



February 22, 2011

Sharon Gillett
Chief
Wireline Competition Bureau
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: Special Access Rates for Price Cap Local Exchange Carriers, WC Docket No. 05-25

Dear Ms. Gillett:

This letter is Sprint Nextel's (Sprint's) response to USTA's December 1, 2010¹ letter and Verizon's January 27, 2011 comments² in this docket. Both of these submissions ask the Wireline Competition Bureau (the "Bureau") to expand and "clarify" its recent voluntary data request regarding special access services (the "Data Request PN"). The Bureau should reject USTA's and Verizon's requested expansion as it considers a second voluntary data request and a mandatory data request.

USTA and Verizon ask the Bureau to significantly change the data request on the theory that the Data Request PN does not seek adequate information about competition and potential competition. The Data Request PN, however, already requests expansive data on both competition and on potential competition, and the changes suggested by USTA and Verizon generally would not improve the request. Indeed, as explained below, USTA's and Verizon's proffered expansion of the data request would cause unnecessary delay and expense and would undermine rather than improve the Commission's ability to analyze competition. Thus, although it might ultimately prove necessary to tweak or modify the Data Request PN before issuing a mandatory data request, any modifications should be made in light of real problems identified in the actual submissions, not on the basis of the unnecessary and counter-productive proposals suggested by USTA and Verizon.

I. The Data Request PN Seeks Adequate Data on Actual Competition.

The most important element of the Data Request PN is the request concerning the number, location, and type of providers' "connections." As is clear from the record, this is the

¹ Letter from Glenn Reynolds, Vice President for Policy, USTelecom, to Marlene Dortch, Secretary, FCC, WC Docket No. 05-25, RM-10593 (filed Dec. 1, 2010) ("USTA Ex Parte").

² Comments of Verizon on the Data Requested for Special Access Notice of Proposed Rulemaking, WC Docket No. 05-25, RM-10593 (filed Jan. 27, 2011) ("Verizon Comments").

most reliable indicator of competition.³ Verizon and USTA, however, criticize the request as inadequate for four reasons, all of which are incorrect. Verizon first complains that the Data Request PN will not produce useful data because it is voluntary and competitors have the option not to respond.⁴ Of course, it is now clear that competitors *did* respond. The Bureau received numerous responses from at least 25 companies, many of which are “competitive” providers. While it may be true that not every potential competitor responded, a large cross section of the industry did respond, and if competition is as vibrant as the ILECs claim, this should be reflected in the responses. Nor is there any reason to believe, as Verizon suggests, that any class of competitive providers would have a disincentive to provide responses voluntarily. The breadth of responses demonstrates otherwise; indeed, the list of companies responding to the voluntary request reads like a who’s-who of the industry. And to the extent that a particular competitor did not respond, this problem will soon be fixed when the Commission issues its mandatory data request.

Second, Verizon and USTA also criticize the Data Request PN for seeking data from December 2009 rather than more recent 2010 data.⁵ In Verizon’s view, the competitive landscape is changing so fast that data from 2009 are no longer relevant. To support this view, it cites a few out-of-context quotations from a press release that mention that competitive providers grew their retail market share for Ethernet services in 2010.⁶ But language in the same press release explicitly rejects Verizon’s view that the competitive landscape has changed drastically since 2009. Indeed, the press release characterizes the growth in 2010 as merely “continuing a trend that began in the second half of last year” (*i.e.*, 2009).⁷ Nor is it true, as Verizon implies, that the continuation of this trend substantially reduced the ILECs’ dominance. As the press release also emphasizes, “Incumbents AT&T and Verizon showed solid performance [in 2010] and remain at the top of the U.S. Ethernet Leaderboard.”⁸ Furthermore, Verizon fails to account for the fact that many alternative providers sell services *over ILEC facilities*. Such resale does not represent real competition to ILEC dominance. By claiming that any service provided by an alternative vendor results in competitive pressure, while ignoring the extent of so-called “type 2” special-access services, Verizon overestimates competition.

Verizon similarly relies on alleged growth in the cable industry’s “commercial services” revenue. But commercial services and special access are not equivalent, and as others have

³ *Data Requested in Special Access NPRM*, WC Docket No. 05-25, RM-10593, Public Notice, at III.A., III.B.1., III.E.1. (rel. Oct. 28, 2010) (“Data Request PN”).

⁴ Verizon Comments at 4-7.

⁵ Verizon Comments at 10; USTA Ex Parte at 3.

⁶ Verizon Comments at 5.

