

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

In the Matter of)

Petition of Ameritech for Forbearance from)
Dominant Carrier Regulation of its Provision of)
High Capacity Services in the Chicago LATA)

CC Docket No. 99-65

**OPPOSITION OF THE
TELECOMMUNICATIONS RESELLERS ASSOCIATION**

The Telecommunications Resellers Association ("TRA"),¹ through undersigned counsel and pursuant to *Public Notice*, DA 99-334 (released February 16, 1999), hereby opposes the APetition for Forbearance from Dominant Carrier Regulation of Its Provision of High Capacity Services in the Chicago LATA≡ filed by Ameritech ("Petitioner") in the captioned proceeding on February 5, 1999 (the "Petition"). As TRA will demonstrate below, Petitioner has fundamentally failed to satisfy the statutory test for exercise by the Commission of its Section 10 forbearance authority. Accordingly, TRA urges the Commission to summarily deny the Petition.

¹ A national trade association, TRA represents more than 800 entities engaged in, or providing products and services in support 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, numbering among its members not only the large majority of providers of domestic interexchange and international services, but the majority of competitive local exchange carriers.

Petitioner urges the Commission to Aforbear from regulating Ameritech as a dominant carrier in the provision of high capacity special access, dedicated transport for switched access, and interstate intraLATA private line (point-to-point) services (collectively, "high capacity services") in the Chicago, Illinois, local access and transport area (ALATA≡)."² In other words, Petitioner seeks relief from those Part 61 tariffing rules and Part 69 access charge rules that apply to dominant providers of interstate access services.

In support of its Petition, Petitioner contends that Athe market for high capacity services in the Chicago, LATA is vigorously competitive," rendering AAmeritech incapable of exercising market power in the provision of high capacity services in the Chicago LATA."³

Elaborating on this claim, Petitioner proclaims that:

- (1) Acompetitive providers have captured almost 94% of the retail market for high capacity special access . . . and a substantial portion of the market for high capacity transport services;≡⁴
- (2) "customers that purchase high capacity services B medium to large businesses, governmental entities, and especially large interexchange carriers (AIXCs≡) -- are highly sensitive to price and other service characteristics;≡⁵
- (iii) A[c]ompetitors have extended their facilities nearly ubiquitously throughout the areas where demand for high capacity services exists, . . . [and] the cost of entry and expansion is not prohibitive;≡⁶ and
- (iv) AAmeritech does not enjoy any unfair advantage in terms of its costs,

² Petition at 1.

³ Id. at 3, 8.

⁴ Id. at 4.

⁵ Id. at iv.

⁶ Id.

structure, size and resources.⁷

TRA submits that Petitioner's analysis is wide of the mark in all respects.

⁷

Id.

Section 10 of the Communications Act of 1934, as amended (the AAct \equiv), 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 carrier rates and charges, as well as practices, are just and reasonable and nondiscriminatory, and to protect consumers and competitors alike.

⁸ 47 U.S.C. \S 160(a).

⁹ 47 U.S.C. \S 160(b).

¹⁰ Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor, First Report and Order, 85 FCC 2d 1 (1980), Second Report and Order, 91 FCC 2d 59 (1982), Order on Reconsideration, 93 FCC 2d 54 (1983), Third Report and Order, 48 Fed. Reg. 46,791 (1983), Fourth Report and Order, 95 FCC 2d 554 (1983), *vacated sub nom. American Tel. and Tel. Co. v. FCC*, 978 F.2d 727 (D.C. Cir. 1992), *cert. denied sub nom. MCI Telecom. Corp. v. American Tel. and Tel. Co.*, 113 S.Ct. 3020 (1993), Fifth Report and Order, 98 FCC 1191 (1984), Sixth Report and Order, 99 FCC 2d 1020 (1985), *vacated sub nom. MCI Telecom. Corp. v. FCC*, 765 F.2d 1186 (D.C. Cir 1985).

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 ("IXCs") 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 ACAPs 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 long classified incumbent LECs as dominant because they were the exclusive or near exclusive providers of local exchange and exchange access services in their respective markets, and, as such possessed pervasive market power. Petitioner, however, argues that its market power has been eroded to the point that it is no longer a dominant provider of high capacity services in the Chicago LATA. This contention is predicated in substantial part on Petitioner's claim that "competitive providers have captured 94 percent of the retail market for high capacity services."¹⁴ While an impressive number, this value is highly misleading.

