

Gary L. Phillips
General Attorney

SBC Telecommunications, Inc.
1401 Eye Street, NW
Suite 1100
Washington, D.C. 20005
Phone: 202-26-8910

DOCKET FILE COPY ORIGINAL



RECEIVED

February 15, 2001

FEB 15 2001

Via Facsimile and Courier

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Ms. Dorothy Attwood
Chief, Common Carrier Bureau
Federal Communications Commission
445 12th Street, SW
Washington, D.C. 20554

Re: **Non-dominant Status of SBC's Advanced Services
Affiliates, CC Docket No. 98-141 /**

Dear Ms. Attwood:

We write to express our views with respect to the implications of *Association of Communications Enterprises v. FCC*, No. 99-1441 (D.C. Circuit, Jan. 9, 2001) (*Ascent v. FCC*) on the operations and regulatory status of SBC's advanced service affiliates. In a separate letter, we will discuss the scope of SBC's continuing obligation to provide advanced services through a separate affiliate. In this letter, we explain why *Ascent v. FCC* in no way alters the presumptively non-dominant status of SBC's advanced services affiliates. We show, in particular, that the Commission's conclusion in the *Merger Order*¹ that the separation requirements established therein are likely to prevent the SBC operating companies from leveraging market power in the local market to gain market power in the advanced services market compels the conclusion that SBC's advanced services affiliates are presumptively non-dominant. Nothing in *Ascent v. FCC* impugns that reasoning; indeed, a contrary conclusion would be inconsistent with Commission precedent and its own observations about competition in the advanced services market.

At the same time, we recognize that some may argue – incorrectly in our view – that footnote 41 of the Merger Conditions effectively revokes the non-dominant status of SBC's advanced services affiliates as a result of the D.C. Circuit's conclusion that those affiliates are successors or assigns of the SBC incumbent LECs for purposes of section 251 of the Communications Act. We believe that is a mis-reading of footnote 41 – one that takes that footnote out of context. Nevertheless, to the extent the Commission concludes otherwise, we ask that the Commission either waive the application of footnote 41 or find that SBC's advanced

¹ *Application of Ameritech Corp. and SBC Communications, Inc for Consent to Transfer Control of Corporations Holding Licenses and Lines Pursuant to Sections 214 and 310(d) of the Communications Act and Parts 5, 22, 24, 25, 63, 90, 95, and 101 of the Commission's Rules, CC Docket No. 98-141, FCC 99-279, released October 8, 1999 (Merger Order).*

No. of Copies rec'd 011
List A B C D E

services affiliates remain non-dominant, notwithstanding that they no longer are entitled to the automatic presumption of non-dominance established in the *Merger Order*.

In demonstrating that SBC's advanced services affiliates should continue to be treated as non-dominant under the Commission's rules, we in no way concede that a separate affiliate is a pre-condition to non-dominant status. To the contrary, incumbent LECs are dwarfed by their competitors in the advanced services market and the Commission itself has found that there is enough "actual and potential competition" in the broadband market today to leave its development to market forces.² Accordingly, if and when the Commission is asked to determine the regulatory status of an incumbent LEC's integrated advanced services operations, it should find them to be non-dominant. That, however, is an argument for another day. For present purposes, SBC limits its analysis to the issue the Commission has already addressed: the regulatory status for section 203 and 214 purposes of SBC's separate advanced services affiliates during the period in which those affiliates comply with the separation requirements of the *Merger Order*.

A. A BOC affiliate should be classified as dominant only if it can profitably sustain prices above competitive levels by restricting its own output.

Under the Commission's rules, a carrier is dominant in the provision of a service if it possesses market power with respect to that service, and a carrier is non-dominant if it lacks market power in the provision of that service.³ A carrier is deemed to have market power in the provision of a service if it can profitably raise and sustain prices above competitive levels by restricting output.⁴

Although the Commission has recognized two different forms of market power – Stiglerian and Banian market power⁵ – it has held that a BOC affiliate should be classified as

² *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from MediaOne Group, Inc. to AT&T Corp.*, 15 FCC Rcd 9816, 9862 (2000). See also *Rulemaking to Amend Parts 1, 2, 21, and 25 of the Commission's Rules to Redesignate the 27.5-29.5 GHz Frequency Band*, 15 FCC Rcd 11857 at 11864 (2000) (*Fixed Wireless Competition Order*).

