> Provision of operator services is clearly a competitive endeavor and SWBT's position as an overwhelmingly dominant provider of local exchange services does not alter the competitive nature of the marketplace it seeks to enter through its DOS offering. In a competitive environment, disclosure of direct cost data carries a significant risk of competitive harm by providing competitors with information necessary to underprice a service or product. SWBT correctly notes that the likelihood of such serious harm is exacerbated by the fact that virtually all OSPs ... are not required to file such detailed cost support materials.[59]

SWBT needs the ability to rapidly bring new services to the market and to be responsive to customer demands and changing market conditions. SWBT and other price cap LECs should be granted the same pricing flexibility for providing operator call completion services that currently exist for all other OSPs which do not have to file tariffs for these services provided to IXCs. This streamlined pricing flexibility must include the ability to offer these services under contract, or on an ICB. Certainly it is not premature at this time for the Commission to find LECs "nondominant" in the provision of operator call completion services.

The competitive market will ensure just and reasonable rates for these services. Clearly, alternative sources of supply exist. By including operator call completion services in LEC price cap regulation, the Commission adds more inappropriate pricing restrictions and unnecessarily restricts the ability of the LECs to respond to competition.

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[59] Letter from Kathleen M. H. Wallman, Chief, Common Carrier Bureau, to Gregory F. Intoccia, Freedom of Information Act Request Control No. 95-187, DA-95-1399, released June 23, 1995.

Issue 9b:

What is the proper price cap treatment of directory assistance-related call completion services?

The Commission incorrectly presumes that competition does not exist for directory assistance-related services.[60] In fact, however, viable competition does exist in the directory assistance market and continues to grow rapidly. Access to listing information has been facilitated by several factors. First, the Supreme Court decision in *Feist Publications, Inc., v. Rural Telephone Service Company*[61] which removed copyright protection for white-pages directories, spurred extensive competition and the development of alternative directory assistance products. Secondly, the rapid growth of computer technology has now made it possible for anyone with a personal computer to manipulate huge national databases that formerly required significant investment and extensive technical expertise. These popular and relatively inexpensive CD-ROM products are readily available at most software retail outlets.[62] Some of these products offer updates for regular users. In conjunction with other PC software, call completion can be accomplished with these products.

Technology has also made it possible to monitor and keep track of millions of consumer and business listings from a remarkably diverse range of sources. A formidable national database of residence and business listings is currently offered by Metromail Corporation, a subsidiary of R.R. Donnelley & Sons Company. The company promotes the

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[60] Second FNPRM, para. 101 Issue 8b, p. 47.

[61] 499 U.S. 340 (1991).

[62] See the August/September 1995 issue of *DATABASE* for a review of two CD-ROM products offered by Digital Directory Assistance and ProCD, Inc.

service as the "largest most accurate national directory service database available," with listings "compiled from more than 300 sources." Alternative providers are accessing the Metromail database to offer directory assistance to IXCs with call completion service.

MCI's "1 800 or 900 GET-INFO" service offers a nationwide directory assistance service with call completion. AT&T's "1 900 555-1212" offers a similar service with call completion. Both services compete directly with LEC directory assistance-related call completion services.

Viable alternatives to LEC directory assistance also exist in the cellular market. Companies like Hebenstreit Communications Corporation and Metro One Communications both offer enhanced directory assistance to cellular carriers. These services include traditional name, address, and telephone number, plus categorical search and specialized information services with call completion options.

Alternate sources of supply exist today for IXCs and frequent users of directory assistance. Competitors have the capacity and the geographic coverage to offer nationwide service. Clearly, the business is becoming increasingly more competitive and the Commission is simply incorrect to conclude that directory assistance call completion services "do not seem likely to be competitive."

Price cap LECs will need the same pricing flexibility as other providers offering directory assistance call completion services to IXCs. This includes the possibility of offering these services under contract or some form of streamlined regulation. As the industry becomes even more competitive with the emergence of local exchange competition, LECs will need the pricing flexibility and an incentive to offer new services. SWBT urges the Commission not to

unnecessarily restrict the LEC's ability to respond to the rapidly changing market conditions, by establishing a separate service category for directory assistance-related call completion services. Directory assistance-related call completion services will readily qualify to be removed from price cap regulation and subject to streamlined regulation.

