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JUN 19 1997

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Toll Free Service Access Codes	)	CC Docket No. 95-155
	)	
Petition to Modify 888 Number Allocation Plan Filed by LCI International, Inc.	)	NSD File No. 97-10
	)	
Petition to Modify 888 Number Allocation Plan filed by UniDial, Inc.	)	NSD File No. 97-15
	)	
Petition to Modify 888 Number Allocation Plan filed by Consolidated Communication Telecom Services Inc.	)	NSD File No. 97-16

COMMENTS OF U S WEST, INC. ON
PETITIONS FOR RECONSIDERATION

U S WEST, Inc. ("U S WEST") hereby submits these Comments on the Petitions for Reconsideration filed in this matter.[1] Herein, we demonstrate that the Federal Communications Commission's ("Commission") Second Report and Order[2]

[1] Public Notice, Petitions for Reconsideration and Clarification of Action in Rulemaking Proceedings, Report No. 2200, rel. May 30, 1997. Petitions for Reconsideration and/or Clarification filed by Tellnet Communications Inc. (Tellnet"), filed May 20, 1997; Mark D. Olson & Associates Inc. ("MDOA"), filed May 2, 1997; Vanity International/SoftLine Studios ("Vanity International"); ICB, Inc. ("ICB"), filed May 27, 1997; TLDP Communications, Inc. ("TLDP"), filed May 27, 1997; Sprint Communications Company, L.P. ("Sprint"), filed May 27, 1997; Toll Free Referrals, Inc. ("Toll Free Referrals"), filed May 23, 1997; National Association of Telecommunications End-Users ("NATE").

[2] In the Matter of Toll Free Service Access Codes, et al., CC Docket No. 95-155, et al., Second Report and Order and Further Notice of Proposed Rulemaking, FCC 97-123, rel. Apr. 11, 1997.

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("Order"), while it may require clarification or minor modification, will advance the public interest by enhancing the efficient use of toll-free telephone numbers, thus helping to ensure the continued availability of those numbers.

THE COMMISSION CORRECTLY CONCLUDED THAT "WAREHOUSING," "HOARDING" AND "BROKERING" TOLL-FREE NUMBERS DISSERVE THE PUBLIC INTEREST.

The centerpiece of the Order is the Commission's determination to prohibit the practices of "warehousing" and "hoarding" toll-free numbers. "Warehousing" is the act of a Responsible Organization ("RespOrg") obtaining toll-free numbers for which it has no identified subscriber.[3] RespOrgs sometimes engage in warehousing, so as to be able to provide certain desirable numbers for subscribers, or to ensure an ample supply of toll-free numbers. The Commission determined – correctly in our view – that warehousing is an unreasonable practice under Section 201(b) of the Communications Act of 1934, and inconsistent with the Commission's obligations to ensure the equitable availability of toll-free numbers under Section 251(e)(1).[4] None of the Petitions challenges this determination.

To eliminate warehousing, the Commission promulgated a rule under which a RespOrg, by reserving a toll-free number, is deemed to certify that it has an identified subscriber who has agreed to be billed for service associated with that number.[5] Sprint questions the need for the certification rule, suggesting the

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[3] Id. ¶ 19.

[4] Id. ¶ 2.

[5] Id. ¶ 25.

Commission require, instead, that RespOrgs have an identified subscriber by the end of the 45-day reservation period.[6]

U S WEST believes the Commission should reject Sprint's suggested modification. Sprint would change the Commission's prohibition against warehousing into a limitation on that practice. The Commission correctly concluded that warehousing is an unreasonable practice. It did not determine that warehousing is unreasonable only if it exceeds some defined period of time. If all RespOrgs engaged in such behavior, large blocks of toll-free numbers would be unavailable. Moreover, while Sprint seeks a customer for a number it has warehoused, another RespOrg might have an identified customer for that particular number. The availability of toll-free numbers should not depend on a RespOrg's ability to warehouse them.

