

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

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

REPLY COMMENTS OF NUVOX, INC.

NuVox, Inc. (“NuVox”), by and through its attorneys, hereby files these reply comments to BellSouth’s petition for forbearance.^{1/} The comments filed in this proceeding make abundantly clear that the petition must be denied.

I. INTRODUCTION

Despite its opposition to this particular petition, NuVox believes that reasonably targeted and supported forbearance petitions are a far superior mechanism to address unnecessary regulation than the Commission’s ill-advised efforts to deregulate by redefinition. For example, specifically identified retail regulations that negatively affect BellSouth’s timely provision of residential DSL service may be an appropriate target for relief given the competition from cable modem services in that market segment.^{2/}

^{1/} *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 (filed Oct. 27, 2004) (“*BellSouth Petition*”).

^{2/} *See* Comments of Vonage Holdings Corp., *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, at 24 (filed Dec. 20, 2004) (“*Vonage Comments*”). Unless otherwise noted, all comments or oppositions cited in these reply comments were filed in this proceeding.

BellSouth's petition, however, goes far beyond such reasonably tailored regulatory relief and thus must be denied.

II. BELLSOUTH'S PETITION IS FATALLY OVERBROAD AND UNSUBSTANTIATED

BellSouth's petition requests regulatory relief of breathtaking scope.^{3/} It seeks the elimination of all Title II common carrier obligations and *Computer Inquiry* requirements for any technology "capable of providing 200 Kbps in both directions."^{4/} BellSouth's primary justification for such a sweeping action is that, currently, more residential consumers buy cable modem service than DSL service, and that cable companies providing cable modem service to residential consumers are not currently subject to common carrier rules per the *Cable Modem Declaratory Ruling*.^{5/} Given this

^{3/} Commenters have highlighted the potential breadth of the petition by identifying Title II provisions that would be swept aside. *See e.g.*, AT&T's Opposition to Petition for Forbearance of BellSouth Telecommunications, Inc. at 11 (filed Dec. 20, 2004) ("*AT&T Opposition*") (noting elimination of private right of action for damages provided in §§ 207-09); Comments of EarthLink, Inc. in Opposition to the Petition at 13-14 (filed Dec. 20, 2004) ("*Earthlink Comments*") (noting, *inter alia*, BellSouth's utter failure to address consequences of elimination of § 214 reviews, § 222 privacy protections, § 254 universal service, and § 255 access by persons with disabilities); Comments of National Association of Telecommunications Officers and Advisors; National League of Cities; U.S. Conference of Mayors; Texas Coalition of Cities for Utilities Issues; Greater Metro Telecommunications Consortium; Metropolitan Area Communications Commission; Mt. Hood Cable Regulatory Commission; City of Eugene, Oregon; and Montgomery County, Maryland (The "Local Government Coalition") at 21-22 (filed Dec. 20, 2004) ("*Local Government Coalition Comments*") (citing, *inter alia*, § 230 on-line child protection and § 229 CALEA). Perhaps BellSouth does not intend to be relieved of all of these obligations but it cannot place the Commission in the position of guessing which provisions are included in the petition and which are not.

^{4/} *BellSouth Petition* at 1, n.2.

^{5/} *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd 4798 (2002) (subsequent history omitted) ("*Cable Modem Declaratory Ruling*"). BellSouth also points to broadband services from other "intermodal competitors" such as wireless, satellite or broadband over power line. As several commenters point out, however, competition from these platforms is *de minimis* or nonexistent. *See e.g.*, Comments of

justification, one would have expected BellSouth to target its requested relief to the provision of retail DSL services to residential consumers, which is the service that competes with cable modem.^{6/} Indeed, the *Cable Modem Declaratory Ruling*, with which BellSouth seeks regulatory parity,^{7/} applies only to residential service.^{8/} Neither the extent of residential cable modem service nor the regulatory ruling in the *Cable Modem Declaratory Ruling* provide any basis for deregulation of wholesale, high capacity services to business customers.

The Commission cannot permit BellSouth to leverage the cable companies' market share of retail, residential Internet access services into deregulation of all wholesale services in excess of 200 Kbps, by which BellSouth apparently intends to include high capacity special access services.^{9/} The current market share of retail cable modem service sheds no light on the question of whether the ILECs have market power in the provision of wholesale high-speed services, either to independent ISPs or to competitive telecommunications carriers. BellSouth's total disconnect between the evidence provided (level of residential retail sales of broadband services) and the relief

McLeodUSA Telecommunications Services, Inc. at 13-14 (filed Dec. 20, 2004); *Local Government Coalition Comments* at 16; *Earthlink Comments* at 21; *Vonage Comments* at 13-14.

^{6/} See *Local Government Coalition Comments* at 14.

^{7/} See *BellSouth Petition* at 13-15.

