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August 14, 2003

VIA E-MAIL

Marlene Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W., TW-A-325
Washington, DC 20554

Re: WC Docket Nos. 02-33, 98-10, 95-20; 01-337; CS Docket No. 02-52. _

Dear Ms. Dortch:

I am writing on behalf of AT&T Corp. in response to recent *ex parte* letters by Verizon and BellSouth regarding “costs” these Bells claim they incur in complying with the Commission’s *Computer Inquiries* rules.¹ As detailed below, BellSouth and Verizon vastly overstate the relevant compliance costs – indeed, most of the activities they complain about are not even caused by the *Computer Inquiries* rules. At the outset, however, it must be recognized that so long as the Bells retain substantial market power – and the record in this proceeding confirms that they will for the foreseeable future – complaints that it is “costly” for them to comply with the *Computer Inquiries* rules could not possibly justify the wholesale repeal of core nondiscrimination and unbundling requirements that the Bells seek. As the Commission and the courts have consistently held for more than two decades, the enormous public interest benefits in protecting information and advanced services consumers and competition from market power abuse far outweigh any incidental costs of compliance. And absent the *Computer Inquiries* nondiscrimination and unbundling requirements, the Bells would have powerful incentives to discriminate against rival information service providers (“ISPs”), because doing so both

¹ See Letter from L. Barbee Ponder IV, BellSouth, to Marlene Dortch, FCC (WC Docket Nos. 02-33 *et. seq.*, July 10, 2003) (“7/10/03 BellSouth Ex Parte”), as modified by Letter from L. Barbee Ponder IV, BellSouth, to Marlene Dortch, FCC (WC Docket Nos. 02-33 *et. seq.*, Aug. 11, 2003) (filing corrected version of 7/10/03 BellSouth Ex Parte); Letter from L. Barbee Ponder IV, BellSouth, to Marlene Dortch, FCC (WC Docket Nos. 02-33 *et. seq.*, July 29, 2003) (“7/29/03 BellSouth Ex Parte”); Letter from W. Scott Randolph, Verizon, to Marlene Dortch, FCC (CC Dockets No. 02-33 *et. seq.*, June 26, 2003) (“6/26/03 Verizon Ex Parte”).

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enhances the relative attractiveness of the Bells' own broadband services and protects their other high margin services from cannibalization by rivals.

Thus, the critical inquiry here is not whether the *Computer Inquiries* rules impose some costs on the Bells, but whether the Bells retain market power and the ability to raise rivals' costs. The Bells seem to believe that merely showing the existence of duopoly conditions would be sufficient to establish that they lack market power. That is clearly wrong. Indeed, as the Commission made clear in the *EchoStar-DirecTV Merger Order*, 17 FCC Rcd. 20559, ¶ 103 (2002), "existing antitrust doctrine suggests that a merger to duopoly . . . faces a strong presumption of illegality." Duopoly "inevitably result in less innovation and fewer benefits to consumers" which "is the antithesis of what the public interest demands." *Id.* (separate statement of Chairman Powell). Duopoly "competition" therefore cannot be expected to force the Bells to grant rival ISPs access to broadband networks on competitive market terms and conditions that would permit effective competition, and the *Computer Inquiries* nondiscrimination and unbundling requirements thus remain essential in a duopoly environment.

Of course, the reality is that the Bells cannot demonstrate the existence of even duopoly competition in many relevant markets. "[T]he geographic scope of the market for broadband access is local,"² and, as the Commission has recognized, what is true for "any technology" in the early stages of development is true for broadband: deployment "is not uniform across the nation."³ In some residential areas, cable service is not available to anyone.⁴ Indeed, BellSouth now concedes that there may be as many as 20 million households in the United States that have access to Bell-provided DSL service, but have no cable alternative. *See* 7/29/03 BellSouth Ex Parte at 2. In addition, cable modem services are not generally available in business districts at all; virtually all small business customers of cable are in suburban areas that contain or are immediately adjacent to residences.⁵ These marketplace realities foreclose the Bells' requested across-the-board elimination of the *Computer Inquiries* obligations.

