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**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

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| Petition of U S West Communications, Inc. For Forbearance from Regulation as a Dominant Carrier in the Phoenix, Arizona MSA | ) | CC Docket No. 98-157 |
| Petition of the SBC Companies For Forbearance from Regulation as a Dominant Carrier for High Capacity Dedicated Transport Services in Specified MSAs | ) | CC Docket No. 98-227 |
| Petition of U S West Communications, Inc. For Forbearance from Regulation as a Dominant Carrier in the Seattle, Washington MSA | ) | CC Docket No. 99-1 |
| Petition of Bell Atlantic Telephone Companies For Forbearance from Regulation as Dominant Carriers in Delaware; Maryland; Massachusetts; New Hampshire; New Jersey; New York; Pennsylvania; Rhode Island; Washington, D.C.; Vermont; and Virginia | ) | CC Docket No. 99-24 |
| 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 |

## MEMORANDUM OPINION AND ORDER

**Adopted: November 22, 1999** **Released: November 22, 1999**

By the Commission:

## I. INTRODUCTION

1. On August 24, 1998, U S West Communications, Inc. (U S West) filed a petition with the Commission under Section 10 of the Communications Act of 1934, as amended (Communications Act or the Act), seeking pricing flexibility in the form of forbearance from dominant carrier regulation in the provision of certain special access and high capacity dedicated

transport services[1] in the Phoenix, Arizona Metropolitan Statistical Area (MSA).[2] After U S West filed its Phoenix forbearance petition, U S West, SBC Companies (SBC), Bell Atlantic Telephone Companies (Bell Atlantic) and Ameritech Operating Companies (Ameritech) (collectively the Regional Bell Operating Company (BOC) petitioners) filed several additional forbearance petitions pursuant to Section 10 of the Act seeking pricing flexibility in the provision of certain special access and high capacity dedicated transport services in many markets throughout the United States for substantially the same reasons proffered by U S West in its Phoenix petition.[3] On August 5, 1999, after the four BOCs filed their forbearance petitions, we adopted an order establishing a framework for granting relief from our price cap and tariff rules (the *Pricing Flexibility Order*) without requiring a showing of non-dominance.[4]

2. Although we are not persuaded by the arguments presented in the pending forbearance petitions, we wish to emphasize that the *Pricing Flexibility Order* establishes a mechanism by which the petitioners may receive much of the relief they seek. As we stated in that order, retention of all of our rate level and rate structure rules until incumbent LECs are non-dominant would delay the benefits of competition in setting efficient rate levels and structures.[5] An incumbent price cap LEC may now file a petition with the Commission, in accordance with the procedures outlined in the *Pricing Flexibility Order*,[6] identifying the relief it seeks and demonstrating that it has satisfied the triggers discussed in Section II.C below. The *Pricing Flexibility Order* sets forth administratively simple bright line rules that allow the Commission to determine the level of competitive entry in particular markets without making the type of difficult market share determinations required by the BOCs' forbearance petitions. These bright

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1 U S West defines high capacity services as special access services and dedicated transport for switched access services at DS1 and higher transmission levels (*e.g.*, DS1, DS3, and OCn). Petition of U S West Communications, Inc. for Forbearance from Regulation as a Dominant Carrier in the Phoenix, Arizona MSA, CC Docket No. 98-157, at 1 n.2 (filed August 24, 1998) (*U S West Phoenix Forbearance Petition*).

2 *See id.*

3 *See U S West Phoenix Forbearance Petition*; Petition of SBC Companies for Forbearance from Regulation as a Dominant Carrier for High Capacity Dedicated Transport Services in Specified MSAs, CC Docket No. 98-227 (filed Dec. 7, 1998) (*SBC Forbearance Petition*); Petition of U S West Communications, Inc. for Forbearance from Regulation as a Dominant Carrier for High Capacity Services in the Seattle, Washington MSA, CC Docket No. 99-1 (filed Dec. 30, 1999) (*U S West Seattle Forbearance Petition*); Petition of Bell Atlantic Telephone Companies for Forbearance from Regulation as Dominant Carriers in Delaware; Maryland; Massachusetts; New Hampshire; New Jersey; New York; Pennsylvania; Rhode Island; Washington, D.C.; Vermont; and Virginia, CC Docket No. 99-24 (filed Jan. 20, 1999) (*Bell Atlantic Forbearance Petition*); and 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 (filed Feb. 5, 1999) (*Ameritech Forbearance Petition*).

4 In the Matter of Access Charge Reform, CC Docket No. 96-262, FCC No. 99-206, Fifth Report and Order, __ FCC Rcd ___ (rel. August 27, 1999) (*Pricing Flexibility Order*).

5 *Id.* at ¶ 154.

6 *Id.* at ¶¶ 171-75.

line rules enable us to respond quickly once a price cap LEC has shown that sufficient competition has developed in the market for special access and high capacity dedicated transport services to warrant relaxation of our Part 61 and Part 69 rules.[7] In this Order, therefore, we grant the relief requested in the forbearance petitions to the extent that the *Pricing Flexibility Order* establishes a framework pursuant to which the BOC petitioners may obtain relief by demonstrating satisfaction of the competitive triggers adopted in that order. In all other respects, the petitions are denied for the reasons discussed below. The BOC petitioners may file petitions with the Commission in accordance with the procedures outlined in the *Pricing Flexibility Order* for any market, including the markets identified in their forbearance petitions, identifying the relief requested and demonstrating satisfaction of the triggers adopted therein.

## II. BACKGROUND AND SUMMARY

### A. Price Cap Regime

3. To recover the costs of providing interstate access services, incumbent LECs charge interexchange carriers (IXCs) and end users for access services in accordance with our Part 69 access charge rules.[8] Part 69 establishes two basic categories of access services: special access services and switched access services. Special access services do not use local switches; instead they employ dedicated facilities that run directly between the end user and the IXC's point of presence (POP).[9] Switched access services, on the other hand, use local exchange switches to route originating and terminating interstate toll calls.[10] Incumbent LECs provide some components of interstate switched access services over facilities dedicated to a particular IXC.[11]

4. In 1990, the Commission replaced rate-of-return regulation for the BOCs and GTE with an incentives-based system of regulation that encourages companies to: (1) improve their efficiency by developing profit-making incentives to reduce costs; (2) invest efficiently in new plant and facilities; and (3) develop and deploy innovative service offerings.[12] This system is

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7 *See* Section II.C, *infra*.

8 47 C.F.R. Part 69.

9 A POP is the physical point where an IXC connects its network with the LEC network.

10 *See Pricing Flexibility Order*, at ¶¶ 8-10.

11 For example, with direct-trunked transport service, calls are transported between the wire center serving an IXC POP (called the serving wire center or SWC) and the LEC end office by means of a direct trunk, a facility dedicated to that IXC that does not pass through an intervening switch. *See* 47 C.F.R. § 69.112 (requiring LECs to impose a flat-rated charge on IXCs to recover the costs of direct-trunked transport).

12 Price Cap Performance Review for Local Exchange Carriers, CC Docket No. 94-1, Second Further Notice of Proposed Rulemaking, 11 FCC Rcd 858, 863 (1995) (*Price Cap Second FNPRM*). The Commission instituted price cap regulation for the Regional Bell Operating Companies (BOCs) and GTE in 1991, and it permitted other LECs to adopt price cap regulation voluntarily, subject to certain conditions. Policy and Rules Concerning Rates for Dominant Carriers, CC Docket No. 87-313, Second Report and Order, 5 FCC Rcd 6786, 6818-20 (1990) (*LEC*

known as price cap regulation.[13] The price cap plan is designed to replicate some of the efficiency incentives found in fully competitive markets and to act as a transitional regulatory scheme until actual competition makes price cap regulation unnecessary.[14] Under our price cap scheme, interstate access services are grouped into four different baskets: common line, traffic-sensitive, trunking, and interexchange baskets.[15] Each basket is subject to a price cap index (PCI), which caps the total charges a price cap LEC may impose for interstate access services in that basket.

