SEPARATE STATEMENT OF COMMISSIONER KATHLEEN Q. ABERNATHY

Re: *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*, CC Docket No. 01-194

I fully support the Commission's order and write separately to comment on the difficult and complex questions regarding SBC's resale obligations in the context of its provision of DSL-related services. The Commission appropriately concludes in the foregoing order that, because we have never held that an incumbent LEC's DSL Internet access service — as opposed to a distinct end-user DSL transport service — is subject to section 251(c)(4), we cannot find that SBC is in violation of checklist item 14. Whether SBC's DSL Internet access service is subject to section 251(c)(4) turns on whether the provision of that service entails the provision of a "telecommunications service . . . at retail."[1] The Commission has prudently declined to reach a definitive conclusion on this issue in this adjudicatory proceeding, in light of the 90-day statutory deadline for decision and the fact that our ultimate resolution of this issue likely will have significant implications in other regulatory contexts. For example, our analysis of this question likely will affect our classification of advanced services provided by cable operators and other facilities-based Internet service providers; it also could affect our administration of the federal universal service mechanisms, since carriers contribute based on their end-user revenues from telecommunications services, but not information services. I look forward to addressing the appropriate regulatory treatment of incumbent LECs' DSL-based Internet access services in a separate rulemaking proceeding, in which we can thoroughly explore this complex issue based on comments from a broad range of parties.

I support the cautious approach we take today, but I write this statement to further explain my support for our conclusion that SBC is in compliance with checklist item 14. Based on the current record and existing precedent, it appears that SBC's end-user Internet access service does not entail provision of a telecommunications service at retail and, therefore, that SBC is not required to make that service available for resale under section 251(c)(4). I note that my analysis of this question is not free from doubt, and both I and the Commission may adopt a different approach in the future based on a more fully developed record. Yet I hope that, by framing the debate below, I will give parties a starting point in our future consideration of these issues.

SBC provides three separate categories of DSL-related services. First, through its affiliate Advanced Solutions, Inc. (ASI), SBC sells DSL transport services to business customers and to a small number of grandfathered residential customers.[2] Second, also

[1] 47 U.S.C. § 251(c)(4).

[2] Before merging with Ameritech in 1999, SWBT sold a DSL transport service directly to residential customers at retail. SBC Application at 51. Following the merger, ASI decided to cease providing a DSL transport service directly to end users as a stand-alone service, and to focus instead on the wholesale provision of DSL transport to ISPs (including its affiliated ISP). *Id.* at 51-52.

through ASI, SBC sells DSL transport services to ISPs, which, in turn, combine these services with enhanced functionalities to offer end-user subscribers DSL-based Internet access services. Third, through its affiliated ISP, Southwestern Bell Internet Services, Inc. (SBIS), SBC sells high-speed DSL Internet access services to end-user subscribers.

SBC acknowledges that the first category of services consists of telecommunications services provided at retail; therefore, pursuant to section 251(c)(4), SBC states that it makes those services available to CLECs for resale at the appropriate wholesale discount in Arkansas and Missouri.[3] SBC contends, however, that the second and third categories of services respectively consist of *wholesale* telecommunications services and retail *information* services, and that, as a result, neither of these categories is subject to the resale requirement in section 251(c)(4). Based on my review of our existing precedent, I am inclined to agree that this is the most reasonable interpretation of the Act. Since there is no dispute about SBC's first category of services, I discuss below only the second and third categories.