But even apart from these overriding market power concerns, the Bells greatly overstate the burden of complying with the Commission's rules. Indeed, the lion's share of the costs the Bells identify are not even caused by the *Computer Inquiries* rules, but would be incurred by any carrier seeking to offer wholesale broadband transport to ISPs – a service that the Bells say that they would continue to provide "voluntarily" in the absence of the *Computer Inquiries* rules. Thus, it is clear that the Bells' real complaint is not that they have to "unbundle"

² BellSouth Reply Comments, Harris Dec. ¶ 6 (CC Docket No. 01-337, Apr. 22, 2002).

³ *Second Section 706 Report*, 15 FCC Rcd. 20913, ¶ 1 (2000).

⁴ *See Third Section 706 Report*, 17 FCC Rcd. 2844, App. C, Table 9 (2002).

⁵ *Ex Parte* Letter from David Lawson, AT&T, to Marlene Dortch, FCC, at 7-8 (CC Docket Nos. 02-33 *et. seq.*, Dec. 23, 2002); *Ex Parte* Letter from David Lawson, AT&T, to Marlene Dortch, FCC, at 4-5 (CC Docket Nos. 02-33 *et. seq.*, Feb. 4, 2003).

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broadband transport, but that they cannot discriminate when they do so. To be sure, that is a “cost” of the *Computer Inquiries* rules, but one that the public interest demands be incurred, at least until the full development of robust intermodal competition – as opposed to today’s monopoly/duopoly environment.

1. BellSouth and Verizon advance both specific and general attacks on the Commission’s *Computer Inquiries* rules. They urge repeal of the so-called “two-mile rule” on the ground that it impedes their ability to compete against cable providers by requiring them to “impute” to their retail rates transportation costs that they do not actually incur. And they attack the core nondiscrimination/unbundling framework on the ground that it is “archaic” and requires the Bells to operate their networks in an inefficient manner. These alleged inefficiencies can be grouped into four distinct categories: (i) claims that the Bells must develop redundant customer care systems to comply with the nondiscrimination and unbundling requirements; (ii) claims that those rules require the Bells to purchase expensive “customized” or “redundant” equipment; (iii) claims that the rules require the Bells to transport data to ISPs in an inefficient matter; and (iv) claims that the rules prevent the Bells from entering into efficient, individualized arrangements. None of these claims are supported.

The Bells provide no verifiable cost estimate that the Commission could measure against the enormous public interest benefits that the nondiscrimination and unbundling requirements generate. Verizon does not even attempt to quantify the costs it claims the *Computer Inquiries* rules cause. And BellSouth’s \$45 million annual cost figure is supported by nothing more than BellSouth’s *ipse dixit*. No affiant attests to the accuracy of that number, and BellSouth provides none of the work papers or underlying documents that were (allegedly) used to derive it. Such bare assertions are patently insufficient to support elimination of a longstanding regulatory regime that has enabled literally hundreds of information service providers to flourish and bring the enormous benefits of access to the public Internet to virtually every American. This is particularly true in light of BellSouth’s recent admission that its prior cost analysis failed to include savings that could be achieved through integration of its operation permitted by the *Computer Inquiries* rules. Obviously, without access to BellSouth’s underlying “study,” there is no way of knowing if other similar errors exist.

Nor do the Bells provide any proof that the costs they claim are even actually *caused* by the *Computer Inquiries* rules they urge the Commission to repeal. In fact, the types of costs the Bells identify (to the extent they exist at all) would, in most cases, be incurred by *any* company (including cable companies) in the “wholesale” broadband transport business. For example, BellSouth claims, as a result of the *Computer Inquiries* rules, to have spent millions of dollars to “develop . . . broadband customer support processes,” 7/10/03 BellSouth Ex Parte at 7, n.6, but any company seeking to offer ISPs broadband transport would incur such costs. This is no mere technicality, given that BellSouth and the other Bells assert that they *voluntarily* will provide broadband transport to ISPs even if the *Computer Inquiries* rules are lifted. And, sunk costs to develop existing systems are, of course, irrelevant to any inquiry whether the public

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interest benefits of the *Computer Inquiries* rules will, going forward, continue to outweigh any compliance costs that will be incurred.

But even apart from these overarching flaws that undermine all of the Bells' cost arguments, their individual cost claims are greatly overstated.

