



governing many aspects of the retail market, which they contend are necessary to prevent providers of BIA services from taking advantage of their customers. The other camp supports a competitive market approach by which competition, free of needless government regulation, serves as the best protection against bad actors. While recognizing that competition may not be a panacea, this camp believes that an efficient competitive market is the best means to ensure that consumers receive the services they desire with the protections naturally inherent in that system.

As BellSouth demonstrated in its comments, considering the Commission's approach in the *Broadband Internet Access Order* to eliminate antiquated and unnecessary common carrier transmission requirements, the Commission should not rush to apply legacy telephone regulations in the name of consumer protection before a need for such regulations is clearly identified. The Commission should instead observe the market and monitor consumer issues closely. For example, while privacy is a key issue in today's communications markets, BellSouth, like most broadband Internet access providers, has a carefully developed privacy policy for its BIA services that is displayed on its website (and attached to its comments). This policy protects consumer information, meets consumer expectations about restricting access to their information, and can be changed to meet changing consumer needs. If, however, after sufficient observation, the Commission determines that the market is not fulfilling a consumer need it can then issue regulations to address that specific need. Under no circumstance, however, should the Commission simply apply to new broadband services old rules, which were designed for a telecommunications landscape that is quickly disappearing.<sup>2</sup>

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<sup>2</sup> This is especially true considering BIA service is an information service governed under Title I. Traditionally, the Commission has cautiously limited regulations over Title I services. See Comcast Comments at 9-11.

Those comments arguing in favor of extending legacy telecommunications regulations, which were developed for traditional phone services, to BIA services do so on the misguided premise that because the regulations may have been needed for phone services in the past then they will probably be needed for BIA services in the future. The Commission should reject this backward view of the market. More consumer harm will likely come from premature regulation that stifles the market's growth than from applying regulation at a later date if a market failure is identified. Consistent with BellSouth's comments, the Commission should reject the claims of these commenters and allow the market the opportunity to grow free from the overlay of legacy rules that were not designed to address any consumer concern in the BIA services market.

## **II. The Current *Notice* Is Not an Appropriate Venue to Decide Matters Being Addressed in Other Commission Proceedings**

Many of the comments address issues outside the scope of this proceeding. While the *Notice* did ask in an introductory paragraph whether there were other "areas of consumer protection not [listed in the *Notice*] for which the Commission should impose regulations,"<sup>3</sup> this open question is limited to consumer protection issues related to BIA services. This brief sentence cannot be read to incorporate into this proceeding the entire body of broadband issues, even if commenters twist those issues in an attempt to make them tangentially related to consumer protection. Moreover, many comments not only exceeded the scope of the *Notice* but sought regulations that would impact other proceedings currently open before the Commission.

The Commission must act within the proper scope of this proceeding, which does not include substantive matters related to areas such as voice over Internet protocol ("VoIP") and Universal Service Fund ("USF"). These topics are the subject of separate proceedings and

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<sup>3</sup> *Notice*, 20 FCC Rcd at 14930, ¶ 147.

should be addressed in the context of those proceedings.<sup>4</sup> The Commission should not allow parties to bootstrap important and complex issues such as the appropriate regulatory treatment of IP-enabled services and the reform of the USF system into this narrowly focused proceeding simply by alleging a connection to consumer protection. Consequently, BellSouth does not believe a reply is necessary to address the majority of these comments. However, one topic – net neutrality – which is beyond the scope of this proceeding, deserves specific attention.

The New Jersey Division of the Ratepayer Advocate, NASUCA, and Pac-West argue that the Commission should use this docket as an opportunity to address net neutrality, but in so doing they misconstrue the net neutrality debate and misrepresent the plans of broadband providers such as BellSouth.<sup>5</sup>

For example, the New Jersey Division of the Ratepayer Advocate points to a news article which, according to the Ratepayer Advocate, indicates that BellSouth and the other Bell companies intend to “cripple or slow Internet traffic to and from third party content providers which do not agree to begin paying for use of the network.”<sup>6</sup> Nothing could be further from the truth. In September 2003, the High Tech Broadband Coalition released its “Broadband Principles for Consumer Connectivity,” which protect the openness of the Internet by ensuring that broadband consumers have the ability to: (1) obtain meaningful information regarding their broadband service plans; (2) access their choice of legal Internet content within the bandwidth limits and quality of service of their service plan; (3) run applications of their choice, within the

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<sup>4</sup> *IP-Enabled Services*, WC Docket No. 04-36, *Notice of Proposed Rulemaking*, 19 FCC Rcd 4863 (2004); *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, *Report and Order and Second Further Notice of Proposed Rulemaking*, 17 FCC Rcd 24952 (2002).

