DISSENTING STATEMENT OF COMMISSIONER KEVIN J . MARTIN

Re: *Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services*, Memorandum Opinion and Order, CC Docket No. 01-337

Over fifteen months ago, SBC filed a petition pursuant to section 10 of the Telecommunications Act of 1996, which asked the Commission to "find it non-dominant in its provision of advanced services . . . and to forbear from dominant carrier regulation of those services . . . irrespective of whether it continues to provide them through a separate affiliate."[1] In this Order, the majority fails to act on the heart of SBC's requested relief. Relying on the fact that "non-dominance issues" are being addressed in the *Incumbent LEC Broadband* rulemaking,[2] the majority puts off for another day any discussion, market analysis, or decision on whether SBC is non-dominant in its provision of advanced services. Instead, the majority grants SBC only limited relief – forbearance from tariffing requirements for advanced services. In doing so, moreover, the majority puts in place *additional regulations*, including a requirement that SBC offer advanced services through a structurally separate affiliate.[3] The majority ignores SBC's explicit request not to be required to use a separate affiliate structure and offers no explanation why, in the absence of a finding of market dominance, such requirements are appropriate.

These decisions fly in the face of several recent decisions of the D.C. Circuit. In these decisions, the Court has reversed Commission orders because (1) the availability of alternative regulatory relief "does not diminish the Commission's responsibility to fully consider petitions under § 10";[4] (2) the Commission cannot "circumvent[]" the analysis required by a forbearance petition by imposing a separate affiliate structure;[5] and (3) the Commission cannot engage in a "naked disregard" of the competition from cable modem service in regulating incumbents' provision of advanced services.[6] Because, as explained further below, this Order conflicts with each of these mandates, I respectfully dissent.

1. The D.C. Circuit has squarely held that the Commission must fully address a forbearance petition and cannot shirk this responsibility based on the availability of alternative regulatory relief. In *AT&T Corporation v. FCC*, the Court reviewed the Commission's decision on a forbearance petition filed by US West and other Bell Operating Companies. These companies had petitioned "for forbearance from 'dominant carrier' regulation" in the provision of high capacity services, which, among other things, would have allowed them flexibility in pricing their services. *Id.*, 236 F.3d at 730. The Commission rejected the petition based in part on the availability of similar relief through procedures established in the *Pricing Flexibility Order*. In the Commission's view, "the

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[1] SBC's 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 1-2. (filed Oct.3, 2001) ("*SBC Petition*").
[2] Order ¶ 31.
[3] *Id.* ¶ 15.
[4] *AT&T Corp. v. Federal Communications Commission*, 236 F.3d 729, 738 (D.C. Cir. 2001).
[5] *ASCENT v. FCC*, 235 F.3d 662, 668 (D.C. Cir. 2001).
[6] *United States Telecom Ass'n v. FCC*, 290 F.3d 415, 429 (D.C. Cir. 2002).

Pricing Flexibility Order establishes a mechanism by which the petitioners may receive much of the relief they seek" and, partially on that basis, rejected their forbearance petition. *Id.* at 731 (quoting *Petition of U.S. WEST Communications, Inc. for Forbearance from Regulation as a Dominant Carrier in the Phoenix, Arizona MSA, et al.*, Memorandum Opinion and Order, 14 FCCR 19947, 19968 ¶ 36 (1999)).

The Court flatly rejected the Commission's refusal to reach the issues raised in the petitioners' forbearance petition. Concluding that Congress intended forbearance petitions under section 10 to be available regardless of alternative avenues for regulatory relief, the Court stated: "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 § 10 as a viable and independent means of seeking forbearance." *Id.* at 738. According to the Court, "[T]he availability of the Pricing Flexibility Order as an alternative route for seeking pricing flexibility does not diminish the Commission's responsibility to fully consider petitions under § 10." *Id.*

