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

JAN - 7 2004

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of	)	
	)	
SBC Communications Inc	)	WC Docket No. 03-250
Petition for Waiver of	)	
Section 61.42 of the Commission's Rules	)	

**OPPOSITION OF AT&T CORP. TO  
SBC COMMUNICATIONS INC. PETITION FOR WAIVER**

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January 7, 2004

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Pursuant to the Wireline Competition Bureau's Public Notice,<sup>1</sup> AT&T Corp. ("AT&T") hereby submits this opposition to the petition of SBC Communications Inc ("SBC") for a blanket waiver of Section 61.42(f) of the Commission's pricing rules so that SBC can include any "existing or future packet-switched offerings under price cap regulation in the special access basket, high capacity/DDS service category."<sup>2</sup>

SBC must demonstrate "good cause" in order to obtain a waiver under Section 1.3. The "good cause" standard requires SBC to show that "special circumstances warrant deviation from the general rule and such deviation will serve the public interest."<sup>3</sup> SBC has not demonstrated good cause necessary to justify a waiver, and the Commission should therefore deny the relief sought in SBC's petition.

<sup>1</sup> *Pleading Cycle Established in SBC Communications Petition for Waiver of Price Cap Rules*, FCC Public Notice, DA-03-3939 (rel Dec 11, 2003)

<sup>2</sup> SBC Communications Petition for Waiver at 1 (filed Dec 9, 2003) ("SBC Petition" or "Petition")

<sup>3</sup> Moreover, SBC "must plead with particularity the facts and circumstances" that support the grant of waiver. *See, e.g., Access Charge Reform, et al.*, CC Docket No. 96-262, et al., Fifth Report and Order and Further Notice of Proposed Rulemaking, 14 FCC Rcd. 14221, 14238 n 70 (1999), *aff'd. WorldCom, Inc. v FCC*, 238 F 3d 449 (2001) ("*Pricing Flexibility Order*") (citations omitted)

## INTRODUCTION AND SUMMARY

Pursuant to Sections 1.3 of the Commission's rules, SBC has submitted a petition seeking a blanket waiver of Section 61.42(f) of the Commission's pricing rules so that SBC may include under price cap regulation its loop-based BPN service and OPT-E-Man service, as well as an undefined set of future services that SBC simply identifies as "packet-switched offerings." More specifically, SBC seeks expedited treatment to enable it to include "packet-switched" services in price caps in its 2004 annual price cap tariff filing and, "ultimately take advantage of the pricing flexibility afforded services subject to price caps." SBC Petition at 2-4. Currently, SBC treats these offerings as non-price cap services. The Commission's rules provide that a tariff offering such services is subject to, among other things, a 15-day notice requirement, 47 C.F.R. § 61.58, and must include the basis of ratemaking employed and economic information to support the new (or modified) service. 47 C.F.R. § 61.38.

As described in detail below, SBC's petition must be rejected for several reasons. SBC's petition utterly fails to demonstrate any special circumstances warranting the requested relief. Although SBC claims that it needs flexibility to compete with others' packet-switched services, SBC has not identified a single instance in which the current regulatory structure has impeded its efforts to provide a packet-switched service. Additionally, the requested relief will not alleviate what SBC identifies as a central impediment – the need to file cost support. SBC seeks to have its packet-switched services treated as new services under price cap regulation. The services at issue, however, are "looped-based services" for which cost support information is required

under the Commission's price cap rules for new services.<sup>4</sup> Thus, even if SBC's waiver were granted, SBC would still have to file cost information. SBC's petition also raises legitimate concerns that SBC's objective is to bring its packet-switched services into the price cap regime in order to raise special access rates, either for those packet-based services it determines to include, or for other special access services in the special access basket.

