

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 )  
Application of *Computer Inquiry* and Title II )  
Common Carriage Requirements )

Docket No. 04-405

REPLY COMMENTS OF PULVER.COM

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## REPLY COMMENTS OF PULVER.COM

Pursuant to Section 1.2 of the Commission's Rules, 47 C.F.R. § 1.2, pulver.com submits these Reply Comments in response to BellSouth's Petition For Forbearance from enforcing the *Computer Inquiry* and Title II common carrier regulations for broadband transmission services.<sup>1</sup>

### I. INTRODUCTION

pulver.com believes that a broadly deregulated environment is the best method to spur the growth and advancement of broadband and advanced IP-based communications services and technologies. There, generally, should be no regulation of any Internet-based application, including voice, particularly in the absence of a demonstration of monopolistic or anti-competitive control by an Application Service Provider ("ASP") over consumers. There, however, is potential for an entity that controls access to a consumer, or has inordinate control over a computer application or operating system, to use that control to interfere with the consumer's ability to control or maximize their communications experience. This ability to thwart a consumer's communications experience has been the historic impetus for common carrier regulation, generally, and *Computer Inquiry* rules, in particular. With the emergence of IP technology, which separates the application from the underlying telecom transmission service, it might be possible for the Commission to relax and unify certain common carrier obligations, particularly as they relate to the delivery of IP-based communications applications.

There, however, must be some minimal rules in place, and to be applied equally across

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<sup>1</sup> See Public Notice, "Comments Invited on Petition for Forbearance Filed by BellSouth Telecommunications, Inc. Regarding Incumbent LEC Provision of Broadband," DA 04-3507 (rel. Nov. 3, 2004).

delivery platforms, to assure competitive choice and communications control by the consumer before the Commission further eliminates existing common carrier obligations and safeguards.

Regulators and representatives on all sides of the communications industry have pointed to IP, the Internet and broadband as the impetus for telecom deregulation. Regulators across the political spectrum, including both Chairman Powell and Commission Copps have pointed to the ability of “net neutrality” or “net freedom” as a vehicle to allow for further deregulation while ensuring consumer protection and consumer empowerment. Regulators, however, cannot point to net freedom as the enabler of deregulation, then deregulate and never implement net freedom rules. That would be an unfair bait and switch on consumers and would-be IP innovators. The deregulated world without meaningful net freedom is a world in which consumers might be too-readily subjected to the unilateral judgment of unregulated monopolists.

The Commission has done much to move the communications industry to a less regulated model, while simultaneously attempting to ensure a sustainable competitive marketplace, an environment that encourages innovation and entrepreneurship, and a regulatory structure that provides for parity across platforms and encourages deployment of more robust, IP-capable, broadband networks. This is a delicate tightrope walk, and, to date, the Commission has carefully negotiated the precipice, but it is essential for the Commission to solidify this vision by memorializing the concepts of consumer empowerment and net freedom.

Although pulver.com, itself, does not rely on *Computer Inquiry* rules, pulver.com believes that there is some value in preserving the *Computer Inquiry* and other common

carrier rules unless and until the Commission adopts meaningful, sustainable and enforceable net freedom rules that would apply across platforms and would ensure that consumers may control their own communications experience.

The heart of the debate before the Commission in this proceeding and in the other related common carrier deregulation efforts centers around whether the Commission needs to preserve common carriage rules (at least at the telecom transmission level through unbundling or preservation of *Computer Inquiry* rules) to ensure competition at the applications layer or service level, or whether simple consumer empowerment and net freedom rules would be sufficient to ensure competition and innovation. At the moment, there is an ongoing need to preserve some form of common carrier obligation, but, if implemented properly, net freedom could prove to be the vehicle to do away with many of the more onerous, inconsistently applied common carrier rules, including those derived from *Computer Inquiry*. The right answer will be essential to establishing the regulatory structure that will ensure the long-term sustainability of IP-based communications in a manner that both ensures competition and promotes broadband deployment and innovation.

## **I. DISCUSSION**

Before the Commission grants BellSouth's Forbearance Petition or otherwise eliminates any other common carrier obligations currently imposed upon controllers of bottleneck access facilities, the Commission should adopt a set of rules that would ensure that consumers are genuinely able to control and maximize their own communications experience without being subject to the will or whims of any entity, be it a carrier or

otherwise, that has excessive control over the consumer or the consumer's access to the Internet or the consumer's Internet experience. In addition to adopting these rules, pulver.com asks that the Commission establish certain and expedited enforcement mechanism to ensure that no entity is able to circumvent these rules and thereby deny consumers fair access to the Internet and the ability to control and maximize their communications experience.

pulver.com, itself, does not directly rely on *Computer Inquiry* for its access to consumers. pulver.com simply needs broadband access to consumers and an assurance that no entity may choke, curb, degrade or otherwise undermine the quality of that access. Nor should any entity be allowed to compel an end-user to receive any additional services (most notably voice) in order for that end-user to have unfettered broadband access to reach the applications and services of his or her own choosing. pulver.com writes these Reply Comments primarily to express its concern that BellSouth's Forbearance Petition, if granted without prior adoption of baseline consumer and competition safeguards, might cause serious problems for the ability of unaffiliated ISPs and VoIP Application Service Providers (without their own underlying telecom transmission facilities) to reach consumers and to continue to be viable providers of IP-based communications services. From a public policy perspective, it is essential that the Commission ensure that consumers may control and maximize their own communications experience through official Commission adoption of consumer empowerment or net freedom rules.

