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Federal Communications Commission
Office of Secretary

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

In the Matter of)
)
Computer III Further Remand Proceedings:)
Bell Operating Company Provision of)
Enhanced Services; 1998 Biennial Regulatory)
Review – Review of *Computer III* and ONA)
Safeguards and Requirements)

CC Dockets Nos. 95-20, 98-10

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OPPOSITION OF EARTHLINK

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OPPOSITION OF EARTHLINK

Introduction and Summary

EarthLink, Inc. (“EarthLink”), by its attorneys, hereby opposes the “Petition for Declaratory Ruling or Waiver of OSS Same Access Requirement” filed by SBC Advanced Solutions, Inc. on August 11, 2004 (“SBC Petition”). EarthLink, established in 1994, is currently among the largest providers of Internet access services in the United States with approximately 5.3 million subscribers nationwide. Of these, approximately 1.2 million are broadband subscribers.

The SBC Petition is wrong on the law and the policy underlying the *Computer III* obligation for Bell Operating Companies (“BOCs”) to provide the same access to operations support systems (“OSS”) as are enjoyed by the BOCs’ affiliated information service operations. Parity of OSS is critical to competition among Internet service providers (“ISPs”). The SBC Petition, however, takes the position that the Commission *sub silentio* reversed itself on core *Computer III* safeguards. This is, of course, absurd and it is not the law. With regard to the waiver request, the SBC Petition fails to answer critical questions of whether the requested

waiver would serve the public interest or would, instead, sanction discrimination by SBC against unaffiliated ISPs.

Contrary to SBC's self-serving assertions of legal ambiguity, SBC-ASI, the affiliate that offers SBC's advanced services, is fully subject to *Computer III*. Further, the OSS safeguards under consideration in this proceeding are critical to a competitive market for ISP services. The Commission's decisions reviewing and approving mediated OSS access for CLECs have no legal relevance to the continuing importance of the *Computer III* "same" OSS requirement. Finally, SBC has failed to explain how the FCC would approve its proposed alternate mediated access arrangements for ISPs, and it has not explained what advantages the direct access OSS would provide to SBCIS. For these reasons, the Commission should reject SBC's request.

DISCUSSION

I. As SBC Has Conceded, SBC-ASI is Fully Subject to *Computer III*.

Contrary to SBC's self-serving assertions of "legal ambiguity," SBC-ASI is subject to *Computer III* and Commission action on the SBC Petition would be unnecessary if it were not. SBC has said so itself in the proceeding to obtain the FCC's Section 271 approval for Arkansas and Missouri (and two years after the merger approval), where SBC argued to the FCC that, with respect to SBC-ASI's DSL service, "the telecommunications component included in SB[C]IS's information service offering . . . is subject to unbundling under the Commission's Computer III requirements."¹ On reply in that same proceeding, SBC reiterated that "ASI has assumed all the obligations that SWBT would have if it (SWBT) were the entity providing the advanced

¹ "Brief in Support of the Joint Application By Southwestern Bell for Provision of In-Region, InterLATA Services in Arkansas and Missouri," CC Dkt. No. 01-194, at 61 (filed Aug. 20, 2001) (relevant pages attached hereto).

services.”² It is too late now for SBC to argue that SBC-ASI is not subject to *Computer III* or that the matter is ambiguous.

In addition to SBC’s own words, the Commission has also made clear that SBC-ASI is subject to *Computer III*. The *SBC Forbearance Order* has explained that tariffing forbearance “would not relieve ASI of ... its obligation under our *Computer Inquiry* rules to offer ISPs non-discriminatory access to the transmission capabilities underlying SBC’s Internet access services.”³ Moreover, in 1998, the Commission held that DSL services are “telecommunications services” under the Act and BOCs offering information services using DSL as an input must offer such DSL to competing ISPs under the *Computer III* framework.⁴ In that same year, the Commission also explained that *Computer III* applies to a “BOC affiliate.”⁵ The 1999 *SBC-Ameritech Merger Order* did not expressly or implicitly relieve SBC, or its LEC (“local exchange carrier”) affiliates, of these obligations. To the contrary, both the *SBC-Ameritech*

² Reply Brief of Southwestern Bell In Support of InterLATA Relief in Arkansas and Missouri, CC Dkt. No. 01-194, at 24 (filed Oct. 4, 2001) (relevant pages attached hereto).

³ *In the Matter of Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services*, Memorandum Opinion and Order 17 FCC Rcd. 27000, ¶ 18 (2002) (“*SBC Forbearance Order*”); *see also, id.*, at ¶ 14 (“forbearance action encompasses the tariffing requirements applicable to ASI under our *Computer Inquiry* rules”), ¶ 27 (detariffing conditions will still require SBC-ASI to meet *Computer Inquiry* mandates); *In the Matter of Amendment of Section 64.702 of the Commission’s Rules (Third Computer Inquiry)*, Report and Order, 104 F.C.C. 2d 958, ¶ 129 (1986) (subsequent history omitted) (“*Computer III*”) (“we find that CEI requirements are necessary for the BOCs”).

⁴ *In the Matter of Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Memorandum Opinion and Order, and Notice of Proposed Rulemaking, 13 FCC Rcd. 24011, ¶¶ 35-37 (1998).

⁵ *In the Matter of Computer III Further Remand Proceedings, Further Notice of Proposed Rulemaking*, 13 FCC Rcd. 6040, ¶ 91 (1998) (*Computer III* obligations apply to “the BOC affiliate, even where the basic service is solely located in, and owned by, the BOC affiliate, and not the BOC”).

