

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

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| In the Matter of |) | |
| BellSouth Telecommunications, Inc. |) | |
| Request for Declaratory Ruling that State |) | |
| Commissions May Not Regulate Broadband |) | WC Docket No. 03-251 |
| Internet Access Services By Requiring |) | |
| BellSouth to Provide Wholesale or Retail |) | |
| Broadband Services to CLEC UNE Voice |) | |
| Customers |) | |

**JOINT COMMENTS OF
THE UNITED STATES DEPARTMENT OF JUSTICE,
THE FEDERAL BUREAU OF INVESTIGATION, AND
THE UNITED STATES DRUG ENFORCEMENT ADMINISTRATION**

The United States Department of Justice ("USDOJ"), the Federal Bureau of Investigation ("FBI"), and the United States Drug Enforcement Administration (hereinafter "Law Enforcement") hereby submit their joint comments in response to the Public Notice, DA 03-3991,¹ arising from BellSouth Telecommunications, Inc.'s ("BellSouth") request for a declaratory ruling.² In its petition, BellSouth, requests that the Commission issue an expedited declaratory ruling stating that: (1) state commission

¹ *In re BellSouth Telecommunications, Inc. Request for Declaratory Ruling That State Commissions May Not Regulate Broadband Internet Access Services by Requiring BellSouth to Provide Wholesale or Retail Broadband Services to CLEC UNE Voice Customers*, Public Notice, WC Docket No. 03-251 (rel. December 16, 2003) (hereinafter "Public Notice").

² *In re BellSouth Telecommunications, Inc. Request for Declaratory Ruling That State Commissions May Not Regulate Broadband Internet Access Services by Requiring BellSouth to Provide Wholesale or Retail Broadband Services to CLEC UNE Voice Customers*, WC Docket No. 03-251 (filed December 9, 2003) (hereinafter the "BellSouth Petition").

decisions requiring incumbent local exchange carriers to provide broadband Internet access³ to competitive local exchange carriers ("CLECs") are contrary to the Triennial Review Order⁴ and thus must be preempted; (2) state commission decisions requiring the provision of broadband Internet access to CLEC voice customers impose state regulation on interstate information services in contravention of the Commission's Computer Inquiry decisions; and (3) state commission decisions specifying the terms and conditions under which incumbent local exchange carriers provide federally tariffed broadband transmission (*e.g.*, DSL service) either on its own or as part of a broadband information service intrude on the Commission's exclusive authority over interstate telecommunications, and thus are unlawful.⁵

For the reasons stated below, Law Enforcement urges the Commission to deny the BellSouth Petition. However, should the Commission decide to grant the BellSouth Petition, it is critical that the Commission hold that BellSouth's wholesale and retail broadband Internet access services⁶ and its wholesale and retail DSL access services are

³ In its petition, BellSouth uses the term "Fast Access®" to refer to its retail broadband Internet access. BellSouth Petition at 2 n.2. *See also infra* note 6.

⁴ *See Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, et al.*, CC Docket Nos. 01-338, 96-98, and 98-147, FCC 03-36 (released August 21, 2003), 68 Fed. Reg. 52276 (Sept. 2, 2003) (hereinafter the "Triennial Review Order").

⁵ BellSouth Petition at 3-5.

⁶ For purposes of these comments, Law Enforcement uses the term "wireline broadband Internet access service" to have the same meaning as used by the Commission in footnote one of the Commission's Wireline Broadband NPRM released in February 2002 -- *i.e.*, high speed broadband access to the Internet. *In re Appropriate*

subject to the Communications Assistance for Law Enforcement Act ("CALEA").⁷ Otherwise, federal, state, and local law enforcement face the prospect that criminals, terrorists, and spies will use these broadband services while law enforcement lacks the tools required by the CALEA statute to conduct lawfully authorized surveillance.

