

ORIGINAL

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

In the Matter of)
)
Petition of U S WEST Communications, Inc.) CC Docket No. 99-1
for Forbearance from Regulation as a Dominant)
Carrier in the Seattle, Washington MSA)

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**OPPOSITION OF THE
TELECOMMUNICATIONS RESELLERS ASSOCIATION**

The Telecommunications Resellers Association ("TRA"),¹ through undersigned counsel and pursuant to *Public Notice*, DA 99-104 (released January 4, 1999), hereby opposes the "Petition for Forbearance" filed by U S WEST Communications, Inc. ("Petitioner") in the captioned proceeding on December 30, 1998 (the "Petition"). As TRA will demonstrate below, Petitioner has fundamentally failed to satisfy the statutory test for exercise by the Commission of its Section 10 forbearance authority. Accordingly, TRA urges the Commission to summarily deny the Petition.

Petitioner urges the Commission to "exercise its authority to forbear from regulating U S WEST as a dominant carrier in the provision of high capacity special access and dedicated transport for switched access ("high capacity services") in the Seattle, Washington Metropolitan Statistical Area ("MSA")."² In other words, Petitioner seeks relief from those Part 61 tariffing rules and Part 69 access charge rules that apply to dominant providers of interstate access services.

¹ A national trade association, TRA represents nearly 800 entities engaged in, or providing products and services in support of, telecommunications resale. TRA was created, and carries a continuing mandate, to foster and promote telecommunications resale, to support the telecommunications resale industry, and to protect and further the interests of entities engaged in the resale of telecommunications services. TRA is the largest association of competitive carriers in the United States, numbering among its members not only the large majority of providers of domestic interexchange and international services, but the majority of competitive local exchange carriers.

² Petition at 1.

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In support of its Petition, Petitioner contends that "the market for high capacity services in the Seattle MSA is robustly competitive," leading to "the conclusion that U S WEST lacks the ability to exercise market power in the Seattle area market for high capacity services."³

Elaborating on this claim, Petitioner asserts that:

"(1) U S WEST has a diminishing market share, serving only 20 percent of the retail market and providing one-third of the facilities that serve new demand;

(2) customers (*e.g.*, providing large businesses and other carriers) are highly sensitive to price and other service characteristics;

(3) U S WEST's competitors have the ability to expand their facilities and capture U S WEST's existing business, and there are minimal barriers to entry; and

(4) U S WEST's size does not provide it an insurmountable advantage."⁴

TRA submits that Petitioner's analysis is wide of the mark in all respects.

Section 10 of the Communications Act of 1934, as amended (the "Act"), permits the Commission to "forbear from applying any regulation or any provision of [the Communications Act] to a telecommunications carrier" only if the Commission "determines that (1) enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier . . . are just and reasonable and are not unjustly or unreasonably discriminatory; (2) enforcement of such regulation or provision is not necessary for the protection of consumers; and (3) forbearance from applying such provision or regulation is consistent with the public interest."⁵ Moreover, the Act requires the Commission

³ Id. at 2 - 3, 38.

⁴ Id. at 33.

⁵ 47 U.S.C. § 160(a).

to determine "whether forbearance will promote competitive market conditions, including the extent to which forbearance will enhance competition among providers of telecommunications services."⁶

It belabors the obvious to suggest that the above standard as applied to requests for forbearance from dominant carrier regulation can only be met if the petitioning carrier is no longer dominant. A dominant carrier has long been defined as one "possesse[d] of market power."⁷ Because they are possessed of market power, the behavior of dominant carriers is not adequately disciplined by market forces. Accordingly, enhanced regulatory oversight is necessary both to ensure that dominant carrier rates and charges, as well as practices, are just and reasonable and nondiscriminatory, and to protect consumers and competitors alike.

Thus, before the Commission reclassified AT&T Corporation ("AT&T") as a non-dominant domestic service provider, it first concluded that "AT&T lack[ed] market power in the interstate, domestic, interexchange market."⁸ The Commission forbore from applying tariff filing requirements to non-dominant interexchange carriers ("IXCs") because such carriers lacked market power.⁹ And the Commission extended this detariffing policy to competitive local exchange carriers ("LECs") and competitive access providers ("CAPs") because "CAPs are nondominant, and . . .

