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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Petition of SBC Communications, Inc.	)	**CC Docket No. 98-227**
for Forbearance from Regulation as a	)	
Dominant Carrier for High Capacity Dedicated	)	
Transport Services in Fourteen Metropolitan	)	
Service Areas	)	
	)	

MCI WORLDCOM OPPOSITION

MCI WORLDCOM, INC.

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January 21, 1999

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MCI WORLDCOM OPPOSITION

I. Introduction and Summary

MCI WorldCom, Inc. (MCI WorldCom) hereby submits its opposition to the petition for forbearance filed by SBC Communications, Inc. (SBC) on December 7, 1998 in the above-captioned docket. SBC seeks relief from "any Commission rules affecting high capacity dedicated transport services that apply to the SBC Companies but not to their competitors" in 14 Metropolitan Statistical Areas (MSAs).

The Commission need not, and should not, conduct a full-scale analysis of the transport market in the 14 MSAs that are the subject of SBC's petition. Instead, the Commission should act immediately to deny SBC's petition on the grounds that the city-specific relief that SBC seeks would be contrary to the public interest and thus fails to satisfy the Section 10(a)(3) public interest criterion. As the Commission has demonstrated by its recent request that parties update the record in the pricing flexibility

phase of the access reform proceeding, the public interest is best served by addressing pricing flexibility issues on a national basis.

If the Commission does proceed to conduct a full-scale forbearance analysis addressing each of the three statutory criteria outlined in Section 10 of the Act, then it must find that SBC's petition fails to satisfy these criteria. As shown below, the Commission's dominant carrier rules (1) remain necessary to ensure that SBC is charging just, reasonable, and not unreasonably discriminatory rates; (2) remain necessary to protect consumers from paying rates that are not just and reasonable; and (3) are consistent with the public interest.

The Commission's dominant carrier rules remain necessary because SBC continues to possess market power in the market for high capacity services in all 14 MSAs that are the subject of SBC's petition. Contrary to SBC's claims of widespread competition, the record shows that SBC's high capacity customers have no alternative sources of supply on the vast majority of routes. SBC thus continues to have the ability to "raise prices above competitive levels and maintain that price for a significant period, reduce the quality of the relevant product or service, reduce innovation or restrict output profitably."[1]

The extent of competition for high capacity services in these 14 MSAs -- limited competition on a few routes in the central business districts -- is in most respects typical of metropolitan service areas in general. The rules adopted in the expanded

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[1]See In the Matter of COMSAT Corporation, File No. 60-SAT-ISP-97, Order and Notice of Proposed Rulemaking, rel. April 28, 1998, at ¶67 (Comsat Order).

interconnection proceedings, particularly the density zone pricing provisions, were crafted precisely to address the early stages of competition that characterize these metropolitan areas. To the extent that transport competition has advanced beyond the point contemplated by the expanded interconnection orders, which is not the case in the 14 MSAs that are the subject of SBC's petition, any changes to the dominant carrier rules should be considered in CC Docket No. 96-262, not on an ad hoc city-by-city basis.

A narrow focus on particular markets ignores the fact that most IXCs, including MCI WorldCom, do not buy access services only in particular MSAs, but instead purchase access services throughout SBC's region. Under the approach urged by SBC, SBC could selectively decrease access rates in only those markets where it faces competition, while maintaining or increasing already-inflated transport rates elsewhere. Only a national approach can ensure that any pricing flexibility that is granted to the ILECs is consistent with the Commission's overall objective of reducing access charges.

II. SBC's Petition Fails the Public Interest Test

Section 10 allows the Commission 12 months in which to deny a petition for forbearance for failure to meet the requirements of Section 10(a). The Commission should, however, reject SBC's petition immediately for failing to satisfy the public interest test -- the third prong of Section 10(a) -- because the issues raised by SBC are already being addressed in the pricing flexibility phase of the CC Docket No. 96-262 access reform proceeding.

