

**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 04-405
Application of <i>Computer Inquiry</i> and Title II)	
Common Carrier Requirements)	

REPLY COMMENTS OF EARTHLINK, INC.

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EarthLink, Inc. hereby submits its reply comments to the “Petition of BellSouth Telecommunications, Inc. for Forbearance” filed with the Commission on October 27, 2004 (“Petition”).¹ As EarthLink and several others pointed out in the initial comments in this proceeding, the Petition essentially asks the Commission to give ILECs unfettered control over their network facilities sufficient to deny ISPs and CLECs access to the essential resource required to deliver any broadband service to end users. Forbearance from the core common carrier obligations in the Communications Act that serve to prevent discrimination² would allow BellSouth to curtail, or even eliminate, all competition from ISPs and CLECs that depend on the reasonable and nondiscriminatory rates and terms for this transmission service. Several parties agree that the Petition has blatant deficiencies, both procedurally and substantively. Not only does the Petition fail

¹ Petition of BellSouth Telecommunications, Inc. For Forbearance Under 47 U.S.C. §160(c) From Application of *Computer Inquiry* and Title II Common Carrier Requirements, WC Docket No. 04-405 (filed Oct. 27, 2004) (hereinafter “Petition”).

² See 47 U.S.C. §§ 201 and 202.

to conduct an adequate section 10 forbearance analysis for each service and market for which forbearance is sought, as is required by the statute, it does not even identify what specific provisions of law the Commission should forbear from applying. To the extent that it requests the Commission to forbear from applying *all* Title II regulations, the Petition provides no discussion of fundamental provisions in Title II, many of which reflect important public policy objectives, and even some that are necessary for BellSouth to continue to successfully manage its own business.

The majority of comments in this proceeding also recognized that the Petition—likely by design—mischaracterizes the relevant marketplace. BellSouth’s Petition relies solely on evidence regarding *retail competition*, while providing no discussion or analysis on the level of competition in the provision of *wholesale transmission services*. It is wholesale competition that is necessary to ensure that competitive services continue to reach end users. Perhaps the central issue in this proceeding for competitors like EarthLink, as well as other ISPs and CLECs, is whether there are alternative safeguards within the *wholesale* product market sufficient to protect against unreasonable or discriminatory rates and practices by LECs—and in particular ILECs like BellSouth—in the absence of the requirements that mandate that ILECS make available the transmission underlying their broadband Internet access service. The Petition offers no discussion whatsoever on this central question. It provides no evidence of the state of competition in the wholesale marketplace, and it grossly understates the market power that ILECs like BellSouth retain in this market. For all these reasons, the Commission must deny the Petition.

Despite these deficiencies, even if the Commission were to review the Petition on the merits—and it should not—it must reject the Petition because BellSouth has failed to satisfy the requirements set out in section 10 of the Communications Act.³ Section 10 requires the Commission to “deny a petition for forbearance if it finds that any one of the three prongs [of the statutory forbearance test] is not satisfied.”⁴ The Petition has offered no evidence that forbearance from Title II, and specifically sections 201 and 202, ensure that the rates and practices by ILECs will be reasonable and nondiscriminatory with respect to the company’s provision of wholesale transmission services to independent ISPs and CLECs. The Petition also fails to explain how such forbearance protects consumers, especially in light of the fact that such wholesale availability is the driving force behind competition in the retail Internet access marketplace. Finally, the Petition provides no evidence that such forbearance is in the public interest, as it is devoid of any analysis regarding the competitive market conditions in the wholesale marketplace. The vast majority of comments in this proceeding have shown that forbearance from the core common carrier obligations in the Communications Act will without question lead to discriminatory and unreasonable rates and practices by the ILECs, will harm consumers, and is not consistent with the public interest. For all these reasons, the Commission must deny the Petition.

³ See 47 U.S.C. §160.

⁴ *CTIA v. FCC*, 330 F.3d 502, 509 (D.C. Cir. 2003).

I. BELLSOUTH'S PETITION ASKS THE COMMISSION TO MAKE IT LEGAL FOR ILECs TO DISCRIMINATE AGAINST INDEPENDENT ISPs and CLECs.

