

FCC MAIL SECTION

Before the
Federal Communications Commission
Washington, D.C. 20554

JUN 7 11 03 PM '05

In the Matter of)
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)
SBC Services Inc. Petition for Waiver of Section) WCB/Pricing File No. 05-24
61.42(g) of the Commission's Rules)
)
)

ORDER

Adopted: June 6, 2005

Released: June 6, 2005

By the Chief, Pricing Policy Division, Wireline Competition Bureau:

I. INTRODUCTION

1. SBC Services Inc. (SBC) filed a petition¹ on April 22, 2005, seeking a waiver of section 61.42(g) of the Commission's rules to exclude its True IP to PSTN (TIPToP) service from price caps in the 2005 annual access tariff filing.² For the reasons explained below, we grant SBC the requested waiver for purposes of the 2005 annual access tariff filing.

II. BACKGROUND

2. SBC has requested a waiver of section 61.42(g) of the Commission's rules so that it may exclude its TIPToP service from any price cap basket for purposes of the 2005 annual access tariff filing.³ SBC states that TIPToP is a new offering "that provides Internet Protocol Voice Information Service Providers (IP-VIS Providers) with connectivity" to the SBC network.⁴ The service "is provided through one-way and two-way port interfaces that provide trunking and switching components" that provide connectivity to "SBC users and non-SBC users that are connected through (subtended by) SBC Access Tandems."⁵

¹ SBC Services Inc. Petition for Waiver – Expedited Treatment Requested (filed April 22, 2005) (SBC Petition). SBC filed the petition on behalf of Pacific Bell Telephone Company, Southwestern Bell Telephone Company, the Ameritech Operating Companies, Southern New England Telephone Company, and Nevada Bell Telephone Company.

² See 47 C.F.R. §§ 61.42(g) (new services must be included in the annual price cap filing in the year after the one in which they are introduced), 61.43 (annual price cap filing requirements).

³ The Wireline Competition Bureau issued a public notice seeking comment on SBC's petition. See *Comments Sought on SBC Petition For a Waiver of Section 61.42(g) of the Commission's Rules*, WCB/Pricing File No. 05-24, Public Notice, DA 05-1274 (Wireline Comp. Bur. rel. May 2, 2005).

⁴ SBC Petition at 1.

⁵ *Id.* at 1-2.

TIPToP first was tariffed in November 2004 and, absent a waiver, SBC would be required to include it in the appropriate price cap basket in SBC's 2005 annual access tariff filing.⁶

3. SBC offers two reasons why a waiver is warranted. First, SBC states that TIPToP does not fit squarely within either the traffic-sensitive or the trunking basket and that a waiver would give SBC additional time to work with Commission staff to determine the appropriate treatment of the service under the price cap regime.⁷ Second, SBC states that a waiver would not harm the public interest because there was no demand for TIPToP in 2004 and, therefore, the exclusion of the service from price caps in the 2005 annual filing will have no effect on rates for any price cap services.⁸ SBC's argument is based on the fact that adding a service for which there is no demand to a basket or category does not change the price cap for that basket or category.⁹

4. Earthlink was the only party to oppose the petition.¹⁰ Earthlink argues that SBC has failed to explain adequately why the existence of ongoing discussions with Commission staff regarding the price cap treatment of TIPToP service constitutes the type of special circumstances that warrant a waiver.¹¹ Earthlink also argues that a waiver is inappropriate because SBC has "unclean hands" due to its failure to comply with Commission rules requiring it to submit cost support with its initial TIPToP tariff filing.¹² Finally, Earthlink argues that a waiver is inappropriate because price cap regulation is needed to ensure that rates for TIPToP service are reasonable.¹³

