

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C.**

In the Matter of)
)
BellSouth Telecommunications, Inc.) WC Docket No. 03-251
)
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 CLEC UNE)
Customers)

**REPLY COMMENTS OF
RNK, INC. D/B/A RNK TELECOM**

In accordance with the Commission’s *NOI*, RNK, Inc. d/b/a RNK Telecom (“RNK”), by its attorneys, hereby respectfully submits these reply comments.

I. INTRODUCTION

BellSouth and the other incumbent local exchange carriers (collectively “ILECs”) put forward convincing arguments regarding the benefit to consumers of “bundled” products.² Indeed there are substantial benefits to “bundling” for consumers. RNK

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*, Memorandum Opinion and Order and Notice of Inquiry, WC Docket No. 03-251 (“*NOI*”).

² Verizon, *NOI* Comments at 9.

does not contest these notions. In fact, RNK offers its own bundled voice products, including bundled local, toll and long distance products offered via VoIP. However, attempts to cloak the truth of the matter before the Commission - the attempt by ILECs to perpetuate their monopoly in the local voice market by bundling these products with ostensibly competitive DSL service - must be ignored by the Commission. In order to preserve competition and promote the development of newly developed voice products, such as VoIP, the Commission must require ILECs to offer so called “naked” DSL and not require consumers to purchase particular legacy voice products when they order DSL service.

II. THE ILECS HAVE FAILED TO DEFEND THIER ANTICOMPETITIVE TYING ARRANGEMENTS OR REFUTE CLAIMS THAT SUCH ARRANGEMENTS POSE A BARRIER TO CUSTOMER CHOICE AND TO COMPETITION

The ILECs continue to argue that their tying of competitive broadband and legacy voice services has no impact on competition or consumer choice. Indeed, the ILECs would have the Commission believe that their practices are similar to grocers packaging lettuces and other vegetables for salads³ or sneakers with shoelaces.⁴ These “analogies” clearly fail to capture the quintessential character of the tying arrangement at issue, that is, the leveraging of a competitive broadband service in order to force consumers into purchasing monopoly voice products instead of allowing customers to choose voice service from CLECs or competitive VoIP

³ Verizon, *NOI* Comments at 1.

⁴ *Id.* at 6.

providers. Perhaps a better analogy would be the primary reasons AT&T was broken up in the early 1980's, that is, the tying of underlying local and the long distance services that rode on them. No one wants to return to the days of being trapped in a bundled service without the choice of long distance carrier, or give up the precipitous drop in prices and innovation the break-up of AT&T made possible, but if the same broadband and local service tying arrangement is left to exist, oligopolies and lack of choice in VoIP providers will result.

The ILECs fallaciously argue that their tying arrangements in fact provide greater consumer choice and foster competition⁵ and attempt to recolor the position of commentators that oppose tying arrangements as an attempt to entirely bar tying arrangements.⁶ While RNK cannot speak for the sentiments of the other commentators averse to ILEC tying arrangements, RNK does not support a bar on bundled arrangements freely chosen by consumers, and is instead opining that to foster consumer choice the Commission must require ILECs to offer DSL separate from a bundled service at a non-discriminatory price. Requiring ILECs to offer “naked” DSL at reasonable prices will negate the competitive distortion created by ILEC tying practices.⁷ The Commission should not be persuaded by arguments by the ILECs that “bundling” is the prime issue here -- the issue is anti-competitive

⁵ See *id.* at 5, See also BellSouth, *NOI* Comments at 13.

⁶ SBC, *NOI* Comments at 21.

⁷ This sentiment is echoed by other commentators. See EarthLink comments at 2, See T-Mobile at 2 (Suggesting that the Commission begin a proceeding to require ILECs to make cost-based stand alone naked DSL available to consumers on a nondiscriminatory basis.).

“tying,” and the need for a rational and necessary cure to the deleterious effects on competition and consumer choice such practices facilitate.

ILEC arguments that offering “naked” DSL is technically or economically impractical are fatally flawed and contradicted by the evidence on record. BellSouth, for instance, has argued that these limitations, provisioning of a line if the customer had not previously received BellSouth local exchange service and other “operational or technical modifications,” have necessitated its decision not to offer stand alone DSL to consumers.⁸ Apparently, these economic and technical limitations are not present or are minute in the case of cable modem broadband service, which is offered as a stand alone service in most places. To the best of RNK’s knowledge, no major cable operators offering broadband service require consumers to also purchase their voice products. More to the point, most large cable operators that offer broadband do not require the purchase of cable television.⁹ This observation is buttressed by ILEC and cable commentators.¹⁰ In fact, there are several fellow ILECs that offer stand alone DSL.¹¹ It seems peculiar that BellSouth is so markedly different from its peers and cable companies. The truth of the matter is that BellSouth and other ILECs are putting up a smoke screen clothed in

⁸ BellSouth, *NOI* Comments at 5.