Merger Order and associated merger conditions specified that SBC and its affiliates were required to comply with all extant laws.⁶

Moreover, SBC-ASI is a “successor or assign” of several of the entities identified as a “Bell Operating Company” in the Act.⁷ Indeed, the formation of SBC-ASI was premised on the notion that SBC-ASI would wholly step into the shoes of the BOC: all BOC advanced services customers at the time of the merger would be assigned to SBC-ASI; the BOC would transfer ownership of all existing advanced services assets and equipment to SBC-ASI without compensation; SBC-ASI would use the BOC’s “name, trademarks or service markets on an exclusive basis;” the affiliated BOC operating company would jointly market SBC-ASI’s services and perform customer care, as well as operations, installation, and maintenance functions for SBC-ASI; and affiliated BOC operating company employees and SBC-ASI employees would even share the same office buildings and work together on the same floors.⁸ These were the facts, in turn, that led the D.C. Circuit to declare “implausible the notion that a wholly owned affiliate providing telecommunications services with equipment originally owned by its ILEC parent, to customers previously served by its ILEC parent, marketed under the name

⁶ *In re Applications of Ameritech Corp., Transferor, and SBC Communications Inc., Transferee, for Consent to Transfer Control, Memorandum Opinion and Order*, 14 FCC Rcd 14712 (1999) (“*Merger Order*”), vacated in part *sub nom. Association of Communications Enters. v. FCC*, 235 F.3d 662 (D.C. Cir. 2001) (“*ASCENT*”). *Merger Order, Appendix C Merger Conditions*, ¶ 68 (“Performance or non-performance of these Conditions by SBC/Ameritech does not in itself constitute compliance or non-compliance with any federal... law or regulation...”); *Merger Order*, ¶¶ 356, 357 (“the merged firm must comply with any applicable Commission orders or rules in addition to the requirements of these conditions” and “adoption of SBC/Ameritech’s proposed conditions does not signify that, by complying with these conditions, SBC/Ameritech will satisfy its nondiscrimination obligations under the Act or Commission rules”).

⁷ 47 U.S.C. § 153(4) (2004).

⁸ *Merger Order*, ¶ 365.

of its ILEC parent, should be presumed to be exempted from the duties of the ILEC parent.”⁹ Further, SBC-ASI has itself asserted to the California Public Utilities Commission that “in the case of *Association of Communications Enterprises v. FCC*, 235 F.3d 662 (D.C. Cir. 2001), the U.S. Court of Appeals for the District of Columbia Circuit ruled that ASI must be considered a ‘successor or assign’ under the Telecommunications Act of 1996.”¹⁰

SBC’s assertion that it is not a “successor or assign” flatly contradicts the holding in *ASCENT*. In that case, the court found that SBC-ASI was an incumbent LEC subject to the duties of Section 251(c) of the Act by virtue of SBC-ASI’s affiliation with the BOC.¹¹ The court also rejected the FCC’s holding in the *Merger Order* that SBC-ASI is not a “successor and assign” of the BOC under the Act.¹² Moreover, the court rejected SBC’s contention that SBC-ASI lacks the market power advantages of the BOC: “the [SBC-ASI] affiliate structure is a *non sequitur* if an ILEC cannot use its local loop monopoly to leverage its position in the advanced service market.”¹³

After the court’s rejection of the Commission’s position that SBC-ASI was not a “successor or assign” of the BOC, the Commission properly treated SBC-ASI as a dominant carrier subject to dominant carrier tariffing.¹⁴ The subsequent January 18th one-page *per curiam*

⁹ *ASCENT*, 235 F.3d at 668.

¹⁰ *California ISP Association, Inc. v. Pacific Bell Telephone Company, et al.*, “Answer of SBC Advanced Solutions, Inc. (U-6346-C) to Complaint,” C.01-07-027, at n. 4 (Oct. 22, 2001) (relevant pages attached hereto).

¹¹ *ASCENT*, 235 F.3d at 667 (“We do not think that in the absence of the successor and assign limitation an ILEC would be permitted to circumvent § 251(c)’s obligations merely by setting up an affiliate to offer telecommunications services.”).

¹² *Id.*.

¹³ *Id.*, at 668.

¹⁴ *SBC Forbearance Order*, ¶ 16.

order¹⁵ simply permitted the merger to be consummated, by clarifying that the vacatur of the *Merger Order* applies only to matters that were the subject of the appeal, *i.e.*, the application of Section 251(c) to SBC-ASI. This ruling, however, did not retract or lessen in any way the *ASCENT* court’s holding and opinion regarding the affiliate relationship between SBC-ASI and the SBC BOCs or the rejection of the Commission’s presumption that SBC-ASI would not be treated as a BOC successor or assign.

Defendants’ contention that SBC-ASI is not a BOC as defined in the Act because SBC-ASI does not provide “telephone exchange service”¹⁶ misconstrues the plain language of the Act. Contrary to SBC’s statutory reading, the phrase “telephone exchange service” in both Section 251(h)(1)(A) and Section 153(4)(B) of the Act¹⁷ refers to the original incumbent LEC, not to SBC-ASI. Thus, for example, SBC-ASI meets the Section 153(4) definition of a “Bell Operating Company” because its predecessor (e.g., Pacific Telephone and Telegraph Company) is “such company that provides wireline telephone exchange service.” Indeed, Defendants’ interpretation of 251(h)(1) conflicts with the holding of *ASCENT*, for if SBC-ASI were excluded by statute from the definition of “incumbent local exchange carrier” by virtue of the fact that it does not provide “telephone exchange service,” then the Court’s controlling holding that Section 251(c) applies to SBC-ASI would plainly be in error.

Thus, the *Computer III* “same” OSS safeguard applies fully to SBC-ASI, and it is anything but “obsolete.”¹⁸

¹⁵ *Association of Communications Enterprises v. FCC, Order*, 2001 U.S. App. LEXIS 1499 (2001).

¹⁶ SBC Petition at n.4.

¹⁷ 47 U.S.C. §§ 251(h)(1)(A), 153(4)(B) (2004).

¹⁸ SBC Petition at 7.

