20 December 2004

Marlene H. Dortch
Office of the Secretary
Federal Communications Commission
445 12th St., SW
Suite TW-A325
Washington, D.C. 20554

Re: WC Docket No. 04-405

Please accept these comments in opposition to the request of BellSouth Telecommunications, Inc., for Forbearance.

Introduction

WinNET Communications, Inc (Win.Net Internet) is an Internet Service Provider located in Louisville Kentucky. We serve the area from Corydon Indiana, Southern Indiana (Louisville MSA), Louisville, Central Kentucky, and Frankfort and Lawrenceburg Kentucky. These areas encompass Verizon, SBC, and BellSouth territories.

We were started in 1990. We were a pioneer of the Internet business. We developed the 1st Microsoft Windows software application for accessing Internet email and sold the software worldwide. After Al Gore and others discovered the Internet we ultimately focused on providing local Internet access at the Dial-up, DSL, Wireless, and T1 level plus Web Hosting mostly in our immediate market area.

We have been involved in the community and have provided nearly 600 free Internet seminars in the Louisville, Frankfort, and Southern Indiana area over the last several years. We have participated with the Louisville Chamber of Commerce on an early initiative, Get Wired, to promote Internet use in this area and even today we have the Get Net initiative we are working together jointly on with the Southern Indiana Chamber of Commerce – an underserved area.

In addition to being an ISP, we have a CLEC subsidiary with interconnection agreements with the three ILEC's in our areas of service.

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A Comment on the Implementation of the 1996 Telecommunications Act.

It is breathtaking to me how poorly the FCC has implemented the 1996 Telecommunications Act. There are many ways the Congress might have chosen to open up the local telephone network of the United States. It might have, for instance, simply allowed competitors to exist (not legal before '96), required the ILEC's to interconnect with the new competitors (probably a good idea), allowed ILEC's to enter the long-distance market (hey competition is competition and it isn't the FCC's concern with what happens to AT&T, MCI, Sprint, et. al), but still require ILEC's to provide equal access to the long-distance companies (a fig leaf of fairness).

The Congress might have done it this way, and the FCC might have preferred it this way, but Congress didn't. The Congress seems to have concluded that simply making competing service legal would not be sufficient to bring about competition. After all, rarely do we see a second cable system develop, even though local franchise agreements in many places now permit it – it doesn't happen. This is how and why telephone, power, cable, and water monopolies (utilities) have been justified for a century (not to mention roads, trash collection, recycling, police, and fire).

Congress also concluded that simply dropping a bomb on the long distance industry was probably not a good idea either. I'm sure it was clear that once the ILEC's swallowed up the long distance market that consumers would be hurt because who would be left to provide competition?

Congress seems have devised a system of requirements and incentives designed to unwind a monopoly that was created on the back of ratepayers for the last 100 years. They did not envision simply letting loose of these monopolies in the name of recently discovered competition.

I suspect what they had in mind was to try to develop a competitive landscape similar to that which existed in the long-distance market after the 1982 Consent Decree. In long-distance competition, we developed new competitors all across the spectrum. There were hundreds of one-person long-distance phone companies using wholesale services provided by Wiltel, et. al. There were medium sized providers with their own switches but no wires. And there were larger carriers with switches, wires, and all (most selling wholesale to the others). In true American style, many of these smaller guys got bigger. But they would never have had the opportunity, if they hadn't been able to start small. In long-distance, all of that happened. Fortunes were made and some were lost, customers got increasingly better rates, and even AT&T won a Malcolm Baldrige National Quality award for it efforts to retain customers. It was a great competition and we all benefited.

Congress may have had in mind the experience of the long-distance market, but this is not what they got. Instead, it seems the FCC has adopted a plan that is closer to the take off the regulations and let the monopolies all go at it with each other plan – especially the Cable and Phone monopolies. Intermodal competition I think you call it.

One requirement of the 1996 Act was that the ILEC's provide Resale (Sec 251 (c) 4). That was where all the small businesses - one person operations and others - were

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supposed to enter I guess. I suspect one could measure the competitiveness of an industry by the percentage of one to a few person enterprises that exist within it. But the Resale rates were terrible. A few tried anyway, but failed right away. The Bell's managed to avoid the requirement of the 1996 Act, by charging an unfair price. The FCC allowed this to happen.

