

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554**

In the Matter of	)	
	)	
Petition of BellSouth Telecommunications, Inc.	)	
For Forbearance Under 47 U.S.C. §160(c) From	)	WC Docket 04-405
Application of <i>Computer Inquiry</i> and Title II	)	
Common Carrier Requirements	)	

**COMMENTS OF EARTHLINK, INC.  
IN OPPOSITION TO THE PETITION**

John W. Butler  
Earl W. Comstock  
Robert K. Magovern  
SHER & BLACKWELL LLP  
1850 M Street, N.W.  
Suite 900  
Washington, DC 20036  
(202) 463-2500

David N. Baker  
Vice President for Law  
and Public Policy  
EarthLink, Inc.  
1375 Peachtree Street  
Atlanta, GA 30309

December 20, 2004

**TABLE OF CONTENTS**

INTRODUCTION..... 1

DISCUSSION ..... 3

I. HISTORY AND PURPOSE OF COMMON CARRIER REGULATION ..... 3

    a. Common Carrier Regulation Before 1934..... 4

    b. Sections 201 and 202 of the Communications Act..... 7

II. SECTION 10 OF THE COMMUNICATIONS ACT ..... 10

III. THE PETITION IS TOO VAGUE TO EVALUATE ADEQUATELY ON  
THE MERITS..... 12

    a. The Petition Fails to Identify the Provisions in the Act From Which it .....  
    Requests Forbearance. .... 12

    b. The Evidence Relied on by the Petition is Not Sufficient to Support  
    the Requirements Under Section 10. .... 14

    c. The Analysis is the Same With Respect to BellSouth’s Title II and .....  
    *Computer Inquiry* Forbearance Requests. .... 16

IV. THE PETITION FAILS TO SHOW THAT, ABSENT TITLE II  
REGULATION, CHARGES WILL BE JUST AND REASONABLE AND  
BELLSOUTH WILL NOT ENGAGE IN UNREASONABLE AND UNJUST  
DISCRIMINATION..... 18

V. REGULATION IS NECESSARY FOR THE PROTECTION OF  
CONSUMERS..... 22

VI. THE PROPOSED FORBEARANCE IS NOT IN THE PUBLIC INTEREST..... 26

CONCLUSION ..... 31

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554**

In the Matter of	)	
	)	
Petition of BellSouth Telecommunications, Inc.	)	
For Forbearance Under 47 U.S.C. §160(c) From	)	WC Docket 04-405
Application of <i>Computer Inquiry</i> and Title II	)	
Common Carrier Requirements	)	

**OPPOSITION OF EARTHLINK, INC.**

**INTRODUCTION**

EarthLink, Inc. opposes the “Petition of BellSouth Telecommunications, Inc. for Forbearance” filed with the Commission on October 27, 2004 (“Petition”).<sup>1</sup> EarthLink is one of the nation’s leading Internet service providers (“ISPs”), with approximately 5.3 million total customers, of which approximately 1.2 million are broadband customers. In its Petition, BellSouth has requested that the Commission exercise its statutory authority under section 10 of the Communications Act to forbear from applying all Title II common carriage requirements and also to forbear from applying the *Computer Inquiry* requirements that presently require ILECs to make available on reasonable and non-discriminatory terms the transmission component of its wireline broadband Internet

---

<sup>1</sup> Petition of BellSouth Telecommunications, Inc. For Forbearance Under 47 U.S.C. §160(c) From Application of *Computer Inquiry* and Title II Common Carrier Requirements, WC Docket No. 04-405 (filed Oct. 27, 2004) (hereinafter “BellSouth Petition”).

access service.<sup>2</sup> As a competitor in the information services marketplace, EarthLink has a fundamental interest in this proceeding. This proceeding, among others currently before the Commission,<sup>3</sup> will ultimately determine whether competitive ISPs can continue to obtain the transmission services necessary to offer innovative and diverse information services to consumers. For competitors like EarthLink that do not own one of the very limited number of transmission networks that make delivery of information services to its customers possible, the right to obtain this transmission service from facilities-based providers is essential.

Despite the fact that the Commission has explicitly declined to do so several times in the past, and has in fact *never* done so before, BellSouth here asks the Commission to forbear from applying sections 201 and 202 of the Communications Act—the fundamental common carrier provisions that require carriers like BellSouth to make available their transmission facilities on reasonable and non-discriminatory terms. If the FCC were to grant the forbearance as requested, the Commission would allow BellSouth, and all incumbent local exchange carriers (“ILECs”) for that matter, to curtail or eliminate competition from ISPs and competitive local exchange carriers (“CLECs”) by giving ILECs the right to demand discriminatory rates and terms for transmission service, and even, as has been the case with cable facility owners, to refuse to provide any transmission service at all.

---

<sup>2</sup> *Id.* at 1.

<sup>3</sup> See e.g., *In re IP-Enabled Services*, WC Docket No. 04-36 (rel. Mar. 10, 2004); Petition of SBC Communications Inc. for Forbearance, WC Docket No. 04-29 (filed Feb. 5, 2004); Petition of Qwest Corporation for Forbearance, WC Docket No. 04-416 (filed Nov. 10, 2004).

As discussed in more detail below, BellSouth is not asking the Commission to forbear from applying specific burdensome and unnecessary regulations. Courts and the Commission alike have held that sections 201 and 202 represent the core concepts of federal common carrier regulation and indeed are the “centerpiece of the Act’s regulatory regime.”<sup>4</sup> Indeed, forbearance from these provisions would ultimately leave the rest of the Act without any meaning at all with respect to common carriers, and thus the Commission should approach such a request with extreme caution. In any event, forbearance is only permitted upon a proper section 10 analysis, and the instant Petition fails on all counts to meet the specific three-prong test for forbearance established by Congress. As EarthLink demonstrates below, the prevention of unreasonably discriminatory practices, consumers’ interests, and the protection of the public interest all demand that the transmission component of wireline broadband services remain subject to Title II of the Act and to the FCC’s *Computer Inquiry* precedent. Accordingly, BellSouth’s petition should be denied.

## DISCUSSION

### **I. HISTORY AND PURPOSE OF COMMON CARRIER REGULATION**

Before addressing the merits of BellSouth’s Petition under the section 10 three-prong analysis, EarthLink notes that it is vital for both the Commission and the industry to be able to identify the statutory requirements from which BellSouth seeks relief.

