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December 19, 2002

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Re: Review of Regulatory Requirements for Incumbent LEC Broadband
Telecommunications Services, CC Docket No. 01-337

Dear Ms. Dortch:

In a November 15, 2002 *ex parte* submission in the above-captioned docket, SBC purports to offer “evidence” that existing tariff, cost support and other dominant carrier regulations designed to provide the transparency necessary for effective Commission oversight are no longer needed with respect to “broadband” services. SBC notes that its advanced services affiliate, ASI, was treated as a non-dominant carrier and excused from these regulations from September 2000 to September 2001 as part of the separate affiliate obligations imposed on SBC in connection with the SBC-Ameritech merger proceeding. SBC contends that its “track record” in dealing with ISPs during this earlier period demonstrates that there is little risk that market power abuse will go undetected if the Commission grants SBC’s petition to “remove dominant carrier regulation of ILEC broadband services.”¹

SBC does not, and could not, dispute that most ISPs in most local markets have *no* choice but the Bells for last mile broadband transport. Where there are no alternatives, market power generally exists. And as the record in this proceeding overwhelmingly demonstrates, duopoly *retail* competition with cable (where it exists) is patently inadequate to overcome the Bells’ anticompetitive incentives to overprice and underpromote DSL services to protect their high profit dial-up, second line, T1 and other legacy services – and to deny reasonable access requests from ISPs and carriers that might threaten that anticompetitive strategy. That is why independent ISPs in this and related proceeding have vigorously opposed the elimination of the existing tariffing and cost support regulations that remain important tools in the detection and deterrence of market power abuse. (As the Commission has tentatively

¹ November 15, 2002 SBC *Ex Parte* at 3.

December 19, 2002

Page 2

concluded in a related proceeding, the Bells' *retail* broadband Internet services are information services that are not subject to the Title II dominant carrier regulations at issue in this proceeding.)

SBC urges the Commission to disregard the marketplace realities based solely on SBC's claim that it treated unaffiliated ISPs fairly when ASI was excused from dominant carrier regulation (an exemption that the court of appeals ruled unlawful). Implicit in this reasoning, of course, is the assumption that competitive and regulatory conditions at the time that ASI was exempt from dominant carrier regulation are a good proxy for current conditions. That assumption is false.

SBC faces much *less* intramodal competition now than it did from September 2000 to September 2001. During much of this earlier period SBC faced at least some competition from independent "data LECs" that have since filed for bankruptcy (and, with one exception, have disappeared altogether). While they were in operation, these data LECs provided unaffiliated ISPs with an alternative to the Bells for last mile broadband transport in some local markets. Accordingly, even if SBC could show good behavior during this earlier period, that would merely confirm the importance of strengthening the unbundling and line sharing rules that are necessary to enable such intramodal competition (but that SBC and the other Bells seek to eliminate).

The 2000-2001 regulatory treatment of SBC and ASI is also different than the regulatory treatment that SBC seeks on a going forward basis. The Commission lifted dominant carrier regulation on ASI only after SBC agreed to maintain ASI as a *structurally separate* advanced services affiliate. But these separate affiliate obligations are no longer in effect, because they were conditioned on affirmance of the Commission's determination that ASI was exempt from the dominant carrier regulations (and thus ended when the court of appeals reversed the Commission's nondominance ruling).² Logically, there can be no finding that SBC is unlikely to exercise market power on the basis of evidence compiled under a regime of structural separation requirements that no longer exist.

It must also be emphasized that during the entire 2000-2001 time period SBC understood that there was a strong likelihood that its advanced services would in the near future again be subjected to dominant carrier regulation. The Commission's decision to free ASI of dominant carrier regulation was predicated on its finding that ASI was not a "successor or assign" of SBC's incumbent local exchange carrier operations. From the outset, both SBC and the Commission recognized that this ruling was subject to substantial legal challenges, and those legal challenges placed important constraints on SBC's behavior during the pendency of the

² See *ASCENT v. FCC*, 235 F.3d 662 (D.C. Cir. 2001). Pursuant to Paragraph 12 of Merger Condition I, SBC was freed of the requirements nine months after the court's decision became final.

