

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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JUN 22 1998

In the Matter of
Local Competition Survey

)
) CC Docket No. 91-141
) CCB-IAD File No. 98-102

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

REPLY COMMENTS OF U S WEST COMMUNICATIONS, INC.

U S WEST Communications, Inc. ("U S WEST") hereby submits these reply comments pursuant to the schedule set forth in the Public Notice¹ issued by the Common Carrier Bureau ("Bureau") of the Federal Communications Commission ("Commission"), regarding the proposed collection of information on local exchange competition through a periodic survey.

I. **INTRODUCTION**

A review of the initial comments² filed reveals two major points, which this reply will address. First, the Bureau's delegated authority to conduct its proposed local competition survey is questionable. Second, the comments demonstrate the absence of a clear, common understanding of either (a) the purpose of the proposed survey, or (b) whether the survey is properly designed to gather information that will facilitate the Bureau's achievement of such purpose (whatever that may be). This obvious confusion, in U S WEST's view, reflects a lack of clarity of purpose and design on the part of the Bureau, as revealed by the Notice and the commenters' reaction thereto.

¹ Public Notice, Common Carrier Bureau Seeks Comment On Local Competition Survey, CC Docket No. 91-141, CCB-IAD File No. 98-102, DA 98-839, rel. May 8, 1998 ("Notice").

² Comments were filed by Allegiance Telecom, Inc. ("Allegiance"), the Association for Local Telecommunications Services ("ALTS"), Ameritech, AT&T Corp. ("AT&T"), Bell Atlantic, BellSouth Corporation ("BellSouth"), the General Services Administration ("GSA"), GTE Service Corporation ("GTE"), GVNW Inc./Management ("GVNW"), KMC Telecom, Inc. ("KMC"), MediaOne Group, Inc., ("MediaOne"), MCI Telecommunications Corporation ("MCI"), the National Telephone Cooperative Association ("NTCA"), a group of small, rural independent telephone companies representing themselves as the Rural ILECs, Southern New England Telephone Company ("SNET"), SBC

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Given the deregulatory focus of the governing Telecommunications Act of 1996 (the "Act"), a significant regulatory burden (such as that associated with this proposed survey) should not be imposed without a clearly articulated purpose for doing so, and a well-defined plan demonstrating how the imposition of the burden will actually achieve that purpose. Both the purpose and the plan -- as well as the properly delegated authority for the Bureau -- are missing here.

II. THE BUREAU'S DELEGATED AUTHORITY IS QUESTIONABLE

In its comments, BellSouth picked up on an important point that must not be ignored: the Bureau does not appear to have been properly delegated the authority to impose local competition reporting requirements.³

In most instances, of course, the Bureau may act only pursuant to authority delegated to it by the Commission. The only citation to the source of the Bureau's authority contained in the Notice is to a Memorandum Report and Order in the Expanded Interconnection proceeding (CC Docket 91-141)⁴ -- a 1994 Commission decision that predates the Act by a couple of years. (A look at the caption in this proceeding shows that the instant Notice, while stating right at the outset that it is attempting to "achieve the . . . objectives of the Telecommunications Act of 1996[,]"⁵ was actually issued in the Expanded Interconnection docket -- a clear indication that the Bureau intended to rely directly upon this delegation.)

The delegation contained in the cited Expanded Interconnection Order is expressly based upon a Commission conclusion that:

a broader monitoring program is needed to gather empirical data that will better enable us to monitor the

Communications, Inc. ("SBC"), Teleport Communications Group, Inc. ("TCG"), the Telecommunications Resellers Association ("TRA"), the United States Telephone Association ("USTA"), and U S WEST.

³ See BellSouth at 2.

⁴ See Notice ¶ 1, n. 1, citing Expanded Interconnection with Local Telephone Company Facilities, Memorandum Report and Order, CC Docket No. 91-141, 9 FCC Rcd. 5154, 5177 (1994) ("Expanded Interconnection Order").