It is well-established that the "choice between proceeding by general rule or by individual, ad hoc litigation is one that lies primarily in the informed discretion of the administrative agency."[2] The Commission has already decided to address the issues raised by SBC's petition -- the extent to which dominant carrier rules may need to be modified in an environment of evolving competition -- in a general rulemaking. In fact, the Commission specifically asked, in the Access Reform Notice, whether "high capacity services, e.g. those special access services offered at speeds of DS1 or higher, should be removed immediately from price cap regulation."[3] Contrary to SBC's claim that the record in the access reform proceeding is "out of date,"[4] the Commission only recently gave interested parties, including SBC, the opportunity to refresh the record in that proceeding.[5]

Given that the Commission has chosen to address pricing flexibility issues by rulemaking, it would not be in the public interest to proceed further with the ad hoc approach requested by SBC. As the Commission has stated, when there are important consequences for the entire telecommunications industry, "the coordinated and comprehensive approach made possible by a rulemaking will reduce industry uncertainty, while ensuring the smoothest possible transition to any new rules that may

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[2]SEC v. Chenery Corp., 332 U.S. 194, 203 (1947).

[3]Access Reform Notice at ¶153.

[4]SBC Petition at 3.

[5]Public Notice, FCC 98-256, October 5, 1998.

be necessary."[6] The ad hoc city-specific relief that SBC requests in its petition is obviously inconsistent with such a "coordinated and comprehensive approach."

On the rare occasions when the Commission has addressed pricing flexibility issues on an ad hoc city-specific basis, it has done so only when there was no general rulemaking underway and after finding, for example, "factors [that] generally distinguish the economic conditions existing in the New York City metropolitan area from other areas in NYNEX's region."[7] There is nothing that indicates that competitive conditions in SBC's region -- limited competition on a few routes in the central business districts of some MSAs -- can be distinguished from competitive conditions in other metropolitan areas.

Further, immediate denial of SBC's petition will serve the public interest by allowing the Commission to focus its resources on CC Docket No. 96-262. The Commission would not only avoid the need to conduct a market power analysis for each of the 14 MSAs that are the subject of SBC's petition, but denial of SBC's petition would forestall a flood of "me too" petitions from other ILECs. SBC's petition is itself a near-copy of U S West's October 1998 petition for forbearance from dominant carrier rules in the Phoenix MSA, and several other ILECs have indicated that they are planning to file similar petitions.[8]

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[6]In the Matter of AT&T Communications v. MCI Telecommunications Corp., Memorandum Opinion and Order, 7 FCC Rcd 807, 809 (1992).

[7]In the Matter of NYNEX Telephone Companies Petition for Waiver, Memorandum Opinion and Order, 10 FCC Rcd 7445, 7455 (1995).

[8]See, e.g., CC Docket No. 98-157, Comments of GTE at 2.

III. The Commission's Dominant Carrier Rules Remain Necessary

If the Commission does not deny SBC's petition immediately on public interest grounds, but proceeds instead to conduct a full-scale forbearance analysis, such an analysis would show that SBC's petition fails to satisfy Section 10's three-part test. In particular, this analysis would show that the Commission's dominant carrier rules remain necessary to ensure that SBC's high-capacity rates and practices are just, reasonable, and not unreasonably discriminatory, and that SBC's petition therefore fails to satisfy the Section 10(a)(1) and 10(a)(2) criteria.

A. SBC Continues to Possess Market Power in All 14 MSAs

According to Commission precedent, the price cap and dominant carrier tariffing regulations can be eliminated (in the case of price cap regulation) or replaced by less onerous regulation (in the case of tariffing) if a carrier is "non-dominant" (i.e., does not have market power in the relevant market).[9] In determining whether a carrier has market power, the Commission looks at such factors as demand elasticity, supply elasticity, the incumbent's pricing behavior, market share, and differences in cost structures. When these factors are evaluated with reference to high-capacity services in the SBC region, it is clear that SBC continues to possess market power.

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[9]In the Matter of Motion of AT&T Corp to be Reclassified as a Non-Dominant Carrier, Order, 11 FCC Rcd 3271 (1995) (AT&T Reclassification Order); Comsat Order.