The Two-Mile Rule. The Bells' arguments against the so-called "two-mile rule" are trivial. 7/10/03 BellSouth Ex Parte at 9. This rule was put into place to curb demonstrated market power abuses by the Bells, and the only thing this rule costs the Bells is additional opportunities to price-squeeze their ISP rivals.

In *Computer III*, the Commission declined to require the Bells to allow rival ESPs to collocate so that they could self-provide their own transport. Predictably, the Bells immediately sought to leverage this advantage for anticompetitive purposes. Specifically, BellSouth's initial ONA tariff sought to give its own ESPs preferential rates by offering a "zero" mileage band rate that only BellSouth's ESP could use (as no other ESP could collocate). *ONA Compliance Order*, 4 FCC Rcd. 1, ¶ 171 (1988). To curb this blatant discrimination, the Commission required the Bells either to establish an initial transport service band of two miles or to impute the two mile rate. *Id.* ¶ 168.

BellSouth advances three complaints against this rule. First, BellSouth complains that some ISPs have other advantages that BellSouth does not have. 7/20/03 BellSouth Ex Parte at 9. But these advantages do not extend to the most potent advantage of all – control of bottleneck facilities that are essential to providing broadband services. And the fact that one ISP, AOL, may have "unique" content is no justification for eliminating a rule that also protects hundreds of other ISPs and ESPs that do not have any comparable offsetting "advantage."

Second, BellSouth suggests that ISPs can purchase transport from competitive carriers. *Id.* But BellSouth offers no proof that competitive carriers generally have facilities that are connected to both BellSouth's network and ISPs at all the points necessary to pick up the data traffic. Of course, they do not.

Finally, BellSouth asserts that the two-mile rule requires it to incur an extra \$2310 per month per circuit. *Id.* But BellSouth only has itself to blame for this "cost," as the price BellSouth chooses to charge for transport is a monopoly price that is far above cost.⁶ If BellSouth were to charge competitive rather than monopoly prices for transport, it would be able to slash dramatically its "imputed" costs (which are mere left pocket, right pocket transactions in any case). And if BellSouth really wanted to achieve "parity," it already has the ability to do so. In the *ONA Compliance Order*, the Commission held that a Bell would not be bound by the two-mile rule if it agreed to allow unaffiliated ESPs to collocate and self-provide transport. *See ONA*

⁶ *See generally* Petition of AT&T (RM No. 10593, Oct. 15, 2002); Reply Comments of AT&T (RM No. 10593, Jan. 23, 2003).

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Compliance Order ¶¶ 168, 170. Thus, it is clear that what BellSouth really wants is the entitlement to earn monopoly profits on essential transport and the ability to cost-price squeeze rival ISPs.

Inefficient Support Systems. The Bells contend that they must maintain a “separate support organization for the basic and information services” to comply with the *Computer Inquiries* rules. 7/10/03 BellSouth Ex Parte at 7; *id.* (claiming “redundant” personnel centers add \$13 million in additional costs). This argument is a contrivance. The Commission in *Computer III* eliminated the requirement that the Bells provide enhanced services through a structurally separate affiliate. Thus, nothing in the *Computer Inquiries* rules prevents a Bell from using the same personnel and systems to serve both its own affiliate and ISPs.⁷ Moreover, as noted, the Bells tout the fact that they would continue to provide access to unaffiliated ISPs, even in the absence of *Computer Inquiries*. But that would require the Bells to incur the very same costs for interfaces and support personnel that they complain about here. And, to the extent that the Bells are arguing that it costs them more money to provide *nondiscriminatory* treatment to unaffiliated and affiliated ISPs, that is no basis for gutting the *Computer Inquiries* rules, but confirmation that in the absence of those rules, the Bells would have powerful incentives to discriminate against rival ISPs.

