

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 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 Competitive LEC UNE)	
Voice Customers)	

REPLY COMMENTS OF QWEST

Qwest Communications International Inc. (“Qwest”) respectfully submits these Reply Comments to the *Notice of Inquiry* in the above-captioned proceeding.¹ Several commenters assert that the Federal Communications Commission (“Commission”) should adopt rules of general applicability regarding bundling, and in particular adopt rules requiring incumbent local exchange carriers (“LECs”) to offer naked DSL. Despite Qwest’s willingness to voluntarily offer naked DSL (as several commenters have noted²), Qwest does not believe that the Commission should adopt rules of general applicability imposing additional regulatory burdens on either incumbent broadband offerings or on carrier service bundles in general.

First, the Commission should focus on illegal tying arrangements and not permissible service bundles.³ Given the well-documented benefits to consumers and competition that flow

¹ *In the Matter of BellSouth Telecommunications, Inc. Request for Declaratory Ruling that State Commissions May Not Regulate Broadband Internet Access Services by Requiring BellSouth to Provide Wholesale or Retail Broadband Services to Competitive LEC UNE Voice Customers, Memorandum Opinion and Order and Notice of Inquiry*, 20 FCC Rcd 6830, 6849-50 ¶ 37 (2005) (“*Notice*”).

² See CompTel/ALTS Comments at 4; NASUCA Comments at 2; Earthlink Comments at 5-6; T-Mobile Comments at 5.

³ See also Comcast Comments at 2 (asserting that “it is essential to distinguish between the terms ‘tying’ and ‘bundling’”).

from service bundles,⁴ the Commission should take no action that encroaches on a carrier's ability to offer bundles. Yet several parties confuse the concept of such permissible bundling with unlawful tying arrangements -- suggesting that even where incumbents lack market power (*i.e.*, the broadband market⁵), the incumbent could force consumers to purchase unwanted voice service by bundling voice with DSL.⁶ Contrary to these assertions, only if the dominant provider conditioned the offer of *dominant* services on the purchase of additional services could there possibly be illegal tying.⁷ If an incumbent refused to offer stand-alone local voice service, and instead tied additional services to the local voice (assuming the incumbent has market power), then the tying would likely be illegal. But where the seller lacks market power in the market for the "tying" product (*i.e.*, the product that is not offered separately), this "tying" is not illegal.

Second, consistent with the deregulatory mandates of the Act,⁸ the Commission should be identifying broadband regulations for elimination and not imposing new rules of general applicability. This is especially true of regulations concerning the incumbents' broadband

⁴ See Qwest Comments at 2-3; Verizon Comments at 12-22; SBC Comments at 5-11. Even Vonage concedes that it is important that the Commission not impose rules that "unduly interfere with the ability of companies to offer packages that consumers desire." Vonage Comments at 8.

⁵ The Commission has previously concluded that broadband services are provided in a "competitive market." See *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capability, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking*, 18 FCC Rcd 16978, 17135-36 ¶ 262, 17151-52 ¶ 292; see also BellSouth Comments at 6-11; SBC Comments at 22-23; Verizon Comments at 16-17.

⁶ CompTel/ALTS Comments at 6; NASUCA Comments at 2-3; T-Mobile Comments at 4-5; Earthlink Comments at 2-3.

⁷ See *Eastman Kodak Co. v. Image Technical Services*, 504 U.S. 451, 461, 112 S. Ct. 2072, 2079 (1992); *General Cigar Holdings, Inc. v. Altadis, S.A.*, 205 F. Supp. 2d 1335, 1355 (S.D. Fla. 2002) (*cited in* SBC Comments at 29); *Gappone v. Subaru of New England, Inc.*, 858 F.2d 792, 795-96 (1st Cir. 1988) (*cited in* Verizon Comments at 7); see also CompTel/ALTS Comments at 7 (*citing* *United States v. Microsoft Corporation*, 253 F.3d 34, 126 (D.C. Cir. 2001) (anticompetitive tying arrangement requires, among other things, that the defendant has market power in the market for the tying product -- *i.e.*, the product to which the second product is tied)).

⁸ See generally 47 U.S.C. §§ 160, 161.

offerings -- particularly in the wake of the Supreme Court's *Brand X* decision.⁹ In *Brand X*, the Supreme Court upheld the Commission's conclusion that the cable modem offerings of the cable companies are information services and therefore free of the regulatory burdens of Title II.¹⁰ In light of Chairman Martin's commitment to apply the same framework to all providers and "finalize regulations that will spur the deployment of broadband services for all Americans,"¹¹ imposing additional regulatory conditions on broadband offerings of the incumbents makes no sense. Indeed, Qwest's willingness to voluntarily offer naked DSL demonstrates that general rules are not necessary.

Third, rather than imposing new rules of general applicability, the Commission should address specific and discrete instances of harm with narrow and fact-specific remedies tailored to the specific concerns as the Commission has effectively done in the past.¹² For instance, as noted by T-Mobile, the Commission took appropriate action to prevent Madison River Communications from blocking ports for VoIP services.¹³ But contrary to the assertions of T-Mobile, the Commission's action concerning Madison River does not mean that the Commission should adopt rules of general applicability here. Indeed, the Madison River situation demonstrates that the Commission's enforcement authority is sufficient to address the fact-specific concerns that may arise. Similarly, the Commission should elsewhere address the competitive concerns arising from the proposed mergers of SBC/AT&T and Verizon/MCI by conditioning any approval on (among other things) the merged entities' willingness to offer

⁹ See *National Cable & Telecommunications Assoc. v. Brand X Internet Services*, No. 04-277, slip opinion (U.S. Sup. Ct., June 27, 2005).

¹⁰ *Id.* slip opinion at 1-2.

¹¹ Chairman Kevin J. Martin's Announcement Regarding the Supreme Court's Decision in *Brand X* (June 27, 2005).

¹² See also Sprint Comments at 2 (Commission should address issues on a case-by-case basis); Comcast Comments at 5-6 (asserting that if the Commission perceives genuine problems, it should address them in discrete proceedings).

¹³ See T-Mobile Comments at 6 (citing *In the Matter of Madison River Communications, LLC and Affiliated Cos.*, File No. EB-05-IH-0110, *Consent Decree*, 20 FCC Rcd 4295 ¶ 1 (2005)).

naked DSL. Such a condition is certainly justified in those proceedings, but there is no need to impose such a general regulation here or to otherwise impose rules of general applicability regarding service bundles.

Respectfully submitted,

QWEST COMMUNICATIONS
INTERNATIONAL INC.

By: Blair A. Rosenthal
Blair A. Rosenthal
Suite 950
607 14th Street, N.W.
Washington, DC 20005
(303) 383-6579

Its Attorney

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