

TABLE OF CONTENTS

I. Introduction and Summary..... 1

A. No Need Exists to Regulate Competitive Markets 5

**B. Consumer Protection Laws and Industry Practices Are Adequate to Ensure
 Consumer Protection in a Competitive Market 8**

**II. The Rules in Question Were Developed in a Narrowband World and Do Not Translate to a
Broadband World 10**

A. Slamming..... 10

B. CPNI 13

C. Truth-in-Billing 18

D. Network Outage Reporting 20

E. Section 214 Discontinuance 22

F. Section 254(g) Rate Averaging 23

**G. The Commission Should Preempt All State Laws and Maintain Enforcement
 Jurisdiction 24**

III. Conclusion 24

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

In the Matter of)
)
)
Consumer Protection in the Broadband Era) WC Docket No. 05-271

BELLSOUTH COMMENTS

I. Introduction and Summary

BellSouth Corporation, on behalf of itself and its wholly owned affiliates (“BellSouth”), by its attorneys, files these Comments in response to the *Notice of Proposed Rulemaking* issued with the Commission’s *Report and Order* in the *Broadband Internet Access Order*.¹

The broadband services market has developed at a lightning pace. Consider that the Telecommunications Act of 1996 hardly makes reference to the term “Internet.” Since its passage, however, the Internet has become one of the biggest economic engines in the country’s history. Connection to the Internet, which initially began with dial-up service, has quickly given way to broadband, as technology advanced and applications became more sophisticated, increasing consumers’ need for more speed to take advantage of the opportunities the Internet has to offer. Unhampered by any regulatory impediments, cable modem providers quickly jumped out of the gate and gained a significant share of the broadband market, as incumbent local exchange carriers (“ILECs”) struggled to offer Digital Subscriber Line (“DSL”) service under heavy and disparate regulation.

¹ *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, et al.*, CC Docket No. 02-33, *et al.*, *Report and Order and Notice of Proposed Rulemaking*, FCC 05-150 (rel. Sept. 23, 2005) (“*Broadband Internet Access Order*” or “*Notice*”).

In the *Broadband Internet Access Order* the Commission took an important step toward promoting further broadband deployment by relieving ILECs of unnecessary regulatory burdens associated with the provision of broadband Internet access (“BIA”) service. Consistent with the Supreme Court’s decision in *Brand X*,² the Commission found BIA service to be an information service. The Commission also held that facilities-based wireline BIA service providers are no longer required to separate out and offer the wireline broadband transmission component of BIA service as a stand alone telecommunications service under Title II, and relieved Bell Operating Companies (“BOCs”) of their *Computer Inquiry* obligations related to wireline broadband Internet access service. Moreover, the Order found that facilities-based wireline carriers are permitted to offer stand alone broadband transmission services used for BIA service as common carrier or non-common carrier services. Thus, the *Broadband Internet Access Order* went a long way to remove regulatory “underbrush” in the provision of broadband and in creating a level playing field among BIA service providers.

In finding BIA service to be an information service outside of Title II regulation, the Commission now seeks comment on what, if any, consumer protection rules may be needed in the provision of BIA services. The rules on which the Commission specifically seeks comment are all Title II-type regulations that currently relate to telecommunications services. Most of these rules, however, are the byproduct of the old narrowband world where the consumer was

² *National Cable & Telecommunications Ass’n v. Brand X Internet Services*, 125 S. Ct. 2688 (2005) (“*Brand X*”) *aff’g Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities, Internet Over Cable Declaratory Ruling, Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, GN Docket No. 00-185 & CS Docket No. 02-52, *Declaratory Ruling and Notice of Proposed Rulemaking*, 17 FCC Rcd 4798 (2002).

limited to a single provider of telephone services.³ In this bygone era, a customer that wanted, or needed, to continue receiving a narrowband service generally could not go to another provider in the event of misbehavior by the monopoly carrier, and rules were established to protect these customers in lieu of competitive alternatives. Additionally, the rules were designed to protect a segment of the market against unfair competition.⁴

As the Commission found in the *Broadband Internet Access Order*, however, “[t]he broadband marketplace before us today is an emerging and rapidly changing marketplace that is markedly different from the narrowband marketplace that the Commission considered in adopting the *Computer Inquiry* rules.”⁵ Indeed, the broadband marketplace differs significantly from the delivery of information services in a narrowband world “when only a single platform capable of delivering such services was contemplated and only a single facilities-based provider of that platform was available to deliver them to any particular end user.”⁶ This dynamic transformation of the market has resulted in “many consumers [having] a competitive choice for broadband Internet access services today.”⁷

³ The Commission implemented slamming rules, and slamming restrictions were later codified in the 1996 Act, as a result of interLATA services competition. As explained in detail below, however, there is no analog to slamming in the BIA services market because of technical differences in how the services are provided to the customer.

⁴ For example, consumer proprietary network information (“CPNI”) rules grew out of the *Computer Inquiry* line of Commission orders and were implemented “to protect independent enhanced services providers and CPE suppliers by prohibiting AT&T, the BOCs, and GTE from using CPNI obtained from their provision of regulated services to gain a competitive advantage in the unregulated CPE and enhanced services markets,” Peter W. Huber, Michael K. Kellogg & John Thorne, *Federal Telecommunications Law* § 14.5.2 (2d ed. 1999).

⁵ *Broadband Internet Access Order*, ¶ 47.

⁶ *Id.*

⁷ *Id.*

Considering the dramatic competitive change that has occurred in the BIA service market, it is premature to consider subjecting these services to regulation; however, it would be especially egregious to overlay old regulations that were developed for a narrowband world on this new market of broadband services. As explained herein, most of the rules contemplated in the *Notice* are a reaction to the fact that the early narrowband market, which lacked competitive alternatives, failed to achieve certain consumer protection goals that were valued by the public. These rules, thus, were tailored to correct some form of market failure that existed, or was perceived to exist, in an, non-competitive narrowband market. It would be ill-conceived to merely apply the same types of rules to a new dynamic market, which has been properly functioning without the rules, particularly when there is no evidence to even suggest that these types of rules are necessary.