DSL Transport Services Offered by ASI to ISPs

SBC offers DSL transport to ISPs, which then bundle that transport with their own enhanced functionalities and customer care to offer Internet access services to end users.[4] Under the terms of the relevant SBC tariff, a customer of this DSL transport service is responsible for "providing all customer support to its End Users, and all marketing, billing, ordering, and repair for its End Users."[5] The tariff also includes a volume discount plan, under which the monthly charge for the DSL transport service depends on the volume commitment the ISP has made.[6]

In the *Bulk Services Order*,[7] the Commission determined that DSL transport services provided by incumbent LECs to ISPs generally will not be considered services provided "at retail." We observed that "bulk DSL services sold to Internet Service Providers are markedly different from the retail DSL services designed for individual end-user consumption."[8] Unlike such retail services, DSL transport services sold to Internet service providers are designed to be "an input component to the Internet Service Providers' retail high-speed Internet service."[9] Moreover, "DSL services sold to Internet Service Providers are not targeted to end-user subscribers, but instead are targeted to Internet Service Providers that will combine a regulated telecommunications service with an enhancement, Internet service, and offer the resulting service, and unregulated

[3] *Id.* at 52.

[4] *Id.* at 54-58.

[5] SBC Reply at 26 (quoting SBC Tariff F.C.C. No. 1, § 6.3.1).

[6] *Id.* at 27 (citing SBC Tariff F.C.C. No. 1, §§ 6.4, 6.6).

[7] *See Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Second Report and Order, 14 FCC Rcd 19237 (1999) (*Bulk Services Order*).

[8] *Id.* at 19244 ¶ 15.

[9] *Id.* at 19245 ¶ 17.

information service, to the ultimate end-user."[10] The Internet service provider "take[s] on the consumer-oriented tasks of marketing, billing, and collections to the ultimate consumer and accepting repair requests directly from the end-user."[11] We incorporated this wholesale/retail distinction into our rules, which provide that "advanced telecommunications services sold to Internet Service Providers as an input component to the Internet Service Providers' retail Internet service offering shall not be considered to be telecommunications services offered on a retail basis that incumbent LECs must make available for resale at wholesale rates to requesting telecommunications carriers."[12] The D.C. Circuit upheld the *Bulk Services Order* in *ASCENT II*, holding that the Commission reasonably construed the statutory phrase "at retail."[13]

Under the *Bulk Services Order* and section 51.605(c) of our rules, it seems clear that SBC's tariffed DSL transport service for ISPs is a *wholesale* telecommunications service. This service accordingly is not subject to the resale obligation in section 251(c)(4), because that provision applies only to *retail* telecommunications services.[14] As noted above, under SBC's tariff, the ISPs themselves provide all customer-care functions as part of their own retail information services.[15] SBC states that the ISPs alone may accept orders for their DSL-based Internet access service, and SBC accepts orders for its DSL transport service only from the ISPs.[16] The ISPs are responsible for all installation costs, and they are obligated to accept repair requests directly from their end-user customers and to incur the costs of maintaining and operating help-desk functions.[17] ISPs also are solely responsible for billing and collecting from their end-user customers.[18] In sum, as with the Verizon tariff found to be a wholesale offering in the *Bulk Services Order*, SBC's tariff "specifically contemplate[s] that the Internet Service Provider will be the entity providing to the ultimate end-user many services typically associated with retail sales, thus reinforcing our conclusion that the bulk DSL services are not retail services offered to the ultimate end-users."[19]

As the court noted in *ASCENT II*, "[i]f in the future an ILEC's offering designed for and sold to ISPs is shown actually to be taken by end users to a substantial degree, then the Commission might need to modify its regulation to bring its treatment of that offering into alignment with its interpretation of 'at retail,' *but that is a case for another*

---

[10] *Id.*

[11] *Id.*

[12] 47 C.F.R. § 51.605(c).

[13] *Association of Communications Enterprises v. FCC*, 253 F.3d 29 (D.C. Cir. 2001) (*ASCENT II*).

[14] *See* 47 U.S.C. § 251(c)(4).

[15] SBC Application at 56-57; SBC Reply at 26-30; SBC Tariff F.C.C. No. 1, §§ 6.3.1, 6.4, 6.6.

[16] SBC Application at 56.