### B. Petitions for Forbearance

5. On February 8, 1996, Congress enacted the Telecommunications Act of 1996 (1996 Act).[16] The goal of the 1996 Act is to establish "a pro-competitive, de-regulatory national policy framework" in order to make available to all Americans advanced telecommunications and information technologies and services "by opening all telecommunications markets to competition."[17] An integral part of this framework is the requirement in Section 10 of the Act that the Commission forbear from applying any provision of the Communications Act, or any of the Commission's regulations, to a telecommunications carrier or telecommunications service, or class thereof, if the Commission makes certain specified findings with respect to such provisions or regulations.[18] Central to this inquiry is a determination whether forbearance will promote competitive market conditions, including the extent to which forbearance will enhance competition among providers of telecommunications services.[19]

6. On August 24, 1998, U S West filed a petition pursuant to Section 10 of the Act seeking forbearance from dominant carrier regulation in the provision of certain special access and high capacity dedicated transport services in the Phoenix, Arizona Metropolitan Statistical

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*Price Cap Order*).

[13] The Commission refers to incumbent local exchange carriers that are subject to such price cap regulation as "price cap LECs."

[14] Rules governing price cap LECs are set forth in Part 61 of our rules. 47 C.F.R. Part 61; *see also Pricing Flexibility Order*, at ¶¶ 11-13 (discussing price cap regulation).

[15] *See* 47 C.F.R. § 61.42(d).

[16] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, *codified at* 47 U.S.C. §§ 151, *et seq.* Hereinafter, all citations to the 1996 Act will be to it as codified in the United States Code.

[17] Joint Explanatory Statement of the Committee of Conference, S. Conf. Rep. No. 230, 104th Cong., 2d Sess. 113 (1996).

[18] 47 U.S.C. § 160 (a).

[19] 47 U.S.C. § 160(b).

Area (MSA).[20] On December 7, 1998, SBC filed a forbearance petition pursuant to Section 10 of the Act seeking substantially the same relief as U S West with respect to 14 MSAs in SBC's service territory.[21] On December 30, 1998, U S West filed a forbearance petition pursuant to Section 10 of the Act for the Seattle MSA that is nearly identical in form and substance to its Phoenix petition.[22] On January 20, 1999, Bell Atlantic filed a forbearance petition pursuant to Section 10 of the Act seeking pricing flexibility in the provision of all special access services in eleven states and the District of Columbia.[23] Finally, on February 5, 1999, Ameritech filed a forbearance petition pursuant to Section 10 of the Act seeking, with respect to the Chicago LATA, substantially the same relief U S West seeks.[24] More specifically, the BOC petitioners seek forbearance from application of our Part 61 rate level, Part 69 rate structure, and tariffing rules for these services in various geographic regions throughout the United States.

### C. The *Pricing Flexibility Order*

7. On August 5, 1999, subsequent to the filing of the five BOC forbearance petitions, we adopted an order establishing a framework for granting price cap LECs relief from our rate level, rate structure, and tariffing rules (the *Pricing Flexibility Order*).[25] In the *Pricing Flexibility Order*, we granted price cap LECs immediate flexibility to deaverage rates for services in the trunking basket[26] and to introduce new services[27] on a streamlined basis.[28] We also removed certain interstate interexchange services from price cap regulation upon implementation of intra-

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20 *See* Summary of *U S West Phoenix Forbearance Petition*, Section III.A, *infra*.

21 *See* Summary of *SBC Forbearance Petition*, Section III.B, *infra*.

22 *See* Summary of *U S West Seattle Forbearance Petition*, Section III.C, *infra*.

23 *See* Summary of *Bell Atlantic Forbearance Petition*, Section III.D, *infra*. In addition to the ten states and the District of Columbia identified in the caption of Bell Atlantic's forbearance petition, Bell Atlantic also seeks relief for part of the state of Connecticut. *See Bell Atlantic Forbearance Petition* at 2 n. 2.

24 *See* Summary of *Ameritech Forbearance Petition*, Section III.E, *infra*.

25 *Pricing Flexibility Order*.

26 *See id.* at ¶¶ 58-66. For purposes of deaveraging rates for services in the trunking basket, we eliminated the limitations inherent in our density zone pricing plan and allowed price cap LECs to define the scope and number of zones within a study area, provided that each zone, except the highest-cost zone, accounts for at least 15 percent of the incumbent LEC's trunking basket revenues in the study area and that annual price increases within a zone do not exceed 15 percent. *Id.* In addition, we eliminated the requirement that LECs file zone pricing plans prior to filing their tariffs. *Id.*

27 *See id.* at ¶¶ 34-44.

28 *Id.* at ¶ 39. Specifically, we revised Section 69.4 of the Commission rules to eliminate the public interest showing required by Section 69.4(g). *Id.* We also eliminated the new services test in Section 61.49(f) and (g) for all new services except loop-based services. *Id.*

and interLATA toll dialing parity.[29]

8. The *Pricing Flexibility Order* also established a framework for granting price cap LECs greater flexibility in the pricing of all interstate access services once they satisfy certain competitive criteria.[30] To obtain Phase I relief for dedicated transport[31] and special access services, price cap LECs must demonstrate that unaffiliated competitors have collocated in at least 15 percent of the LEC's wire centers within an MSA or collocated in wire centers accounting for 30 percent of the LEC's revenues from these services within an MSA.[32] Higher thresholds apply, however, for channel terminations between a LEC end office and an end user customer.[33] In that case, the LEC must demonstrate that unaffiliated competitors have collocated in 50 percent of the price cap LEC's wire centers within an MSA or collocated in wire centers accounting for 65 percent of the price cap LEC's revenues from this service within an MSA.[34] Phase I relief permits price cap LECs to offer, on one day's notice, volume and term discounts and contract tariffs for these services, so long as the services provided pursuant to contract are removed from price caps.[35]

9. To obtain Phase II relief for dedicated transport and special access services, a price cap LEC must demonstrate that unaffiliated competitors have collocated in at least 50 percent of the LEC's wire centers within an MSA or collocated in wire centers accounting for 65 percent of the LEC's revenues from these services within an MSA.[36] Again, a higher threshold applies to

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29 *See id.* at ¶¶ 45-57. Specifically, we allowed price cap LECs to remove from the interexchange basket, and, hence, price cap regulation, their interstate intraLATA toll services and corridor services, provided the price cap LEC has implemented intra- and interLATA toll dialing parity in all of the states in which it provides local exchange service. *Id.*

30 *Id.* at ¶¶ 67-178. Relief generally will be granted in two phases and on an MSA basis. *Id.* at ¶ 72. Pricing flexibility also is available for the non-MSA sections of a study area, provided the price cap LEC satisfies the triggers adopted for MSAs.

31 For purposes of this Order, "dedicated transport services" refer to entrance facilities, direct-trunked transport, and the dedicated component of tandem-switched transport service. *See* 47 C.F.R. §§ 69.2 (oo), (qq), and (ss).

32 *Pricing Flexibility Order*, at ¶¶ 24, 77-80, and 122-40. All of the collocation triggers in the *Pricing Flexibility Order* require that the LEC also demonstrate, with respect to each wire center upon which it relies to satisfy the trigger, that a collocated competitor is relying on transport facilities provided by an entity other than the incumbent LEC. *Id.* at ¶ 77.

33 *Id.* at ¶ 100.

34 *Id.*

35 We also eliminated the low-end adjustment mechanism for those price cap LECs qualifying for and electing to exercise either Phase I or Phase II pricing flexibility. *See id.* at ¶¶ 160-168.

36 *Id.* at ¶¶ 141-57.

channel terminations between a LEC end office and an end user customer. In that case, a price cap LEC must show that unaffiliated competitors have collocated in 65 percent of the LEC's wire centers within an MSA or collocated in wire centers accounting for 85 percent of the LEC's revenues from this service within an MSA.[37] Phase II relief permits price cap LECs to file tariffs for these services on one day's notice, free from both our Part 61 rate level and our Part 69 rate structure rules. Although Phase II relief does not provide incumbent LECs all the regulatory relief that we afford to non-dominant carriers, it would provide the BOC petitioners with most of the relief they seek in their forbearance petitions.[38]

### D. Summary of This Order

10. In their forbearance petitions, the BOC petitioners present various levels of competitive market data and ask us to find that they are non-dominant in the provision of special access and high capacity dedicated transport services in the geographic markets delineated in their petitions. As is discussed in more detail below, and as the majority of commenters[39] argue, we do not believe that the record in these proceedings concerning the state of competition in the market for special access and high capacity dedicated transport services is sufficiently developed to support a conclusion that the BOC petitioners lack market power, and thus qualify for non-dominant treatment, in the provision of these services in the relevant markets. The record in these proceedings does not, therefore, warrant forbearance from dominant carrier regulation.

