

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

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Implementation of the Local Competition)
Provisions of the Telecommunications Act)
Of 1996)
)
Interconnection between Local Exchange)
Carriers and Commercial Mobile Radio)
Services Providers)

CC Docket No. 96-98

CC Docket No. 95-185

**OPPOSITION OF LBC COMMUNICATIONS, INC. TO
PETITION FOR STAY PENDING JUDICIAL REVIEW**

LBC Communications, Inc. ("LBC"), hereby opposes the petition of U S WEST, Inc. ("USW"), filed September 9, 1997 (the "Petition"), for stay, pending judicial review, of the Third Order on Reconsideration (the "Order") in the above-captioned proceeding. In its Petition, USW asks that the Commission stay the Order insofar as it requires incumbent local exchange carriers ("ILECs") to provide shared transport to new entrants on an unbundled basis. For the reasons set forth below, LBC opposes USW's Petition.

DISCUSSION

Proponents of a stay must demonstrate (1) that they are likely to prevail on the merits, (2) that they will suffer irreparable harm if a stay is not granted, (3) that other interested parties will not be harmed if a stay is granted, and (4) that the public interest favors the grant of a stay.¹ In this case, USW has failed to satisfy even one, much less all four, of this four-prong test.

I. USW Is Unlikely To Succeed On The Merits.

USW's complaint is that the Order will require ILECs to make shared transport available to new entrants at a price that is less than that which USW would like to charge. It is not clear, however, why USW's unhappiness with the Commission's policy direction should render the Order arbitrary, capricious, or otherwise unlawful. Indeed, USW does little more than repeat arguments that already have been rejected both by the Commission

¹ See Virginia Petroleum Jobbers Ass'n v. PC, 259 F.2d 921 (D.C. Cir. 1958); Washington Metropolitan Area Transit Comm'n v. Holiday Tours, Inc., 559 F.2d 841 (D.C. Cir. 1977).

in the Local Competition Order² and the United States Court of Appeals for the Eighth Circuit in review of that order. USW has offered no reason for the Commission to now reverse its course.

In the Order, the Commission reiterated that it would not identify network elements “in rigid terms, but rather by function.”³ In light of that determination, and pursuant to its authority under Section 251(d)(2), the Commission concluded that the obligation of ILECs to provide shared transport to new entrants extends to all ILEC interoffice transport facilities on a usage-sensitive basis.⁴

USW takes issue with this conclusion. USW claims that network elements must be identified, not functionally, but in terms of the business risk of acquiring the facility. Apparently, USW would have the Commission define only high-risk facilities as network elements. When the acquisition of a facility presents little business risk, USW posits, ILECs should only be required to make them available on a resale basis. This construct has obvious advantages from the perspective of the ILEC, but it would, if adopted, increase the barriers to entry for competitive local exchange carriers (“CLECs”) and it has no basis in the law.

As the Commission recognized in the Order, “the opportunity to purchase transport facilities on a shared basis, rather than exclusively on a dedicated basis, will decrease the costs of entry.”⁵ Indeed, for new entrants struggling to gain a toehold against entrenched incumbent monopolists, a rule that would require CLECs to purchase transport on a dedicated basis could stifle completely the development of competition. The Commission’s rule, on the other hand, will allow CLECs with low initial penetration rates to compete in the local exchange market.

The Commission’s procompetitive policy is entirely consistent with the letter and spirit of the 1996 Act, and nothing in the Petition is to the contrary. The Commission did not, in the Order, “abruptly reverse[] course”⁶ and, to the extent that the Order goes beyond earlier unbundling orders, the policy decisions underlying the Order are more than adequately explained.

² First Report and Order, Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, 11 FCC Rcd 15499 (1996).

³ Order ¶ 5 (quoting Local Competition Order, 11 FCC Rcd at 15631-32).

⁴ Order ¶ 25.

⁵ Id. ¶ 34.

⁶ Petition at 11.

