

demonstrate that it adheres to industry numbering administration guidelines and Commission rules.²⁰¹

J. Checklist Item 10 – Databases and Associated Signaling.

62. Section 271(c)(2)(B)(x) of the 1996 Act requires a BOC to provide “nondiscriminatory access to databases and associated signaling necessary for call routing and completion.”²⁰² In the *Second BellSouth Louisiana Order*, the Commission required BellSouth to demonstrate that it provided requesting carriers with nondiscriminatory access to: “(1) signaling networks, including signaling links and signaling transfer points; (2) certain call-related databases necessary for call routing and completion, or in the alternative, a means of physical access to the signaling transfer point linked to the unbundled database; and (3) Service Management Systems (SMS).”²⁰³ The Commission also required BellSouth to design, create, test, and deploy Advanced Intelligent Network (AIN) based services at the SMS through a Service Creation Environment (SCE).²⁰⁴ In the *Local Competition First Report and Order*, the Commission defined call-related databases as databases, other than operations support systems, that are used in signaling networks for billing and collection or the transmission, routing, or other provision of telecommunications service.²⁰⁵ At that time the Commission required incumbent LECs to provide unbundled access to their call-related databases, including but not limited to: the Line Information Database (LIDB), the Toll Free Calling database, the Local Number Portability database, and Advanced Intelligent Network databases.²⁰⁶ In the *UNE Remand Order*, the Commission clarified that the definition of call-related databases “includes, but is not limited to, the calling name (CNAM) database, as well as the 911 and E911 databases.”²⁰⁷

K. Checklist Item 11 – Number Portability.

63. Section 271(c)(2)(B) of the 1996 Act requires a BOC to comply with the number portability regulations adopted by the Commission pursuant to section 251.²⁰⁸ Section 251(b)(2)

²⁰¹ See *Second Bell South Louisiana Order*, 13 FCC Rcd at 20752; see also *Numbering Resource Optimization, Report and Order and Further Notice of Proposed Rulemaking*, 15 FCC Rcd 7574 (2000); *Numbering Resource Optimization, Second Report and Order, Order on Reconsideration in CC Docket No. 99-200 and Second Further Notice of Proposed Rulemaking in CC Docket No. 99-200, CC Docket Nos. 96-98; 99-200* (rel. Dec. 29, 2000).

²⁰² 47 U.S.C. § 271(c)(2)(B)(x).

²⁰³ *Second BellSouth Louisiana Order*, 13 FCC Rcd at 20753, para. 267.

²⁰⁴ *Id.* at 20755-56, para. 272.

²⁰⁵ *Local Competition First Report and Order*, 11 FCC Rcd at 15741, n.1126; *UNE Remand Order*, 15 FCC Rcd at 3875, para. 403.

²⁰⁶ *Id.* at 15741-42, para. 484.

²⁰⁷ *UNE Remand Order*, 15 FCC Rcd at 3875, para. 403.

²⁰⁸ 47 U.S.C. § 271(c)(2)(B)(xii).

requires all LECs “to provide, to the extent technically feasible, number portability in accordance with requirements prescribed by the Commission.”²⁰⁹ The 1996 Act defines number portability as “the ability of users of telecommunications services to retain, at the same location, existing telecommunications numbers without impairment of quality, reliability, or convenience when switching from one telecommunications carrier to another.”²¹⁰ In order to prevent the cost of number portability from thwarting local competition, Congress enacted section 251(e)(2), which requires that “[t]he cost of establishing telecommunications numbering administration arrangements and number portability shall be borne by all telecommunications carriers on a competitively neutral basis as determined by the Commission.”²¹¹ Pursuant to these statutory provisions, the Commission requires LECs to offer interim number portability “to the extent technically feasible.”²¹² The Commission also requires LECs to gradually replace interim number portability with permanent number portability.²¹³ The Commission has established guidelines for states to follow in mandating a competitively neutral cost-recovery mechanism for interim number portability,²¹⁴ and created a competitively neutral cost-recovery mechanism for long-term number portability.²¹⁵

L. Checklist Item 12 – Local Dialing Parity.

64. Section 271(c)(2)(B)(xii) requires a BOC to provide “[n]ondiscriminatory access to such services or information as are necessary to allow the requesting carrier to implement local dialing parity in accordance with the requirements of section 251(b)(3).”²¹⁶ Section 251(b)(3)

²⁰⁹ *Id.* at § 251(b)(2).

²¹⁰ *Id.* at § 153(30).

²¹¹ *Id.* at § 251(e)(2); *see also Second BellSouth Louisiana Order*, 13 FCC Rcd at 20757, para. 274; *In the Matter of Telephone Number Portability*, Third Report and Order, 13 FCC Rcd 11701, 11702-04 (1998) (*Third Number Portability Order*); *In the Matter of Telephone Number Portability*, Fourth Memorandum Opinion and Order on Reconsideration, CC Docket No. 95-116, at paras. 1, 6-9 (Jun. 23, 1999) (*Fourth Number Portability Order*).

²¹² *Fourth Number Portability Order* at para. 10; *In re Telephone Number Portability*, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 8352, 8409-12, paras. 110-116 (1996) (*First Number Portability Order*); *see also* 47 U.S.C. § 251(b)(2).

