

In the Matter of)
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SBC Advanced Solutions, Inc.)
Transmittal No. 11)

October 4, 2002

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SUMMARY

DIRECTV's Petition fails to raise any procedural or substantive issues that would warrant investigation, let alone suspension, of SBC-ASI's tariff filing.

The Commission should reject DIRECTV's argument that SBC-ASI's request for special permission to file without cost support did not present good cause. SBC-ASI has previously demonstrated that special circumstances justify a grant of limited and temporary relief from the cost support requirement of section 61.38. Likewise, the Commission should reject arguments that granting SBC-ASI's tariff "deemed lawful" status is unjust. Ironically, DIRECTV previously claimed that SBC-ASI's one-day filing was insufficient. In any event, DIRECTV has reviewed and commented on the tariff and thus will not be prejudiced if the tariff takes effect.

DIRECTV further claims that it should have access to SBC-ASI's cost support information. However, as Commission precedent establishes, allowing SBC-ASI to file its tariff without cost support is warranted, particularly given the competitive state of the market for packet-switched services.

Lastly, DIRECTV raises unsubstantiated allegations regarding the reasonableness of SBC-ASI's tariff revisions. DIRECTV is wrong that SBC-ASI can provide interLATA connectivity for customers and that SBC-ASI does not offer aggregated transport. Further, concerns regarding SBC-ASI's proposed one-year minimum commitment and 50% termination liability are unfounded, given that they are based on and consistent with industry standards. Further, SBC-ASI is entitled to recover its costs through the proposed non-recurring charges, which were inadvertently omitted from prior filings and are consistent with industry standards. Lastly, SBC-ASI's restructuring of ATM includes price increases and decreases, and its overall effect will prove tremendously beneficial for customers.

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REPLY COMMENTS OF SBC ADVANCED SOLUTIONS, INC.

SBC Advanced Solutions, Inc. (SBC-ASI) hereby responds to the Petition to Reject or Suspend and Investigate filed by DIRECTV Broadband, Inc. (DIRECTV) in connection with the above-referenced tariff revisions.¹ DIRECTV's Petition fails to raise any procedural or substantive issues that would warrant investigation, let alone suspension, of SBC-ASI's tariff filing. Rather, the Petition is simply the latest in a long line of filings in which DIRECTV is seeking to gain an unfair competitive advantage in the broadband market by subjecting one of its competitors — SBC-ASI — to unwarranted and extremely burdensome regulatory obligations. The Commission should reject DIRECTV's baseless Petition and allow SBC-ASI's tariff to take effect without investigation or suspension.

I. DIRECTV Ignores the Good Cause and Special Circumstances Underlying SBC-ASI's Request for Special Permission.

DIRECTV argues that SBC-ASI's request for special permission to file without cost support was perfunctory and did not present good cause.² This claim is preposterous. SBC-ASI has already provided the Commission with an extensive showing of special circumstances and legal support for the limited tariff relief that it has been granted. As DIRECTV is well aware, in

¹ Petition to Reject or Suspend and Investigate Proposed Tariff Revisions filed by DIRECTV Broadband, Inc. on September 30, 2002 (Petition).

² *Id.* at 4.

November 2001, SBC-ASI filed a request for an interim waiver of the cost support and other tariff requirements while the Commission completes its pending proceeding to consider SBC's Non-Dominant Petition.³ The record of SBC-ASI's waiver request, which includes notice and comment by DIRECTV and others, clearly establishes the basis for granting SBC-ASI special permission to file the proposed tariff at issue here without cost support.

As SBC-ASI previously explained, special circumstances justify a grant of limited and temporary relief from the cost support requirement of section 61.38. SBC-ASI operated as a non-dominant carrier for more than 18 months and it is the only entity that continues to operate as a BOC structurally separate advanced services affiliate. Under the structural and transactional separation requirements established by the Commission, SBC-ASI is precluded from relying on many of the resources of the SBC telephone companies and is forced to operate more like a CLEC in the market.⁴ As a result, SBC-ASI has neither the resources nor the expertise needed to prepare cost support showings for its tariff filings. That is just as true today as it was when SBC-ASI first requested a waiver of the cost support requirement because SBC-ASI has not been forced to undertake the costly and time-consuming transition that would be required to operate under such a requirement.

