

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In the Matter of	)	
	)	
BellSouth Telecommunications, Inc.	)	
	)	
Request for Declaratory Ruling That State	)	WC Docket No. 03-251
Commissions May Not Regulate Broadband	)	
Internet Access Services by Requiring BellSouth	)	
to Provide Wholesale or Retail Broadband	)	
Services to CLEC UNE Voice Customers	)	

**SUPPLEMENTAL INITIAL COMMENTS OF VONAGE HOLDINGS CORP.**

In response to the Commission’s Notice of Inquiry (NOI) issued in this docket on March 25, 2005, Vonage Holdings Corp. (“Vonage”) submits these supplemental comments to reemphasize its earlier comments regarding the need for prompt Commission action to remedy the serious, ongoing anticonsumer and anticompetitive consequences of broadband “tying” arrangements in which facilities-based carriers or their affiliates require (or effectively require) the purchase of voice service as a condition of purchasing broadband access. Certain incumbent LECs in particular have resorted to broadband tying arrangements to insulate their legacy circuit-switched services from competition by inhibiting the ability of consumers to replace their existing ILEC voice services with competitive services such as VoIP.

Vonage’s initial comments filed in this docket on January 30, 2004 are directly responsive to many of the questions posed by the NOI. Rather than repeat these comments here, Vonage urges the Commission to consider Vonage’s earlier comments in the context of the entire broadband access market. The NOI properly places its greatest emphasis on the adverse impact of tying on (1) consumers and (2) “competition, particularly unaffiliated providers of new

services, such as voice over Internet protocol (VoIP).”<sup>1</sup> Vonage’s prior comments demonstrated that broadband tying unquestionably harms, and is designed to harm, both consumers and competition, and that the public interest and the Act demand a prohibition on anticompetitive, unreasonable and discriminatory broadband tying practices. In short, broadband tying not only denies consumers the full benefits of competition in the voice market, but also undermines the potential of VoIP to stimulate broadband adoption. Broadband therefore remains more expensive and less attractive to American consumers, who as a result are falling further and further behind other countries that increasingly are leading the broadband revolution. The cost efficiencies of VoIP and broadband can reverse this course by fueling demand for each other – but only if consumers have the freedom to choose their preferred broadband and voice service providers based upon the strength of the service offerings, unfettered by limitations imposed via the strength of a provider’s market power. The elimination of broadband tying is an essential step in putting this power of choice into the hands of consumers.

Below, Vonage supplements its earlier comments to address specific questions posed in the NOI that were not directly answered by its January 2004 comments.

**I. Market Forces Are Not Presently Sufficient to Protect Consumers and Competition**

The NOI asks “whether competition is supplying sufficient incentives for providers to disaggregate bundles to maximize consumer choice.”<sup>2</sup> Unfortunately, real-world facts demonstrate that the answer today is often no. BellSouth and SBC, for example, refuse to disaggregate their residential DSL and voice bundle at any price, and thereby unabashedly minimize, rather than maximize, consumer choice. If existing competition were capable of checking this abuse of market power, it would already do so and SBC and BellSouth would

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<sup>1</sup> NOI at ¶ 37.

<sup>2</sup> NOI at ¶ 37.

begin to offer “naked” broadband rather than risk losing all of the customer’s business. But these carriers clearly believe that competition will *not* compel them to offer broadband as a separate service; BellSouth presumably did not spend the last four years fighting “naked” DSL requirements in every regulatory and judicial forum only to turn around and give consumers the choices they want. Commission intervention is therefore necessary to give consumers the ability to select the broadband and voice service providers of their choice.

While ILECs do face competition from cable broadband in many (but certainly not all)<sup>3</sup> neighborhoods, the Commission has consistently determined, and real world facts consistently proven, that a duopoly does not create sufficient competition to protect consumers.<sup>4</sup> The same is true with broadband tying, because both ILECs and cable companies have an incentive to use their duopolist power in the still relatively non-competitive broadband access market to stymie competition in what otherwise would be their relatively more competitive legacy markets. If both providers tied their broadband access services to their legacy services, the consumer would have a “choice,” but only to choose which of two unwanted services would have to be swallowed with their broadband access service. Many residential consumers who do not wish to purchase cable television will therefore purchase the mandatory voice-broadband bundle from the local exchange carrier, even if they would prefer not to purchase voice service if given the choice.

Regardless of any hypothetical view of the possible influence of additional future broadband competition, the plain fact today is that some ILECs still impose tying requirements that are obviously designed to restrict consumer choice. If competition one day makes it impossible for vertically-integrated broadband access providers to suppress competition in other markets, then any new Commission tying requirements could be relaxed. Until that day arrives,

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<sup>3</sup> See Vonage January 2004 Comments at 15-17.