<sup>5</sup> NASUCA Comments at 8-17; Pac-West Comments at 5-6; New Jersey Division of the Ratepayer Advocate Comments at 23-25.

<sup>6</sup> New Jersey Division of the Ratepayer Advocate Comments at 23.

bandwidth limits and quality of service of their service plans, as long as they do not harm the provider's network; and (4) attach any devices at the consumer's premises, so long as they operate within the bandwidth limits and quality of service of their service plans and do not harm the provider's network or enable theft of services.<sup>7</sup> BellSouth publicly endorsed these connectivity principles more than two years ago and has abided by them ever since.<sup>8</sup>

Pac-West insists that rules to protect net neutrality should be established because “[t]he likelihood of anticompetitive behavior by the ILECs that could harm consumers is very real.”<sup>9</sup> However, the only evidence of such “behavior” or harm to consumers is the case involving Madison River Communications, which was alleged to have deliberately blocked Vonage customers' calls. Shortly after Vonage complained to the Commission about Madison River's conduct, the Commission approved a consent decree with Madison River by which the company agreed to pay \$15,000 and to “not block ports used for VoIP applications or otherwise prevent customers from using VoIP applications.”<sup>10</sup> Almost 12 months have passed since this consent decree was entered, and yet neither Vonage nor any other Internet application provider has filed complaint with the Commission about any alleged “anticompetitive behavior” that Pac-West now insists warrants the adoption of heavy-handed net neutrality rules.<sup>11</sup>

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<sup>7</sup> *Ex Parte* Letter from High Tech Broadband Coalition to Michael K. Powell, FCC Chairman, CC Docket Nos. 02-33, 98-10 & 95-20 and CS Docket No. 02-52 (Sept. 25, 2003).

<sup>8</sup> *Ex Parte* Letter from Robert T. Blau, BellSouth, Vice President – Executive and Federal Regulatory Affairs, to Marlene H. Dortch, Secretary, FCC, CC Docket Nos. 02-33, 98-10 & 95-20 and CS Docket No. 02-52 (Sept. 29, 2003).

<sup>9</sup> Pac-West Comments at 5.

<sup>10</sup> *In re: Madison River Communications, LLC and affiliated companies*, File No: EB-05-IH-0110, *Consent Decree*, 20 FCC Rcd 4296, 4297, ¶ 6, *adopted by Order*, 20 FCC Rcd 4295 (2005).

<sup>11</sup> NASUCA cites an *ex parte* filed in June 2004 by Timothy Wu and Lawrence Lessig in CS Docket No. 02-52, in which the authors speculate that the “potential for discrimination” “imposes a burden on innovation” and “dampens the incentives to invest today.” NASUCA

Pac-West seeks to justify the imposition of net neutrality rules by claiming that “there is insufficient competition in the provision of broadband connections to end users” because, according to Pac-West, ILECs and cable operators have been “restricting output, in this case in the form of lower speeds.”<sup>12</sup> This claim is simply untrue. Not only are broadband providers bringing to market faster and faster speeds, they are also reducing broadband prices.<sup>13</sup> Better service and lower prices are the hallmarks of a competitive market, which is the case for broadband Internet access services, as the Commission recently found.<sup>14</sup>

Notwithstanding the Commission’s findings about the competitiveness of the broadband market, NASUCA wants the Commission to take a large step backward by reinstating for broadband Internet access services the “unbundling” requirements of the *Computer Inquiry* regime.<sup>15</sup> This request is a thinly veiled attempt to obtain reconsideration of the Commission’s