1. Supply Elasticity

A key issue in the Commission's market power assessment is whether supply is sufficiently elastic to constrain SBC's unilateral pricing decisions in the provision of high-capacity services, i.e., whether competitors have or could quickly acquire the capacity to take away enough business from SBC to make unilateral price increases by SBC unprofitable.[10] In its petition, SBC's petition argues that "a significant amount of unused network capacity is available in particular MSAs" and that this "[a]vailable capacity . . . appears more than sufficient to thwart any attempts by carriers unilaterally to increase their prices substantially above competitive levels."[11]

SBC's focus on "unused network capacity" is misleading. While CAP fiber rings may have significant theoretical data-carrying capacity, the fact is that CAP networks have only limited geographic scope. On the vast majority of high-capacity routes in the 14 MSAs that are the subject of SBC's petition, the available competitive capacity is zero. The market research study attached to SBC's petition shows that CAP networks serve at most a few hundred buildings in each of the 14 MSAs. SBC provides no data that would put these building counts into context, but it is likely that SBC currently provides high-capacity services to thousands of buildings in each MSA.[12]

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[10]See AT&T Reclassification Order, 11 FCC Rcd at 3303.

[11]SBC Petition at 19-20.

[12]U S West's petition for forbearance from dominant carrier regulation in the Phoenix MSA showed 3,101 locations with high-capacity service in the Phoenix MSA. CC Docket No. 98-157, U S West Petition for Forbearance, Attachment B, page 3.

Consistent with the data showing that CAPs serve only a fraction of the buildings in each MSA, MCI WorldCom has found that competitive alternatives to SBC are available on only a very limited number of routes. In some of the 14 MSAs that are the subject of SBC's petition, MCI WorldCom has been able to obtain some of its DS3 entrance facilities through self-provisioning or from unaffiliated CAPs. However, reflecting the fact that most routes with lower traffic volumes still have no competitive alternatives, SBC still provides, in the aggregate, over 90 percent of MCI WorldCom's DS1 interoffice and channel termination circuits in the 14 MSAs.

Furthermore, SBC still provides 100 percent of the multiplexing purchased by MCI WorldCom in the 14 MSAs. Typically, CAPs cross-connect to SBC facilities at the DS3 level; MCI WorldCom must then obtain DS3/DS1 multiplexing from SBC. CAPs do not offer multiplexing services because the installation of multiplexing equipment and associated cross-connect frames in collocation cages would consume too much floor space to be practical under existing collocation space restrictions.

There is little prospect that competitors "could quickly acquire" capacity on the routes that they do not currently serve in the 14 MSAs. Massive amounts of capital would be necessary for CAPs to build out their networks on these routes and to do so sufficiently rapidly to constrain SBC's high-capacity pricing. In addition to the financial barriers, CAPs would face the task of planning and engineering these new links, negotiating new rights-of-way, obtaining necessary permits, and negotiating with building owners.

The Telecommunications Act of 1996 provided for alternative market-entry paths that, in theory, could accelerate entry into the high-capacity market. A competitor could, for example, use unbundled loops and collocated transmission equipment in providing competitive DS1 special access services. But collocation space and unbundled loops that SBC has priced well above forward-looking economic cost, coupled with the lack of functional OSS, have limited competitors to the capital-intensive and time-consuming path of facilities-based entry.

In no respect is the supply elasticity for high-capacity services in the 14 MSAs that are the subject of SBC's petition comparable to the supply elasticity the Commission found in the AT&T or Comsat nondominance proceedings. In the AT&T nondominance proceeding, the record showed that AT&T's competitors could immediately absorb 15 percent of AT&T's total switched demand, could absorb one-third of AT&T's capacity with existing equipment, and could absorb two-thirds of AT&T's capacity within a year after investing only $660 million.[13] By contrast, SBC's competitors currently serve only a fraction of SBC's high capacity locations, can absorb zero demand on most routes, can provide service to additional locations only by constructing new facilities, and can address a significant fraction of SBC's high capacity market only by making investments that are prohibitive.

It is clear, therefore, that the high capacity market in SBC's region is subject to an inelastic competitive supply, which requires customers to use SBC's high-capacity services on the vast majority of routes in these MSAs. Competitive networks are in the

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[13] AT&T Reclassification Order, 11 FCC Rcd at 3303.

early stages of their development, and are therefore unable to constrain SBC's pricing of high-capacity circuits and multiplexing or to constrain SBC's ability to discriminate unreasonably in the provision of high-capacity facilities.

