Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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

OPPOSITION OF COMPUTER OFFICE SOUTIONS, INC.

By :

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Dated: December 20, 2004

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Computer Office Solutions, Inc. d.b.a. SnappyDSL.net ("SnappyDSL"), by its vice president, hereby submits it Opposition to the October 27, 2004, Petition for Forbearance filed by BellSouth Telecommunications, Inc. ("Petition").[1]

STATEMENT OF INTEREST

SnappyDSL is a Florida based Internet Service Provider that provides aDSL based broadband and full Internet services throughout eight southern states. Our lineage began as Computer Office Solutions, Inc., originally founded in 1992 with the objective of serving local businesses as a Value Added Reseller / Systems Integrator. We first offered Internet services to our clients in 1994, primarily in response to filling the needs of our existing customer base at a time when expertise and knowledge in Internet services was uncommon. In 1999, we recognized the growing demand for flexible and robust Internet access services, and by the following year we totally exited the VAR/Integration business to focus exclusively on providing Internet services. By 2000 we rolled out our first

[1] 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 (Oct. 27, 2004)

broadband offering and re-branded as "SnappyDSL.net". After being recognized in the local marketplace as a premier Internet Service Provider for both residential and business applications, we expanded the territory of our broadband offerings to include most of the 28 major and minor metropolitan areas of the eight Southern States, (also known as 'the BellSouth Territories'). They include: Florida, Georgia, Alabama, Mississippi, Louisiana, Tennessee, North Carolina, and South Carolina. Today we provide High Speed Internet Access and other enhanced services to customers throughout these areas. All this has been possible due to the markets created and maintained through application of the Telecom Act of 1996, *Computer II* / *III* and Title II regulations.

I SUMMARY

Computer networks and communications networks have been converging and evolving for the last forty years. The *Computer Inquiries* represent this Commission's fundamental understanding that appropriate stewardship of this convergence is vital to the public interest, as expressed both directly by the interests of consumers and indirectly by effects on the U.S. economy. Today's marketplaces and economic environment depend greatly on the stewardship so painstakingly crafted throughout the years.

Bellsouth's forbearance petition to the Commission boldly and even recklessly attempts to shatter the time-tested and balanced stewardship which has fostered both Bellsouth's own existence as well as the marketplace which it and other ILECs serve. Bellsouth's petition does not present sufficient data to support its claims that forbearance, either in full or in part, is required or even appropriate. Bellsouth's petition can be viewed as a greedy and short-sighted attempt to return to the days of monopolistic arrogance. The

purpose of this opposition is to present discussion and data necessary to refute Bellsouth's petition.

II. BACKGROUND

A. Broadband Market Develops as a result of *Computer Inquiry* Foresight

The issues facing today's broadband market are fundamentally the same as those considered at the time of *Computer II* and *Computer III*. Of primary importance is the issue of determining what regulations and safeguards are necessary in light of the fact that the ILECs have both the ability and the incentive to act in an anti-competitive manner, sitting in the unusual place of being both supplier and competitor.

ILECs provide the basic services on which enhanced service offerings are built. The purchasers of these basic services, known as Enhanced Service Providers (ESPs), often find themselves competing directly with the ILECs themselves. The *Computer Inquiries* have addressed the conceptual matters of fostering enhanced service marketplaces, while restraining anti-competitive behavior. The Commission's foresight in addressing matters on a conceptual level in the *Inquiries* assured that the precepts set forth would endure regardless of the technical nature of the enhanced service offerings. Thus whether talking about today's broadband market, or yesterday's narrowband "dialup" market, or whatever will be tomorrow's enhanced marketplace, the conceptual issues faced in the *Computer Inquiries* are relevant.

The rules imposed on the ILECs by *Computer II / III* have successfully fostered innovation and competition in the enhanced services marketplaces[2], while regulating the

2. "The Computer Inquiries have been wildly successful. They followed a layered model of regulation and sought to constrain anticompetitive behaviour where it occurred. The potential bottleneck in the physical network layer was identified. A policy was created which promoted economic and technological expansion…." -- Robert Cannon, *The Legacy of the Federal Communications Commission's Computer Inquiries*, (2003).

underlying basic services on which they depend. The positive results of the FCC's long history of affirmative and aggressive regulation of the ILECs cannot be disputed. The Bellsouth petition dangerously attempts to circumvent the very same precepts which coalesced to form and bolster the most important enhanced services market of today, that of broadband.