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Comments at 15, n.39. However, software and high-tech firms – including Amazon.com, Yahoo, Disney, and Microsoft – have been concerned about “discrimination” by broadband service providers since at least 2002, when they urged the Commission to adopt rules to “assure that consumers and other Internet users continue to enjoy the unfettered ability to reach lawful content and services.” *Ex Parte* Letter from Coalition of Broadband Users and Innovators (“CBUI”) to Michael K. Powell, FCC Chairman, CC Docket Nos. 02-33, 98-10 & 95-20, CS Docket No. 02-52, and GN Docket No. 00-185 (Nov. 18, 2002). *See also* Comments of High Tech Broadband Coalition, CC Docket No. 96-45 (June 17, 2002). If innovation truly has been burdened or investment incentives dampened by the lack of net neutrality rules, one would have thought NASUCA or its supporters could provide a single example to support this theory in the intervening four years. Their failure to do so is telling.

<sup>12</sup> Pac-West Comments at 6.

<sup>13</sup> *See, e.g.*, “BellSouth Introduces New Pricing for BellSouth® FastAccess® DSL Internet Service” (Jan. 9, 2006), “BellSouth Introduces Faster High-Speed Internet Service for Businesses” (Dec. 5, 2005), at <http://bellsouth.mediaroom.com> (News Releases); “New AT&T Offers Consumers \$12.99 Online Promotion for High Speed Internet” (Feb. 3, 2006) at <http://att.sbc.com> (Learn More, Media Newsroom, News Releases).

<sup>14</sup> *Broadband Internet Access Order*, 20 FCC Rcd at 14884-86, ¶¶ 56-62.

<sup>15</sup> NASUCA Comments at 13.

*Broadband Internet Access Order*, which, like the similar request by CompTel, is untimely.<sup>16</sup> Furthermore, NASUCA makes no attempt to rebut the compelling evidence, as cited by the Commission in its *Broadband Internet Access Order*, that the *Computer Inquiry* regime stifles innovation and harms consumers.<sup>17</sup> Indeed, it is no coincidence that after release of the Commission's order, fiber optic broadband capability reached almost 1 million additional U.S. homes in the last four months of 2005, bringing fiber-to-the-home ("FTTH") connections to a total 3.6 million homes passed.<sup>18</sup>

NASUCA also extols the benefits of the Commission's *Hush-a-phone* and *Carterfone* cases, claiming that these decisions should apply equally to "this era of broadband access to the Internet."<sup>19</sup> However, these decisions were handed down decades ago during the government-sanctioned telephone monopoly of "Ma Bell," and rules designed during this era have no place in today's competitive broadband market.<sup>20</sup> Furthermore, a preemptory regulatory regime of the

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<sup>16</sup> See CompTel Comments at 2. CompTel argued, in the context of the *Notice*, that consumer protection can only be achieved by re-implementing Title II regulation over BIA services. CompTel thus contended that the Commission should completely undo the entire *Broadband Internet Access Order* and revert to the common carrier regulations that the *Order* abandoned. CompTel's request, as is NASUCA's, is actually a late-filed petition for reconsideration ("PFR") that is time barred. 47 U.S.C. § 405 and 47 C.F.R. § 1.429. While the Commission may in its discretion act on an untimely filed PFR, the courts have encouraged the Commission not to do so except in extraordinary circumstances. *21<sup>st</sup> Century Telesis Joint Venture v. FCC*, 318 F.3d 192, 199 (D.C. Cir. 2003) ("The court has discouraged the Commission from accepting late petitions in the absence of extremely unusual circumstances."). Neither CompTel or NASUCA cite any such circumstances and in fact, disguise the PFRs as timely filed comments in the *Notice* proceeding.

<sup>17</sup> *Broadband Internet Access Order*, 20 FCC Rcd at 14887-88, ¶ 65.

<sup>18</sup> Render, Vanderslice & Associates, LLC, "FTTH/FTTP UPDATE" (Feb. 2006); "Fiber-To-The-Home subscribers increase 70% in the last third of 2005," press release from the Telecommunications Industry Association and the Fiber-to-the-Home Council (Feb. 22, 2006), both available at <http://www.ftthcouncil.org> (Research/Documents, Analyst Research).