Underpinning SBC's request for relief is its assumption that it is non-dominant in the provision of advanced services. SBC Petition at 7. That issue, however, has not been decided and is squarely before the Commission in the *Dom/Non-Dom NPRM*.<sup>5</sup> In relevant part, that proceeding contains thousands of pages of record evidence regarding the question of whether incumbent LECs have market power in any of the to-be determined markets, and on the appropriate regulatory requirements that should govern the provision of broadband services.<sup>6</sup> Indeed, the evidence is overwhelming that Bell companies continue to have market power in local markets, including the provision of special access services.

In light of the foregoing, AT&T respectfully suggests that the most prudent course is to reject SBC's overly broad and unsupported waiver request and

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<sup>4</sup> *Pricing Flexibility Order* at ¶ 39, 47 C.F.R. § 61.49(f)(2).

<sup>5</sup> *Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services*, 16 FCC Rcd 22745 (2001) ("*Dom/Non-Dom NPRM*")

<sup>6</sup> That rulemaking also incorporated a separate proceeding, in which the Commission granted conditional interim authority for SBC to forbear from tariff regulation of then existing advanced services that SBC offered through its advanced services affiliate, Advanced Solutions, Inc. ("*SBC-ASI*") *Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services*, 17 FCC Rcd 27000 (2003) ("*SBC-ASI Order*"). In that Order, the FCC stated that the relief granted was "conditional, and only applies to the extent that SBC chooses to continue to offer [then existing ATM, frame relay, and DSL] services through a structurally separate affiliate and in accordance with its commitment it has made in this record." *Id.* at ¶¶ 14-15.

comprehensively address the appropriate regulation of packet-switched services through the *Dom/Non-Dom NPRM* and related proceedings

## ARGUMENT

### **I. SBC Has Not Demonstrated Any Need for a Blanket Waiver at This Time.**

SBC has not demonstrated that there is any real need – or “special circumstances” – for the blanket waiver requested for all current and future “packet switched” services. Although SBC’s 9-page petition boldly asserts that the Commission’s failure to grant this request “would prove costly and detrimental to consumers by unnecessarily delaying the introduction of new services and new prices into the marketplace,” SBC Petition at 8, it provides no evidence, exhibits, or supporting affidavits to suggest that the tariff filing and cost showing requirement that it seeks to eliminate have posed any impediment to the reasonable rollout of any packet-switched service. Nor does SBC allege that it has been unable to provide any specific service or respond to particular competitive circumstances.

To the contrary, SBC readily concedes that SBC-ASI, not SBC, currently provides the overwhelming majority of packet switched services to SBC’s customers. With regard to SBC’s packet switched services, its claim is severely undermined by the fact that Pacific Bell Telephone Company has already introduced “BPON” service to approximately 6,000 residential units in the Mission Bay Development in San Francisco, California, pursuant to an interstate tariff.<sup>7</sup> Indeed, SBC requested and received special permission to offer BPON service in California on one-day’s notice, and received a waiver of several of the Commission’s tariff and pricing rules.<sup>8</sup> Thus, SBC has

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<sup>7</sup> Pacific Bell Telephone Company Access Tariff FCC No. 1, Transmittal No. 112 (effective April 29, 2003).

<sup>8</sup> Pacific Bell Telephone Company, Application for Special Permission to waive Section 61.38 and 61.58 of the Commission’s Rules, Application No. 21, April 25, 2003

demonstrated that it can seek and obtain a waiver of the Commission's tariff and pricing rules on a case-by-case basis, when appropriate. There is no need for the blanket waiver authority requested by SBC<sup>9</sup>

Moreover, the requested relief will not eliminate the need to file cost support information, which SBC identifies as a major impediment. SBC maintains that its packet-switched services should be subject to the price cap rules for new services. SBC Petition at 6. The packet-switched services at issue, however, are loop-based services and, for good reason, the Commission's price cap rules require cost support information for new loop-based services. As the Commission noted, "[w]e are concerned that new services that employ local loop facilities raise cost allocation issues that the Commission has not yet addressed. . . . Until these issues are resolved, it is not appropriate to permit price cap LECs to file tariffs for new loop-based services without satisfying the cost support requirements of the new services test." *Pricing Flexibility Order* at ¶ 39. Thus, even if its petition were granted, SBC would still have to prepare and submit cost support information.