Accordingly, the Commission should not implement any new consumer protection rules related to BIA service. First, BIA services are competitive. Just as with economic regulation, the need for non-economic regulation, as contemplated here, is greatly diminished in a competitive market. Competitive pressures require entities to act in a manner acceptable to the customer or risk losing the customer to a competitor. Moreover, even if the Commission had concerns about consumer protection in the provision of BIA services, it is premature to implement rules in the broadband market based only on past experiences of the narrowband market. The Commission should take a wait-and-see approach and consider rules only if and when it finds specific problems in the provision of BIA services.

Second, to the extent customers in a competitive market are in need of some form of governmental protection, it already exists in the form of statutory and common law remedies that protect all consumers. Consumer protection laws as well as common law actions have well

served to protect consumers from improper actions by merchants. These laws have been, and will continue to be, just as effective in protecting consumers in the broadband market.

Additional Commission regulation over the market is therefore unwarranted.

However, any action the Commission takes in the area of consumer protection must be applicable to all providers on an equal basis. Regulatory parity was a fundamental basis for removing the *Computer Inquiry* requirements associated with wireline Internet access service, which allowed the BOCs to compete with other BIA service providers on an equal footing.⁸ Accordingly, while the best regulatory policy approach is to allow the broadband market to continue to thrive in its current competitive environment without any further regulation, any regulation the Commission deems necessary must be applicable to “all providers of [BIA service], regardless of the underlying technology.”⁹

A. No Need Exists to Regulate Competitive Markets

There is no serious dispute that the broadband market is competitive. The Commission’s own reports demonstrate the dynamic growth of the market. As of December 31, 2004, the latest data available, 37.9 million customers subscribed to broadband services.¹⁰ Of this number, 21.4 million subscribed to cable modem services, 13.8 million subscribed to DSL, and the remaining 2.7 million subscribed to other technologies such as fixed wireless or satellite services.¹¹ The

⁸ *Id.* ¶ 45 (“[The Commission] should regulate like services in a similar manner so that all potential investors in broadband network platforms, and not just a particular group of investors, are able to make market-based, rather than regulatory-driven, investment and deployment decisions.”).

⁹ *Notice*, ¶ 146 (emphasis in original).

¹⁰ High Speed Services for Internet Access: Status as of December 31, 2004, Industry Analysis and Technology Division, Wireline Competition Bureau, July 2005, at 1 & Table 1.

¹¹ *Id.* Table 1.

37.9 million subscribers represent a 17% increase in total subscribers for the last 6 months of 2004 and a 34% increase in total subscribers over December 31, 2003.¹²

It was this type of growth that led the Commission to eliminate the burdensome *Computer Inquiry* regulations on wireline broadband Internet access services that had handicapped the BOCs in the past. Indeed, while it did not find the market penetration levels as high as some markets it had reviewed in the past, the Commission expected that DSL and cable modem providers “will continue to invest and extend the reach of their services.”¹³ It therefore concluded that “[g]iven recent trends, the market penetration of cable modem and DSL broadband Internet access services, in particular, could grow dramatically in the future.”¹⁴ According to the Commission, this “head-to-head” competition between DSL and cable modems would continue to push penetration rates for both services. Moreover, it also acknowledged that the “threat of competition from other forms of broadband Internet access” would “exert competitive pressure” on DSL and cable modem providers.¹⁵ Based on this evidence, the Commission recognized that competition, not regulation, would better control the market. The same competitive pressures that were the basis for relief from the *Computer Inquiry* rules for the BOCs, will also protect consumer interests and obviate the need for additional consumer protection rules.

In a non-competitive market, consumer protection rules can be important for the protection of the public interest. In a competitive market, however, such rules are unnecessary. The consumer choice that competition creates does two things. First, it gives consumers an

¹² *Id.*

¹³ *Broadband Internet Access Order*, ¶ 57.

¹⁴ *Id.* ¶ 56.

¹⁵ *Id.* ¶¶ 57-58.

alternative to their service provider in the event their service provider does not act in an appropriate manner. Second, it keeps the service provider in check, ensuring that it will be sensitive to its customers' desires, lest the customers move to another provider.

Consumer protections that evolved out of the old narrowband world, which offered consumers no choice in providers, are not needed in a highly competitive broadband world. The Commission took an important step in the *Broadband Internet Access Order* in eliminating unnecessary regulation. It did this based on a rapidly moving and competitive broadband market. The Commission should not reverse course by seeking to impose new regulations on the same competitive market, without first allowing that market time to demonstrate that it can and will work.

Finally, even if the Commission feared that a competitive market may not achieve the non-economic goal of consumer protection for BIA services, it would be flawed policy to impose narrowband rules in an attempt to remedy those concerns. First, these rules were developed and implemented in a market that is vastly different from the broadband market. Indeed, the Commission's *Order* is very instructive about the differences – both technical and competitive – in the old narrowband and the new broadband markets. These differences were one of the significant reasons for the Commission's decision not to apply other types of regulation to DSL services. Under the same line of reasoning, it would make little sense to apply the old consumer protection rules developed for the narrowband market to the broadband market.

Second, it would be highly likely that application of the old rules to a new dynamic market would result in regulatory failure. The consumer protection rules contemplated would not translate from the narrowband purpose for which they were implemented to the broadband market. Additionally, the broadband market is facing rapid changes as a result of technological

advances and any attempt by the Commission to force-fit the rules to apply to the broadband market will only be met by more market changes. The Commission will be unable to keep pace, thus creating a situation in which regulatory requirements could potentially distort the market.

Accordingly, the better course is for the Commission to watch the market and intervene only if a market failure develops. Under this course of action, the Commission could develop specific rules tailored to correct any such failures that occur in the broadband market as opposed to simply adopting the broad-brush narrowband rules that have no place in the new broadband world. Regulatory restraint with a clear warning to the industry that it will monitor and act on any consumer protection problem it observes is clearly the better policy position at this stage.

