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December 11, 1995

Mr. William F. Caton, Acting Secretary
Federal Communications Commission
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OFFICE OF SECRETARY

In the Matter of:

Price Cap Performance Review for Local Exchange Carriers	))	CC Docket No. 94-1

Dear Mr. Caton:

Enclosed are an original and nine copies of the Comments of Cincinnati Bell Telephone in the above referenced proceeding. A duplicate original copy of this letter and attached Comments is also provided. Please date stamp this as acknowledgment of its receipt and return it. Questions regarding these Comments may be directed to me at the above address or by telephone on (513) 397-1393.

Sincerely,

Peggy A. Peckham
Director - Legislative &
Regulatory Planning

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

In the Matter of	)	
	)	
Price Cap Performance Review for Local Exchange Carriers	)	CC Docket No. 94-1
	)	
Treatment for Operator Services Under Price Cap Regulation	)	CC Docket No. 93-124
	)	
Revisions to Price Cap Rules for AT&T	)	CC Docket No. 93-197
	)	

COMMENTS OF CINCINNATI BELL TELEPHONE COMPANY

SUMMARY

While Cincinnati Bell Telephone Company ("CBT") does not currently operate under price cap regulation, CBT files these comments in this proceeding because development of a long-term price cap regulatory plan affects the environment in which CBT operates. CBT's comments focus primarily on ways in which price cap regulation might be made more attractive to small and mid-size LECs. CBT asserts that the price cap rules for the introduction of new service offerings and rate changes must be relaxed. CBT supports the elimination of the need for Part 69 waivers, the elimination of lower service band index limits and relaxed regulatory treatment for alternative pricing plans. CBT opposes the proposal to require the filing of general tariffs for individual case basis contracts and the proposal for a one percent limit on upper service band pricing. Finally, CBT proposes that relaxation of regulation and pricing flexibility be available to carriers without a showing that a prescribed level of competition exists in a given market area.

TABLE OF CONTENTS

1. INTRODUCTION 1

2. DISCUSSION 3

A. Price Cap Rules For The Introduction Of New Service Offerings And Rate Changes Must Be Relaxed. 3

1. Services should not be categorized according to competition 5

2. CBT opposes the Commission's proposal to require the filing of general tariffs for individual case basis contracts. 6

3. CBT supports relaxed regulatory treatment for alternative pricing plans. 7

4. CBT supports the elimination of the need for Part 69 waivers. 8

5. CBT supports the elimination of lower service band index limits. . . . 9

6. CBT opposes the Commission's proposal for a one percent limit on upper service band pricing. 10

7. CBT supports permitting LECs to offer contract prices for access services. 11

8. CBT proposes that the relaxation of regulation and pricing flexibility proposed by the Commission be available without a showing that a prescribed level of competition exists. 12

B. Market Share Does Not Reflect Market Power 13

III. CONCLUSION 13

I. INTRODUCTION

Cincinnati Bell Telephone Company ("CBT"), an independent, mid-size local exchange carrier ("LEC"), submits these comments in response to the Commission's September 20, 1995 Notice of Proposed Rulemaking ("NPRM") in the above-captioned proceeding.[1] This NPRM examines potential modifications to interstate access price regulation in order to respond to changes in the market for such services and to employ market forces to achieve certain policy goals.[2]

Although CBT does not currently operate under price cap regulation, CBT is commenting in this proceeding because the development of a long term price cap regulatory plan will significantly affect the environment in which CBT operates. Speaking solely from CBT's experience, CBT will address the Commission's concerns and proposals primarily within the context of examining how price cap regulation might be made more attractive to small and mid-size LECs.

Many of the proposals offered by the Commission to alter the price cap regulation plan should also be available to those service providers which have chosen not to operate under price cap regulation. All LECs are facing competitive pressures, regardless of the pricing regulations under which they are operating. In developing a long-term plan for pricing regulation which includes regulatory flexibility, the Commission must not assume that competition exists solely

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[1] Price Cap Performance Review for Local Exchange Carriers, CC Docket No. 94-1; Treatment for Operator Services Under Price Cap Regulation, CC Docket No. 93-124; Revisions to Price Cap Rules for AT&T, CC Docket No. 93-197, Notice of Proposed Rulemaking, released September 20, 1995.