²¹³ *See* 47 C.F.R. §§ 52.3(b)-(f); *Second BellSouth Louisiana Order*, 13 FCC Rcd at 20758, para. 275; *First Number Portability Order*, 11 FCC Rcd at 8355 and 8399-8404, paras. 3 and 91; *Third Number Portability Order*, 13 FCC Rcd at 11708-12, paras. 12-16.

²¹⁴ *See* 47 C.F.R. § 52.29; *Second BellSouth Louisiana Order*, 13 FCC Rcd at 20758, para. 275; *First Number Portability Order*, 11 FCC Rcd at 8417-24, paras. 127-140.

²¹⁵ *See* 47 C.F.R. §§ 52.32, 52.33; *Second BellSouth Louisiana Order*, 13 FCC Rcd at 20758, para. 275; *Third Number Portability Order*, 13 FCC Rcd at 11706-07, para. 8; *Fourth Number Portability Order* at para. 9.

²¹⁶ Based on the Commission’s view that section 251(b)(3) does not limit the duty to provide dialing parity to any particular form of dialing parity (*i.e.*, international, interstate, intrastate, or local), the Commission adopted rules in August 1996 to implement broad guidelines and minimum nationwide standards for dialing parity. *Local Competition Second Report and Order*, 11 FCC Rcd at 19407; *Interconnection Between Local Exchange Carriers* (continued....)

imposes upon all LECs “[t]he duty to provide dialing parity to competing providers of telephone exchange service and telephone toll service with no unreasonable dialing delays.”²¹⁷ Section 153(15) of the Act defines “dialing parity” as follows:

. . . a person that is not an affiliate of a local exchange carrier is able to provide telecommunications services in such a manner that customers have the ability to route automatically, without the use of any access code, their telecommunications to the telecommunications services provider of the customer’s designation . . .²¹⁸

65. The rules implementing section 251(b)(3) provide that customers of competing carriers must be able to dial the same number of digits the BOC’s customers dial to complete a local telephone call.²¹⁹ Moreover, customers of competing carriers must not otherwise suffer inferior quality service, such as unreasonable dialing delays, compared to the BOC’s customers.²²⁰

M. Checklist Item 13 – Reciprocal Compensation.

66. Section 271(c)(2)(B)(xiii) of the Act requires that a BOC enter into “[r]eciprocal compensation arrangements in accordance with the requirements of section 252(d)(2).”²²¹ In turn, pursuant to section 252(d)(2)(A), “a state commission shall not consider the terms and conditions for reciprocal compensation to be just and reasonable unless (i) such terms and conditions provide for the mutual and reciprocal recovery by each carrier of costs associated with the transport and termination on each carrier’s network facilities of calls that originate on the network facilities of the other carrier; and (ii) such terms and conditions determine such costs on the basis of a reasonable approximation of the additional costs of terminating such calls.”²²²

(Continued from previous page) _____
and Commercial Mobile Radio Service Providers, CC Docket No. 95-185, Further Order On Reconsideration, FCC 99-170 (rel. July 19, 1999).

²¹⁷ 47 U.S.C. § 251(b)(3).

²¹⁸ *Id.* at § 153(15).

²¹⁹ 47 C.F.R §§ 51.205, 51.207.

²²⁰ See 47 C.F.R. § 51.207 (requiring same number of digits to be dialed); *Local Competition Second Report and Order*, 11 FCC Rcd at 19400, 19403.

²²¹ 47 U.S.C. § 271(c)(2)(B)(xiii).

²²² *Id.* § 252(d)(2)(A).

N. Checklist Item 14 – Resale

67. Section 271(c)(2)(B)(xiv) of the Act requires a BOC to make “telecommunications services . . . available for resale in accordance with the requirements of sections 251(c)(4) and 252(d)(3).”²²³ Section 251(c)(4)(A) requires incumbent LECs “to offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers.”²²⁴ Section 252(d)(3) requires state commissions to “determine wholesale rates on the basis of retail rates charged to subscribers for the telecommunications service requested, excluding the portion thereof attributable to any marketing, billing, collection, and other costs that will be avoided by the local exchange carrier.”²²⁵ Section 251(c)(4)(B) prohibits “unreasonable or discriminatory conditions or limitations” on service resold under section 251(c)(4)(A).²²⁶ Consequently, the Commission concluded in the *Local Competition First Report and Order* that resale restrictions are presumed to be unreasonable unless the LEC proves to the state commission that the restriction is reasonable and non-discriminatory.²²⁷ If an incumbent LEC makes a service available only to a specific category of retail subscribers, however, a state commission may prohibit a carrier that obtains the service pursuant to section 251(c)(4)(A) from offering the service to a different category of subscribers.²²⁸ If a state creates such a limitation, it must do so consistent with requirements established by the Federal Communications Commission.²²⁹ In accordance with sections 271(c)(2)(B)(ii) and 271(c)(2)(B)(xiv), a BOC must also demonstrate that it provides nondiscriminatory access to operations support systems for the resale of its retail telecommunications services.²³⁰

²²³ *Id.* § 271(c)(2)(B)(xiv).

²²⁴ *Id.* § 251(c)(4)(A).

²²⁵ *Id.* § 252(d)(3).

²²⁶ *Id.* § 251(c)(4)(B).

²²⁷ *Local Competition First Report and Order*, 11 FCC Rcd at 15966, para. 939; 47 C.F.R. § 51.613(b). The Eighth Circuit acknowledged the Commission’s authority to promulgate such rules, and specifically upheld the sections of the Commission’s rules concerning resale of promotions and discounts in *Iowa Utilities Board. Iowa Utils. Bd. v. FCC*, 120 F.3d at 818-19, *aff’d in part and remanded on other grounds, AT&T v. Iowa Utils. Bd.*, 525 U.S. 366 (1999). *See also* 47 C.F.R. §§ 51.613-51.617.