B. Consumer Protection Laws and Industry Practices Are Adequate to Ensure Consumer Protection in a Competitive Market

Competitive markets have been the cornerstone of economic growth. Consumer protection is clearly a fundamental concern for these markets. In order for the economy to operate smoothly, consumers must have confidence in the products and services they purchase. Consumer confidence can be shaken if the providers of those products and services act in an unfair or deceptive manner. In this context, consumer protection laws, both common law and statutory, have evolved to provide the safety net of consumer protection that is needed in a competitive market. It is within this safety net that BIA service will operate. Thus, not only will competitive pressures serve to protect consumers, but, to the extent consumers believe they have been harmed, they have adequate remedies under existing law.

Most states within BellSouth's region have adopted statutes that prohibit unfair and deceptive business practices and acts.¹⁶ These statutes vary in their requirements but are similar in the protection they provide. Using North Carolina's Unfair or Deceptive Trade Practices Act¹⁷ as an example, the elements of an unfair trade practice are: 1) the defendant commits an unfair or deceptive trade practice or an unfair method of competition; 2) that is in or affecting commerce; and 3) proximately causes damages to the plaintiff or her business.¹⁸ An unfair trade practice has been defined as a practice that is "immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers."¹⁹ These statutes allow for state action for their enforcement typically through an office of consumer protection or through the state attorney general. State action can result in the imposition of both criminal and civil penalties. Moreover, the states also allow for private actions for those injured by a violation of the applicable unfair trade practice act. Most of the concerns that the Commission raises in the *Notice* – slamming, disclosure of private information without proper consent, or untruthful billing – appear to be issues for which the statutes provide a remedy.²⁰ These statutes of general applicability obviate the need for additional consumer protection rules directed at the broadband market.

¹⁶ These state acts are similar to the provision relating to unfair competition in the Federal Trade Commission Act ("FTCA"). It provides that "unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful." 15 U.S.C. § 45(a)(1). Common carriers, such as BellSouth, however, are exempt from the FTCA.

¹⁷ N.C. Gen. Stat. § 75-1.1 (2005).

¹⁸ *Furr v. Fonville Morisey Realty, Inc.*, 503 S.E.2d 401, 408 (N.C. App. 1998); *Spartan Leasing Inc. v. Pollard*, 400 S.E.2d 476, 482 (N.C. App. 1991).

¹⁹ *Branch Banking and Trust Co. v. Thompson*, 418 S.E.2d 694, 700 (N.C. App.), *cert. denied*, 421 S.E. 2d 350 (1992).

²⁰ It is unlikely that network outage reporting, notice of discontinuance of service, or rate averaging would be covered by the states' laws. However, as discussed below, the Commission should refrain from implementing any rules related to outage reporting or notice of

II. The Rules in Question Were Developed in a Narrowband World and Do Not Translate to a Broadband World

The *Notice* identifies specific areas of consumer protection rules that the Commission has applied under its Title II authority and asks to what extent, if any, it should use its Title I authority to apply similar type regulations to BIA service, an information service. As discussed, because of the competitive market in which BIA service exists and because of the existing legal protections already in place, no further action by the Commission is needed. In addition to these reasons, many of the rules, which grew out of the old narrowband voice world, do not translate to the new broadband world.

A. Slamming

The slamming rules originated out of changes that occurred in the telecommunications industry as a result of the Modification of Final Judgment (“MFJ”) that divested the local exchange and long distance markets from common ownership. The MFJ imposed an equal access obligation on all the local exchange carriers. This equal access obligation is found in Section II(A) of the MFJ, and requires that each Bell operating company (“BOC”) “shall provide to all interexchange carriers and information service providers exchange access, information access, and exchange services for such access on an unbundled, tariffed basis, that is equal in type, quality, and price to that provided to AT&T and its affiliates.”²¹

Briefly, the equal access requirements were meant to abolish a “substantial disparity in dialing convenience” caused by end-users having to dial a multiple-digit access code to access

discontinuance of service. The better course is for the Commission to monitor the market and only implement rules related to these areas if a need for regulation is found and then only after a more focused rulemaking. BellSouth does not believe any form of price regulation, such as rate averaging requirements, is appropriate for BIA services.

²¹ *United States v. America Tel. & Tel. Co.*, 550 F.Supp. 131, 227 (D.D.C. 1982), *aff'd sub nom*, *Maryland v. United States*, 460 U.S. 1001 (1983).

interexchange carriers other than AT&T.²² As noted by the Court, “[a] customer can place an interexchange call through AT&T by dialing 1 or 0 plus a normal ten-digit number, for a total of eleven digits. If a customer wishes to place a call through any other interexchange carrier, however, he must dial a twelve- or thirteen-digit access code plus the ten-digit number, for a total of twenty-two or twenty-three digits.”²³

Equal access allowed customers to presubscribe to their interexchange carrier (“IXC”) with their local exchange carrier (“LEC”), which allowed them to use their prescribed carrier by simply dialing 1+, no matter who the customer chose as his or her preferred carrier. Typically, the IXC acted as the customer’s agent to designate the IXC as the preferred carrier with the customer’s LEC.

Allowing an IXC to act as a customer’s agent to change the customer’s preferred carrier, however, created possibilities for IXCs to make changes without actually having obtained authorization for the change from the customer. Such unauthorized changes were virtually undetectable until the customer actually received her telephone bill, which would typically include numerous charges from the unauthorized carrier. Moreover, unauthorized changes sometimes went completely undetected even after the customer received her bill unless the customer closely scrutinized the charges. The ability for a carrier to make an unauthorized change without the customer’s knowledge, as well as the difficulty in spotting such a change,

²² *United States v. Western Elec. Co.*, 578 F. Supp. 668, 670 (D.D.C. 1983).

