Rulemaking, 48 Fed. Reg. 28,292 (1983), Third Report and Order, 48 Fed. Reg. 46,791 (1983), Fourth Report and Order, 95 FCC 2d 554 (1983), *vacated sub nom.* American Telephone and Telegraph Corp. v. FCC, 753 F.2d 727 (D.C. Cir. 1992), *cert. denied sub nom.* MCI Telecommunications Corp. v. American Telephone and Telegraph Corp., 505 U.S. 3020 (1993), Fourth Further Notice of Proposed Rulemaking, 96 FCC 2d 1191 (1984), Fifth Report and Order, 98 FCC 2d 1191 (1984), Sixth Report and Order, 99 FCC 2d 1020 (1985), *vacated sub nom.* MCI Telecommunications Corp. v. FCC, 765 F.2d 1020 (D.C. Cir. 1985).

carrier rates and charges, as well as practices, are just and reasonable and nondiscriminatory, and to protect consumers and competitors alike.

Thus, before the Commission reclassified AT&T Corporation ("AT&T") as a non-dominant domestic service provider, it first concluded that "AT&T lack[ed] market power in the interstate, domestic, interexchange market."¹¹ The Commission forbore from applying tariff filing requirements to non-dominant interexchange carriers because such carriers lacked market power.¹² And the Commission extended this detariffing policy to competitive local exchange carriers (ALECs) and competitive access providers ("CAPs") because ALECs are nondominant, and . . . nondominant carriers, >by definition,= cannot exercise market power,= and Acompetitive LECs do not appear to possess market power,= being possessed of Aan extremely small share of the interstate access market.=¹³

The Commission has long classified incumbent LECs as dominant because they were the exclusive or near exclusive providers of local exchange and exchange access services, and, as such possessed pervasive market power. Petitioners have submitted a study with their Petition which purports to show that not only do alternative providers of high capacity dedicated transport services exist in each of the 14 identified MSAs, but that the "intense facilities-based competition" generated by these alternative providers has eliminated Petitioners' market power in all 14 of the MSAs. TRA does not dispute that alternative sources for high capacity dedicated transport services exist in each of the 14

Motion of AT&T Corp. to be Reclassified as a Non-Dominant Carrier, 11 FCC Rcd. 3271, & 1 (1995), *recon.* 12 FCC R 87 (1996).

Policy and Rules Concerning the Interstate, Interexchange Marketplace, 11 FCC Rcd. 20730 (1996), *recon.* 12 FCC R 14 (1997), *pet. for review pending sub nom. MCI Telecommunications Corp. v. FCC*, Case No. 96-1459 (D.C.Cir. Feb. 7), *stayed pending judicial review, further recon. pending.*

Hyperion Telecommunications, Inc. Petition Requesting Forbearance, 12 FCC Rcd. 8596, & 23 - 24 (1997).

identified markets, but strongly disagrees that Petitioners' market power in these markets has been so eroded as to justify their reclassification as non-dominant carriers. Not only is the market study upon which Petitioners rely in so asserting seriously biased, and hence lacking credibility, but the arguments espoused by Petitioners are not supported by even the study's flawed conclusions.

Initially, Petitioners acknowledge that what competition they face is concentrated in "central business districts and business-intensive suburbs."¹⁴ Nonetheless, Petitioners seek forbearance from dominant carrier regulation for the entirety of each of the identified MSAs. For entities outside these "central business districts and business-intensive suburbs," Petitioners more often than not remain the exclusive source of high capacity dedicated transport services, able, as such, to exercise full market power.¹⁵ Entities outside the central business districts and business-intensive suburbs,¹⁶ accordingly, will likely be forced to subsidize Petitioners' competitive pricing and other

Petition at Attachment A, p. 4.

While ruling that "each point-to-point market constitute[s] a separate geographic market," the Commission in defining geographic markets has often consolidated "groups of point-to-point markets where customers face[] the same competitive conditions." As the Commission has explained, "[a] geographic market aggregates those consumers with similar choices regarding a particular good or service in the same geographical area." Thus, the Commission has "treat[ed] as a geographic market, an area in which all consumers in that area will likely face the same competitive alternatives for a product." Applications of NYNEX Corp. as Transferor, and Bell Atlantic Corp., Transferee, for Consent to Transfer Control of NYNEX Corp. and Its Subsidiaries (Final Report and Order), 12 FCC Rcd. 19985, & 54 (1997). In other words, MSAs are not markets to which forbearance policies can be applied because all consumers throughout the MSAs do not have the benefit of the same competitive conditions.