Without guaranteed access to the broadband transmission services, unaffiliated ISPs and VoIP providers, especially those without significant purchasing power, could be left with little to no access to consumers -- especially as competitive access, through

CLECs and other alternate access providers, becomes more restricted through evisceration of unbundling and other common carrier rules. Conceivably, nothing (except perhaps antitrust laws which, themselves, have been curtailed in recent years) would ensure that incumbent LECs offer interconnection or access services to any entity other than their own unregulated ISP or VoIP affiliates. pulver.com is concerned that without some regulatory backstop, grant of this Petition might undermine deployment of new technologies and services, innovation at both the edge and within the network, and the emerging application and service competition. If unaffiliated VoIP providers are left to the whims of the last-mile access provider or controller of the underlying telecom transmission facilities, end-user will not be able to fully avail themselves of the capabilities, powers and promise of IP-based communications. pulver.com believes many of the potential anti-competitive consequences that could arise in the wake of elimination of *Computer Inquiry* or other common carrier rules could be overcome by meaningful implementation of consumer empowerment, net neutrality or net freedom rules.

On March 10, 2004, Chairman Powell spoke to the National Association of Regulatory Utility Commissioners (“NARUC”). In that speech, Chairman Powell spoke of empowering consumers of IP-based communications services. Chairman Powell challenged the industry to adopt four simple Internet Freedoms for consumers:

- *Freedom to Access Content*: Consumers should have access to their choice of legal content;
- *Freedom to Use Applications*: Consumers should be able to run applications of their choice;
- *Freedom to Attach Personal Devices*: Consumers should be permitted to attach any devices they choose to the connection in their homes; and

- *Freedom to Obtain Service Plan Information:* Consumers should receive meaningful information regarding their service plans.

On October 18, 2004 at the Voice on the Net Conference (“VON”), Chairman Powell further expressed his desire to replace an overly regulatory common carrier regime with simpler consumer empowerment obligations. According to Chairman Powell, these freedoms will preserve consumer choice, foster competition and promote investment in infrastructure and Internet applications. pulver.com agrees that we, as an industry, need to think creatively about how to protect consumers in a newly competitive communications environment. pulver.com and many members of the IP-based communications community are committed to achieving these very same goals.

The Commission has the opportunity to implement a regulatory structure that will shape the future of communications, allow new technologies and services to emerge, enable traditional telecommunications and emerging communications entities to cooperate and compete, establish the right incentives to ensure investment in and deployment of networks, infrastructure and equipment, and empower consumers to control their own communications experience. The Commission has the power to ensure that innovation in IP-based communications flourishes, so that rapid deployment, adoption, interoperability and ubiquity of IP-based communications emerges, and so that the United States may lead the way in realizing the full promise of IP-based communications. In doing so, the Commission should adhere to two core principles: (1) do not regulate unless necessary; and (2) ensure that no entity can leverage its market power to stifle choice and innovation. With these principles in mind, there is no need to impose legacy regulatory structures on the new and emerging IP-based applications and

services, but there is a need to ensure that no entity can wield monopoly control over a facility, a market, or a customer to thwart innovation and consumer choice. The *Computer Inquiry* rules or other common carrier obligations are among the methods that the Commission could use to ensure a competitive environment, but these are not necessarily the only means to ensure deployment of broadband networks, innovation and competition. A less onerous approach would be through the adoption of sustainable, enforceable net freedom rules. The bottom line is that some interconnection or access obligation must exist, albeit not necessarily the more onerous, unequally applied common carrier rules.

In order to ensure the four Internet Freedoms heralded by Chairman Powell and Commissioner Copps, the Commission must adopt a framework for regulation where market power or facility control exists and no regulation where competitive forces guarantee choice and innovation. This model must also serve as the template for every other related proceeding before the Commission.<sup>2</sup> The Commission might have to abandon much of the convoluted regulatory quilt that currently exists as a result of divergent legacy regulations that govern historically distinct services and technologies. The Commission could logically move to a unified framework that regulates along horizontal network layers, rather than legacy vertical silos.<sup>3</sup> Most simply, the

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<sup>2</sup> This approach would be consistent with the Commission's historic conclusions, in particular, its light regulatory approach set forth in *Computer Inquiry*, but this approach would have to be applied consistently across the entire array of proceedings currently before the Commission, including the following proceedings: *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, WC 02-33; *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, GN 00-185; *Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, CS 02-52; *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, WC 01-338; *Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services*, WC 01-337.