⁶ 47 U.S.C. § 160(b).

⁷ Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor, First Report and Order, 85 FCC 2d 1 (1980), Second Report and Order, 91 FCC 2d 59 (1982), Order on Reconsideration, 93 FCC 2d 54 (1983), Third Report and Order, 48 Fed. Reg. 46,791 (1983), Fourth Report and Order, 95 FCC 2d 554 (1983), *vacated sub nom. American Tel. and Tel. Co. v. FCC*, 978 F.2d 727 (D.C. Cir. 1992), *cert. denied sub nom. MCI Telecom. Corp. v. American Tel. and Tel. Co.*, 113 S.Ct. 3020 (1993), Fifth Report and Order, 98 FCC 1191 (1984), Sixth Report and Order, 99 FCC 2d 1020 (1985), *vacated sub nom. MCI Telecom. Corp. v. FCC*, 765 F.2d 1186 (D.C. Cir 1985).

⁸ Motion of AT&T Corp. to be Reclassified as a Non-Dominant Carrier, 11 FCC Rcd. 3271, ¶ 1 (1995), *recon.* 12 FCC Rcd. 20787 (1996).

⁹ Policy and Rules Concerning the Interstate, Interexchange Marketplace, 11 FCC Rcd. 20730 (1996), *recon.* 12 FCC Rcd. 15014 (1997), *pet. for review pending sub nom. MCI Telecommunications Corp. v. FCC*, Case No. 96-1459 (D.C.Cir. Feb. 13, 1997), *stayed pending judicial review, further recon. pending.*

nondominant carriers, 'by definition,' cannot exercise market power," and "competitive LECs do not appear to possess market power," being possessed of "an extremely small share of the interstate access market."¹⁰

The Commission long classified incumbent LECs as dominant because they were the exclusive or near exclusive providers of local exchange and exchange access services, and, as such possessed pervasive market power. Petitioner, however, argues that its market power has been eroded to the point that it is no longer a dominant provider of high capacity services in the Seattle MSA. This contention is predicated in substantial part on Petitioner's claim that "competitive providers have captured almost 80 percent of the retail market for high capacity services."¹¹ While an impressive number, this value is highly misleading.

First, the percentage of the "retail" market allegedly lost by Petitioner to competitors overstates dramatically the competitive inroads made by alternative providers. By focusing on the "retail" market, Petitioner entirely ignores the "wholesale" market. Petitioner trumpets that its share of the former has fallen to 20.7 percent, but downplays its retention of an admitted 71.7 percent of the wholesale market.¹² In other words, Petitioner deceptively claims a 20 percent market share when it actually provides the facilities used to serve nearly 80 percent of the market.

When Petitioner serves the retail market, it generates revenues. It also generates revenues when it serves the wholesale market, and the differential is not that substantial given that the bulk of wholesale sales of high capacity services are to IXC acting as agents for end users.

¹⁰ Hyperion Telecommunications, Inc. Petition Requesting Forbearance, 12 FCC Rcd. 8596, ¶ 23 - 24 (1997).

¹¹ Petition at 3 - 4.

¹² Petition at Attachment A, p. 12.

Because it controls the large majority of the facilities used to provide high capacity service, Petitioner retains the ability to manipulate the price and availability of those facilities to enhance its competitive position and disadvantage competitors. If this were not the case, Petitioner would have been reclassified as nondominant years ago because it has never served a large percentage of the "retail" market, at least as defined to exclude high capacity services provided to IXCs.