As the demand for high-speed dedicated transport services, such as DSL-based services, expands in conjunction with increased use of the Internet, it is likely that these more geographically-dispersed entities will become an ever larger percentage of the customer base for high capacity dedicated transport services.

practices in the central business districts and business-intensive suburbs, to the detriment of consumers, competitors and the public interest as a whole.¹⁷

Likewise, Petitioners remain the exclusive source of high capacity dedicated transport services for entities located in buildings not connected to competitors' networks. It is not surprising then that Petitioners make much of the number of buildings "lit" by competitors in each of the 14 identified MSAs. Standing alone, it may look impressive that, for example, there are somewhere between 350 and 950 buildings on competitors' networks in the Los Angeles MSA.¹⁸ As relative values in an area populated by tens of thousands of buildings, however, the touted numbers seem rather small.¹⁹ A legitimate study would, at a minimum, have identified the number of buildings housing potential users of high capacity dedicated transport services before claiming that enough such buildings had been "lit" by competitors to produce a substantial erosion of market power.²⁰

Third, the study upon which Petitioners rely to support their claim that their market share has been significantly eroded overstates the market share of competitors through manipulation of market assessment tools. Petitioners' study bases its market share analysis on DS1 "equivalent

Other services, not the least of which is tandem-switched transport (which Petitioners make no claim of a diminution of market power) could also be used as a source of cross-subsidization, to the detriment of the smaller carriers that must rely upon such services because they do not have the traffic volumes to justify direct-trunked transport.

It is impossible to ascertain from Petitioners study how many buildings are connected to competitors' networks because the study does not indicate which buildings are on multiple networks.

Petitioners offer no data regarding the number of buildings connected to their networks, thus eliminating the possibility of a meaningful comparison.

Of course, in many of the 14 identified MSAs, the number of buildings connected to competitors' networks is not available." For example, in the Houston MSA, the data is missing for four of the five identified competitors, while in San Francisco, San Jose, Dallas, San Antonio, and St. Louis, the data is missing for 50 percent or more of the identified competitors. See Attachment A, pp.19, 22, 24, 33, 41. The absence of this critical data, however, does not deter Petitioners from asserting they lack market power in these MSAs.

circuits."²¹ Use of equivalent circuits gives greater weight to DS3 circuits in a market share analysis than would a comparative analysis based on revenues. This is because a DS3 represents 24 DS1 equivalent circuits, but less than half the revenues of 24 DS1 circuits. And as Petitioners confirm on pages 23 and 24 of the Petition, competition for DS3 services is more intense than competition for lesser capacity services.²² Thus, Petitioners, by predicating their market share analysis on DS1 equivalent circuits have painted a false picture of competition in the high capacity dedicated transport services market.

Moreover, it is impossible to assess the validity of Petitioners' market share data because Petitioners have provided only a general description of their methodology and little of their raw data. Reference is made by Petitioners to "unique weights" established for each MSA, developed by, among other things, "evaluat[ing] in-house, proprietary data" and "internal databases."²³ According to Petitioners "quantitative market share data can be coupled with qualitative competitive data to accurately describe and assess the market for high capacity circuits."²⁴ Unfortunately, much of this qualitative data is housed in "proprietary regional and national databases."²⁵ In short, too much is unknown about the methods and the data used by Petitioners to lend credence to their market share figures.

Petition at Attachment A, p. 48.

On Table 2, Petitioners list the "# of DS3s" purportedly lost or to be lost by Petitioners to competitors. Each of the anecdotes on page 23 involve the loss by Petitioners of DS3 business to competitors.

Petition at Attachment A, p. 47.

Id. at Attachment A, p. 44.

Id. at Attachment A, p. 45.