10. General Issues

Issue 10a:

As to each proposed relaxation of regulation and pricing flexibility, should LECs be permitted to take advantage of the regulatory relief and pricing flexibility at this time or should they first have to make a showing that a certain level of competition exists before being able to use it? If a showing should be required, what should the showing be and why?

A fundamental Commission objective for some time now has been to foster competition and promote economic efficiency. Sound regulatory policies should provide the correct pricing signals to potential entrants to encourage efficient entry, and discourage uneconomic entry. Unequal application of regulatory oversight, which places pricing and other restrictions on the incumbent but not on new entrants, leads to economically inefficient pricing and actually inhibits rather than fosters true competition. It is critically important that the Commission revise its regulation to allow all providers, including the incumbent LECs, to compete based on economic efficiencies in markets where competition is emerging. To foster competition, LECs must be able to adjust prices and services right from the start, and not only after competitive providers have become established as a result of improper pricing and marketing signals by the regulatorily restricted LEC.

As Dr. Schmalensee states, the Commission's objective can best be achieved by creating conditions of competitive parity in the market, so that:

> The success in the market is determined solely by the competitors' relative abilities to supply customer demands. This change must occur when the market is first opened to competitors, for only then will entrants and incumbents make efficient entry and exit decisions, some of which entail large investments and sunk costs. In particular, such flexible regulation should begin before there is any assurance that competitive forces can currently--or will in the future--effectively discipline the pricing decisions of the regulated telephone company. Consequently, some limitation should be placed on the ability of the regulated firm to raise its prices for such services.[63]

Therefore, SWBT proposes a baseline level of price cap regulation that fosters efficient pricing as competition evolves, not only after it has evolved. Once a market has been demonstrated to be competitive, regulatory oversight would be reduced as appropriate for the increased level of competition.

Issue 10b:

What is the relationship between the various regulatory relief and pricing flexibilities we have proposed and should any restrictions be placed on the ability of a LEC to take advantage of one type of relief or flexibility in combination with another? Should some relief be granted only after successful implementation of other forms of relief, or are there other sequencing concerns we should consider?

None of the modifications proposed by SWBT above, when taken in combination, would result in anti-competitive market outcomes. Because the Commission should simplify and modernize regulation, the Commission should not place a series of complicated restrictions on the adaptive characteristics of the plan. Any such restrictions would only serve to further complicate an already overly complicated regulatory scheme.

Issue 10c:

Should we impose new limits on subsequent upward pricing flexibility after a price has been reduced? If so, what should those limits be? If such limits are unnecessary, explain why they are not needed to protect consumers and to insure a competitive marketplace.

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[63] Schmalensee, p. 7.

The Commission should not impose new limits on subsequent upward pricing flexibility after a price has been reduced. SWBT discussed this issue in its response to Issue 5b above. As described above, the effect of any such constraints could be to actually chill existing incentives to lower prices. If a LEC is forced to permanently forego the ability to raise a price once it has lowered a price, incentives to be cautious about near-term price declines could inadvertently be created.

11. Removal Of Barriers To Local Competition

Issue 11a:

Which of the changes discussed in Section IV.B. herein, if any, should be predicated on a demonstration that certain barriers to entry have been removed, and why? If such a demonstration should be required, should a competitive checklist be used and, if so, what should be included in it? Are there any other tests for the existence of competition that should be used to determine whether regulatory relief and pricing flexibility should be granted? Should any of the proposed changes to our price cap rules be predicated on a demonstration of actual competition or upon some other circumstances and, if so, why?

None of the flexibilities proposed under baseline regulation should be contingent on a competitive showing. The proposed baseline flexibilities produce more efficient pricing which is in the public interest regardless of the presence of competition.

A number of checklists have been proposed by the LECs' competitors. Most, if not all of these checklists were designed to measure competition in the local exchange market. Checklist items related to local exchange competitiveness have no bearing on the degree of competition in access markets. For example, it does not take local competition to make transport services competitive.

