

FCC MAIL SECTION

DOCKET FILE COPY ORIGINAL

OCT 17 12 52 PM '95

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

DISPATCHED BY

DA 95-2156

In the Matter of)

Southwestern Bell Telephone Company)
Tariff F.C.C. No. 73)

Transmittal Nos. 2470, 2489

CC Docket No. 95-158

Direct Case Due: October 27, 1995
Oppositions Due: November 3, 1995
Reply Due: November 10, 1995

ORDER INITIATING INVESTIGATION

Adopted: October 13, 1995; Released: October 13, 1995

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. On June 16, 1995, Southwestern Bell Telephone Company (SWBT) filed Transmittal No. 2470 which proposes to provide 155 Mbps of protected bandwidth to a particular customer at individual case basis (ICB) rates. On August 14, 1995, SWBT filed Transmittal No. 2489 to defer the effective date of Transmittal No. 2470 to August 30, 1995, and to revise the cost support information submitted with Transmittal No. 2470. SWBT requested confidential treatment of this additional cost support information on the grounds that release of the information would result in competitive harm. These transmittals are currently scheduled to become effective October 14, 1995. In this Order, we deny SWBT's request for confidential treatment of cost support information submitted with Transmittal No. 2489. We also suspend Transmittal No. 2470 for five months, initiate an investigation of that transmittal, and designate for investigation the sufficiency of the cost support data for the ICB offering.

II. BACKGROUND AND SUMMARY OF PLEADINGS

2. In Transmittal No. 2470, SWBT proposes to provide 155 Mbps of protected bandwidth between 15201 W. 99 and 600 N. Industrial Parkway, Lenexa, Kansas, for Sprint

Access Management.¹ SWBT states that the service will be provided as a "specialized arrangement" in accordance with Commission guidelines for ICB rates.² In support of this offering, SWBT submitted summary information setting forth the total installed costs, total annual cost, monthly cost, and nonrecurring charges for its proposed service.

3. On June 30, 1995, MCI Telecommunications Corporation (MCI) filed a petition to reject or, alternatively, to suspend and investigate Transmittal No. 2470 on the grounds that SWBT had failed to file detailed cost support information as required under Section 61.38 of the Commission's Rules.³ MCI argues that SWBT submitted only generic, aggregate cost information which is insufficient to demonstrate the reasonableness of SWBT's proposed rates. According to MCI, SWBT should have provided: (1) a projection of costs for a representative 12 month period; and (2) estimates of the effect of the new matter on the traffic and revenues from the service to which the new matter applies, and the carrier's overall traffic revenues.⁴

4. In its reply, SWBT argues that MCI has not presented grounds for suspension or rejection. SWBT claims that the Commission has allowed arrangements with similar levels of cost support to take effect for MCI. SWBT asserts that MCI is complaining about the level of cost support in Transmittal No. 2470 because the transmittal proposes rates for MCI's competitor.⁵ It also contends that the filing contains the level of cost support the Commission has always accepted for ICB filings.⁶ SWBT maintains in any event, that the information satisfies the additional requirements MCI claims SWBT must meet. SWBT points out that it provided total annual cost of the service that satisfies the "12 month projection of costs." SWBT also claims that the effect of the "new matter" on overall revenues is not likely to exceed the proposed rate. Furthermore, it claims that the estimate of the effect of the new matter on traffic and revenue of the service in question is the revenue and traffic that is generated by the filing - \$14,421.⁷

5. In Transmittal No. 2489, SWBT provided additional cost support information for the service proposed in Transmittal No. 2470 under request for confidential treatment. SWBT contends that the information reveals its direct costs for the equipment used in providing the

¹ Description and Justification at 1.1.

²*Id.* at 2.1.

³47 C.F.R. § 61.38.

⁴MCI Petition at 2-3.

⁵SWBT Reply at 2-4.

⁶*Id.* at 6.

⁷*Id.* at 5-6.

recurring rate elements, and that if this detailed cost information is released to the public, SWBT's competitors will have a target for pricing their own services or satisfying some niche market. On August 23, 1995, MCI filed an amended petition, arguing that SWBT had not presented a legitimate basis for granting confidential treatment of the cost data contained in Transmittal No. 2489.

