

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

In the Matter of)	
)	
Petition of BellSouth Telecommunications, Inc.)	WC Docket No. 04-405
For Forbearance Under 47 U.S.C. § 160(c))	
From Application of Computer Inquiry and Title)	
II Common Carriage Requirements)	

**REPLY COMMENTS OF
NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION**

Howard J. Symons
Tara M. Corvo
Mintz, Levin, Cohn, Ferris, Glovsky
and Popeo, P.C.
701 Pennsylvania Avenue, N.W.
Washington, D.C. 20004

Daniel L. Brenner
Neal M. Goldberg
National Cable & Telecommunications
Association
1724 Massachusetts Avenue, NW
Washington, D.C. 20036

January 28, 2005

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The National Cable & Telecommunications Association (“NCTA”) hereby submits its Reply Comments in the above-captioned proceeding. NCTA is the principal trade association representing the cable television industry in the United States. Its members include cable operators serving more than 90% of the nation’s cable television subscribers. In addition to providing multichannel video programming services, NCTA’s cable operator members also provide high-speed Internet access service and offer local telephone service using Internet Protocol as well as circuit-switched technology. NCTA’s members also include more than 200 cable programming networks and services, as well as suppliers of equipment and services to the cable industry.

INTRODUCTION AND SUMMARY

If the Commission decides to grant BellSouth’s Petition,^{1/} it should extend the same relief to all broadband platforms, regardless of whether they are offered by BellSouth, a cable operator, or another provider. BellSouth’s request for forbearance from *Computer II* and Title II’s

^{1/} Petition of BellSouth Telecommunications, Inc. for Forbearance Under 47 U.S.C. § 160(c) From Application of Computer Inquiry and Title II Common Carriage Requirements, WC Docket No. 04-405 (filed Oct. 27, 2004) (“Petition”).

application to its “broadband services” rests on the premise that its broadband services must compete with cable operators’ “unregulated” cable modem services. BellSouth mischaracterizes the current state of cable modem regulation, however. As the Commission knows, the question of whether or not the broadband transport component of cable modem service will be subject to third party access, tariffing, or other common carriage requirements is the subject of a pending decision by the Supreme Court in the *Brand X* case and resolution of the issues raised in the *Cable Modem NPRM*. Thus, the “like regulation” BellSouth seeks can only be achieved at this stage if the Commission extends the relief requested to all broadband providers.

Given the regulatory state of cable modem service, the Commission may decide that granting BellSouth’s forbearance request is premature. If so, it retains the option of moving forward on the regulatory framework for telephone company broadband services in the ongoing *Wireline Broadband* and *Broadband Non-Dominance NPRMs*. Acting through those proceedings would also allow the Commission to await conclusion of the *Brand X* case and establish the rules for telephone company broadband services concurrently with its resolution of the *Cable Modem NPRM*.

Whatever route the Commission determines it should follow, it should make clear that any decision to forbear from applying some or all of Title II’s requirements to BellSouth’s broadband services has no bearing on the issue of whether any of those services are subject to the requirements of Title VI, an issue that BellSouth has not raised in this proceeding.

DISCUSSION

I. ANY DECISION TO FORBEAR FROM TITLE II REQUIREMENTS SHOULD APPLY TO ALL BROADBAND SERVICES

If the Commission decides to grant BellSouth's Petition, it should extend the same relief to all broadband platforms, including cable. While BellSouth bases its request on its belief that it should be subject to "the same obligations [as cable modem service operators] regardless of the technologies they use,"^{2/} it remains an open question what "obligations" may ultimately apply to cable modem service. As the Commission and BellSouth know,^{3/} the FCC decision on which BellSouth relies (holding that cable modem service is an information service without a separate telecommunications service component) was overturned by the Ninth Circuit in the *Brand X* case^{4/} and is on appeal to the United States Supreme Court.

