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 Competitive LEC UNE	)	
Voice Customers	)	

REPLY COMMENTS OF SCOTT A. BURSOR

I am an attorney representing a number of consumers who are pursuing antitrust claims challenging incumbent LECs' practices of punishing or threatening to punish customers who would patronize competitive LECs' voice telephone service by cutting off, or refusing to provide, DSL service to such customers.

The comments in this docket generally address two issues: (1) whether the Commission should permit bundling of communications services as a general matter, and (2) whether the Commission should permit incumbent LECs' refusal to sell so-called "stand-alone DSL." On the first issue, there is a broad consensus that bundling should generally be permitted. I agree, and we therefore will not address that issue. On the second issue, there is disagreement: incumbent LECs argue that there is nothing nefarious about their refusal to offer DSL on a stand-alone basis, whereas most other commenters argue that the ILEC's practice harms consumers. I agree with the latter group of commenters, though my analysis differs from that of most.

I. THE ILECS' REFUSAL TO PROVIDE STAND-ALONE DSL SERVICE CONSTITUTES UNLAWFUL MONOPOLY MAINTENANCE.

Under Section 201 and 202 of the Communications Act, this Commission has broad authority to prohibit common carriers' conduct insofar as it is other than "reasonable."[1] Although the Commission's authority reaches further than that of antitrust courts, the Commission has held that conduct prohibited under the antitrust laws automatically also violates the Communications Act.[2] Thus, antitrust law can provide a useful guide for analyzing conduct that is claimed to be anticompetitive.

The incumbent LEC's refusal to provide stand-along DSL service constitutes monopoly maintenance. Incumbent LECs unquestionably have market power in voice service, particularly with respect to residential customers: in most locations, incumbent LECs have a market share of close to 100% of residential telephone subscribers. The ILEC's practice of turning off the DSL spigot when subscribers go elsewhere for voice service imposes a cost on departing subscribers: losing DSL service means that consumers must obtain a new modem, configure new software, lose e-mail addresses, and (possibly) lose broadband service altogether for a short time. Thus, loss of their DSL service will deter many consumers from switching voice providers, even if they know that they would be able to save a few dollars by doing so.

Moreover, there is no bona fide business justification for the ILECs' practice of turning off the DSL spigot. Incumbent LECs do not and cannot argue that there is a technological reason

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[1] 47 U.S.C. §§ 201, 202.

[2] *See*, *e.g.*, *AT&T's Private Payphone Commission Plan*, Memorandum Opinion and Order, 3 FCC Rcd 5834, ¶ 11 (1988) ("While we do not find it necessary to engage in a strict Clayton Act analysis, we believe AT & T's tying of its '0 +' service to its '1 +' service violates the underlying policy goals of the antitrust laws, and is, therefore, unreasonable under Section 201(b).").

for their practice: Qwest has been providing stand-alone DSL voluntarily for some time, and other RBOCs have provided stand-alone DSL where state commissions required it. Moreover, although the ILECs' conduct initially targeted UNE-P providers, the conduct has nothing to do with the complications of line-sharing: ILECs also turn the spigot off when their voice customers depart for facilities-based voice-service providers (say, cable operators).

Thus, it appears that the sole justification for the incumbent LECs' conduct is its effect on competition: ILECs apparently hope to deter defection by punishing defecting customers with a gratuitous loss of DSL service. As such, the ILECs' conduct readily fits the definition of "exclusionary conduct" for purposes of Section 2 of the Sherman Act: "acts that . . . are reasonably capable of . . . prolonging monopoly power by impairing the opportunities of rivals; and . . . that either . . . do not benefit customers at all, or . . . are unnecessary for the particular consumer benefits that the acts produce, or . . . produce harms disproportionate to the resulting benefits."[3] The ILECs' conduct plainly prolongs their voice monopoly, and it has no procompetitive justification.