Customized/Redundant Equipment. The Bells claim that they must buy costly (or inferior) specialized equipment to comply with the *Computer Inquiries* rules. 7/10/03 BellSouth Ex Parte at 4; 6/26/03 Verizon Ex Parte at 2. Tellingly, however, the Bells are unable to point to a *single* example where they have been unable to get the equipment or vendor support that they need to meet their regulatory obligations, or, for that matter, any instance in which they have been charged a “premium” for such equipment. Indeed, the Bells do not identify any way in which they would change their purchasing practices if relieved of the *Computer Inquiries* nondiscrimination and unbundling requirements. Rather, the Bells’ suggest that there simply must be such costs, because “vendors have no incentives to [offer the necessary equipment or support] since all but four potential purchasers, . . . do not want or need” such offers, 7/10/03 BellSouth Ex Parte at 4. But the fact that there are only “four” potential purchasers of “specialized” equipment is an economically irrelevant statistic; it is their aggregate demand that determines whether or not vendors will have an incentive to supply them with the equipment that they need. Given the billions of dollars that the Bells spend on network infrastructure, the reality is that equipment manufacturers bend over backwards to work with the Bells and, in fact, design equipment to the precise specifications provided by the Bells.

⁷ Indeed, in BellSouth’s August 11, 2003 *errata* filing, it acknowledged that it has overstated the cost savings it had alleged because it had failed to reflect the fact that BellSouth had eliminated the practice of dual dispatches. Comparable integration can be used to produce “cost savings” – assuming they exist – in other areas as well.

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The Bells' main complaint, therefore, appears to be that the *Computer Inquiries* rules require them to "allocate" the costs of the equipment that they buy between regulated and unregulated accounts. 7/10/03 BellSouth Ex Parte at 4. That is a remarkable complaint, to say the least. Just weeks ago, in asking the Commission to gut the section 272 "OI&M" rules, BellSouth argued that those "structural" rules are unnecessary, because of the ease and accuracy of allocating the costs of services and equipment used by both its incumbent telephone and separate long distance affiliate operations. See Petition of BellSouth at 5 (CC Docket 96-149, July 14, 2002).

Further, even if the Bells were freed of *Computer Inquiries* obligations, they would, for internal purposes, need to know how much ISPs were using their network facilities (relative to their own usage) for purposes of setting the terms and conditions of such access (assuming that their claims that they would, in fact, offer such access could be credited). For that reason, the *Computer Inquiries* obligations impose, at most, modest additional incremental costs.

Inefficient Transport to ISPs. The Bells contend that the *Computer Inquiries* rules require them "to use inefficient methods of transporting data to ISPs by forcing aggregated backhaul and access to use the same transport protocols." 7/10/03 BellSouth Ex Parte at 3; see also 6/26/03 Verizon Ex Parte at 4. In particular, the Bells claim that their DSL service is based on an ATM transmission protocol, but that some ISPs desire to pick up their customers' data in a different format, such as Ethernet or Frame Relay. According to the Bells, such a "protocol conversion" service is an "information service," which in turn requires them to "decouple" the basic transmission path from the "enhancement." 7/10/03 BellSouth Ex Parte at 4; see also 6/26/03 Verizon Ex Parte at 4.

Although the Bells claim that making the underlying basic transmission path available is unduly "complex[]," 6/26/03 Verizon Ex Parte at 3, they fail to offer a persuasive reason as to why this is so. First, citing its experience with its RBAN, BellSouth suggests that the necessary tariff filing obligations are onerous. According to BellSouth, this offering was impeded by the *Computer Inquiries* tariff filing obligations because it was "required to make several changes to its tariff to support the development" of the basic service. 7/10/03 BellSouth Ex Parte at 5. However, in a footnote, BellSouth acknowledges that those changes were "*minor* changes to its tariff and technical publications." *Id.* at 5 n.5 (emphasis added). The fact that BellSouth had to make some "minor changes" to its tariff in the course of offering a stand alone transport service hardly shows that compliance with the *Computer Inquiries* rules is unduly costly.

More seriously, the Bells argue the *Computer Inquiries* rules require them to perform protocol conversion in the "non-regulated" part of their networks, but that it would often be more efficient for them to do such protocol conversion in the "regulated" part of the network, closer to the end-user. *Id.* at 6 (claiming that BellSouth would like to perform protocol conversion at Egress Broadband Gateway or Ingress Broadband Gateway). It is far from clear what the Bells mean by this. A Bell can perform protocol conversion at *any* point in its network

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(and there are, of course, no separate “regulated” and “non-regulated” networks). The Bell’s only relevant obligation under the *Computer Inquiries* rules is to unbundle and make available on nondiscriminatory terms the underlying transport service.