In this proceeding, and in several others currently before the Commission that will ultimately decide whether competitive ISPs can continue to obtain the necessary transmission services needed to offer information services to consumers, EarthLink has continuously emphasized the central role that independent ISPs have played in bringing choice and competition to consumers in the high-speed Internet access market. It is without question that independent ISPs are vital to the Commission's stated goals of bringing affordable high-speed access to all consumers. As EarthLink argued in its first round of comments, the core purpose of Communications Act, as expressed in sections 201 and 202, is the prevention of discrimination.⁵ In asking the Commission to forbear from applying these fundamental requirements to the transmission component of its wireline broadband Internet access service, BellSouth essentially asks the Commission to make it legal for ILECs to discriminate against independent ISPs and CLECs. Due to the breadth of BellSouth's request, the enormous consequences involved, and the Commission's long history regarding the importance of sections 201 and 202,⁶ many commenters agree with EarthLink that the Commission should deny BellSouth's request in order to preserve the ability of independent ISPs to continue to provide its customers with diverse and innovative information services. On this point, AT&T stated:

The Petition effectively asks the Commission to turn the entire future of wireline broadband services in BellSouth's region over to BellSouth's monopoly control. Thus, the Commission's decision here will determine whether

⁵ See EarthLink Comments at 18.

⁶ See *id.* at 9.

residential and business customers will be served by a dynamic, open, and vibrantly competitive marketplace or by an environment that is dominated by market power.⁷

The Information Technology Association of America (“ITAA”) agrees, when it states:

The Commission should make no mistake about what BellSouth is requesting. If the Commission grants BellSouth’s petition, the ILECs will have the legal right to refuse to provide broadband telecommunications services – including special access services – to non-affiliated ISPs. If the ILECs choose to provide these services to non-affiliated ISPs, the ILECs will be able to do so at prices, terms, and conditions that are significantly less favorable than those on which they provide the identical services to themselves and their affiliates.⁸

Both the Courts and the Commission have recognized that sections 201 and 202 of the Communications Act represent the core concepts of federal common carrier regulation and are “the centerpiece of the Act’s regulatory regime.”⁹ Sections 201 and 202 are essential to ensure that the rates and practices of ILECs remain reasonable and nondiscriminatory. Instead of providing tangible, empirical evidence to support its claim that consumers and independent ISPs have sufficient competitive alternatives so that Title II requirements are not needed to prevent anti-consumer and anti-competitive practices and rates, BellSouth asks the Commission to rely on no more than mere promises not to

⁷ AT&T Comments at i.

⁸ ITAA Comments at 2. *See also* CISP Comments at 6 (“By granting BellSouth’s Petition, the FCC would be deterring competition in this market and encouraging the ILECs and their own ISP affiliates to become the sole source of information services provided by DSL.”).

⁹ *See MCI v. AT&T*, 512 U.S. 218, 220 (1994); *see also In the Matter of PCIA Petition for Forbearance for Broadband Personal Communications Services*, 13 FCC Rcd. 16,857 at ¶15 (1998).

discriminate against ILECs and CLECs.¹⁰ The Commission may not rely on such vague promises to support forbearance under section 10. As EarthLink and others stated in their comments, the Commission has often recognized the importance of these sections and has never before relieved any common carrier from compliance with sections 201 and 202.¹¹ Given the magnitude of BellSouth's request, and the lack of evidence offered to support it, it must rely on its own precedent and reject the Petition.

II. THE COMMISSION SHOULD DISMISS THE PETITION BECAUSE BELLSOUTH'S REQUEST FOR RELIEF IS OVERBROAD, VAGUE, AND NOT SUPPORTED BY SUFFICIENT EVIDENCE.