Although BellSouth never says which specific provisions in Title II it seeks relief from—

---

<sup>4</sup> See *MCI v. AT&T*, 512 U.S. 218, 220 (1994); see also *In the Matter of PCIA Petition for Forbearance for Broadband Personal Communications Services*, 13 FCC Rcd. 16,857 at ¶15 (1998) (hereinafter “*PCIA Forbearance Order*”).

an issue EarthLink addresses in greater detail below—it is clear from the Petition that BellSouth, at a minimum, seeks forbearance from sections 201 and 202 of the Act. Sections 201 and 202 implement the core principles underlying over a hundred years of common carrier regulation. In order to evaluate the Petition, it is necessary to understand the purpose and function of the statutory provisions from which relief is sought. To assist the Commission in that analysis, EarthLink begins with an overview of the history and purpose of common carrier regulation, and identifies how Congress drafted sections 201 and 202 to reflect this history and purpose.

**a. Common Carrier Regulation Before 1934**

Common carriage principles, first developed in the English common law, imposed special duties on certain professions referred to as “common callings” to serve all who sought service, on just and reasonable terms, and without discrimination.<sup>5</sup> It was thought that these duties should be placed on some professions—such as carriers, innkeepers, and smiths—because they obtained certain benefits from serving the public, including the use of public rights-of-way. It was further thought that these professionals held themselves out to serve the public, and the user was often at the mercy of their services.<sup>6</sup> Under these premises, the rules of common carriage intended to guarantee that no customer seeking service upon reasonable demand, who was willing and able to pay the established price for such services, could be refused lawful use of the service or otherwise discriminated against.

---

<sup>5</sup> See *In the Matter of Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities*, 84 F.C.C.2d 445 at Appendix B, ¶4 (1980).

<sup>6</sup> See Wyman, *The Law of Public Callings as a Solution of the Trust Problem*, 17 Harv. L. Rev. 156, 159 (1904).

In 1876, the U.S. Supreme Court in *Munn v. Illinois* issued its first decision regarding common carrier duties and the public interest.<sup>7</sup> In 1870, the Illinois state legislature imposed rate caps and required grain elevator operators to serve all customers indiscriminately.<sup>8</sup> Despite several challenges under the U.S. Constitution, the Court held that the legislation was consistent with the common law of “public callings.”<sup>9</sup> The Court emphasized that “common carriers” exercise a sort of public office, and that the law had rightfully imposed a duty on transportation operators and related services to serve the public on reasonable and non-discriminatory terms because these carriers stand “in the very ‘gateway of commerce,’ and take a toll from all who pass.”<sup>10</sup> The Court in *Munn* found that the grain elevators in question, while privately owned and run, had become common carriers under the law by the fact of how they chose to conduct their operations.<sup>11</sup> This holding, therefore, is consistent with the common law in that, while monopoly power was one basis to impose common carrier duties, the concept of common carriage is more inclusive, extending to many enterprises that hold themselves out to the public and that derive certain benefits as a result of this status.

The first federal legislation to impose common carrier duties was the Interstate Commerce Act of 1887 (“ICA”). Motivated primarily by concerns over railroad trusts,

---

<sup>7</sup> *Munn v. Illinois*, 94 U.S. 113 (1876).

<sup>8</sup> *Id.* at 123.

<sup>9</sup> *Id.* at 129.

<sup>10</sup> *Id.* at 132.

<sup>11</sup> *See id.*; *see also Brass v. North Dakota*, 153 U.S. 391 (1894) (relied on *Munn* to hold that if the legislature saw fit to regulate a commercial endeavor, the Court would not review that judgment so long as the enterprise was of a type that was customarily regulated as a common carrier).

the ICA imposed requirements on certain carriers to serve at just, reasonable, and nondiscriminatory rates and conditions, and to file tariffs establishing these rates.<sup>12</sup> Similar to the common law and the Supreme Court's holding in *Munn*, the ICA was based on the notion that the public had supported the development of the railroads and as a result all were entitled to their fair and reasonable operation. While the ICA did not initially include telephone carriers within its jurisdiction, most courts nonetheless subjected them to the same duties as other established common carriers because telephone carriers were also engaged in a public occupation whereby the public conferred considerable benefits to these companies in exchange for their services.<sup>13</sup> The Mann-Elkins Act of 1910 expanded the ICA to include jurisdiction over the rates and practices of telephone and telegraph companies,<sup>14</sup> and the Transportation Act of 1920 further expanded the Interstate Commerce Commission's ("ICC") jurisdiction to include "the transmission of intelligence by wire and wireless."<sup>15</sup> Interestingly, while the Mann-Elkins Act subjected telephone companies to the ICA's reasonable rates and non-discrimination requirements, it did not require these companies to interconnect with each other. Seen as a barrier to the ICC's authority over communication common carriers, the

---

<sup>12</sup> See James B. Speta, *A Common Carrier Approach to Internet Interconnection*, 54 Fed. Comm. L.J. 225, 259 (2002).

<sup>13</sup> *Id.* at 261 (citing *Western Union Tel. Co. v. Priester*, 276 U.S. 252 (1928)).

<sup>14</sup> Mann-Elkins Act, 36 Stat. 539 (1910) ; see also Peter K. Pitsch, *Common Carrier Regulation of Telecommunications Contracts and the Private Carrier Alternative*, 48 Fed. Comm. L.J. 447 (1996).

<sup>15</sup> Transportation Act, 41 Stat. 456, 474 (1920).

lack of an interconnection duty resulted in little action being taken by the ICC in regulating these carriers before 1934.<sup>16</sup>

**b. Sections 201 and 202 of the Communications Act**

The Communications Act of 1934 removed telephone and telegraph companies from the jurisdiction of the ICC and established the FCC.<sup>17</sup> As several courts have held, the legislative history and the plain language of the statute indicate that the common carrier provisions in the Communications Act are largely copied from the ICA.<sup>18</sup> Title II of the Act applies the basic common carrier requirements of service on just and reasonable terms without discrimination to communications carriers that are engaged in interstate communication by wire and radio. Addressing the fact that neither the ICA nor the Mann-Elkins Act required communications common carriers to interconnect their lines with each other, section 201 of the Act now requires common carriers to furnish their transmission service upon reasonable request.<sup>19</sup> Section 202 of the Act makes it unlawful for any common carrier to unjustly or unreasonably discriminate with regard to

---

<sup>16</sup> Pitsch, *supra* note 14, at 452.

<sup>17</sup> 47 U.S.C. § 151.