To the extent that the Bells are claiming that they cannot perform protocol conversion “deep” in its network and still break out basic transport as technical matter, 6/26/03 Verizon Ex Parte at 3, that is plainly false. Although the Bells provide no detail, it appears that their argument is that once a Bell converts the ATM transmission it obtains from an end user at a “deep” point in its network to another format, it has no way to deliver to ISPs at the edge of its network a “no net protocol conversion” basic ATM transmission other than building a redundant, parallel ATM network to that ISP. See 7/10/03 BellSouth Ex Parte at 6 & Att. A. But that claim simply ignores the fact that it is only *net* protocol conversion that is relevant for regulatory classification purposes. Thus, a Bell can perform protocol conversion anywhere it wants in its network so long as it is able to also re-convert back to ATM format for any ISP that wants it.

With modern routers, such protocol re-conversion at the interface with any ISP that desires ATM delivery is quite routine. Smaller (and many large) ISPs connect to a Bell’s network, for example, at the Bell’s (or its affiliate’s) internet backbone. In such arrangements, the Bell delivers packets to the unaffiliated ISPs through an interface that consists of a router line card and port dedicated to the ISP through a dedicated transport link. Individual router line cards can, at BellSouth’s election, deliver packets in the same protocol that those packets were delivered to the router or in a different protocol specified by the ISP. See <http://a816.g.akamai.net/7/816/5107/20030429053618/www.nortelnetworks.com/products/01/shasta/enterprise/collateral/nn104081-042403.pdf>.

The *Computer Inquiries* rules thus in no way prevent the Bells from performing any protocol conversions anywhere in their networks they deem appropriate. All that the *Computer Inquiries* rules require is that the Bells make available to any ISPs that wants it a basic ATM transmission (if ATM is, indeed, the protocol generated by existing customer equipment). And any reconversion necessary to make basic (*i.e.*, no *net* protocol conversion) transport available is easily accomplished through line cards in existing “edge” routers and with no need for parallel networks.

In all events, to the extent that there are specific *Computer Inquiries* rules that truly prevent the Bells from adopting efficient network architectures, the Bells should identify those specific rules and propose reasonable modifications to them. But the potential existence of to date unidentified rules is no basis for eliminating altogether *Computer Inquiries*’ core unbundling obligation.

Inability To Make Customized Deals. Given the limited burden imposed by the *Computer Inquiries* unbundling requirement, it is clear that the Bells’ real complaint is with the *nondiscrimination* requirements of those rules. Thus, the Bells repeatedly contend that as a result of *Computer Inquiries* nondiscrimination obligations, they are unable to meet ISPs’

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requests for “customized” arrangements that would be beneficial to all parties. *See, e.g.*, 7/10/03 BellSouth Ex Parte at 4; 6/26/03 Verizon Ex Parte at 4. That is false. Nondiscrimination does not mean that a carrier is required only to provide “off the shelf” services that are not tailored to an individual customer’s needs. To the contrary, the Commission developed the contract tariff doctrine to give carriers the flexibility to make customized deals while preventing market power abuses of that flexibility. *See, e.g., Interexchange Competition Order*, 6 FCC Rcd. 5880 (1991).

Under that precedent, a carrier can reach an individualized contract with a customer and then file that contract as a tariff. Although this makes the arrangement generally available, only customers that are “similarly situated” with regard to the relevant economic criteria can demand service under the terms of the contract tariff. Notably, the Bells have already utilized this flexibility to “enter[] into arrangements directly with Internet Service Providers.” *AOL Bulk Service Order*, 14 FCC Rcd 19237, ¶ 7 (1999). Thus, for example, they have filed tariffs in which they give volume discounts to large purchasers like AOL and Prodigy. *Id.*

Furthermore, the Bells can, under the existing rules, protect themselves against “lingering” obligations by providing in the tariff that the offer is available only for a specified (but reasonable) time period. And, contrary to Verizon’s claims, 6/26/03 Ex Parte at 4, to the extent that a Bell voluntarily offers ISPs customized arrangements that provide more than “basic” transport, if those arrangements turn out to be uneconomic or impracticable from a network management perspective, nothing in the *Computer Inquiries* rules prohibits a Bell from subsequently withdrawing those arrangements.

