

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

In the Matter of	)	
	)	
Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services	)	CC Docket No. 01-337
	)	

**MEMORANDUM OPINION AND ORDER**

**Adopted:** December 30, 2002

**Released:** December 31, 2002

Before the Commission: Commissioners Copps and Adelstein concurring and issuing a joint statement; Commissioner Martin dissenting and issuing a separate statement.

**I. INTRODUCTION**

1. In this Order, we address SBC Communications Inc.'s (SBC's) petition for forbearance from the application of tariffing requirements to its provision of advanced services.<sup>1</sup> We grant SBC's petition to the extent it seeks forbearance from tariff regulation of advanced services that SBC provides through its advanced services affiliate, Advanced Solutions, Inc. (ASI), which provides intraLATA advanced services throughout the SBC region.<sup>2</sup> We otherwise deny SBC's petition without prejudging in any way the issues in the rulemaking commenced under the *Incumbent LEC Broadband Notice*.<sup>3</sup>

**II. BACKGROUND**

**A. Relevant Procedural History**

2. Because our analysis of SBC's petition for forbearance relies on SBC's current corporate structure, it is useful to recount in detail the relevant history of that structure. In October 1999, the Commission conditionally approved the transfer of licenses and lines from

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<sup>1</sup> SBC Petition for Expedited Ruling that It Is Non-Dominant in Its Provision of Advanced Services and for Forbearance from Dominant Carrier Regulation of Those Services, CC Docket No. 01-337 (filed Oct. 3, 2001).

<sup>2</sup> SBC provides interLATA advanced services through a different affiliate in those states where it has received in-region, interLATA authority pursuant to section 271 of the Communications Act of 1934, as amended (Communications Act or Act).

<sup>3</sup> See *Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services*, CC Docket No. 01-337, Notice of Proposed Rulemaking, 16 FCC Rcd 22745 (2001) (*Incumbent LEC Broadband Notice*).

Ameritech Corp. (Ameritech) to SBC in connection with their merger.<sup>4</sup> The conditions required, among other matters, that, starting 30 days after receiving all necessary state approvals and certifications, SBC provide in-region advanced services only through one or more structurally separate affiliates and only in accordance with certain structural, transactional, and non-discrimination safeguards.<sup>5</sup> These safeguards were designed to ensure that competing advanced services providers received effective, non-discriminatory access to the bottleneck local telephone facilities and services that the merged entity would use as inputs for its advanced services offerings.<sup>6</sup> The safeguards required, in particular, that one or more separate advanced services affiliates shall have overall responsibility for providing SBC's in-region advanced services, and that these affiliates shall own and operate any advanced services equipment the merged entity placed into service after November 7, 1999.<sup>7</sup> In addition, each separate affiliate was required to order, in the same manner as its competitors, any unbundled network elements (UNEs), collocation space, and telecommunications services that it sought to obtain from affiliated incumbent local exchange carriers (incumbent LECs).<sup>8</sup> Specifically, SBC was required to allow unaffiliated telecommunications carriers to order UNEs and telecommunications services from its incumbent LECs under the same rates, terms, and conditions, utilizing the same interfaces,

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<sup>4</sup> *Applications of Ameritech Corp., Transferor, and SBC Communications, Inc. Transferee, for Consent to Transfer Control of Corporations Holding Commission Licenses and Lines Pursuant to Sections 214 and 310(d) of the Communications Act and Parts 5, 22, 24, 25, 63, 90, 95, and 101 of the Commission's Rules*, CC Docket No. 98-141, Memorandum Opinion and Order, 14 FCC Rcd 14712 (1999) (*SBC/Ameritech Merger Order*), vacated in part *sub nom.*, *Association of Communications Enterprises v. FCC*, 235 F.3d 662 (D.C. Cir. 2001) (*ASCENT v. FCC*).

<sup>5</sup> *Id.* at 14859-867, paras. 363-76, & 14970-82, Conditions I.3-I.4. The conditions define "Advanced Services" as:

[I]ntrastate or interstate wireline telecommunications services, such as ADSL, IDSL, xDSL, Frame Relay, Cell Relay and VPOP-Dial Access Service (an SBC Frame Relay-based service) that rely on packetized technology and have the capability of supporting transmission[] speeds of at least 56 kilobits per second in both directions. This definition of Advanced Services does not include (1) data services that are not primarily based on packetized technology, such as ISDN, (2) x.25-based and x.75-based packet technologies, or (3) circuit switched services (such as circuit switched voice grade service) regardless of the technology, protocols or speeds used for the transmission of such services.

*Id.* at 14969, Condition I.2.

<sup>6</sup> *See id.* at 14859, para. 363. We note that these safeguards were based on the safeguards that section 272 of the Communications Act, 47 U.S.C. § 272, prescribes to govern a separate interLATA services affiliate's relationship with a Bell Operating Company (BOC). *See SBC/Ameritech Merger Order*, 14 FCC Rcd at 14901, para. 460, & 14969-70, Condition I.3.

<sup>7</sup> *Id.* at 14972, Condition I.3.d, & 14974, Condition I.4. November 7, 1999 was 30 days after the merger closing date of October 8, 1999.

<sup>8</sup> *Id.* at 14974, Condition I.4.a.3, & 14978, Condition I.4.f.

processes, and procedures, as those available to its advanced services affiliate.<sup>9</sup> In addition, that affiliate must arrange and negotiate for collocation space under the same terms and conditions, using the same processes, as those available to unaffiliated telecommunications carriers.<sup>10</sup>

3. In the *SBC/Ameritech Merger Order*, the Commission concluded that an advanced services affiliate that operated in accordance with the specified safeguards would be presumed not to be a “successor or assign” of an incumbent LEC and thus would not be subject to regulation under section 251 as an incumbent LEC.<sup>11</sup> The Commission also concluded, without extensive analysis, that because such an advanced services affiliate would not be a “successor or assign” of an incumbent LEC, it would be presumed to be non-dominant in its provision of interstate advanced services.<sup>12</sup> The merger conditions thus specified that the interstate telecommunications services offered by this presumptively non-dominant affiliate would be permissively detariffed.<sup>13</sup> The merger conditions also specified that in the event a court of competent jurisdiction ruled that a separate advanced services affiliate operating in accordance with the merger conditions must be deemed a “successor or assign” of an incumbent LEC, SBC would have the option of providing advanced services directly, rather than through a separate affiliate, but did not otherwise address what would happen to SBC’s tariffing obligations in such an event.<sup>14</sup>

4. In January 2001, the United States Court of Appeals for the District of Columbia Circuit vacated certain portions of the *SBC/Ameritech Merger Order*, ruling that the Commission may not permit an incumbent LEC to avoid section 251(c) obligations as applied to advanced services by establishing a wholly-owned affiliate to offer those services.<sup>15</sup> While the D.C. Circuit did not address specifically whether SBC’s advanced services affiliate should continue to be presumed non-dominant in the provision of advanced services, the court, by vacating the Commission’s holding that those affiliates were not successors or assigns of an incumbent LEC,

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<sup>9</sup> *Id.* Additional safeguards require, among other matters, that the affiliated BOCs conduct transactions with the advanced services affiliates in the same manner in which they conduct transactions with unaffiliated entities, limit asset transfers from the affiliated BOCs to the advanced services affiliates, and preclude the affiliated BOCs from discriminating between their advanced services affiliate and any other entity in the provision or procurement of goods, services, facilities, or information, or in the establishment of standards. *Id.* at 14902-14905, paras. 462-467. For the complete safeguards, see *id.* at 14969-90, Conditions I.1-I.13.

<sup>10</sup> *Id.* at 14974, Condition I.4.a.3.

<sup>11</sup> *Id.* at 14900, para. 458.

<sup>12</sup> *Id.* at 14900, n.834, & 14988, Condition I.9.

<sup>13</sup> *Id.* at 14988, Condition I.9.