Then there was UNE-P. Ok, so we didn't get off to a perfect start, but better late than never. Even though the Bell's would do what they can to undermine the spirit of this by not allowing DSL to be sold over a UNE-P/UNE line even though there was no technical reason for that. Still, UNE-P was the resale rate that should have been there from the beginning so it was off to the races! Then – bam! The FCC manages to bungle things, muddy the water, and ultimately kill UNE-P.

So, here we are about to begin 2005 – 9 years after the 1996 Act – and there is NO VIABLE RESIDENTIAL COMPETITION to speak of. Good job FCC. And there is no reasonable implementation of the requirement to Resell in the 1996 Act. The FCC may prefer intermodal competition, but the 1996 Act is the law of the land and you have done a poor job implementing it. Cable has barely scratched the surface, and due to FCC mishandling, no one else can touch residential.

In 9 years you have not implemented important sections of the 1996 Act and worse you have taken us all on a roller coaster ride of false starts. You really need to convene an internal review committee to look at your failure in this area. The country is littered with bankrupt and destroyed telecommunications businesses and much of that can be blamed on the FCC.

I believe that Congress wanted to not only open up the Bell's to competition by small providers, but very importantly open up local competition to the major long distance carriers. The delay and elimination of reasonable Resale/UNE-P rates has effectively destroyed local competition by the major long-distance carriers (except where they became the ILEC). Your implementation of the Act has just about destroyed the long-distance carriers. A representative of BellSouth testified to a Kentucky legislative committee in the last two months that BellSouth now has a 40% market share in long distance. In just a few years! But what about the long-distance providers share of the local market? Does it exist?

The FCC's implementation of the 1996 Act has allowed the Bell's to essentially remonopolize the phone network in many important ways. In the residential market you have not only not opened up the market to competition as envisioned by the 1996 Act, you have rolled the market back to the 1970's – everything offered by one company including long-distance. I think it is quite likely that the companies born of the Consent Decree, will be destroyed not be the 1996 Act, but by your implementation if it.

Finally, I think all one has to do is look at the nearly complete absence of ILEC's in each other's territories to know that a fair competitive landscape was never implemented. Who would be better to enter the local phone business in another market than one of the ILEC's? They have everything they need. But they didn't? Why? Because they choose to all stand on one side and bully the FCC onto their cause. That is why after 9 years

there is no reasonable implementation of the Resale provision. That is why long-distance carriers have been blocked from being viable local competitors. That is why many CLEC's are bankrupt or gone. And that is why ISP's have to fight for the chance to stay alive now.

Opposition to the petition

We stand in opposition to BellSouth's request for forbearance.

1. For 100 years (more or less), ratepayers of the US were charged monopoly regulated rates for the build-out of the ILEC's networks and prevented from building a competing system. With the 1996 Telecommunications Act, these private companies where handed these networks free of charge, but with a few strings attached – fees if you will for the 100 year guaranteed rate of return. These strings are absolutely fair. Just because there are other companies out there that don't have these same strings attached, doesn't mean that the ILEC's aren't getting a great deal.

   Cable may not have these specific requirements (we think they should), but they have others placed by the various municipalities. Our local cable company has to provide free access channels and provide fiber for the school system data network (a pretty big requirement). So while the specific requirements are not the same, it is not quite as unfair as BellSouth might lead us to believe. Plus, BellSouth has other benefits. In the state of Kentucky, BellSouth is exempt from all local taxes (over 100 year old law). In Louisville, all telecommunications companies have to pay a new usage tax to use the public rights of way – all but BellSouth.

   The US auctions spectrum – billions paid for the opportunity to then spend billions more developing a national networks. How much would an auction of the national copper/fiber network of the Bell companies fetch? This auction hasn't and won't happen, but the relatively few requirements including these regarding DSL are not too high a price to pay.

2. Contrary to the statements of BellSouth, there are very few viable providers of broadband services out there. 1st, it is important to consider at least two parts of the market: residential and business. In the residential market, Cable and DSL are the two main choices. They are not available everywhere. We get calls every day from customers looking for just one choice. But two choices do not a competitive marketplace make. You can find Duopoly in the next chapter to Monopoly in the economics texts. One company picks a price, the other follows suite and without direct collusion you have now effectively fixed the price. One, two, or even three and four choices are not the sign of a competitive market. Compare with long distance where you may have hundreds of long-distance choices.

