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

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FEB 11 1999

In the Matter of

Petition of the SBC Companies for	)	
Forbearance from Regulation as a Dominant Carrier	)	CC Dkt 98-227
for High Capacity Dedicated Transport	)	
Services in Specified MSAs	)	

REPLY COMMENTS OF LEVEL 3 COMMUNICATIONS, INC.

Level 3 Communications, Inc. ("Level 3") respectfully submits the following reply comments in the above-captioned proceeding concerning the petition filed by the SBC Companies ("SBC") requesting forbearance from regulation as dominant carriers in their provision of high capacity transport services in 14 Metropolitan Statistical Areas ("MSAs") in their service areas.[1]

Level 3 is a communications and information services company that is building an advanced Internet Protocol technology-based network across the U.S., connecting 25 cities. Level 3's network is scheduled to be completed in phases by 2001. The company also plans to build local networks in cities across the country and to interconnect these city networks with its national long distance network. Additionally, the company has announced plans to expand internationally.

[1] *Public Notice*, Petition of SBC Communications, Inc. for Forbearance from Regulation as a Dominant Carrier for High Capacity Dedicated Transport Services in Fourteen Metropolitan Service Areas, CC Docket No. 98-227 (December 8, 1998).

Level 3 strongly opposes the SBC petition for forbearance. The petition fails to demonstrate that SBC lacks market power in provision of high capacity services, and, if granted, would enable SBC to thwart competitive provision of high capacity services. Level 3 submits that the petition, therefore, does not meet the requirements for forbearance under Section 10 of the Communications Act.

I. SBC HAS FAILED TO SHOW THAT IT DOES NOT POSSESS MARKET POWER IN PROVISION OF HIGH CAPACITY SERVICES IN THE 14 MSAs IN QUESTION

In determining whether a carrier has market power, the Commission has considered several factors: market share, supply and demand elasticities, and the carrier's size and resources.[2] SBC has failed to show that it lacks market power under any of these factors.

Market Share. SBC's primary basis for asserting that it lacks market power is a study submitted by Quality Strategies purporting to show that competitors have a significant market share of high capacity services in the 14 markets in question. This study purports to show that in some MSAs competitors have a 51% market share in provision of high capacity services. Level 3 submits that this study is so badly flawed that it cannot provide a sufficient basis for reaching conclusions concerning SBC's market share.

First, the Quality Strategies study does not provide any supporting data, or attempt to seriously explain its methodology. The study's statement that it is based on "available

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[2] *Motion of AT&T Corp. To Be Reclassified as a Non-Dominant Carrier*, 11 FCC Rcd 3271 (1995) ("*AT&T Non-Dominance Order*").

information" and "in-house proprietary data"[3] does not permit parties to assess the quality of the data, and, therefore, of the study itself. As to methodology, the study describes in general terms that it is based on primary and secondary market research conducted for SBC including interviews with industry officials. Level 3 submits that a study must do considerably more than leave the parties guessing as to how its conclusions were developed and the facts underlying those conclusions before the Commission can rely on it to any extent in determining market share. Other commenters also correctly observe that the Quality Strategies is wholly inadequate in these respects.[4]

However, the study does apparently acknowledge that it is based on "DS-1 equivalents."[5] Level 3 submits that DS-1 equivalents does not provide an adequate basis for assessing market share. A DS-3 circuit is equivalent in capacity to 28 DS-1s. Thus, for example, if SBC is providing 28 DS-1s to 28 different customers throughout an MSA and a CLEC is providing one DS-3 to one customer at one location, each would have a 50% market share. This is not a realistic assessment of the state of competition because it ignores other factors such as revenues or location of facilities. As other commenters have pointed out, a DS-3 circuit may be priced at only 2-3 times as much as a DS-1 circuit even though it has 28 times the capacity.[6] In the example above, if SBC's price for a DS-1 is $100/month and the CLEC's price

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3 SBC High Capacity Market Study, November 25, 1998, Quality Strategies, Washington, DC, at 44, ("Quality Strategies Study").