Section 10 of the Communications Act provides that "the Commission shall forbear from applying any regulation or any provision of this Act to a telecommunications carrier or telecommunications service, or class of telecommunications carriers or telecommunications services, in any or some of its or their geographic markets" if the Commission determines all three forbearance criteria are satisfied.¹² The plain language of the statute requires the Petitioner to specify: 1) the "provision or regulation" that it requests the Commission to forbear from applying, and 2) the geographic markets in question.¹³ EarthLink and others noted in their comments

¹⁰ See, e.g., BellSouth Petition at 6. See also AT&T Comments at 4 ("BellSouth asks the Commission to de-regulate first, based on vague promises of future fair play, and only ask questions later, without regard for the consequences on customers, competition, or the public interest."); McLeodUSA Comments at 23 ("While the Commission should not grant the requested forbearance in any event, the Commission may not do so based on the unsupported promises of BellSouth that it will not harm competition.").

¹¹ See EarthLink Comments at 9-10; AT&T Comments at 12-15.

¹² 47 U.S.C. § 160.

¹³ *Id.*

that BellSouth's Petition fails in all respects to do either, and therefore its analysis is procedurally deficient. In support of this, McLeodUSA states:

[T]he statute expects that the petition and the Commission's analysis will be sufficiently granular and will not make broad sweeping regulatory pronouncements where narrower findings are more appropriate.¹⁴

BellSouth's extraordinarily broad request precludes the Commission from fulfilling its statutory duty to consider forbearing from specific provisions or regulations as they apply to services within specific geographic markets. The Commission is given no basis at all upon which it could make the factual findings necessary to support a forbearance request. With no discussion of the statutory provisions or the geographic markets at issue, it is impossible for either the Commission or interested parties to assess the consequences of forbearance, and for this reason the Petition must be denied.

In addition to these procedural deficiencies, perhaps the most fatal flaw in BellSouth's request is that the Petition relies on evidence of the wrong product market to support its request for forbearance. To support its forbearance request, BellSouth essentially makes two arguments. First, because there is evidence of competition in the retail marketplace, the statutory requirements in Title II are not necessary to ensure reasonable and nondiscriminatory rates or to protect consumers.¹⁵ Second, common carrier obligations are not required because ILECs do not have "market power in broadband transmission."¹⁶ As virtually all of the commenters that opposed the Petition

¹⁴ McLeodUSA Comments at 7.

¹⁵ BellSouth Petition at 3.

¹⁶ *Id.* at 29.

recognized, both of these arguments fail to address the facts that: 1) there are *two* relevant markets that must be discussed in this forbearance Petition—the retail consumer market (which is correctly regulated already) and the wholesale transmission market, 2) evidence of retail competition has absolutely no relevance regarding whether or not it is necessary to retain the essential statutory requirements that ensure just, reasonable, and nondiscriminatory rates and practices in the wholesale marketplace, and 3) there is currently no competition in the wholesale marketplace and as a result ILEC-owned facilities are the primary means for independent ISPs and CLECs to access their customers.

The wholesale marketplace for underlying transmission services is not competitive. In its Petition, BellSouth not only does not contest this reality, it fails to discuss the wholesale marketplace at all. Numerous parties have pointed out that BellSouth’s analysis focuses only on the competitive alternatives that end users have in the retail Internet access services product market.¹⁷ As EarthLink argued in its comments, unaffiliated ISPs largely depend on ILEC broadband transmission facilities to provide high-speed Internet access to its customers.¹⁸ In response to comments in this proceeding from Qwest that “LEC facilities are not essential to the provision of enhanced services [because ISPs] may purchase broadband transmission services from entirely distinct platform providers, including cable modem providers, wireless providers and

¹⁷ See AT&T Comments at 3; CISPA Comments at 2-3; COMPTTEL/ASCENT Comments at 12-13; ITAA Comments at 3-5; MCI Comments at 1-4; McLeodUSA Comments at 8; Local Government Coalition Comments at 8-9; Time Warner Telecom Comments at 16; Vonage Comments at 3.