²²⁸ 47 U.S.C. § 251(c)(4)(B).

²²⁹ *Id.*

²³⁰ *See, e.g., Bell Atlantic New York Order*, 15 FCC Rcd at 4046-48, paras. 178-81 (Bell Atlantic provides nondiscriminatory access to its OSS ordering functions for resale services and therefore provides efficient competitors a meaningful opportunity to compete).

V. COMPLIANCE WITH SEPARATE AFFILIATE REQUIREMENTS – SECTION 272

68. Section 271(d)(3)(B) requires that the Commission shall not approve a BOC's application to provide interLATA services unless the BOC demonstrates that the "requested authorization will be carried out in accordance with the requirements of section 272."²³¹ The Commission set standards for compliance with section 272 in the *Accounting Safeguards Order* and the *Non-Accounting Safeguards Order*.²³² Together, these safeguards discourage and facilitate the detection of improper cost allocation and cross-subsidization between the BOC and its section 272 affiliate.²³³ In addition, these safeguards ensure that BOCs do not discriminate in favor of their section 272 affiliates.²³⁴

69. As the Commission stated in the *Ameritech Michigan Order*, compliance with section 272 is "of crucial importance" because the structural, transactional, and nondiscrimination safeguards of section 272 seek to ensure that BOCs compete on a level playing field.²³⁵ The Commission's findings regarding section 272 compliance constitute independent grounds for denying an application.²³⁶ Past and present behavior of the BOC applicant provides "the best indicator of whether [the applicant] will carry out the requested authorization in compliance with section 272."²³⁷

²³¹ 47 U.S.C. § 271(d)(3)(B).

²³² See *Implementation of the Accounting Safeguards Under the Telecommunications Act of 1996*, CC Docket No. 96-150, Report and Order, 11 FCC Rcd 17539 (1996) (*Accounting Safeguards Order*), Second Order On Reconsideration, FCC 00-9 (rel. Jan. 18, 2000); *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended*, CC Docket No. 96-149, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 21905 (1996) (*Non-Accounting Safeguards Order*), petition for review pending sub nom. SBC Communications v. FCC, No. 97-1118 (filed D.C. Cir. Mar. 6, 1997) (held in abeyance May 7, 1997), First Order on Reconsideration, 12 FCC Rcd 2297 (1997) (*First Order on Reconsideration*), Second Order on Reconsideration, 12 FCC Rcd 8653 (1997) (*Second Order on Reconsideration*), *aff'd sub nom. Bell Atlantic Telephone Companies v. FCC*, 131 F.3d 1044 (D.C. Cir. 1997), Third Order on Reconsideration, FCC 99-242 (rel. Oct. 4, 1999) (*Third Order on Reconsideration*).

²³³ *Non-Accounting Safeguards Order*, 11 FCC Rcd at 21914; *Accounting Safeguards Order*, 11 FCC Rcd at 17550; *Ameritech Michigan Order*, 12 FCC Rcd at 20725.

²³⁴ *Non-Accounting Safeguards Order*, *id.* at paras. 15-16; *Ameritech Michigan Order*, 12 FCC Rcd at 20725, para. 346.

²³⁵ *Ameritech Michigan Order*, *id.*; *Bell Atlantic New York Order*, 15 FCC Rcd at 4153, para. 402.

²³⁶ *Second BellSouth Louisiana Order*, 13 FCC Rcd at 20785-20786 at para. 322; *Bell Atlantic New York Order*, *id.*

²³⁷ *Bell Atlantic New York Order*, *id.*

VI. COMPLIANCE WITH THE PUBLIC INTEREST – SECTION 271(D)(3)(C).

70. In addition to determining whether a BOC satisfies the competitive checklist and will comply with section 272, Congress directed the Commission to assess whether the requested authorization would be consistent with the public interest, convenience, and necessity.²³⁸ Compliance with the competitive checklist is itself a strong indicator that long distance entry is consistent with the public interest. This approach reflects the Commission's many years of experience with the consumer benefits that flow from competition in telecommunications markets.

71. Nonetheless, the public interest analysis is an independent element of the statutory checklist and, under normal canons of statutory construction, requires an independent determination.²³⁹ Thus, the Commission views the public interest requirement as an opportunity to review the circumstances presented by the application to ensure that no other relevant factors exist that would frustrate the congressional intent that markets be open, as required by the competitive checklist, and that entry will therefore serve the public interest as Congress expected. Among other things, the Commission may review the local and long distance markets to ensure that there are not unusual circumstances that would make entry contrary to the public interest

²³⁸ 47 U.S.C. § 271(d)(3)(C).

²³⁹ In addition, Congress specifically rejected an amendment that would have stipulated that full implementation of the checklist necessarily satisfies the public interest criterion. See *Ameritech Michigan Order*, 12 FCC Rcd at 20747 at para. 360-366; see also 141 Cong. Rec. S7971, S8043 (June. 8, 1995).

under the particular circumstances of the application at issue.²⁴⁰ Another factor that could be relevant to the analysis is whether the Commission has sufficient assurance that markets will remain open after grant of the application. While no one factor is dispositive in this analysis, the overriding goal is to ensure that nothing undermines the conclusion, based on the Commission's analysis of checklist compliance, that markets are open to competition.

