

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of)
)
Texas Internet Service Providers)
Association Petition for Investigation,)
Suspension and Rejection of SBC-ASI)
Tariff F.C.C. No. 1, and Petition for)
Reconsideration and Application for)
Review of Special Permission No. 01-095)

OPPOSITION OF SBC ADVANCED SOLUTIONS, INC.

SBC Advanced Solutions, Inc. (SBC-ASI) hereby submits this Opposition to the Joint Petition for Investigation, Suspension, and Rejection of Tariff F.C.C. No. 1 and Petition for Reconsideration and Application for Review of Special Permission No. 01-095 (Joint Petition) filed by the Texas Internet Service Providers Association (TISPA) on August 13, 2001.¹

The Commission should deny the Joint Petition on both procedural and substantive grounds. The Joint Petition is procedurally defective in a number of respects, including the fact that it improperly calls for suspension and rejection of a tariff that already has taken effect. As a substantive matter, the Joint Petition is a grab bag of baseless challenges to the special permission that was granted to facilitate the filing of SBC-ASI's tariff. The Commission's Common Carrier Bureau (Bureau) had good cause to grant the requested waivers based on prior precedent and the unique circumstances of SBC-ASI's tariff filing. Moreover, the Joint Petition is irrelevant because it fails to identify any legitimate concerns about the substance of SBC-

¹ While Tariff F.C.C. No. 1 was filed in the name of SBC Advanced Solutions, Inc., the tariff also was filed on behalf of a number of Ameritech advanced services affiliates that were formed in 1992.

ASI's tariff. SBC-ASI values its ISP customers and its tariff offers advanced services, including DSL service, on terms and conditions that are reasonable and competitive in the market.

I. The Joint Petition Should be Denied Because it is Procedurally Defective.

Before SBC-ASI addresses the substance of TISPA's arguments, it will attempt to sort out the procedural deficiencies of the Joint Petition. These defects, coupled with the fact that the Joint Petition fails to reference relevant rule provisions and is internally inconsistent, make it difficult for SBC-ASI to determine the exact nature of the pleading to which it is responding. By necessity, SBC-ASI has been forced to make some assumptions about how the Joint Petition should be interpreted as a procedural matter and to make arguments in the alternative.

The Joint Petition is defective because it includes both a petition for reconsideration of the special permission granted to SBC-ASI, as well as an application for review of that same decision. The Commission's rules provide that a party may file a petition for reconsideration or an application for review, but not both.² Accordingly, the relief requested in the Joint Petition is inconsistent with the Commission's rules and should be denied. If this portion of the Joint Petition is not rejected outright, then it should be treated like a petition for reconsideration of the special permission and addressed at the Bureau level. Such treatment would be consistent with the Commission's rules, which provide that if one party files a petition for reconsideration and another party files an application for review, the Commission will withhold action on the application for review until final action has been taken on the petition for reconsideration.³

² 47 C.F.R. §§ 1.44(a), 1.104(b).

³ 47 C.F.R. § 1.104(c). SBC-ASI notes that TISPA reserves the right to amend its Joint Petition at some future time. Joint Petition at 1. No such amendment of a petition for reconsideration or other request for relief is envisioned or permitted under the Commission's rules.

The most significant procedural problem with the Joint Petition is that it calls for the Commission to investigate, suspend and reject a tariff that already has taken effect.⁴ This type of *post hoc* suspension and rejection of a tariff is not permitted by Section 204 of the Act or the Commission's rules. It is clear from the terms of Section 204 that the Commission must suspend a tariff filing before the time it would "otherwise go into effect."⁵ Likewise, it is clear that the Commission cannot simply reject a tariff that has taken effect without first conducting an investigation. Section 205 provides that, *after full opportunity for hearing*, the Commission is authorized to determine what tariff classification, regulation or practice is just, fair and reasonable and to require that a carrier conform its tariff to its prescription on a prospective basis.⁶

The Commission itself described the statutory framework in a similar case as follows:

Once a tariff is filed and becomes effective, the Commission may not reject it summarily. The Communications Act authorizes the Commission to suspend and investigate a tariff before it takes effect or to initiate a proceeding after the tariff takes effect to ascertain the lawfulness thereof. Accordingly, to the extent [the] petitions seek summary rejection of effective tariffs, they seek a remedy beyond the scope of our authority.⁷

Therefore, the Commission should reject TISPA's petition for investigation, suspension and rejection of SBC-ASI's tariff as an impermissible pleading that is inconsistent with the statute and the Commission's rules. It is improper for TISPA to simply assume that the special permission grant will be set aside and proceed to ask the Commission to suspend and reject a

⁴ Joint Petition at 10.

⁵ 47 U.S.C. § 204(a)(1).

⁶ 47 U.S.C. § 205(a).