¹⁸ See EarthLink Comments at 19-20.

satellite providers, as well as from CLECs,”¹⁹ the majority of comments recognize that independent ISPs largely depend on ILEC facilities, and forbearance from all Title II provisions would literally leave *no competition* in the wholesale marketplace. In support of this, ITAA states:

BellSouth, however, has completely ignored the *wholesale* market. ISPs that do not own their own facilities, but which seek to provide broadband information services to mass market customers, must obtain broadband transmission service. In most cases, ISPs have no viable alternative but to obtain this service from an ILEC. Cable systems do not provide intermodal competition in the wholesale mass market broadband telecommunications market. To the contrary, no cable system offers a generally available wholesale broadband transmission service that ISPs can use to serve their mass market retail customers.²⁰

In addition, AT&T argues:

BellSouth has not offered a shred of evidence showing the existence of a widespread wholesale market for the “underlying basic service[s]” that competitors need to provide their retail services. And in fact the evidence is totally to the contrary. In the vast majority of cases, independent ISPs and other enhanced service providers simply do not have any way of providing broadband services without access to incumbent LEC last-mile facilities, because they rarely have access to competitive alternatives. Regardless of any retail services they may offer, cable providers do not provide adequate wholesale broadband access alternatives to constrain incumbent LECs’ market power over inputs needed by non-affiliated broadband providers.²¹

¹⁹ Qwest Comments at 4.

²⁰ ITAA Comments at 6 (emphasis in original).

²¹ AT&T Comment at 32.

In its comments, Qwest claims that ISPs are not dependent on LEC broadband transmission, and that this “is demonstrated by simply looking at EarthLink’s web page, where the company offers customers ‘EarthLink cable,’ ‘EarthLink satellite,’ and ‘EarthLink DSL.’”²² Qwest’s argument fails for three reasons. *First*, with the exception of Time Warner Cable, which is required to sell access to ISPs under conditions of the AOL Time Warner merger,²³ EarthLink’s experience and the undisputed evidence shows that no other cable company has been willing to offer transmission services to unaffiliated ISPs on any commercially meaningful scale. *Second*, because forbearance from all Title II regulations would mean the Commission must forbear from the requirements of section 251(c)—the provision that Congress explicitly included to require ILECs to permit service by competitive LECs, CLECs would also presumptively be eliminated in those few marketplaces where wholesale facilities-based competition arguably exists.²⁴ *Third*, despite any claim by BellSouth or Qwest that satellite and wireless providers represent comparable alternatives to DSL, there is no question that—whatever their *future* potential may be—satellite and wireless services are not *presently*

²² Qwest Comments at 4-5.

²³ See *In the Matter of America Online, Inc. and Time Warner Inc.*, FTC Docket No. C-3989, Agreement Containing Consent Orders; Decision and Order, 2000 WL 1843019 (FTC) (proposed Dec. 14, 2000) and *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations by Time Warner Inc. and America Online, Inc.*, Memorandum Opinion and Order, CS Docket No. 00-30 (rel. Jan. 22, 2001).

²⁴ As stated in its comments, EarthLink questions whether the Commission has the ability to forbear from applying this section at all, because section 10(d) of the Act (47 U.S.C. § 160(d)) requires that section 251(c) be fully implemented in order for the Commission to forbear. Therefore, in order for the Commission to take any action, the Petitioner must address, as a preliminary matter, whether section 251(c) has been fully implemented. It has not.

comparable to DSL's availability, reliability, speed, pricing, and consumer demand.²⁵ If the above information cited by Qwest is evidence of anything at all, it is evidence of the fact that EarthLink is only able to provide broadband services to its consumers because the Title II safeguards currently in place ensure that ILECs continue to make available the transmission component of its wireline broadband Internet access service on reasonable and non-discriminatory terms.

Finally, to the extent that BellSouth and other ILECs argue that common carrier obligations are not required because ILECs do not have "market power in broadband transmission,"²⁶ the comments opposing the Petition universally show that ILECS do in fact retain substantial market power in the wholesale marketplace because in most cases there are no alternatives for ISPs to obtain the underlying transmission component of broadband Internet access service. Thus, BellSouth's claim that ILECs somehow lack market power is just not true.²⁷ In support of this, MCI states:

As long as the carriers that own the broadband transmission networks can exercise market power because transmission is not yet available on a competitive basis, they will exercise that market power by controlling downstream markets that depend on those transmission services.

BellSouth and other ILECs possess significant market power in the wholesale transmission marketplace, and as a result, have both the ability and incentive to use this

²⁵ See CISPA Comments at 5; ITAA Comments at 7; MCI Comments at 7; McLeodUSA Comments at 19.