III. DISCUSSION

A. Request for Confidential Treatment

6. The decision whether to withhold data is governed by Exemption 4 of the Freedom of Information Act, 5 U.S.C. § 552(b)(4), and the Commission's rules, 47 C.F.R. §§ 0.457(d) and 0.459. Exemption 4 permits withholding of "commercial or financial information obtained from a person and privileged or confidential." Commercial or financial information filed pursuant to mandatory requirements may be deemed confidential under Exemption 4 if disclosure of the information is likely to cause substantial harm to the competitive position of the person from whom the information was obtained.⁸ Parties requesting confidentiality are not required to demonstrate actual competitive harm, rather all they need to show is "actual competition and a likelihood of substantial competitive injury."⁹ Although a sophisticated analysis of the likely effects of disclosure is not required, conclusory and generalized allegations of substantial competitive harm are unacceptable.¹⁰ Parties seeking protection must demonstrate the likelihood of substantial harm "by a preponderance of evidence."¹¹

⁸*National Parks and Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974); *Critical Mass Energy Project v. NRC*, 975 F.2d 871 (D.C. Cir. 1992) (*en banc*), *cert. denied*, 113 S.Ct. 1579 (1993). A different standard applies where information is submitted voluntarily. *Id.*

⁹*CNA Fin. Corp. v. Donovan*, 830 F.2d 1132, 1152 (D.C. Cir. 1987), *cert. denied sub nom.*, *CNA Fin. Corp. v. McLaughlin*, 485 U.S. 977 (1988).

¹⁰*Public Citizen Health Research Group v. F.D.A.*, 704 F.2d 1280, 1291 (D.C. Cir. 1983); *National Parks and Conservation Association v. Kleppe*, 547 F.2d 673, 680-81 (D.C. Cir. 1976).

¹¹47 C.F.R. § 0.459(d). An agency's finding that substantial competitive harm is probable, however, does not automatically lead to a finding against release of information since FOIA exemptions are not mandatory bars to disclosure. Even when particular information falls within the scope of a FOIA exemption, the government may order release based on public interest grounds. *Chrysler v. Brown*, 441 U.S. 281, 290-94 (1979); *see also Classical Radio for Connecticut, Inc.*, 69 FCC 2d 1517, 1520 n.4 (1978); *Commission Requirements for Cost Support Materials to be Filed with Open Network Architecture Access Tariffs*, 7 FCC Rcd 1526, 1533 (Com. Car. Bur. 1992)

7. We find that SWBT has not met the threshold requirements for confidential treatment in this case. Although SWBT alleges that it is generally subject to competition, it has failed to explain the competitive significance of the particular data for which it seeks confidential treatment and has failed to link these data to specific examples of likely competitive harm. Moreover, the cost support data at issue include aggregated data rather than costs for individual expense items. SWBT has failed to explain (or even address) how data aggregated at this level could be of use to competitors. In sum, while SWBT states a generalized concern over the disclosure of its cost support data to the public, it offers no support for its assertions that disclosure would likely cause substantial competitive injury in these particular cases. Thus, for all of these reasons, we deny SWBT's request for confidential treatment of its cost support data.

B. Transmittal No. 2470

8. Carrier tariff filings that contain proposed ICB rate offerings must comply with the cost support requirements specified in Section 61.38 of the Commission's Rules, 47 C.F.R. § 61.38.¹² Upon review of the cost support information submitted with SWBT Transmittal No. 2470, we conclude that significant issues concerning the sufficiency of the cost information filed on the record warrant an investigation into the lawfulness of Transmittal No. 2470. We have not considered the cost support information contained in Transmittal No. 2489 in our determination of the lawfulness of the rates proposed in Transmittal No. 2470. Section 0.455 (b) (11) of the Commission's Rules, 47 C.F.R. § 0.455 (B) (11), provides that tariff schedules and "all documents filed in connection therewith" are routinely available for public inspection during the tariff review period. This has not been the case for the cost support information in Transmittal No. 2489 filed to supplement Transmittal No. 2470, for which the statutory 120 day notice period expires today. If SWBT does not seek review of the denial of its request for confidential treatment of that information within 5 working days, we will include the information in the record of the investigation we now begin. Without the data for which it sought confidentiality, SWBT has submitted very general, very summary information that does not appear to comply with the requirements of Section 61.38 and, hence does not appear to furnish an adequate basis for us to reach a determination on the reasonableness of the rates proposed in this transmittal. Accordingly, we suspend Transmittal No. 2470 for the full statutory period and initiate an investigation.

9. In this Order, we designate the following issue in the investigation of Transmittal No. 2470.

Issue: Is the cost support information SWBT submitted with Transmittal No.

¹²See, e.g., In the Matter of Bell Atlantic Telephone Companies Transmittal Nos. 224 and 226 Revisions to Tariff 1, 3 FCC Rcd 1621, 1622-23 (Com.Car.Bur. 1988); In the Matter of BellSouth Telephone Companies Transmittal No. 346 Revisions to Tariff F.C.C. No. 4, 6 FCC Rcd 373, 374 (Com.Car.Bur. 1991).

