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1501 K STREET, N.W.  
WASHINGTON, D.C. 20005  
TELEPHONE 202 736 8000  
FACSIMILE 202 736 8711  
www.sidley.com  
FOUNDED 1866

LOS ANGELES  
NEW YORK  
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TOKYO  
WASHINGTON, D.C.

WRITER'S DIRECT NUMBER  
(202) 736-8088

WRITER'S E-MAIL ADDRESS  
dlawson@sidley.com

October 22, 2004

Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12th St., S.W.  
Washington, D.C. 20554

Re: BellSouth Request for Declaratory Ruling that State Commissions  
May Not Regulate Broadband Internet Access Service by Requiring  
BellSouth to Provide Wholesale or Retail Broadband Service,  
WC Docket No. 03-251

Dear Ms. Dortch:

I write on behalf of AT&T Corp. to respond to letters filed by BellSouth Corp. in this proceeding on June 15, 2004, June 24, 2004, and July 6, 2004. Each of these letters urges the Commission to construe the *Triennial Review Order* ("TRO") in a manner that the TRO cannot support; one confirms the absence of record support for BellSouth's petition; and one would have the Commission simply disregard established limits on its authority to pre-empt state regulations designed to foster competition in the provision of local telephone services.

As an initial matter, it is important to recognize the importance of this proceeding even apart from ongoing proceedings addressing the scope of access to the elements of BellSouth's network: BellSouth's tying and DSL disconnection policy is anticompetitive no matter what forms of access to BellSouth's facilities are available to allow competing carriers to serve their voice customers. Indeed, recent developments have only underscored the anticompetitive potential of BellSouth's tying practice. In particular, that practice poses a serious threat to the robust development of VoIP services -- BellSouth's DSL customers remain locked into the BellSouth voice service because they face disconnection of their DSL service if they attempt to displace their BellSouth voice service with a VoIP offering from another service provider.<sup>1</sup>

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<sup>1</sup> BellSouth's justification of its DSL disconnection policy has always been entirely pretextual, as confirmed by the attached BellSouth letter to a small business customer declaring that "BellSouth is and always has been willing to provide its unregulated retail high-speed Internet

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July 6, 2004 Letter. The July 6, 2004 BellSouth letter addresses a federal court decision that BellSouth claims “tracks BellSouth’s argument in this proceeding” and supports the relief BellSouth seeks.<sup>2</sup> That decision, *Wisconsin Bell*, in fact rests on reasoning that the Commission has not adopted and could not adopt (without inviting reversal on appeal), and thus confirms that the grant of declaratory relief that BellSouth seeks would exceed the Commission’s powers.

In *Wisconsin Bell*, the District Court erroneously conflated two separate portions of the TRO and rested its determination on facts not present here. In that case, the contract provision at issue required Wisconsin Bell not only to continue providing data services to customers that switch to AT&T’s local voice service, but also to pay AT&T for the HFPL. In reaching its decision, the Court quoted at length the Commission’s rationale for denying separate unbundling of the *high frequency* portion of the loop, *i.e.*, that requiring CLECs to pay the full price of the loop provided them with incentives to partner with DSL providers to share in the loop costs. *Wisconsin Bell*, at 19 (quoting TRO ¶¶ 260-61). As AT&T has noted elsewhere, the state commission decisions at issue in this proceeding – unlike the Wisconsin PSC decision at issue in *Wisconsin Bell*, *see id.* at 20 – have required CLECs to pay for the entire loop. The state commissions in the BellSouth region have thus created just the incentives that the Commission sought (encouraging CLECs to partner with DSL providers in line-splitting arrangements, because CLECs secure no financial gain from BellSouth’s provision of DSL service over the leased loop, other than having customers escape the anticompetitive “lock-in” created by the BellSouth disconnection policy). Moreover, these state commission decisions have highlighted the anticompetitive effects of BellSouth’s action because BellSouth is seeking to discontinue a profitable service even where it is charged *nothing* for a principal input cost for that service.<sup>3</sup> In

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access service, known as BellSouth FastAccess® DSL, to a customer, such as your firm, that is obtaining voice telephone service from a competitive local exchange company over a resale line.” October 15, 2004 Letter from Dorothy J. Chambers, General Counsel/Kentucky, BellSouth Telecommunications, Inc., to James Vanover, Esq., Vanover, Hall & Bartely, P.S.C. (attached hereto).

<sup>2</sup> See Letter from S. Lev to M. Dortch, WC Docket No. 03-251, at 2 (filed July 6, 2004) (addressing *Wisconsin Bell, Inc. v. AT&T Communications of Wisconsin et al.*, Order, 03-C-671-S (W.D. Wisc. July 1, 2004) (“*Wisconsin Bell*”).