¹¹ Motion of AT&T Corp. to be Reclassified as a Non-Dominant Carrier, 11 FCC Rcd. 3271, & 1 (1995), *recon.* 12 FCC Rcd. 20787 (1996).

¹² Policy and Rules Concerning the Interstate, Interexchange Marketplace, 11 FCC Rcd. 20730 (1996), *recon.* 12 FCC Rcd. 15014 (1997), *pet. for review pending sub nom. MCI Telecommunications Corp. v. FCC*, Case No. 96-1459 (D.C.Cir. Feb. 13, 1997), *stayed pending judicial review, recon.* FCC 99-47 (March 31, 1999).

¹³ Hyperion Telecommunications, Inc. Petition Requesting Forbearance, 12 FCC Rcd. 8596, & 23 - 24 (1997).

¹⁴ Petition at 14.

First, the percentage of the "retail" market allegedly lost by Petitioner to competitors overstates dramatically the competitive inroads made by alternative providers. By emphasizing the "retail" market, Petitioner attempts to draw attention away from its position as the dominant facilities-based provider of high capacity services. Petitioner trumpets that its share of the retail market has allegedly fallen to 6 percent, but downplays its retention of an admitted 52 percent of the wholesale market in AChicago City≡ and a whopping 72 percent of the wholesale market in the AChicago Suburbs,≡ for a LATA market share approaching 60 percent.¹⁵

When Petitioner serves the retail market, it generates revenues. It also generates revenues when it serves the wholesale market, and the retail/wholesale differential is often not that substantial given that the bulk of wholesale high capacity service sales are to IXC acting as agents for end users. Because it controls the large majority of the facilities used to provide high capacity service, Petitioner retains the ability to manipulate the price and availability of those facilities to enhance its competitive position and disadvantage competitors. If this were not the case, Petitioner would have been reclassified as nondominant years ago because it has never served a large percentage of the "retail" market, at least as defined to exclude high capacity services provided to IXCs.

¹⁵ Id. at 14 - 15.

Even a 60 percent market share figure likely understates the percentage of the high capacity market controlled by Petitioner.¹⁶ This is because Petitioner bases its market share analysis on DS1 "equivalent circuits."¹⁷ Use of DS1 Equivalent circuits≅ distorts Petitioner's competitive analysis of the high-capacity market by assigning undue weight to DS3 circuits. Twenty-eight DS1 circuits will produce substantially more revenue and serve far more customers than a single DS3 circuit. Under Petitioner's methodology, however, a competitive provider of a single DS3 circuit will appear to have the same competitive impact as an incumbent provider of twenty-eight DS1 circuits even though the former is serving a fraction of the customers served by the latter and generating only a third of the revenues generated by the latter. And as Petitioner acknowledges, the market at DS3 capacity and above is more competitive than the market for DS1 service.¹⁸ In other words, use of a DS1 equivalent market share measure tends to obscure Petitioner's dominance over such service offerings as multiplexing, interoffice transport, and channel termination elements.

This assessment is confirmed by the experience of IXCs in other markets QSI has characterized as intensely competitive. For example, data submitted by MCI WorldCom, Inc. ("MCI WorldCom") in response to a SBC Communications, Inc. petition seeking relief in fourteen major metropolitan statistical areas comparable to that sought here by Petitioner here, advised the

¹⁶ It is impossible to fully assess the validity of Petitioner's market share data because Quality Strategies, Inc. (AQSI≅) upon whose analysis Petitioner relies in making its market share claims has omitted the information and materials necessary to make such an assessment. While QSI generally describes its survey approach and sampling techniques, Petitioner neglects to include with its Petition QSI's survey or to identify QSI's sample size or make up. Moreover, QSI acknowledges that it Aincorporates competitive intelligence (both primary research and our national CI database) into the computation of provider market share,≅ but fails to identify this Acompetitive intelligence≅ or disclose its impact upon QSI's market share conclusions. *See generally* Petition at Exh. 8.