Fourth, Petitioners entirely overlook one of the principal reasons for which large corporate users utilize the services of alternative providers of high capacity dedicated transport services -- *i.e.*, redundancy. Entities which use non-incumbent LEC high capacity dedicated transport services for redundancy purposes have not ported their business to competitors, but are making use of the competitors' services in conjunction with the services provided by Petitioners. Such usage does not represent lost business for Petitioners; it represents instead business which Petitioners would not have had.

Fifth, Petitioners fail to indicate what percentage of users of its high capacity dedicated access services currently take service under extended-term contracts. Customers of incumbent LEC high capacity dedicated transport services often take such services under contract terms of five, ten or more years. To the extent that significant percentages of Petitioners' high capacity dedicated transport customers are locked into long-term contracts, Petitioners' market power has not been seriously diminished because these customers have no meaningful alternative to Petitioners' services.

Sixth, Petitioners ask the Commission to simply ignore the market power they retain in all other segments of the local exchange and exchange access markets. Petitioners can leverage their market power in these other market segments to secure competitive advantages in the market for high capacity dedicated transport services. As discussed above, other market segments would provide a source of cross-subsidy to fund Petitioners' competitive efforts in the high capacity dedicated transport market. Moreover, Petitioners could use their bottleneck control over local exchange and exchange access facilities to disadvantage their high capacity dedicated transport competitors, for example, by degrading the quality of interconnection for such providers or assessing higher interconnection fees.

TRA submits that it is clear that Petitioners have not demonstrated that they no longer possess market power in the provision of high capacity dedicated transport, as well as local exchange and other

exchange access, services in the 14 identified MSAs. As such, Petitioners are properly classified as dominant providers in these geographic areas. The Commission cannot rule that tariff and access charge regulation of dominant carriers is not necessary to ensure just, reasonable and nondiscriminatory rates, charges and practices, and to protect consumers and competitors without reversing decades of policy and precedent. Moreover, the Commission cannot find that forbearance from dominant carrier regulation in this instance would promote competitive market conditions, thereby enhancing the public interest. As the Commission succinctly noted in granting incumbent LECs a measure of pricing flexibility for special access services:

Care must be exercised . . . in the regulation of LEC pricing during the period of transition from monopoly to competition. . . . [I]nadequate restrictions on LEC special access pricing and rate structure could permit competitive abuses, stifling competitive entry and placing excessive cost burdens on customers of less competitive services.²⁶

Finally, TRA submits that there is no need for the forbearance Petitioners seek here. The Commission has already afforded Petitioners, and other incumbent LECs, significant flexibility in pricing special access services to meet competition. Under Section 69.123 of the Commission's Rules, Petitioners may establish a reasonable number of density pricing zones within each study area.²⁷ As described by the Commission, this system of traffic density-related rate zones was designed to expand the LECs' flexibility in responding to competition by allowing them to bring special access rates more in line with costs.²⁸ The difference between the pricing flexibility Petitioners now have and that which they seek here is that Petitioners now must maintain uniform rates across like density zones

Expanded Interconnection with Local Telephone Company Facilities, 7 FCC Rcd. 7369, & 172 (1992), recon. 8 FCC Rcd. 1441 (1992), further recon. 8 FCC Rcd. 7341 (1993), vacated in part and remanded sub nom. Bell Atlantic Telephone Cos. V. F

47 C.F.R. § 69.123. Petitioners also have the right to institute volume and term discounts for special access.

Expanded Interconnection with Local Telephone Company Facilities, 7 FCC Rcd. 7369 at & 179.

instead of being able to price without restraint in the 14 identified MSAs. In short, Petitioners do not wish to reduce prices in areas with comparable cost structures which lack competition. Instead, they desire to use above-cost pricing in these comparable cost structure areas to subsidize their competitive pricing in the 14 MSAs. This is hardly a pricing scenario designed to further the public interest.

By reason of the foregoing, the Telecommunications Resellers Association strongly urges the Commission to deny as premature the regulatory relief sought by SBC Communications Inc. on behalf of Southwestern Bell Telephone Company, Pacific Bell and Nevada Bell in their Petition for Forbearance.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Evelyn Correa, do hereby certify that copies of the foregoing Comments were this 21st day of January, 1999, sent by United States First Class Mail, postage prepaid, to the following:

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