³ 47 CFR §§ 61.3(o), 61.3(u). See also *Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area*, 12 FCC Rcd 15756 (1997) (*BOC Classification Order*).

⁴ *Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area*, 12 FCC Rcd 15756 (1997) (*BOC Classification Order*) at paras. 82, 85. See also *Polic and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor*, Fourth Report and Order, 95 FCC 2d 554 (1983), *vacated on other grds.*, *AT&T v. FCC*, 978 F.2d 727 (D.C. Cir. 1992) (defining market power alternatively as "the ability to raise prices by restricting output" and as "the ability to raise and maintain price above the competitive level without driving away so many customers as to make the increase unprofitable.")

⁵ "Stiglerian" market power is the ability to raise prices by restricting one's own output. "Banian" market power is the ability to raise prices by increasing one's rivals' costs or by restricting one's rivals' output through control of an essential input, such as access to bottleneck facilities, that those rivals need

dominant only if the affiliate has the ability to exercise Stiglerian market power – that is, only if the affiliate can profitably raise its prices by restricting its *own* output.⁶ The Commission acknowledged that dominant carrier regulation of a BOC affiliate might have some effect on the incentives and ability of a BOC to exercise Banian market power by leveraging control over bottleneck facilities.⁷ It found, though, that dominant carrier regulation of a BOC affiliate was not well-suited to address such concerns. It noted that dominant carrier regulation can “dampen competition” and impose other significant social costs and that any concerns about BOC pricing and practices are best addressed directly rather than by regulating the pricing of its affiliate.⁸ It summed up by noting: “We agree with DOJ that applying dominant carrier regulation to an affiliate in a downstream market would be ‘at best a clumsy tool for controlling vertical leveraging of market power by the parent, if the parent can be directly regulated instead.’”⁹

Having concluded that a BOC affiliate should be regulated as dominant only if the affiliate could raise prices by restricting its own output, the Commission went on to assess whether the BOCs’ interLATA affiliates should be regulated as dominant. It found that, as new entrants (with zero market share) in the long-distance market, a BOC affiliate could not raise prices by restricting its own output. Moreover, pointing both to its regulation of the BOCs and its section 272 safeguards, it concluded that a BOC affiliate could not, “upon entry or shortly thereafter” acquire market power through discrimination, cross-subsidization, or other anticompetitive behavior by or in conjunction with its BOC affiliate.

B. The *Merger Order* and other FCC Decisions compel the conclusion that SBC’s advanced services affiliates do not have market power.

In the *Merger Order*, the Commission found that, if SBC complies with specified separations requirements and safeguards, its advanced services affiliate would not acquire market power in the provision of advanced services:

The separation requirements and safeguards that prevent the advanced services affiliate from being a successor or assign of an incumbent also are likely to prevent an incumbent from leveraging its market power in the local market through an affiliate to gain market power in the advanced services market. The affiliate, therefore, can provide advanced services as a nondominant carrier,

to offer their services. *Non-Accounting Safeguards Order* at para. 132; *BOC Classification Order* at para. 83 citing T.G. Krattenmaker, R.H. Lande, and S.C. Salop, *Monopoly Power and Market Power in Antitrust Law*, 76 Geo. L.J. 241, 249-53 (1987).

⁶ *BOC Classification Order*, paras. 85-92.

⁷ It noted, for example, that there are circumstances in which subjecting a BOC affiliate to price floors could decrease any risk of a price squeeze or predatory pricing.

⁸ The Commission describes the costs of dominant carrier regulation in paragraphs 88-90 of the *BOC Classification Order*.