B. WIRELINE ADSL IS KEY TO THE BROADBAND MARKETPLACE

The existence of today's broadband market depends heavily on the public switched telephone network[3], which provides the underlying last-mile transport required for broadband services. Recent data from this Commission[4] show that ADSL has the fastest growth rate for all high-speed lines (greater than 200kbps). From June through December 2003, the total number of ADSL high-speed lines increased by 24% to 9,509,422. The nearest competitor to ADSL technology, coaxial cable, experienced growth of only 20% to 16,446,322 total high-speed lines during this same period.

In the all-important residential and small business market, data from June through December 2003[5] shows that the total number of ADSL high-speed lines grew by a whopping 39% to 8,909,027. During this same time period, coaxial cable high-speed lines in the residential and small business market increased by only 20% to 16,416,314.

Not only is ADSL the fastest growing high-speed technology overall, but in states

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3. "Traditional telephone providers and new entrants made improvements to their networks that built upon and leveraged existing public switched telephone network infrastructure. Our most recent data show that this incremental network buildout enabled large increases in high-speed Internet access subscribership." *FCC Notice of Proposed Rulemaking,* adopted: February 14, 2002

4. Table 1 - *High-Speed Services for Internet Access: Status as of December 31, 2003,* Industry Analysis and Technology Division, Wireline Competition Bureau, June 2004.

5. Table 3 - *High-Speed Services for Internet Access: Status as of December 31, 2003,* Industry Analysis and Technology Division, Wireline Competition Bureau, June 2004.

such as California and Georgia, ADSL technology delivers more total high-speed lines than any other technology (California -- 2,065,780 ADSL; 1,706,217 cable, Georgia – 452,567 ADSL; 361,127 cable[6]). How long will it be before cable's temporary lead in total number of high-speed lines in other states - due primarily to cable's earlier entrance into the broadband market - will erode?

Cable's comparative erosion is already evidenced by recent data that shows overall cable penetration has declined to a nine-year low[7]. This will continue, especially in consideration of ADSL's phenomenal growth. Already, faster 3Mbps ADSL service was deployed in the second quarter of 2004[8], and faster 4Mbps to 6Mbps ADSL will arrive in 2005[9]. Can there be any doubt that Bellsouth's self-serving petition is created in full awareness of the current and future critical dependence of the broadband market on the underlying last-mile transport which ADSL requires?

III. DISCUSSION

A. Regulatory Flexibility to Forbear only under specific conditions

Regulatory flexibility to grant forbearance of any regulation can only be exercised if all of the following three conditions are satisfied fully: (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

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6. Table 7 - *High-Speed Services for Internet Access: Status as of December 31, 2003,* Industry Analysis and Technology Division, Wireline Competition Bureau, June 2004.

7. John Eggerton -- Broadcasting & Cable, 8/4/2004

8. e.g., see Bellsouth FCC tariff effective 3/26/04

9. see *Bellsouth Press Release*, 12/6/2004.

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; and (3) forbearance from applying such provision or regulation is consistent with the public interest[10].

B. The Requirements For Forbearance Have Not Been Satisfied

Bellsouth's petition clearly does not provide sufficient data according to the Forbearance criteria to prove that enforcement of the regulations from *Computer II / II* and Title II are not necessary. Consider the findings from the U.S. Small Business Administration[11], in which the following facts are outlined and continue to be applicable:

