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

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 CLEC UNE Voice Customers	)	WC Docket No. 03-251

REPLY COMMENTS OF VONAGE HOLDINGS CORP.

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Summary

SBC and BellSouth have failed to provide any compelling, reasonable justification for their refusal to sell DSL to consumers who do not also purchase their voice services. Instead, they try to engage in a lengthy defense of something that no one has challenged – optional bundling, in which carriers offer discounted packages of services in addition to their stand-alone service offerings. Optional bundles provide consumers with additional choices, and therefore will generally be pro-competitive; restrictive tying, by contrast, denies choices to consumers and is designed for the purpose of suppressing competition.

SBC and BellSouth do not deny that their restrictive tying practices limit consumer choice. Instead, they contend that consumers can simply buy cable broadband instead. SBC and BellSouth argue, mistakenly, that a second-place share of the number of consumer broadband lines nationwide behind cable automatically translates into a lack of market power over any consumer anywhere in the country, and that *any* competition *anywhere* is conclusive evidence of *robust* competition *everywhere*. However, millions of consumers do not have access to cable. It is irrelevant to them that ILECs may serve fewer consumer broadband customers nationwide than cable; the ILEC still has market power over *them*. Under Supreme Court precedent, the relevant inquiry in assessing the ILECs' tying practices is their power over each particular customer, not their national market share. The Commission must not ignore customers without broadband choices simply because *some* consumers have some form of choice.

Even where consumers can choose between ILEC DSL and cable, they remain vulnerable to tying practices in a duopoly market. If both duopolists engaged in some form of tying, the consumer would have a choice only of which of two unwanted services they would have to swallow in order to purchase a desired broadband service.

BellSouth vastly overstates the costs and difficulties of providing stand-alone ADSL. Qwest reports that it has incurred little cost or difficulty in establishing stand-alone DSL, and within a year subscribed more than 25,000 customers at a rate of $5 more than the DSL portion of its bundled service. Qwest's offering demonstrates that it would be easy and economical for other ILECs to offer stand-alone DSL *if* they are willing to let their customers have choices and to compete on the strength of their service offerings, rather than the strength of their leverage over customers.

BellSouth contends that since it "made the investment and assumed all the risk" of its broadband deployment that it should receive the "benefits of its labors." But the suppression of competition in the voice market is not one of the "benefits" that BellSouth is entitled to as a reward for investing in broadband facilities. The Commission should put an end to unlawful tying practices in order to promote innovation and broadband adoption and to safeguard competition and consumer choice.

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SBC and BellSouth have failed to provide any compelling, reasonable justification for their refusal to sell DSL to consumers who do not also purchase their voice services, relying instead on the fallacious argument that the existence of any competition anywhere is conclusive evidence of robust competition everywhere. Because millions of consumers do not have a choice between wireline and cable broadband, and therefore are vulnerable to being forced to purchase unwanted services as a condition of obtaining broadband, the Commission should adopt the consumer-safeguard regulations proposed by Vonage Holdings Corp. ("Vonage") in its June 13, 2005 comments in this proceeding.

I. SBC's and BellSouth's Lengthy Defense of Optional Bundling is a Smokescreen.

The NOI addresses the type of restrictive bundling now practiced by SBC and BellSouth, in which a vertically-integrated broadband provider refuses to sell broadband to consumers unless they also purchase some other product such as voice services. While the NOI used the term bundling, it clearly did so to refer to *restrictive* bundling practices in which "services are not available independent from one another to end users," and which force consumers "to purchase redundant or unwanted services."[1]

Rather than addressing this discriminatory conduct head-on, SBC and BellSouth[2] try to distract the Commission by devoting a significant percentage of their comments to the defense of something else that no one has challenged – optional bundling, in which carriers offer discounted packages of services *in addition to* their stand-alone service offerings. These two types of bundling are completely different, and warrant different regulatory oversight. Optional bundles provide consumers with additional choices, and therefore will generally be pro-competitive; SBC and BellSouth's tying practice, by contrast, denies choices to consumers and is designed for the purpose of suppressing competition.

Neither Vonage nor any other commenter has suggested that the Commission reverse course from its 2001 *Bundling Order*, which permitted carriers to bundle telecommunications services with CPE and enhanced services. However, the Commission has never endorsed a tying practice in which a carrier refuses to offer a particular service except as part of a bundle. On the contrary, the relief in the *Bundling Order* was explicitly conditioned on the continued offering of stand-alone services.[3] It found that "the separate availability of the components of a package on

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[1] NOI at ¶ 37.