¹⁷ Id. at Exh. 8, p. 8.

¹⁸ Id. at Exh. 8, p. 10.

Commission that while "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."¹⁹ AT&T echoed this assessment in response to a U S WEST Communications, Inc. (AU S WEST \cong) claim that the high capacity market in the Phoenix MSA was intensely competitive:

¹⁹ Opposition of MCI WorldCom filed in CC Docket No. 98-277 on January 1, 1999, at 14.

While AT&T has migrated some (but by no means all) of its DS3 services in the Phoenix area to CLEC facilities, it continues to purchase all of its multiplexing (DS3 to DS1 and DS1 to DS0) services from U S WEST. Additionally, nearly 90% of AT&T's DS1 services are purchase from U S WEST. On a dollar-weighted basis, AT&T estimates that, as of September 1, 1998, U S WEST collects approximately 80% of the dollars that AT&T spends in the Phoenix LATA on high capacity services.²⁰

²⁰

Opposition of AT&T filed in CC Docket No. 98-157 on October 7, 1998.

More directly to the point, only an entity that has always enjoyed a dominant position in a market would assert that a 60 percent market share was indicative of non-dominance. When the Commission finally reclassified AT&T as a non-dominant provider of interstate, domestic, interexchange service, AT&T's market share based on operating revenues of long distance carriers only was 51.8 percent, and based on total toll revenues (inclusive of local exchange carrier (ALEC) toll revenues) was only 44.9 percent.²¹ Acknowledging, however, commenters' concerns that a market share of this size was inconsistent with a finding of non-dominance, the Commission emphasized that AT&T faced two full-fledged facilities-based competitors, with nationwide networks that . . . [were] capable of offering most consumers an alternative choice of services relative to AT&T, one other nationwide facilities-based provider, . . . dozens of regional facilities-based carriers, . . . [and] several hundred small carriers that primarily resell the capacity of the largest interexchange carriers.²² Moreover, the Commission stressed that virtually all customers today . . . have numerous choices of equal access carriers employing facilities or resale or both.²³ Taken together, the Commission explained, these changes in market conditions warrant[ed] . . . reconsideration and reevaluation of AT&T's classification.²⁴

Petitioner's market share is upwards to 50 percent greater than that the Commission

²¹ Zolnierek, J., Rangos, K., Eisner, J, Industry Analysis Division, Common Carrier Bureau, Federal Communications Commission, Long Distance Market Shares Third Quarter 1998, Tables 3.2 and 3.3 (December, 1998).

²² Motion of AT&T Corp. to be Reclassified as a Non-Dominant Carrier, 11 FCC Rcd. 3271 at & 70.

²³ Id. at & 71.

²⁴ Id.

sensed was not low enough to alone warrant reclassification of AT&T as a non-dominant provider of interstate, domestic, interexchange services. Rather than the dozens of established national and regional facilities-based competitors faced by AT&T, Petitioner faces a small number of relatively new local market entrants whose networks are still being deployed and whose transmission and other facilities, in the aggregate, are dwarfed by those of Petitioner. Petitioner, for example, touts the 1,300 miles of fiber competitors together have installed in the Chicago LATA.²⁵ Petitioner has installed more 100 times this amount of fiber across its five-state region.²⁶

²⁵ Petition at 5 - 6.

²⁶ Kraushaar, J.M., Industry Analysis Division, Common Carrier Bureau, Federal Communications Commission, Fiber Deployment Update End of Year 1997, Table 6 (1998).

Perhaps even more critically, unlike AT&T's customers, who could select among hundreds of competing providers, many of Petitioner's customers do not have any, much less hundreds of, alternatives. Until a building is "lit" by a competitor, Petitioner remains the only source of high capacity service for the businesses occupying the building. Petitioner makes much of the number of buildings "lit" by competitors in the Chicago LATA. Standing alone, it may look impressive that MCI WorldCom has connected between 300 and 400 buildings to its network or that AT&T has 300 to 400 on-net buildings,²⁷ but these values represent a relatively small percentage of the tens of thousands of buildings in the Chicago LATA. A legitimate analysis would, at a minimum, have identified the number of buildings housing potential users of high capacity services before claiming that enough such buildings had been "lit" by competitors to produce a substantial erosion of Petitioner's market power.