<sup>4</sup> See Vonage January 2004 Comments at 19-20.

however, consumers should not be left to suffer the unreasonable and discriminatory consequences that broadband tying inflicts upon them in the present.

## **II. Jurisdictional and Cross-Docket Issues**

The NOI asks how potential remedies for anticompetitive broadband tying relate to the Commission's broadband dominance and classification proceedings. The Commission need not resolve these issues before providing consumer relief from the immediate harms of tying. Whether the Commission's jurisdiction over broadband access will in the future be exercised under Title I or Title II, it possesses sufficient jurisdiction under either Title to address tying. The current uncertainty over certain broadband regulatory issues need not paralyze the Commission's long-standing authority to act promptly to remedy discrimination and consumer harms. Instead, the Commission should base its remedies for broadband tying on all available sources of its authority, including a declaratory ruling reaffirming its existing policies against tying as outlined above, and then later modify such rules as needed to conform them to any further developments in its other broadband dockets.

The Commission followed a similar approach in its recent *VoIP E911 Order*, noting that “[b]ecause we have not decided whether interconnected VoIP services are telecommunications services or information services, we analyze the issues addressed in this Order primarily under our Title I ancillary jurisdiction to encompass both types of service.”<sup>5</sup> The Commission concluded that its Order “in no way prejudices” its pending classification issues, and that it would adapt its rules to any new regulatory regime later if necessary.<sup>6</sup> Because broadband tying

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<sup>5</sup> *IP-Enabled Services*, WC Docket 04-36, and *E911 Requirements for IP-Enabled Service Providers*, WC Docket 05-196, First Report and Order and Notice of Proposed Rulemaking, FCC 05-116 (rel. June 3, 2005), ¶ 22.

<sup>6</sup> *Id.* at ¶ 26.

imposes significant ongoing harm to customers today, resolution of this issue need not and should not wait on resolution of the Commission's broader proceedings.

**A. The Commission Has Authority Under Title II to Address Broadband Tying**

Vonage's prior comments explain in detail that DSL tying violates both sections 201 and 202 of the Act, and that the Commission has previously prohibited anticompetitive, unreasonable and discriminatory tying requirements under Title II.<sup>7</sup> In addition to the reasons set forth therein, Vonage urges the Commission to consider that unfettered tying practices could seriously undermine one of the Commission's most basic Title II principles -- the ability of consumers to use telecommunications services to connect to third-party services and applications. This fundamental objective, with its origins in the *Hush-A-Phone*<sup>8</sup> and *Carterfone*<sup>9</sup> cases and later developed in the *Computer Inquiries*, directly contributed to the explosion of technical and marketing innovation that led to the success of today's Internet. Similarly, the Commission has prohibited common carriers from imposing "use and user restrictions" on communications services solely to "protect carrier revenues or rate structures,"<sup>10</sup> and, through its "slamming" rules, from impeding an end user's ability to select another voice provider.<sup>11</sup>

Broadband tying threatens to end-run these long-standing principles. If customers are forced to purchase voice service from the ILEC, while they may still technically be free to also

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<sup>7</sup> See Vonage January 2004 Comments at 9-20 (citing, *inter alia*, *Payphone Bundling Order* at ¶ 16 ("We also conclude that, without regard to whether it may violate the antitrust laws, AT&T's practice of bundling its '0 +' and '1 +' services constitutes an unreasonable practice in violation of Section 201(b) of the Communications Act.")).

<sup>8</sup> *Hush-A-Phone Corp. v. United States*, 238 F.2d 266, 269 (D.C. Cir. 1956).

<sup>9</sup> *Use of the Carterfone Device in Message Toll Telephone Service*, 13 F.C.C.2d 420, *recon. denied*, 14 F.C.C.2d 571 (1968).

<sup>10</sup> *Regulatory Policies Concerning Resale and Shared Use of Common Carrier Services and Facilities*, 60 F.C.C.2d 261, ¶ 40 (1976), *on recon.*, 62 F.C.C.2d 588 (1977), *aff'd sub nom. American Tel. & Tel. Co. v. FCC*, 572 F.2d 17 (2nd Cir. 1978).