[2] Although Verizon makes similar arguments, it has recently committed in public statements to provide stand-alone broadband to at least certain customers in certain regions. Vonage believes that even this commitment has not yet fully been met, but hopes that Verizon will move forward expeditiously to offer stand-alone broadband on nondiscriminatory rates and terms to all consumers in its service territory. Notwithstanding Verizon's limited progress to date, the Commission should still impose a stand-alone broadband requirement as a condition of any approval of Verizon's proposed acquisition of MCI. *See* Docket 05-75, Comments of Vonage Holdings, Inc.

[3] The Commission relied as a safeguard that other legal requirements forced LECs to offer their telecommunications services separate from CPE or enhanced services, in addition to any bundled offering. *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*") at ¶ 12.

nondiscriminatory terms, whether through the functioning of a competitive market for each component or through existing regulatory requirements, is essential to prevent the improper extension of market power."[4]

The ILECs' examples of bundles of local and long-distance services and radios and alarm clocks are not instructive here, because each of these four products is readily available separately from numerous providers, usually including the provider of the bundle. The Commission should simply ignore these distractions and move on to the real, narrower issue raised by the NOI.

II. Adoption of Vonage's Proposed Regulations is Needed to Protect the Millions of Consumers Who Do *Not* Have Access to a Competitive Broadband Market.

SBC and BellSouth's comments do not deny that their restrictive broadband tying practices limit consumer choice. Instead, they contend that their refusal to provide stand-alone service does not violate the antitrust laws because consumers that do not wish to purchase voice service from them can simply buy broadband from someone else.[5] In the first place, this argument is irrelevant. Even if the ILECs' broadband tying practices would survive antitrust review – and they would not – the Commission would still be obligated to condemn broadband tying as unreasonable and discriminatory in violation of Title II of the Communications Act, regardless of the availability of services from other carriers. *See* Vonage January 2004 Comments at 9-21.[6] For example, the Commission has previously found that a tying practice can

[4] *Bundling Order* at ¶ 18.

[5] *See* BellSouth Comments at 6 ("if a consumer wants VoIP without also purchasing a local exchange service from an ILEC … he or she can simply change broadband providers.")

[6] Vonage's comments demonstrated that BellSouth's tying practice results in unreasonable denials of service in violation of section 201(a), and constitutes an unreasonable term of service violation of section 201(b) (at pp. 9-15); and that it unlawfully discriminates against consumers who desire alternative voice services, in violation of section 202 (at pp. 15-21).

violate section 201, regardless of whether it also violates the antitrust laws.[7] And even if the Commission ultimately determines not to apply Title II regulation to the ILECs' broadband transport services, broadband tying should still be regulated under Title I because it significantly impedes the Commission's statutory objectives. *See* Vonage June 2005 Comments at 6-8.

The first key fact in the evaluation of broadband tying is that millions of consumers are *not* able to choose a comparable stand-alone broadband alternative such as cable. *See* Vonage January 2004 Comments at 15-18. For these consumers, the consequence of ILEC broadband tying is real and inescapable – if they want broadband that is comparable to DSL in price and quality, they are forced to purchase ILEC voice services whether they want them or not. Contrary to the ILECs' claims, neither antitrust law nor the Communications Act require the Commission to strand these millions of consumers simply because *other* consumers have at least one other choice (cable) that they do not.

SBC and BellSouth base much of their argument on a fundamental misstatement of what they characterize as a mandatory requirement of "market power" to establish a claim of unlawful tying under the antitrust statutes. Contrary to the ILECs' comments, a showing of "market power" is essential *only* if the plaintiff is attempting to qualify the practice as a "*per se*" violation of antitrust law, in which the tying practice is deemed automatically unlawful by a court "without the necessity of any analysis of the market context in which the arrangement may be found."[8] As demonstrated below, the ILECs do possess market power as defined in the context of tying, so their tying practice is *per se* unlawful. However, even when "the seller does not have either the degree or the kind of market power that enables him to force customers to purchase a second,

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[7] *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.")

