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

In the Matter of	)	
	)	
Nevada Bell Telephone Company Tariff F.C.C. No. 1	))	Transmittal No. 92
	)	
Southern New England Telephone Company Tariff F.C.C. No. 39	))	Transmittal No. 852
	)	
Pacific Bell Telephone Company Tariff F.C.C. No. 1	))	Transmittal No. 198
	)	
Southwestern Bell Telephone Company Tariff F.C.C. No. 73	))	Transmittal No. 3031

PETITION OF AT&T CORP.

Pursuant to Section 1.773 of the Commission's rules, 47 C.F.R. § 1.773, AT&T Corp. ("AT&T") requests the Commission to reject or, in the alternative, suspend and investigate for the full five-month statutory period the above-captioned tariff revisions filed January 13, 2005 by the SBC Communications operating telephone companies (collectively "the SBC companies" or "SBC").[1] In a remarkable display of hubris, the SBC companies in these filings propose to require new subscribers to their DS1 Term Payment Plans ("TPPs") to commit at least 90 percent of those customers'

1 A tariff is subject to rejection when it is *prima facie* unlawful, in that it demonstrably conflicts with the Communications Act or a Commission rule, regulation or order. *See, e.g., American Broadcasting Companies, Inc.* v. *AT&T*, 663 F.2d 133, 138 (D.C. Cir. 1980); *MCI* v. *AT&T*, 94 F.C.C.2d 332, 340-41 (1983). Suspension and investigation are appropriate where a tariff raises substantial issues of lawfulness. *See AT&T* (Transmittal No. 148), Memorandum Opinion and Order, 56 RR2d 1503 (1984); *ITT* (Transmittal No. 2191), 73 F.C.C.2d 709, 716 n.5 (1979) (citing *AT&T*, 46 F.C.C.2d 81, 86 (1974)).

total special access demand obtained from SBC to avoid incurring termination liability for *any* special access circuits (or their associated revenues) that the customer has elected to make subject to those discount plans.[2] These proposed tariff revisions come only a little more than a month after the Commission's release of its *BellSouth Order* finding unlawful an analogous 90 percent commitment obligation in that carrier's principal optional discount plan for special access services.[3] As AT&T shows below, the filed revisions are patently unlawful under Section 272 of the Communications Act (47 U.S.C. § 272) because, as the *BellSouth Order* recognized, requiring such a percentage commitment as a condition of obtaining price reductions from a Bell Operating Company ("BOC") under its special access discount plans discriminates in favor of smaller access customers with growing demand -- including, in particular, the BOC's long distance affiliate.

Moreover, even apart from impermissibly advantaging SBC's long distance affiliate, the proposed tariff revisions serve to "lock-in" new customers' total volume of special access services from SBC once they have subscribed to a TPP. The lock-in effect of the revised tariff provision is wholly unrelated to cost or other legitimate grounds, in violation of Commission policies and rules for term and volume discounts. It also maintains the SBC companies' market share of DS1 special access services, impedes

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[2] With the exception of Southern New England Telephone Company ("SNET"), the SBC companies' tariffs label the discount plan as a "TPP" and AT&T's petition uses that abbreviation to refer to all of the filing entities' DS1 discount plans.

[3] *AT&T Corp. v. BellSouth Telecommunications, Inc.*, File No. EB-04-MD-010, FCC 04-278, rel. December 9, 2004 ("*BellSouth Order*").

the development of wholesale special access competition, and facilitates supracompetitive pricing by those carriers. The tariff revisions thus are unjust, unreasonable, and discriminatory in violation of Sections 201(b) and 202(a) of the Communications Act.[4]

Any of these blatant violations of the Communications Act, standing alone, warrants rejection of these tariff filings and AT&T submits that, when they are taken together, compel such action by the Commission. At a bare minimum, however, in light of the serious issues raised by the filings the Commission should suspend the proposed revisions for the full statutory period and initiate an investigation into the lawfulness of these tariff changes under the *BellSouth Order* and other established Commission precedent and policies implementing the pro-competitive objectives and nondiscrimination requirements of the Communications Act.