Even assuming that the Supreme Court upholds the Commission's classification of cable modem service, there remains an ongoing proceeding to determine what, if any, regulatory obligations should apply to cable operators' broadband offerings.^{5/} As part of that proceeding, the Commission is considering whether cable operators should be subject to a variety of requirements, including third party access, local franchising and rights-of-way regulation, consumer protection and customer service standards, and other issues.^{6/} If the Commission wants to regulate BellSouth's broadband services similarly to cable modem service, it would be

^{2/} Petition at 21.

^{3/} BellSouth is an intervenor in the *Brand X* case and recently filed a brief in support of the FCC's efforts to reverse the Ninth Circuit's decision. Brief for Respondents BellSouth and SBC in Support of Petitioners, *National Cable & Telecommunications Association, et al. v. Brand X Internet Servs., et al.*, Nos. 04-277 & 04-281 (S.Ct., filed Jan. 18, 2005).

^{4/} *Brand X Internet Servs. v. FCC*, 345 F.3d 1120 (9th Cir. 2003), *cert. granted* Dec. 3, 2004.

^{5/} *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities, Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, Notice of Proposed Rulemaking, CS Docket No. 02-52, 17 FCC Rcd 4798 (2002) ("*Cable Modem NPRM*").

^{6/} *Id.* ¶¶ 108-112.

difficult for it to determine what regulations it should forbear from applying to achieve this goal while the *Cable Modem NPRM* is pending.

BellSouth argues that even if the Supreme Court affirms the Ninth Circuit's decision, the Commission already has tentatively concluded that forbearance from some Title II requirements may be appropriate for cable modem service and so it is clear that cable modem service will be unregulated.⁷⁷ A "tentative" decision however is, by definition, not final. Any final decision by the Commission would take into account, at a minimum, any direction it receives from the Supreme Court. The decision might include an analysis of new evidence on the state of the market, or any number of other factors the Commission determines are relevant to its consideration. BellSouth's conclusion that there is "no barrier to this Commission acting now to provide the relief"^{8/} because the cable modem service decision is foreordained, therefore, is simply not correct.

If the Commission does choose to act on BellSouth's request, it should extend any decision to keep broadband services unregulated to include all broadband services offered by any provider, not just BellSouth. The rationales BellSouth presents for forbearance – promoting broadband deployment, encouraging competition in the provision of broadband service, and lowering costs for consumers – apply with equal force to all broadband services. Extending any ruling to all broadband services would ensure that if cable modem service is found to be subject to Title II, then it will be regulated in the same manner as BellSouth's DSL service – the result BellSouth states it seeks.^{9/}

⁷⁷ Petition at 5-6, 14-15, 32.

^{8/} *Id.* at 6.

^{9/} *See id.* at 21 ("both law and policy require that competing providers be subject to the same obligations regardless of the technologies they use").

II. EVEN IF THE COMMISSION CHOOSES NOT TO GRANT BELLSOUTH'S PETITION, PENDING DOCKETS PROVIDE THE OPPORTUNITY TO CONSIDER THE RELIEF BELLSOUTH SEEKS

The relief BellSouth seeks raises an issue of general interest to the entire broadband community, not an issue uniquely relevant to BellSouth, and may be more appropriately resolved in a proceeding of general applicability. If the Commission determines, because of unsettled questions regarding cable modem service or otherwise, that forbearance is inappropriate at this juncture, it is not without existing opportunities to address the matters at the heart of BellSouth's Petition.

In the *Wireline Broadband NPRM*,^{10/} for instance, the Commission has tentatively concluded that wireline broadband access is an "information service with a telecommunications component" and sought comment on how wireline broadband services would thereby be affected, whether there should be any changes in, or elimination of, the access requirements for independent ISPs under the *Computer Inquiries* regime, and whether unbundling, disability and security requirements should apply to these services. These are the very issues raised by BellSouth's Petition. Resolution of them in the generic *Wireline Broadband* proceeding would ensure that the Commission acts on a full and complete record comprised of the comments of all interested parties (in contrast, not all parties might submit comments in a proceeding solely involving BellSouth).