II. “Same” OSS Access Is Critical to a Competitive ISP Marketplace

A. “Same” OSS Ensures That Independent ISPs Can Continue to Compete.

The Commission adopted the “same” OSS safeguard for good reason in *Computer III*, and it remains just as important today to ensure OSS access is comparably efficient for all ISPs. In the *BOC ONA Amendment Order*, the Commission determined that “we believe there are serious competitive questions raised by relegating independent ESPs to indirect access status. If, for instance, the BOCs’ enhanced services operation has real-time access to OSS information while an independent ESP receives only infrequent access to that same information, the playing field would be far from level.”¹⁹ The Commission required that only four specific OSS functions -- service order entry and status; trouble reporting and status; diagnostics, monitoring, testing, and network reconfiguration; and traffic data collection -- be offered to all competitive enhanced service providers because they are basic services “directly related” to the ESP’s use and management of BOC telecommunications services.²⁰ This standard followed from the Commission’s decision in *Computer III* to impose an “equal access” standard for interconnection generally. Under “equal access,” “we require the basic service functions utilized by a carrier-provided enhanced service to be available to others on an unbundled basis, with technical specifications, functional capabilities, and other quality and operational characteristics, such as installation and maintenance times, equal to those provided to the carrier’s enhanced services.”²¹

¹⁹ *In the Matter of Filing and Review of Open Network Architecture Plans*, Memorandum Opinion and Order, 5 FCC Rcd. 3103, ¶ 43 (1990) (“*BOC ONA Amendment Order*”).

²⁰ *In the Matter of Filing and Review of Open Network Architecture Plans*, Memorandum Opinion and Order on Reconsideration, 5 FCC Rcd. 3084, ¶ 26 (1990) (“*BOC ONA Reconsideration Order*”).

²¹ *Computer III*, ¶ 147.

The Commission also explained that “we will view any systematic differences between a carrier and its competitors . . . as inconsistent with the equal access standard.”²²

The Commission found that the “equal access” standard would serve the “public welfare by maximizing the availability of enhanced services to the public” and by allowing competition to “focus on the innovative, value-added features of the various enhanced services being offered,”²³ rather than based on the ownership of the last-mile network. The Commission rejected “comparability” or “rough comparability” standards because they would “reduce carrier incentives to develop truly equal forms of interconnection for enhanced services” and because such discretionary standards are more difficult to enforce than a standard of equality.²⁴

The ability to order services, as well as repairs and maintenance, of basic telecommunications services such as xDSL services on a parity with the BOCs’ ISP goes to the very core of competition in the Internet service provider business. OSS should provide ISP competitors with the ability to pre-order and order telecommunications services (such as xDSL), obtain installation and service dates, and a myriad of other functions with the same level of efficiency, accuracy, and reliability as the BOC enjoys. Without this, the ISP will be severely disadvantaged in the market and will be unable to compete with the BOC information service offerings, to the detriment of consumers.

The “same” OSS is a straightforward prophylactic safeguard that is easy to administer and best ensures that the OSS used by all ISPs, unaffiliated and affiliated, is equal. Clearly, the Commission should continue to apply this “bright line” rule, and not engage in the more complex

²² *Computer III*, n.209.

²³ *Computer III*, ¶ 149.

²⁴ *Computer III*, ¶ 150.

examinations of discerning which mediated access systems may be “comparably efficient.”²⁵

Notably, the “same” OSS requirement does not force SBC to use mediated access for SBCIS; rather, it is SBC’s business decision to arrange OSS for its affiliate, so long as it offers that same OSS to all competitors.

B. Realities of Today’s Marketplace Underscore the Need for Continuation of the “Same” OSS Safeguard.

These *Computer III* safeguards continue to be in the public interest, despite SBC’s erroneous contentions that “the broadband marketplace in which ASI competes is robustly competitive.” SBC Petition at 14. Accordingly, the following evidence indicates the overall lack of sufficient competitive pressure upon the SBC-ASI Service within the SBC region.

- “The record indicates that no third parties are effectively offering, on a wholesale basis, alternative local loops capable of providing narrowband or broadband transmission capabilities to the mass market.” *In the Matter of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Report and Order*, 18 FCC Rcd. 16978, ¶ 233 (2003), *partially vacated on other grounds, USTA v. FCC*, 359 F.3d 554 (2004) (“*TRO Order*”).
- According to FCC data, fixed wireless and satellite hold insufficient market share (just 1.3%) to be considered serious competition to SBC in any relevant market.²⁶

²⁵ *BellSouth Corp. v. FCC*, 162 F.3d 1215, 1225 (D.C. Cir. 1999) (Court affirms FCC’s decision to deny waiver from a “bright line” rule, especially where the waiver applicant “has never explained how the public interest would be served by granting its waiver request; instead it merely equates its own business interest with the public interest” and where “ ‘strict adherence to a general rule may be justified by the gain in certainty and administrative ease, even if it appears to result in some hardship in individual cases.’” *citing, Turro v. FCC*, 859 F.2d 1498, 1500 (D.C. Cir. 1988)).

²⁶ *High-Speed Services for Internet Access: Status as of December 31, 2003*, Chart 2 – High-Speed Lines by Technology (rel. June 8, 2004) (“*FCC June 2004 High-Speed Report*”); *see also, In the Matter of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Report and Order*, 18 FCC Rcd. 16978, ¶ 231 (2003), (“*TRO*”), *partially vacated and remanded, USTA v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) (“The record indicates that, at present, fixed wireless and satellite services remain nascent technologies, with limited availability, when used to provide broadband services to the mass market.”).

- Broadband over power lines (“BPL”) is not a significant entrant in either retail or wholesale markets.²⁷ In a May 2004 survey of alternative broadband services, SBC was able to list only two commercial roll-outs of BPL, at least one of which was not in SBC territory.²⁸

Even if retail cable modem services were included in the relevant market for wholesale broadband transport (which they should not be) and/or providers of retail cable modem services were considered participants in the relevant wholesale broadband transport market (which would also be incorrect), the market still would not be competitive; rather the market so defined is at best a duopoly in which each duopolist holds market power.²⁹

²⁷ *TRO Order*, ¶ 232 (“Finally, we note that other technologies that can substitute for loops in providing narrowband and broadband service are currently under development. For example, some companies are experimenting with delivering narrowband voice service via power lines. Such technologies have not been deployed beyond an experimental basis (e.g., technical trials) at this time.”)(footnote omitted).

