

ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20054

RECEIVED

APR 19 1996

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY
CC Docket 96-01

In the Matter of)
)
Policy and Rules Concerning the)
Interstate, Interexchange Marketplace)

COMMENTS OF MFS COMMUNICATIONS, COMPANY, INC.

DOCKET FILE COPY ORIGINAL

Andrew D. Lipman
Erin M. Reilly

SWIDLER & BERLIN, CHARTERED
3000 K Street, N.W., Suite 300
Washington, D.C. 20007
(202) 424-7500

Attorneys for
MFS COMMUNICATIONS COMPANY, INC.

Dated: April 19, 1996

OH

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20054**

In the Matter of)
)
Policy and Rules Concerning the) CC Docket 96-61
Interstate, Interexchange Marketplace)

COMMENTS OF MFS COMMUNICATIONS, COMPANY, INC.

Table of Contents

INTRODUCTION AND SUMMARY 3

I. DEFINITION OF RELEVANT PRODUCT AND GEOGRAPHIC MARKETS ... 4

A. The DOJ Guidelines Are Inappropriate for Determining the Market Power of a Telecommunications Carrier in the Current Marketplace. 4

B. The Market Test Adopted by the Commission Must Reflect the Unique Characteristics of the Telecommunications Market, Including the Purchasing of Essential Services from Competitors, Market Segmentation and The Potential for Non-Pricing Anticompetitive Actions. 7

II. SEPARATIONS REQUIREMENTS FOR INDEPENDENT LOCAL EXCHANGE CARRIER AND BELL OPERATING COMPANY PROVISIONS OF “OUT-OF-REGION” INTERSTATE, INTEREXCHANGE SERVICES 9

A. The Commission Must Enact Safeguards Designed to Protect the Market From Anticompetitive BOC Activities, Such as Cross-subsidization. 9

III. RATE AVERAGING REQUIREMENTS OF 1996 ACT 10

A. The Commission Should Forbear From Applying Rate Averaging to Carriers Providing Interexchange Service That Possess Less Than Five Percent of the Interexchange Market Nationwide. 10

IV. CONCLUSION 12

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20054**

RECEIVED

APR 19 1996

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of)
)
Policy and Rules Concerning the) CC Docket 96-61
Interstate, Interexchange Marketplace)

COMMENTS OF MFS COMMUNICATIONS, COMPANY, INC.

MFS Communications Company Inc. ("MFS"), by its undersigned counsel and pursuant to Section 1.415 of the Federal Communications Commission's ("FCC" or "Commission") rules, hereby respectfully submits the following comments in response to the Commission's Notice of Proposed Rulemaking ("NPRM") regarding the interstate, interexchange marketplace.^{1/}

INTRODUCTION AND SUMMARY

MFS supports the Commission's efforts to promote the development of competition in all market segments of the telecommunications industry, as mandated by the Telecommunications Act of 1996.^{2/} However, the Commission should avoid a mere cloning of the U.S. Department of Justice ("DOJ")/Federal Trade Commission ("FTC") 1992 Merger Guidelines ("DOJ Merger Guidelines"), which are too generic by nature to be helpful to the telecommunications industry. Instead, the Commission must adopt a new market power test that is more reflective of the

^{1/} *Policy and Rules Concerning the Interstate, Interexchange Marketplace*, CC Docket No. 96061, FCC 96-123 (Mar. 25, 1996) ("*NPRM*").

^{2/} Telecommunications Act of 1996, Pub. L. No. 104-104, 100 Stat. 56 (1996) ("*1996 Act*").

unique characteristics of the telecommunications industry. Specifically, the Commission should adopt a pragmatic market power test designed to evaluate a firm's market power, based upon the firm's ability to drive more efficient rivals out of the market, or prevent firms from entering the market.

In imposing separations requirements on the Bell Operating Companies ("BOCs"), the Commission must guard against threats of cross-subsidization by BOC provision of out-of-region interstate, interexchange services. Finally, the Commission should forbear from applying rate averaging to carriers engaged in the provision of interexchange service that possess less than five percent (5%) of the sum total of both access lines and presubscribed lines in the interexchange market nationwide.