Even an 80 percent market share figure likely understates the percentage of the high capacity market controlled by Petitioner.¹³ This is because Petitioner bases its market share analysis on DS1 "equivalent circuits."¹⁴ Use of DS1 "equivalent circuits" distorts Petitioner's competitive analysis of the high-capacity market by assigning undue weight to DS3 circuits. Twenty-eight DS1 circuits will produce substantially more revenue and serve far more customers than a single DS3 circuit. Under Petitioners' methodology, however, a competitive provider of a single DS3 circuit will appear to have the same competitive impact as an incumbent provider of twenty-eight DS1 circuits even though the former is serving a fraction of the customers served by the latter and generating only a third of the revenues generated by the latter. And as Petitioner acknowledges, the market at DS3 capacity and above is more competitive than the market for DS1 service.¹⁵ In other

¹³ It is impossible to fully assess the validity of Petitioner's market share data because Petitioner has provided only a general description of its methodology and little of its raw data. According to Petitioner "quantitative market share data can be coupled with qualitative competitive data to accurately describe and assess the market for high capacity circuits." *Id.* at Attachment A, p. 22. Unfortunately, much of this qualitative data is housed in "proprietary regional and national databases." *Id.* at Attachment A, p. 23. In short, too much is unknown about the methods and the data used by Petitioner to lend credence to its market share figures.

¹⁴ Petition at Attachment A, p. 25.

¹⁵ Petition at Attachment A, p. 7.

words, use of a DS1 equivalent market share measure tends to obscure Petitioner's dominance over such service offerings as multiplexing, interoffice transport, and channel termination elements.

This assessment is confirmed by data submitted by MCI WorldCom, Inc ("MCI WorldCom") in response to a SBC Communications, Inc. petition seeking relief comparable to that sought here by Petitioner and claiming in support of its request that the high capacity market is intensely competitive in fourteen major MSAs. MCI WorldCom advised the Commission that while "somewhat successful in finding alternatives to SBC's DS3 entrance facilities, it continues to purchase 100 percent of multiplexing and over 90 percent of DS1 interoffice and channel terminations from SBC."¹⁶ AT&T Corp. ("AT&T") echoed this assessment in response to an earlier claim by Petitioner that the high capacity market in the Phoenix MSA was intensely competitive:

While AT&T has migrated some (but by no means all) of its DS3 services in the Phoenix area to CLEC facilities, it continues to purchase all of its multiplexing (DS3 to DS1 and DS1 to DS0) services from U S WEST. Additionally, nearly 90% of AT&T's DS1 services are purchase from U S WEST. On a dollar-weighted basis, AT&T estimates that, as of September 1, 1998, U S WEST collects approximately 80% of the dollars that AT&T spends in the Phoenix LATA on high capacity services.¹⁷

Further undermining Petitioner's claim that its market power in the high capacity market has been sufficiently blunted to justify its reclassification as nondominant, as well as its contention that the sensitivity of large business and carrier customers to price and service characteristics warrants such action, is the geographic breadth of the relief for which it has petitioned

¹⁶ Opposition of MCI WorldCom filed in CC Docket No. 98-277 on January 1, 1999, at 14.

¹⁷ Opposition of AT&T filed in CC Docket No. 98-157 on October 7, 1998.

the Commission.¹⁸ Petitioner acknowledges that what competition it faces is concentrated in "central business districts and business-intensive suburbs."¹⁹ Nonetheless, Petitioner seeks forbearance from dominant carrier regulation for the entirety of the Seattle MSA. For entities outside the referenced central business districts and business-intensive suburbs, Petitioner more often than not remains the exclusive source of high capacity services, able, as such, to exercise full market power.²⁰ Entities outside central business districts and business-intensive suburbs,²¹ accordingly, will likely be forced to subsidize Petitioner's competitive pricing and other practices in those areas, to the detriment of consumers, competitors and the public interest as a whole.²²

¹⁸ Also undercutting its reliance upon the price and service sensitivity of large business and carrier customers is Petitioner's failure to disclose the percentage of users of its high capacity services that currently take service under extended-term contracts. Customers of incumbent LEC high capacity services often take service under contract terms of five, ten or more years. To the extent that significant percentages of Petitioner's high capacity service customers are locked into long-term contracts, Petitioner's market power has not been seriously diminished because these customers cannot avail themselves of competitive alternatives. Moreover, Petitioner's market analysis completely overlooks one of the principal reasons for which large corporate users utilize the services of alternative providers of high capacity services -- *i.e.*, redundancy. Entities which use non-incumbent LEC high capacity services for redundancy purposes have not ported their business to competitors, but are making use of competitors' services in conjunction with services provided by Petitioner. Such usage does not represent lost business for Petitioner.

