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## SUMMARY

The Commission should not accept SBC's proposal is an egregious attempt to obtain "deemed lawful" treatment for its proposed tariff revisions while also insisting that the Commission exempt the tariff from any substantive rate regulation or standard of reasonableness that could provide some assurance to the Commission, SBC's customers and the public that the increased tariff rates and other changes are reasonable. The proposed tariff revisions include major restructuring and rate level increases, do not conform to price cap requirements governing SBC's rates, nor have no basis in increased costs of providing service, and are being imposed by SBC without any consultation with the customers who would be subjected to the new terms and conditions. This most recent attempt to impose a rate change without the possibility of meaningful feedback from the impacted parties – either through the Commission's review process or informally by consultation with customers – provides another example of the disconnect between SBC's contention that it should be receive non-dominant treatment, and conduct that demonstrates that SBC in fact is a dominant provider.

No basis exists for the Commission to conclude that competition is sufficient to protect against SBC's incentive and ability to discriminate against, and charge unreasonable rates to, competitors such as DIRECTV Broadband that purchase services from SBC's ASI division. To the contrary, available evidence suggests that ASI is grossly overcharging its customers. The Commission is faced with a major inconsistency in that SBC, on the one hand, is asking the Commission to accord ASI virtually non-regulated status (as though it had already been classified as non-dominant) while, on the other hand, requesting "deemed lawful" treatment for the tariff changes, which treatment, as a practical matter, has been accorded by the Commission only to dominant carriers. SBC should not be permitted to have it both ways. At a minimum, if

ASI wants “deemed lawful” status it should be required to justify its rates, and to explain the manner in which the changes benefit not only SBC but the industry and consumers most impacted by the changes. Accordingly, the Commission should rescind Special Permission No.11 that permitted ASI to file this tariff without cost support and reject the tariff, or suspend the tariff for five months, and initiate an investigation.





nationwide broadband network combined with last-mile wholesale xDSL connectivity and transport purchased from ILECs, including ASI, and, where possible, from CLECs such as MCI WorldCom. DIRECTV Broadband's and other BSPs have no choice but to rely on ASI as their provider of wholesale DSL connectivity within SBC's 13-state incumbent region. Therefore, the BSPs could be seriously adversely affected by changes to terms and conditions of ASI's service offers and are vitally interested in assuring the reasonableness of ASI's proposed rates, terms, and conditions of service.

## **II. THE COMMISSION SHOULD RESCIND SPECIAL PERMISSION NO. 11 AND REJECT THE PROPOSED TARIFF REVISIONS**

In light of the potential harmful effect on its customers and on broadband competition, all tariff revisions proposed by ASI should be fully justified under some scheme of regulation, either price caps or based on cost, even if filed on less than 15 day's notice. Without compliance with such rate regulation, neither its customers nor the Commission have any assurance that the proposed rates are reasonable. The Commission has not yet reached any conclusions in the *Non-Dom Proceeding*.<sup>2</sup> The D.C. Circuit in *Ascent* invalidated any assumption that ASI is not an ILEC merely because it is a separate affiliate of SBC. Therefore, there is no basis for the Commission to conclude that competition is sufficient to constrain ASI's potential for unreasonable practices and that it could dispense with cost support or some other mode of substantive rate regulation in order to assure the reasonableness of ASI's tariff. In fact, as pointed out in the *Non-Dom Proceeding*, both SBC and its alleged intermodal competitors have been raising prices, showing the lack of competitive pressure.<sup>3</sup>

It is particularly harmful to ASI's customers that ASI should be permitted to institute major new tariff changes without any cost support or other justification that could show the rates

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<sup>2</sup> *Association of Communications Enterprises v. FCC*, 235 F.3d 662, (D.C. Cir. January 9, 2001) ("ASCENT").

are reasonable and be accorded “deemed lawful” treatment under Section 204 (a)(2)(C)(3) of the Act. If a LEC tariff is filed on one day’s notice without any cost support, at least customers may file complaints and obtain refunds of overcharges. ASI’s current proposal is particularly egregious in that it seeks to obtain immunity from refunds for overcharges while also declining to provide any justification for the proposed rates.