²³ *Id.* (citations omitted).

was the basis for the slamming rules implemented by the Commission and the inclusion of Section 258 of the 1996 Act, which prohibits unauthorized carrier changes.²⁴

The same concerns that were the basis for slamming rules in the narrowband market do not exist in the broadband market. Indeed, the capability of an ISP to change a customer's service without the customer's knowledge is virtually non-existent. First, establishing BIA service with an Internet service provider ("ISP") requires some form of equipment be attached to the customer's computer. For DSL service, this is a DSL modem; for cable modem service, it is a cable modem. Unless the customer receives this equipment and installs it through a connection to her computer, the new ISP cannot provide service to the customer. If the customer already has an ISP, such installation could also require that the current ISP's equipment be uninstalled and the connection removed.²⁵ This step alone virtually ensures that an unauthorized change in a customer's ISP for BIA service cannot happen without the customer's knowledge, which eliminates the need for regulation in this area.

Even if the customer received the equipment, uninstalled the existing ISP, if necessary, and then installed the new equipment, the customer would still need to contact the ISP to obtain the necessary information, e.g., establish a password, to make a connection to the Internet. These steps clearly demonstrate that an unauthorized change in a customer's ISP for the provision of BIA service cannot happen – at least not without the customer having full

²⁴ The opening of the local market to competition created the opportunity for unauthorized LEC changes similar to what equal access caused in the interexchange market. Thus, the Commission extended the slamming rules it implemented pursuant to Section 258 to both the local and interexchange markets.

²⁵ If the customer has a computer with multiple connection ports, e.g., Ethernet or USB, the new modem, cable or DSL, could be attached without disconnection of the existing ISP's equipment. Even if this is the case, the steps needed to change ISPs – actual receipt of the equipment, connection, and set up (see discussion in next paragraph) – are adequate to protect the consumer against an unauthorized change.

knowledge of and actively participating in the change.²⁶ Indeed, ISPs have been providing BIA service for several years and there have been no significant complaints by customers to either the Commission or among the industry of attempted slamming of ISPs. Accordingly, the Commission has no need to implement safeguards against potential unauthorized changes in broadband service.

B. CPNI

Although the CPNI rules have their genesis in the *Computer Inquiry* line of orders, Congress codified the rules when it enacted Section 222 of the 1996 Act. The rules, as enacted, continued with the theme that the Commission had followed throughout the *Computer Inquiry* orders and were designed to protect consumers against the disclosure and dissemination of sensitive personal information that a telecommunications carrier may obtain in the provision of telecommunications services to a customer. Section 222 and the implementing rules of the Commission were designed to focus on the nature of the customer approval needed before a carrier can use, disclose, or permit access to CPNI. In sum, the statute and the rules do not prohibit the use of CPNI by a carrier in certain ways but instead require that the carrier obtain proper customer consent before using such information for such purposes.²⁷ In its CPNI rules, the Commission established four types of consent – implied consent, opt-out, opt-in, and limited

²⁶ On occasion, BellSouth, as a facilities-based DSL provider, has been involved in situations where BellSouth, or an ISP who is a wholesale DSL customer of BellSouth, has accused another ISP of attempting to effect an unauthorized change of ISPs for BIA service. In each situation, the customer was aware of the attempted change because of the receipt of equipment and other steps necessary to make such a change, and contacted his or her ISP to gain information about the attempted change. In each situation, the ISPs and the customer were able to ensure that the customer maintained the ISP of his or her choice.

²⁷ The statute also allows for some use of customer information without customer consent, such as the exceptions listed in 47 U.S.C. §222(d).

duration consent.²⁸ The type of customer consent needed depends on the type of services the consumer purchases from the carrier and how or when the carrier intends to use the CPNI.

The types of services the consumer purchases from the carrier determine the customers “total service relationship” (“TSR”) with the carrier. For example, the CPNI rules establish two types of services, telecommunications services and non-telecommunications services. Within telecommunications services there are three separate categories: local,²⁹ wireless,³⁰ and long distance.³¹ If a customer purchases only local service from the carrier, then the customer’s TSR is limited to local service only. Likewise, if the customer has local and wireless services with the carrier, the TSR would include all services in the local and wireless categories of services. Thus, if a carrier wants to use a customer’s CPNI within the TSR, i.e., the customer has local service with the carrier and the carrier wants to market intraLATA toll services to the customer, the carrier has implied consent from the customer for this use of the customer’s CPNI.

If the carrier wants to use CPNI itself or within the carrier’s family of affiliates but outside the TSR, however, the carrier must obtain “opt-out consent.”³² For example, if the customer has local service with the carrier and the carrier wants to use the customer’s CPNI to market interLATA services or a communications-related service that is not a telecommunications service that is offered by the carrier or its affiliate, then opt-out consent is needed. While opt-out

²⁸ A limited duration consent is a verbal consent obtained by the carrier when interacting with the customer. The consent is valid only for the duration of the interaction.

²⁹ This category of service includes local telephone service and intraLATA toll services.

³⁰ This category of service includes analog and digital cellular service, personal communications services, and paging services.

³¹ This category of service includes interexchange service, intraLATA toll (if provided by an affiliate other than the local carrier) and interLATA toll services.

³² Opt-out consent is obtained by the carrier providing the customer with notification of its planned use of the CPNI without further authorization unless the customer explicitly denies the carrier approval of such use.

notification is less burdensome to the carrier than opt-in consent, it requires the carrier to retain all such notifications and the approval status for each customer in an identifiable format. Such retention and tracking practices are costly for the carrier.

If the carrier wants to use CPNI for marketing products or services that are not communications-related services, the carrier must obtain “opt-in consent.”³³ Opt-in consent is also required if the carrier plans to provide CPNI to a third party that is not an agent, joint venture partner, or independent contractor acting on behalf of the carrier.³⁴ Thus, at bottom, the purpose of the CPNI rules is to make sure that a carrier does not use a customer’s private information unless the customer (1) knows of the use, or has a reasonable expectation that it will be used, and (2) has consented to the use, either implicitly or explicitly.

BellSouth fully supports the principle that a customer should have knowledge of and consent to a provider’s use of information obtained about the customer in the course of providing service to the customer. Control of personal information is important to all individuals and the information should be protected in the manner that the customer finds acceptable. Use of the information in a competitive market, however, should be a matter left to the provider and its customer, and not subject to Commission-imposed rules. Indeed, this is how the broadband market currently operates.