²⁷ Id. at Exh. 5, pp. 5, 22. It is impossible to discern from data submitted by Petitioner how many buildings are connected to competitors' networks because Petitioner does not identify which buildings are served by multiple carriers.

Petitioner, however, opines that the cost of entry is not prohibitive,²⁸ citing a Bell Atlantic estimate that the approximate cost to reach a customer location within 2,000 feet . . . [of a] backbone network . . . [can be] as low as \$6,200 in a major urban area,²⁹ and a U S WEST estimate that a competitor can reach a customer location that is between 1,000 and 2,000 feet from its fiber route for approximately \$40,000.²⁸ As TRA has pointed out elsewhere,²⁹ even the higher U S WEST value fails to capture the non-construction activities associated with a network buildout. Before construction can commence, rights of way must be secured, permits must be obtained, and negotiations with building owners must be completed. These additional activities add substantially to costs associated with adding a new building to a network.³⁰ For example, the U S WEST cost estimates do not reflect the entrance fees most building owners demand or the cost of installing inside wire which most building owners require carriers to bear. And, of course, these cost estimates do not include the collocation costs incumbent LECs impose on competitors seeking to provide a competitive switched transport service.

Petitioner, however, also declares that competitors can provide service through collocation arrangements with Petitioner. Petitioner's reliance upon competitors' right to collocate

²⁸ Id. at Att. A, pp. 28 - 29.

²⁹ Opposition of TRA to Petition for Forbearance filed by U S WEST in CC Docket No. 99-1 on February 18, 1999, at 8 - 9.

³⁰ Petitioner conveniently overlooks the lag in time between the immediate relief it seeks and the period of years that would be required for competitors to extend their networks to reach every building currently served by Petitioner. U S WEST acknowledged in its petition seeking relief from dominant carrier regulation in the Seattle, Washington market that it would require at least "18 to 24 months" for competitors to install the facilities necessary to serve "the 60 percent of current U S WEST-served locations that are within 1,000 feet of the providers' existing fiber networks," and "serving those customers beyond 1,000 feet would require additional time." Petition of U S WEST for Forbearance in CC Docket No. 99-1 at Attachment 1.

is unavailing. A competitor that elects to take advantage of this opportunity will find itself relying in critical ways on Petitioner for essential facilities, including, for example, connections between the collocated space and the customer premise and its own switch. Reliance upon a direct competitor for essential facilities leaves an entity open to abuses associated with strategic manipulation of both the provision and cost of such facilities.

Further undermining Petitioner's claim that its market power in the high capacity market has been sufficiently blunted to justify its reclassification as nondominant, as well as its contention that the sensitivity of large business and carrier customers to price and service characteristics warrants such action, is the geographic breadth of the relief for which it has petitioned.³¹ Petitioner acknowledges that what competition it faces is concentrated in "Chicago City."³² Nonetheless, Petitioner seeks forbearance from dominant carrier regulation for the entirety of the Chicago LATA. For entities outside AChicago City, Petitioner more often than not remains the exclusive source of high capacity services, able, as such, to exercise full market power.³³ Entities outside

³¹ Also undercutting their reliance upon the price and service sensitivity of large business and carrier customers is Petitioner's failure to disclose the percentage of users of its high capacity services that currently take service under extended-term contracts. Customers of incumbent LEC high capacity services often take service under contract terms of five, ten or more years. To the extent that significant percentages of Petitioner's high capacity service customers are locked into long-term contracts, Petitioner's market power has not been seriously diminished because these customers cannot avail themselves of competitive alternatives. Moreover, Petitioner's market analysis completely overlooks one of the principal reasons for which large corporate users utilize the services of alternative providers of high capacity services -- *i.e.*, redundancy. Entities which use non-incumbent LEC high capacity services for redundancy purposes have not ported their business to competitors, but are making use of competitors' services in conjunction with services provided by Petitioner. Such usage does not represent lost business for Petitioners.

³² Petition at 6.