<sup>14</sup> *Id.* at 14989, Condition I.12.c. The conditions spell out certain requirements that would apply if SBC were to provide advanced services through its operating companies. *Id.* at 14989-90, Condition I.13.

<sup>15</sup> *ASCENT v. FCC*, 235 F.3d at 663.

eliminated the basis for that presumption, as explicitly set forth in the *SBC/Ameritech Merger Order*.<sup>16</sup>

5. Although SBC has argued that ASI should continue to be presumed non-dominant in the provision of advanced services,<sup>17</sup> ASI filed an interstate advanced services tariff on September 7, 2001, which became effective on September 10, 2001.<sup>18</sup> ASI accordingly now offers its interstate advanced services pursuant to tariff. Under the merger conditions, the decision in *ASCENT v. FCC* gave SBC the option of providing advanced services directly, rather than through one or more separate affiliates.<sup>19</sup> SBC, however, currently uses ASI to provide its advanced services, and there is no evidence on the record suggesting any immediate plans to reintegrate ASI and the services it presently provides into SBC's operating companies.

## B. ASI's Advanced Services Operations

6. The SBC/Ameritech merger closed on October 8, 1999. SBC states that, once ASI obtained the state authority and certifications it needed to operate, SBC withdrew its interstate advanced services tariffs and began offering in-region advanced services exclusively through contracts between ASI and its customers.<sup>20</sup> SBC also states that ASI operated pursuant to contract for approximately 18 months prior to filing its advanced services tariff during September 2001.<sup>21</sup> ASI's advanced services include asynchronous transfer mode (ATM) and frame relay services that ASI offers to both wholesale and retail customers.<sup>22</sup> ASI also offers

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<sup>16</sup> See *SBC/Ameritech Merger Order*, 14 FCC Rcd at 14900, n.834, & 14988, n.41.

<sup>17</sup> See, e.g., Letter from Gary L. Phillips, General Attorney, SBC, to Dorothy Attwood, Chief, Common Carrier Bureau, FCC, at 1 (filed Feb. 15, 2001) (*SBC Feb. 15, 2001 Letter*).

<sup>18</sup> SBC Advanced Solutions, Inc., Tariff FCC No. 1, Original Title Page (issued Sept. 7, 2001) (*ASI FCC Tariff*). This tariff was filed approximately 18 months after ASI began to provide advanced services pursuant to contract. Letter from Jeffrey Brueggeman, General Attorney, SBC, to Marlene H. Dortch, Secretary, FCC, at 3 (filed Nov. 15, 2002) (*SBC Nov. 15, 2002 Letter*). We note that the Common Carrier Bureau or its successor, the Wireline Competition Bureau, waived cost support and notice requirements for this filing as well as for subsequent amendments to this tariff. See, e.g., Letter from Jane E. Jackson, Chief, Competitive Pricing Division, Common Carrier Bureau, FCC, to Debbie Clemons, Associate Director – Federal Regulatory, SBC, Special Permission No. 01-095 (Sept. 7, 2001).

<sup>19</sup> *SBC/Ameritech Merger Order*, 14 FCC Rcd at 14989, Condition I.12.c. The conditions spell out certain requirements that would apply if SBC were to provide advanced services directly. *Id.* at 14989-90, Condition I.13.

<sup>20</sup> *SBC Nov. 15, 2002 Letter*, at 7 n.7.

<sup>21</sup> *Id.* at 3.

<sup>22</sup> *ASI FCC Tariff*, at §§ 4-5. ATM is a “high bandwidth, low-delay, connection-oriented packet-like switching and multiplexing technique” in which “[u]sable capacity is segmented into 53-byte fixed-sized cells, consisting of header and information fields [and] allocated to services on demand.” Harry Newton, *Newton's Telecom Dictionary: The Official Dictionary of Telecommunications and the Internet*, 63 (17th ed. 2001) (*Newton's Telecom Dictionary*); see *ASI FCC Tariff*, at § 4.1. Frame relay is a “high-speed, packet-switched technology used to transmit digital data between, among other things, geographically dispersed local area networks (LANs).” *Independent Data Communications Manufacturers Association, Inc.*, Memorandum Opinion and Order, 10 FCC (continued....)

wholesale digital subscriber line (DSL) transport service to affiliated and unaffiliated Internet services providers (ISPs).<sup>23</sup> In addition, ASI offers remote local area network (LAN) DSL transport service to businesses and network access point service to Internet backbone providers.<sup>24</sup>

7. ASI uses UNEs, telecommunications services, and collocation space purchased from the SBC operating companies, along with its own packet switches and digital subscriber line access multiplexers (DSLAMs) to create its advanced services offerings.<sup>25</sup> Many of ASI's customers are ISPs, including affiliated ISPs, that package ASI's wholesale DSL transport and ATM services with their own Internet access services to provide end users with retail, high-speed, Internet access services.<sup>26</sup> SBC states that, during the period ASI operated pursuant to contract, ASI took a number of specific steps to improve the processes unaffiliated ISPs use to obtain wholesale DSL transport service.<sup>27</sup> These steps included, according to SBC, the posting

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Rcd 13717, 13720, para. 6 (Com. Car. Bur. 1995) (*Frame Relay Order*); see *ASI FCC Tariff*, at § 5.1. ASI sells its ATM and frame relay services primarily to businesses, but its tariff places no restrictions on the availability of these services. *Id.* at §§ 4.1, 5.1.

<sup>23</sup> *Id.* at § 6. This service connects network interface devices (NIDs) located at end-users' premises with ASI's packet switches. *Id.* at § 6.1.1. An ISP typically combines this service with ATM service (which may be self-provisioned, provisioned by ASI, or provisioned by an ASI competitor) to obtain end-to-end connections between the end users' premises and the ISPs point of presence. ASI sells its DSL transport service primarily to ISPs, including affiliated ISPs, but its tariff states that this service "may be purchased by any information service provider or carrier to connect to their End User for the purposes [sic] of providing to that End User a retail service that includes high speed DSL." *Id.* at § 6.1.1. End users cannot purchase this service. *Id.* at 9 (definition of end user). We note that in the *SBC Missouri/Arkansas Order*, the Commission determined that ASI need not offer its DSL transport service at a resale discount pursuant to section 251(c)(4). *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*, Memorandum Opinion and Order, 16 FCC Rcd 20719, para. 80 (2001) (*SBC Missouri/Arkansas 271 Order*).

<sup>24</sup> *ASI FCC Tariff*, at §§ 7-8. Remote LAN DSL transport service enables businesses to allow remote access to their LANs over DSL lines. *Id.* at § 7.1.1. A typical application would enable a business to provide its telecommuting employees with access to the LAN at their workplace. *Id.* ASI's tariff states that the business purchasing this service is the retail customer and that the service "may not be used as a wholesale input to provide another retail offering, such as high-speed Internet service." *Id.* Network access point service uses clusters of ATM switches to allow Internet backbone providers to interconnect and "peer" (i.e., exchange traffic). *Id.* at § 8.1.1. ASI's tariff indicates that this service is available to government, research, and educational organizations as well as to ISPs. *Id.*

<sup>25</sup> ASI owns, in addition to DSLAMs and packet switching equipment, routers, servers, test equipment, operations support systems equipment, multiplexing and cross-connect equipment, power equipment, and customer premises equipment (CPE) kept in inventory. Letter from Jeffry Brueggeman, General Attorney, SBC, to Marlene H. Dortch, Secretary, FCC, at 2 (filed Nov. 26, 2002) (*SBC Nov. 26, 2002 Letter*). ASI does not own any local loops, interoffice transmission lines, or other transmission lines. *Id.*

<sup>26</sup> See generally DIRECTV Broadband Comments at 1-2; EarthLink Comments at 7.