<sup>19</sup> NASUCA Comments at 11-14.

<sup>20</sup> See Adam Thierer, *Net Neutrality: Digital Discrimination or Regulatory Gamesmanship in Cyberspace?*, Policy Analysis (Jan. 12, 2004), at 15-16 (noting that "there are no such 'device attachment' regulations for the automotive industry or even the consumer software sector")

sort envisioned by NASUCA would likely discourage broadband service providers “from building new network infrastructure in the first place.”<sup>21</sup>

For more than a decade, the United States has adopted a policy of keeping government’s “hands off the Internet.” This policy has served this country well, directly contributing to the growth of broadband services and the innovation of the Internet. The Commission embraced this approach when it adopted its *Policy Statement* articulating four principles “to ensure that broadband networks are widely deployed, open, affordable, and accessible to all consumers.”<sup>22</sup> These principles implicitly recognize that broadband providers have strong incentives to carry more content and websites so that customers will want to buy their service. Given the dearth of evidence that broadband providers are preventing customers from accessing the Internet content of their choosing or interfering with such customer access, there is simply no need for this Commission to adopt a “hands all over the Internet” policy, as advocated by NASUCA, the Ratepayer Advocate, and Pac-West.

### **III. The Commission Should Preempt State Jurisdiction**

Several state commissions and NARUC argue in favor of the Commission and state commissions maintaining dual jurisdiction over consumer protection regulations.<sup>23</sup> They believe that states should not only enforce federal rules (as proposed in the *Notice*) but should also be

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because “[i]n those and countless other industries, market negotiations, contracts, and the common law – not preemptive government regulations – are used to sort out difficult controversies when they arise.”).

<sup>21</sup> *Id.* at 15.

<sup>22</sup> *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, et al.*, CC Docket No. 02-33, *et al.*, *Policy Statement*, 20 FCC Rcd 14986, 14988, ¶ 4 (2005).

<sup>23</sup> NASUCA Comments at 42; NARUC Comments at 4; New Jersey Division of the Ratepayer Advocate Comments at 14; New York State Department of Public Service Comments at 2.

allowed to implement rules beyond what the Commission may impose. Thus, they argue against any form of preemption by the Commission.

Regardless of what ultimate decision the Commission reaches in this proceeding – implement consumer protection rules over BIA service providers or wait and monitor the market and only act if a market failure is identified – the Commission should make clear that any regulation of a Title I service remains exclusively with the Commission. For example, application of CPNI-type rules to BIA providers should be the exclusive province of the Commission, and state attempts to establish piecemeal rules should be preempted. If the Commission were to establish CPNI rules applicable to BIA service providers – which it should not – these rules should be the full measure and not the minimum upon which state commissions could stack more regulations applicable only to the state jurisdiction.

Thus, to the extent a need for consumer protection regulation is identified it should be the federal Commission establishing a proceeding to address the need and any rules that are implemented must be under the exclusive jurisdiction of the Commission. This not only promotes efficiency for the regulators, it also reduces burdens on providers. No provider should be forced to be subject to 51 potential sets of rules when one set would be just as effective in meeting the public need.

### **Conclusion**

For the reasons stated in BellSouth's comments and reply comments, the Commission should not implement any consumer protection rules over BIA services at this time. Nothing in the comments supports adopting the regulation contemplated in the *Notice*. Indeed, those parties that argued in favor of the rules did so not because of any identified problem in the BIA services market but instead pointed to issues that are not relevant to or properly before the Commission in

this proceeding. The BIA services market is competitive; it adequately protects consumers from the concerns contemplated in the *Notice*. The Commission should not, therefore, saddle BIA services with rules that correct no identifiable problem and were designed for a narrowband services world. The Commission should let the market work.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I do hereby certify that I have this 1st day of March 2006 served the parties of record to this action with a copy of the foregoing **BELLSOUTH REPLY COMMENTS** by electronic filing, electronic mail and/or by placing a copy of the same in the United States Mail, addressed to the parties on the attached service list.

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