⁵ Notice ¶ 1.

development of competition in the interstate access markets.⁶

The Notice does not address whether a delegation to the Bureau to gather competitive data on “interstate access” services may be deemed to include intrastate “local exchange and exchange access.” As BellSouth correctly notes,⁷ given the 8th Circuit Court’s strong views on the limits of Commission jurisdiction under the Act over intrastate activities,⁸ the authority of the Commission to make such a delegation to the Bureau at all is open to question. Without a proper Commission delegation behind it, the proposed local competition survey is simply beyond the Bureau’s power to impose.

III. WHAT IS THE PURPOSE OF THE SURVEY -- AND HAS THE SURVEY BEEN DESIGNED TO ACHIEVE THAT PURPOSE?

The Notice summarily lists a number of “objectives” or “purposes.” It refers to collecting “sufficient information to achieve the regulatory flexibility, pro-competition, and universal service objectives” of the Act.⁹ It talks about achieving “an adequate understanding of local exchange and exchange access competition in diverse areas of the country[.]”¹⁰ It references carriers’ obligations “designed to open telecommunications markets to competitive entry, to promote universal service, and to lessen the need for government regulation [.]”¹¹ It cites the Act’s direction to the Commission “to forbear from regulating telecommunications carriers or services” if

⁶ Expanded Interconnection Order, 9 FCC Rcd. at 5177 ¶ 79 (emphasis added).

⁷ BellSouth at 2.

⁸ See Iowa Utilities Board v. FCC, 120 F.3d 735, pet. for cert. granted sub nom. AT&T Corp. v. Iowa Utilities Board, 118 S. Ct. 879 (1998). A number of commenters referenced the local competition reporting requirements already imposed by various state commissions -- demonstrating that the states understand local competition data collection to be within their intrastate jurisdiction. See, e.g., BellSouth at 5-6; Allegiance at Exhibit 1; AT&T at 16.

⁹ Notice ¶ 1.

¹⁰ Id.

¹¹ Id. ¶ 2.

regulation is “not necessary to protect competitors and consumers” and is in “the public interest.”¹² The Bureau summarizes its purpose by noting the Commission’s need for “better information on the development of local competition in order to avoid ‘one size fits all’ regulation and in order to reduce regulation where appropriate.”¹³

Nowhere in the Notice or in the appended proposed survey does the Bureau address in any systematic way how the information to be requested is somehow “better” than what it already has (through ARMIS reports and other sources) or could get from readily available sources¹⁴ -- or how the survey requesting this “better information” is designed to achieve the objectives listed in the Notice’s Introduction.

The comments reflect that lack of clarity of purpose and design. The commenters are all over the map as to what purpose they read into the Bureau’s Notice -- and then they critique the Bureau’s proposal based upon the purpose that they think the survey ought to try to achieve and whether the survey is properly designed to achieve it.

Ameritech, for example, thinks the purpose of any data collection ought to be to measure market power and study market structure for the purpose of regulatory forbearance. That purpose leads Ameritech to suggest that the Commission should analyze and carefully define, from an economic perspective, the relevant product and geographic markets, supply elasticities, and potential as well as actual entry, and that the market share-type measures dominating the proposed survey be avoided in favor of profitability-type measures (e.g., revenues).¹⁵

Commenters like KMC and Allegiance, on the other hand, view the survey not as a vehicle for obtaining a complete and economically valid picture of local exchange competition, but rather as “a valuable tool for enforcing

¹² Id.

¹³ Id. ¶ 3.

¹⁴ AT&T at 15-18; BellSouth 6; USTA at 3-5; U S WEST at 4-5.