I. DEFINITION OF RELEVANT PRODUCT AND GEOGRAPHIC MARKETS

A. The DOJ Guidelines Are Inappropriate for Determining the Market Power of a Telecommunications Carrier in the Current Marketplace.

In its NPRM, the Commission stated that it was seeking to devise a narrow product market definition in order to create a "[r]efined analytical tool for evaluating whether a carrier or group of carriers together" is exerting market power.^{3/} To this end, the Commission proposed to define the relevant product market^{4/} as an interstate, interexchange telecommunications service

^{3/} NPRM at para. 44.

^{4/} The Commission has defined the relevant product market as "[t]he set of services which check the ability of a carrier to restrict its output of a service and thereby raise its price." *Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor*, 95 F.C.C. 2d 554, 563 (1983) ("*Fourth Report and Order*").

for which there is no close substitute, or a group of services for which there are no other close substitutes.^{5/} There are no relevant submarkets in the FCC's proposed definition. The Commission also proposed to define the relevant geographic market,^{6/} as a single national market of interstate, interexchange services, for purposes of determining whether a carrier or group of carriers acting together has market power. In prior proceedings, the Commission has stated that indicators of a firm's market power can be inferred from the level and change in a firm's share of a relevant market, as well as the barriers to entry into the relevant market.^{7/}

The Commission long has recognized that a relevant market has product dimensions, as well as geographic dimensions, and has proposed to adopt the approach taken in the DOJ Merger Guidelines for defining relevant product and geographic markets.^{8/} These Guidelines, however, are too generic to be applicable to the telecommunications industry, which is characterized by the presence of unique, essential and non-substitutable goods and services, often purchased by competitors, as well as by significant market segmentation. For the following reasons, using the DOJ Guidelines in defining relevant markets make little sense in determining the market power of a carrier in the current telecommunications marketplace.

First, the DOJ Guidelines contemplate industries where goods and services are substitutable, unlike the uniquely-tailored products and services created by the

^{5/} NPRM at paras. 41, 46.

^{6/} The relevant geographic market includes the locations of the suppliers to which buyers in any one area practicably can turn for alternative sources of supply, or which otherwise check the prices charged to those buyers. *Fourth Report and Order* at 573.

^{7/} *Fourth Report and Order* at 562-3.

^{8/} NPRM at para. 41.

telecommunications industry. This traditional “substitution of goods analysis” is useful as long as a firm is engaged in the sale of goods that are substitutable for other goods. However, in the telephone market, where carriers typically purchase inputs or essential services, such as interconnection, access, wholesale services, or unbundled network elements from competitors, such services are not substitutes, but essential inputs used by competitors. As a result, the DOJ’s “substitution of goods” analysis is deficient when applied to the telecommunications marketplace.

Second, the telecommunications industry is characterized by market segmentation, as exemplified by different market areas such as residential, business, peak, off-peak, local, toll and access. Such market segmentation makes it possible for dominant firms to engage in predatory cross subsidization practices between market segments. The DOJ Guidelines are not well-suited for application to industries with significant market segmentation, and thus, are somewhat ineffectual when applied to the telecommunications industry.

Finally, the DOJ Guidelines focus on the *geographic* factors and *pricing* issues of the market, rather than on the actual anticompetitive *practices* of the market participants. Because it is difficult to detect non-price, anticompetitive actions, incumbent carriers in the telecommunications marketplace are afforded a significant opportunity to engage in anticompetitive activity, merely by claiming, for example, that an essential requested service is “not technically feasible,” or by denying access to essential facilities like telephone numbers. While anticompetitive, non-price actions are a critical characteristic of the telephone industry, they are outside the scope of geographic and physical market tests that characterize the DOJ Guidelines. As a result, in order for the Commission to engage in an effective analysis of

market power within the telecommunications industry, it is critical that the FCC take into account not only those pricing issues that signify suspect price changes, but also and perhaps more importantly, non-price issues such as physical collocation, interconnection and the allocation of telephone numbers.