¹⁹ Petition at Attachment A, p. 13.

²⁰ While ruling that "each point-to-point market constitute[s] a separate geographic market," the Commission consolidates "groups of point-to-point markets where customers face[] the same competitive conditions." As the Commission has explained, "[a] geographic market aggregates those consumers with similar choices regarding a particular good or service in the same geographical area." Thus, the Commission has "treat[ed] as a geographic market, an area in which all consumers in that area will likely face the same competitive alternatives for a product." Applications of NYNEX Corp., Transferor, and Bell Atlantic Corp., Transferee, for Consent to Transfer Control of NYNEX Corp. and Its Subsidiaries, 12 FCC Rcd. 19985, ¶ 54 (1997). In other words, MSAs are not "markets" to which forbearance policies can be applied because all consumers throughout the MSAs do not have the benefit of the same competitive choices.

²¹ As the demand for high-speed services, such as DSL-based services, expands in conjunction with increased use of the Internet, it is likely that these more geographically-dispersed entities will become an ever larger percentage of the customer base for high capacity dedicated transport services.

²² Other services, not the least of which is tandem-switched transport (which Petitioners make no claim of a diminution of their market power) could also be used as a source of cross-subsidization, to the detriment of the smaller carriers that must rely upon such services because they do not have the traffic volumes to justify direct-trunked transport.

Likewise, Petitioner remains the exclusive source of high capacity services for entities located in buildings not connected to competitors' networks. It is not surprising then that Petitioner makes much of the number of buildings "lit" by competitors in the Seattle MSA. Standing alone, it may look impressive that there are somewhere between 115 and 285 buildings on competitors' networks,²³ but these values represent a relatively small percentage of the thousands of buildings in the Seattle MSA. A legitimate analysis would, at a minimum, have identified the number of buildings housing potential users of high capacity services before claiming that enough such buildings had been "lit" by competitors to produce a substantial erosion of Petitioner's market power.

Petitioner claims, however, that "competitors have the ability to expand their facilities and capture U S WEST's existing business" and thus that the inability of many potential customers to access alternative sources of service is irrelevant.²⁴ First, Petitioner acknowledges that it would require at least "18 to 24 months" for competitors to install the facilities necessary to serve "the 60 percent of current U S WEST-served locations that are within 1,000 feet of the providers' existing fiber networks," and "serving those customers beyond 1,000 feet would require additional time."²⁵ Grant of the requested relief would, accordingly, be premature even by Petitioner's own estimates.

Second, and more consequentially, Petitioner overlooks all the non-construction activities associated with network buildout. Before construction can commence, rights of way must be secured, permits must be obtained, and negotiations with building owners must be completed. These additional activities add not only to the time required to add a new building to a network, but

²³ It is impossible to discern from its data how many buildings are connected to competitors' networks because Petitioner does not identify which buildings are served by multiple carriers.

²⁴ Petition at Attachment A, p. 33.

²⁵ Petition at Attachment B, p. 3.

the costs of doing so. For example, Petitioner has not factored into its cost estimates the entrance fees most building owners demand or the cost of installing inside wire which most building owners require carriers to bear. And, of course, Petitioner has left out the collocation costs it imposes on competitors seeking to provide a competitive switched transport service.²⁶

Finally, Petitioner's assertion that its "size does not provide it an insurmountable advantage" may or may not be true, but in either event is not the pertinent consideration. The insurmountable advantage which Petitioner possesses derives not from its size, but its control of "bottleneck" facilities. Petitioner asks the Commission to simply ignore the market power it retains in all other segments of the local exchange and exchange access markets. Petitioner can leverage its market power in these other market segments to secure competitive advantages in the market for high capacity services. As discussed above, other market segments would provide a source of cross-subsidy to fund Petitioner's predatory pricing in the Seattle high capacity market.²⁷ Moreover, Petitioner could use its "bottleneck" control over local exchange and exchange access facilities to disadvantage its high capacity services competitors, for example, by degrading the quality of interconnection for such providers or assessing higher interconnection fees.