⁹ *BOC Classification Order*, para. 91.

while the nascent market for advanced services can continue to grow in a competitive fashion protected from anticompetitive behavior.¹⁰

The Commission elaborated on this analysis in paragraphs 460-476 of the *Merger Order*. In those paragraphs, the Commission explained how each of the structural and non-structural safeguards to which SBC would be subject would prevent discrimination and/or cross-subsidization to the benefit of its advanced services affiliates. It found that “[s]tructural separation, by itself, greatly assists in deterring improper cost allocation” and that SBC’s adherence to sections 272(b)(5) and (c)(2) provide “[a]dditional protection against improper cost allocation.”¹¹ Likewise, it found that section 272(c)(1) nondiscrimination requirements will ensure that an SBC operating company “will not discriminate between its advanced services affiliate and any other entity in the provision or procurement of goods, services, facilities, or information, or in the establishment of standards.”¹² Based on the panoply of structural and transactional safeguards to which SBC would be subject, it found that “the affiliate structure set forth in the conditions will ensure that an SBC/Ameritech advanced services affiliate occupies a position in the market comparable not to an incumbent, but rather to a non-incumbent advanced services competitors. [sic]”¹³

The Commission’s conclusion in the *Merger Order* that the structural and transactional safeguards specified therein will prevent SBC’s advanced services affiliate from “gaining market power” mirrors the Commission’s conclusion in the *BOC Classification Order* that a BOC long-distance affiliate could not, “upon entry or shortly thereafter” acquire market power. Moreover, implicit in this analysis – and in the Commission’s stated expectation that, with safeguards, “the nascent market for advanced services can *continue* to grow in a competitive fashion”¹⁴ – is the Commission’s recognition that SBC’s advanced services affiliates do not now have market power. Otherwise the references to “gaining” market power and “continued” competitive growth would be *non sequiturs*.

These two conclusions – that SBC’s advanced services affiliates do not now have, and could not acquire, market power in the provision of advanced services – are not only consistent with, but compelled by, other recent analyses of the advanced services market by the

¹⁰ *Merger Order*, note 834.

¹¹ *Id.* at para. 465.

¹² *Id.* at para. 467. *See also id.* at para. 463: (the Commission’s affiliate transaction rules and accounting safeguards will prevent below-cost transfers of assets from the SBC operating companies to its advanced services affiliates). *And see id.* at para. 468 (concluding that “an SBC/Ameritech advanced services affiliate will not derive unfair advantages from the activities between it and the incumbent that are permitted under the conditions.”)

¹³ *Id.* at para. 461.

¹⁴ *Id.*, n. 834 (emphasis added).

Commission.¹⁵ For example, in February 1999, the Commission found that the “preconditions for monopoly appear absent” in the consumer market for broadband service.¹⁶ Similarly, in June 2000, the Commission held that: “[t]he record before us, which shows a continuing decrease in consumer broadband choices within and among the various delivery technologies – xDSL, cable modems, satellite, fixed wireless, and mobile wireless - suggests that no group of forms or technology will likely be able to dominate the provision of broadband services.”¹⁷

Notably, in this latter order, the Commission detailed how the pricing of cable modem service has constrained the pricing of DSL service. For example, it described how SBC dropped its DSL prices in California by more than half in response to a decrease in the price of Excite@Home cable modem service, and it catalogued similar evidence of price competition from other providers and other technologies.

While the Commission has thus concluded that there is no dominant provider of broadband service, one thing is clear: if the Commission is wrong, it is certainly not the telephone companies that are dominant in the provision of this service. If there are *any* dominant firms in this market, they are cable operators. Cable operators were the first to enter the market, and they currently boast close to 75% of all residential and small business broadband subscribers.¹⁸ Together, the two largest cable modem providers – AT&T’s Excite@Home and Time Warner’s Road Runner – have far more residential subscribers than all DSL providers combined. Moreover, Commission staff predict that cable modem service will lead DSL service