11. As a result of our *Pricing Flexibility Order*, however, price cap LECs are not required to demonstrate that they lack market power in the provision of any access service to receive much, if not all, of the pricing flexibility that the BOC petitioners seek in their forbearance requests.[40] As the record in these proceedings clearly illustrates, non-dominance showings are neither administratively simple nor easily verifiable. The Commission previously has based non-dominance findings on complex criteria, including market share and supply elasticity.[41] Market share analyses require considerable time and expense, and they generate controversy that is difficult to resolve.

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37 *Id.* at ¶ 149.

38 *Id.* at ¶ 151.

39 A list of parties submitting comments in response to the five forbearance petitions is included at Appendix A. The list identifies the specific proceeding and how each commenter is identified in the text of this item.

40 As we noted in the *Pricing Flexibility Order*, Phase II relief is not tantamount to non-dominant treatment for special access and high capacity dedicated transport services because, *inter alia*, incumbent LECs are still required to file generally available tariffs with cost support, while non-dominant LECs and competitive access providers are permitted, but not required, to file tariffs, and Phase II relief is limited to certain services and areas. *Id.* at ¶ 151. Nonetheless, upon satisfaction of the Phase II showings, the BOC Petitioners would obtain much of the relief they seek in their forbearance petitions.

41 *See, e.g.,* Comsat Corporation, Petition Pursuant to Section 10(c) of the Communications Act of 1934, as amended, for Forbearance from Dominant Carrier Regulation and for Reclassification as a Non-Dominant Carrier, Order and Notice of Proposed Rulemaking, File No. 60-SAT-ISP-97, 13 FCC Rcd 14083, 14118-19 (1998).

12. In the *Pricing Flexibility Order*, we reaffirmed our belief that the Commission should allow incumbent LECs progressively greater pricing flexibility as they face increasing competition.[42] The framework adopted in the *Pricing Flexibility Order* is designed to grant greater flexibility to price cap LECs as competition develops, while ensuring that: (1) price cap LECs do not use pricing flexibility to deter efficient entry or engage in exclusionary pricing behavior; and (2) price cap LECs do not increase rates to unreasonable levels for customers that lack competitive alternatives.[43] Moreover, we concluded in the *Pricing Flexibility Order* that, in order quickly to respond to changes in competitive market conditions, the Commission had to avoid the type of time-consuming inquiry that is necessitated by a Dominance/Non-dominance analysis. As we explained in the *Pricing Flexibility Order*, regulation imposes costs on carriers and the public, and the costs of delaying regulatory relief outweigh any costs associated with granting that relief before competitive alternatives have developed to the point that the incumbent lacks market power. Thus, in the *Pricing Flexibility Order*, we adopted bright line rules to allow us to respond quickly once a price cap LEC has shown that sufficient competition has developed in the market for dedicated transport and special access services to warrant relaxation of our Part 61 and Part 69 rules.[44]

13. Accordingly, in this Order, we grant the relief requested in the forbearance petitions to the extent that the *Pricing Flexibility Order* establishes a framework pursuant to which the BOC petitioners may obtain relief from our rate level, rate structure, and tariffing rules by demonstrating satisfaction of the competitive triggers adopted in that order. In all other respects, the petitions are denied. The BOC petitioners may file petitions with the Commission in accordance with the procedures outlined in the *Pricing Flexibility Order*, identifying the relief requested and demonstrating satisfaction of the triggers adopted therein

## III. Summary of BOC Forbearance Petitions

### A. *U S West Phoenix Forbearance Petition*

14. On August 24, 1998, U S West filed a petition under Section 10 of the Communications Act,[45] requesting that we forbear from regulating U S West as a dominant carrier in the provision of high capacity services[46] in the Phoenix, Arizona Metropolitan

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42 *Pricing Flexibility Order*, at ¶ 67.

43 *Id.* at ¶ 3.

44 *See* Section II.C, *supra*.

45 47 U.S.C. § 160.

46 U S West defines high capacity services as special access services and dedicated transport for switched access services at DS1 and higher transmission levels (*e.g.*, DS1, DS3, and OCn). *U S West Phoenix Forbearance Petition* at 1 n. 2.

Statistical Area ("MSA").[47] Specifically, U S West seeks forbearance from the following Commission regulations with respect to high capacity special access and dedicated transport services: (1) tariff filing requirements for such interstate access services;[48] (2) Sections 61.38 and 61.41-61.49 of our rules, which require dominant carriers to file tariffs on up to 15-days' notice with cost support; (3) Section 69.3(e)(7), which requires price cap LECs to charge averaged rates within a study area; (4) Sections 61.41-61.49 and Part 65, which impose price cap and rate of return regulation on dominant carriers; and (5) any other rules that apply to U S West, but not to other providers, in the Phoenix MSA for high capacity services.[49] On August 5, 1999, we extended by ninety days, pursuant to Section 10(c) of the Act,[50] the date by which U S West's petition would be deemed granted in the absence of a Commission decision that the petition did not meet the standard for forbearance under Section 10(a).[51]

### B. *SBC Forbearance Petition*

15. On December 7, 1998, SBC filed a petition requesting that the Commission exercise its authority to forbear from regulating SBC as a dominant carrier in the provision of high capacity dedicated transport services [52] in fourteen MSAs, pursuant to Section 10(a) of the Act.[53] SBC seeks such relief for the following MSAs: Little Rock, AR; Los Angeles, CA; Sacramento, CA; San Diego, CA; San Francisco, CA; San Jose, CA; St. Louis, MO; Reno, NV; Oklahoma City, OK; Austin, TX; Dallas/Ft. Worth, TX; El Paso, TX; Houston, TX; and San Antonio, TX.[54] SBC generally requests that the Commission forbear from applying any Part 61 rate level rule or Part 69 rate structure rule that does not apply to the provision of high capacity dedicated

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[47] *See* Petition of U S West Communications, Inc. for Forbearance from Regulation as a Dominant Carrier in the Phoenix, Arizona MSA, CC Docket No. 98-157, Public Notice, 13 FCC Rcd 16243 (Com. Car. Bur. 1998) (*U S West Phoenix Forbearance Proceeding*).

[48] U S West seeks "permissive detariffing." Permissive detariffing would allow, but not require, the filing of tariffs for interstate high capacity services on one-day's notice with a presumption of lawfulness and without any cost support. *See* In the Matter of Hyperion Telecommunications, Inc., Petition Requesting Forbearance, Memorandum Opinion and Order, 12 FCC Rcd 8596 (1997).

[49] *U S West Phoenix Forbearance Petition* at 35.

[50] 47 U.S.C. § 160(c).

[51] *See Pricing Flexibility Order, at* ¶ 179.

[52] SBC defines high capacity dedicated transport services as those special access services, switched access entrance facilities, and switched access direct-trunked transport services that operate at DS1 and higher transmission speeds. *See SBC Forbearance Petition* at 1 n. 2.

[53] *See* 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, Public Notice, 14 FCC Rcd 1886 (Com. Car. Bur. 1998) (*SBC Forbearance Proceeding*).

[54] *SBC Forbearance Petition* at 2.

transport services offered by SBC's competitors in the above-listed MSAs.[55]

### C. *U S West Seattle Forbearance Petition*

16. On December 30, 1998, U S West filed a petition requesting that the Commission exercise its authority pursuant to Section 10 of the Communications Act to forbear from regulating U S West as a dominant carrier in the provision of high capacity services in the Seattle, Washington MSA.[56] In its Seattle petition, U S West defines high capacity services in the same manner as in its Phoenix petition.[57] Similarly, U S West's Seattle Petition requests forbearance from the same Commission rules as it sought in its Phoenix petition.[58]

### D. *Bell Atlantic Forbearance Petition*

17. On January 20, 1999, Bell Atlantic filed a petition requesting that the Commission exercise its authority pursuant to Section 10 of the Communications Act to forbear from applying Part 69 rate structure rules and Part 61 rate level rules with respect to its provision of all special access services[59] in 12 of the jurisdictions in which it provides these services.[60] In contrast to the forbearance petitions filed by U S West and SBC, Bell Atlantic does not explicitly request "non-dominant" treatment in the provision of special access services.[61] Nevertheless, as is the case with the other forbearance petitioners, Bell Atlantic seeks relief from our Part 69 rate structure

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55 *Id.* at 21-22.