<sup>3</sup> See Comments of AT&T Corp. and the CompTel/ASCENT Alliance, WC Docket No. 03-251 at 5-13 (filed Jan. 30, 2004); Reply Comments of AT&T Corp. and the CompTel/ASCENT Alliance, WC Docket No. 03-251, at 4-6 (filed Feb. 20, 2004). Indeed, only one district court decision has addressed a state commission order that, consistent with the TRO’s incentive-based rationale, required the CLEC to pay for the entire loop. See *BellSouth Telecomm. Inc. v. Cinergy Comm.*, No. Civ. A 03-23-JMH, 2003 WL 23139419 (E.D. Ky. Dec. 29, 2003) (appeal pending). That decision, directly considering a state commission order that BellSouth would have the Commission pre-empt, found that the state commission order was a legitimate exercise of its traditional and preserved powers and was not pre-empted.

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*Wisconsin Bell*, the court found that requiring the RBOC to pay for the high frequency portion of the loop amounted to “thinly veiled unbundling of the local loop” – and then (erroneously) found that the *low frequency* portion of the loop had been unbundled. See *Wisconsin Bell*, at 20-21.

The Commission cannot accept BellSouth’s invitation to follow the District Court’s reasoning. Not only are facts that led the Court to conclude that the state was effectively requiring unbundling absent here, but it would be irrational at best for the Commission to rely on reasoning set forth in one portion of the *TRO* for one unbundling determination (regarding high frequency loop unbundling) to support a different outcome reached in another portion (regarding low frequency loop unbundling) that rested on a different rationale. This is especially clear when the incentive-based rationale for the high capacity unbundling determination in fact *supports* the outcome reached by the state commissions in BellSouth’s region. And the error is highlighted by the District Court’s further improper inference that the Commission’s acknowledgement that certain RBOCs were tying voice service to DSL service meant that the Commission in some manner was *sanctioning* this patently anticompetitive behavior. See *Wisconsin Bell*, at 21 (citing *TRO* ¶ 259). Of course the Commission has done no such thing; instead, in the course of addressing the incentives created by its high frequency unbundling policy, the Commission only noted that customers had to secure DSL service elsewhere as a result of the RBOC tying practice. Not only did the Commission’s observation have nothing to do with unbundling of the low frequency portion of the loop, but an observation that the RBOCs tie their two products would serve as a remarkably poor basis for pre-empting state commission decisions designed to limit the anticompetitive effect of that practice on local telephone markets. Understandably, even BellSouth has not sought comfort in that paragraph of the Commission’s reasoning.

June 15, 2004 Letter: In its June 15, 2004 letter, BellSouth claims to provide evidence in support of “this Commission’s policy of promoting innovation by encouraging narrowband services-only competitive LECs to take full advantage of an unbundled loop’s capabilities by partnering with a second competitive LEC that will offer xDSL service” – a policy that BellSouth invokes as the basis for the relief it seeks.<sup>4</sup> But under the Commission’s own reasoning developed with respect to whether the high frequency portion of the loop should be unbundled, the state commission decisions at issue here advance the policy goal that BellSouth describes. Unrefuted record evidence in those state proceedings strongly supports the conclusion that the state commission orders foster, rather than impede, the Commission’s policy of encouraging competitive supply of voice and DSL services. Specifically, not only do the state commission orders prohibit BellSouth from employing policies that lock up its voice customers, but they also give voice providers every incentive to partner with a DSL provider that will contribute to the cost of leasing the entire loop.

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<sup>4</sup> See Letter from G. Reynolds to M. Dortch, WC Docket No. 03-251, at 2 (filed June 15, 2004) (“BellSouth June 15 Letter”); see also Letter from S. Lev to M. Dortch, WC Docket No. 03-251, at 3 (filed June 24, 2004) (“BellSouth June 24 Letter”).

