

**STATE OF NEW YORK
PUBLIC SERVICE COMMISSION**

Case 05-C-0616 - Proceeding on Motion of the Commission to Examine Issues Related to the Transition to Intermodel Competition in the Provision of Telecommunications Services

COMMENTS OF US DATANET CORP.

I. PRELIMINARY STATEMENT

US DataNet Corp., d/b/a USA DataNet (DataNet) hereby responds to the “Order Initiating Proceeding and Inviting Comments” (Order) issued on June 29, 2005.

DataNet currently provides long distance calling to customers in New York State through application of VOIP. In addition, DataNet is in the process of commencing local exchange services utilizing the same technology.

DataNet's operations are based in Syracuse, where it provides service to almost 200,000 customers in New York State.

DataNet respectfully submits that one of the principal goals of this proceeding is to assure the continuation of viable competition in retail telecommunications markets in New York State. As this Commission notes in the Order, robust competition can be a far more effective determinant of marketplace behavior than application of an unnecessary regulatory regime. Reliance on competition, however, can produce desired results only when real competitive choices and pricing are available in the market segment to be examined. Once the market is characterized by effective competition, the regulatory regime can be reduced or eliminated. But absent such effective competition, use of a

regulatory regime to provide the consumer protections which would flow in the presence of effective competition, is appropriate. The key, accordingly, is not whether there exists nominal competition in the relevant market, but instead real and effective competition.

In DataNet's view, the retail market for many telecommunications services in New York is approaching some of the characteristics of a competitive market. However, the sine qua non for the development of that retail competition must be the ability of competitors to obtain access to underlying facilities of the dominant wholesale providers, at rates approaching cost, bolstered by efforts to police discriminatory and self-serving conduct on the part of dominant wholesale providers.

To whatever extent competition may be developing at the retail level, thus permitting a decrease in the regulatory regime applicable to retail services, the same simply is not true today of the wholesale telecommunications market. For the great majority of the underlying services critical to competitors, including local loops, collocation, accurate and timely billing, special access and high bandwidth facilities, there are few if any realistic alternatives to Verizon (and, in the Rochester area, Frontier).

Absent an appropriate regulatory regime applicable on the wholesale level, in the Verizon and Frontier territories, retail competition simply cannot develop and sustain the level where a retail regulatory regime is no longer necessary. Thus, in order to achieve effective retail competition, with its attendant consumer benefits, DataNet urges the Commission to focus on and strengthen the regulatory regime applicable to the two dominant ILEC providers in this state at the wholesale level.

II. TO PRESERVE RETAIL COMPETITION, THE COMMISSION SHOULD DEVELOP AND ENFORCE A COMPREHENSIVE AND EFFECTIVE REGULATORY REGIME AT THE WHOLESALE LEVEL

Effective retail telecommunications competition cannot exist without the existence of a strong regulatory regime applicable at the wholesale level to the two dominant ILECs. With very few exceptions, Verizon and Frontier have near monopoly control over the bottleneck facilities in their markets needed by retail competitors to both enter and remain in the marketplace. Absent continued availability of those bottleneck facilities, at efficient, cost-based rates, with non-discriminatory provisioning and maintenance, retail competition simply will not be able to survive.

The theoretical availability of underlying bottleneck facilities, at rates which theoretically reflect forward-looking, efficient costs, is not sufficient to assure retail competition. Mechanisms must be in place to assure that the entities controlling these bottleneck facilities do not implement anti-competitive tactics, including denial of facilities; manipulation of installation and repair; or establishment of uneconomic and unreasonable rates, terms and conditions for those wholesale services and facilities.

To assure such anti-competitive conduct does not occur, the Acost@ to the underlying provider of engaging in anti-competitive conduct must have a sufficient economic impact to effectively deter such conduct. This requires, among other things, a self-enforcing monitoring, reporting and payment mechanism applicable to provisioning and maintenance of bottleneck facilities, with monetary penalties large enough to convey

the appropriate motivational signals to the dominant carriers.

The penalties associated with anti-competitive conduct cannot be so small as to constitute mere annoyances, with the result that underlying providers are fully prepared to accept the possibility of meaningless payments as an everyday cost of doing business. The penalties must both accurately reflect the actual damage suffered by a competitor as a result of anti-competitive conduct, and carry sufficient deterrence comparable to punitive damages awarded in civil litigation.

An underlying carrier which refuses to provide an essential circuit to a competitor, or drags its feet in repairing the facility (compared to the speed of repair or installation on services for its own customers), will have a devastating impact on the relationship between the competitor and the competitor's customer. This is particularly true, as frequently occurs, when underlying carriers refuse to provide bottleneck facilities to a competitor, on grounds that no such facilities exist, or take months to provision such facilities, while the underlying carrier itself offers to provide the very same facility to its own retail customer in short order. This causes the competitor's customer to lose all confidence in the competitor, destroying not only that one business relationship, but significantly impairing the competitor's ability to attract other customers.