B. The Market Test Adopted by the Commission Must Reflect the Unique Characteristics of the Telecommunications Market, Including the Purchasing of Essential Services from Competitors, Market Segmentation and The Potential for Non-Pricing Anticompetitive Actions.

The Commission must use a different market power test than the DOJ Guidelines it currently proposes to adopt--one that reflects the unique characteristics of the telecommunications industry and its various market segmentations. A new market power test also is necessary because traditional legal and economic theories regarding predatory pricing practices are of little use in a multi-product industry characterized by differing degrees of competitive pressure in various market segments, price following or price taking by non-dominant firms, and significant common costs.

The Commission should develop and use a market power test that reflects the unique economic characteristics of the telecommunications industry. In particular, an appropriate market power test for the telecommunications industry should reflect the following three characteristics.

First, a market power test for the telecommunications industry should recognize that telecommunications competitors often purchase essential services from one another.

Competitive local exchange carriers purchase interconnection services and unbundled network

elements from incumbent local exchange carriers. Long distance providers purchase access services from local exchange carriers. Resellers purchase services from facilities-based carriers. A market power test based on traditional analyses of product and geographic markets simply fails to capture these competitive interrelationships. For example, an incumbent firm that sells interconnection services to a competitor could drive rivals out of the market by inflating its interconnection charges or by simply refusing to make interconnection available.

Second, a market power test for the telecommunications industry should recognize that the telecommunications industry is characterized by a host of market segments, such as residential, business, peak and off-peak offerings, interstate, intrastate, local, toll, access, etc. Such market segmentation creates the possibility of predatory cross-subsidization between competitive and less competitive market segments that is not captured by traditional market power tests based on product and geographic market tests. For example, a dominant price leader could drive more efficient rivals out of the market by reducing prices in competitive market segments and recouping losses with modest price increases in less competitive market segments where competitors are under-represented.

Third, a market power test for the telecommunications industry should recognize the existence of the potential for non-price anticompetitive actions. Competition is thwarted if an incumbent firm fails or refuses to make essential services, like telephone numbers or interconnection, available to competitors. A price-based product and geographic market definition fails to capture the competitive implications of non-price actions.

Rather than engage in hypothetical analyses of the product and geographic scope of the market, MFS suggests that the Commission define and apply a more pragmatic market power

test. Specifically, MFS suggests the following definition:

“a firm possesses market power if it has the ability to drive more efficient rivals out of the market or prevent firms from entering the market.”

This test is broad enough to capture the potential for anticompetitive activities springing from the provision of essential services, market segmentation, or anticompetitive non-price activities. It is also more directly related to the pro-competitive goals of the 1996 Act than the DOJ Merger Guidelines. Use of this test will enable the Commission to achieve its goal of devising a narrow market definition, for purposes of accurately determining whether a carrier is exerting market power.

II. SEPARATIONS REQUIREMENTS FOR INDEPENDENT LOCAL EXCHANGE CARRIER AND BELL OPERATING COMPANY PROVISIONS OF “OUT-OF-REGION” INTERSTATE, INTEREXCHANGE SERVICES

A. The Commission Must Enact Safeguards Designed to Protect the Market From Anticompetitive BOC Activities, Such as Cross-subsidization.

Due to the 1996 Act, which permits the BOCs to provide interLATA services originating outside of their in-region states,^{9/} the Commission has proposed to base its oversight of BOC provision of out-of-region interstate, interexchange services on the separations requirements imposed upon independent local exchange carriers (“LECs”) that provide interexchange services.^{10/}

With respect to BOC provision of out-of-region interstate, interexchange service, the

^{9/} 1996 Act at § (adding § 271(b)(2)).

^{10/} NPRM at para. 60.