FACTUAL BACKGROUND

Each of the SBC companies that have made the instant tariff filings offers an optional pricing plan for DS1 (1.544 Mbps) special access services, under which access customers may receive a discount from those carriers' monthly recurring rates by committing specific DS1 circuits for terms ranging up to as much as 7 years.[5] Under these plans, each SBC company applies an identical discount to all customers subscribed

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[4] 47 U.S.C. § 201(b), 202(a).

[5] *See* Nevada Bell Telephone Company Tariff F.C.C. No. 1, Section 7.11.5.2; Pacific Bell Telephone Company Tariff F.C.C. No. 1, Section 7.4.18; Southwestern Bell Telephone Company Tariff F.C.C. No. 73, Section 7.2.22; Southern New England Telephone Company Tariff F.C.C. No. 39, Section 2.11.1.1.

to the TPP, regardless of the volume of circuits and associated rate elements made subject to the plan by any individual customer. In the event the customer discontinues service from SBC for any of the circuits subject to the TPP prior to the expiration of the plan's term, the SBC companies assess a termination charge with respect to the discontinued circuit. Depending upon the point in the term plan at which such service is discontinued, the termination charges may considerably exceed the total amount of discounts obtained by the TPP customer for that circuit.[6]

TPP customers may only avoid such termination liability under their discount plans by subscribing for three years (or additionally, in the case of SNET, for five years) to a "DS1 High Capacity Portability Commitment." These euphemistically titled "portability" provisions require the customer to maintain for those periods a minimum commitment level determined, not by the volume of DS1 circuits covered under the discount plan, but by *all* of the subscriber's DS1 service from SBC (including undiscounted circuits) purchased during the month preceding that customer's adoption of the portability provision.[7]

Under the SBC companies' current tariffs, once the commitment level is set a TPP customer is required to maintain at least 80 percent of that DS1 special access

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[6] *See* Nevada Bell Telephone Company Tariff F.C.C. No. 1 Section 7.11.5.2(G); Pacific Bell Telephone Company Tariff F.C.C. No. 1, Section 7.4.18(G); Southwestern Bell Telephone Company Tariff F.C.C. No. 73, Section 7.2.22(G); Southern New England Telephone Company Tariff F.C.C. No. 39, Section 2.11.1.1(B).

[7] *See* Nevada Bell Telephone Company Tariff F.C.C. No. 1 Section 7.11.5.2(E)(1); Pacific Bell Telephone Company Tariff F.C.C. No. 1, Section 7.4.18(E)(1); Southwestern Bell Telephone Company Tariff F.C.C. No. 73, Section 7.2.22(E)(1); Southern New England Telephone Company, F.C.C. No. 39, Section 2.11.1.1(D)(1).

demand in service with SBC to avoid incurring termination liability for any circuits covered under the TPP.[8] In the instant tariff filings, the SBC companies propose "grandfathering" the 80 percent commitment level for existing DS1 TPP customers, and increasing the commitment level for new customers to 90 percent.[9]

ARGUMENT

I. THE PROPOSED 90 PERCENT COMMITMENT DISCRIMINATES IN FAVOR OF SBC's LONG DISTANCE AFFILIATE IN VIOLATION OF SECTION 272 OF THE COMMUNICATIONS ACT.

Section 272(c)(1) of the Communications Act prohibits a BOC from discriminating between its long distance affiliate and other unaffiliated carriers in the

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[8] *See* Nevada Bell Telephone Company Tariff F.C.C. No. 1 Section 7.11.5.2(E)(2); Pacific Bell Telephone Company Tariff F.C.C. No. 1, Section 7.4.18(E)(2); Southwestern Bell Telephone Company Tariff F.C.C. No. 73, Section 7.2.22(E)(2); Southern New England Telephone Company, F.C.C. No. 39, Section 2.11.1.1(D)(2). In addition to satisfying the portability provision's minimum percentage threshold, TPP customers must also maintain at least 40 channel terminations in service each month. *Id.*

The SBC companies' current 80 percent commitment already raises all the same issues under Sections 201, 202 and 272 as those carriers' proposed tariffs addressed in AT&T's instant petition. Accordingly, in addition to rejecting the present tariff filings, or suspending and investigating those proposed revisions, the Commission should initiate an immediate investigation of the currently effective tariffs' commitment requirements pursuant to Section 205 of the Communications Act, 47 U.S.C. § 205. To promote efficient use of scarce administrative resources, such an investigation should be consolidated with any investigation of the present tariff filings that the Commission may order pursuant to Section 204 of the Act (47 U.S.C § 204).