Rather than identify any harm resulting from the classification of packet-switched services as non-price cap services, SBC asserts that the request for price cap treatment is warranted because "[a]dvanced services are completely optional" and "precisely the type of new, innovative services the Commission envisioned when adopting price cap regulation." SBC Petition at 6. Underpinning SBC's request is its assumption that it will

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<sup>9</sup> AT&T does not suggest that SBC may never obtain appropriately tailored waivers on a case-by-case basis for specifically defined services. AT&T's objection lies with this broad, open-ended waiver that would effectively grant SBC relief that is the subject of the pending proceeding

be found to be non-dominant in the provision of advanced services *Id.* at 7. This claim is both premature and wrong.

SBC's confidence in the outcome of the pending non-dominance proceeding notwithstanding, its claim that it is "non-dominant in the provision of advanced services to mass market and larger business customers" is both unsupported and unsupportable. SBC Petition at 7-8.<sup>10</sup> As AT&T has previously explained in numerous proceedings, SBC and the other Bells enjoy market power in the provision of packet-switched broadband services.<sup>11</sup> Neither competitive carriers nor ISPs have effective alternatives to the Bells for wholesale packet-switched broadband transmission facilities and services.<sup>12</sup> SBC's and the Bells' market dominance is even more pronounced in the small and medium business segment, where the incumbent LEC faces no significant competition in the provision of broadband services.<sup>13</sup> The Bells also continue to exercise market power over broadband services to large businesses through their bottleneck control of special

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<sup>10</sup> SBC refers to the *AT&T Reclassification Order*, without context or support, as the purported legal basis for its assertion SBC Petition at 8 citing *Motion of AT&T Corp to be Reclassified as a Non-Dominant Carrier*, Order, 11 FCC Rcd 3271 (1995) ("*AT&T Reclassification Order*") AT&T assumes that this cryptic reference is taken from SBC's comments in response to the *Dom/Non-Dom NPRM*, in which SBC argues for a finding of non-dominance by advancing arguments that are insufficient under the Commission's precedents and that are based solely on a mechanical misreading of the *AT&T Reclassification Order* AT&T has already set forth its detailed response to SBC's arguments in the *Dom/Non-Dom NPRM*, and incorporates them by reference herein *Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services*, CC Docket No 01-337, Comments of AT&T Corp at 12-13 (Mar 1, 2002) ("*AT&T Dom/Non-Dom Comments*")

<sup>11</sup> See, e.g., *Inquiry Regarding Carrier Current Systems, including Broadband over Power Line Systems*, ET Docket No 03-104, Comments of AT&T Corp at 2-5 (Aug. 20, 2003) ("*AT&T BPL Comments*"), *Ex Parte* Letter from D. Lawson, counsel for AT&T Corp to FCC, CC Docket Nos. 01-338, 96-98, 98-147, 96-149, dated December 23, 2002 at 3-7 ("*AT&T Broadband Ex Parte*"); *AT&T Dom/Non-Dom Comments* at 19-50, *Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services*, CC Docket No 01-337, Reply Comments of AT&T Corp at 4-27 (Apr 22, 2002) ("*AT&T Dom/Non-Dom Reply Comments*")

<sup>12</sup> *AT&T BPL Comments* at 2-3, *AT&T Broadband Ex Parte* at 4

<sup>13</sup> *AT&T BPL Comments* at 3

access services.<sup>14</sup> Although AT&T and other competitive carriers would prefer to self provide these last mile facilities, the reality is that SBC and the other incumbent LECs remain the only source for these facilities in the overwhelming majority of situations.<sup>15</sup>

