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FEDERAL COMMUNICATIONS COMMISSION
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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)	
)	
The Southwestern Bell Telephone Company)	Transmittal Nos. 2443 and 2449
)	
Tariff F.C.C. No. 73)	CC Docket No. 95-140

OPPOSITION TO DIRECT CASE

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Multimedia Hyperion Telecommunications ("Multimedia"), by its attorneys, hereby files this opposition to the direct case filed by Southwestern Bell in the above-referenced matter.^{1/} The tariff revisions proposed by Southwestern Bell would give the company unfettered pricing discretion in contravention of the Commission's access pricing policies. Southwestern Bell has failed to demonstrate these provisions are justified by competitive necessity and therefore the proposed tariff revisions must be rejected.

I. INTRODUCTION

In Transmittal No. 2433, Southwestern Bell introduced a new section 29, "Request for Proposal," to its access tariff. Pursuant to this new section, Southwestern Bell will offer service at a reduced rate in response to a Request for Proposal ("RFP") in "competitive bid situations." The rates contained in Transmittal No. 2443 responded to an RFP from MCI for DS3 services in St. Louis and Topeka. In Transmittal No. 2449, Southwestern Bell amended this provision to clarify that the RFP rate is generally available

^{1/} Southwestern Bell Telephone Company, Tariff F.C.C. No. 73, Direct Case of Southwestern Bell Telephone Company, filed Sept. 11, 1995 ("Southwestern Bell Direct Case").

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to similarly situated customers that order the same number of circuits between the same central offices.

The Common Carrier Bureau suspended the two transmittals and initiated this investigation.^{2/} The Bureau found that the tariff language was ambiguous because Southwestern Bell did not define the term "competitive bid situation." Suspension Order at ¶ 8. The Bureau also found that there were substantial questions regarding whether the proposed tariff provision was consistent with the Commission's zone density pricing rules and whether the proposal is justified under the competitive necessity doctrine. Id. at ¶ 9-11.

Multimedia is a competitive access provider operating in Kansas. As described below, the tariff revisions proposed by Southwestern Bell would stifle competition and undermine the regulatory regime established by the Commission for dominant carriers. Because Southwestern Bell has not demonstrated that these provisions are required by competitive necessity, the proposed tariff revisions must be rejected.

II. THE PROPOSED TARIFF REVISIONS MUST BE REJECTED BECAUSE THEY UNDERMINE THE COMMISSION'S REGULATORY REGIME FOR DOMINANT CARRIERS.

As competition has started to develop in the interstate access market, the Commission has established mechanisms that permit dominant carriers like Southwestern Bell to remain competitive while protecting ratepayers of monopoly services and potential

^{2/} Southwestern Bell Telephone Company, Revisions to Tariff F.C.C. No. 73, Transmittal Nos. 2443 and 2449, Order, DA 95-1445 (rel. June 26) ("Suspension Order"); Order Designating Issues for Investigation, DA 95-1867 (rel. Aug. 25, 1995) ("Designation Order").

competitors. The Commission's price cap rules, for example, were adopted to give carriers a degree of flexibility in the relative pricing of various services.^{3/} Recent changes in those rules give carriers additional flexibility with regard to rate reductions.^{4/} Furthermore, the Commission recently initiated a proceeding in which it will consider when services should be removed from price cap regulation.^{5/}

The Commission's expanded interconnection rules give LECs additional pricing flexibility.^{6/} The implementation of density zone pricing allows carriers to reduce rates in more competitive markets.^{7/} LECs also have additional pricing flexibility through the use of volume discounts for special access and, when certain threshold levels of competition exist, for switched transport.^{8/} The net effect of the Commission's rules is a

^{3/} Policy and Rules Concerning Rates for Dominant Carriers, 5 FCC Rcd 6786, 6810-11 (1990) ("We will employ a system of baskets and bands to limit, but not eliminate, LEC pricing flexibility. Our goal is to permit incremental changes in prices that will assist LECs in achieving the efficiency objectives at the heart of this proceeding").

^{4/} Price Cap Performance Review for Local Exchange Carriers, First Report and Order, FCC 95-132 at ¶ 411 (rel. Apr. 7, 1995) (modifying lower bands that apply to service categories in the traffic sensitive and trunking baskets).

^{5/} Price Cap Performance Review for Local Exchange Carriers, CC Docket No. 94-1, Second Further Notice of Proposed Rulemaking, FCC 95-393 at ¶¶ 147-50 (rel. Sept. 20, 1995).

^{6/} Expanded Interconnection With Local Telephone Company Facilities, Memorandum Opinion and Order, 9 FCC Rcd 5154 (1994) ("Virtual Collocation Order").

^{7/} Id. at 5196.

^{8/} Id. at 5204.

substantial degree of pricing flexibility given the limited degree of competition LECs face.^{9/}

The tariff revisions proposed by Southwestern Bell represent the latest in a series of attempts by Southwestern Bell to destroy completely the balance achieved by the Commission in the price cap and expanded interconnection proceedings.^{10/} The core of Southwestern Bell's argument is that it should be permitted to charge the lowest amount necessary to keep a customer from obtaining service elsewhere. Southwestern Bell has explained the need for the instant provisions as follows:

Given a scenario where SWBT is restricted to published average rates, while competitors are allowed pricing flexibility, competitors can simply look up SWBT's average prices and simply bid a sufficient amount lower to win the business. As a result, SWBT is completely "shut out" of the RFP process and customers do not receive the lower prices that would have been available to them from SWBT (or the competitors) had SWBT been allowed to fully compete in the RFP process.^{11/}

This type of pricing flexibility is completely at odds with the Commission's access charge policy and Section 202(a) of the Act which requires rates that are generally available on a nondiscriminatory basis. If a monopoly carrier can offer less than tariffed

^{9/} "We conclude that density zone pricing for special access and switched transport, as well as our switched transport discount rules, strike a reasonable balance between these competing concerns under our mandatory virtual collocation regime." Id. at 5194.

