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The Communications Association of Choice

*Half Truths, Whole Truths, and Internal Contradictions:
A Commentary on the Bell Special Access Briefing*

Half-Truth: “[B]uyers [of special access services] are highly sophisticated business customers who leverage their buying power to negotiate substantial discounts.” P. 4 U.S. Telecom Presentation, July 27, 2007 [“U.S. Telecom”].

“[Wholesale and retail customers] erroneously point to high capacity ‘sticker prices’ to argue rates are excessive.” *Id.* at 9.

“ILECs offer discounts of 40-70 percent off the ‘sticker prices.’ The majority of customers purchase under discount plans.” *Id.*

Contradiction: If the “sticker prices” are not relevant, and the “discount contracts” are not exclusionary, then why have prices risen in what the FCC has determined to be the “most competitive” areas?

Whole Truth: If only one provider can supply all of any customer’s demand, then that customer must deal with that provider, notwithstanding the customer’s “sophistication.” Said differently, when a seller has genuine market power over the purchaser—and can artificially restrict output (to raise prices)—the purchaser’s relative sophistication is of no consequence; it cannot change the laws of supply and demand. The former Soviet Union doubtless had many sophisticated purchasers of bread, yet bread lines were persistent.

The ability of a firm with market power to create a shortage is not negated by customers with high demand. To the contrary, high demand by even “sophisticated” customers only enhances the market power of the supplier. Thus, it is simply incorrect to state that the month-to-month “sticker price” is irrelevant because most customers purchase transmission services under discount plans. Indeed, the sticker price can be seen as a negative inducement to enter into a “discount plan” that has the primary effect of locking in purchasers (to higher-than-competitive prices) and locking out competitors (by foreclosing potential sales opportunities).

As the former chief economist at the DoJ Antitrust Division and the FCC has explained:

“When the basic month-to-month plan specifies prices significantly above the competitive level, these discounted prices . . . can also be above competitive levels. Moreover, when a monopoly offers proportional or relative discounts off its undiscounted prices in order to induce customers to agree to exclusionary provisions, it has an incentive to set the undiscounted price above even the monopoly level (because, rather than simply deterring demand, an increase above the monopoly level steers customers into the discount plans and also brings the discount prices closer to the monopoly level).”

Reply Declaration of Joseph Farrell On Behalf of CompTel, FCC Special Access Rulemaking, WC Docket No. 05-25, executed July 29th 2005, at ¶ 4 (citation omitted).

Half-Truth: “Challenge: Uncovering Deployment of Competitive Facilities.” U.S. Telecom at 6. The clear implication of this statement is that competitors are “hiding the ball” and not disclosing the true scale and scope of their own local transmission facilities.

Contradiction: The two largest Bells are also the two largest nationwide wireless carriers. Given this fact, does it really make sense that competitive carriers would incur the expense of building out redundant access networks, and then NOT trying to market to Verizon Wireless and AT&T Wireless for their out-of-region demand? Of course not; competitors are aggressively marketing their services to AT&T Wireless and Verizon Wireless for their out-of-region demand. Thus, it is simply specious for the Bells to suggest that their “challenge” is to “uncover” where competitive facilities are available.

Whole Truth: Both Sprint and T-Mobile have confirmed that, despite their best efforts to divert resources to non-incumbent providers, both still spend at least 90% of their overall demand for special access with the incumbent. Verizon Wireless and AT&T Wireless have every reason to search just as diligently for non-incumbent, low cost providers of dedicated transmission as others like Sprint and T-Mobile. *The fact is that there is simply not enough competitive capacity deployed (by all competitors put together) to meaningfully discipline the pricing practices of the largest Bell companies. Why?*

Reason 1—No Single Access Competitor Has the Scale or Scope of the Largest Bells:

“[Almost all of the access-based services that competitors sell is sold to] the retail enterprise customer, about 95 percent or maybe a little more, is bought by these kinds of large customers. And what they buy is a package of service that covers not just a connection to a building, but Internet access and long distance telecommunications and global international services. And *they buy in all their locations. And these kinds of customers typically have many locations that have to be knit together. So it’s not just one building with a fiber connection, it’s a lot of buildings and a lot of stuff in the middle.*” John Thorne, Verizon Communications, Transcript of July 12, 2006 Oral Argument in *United States v. Verizon Communications, Inc., et al.*, Docket Nos. CA-05-2102 and CA-05-2103 [“Tunney Act Proceeding”], at pp. 93-94 (emphasis added).