²⁴⁰ See *Second BellSouth Louisiana Order*, 13 FCC Rcd at 20805-06, para. 360 (the public interest analysis may include consideration of "whether approval . . . will foster competition in all relevant telecommunications markets").

SEPARATE STATEMENT OF COMMISSIONER KATHLEEN Q. ABERNATHY

Re: *Joint Application by SBC Communications, Inc., Southwestern Bell Telephone Company and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance Pursuant to Section 271 of the Telecommunications Act of 1996 To Provide In-Region, InterLATA Services in Arkansas and Missouri*, CC Docket No. 01-194

I fully support the Commission's order and write separately to comment on the difficult and complex questions regarding SBC's resale obligations in the context of its provision of DSL-related services. The Commission appropriately concludes in the foregoing order that, because we have never held that an incumbent LEC's DSL Internet access service — as opposed to a distinct end-user DSL transport service — is subject to section 251(c)(4), we cannot find that SBC is in violation of checklist item 14. Whether SBC's DSL Internet access service is subject to section 251(c)(4) turns on whether the provision of that service entails the provision of a "telecommunications service . . . at retail."¹ The Commission has prudently declined to reach a definitive conclusion on this issue in this adjudicatory proceeding, in light of the 90-day statutory deadline for decision and the fact that our ultimate resolution of this issue likely will have significant implications in other regulatory contexts. For example, our analysis of this question likely will affect our classification of advanced services provided by cable operators and other facilities-based Internet service providers; it also could affect our administration of the federal universal service mechanisms, since carriers contribute based on their end-user revenues from telecommunications services, but not information services. I look forward to addressing the appropriate regulatory treatment of incumbent LECs' DSL-based Internet access services in a separate rulemaking proceeding, in which we can thoroughly explore this complex issue based on comments from a broad range of parties.

I support the cautious approach we take today, but I write this statement to further explain my support for our conclusion that SBC is in compliance with checklist item 14. Based on the current record and existing precedent, it appears that SBC's end-user Internet access service does not entail provision of a telecommunications service at retail and, therefore, that SBC is not required to make that service available for resale under section 251(c)(4). I note that my analysis of this question is not free from doubt, and both I and the Commission may adopt a different approach in the future based on a more fully developed record. Yet I hope that, by framing the debate below, I will give parties a starting point in our future consideration of these issues.

SBC provides three separate categories of DSL-related services. First, through its affiliate Advanced Solutions, Inc. (ASI), SBC sells DSL transport services to business customers and to a small number of grandfathered residential customers.² Second, also through ASI, SBC

¹ 47 U.S.C. § 251(c)(4).

² Before merging with Ameritech in 1999, SWBT sold a DSL transport service directly to residential customers at retail. SBC Application at 51. Following the merger, ASI decided to cease providing a DSL transport service directly to end users as a stand-alone service, and to focus instead on the wholesale provision of DSL transport to ISPs (including its affiliated ISP). *Id.* at 51-52.

sells DSL transport services to ISPs, which, in turn, combine these services with enhanced functionalities to offer end-user subscribers DSL-based Internet access services. Third, through its affiliated ISP, Southwestern Bell Internet Services, Inc. (SBIS), SBC sells high-speed DSL Internet access services to end-user subscribers.

SBC acknowledges that the first category of services consists of telecommunications services provided at retail; therefore, pursuant to section 251(c)(4), SBC states that it makes those services available to CLECs for resale at the appropriate wholesale discount in Arkansas and Missouri.³ SBC contends, however, that the second and third categories of services respectively consist of *wholesale* telecommunications services and retail *information* services, and that, as a result, neither of these categories is subject to the resale requirement in section 251(c)(4). Based on my review of our existing precedent, I am inclined to agree that this is the most reasonable interpretation of the Act. Since there is no dispute about SBC's first category of services, I discuss below only the second and third categories.

DSL Transport Services Offered by ASI to ISPs

SBC offers DSL transport to ISPs, which then bundle that transport with their own enhanced functionalities and customer care to offer Internet access services to end users.⁴ Under the terms of the relevant SBC tariff, a customer of this DSL transport service is responsible for "providing all customer support to its End Users, and all marketing, billing, ordering, and repair for its End Users."⁵ The tariff also includes a volume discount plan, under which the monthly charge for the DSL transport service depends on the volume commitment the ISP has made.⁶

In the *Bulk Services Order*,⁷ the Commission determined that DSL transport services provided by incumbent LECs to ISPs generally will not be considered services provided "at retail." We observed that "bulk DSL services sold to Internet Service Providers are markedly different from the retail DSL services designed for individual end-user consumption."⁸ Unlike such retail services, DSL transport services sold to Internet service providers are designed to be "an input component to the Internet Service Providers' retail high-speed Internet service."⁹ Moreover, "DSL services sold to Internet Service Providers are not targeted to end-user

³ *Id.* at 52.

⁴ *Id.* at 54-58.

⁵ SBC Reply at 26 (quoting SBC Tariff F.C.C. No. 1, § 6.3.1).

⁶ *Id.* at 27 (citing SBC Tariff F.C.C. No. 1, §§ 6.4, 6.6).

⁷ See *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Second Report and Order, 14 FCC Rcd 19237 (1999) (*Bulk Services Order*).

⁸ *Id.* at 19244 ¶ 15.