The present Order plainly conflicts with this mandate. Here, the majority makes no determination whatsoever on the central question in SBC's forbearance petition – whether SBC is non-dominant in its provision of advanced services. Nor does the majority address forbearance from any dominant carrier regulations other than tariffing requirements. Instead, the majority states: "We intend to address non-dominant 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." Order ¶ 31. According to the majority, "the most orderly procedure is to defer action on [these] issues raised in SBC's petition pending resolution of those questions." *Id*. As the Court made clear, however, whatever the majority "surmises about the purported advantages" of a different regulatory proceeding, "these surmises are beside the point." *AT&T*, 236 F.3d at 738. "The Commission has no authority to sweep [section 10] away by reference to another, very different, regulatory mechanism." *Id.*

To defend the lawfulness of its decision, the majority claims that SBC's petition should be construed as a request for a declaratory ruling that SBC is non-dominant in the provision of advanced services and a separate forbearance petition from dominant carrier regulation for advanced services. The majority argues that it need not resolve the purported request for a declaratory ruling, because "unlike SBC's forbearance request, [it] is not subject to a statutory timetable." Order ¶ 31. With respect to the forbearance petition, the majority claims that the substance of SBC's request was for relief from tariffing requirements and that the majority fully granted this request without needing to make a finding on dominance. *See id.* ¶ 30.

This argument suffers from multiple flaws. Even if SBC's petition could be construed as seeking a declaratory ruling in addition to forbearance, SBC's forbearance petition was not limited to tariffing requirements. The petition was entitled a petition for "*forbearance from dominant carrier regulation*" and repeatedly sought forbearance from

"*dominant carrier regulation, including tariffing*." *SBC Petition* at Title Page, 79 (emphasis added); *see also*, *e.g.*, *id.* at 1, 2, 3, 76, 80, 83. Moreover, even with respect to tariffing requirements, SBC's petition could not be fully resolved without a finding on dominance, or, at the least, a decision on forbearance from all tariffing requirements. The majority made no such finding and granted no such relief. Instead, the majority puts in place a core of tariffing and related requirements, including mandates that SBC "offer [advanced] services through a structurally separate affiliate," "post rates, terms and conditions of broadband access arrangements with affiliated ISPs on its website," "make physical copies of contracts reflecting these rates, terms and conditions available for public inspection," "continue to record cost data using the methods it presently uses and must retain its cost data for at least two years," and "submit to the Commission annually an affidavit, signed by a responsible officer, attesting to [its] compliance with its commitments in this proceeding during the preceding year." Order ¶ 15. As discussed in more detail below, these requirements can be justified only by an assumption that SBC is dominant in the market for advanced services. Accordingly, even if SBC's petition is construed in the strained manner suggested by the majority, the majority's refusal to address SBC's request to be considered non-dominant shirked the Commission's "responsibility to fully consider petitions under § 10." *AT&T*, 236 F.3d at 738.

2. The majority's decision is also unlawful for another reason: The D.C. Circuit has held that the Commission cannot "circumvent[]" the analysis required by a forbearance petition by imposing a separate affiliate structure. *ASCENT,* 235 F.3d at 666. In *ASCENT*, the Court addressed the Commission's determination, in approving the SBC-Ameritech merger, that the merged company could avoid statutory resale obligations on advanced services by providing those services through a separate affiliate. *See id.* at 663. The Commission had previously rejected petitions that sought forbearance from these provisions on the basis of non-dominance. *See id.* at 664. In the SBC-Ameritech Order, however, the Commission concluded, without any analysis of market dominance, that if the merged company provided advanced services through a structurally separate affiliate, it would not be subject to the challenged regulation. *See id.* at 665.

The D.C. Circuit vacated this determination. *See id.* at 668. The Court concluded that the Commission had used the separate affiliate structure as a vehicle for "circumvention of the statutory scheme." *See id.* at 666. Because section 10 imposes specific requirements that must be met before the forbearance sought could be granted, the Commission could not "sideslip" those requirements by imposing a separate affiliate structure. *Id.* In concluding that the use of the separate affiliate structure was nothing more than a device for evading a section 10 analysis, the Court emphasized that the use of the structure could not be justified in the absence of a determination on market dominance: "If an ILEC has no market power over advanced services, . . . it is not apparent why a separate affiliate would be necessary – or even useful. It could be thought that the affiliate structure is a *non sequitur* if an ILEC cannot use its local loop monopoly to leverage its position in the advanced service market." *Id.* at 668. Thus, the separate affiliate structure was "simply a device to accomplish indirectly what the statute clearly forbids: the Commission's exercise of forbearance authority over an ILEC's provision of advanced services." *Id.* at 665.