¹⁵ As the Commission has previously concluded, broadband Internet service occupies a market that is separate and discrete from narrowband, traditional voice services. See *Inquiry Concerning the Deployment of Advanced Telecommunications Capability*, Report, 14 FCC Rcd 2398, 2406, 2407 (1999) (defining “broadband” as the capability of supporting in both directions a speed in excess of 200 kbps in the last mile). See also *id.* at 2407 (“whether a capability is broadband does not depend on the use of any particular technology or the nature of the provider”); *Rulemaking to Amend Parts 1,2,21, and 25 of the Commission’s Rules to Redesignate the 27.5-29.5 GHz Frequency Band, to Reallocate the 29.5-30.0 GHz Frequency Band, to Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services*, 15 FCC Rcd 11857 (2000) (*Fixed Wireless Competition Order*) at para. 18 (“[a]n increasing number of broadband firms and technologies are providing growing competition to incumbent LECs and incumbent cable companies, apparently limiting the threat that they will be able to preclude competition in the provision of broadband services. Both competitive LECs and incumbent LECs are expanding their use of DSL service, cable modem providers are providing substantial competition to DSL offerings, and satellite companies are offering one-way nationwide broadband services. Moreover, emerging broadband providers are likely to furnish even more choices.” See FCC Staff Report, *Broadband Today* at 42 (Oct. 1999) (arguing that cable’s dominance over broadband will be tempered not by dial-up services but rather by “alternative platforms to use for high speed access.”)

¹⁶ *Inquiry Concerning the Deployment of Advanced Telecommunications Capability*, 14 FCC Rcd 2398, 2423-24 (1999) (*First Advanced Services Report*).

¹⁷ *Fixed Wireless Competition Order* at para. 19.

¹⁸ FCC, High-Speed Services for Internet Access: Subscribership as of June 30, 2000 (released Oct 2000).

until at least 2007,¹⁹ while analysts posit that DSL will not be on a competitive bar with cable for four years or more.²⁰

The low market share of DSL providers in relation to the cable companies and the Commission's own predictions that the gap will continue cannot be squared with a conclusion that SBC's advanced services affiliates can, through the exercise of market power, raise prices by reducing their output. As the Commission recognized in the *BOC Classification Order* (and courts have repeatedly recognized), a low market share, such as is possessed by SBC's advanced services affiliates, is incompatible with Stiglerian market power.²¹

Moreover, while SBC's extremely low market share is, in itself, dispositive,²² an analysis of supply and demand elasticities confirms that SBC's advanced service affiliates do not have market power in their provision of advanced services. First, alternative broadband providers – including cable companies, satellite, fixed wireless providers, as well as competitive xDSL providers – have more than enough capacity to absorb all of SBC's xDSL subscribers in the event SBC attempted to raise its prices to anticompetitive levels. As stated in the *Fixed Wireless Competition Order*:

[a]n increasing number of broadband firms and technologies are providing growing competition to incumbent LECs and incumbent cable companies, apparently limiting the threat that they will be able to preclude competition in the provision of broadband services. Both competitive LECs and incumbent LECs are expanding their use of DSL service, cable modem providers are providing substantial competition to DSL offerings, and satellite companies are

¹⁹ FCC Staff Report, *Broadband Today* (Oct. 1999) at 27 and App. B, Chart 2 (*Broadband Today*).

²⁰ Bear Stearns Equity Reserch, *Byte Fight!* April 2000 at 57 (predicting 12.7 million cable modem customers in 2004 compared to 9.5 million DSL customers); Sanford C. Bernstein & Co. and McKinsey & Co., Inc. *Broadband!* (Jan. 2000) at 44 (“[w]e expect that cable’s initial lead and higher installed base combined with its closer and more natural tie to television will likely mean the persistence of the cable market-share lead over DSL into the 2004 time frame”).

