ALJ/MCK/jva **DRAFT** **Agenda ID #3122**
Adjudicatory
Item 41 1/8/2003

Decision _____

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

DSLExtreme.com, Inc. and Sonic.net, Inc. Complainants, vs. Pacific Bell Telephone Company (U-1001-C); SBC Advanced Solutions, Inc. (U-6346-C); and Verizon California Inc. (U-1002-C) Defendants.	Case 03-01-007 (Filed January 10, 2003)

ORDER EXTENDING STATUTORY DEADLINE

Public Utilities Code Section 1701.2(d) provides that adjudicatory matters such as this complaint case shall be resolved within 12 months after they are initiated, unless the Commission makes findings why that deadline cannot be met and issues an order extending the 12-month deadline. In this proceeding, the 12-month deadline for resolving the case is January 10, 2004. Although a draft decision dismissing the Amended Complaint in its entirety will be on the Commission's agenda for the January 8, 2004 meeting, it is possible that the Commission will take no action on that date, or that an alternate to the draft decision will eventually be adopted. In view of these possibilities, it is appropriate to extend the 12-month deadline to give the Commission adequate

time to decide whether this proceeding should be dismissed, or whether a schedule should be set that will ultimately result in a hearing.

Background

This case arises out of the December 2002 decision of DIRECTV Broadband, Inc. (DIRECTV), a subsidiary of Hughes Electronics, to stop providing Direct Subscriber Line (DSL) service to its customers. When DIRECTV decided to exit the DSL business, it sought to ensure that its retail customers would be able to make the transition to a new Internet Service Provider (ISP) with a minimum of inconvenience. To achieve this, DIRECTV negotiated arrangements with defendants SBC Advanced Solutions, Inc. (SBC ASI) and Verizon Advanced Data, Inc. (VADI), both of which provided DSL transport service to DIRECTV, whereby the ISP service offered by the retail affiliates of SBC ASI and VADI -- SBC Yahoo! DSL (SBC Yahoo) and Verizon Online DSL (Verizon Online), respectively -- would be advertised as the "preferred products" for DIRECTV customers seeking a new ISP within the geographic areas served by the defendants.

The complainants in this case are Sonic.net, Inc. (Sonic), a Northern California ISP unaffiliated with SBC that purchases DSL transport from SBC ASI and that offers DSL service that competes with SBC Yahoo, and DSLExtreme.com, Inc. (DSLExtreme), a Southern California ISP unaffiliated with SBC or Verizon that purchases DSL transport from both SBC ASI and VADI and offers DSL service which competes with both SBC Yahoo and Verizon Online.

In the Amended Complaint served on February 19, 2003, the complainants allege that as part of the campaign to steer former DIRECTV customers to SBC Yahoo and Verizon Online, SBC ASI and VADI (as well as SBC California) issued misleading press releases and advertisements which falsely suggested that by

choosing SBC Yahoo or Verizon Online as their new ISP, DIRECTV subscribers could minimize the downtime that occurs when a customer transitions from one ISP to another. The complainants also allege that although the defendants had agreed to maintain connectivity for DIRECTV subscribers until February 28, 2003, they issued statements suggesting that DIRECTV's network might shut down as early as January 16, 2003, statements that were designed to induce a sense of panic in DIRECTV's customers and induce more of them to choose defendants' ISP affiliates than would otherwise have been the case. Since SBC Yahoo and Verizon Online were allegedly aware of the February 28 date, complainants allege that defendants' failure to share this information with the other ISPs constitutes unlawful discrimination under Section 453 and other provisions of the Public Utilities Code.

The Amended Complaint also alleges that SBC ASI discriminated against ISPs that compete with SBC Yahoo because SBC ASI failed to post the disconnect dates for DIRECTV subscribers on its Complex Product Service Order System (CPSOS) until December 30, 2002, even though such disconnection information "is usually available and is vital to inform new subscribers about the status of their DSL service orders."

Finally, the Amended Complaint alleges that VADI discriminated against its ISP customers by failing to inform them at the same time it told Verizon Online about a "hot swap" procedure VADI had devised to minimize customer downtime, and also by holding back from non-affiliated ISPs the news that, contrary to earlier suggestions, the hot swap procedure could be used for static Internet protocol (IP) addresses; *i.e.*, the type of IP address necessary for maintaining a website.

In the motions to dismiss filed on March 28, 2003, defendants argue that none of the allegations in the Amended Complaint have merit, and that the Amended Complaint should therefore be dismissed in its entirety. On April 18, 2003, the complainants filed a response opposing dismissal of the Amended Complaint.

