

**Before the
Federal Communications Commission
Washington, D.C.**

In the Matter of)
)
Petition of BellSouth Telecommunications,)
Inc. for Forbearance Under 47 U.S.C.)
§ 160(c) from Application of *Computer*) WC Docket No. 04-405
Inquiry and Title II Common-Carriage)
Requirements)

**Comments
Of
The Nebraska Rural Independent Companies**

I. Introduction

The Nebraska Rural Independent Companies (the “Nebraska Companies”)¹ hereby submit comments in the above captioned proceeding. With this Public Notice² the Federal Communications Commission (the “Commission”) seeks comment on a petition (the “Petition”)³ filed by BellSouth Telecommunications, Inc. (“BellSouth”) for forbearance from Title II common carriage requirements that apply to incumbent local exchange carrier (“ILEC”) broadband transmission. BellSouth also seeks forbearance from the *Computer Inquiry* rules to the extent that they require ILECs to tariff and offer

¹ Companies submitting these collective comments include: Arlington Telephone Company, The Blair Telephone Company, Cambridge Telephone Company, Clarks Telecommunications Co., Consolidated Telco, Inc., Consolidated Telecom, Inc., Consolidated Telephone Company, Eastern Nebraska Telephone Company, Great Plains Communications, Inc., Hartington Telecommunications Co., Inc., Hershey Cooperative Telephone Company, Inc., K&M Telephone Company, Inc., Nebraska Central Telephone Company, Northeast Nebraska Telephone Co., Rock County Telephone Company, Stanton Telephone Co., Inc. and Three River Telco.

² See Public Notice, Comments Invited on Petition for Forbearance Filed by BellSouth Telecommunications, Inc. Regarding Incumbent LEC Provision of Broadband, WC Docket No. 04-405, DA 04-3507 (rel. Nov. 3, 2004).

³ See *Petition of BellSouth Telecommunications, Inc. for Forbearance Under 47 U.S.C. § 160(c) from Application of Computer Inquiry and Title II Common-Carriage Requirements*, WC Docket No. 04-405, Petition for Forbearance (filed Oct. 27, 2004).

the transport component of their broadband services on a stand-alone basis and to take service under those same terms and conditions.

The Nebraska Companies believe that issues such as those raised in the Petition should be addressed in a comprehensive rulemaking proceeding, as a ruling on this Petition would affect not only BellSouth but all carriers offering broadband transmission services. The Commission currently has an open rulemaking proceeding addressing this issue⁴ and this proceeding is the appropriate mechanism in which to examine the issues raised in the Petition, as the issues can be considered in a comprehensive, instead of piecemeal, fashion.

The Nebraska Companies also believe that the Petition does not meet the statutory requirements to grant forbearance, as explained in greater detail below. Therefore, the Nebraska Companies believe that the Commission must deny the BellSouth Petition.

II. The Arguments Provided By Bellsouth In Support Of Its Forbearance Petition Do Not Meet The Statutory Requirements To Grant Forbearance.

A. Enforcement Of The Title II Common Carriage And *Computer Inquiry* Requirements Is Necessary To Ensure That The Charges And Practices Are Just And Reasonable And Not Unjustly And Unreasonably Discriminatory.

There Is Not Sufficient Competition In The High-Speed Broadband Access Market To Ensure Just And Reasonable Charges.

BellSouth asserts that the enforcement of Title II common carriage and *Computer Inquiry* requirements is not necessary to ensure that rates are just and reasonable or that

⁴ See *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, CC Docket No. 02-33, *Universal Service Obligations of Broadband Providers*, and *Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services; 1998 Biennial Regulatory Review – Review of Computer III and ONA Safeguards and Requirements*, CC Docket Nos. 95-20, 98-10, Notice of Proposed Rulemaking, FCC 02-42 (“*Wireline Broadband NPRM*”) (rel. Feb. 15, 2002).

carriers do not engage in unjust or unreasonable discrimination.⁵ In support of this assertion, BellSouth offers statistics indicating that cable modem service is the primary provider of broadband connections to the Internet.⁶ BellSouth also notes that services providing high-speed access to the Internet are provided by wireless and satellite carriers, and by electric companies through the use of power lines.⁷