56 Petition of U S West Communications, Inc. for Forbearance from Regulation as a Dominant Carrier for High Capacity Services in the Seattle, Washington MSA, CC Docket No. 99-1, Public Notice, 14 FCC Rcd 4126 (Com Car. Bur. 1999) (*U S West Seattle Forbearance Proceeding*).

57 *See* Section III.A, *supra*.

58 *Compare U S West Seattle Forbearance Petition* at 35 *with U S West Phoenix Forbearance Petition* at 35.

59 Bell Atlantic does not limit its request for forbearance to "high capacity" special access services. *Cf. U S West Phoenix Forbearance Petition* at 1 n. 2; *SBC Forbearance Petition* at 1 n. 2; and *U S West Seattle Forbearance Petition* at 1 n. 2. Bell Atlantic seeks forbearance from Part 69 rate structure and Part 61 rate level rules for *all* of its special access services. Bell Atlantic does not, however, seek relief for any switched access services. *See Bell Atlantic Forbearance Petition* at 1-2.

60 *See* Petition of Bell Atlantic Telephone Companies for Forbearance from Regulation as Dominant Carriers in Delaware; Maryland; Massachusetts; New Hampshire; New Jersey; New York; Pennsylvania; Rhode Island; Washington, D.C.; Vermont; and Virginia, CC Docket No. 99-24, Public Notice, 14 FCC Rcd 1081 (Com. Car. Bur. 1999) (*Bell Atlantic Forbearance Proceeding*). In addition to the ten states and District of Columbia identified in the caption, Bell Atlantic also seeks relief for part of the state of Connecticut. *See Bell Atlantic Forbearance Petition* at 2 n. 2. Unlike U S West and SBC, Bell Atlantic does not limit its request for relief to any particular MSA. Rather, Bell Atlantic seeks such relief throughout its entire region, except Maine and West Virginia.

61 Bell Atlantic reasons that, because it does not seek mandatory or permissive detariffing of its special access services in these states, its petition does not seek non-dominant treatment. *See id.* at 3 n. 3.

rules and Part 61 rate level rules by showing that it no longer has "market power" in the relevant product and geographic markets.

### E. *Ameritech Forbearance Petition*

18. On February 5, 1999, Ameritech filed a petition requesting that the Commission exercise its authority pursuant to Section 10 of the Communications Act to forbear from regulating Ameritech as a dominant carrier in the provision of high capacity special access services and dedicated transport for switched access services in the Chicago local access and transport area (LATA).[62] Although Ameritech's request for relief is substantially similar to that sought in U S West's and SBC's forbearance petitions,[63] it differs in that Ameritech uses the Chicago LATA rather than the Chicago MSA as the relevant geographic market for purposes of assessing market power in the relevant market.[64]

## IV. Dominant Carrier Regulation

19. As summarized above, the BOC petitioners ask us to forbear from applying dominant carrier regulation to their provision of certain special access and high capacity dedicated transport services in particular geographic areas. Under Title II of the Communications Act, the Commission traditionally has applied a variety of regulations to carriers in order to protect customers from unjust, unreasonable, and unreasonably discriminatory rates. In the *Competitive Carrier Proceeding*, the Commission under its broad rulemaking authority[65] considered revisions to its regulations to distinguish between carriers that were subject to effective competition in their respective telecommunications markets and those that were not.[66] The Commission found that certain regulations, which had applied to all carriers

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[62] 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, Public Notice, 14 FCC Rcd 2936 (Com. Car. Bur. 1999) (*Ameritech Forbearance Proceeding*).

[63] Ameritech, like U S West and SBC, seeks forbearance from the following Commission regulations: (1) tariff filing requirements for interstate access services; (2) Sections 61.38 and 61.41-61.49, which require dominant carriers to file tariffs on up to 15-days' notice with cost support; (3) Section 69.3(e)(7), which requires averaged rates within a study area; (4) Sections 61.41-61.49 and 65.1 (b), which impose price cap and rate of return regulation on dominant carriers; and (5) any other rules that apply to Ameritech as a dominant provider, but not to other providers, for high capacity services in the Chicago LATA. *Ameritech Forbearance Petition* at 24.

[64] *Ameritech Forbearance Petition* at 1 n.3. Ameritech also defines high capacity services differently than the other petitioners as "special access and dedicated transport for switched access and interstate intraLATA private line (point-to-point) services at DS1 and higher transmission levels." Ameritech recently explained that interstate intra-LATA private line services are subsumed within the category of special access services. *See* Ameritech *ex parte* statement of October 26, 1999.

[65] *See, e.g.*, 47 U.S.C. § 154(i).

[66] *Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor*, CC Docket No. 79-252, Notice of Inquiry and Proposed Rulemaking, 77 FCC 2d 308

under Title II, were unnecessary for carriers that were subject to competition and therefore lacked sufficient market power to engage in anticompetitive activity.[67]

20. Accordingly, the Commission established a regulatory framework to distinguish between those carriers that the Commission determined to have market power, which are classified as dominant, and those that lack market power, which are classified as non-dominant.[68] "Market power" is "the ability to raise prices by restricting output," or "to raise and maintain price above the competitive level without driving away so many customers as to make the increase unprofitable."[69] Pursuant to the framework outlined in the *Dominant/Non-Dominant Order*, the Commission determines whether a carrier is dominant by: 1) delineating the relevant product and geographic markets for examination of market power, 2) identifying firms that are current or potential suppliers in that market, and 3) determining whether the carrier under evaluation possesses individual market power in that market.[70] Central to this inquiry is reliable market data concerning competitive market conditions for the service or services at issue.

21. Because the Commission has found that incumbent LECs, including the BOC petitioners, have market power in the provision of most services within their service areas, the rates that incumbent LECs may charge for special access and dedicated transport services currently are subject to dominant carrier regulation.[71] Dominant carriers are subject to price cap or rate-of-return regulation, and must file tariffs -- on a minimum of seven days' notice and often

(1979); First Report and Order, 85 FCC 2d 1 (1980) (*Competitive Carrier First Report and Order*); Further Notice of Proposed Rulemaking, 84 FCC 2d 445 (1981); Second Further Notice of Proposed Rulemaking, FCC 82-187, 47 Fed. Reg. 17,308 (1982); Second Report and Order, 91 FCC 2d 59 (1982) (*Competitive Carrier Second Report and Order*); Order on Reconsideration, 93 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) (*Competitive Carrier Fourth Report and Order*), *vacated*, *AT&T v. FCC*, 978 F.2d 727 (D.C. Cir. 1992), *cert. denied*, *MCI Telecommunications Corp. v. AT&T*, 509 U.S. 913 (1993); *Competitive Carrier Fifth Report and Order*, 98 FCC 2d 1191 (1984); Sixth Report and Order, 99 FCC 2d 1020 (1985), *vacated*, *MCI Telecommunications Corp. v. FCC*, 765 F.2d 1186 (D.C. Cir. 1985) (*Competitive Carrier Sixth Report and Order*) (collectively referred to as the *Competitive Carrier Proceeding*).

67 *See, e.g., Competitive Carrier First Report and Order*, 85 FCC 2d 1.

68 *Id.*; *Competitive Carrier Fourth Report and Order*, 95 FCC 2d 554; *Competitive Carrier Fifth Report and Order*, 98 FCC 2d 1191; *see also* 47 C.F.R. §§ 61.3(o), (u).

69 *Competitive Carrier Fourth Report and Order*, 95 FCC 2d at 558.

70 *See* Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area, CC Docket No. 96-149, Second Report and Order in CC Docket No. 96-149 and Third Report and Order in CC Docket No. 96-61, 12 FCC Rcd 15756, 15775, 15776, 15782 (1997) (*Dominant/Non-Dominant Order*).

