

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Review of Regulatory Requirements for)
Incumbent LEC Broadband)
Telecommunications Services)

CC Docket No. 01-337

REPLY COMMENTS
of the
GENERAL SERVICES ADMINISTRATION

GEORGE N. BARCLAY
Associate General Counsel
Personal Property Division

MICHAEL J. ETTNER
Senior Assistant General Counsel
Personal Property Division

GENERAL SERVICES ADMINISTRATION
1800 F Street, N.W., Room 4002
Washington, D.C. 20405
(202) 501-1156

Economic Consultants:
Snaveley King Majoros O'Connor & Lee, Inc.
1220 L Street, N.W., Suite 410
Washington, D.C. 20005

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SUMMARY

In these Reply Comments, GSA responds to the comments of thirty-nine parties concerning the regulatory requirements for the provision of broadband service by the ILECs.

GSA agrees with SBC and other ILECs that intermodal competition from cable modem providers has limited ILEC market power with respect to residential broadband services in many localities. The ILECs should be permitted to petition the Commission for non-dominant treatment of residential broadband services in localities facing such pervasive competition.

On the other hand, GSA agrees with the CLECs and other parties that the ILECs retain significant market power in the business and wholesale broadband markets. The ILECs should not be granted nondominant status in these markets.

GSA also agrees with those parties who contend that the Commission's unbundling, collocation and Computer Inquiry nondiscrimination regulations should be retained. These rules remain necessary to promote intramodal competition in the local telecommunications market.

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GENERAL SERVICES ADMINISTRATION**

The General Services Administration ("GSA") submits these Reply Comments on behalf of the customer interests of all Federal Executive Agencies ("FEAs") in response to the Commission's Notice of Proposed Rulemaking ("Notice") released on December 20, 2001. In the Notice, the Commission seeks comments and replies on the appropriate regulatory requirements for the provision of domestic broadband telecommunications services ("broadband services") by incumbent local exchange carriers ("ILECs").

I. INTRODUCTION

Pursuant to Section 201(a)(4) of the Federal Property and Administrative Services Act of 1949, as amended, 40 U.S.C. 481(a)(4), GSA is vested with the responsibility to represent the customer interests of the FEAs before Federal and state

regulatory agencies. The FEAs require a wide array of interexchange and local telecommunications services throughout the nation. From their perspective as end users, the FEAs have consistently supported the Commission's efforts to bring the benefits of competitive markets to consumers of all telecommunications services. Until such time as competition provides an effective control over ILEC prices, however, GSA believes that the Commission must continue to maintain rules which assure just and reasonable rates.

On October 3, 2001, SBC Communications Inc. ("SBC") filed a petition requesting an expedited ruling that it is non-dominant in the provision of broadband services, and asking the Commission to forbear from dominant carrier regulation of those services.¹ The Notice seeks comment on SBC's petition, the nature of the market for domestic broadband services, and the appropriate regulatory requirements for the provision of broadband services by ILECs given current market conditions.

On March 1, 2002, comments were filed by thirty-nine parties, including:

- SBC and 8 other ILECs and ILEC representatives;
- The Competitive Telecommunications Association ("CompTel"), The Association for Local Telecommunications Services ("ALTS") and 13 competitive local exchange carriers ("CLECs");
- 3 state regulatory commissions, and
- The Ad Hoc Telecommunications Users Committee ("Ad Hoc")

In these Reply Comments, GSA responds to the comments and proposals of these parties.

¹ SBC Petition For Expedited Ruling that It Is Non-Dominant In Its Provision of Advanced Services And For Forbearance From Dominant Carrier Regulation of those Services, filed October 3, 2001.

II. ILEC MARKET POWER ANALYSES ARE FLAWED

SBC and other ILECs propose only two broadband product markets for analysis: "larger business" and "mass."² The ILECs see their entire service territory, or the entire nation, as the relevant geographic market for analysis.³

These categorizations are much too broad. With respect to product markets, larger businesses do have requirements for high-volume broadband services, such as Frame Relay and Asynchronous Transfer Mode ("ATM") switching, which clearly set them apart as a separate product market. The "mass" market, however, is not monolithic, as will be shown below, and must be divided into three submarkets for analysis: residential, small and medium enterprise ("SME"), and wholesale.