4 KMC at 2; Time Warner at 13; AT&T at 5.

5 Quality Strategies Study at 48.

6 AT&T at 5; Sprint at 9.

for a DS-3 is $300/month, then SBC would have revenues of $2,800/month and the CLEC would have revenues of $300/month, giving SBC a market share of about 87% based on revenues. Therefore, DS-1 equivalents present a distorted picture of market share. The Commission has previously considered revenues in assessing the amount of competition in a market and it should reject SBC's self-serving attempt to rely exclusively on DS-1 equivalents.[7]

In addition, most CLECs do not have ubiquitous facilities. Whereas incumbent LECs will have high capacity facilities throughout a metropolitan area because those facilities are also used to provide other services such as switched access, most CLEC facilities are far more limited in scope. CLECs frequently enter the market by constructing a fiber ring or backbone fiber facilities that were not designed to permit service throughout an MSA because of economic constraints. While the fiber ring may have a very significant capacity, it does not enable CLECs to readily serve all customers within an MSA.

Therefore, use of DS-1 equivalents presents a completely misleading estimate of market share that ignores other important indicia of a competitive presence such as revenues and the ability to provide service throughout an area. Accordingly, the Commission should reject SBCs showing of market share. Level 3 fully supports the concerns of other commenters concerning use of DS-1 equivalents.[8]

<u>Supply/Demand Elasticities</u>. Level 3 submits that there is no basis on this record for determining that there are sufficient alternative high capacity networks available so that other

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7 *See generally, AT&T Non-Dominance Order.*

8 KMC at 3; AT&T at 4; Sprint at 8.

suppliers could readily provide service to SBC's customers. As discussed, CLEC networks do not cover an MSA and cannot compete for customers that are beyond the ready reach of their facilities. This is amply demonstrated by initial comments.[9] Further, the drawings of competitor networks appended to the Quality Strategies study show that those networks do not reach every area of the MSA. To the extent they could be considered to provide sufficient evidence at all concerning competitors' facilities, they appear to show more areas within every MSA in which there are no nearby competitor facilities, rather than the reverse. Therefore, the Commission should find that SBC has not shown that there are sufficient elasticities of supply warranting deregulation.

SBC's initial petition provided only unsupported, conclusory statements concerning demand elasticities. As pointed out by other commenters, SBC has failed to provide information of the type that the Commission has previously used to make a finding of demand elasticities sufficient to warrant a finding of non-dominance such as evidence of customer churn on increased advertising expenses that AT&T submitted in support of its request for non-dominant treatment.[10] Accordingly, the Commission should not find that SBC has shown that the market for high capacity services is characterized by elasticities of demand.

<u>SBC's Size and Resource Advantages</u>. SBC continues to control facilities that are essential to CLECs' provision of service. Most CLECs require collocation, UNEs , and various forms of interconnection in order to provide service. SBC therefore continues to have the ability

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9 *See e.g.*, Time Warner at 8.

10 Time Warner Comments at 10.

to disadvantage its competitors by, for example, providing these required inputs slowly or providing poor quality ones. SBC's ability to disadvantage competitors strongly militates against a finding of lack of market power.

Further, SBC possesses resources that dwarf those that any competitor can bring to bear in any of its local markets. While other large companies are seeking to enter SBC's service territory, they must spread resources among the various local markets they are seeking to enter and cannot individually or together, match the resources of SBC in any single market. At the same time, SBC's request to merge with Ameritech must be considered in assessing size and resources.

Level 3 submits that the Commission in assessing market power should give heavy weight to the fact that SBC remains the incumbent LEC in each of the 14 MSAs possessing bottleneck control over many of the essential inputs to its competitors provision of service, and that its size and resources vastly exceed those that any competitors can bring to bear in any of its local service markets. These circumstances give SBC that ability to thwart competition and continue to exercise market power in provision of high capacity services.