The LECs' competitors may continue to recommend absurdly stringent checklist preconditions before the baseline price cap plan would contain a reasonable degree of pricing

flexibility. These are generally transparent attempts to prevent the public interest from being served by forcing the LECs to continue pricing services inefficiently.

Issue 11b:

In addition to adopting a "competitive checklist," are there other steps that need to be taken to ensure competition in the interstate access market. For example, is it necessary for the LECs to separate local bottleneck facilities, such as loops and switching, through a separate subsidiary, and to provide these facilities to all access providers at "wholesale prices"?

As described above, it is not appropriate to adopt a competitive checklist associated with the baseline price cap plan. Moreover, the types of flexibilities recommended in the baseline plan do not rely upon the degree of access competition. The baseline flexibilities proposed are long overdue.

Consideration of the existence of "bottleneck" facilities has no place in the consideration of the baseline price cap plan. Such consideration may be relevant only in the context of the determination of market power and nondominance.

12. Procedural Matters

Issue 12:

What is the best procedural mechanism for price cap LECs to use when seeking regulatory relief or pricing flexibility within the price cap plan?

No procedural mechanisms or certification letters are necessary for LECs to qualify for the flexibilities within the baseline price cap plan. This is true because no competitive demonstration should be required.

B. STREAMLINED REGULATION

Issues 13, 14a and 14b are inappropriately placed in the Second FNPRM as a matter for consideration in the baseline price cap plan. The definition of the relevant access market is only relevant to the measurement of competition.[64] The measurement of competition in relevant access markets is appropriate in determining whether services should be streamlined (and in considering LEC nondominance).

1. Relevant Product Market

Issue 13:

Should we use the existing price cap service categories within the baskets to define the relevant product market?

As noted above, discussion of the relevant product market is not appropriate to baseline regulation, but to streamlined regulation and nondominance. Neither the existing nor the proposed service categories should be used exclusively to define the relevant product market. Service categories may be defined based on traditional access functionality, but the market defines substitutability from the customers' perspective.

As the Commission stated, proper market definition is a key factor in an assessment of the competitiveness of specific markets,[65] and improper definition can severely affect the outcome. All markets have two dimensions. The product dimension consists of the products or services comprising the market, which are substitutes for one another. The geographic dimension consists of the geographic area within which services are meaningful

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[64] SWBT has demonstrated above that a competitive showing is not appropriate for the flexibilities in the baseline price cap plan.

[65] Second FNPRM, para. 116

substitutes or alternatives for each other. A market is thus defined as a group of products or services and a geographic area in which this group of products are sold to a group of customers, such that there is strong substitutability in supply or in demand between the products in the group.

The product dimension is driven by customer demand. There will necessarily be differences in customer demand which will result in the development and delivery of varied service offerings. For this reason, the relevant market definition will incorporate a "customer dimension" within the product dimension. This is especially important in assessing the competitiveness of the relevant market because competitors indeed target specific customer segments. The Commission should not require a focus on the broad range of all customers for a particular class of services within a certain geographic area. Instead, the Commission should allow a more narrow focus, where appropriate, on those customers for which competitive alternatives indeed exist.

In order to be substitutes for each other, two services need not be identical. The question of substitutes can involve trade-offs between price, quality, functions, and features. What is really important in assessing a market, and all the substitute services from which consumers can choose, is whether consumers will switch their purchases from one service to another in response to changes in the relative prices of the services. If an increase in the price of one service causes consumers to switch to another service, then the existence of substitute services will prevent the exercise of significant market power and the market—as well as all substitutable services comprising the market — is competitive.

2. Relevant Geographic Market

Issue 14a:

Should the Commission adopt density-based pricing zones as the relevant geographic market for assessing competition and granting regulatory relief under price caps? Should some other defined geographic area be used?

As noted above, discussion of the relevant geographic market is appropriate not to baseline regulation, but to streamlined regulation and nondominance.