DIRECTV Broadband has been seriously concerned about the Commission’s apparent concessions to ASI’s insistence over the last 18 months that ASI in practice be treated as a non-dominant carrier even before the Commission has made any such determination. But ASI’s current demand is outrageous - ASI wants the desirable features of non-dominant treatment such as filing without cost support, but also “deemed lawful” treatment that would preclude any recovery of overcharges by its customers for unlawful rates. To the best of DIRECTV Broadband’s knowledge, the Commission so far has only permitted “deemed lawful” treatment to be accorded dominant carriers that fully justify rates either under price caps or on a cost basis. DIRECTV Broadband surmises that if a non-dominant carrier, such as a CLEC, endeavored to file a tariff on fifteen day’s notice and obtain “deemed lawful” status it would set off major alarm bells. But that is precisely what ASI is attempting in the current filing, although DIRECTV Broadband stresses that ASI’s persistent contention that ASI is non-dominant in provision of broadband services has no merit whatsoever. DIRECTV Broadband requests that the Commission flatly refuse ASI’s proposal that it be given “deemed lawful” treatment for totally unsupported rates by rescinding Special Permission No.11 that permitted it to file this tariff

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<sup>3</sup> See, e.g. Comments of DIRECTV Broadband, CC Docket No. 01-337, filed March 1, 2002.

without cost support and by then rejecting the tariff for failure to comply with cost support requirements.<sup>4</sup>

In this connection, DIRECTV Broadband stresses that ASI's perfunctory request for special permission did not present good cause. ASI stated that it would be "extremely burdensome" for it to be required to comply with cost support rules.<sup>5</sup> On its face, this is an insufficient reason to waive cost support requirements. The Act requires that ASI charge just and reasonable rates. Until it is accorded non-dominant status, it must file cost support or comply with price cap regulation. Nor is there any reason to believe that it would be particularly burdensome to submit cost information. While SBC has told DIRECTV Broadband that its rates are cost justified, it has not provided any cost justification to DIRECTV Broadband or the Commission. Presumably, therefore, ASI has cost information and it may readily, and should be required to, submit the information referred to. Even more absurdly, ASI stated that there is good cause for waiver of the cost support requirement "to accommodate the transition to tariffed operations."<sup>6</sup> Given that ASI's services were initially offered by SBC on a tariffed basis, and have been offered on a tariffed basis by ASI for more than one year, this excuse for not filing cost support is clearly obsolete. ASI has had substantial opportunity to prepare cost support material. Apart from these deficiencies, ASI did not bother to address why it should be permitted to obtain "deemed lawful" status for a major tariff without any cost justification. This failure by itself should have disqualified ASI from receiving a grant of Special Permission No. 11, even apart from the overall perfunctory and unsupported nature of its special permission request.

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<sup>4</sup> DIRECTV Broadband had no opportunity to comment on ASI's application for special permission because it was granted the next business day after it was filed.

<sup>5</sup> Application for Special Permission No. 1, filed September 30, 2002.

<sup>6</sup> *Id.*

Furthermore, while DIRECTV Broadband has not had an opportunity to fully research the issue, to the best of its knowledge DSL service provided by the BOCs is subject to price cap regulation. Therefore, the Commission should also reject the proposed tariff for failure to comply with price cap requirements. Significantly, Verizon has obtained waivers of both Section 61.38 and 61.49 of the Rules for its recent DSL tariff filings. Although these waivers should not have been granted, SBC's failure to obtain a waiver of Section 61.49 also warrants rejection.

### **III. THE PROPOSED TARIFF PROVISIONS RAISE SUBSTANTIAL QUESTIONS OF LAWFULNESS**

#### **A. The Proposed Revisions Raise Substantial Questions of Lawfulness Simply Because They Have Not Been Justified Based on Costs, or Otherwise**

As noted, ASI has not submitted any cost justification for its proposed tariff revisions. Therefore, there is no basis to assume that the proposed revisions are justified based on cost. While this might be acceptable if the proposed revisions were trivial, ASI proposes a major restructuring going forward of virtually all its services. In this connection, some rates are being dramatically increased, and the rate structure is being dramatically changed, as explained more below. ASI is also introducing some entirely new charges. Moreover, because these are major restructuring changes it is not possible to assume that the proposed changes are reasonable by reference to a previous tariff. ASI has now been filing tariffs without cost-support for over one year. There is no way for the Commission or customers at this point to form any assumptions about the relationship of the proposed rates to cost. Nor, as discussed, is there any basis for

assuming that proposed rates are lawful because they conform to price cap requirements or because of competition.

The total lack of any justification whatsoever that could support a finding that these major changes are reasonable by itself raises a substantial question of lawfulness.<sup>7</sup> In no event, should the Commission permit these major changes to become effective and deemed lawful without any cost support. Accordingly, assuming the Commission does not reject the tariff, the Commission should suspend the tariff for five months and direct ASI to justify the tariff based on cost or some other basis that might provide some assurance that the rates are reasonable.

**B. Available Evidence Creates A Substantial Question that ASI's Rates Are Unreasonable**

DIRECTV Broadband does not have access to ASI's cost information and, therefore, is unable to present an analysis of ASI's rates in relation to ASI's costs. The Commission should require that ASI submit this information.