However, the Nebraska Companies do not believe that the data presented by BellSouth indicates that a competitive market exists for the provision of high-speed Internet access that would ensure just and reasonable charges. BellSouth has not demonstrated that wireless, satellite, and power-line platforms for broadband service provide substantial competition in terms of market share at this time. In fact, the data cited by BellSouth concerning market shares of broadband Internet access by type of technology indicates that only 2.5 percent of broadband connections to the Internet are provided by a technology other than cable modem or asynchronous digital subscriber line (“ADSL”).⁸ Furthermore, examination of the Commission’s own data indicates that there are not a large number of competitors providing high-speed access to the Internet in many areas of the country. For example, in 54 percent of the zip codes in the United States, high speed Internet access is available from three or fewer providers.⁹

⁵ See *Petition* at pp. 17-19, 29-31.

⁶ *Id.* at p. 8.

⁷ *Id.* at pp. 10-13.

⁸ *Id.* at p. 8.

⁹ See High-Speed Services for Internet Access: Status as of December 31, 2003, Industry Analysis and Technology Division, Wireline Competition Bureau, June 2004 at Table 13. The 54 percent includes 7 percent of the zip codes that do not have high-speed Internet access available.

The factors that determine whether or not a market is competitive and will deliver the benefits ascribed to a competitive market are the number of providers of a service and the market share of each of the providers. The mere presence of a few alternative providers for a service does not constitute competition. A market in which there are a few major competitors is referred to by economists as an oligopoly.¹⁰ In such a market, the providers find that over the long-run they will maximize their profits through collusion in the form of price leadership.¹¹ Such collusion will result in prices that are higher than those of a regulated monopoly or a truly competitive market.¹² Therefore, without the protection of the Title II common carriage and *Computer Inquiry* requirements, prices for broadband service to access the Internet provided by ILECs may not be just and reasonable.

The Nebraska Companies also wish to emphasize that even if a large number of competitors exist in a market, there may still be market concentration and market power that will not result in the benefits of competition. For example, some carriers in the long-distance industry have argued that the industry is competitive because there are a large number of providers within the nation. However, a Commission report indicates that when viewed from the standpoint of market power, the long-distance industry is far from competitive, and is instead highly concentrated in terms of market power.

Information on market concentration is developed by the Department of Justice (“DOJ”), which uses such information in reviewing mergers. The DOJ often uses a

¹⁰ See Campbell R. McConnell, *Economics*, (New York: McGraw-Hill, Inc. 1978) at pp. 591-592.

¹¹ *Id.* at pp. 598-599.

¹² *Id.* at p. 605.

measure of market concentration known as the Herfindahl-Herschman Index (“HHI”). This index ranges from zero in a perfectly competitive industry to 10,000 in an industry completely monopolized by a single firm. The most recently available HHI for ordinary long-distance service provided by long distance carriers is 2,832.¹³ The DOJ divides the spectrum of market concentration measured by the HHI into three regions that can be characterized as unconcentrated, moderately concentrated, and highly concentrated.¹⁴ The HHI for long distance service falls into the highly concentrated category, which is an HHI above 1,800. Therefore, while some might argue that the long-distance industry is competitive because it consisted of 940 firms at the time HHI cited here was calculated, there was still significant concentration of market power that cannot be characterized as a competitive market. Market concentration data for providers of high-speed broadband access to the Internet in markets served by BellSouth is not available, however, the Nebraska Companies believe that the concentration of market power in these markets is similar, if not greater, than that in the long-distance market.

Bellsouth Has Mischaracterized The Commission’s Findings With Regard To The Need For The Application Of The *Computer Inquiry* Rules And Common Carriage Obligations To Cable Companies Providing Cable Modem Service.

BellSouth reviews the Commission’s findings with regard to the need for application of the *Computer Inquiry* rules and common carriage obligations to cable companies providing cable modem service. BellSouth then makes the argument that because such requirements were not applied to cable companies, the leading providers of

¹³ See Statistics of the Long Distance Telecommunications Industry, Industry Analysis & Technology Division, Wireline Competition Bureau, May 2003 at Table 9.