[8] *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 9 (1984).

unwanted product in order to obtain the tying product, an antitrust violation can [still be] established … by evidence of an unreasonable restraint on competition in the relevant market."[9] Therefore, even if a trial court (or, in the wake of *Trinko*,[10] this Commission acting as the primary enforcer of antitrust in the communications industry) were to establish that ILECs did not have market power in a fully competitive broadband market, it would still be compelled to review the competitive consequences of the particular facts of their tying practices.

SBC and BellSouth argue, mistakenly, that a second-place share of the number of consumer broadband lines nationwide (behind cable) automatically translates into a lack of market power over any consumer anywhere in the country, and that *any* competition *anywhere* is conclusive evidence of *robust* competition *everywhere*. These assertions are emphatically wrong. In the *per se* unlawful tying test, the concept of "market power" over a particular customer does not necessarily mean the same thing as national market share. Instead, the Supreme Court has held as *per se* unlawful "tying arrangements when the seller has some special ability – usually called 'market power'– to force a purchaser to do something that he would not do in a competitive market."[11] Thus, the term "special ability" is not limited to market power in the sense of national market share, as the ILECs here insist. Instead, the Supreme Court has instructed that "[t]he proper market definition … can be determined only after a factual inquiry into the 'commercial realities' faced by consumers."[12] The Court also explained that "[t]his type

[9] *Id.* at 17-18.

[10] *Verizon v. Law Offices of Curtis V. Trinko*, 540 U.S. 398 (2004). As explained in Vonage's January 2004 comments at 7-8, the Supreme Court in *Trinko* placed foremost responsibility for enforcement of federal antitrust policy on the Commission.

[11] *Jefferson Parish*, 466 U.S. at 13-14.

[12] *Eastman Kodak Co. v. Image Technical Serv.*, 504 U.S. 451, 482 (1992). Even though Kodak held a small share of the national equipment market, the Court found that Kodak possessed market power for services offered to customers who had already purchased Kodak's product. "If the cost of switching is

of market power has sometimes been referred to as 'leverage,'" which it defined as "a supplier's ability to induce his customer for one product to buy a second product from him that would not otherwise be purchased solely on the merit of that second product."[13] The ILECs undoubtedly possess this leverage over the millions of consumers who do not have access to cable. Therefore, the key inquiry in assessing the ILECs' tying practices is the real-world impact *on each particular customer*.

From the consumer perspective – the advancement of which is, after all, the ultimate objective of both antitrust law and the Commission's duties – it is clear that national market share is not the appropriate measure for market power over a particular consumer for broadband services. Instead, the Supreme Court has held that market power is measured within "the area of effective competition ... in which the seller operates, *and to which the purchaser can practically turn for supplies*."[14] Different from most products, in which consumers can search far and wide for alternative suppliers, the area in which homeowners can "practically turn for supplies" of broadband is limited to the suppliers that have installed broadband capacity capable of serving their home. If a homeowner has access to DSL but not cable, it is no consolation to him that other people do have a choice between the two services. It is similarly irrelevant to the homeowner that his ILEC may serve fewer broadband customers nationwide than cable; the ILEC still has market power over *him*. The canteen at a prison has market power over its inmates, regardless of whether there is a shopping mall right outside its gates. Similarly, before the introduction of local telephone competition, a hypothetical county might have been split

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high, consumers who already have purchased the equipment, and are thus 'locked-in,' will tolerate some level of service-price increases before changing equipment brands." *Id*. at 476.

[13] *Id.* at 14, fn. 20.

[14] *United States v. Philadelphia National Bank*, 374 U.S. 321, 359 (1963).

geographically between three different ILECs, each with a "market share" of 33% of the county's total access lines. Such a county would hardly be considered to have a competitive local exchange market, and the three monopoly incumbents could hardly be said to lack market power because of their minority share of the county's customers. The relevant question in defining market power and leverage in broadband is the number of suppliers available to each potential customer, not the provider's overall share of the national market.

It is undisputed that millions of Americans still do not have the choice between DSL and cable. BellSouth has admitted that "a substantial number of Georgia customers have access to BellSouth DSL but not to cable broadband,"[15] and presented studies indicating that 99% of small businesses and at least 25% of residences do not have access to cable broadband.[16] BellSouth presented evidence to the Florida Commission indicating that fewer than 1% of small business customers could obtain cable broadband services, and that for the foreseeable future, cable modem providers are unlikely to deploy broadband access to approximately 25% of their total residential footprint.[17] The California PUC has stated 45% of consumers in SBC territory who have access to DSL and/or cable broadband have DSL as their only wireline broadband choice.[18] While cable companies continue to deploy, even BellSouth's most recent comments admit that

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15 *See* BellSouth Petition, Exhibit 13 (October 21, 2003 Georgia PSC Order at 10).