71 *See Competitive Carrier First Report and Order*, 85 FCC 2d at 21 (finding that control of bottleneck facilities is "prima facie" evidence of market power).

more -- and usually with cost support data.[72] Non-dominant carriers, on the other hand, are not subject to rate regulation and may file tariffs, on one day's notice and without cost support, that are presumed lawful.[73]

## V. Analysis

### A. Summary of the BOC Petitioners' Claims

22. The BOC petitioners assert that they no longer possess market power in the provision of special access and high capacity dedicated transport services in the specified market(s) because there is sufficient competition to prevent them from raising prices above competitive levels. In support of this claim, all of the BOC petitioners proffer evidence: (1) that competitors have captured a significant share of the retail market for special access and high capacity dedicated transport services;[74] (2) that competitors include sizable companies, such as AT&T-TCG and MCI WorldCom;[75] and (3) that competitors have deployed a significant amount of fiber in the specified markets, and thus have the ability to serve most of the BOC petitioners' customers with minimal additional investment.[76]

23. In support of their requests for non-dominant treatment, all of the BOC petitioners rely heavily on market analyses prepared by the same market research company, Quality Strategies, Inc. ("Quality Strategies"), which purport to show substantial competition for special

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[72] *See* 47 U.S.C. §§ 203(b), 204(a)(3); 47 C.F.R. §§ 61.38, 61.41, 61.58; Implementation of Section 402(b)(1)(A) of the Telecommunications Act of 1996, CC Docket No. 96-187, Report and Order, 12 FCC Rcd 2170, 2182, 2188, 2191-92, 2202-03 (1997).

[73] 47 C.F.R. §§ 1.773(a)(ii) and 61.23(c); Tariff Filing Requirements for Non-dominant Carriers, CC Docket No. 93-36, Order, 10 FCC Rcd 13653, 13653-54 (1995).

[74] U S West claims that competitive providers have captured more than 70 percent of the "retail market" for high capacity services. *U S West Phoenix Forbearance Petition* at 19. SBC states that it has competitive losses for the high capacity market exceeding 25% in each of the14 MSAs for which it seeks relief. *SBC Forbearance Petition* at 15. U S West claims that competitive providers have captured almost 80 percent of the "retail market" for high capacity services in the Seattle MSA. *U S West Seattle Forbearance Petition* at 19. Bell Atlantic claims that competitors captured 31.7 percent, on average, of the market for special access services in 18 areas surveyed by Quality Strategies. *Bell Atlantic Forbearance Petition,* Attachment C at 20-21. Ameritech states that competitors have captured 94% of the "retail market" for high capacity services in the Chicago LATA. *Ameritech Forbearance Petition* at 14.

[75] *Ameritech Forbearance Petition* at 3-4; *Bell Atlantic Forbearance Petition,* Attachment C at 17-18; *SBC Forbearance Petition* at 20-21; *U S West Phoenix Forbearance Petition* at 14-18; *U S West Seattle Forbearance Petition* at 14-18.

[76] *Ameritech Forbearance Petition* at 11-14; *Bell Atlantic Forbearance Petition,* Attachment C at 13-14; *SBC Forbearance Petition* at 19; *U S West Phoenix Forbearance Petition* at 14-17; and *U S West Seattle Forbearance Petition* at 14-17.

access and high capacity dedicated transport services in each of the specified markets. To formulate market share estimates, Quality Strategies primarily relied on end user surveys that focused on such end user's access services at the end of a specific quarter of the year.[77] The BOC petitioners do not include copies of Quality Strategies' surveys in their petitions. Quality Strategies sent its survey to a vaguely identified "sampling" of end user customers.[78] According to Quality Strategies, the survey includes questions on all competitive DS-1 and DS-3 services, including competitive access provider (CAP) fiber-based services, microwave services, satellite services, and customer-owned facilities.[79] Moreover, Quality Strategies states that it also relied on customer invoices to validate self-reported data and to correct for over- and under-reporting based on actual customer usage.[80] Finally, Quality Strategies states that it gathered competitive information through interviews with CAP/CLEC and IXC personnel, large business end users, and equipment vendors and retailers.[81]

24. Quality Strategies analyzes market share on the basis of "DS1 equivalents."[82] "DS1 equivalents" measurements count a single DS3 circuit as 28 "DS1 equivalents" for the purpose of evaluating overall high capacity market share in a given market.[83] "DS1 equivalents" are then totaled, and market share is calculated based on the percentage of the total "DS1 equivalents" that each carrier provides.[84] Furthermore, for purposes of analyzing market share, Quality Strategies divides the high capacity market alternatively into the provider/transport markets or retail/wholesale markets.[85] According to Quality Strategies, the provider market consists of DS-1 and DS-3 circuits provisioned by a facilities-based local telecommunications provider, which ultimately are purchased by end users, though the provider does not always sell the circuit to the end user.[86] The transport market consists of circuits purchased by one communications company

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77 *See, e.g., U S West Phoenix Forbearance Petition*, Attachment A at 34.

78 *Id.*

79 *Id.*

80 *Id.*

81 *Id.*

82 *Ameritech Forbearance Petition*, Attachment, Aron Report at 2 n. 3; *Bell Atlantic Forbearance Petition*, Attachment C at 10; *SBC Forbearance Petition* at 14 n. 42; *U S West Phoenix Forbearance Petition* at 18; *U S West Seattle Forbearance Petition* at 18.

83 *U S West Phoenix Forbearance Petition*, Attachment A at 35.

84 *See, e.g., U S West Phoenix Forbearance Petition*, Attachment A at 7, 33; *SBC Forbearance Petition*, Attachment A at 45.

85 *See, e.g., U S West Phoenix Forbearance Petition*, Attachment A at 5.

86 *Id.*

from another to transmit traffic from one POP to another or from a POP to a LEC end office.[87]

### B. Discussion

#### 1. Insufficiency of Market Study Information

25. We conclude that the BOC petitioners failed to provide the Commission and interested parties a meaningful opportunity to examine the conclusions contained in the Quality Strategies' market reports, because they did not provide sufficient information with their petitions concerning the market share conclusions contained in such reports. The BOC petitioners must provide more than just general conclusions about market conditions so that interested parties have a meaningful opportunity to refute, and this Commission has a meaningful opportunity to evaluate, the BOC petitioners' claims of lost market share. We agree with the vast majority of commenters in these proceedings that argue that the Commission cannot rely on the BOC petitioners' market share information because they did not provide any raw data underlying the market share claims presented in Quality Strategies' reports, thus making it impossible for parties to refute the calculations contained therein.[88] For example, AT&T avers that Quality Strategies' reports are inadequately documented, unverifiable, and simply wrong.[89] AT&T notes that Quality Strategies did not provide a copy of the survey questions and answers, nor did it describe how it weighted and evaluated responses to the surveys.[90] AT&T also notes several other problems with Quality Strategies' study methodology, including: no information is provided about the sampling size for surveys and interviews of the CLEC market segment; the historical trend analysis used to evaluate the DS1/DS3 provider and transport market share does not specify the historical period used or the factors accounted for in predicting market

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87 *Id.* Quality Strategies further provides a wholesale/retail view of the high capacity transport market. According to Quality Strategies, the retail view is another method of distributing provider share by crediting market share to the company that sells and bills for the circuit. *Id.* The wholesale view consists of circuits provisioned by a local telecommunications provider and sold to another telecommunications provider either for resale to end users or for transport. *Id.*

88 *See, e.g.*, Sprint Opposition in *U S West Phoenix Forbearance Proceeding* at 7; Time Warner Comment in *SBC Forbearance Proceeding* at 7; Logix Comments in *SBC Forbearance Proceeding* at 3-4; KMC Telecom Comments in *SBC Forbearance Proceeding* at 2; AT&T Opposition in *Bell Atlantic Forbearance Proceeding* at 4; CTSI Comments in *Bell Atlantic Forbearance Proceeding* at 3; GSA Comments in *Bell Atlantic Forbearance Proceeding* at 8; GSA Reply Comments in *Bell Atlantic Forbearance Proceeding* at 5; Sprint Opposition in *Bell Atlantic Forbearance Proceeding* at 2, 7-8; TRA Comments in *Bell Atlantic Forbearance Proceeding* at 5; Time Warner Comments in *Bell Atlantic Forbearance Proceeding* at 18-19; AT&T Opposition in *Ameritech Forbearance Proceeding* at 4; CoreComm Comments in *Ameritech Forbearance Proceeding* at 6; MCI WorldCom Opposition in *Ameritech Forbearance Proceeding* at 18-21; NEXTLINK Comments in *Ameritech Forbearance Proceeding* at 8.

89 *See, e.g.*, AT&T Opposition in *Ameritech Forbearance Proceeding* at 13.

90 *Id.*

development; and the time period used to develop the trend analysis is not identified.[91] We are not persuaded by the BOC petitioners' response, which is to defend the integrity of Quality Strategies' data collection methodologies, because they fail to produce the data underlying Quality Strategies' conclusions.[92] Nor do we find persuasive Bell Atlantic's argument that the Commission should ignore any problems with the market share data so long as we find that some reasonable percentage of demand is being won by competitors in the market and that there are sufficient competitive alternatives.[93] Although we have found that market share should not be the "*sole* determining factor of whether a firm possesses market power,"[94] such information certainly is significant to a determination of whether a carrier has market power.