²⁸ “Competition in the Provision of Voice Over IP and Other IP-Enabled Services,” CC Dkt. No. 04-36, at A-13 (filed May 28, 2004) (referencing BPL roll-outs in Virginia and Ohio).

²⁹ “In a duopoly, a market with only two competitors, supracompetitive pricing at monopolistic levels is a danger.” *FTC v. H.J. Heintz*, 246 F.3d 708, 724 (D.C. Cir. 2001); *In the Matter of Application of Echostar Communications Corp., Hearing Designation Order*, 17 FCC Rcd. 20559, ¶ 100 (“courts have generally condemned mergers that result in duopoly”), ¶ 103 (“existing antitrust doctrine suggests that a merger to duopoly or monopoly faces a strong presumption of illegality”) (2002); United States Dept. of Justice Antitrust Div. and Federal Trade Commission, *1992 Horizontal Merger Guidelines*, 57 Fed. Reg. 41552, § 0.1 (1992) (“*Merger Guidelines*”)(“where only a few firms account for most of the sales of a product, those firms can exercise market power, perhaps even approximating the performance of a monopolist . . .”). The Commission has held that “both economic theory and empirical studies suggest that a market that has five or more relatively equally sized firms can achieve a level of market performance comparable to a fragmented, structurally competitive market.” *In the Matter of 2002 Biennial Regulatory Review—Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, Report and Order and Notice of Proposed Rulemaking*, 18 FCC Rcd. 13620, ¶ 289 (2003); *see, In the Matter of Personal Communications Industry Ass’n, Memorandum Opinion and Order and Notice of Proposed Rulemaking*, 13 FCC Rcd. 16857, ¶¶ 22, 23 (1998) (declining to find the CMRS marketplace sufficiently competitive where some of six potential competitive PCS licensees may not have begun to offer service).

- For “a typical local broadband market, the HHI ranges between approximately 5000 and 5400. The above figures indicate that the typical broadband internet market is very highly concentrated.”³⁰
- Commission statistics show that 14.9% of U.S. zip codes are served by (*i.e.* receive at least a single high-speed line over any technology at any price and any quality level) just one provider and another 17.1% are served by just two providers.³¹
- As of December 31, 2003, ADSL and cable accounted for 91.9% of all high-speed lines in the U.S. and for 97.5% of all high speed lines in the residential and small business market.³² Of those ADSL lines, incumbent LECs have a 95.0% market share, with competitive LECs accounting for only 5.0%.³³
- In several SBC states, monopoly or duopoly market power exists in many communities. For example, according to FCC data, in Arkansas, Kansas, Missouri, and Nevada, 40% or more of the zip code areas are served by just one or two providers.³⁴ It should be kept in mind that this percentage represents only the number of zip codes in a state with at least one high-speed line in service at any price, over any technology, at any level of quality. Accordingly, they likely

³⁰ *Rulemaking to Amend Parts 1, 2, 21, and 25 of the Commission’s Rules, Notice of Proposed Rulemaking and Memorandum Opinion and Order*, 18 FCC Rcd. 6722, ¶ 123 (2003). The Herfindahl-Hirschman Index, or HHI, a well-accepted measure of market concentration used by the U.S. Department of Justice and the Federal Trade Commission, is described at Section 1.5 of the *Merger Guidelines*. The HHI score is the sum of the squares of the market shares of each platform. The index divides the spectrum of market concentration into three categories: “unconcentrated” for markets with an HHI of less than 1,000; “moderately concentrated” for markets with HHI between 1,000 and 1,800; and “highly concentrated” for markets with an HHI above 1,800. *Merger Guidelines*, § 1.5. We note that the FCC data does not include non-incumbent LEC ADSL on a state-by-state basis. However, if included, it would be unlikely to change the HHI analysis in any significant way since non-incumbent LEC ADSL comprises only 5% of ADSL nationally. In fact, on a national level, with 5% non-incumbent LEC ADSL, 28.7% incumbent LEC DSL, 58% cable, and 8% “other,” the HHI is 4,312, which is still a very highly concentrated market. *FCC June 2004 High-Speed Report*, Table 5 – High-Speed Lines by Type of Provider as of December 31, 2003.

³¹ *FCC June 2004 High-Speed Report*, Table 12 – Percentage of Zip Codes with High-Speed Lines in Service.

³² *FCC June 2004 High-Speed Report*, Table 1 – High Speed Lines and Table 3 – Residential and Small Business High Speed Lines.

³³ *FCC June 2004 High-Speed Report*, Table 5 – High-Speed Lines by Type of Provider as of December 31, 2003.

³⁴ *FCC June 2004 High-Speed Report*, Table 13 – Percentage of Zip Codes with High-Speed Lines in Service as of December 31, 2003.

overstate the level of competition (understate the extent of monopoly and duopoly market power) by including zip codes where one or more providers provides very few if any lines that are comparable in speed, price, or quality to the SBC-ASI DSL service.