The ILEC's geographic market analysis is also incorrect. As AT&T explains, the geographic markets that must be assessed are unquestionably local because the competitive constraints on the ILECs' various broadband offerings vary widely by locality.⁴ WorldCom agrees and notes the Commission found in the AOL/Time Warner Merger Order that "[t]he relevant geographic markets for residential high-speed Internet

² Comments of SBC, p. 15-31; Verizon, pp. 11-12; BellSouth, pp. 30-31; Qwest Communications International Inc. ("Qwest"), pp. 12-24.

³ Comments of SBC, pp. 32-35; Verizon, pp. 22-24; BellSouth, pp. 30-31; Qwest, pp. 24-31.

⁴ Comments of AT&T Corp. ("AT&T"), pp. 15-16. See, also, Comments of CompTel, p. ii.

access services are local.”⁵

The following analysis treats each relevant broadband market in turn.

A. ILECs Possess Significant Market Power In The Large Business Broadband Market

The foundation for the ILECs' claim that they lack market power in the large business market is their contention that their share of Frame Relay and ATM revenues is less than 20 percent.⁶ As AT&T points out, however, this statistic is highly misleading.⁷

Most large business broadband requirements involve interLATA transport. The ILECs' share of total large business broadband revenues has been limited because the Regional Bell Operating Companies (“RBOCs”) have been prohibited from providing interLATA services. The market share picture is entirely different when intraLATA revenues are viewed in isolation. As AT&T demonstrates, over 90 percent of local Frame Relay and ATM revenues were captured by the ILECs in 2000.⁸

It is likely that the ILECs' control of local special access facilities has contributed to their very high share of intraLATA large business broadband revenues. As the RBOCs gain permission to provide interLATA services, their market share of total large

⁵ Comments of WorldCom, Inc. (“WorldCom”), p. 10, citing Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations by Time Warner Inc. and America Online, Inc., Transferors, to AOL Time Warner, Inc., Transferee, Memorandum Opinion and Order, 16 FCC Rcd 6547, CS Docket No. 00-30 (2001) (“AOL Time Warner Merger Order”), para. 74.

⁶ Comments of SBC, p. 42; Verizon, p. 20; BellSouth, pp. 44-45; Qwest, pp. 43-46.

⁷ Comments of AT&T, pp. 23-26.

⁸ Id., p. 25. See also, Comments of Covad Communications Company (“Covad”), p. 12.

business broadband revenues can be expected to rise. Indeed, the ILECs' control of local special access facilities may allow them to attain market shares for total large business broadband revenues comparable to their existing market shares for local large business broadband revenues. Given this situation, it would be premature to declare the ILECs non-dominant in the large business broadband market.

B. ILEC Market Power Is Limited In The Residential Broadband Market In Many Localities

SBC and other ILECs contend that they should be declared non-dominant in the mass market for broadband services because intermodal competition deprives them of significant market power.⁹ SBC notes that its share of this market is only about thirty percent.¹⁰

The principal competition to the ILECs' Digital Subscriber Line ("DSL") broadband service is the cable modem service provided by cable television operators. The Commission's latest report on residential and small business broadband deployment shows that there are twice as many cable modem lines (5.0 million) as DSL lines (2.5 million) nationwide as of June 30, 2001.¹¹ Significantly, in the first half of 2001, many more cable modem lines were added (1.7 million) than DSL lines (.9

⁹ Comments of SBC, pp. 35-41; Verizon, pp. 13-19; BellSouth, pp. 32-44; Qwest, pp. 36-43.

¹⁰ Comments of SBC, p. 36.

¹¹ *In the Matter of Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, CC Docket No. 98-146, *Third Report*, FCC 02-33, Appendix C, High Speed Services for Internet Access: Subscriberhip as of June 30, 2001, Table 3: Residential and Small Business High-Speed Lines (Over 200 kbps in at Least One Direction), rel. Feb. 6, 2002.

million).¹² The Commission's report also shows that wireless and satellite providers provide only minimal competition to DSL and cable modem services.¹³

As AT&T points out, however, cable modem service is only available to about 70 percent of residential households.¹⁴ In localities lacking a cable modem provider, ILECs face virtually no competition to their DSL service. In those localities the ILECs clearly possess the market power of a dominant carrier.

In summary, therefore, the ILECs' residential broadband market power has been limited by cable modem competition in many – but not all – localities.