[2] NPRM at ¶ 1.

where a LEC chooses to operate under price cap regulation. Other reasons exist which explain why small and mid-size LECs have chosen not to operate under price cap regulation.

Currently, CBT is subject to Optional Incentive Regulation ("OIR") for interstate access services.[3] When the Commission developed the OIR rules for small and mid-size LECs, OIR was envisioned as a step on a continuum toward price cap regulation and away from rate of return. These rules recognized the fact that small and mid-size carriers required additional flexibility to respond to increased challenges.[4] CBT initially elected OIR because it provided a degree of regulatory and pricing flexibility that did not exist under rate of return regulation. CBT determined that under the Commission's price cap regulations, small and mid-size service providers, such as CBT, would be unable to meet the price cap productivity levels.[5]

A significant advantage of OIR over Price Caps to small and mid-size LECs is the ability to opt out of OIR after four years (two 2-year tariff periods).[6] The choice of a company to operate under price caps, on the other hand, is irrevocable. CBT believes that if the Commission wishes to increase the number of smaller LECs electing to operate under price cap regulations, the "lifetime" election rule must be eliminated. As a result of their small market

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[3] The rules articulated by the Commission for OIR became effective on June 11, 1993. *See,* Report and Order, CC Docket No. 92-135, *adopted* May 13, 1993, *effective* June 11, 1993. CBT's initial tariff filing under the OIR regulations was made on October 1, 1993, with an effective date of January 15, 1994. In March of 1995, CBT filed its first biennial OIR tariff filing.

[4] Report and Order, CC Docket No. 92-135, *adopted* May 13, 1993, *effective* June 11, 1993 at ¶ 2.

[5] This conclusion was supported by a productivity study submitted to the Commission by CBT on June 19, 1989. *See*, CBT's Comments, CC Docket No. 87-313, filed June 19, 1989.

[6] 47 CFR § 61.50(d).

areas and lack of geographic dispersion, small and mid-size LECs experience extreme volatility in productivity. Therefore, the decision to elect to permanently operate under price cap regulation strips these carriers of the flexibility which may be necessary to respond to this volatility.

CBT recommends that the Commission adopt rules which provide an elective price cap classification. A company which chooses to operate under price cap regulation would be required to remain under price cap regulation for a minimum of four years. At the end of this period, the company may then choose to remain under price cap regulation, return to rate of return regulation or elect to operate under OIR regulation. Such flexibility would provide an incentive for smaller LECs to consider operating under price cap regulation, while providing them a mechanism to respond to their changing circumstances.

II. DISCUSSION

A. Price Cap Rules For The Introduction Of New Service Offerings And Rate Changes Must Be Relaxed.

In making these proposals, the Commission is concerned that its current rules slow the introduction of new services to given markets, which is harmful to consumers and stymies the emergence of competition.[7] In order to minimize this effect, the Commission has proposed modifications in the definitions of new services, restructured services, and individual case basis ("ICB") filings. The Commission also has proposed the introduction of a new category of service offerings, alternative pricing plans ("APPs"), with modified filing requirements.[8]

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[7] NPRM at ¶ 38.

[8] NPRM at ¶ 38.

CBT appreciates the Commission's efforts and urges additional ongoing reforms to develop a system of rules and regulations which would relax regulations on new services. In order to provide the maximum benefits of competition to consumers, current regulatory limitations in access services must be eliminated.

With the advent of competition, LECs must be permitted to quickly adjust their prices and services in order to respond to changing market conditions. LECs introduce new services to meet the needs of their customers. They require flexibility to introduce their services in a timely manner and to price their services based on prudent business decisions, not based on regulatory control. LECs realize that with the introduction of a new service into a market, consumers must make an evaluation which balances their need and desire for the service against the price of the service. If the price is set too high, customers will be less likely to choose that product. LECs, like any other rational business, will price a product or service at a level which is responsive to the marketplace and consistent with its business strategies. Within a competitive environment, all competitors must be provided with the same opportunity to compete for customers, based on their product, service, quality and price. CBT asserts that, all too often, the current price cap rules have served as an obstacle to fair competition, economic pricing and to the introduction of new services, because they create time delays, pricing restraints, and unnecessary regulatory burdens for carriers.