The Commission should not adopt density-based pricing zones as a basis for assessing competition and granting regulatory relief. Regulatory relief should be granted where competition exists, not just in areas where the density is greatest. While there is a correlation between marketplace density and the likelihood of competitive entry, the existence of high density does not guarantee competitive entry. Conversely, low density areas may be highly competitive. There are many reasons why a viable competitor may be present in any given marketplace. Competition can come from cable companies, CAPs, IXCs, electric utilities and others. The only proper way to assess the relevant geographic markets is to gather data on the suppliers operating and the areas in which they serve.[66] Only from this data can an accurate picture of the "competitive landscape" be developed. The best method is to develop a "competitive footprint" (i.e., the geographic area having a competitive alternative). Production

[66] Attachment D is a set of three maps that illustrate the SWBT-served wire centers in Missouri, SWBT's current density zones and the presence of CAP and other relevant non-LEC fiber facilities. These maps clearly demonstrate that alternative access supply is available in all Zone 1, most Zone 2 and a significant number of Zone 3 wire centers in the St. Louis metro area. Thus, SWBT's density zones are not the appropriate geographic dimension for determining the degree of access competition in the St. Louis metro area because either the Zone 1 or the Zone 1 plus Zone 2 geography is a poor match with the actual competitive footprint.

of a "competitive footprint" can be developed by simply requiring all telecommunications providers to detail the areas in which they provide service and the services they provide.

The Commission correctly concludes that defining the relevant geographic market incorrectly will misstate competition, and that a single national market is not the appropriate geographic market definition for the services of the LECs.[67] The Commission seeks comment on how the geographic dimension of a market should reasonably be established.

Wire centers should serve as the appropriate basis for identifying the geographic boundaries of a market. The wire center is the smallest geographic unit for which data is available to perform a competitive assessment. Furthermore, substantial traffic and revenues are generated within individual wire centers in densely populated urban centers, attracting entry. Such wire centers may well be highly competitive before the surrounding wire centers, and SWBT should be allowed to compete fully within the competitive wire center (or group of wire centers).

SWBT hereby does not, however, propose that a competitive determination should be made on an individual wire center by wire center basis; this would be administratively burdensome for all parties. Instead, the individual wire center should serve as the smallest relevant unit of geography that, like pieces of a puzzle, can be combined logically into a larger area that meets the requirements for competitive classification. In many cases, this will likely result in major portions of an area being included in a market grouping. Other aggregations of wire centers could resemble or match an entire LATA, a metro area, or the urban business

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[67] Second FNPRM, para. 120.

district within a metro area. In any case, the relevant geographic market will be determined by the matching of the independently determined competitive footprint with the LEC wire centers.

Issue 14b:

If we condition the regulatory relief and pricing flexibility discussed in Section IV.B. on a demonstration of competitive conditions, should the relief and flexibility be allowed only in the geographic market in which the demonstration of competitive conditions has been made? How would this affect interstate toll rates? Should the relief and flexibility be permitted in an entire study area even if a demonstration of competitive conditions has been made only in a portion of the study area?

As noted above, discussion of the demonstration of competitive conditions and related implications are appropriate not to baseline regulation, but to streamlined regulation and nondominance.

Consistent with the theme of tailoring the degree of regulatory oversight with the degree of competition in individual market areas, streamlined regulatory treatment should only be granted in the relevant market area defined in the competitive showing. In areas where competitive alternatives exist, an incumbent carrier will be unable to unreasonably discriminate. Any attempt to price unreasonably will cause demand to shift to other suppliers. Similarly, additional regulatory relief above that contained in the baseline price cap plan would be appropriate in those areas in which competitive alternatives exist.

Any resulting deaveraging of prices that would accompany streamlined regulation of certain LEC markets/services in this manner will have little direct impact on interstate toll rates. First, IXCs are already receiving deaveraged rates as they obtain access from a number of sources (e.g., LECs, CAPs, self provisioning etc.). Further, LEC access rates are today deaveraged by state and sometimes by zone. Therefore, there is no reason to assume that additional price deaveraging will have a negative impact on toll rates. Interstate toll markets are

currently viewed as nationwide in scope. Averaged toll rates for IXC basic rate schedules are an industry practice. However, optional calling plans, contract pricing, promotional offerings and other practices already provide significant deaveraging of interstate toll rates. There is no evidence that these practices will change in the foreseeable future and should not preclude LEC pricing flexibility.