¹⁴ See U.S. Department of Justice and the Federal Trade Commission, Horizontal Merger Guidelines, issued April 2, 1992, revised April 8, 1997 at p. 15.

high-speed access to the Internet, such requirements should not applied to ILEC broadband transmission as well.¹⁵ However, BellSouth mischaracterizes the reasons that the Commission did not apply the *Computer Inquiry* and common carriage requirements to cable modem service. The reasons for which the Commission did not seek to apply the *Computer Inquiry* rules and common carriage obligations to cable modem service are not applicable to wireline broadband access services. Therefore, the fact that such rules were not applied to cable modem service is irrelevant to the question of whether such rules should be applied to wireline broadband access service.

BellSouth claims that the *Computer Inquiry* and common carriage rules were not applied to cable modem service “because the market for broadband transmission is so competitive.”¹⁶ However, the Commission did not take the presence of competition into account in declining to apply such rules to cable modem service providers. The Commission declined to apply the *Computer Inquiry* rules to cable companies because it found that cable companies were not offering telecommunications services separate from their provision of information services, as traditional wireline common carriers were at the time the *Computer Inquiry* rules were adopted.¹⁷ The Commission also declined to apply common carriage obligations to cable modem service because it found cable modem service to be an information service.¹⁸ The Commission did not waive either of

¹⁵ See *Petition* at pp. 3-5.

¹⁶ *Id.* at p. 3.

¹⁷ See *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, GN Docket No. 00-185, *Internet Over Cable Declaratory Ruling*, and *Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, CS Docket No. 02-52, Declaratory Ruling and Notice of Proposed Rulemaking, FCC 02-77 (“*Cable Modem Declaratory Ruling*”) (rel. Mar. 15, 2002) at para. 43.

¹⁸ *Id.* at para. 38.

these requirements for cable modem service on the basis that the market for broadband transmission is competitive. Therefore, it is not appropriate to waive such requirements for wireline broadband service, even if the market were found to be competitive. As discussed above, the presence of few providers in a market will not lead to the desirable economic effects of pure competition.

The Impending Supreme Court Ruling In The *Brand X Internet Services v. FCC* Case Is Relevant To BellSouth's Petition.

BellSouth posits that the Commission may not have lifted *Computer Inquiry* rules and common carriage obligations for ILEC broadband transmission, after proposing such changes in the *Wireline Broadband NPRM*, due to the United States Court of Appeals for the Ninth Circuit decision in the *Brand X Internet Services v. FCC* case.¹⁹ At the time BellSouth filed its Petition, the Commission had appealed the decision to the United States Supreme Court but the court had not yet granted the Commission's petition for certiorari. The Supreme Court has now granted certiorari.²⁰ BellSouth asserts that even if the Supreme Court were to affirm the Ninth Circuit decision in that case, that still would not preclude the Commission from forbearing from imposing Title II obligations on ILEC broadband transmission.²¹

The Nebraska Companies believe that the Petition does not meet the statutory requirements for forbearance as explained throughout these comments. However, the Nebraska Companies also believe that the appeal of the Brand X case is relevant to the

¹⁹ See *Brand X. Internet Services v. FCC*, 345 F.3d 1120 (9th Cir. 2003).

²⁰ See *National Cable & Telecom Association v. Brand X*, 2004 WL 2070879 (2004) and *FCC v. Brand X*, 2004 WL 2153536 (2004).

²¹ See *Petition* at pp. 5-6.

request for forbearance in the Petition. If the Ninth Circuit decision is upheld by the Supreme Court, it would provide yet another reason why the Petition should be denied. The Ninth Circuit found that cable modem service contains a telecommunication service component. If the Ninth Circuit decision is upheld, it would be appropriate for the Commission to reverse its previous decisions regarding cable modem service, and apply Title II obligations to the telecommunications service component of cable modem service. Without Title II regulation, carriers may restrict access or charge discriminatory rates to certain information service providers (“ISPs”). As discussed below, comparable access to broadband transmission services is necessary to ensure that a variety of ISPs remain in the market to spur innovation, and to ensure that bundled ISP and broadband transmission offerings remain just and reasonably priced.