1. Services should not be categorized according to competition.

The Commission has proposed new services be divided into two categories, "Track 1" and "Track 2," for the purpose of determining appropriate filing requirements.[9] Under this proposal, services categorized as Track 1 would continue to have the same notice, cost data and other requirements as under current Commission rules.[10] Services classified as Track 2 services would have reduced notice and cost support requirements.[11]

CBT asserts that no need exists to divide new services into these two separate tracks.[12] Such a division would be completely arbitrary, and any definition adopted by the Commission to distinguish between the two different kinds of new service would rapidly become outdated. The proposed division of new services into two classifications would seem to run counter to the Commission's goal of eliminating undue delays and regulatory burdens imposed by the current rules. No definition would be fluid enough to deal with the rapidly changing technology, marketplace dynamics and regulatory environment in the provision of telecommunications service. It appears that each new undefined service that a company introduces would require a waiver, much like the current part 69 waiver. This waiver process would slow the introduction of new services.[13]

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[9] NPRM at ¶ 45.

[10] NPRM at ¶ 45.

[11] NPRM at ¶ 45.

[12] In fact, this additional regulatory burden may further persuade non-price cap LECs from transitioning to price caps.

[13] See, *infra*, at pp. 8-9, for a discussion of part 69 waivers and CBT's assertion that they should be eliminated for all LECs.

CBT asserts that the Commission should not be proposing additional regulatory hurdles for the introduction of new services, but rather should be offering a decrease in the regulatory requirements concurrent with competitive activities.[14] However, should the Commission decide that it must divide the introduction of new services into two classifications, CBT asserts that the separation must be defined in a clear and unambiguous fashion. It is imperative that service providers be able to predict what regulatory treatment a particular service will receive prior to the introduction of that service.

If such rules are adopted by the Commission, Track 1 services should include only mandated services, such as interconnection. All other services should be categorized as Track 2 services, regardless of the level of competition present in a given service area. CBT further argues that rates for Track 2 services should be presumed lawful, and filed on 14 days notice with minimal cost support.

2. CBT opposes the Commission's proposal to require the filing of general tariffs for individual case basis contracts.

In a time when regulation should be decreasing, the proposed rules for individual case basis ("ICB") pricing become even more confining. Currently, CBT has very few ICB filings with the Commission. CBT has used ICBs mainly for special construction of diverse routes or dual entrance facilities for end-user customers that order services from CBT's access tariff. CBT sees these ICB filings as singular events, requiring a tariff filing based solely on Commission rules, not on any need to offer this service to others. CBT's ICB filings are

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[14] Decreased requirements should be available equally to non-price cap LECs. All LECs face identical regulatory hurdles regarding the introduction of new service.

customer specific, not generic offerings. They are not generally available offerings that other customers will choose to select. Granted, others may also want diverse routing, but each circumstance will be vastly different based on customer requirements, customer location, and equipment desired. For the Commission to propose that LECs tariff these ICBs on a generally available basis with averaged prices runs counter to what an ICB is intended to be.

3. CBT supports relaxed regulatory treatment for alternative pricing plans.

Under current regulations, no special rules exist which govern the offering of alternative pricing plans ("APPs") by LECs operating under price cap regulation.[15] Where a LEC intends to introduce an optional discounted plan for a service it is providing, such a plan is treated as if it were a new service.[16] The Commission proposes to establish a new category of tariff filing for these services, as well as allowing these services to be introduced under relaxed regulatory treatment.[17]

Similar to how businesses operate in other competitive markets, LECs should be allowed the full range of pricing opportunities, including APPs. APPs, along with volume and term discounts are specifically requested by LEC customers.

CBT proposes that the Commission adopt regulations which would allow for the introduction of temporary promotional offerings, lasting ninety days or less, on 14-days notice. Such promotional offerings should be allowed without cost support data, and should be allowed

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[15] NPRM at ¶ 55.

[16] NPRM at ¶ 55.

[17] NPRM at ¶ 54.

for all carriers, regardless of whether they operate under price cap regulation, OIR, or rate of return.

