

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

In the Matter of)
)
Local Competition and) CC Docket No. 99-301
Broadband Reporting)
)

REPLY COMMENTS OF THE COMPETITION POLICY INSTITUTE

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REPLY COMMENTS OF THE COMPETITION POLICY INSTITUTE

I. INTRODUCTION AND SUMMARY

Pursuant to the Commission's Notice of Proposed Rulemaking,¹ released October 22, 1999 in the above captioned proceeding, the Competition Policy Institute submits these reply comments.

CPI is an independent, non-profit organization that advocates state and federal policies to promote competition in telecommunications and energy services in ways that benefit consumers.² CPI is commenting in this proceeding for two fundamental reasons. First, we believe that sound regulatory policy requires good data and we support efforts by regulators to develop information that improves policy decisions. Consumers will benefit because having adequate data will serve the Commission's overarching policy goal of promoting local exchange competition. Second, we know that the cost of data collection has implications for the prices consumers pay. When regulation raises carriers' costs, those costs ultimately are passed through to the consumer. Throughout these comments we advocate measures that we think strike the appropriate balance between the Commission's need for specific information with the industry's desire to minimize costs.

In the Notice, the Commission proposes to collect information about the status of local competition and the deployment of advanced telecommunications capability on a state-by-state

¹ *Local Competition and Broadband Reporting*, Notice of Proposed Rulemaking, FCC 99-283 CC Docket No. 99-301 (rel. October 22, 1999) ("Notice").

² Complete information about CPI can be obtained from our web site at <www.cpi.org>.

basis. The Commission states that it needs this information in order to “evaluate the effectiveness of actions the Commission and the states are taking to promote local competition”³ and to ensure that the Commission can “evaluate the nature and impact of our existing regulation and, where appropriate reduce or eliminate regulation.”⁴ To accomplish these two goals, the Commission tentatively concludes that “only a mandatory and systematic collection of local competition and broadband deployment information will provide the comprehensive set of reliable data we require to carry out our statutory mandates.”⁵ We support the Commission on this threshold question of whether data reporting should be voluntary or mandatory.

CPI generally agrees with the Commission’s tentative conclusions in the Notice and thinks that the Commission’s pro-competitive goals will be well served by data collection from market participants. Likewise, we generally agree with the Commission’s tentative conclusions concerning which entities must file survey responses. However, we think the Commission can improve the proposed collection in some specific areas and offer suggestions for improvements. For instance, we think the survey should include one-way broadband lines in the reporting threshold for broadband lines and subscribers. In the other direction, we believe that including mobile telephony providers in the survey on local competition at this time is not necessary. We support the position, identified by several parties,⁶ that the Commission not require information

³ Notice at ¶ 1.

⁴ *Id.* at ¶ 2.

⁵ *Id.* at ¶ 20.

⁶ See Bell Atlantic at p. 7-8; Northpoint at p 6.

reporting from Internet Service Providers (ISPs) that offer broadband lines to consumers, and instead that the Commission obtain that data from the companies that provide the actual transmission facilities. Lastly, we suggest in these reply comments how the Commission might strike a balance between the public's need for access to reported information and the carriers' asserted need for confidentiality.

The modifications we suggest are made in light of two important policy goals that should be met in this proceeding. First, the Commission should seek to minimize the burden that the survey imposes on carriers; new regulatory reporting requirements, even if designed to serve deregulatory purposes, will impact both competitive and developing markets. Second, the Commission should, to the greatest extent possible, conform the survey design to the actual recordkeeping practices of reporting carriers. In line with this, we also suggest that the process of improving the survey should continue throughout the life of the data collection.

II. MANDATORY REPORTING OF DATA

In the Notice, the Commission tentatively concludes that a mandatory data collection best serves the purposes underlying the survey, reasoning that “Regulatory policies that are based on incomplete information are less effective than regulation based on an informed evaluation of what is actually happening in markets.”⁷ To facilitate informed policymaking the Commission concludes that it should generate data of “uniform quality and reliability.”⁸

⁷ Notice at ¶ 12.