Retention Of The Title II Common Carrier Obligations Is Critical To Maintaining Just And Reasonable Rates For Basic Local Exchange Service For Many Rural, High-Cost Carriers.

Section 254(k) of the Telecommunications Act of 1996 (the “Act”) states that “[t]he Commission, with respect to interstate services, . . . shall establish any necessary cost allocation rules, accounting safeguards, and guidelines to ensure that services included in the definition of universal service bear no more than a reasonable share of the joint and common costs of facilities used to provide those services.” The Nebraska Companies believe that in order to comply with this provision of the Act, the elimination of Title II regulation from wireline broadband service would require all carriers offering such service to move a portion of the investment and expenses to provide broadband service to a deregulated category. This would certainly include a portion of the local loop and loop-related expenses, as wireline broadband service is provided over the local loop.

Allocating loop investment and expenses to a deregulated category would make it difficult, if not impossible for rural, high-cost companies to recover their network costs. The allocation of loop costs to a deregulated category would reduce any high-cost universal service support a company would receive, as the allocated cost would decrease. While the universal service support received by rural, high-cost carriers would decrease due to this allocation, it is unlikely that such carriers would receive an amount equal to the decrease in support through wireline broadband service revenues. In fact, an allocation of loop costs to wireline broadband service would necessitate an increase in the rate for this service. A rate increase would in turn decrease demand for the service, lowering overall revenues received to maintain loop plant and pay loop-related expenses. Therefore, the only alternative many rural, high-cost companies would have to recover their loop investment and expenses would be to raise basic local exchange rates. This would not result in just and reasonable rates for customers in rural, high-cost areas. It would also violate Section 254(b)(3) of the Act, which requires that rates in rural areas be reasonably comparable to rates for similar services offered in urban areas.

B. Forbearance Is Not Consistent With The Public Interest, As It Would Limit Innovation.

In its Petition, BellSouth claims that "no regulatory rule is necessary to ensure independent ISPs access to BellSouth's network," asserting that it "has every incentive to *negotiate* mutually beneficial network-access arrangements with these companies."²² (emphasis added) These statements are remarkable for two reasons. First, BellSouth appears to acknowledge the important role played by independent ISPs in the growth and development of the Internet, and seems to recognize that if the forbearance it seeks would

²² Id. at p. 28.

limit access of independent ISPs to its network, such forbearance would not be in the public interest. Second, through its use of the word "negotiate," BellSouth has given a clear indication of the means by which it would pursue its own business objectives.

Similar claims were made by AOL and Time Warner at the time of their merger, and have proven to be far from reliable.²³ The Commission must not permit itself to be misled by mere promises of open access, especially when the behavior of major players in the broadband market has demonstrated their propensity to abandon such promises in favor of discriminatory actions.

The principle of open, *nondiscriminatory* access to essential facilities is an important part of the foundation of our legal system that permits innovators to confidently develop new products and services in the knowledge that they can freely deliver them to consumers. Without open access to transportation networks, manufacturers would be unable to freely ship goods to their markets. They would instead be forced to *negotiate*, perhaps with owners of roads and bridges, the terms under which shipment of goods could occur.

In the information services market, independent ISPs have played a crucial entrepreneurial role²⁴ in producing the "vibrant and competitive free market that presently exists for the Internet"²⁵ the Commission correctly seeks to preserve.²⁶ If the

²³ See An Open Access Business Model for Cable Systems: Promoting Competition and Preserving Internet Innovation on a Shared, Broadband Communications Network, NorthNet, Inc. available at <http://northnet.net/OpenAccessModel.pdf>

²⁴ See CFA: Administration's Broadband Policy Would Strangle ISPs, Destroy Competitive Internet Marketplace; available at http://www.consumerfed.org/070102_broadband_release.html

²⁵ 47 U.S.C. § 230 (b)(2).

²⁶ See *Cable Modem Declaratory Ruling* at para. 4.