4. CBT supports the elimination of the need for Part 69 waivers.

CBT supports the Commission in its quest to modify requirements for waiver of the Part 69 rules for the introduction of new switched services or rate elements.[18] These rules, adopted in 1984, often prove to be ineffective and unnecessary. The current rate structure is extremely rigid and limiting, in that services developed using current technology simply do not fit into the regimented scheme envisioned by Part 69. As a result of this, almost all new switched services which carriers seek to introduce to customers require a waiver under Part 69. Waiver filings will only increase as technology continues to advance. Unlike switched access service, Part 69 waivers are not required when introducing special access service since that portion of the rules is far less specific. The introduction of new switched services does not raise more concerns or require additional regulatory review than the introduction of new special access services.

The introduction of new services, be they switched service, special access service or others, is in the public interest, and should not require the two-step process of the filing of a waiver request and then the tariff review process. If a party opposes the introduction of a particular new service, and believes that its introduction will result in harm to the public interest, then the burden should be on that party to present evidence to support their contention. Such

[18] CBT welcomes the Commission's future proceeding seeking a complete and substantial rewrite of all the Part 69 rules. The current rules have become inflexible and outdated, forcing many uneconomical costs and regulatory barriers to be erected which restrict LEC pricing in the face of competition.

evidence should be presented in the context of the tariff review process, rather than in the waiver process.

CBT asserts that many waiver applications are challenged by competitors in an effort to delay the implementation of the new service. Many of these challenges have focused not on public harm which might result from the introduction of the new service, but on the possible rates and costs of the new service. In such cases, the Commission has reminded those seeking to challenge rates and costs in the waiver context that the appropriate venue for such a challenge is the tariff process.

Part 69 waivers have been a major concern for LECs because of the length of time required to resolve waiver applications. For LEC customers, this waiver process appears to only serve the purpose of delaying the introduction of a new service they wish to purchase. CBT supports the elimination of all Part 69 waivers, no matter the regulatory pricing plan under which an individual carrier operates.[19]

5. CBT supports the elimination of lower service band index limits.

The Commission has proposed the elimination of the lower service band limits which exist under the current price cap regulation plan.[20] CBT supports the elimination of the lower

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[19] The Commission should realize that these waivers affect all LECs and their customers equally. Special treatment should not be afforded solely to LECs operating under price cap regulation when general rules such as Part 69 are revised. If the rules are obsolete and a deterrent to service introduction, they are obsolete and a deterrent for all carriers, regardless of the carrier's form of regulation.

[20] NPRM at ¶ 75.

service band index limits for all access services since such action would promote efficiency in provisioning services to customers.

In an increasingly competitive environment, all competitors must have the flexibility necessary to adjust their rates in response to the market. The current lower band limits may act as an obstacle to LECs in responding to competitive forces. They prohibit any potential cost efficiencies from being recognized in the market and passed on to customers. The elimination of the lower service band index will result in achieving competitive pricing because prices can be lowered if costs decrease, thus eliminating any pricing umbrella that artificial regulatory constraints create.

6. CBT opposes the Commission's proposal for a one percent limit on upper service band pricing.

The Commission has proposed an arbitrary limit on upper service band pricing after a price reduction in order to preclude anticompetitive behavior on the part of LECs.[21] CBT opposes such a limit. If a carrier has an inflexible upward limitation, that carrier may not lower rates for fear that it will be necessary to raise rates higher than the one percent limit in the future. With a competitive market, the Commission needs to allow the marketplace to determine the appropriate price.

The Commission's proposal assumes that LECs will price in a predatory fashion. CBT suggests that the Commission allow the market to operate freely. Where a competitor feels that anticompetitive pricing has taken place, that competitor may file a complaint challenging such behavior.

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[21] NPRM at ¶ 105.

7. CBT supports permitting LECs to offer contract prices for access services.

All providers of similar services must be allowed to price their services under the same rules and conditions so that competitive advantages do not accrue to providers who are given greater flexibility. Contract pricing is the norm when a carrier responds to a Request For Proposal ("RFP") from a business. RFPs are the standard procedure for business customers seeking quality services and products at competitive prices from providers who are in competition with each other. When a business issues an RFP for communication services, LEC competitors have the freedom to respond to customer requests on a contract basis. LECs are currently limited in their response to such requests by inflexible tariff rates and conditions. This severely limits LECs in their ability to respond to competition. In many instances, customers are forced to select an alternative vendor, even where the LEC could provide the service with a lower price or under better terms and conditions.