26. In addition, because the BOC petitioners did not provide sufficient support for their market share conclusions, we are unable resolve discrepancies between their market share evidence and information provided by other commenters. For example, AT&T argues that, to the extent the data provided in Quality Strategies' reports can be tested, AT&T's own data contradict Quality Strategies' conclusions. Quality Strategies' Chicago report states that AT&T purchased 48.2% of its channel termination circuits from Ameritech in the fourth quarter of 1997 and the first quarter of 1998.[95] AT&T states that its own data show that it purchased over 95% of these circuits from Ameritech during this time.[96] Similarly, MCI WorldCom adds that local distribution channel (LDC)[97] market share data based on end user customer surveys are unreliable because the end user only knows the carrier from which it ordered the special access circuit; it may not know which carrier is the actual provider of the underlying LDC.[98] Without the underlying data showing how Quality Strategies reached its market share results, we are unable to rely on the conclusions drawn from such data concerning the BOC petitioners' market

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91 AT&T Opposition in *SBC Forbearance Proceeding* at 4-6.

92 *See* Reply Comments of SBC in *SBC Forbearance Proceeding*, Attachment 1 at 5 and 8; Reply Comments of Ameritech in *Ameritech Forbearance Proceeding*, Attachment A at 3-4. *Cf.* Reply Comments of U S West in *U S West Phoenix Forbearance Proceeding* at 6 and Reply Comments of U S West in *U S West Seattle Forbearance Proceeding* at 5 (stating that opponents do not question the validity of U S West's market share data).

93 *See* Reply Comments of Bell Atlantic in *Bell Atlantic Forbearance Proceeding* at 8-9.

94 In the Matter of Motion of AT&T to be Reclassified as a Non-Dominant Carrier, Order, 11 FCC Rcd 3271, 3307 (1995) (emphasis added).

95 *Ameritech Forbearance Petition*, Exhibit 7 at 11, Exhibit 8 at 15.

96 AT&T Opposition in *Ameritech Forbearance Proceeding* at 14-15

97 Ameritech refers to special access channel terminations as Local Distribution Channels (LDCs). *Ameritech Forbearance Petition* at 15; *see Pricing Flexibility Order*, at ¶¶ 8-10; *see also* AT&T Opposition in *Ameritech Forbearance Proceeding*, Exhibit A at 8-9 (stating that LDCs are the facilities used to connect a special access customer to a LEC end office).

98 MCI WorldCom Opposition in *Ameritech Forbearance Proceeding* at 19; *see also* AT&T Opposition in *Ameritech Forbearance Proceeding* at 15.

power in the market for special access and high capacity dedicated transport services.

### 2. "DS1 Equivalents" Methodology

27. In addition to the general shortcomings of the BOC petitioners' market share data, we also find that a market analysis based on "DS1 equivalents" fails to provide an accurate measure of competition for special access and high capacity dedicated transport services.[99] The BOC petitioners use of a "DS1 equivalent" measure of market share overstates competitive inroads in a market by placing a disproportionate emphasis on DS3 circuits.[100] For example, CTSI explains that a DS3 channel is equivalent to 28 DS1 channels; therefore, if a competitive LEC provides one DS3 channel to a customer and Bell Atlantic provides 28 DS1 channels to 28 different customers, Bell Atlantic claims that it has only 50 percent market share based on capacity.[101] In contrast, CTSI states that if a CLEC provides a customer a DS3 channel at $100 per month and Bell Atlantic provides its customers with 28 DS1 channels at $50 per month per channel, then the CLEC's revenues would be $100 per month and Bell Atlantic's revenues would be $1400 per month.[102] Measured on the basis of revenues, therefore, Bell Atlantic's market share would be 86 percent.[103] Commenters note that 28 DS1 circuits will produce substantially more revenue and serve far more customers than a single DS3 circuit.[104] We therefore reject the BOC petitioners' argument that the "DS1 equivalent" methodology provides a more accurate measure of market share than revenue data.[105] Because one DS3 circuit costs less than 28 DS1

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99 *Pricing Flexibility Order*, at ¶ 87.

100 *See* MCI WorldCom Opposition in *U S West Seattle Forbearance Proceeding* at 19-20; AT&T Opposition in *U S West Seattle Forbearance Proceeding* at 7; Sprint Opposition in *U S West Seattle Forbearance Proceeding* at 7, 8.

101 CTSI Comments in *Bell Atlantic Forbearance Proceeding* at 7; *see also* MCI WorldCom Opposition in *Bell Atlantic Forbearance Proceeding* at 15; GSA Reply in *Bell Atlantic Forbearance Proceeding* at 5-6.

102 CTSI Comments in *Bell Atlantic Forbearance Proceeding* at 7; *see also* Sprint Opposition in *Bell Atlantic Forbearance Proceeding* at 9

103 CTSI Comments in *Bell Atlantic Forbearance Proceeding* at 7.

104 *See, e.g.,* Bell Atlantic, Tariff F.C.C. No. 1, 6th Revised Page 478 and 478.1 (effective July 1, 1999); *see also* NEXTLINK Comments in *Bell Atlantic Forbearance Proceeding* at 4-5; Network Plus Comments in *Bell Atlantic Forbearance Proceeding* at 7-8; KMC Comments in *Bell Atlantic Forbearance Proceeding* at 12; CTSI Comments in *Bell Atlantic Forbearance Proceeding* at 7; Sprint Opposition in *Bell Atlantic Forbearance Proceeding* at 8-9; MCI WorldCom Opposition in *Bell Atlantic Forbearance Proceeding* at 15; AT&T Opposition in *Bell Atlantic Forbearance Proceeding* at 5; AT&T Opposition in *U S West Seattle Forbearance Proceeding* at 6-7; MCI WorldCom Opposition in *U S West Seattle Forbearance Proceeding* at 19, n. 36; TRA Comments in *U S West Seattle Forbearance Proceeding* at 5; MCI WorldCom Opposition in *SBC Forbearance Proceeding* at 14; Sprint Opposition in *SBC Forbearance Proceeding* at 9-10; Logix Comments in *SBC Forbearance Proceeding* at 4-5; KMC Comments in *SBC Forbearance Proceeding* at 2-3; Hyperion Comments in *SBC Forbearance Proceeding* at 4.

105 *See, e.g., SBC Forbearance Petition* at 14 n.42.

circuits,[106] even though they provide equal capacity, measuring competitors' market presence on the basis of revenues gives a better indication of the extent to which competitors have made significant inroads into the market in question.

28. We also believe that the "DS1 equivalent" methodology places disproportionate weight on entrance facilities (which are usually DS3 circuits) where competitive entry has been the greatest.[107] We agree with commenters that argue that the use of "DS1 equivalents" fails adequately to account for differences between the market for entrance facilities[108] and the market for channel terminations.[109] For example, Focal states that, to the extent that competitive LECs have entered the Seattle market, they have concentrated on facilities between U S West wire centers and competitive LEC and IXC points of presence.[110] Focal claims that there is far less competition for channel terminations than is suggested by the Quality Strategies report, thus calling into question the methodology and validity of Quality Strategies' findings.[111] According to MCI WorldCom, although it has been able to find alternative suppliers for 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.[112] Focal maintains that, although it is true that 28 DS-1s equal the capacity of a DS-3 circuit, the differing uses of each type of circuit make it inappropriate to aggregate the data in this fashion.[113] For these reasons, several commenters argue that a DS-1 equivalent market share measure tends to obscure the BOC petitioners' dominance over such service offerings as multiplexing, interoffice transport, and channel

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106 *See* AT&T Opposition in *SBC Forbearance Proceeding*, at 5; AT&T Opposition in *U S West Phoenix Forbearance Proceeding* at 7.

107 *Pricing Flexibility Order*, at ¶ 81.

108 Incumbent LEC transmission facilities that carry switched interstate traffic between an IXC's POP and the incumbent LEC office serving the POP (this office is called the serving wire center, or SWC) are known as entrance facilities. *See* 47 C.F.R. §§ 69.2 (qq) and 69.110.