III. DISCUSSION

5. The Commission may waive its regulations for good cause shown.¹⁴ In general, the waiver request must demonstrate special circumstances warranting a deviation from the general rule, and that such a deviation will serve the public interest.¹⁵ We find that good cause exists to grant SBC a waiver of section 61.42(g) for TIPToP services for purposes of the 2005 annual access tariff filing. We agree with SBC that special circumstances exist due to the nature of the service and the absence of demand for that service in 2004. In particular, we agree with SBC that TIPToP does not fit squarely within the price cap structure because it appears to include both traffic-sensitive and trunking elements. It would serve the public interest to give Commission staff additional time to determine which price cap basket would best accommodate the TIPToP service. Moreover, as SBC notes, excluding TIPToP from price cap baskets in the 2005 annual filing would not affect any price cap rates due to the absence of demand in 2004.¹⁶ We

⁶ *Id.* at 2; 47 C.F.R. § 61.42(g).

⁷ SBC Petition at 3.

⁸ *Id.*

⁹ *See, e.g.*, 47 C.F.R. §§ 61.47(a), (b) (base period demand for new services must be included in calculating Service Band Index).

¹⁰ Opposition of Earthlink, Inc., WCB/Pricing File No. 05-25 (filed May 9, 2005) (Earthlink Opposition).

¹¹ *Id.* at 2-3.

¹² *Id.* at 3-4.

¹³ *Id.* at 5.

¹⁴ 47 C.F.R. § 1.3.

¹⁵ *See Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (citing *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969)).

¹⁶ *See* 47 C.F.R. §§ 61.47(a), (b).

therefore find that the requested waiver will serve the public interest by giving the company and the Commission additional time to address the proper treatment of the service for price cap purposes.¹⁷

6. Earthlink incorrectly asserts that SBC was required to file cost support when SBC first tariffed the TIPToP service. Incumbent LECs are required to provide cost support for new services only when they introduce "loop-based" services.¹⁸ We agree with SBC that TIPToP is not a loop-based service because the TIPToP customer does not obtain access to SBC loops.¹⁹ Rather, the customer obtains access to "switched circuit port interfaces" that "incorporate Transport, SS7 connectivity, choke trunks and call related database query capability."²⁰ Finally, Earthlink's concern about the reasonableness of rates for TIPToP is unfounded. As noted above, excluding TIPToP from the 2005 annual filing will not affect SBC's rates for the TIPToP service or the rates it charges for other services that are subject to price caps.²¹

IV. ORDERING CLAUSES

7. Accordingly, IT IS ORDERED that, pursuant to section 204(a) of the Communications Act of 1934, as amended, 47 U.S.C. § 204(a), and the authority delegated pursuant to sections 0.91, 0.291, and 1.3 of the Commission's rules, 47 C.F.R. §§ 0.91, 0.291, and 1.3, section 61.42(g) of the Commission's rules IS WAIVED for TIPToP services offered by SBC, with respect to SBC's 2005 annual access tariff filing requirements under section 61.43 of the Commission's rules, 47 C.F.R. §§ 61.42(g), 61.43.

FEDERAL COMMUNICATIONS COMMISSION



Tamara L. Preiss
Chief, Pricing Policy Division
Wireline Competition Bureau

¹⁷ The Commission has granted similar waivers in the past. *See, e.g., Petition for Waiver of the Commission's Price Cap Rules for Services Transferred from VADL to the Verizon Telephone Companies*, WCB/Pricing File No. 05-17, DA 05-1335 (Wireline Comp. Bur. rel. May 11, 2005).

¹⁸ *See* 47 C.F.R. §§ 61.49(f)(2), (g).

¹⁹ *See* Reply of SBC Services Inc. to Earthlink, Inc.'s Opposition to Petition for Waiver, WCB/Pricing File No. 05-24 at 2-3 (filed May 16, 2005) (SBC Reply).

²⁰ Southwestern Bell Telephone Company Tariff FCC No. 73, Transmittal No. 3019, Description and Justification at 1 (filed Nov. 24, 2004).

²¹ SBC Reply at 3.