

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

In the Matter of)	
)	
Petition of Qwest Corporation for Forbearance)	
Pursuant to 47 U.S.C. § 160(c))	WC Docket No. 04-416
Pertaining to Qwest's xDSL Services)	

BELLSOUTH'S COMMENTS

BellSouth Corporation, for itself and its wholly owned affiliated companies (collectively "BellSouth"), submits the following comments in support of the above-captioned Petition for Forbearance filed by Qwest ("Qwest Petition").¹

On October 27, 2004, BellSouth filed a Petition for Forbearance seeking relief from the Computer Inquiry and Title II common carriage regulations, including tariffing requirements, for broadband services ("BellSouth Petition"). The Qwest Petition, likewise, seeks relief from vestiges of this antiquated system. The relief sought by both BellSouth and Qwest relates to requirements that were established to regulate a carrier that is dominant in the market. Such dominant carrier regulation² is unnecessary when effective competition exists in the market. Moreover, dominant carrier regulation is particularly inappropriate when the market leaders in broadband service – cable modem providers – are not burdened by such regulations. This irrational framework of saddling incumbent local exchange carriers ("ILECs") with regulatory obligations that do not apply to cable modem providers harms the market by stifling deployment

¹ *Comments Invited on Petition for Forbearance Filed by Qwest Corporation Regarding Qwest's DSL Service*, WC Docket No. 04-416, *Public Notice*, DA 04-3602 (rel. Nov. 16, 2004).

² BellSouth refers to the specific relief sought in both the BellSouth Petition and Qwest Petition as "dominant carrier regulation" throughout these comments.

and innovation. The public interest is best served by ensuring that *all* competitors have incentives to invest in and to deploy advanced services rapidly.

The BellSouth Petition and the Qwest Petition effectively demonstrate that all the elements of Section 10 of the Telecommunications Act 1996 (the “Act”), fortified by Section 706, have been met, which justifies forbearance of dominant carrier regulation in the broadband market. Accordingly, the Commission should grant both petitions.

A. The Commission Must Implement its Forbearance Mandate

Section 706 of the Act requires the Commission to use regulatory forbearance and other measures to encourage the rapid deployment of advanced services to American consumers.³ The Commission cannot satisfy this statutory command without eliminating unnecessary and uneven regulation of ILEC broadband services. Market distortions caused by asymmetrical regulation cannot be justified in a competitive market, let alone a converging market.⁴ In the absence of regulatory relief, evidence has shown that ILECs are inhibited in the offering of broadband services and are forced to incur costs not borne by their competitors, which harms the public interest and adversely impacts competition in the market.

Section 10 directs the Commission to forbear from enforcing any regulatory or statutory requirements that “inhibit or distort competition in the marketplace, represent unnecessary regulatory costs, or stand as obstacles to lower prices, greater service options, and higher quality

³ § 706(a) and (b), Pub.L. 104-104, Title VII, Feb. 8, 1996, 110 Stat. 153, reproduced in the notes under 47 U.S.C. § 157.

⁴ See *Implementation of Sections 3(n) and 332 of the Communications Act, et al.*, GN Docket No. 93-252, PR Docket Nos. 93-144 & 89-553, *Third Report and Order*, 9 FCC Rcd 7988, 7996, ¶ 13 (1994) (“*CMRS Regulatory Parity Order*”) (broadly interpreting statutory terminology to “promot[e] uniformity in CMRS regulation and, thereby, minimize[] the potentially distorting effects of asymmetrical regulation.”).

services for American telecommunications consumers.”⁵ Section 706 in turn commands that broadband services be promoted through robust competition and prescribes regulatory forbearance as a means of fostering such competition. The dominant carrier regulation of broadband services identified in the BellSouth and Qwest Petitions represent exactly the type of unnecessary obstacles that must be removed.