The issues BellSouth raises could also be appropriately resolved in the Commission's ongoing proceeding concerning the dominance or non-dominance of the Bells' broadband

^{10/} *Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities; Universal Service Obligations of Broadband Providers*, CC Docket No. 02-33; *Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services; 1998 Biennial Regulatory Review – Review of Computer III and ONA Safeguards and Requirements*, CC Docket Nos. 98-10, Notice of Proposed Rulemaking (rel. Feb. 15, 2002).

services.^{11/} In that docket, the Commission has sought and received extensive comments on the continued application of dominant carrier regulation to incumbent LECs when they provide broadband telecommunications services, including DSL services. A key issue is whether traditional common carrier regulation is appropriate or should be eliminated.

Deferring the issues raised by BellSouth's Petition to one or both of those proceedings by denying the forbearance petition in light of the pending Supreme Court determination would also allow the Commission to wait, if it chooses, until the resolution of the *Brand X* litigation and establish the rules for telephone company broadband services concurrently with its resolution of the *Cable Modem NPRM*. In this way, the Commission would address its "legal obligation" as the petition puts it, to ensure that BellSouth is subject to "the same obligations" as cable modem service operators.^{12/}

III. THE COMMISSION SHOULD CLARIFY THAT ANY DECISION HAS NO IMPACT ON THE APPLICABILITY OF TITLE VI

If the Commission does decide to grant the request to forbear from applying certain regulatory requirements to BellSouth's broadband services, it is critical that the Commission make clear that its decision is limited to the application of Title II and has no bearing on the applicability of Title VI to broadband video services.

Verizon and SBC have announced their intent to offer consumers a video programming service over their broadband facilities that appears very comparable to cable service and appears to be appropriately regulated under Title VI. Nonetheless, both of these companies have already

^{11/} *Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services*, CC Docket No. 01-337 (rel. Dec. 20, 2001) ("*Broadband Non-Dominance NPRM*").

^{12/} Petition at 21.

indicated their belief that some or all of Title VI's requirements may not be applicable to their services. SBC has explicitly sought a declaratory ruling on this point.^{13/}

The instant Petition has not raised the issue of the applicability of Title VI. Unlike SBC and Verizon, BellSouth has not yet indicated publicly any intent to offer video programming service directly to subscribers. BellSouth's discussion of "broadband services" in its Petition is focused on high-speed Internet access services and the comparison between cable modem and DSL services. Its evaluation of whether the criteria for forbearance are satisfied is limited to a discussion of Title II and *Computer II* obligations.

Given the pendency of SBC's petition, however, the Commission should take care to clarify that any regulatory relief it grants BellSouth's broadband services in this docket is limited in scope to relief from Title II and does not prejudge any decision regarding the applicability of Title VI to such services. This would both ensure that the scope of the Commission's decision matches the issues raised (and thus briefed by interested parties) and allow the Commission to avoid unintentionally creating a situation of unintended regulatory disparity as to cable operators.

^{13/} Petition of SBC Communications Inc. for a Declaratory Ruling (filed Feb. 5, 2004) at 34-42. The Commission has announced that it expects to resolve SBC's petition in the *IP-Enabled Services* docket. See Public Notice, Wireline Competition Bureau Extends Comment Deadlines for SBC's "IP Platform Services" Forbearance Petition, DA 04-899 (Mar. 30, 2004), at n.2.

CONCLUSION

For the foregoing reasons, the Commission either should conclude that Title II's common carriage requirements are not appropriately applied to *any* broadband service, including cable modem service, or defer action on BellSouth's Petition to other pending proceedings that are directly relevant to the issues raised by BellSouth.

Respectfully submitted,

/s/ Daniel L. Brenner

Howard J. Symons
Tara M. Corvo
Mintz, Levin, Cohn, Ferris, Glovsky
and Popeo, P.C.
701 Pennsylvania Avenue, N.W.
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