Commission were to stifle the ability of innovative entrepreneurs to gain nondiscriminatory access to broadband transmission facilities, thereby curtailing their ability to freely deliver information services to consumers, not only would it run counter to Congressional intent and the legal principle of open access to essential facilities, but it would violate one of its own goals.

C. Forbearance Is Not In The Interest Of Consumers.

Consumers May Be Harmed By Lifting The *Computer Inquiry* Rules And Common Carriage Requirements.

BellSouth argues that the *Computer Inquiry* rules harm consumers by raising costs and impeding competition.²⁷ BellSouth claims that complying with *Computer Inquiry* requirements cost it about \$45.28 annually per customer utilizing its broadband network. It asserts that these increased costs diminish competitive pressure on cable modem rates.

Yet elsewhere within its Petition, BellSouth claims that there is currently vigorous price competition. For example, Bell South states that “. . . cable has continued to maintain its lead over DSL through the second quarter of 2004, *despite significant price decreases by DSL providers.*”²⁸ (emphasis added) BellSouth further states “. . . intermodal competition has led to a ‘price war’ in which wireline competitors have reduced rates and cable companies have responded. . . .”²⁹

In addition to the statements within the Petition regarding price competition, recent reports have identified price decreases for broadband transmission on the part of

²⁷ See *Petition* at p. 21.

²⁸ *Id.* at p. 9.

²⁹ *Id.* at p. 19.

BellSouth. The Wall Street Journal reported that BellSouth is expected to announce that it has exceeded the target that it provided to investors one year ago for total DSL subscribers.³⁰ The report claims that “[t]he growth in subscribers was fueled in part by the telecom company’s decision to significantly lower its subscription rates for high-speed Internet connections.”³¹

Given the statements BellSouth makes regarding price competition, the Nebraska Companies believe that BellSouth does not provide sufficient evidence that the costs it claims are associated with complying with *Computer Inquiry* requirements diminish competitive pressure on prices for broadband transmission service. In fact, the Nebraska Companies believe that competitive pressure to lower prices for broadband transmission service will be reduced if *Computer Inquiry* and Title II requirements for wireline broadband transmission are eliminated. This is due to the fact that wireline broadband access and cable modem providers will likely seek exclusive arrangements with select ISPs, greatly reducing the number of ISPs that offer such service bundled with broadband access. The reduction in the number of competitors offering bundled ISP and broadband transmission will allow the providers of such bundles to gain market power and thus raise the price for such bundles relative to a market in which there are a greater number of providers.

III. Conclusion

The Nebraska Companies recommend that the Commission should dismiss the BellSouth Petition, and continue to apply the *Computer Inquiry* rules and Title II

³⁰ See Bell South Targets Web Market As Battle With Cable Intensifies, Wall Street Journal, December 6, 2004 at p. A3.

³¹ Ibid.

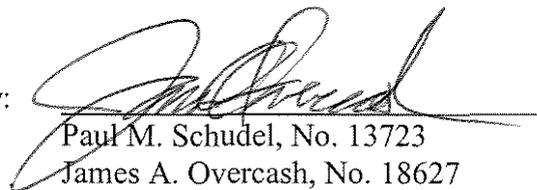
common carriage requirements to ILEC broadband transmission service. As indicated in the introduction, the Nebraska Companies believe that the issues raised by the BellSouth Petition should be addressed through the *Wireline Broadband NPRM*, which provides a comprehensive framework for examining changes in regulation of ILEC broadband transmission services.

Dated: December 20, 2004.

Respectfully submitted,

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The Blair Telephone Company,
Cambridge Telephone Company,
Clarks Telecommunications Co.,
Consolidated Telco, Inc.,
Consolidated Telecom, Inc.,
Consolidated Telephone Company,
Eastern Nebraska Telephone Company,
Great Plains Communications, Inc.,
Hartington Telecommunications Co., Inc.,
Hershey Cooperative Telephone Company, Inc.,
K&M Telephone Company, Inc.,
Nebraska Central Telephone Company,
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Rock County Telephone Company,
Stanton Telephone Co., Inc. and
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