   Wireless and Satellite are offered as additional choices. Our company offered unlicensed spectrum wireless service for a couple of years but ultimately we had to shut it down. We service a mostly urban business market and interference and

reliability were just too great of issues. You tend to see this kind of wireless in rural markets that have no DSL or Cable choices. The numbers on Satellites tell the story – there just aren't many very good options (by BellSouth's numbers, fewer than 340,000 lines for wireless and satellite). On top of other issues, Satellite, at least geosynchronous satellites, can never be used for new services like VOIP due to the limitations of Physics – the speed of light. Two satellite users talking to each other using VOIP would experience ½ second delays which is just not good enough.

In the business market – which is our primary market – Cable is largely absent. Very few businesses have cable for television, so the option for cable for Internet is not normally present. Our customers use DSL or T1 with DSL being by far the most used (due to cost). We can only deliver DSL to our customers on the ILEC's DSL lines or not at all.

3. BellSouth is using this request not to open competition, but to limit it. If forbearance is granted, BellSouth will be able to shut down nearly all of its competition on DSL. They have already been very successful as they cite: 90% of their DSL lines are used by themselves at retail. Why? Because they have been able to charge unreasonable rates (see what they did to Resale CLEC rates for an example). Still, they should not be allowed to destroy what remains. Instead, I would ask the FCC to actually look closely at how BellSouth uses DSL to limit phone competition. They do not allow DSL to be used with CLEC circuits (UNE-P or other UNE forms). As an ISP we have to go around switching customers back to BellSouth in order to provide DSL to them. But there are almost no other providers of DSL around the BellSouth region (just Covad and only in a few places).

   If BellSouth provided DSL on a fair basis to competitors, without having to have a BellSouth phone circuit, then we and others would be able to deliver VOIP over DSL and cut the customer's costs in half. However, since the customer has to have a BellSouth phone line with each DSL circuit, residential customers don't switch to VOIP. This is a barrier to development of advances services.

4. BellSouth will use forbearance to limit competition in Business markets. In Business Markets, DSL is the dominant broadband service. Cable plays a very small role in business. Cable is a residential service. If BellSouth were to eliminate our access to DSL – or make it prohibitively expensive, we would be out of the business broadband business entirely. Further, our only other access method, T1's, has just recently been limited due to new FCC rules not allowing CLEC's access to UNE T1's in urban markets.

5. BellSouth is exaggerating their cost claims or deceiving about keeping Network Service Providers (users of their DSL network) on their network at market rates after forbearance. If it really costs BellSouth $3.50 per subscriber for all subscribers to support access by multiple Network Service Providers, and BellSouth uses 90% of the DSL service itself, then BellSouth would have to charge the 10% of who remain an additional $35 per subscriber for each Network

Service Provider subscriber to make up for this additional costs. At that rate, Network Service Providers would be paying far more than retail – and having to provide equipment, bandwidth, support, billing, etc., which would make no sense and they wouldn't do it. Clearly, either they are exaggerating their cost claims, or they intend to shut off all Network Service Providers. Alternatively, they might claim that much of the cost is a sunk cost, in which case the stated costs aren't relevant going forward.

In our experience, BellSouth and the other ILEC's have been acting on every front since the passage of the 1996 Telecommunications Act, to:

- Prohibit
- Delay, or
- Make too expensive

to competitors, services they believe are important to their future. Some examples with BellSouth:

1. In 1997 shortly after the passage of the Act, we purchased a DSL Access Multiplexer and a half dozen DSL modems intending to try deploying DSL ourselves. At that time, Cable or DSL was available in our area. At 1st we looked at one of the 1st local CLEC's existing Interconnection agreement (the company was ACSI – later e.Spire, now bankrupt and sold). DSL dry copper pairs cost approximately $12/month plus around $60 to install. Not unreasonable we thought. We requested an Interconnection agreement from BellSouth for ourselves. Our proposed Interconnection agreement had the monthly rate down to $11/month but up to around $300 to install – a five time increase! We asked why, and they said they did a study and concluded it costs them $300 to provide a dry copper pair. On the other hand, an ISDN line which is similarly conditioned only cost around $175 to install including port installation and configuration which is not needed on a DSL pair.