There is, moreover, ample antitrust precedent to condemn the ILECs' conduct. In *Lorain Journal v. United States*,[4] the Supreme Court held that a monopolist newspaper had violated Section 2 when it implemented a policy of punishing defecting customers. Whenever the Lorain Journal discovered that an advertising customer had bought advertising from a radio station that competed with its newspaper, it refused to sell that customer any more advertising at all. The newspaper was thereby able to slow down the loss of its monopoly power: "Numerous Lorain

[3] Philip E. Areeda & Herbert Hovenkamp, Antitrust Law ¶ 651, at 72 (2d ed. 2002).

[4] 342 U.S. 143 (1951).

advertisers wished to supplement their local newspaper advertising with local radio advertising but could not afford to discontinue their newspaper advertising in order to use radio."[5] The principle underlying *Lorain Journal* — that gratuitous punishment of disloyal customers constitutes exclusionary conduct — has been universally accepted by lower courts[6] and by commentators.[7] That principle applies equally here.

II. THE INCUMBENT LECS' ATTEMPTS TO FORMULATE BONA FIDE BUSINESS JUSTIFICATIONS ARE UNSUCCESSFUL.

SBC argues that the antitrust laws generally do not condemn aggressive competition on the merits,[8] and that turning off the DSL spigot is nothing more than that. In particular, SBC argues that, "to the extent the development of [SBC's line-shared DSL] product created an advantage in the *voice* market, that reflects a legitimate effort to profit from the company's own

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[5] *Id.* at 152.

[6] *See*, *e.g.*, *Byars v. Bluff City News Co.*, 609 F.2d 843, 858 (6th Cir. 1979) ("[T]here is the context in which a monopolist refuses to deal with customers who deal with its rivals. This behavior is inherently anti-competitive; *Lorain Journal* . . . makes it clear that this is illegal, either as monopolization or attempt to monopolize."); *Pepsico, Inc. v. Coca-Cola Co., Inc.*, No. 98 Civ. 3282 (LAP), 1998-2 Trade Cas. ¶ 72,257, 1998 WL 547088, at *18 (S.D.N.Y. Aug. 27, 1998) ("PepsiCo asserts that Coca-Cola has refused to deal and threatened to refuse to deal with independent foodservice distributors who wish to distribute Pepsi. . . . As such, PepsiCo's complaint states a section 2 claim, and Coca-Cola's motion to dismiss on the ground that PepsiCo has failed to allege anticompetitive conduct must be denied.").

[7] *See*, *e.g.*, Philip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 768e3, at 155 (2d ed. 2002) ("Extraction of an agreement not to deal with a competitor — or the equivalent, refusing to deal with buyers who do — can be exclusionary and particularly damaging where the buyers cannot do without the seller's product or service."); Robert H. Bork, *The Antitrust Paradox*, at 344 (1978) (calling *Lorain Journal* "clearly correct"); Kenneth L. Glazer & Abbott B. Lipsky, Jr., *Unilateral Refusals to Deal Under Section 2 of the Sherman Act*, 63 Antitrust L.J. 749, 792-93 (1995) (stating that when a defendant refuses to do business with rivals' customers, the "easy" conclusion is that there "should be a presumption that such conduct is illegal").

[8] SBC at 32.

efficiency and innovation, which is conduct that the antitrust laws are specifically designed to encourage."[9]

Insofar as this argument is comprehensible at all, it is unconvincing. When voice customers leave SBC for another carrier, SBC purposely turns off their DSL service. There is no technological reason for this, and SBC's conduct imposes great harm on consumers. Indeed, SBC's conduct does not even make sense from SBC's own perspective: it causes SBC to lose revenue that it otherwise would have earned by continuing to sell DSL service. This conduct is explainable only on the basis of expected monopoly profits — on *voice* service sold to subscribers who have been discouraged from departing by the ILEC's threat to cut off their DSL service.[10] To label such conduct "a legitimate effort to profit from the company's own efficiency and innovation" is simply unconvincing.