109 *See* Focal Comments in *U S West Seattle Forbearance Proceeding* at 6; *see also* TRA Comments in *U S West Seattle Forbearance Proceeding* at 4; MCI WorldCom Opposition in *U S West Seattle Forbearance Proceeding* at 17; AT&T Opposition in *U S West Seattle Forbearance Proceeding* at 6-7; Sprint Opposition in *U S West Seattle Forbearance Proceeding* at 8-9. For a description of termination circuits, *see Pricing Flexibility Order*, at ¶¶ 8-10.

110 Focal Comments in *U S West Seattle Forbearance Proceeding* at 7.

111 Focal Comments in *U S West Seattle Forbearance Proceeding* at 7-8; *see also* ALTS Comments in *U S West Seattle Forbearance Proceeding* at 5.

112 MCI Comments in *SBC Forbearance Proceeding* at 14.

113 Focal Comments in *U S West Seattle Forbearance Proceeding* at 7; *see also* TRA Comments in *U S West Seattle Forbearance Proceeding* at 5; AT&T Opposition in *U S West Seattle Forbearance Proceeding* at 2, 6-7 (using "equivalent DS1s" as a measure of market share means that the loss of a single DS3 is viewed as the same as the loss of 28 DS1s); Sprint Opposition in *U S West Seattle Forbearance Proceeding* at 8.

terminations.[114] As we found in the *Pricing Flexibility Order*, it is important to distinguish between competition for entrance facilities and competition for channel terminations.[115]

### 3. "Retail" Market Share Losses

29. We also find that the BOC petitioners' arguments regarding market share distort the level of competitive entry to the extent they rely on loss of "retail" market share.[116] As discussed in Section V.A above, the BOC petitioners analyze the high capacity transport market on either a provider/transport basis or a retail/wholesale basis. By analyzing the high capacity transport market in this way, the BOC petitioners assert that they have lost market share to IXCs when end users purchase circuits from IXCs that, in turn, purchase the circuits from the BOC petitioners. Thus, by defining competitive losses on a "retail" basis, the BOC petitioners can show competitive losses even when they still provide the underlying facilities, and continue to enjoy a substantial revenue stream by providing such circuits. For example, U S West claims to have lost 70 percent of the "retail" market in Phoenix for the provision of special access and high capacity dedicated transport services.[117] By its own calculation, however, it still retains control over 77 percent of the "overall" market for special access and high capacity dedicated transport in Phoenix.[118] Similarly, Ameritech claims to have lost 94 percent of the "retail" market in the Chicago LATA for the provision of special access and high capacity dedicated transport services.[119] According to its own data, however, Ameritech continues to provide the underlying facilities for 51.5 percent of special access channel terminations, 52 percent of the dedicated transport in the city of Chicago, and 72.2 percent of the dedicated transport in the Chicago suburbs.[120] We agree, therefore, with those commenters that argue that measuring market share losses on a "retail" basis does not sufficiently depict the nature of facilities-based competition for

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114 TRA Comments in *U S West Seattle Forbearance Proceeding* at 6; *see also* AT&T Opposition in *U S West Seattle Forbearance Proceeding* at 6; GSA Reply Comments in *Bell Atlantic Forbearance Proceeding* at 5; *see also* MCI WorldCom Opposition in *U S West Seattle Forbearance Proceeding* at 19.

115 *Pricing Flexibility Order*, at ¶ 100.

116 *See, e.g., U S West Phoenix Forbearance Petition* at 3.

117 *U S West Phoenix Forbearance Petition* at 19. Similarly, U S West claims to have lost almost 80 percent of the "retail" market for the provision of special access and high capacity dedicated transport in the Seattle MSA. *U S West Seattle Forbearance Petition* at 19.

118 *U S West Phoenix Forbearance Petition* at 22. This 77 percent market share figure likely would be even higher if U S West had not calculated it in terms of "DS1 equivalents." Similarly, U S West admits that it still controls over 73% of the "overall" market for special access and high capacity dedicated transport in the Seattle MSA. *U S West Seattle Forbearance Petition* at 22.

119 *See Ameritech Forbearance Petition* at 14.

120 *Id.*, Aron Attachment at 21. Notably, these figures are based on a "DS1 equivalent" conversion.

high capacity dedicated transport and special access services in a given market.[121]

### C. Forbearance Authority: Section 10 of the 1996 Act

30. The 1996 Act provides for regulatory flexibility by requiring the Commission to forbear from applying any regulation or any provision of the Communications Act to telecommunications carriers or telecommunications services, or classes thereof, if the Commission determines that certain conditions are satisfied.[122] Specifically, the 1996 Act amends the Communications Act to provide that:

> [T]he Commission shall forbear from applying any regulation or any provision of this Act to a telecommunications carrier or telecommunications service, or class of telecommunications carrier or telecommunications services, in any or some of its geographic markets, 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 or telecommunications service 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.[123]

31. In making the public interest determination, the Act requires the Commission to consider whether forbearance will promote competitive market conditions, including the extent to which forbearance will enhance competition among providers of telecommunications services.[124] The statute also provides that, "[i]f the Commission determines that such forbearance will promote competition among providers of telecommunications services, that determination may be the basis for a Commission finding that forbearance is in the public interest."[125]

32. In order to satisfy the first prong of the three-part forbearance analysis, the BOC

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121 *See, e.g.*, MCI WorldCom Oppostion in *U S West Phoenix Forbearance Proceeding* at 18; Qwest Comments in *U S Phoenix Forbearance Proceeding* at 6.

122 47 U.S.C. § 160.

123 47 U.S.C. § 160(a).

124 47 U.S.C. § 160(b).

125 *Id.*

petitioners must make a *prima facie* showing that sufficient competition exists so that application of the Commission's rate level, tariffing, and rate structure rules is not necessary to ensure that the BOC petitioners' rates and practices for the services in question are just, reasonable, and not unreasonably discriminatory. Absent sufficient competition in, or dominant carrier regulation of, these markets, we have held that the BOC petitioners would be able to charge unjust and unreasonably discriminatory rates for special access and high capacity dedicated transport services.[126] For example, without the tariffing requirement, customers would not be able to challenge potentially unlawful rates before they become effective. Thus, the BOC petitioners must make a sufficient showing of competition before we proceed to determine whether enforcement of our rules, in light of such competition, is necessary to ensure that rates and practices are just, reasonable, and not unreasonably discriminatory.

33. As discussed in Section V.B above, the evidence proffered by the BOC petitioners in support of their forbearance petitions is not sufficient to support a conclusion that they are no longer dominant in the provision of special access and high capacity dedicated transport services or that sufficient competition exists to preclude anti-competitive conduct in those markets. All five of the BOC petitions rely heavily on market reports prepared by Quality Strategies purporting to show significant market share loss by the BOC petitioners and substantial competitive entry into the market. As we discuss above, however, the Quality Strategies reports rely on flawed findings and unsubstantiated results for the competitive market conclusions contained therein. Equally problematic, the BOC petitioners' use of a "DS1 equivalent" measure of market share distorts competitive inroads in a market by placing a disproportionate emphasis on DS3 circuits and competition for entrance facilities. Similarly, the BOC petitioners' arguments regarding lost market share distort the level of competitive entry because their emphasis on "retail" market share loss discounts the fact that they still provide, and receive compensation for, the underlying facilities. All of these facts undermine the usefulness of the market share information that the BOC petitioners provide. Absent a *prima facie* showing of competition, the BOC petitioners have not satisfied the first prong of the forbearance test under Section 10. Accordingly, based solely on the record developed in these proceedings, we find that our current dominant carrier rate level, rate structure, and tariff regulations remain necessary to ensure that the BOC petitioners charge just and reasonable rates for the services for which they seek relief.[127]

34. Nor have the BOC petitioners satisfied the second or third prongs of the forbearance analysis. Absent a sufficient showing of competition, it is clear that regulation of the BOC petitioners' special access and high capacity dedicated transport services is necessary to protect consumers. Without such regulation, and in the absence of competition, the BOC petitioners

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[126] *See, e.g.,* In the Matter of Southwestern Bell Telephone Company, Tariff F.C.C. No. 73, CC Docket No. 97-158, Order Concluding Investigation and Denying Application for Review, 12 FCC Rcd 19311, 19314 (1997) (*SWBT Tariff Order*).