16 *See Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket 01-338, *Ex Parte* Presentation of Florida Digital Network, Inc. (October 21, 2002) at 11-12 and Exhibit 3 (citing evidence presented by BellSouth in the Florida Digital-BellSouth arbitration that cable broadband service is obtained by less than 1% of small and medium sized businesses, and that, for the foreseeable future, cable broadband providers were unlikely to extend the availability of broadband service to approximately 25% of their residential customers.).

17 *See Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket 01-338, Ex Parte Presentation of Florida Digital Network, Inc. (October 21, 2002) at 11-12 and Exhibit 3 (citing evidence presented by BellSouth in the Florida Digital-BellSouth arbitration).

18 *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, CC Docket 02-33, Comments of the California Public Utilities Commission (May 3, 2002) at 1.

one in eight households nationwide do not have access to cable broadband.[19] Similarly, there are undoubtedly millions of consumers who are able to purchase cable broadband but not DSL.

While the Commission, Vonage and consumers everywhere remain eager to see the emergence of a third alternative to cable and ILEC wires, these options today are either technically inferior (satellite), available only on a very limited basis (CLEC ADSL), or both (powerline and fixed wireless).[20] The Commission's most recent statistics on high-speed lines indicate not only that the market shares of powerline/fiber and satellite/wireless are at less than 2%, but also that they both have *smaller* market shares than five years ago.[21] CLECs, meanwhile, offer only 4% of the ADSL lines nationwide,[22] and now must contend with the loss of the line sharing UNE. Perhaps the emergence of these or other options on a widespread basis will one day reduce the need for regulation of broadband tying that exists today, but for now the Commission's decisions must be based on the realities of the present, and not solely on its hopes for the future.

For the millions of customers who have no comparable broadband alternative to ILEC DSL, given the choice only between a voice-broadband bundle or no broadband at all, many forgo the opportunities of voice alternatives such as wireless phones or Vonage's VoIP service to avoid being shut out of broadband, while others, finding the bundle to be too expensive, forgo broadband altogether. These consumers therefore not only must continue to wait for the benefits of broadband competition, but they are also denied the benefits of competitive and innovative

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[19] BellSouth Comments at 7 ("cable modem service [is] now available to more than 88% of all U.S. households," citing the National Cable & Telecommunications Association.)

[20] *See* Vonage January 2004 Comments at 15-18.

[21] *High-Speed Services for Internet Access: Status as of December 31, 2004*, Industry Analysis and Technology Division, Wireline Competition Bureau (rel. July 7, 2005) at Chart 2.

[22] *Id.* at 3.

voice services from VoIP providers, wireless carriers and CLECs that would otherwise be available to them today. A decision by the ILECs to offer stand-alone DSL as a result of Commission regulation, merger conditions, or simple encouragement would have a real and immediate beneficial impact on the thousands of these customers who have been eagerly awaiting the availability of stand-alone broadband, and on millions more in the longer-term through the promotion of competition and access to third-party services and applications. These real concerns of real Americans deserve more consideration from the Commission than sleight-of-hand interpretations of antitrust decisions from cases that addressed markets far more fluid than broadband.

The Supreme Court has written that "Congress prescribed a pragmatic, factual approach to the definition of relevant market, and not a formal, legalistic one,"[23] while the Third Circuit has warned that antitrust determinations should not be "a kind of semantic shell game, resting more on key words than on careful analysis."[24] A careful analysis of the true facts on the ground easily reveals that tying by vertically-integrated broadband providers today does force many consumers "to purchase redundant or unwanted services."[25] These real-world facts plainly contradict SBC's and BellSouth's conclusory and obviously-overbroad contentions that "there is no plausible claim that broadband could cause competitive harm,"[26] and that "no dispute exists that the broadband market is highly competitive."[27] At a bare minimum, a stand-alone broadband service requirement remains necessary for the millions of consumers who do not have access to comparable broadband alternatives.