3. Demand Responsiveness

Issue 15a:

Should demand-responsiveness be a factor in determining the level of competition for purposes of determining whether services should be streamlined? What should be the relevant factors in determining whether a LEC's customers are demand-responsive? What data and information would be necessary and relevant in determining whether a LEC's customers are demand-responsive? Does the fact that LECs have relatively few customers that account for most of their interstate access demand affect the usefulness of demand-responsiveness as a factor in determining the level of competition?

Stated simply, competition exists when customers have alternative sources of supply, either actual or potential, at prices they regard as comparable. In the Second FNPRM, the Commission proposes to adopt the analytical framework it used to streamline AT&T's services for price cap LECs. Specifically, the Commission proposes to adopt streamlined regulation for services found to be competitive based on considerations of demand responsiveness and supply responsiveness as the primary factors, and using market share and pricing trends as additional secondary evidence.[68] SWBT agrees with this general economic framework, but notes several areas where that framework must be modified to reflect the realities specific to the access markets.

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[68] Second FNPRM, paras. 133-146.

As the Commission has indicated, demand characteristics of the market are a primary factor in assessing the competitiveness of a market. The higher the elasticity of demand that a firm faces, the lower is its ability to raise prices significantly above competitive levels. In general, demand will be elastic if:

- customers consider other services to be good substitutes at a comparable price;
- customers have the incentive and ability to evaluate available options;
- customers are informed purchasers, soliciting bids from alternative suppliers or utilizing telecommunications consultants in choosing services;
- customers increasingly use multiple suppliers;
- there are a few very large customers, or resellers, such that a firm could lose substantial sales if just one large customer would switch to a competitor in response to the firm's price increase;
- firms try to attract customers through enormous advertising campaigns, product differentiation, extensive negotiations in changing/establishing service, etc.

Several of these indicators of elastic demand are present for access services. First, access services are relatively undifferentiated, in part because the technology is available to all providers. Second, the demand side is dominated by only a few very large buyers, each very knowledgeable and capable of self-provisioning. For these buyers, access services represent an intermediate good that constitutes a large portion of their input costs. Yet, these same buyers compete with each other in the downstream competitive long distance market. To compete effectively in the long distance market, they constantly strive to reduce input costs, including access costs. If the LEC cannot meet requests for access price reductions, these buyers will likely switch to alternate access providers or self-supply, particularly with expanded interconnection. Clearly, the alternatives available to these large customers restrict LEC pricing.

In support of the second qualitative measure, MCI has established an access provisioning arm -- MCI Metro -- and has publicly stated that it will seek to divest access traffic away from LEC services and toward MCI metro.[69]

Additionally, by its joint venture with Comcast, TCI, and Cox Communications, Sprint has obtained a 40 percent ownership stake in Teleport Communications Group (TCG). Clearly, Sprint too has strong incentive to shift access traffic away from LECs to TCG as its vendor of choice in as many markets as possible. Sprint has publicly stated that it will assist TCG in establishing "beachheads" around the nation in markets now served by the Regional Bell Operating Companies.

4. Supply Responsiveness

Issue 15b:

Should supply-responsiveness be a factor in determining the level of competition for purposes of determining whether services should be streamlined? What should be the relevant factors in determining whether a LEC's competitors have enough readily available supply capacity to constrain the LEC's market behavior and inhibit it from charging excess rates? What data and information would be necessary and relevant in determining whether a LEC's competitors are supply-responsive?

SWBT supports the use of supply responsiveness for the purposes of determining whether services should be streamlined.

The most relevant factors in assessing whether a market is sufficiently competitive to warrant streamlined regulation are structural characteristics, such as the existence of other firms selling substitutes and the availability of alternate supply capacity. The appropriate definition for assessing the level of competition for LEC services to qualify for streamlined

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[69] Evidence of extensive fiber deployment by MCI in the downtown St. Louis business district is demonstrated in Attachment D.