²¹ *BOC Classification Order* at para. 83 (the ability to raise prices by restricting one’s own output “usually requires a large market share.”) See also *United States v. Aluminum Co. of America*, 148 F.2d 416, 424 (2nd Cir. 1945) (it is doubtful whether a 60% market share would constitute a monopoly, and certainly 33% is not.) And see, *Antitrust Law Developments*, Section of Antitrust Law, American Bar Association, Third Edition 1992 at 213-14 (a market share of less than about 40% virtually precludes a finding of monopoly power).

²² While the Commission has recognized that a firm with a high market share may not necessarily have market power – if, for example, there is high elasticity of supply and demand – an analysis of elasticities of supply and demand is not critical when a firm has a very low market share, as does SBC's advanced services affiliates. That is because it is extremely unlikely that the customers of a firm with a very low market share could not be absorbed by the other, much larger participants in the market if the firm attempted to raise its prices above competitive levels. It is for this reason that courts generally conclude that a market share of below 40% virtually precludes a finding of monopoly power. See *id.*

offering one-way nationwide broadband service. Moreover, emerging broadband providers are likely to furnish even more choices.²³

The Commission has projected that broadband cable service alone will be available to 61 million households by the end of 2000.²⁴ By way of contrast, SBC provides DSL service on fewer than 1 million lines. Moreover, analysts state that by year-end 2000, all major cable operators will have upgraded at least 70% of their plant to be cable of transmitting data at a speed of 750 MHz or above.²⁵ While a small percentage of SBC's xDSL customers may not yet have a cable modem option, those consumers have other options from competing LECs and wireless service providers, and they represent, in any event, a small minority of SBC's customer base. Moreover, SBC sells its xDSL services to ISPs with regional and national presences, and the prices it charges its ISP customers for xDSL service does not vary from location to location, depending upon whether a competing cable modem service is available in a particular community.

Second, users of broadband services are highly demand elastic. SBC sells its advanced services primarily to ISPs, which typically obtain xDSL service from more than one LEC, aggressively negotiate price discounts, and juggle their purchasing to reflect price differences among LECs. ISPs demonstrate by their actions every day that they are willing to shift their traffic to a rival of SBC if SBC raises its prices. Moreover, insofar as advanced services represent the cutting edge, consumers who purchase xDSL service directly from SBC tend to be highly sophisticated. There is no reason to believe that the purchasing decisions of these customers are not sensitive to changes in price or that they would be unwilling to shift their traffic to a rival of SBC if SBC raised its price.²⁶ Surely, the Commission would not have found that the "preconditions for monopoly appear absent" in the consumer broadband market were this not the case.²⁷

Third, given the present of such large, well-established competitors in the advanced services market, including AT&T, Time Warner, and other LECs and providers of wireless services, SBC's advanced service affiliates do not have cost structure, size, and resource advantages that would confer on them the ability to raise prices above the competitive levels.

²³ *Fixed Wireless Competition Order*, 15 FCC Rcd at 11864-65.

²⁴ *Broadband Today* at 26. See also *McKinsey Broadband Report* at 30-31 & Exhibits 22, 26 (forecasting that broadband cable will reach 63,680,000 households by year-end 2000).

²⁵ See *Bear Stearns Report* at 36. *Second Broadband Report* at 5-6 (there is at least one subscriber to high-speed services in zip codes serving 91% of the country's population). See also *Second Advanced Services Report* at para. 8 (deployment of advanced telecommunications capability is proceeding in a reasonable and timely fashion. Specifically, competition is emerging, rapid buildout of necessary infrastructure continues, and extensive investment is pouring into this segment of the economy).

²⁶ See *Competition in the Interstate Interexchange Marketplace*, 6 FCC Rcd 5880, 5887 (1991) (noting that business customers, as sophisticated and knowledgeable purchasers of telecommunications services, are highly demand-elastic).

²⁷ *First Advanced Services Report*, 14 FCC Rcd at 2423-24.

If all of this seems self-evident, that is because it is. Simply put, there is no credible basis upon which the Commission could conclude that SBC's advanced services affiliates, which are dwarfed in size by competitors who operate free from price regulation, are dominant in their provision of advanced services.

