

**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)

BellSouth Reply Comments

BellSouth Corporation, on behalf of itself and its wholly owned affiliates (“BellSouth”), by its attorneys, files these Reply Comments in the *Notice of Inquiry* issued with the Commission’s *Order* granting BellSouth’s Petition for Declaratory Ruling seeking relief from state commissions requiring BellSouth to provide wholesale or retail broadband services to Competitive LEC UNE voice customers.¹

As BellSouth demonstrated in its comments, the bundling of DSL and voice services is a function of network design and efficiency. As explained, BellSouth’s DSL service is an overlay to its voice service with DSL being provided over the high frequency portion of the same loop that is used to provide voice service over the low frequency portion of the loop. Because of the efficiencies gained from offering the services as a bundle and because of the additional costs of offering DSL on a standalone basis, BellSouth has made a business decision to only provide DSL

¹ *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*, WC Docket No. 03-251, *Memorandum Opinion and Order and Notice of Inquiry*, 20 FCC Rcd 6830 (2005) (“*DSL Order*”).

in a bundle with its voice service. Despite the few claims to the contrary offered in the comments in this proceeding, such bundling does not constitute anticompetitive behavior and clearly does not require any Commission action on the matter.

Only a few commenters offered support for the contention that an ILEC's current business decision not to offer DSL as a standalone service somehow violates either sections 201 and 202 of the Communications Act of 1934, as amended, or is an antitrust violation under the Sherman and Clayton Acts, or both. This support, however, was based on a flawed view of reality, namely that the broadband access market is not competitive and that there are not sound reasons for the practice.²

EarthLink, for example, claims that an ILEC's bundling of voice and DSL service has what it terms "four pernicious effects on communications markets that are contrary to the public interest and undermine the goals of the Communications Act."³ Each of the items listed, however, is based on a flawed view of the broadband access market. EarthLink first claims that "broadband deployment and consumer adoption of broadband services" are negatively affected because consumers are not allowed to "choose the local exchange services of a competitive LEC" when they buy DSL from an ILEC, whether directly from an ILEC or from an ISP that

² Comcast offers a discussion of the differences between the bundling of services and a tying claim. Comcast describes bundling as "a colloquial term, with no legal meaning, that is loosely used to describe a variety of arrangements in which products are combined – including ways that create significant consumer benefits and raise no cognizable policy concerns." Comcast Comments at 2-3. Tying is a defined term "with a specific meaning illuminated by decades of precedent under antitrust laws, and is a *per se* violation of Section 1 of the Sherman Act, and Section 3 of the Clayton Act." *Id.* at 2. In these reply comments, BellSouth refers to its offering of voice and DSL Service as bundling because, as discussed herein, its actions do not constitute a violation of either the Communications Act or the Sherman and Clayton Acts.

³ EarthLink Comments at 4.

buys wholesale DSL from the ILEC.⁴ Its second claim is similar, stating that the practice “has a deterrent effect for consumers who would otherwise choose a competitive LEC voice service,” which it claims undermines the competitive purpose of the Telecommunications Act of 1996.⁵

Neither of these arguments is persuasive considering the competitive market realities of the broadband market and the local exchange markets as well as the powerful policy arguments for allowing the free market to decide whether ILECs change their business practices to provide DSL on a standalone basis. Despite EarthLink’s accusation that ILECs dominate the broadband access market, the evidence clearly demonstrates otherwise.⁶ Broadband deployment is occurring at a rapid pace with numerous providers supplying last mile connections. Cable modem service leads the way with DSL following a distant second. Moreover, new technologies, such as fixed wireless, satellite, and others, are gaining ground in deployment. Thus, regardless of EarthLink’s claims, these entities all provide consumers choices for broadband access; ILECs are not the only game in town.

Given these choices, EarthLink’s contention that broadband deployment and consumer adoption of broadband services are somehow stunted because of ILECs’ bundling practices is completely unwarranted. Indeed, deployment of high-speed lines serving residential and small business subscribers increased to 35.3 million lines during 2004; this represents a 36% increase for the year.⁷ This one-year period increase demonstrates that deployment is progressing at an effective pace. And, to the extent deployment has been slowed, the cause can be squarely placed

⁴ *Id.*

⁵ *Id.*

⁶ BellSouth Comments at 6-11; SBC Comments at 29-30; Verizon Comments at 17.

⁷ High-Speed Services for Internet Access: Status as of December 31, 2004, Industry Analysis and Technology Divison, Wireline Competition Bureau, July 2005, Table 3.

on policies that place regulations on ILECs' provision of broadband services when other broadband access providers, such as cable modem providers, do not face such regulation. Indeed, BellSouth is confident that with the release of the *Brand X* decision,⁸ the Commission will move forward with deliberate speed in bringing parity among broadband access providers. Such parity will boost deployment and, in turn, subscribership, significantly.