⁹ See, e.g., *Comcast Frequently Asked Questions* (“FAQ”), “Do I need to have cable TV to get Comcast High-Speed Internet?” (<http://www.comcast.com/Support/Corp1/FAQ/FaqDetail_476.html>, visited July 12, 2005); *Cable internet and modem provider- Optimum Online* (<<http://www.optimumonline.com/index.jhtml?pageType=pricing>>, visited July 12, 2005) (illustrating pricing and service options, including for non-Cablevision Services Corp.’s cable customers).

¹⁰ See SBC, *NOI* Comments at 15, See also Qwest, *NOI* Comments at 4, See also Comcast, *NOI* Comments at 4.

¹¹ See SBC, *NOI* Comments at 3. See also T-Mobile, *NOI* Comments at 5, n.11.

technical and economic jargon to disguise their anti-competitive practices. The Commission should not be fooled by these blatant attempts to lock-in customers, perpetuate monopoly legacy voice services, and stymie healthy competition from CLECs and VoIP providers.

BellSouth and other ILECs have made much of the competitive alternatives to consumers, in particular broadband cable providers.¹² They state, somewhat casually, that a consumer who does not want voice service can simply go to another voice service provider and another broadband service provider.¹³ Consumers forced to choose between competitive alternatives and losing their DSL access have a rational and foreseeable reluctance to switch and maximize savings opportunities that inevitably occur in a truly competitive environment. In addition, although broadband is available as a class of service to ever increasing percentages of the population, choice of providers has not increased in similar fashion, leaving many BellSouth and other potential broadband customers with one real choice: DSL via Bell South. Even if there is a choice for some customers, tying practices prevent them from taking service from the carrier they prefer or from leaving a carrier whom they might find to have substandard service for fear of losing their DSL service.¹⁴ This truth is further illustrated when viewed in light of ILECs marketing

¹² BellSouth, *NOI* Comments at 3, *See also* SBC, *NOI* Comments at 15 (“Customers that want a standalone voice service can obviously obtain it from the ILEC serving a particular area as well as from competitive providers...”).

¹³ BellSouth, *NOI* Comments at 6 and 16 (Claiming that customers have the choice of obtaining another broadband service provider.), *See also* Verizon, *NOI* Comments at 14.

¹⁴ To demonstrate the absurdity of this position, one could use Verizon’s salad analogy (*see* fn. 3, *supra*). In this case, Bell South would be akin to a grocer (who is the only such provider in a given

their DSL service to customers already receiving voice service. Many customers accept these offers and unknowingly abrogate their competitive and independent choice necessarily associated with ILEC “bundles.” No ILEC has effectively substantiated, nor can they substantiate, a practice that prevents current customers from switching to new or competitive services. The more appropriate retort by ILECs should be “simply switch to a new provider and fear the imposition of termination fees, loss of incidental associated features of DSL service, such as email address, and lost productivity involved with your competitive choice.” In effect, BellSouth and other ILECs have contrived a hostage market where none should exist under the guise of “competition.”

III. ILEC DSL MANDATORY BUNDLING POLICIES CONSTITUTE AN UNLAWFUL “TYING” ARRANGEMENT

The ILECs have made much of what they believe is a flaw in arguments proffered by competitive carriers, state commissions, and VoIP providers that since ILECs do not have dominant market power in the offering of broadband services,

area) that sells pre-made salads exclusively, without offering lettuce as a “stand-alone” retail product. BellSouth—and, apparently the other ILEC commenters—would hold that it would not be unreasonable for consumers who wanted *just* lettuce (which is a necessary component of such a “bundled” salad) to buy the salad and discard the carrots, tomatoes, etc. But this analogy is insufficient, since BellSouth is a monopoly—or near monopoly—in the provision of the “unwanted” products that customers would have to “waste” to get the service they truly desired. In this scenario, if a customer wanted a yellow tomato instead of the provided red one in her salad, she would have to waste the red tomato and procure her own yellow tomato at added expense, to add to the salad. Wasting resources is not a rational consumer response and, thus, Verizon’s analogy fails.

they cannot be accused of an unlawful “tying” practice.¹⁵ The ILECs seem to be equating “market power” necessary for an unlawful “tying” practice with possessing the largest market share.¹⁶ In essence, the ILECs claim that since they are not the dominant provider of broadband services in the nation, they cannot be found to have unlawful tying arrangements.