   Our conclusion was this: BellSouth knows they are going to deploy DSL; they have raised the rate for everyone who might get there before them (I know of no one in our state who was deploying DSL). In the end, we did not go forward with the Interconnection agreement and abandoned our effort to deploy DSL because of that unfair rate. We decided to wait for BellSouth wholesale DSL Rate.

2. BellSouth bring out their Network Service Provider (NSP) wholesale DSL. For the 1st time in my experience with BellSouth, they created a steep volume discount scale. If you could commit to 40,000 customers, you could get DSL for $29/subscriber. However, if you were a small ISP and couldn't commit immediately to more than 50 subscribers, your cost was $45/sub!! In all my experience with BellSouth, I had never seen them discount more than a few percent due to volume. The ISP Mindspring had made a public filing of their BellSouth telephone contract. They received an 8% discount for a $1 million/month volume commitment. But for DSL, you could get 36%!

Clearly, only BellSouth and one or two others could ever consider signing up for the service at the best rate. At the same time the retail rate for DSL was $49.95 or $39.95 with the Complete Choice plan (a bundle). An ISP has to pay not only for the T1 or T3 to connect to BellSouth's network, (approximately $4,000 for port and loop at the T3 level), but they pay practically retail for the DSL service. And provide equipment, setup, billing, technical support, email, and taking the credit risk. Consequently, most ISP's in our area including ourselves had to delay a year or more before entering the market. BellSouth had to share, but did not have to share at a fair price.

Eventually, BellSouth reduced the scale. Then finally, after a couple of years, BellSouth reduced the rate to a flat $33 (after a case against them with the KY PSC). By then, they were far and away the market leader in DSL and that is why they still have 90% of the market.

Points 1 and 2 illustrate the idea of using price to delay entry of competitors. 1st they stopped or slowed potential competitors at the CLEC level by charging a ridiculous install price (BTW, now that they offer DSL, their Interconnection DSL prices are back to normal). 2nd, they offer their wholesale product but at a volume levels completely advantageous to their own position and discriminatory to everyone else and especially the incumbent ISP's who at the time were the market leaders. Finally, when pushed to the wall in a case with the PSC, they do something more-or-less reasonable – long after they have established market dominance.

3. A few years ago the Kentucky Legislature passed utility fairness regulation. It basically said that KY utilities couldn't bundle non-regulated services with regulated and if they used things like bills to advertise unregulated services, they had to give access to others to do the same. BellSouth managed to get itself and other ILEC's exempted from the final version of the legislation. How? By claiming that the FCC, not the KY PSC, was the place to regulate BellSouth and they, the FCC, would protect consumer's interest. I've never seen anything from the FCC about bundling and advertising regulated and unregulated services. BellSouth uses bundling every day to build its non-regulated/lesser-regulated business using the regulated one. BellSouth offers DSL all they way down to $9.95/mo – far below the NSP wholesale rate when bundled with a bunch of other BellSouth services.

   Frankly, I've always wondered why this isn't illegal. In residential markets where most of this bundling takes place, BellSouth has a practical monopoly (and thanks to UNE-P rules will have even more market share). Why is BellSouth allowed to bundle like this? Such tying only has one purpose – to lock in subscribers and reduce competition.

4. Two years ago BellSouth persuaded the KY PSC to raise rates on all KY phone service to help fund the deployment of DSL in rural areas. So now, at least in Kentucky, BellSouth has effectively taxed all Kentucky rate payers to build their DSL network which they are now asking the FCC to hand over to them with no

strings attached and no requirement to reimburse anyone. I've got to hand it to these BellSouth people, they are really good!

One time in college I was in the library studying - well I was supposed to be studying. I ran across a book on the early formation of AT&T under Benjamin Strong. He had two rules: Universal Service and Good Customer Service. If we do these two things, he said, they will let us build a monopoly. He understood that Universal Service would be the lever he could use with politicians to permit the formation of a monopoly. He also knew that bad service could undermine that. It was a great plan, and it worked. Decades after the need for a monopoly had passed we still had a monopoly phone system.