[17] *Id.*

[18] *Id.*

[19] *Bulk Services Order*, 14 FCC Rcd at 19244; *see* SBC Reply at 27-29 (comparing SBC tariff with Verizon tariff).

day."[20] Accordingly, if a CLEC could demonstrate that SBC's DSL transport service is in fact being consumed by end users — as opposed to noting the "mere possibility" that such retail consumption *might* occur[21] — that would require me to reassess my tentative conclusion that this offering is a wholesale service.[22]

DSL Internet Access Services Offered by SBIS to End-User Subscribers

SBC also provides a high-speed DSL Internet access service to end users through SBIS, its affiliated ISP. SBC states that SBIS is the only entity that has a contractual relationship with end users who subscribe to this Internet access service.[23] SBIS representatives handle customer care, repair, and maintenance inquiries.[24] SBIS and SWBT jointly market the DSL-based Internet access service to end users. Under the terms of their agreement, SBIS pays SWBT for soliciting and accepting orders for SBIS.[25] SBIS also pays SWBT for a separate page on the customer's bill, in the same manner that interexchange carriers often do, and that page bears the SBIS brand and the monthly customer charges for SBIS's high-speed Internet access service.[26]

The Commission discussed the appropriate regulatory classification of Internet access services at length in the *Report to Congress*. In that Report, we began by reaffirming our longstanding understanding that "the categories of 'telecommunications service' and 'information service' in the 1996 Act are mutually exclusive."[27] Based on the statutory definitions of these terms, our *Computer Inquiry* precedents, and the legislative history of the 1996 Act, we rejected the argument that "a service qualifies as a 'telecommunications service' whenever the service provider transports information over transmission facilities, without regard to whether the service provider is using information-processing capabilities to manipulate that information or provide new

[20] *ASCENT II*, 253 F.3d at 32 (emphasis added).

[21] *Id.*

[22] I agree with SBC that its previously offered "split-billing" option — under which SBC allowed customers of Internet service providers to pay SBC directly (rather than through the ISP) for SBC's DSL transport service — does not compromise the wholesale nature of this DSL transport service. This billing arrangement did not somehow make Internet service providers the "ultimate consumer[s]" of SBC's DSL transport service. *Bulk Services Order*, 14 FCC Rcd at 19245 ¶ 17. In any event, SBC's elimination of this billing option, together with its modification of its website to make clear that SBC does not offer DSL transport service to end users at retail, clarify the wholesale nature of SBC's tariffed DSL transport service. *See* SBC Application at 57-58.

[23] SBC Application at 59.

[24] *Id.*

[25] *Id.*

[26] *Id.* at 60.

[27] *Report to Congress*, 13 FCC Rcd at 11520 ¶ 39; *id.* at 11530 ¶ 59 (reiterating that the categories of "telecommunications service" and "information service" are "mutually exclusive"). *See also Implementation of the Non-Accounting Safeguards of Section 271 and 282 of the Communications Act of 1934, as Amended*, FCC 01-140, CC Docket No. 96-149, ¶¶ 34-39 (rel. Apr. 27, 2001) (same).

information."[28] Rather, we stated that an entity is providing a telecommunications service "only when the entity provides a transparent transmission path, and does not 'change . . . the form and content' of the information."[29] We therefore adopted a "functional approach," under which the classification of a service depends on "the *nature* of the service being offered to customers."[30]

Applying this general framework to Internet access services, the Commission concluded that Internet access services are information services, not telecommunications services.[31] The mere fact that such services are offered "via telecommunications" cannot suffice to render such services "telecommunications services." By definition, information services "necessarily require a transmission component in order for users to access information."[32] Indeed, if we had found that any entity self-provisioning *telecommunications* were thereby providing a *telecommunications service* to end users, "it would be difficult to devise a sustainable rationale under which all, or essentially all, information services did not fall into the telecommunications service category."[33] Thus, even though an Internet access service offered to end users "involves data transport elements . . . the provision of Internet access service crucially involves information-processing elements as well; it offers end users information-service capabilities *inextricably intertwined* with data transport."[34] This intertwining of telecommunications and information-processing components signifies that an information service provider cannot be deemed to be offering separate services, each with a distinct legal status; rather, an ISP offers a single service — Internet access — which is best considered an information service.[35]

Based on this analysis, it appears that SBC's end-user DSL Internet access service is best characterized as an information service. Thus, if we were forced to resolve the classification issue posed in this proceeding — and I am persuaded that our precedents permit us to defer such resolution — it would follow that this service is not covered by the resale requirement in section 251(c)(4).