But the justification for allowing SBC-ASI to file its tariff without cost support is not limited to the fact that it would be extremely burdensome. The Commission's structural separation requirements also obviate the need for imposing a cost support requirement on SBC-

³ SBC-ASI Petition for Waiver of Sections 61.38, 61.58 and 61.59 of the Commission's rules filed on November 1, 2001.

⁴ *Application of Ameritech Corp. and SBC Communications, Inc for Consent to Transfer Control of Corporations Holding 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, at ¶ 461 (1999).

ASI. Whenever SBC-ASI obtains telecommunications services or certain other services (*e.g.*, billing and collection and operation, installation and maintenance services) from the SBC telephone companies, it must do so on a non-discriminatory basis. As the Commission correctly concluded, the structural separation requirements “are likely to prevent [SBC] from leveraging its market power in the local market through an affiliate to gain market power in the advanced services market.”⁵ Thus, the continued application of the Commission’s structural separation requirements provides a compelling basis for concluding that a cost support showing is not necessary to ensure the reasonableness of SBC-ASI’s prices.

Moreover, SBC-ASI previously demonstrated that allowing it to file tariffs without cost support for an interim period serves the public interest. The record developed in the Commission’s pending broadband proceedings, as well as the proceeding to consider SBC-ASI’s interim waiver requests, demonstrates that the broadband market is intensively competitive. Indeed, the Commission itself has recognized that there is robust intermodal competition in the residential broadband market and that cable modem service is the clear market leader.⁶ The Commission can and should rely on the competitiveness of the market and the minority market position of SBC-ASI as a factor in granting interim relief from the cost support requirement during the pendency of the broadband proceedings.

As SBC-ASI demonstrated in its interim waiver request, there is precedent for the Common Carrier Bureau (Bureau) granting waivers of its tariff rules on an interim basis. In a similar case involving Comsat, the Bureau determined that the market was sufficiently

⁵ *Id.* at n.834.

⁶ *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities; Internet Over Cable Declaratory Ruling; Appropriate Regulatory Treatment for Broadband*

competitive to warrant granting Comsat waivers of the tariff requirements while its petition to be declared non-dominant was pending.⁷ Likewise, the Bureau granted blanket waivers of the tariff requirements on an interim basis to wireless carriers while their petitions to be declared non-dominant were pending.⁸ Thus, the relief that SBC-ASI has obtained is not novel and does not prejudice the Commission's actions in the pending broadband proceedings in which broader regulatory relief is being considered.⁹

Ironically, DIRECTV also complains about the fact that SBC-ASI's tariff will be deemed lawful because it was filed on 15-days' notice.¹⁰ SBC-ASI was previously criticized for filing tariffs on one days' notice. DIRECTV itself previously asked the Commission to require that SBC-ASI provide its customers with prior notice of proposed tariff changes.¹¹ SBC-ASI responded to concerns that it was not providing adequate notice of tariff changes by filing its proposed tariff with the full 15-day notice period, rather than seeking special permission to file on one-day's notice.

Access to the Internet Over Cable Facilities, GN Docket No. 00-185 and CS Docket No. 02-52, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd 4798, at ¶ 9 (2002).

⁷ *Application of Comsat Corporation Petition for Partial Relief From the Current Regulatory Treatment of Comsat World Systems' Video and Audio Services*, File No. 14-SAT-ISP-97, Order, 12 FCC Rcd 12059, 12060 (1997).

⁸ *Cellular Telecommunications Industry Association Non-Dominant Petition for Waiver of Part 61 of the Commission's Rules*, Order, 8 FCC Rcd 1412 (1993) (*CTIA Waiver Order*).

⁹ *See Comsat*, 12 FCC Rcd at 12060.

¹⁰ Petition at 3.

¹¹ DIRECTV Comments at 18, CC Docket No. 01-337 (FCC filed March 1, 2002).