C. ILECs Posses Significant Market Power In The Small And Medium Enterprise Broadband Market

As noted above, SBC and other ILECs do not recognize sub-markets within the mass market for broadband services. AT&T explains, however, that SMEs must be subjected to separate market power analysis.¹⁵

AT&T observes that few businesses are served by cable, and only 5 percent of cable modem subscribers are business.¹⁶ Indeed, Ad Hoc notes that “the networks constructed by cable service providers are largely designed to reach residential dwellings, not business locations. With the possible exception of local retail shopping areas interspersed within or adjacent to residential neighborhoods, cable TV

¹² Id.

¹³ Id., Wireless and satellite providers have a combined market share of less that three percent. See also, Comments of US LEC Corp. (“US LEC”), p. 18.

¹⁴ Comments of AT&T, p. 42.

¹⁵ Id., pp. 40-41.

¹⁶ Id., p. 41.

infrastructures generally do not 'pass' business areas."¹⁷ Cbeyond Communications and NuVox ("Joint Commenters") state that in NuVox's experience "intermodal competition does not exist in the small-to-medium sized business market to any significant degree."¹⁸ ALTS terms the situation bleak "for small business customers, who have no access to cable modem facilities."¹⁹

The significant intermodal competition provided by cable modem providers in the residential broadband market simply does not extend to SMEs. The ILECs, therefore, possess significant market power in the SME broadband market.

**D. ILECs Possess Significant Market Power
In The Wholesale Broadband Market**

As WorldCom explains, Internet Service Providers ("ISPs") have three potential choices for obtaining broadband services on a wholesale basis: ILECs, CLECs, and cable companies.²⁰ At this point, WorldCom notes, offerings by wireless and satellite providers are not viable alternatives for reaching the vast majority of residential customers.²¹

As a practical matter, however, the ILECs retain significant market power in this product market. Cable operators have no general legal obligation to provide ISPs with nondiscriminatory access, and there is little such provisioning going on. Similarly,

¹⁷ Comments of Ad Hoc, p. 17.

¹⁸ Comments of Joint Commenters, p. 28.

¹⁹ Comments of ALTS, p. 3.

²⁰ Comments of WorldCom, p. 11.

²¹ Id.

CLECs provide some ISPs with digital subscriber line ("DSL") service, but over 90 percent of DSL service is provided by the ILECs.²² Even when DSL service is provided by a CLEC, it often involves the leasing of ILEC facilities. Accordingly, ISPs are essentially dependent upon the ILECs and their facilities for access to wholesale broadband services.

The Information Technology Association of America ("ITAA"), the principal trade association of the computer software and services industry, concurs in this analysis, and states:

Because the ILECs continue to have the ability and incentive to discriminate in the provision of wholesale mass-market broadband telecommunications services, it would not be appropriate to reclassify them as non-dominant or to eliminate existing regulations applicable to these services.²³

GSA agrees with ITAA that it would be premature to declare the ILECs non-dominant in the wholesale broadband market .

III. MOST ILEC PROPOSALS FOR REGULATORY CHANGE SHOULD BE DENIED

A. No Changes Are Required In The Regulation Of Business and Wholesale Broadband Services

The ILECs' request to be classified as non-dominant in the provision of business and wholesale broadband services must be denied. As explained above, the ILECs possess significant market power in these markets.

²² *Id.*, p. 15. See also, Comments of US LEC, pp. 14-15.

²³ Comments of ITAA, p. 23.

B. ILECs Should Be Granted Non-Dominant Treatment For Residential Broadband In Localities Facing Pervasive Intermodal Competition

As discussed above, ILEC broadband market power is limited by intermodal competition from cable modem operators in many residential localities. As WorldCom notes, however, even in these localities, there are essentially only two vertically-integrated suppliers: the ILEC and the local cable television company.²⁴

A duopoly such as this is not likely to bring all of the benefits of a fully competitive market to consumers. The situation will be improved, of course, if CLECs succeed in the provisioning of DSL over ILEC lines, and if satellite and wireless providers are able to develop viable competing products.

On the other hand, as the ILECs contend, it is not fair to consider them "dominant" carriers in markets in which their cable modem competitors successfully compete on a virtually unregulated basis.²⁵ Economists Alfred Kahn and Timothy Tardiff note the "absurdity of shackling a competitor running in second place."²⁶ The ILECs, therefore, should be permitted to petition for non-dominant status with respect to residential broadband in any locality in which they face pervasive intermodal competition. Such a finding would relieve the ILECs of tariff filing requirements and pricing constraints.