The Commission also prohibited "hoarding," which it defines as –

> the acquisition by a toll free subscriber from a Responsible Organization of more toll free numbers than the toll free subscriber intends to use for the provision of toll free service.[7]

The Commission concluded that hoarding is not in the public interest because it depletes the pool of available toll-free numbers, hastening the need to open new toll-free service access codes. The Commission therefore determined to prohibit hoarding.[8]

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[6] Sprint at 2-3.

[7] Order at Appendix. C, § 52.107(a).

[8] Id. ¶ 38.

No party directly challenges the Commission's prohibition on hoarding, though Toll Free Referrals and Tellnet, in identical petitions, seek exemptions from the rule that would effectively eviscerate it.[9] Both parties seek an exemption for all numbers "owned" prior to May 25, 1997 (the significance of this date is nowhere explained), as well as for all 800 and 888 numbers. The anti-hoarding rule thus would apply only to numbers issued sometime in the future under not-yet-opened service access codes ("SAC"), thereby enabling companies who have established businesses buying and selling toll-free numbers to continue in business.

Merely reciting the rationale for these exemptions shows their futility. They would emasculate the rule, undoing everything the Commission hopes to accomplish. These Petitioners wish to continue their business of buying and selling a public resource – toll-free numbers – in which they have no legitimate interest. The Commission should reject this proposal.

To further its anti-hoarding rule, the Commission adopted three corollary rules. One would prohibit number "brokering" – the selling of numbers by private parties for a fee – because it provides an incentive to hoard numbers.[10] Under the second, routing multiple toll-free numbers to subscribers will give rise to a rebuttable presumption of hoarding or brokering.[11] Finally, toll-free service providers "must" terminate the service of those who hoard numbers.[12]

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[9] Toll Free Referrals at 1; Tellnet at 1.

[10] Order ¶ 38.

[11] Id. ¶ 40.

[12] Id. ¶ 42.

In making these determinations, the Commission reaffirmed its belief that toll-free numbers are a public resource that the Commission is empowered to manage in the public interest.[13] Several parties challenge this characterization of toll-free numbers. Thus Vanity International says the notion that toll-free numbers are a public resource is a "continuing fiction" and "pure fantasy."[14] NATE pronounces the rebuttable presumption an "unlawful taking of private property . . . in contravention of the Fifth Amendment."[15]

The Commission has long recognized that telephone numbers are a public resource because they "are essential to routing calls on the public switched network."[16] Neither subscribers, nor carriers, can claim to "own" telephone numbers. Indeed, the Act expressly directs the Commission to appoint an "impartial entity" to "make . . . numbers available on an equitable basis."[17] Thus NATE is wrong in claiming that customers' "ownership" of numbers is "an established business practice:"[18] the "established practice" in the industry is indeed exactly the contrary.

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[13] Id. ¶ 32.

[14] Vanity International at 4.

[15] NATE at 2.

[16] Order ¶ 32; see also In the Matter of The Use of N11 Codes and Other Abbreviated Dialing Arrangements, First Report and Order and Further Notice of Proposed Rulemaking, CC Docket No. 92-105, 6 Comm. Reg. (P&F) 695, 717 ¶ 72 (1997).

[17] 47 U.S.C. § 251(e)(1).

[18] NATE at 2.

This is not to say, however, that subscribers have no interest in the continued use of a particular number. Absent compelling public necessity, a subscriber who continuously uses and pays for service associated with a particular number should be allowed to keep that number. Thus, those who seek reconsideration of the anti-brokering rule and the rebuttable presumption raise legitimate points the Commission should address by clarifying – and, if necessary, modifying – these provisions.

"Brokering" a good or service connotes engaging in the business of buying and selling that good or service. In this context, that would include those who obtain toll-free numbers for the purpose of reselling them; U S WEST fully supports the Commission's outlawing this practice. As articulated by the Commission, however, "brokering" appears to include <u>any</u> sale of a toll-free number by a private entity. If that is what the Commission intended, we believe the rule goes further than the situation requires, and it will likely prove unenforceable.