Rather than being able to raise access prices, LECs are under constant pressure from the IXCs to lower prices. All of the major IXCs routinely "grade" the LECs on their price and service responsiveness. These "report cards" are real examples that the LECs' most influential customers evaluate LEC pricing performance against a number of alternatives, including alternate access providers and self-supply of access by IXCs. These evaluations and the threat of moving IXC demand to alternatives is substantial evidence of the responsiveness of the demand for access by IXCs.

It is very difficult to accurately econometrically estimate elasticities of demand for access services as a means to quantify the current degree of demand responsiveness for purchasers of access. A qualitative approach would be more proper. A qualitative approach examines such factors as: (1) customer's willingness to seek alternate sources of supply and (2) the organizational structures of LEC access customers which indicate they are structuring themselves to divert access traffic away from LECs using self-supply or competitive alliances with the LECs' competitors.

In support of the first qualitative measure listed above, IXCs are already issuing RFPs and expecting competitive responses from all providers including LECs. Interestingly, in a recent instance which SWBT has pointed out to the Commission, MCI was actively seeking competing bids for its access traffic. MCI obtained services from other providers in two cases and withdrew its bid requests in two other cases.

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[69] Evidence of extensive fiber deployment by MCI in the downtown St. Louis business district is demonstrated in Attachment D.

regulation is the concept of supply "addressability." LECs could demonstrate supply elasticity by showing that 25 percent of the LEC's access demand in the relevant market have choices available from alternative sources. Optionally, LECs could demonstrate that customers representing 25 percent of the total demand within the particular relevant market had alternative choices. This would enable LECs operating in markets where much of the addressable demand had already switched to a competitor to achieve streamlined regulation.

Addressability demonstrates the availability of alternative supply from alternative service providers within the relevant market.[70] Addressability also reliably illustrates the presence of, or lack thereof, barriers to entry. Addressability focuses on the physical presence of alternative providers with the ability to provide a viable alternative to customers within the relevant market.

The addressability showing would compute the ratio of relevant market demand of customers in the competitive footprint to the LEC demand or total demand within the relevant market. Where the relevant market includes services sold in different units, a reasonable equivalent could be established to express all demand in a common unit such as minutes or DS-1 equivalents similar to procedures developed for purposes of the zone density plans.

Readily available supply capacity from other providers functions as a check on LEC prices and precludes the LEC from substantially raising rates, threatening it with the loss

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[70] Facilities-based does not require that the facility necessarily be located within the incumbent's serving area. Technology is broadening the availability of services such that geographic area is no longer a limiting factor. For example, directory assistance can be provided by a multitude of providers in multiple areas without requiring an actual facility in each area where the service can be obtained. Therefore, the competitive footprint should be the area where the service is available, not where the facility is based.

of substantial customers to the alternate providers standing ready to serve them at the lower rates.

Data on presence of alternative supply is necessary to determine supply responsiveness. Importantly, the Commission must require some level of reporting by all access providers. All interstate access providers must provide sufficient data to the Commission to make a determination as to whether customers in a relevant market indeed have alternatives to the incumbent LEC. Specifically, the Commission should require all such providers to file a description of the area in which they make services available to customers. This requirement can be satisfied by a general description of the service area (e.g., listing of zip codes served, city or county boundaries, or exchange carrier wire centers) and a list of services provided in that area, or by filing a service area map. Alternatively, all providers should be required to file, on an annual basis, detailed maps showing their network facilities within each area served, including planned additions. Further, the data reported must be appropriate to the relevant services and relevant market areas. Exchange carriers should not be responsible for reporting data regarding their competitors as they do not, and should not normally have access to such data to the extent needed.

5. Market Share

Issue 15c:

Should market share be a factor in determining the level of competition for purposes of determining whether services should be streamlined? If the Commission considers the relative market share of the LECs and their competitors as one factor in assessing the level of competition for LEC services, what data and information would be necessary to assess the relative market shares of the LECs and their competitors? What should be the relative importance of the market share of the LECs and their competitors in light of other factors incorporated into our analysis and on any other factors that may be proposed?