> *"Small ISPs, which constitute the majority of ISPs nationally, are dependent upon transport over wireline carriers' facilities. An overwhelming number of ISPs have access arrangements with wireline carriers rather than cable providers, and 93 percent of all digital subscriber lines are provided by incumbent local carriers. As an ISP organization noted, a small ISP's options other than carriage on a wireline carrier's lines are virtually non-existent. Therefore, small ISPs are dependent on the incumbent wireline carriers to carry their signals. Even for small ISPs dealing mainly with the provision of broadband, the total reliance upon carriage over wireline carriers' facilities is undisputed.*
>
> *This dependence is born from 80 years of government-sanctioned monopoly that enabled incumbent wireline carriers to construct a pervasive network to almost every home and business in the nation. Such a network will take decades to replicate, if it is possible to replicate at all, considering changes in the regulatory environment and the reluctance of local communities to installing new wires. The "last mile" of the network, which extends from a home or business to the central office of the incumbent wireline carrier, is particularly difficult for small alternative carriers to replicate or bypass, <u>which grants the incumbent carrier a near monopoly in residential areas and a substantial economic advantage in business districts.</u>*

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10. 47 U.S.C. s.160(a)

11. Letter from the SBA Office of Advocacy to Chairman Michael K. Powell, dated 8/27/02 RE: Ex Parte Presentation in a Non-Restricted Proceeding Initial Regulatory Flexibility Analysis for Appropriate Framework for Broadband Access to the Internet over Wireline Facilities (CC Dkt. No. 02-33), at http://www.sba.gov/advo/laws/ comments/ fcc02_0827.html

In the NPRM, the Commission appears to operate under the assumption that broadband is a completely separate service from voice telephone. Several commenters question this assumption, and claim that broadband is an extension of existing wireline telephony systems. One commenter states that no separate

broadband network exists. Instead, wireline carriers are using the same copper structure that is used to carry voice telephony. Another commenter states that the voice telephony market and the broadband market are inextricably joined and that recent broadband investments are just on-going upgrades to existing networks.

There is merit to both of these comments because wireline broadband is currently using last-mile physical structure. Small ISPs do not have an alternative when it comes to reaching their wireline broadband customers; they rely upon carriage over wireline carriers facilities, as detailed in Computer II and Computer III. If the Commission removes the requirements for local carriers to carry the broadband traffic of small ISPs, incumbent wireline carriers have significant economic reasons to stop doing so. Without that carriage, small ISPs will face a harsh economic future, as Internet service migrates from dial-up to broadband.

Without the carriage requirement of Computer II and Computer III, control over the last mile gives wireline carriers an enormous bargaining advantage when dealing with ISPs, and the potential for discrimination by wireline carriers is a real concern. Small ISPs have no leverage and no alternatives but to take whatever deal is offered to them by the wireline carriers. As commenters noted, the potential for discrimination by the wireline carriers in the absence of the Computer II and Computer III safeguards is real, and a different regulatory treatment for broadband would encourage wireline carriers to close their networks or engage in anti-competitive and supra-competitive pricing.

If the incumbent wireline carriers refuse to provide broadband access services to small ISPs, one commenter estimates the cost to small ISPs at $8 billion in lost revenue. Such a blow would cripple the ISP industry and force hundreds of small businesses into bankruptcy, further endangering the prospect of sound economic recovery. Furthermore, competition would be thwarted, as these small ISPs and other alternative providers are driven out of the marketplace. Should small ISPs cease operating, the Internet access market will be controlled by a duopoly – a wireline carrier monopolist that dominates in the provision of Internet services to businesses, and the cable monopolist that dominates in the provision of Internet services to residences."

Bellsouth's petition also ineffectually points to the existence of broadband via cable as a form of "vigorous intermodal competition" which satisfies the "just and reasonable" condition of forbearance. But the SBA's findings[11] refute Bellsouth's claim. Consider the following:

> *"The Commission should not rely upon cable as the sole source of competition to wireline broadband, because cable is not a perfect substitute for wireline broadband. The physical plants do not generally overlap; cable dominates the residential broadband market, while wireline carriers dominate the business market and have a presence in every single home in the United States.*
>
> *If the incumbent wireline carrier is the sole source for wireline broadband communications, large numbers of small business consumers will have a single choice for broadband Internet service and will likely face higher rates, more restricted service, and delays on deployment of broadband service. Because of the incentive structure faced by the incumbent wireline carrier, rural consumers, and consumers in low-density areas would have little chance of receiving broadband services. Deployment, then, becomes a classic case of "cherry picking" and is not consistent with the Commission's goals."*