<sup>18</sup> *See American Broadcasting Co. v. FCC*, 643 F.2d 818,821(D.C. Cir. 1980) (“As both the House and Senate Committees responsible for the Communications Act wrote: In this bill many provisions are copied verbatim from the Interstate Commerce Act because they apply directly to communication companies doing a common carrier business....”); *Ad Hoc Telecom. Users Comm. v. FCC*, 680 F.2d 790, 805-806 (D.C. Cir. 1982) (The legislative history of the Communications Act of 1934 supports [the interpretation] that the language of section 202(a) was drawn from provisions of the Interstate Commerce Act which prohibited discrimination by common carriers against any customers who were purchasing the same service under substantially similar circumstances and conditions.”); *MCI Telecom. Corp. v. FCC*, 917 F.2d 30, 38 (D.C. Cir. 1990) (“The Communications Act, or course, was based upon the ICA and must be read in conjunction with it.”).

<sup>19</sup> 47 U.S.C. § 201.

its charges or practices.<sup>20</sup> Section 203 required that common carriers file the rates charged for their communications services with the Commission.<sup>21</sup> In 1994, two years before the enactment of the Telecommunications Act of 1996, the Supreme Court reaffirmed in *MCI Telecom. Corp. v. AT&T* that these three provisions—the ones that authorize the Commission to ensure that the rates and practices by communications common carriers are reasonable and nondiscriminatory—are “the centerpiece of the Act’s regulatory regime.”<sup>22</sup> These three provisions were not modified in the 1996 Act.

Under the Telecommunications Act of 1996, Congress created a regulatory framework premised on the concept of including telecommunications services within the scope of common carrier regulation. This is evident in Congress’s express declaration that a telecommunications carrier “shall be treated as a common carrier...only to the extent that it is engaged in providing telecommunications services....”<sup>23</sup> Furthermore, in 2001 the Supreme Court in *Verizon Communications, Inc. v. FCC*, reaffirmed that the primary purpose of common carrier regulation, was not—as BellSouth has suggested—to protect against monopolies,<sup>24</sup> but was instead to “protect against potential discrimination...in its various manifestations.”<sup>25</sup> The essential premise of common carriage, therefore, is not whether a monopoly is present, but instead whether the carrier

---

<sup>20</sup> 47 U.S.C. § 202.

<sup>21</sup> 47 U.S.C. § 203.

<sup>22</sup> *MCI v. AT&T*, 512 U.S. 218, 220 (1994).

<sup>23</sup> 47 U.S.C. § 153(44).

<sup>24</sup> BellSouth Petition at 7-8.

<sup>25</sup> *Verizon Communications, Inc. v. FCC*, 535 U.S. 475, 479 (2001).

is “holding oneself out to serve the public indiscriminately.”<sup>26</sup> Further, with nondiscrimination as the hallmark of common carrier regulation, it is “not necessary that a carrier be required [by statute or regulation] to serve all indiscriminately; it is enough that its practice is, in fact, to do so.”<sup>27</sup>

Although the language of section 10 does not specifically restrict the Commission’s ability to forbear from sections 201 and 202, the Commission itself has long recognized that these sections represent the “core concepts of federal common carrier regulation dating back over a hundred years.”<sup>28</sup> Because the Commission views sections 201 and 202 of the Act as so central to the purpose of the Act, it has never before relieved any common carrier from compliance with these provisions.<sup>29</sup> Perhaps the reason for this is that the basic provisions of common carrier regulation are encompassed within the three-part forbearance test, most notably in the first prong, which states that forbearance is not appropriate unless there is a showing that the provisions of the Act are not needed to ensure just, reasonable, and non-discriminatory practices by the telecommunications carrier. Thus, the first prong of the forbearance test is derived from the same standards found in sections 201 and 202, and the Commission may only forbear if it determines that a provision is not needed to ensure such reasonable and non-discriminatory practices. It is therefore hard to imagine a scenario where sections 201 and 202 – the sections that the Commission has said “lie at the heart of consumer

---

<sup>26</sup> *NARUC v. FCC*, 525 F2d 630, 642 (1979).

<sup>27</sup> *Id.* at 643 (brackets added).

<sup>28</sup> *PCIA Forbearance Order* at ¶ 15.

<sup>29</sup> *Id.* at ¶ 17.

protection” – would not be needed.<sup>30</sup> Indeed, by the Commission’s own account, forbearance from these sections would “be a particularly momentous step.”<sup>31</sup> Whatever conditions might allow forbearance from sections 201 and 202, nothing of that sort presents itself here.

## II. SECTION 10 OF THE COMMUNICATIONS ACT

One of the primary purposes of the Telecommunications Act of 1996 was to include telecommunications services within the scope of common carrier regulation.<sup>32</sup> Congress declared in the Act that a telecommunications carrier “*shall* be treated as a common carrier...only to the extent that it is engaged in providing telecommunications services....”<sup>33</sup> The 1996 Act also provided the Commission with regulatory flexibility by giving it the authority under section 10 to forbear from applying, in specific circumstances, any regulation or provision in the Act.<sup>34</sup> In the case of this Petition, BellSouth requests that the Commission use its section 10 authority to forbear from applying one of the primary purposes of the Act—that is, the application of all the core common carrier provisions—to all broadband telecommunications services provided by ILECs. While this is not technically beyond the scope of the Commission’s section 10 authority, before the Commission may exercise such broad authority, section 10 requires

---

<sup>30</sup> *Id.* at ¶ 15.

<sup>31</sup> *Id.*

<sup>32</sup> See Sen. Ted Stevens, *The Internet and the Telecommunications Act of 1996*, 35 Harv. J. on Legis. 5, 10 (“The new definitions are vital to the changes effected by the 1996 Act. All the central provisions of the 1996 Act are applicable to ‘telecommunications carriers’ and the provision of ‘telecommunications services.’”).

<sup>33</sup> 47 U.S.C. § 153(44) (emphasis added).

<sup>34</sup> 47 U.S.C. § 160.

the FCC to affirmatively demonstrate that such forbearance meets the three-part test established by Congress:

(a) Notwithstanding section 332(c)(1)(A) of this Act, the Commission shall forbear from applying any regulation or any provision of this Act to a telecommunications carrier or telecommunications service, or class of telecommunications carriers or telecommunications services, in any or some of its or their geographic markets, if the Commission determines that-

(1) enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory;

(2) enforcement of such regulation or provision is not necessary for the protection of consumers;

(3) forbearance from applying such provision or regulation is consistent with the public interest.<sup>35</sup>

In its Petition, BellSouth suggests that the existence of intermodal competition in a given marketplace satisfies all three prongs of the above test.<sup>36</sup> This suggestion is incorrect. Because the section 10 test is stated in the conjunctive, before the Commission may lawfully forbear from applying any of the Act's provisions, it must satisfy each of the three parts of that test. Although the existence of competition may be relevant to the analysis under each part, competition in and of itself is not sufficient to satisfy the requirements under section 10. The language of section 10(b) provides that the Commission must consider "competitive market conditions" in making a public interest determination under the third prong.<sup>37</sup> Under section 10(b), however, although the

---

<sup>35</sup> 47 U.S.C. § 160.