As to its statement that the local exchange market has not been transformed as envisioned by the 1996 Act, EarthLink need only look to the *Triennial Review Order*, as reaffirmed in the *DSL Order*, regarding the Commission's findings concerning unbundling and an ILEC's non-provisioning of DSL over a UNE-P loop. There, the Commission examined any possible competitive benefits from requiring ILECs to provide their DSL service to CLEC customers, and determined not only that such a regulatory requirement would bring no benefit, but also that it would discourage investment and innovation and thus *harm* consumers. The Commission held that requiring incumbents to provide DSL service to CLEC voice customers was not necessary to promote competition by voice service providers since such carriers can "take full advantage of an unbundled loop's capabilities by partnering with a second competitive LEC that will offer [D]DSL service."⁹

The Commission not only declined to impose upon ILECs the duty to provide DSL service when they are not the provider of voice services, but also explained why, in its judgment,

⁸ *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 2005 U.S. LEXIS 5018 (2005).

⁹ *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, et al.*, CC Docket Nos. 01-338, *et al.*, *Report and Order and Order on Remand and Further Notice of Proposed Rulemaking*, 18 FCC Rcd 16978, 17141, ¶ 270 (2003) ("*Triennial Review Order*" or "*TRO*"), *aff'd in part, rev'd in part and remanded*, *United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir.) ("*USTA IP*"), *cert denied*, 125 S. Ct. 313 (2004).

that type of duty is actually harmful to competition. Applying its regulatory standards under the 1996 Act the Commission held that requiring the forced provision of service to CLEC customers – the same remedy that Vonage, EarthLink, and CompTel/ALTS seek in this proceeding – is not just *unnecessary* to give CLECs every opportunity to compete on the merits; rather, such arrangements actually *discourage* CLECs’ independent competitive efforts to consumers’ detriment. In reversing line sharing the Commission held that such forced cooperation “may skew competitive LECs’ incentives” and thus discourage development of “bundled voice and [D]DSL service offering[s]. . . . [S]uch results would run counter to the . . . goal of encouraging competition and innovation.”¹⁰ The Commission’s analysis in that closely related context applies here as well.

Thus, the Commission has found nothing anticompetitive or discriminatory in the fact that an ILEC does not unbundle the lower frequency portion of the loop (“LFPL”) and has found no basis in the 1996 Act for such a requirement. It follows then, that there is also no sound basis for forcing ILECs to offer a standalone DSL service. Even if a standalone DSL service were offered to consumers, any CLEC offering of voice services would have to be pursuant to a separate loop and could not be provided over the LFPL. BellSouth believes that the economics of this arrangement make it highly unlikely that it would be more attractive than a bundled offer by an ILEC or a bundled offer by a CLEC through its own facilities or a line splitting arrangement.

¹⁰ *Id.* at 17135, ¶ 261; *see also United States Telecom Ass’n v. FCC*, 290 F.3d 415, 424-25 (D. C. Cir. 2002) (“*USTA I*”), *cert. denied*, 538 U.S. 940 (2003) (noting disincentives to investment from forced sharing).

EarthLink next contends that the deployment of new services such as voice over Internet protocol (“VoIP”) will be harmed through the ILEC bundling arrangements.¹¹ Just as with the above discussion, and as set forth in BellSouth’s comments, this claim is invalid because of the broadband access choices available to consumers. If a consumer wants broadband access service without ILEC local exchange voice service, he or she can choose another broadband provider. Consumers, therefore, are not harmed, nor is VoIP deployment jeopardized, by the ILECs’ bundled offering of voice and broadband access services.

Finally, EarthLink contends that bundling of voice and broadband access services is “detrimental to the public interest in fostering intermodal competition between wireline and wireless services.”¹² Considering that wireless phones now outnumber wireline phones,¹³ BellSouth is unsure on what basis EarthLink makes this claim. In any event, a consumer that only wants broadband access and wireless service for all voice calls, can choose a broadband access provider other than BellSouth (or another ILEC that has not chosen to provide standalone DSL service) from this highly competitive market.

Vonage reiterated the comments it filed in the *DSL Order* proceeding, most of which BellSouth addressed in its comments, and did not restate its position in the comments to the *NOI*. Instead, Vonage commented on the Commission’s authority to act under either Title I or Title II of the Communications Act. Thus, Vonage commented that regardless of whether the Commission found broadband access service to be an information service under Title I or a telecommunications service under Title II, the Commission had adequate authority to fashion

¹¹ EarthLink Comments at 5.

¹² *Id.*

¹³ Local Telephone Competition: Status as of December 31, 2004, Industry Analysis and Technology Division, Wireline Competition Bureau, July 2005, Tables 1 & 13.

remedies for ILECs' bundling of services.¹⁴ Vonage's discussion presupposes that the bundling of voice and DSL services violates either sections 201 and 202 of Title II or general obligations under Title I. As demonstrated by BellSouth in its comments and in the above discussion, however, bundling of voice and DSL services is neither anticompetitive nor discriminatory. It is the result of a business plan implemented by BellSouth and other ILECs that resulted from network design and efficiencies. Moreover, BellSouth does not currently believe that the market would be receptive to a standalone DSL service at a price BellSouth currently perceives would be necessary to cover costs. Accordingly, however, BellSouth will continue to analyze the market to monitor demand and price of a standalone offering. If market conditions become favorable such that BellSouth believes them to merit a standalone broadband access service offer, it is likely that BellSouth would provide such a service. Significantly, because of the competitiveness of the market, this should be a business decision left to BellSouth and not one forced by regulation.¹⁵