<sup>3</sup> See Richard S. Whitt, MCI Public Policy Paper, *A Horizontal Leap Forward, Formulating A New Public Policy Framework Based On The Network Layers Model* (December 2003).

Commission could replace much of the existing, kluged regulatory scheme with meaningful, sustainable, enforceable net freedom rules. What the Commission must not do is deregulate under the vague assumption that it might some day adopt meaningful net freedom rules.

Ideally, the Commission should attempt to regulate along regulatory layers that broadly track the engineering network layers, although the layers could be conflated to simply a facilities layer and an applications layer, with some minimal regulation on the facility and no regulation of the application (unless demonstration is made that an application provider has managed to gain unfair consumer control or market power).

The Commission should ensure that Application Service Providers have reasonable access to consumers. The simplest way, if not the most certain, would be the establishment of net freedom rules, with attached enforcement mechanisms. Until we find a technology that affords open access to limitless capacity for all consumers and service providers, there will always be some degree of imperfect competition in last-mile access. We may have a virtual infinite supply of applications and content, but these applications and content are only guaranteed if they can access the physical transmission facilities upon which every communications application must ride.

In order to ensure competitive choice at the application layer, some level of oversight must occur at the transmission layer, where the potential for anticompetitive behavior is simply too inevitable. Again, this oversight need not be overly intrusive or inconsistently applied (as is the case with the unbundling obligations imposed only on the incumbent LECs). The oversight could be as simple as adherence to meaningful net

freedom rules, provided that these rules are treated seriously and not just an excuse to undo unbundling rules, *Computer Inquiry*, or other common carrier obligations.

Such net freedom rules must also ensure that no entity may use its control over a consumer, a facility, or even an application (in the event such anticompetitive control emerges at the application layer) to extract monopoly rents for access to end-users. Net freedom should preclude any entity from engaging in anticompetitive price squeezes or service tying or bundling that would make it uneconomic for an end-user to obtain an application or service from an unaffiliated Application Service Provider. For instance, if a cable company requires an end-user to subscribe to its own voice product in order to obtain cable modem service at a price point below the price that an ASP could realistically serve the end-user, then this should demonstrate a violation of the Commission's Net freedom rules. Furthermore, the controller of an access bottleneck must make its access products and services available to all Application Service Providers and end-users on nondiscriminatory, terms rates and conditions, and must not be allowed to discriminate against unaffiliated Application Service Provider vis-à-vis other Application Service Providers or end-users. Thus, any Application Service Provider must be accorded the same access to products and services that the controller of a bottleneck facility offers to any other APS or end-user.

The enforcement mechanisms that should be adopted to ensure compliance with the net freedom rules should be clear and subject to an expedited decision process. Anyone who may demonstrate that an entity has violated the net freedom rules should have a certain, affordable and swift response from the Commission. Such an enforcement process is essential so that an entity with more power and deeper pockets

cannot simply game the system, slow-roll, or otherwise drag out the process at the expense of the allegedly aggrieved party.

The Commission must ensure that Application Service Providers may deliver their innovative services and applications to consumers. Such an access obligation can be developed that does not discourage or disincent last-mile access providers from either building out advanced networks or from wanting to provide reasonable access to Application Service Providers.

pulver.com would accept any number of minimally intrusive solutions. The bottom line is simply that a monopolist must be encouraged, and perhaps, unfortunately, at times, compelled to ensure that consumers can choose from among a multitude of ASPs and not have to accept whatever limited options or favored solutions the monopolist prefers. Unfortunately, we will never have a completely competitive last-mile access market. As a result, there will always be some need for government oversight to ensure fair access. Fortunately, this access regime does not have to result in the controversy that resulted from the Commission's experiment with network element unbundling over the past eight years.

The controller of last-mile bottlenecks (or the controller of any other service, function or system that establishes inordinate control over a consumer) must not be allowed to preclude consumers from availing themselves of the essential net freedoms. The IP-based application providers must be allowed to reach consumers to provide services that are distinct from, or compete with, the services offered by the controller of last-mile access facilities.

### III. CONCLUSION

It is all well and good that the Commission has moved on a deregulated path and has attempted to establish parity across platforms and encouraged ubiquitous broadband deployment. Without application of some form of net freedom or common carrier superstructure, however, consumers and Internet innovators might remain subject to some carrier, some Internet company or some other entities unfair control over the captive consumer. Now, simultaneously with the laxation of the regulatory structure, is the moment for the Commission to adopt the net freedom rules, and ensure that some structure is in place to ensure that consumers can truly control their communications experience and to ensure that innovation can occur at the edge and within the network.

For the foregoing reasons, pulver.com respectfully requests that the Commission deny BellSouth's Petition For Forbearance unless and until the Commission creates a backstop to ensure that consumers may control their communications experience through Commission adoption of meaningful, enforceable net freedom rules.

Respectfully submitted,  
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