As a threshold matter, I emphasize that this approach would not rely in any respect on the particularities of SBC's corporate structure. That is, I do not consider it relevant that an SBC affiliate, SBIS, is providing the Internet access service in question. In *ASCENT I*, the D.C. Circuit made clear that the resale obligation in section 251(c)(4)

---

[28] *Report to Congress*, 13 FCC Rcd. at 11520-21 ¶ 40.

[29] *Id.* at 11521 ¶ 41 (quoting 47 U.S.C. § 153(43)).

[30] *Id.* at 11530 ¶ 59 (emphasis added).

[31] *Id.* at 11529-11540 ¶¶ 56-82.

[32] *Id.* at 11529 ¶ 57.

[33] *Id.*

[34] *Id.* at 11539-40 ¶ 80 (emphasis added).

[35] *Id.* at 11539-40 ¶¶ 79-80. *See also Bulk Services Order*, 13 FCC Rcd at 19247 ¶ 20 (reaffirming that Internet access providers are information service providers, rather than telecommunications providers).

applies to an incumbent LEC's data affiliate, just as it does to the incumbent LEC itself.[36] Thus, as SBC recognizes, there is no question that SBIS is *subject to* section 251(c)(4), no less than SWBT is; the pertinent question is whether that statutory provision *applies by its terms* to the DSL-based Internet access service at issue.[37] SBC argues persuasively that *ASCENT I* essentially requires us to "draw[] a circle that includes SWBT, ASI, and SBIS" and ask, "what DSL-related service is provided [by the combined entity] at retail?"[38] It appears that the Commission was correct in the *Report to Congress* in concluding that the data transport and computer processing functionalities that make up an Internet access service are "inextricably intertwined" and that, therefore, Internet access should be characterized as a single, indivisible information service.[39]

I recognize that the *Report to Congress* primarily concerned the status of Internet access services offered by independent ISPs — *i.e.*, those not affiliated with incumbent LECs. Such ISPs, unlike ILEC-owned ISPs, "typically own no telecommunications facilities."[40] While I look forward to exploring in a separate rulemaking proceeding whether there is any relevant distinction between affiliated and unaffiliated ISPs, I currently look for guidance to the Commission's analysis in the *Report to Congress*, where we said:

> When the information service provider owns the underlying [transmission] facilities, it appears that it should itself be treated as providing the underlying telecommunications. *That conclusion, however, speaks only to the relationship between the facilities owner and the information service provider (in some cases, the same entity); it does not affect the relationship between the information service provider and its subscribers.*[41]

Thus, the nature of the Internet access service provided to end-user subscribers does not appear to be affected by the relationship between the ISP (here, SBIS) and the facilities provider (here, SWBT). That end-user Internet access service is — at this point, based on our existing precedents — best considered an information service, irrespective of who provides it.

It does not appear that the Commission has ever held that an incumbent LEC's *information service* is subject to regulation under Title II of the Act, and there is much to be said for refraining from doing so on a going-forward basis. Looking beyond the

---

[36] *Association of Communications Enterprises v. FCC*, 235 F.3d 662, 668 (D.C. Cir. 2001) ("[T]he Commission may not permit an ILEC to avoid § 251(c) obligations as applied to advanced services by setting up a wholly owned affiliate to offer those services.").

[37] *See* SBC Reply at 24.

[38] SBC Application at 60.

[39] *Report to Congress*, 13 FCC Rcd at 11539-40 ¶ 80.

[40] *Id.* at 11540 ¶ 81.

