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

In the Matter of		
Ameritecli Operating Companies Tariff FCC Nos. 2, Transmittal No. 1312	)	
Nevada Bell Telephone Companies Tariff FCC No. 1 Transmittal No. 20	)	WC Docket No. 02-319
Pacific Bell Telephone Company FCC Tariff No. 1 Transmittal No. 77	)	
Southern New England Telephone Companies Tariff FCC No. 39 Transmittal No. 772	)	
Southwestern Bell Telephone Company FCC Tariff No. 73 Transmittal No. 2906	)	

OPPOSITION OF
MPOWER COMMUNICATIONS CORP.
TO SBC DIRECT CASE

Mpower Communications Corp. ("Mpower") hereby submits its Opposition to SBC Communications Inc's ("SBC's") Direct Case and its Comments on the issues raised by rhc Federal Communications Commission ("Commission" or "FCC") on the SBC tariffs which were filed to become effective August 17, 2002.

I. Introduction

SBC is a monopoly wholesale provider of telecommunications services to competitive local exchange carriers ("CLECs"). The tariffs at issue could have a significant anti-competitive impact on CLECs, especially deposit requirements based on stock ratings and shortened notice of termination provisions, and should not be approved as filed.

II. Risk of Non-Collection

SBC states that the level of carriers' uncollectibles has increased "by astounding proportions."[1] SBC notes, however, that the increase is due not only to the number of carrier bankruptcies "but also the size of those bankruptcies. Most notably, World Com and Global Crossing top the list of the largest U.S. bankruptcies of, [sic] the past twenty years, ranking 1 and 5 respectively."[2]

Mpower believes SBC's figures are seriously contaminated by the inclusion of the largest known bankruptcies in history. Further, these bankruptcies were triggered by the largest amounts of corporate fraud ever uncovered. By definition, such huge failures cannot continue unabated. Further, SBC admits that of "hundreds of millions of dollars.,.most…is owed by several of [SBC's] largest customers."[3] If one excludes the dramatic and unique cases of WorldCom and Global Crossing, BellSouth data[4] shows exactly the same number of carriers defaulting in 2000 and 2002 and again excluding the largest cases of corporate fraud in history, lower dollar amounts of default in 2002 than in

[1] SBC Direct Case, p. 5.
[2] *Id.*
[3] SBC Direct Case, p. 2.
[4] BellSouth Direct Case, 10/10/02, WC 02-304, Ex. 2, pp. 2-4

2000. SBC's figures show some similar patterns. Excluding the 2002 figures which contain the amounts at risk from WorldCom and Global Crossing, the uncollectible amounts shown for Ameritech average less than the embedded price cap rates.[5] Further the largest levels are found in 1994, 1996 and the early 1990's. Excluding 2002, PacBell uncollectible levels average just slightly more than the embedded uncollectible rates and the highest rates occurred in 2001, 1997 and 1990,

Equally significant, however, is that there are only so many telecommunications carriers. Thcrc is not an endless number waiting to file bankruptcy. In fact, evidence suggests that those carriers that are going to tile bankruptcy have already done so. The telecom "shake out" has largely occurred. Mergers and acquisitions will no doubt increase to further consolidate the remaining "players," however, the wave of bankruptcies has certainly passed.

In fact, a recent article headlined "ALTS: Publicly held CLECs have turned corner," reports that:

> The 19 publicly held competitive local exchange carriers (CLECs) collectively will produce an EBITDA (earnings before interest, taxes, depreciation and amortization) profit in 2002, barring unforeseen developments, according to a study released today by The Association for Local Telecommunications Services.
>
> If that happens, it would mark the first time CLECs have turned **a** profit since the passage of the Telecom Act in 1996.
>
> 'This is a very significant development,' said ALTS President John Windhausen. 'The reponed death of competitive carriers is woefully premature. CLECs are turning the corner.'"

[5] See, SBC Direct Case, **p.** 6.
[6] TelephoneOnline.com, *ALTS: Publicly held CLECs have turned corner,* 10/17/02.

This analysis supports the view that the telecommunications industry has behaved much as many other new industries have, with an initial rush of capitalization, a "shake out" and subsequently, stabilization and consolidation. There is no good reason to believe that the "crisis" SBC delineates will continue.

III. Basis for Requiring a Deposit

SBC proposes to increase the number of circumstances in which it may demand that its competitors pay a deposit. SBC already has the ability to demand deposits from companies that do not timely pay their bills, however, SBC now proposes to require deposits from its competitors who experience reduced stock ratings, whether they continue to pay in a timely fashion or not. It also proposes to include disputed amounts in "overdue" amounts. Sometimes these amounts are large enough to put a carrier into the category requiring deposits. Disputed amounts, handled pursuant to contract, should not bc allowed to trigger deposits.

As support for using reduced stock ratings to trigger deposits, SBC states that: "Studies by Moody's and S&P indicate that the risk of default increases from 4 companies per 1,000 to 100 companies per 1,000 as rated companies fall from investment grade to the lowest speculative grade."[7] In other words, the correlation SBC proposes to use to require large deposits from its competitors rises to 10% at the lowest speculative grade! In order to "protect" itself, it would require deposits from 90% of its competitors with reduced stock ratings that were not a **risk** of default in order to "protect" itself from *the* 10% who might default.