Vonage's suggested remedy for alleged violations is for the Commission to require a standalone DSL offering by ILECs. Vonage also suggests, without any basis whatever, that the price for such a service should be regulated to be what Vonage thinks it should be. Thus, Vonage states that the price should not be allowed to be greater than a modest amount more than the price assigned to DSL in a bundled offer.¹⁶ Vonage makes this claim without regard to the ILECs' cost or the demand for such service. Clearly, an unsubstantiated conclusion made by an entity that has no basis to know cost structures or potential demand for a service cannot be a

¹⁴ Vonage Holdings Corp. ("Vonage") Comments at 4.

¹⁵ Direct Testimony of William E. Taylor, Ph.D., at 17-19, Exhibit 1 to BellSouth Comments ("Taylor Direct Testimony").

¹⁶ Vonage Comments at 9.

basis for price regulation. Any offer of a standalone DSL service must be commercially priced at an amount to cover the ILEC's costs regardless of how that price compares to DSL in a bundled offering.

CompTel/ALTS asserts that ILECs' bundling constitutes an antitrust "tying" violation. CompTel/ALTS argues that each of the four elements of a tying claim is met and therefore ILECs are illegally tying voice and DSL services.¹⁷ CompTel/ALTS' analysis, however, is fatally flawed because it assumes, as it must to support a tying claim, that ILECs have market power in the broadband access market.¹⁸ BellSouth's antitrust analysis in its comments is clear that an antitrust tying claim is not sustainable against any ILEC that bundles voice and DSL service because (among other reasons) ILECs do not possess market power in the broadband access market. CompTel/ALTS tries to solve this flaw in its analysis by limiting the broadband access market to DSL only. As BellSouth discussed in its comments, however, such a limitation is not sustainable because DSL service is not a market by itself.¹⁹ Indeed, DSL service is only one technological means of serving the broadband access market. Thus, CompTel/ALTS cannot, nor can the Commission, define the relevant tying market by ignoring the numerous other

¹⁷ CompTel/ALTS Comments at 7-8.

¹⁸ See BellSouth Comments at 16 ("There are two critical elements of an illegal tying arrangement. First, the seller must force the buyer to purchase the tied product to get the tying product. Second, that the seller must possess sufficient economic power in the tying product market to coerce buyer acceptance of the tied product.") *Amey, Inc. v. Gulf Abstract & Title, Inc.*, 758 F.2d 1486, 1502-03 (11th Cir. 1985), *cert. denied*, 475 U.S. 1107 (1986).

¹⁹ See BellSouth Comments at 17 (noting the existence of numerous broadband alternatives and the fact that even the D.C. Circuit in *USTA I* recognized that the broadband market includes services in addition to DSL and that robust competition exists in that market).

broadband alternatives described above that have the actual and potential ability to take significant amounts of business away from an ILEC's DSL service.²⁰

BellSouth provided empirical evidence in its comments that it does not have market power in the broadband access market. Without market power in the tying market, an antitrust tying claim must fail.²¹

Comtel/ALTS makes equally unremarkable allegations that bundling of voice and DSL services violates sections 201 and 202 of the Communications Act. As explained throughout BellSouth's comments and discussed herein, such practices are not unjust and unreasonable nor are they discriminatory.

Conclusion

The Commission should close this proceeding and find that no further action is needed. Broadband competition is thriving. Such competition ensures that ILECs cannot control prices or demand in the broadband market. ILECs' bundling of voice and DSL service, therefore, is not discriminatory or anticompetitive and does not meet the elements of an antitrust tying claim. In a competitive market, business decisions, not regulation, must drive service offerings. Accordingly, the Commission should allow the competitive market to work and avoid

²⁰ See *U.S. Anchor Mfg., Inc. v. Rule Indus.*, 7 F.3d 986, 995 (11th Cir. 1993); *Town Sound & Custom Tops, Inc. v. Chrysler Motors Corp.*, 959 F.2d 468, 479 (3d Cir. 1992) (rejecting a relevant market consisting only of new Chrysler cars manufactured for sale in the United States because "such a narrow definition makes no sense in terms of real world economics, and as a matter of law we cannot adopt it").

²¹ See BellSouth Comments Section III; Taylor Direct Testimony at 19-30, *See also* Declaration of David S. Evans filed as Attachment B to Verizon's Comments, ¶ 89 ("the standard tying claim is that a firm is extending monopoly power from the already monopolized tying product to the otherwise competitive tied product. That is implausible here as DSL faces very substantial competition among broadband providers.").

implementing any regulation, which will only distort the market and lead to unfavorable consequences.

Respectfully submitted,

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Dated: July 12, 2005

CERTIFICATE OF SERVICE

I do hereby certify that I have this 12th day of July 2005 served the following parties to this action with a copy of the foregoing **BELLSOUTH REPLY COMMENTS** by electronic mail and/or by placing a true and correct copy of the same in the United States Mail, postage prepaid, addressed to the parties on the attached service list.

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