CBT agrees with the Commission's proposal that LECs be allowed to offer contract pricing to their customers.[22] This would allow LECs to respond more directly and individually to the specific needs of their customers. Such contract rates could be filed with the Commission as "Tariff 12-type" offerings, as was allowed in the case of AT&T.[23] This option should also be available to non-price cap LECs that face competition in their area.

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[22] NPRM at ¶ 148.

[23] NPRM at ¶ 147.

8. CBT proposes that the relaxation of regulation and pricing flexibility proposed by the Commission be available without a showing that a prescribed level of competition exists.

LECs should be allowed to take advantage of regulatory relief and pricing flexibility without having to prove that a certain level of competition exists. APPs, ICBs and Contract Pricing are all reactions to customer requests for services and pricing tailored to their individual needs. Most of these requests are in response to a customer's RFP which is also sent to competitive bidders. This in itself indicates that LECs face competition. Any other competitive showing is unnecessary, burdensome and would delay the LECs response to customer's requests. Although CBT feels no additional proof is required, if the Commission determines that a specific level of competition must be shown, the Commission will need to consider the difference between an RBOC and smaller LECs. The loss of one large business customer to a smaller LEC could have the same detrimental affect as multiple customer losses for an RBOC.

CBT feels that sufficient competitive safeguards are currently in place to assure that LECs do not have an incentive to discriminate against their competitors. Under price cap regulation and using cost based pricing floors,[24] LECs are restricted from engaging in anticompetitive pricing.[25] Therefore, the Commission should not require pricing rules and tariff restrictions for new services introduced by LECs beyond those already reflected by the constraints resulting from price cap rules. Further, the Commission must allow LECs flexibility in their ability to compete with the new service offerings of competing access providers.

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[24] CBT supports the Commission's proposal that the LEC pricing floor for services be established at the level of direct costs.

[25] NPRM at pp 106-110.

B. Market Share Does Not Reflect Market Power.

Incumbent market share levels do not necessarily indicate the levels of market power held by others. Therefore, conditioning streamlined regulation on loss of market share (as was done for the interexchange market) is problematic for several reasons.[26] First, market share has no relevance to market power in markets where regulation precludes competitive entry and asymmetric regulation maintains the incumbent carrier's prices at economically inefficient levels. Under these conditions, there can be no meaningful measure of supply elasticity and, therefore, no conclusive determination that significant barriers to entry exist.

Second, if LECs lose their most profitable customers, they could possibly continue with a relatively high market share level, while facing significant financial loss. A small loss of market share may be equal to a large loss in market power.

Third, market share tests for streamlined regulation undermine the high-powered incentive properties of price-cap regulation. Market share tests create perverse incentives for both incumbent carriers and their rivals. The incumbent carrier may be reluctant to increase market share because it will lead to more stringent regulatory rules. Rival carriers may be equally reluctant to increase market share precisely because it may lead regulators to adopt less stringent regulatory rules for the incumbent carrier. The end result is a situation where success by the incumbent in a competitive marketplace is penalized rather than rewarded.

III. CONCLUSION

Regulatory policy should "enable" the development of competition in the industry without mandating it directly or promoting it artificially. Facilitating an equal opportunity to compete

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[26] NPRM at ¶ 143.

is not synonymous with preordained marketplace outcomes. Also, excessive regulation imposes direct costs on society and raises the risk of potentially harmful marketplace intervention. CBT asserts that the Commission should minimize regulatory oversight in all actions regarding competition and promote rules that reflect efficient and effective competition.

Although the Commission is moving in the right direction by proposing to relax some regulations for new and existing price cap services, it is continuing to create asymmetrical regulation in a competitive market. The Commission's proposals also result in building asymmetrical walls between price cap and non-price cap LECs in areas where the only difference is the type of pricing regulation elected. CBT believes that many of the proposals for price cap companies should also be granted to non-price cap companies as well and is concerned that additional restrictions in the price cap rules will further preclude non-price cap LECs from selecting price cap rate regulation in the future.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that copies of the foregoing **Comments of Cincinnati Bell Telephone Company** have been delivered by first class United States Mail, postage prepaid, on December 11, 1995, to the persons on the attached service list.

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