DIRECTV has now reversed course and is arguing that it would be better for SBC-ASI to file tariffs on one-day's notice so that customers may file complaints and obtain refunds.¹² Obviously, SBC-ASI is in a no-win situation and DIRECTV will complain no matter what SBC-ASI does. In any event, the fact that DIRECTV's Petition fails to raise any legitimate concerns about SBC-ASI's tariff demonstrates that (i) DIRECTV unquestionably has taken advantage of the opportunity to review SBC-ASI's tariff within the 15-day notice period and (ii) DIRECTV will not be prejudiced if SBC-ASI's tariff is allowed to take effect. Further, it certainly is not the case that SBC-ASI is better off than if it were regulated as a non-dominant carrier, as DIRECTV implies.¹³ A non-dominant carrier has *more* options than SBC-ASI without any of the regulatory burdens that saddle SBC-ASI's operations. Unlike SBC-ASI, a non-dominant carrier can elect not to file a tariff at all or it can file a tariff on either one-day's notice *or* 15-days' notice so that the tariff is deemed lawful.

II. DIRECTV's Demand for Cost Support is Unwarranted and Competitively Harmful.

DIRECTV argues that it has a legitimate interest in gaining access to SBC-ASI's cost support information in order to ensure the reasonableness of SBC-ASI's prices.¹⁴ However, DIRECTV does *not* disclose the fact that it is also a major intermodal competitor of SBC-ASI in the broadband market. In fact, DIRECTV had more than 100,000 satellite high-speed Internet

¹² Petition at 3.

¹³ *Id.* at 3.

¹⁴ *Id.* at 1.

access customers as of December 31, 2001.¹⁵ Thus, DIRECTV's assertion that SBC-ASI's DSL service is an "essential non-competitive" service is demonstrably incorrect.¹⁶

The Commission should be skeptical about DIRECTV's motives in seeking access to SBC-ASI's cost support information. As the Commission has consistently recognized, cost support requirements and other aspects of dominant carrier tariff regulation are extremely harmful in competitive markets. In the *CTIA Waiver Order*, for example, the Bureau determined that the cost support requirement should be waived because it might provide competitors with access to competitively sensitive costs.¹⁷ The Bureau reasoned that the regulatory status of wireless carriers should be determined *before* they were required to reveal their costs to competitors.¹⁸

In addition, the Commission previously granted Southwestern Bell a waiver of the cost support requirement for its packet-switched services.¹⁹ In support of its decision, the Commission noted that the market for packet-switched services was highly competitive.²⁰ There can be no serious question that the current market is even *more* competitive than it was twelve

¹⁵ See Form 10-K of Hughes Electronics Corporation at 11 (Mar. 11, 2002). DIRECTV's parent company has entered into marketing arrangements with AOL, Earthlink and others to market high-speed Internet access service via its satellite network to DIRECTV customers. As of December 31, 2001, more than 100,000 customers had signed up for this service.

¹⁶ See Petition at 8.

¹⁷ *CTIA Waiver Order*, 8 FCC Rcd at 1412-13.

¹⁸ *Id.*

¹⁹ *Open Network Architecture Tariffs of Bell Operating Companies*, CC Docket No. 92-91, Order, 9 FCC Rcd 440, at ¶ 68 (1993).

²⁰ *Id.* ("Section 61.38 cost support would be of little value in promoting our pro-competitive policies. . . . The packet switching services market is still highly competitive.").

years ago and that SBC-ASI has even less of an ability to charge unreasonable prices than Southwestern Bell did at that time. Therefore, the Commission's decision allowing SBC-ASI to file its tariff without cost support is justified and consistent with established precedent.

III. DIRECTV's Substantive Concerns About SBC-ASI's Tariff are Baseless.

SBC-ASI's tariff is designed to accomplish two important objectives, both of which are beneficial to consumers. The tariff standardizes SBC-ASI's ATM and Frame product offerings across its service territory, thereby eliminating customer confusion currently surrounding SBC-ASI's varied product and pricing options. This standardization results in some prices going up and some going down. In addition, the tariff provides additional options for customers in many cases, which allows customers to customize the services they purchase from SBC-ASI. The reasonableness of SBC-ASI's tariff is confirmed by the fact that the terms and conditions of service are consistent with the service offerings of other providers in what is an intensely competitive market.

DIRECTV has not raised any substantive concerns that would warrant investigation or suspension of SBC-ASI's tariff. A number of DIRECTV's claims have nothing whatsoever to do with the tariff revisions that SBC-ASI has filed. Below, SBC-ASI responds to the specific allegations in DIRECTV's Petition.