Discussion

As noted above, a draft decision dismissing the Amended Complaint is on the Commission's agenda for the January 8, 2004 meeting. The 62-page draft decision points out that the complainants in this case sought a temporary restraining order (TRO) against SBC ASI and its affiliate, SBC California, on grounds very similar to those alleged in the Amended Complaint. A hearing on the TRO request[1] was held on January 30, 2003, at the end of which the assigned

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[1] The draft decision also notes that the issues heard at the January 30 hearing represented complainants' second attempt to formulate a request for injunctive relief against SBC ASI and SBC California. The complainants' first request for a TRO was made in a motion accompanying their original complaint, which was filed on January 10, 2003. In their first motion, complainants sought, *inter alia*, an order prohibiting SBC ASI and VADI from disconnecting the DSL service of any DIRECTV customer until mid-March 2003. After the technical difficulties that such an order would present were pointed out to them, complainants (with the permission of the ALJ) reformulated their request and sought a new form of TRO. In their new request, complainants sought an order (1) prohibiting SBC California from marketing its affiliate's DSL service to former DIRECTV customers who had chosen to go with complainants, (2) prohibiting SBC ASI's technicians from disparaging the DSL service offered by complainants, and (3) requiring SBC ASI to inform DIRECTV customers that their DSL connectivity would be maintained through February 28, 2003, and that it would seek to transition them to a new ISP with a maximum of five days of downtime. It was this revised request on which the assigned ALJ denied a TRO at the close of the January 30 hearing.

In their January 10, 2003 motion for a TRO, the complainants had also sought injunctive relief against Verizon California (a VADI affiliate erroneously named as a defendant) similar to the relief sought against SBC ASI and SBC California. However, after

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Administrative Law Judge (ALJ) denied the TRO. The close similarity of the arguments made at the TRO hearing with the allegations in the Amended Complaint, and complainants' failure to seek discovery before proceeding with their TRO application, is one of the grounds relied on in the draft decision for dismissal of the Amended Complaint.

Because of the length and complexity of the draft decision, one or more Commissioners may decide that the decision should be held to a later meeting so that it can be studied. It is also possible that one or more Commissioners will conclude that some of the allegations in the Amended Complaint should not be dismissed, and will want time to draft an alternate decision reflecting this conclusion. Finally, counsel for complainants, SBC ASI and SBC California have asked for a one-week extension of the time within which they must submit comments, because otherwise opening comments on the draft decision would be due on December 29, in the middle of the holidays.

In view of all these factors, it is appropriate to extend the one-year deadline set forth in Pub. Util. Code § 1701.2 (d) so that the parties can have additional time to submit their comments and the Commission will have adequate time to determine whether this proceeding should be dismissed, or whether it should go forward and be scheduled for a hearing. In the event the latter course of action is chosen, we will expect the assigned ALJ to hold a prehearing conference within 90 days after the Commission's decision for the purpose of setting a procedural schedule.

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considering VADI's papers in opposition to the TRO request, complainants decided not to pursue relief against VADI at the January 30 TRO hearing.

Comments on Draft Decision

Under Rule 77.7(f)(4) of the Commission's Rules of Practice and Procedure, the Commission may waive the otherwise-applicable 30-day period for public review and comment on a decision that extends the 12-month deadline set forth in Pub. Util. Code § 1701.2(d). Under the circumstances of this case, it is appropriate to waive the 30-day period for public review and comment.

Assignment of Proceeding

Geoffrey F. Brown is the Assigned Commissioner and A. Kirk McKenzie is the assigned ALJ in this proceeding.

Findings of Fact

1. The complaint in this case was filed on January 10, 2003, along with a motion requesting a TRO.

2. After the technical infeasibility of the relief they were seeking was pointed out to complainants, they reformulated their request for injunctive relief against defendants SBC ASI and SBC California, and decided not to pursue a TRO against VADI.

3. A hearing on complainants' amended request for a TRO against SBC ASI and SBC California was held on January 30, 2003.

4. At the conclusion of the hearing, the assigned ALJ declined to issue a TRO.

5. With the permission of the assigned ALJ, complainants filed an Amended Complaint on February 19, 2003.

6. On March 28, 2003, the various defendants moved to dismiss all of the allegations against them in the Amended Complaint.

7. Complainants filed a response to the motions to dismiss the Amended Complaint on April 18, 2003.

8. A draft decision dismissing the Amended Complaint is scheduled to be on

the agenda for the Commission meeting of January 8, 2004.

9. Because of the length and complexity of the draft decision, one or more Commissioners may seek extra time to review and consider the draft decision.

10. Complainants, SBC ASI and SBC California have asked for a one-week extension of time to file comments on the draft decision.

Conclusions of Law

1. In the event that the Commission does not adopt the draft decision dismissing the Amended Complaint at its January 8, 2004 meeting, it will not be possible to meet the 12-month statutory deadline imposed by Pub. Util. Code § 1701.2(d).

2. The 12-month statutory deadline should be extended until this proceeding is resolved.

O R D E R

IT IS ORDERED that:

1. The 12-month statutory deadline in this proceeding, January 10, 2004, is extended until further order.

2. In the event the Commission does not adopt the draft decision, and instead adopts an alternate decision providing that some or all of the allegations in the Amended Complaint should not be dismissed, the Administrative Law Judge shall hold a prehearing conference within 90 days after the mailing date of the decision adopted by the Commission for the purpose of setting a procedural schedule for this proceeding.

This order is effective today.

Dated _____, at San Francisco, California.