<sup>27</sup> *SBC Nov. 15, 2002 Letter*, at 5-7.

on ASI's website of general services agreements containing the rates, terms, and conditions under which ISPs could obtain that service from ASI.<sup>28</sup> SBC also states that ISPs that did not wish to take service under these general services agreements had the flexibility to negotiate different rates, terms, and conditions with ASI.<sup>29</sup> SBC indicates that its general services agreements and its positions in individual negotiations were tailored to meet the needs of all types of ISPs, from small regional players to large national companies.<sup>30</sup>

8. SBC states further that ASI implemented numerous systems and process improvements benefiting affiliated and unaffiliated ISPs during the period it operated pursuant to contract.<sup>31</sup> SBC states that these improvements included the establishment of an internal management organization charged with identifying and resolving ordering, provisioning, and maintenance issues affecting ISPs.<sup>32</sup> In addition, SBC states that, while operating pursuant to contract, ASI responded to input from affiliated and unaffiliated ISPs by improving its operations support systems and processes.<sup>33</sup> SBC states further that ASI's installation and repair performance improved significantly, and that ASI provided affiliated and unaffiliated ISPs with the same level of provisioning, installation, maintenance, and repair service, during that period.<sup>34</sup>

### C. Forbearance Request

9. SBC filed its petition for forbearance on October 3, 2001. In its petition, SBC asks the Commission to forbear from application of tariffing regulation to its provision of advanced services.<sup>35</sup> SBC contends that it does not have market power in the provision of advanced services and that it cannot leverage any power it has in the local market to acquire market power in the provision of advanced services.<sup>36</sup> SBC maintains that its petition therefore meets the statutory forbearance criteria, regardless of whether it provides those services through a separate affiliate, as defined in the conditions adopted in the *SBC/Ameritech Merger Order*, or on an integrated basis.<sup>37</sup> In addition to seeking forbearance from tariffing requirements, SBC

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<sup>28</sup> *Id.* at 5.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at 5-7; *see SBC Nov. 26, 2002 Letter*, at 1.

<sup>32</sup> *SBC Nov. 15, 2002 Letter*, at 6; *see SBC Nov. 26, 2002 Letter*, at 1.

<sup>33</sup> *SBC Nov. 15, 2002 Letter*, at 6. SBC indicates that these improvements included, for example, web-based programs that allow ISPs to use the Internet to learn the status of their wholesale DSL transport service orders and trouble reports. *Id.*

<sup>34</sup> *Id.* at 6-7.

<sup>35</sup> SBC Petition at 1.

<sup>36</sup> *Id.* at 15-72.

<sup>37</sup> *Id.* at 73-83.

requests that we declare it non-dominant in its provision of advanced services.<sup>38</sup> SBC's petition, however, fails to request any specific forbearance relief, other than relief from tariffing regulation.<sup>39</sup>

10. In December 2001, the Commission released the *Incumbent LEC Broadband Notice*. This *Notice* invited comment on SBC's petition as part of an overall examination of the appropriate regulation for incumbent LEC provision of domestic broadband telecommunications services.<sup>40</sup> In addition to requesting that commenters address with specificity the statutory forbearance criteria in section 10 of the Communications Act,<sup>41</sup> this *Notice* raised broad issues regarding the nature and scope of the market for domestic broadband services and the appropriate regulatory requirements under Title II of the Communications Act for the provision of broadband services by incumbent LECs.<sup>42</sup> The comments generally address these broad issues, rather than the specifics of SBC's forbearance request. Several parties, however, support SBC's forbearance request.<sup>43</sup> Other parties, including certain competitive local exchange carriers (competitive LECs) and ISPs, contend that SBC has failed to show that forbearance would be consistent with the statutory criteria.<sup>44</sup>

11. On November 15, 2002 and November 26, 2002, SBC filed ex parte letters setting forth steps it intends to take to facilitate ISP broadband access in the event we grant forbearance prior to considering the broader network access issues raised in pending rulemaking proceedings.<sup>45</sup> SBC states that these commitments are based on ASI's practices during the approximately 18 months when it operated pursuant to contract.<sup>46</sup> Specifically, SBC commits itself to the following practices pending action in the broadband rulemakings:

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<sup>38</sup> *Id.* at 1.

<sup>39</sup> *Id.*, *passim*.

<sup>40</sup> *Incumbent LEC Broadband Notice*, 16 FCC Rcd at 22748, para. 7, & 22766, n.88. An appendix to this Order lists the parties filing comments and replies in response to the *Incumbent LEC Broadband Notice*.

<sup>41</sup> *Id.* at 22766, n.88.

<sup>42</sup> *Id.* at 22754-769, paras. 17-48.

<sup>43</sup> *See, e.g.*, Alcatel Comments at 7-9; BellSouth Comments at 49-53.

<sup>44</sup> *See, e.g.*, EarthLink Comments at 31-34; IP Communications Comments at 4-5; WorldCom Comments at 29-32.

<sup>45</sup> *SBC Nov. 26, 2002 Letter, supra* at 1; *SBC Nov. 15, 2002 Letter*, at 7-8; *see Incumbent LEC Broadband Notice*, 16 FCC Rcd at 22754-69, paras. 17-48; *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, Universal Service Obligations of Broadband Providers, 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 Docket Nos. 02-33, 95-20, 98-10, Notice of Proposed Rulemaking, 17 FCC Rcd 3019, 3029-56, paras. 17-83 (2002) (*Wireline Broadband Notice*).

<sup>46</sup> *SBC Nov. 15, 2002 Letter*, at 7.

- SBC will post on its website the rates, terms, and conditions of any broadband access arrangement that it has entered into with an affiliated ISP. Unaffiliated ISPs that are similarly situated will be able to take service under these rates, terms, and conditions.
- SBC will post on its website the general rates, terms, and conditions for ISP broadband access arrangements that unaffiliated ISPs can either opt into or use as the starting point for negotiating alternative rates, terms, and conditions.
- SBC will grandfather all existing volume and term plans for the remainder of their term and provide a 90-day transition period for month-to-month ISP customers. If an ISP does not negotiate a contract with SBC within the 90-day period, it will be automatically converted to a basic month-to-month general services agreement.
- SBC will continue to implement service and process improvements for its ISPs customers, including modifications that are already planned for 2003.<sup>47</sup>

SBC asserts that these commitments will ensure that unaffiliated ISPs would be able to obtain advanced services on reasonable terms in the event we grant forbearance.<sup>48</sup>

#### **D. Forbearance Criteria**

12. Section 10 of the Communications Act requires that the Commission forbear from applying any regulation or provision of the Act to telecommunications carriers or telecommunications services, or classes thereof, if the Commission determines that three conditions set forth in section 10(a) are satisfied. In particular, section 10(a) provides:

[T]he Commission shall forbear from applying any regulation or any provision of this chapter to a telecommunications carrier or telecommunications service, or class of telecommunications carriers or telecommunications services, in any or some of its or their geographic markets, if the Commission determines that —

(1) enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that

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<sup>47</sup> SBC Nov. 26, 2002 Letter, at 1; SBC Nov. 15, 2002 Letter, at 7-8.

<sup>48</sup> SBC Nov. 15, 2002 Letter, at 8.

telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory;

(2) enforcement of such regulation or provision is not necessary for the protection of consumers; and

(3) forbearance from applying such provision or regulation is consistent with the public interest.<sup>49</sup>

Section 10(b) specifies that, in making the public interest determination under section 10(a)(3), “the Commission shall consider whether forbearance from enforcing the provision or regulation will promote competitive market conditions, including the extent to which such forbearance will enhance competition among providers of telecommunications services.”<sup>50</sup> Section 10(b) also specifies that, “if the Commission determines that such forbearance will promote competition among providers of telecommunications services, that determination may be the basis for a Commission finding that forbearance is in the public interest.”<sup>51</sup>

### III. DISCUSSION

#### A. Forbearance from Tariff Regulation

13. Section 10(a) of the Act requires that we forbear from application of tariff regulation to SBC’s advanced services if we determine that each of three statutory forbearance criteria is satisfied. In evaluating whether these criteria are met, we focus on SBC’s present corporate structure and operations, which place all of SBC’s advanced services operations in a structurally separate affiliate, ASI, rather than on other, largely hypothetical ways in which SBC might choose to provide advanced services.<sup>52</sup> Consistent with the Commission’s approach in the *SBC/Ameritech Merger Order*, we conclude that, to the extent SBC operates in accordance with the separate affiliate structure established in that Order, with SBC’s commitments made in this record, and with the safeguards set forth below, it is not necessary to impose the burdens of tariff regulation on ASI’s rates, terms, and conditions for the advanced services subject to this petition. Therefore, in this limited instance and subject to all of the conditions set forth herein, forbearance from applying tariffing regulation to ASI’s advanced services operations meets the statutory criteria.