2. Ultimately, the central issue before the Commission is not the “costs” that *Computer Inquiries* rules may impose, but whether independent ISPs have viable alternatives to the Bells for last mile broadband transport. As AT&T has explained in several filings, for many customers, ISPs have only the Bell.⁸ This is true not only because cable modem services are often not available to customers served by DSL, but also because many cable companies do not offer ISPs access to cable facilities.

BellSouth now claims that, whatever may be true elsewhere, the vast majority of its DSL customers have a cable alternative. *See* 7/29/03 BellSouth Ex Parte. This “study” is flawed on several levels. Once these errors are corrected, the new BellSouth data merely confirms the Bells’ enduring market power.

As an initial matter, even if BellSouth’s calculations could be taken at face value, BellSouth’s *ex parte* demonstrates that, at best, there is merely a broadband duopoly for most

⁸ *See generally, e.g.*, Comments of AT&T (CC Docket No. 02-33, May 3, 2002); Reply Comments of AT&T (CC Docket No. 02-33, Jul. 1, 2002); *Ex Parte Letter* from David Lawson, AT&T, to Marlene Dortch, FCC (CC Docket Nos. 02-33 *et seq.*, Dec. 23, 2002).

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customers in BellSouth's service areas. BellSouth makes no attempt to show that platforms other than cable are a viable method for providing broadband access to the Internet. Nor could it, as much-touted fixed wireless- and satellite-based broadband Internet access services have not developed.⁹

There is simply no basis in economic theory to conclude that the presence of a single alternative would compel the Bells to offer rival ISPs reasonable terms and conditions to its broadband network. It is well recognized that where a handful of companies provide the bulk of a product's output, and there are significant barriers to entering that market, the result will be a tight oligopoly that will permit the individual companies (even the smaller providers) to exercise market power. *See Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 227 (1993) (describing oligopolistic price coordination); *Bailey v. Allgas, Inc.*, 284 F.3d 1237, 1245-46 (11th Cir. 2002) ("market power" can be "demonstrat[ed]" by "show[ing] the existence of an oligopoly"); *Bonjorno v. Kaiser Aluminum & Chemical Corp.*, 752 F.2d 802, 809 (3d Cir. 1984); *Grumman Corp. v. LTV Corp.*, 527 F. Supp. 86, 95 (E.D.N.Y. 1981) (finding "market power" based on the existence of a "tight oligopoly"); *EchoStar-DirecTV Merger Order*, 17 FCC Rcd. 20559, ¶ 103 (2002) ("existing antitrust doctrine suggests that a merger to duopoly or monopoly faces a strong presumption of illegality."). Duopoly "competition" is likely to be particularly ineffective here given the fact that the broadband services that would be offered by rival ISPs potentially cannibalize the Bells' high margin second line services and other premium "broadband" services like ISDN and T1 – a point that BellSouth's own economists concede.¹⁰

Moreover, as noted, in many instances the presence of a cable competitor is of no benefit to ISPs. The relevant issue here is what *wholesale* alternatives exist for ISPs that are seeking to offer Internet access and related services. And there can be no debate that in many

⁹ Comments of AT&T at 49-50 (CC Docket No. 02-33, May 3, 2002) & Willig Dec. ¶¶ 28-29; *Ex Parte* Letter from David Lawson, AT&T, to Marlene Dortch, FCC at 6-8 (CC Docket No. 02-33 *et seq.*, Feb. 4, 2003).

¹⁰ Reply Comments of BellSouth, Att. 1, NERA Reply Report ¶ 167 (CC Docket No. 01-338, July 17, 2002) (broadband services "*are increasingly likely to cannibalize the traditional services offered by ILECs*"). *See also* Goldman Sachs Telecom Services, Report, *DSL Under A Microscope*, at 15 (June 11, 2002) ("[A] negative side effect of adding a DSL subscriber is the potential loss of a second line that the customer had previously subscribed to. *SBC estimates that as much as one-half of customers with second lines that sign up for DSL service disconnect their second lines, Verizon estimates that this figure is closer to three-quarters. . . .* Second lines generate only \$25 per month in revenue and come at a very low incremental cost to the provider, implying very high returns. Alternatively, DSL requires significant upfront acquisition costs as well as infrastructure costs. . . . *A DSL subscriber often comes at the expense of a disconnected second line, which means \$25 in high-margin revenues are lost.*") (emphasis added).