Interestingly, Bellsouth's petition does not address any specifics with regard to the business market. All references are to either the residential market, or to aggregate data which considers both residences and only "small businesses". But what about mid and large businesses? The SBA recognized such consideration is essential to any effective policy/ regulation changes, and recently commissioned a study[12] which suggests that the "small businesses" previously referenced in the aggregate data for broadband consumption primarily consist of home-offices and other non-employer based businesses in residential areas. This leaves out an entire market segment, which the study asserts as follows:

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12. "*A Survey of Small Businesses' Telecommunications Use and Spending*" by Stephen B. Pociask, Telenomic Research, LLC for SBA Office of Advocacy, Release Date: March 2004.

1. "*While the FCC collects voluminous data from telecommunications service providers, these data are often too aggregated to provide insight into small businesses' use of telecommunications services. To the extent that public data for market segments exist, it is limited primarily to the residential customer market segment*."

2. "*The lack of accurate and comprehensive data on small business use of telecommunications may leave policymakers guessing about how market segments are affected by legislative and regulatory actions*."

3. "*Determining whether these regulatory and public policy changes adversely affect small businesses requires vastly more information on small businesses' telecommunications use than is available today from public sources*."

If data does not exist for an entire market segment, how can Bellsouth's petition legitimately claim that the forbearance criteria have been fully satisfied?

In fact, evidence is crystal clear that the regulations of *Computer II / III* and those of Title II are vitally necessary to protect consumers and serve the public interest. The following discussion presents this evidence:

1. <u>Cable is not a complete substitute for wireline broadband</u>. Both residential and business consumers concerned with the issues of reliability, stability and security recognize that only wireline based xDSL technology will suffice. Cable modem network architecture[13] suffers a fundamental weakness - all signals go to all cable modem users within a particular area on a single line. A cut, break or other problems on a single line will bring down all users on that line. Although the first user of a cable modem on a given line will have excellent service, each additional user creates noise, loads the channel, reduces reliability, and generally degrades the quality of service for everyone on the line. Intended or inadvertent wiretapping is facilitated by having access to multiple users at a single point of

entry on the cable line. By contrast, xDSL's dedicated 'one-user, one-line' architecture provides an inherent defense against these issues.

2. Other broadband platforms do not offer viable substitutes for wireline broadband. Satellite broadband options are comparatively expensive and suffer speed limitations, particularly on data upload. Total Satellite/Wireless deployment at the end of 1993 was less than 1.3% of total high-speed lines[4]. Broadband over power line (BPL) deployment is virtually non-existent in the U.S., and long-term prospects are not good due to the many technical challenges.

3. Small ISPs are the only providers of enhanced broadband services demanded by consumers. Broadband is much more than just a fast connection to the Internet – it includes a host of advanced features are that are only provided by small, independent ISPs. Traditionally, citing the cost and complexity of delivering advanced broadband features, most if not all ILECs, cable providers and national ISPs have confined the provision of such features to only business consumers (at increased cost). Conversely, most small ISPs have recognized the sizable demand from residential consumers that need advanced features (e.g. for teleworkers, home-offices and techno-enthusiasts); and by virtue of their size and flexibility, most if not all small ISPs cost-effectively provision such features to both residences and businesses. Advanced broadband features include:

- *Multiple static IP addresses* – Static IP addresses enable and facilitate many activities in the broadband world; such as operating a web or mail server, creating a secure VPN connection, remotely controlling & managing computers across the Internet and more. The broadband offerings of small ISPs are virtually the sole choice for residential consumers that need multiple static IPs. Most cable broadband offerings for residences do not include a static IP address, and certainly do not offer consumers the ability to competitively obtain multiple static IPs. The situation is similar for wireline broadband offerings by ILECs. As an example, Bellsouth's broadband offerings to residences do not include a static IP as standard, but do allow a single static IP to be purchased separately. However, Bellsouth currently does not provide multiple static IPs. By contrast, most small independent ISPs offer both single and multiple static IPs.
- *Port Unblocking* – Small ISPs remain the sole source for consumers, particularly residential consumers, that require broadband service with unblocked access to vital communication ports. Driving this issue is the proliferation of spam across the Internet. The unanimous policies of cable providers, ILECs and national ISPs provide limitations on the flow of email traffic through their networks. Such "port 25 blocking" as it commonly is referred has the consequence of hindering legitimate consumers from running their own mail servers or having essential flexibility in their email capabilities. Most small ISPs recognize the consequences of port 25 blocking and find