⁹ *Id.* at 19245 ¶ 17.

subscribers, but instead are targeted to Internet Service Providers that will combine a regulated telecommunications service with an enhancement, Internet service, and offer the resulting service, and unregulated information service, to the ultimate end-user.”¹⁰ The Internet service provider “take[s] on the consumer-oriented tasks of marketing, billing, and collections to the ultimate consumer and accepting repair requests directly from the end-user.”¹¹ We incorporated this wholesale/retail distinction into our rules, which provide that “advanced telecommunications services sold to Internet Service Providers as an input component to the Internet Service Providers’ retail Internet service offering shall not be considered to be telecommunications services offered on a retail basis that incumbent LECs must make available for resale at wholesale rates to requesting telecommunications carriers.”¹² The D.C. Circuit upheld the *Bulk Services Order* in *ASCENT II*, holding that the Commission reasonably construed the statutory phrase “at retail.”¹³

Under the *Bulk Services Order* and section 51.605(c) of our rules, it seems clear that SBC’s tariffed DSL transport service for ISPs is a *wholesale* telecommunications service. This service accordingly is not subject to the resale obligation in section 251(c)(4), because that provision applies only to *retail* telecommunications services.¹⁴ As noted above, under SBC’s tariff, the ISPs themselves provide all customer-care functions as part of their own retail information services.¹⁵ SBC states that the ISPs alone may accept orders for their DSL-based Internet access service, and SBC accepts orders for its DSL transport service only from the ISPs.¹⁶ The ISPs are responsible for all installation costs, and they are obligated to accept repair requests directly from their end-user customers and to incur the costs of maintaining and operating help-desk functions.¹⁷ ISPs also are solely responsible for billing and collecting from their end-user customers.¹⁸ In sum, as with the Verizon tariff found to be a wholesale offering in the *Bulk Services Order*, SBC’s tariff “specifically contemplate[s] that the Internet Service Provider will be the entity providing to the ultimate end-user many services typically associated with retail sales, thus reinforcing our conclusion that the bulk DSL services are not retail services offered to the ultimate end-users.”¹⁹

¹⁰ *Id.*

¹¹ *Id.*

¹² 47 C.F.R. § 51.605(c).

¹³ *Association of Communications Enterprises v. FCC*, 253 F.3d 29 (D.C. Cir. 2001) (*ASCENT II*).

¹⁴ *See* 47 U.S.C. § 251(c)(4).

¹⁵ SBC Application at 56-57; SBC Reply at 26-30; SBC Tariff F.C.C. No. 1, §§ 6.3.1, 6.4, 6.6.

¹⁶ SBC Application at 56.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Bulk Services Order*, 14 FCC Rcd at 19244; *see* SBC Reply at 27-29 (comparing SBC tariff with Verizon tariff).

As the court noted in *ASCENT II*, “[i]f in the future an ILEC’s offering designed for and sold to ISPs is shown actually to be taken by end users to a substantial degree, then the Commission might need to modify its regulation to bring its treatment of that offering into alignment with its interpretation of ‘at retail,’ *but that is a case for another day.*”²⁰ Accordingly, if a CLEC could demonstrate that SBC’s DSL transport service is in fact being consumed by end users — as opposed to noting the “mere possibility” that such retail consumption *might* occur²¹ — that would require me to reassess my tentative conclusion that this offering is a wholesale service.²²

DSL Internet Access Services Offered by SBIS to End-User Subscribers

SBC also provides a high-speed DSL Internet access service to end users through SBIS, its affiliated ISP. SBC states that SBIS is the only entity that has a contractual relationship with end users who subscribe to this Internet access service.²³ SBIS representatives handle customer care, repair, and maintenance inquiries.²⁴ SBIS and SWBT jointly market the DSL-based Internet access service to end users. Under the terms of their agreement, SBIS pays SWBT for soliciting and accepting orders for SBIS.²⁵ SBIS also pays SWBT for a separate page on the customer’s bill, in the same manner that interexchange carriers often do, and that page bears the SBIS brand and the monthly customer charges for SBIS’s high-speed Internet access service.²⁶

The Commission discussed the appropriate regulatory classification of Internet access services at length in the *Report to Congress*. In that Report, we began by reaffirming our longstanding understanding that “the categories of ‘telecommunications service’ and ‘information service’ in the 1996 Act are mutually exclusive.”²⁷ Based on the statutory

²⁰ *ASCENT II*, 253 F.3d at 32 (emphasis added).

²¹ *Id.*

²² I agree with SBC that its previously offered “split-billing” option — under which SBC allowed customers of Internet service providers to pay SBC directly (rather than through the ISP) for SBC’s DSL transport service — does not compromise the wholesale nature of this DSL transport service. This billing arrangement did not somehow make Internet service providers the “ultimate consumer[s]” of SBC’s DSL transport service. *Bulk Services Order*, 14 FCC Rcd at 19245 ¶ 17. In any event, SBC’s elimination of this billing option, together with its modification of its website to make clear that SBC does not offer DSL transport service to end users at retail, clarify the wholesale nature of SBC’s tariffed DSL transport service. *See* SBC Application at 57-58.

²³ SBC Application at 59.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.* at 60.