2470 sufficient to support the ICB service proposed therein under the Commission's rules and polices?

IV. PROCEDURAL MATTERS

A. Filing Schedules

10. This investigation, to be identified as CC Docket No. 95-158, will be conducted as a notice and comment proceeding during which SWBT bears the burden of proof to show the adequacy of its cost support showing. SWBT is designated as a party to this proceeding and shall file its direct case no later than 14 days after the release of this Order. The direct case must present the party's position with respect to the issue described above. Pleadings responding to the direct case may be filed no later than 28 days after the release of this Order, and must be captioned "Opposition to Direct Case" or "Comments on Direct Case." The parties may each file a Rebuttal to oppositions or comments no later than 35 days after the release of this Order.

11. An original and four copies of all pleadings must be filed with the Secretary of the Commission. In addition, one copy must be delivered to the Commissions commercial copying firm, International Transcription Service, 1919 M Street, N.W., Room 246, Washington, D.C. 20554. Also, one copy of each pleading must be delivered to the Tariff Division, Room 518, 1919 M Street, N.W., Washington, D.C. 20554. Members of the general public who wish to express their views in an informal manner regarding the issues in this investigation may do so by submitting one copy of their comments to the Secretary, Federal Communications Commission, 1919 M Street, N.W., Room 222, Washington, D.C. 20554. Such comments must specify the docket number of this investigation.

12. All relevant and timely pleadings will be considered by the Commission. In reaching a decision, the Commission may take into account information and ideas not contained in pleadings, provided that such information or a writing containing the nature and source of such information is placed in the public file, and provided that the fact of reliance on such information is noted in the Order.

B. Ex Parte Requirements

13. *Ex parte* contacts are permitted in this proceeding during the time periods established by the Commissions rules. Written *ex parte* contacts must be filed on the day submitted with the Secretary and Commission employees receiving each presentation. For other requirements, *see generally* Section 1.1200 *et seq.* of the Commissions Rules, 47 C.F.R. § 1.1200 *et seq.*

C. Paperwork Reduction Act

14. The investigation established in this Order has been analyzed with respect to the Paperwork Reduction Act of 1980 and found to contain no new or modified form, information

collection or other record retention requirements as contemplated under the statute. See 44 U.S.C. § 3502(4)(A). The request for information contained herein is not subject to the clearance procedures of 44 U.S.C. § 3507.

V. ORDERING CLAUSES

15. ACCORDINGLY, IT IS ORDERED that the request for confidential treatment filed by Southwestern Bell Telephone Company IS DENIED. Information filed under this request may not be released until Southwestern Bell Telephone Company has exhausted its appeal rights under 47 C.F.R. § 0.459(g). Southwestern Bell Telephone Company may file an application for review within 5 working days of this ruling.

16. IT IS FURTHER ORDERED that, pursuant to Section 204(a) of the Communications Act of 1934, as amended, 47 U.S.C. § 204(a), and Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, Southwestern Bell Telephone Company Transmittal Nos. 2470 and 2489 ARE SUSPENDED for five months from the currently scheduled effective date.

17. IT IS FURTHER ORDERED that, pursuant to Sections 4(i), 204(a), and 403 of the Communications Act of 1934, as amended, 47 U.S.C. §§154(i), 204(a), and 403, an investigation IS INSTITUTED into the lawfulness of Southwestern Bell Telephone Company Transmittal Nos. 2470 and 2489. Southwestern Bell Telephone Company SHALL FILE revisions reflecting this suspension no later than five business days from the date of this order. Southwestern Bell Telephone Company shall cite the "DA" number of this order as authority for this filing.

18. IT IS FURTHER ORDERED that the petition to reject and suspend Southwestern Bell Telephone Company Transmittal No. 2470 and 2489 IS GRANTED to the extent discussed above and otherwise IS DENIED.

19. IT IS FURTHER ORDERED that, pursuant to 4(i), 4(j), and 204(a), of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 204(a), Southwestern Bell Telephone Company SHALL RESPOND to the issues designated in this Order no later than 14 days from the release of this order. Interested parties may file pleadings responding to the direct case no later than 28 days after the release of this Order, and Southwestern Bell Telephone Company may file a rebuttal no later than 35 days after the release of this Order.

FEDERAL COMMUNICATIONS COMMISSION



Kathleen M.H. Wallman
Chief, Common Carrier Bureau