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BellSouth manufactures a link between the *TRO* determination it invokes (declining to unbundle the low frequency portion of the loop, *see TRO* ¶ 270) and the Commission's incentive rationale for discontinuing unbundling of the high frequency portion of the loop through line-sharing (*see TRO* ¶¶ 260-61). The Commission's former determination was simply a conclusion regarding the lack of impairment in the absence of low frequency loop unbundling and did not rest on any associated incentives. *See TRO* ¶¶ 270. In contrast, the Commission's rationale for discontinuing unbundling of the HFPL rested on the incentives created by requiring CLECs to pay for the entire loop rather than only the low frequency portion of it. *See TRO* ¶ 260. And, as noted above, the state commission orders challenged by BellSouth require the CLEC to pay for the entire loop and thus create just the incentives envisioned by the Commission. Because CLECs have every incentive, once they overcome the barriers to entry created by BellSouth's DSL disconnection policy, to secure DSL partners that will pay something, rather than nothing, for the high frequency portion of the loop, any evidence of increased DSL roll-out could be attributed to the BellSouth states' policies as much as to any other source. The "balance" that BellSouth insists that the state commission orders would disturb is, in fact, neither one that exists in the Commission's low frequency unbundling determination nor one that is in any sense "disturbed" by the state commission orders.

Even apart from the lack of any inconsistency between the *TRO* and the state commission orders, the Commission would be ill-advised, in any event, to rest a pre-emption order on the incentive structure created with respect to its line-sharing determination. As the *TRO* made clear, that decision principally responded to the D.C. Circuit's rejection of the Commission's impairment conclusion (an issue not present in this proceeding), *see TRO* ¶¶ 256, 262-62, and individual Commissioners indicated that they believed that line sharing in fact *increased* incentives for broadband deployment. *See* Separate Statement of Chairman Michael K. Powell, FCC 03-36, at 1-2; Separate Statement of Commissioner Kathleen Q. Abernathy, FCC 03-36, at 9; Statement of Commissioner Michael J. Copps, FCC 03-36, at 2; Statement of Commissioner Jonathan S. Adelstein, FCC 03-36, at 4; *see also* Statement of Commissioner Kevin J. Martin, FCC 03-36, at 13.

In any event, the evidence submitted by BellSouth only confirms the procompetitive implications of the state commission orders at issue here. Whether independent DSL providers can provide service where BellSouth can is irrelevant to the anticompetitive lock-in effects identified by the state commissions, which focused on evidence that customers will be reluctant to switch to a new voice service provider if they have to disconnect their established DSL service.<sup>5</sup> That record evidence is extensive, and BellSouth has not attempted to rebut it. But the availability of independent DSL service providers is relevant to the ability of voice CLECs to compete for the relatively few customers that are willing to bear those extensive switching costs and to their ability to retain voice customers who would want BellSouth's DSL offering and, as a result, must also purchase BellSouth's voice service.

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<sup>5</sup> *See, e.g.*, Comments of AT&T and the CompTel/ASCENT Alliance, at 5-13.

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BellSouth erroneously claims that figures from Covad, a leading national provider of DSL services, show that alternatives to BellSouth's DSL service are widely available. BellSouth June 15 Letter, at 1. In fact, Covad's subsequent filing shows that AT&T's original claims were correct. Indeed, even where Covad serves a central office, only a small proportion of lines associated with that office are operationally capable of enabling Covad's service.<sup>6</sup> That filing also shows that BellSouth's claims regarding Covad's expansion of service are greatly exaggerated and that the percentage of central offices in BellSouth territory that are served by Covad is quite small.<sup>7</sup>

The Covad letter also confirms that electronic ordering, which is essential to securing new customers, is virtually non-existent – and does not exist for the customers most affected by BellSouth's disconnection policies. As Covad observes, “if a customer who currently has BellSouth DSL wishes to purchase AT&T/Covad provided voice and DSL service, BellSouth does not have a single electronic ordering process for such a scenario.”<sup>8</sup> Thus, a customer with BellSouth DSL service that wishes to purchase a lower-priced CLEC voice service must not only suffer the very severe burdens associated with BellSouth's DSL disconnection policy, but – where an alternative DSL provider exists at all – must also suffer the extensive delays associated with BellSouth's failure to provide a non-discriminatory electronic ordering process.

June 24, 2004 Letter. BellSouth's June 24, 2004 letter purports to respond to AT&T's letter of June 10, 2004, but, in truth, simply repeats BellSouth's prior arguments.<sup>9</sup> AT&T's letter addressed a discrete issue: whether the Commission, if it chose to rest its pre-emption authority on Section 251, could avoid the traditional pre-emption standard established by cases such as *NARUC v. FCC*, 880 F.2d 422 (D.C. Cir. 1989). AT&T showed that Congress, in enacting the 1996 Act, in several respects confirmed and enhanced the protections for state powers set forth in the Communications Act – not least in Sections 252(e)(3), 261(b), 261(c), and 601(c) – and that Section 251(d)(3) certainly did not displace traditional pre-emption standards.<sup>10</sup>

BellSouth's response is to reiterate its claims that “the [TRO] has already established the standards for preemption in this context” and that the TRO's conclusions “apply directly here” to support BellSouth's petition. *BellSouth June 24 Letter*, at 1, 3; *see id.* at 1-4. These assertions

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<sup>6</sup> *See* Letter from C. Watkins, Covad Senior Counsel, to M. Dortch, WC Docket No. 03-251, at 1 (filed July 29, 2004) (“Covad Letter”).