However, available information suggests that its rates are egregiously high. Thus, SBC has boasted of a 25% decline in DSL subscriber acquisition costs since late 2000 and predicts further expense reductions due to declining equipment costs and operational efficiencies.<sup>8</sup> However, ASI's wholesale charges continue to increase, including not only the current proposal but also ASI's 15% rate increase for DSL transport in 2001. SBC's continuously rising prices

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<sup>7</sup> Suspension and investigation of a proposed tariff is warranted if the tariff modification raises significant questions of lawfulness. *See* Iowa Telecomm. Svs., Inc. Transmittal No. 22, *Order*, DA 02-1732 (rel. Jul. 17, 2002); AT&T Co., Transmittal No. 148, *Memorandum Opinion and Order*, 56 RR 2d 1503 (1984); ITT World Comms., Transmittal No. 2191, *Memorandum Opinion and Order*, 73 FCC 2d 709, 719 (1979); AT&T Co., Transmittal No. 11935, CC Docket No. 19989, 46 FCC 2d 81, 86 (1974); *see also* *Arrow Transp. Co. v. Southern Ry. Co.*, 372 U.S. 658 (1963).

<sup>8</sup> SBC Investor Briefing, "Second-Quarter Diluted Earnings Per Share Increases by 8.9% with Focus on Disciplined Financial Management, Growth Drivers (July 25, 2001) at 5 ("SBC continues to improve the economics of DSL. Acquisition costs have declined by more than 25 percent since the fourth quarter of 2000 due to modem cost reductions and operational improvements." [http://www.sbc.com/Investor/Financial/Earning\\_Info/docs/2Q\\_IB\\_FINAL\\_Color.pdf](http://www.sbc.com/Investor/Financial/Earning_Info/docs/2Q_IB_FINAL_Color.pdf) (viewed September 29, 2002).

during a period of declining wholesale cost raises and the total absence of a cost justification for the proposed rates raises a substantial question of lawfulness warranting suspension and investigation. It is also worth noting that if ASI's DSL rates had been subject to price cap regulation over the last few years, those rates would have been subject to "X-Factor" reductions applicable to the special access basket under the *CALLS Order*. The fact that ASI rates are therefore now inflated by about at least 15% above what would be the case under price cap regulation also raises a substantial question of lawfulness warranting suspension and investigation.

**C. The Proposed Tariff Would Dramatically and Unreasonably Increase Certain ATM Rates**

**1. ASI Proposes to Establish New Non-Recurring Charges that Could Substantially Increase Customer Charges**

ASI proposes to introduce a series of new, non-recurring charges related to its ATM service.<sup>9</sup> Section 3.2.5 would impose a new \$14.00 charge for every Record Order Change. Section 3.2.6 would levy \$50.00 for every Service Order Change. Section 3.2.7 proposes a new charge of \$500.00 for Expedited Orders. Section 3.8 would alter the rate scheme applicable to cancellation charges. DIRECTV Broadband has not had an opportunity to definitively determine the impact of these proposed rates. Apart from other problems with the tariff. However, these new charges by themselves would substantially increase BSPs costs of doing business.

ASI's Description and Justification offers only a cursory description and not a word to attempt any justification. Therefore, there is no evidence to suggest that any costs incurred as part of these activities were not already built into existing rates; indeed, ASI in its filing does not even allege that these activities now result in any cost to ASI. In fact, any costs associated with

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<sup>9</sup> ASI requires all BSPs purchasing wholesale DSL service to also purchase ATM Transport. See ASI FCC Tariff No. 1 at §§ 6.1.1, 6.2.7.

these activities are not new costs and presumably ASI previously has been recovering them in other charges. Therefore, these new charges, without further explanation, raise a substantial question of double recovery warranting suspension and investigation.

## **2. Numerous Other ATM Rates Would Be Increased**

Numerous ATM rates would be increased, as evidenced by the dozens of “(I)” notations in the proposed tariff. Many of the charges for ATM ports and transport would be increased, without explanation or justification.<sup>10</sup> One of the most significant increases, for Permanent Virtual Channels is not readily apparent from the face of the proposed tariff because ASI has completely changed the rate structure applicable to this portion of the ATM service. Under the current tariff, ASI offers Unspecified Bit Rate (UBR) PVCs for \$30 per month each in its West region (Pacific and Nevada Bell), where DIRECTV Broadband has its most significant relationship with ASI. The proposed tariff would adopt, in place of this single rate, a schedule based on the bandwidth allocated to the PVC, with charges of up to \$750 per month for UBR PVCs, and much more for new Constant Bit Rate (CBR) and Virtual Bit Rate (VBR) service offerings.<sup>11</sup> Many customers, including DIRECTV Broadband, could face unreasonable rate increases for PVCs, and therefore for wholesale DSL service, if this new unsubstantiated rate schedule is adopted. The Commission should not permit ASI to obtain “deemed lawful” treatment for an essential non-competitive service<sup>12</sup> by as much as 2400% without cost support or other justification therefore. Given the magnitude, all of these proposed rate increases raise substantial questions of lawfulness.

