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

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In the Matter of	)	
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Southwestern Bell Telephone Company	)	CC Docket No. 94-97
Revisions to Tariff F.C.C. No. 73	)	Transmittal Nos. 2383, 2388,
	)	2392, 2397, 2407

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OPPOSITION OF MFS COMMUNICATIONS COMPANY, INC. TO APPLICATION FOR REVIEW OF SOUTHWESTERN BELL TELEPHONE COMPANY

MFS Communications Company, Inc. ("MFS"), by its undersigned counsel, hereby requests that the Commission deny the Application for Review of Southwestern Bell Telephone Company ("SWB") requesting interlocutory review of the Common Carrier Bureau's Order (*"Partial Suspension Order"*)[1/] that appropriately partially suspended Tier 1 local exchange carrier virtual collocation tariff rates. As MFS discusses below, the Bureau's action was necessary to prevent unreasonable rates from taking effect pending conclusion of the Commission's investigation in the above-captioned docketed proceeding, and was fully consistent with the Communications Act and established Commission rules and policies.

I. INTRODUCTION

In stark contrast to SWB's claim that it has "valiantly" tried to comply with the July *Virtual Collocation Order*, this Application for Review demonstrates that SWB — alone among all the LECs — is pursuing a campaign of unprecedented recalcitrance towards any Commission attempt to establish effective expanded interconnection and the local exchange competition that it will facilitate. SWB's claim that there is an inadequate record in this

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1/ *Ameritech Operating Companies,* CC Docket No. 94-97, DA 94-1421 (December 9, 1994) (*Partial Suspension Order*).

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proceeding rings hollow in light of the fact that SWB -- alone among the LECs -- has refused to make publicly available equipment and overhead cost support data to support the claims of its *Application*. SWB has flaunted the Commission's express order to provide this material, even under cover of a protective order. Of course, SWB may have refused to provide cost support because its tariffed rates are unsupportable: as MFS has shown, SWB's federally filed interconnection rates are set at levels almost 250 percent above the median LEC rate.[2/]

SWB's *Application* is further trivialized by tenuous arguments, such as the claim that SWB has had inadequate notice in this proceeding (despite robust comment on all the issues) or that a bulk equipment purchase scheme dreamed up by SWB should replace the equipment pricing rates mandated by the Commission. SWB's *Application for Review* is therefore simply another volley in SWB's campaign to preclude collocation and local competition by filing patently unfair rates and then abusing the regulatory process to delay an effective remedy as long as possible. The *Partial Suspension Order* is based on reasoned analysis, and a robust public record. Moreover, if SWB can support the rates, terms and conditions it has filed -- and MFS contends that it cannot -- SWB will have ample opportunity to do so in the ongoing five-month investigation in CC Docket No. 94-97. SWB's *Application* should therefore be denied.

[2/] MFS Communications Company, Inc., Petition for Partial Rejection or Suspension and Investigation, and for Prescription of Tariffed Rates, Terms and Conditions, filed in CC Docket 91-141 on October 14, 1994, at 4.

II. SWB HAS NEVER JUSTIFIED ITS OVERHEAD LOADINGS

SWB cannot now be heard to protest that the Commission has concluded that its virtual interconnection overhead loadings are "too high" because SWB has never offered cost support to adequately justify its overhead loadings. The Commission and the parties to this proceeding have been forced to analyze the SWB overhead loadings without input from SWB which has not met its Commission-mandated burden of providing cost support for its virtual collocation overhead loadings. The Commission required such cost support in the *Virtual Collocation Order*[3/] to prevent LECs from discriminating against collocators by charging higher overhead loadings on interconnection services than on competitive end-user (e.g., DS-1 and DS-3) services and thereby subsidizing competitive services at the expense of competitors. SWB not only failed to provide this cost support, but now has the audacity to criticize the Common Carrier Bureau for calculating reasonable overhead loadings for SWB based on the copious record provided by other parties. MFS, as well as other parties, provided exhaustive cost data for comparable services culled from past SWB filings. Given SWB's intransigence in providing cost support, the overhead loading rates of the *Partial Suspension Order* are eminently reasonable. MFS would welcome an attempt by SWB to provide public overhead cost support that proves otherwise.

Even despite the withholding of critical data by SWB, the Bureau acted on an extensive record that provided ample support for suspending certain of SWB's virtual

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[3/] *Expanded Interconnection with Local Telephone Company Facilities*, 9 FCC Rcd. 5154, 5189 (1994) ("*Virtual Collocation Order*").

collocation rates. The Bureau's rates were therefore based on the record before it and are fully consistent with past Commission practice.

SWB's withholding of overhead loading cost support is perhaps not surprising in light of the fact that its interconnection rates are among the highest in the country. SWB's virtual collocation rate per DS1 equivalent was almost four times as large as Ameritech's comparable rate ($82.51 v. $22.42; see MFS Petition for Partial Rejection at 4). Comparison of SWB's inflated interconnection rates with the more reasonable interconnection rates of certain other LECs — rates which *were* supported by cost data — confirms the reasonableness of the Bureau's rates. Again, SWB has, by violating the Commission's order, failed to prove otherwise.