[23] *Brown Shoe Co. v. United States*, 370 U.S. 294, 336 (1962).

[24] *Ungar v. Dunkin Donuts*, 531 F.2d 1211, 1222 (3rd Cir. 1976).

[25] NOI at ¶ 37.

[26] SBC Comments at 2.

[27] BellSouth Comments at 14.

III. Broadband Tying is Unreasonable and Contrary to Commission Objectives Even Where Duopoly Competition Exists.

As discussed above, under both antitrust law and the Communications Act, broadband tying must be reviewed for reasonableness even if its practitioners do not have sufficient market power to be guilty of *per se* unlawful tying. This review must analyze the specific product characteristics and demand, which is why the ILECs' many examples of products and markets that share no resemblance to broadband – such as "shoes without shoelaces" [28] – are irrelevant. Unlike these frivolous examples, the Commission is confronted here with a tying practice that (1) denies the availability of a stand-alone product that consumers do demand; (2) leaves consumers vulnerable to abuses because there is only one other comparable service provider; and (3) has a substantial adverse impact on the Commission's statutory objectives.

A. Consumers Want Stand-Alone Broadband.

As noted above, the reality of what consumers demand is crucial in analyzing whether broadband tying is an unreasonable practice. Many consumers, when given the choice, have "voted with their pocketbooks" for the ability to buy broadband without bundled telephone service. For example, Qwest has signed up at least 25,000 stand-alone broadband customers within its first year of offering the service,[29] for which Qwest charges only $5 more than for the DSL portion of its bundled service.[30]

By contrast, SBC and BellSouth contend that "the market has not demanded" stand-alone broadband.[31] BellSouth offers as supposed evidence of this lack of demand the fact that only

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[28] Verizon Comments at 6.

[29] "Dangling Broadband From the Phone Stick," N.Y. Times, March 19, 2005, at p. C1 (also available at 2005 WLNR 4264289).

[30] http://www.qwest.com/residential/internet/pricing.html (viewed July 5, 2005).

[31] *See, e.g.*, SBC Comments at 27; BellSouth Comments at 12.

"100 or so" customers have purchased a stand-alone SDSL offering that it claims to have offered since December 2003.[32] However, this product is not even described on BellSouth's consumer website or in its promotional DSL materials. It appears from BellSouth's federal tariff that the service costs *several times* more than its ADSL service, with a wholesale monthly rate of $120.00 for 512 kbps and $225.00 for 1.5 mbps service.[33] It is a wonder that 100 customers even found out about this service, much less wanted to buy it.

Consumer groups, such as the Consumers' Union (publisher of *Consumer Reports*), the Consumer Federation of America (representing 50 million members), and the National Association of State Utility Consumer Advocates (representing the official state consumer advocate of 41 U.S. state jurisdictions) have denounced restrictive tying practices by broadband infrastructure providers.[34] These well-respected and broad-based consumer organizations surely present a more accurate portrayal of consumer demands and interests than the self-serving and counterintuitive assertions of BellSouth and SBC.[35] Online consumer forums such as

[32] BellSouth Comments at 19.

[33] BellSouth Telecommunications, Inc. Tariff F.C.C. No. 1, § 28.1.9(A)(1). Additional charges would apply for the ISP to establish backhaul transport necessary to offer a retail broadband service.

[34] *See* Comments of NASCUA; *see* http://www.consumersunion.org/telecom/cable-price.htm, *Consumer Groups Ask FTC, Justice to Investigate Cable Pricing Structure That Ties TV, Internet Services*, March 26, 2003 (stating of practices of cable companies offering $15/month discounts on cable broadband to customers who also purchase cable television are "pricing and tying arrangements [that] involve such steep discounts that they constitute anti-competitive tying and possibly predatory pricing schemes," and that such schemes "harm consumers by denying them the long-term benefits of expanded choices and lower prices." (available at (viewed July 7, 2005).

[35] Even if consumers were indifferent as to whether they purchased voice service from the ILEC as part of a bundle or separately from another provider, SBC and BellSouth's tying practice remains unlawful. Tying violates antitrust laws "even if the customer is indifferent among brands of the second and therefore loses nothing by agreeing to use the seller's brand of the second in order to get his brand of the first, [because] such tying arrangements may work significant restraints on competition in the tied product. The tying seller may be working toward a monopoly position in the tried market, and, even if he is not, the practice of tying forecloses other sellers of the tied product and makes it more difficult for new firms to enter that market." Areeda & Hovenkamp, Antitrust Law Vol. IX § 1700d, citing *Fortner Enters. v. United States Steel Corp.*, 394 U.S. 495, 512-513 (1969) (White, J., dissenting, though not on this point).

