

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 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)	

**REPLY COMMENTS OF
VONAGE HOLDINGS CORP.**

Vonage Holdings Corp. (“Vonage”) submits these reply comments to respond to the comments filed by the incumbent local exchange carriers (“ILECs”) addressing BellSouth’s Petition for forbearance from application of Title II and *Computer II/III* regulatory requirements to its provision of “broadband.” For the reasons stated below and in Vonage’s initial comments, the Commission should deny BellSouth’s Petition.

I. ILEC COMMENTS FAIL TO JUSTIFY THE BREADTH OF THE REQUESTED RELIEF.

The comments filed by SBC, Qwest and Verizon suffer from the same inadequacies as BellSouth’s forbearance Petition, which Vonage has already addressed in its initial comments. In particular, the ILECs continue to casually brush aside the need to demonstrate the satisfaction of the specific statutory prerequisites for forbearance *with respect to each regulation from which they seek relief*. As Vonage explained in its Comments, it does not rule out that the ILECs could establish that the public interest favors the modification or elimination of certain existing rules in order to address specific problems. For example, the record in other proceedings may be sufficiently mature for the Commission to render decisions as to whether ILECs should be classified as non-dominant carriers in some broadband markets. But instead of seeking tailored

relief from the specific regulations that supposedly cause the harms complained of, BellSouth's Petition and the ILEC comments in support thereof seek sweeping and unprecedented deregulation without acknowledging those areas where some degree of regulatory oversight may be appropriate, such as, for example, guarantees of "net neutrality." BellSouth's Petition and the ILEC comments necessarily hide behind the unfounded breadth of their request, because it would of course be a far more difficult for them to contend openly that grant of a license to deny their customers access to competitive VoIP "is consistent with the public interest" – a finding that the Commission would be required to make to grant forbearance here. The Commission has made clear that the public interest would be served by the promotion of a competitive and innovative IP-enabled services market,¹ and it cannot now reasonably conclude that permitting BellSouth to deny access to independent IP-enabled services would serve the public interest. Because BellSouth's Petition does not (and could not) meet the forbearance test for each aspect of its requested relief, and because it declined to present alternative arguments for lesser relief, its Petition must be denied.

II. EVEN IF SOME DEREGULATION IS JUSTIFIED, DUOPOLY COMPETITION CANNOT JUSTIFY ELIMINATION OF CORE NONDISCRIMINATION REQUIREMENTS.

Rather than address the public interest consequences of removal of important and long-standing safeguards designed to protect against unreasonable discrimination, the ILECs' comments focus nearly exclusively on the theme of regulatory parity with cable operators. But their comments fail to show that an unregulated cable-LEC broadband duopoly would assure that

¹ See, e.g., *IP-Enabled Services, WC Docket 04-36, Notice of Proposed Rulemaking*, ¶ 5 (rel. Mar. 10, 2004).

consumers would continue to have access to the information services and applications of their choice.²

For example, *nothing* in the ILEC comments demonstrate that ILECs would not use the requested relief to frustrate the ability of consumers to use competitive VoIP services, since ILECs (more so than cable companies) clearly have the incentive to do.³ In the absence of all regulation, and in the absence of additional significant competitors, *both* ILECs and cable could engage in practices that would undermine the Commission's public interest objectives. Vonage is pleased that the National Cable and Telecommunications Association has pledged that its members would not block traffic from competing Internet voice providers.⁴ Still, as Chairman Powell has repeatedly explained, the Commission "must keep a sharp eye on market practices that will continue to evolve rapidly," and should safeguard consumers "against the potential rise of abusive market power by vertically-integrated broadband providers."⁵ Grant of BellSouth's Petition could only undermine the Commission's future capacity to safeguard consumers in this manner.

The ILECs' comments are thus off the mark in their cursory implication that the mere presence of a second competitor eliminates the need for any and all regulation of their networks. As Vonage and many other parties explained in initial comments, Commission and legal

² Vonage's and other comments demonstrated that other intermodal alternatives such as BPL, satellite, and wireless have not sufficiently matured to constrain the practices of the incumbent LECs or cable companies. *See* Vonage Comments at 3, 13-14 (indicating, among other factors, that "Vonage's service does not perform optimally, if at all, over other types of Internet access such as satellite broadband or dial-up.")

³ *See* Vonage comments at 6-7.

⁴ *See* Vonage comments at 4-5 (citing Remarks of Chairman Michael K. Powell at the Silicon Flatirons Symposium, "Preserving Internet Freedom: Guiding Principles for the Industry" (Feb. 8, 2004), [see http://www.fcc.gov/commissioners/powell/mkp_speeches_2004.html](http://www.fcc.gov/commissioners/powell/mkp_speeches_2004.html)).