III. SWB'S APPLICATION IS PROCEDURALLY INAPT

SWB's *Application*, seen in the appropriate procedural context, is premature at this time. The *Application* requests review of a partial suspension of certain SWB rates that appeared to the Bureau to be excessive pending a five-month investigation of the LECs' overall rate levels. This action was taken "to ensure that expanded interconnection is available, without interruption, at rate levels that will promote economically efficient competition during the pendency of our investigation." *Partial Suspension Order* at 3. SWB has ample opportunity to pursue its agenda in the ongoing investigation, which is limited by the Communications Act to five months to ensure that final rates are prescribed expediently.

This partial suspension was therefore the appropriate interim Bureau response to ensure that LECs could not game the regulatory process by imposing arbitrarily high interconnection rates for any period of time. This interim measure was based on ample cost

support provided by the parties and was entirely consistent with the Commission's policy of facilitating the transition to local exchange competition without undue delay.

Yet despite the interlocutory nature of the *Partial Suspension Order*, and consistent with its strategy of litigiously contesting every Commission step towards local competition, SWB has resorted to Section 1.115 of the Commission's rules which permits review of any action taken on delegated authority. SWB's reliance on Section 1.115 is inapt, however, to the extent that it only applies when action taken on delegated authority is inconsistent with statute or past Commission policy. On the contrary, the Bureau's action is in lockstep with the express orders of the Commission throughout this proceeding:

> On the current record, we reaffirm our decision in the earlier orders in this proceeding that the LECs may include no more than uniform overhead loadings in their rates for expanded interconnection services, or must justify any deviations from uniform loadings. In other words, LECs may not recover a greater share of overheads in rates for expanded interconnection services than they recover in rates for comparable services, absent justification. The LECs have the burden of demonstrating that their connection charges meet this overhead loading standard, and are otherwise just, reasonable, and not unreasonably discriminatory. The price cap LECs may be required to submit additional information to enable us to verify that the overhead loadings on the expanded interconnection connection charges do not unreasonably differ from the overhead loadings on other services, for which price cap LECs generally do not provide cost justification. <u>We will carefully scrutinize the overhead costs that the LECs propose to recover through connection charges to ensure that they are reasonable.</u>[4/]

As indicated by the Commission in this paragraph, ample authority exists for the Bureau's interim partial suspension of the LEC's virtual interconnection rates. The Bureau's interim order is entirely appropriate to the extent that it initiates an investigation under which the Commission will prescribe rates in a final order. In light of the pending Commission

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[4/] Virtual Collocation Order at ¶ 128 (emphasis added).

investigation, SWB's Application is procedurally questionable, and will be rendered moot by the Commission's final order prescribing rates.

SWB also attempts to make the thoroughly unsupportable argument that there has been insufficient notice and comment in Docket No. 91-141, a docket that, along with related dockets, such as No. 93-162, has included literally thousands of pages and several years of exhaustive comment on all material issues, including extensive comment by SWB among others on this precise issue of LEC discriminatory overhead loadings. The only gap in the record is the absence of SWB's publicly available actual overhead loading cost support, which SWB refuses to provide to interested parties, even under a protective order.

The Commission expressly incorporated the record of the entire proceeding in CC Docket No. 91-141, as summarized in three previous orders in reaching the conclusions stated in its *Virtual Collocation Order*.[5] In fact, the issue of overhead loadings was expressly addressed by numerous parties -- including SWB -- throughout the proceeding. MFS in particular argued that LECs should not be allowed to impose on interconnectors overhead loadings in excess of those paid by end user customers of discounted high capacity services.[6] SWB has made repeated comment and filings on adequate load levels,[7] and has

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[5] *Virtual Collocation Order* at n.8.

[6] MFS Communications Company, Inc., Petition for Partial Rejection or Suspension and Investigation, and for Prescription of Tariffed Rates, Terms and Conditions, filed in CC Docket 91-141 on October 14, 1994, at 13-18.

[7] *See, e.g.*, SWB explanation of the development of its overhead loading factors. *In the Matter of Local Exchange Carriers' Rates, Terms and Conditions for Expanded Interconnection for Special Access*, CC Docket No. 93-162 (Phase 1), Southwestern Bell Direct Case at 5-6 and appendix 4 (November 12, 1993); *In the Matter of Southwestern Bell Telephone Company Tariff* F.C.C. No. 73, Docket No. 91-141, Transmittal No. 2383, Reply Comments of Southwestern Bell Telephone Company at 13-21.

never raised the issue of inadequate notice. The record clearly shows that SWB had actual as well as constructive notice on this issue. Therefore, SWB's claim of inadequate notice and comment must be rejected and cannot support its application.

IV. THE BUREAU ADEQUATELY ADDRESSED THE ISSUES RAISED BY SWB

The *Partial Suspension Order*, in suspending portions of certain LEC virtual collocation rates, came to several reasoned conclusions regarding those rates that are simply an extension of past Commission virtual interconnection policies. If SWB does not agree with some of these reasoned conclusions, it can pursue these issues in the context of the ongoing investigation. For example, SWB expresses concern about the Bureau's use of "comparable services" as a basis of comparison for overheads, and the Bureau's implementation of equipment cost requirements. As discussed below, neither of these arguments provides grounds for the review sought by SWB.