[9] *See* Nevada Bell Telephone Company, Transmittal No. 92, Southern New England Telephone Company Transmittal No. 852, Pacific Bell Telephone Company Transmittal No. 198, and Southwestern Bell Telephone Company Transmittal No. 3031, Description and Justification ("D&J") at 1.

provision, inter alia, access services.[10] Moreover, Section 272(e)(3) requires that a BOC's access charges to unaffiliated interexchange carriers not exceed those assessed on, or imputed to, the BOC's long distance affiliate.[11] As the *BellSouth Order* has underscored, under controlling Commission precedent a non-cost based percentage commitment requirement on the availability of a BOC's term discount plans, such as the SBC companies effectively propose here, is barred by the nondiscrimination obligations imposed by Section 272.

The *BellSouth Order* was issued in response to AT&T's formal complaint challenging the discriminatory and anticompetitive effects of BellSouth's discount special access plans. The FCC determined there that BellSouth's principal special access discount plan, the Transport Savings Plan ("TSP"), violated Sections 272(c)(1) and 272(e)(3) because the plan conditioned its discounts upon the special access customer's committing to continuing for five years to purchase 90 percent of the customer's most recent level of purchases.[12] The Commission concluded that the 90 percent commitment

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[10] 47 U.S.C § 272(c)(1) ("In its dealings with its affiliate . . . a Bell operating company . . . may not discriminate between that . . . affiliate and any other entity in the provision or procurement of goods, services, facilities, and information, or in the establishment of standards").

[11] 47 U.S.C. § 272(e)(3) (providing that a BOC "shall charge [its] affiliate . . . or impute to itself . . . an amount for access to its telephone exchange service and exchange access that is no less than the amount charged to any unaffiliated interexchange carriers for such service").

[12] While the Commission found that the 90 percent lock-in, standing alone, was sufficient to establish a violation of Section 272 (*BellSouth Order*, ¶ 36) it also noted that the discriminatory and anticompetitive effects of that provision were further magnified by its relationship to the TSP's rate structure. BellSouth's plan provided discounts to small-volume customers that were not significantly dissimilar from the discounts afforded to

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provision discriminated in favor of smaller, rapidly growing long distance carriers such as BellSouth's long distance affiliate that could qualify readily under that tariff requirement for the TSP discounts, while BellSouth's established special access competitors would likely be unable to satisfy that commitment in light of ongoing inroads on their businesses by BellSouth's affiliate and other carriers.[13] Moreover, even if an established carrier taking service under BellSouth's TSP could continue to satisfy its 90 percent commitment, that restriction would seriously constrain its ability to manage its special access traffic -- for example, by migrating a portion of its service from BellSouth to a competing access vendor.[14]

These same discriminatory effects of the TSP commitment provision that the Commission found unlawful in the *BellSouth Order* pervade the 90 percent commitment proposed by the SBC companies in their instant tariff filings. The proposed commitment level, if it were allowed to become effective, would present potential new

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customers that committed much higher volumes of special access services. The Commission concluded that these relative discount levels, for which BellSouth had not provided any cost justification, were likewise unlawful under Section 272 because they discriminated in favor of lower-volume customers such as its long distance affiliate. *BellSouth Order*, ¶¶ 22-33. In this respect, SBC's TPPs are even more seriously skewed because they do not offer *any* differential in the level of the discounts afforded to those plans' subscribers, regardless of the volume committed by a customer. *See* n. 5, *supra*.

[13] *See BellSouth Order*, ¶ 38. The Commission noted that in this respect the 90 percent commitment operated similarly to so-called "growth discount" tariffs for carriers that increase their usage over a BOC's network (or that commit to purchase specified percentages above the subscriber's current usage). The Commission has consistently rejected such growth discount tariffs as unlawful under Section 272. *Id.*, ¶ 37 and n. 99.