⁸ *Id.*

Several parties dispute the Commission’s rationale for mandatory data collection. Winstar contends that a mandatory collection is unduly burdensome and unlikely to generate data more useful than data the Commission already collects through its voluntary programs.⁹ MediaOne argues that the proposed survey unnecessarily duplicates information many carriers already provide in reports to state commissions.¹⁰ In addition, AT&T contends that the mandatory survey the Commission proposes may “frustrate rather than further the objectives of increasing regulatory flexibility and encouragement of competition.”¹¹

The parties opposing mandatory collection argue that the proposed survey imposes costs on the entities that must respond. We agree, but observe that those costs are part of a tradeoff. While it is true that “reporting is a form of regulation”,¹² we also think that, if the Commission is ultimately to modify its regulatory policies as competition progresses, it must have comprehensive information to do so. It would be ill-advised for the Commission to advocate policy shifts based on incomplete information.

In our view, the Commission states a convincing case that a mandatory collection will generate more reliable and uniform data than it has previously generated through voluntary data collection. Mandatory data collection, with clear guidelines on the data entities must report, will allow the Commission to make an informed evaluation of the state of competition in a particular

⁹ Winstar at p. 2.

¹⁰ MediaOne at p. 4

¹¹ AT&T at p. 3.

¹² MediaOne at p. 8.

market and adapt its regulatory policies based on the conclusions to which the data leads.

III. TYPES OF ENTITIES THAT MUST REPORT AND REPORTING THRESHOLDS

A. Local Exchange Carriers

The Commission tentatively concludes that it should require all telecommunications carriers with 50,000 or more nationwide access lines to report local competition data in the survey.¹³ Nearly every party commented on this issue and the comments varied widely: some parties seek a lower threshold, bringing more participants into the survey,¹⁴ some suggest a higher threshold,¹⁵ and some argue for no threshold at all.¹⁶

Parties that urge the Commission to adopt a lower threshold contend that the 50,000 access line threshold restricts the data available to the Commission, ultimately limiting the usefulness of the data the Commission does collect.¹⁷ The parties advocating a higher threshold essentially argue that the 50,000 line threshold requires smaller companies with fewer resources to prepare burdensome reports in response to the survey.¹⁸

¹³ Notice at ¶ 37.

¹⁴ *See* US West at p. 3 (10,000 nationwide access lines); BellSouth at p. 3 (10,000 nationwide access lines); Bell Atlantic at p. 4 (10,000 nationwide access lines).

¹⁵ *See* Telecommunications Resellers Association (TRA) at p. 4 (25,000 access lines per state); NCTA at p. 10 (10,000 access lines per state).

¹⁶ *See* SBC at p. 1.

¹⁷ *See* Bell Atlantic at p. 4.

¹⁸ *See* TRA at p. 4.

Although CPI does not have specific information to prove that 50,000 is the exact right number, we agree it is a justifiable threshold. The Commission explains that it recommends the use of 50,000 nationwide access lines as the threshold here because the 1996 Act uses that number to define a rural telephone company.¹⁹ The Notice further explains that the Commission's reliance on this definition makes sense since the 1996 Act exempts rural telephone companies from many of its local competition provisions.²⁰

While we support the Commission's reasoning in support of the 50,000 line threshold, we think the Commission would be on firmer ground if it justified this choice by examining the percentage of all access lines in service that this threshold would bring into the collection. If, for example, the 50,000 access line threshold brings 95% of the all US access lines into the report, the Commission could reasonably conclude that lowering the threshold adds little value while significantly increasing the cost of the survey.

B. Broadband Providers.

1. 1,000 Line Threshold

Likewise, CPI has no statistical information to support the Commission's judgment that 1,000 broadband lines or subscribers should trigger the mandatory survey requirement for broadband providers.²¹ As before, we recommend that the Commission buttress its decision by attempting to estimate the percentage of all broadband lines in service that will be captured with

¹⁹ Notice ¶ 37 *citing* 47 U.S.C. 153(37)(B).