¹⁵ Ameritech at 4-9. U S WEST notes with chagrin the relative absence of economic analysis in the Notice, and wonders how “an adequate understanding of local exchange and exchange access competition” (Notice ¶ 1) can be derived from a survey designed without recourse to such analysis.

the Commission's rules and [incumbent local exchange carriers] ILECs' nondiscrimination obligations."¹⁶ KMC sees the survey as a "useful gauge to determine whether ILECs and [competitive local exchange carriers] CLECs are truly competing on level ground" and as a way of assessing "whether ILECs are providing non-discriminatory access to the local exchange network as required by the 1996 Act."¹⁷ In other words, the survey should be a compliance measurement and enforcement tool -- not a means of monitoring competitive developments.

AT&T goes one step further. To AT&T, the survey's purpose is to provide a vehicle to support AT&T's view that competitive activity is not happening, and at the same time to attribute fault to the ILECs for that presumed inactivity. To determine the level of competitive activity, AT&T focuses on market share.¹⁸ AT&T concludes (based upon no economic analysis whatsoever) that a low market share means that "growth of local

¹⁶ Allegiance at 5. Allegiance made this statement in the context of recommending that the Bureau duplicate an information query regarding collocation propounded on U S WEST by the Washington state commission. U S WEST sees nothing to be achieved by the Commission duplicating the information collection mandates of the states, other than to increase the regulatory burden on carriers without cause.

¹⁷ KMC at 4. This statement by KMC was made in the context of another purely duplicative information collection suggestion: that the Bureau require ILECs to provide, as part of this survey, operations support systems ("OSS") and performance measurement data duplicating that described in the recent OSS NPRM. (See In the Matter of Performance Measurements and Reporting Requirements for Operations Support Systems, Interconnection, and Operator Services and Directory Assistance, CC Docket No. 98-56, RM-9101, Notice of Proposed Rulemaking, FCC 98-72, rel. Apr. 17, 1998 ("OSS NPRM").) Not only is the proliferation of the Commission's uncoordinated and duplicative data-gathering schemes cause for concern --- see U S WEST comments at 5 -- but it would be both ironic and improper for the Bureau to use this survey to mandate reporting that the Commission has proposed, in the OSS NPRM, to be left to the states to require or not. See OSS NPRM ¶¶ 4, 5, 22, 23, 26 (proposing that its appended performance measurements serve as guidelines to the states rather than as legally binding requirements imposed by the Commission).

¹⁸ AT&T argues that "to develop an accurate view of the extent of local competition, it is crucial for the Commission to be able to compare the ILECs' total base of access lines provided to end users in each reporting area with the lines served by CLECs." AT&T at 9. This type of access line comparison may not even be accurately indicative of market share, in that an access line count alone says nothing about the bandwidth or capacity to serve of each such line.

competition. . . is de minimis.”¹⁹ AT&T then states the following:

If competitors as a whole are unable to use the ILEC’s inputs and accompanying processes to provide retail services, it will not only raise serious questions about the ILEC’s ability to meet its obligations under Sections 251 and 252 of the Act to provide nondiscriminatory service offerings, but will also result in survey returns showing insignificant amounts of competition.²⁰

According to AT&T, since nefarious acts on the part of the ILECs will result in survey data showing a lack of competitive activity, the Commission must therefore augment the survey to inquire into “barriers raised by the ILECs.”²¹ Of course, the many other factors could potentially be the reason for the level of competitive activity revealed by survey returns;²² the only factor into which AT&T wants the Bureau to inquire is the presumed bad acts of the ILECs.²³

The broadly differing approaches of the commenters give rise to a question: what is the purpose of this survey? Is it to measure true competition from a legitimate economic standpoint? Is it to measure compliance with the Act’s directives, as a foundation for further enforcement? Is it to support self-serving and barely veiled accusations of illicit activities by the ILECs?²⁴

¹⁹ Id. Of course, as Ameritech eloquently points out, market power, not market share, is the crucial criterion in evaluating whether a market is competitive; market share alone is only “one dimension of any reasonable analysis of market power” and “totally ignores other potentially significant factors.” Ameritech at 6.

²⁰ AT&T at 11-12.