Broadbandreports.com are filled with thousands of posts from consumers looking for or longing for "naked DSL,"[36] a term with such a zealous following that has even found its way into the encyclopedia.[37] The Commission explained of its primary motivation for the *Bundling Order*, "facilitating consumer choice is what compels us to take action in this proceeding."[38] Broadband tying eliminates a choice many consumers desperately want, a fact that should compel Commission action to adopt at least the narrowly-tailored regulations proposed by Vonage in its June 2005 comments.

B. Consumer Interests Remain Vulnerable in Duopoly Competition.

Even where consumers have the benefit of being able to choose between ILEC DSL and cable, they remain vulnerable to tying practices. SBC and BellSouth keep saying that if consumers do not want to purchase their bundles, they can get broadband from the cable company. But what is a consumer to do if the cable company also imposes mandatory bundling of its services? Although most cable companies offer stand-alone broadband, some effectively impose backdoor mandatory bundling by charging $15/month extra to customers that do not purchase their cable television service. If a broadband customer did not wish to purchase cable television, they would have a choice only of which of two unwanted services they would have to swallow to purchase the desired broadband service.

This is why the Commission consistently has found that duopoly is not enough to protect competition. In explaining his vote not to approve the proposed DirecTV-EchoStar merger, the former FCC Chairman reasoned that a duopoly market cannot be expected to deliver the benefits of innovation and unfettered competition to consumers:

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[36] *See, e.g.*, http://www.broadbandreports.com/forum/remark,13296065 (viewed July 7, 2005).

[37] *See* http://en.wikipedia.org/wiki/Naked_DSL (viewed July 7, 2005).

[38] *Bundling Order* at ¶ 10.

> At best, this merger would create a duopoly in areas served by cable; at worst it would create a merger to monopoly in unserved areas. Either result would decrease incentives to reduce prices, increase the risk of collusion, and inevitably result in less innovation and fewer benefits to consumers. That is the antithesis of what the public interest demands.[39]

The Commission should not relax its guard on the tying practices of ILECs simply because ILEC DSL has a single substantial competitor, cable broadband. Instead, the Commission should remain vigilant against anticompetitive practices of both ILEC and cable broadband providers, both of which have sufficient market power to leverage consumers to purchase unwanted services.

C. Narrowly-Tailored Regulation of Broadband Tying Remains Necessary to Promote the Goals of the Act.

Vonage's previous comments demonstrated that broadband tying undermines many of the fundamental principles of the Act and that the Commission has the authority and obligation to remedy these harms using its Title I authority.[40] In particular, tying deters consumer adoption of broadband by increasing its price and threatens innovation by impeding public access to new Internet services and applications developed by third parties. Broadband tying also chills competition in the voice services market, leading to higher prices for consumers. Therefore, regardless of the antitrust analysis of broadband tying, the Commission should adopt the regulations proposed by Vonage to promote availability of a rapid, efficient, nationwide and reasonably-priced communication system;[41] encourage the deployment of advanced

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[39] *Application of EchoStar Communications Corporation, General Motors Corporation, and Hughes Electronics Corporation, Transferors, and EchoStar Communications Corporation, Transferee, CS Docket No. 01-348, Hearing Designation and Order*, FCC 02-284, Separate Statement of Chairman Michael K. Powell (rel. Oct. 18, 2002).

[40] *See* Vonage January 2004 Comments at 9-21 and June 2005 Comments at 5-6 (demonstrating that broadband tying violates sections 201-202 of the Act, and Vonage June 2005 Comments at 6-8.