⁷ Press Release, Vertical Systems Group, Mid-2010 U.S. Business Ethernet Leaderboard: Competitive Providers and Cable MSOs Continue to Gain Port Share During the First Half of 2010 (Aug. 16, 2010) at http://www.verticalsystems.com/prarticles/stat-flash-0810-Mid2010_US-Leaderboard.html.

⁸ *Id.*

previously explained, commercial customers do not generally view cable service as a substitute for special access.⁹

In any event, Verizon's complaints about the age of data will likely turn out to be moot. Although Sprint believes that year-old data is sufficient to allow the Bureau to evaluate competition, Sprint, Verizon,¹⁰ and other respondents provided very recent data—in the case of Sprint and Verizon, data from late 2010. Moreover, to the extent that the Bureau is concerned that this data may become stale, this only shows that the Bureau must move quickly to analyze the data and provide relief.

Third, Verizon and USTA ask the FCC to broaden the data request to include virtual collocation arrangements, including those involving collocation hotels.¹¹ This request is meritless. The Data Request PN seeks data on collocation only in order to help the Bureau determine how to replace the clearly irrational pricing-flexibility triggers. The current pricing-flexibility triggers only take into account CLEC collocations in ILEC central offices, not collocations or collocation-like facilities in carrier hotels or other non-ILEC facilities. Thus, virtual collocations or collocations in carrier hotels are irrelevant in the current system.

Data about collocation is, nevertheless, important, and the Bureau could improve future data requests by ensuring that question III.B.2. (which seeks information on collocation) collects data to assist in designing replacement triggers. For example, the triggers only count those collocations which are “operational” and which are connected to non-ILEC transport. The data request does not make these distinctions. The FCC should therefore clarify that competitors should only supply information regarding collocations which are both operational and connected to non-ILEC transport.

Finally, Verizon complains that the data request does not “specifically seek information about competition using other providers' facilities, or about the connections that competitive providers sell to other providers on a wholesale basis.”¹² But the Bureau's December 23 clarification already addresses this point directly, explaining that providers should *not* report connections they merely lease from other providers but also explaining that those connections should be reported by the ultimate *owner*.¹³ This clarification reaches the right result: when a dominant ILEC leases connections to a competing provider, the ILEC has every bit as much power to extract a supracompetitive price from the competing provider (who in turn must pass

⁹ Comments of tw telecom, WC Docket No. 05-25, RM-10593, at 11-12 (filed Jan. 19, 2010); Comments of Ad Hoc Telecommunications Users Committee, WC Docket No. 10-188, at 5 (filed Oct. 15, 2010).

¹⁰ Verizon Comments at 10; Verizon Methodology for Data Submitted in Response to Data Request, WC Docket No. 05-25, RM-10593, at 3 (filed Feb. 4, 2011) (explaining that the data was provided as of November and December 2010).

¹¹ Verizon Comments at 11-12; USTA Ex Parte at 2.

¹² Verizon Comments at 12.

¹³ *Clarification of Data Requested in Special Access NPRM*, WC Docket No. 05-25, RM-10593, Public Notice, at 1-2 (rel. Dec. 23, 2010).

through this expense to the end user) as it would if it sold the connection directly to an end user. Thus, when a dominant ILEC leases connections to other providers, they are properly attributed to the ILEC rather than the competing provider.

II. The Data Request PN Seeks Adequate Data on Potential Competition.

Verizon and USTA similarly criticize the data request as it relates to potential competition. But the Data Request PN clearly and thoroughly addresses potential competition. It requests network facility maps and information about any “business rule that [providers] use to determine whether to build a channel termination to a particular location” and “reasons why even if [the provider’s] business rule suggests that it would make sense to build, [the provider] would not.”¹⁴ This information will allow the Commission to analyze when competitors would expand their services to buildings they do not currently cover—and whether they would be able to do so within a reasonable timeframe in response to a price increase by an incumbent provider. Understanding the location of facilities and how “build-buy” decisions are made, supplemented with demand data already readily available from sources like GeoResults, will allow the Commission to apply or improve the model developed by the Department of Justice (“DOJ”) to determine when it is economical for a provider to deploy to a new building. Specifically, DOJ found that a competitor will deploy: (1) to a building within one-tenth of a mile from its facilities only if customers in a building would purchase at least the equivalent of 2 DS-3s (approx. 88 Mbps) from that carrier; and (2) to a building within one mile from its facilities only if it could sell at least the equivalent of an OC-48 (approx. 2.4 Gbps).¹⁵

A. It Would Be Unhelpful and Unnecessary to Ask Providers Where They Are “Capable of Providing” Service.

USTA and Verizon suggest, nonetheless, that to evaluate potential competition the Bureau should solicit information about where providers offer or *are capable of providing* high-capacity services.¹⁶ This language is problematic for several reasons. First, the language is too broad. The Commission correctly has made clear that it does not intend to seek data about a provider’s ability to offer services using the facilities of a competitor. This is wise because such information would pollute data about real competition with data about resold incumbent services masquerading as competitive connections.¹⁷ USTA’s expansive language, however, would introduce just this flaw into the Commission’s data, because if respondents provide data on every location where they “offer or are capable of providing high-capacity services” they would have to include resold services.