TRA submits that it is clear that Petitioner has not demonstrated that it no longer possesses market power in the provision of high capacity dedicated transport, as well as local

²⁶ Petition at Attachment B, p. 3. Nor does Petitioner's reliance upon competitors' right to collocate in Petitioner's central offices advance its case. A competitor that availed itself of this opportunity would find itself relying in multiple ways on Petitioner for essential facilities, including, for example, connections between the collocated space and the customer premise and its own switch.

²⁷ The impact of such conduct may well extend beyond the borders of the Seattle MSA. As the Commission has previously recognized, "[i]f an incumbent is able to develop a reputation of aggressively competing via targeted bids with recent entrants by doing so in a handful of markets, it may be able to dissuade potential entrants from entering any of its other markets." Southwestern Bell Telephone Company, Tariff F.C.C. No. 73, 12 FCC Rcd. 19311, ¶ 50 (1997).

exchange and other exchange access, services in the Seattle MSA.²⁸ As such, Petitioner is properly classified as a dominant provider of high capacity and other services in this geographic area. The Commission cannot rule that tariff and access charge regulation of dominant carriers is not necessary to ensure just, reasonable and nondiscriminatory rates, charges and practices, and to protect consumers and competitors without reversing decades of policy and precedent. Moreover, the Commission cannot find that forbearance from dominant carrier regulation in this instance would promote competitive market conditions, thereby enhancing the public interest. As the Commission succinctly noted in granting incumbent LECs a measure of pricing flexibility for special access services:

Care must be exercised . . . in the regulation of LEC pricing during the period of transition from monopoly to competition. . . . [I]nadequate restrictions on LEC special access pricing and rate structure could permit competitive abuses, stifling competitive entry and placing excessive cost burdens on customers of less competitive services.²⁹

Finally, TRA submits that there is no need for the forbearance Petitioner seeks here. The Commission has already afforded Petitioner, and other incumbent LECs, significant flexibility in pricing special access services to meet competition. Under Section 69.123 of the Commission's Rules, Petitioner "may establish a reasonable number of density pricing zones within each study area."³⁰ As described by the Commission, this "system of traffic density-related rate zones" was

²⁸ The Commission should not allow itself to be swayed by a monopolist's distorted perception of what constitutes competition. Regulatory action should be soundly founded in reality, not on a perception of reality which reflects decades of legal and regulatory insulation from competition.

²⁹ Expanded Interconnection with Local Telephone Company Facilities, 7 FCC Rcd. 7369, ¶ 172 (1992), *recon.* 8 FCC Rcd. 127 (1992), *further recon.* 8 FCC Rcd. 7341 (1993), *vacated in part and remanded sub nom. Bell Atlantic Telephone Cos. V. FCC*, 24 F.3d 1441 (D.C. Cir. 1994).

³⁰ 47 C.F.R. § 69.123. Petitioner also has the right to institute volume and term discounts for special access.

designed to "expand the LECs' flexibility in responding to competition" by allowing them to "bring special access rates more in line with costs."³¹ The difference between the pricing flexibility Petitioner now has and that which it seeks here is that Petitioner now must maintain uniform rates across like density zones instead of being able to price without restraint in the Seattle MSA. In short, Petitioner does not wish to reduce prices in areas with comparable cost structures which lack competition. Instead, it desires to use above-cost pricing in these comparable cost structure areas to subsidize its competitive pricing in the Seattle MSA. This is hardly a pricing scenario designed to further the public interest.

By reason of the foregoing, the Telecommunications Resellers Association strongly urges the Commission to deny as premature the regulatory relief sought here by U S WEST Communications, Inc.

Respectfully submitted,

**TELECOMMUNICATIONS
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³¹ Expanded Interconnection with Local Telephone Company Facilities, 7 FCC Rcd. 7369 at ¶ 179.

CERTIFICATE OF SERVICE

I, Evelyn Correa, do hereby certify that a true a correct copy of the foregoing document has been served on the individuals listed below by the United States First Class Mail, postage prepaid, this 18th day of February, 1999.

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A handwritten signature in cursive script, appearing to read 'Evelyn Correa', is written over a horizontal line.

Evelyn Correa