²⁷ *Report to Congress*, 13 FCC Rcd at 11520 ¶ 39; *id.* at 11530 ¶ 59 (reiterating that the categories of “telecommunications service” and “information service” are “mutually exclusive”). *See also Implementation of the* (continued....)

definitions of these terms, our *Computer Inquiry* precedents, and the legislative history of the 1996 Act, we rejected the argument that “a service qualifies as a ‘telecommunications service’ whenever the service provider transports information over transmission facilities, without regard to whether the service provider is using information-processing capabilities to manipulate that information or provide new information.”²⁸ Rather, we stated that an entity is providing a telecommunications service “only when the entity provides a transparent transmission path, and does not ‘change . . . the form and content’ of the information.”²⁹ We therefore adopted a “functional approach,” under which the classification of a service depends on “the *nature* of the service being offered to customers.”³⁰

Applying this general framework to Internet access services, the Commission concluded that Internet access services are information services, not telecommunications services.³¹ The mere fact that such services are offered “via telecommunications” cannot suffice to render such services “telecommunications services.” By definition, information services “necessarily require a transmission component in order for users to access information.”³² Indeed, if we had found that any entity self-provisioning *telecommunications* were thereby providing a *telecommunications service* to end users, “it would be difficult to devise a sustainable rationale under which all, or essentially all, information services did not fall into the telecommunications service category.”³³ Thus, even though an Internet access service offered to end users “involves data transport elements . . . the provision of Internet access service crucially involves information-processing elements as well; it offers end users information-service capabilities *inextricably intertwined* with data transport.”³⁴ This intertwining of telecommunications and information-processing components signifies that an information service provider cannot be deemed to be offering separate services, each with a distinct legal status; rather, an ISP offers a single service — Internet access — which is best considered an information service.³⁵

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Non-Accounting Safeguards of Section 271 and 282 of the Communications Act of 1934, as Amended, FCC 01-140, CC Docket No. 96-149, ¶¶ 34-39 (rel. Apr. 27, 2001) (same).

²⁸ *Report to Congress*, 13 FCC Rcd. at 11520-21 ¶ 40.

²⁹ *Id.* at 11521 ¶ 41 (quoting 47 U.S.C. § 153(43)).

³⁰ *Id.* at 11530 ¶ 59 (emphasis added).

³¹ *Id.* at 11529-11540 ¶¶ 56-82.

³² *Id.* at 11529 ¶ 57.

³³ *Id.*

³⁴ *Id.* at 11539-40 ¶ 80 (emphasis added).

³⁵ *Id.* at 11539-40 ¶¶ 79-80. See also *Bulk Services Order*, 13 FCC Rcd at 19247 ¶ 20 (reaffirming that Internet access providers are information service providers, rather than telecommunications providers).

Based on this analysis, it appears that SBC's end-user DSL Internet access service is best characterized as an information service. Thus, if we were forced to resolve the classification issue posed in this proceeding — and I am persuaded that our precedents permit us to defer such resolution — it would follow that this service is not covered by the resale requirement in section 251(c)(4).

As a threshold matter, I emphasize that this approach would not rely in any respect on the particularities of SBC's corporate structure. That is, I do not consider it relevant that an SBC affiliate, SBIS, is providing the Internet access service in question. In *ASCENT I*, the D.C. Circuit made clear that the resale obligation in section 251(c)(4) applies to an incumbent LEC's data affiliate, just as it does to the incumbent LEC itself.³⁶ Thus, as SBC recognizes, there is no question that SBIS is *subject to* section 251(c)(4), no less than SWBT is; the pertinent question is whether that statutory provision *applies by its terms* to the DSL-based Internet access service at issue.³⁷ SBC argues persuasively that *ASCENT I* essentially requires us to “draw[] a circle that includes SWBT, ASI, and SBIS” and ask, “what DSL-related service is provided [by the combined entity] at retail?”³⁸ It appears that the Commission was correct in the *Report to Congress* in concluding that the data transport and computer processing functionalities that make up an Internet access service are “inextricably intertwined” and that, therefore, Internet access should be characterized as a single, indivisible information service.³⁹

I recognize that the *Report to Congress* primarily concerned the status of Internet access services offered by independent ISPs — *i.e.*, those not affiliated with incumbent LECs. Such ISPs, unlike ILEC-owned ISPs, “typically own no telecommunications facilities.”⁴⁰ While I look forward to exploring in a separate rulemaking proceeding whether there is any relevant distinction between affiliated and unaffiliated ISPs, I currently look for guidance to the Commission's analysis in the *Report to Congress*, where we said:

When the information service provider owns the underlying [transmission] facilities, it appears that it should itself be treated as providing the underlying telecommunications. *That conclusion, however, speaks only to the relationship between the facilities owner and the information service provider (in some cases, the same entity); it does not affect the relationship*

³⁶ *Association of Communications Enterprises v. FCC*, 235 F.3d 662, 668 (D.C. Cir. 2001) (“[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.”).

³⁷ See SBC Reply at 24.

³⁸ SBC Application at 60.

³⁹ *Report to Congress*, 13 FCC Rcd at 11539-40 ¶ 80.

⁴⁰ *Id.* at 11540 ¶ 81.

*between the information service provider and its subscribers.*⁴¹

Thus, the nature of the Internet access service provided to end-user subscribers does not appear to be affected by the relationship between the ISP (here, SBIS) and the facilities provider (here, SWBT). That end-user Internet access service is — at this point, based on our existing precedents — best considered an information service, irrespective of who provides it.