A. The Definition of "Comparable Services" is Amply Supported by the Record

In light of the likelihood that LECs would attempt to discriminate against collocating competitors, the Commission explicitly required that "LECs may not recover a greater share of overheads in rates for expanded interconnection services than they recover in rates for comparable services, absent justification."[8/]

The Bureau appropriately determined that "DS1 and DS3 virtual collocation services are comparable to all point-to-point DS1 and DS3 services."[9/] This is consistent with SWB's statement that the "Commission has only required the use of overheads from

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8/ *Virtual Collocation Order* at ¶ 128.

9/ *Partial Suspension Order* ¶ 17.

comparable services (*e.g.*, DS1 and DS3)." SWB Reply Comments at 18. Contrary to SWB's misleading assertion that the Bureau picked "the one rate element with the lowest overhead, not the best comparable group of services," the Bureau in fact conducted and presented a careful, factual comparison of the types of equipment required for the comparable services chosen. Based on this analysis, the Bureau determined that the much higher rate SWB charges for DS1 electrical channel termination service "not only requires termination equipment at the LEC central office (as does virtual collocation service) but also requires such equipment to be provided by the LEC at the customer premises, thereby approximately doubling the cost."[10/]

While the Bureau's analysis is reasonable and complete, SWB still has not met its burden of proving that its overhead loadings are based on actual costs, nor has it demonstrated that it would be deprived of a reasonable rate of return on its overall investment by the interim virtual collocation rates established by the *Partial Suspension Order*. SWB cannot meet its burden of proving the reasonableness of its rates (nor the unreasonableness of the Bureau's action) by stating that "SWB cannot be more specific in this public pleading about the overhead factor used by the Bureau, due to the factor's confidential nature."[11/] The Commission clearly and correctly placed the burden of supporting virtual interconnection rates on the LECs. Given SWBs' refusal to meet this standard, SWB may not now contest the Bureau's action.

10/ *Partial Suspension Order* at ¶ 17 & n.49.

11/ *Application for Review* at n.10.

B. The Bureau Was Correct in Striking SWB's Bizarre Equipment Purchase Requirements

SWB's proposed tariff attempted to impose upon interconnectors the obligation to act as a sales agent for circuit termination equipment and sell it at their cost to SWB.[12] In the *Virtual Interconnection Order*, the Commission expressed its concern that LECs could inflate the costs of equipment that interconnectors were forced to buy from the LECs as part of a virtual interconnection arrangement. In order to address this concern, the Commission found that the LEC would be required to sell the equipment to the interconnector at the lowest reasonably available price, which would be set as the price at which the interconnector would be willing to sell the equipment to the LEC.

Most LECs agreed to purchase or lease equipment from interconnectors for the nominal price of $1.00. This approach is by far the most expedient and administratively efficient means of complying with the Commission's orders. Rather than take this reasonable approach, however, SWB -- alone among the LECs -- unilaterally redrafted the Commission's rules by inserting a requirement, never mentioned by the Commission, that interconnectors should be required to sell unlimited amounts of equipment to SWB. The *Partial Suspension Order* properly suspended this burdensome provision as completely inconsistent with the Commission's mandate.[13]

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[12] SWB proposed § 25.2.1(C)(5).

[13] SWB attempts to raise other trivial concerns as a basis to grant its *Application for Review*. As to SWB's concern that equipment will not be warranted, such routine concerns can be addressed in any lease agreement between the collocator and the LEC, or the LEC can purchase equipment directly from the equipment provider for the same amount that the interconnector would pay. SWB also argues that purchasing equipment for $1.00 will not

(continued...)

V. CONCLUSION

The interim partial suspension of rates in the *Partial Suspension Order* is eminently reasonable and fully supported by an extensive record. The Bureau's actions are entirely consistent with statute, as well as the Commission's rules and policies. SWB has failed to meet its burden of showing that the Bureau's actions were unreasonable. In fact, SWB's *Application* merely highlights the fact that it is SWB that is in continuing derogation of the Commission's orders. For these reasons, the SWB application for review should be denied.

Respectfully submitted,

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[13/](...continued)
allow adequate recovery of overheads. This concern has not prevented the majority of the other LECs from purchasing or leasing equipment from interconnectors for $1.00. Moreover, as discussed above, SWB has not shown that such an arrangement would deprive SWB of an adequate overall return on its expanded interconnection service. For these reasons, SWB's arguments must be rejected and its application for review denied.

CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of January 1995, copies of the foregoing OPPOSITION OF MFS COMMUNICATIONS COMPANY, INC. TO APPLICATION FOR REVIEW OF SOUTHWESTERN BELL TELEPHONE COMPANY were sent via Hand-Delivery* or First-Class Mail, U.S. postage prepaid, to the parties on the attached service list.

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