^{8/} See *Cable Modem Declaratory Ruling* at 4800, n.5 (stating that cable offerings targeted to businesses, "including small ones," are not considered in that proceeding).

^{9/} It is unclear whether, by its petition, BellSouth also proposes to eliminate § 251 unbundling obligations for high capacity facilities, such as DS1 loops and transport. To the extent the petition seeks such relief, it must be denied in light of the Commission's recent findings that carriers remain impaired without access to DS1 loops and transport in many locations. See FCC Press Release, *FCC Adopts New Rules for Network Unbundling Obligations of Incumbent Local Phone Carriers*, Docket No. 04-290 (Dec. 15, 2004) ("*FCC Dec. 2004 Press Release*").

sought (elimination of wholesale obligations for all high capacity services) has been pointed out by numerous commenters.^{10/}

Retail cable modem service does not alleviate BellSouth's persistent market power in the wholesale market for high-speed services. Evidence of such market power may be found in the Commission's recently revised unbundled network element rules. The Commission found, for example, that carriers are impaired without access to ILEC DS1 loops and transport in many geographic markets.^{11/} Implicit in this impairment finding is that carriers do not have reasonably available alternatives to ILEC facilities and cannot economically self deploy those high capacity facilities in those markets. The Commission's determination that carriers continue to need access to DS1 facilities includes the provision of DS1-level capacity over the ILECs' fiber facilities, as the Commission found in the *Triennial Review Order*.^{12/}

The comments submitted by ISPs, CLECs, and VoIP providers confirm that ILECs must continue to be subject to fundamental common carrier obligations. Independent ISPs, for example, have provided persuasive evidence that they have no

^{10/} See e.g., Joint Comments of Time Warner Telecom, CBeyond Communications, and XO Communications at 6-8 (filed Dec. 20, 2004) ("*Time Warner Joint Comments*"); Comments of the Association for Local Telecommunications Services at 7 (filed Dec. 20, 2004) ("*ALTS Comments*"); *EarthLink Comments* at 15-16, 19; *AT&T Opposition* at 2-3; Opposition of MCI Inc. at 3, 6 (filed Dec. 20, 2004) ("*MCI Opposition*"); Opposition of the Information Technology Association of America at 5 (filed Dec, 20, 2004) ("*ITAA Opposition*").

^{11/} See *FCC Dec. 2004 Press Release* at 1.

^{12/} See *In the Matter of Review of the Section 251 Unbundling Obligations for Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 18 FCC Rcd. 16978, 17173 n.956 (2003), *aff'd in part, rev'd in part, United States Telecom Assoc. v. FCC*, 359 F. 3d 554 (D.C. Cir. 2004).

alternatives to ILEC broadband networks for reaching consumers because cable companies have largely refused access to independent ISPs and other alternative platforms are unavailable.^{13/} These comments belie BellSouth's assertion that it cannot charge unjust or unreasonably discriminatory rates to "consumers" because they will simply chose other facilities-based competitors. VoIP providers also have shown that BellSouth's petition is inimical to competition and innovation, and that clear evidence of BellSouth's continuing incentives and ability to suppress competition is demonstrated by its refusal to sell DSL service to consumers who do not also buy BellSouth's voice service.^{14/}

III. IT IS PREMATURE TO DEREGULATE WHOLESALE SERVICES AND FORBEARANCE RELIEF, IF ANY, THEREFORE MUST BE LIMITED TO RETAIL SERVICES

Although the record overwhelmingly demonstrates that this particular BellSouth petition must be rejected, NuVox supports reasonably targeted forbearance petitions. With respect to broadband, forbearance may be appropriate to eliminate or streamline specifically identified regulations that are shown to hinder the timely provision of *retail* broadband services to residential consumers.^{15/} It is premature, however, to eliminate

^{13/} See, e.g., Opposition of the Federation of Internet Solution Providers of the Americas at 28-33, 38-44 (filed Dec. 20, 2004); *EarthLink Comments* at 19-20; Comments of the California ISP Association, Inc. in Response to the Petition of BellSouth telecommunications, Inc. for Forbearance at 5 (filed Dec. 20, 2004); *ITAA Opposition* at 6-7.

^{14/} See *Vonage Comments* at 6-7. See also *id.* at 8-10 (expressing concern that granting the *BellSouth Petition* would facilitate BellSouth's ability to discriminate against VoIP providers for E911 access).