³³ Opt-in consent is obtained by the carrier providing the customer with notification of its planned use of the CPNI. In order for the carrier to use the CPNI in this manner, the customer must provide an explicit affirmative response to the carrier.

³⁴ The carrier may provide CPNI to an agent, joint venture partner, or independent contractor based on opt-out consent, as long as these third parties are acting on behalf of or in a joint venture with the carrier and the CPNI will be used only as the carrier is permitted to use it. Moreover, these third parties must also enter into a confidentiality agreement. Unless these conditions are met, any disclosure of CPNI to a third party requires opt-in consent.

Today, most, if not all, BIA service providers have a privacy policy that specifically addresses the information about the customer that the BIA service provider collects.³⁵ In fact, there are industry groups that have developed best practices that companies such as BIA service providers should follow in dealing with customer information.³⁶ The industry developed these policies and practices, and companies have implemented privacy policies, because it recognized the importance that customers place on this issue. Accordingly, although protection of customer information is an important matter, it is one that is being addressed and should continue to be addressed by the industry.³⁷ Indeed, because of the importance that customers place on information, providers will view this as a competitive issue of quality of service.

Additionally, to the extent that an ISP has a privacy policy and the ISP acts in a manner inconsistent with that policy, such an act could potentially be a violation of state consumer protection laws.³⁸ As discussed above, these state laws were implemented as a safety net to protect consumers against unfair or deceptive business practices.

³⁵ A copy of BellSouth's privacy policy is attached as exhibit 1.

³⁶ See, e.g., the Online Privacy Alliance which describes itself as a "diverse group of corporations and associations who have come together to introduce and promote business-wide actions that create an environment of trust and foster the protection of individuals' privacy online." <http://www.privacyalliance.org/>.

³⁷ See Karim Jamal, Michael Maier & Shyam Sunder, *Regulation and the Marketplace*, Regulation, Winter 2003-2004, 38-41. In this article the authors compared the effectiveness of privacy regulations implemented in United Kingdom to the non-regulated industry practices followed in the United States and found that regulation performed no better than the competitive market. The authors concluded "[c]ontrary to the claims made in the 1990s, the laws of economics remain unchanged in the dotcom world; the self-interest of Internet merchants still seems to drive most of them to respect the privacy of their customers. Attempts to use regulation to control the behavior of a few outliers in a market characterized by fast-changing technology are unlikely to be effective." *Id.* at 41.

³⁸ See discussion in I.B. *supra*. The Federal Trade Commission ("FTC") has found that a merchant that contradicted its privacy policy violated Section 5(a) of Federal Trade Commission Act ("FTCA"), which prohibits unfair and deceptive trade practices. <http://www.ftc.gov/opa/2005/03/cartmanager.htm>. While common carriers, such as BellSouth, are exempt from FTC jurisdiction, they are not exempt from state consumer protection statutes,

Moreover, Congress and many states have introduced, and more states are contemplating, statutes that specifically address Internet privacy issues.³⁹ Some of these statutes are focused on specific issues such as spyware,⁴⁰ while others are more generally applicable to overall online privacy issues. Any rules the Commission would implement similar to the rules that govern a carrier's use of CPNI would undoubtedly intersect with this multitude of statutes.

Finally, the Commission must be mindful of the existing CPNI rules governing telecommunications services, discussed above, and their impact on telecommunications carriers in their provision of telecommunications services and BIA service. For the reasons discussed herein, BellSouth does not believe that any CPNI-type rules should be applied to BIA service providers. However, if the Commission does apply CPNI-type rules to BIA service, these rules should be consistent with all CPNI rules. That is, it would be extremely burdensome for any common carrier to have to apply CPNI rules to information related to telecommunications services and apply a different set of rules to information related to BIA service. This is especially true considering the regulatory disparity that exists today for non-telecommunications carriers that provide BIA service, such as cable modem providers, which are not subject to the

which have similar language to that found in the FTCA prohibiting unfair and deceptive trade practices.

³⁹ See Spyware Control Act, Utah Code Ann. § 13-40-101 to 401 (2005); Consumer Protection Against Computer Spyware Act, Cal. Bus. & Prof. Code §§ 22947 to 22947.6 (2005); Ariz. Rev. Stat. §§ 44-7301 to 7304 (2005); Personal Information Protection Act, Ark. Code Ann. §§ 4-110-101 to 108 (2006); Georgia Computer Security Act of 2005, Ga. Code Ann. §§ 16-9-150 to 157 (2005); Iowa Code § 714.1 (2004); Virginia Computer Crimes Act, Va. Code Ann. §§ 18.2-152.1 to 152.15 (2005); Regulating Computer Spyware, 2005 Wash. Rev. Code §§ 19.270.010 to 19.270.900 (2005).

⁴⁰ The FTC provided a working definition of Spyware as software that "aids in gathering information about a person or organization without their knowledge and that may send such information to another entity without the consumer's consent, or that asserts control over a computer without the consumer's knowledge." Public Workshop; Monitoring Software on your PC: Spyware, Adware, and Other Software, 69 Fed. Reg. 8538 (Feb. 24, 2004). Spyware can be used by any website that the customer visits; its use is not limited to ISPs.

CPNI rules when marketing or selling BIA service to their existing customers.⁴¹ Consequently, the Commission should allow privacy issues to continue to be addressed by the industry and policed by competition and laws of general applicability instead of adopting any new CPNI-type rules for BIA services.

C. Truth-in-Billing

Truth-in-Billing (“TIB”) requirements that currently apply to carriers in the provision of telecommunications services should not be extended to BIA service, or any information service. As the *Notice* states, these rules were “designed to reduce slamming, cramming, and other telecommunications fraud by setting standards for accuracy on bills for telecommunications service.”⁴² Such concerns are not applicable in the broadband market.

