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Via ECFS
Ms. Marlene Dortch
Office of the Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: BellSouth Petition for Forbearance, WC Docket No. 04-405

Dear Secretary Dortch:

Attached for filing are the comments of DSLExtreme.com in the above referenced docket. Please contact me with any questions.

Sincerely,

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Counsel to DSLExtreme.com

Enclosures

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Before the
Federal Communications Commission
Washington, DC 20554

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

SUMMARY

BellSouth argues that Title II common carriage should be eliminated, and BellSouth should be allowed to price DSL transport at "market rates." In effect, the Commission already allows this to occur throughout the residential DSL market. Independent ISPs already pay more for the required wholesale inputs from the ILEC to sell retail DSL services than the incumbent's ISP charges for retail DSL alone. BellSouth proves this point already given that its ISP controls over 90% of the DSL market in its local territory,[1] as is the case with most other ILECs as well. BellSouth is now asking for permission for all ILECs to engage in predatory pricing. The real goal of this Petition is to destroy the independent Internet service provider industry. This Petition should be summarily denied and, in fact, should spur the Enforcement Bureau to initiate an immediate independent review of the wholesale versus retail price in the DSL market.

I. Introduction

DSLExtreme.com ("DSLExtreme") is an Internet service provider ("ISP") based in southern California. It is one of the most highly rated independent ISPs in the United States. DSLExtreme is also one of the top five wholesale customers of digital subscriber

[1] "'The change would not reduce competition,' Curtin says, 'because more than 90 percent of DSL users in BellSouth's area are BellSouth retail customers and only 10 percent are served by other ISPs.'" Charlotte Wolter, *BellSouth Petition a Threat to VoIP, Says Pulver*, XChange Magazine, November 19, 2004, available at http://www.x-changemag.com/hotnews/4bh19114724.html. The real question here is, how did the FCC allow this to happen?

line transport ("DSL transport")[2] from SBC and Verizon. DSLExtreme has operations in BellSouth territory but only through a wholesale agreement with Covad Communications. DSLExtreme does not purchase DSL transport from BellSouth yet, but is considering doing so in the near future.

II. Forbearance Prongs Have Not Been Met

A. All Three Prongs Must Be Met

There are three prongs that a Petitioner must show in order for a Petition for forbearance to be granted. The first is that enforcement is not necessary because rates are not discriminatory. The second prong is that enforcement is not necessary for the protection of consumers. The third prong is that forbearance is consistent with the public interest. All of these prongs must be met for the Petition to be granted.

B. Enforcement Necessary Because Discrimination is Ongoing

The first prong requires the Commission to forbear if enforcement "is not necessary to ensure that the charges, practices, classifications, or regulations" are "just and unreasonable and not unjustly and unreasonably discriminatory."[3] This prong can not be met and the Petition should be summarily dismissed as a result.

ILECs, apparently including BellSouth, have engaged in predatory pricing with their DSL transport offering for years now. As long as it costs an ISP more to buy the inputs for DSL services from an ILEC than the combined cost of that ILEC's ISP DSL retail price, this Petition cannot be granted. Such a pricing policy is unjust, unreasonable, and discriminatory on its face.

As one example, DSLExtreme buys DSL transport from Verizon in southern California via Verizon's federal tariff. The wholesale price for DSL Transport from Verizon is

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[2] DSL service is comprised of a combination of many inputs. The most vital is DSL Transport, an ISP's connection between its end user customers and the Internet, which is a telecommunications service purchased from ILECs. To provide DSL-based Internet service to end users, ISPs utilize their own facilities to provide Internet access, email connectivity, instant messaging, online gaming, virtual private networks, and many other applications and services.

[3] 47 U.S.C. § 160 (a).

$28.95 per month, plus universal service fees,[4] for a total of $32.05. Verizon requires an ISP to pay an initial non-recurring set-up fee of $60 and $99 for a DSL modem. In addition, ISPs must purchase a DSL traffic aggregation circuit from Verizon to carry this traffic back to DSLExtreme's equipment with a per customer charge averaging around $1.50 per month. The total charges in a year to service a customer are, therefore, $561.60. On a per month basis then, an ISP's average cost would be $46.80.