I. The Commission Should Deny BellSouth's Emergency Request for Declaratory Ruling

Law Enforcement urges the Commission to deny BellSouth's Petition for several important reasons. First, the very issue that BellSouth raises in its petition -- *i.e.*, the appropriate role of state public utility commissions ("PUCs") in regulating broadband Internet access services -- currently is part of a pending rulemaking proceeding before the Commission,⁸ and therefore, should not be decided in a petition for declaratory ruling. It is the Commission's policy, as a matter of both procedure and administrative efficiency, not to grant declaratory relief pursuant to Section 1.2 of the Commission's Rules, 47 C.F.R. § 1.2, where the matter on which the ruling is requested relates to a

Framework for Broadband Access to the Internet Over Wireline Facilities et al., CC Docket Nos. 02-33, 95-20, and 98-10, at ¶ 1 n.1 (rel. February 15, 2002) ("Wireline Broadband NPRM"). The Commission stated that "wireline broadband Internet access services, mean[] . . . over the existing and future infrastructure of the traditional telephone network." *Id.* In these comments, Law Enforcement addresses only wireline broadband Internet access service and does not speak to information services as defined in 47 U.S.C. § 1001(6).

⁷ 47 U.S.C. § 1001 *et seq.*

⁸ Wireline Broadband NPRM at ¶ 62-64. Specifically, the Commission asked for public comment on the proper role of the state commissions in regulating broadband wireline Internet access. *Id.*

matter already under consideration by the Commission in a pending rulemaking proceeding. Rather, the Commission's policy has been to either hold such a petition in abeyance until the rulemaking proceeding is completed, or to dismiss it without prejudice.⁹

Second, the state PUCs play an important role in the debate over the regulation of broadband internet access services. The Commission recognized as much when it sought public comments on the role of state PUCs its Wireline Broadband NPRM.¹⁰ Because of the current uncertainty of another Commission ruling that attempted to classify cable modem Internet access as an interstate information service, due to the *Brand X* appeal,¹¹ and its potential impact on the Commission's classification of broadband wireline Internet access, we believe it would be inappropriate for the Commission to act on BellSouth's Petition until the *Brand X* case is resolved.

⁹ The Commission recently followed this course action where the state commission decision for which the petitioning party sought declaratory relief had been overturned by a Circuit Court but where final resolution of the matter was still pending on further appeal. *In The Matter Of Federal-State Joint Board On Universal Service; Western Wireless Corporation Petition For Preemption Of An Order Of The South Dakota Public Utilities Commission*, 15 FCC Rcd 15168, 15169-70 (2000).

¹⁰ See *supra* note 8.

¹¹ *In the Matter of 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, Declaratory Ruling and Notice of Proposed Rulemaking*, 17 FCC Rcd 4798 (2002) ("Cable Modem Declaratory Ruling and NPRM"), *vacated and remanded*, *Brand X Internet Services v. Federal Communications Commission*, 345 F.3d 1120 (9th Cir. Oct. 6, 2003) (hereinafter "*Brand X*").

Third, at this time, BellSouth's Petition is premature given that several of the state PUC decisions it references in its Petition currently are on appeal before federal district courts.¹² Specifically, the Florida, Georgia, and Kentucky PUCs cases referred to by BellSouth involve its appeals, under Section 252(e)(6)¹³ of the Communications Act, of state PUC arbitration decisions of BellSouth interconnection agreements with CLECs.¹⁴ As provided by Section 252(e)(6), the proper venue to review these state PUC disputes is before the federal district courts and not the FCC. Given that these cases currently are on appeal before federal district courts, it would be premature for the Commission to act on the BellSouth Petition before such federal courts have acted on the appeals.