[7] SBC Direct Case, **p.** 21

As a wholesale supplier of telecommunications services, SBC has a monopoly on "bottleneck" equipment, such as loops, without which its competitors cannot operate. Because SBC and other incumbent local exchange carriers ("ILECs") do not operate in a competitive wholesale environment, they cannot be allowed to "protect" themselves at will, when their actions have a direct and potentially anti-competitive impact on their competitors

SBC's request shows a desire to continue to act like the monopoly provider it has long been in retail telecommunications services. It wants to be completely protected not only from known credit risks but from all possible credit risks. This is not the way competition works. SBC is already better protected than most of its wholesale customers, who frequently are not in a sufficiently strong competitive position to demand large deposits from their customers. SBC should not be allowed to implement the proposed system for triggering deposit obligations based solely upon the rating of the company's securities. To allow SBC vastly increased powers to require deposits from its competitors who are paying in a timely fashion *is* inappropriate, unjust and discriminatory.

IV. Refund of Deposits

SBC proposes to place the burden of proving a restored "creditworthiness" upon the competitor rather than automatically returning a deposit after a one-year history of no late payments, arguing that the customer has the greatest interest in its credit ratings. If *the* criterion *is* only the timely paynient of bills, it should be an automatic process for SBC to return a deposit. Presumably, it is only the stock ratings criterion that causes a need for any outside research and that criterion is discriminatory and unfair and should not he allowed. Thus, the refund should be instituted by SBC upon restoration of a prompt payment history. Interest earned on any deposit held should be credited periodically, not held as an additional deposit.

V. Reduced Notice of Termination and Bill Payment Interval

SBC argues that its proposed reduction in the amount of time for competitors to pay will be mitigated by making the time frame run from when SBC actually sends the bills. Mpower has previously argued that the 30-day time frame is often too short because bills are actually received many days after the bill date and because of the time required to audit the immense ILEC bills. In this instance, however, if SBC typically does not send a bill until 6 days after the billing date,[8] a CLEC still must pay within 30 days from the bill date. If the 21-day period runs from the time a bill is <u>sent</u>, rather than the bill date -- assuming this can be adequately identified and agreed upon – there should he almost no additional impact on the customer from making this change. Thus, while the 30-day time frame for bill payment is already shorter than for many other industries and is often difficult to meet for technical reasons, this proposal should not markedly shorten the current time frame. On that basis, Mpower would not object.

As to the shortened notice of termination of services, however, Mpower would strenuously object. It has been Mpower's experience that ILECs send such notices primarily to pressure its competitor to pay <u>disputed</u> bills and that time is necessary to negotiate the disputes. A greatly shortened time frame prior to terminating services to a competitor when the competitor <u>cannot do business</u> without those products is tantamount to granting the monopoly providers of these services an absolute choke hold on a

[8] *See,* SBC Direct **Case,** p. 31

competitor's business. Such an approach would be extremely anti-competitive and should not be allowed.

VI. Application *to* Term Plan Customers

Mpower has signed contracts with competitive carriers incorporating certain tariff provisions, which allow them lo change. Mpower finds SBC's arguments, however, to be both contradictory and inaccurate. SBC argues that the general tariffprovisions are not expressly incorporated or even referenced in the term plans and that consequently, the general tariff terms are not "locked-in." [9] On the other hand, SBC argues that some term plans do include language incorporating general tariff provisions but that these provisions, likewise, do not "freeze" the general regulations.'" One cannot have it "both ways." If the general terms are not incorporated expressly, whether "frozen" or not, it is hard to see how significant material changes could be incorporated without changing the expectations of the parties.

SBC also argues that even if the term plans do incorporate and freeze the general tariff provisions, that the proposed deposit requirements are not "material."'[1] Deposit provisions which could cause companies that have been paying timely to have to deposit millions or even hundreds of millions of dollars with SBC are material by any standard. In this regard, SBC cites Idaho and Rhode Island cases relying on the Uniform Commercial Code ("UCC") language of 2-207 for the formation of contracts between merchants to claim that "revisions to credit terms and finance charges do not constitute 'material' changes to a contract."[12] In each instance, the disputes involved the payment

[9] SBC Direct Care, p. **34.**
[10] SBC Direct Case, **p.** 35.
[11] *Id*
[12] SBC Direct Case, **p.** ***36*** & fn 24.

of interest on overdue accounts. The interest provisions were held to be part of the contracts because merchants had accepted goods or paid bills. The delivery receipts and bills contained the interest provisions and pursuant to UCC 2-207:

> Additional terms in acceptance or confirmation
>
> (1) A definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms.
>
> (2) The additional terms are to be construed as proposals for addition to the contract. Between merchants such terms become part of the contract unless:
> (a) the offer expressly limits acceptance to the terms of the offer;
> (b) they materially alter it; or
> (c) notification of objection to them has already been given or is given within a reasonable time after notice of them is received.[13]

This is not what we are talking about in this case. Large deposit provisions are material and shout not automatically be incorporated in term plans.

VII. Conclusions

Thus, SBC should not be allowed to implement its proposed tariff criteria for establishing customer deposits, advance payments and notices of termination. It is not clear that SBC needs additional "protection" now that the "shake out" in the telecommunications industry seems to have passed its peak. Even more significant, however, it would allow for an arbitrary transfer of scarce resources from struggling

[13] (*Tri-Circle v Brugger*, 829 P.2d 540, 547. 548 (Id.Ct.App., 1992); *Hennigan v. Nunes*, 437 A.2d 1355, 1357 (R.I. Sup.Ct., 1981))

CLECs to their bigger "bottleneck" wholesale services provider, a result which would be damaging lo CLECs, as well as anti-competitive.

Respectfully submitted,

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