<sup>7</sup> Covad Letter, at 1-2.

<sup>8</sup> *Id.* at 2.

<sup>9</sup> *See* BellSouth June 24 Letter.

<sup>10</sup> *See* Letter from D. Lawson to M. Dortch, WC Docket No. 03-251 (filed June 10, 2004) (“AT&T June 10 Letter”); *see also* Comments of AT&T Corp. and the CompTel/ASCENT Alliance, at 13-21.

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are unfounded, as AT&T has elsewhere demonstrated at length.<sup>11</sup> Moreover, there is no basis for BellSouth's assertions regarding the relevant statutory provisions. For example, BellSouth claims that AT&T is resurrecting the argument, addressed in the *TRO*, that Section 252(e)(3), permits a state to impose "additional unbundling obligations ... without regard to the federal scheme." BellSouth June 24 Letter, at 2 (quoting *TRO* ¶ 194). Whatever the merits of the Commission's treatment of AT&T's original argument, the claim here is different. AT&T here asserts that the Commission may not preempt the states' actions without conducting a traditional preemption analysis applicable to mixed jurisdiction services. That is, the Commission cannot point to a mere inconsistency in policy but must rather determine *whether* a state commission has acted so inconsistently with the federal scheme that its actions are pre-empted under controlling legal standards.<sup>12</sup> And the Act's preservation of state powers as state commissions discharge their Section 252 obligations (as they did in the state commission orders BellSouth seeks to have pre-empted) provides powerful evidence of Congress' intent not to relax pre-existing pre-emption standards.

So, too, with sections 261(b) & (c). BellSouth cannot claim that the provisions do not constrain the Commission. Instead, it briefly repeats its argument that the state commission actions are "inconsistent" with the policies invoked in the *TRO*. See BellSouth June 24 Letter, at 2 n.5. But that fails to address the statutory language of Sections 261(b)&(c).<sup>13</sup> And even under BellSouth's view – which would read "this part" in Section 261(b) to encompass not only the relevant portions of the Act, but *any* federal "regulation" – BellSouth can point to no "regulation" that pre-emptes the state commission orders, expressly or by implication. Instead, BellSouth relies solely on the unstated "policies" of the *TRO* that led the Commission not to find impairment, and thus not to promulgate a particular unbundling regulation.

Finally, BellSouth's claim that Section 601(c) is irrelevant because "there is no question of implied preemption here" ignores the basis for BellSouth's own petition. BellSouth June 24 Letter, at 2 n.4. BellSouth points to no statute or regulation that expressly pre-emptes the state orders at issue, and instead relies only upon the policies informing the Commission's decision not to issue a regulation and upon cases that establish or apply the implied pre-emption doctrine.

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<sup>11</sup> See Comments of AT&T and the CompTel/ASCENT Alliance, at 13-28; Letter from D. Lawson to M. Dortch, WC Docket No. 03-251 (filed April 28, 2004).

<sup>12</sup> In addition, BellSouth does not even attempt to meet the express pre-emption standard adopted by Congress: the state orders do not "prohibit or have the effect of prohibiting" BellSouth from offering DSL service. See 47 U.S.C. § 253. Nor has BellSouth presented information that would permit the Commission to make the requisite individualized determination with respect to each state commission order. See *Qwest Corp. v. City of Portland*, No. 02-35473, slip op. at 14480 (9<sup>th</sup> Cir. Oct. 12, 2004).

<sup>13</sup> See AT&T June 10 Letter; Comments of AT&T Corp. and the CompTel/ASCENT Alliance, at 14-16.

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See BellSouth June 24 Letter, at 3-4. BellSouth suggests that Section 251(d)(3) itself operates as an “express” pre-emption provision, but that plainly is not so. Whatever latitude the Commission has to interpret Section 251(d)(3), it cannot be that a statutory *limitation* on the Commission’s power, such as that contained in Section 251(d)(3), operates as an express pre-emption of the state commission orders at issue here.<sup>14</sup> And this is especially so where BellSouth claims that pre-emption arises not from the state commission orders’ inconsistency with Section 251(d)(3), but from their “inconsistency” with the policies underlying *TRO* ¶ 270.