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<sup>49</sup> 47 U.S.C. § 160(a).

<sup>50</sup> 47 U.S.C. § 160(b).

<sup>51</sup> *Id.*

<sup>52</sup> We note that SBC is planning to deploy a passive optical network technology to provide advanced services through its operating company to the Mission Bay housing development in San Francisco, California. Our grant of forbearance does not encompass this project.

14. We wish to make clear, however, that we make no finding regarding whether SBC's operating companies or ASI is non-dominant in the provision of any service, and that our forbearance action encompasses the tariffing requirements applicable to ASI under our *Computer Inquiry* rules. Moreover, it applies only to services currently provided by ASI, such as its ATM, frame relay, and DSL services, and that fall within the definition of advanced services adopted in the *SBC/Ameritech Merger Order*. This Order does not relieve any tariffing obligations or other regulations applicable to special access and other services that competitive LECs and ISPs obtain from SBC's operating companies to access ASI's ATM and frame relay offerings, nor does it have any other impact on or application to these services.

15. We also wish to make clear that this Order is conditional, and only applies to the extent SBC chooses to continue to offer those services through a structurally separate affiliate and in accordance with its commitments it has made in this record. In addition to the commitment that SBC post rates, terms and conditions of broadband access arrangements with affiliated ISPs on its website, it must also make physical copies of contracts reflecting these rates, terms and conditions available for public inspection at a minimum of one place of business. To ensure that we continue to be able to evaluate ASI's rates in the event of a section 208 complaint, ASI must continue to record cost data using the methods it presently uses and must retain its cost data for at least two years from the date it is recorded. In the event of a Commission audit, ASI must provide its cost data within ten (10) days of a request from Commission staff. ASI must submit to the Commission annually an affidavit, signed by a responsible officer, attesting to ASI's compliance with its commitments in this proceeding during the preceding year.<sup>53</sup>

16. We emphasize that SBC, including ASI, will remain subject to section 251(c) of the Communications Act, including the unbundling and resale obligations. In addition, SBC's operating companies also will remain subject to dominant carrier regulation for the facilities and services ASI and its competitors use as inputs for their advanced services offerings, and ASI must continue to purchase inputs from SBC's operating companies on a non-discriminatory basis.<sup>54</sup> Our granting of forbearance therefore complies fully with the D.C. Circuit's holding in *ASCENT v. FCC* that the establishment of a wholly-owned, advanced services affiliate does not permit an incumbent LEC to avoid its section 251 obligations, as neither ASI nor any of its incumbent LEC affiliates will be relieved of those obligations.

### **1. Charges, Practices, Classifications, and Regulations**

17. Section 10(a)(1) requires that we analyze whether application of tariff regulation to SBC's advanced services operations is necessary to ensure that the "charges, practices,

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<sup>53</sup> The first attestation will be due January 2, 2004.

<sup>54</sup> Our statement here is in no way intended to change how ASI currently does so, or in any way mandate any particular method of doing so. Rather, ASI shall continue to purchase inputs in the same way as it currently does, whether that is through a statement of generally available terms, tariff or interconnection agreement, assuming this method is currently compliant with the Act and the Commission's implementing rules.

classifications, or regulations . . . for[] or in connection with that . . . telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory.”<sup>55</sup> We conclude that, in the unique circumstances of this case, tariff regulation is not necessary within the meaning of this forbearance criterion, provided ASI operates in accordance with the separate affiliate structure established in the *SBC/Ameritech Merger Order* and SBC’s commitments made in this record.

18. As DIRECTV Broadband suggests, our first task under this forbearance criterion is to identify the specific regulatory provisions at issue.<sup>56</sup> The tariffing requirements from which SBC seeks forbearance are set forth in subpart E of our part 61 rules.<sup>57</sup> These rules require that dominant carriers file tariffs setting forth the prices, terms, and conditions for their interstate telecommunications services, typically on either seven or fifteen days’ notice.<sup>58</sup> The rules also require that dominant carriers include supporting information, which may include detailed cost data, in their tariff filings.<sup>59</sup> Forbearance from tariff regulation would allow ASI to withdraw its advanced services tariff and provide service pursuant to contracts negotiated with its customers, including its ISP affiliates. ASI would not be required to file the resulting contracts with the Commission, unless the Commission so directed. Alternatively, under forbearance, ASI would have the option of amending its advanced services tariff without complying with our rules for tariff filings. Under this approach, ASI would be able to amend that tariff on one-day’s notice and without filing any cost support.<sup>60</sup> Importantly, however, forbearance from tariff regulation would not relieve ASI of its statutory obligations to offer its interstate services under rates, terms, and conditions that are just, reasonable, and not unjustly or unreasonably discriminatory,<sup>61</sup> or its obligation under our *Computer Inquiry* rules to offer ISPs non-discriminatory access to the transmission capabilities underlying SBC’s Internet access services.<sup>62</sup> Nor would forbearance

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<sup>55</sup> 47 U.S.C. § 160(a)(1).

<sup>56</sup> DIRECTV Broadband Reply at 2.

<sup>57</sup> 47 C.F.R. § 61.31-61.59.

<sup>58</sup> 47 C.F.R. § 61.58(a)(2)(i).

<sup>59</sup> 47 C.F.R. § 61.38. If the Commission determines that a tariff filing contains unjust, unreasonable, or unjustly or unreasonably discriminatory rates, terms, or conditions, it may reject the tariff, or investigate, and if it finds the tariff unlawful, order the carrier to refund any overcharges. 47 U.S.C. § 204.

<sup>60</sup> See *Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC’s Local Exchange Area and Policy and Rules Concerning the Interstate, Interexchange Marketplace*, CC Docket Nos. 96-149, 96-61, Second Report in CC Docket No. 96-149 and Third Report and Order in CC Docket No. 96-61, 12 FCC Rcd 15756, 15766, para. 12 (*LEC Classification Order*), Order on Reconsideration, 12 FCC Rcd 8730 (1997) (*LEC Classification Reconsideration Order*), Order, 13 FCC Rcd 6427 (Comm. Car. Bur. 1998) (*LEC Classification Partial Stay Order*); Second Order on Reconsideration and Memorandum Opinion and Order, 14 FCC Rcd 10771 (1999) (*LEC Classification Second Reconsideration Order*).

<sup>61</sup> 47 U.S.C. §§ 201-02; see SBC Comments at 56-57.