Further, neither the 1996 Act nor the Eighth Circuit's decision on interconnection mandate that network elements be defined in terms of their "risk profiles." That concept is entirely based upon inferences drawn by USW — inferences that themselves are premised on USW's particular policy perspective. To the contrary, the Eighth Circuit affirmed the Commission's functional definition of network elements, holding that the "FCC's determination that the term 'network element' includes all of the facilities and equipment that are used in the overall commercial offering of telecommunications is a reasonable conclusion and entitled to deference."⁷ Thus, the Petition provides no compelling legal argument for reversing the procompetitive decision made in the Order that ILECs must make shared transport available to new entrants on an unbundled basis.

II. USW Will Suffer No Irreparable Injury Absent A Stay.

A "concrete showing of irreparable harm is an essential factor in any request for a stay."⁸ In this case, USW has failed to make such a showing. USW alleges that it will suffer irreparable harm in the absence of a stay because the Order will "enable new entrants to under price USW and attract away its customers."⁹ In addition, USW complains that the Order will undermine its ability to charge certain local exchange customers inflated prices in order to support universal service. Even if true, however, neither of these contentions satisfies the standard for a stay.

First, as the courts and the Commission have made abundantly clear, economic loss, including the loss of customers to competition, does not constitute "irreparable harm" for purposes of the Virginia Petroleum Jobbers test.¹⁰ Indeed, in this case, the fact that the Order will help to promote competition to USW is not a reason to overturn it, but to support it. This was, after all, the very purpose of the 1996 Act.

Further, USW's complaint that the Order will undermine its universal service efforts is unavailing. To the extent that USW loses customers as a result of increased competition, such losses were an inevitable consequence of the 1996 Act and their impact on USW's ability to provide universal service is to be addressed in a separate proceeding.

⁷ Iowa Utilities Board, Slip Op. at 132.

⁸ Local Competition Order, 11 FCC Rcd at 11755 (citations and quotations omitted).

⁹ Petition at 16.

¹⁰ See Local Competition Order, 11 FCC Rcd at 11756 (citing Wisconsin Gas Co. v. FERC, 758 F.2d 669, 674 (D.C. Cir. 1985)).

III. CLECs will Suffer Substantial Harm If A Stay Is Granted.

USW alleges that grant of a stay will cause little or no harm to other parties. To the contrary, the opportunity to obtain shared transport on an unbundled basis will be critical for many CLECs seeking to compete in the smaller, "second-tier" local exchange markets. If the Commission were to grant USW's Petition and ultimately require CLECs to use dedicated interoffice transport, it will slow the development of competition and derail the efforts of new competitors to enter the market.

IV. A Stay Would Not Serve The Public Interest.

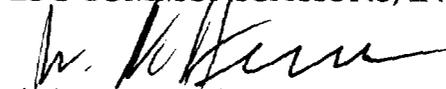
USW has failed entirely to demonstrate that the proposed stay would advance the public interest. Instead, USW merely reiterates its principle argument on the merits, *i.e.*, that the Order will supposedly lead to distortions in the marketplace. In fact, grant of USW's stay request would be contrary to the public interest. If granted, a stay would shelter USW and the other ILECs from a new competition in most smaller local exchange markets while the ILECs tie the Commission up with, potentially, years of litigation. The consequent delays will prevent the public from enjoying the fruits of competition.

CONCLUSION

For all of the foregoing reasons, USW has failed to satisfy even one, much less all four, of the factors from Virginia Petroleum Jobbers Ass'n v. FPC, and its petition for stay pending appeal should be denied.

Respectfully submitted,

LBC COMMUNICATIONS, INC.



/s/ W. Kenneth Ferree

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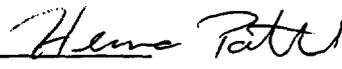
September 22, 1997

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Opposition of LBC was sent by first-class mail, postage prepaid, this 22nd day of September, 1997, to each of the following:

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