[14] *Id.*, ¶ 38.

TPP customers that compete with the SBC companies' long distance affiliate with a Hobson's choice. Customers subscribed to the plan with the "portability" commitment must give up the flexibility to migrate more than a small portion of their total DS1 special access demand to the SBC companies' access competitors -- even if those vendors offer lower prices with equal or better service quality than SBC. This deterrent effect of the increased commitment percentage is especially powerful for special access customers with a stagnant or declining share of the special access market. Alternatively, new TPP customers with declining volumes that do not also subscribe to the revised portability commitment are placed at risk of incurring termination liabilities if services under the discount plan are discontinued. SBC's affiliate is effectively insulated from either of these serious adverse business consequences, because it can readily elect both the TPP and avoid termination liability as it gains DS1 market share. And an SBC competitor that entirely foregoes subscribing to the TPP, to avoid the unwarranted restrictions on its choice of access vendors created by the 90 percent commitment level, will find itself even more significantly disadvantaged in competing with a smaller, growing carrier such as SBC's affiliate that will readily qualify for discounts under the TPP.

The SBC companies do not make even a pretense of demonstrating the lawfulness of these tariff revisions under these standards. Their one-page D&Js merely restate the current tariffs' 80 percent commitment obligation, parrot the brief summary of the proposed revision set forth in their respective transmittal letters, and provide a calculation showing that the revision would satisfy the index requirements under the Commission's price cap rules. SBC provides no support to demonstrate that the 90 percent commitment is nondiscriminatory or that it is cost-justified in any manner, so as to pass muster under the *BellSouth Order* and numerous other prior Commission decisions.[15] SBC's solution to this glaring deficiency in its proposed tariff is simply to ignore the *BellSouth Order* and the well-established Commission pricing policies that were applied there.

In sum, the SBC companies have done nothing to dispel the transparent unlawfulness of their tariff filings under Section 272, and the proposed revisions should be rejected or suspended and investigated for this reason alone.

II. THE PROPOSED COMMITMENT IS UNJUST AND UNREASONABLE IN VIOLATION OF SECTION 201

A tariffed practice or charge is "unreasonable" under Section 201(b), as well as under Section 202(a), when it "operates to discourage competitive pricing behavior or to facilitate anticompetitive behavior," and the Commission focuses on whether the challenged practices "have serious *potential* anticompetitive consequences," even without requiring a showing that the defendant "adopted this pricing mechanism for the purpose of limiting competition or that it has had such an effect."[16] The Commission generally reaches conclusions regarding the unreasonableness of a practice based on the *potential*

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[15] *See id.*, ¶ 22 and n. 63 (citing prior Commission orders regarding volume discounts).

[16] *AT&T Communications, Tariff FCC No. 15*, 6 FCC Rcd. 5648 (1991) ("*Tariff 15 Order*"), ¶¶ 16, 22. For example, in the context of a carrier's effort to combine competitive and non-competitive services to foreclose competition, the Commission has found the practice unreasonable in violation of Section 201(b) based upon evidence that the carrier simply linked the two products through the structure of its offering. *See AT&T's Private Payphone Commission Plan*, 7 FCC Rcd. 7135 (1992), ¶¶ 14-16; *see also AT&T Communications Revision to Tariff FCC Nos. 1 & 2*, 7 FCC Rcd. 5656 (1992); *AT&T Communications, Revisions to Tariff FCC No. 1 & 2*, 5 FCC Rcd. 3833 (1990); *MCI Telecommunications Corp.* v. *AT&T.*, 7 FCC Rcd. 3047 (1992), ¶¶ 21-22.

harm to competition, rather than upon evidence of specific harm to individual customers or to the market as a whole.[17]

The 90 percent commitment requirement is unlawful under these controlling legal principles because it discourages economically efficient pricing and enables the SBC companies to engage in anticompetitive behavior. The commitment requirement limits the opportunities for competitors to bid for nearly all of new TPP customers' DS1 business subject to those plans; impairs TPP customers' ability to deploy facilities to increase competition; and enables SBC to retain demand even while offering above-market prices.