C. The D.C. Circuit decision does not alter the non-dominant status of SBC's advanced services affiliates.

The Commission's conclusion in the *Merger Order* that SBC's advanced services affiliates would be nondominant – a conclusion compelled by the facts and its contemporaneous analyses of the advanced services market – was in no way impugned by *Ascent v. FCC*. To the contrary, *Ascent v. FCC* was decided on grounds that have nothing to do with market power.

In *Ascent v. FCC*, the D.C. Circuit held that SBC's advanced services affiliates must comply with section 251. The court based its decision on two, inter-related grounds, both of which derive from the fact that Congress prohibited the Commission from forbearing from applying section 251(c) to an ILEC until that provision is fully implemented.

First, the court found persuasive arguments that the *Merger Order* “is the legal and practical equivalent” of forbearance. The court stated, in this regard: “Although the Commission has not explicitly invoked forbearance authority (in direct violation of § 10), to allow an ILEC to sideslip § 251(c)'s requirements by simply offering telecommunications services through a wholly owned affiliate seems to us a circumvention of the statutory scheme.”²⁸

Second, the court found that an affiliate that receives assets from the operating company and markets services previously provided by the operating company to customers previously served by the operating company must be deemed a successor or assign of the operating company for section 251 purposes. Here, again, the court based its decision on statutory construction, not a market power analysis. The court stated that Congress “has specified when an ILEC may avoid the Act's burdens by providing telecommunications services through a separate affiliate, and what services that affiliate may provide.”²⁹ It found “implausible” the Commission's successor or assign analysis and concluded:

[T]he Commission may not permit an ILEC to avoid § 251(c) obligations as applied to advanced services by setting up a wholly owned affiliate to offer those services. Whether one concludes that the Commission has actually forborne or whether its interpretation of “successor or assign” is unreasonable, the conclusion is the same: The Commission's interpretation of the Act's structure is unreasonable.³⁰

²⁸ Slip Op. at 7.

²⁹ *Id.* at 10.

³⁰ *Id.* at 11.

As noted, nothing in this decision is in any way inconsistent with the Commission's determination that SBC's advanced services affiliates lack market power in the provision of advanced services. Indeed, the court expressly recognized that the safeguards established in the *Merger Order* are designed to prevent BOC affiliates from acquiring market power.³¹ From the court's perspective, however, that was irrelevant. What mattered to the court was that Congress established clear the limits on the Commission's forbearance authority and the court viewed the *Merger Order* as an end-run around those limits.

Because the court did not purport to engage in a market power analysis and based its decision on considerations that had nothing do with market power, the Commission's conclusion that SBC's advanced services affiliates are not likely to possess market power is as valid and intact today as it was at the time of the *Merger Order*. That being the case, so too is the Commission's conclusion that SBC's advanced services affiliates are non-dominant, at least for as long as they comply with the safeguards set forth in the *Merger Order*.

To be sure, note 41 of the Merger Conditions states that the nondominant status presumes that the Advanced Services affiliate is not found to be a successor or assign of the incumbent LEC. In context, however, it appears that this language was not intended to address the situation in which SBC's advanced service affiliates are deemed successors or assigns of the SBC incumbent LECs simply because a court rejects the Merger Order's section 251 legal analysis. Rather, the footnote was intended to preserve the ability of the Commission to accord dominant status to SBC's advanced services affiliate(s) based on their conduct in the marketplace. More specifically, the purpose of the footnote was to ensure that, if those affiliates were deemed successors or assigns because of conduct, not expressly permitted by those conditions and inconsistent with their intent, they would likewise lose their non-dominant status. As explained below, this is the only interpretation of note 41 that can be reconciled with FCC precedent and reasoned analysis.