other methods to control the spam issue without limiting the abilities of their customers.

- *Bridged connections* – The sizable xDSL market utilizes two prevalent connection schemes, referred to as PPPoX and Bridged[14]. With the point-to-point protocol (PPPoX), the end user first authenticates with a user-name & password, and then connects. The connection is managed either by client software on the end-user's computer or by hardware CPE. With a Bridged connection, a standard "IP" lease is negotiated on bootup, without the need for any special software, hardware or username/password. Bridged connections most closely resemble a true 'always-on' connection. From the perspective of the last-mile provider (the ILEC) and the broadband provider, PPPoX provides more granular control over the broadband transmission, and not surprisingly, is the choice of ILECs. Since late spring/early summer of 2000, Bellsouth has offered only PPPoX. This greatly constrains many consumers who prefer the technical attributes and simplicity of the bridged connection. Most small ISPs currently offer both bridged and PPPoX connections, but their continued ability to offer bridged connections is protected only by the tariff requirements of the *Computer Inquiries*. Bellsouth's DSL tariff[15] makes reference to both its "Bellsouth ADSL Service", which allows for bridged connections, and its "Bellsouth Session Based DSL service", which does not permit Bridged connections. Bellsouth has shifted all development efforts exclusively to the "Bellsouth Session Based DSL service"; for this reason, Bellsouth's new faster 3Mbps DSL is only available as session based (PPPoX

only), as will be all future DSL services. Bellsouth has stopped all development on the "Bellsouth ADSL Service" which allows for bridged connections, and would eliminate this product entirely if not for the tariff requirements.

- *Other advanced features* – Additional e-mailboxes, expanded e-mailbox sizes, domain name service(s), web site hosting, realtime virus protection, VPN, bridge groups, remote access, and for so much more – small ISPs are experts at flexibly meeting the advanced needs of consumers. The 'one-size fits all' approach of ILECs simply leaves a vast territory of dissatisfied consumers who rely on smaller ISPs to provide additional features on top of the basic broadband access.

4. Small ISPs are oftentimes the only alternative for many consumers that desire wireline broadband. For the most part, Bellsouth currently retails its ADSL only to consumers that maintain a phone line with active local telephone service from Bellsouth: consumers in the Bellsouth region who do not purchase local telephone service simply cannot get ADSL[16], and consumers in the Bellsouth region that have local telephone service from someone other than Bellsouth generally can only get ADSL in certain cases from a small ISP.

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13. Cable Modems and ADSL, 1998 at http://www.dslforum.org/PressRoom/ adsl_vs_cable.html

14. *Broadband reports.com FAQ* at http://www.broadbandreports.com/faq/1416

15. Bellsouth FCC Tariff 1, Section 28

16. Excluding Georgia and Louisiana, per state PSC rulings

This situation definitely limits the ability of consumers to independently choose both the local telephone service provider and the broadband provider. ILECs such as Bellsouth provide the last-mile transport on which small ISP's depend to provide broadband service. The *Computer II / III* requirements, together with the Title II common-carriage requirements, are the only assurances that the ILECs will continue to provide last-mile transport to the small ISP's. Without these requirements, consumer choices will dwindle drastically.

The Computer Inquiry rules affirmatively help consumers by discouraging anti-competitive behavior while simultaneously promoting competition and technological development. In particular, the Part 64 accounting requirements are performing exactly as they should in preventing ILECs from subsidizing their non-regulated operations with the regulated operations. This safeguard forces ILECs to control costs through innovation and good old-fashioned accounting controls, rather than relying on easy-fix subsidies and accounting manipulations.