The SBC companies already control the great preponderance of DS1 special access in their service territories and, even where competitors have entered limited portions of SBC's geographic market, that competition is frequently focused on higher capacity (DS3 and above) special access service. Accordingly, customers' alternatives to purchasing DS1 services from SBC are in many instances limited at best. But the 90 percent commitment requirement of the SBC companies' tariff revisions indisputably serves to lock up virtually all DS1 demand now served on the SBC network. The plain terms of the tariffs establish this effect: to avoid termination liabilities under the TPP, new customers must commit to maintain at least 90 percent of their total prior level of DS1 special access purchases with SBC. The proposed new commitment requirement thereby necessarily deprives SBC's TPP customers of the ability to secure

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[17] *See Private Line Rate Structure and Volume Discount Practices*, 97 FCC.2d 923 (1984) ("*Volume Discount Order*"); *Access Charge Reform (Fifth Report and Order)*, 14

(footnote continued on following page)

virtually any additional contestable DS1 special access services -- whether or not those services are included in the customers' TPPs -- at wholesale prices set by the market, and thus both "discourage competitive pricing" and "facilitate anticompetitive behavior."[18] These are precisely the results that the Commission's prior decisions, as well as relevant antitrust and commercial law precedent, are intended to prevent.[19]

A principal goal of the 1996 Telecommunications Act was to foster facilities-based competition in special access and related markets.[20] Facilities-based competition benefits consumers, by reducing retailers' dependence upon the monopolist's

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FCC Rcd. 14221 (1999) ("*Pricing Flexibility Order*"); *Computer II*, Final Decision, 77 FCC.2d 384 (1980).

[18] *Tariff 15 Order*, ¶ 16.

[19] For example, case law addressing requirements contracts confirms the impermissibility of pricing based on the extent of the customer's committed demand where such arrangements discourage market competition. A contract that effectively requires customers to purchase most or all of their requirements for a product or service from a supplier is often found to be anticompetitive when a significant portion of the market -- generally in excess of 20 to 40 percent -- is affected or "locked up" by the contract. *Tampa Elec. Co.* v. *Nashville Coal Co.*, 365 U.S. 320 (1961); *Jefferson Parish Hosp. Dist. No. 2* v. *Hyde*, 466 U.S. 2, 45 (1984) (Brennan, J., concurring); *United States* v. *Microsoft Corp.*, 253 F.3d 34, 70 (D.C. Cir. 2001) (referencing the "40% standard drawn from the caselaw"); *Twin City Sportservice, Inc.* v. *Charles O. Finley & Co.*, 676 F.2d 1291 (9th Cir.), *cert. denied*, 459 U.S. 1009 (1982) (24 percent foreclosure combined with long term contracts).

[20] Congress intended the 1996 Act "to provide for a procompetitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition." S. Rep. No. 104-230, at 1 (1995). Development of facilities-based competition is an especially important objective of the Commission's policies and its implementation of the Act. *See Triennial Review Order*, 18 FCC Rcd. 16,978 (2003), ¶¶ 22, 70, 114, 200, 242, 448; *Local Competition Order*, 11 FCC Rcd. 15499 (1996), ¶¶ 172, 325, 635, 685.

facilities and constraining the monopolist's ability to price without concern for competitive alternatives. For these reasons, the Commission has made the development of facilities-based competition a central focus of its policies.

The 90 percent commitment is antithetical to these objectives. When a new TPP customer subject to the proposed revised commitment anticipates potential inability to satisfy that commitment, it will naturally be loathe to shift special access demand that is not covered under the TPP from the SBC network to facilities that customer might otherwise construct. The 90 percent commitment creates similar strong disincentives for a new TPP customer to shift demand to existing or planned facilities of a competitive local exchange carrier ("CLEC") or other alternate access vendor ("AAV"). The ability of these entities to secure sufficient traffic in advance of constructing facilities is indispensable to their decision to commence competing on a particular route, because without such commitments there is inadequate economic justification for them to incur enormous fixed (and sunk) costs of deploying such facilities.[21]

Finally, the 90 percent commitment is likewise unreasonable (as well as unlawfully discriminatory) because it is not economically justified by cost or on other lawful grounds.[22] Customers with high volumes that are less costly to serve cannot deal with CLECs or AAVs, or self-provide facilities, for all but a minor portion of their total current DS1 service from SBC without placing themselves at risk of termination

[21] If the bankruptcies experienced by many BOC competitors in the last 7 years have proven anything, it is that carriers can no longer afford to deploy facilities on a "build it and they will come" philosophy with an expectation of attracting customers.