In sum, BellSouth fails to identify any inconsistency between the Commission’s policies and the state commission orders at issue, much less one so clear and severe that pre-emption would be justified under the established test of *NARUC v. FCC* and related cases. BellSouth’s essential claim is that the Commission’s low frequency unbundling determination established a “balance” based on the need to provide an incentive for broadband service development. But as shown above, that determination (set forth in *TRO* ¶ 270) did not rest on an incentive rationale. And where the Commission did separately discuss incentives, it did so by focusing on having CLECs pay for the entire loop cost, which is exactly what the state commissions in the BellSouth region require; thus the state commission orders do not disturb any Commission “balance.” Instead, the only Commission policy implicated by the state commission orders relates to the development of local telephone service competition based on distinct local conditions, and the record in those proceedings and here sets forth the very real risks to competition posed by BellSouth’s DSL disconnection policy. BellSouth has provided no basis to question those state commission determinations. Because the state commission orders are entirely consistent with existing Commission policy, and the record support for that conclusion is overwhelming, no ground exists to grant the relief BellSouth seeks.

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<sup>14</sup> BellSouth also gratuitously repeats its claim that the state commission orders are pre-empted because they address “what this Commission has already determined to be jurisdictionally interstate services.” BellSouth June 24 Letter, at 5. Even on this point, BellSouth still fails to explain how the Commission’s determinations regarding federally tariffed wholesale broadband services could limit the state commission orders directed to BellSouth’s untariffed retail practices, and AT&T has already addressed other flaws in BellSouth’s argument in this respect. See, e.g., Comments of AT&T Corp. and the CompTel/ASCENT Alliance, at 28-38.

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Respectfully submitted,

David L. Lawson

*Counsel for AT&T Corp.*

cc: Chris Libertelli  
Matthew Brill  
Daniel Gonzalez  
Scott Bergmann  
Jessica Rosenworcel  
Jeffrey Carlisle  
Robert Tanner  
Michelle Carey  
Ian Dillner  
John Stanley



BellSouth Telecommunications, Inc.  
601 W. Chestnut Street  
Room 407  
Louisville, KY 40203

Dorothy.Chambers@BellSouth.com

Dorothy J. Chambers  
General Counsel/Kentucky

502 582 8219  
Fax 502 582 1573

October 15, 2004

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OCT 18 2004

PUBLIC SERVICE  
COMMISSION

James Vanover, Esq.  
Gregory L. Hall, Esq.  
Vanover, Hall & Bartley, P.S.C.  
152 Third Street  
Pikeville, KY 41501

Re: Vanover, Hall & Bartley, P.S.C., Complainant, v. BellSouth  
Telecommunications, Inc., Defendant  
KPSC 2004-00410

Dear Messrs. Vanover and Hall:

This relates to the Complaint you filed with the PSC on October 8, 2004, which BellSouth received on October 14, 2004.

BellSouth is and always has been willing to provide its unregulated retail high-speed Internet access service, known as BellSouth FastAccess® DSL, to a customer, such as your firm, that is obtaining voice telephone service from a competitive local exchange company over a resale line. Our investigation has revealed that your firm's local voice service is being provided via a resale line, so your firm is eligible to continue to receive FastAccess. The issue is that you must make an alternate billing arrangement. Your firm was initially billed for FastAccess via your BellSouth phone bill. Once your firm changed voice providers, BellSouth should have offered your firm the opportunity to continue your FastAccess service by making arrangements to bill via credit card. The alternative billing arrangement, of course, is necessary because your voice telephone service no longer is billed to your firm by BellSouth. If BellSouth did not contact your firm to make alternate billing arrangements, we apologize for any inconvenience that was caused.

If you would like to continue with FastAccess service, please let me know and I will be happy to put you in touch with a BellSouth representative so you can make billing arrangements.

FastAccess service is unregulated and the Kentucky Public Service Commission has recognized in previous cases that it does not have jurisdiction regarding that unregulated service. BellSouth reserves its right to assert this and all other defenses it

James Vanover, Esq.  
Gregory L. Hall, Esq.  
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has to the complaint you have filed with the Public Service Commission in the event that you pursue the Complaint.

I apologize for what appears to have been a misunderstanding, and the inconvenience to you and the members of your firm. If you should wish to discuss this letter or your complaint, please do not hesitate to contact me.

Very truly yours,

A handwritten signature in cursive script, appearing to read "Dorothy J. Chambers". The signature is written in black ink and is positioned above the printed name.

Dorothy J. Chambers

cc: Ms. Beth O'Donnell, Executive Director  
Kentucky Public Service Commission

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