²¹ Id. at 12.

²² As U S WEST said in its initial comments, a survey such as the one appended to the Notice would simply “show the result of CLECs’ decisions to provide (or not to provide) local exchange service, with those decisions having been based upon a myriad of factors, many of which were unrelated to the level of entry opportunity afforded by the ILEC.” U S WEST comments at 7.

²³ AT&T is confusing the level of competitive activity with the reasons for that level; knowing raw numbers reflecting the former, however, should not be mistaken for an understanding of the latter. No one can reasonably conclude that AT&T’s failure to take reasonable steps to provide facilities-based local exchange service in U S WEST’s region is due to AT&T being a poor, little, defenseless entity being victimized by the big, bad BOC. To the extent that AT&T is using this proceeding to intimate that this is the case, U S WEST and all members of the industry would be well-justified in taking offense.

²⁴ The latter two objectives would clearly not be supported by the Expanded Interconnection Order delegation upon which the Bureau relies. See Part II, supra.

The confusion in this regard evidenced in the comments is indicative of the lack of clarity in the Notice itself. This leads to a second question: if the Bureau's purpose in mandating responses to the survey is less than clear, how can the survey instrument possibly have been designed to achieve it?

IV. **NO NEW REGULATORY REQUIREMENTS OF ANY KIND SHOULD BE IMPOSED ABSENT A CLEARLY ARTICULATED PURPOSE, AND A SHOWING THAT THE REQUIREMENT IS DESIGNED TO ACHIEVE THAT PURPOSE**

GTE rightly expresses concern about the proposed survey's potential to become "a process whereby carriers provide mountains of data over a period of years only to be rewarded with an opportunity to provide more data."²⁵ The likelihood that this local competition survey will turn into a "data-in-the-drawer" exercise -- a directionless accumulation of "mountains of data," burdensome to compile and not very useful to deploy -- is obviously enhanced if the Bureau has no clear idea as to why it is collecting the data beyond the need to get "better information."²⁶

Because of the regulatory burden imposed by this data collection,²⁷ the confusion surrounding the purpose of the exercise is particularly troubling. By enacting the Act, Congress intended that excess and unnecessary regulation be eliminated or minimized²⁸ -- and that includes regulatory reporting requirements.²⁹ Indeed, in view of Congress's clear preference for deregulation, no additional regulatory burden should be initiated or imposed by this Commission without a specific articulation of (a) the purpose for which the burden is being imposed, and (b) how that burden is designed to achieve or further that purpose. As the confusion and lack of consensus among the commenters show, the Bureau's Notice fails on both counts.

²⁵ GTE at 2.

²⁶ Notice ¶ 3.

²⁷ See BellSouth at 4; Rural ILECs at 6-10; AT&T at 18.

²⁸ See, e.g., Section 11 of the Act, 47 U.S.C. § 161(a)(2), (essentially reversing any previous presumption favoring continuation of existing regulations by establishing a new regulatory presumption that regulation is not necessary, and commanding that regulations be eliminated which are not proven still to be necessary).

Consequently, U S WEST reiterates its position from its initial comments, that the survey appended to the Notice not be expanded and made mandatory as proposed by the Bureau.³⁰

Respectfully submitted,

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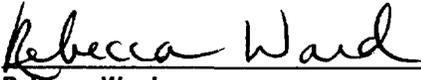
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²⁹ See U S WEST comments at 6, n.15.

³⁰ Id. at 12. If the survey is to be expanded as the Notice proposes, U S WEST continues to support obtaining information from all industry participants, as stated in its initial comments. Id. at 7-8.

CERTIFICATE OF SERVICE

I, Rebecca Ward, do hereby certify that on this 22nd day of June, 1998, I have caused a copy of the foregoing **REPLY COMMENTS OF U S WEST COMMUNICATIONS, INC.** to be served, via first-class United States Mail, postage pre-paid, upon the persons listed on the attached service list.


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