²⁰ *Id.*

²¹ *Id.* at ¶ 40.

this threshold. In addition, as argued below, we concur with comments that the Commission should modify its broadband reporting threshold to include lines or subscribers with one-way broadband service.²²

Several parties contend the thresholds for broadband reporting are too low.²³ We note that the threshold for broadband reporting is actually relatively higher than the threshold for local exchange competition at the present time: assuming there are currently about 1.5 million broadband lines currently in service and 170 million access lines, the 1,000 line threshold is .07% of the total broadband lines in service, whereas 50,000 is .03% of the total telecommunications lines in service. On the other hand, we expect the number of broadband lines to grow very rapidly, with the result that 1,000 will soon be much smaller, as a percentage of total lines in service, than the corresponding telecommunications line number. This amounts to an argument that, if the Commission adopts the 1,000 line threshold at the outset, it should consider raising the threshold in the future.

We also recognize that the 1996 Act places a specific obligation on the Commission to monitor the progress of the deployment of advanced telecommunications capability to “all Americans.”²⁴ This provides additional support for the Commission’s choice of the 1,000 line threshold at this time when the penetration of such advanced services is relatively low.

CPI also recommends that the Commission treat the 1,000 broadband line threshold as a

²² See USTA at p.6; Northpoint at p. 5.

²³ See American Cable Association (ACA) at p. 8; NCTA at p. 7.

²⁴ 47 U.S.C. § 706.

starting point. Considering that the broadband industry is in its infancy, the Commission should periodically review and adjust the threshold upward, perhaps on an annual basis. As the industry matures, the Commission may have little interest in reviewing data from carriers with broadband lines in the range of one thousand lines. The Commission should establish a mechanism by which it can easily adjust that reporting threshold as the broadband market matures and the Commission's need to track its development changes.

2. One-way Broadband Services

In the Notice, the Commission tentatively concludes that it would require reporting entities to provide information about both “full broadband lines” and “one-way broadband lines.”²⁵ The reporting threshold, though, is set at 1,000 full broadband lines and does not count one-way broadband lines.²⁶ Some parties, such as Northpoint, argue that, by excluding one-way broadband lines from the threshold requirement, “the Commission would not receive important information about significant developments in the broadband services marketplace.”²⁷ We agree. The exclusion of one-way broadband services distorts the picture the Commission will receive of how Americans currently receive broadband service.²⁸

CPI believes that many of the broadband services currently on the market have only one-

²⁵ Notice ¶ 64 (defined as 200 Kbps capacity in one direction and voice grade in the slower direction.)

²⁶ *Id.* at ¶ 40.

²⁷ Northpoint at p. 5; *See also* Bell Atlantic at p. 6-7.

²⁸ *See* USTA at p. 6.

way broadband capability, as defined by the Commission in the Notice. Bell Atlantic and USTA, for example, note that “the most popular Asymmetric Digital Subscriber Line (“ADSL”) service offerings, which are primarily used for Internet access, are ‘one-way’ broadband services under the Commission’s definition, because their upstream data rates are less than 200 Kbps.”²⁹ Certain other services that compete with ADSL are also sometimes limited to one-way broadband capability. For example, DirecPC, a DBS-based broadband Internet access service, has a downstream capacity in excess of 200 kbps, but requires the use of an ordinary phone line, which the customer obtains from a LEC, to transmit data upstream.

In addition, some cable companies currently offer only one-way cable modem service. For instance, Cable TV Montgomery (CTM), in Montgomery County, MD, provides cable modem service over the portions of its network that are not yet upgraded to support two-way communications. In those neighborhoods where two-way broadband is not yet an option, CTM customers can subscribe to the company’s ExpressNet cable modem service and receive downstream transmissions in excess of 200 Kbps. However, CTM does not provide an upstream path through its cable facilities; customers must connect their computer’s analog modem to a telephone line in order to transmit data upstream. Under the terms of the proposed survey, neither ADSL, DirecPC, nor one-way cable modem services would count towards the 1,000 line reporting threshold. We believe that this may exclude some broadband entities from reporting at all, so that “the Commission would not receive important information about significant

²⁹ Bell Atlantic at p. 6-7; *See* USTA at p. 6.

developments in the broadband services marketplace.”³⁰

CPI recognizes that this may impose burdens on some carriers that otherwise might not be subject to the proposed data collection and that the burden will fall on companies that are rushing to deploy these services in a rapidly emerging market. However, we believe that the reasons the Commission offered in the Notice for gathering this data mean that the Commission should be more inclusive with respect to broadband data. In particular, CPI suggests the Commission rely on its statutory mandate set forth in Section 706 as justification for including more participants in this section of its survey.