In its discussion in the Merger Order of the separate affiliate condition, the Commission expressly contemplated the possibility that the affiliate might be found to be a successor or assign of the ILEC. It recognized two contexts in which such a finding might occur. It recognized, first, that a court might reject the Commission's legal analysis and conclude that, notwithstanding SBC's full compliance with the letter and spirit of the separation requirements, its advanced services affiliate was, as a matter of law, a successor or assign of its operating companies for section 251 purposes. It recognized, second, that an SBC advanced services affiliate might be deemed a successor or assign of the ILEC strictly as a result of its own actions. It noted, in this regard, that "a successor or assign analysis is ultimately fact-based, and, at this time, SBC/Ameritech's advanced services affiliate has yet to engage in actual transactions with the incumbent or establish a course of conduct that will shed light on the degree of continuity."³² It warned that "if an SBC/Ameritech incumbent LEC and its advanced services affiliate behave

³¹ Section 272 "sets out a series of formal structural and transactional obligations intended to check LECs' incentive to leverage their bottleneck assets into market power over other telecommunications services." (Slip op. at 9).

³² *Merger Order* para. 458. It stressed, for this reason, that the presumption that the affiliate was not a successor or assign of the ILEC was rebuttable. (Id.)

in a manner inconsistent with the intent of the conditions or engage in activities beyond those expressly permitted in the conditions, the company bears the risk that the affiliate will be deemed a successor or assign of the incumbent LEC[.]”³³

Significantly, the Commission found that the consequences of a finding of successor or assign status should depend upon which of these two contexts resulted in the finding. It held that under the first scenario, following a nine-month transition period, SBC would no longer have to provide advanced services through a separate affiliate. In contrast, it held that, in the second scenario, SBC would be required to retain the separate affiliate for the provision of advanced services.

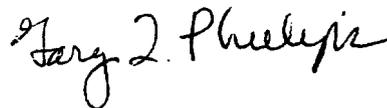
Footnote 41 does not, by its express terms, refer to or differentiate between these two contexts. It is reasonable to assume, however, that the Commission intended to withhold the presumption of non-dominance only if the successor or assign determination was made in the second context. As noted above, the Commission concluded that if SBC complies with the structural separation and transactional safeguards, it will lack market power. Therefore, SBC’s advanced services affiliate should lose its non-dominant status only if it engages in conduct not contemplated by the *Merger Order* or that directly violates the safeguards specified therein. In the absence of such conduct, nothing relevant to a market power analysis has changed. The mere fact that a court concludes – based on considerations that have nothing to do with market power – that the affiliate must be deemed a successor or assign of the ILEC for section 251 purposes should have no bearing on the status of that affiliate under sections 203 and 214 of the Act.

For all of these reasons, SBC’s advanced services affiliates remain non-dominant. Nevertheless, if the Commission concludes that those affiliates will lose their non-dominant status as a result of footnote 41, SBC respectfully requests that, before the court’s mandate issues, the Commission waive the application of footnote 41 or issue a declaratory ruling that SBC’s advanced services affiliates remain non-dominant in their provision of advanced services. As discussed above, SBC’s advanced services affiliates do not have market power in the provision of advanced services.

³³ *Id.* at para. 445.

Moreover, as the Commission has recognized, dominant carrier regulation imposes significant costs and burdens and can have undesirable effects on competition.³⁴ Under the circumstances, and particularly in light of section 706's command that the Commission encourage the deployment of advanced telecommunications capabilities through, *inter alia*, regulatory forbearance, the public interest would best be served if SBC's advanced services were permitted to continue providing service on a non-dominant basis.

Sincerely,



Gary L. Phillips

cc: C. Matthey
G. Reynolds
M. Carey

³⁴ See *BOC Safeguards Order* at paras. 88-92. See also *Competition in the Interstate Interexchange Marketplace, Notice of Proposed Rulemaking*, CC Docket No. 90-132, FCC 90-90, released April 13, 1990, at para. 98 ("the tariff review process may be functioning not so much as a safeguard against unreasonable rates, but as a means by which firms may insulate themselves from competitive market pressures. Thus, instead of protecting the public, our tariffing requirements may unnecessarily be denying or delaying the consumer benefits of rate decreases and new service offerings").