[41] 47 U.S.C. § 151.

telecommunications capability to all Americans;[42] promote the continued development of the Internet and other interactive computer services;[43] and promote competition to secure lower prices and higher quality services for American telecommunications consumers.[44]

SBC argues, however, that any suggestion that broadband tying has inhibited VoIP "is belied by the fact that VoIP providers such as Vonage have posted staggering customer gains in the past year."[45] Vonage is indeed proud of its rapid growth and customer satisfaction, but if anything Vonage's popularity with consumers has given it a front-row seat to witness the damage inflicted on consumers by broadband tying. Vonage customer service representatives receive inquiries around the clock from ILEC customers who want to replace their circuit-switched voice service with Vonage service but are disappointed to learn that they cannot do so because they cannot switch to cable. Other potential Vonage customers turn back because they do not want to lose their ILEC-based e-mail address or website, or endure a disconnection and reconnection of their broadband service, which can involve changing equipment, software, and passwords, as well as half-day installation appointments and other inconveniences.[46] So while Vonage has been successful despite broadband tying, the true potential of VoIP and of broadband for all Americans cannot be realized until they are freed from the limitations of broadband tying.

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[42] Telecommunications Act of 1996, § 706.

[43] 47 U.S.C. § 230(b).

[44] Telecommunications Act of 1996, preamble.

[45] SBC Comments at 3.

[46] *See* Vonage January 2004 Comments at 18-19. *See also Eastman Kodak Co. v. Image Technical Serv.*, 504 U.S. 451, 476 (1992). Even though Kodak held a small share of the national market, the Court found that Kodak possessed market power over customers who had already purchased Kodak's product. "If the cost of switching is high, consumers who already have purchased the equipment, and are thus 'locked-in,' will tolerate some level of service-price increases before changing equipment brands."

SBC argues that that any regulation to protect consumers' rights to select the broadband and voice providers of their choice "would be sending a message that the Internet – which the Commission has previously struggled to keep free from regulation – is fair game for competitors seeking a regulatory advantage to make up for any shortcomings they are experiencing in the marketplace."[47] On the contrary, the "message" the Commission would be sending is a reaffirmation of the federal policies that led to the success in the first place – namely, that consumers should be free to select the Internet content and applications of their choice, rather than having their options limited and dictated by a small number of companies that dominate the infrastructure consumers use to access the Internet. SBC feigns amnesia when it asserts that because "[t]he Commission has spent the better part of three decades laboring to keep [Internet access] services free from regulation," it "would be a giant step backwards if the Commission were to now substitute its judgment for that of the market and force the provision of standalone broadband service."[48] The *Computer Inquiry* rules, which are the cornerstone of the decades-long effort Commission effort to which SBC refers, have as their foundation the regulatory requirement that carriers offer stand-alone transport to consumers so that they could access the service providers of their choice.[49] A requirement that vertically-integrated providers offer stand-alone broadband so that consumers may access broadband applications and services of

[47] SBC Comments at 25.

[48] SBC Comments at 3.

[49] *See, e.g., Bundling Order* at ¶ 46. *See also Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, CC Docket 02-33, Notice of Proposed Rulemaking, Separate Statement of Commissioner Kathleen Q. Abernathy (February 14, 2002) ("our *Computer II/III* rules played a key role in fostering a robustly competitive ISP market in which consumers can choose from a wide range of providers. Thus, while I intend to examine the record with an eye toward streamlining wholesale regulations where possible, I am committed to preserving regulations to the extent necessary to safeguard competition and consumer choice.").

their choice is therefore completely consistent with the Commission's and the Congress' long-standing policies to promote consumer freedom and choice in the Internet.

IV. Qwest's and Time Warner's Stand-Alone Broadband Offerings Demonstrate that BellSouth Exaggerates the Costs and Difficulties of Providing Such Services.

BellSouth vastly overstates the additional costs and difficulties of providing stand-alone ADSL services.[50] Incredibly, BellSouth claims that it might even cost more to provide ADSL by itself than it charges customers for voice and ADSL *combined*, and that consumers therefore would receive no benefit if BellSouth were ordered to offer DSL separately.[51] This claim is immediately suspect – if the costs of voice and DSL were really so overlapping, why does BellSouth charge more to add DSL to a bundle than the price of its basic local telephone service? BellSouth's fuzzy math may instead be based on its allegation that the per customer cost of development of the network and operations support systems to initiate a new offering would be high because it expects low demand for a stand-alone product. However, this suggestion is also doubtful, for many reasons. First, BellSouth has already provided stand-alone broadband to thousands of customers in the four states that had ordered it to do so,[52] before the Commission preempted them. Second, as discussed above, BellSouth obviously has understated the demand for stand-alone broadband. Third, and perhaps most telling, is that Qwest charges <u>only $5 more</u> per month for ADSL broadband to customers who do not purchase any voice service compared to those who do.[53] Qwest CEO Richard Notebaert reported to the *New York Times* that Qwest

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[50] Vonage has previously acknowledged that broadband providers may be able to justify higher prices for stand-alone broadband than for the broadband portion of a bundled service, and the tying rules that Vonage proposed in its June 2005 comments would permit carriers to do so, within reason.