The Commission implemented the TIB rules during a time of transition in the telecommunications market. During this time, and even continuing today, many IXCs contracted with local exchange carriers to bill the IXC’s charges on behalf of the IXC. Pursuant to the slamming discussion above, it is relatively easy to change a customer’s telecommunications service carrier without the customer’s knowledge. In fact, the customer usually does not find out about the change until he or she receives a monthly bill from the new carrier. Before the TIB

⁴¹ Pursuant to the rules, if an ILEC wants to market BIA service to an existing telecommunications customer, it must obtain consent from that customer in order to use the customer’s CPNI for that marketing purpose. Conversely, a cable modem provider would not be subject to this consent requirement for marketing or selling BIA service to a customer who is a cable subscriber. Because of the disparity that exists with CPNI rules today between common carriers that provide BIA services versus non-common carriers that provide those same services, the Commission should issue a CPNI – specific notice of proposed rulemaking that could concentrate on restructuring and implementing a standard set of rules that would apply in all situations regardless of the type of service that is being marketed or provisioned to the customer.

⁴² *Notice*, ¶ 152.

rules, however, new IXCs would not always clearly identify themselves and the format of the bill often made it difficult to see when a new carrier had taken over the customer's business.

Moreover, at the time the Commission implemented the TIB rules, there was a proliferation of carriers entering markets while other carriers were expanding into new markets, including dial-around services that became extremely popular in the mid-1990s. With a dial-around service the customer can have a primary interexchange carrier ("PIC") assigned to his or her account yet still dial 1010XXX and gain access to another carrier. Typically, a dial-around service was billed to the customer by its local exchange carrier through billing clearing house agencies. The local exchange company billing on the dial-around company's behalf would often be given very little information about the carrier or what the charge was for, even though the responsibility for providing such information rested with the dial-around company. In many instances, the clearing house would not provide the billing information until a month or more after the actual charge. This in turn caused considerable customer confusion as an inadequately defined charge would appear on the customer's bill long after the customer had incurred the charge.

These problems prompted the Commission to implement the TIB rules, which require new service providers to be adequately identified on the bill and provide an easily identifiable number through which the customer can reach the carrier. Additionally, the service must be described in a clear non-misleading manner. These type of regulations are not necessary for BIA service for two reasons. First, as discussed herein, competition currently drives competitors to provide the information on a bill that a customer wants and needs; otherwise that customer will

find a different provider. Moreover, to the extent that any provider is using misleading billing information, that provider is subject to state laws of general applicability.⁴³

Second, because of the way BIA service is provisioned, as opposed to the way telecommunications services are provisioned, as discussed in the slamming section above, changing carriers is virtually impossible without customer knowledge and participation. Thus, many of the concerns that were the basis for the TIB rules are not present in the provision of BIA service.

Finally, to the extent that the Commission does apply similar TIB-type rules to BIA service, just as with CPNI, these rules must be consistent with existing telecommunications rules and must be applied to *all* providers of BIA services in the same manner. It would be extremely burdensome for common carriers that will bill both telecommunications services and BIA services on the same bill to be subject to one set of rules for telecommunications services and another set of rules for BIA services.

D. Network Outage Reporting

BellSouth recognizes that in today's environment, outage reporting cannot be taken lightly in any sector of the communications market. The Commission should not, however, underestimate the long-standing commitment of communications services providers to protect the nation's network and minimize disruptions of all services. This has been especially true among telecommunications carriers, and BellSouth believes this tradition will be just as strong among BIA service providers. Indeed, BIA service providers have an obvious vested interest in

⁴³ See e.g., Letter from Kathryn A. Zachem, Counsel for Verizon Wireless, to Marlene H. Dortch, Secretary, FCC, CG Docket No. 04-208 & CC Docket No. 98-170 (Jan. 10, 2005), attaching Assurance of Voluntary Compliance, In the Matter of Celco Partnership d/b/a Verizon Wireless (action brought by numerous state attorneys general against wireless companies for various marketing and billing practices).

ensuring that their customers have access to reliable services, especially in today's competitive marketplace. BellSouth is confident that much of the cooperation exhibited by telecommunications carriers and manufacturers in working to understand the causes of service outages and to develop a set of best practices to manage through them will also take place among BIA services providers. Thus, it is important that the Commission not act hastily or base its decision on limited information in implementing any outage reporting requirements that could hamper the way the industry evolves in dealing with network outages.

Moreover, in establishing the rules for the existing reporting requirements for telecommunications services, the Commission considered a much broader set of issues that were well beyond the scope of consumer protection. For example, in the latest *Network Outage Reporting Order*,⁴⁴ the Commission extended "its requirements for reporting communications disruptions to providers of wireless and satellite communications"⁴⁵ where such requirements had been limited to wireline telecommunications providers in the past. The Commission stated it adopted rules to include these providers "because we recognized the critical need for rapid, complete, and accurate information on service disruptions that could affect homeland security, public health or safety, and the economic well-being of our Nation, especially in view of the increasing importance of non-wireline communications in the Nation's communications networks and critical infrastructure."⁴⁶

⁴⁴ *New Part 4 of the Commission's Rules Concerning Disruptions to Communications*, ET Docket No. 04-35, *Report and Order and Further Notice of Proposed Rulemaking*, 19 FCC Rcd 16830 (2004).

⁴⁵ *Id.* at 16833, ¶ 1.

⁴⁶ *Id.*

Moreover, before establishing the rules for outage reporting over this segment of the industry, the Commission released a detailed NPRM that included “proposals . . . designed to allow the Commission to obtain the necessary information regarding services disruptions in an efficient and expeditious manner and achieve significant concomitant public interest benefits.”⁴⁷ In response to the NPRM, 36 entities filed comments and 24 entities filed reply comments. In addition, numerous parties filed *ex parte* communications with the Commission. The result of this extensive record was an 88-page order, not including appendices.⁴⁸

Accordingly, while it does not diminish the fact that network outage reporting is an important issue for the Commission for all services, including BIA services, BellSouth believes that such reporting rules should not be taken lightly by simply imposing on BIA services existing rules developed for other services without the benefit of a full record on the issue. The Commission should monitor the market and, as with the NPRM on wireless and satellite services, design specific proposals that can be tested and reviewed through a complete rulemaking proceeding. Without this process, the Commission will be in danger of subjecting the industry to burdensome reporting requirements to obtain information it may not need while failing to secure other vital information.