Market share is not a reliable indicator of the competitiveness of a market, but it may be useful as additional or secondary evidence.[71] Although market shares are freely used as an indicator of competition, it is dangerous and inappropriate to rely on market share as a primary method of measuring market power for several reasons. The first danger is that the market shares may not be properly defined and calculated, or may be based on improper market definition. LEC competitors often cite extremely low "market shares" (for an overly broad, improperly defined "market") as evidence that the LECs continue to hold monopoly power. Such market share figures are typically based on statewide or nationwide sales data and totally ignore proper market definition. If the geographic component of a market for market share calculation is defined too broadly, it will include areas where no substantial competition has yet developed. This would necessarily result in lower "overall" market share results, which could mask the fact that stiff competition exists in certain markets. In addition, too often market shares are based on revenues, when in fact, available supply capacity would be a more appropriate measure of firm presence in a market.

Another danger with market share analysis stems from the difficulty in interpretation of results. While it is true that "low" market shares indicate that a market is competitive, a market in which one or more firms have "high" market shares does not indicate that the market is not competitive; it may or may not be, making a reliance on market share data inconclusive.

There are several reasons why one might observe a market in which high market shares for a firm occurs in a competitive market. One firm may simply be better than its

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[71] Second FNPRM, paras. 142-143.

competitors. However, if that same firm were to raise its prices even slightly, or if it were to get out of step with industry norms, innovations, or other ways in which firms compete, it would lose business rapidly, and market share along with it.

Regulation can produce a situation in which a firm with high market share has no ability to control market prices or exclude competition. Perhaps the best example is where a regulated firm must service a market through a carrier-of-last-resort obligation in which no provider desires to offer the service. Residence local service in rural exchanges is likely an example of this situation. In this case, the LEC may have virtually 100% market share.[72] Market share figures cited by the LEC competitors typically include these areas in their attempt to show competition is not present in other LEC markets.

Another example is when a regulated firm which previously was granted a franchise monopoly, but regulatory barriers to entry already have been removed and the firm now faces competition (which prevents it from charging prices above competitive levels). In this example, the firm may have a relatively high market share as a legacy of the past regulation, but operates very efficiently and currently is unable to charge prices above competitive levels.

The courts have recognized that high market share as the result of past regulation has little or no meaning when the regulatory environment has substantially changed.[73]

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[72] The LEC's artificially low price in these areas precludes new entry, at least until cheaper alternative sources of supply become available.

[73] See Metro Mobile CTS, Inc. v. New Vector Communications, Inc., 892 F.2d 62, 63 (9th Cir. 1989) ("Reliance on statistical market share in cases involving regulated industries is at best a tricky enterprise and is downright folly where, as here, the predominant market share is the result of regulation. In such cases, the court should focus directly on the regulated firm's ability to control prices or exclude competition.").

Thus, in markets where high market shares are observed, one cannot make reliable inferences about competitive pressures. Policies which examine market shares over other more relevant factors, or policies which require a LEC to lose market share before regulation is relaxed, are bound to be misguided and ineffective. As a result, the Commission cannot rely on market share data as a determinative measure of competition, nor should the Commission adopt policies that require a LEC to lose a prespecified amount of market share as a condition for relaxed regulation.

6. Pricing Of Services Under Price Cap Regulation

Issue 15d:

Should we consider evidence that a price cap LEC is pricing services below the price cap ceiling over a sustained period of time as additional evidence that such services are subject to competitive pressures in markets with high supply and demand elasticities? If so, what is the competitive significance of a LEC's pricing below the price cap ceiling for such a period?[74]

Pricing below the cap most likely indicates that market power is not present, but pricing at the cap does not necessarily indicate the presence of market power. The evaluation of pricing behavior relative to a price cap set by the regulators should not be a primary factor in assessing the competitiveness of a market. Because the setting of the price cap constraint is not likely to be the outcome of a market process, pricing at the cap should never be used as a decisive factor in assessing the workings of the market.

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[74] Second FNPRM, para. 145.