Specifically, Section 10 *requires* the Commission to forbear from applying any regulation or provision of the Act if the Commission determines that: (1) enforcement is not necessary to ensure that the rates and practices of a telecommunications carrier or service are just, reasonable and not unjustly or unreasonably discriminatory; (2) enforcement is not necessary to protect consumers; and (3) forbearance is consistent with the public interest.⁶ In assessing the public interest, the Commission must consider whether forbearance will promote competitive market conditions and enhance competition among service providers.⁷

In order to accomplish the broadband objectives of our country,⁸ the Commission must forbear from enforcing dominant carrier obligations of broadband services that currently shackle

⁵ *Personal Communications Industry Association’s Broadband Personal Communications Services Alliance’s Petition for Forbearance for Broadband Personal Communications Services, et. al*, WT Docket No. 98-100, *et al.*, *Memorandum Opinion and Order and Notice of Proposed Rulemaking*, 13 FCC Rcd 16857, 16859, ¶ 2 (1998) (“PCIA Order”).

⁶ 47 U.S.C. § 160(a).

⁷ 47 U.S.C. § 160(b).

⁸ As President Bush recently stated “A proper role for the government is to clear regulatory hurdles so those who are going to make investments do so. Broadband is going to spread because it's going to make sense for private sector companies to spread it so long as the regulatory burden is reduced — in other words, so long as policy at the government level encourages people to invest, not discourages investment.” Remarks by the President at the American Association of Community Colleges Annual Convention, Minneapolis Convention Center, Minneapolis, Minnesota, Apr. 26, 2004, *available at* <http://www.whitehouse.gov/news/releases/2004/04/print/20040426-6.html>.

non-dominant ILECs. As explained below, in the broadband services context where the ILECs are not the exclusive, or the even the primary means by which consumers obtain broadband services, forbearance from regulation created for dominant carriers will allow ILECs to satisfy consumer demands more efficiently and at lower rates.

Basic economic principles instruct that “aspects of dominant carrier regulation may hinder competition . . . if applied to a carrier that no longer possesses market power.”⁹ In a competitive environment market forces amply protect the public from unreasonably high rates and undue discrimination.¹⁰ Non-dominant firms lack the incentive to charge rates or engage in anticompetitive practices because, simply, customers could move to competitors.¹¹ In the broadband services market, ILECs have no incumbency advantage or market power, and thus,

⁹ *Comsat Corporation Petition Pursuant to Section 10(c) of the Communications Act of 1934, as amended, for Forbearance from Dominant Carrier Regulation and for Reclassification as a Non-Dominant Carrier, et al.*, File No. 60-SAT-ISP-97, *et al.*, Order and Notice of Proposed Rulemaking, 13 FCC Rcd 14083, 14118 ¶ 66 (1998) (“Comsat Order”).

¹⁰ See *Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor*, CC Docket No. 79-252, *First Report and Order*, 85 F.C.C.2d 1 (1980); *Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor, Second Report and Order*, 91 F.C.C.2d 59, 71-73 (1982) (“Competitive Carrier Second Report”); *Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor, Third Report and Order*, Mimeo No. 012, rel. Oct. 6, 1983, 48 Fed. Reg. 46,791 (Oct. 14, 1983) (“Competitive Carrier Third Report”); *Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor, Fourth Report and Order*, 95 F.C.C.2d 554 (1983) (“Competitive Carrier Fourth Report”), vacated *sub nom. American Tel. and Tel. Co. v. FCC*, 978 F.2d 727 (D.C. Cir. 1992); *Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor, Fifth Report and Order*, 98 F.C.C.2d 1191(1984) (“Competitive Carrier Fifth Report”); *Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor, Sixth Report and Order*, 99 F.C.C.2d 1020 (1985) (“Competitive Carrier Sixth Report”), vacated *sub nom. MCI Telecommunications Corp. v. FCC*, 765 F.2d 1186 (D.C. Cir. 1985).

¹¹ See *Competitive Carrier Second Report*, 91 F.C.C.2d at 73; *Competitive Carrier Fourth Report*, 95 F.C.C.2d at 578; *Competitive Carrier Fifth Report*, 98 F.C.C.2d 1191; *Competitive Carrier Sixth Report*, 99 F.C.C.2d 1020; see also *Comsat Order*, 13 FCC Rcd at 14090-91, ¶ 9.

the Commission must not retain the dominant carrier regulation described in the Petitions over ILECs' broadband services.