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areas cable operators are not a viable wholesale alternative because they do not provide broadband transport to ISPs. Thus, in those instances, ISPs are captive to the Bells that have little incentive to grant these carriers access that could erode the Bells' profits.

But even if these "complications" could be ignored, the BellSouth study still would not support the sweeping national deregulation sought by the Bells. BellSouth concedes that as many as 20 million customer nationwide have no choice but DSL for broadband transport, with the majority of these customers being Bell DSL customers. 7/29/03 BellSouth Ex Parte at 2. This fact alone forecloses the sweeping across-the-board relief sought by the Bells. That *some* consumers might have a choice of DSL or cable is clearly not a basis for eliminating *Computer Inquiries* obligations for those potentially tens of millions of customers that do not have such a choice. As the D.C. Circuit has recently emphasized, where relevant local competitive conditions vary – as they do here – the Commission is obligated to conduct a "granular" analysis and tailor its regulation to reflect the varying competitive conditions. *See United States Telecom. Ass'n v. FCC*, 290 F.3d 415 (D.C. Cir. 2002).¹¹

BellSouth also fails to come to grips with the fact that cable modem services are generally not available to businesses.¹² Rather, in developing its "nationwide" overlap statistic, BellSouth looks only at residential customers and ignores the business market altogether. *See* 7/29/03 BellSouth Ex Parte at 2. Again, an appropriate "granular" analysis requires the Commission to consider the options available to customers in each of these separate relevant market segments, and it would be clearly improper for the Commission to eliminate the Bells' obligation to provide stand-alone broadband transport services that are the only high speed services available to businesses on the basis that residential customers often have a cable modem alternative.

Finally, BellSouth's "analysis" of the data is hopelessly flawed. BellSouth conducted its study as follows. It began with the 1300 central offices that are equipped with

¹¹ In this regard, BellSouth has conceded that "the geographic scope of the market for broadband access is local." BellSouth Reply Comments, Harris Dec. ¶ 6 (CC Docket No. 01-337, Apr. 22, 2002).

¹² *Ex Parte* Letter from David Lawson, AT&T, to Marlene Dortch, FCC, at 7-8 (CC Docket No. 02-33 *et seq.*, Dec. 23, 2002); *Ex Parte* Letter from David Lawson, AT&T, to Marlene Dortch, FCC, at 4-5 (CC Docket No. 02-33 *et seq.*, Feb. 4, 2003). To be sure, cable operators have announced their interest in trying to penetrate the business market. But the reality today is that the inroads made by cable into business markets has been quite limited and, more generally, that cable is unlikely to ever be a threat for businesses located in urban areas that are quite distant from the residential areas that are passed by cable networks. As the Bells themselves have acknowledged, the Commission "cannot impose inappropriate regulation today because of what might theoretically happen in the next several years." *See* Qwest Reply Comments (CC Docket No. 01-337, Apr. 22, 2002).

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DSL capability. It then apparently looked to see if there were *any* addresses in the area served by the central office where cable modem service was available. 7/29/03 BellSouth Ex Parte at 3. And where it found such a match, it then concluded that cable modem services were available to *all* of the households served by the central office. *Id.*

There is no basis in logic or fact to believe that where a cable operator serves a single address in a wire center area (or even a majority of addresses in that wire center), it serves every address in that area. Indeed, the exact opposite is true. For example, as explained above, cable modem service are generally not offered to businesses. Where a BellSouth central office serves both residential and business customers, it cannot be assumed, as BellSouth has, that the fact that the cable modem services are offered in the residential portions of the wire center means that they are also offered in the business districts served by that wire center.

Thus, at the end of the day, the Bells retreat to their now shop-worn regulatory parity argument that identical outcomes are required, regardless of relevant differences. 7/29/03 BellSouth Ex Parte at 1. The Commission has repeatedly ruled that regulatory parity means equality of principles, not necessarily equality of results, and there is now an extensive record of important legal, economic, and technological differences that could justify disparate treatment of cable companies and the Bells with regard to last mile access.

Sincerely,

/s/ David L. Lawson

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