The importance of Part 64 rules can be illustrated by understanding the basic network elements required for deployment of xDSL. First, the last-mile copper loop is used for broadband transport between the consumer through the ILECs DSLAM and onto the ILECs network. This loop is owned by the ILEC, and the transport provided by it is sold to the broadband providers (ESPs). Next, an additional transport (e.g. DS1, DS3, OC3, etc.). is used to aggregate the many individual transports onto a single higher-capacity transport between the ILECs network and the ESP's network. This aggregate

transport is also owned by the ILECs and sold to the ESPs. Once at the ESP's network, information follows through the ESPs infrastructure to/from the Internet.

If the ILECs were solely a supplier of last-mile transport and aggregate transport to the ESPs, then anti-competitive behavior would not be a concern. But when the ILECs also become ESPs, a question arises as to how to account for the last-mile and aggregate transports. If some or all of the costs of these transports are allocated to the ILEC's regulated operations rather than to the ILEC's non-regulated operations, then the cost-side of the ILEC's operations would be significantly less than that of a competing ESP. This situation is further compounded by additional factors: the last-mile transports and the aggregate transports may be subject to significant current state communications taxes, proposed future communications taxes and federal universal service fund contributions. It would be in any ILECs best interest to allocate the costs of these transports to their regulated operations and avoid these issues altogether. Such actions would provide ILECs with an extreme competitive advantage over the independent ESPs. Part 64 accounting rules are the only way to prevent such anti-competitive behavior.

The Bellsouth petition also requests forbearance from the Title II Common carrier regulations citing two laughable reasons. The first, so that Bellsouth may "*structure tailored private-carriage arrangements that meet the needs of independent ISPs without the burden and expense of Title II obligations*". Given that Bellsouth is both a supplier of underlying transport to the ESPs, and a direct competitor to the ESPs, what incentive would Bellsouth have to provide competitive private-carriage arrangements to its competitors absent of Title II obligations? Bellsouth's petition also includes an attached Fogle affidavit that discusses Bellsouth's failed attempt at providing a private-carriage

RBAN service. The widespread lack of interest in this untarriffed service among ESPs, as opposed to ESPs widespread adoption of Bellsouth's tariffed broadband products, dramatically demonstrates the need for continued Title II regulation.

Bellsouth's petition also asks Title II relief on the basis that ILECs do not have market power in broadband transmission. Such a claim is contrary to data presented previously in this opposition; primarily that: ADSL is the fastest growing broadband technology; ADSL already accounts for a substantial share of the broadband market; ADSL is already a market leader in at least two states and will soon lead in many other; ADSL has no technological substitute; and ADSL is the only technology of choice for many consumers.

Bellsouth's petition also states "because ILECs lack market power in broadband transmission, they cannot charge unjust or unreasonably discriminatory rates". Examination of Bellsouth's current pricing structure should be analyzed with regard to this statement. According to the Bellsouth website as of 12/20/04 base pricing for their retail broadband services ("FastAccess DSL") are as follows: FastAccess DSL Lite -- $34.95/month; FastAccess DSL Ultra -- $42.95/month; FastAccess DSL Xtreme -- $54.95/month. Curiously, the Bellsouth website also states, "

> *"*In Louisiana and Georgia, the price requires BellSouth retail local voice service. For customers without BellSouth retail local voice service, the prices are as follows:*
>
> *FastAccess DSL Lite - $44.95*
> *FastAccess DSL Ultra - $52.95*
> *FastAccess DSL Xtreme - $64.95"*

Why is Bellsouth's pricing for its broadband services higher if the consumer does not also have Bellsouth's local voice service. From the consumer's perspective, they are purchasing exactly the same broadband service regardless of who provides their local

voice service. Yet the rates are very different. Does this amount to unjust and/or unreasonably discriminatory pricing?

IV. CONCLUSION

The Commission should deny Bellsouth's petition in its entirety and in all parts for failure to meet the requirements for forbearance under subsection (a) of 47 USC Sec. 160.

Respectfully submitted,

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