[51] BellSouth Comments at 12.

[52] *See* http://news.com.com/Source+FCC+to+dress+naked+DSL/2100-1037_3-5627726.html?tag=html.alert (viewed July 7, 2005).

[53] http://www.qwest.com/residential/internet/pricing.html (viewed July 5, 2005).

had established its stand-alone DSL service with minimal cost and effort, and that "we've had no technical problems; we've had no billing problems. If the consumer wants it, why are you stiffing them?"[54] Similarly, in some markets Time Warner Cable charges the same amount for cable broadband whether the customer purchases its basic cable TV service or not (in some cases with a $4.95 discount for a premium cable TV package).[55] These reasonably-priced offerings demonstrate that it is easy and economical for vertically-integrated broadband providers such as BellSouth to offer stand-alone broadband *if* the provider is willing to let its customers have choices and to compete on the strength of its service offering, rather than the strength of its leverage over consumers.

Vonage appreciates that there are real costs and operational issues that must be addressed for an ILEC to provide stand-alone DSL, but as the Qwest deployment shows, these are not the real reasons that some ILECs refuse to sell stand-alone broadband. As the Georgia Commission concluded:

> The apparent motivation behind BellSouth's policy is to maintain its voice customers by denying them options in a separate market. The customers do not receive a benefit from being denied this option. In fact, they are harmed by being denied the option of receiving BellSouth's DSL service and another provider's voice service. While BellSouth will inevitably lose some DSL customers because of this policy, the only reasonable assumption is that BellSouth believes that it will keep enough voice customers that would have otherwise departed for a preferred CLEC that BellSouth will still come out ahead financially.[56]

[54] "Dangling Broadband From the Phone Stick," N.Y. Times, March 19, 2005, at p. C1 (also available at 2005 WLNR 4264289).

[55] *See* http://www.timewarnercable.com/piedmonttriad/products/packagesprices/rrpricing.html; http://www.timewarnercable.com/austin/products/internet/hspeedpricing.html

[56] *See* BellSouth Petition, Exhibit 13 (October 21, 2003 Georgia PSC Order at 16).

Similarly, the Supreme Court has observed that "tying arrangements serve hardly any purpose beyond the suppression of competition."[57] BellSouth contends that since it "made the investment and assumed all the risk" of its broadband deployment that it should receive the "benefits of its labors."[58] But the suppression of competition in the voice market is not one of the "benefits" that BellSouth is entitled to as a reward for investing in broadband facilities. Such a reward is plainly not what Congress intended by its policy of minimal regulation of the Internet, and even more plainly is not in concert with the pro-competitive and consumer-protection objectives of the Act. The Commission should finally put an end to this practice in order to promote innovation and broadband adoption and to safeguard competition and consumer choice.

V. Conclusion

BellSouth misses the point of the NOI when it asserts that "the market will decide" whether ILECs should sell stand-alone DSL.[59] When Qwest offered this service, the market decided—consumers flocked to buy it; yet BellSouth still refuses to offer a service that customers want to buy. The purpose of the Communications Act, antitrust law, and the Commission's regulatory authority is to protect the public interest and consumers where the market does not or cannot, not just to cheer it when it does. Even BellSouth acknowledges that the Commission "should regulate where regulation is needed … because of a market failure."[60] Vonage agrees with T-Mobile's conclusion that "narrow, targeted regulation to require ILECs to make naked DSL available to U.S. consumers is necessary in this case because the competitive

57 *Standard Oil Co. v. United States*, 337 U.S. 293, 305-306, n. 42 (1949).

58 BellSouth Comments at 6.

59 BellSouth Comments at 6.

60 BellSouth Comments at 13.

market is not functioning."[61] Therefore, the Commission should adopt the consumer-safeguard regulations proposed by Vonage's June 13, 2005 comments, to assure that consumers will have the freedom to select the broadband and voice services providers of their choice.

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[61] T-Mobile Comments at 2.