2. Demand Elasticity of SBC's Customers

SBC argues that "[e]vidence for the major dedicated transport markets in the SBC Companies' service territory indicates that demand for the SBC Companies' services is price elastic, consistent with competitive market conditions."[14] SBC points out that high capacity transport services are sold predominantly to telecommunications carriers, large corporate end users, and other sophisticated buyers.

While MCI WorldCom and other access customers are obviously eager to find alternatives to SBC's transport services, a finding of high demand elasticity requires that SBC's customers not only be willing to switch suppliers, but also that they have the ability to do so.[15] High-capacity customers in the 14 MSAs currently have only a limited ability to switch suppliers. First, as discussed above, alternative sources of supply are simply unavailable on every route. Second, excessive termination liabilities and inflated nonrecurring charges combine to severely restrict access customers' ability to switch suppliers, even on the limited number of routes where CAPs provide an alternative.

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[14]SBC Petition at 17.

[15]See, e.g., Comsat Order at ¶71 ("High firm demand elasticity indicates that customers are willing and have the ability to switch to another service provider in order to obtain price reductions or desired features.").

Pursuant to Southwestern Bell's tariff, the termination liability equals 20 percent of the remaining cost of a term plan,[16] a figure sufficiently large to overwhelm any savings that might result from a CAP's lower monthly rates. Thus, the substantial fraction of transport demand that is covered by SBC term plans is effectively out of competitors' reach. In many cases, customers entered into term plans prior to the passage of the 1996 Act, based on reasonable predictions of the likely evolution of competition and SBC pricing under pre-1996 Act and pre-access reform rules. Term plans were one of the few tools available to customers seeking to avoid a portion of the ILECs' excessive non-cost-based switched transport and special access rates. Customers also entered into term plans to avoid the extremely high non-recurring charges that SBC assesses on customers signing month-to-month contracts. Pacific Bell, for example, assesses a non-recurring charge of $31,000 for a DS3 ordered on a month-to-month basis, while the nonrecurring charge for a five-year contract is waived.[17]

A second barrier to switching suppliers is created by the excessive nonrecurring charges that SBC assesses on access customers switching to a competing supplier. For example, at Pacific Bell's tariffed rates, shifting 28 DS1s from Pacific Bell to a competitor would cost the access customer $12,522 in nonrecurring charges. Such nonrecurring charges lengthen the "payback period" so significantly that switching to CAP transport is often not a viable alternative even when competitors' facilities are in place.

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[16]SWBT Tariff F.C.C. No. 73, Section 7.2.20(D)(3).

[17]Pacific Bell Tariff F.C.C. No. 128, Section 7.5.9(A)(3)(a), (c).

Because SBC's termination liabilities and nonrecurring charges are so significant, new entrants are, as a practical matter, competing only for "growth" or new circuits. Competitors are therefore limited in their ability to "prove in" additional routes, expand their networks, and develop economies of scale. While competitors offer service on only a limited number of routes, the ILECs can structure volume discounts based on their ability to aggregate customer circuits on all routes.

3. SBC's Pricing Behavior

The Commission has, on various occasions, examined the incumbent's pricing behavior to determine whether such pricing behavior was consistent with declining market power. In the AT&T nondominance proceeding, for example, the Commission noted that AT&T's Basket 1 API was 6.2 percent below the PCI.[18]

SBC's pricing behavior is consistent with a carrier that continues to possess market power. Both Pacific Bell and Southwestern Bell are currently pricing their trunking basket services at the maximum permitted by the price cap rules. Further, during the past two years, when the X-Factor was targeted to the TIC and was therefore not driving high-capacity rates down, Southwestern Bell's transport rates have actually

[18] AT&T Reclassification Order, 11 FCC Rcd at 3314.

increased.[19] It is apparent, therefore, that the only limit on SBC's high-capacity rates is provided by the price cap mechanism, not by any competitive pressures.