First, DIRECTV complains that SBC-ASI's tariff requires DIRECTV to purchase connectivity to SBC-ASI ATM network within each LATA, rather than providing interLATA connectivity for customers.²¹ It appears that DIRECTV is not familiar with the statutory requirements of sections 271 and 272. SBC-ASI is strictly prohibited from providing interLATA services because it is not a section 272 separate affiliate. SBC-ASI's tariff merely adds the

²¹ Petition at 9-10.

language “within the LATA” to Section 6.2.7 simply to reiterate that SBC-ASI cannot offer interLATA services. DIRECTV certainly is free to seek interLATA connectivity to SBC-ASI’s ATM network from SBC Long Distance (SBC’s section 272 affiliate), but it should be aware that SBC Long Distance is prohibited from filing a federal tariff for its interstate interexchange services.

Second, DIRECTV claims that SBC-ASI refuses to allow customers to share transport facilities, which is not true.²² As DIRECTV itself acknowledged in comments it filed with the Commission in May 2002, SBC-ASI *does* support aggregated transport.²³ Given DIRECTV’s characterization of SBC-ASI’s aggregated transport policy as a “significant step forward” for DSL customers, it is mystifying that DIRECTV would incorrectly describe SBC-ASI’s policy in its Petition.

Third, DIRECTV claims that SBC-ASI’s elimination of month-to-month prices for ATM service is harmful and imposes unreasonable term commitments and termination penalties on its customers.²⁴ A one-year term commitment is not unreasonable — it is the industry standard. SBC-ASI, in fact, currently offers month-to-month prices with no term commitment only in the West region. Other carriers, such as Verizon, likewise require one-year commitments from customers purchasing ATM service. Importantly, DIRECTV neglects to mention that SBC-ASI’s tariff does allow customers to purchase ATM service on a month-to-month basis after they have fulfilled a one-year term commitment.

²² *See id.* at 9.

²³ DIRECTV Comments at 15, CC Docket Nos. 02-33, 95-20, 98-10 (FCC filed May 3, 2002).

²⁴ *Id.* at 9.

Fourth, DIRECTV complains about the 50% early termination charge.²⁵ That charge is already in SBC-ASI's existing tariff and DIRECTV provides no basis for reexamining it. In fact, SBC's early termination charge is significantly lower than Verizon's, which imposes a charge of 100% of the monthly charges for termination within the initial 12-month period.²⁶

Fifth, DIRECTV repeats its erroneous and utterly irrelevant assertion that SBC-ASI increased its DSL transport prices by 15% in its initial 2001 tariff.²⁷ As SBC-ASI previously explained, most ISP customers that purchase out of the tariff will enjoy DSL transport prices that are *lower or equal to* the prices they were paying under contract.

Sixth, DIRECTV questions the legitimacy of new non-recurring charges that are included in SBC-ASI's tariff.²⁸ When SBC-ASI filed its tariff in September 2001, it inadvertently omitted these non-recurring charges. Contrary to DIRECTV's unsupported assertion, the non-recurring charges do not provide SBC-ASI with double recovery, but correct the prior omission so that SBC-ASI may rightfully recover its costs. As discussed below, comparable non-recurring charges are included in some or all SBC Telephone Company tariffs. Moreover, the fact that many of the non-recurring charges recover the cost of charges that the SBC telephone companies assess on SBC-ASI and are equal to or less than the charges assessed by other ATM service providers is further proof that the following non-recurring charges are reasonable.

²⁵ *Id.*

²⁶ Additionally, SBC-ASI's tariff provides the added benefit of allowing customer to move or upgrade a circuit without incurring an early termination charge. *See* Section 3.6.3 of SBC-ASI's existing tariff.

²⁷ *Id.* at 6.

²⁸ *Id.* at 7.