7. Other Factors

Issue 15e:

Should the Commission consider factors other than demand responsiveness, supply responsiveness, market share, and pricing behavior in assessing the level of competition for LEC services? If the Commission considers such other factors in assessing the level of competition for LEC services, what data and information would be necessary to assess the relative importance of these factors?

Supply and demand responsiveness are the most important factors in the assessment of the level of competition for LEC services. An evaluation of these two factors is sufficient to allow a proper determination for purposes of streamlined regulation. Beyond these factors, no other factors (i.e., barriers to entry) are relevant or necessary for this assessment for the purposes of streamlined regulation. For example, if competitors are present in the relevant market, then consideration of barriers is superfluous. The presence of alternative supply indicates the lack of barriers to entry.

8. Contract Carriage

Issue 16a:

Should the Commission allow the price cap LECs to offer individually negotiated contracts for services subject to streamlined regulation, provided such contracts are made generally available to similarly situated customers under substantially similar circumstances? In particular, would allowing such contract carriage benefit consumer welfare, foster competition, and foster efficient use of the network? Would allowing such contract carriage result in unreasonable price discrimination?

LECs should be able to offer service offerings under contracts in those competitive market areas subject to streamlined regulation. The standards for filing established by the Commission should be applied to all service providers. Since these contract services are being offered on a common carrier basis under the provisions of the Communications Act, they must be made available to similarly situated customers under the same terms and conditions.

Allowing contract carriage would bring substantial consumer benefit. Currently, LECs are precluded from offering contract services. LEC competitors, knowing this, merely price their services at a percentage off of LEC prices. In this scenario, consumers do not receive fully competitive prices from LECs or their competitors. Introduction of contract carriage would rectify this problem and bring many consumer benefits. First, because contract offerings are customer specific arrangements, they can be tailored to meet specific needs and provide maximum consumer benefit. Second, because contract services are not based on averaged costs, but rather specific costs, LECs are better able to price closer to cost. Knowing that the LEC can effectively bid on a service will encourage other carriers to make their best offers. Thus, a truly competitive process is realized with consumers receiving lower prices, higher quality and better service.

Since under SWBT's proposal LECs would be allowed to offer contracts only in those competitive market areas subject to streamlined regulation, contract services have substantial competition and unreasonable discrimination is not possible. Customers who feel that a rate would be unjust or unreasonably discriminatory would simply switch to another provider. This is consistent with the conclusions reached by the Commission in CC Docket No. 93-36.[75]

Issue 16b:

If such contracts should be allowed, what tariff filings requirements should we adopt for such contract rates? Specifically, should we require the LECs to file on 14 days' notice a tariff summarizing the contract and containing the following information: (1) the term of the contract, including any renewal options; (2) a brief description of each of the services provided under the contract; (3) minimum volume commitments for each service; (4) the contract price for each service or services at the volume levels committed to by

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[75] Tariff Filing Requirements for Nondominant Common Carriers, CC Docket No. 93-36, 8 FCC Rcd 6752 (1993).

the customers; (5) a general description of any volume discounts built into the contract rate structure; and (6) a general description of other classifications, practices, and regulations affecting the contract rate?

LECs offering contract services under streamlined regulation should file a service description and listing of rates, terms and conditions sufficient for any customer to determine if they are similarly situated. These same provisions should apply to all carriers offering contract services.[76]

9. Procedural Matters

Issue 17:

What procedure should be followed to implement streamlined regulation for a LEC?

Streamlined market areas would be established through a process where the LEC would submit a letter requesting streamlined regulation (certification letter), which would be available for public comment. The certification letter would be considered accepted unless the Commission otherwise takes action within 21 days.

The showing for streamlined regulation should include the following:

- Identification of areas served by competitive networks from serving areas provided by competitive tariffs or using competitors' facility maps, and from other market research.
- Definition of the market area based on the competitive footprint.
- Identification of the appropriate market area demand (e.g., single line/multiline)
- Identification of the portion of LEC demand addressable

[76] See Sections 203 and 211 of the Communications Act. The provisions of the Communications Act should apply equally to all carriers. Thus, they cannot be avoided by a designation that contracts are "minor" just because they are offered by nondominant carriers.