It does not appear that the Commission has ever held that an incumbent LEC's *information service* is subject to regulation under Title II of the Act, and there is much to be said for refraining from doing so on a going-forward basis. Looking beyond the legacy regulatory classification of the service provider, and focusing instead on the nature of the service being provided, would allow the Commission to develop a more consistent regulatory approach to advanced services and to reduce regulatory distortions that hamper intermodal competition. To be sure, the Commission's orders dealing with advanced services have muddied the waters in this regard. For example, the Commission has stated that "advanced services sold [by incumbent LECs] at retail . . . are subject to the discounted resale obligation."⁴² But I believe that such assertions should be read in light of the statutory language, which imposes such an obligation only on advanced *telecommunications* services provided at retail — not on advanced *information* services. Thus, blanket statements that "advanced services" or "DSL services" are subject to section 251(c)(4) appear to be inherently overbroad. In making such statements in the past, the Commission apparently was referring only to advanced *telecommunications* services, or DSL-based *telecommunications* services.

If SBC is providing a retail information service, rather than a retail telecommunications service, the question arises: Should SBC be compelled to provide separately a retail DSL transport service to residential customers? That is a question that I hope to explore in our upcoming rulemaking. As a general matter, though, it appears that incumbent LECs are under no *existing* federal obligation to offer DSL transport services on a retail basis.⁴³ As SBC concedes, the Commission's *Computer III* unbundling obligations require the company to make its underlying telecommunications functionality available to unaffiliated information service providers,⁴⁴ but I am not aware of any requirement under our *Computer III/Computer III* regime to offer this telecommunications functionality on a *retail* basis. Moreover, I am not persuaded by

⁴¹ *Id.* at 11534 ¶ 69 n.138 (emphasis added).

⁴² *Bulk Services Order*, 13 FCC Rcd at 19238 ¶ 3; *see also id.* ¶¶ 8, 10.

⁴³ *See SBC Reply* at 31-32 (citing *Local Competition Order*, 11 FCC Rcd at 15976-78 ¶¶ 965-68, *MCI Telecomms. Corp. v. SNET*, 27 F. Supp. 2d 326, 335 (D. Conn. 1998)).

⁴⁴ SBC Application at 61-62. Even if the Commission had definitively ruled on this record that SBC is providing an information service, I do not think we could have determined whether SBC's offering to unaffiliated ISPs complies with the prohibitions against nondiscrimination under *Computer III*. ISPs that believe that SBC is engaging in discriminatory or otherwise unlawful conduct should file a complaint with the appropriate state commission or with this Commission.

ASCENT's assertion that the *Bulk Services Order* implicitly held that "the incumbent LEC would still have to make available for Section 251(c)(4) resale xDSL-based advanced services provided to residential and business end-users."⁴⁵ While Verizon was offering both a retail DSL transport service for residential customers and a wholesale DSL transport service for ISPs, the Commission did not state or imply that it was necessary for a carrier to offer both kinds of telecommunications services.

Finally, it is important to recognize that, if the Commission ultimately concludes in a rulemaking proceeding that SBC's DSL-based information services are not subject to the resale requirement in section 251(c)(4), that would not deny competitors an opportunity to provide their own high-speed Internet access services. Most importantly, CLECs retain the ability to provide DSL-based Internet access service by purchasing unbundled loops and attaching their own DSLAM in the incumbent LEC's central office. CLECs also may resell CSAs to business customers and may obtain resale under section 251(b)(1).⁴⁶ Independent Internet service providers may purchase bulk DSL transport from SBC under its advanced services tariff. And, of course, facilities-based competitors such as cable operators can provide service without relying on incumbent LECs' networks at all. I therefore do not believe that an interpretation along the lines I suggest would have anticompetitive consequences, particularly because, in my experience, competitive carriers do not typically rely on section 251(c)(4) as a means of providing DSL-related services. Indeed, by focusing carriers on facilities-based entry strategies, such an interpretation of the Act likely would have highly procompetitive effects over the long term.

⁴⁵ ASCENT Comments at 10-11.

⁴⁶ 47 U.S.C. § 251(b)(1). Some commenters have suggested that SBC is imposing unreasonable restrictions on the resale of its DSL transport service in violation of section 251(b)(1). *See, e.g.*, Ex Parte Letter of Florida Digital Network, Inc., filed Nov. 7, 2001. As in the case of alleged violations of section 251(c)(4) or *Computer III*, I believe such allegations would be best resolved in a separate proceeding.

**SEPARATE STATEMENT OF
COMMISSIONER MICHAEL J. COPPS,
CONCURRING**

Re: *Joint Application by SBC Communications Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc., d/b/a/ Southwestern Bell Long Distance Pursuant to Section 271 of the Telecommunications Act of 1996 To Provide In-Region InterLATA Services in Arkansas and Missouri*

Today's decision is the closest of calls. Questions raised in the closing hours of deliberation, arguably going beyond the section 271 process, compel further consideration which the Commission today agrees to undertake in a new and separate proceeding to be initiated by the end of the year and completed as soon as possible next year. This proceeding could conceivably lead to changes in the implementation of the majority decision to authorize SBC to provide long-distance services in Missouri and Arkansas. With assurances for the timely disposition of a Notice of Proposed Rulemaking and completion of an Order on the extant issues, I have agreed, with no small reluctance, to concur in this decision.

Let me begin by noting that SBC has made laudable progress to open its local markets to competition and I commend the company for its significant efforts. I also commend the Arkansas and Missouri Commissions which have worked very hard to promote competition in their markets.