II. If the Commission Decides to Grant BellSouth's Petition, the Commission Should Hold that BellSouth's Internet Access Service and DSL Access Service are Subject to CALEA

If the Commission decides to grant BellSouth's Petition -- and therefore, preempt all state regulation of broadband Internet access service and DSL services -- then the Commission must: (1) defer to its past decisions, discussed below, and retain its

¹² See BellSouth Petition at p. 6-9. All of the critical state PUC decisions referenced by the BellSouth Petition -- *i.e.*, in Florida, Georgia, Kentucky, and Louisiana -- are currently on appeal before Federal district courts. *Id.*

¹³ 47 U.S.C. § 252(e)(6). This section states that "[i]n any case in which a state commission makes a determination under this section, any party aggrieved by such determination may bring an action in an appropriate Federal district court" *Id.*

¹⁴ BellSouth Petition at 6-9.

classification of DSL as a telecommunications service subject to CALEA; and (2) classify Internet access service as a telecommunications service for purposes of CALEA.¹⁵ Otherwise, federal, state, and local law enforcement face the risk that broadband Internet access service and DSL service -- that are used by an ever-growing percentage of the population -- will not be subject to CALEA and, and hence, the legal framework for the delivery of electronic surveillance capabilities.

As previously stated by Law Enforcement in the Commission's Wireline Broadband NPRM and Cable Modem Declaratory Ruling and NPRM,¹⁶ Law Enforcement maintains that broadband Internet access service is a telecommunications service (not an information service), and therefore, is subject to CALEA.¹⁷ We urge the

¹⁵ Under CALEA Section 102(8), we believe that Internet access service providers -- *i.e.*, those companies who provide customers with access to the Internet -- via cable modem or DSL loop -- should be classified as "telecommunications carriers" for CALEA purposes because they are "engaged in the transmission or switching of wire or electronic communications as a common carrier for hire." 47 U.S.C. § 1002(8)(A).

¹⁶ *In the Matter of Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities; Universal Service Obligations of Broadband Providers; 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*, Notice of Proposed Rulemaking, 17 FCC Rcd 3019 (2002) ("Wireline Broadband NPRM"); *In the Matter of 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*, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd 4798 (2002) ("Cable Modem Declaratory Ruling and NPRM").

¹⁷ See FBI and DOJ Comments, CC Docket Nos. 95-20, 98-10, at 2, 7 (filed April 15, 2002); FBI and DOJ Reply Comments, CC Docket No. 95-20, 98-10, at 2, 6 (filed June 3,

Commission to reach this conclusion in this docket, should it act on the BellSouth Petition.

Furthermore, as the Commission held in prior CALEA and DSL decisions, DSL is a telecommunications service and subject to CALEA.¹⁸ If the Commission grants this Petition, it is critically important that the Commission abides by its past precedent and reiterates that it is not altering its long-standing policies on the regulatory classification of DSL services.¹⁹

III. Conclusion

For the reasons stated above, Law Enforcement urges the Commission to deny the BellSouth Petition. Furthermore, Law Enforcement will object to similar petitions filed before the Commission in the future unless the petitioners agree to the applicability of CALEA to wireline broadband Internet access.

2002); FBI and DOJ Comments, GN Docket No. 00-185, CS Docket No. 02-52, at 2, 7, 8, 10, 11, 12, 14, 15 (filed June 17, 2002).

¹⁸ *In re Communications Assistance for Law Enforcement Act*, Second Report and Order, CC Docket No. 97-213, at ¶ 27 (rel. August 31, 1999). *See also In re GTE Telephone Operating Cos.*, GTOC Tariff No. 1, GTOC Transmittal No. 1148, Memorandum Opinion and Order, CC Docket No. 98-79, at ¶ 25 (rel. October 30, 1998) (holding that "GTE's ADSL service is a special access service, thus warranting federal regulation under the 'ten percent rule'"). *Id.*

¹⁹ The proper forum for the Commission to address changes to its prior Orders that have the potential to impact the entire industry is in a rulemaking proceeding and not in response to a petition for declaratory ruling. *See supra* note 9.

However, should the Commission decide to grant the petition, it is critical that the Commission holds that BellSouth's wholesale and retail wireline broadband Internet access services and DSL access service are subject to CALEA. Otherwise, federal, state, and local law enforcement face the danger that criminals, terrorists, and spies, will exploit this potential loophole and use these services to avoid lawfully authorized surveillance.

Respectfully submitted,

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