Now, Benjamin Strong's descendants at BellSouth are using the siren song of Universal Service for broadband Internet service together with the modern impulse of unregulated competition to wrest away control of a network we have all paid to build without so much as a kiss or a thank you for the 100 years of guaranteed returns.

Summary

The granting of BellSouth's forbearance petition only serves to reduce competition in the business and residential markets. Consumers will be harmed because competitors will be eliminated by the hundreds or even thousands. One or two providers in a market segment is not competition, it is just monopoly and duopoly. The Bell companies have spent 100 years as monopolies, it seems to be in their bones to do all they can to maintain, broaden, or reassemble their monopolies.

The building of the BellSouth DSL network is paid for, not so much by investors, but by regulated rate payers who had no choice in the matter. In Kentucky's case, BellSouth specifically got a rate increase on phone service to pay for the deployment of its DSL network. Everyday it uses that network to prevent phone competition and if forbearance is granted would destroy what remains of every ISP from the local/regional ISP like ours, to the largest like Earthlink and AOL (AOL has recently withdrawn from broadband service in KY due to the existing unfair situation with BellSouth, et. al).

If the FCC grants this petition for forbearance, I would warn you to get ready for the next forbearance petition eliminating equal access to long distance carriers. The same arguments apply. I am sure equal access it quite a hassle and after all the Cable companies don't have to do it. I believe the FCC needs to come to terms with the fact that intermodal competition, where there are only one, two, or three modes, is just monopoly/duopoly/oligopoly by another name. Prices rise, choices are eliminated. If there is only the incumbent phone company and the incumbent cable company, there will be no competition – just two services similarly priced, and similarly featured (Cable modem service and DSL are practically interchangeable even now). Both sides will seek stability and will pretty easily be able to achieve it – after that – both sides get to hit the golf course. In fact, I suspect you will start to see Cable back away from deploying phone service and BellSouth back away from deploying Video. Why? For the same reason that none of the Bell companies went into each other's territories (except in the most trivial ways). If BellSouth can give up Video for which it has no expertise (or network), and Cable can give up telephone for which its network is not well suited (not as

reliable), and get a de facto truce with the other side – they'll do it and the consumer will be the worse for it.

The granting of forbearance reduces the likelihood of the emergence of VOIP as a reliable technology – especially in the residential market. To implement VOIP so that it can be used as a replacement service to POTS service, requires implementing quality of service configuration in the local BellSouth or Cable provided modem as well as in nearby network elements. Network Service Providers using BellSouth's DSL network are able and happy to do this – we control all the elements necessary. But why would either BellSouth or Cable want to do this if both offer existing phone services? Not only does it compete with existing services, it could permit national (or distant) companies to take away the voice customer entirely. If given the choice, BellSouth and Cable won't do it.

Similarly, forbearance reduces the likelihood of the emergence of Video over IP as a replacement for either Cable or Satellite. Why? Same reason as with VOIP. Two near monopoly companies would have to be powerfully motivated to chew each other up like that – they won't do it. Who looses? We all do.

What about wireless and other means of delivering Internet access? Well, unlicensed wireless (at least at present), is a poor competitor to either DSL or Cable which is why it exists mostly in rural underserved markets. Great for mobility in dense areas, it does not replace either residential or business service. Licensed wireless is better potentially, but very expensive and completely out of reach of small business ISP's. MMDS and other licensed bands seem to have disappeared from the market entirely (I had heard, and this is just a rumor, that BellSouth bought the MMDS license for Louisville and is sitting on it). Cellular wireless has promise for business users and travelers, and could maybe one day impact business or residential use – but this remains to be seen. Internet over Power Lines, great idea, if it works it brings three legs to the monopoly stool, but I would not expect to see this affect prices or innovation.

Finally, if BellSouth would like to build networks with no regulation, we recommend that the FCC encourage BellSouth to build a DSL and phone network in the 2/3's of the nation outside of their ILEC territory. We hear that all of the ILEC's are very fair in their willingness to open up their markets to new competitors. I'm sure they would feel quite welcome.

Sincerely,

Michael Tague
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