In fact, the only two services addressed in SBC's brief assertion of non-dominance are frame relay and ATM, two business services that are provided by its affiliate, SBC-ASI, over SBC's high capacity loops and transport facilities. Notwithstanding SBC's claim (at 7) that advanced services competition is "flourishing" because long distance carriers control more than two-thirds of the *retail* market for ATM and frame relay, the competitive situation is no better for these services. In making this claim, SBC inappropriately lumps together both local and interLATA data services. In the local markets where the Bells have been able to compete, in contrast, they have already parlayed their control over bottleneck facilities into control of over 90% of the retail ATM and frame services provided to businesses – clear confirmation of enduring market power.<sup>16</sup>

SBC's attempt to assign for itself the determination of which services qualify for regulatory relief is particularly problematic given that the Commission recognized the difficult definitional issues involved in the *Dom/Non-Dom NPRM* and was cautious "to avoid pre-judging which services belong in the same product markets." *Dom/Non-Dom NPRM* at n.37. SBC appears confident, however, that whatever "packet switched

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<sup>14</sup> *AT&T BPL Comments* at 4; see also *AT&T Corp., et al., Petition for a Writ of Mandamus*, No. 03-1397, at 17, 25-28, D.C. Circuit (filed November 5, 2003) ("*AT&T Mandamus Petition*")

<sup>15</sup> *AT&T BPL Comments* at 4

<sup>16</sup> For example, information that Qwest has submitted to the FCC in another proceeding shows that the Bells account for 90.3% of frame relay local revenues, and 97% of ATM local revenues *AT&T BPL Comments* at 3-5

services” it determines to include within the ambit of its waiver request ultimately will be found by the Commission to warrant regulatory relief.<sup>17</sup>

Fortunately, the Commission has already entertained and rejected SBC’s earlier attempts to prejudge the issues raised in the *Dom/Non-Dom NPRM* and other proceedings. More specifically, the Commission denied SBC’s request to issue a declaratory ruling that SBC’s operating companies and SBC-ASI are non-dominant in the provision of any advanced service, and expressly refused to attach *any* relief to SBC’s BPON service. *SBC-ASI Order* at ¶¶ 13, 14 & n.52, *see also id* ¶¶ 30-31. In that Order, the Commission made clear that issues of core Title II regulation must be implemented on a full evidentiary record and cannot be left to SBC’s unilateral interpretation:

Because the fundamental question regarding how broadband services should be defined and whether they are telecommunications services subject to Title II regulation are before us in other proceedings, we find that the most orderly procedure is to defer action on the non-forbearance issues raised in SBC’s petition pending resolution of those questions. *SBC-ASI Order* at ¶ 31.

The Commission should take a similar position in the instant case and reject, or at least defer, consideration of SBC’s waiver request at this time. Such action is necessary to minimize the risk of anticompetitive policies being inextricably interwoven into an SBC network that will service its operating companies, affiliates and competitive carriers for many years to come.

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<sup>17</sup> SBC claims that its current “packet switched” services, BPON and OPT-E-MAN, should be placed in the high capacity special access/DDS service category under price cap regulation because they are “high speed fiber-based service[s]” that are “targeted to the same or similar customer base as [SBC’s] other high speed services in the high capacity special access/DDS service category.” SBC Petition at 9

**II. Granting the Petition Is Not in the Public Interest Because It Would Increase SBC's Incentive and Ability to Game Rates in an Anticompetitive Manner.**

Granting SBC's petition substantially increases the risk of higher special access rates. This could occur in one of two ways. First, there is the possibility that SBC will "game the system" by strategically handpicking certain packet switched services (*i.e.*, the services that SBC deems that it, and not its advanced services affiliate, should introduce) for the H1-Cap/DDS service category within the Special Access basket as new services under the price cap rules. By strategically adding or removing services from price cap regulation at opportune moments, SBC would be able to circumvent the Commission's pricing rules.