<sup>36</sup> See BellSouth Petition at 16.

<sup>37</sup> 47 U.S.C. § 160(b).

Commission must consider the effect on competition, a finding that forbearance will enhance competition is not dispositive even under a third prong analysis. Further, the structure of section 10(b) demonstrates that a finding that forbearance would enhance competition—without more—is not adequate to satisfy the requirements under the first two parts of the test.

### **III. The Petition is Too Vague to Evaluate Adequately on the Merits.**

#### **a. The Petition Fails to Identify the Provisions in the Act From Which it Requests Forbearance**

Commission precedent demands that petitions for forbearance provide the specific factual and legal bases for any Commission action. The Petition fails on both points. The Commission held in its *Fixed Wireless Forbearance Order* that “the decision to forbear from enforcing statutes or regulations is not a simple one, and must be based upon a record that contains more than broad, unsupported allegations of why the statutory criteria is met.”<sup>38</sup> It held that it could not forbear “in the absence of a record that would permit [it] to determine that each of the tests set forth in Section 10 is satisfied....”<sup>39</sup> BellSouth’s Petition fails to identify which specific statutory provisions in Title II it is requesting that the FCC forbear from applying. Before any forbearance analysis may even begin, the Commission must determine and analyze the purpose and function of the

---

<sup>38</sup> *In the Matter of Forbearance from Applying Provisions of the Communications Act to Wireless Telecommunications Carriers*, First Report and Order, 15 FCC Rcd. 17,414 at ¶ 13 (2000) (“*Fixed Wireless Forbearance Order*”) (internal citations omitted).

<sup>39</sup> *Id.*

section or sections of the Act at issue.<sup>40</sup> BellSouth has failed to provide this essential information. As a result, it is impossible to perform a meaningful section by section analysis to evaluate the effect that any forbearance might have.

To the extent that BellSouth requests that the Commission forbear from applying *all* Title II provisions, EarthLink notes that Title II of the Communications Act consists of a balancing of both rights and obligations. Thus, along with requesting that the Commission forbear from applying the core common carrier requirements found in sections 201, 202, and 203 of the Act, the Petition on its face also seeks suspension of the various provisions that relate to the operation of any functional network. If the Petition were granted as requested, without the enforcement of sections 201 and 251(a), for example, BellSouth would no longer have the right to interconnect with any ILEC or other service provider, a protection that is without question essential to its business.<sup>41</sup> Forbearance from section 230 of the Act would leave BellSouth, and all other ILECs, open to civil liability for any objectionable material found on its networks.<sup>42</sup> For that matter, forbearance from section 214 would mean the Commission would no longer enforce the provision that gives BellSouth the authority to operate any line or engage in any transmission over that line in the first place.<sup>43</sup> Additionally, the Petition provides absolutely no discussion regarding the effect that forbearance from applying the

---

<sup>40</sup> *In the Matter of Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services*, Memorandum Opinion and Order, 17 FCC Rcd. 27,000 at ¶ 18 (2002).

<sup>41</sup> 47 U.S.C. §§ 201 and 251(a).

<sup>42</sup> 47 U.S.C. § 230.

<sup>43</sup> 47 U.S.C. § 214.

provisions implementing consumer privacy (section 222), E-911 (section 251(e)), universal service (section 254), and access by persons with disabilities (section 255) would have on the industry and consumers.<sup>44</sup> This discussion is meant to simply highlight the fact that the breadth of BellSouth's request makes it impossible either for the industry to provide any meaningful comment or for the Commission to evaluate the Petition adequately on the merits. The Petition has not stated the specific provisions in the Act for which it requests forbearance, the geographic markets in which such forbearance is sought, and furthermore has not applied the three-prong test to each provision requested to ensure that forbearance is appropriate. Therefore, the Petition is inadequate on its face and for this reason alone should be denied.

**b. The Evidence Relied on by the Petition is Not Sufficient to Support the Requirements Under Section 10.**

The Commission may not grant the forbearance requested by relying on BellSouth's anecdotal evidence regarding the "market for broadband transmission."<sup>45</sup> The Commission has said that "the first step in assessing what regulatory requirements are appropriate for incumbent LEC-provided broadband services is to define and analyze the relevant markets in which the incumbent LECs provide these services."<sup>46</sup> There are in fact *two* relevant markets that must be discussed in this forbearance Petition—the retail

---

<sup>44</sup> See 47 U.S.C. §§ 222, 251(e), 254, 255.

<sup>45</sup> See, e.g., BellSouth Petition at 3.

<sup>46</sup> *In the Matter of Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services*, Notice of Proposed Rulemaking, 16 FCC Rcd. 22,745 at ¶ 18 (2002).

consumer market and the wholesale market. The Commission has recognized that the retail services product market is distinct from the wholesale product market.<sup>47</sup> As EarthLink has argued in several proceedings before the Commission, and does so again now, the FCC must conduct a genuine market analysis that identifies the relevant product market, and which includes proper geographic scope and other relevant factors.<sup>48</sup> The retail and wholesale markets are distinct, and therefore the Petition must provide a separate forbearance analysis for each. In support of this, the Commission has held that “petitioners [for forbearance] must provide more than just general conclusions about market conditions so that interested parties have a meaningful opportunity to refute, and this Commission has a meaningful opportunity to evaluate...”<sup>49</sup> The Petition includes no such analysis of each of these two markets, but simply relies on selected data regarding the retail Internet access market. As such, the Petition’s market analysis is insufficient.

Furthermore, in its analysis supporting forbearance, BellSouth’s Petition impliedly references only the *retail availability* of broadband services, and the impact that forbearance would have on *retail customers*.<sup>50</sup> However, one of the central issues in this proceeding to competitors like EarthLink, as well as other ISPs and CLECs, is whether, in the *absence* of the requirements that mandate that ILECs like BellSouth make

---

<sup>47</sup> *In the Matter of Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Second Report and Order, 14 FCC Rcd. 19,237 at ¶ 8 (1999).

<sup>48</sup> *See, e.g.*, Presentation of EarthLink, Inc. In Opposition to Proposed Forbearance From Applying Title II of the Communications Act to Facility-Based Transmission Underlying Cable-Based Internet Access Services, CS Docket No. 02-52 (July 30, 2003).