⁵ *Id.*

precedent is clear that duopoly “competition” is not sufficient to protect consumers.⁶ Moreover, even where multi-party competition exists, such as in the interexchange market, the Commission has designated carriers as non-dominant and relieved them of many obligations, but it has never granted forbearance from the fundamental common carriage obligations of Sections 201 and 202.⁷ These core principles of the Act were intended to apply to every carrier, even those with no market power, and remain just as relevant and necessary today.

In any event, before any rush is made to change the obligations of the LECs in the name of parity, it must of course be considered that the obligations of the cable broadband providers are currently under review by the Supreme Court in the *Brand X* litigation, and could ultimately be changed substantially. Once that appeal is concluded, the Commission may want to consider the obligations of LEC and cable broadband providers together in a consolidated rulemaking proceeding. Even if the Commission were ultimately conclude in such a proceeding that incumbent cable companies and LECs should no longer be subject to the existing regulatory scheme, it may wish to replace that scheme with other regulatory safeguards, such as “net neutrality,” that are needed to protect consumers in the twenty-first century broadband marketplace. Until that time, it would be premature for the Commission to consider establishing *ad hoc* regulatory relief for ILECs based on concerns about parity of regulation with cable operators. At a minimum, it would clearly be prudent and appropriate for the Commission should preserve the bedrock principle of its current generation of rules – assuring non-discriminatory access to information services – until it has completed a comprehensive consideration of net neutrality and other safeguards that would be necessary to protect consumers

⁶ See Vonage comments at 5, 13-16 (citing, e.g., *EchoStar-DirecTV Merger Order*, 17 FCC Rcd 20559, ¶ 103 (2002).

⁷ *Motion of AT&T Corp. To Be Reclassified As A Non-Dominant Carrier*, Order, 11 FCC Rcd 3271, ¶ 13 (1995).

if the existing safeguards are eliminated.⁸ Only when the Commission has firmly settled upon its next-generation broadband regulatory framework should changes be made to any carrier's obligation in the name of parity.

III. ILEC COMMENTERS, LIKE BELL SOUTH, FAIL TO ADEQUATELY DEFINE THE REQUESTED RELIEF.

Like BellSouth, the ILEC commenters fail to present sufficient detailed analysis of each affected market, as is required to justify regulatory relief based on the presence of competition. BellSouth broadly requests forbearance from application of any regulation to all "technologies that are capable of providing 200 kbps in both directions."⁹ The ILEC comments fail to acknowledge that while all of their evidence pertains to the retail residential market, BellSouth's requested relief would appear to apply to other "broadband" markets such as the enterprise and wholesale markets. Relief in these other markets, without evidence specific to those markets, would be inappropriate and unlawful.

The courts have found that forbearance from dominant carrier regulation requires "a painstaking analysis of market conditions" supported by evidence.¹⁰ The Commission has often recognized the need to separately analyze the retail and wholesale markets, and mass market and enterprise markets.¹¹ Therefore, to support its open-ended requested relief in all markets, BellSouth's Petition must identify the product and geographic markets and the firms that

⁸ SBC's comments effectively admit that the BellSouth Petition is really just another attempt to urge Commission to speed up its consideration of next-generation rules for broadband carriers. *See* SBC Comments at 9 (explaining that BellSouth's Petition was motivated by the inaction on the pending *Wireline Broadband and Non-Dominance* Proceedings).

⁹ BellSouth Petition at 1, n. 1.

¹⁰ *WorldCom, Inc. v. FCC*, 238 F.3d 449, 459 (D.C. Cir. 2001); *AT&T Corp. v. FCC*, 236 F.3d 729, 735-737 (D.C. Cir. 2001).

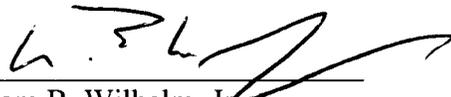
¹¹ *See e.g., Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Second Report and Order, 14 FCC Rcd 19237, ¶ 8 (1999).

participate in those markets, calculate market shares, and address possible barriers to entry.¹²

Because it has failed to do so, its Petition must be denied.

IV. CONCLUSION

For the reasons set forth above and in Vonage's initial comments, the Commission should deny BellSouth's Petition for forbearance.



William B. Wilhelm, Jr.
Patrick J. Donovan
Paul B. Hudson
Swidler Berlin LLP
3000 K Street, NW, Suite 300
Washington, DC 20007
(202) 424-7500

Counsel for Vonage Holdings Corp.

January 28, 2005

¹² See, e.g., *Application of Echostar Communications Corp. et al*, Hearing Designation Order, CS Docket No. 01-348, 17 FCC Rcd 20559 (2002) at ¶¶ 105-150; Horizontal Merger Guidelines, U.S. Department of Justice and Federal Trade Commission, April 2, 1992, revised April 8, 1997.