<sup>62</sup> See, e.g., *Wireline Broadband Notice*, 17 FCC Rcd at 3040-43, paras. 43-52.

affect our ability to enforce those obligations in response to a complaint pursuant to section 208 of the Act.<sup>63</sup> ASI, moreover, would continue to be required to give notice and obtain Commission approval prior to discontinuing, reducing, or impairing any of its interstate services.<sup>64</sup>

19. We recognize, of course, that there are real differences between tariff regulation and a contract or permissive detariffing regime for SBC's advanced services operations. As several parties suggest, tariff regulation enables ASI's competitive LEC and ISP customers to monitor the generally available charges, practices, classifications, and regulations applicable to ASI's advanced services offerings.<sup>65</sup> That form of regulation also gives ASI's customers an opportunity to challenge changes in those charges, practices, classifications, and regulations prior to their taking effect.<sup>66</sup> On the other hand, tariff regulation does not and cannot address all aspects of a carrier's relationship with its customers. For example, even the most detailed tariff would provide no more than general rules to govern the many day-to-day operational issues carriers and their customers encounter. In particular, factually-intensive disputes regarding matters such as whether a carrier's operations support systems discriminate unreasonably against unaffiliated ISPs almost inevitably must be resolved through negotiation or the section 208 complaint process.<sup>67</sup>

20. Because ASI obtains inputs for its advanced services offerings from SBC's operating companies, the charges, practices, classifications, or regulations associated with these inputs are "charges, practices, classifications, or regulations . . . in connection with" ASI's advanced services within the meaning of section 10(a).<sup>68</sup> We conclude that, given SBC's current corporate structure and the commitments made in this record, tariff regulation of ASI is not necessary to ensure that these charges, practices, classifications, and regulations do not violate that section's standard. As we concluded in the *LEC Classification Order*, tariff regulation of a BOC affiliate is, at best, a clumsy tool for protecting against an exercise of market power by the BOC itself.<sup>69</sup> Consistently, we conclude here that the separate affiliate structure established in the *SBC/Ameritech Merger*, together with the commitments and safeguards required herein, and the direct regulation of SBC's operating companies where appropriate, adequately assures that

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<sup>63</sup> 47 U.S.C. § 208; *see* SBC Comments at 56-57.

<sup>64</sup> *See* 47 U.S.C. § 214(a); 47 C.F.R. § 63.71. We note that, absent a declaration of non-dominance, forbearance from tariff regulation would not preclude ASI from retaining its tariff. *See generally* 47 C.F.R. § 61.19(a).

<sup>65</sup> *E.g.*, AT&T Comments at 12; EarthLink Comments at 25-26; US LEC Comments at 11.

<sup>66</sup> *E.g.*, DIRECTV Broadband Comments at 12; WorldCom Reply at 22.

<sup>67</sup> *Cf.* *LEC Classification Order*, 12 FCC Rcd at 15831, para. 128 (concluding that the Commission can address any predatory pricing by the BOC section 272 affiliates through the section 208 complaint process).

<sup>68</sup> 47 U.S.C. § 180(a).

<sup>69</sup> *LEC Classification Order*, 12 FCC Rcd at 15808, para. 91 (concluding that tariff regulation of BOC's section 272 affiliates would be at best a clumsy tool for protecting against an exercise of market power by the BOC).

SBC's operating companies will likely be unable to impose unjust, unreasonable, or unjustly or unreasonably discriminatory charges, practices, classifications, or regulations for or in connection with the telecommunications facilities and services that ASI and its competitors use as inputs for their advanced services offerings.<sup>70</sup> In particular, direct regulation of SBC's operating companies is the appropriate tool for addressing whether the operating companies' charges, practices, classifications, or regulations are just and reasonable. In addition, because the separate affiliate structure walls off from ASI any control SBC's operating companies might have over advanced services inputs and prevents the transfer to ASI of the equipment and facilities with which those inputs are provided, tariff regulation of ASI is not necessary to ensure that ASI's transactions with SBC's operating companies will be transparent and non-discriminatory.<sup>71</sup>

21. We now turn to the question whether tariff regulation of ASI is necessary to ensure that ASI's own charges, practices, classifications, or regulations meet the standard set forth in section 10(a). We conclude that the separate affiliate structure established in the *SBC/Ameritech Merger Order*, in combination with SBC's commitments in this proceeding, commercial experience during approximately 18 months when ASI offered advanced services under contract, and the availability of the section 208 complaint process, establish that tariff regulation is not necessary to ensure that ASI's own charges, practices, classifications, and regulations meet that standard. Specifically, SBC's commitments in this proceeding, which are based on ASI's practices during the period it operated pursuant to contract, ensure that ASI will provide customers and competitors with notice comparable to that available under a dominant tariffing regime.<sup>72</sup> In addition, those commitments, in combination with the separate affiliate structure and the prospect of regulation via the section 208 complaint process, help to ensure that the rates, terms, and conditions under which ASI offers advanced services will be just, reasonable, and not unjustly or unreasonably discriminatory.<sup>73</sup>

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<sup>70</sup> See, e.g., *SBC/Ameritech Merger Order*, 14 FCC Rcd at 14978, Condition I.4.f (requirements that ASI order, in the same manner as its competitors, any UNEs and telecommunications services that it seeks to obtain from SBC and that SBC must allow non-affiliates to order UNEs and telecommunications services from its incumbent LECs under the same rates, terms, and conditions, and utilizing the same interfaces, processes, and procedures, as are available to ASI); ITAA Comments at 27 (contending that structural separation, coupled with appropriate price regulation of operating companies' telecommunications services, helps deter anti-competitive abuses); New Edge Comments at 9-10 (arguing that structural separation protects against discrimination in connection with the facilities and services that advanced services providers obtain from operating companies).

<sup>71</sup> See, e.g., Time Warner Comments at 11-12 (arguing that structural separation helps limit an incumbent's ability to leverage its control over bottleneck end-user connections to inhibit competition in advanced services).

<sup>72</sup> *SBC Nov. 15, 2002 Letter*, at 7 (commitments to post on ASI's website the general rates, terms, and conditions under which ASI is willing to provide advanced services as well as the rates, terms, and conditions of any broadband access arrangement that ASI has with an affiliated ISP).

<sup>73</sup> *SBC Nov. 26, 2002 Letter*, at 1 (commitment to allow unaffiliated ISPs that are similarly situated to take service under those rates, terms, and conditions made available to affiliated ISPs).

22. Further, as stated above,<sup>74</sup> the separate affiliate structure helps to ensure that unaffiliated advanced services providers are able to order access to these facilities and any requisite telecommunications services from SBC under the same rates, terms, and conditions that SBC makes available to ASI.<sup>75</sup> ASI's customers and competitors thus receive protection against the imposition of unjust, unreasonable, and discriminatory rates, terms, and conditions by ASI comparable to that available under tariff regulation. In these circumstances, we are not convinced that tariff regulation is necessary for ensuring that the rates, terms, and conditions for ASI's advanced services are just, reasonable, and not unjustly or unreasonably discriminatory. We find instead that the better policy is to allow ASI to respond to technological and market developments without our reviewing in advance the rates, terms, and conditions under which ASI provides service. We emphasize that our findings are limited to the facts currently before the Commission – that is, we make this holding based entirely on the history of ASI's provision of advanced services under contract, the commitments made in this record, and the existence of the structurally separate affiliate described in the *SBC/Ameritech Merger Order*. We also emphasize that the rates, terms, and conditions under which ASI provides telecommunications services will remain subject to challenge through the section 208 complaint process.<sup>76</sup> Our grant of forbearance should not be construed as prejudging in any way the outcome of any section 208 complaint proceeding.

## 2. Protection of Consumers

23. In order to forbear from applying tariff regulation to SBC's advanced services operations, section 10(a)(2) requires us to analyze whether such application is necessary to ensure the protection of consumers.<sup>77</sup>

24. For reasons similar to those that persuade us that tariff regulation is not necessary within the meaning of section 10(a)(1), we also conclude that tariff regulation is not necessary for the protection of consumers. Given SBC's maintenance of the separate affiliate structure and SBC's commitments in this record, forbearance from tariff regulation of ASI's advanced services operations should not adversely affect any entity's ability to provide consumers with telecommunications and Internet access services. Specifically, as ASI operates in accordance with those conditions and commitments, consumers will continue to be able to receive services

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<sup>74</sup> See para. 20, *supra*.

<sup>75</sup> See *SBC/Ameritech Merger Order*, 14 FCC Rcd at 14978, Condition I.4.f.