<sup>11</sup> *Implementation of the Subscriber Carrier Selection Changes Provisions of the Telecommunications Act of 1996*, 14 FCC Rcd. 1508, ¶ 103 (1998). The Commission established that actions that impede customer choice violate section 201(b) and section 258.

purchase service from a VoIP provider, their appetite and ability to pay for an at least partially redundant VoIP service on top of the ILEC voice service is obviously suppressed. Carriers should not be permitted to use tying to accomplish indirectly the suppression of consumer access that the Act and the Commission has required them to permit. For this reason and those set forth in Vonage's prior comments, broadband tying violates both sections 201 and 202 of the Act and should be prohibited.

**B. The Commission Has Authority Under Title I to Address Broadband Tying**

The Commission may also rely on Title I to provide consumer relief, since broadband tying threatens many of the most basic goals of the Act. Title I authorizes the “[t]he Commission [to] ... perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Chapter, as may be necessary in the execution of its functions.”<sup>12</sup> This grant of authority “endows the Commission with sufficiently elastic powers such that it may readily accommodate dynamic new developments in the field of communications,”<sup>13</sup> and “may be employed, in the Commission’s discretion, where the Commission’s general jurisdictional grant in Title I of the Communications Act covers the subject of the regulation and the assertion of jurisdiction is ‘reasonably ancillary to the effective performance of the [its] various responsibilities.’”<sup>14</sup>

Even if broadband access were determined to be an information service, the exercise of Title I ancillary authority here would effectuate many of the fundamental goals of the Act, which requires the Commission to: promote the availability of a rapid, efficient, nationwide and

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<sup>12</sup> 47 U.S.C. § 154(i).

<sup>13</sup> *Gen. Tel. Co. of Southwest v. United States*, 449 F.2d 846, 855 (5th Cir. 1971).

<sup>14</sup> *Digital Broadcast Content Protection*, 18 FCC Rcd. 23550, ¶ 29 (2003) (quoting *United States v. Southwestern Cable Co.*, 392 U.S. 157, 178 (1968) (punctuation altered)).

reasonably-priced communication system;<sup>15</sup> encourage the deployment of advanced telecommunications capability to all Americans;<sup>16</sup> promote the continued development of the Internet and other interactive computer services;<sup>17</sup> and promote competition to secure lower prices and higher quality services for American telecommunications consumers.<sup>18</sup> In furtherance of these goals, the Commission has long recognized that one of the most crucial responsibilities is to promote innovation and competition for information services by seeking to assure that consumers are able to access the service providers, applications and content of their choice. All of these objectives are undermined by BellSouth's and SBC's practices that deny consumers the benefit of competitive voice services by refusing to sell them broadband unless they also purchase the ILECs' legacy voice services. In this case, the Commission's ancillary authority is particularly clear because, even if broadband access is considered an information service, tying it to voice services directly affects the market for basic local exchange telephone service, which is indisputably a Title II service.

The Commission has previously indicated that it would act decisively to remedy such anticompetitive tying practices. *See, e.g., AT&T-TCI Order* at ¶ 126 (warning that “should [TCI-AT&T] engage in anticompetitive tying of services to cable service, we will deal with that behavior forthrightly.”). Such action would clearly be within the Commission's authority. “Both the courts and the Commission have long held that ‘in a regulated industry, anti-competitive practices are contrary to the public interest and the Commission has both the authority and the obligation under the broad public interest standard, to consider such issues

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<sup>15</sup> 47 U.S.C. § 151.

<sup>16</sup> Telecommunications Act of 1996, § 706.

<sup>17</sup> 47 U.S.C. § 230(b).

<sup>18</sup> Telecommunications Act of 1996, preamble.

when an application is presented to it.”<sup>19</sup> The Commission has consistently exercised its authority to prohibit practices based on their anticompetitive consequences,<sup>20</sup> and should do so here as soon as possible.

### III. Proposed Remedies

The NOI seeks comment on “the least invasive regulations that could effectively remedy” the harms consumers suffer from broadband tying. Vonage recognizes, as the Commission did in its *Bundling Order*,<sup>21</sup> that some packages of combined services facilitate rather than frustrate consumer choice and the public interest and should be allowed. It is important that rules governing broadband tying do not sweep too broadly to unduly interfere with the ability of companies to offer packages that consumers desire and that do not unreasonably discriminate or suppress competition.<sup>22</sup> At the same time, as explained in Section I above, some regulation will be needed absent commitments from broadband access providers to halt their existing anticompetitive tying practices.<sup>23</sup>

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<sup>19</sup> *Applications for Renewal of License Filed by United Telephone Co. of Ohio for Radio Common Carrier Stations KQA459 and KQA651 in the Domestic Public Land Mobile Radio Service at Lima, Ohio, and Bellefontaine, Ohio*, 26 F.C.C.2d 417, ¶ 6 (1970) (citing *NBC v. U.S.*, 319 U.S. 190, 222-223 (1943)).