<sup>49</sup> *In the Matter of Petition of US West for Forbearance from Regulation as a Dominant Carrier*, 14 FCC Rcd. 19,947 at ¶ 25 (1999).

<sup>50</sup> *See* BellSouth Petition at 5.

available the transmission underlying their broadband Internet access service, there are alternative safeguards within the *wholesale* product market sufficient to protect against discriminatory and unjust and unreasonable rates and practices by ILECs. BellSouth's Petition is silent on this central point.

Furthermore, in addressing the relevant geographic market, the Commission has held that "[t]he relevant geographic markets for residential high-speed Internet access services are local."<sup>51</sup> Thus, the existence of competitive alternatives in one locality has no bearing on the analysis regarding presence or absence of competitive alternatives in another. The Petition does not address the competitive alternatives, if they exist at all, in each and every local market for which BellSouth seeks forbearance. Thus, even assuming the retail market did have some impact on the wholesale market, an argument EarthLink addresses in greater detail below, the Petition's analysis with regard to the retail market is nonetheless insufficient. For these threshold reasons alone, the Petition must be denied.

**c. The Analysis is the Same With Respect to BellSouth's Title II and Computer Inquiry Forbearance Requests**

In its Petition, BellSouth has asked the Commission to separately forbear from applying all Title II safeguards under the Act, as well as the *Computer Inquiry* requirements adopted by the Commission. As a matter of statutory construction and Commission precedent, the requests merge because the duty to provide

---

<sup>51</sup> *In the Matter of Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations by Time Warner, Inc. and America Online, Inc. to AOL Time Warner*, Memorandum Opinion and Order, 16 FCC Rcd. 6547 at ¶74 (2001).

telecommunications services on reasonable and non-discriminatory terms and conditions upon request are the same under sections 201 and 202 and the *Computer Inquiry* rules.

In the Commission's *Second Computer Inquiry* ("*Computer I*"), the FCC addressed the proper regulation of information services and the transmission services over which those information services are offered.<sup>52</sup> In *Computer II*, the FCC focused on a specific factual situation and required all common carriers that owned their own facilities and provided "enhanced services" to make the transmission portion of that service available on reasonable and nondiscriminatory terms.<sup>53</sup> The Commission has held that Congress used the *Computer II* framework in adopting the definitions in the Telecommunications Act of 1996.<sup>54</sup> Under the Act's definitions of "information service," "telecommunications," and "telecommunications service," when any given information service is offered for a fee directly to the public, the telecommunications used to provide that information service qualifies as a "telecommunications service."<sup>55</sup> The Act requires that all telecommunications carriers "shall be treated as a common carrier...to the extent that it is engaged in providing telecommunications services...."<sup>56</sup> Therefore, it is clear that the requirements under the *Computer Inquiry* regulations have since merged with the requirements of the statute.

---

<sup>52</sup> *In the Matter of Amendment of Section 64.701 of the Commission's Rules and Regulations*, Final Order, 77 F.C.C.2d 384 at ¶ 231 (1980).

<sup>53</sup> *Id.*

<sup>54</sup> *Federal-State Joint Board on Universal Service*, Report to Congress, 13 F.C.C.R. 11,501, 11,511 at ¶ 21 (1998).

<sup>55</sup> 47 U.S.C. § 153(46).

<sup>56</sup> 47 U.S.C. § 153(44).

BellSouth relies heavily on the argument that the “core assumption underlying the *Computer Inquiry* requirements was that the telephone network is the primary, if not exclusive means through which information services can obtain access to customers.”<sup>57</sup> However, whether or not BellSouth’s assertions with respect to the “core” assumption of *Computer II* are correct, all telecommunications carriers are under a continuing statutory obligation to offer telecommunications services to ISPs and CLECs that make reasonable requests for such services.<sup>58</sup> The Act does not impose common carrier obligations only on the dominant carriers within the marketplace. This is true of both the sections 201-203 requirements and the *Computer Inquiry* requirements.

**IV. THE PETITION FAILS TO SHOW THAT, ABSENT TITLE II REGULATION, CHARGES WILL BE JUST AND REASONABLE AND BELLSOUTH WILL NOT ENGAGE IN UNREASONABLE AND UNJUST DISCRIMINATION.**

The first prong of the Section 10 forbearance test requires the petitioner to demonstrate that “enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory.”<sup>59</sup> As noted above, the core purpose of the Act, as expressed in sections 201 and 202, is the prevention of discrimination. The Petition provides no assurance of just and reasonable rates, nor does it explain how unjust and unreasonable discrimination against ISPs and competitive LECs will not occur.

---

<sup>57</sup> See BellSouth Petition at 2, 7-8.

<sup>58</sup> 47 U.S.C. §§ 201, 202.

<sup>59</sup> 47 U.S.C. § 160(a)(1).

BellSouth's primary argument under this prong is that, because ILECs lack market power in broadband transmission, they cannot charge unjust or unreasonable rates. BellSouth's only support for this statement is that, should any ILEC elect to charge unreasonable rates or impose discriminatory conditions, consumers will simply choose another facilities-based competitor.<sup>60</sup> This argument fails for three reasons: (1) it is premised on the wrong product market, (2) even if the analysis of the retail product market were relevant, the facts do not support BellSouth's claim, and (3) it ignores the practical effect that forbearance from Title II would have.

BellSouth's argument that consumers will choose another facilities-based provider fails first because it is premised on the wrong market analysis. As stated above in section III(b), there are *two* relevant markets that must be discussed in this forbearance Petition—the retail consumer market and the wholesale market. The Petition plainly seeks to make it legal for carriers such as BellSouth to refuse to sell transmission services to ISPs. However, the Petition only relies on selected data in the *retail* products market, but provides no analysis at all with respect to the *wholesale* market. The Petition has not and cannot show that independent ISPs today have a competitive wholesale market from which to obtain transmission to provide the public with their broadband-based information services. The fact remains that cable, with certain limited exceptions, continues to refuse to sell its transmission service to unaffiliated ISPs. This eliminates cable as a potential competitor to ILECs in the wholesale market. Because forbearance from all Title II regulations would mean the Commission must forbear from the requirements of section 251(c)—the provision that Congress explicitly included to

---

<sup>60</sup> BellSouth Petition at 31.

require ILECs to permit service by competitive LECs,<sup>61</sup> CLECs would presumptively be eliminated in those few marketplaces where wholesale facilities-based competition arguably exists. Thus, the facts show that forbearance from Title II of the Act to ILEC transmission services literally leaves no competition in the wholesale transport market for ISPs. The Petition fails in all respects to address what effect forbearance from Title II regulation would have on the Commission's ability to ensure that facilities-based carriers furnish their service at just, reasonable, and non-discriminatory rates to ISPs and CLECs. Thus, any contention that retail consumers would simply choose other providers should ILECs engage in unreasonable or discriminatory practices—a contention that is wrong in any event—is irrelevant with respect to forbearance affecting wholesale services under the first prong analysis.