²⁶ See BellSouth Petition at 29; *see also* Qwest Comments at 5; SBC Comments at 1-3.

²⁷ See AT&T Comments at 38-39; CISPA Comments at 7; COMPTTEL/ASCENT Comments at 13; ITAA Comments at 3-5; MCI Comments at 3; McLeodUSA Comments at 19; Local Government Coalition at 14-15; Time Warner Telecom Comments at 3-4; Vonage Comments at 16-21.

market power to exclude independent ISPs from access to their networks. Thus, forbearance from sections 201 and 202—the provisions in the Act that would prevent such discrimination—is not appropriate.

III. THE COMMISSION SHOULD DISMISS THE PETITION BECAUSE IT DOES NOT MEET ANY OF THE CRITERIA NECESSARY FOR FORBEARANCE UNDER SECTION 10.

a. The Petition Fails to Show That Title II Obligations Are Not Necessary to Ensure that ILEC Rates and Practices Will Be Reasonable and Nondiscriminatory.

The first prong of the section 10 forbearance test requires the Petitioner to demonstrate that “enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory.”²⁸ Thus, the statute requires BellSouth to demonstrate that Title II regulations—in particular, those designed specifically to prevent discrimination²⁹—are not necessary to ensure just, reasonable, and nondiscriminatory rates, terms, and conditions for access to ILEC wholesale transmission facilities. The Petition relies solely on the unsupported premise that “competition is the most effective means of ensuring that the charges, practices, classifications, and regulations” of BellSouth and other ILECs remain just, reasonable and nondiscriminatory.³⁰ However, because the Petition completely ignores the lack of

²⁸ 47 U.S.C. § 160(a)(1).

²⁹ 47 U.S.C. §§ 201 and 202.

³⁰ BellSouth Petition at 17.

competition in the wholesale marketplace, it has not met its burden of showing that Title II regulations are not necessary to prevent unjust and unreasonable discrimination against ISPs and competitive LECs. BellSouth did not and cannot show that wireline or other alternatives exist for ISPs sufficient to support the forbearance from sections 201 and 202 of the Communications Act. Moreover, as several parties have demonstrated in their comments, BellSouth and other ILECs have in fact indicated that they are both willing and able to discriminate against, and even exclude independent ISPs from their networks.³¹ For these reasons, BellSouth has failed in all respects to satisfy the requirements of section 10(a)(1) of the Communications Act.

b. Forbearance From Title II Regulations Will Harm Consumers.

The second prong of the section 10 forbearance test requires the Petitioner to demonstrate that “enforcement of such regulation or provision is not necessary for the protection of consumers.”³² Forbearance from sections 201, 202, and 251 of the Communications Act, as stated above in section II, would eliminate all competition in the wholesale transmission marketplace. This, in turn, would substantially harm the retail consumer, because the driving force behind competition in the *retail Internet access* marketplace has always been *wholesale transmission availability*. As EarthLink stated in its comments, the distinct question for the Commission to decide under this prong is whether the benefits of regulation, including the benefits of competition in the information services market that come from the enforcement of sections 201 and 202, are

³¹ See, e.g., CISPA Comments at 9; ITAA Comments at 13.

³² 47 U.S.C. § 160(a)(2).

outweighed by specific and quantified regulatory costs and harms.³³ Neither BellSouth nor any other ILEC supporting the Petition³⁴ has provided any evidence that Title II regulations have any effect on consumer costs, and that the balance tips in favor removing the requirements that Congress set in place to protect consumers.³⁵ If in fact Title II regulations did result in increased costs for consumers, BellSouth has failed to reconcile how broadband Internet access over cable is currently an unregulated service, but still charges the consumer substantially more per month for its service than DSL, a regulated service.³⁶ BellSouth's vague and unsupported claim that deregulation will somehow result in lower prices for consumers is directly contradicted by real-world experience in the marketplace. If the Commission were to grant BellSouth the relief that it requests, ILECs would have the ability and incentive to exclude independent ISPs from their networks, which ultimately is to the detriment of all retail customers. By undermining ISP competition through forbearance from Title II of the Act, it is clear that consumers will not have the full benefits of competition, such as competitive pricing and diverse advanced service offerings, which is what ultimately drives consumer demand for high-speed Internet access services.