¹⁴ Data Request PN at III.D.2.

¹⁵ See Declaration of W. Robert Majure, *United States v. SBC Comms., Inc.*, No. 05-02102, Docket Entry 133-2 (D.D.C. Aug 4, 2006).

¹⁶ Verizon Comments at 10; USTA Ex Parte at 2.

¹⁷ See, e.g., Data Request PN at III.A., III.B.1.

Second, the language is too vague to be useful because it fails to provide a workable definition of when a provider is “capable” of providing service. Although providers may be “capable” in the abstract of providing service to any building near their network, a multitude of real-world factors may prevent them from actually competing, as properly recognized in Section III.D. of the Data Request PN. For example, even when a provider is “capable” of providing service in the abstract, the provider’s abstract capabilities are relevant only if the provider can deploy services within a timeframe demanded by consumers. If there is demand for service at 1,000 buildings but competitors can build out to only 20 per year, the remaining 980 are captive to the incumbent.¹⁸ USTA’s request that the Bureau replace the Data Request PN’s careful language with vague references to abstract capability would therefore be counterproductive.

B. It Would Be Unhelpful and Unnecessary to Query Providers’ Future Plans For Expansion.

USTA and Verizon next ask the Commission to seek data or maps showing the locations where competitive providers intend to provide service over the next two years.¹⁹ This request is unnecessary and would be unproductive. First, as explained above, the Data Request PN already solicits sufficient data to analyze actual and potential competition, including both where competitive providers have facilities, and how they decide where to build further facilities. These data are the best indicator of where competitive providers “intend to provide service” over the next two years, and are certainly the best indicator of where they are capable of providing service within the next two years. Thus this new information would add nothing beyond that already contained in the data already collected, and is therefore not necessary. Moreover, competitive providers in most cases do not even have the alternative type of information that USTA and Verizon seek, so the request would be unproductive. Competitive providers do not typically plan where they will provide service two years in advance, especially as regards the connections to customer locations that are at issue in this data request. Instead, they must respond to customer requests for service at specific locations, and make their determinations of where to provide service accordingly. Finally, even to the extent that the data do exist, they would be so speculative as to be unreliable.

C. It Would Be Futile and Counterproductive to Request Data on Unsuccessful Bids.

USTA and Verizon also urge the Commission to seek data regarding competitors’ unsuccessful bids to provide backhaul and other high-capacity services.²⁰ But this request would be unproductive because competitors simply do not retain a database of unsuccessful bids. And even if the Commission could acquire some limited number of records of unsuccessful bids, such spotty data would not allow the Commission to gain any reliable understanding of the situation even within an MSA, undermining the Commission’s ability to analyze competition comprehensively.

¹⁸ See Lee Selwyn, Economist Workshop Tr. 143-47 (July 19, 2010).

¹⁹ Verizon Comments at 10; USTA Ex Parte at 2.

²⁰ Verizon Comments at 10; USTA Ex Parte at 2.

The shortage of available data would be exacerbated by a second problem: bids typically propose a single price for a wide range of services, including services that are not relevant in this proceeding. Importantly, competitive providers usually provide bids for services that encompass more than the channel termination services on which the Data Request PN focuses, including transport and even non-telecommunications services, all covered by a single proffered price. For example, bids often include transport services and services which combine transmission components (special access) as an integrated part of a retail TDM or Ethernet-based product (e.g., channelized DS-1 Internet access, voice circuits, and VPN Ethernet). Moreover, the price of a bid often includes services for more than one building or tower. As a result, disaggregating a failed bid's price for special access at a particular site would be difficult or impossible.

Even putting aside these practical problems, however, using bid data would be a mistake for more fundamental, conceptual reasons. A losing bid is likely to tell the FCC very little about the state of competition, which depends not just on the presence of multiple bids but on the ability of those bids to discipline the incumbent's prices. Failed bids may provide no price discipline if customers do not consider them to be equivalent to the incumbent's. That may happen, for example, if the provider's network is not comprehensive enough to serve all (or at least a substantial number) of the customer's sites or because the provider is not seen as a reliable or stable enough partner.²¹ Similarly, a customer may be unwilling to consider an otherwise acceptable bid because it contains onerous terms and conditions. In each of these cases, a failed bidder may look like a potential competitor, but if the customer does not view the provider as a credible contender, there is no true competition. In short, the only reliable way to know that a provider is a viable competitor is to determine that it has placed *successful* bids for the building or cell site in question. Collecting information about failed bids is a conceptually flawed endeavor.