Even where the monopoly has been reduced to a duopoly, SBC is a significant player:

- A recent study by the Leichtman Research Group shows that incumbent LEC ADSL exceeded cable in net adds for the First Quarter, 2004.³⁵
- The Pew Internet & American Life Project confirms that “DSL now has a 42% share of the home broadband market” compared with cable’s 54% share. According to the Pew Study, fixed-satellite and wireless providers captured just 3% of the market. The Pew Study also confirms the FCC data that 17% of consumers are served by just one last mile broadband provider.³⁶ Thus, incumbent LECs, including SBC, are now roughly equal partners in the broadband duopoly/monopoly.
- According to the FCC, SBC’s ADSL in California leads cable in market share: ADSL has 49.6% and cable has 41.0% of the market for high-speed lines.³⁷

In the Commission’s still on-going proceeding addressing the appropriate regulatory classification for wireline broadband services, the State of California and the California Public Utilities Commission entered into the record the following findings:

- “In California, SBC, and other incumbent LECs, continue to be the sole providers of broadband transmission service to nearly half of all residential customers in the state who have access to broadband service.”³⁸
- “California does not believe that the current state of intermodal broadband competition can be described as effective, price constraining competition. At

³⁵ “A Record 2.3 Million Add Broadband in First Quarter of 2004,” Leichtman Research Group Press Release (May 11, 2004). This study also confirms that Covad, the only competitive provider of broadband among the top twenty providers, has approximately 5.3% of the DSL market share. *Id.*

³⁶ Pew Internet Project Data Memo, at 2 and 6 (April 2004), *found at* http://www.pewinternet.org/pdfs/PIP_Broadband04.DataMemo.pdf.

³⁷ *FCC June 2004 High-Speed Report*, Table 7 – High-Speed Lines By Technology as of December 30, 2003.

³⁸ Reply Comments of the People of the State of California and the California Public Utilities Commission, CC Docket Nos. 02-33, 95-20, 98-10, at 2 (filed July 1, 2002) (“CA Wireline Broadband Reply Comments”).

best, there currently is a duopoly of the incumbent LEC and the cable modem provider. But for many customers, *i.e.*, residential customers who do not have access to cable broadband and the majority of small and medium sized business customers, the incumbent LEC is the sole provider of broadband services. As a result of active regulatory actions in California, competitive LECs were able to provide DSL services in California earlier than elsewhere. However, in the last two years, much of that competition has evaporated as competitors offering DSL services in competition with the incumbent LEC have exited the market. While there were three major wholesale providers of DSL service in competition with Pacific Bell/SBC in 1997, currently only one major non-ILEC provides DSL service in California, and SBC/Pacific owns equity in that company.”³⁹

- “Forty-five percent of California’s population with broadband access (including vast majority of San Francisco, San Jose, Long Beach, Oakland, and Stockton) can only get DSL service and cannot get cable modem service.”⁴⁰
- “According to an internal study by the CPUC staff, 35% of Californians live in communities where DSL is the only broadband service choice, while 21% of Californians live in communities that have neither cable modem nor DSL service. Only 30% of the state’s population live in communities where both DSL and cable modem services are available. Because of DSL’s lower upgrade cost and faster upgrade time frames, incumbent LECs may continue to dominate in providing broadband services in California.”⁴¹
- “Currently, one of three California residents live in areas where DSL service is the sole means of gaining broadband transport to an ISP. The incumbent LECs are the dominant, and in many cases, the exclusive provider of broadband service in California. Certain customers in discrete metropolitan areas may also obtain transport to the Internet from cable operators via a cable modem transmission service over cable facilities; however, in California, primarily because of the substantial cost in upgrading cable facilities to provide cable modem service, such service is limited to certain suburban areas with spotty coverage in downtown urban areas. Other transport methods of accessing the Internet use wireless, broadcast, and unlicensed spectrum technologies. These technologies for transport to the Internet, however, are not widely available to California customers as a viable alternative to either DSL service or cable modem service.”⁴²

³⁹ Reply Comments of the State of California and the California Public Utilities Commission, CC Dkt. 01-337 at 12 (filed April 22, 2002) (“CA Dom/Nondom Reply Comments”)(footnotes omitted).

⁴⁰ *Id.* at 17.

⁴¹ *Id.*, at 14-15. *See also, id.*, Appendix A (pie chart of DSL, cable and other in California).

⁴² Comments of California, CC Dkt. 02-33 at 5-6 (filed May 3, 2002).

Further, the following HHI analysis using FCC data on either a national or SBC state-by-state basis shows that the broadband market (which includes all broadband lines, regardless of whether they are offered at wholesale to independent ISPs) is currently far more concentrated than a market with an HHI score of 1,800, which is the score the Department of Justice considers indicative of a “highly concentrated” market:

HHI ANALYSIS OF THE BROADBAND MARKET USING FCC DATA⁴³

	ADSL (%)	Cable (%)	Other (%)	HHI
National	33.7	58.3	8.0	4,598.6
Arkansas	38.2	54.6	7.2	4,496.3
California	49.6	41.0	9.5	4,226.2
Connecticut	37.7	58.6	3.8	4,864.8
Illinois	42.8	45.4	11.8	4,031.4
Indiana	30.9	61.3	7.8	4,773.9
Kansas	23.9	70.0	6.1	5,504.7
Michigan	20.6	72.0	7.4	5,663.7
Missouri	41.5	50.5	8.0	4,338.7
Nevada	24.7	*	*	Not known
Ohio	31.1	61.1	7.8	4,760.0
Oklahoma	37.0	*	*	Not known
Texas	40.1	53.0	6.9	4,465.6
Wisconsin	24.6	68.4	7.0	5,337.5

* Data withheld by the FCC to maintain firm confidentiality.

As the HHI analysis indicates, even when retail broadband lines are included, the market is extremely concentrated, which strongly indicates the absence of effective competition.

III. The Commission Has Not Superseded the Computer III “Same” OSS Requirement.

The SBC Petition fails to cite to even a single FCC precedent supporting the proposition that the Commission’s decisions in the *BOC ONA Reconsideration Order* and affirmed in the

⁴³ State data are based on *FCC June 2004 High-Speed Report*, Table 7 – High-Speed Lines By Technology as of December 30, 2003, and national data are based on *FCC June 2004 High-Speed Report*, Chart 2—High-Speed Lines by Technology.