²⁴ *Id.*, pp. 12-14. See also, Comments of Comptel, p. 13; DSLNET Communications, LLC, Focal Communications Corporation and Pac-West Telecom, Inc., p. 11.

²⁵ Comments of SBC, pp. 55-65; Verizon, pp. 25-30, BellSouth, pp. 45-53; Qwest, pp. 56-59.

²⁶ Comments of Verizon, Exhibit C, Declaration of Alfred E. Kahn and Timothy J. Tardiff, December 18, 2001, para. 18.

Non-dominant treatment of ILEC residential broadband services in localities subject to pervasive competition is not only fair, it also serves to encourage broadband investment and deployment, consistent with the Commission's goals.²⁷

**C. Regulations That Promote Intramodal Competition
Must Be Retained**

SBC and other ILECs also seek relief from the Commission's network unbundling, collocation and Computer Inquiry nondiscrimination regulations.²⁸ These requests must be denied.

The limited intermodal competition in the residential broadband market discussed above does little to diminish the pervasive market power of the ILECs in the provision of local telecommunications transport services. According to the Commission's latest local competition report, over 97 percent of end-user access lines are owned by the ILECs.²⁹ Ad Hoc notes that the ILECs "have continuing market power over an essential bottleneck facility, namely, the "final mile" or local loop."³⁰ Wisconsin sees the ILECs as "the gatekeepers of the bottleneck facilities that lead to that last mile to the consumer."³¹ The ability of CLECs to provide effective competition to the ILECs in the long-run is dependent upon their having non-discriminatory access, at just and reasonable rates, to these ILEC bottleneck facilities.

²⁷ Notice, para. 7.

²⁸ Comments of SBC, pp.8-9; Verizon, pp. 41-46; BellSouth, pp. 53-55; Qwest, pp. 59-60.

²⁹ Local Telephone Competition: Status as of June 30, 2001, released February 27, 2002, Tables 1 and 4. ILECs own 186.8 million of 191.8 million end-user lines.

³⁰ Comments of Ad Hoc, p. 27; See also, Comments of Comptel, pp. 5-8.

³¹ Comments of the Public Service Commission of Wisconsin ("Wisconsin"), p. 1.

Competition in the local exchange and exchange access markets is fragile at best. The Commission's unbundling, collocation and Computer Inquiry rules must remain in effect if the Commission's goal of full and open competition in the local market is to ever be realized. As the Association of Communications Enterprises ("ASCENT") states:

The Commission cannot, and from a public interest perspective, should not, sacrifice local telecommunications competition in its zeal to prompt deployment of advanced services capability.³²

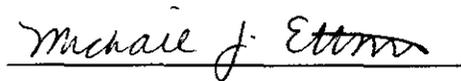
³² Comments of ASCENT, p. 6.

IV. CONCLUSION

As a major user of telecommunications services, GSA urges the Commission to implement the recommendations set forth in these Comments.

Respectfully submitted,

GEORGE N. BARLCLAY
Associate General Counsel
Personal Property Division



Michael J. Ettner
Senior Assistant General Counsel
Personal Property Division

GENERAL SERVICES ADMINISTRATION
1800 F Street, N.W., Rm. 4002
Washington, D.C. 20405
(202) 501-1156

April 22, 2002

CERTIFICATE OF SERVICE

I, MICHAEL J. ETTNER, do hereby certify that copies of the foregoing "Reply Comments of the General Services Administration" were served this 22nd day of April, 2002, by hand delivery or postage paid to the following parties.

The Honorable Michael K. Powell
Chairman
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

William F. Caton
Acting Secretary
Federal Communications Commission
445 12th Street, S.W. TW-A325
Washington, D.C. 20554

The Honorable Kevin J. Martin
Commissioner
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Editorial Offices
Telecommunications Reports
1333 H Street, N.W., Room 100-E
Washington, D.C. 20005

The Honorable Michael J. Copps
Commissioner
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Ms. Edith Herman
Senior Editor
Communications Daily
2115 Ward Court, N.W.
Washington, D.C. 20037

The Honorable Kathleen Q. Aberthany
Commissioner
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Qualex International
Portals II
445 12th Street, S.W.
Room CYB402
Washington, D.C. 20554

Ms. Janice Myles
Policy & Program Planning Division
Federal Communications Commission
236 Massachusetts Avenue, N.E. - Ste 110
Washington, D.C. 20002