⁷ *Teleport Communications Group Operating Companies, Tariff F.C.C. No. 1 et al.*, 8 FCC Rcd 3611 (1993).

tariff that has taken effect.⁸ At most, the Joint Petition could be treated as an informal request for the Commission to initiate an investigation of SBC-ASI's tariff pursuant to its Section 205 authority. TISPA may submit an informal request for Commission action pursuant to Section 1.41 of the rules, but the decision to initiate a tariff investigation rests solely with the Commission.⁹

II. The Bureau (or the Commission) Should Reject TISPA's Challenge to the Special Permission Granted to SBC-ASI.

If the Bureau (or the Commission) does not reject TISPA's challenge to the special permission that was granted to SBC-ASI on procedural grounds, then it should do so on substantive grounds. TISPA fails to identify any problems with the waivers that were granted and certainly does not refute SBC-ASI's showing that there was good cause to support its application for special permission.

TISPA first raises the completely circular argument that SBC-ASI is a dominant carrier and, as a result, there was not good cause to waive the tariff rules that apply to dominant carriers.¹⁰ As a preliminary matter, SBC-ASI strongly disagrees with TISPA's assertion that the court's decision in *ASCENT v. FCC* compels the conclusion that SBC-ASI is a dominant carrier. To the contrary, in its decision approving the merger of SBC and Ameritech, the Commission held that SBC-ASI could operate as a non-dominant carrier in its provision of advanced services, provided that SBC-ASI complies with various structural and transactional safeguards. Of particular relevance to SBC-ASI's waiver requests, the Commission concluded that the "affiliate

⁸ Joint Petition at 10.

⁹ 47 U.S.C. § 205(a).

¹⁰ Joint Petition at 5.

structure set forth in the [merger] conditions will ensure that an SBC/Ameritech advanced services affiliate occupies a position in the market comparable not to an incumbent, but rather to a non-incumbent advanced services competitors. [sic]”¹¹ Nothing in the *ASCENT v. FCC* decision disturbed the Commission’s determination that SBC-ASI is presumptively non-dominant as a result of the structural and transactional safeguards that govern its operations.

In any event, TISPA’s discussion of the meaning of the *ASCENT* decision is irrelevant to the application for special permission. SBC-ASI is not even required to file a tariff, let alone comply with the Commission’s tariffing requirements, to the extent it is a non-dominant carrier. SBC-ASI continues to believe it is a non-dominant carrier, but it filed an interstate tariff to avoid any potential for disputes related to its regulatory status. In its application for special permission, SBC-ASI demonstrated that, regardless of whether it was deemed a dominant carrier, there was good cause to grant the requested waivers to facilitate the filing of the tariff. Thus, the *ASCENT* decision has no bearing on the Bureau’s grant of the waivers requested by SBC-ASI.

TISPA also argues that SBC-ASI’s tariff is not a “new service offering” because the advanced services it covers are the same as those previously offered by SBC-ASI’s parent companies.¹² This argument ignores the fact that the Commission’s definition of a new service offering includes new rates and rate plans, as well as new types of services.¹³ Accordingly, the application for special permission explained that, not only was this SBC-ASI’s initial tariff filing, but the rates contained in the tariff are different from the rates that its parent companies

¹¹ *Merger Order* at ¶ 461.

¹² Joint Petition at 8.

¹³ 47 C.F.R. § 61.3(x).

previously had on file with the Commission almost two years ago. The tariff also enlarges the options available for customers, who had been purchasing advanced services from SBC-ASI exclusively through contracts.

Even if TISPA were correct that the tariff was not a new service offering, SBC-ASI requested alternative relief to file its initial tariff on one day's notice and without cost support. SBC-ASI demonstrated that it was in the unique position of transitioning from offering service through contracts to offering service out of a tariff and continuing to operate pursuant to the structural safeguards established in the *Merger Order*. SBC-ASI also demonstrated that there was precedent for granting a waiver of the tariff notice and cost support requirement in a similar case involving dominant carriers. For these reasons, there was good cause to grant the requested waivers regardless of whether the tariff is a new service offering.

While acknowledging that the cost support requirement is burdensome and would cause a delay of the tariff's effectiveness, TISPA claims there was not good cause to grant the requested waivers.¹⁴ TISPA's claim is based on the unsupported and erroneous assumption that SBC-ASI essentially re-filed the tariffs of its parent companies and had adequate time and resources to assemble the required cost support information.¹⁵ As discussed above, the rates in SBC-ASI's tariff are different from those in the tariffs that its parent companies previously had on file almost two years earlier. Moreover, SBC-ASI explained in its application for special permission that it does not have the expertise or resources needed to prepare a cost study in support of its rates. Under the requirements imposed by the Commission, SBC-ASI must operate independently and

¹⁴ Joint Petition at 7-8.

¹⁵ *Id.*

must conduct transactions with the SBC telephone companies on an arm's length basis.¹⁶ The structural and transactional safeguards established in the *Merger Order* preclude SBC-ASI from relying on many of the resources of the SBC telephone companies and force it to operate more like a CLEC in the market.