The presence of actual and imminent competitors in the broadband services market will ensure just, reasonable, and not unreasonably discriminatory prices and practices by all competitors. Each competitor, ILECs included, started with *zero* market share and *no* incumbent advantage, and therefore does not have the ability to lock up supply or economic incentive to increase prices. If an ILEC were to charge an above-market price for, or to impose stringent terms and conditions on DSL service, for example, consumers could simply switch to another broadband services supplier. Indeed, cable modem providers far exceed ILECs in the provision of broadband services and continue to deploy facilities in order to reach an ever-increasing number of consumers. Thus, no one can seriously argue that strong competition is lacking in the broadband services market.

Nor could an ILEC charge predatorily low prices for broadband services. Predatory pricing only occurs when there are barriers to entry and when the predating firm has the subsequent ability to raise prices to recoup its costs.¹² Barriers to entry in the broadband services market are low and an ILEC cannot keep other firms from entering the market. Consequently, because they lack market power, ILECs could not recoup profits lost through any attempted predatory pricing scheme.

¹² See *Price Cap Performance Review for LECs, et. al*, CC Docket Nos. 94-1, 93-124, 93-197, *Second Further Notice of Proposed Rulemaking in CC Docket No. 94-1*, *Further Notice of Proposed Rulemaking in CC Docket No. 93-124*, and *Second Further Notice of Proposed Rulemaking in CC Docket No. 93-197*, 11 FCC Red 858, 870-71, ¶ 22 (1995); *Policy and Rules Concerning Rates for Dominant Carriers*, CC Docket No. 87-313, *Notice of Proposed Rulemaking*, 2 FCC Rcd 5208, 5216, ¶ 48 (1987).

B. Consumers Are Adequately Protected Without Dominant Carrier Requirements

Competitive market conditions for broadband services also amply protect consumers. In fact, the Commission has stated that “[c]ompetitive markets are superior mechanisms for protecting consumers by ensuring that goods and services are provided to consumers in the most efficient manner possible and at prices that reflect the cost of production.”¹³ Thus, a market-based approach for competitive broadband services offers the best form of protection for consumers.

Conclusion

When an entity no longer possesses market power in a relevant market, the Commission must relieve it of regulations created to protect against abusive market power.¹⁴ Maintaining the dominant carrier regulations described in the Petitions in the highly competitive broadband services environment is unfair, creates inefficiencies, and only hurts consumers by delaying the deployment of broadband services.¹⁵ Conversely, forbearance will stimulate competition by leveling the playing field for all providers and will facilitate innovative integrated service offerings designed to meet changing market conditions.

¹³ *Access Charge Reform; Price Cap Performance Review for Local Exchange Carriers; Transport Rate Structure and Pricing End User Common Line Charges*, CC Docket Nos. 96-262, 94-1, 91-213 & 95-72, *First Report and Order*, 12 FCC Red 15982, 16094, ¶ 263 (1997).

¹⁴ *Comsat Order*, 13 FCC Rcd at 14097, ¶ 21.

¹⁵ *Id.* at 14092, ¶ 12.

The public interest, and Section 706's explicit command to ensure rapid deployment of broadband services to all Americans, compel the Commission to promote broadband services competition through aggressive Section 10 forbearance.

Respectfully submitted,

BELLSOUTH TELECOMMUNICATIONS, INC.

By: /s/ Stephen L. Earnest
Stephen L. Earnest

Its Attorney

BellSouth Telecommunications
675 West Peachtree Street, N. E., Suite 4300
Atlanta, Georgia 30375
(404) 335-0711

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CERTIFICATE OF SERVICE

I do hereby certify that I have this 6th day of January 2005 served the parties of record to this action with a copy of the foregoing **BELLSOUTH'S COMMENTS** by electronic mail to the parties listed below:

Marlene H. Dortch
Office of the Secretary
Federal Communications Commission
445 12th Street, S. W.
Room TW-B204
Washington, DC 20554

Best Copy and Printing, Inc.
The Portals, 445 12th Street, S.W.
Room CY-B402
Washington, DC 20554

/s/ Lynn Barclay
Lynn Barclay