³³ See EarthLink Comments at 23.

³⁴ See Qwest Comments at 7; SBC Comments at 11.

³⁵ See, e.g., AT&T Comments at 44; COMPTTEL/ASCENT Comments at 14.

³⁶ The base price for BellSouth "FastAccess DSL" service as listed on BellSouth's website is \$34.95. See BellSouth website, *available at* <https://www.fastaccess.com/content/consumer/products.jsp#dslite>. In comparison, the base price for Comcast's High-Speed Internet Service as listed on its website is \$57.95 (for consumers that do not also purchase cable television services). See Comcast website, *available at* <http://www.comcast.com/Benefits/CHSIBenefits.asp>.

c. Forbearance From Title II Regulations is Not Consistent With the Public Interest.

Section 10(a)(3) of the Act requires a Petitioner to demonstrate that “forbearance from applying such provision or regulation is consistent with the public interest.”³⁷ Section 10(b) of the Act states that in making a public interest determination, the Commission “shall consider whether forbearance from enforcing the provision or regulation will promote competitive market conditions, including the extent to which such forbearance will enhance competition among providers of such telecommunications service.”³⁸ BellSouth has not demonstrated that forbearance from Title II of the Communications Act is consistent with the public interest for four reasons. *First*, BellSouth’s reliance on section 706 to support a public interest analysis under section 10(a)(3) is unsupported because section 706 is not an independent grant of forbearance authority.³⁹ BellSouth cannot make up for its inability to meet the requirements of section 10 by relying on section 706 to support its forbearance request.⁴⁰ *Second*, as stated above, BellSouth provides no analysis as to how forbearance will promote competition in the wholesale transmission marketplace. In fact, the evidence clearly suggests that forbearance from all Title II provisions would have the direct opposite effect. *Third*, BellSouth seeks to avoid many statutory obligations that are in the public

³⁷ 47 U.S.C. § 160(a)(3).

³⁸ 47 U.S.C. § 160(b).

³⁹ See *In the Matters of Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 13 F.C.C.R. 24,012, 24,044 at ¶ 69 (1999); see also AT&T Comments at 48 (stating that the Bells themselves have acknowledged that section 706 grants the Commission no independent authority).

⁴⁰ See MCI Comments at 9-10 (stating that BellSouth seeks to compensate for its failure to adequately address the requirements of section 10 by relying on section 706 of the Act).

interest, such as consumer privacy (section 222), E-911 (section 251(e)), universal service (section 254), and access by persons with disabilities (section 255). BellSouth has offered no analysis to demonstrate how forbearance from these provisions—which are aimed at implementing public policy objectives—is in the public interest.⁴¹ *Fourth*, BellSouth has not demonstrated how removing Title II common carrier requirements will have any effect on overall broadband investment or deployment.⁴² In fact, the evidence seems to show that Title II requirements in no way affects BellSouth’s investment in wireline broadband services.⁴³

For all these reasons, it is clear that the forbearance that BellSouth has requested is not in the public interest.

CONCLUSION

BellSouth’s Petition suffers from fatal procedural and substantive deficiencies. Furthermore, the Petition fails in all respects to satisfy the requirements for forbearance under section 10 of the Communications Act. EarthLink and several other parties to this proceeding have shown that the prevention of unreasonable and discriminatory practices by ILECs, the protection of consumers’ interests, and the public interest all demand that the transmission component of wireline broadband services provided by BellSouth and

⁴¹ See AT&T Comments at 17-21; Local Government Coalition Comments at 21-22.

⁴² See Vonage Comments at 24-25 (Title II safeguards promote competition and do not stifle investment).

⁴³ See EarthLink Comments at 25 (In the absence of regulatory relief, BellSouth recently spent an estimated \$2 billion to provide its customers with Internet access over the next two to three years).

other ILECs remain available on reasonable and nondiscriminatory terms under Title II of the Communications Act. BellSouth's Petition must be denied.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "John W. Butler", with a long horizontal flourish extending to the right.

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