Under price cap regulation, increases in the price of a service have to be offset by reductions in prices of services within the same basket. Similarly, reductions in price create "headroom" under the price cap ceiling that can be used to raise prices of other services within the same "basket." For example, if an incumbent LEC were planning to reduce prices associated with a particular packet service that it introduced into the marketplace in order to generate interest in that service, it would be advantageous to have that service under price caps in order to get credit for the price reduction, which could then be offset by raising the prices for other, less competitive, services. Thus, if SBC's waiver request were granted, packet-based services first placed under price caps during 2004 would be included in the 2004 base period and, therefore, be included in the 2005 annual price cap filing. If the prices for the packet-based BPO services were thereafter reduced, that would reduce the API (average price index) of the special access category, making it possible for SBC to raise the price of other services within the special access basket. Creating such pricing "headroom" in the special access basket and raising the

rates for other services, which may be SBC's objective here, would be particularly inappropriate given the already astronomical rate of return that SBC achieves for its special access services.<sup>18</sup>

Second, it is also possible that SBC will attempt to take advantage of additional pricing flexibility afforded services subject to price caps. For example, SBC's objective may be to bring its packet-switched services into price caps and then obtain pricing flexibility under the Commission's *Pricing Flexibility Order* (which AT&T has shown does not test for the presence of price-constraining competition) and allow SBC to raise rates for its packet-based services without any pricing constraints. The Bells have used their control over special access to reap monopoly rents, put competitors in a price squeeze, and foreclose competitive broadband offerings. Where the Commission has mistakenly granted the Bells special access pricing relief, they have responded by charging rates that are generally above those that are still under price caps, which by itself refutes any claim that a competitive market exists for last-mile access services, such as the loop-based packet-switched services contemplated in this proceeding. Indeed, the ILECs' own ARMIS reports filed with the Commission show rates of return on special access that averaged about 40% in 2002, with total special access revenues more than \$5 billion in excess of the 11.25% return found reasonable under price cap regulation.<sup>19</sup>

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<sup>18</sup> According to ARMIS data provided by the SBC companies, SBC's rate of return on interstate special access was 51.3% in 2002. *Ex Parte* Letter from P. Merrick to FCC, RM No. 10593, dated May 20, 2003, at 6.

<sup>19</sup> AT&T and others have pointed this out on numerous occasions, most recently the mandamus petition and the June 12, 2003 Special Access Reform Coalition ("SPARC") study, where the calculations in Appendix 3 showed \$5.6 billion excess revenues for price cap LECs in 2002. See *AT&T Mandamus Petition* at 17, *AT&T BPL Comments* at 4 n. 12 (citing to the special access macroeconomic study that SPARC filed as an *Ex Parte* with the Commission in Rulemaking No. 10593).

While SBC's planned course of action is unclear, the fundamental reality is that SBC's request, if granted, will *increase*, rather than minimize its incentive and ability to engage in anticompetitive pricing with respect to the packet-switched services it elects to place within the Special Access basket. Indeed, the incentive to discriminate is heightened considerably where, as here, SBC's packet-switched services in question employ local loop facilities, which in turn will give SBC the ability to leverage its monopoly power over its fiber-based loops into related areas or services that utilize those same facilities. As the Commission found in the *SBC-Ameritech Merger Order*, "incumbent LECs, such as SBC and Ameritech have the incentive and ability to discriminate against competitors in the provision of advanced services . . . and that such incentive and ability will increase as a result of the merger."<sup>20</sup>

### **III. The Rationale for Excluding Packet-Switched Services From Price Caps Supports Rejection of SBC's Petition.**

SBC maintains that it is entitled to *include* all packet-switched services in price caps in its upcoming price cap tariff filings with or without a waiver, notwithstanding SBC's concession that it has consistently interpreted the Commission's rules and orders to mean that it should *exclude* all packet-switched services from price cap regulation. SBC Petition at 2. Indeed, in its initial *Price Cap Order*, the Commission concluded that price cap LECs must exclude certain services, such as packet-switched services, from price cap regulation.<sup>21</sup>

SBC claims that the Commission's rationale for excluding packet-switched services from price cap regulation is no longer valid. It is wrong. In fact, the rationale

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<sup>20</sup> *SBC-Ameritech Merger Order*, at ¶ 186.