Reason 2—No Single Access Competitor Has the Scale or Scope of the Largest Bells:

In the same *Tunney Act Proceeding*, the Department of Justice produced customer declarations gathered by Verizon and AT&T. More than 85% of these declarations described a customer with multiple locations, with most expressing a preference for a provider that meets all of its needs.

Reason 3—No Single Access Competitor Has the Scale or Scope of the Largest Bells:

The FCC similarly observed that multi-location customers would prefer a single provider and recognized that these demand-considerations required a broader definition of the geographic market:

For larger, multi-location enterprise customers, we reach a slightly different conclusion. We find that these customers typically seek service from a provider that can serve all of their locations, and generally only a few carriers serving a particular location have such capabilities. In light of the fact that there are relatively few providers that can offer a high level of ubiquitous service, we conclude that this geographic market should encompass all the geographic locations where these multi-location business customers may have a presence.¹

Reason 4—No Single Access Competitor Has the Scale or Scope of the Largest Bells:

The desire by the enterprise customer to place as much of its network requirements with a single vendor as possible was cited as a primary motivation for SBC's acquisition of Ameritech (the Regional Bell Operating Company serving the Upper Midwest). See also *the AT&T/BellSouth Public Interest Statement at 42-45*. According to SBC's sworn affidavit, the typical large corporate customer places a high premium on the ability of its primary vendor to meet a large portion of its needs:

In order to have an opportunity to be considered along with our competitor/opponents to serve these large corporate customers, we believe that 70-80% coverage of the customers' local and long distance expenditures is critical. It is at this point that SBC can become a viable candidate for delivering telecommunications services as a primary carrier, as opposed to a niche carrier. This is true for the following reasons:

- Larger geographic coverage enables SBC to be considered for a higher percentage of the customers' telecommunications services;
- Broader geographic coverage allows a provider to develop and roll-out new products and services more cost effectively;
- This broader geographic coverage results in a higher percentage of the customers' telecommunications expenditures being considered in a consolidated contract which recognizes the customers' total telecommunications purchasing power;

¹ *SBC/AT&T Order at ¶ 63.*

- Consolidated contracts based on revenue and term commitments result in SBC being able to deliver reduced rates and value added service packages for the customers; and
- Larger geographic coverage by a telecommunications provider also results in the customer having to make fewer contacts to accomplish ongoing move, add and change activity throughout their nationwide organizations. This is a key, value-added consideration for large business customers.²

Conclusion: In 1999, the FCC thought it could predict (without actually confirming competition) through externally observable “triggers” that would indicate when the competitive market would be able to discipline the Bell companies’ market power. These predictions turned out to be wrong and the Bells were able to prematurely exploit their market power. This unchecked market power was only exacerbated by subsequent choices made by the Commission.

Beginning in 1997, the two largest Bells have asked for, and been granted, permission to obtain—through numerous mergers—a degree of network scale, scope, and integration that cannot be matched by any other competitive wireline, wireless, or Internet backbone provider. In their regions, the Bells dominate these markets. In return for the FCC’s permission to acquire this market power, the Bells assured the FCC that competition would not be diminished. The Bells have broken their promise.

The Bells must be held accountable and the FCC must be held responsible for the outcomes of these poor choices, and broken promises. Restoring market prices and conditions to levels that reflect competitive prices and create an environment where efficient future competition will flourish is not unnecessary regulation, but simply responsible government.

² Reply Affidavit of James Kahan, Senior Vice President for Corporate Development, SBC Corporation, Federal Communications Commission CC Docket 98-141, Filed November 13, 1998 at 16.