Meanwhile, Verizon Online, Verizon's affiliated ISP, is charging $29.95 plus USF for a total of $33.15 per month for retail DSL to their customers. That is an impossible market in which to compete already. But, an ISP has additional costs as well such as commercial rent, personnel salaries, marketing expenses, bad debt allowance, email, access to the Internet itself, equipment maintenance, etc. normal costs of running a business. Never mind actually hoping to make any profit. Given this situation, it is actually astonishing that any independent ISPs still survive.[5]

ILECs already have all the pricing power they need to make life very difficult for ISPs. BellSouth's success is apparent in the fact that its ISP claims control of 90% of the DSL market in its territory. This was not achieved by better service; independent ISPs are routinely rated as having better overall service whether it is customer support or variety of enhanced services offered. This market domination was achieved by simple price pressure, the oldest monopoly trick in the book. Thus far, the Commission has actively ignored this issue under the policy guise of seeking "intermodal" competition. That is bad public policy.

Granting BellSouth's Petition would allow this type of predatory pricing to continue without any hope of regulatory oversight. The Commission should not believe that ILECs will engage in real commercial negotiations on pricing. Pricing will be set an impossible rate and it will be nonnegotiable, as it already is. Should the Commission really expect ILECs to reduce the pricing of wholesale DSL inputs if regulatory oversight

[4] At 10.7 percent for the first quarter of 2005 per the latest universal service contribution factor.

[5] Verizon is also suggesting that ISPs move away from their current facilities-based approach to DSL and to simply resell Verizon Online's service. And, they are offering this service for $25, more than $3 less than the wholesale price of DSL transport alone. Such antics should not be possible.

is removed? The Commission needs to step in and fix this industry, not grant the ILECs a monopoly.

III. Elimination of Common Carriage Requirement Premature

This is the real goal of BellSouth's Petition, and the great hope of ILECs everywhere. ILECs want to eliminate independent ISPs as a class of competitor. The interesting question to ask is why? Independent ISPs actually pay more for DSL transport than do ILEC-affiliated ISPs, usually as a result of volume discounts enjoyed by ILEC ISPs. Then these ISPs must purchase backhaul aggregation circuits from the ILEC as well and spread these costs over far fewer customers. So practically speaking, BellSouth actually makes more in revenue per month from an independent ISP than it does from its own ISP. Yet they want to eliminate the channel.

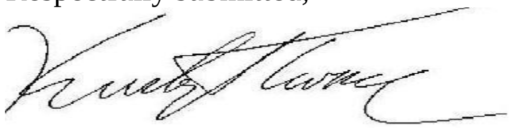
The real motivation here is to limit competition not only in broadband, but in all other services that can be provided over a broadband network. BellSouth is not really concerned with having the ability to make special deals for ISPs; that would already be possible via contract tariffs. Their real goal is to have the ability to force contract "negotiations" whereby BellSouth can demand ISPs pay even higher rates for DSL transport to ensure that the pesky 10% ISP competition is erased permanently. Then BellSouth can return to the standard ILEC playbook—give the ratepayers only what we want to give them, and at the highest possible profit margin.

IV. The Petition Should be Denied in its Entirety

The FCC must acknowledge that granting this Petition will destroy the companies that created the Internet market and leave consumers with a choice between only two services for the foreseeable future. Give the current sad state of residential voice competition, this is bad policy. ISPs such as DSLExtreme may be the only entities in any position to provide competition to the cable/ILEC duopoly in an IP world. ISPs have thousands of customers and local brand recognition. They understand how to effectively move packets on their networks. By participating in the destruction of the independent ISP industry, the FCC will be missing the sole remaining chance for real, facilities-based competition to arise in the residential marketplace.

The Petition should be denied in its entirety.

Respectfully submitted,



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