^{10/} Southwestern Bell Telephone Company, Revisions to Tariff F.C.C. No. 73, Transmittal No. 2297, Order, 9 FCC Rcd 2683 (1994) (rejecting request to offer service at non-tariffed rates in response to a "bona fide" customer request"); Southwestern Bell Telephone Company, Revisions to Tariff F.C.C. No. 73, Transmittal No. 2312, Order, 9 FCC Rcd 1616 (1994) (rejecting request to offer promotional discounts resulting in charges below tariffed rates); Southwestern Bell Telephone Company, Revisions to Tariff F.C.C. No. 73, Transmittal No. 2316, Order, 9 FCC Rcd 1883 (1994) (rejecting request to implement rate ranges for certain special access services).

^{11/} Southwestern Bell Direct Case at 17.

rates to customers in potentially competitive markets, the inevitable result is that prices will rise (or not fall as much as they should) for customers in noncompetitive markets. This is precisely the type of conduct the price cap and expanded interconnection rules are supposed to limit.

The long term effect of this strategy is to prevent competitors from even entering the market. Today, a potential competitor in the special access market only can compete if it offers a rate substantially lower than Southwestern Bell's volume and term discount rate. If Southwestern Bell has unfettered discretion to reduce this rate further, it will close the limited window that exists for competitive entry. This result is totally inconsistent with the Commission's pro-competitive policies and consequently the proposed tariff revisions must be rejected.

III. THE COMMISSION MUST REJECT THE TARIFF BECAUSE SOUTHWESTERN BELL HAS NOT DEMONSTRATED COMPETITIVE NECESSITY.

Southwestern Bell asserts that its RFP pricing proposal is justified by competitive necessity. This argument is completely unsubstantiated. The key element that must be proved by a carrier attempting to justify a discriminatory rate under the competitive necessity doctrine is that an equal or lower priced competitive alternative is generally available to customers of the discounted offering.^{12/} Southwestern Bell has argued that the

^{12/} Private Line Guidelines Order, 97 F.C.C. 2d at 948.

mere existence of the RFP satisfies this requirement.^{13/} However, the fact that a customer has issued an RFP does not mean that a competitive situation exists. Even if the customer certifies that it has sent the RFP to another company, as Southwestern Bell says it may require, this does not mean the company to whom the RFP is sent is capable of providing a competitive response. Only the responses to the RFP could provide evidence of a potentially competitive situation, but Southwestern Bell correctly claims this information should not be disclosed by the customer.^{14/}

It is telling that Southwestern Bell has not even attempted to provide alternative evidence that competition exists (e.g., a listing of competitive carriers serving the area) in the markets where the RFP rates were proposed. Multimedia is familiar with the Kansas market and at the time the tariff was filed, there were no certificated carriers in the Topeka area. Thus, notwithstanding the existence of an RFP, it is plain that Topeka is not a competitive market. Southwestern Bell's argument that a market may be competitive notwithstanding a lack of expanded interconnection was rejected by the Commission in the expanded interconnection proceeding and no additional evidence is presented to change that conclusion.^{15/}

^{13/} Southwestern Bell Direct Case at 7 ("The existence of the RFP itself, whether or not vendors choose to participate, constitutes a competitive bid situation").

^{14/} Id.

^{15/} Virtual Collocation Order, 9 FCC Rcd at 5196 (rejecting the argument that density zone pricing should be permitted before there exists an operational expanded interconnection offering).

If Southwestern Bell were permitted to implement this proposal, there would be an overwhelming incentive for every company to procure telephone service exclusively through RFP procedures in order to cut its own deal with Southwestern Bell. There would be no reason for a customer not to issue an RFP, regardless of the presence of actual competition, in order to obtain service at rates lower than those contained in Southwestern Bell's tariff. When combined with volume and term discounts and density zone pricing, Southwestern Bell's RFP pricing scheme effectively ensures that no competitor will be able to compete at economically viable rates. Because this result violates the Commission's access pricing policies, the tariff must be rejected.

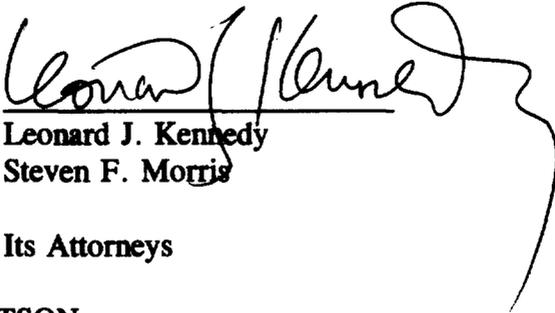
IV. CONCLUSION

This tariff constitutes the latest in a series of attempts by Southwestern Bell to circumvent the Commission's scheme of dominant carrier regulation through the tariff process. The Commission's existing price cap and expanded interconnection policies provide more than adequate pricing flexibility for Southwestern Bell to face the limited competition that now exists in its markets. Consequently, as it has before, the Commission should reject

Southwestern Bell's proposal to have the pricing flexibility of a competitive carrier before the advent of effective competition.

Respectfully submitted,

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September 25, 1995

CERTIFICATE OF SERVICE

I, Tracie Ivey, hereby certify that the foregoing Opposition Direct Case of Southwestern Bell Telephone Company in Transmittal Nos. 2433 and 2499, has been served this 25th day of September, 1995 to the Parties of Record.

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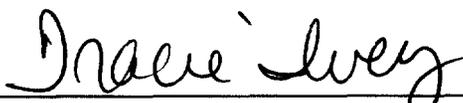
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