[22] *See Volume Discount Order*, ¶9.

liabilities for doing so, and customers with smaller or identical levels of demand that are willing to refuse to deal with SBC's competitors can avoid the termination charges. For the reasons described by the Commission in the *BellSouth Order*, this economically irrational pricing is comparable to the LEC growth tariffs previously rejected by the Commission, and both are unrelated to the quantum of committed demand, to cost-based pricing or to any other legitimate economic rationale for price-setting.

III. THE 90 PERCENT COMMITMENT VIOLATES SECTION 202 BECAUSE IT IS UNREASONABLY DISCRIMINATORY

Section 202(a) of the Communications Act provides, in part, that no common carrier shall "make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service, directly or indirectly …."[23] The courts and the Commission have established three-prong test to determine when a carrier's practice violates Section 202(a): "(1) whether the services are 'like'; (2) if they are, whether there is a price difference between them; and (3) if there is, whether that difference is reasonable."[24]

Each of these three prongs applies to the tariff revisions the SBC companies propose here. First, the services are indisputably "like" because identical DS1

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[23] 47 U.S.C. § 202(a).

[24] *Competitive Telecommunications Ass'n* v. *FCC*, 998 F.2d 1058, 1061 (D.C. Cir. 1993). Although the two statutory provisions are related, Section 272's prohibition against discrimination is not synonymous with the 'unjust and unreasonable' discrimination language used in Section 202; rather, Congress "intended a more stringent standard" under the 1996 Act's new provision specifically governing BOCs. *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Telecommunications Act of 1934, As Amended*, 13 FCC Rcd 11230 (1996) ("*Non-Accounting Safeguards Order*") ¶ 197.

services are provided to customers whether or not they subscribe to the TPPs' commitment level. Second, a price differential effectively exists because a new customer that subscribes to the TPP and that also subjects itself to the 90 percent commitment requirement is eligible for waiver of the otherwise applicable termination charges for discontinuing services subject to the discount plan. And third, Commission precedent also already establishes that volume discounts cannot be conditioned in the manner SBC proposes; that, independently, the 90 percent commitment requirement is unreasonable because it is not cost-justified and is anticompetitive.[25]

The Commission has already developed a clear set of limitations that a carrier may place on the availability of volume discounts, and indeed has done so when addressing the private line, special access, and transport services at issue in this proceeding.[26] Those decisions – set forth most prominently in the Commission's *Volume Discount Order*, *Pricing Flexibility Order*, and related transport orders – clearly deem and prohibit the type of restrictions on volume discounts that SBC proposes through the 90 percent commitment requirement for the TPP.[27]

The Commission has permitted volume and term discounts, and conditions that restrict their availability, only where they are "justified by underlying costs, and are

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[25] *Non-Accounting Safeguards Order*; ¶ 257; *Expanded Interconnection with Local Telephone Company Facilities*, 7 FCC Rcd. 7369 (1992) ("*Expanded Interconnection Order*") ¶ 199; *see also Volume Discount Order*, ¶¶ 34-36.

[26] *See* n. 28, *supra* (citing decisions).

[27] *Pricing Flexibility Order*, ¶¶ 124-25.

not otherwise unlawful, because they encourage efficiency and full competition."[28] In particular, the Commission in the *Volume Discount Order* permitted "efficiently-priced, volume-discounted offerings" that have demonstrable consumer benefits, but interpreted the Act "to eliminate the carrier's ability to discriminate by targeting a volume discount to a particular segment of customers through restrictions."[29] The *Volume Discount Order* requires carriers to provide "similar service offerings with no restrictions on customers or uses," and prohibited "having two similarly-situated customers who order the same quantity of a service with volume discounts charged different rates."[30]

Moreover, because commitments of greater volumes allow services to be provided at lower costs, thus enhancing efficiency and consumer benefits, the Commission in the transport context has defined legitimate volume discounts as an offering of reduced per-unit prices for a particular number of units of service.[31] Permissible volume discounts are those that recognize efficiencies and the lower costs

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[28] *See, e.g., Access Charge Reform, Third Report,* 11 FCC Rcd 21354 (1996), ¶ 187.