December 19, 2002

Page 3

appeals of the merger order. If SBC had taken advantage of the temporary elimination of tariff and cost support requirements to, for example, enter into secret discriminatory deals with ASI or other favored ISPs, SBC would have risked having to offer such deals to *all* ISPs on a non-discriminatory basis upon reinstatement of the tariff filing requirement. In short, SBC's behavior during the 2000-2001 time period provides no information probative of the behavior that could be expected if SBC's broadband services were exempted altogether from dominant carrier regulation.

In all events, the behavior SBC touts does not support its claim that market forces led it to act as a model citizen during the 2000-2001 period. For example, SBC cites improvements to its OSS systems for advanced services while ASI was "nondominant." But SBC neglects to mention that the Commission recognized in the *SBC-Ameritech Merger Order* that SBC's OSS were deficient in the extreme and *mandated* improvements.³ Thus, these changes cannot be attributed to SBC responding to competition, but instead confirm that SBC will respond only to continued Commission oversight and regulation.

And SBC is simply wrong in claiming that the historical "evidence" that it proffers could support any finding that it declined to abuse its market power during the 2000-2001 period. The central piece of evidence proffered by SBC is the "fact" that SBC's wholesale DSL prices did not increase over the 2000-2001 period. But as independent ISPs were documenting to the Commission at that time, there was no need for SBC to *increase* rates to gain a competitive advantage because its *existing* rates and practices were already sufficient to preclude meaningful competition.⁴ Indeed, as EarthLink explained, the \$35 per month SBC charged ISPs for bare DSL transport service at that time was *more* than SBC charged for finished retail services in the Ameritech region.⁵

SBC also points to the "fact" that it grew its wholesale business from September 2000 to September 2001.⁶ That is neither surprising nor supportive of SBC's position, given the

³ *SBC-Ameritech Merger Order*, CC Docket No. 98-184 (2000) Condition III (Advanced Services OSS).

⁴ Comments of Brand X, CC Docket No. 95-20, at 6 (Apr. 16, 2001).

⁵ *Ex Parte* Letter from Kenneth Boley to Marlene Dortch, at 3 (Sep. 9, 2002).

⁶ SBC provides no support for these numbers, or explanation as to how they were calculated. The need for such backup is essential in order to verify SBC's claims. For example, SBC says that "[u]naffiliated ISPs became a larger portion of SBC's wholesale DSL Transport business during the period in which SBC operated as a non-dominant provider." November 15, 2002 SBC *Ex Parte* Letter at 4. Such calculations, however, require SBC to assign a monetary value to the access it provided to its affiliate ISP. Given that these transactions were not at arm's length, the determination of the proper value of these intracompany transfers is clearly subject to manipulation.

December 19, 2002

Page 4

explosive growth in demand for DSL services during this time period and the fact that ISPs in SBC's region rarely had (or have) alternative suppliers of broadband transport. Indeed, several ISPs even attempted "free" DSL offerings during this period on the (mistaken) assumption that they could use advertising and other value added service revenues to offset the costs of DSL transport that they purchased from the Bells. It is also telling that SBC provides no evidence regarding the number of unaffiliated ISP customers it has now or how those ISPs' subscriber bases compare to SBC's own retail customer base.