<sup>20</sup> See, e.g., *Implementation of the Telecommunications Act of 1996; Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information; Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as Amended*, 13 FCC Rcd. 8061, ¶ 59 (1998); *AT&T's Private Payphone Commission Plan*, 3 FCC Rcd. 5834, ¶ 26 (1988), *reconsideration and review denied*, 7 FCC Rcd. 7135 (1992).

<sup>21</sup> *Policy and Rules Concerning the Interstate, Interexchange Marketplace*, CC Docket No. 96-61; *1998 Biennial Regulatory Review – Review of Customer Premises Equipment and Enhanced Services Unbundling Rules in the Interexchange, Exchange Access and Local Exchange Markets*, CC Docket No. 98-183, Report and Order, FCC 01-98 (rel. March 30, 2001) (“*Bundling Order*”).

<sup>22</sup> However, the Commission has recognized that the need to regulate tying can outweigh the existence of certain undesirable costs of tying regulations. See AT&T-TCI Order at fn. 350 (“When seller of a tied product has ‘appreciable economic power’ in the tying product market and the arrangement affects a ‘substantial volume of commerce’ in the tied market, the arrangement may be anticompetitive, despite any purported consumer benefits or efficiency gains from the arrangement. *Eastman Kodak Co. v. Image Technical Servs, Inc.*, 504 U.S.451, 461-62 (1992); *Jefferson Parish Hosp. Dist. v. Hyde*, 466 U.S. 2, 12 (1984).”)

<sup>23</sup> While market forces have been insufficient to incent some broadband providers to stop engaging in anticompetitive and unreasonable tying practices, the mere threat of Commission regulation could be. The Commission could expedite consumer relief and retain future flexibility to adapt to the inevitable changes to the

The first needed rule presents an easy case. Broadband access providers should not be permitted to condition the availability of broadband exclusively on the purchase of other services such as voice services, as BellSouth and SBC now do. Broadband access should instead be available to consumers as a stand-alone service, untied from other services, unless technically infeasible to do so. There is no public interest benefit to requirements that broadband customers purchase an unrelated voice service they may not want, and any lesser rule would not adequately protect consumers.

Second, broadband access providers should not be permitted to evade a stand-alone service requirement through manipulated pricing. While providers may be able to justify a modest discount for a bundled service to reflect cost efficiencies achieved by the bundling, there would be no legitimate basis to charge more than such savings as the premium for stand-alone broadband. For example, if an ILEC's voice service was priced at \$25 and its price for the addition of ADSL service were \$35 more (for a total of \$60), it might be reasonable to charge \$40 for stand-alone broadband, but not \$50 and certainly not \$60 or more. Accordingly, the Commission should require that stand-alone broadband be priced at rates reasonably comparable to the price for the broadband portion of the provider's bundled service packages.

#### **IV. Conclusion**

Commissioner Abernathy has expressed optimism that VoIP “is increasingly creating the robust, facilities-based voice competition that the framers of the 1996 Act envisioned.”<sup>24</sup> The

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broadband market by making its most immediate priority on this issue the encouragement of vertically-integrated broadband providers to commit to offer stand-alone broadband and not engage in anticompetitive tying practices. For example, Vonage has urged the Commission to condition its approval of the SBC-AT&T merger on a commitment by SBC to offer stand-alone broadband. At the same time, Vonage urges the Commission to move forward with the consideration of formal rules, if for no other reason than to back up its hand in seeking commitments from broadband providers.

<sup>24</sup> See Remarks of Commissioner Kathleen Q. Abernathy, “Overview of the Road to Convergence: New Realities Collide with Old Rules,” January 22, 2004, at 1.

Commission has increasingly encouraged the development of alternative platforms and technologies to stimulate the competition envisioned by the 1996 Act. However, if this path toward competition is to fully develop, the Commission must assure that vertically-integrated broadband access providers are not able to effectively prevent consumers from taking advantage of these new choices. Broadband tying deprives consumers of the opportunity to take full advantage of competitive and innovative services from VoIP providers, wireless carriers, and other competitive alternatives, without any offsetting public interest benefit. The elimination of broadband tying is clearly, therefore, a regulation that is necessary to safeguard competition and consumer choice. For the foregoing reasons, and the reasons set forth in Vonage's prior comments, the Commission should enjoin tying practices that deny consumers the right to select the providers and technologies of their choice.

Respectfully submitted,



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