While SBC has requested relief on a city-by-city basis, SBC's region-wide pricing practices are relevant to analyzing its market power in the MSAs that are the subject of SBC's petition. As SBC points out, the 14 MSAs represent over 70 percent of the SBC region's high-capacity demand.[20] If competitors had, as SBC claims, made significant inroads in these markets, this competitive entry would have generated pricing pressure for the region as a whole.

4. Market Share

SBC contends that competitors have captured market shares that, depending on the MSA, range from 25 percent to over 50 percent. SBC argues that "[w]ith competitive losses exceeding 25% in each of the 14 MSAs at issue here, the SBC

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[19] SWBT:

	6/30/97 SBI	1/1/99 SBI
DS1 Sub Cat	73.5939	75.8826
DS3 Sub Cat	77.8090	78.0852

Source:
6/30/97 SBI - SWBT Tr. No. 2645, Chart PCI-1, col. (G), rows 310, 410
1/1/99 SBI - SWBT Tr. No. 2741, Chart PCI-1, col. (C), rows 310, 410

[20] SBC Petition at 11 n.33.

Companies could not successfully increase their prices for high capacity dedicated transport service substantially above competitive levels and reap 'monopoly profits.'"[21]

SBC's market share figures are misleading. They are expressed in "DS1 equivalents," an approach that has the effect of attributing greater share gains to CAPs than if a revenue-based market share measure is used. The "DS1 equivalent" measure overstates CAPs' competitive inroads because it weights the type of facility for which ILECs have faced some competition — DS3 entrance facilities — more heavily than if a revenue measure were used. When measured on a circuit basis, a DS3 entrance facility circuit counts the same as 28 interoffice DS1s or DS1 channel terminations. But when measured on a revenue basis, entrance facilities are much less significant.[22] "DS1 equivalent" market share measures obscure SBC's continued dominance of the more significant (in revenue terms) multiplexing, interoffice transport, and channel termination elements.

As discussed above, while MCI WorldCom has been somewhat successful in finding alternatives to SBC's DS3 entrance facilities, it continues to purchase 100 percent of multiplexing and over 90 percent of DS1 interoffice and channel terminations from SBC. SBC facilities represent, in the aggregate, over 80 percent of MCI WorldCom's high-capacity costs in the 14 MSAs that are the subject of SBC's petition.

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[21]SBC Petition at 15.

[22]The per-DS1 cost of a DS3 is significantly less than the cost of a DS1, for circuits of the same mileage. Furthermore, mileage between the serving wire center and the end office is typically much greater than the mileage between the IXC POP and serving wire center.

At this level, SBC's market share is inconsistent with its claim of lost market power. In the AT&T Reclassification Order, the Commission declared AT&T to be nondominant only after finding that AT&T's share of interexchange market revenues had fallen to 55.2 percent.[23]

5. Cost Structure, Size and Resources

As the incumbent provider of high-capacity services in the 14 MSAs, SBC enjoys several cost advantages. First, as the Commission has observed, CAPs are attempting to enter a market that is dominated by the incumbent provider, and may not have attracted a sufficient amount of business to achieve economies of scale.[24]

Second, one of the most important factors inhibiting CAPs from expanding their networks to serve additional buildings is the refusal of most landlords to allow CAPs to provide service in their building without payment of compensation — compensation that is almost never demanded from the ILEC. This places CAPs at a competitive disadvantage in terms of the cost of providing service. Furthermore, the CAPs must

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[23]AT&T Reclassification Order, 11 FCC Rcd at 3307. MCI WorldCom is not suggesting that 55.2 percent is an appropriate indicator of reduced market power in the access market. The Commission recognized that this high market share figure was "not incompatible" with a competitive market only "in markets with high supply and demand elasticity." AT&T Reclassification Order, 6 FCC Rcd at 5890 ¶51. Given the highly route-specific nature of competitive alternatives in the access market, and the correspondingly inelastic supply, a 55.2 percent market share figure would be an indicator of continued ILEC dominance of the access market.