Finally, SBC claims that during the 2000-2001 time period it "implemented numerous systems and process improvements that benefited unaffiliated ISPs." These claims amount to little more than self-congratulatory rhetoric. SBC provides *no* hard performance data showing that unaffiliated ISPs were provisioned in the same time and at the same quality as SBC's ISP affiliate.⁷

SBC's ISP customers seem particularly unaware of SBC's alleged "focus[] on customer management" during this period.⁸ The pending *Computer III* proceeding is replete with evidence of discriminatory practices by SBC during this period. According to Brand X, SBC has asserted bogus technical restrictions on the facilities used by ISPs in order artificially to increase their costs.⁹ Even with "dramatic improvements," SBC's OSS systems were "non-functional."¹⁰ eVoice sums up its dealings with SBC as "death by a thousand cuts."¹¹

Perhaps the best evidence refuting SBC's claims here is its decision unilaterally and dramatically to change the terms and conditions of its DSL offerings to ISPs. In March 2001, SBC informed unaffiliated ISPs in California that to get DSL transport service, they would, *inter alia*, have to: (i) allow SBC to market high margin services over the DSL connection directly to the independent ISPs' customers; (ii) accept higher prices for DSL modems; (iii) accept a new \$50 surcharge for non-electronic orders (even though SBC's electronic ordering system remained unreliable); and (iv) pay SBC \$150 for any customer unable

⁷ SBC does cite data that purport to show a decrease in overall installation and repair intervals during the September 2000 to September 2001 time period, but provides no detail breaking out how performance levels compared for SBC's affiliated ISP versus unaffiliated ISPs. *See* November 15, 2002 SBC *Ex Parte* Letter at 5. Given that SBC has access to such data, it can only be assumed that discrimination persisted throughout the period.

⁸ November 15, 2002 SBC *Ex Parte* Letter at 7.

⁹ Comments of Brand X, CC Docket No. 95-20, at 6 (Apr. 16, 2001).

¹⁰ Reply Comments of California ISP Ass'n, CC Docket No. 95-20, at 6 (Apr. 30, 2001).

¹¹ Comments of eVoice, CC Docket No. 95-20, at 4 (Apr. 16, 2001).

December 19, 2002

Page 5

to self-install DSL.¹² And if there were any doubt as to whether these ISPs had real alternatives, SBC told complaining ISPs that they could “take it or leave it.”¹³

These same commenters also refute SBC’s *ipsi dixit* that “affiliated and unaffiliated ISPs received the same level of service with respect to provisioning, installation, maintenance, and repair.”¹⁴ SBC’s ISP gained “early or exclusive access to information regarding DSL infrastructure.”¹⁵ And SBC’s ISP benefited from superior ordering systems, loop qualification, and billing.¹⁶

SBC’s voluntary “commitments” would not prevent these and similar anticompetitive abuses. Most fundamentally, SBC has been successful in choking off competition by price squeezing its ISP rivals. SBC, however, makes no commitment to even provide minimal cost justification for its DSL transport charges, let alone reduce those charges toward competitive levels. On this record, any further weakening of regulatory protections in this area should be a non-starter.

Nor would SBC’s proposals prevent discrimination. SBC promises to post only “general terms and conditions” of its arrangements with individual ISPs.¹⁷ Without disclosure of the entire agreements, there is no way for ISPs to ensure that they are not being offered an inferior deal relative to other ISPs. In short, any requirement less than full disclosure of all essential terms of service would seriously impair the ability of the industry and the Commission to detect discrimination by SBC and the Bells.

Sincerely,

/s/ David L. Lawson

David L. Lawson

cc: C. Libertelli
M. Brill
J. Goldstein
D. Gonzales
L. Zaina

¹² Comments of California ISP Ass’n, CC Docket No. 95-20, at 19-20 (Apr. 16, 2001).

¹³ *Id.* at 20.

¹⁴ November 15, 2002 SBC *Ex Parte* Letter at 4.

¹⁵ Comments of California ISP Ass’n, CC Docket No. 95-20, at 12 (Apr. 16, 2001).

¹⁶ Comments of California ISP Ass’n, CC Docket No. 95-20, at 21-23 (Apr. 16, 2001).

¹⁷ November 15, 2002 SBC *Ex Parte* Letter at 7.