The present Order violates the D.C. Circuit's ruling. Having once been told that the Commission cannot impose a separate affiliate structure as a substitute for the analysis necessary to respond to a forbearance petition, the majority here again imposes a separate affiliate requirement rather than conduct the requisite analysis. Just as in *ASCENT*, the majority has conducted no market dominance analysis whatsoever, even though the Court made clear that a separate affiliate requirement can be justified only upon a finding of market dominance. In fact, the majority here *goes even further* than the Commission did in *ASCENT* and imposes *additional requirements that assume market dominance*. Why should SBC be required to record cost data or post rates, terms and conditions of broadband access arrangements with affiliated ISPs on its website if it is non-dominant? In the absence of a finding of market dominance, such requirements do not appear "necessary – or even useful." The majority's attempt to "sideslip" the question whether SBC is non-dominant thus necessarily fails.[7]

3. Finally, the majority's Order violates another basic tenet of administrative law: it is a fundamental principle that an "agency must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962)). Not only did the majority fail to offer any explanation – satisfactory or otherwise – for the imposition of requirements that assume SBC's dominance in the provision of advanced services, but, equally importantly, the majority has failed to "examine the relevant data."

The D.C. Circuit has held that in regulating the advanced services provided by incumbent telephone companies, the Commission must "consider the relevance of competition in broadband services coming from cable." *USTA*, 290 F.3d at 428. In the *USTA* case, the Commission had ordered incumbents to make available to competitors the high frequency portion of the local loop, which allows competitors to deploy advanced services over the incumbents' facilities. *See id.* at 429. The Commission based this decision on its view that, without this "line-sharing," competitors would be impaired in their ability to provide advanced services. *See id.* The Court vacated the Commission's order, finding that the Commission (Cite as: 236 F.3d 729, *731, 344 U.S.App.D.C. 362, **364) "completely failed to consider the relevance of competition in broadband services coming from cable." *Id.* at 428. The Court reasoned that the Commission's own findings "repeatedly confirm both the robust competition, and the dominance of cable, in the broadband market." *Id.* The Court held that because the Commission had engaged in a "naked disregard" of these facts, its conclusion that

[7] The majority claims that limiting SBC to providing advanced services through an affiliate is reasonable because SBC currently provides advanced services in this manner and has not suggested that it will provide them in a different manner "during the foreseeable future." Order ¶ 30. But SBC explicitly asked the Commission "to forbear from dominant carrier regulation of [advanced] services . . . irrespective of whether it continues to provide them through a separate affiliate." *SBC Petition* at 1-2. The majority must offer some explanation why imposing this structure is in any way appropriate, something it cannot do in the absence of a determination on market dominance.

competitors needed access to telephone lines to provide advanced services could not stand. *Id.* at 429.

Here, the majority has engaged in the same "naked disregard" for competition from cable. In addition to the Commission's own findings on the dominance of cable relied upon by the Court in *USTA*, SBC provided voluminous data showing that it has a significantly smaller share of the advanced services market than do cable providers. *See* SBC Petition, Declaration of Robert W. Crandall and J. Gregory Sidak. Regardless whether the Commission agrees with SBC's data, *USTA* makes clear that the Commission had an obligation to at least consider it. Instead, the majority completely ignored this data, refusing to make any determination on whether SBC is dominant in the provision of advanced services and simultaneously placing restrictions on SBC's provision of advanced services that in no way apply to cable providers. Under *USTA*, this decision was unlawful.

Accordingly, for all of these reasons, I respectfully dissent.