- *Service Order Change Charge* recovers the costs of a charge the SBC Telephone companies assess on SBC-ASI when their facilities are used, or other engineering and costs that SBC-ASI incurs when the SBC Telephone Companies' facilities are not used. This charge is comparable to the Design Change Charge contained in a number of the SBC Telephone Company tariffs. It is reasonable and indeed is much less than the comparable charge in Verizon's ATM tariff.
- *Record Order Change Charge* recovers the costs of changing information (*e.g.*, name or address) on a service order. This charge is comparable or analogous to charges contained in a number of the SBC Telephone Company tariffs.
- *Expedite Order Charge* recovers the average cost the SBC Telephone Companies charge SBC-ASI (a range of \$375 to \$675) when a customer requests the provisioning of service earlier than the due date on the Firm Order Confirmation. The amount of the charge is reasonable and is comparable to the equivalent charge contained in Verizon's ATM tariff.
- *Cancellation Charge* recovers the cost of canceling a service order. This charge recovers the cost of a charge that SBC-ASI previously passed through directly from the SBC telephone companies. Not only does the tariff create a uniform cancellation charge that provides customers with greater certainty, but DIRECTV also neglects to mention that SBC-ASI has significantly *reduced* its cancellation charge.

Seventh, DIRECTV claims that SBC-ASI has significantly increased its prices for ATM service.²⁹ That is not a fair characterization of the new pricing structure implemented by SBC-ASI. The purpose of the restructuring is to give all ATM customers, including wholesale DSL customers, the benefits of standardized ATM prices throughout SBC-ASI's service territory.

²⁹ *Id.* at 8.

The restructuring not only standardizes the price of Unspecified Bit Rate (UBR) PVC for wholesale DSL customers, but it also results in *lower ATM prices for many of these customers*, including DIRECTV. SBC-ASI's restructured ATM prices also are very competitive within the industry and are similar to the prices contained in Verizon's ATM tariff.

DIRECTV's comparison of the \$30 per-unit price for a UBR PVC that is currently available in SBC-ASI's West region with a \$750 PVC UBR price in the tariff is highly misleading and fails to account for the overall impact of the restructuring.³⁰ The \$750 price that DIRECTV quotes is for a single OC-3 PVC UBR, which is not something that is likely to be purchased by a wholesale DSL customer. Indeed, SBC-ASI's tariff expressly provides that a wholesale DSL customer may purchase a DS-3 PVC UBR, which is priced at only \$250, even if it is used in conjunction with an OC-3 capacity port. In effect, DIRECTV has presented an apples-to-oranges comparison.

In addition, DIRECTV completely ignores the benefits that wholesale DSL customers can obtain by buying UBR PVCs in bulk through the ATM Host Link Product. For example, a wholesale DSL customer that pays \$750 for ATM Host Link can obtain up to 100 UBR PVCs for connectivity to multiple DSLAMs and Optical Concentration Devices within a LATA. The per-unit price for the UBR PVC will be only \$7.50 if the wholesale DSL customer uses all 100 UBR PVCs that are available to them. Further, DIRECTV ignores the fact that ATM Host Link is almost always a better deal for wholesale DSL customers than individual UBR PVCs of comparable capacity. Given that an individual DS-3 UBR PVC is priced at \$250, a wholesale DSL customer realizes a financial benefit from purchasing ATM Host Link as soon as they use more than three UBR PVCs.

DIRECTV also creates a distorted impression of SBC-ASI's tariff by comparing the new ATM Host Link pricing structure with the \$30 UBR PVC that was previously available in the West region. This UBR PVC pricing structure was an aberration and did not comport with standard industry practice of charging for ATM services based on capacity. Moreover, as discussed above, wholesale DSL customers will pay as little as \$7.50 for each UBR PVC under the new ATM Host Link pricing structure, which obviously is much less expensive than paying \$30 for each UBR PVC.³¹ Finally, it should be noted that DIRECTV's price comparison fails to mention that comparable UBR PVC services in other SBC-ASI regions were much *more* expensive than the price of the new ATM Host Link service.

For the foregoing reasons, the Commission should reject DIRECTV's Petition and allow SBC-ASI's tariff to take effect without investigation or suspension.

Respectfully Submitted,

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³⁰ *Id.*

³¹ DIRECTV and other grandfathered customers can continue to purchase individual UBR PVCs on existing ports at a price of \$30 for as long as it likes under SBC-ASI's tariff. Therefore, even though DIRECTV is better off under the new pricing structure, it also has the option of continuing to buy UBR PVCs under the old structure.