³³ While ruling that "each point-to-point market constitute[s] a separate geographic market," the Commission consolidates "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

A Chicago City,³⁴ thus, can be forced to subsidize Petitioner's predatory pricing and other practices in those areas, to the detriment of consumers, competitors and the public interest.³⁵

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., Transferor, and Bell Atlantic Corp., Transferee, for Consent to Transfer Control of NYNEX Corp. and Its Subsidiaries, 12 FCC Rcd. 19985, & 54 (1997). In other words, states are not Amarkets to which forbearance policies can be applied because all consumers throughout a state do not have the benefit of the same competitive choices.

³⁴ As the demand for high-speed 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.

³⁵ Other services, not the least of which is tandem-switched transport (which Petitioners make no claim of a diminution of their 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.

Finally, Petitioner simply overlooks the insurmountable advantage which it possesses because of its control of "bottleneck" facilities. Petitioner expects the Commission to simply ignore the market power it retains in all other segments of the local exchange and exchange access markets. Petitioner can leverage its market power in these other market segments to secure competitive advantages in the market for high capacity services. As discussed above, other market segments would provide a source of cross-subsidy to fund Petitioner's predatory pricing in Chicago City.³⁶

Moreover, Petitioner could use its Abottleneck≡ control over local exchange and exchange access facilities to disadvantage their high capacity services competitors, for example, by degrading the quality of interconnection for such providers or assessing higher interconnection fees.

TRA submits that it is clear that Petitioner has not demonstrated that it no longer possesses market power in the provision of high capacity dedicated transport, as well as local exchange and other exchange access, services in the Chicago LATA.³⁷ As such, Petitioner is properly classified as a dominant provider of high capacity and other services in this geographic area. 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

³⁶ The impact of such conduct will extend beyond the Chicago LATA to other areas within the Ameritech region. As the Commission has previously recognized, "[i]f an incumbent is able to develop a reputation of aggressively competing via targeted bids with recent entrants by doing so in a handful of markets, it may be able to dissuade potential entrants from entering any of its other markets." Southwestern Bell Telephone Company, Tariff F.C.C. No. 73, 12 FCC Rcd. 19311, & 50 (1997).

³⁷ The Commission should not allow itself to be swayed by a monopolist's distorted perception of what constitutes competition. Regulatory action should be soundly founded in reality, not on a perception of reality which reflects decades of legal and regulatory insulation from competition.

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.³⁸

³⁸ Expanded Interconnection with Local Telephone Company Facilities, 7 FCC Rcd. 7369, & 172 (1992), *recon.* 8 FCC Rcd. 127 (1992), *further recon.* 8 FCC Rcd. 7341 (1993), *vacated in part and remanded sub nom. Bell Atlantic Telephone Cos. V. FCC*, 24 F.3d 1441 (D.C. Cir. 1994).

Finally, TRA submits that there is no need for the forbearance Petitioner seeks here.

The Commission has already afforded Petitioner, and other incumbent LECs, significant flexibility in pricing special access services to meet competition. Under Section 69.123 of the Commission's Rules, Petitioner may establish a reasonable number of density pricing zones within each study area.³⁹ 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.⁴⁰ The difference between the pricing flexibility Petitioner now has and that which it seeks here is that Petitioner now must maintain uniform rates across like density zones instead of being able to price without restraint in the Chicago LATA. In short, Petitioner does not wish to reduce prices in areas with comparable cost structures which lack competition. Instead, it desires to use above-cost pricing in these comparable cost structure areas to subsidize its competitive pricing in the Chicago LATA. This is hardly a pricing scenario designed to further the public interest.

³⁹ 47 C.F.R. § 69.123. Petitioner also has the right to institute volume and term discounts for special access.

⁴⁰ Expanded Interconnection with Local Telephone Company Facilities, 7 FCC Rcd. 7369 at & 179.

By reason of the foregoing, the Telecommunications Resellers Association strongly urges the Commission to deny as premature the regulatory relief sought here by Ameritech.

Respectfully submitted,

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April 1, 1999

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CERTIFICATE OF SERVICE

I, Evelyn Correa, do hereby certify that a true and correct copy of the foregoing document has been served by the United States First Class Mail, postage prepaid, on the individuals listed below, on this 1st day of April 1999.

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