The second reason that BellSouth's argument fails is that even if the retail market were relevant to ensuring that ILECs provide reasonable and non-discriminatory service to ISPs and CLECs, the argument that the retail broadband market has competition from multiple sources and technologies<sup>62</sup> is simply not supported by the facts. The facts are that there are only two significant carriers in the broadband transmission marketplace—cable and DSL. As of December 2003, FCC data showed that ADSL and cable

---

<sup>61</sup> 47 U.S.C. § 251(c). EarthLink questions whether the Commission has the ability to forbear from applying this section at all, because section 10(d) of the Act (47 U.S.C. § 160(d)) requires that section 251(c) be fully implemented in order for the Commission to forbear. EarthLink notes that in *In the Matter of Petition for Forbearance of the Verizon Telephone Companies*, WC Docket No. 01-338 (rel. Oct. 27, 2004), the Commission found that, under a specific set of facts, certain parts of sections 271 and 251 were fully implemented. However, that Order did not address several provisions in section 251 that BellSouth has requested the Commission forbear from applying in its own Petition. Thus, even assuming the Commission's reasoning in the *Verizon Order* survives judicial scrutiny, in order for the Commission to take any action, petitioners must address, as a preliminary matter, whether section 251(c) has been fully implemented.

<sup>62</sup> BellSouth Petition at 3, 10, 31.

accounted for 92.0% of all high-speed lines in the U.S., and 97.5% of all high-speed lines in the residential and small business market.<sup>63</sup> Of the ADSL lines, incumbent LECs have a 95.0% market share, with competitive LECs accounting for only 5.0%.<sup>64</sup> Therefore, despite BellSouth's attempt to suggest that technologies other than wireline and cable, such as wireless, satellite, and broadband over powerline ("BPL"), are "rapidly being developed,"<sup>65</sup> the simple truth is that wireless, satellite, and BPL technologies combined still comprise less than 3% of the overall high-speed connections available to consumers.<sup>66</sup> It is also significant to note that ILECs control the majority of both fiber and wireless networks used to provide high-speed connections. Simply put, competition is not coming from multiple sources and technologies.

The third reason why the arguments in the Petition fail under this prong is because the Petition does not address the practical effect that forbearance from sections 201 and 202 would have on those providers, like EarthLink, that request transmission service under those provisions. If, for example, an independent ISP is denied a request for transmission by a facilities-based provider like BellSouth, and that provider is not legally required to furnish such service upon request because the Commission chose to forbear from applying sections 201 and 202 of the Act, then essentially the only way that a non-facilities-based provider can remain in the marketplace is to build its own network. The

---

<sup>63</sup> See *FCC High Speed Services for Internet Access: Status as of December 31, 2003*, at Table 1 – High Speed Lines and Table 3 – Residential and Small Business High Speed Lines (rel. June 8, 2004) (hereinafter *High-Speed Services Report*).

<sup>64</sup> *High-Speed Services Report* at Table 5—High-Speed Lines by Type of Provider.

<sup>65</sup> BellSouth Petition at 10.

<sup>66</sup> *High-Speed Services Report* at Chart 2—High-Speed Lines by Type of Provider.

FCC must find that such a solution is unrealistic, as it represents both a financial and practical impossibility. EarthLink is aware of no business or investment model that claims that the industry would in fact be better off if each competitor constructed its own facilities. Further, construction and operation of multiple networks will only increase costs to consumers—if the financing for such networks can even be found at all. The Petition offers no analysis on this issue, and the Commission would be legally be required to do so under section 10(a)(1) before forbearance would be permitted.

Because the three-part test crafted by Congress is stated in the conjunctive, the Commission’s analysis should end here. However, to provide a complete record, EarthLink addresses the other two prongs of the forbearance analysis.

**V. REGULATION IS NECESSARY FOR THE PROTECTION OF CONSUMERS.**

The second prong of the Section 10 forbearance test requires the petitioner to demonstrate that “enforcement of such regulation or provision is not necessary for the protection of consumers.”<sup>67</sup> BellSouth argues under this prong that the regulatory restraints placed on ILECs harm consumers “by preventing ILECs from providing tailored offerings that respond to consumer needs.”<sup>68</sup> Specifically, BellSouth claims that it was required to spend \$3.50 per customer per month in 2003 in order to comply with Title II requirements, and that these expenses directly translate into higher costs for consumers.<sup>69</sup> Initially, EarthLink notes that BellSouth has failed to provide adequate

---

<sup>67</sup> 47 U.S.C. § 160(a)(2).

<sup>68</sup> BellSouth Petition at 32.

<sup>69</sup> *Id.* at 5.

factual reasoning as to how the consumer, and not BellSouth itself, bears the burden of these costs. It is without question in the self-interest of BellSouth and other carriers to avoid regulation. However, this is not relevant under the second prong of the forbearance analysis. Instead Congress is only concerned with the protection of consumers—not carriers. Thus, the distinct question for the Commission to decide is whether the benefits of regulation, including the benefits of competition in the information services market that come from the enforcement of sections 201 and 202, are outweighed by specific and quantified regulatory costs and harms. The Petition fails to demonstrate that this balance tips in favor of removing the requirements that Congress put in place to protect consumers. Instead, the Petition simply claims that the cost of regulation is passed onto consumers without any further discussion. On this point, it is telling that broadband Internet access over cable is currently an unregulated service, but still charges the consumer anywhere from \$5 to \$20 more a month than DSL, a regulated service. Thus, BellSouth’s vague and unsupported claim that deregulation will somehow result in lower prices for consumers is directly contradicted by real-world experience in the marketplace. A legal analysis under the second prong of the forbearance test requires much more precision.