^{15/} See e.g., *Vonage Comments* at 23-24. See also *ALTS Comments* at 13 (urging the Commission to grant regulatory relief where appropriate for retail service offerings).

wholesale obligations, especially for high capacity services for business customers for which cable modem service does not provide any competitive discipline.^{16/}

Moreover, BellSouth has failed to demonstrate that the elimination of all Title II obligations is necessary to accomplish what it contends is its primary objective – having the freedom to negotiate individualized deals with ISPs on a private carriage basis.^{17/} For one, it is not clear which, if any, rules constrain BellSouth’s ability to enter into contract tariffs containing individualized terms.^{18/} The Commission specifically sought to facilitate Bell company offerings of volume and term deals to ISPs by concluding that such offerings are not subject to the avoided cost resale requirement of section 251(c)(4).^{19/}

BellSouth should specifically identify the rules that it contends prevent it from meeting the needs of independent ISPs and seek relief from them. (It is telling that no independent ISP has complained that it is regulation that constrains BellSouth’s ability to meet their needs.) Complete elimination of Title II non-discrimination protections, on the other hand, is not appropriate. There is nothing in BellSouth’s track record to suggest that, given complete freedom to determine whether and with whom to deal and on what terms – the hallmark of private carriage – BellSouth would engage in reasonable

^{16/} See e.g., *Time Warner Joint Comments* at 10-12 (noting that cable is not a competitive offering in the business market); *Local Government Coalition Comments* at 14 (reporting that fewer than 1% of cable modem subscribers were medium or large businesses); *MCI Opposition* at 7 (noting that “cable modem systems do not serve businesses”).

^{17/} *BellSouth Petition* at 29.

^{18/} See e.g., *AT&T Opposition* at 47 (noting that BellSouth fails to identify any rules that prevent it from offering customized deals).

^{19/} *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Second Report and Order, 14 FCC Rcd 19237 (1999).

negotiations. Even under current regulatory scrutiny, BellSouth is engaged in discriminatory actions against unaffiliated competitors in downstream markets.^{20/}

IV. CONCLUSION

For the reasons explained above, the Commission should deny BellSouth's overbroad and unsupported petition for forbearance from *Computer Inquiry* and Title II common carrier requirements.

Respectfully submitted,

Jake E. Jennings
Vice President
Regulatory and Industry Affairs
NUVOX, INC.
Two North Main Street
Greenville, SC 29601
(864) 672-5877 (voice)
(864) 672-5105 (facsimile)

/s
Michael H. Pryor
MINTZ, LEVIN, COHN, FERRIS, GLOVSKY
AND POPEO, P.C.
701 Pennsylvania Avenue, N.W.
Suite 900
Washington, D.C. 20004
(202) 434-7300 (voice)
(202) 434-7400 (facsimile)

Its Attorneys

^{20/} See, e.g., *Vonage Comments* at 6-7 (discussing BellSouth's attempt to leverage strength in broadband access to suppress VoIP competition); *ITAA Opposition* at 16-17 (discussing the Commission's finding that BellSouth had engaged in discriminatory provision of special access services).

CERTIFICATE OF SERVICE

I, Ernest C. Cooper, hereby certify that on this 28th day of January 2005, the foregoing Reply Comments of NuVox Inc. in WC Docket No. 04-405, were filed electronically through the FCC's Electronic Comment Filing System and courtesy copies were sent via electronic mail to the following as indicated:

Marlene H. Dortch
Office of the Secretary
Federal Communications Commission
445 12th Street, SW
Washington, D.C. 20554

Best Copy & Printing, Inc.
Portals II
445 12th Street, SW
Room CY-B402
Washington, D.C. 20554
fcc@bcpiweb.com

Janice M. Myles
Competition Policy Division
Wireline Competition Bureau
Federal Communications Commission
445 12th Street, SW
Washington, D.C. 20554
janice.myles@fcc.gov

Christopher Libertelli
Senior Legal Advisor
Federal Communications Commission
445 12th Street, SW
Washington, D.C. 20554
christopher.libertelli@fcc.gov

Matthew Brill
Senior Legal Advisor
Federal Communications Commission
445 12th Street, SW
Washington, D.C. 20554
matthew.brill@fcc.gov

Jessica Rosenworcel
Competition and Universal Service
Legal Advisor
Federal Communications Commission
445 12th Street, SW
Washington, D.C. 20554
jessica.rosenworcel@fcc.gov

Daniel Gonzalez
Senior Legal Advisor
Federal Communications Commission
445 12th Street, SW
Washington, D.C. 20554
daniel.gonzalez@fcc.gov

Scott Bergmann
Legal Advisor for Wireline Issues
Federal Communications Commission
445 12th Street, SW
Washington, D.C. 20554
scott.bergmann@fcc.gov

Jeffrey Carlisle
Bureau Chief
Wireline Competition Bureau
Federal Communications Commission
445 12th Street, SW
Washington, D.C. 20554
jeffrey.carlisle@fcc.gov

Thomas Navin
Division Chief
Competition Policy Division
Wireline Competition Bureau
Federal Communications Commission
445 12th Street, SW
Washington, D.C. 20554
thomas.navin@fcc.gov

Michelle Carey
Deputy Bureau Chief
Wireline Competition Bureau
Federal Communications Commission
445 12th Street, SW
Washington, D.C. 20554
michelle.carey@fcc.gov

/s/
Ernest C. Cooper

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