<sup>76</sup> 47 U.S.C. § 208; see, e.g., *Hyperion Telecommunications, Inc. Petition Requesting Forbearance, Time Warner Communications Petition for Forbearance, Complete Detariffing for Competitive Access Providers and Competitive Exchange Carriers*, Memorandum Opinion and Order and Notice of Proposed Rulemaking, 12 FCC Rcd 8596, 8609, para. 25 (1997); BellSouth Comments at 50 (arguing that sections 201 and 202, in conjunction with the section 208 complaint process, ensure that rates and practices are just, reasonable, and not unreasonably discriminatory); SBC Comments at 56-57. *But see* EarthLink Reply at 13 (arguing that the section 208 complaint process is time consuming and resource intensive and ignores the practical need to redress anticompetitive conduct when it happens).

<sup>77</sup> 47 U.S.C. § 160(a)(2).

from carriers that rely on telecommunications facilities and services obtained from SBC's operating companies as inputs for their advanced services offerings. Forbearance from tariff regulation of ASI will not affect the rates, terms, and conditions under which these telecommunications facilities and services are provided. In addition, ISPs that rely on telecommunications services obtained from ASI or its competitors will continue to be able to receive those services with protections, including the section 208 complaint process, against the imposition of unjust, unreasonable, and unjustly or unreasonably discriminatory rates, terms, or conditions. Finally, because SBC has committed itself to making its wholesale DSL transport service and other advanced services available to similarly situated unaffiliated ISPs on the same rates, terms, and conditions under which affiliated ISPs obtain those services,<sup>78</sup> forbearance will not affect consumers' ability to obtain Internet access service from ISPs of their choosing.<sup>79</sup>

### 3. Public Interest

25. In order to forbear, section 10(a)(3) requires us to analyze whether forbearance would be consistent with the public interest.<sup>80</sup> Specifically, we must "consider whether forbearance from the provision or regulation will promote competitive market conditions, including the extent to which such forbearance will enhance competition among providers of telecommunications services."<sup>81</sup> We conclude that, by allowing ASI to compete more effectively in the provision of advanced services, forbearance from tariff regulation will promote competition among advanced services providers, provided ASI operates in accordance with the separate affiliate structure established in the *SBC/Ameritech Merger Order* and SBC's commitments made in this record. We therefore also conclude that forbearance subject to operation in accordance with that structure and those commitments would be consistent with the public interest.

26. We believe that tariff regulation imposes significant costs on ASI, irrespective of whether it is non-dominant in its provision of advanced services, as SBC urges, or dominant in its provision of those services, as several competitive LECs and ISPs contend.<sup>82</sup> Specifically, we

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<sup>78</sup> *SBC Nov. 26, 2002 Letter*, at 1.

<sup>79</sup> See AOL Reply at 4 (arguing that we should not allow SBC to restrict consumers' choice of ISPs).

<sup>80</sup> 47 U.S.C. § 160(a)(3).

<sup>81</sup> 47 U.S.C. § 160(b).

<sup>82</sup> The Commission has long recognized that tariff regulation has many drawbacks. See, e.g., *LEC Classification Order*, 12 FCC Rcd at 15806, para. 88; *Motion of AT&T Corp. to be Reclassified as a Non-Dominant Carrier*, Order, 11 FCC Rcd 3271, 3288, para. 27 (1995) (*AT&T Reclassification Order*). Tariff regulation can prevent a carrier from quickly introducing new services and from quickly responding to its competitors' new offerings. See *LEC Classification Order*, 12 FCC Rcd at 15806, para. 88; *AT&T Reclassification Order* 11 FCC Rcd at 3288, para. 27; see also Qwest Comments a 59-60 (arguing that the imposition of tariff regulation of non-dominant carriers imposes unnecessary costs and skews competition). It also can limit the ability of customers to obtain service arrangements that are specifically tailored to their needs. *Policy and Rules Concerning the Interstate, Interexchange Marketplace, Second Report and Order*, 11 FCC Rcd. 20730, 20760-61, para. 53 (1996) (*LXC Forbearance Order*) (subsequent history omitted); SBC Comments at 60. Tariff regulation also imposes (continued....)

find that tariff regulation impedes ASI from quickly introducing new services in response to customer demands and opportunities created by technological developments. We also find that tariff regulation reduces ASI's ability to respond quickly to its competitors' advanced services offerings and tailor its own offerings to meet customers' individualized needs. In particular, such regulation diminishes ASI's ability to reduce prices and improve service in response to competitive pressures.

27. In this case, the separate affiliate structure established in the *SBC/Ameritech Merger Order* and SBC's commitments provide many of the beneficial features of tariff regulation without the costs identified above. Certain parties argue, for example, that tariffs provide the information consumers and regulators need to detect unreasonable discrimination.<sup>83</sup> The separate affiliate structure, however, should ensure that ASI's competitors will obtain telecommunications facilities and services from SBC at the same rates, terms, and conditions as are available to ASI; and SBC's commitments will help ensure that unaffiliated carriers and ISPs will be able to obtain ASI's services at the same rates, terms, and conditions as are available to affiliated ISPs. Those commitments also should ensure that unaffiliated ISPs have non-discriminatory access to the transmission capabilities underlying the Internet access services provided by ASI's ISP affiliates, as our *Computer Inquiry* rules require. Similarly, several parties contend that tariffing facilitates detection of unreasonable rates, terms, and conditions.<sup>84</sup> SBC's commitments in this proceeding, however, will provide ASI's customers and competitors with the same ability to detect unreasonable rates, terms, and conditions as tariff regulation provides, as ASI posts on its website generally available rates, terms, and conditions for its advanced services offerings that parties can review and analyze for reasonableness.

28. Certain of ASI's competitors and customers also point out that forbearance from tariff regulation would eliminate their ability to challenge, and have us review, changes in advanced services rates, terms, and conditions prior to their taking effect.<sup>85</sup> While we would hope that third party and our own prior review of rates, terms, and conditions under which carriers provide telecommunications services would benefit competition in some circumstances, we find, given the separate affiliate structure established in the *SBC/Ameritech Merger Order* and SBC's commitments in this record, subjecting the rates, terms, and condition under which ASI provides advanced services to our dominant carrier tariffing process is more likely to impede, than promote, competition. That structure and those commitments help protect against the initial imposition of unjust, unreasonable, or unjustly or unreasonably discriminatory rates, terms, and conditions. By interjecting regulatory delay into an otherwise dynamic process, tariff regulation would more likely reduce the overall level of innovation and responsiveness to

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administrative costs on carriers, which must prepare and file tariffs, and on the Commission staff, which must review them. *See, e.g., LEC Classification Order*, 12 FCC Rcd at 15807-08, para. 89.

<sup>83</sup> *E.g., AT&T Comments* at 52-54; *CompTel Comments* at 19; *WorldCom Reply* at 22-23.

<sup>84</sup> *E.g., CompTel Comments* at 19-20; *Earth Link Comments* at 25; *WorldCom Reply* at 22-23.

<sup>85</sup> *See, e.g., DIRECTV Broadband Comments* at 12; *WorldCom Reply* at 22.

consumer demands in advanced services.<sup>86</sup> We therefore find that, given that separate affiliate structure, those commitments, and the availability of the section 208 complaint process, any benefits of tariff regulation of ASI are not sufficiently substantial as to exceed the costs of that regulation.

## B. Other Matters

29. As stated above,<sup>87</sup> our focus in addressing SBC's forbearance request is on the separate affiliate structure and commitments under which SBC intends to provide advanced services, rather than on other, largely hypothetical ways in which SBC might choose to conduct its advanced services operations. In view of our findings above that operation in accordance with that structure and those commitments warrants forbearance from tariff regulation of ASI, we reject any suggestion that more stringent safeguards are needed to keep SBC's operating companies from leveraging any control they might have over essential inputs to impede competition in advanced services and Internet access services.<sup>88</sup> The separate affiliate structure established in the *SBC/Ameritech Merger Order* was specifically designed to ensure that competing advanced services providers received effective, non-discriminatory access to the inputs needed for their advanced services offerings.<sup>89</sup> The record in this proceeding identifies no specific aspect of that structure that requires changing in order for this purpose to be realized. As we have set forth above, in order to qualify for the relief granted in this Order, we still require SBC and ASI to maintain the separate affiliate structure they currently use, ASI to purchase its inputs in a nondiscriminatory manner, SBC and ASI to meet all of the commitments they have placed in the record, and in order to ensure effective enforcement of these conditions additionally require SBC and ASI to abide by the requirements we have set forth above regarding data retention, attestation, and making physical copies of the rates, terms and conditions under which affiliated ISPs purchase broadband access available for public inspection. In these circumstances, we cannot find that more stringent safeguards are needed to meet the statutory forbearance standards.