III. TISPA Has Provided No Basis to Investigate SBC-ASI's Tariff.

If the Commission does not reject TISPA's request for investigation, suspension and rejection of SBC-ASI's tariff outright on procedural grounds, then it should decline to initiate an investigation of the tariff. While TISPA lists four pages of objections (many of which are in question format), it fails to identify any legitimate concerns about the substance of SBC-ASI's tariff. Therefore, TISPA's challenge to the application for special permission is irrelevant and no investigation of the tariff is warranted. SBC-ASI addresses some of TISPA's particular claims below.

TISPA questions whether the tariff prevents end users from changing ISPs based on an agreement between the two ISPs.¹⁷ There is no such restriction. However, it is important to note that SBC-ASI offers a *wholesale* DSL service, and therefore ISPs (and not end users) are its customers. Because of the wholesale nature of this relationship, SBC-ASI does not have a service relationship with the end user and is not directly involved when an end user changes ISPs. The tariff does include a provision that allows an ISP customer to assign or transfer its

¹⁶ As part of the structural separation requirements, SBC-ASI must have separate officers, directors, employees, books, records and accounts from the SBC telephone companies. Because of these requirements, SBC expended significant financial and personnel resources establishing the separate affiliate and implementing all of the operational support and other systems needed to conduct business.

¹⁷ Joint Petition at 14.

services to another ISP under certain conditions, which should cover the situation where there is an agreement between two ISPs.¹⁸

TISPA also alleges that the tariff changes the terms and conditions of existing contracts.¹⁹ That is not the case. Section 2.11.1 clearly grandfathers all existing contracts between SBC-ASI and non-affiliated customers, and any rates, terms and conditions contained in such contracts remain in effect. To the extent a customer elected to enter into a contract with month-to-month rates, the contract included a provision that gave *either party* the right to cancel the contract upon 30 days' notice. SBC-ASI has exercised its contractual right to terminate these contracts and has provided constructive notice to all customers that are parties to such contracts. To help minimize customer confusion, Section 2.11.2 of the tariff provides for a 90-day transition period, and SBC-ASI will be providing customers with much more than the requisite 30 days' notice.

In addition, TISPA mischaracterizes the shortfall liability and early termination liability provisions of the tariff as penalty provisions.²⁰ As the Commission is aware, such provisions are an essential component of volume and term discount plans, and are commonplace in the advanced services market. SBC-ASI has reasonably based the amount of the shortfall and early termination liabilities on the level of customer commitment that determines the amount of the customer's volume and term discounts (*e.g.*, the difference between the commitment volume and the actual volume purchased by the customer). In the absence of these shortfall and early termination liability provisions, SBC-ASI would have no ability to offer its customers the benefits of volume and term discount plans.

¹⁸ SBC-ASI Tariff F.C.C. No. 1, § 2.9.1.A.1.

¹⁹ Joint Petition at 14.

²⁰ *Id.* at 16.

Moreover, TISPA's complaint about the shortfall and early termination liability provisions of Section 6.4.3 of the tariff is irrelevant. The provisions of Section 6.4.3 reflect the terms of the volume discount plan purchased by SBC-ASI's affiliates because affiliate contracts are not grandfathered. SBC-ASI does not expect any other customer to buy DSL service out of the affiliate volume discount plan, since other volume discount plans in the tariff offer much more favorable terms. Specifically, a non-affiliated customer can obtain a \$35 rate by committing to a volume of only 250 DSL lines, whereas SBC-ASI's affiliates obtain the \$35 rate by committing to a volume of 750,000 DSL lines and agreeing to be subject to the associated shortfall liabilities set forth in Section 6.4.3.²¹

Finally, TISPA complains about the way that SBC-ASI has described its DSL service as a "virtual session" between its ATM network and a designated end user premises using DSL technology. SBC-ASI employed this definition to provide notice to its customers that, in the future, it is possible that SBC-ASI may provide the capability to offer multiple applications (*e.g.*, Internet access, streaming video) using multiple "virtual sessions" over a single DSL line. TISPA claims that the tariff does not allow an ISP customer to offer a similar service, but that is not true. An ISP customer is free to offer multiple applications or virtual sessions utilizing the DSL service that it purchases from SBC-ASI. The tariff merely provides that SBC-ASI itself does not support multiple private virtual circuits (PVCs) to any customer at this time. Moreover, TISPA's concerns about multiple virtual sessions are purely hypothetical because SBC-ASI does not provide multiple virtual sessions over a DSL line at this time. If SBC-ASI decides to make changes to its network in the future that enable multiple virtual sessions, SBC-ASI will comply

²¹ Of course, the affiliate volume discount plan is available to any customer that wants it on non-discriminatory terms and conditions.

with any network disclosure and notification obligations. To avoid any confusion about this issue, SBC-ASI will amend its tariff to clarify that it does not support multiple PVCs or virtual sessions over a single DSL line at this time, although it may do so in the future.

For the foregoing reasons, the Commission should deny TISPA's disjointed and Joint Petition on procedural and substantive grounds.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I, Anisa A. Latif, do hereby certify that a copy of the **Opposition of SBC Advanced Solutions, Inc. to Texas Internet Service Providers Association, Inc. Joint Petition** has been served on the party below via first class mail – postage prepaid on this 24th day of September 2001.

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