As written, the rule appears to prohibit the sale of a number only if a "fee" is involved. In this context, a "fee" might be the consideration paid by the purchaser to the seller, or it might be an amount charged by an intermediary broker to facilitate the transaction between the buyer and seller. If the Commission intended the latter meaning, it should clarify that intent.

If, however, the Commission intends to prohibit all sales of toll-free numbers, its rule will likely prove unenforceable unless it prohibits all transfers of toll-free numbers – with or without consideration. If the Commission allows toll-free subscribers to transfer their numbers, so long as they receive no consideration,

entities will simply conceal the exchange of money, or engage in a ruse by which the buyer purchases some other item, the price of which includes the agreed-upon price for the toll-free number. More legitimately, the seller of a going business will "throw in" the toll-free number "at no additional charge."

U S WEST believes the Commission should allow a toll-free subscriber to sell a number as part of the sale of the subscriber's business, but only so long as the subscriber has actually used the number in the conduct of that business for a period of time sufficient to establish that the subscriber acquired the toll-free number for use in that business and not for purposes of sale. A toll-free subscriber who has built the value of a toll-free number by advertising and using it, and thus creating an association between that number and the subscriber's business, would be able to recapture some of that value upon selling the business. At the same time, however, a subscriber could not sell the number standing alone, and it must have used the number in the conduct of its business, making it very difficult to hold a number simply for the purpose of selling it.

Petitioners complain that the rebuttable presumption, particularly in combination with the requirement of service termination for subscribers who hoard numbers, will allow the RespOrgs to terminate service without justification so as to capture desirable numbers.[19] As TLDP observes,[20] the problem here is the absence

[19] MDOA at 1-3; TLDP at 7-8.

[20] TLDP at 7-8.

of Commission guidance as to the application of these rules. We thus do not know who applies the rebuttable presumption, or in what context; nor do we know who decides that a subscriber is hoarding numbers, thus requiring termination of the subscriber's service. The Commission should take this opportunity to address these issues.

U S WEST believes the Commission – not the RespOrgs – should resolve allegations of hoarding through its complaint procedures or some other suitable mechanism. Leaving these decisions to the RespOrgs will put the RespOrgs in an untenable position: no matter how they resolve a claim of hoarding, some party is likely to complain (putting the matter before the Commission or a judicial body in any event). And, if a RespOrg determines that a customer is indeed guilty of hoarding, the rules require it to terminate service to the offending subscriber, a move almost certain to result in litigation.

Given this, the far preferable route is for the Commission to resolve claims of hoarding (and brokering). U S WEST thus suggests that the Commission clarify that –

- it will resolve claimed violations of the toll-free number rules through its complaint process or other suitable mechanism;[21] and
- RespOrgs (and other 800 service providers) may not terminate a subscriber's service for hoarding absent a Commission order to do so.

[21] Such proceedings would enable the Commission to determine what evidence it will consider to rebut the presumption, as well as the evidence necessary to sustain a charge of hoarding. Alternatively, the Commission could attempt to articulate those matters in this proceeding (or in a rulemaking), though that seems unnecessary, and it would likely omit relevant considerations.

With this clarification, and subject to the modification suggested above, U S WEST believes the Commission should reaffirm the rules as promulgated in the Order.

Respectfully submitted,

U S WEST, INC.

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June 19, 1997

CERTIFICATE OF SERVICE

I, Rebecca Ward, do hereby certify that on this 19th day of June, 1997, I have caused a copy of the foregoing **COMMENTS OF U S WEST, INC. ON PETITIONS FOR RECONSIDERATION** to be served via first-class United States Mail, postage prepaid, upon the persons listed on the attached service list.

Rebecca Ward

Rebecca Ward

***Via Hand-Delivery**

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