Eventually the Commission may be able to refine the broadband reporting threshold. As more cable companies upgrade their networks to enable two-way transmissions, the Commission might desire to eliminate responses from entities that don’t provide “full broadband.” At this time, however, when the market is in its infancy, it makes more sense to gauge competition and the progress of the market through the widest lens possible.

C. Mobile Telephony

In the Notice, the Commission tentatively concludes that it should require mobile telephony providers to respond to the survey. In reaching this conclusion, the Commission postulates that the data mobile telephony carriers’ report will be valuable “because of their practical potential as a substitute for wireline service.”³¹ The Commission further notes that the

³⁰ Northpoint at p. 5.

³¹ Notice at ¶ 27.

proposed survey imposes minimal burdens on these entities since “we require relatively little information from mobile wireless service providers.”³² The Commission received comments from several companies with significant presence in the mobile telephony market. Some parties oppose including mobile telephony in the proposed report,³³ while others have minor objections or no objections.³⁴

We concur with those parties that suggest the Commission should omit the mobile telephony carriers from the local competition section of its report. We suggest this modification primarily because the data to be reported—mobile telephony subscriber numbers—does not serve the purpose for which the survey is created. In the Notice, the Commission notes that mobile telephony will become a substitute for landline local exchange service. This may be. But a review of statewide mobile telephony subscribership data will not permit the Commission to “develop an accurate sense of the developing potential of mobile telephony to substitute for wireline local service”³⁵ without additional information about the use to which consumers are putting their mobile telephony service. After all, the Commission will receive no data from mobile telephone *subscribers* indicating whether they are using wireless as a replacement for wireline local exchange service.

We do not suggest, though, that mobile telephony providers be exempted from all

³² *Id.* at ¶ 38.

³³ *See* Bell Atlantic Mobile at p. 2; AT&T at p. 4; SBC at p. 8.

³⁴ *See* Nextel at p. 1; Sprint at p. 4.

³⁵ Notice at ¶29.

reporting requirements in the survey. If a mobile telephony carrier also provides broadband service and meets the reporting threshold, it should be required to respond to the relevant sections of the survey. Ours is a simple point: mobile telephony is not yet widely used as a replacement for wireline local service, and, even if it were, the data the Commission proposes to collect will not shed light on this issue. Since the data will lack any direct link to the underlying purpose of the data collection, the burden of the reporting obligation, even if small, outweighs the utility of the data that might be collected. By eliminating the mobile telephony sections from the proposed survey, the Commission strikes the appropriate balance between the purposes of the survey and the goal of avoiding unnecessary requirements on carriers.

IV. FREQUENCY OF REPORTING

In the Notice, the Commission asks parties to comment on whether quarterly, semi-annual, or annual reports would best serve the purposes of the data collection.³⁶ Although CPI acknowledges the attraction of having quarterly data, balancing the costs and benefits of this data collection leads us to conclude that an annual survey is the proper approach.

First, we suggest the Commission consider the purposes the data will serve as it determines the frequency of the proposed survey. Although data collected more frequently might allow the Commission (say) to develop an econometric model that describes the development of competition, it will also impose significant costs on the carriers. Are those costs, which the

³⁶ *Id.* at ¶ 35.

carriers will inevitably pass on to consumers in higher prices, justified by the benefits the additional data brings? We think the answer is no.

CPI believes that annual reports will provide the Commission with a series of snapshots of the relevant markets that will be sufficient to determine whether shifts in Commission policy are required. Given the time it takes to implement significant policy changes, an additional report each year adds little value. For these reasons we support the annual collection of data, in preference to a semi-annual or quarterly requirement.

V. SUNSET OF REPORTING REQUIREMENTS

In the Notice, the Commission suggests the possibility of a five year sunset date for the data collection, although it does not reach that date as a tentative conclusion.³⁷ The Commission reasons that the purpose of developing the survey is “to assist the Commission in evaluating the development of local competition and broadband deployment during a critical transition period.”³⁸ In their comments, many parties suggested specific sunset dates. The suggestions include recommendations for two years,³⁹ and four years;⁴⁰ other commenters agree with the Commission’s suggestion of five years.⁴¹

³⁷ Notice at ¶ 82.