[24]In the Matter of Southwestern Bell Telephone Company, Tariff F.C.C. No. 73, Order Concluding Investigation and Denying Application for Review, 12 FCC Rcd 19311, 19337 (1997) (SWBT RFP Tariff Rejection Order).

make a difficult decision regarding the allocation of scarce capital. Ideally, given the necessity of paying building owners, the CAP would prefer to make the commitment to enter a building only after obtaining contracts to provide service to customers in that building. But given that the process of obtaining authority to enter a building after signing up a new contract may take months, CAPs may risk capital by committing to certain buildings prior to having a signed customer contract. Others will wait for the customer contract, but the resulting lengthy time for delivery of service will make the sales efforts more difficult.

B. Dominant Carrier Regulation is Necessary to Ensure that SBC's High Capacity Rates and Practices are Just, Reasonable, and Not Unreasonably Discriminatory

In order to satisfy the first statutory criterion of Section 10, SBC is required to demonstrate that application of the Commission's price cap, tariffing, and rate averaging rules is not necessary to ensure that its rates and practices are just, reasonable, and not unreasonably discriminatory. Because, as discussed above, SBC continues to possess market power in the provision of high-capacity services in all 14 MSAs, the Commission should conclude that SBC has failed to satisfy the Section 10(a)(1) criterion. The Commission has previously found that its price cap rules (or other forms of rate regulation) and dominant carrier tariff rules are necessary as long as a carrier possesses market power.[25]

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[25] Comsat Order at ¶144.

It is clear that the Commission's price cap and tariff rules remain necessary to ensure that SBC's rates are just and reasonable. Because there are no competitive alternatives on the vast majority of high-capacity routes in the 14 MSAs, SBC has the ability and incentive to charge rates that are not just and reasonable on these routes. To prevent SBC from overcharging access customers, the Commission must continue to apply its price cap rules.[26] The Commission must also continue to apply its dominant carrier tariff rules. The tariff rules' advance notice and cost support requirements permit SBC customers and the Commission to challenge potentially unlawful rates before they become effective.[27]

Similarly, the rate averaging requirements remain necessary to ensure that SBC's rates for high capacity services in the 14 MSAs are not unreasonably discriminatory. Absent the rate averaging requirement, SBC could offer rates on routes that are subject to competition that are not generally available to similarly situated customers on routes not subject to competition. The Commission has previously found that such practices are unreasonably discriminatory in violation of Section 202(a) of the Act.[28]

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[26]In the Matter of Policy and Rules Concerning Rates for Dominant Carriers, Second Report and Order, 5 FCC Rcd 6786, 6787 (1990).

[27]Comsat Order at ¶153.

[28]In the Matter of Southwestern Bell Telephone Company Tariff F.C.C. No. 73, Memorandum Opinion and Order on Reconsideration, 13 FCC Rcd 6964, 6965 (1998).

C. Dominant Carrier Regulation is Necessary for the Protection of Consumers

In order to satisfy the second statutory criterion of Section 10, SBC must demonstrate that application of the Commission's price cap, tariffing, and rate averaging rules is not necessary for the protection of consumers. Because the record shows that, absent regulation, SBC would have the ability and incentive to charge access rates that are not just and reasonable or are unreasonably discriminatory, and thus increase prices and distort competition in the interexchange market, the Commission's dominant carrier regulations remain necessary for the protection of consumers.

V. Conclusion

The Commission should act immediately to deny SBC's petition for forbearance on the grounds that the city-specific relief that SBC seeks would be contrary to the public interest and thus fails to satisfy the Section 10(a)(3) public interest criterion. If the Commission proceeds instead to conduct a full-scale forbearance analysis, then it should find that SBC continues to possess market power in the 14 MSAs that are the subject of its petition and that the Commission's dominant carrier rules are necessary to ensure that SBC's high-capacity rates and practices are just, reasonable, and not unreasonably discriminatory.

Respectfully submitted,
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January 21, 1999

STATEMENT OF VERIFICATION

I have read the foregoing, and to the best of my knowledge, information, and belief there is good ground to support it, and that it is not interposed for delay. I verify under penalty of perjury that the foregoing is true and correct. Executed on January 21, 1999.

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CERTIFICATE OF SERVICE

I, Vivian I. Lee, do hereby certify that copies of the foregoing Opposition were sent via first class mail, postage paid, to the following on this 21st day of January, 1999.

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