The Commission has often held that sections 201 and 202 “codify the bedrock [of] consumer protection.”<sup>70</sup> Viewed from the perspective of the consumer, the Commission’s proposed forbearance from enforcing sections 201 and 202 would mean that the vast majority of consumers subscribing to broadband Internet service would only have access to one or two providers—namely, those ISPs chosen by the ILEC or cable

---

<sup>70</sup> *Wireless Forbearance Order* at ¶ 20.

company that owns the transmission facilities. In light of this, the Commission has previously recognized that a lack of robust price competition may lead to rates that are excessive and that harm consumers.<sup>71</sup> In response, BellSouth argues that cable competition provides sufficient price discipline,<sup>72</sup> a highly questionable assumption from the consumer perspective when the unregulated cable modem service is priced higher than the “regulated” DSL service.<sup>73</sup> Further, it is also questionable as to whether a duopoly provides a similar price discipline to that of a robustly competitive market. As the D.C. Circuit has held, “[i]n a duopoly, a market with only two competitors, supracompetitive pricing at monopolistic levels is a danger.”<sup>74</sup> Moreover, cable companies today provide virtually no source of competition in the market for transmission sold to independent ISPs, because they have refused to provide such service except where ordered to do so in connection with merger proceedings. The Petition is silent on these essential points. For the Commission to lawfully forbear from enforcing these sections, it would have to address how limiting consumer choice of service providers even further is in the consumer’s best interest.

BellSouth also argues that without such forbearance there is no reason to invest in wireline broadband services, which ultimately harms consumer choice.<sup>75</sup> However, a

---

<sup>71</sup> *US West Forbearance Order* at ¶ 39. See also *AT&T v. FCC*, 236 F.3d 729 (D.C. Cir. 2001) (“Absent a sufficient showing of competition, it is clear that regulation of the BOC petitioners’ special access and high capacity dedicated transport services is necessary to protect consumers.”).

<sup>72</sup> BellSouth Petition at 5.

<sup>73</sup> EarthLink notes that the Commission already does not regulate the retail price of DSL services.

<sup>74</sup> *FTC v. H.J. Heintz*, 246 F.3d 708, 724 (D.C. Cir. 2001).

<sup>75</sup> BellSouth Petition at 5.

recent study by the Leichtman Research Group shows that the growth in the number of incumbent LEC ADSL lines actually exceeded the growth of cable modem service for cable for the First Quarter, 2004.<sup>76</sup> The most recent FCC data shows that, during the full twelve-month period in 2003, high-speed connections over ADSL increased by 47%, compared to a 45% increase over the same time period for cable.<sup>77</sup> In fact, the Wall Street Journal reported this past month that BellSouth itself has “been steadily rolling out fiber technology for years,” spending an estimated \$2 billion to “provide 80% of households in its nine-state territory with superfast Internet access in the next two to three years” at an average cost of less than \$300 per customer.<sup>78</sup> The article makes no mention of regulation somehow adversely affecting this deployment, which is driven by BellSouth’s desire to get into video markets.<sup>79</sup> BellSouth has not provided any facts in opposition to these hard numbers to support its allegation that somehow investment in wireline broadband services is dampened. The facts would appear to reflect the very opposite of that which BellSouth contends.

---

<sup>76</sup> “A Record 2.3 Million Add Broadband in First Quarter of 2004,” Leichtman Research Group Press Release (May 11, 2004), *available at* <http://www.leichtmanresearch.com/press/051104release.pdf#search='A%20Record%202.3%20million'>

<sup>77</sup> *High-Speed Services Report* at Table 1—High-Speed Lines.

<sup>78</sup> Almar Latour, *BellSouth Targets Web Market as Battle With Cable Intensifies*, *The Wall Street Journal* (Dec. 6, 2004) at A3.

<sup>79</sup> *Id.* Similarly, the article reports that other ILECs like Verizon and SBC, are likewise already deploying fiber networks to serve the majority of their customers within the next few years.

## VI. THE PROPOSED FORBEARANCE IS NOT IN THE PUBLIC INTEREST.

Section 10(a)(3) of the Act requires a petitioner to demonstrate that “forbearance from applying such provision or regulation is consistent with the public interest.”<sup>80</sup>

Section 10(b) of the Act states that in making a public interest determination, the Commission “shall consider whether forbearance from enforcing the provision or regulation will promote competitive market conditions, including the extent to which such forbearance will enhance competition among providers of such telecommunications service.”<sup>81</sup>

BellSouth argues that subjecting ILECs to Title II regulation is not in the public interest because it is “fundamentally inconsistent with the Commission’s commitment to creating a regime that does not pick winners and losers by imposing asymmetrical regulation on a subset of broadband providers.”<sup>82</sup> Indeed, BellSouth places considerable emphasis on the notion that, because the FCC has found it unnecessary to impose Title II requirements on cable, it cannot find it necessary to impose such obligations on DSL and other wireline services.<sup>83</sup> This argument is misplaced for a number of reasons. First, the FCC has not formally decided to forbear from applying Title II regulations to cable. To the extent that BellSouth’s Petition suggests that *Brand X Internet Services v. FCC*<sup>84</sup> involves forbearance, BellSouth is incorrect. *Brand X* involves the question of whether

---

<sup>80</sup> 47 U.S.C. § 160(a)(3).

<sup>81</sup> 47 U.S.C. § 160(b).

<sup>82</sup> BellSouth Petition at 32.

<sup>83</sup> *Id.* at 4.

<sup>84</sup> *Brand X Internet Services v. FCC*, 345 F.3d 1120, 1132 (9th Cir. 2003), *cert. granted* (Dec. 3, 2004) (Nos. 04-277 & 04-281).

cable modem service, as it is currently offered, consists of both a “telecommunications service” and an “information service” under the Communications Act.<sup>85</sup> In its Declaratory Ruling, the Commission concluded that cable modem service is wholly an interstate information service, and contains no separate offering of telecommunications service.<sup>86</sup> Thus, *Brand X* and forbearance are separate issues.

Furthermore, the justification given by the Commission for potentially using its forbearance authority to relieve cable companies from Title II was both legally and factually inadequate. The Commission’s asserted in the Declaratory Ruling that forbearance would be appropriate because: (1) “cable modem service is still in its early stages,” (2) “supply and demand are still evolving,” and (3) that networks providing residential Internet access are still developing.<sup>87</sup> These are all three ways of saying the same thing: cable modem service is somehow still a new service. It is not. Even if it were, however, the Commission appears to reason that all new services merit forbearance. There is no factual or logical support for this presumption. Indeed, as BellSouth argues, cable modem service accounts for nearly two-thirds of the high-speed Internet connections provided to residential and small business customers.<sup>88</sup> Congress declared that telecommunications carriers “shall be treated as common carriers” to the

---

<sup>85</sup> *Id.* at 1125.

<sup>86</sup> *In the Matter of Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, Declaratory Ruling, CS Docket No. 02-52, Aug. 6, 2002, at ¶ 39 (hereinafter “Declaratory Ruling”).

<sup>87</sup> Declaratory Ruling at ¶ 39.