D. It Would Be Unhelpful and Unnecessary to Seek Maps of Non-Fiber Facilities.

Finally, the FCC should also reject USTA's and Verizon's requests that the Commission expand the request by seeking maps of all facilities, regardless of technology, rather than maps of fiber facilities.²² This would be an enormous change in that all companies would submit maps of any facilities, regardless of the facilities' usefulness in providing services that compete with ILEC special access service offerings. As a result the FCC could get maps that mix together facilities that can be used to provide special access channel termination with those that cannot. The Commission could receive data on DSL, residential cable broadband, or even twisted-pair voice circuits. This information would represent a massive expansion of the data request and, as explained in Part II.A. above, would produce information irrelevant to the FCC's inquiry and would only make the FCC's task more difficult and force respondents to waste resources.

²¹ Of course, to the extent that a bid would provide service using facilities from the ILEC, that bid would provide little, if any, competitive discipline to the ILEC's pricing of special access.

²² Verizon Comments at 13; USTA Ex Parte at 3.

It is correct to restrict the request in Section III.B.3. to fiber facilities. Fiber facilities, while far from adequate alone to provide competition to ILEC special access dominance, are almost always a prerequisite for competition. Therefore, while the FCC asks about actual competition in Section III.B.1., Section III.B.3.'s focus on these fiber facilities allows the Commission to examine potential competition because virtually any potential competitor would have some fiber facilities (even if the presence of these facilities alone are not evidence of competition) in an MSA wherever it competes. This is even true for competitors using microwave facilities. And even if there are some rare situations where fiber plays no part in a competitor's network, the FCC's data request is still adequate. This is because Section III.B.1. and its accompanying filing specification in Appendix A specifically ask for the type of facility used to provide connections. Therefore, if Section III.B.1. produces the unlikely result that substantial competition exists without any fiber facilities, the FCC will learn of this situation and can account for it in its analysis. But the additional cost to data providers that would be created by the expansion sought by USTA, as well as the added confusion that a flood of irrelevant and possibly misleading data would create for the FCC, clearly outweigh the unlikely usefulness of expanding Section III.B.3. so dramatically.

If, nonetheless, the FCC determines that it must expand the question to include additional data related to microwave services, it should not attempt to apply the concept of landline route maps to the very different wireless context. Instead, a question about the presence of wireless nodes or other facilities, while still dramatically over-inclusive, would be more rational than asking a question that could result in the submission of unhelpful and misleading spectrum coverage maps. Clearly the fact that a microwave provider has spectrum rights for New York City, for example, does not mean that it is a potential competitor for all of New York City. Spectrum is only one of the many barriers to the use of microwave facilities to compete with ILEC landline facilities. In particular, microwave providers with spectrum often cannot compete adequately because of (1) line-of-sight limitations; (2) the limited range of equipment; (3) the uneconomic cost of building facilities to serve customers with limited demand; and (4) building access challenges, including roof access and roof-down rewiring.

III. The Data Request PN Complies With the Paperwork Reduction Act.

Verizon also objects to the voluntary data request on the theory that the request violates the Paperwork Reduction Act ("PRA").²³ Verizon rightly points out that the PRA applies only to requests for "information" but then misconstrues the Bureau's logic in determining that the request does not seek "information." Despite Verizon's contrary assertions, the Bureau never took the position that the PRA is inapplicable simply because the information request is voluntary. On the contrary, the Bureau concluded—rightly—that the request does not seek "information" because OMB regulations provide that information does *not* include "general solicitations of comments, . . . regardless of the form or format thereof, provided that no person is required to supply specific information pertaining to the commenter, other than that necessary for self-identification, as a condition of the agency's full consideration of the comment."²⁴

²³ Verizon Comments at 14-15.

²⁴ 5 C.F.R. § 1320.3(h)(4).

Ms. Sharon Gillett
February 22, 2011
Page 8 of 8

Although the Bureau helpfully suggested a template for responses to facilitate its analysis, the Data Request PN made clear that the Bureau will give “full consideration” to all comments—regardless of whether they supply any “specific information pertaining to the commenter,” including any information requested in the template.²⁵ Thus, the PRA does not apply.

Please do not hesitate to contact me if you would like further information on any of the topics discussed in this letter.

Sincerely yours,

/s/ Paul Margie

Paul Margie
Counsel for Sprint Nextel

²⁵ Data Request PN at 2 n.7.