30. We also reject SBC's forbearance request to the extent it argues that lesser safeguards would suffice in the event it were to change its affiliate structure and ways of dealing

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<sup>86</sup> We note that our forbearance action encompasses enterprise services (*i.e.*, services not described in a preexisting tariff or contract offering) that employ ATM or frame relay technology. *See* para. 13, *supra*. SBC has argued that interexchange carriers, such as AT&T, Sprint, and WorldCom, collectively account for the majority of the ATM and frame relay revenues. *See, e.g.*, SBC Reply at 31-37.

<sup>87</sup> *See* para. 13, *supra*.

<sup>88</sup> *See, e.g.*, ITAA Comments at 28-29 (arguing that although separation requirements can effectively deter anticompetitive conduct, a separate advanced services affiliate should comply with the separation requirements set forth in section 272 of the Act).

<sup>89</sup> *See SBC/Ameritech Merger Order*, 14 FCC Rcd at 14859, para. 363.

with its advanced services customers.<sup>90</sup> We find that relief narrowly tailored to SBC's present circumstances is consistent with section 10. Specifically, although SBC argues in its petition that forbearance would be warranted even if it were to provide advanced services on an integrated basis, that petition does not suggest that any SBC affiliate other than ASI, or the SBC operating companies, will provide advanced services during the foreseeable future. Nor does that petition request forbearance from tariff regulation with respect to SBC's operating companies generally. We have granted appropriate forbearance given the facts SBC has pled, and find that the question of whether such relief should also apply to allow SBC's operating companies to provide advanced services on an integrated basis free from tariff regulation is not yet ripe for resolution.<sup>91</sup> Accordingly, we grant SBC's petition to the extent set forth herein, and otherwise dismiss SBC's petition.

31. We note that SBC's petition also requests that we issue a declaratory ruling that it is non-dominant in the provision of advanced services. This request, unlike SBC's forbearance request, is not subject to a statutory timetable. As we have noted above, we do not decide or otherwise prejudge this issue here, as we only conclude that, under the limited circumstances identified in this petition, forbearance from tariffing requirements is warranted. We intend to address non-dominance issues in the *Incumbent LEC Broadband* rulemaking as part of our broader examination of the appropriate regulation for incumbent LEC provision of domestic broadband telecommunications services. As part of that examination, we will consider the parties' arguments regarding the nature and scope of the market for domestic broadband services and the appropriate regulatory requirements under Title II of the Communications Act for those services.<sup>92</sup> We also will consider, in the *Wireline Broadband* rulemaking, whether to retain, modify, or eliminate the *Computer Inquiry* rules, which hinge on the assumption that incumbent LECs have market power in the provision of transmission services underlying information services. The *Incumbent LEC Broadband* rulemaking is one of several ongoing proceedings in which we are focusing on the regulatory treatment of broadband. Because fundamental questions regarding how broadband services should be defined and whether they are telecommunications services subject to Title II regulation are before us in other proceedings, we find that the most orderly procedure is to defer action on the non-forbearance issues raised in

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<sup>90</sup> Compare SBC Petition at 2 (requesting forbearance from tariff regulation irrespective of whether SBC continues to provide advanced services through a separate affiliate) with *SBC Nov. 15, 2002 Letter* at 7-8 (committing to certain safeguards pending action in broadband rulemakings).

<sup>91</sup> 47 U.S.C. § 160(c) (specifying that "any telecommunications carrier . . . may submit a petition to the Commission requesting that the Commission exercise its authority under [section 10] with respect to that carrier . . . , or any service offered by that carrier . . ."). We note that because we grant SBC all forbearance relief reasonably available under its petition, this situation differs from the situation before the Court in *AT&T v. FCC*, 236 F.3d 729 (D.C. Cir. 2001), where the Commission had denied all requested forbearance relief based on the availability of part of that relief through a different mechanism.

<sup>92</sup> See, e.g., AT&T Comments at 10-36; EarthLink Comments at 4-25; SBC Comments at 9-55; Verizon Comments at 8-22.

SBC's petition pending resolution of those questions.<sup>93</sup> We will monitor ASI's provision of services under the approach we adopt here, and may consider ASI's track record when we ultimately resolve these proceedings.

#### IV. ORDERING CLAUSE

32. Accordingly, IT IS ORDERED, pursuant to sections 1, 4(i), 4(j), 10, and 201-205 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 160, 201-205, that the petition for forbearance filed, October 3, 2001, by SBC Communications Inc., IS GRANTED to the extent and subject to the conditions set forth above and OTHERWISE IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch  
Secretary

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<sup>93</sup> See Covad Comments at 10 (arguing that we should address, in the *Wireline Broadband* rulemaking, the fundamental question of whether high speed Internet access service is a telecommunications service subject to Title II of the Communications Act before considering, in the *Incumbent LEC Broadband* rulemaking, the appropriate level of Title II regulation to apply to those services); US LEC Comments at ii (same).

**APPENDIX – LIST OF COMMENTERS  
(CC Docket No. 01-337)**

**Comments**

1. Ad Hoc Telecommunications Users Committee (Ad Hoc)
2. Alaska Communications Systems Affiliated Local Exchange Companies (ACS)
3. Alcatel USA, Inc. (Alcatel)
4. Alliance for Public Technology (APT)
5. Association for Local Telecommunications Services (ALTS)
6. Association of Communications Enterprises (ASCENT)
7. AT&T Corp. (AT&T)
8. BellSouth Corporation (BellSouth)
9. Cbeyond Communications and NuVox Communications (Cbeyond and NuVox)
10. Citizens for a Sound Economy Foundation (CSE Foundation)
11. Competitive Telecommunications Association (CompTel)
12. Corning Incorporated (Corning)
13. Covad Communications Company (Covad)
14. David M. Sharnoff
15. DIRECTV Broadband, Inc. (DIRECTV Broadband)
16. DLS Forum
17. DSLNet Communications, LLC, Focal Communications Corporation, and Pac-West Telecom, Inc. (DSLNet *et al.*)
18. EarthLink, Inc. (EarthLink)
19. Fiber-to-the-Home Council (Fiber-to-the Home)
20. Fred Williamson & Associates, Inc. (FW&A)
21. Information Technology Association of America (ITAA)
22. IP Communications Corporation (IP Communications)
23. Moultrie Independent Telephone Company (Moultrie)
24. Mpower Communications Corp. (Mpower)
25. National Telecommunications Cooperative Association (NTCA)
26. New Edge Network, Inc. (New Edge)
27. New Mexico Internet Professionals Association (NMIPA)
28. New York Public Service Commission (New York Commission)
29. Public Service Commission of the State of Missouri (Missouri Commission)
30. Public Service Commission of Wisconsin (Wisconsin Commission)
31. Qwest Communications International, Inc. (Qwest)
32. SBC Communications Inc. (SBC)
33. SouthEast Telephone (SouthEast)
34. Sprint Corporation (Sprint)
35. SureWest Communications (SureWest)
36. Teletruth
37. Texas Coalition of Cities for Utility Issues and City of Plano, Texas (Texas Coalition and Plano)
38. Time Warner Telecom (Time Warner)
39. United States Internet Industry Association (USIIA)