³⁸ *Id.*

³⁹ *See* Bell Atlantic at p. 3; Sprint at p. 3.

⁴⁰ *See* US West at p 6.

⁴¹ *See* BellSouth at p. 6.

CPI agrees that this survey serves an important purpose in a time of transition and agrees with those parties that advocate a sunset review of the data collection. We think that four years is the minimum period necessary. We disagree with parties that suggest the Commission sunset the survey requirement after two years. In our view, it would not be good policy to base deregulatory decisions on the limited set of data that two years of surveys would produce.

We also note that, even if it adopts a five year sunset period, the Commission has the flexibility to review and modify the data collection at any point in the five year period; the sunset requirement serves merely as an automatic check on the longevity of the reporting process. In this regard, it would be reasonable for the Commission, on an annual basis, to review the effectiveness of the report in generating useful data. To accomplish this, we suggest that the Commission establish a procedure by which it can review and modify the data collection each year to improve the process before the next year's survey is due.

VI. LEVEL OF DETAIL IN DATA COLLECTED

A. Residential/Non-Residential Distinction

In the draft survey included in the Notice, the Commission asks respondents to provide separate data for residential and non-residential lines in service.⁴² This requirement appears in both the local competition sections and the broadband sections of the survey.⁴³ In their comments, several parties contend that many carriers do not maintain records that distinguish

⁴² Notice at ¶ 51.

⁴³ *Id.* at ¶ 51, 64.

residential customers from business customers.⁴⁴ CPI agrees the Commission has important reasons for asking for this information. However, in light of carrier concerns, we suggest that the rules be flexible on this subject and not require carriers to collect new data.

Residential and business services are two distinct markets and different policy questions arise with respect to each market. Aggregated data that does not distinguish between business and residential customers could present a misleading picture of the development of competition and deny the Commission needed information. If the Commission is to make informed policy decisions concerning residential local exchange competition, for example, it will need either disaggregated data or *at least* informed estimates of the level of competition in that distinct market.

These competing concerns lead us to propose the following compromise proposal. First, we agree with AT&T's suggestion that the Commission should require a carrier to report lines in service categorized by residential lines and non-residential lines if and only if the carrier keeps those records in its ordinary business practice.⁴⁵ Second, we suggest that carriers that do not keep records that distinguish residential from non-residential customers be required to certify that such data is not maintained and then be required to make a good faith estimate of the percentage of reported lines that serve residential customers. While a carrier might not keep the exact data, we suspect most will be able to render a credible estimate. Further, an estimate is better than no

⁴⁴ See Northpoint at p. 5; AT&T at p. 16.

⁴⁵ AT&T at p. 16.

data at all. We think this proposal strikes the appropriate balance between the Commission's legitimate need for this information and the burden this data collection places on the carriers.

B. Data from ISPs

In the Notice, the Commission proposes to require data reporting by ISPs that offer broadband capability to customers.⁴⁶ Several parties, including LECs,⁴⁷ CLECS,⁴⁸ and ISPs,⁴⁹ oppose this tentative conclusions. CPI shares these parties concerns that including ISPs could be burdensome to providers that are largely not otherwise subject to the Commission's regulations. Further, reporting by ISPs may distort the Commission's view of the pace of broadband deployment.

Northpoint argues that ISPs are "not traditionally subject to Commission reporting requirements, may not be aware of their reporting obligation, and do not have incentives to supply this information."⁵⁰ Northpoint contends that by extending reporting requirements to these entities the Commission might not obtain the data about broadband deployment it needs because small ISPs might not meet the threshold a while a "LEC supplying broadband lines to multiple ISPs is more likely to meet the reporting threshold."⁵¹ We agree with Northpoint.

⁴⁶ Notice at ¶ 63-64.

⁴⁷ *See* Bell Atlantic at p. 7-8.

⁴⁸ *See* Northpoint at p. 6; AT&T at p. 15-16

⁴⁹ *See* America Online at p. 1.