[127] BOC petitioners remain free, of course, to make the showings required in the *Pricing Flexibility Order* to obtain most of the relief they seek.

could discriminate against certain customers by charging higher rates to those that lack competitive alternatives. For example, without our rate structure and rate level regulations, the BOC petitioners could engage in strategic pricing by offering reductions in rates for special access and high capacity dedicated transport services where they face competition and higher rates for these services where they face little competition. This sort of strategic pricing discriminates among consumers, not on the basis of cost characteristics, but on the basis of the availability of competitive alternatives. Moreover, it deters entry by competitors.[128] As we concluded in the *Pricing Flexibility Order*, relaxation of our rate structure and rate level rules must be structured to prevent exclusionary pricing behavior so as to safeguard the development of competition.[129] Similarly, because the BOC petitioners have failed to show that competition will constrain anti-competitive conduct by them, the public interest is best served by continued regulation of special access and high capacity dedicated transport services which is designed to foster competition for these services. For these same reasons, we do not believe that forbearance from dominant carrier regulations will promote competitive market conditions in the market for special access and high capacity dedicated transport services.[130]

35. For the reasons stated herein, therefore, we conclude that the BOC petitioners have not demonstrated that our Part 61 rate level, Part 69 rate structure, and tariffing rules are unnecessary to ensure that rates for the provision of special access and high capacity dedicated transport services are just and reasonable and unnecessary to protect consumers of these services in the markets at issue. Similarly, the BOC petitioners have not shown that forbearance is consistent with the public interest.

36. We wish to emphasize, however, that the *Pricing Flexibility Order* establishes a mechanism by which the petitioners may receive much of the relief they seek without having to demonstrate loss of market power. An incumbent LEC may now file a petition with the Commission, in accordance with the procedures outlined in the *Pricing Flexibility Order*,[131] identifying the relief it seeks and demonstrating that it has satisfied the triggers discussed in Section II.C above. We encourage the BOC petitioners to submit such petitions for any market, including the markets identified in the their forbearance petitions, as soon as they have sufficient information to satisfy the required competitive triggers discussed in Section II.C above.

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128 *See SWBT Tariff Order*, 12 FCC Rcd at 19336.

129 *Pricing Flexibility Order*, at ¶ 79.

130 *See* 47 U.S.C. § 160(b).

131 *Pricing Flexibility Order*, at ¶¶ 171-75.

## VI. Ordering Clause

Accordingly, IT IS ORDERED, pursuant to sections 1, 4(i), 4(j), 10, 201-205, 303(r), and 403 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 160, 201-205, 303(r), and 403, that the BOC petitioners' forbearance petitions are GRANTED, in part, and DENIED, in part, as set forth herein.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas

Magalie Roman Salas
Secretary

# APPENDIX A

## Parties Filing Comments in Response to Forbearance Petitions

1. U S West, Phoenix MSA

   a. Comments

      1. Ameritech Operating Companies (Ameritech)
      2. AT&T Corp. (AT&T)
      3. BellSouth Telecommunications, Inc. (BellSouth)
      4. Competitive Telecommunications Association (CompTel)
      5. GST Telecom Inc. (GST)
      6. GTE Service Corp. (GTE)
      7. MCI WorldCom, Inc. (MCI)
      8. Qwest Communications Corp. (Qwest)
      9. SBC Communications, Inc. (SBC)
      10. Sprint Corporation (Sprint)
      11. TSR Wireless LLC (TSR)
      12. United States Telephone Association (USTA)

   b. Replies

      1. Ad Hoc Telecommunications Users Committee (Ad Hoc)
      2. AT&T Corp. (AT&T)
      3. Bell Atlantic Telephone Companies (Bell Atlantic)
      4. GST Telecom Inc. (GST)
      5. MCI WorldCom, Inc. (MCI)
      6. U S West Communications, Inc. (U S West)

2. SBC, Fourteen SBC MSAs

   a. Comments

      1. Ameritech Operating Companies (Ameritech)
      2. Association for Local Telecommunications Services (ALTS)
      3. AT&T Corp. (AT&T)
      4. Competitive Telecommunications Association (CompTel)
      5. GST Telecom Inc. (GST)
      6. Hyperion Telecommunications, Inc. (Hyperion)
      7. KMC Telecom, Inc. (KMC)
      8. Logix Communications Corporation (Logix)
      9. MCI WorldCom, Inc. (MCI)
      10. MediaOne Group, Inc. (MediaOne)

11. Network Access Solutions, Inc.
12. NEXTLINK Communications, Inc. (NEXTLINK)
13. Sprint Corporation (Sprint)
14. Telecommunications Resellers Association (TRA)
15. Time Warner Communications Holdings, Inc. d/b/a Time Warner (Time Warner)
16. U S West Communications, Inc. (U S West)
17. United States Telephone Association (USTA)
18. UTC, The Telecommunications Association

b. Replies

1. Ad Hoc Telecommunications Users Committee (Ad Hoc)
2. Bell Atlantic Telephone Companies (Bell Atlantic)
3. Hyperion Telecommunications, Inc. (Hyperion)
4. KMC Telecom, Inc. (KMC)
5. Level 3 Communications Inc.
6. Logix Communications, Corporation (Logix)
7. NEXTLINK Communications, Inc. (NEXTLINK)
8. SBC Communications, Inc. (SBC)
9. Telecommunications Resellers Association (TRA)

3. U S West, Seattle MSA

a. Comments

1. Association for Local Telephone Services (ALTS)
2. AT&T Corp. (AT&T)
3. Competitive Telecommunications Association/America's Carriers Telecommunications Association (CompTel)
4. Ms. Sue Conachan
5. Ms. Kathryn Fancher
6. Focal Communications, Inc. (Focal)
7. General Services Administration (GSA)
8. GST Telecom Inc. (GST)
9. Hyperion Telecommunications, Inc. (Hyperion)
10. MCI WorldCom, Inc. (MCI)
11. Network Access Solutions, Inc.
12. NEXTLINK Communications Inc. and Electric Lightwave, Inc. (NEXTLINK)
13. SBC Communications (SBC)
14. Sprint Corporation (Sprint)
15. Telecommunications Resellers Association (TRA)

16. Washington Association of Internet Service Providers
17. WGHT Pompton Lakes NJ

b. Replies

1. Bell Atlantic Telephone Companies (Bell Atlantic)
2. General Services Administration (GSA)
3. Qwest Communications Corp. (Qwest)
4. U S West Communications, Inc. (U S West)

4. Bell Atlantic, Twelve Bell Atlantic Study Areas

a. Comments

1. Association for Local Telecommunications Services (ALTS)
2. AT&T Corp. (AT&T)
3. Cablevision Lightpath, Inc
4. Capital One Financial Services
5. CBS Broadcasting Corporation, National Broadcasting Company, Turner Broadcasting System, Inc., and The Walt Disney Corporation
6. Competitive Telecommunications Association/America's Carriers Telecommunications Association (CompTel)
7. CTSI, Inc. & RCN Telecom (CTSI)
8. General Services Administration (GSA)
9. Hyperion Telecommunications, Inc. (Hyperion)
10. Mr. Marcel Kates
11. KMC Telecom, Inc. (KMC)
12. Marriott Corporation (Marriott)
13. MCI WorldCom, Inc. (MCI)
14. MediaOne Group (MediaOne)
15. Network Access Solutions, Inc.
16. Network Plus, Inc.
17. NEXTLINK Communications, Inc. (NEXTLINK)
18. Sprint Corporation (Sprint)
19. Telecommunications Resellers Association (TRA)
20. Mr. Jerry Thompson
21. Time Warner Communications Holdings, Inc. d/b/a Time Warner (Time Warner)
22. United States Telephone Association (USTA)
23. xDSL Networks, Inc.

b. Replies

1. Bell Atlantic Telephone Companies (Bell Atlantic)
2. General Services Administration (GSA)

5. Ameritech, Chicago LATA

a. Comments

1. Association for Local Telephone Services (ALTS)
2. AT&T Corp. (AT&T)
3. Competitive Telecommunications Association (CompTel)
4. Core Comm, Ltd. (CoreComm)
5. Focal Communications Corporation and KMC Telecom, Inc. (Focal)
6. MCI WorldCom, Inc. (MCI)
7. McLeod USA Telecommunications Services, Inc.
8. NEXTLINK Communications, Inc. (NEXTLINK)
9. SBC Communications, Inc. (SBC)
10. Sprint Corporation (Sprint)
11. Telecommunications Resellers Association (TRA)
12. United States Telephone Association (USTA)

b. Replies

1. Ameritech Operating Companies (Ameritech)