My major concern in this application is whether SBC has complied with an important checklist requirement – the obligation to ensure that telecommunications services are made available for resale. More precisely, the issue concerns whether SBC has met its obligation to make its DSL services available for resale. The majority concludes that our precedent is not adequately clear. While I believe it would have been preferable to resolve these issues here, I believe that a separate proceeding with a full record can clarify the situation and provide relatively prompt redress if the facts indicate the need for remedy.

This is a tremendously important issue. Through the Telecommunications Act of 1996, Congress sought to promote competition in all telecommunications markets, including especially the replacement of monopoly with competition in the local telecommunications market. At the heart of the Congressional framework is the clear requirement that Bell companies may enter the long-distance market only after they have opened their local markets to competition.

The 1996 Act provides for three modes of entry for competitors in the local market – the construction of new networks, the use of unbundled elements of the incumbent's network, and resale of the incumbent's services. Congress incorporated these three paths into the competitive checklist of section 271. I am committed to preserving all of these statutory paths for competitive entry.

I am seriously troubled that, for small business and residential customers, SBC does not make available for resale pursuant to section 251(c)(4) any DSL service offerings. SBC currently offers two types of broadband DSL services. First, SBC sells directly to large businesses. These services are retail offerings, and SBC makes them available at a wholesale discount to competitors wishing to resell them. For small businesses and residential customers, however, SBC generally provides DSL services only to its own Internet provider and to unaffiliated Internet providers. Citing the *AOL Bulk Services Order*, SBC claims that it is not providing DSL at retail, thus triggering no obligations under section 251(c)(4). Yet, a strong argument can be made that the *AOL Bulk Services Order* was premised on the expectation that there would be a retail offering from which discounts would be calculated.

The need to resolve these issues soon in the separate proceeding is made even starker when one considers the harmful impact of the failure to provide such an offering. SBC and other incumbents could attempt to use a DSL loophole that need not exist to spread beyond the provision of DSL services. Although there is some confusion in the record, SBC appears to have the ability to limit the provision of broadband DSL for Internet providers, affiliated or independent, to those customers who purchase its voice services. Customers may not be able to obtain a separate line for DSL services without also purchasing SBC's voice services. Thus, by tying the provision of broadband to the purchase of voice services, SBC might effectively limit competition for voice services as well. Not only should this issue be addressed in the separate proceeding, but I would also urge the Commission to pursue aggressively enforcement options should violations of rules that are outside the competitive checklist come to light, or even the existence of conditions tolerating such violations.

I understand the majority's conclusion that these issues raise complex and far-reaching questions that should be addressed in a general rulemaking. Under the circumstances, I support conducting and concluding an expeditious rulemaking in the close near term to answer these questions once and for all. I would expect that we will complete this proceeding with a full record that will allow us to promulgate clear rules that advance the pro-competitive objectives of the Congress and preserve the three paths of competitive entry.

SEPARATE STATEMENT OF COMMISSIONER KEVIN MARTIN

Re: *Joint Application by SBC Communications, Inc., Southwestern Bell Telephone Company and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance Pursuant to Section 271 of the Telecommunications Act of 1996 To Provide In-Region, InterLATA Services in Arkansas and Missouri, CC Docket No. 01-194*

I am pleased that the local exchange markets in Arkansas and Missouri are open to competition and that SBC will be permitted to compete for long distance service in those states. I am writing separately on the narrow issue of the high-speed Internet access service offered by SBIS. Some commenters argue that this service is available to end users “at retail,” and that therefore SBC must make the underlying DSL transport component available to competitive LECs pursuant to section 251(c)(4). SBC argues that this service is not subject to section 251(c)(4) because (1) this is an information service, not a “telecommunications service;” and (2) DSL transport is merely a *component* of the overall information service, and is not separately offered “at retail.” Accordingly, SBC argues that the obligations of section 251(c)(4), which are triggered only by services that are “telecommunications services” provided “at retail,” simply cannot apply.

Section 251(c)(4) imposes on incumbent LECs the duty “to offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers.” As today’s order states, SBIS is offering a “high-speed Internet access service.” The Commission has definitively concluded that “Internet access services are appropriately classed as information, rather than telecommunications, services.”¹ Moreover, the Commission has concluded that “the categories of ‘telecommunications service’ and ‘information service’ in the 1996 Act are mutually exclusive.”² While the Commission may ultimately address this issue in more detail, those who argue that this high-speed Internet access service provided to end users should be subject to section 251(c)(4) must show how, in light of the precedent described above, this is a “telecommunications service” being offered “at retail.”

¹ *Federal-State Joint Board on Universal Service*, Report to Congress, CC Docket No. 96-45, FCC 98-67 (rel Apr. 10, 1998) (“Report to Congress”) at ¶ 73. A “telecommunications service” is defined in the Act as a transmission of information of the user’s choosing “without change in the form or content of the information as sent and received.” 47 U.S.C. § 153(43). The Commission explained that “Internet access providers do not offer a pure transmission path; they combine computer processing, information provision, and other computer-mediated offerings with data transport.” Report to Congress at ¶ 73. The Commission summarized this distinction by explaining that “if the user can receive nothing more than pure transmission, the service is a telecommunications service,” and “if the user can receive enhanced functionality, such as manipulation of information and interaction with stored data, the service is an information service.” *Id.* at ¶ 59.

² Report to Congress at ¶ 12; see also *id.* at ¶ 59.