Commission must guard against BOC anticompetitive practices, such as cross-subsidization. The potential for cross-subsidization exists because the 1996 Act places the BOCs in positions that will enable them to cross-subsidize their competitive out-of-region services with their less-competitive local exchange and access services within their local service regions. Cross-subsidization and other anticompetitive practices are issues of lesser importance for independent LECs, which traditionally do not enjoy the large market shares and contiguous geographic service areas possessed by the BOCs.

As a result, the Commission should treat the BOCs as non-dominant carriers for the provision of out-of-region services **as long as** the BOCs satisfy the separations requirements established in the Commission's *Competitive Carrier Fifth Report and Order*.¹¹¹ If necessary, the Commission should develop more stringent separations requirements for the BOCs. These requirements should be designed to reduce the potential threat of BOC anticompetitive pricing practices, through which the BOCs are able to fund price reductions for their non-dominant, competitive services in out-of-region markets, with price increases for their non-competitive, in-region services.

III. RATE AVERAGING REQUIREMENTS OF 1996 ACT

A. The Commission Should Forbear From Applying Rate Averaging to Carriers Providing Interexchange Service That Possess Less Than Five Percent of the Interexchange Market Nationwide.

The 1996 Act requires providers of interexchange telecommunications services to charge

¹¹¹ *Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor*, 98 FCC 2d 1191 (1984) ("Fifth Report and Order").

the same rates to subscribers in rural and high cost areas as those rates charged to urban customers^{12/} and the Commission supports this mandate as reflective of its long-standing policy of geographic rate averaging.^{13/} This requirement makes sense for larger carriers providing interexchange service, which have large customer bases that allow them to average their prices for high and low cost customers. Larger carriers engaged in the provision of interexchange service also participate in national marketing efforts (*e.g.* Sprint's 10¢ a minute campaign) that effectively result in geographically averaged rates.

However, the Commission should forbear from applying rate averaging requirements to small carriers with less than five percent (5%) of the sum total of both access lines and presubscribed lines nationwide, because their customer bases are more modest and because their service provision is limited to a few select geographic areas. Because small carriers are less likely to provide interexchange service in markets nationwide, their costs legitimately may be higher in certain rural or high cost areas than in other, more densely populated areas, and need to be priced accordingly. Additionally, there is a good deal of variation in access charges nationwide, which results in legitimate cost differentials in certain markets. Smaller carriers may have to reflect these cost variations in their prices in order to survive in the interexchange market, whereas larger carriers are able to absorb the cost difference.

MFS suggests that the Commission forbear from applying the rate averaging requirements to smaller carriers engaged in the provision of interexchange service, *i.e.* those with

^{12/} 1996 Act at § 101 (adding § 254(g)).

^{13/} NPRM at para. 66.

less than five percent of the nation's access and presubscribed lines. If exempted from these geographic rate averaging requirements, MFS also suggests that small carriers will have no need to file the certificate of compliance proposed by the Commission in the NPRM.^{14/} Such an exemption from geographic rate averaging requirements will enable small carriers of interexchange service to continue to accurately reflect legitimate price differentials, without subjecting them to unnecessary regulation.

IV. CONCLUSION

The Commission's stated goal in this proceeding is to promote competition by reducing or eliminating existing regulations that may no longer be in the public interest in the "increasingly competitive interexchange market."^{15/} Recognizing this objective, the Commission should develop an appropriate market power test that reflects the characteristics of the telecommunications market. As well, the Commission should forbear from applying

^{14/} NPRM at para. 70.

^{15/} NPRM at para. 4.

regulatory provisions to carriers in certain market segments where competitive conditions signify that such strict scrutinization is no longer warranted.

Respectfully submitted.

A handwritten signature in cursive script, appearing to read "Andrew D. Lipman".

Andrew D. Lipman
Erin M. Reilly

SWIDLER & BERLIN, CHARTERED
3000 K Street, N.W. Suite 300
Washington, D.C. 20007

Attorneys for MFS Communications
Company, Inc.

Dated: April 19, 1996