⁵⁰ Northpoint at p. 6.

⁵¹ *See Id.*

Bell Atlantic and AT&T note that ISPs usually resell broadband services acquired from several sources and that they would report capacity data to the Commission in aggregated form.⁵² Bell Atlantic contends that this data does not reflect “the extent of competition among those entities that are actually offering broadband services”⁵³ (the underlying carriers) and instead shows only the number of lines ISPs have leased. For these reasons, we support the suggestions offered by AOL, AT&T, Northpoint and Bell Atlantic that the Commission should require only the LECs to file reports and eliminate the obligation the Notice suggests placing on ISPs. In this way, the Commission will obtain data that reveals the number of carriers deploying broadband lines on a state by state basis, “a far more meaningful measure of relevant competition.”⁵⁴

VII. CONFIDENTIALITY

In the Notice, the Commission states that it is extremely important that “all local competition and broadband information collected pursuant to the proposed survey be made available to the public.”⁵⁵ The Commission reasons that the availability of the data will help “promote a general awareness and public discussion” of the issues that will ultimately help educate consumers.⁵⁶ We strongly agree with the Commission on this point.

Nonetheless, as the Commission correctly anticipated, the vast majority of comments

⁵² See Bell Atlantic at p. 7-8; AT&T at p. 15-16.

⁵³ Bell Atlantic at p. 7.

⁵⁴ *Id.* at p. 8.

⁵⁵ Notice at ¶ 73.

⁵⁶ *Id.*

asserted that “the submitted information is sensitive or otherwise protectable.”⁵⁷ AT&T puts it bluntly: “There is little information that is guarded more closely by a newly-developing competitor, especially when facing an entrenched monopolist, than its subscriber or access line counts.”⁵⁸ Carrier concerns are apparently not eased by the fact that they would report their line counts on a statewide basis and not in a more granular geographic area, such as MSAs, BTAs, or zip codes.⁵⁹ Carriers contend that many CLECS offer their services in small geographic clusters within a state so that “the fact that the Commission may only be gathering information on a statewide basis does not necessarily negate the concern that carriers would have with the potential release of the material.”⁶⁰

Most parties that registered concerns about confidentiality also offered the Commission suggestions to alleviate those concerns. The consensus among the parties appears to be that the Commission should release statewide data in a categorized format. Thus the public would see, for each state, the number of ILEC access lines, CLEC access lines, broadband lines, broadband subscribers, plus whatever other categories the Commission includes in the report.⁶¹ We think this solution strikes a reasonable balance between the Commission’s need to make reported information available to the public and the carriers’ need to protect data that would otherwise be

⁵⁷ *Id.* at ¶ 74.

⁵⁸ AT&T at p. 17; *See also* Nextlink at p. 5-6.

⁵⁹ *See* Association for Local Telecommunications Services (ALTS) at p. 12.

⁶⁰ *Id.*

⁶¹ *See Id.*; Sprint at p. 3; Nextlink at p. 6.

unavailable to their competitors.

However, we can also foresee problems with this approach in isolated instances. In its comments, Sprint raises the possibility of a state where only one CLEC operates. In this case, categorized data, even if aggregated, would allow each carrier to know their competitors access line counts.⁶² We are confident the Commission can adopt solutions in such cases to balance the interest of consumers in disclosure with the carriers' interest in confidentiality.

⁶² See Sprint at p. 3.

VIII. CONCLUSION

CPI supports the Commission's proposal to establish a mandatory data collection to assess developments in local competition and deployment of broadband services. CPI believes that gathering such information from market participants will allow the Commission to make sound policy decisions that promote local competition and thereby serve consumer interests. As the Commission develops the survey to collect the data, CPI urges the Commission to balance the need for the information with the costs the survey imposes on the segments of the telecommunications industry that must file responses. Ultimately the costs are borne by the customers these carriers serve.

Respectfully submitted,

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Certificate of Service

I, _____, hereby certify that on this twentieth (20th) day of December, 1999, copies of the foregoing Reply Comments of the Competition Policy Institute were served by electronic filing or by first-class, United States mail, postage prepaid, upon each of the parties listed below.

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