BellSouth takes a different tack: it argues that, before it would be able to provide stand-alone DSL, it would have to incur additional costs. According to BellSouth, "BellSouth's DSL services were designed as an overlay to BellSouth's voice service. . . . If BellSouth had to provide a standalone DSL offering where no local exchange service existed, there would be no line over which to overlay the DSL services. Thus, in order to provide a standalone DSL offering, BellSouth must make operational or technical modifications, including provisioning a DSL-only line in order to provide the standalone DSL service. . . . [I]t is these additional cost and

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[9] *Id.* at 32-33.

[10] *Cf. Verizon Communications v. Law Offices of Curtis V. Trinko*, 124 S. Ct. 872, 880 (2004) ("The unilateral termination of a voluntary (and thus presumably profitable) course of dealing suggested a willingness to forsake short term profits to achieve an anticompetitive end. . . . Similarly, the defendant's unwillingness to renew the ticket even if compensated at retail price revealed a distinctly anticompetitive bent.").

market conditions that underlie BellSouth's current decision not to offer a standalone broadband service at present."[11]

This assertion is remarkable mostly for its vagueness. What kinds of costs are involved here? What "operational or technical modifications" are involved? What is meant by "provisioning a DSL-only line"? BellSouth doesn't say. Plainly, facially anticompetitive conduct cannot be excused on the strength of such vague statements — or the *Lorain Journal* could have avoided condemnation simply by contending that there were additional costs in selling less than a customer's full advertising requirements.

Finally, BellSouth argues that any stand-alone DSL requirement would be self-defeating in that ILECs might charge consumers a higher price for stand-alone DSL than for a bundle of DSL and voice service.[12] Any defendant who stands accused of tying could make the same argument that BellSouth makes here: that, if it were forced to sell the two products together, the combination might cost more than the tied bundle, and consumers would only be worse off. For obvious reasons, antitrust courts routinely reject such arguments: if tying harms consumers (which is the basic precept underlying the prohibition on tying), then obviously consumers must be better off without it.[13] The same is true here.

Besides, BellSouth's argument ignores the manner in which incumbent LECs commonly exploit their refusal to provide stand-alone DSL. Incumbent LECs commonly offer DSL at a low

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[11] BellSouth at 5.

[12] *See id.* at 12.

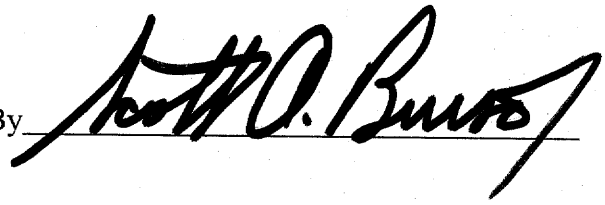
[13] *See*, *e.g.*, *In re Visa Check/Mastermoney Antitrust Litig.*, 280 F.3d 124, 142-43 (2d Cir. 2001) ("Under [the "tied product" damages] measure, the damages awarded reflect the difference between the prices actually paid for the tied product and the price for which the item could have been purchased in the open market.").

price, but make the offer subject to a one-year term and a sizable early-termination penalty.[14] Moreover, incumbent LECs commonly do not clearly advise consumers that the early termination penalty will be triggered if they seek to change voice-service providers. Thus, if incumbent LECs were required to provide stand-alone DSL, subscribers would be able to earn savings on their phone service while avoiding early-termination penalties on their DSL service. Consumers would unquestionably be better off.

Conclusion

For the reasons set forth above, the Commission should require incumbent LECs to provide stand-alone DSL service.

Respectfully submitted,

By 

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[14] *See, e.g.*, http://www22.verizon.com/forhomedsl/channels/dsl/package+price.asp ("For one year commitment plan, if service is cancelled between months 2 and 12, a $99 early termination fee applies.").