Under antitrust law, an unlawful tying arrangement results in the “abdication of a buyer’s independent judgment” and deprives the “tied” product from competition in the market.¹⁷ However, the quintessential factor in converting an otherwise legal tying arrangement into an unlawful one “lies in the seller’s exploitation of its control over the tying product to force the buyer into the purchase of a tied product that the buyer either did not want at all, or might have preferred to purchase elsewhere on different terms.”¹⁸ Courts apply four elements in order to establish an unlawful tying arrangement: (1) that there are two separate products, a tying product and tied product; (2) that the products are tied together in fact and the buyer is forced to buy the tied product; (3) the seller possesses sufficient economic

¹⁵ BellSouth, *NOI* Comments at 17 (“While a high market share will sometimes permit the inference of market power, a low market share signifies the lack of market power.”), *See also* Verizon, *NOI* Comments at 19.

¹⁶ BellSouth, *NOI* Comments at 7 (“while cable modem is the dominant broadband service provider, DSL is a distant second.”), *See also* Verizon, *NOI* Comments at 19 (“[N]ationally, DSL service provided by a local incumbent LEC captures only 38% of the residential broadband market; cable modem service makes up most of the rest.” (footnotes omitted)), *See also* SBC, *NOI* Comments at 30 (“[C]able modem service providers have been and remain the leading provider of broadband Internet access, with DSL a distant second ... [i]n light of these marketplace realities, commenters’ tying claim lacks any foundation.” (footnotes omitted)).

¹⁷ *Times-Picayune Pub. Co. v. United States*, 345 U.S. 594, 604 (1953).

¹⁸ *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 12 (1984).

power in the tying product market to force the buyer to accept the tied product; and (4) the involvement of interstate commerce.¹⁹ In analyzing the market power element, courts need not find that the “tying” entity has complete market power or even majority market power.²⁰ In fact, some courts have determined that an entity with a 33% market share may have market power.²¹

While it is true that as of December 31, 2004, cable modem broadband services maintained a 54.4% market share in broadband subscribers, DSL service has added customers faster and is closing that percentage.²² Indeed, DSL subscriptions totaled 13.9 million lines, an increase 21% during the second half of 2004 alone.²³ In comparison, cable modem service subscriptions increased 15% over the previous quarter to 21.4 million lines in service.²⁴ Several ILEC commentators have

¹⁹ *Tic-X-Press, Inc. v. Omni Promotions Co.*, 815 F.2d 1407, 1414 (11th Cir. 1987).

²⁰ *Fortner Enterprises, Inc. v. United States Steel Corp.*, 394 U.S. 495, 502 (1969).

²¹ *Sea-Land Serv. v. Atlantic Pac. Int'l.*, 61 F. Supp. 2d 1092, 1099 (D.Haw. 1999) (Court held that Sea-Land's inclusion of the cost of its containers in its shipping charges, and its 33% share of the relevant market, justified a trial on the issue of tying pursuant to § 1 of the Sherman Act (15 U.S.C. § 1). *See also Wilson v. Mobil Oil Corp.*, 940 F. Supp. 944, 952 (E.D. La. 1996) (In *Wilson*, Fast-lube franchisees alleged that their franchisor had created an unlawful tie by requiring them to purchase high-priced motor oil exclusively from Mobil Oil Corp. The defendants argued that no tie could exist because the franchisor lacked market power in the national Fast-lube market. The court found that Fast-lube franchisees might be as locked-in considering "the size of the capital investment in a business format franchise" and because "the franchise agreement can involve a long-term arrangement in which the franchisee invests in brand development, which may make switching to another franchise costly." The similarities, although on a smaller scale, with a consumer being locked-in to a term commitment and fearing the loss of ancillary services when switching to a competitive carrier and the Plaintiffs in *Wilson* are telling in this matter.).

²² Federal Communications Commission, *High-Speed Services for Internet Access: Status as of December 31, 2004*, Table 1 (July 2005) (“*Internet Access Report*”).

²³ *Id.* at 2.

²⁴ *Id.*

acknowledged the gains made by DSL service in the past year.²⁵ In light of these statistics, it can hardly be said that DSL is a “distant second”²⁶ and therefore incapable of composing part of an unlawful tying arrangement. Even if the Commission were to find that the ILECs do not possess the requisite market power to impose an unlawful tying arrangement on consumers, an outcome that RNK deems unjustified, the tying practice is still unlawful in that it is designed to maintain their monopoly grasp on the local exchange market.²⁷

Further, ILEC contentions regarding market dominance nationwide completely ignore that a particular provider may have market dominance in a particular geographic area, or may be the only true broadband provider in an area. Despite the fact that DSL, although growing, lags behind cable broadband service for subscribers nationwide, in several areas ILECs are the only broadband provider. The Georgia Public Service Commission determined that BellSouth had a “substantial majority” of Georgia’s DSL lines and that DSL lines captured the majority of the high speed internet market.²⁸ Similarly, the Kentucky Public Service Commission also maintains that DSL, in particular BellSouth DSL, has a

²⁵ SBC, *NOI* Comments at 16.