BOC ONA Further Reconsideration Order has been “effectively repudiated.”⁴⁴ Instead, SBC takes the position that the Commission has accepted mediated access in the Section 251 and 271 contexts, and so it should do so in the *Computer III* context, as well.⁴⁵

The SBC Petition, however, rests on the false premise that *any* mediated OSS access would be acceptable. This is not the case in the Commission’s Section 251 and 271 review, where the Commission has required for the BOC to demonstrate that “the quality of an unbundled network element [i.e., OSS], as well as the quality of access to such element, that an incumbent LEC provides to a requesting carrier shall be at least equal in quality to that which the incumbent LEC provides to itself.” 47 C.F.R. § 51.311(b). As the Commission explained,

We thus conclude that an incumbent LEC must provide nondiscriminatory access to their operations support systems functions for pre-ordering, ordering, provisioning, maintenance and repair, and billing available to the LEC itself. Such nondiscriminatory access necessarily includes access to the functionality of any internal gateway systems the incumbent employs in performing the above functions for its own customers. For example, to the extent that customer service representatives of the incumbent have access to available telephone numbers or service interval information during customer contacts, the incumbent must provide the same access to competing providers. Obviously, an incumbent that provisions network resources electronically does not discharge its obligation under section 251(c)(3) by offering competing providers access that involves human intervention, such as facsimile-based ordering.⁴⁶

As discussed more fully below, however, the SBC Petition fails to demonstrate that the OSS for independent ISPs would meet the relevant standard of “comparable efficiency.”

⁴⁴ SBC Petition at 7.

⁴⁵ SBC also wrongly asserts that the *Computer III* nondiscrimination standard is less stringent than the Section 251 nondiscrimination standard. SBC Petition at 12. Contrary to SBC’s claims, *Computer III* requires nondiscrimination, a standard which exceeds the general Section 202 mandate for no “unreasonable” discrimination. In *Computer III* (¶ 148), the Commission adopted an “equal access” standard in order that “basic facilities be available on the same terms to all participants in the enhanced services marketplace.” Thus, the *Computer III* nondiscrimination standard is at least as stringent as the Section 251 nondiscrimination standard.

⁴⁶ *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, First Report and Order*, 11 FCC Rcd. 15499, ¶ 523 (1996).

IV. SBC Fails to Show that Separate OSS Would be Comparably Efficient.

In the *BOC ONA Reconsideration Order*, the Commission deliberately established the “same” access requirement because the BOCs had failed to show that “the indirect gateway access to OSS that the BOCs propose to offer ESPs is comparably efficient to direct access.” On reconsideration of that decision, the Commission confirmed that the “same” OSS would be required “until the BOCs can demonstrate that indirect access and direct access to the OSS services specified in that order are comparably efficient”⁴⁷ The Commission further explained that “[i]n evaluating whether interconnection is comparably efficient we use[] such factors as: absence of systematic differences between basic service access given to the carrier and to others, end-user perception of equality, and absence of a difference in the ability of competitors to provide their enhanced services.”⁴⁸ Thus, “BOCs may demonstrate comparability on a service-specific basis, consistent with CEI standards, at a later date.”⁴⁹

Even if the Commission were to consider a waiver of the “same” OSS requirement (which it should not), however, the SBC Petition fails to answer the essential question of whether independent ISPs that are offered mediated OSS access will have a service that is comparably efficient to the direct access OSS enjoyed by SBC’s ISP. Indeed, the SBC Petition fails even to provide the facts to make that determination.⁵⁰ It offers no facts, for example, describing the

⁴⁷ *In the Matter of Filing and Review of Open Network Architecture Plans, Memorandum Opinion and Order on Reconsideration*, 8 FCC Rcd. 97, ¶ 4 (1993) (“*BOC ONA Further Reconsideration Order*”).

⁴⁸ *Id.*, n.12.

⁴⁹ *Id.*, ¶ 4.

⁵⁰ Thus, whether or not “the Bureau itself now has a wealth of experience of its own in reviewing the adequacy of OSS offerings” (SBC Petition at 12), SBC has failed to provide a comprehensive

direct access OSS that would be enjoyed by SBC's ISP. Further, the SBC Petition does not attempt to present facts regarding two separate OSS systems that would be essential to evaluate them according to the CEI factors.⁵¹ A CEI evaluation would necessarily encompass such questions as: What systemic differences would exist between the two OSSs? Would consumers perceive any differences in the enhanced services stemming from the differences in the OSSs? Does the SBC ISP have more favorable access to information (such as pre-qualification data), access to databases (i.e., real-time access), or means of checking on the status of orders?

A public examination of the facts of the separate OSS under the comparably efficient standard is certainly necessary before the Commission can determine whether the grant of the "same" OSS waiver is in the public interest. The Declaration of Richard Deitz suggests that significant systemic advantages would benefit SBCIS relative to all unaffiliated ISPs by permitting SBCIS to have direct access to SBC-ASI's OI&M OSS systems. For example, calling it an "inefficient business model," Mr. Deitz notes that without full integration SBCIS will be unable to test the SBCIS and SBC-ASI networks on a real-time and end-to-end basis.⁵² However, under the plan SBC proposes, unaffiliated ISPs would be denied access to that functionality. In other words, the "efficiencies" will only establish that the unaffiliated ISPs' OSS is technically and operationally inferior to that offered to SBCIS. As such, the SBC Petition is not adequate and must be rejected as inconsistent with the broader "comparably efficient" *Computer III* law and the sound and successful policies that underlie it.

overview of the proposed direct access OSS to be enjoyed by SBC's ISP and how that compares with the mediated access OSS for competing ISPs.

⁵¹ Similarly, SBC fails to support its contention that "this relief would have no material adverse affect (sic) on unaffiliated ISPs." SBC Petition at 10.

⁵² Declaration of Richard Deitz at 2 (¶ 3).