E. Section 214 Discontinuance

Section 214 provides protection to consumers to ensure that a telecommunications carrier does not leave a market, and thus leave the consumer with no service provider, unless the carrier notifies the Commission of its intended departure and allows the Commission to review the impact of the departure on the telecommunications market. In the broadband market, in which

⁴⁷ *Id.*

⁴⁸ *Id.*

customers have a choice of providers, Section 214-type notification requirements do not appear warranted at this time. The Commission should monitor the situation and consider imposing such notification requirements only in the event of demonstrated need. However, if, after such monitoring, the Commission believes that some form of notification is needed, it should not adopt requirements that are any more stringent than those it implemented for stand alone transmission services in the *Broadband Internet Services Order*.⁴⁹

F. Section 254(g) Rate Averaging

It would be inappropriate for the Commission to establish any regulations concerning rates or rate structures for BIA services. Section 254(g) is a form of rate regulation that is wholly inappropriate in a competitive market. If the Commission were to engage in economic regulation, such as requiring that providers engage in rate averaging, such regulation could significantly alter the competitive dynamic and negatively affect the deployment of these services. To the extent that providers encounter different cost structures to serve different areas, any requirement that would prevent providers from recognizing these different costs in the rates that they charge for their services would simply create a disincentive to deploy services in high cost areas.

Where cost variations are substantial, rate averaging would produce a system of implicit subsidies between high and low cost areas. The Commission, through its universal service considerations for wireline telecommunications, is fully cognizant of the problem that implicit subsidies generate. The Commission should eschew actions that would graft similar problems onto the competitive broadband market. The Commission's policy to encourage the widespread deployment of broadband capabilities is best served by an environment that permits providers to

⁴⁹ *Broadband Internet Services Order*, ¶ 101.

make rational pricing decisions. Rational prices require that providers be able to reflect costs that are encountered in delivering the services. A regulatory requirement that is inconsistent with rational pricing decisions will simply chill broadband deployment and deprive portions of the consuming public of the advances that broadband technology can bring.

G. The Commission Should Preempt All State Laws and Maintain Enforcement Jurisdiction

Although it should refrain from implementing any regulations to govern the competitive broadband market, in the event that the Commission deems some regulation to be necessary, this regulation should be under the exclusive jurisdiction of the Commission and not under the dual controls of the states. Preemption will eliminate the unnecessary hardships that carriers face in having to comply with both national and local rules governing this area, and will lessen potential consumer confusion in the event rules from different jurisdictions conflict with each other. The ability of any carrier to maintain nation- or region-wide operations is severely hampered when the carrier must comply with multiple sets of rules governing the same area of business.

III. Conclusion

For the reasons discussed herein, the Commission should not implement any regulations on BIA service at this time. The broadband market is competitive, existing statutory and legal remedies are available to customers for these services, and many of the rules being contemplated were designed for narrowband services and are not applicable to BIA service. The Commission should, instead, take a wait-and-see approach and let the market work. If the Commission then observes problems that need correcting, it can implement a rulemaking proceeding designed to

address those particular problems. However, force-fitting old regulations on new services is not the answer.

Respectfully submitted,

BELLSOUTH CORPORATION

/s/ Stephen L. Earnest

Stephen L. Earnest

Richard M. Sbaratta

Suite 4300

675 West Peachtree Street, N. E.

Atlanta, Georgia 30375

(404) 335-0711

Bennett L. Ross

1133 21st Street, NW

Suite 900

Washington, DC 20036

(202) 463-4155

Its Attorneys

Date: January 17, 2006

Exhibit 1



NETWORK STATUS

[BELLSOUTH® FASTACCESS® DSL SUPPORT](#)[WWW.BELLSOUTH.NET](#)[EMAIL](#)[HELP AND TECHNICAL SUPPORT](#)

BellSouth FastAccess DSL Support



Legal Page

Privacy Policy

Online Privacy Policy

At BellSouth we are committed to honoring the privacy of our on-line customers and visitors to our Web sites. We recognize the importance to you of maintaining an appropriate level of privacy and security for the personal information we collect from you over the Internet. The following discloses our Web site information gathering and use practices and is limited to the protection and use of personal information collected by us in the online environment. Your access to and use of our site are subject to this policy and any other terms of use or policies posted by us. Please note that this privacy statement applies only to this site and not to the web sites of our advertisers or of other companies or organizations to which we link. All references to "BellSouth" throughout this policy statement include, unless otherwise stated, all BellSouth affiliate companies, successors and assigns.

What Kinds of Information Does BellSouth Collect and Use?

The only personally identifiable information we collect about visitors is provided voluntarily. In general, you can visit our Web site without telling us who you are or revealing any personal information about yourself. However, some portions of our Web site may be accessible only to users who have registered with us (and who may be asked to provide certain information as part of the registration or login process). In addition, our Web servers may use "cookies" (described below) to collect information about visitors such as domain names, but not your e-mail addresses. This information may be aggregated to measure such things as the number of visits, average time spent on the site, number of pages viewed, and methods by which our site was found. BellSouth uses such information to evaluate the use of our site and to continuously improve the content and services being provided. At times we may ask you for contact information or conduct on-line surveys in order to better understand your needs so that we can provide you with a customized experience. If we wish to use this information other than as set forth in this statement, we will let you know at the time of collection. We will take commercially reasonable steps to safeguard this information from unauthorized access.

At times we may ask you for contact information or conduct on-line surveys in order to better understand your needs so that we can provide you with a customized experience. If we wish to use this information other than as set forth in this statement, we will let you know at the time of collection. We will take commercially reasonable steps to safeguard this information from unauthorized access.