40. US LEC Corp. (US LEC)
41. Verizon
42. WorldCom, Inc. (WorldCom)

### Replies

1. Ad Hoc
2. ACS
3. Alcatel
4. Allegiance Telecom, Inc. (Allegiance)
5. AOL Time Warner Inc. (AOL)
6. ASCENT
7. AT&T
8. BellSouth
9. Consumer Federation of America, Consumers Union, Media Access Project, Center for Digital Democracy, United Church of Christ, Office of Communication, Inc., the Association for Independent Video and Filmmakers, and the National Association for Media Arts and Culture (CFA *et al.*)
10. Debra J. Aron *et al.* (43 Economists)
11. DIRECTV Broadband
12. EarthLink
13. Focal Communications Corporation and Pac-West Telecomm, Inc. (Focal and Pac-West)
14. FW&A
15. General Communication, Inc. (GCI)
16. General Services Administration (GSA)
17. GVNW Consulting, Inc. (GVNW)
18. ITAA
19. IP Communications
20. Kenneth Arrow *et al.*
21. Michigan Public Service Commission (Michigan Commission)
22. National Association of State Utility Consumer Advocates (NASUCA)
23. National Association of the Deaf
24. NuVox Communications, Cbeyond Communications, and KMC Telecom, Inc. (NuVox, Cbeyond, and KMC)
25. Organization for the Promotion and Advancement of Small Telecommunications Companies (OPASTCO)
26. Qwest
27. SBC
28. Sprint
29. The People of the State of California and the California Public Utilities Commission (California)
30. United States Telecom Association (USTA)
31. US LEC
32. Verizon
33. Women Impacting Public Policy (WIPP)

34. WorldCom

35. Wyoming Public Service Commission (Wyoming Commission)

**JOINT STATEMENT OF  
COMMISSIONER MICHAEL J. COPPS AND  
COMMISSIONER JONATHAN ADELSTEIN,  
CONCURRING**

*Re: SBC's petition for forbearance from application of dominant carrier status to its provision of advanced services*

We concur, with both reluctance and disappointment, in this Order to forbear from requiring SBC's separate affiliate to file tariffs or cost support for its provision of certain broadband services. We support this Order, not because it is the optimal outcome, or even a good one, but because it is significantly superior to the option presented to us of no decision from the Commission and the resultant forbearance from such Commission inaction. A failure to reach agreement would have resulted, under the Communications Act, in an automatic grant of SBC's entire request for forbearance, a result that we find incomprehensible in light of the record before us.

Previously, the Commission concluded that a separate affiliate providing advanced services is not a successor or assign of the Bell company and therefore, unlike the Bell company, would be nondominant. The D.C. Circuit overturned the Commission's decision, thereby eliminating the basis for the Commission's determination that the affiliate does not exercise market power. Thus, in the absence of a finding of nondominance, we must presume that SBC's affiliate exercises market power in its provision of advanced services.

We do not believe the forbearance criteria are met to detariff and eliminate cost support for a dominant carrier. In previous orders forbearing from tariff requirements, the Commission has rested its decision on its conclusion that carriers lacking market power could not successfully charge rates that violate the Communications Act. In today's Order, we extend that conclusion to a provider with market power. Some may read this Order to prejudge our decision in the broader proceeding in which we are examining whether incumbents are dominant in their provision of broadband. We want to express explicitly that this Order does not support such a conclusion.

We believe that a vastly preferable approach would have been for the Commission to conduct the requisite market analysis first. We could then detariff SBC or its affiliate only in those markets in which we had first determined the carrier does not exercise market power. But in the absence of an economic market analysis, we do not see how we can conclude that the forbearance criteria are met. Therefore, we would have preferred to deny SBC's request for forbearance and required it to maintain its tariffs and cost support until the Commission completes its examination of dominance in the broadband market.

We recognize that the Commission has been operating under tight deadlines which require difficult resource allocation decisions. Nonetheless, we believe that as a result of the Commission's having not completed its work in this proceeding in a timely fashion, and in order to avoid more far-reaching forbearance through Commission inaction, we are left only with the option to concur in the Order.

**PRESS STATEMENT OF COMMISSIONER  
KEVIN J. MARTIN  
Dissenting**

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

Fifteen months ago, SBC asked the Commission to “find it non-dominant in its provision of advanced services...and to forbear from dominant carrier regulation of those services.”<sup>94</sup>

Today, the Commission fails to act on the heart of SBC’s requested relief and puts off for another day any discussion, economic market analysis, or decision on whether SBC is non-dominant in its provision of advanced services. In my view, the decision to ignore SBC’s petition for forbearance from dominant carrier regulation in the provision of advanced services and instead grant limited forbearance from the application of tariffing requirements based on SBC’s corporate structure and future commitments is inconsistent with several recent mandates from the United States Court of Appeals for the District of Columbia Circuit (“DC Circuit”).

In several recent decisions, the DC Circuit has reversed Commission orders because: 1) the Commission had engaged in a “naked disregard” of the competition from cable modem service in evaluating the competition context for an incumbents’ provision of advanced services;<sup>95</sup> 2) a separate affiliate structure does not provide a mechanism to avoid requirements that prohibit an incumbent local exchange carrier from abusing market power, but that, without market power, such a structurally separate affiliate would not be “necessary—or even useful”<sup>96</sup>; and 3) the availability of alternative regulatory relief “...does not diminish the Commission’s responsibility to fully consider petitions under section 10.”<sup>97</sup>

I fear that in this one order, we may be ignoring all three of these recent mandates by: 1)

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<sup>94</sup> SBC Petition for Expedited Ruling that It is Non-Dominant in Its Provision of Advanced Services and for Forbearance from Dominant Carrier Regulation of Those Services, CC Docket No. 01-337 at 1. (filed Oct.3, 2001)(“SBC Petition”).

<sup>95</sup> *United States Telecom Association v. FCC*, 290 F.3d 415, 428-429 (DC Cir., May 24, 2002)

<sup>96</sup> *ASCENT v. FCC*, 235 F.3d 662, 668 (DC Cir., Jan. 9, 2001)

<sup>97</sup> *AT&T Corporation v. Federal Communications Commission*, 236 F.3d 729 (DC Cir., Jan. 23, 2001).

ignoring the competition that SBC faces in its provision of high speed internet access services in the residential market where cable modem service is available by refusing to act on the petition for forbearance from dominant carrier regulation of

advanced services; 2) reapplying the exact same structurally separate affiliate requirements that the DC Circuit has already rejected as either insufficient protections or unnecessary in light of competition; and 3) again relying on an alternative regulatory approach (i.e., separate affiliate safeguards) to avoid a petitioner's explicit request for complete "...forbearance from applying dominant carrier regulation, including tariff requirements, to SBC's provision of advanced services."<sup>98</sup>

I fear that, in once again removing tariff obligations but imposing a separate affiliate requirement while ignoring the broader forbearance relief requested, the Commission is attempting to re-impose its view of a better regulatory relief mechanism for affected companies. As the DC Circuit recently admonished the Commission, that is not an appropriate avenue.

"There is no doubt that the Commission expressed great enthusiasm over the availability of the Pricing Flexibility Order as a mechanism for relief of the sort sought here by US WEST and other BOCs. Indeed, the Commission suggested that might be a better mechanism for affected companies, because non-dominance showings [under section 10] are neither administratively simple nor easily verifiable. The Commission [bases] non-dominance findings on complex criteria, including market share and supply elasticity. Market share analyses require considerable time and expense, and they generate controversy that is difficult to resolve.

The Commission may or may not be right in what it surmises about the purported advantages of the Pricing Flexibility Order; but, at least for now, these surmises are beside the point. Congress has established section 10 as a viable and independent means of seeking forbearance. The Commission has no authority to sweep it away by mere reference to another, very different, regulatory mechanism."<sup>99</sup>

While the majority may continue to have great enthusiasm for the separate affiliate mechanism as an answer for regulatory relief, that does not justify its failure to act on the broader forbearance petition.

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<sup>98</sup> *SBC Petition at 2.*

<sup>99</sup> *AT&T v. FCC, 236 F3d 729, 737-738.*