²⁶ BellSouth, *NOI* Comments at 7.

²⁷ 15 U.S.C. § 2 makes it unlawful for a company to “monopolize, or attempt to monopolize,” trade or commerce. The law is violated only if the company tries to maintain or acquire a monopoly position through unreasonable methods. For the courts, a key factor in determining what is unreasonable is whether the practice has a legitimate business justification or whether it is leveraged “to foreclose competition, to gain a competitive advantage, or to destroy a competitor.” *Eastman Kodak Co. v. Image Technical Servs.*, 504 U.S. 451, 482-83 (1992).

²⁸ *In Re: BellSouth’s provisions of ADSL Service to end-users over CLEC loops pursuant to the Commission’s directive in Order U-22252-E*, Order R-26173 at 12 (January 24, 2003).

higher penetration rate in Kentucky than cable modem broadband services.²⁹ As such, it would be inappropriate and competitively damaging for the Commission to ignore this clear evidence from its sister commissions of BellSouth's market dominance in particular geographic areas.

Based on the above and information provided by commentators, arguments by the ILECs that DSL broadband service cannot have the requisite market power to sustain a claim for unlawful "tying" under antitrust law must fail. DSL providers can maintain and exert the necessary market power in order to supplant consumer independent judgment and choice to the detriment of competition and consumers.³⁰

IV. THE COMMISSION SHOULD REQUIRE, AS A CONDITION TO ANY MERGER, ILECS TO OFFER DSL SEPARATE FROM ITS LOCAL VOICE PRODUCTS

As RNK noted in its initial *NOI* comments, the Commission should also consider requiring, as a condition to the approval of any merger between Verizon-MCI or SBC-AT&T who also enjoy monopoly dominance in DSL and local voice market, the offering of "naked DSL" or even UNE-like DSL.³¹ T-Mobile also suggests that the Commission "condition approval of pending large wireline mergers on the availability of cost-based, nondiscriminatory naked DSL."³² Additionally, New York

²⁹ Kentucky Public Service Commission, Comments 03-251 at 5 (January 28, 2004).

³⁰ While RNK believes that there is ample evidence of the harmful effects of ILEC tying practices on the record and compiled at the state commissions for the Commission to conduct and base its decision on BellSouth's petition using the above four-prong test. RNK also reminds the Commission that it may also refer to its ARMIS data and Form 477 filings in order to further assess the anticompetitive effects of such tying arrangements in individual markets.

³¹ RNK, *NOI* Comments at 17.

³² T-Mobile, *NOI* Comments at 3 nn. 7 and 8.

Public Service Commission Staff recently addressed the possible competitive harms associated with proposed wireline mergers.³³ Staff suggested that the Commission should require stand alone DSL as one of may conditions to approval of the merger between Verizon and MCI in order to remedy the competitive ills associated with the merging of two vast wireline entities. Staff recommended that due to the “anticompetitive harm associated with the highly concentrated post-merger mass market,” requiring Verizon to offer unrestricted “naked DSL” might remedy post-merger ills.³⁴ According to Staff, “Broadband is not available everywhere in New York State. DSL has distance limitations, and cable telephony is similarly limited to where cable companies have built out cable systems. Without question, customers in certain locations in New York have competitive options, including cable options, for voice. In some locations, however, competition does not exist.”³⁵ Staff concluded by asking a simple question that resonates in New York as well as other jurisdictions where ILECs attempt to limit customer choice and waylay competition: “Thus, the question is not ‘Is there competition?’ but rather, ‘Where is there competition?’”³⁶ Perhaps the Commission can make the same query here.

³³ State of New York Public Service Commission, Case No. 05-C-0237 - Joint Petition of Verizon New York Inc. and MCI, Inc. for a Declaratory Ruling Disclaiming Jurisdiction over or in the Alternative for Approval of Agreement and Plan of Merger and Case No. 05-C-0242 - Joint Petition of SBC Communications Inc., AT&T Corporation, together with its Certificated New York Subsidiaries, for Approval of Merger, Department of Public Service Staff White Paper, July 6, 2005 (“New York White Paper”).

³⁴ *Id.* at 27.

³⁵ *Id.* at 55.

³⁶ *Id.* (quotations original).

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