When you access your account information, order a service or make a payment on-line, request product or service information, send us e-mail, register to receive news or information alerts, establish a "My Yellow Pages," submit a click wrap agreement or enter a contest that we are sponsoring, we will ask you to provide individually-identifiable information to us. Except as otherwise provided below under the heading "Who Has Access to This Information?", when you supply information about yourself for a specific purpose, we use the information for that purpose and to manage the internal operations and security of our Web site consistent with the terms of use and policies established from time to time governing this site. Such purpose may involve the disclosure of such information to unaffiliated companies/vendors where necessary to and for the limited purpose of processing your request, processing a transaction authorized by you or providing you with products or services.

We also want you to be aware that certain information related to telecommunications services provided to you by

BellSouth, commonly referred to as "Customer Proprietary Network Information" or "CPNI," is subject to special Federal laws and regulations, with which we are fully committed to comply, both in the on-line environment and in all other respects. For more information about these special rules and our related policies regarding the use of CPNI, please visit BellSouth's Public Policy website at <http://bellsouthcorp.com/policy/>.

Who Has Access to This Information?

Unless we specifically disclose it to you at the time of collection or subsequently obtain your approval, we will not make visitor or customer-specific information that is gathered on our site available to unaffiliated organizations for commercial purposes unrelated to the business of BellSouth. BellSouth and its affiliated companies use this information to help us deliver the services you have requested, or to design or offer specific products or services that we believe will be useful to you. While we may use this information to contact you or to send materials to you for marketing purposes, we will take commercially reasonable steps to safeguard such information from unauthorized access by any other parties. As we strive to meet the needs of our customers, we may disclose personally identifiable information we collect, as described above, to companies and vendors that perform marketing or other services on our behalf or with whom we have joint marketing agreements so that we may provide a full range of products and services to you. Our policy is to prohibit these companies from otherwise selling or disclosing the personal information we provide.

We believe it is necessary to share information in order to investigate, prevent, or take action regarding illegal activities, suspected fraud, situations involving potential threats to the physical safety of any person, violations of BellSouth's Terms of Use, or as otherwise required by law.

Certain federal, state and local laws or government regulations may require us to disclose non-public personal information about you. In these circumstances, we will use reasonable efforts to disclose only the information required by law, subpoena or court order to be disclosed.

Cookies

Our site may make use of cookies (or a similar technology) to better manage our sites and to assist us in providing you with tailored information and services. A cookie is a tiny element of data that a Web site can send to your browser, which is stored on your hard drive so that we can do things such as better serve you as you navigate through our site or when you return. You may set your browser to notify you or decline the receipt of a cookie; however, certain features of our sites may not function properly or be available if your browser is configured to disable cookies.

E-Mail

BellSouth's policy is not to read or disclose private e-mail communications that are transmitted using BellSouth services except to respond, if directed to us, or as required to operate the service, as set forth in the terms of use and policies established from time to time governing the service, or as otherwise required by law.

Children

BellSouth recognizes the importance of children's safety and privacy on the Internet. For this reason and to comply with certain laws, we do not intentionally collect personal, individually identifiable information from children under the age of 13, nor do we offer content targeted to children under 13. Children should always ask their parents or guardians for permission before disclosing any information online. Several software companies can provide children's safety software, including some that may have reduced prices or other special offers for certain BellSouth customers.

Security

BellSouth maintains physical, electronic and procedural safeguards designed to protect the confidentiality of personal information provided by you at our Web site. For example, unique passcodes or passwords are required to access a number of our Web site services. In addition to requiring the use of a unique passcode or password, all payments processed through our Web site require personal transactional information provided by you to be sent in a "Secure Session" using Secure Socket Layer encryption technology. This technology encrypts - or scrambles - your financial or credit card account information to help prevent unauthorized parties from reading it. We regularly test and update our technology to help protect your personal information. However, such precautions do not guarantee that our Web site is

is vulnerable to all security breaches. BellSouth makes no warranty, guarantee, or representation that use of our Web site is protected from all viruses, security threats or other vulnerabilities and that your information will always be secure. When doing business with others, such as advertisers to whom you can link from our site, you should consider the separate security and privacy policies of those other sites.

Discussion Areas

This site may provide discussion areas so that customers and visitors can communicate freely and share ideas. Please remember that any information that is disclosed in these areas becomes public information and you should exercise caution when disclosing such information. These discussion areas may be monitored occasionally in order to enhance the safety and respect for all of our customers and visitors, and off-topic, unlawful or otherwise inappropriate content of materials of which we become aware may or may not be removed from the site during the course of such monitoring. However, BellSouth is not responsible for any information posted or remaining on these discussion areas.

Links to Other Sites

For the convenience of our visitors and customers, this Web site may contain links to other sites. While we generally try to link only to sites that share similar high standards and respect for privacy, we are not responsible for the content, products or services offered or the privacy and security practices employed by these other sites.

Third Party Ad Servers

We use a third-party advertising company to serve ads when you visit our Site. This company may use information (not including your name, address, email address or telephone number) about your visits to our and other web sites, in combination non-personally identifiable information about your purchases and interests from other online and offline sources, in order to provide advertisements about goods and services of interest to you. In addition, we share web site usage information about our visitors to our sites with this company for the purpose of managing and targeting advertisements and for market research analysis on our site and other sites. For these purposes, we and our third-party advertising company may note some of the pages you visit on our site through the use of pixel tags (also called clear gifs) or other similar tracking mechanisms. In the course of serving advertisements to this site, our third-party advertiser may place or recognize a unique "cookie" on your computer.

Revisions

Because of the evolving nature of the technologies that we use and the way that we conduct business, we may amend this policy from time to time. We will post any revisions on this site.

Feedback

If you have any questions or comments about this privacy statement, your dealings with this Web site, or if you find that we have any incorrect information concerning you or any of your accounts with us, you may contact us at webmaster@bellsouth.net.

[Back to the previous page](#)

CERTIFICATE OF SERVICE

I do hereby certify that I have this 17th day of January 2006 served the parties of record to this action with a copy of the foregoing **BELLSOUTH COMMENTS** by electronic mail addressed to the parties listed as follows:

*janice.myles@fcc.gov

/s/ Lynn Barclay

Lynn Barclay

VIA (*) ELECTRONIC MAIL