The assessment of a minor monetary penalty on the underlying carrier in such a situation cannot possibly compensate the competitor for the harm it will suffer, assuming the competitor is even able to remain business in the face of the underlying provider's conduct. Accordingly, the monetary penalties established for the underlying carrier's poor

performance - particularly where the discriminating or anti-competitive conduct is pursuant to a deliberate policy - must be punitive enough to prevent the conduct from ever occurring.

III. INTERMODEL COMPETITION DOES NOT ELIMINATE THE NEED FOR A WHOLESALE REGULATORY REGIME

While intermodel competition certainly offers the potential of a more competitive retail marketplace, such competition cannot develop without the prospective competitors having reliable access to underlying inputs from the large ILECs at cost-based pricing.

VOIP providers, whose customers initiate calls over broadband facilities, require access to such facilities to reach the VOIP provider's gateway. Currently, broadband access can be obtained through certain high capacity facilities (such as T-1 circuits) and over DSL. Unfortunately, the extent to which the large ILECs will be required to make DSL available to customers of competing VOIP providers is very much uncertain.¹

Similar statements can be made with respect to unbundled local loops, high capacity transport, collocation, and other interconnection facilities required by CLECs to offer service to their end user customers.

¹ In an Order adopted by the FCC on August 5, 2005, but not yet released, the FCC appears to have determined the large ILECs have no obligation to provide DSL to customers wishing to use it to access the services of independent internet service providers or VOIP providers. This will make the availability of other forms of high capacity circuits, such as T-1, even more critical to VOIP competitors. But unless those high capacity facilities are provided by the ILECs in a technically efficient manner, non-discriminatorily, and at appropriate pricing, the promise of VOIP as a competitive alternative to the large ILECs may disappear.

Wireless technology is no different. Absent appropriate wholesale interconnection services and facilities from the ILECs, and in many cases the dedicated transport services necessary to link wireless facilities to cellular and ILEC switching centers, wireless competition will be greatly jeopardized.

Even cable competitors require access to ILEC bottleneck facilities, including but not limited to access to poles, ducts, and conduits; entrance facilities and high capacity circuits; interconnection arrangements; and collocation.

What all this demonstrates is that existing and future retail competition is wholly dependent on maintaining - and indeed strengthening - regulatory safeguards at the wholesale level to assure the provisioning of bottleneck facilities. Absent those safeguards, retail competition cannot survive.

IV. NECESSARY REGULATORY REGIME AT THE WHOLESALE LEVEL

As described above, in order to promote competition at the retail level, anti-competitive practices must be prevented at the wholesale level. To accomplish this, the Commission should implement a regulatory regime which requires, at a minimum, the following:

1. Accurate and verified reporting of the performance of Verizon and Frontier in provisioning services and facilities at the wholesale level, using as a starting point the service standards established in Case 97-C-0139.

2. Implementation of realistic monetary penalties for Verizon and Frontier for inadequate or discriminatory wholesale service, using the Performance Assurance Plan as a starting point, but significantly increasing those penalties - particularly for deliberate anti-competitive conduct - to have a meaningful deterrent effect.
3. Continued tariffing for Verizon and Frontier, for all wholesale bottleneck services (whether or not classified as Unbundled Network Elements by the FCC), with rates to be established at forward-looking, direct economic cost, without recoupment of subsidy.
4. Maintenance and strengthening of the Commission's Expedited Dispute Resolution Procedures, in which claims of anti-competitive conduct can be quickly reviewed by Senior Commission Staff, with the authority to specify appropriate remedies, including payment of damages and penalties to competitors.
5. Requiring that large ILEC retail negotiated rates, ICBs, and bundled service offerings pass appropriate imputation tests, including, as a starting point, inclusion of costs for underlying services equivalent to

the rates which the LEC charges to its competitors for those underlying services.

6. Establishing standards for accuracy of wholesale billing, and limitation of backbilling to one year, to preclude unfair economic impact and prejudice to the purchasers of those wholesale services.
7. Strengthening Commission resources to assure enforcement of the Commission's regulatory requirements, including prompt adjudication of disputes involving wholesale services and billing, including, where necessary, prompt initiation of enforcement and penalty actions in the State Supreme Court.
8. Utilizing the broadest possible scope of the Commission's authority to achieve regulatory goals. As but one example, if the Commission does not have the direct jurisdiction to require Verizon or Frontier to provide DSL service that can be used by competing VOIP providers, the Commission could condition grants of other authority, including authority to merge or consolidate, or the continuance of flexible pricing, upon the large ILECs agreeing to provide stand-alone DSL on a non-discriminatory basis, available for use by customers of all

competitors.

V. CONCLUSION

At this time, the level of retail competition in many markets would seem to allow a reduction in applicable regulatory requirements, including service reporting and standards, for all carriers. Supervision of generally available retail rate levels, for services which are truly subject to competition, can also be decreased. However, scrutiny of Aspecially negotiated@ or bundled rates offered by Verizon and Frontier must be subject to imputation and non-discrimination criteria.

On a going forward basis, the Commission's emphasis should be on the wholesale market, with the development of an effective regulatory regime, strictly enforced, to prevent manipulation and anti-competitive conduct.

Respectfully submitted,

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