V. SBC Has Failed to Demonstrate Sufficient Cause for a *Computer III* Waiver

Finally, the SBC Petition fails to demonstrate that unaffiliated ISPs cannot be provided with direct access to the new SBC-ASI OSS system, and thus avoid the alleged lost efficiencies. While it is a necessary predicate for any waiver proponent to explain fully why it cannot comply with the law (in this case, the “same” OSS access obligation), SBC has chosen not to do so in the SBC Petition.

Similarly, while SBC claims that it would lose millions of dollars “to create overlapping systems to perform functions for SBCIS that ASI will already be performing for other affiliates,”⁵³ the SBC Petition fails to explain why SBCIS cannot continue to use its current OSS systems to perform these functions, which would also avoid the putative costs entirely. Indeed, SBC asserts that it offers competing ISPs “a wealth of tools that allow them to perform OSS functions.” SBC Petition at 11.

⁵³ SBC Petition at 8.

Conclusion

For the forgoing reasons, the Commission should deny the SBC Petition.

Respectfully submitted,

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

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of

Joint Application by SBC Communications
Inc., Southwestern Bell Telephone Company,
and Southwestern Bell Communications
Services, Inc. d/b/a Southwestern Bell Long
Distance for Provision of In-Region,
InterLATA Services in Arkansas and Missouri

CC Docket No. 01-194

To: The Commission

**BRIEF IN SUPPORT OF THE JOINT APPLICATION
BY SOUTHWESTERN BELL FOR PROVISION OF IN-REGION,
INTERLATA SERVICES IN ARKANSAS AND MISSOURI**

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August 20, 2001

customer meets the criteria for service that SBIS has established, and transmit customer ordering information directly to SBIS. SBIS will then place an order with ASI for the DSL transport service input. Id.

SBIS is also responsible for the billing and collection activities associated with its high-speed Internet access product. SBIS has entered into a contract with SWBT for direct billing, the same generic contract through which SWBT provides direct billing services to interexchange carriers and other product carriers. Id. ¶ 37. SBIS purchases a separate page on the customer's bill, and that page bears the SBIS brand and the monthly customer charges for SBIS' high-speed Internet access product. Id.

Notwithstanding these indicia of a wholesale relationship between ASI and SBIS with respect to the DSL telecommunications services, it is clear that ASI and SBIS are affiliates within the same corporate family. As such, they do not necessarily reflect the strict separation between the responsibilities of a wholesale telecommunications provider and the "consumer-oriented tasks" of a retail information service provider articulated in the Second Advanced Services Order. In fact, this Commission's Second Advanced Services Order does not expressly address the relationship between a telecommunications provider and its affiliated ISP.

Indeed, it is arguable that, after ASCENT I, the Commission may no longer rely on the distinctiveness of separate affiliates within a single corporate family as a means of defining obligations under section 251(c). See 235 F.3d at 668. For this reason, SBC does not in this application rely on the Second Advanced Services Order to govern the relationship between ASI and SBIS. Rather, by drawing a circle that includes SWBT, ASI, and SBIS, the question at issue is simply, what DSL-related service is provided "at retail"? The answer is, unequivocally, an information service consisting of a high-speed DSL Internet access service.

In the Report to Congress, this Commission expressly addressed the question how to characterize the relationship between an information service provider and a telecommunications service provider, even when they are one and the same:

Under Computer II, and under our understanding of the 1996 Act, we do not treat an information service provider as providing a telecommunications service to its subscribers. The service it provides to its subscribers is not subject to Title II, and is categorized as an information service. The information service provider, indeed, is itself a user of telecommunications; that is, telecommunications is an input in the provision of an information service. Our analysis here rests on the reasoning that under this framework, in every case, some entity must provide telecommunications to the information service provider. When the information service provider owns the underlying 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 between the information service provider and its subscribers.

Report to Congress, 13 FCC Rcd at 11534, ¶ 69 n.138 (emphasis added). Thus, even where the telecommunications provider and the information service provider are the "same entity" – e.g., SBC – the subscriber to the information service is receiving only an information service. SBC's high-speed DSL Internet access service is, therefore, an information service, not a retail telecommunications service, and it is accordingly not subject to resale at a wholesale discount under section 251(c)(4). See Connecticut Order ¶ 42 n.93 (rejecting argument that "Verizon should make its bundled offerings that include deregulated CPE and internet access available for resale. The resale obligation clearly extends only to telecommunications services offered at retail") (emphasis added).

While the telecommunications component included in SBIS's information service offering is not a retail offering, it is subject to unbundling under the Commission's Computer III requirements. As the Commission made clear in its First Advanced Services Order, "[w]e note that BOCs offering information services to end users of their advanced service offerings, such as

xDSL, are under a continuing obligation to offer competing ISPs nondiscriminatory access to the telecommunications services utilized by the BOC information services." 13 FCC Rcd at 24031, ¶ 37. As discussed above, SBC's advanced services affiliate offers its wholesale DSL transport service to unaffiliated ISPs under the same terms and conditions that it offers such a service to its own ISP affiliate.

* * * * *

SBC offers for resale at a wholesale discount those advanced telecommunications services that it offers at retail to end-user subscribers. But, as the Second Advanced Services Order provides, where SBC offers telecommunications services at wholesale to unaffiliated ISPs, such services are not offered "at retail" so they are not available for resale at a wholesale discount under section 251(c)(4). And, as the Report to Congress, the First Advanced Services Order, and the Connecticut Order dictate, where SBC offers information services at retail to end-user subscribers, such services are not "telecommunications services" so they are not available for resale at a wholesale discount under section 251(c)(4).