[29] *Volume Discount Order*, at ¶¶ 41, 43; *see also AT&T Communications, Revisions to Tariff F.C.C. No. 12*, Order on Remand, 6 FCC Rcd. 7039 (1991) ("*Tariff 12 Order*") ¶ 69 (prohibiting any "undue restriction" or "artificial constraint[]" that limits eligibility for an offering).

[30] *Volume Discount Order*, ¶¶ 35, 38; *see also Telecom New Zealand Ltd.*, 13 FCC Rcd. 363 (1998) ¶ 14. Indeed, the Commission rested the *Pricing Flexibility Order*'s regulatory relief with respect to volume discounts on this requirement: it concluded that certain potential risks to competition associated with its approach were reduced because "incumbent LECs must make [the volume discount] available to any customer with sufficient volumes." *Pricing Flexibility Order*, ¶ 124.

[31] *Transport Rate Structure*, 10 FCC Rcd 3030 (1994) ¶ 114.

"associated with larger volumes of traffic."[32] The absence of such a pro-competitive rationale was one reason the Commission prohibited growth discounts for transport services -- a type of discount that, as the *BellSouth Order* recognized, is analogous to the 90 percent commitment requirement in terms of the competitive effect and absence of pro-competitive justification.[33]

SBC's proposed 90 percent commitment requirement is unreasonable because it violates these legal standards in multiple respects. First, although a carrier's volume discounts must provide "similar service offerings with no restrictions on customers or uses," to avoid "having two similarly-situated customers who order the same quantity of a service with volume discounts charged different rates,"[34] the proposed 90 percent commitment requirement has just this effect. Under that commitment requirement, one new TPP customer with a particular volume of service that agrees to and maintains the 90 percent commitment level may avoid termination liability under that plan, but another customer that is willing to purchase the same quantity of identical services from SBC -- but that wishes to direct anything more than 10 percent of its total prior DS1 purchases from SBC to one of SBC's competitors -- is in jeopardy of incurring such termination liabilities under the TPP.

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[32] *Id.*

[33] *BellSouth Order*, ¶¶ 37-38.

[34] *Volume Discount Order*, ¶¶ 35, 38.

Further, in marked contrast to permissible volume discounts that recognize efficiencies and lower costs "associated with larger volumes of traffic"[35] and provide "efficiently-priced, volume-discounted offerings" that are "justified by underlying costs,"[36] the proposed 90 percent commitment requirement would expose high-volume customers that wish to deal with SBC's competitors or to deploy their own facilities to potential termination liability under the TPP, while exempting smaller-volume customers who are more expensive to serve, as long as they are willing to refuse to deal with competitors for the vast majority of their prior purchases. The 90 percent commitment would not provide "reduced per-unit prices for a particular number of units of service."[37] And SBC's targeting of the TPP discounts through the proposed tariff revision to new customers that refuse to deal with its competitors is blatantly anticompetitive. All of these consequences of the proposed tariff revisions are contrary to Section 202(a), and the Commission should not permit the SBC companies' filings to take effect.

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[35] *Expanded Interconnection Order,* ¶ 199; *see also Volume Discount Order*, ¶¶ 34-36.

[36] *Id.* at ¶¶ 41, 43; *see also Tariff 12 Order,* ¶ 69 (prohibiting any "undue restriction" or "artificial constraint" that limits eligibility for an offering).

[37] *Transport Rate Order*, ¶ 114.

CONCLUSION

For the reasons stated above, the Commission should reject SBC's tariff filings or, in the alternative, suspend and investigate those tariff revisions for the full five-month statutory period.

Respectfully submitted,

AT&T CORP.

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January 21, 2005

CERTIFICATE OF SERVICE

I, Hagi Asfaw, do hereby certify that on this 21st day of January, 2005, a copy of the foregoing "Petition of AT&T Corp." was served by facsimile and U.S. first class mail, postage prepaid, on the party named below.

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