<sup>21</sup> *Policy and Rules Concerning Rates for Dominant Carriers*, Second Report and Order, 5 FCC Rcd 6786 (1990) ("1990 Price Cap Order").

for this requirement – “some offerings that currently appear in the LECs’ federal tariffs do not lend themselves to incentive-based regulation, or raise significant and controversial issues that should be resolved outside of the price cap arena”<sup>22</sup> – is acutely applicable today, especially as applied to loop-based packet-switched incumbent services such as BPN. While SBC notes that the Commission excluded packet-switched services from price cap regulation in 1990 because such services were not then subject to scrutiny as part of the Commission’s investigation of LEC productivity (*see* SBC Petition at 2), it does not – and cannot – deny that packet-switched loop-based services offered today engender “significant and controversial” regulatory classification, cost allocation, and other fundamental Title II issues that the Commission has not yet addressed. Until these issues are resolved, it would not be in the public interest to permit SBC to include all current and future packet-switched loop-based services within the price cap indexes and price cap rates, when it has never done so before.

SBC erroneously contends that the Bureau’s decision to grant Verizon a limited interim waiver in 2002 and 2003 to exclude from price caps the advanced services it reintegrated from its affiliate, VADI, into its operating companies somehow supports SBC’s request in this proceeding.<sup>23</sup> Those decisions provide no support for SBC’s request. To the contrary, SBC’s filing misconstrues both the Commission’s legal conclusions and the underlying facts in the *Verizon Interim Waiver Orders*, which are consistent with AT&T’s opposition in this proceeding.

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<sup>22</sup> 1990 Price Cap Order, ¶ 191

<sup>23</sup> SBC Petition at 3, citing *Verizon Petition for Interim Waiver of Section 61.42(g) of the Commission’s Rules*, 18 FCC Rcd 6498 (2003), *Verizon Petition for Interim Waiver of Section 61.42(g), 61.38, and 61.49 of the Commission’s Rules*, WCB/Pricing No. 02-16, Order (2002) (collectively the “*Verizon Interim Waiver Orders*”)

In the *Verizon Interim Waiver Orders*, the Commission ruled only that the unique and special circumstances associated with reintegrating advanced services back into the parent company merited a limited interim price cap waiver for those services to “allow maintenance of the *status quo*” until the Commission fully considered the issues related to the *Dom/Non-Dom NPRM* proceeding *2003 Verizon Interim Waiver Orders* at ¶ 8 (emphasis added). The *Verizon Interim Waiver Orders* do not help SBC in its effort to *change – rather than maintain – the status quo* for its packet-based services. These orders stand for the straightforward proposition that interim waiver relief may be granted for advanced services during the pendency of the Commission’s review of the *Dom/Non-Dom NPRM* proceeding only when deemed necessary to “prevent changes in the rates for advanced services from having a secondary impact on rates for other services.” *Id.* at ¶¶ 7-8 SBC’s request clearly flunks that criteria.<sup>24</sup>

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<sup>24</sup> In addition, SBC’s reliance on the *BellSouth Pricing Flexibility Order* is also misplaced. See SBC Petition at 2-3, citing *BellSouth Petition for Pricing Flexibility for Special Access and Dedicated Transport Services*, Memorandum Opinion and Order, 16 FCC Rcd 18174 (Oct 3, 2001). Indeed, the most that can be said about this order is that, unlike this case, no party challenged BellSouth’s decision to include ATM and frame relay services within its trunking basket price cap index when introduced in the mid-1990s.

**CONCLUSION**

Thus, for the reasons stated above, AT&T requests that the Commission deny SBC's waiver petition and preserve the *status quo* with respect to how it regulates SBC's packet-switched services

Respectfully submitted,

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/s/

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**CERTIFICATE OF SERVICE**

I, Michelle S. Cadin, hereby certify that on this 7<sup>th</sup> day of January 2004, the foregoing Opposition of AT&T Corp. to SBC Communications Inc. Petition for Waiver was filed in WC Docket No. 03-250 with the Federal Communications Commission's Washington D.C. location and copies were sent by the method indicated to the following:

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