[41] *Id.* at 11534 ¶ 69 n.138 (emphasis added).

legacy regulatory classification of the service provider, and focusing instead on the nature of the service being provided, would allow the Commission to develop a more consistent regulatory approach to advanced services and to reduce regulatory distortions that hamper intermodal competition. To be sure, the Commission's orders dealing with advanced services have muddied the waters in this regard. For example, the Commission has stated that "advanced services sold [by incumbent LECs] at retail . . . are subject to the discounted resale obligation."[42] But I believe that such assertions should be read in light of the statutory language, which imposes such an obligation only on advanced *telecommunications* services provided at retail — not on advanced *information* services. Thus, blanket statements that "advanced services" or "DSL services" are subject to section 251(c)(4) appear to be inherently overbroad. In making such statements in the past, the Commission apparently was referring only to advanced *telecommunications* services, or DSL-based *telecommunications* services.

If SBC is providing a retail information service, rather than a retail telecommunications service, the question arises: Should SBC be compelled to provide separately a retail DSL transport service to residential customers? That is a question that I hope to explore in our upcoming rulemaking. As a general matter, though, it appears that incumbent LECs are under no *existing* federal obligation to offer DSL transport services on a retail basis.[43] As SBC concedes, the Commission's *Computer III* unbundling obligations require the company to make its underlying telecommunications functionality available to unaffiliated information service providers,[44] but I am not aware of any requirement under our *Computer II*/*Computer III* regime to offer this telecommunications functionality on a *retail* basis. Moreover, I am not persuaded by ASCENT's assertion that the *Bulk Services Order* implicitly held that "the incumbent LEC would still have to make available for Section 251(c)(4) resale xDSL-based advanced services provided to residential and business end-users."[45] While Verizon was offering both a retail DSL transport service for residential customers and a wholesale DSL transport service for ISPs, the Commission did not state or imply that it was necessary for a carrier to offer both kinds of telecommunications services.

Finally, it is important to recognize that, if the Commission ultimately concludes in a rulemaking proceeding that SBC's DSL-based information services are not subject to the resale requirement in section 251(c)(4), that would not deny competitors an opportunity to provide their own high-speed Internet access services. Most importantly, CLECs retain the ability to provide DSL-based Internet access service by purchasing

---

[42] *Bulk Services Order*, 13 FCC Rcd at 19238 ¶ 3; *see also id.* ¶¶ 8, 10.

[43] *See* SBC Reply at 31-32 (citing *Local Competition Order*, 11 FCC Rcd at 15976-78 ¶¶ 965-68; *MCI Telecomms. Corp. v. SNET*, 27 F. Supp. 2d 326, 335 (D. Conn. 1998)).

[44] SBC Application at 61-62. Even if the Commission had definitively ruled on this record that SBC is providing an information service, I do not think we could have determined whether SBC's offering to unaffiliated ISPs complies with the prohibitions against nondiscrimination under *Computer III*. ISPs that believe that SBC is engaging in discriminatory or otherwise unlawful conduct should file a complaint with the appropriate state commission or with this Commission.

[45] ASCENT Comments at 10-11.

unbundled loops and attaching their own DSLAM in the incumbent LEC's central office. CLECs also may resell CSAs to business customers and may obtain resale under section 251(b)(1).[46] Independent Internet service providers may purchase bulk DSL transport from SBC under its advanced services tariff. And, of course, facilities-based competitors such as cable operators can provide service without relying on incumbent LECs' networks at all. I therefore do not believe that an interpretation along the lines I suggest would have anticompetitive consequences, particularly because, in my experience, competitive carriers do not typically rely on section 251(c)(4) as a means of providing DSL-related services. Indeed, by focusing carriers on facilities-based entry strategies, such an interpretation of the Act likely would have highly procompetitive effects over the long term.

[46] 47 U.S.C. § 251(b)(1). Some commenters have suggested that SBC is imposing unreasonable restrictions on the resale of its DSL transport service in violation of section 251(b)(1). *See, e.g.*, Ex Parte Letter of Florida Digital Network, Inc., filed Nov. 7, 2001. As in the case of alleged violations of section 251(c)(4) or *Computer III*, I believe such allegations would be best resolved in a separate proceeding.