Product and Geographic Markets. In order to demonstrate that it lacks market power, SBC must also adequately define and justify the product and geographic markets in which it claims to be non-dominant. SBC has completely failed to do so.

SBC defines the product market for which it claims to be a non-dominant provider as "special access services, switched access entrance facilities, and switched access direct trunked transport services that operate at DS-1 and higher transmission speeds."[11] It excludes switched access or special access dedicated transport at transmission levels DS-0 and below.[12] Level 3 submits that the relevant product market should include all the services that can be provided over the facilities that are used to provide high capacity services. There is virtually no competition for switched access services. SBC glosses over this point and fails to explain how it can be dominant for one set of services, and not another, that are provided over the same facilities.

SBC has failed to even attempt to seriously justify its choice of MSAs as the relevant geographic markets. It states only that it selected MSAs as the relevant geographic market because demand for high capacity services is concentrated in urban areas.[13] However, there is virtually no basis in the record for assuming that the boundaries of MSAs have any reasonable connection to the various factors that are relevant to a market power analysis. On the one hand, an MSA may be far too broad in that there are clearly areas of MSAs in which competitive LECs do not have the ability to provide service. On the other hand, it has not been shown that market power should not be based on a state-wide or LATA-wide basis. Level 3 submits that a state-wide basis for defining the relevant geographic market makes possible a more realistic assessment of market power because SBC markets high capacity services, and constructs the facilities to provide them, on a state-wide or even region-wide basis. Accordingly, SBC has not shown that MSAs are the appropriate geographic market for measuring market power.

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11 Petition, n. 2.

12 *Id.*

13 Petition at 11.

For these reasons, the Commission should find that SBC has failed to show that it lacks market power in the provision of high capacity services in the 14 markets in question. The few comments in support of the petition provide no information beyond what is provided in the SBC petition that would warrant a finding that SBC lacks market power.[14] They provide only very brief conclusory allegations that add nothing to the market power analysis While US West contends that DS-1 equivalents is preferable to revenues as a measure of market share, it has not shown that revenues are not a meaningful measure of market share.[15] Accordingly, the Commission comments in filed in support of the SBC petition to provide a basis for granting the requested relief.

II. THE SBC PETITION FAILS TO MEET THE STATUTORY STANDARD FOR FORBEARANCE

Under Section 10(a) of the Communications Act, the Commission must forbear from enforcing a regulatory requirement if (1) enforcement of such regulation is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable; (2) enforcement of such regulation is not necessary for the protection of consumers; and (3) forbearance from applying such regulation is consistent with the public interest.[16]

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14 *See* comments of US West, Ameritech, and the United States Telephone Association.

15 US West at 3.

16 47 U.S.C. Sec. 160(a).

The Commission cannot make the requisite findings under Section 10 to warrant forbearance in this case. For the reasons discussed, SBC has not shown that it lacks market power in provision of high capacity services that would enable the Commission to rely on market forces, rather than regulation, to assure that prices for high capacity services are reasonable. Continued enforcement of price regulation is necessary to assure that prices for high capacity services remain reasonable. SBC has not provided probative evidence of competitors' market share. Further, the Commission could not conclude that forbearance would be consistent with the public interest. Absent a more substantial showing of lack of market power, it would not be in the public interest to substantially deregulate SBC because there would be no assurance that it could not engage in conduct that would thwart competition. Accordingly, the Commission should deny SBC's request for forbearance.

III. CONCLUSION

For these reasons, Level 3 urges the Commission to deny SBC's request for forbearance from dominant carrier regulation for provision of high capacity services.

Respectfully submitted,

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Dated: February 11, 1999

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Reply Comments was sent by hand delivery or by U.S. first class mail, postage prepaid, on this 11th day of February, 1999 to the attached list of parties.

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