There is no basis for concluding that SBC currently offers a DSL telecommunications service at retail to end-user subscribers. There is also no basis for this Commission, in the context of a review of a section 271 application, to explore for the first time the implications of the Second Advanced Services Order on the relationship between an advanced services provider and its affiliated ISP. As the Commission made abundantly clear in the New York Order and the Texas Order, and as it successfully argued to the D.C. Circuit in review of the New York Order in AT&T Corp., 220 F.3d 607, a section 271 proceeding is not an appropriate forum for the resolution of interpretive disputes or industry-wide questions of general applicability. Texas Order, 15 FCC Rcd at 18366-67, ¶¶ 22-27. Nor is it appropriate for the Commission to create

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Distance for Provision of In-Region,
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CC Docket No. 01-194

To: The Commission

**REPLY BRIEF OF SOUTHWESTERN BELL
IN SUPPORT OF INTERLATA RELIEF IN ARKANSAS AND MISSOURI**

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October 4, 2001

2001) ("ASCENT I"), by effectively ignoring the corporate distinctions between SWBT, on the one hand, and SBC's wholly owned advanced services subsidiary, SBC Advanced Solutions, Inc. ("ASI"), on the other. The combined telephone/advanced-services entity is fulfilling its obligation, under ASCENT I, to comply with the requirements of section 251(c). As John S. Habeeb described in his opening affidavit, ASI has entered into agreements in both Missouri and Arkansas to allow CLECs to resell the advanced services that it provides at retail by offering such services at the wholesale discount applicable to Southwestern Bell's own retail services in both states. See Habeeb Aff.; ASI-Logix Agreement – MO (App. G MO, Tab 114); ASI-Logix Agreement – AR (App. E – AR, Tab 25). As a result of ASCENT I, therefore, the obligations of section 251(c) apply to the services provided by ASI in the same way that they would apply were those services provided by SWBT.

AT&T is wrong, therefore, when it suggests that Southwestern Bell has attempted to avoid its checklist obligations for advanced services by setting up a wholly owned affiliate to provide those services. See AT&T Comments at 61-62. On the contrary, as Southwestern Bell has explained in detail, ASI has assumed all the obligations that SWBT would have if it (SWBT) were the entity providing the advanced services. See Southwestern Bell Br. at 50-54; Habeeb Aff. ¶¶ 16-38. This is what ASCENT I requires, and Southwestern Bell has fully complied with that decision.

AT&T also suggests that SWBT has recently engaged in "efforts to evade its resale obligation" by eliminating products from the market that it had previously provided "solely and concededly in order to deny competitors access to DSL transport at a wholesale discount." AT&T Comments at 62-63. That is completely untrue. As Southwestern Bell explained in its opening brief, it has eliminated the "split-billing" option and cleaned up its web site in order to

**BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA**

California ISP Association, Inc.,

Complainant,

C. 01-07-027

vs.

Pacific Bell Telephone Company (U-1001-C);
SBC Advanced Solutions, Inc. (U-6346-C)
and DOES 1 through 20

Defendants.

**ANSWER OF SBC ADVANCED SOLUTIONS, INC.
(U-6346-C) TO COMPLAINT**

Pursuant to Rule 13.1 of the Commission's Rules of Practice and Procedure, and the Administrative Law Judge's ("ALJ's") Ruling dated September 28, 2001, SBC Advanced Solutions, Inc. ("ASI") hereby answers the Complaint of the California ISP Association, Inc. ("CISPA" or "Complainant") in the above-entitled matter.

I. INTRODUCTION AND BACKGROUND

ASI is a wholly-owned subsidiary of SBC Communications, Inc. ("SBC") and an affiliate of co-defendant Pacific Bell Telephone Company ("Pacific Bell"). ASI was formed as a result of the FCC's decision approving the merger of SBC and Ameritech Corp. (the "FCC Merger Order"), and specifically as the result of a condition on that approval requiring SBC to create one or more separate affiliates to provide all advanced

Even if the service in question were a proper matter of Commission jurisdiction, the CISPA Complaint suffers from the fact that the allegations raised in the Complaint have largely been rendered moot since its filing in late July of this year and, on this ground, should be dismissed as well. ASI currently provides DSL Transport service in California and in other states in which it operates pursuant to the terms of an interstate tariff filed with the FCC on September 7, 2001 and made effective September 10, 2001. (A copy of ASI's interstate FCC tariff is attached to the Declaration of John Habeeb as Exhibit A.) Prior to September 10, ASI provided DSL Transport service in California pursuant to written agreements with its ISP customers and pursuant to generally available terms and conditions posted on its website for certain ISP customers which had not executed agreements. Such agreements have been superseded by the terms of the FCC tariff.⁴

The central thrust of the CISPA complaint is its contention that ASI attempted unilaterally to impose certain allegedly objectionable conditions of service on ISPs pursuant to a DSL Addendum to its General Services Agreement ("GSA") (its contract for the provision of these services). ASI strongly disagrees with CISPA's characterization of the terms and conditions set forth in the DSL Addendum to the GSA, and with its contention that such conditions were disadvantageous to ISPs in California. On the contrary, ASI values all of its ISP customers, whether affiliated or not affiliated, and continues to work to develop new, more efficient and more capable facilities and systems to serve ISPs. The DSL Addendum to the GSA addressed a number of such new facilities and systems. In any event, the disagreement of the parties on such issues has

⁴ ASI had provided DSL Transport service under contracts because the FCC's rules permit carriers other than incumbent local exchange carriers and their "successors and assigns" to provide service subject to contract rather than tariff. Under the FCC's Merger Order, ASI had been considered eligible for de-tariffing. However, in the case of *Association of Communications Enterprises v FCC*, 235F.2d 662 (DC Cir. 2001), the U.S. Court of Appeal for the District of Columbia Circuit ruled that ASI must be considered a "successor or assign" of SBC under the Telecommunications Act of 1996. Thus, ASI was required by the FCC to file tariffs covering its provision of services.

CERTIFICATE OF SERVICE

I, Arista Salimi, state that copies of the foregoing Opposition to SBC OSS Petition was sent via hand delivery or overnight delivery, this day, Monday, October 4, 2004, to the following:

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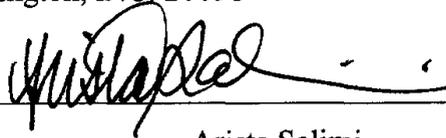
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