<sup>88</sup> BellSouth Petition at 8. EarthLink notes that the FCC’s latest report puts cable’s market share at 58%, instead of at two-thirds as BellSouth claims. *See infra*, note 93.

extent that they are engaged in providing telecommunications services.<sup>89</sup> The Act makes no distinction based on whether such services are new or not. In fact, since the purpose of the Act was to promote local competition by prohibiting state and local barriers to entry for new telecommunications services,<sup>90</sup> it is clear that Congress intended that new telecommunications services would presumptively be subject to common carrier regulation. Further, assuming *arguendo* that the cable modem service market is nascent, it would then be especially important for the Commission to use its section 10 authority with caution towards providers that currently control the network facilities. Thus, if these reasons have any merit at all, they in fact argue *against* exercising forbearance.

In addition, to the extent these reasons were ever factually true, again a proposition with which EarthLink disagrees, they simply are not true any more. Broadband Internet access has now been offered to the public for over eight years, and of the 28.2 million high-speed subscribers reported in December of 2003,<sup>91</sup> over 58 percent subscribe to cable modem service.<sup>92</sup> Further, by the Commission's own research, 73 percent of zip codes in December of 2003 reported that high-speed service was available, compared to just 37 percent in June 2001, meaning broadband technology is now

---

<sup>89</sup> 47 U.S.C. § 153(44).

<sup>90</sup> *See* 47 U.S.C. § 253.

<sup>91</sup> According to the Commission's research, "subscriberhip to high-speed lines has almost tripled from 9.6 million in June 2001 to 28.2 million in December 2003." *See Availability of Advanced Telecommunications Capability in the United States*, Fourth Report to Congress (Sept. 9, 2004) at 8.

<sup>92</sup> *Id.* at 16.

currently being deployed in all but the most rural parts of the country.<sup>93</sup> Finally, the FCC has recently reported that the number of residential and small business subscribers has jumped from 7.8 million in June 2001 to 25.9 million in December 2003, a number which clearly reflects that residential networks are no longer in the developmental stage that they once were.<sup>94</sup>

The Commission's factual conclusions in the Declaratory Ruling do not hold any weight. More important, the factors cited by the Commission have never held any legal relevance. The Commission has never attempted to tie these factors to the tests found in section 10, and without such an analysis, these observations are no more than the "broad, unsupported allegations" the Commission has held cannot be the basis for forbearance.<sup>95</sup> So far as EarthLink is aware, the Commission has not since the Declaratory Ruling offered any alternative legal rationale as to why forbearance would be appropriate. Thus, the Commission's forbearance analysis was inadequate in that proceeding, and BellSouth is misguided to claim that the Commission should logically apply such an analysis to its own services. With respect to BellSouth's argument that wireline service should be subject to the same obligations as cable modem service,<sup>96</sup> EarthLink agrees. The appropriate regime for both cable and wireline is that, to the extent a carrier is providing telecommunications services, including the telecommunications used to provide

---

<sup>93</sup> *Id.* at 30. While EarthLink believes that the national zip code analysis performed by the Commission is not a sufficient geographic market analysis required under section 10, the figures do provide some evidence of the increase in consumer demand over the last two years.

<sup>94</sup> *High-Speed Services Report* at Table 3—Residential and Small Business High-Speed Lines.

<sup>95</sup> *Fixed Wireless Forbearance Order* at ¶ 13.

<sup>96</sup> *See* BellSouth Petition at 4.

information services, that carrier should be treated as a common carrier under the Act. The Commission's analysis for cable modem service was flawed. Following that lead with respect to DSL would neither be good policy nor legally supportable.

Finally, BellSouth argues that forbearance would be in the public interest because section 706 of the Telecommunications Act instructs the Commission to "promote broadband competition."<sup>97</sup> Section 706 is not legally relevant to a public interest analysis under section 10(b). The Commission itself agrees that section 10 is simply one means for implementing the goals of section 706.<sup>98</sup> To do so, however, Congress required a full analysis under all three prongs of the test in section 10. Both the courts and the Commission are not only bound by Congress' purpose, but also by the "means it has deemed appropriate, and prescribed, for the pursuit of those purposes."<sup>99</sup>

Under a section 10(b) analysis, the forbearance requested here would in fact harm "competitive market conditions" and thwart "competition among providers of telecommunications services."<sup>100</sup> By undermining ISP and telecommunications service competition, it is clear that the goals of section 706 of the Act would be defeated by the requested forbearance because consumers will not have the full benefits of competition, such as competitive pricing and diverse advanced service offerings, which is what ultimately will drive consumer demand for advanced telecommunications capability. In

---

<sup>97</sup> *Id.* at 16.

<sup>98</sup> See *In the Matters of Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 13 F.C.C.R. 24,012, 24,044 at ¶ 69 (1999).

<sup>99</sup> *MCI Telecomms. Corp. v. AT&T*, 512 U.S. 218, 231 n. 4 (1994).

<sup>100</sup> 47 U.S.C. § 160(b).

support of this argument, the Commission has noted for the promotion of advanced services across the DSL platform:

The Commission's determination herein should encourage incumbents to offer advanced services to Internet Service Providers at the lowest possible price. In turn, the Internet Service Providers, as unregulated information service providers, will be able to package the DSL service with their Internet service to offer affordable, high-speed access to the Internet to residential and business consumers. As a result, consumers will ultimately benefit through lower prices and greater and more expeditious access to innovative, diverse broadband applications by multiple providers of advanced services.<sup>101</sup>

If the Commission were to adopt the BellSouth Petition, it would clearly contradict its own findings with respect to consumer benefits.

### CONCLUSION

The prevention of unreasonable and discriminatory practices, protection of consumers' interests, and the public interest all demand that the transmission component of wireline broadband services provided by BellSouth and other ILECs remain available on reasonable and non-discriminatory terms under Title II of the Communications Act. Accordingly, BellSouth's Petition for forbearance should be denied.

---

<sup>101</sup> *In the Matters of Deployment of Wireline Services Offering Advanced Telecommunications Capability, Second Report and Order*, 14 FCC Rcd. 19237, ¶ 3 (1999).

Respectfully submitted,

A handwritten signature in black ink, appearing to read "John W. Butler", with a long horizontal flourish extending to the right.

John W. Butler  
Earl W. Comstock  
Robert K. Magovern  
SHER & BLACKWELL LLP  
1850 M Street, N.W.  
Suite 900  
Washington, DC 20036  
(202) 463-2500

David N. Baker  
Vice President for Law  
and Public Policy  
EarthLink, Inc.  
1375 Peachtree Street  
Atlanta, GA 30309

December 20, 2004