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<sup>10</sup> See § 4.8 of the Proposed Tariff, at pages 50.15 to 50.19. Note that ASI has reorganized the structure of its rate tables, such that the initial table in the existing tariff Section 4.4 includes ports and transport, while the first table in the proposed § 4.8 states the rates for ports only.

<sup>11</sup> Moreover, ASI has not presented any substantive evidence in support of its proposed high rates for CBR and VBR offerings. SBC has an incentive to restrict the ability of competitors who could use these service options to offer voice-over-IP services that would compete with the SBC ILECs’ traditional voice services, or other innovative new services that might compete with the SBC ISPs’ plain vanilla Internet access services.

<sup>12</sup> Although other carriers offer ATM services, ISPs purchasing wholesale DSL from SBC must obtain these services from SBC in conjunction with the DSL service, in accordance with the terms of its tariff. As the Commission is aware, competitive ISPs do not have available to them other sources for ubiquitous wholesale broadband transport that is comparable to the services offered by the ILECs pursuant to their *Computer Inquiry* obligations.

### **3. Monthly Rates for ATM Port and Transport Would Be Abolished**

Another very harmful change would be the proposed elimination of month-to-month rates for ATM port and transport services. Under the proposed section 4.8, the minimum term period would be one year rather than one month. Cancellation of a Term Pricing Plan incurs termination charges of 50% of the remaining monthly charges that would have accrued under the full term.<sup>13</sup> In a rapidly changing industry, customers need at least the option of purchasing service on a monthly basis. ASI has not offered any explanation or justification for such a dramatic change in its tariff or that a 50% penalty is cost-based. Suspension and investigation of this proposed change is warranted to ensure that ASI may not impose unreasonable term commitments and termination penalties on its customers.

### **4. ASI's Proposed Tariff Would Impose Costly, Inefficient and Unnecessary Interconnection Requirements on its Customers.**

ASI's proposal would alter Section 6.2.7 of its Tariff to impose an unreasonable and anticompetitive requirement on BSPs to purchase connectivity to SBC/ASI's ATM network "within the LATA" in which it wishes to subscribe end-user customers. Customers would be forced to spend thousands of dollars per month to maintain dedicated transport facilities into each LATA. There is no reasonable basis for ASI to impose this artificial and costly infrastructure requirement on service providers in states where SBC/ASI is now authorized to transmit telecommunications across LATA boundaries. In addition, there is no reasonable basis for ASI to refuse to allow its customers to share transport. Where existing § 271 requirements prevent ASI from offering interLATA transport, at the least, ASI could allow BSPs to consolidate their transport needs and obtain shared connections to SBC/ASI's ATM network within the LATA.

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<sup>13</sup> ASI FCC Tariff No. 1 at § 3.5.6.

Because of the high cost of obtaining its own dedicated localized transport into each LATA (often \$5,000 to \$15,000 per month each), a BSP typically needs to serve thousands of customers in order to recover the cost of the circuit. Independent BSPs are effectively precluded from providing service to most rural and medium-sized LATAs. By contrast, the SBC-affiliated ISPs enjoy significantly greater customer bases over which to spread the costs of this costly architecture. Moreover, SBC will happily excuse their affiliates from spending too much money on interLATA transport when its expenses are paid to the SBC ILECs to carry the traffic. Therefore, independent BSPs are competitively disadvantaged in states where ASI

CLECs typically allow BSPs to pick up DSL traffic at a small number of locations, or at even one location for the entire nation. There is no reasonable justification for ASI's artificial imposition of per-LATA interconnection burdens on its BSP customers. ASI's proposal to amend its tariff to mandate the per LATA requirement warrants an investigation not only of this proposed change but also of ASI's general policy of requiring BSPs to obtain unnecessary and inefficient transport elements in order to obtain wholesale transport that they are entitled to pursuant to the Computer Inquiry rules. ASI has not offered one iota of explanation for this proposal in its Description & Justification of its proposal; indeed, it has failed to even mention this amendment. Therefore, this proposal also raises substantial questions of lawfulness warranting suspension and investigation.

#### **IV. CONCLUSION**

Accordingly, the Commission should reject the proposed tariff revisions, or suspend them for five months and initiate an investigation subject to an accounting order.

Respectfully submitted,

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Patrick J. Donovan  
Paul B. Hudson  
Swidler Berlin Shereff Friedman, LLP  
3000 K Street, N.W. Suite 300  
Washington, D.C. 20007  
(202) 424-7500 (Tel.)  
(202) 474-7645 (Fax)

Counsel for DIRECTV Broadband, Inc.

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